

10-14-1986

# Brief of State of Washington, Department of Ecology (Spokane Tribe of Indians "First Cause of Action")

Charles B. Roe, Jr.  
*Senior Assistant Attorney General*

Kenneth O. Eikenberry  
*Attorney General*

Follow this and additional works at: <https://digitalcommons.law.uidaho.edu/anderson>

---

## Recommended Citation

Roe, Jr., Charles B. and Eikenberry, Kenneth O., "Brief of State of Washington, Department of Ecology (Spokane Tribe of Indians "First Cause of Action")" (1986). *United States v. Anderson (Spokane Tribe)*. 57.  
<https://digitalcommons.law.uidaho.edu/anderson/57>

This Exhibit is brought to you for free and open access by the Hedden-Nicely at Digital Commons @ UIdaho Law. It has been accepted for inclusion in United States v. Anderson (Spokane Tribe) by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

July 10, 1984

# For Publication

# FILED

IN THE UNITED STATES COURT OF APPEALS JUL 10 1984

FOR THE NINTH CIRCUIT

PHILLIP B. WINBERRY  
CLERK, U.S. COURT OF APPEALS

*Re*

1 UNITED STATES OF AMERICA, )  
 2 )  
 3 Plaintiff-Appellant, )  
 4 )  
 5 and )  
 6 )  
 7 SPOKANE TRIBE OF INDIANS, )  
 8 )  
 9 Plaintiff-in-Intervention- )  
 10 Appellant, )  
 11 )  
 12 vs. )  
 13 )  
 14 BARBARA J. ANDERSON, JAMES )  
 15 M. ANDERSON, et al., )  
 16 )  
 17 Defendants-Appellees. )

Nos. 82-3597 and  
82-3625

D.C. No. CV-72-3643-JLQ

## O P I N I O N

13  
14 Appeal from the United States District Court  
15 for the Eastern District of Washington  
16 Justin L. Quackenbush, District Judge, Presiding  
17 Argued and submitted December 8, 1983.

18 Before: ANDERSON and FLETCHER, Circuit Judges, and  
19 EAST,\* District Judge.

20 J. BLAINE ANDERSON, Circuit Judge:

21 The United States of America appeals a district  
22 court's determination that water rights appurtenant to  
23 certain reservation lands which passed out of trust status  
24 but which have subsequently been reacquired by the Spokane  
25 Tribe of Indians are entitled to a priority date as of the  
26 date of reacquisition by the Spokane Tribe. The Spokane

---

\*The Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

1 Tribe also appeals, urging that the district court erred in  
2 holding that the State of Washington had regulatory juris-  
3 diction over use of water by non-Indians on non-Indian land  
4 within the Spokane Indian Reservation. We affirm in part and  
5 reverse in part and remand for further proceedings in accord-  
6 ance with this decision.

7 I. BACKGROUND

8 This action was originally filed in 1972 by the  
9 United States, acting on its own behalf and as trustee for  
10 the Spokane Tribe of Indians (Tribe), pursuant to 28 U.S.C.  
11 § 1345 (1976). The Tribe was permitted to intervene as a  
12 plaintiff. Defendants include the State of Washington,  
13 acting in its governmental and proprietary capacities,  
14 and all other persons or corporations who might have an  
15 interest in the disputed water rights which were the subject  
16 of the litigation.

17 The plaintiffs sought an adjudication of water  
18 rights in the Chamokane Basin, a hydrological system in-  
19 cluding Chamokane Creek, its tributaries and its ground water  
20 basin. The waters of the Chamokane Basin are not wholly  
21 within the Spokane Indian Reservation; Chamokane Creek  
22 originates north of the reservation and flows south along  
23 the eastern boundary. The creek leaves the reservation  
24 by discharging into the Spokane River which, in turn,  
25 joins with the Columbia River and flows into the Pacific  
26 Ocean. A water master for the Chamokane Basin has been

1 appointed, according to the terms of a judgment entered on  
2 September 12, 1979, by the Honorable Marshall A. Neill,  
3 United States District Judge.

