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Memorandum Opinion and Order Filed in the US District Court, Eastern District of Washington

Eastern District of Washington, District Court

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July 23, 1979

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,)
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 Plaintiff,)
)
 SPOKANE TRIBE OF INDIANS,)
)
 Plaintiff-in-Intervention,)
)
 -vs-)
)
 BARBARA J. ANDERSON, et al,)
)
 Defendants.)

No. 3643

MEMORANDUM OPINION
AND ORDER
FILED IN THE
U. S. DISTRICT COURT,
Eastern District of Washington

JUL 23 1979

J. R. FALLQUIST, Clerk
Deputy.

The United States brought this action on its own behalf and as trustee for the Spokane Tribe of Indians to adjudicate the rights in and to the waters of Chamokane Creek and its tributaries. The Court permitted the Spokane Tribe to intervene as a plaintiff. Defendants include the State of Washington in its governmental and proprietary capacities and all other persons and corporations that claim an interest in the waters of Chamokane Creek, its tributaries, or its groundwater basin.^{1/} Jurisdiction lies in this Court under 28 U.S.C. §1345.

All parties to the litigation claim water in the

^{1/} In this opinion, the term "Chamokane basin" is used below to refer to the entire system, including the creek, its tributaries, and its ground water basin.

1 Chamokane Creek area, either based upon Tribal reserved
2 water rights or state appropriative rights, and the plaintiffs
3 seek other relief in aid of their asserted water rights.
4 Because a description of the nature of the Chamokane Creek
5 drainage system will be helpful in understanding the Court's
6 adjudication of water rights within the area, the first
7 section of this opinion includes the Court's findings about
8 the Chamokane Creek basin. Next the parties' claims concern-
9 ing water are discussed and determined in the following
10 order: first, plaintiffs' claim to water, including the
11 Indians' reserved water rights claims and the United States'
12 water claim; second, defendants' claims to water pursuant to
13 state law; and third, the plaintiffs' other requested relief,
14 including request for permission to modify the judgment,
15 request to enjoin the State from exercising jurisdiction
16 over water rights within the basin, and request for appoint-
17 ment of a Water Master.

18 THE CHAMOKANE CREEK BASIN

19 Chamokane Creek has a drainage area of 178 square
20 miles. The drainage basin was formed by glacial action and
21 is bounded on the east by granite walls and on the west by
22 basalt. A granite dike, located approximately one and one-
23 half miles north of the mouth of the creek, forms the
24 southern wall of the basin. These physical barriers keep
25 the ground water within the basin system.

26 The headwaters of the creek lie in the Huckleberry
27 Mountains north of the Spokane Indian Reservation. The
28 creek flows eastward through the Camas Valley in what is
29 known as the Upper Chamokane area, carrying runoff from the
30 mountains and precipitation which finds its way into the
31 surface flow. Near the town of Springdale, Washington, the
32 creek turns southeastward. At the northern boundary of the

1 Spokane Reservation the creek flows south and southwesterly
2 through the Mid-Chamokane area (Walker's Prairie) to Chamokane
3 Creek Falls. The creek flows continuously in the northermost
4 two-mile section of the Mid-Chamokane area, and then for the
5 next five miles is intermittent and is dry during the summer.
6 At the end of the five mile intermittent-flow area, just
7 above Ford, Washington, and for the next three miles, massive
8 springs with a regular flow throughout the year feed the
9 creek which flows to the falls. The ground water flow from
10 the basin drainage system surfaces either at the massive
11 springs or at the falls. The water then flows from the
12 falls another 1.5 miles to the mouth of the creek, where it
13 joins the Spokane River. The area between the falls and the
14 mouth of the creek is known as the Lower Chamokane area.

15 The creek and the ground water system are inter-
16 related. Water enters the Chamokane Creek basin in the form
17 of precipitation. Precipitation in the area either sinks
18 into the ground, runs off, or is lost through evaporation or
19 evapotranspiration. The precipitation absorbed into the
20 ground in the Upper Chamokane area becomes part of an under-
21 ground reservoir unconnected to the Chamokane drainage
22 system. The surface flow of the creek from the Upper Chamokane
23 area which reaches the Mid-Chamokane region does become part
24 of the Chamokane system, either by entering the basin ground-
25 water system as recharge or by remaining as surface flow and
26 exiting over the falls, usually as spring floods. Precipita-
27 tion falling on the Mid-Chamokane region which is not lost
28 by evaporation or evapotranspiration also becomes part of
29 the groundwater system or flows out over the falls as
30 spring surface runoff. In the Lower Chamokane area the
31 steep canyon sides prevent much contribution to the creek
32 flow from runoff.

