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

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1 UNITED STATES DISTRICT COURT

2 FOR THE EASTERN DISTRICT OF WASHINGTON

3 THE UNITED STATES OF AMERICA, )

4 Plaintiff, )

CIVIL NO. 3643

5 v. )

6 BARBARA J. ANDERSON, et al., )

7 Defendants. )

8  
9 BRIEF OF NATURAL RESOURCES IN  
10 OPPOSITION TO PLAINTIFFS'  
11 OPENING BRIEFS

12  
13 FILED IN THE  
U. S. DISTRICT COURT,  
Eastern District of Washington

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1 UNITED STATES DISTRICT COURT

2 FOR THE EASTERN DISTRICT OF WASHINGTON

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

8 I. INTRODUCTION - STATEMENT OF THE CASE

9 This suit was filed by the United States on its own behalf and  
10 as trustee for the Spokane Tribe of Indians. Subsequent to its in-  
11 itiation, the Spokane Tribe was permitted to intervene. The defend-  
12 ants are all persons and corporations who might have an interest in  
13 the waters of Chamokane Creek deriving from rights vested under state  
14 law. Also included as defendants are the Department of Ecology and  
15 the Department of Natural Resources of the State of Washington.  
16 Ecology is mandated, under state law, to implement and administer the  
17 state's laws, rules and regulations pertaining to the appropriation  
18 and use of water. Thus, Ecology represents the State of Washington  
19 in its governmental or regulatory function.<sup>1</sup> The Department of  
20 Natural Resources, on the other hand, has the duty to manage state  
21 lands as a trustee for the benefit of the common school fund and  
22 other constitutionally specified trust purposes. Natural Resources,  
23 therefore, represents the State in this proceeding in its proprietary  
24

25  
26 <sup>1</sup> For a description of the statutory duties and authority of Ecology,  
27 See: RCW, Title 90.

1 capacity.<sup>2</sup>

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

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

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

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

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

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

21 F. Declare that the implied reserved right to irrigation water  
22 extends to all lands within the Reservation regardless of their own-  
23 ership status or statutory classification. (U. S. Brief, pp. 46, 47,  
24 50, 52, 58);

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

29 H. Declare that the United States and the Tribe possess exclus-  
30 ive jurisdiction to manage and control all waters (ground and sur-  
31 face) which arise in the Chamokane watershed whether on or off the  
32

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

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

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

4 Defendant, Natural Resources, will respond to these often in-  
5 genious arguments and will substantiate its position in opposition to  
6 the broad, generalized and, indeed, startling relief sought by the  
7 United States and the Spokane Tribe of Indians. Natural Resources  
8 will generally limit its response to the protection of its propri-  
9 etary trust land interests. Ecology will separately address questions  
10 of jurisdiction to issue water permits and perform water management  
11 activities on the Spokane Reservation.

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

14 The nature of "title" which the Indians possessed to the lands,  
15 waters and resources of what is now the State of Washington prior  
16 to the coming of the white man is the predicate to this case. This  
17 concept (aboriginal title) has been the subject of a number of judi-  
18 cial decisions. Prehistoric Indian occupancy predated present  
19 governmental arrangements. Indians were allowed to continue their  
20 way of life on their traditional tribal lands. Aboriginal title is a  
21 right to continue, at least temporarily, a way of life for the In-  
22 dians. The gradual transition of a tribe into a self-sustaining  
23 status would necessarily take years. Unless the Indians were per-  
24 mitted to maintain their way of life and pursue their gathering  
25 culture, they would starve. Two possible lines of reasoning are  
26 available to analyze the nature of aboriginal title possessed by  
27 the Indians. Tlingit and Haida Indians v. United States, 389 F.2d  
28 778 (Ct. Cl. 1968) held that no damages could be awarded for the loss  
29 of exclusive fishing rights which were based upon "aboriginal owner-  
30 ship of the land". Other courts have held that, where established by  
31 historical use, aboriginal title includes the right to beneficially  
32 use lands and waters and pursue a gathering culture where those rights  
33 have not been extinguished by the United States, by treaty or otherwise.

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

10 "It very early became accepted doctrine in this Court  
11 that although fee title to the lands occupied by Indians  
12 when the colonists arrived became vested in the sovereign  
13 - - first the discovering European nation and later the  
14 original states and the United States - - a right of  
15 occupancy in the Indian tribes was nevertheless recognized.  
16 That right, sometimes called Indian title and good against  
17 all but the sovereign, could be terminated only by sovereign  
18 act. Once the United States was organized and the constitu-  
19 tion adopted, these tribal rights to Indian land became  
20 the exclusive province of the federal law. Indian title,  
21 recognized to be only a right of occupancy, was extinguish-  
22 able only by the United States." (Emphasis supplied)

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

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34 <sup>3</sup> These decisions, because of their pivotal importance, are provided  
35 as an attachment to this brief as appendices.

