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Supplemental Brief of the State of Washington Department of Ecology

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6 Attorneys for State of Washington,
7 Department of Ecology

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

10 UNITED STATES OF AMERICA,)
11)
12 Plaintiff,)
13)
14 v.)
15 BARBARA J. & JAMES ANDERSON,)
16 et al.,)
17 Defendants.)

CIVIL NO. 3643

17 SUPPLEMENTAL BRIEF OF THE STATE OF WASHINGTON

18 DEPARTMENT OF ECOLOGY

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1 I. INTRODUCTION

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

18
19 A. This Case is a "General Adjudication" of Water Rights.

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

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

23
24 ^{1/} By letter to the Court of July 21, 1977, counsel for the
25 Spokane Tribe implied that another brief would be necessary to
26 respond to new matters raised in the supplemental briefs of the
27 Departments of Ecology and Natural Resources and that the Tribe
28 is prepared to furnish the court new evidentiary matter being
29 compiled by their consultant. There are procedures for reopening
a case for new evidence. If the Tribe wishes to invoke these,
we will respond appropriately. However, we strenuously object to
the offering of additional evidentiary material without the
opportunity to cross-examine the person compiling the evidence
and the opportunity to make objections.

30
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33

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

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

6 The Tribe is wrong on both statements.

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

19 It is clear that a general adjudication is the type of case
20 the United States intended to and did initiate in this proceeding.^{2/}
21

22 ^{2/} The court should be aware of the following background. At
23 the time the United States served the Department of Ecology in
24 this cause, the State of Washington was in the final stages of
preparation of pleadings leading to filing of a "general adjudi-
25 cation" of the Chamokane Creek stream system in state court.
The State had intended to join the United States, pursuant to 43
26 U.S.C. § 666, so that all federal water rights, reserved as well
as state based including those of Indians, could be adjudicated
27 in state court in the same manner as it has in approximately a
dozen adjudications over the past decade. See, e.g., the Superior
28 Court decree reviewed by the State Supreme Court in In re Chiliwist
Creek, 77 Wn.2d 658, 466 P.2d 513 (1970). When the United States
29 served the State of Washington in this proceeding the Department's
attorney, Mr. Roe, immediately inquired of the Department of
30 Justice attorney, Mr. Donald Redd, as to whether the United States
was initiating a general adjudication of the Chamokane. The
31 response of the lead attorney of the Justice Department was in
the affirmative. Thereafter the State decided not to pursue
further the initiation of the state court proceeding and, after
32

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

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

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

24 2/ (continued)
25 wiping out its spirit of disappointment at the United States Depart-
26 ment of Justice unannounced "race to the court house," provided that
27 Department, without charge, an exhaustive title report listing all
28 potential claimants to Chamokane waters. This report, which was
29 developed by the state earlier in the year at the cost of several
30 thousand dollars, set out the parties required to be joined as neces-
31 sary parties in a general adjudication. The United States thereafter
32 amended its complaint by joining these claimants.

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

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

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

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

28
29 ^{3/} The crucial distinction between a tribe's powers of "self govern-
30 ment," i.e., the power to regulate themselves and their real property
31 interest, and general government powers of "sovereignty," which only
32 the United States and the States have in our federal system, must be
33 kept in mind. A mixing of the two will only create chaos in legal
analysis. See the excellent discussion of this distinction by
Congressman Lloyd Meeds in his dissent to the Report of the American
Indian Policy Review Commission, copies of which have been filed with
the Court.

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

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

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

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

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

6 In a nutshell the state's governmental powers are limited as to
7 waters of Chamokane Creek within the reservation in that they cannot
8 apply, absent express federal authorization or consent, to the admini-
9 stration of Indian reserved property rights. Likewise, the State's
10 power is limited in that its laws cannot be applied so as to the inter-
11 fere with any tribal powers of self government applicable to reserved
12 real property interest, such as water rights. But, except for these
13 two limitations, the state's powers extend to all waters of the
14 Chamokane Creek to the same extent as they apply to lands outside the
15 reservation within the State of Washington.