1 The recharge to the basin aquifer, which comes
2 from precipitation, varies from year to year. Water which
3 recharges the aquifer is partially withdrawn by manmade
4 diversions and the remainder exits over the falls. A
5 United States Geological Survey gauge below the falls measures
6 the total output of the drainage system, which averages
7 approximately 35,000 acre-feet per year. The impact on the
8 system from manmade water diversions can be calculated from
9 the USGS measurements.

10 Groundwater withdrawals in the Upper Chamokane
11 region have no impact upon the creek flow below the falls
12 because groundwater in this area is part of a separate
13 aquifer. Groundwater withdrawals in the Mid-Chamokane area,
14 however, eventually do reduce the lower creek flow. This
15 flow reduction occurs less immediately when the water removal
16 occurs a greater distance upstream from the falls. Although
17 the effect of groundwater removal near the massive springs
18 sometimes is immediate, the effect of groundwater removal
19 near the northern boundary of the reservation can be delayed
20 up to two years.

21 PLAINTIFFS' CLAIMS TO WATER

22 A. The Indians' Reserved Water Rights

23 When the United States sets aside a reservation of
24 land, it impliedly reserves water then unappropriated in
25 sufficient quantity to fulfill the purposes for which the
26 reservation was created. United States v. Winters, 207 U.S.
27 564 (1908). Where surface and groundwaters are hydraulically
28 related, as they are in this case, the reservation of water
29 applies to ground as well as surface water. Cappaert v.
30 United States, 426 U.S. 128, 142-143 (1976).

31 The plaintiffs claim that the Tribe holds reserved
32 water rights under the Winters doctrine for irrigation of

1 crops, for fishery, and for recreational and esthetic purposes.
2 In adjudicating the Tribe's reserved water rights for each
3 of these purposes, the Court must address three issues:
4 first, the validity of the Tribe's claim to a reserved water
5 right for the purpose asserted; second, the quantity of
6 water which is sufficient to fulfill the purpose; and third,
7 the priority date of the reserved right.

8 1. Reserved Water Rights for Irrigation

9 In determining whether plaintiff Tribe has a right
10 to sufficient water to irrigate all of the practicably
11 irrigable acres within the Chamokane Creek basin portion of
12 the Spokane Indian Reservation, the Court must first determine
13 whether irrigation of crops is one of the purposes for which
14 the reservation was created. The United States set aside
15 Indian reservations in the West in order to end the Indians'
16 nomadic lifestyles and to make them self-supporting agrarian-
17 based peoples. Arizona v. California, 373 U.S. 546, 599-601
18 (1963). One of the purposes for which Indian reservations
19 in Eastern Washington were established was to provide farms
20 to the Indians. See Colville Confederated Tribes v. Walton,
21 460 F. Supp. 1320, 1330 (E.D.WA. 1978), appeal docketed, No.
22 79-4309, 9th Cir., May 17, 1979. Because irrigation is
23 essential for farming in this area, the Court holds that
24 water for irrigation of crops was impliedly reserved at the
25 creation of the Spokane reservation.

26 One measure of the water impliedly reserved to
27 fulfill the purposes of an Indian reservation is the amount
28 of water necessary to irrigate all the practicably irrigable
29 acreage within the reservation. Arizona, supra at 599-601.
30 Although defendants assert that the Tribe may not claim
31 reserved water for acreage which was classified as timber or
32 grazing land under the Act of May 29, 1908, ch. 217, 35

1 Stat. 458, the Court rejects this argument. Indians should
2 be allowed to benefit from modern technology which permits
3 irrigation of land which formerly was not practicably
4 irrigable. Winters, supra; Arizona v. California, supra.
5 The Court also holds that the Tribe's decision not to use
6 Chamokane water for irrigation at this time, in order to
7 preserve the esthetic and fishery uses of the creek, does
8 not abrogate their right to use reserved water for irrigation
9 at a later date. Implied reserved water rights are open-
10 ended, and they need not be appropriated continuously and
11 put to beneficial use in order to be maintained. Arizona v.
12 California, supra.

