3-28-1977

Brief of Natural Resources in Opposition to Plaintiff's Opening Briefs

J. Lawrence Coniff, Jr.
Assistant Attorney General, Department of Natural Resources

Slade Gorton
Attorney General

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

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

BRIEF OF NATURAL RESOURCES IN OPPOSITION TO PLAINTIFFS' OPENING BRIEFS

144

TABLE OF CONTENTS

SLADE GORTON
Attorney General

J. LAWRENCE CONIFF, JR.
Assistant Attorney General

Temple of Justice
Olympia, Washington 98504

Telephone: (206) 753-5318

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

THE UNITED STATES OF AMERICA, Plaintiff, v. BARBARA J. ANDERSON, et al., Defendants.	Civil No. 3643 BRIEF OF THE DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON

I. INTRODUCTION - STATEMENT OF THE CASE

This suit was filed by the United States on its own behalf and as trustee for the Spokane Tribe of Indians. Subsequent to its initiation, the Spokane Tribe was permitted to intervene. The defendants are all persons and corporations who might have an interest in the waters of Chamokane Creek deriving from rights vested under state law. Also included as defendants are the Department of Ecology and the Department of Natural Resources of the State of Washington. Ecology is mandated, under state law, to implement and administer the state's laws, rules and regulations pertaining to the appropriation and use of water. Thus, Ecology represents the State of Washington in its governmental or regulatory function.[1] The Department of Natural Resources, on the other hand, has the duty to manage state lands as a trustee for the benefit of the common school fund and other constitutionally specified trust purposes. Natural Resources, therefore, represents the State in this proceeding in its proprietary

---

[1] For a description of the statutory duties and authority of Ecology, See: RCW, Title 90.

capacity.[2]

Essentially, the United States and the Spokane Tribe seek to displace state law pertaining to the use of waters arising in the Chamokane Creek watershed and any rights to beneficial use derived thereunder. The court is requested to:

A. Declare that the State of Washington has no authority to issue water permits within the boundaries of the Spokane Reservation (U.S. Brief, p. 91) and to enjoin any further issuance of water permits from the Chamokane Creek watershed outside reservation boundaries. (U. S. Brief, p. 92);

B. Declare that the Tribe's water rights are equally applicable to surface and ground water (U. S. Brief, p. 5);

C. Declare that the amount of water reserved for the Tribe should be at least 30 cfs for protection of the environment for fish and game, recreational and aesthetic purposes. (U. S. Brief, p. 38-39);

D. Establish a priority date for the 30 cfs minimum flow as "time immemorial"; (U. S. Brief, p. 39)

E. Declaring that, in addition to the 30 cfs, the Tribe has an implied reserved right to water for irrigation of land that is or can be made capable of producing crops. (U. S. Brief, p. 44);

F. Declare that the implied reserved right to irrigation water extends to all lands within the Reservation regardless of their ownership status or statutory classification. (U. S. Brief, pp. 46, 47, 50, 52, 58);

G. Declare that the implied reserved water rights in favor of the Tribe are not limited to presently foreseeable uses. (U. S. Brief, p. 63) and are subject to changes in place and nature of use (U. S. Brief, p. 66);

H. Declare that the United States and the Tribe possess exclusive jurisdiction to manage and control all waters (ground and surface) which arise in the Chamokane watershed whether on or off the

---

[2] The Constitution of the State of Washington, Article XVI. sets aside every 16th and 36th section of land for this trust. The statutory authority for Natural Resources to manage such lands is found in Title 79 RCW. The "reservation" of these lands for trust purposes is discussed in some detail infra.

Reservation (U.S. Brief, pp. 81, 82);

I. Appoint a water master to enforce the final decree. (U.S. Brief, p. 93).

Defendant, Natural Resources, will respond to these often ingenius arguments and will substantiate its position in opposition to the broad, generalized and, indeed, startling relief sought by the United States and the Spokane Tribe of Indians. Natural Resources will generally limit its response to the protection of its proprietary trust land interests. Ecology will separately address questions of jurisdiction to issue water permits and perform water management activities on the Spokane Reservation.

II. THE "ABORIGINAL TITLE" OF THE SPOKANE TRIBE HAS BEEN EXTINGUISHED BY THE UNITED STATES WHICH ENCOMPASSES IMPLIED WATER RIGHTS.

The nature of "title" which the Indians possessed to the lands, waters and resources of what is now the State of Washington prior to the coming of the white man is the predicate to this case. This concept (aboriginal title) has been the subject of a number of judicial decisions. Prehistoric Indian occupancy predated present governmental arrangements. Indians were allowed to continue their way of life on their traditional tribal lands. Aboriginal title is a right to continue, at least temporarily, a way of life for the Indians. The gradual transition of a tribe into a self-sustaining status would necessarily take years. Unless the Indians were permitted to maintain their way of life and pursue their gathering culture, they would starve. Two possible lines of reasoning are available to analyze the nature of aboriginal title possessed by the Indians. Tlingit and Haida Indians v. United States, 389 F.2d 778 (Ct. Cl. 1968) held that no damages could be awarded for the loss of exclusive fishing rights which were based upon "aboriginal ownership of the land". Other courts have held that, where established by historical use, aboriginal title includes the right to beneficially use lands and waters and pursue a gathering culture where those rights have not been extinguished by the United States, by treaty or otherwise.

In other words, those aboriginal rights continue to adhere to the present membership of a tribe which held them aboriginally. State v. Tinno, 94 Idaho 759, 497 P.2d 1586 (1972). Following this line of reasoning, only the United States government, in its capacity as the ultimate sovereign, (under its constitutional power to exclusively deal with Indians) can extinguish Indian aboriginal title to the lands which they historically wandered over. This view is supported by Oneida Indian Nation v. County of Oneida, N.Y., 414 U.S. 661, 668 (1974):

> "It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign - - first the discovering European nation and later the original states and the United States - - a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the constitution adopted, these tribal rights to Indian land became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States." (Emphasis supplied)

The usual method of terminating Indian aboriginal title (or rights dependent thereon) was by treaty. This was in accordance with official federal policy. Efforts were made to treat with the Spokane Tribe of Indians. These efforts were unsuccessful. Spokane Tribe of Indians v. United States, 9 Ind. Cl. Comm. 236, 238 (1961), affirmed as modified 163 Ct. Cl. 58 (1963).[3] In a treaty context, the United States and the Indian tribes negotiated to reach agreement as to its terms. The Indians gave up their aboriginal title to the land and, in return, the United States usually agreed to certain specified conditions including payment of moneys, provision of services such as blacksmiths, farmers, doctors, etc. Usually, treaties established areas of exclusive Indian occupancy (reservations) and often provided for some sort of off reservation fishing and hunting rights.

---

[3] These decisions, because of their pivotal importance, are provided as an attachment to this brief as appendices.

See: United States v. Washington, 384 F.Supp. 312 (D.C. Wash. 1974) The relative rights of Indian tribes and the various states are, therefore, usually determined by interpreting treaties between the federal government and the respective tribes. Antoine v. Washington, 420 U.S. 194 (1975). The nature of aboriginal rights and the power of the United States to extinguish or terminate those rights was further explained in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). The Court stated, at p. 279:

> "The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent upon such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabitated the lands of the States held claim to such lands after coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership of Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty" as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." [4]

The governmental power to extinguish Indian aboriginal title was summarized in United States v. Santa Fe Railroad Company, 314 U.S. 339, 347 (1941):

> "The manner, method and time of such extinguishment raised political, not justiciable issues. . . . Whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy or otherwise, its justness is not open to inquiry in the courts."

Aboriginal rights of occupancy are essentially a revokable privilege granted by the United States and which may only be extinguished by action of the United States. Indian Title: The

---

[4] The rationale of Tee-Hit-Ton, supra, has been consistently followed. Cowlitz Tribe of Indians v. City of Tacoma, 235 F.2d 625 (9th Cir. 1957); Prairie Band of Potawatomi Indians v. United States, 165 F. Supp. 139 (Ct. Cl. 1958); Minnesota Chippewa Tribe v. United States, 315 F.2d 906 (Ct.Cl. 1963). See also: Duwamish Indians, et al. v. United States, 79 Ct. Cl. 530 at 598 (1934).

Rights of American Natives in Land They Have Occupied Since Time Immemorial, 75 Columbia L. Rev. 655 (1975). In this article the author concludes that the power is lodged exclusively in Congress which can even arbitrarily appropriate Indian title and at that such an appropriation is not reviewable by the courts. Other decisions which explain and apply this concept of aboriginal title are: Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Creek Nation v. United States, 302 U.S. 620 (1938); Shoshone Tribe v. United States, 299 U.S. 476 (1937); Menominee Tribe v. United States, 391 U.S. 404 (1968); United States v. Kabinto, 456 F.2d 1087 (9th Cir. 1972); Unitah and White River Bands v. United States, 152 F. Supp. 953 (Ct. Cl. 1957).

The question to be resolved, within the context of this suit, is whether the Spokane Tribe's aboriginal title to the lands over which they wandered has been extinguished by the United States.