1 See: United States v. Washington, 384 F.Supp. 312 (D.C. Wash. 1974)  
2 The relative rights of Indian tribes and the various states are,  
3 therefore, usually determined by interpreting treaties between the  
4 federal government and the respective tribes. Antoine v.  
5 Washington, 420 U.S. 194 (1975). The nature of aboriginal rights  
6 and the power of the United States to extinguish or terminate those  
7 rights was further explained in Tee-Hit-Ton Indians v. United States,  
8 348 U.S. 272 (1955). The Court stated, at p. 279:

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

20 The governmental power to extinguish Indian aboriginal title was  
21 summarized in United States v. Santa Fe Railroad Company, 314 U.S.  
22 339, 347 (1941):

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

26 Aboriginal rights of occupancy are essentially a revokable  
27 privilege granted by the United States and which may only be exting-  
28 uished by action of the United States. Indian Title: The

30 <sup>4</sup> The rationale of Tee-Hit-Ton, supra, has been consistently follow-  
31 ed. Cowlitz Tribe of Indians v. City of Tacoma, 235 F.2d 625 (9th  
32 Cir. 1957); Prairie Band of Potawatomi Indians v. United States,  
33 165 F. Supp. 139 (Ct. Cl. 1958); Minnesota Chippewa Tribe v. United  
States, 315 F.2d 906 (Ct.Cl. 1963). See also: Duwamish Indians, et  
al. v. United States, 79 Ct. Cl. 530 at 598 (1934).



1 Rights of American Natives in Land They Have Occupied Since Time  
2 Immemorial, 75 Columbia L. Rev. 655 (1975). In this article the  
3 author concludes that the power is lodged exclusively in Congress  
4 which can even arbitrarily appropriate Indian title and at that such  
5 an appropriation is not reviewable by the courts. Other decisions  
6 which explain and apply this concept of aboriginal title are: Lone  
7 Wolf v. Hitchcock, 187 U.S. 553 (1903); Creek Nation v. United States,  
8 302 U.S. 620 (1938); Shoshone Tribe v. United States, 299 U.S. 476  
9 (1937); Menominee Tribe v. United States, 391 U.S. 404 (1968);  
10 United States v. Kabinto, 456 F.2d 1087 (9th Cir. 1972); Unitah  
11 and White River Bands v. United States, 152 F. Supp. 953 (Ct. Cl.  
12 1957).

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

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

1 entered into between the United States and the Spokane Indians on  
2 March 18, 1887 (27 Stat. 120) by which the Indians ceded all their  
3 "right, title and claims which they now have, or ever had, to any  
4 and all lands lying outside of the Indian reservations in Washington  
5 and Idaho territory, and they hereby agree to remove to and settle  
6 upon the Coeur d 'Alene reservation in the territory of Idaho".  
7 9 Ind. Cl. Comm. at 244 (Finding of Fact No. 15). The cession of  
8 aboriginal title became binding upon its ratification by Congress  
9 on July 13, 1892. (Finding of Fact No. 16).

10 The territorial extent of federal extinguishment of Spokane  
11 tribal aboriginal title is described in Finding of Fact No. 31 of  
12 the Commission opinion. 9 Ind. Cl. Comm. at 252-253. The area  
13 described encompasses the entire Chamokane Creek watershed. The  
14 territorial extent of the Tribe's aboriginal title was challenged  
15 on appeal. Spokane Tribe v. United States, 163 Ct. Cl. 58 (1963).  
16 The Court of Claims opinion reveals that the only issues raised by  
17 the Tribe on its appeal were questions relating to the extent of  
18 the lands over which the Spokane Tribe had aboriginal title. Basic-  
19 ally, the Court of Claims agreed with the arguments of the Spokane  
20 Tribe and found that boundaries drawn by the Commission were re-  
21 strictive and that the Tribe actually held aboriginal title to a  
22 larger area which likewise included the entire Chamokane Creek water-  
23 shed.

24 Upon remand, the Commission entered Findings of Fact on a  
25 compromise settlement reached between the Spokane Tribe and the  
26 United States. 17 Ind. Cl. Comm. 584 (1967). The Commission  
27 entered an Order Approving Compromise Settlement between the parties  
28 and rendered final judgment in favor of the Tribe in the sum of  
29 \$6,700,000. 17 Ind. Cl. Comm. 612 (1967).<sup>5</sup>

30  
31  
32 <sup>5</sup> The Findings and Order awarding attorney fees are reported in  
33 18 Ind. Cl. Comm. 414 (1967).

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

8 In Rogue River Tribe of Indians v. United States, 89 F. Supp.  
9 798 (Ct. Cl. 1950) the court considered the value of water in determ-  
10 ining fair market value on the date of the taking by the United  
11 States.

12 "The Umpqua River enters the reservation near its  
13 southeast corner, flows through it in an irregular  
14 course to the north and northwest and then west into  
15 the Pacific Ocean. There are a large number of streams  
16 and creeks in the reservation which run into the river.  
17 The town of Scottsburg was just to the northwest of the  
18 reservation, and the town of Roseburg to the southeast.  
19 The Umpqua River was an important avenue of transportation  
20 at that time before the building of railroads, and was  
21 navigable from the Pacific Ocean to Scottsburg, about  
22 20 miles from the reservation. There was evidence of  
23 navigation by small craft on the river through the  
24 reservation between Scottsburg and Roseburg. Although  
25 the greater portion of the reservation was best adapted to  
26 the growing of timber, there was good agricultural and  
27 grazing land in the long narrow valleys and along the  
28 river and creeks. The soil was fertile and well adapted  
29 to the growing of farm crops, fruits and vegetables;  
30 water for human consumption was abundant and the climate  
31 mild and not subject to extremes." 89 F. Supp. at 803.