13 In quantifying the plaintiffs' reserved water for
14 irrigation purposes, the Court finds that plaintiffs have
15 two tracts of practicably irrigable acreage on the reservation
16 within the Chamokane basin. One tract consists of 1,880
17 acres of bottom land and the other tract contains approximate-
18 ly 6,580 acres of bench land. Based upon the testimony
19 produced at trial, the Court finds that the water duty to
20 irrigate these acres is a maximum of three acre-feet per
21 year.

22 In general, the priority date for reserved water
23 rights is the date of the founding of the reservation.
24 Winters, supra. In Northern Pacific Ry. Co. v. Wismer, 246
25 U.S. 283 (1918), the Supreme Court recognized August 18,
26 1877, as the date of the establishment of the Spokane Indian
27 Reservation even though the Executive order setting aside
28 the reservation was not signed until January 18, 1881.
29 Therefore, August 18, 1877, unquestionably is the priority
30 date for reserved water for irrigation as to lands in the
31 Chamokane basin which have been held for the Indians contin-
32 uously since 1877.

1 Determining the priority date for land within the
2 reservation which has not been held continuously for the
3 Indians is more complex, however. Congress by the Act of
4 May 29, 1908, ch. 217, 35 Stat. 458, authorized the allotment
5 of lands on the Spokane Reservation to individual Indians
6 and opened up excess lands to homesteading by non-Indians.
7 Some land opened for homesteading was never claimed by
8 settlers and was later restored to the Tribe pursuant to the
9 Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121. Other
10 land passed from Indian ownership after allotment or home-
11 steading, was reacquired by the Tribe, and was later returned
12 to trust status by the Secretary of the Interior. See 25
13 U.S.C. § 487 (legislative authorization for return to trust
14 status, enacted originally as the Act of June 10, 1968, Pub.
15 L. 90-335, § 1(a)-(e), 82 Stat. 174).

16 As to the unclaimed homestead land restored under
17 the 1958 Act, the Court finds that the Tribe holds 28.7
18 irrigable acres of such land in the basin. The Court holds
19 that the priority date for water rights for these 28.7 acres
20 is August 18, 1877, the date of the founding of the reservation.
21 This date is appropriate because the land, although opened
22 for homesteading for a period of time, was treated identically
23 to the lands continuously held in trust by the United States
24 for the Tribe.

25 Of the land reacquired from non-Indians, 1,798.11
26 acres within the Chamokane basin have been returned to trust
27 status to date. The Court finds that 562 of these reacquired
28 acres are practicably irrigable. The Court further holds
29 that the priority date for water rights for reacquired land
30 is the date of reacquisition, rather than the earlier date
31 of the original creation of the reservation or the later
32 date of the statutory return to trust status. The date of

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the original creation of the reservation is not the priority date because the original purposes of the reservation, and therefore the implied reserved water rights for those purposes ceased to exist when the land passed out of Indian ownership. See Colville Confederated Tribes v. Walton, 460 F. Supp. at 1326-1329. The date of the enactment of the statute authorizing return of the land to trust status also is not the priority date because the statute merely "gave formal sanction to an accomplished fact." United States v. Walter River Irr. Dist., 104 F.2d 334, 338 (9th Cir. 1939). Once the Tribe reacquired original reservation land, the Tribe and the Department of Interior treated this land as any reservation land in trust status. This de facto status as part of the trust land on the reservation was simply confirmed by the 1968 Act (25 U.S.C. §487).

The Court finds that the priority date for reserved water for irrigation of the 562 reacquired acres, based upon the date of reacquisition, is as follows:

TRIBAL LANDS REACQUIRED FROM NON-INDIANS

Section Twp. & Range	Description, Tract No.	Date of Reacquisition	Irrigable Acreage
Sec. 35, T29N, R39E	E 1/2 S 1/4, T1000	3/24/42	15
Sec. 36, T29N R39E	SW 1/4, T1000 T1001	3/24/42 2/2/42	130
Sec. 2, T28N, R39E	Lots 1 & 2, S 1/2 NE 1/4, T1010	3/25/42	130
Sec. 23, T28N, R39E	Lot 2, S 1/2 SE 1/4 NE 1/4, NE 1/4, SE 1/4 T1007	2/7/42	30
Sec. 24, T28N R39E	Lots 7 & 8, T 1006	2/7/42	49
Sec. 27, T28N, R39E	E 1/2 SE 1/4, T 1012	7/16/45	15