By enactment of the Indian Claims Commission Act in 1946, 25 U.S.C. § 70a et seq., the Congress of the United States established a federal judicial tribunal with jurisdiction to award compensation to Indian tribes for aboriginal title to lands taken by the federal government from them. The Spokane Tribe of Indians has availed itself of this right to compensation when it filed its claim with the Indian Claims Commission, 9 Ind. Cl. Comm. 236 (1961), affirmed as modified 163 Ct. Cl. 58 (1963). By filing their claim, the Spokane Tribe admitted the taking of their aboriginal lands by the United States. This is the necessary implication because they could not be entitled to any compensation under the terms of the Act unless their lands had been taken by the United States. It appears from the opinion of the Indian Claims Commission as affirmed by the Court of Claims that the Spokane Tribe of Indians never disputed the taking because the issues involved the questions of the boundaries of the lands, waters and resources over which the Spokane Indians had aboriginal title. The question was not whether aboriginal title had been extinguished. The Commission found that an agreement was

entered into between the United States and the Spokane Indians on March 18, 1887 (27 Stat. 120) by which the Indians ceded all their "right, title and claims which they now have, or ever had, to any and all lands lying outside of the Indian reservations in Washington and Idaho territory, and they hereby agree to remove to and settle upon the Coeur d 'Alene reservation in the territory of Idaho". 9 Ind. Cl. Comm. at 244 (Finding of Fact No. 15). The cession of aboriginal title became binding upon its ratification by Congress on July 13, 1892. (Finding of Fact No. 16).

The territorial extent of federal extinguishment of Spokane tribal aboriginal title is described in Finding of Fact No. 31 of the Commission opinion. 9 Ind. Cl. Comm. at 252-253. The area described encompasses the entire Chamokane Creek watershed. The territorial extent of the Tribe's aboriginal title was challenged on appeal. Spokane Tribe v. United States, 163 Ct. Cl. 58 (1963). The Court of Claims opinion reveals that the only issues raised by the Tribe on its appeal were questions relating to the extent of the lands over which the Spokane Tribe had aboriginal title. Basically, the Court of Claims agreed with the arguments of the Spokane Tribe and found that boundaries drawn by the Commission were restrictive and that the Tribe actually held aboriginal title to a larger area which likewise included the entire Chamokane Creek watershed.

Upon remand, the Commission entered Findings of Fact on a compromise settlement reached between the Spokane Tribe and the United States. 17 Ind. Cl. Comm. 584 (1967). The Commission entered an Order Approving Compromise Settlement between the parties and rendered final judgment in favor of the Tribe in the sum of $6,700,000. 17 Ind. Cl. Comm. 612 (1967).[5]

---

[5] The Findings and Order awarding attorney fees are reported in 18 Ind. Cl. Comm. 414 (1967).

The question of whether the Indian Claims Commission included waters arising on the lands held under aboriginal title by the Spokane Tribe has been answered in the affirmative. From early decisions by the Commission and the Court of Claims to recent opinions, such water values have formed a basis upon which compensation has been awarded to Indian Tribes who present claims for "takings" under the Act.

In Rogue River Tribe of Indians v. United States, 89 F. Supp. 798 (Ct. Cl. 1950) the court considered the value of water in determining fair market value on the date of the taking by the United States.

> "The Umpqua River enters the reservation near its southeast corner, flows through it in an irregular course to the north and northwest and then west into the Pacific Ocean. There are a large number of streams and creeks in the reservation wich run into the river. The town of Scottsburg was just to the northwest of the reservation, and the town of Roseburg to the southeast. The Umpqua River was an important avenue of transporation at that time before the building of railroads, and was navigable from the Pacific Ocean to Scottsburg, about 20 miles from the reservation. There was evidence of navigation by small craft on the river through the reservation between Scottsburg and Roseburg. Although the greater portion of the reservation was best adapted to the growing of timber, there was good agricultural and grazing land in the long narrow valleys and along the river and creeks. The soil was fertile and well adapted to the growing of farm crops, fruits and vegetables; water for human consumption was abundant and the climate mild and not subject to extremes." 89 F. Supp. at 803.

A landmark opinion by Judge Littleton formulates the measure of value of aboriginal lands formerly held by an Indian. Otoe and Missouria Tribe of Indians v. United States, 131 F. Supp. 265 (Ct. Cl. 1955) continues to be followed and applied by the Commission to the present time. Littleton's formulation is set forth, in extensio:

> "In view of the above circumstances, we have reviewed the evidence of record on value submitted by the parties in order to determine whether or not further primary findings on that evidence would support the ultimate finding made by the Commission. Cf. Fletcher v. Fletcher, D.C.Cir., 219 F.2d 768. We are of the opinion that the evidence of record fully supports the Commission's findings on the question of value of the land.
>
> The Government's evidence of value of the lands in question is derived from the testimony and report of John Muehlbier, Agricultural Economist of the United States Department of Agriculture. The evidence prepared and submitted by the

Government's witness was in support of the Government's contention that the only cognizable value of Indian land ceded at a remote time and in an area not yet open to public sale or settlement, is "market value" notwithstanding the fact that under the circumstances there could be and was no actual market in the sense contended by the Government. He made a study of the so-called use value of the land and concluded that on that basis the land was worth from two to fourteen cents per acre. He arrived at this conclusion by estimating the money value of the Indians' subsistence derived from such land, the proportion of gross income that could be attributed to the land, the rate of capitalization, the number of persons in the tribe, and the acreage claimed as hunting grounds.

As noted by the Government in its appeal, the Commission obviously rejected the valuation method proposed by the Government and relied on the method urged by the Indian claimants in arriving at the determination that the land had a value of 75 cents per acre at the time it was ceded.

The method of valuation proposed by the Indian appellants is along the lines adopted by this court in many cases and in particular in Alcea Band of Tillamooks v. United States, 87 F.Supp. 938, 115 Ct.Cl. 463, reversed as to interest, 341 U.S. 48, 71 S.Ct. 552, 95 L.Ed. 738, Rouge River Tribe of Indians v. United States, 89 F.Supp. 798, 116 Ct.Cl. 454, certiorari denied 341 U.S. 902, 71 S.Ct. 610, 95 L.Ed. 1342. The same method of valuation was followed by the Indian Claims Commission in the Osage case (3 Ind. Cl. Com. 217). In those cases the court said the Commission rejected the notion that the value of Indian lands must be based on market value alone because the market for such lands was absolutely controlled by the only possible purchaser, i.e., the Government either direct or in trust for sale. Until Indian title to an area of land is extinguished and the land is surveyed, no sales thereof or settlements thereon are possible.

In the instant case the surrounding lands were not open to settlement because the Government had not yet extinguished Indian title thereto. But that does not mean that such land was worth no more than the value of the subsistence it provided for the Indians. In the absence of a market at the time in question, and therefore the absence of evidence of "market value" in the conventional sense this court and the Commission have taken into consideration numerous other factors in determining the value of lands ceded by the Indians. The Indian Appellants' expert witness, Thomas H. LeDuc took those other factors into consideration in giving his opinion of the value of the ceded lands. For the most part the factors were the same as those relied on by the Commission in its recent Osage findings, and follow, to some extent, the pattern laid down in the Alcea and Rogue River decisions in this court. This method of valuation takes into consideration whatever sales of neighboring lands are of record. It considers the natural resources of the land ceded, including the climate, vegetation, including timber, game and wildlife, mineral resources and whether they are of economic value at the time of cession, or merely of potential value, water power, its then or potential use, markets and transportation - considering the ready markets at that time and the potential market. LeDuc concludes that the land ceded in 1833 was worth not less than $1.50 per acre.

We think that the factors taken into consideration by claimants expert witness were valid factors in the determination of the value of Indian lands under the circumstances of this case and similar cases. We believe that the results of such consideration will more nearly accomplish the fair

> settlement of these claims desired by Congress than the "subsistence" approach advocated by the Government. Values cannot be determined on the basis of berries and wild fruits. In the Alcea case, the Supreme Court had an opportunity to reject the method of valuation used by the Commission in this case, but it confined its consent to review, in view of the consent to sue given by Congress, to the question of an additional allowance by way of interest and refused to review the question of valuation." (131 F.Supp. 289-291) [6] (Emphasis supplied.)

The acceptance of the settlement in the amount of $6,700,000.00 by the Spokane Tribe from the United States extinguishes any claim of/paramount right to water arising outside reservation boundaries. an implied This is clear from the Order Approving Settlement entered by the Commission on February 21, 1967. It provides, in relevant part:

> "This stipulation and entry of final judgment shall finally dispose of all claims and demands which the Spokane Tribe of Indians has asserted or could have asserted against the defendant . . . under the provisions of Sec. 2 of the Indian Claims Commission Act (60 Stat. 1049). This stipulation and entry of final judgment shall also finally dispose of all claims, demands, payments on the claims, counterclaims or offsets which the defendant has asserted or could have asserted against petitioner . . . under the provisions of Sec. 2 of the Indian Claims Commission Act." 17 Ind. Cl. Comm. at 586-57, 595. (Finding of Fact No. 5 and No. 9).

When title to land is extinguished without limitation, such extinguishment includes all physical things on the earth including soil, minerals, trees, grass and water. A right to water, arising by judicial implication from Winters v. United States, 207 U.S. 564 (1908) and its progeny, does not survive total extinguishment of the Spokane's aboriginal title. The purpose of the Indian Claims Commission Act was to finally resolve all such claims by Indian tribes.[7] 25 U.S.C. 70(a) et seq.