4 The Spokane Indian Reservation is not exclusively  
5 owned and resided upon by Indians. Non-Indian settlement  
6 has occurred there, encouraged by various federal programs  
7 authorizing allotment of reservation lands to individual  
8 Indians and opening excess land to homesteading by non-  
9 Indians. See, the General Allotment Act of 1887, 24 Stat.  
10 388, codified at 25 U.S.C. § 331, et seq., and the Act of  
11 May 29, 1908, 25 Stat. 458 (a "homestead" act). Some land  
12 opened for homesteading was never claimed and was subse-  
13 quently restored to the Tribe by the Act of May 19, 1958, 72  
14 Stat. 121. Some of the reservation land was homesteaded by  
15 non-Indians and some former Indian allotments passed into  
16 non-Indian ownership; much of this property has been  
17 reacquired by the Tribe and returned to trust status pursuant  
18 to the Act of June 10, 1968, 82 Stat. 174, codified as  
19 amended at 25 U.S.C. § 487. This vacillation of land  
20 ownership provides a framework for the instant controversy.

## 21 II. DISCUSSION

22 Three general categories of reservation land are  
23 involved here: lands now owned in fee by non-Indians;  
24 lands which never left trust status; and lands removed from  
25 trust status which were subsequently reacquired by the Tribe  
26 and returned to that status. This later category, that of

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

lands reacquired by the Tribe and returned to trust status, includes (1) lands opened to homesteading which were never claimed; (2) lands allotted to individual Indians who later sold their parcels to non-Indians; and (3) lands opened for homesteading which were acquired by non-Indians.

Changes in the ownership of lands within the Spokane Indian Reservation created doubts regarding the priority dates of the water rights appurtenant to those lands. Additionally, a question has arisen regarding the regulatory jurisdiction of the State of Washington concerning allocation of excess Chamokane Basin Water rights within the reservation and appurtenant to non-Indian lands.

A. Priority Dates for Reacquired Lands.

The district court awarded a priority as of the date of the creation of the reservation to those water rights appurtenant to land which never left trust status and those water rights appurtenant to lands opened for homesteading which were never claimed. This award was based on the doctrine of tribal reserved Winters rights and is not at issue here. Winters v. United States, 207 U.S. 564 (1908).

Those water rights appurtenant to lands reacquired by the Tribe following allotment and sale to non-Indians or homesteading were awarded a priority date as of reacquisition by the Tribe. The United States takes issue with this determination. We hold that those perfected water

1 rights appurtenant to homesteaded lands will not have a  
2 priority as of the date of reacquisition of the property by  
3 the Tribe; instead, they will carry a priority as determined  
4 under state law. Homesteaded lands where the water right has  
5 not been perfected or the rights have been lost, will have a  
6 priority date as of the date of reacquisition, rather than an  
7 original, date-of-the-reservation priority. We hold that  
8 those water rights appurtenant to lands reacquired after  
9 allotment and sale to non-Indians carry a priority date, as  
10 to those water rights not lost to nonuse, as of the date of  
11 the creation of the reservation.

12 1. The allotted lands.

13 When the United States establishes a  
14 federal reservation, it reserves the land and impliedly  
15 reserves the right to sufficient unappropriated water to  
16 fulfill the purposes of that reservation. United States v.  
17 New Mexico, 438 U.S. 696, 698-700 (1978). The Supreme Court  
18 has applied this concept to Indians and Indian reservations,  
19 holding that the establishment of the reservation implies a  
20 right to sufficient unappropriated water to accomplish its  
21 purposes. Winters v. United States, 207 U.S. 564, 576-578  
22 (1908). These tribal reserved Winters rights vest on the  
23 date of the creation of the Indian reservation. Id. at 577.

24 The Ninth Circuit has recently addressed  
25 the matter of Winters rights in the context of the sale of  
26 allotted lands to non-Indians. The court held that when

1 title passed from an Indian to a non-Indian for an allotted  
 2 parcel, the appurtenant right to share in tribal reserved  
 3 waters passed with it. Colville Confederated Tribes v.  
 4 Walton, 647 F.2d 42, 50 (9th Cir. 1980), cert. denied, 454  
 5 U.S. 1092 (1981); United States v. Adair, 723 F.2d 1394  
 6 (1983). See also United States v. Ahtanum Irrigation  
 7 District, 236 F.2d 321, 342 (9th Cir. 1956), cert. denied,  
 8 352 U.S. 988 (1957). The court's rationale in Walton was  
 9 that, in order for an Indian allottee to enjoy the full  
 10 benefit of his allotment, he must be able to sell his land  
 11 together with the right to share in the reserved waters. 647  
 12 F.2d at 49-50. The court determined that the non-Indian  
 13 successor also inherits his predecessor's priority--the date  
 14 of the creation of the reservation. That priority date "is  
 15 the principal aspect of the right that renders it more  
 16 valuable than the rights of competing water users, and  
 17 therefore applies to the right acquired by a non-Indian  
 18 purchaser." Id. at 51. The Walton decision accords with the  
 19 Congressional policy of ensuring to an Indian allottee the  
 20 full economic benefit of the allotment.

