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Findings of Fact, Conclusions of Law, and Decree Proposed for Entry by the Deparment of Ecology

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

UNITED STATES OF AMERICA, Plaintiff, v. BARBARA J. and JAMES ANDERSON, et al., Defendants.	CIVIL NO. 3643 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE PROPOSED FOR ENTRY BY THE DEPARTMENT OF ECOLOGY

PROPOSED FINDINGS OF FACT

NATURE OF ACTION

1. This action was initiated by the United States as a "general adjudication" (as that term is understood in western water rights law) of all claims to the right to the use of the waters, surface and ground, of the Chamokane Creek basin. The action was brought to determine and declare the water rights of each of the parties (claimants), both plaintiff-United States (in its own right and on behalf of its trustee, Spokane Indian Tribe) and defendants, and to obtain a decree setting forth such rights, with the date of priority for each right. The United States further asks for an order directing all uses of the waters of Chamokane Creek to be in accord with the rights confirmed by the court.

CHAMOKANE CREEK DRAINAGE

General Location

2. The Chamokane Creek basin is located within the State of Washington which was admitted to the United States on November 22, 1889. 25 Stat. 676.

3. The area which makes up the State of Washington (which includes the Chamokane Basin) became subject to the sole sovereignty of the United States by discovery and settlement and by treaties, notably with Great Britain. See Treaty of June 15, 1846, 9 Stat. 869. See also earlier treaties with Spain (Treaty of February 22, 1819, 8 Stat. 252) and Russia (Convention of April 17, 1824, 8 Stat. 869).

4. The Chamokane Basin is also located, in part, within the Spokane Indian Reservation - a reserve established by executive order of the President of the United States on January 18, 1881.

5. Chamokane Creek has its headwaters in the Huckleberry Mountains of Southern Stevens County, Washington. From its place of origin, the creek flows generally in a southeasterly direction over private and state owned land through the Camas Valley (Upper Chamokane area). At the northeast corner of the Reservation, it flows south and southwesterly through the Walker's Prairie area to Chamokane Creek Falls. From the falls, it flows south through the Lower Chamokane area, discharging into the Spokane River at a point 1.4 miles below Long Lake. U.S. Br. at 71.

Area

6. There are 178 square miles in the Chamokane Creek drainage, only a portion of which is in the Reservation. U.S. Br. at 71; P.E. 2.

Geology

7. The Chamokane Creek basin was formed through prehistoric glacial action. As the glacier retreated, it left a lateral moraine

to a depth of 150 feet which blocks off Camas Valley, thereby precluding any appreciable ground water flow into the Chamokane Creek basin from that area. U.S. Br. at 73.

8. The basin is essentially a closed area; i.e., water once in the basin does not leave the basin.

9. The Camas Valley area is segregated from the remainder of the basin in that withdrawals of ground water from that area have no impact on the flow in Chamokane Creek. U.S. Reply Br. at 50; Tr. 73.

Topography

10. The basin is situated between elevations 1,350 and 4,200 feet. The Walker's Prairie region strattling the boundary of the Spokane Reservation, lies primarily between elevation 1,800 and 1,900 feet, with a distinct topograhic depression beginning west of Ford, Washington. P.E. 41.

11. There are two tracts of land within the Chamokane Creek basin portion of the Reservation which have soil characteristics which, if irrigated, would allow the growing of crops. These are a tract of 1,880 acres below elevation 2,100 feet (bottom land) and a tract of about 6,580 acres above elevation 2,100 feet (bench land). U.S. Br. at 44; P.E. 34. The 6,580 acres are timbered lands in the area known as the Chamokane Bench. Tr. 225.

Weather

12. The Chamokane Creek drainage is a semi-arid area. There are often low temperatures in the winter and high temperatures in the summer.

Chamokane Creek Flows

13. Waters flowing in Chamokane Creek are from two general sources: (1) precipitation falling on lands of the basin, which

flows to the stream as diverse surface runoff; and (2) precipitation falling on lands of the basin which percolate downward to a water bearing zone after which it migrates laterally until it breaks out into Chamokane Creek. Tr. 928-60.

14. The flow in Chamokane Creek varies greatly depending upon the year and the season. Flows have been as high as 1,430 cfs and as low or less than 30 cfs. U.S. Br. at 77.

15. Though the flow is continuous in the creek at the north boundary of the Reservation and to a point two miles south, for the next five miles the creek is intermittent. Then, just above Ford, and for the next three miles, massive springs contribute to a very regular flow in the creek. P.E. 3-4-74-29.

16. These springs contribute in excess of 20 cfs to the flow in Chamokane Creek, creating permanent flow in the creek, downstream to its confluence with the Spokane River. P.E. 64.

17. Downstream from the springs and approximately one mile upstream from the Spokane River are falls which provide a barrier to fish attempting to travel upstream. P.E. 64; Tr. 477.

18. Records from the USGS gaging station located below Chamokane Creek Falls indicate the following flows:

Year	Avg. stream flow Low flow month	Maximum	Minimum
1971	29.3 cfs	1,320 cfs	21 cfs
1972	26.1 cfs	332 cfs	20 cfs
1973	19.7 cfs	269 cfs	17 cfs
1974	35.3 cfs	955 cfs	22 cfs
1975	39.1 cfs	1,430 cfs	34 cfs

U.S. Br. at 77.