In this suit, both the United States and the Spokane Tribe ask the

---

[6] Recent opinions of the Commission illustrate the values of water as applied to establishment of compensation due an Indian tribe. Western Shoshone v. United States, 29 Ind. Cl. Comm. 5, 127, 135-136 (1972); Confederated Tribes of the Warm Springs Reservation, 29 Ind. Cl. Comm. 324, 401-402 (1972).

[7] See the detailed discussion of the legislative history of the Act and its purpose by Judge Littleton in Otoe and Missouria Tribes of Indians v. United States, 131 F.Supp. 265, 268-285 (Ct.Cl. 1955).

court to grant broad extraordinary relief on the basis of an implied water right which was alleged to have been lost when the United States "took" the Spokane's aboriginally held lands. The United States has paid the value of the lands in question, including the waters arising on them to the Tribe. It ill-behooves the parties plaintiff to now assert an implied right to water which they know has been paid for.

The Spokane Tribe's Acceptance of the Award ($6,700,000) Includes Payment for any "Implied Water Right" Which Might Otherwise Exist.

As noted above, the valuation of the lands in question taken by the United States from the Spokane Tribe includes the natural resources (water) situate. Otoe and Missouria Tribe of Indians v. United States, supra. Such a settlement, as that approved by the Indian Claims Commission, 17 Ind. Cl. Comm. 584, becomes res judicata between the parties and those claiming rights under them. When the State of Washington was admitted into the Union in 1889, it succeeded to the sovereign and proprietary interest of the United States over the Territory by virtue of its Enabling Act, 25 Stat. 676, 678. By admission, it became entitled to exercise all of the powers of government enjoyed by the original states of the Union. Coyle vs. Smith, 221 U.S. 559, 576 (1911). The United States may reserve rights to the soil or waters while the lands in question are held in territorial status without conflict with the subsequent admission of states into the Union upon an equal footing. Shively vs. Bowlby, 152 U.S. 1, 48 (1894); Stearns vs. Minnesota, 179 U.S. 223 (1900); Village of Kake v. Egan, 369 U.S. 60 (1962).[8] The Spokane Tribe of Indians do not possess a treaty nor was their reservation established pursuant to a treaty. The aboriginal title of the Spokane Tribe of Indians has been extinguished to the lands over which they formerly

---

[8] The "disclaimer" clause of the Constitution of the State of Washington, Art. XXVI, does not extend to lands or waters lying outside Indian reservations over which Indian aboriginal title has been extinguished.

roamed. In order that an inference may be drawn regarding the intent of Congress that the Spokane Tribe has "title" to the waters of Chamokane Creek outside their reservation or a paramount right thereto, such a conclusion must be clearly stated and is not lightly to be inferred. This is true where vested rights under state law will be displaced. United States v. Holt Bank, 270 U.S. 49, 55 (1926). If there was, in fact, an intent on the part of Congress to cede the waters of Chamokane Creek to the Spokane Tribe, evidence to that effect has not been presented in this record. There must be an unequivocal expression of Congressional will if state powers (i.e., the ability to apply state laws to water or lands lying outside reservations) are to be pre-empted. Cohens v. Virginia, 19 U.S. 264 (1821); Reid v. Colorado, 187 U.S. 137 (1902). There is no express limitation of governmental power of the State of Washington regarding waters arising in the Chamokane watershed outside the Spokane Indian Reservation. There is no expression of Congressional will which in any way conflicts with the application of state law or water rights vested thereunder. In the absence of a clear conflict with federal law, state law must prevail. Even in cases involving express language in a treaty, wherever reasonably possible such statements will be construed so as not to override state laws or impair rights arising thereunder. Guarantee Trust Company v. United States, 304 U.S. 126, 143 (1938). This court should not permit a state to be stripped of an essential attribute of its governmental perogatives by implication and deduction. The Spokane Tribe's aboriginal title to the lands and waters in question has been extinguished. Upon admission into the Union upon an equal footing, the State of Washington acquired all of the sovereign powers of the original states, including the power to preserve and allocate its natural resources (including water). It should not be shorn of this power by building inferences upon inferences. State law concerning the proper distribution and conservation of waters arising in the Chamokane watershed (beneficial use) should not be displaced on the

basis of judicial speculation as to an undisclosed intent to create a right in favor of the Spokane Tribe which has been paid for anyway. Spokane Tribe v. United States, 17 Ind. Cl. Comm. 584 (1967).

Neither should the State's proprietary interest in school trust lands be diminished on such a basis. School trust lands (Sections 16 and 36) were guaranteed to the State under Section 20 of its Organic Act (March 2, 1853) prior to statehood (10 Stat. 172) and its Enabling Act (February 22, 1889) authorizing admission into the Union (25 Stat. 676). The Organic Act, supra, pre-dates the claimed water right in this suit.

Any Claim for Alleged Loss or Impairment of an "Implied" Water Right by the Spokane Tribe of Indians Should Be Heard and Determined by The Indian Claims Commission Which Has Exclusive Jurisdiction Over Such Matters.

By creation of the Indian Claims Commission in 1946, Congress established a forum to hear and determine all matters of a legal or equitable nature concerning Indian Tribal claims of loss, impairment or diminishment of rights to lands and resources (whether "recognized" by treaty or based on aboriginal use and occupancy). 25 U.S.C. 70(a). In addition, Congress created new causes of action in favor of Indians, not available to non-Indians, based on "fair and honorable dealings that are not recognized by any existing rule of law or equity". 25 U.S.C. 70(a)(5). Otoe and Missouria Tribe of Indians v. United States, 131 F.Supp. 265, 269-285 (Ct.Cl. 1955). As noted by Judge Littleton in his opinion:

> "The Indian Claims Commission Act is both remedial legislation and special legislation. It broadens the Government's consent to suit and as such is in derogation of its sovereignty. It confers special privileges upon the Indian claimants apart from the rest of the community, and to some extent is in derogation of the common law. This was, we think, because of the peculiar nature of the dealings between the Government and Indians from very early times. On the other hand, it remedies defects in the common law and in pre-existing statutory law as those laws affected Indians, and it was designed to correct certain evils of long standing and well known to Congress. Fortunately, under these circumstances, rules of interpretation and construction are subordinate to the principle that the object of all construction and interpretation is the just and reasonable operation of the particular statute, and accordingly it should be possible to construe the

statute liberally to affect its remedial purpose and intent, and strictly to limit undue abrogation of fundamental rights or to prevent undue extension of extraordinary remedies." 131 F.Supp. at 271

In Gila River Pima-Maricopa Indian Community v. United States, 140 F.Supp. 776, 779 (Ct.Cl. 1956) Judge Littleton held that a suit brought by an Indian tribe on grounds that the Government breached its fiduciary duty should be initially presented to the Indian Claims Commission allowing it, in the first instance, to determine the scope of its own jurisdiction. The court held:

> "Assuming, without deciding, that the legal relationship of guardian and ward existed between the instant plaintiffs and the United States by virtue of the provisions of executive and statutes cited in the petition in this court, the alleged breach of that duty merely presents an additional ground for recovery on the same claims now pending before the Indian Claims Commission. Such a ground of recovery is within the jurisdiction of the Indian Claims Commission and we do not think that plaintiffs may divide their grounds of recovery between that tribunal and this. See United States v. California & Oregon Land Co., 192 U.S. 355, 24 S.Ct. 266, 48 L.Ed. 476; Guettel v. United States, 8 Cir., 95 F.2d 229, 118 A.L.R. 1060, certiorari denied 305 U.S. 603, 59 S.Ct. 64, 83 L.Ed 383. In any event, moral grounds for recovery are clearly within the jurisdiction of the Commission under section 2 of the Indian Claims Commission Act. We are not disposed at this time finally to decide a question that may well come up before the Commission as a result of the trial on the merits of plaintiffs' claims." (140 F.Supp. at 781)

It is Natural Resources' position that the subject matter of the relief sought is inextricably bound up in the decision of the Indian Claims Commission. Spokane Tribe of Indians v. United States, 9 Ind. Cl. Comm. 236 (1961); settlement approved 17 Ind. Cl. Comm. 584 (1967). [9] As noted by the Commission:

> "This stipulation and entry of final judgment shall finally dispose of all claims and demands which the Spokane Tribe of Indians has asserted or could have asserted against the defendant . . . under the provisions of Sec. 2 of the Indian Claims Commission Act (60 Stat. 1049). This stipulation and entry of final judgment shall also finally dispose of all claims, demands, payments on the claims, counterclaims or offsets which the defendant has asserted or could have

---

[9] As previously noted, we believe that the Spokane Tribe has been paid for the value of lands aboriginally held including water thereon. Our point here is that, if the Tribe believes that implied water rights exist on such lands, it should present its claim to the Commission.

asserted against petitioner . . . under the provisions of Sec. 2 of the Indian Claims Commission Act." 17 Ind. Cl. Comm. at 586-57, 595. (Finding of Fact No. 5)

It is clear, from the legislative history of the Act, that Congress intended to finally resolve Indian claims of a proprietary nature to lands or resources situate outside present reservation boundaries.[10] Even if the Spokane Tribe did not present their instant claim to the Commission, they are bound by their stipulation with the United States. At best, they should have presented it in the context of their primary claims in that litigation. A claim to water under an implied federal right[11] is a "claim which could have been asserted against the United States" under Section 2 of the Act because it arose out of federal extinguishment of their aboriginal title and removal to a reservation. The conclusion that Spokane tribal claims to waters arising from off-reservation lands were extinguished (and compensated) seems inescapable.