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

"In view of the above circumstances, we have reviewed  
the evidence of record on value submitted by the parties  
in order to determine whether or not further primary  
findings on that evidence would support the ultimate  
finding made by the Commission. Cf. Fletcher v. Fletcher,  
D.C.Cir., 219 F.2d 768. We are of the opinion that the  
evidence of record fully supports the Commission's findings  
on the question of value of the land.

The Government's evidence of value of the lands in question  
is derived from the testimony and report of John Muehlbier,  
Agricultural Economist of the United States Department of  
Agriculture. The evidence prepared and submitted by the

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

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

21 The method of valuation proposed by the Indian appellants  
22 is along the lines adopted by this court in many cases and  
23 in particular in Alcea Band of Tillamooks v. United States,  
24 87 F.Supp. 938, 115 Ct.Cl. 463, reversed as to interest,  
25 341 U.S. 48, 71 S.Ct. 552, 95 L.Ed. 738, Rouge River Tribe  
26 of Indians v. United States, 89 F.Supp. 798, 116 Ct.Cl. 454,  
27 certiorari denied 341 U.S. 902, 71 S.Ct. 610, 95 L.Ed. 1342.  
28 The same method of valuation was followed by the Indian  
29 Claims Commission in the Osage case (3 Ind. Cl. Com. 217).  
30 In those cases the court said the Commission rejected the  
31 notion that the value of Indian lands must be based on  
32 market value alone because the market for such lands was  
33 absolutely controlled by the only possible purchaser, i.e.,  
the Government either direct or in trust for sale. Until  
Indian title to an area of land is extinguished and the  
land is surveyed, no sales thereof or settlements thereon  
are possible.

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

60 We think that the factors taken into consideration by  
61 claimants expert witness were valid factors in the deter-  
62 mination of the value of Indian lands under the circum-  
63 stances of this case and similar cases. We believe that the results  
of such consideration will more nearly accomplish the fair

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

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

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

29 When title to land is extinguished without limitation, such extin-  
30 guishment includes all physical things on the earth including soil,  
31 minerals, trees, grass and water. A right to water, arising by  
32 judicial implication from Winters v. United States, 207 U.S. 564  
33 (1908) and its progeny, does not survive total extinguishment of the  
34 Spokane's aboriginal title. The purpose of the Indian Claims Commis-  
35 sion Act was to finally resolve all such claims by Indian tribes.<sup>7</sup>  
36 25 U.S.C. 70(a) et seq.

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

38 <sup>6</sup> Recent opinions of the Commission illustrate the values of water  
39 as applied to establishment of compensation due an Indian tribe.  
40 Western Shoshone v. United States, 29 Ind. Cl. Comm. 5, 127, 135-136  
41 (1972); Confederated Tribes of the Warm Springs Reservation, 29 Ind.  
42 Cl. Comm. 324, 401-402 (1972).

43 <sup>7</sup> See the detailed discussion of the legislative history of the  
44 Act and its purpose by Judge Littleton in Otoe and Missouri Tribes  
45 of Indians v. United States, 131 F.Supp. 265, 268-285 (Ct.Cl. 1955).

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

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

11 As noted above, the valuation of the lands in question taken  
12 by the United States from the Spokane Tribe includes the natural  
13 resources (water) situate. Otoe and Missouri Tribe of Indians v.  
14 United States, supra. Such a settlement, as that approved by the  
15 Indian Claims Commission, 17 Ind. Cl. Comm. 584, becomes res judicata  
16 between the parties and those claiming rights under them. When the  
17 State of Washington was admitted into the Union in 1889, it succeeded  
18 to the sovereign and proprietary interest of the United States over  
19 the Territory by virtue of its Enabling Act, 25 Stat. 676, 678. By  
20 admission, it became entitled to exercise all of the powers of govern-  
21 ment enjoyed by the original states of the Union. Coyle vs. Smith,  
22 221 U.S. 559,<sup>576</sup> (1911). The United States may reserve rights to the  
23 soil or waters while the lands in question are held in territorial  
24 status without conflict with the subsequent admission of states  
25 into the Union upon an equal footing. Shively vs. Bowlby, 152 U.S.  
26 1, 48 (1894); Stearns vs. Minnesota, 179 U.S. 223 (1900); Village of  
27 Kake v. Egan, 369 U.S. 60 (1962).<sup>8</sup> The Spokane Tribe of Indians  
28 do not possess a treaty nor was their reservation established pur-  
29 suant to a treaty. The aboriginal title of the Spokane Tribe of  
30 Indians has been extinguished to the lands over which they formerly

31 <sup>8</sup> The "disclaimer" clause of the Constitution of the State of  
32 Washington, Art. XXVI, does not extend to lands or waters lying  
33 outside Indian reservations over which Indian aboriginal title has  
been extinguished.