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

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

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

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

3 Plaintiffs misstate the Department of Ecology's position.^{4/}
4 The Department has consistently taken the position that along with
5 the reservation of land by the presidential executive order of 1881
6 there was impliedly reserved rights to the use of water for
7 agricultural irrigation uses. As we noted in our Brief, the right
8 may be for substantial amounts, or it may be approaching zero. The
9 evidence before the Court is not clear enough to precisely quantify.
10 See Brief of the Department of Ecology at 27-31. The point we made
11 in our opening brief, which the plaintiffs miss, is that it is diffi-
12 cult, from any of the description of the actions surrounding the
13 execution of the presidential executive order, to support a finding
14 of the establishment of two implied water rights: one authorizing
15 the removal of of the stream for irrigation and the other author-
16 izing the retention of all of the same waters for fisheries purposes.
17 They are mutually exclusive. It could be one but not both. And, as
18 the Court knows from the analysis of our opening brief, the Depart-
19 ment suggested the confirmation of a reserved right for agricultural
20 purposes was warranted. See Department of Ecology Brief at 29-30.

21 In any event, the Department of Ecology has never contended
22 that the Tribe was not entitled to a right to make use of water from
23 the Chamokane for both instream and agricultural uses.^{5/}
24

25 ^{4/} The Department of Ecology is very sensitive on this score. Such
26 approaches unfairly paint a picture of party setting forth an appear-
27 ance of one who blatantly disregards well established law when, in
good faith, they are attempting to follow the precedents to the best
of their ability.

28 ^{5/} Note is made that the Department of Ecology has already recom-
29 mended that a minimal flow be set on the stream that flow should be
30 set based not upon any impliedly reserved federal right but upon
Washington state law. See Brief of Department of Ecology at 59. If
31 the Court is reluctant to enter such an order, based upon concepts of
primary jurisdiction or otherwise, the Court may wish to consider the
32 entry of an order referring the matter of level setting pursuant to
Chapter 90.22 RCW to the Department of Ecology.

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

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

10 Let us consider the following:

- 11 1. Waters of stream systems generally, and the Chamokane
12 Creek drainages in particular, are transitory in nature
13 following Newton's law not the vagaries of the location
14 of governmental boundaries.
- 15 2. In the Chamokane drainage the majority of the stream's
16 basin, from its beginnings until it discharges into the
17 Spokane River, is outside the boundaries of the Spokane
18 Reservation. And even when the stream flows within the
19 original boundaries of the reservation reaches of the
20 stream touch non-Indian lands.
- 21 3. Federal congressional policy has, for more than a century,
22 pointed to and encouraged states to establish water rights
23 laws applicable to the vast majority of federal lands as
24 well as all non-federal lands. See, e.g., Acts of 1866,
25 1870, and 1877, 43 U.S.C. §§ 321, 661. Further federal
26 policy has, on numerous occasions, directed federal agencies,
27 activities, and licenses to comply with state water rights
28 laws. See, e.g., Reclamation Act of 1902, 43 U.S.C. §§ 383,
29 and Federal Power Act of 1920, 16 U.S.C. § 802.
- 30 4. As a matter of historical development, consistent with
31 the aforementioned federal policy, the only governmental

1 unit equipped presently to operate a water rights alloca-
2 tion and regulation system applicable to the entire water-
3 shed, such as the Chamokane, is state government.

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

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

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

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

1 further, it may be that the Secretary of the Depart-
2 ment has no power to delegate the authority of the
3 Department to administer a code to a tribe where the
4 authority to adopt and administer codes is vested
5 expressly in the Secretary.

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

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

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

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

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

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

10
11 ^{6/} The only roadsign pointing to a contrary result concerns the
12 often repeated allegation that Indian interests cannot be treated
13 fairly by the state's administrative and judicial branches. The
14 contrary of this roadsign message is demonstrated by two important
15 recent developments: a statement of the United States Supreme
Court and the recent "non-actions" of the Department of Justice
involving recent general adjudication conducted in state court per-
taining to decisions on claims for reserved rights, including Indian
rights.