III. ASSUMING, ARGUENDO, THAT AN "IMPLIED WATER RIGHT" IS FEDERALLY RESERVED IN FAVOR OF THE SPOKANE TRIBE, IT IS LIMITED IN SCOPE TO BENEFICIAL USE FOR IRRIGATION PURPOSES.

The position of the Spokane Tribe and the United States is best summarized by the following statement: "The United States, by withdrawing the land of the Spokane Indian Reservation from the public domain and reserving it for the use and benefit of the Spokane Indians, reserved unappropriated waters appurtenant to the land to the extent necessary to fulfill the purposes of the reservation."[12] Ancillary to the foregoing proposition is the argument that the United States and the Spokane tribe intended to reserve sufficient water to preserve and protect Chamokane Creek on the Spokane Indian Reservation for game and fish, preservation of the environment, for

---

[10] See: Otoe and Missouria Tribe of Indians, supra, at pp. 269-285 for a detailed review of the Act's legislative history.

[11] Winters, supra, is the doctrinal basis of their claim.

[12] U.S. Brief, page 3.

recreational purposes and aesthetic purposes.[13] These arguments will be dealt with seriatum.

We deal first with the argument that the waters of Chamokane Creek have been reserved for the Tribe's exclusive use. In Winters vs. United States, 207 U.S. 564 (1908) settlers in Montana had diverted a river's flow away from a reservation, thereby denying the Indians the ability to use the water. The Court found the land within the reservation was arid and without irrigation and was practically valueless without water. It concluded that, without the water, the land was uninhabitable. Therefore, the treaty, dispite no specific language reserving the water, must have intended that the Tribe have a reserved right to use the river superior to that of an up-stream diverter. The Court was faced with a similar issue in United States vs. Powers, 305 U.S. 527 (1939) and in Arizona vs. California, 373 U.S. 546 (1963). In the Powers decision, the Court determined that the treaty (which established their reservation) had contemplated Indian utilization of the lands for agricultural purposes. Since water is necessary for cultivation of crops, the Court concluded that the treaty operated, by implication, to reserve waters arising outside the reservation for the benefit of the Tribe. The 1963 decision of Arizona vs. California, supra, determined that water had been ceded by the government to the affected tribes at the time of their original treaty even though the treaty was silent in this regard. The Court concluded that, without the availability of water for irrigation purposes, life on the reservation could not be sustained. Under the implied water right doctrine, Indian prior rights to water were upheld.

Cases of similar import are Conrad Inv. Co. vs. United States, 161 Fed. 829 (9th Circuit, 1908); Skeem vs. United States, 233 Fed. 93 (9th Circuit, 1921); United States vs. Parkins, 18 Fed. 2d 642 (D.C. Wyo. 1926) and United States vs. Hibner, 27 Fed. 2d 909 (D.C. Ida. 1929).

---

[13] U.S. Brief, pages 16-35.

These cases all have a thread of commonality. The water rights sought to be protected involved irrigation of Indian-owned lands lying within reservation boundaries. The absence of the water would render the land valueless and uninhabitable. This is not the case at bar. There is no evidence in this record to indicate that the absence of water renders the Spokane reservation lands "valueless" (Winters, supra, at 576) or ". . . that water from the river would be essential to the life of the Indian people. . ." Arizona, supra, at 599.

Succinctly put, none of the reported decisions involving reserved waters for beneficial use on Indian reservations extend the scope of that implied right beyond those waters needed for irrigation for agricultural purposes. All Indian "water right" cases involve the on reservation consumptive use of water which was necessary for the agricultural development of Indian lands. Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) is not inconsistent with this view because it involved a determination of reservation boundaries and not the implication of a Winters type of water right.

It was the policy of Congress to integrate the various Indian tribes eventually into the agrarian level of our economy. Conrad Inv. Co. v. United States, 161 F. at p. 831, supra; Handbook of Federal Indian Law, United States Department of Interior, pp. 225-230 (1958). An extension of the "water rights" rationale is unwarranted when it goes beyond consumptive use for agricultural purposes. United States v. Fallbrook Public Utility District, 165 F.Supp. 806, 838 (1958). This decision forcibly demonstrates that the implied water right beyond the need for "development of Indian agriculture upon the reservation, is not to be extended by analogy." Yet, this is precisely what the United States urges. Such a view of the law is unsupportable.

No Factual Basis Exists to Conclude that the Spokane Indians Depended Upon Fish from Chamokane Creek for Their Subsistence. (i.e. an intent to reserve water for this purpose)

The position of the United States may best be stated from its brief:

> "It is undisputed that the Spokane Tribe was historically and remains today a fishing people. . . . The area which is now the Spokane Reservation was the aboriginal home of the lower band of the Spokane Indians . . . primarily because of the excellent fishing in the Columbia River, Spokane River and Chamokane Creek."[14]

These statements are false. Findings of Fact Nos. 23 and 24 made by the Indian Claims Commission in Spokane Tribe v. United States, 9 Ind. Cl. Comm. 236, 247-249 (1961) belie them. For ease of reference, they are:

> "23. The Spokane Tribes were a tribe of Indians and were usually recognized and considered to be such by defendant and its representatives and agents. The tribe was the land-using unit, all members making use of the hunting and food gathering grounds without regard to their band affiliations. It was divided into three major bands known as the Upper, Middle and Lower bands of Spokane Indians. These bands were much intermarried and an over-all council united them for tribal action.
>
> "24. The Spokane Indians covered a wide range in their quest for food, having acquired horses in the first decade of the 18th century. They left their winter village or camp during March or in early April and spent about six weeks gathering dry-land camas on the plains south of Spokane River, traveling in minimal groups of 30 or 40 adults, the women digging camas while the men hunted. The roots were then cashed away and most of the Spokanes went west to the vicinity of Moses Lake near central Washington where they spent from two weeks to a month in social activities, gambling, dancing, horse racing, and trading with other tribes that gathered there. From June to October the Spokanes fished the Columbia and Spokane Rivers, and raced horses on the plains south of the Spokane. Bitter root was gathered in June and after July of each year moist-land camas was dug on upper Latah Creek and north of Spokane River. Sometimes the Spokanes joined the Colville and Kalispel Indians at camas fields near Cusick, Washington, and sometimes they went eastward beyond the Coeur d'Alene Lake in Idaho. Berries and wild parsnip were gathered in the fall. Antelope, deer, ground hog, jack rabbit, and other small game were found in the plains region between the Spokane and Palouse Rivers. During August, buffalo hunting parties left for the plains east of the Rocky Mountains, some returning during November and others wintering there. In December most of the Spokane Indians retired to their winter villages or camps, where they subsisted on dried fish, roots and game

---

[14] U.S. Brief, page 16.

supplemented sometimes, of necessity, by dried moss."[15] (Emphasis Supplied)

If the Spokane Tribe depended on fish from Chamokane Creek, the Indian Claims Commission wasn't aware of it (even though both the Tribe and the United States were parties). In fact, evidence introduced in this proceeding dispells such notions.[16] There is no evidence of historical dependence on a fishery in Chamokane Creek for subsistence by Spokane Indians. Yet the Tribe and the Government argue that it was a "manifest" purpose of the creation of the reservation to reserve sufficient waters in Chamokane Creek to sustain a historical fishery. The entho-historical facts regarding the Spokane Tribe do not support implication of such an intention.

Neither can it be asserted that present fish populations in Chamokane Creek form an indispensable or even important part of Spokane tribal subsistence. The only fish found in the creek are Brown Trout, Rainbow Trout, suckers and sculpins.[17] No population or catch estimates are given. Its present use is restricted to sport fishing and it provides an estimated 800 man-days per year of recreation.[18] No commercial fishing occurs there or is feasible.[19]

In sum, there is no evidence of past or present dependence of the Spokane Tribe on fisheries in Chamokane Creek. Neither is there

---

[15] The failure of the Government or the Tribe to cite or discuss this decision which has relevance to this issue is, perhaps, understandable in light of their joint endeavors in this suit to circumscribe the state's governmental and proprietary authority. Natural Resources submits that both the United States and the Tribe are bound by these findings which are relevant to the question of intent to reserve water.

[16] Plaintiff's Exhibit No. 55 are reports to the Commissioner of Indian Affairs by local government agents explaining the dependence of the Indians on their fishery at Kettle Falls on the Columbia River. Plaintiff's Exhibit No. 62 is also a report which demonstrates dependence on the fisheries at the mouth of the Little Spokane River. No reference is made to Chamokane Creek.

[17] Plaintiff's Exhibit No. 64, Special Report on Factors Affecting the Status of Trout Populations in Lower Chamokane Creek, Table 6.

[18] Plaintiff's Exhibit No. 38, Fisheries Management Program, Spokane Indian Reservation, p. 2.

[19] Galbraith, TR 809.

a shred of evidence that there was an intent on the part of the Government or the Indians to "reserve" sufficient water in the creek for fisheries, environmental, aesthetic or any other non-consumptive use when the reservation was created. There is a total failure of proof regarding the alleged "purpose" of creation of the Spokane Reservation to bring this case within the rationale of the "pupfish" decision, Cappaert v. United States, U.S. , 48 L.Ed.2d 523 (1976).