Chamokane Creek Temperatures and Their Effect on Fish

19. Because the creek is spring-fed, variation in water temperature declines towards the spring source. P.E. 64 at 6.

20. The upper limit of a trout's tolerance is 76-77°. At these temperatures, a trout eventually will die, but only after it has lost its stamina and has drifted downstream. Tr. 447.

21. Temperatures above the falls did not exceed the maximum for the well being of trout. Tr. 454, 474-75; DOE Br. at 24.

22. Temperatures below the falls did on rare occasions in the hot summer months exceed 68° for one or two hours. Tr. 474. At those temperatures, fish will cease to feed, but will not die. Tr. 474, 510, 519; P.E. 64 at 7-8; DOE Br. at 24-25.

Relationship Between Flow and Temperature

23. There generally is an inverse relationship between water flow and maximum water temperatures in the creek.

24. The evidence presented at trial on the flow necessary to maintain a flow 68° was confused and confusing. Tr. 457-58, 488-90, 601-04. It appears, however, that a flow of 20 cfs in the creek would maintain a temperature adequate to protect trout. Tr. 483.

25. The important factor in protection if fish life, however, is not the quantity of the water, but the temperature of the water.

Population Characteristics

26. The Chamokane Creek basin portion of the Spokane Reservation is inhabited by both Indian and non-Indians residing on both Indian and non-Indian land.

HISTORY

Spokane Indians

27. The Spokane Tribe historically consisted of three bands: the upper, middle, and lower bands. Each of these bands tended to localize their activities in one certain area, although they used the entire tribal area from time to time. The upper band lived near

the present day site of Spokane, Washington. The middle band lived near the confluence of the Spokane and Little Spokane Rivers. The lower band lived near the confluence of the Columbia and Spokane Rivers. These bands chose these spots in part because they were near the great salmon runs on which they relied in substantial part for their food. U.S. Br. at 11.

28. The three bands of the Spokane Indians also relied, through a smaller part, on hunting and on gathering of various roots. U.S. Br. at 11.

White Settlers

29. By the mid 1850s, there was a heavy influx of white settlers into what is now the State of Washington. U.S. Br. at 12.

30. In order to preserve order in the Pacific Northwest and to accommodate the influx of white settlers, the United States sought to place the Spokanes and other tribes on a reservation.

Establishment of the Spokane Reservation

31. In August 1877 Colonel E. C. Watkins met with the Lower Spokanes and some of the other tribes at Spokane Falls to negotiate their placement on a permanent reservation. The meeting resulted in an agreement between the United States and the Lower Spokanes whereby the lower band would go upon the reservation (essentially the same boundaries as the current reservation) "with the view of establishing . . . permanent homes thereon and engaging in agricultural pursuits." By November 26, 1877, the Lower Spokanes had been relocated.

32. In the course of proceedings leading up to the 1877 agreement, the Indians exhibited an intent to live under the laws of the "white man." DOE Supp. Br. at 31.

33. On January 18, 1881, President Rutherford B. Hayes signed an Executive Order creating the Reservation. The Reservation was

described as follows:

> Commencing at a point where Chamokane (sic) Creek crosses the forty-eighth parallel of latitude; thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane River westwardly along the southern bank thereof to a point where it enters the Columbia River; thence across the Columbia River northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude; thence east along said parallel to the place of beginning.

P.E. 52.

34. At the time of creation of the Reservation, the Upper and Middle Spokanes were not located on any reservation. Accordingly, by agreement of March 18, 1887, the upper and middle bands agreed to move to the Coeur de'Alene Reservation where they were to receive allotments of land. This agreement was ratified by Congress on July 13, 1892. However, most of the Middle Spokanes ended up at the Spokane Reservation. U.S. Br. at 15.

Opening of Reservation to Non-Indians

35. By Act of May 29, 1908 (35 Stat. 458), Congress authorized the opening of the Reservation for homesteading on unallotted agricultural lands. Under that act, after the allotment process is completed, the Secretary of the Interior was to classify the surplus land as either agricultural or timberland. The land classified as agricultural land was to be opened to non-Indian settlement pursuant to the homestead laws and under conditions prescribed by the President. Timberland was to remain in trust for the Tribe because of the importance of timber to the Tribe's economy. U.S. Br. at 47.

36. On June 15, 1909, the classification report was submitted. 82,647.5 acres were classed as timberland; 5,781.22 acres were classed agricultural. Most of the agricultural land was located in the eastern part of the Reservation. The land described as agricultural was not suitable for inclusion in a forest reserve. U.S. Br. at 48.

37. On May 22, 1909, President Taft proclaimed open for homesteading "all the non-mineral, unreserved lands classified as agricultural lands within the Spokane Reservation. . . ." These lands were to be settled "under the provisions of the homestead laws." DOE Supp. Br. at 34.

38. Of the lands opened up for homesteading, most were settled by non-Indians. Others were never settled. By the act of May 19, 1958 (72 Stat. 121) the land in the Reservation which had been eligible for homesteading but was never claimed was restored to tribal ownership. Under this act, 77 acres were restored to tribal ownership within the Chamokane Creek basin. U.S. Br. at 48-49.

Issuance of State Water Rights Permits

39. From time to time after the opening up of the Reservation for homesteading, non-Indians in the Chamokane Creek basin, both within and without the boundaries of the Reservation, sought and obtained water rights under state law. These included permits and certificates issued by the Department of Ecology in its predecessor agencies. Neither the United States nor the Spokane Tribe objected to the issuance of the permit on any grounds, jurisdictional or otherwise, until recent times.