1 roamed. In order that an inference may be drawn regarding the intent  
2 of Congress that the Spokane Tribe has "title" to the waters of  
3 Chamokane Creek outside their reservation or a paramount right there-  
4 to, such a conclusion must be clearly stated and is not lightly to  
5 be inferred. This is true where vested rights under state law will  
6 be displaced. United States v. Holt Bank, 270 U.S. 49, 55 (1926).  
7 If there was, in fact, an intent on the part of Congress to cede  
8 the waters of Chamokane Creek to the Spokane Tribe, evidence to that  
9 effect has not been presented in this record. There must be an un-  
10 equivocal expression of Congressional will if state powers (i.e.,  
11 the ability to apply state laws to water or lands lying outside  
12 reservations) are to be pre-empted. Cohens v. Virginia, 19 U.S.  
13 264 (1821); Reid v. Colorado, 187 U.S. 137 (1902). There is no  
14 express limitation of governmental power of the State of Washington  
15 regarding waters arising in the Chamokane watershed outside the  
16 Spokane Indian Reservation. There is no expression of Congressional  
17 will which in any way conflicts with the application of state law  
18 or water rights vested thereunder. In the absence of a clear  
19 conflict with federal law, state law must prevail. Even in cases  
20 involving express language in a treaty, wherever reasonably possible  
21 such statements will be construed so as not to override state laws  
22 or impair rights arising thereunder. Guarantee Trust Company v.  
23 United States, 304 U.S. 126, 143 (1938). This court should not  
24 permit a state to be stripped of an essential attribute of its govern-  
25 mental prerogatives by implication and deduction. The Spokane Tribe's  
26 aboriginal title to the lands and waters in question has been ex-  
27 tinguished. Upon admission into the Union upon an equal footing,  
28 the State of Washington acquired all of the sovereign powers of the  
29 original states, including the power to preserve and allocate its  
30 natural resources (including water). It should not be shorn of this  
31 power by building inferences upon inferences. State law concerning  
32 the proper distribution and conservation of waters arising in the  
33 Chamokane watershed (beneficial use) should not be displaced on the

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

4 Neither should the State's proprietary interest in school trust  
5 lands be diminished on such a basis. School trust lands (Sections  
6 16 and 36) were guaranteed to the State under Section 20 of its  
7 Organic Act (March 2, 1853) prior to statehood (10 Stat. 172) and  
8 its Enabling Act (February 22, 1889) authorizing admission into the  
9 Union (25 Stat. 676). The Organic Act, supra, pre-dates the claimed  
10 water right in this suit.

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

15 By creation of the Indian Claims Commission in 1946, Congress  
16 established a forum to hear and determine all matters of a legal or  
17 equitable nature concerning Indian Tribal claims of loss, impair-  
18 ment or diminishment of rights to lands and resources (whether  
19 "recognized" by treaty or based on aboriginal use and occupancy).  
20 25 U.S.C. 70(a). In addition, Congress created new causes of action  
21 in favor of Indians, not available to non-Indians, based on "fair  
22 and honorable dealings that are not recognized by any existing rule  
23 of law or equity". 25 U.S.C. 70(a)(5). Otoe and Missouri Tribe  
24 of Indians v. United States, 131 F.Supp. 265, 269-285 (Ct.Cl. 1955).

25 As noted by Judge Littleton in his opinion:

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



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

5 In Gila River Pima-Maricopa Indian Community v. United States,  
6 140 F.Supp. 776, 779 (Ct.Cl. 1956) Judge Littleton held that a suit  
7 brought by an Indian tribe on grounds that the Government breached  
8 its fiduciary duty should be initially presented to the Indian Claims  
9 Commission allowing it, in the first instance, to determine the scope  
10 of its own jurisdiction. The court held:

11 "Assuming, without deciding, that the legal relation-  
12 ship of guardian and ward existed between the instant  
13 plaintiffs and the United States by virtue of the  
14 provisions of executive and statutes cited in the  
15 petition in this court, the alleged breach of that  
16 duty merely presents an additional ground for recovery  
17 on the same claims now pending before the Indian Claims  
18 Commission. Such a ground of recovery is within the  
19 jurisdiction of the Indian Claims Commission and we do  
20 not think that plaintiffs may divide their grounds of  
21 recovery between that tribunal and this. See United  
22 States v. California & Oregon Land Co., 192 U.S. 355,  
23 24 S.Ct. 266, 48 L.Ed. 476; Guettel v. United States,  
24 8 Cir., 95 F.2d 229, 118 A.L.R. 1060, certiorari denied  
25 305 U.S. 603, 59 S.Ct. 64, 83 L.Ed 383. In any event,  
26 moral grounds for recovery are clearly within the juris-  
27 diction of the Commission under section 2 of the Indian  
28 Claims Commission Act. We are not disposed at this time  
29 finally to decide a question that may well come up before  
30 the Commission as a result of the trial on the merits of  
31 plaintiffs' claims." (140 F.Supp. at 781)