21 The Walton decision makes it clear that  
 22 reserved Winters rights do not cease to exist merely because  
 23 the land passes out of Indian ownership. Adair, 723 F.2d at  
 24 1417 (citing Walton, 647 F.2d at 51). The Ninth Circuit held  
 25 that the full quantity of water available to the Indian  
 26 allottee thus may be conveyed to the non-Indian purchaser.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

It follows that upon reacquisition of these lands, the Tribe is equally entitled to an original priority date. We find, therefore, that Winters rights appurtenant to allotted lands conveyed to a non-Indian purchaser will pass with title upon reacquisition by the Tribe and will retain their original priority date.

The Ninth Circuit has restricted its rule concerning the transfer of reserved rights appurtenant to allotted lands. The first restriction is that "the non-Indian successor's right to water is 'limited by the number of irrigable acres [of former reservation lands that] he owns.'" Adair at 1417 (citing Walton, id., at 51). The second restriction may be simply expressed as: use it or lose it. Walton, 647 F.2d at 51. Pursuant to this restriction, a non-Indian successor acquires a right to that quantity of water being utilized at the time title passes, plus that amount of water which the successor puts to beneficial use with reasonable diligence following the transfer of title. Where "the full measure of the Indian's reserved water right is not acquired by this means and maintained through continued use, it is lost to the non-Indian successor." Id. Consequently, on reacquisition the Tribe reacquires only those rights which have not been lost through nonuse and those rights will have an original, date-of-the-reservation priority.

2. The homesteaded properties.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

The Supreme Court has determined that a homesteader acquires no federal water rights incident to the transfer of public lands into private ownership. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935). Application of this rule to the case before us would terminate the availability of Winters rights on those reservation lands which have been declared public domain, opened to homesteading, and subsequently conveyed into private ownership. This result is supported by the fact that Winters rights were only intended to assist in accomplishing the needs of the reservation; where the land has been removed from the Tribe's possession and conveyed to a homesteader, the purposes for which Winters rights were implied are eliminated. Winters v. United States, 207 U.S. at 577. Therefore, a homesteader is not entitled to rely on the Winters doctrine. The appropriation doctrine will serve as the source of his water rights. See California Oregon Power Co., 295 U.S. at 164 (Desert Land Act gives sanction to appropriation doctrine, seeking to remove impediment to its successful operation).

It is a basic tenent of western water law that water rights perfected through appropriation and not subsequently lost to nonuse or abandonment will generally pass with transfer of title to real property and will carry a priority date as of their original application to beneficial

1 use. We see no reason to depart from this rule as to the  
2 perfected water rights of homesteaders on reacquisition of  
3 the property by the Tribe. As to lands in this category,  
4 state law determines the priority date.

5           Where the homesteader has no perfected  
6 water rights or has lost rights which were perfected, there  
7 are no rights to be regained by the Indians on reacquisition  
8 of the property. This principle protects the intervening  
9 rights, if any, that may have been acquired in good faith by  
10 third party water users during the homesteading process and  
11 prior to reacquisition by the Tribe. On return of the  
12 property to tribal status, it becomes necessary to utilize  
13 the Winters doctrine to assure that the Tribe has sufficient  
14 water to 'fulfill the very purposes for which [the]  
15 reservation was created.' United States v. Adair, 723 F.2d at  
16 1409 (citing United States v. New Mexico, 438 U.S. 696, 702  
17 (1978)). We treat these lands in a manner analogous to that  
18 of a newly created federal reservation and find that the  
19 purposes for which Winters rights are implied arise at the  
20 time of reacquisition by the Tribe. See generally Cappaert  
21 v. United States, 426 U.S. 128, 138-144 (1976) (discussing the  
22 scope and nature of Winters water rights on federal lands).  
23 Therefore, we hold that the Tribe is entitled to an  
24 implication of Winters rights with a priority for these  
25 rights as of the date of reacquisition, rather than an  
26 original, date-of-the-reservation priority.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

B. State Regulatory Jurisdiction

In the case before us, the district court determined that it was permissible for the State of Washington to exercise regulatory jurisdiction over non-Indian use of excess Chamokane Basin waters on lands owned by non-Indians within the Spokane Indian Reservation. The Spokane Tribe takes issue with this determination, arguing that it, not the state, has jurisdiction by virtue of our decision in Colville Confederated Tribes v. Walton. We agree with the rationale of the district court in its unpublished Memorandum and Order, C.R. 252 at 22-28, and find that Walton is not controlling.