Grand Coulee Dam

40. The Grand Coulee Dam built by the United States cut off all salmon runs which may have existed in Chamokane Creek below the falls.

PURPOSES FOR WHICH RESERVATION WAS CREATED

General

41. The intent of the United States in creating the Reservation was to place the Spokane Tribe in one place so there would be minimal

interference with non-Indian settlers moving west.

42. The history of the proceedings leading up to the Executive Order creating the Reservation and the circumstances surrounding the creation of the Reservation indicate that the United States and the Tribe contemplated that members of the Tribe would engage in agriculture on certain lands within the Reservation. The parties also contemplated that the Tribe would make use of their vast forest resources on the Reservation and would continue their fishing for anadromous fish and hunting and raising of game and stock.

43. There was reserved for the use of the Spokane Tribe waters of Chamokane Creek (and other waters of the Reservation) for agricultural irrigation, timber production, stockwatering, and domestic use.

44. The United States and the Tribe did not intend, impliedly or otherwise, use of waters of Chamokane Creek for religious or ceremonial use.

45. The United States and the Tribe did not intend, impliedly or otherwise, the use of waters of Chamokane Creek for aesthetic purposes or recreational development.

Fishery

46. Although there may have been implied reserved waters of Chamokane Creek for purposes of allowing anadromous fish upstream to spawn, because of the construction of Grand Coulee Dam, and the resultant elimination of those fish runs, it is unnecessary for this Court to find such a fishery purpose. Any question of damages to the reserved right of the Tribe by the United States constructing the dam is a matter between the Tribe and the United States and is not before this Court.

47. The United States did not intend, impliedly or otherwise, to reserve waters of Chamokane Creek below the falls to be used as a trout fishery, as such a purpose of the Reservation was not

contemplated by the parties.

STATE ISSUANCE OF WATER RIGHTS

In Chamokane Basin, Outside the Reservation

48. The following permits and certificates have been issued by the State of Washington within the Chamokane Creek Basin:

Surface Water Certificate No.	294	Dec. 4, 1925
	1675	May 13, 1940
	1725	May 15, 1940
	2258	Feb. 12, 1945
	8600	Oct. 21, 1946
	4872	March 17, 1950
	6394	July 21, 1950
	9100	
Ground Water Certificate No.	4891A	Feb. 1, 1951
	2768	Sept. 6, 1956
Surface Water Application No.	20248	May 19, 1967
	21786	August 25, 1969
	22922	March 9, 1971
	23503	Nov. 10, 1971
	23551	Dec. 3, 1971
Ground Water Permit No.	9361	Sept. 17, 1968
	9563	Jan. 30, 1969
Ground Water Application No.	10386	Sept. 3, 1969
	10506	Mar. 18, 1969
	11227	Sept. 11, 1970
	11753	April 2, 1971
	11905	May 20, 1971
	321939	Oct. 15, 1973

See U.S. Reply Br. 51-58.

49. Neither the United States nor the Tribe has objected to the issuance of any of the above-mentioned permits on jurisdictional or other grounds until recent times.

50. Water rights issued under state law within the Chamokane Creek basin, outside the Reservation are subject to prior rights, including those prior rights of the Spokane Tribe.

In Chamokane Creek Basin, Inside the Reservation

51. The State of Washington has issued the following permits, certificates, and applications to non-Indians on non-Indian lands

within the boundaries in the Chamokane Creek basin within the boundaries of the reservation:

Certificate No.	7142	Dawn Mining Co.	August 1, 1956
Certificate No.	8826	Urban S. Schaffner	March 20, 1958
Permit No.	15894	A.L., F.L. Smithpeter	March 28, 1969
Application No.	11989	B. Dituri	June 23, 1971
Application No.	320422	Urban Schaffner	July 3, 1972
Application No.	320536	Paul Duddy	Sept. 28, 1972

See U.S. Br. at 81.

52. The State of Washington has issued a certificate to the United States, through its Bureau of Reclamation authorizing the use of 10 cfs of the flow of Spring Creek (tributary of Chamokane Creek) for fish propagation purposes. The certificate bears a priority date of October 21, 1943. None of the parties challenge the validity of this certificate, presumably because all deem it was issued validly by the State of Washington. U.S. Br. at 63.

53. The State of Washington has in the issuance of permits and certificates recognized that there is a need to establish minimum flows in Chamokane Creek. In the permit issued to Mr. Smithpeter, there was a condition imposed that the diversions would stop when the flow in the creek dropped below 20 cfs. The Court can presume that similar low flow provisos would be added to any subsequent permits issued by the state in the Chamokane Creek basin.

54. Water rights issued under state law within the Reservation as well as without the Reservation are subject to prior rights, including prior rights of the Spokane Tribe.

Outside Chamokane Basin, Within Other Indian Reservations

55. The State of Washington has long issued permits to non-Indians within the boundaries of reservations within Washington.

56. There have been no objections by the United States or the various Indian Tribes to the state issuance of water rights permits or certificates to non-Indians on non-Indian lands within the boundaries of an Indian reservation in Washington until recent years.

57. As is the case in Washington, other western states have assumed jurisdiction over water rights to non-Indians on non-Indian land within the boundaries of reservations in those states.

QUANTIFICATION OF THE RESERVED RIGHT

Agriculture

58. There is no evidence in the record that the United States intended, impliedly or otherwise, to irrigate lands covered by timber at the time of the creation of the Reservation. Accordingly, there can be no reservation of a water right appurtenant to those lands for the purpose of agricultural irrigation. Tr. 781.