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

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

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

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

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

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

19 The position of the Spokane Tribe and the United States is best  
20 summarized by the following statement: "The United States, by with-  
21 drawing the land of the Spokane Indian Reservation from the public  
22 domain and reserving it for the use and benefit of the Spokane  
23 Indians, reserved unappropriated waters appurtenant to the land to  
24 the extent necessary to fulfill the purposes of the reservation."<sup>12</sup>  
25 Ancillary to the foregoing proposition is the argument that the  
26 United States and the Spokane tribe intended to reserve sufficient  
27 water to preserve and protect Chamokane Creek on the Spokane Indian  
28 Reservation for game and fish, preservation of the environment, for

29 \_\_\_\_\_  
30 <sup>10</sup> See: Otoe and Missouri Tribe of Indians, supra, at pp. 269-285  
for a detailed review of the Act's legislative history.

31 <sup>11</sup> Winters, supra, is the doctrinal basis of their claim.

32 <sup>12</sup> U.S. Brief, page 3.  
33

1 recreational purposes and aesthetic purposes.<sup>13</sup> These arguments will  
2 be dealt with seriatim.

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

28 Cases of similar import are Conrad Inv. Co. vs. United States,  
29 161 Fed. 829 (9th Circuit, 1908); Skeem vs. United States, 233 Fed.  
30 93 (9th Circuit, 1921); United States vs. Parkins, 18 Fed. 2d 642  
31 (D.C. Wyo. 1926) and United States vs. Hibner, 27 Fed. 2d 909 (D.C.  
32 Ida. 1929).

33

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<sup>13</sup> U.S. Brief, pages 16-35.

1        These cases all have a thread of commonality. The water rights  
2 sought to be protected involved irrigation of Indian-owned lands  
3 lying within reservation boundaries. The absence of the water would  
4 render the land valueless and uninhabitable. This is not the case  
5 at bar. There is no evidence in this record to indicate that the  
6 absence of water renders the Spokane reservation lands "valueless"  
7 (Winters, supra, at 576) or ". . . that water from the river would be  
8 essential to the life of the Indian people. . ." Arizona, supra, at  
9 599.

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

19        It was the policy of Congress to integrate the various Indian  
20 tribes eventually into the agrarian level of our economy. Conrad  
21 Inv. Co. v. United States, 161 F. at p. 831, supra; Handbook of  
22 Federal Indian Law, United States Department of Interior, pp. 225-230  
23 (1958). An extension of the "water rights" rationale is unwarranted  
24 when it goes beyond consumptive use for agricultural purposes.  
25 United States v. Fallbrook Public Utility District, 165 F.Supp. 806,  
26 838 (1958). This decision forcibly demonstrates that the implied  
27 water right beyond the need for "development of Indian agriculture  
28 upon the reservation, is not to be extended by analogy." Yet, this  
29 is precisely what the United States urges. Such a view of the law  
30 is unsupportable.

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

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

3 "It is undisputed that the Spokane Tribe was historically  
4 and remains today a fishing people. . . . The area which  
5 is now the Spokane Reservation was the aboriginal home of  
6 the lower band of the Spokane Indians . . . primarily because  
7 of the excellent fishing in the Columbia River, Spokane  
8 River and Chamokane Creek."<sup>14</sup>

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

13 "23. The Spokane Tribes were a tribe of Indians and  
14 were usually recognized and considered to be such by  
15 defendant and its representatives and agents. The tribe  
16 was the land-using unit, all members making use of the  
17 hunting and food gathering grounds without regard to  
18 their band affiliations. It was divided into three  
19 major bands known as the Upper, Middle and Lower bands  
20 of Spokane Indians. These bands were much intermarried  
21 and an over-all council united them for tribal action.

22 "24. The Spokane Indians covered a wide range in their  
23 quest for food, having acquired horses in the first  
24 decade of the 18th century. They left their winter vil-  
25 lage or camp during March or in early April and spent about  
26 six weeks gathering dry-land camas on the plains south of  
27 Spokane River, traveling in minimal groups of 30 or 40  
28 adults, the women digging camas while the men hunted. The  
29 roots were then cashed away and most of the Spokanes went  
30 west to the vicinity of Moses Lake near central Washington  
31 where they spent from two weeks to a month in social  
32 activities, gambling, dancing, horse racing, and trading  
33 with other tribes that gathered there. From June to  
October the Spokanes fished the Columbia and Spokane  
Rivers, and raced horses on the plains south of the Spokane.  
Bitter root was gathered in June and after July of each  
year moist-land camas was dug on upper Latah Creek and  
north of Spokane River. Sometimes the Spokanes joined  
the Colville and Kalispel Indians at camas fields near  
Cusick, Washington, and sometimes they went eastward  
beyond the Coeur d'Alene Lake in Idaho. Berries and wild  
parsnip were gathered in the fall. Antelope, deer, ground  
hog, jack rabbit, and other small game were found in the  
plains region between the Spokane and Palouse Rivers.  
During August, buffalo hunting parties left for the plains  
east of the Rocky Mountains, some returning during November  
and others wintering there. In December most of the  
Spokane Indians retired to their winter villages or camps,  
where they subsisted on dried fish, roots and game

32 <sup>14</sup> U.S. Brief, page 16.