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Sec. 34, T28N, R39E	NE 1/4, E 1/2 SE 1/4 T1012	7/16/45	15
Sec. 21, T29N, R40E	Lots 5 & 7, E 1/2 SW 1/4, E 1/2 SE 1/4 T 1001	2/2/42	20
Sec. 31, T29N, R40E	NW 1/4, W 1/2 NE 1/4 T1001	2/2/42	110
Sec. 2, T27N, R39E	Lots 6 & 9, NE 1/4 NW 1/4, S 1/2 NW 1/4, NW 1/4 SW 1/4, T 1001	2/2/42	48

In conclusion, this Court recognizes reserved water rights for irrigation of lands within the Chamokane basin on the Spokane Indian Reservation in the following amounts. The Tribe has a reserved right to a maximum of 23,694 acre-feet of ground or surface water from the basin each year for irrigation of the 7,898 irrigable acres with a priority date of August 18, 1877, the date of the creation of the reservation. For the 562 reacquired irrigable acres within the basin, the Tribe has a reserved right to a maximum of 1,686 acre-feet of water each year with a priority date of the date of reacquisition.

2. Reserved Water Rights for Fishing

Plaintiffs also assert a reserved right to sufficient water to preserve fish in the Creek. They therefore claim that one of the purposes for creating the Spokane Indian Reservation was to insure the Spokane Indians access to fishing areas and to fish for food. See, e.g., United States v. Winans, 198 U.S. 371 (1905).

The Court finds that maintenance of the creek for fishing was a purpose for creating the reservation. The United States acknowledged the importance of Chamokane Creek to the Spokane Indians by setting the eastern boundary of the reservation at the eastern bank of the creek, thus in-

1 cluding the breadth of the waterway within the reservation.
2 Fish remain a staple food in the diet of the Spokane Indians.
3 The Spokanes have reserved the exclusive right to take fish
4 from the part of Chamokane Creek contained within the reserva-
5 tion, and many Indians catch and use the native trout as a
6 food source.

7 The Court therefore holds that the Tribe has the
8 reserved right to sufficient water to preserve fishing in
9 Chamokane Creek.

10 The Court finds that the quantity of water needed
11 to carry out the reserved fishing purposes is related to
12 water temperature rather than simply to minimum flow. The
13 native trout cannot survive at a water temperature in excess
14 of 68°F. The minimum flow from the falls into Lower Chamokane
15 Creek which will maintain the water at 68°F varies, but is
16 at least 20 cfs. The Court therefore holds that the plain-
17 tiffs have a reserved right to sufficient water to maintain
18 the water temperature below the falls at 68°F or less,
19 provided that at no time shall the flow past the falls be
20 less than 20 cfs.

21 Although the usual priority date for reserved
22 water rights is the date of the creation of the reservation,
23 the priority date for the water reserved for fishing uses
24 arguably is even earlier. The Spokane Indians have used
25 this creek for fishing purposes since "time immemorial," and
26 therefore they claim a reserved water right with a priority
27 date of "time immemorial."

28 The priority date for reserved water for fishing
29 at the latest is the date of the creation of the reservation,
30 and the Court need not rule on whether the priority date is
31 "time immemorial." Under either priority date, the Tribe's
32 reserved water rights for fishing uses are superior to any

1 and all of defendant's claims. (See discussion of defendants
2 water claims, below.)

3 3. Reserved Water Rights for Esthetic and
4 Recreational Purposes

5 It is also unnecessary to determine whether one of
6 the purposes of the creation of the reservation was to
7 preserve the esthetic qualities and recreational potential
8 of the creek. The Court has determined above plaintiffs'
9 reserved right to the amount of water required to maintain
10 the water temperature below the falls at 68°F or less in
11 order to preserve fishing. This amount of water will also
12 suffice to preserve the creek's esthetic and recreational
13 qualities.

14 B. The United States' Water Claim

15 The United States, through its Bureau of Reclamation
16 Department of Interior, claims a right to water as the holder
17 of Surface Water Certificate No. 2831. This Certificate,
18 issued by the State of Washington, bears a priority date of
19 October 21, 1942. It authorizes the non-consumptive use of
20 10 cfs of the flow of Spring Creek, a tributary of Chamokane
21 Creek, for fish propagation. Because the authorization is
22 for the use of water outside exterior boundaries of the
23 Indian reservation, none of the parties in this action have
24 challenged the validity of this Certificate.