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

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

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

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

15 Our approach has similarities to the state water rights
16 authority regulation authority so commonly applied to other quasi-
17 governmental units such as irrigation districts. A district estab-
18 lishes a water right. That right has many beneficiaries, i.e., the
19 water users entitled to water delivered from the district's facilities.
20 The State has authority, in its unitary command position, to insure
21 the district gets its "in gross share," through general adjudication
22 and other powers, and to protect others against the district taking
23 too much. Subject to the state's general overview, the district
24 itself controls the allocations among those entitled to portions of
25 "in gross" amount adjudicated to the district. Analogizing to the
26 Indian reserved water rights situation, for those looking to entitle-
27 ments from the federally reserved right the unit in charge of deter-
28 mining those entitlements is the United States or possibly the Tribe.

29 6/ (continued)
30 referee's proposal by other defendants, including a party to this
31 proceeding, the Department of Natural Resources, and the matter of
the reserved right was remanded to the referee for the taking of
further evidence.)

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

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

6 II. SCOPE OF THE WINTERS DOCTRINE

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

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

1 during any period of time in the future.^{7/}

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

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

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

13 The position of the Department of Ecology is that when the
14 United States created an Indian Reservation, there was indeed
15 reserved for the use of the tribe water in sufficient quantities to
16 fulfill the purposes for which the reservation was created. This
17 reservation of water need not be express, though it may be. Rather,
18 it is implied from the purposes for which the reservation was created.
19 Therefore, as in Winters, when the United States created an Indian
20 Reservation, such as the Fort Belknap Reservation, for the purpose of
21 placing Indians on farms, there was impliedly reserved water for
22 agricultural purposes. Likewise, when the United States created a
23 national monument one of the purposes of which is to preserve a
24 unique species of pupfish, there is impliedly reserved water adequate
25 to preserve that species. Cappaert v. United States, 426 U.S. 128
26 (1976).

27 Where the plaintiffs differ with the Department of Ecology is
28 that they argue that an implied reservation of water may be made for
29

30 7/ As stated by the Tribe, the Tribe's right to water encompasses
31 "[e]verything that could be included . . . in their making a living.
Spokane Reply Brief at 45.

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

12 1. Winters -- One More Close Examination.

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

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

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

26 ^{8/} As will be explained fully later, any limitation on "Winters"
rights are not limitations on the ability of the United States
27 or a tribe to acquire "water" rights. Creation of a federally
reserved right is just one way for the federal government to create
28 a water right. The federal government or an Indian Tribe also may
secure a right pursuant to state law. (Indeed, many federal agencies
29 such as the Bureau of Reclamation are required to obtain the water
rights through state laws.) Further, at least the United States
30 could acquire additional water rights, as the purposes for which water
is needed on reservations change from the original purposes, through
31 its powers of eminent domain.

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

143 Fed. at 745 (emphasis added).

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

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

14 This view was upheld by the United States Supreme Court. The
15 Winters Court held that where there are two conflicting implications,
16 one of which would defeat the purpose of the agreement (treaty) and
17 one which would defeat it, the Court should choose that approach
18 which would support and uphold the agreement and make it meaningful.
19 207 U.S. at 576. The purpose of the reservation was agriculture.
20 There was an ambiguity in the treaty as to whether water was reserved.
21 To construe the treaty to not include reserved water would defeat
22 the purpose of the reservation; to construe the treaty to include
23 water would support it.

24 This is the foundation of the Winters doctrine.

25 2. Arizona v. California

26 Arizona v. California supports this view. Though cited by the
27 plaintiffs for establishing the "practicably irrigable acreage" stand-
28 ard, it can only be understood in the context in which the case
29 developed.

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

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

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

10 such a limitless claim would place all junior water
11 rights in jeopardy of the uncertain and the unknowable.
12 Financing of irrigation projects would be severely
13 hampered if investors were faced with the possibility
14 that expanding needs on an Indian Reservation might
15 result in a reduction of the project's water supply.
16 Moreover, it would not give the United States any
17 certainty as to the extent of its reserved rights,
18 which would undoubtedly hamper the United States in
19 developing them. Since, under the Arizona theory,
20 United States water rights vary with changes in
21 Indian population, the planning of works to serve
22 future needs would be difficult because the United
23 States could never know whether sufficient water to
24 operate the works economically would be legally
25 available.