1 supplemented sometimes, of necessity, by dried moss."<sup>15</sup>  
2 (Emphasis Supplied)

3 If the Spokane Tribe depended on fish from Chamokane Creek, the  
4 Indian Claims Commission wasn't aware of it (even though both the  
5 Tribe and the United States were parties). In fact, evidence intro-  
6 duced in this proceeding dispells such notions.<sup>16</sup> There is no evi-  
7 dence of historical dependence on a fishery in Chamokane Creek for  
8 subsistence by Spokane Indians. Yet the Tribe and the Government  
9 argue that it was a "manifest" purpose of the creation of the  
10 reservation to reserve sufficient waters in Chamokane Creek to sus-  
11 tain a historical fishery. The entho-historical facts regarding the  
12 Spokane Tribe do not support implication of such an intention.

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

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

22 \_\_\_\_\_  
23 <sup>15</sup> The failure of the Government or the Tribe to cite or discuss  
24 this decision which has relevance to this issue is, perhaps, under-  
25 standable in light of their joint endeavors in this suit to circumscribe the  
26 state's governmental and proprietary authority. Natural Resources  
27 submits that both the United States and the Tribe are bound by these  
28 findings which are relevant to the question of intent to reserve  
29 water.

30 <sup>16</sup> Plaintiff's Exhibit No. 55 are reports to the Commissioner of  
31 Indian Affairs by local government agents explaining the dependence  
32 of the Indians on their fishery at Kettle Falls on the Columbia River.  
33 Plaintiff's Exhibit No. 62 is also a report which demonstrates depen-  
34 dence on the fisheries at the mouth of the Little Spokane River. No  
35 reference is made to Chamokane Creek.

36 <sup>17</sup> Plaintiff's Exhibit No. 64, Special Report on Factors Affecting  
37 the Status of Trout Populations in Lower Chamokane Creek, Table 6.

38 <sup>18</sup> Plaintiff's Exhibit No. 38, Fisheries Management Program,  
39 Spokane Indian Reservation, p. 2.

40 <sup>19</sup> Galbraith, TR 809.

1 a shred of evidence that there was an intent on the part of the  
2 Government or the Indians to "reserve" sufficient water in the creek  
3 for fisheries, environmental, aesthetic or any other non-consumptive  
4 use when the reservation was created. There is a total failure of  
5 proof regarding the alleged "purpose" of creation of the Spokane  
6 Reservation to bring this case within the rationale of the "pupfish"  
7 decision, Cappaert v. United States, U.S. , 48 L.Ed.2d 523  
8 (1976).

9 The evidence shows that it was government policy, at the time of  
10 creation of the Spokane Reservation, to integrate the Indians into the  
11 agrarian level of our economy.<sup>20</sup> Apparently the policy has been some-  
12 what successful on the Spokane Reservation.<sup>21</sup>

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

16 "The implied reservation (of Winters) looked to the  
17 needs of the Indians in the future when they would  
18 change their nomadic habits and become accustomed to  
tilling the soil." (Insert by Author)

19 United States v. Ahtanum Irr. Dist., 236 F.2d 321, 327  
(9th Cir. 1956)

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

26  
27 <sup>20</sup> "Always the intent is given to reduce the Indians to more compact  
28 Reservations and orient them in the direction of agriculture."  
29 Spokane Tribe Brief, p. 28. Appendix II to their brief recites the  
30 intention of the government agents to give the Indians lands to farm,  
training in agricultural pursuits and farming implements: Record  
of Proceedings, N.W. Indian Commission, 1887.

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

1 . . .  
2 "It would be irrational to assume that the intent was  
3 merely to set aside the arid soil without reserving the  
4 means of rendering it productive."

5 United States v. Walker River Irr. Dist., 104 F.2d  
6 334, 339 (9th Cir. 1939)

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

13 Natural Resources submits that this Court should bear in mind:

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

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

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

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

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

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

<sup>22</sup> U. S. Brief, p. 39



1 was extinguished by the Government on July 13, 1892. Spokane Tribe  
2 v. United States, 9 Ind. Cl. Comm. 236, 253 (1961). The contention  
3 presented is legally spurious.<sup>23</sup>

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

6 According to the Government's argument, the agreement of August  
7 18, 1877 established the Spokane Reservation, and that date should  
8 fix the priority for any implied Winters water rights in favor of  
9 the Tribe.<sup>24</sup> The Government states:

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

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

22 In accordance with Congressional policy, Territorial Governor  
23 Isaac I. Stevens procured a series of treaties with Indians in Western  
24 and Eastern Washington in 1855. Although he met with the Spokanes in  
25 council that year, no treaty was consummated. Subsequently, numerous  
26 councils were held with the Spokane Tribe but no cession was procured  
27 from them until March 18, 1887. 9 Ind. Cl. Comm. at 238. On August  
28 18, 1877 a council was held by Indian Inspector E. C. Watkins and others  
29 on behalf of the United States with the Coeur d'Alene, Spokane,  
30 Pend d'Oreille, Chewelah, Okanogan, Colville and Palouse Indians.  
31 An agreement was drafted for the Spokanes whereby they agreed to go  
32 upon a tract of land which subsequently was set aside for their  
33 exclusive use and occupancy. The Palouse Indians, in a separate  
agreement, also agreed to move onto this tract. Neither of these

31 <sup>23</sup> The Government was certainly aware of this decision. It was a  
32 party to the case.