Regulatory jurisdiction of a state over non-Indian activities on a tribal reservation "may be barred either because it is pre-empted by federal law, or because it unlawfully infringes on the right of reservation Indians to self-government." Walton, 647 F.2d at 51. These barriers to regulation, although independent, are related by the concept of tribal sovereignty. Id. See also White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980); White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1278 (9th Cir. 1981).

In 1980 the Supreme Court set forth a specific rule for analyzing preemption claims in general and in cases involving non-Indians on reservations in particular.

1 [Where] a state asserts authority over the  
2 conduct of non-Indians engaging in activities  
3 on the reservation [the court must make a]  
4 particularized inquiry into the nature of the  
state, federal and tribal interests at stake,  
an inquiry designed to determine whether, in  
the specific context, the exercise of state  
authority would violate federal law.

5 White Mountain Apache Tribe v. Bracker, 448 U.S. at 145.

6 The Supreme Court further stated in Bracker that "[t]he  
7 tradition of Indian sovereignty over the reservation and  
8 tribal members must inform the determination whether the  
9 exercise of state authority has been pre-empted by operation  
10 of federal law." 448 U.S. at 143 (citations omitted).

11 Of course, tribal sovereignty is not absolute.  
12 In particular, the power to regulate generally the conduct of  
13 nonmembers on land no longer owned by or held in trust for  
14 the tribe is impliedly withdrawn as a necessary result of  
15 tribal dependent status. Montana v. United States, 450 U.S.  
16 544, 564 (1981); see United States v. Wheeler, 435 U.S. 313,  
17 326 (1978). Some exceptions to this implied withdrawal of  
18 tribal regulatory authority do exist.

19 A tribe may regulate, through taxation,  
20 licensing or other means, the activities of  
21 nonmembers who enter consensual relation-  
22 ships with the tribe or its members,  
23 through commercial dealing, contracts,  
24 leases, or other arrangements . . . . A  
25 tribe may also retain inherent power to  
exercise civil authority over the conduct  
of non-Indians on fee lands within the  
reservation when that conduct threatens  
or has some direct effect on the political  
integrity, the economic security, or the  
health or welfare of the tribe.

26 Montana v. United States, 450 U.S. at 565-66 (citations

1 omitted). This civil authority over non-Indians which the  
2 tribe retains, "derives not only from the tribe's inherent  
3 power necessary to self-government and territorial  
4 management, but also from the power to exclude nonmembers  
5 from tribal land." Babbitt Ford, Inc. v. Navajo Indian  
6 Tribe, 710 F.2d 587, 592 (9th Cir. 1983). See Merrion v.  
7 Jicarilla Apache Tribe, 455 U.S. 130, 141-44 (1982).

8 Recent case law has affirmed tribal exercise  
9 of civil jurisdiction over nonmembers. Where nonmembers have  
10 transacted business with the tribe or entered onto the tribal  
11 lands for other purposes, the Supreme Court has upheld the  
12 imposition of taxes or the assessment of special fees. See  
13 Merrion v. Jicarilla Apache Tribe (severance tax on non-  
14 Indian mining operation on reservation lands) and Montana v.  
15 United States (exclusion of nonmembers from hunting on tribal  
16 lands). Likewise, this circuit has upheld tribal economic,  
17 health and welfare regulations. See Cardin v.  
18 De La Cruz, 671 F.2d 363 (9th Cir.) (building, health and  
19 safety regulations applied to nonmember business located on  
20 fee lands within the reservation), cert. denied, \_\_\_\_\_ U.S.  
21 \_\_\_\_\_, 103 S.Ct. 293 (1982); Confederated Salish and Kootenai  
22 Tribes v. Namen, 665 F.2d 951 (9th Cir.) (regulation of  
23 riparian rights of non-Indians), cert. denied, \_\_\_\_\_ U.S.  
24 \_\_\_\_\_, 103 S.Ct. 314 (1982).