19

20 Therefore, the most feasible decree that
21 could be adopted in this case, even accepting
22 Arizona's contention, would be to establish a
23 water right for each of the five Reservations in
24 the amount of water necessary to irrigate all of
25 the practicably irrigable acreage on the Reservation
26 and to satisfy related stock and domestic uses.
27 This will preserve the full extent of the water
28 rights created by the United States and will
29 establish water rights of fixed magnitude and
30 priority so as to provide certainty for both the
31 United States and non-Indian users.

32 Master's Report at 264-65.

33 After determining that the amount reserved should be fixed, the

34 ^{9/} We concur with the United States that the analysis of Special
35 Master Simon Rifkind was "superb." United States Reply Brief at 30.

1 Master continued to define the quantity.

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

22 Id. at 265 (emphasis added.)

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

29 3. Cappaert v. United States

30 This view was confirmed most recently by the Supreme Court in
31 Cappaert v. United States, 426 U.S. 128 (1976), discussed in detail
32 in our opening brief.^{10/} Department of Ecology Brief at 15-16.

33 The Court stated:

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

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

3 426 U.S. at 141 (emphasis added).

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

7 4. Mimbres Valley Irrigation Co. v. Salopek

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

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

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

1 5. United States v. Finch

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

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

11 Finch is cited by the United States as construing broadly the
12 purposes for which a reservation is created. From those broad pur-
13 poses, the United States argues, a broad, virtually unlimited federal
14 reserved Winters right is created. However, decisively for applica-
15 tion here, the discussion in Finch is not in the context of the
16 Winters doctrine; it is a criminal case in which the boundaries of
17 the reservation are at issue.

18 The question was whether the bed of the Big Horn River was
19 within the reservation for the purposes of criminal jurisdiction.
20 The Court of Appeals felt that for criminal jurisdiction the bound-
21 aries of the reservation encompassed the bed of the River. To reach
22 that conclusion, the Court embarked on the appropriate analysis:
23 analyzing the language of the treaty which granted the lands to the
24 Crow Tribe.^{11/} The court found that this treaty was particularly
25 restrictive, noting that

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

31 ^{11/} The court used the term "grant" to describe this treaty. 548
F.2d at 831.

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

5 548 F.2d at 831.

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

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

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

29 _____
30 ^{12/} The court referred to reorienting the Tribe toward agriculture
31 as the "aim" of the United States. 548 F.2d at 832.

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

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

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

16 As stated by the Special Master:

17 The water rights established for the benefit of the
18 five Indian Reservations and enforced in the recom-
19 mended decree are similar in many respects to the
20 ordinary water right recognized under the law of
many western states: They are of fixed magnitude
and priority and are appurtenant to defined lands.

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

25
26 ^{13/} This of course does not mean that the purpose must be spelled
27 out in so many words in the treaty or executive order creating
28 the reservation. The purpose may be expressed in the proceedings
29 leading up to the treaty or executive order, such as agreements or
30 correspondence leading to the agreements. That would be the case
31 with the Spokane Tribe. The purposes of the Spokane Reservation
32 were described fully in our opening brief and will not be repeated
33 here. Department of Ecology Brief at 18-24.

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

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

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

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

24 Master's Report at 260 (emphasis added).

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

30 ^{14/} See, e.g., United States Reply Brief at 5, 13, 16, 37; Spokane
31 Reply Brief at 2, 4.

1 Id. at 262 (emphasis added).

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

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

26
27 ^{15/} The United States would lead this Court to believe that the
28 Department of Ecology attaches some special significance to the Act
29 of May 29, 1908. We do not and did not in our opening brief. That
30 Act is relevant for the purpose of demonstrating that substantial
31 quantities of timber land did exist near the turn of the century.
32 Though it does not purport to describe the extent of timbered lands
at the time of the creation of the reservation, it certainly described
the minimum amount of acreage which was timbered just two decades
earlier. Accordingly, documents supporting that Act may be the best
evidence available to this Court in determining which lands which were
not intended to be irrigated by reserved Winters rights.