33 <sup>24</sup> U.S. Brief, pp. 10-22, 46.

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

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

28 Given these historical facts, the Ninth Circuit was correct in  
29 holding that the date of the Executive Order, January 18, 1881, was  
30 the date of creation of the reservation. Gibson v. Anderson,  
31 131 Fed. 39, 42 (9th Cir. 1904).

32 Reliance is placed on Northern Pac. Ry. v. Wismer, 246 U.S. 283  
33 (1918) to the effect that the agreement of August, 1877 actually

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

16 Neither is United States v. Walker River Irr. Dist., 104 F.2d  
17 334 (9th Cir. 1939) opposite to the views of Natural Resources on  
18 this question. The history leading up to the 1874 Executive Order  
19 creating the Walker River Reservation for the Paiute and Washoe In-  
20 dians shows that the boundaries of the reservation were marked and  
21 the lands were ordered to be surveyed by the Commissioner of Indian  
22 Affairs in 1859. Further, the evidence in the Walker case showed  
23 that the Paiute and Washoe Indians had taken refuge there and had  
24 commenced the practice of agriculture and irrigation in 1859 and  
25 shortly thereafter.<sup>25</sup>

26 The factual differences between Walker, supra, and the instant  
27 case are striking and apparent. Natural Resources submits that the  
28 priority date for any Winters implied water found to exist is January  
29 18, 1881.

30  
31  
32  
33 <sup>25</sup> 104 F.2d 338-339; See also: United States v. Northern Paiute  
Paiute Nation, 393 F.2d 786 (Ct. Cl. 1968).

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

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

12 The Spokane Indian Reservation, as previously discussed, was  
13 created by an Executive Order on January 18, 1881. According to the  
14 Bureau of Indian Affairs, it contains 154,603 acres.<sup>26</sup> Of this total,  
15 100,221 acres are tribally owned; 29,640 acres are allotted lands;  
16 21,683 acres are non-Indian fee lands and 3,085 acres are managed by  
17 the Bureau of Indian Affairs for the benefit of the Spokane Tribe.<sup>27</sup>  
18 Of the total acreage within the reservation, 82,647.5 acres have been  
19 classed as timber production lands and 5,781.22 acres have been  
20 classed as agricultural lands pursuant to Congressional directive.  
21 25 Stat. 458 (Act of May 29, 1908)<sup>28</sup>

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

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

33 <sup>26</sup> The Government states that it contains 154,898 acres. U.S.  
Brief, page 47.

<sup>27</sup> Plaintiff's Exhibit No. 100.

<sup>28</sup> Plaintiff's Exhibit No. 101.

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

20 According to the United States, 77 acres were restored to tribal  
21 ownership pursuant to the Act of May 19, 1958 (72 Stat. 121) and  
22 1,798.11 acres were returned to trust status for the benefit of the  
23 Spokane Tribe pursuant to the Act of June 10, 1968 (82 Stat. 174)  
24 as amended by the Act of May 21, 1974 (88 Stat. 142) - - - now  
25 codified as 25 U.S.C. 487.<sup>34</sup> The arguments advanced in support of

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27 <sup>29</sup> U.S. Brief, page 46.

28 <sup>30</sup> Harvey, TR 585.

29 <sup>31</sup> Stevens, TR 1348.

30 <sup>32</sup> Stevens, TR 1353, 1355.

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

33 <sup>34</sup> U.S. Brief, page 49.

1 these lands' entitlement to a Winters water right are three-fold.<sup>35</sup>

2 First, it is asserted that the tracts are not severed from the  
3 reservation unless it is explicitly authorized by Congress. The  
4 authorities relied upon deal with questions of reservation  
5 boundaries, jurisdiction, diminishment or termination. E.g. DeCoteau  
6 v. District County Court, 420 U.S. 425 (1975); Mattz v. Arnett, 412  
7 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962);  
8 The City of New Town, North Dakota v. United States, 454 F.2d 121  
9 (8th Cir. 1972); United States v. Erickson, 478 F.2d 684 (8th Cir.  
10 1973). None of these decisions have anything to do with the question  
11 presented - namely - does an Indian implied water right "run with  
12 the land" regardless of its status or subsequent alienation?