25 In Montana, the Court permitted the Crow Tribe  
26 to regulate hunting by nonmembers on tribal lands but did not

1 permit the Tribe to prohibit nonmembers from hunting on  
2 reservation lands owned in fee by nonmembers. Montana  
3 v. United States, 450 U.S. at 566-67. Three reasons were  
4 offered for this distinction.

5 First, the non-Indians, who were  
6 hunting and fishing on non-Indian  
7 fee lands, had not '[entered into]  
8 any agreements or dealings with the  
9 Crow Tribe so as to subject themselves  
10 to tribal civil jurisdiction.'

11 Second, there had been no suggestion  
12 that the hunting and fishing activities  
13 on non-Indian fee land so '[threatened]  
14 the Tribe's political or economic  
15 security as to justify tribal regula-  
16 tion.' Finally, the complaint had  
17 failed to allege that such activities  
18 '[imperiled] the subsistence or welfare  
19 of the Tribe.'

20 Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d at 592  
21 (citations omitted).

22 Applying these standards, we conclude that the  
23 State, not the Tribe, has the authority to regulate the use  
24 of excess Chamokane Basin waters by non-Indians on non-  
25 tribal, i.e., fee, land. Our review reveals no consensual  
26 agreement between the non-Indian water users and the Tribe  
which would furnish the basis for implication of tribal  
regulatory authority. We find no conduct which so threatens  
or has such a "direct effect on the political integrity, the  
economic security, or the health or welfare of the Tribe,"  
as to confer tribal jurisdiction. Montana v. United States,  
450 U.S. at 566. The water rights adjudication which fur-  
nishes the basis for the instant inquiry quantifies and

1 preserves tribal water rights. The district court appointed  
2 a federal water master whose responsibility is to administer  
3 the available waters in accord with the priorities of all  
4 the water rights as adjudicated. See Jicarilla Apache  
5 Tribe v. United States, 601 F.2d 1116, 1122 (9th Cir. 1979).  
6 The district court recognized the importance of the tribal  
7 fishery and has awarded non-consumptive water rights to  
8 preserve it. The tribe is, of course, entitled to utilize  
9 its water for any lawful purpose. Colville Confederated  
10 Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981). If the  
11 tribe chooses to use water reserved for irrigation in a non-  
12 consumptive manner, it does not thereby relinquish any of its  
13 water rights to state permittees or subject the exercise of  
14 its rights to state regulation. The state may regulate only  
15 the use, by non-Indian fee owners, of excess water. Any  
16 permits issued by the state would be limited to excess water.  
17 If those permits represent rights that may be empty, so be  
18 it.

19 It is evident, however, that the political  
20 and economic welfare of the Tribe will not suffer adverse  
21 impact from the state-regulated use of surplus waters by  
22 nonmembers on non-Indian lands. Instead the factual  
23 situation points in favor of state regulation. First, no  
24 direct federal preemption of state regulation has occurred.  
25 No federal statute or regulatory scheme expressly or  
26 impliedly governs water use by non-Indians on the Spokane



1 Reservation. Second, the balance of interest weighs most  
2 heavily in favor of the state.

3 The instant situation is contrary to that  
4 addressed by this circuit in Colville Confederated Tribes v.  
5 Walton, 647 F.2d 42 (1981). In Walton, we determined that  
6 state regulation of the water system was preempted when  
7 viewed in light of the Colville's right to self-government.  
8 Walton, 647 F.2d at 52. The Walton decision recognized the  
9 general rule of deference to state water law. 647 F.2d at  
10 53. Walton rested on a determination that "deference is not  
11 applicable to water use on a federal reservation, at least  
12 where such use has no impact off the reservation." Id.  
13 (citing EPC v. Oregon, 349 U.S. at 448). Although  
14 recognizing that the usual policy of deference

15 stems in part from the need to permit  
16 western states to fashion water rights  
17 regimes that are responsive to local  
18 needs and in part from the 'legal  
19 confusion that would arise if federal  
20 water law and state water law reigned  
21 side by side in the same locality,'

22 the Walton court found neither rationale applicable to the  
23 matter. Id. (citing California v. United States, 438 U.S.  
24 650, 653-54 (1978)). In accordance with its determination  
25 that neither of the policy considerations supporting defer-  
26 ence to state jurisdiction would be fulfilled by permitting  
state regulation of the No Name System, the Walton court  
held such jurisdiction preempted by the creation of the  
Colville Reservation. Id.