59. Although there is no evidence in the record detailing which Reservation lands were "practicably irrigable" at the time of the creation of the Reservation, the Secretary of the Interior pursuant to the Act of May 29, 1908, 35 Stat. 458, surveyed unalloted lands on the reservation and classified them as either timber or agricultural. P.E. 101. Although this survey was undertaken sometime after the creation of the Reservation, and the classification does not indicate the true intent of the federal government as to what would be irrigable agricultural land at the time the Reservation was created, it appears to be the best evidence available to determine that intent.

60. Generally, the "bottom land" was intended to be agricultural land, while the upper "bench land" was intended as timberland. Tr. 225. Although this is somewhat of a simplification, it is the best the Court can do given the type of evidence offered by the plaintiffs in support of their claim.

This is consistent with the fact that irrigation of lands substantially above the elevation of the creek would have been difficult to irrigate without some pumping apparatus, and there is

no evidence in the record showing that such apparatus was contemplated at the time of the creation of the reservation.

It also is consistent with testimony given at trial that a "major block" of the bench land now is timbered, Tr. 225; P.E. 3-6-74-29, and that there was substantially more timber there before the 1920's. Tr. 781, 818.

Further, it is consistent with testimony that there is no intent, nor has there been, to irrigate bench lands. Tr. 226, 668. If there is or has been such an intent, the water source of the irrigation likely would be the Spokane River, not Chamokane Creek. Tr. 227.

61 Accordingly, the evidence shows an intent that approximately 1,880 acres of "bottom land" within the Chamokane Creek basin be used for agricultural purposes.

62. The water duty for irrigation of agricultural lands within the Spokane Reservation is three acre-feet per acre. U.S. Br. at 45.

Timber

63. There was impliedly reserved a right to the use of water of the Chamokane Creek basin for the purpose of firefighting, road building and maintenance, and other timber production and harvesting purposes.

64. Because of the nature of the need for water for timber harvesting purposes, there is no need to quantify the right. Either the need is de minimis (road building and maintenance) or the need is for high volumes (all that is reasonably necessary) for a short period (fire fighting).

Stockwatering

65. There is no need to quantify the right to the use of the waters of Chamokane Creek for the purpose of stockwatering. The use of waters for this purpose would be de minimis.

Domestic

66. There is no need to quantify the right to the use of waters of Chamokane Creek for the purpose of serving the domestic needs of the Spokane Tribe. The use of waters for the purpose would be de minimis.

Availability of Waters

67. There have been in the past and it appears that from time to time in the future there will be waters in the Chamokane Creek basin in excess of the amounts necessary to satisfy the reserved rights of the United States on behalf of the Spokane Tribe.

PROPOSED CONCLUSIONS OF LAW

JURISDICTION

1. This Court has jurisdiction under 28 U.S.C. §1345. The Court has jurisdiction over water rights claims and other issues of state law under the doctrine of pendent jurisdiction.

FEDERAL AND STATE POWERS OVER WATERS

General Constitutional Framework

2. Under our federal constitutional system, governmental powers over water are shared, with both the federal government and the State of Washington empowered to establish rights to the use of waters within the state. The federal government's power is found in various provisions of the United States Constitution including, among others, the clauses relating to Commerce (U.S. Const., Art. I, §8, cl. 2), property (U.S. Const., Art. IV, §3, cl. 2), war (U.S. Const., Art I, cls. 11, 12), taxation for the general welfare (U.S. Const., Art I, §8, cl.1), and treaty-making, (U.S. Const., Art. II, §2, cl. 2). The State of Washington's power is contained within the retained, plenary powers of state government recognized by the Amendment X to the United States Constitution. See generally Trelease, Federal-State Relations in Water Law (National Water Commission Legal Study No. 5) Chapter III (1971).

3. Reserved state powers are subject to potential limitations on their exercise arising largely from the "Supremacy Clause." U.S. Const., Art. VI, cl. 2. Thus state powers are restricted if an area of state governmental power is "preempted" or suspended, expressly or implied, by federal statutory or treaty enactment. Additionally, state powers over water may not, absence federal approval, have applicability to waters located on federally owned lands. United States v. Mayo, 319 U.S. 441 (1943).

4. Further limitations on the applicability of state law within the state's boundaries arise from the establishment by the federal government of Indian reservations. Because certain powers of self government, pertaining to the control over individual Indians and over Indian property interests, rest with Indian Tribes, the law has developed that the state may not interfere with the exercise of these limited tribal powers of self government. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1964); Williams v. Lee, 358 U.S. 217, 221 (1949). See also Oliphant v. Suquamish Indian Tribe, 98 S.Ct. 1011 (1978); United States Department of the Interior, Federal Indian Law 513 (1958).

5. Thus, under our federal constitution, state water right laws have applicability to waters located on non-federal lands with a state unless: (1) a federal statute or treaty have preempted that ability to apply, or (2) the state law's application interferes with the exercise of tribal government powers over Indians and Indian interests.

This is in keeping with the long established general teachings of the United States Supreme Court that state laws can apply, in proper circumstances, to non-Indians and non-Indian interests within the original boundaries of a reservation. Langford v. Monteith, 102 U.S. 145 (1880); Utah and Northern Railway v. Fisher, 116 U.S. 28 (1885); Thomas v. Gay, 169 U.S. 264 (1898); Draper v. United States, 164 U.S. 240 (1896); New York v. Martin, 326 U.S. 496 (1946); United States v. Bratney, 104 U.S. 621 (1881). See also Puyallup Tribe v. Washington Dept. of Game, 433 U.S. 165 (1977); Norvell v. Sangre de Cristo Development Co., 372 F. Supp. 348, 353 (D.N.M. 1974), rev'd on grounds not relevant to this case, 519 F.2d 370 (10th Cir. 1975).