25 The Court holds that the United States has a valid
26 right to water as authorized in this Certificate.

27 DEFENDANTS' CLAIMS TO WATER

28 Defendants assert various claims to water which
29 rely on water rights certificates, permits, or applications
30 issued by the State of Washington. Plaintiffs resist those
31 claims of defendants which relate to land within the exterior
32 boundaries of the reservation, asserting that the state has

1 no jurisdiction to determine water rights for uses within
2 the exterior boundaries of the reservation. Plaintiffs do
3 not challenge the state's jurisdiction to issue water permits
4 for uses outside the reservation.

5 This Court resolved the issue of state jurisdiction
6 over water uses on land within Indian reservations in
7 Colville Confederated Tribes v. Walton, supra. The Court
8 therein determined that the state has jurisdiction over non-
9 Indian water interests within the reservation so long as
10 assertion of this jurisdiction is not preempted by federal
11 law and does not infringe upon tribal rights to self-govern-
12 ment.

13 Defendants who have perfected their water claims
14 under state law therefore have valid water rights regardless
15 of whether their lands are located within or outside the
16 exterior boundaries of the reservation. The Court finds
17 that water claims of two defendants have not been perfected
18 under state law. The claims of the Washington State Department
19 of Natural Resources are not perfected, nor are those of
20 Boise Cascade, with one exception. Boise Cascade perfected
21 water rights only for diversion point 14 (Certificate 2258).

22 The Court's findings concerning defendants' recog-
23 nized water rights are stated in the chart below. The chart
24 lists defendants' recognized water rights in order of
25 priority date. The rejected claims are omitted from the
26 chart. In addition to the information contained in the state
27 authorization, the chart includes a finding as to the effect
28 of the maximum exercise of each water right on the flow of
29 Chamokane Creek below the falls. The purpose of making this
30 latter finding is to aid in administering the water rights
31 so as to maintain the flow of the Creek below the falls at
32 the temperature and level required above.

DEFENDANTS' RECOGNIZED CLAIMS TO WATER
FROM CHAMOKANE BASIN

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Priority Date	Authorization	Issued to	For Use On	Max. Use	Effective Reduction of flow of Lower Creek
12/4/25	W.S.S.W. Cert. No. 294	Arna E. Cartier Van Dissel	land N. of reservation	4.0 cfs	1.08 cfs
5/13/40	W.S.S.W. Cert. No. 1675	Geo. Russell	land N. of reservation	.01 cfs	.01 cfs
5/15/40	W.S.S.W. Cert. No. 1725	Chris Mickelson	land N. of reservation	.01 cfs	.01 cfs
2/12/45	W.S.S.W. Cert. No. 2258	Fred J. Werth	land N. of reservation	.01 cfs	.01 cfs
7/8/46	W.S.S.W. Cert. No. 3386	John Smith	land E. of reservation	.02 cfs	.02 cfs
10/21/46	W.S.S.W. Cert. No. 8600	M.B. Echelbarger	land NE. of reservation	1.0 cfs	.27 cfs
3/17/50	W.S.S.W. Cert. No. 4872	Edward Franks	land N. of reservation	.20 cfs	.08 cfs
7/21/50	W.S.S.W. Cert. No. 6394	C.W. Noack	land N. of reservation	.80 cfs	.01 cfs
2/1/51	W.S.G.W. Cert. No. 4891A	Robert J. Seagle	land E. of reservation	1150 gal/min up to 1400 af/yr	.35 cfs
8/1/56	W.S.S.W. Cert. No. 7142	Dawn Mining	land on reservation	1.0 cfs	1.0 cfs
9/6/56	W.S.G.W. Cert. No. 2768	Ford Dev. Co.	land E. of reservation	100 gal/min up to 160 af/yr	.07 cfs
3/20/58	W.S.S.W. Cert. No. 8826	Urban Schaffner	land on reservation	.24 cfs up to 80 af/yr	.08 cfs
7/27/62	W.S.S.W. Cert. No. 9100	Arthur Miller	land N. of reservation	.7 cfs up to 105 af/yr	.20 cfs
5/19/67	W.S.S.W. App. No. 20248	Kerneth Swiger	land E. of reservation	.20 cfs	.06 cfs
9/17/68	W.S.S.W. Per. No. 9361	James Newhouse	land E. of reservation	1500 gal/min up to 648 af/yr	.90 cfs
1/30/69	W.S.G.W. Per. No. 9563	Peter Welk	land E. of reservation	50 gal/min. up to 20 af/yr	.04 cfs