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

3 As in the case of the practicably irrigable acreage "rule," the
4 plaintiffs attempt in the case of reservation boundaries to find
5 simplicity where none exists. The U.S. declares that the reason
6 for President Hayes extending the boundaries to the outside borders
7 of Chamokane Creek is "self-evident." Chamokane Creek was important.
8 United States Reply Brief at 19.^{16/}

9 There is no doubt that the Creek was important; so were the
10 Spokane and Columbia Rivers. But the fact that their entire widths
11 were within the boundaries of the reservation does not mean that
12 all the resources passing through those river beds were controlled
13 by the Tribe, with no regulation by the state. Rather, it indicates
14 that the beds of the rivers were within the boundaries of the reser-
15 vation. This may give rise to some regulatory power over the river
16 which the Tribe otherwise would not have had, but it does not mean
17 that there was any explicit purpose to the river. Cf. United States
18 v. Finch, 548 F.2d 822 (9th Cir. 1976), rev'd, 97 S.Ct. 1828 (1977).
19 It may connote the importance of water to the reservation, but that
20 importance may take the form of importance to irrigation and to salmon
21 fishing, not to trout fishing. Just as the inclusion of a river
22 within the Crow Reservation did not connote a fisheries purpose in
23 Finch, it does not do so here.^{17/} At the very least, the meaning of
24

25 ^{16/} The United States asks the Court to take judicial notice of the
26 "fact" that the usual practice is to set boundaries of reservations
27 at the middle of the watercourse. United States Reply Brief at 19.
28 We have no certain knowledge of what the usual practice was, but we
do know that there are other cases in which reservation boundaries
extend to the outside of rivers, such as the Colorado Indian Reserva-
tion which extends to include the Colorado River. See Master's
Report at 271.

29 ^{17/} Fishing was not an important source of food for the Crow Tribe.
30 548 F.2d at 832, n. 17.

1 the boundary change is not "self-evident."

2
3 III. JURISDICTION OF STATE WITHIN BOUNDARIES OF THE SPOKANE
4 RESERVATION

5 A. Framework for Discussion

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

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

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

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

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

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

24
25 ^{18/} The sole exception is the authority provided by 43 U.S.C. § 666
26 or where directed by a federal court to take such jurisdiction under
the policy of that federal statute.

27 ^{19/} The Supreme Court has recognized that it is permissible for
28 the state to impose on a tribe a burden of collecting a tax levied
by the state on non-Indians within the reservation. The Court found
29 "nothing in this burden which frustrates tribal self-government
30" Moe v. Confederated Salish and Kootnai Tribes, 425 U.S.
31 463, 483 (1976). In contrast to Moe, where the exercise of state
jurisdiction imposed a burden on the tribe, in the instant water
rights case, no burden of any kind would be imposed.

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

3 1. The Oliphant Test

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

9 The proper approach to the question of tribal criminal
10 jurisdiction is to ask "first, what the sovereign
11 powers of the tribes were, and, then, how far and in
what respects these powers have been limited."
[Citations omitted.]

12 "It must always be remembered that the various Indian
13 tribes were once independent and sovereign nations . . ."
14 [citation omitted] who, though conquered and dependent,
15 retain those powers of autonomous states that are
neither inconsistent with their status nor expressly
terminated by Congress.

16 544 F.2d at 1009.

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

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

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

26
27 20/ Given this part of the Oliphant test, there may be little
28 difference in the approaches offered by the various parties here.
29 Though the United States cites Oliphant for the proposition that the
tribe retains jurisdiction except where ceded (United States Reply
Brief at 38), it clearly does not stand for that broad proposition.

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

7 Besides criminal jurisdiction within the boundaries, the courts
8 have stated that where a civil transaction between an Indian and a
9 non-Indian is involved, the tribal courts may have jurisdiction.

10 Williams v. Lee 358 U.S. 217 (1959). The Williams Court, 358 U.S.
11 at 254, stated the relevant test:

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

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

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

22 The second part of the Oliphant test is whether there are any
23 limitations on the right of the tribe to engage in self-government to
24 the exclusion of state jurisdiction. This necessitates an examina-
25 tion of the treaty or agreement or other document creating the reser-
26 vation to see if there exists any limitation of power and a search
27 of various federal laws which may open up the reservation to state
28

29 ^{21/} See, e.g., Moe v. Confederated Salish and Kootnai Tribes, 425
30 U.S. 463 (1976); Organized Village of Kake v. Egan, 369 U.S. 60
31 (1962); Williams v. Lee, 358 U.S. 217 (1959); see generally the
32 strong dissent of Congressman Lloyd Meeds in the Report of the
33 American Indian Policy Review Commission (1977), copies of which
 have been filed with the Court.