Federal-State Powers in Chamokane Basin Prior to Washington Statehood

6. In the context of this case, all powers over the allocation of the use of waters of Chamokane Basin (based on concepts of sovereignty) vested in the federal government of the United States as of 1846. Treaty with Great Britain, 9 Stat. 869.

7. Beginning with the establishment of the Oregon Territory in 1846, rights to use of waters on non-federal lands within the territory, including the Chamokane basin, could be established pursuant to territorial law, statutory and otherwise.

8. By congressional acts of 1866, 1870 and 1877, rights to use waters located on federal lands, based on territorial law and the law of custom, were both confirmed and authorized. Act of July 26, 1866, §9, 14 Stat. 251; Act of July 9, 1870, 16 Stat. 217, amending the Act of 1866; Desert Lands Act of 1877, 19 Stat. 377, 43 U.S.C. §321.

9. In 1881 the United States, by the executive order of President Hayes, creating the Spokane Indian Reservation, reserved rights to the use of waters of Chamokane Creek (as well as other waters within or bordering the reservation) for the benefit of the Spokane Tribe in amounts reasonably necessary to carryout the purposes for which this reservation was created. These rights are implied even though there was no mention of water rights whatsoever in the presidential executive order creating the right. Winters v. United States, 207 U.S. 564 (1908); Conrad Investment Co. v. United States, 161 Fed. 829 (9th Cir. 1908); and United States v. Walker River Irrigation District, 104 F.2d 334 (9th Cir. 1937).

10. The implied rights to use the waters established by the presidential executive order of 1881 did not reserve all waters located within the boundaries within the Spokane Reservation, but only the right to a limited amount; i.e., the amount reasonably necessary to carry out the purposes for which reservation was created, "and no more." Cappaert v. United States, 426 U.S. 128, 141 (1976).

11. The reserved rights doctrine, from its very beginnings in Winters and Conrad, recognized that waters within a stream, to which an implied reserved right attaches, which are in excess (or "surplus") to those amounts required to satisfy a reserved right, are subject to appropriation under state law. See also United States v. Ahtanum Irrigation District, 330 F.2d 897 (9th Cir. 1964). Further, Winters did not hold that by the creation of implied reserved rights a wall was placed upon the boundaries which bars the application of state water rights laws to waters within its boundaries.

Admission of Washington to United States -- Shared Powers Over Waters of Chamokane Basin

12. With the entry of the State of Washington into the federal union in 1889, the state, at that time, had authority to allocate water rights applicable to all waters located on non-federally owned lands. Further, the state water right laws also were applicable to waters on federally owned lands where the federal government authorized such applicability. Stated another way, generally state water rights law applies to water on all non-federally owned lands within a state and on all federal land to which federal law applies state law.

13. State law also is applicable to water on non-Indian lands; i.e., non-federal or non-Indian lands, within the original boundaries of the Spokane Reservation portion of the Chamokane Reservation except that:

(1) the state law may not be applied so as to impair the ability of the Spokane tribe to exercise its limited powers of self government over tribal members and tribal property interests; and

(2) the state law may not be applied if Congress has by treaty or statutory preemption has preempted such application.

Exercise of State Water Rights Does Not Impair Exercise of Tribal Powers

13. State law cannot interfere with tribal self government powers over Indians and Indian interests. The state's assertion of power, activated through issuance of permits establishing water rights applies only to waters on non-Indian lands. The state's authority is not asserted as to Indians, or to lands of Indians, or to waters located on said lands, or to reserved rights of Indians. (The State of Washington has long recognized the doctrine of Winters reserved rights and administers its code in light of those rights.)

14. State permits are issued "subject to" prior rights including senior reserved rights established by the presidential executive order of 1881 with a priority of that date; i.e., all state based rights are subject these impliedly reserved rights and during times of shortage such state based rights may not be exercised as against the reserved rights.

15. There is a substantial dispute as to whether a tribe has any governmental authority over waters. However, the Court need not resolve this issue. Assuming arguendo that tribal self government powers over water and water rights exist, a state cannot interfere with that power. State power has not been exercised in this case in any way to interfere with any such Indians powers that may exist. In sum, as a matter of law, the state's exercise of power in this case does not and cannot interfere with any tribal powers.

There Is No Federal Preemption of State Powers by Statute or Executive Order

16. Preemption by federal statute, the second possible base for removing the applicability of state water law to waters on non-Indian lands, is not to be "lightly presumed." Schwartz v. Texas, 344 U.S. 199 (1952).

17. A court should not conclude Congress legislated an ouster of state authority" in the absence of an unambiguous congressional

mandate to that effect." Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 146-47 (1963). An intention of Congress to exclude states from exerting their police powers must be clearly manifested. Reid v. Colorado, 187 U.S. 137, 148 (1902); Napier v. Atlantic Coast Line, 373 U.S. 132 (1963). This rule is of special strength where a federal displacement would eliminate police powers historically exercised by the states. Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); De Canas v. Bica, 424 U.S. §51 (1976).