The evidence shows that it was government policy, at the time of creation of the Spokane Reservation, to integrate the Indians into the agrarian level of our economy.[20] Apparently the policy has been somewhat successful on the Spokane Reservation.[21]

The decisional law on this subject likewise demonstrates that the scope of the Winters implied water right in favor of Indians is limited to the furtherance of agricultural pursuits.

> "The implied reservation (of Winters) looked to the needs of the Indians in the future when they would change their nomadic habits and become accustomed to tilling the soil." (Insert by Author)
>
> United States v. Ahtanum Irr. Dist., 236 F.2d 321, 327 (9th Cir. 1956)

> "Cultivation of portions of the reservation was early commenced and water for irrigation purposes diverted from the stream. It appears from the files of the Department that not only was the Government desirous of having the Indians learn the acts of husbandry, but that the Indians themselves, who had taken refuge in substantial numbers on the lands reserved, were eager to cultivate the soil and produce crops. The gradual but substantial growth of the practice of farming and irrigation on the reservation is shown in findings of the trial court."

---

[20] "Always the intent is given to reduce the Indians to more compact Reservations and orient them in the direction of agriculture." Spokane Tribe Brief, p. 28. Appendix II to their brief recites the intention of the government agents to give the Indians lands to farm, training in agricultural pursuits and farming implements: Record of Proceedings, N.W. Indian Commission, 1887.

[21] Defendant's Exhibit No. 28, Report on House Res. 698 (82nd Congress), p. 1263 depicts Spokane Indians as largely engaged in agricultural activities on the reservation in 1950. No modern dependence on fishing is shown.

. . .

"It would be irrational to assume that the intent was merely to set aside the arid soil without reserving the means of rendering it productive."

United States v. Walker River Irr. Dist., 104 F.2d 334, 339 (9th Cir. 1939)

The record in this case does not support a factual inference from which an intention may be implied to reserve water from Chamokane Creek for any purpose other than irrigation. State law, and rights vested thereunder, should not be pre-empted unless there is clear and cogent evidence to support such an implied intention. United States v. Holt Bank, 270 U.S. 49 (1926).

Natural Resources submits that this Court should bear in mind:

"We have in this Republic a dual system of government, National and State, each operating within the same territory and upon the same persons, and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in this respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this - - a duty often times of great delicacy and difficulty."

South Carolina v. United States, 199 U.S. 437, 448 (1905)

Any ultimate findings by this Court regarding the existence of an implied federally reserved water right should be limited to consumptive use for irrigation purposes by Spokane Indians.

The Priority Date for An Implied Water Right Is Not Time Immemorial.

The United States contends that the Spokane Tribe possesses, in addition to water impliedly reserved under the Winters doctrine, an aboriginal or immemorial water based upon aboriginal occupancy for 30 cfs minimum flow.[22]

As previously noted, the original Indian title to lands over which the Upper, Middle and Lower bands of Spokanes formerly roamed

---

[22] U. S. Brief, p. 39

was extinguished by the Government on July 13, 1892. Spokane Tribe v. United States, 9 Ind. Cl. Comm. 236, 253 (1961). The contention presented is legally spurious.[23]

The Date of Creation of the Spokane Reservation Fixes the Priority Date for Any Winters Right.

According to the Government's argument, the agreement of August 18, 1877 established the Spokane Reservation, and that date should fix the priority for any implied Winters water rights in favor of the Tribe.[24] The Government states:

> "In order to minimize Indian-settler conflict, the United States entered into an agreement with the Spokanes on August 18, 1877, whereby the Indians gave up the right to the use and occupancy of their aboriginal land in return for the guaranteed, exclusive use of the Spokane Reservation. From the date of the agreement to the present, the Spokanes have resided on the reservation and the United States has recognized the reservation as such." (U.S. Brief, page 15)

This recital does not square with the findings made by the Indian Claims Commission in Spokane Tribe v. United States, supra. The facts seem to be along the following lines.

In accordance with Congressional policy, Territorial Governor Isaac I. Stevens procured a series of treaties with Indians in Western and Eastern Washington in 1855. Although he met with the Spokanes in council that year, no treaty was consumated. Subsequently, numberous councils were held with the Spokane Tribe but no cession was procured from them until March 18, 1887. 9 Ind. Cl. Comm. at 238. On August 18, 1877 a council was held by Indian Inspector E. C. Watkins and others on behalf of the United States with the Coeur d'Alene, Spokane, Pend d'Oreille, Chewelah, Okanogan, Colville and Palouse Indians. An agreement was drafted for the Spokanes whereby they agreed to go upon a tract of land which subsequently was set aside for their exclusive use and occupancy. The Palouse Indians, in a separate agreement, also agreed to move onto this tract. Neither of these

---

[23] The Government was certainly aware of this decision. It was a party to the case.

[24] U.S. Brief, pp. 10-22, 46.

agreements contained a cession of land by the Indians, called for the payment of consideration by the United States, granted any future benefits or privileges to the Spokanes nor were they ever presented to Congress for ratification. 9 Ind. Cl. Comm. 240-241. The tract was recommended by Inspector Watkins to be set aside for the Spokane and Palouse Indians as a reservation. In 1880, the Army directed that the tract should be protected from white settlement in anticipation that an Indian Reservation would be established in the near future. On January 18, 1881 an Executive Order issued setting the tract aside as a reservation for the Spokane Indians. (Plaintiff's Exhibit No. 52) The Executive Order created a reservation for the use and occupancy of the Spokane Tribe. Most of the Lower Spokane Band resided in the tract set aside in 1881. Few members, if any, of the Upper and Middle Spokane Bands moved on the reservation until 1888. The Upper, Middle and Lower Bands of Spokanes met with the Northwest Indian Commission in 1887 and an agreement was reached for cession of Spokane aboriginal title (Plaintiff's Exhibit 49) Congress ratified the 1887 agreement on July 13, 1892. (Plaintiff's Exhibit No. 48) 9 Ind. Cl. Comm. 242-245.

From these facts, what is the appropriate date to select for priority? Natural Resources submits that the date of creation of the Spokane Indian Reservation (January 18, 1881) should be selected because no rights to any specific lands were recognized by the Government prior to the Executive Order. Only a few Spokanes actually resided there prior to 1881. In fact, the majority of the three bands did not move there until 1888. 9 Ind. Cl. 245. Most of the Indians continued to roam until after the 1887 council meeting.

Given these historical facts, the Ninth Circuit was correct in holding that the date of the Executive Order, January 18, 1881, was the date of creation of the reservation. Gibson v. Anderson, 131 Fed. 39, 42 (9th Cir. 1904).

Reliance is placed on Northern Pac. Ry. v. Wismer, 246 U.S. 283 (1918) to the effect that the agreement of August, 1877 actually

created the Spokane Reservation. Wismer is not solid authority for that proposition because it was decided on stipulated and incomplete facts. 246 U.S. at 284, 287. The Supreme Court did not have before it the detailed findings set forth in Spokane Tribe v. United States, supra. This is illustrated by the Court's opinion at page 286 where the 1877 agreement is discussed (and the point is not mentioned that the Senate did not ratify it). Without any further explanation, the next sentence reads: "The Indians remained at peace with the United States and continued in the use and occupancy of the lands described in the (1877) agreement and claimed the same "as their reservation" until the year 1910." The stipulated facts before the Court were obviously deficient. We now know that the Spokane bands did not continue in use and occupancy of the reservation from 1877 to 1910. Most of the Indians did not even move there until 1888. Wismer simply isn't based on accurate facts.

Neither is United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939) opposite to the views of Natural Resources on this question. The history leading up to the 1874 Executive Order creating the Walker River Reservation for the Paiute and Washoe Indians shows that the boundaries of the reservation were marked and the lands were ordered to be surveyed by the Commissioner of Indian Affairs in 1859. Further, the evidence in the Walker case showed that the Paiute and Washoe Indians had taken refuge there and had commenced the practice of agriculture and irrigation in 1859 and shortly thereafter.[25]

The factual differences between Walker, supra, and the instant case are striking and apparent. Natural Resources submits that the priority date for any Winters implied water found to exist is January 18, 1881.

---

[25] 104 F.2d 338-339; See also: United States v. Northern Paiute Paiute Nation, 393 F.2d 786 (Ct. Cl. 1968).

IV. TO THE EXTENT LANDS WITHIN THE RESERVATION HAVE BEEN ALIENATED OR DEDICATED TO SPECIFIC USES, AN IMPLIED WATER RIGHT NO LONGER EXISTS IN FAVOR OF THE SPOKANE TRIBE.

Three categories of lands within the Spokane Reservation are not entitled, as a matter of law, to a prior paramount right to irrigation water. The categories are: (1) alienated lands acquired by non-Indians; (2) lands classified for timber production pursuant to an act of Congress; and, (3) lands reacquired by the Spokane Tribe in recent times. For convenience, each category will be discussed separately.