SUPPLEMENTAL BRIEF
STATE, DOE

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

7 a. The Agreement of 1877

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

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

16 This shows clearly that the Indians agreed to take the reserva-
17 tion subject to the law of "the whites." Although it could be argued
18 that the laws of "the whites" referred only to the powers of the
19 federal government, a better reading is that it referred to the
20 sovereign powers of the white man's government, the bulk of which
21 rested in the State of Washington in 1889. This is supported by the
22 handwritten record of the proceedings leading up to the Agreement
23 (P.E. 57) in which Colonel Watkins in discussing the application
24 of criminal laws stated: "When a white man kills an Indian he shall
25 be tried and hung. That's the white man's law." Clearly, he
26 contemplated the application of some "white man's law" within the
27 boundaries of the reservation. Further, it is supported by the
28 jurisdictional history of the reservation.^{22/} The parlay leading
29

30 ^{22/} The Supreme Court has recognized the relevance of jurisdictional
31 history in interpreting Indian treaties and agreements. See Rosebud
Sioux Tribe v. Kneip, 97 S.Ct. 1361, 1371 (1977).

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

9 b. The General Allotment Act of 1877

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

13 That upon the completion of said allotments and the
14 patenting of the lands to said allottees, each and
15 every member of the respective bands or tribes of
16 Indians to whom allotments have been made shall
17 have the benefit of and be subject to the laws,
18 both civil and criminal, of the State or Territory
19 in which they may reside; and no Territory shall
20 pass or enforce any law denying any such Indian
21 within its jurisdiction the equal protection of
22 the law. And every Indian born within the terri-
23 torial limits of the United States to whom allot-
24 ments shall have been made under the provisions
25 of this act, or under any law or treaty, and every
26 Indian born within the territorial limits of the
27 United States who has voluntarily taken up, within
28 said limits, his residence separate and apart from
29 any tribe of Indians therein, and has adopted the
30 habits of civilized life, is hereby declared to be
31 a citizen of the United States, and is entitled to
32 all the rights, privileges, and immunities of such
33 citizens, whether said Indian has been or not, by
birth or otherwise, a member of any tribe of Indians
within the territorial limits of the United States
without in any manner impairing or otherwise affect-
ing the right of any such Indian to tribal or other
property. [Emphasis added.]

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

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

13 A recent Ninth Circuit case applying section 6 is Dillon v.
14 Antler Land Company, 507 F.2d 940 (9th Cir. 1974) cert. denied,
15 421 U.S. 993 (1975). The question was whether, after the plaintiff
16 obtained a fee patent for an allotment on the Crow Reservation, the
17 Montana Statute of Limitations applied to bar her claim that a subse-
18 quent sale by her was void. The court in an opinion written by
19 Judge McGovern sitting by designation stated that "25 U.S.C. §
20 349 . . . [§6 of the Allotment Act] could scarcely be more
21 explicit . . ." and held Montana law to apply.

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

27 507 F.2d at 944. See also Dickson v. Luck Land Co., 212 U.S. 371
28 (1917); but cf. 61 Interior Dec. 298 (1954).

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

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

11 c. Homestead and Related Laws

12 In its opening brief, the United States argues that the Acts of
13 1866, 1870, and 1877 on their face do not grant jurisdiction to the
14 state to exercise jurisdiction within the boundaries of the Spokane
15 Reservation. In our opening brief, we countered, taking our approach
16 that such analysis of those Acts is irrelevant because the state has
17 jurisdiction over non-Indians within the reservation without the
18 need for such a grant by the federal government. In this section of
19 our reply brief, however, we assume, arguendo, the need for such a
20 grant of jurisdiction. And in the homestead laws, including the
21 above cited Acts, in conjunction with the order opening up the
22 Spokane Reservation to homesteading, we find the requisite "grant."