18. Further the United States Supreme Court has recently stated its "conviction that the proper approach is to "reconcile the operation of both statutory schemes with one another rather than holding one completely ousted." Merrill Lynch, Pierce, Fenner and Smith v. Ware, 414 U.S. 117, 127 (1973) quoting Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963). See also Marshall v. Consumers Power Co., 65 Mich. App. 237, 237 N.W. 2d 266 (1975).

19. The presidential executive order and the events surrounding the order, while impliedly reserving water rights for the benefit of the Spokane Tribe of 1881 reveal no intention whatsoever, either express or implied, to bar the application of state law to "excess waters" located on non-Indian lands within boundaries of the Spokane Reservation.

20. Likewise, the Court has not been cited to any federal statute which preempts the applicability of state law to excess waters so located and the court has not found any such statute.

The Enabling Act and Washington's Constitution

21. Section 4 of the federal "enabling act" admitting Washington State into the Union, 25 Stat. 676, cited by plaintiffs, does not bar the applicability of state water rights law to "excess waters" on non-Indian lands within an Indian reservation. On its face it is inapplicable for the limitations of the section provide that the state disclaims "all right and title to unappropriated

lands" of the United States and to "lands owned or held by any Indian or Indian tribe." The State of Washington, by exerting authority to establish water rights applicable to non-federal and to non-Indian lands, is not in violation of the "disclaimer."

22. The same conclusion applies to Article 26, §2, of the Washington Constitution, which is identical in wording to the quoted portion of the enabling act.

23. Portions of the same provisions of the enabling act and constitution, relied upon by the plaintiffs, stating "said Indian lands shall remain under the absolute jurisdiction and control of the United States," likewise do not constitute a bar to state law applicability. Not only does this language refer only to "said Indian lands," i.e. owned or held by any Indian or Indian tribes, but the U.S. Supreme Court has interpreted the "absolute jurisdiction" language to mean something less than "exclusive jurisdiction." Organized Village of Kake v. Egan, 369 U.S. 60 (1974); see also Norvell v. Sangre de Cristo Development Co., 372 F.Supp. 348 (D.N.M. 1974).

P.L. 83-280

24. Neither PL 83-280 nor its state counterpart, Chapter 37.12 RCW, bar the state's water laws as contended by plaintiffs. The pertinent provision of PL 83-280, section 4 (28 U.S.C. §1360(b)) provides:

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

This wording is substantially the same in RCW 37.12.050. Both relate only to Indian property interests. The issue of state authority over Indian interests is not before the court in this case. As previously pointed out, state based water rights are issued subject to prior rights; therefore, such a right cannot "encumber" an earlier reserved right of the Spokane Tribe. Thus, neither PL 83-280 nor Chapter 37.12 RCW in any way bar the applicability of Washington State's water laws to excess waters on non-Indian lands.

25 U.S.C. §381

25. 25 U.S.C. §381 provides:

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

Emphasis supplied.

This act, dormant in terms of implementation for almost one hundred years, is limited by its terms to "Indians." But see United States v. Powers, 305 U.S. 527 (193). Likewise, it is limited to allocation for "agricultural purposes."

So limited it cannot support the contention of the United States that it places exclusive jurisdiction, as a matter of law, over all waters within the original boundaries of a reservation. At the most the provision's scope embodies comprehensive authority over the allocation of rights, and the necessary waters related thereto, impliedly reserved by treaty - an area outside the scope of the issues raised in this case.

Jurisdictional History Within Spokane Reservation

26. In determining whether or not state laws apply within the

boundaries of an Indian reservation, it is relevant to look to the jurisdictional history of that reservation. Oliphant v. Suquamish Indian Tribe, 98 S.Ct. 1011 (1978); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 603 (1977); Decoteau v. District County Court, 420 U.S. 425, 442 (1975).

27. History of the development of water rights law in the western United States, commonly held understandings of that law, and interpretations by the agencies responsible for the administration of federal water laws and federal-state relationships all support the conclusion that state water rights laws have applicability to excess waters on non-Indian lands within the original boundaries of an Indian reservation.

28. Both the United States Department of Justice and the United States Department of the Interior have, in recent years, rendered the view that with regard to Indian reserves in Washington State that state water rights law may be applied, under appropriate facts, to excess waters on non-Indian lands within a reservation. These interpretations of law are entitled to significant weight. See DOE Supp. Br., App. B; 2A C. Sands, Sutherland on Statutory Construction §§49.01-.09 (1973).

29. The views of the other prime intepreter of water law on the subject, the administrators of state water codes, are also of weight. 2A C. Sands, Sutherland on Statutory Construction, §§49.01-.09 (1973). Washington State's administrator has applied his state's law to the excess waters on non-Indian lands situation. See e.g., Tulalip Tribe v. Walker, Snohomish County No. 71421 (1963). His counterparts in many of the other western states have viewed the reach of state water rights laws in a similar fashion.

30. Of great significance is that the United States in this very case urges that the court confirm a water right based upon state law, relying specifically on a certificate issued by the administrator of the state's water code. See Amended Complaint at

5; U.S. Br. at 63. This act of the federal government recognizes and confirms the longstanding view of the national government that state water rights law can apply within the Spokane Reservation. The contention by the United States in closing argument that the United States obtained the right as a matter of comity does not detract from the force of that conclusion. Clearly the United States has full power under the constitution to establish water rights on Chamokane Creek outside of state law. However, the United States did not choose to establish its water right based on such power, but rather obtained a state-based right and has relied upon and exercised that right to use water on that basis within the reservation for more than twenty-five years. The actions of the federal government by word and deed, for over a quarter century, despite their very recent protestations, show a long held view of the law that there is no wall on the original boundaries of an Indian reservation through which state water rights law cannot pierce.