1 The Walton decision was compelled by the  
2 geography and hydrology of the No Name Basin and its  
3 relationship to the Colville Reservation. The reservation  
4 lands in question were allotted, not opened for entry and  
5 settlement. Id. at 53. The No Name hydrological system is  
6 non-navigable and is located entirely within the reservation.  
7 Id. at 52. Validation of the state-issued permits claimed by  
8 Walton could have jeopardized the agricultural use of  
9 downstream tribal users as well as the existence of the  
10 tribal fishery. Id. In essence, the interest of the Tribe  
11 in regulation of the waters of the No Name Basin was  
12 "critical to the lifestyle of its residents and the develop-  
13 ment of its resources." Id.

14 The district court noted, and we agree, that  
15 because water per se lies within the exterior boundaries of  
16 an Indian reservation does not necessarily negate a state's  
17 interest in overseeing its usage along with the other in-  
18 state water systems. Washington is obligated to regulate and  
19 conserve water consumption for the benefit of all its  
20 citizens, including those who own land within a reservation  
21 in fee. See 25 U.S.C. § 349. Therefore, the state's special  
22 concern is shared with, not displaced by, similar tribal and  
23 federal interests when water is located within the boundaries  
24 of both the state and the reservation.<sup>1</sup> The weight of the  
25 state's interest depends, in large part, on the extent to  
26 which waterways or aquifers transcend the exterior

1 boundaries of Indian country.

2 In Walton, the stream in question was small,  
3 non-navigable, and located entirely within the reservation  
4 and, as noted, water use by non-Indians would impact tribal  
5 agriculture and fisheries. Thus, even though some portion of  
6 the creek was found to be surplus to the tribe's require-  
7 ments, state regulation of the remaining supply could create  
8 jurisdictional confusion and violate tribal sovereignty. In  
9 contrast, Chamokane Creek arises outside of the Spokane  
10 Indian Reservation and its course, for a good deal of its  
11 length, continues outside of that reservation. When the  
12 creek comes to the reservation, it forms the eastern  
13 boundary, and much of the reservation land with state water  
14 rights is immediately adjacent to the creek. The creek then  
15 separates from the reservation boundary, flowing into the  
16 Spokane River and eventually into the Columbia River and to  
17 the Pacific Ocean.

18 The facts in this case are readily  
19 distinguishable from the facts in the Walton decision. By  
20 weighing the competing federal, tribal and state interests  
21 involved, it is clear that the state may exercise its  
22 regulatory jurisdiction over the use of surplus, non-reserved  
23 Chamokane Basin waters by nonmembers on non-Indian fee lands  
24 within the Spokane Indian Reservation. Central to our  
25 decision is the fact that the interest of the state in  
26 exercising its jurisdiction will not infringe on the tribal

1 right to self-government nor impact on the Tribe's economic  
2 welfare because those rights have been quantified and will be  
3 protected by the federal water master. Additionally, in view  
4 of the hydrology and geography of the Chamokane Creek Basin,  
5 the State of Washington's interest in developing a compre-  
6 hensive water program for the allocation of surplus waters  
7 weighs heavily in favor of permitting it to extend its  
8 regulatory authority to the excess waters, if any, of the  
9 Chamokane Basin. State permits issued for any such excess  
10 water will be subject to all preexisting rights and those  
11 preexisting rights will be protected by the federal court  
12 decree and its appointed water master. We do not believe  
13 there is any realistic infringement on tribal rights and  
14 protected affairs. If there is any intrusion, it is minimal  
15 and permissible under all of the circumstances of this case.

### 16 III. CONCLUSION

17 For the foregoing reasons, we AFFIRM in part and  
18 REVERSE in part and REMAND for further proceedings in  
19 accordance with this decision.  
20  
21  
22  
23  
24  
25  
26

FOOTNOTES

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1. In arguing that tribal regulatory authority over all water within the reservation was essential, the tribe raised the possibility that because land owned in fee occupied most of the waterfront property within the reservation, state regulation of water use on fee land could effectively prevent the tribe from exercising its water rights. We conclude that by appointing a water master charged with protecting all water rights and ensuring compliance with the court decree, the district court provided adequate safeguards. The mere issuance of a state permit does not impinge on tribal rights. If Washington were to approve permits that granted rights to use non-existent water or infringed on the tribe's prior water rights, the water master would be obliged to modify them or to give them no effect.