The Spokane Indian Reservation, as previously discussed, was created by an Executive Order on January 18, 1881. According to the Bureau of Indian Affairs, it contains 154,603 acres.[26] Of this total, 100,221 acres are tribally owned; 29,640 acres are allotted lands; 21,683 acres are non-Indian fee lands and 3,085 acres are managed by the Bureau of Indian Affairs for the benefit of the Spokane Tribe.[27] Of the total acreage within the reservation, 82,647.5 acres have been classed as timber production lands and 5,781.22 acres have been classed as agricultural lands pursuant to Congressional directive. 25 Stat. 458 (Act of May 29, 1908)[28]

Before proceeding into a discussion of the legal significance of the classes of lands adverted to, it is necessary to establish the scope (in acres) of the water right asserted for irrigation. The United States contends:

> "The character and topography of the Chamokane Creek basin portion of the Spokane Indian Reservation are such that there are two tracts of irrigable land upon which water will be required: (1) a tract of 1,880 acres below elevation 2,100 feet (bottom land) and (2) a tract of about 6,580 acres above elevation 2,100 feet (bench land)." (Emphasis Supplied) (U.S. Brief, page 44)

---

[26] The Government states that it contains 154,898 acres. U.S. Brief, page 47.

[27] Plaintiff's Exhibit No. 100.

[28] Plaintiff's Exhibit No. 101.

The Government argues that it has a right to 25,380 acre-feet of water per year for the irrigation of 8,460 acres.[29] In submitting this view, the Government overlooks the testimony of its own witnesses. First, acres lying outside the Chamokane Creek Basin are included in the total of 8,460 acres. Plaintiff's witness testified that the implied irrigation water right claimed by the Government and the Tribe was limited to irrigable lands within the Basin inside the reservation.[30] Second, the Superintendent of the Spokane Indian Agency testified that the estimated total acres of tribally-owned irrigable lands within the Basin is currently 6,000 acres.[31] This figure includes lands reacquired by the tribe from non-Indian fee ownership, and lands classified as timber production lands by the Act of May 29, 1908.[32] It is the position of Natural Resources that no basis exists in the record to support a claim to an implied water right to irrigate lands outside the Chamokane Creek Basin, thus limiting the claim to an estimated 6,000 acres.[33] Of the 6,000 acres, there remain portions of that land classified for timber production and reacquired lands insofar as entitlement to an implied paramount water right for irrigation to be dealt with.

According to the United States, 77 acres were restored to tribal ownership pursuant to the Act of May 19, 1958 (72 Stat. 121) and 1,798.11 acres were returned to trust status for the benefit of the Spokane Tribe pursuant to the Act of June 10, 1968 (82 Stat. 174) as amended by the Act of May 21, 1974 (88 Stat. 142) - - - now codified as 25 U.S.C. 487.[34] The arguments advanced in support of

---

[29] U.S. Brief, page 46.

[30] Harvey, TR 585.

[31] Stevens, TR 1348.

[32] Stevens, TR 1353, 1355.

[33] Apparently, the United States is claiming water from Chamokane Creek to irrigate "bench lands" lying outside the Basin. Just where the claimed 8,460 acres is derived is unclear. U.S. Brief, page 44.

[34] U.S. Brief, page 49.

these lands' entitlement to a Winters water right are three-fold.[35]

First, it is asserted that the tracts are not severed from the reservation unless it is explicitly authorized by Congress. The authorities relied upon a deal with questions of reservation boundaries, jurisdiction, diminishment or termination. E.g. DeCoteau v. District County Court, 420 U.S. 425 (1975); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962); The City of New Town, North Dakota v. United States, 454 F.2d 121 (8th Cir. 1972); United States v. Erickson, 478 F.2d 684 (8th Cir. 1973). None of these decisions have anything to do with the question presented - namely - does an Indian implied water right "run with the land" regardless of its status or subsequent alienation?

Next, it is argued that the legislative history of the three Acts mentioned evinces an intent on the part of Congress to "re-vitalize" the Winters water right for these reacquired lands. Nothing in the statutes or the legislative history cited even mentions an implied water right for irrigation. When no ambiguity exists on the face of the statute, and no reference is made in the legislative history to an implied water right, it is beyond reason to infer that Congress intended that an implied right was to be created with a priority date antecedent to establishment of the reservation itself.[36] Water rights vested under state law should not be ousted in the absence of an unambiguous Congressional expression to that effect. Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963); Schwartz v. Texas, 344 U.S. 199 (1952).

Finally, the Government contends that "undue administrative expenditures will be required to administer these numerous small parcels separately."[37] It is indeed novel for a plaintiff to argue

---

[35] U.S. Brief, pages 52-63.

[36] An interesting due process issue would be presented vis-a-vis persons who acquired water rights under state law with priority earlier than the federal acts should this argument be adopted by the Court.

[37] U.S. Brief, pages 52 and 60.

that it is entitled to injunctive relief halting defendants actual use of water pursuant to rights vested under state law based upon an alleged administrative burden regarding identification of the lands claimed to enjoy a priority status. To state the argument is to refute it.

Natural Resources contends that the reacquired lands are not entitled to the benefit of the Winters doctrine except to the extent allowed in United States v. Hibner, 27 F.2d 909, 912 (D. Ida. 1928).

> "Rights of Those Who are Successors of Indian Lands.
>
> This question is not free of difficulty, for it presents for consideration what is the status of the water rights of those who have acquired by purchase their lands from the Indians whose rights were reserved unto them, and who became vested with all the rights incident to ownership of both the lands and water under the treaties, with a priority of February 16, 1869. The right of the Indians to occupy, use, and sell both their lands and water is now recognized, as this view is sustained in the case of Skeem v. U.S., supra, and, such being the case, a purchaser of such land and water right acquires, as under other sales, the title and rights held by the Indians, and that there should be awarded to such purchaser the same character of water right with equal priority as those of the Indians. The status of the water right after it has passed to others by the Indians seems to be somewhat different from while such right is retained by the Indians, because the principle invoked by the courts for the protection of the Indian as long as he retains title to his lands does not prevail and apply to the white man, and the reason for so holding is that there was reserved unto the Indians the absolute right to own and use in their own way the water for their lands, while the white man, as soon as he becomes the owner of the Indian lands, is subject to those general rules of law governing the appropriation and use of the public waters of the state, and would, as grantee of the Indian allotments, be entitled to a water right for the actual acreage that was under irrigation at the time title passed from the Indians, and such increased acreage as he might with reasonable diligence place under irrigation, which would give to him, under the doctrine of relation, the same priority as owned by the Indians; otherwise, the application of any other rule would permit such grantee for an indefinite period to reclaim the balance of his land and withhold the application of the water to a beneficial use, which is against the policy recognized in the development of arid lands."

This case holds that the successor in interest to lands which enjoy a Winters right is entitled to the priority of the Indian to the extent that the acreage was actually under irrigation at the time title passed.

There is no evidence pertaining to this fact question on any of the reacquired tracts. Therefore, plaintiffs have not demonstrated their entitlement to any priority for any amount of water for these tracts. As the court stated in Hibner, supra, the successor in interest must comply with the "general rules of law governing the appropriation and use of public waters of the state". 27 F.2d at 912.

Turning now to the question of the lands classed for timber production for the benefit of the Tribe, the basis of the classification has been mentioned. Act of May 29, 1908 (35 Stat. 458) Section 5 provides:

> "That the lands so classified as timber lands shall remain Indian lands subject to the supervision of the Secretary of the Interior until further action by Congress, and no provision authorizing the sale of timber upon Indian lands shall apply to said lands unless they be specially designated: PROVIDED, That until further legislation the Indians and the officials and employees in the Indian Service on said reservation shall, without cost to them, have the right, under such regulations as the Secretary of the Interior may prescribe, to go upon said timber lands and cut and take therefrom all timber necessary for fuel, or for lumber for the erection of buildings, fences, or other domestic purposes upon their allotments; and for said period the said Indians shall have the privilege of pasturing their cattle, horses, and sheep on said timber lands, subject to such rules and regulations as the Secretary of the Interior may prescribe: PROVIDED FURTHER, That the Secretary of the Interior is hereby authorized to sell and dispose of for the benefit of the Indians such timber upon said timber lands as in his judgment has reached maturity and is deteriorating and which, in his judgment, would be for the best interests of the Indians to sell, the purpose being to as far as possible protect, conserve, and promote the growth of timber upon said timber lands. The Secretary of the Interior shall deduct from the money received from the sale of such timber the actual expense of making such sale and place the balance to the credit of said Indians, and he is authorized to prescribe such rules and regulations for the sale and removal of such timber so sold as he may deem advisable."

The Secretary of Interior caused the Spokane Indian Reservation to be appraised with a view toward classification of the lands as directed by Congress. The report of his appraisers was accepted and the lands classed for timber production have continued to be managed by the Bureau of Indian Affairs from 1909 to the present time for the benefit of the tribe.[38] Unfortunately, the record does not explicitly

---

[38] Plaintiff's Exhibits Nos. 101 and 102 are the Government's appraiser's reports and transmitted letters dated 1909. Plaintiffs' Exhibit No. 83, Resource Development Study, 1968, pp. 89-94 shows the history of timber production and present management of these reserved lands.

reflect the number of acres within Chamokane Basin which are classed and managed for timber production. Plaintiff's Exhibits 99 and 100 do not indicate tribally owned acreages within the Chamokane Basin which are reserved for this purpose.[39] These exhibits relate to present tribal ownership (including reacquired lands). They were related to the soil classes found there.[40] The United States contends that the soil class of the lands (i.e. capability of irrigation) is the sole determinant of quantifying an implied water right for irrigation purposes.[41] Natural Resources disagrees.