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

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

30 3 Kappler, Indian Laws and Treaties 655 (1913) (emphasis added). The
31 cited 1908 Act authorized the President to open up the Spokane
32

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

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

14 C. Tulalip Tribe v. Walker

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

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

25 RESPONDENT'S CONTENTIONS OF LAW

26 1. That the Supervisor of Water Resources has
27 jurisdiction over all waters flowing in Tulalip
28 Creek on lands owned by Union Oil Company of California
29 which are surplus to those waters reserved by the
United States for the benefit of the Indians by the
Treaty of 1855.

30 2. That the appellants are without standing to
31 initiate this appeal, and this court is therefore
32 without jurisdiction to consider this matter.

1 APPELLANT'S CONTENTIONS OF LAW

2 1. The Supervisor of Water Resources is without
3 jurisdiction to enter the Order as shown by Exhibit
4 17.

5 2. That if the State of Washington has juris-
6 diction to make the aforesaid order, such jurisdic-
7 tion applies only to that quantum of water vested
8 in the original allottees or their successors in
9 interest.

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

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

14 IV

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

19 V.

20 The Supervisor of Water Resources has juris-
21 diction over all waters flowing in Tulalip Creek
22 across the lands of Union Oil Company which are
23 surplus to amounts necessary to satisfy the needs
24 of the tribe as reserved by the Treaty of Point
25 Elliott.

26 VI

27 The order of the Supervisor of Water Resources
28 relates solely to said surplus waters and is made
29 subject to existing rights, which include the
30 reserved rights of the Indian tribe to the bene-
31 ficial use of the water in Tulalip Creek, both
32 present and future.

33

VIII

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

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

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

1 over and above the needs of the tribe, is errone-
2 ous. The mistake which I made at the close of
3 the trial was my failure to appreciate that the
exclusive jurisdiction of the United States is
confined to Indians.

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

9

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

19 Memorandum Decision at 1-2 (emphasis added).

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

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

26 Plaintiffs contend that the Act of March 3, 1905, P.L. 58-173,
27 was a grant of power to the state to exercise jurisdiction over water
28 rights within the boundaries of the Spokane Reservation. The passage
29 of the Act, they argue, demonstrates that without such legislation
30

1 there would be no state jurisdiction. See Spokane Reply Brief at
2 13-14; United States Reply Brief at 46.

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

20 The 1905 had another purpose: to clarify and facilitate the
21 obtaining of water rights for proposed power projects. As the
22 legislative history points out, there was confusion under Washington
23 state law as to the interaction of the doctrines of riparian rights
24 and prior appropriation. See id.; 39 Cong. Rec. 2413 (1905)
25 (Remarks of Rep. Jones). The Washington Supreme Court at that time,
26 contrary to the law in several western states, recognized the
27 vitality of the riparian doctrine, even in the arid areas of the
28 state, a doctrine which allowed a riparian owner "to be protected
29 against subsequent appropriation of the water naturally flowing over
30 the land." Benton v. Johncox, 17 Wash. 277, 288, 49 P. 499 (1897).
31

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

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

25 So, we can ask the same question concerning the 1905 Act as was
26 asked by the Tribe: "Where is there legislative authority of a
27 similar import covering the waters of Chamokane Creek?" Spokane
28

29 ^{23/} In Big Bend Transit, the Court stated:

30 The purpose of the 1905 Act was plain and apparent upon
31 its face It gave to the Secretary of the Interior
32 the right to grant the use of water of the Spokane River
33 for the purpose of developing hydroelectric power.
42 F. Supp. at 466-67.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 This is the second time the Department of Ecology, or a predeces-
8 sor agency, has faced this contention of the Department of Natural
9 Resources.^{24/} We are not persuaded. Our analysis, in abbreviated
10 form, follows.

11 The lands transferred by the federal government to the state,
12 either at the time of statehood or at a later date through "lieu
13 land" selections,^{25/} were part of the general public domain -- not
14 lands reserved for a special purpose. To be subject to such a trans-
15 fer, these lands could not be held for a special federal reserved
16 purpose. In California-Oregon Power Co. v. Beaver Portland Cement Co.,
17 295 U.S. 142 (1935), the high court held that when parcels of general
18 public domain lands, not held for a special purpose, were transferred
19 from federal to non-federal ownerships only land was transferred.
20 No water rights were involved. This was based on the determination
21 that, through the Desert Land Act of 1877, if not before, waters on
22 the public domain were severed from the land and that water rights
23 relating to such lands, if any, were to be established pursuant to
24 state law.