31. The Act of March 3, 1905, P.L. 58-173, also is relevant to the jurisdictional history of the reservation. It was passed in part to clarify and facilitate the obtaining of water rights for proposed power projects. At the time of passage, Washington law was particularly confusing in that it recognized both the riparian doctrine and the appropriation system. See Benton v. Johncox, 17 Wash. 277, 288, 49 P. 400 (1897); see S. Rep. No. 4378, 58th Cong., 3d Sess. 3 (1905); 39th Cong. Rec. 2413 (1905) (remarks of Rep. Jones). It authorized the Secretary of the Interior to exericse the preemptive power of the federal government to approve appropriative rights under state law. United States v. Big Bend Transit Co., 42 F. Supp. 459, 466-67 (E.D. Wash. 1941). DOE Supp. Br. at 38-39.

Conclusion: State Law Not Precluded

32. Based on the foregoing, state water right law is not precluded from application by federal statute or executive order or

state constitution or statute, or by a potential for interference with the Spokane Tribe's powers of self government over Indian or Indian property interests. Therefore, state law has application to excess waters located on non-Indians within the original boundaries of the Spokane Reservation. Accord, Tulalip Indian Tribe v. Walker, Snohomish County Superior Court No. 71421 (1963).

Even If There Is Preclusion, Federal Law Grants Authority to State

33. The court reaches the same conclusion even if there is, as a matter of law, a wall upon the original boundaries of the Spokane Reservation through which state water rights law cannot reach unless authorized or consented to by Congress. The court notes three distinct bases which provide for such a reach of state law.

34. Under the Act of May 29, 1908, 35 Stat. 458, the United States authorized the opening of certain lands within the Spokane Reservation for entry and settlement by non-Indians. The specific lands were to be designated by the Secretary of the Department of the Interior through a system 911 lands as "timber" or "agricultural" with the latter opened "to settlement and entry under the provisions of the Homestead Laws." See also P.E. 4.3. Thus certain lands within the original boundaries were severed from its special reserved status and made available under the federal homestead laws. Transfers of property from federal to non-federal ownership under these provisions pass only land; no water rights pass as an incident of the transfer. California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

The attaching of water rights to such lands, whether taking place at the time of such transfer or in the future, are matters of state law. Stated otherwise, Washington State water right laws are the primary if not the only means, to establish water rights available to a non-Indian acquiring homesteaded lands located within the original boundaries of the Spokane Reservation to establish water rights.

35. In 1953, Congress enacted P.L. 83-280, 67 Stat. 590, which invited states to assume jurisdiction over criminal and civil matters within the boundaries of Indian reservations. Section 7 of P.L. 83-280 stated:

> The consent of the United States is hereby given to any other state not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the state shall, by affirmative legislative action, obligate and bind the state to assumption thereof.

Washington accepted this invitation and enacted in 1957 and then amended in 1963 what is now chapter 37.12 RCW. This chapter assumed full "criminal and civil jurisdiction over Indians and Indian territory, reservations, country and lands" with the proviso that "such jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation . . . ." RCW 37.12.010.

Over Indians on such lands, only partial subject matter jurisdiction was assumed over such areas as domestic relations, mental illness and adoption. Full jurisdiction was allowed if the tribe consented. RCW 37.12.021. On the Spokane Reservation there has been no such complete assumption of jurisdiction, see American Indian Policy Review Commission, Final Report 202 (1977), so P.L. 83-280 jurisdiction within the Spokane Reservation is complete with respect to non-Indians on non-Indian lands and partial as to Indians and Indian lands. As the Department of Ecology asserts jurisdiction over the water rights of non-Indians, P.L. 83-280 constitutes a grant of power adequate to cover all state jurisdictional assertions.

Although partial jurisdiction over Indians described in chapter 37.12 RCW is in question, Confederated Bands and Tribes of Yakima Indian Nation v. Washington, 552 F.2d 1332 (9th Cir. 1977), prob. juris. noted, 98 S.Ct. 1447 (1978), the remainder of the statute is severable and should withstand attack. See State v. Anderson,

81 Wn.2d 234, 501 P.2d 184 (1972); Boeing Co. v. State, 74 Wn.2d 82 (1968); Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977).

36. Further, the Executive Order constitutes the requisite grant of jurisdiction as the intent of the parties, as shown in the proceedings surrounding the creation of the reservation, clearly contemplated state assumption of jurisdiction. DOE Supp. Br. at 31.

Conclusion

37. Therefore the State of Washington, whether operating directly under its constitutionally reserved powers or operating with the concurrence and approval of the United States Congress, has authority to establish the right to use of excess waters on non-Indians lands within the original boundaries of the Spokane Reservation. Any use authorized by the state respecting such excess waters on the Spokane Reservation is within the context of a system of priorities and would yield to any prior or subsequently initiated water useage which is within the scope of prior reserved rights of the United States held for the benefit of Indians or other prior rights held by others.

SCOPE OF RESERVED RIGHT

General

38. When the federal government withdraws land from the public domain and reserves it for a federal purpose, the government, by implication, reserves the right to use water then unappropriated to the extent necessary to fulfill the purpose of the reservation, no more. Winters v. United States, 207 U.S. 564 (1908); Cappaert v. United States, 426 U.S. 128, 141 (1976). [U.S. Br. at 3.]