We have calculated from Plaintiff's Exhibit No. 101 the estimated total number of acres reserved for timber production within Chamokane Creek Basin, lying inside reservation boundaries, to be 10,104.64 acres.[42] There is no quarrel with the fact that some of the reserved timber acres have a soil class which is capable of irrigation for agricultural purposes.[43] Our point is that these lands have been reserved by Congress to a specific non-agricultural use for the benefit of the Spokane Tribe. In light of an express declaration of Congressional intent to reserve these lands for timber production, no basis exists for implication of a Winters water right for agricultural purposes. The language of that seminal decision dispells any such notion. After finding that the Indian lands on the Fort Belknap Reservation were "practically valueless" without irrigation for agricultural development, the Court weighed the conflicting

---

[39] Stevens, TR 1353-1354

[40] Stevens, TR 1348, 1355

[41] U.S. Brief, pages 43 and 45.

[42] Our calculations are reasonably accurate but must be termed "estimates" because of the possibility of error in drawing a finite watershed boundary and calculating the interior acreages where it bisects a given tract.

[43] The number of acres within the tracts dedicated to timber production which are suitable for agricultural development (the Government's theory) is not clear from this record. To the extent that irrigable lands (based on their soil class) are included in the Government's claimed total of 8,460 acres, the total is in error.

implications of the silence of the agreement of May, 1888. It found that the purpose of the agreement was to change the Indians from a nomadic and uncivilized people. "It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people." 207 U.S. at 576. The Court was not confronted with an express reservation of lands for timber production for the benefit of the Indians. It was faced with "a conflict of implications". It found that the implication "which makes for the retention of the waters is of greater force than that which makes for its cession," 207 U.S. at 576.[44] As noted in United States v. Walker River Irr. Dist., 104 F.2d 334, 336 (9th Cir. 1939):

> "A statute or an executive order setting apart the reservation may be equally indicative of the intent. While in the Winters case the Court emphasized the treaty, there was in fact no express reservation of water to be found in that document. The intention had to be arrived at by taking into account of the circumstances, the situation and the needs of the Indians and the purpose for which the lands had been reserved." (Emphasis Supplied)

As to the lands expressly reserved for timber production for the benefit of the Spokane Tribe, there is no basis for reliance upon an implication based on silence. Such an approach would be contrary to elemental rules of statutory interpretation. Judicial speculation regarding an undisclosed "intent" should not override express Congressional directives.

To recap this branch of Natural Resources argument, we submit that the claim of the United States and the Spokane Tribe to an implied paramount water right is limited to tribally owned lands lying within the Chamokane Basin which are suitable for agricultural development. From this acreage should be deducted the lands re-acquired from former non-Indian ownership and the lands set aside for timber production:

---

[44] The judicial progency of Winters have all likewise made the same choice when faced with the choice of conflicting implications. None of its subsequent decisional law meets the argument here advanced.

6,000	(Est.)	acres in Basin suitable for agriculture (tribally owned)[45]
minus 562		acres claimed as irrigable returned to trust status[46]
minus 77		acres claimed as irrigable returned to tribal ownership by Act of May 19, 1958[47]
minus ?		acres reserved for timber production by Act of May 29, 1908[48] which are irrigable by soil class
?		Total irrigable acreage entitled to Winters water right[49]

Confronted with this evidentiary hiatus, Natural Resources submits that there is a failure of proof on this pivotal issue of just what lands are entitled to special treatment in terms of water. Based on calculations made from Plaintiff's Exhibit No. 101, we conclude that 4,231.30 acres lie within Chamokane Basin which were classed as agricultural lands pursuant to the Act of May 29, 1908. But neither the Tribe nor the United States argues that this acreage (devoted to this purpose by Congress) is entitled to a special Winters type of water right. No analysis can be made from this record of the past or present ownership status of the 4,231.30 acres nor is it possible to determine the soil classes (i.e. irrigability) present on these tracts. We believe that the burden is on a plaintiff to establish, by a preponderance of the evidence, his entitlement to the relief sought in this case.[50]

---

[45] Stevens, TR 1348.

[46] U.S. Brief, page 60.

[47] U.S. Brief, page 49.

[48] As previously noted, the evidence submitted by plaintiffs does not establish that any particular acreage within Chamokane Basin to which the claimed Winters water right would apply.

[49] Our confusion as to the amount of irrigable acreage claimed is compounded by Plaintiff's Exhibits 40 and 40A. These exhibits show potentially irrigable trust lands along Chamokane Creek in the amount of 2,135 acres for which 4,270 acre-feet of water are claimed as needed.

[50] Natural Resources, in presenting this argument, does not abandon its other arguments that the Winters case does not apply to this case.

V. NO PRESENT USE OR NEED FOR WATER HAS BEEN SHOWN FOR INDIAN-OWNED ACREAGE WITHIN THE CHAMOKANE CREEK BASIN.

Ancillary to the failure of identification of the acreages to which the claimed Winters type water right attaches discussed above is the failure of plaintiffs to show a need or use for a water right on lands within the Chamokane Basin.

> "It seems clear from United States v. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir. 1956), cert.den. 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957) that need and use are prerequisite to any water rights on Indian reservations." Tweedy v. Texas Co., 286 F.Supp. 383, 385 (D. Mont. 1968)

In Ahtanum, supra, the court had this to say about the quality of proof incumbent upon the United States in a case of this nature:

> "The opinion of the trial court found fault with the Government's proof of its water rights, saying (124 F.Supp. 838): 'Since the government cannot recover upon a claim of right of the Yakima Indian Nation as an entity, but only as the trustee for several individual Indians who hold trust patents respectively, the claim of each respective owner must be specifically set up and proved, and further there must be proof of acts of some defendant or defendants which interfere with the trust owners of particular pieces of property, before the government can require any landowner north of the boundary to plead or prove his claim to ownership of a water right.' With this we disagree. By maps and Indian Office records the United States showed the location, point of diversion and capacity of each ditch constructed by Indians, or by the Indian Service, and the description, irrigable area, and location of all reservation lands served by those ditches with water from Ahtanum Creek. Also shown are the rate of progress through the years since the creation of the treaty in getting this water upon these lands. Just which lands are Indian owned, whether under trust or fee patent, and which are owned by successors of Indian allottees, also was proven. The quantities of water required by these lands was both stipulated and proven. No more was required, for the United States has the right to make distribution of its water under such rules as it may adopt, as provided by 25 U.S.C.A. § 381 (note 16, supra). It is no concern of ours which particular parcels or allotments are served by the Indian Service ditches, so long as adequate proof was made of their aggregate needs." (Emphasis Supplied) 236 F.2d at 339-340

The Ninth Circuit went on to observe, that in construing a 1908 agreement relative to the use of water from Ahtanum Creek:

> "This (result) follows from the proposition that it is a fundamental maxim of the law of waters that an individual's rights, no matter how measured or described, can never exceed his needs. Vineyard Land and Stock Co.

v. Twin Falls, etc. Co., 9th Cir., 245 Fed. 9, 22." 236 F.2d at 341.

The United States, however, chooses to rely upon its interpretation of United States v. Arizona, 373 U.S. 546 (1963). Their contention is:

> "2. To establish the irrigable acreage, it need only be shown that the land is arable soil to which water is delivered or can be delivered and which is or can be made capable of producing crops by the construction of those facilities necessary for sustained irrigation." U.S. Brief, page 44.

Natural Resources submits that Arizona, supra, does not support the broad statement set forth. The Court held:

> "We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable."[51] 373 U.S. at 601

Nothing in Arizona is inconsistent with Tweedy or Ahtanum, supra. Natural Resources submits that the "prerequisites" of use and need are not shown in this record. The opposite is true. No evidence has been submitted by the United States or the Spokane Tribe showing (a) the location, point of diversion or capacity of any existing or planned withdrawal from Chamokane Creek; (b) a description, irrigable area and location of reservation lands served or to be served; (c) just which lands are owned by Indians under trust or fee patent; (d) just which lands are owned by successors of Indian allottees; and (e) the quantities of water required by these lands (the duty of water for each tract).[52]

---

[51] The United States reads into this language a very limited evidentiary requirement. They argue that the evidence relied upon by the Master in that case largely consisted of tables showing how diversion requirements are computed and maps showing soil classes on a potential reservation irrigation project. U.S. Brief, page 43. The use of the adjective "largely" makes one suspect that the Master had before him evidence of a more substantial nature than tables and maps. Of course, the complete record of Arizona is not before this court nor are U.S. Exhibits 560, 561, 570, 1007, 1009, 1121, 1207, 1208, 1210, 1317 and 1318 cited by the United States from that record. One is reminded of the old saw "you know I really love you, because I say I do." We believe that the language of the Supreme Court in Arizona means what it says and should be read in context with the Tweedy and Ahtanum decisions which also deal with the burden of proof issue.

[52] The items listed are the evidentiary requirements approved by the Ninth Circuit in Ahtanum, supra.