Legend: af/yr - acre-feet per year
cfs - cubic feet per second

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(Defendants' recognized claims to water, continued)

3/28/69	W.S.S.W. Per. No. 15894	A.L. & F.L. Smithpeter	land on reservation	2.5 cfs to cease when flow of creek below 20 cfs	2.5 cfs
8/6/69	W.S.G.W. App No. 10344	Leonard Lyons	land E. of reservation	1000 gal/ min.	.60 cfs
6/25/69	W.S.S.W. App. No. 21786	Robt. Seagle	land E. of reservation	.33 cfs	.10 cfs
9/3/69	W.S.G.W. App. No. 10386	James Swiger	land E. of reservation	1000 gal/ min.	.60 cfs
11/18/69	W.S.G.W. App. No. 10506	Jess Sulgrove, Jr.	land E. of reservaation	2500 gal/ min. up to 7 af/yr	1.50 cfs
9/11/70	W.S.G.W. App. No. 11227	Gust & Clara Willging	land E. of reservation	2000 gal/ min up to 10 af/yr	1.20 cfs
3/9/71	W.S.S.W. App. No. 22922	Alice Liepold & Frances Lindberg	land E. of reservation	.01 cfs	.01 cfs
4/2/71	W.S.G.W. App. No. 11753	Howard & Harold Dixon	land N. of reservation	100 gal/ min.	0 cfs
5/20/71	W.S.G.W. App. No. 11905	Floyd Norris	land NE of reservation	2000 gal/ min	1.20 cfs
6/23/71	W.S.G.W. App. No. 11989	B. Dituri	land on reservation	1800 gal/ min.	1.08 cfs
11/10/71	W.S.S.W. App. No. 23509	Henry Brown	land N. of reservation	.12 cfs	.04 cfs
12/3/71	W.S.S.W. App. No. 23551	John Luper	land NE of reservation	2.0 cfs not to exceed 250 af/yr	.54 cfs
7/3/72	W.S.G.W. App. No. 320422	Urban Charles Schaffner	land on reservation	1200 gal/ min.	.72 cfs
9/28/72	W.S.G.W. App. No. 320536	Paul Duddy	land on reservation	1000 gal/ min.	.60 cfs
10/15/73	W.S.G.W. App. No. 321939	Richard & Patricia Krieger	land N. of reservation	1.0 cfs nonconsumptive	0 cfs
				
				
				
				

1 PLAINIFFS' OTHER REQUESTS FOR RELIEF

2 A. Modification of Judgment

3 Plaintiffs seek permission to apply to this Court
4 for modification of the judgment entered whenever the Tribe's
5 needs for waters of Chamokane basin exceed the amount reserved
6 by the decree. The judgment entered is a final adjudication
7 of the water rights in the Chamokane Creek basin. The
8 quantification of the Tribe's reserved rights is based upon
9 the amount necessary to irrigate "all the practicably irrigable
10 acreage on the reservation," and as such is designed to meet
11 the future as well as the present needs of the Tribe.
12 Arizona v. California, 373 U.S. 546, 500 (1963). However,
13 the Court will retain jurisdiction as was done in Arizona v.
14 California, 373 U.S. 340, 353 (1964). Such retention of
15 jurisdiction permits the Tribe to apply for a modification
16 of the judgment on showing of a substantial change in circum-
17 stances, unanticipated in the Court's quantification herein,
18 resulting in a need for water greater than the amount
19 reserved for future needs.

20 B. The State's Exercise of Jurisdiction Over
21 Rights Within the Basin

22 The plaintiffs also argue that water within the
23 Chamokane basin is over-appropriated, and on this basis seek
24 to enjoin the state from issuing additional certificates or
25 permits or accepting additional applications for use of
26 water on lands within the basin. The Court denies this
27 relief. Although it presently appears that the water from
28 the Chamokane basin may be over-appropriated in light of
29 this adjudication, and thus that the State may be creating
30 false hopes for persons permitted to apply for water, the
31 challenged state actions will not cause irreparable harm to
32 the parties to this litigation. Any such future applications,

1 permits or certificates are subject to existing rights and
2 thus have no effect upon the herein adjudicated water rights
3 of the parties.

4 C. Appointment of a Water Master

5 Plaintiffs also seek appointment of a Water Master
6 to assure that water is used in a manner consistent with the
7 judgment to be entered herein. The Court finds that appoint-
8 ment of such a Master is appropriate and necessary, and
9 therefore grants this relief. Provisions relating to appoint-
10 ment of a Master and the powers and duties of the Master are
11 listed below.