25
26 ^{24/} This first time was in In re Stranger Creek 77 Wn.2d 649, 466
27 P.2d 508 (1970). The State Supreme Court did not discuss or rule
upon the claim of the Department of Natural Resources.

28 ^{25/} When the State of Washington entered the Union the United States
29 granted the State trust land ownerships to all sections 16 and 36
30 except where such sections had been previously reserved for a special
31 purpose or transferred to non-federal ownership. "Lieu lands" are
those public lands made available by the United States and selected
by the states in lieu of the sections 16 and 36 which were given by
the United States at time of statehood.

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

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

9 V. CONCLUSION

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

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

20 Slightly more than a decade ago the regional office of the
21 solicitor of the Department of the Interior advised the Tulalip
22 Tribal Attorney that there was no impermeable "wall," as a matter
23 of law, around an Indian reservation through which state law cannot
24 pierce.^{26/} To the contrary, that office opined that state law
25 could apply within the original boundaries of a treaty-established
26 reservation. Now the attorney for the United States contends Washing-
27 ton State discredits itself for asserting the same position as taken
28 by the Solicitor for the Department of Interior's Northwest
29 Regional Office, and, more importantly, accepted by one of the most
30

31 ^{26/} See Memorandum from the Office of the Regional Solicitor to the
32 Bureau of Indian Affairs, Realty Branch, dated June 15, 1960, attached
hereto as Attachment B.

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

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

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

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

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

8 B. An Alternate Proposal for Consideration by the Court

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

21 DATED: September 7, 1977.

22 Respectfully submitted,

23 SLADE GORTON
24 Attorney General

25 *Charles B. Roe, Jr.*

26 CHARLES B. ROE, JR.
27 Senior Assistant Attorney General

28 *Jeffrey D. Goltz*
29 JEFFREY D. GOLTZ
30 Assistant Attorney General

31 Attorneys for State of
32 Washington, Department of
33 Ecology

CERTIFICATE OF MAILING

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

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CERTIFICATE OF MAILING

DEPARTMENT of the INTERIOR

OFFICE OF THE SECRETARY

news release

For Release August 4, 1977

ANDRUS EXTENDS WATER POLICY REVIEW TIME FOR 90 DAYS

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

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

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

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

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

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

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

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

(more)

ATTACHMENT 'A'

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

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

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

x x x

UNITED STATES GOVERNMENT

MEMORANDUM

TO Bureau of Indian Affairs,
Realty Branch

Date June 15, 1960

FROM Office of the Regional Solicitor

cc: BIA files

SUBJECT Diversion of Creek and Spring Waters, Tulalip Reservation

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

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

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

ATTACHMENT B

The title to the waters within an Indian reservation, established pursuant to a treaty with the Indians whereby the Indians ceded to the Government large areas of land in consideration for a reservation are in the United States in trust for the Indians of the reservation. The treaty does not grant the water rights, but even though not mentioned in the treaty, the water rights are reserved to the Indians. (United States v. Winans, 198 U.S. 371, 49 L.Ed. 1089; Winters v. United States, 207 U.S. 564, 52 L. Ed. 340, cited with approval in United States v. Ahtanum Irrigation District, 236 Fed. 2d 321, Cert. denied 1 L. Ed. 2d 367; Conrad Investment Co. v. United States, 161 Fed. 829 (1903), and aff'g 156 Fed. 123. All waters within and appurtenant to the Tulalip Reservation, whether used for irrigation or stock or domestic purposes, impliedly were reserved by the United States for the Indians of that reservation, and the waters so reserved were subject to the disposal by the United States to the Indians for their benefit. The waters so reserved are such as may be necessary to make the lands productive or suitable to agricultural, stock raising, and domestic purposes. (Conrad Investment Co. v. United States, supra.)

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

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

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

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

For the Regional Solicitor

Johnston Wilson
Attorney

Attachments