39. Water rights reserved for the benefit of the Spokane Tribe are of fixed magnitude and priority and are appurtenant to defined lands. Arizona v. California, Masters Report at 266; [DOE Supp.

Br. at 23.]

Purposes of the Reservation

40. In determining whether or not in a given case the federal government intended to reserve given quantities of water for use on a federal reservation and the scope of the intended use, it is relevant to look to the jurisdictional history of that reservation. That history of the parties actions subsequent to the creation of the reservation is relevant in the same sense that agency interpretation and implementation of a statute is relevant in determining the meaning of the statutes. Oliphant v. Suquamish Indian Tribe, 98 S.Ct. 1011 (1978); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

41. While reserved rights to the use of water may be implied from the "purposes" for which the reservation is created, the "purposes" of the reservation must have been contemplated at the time of the creation of the reservation. Reserved rights attach only to those intended purposes; there can be no implied reservation of water for purposes not contemplated at the time of the creation of the reservation. Arizona v. California, Masters Report at 264-65.

This is not to say that water may not be acquired under state law for other purposes. However, the implied reserved rights created by the United States for the benefit of the Spokane Tribe is fixed in quantity as that amount necessary to fulfill the intended purposes of the reservation at the time of the creation of the reservation. United States v. Walker River Irrigation Dist., 104 F.2d 334, 336 (9th Cir. 1939); see Winters v. United States, 143 Fd. 740, 745 (9th Cir. 1906), aff'd, 207 U.S. 564 (1908); [DOE Br. at 17; U.S. Reply Br. at 28.]

42. The determination of the purposes of the reservation is a question of fact. The United States or the Tribe has the burden of proving the purposes of the reservation by clear and convincing evidence. The purposes may be proven by reference to the explicit

language of the treaty or executive order creating the reservation and from the history and circumstances surrounding the creation of the reservation.

43. Absent evidence to the contrary, it may be presumed that the federal government intended to reserve water adequate to irrigate all "practicably irrigable acreage" within the boundaries of the reservation. However, where there is evidence of a purpose to use lands for purposes other than agriculture, such as timber, there can be no implied intent to reserve water for irrigation of those lands. Rather, there is reserved water adequate to fulfill that purpose. Arizona v. California, Masters Report at 260, 262.

Ground Water

44. While the parties may "intend" to reserve ground water in addition to surface water, whether there is such an intent is a question of fact.

45. Where there exists a hydrological connection between reserved surface water and ground water, whether on or off the reservation, the United States may maintain an action to enjoin appropriations of ground water which interfere with prior reserved rights to surface water.

Priority Date

46. The reserved water right of the Spokane Tribe have a priority date as of the creation of the reservation by executive order of January 18, 1881. Although there is authority for an earlier date for the creation of the reservation, see Northern Pacific Railway Co. v. Wismer, 246 U.S. 283 (1918), the reservation of the waters could be accomplished only by an official act of the United States. As there could be not reservation of waters by the Agreement of 1877 alone had there been no subsequent executive order, the date of the executive order is the priority date of the reserved right of the

United States.

Injunctive Relief

47. The State of Washington has issued permits and certificates for withdrawals from the Chamokane Creek basin which, if all were exercised simultaneously with a reserved right of the Tribe. could in a low-water year effectively dry up the creek. However, because a "water right" is not a right to the water itself, but a right to the use of water subject to prior rights, there is not need for injunctive relief against either the state or the appropriators of water. Rather, the proper course of action is to appoint a water master with the authority to regulate in times of shortage, giving priority, of course, to those persons holding prior rights.

48. The State of Washington may issue future permits and certificates for appropriation of waters of the basin, both within and without the boundaries of the Spokane Reservation "subject to existing rights" of the United States, the Spokane Tribe, and other holders of rights.

PROPOSED DECREE

Based on the foregoing, the court enters the following schedule which confirms the rights of the parties:

[Note: No attempt has been to set forth the decree confirming rights to the various parties. However, rights are urged for awarding to the United States, based upon reserved rights concepts and state law, applicable to waters within the Spokane Reservation. Further, non-Indians claim based on state law should be confirmed for rights applicable to waters both without and within the Spokane Reservation. (The latter - waters within the reservation - relates to the Smith-peter claim which involves use of waters on "homesteaded" lands owned by non-Indians within the original boundaries of the Spokane Reservation bordering the west bank of Chamokane Creek. Claims by

the defendant Department of Natural Resources, State of Washington, based on a state "reserved rights" concept, should be rejected.

We do, however, suggest the following form be followed in drafting the decree. This is the form used in the numerous general adjudications brought in state court under chapter 90.03 RCW. We include also a proposal for incorporating the reserved right of the United States into the decree as well as the right of the United States based on state law.

Claimant	Quantity	Use	Source
	Class 1 - July 14, 1876		
John Doe	0.75 cfs	irrigation, stock, domestic	Chamokane Creek
Pt. of Diversion: (specific legal description) Place of Use: (specific legal description)			
	Class __ - January 18, 1881		
United States (as trustee of Spokane Indian Tribe)	5,640 ac/ft per year	irrigation	Chamokane Creek
	undefined quantities (amounts as reasonably necessary)	timber harvesting domestic, stock	Chamokane Creek
Pt. of Diversion: Any trust or allotted lands within reservation Place of Use: Any trust or allotted lands within reservation			
	Class __ - October 21, 1942		
United States	10 cfs.	non-consumptive, fish propagation	Spring Creek

DATED this 6th day of June, 1978.

Respectfully submitted,

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