12 This memorandum decision incorporates the Court's
13 findings and conclusions pursuant to F.R.C.P. 52(a).

14 Plaintiffs shall prepare a judgment in accordance
15 with this opinion and submit it to the Court within 20 days.
16 The judgment shall incorporate the following general pro-
17 visions in addition to other appropriate provisions:

18 1. Water for irrigation may be used at any time,
19 unless restricted by a state certificate or permit upon
20 which the water rights are based, provided that the amount
21 applied to the land during any calendar year shall not
22 exceed the amount herein awarded to that land.

23 2. Water for domestic use is not included within
24 the judgment, as it is de minimus and should always be
25 available.

26 3. In any case where water is obtained from two
27 or more sources, the aggregate of the combined waters from
28 such sources which may be used shall not exceed the amount
29 permitted for such use as herein determined.

30 4. The parties shall promptly confer and attempt
31 to agree upon selection of a Water Master, and shall notify
32 the Court promptly if agreement is obtained. If the parties

1 are unable to agree to a selection, each party shall submit
2 to the Court within 20 days of the date of the judgment not
3 more than three proposed names with accompanying background
4 information. The Court will then appoint a Water Master to
5 carry out and enforce the foregoing provisions and the
6 instructions and orders of the Court. If any proper orders,
7 rules, or directions of such Water Master, made in accordance
8 with and for the enforcement of the judgment, are disobeyed
9 or disregarded, the Water Master is hereby empowered and
10 authorized to cut off the water of owners or water users so
11 disobeying or disregarding such proper orders, rules or
12 directions, and the Water Master shall promptly report to
13 the Court the said action and the circumstances leading
14 thereto and connected therewith. The parties may submit
15 within 20 days proposed terms of employment of said Water
16 Master, along with terms for the payment of expenses and
17 compensation of the Water Master.

18 5. Whenever the necessities of the situation
19 appear to the Water Master to so require, the Master may
20 require the owners of the water rights adjudged herein to
21 install and properly maintain at their own expense a reliable,
22 sufficient measuring device whereby the water diverted or
23 pumped may be properly regulated and correctly measured.

24 6. The Master may require installation of devices
25 to measure and record water temperature below the falls in
26 order to regulate water diversions in accordance with this
27 judgment. The cost of making such measurements shall be part
28 of the expenses of the Water Master and shall be borne by
29 the parties in the same fashion as other expenses of the
30 Master.

31 7. The quantities of water permitted to be
32 diverted or pumped pursuant to the priorities herein estab-

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lished are subject to the obligations of said owners to divert and use water only at such times as needed and only in such amounts as may be required under a reasonable, economical and beneficial use.

8. Persons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law, the point of diversion and the place, means, manner or purpose of use of the waters to which they are so entitled or any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed herein.

9. Whenever any person or party is not receiving the amount of water to which he is entitled under this judgment, the Water Master shall, upon request, regulate the necessary headgates, ditches and other works (including pumps) used for the diversion and application of such waters so as to apportion the same as herein provided, and for that purpose may enter upon the lands of any and all persons having rights adjudicated herein.

10. The parties, persons, and corporations hereinbefore named, and all persons claiming by, through or under them and their successors, are hereby forever enjoined and restrained from asserting or claiming any rights in or to the waters of Chamokane Creek, its tributaries, or its groundwater basin, except the rights specified, determined, and allowed herein; and each and all of said parties, persons and corporations, and all persons claiming by, through or under them, are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of Chamokane Creek or its tributaries or with its groundwater basin so as to prevent or interfere in any manner with the diversion, use and enjoyment of the waters

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of any of the other persons or parties as allowed or adjudicated herein, having due regard to the relative priorities herein set forth; and each of said parties and persons is hereby enjoined and restrained from ever taking, diverting, using or claiming any of the water so decreed, in any manner or at any time so as to interfere in any way with the prior rights of any other persons or parties having prior rights under this judgment, as herein set forth, until such person or parties having prior rights have received for their several uses the waters hereby allowed and adjudged to them.

11. The several parties to this suit shall pay and bear their own costs.

12. The Court retains jurisdiction of this suit for the purpose of any order or modification of the judgment that may be deemed proper in relation to the subject matter in controversy.

DONE BY THE COURT this 3rd day of July, 1979.

[Signature]
United States District Judge