The evidence in this reveals no plans on the part of the Spokane Tribe to use water from Chamokane Creek for irrigation! The Tribe has never planned to use water from Chamokane Creek for this purpose.[53] A tribal resolution was passed to this effect.[54] The ultimate plan of development for the reservation does not contemplate irrigation from ground or surface waters in the Chamokane Basin.[55] Tribal representatives uniformly testified negatively on this question of agricultural irrigation water from Chamokane Creek.[56]

This view was corroborated by plaintiff's consultant who said it was the "lowest priority" to irrigate with water from Chamokane Creek.[57] Even with lower costs of construction of an irrigation project utilizing water from this source, plaintiff's consultant did not recommend it because "of the detrimental (sic) expected on the lower part of the Chamokane Creek."[58] This view is confirmed by his report. Plaintiff's Exhibit No. 29, Water Resources On The Spokane Reservation, Woodward, 1973, at page 4.

It is unusual to respond to a brief which seems to be at extreme variance with the desires of the client. Nevertheless, Natural Resources does not hesitate to point out these discrepancies and

---

[53] McCoy, TR 730.

[54] McCoy, TR 731.

[55] McCoy, TR 734.

[56] Sherwood, TR 680; Galbraith, TR 781.

[57] Woodward, TR 178, 340.

[58] Plaintiff's Exhibit No. 30, Supplemental Preliminary Report - Irrigable Lands Below 2200, Spokane Indian Reservation, Woodward, 1973, at page 6. The Government argues the economic feasibility of drawing water from this source and ignores its own witnesses' and the Indians' recommendation against such a proposal. U.S. Brief, page 45. This argument also is not shored up by the evidence for another reason. There is no basis for alleging economic feasibility because no studies were made. TR 282-283. A possible ground water development on Walker's Prairie for 1,045 acres via wells is the only study on economic feasibility reported in this record. Plaintiff's Exhibit 30, Supplemental Preliminary Report - Irrigable Lands Below Elevation 2200 - Spokane Indian Reservation, Woodward, 1973 at page 6. This 1,045 acres is in the area classed as agricultural lands under the Act of May 29, 1908 which was opened to homestead by non-Indians. Its ownership status, past and present, is unclear on this record.

states that the claim does not square with the evidence. Neither is the proof even minimally adequate under the test laid down in Tweedy v. Texas Co., supra, or United States v. Ahtanum Irrigation District, supra.

VI. STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, CLAIM TO WATER RIGHTS.

The State of Washington was named as a defendant primarily because of actions of the Department of Ecology under state law and its possible relationship to plaintiffs. The Department of Natural Resources, as a department under the supervision of the Commissioner of Public Lands, of the State of Washington sets forth its claim to beneficial use of water because of the scope of relief sought by plaintiffs (i.e.: interference with our proprietary responsibilities).

The record shows that present water usage by Natural Resources or its lessees does not conflict with or harm plaintiffs. Plaintiff's complaint (joined by the Spokane Tribe) does not even allege any interference with their claim and water right by any water use or diversion by Natural Resources. No evidence has been submitted that any use of water or withdrawal by Natural Resources, or its lessees, has harmed or will harm the Tribe presently or in the future.

Mr. Woodward, plaintiffs' consultant, stated that stock watering and domestic water uses outside the reservation would have a very minimal effect on the flow of Chamokane Creek.[59] No measurement of such uses was made.[60]

Mr. Woodward also testified that ground water lying north and westerly of what he considered a lateral moraine was not related to the waters of Chamokane Creek or the ground waters lying southerly and easterly of such lateral moraine.[61] The lateral moraine lies in a position approximately at the northeast corner of the reservation and runs northeasterly creating a separate ground water regime that

---

[59] Woodward, TR 288.

[60] Woodward, TR 288.

[61] Plaintiff's Exhibit No. 10, Woodward, TR 186-187, 287.

does not flow into the Chamokane Basin.[62]

The ownership of Natural Resources is shown in red on Defendant's Exhibit No. 23. Defendant's Exhibit 24 is a list of all our lands setting forth the legal description, the acreage, the amount of water necessary for use on each parcel, and the annual amount of water that is necessary for the use of these lands. The amount is 1,905,018.40 gallons per year.

The uses to which these lands have been put are grazing and timber growth, although on Section 16, Township 29, Range 40 East, water is pumped directly from a tributary of Chamokane Creek in the upper basin for homesite purposes.[63] The location of water sources that serve these lands are shown on Defendant's Exhibit No. 68. Some of these are developed water sources, such as water piped to tanks from springs and developed springs themselves.[64] There are approximately 1505 acres that are suitable for irrigation because of their soil classification.[65] Irrigation of our lands is from ground water sources that do not affect the flows of Chamokane Creek. None of our lands are so situated as to affect the ground waters in the Walker Prairie area.

The lands managed by Natural Resources were obtained from the federal government pursuant to the State's "Enabling Act".[66] Sections 16 and 36 were directly obtained from the federal government upon admission into the Union. The balance of our lands were selected as "in lieu" (indemnity lands) to substitute for those sections 16

---

[62] Woodward, TR 286 and 287.

[63] Isaacson, TR 1203, 1212.

[64] Isaacson, TR 1211; Defendant's Exhibit No. 68.

[65] Isaacson, TR 1206 and 1207.

[66] Defendant's Exhibit No. 67; 25 Stat. 180; Article 16, Washington State Constitution.

and 36 which had been reserved by the Federal Government.[67] Section 10 of the Enabling Act states:

> "That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as continguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as to the legislature may provide, with the approval of the Secretary of the Interior: PROVIDED, That the sixteenth and thirty-sixth sections embranced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain."

This section parallels section 20 of the Organic Act establishing the territory of Washington in 1853[68] which reads:

> "AND BE IT FURTHER ENACTED, That when the lands in said Territory shall be surveyed under the direction of the Government of the United States preparatory to bringing the same into market or otherwise disposing thereof, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said Territory. And in all cases where said sections sixteen and thirty-six, or either or any of them, shall be occupied by actual settlers prior to survey thereof, the County Commissioners of the counties in which said sections so occupied as aforesaid are situated, be, and they are hereby, authorized to locate other lands to an equal amount in sections, or fractional sections, as the case may be, within their respective counties, in lieu of said sections so occupied as aforesaid."

The lands obtained through the Enabling Act were granted in trust to the State of Washington for the support of public education and certain public institutions.[69] The Constitutional trust includes

---

[67] Isaacson, TR 1213. Defendant's Exhibit No. 26 contains clear lists which are the documents which grant in lieu selections to the state pursuant to section 10 of the state's Enabling Act. Comparable state statutes reflecting the grants are RCW 79.01.076 and Chapter 79.28RCW.

[68] Act of March 2, 1853, 10 Stat. 112.

[69] Lassen v. Arizona, 385 U.S. 458, 87 Sup.Ct. 584, 17 L.Ed.2d 515 (1967)

financial support of common schools, the state penitentary, scientific schools, normal schools, public buildings at the state capitol, state charitable institutions, juvenile reformatories and agricultural colleges.[70]

Natural Resources submits that its water rights for all the granted trust lands in question have a priority date of November 11, 1889. United States v. Wyoming, 331 U.S. 440 ( ).[71]

It is further submitted that our water priority predates all reservation lands except those tracts proven to be irrigable in fact and which were never removed from trust status or classed as timber production lands. Reacquired lands assume a priority position on the date of reacquisition as established by United States v. Hibner, 27 F.2d 909 (D. Ida. 1928) which are, necessarily, junior to Natural Resources.

Natural Resources' right to use water is also based on riparian usage of waters flowing through our lands and springs arising on them.[72] The legal relationship relative to priority and water use between the defendants is not in dispute in this case. The defendant's rights inter se are determined by state law.[73] We do not understand that this action is similar to comparable state water adjudications.

VII. CONCLUSION

Natural Resources requests that plaintiffs' complaint and the extraordinary relief sought be denied. We believe that:

> "Although the sad history and plight of Indians in this country justifiably arouses sympathy, it is this court's duty to apply sound legal concepts and precedent to the resolution of the question presented herein. It must be concluded that the law does not hear out plaintiffs' claims."

---

[70] Sections 10, 15, 16 and 17, Washington State Enabling Act.

[71] Defendant's Exhibit No. 27.

[72] In re Chiliwist Creek, 77 Wn.2d 685, 466 P.2d 513 (1970); In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970).

[73] RCW 90.03.110 through RCW 90.03.240.

Scholder v. United States, 298 F.Supp. 1282, 1286-1287 (D.C. Cal. S.D. 1969); rev. in part on other grounds, aff. in part, 428 F.2d 1123 (9th Cir. 1970); cert. den. 400 U.S. 942 (1971).

DATED this 15th day of March, 1977.

Respectfully submitted,

SLADE GORTON
Attorney General

J. LAWRENCE CONIFF, JR.
Assistant Attorney General

THEODORE O. TORVE
Assistant Attorney General
Attorneys for Defendant
Department of Natural Resources

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

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

CERTIFICATE OF SERVICE

This is to certify that on the 25th day of March, 1977, I mailed a copy of the "Brief of Natural Resources in Opposition to Plaintiffs' Opening Briefs" to all the parties on the attached list.

J. Lawrence Coniff, Jr.

J. LAWRENCE CONIFF, JR.
Assistant Attorney General
Temple of Justice
Olympia, Washington 98504

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

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

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

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

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

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

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

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

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

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

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

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

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