13 Next, it is argued that the legislative history of the three  
14 Acts mentioned evinces an intent on the part of Congress to "re-  
15 vitalize" the Winters water right for these reacquired lands.  
16 Nothing in the statutes or the legislative history cited even  
17 mentions an implied water right for irrigation. When no ambiguity  
18 exists on the face of the statute, and no reference is made in the  
19 legislative history to an implied water right, it is beyond reason  
20 to infer that Congress intended that an implied right was to be  
21 created with a priority date antecedent to establishment of the  
22 reservation itself.<sup>36</sup> Water rights vested under state law should  
23 not be ousted in the absence of an unambiguous Congressional ex-  
24 pression to that effect. Florida Lime and Avocado Growers v. Paul,  
25 373 U.S. 132 (1963); Schwartz v. Texas, 344 U.S. 199 (1952).

26 Finally, the Government contends that "undue administrative  
27 expenditures will be required to administer these numerous small  
28 parcels separately."<sup>37</sup> It is indeed novel for a plaintiff to argue  
29

30 <sup>35</sup> U.S. Brief, pages 52-63.

31 <sup>36</sup> An interesting due process issue would be presented vis-a-vis  
32 persons who acquired water rights under state law with priority  
33 earlier than the federal acts should this argument be adopted by  
the Court.

<sup>37</sup> U.S. Brief, pages 52 and 60.

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

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

9 "Rights of Those Who are Successors of Indian Lands.

10 This question is not free of difficulty, for it presents  
11 for consideration what is the status of the water rights of  
12 those who have acquired by purchase their lands from the  
13 Indians whose rights were reserved unto them, and who  
14 became vested with all the rights incident to ownership  
15 of both the lands and water under the treaties, with a  
16 priority of February 16, 1869. The right of the Indians  
17 to occupy, use, and sell both their lands and water is  
18 now recognized, as this view is sustained in the case of  
19 Skeem v. U.S., supra, and, such being the case, a pur-  
20 chaser of such land and water right acquires, as under  
21 other sales, the title and rights held by the Indians,  
22 and that there should be awarded to such purchaser the  
23 same character of water right with equal priority as those  
24 of the Indians. The status of the water right after it  
25 has passed to others by the Indians seems to be somewhat  
26 different from while such right is retained by the Indians,  
27 because the principle invoked by the courts for the pro-  
28 tection of the Indian as long as he retains title to his  
29 lands does not prevail and apply to the white man, and  
30 the reason for so holding is that there was reserved unto  
31 the Indians the absolute right to own and use in their  
32 own way the water for their lands, while the white man,  
33 as soon as he becomes the owner of the Indian lands, is  
subject to those general rules of law governing the  
appropriation and use of the public waters of the state,  
and would, as grantee of the Indian allotments, be en-  
titled to a water right for the actual acreage that was  
under irrigation at the time title passed from the  
Indians, and such increased acreage as he might with  
reasonable diligence place under irrigation, which would  
give to him, under the doctrine of relation, the same  
priority as owned by the Indians; otherwise, the appli-  
cation of any other rule would permit such grantee for  
an indefinite period to reclaim the balance of his  
land and withhold the application of the water to a  
beneficial use, which is against the policy recognized  
in the development of arid lands."

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

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

7           Turning now to the question of the lands classed for timber  
8 production for the benefit of the Tribe, the basis of the classifica-  
9 tion has been mentioned. Act of May 29, 1908 (35 Stat. 458) Section  
10 5 provides:

11           "That the lands so classified as timber lands shall remain  
12 Indian lands subject to the supervision of the Secretary of  
13 the Interior until further action by Congress, and no pro-  
14 vision authorizing the sale of timber upon Indian lands  
15 shall apply to said lands unless they be specially designated:  
16 PROVIDED, That until further legislation the Indians and  
17 the officials and employees in the Indian Service on said  
18 reservation shall, without cost to them, have the right,  
19 under such regulations as the Secretary of the Interior may  
20 prescribe, to go upon said timber lands and cut and take  
21 therefrom all timber necessary for fuel, or for lumber for  
22 the erection of buildings, fences, or other domestic pur-  
23 poses upon their allotments; and for said period the said  
24 Indians shall have the privilege of pasturing their cattle,  
25 horses, and sheep on said timber lands, subject to such  
26 rules and regulations as the Secretary of the Interior may  
27 prescribe: PROVIDED FURTHER, That the Secretary of the  
28 Interior is hereby authorized to sell and dispose of for  
29 the benefit of the Indians such timber upon said timber lands  
30 as in his judgment has reached maturity and is deteriorating  
31 and which, in his judgment, would be for the best interests  
32 of the Indians to sell, the purpose being to as far as pos-  
33 sible protect, conserve, and promote the growth of timber  
upon said timber lands. The Secretary of the Interior  
shall deduct from the money received from the sale of such  
timber the actual expense of making such sale and place the  
balance to the credit of said Indians, and he is authorized  
to prescribe such rules and regulations for the sale and  
removal of such timber so sold as he may deem advisable."

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

40  
41  
42  
43 <sup>38</sup> Plaintiff's Exhibits Nos. 101 and 102 are the Government's ap-  
praiser's reports and transmitted letters dated 1909. Plaintiffs' Exhibit  
No. 83, Resource Development Study, 1968, pp. 89-94 shows the history of  
timber production and present management of these reserved lands.  
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1 reflect the number of acres within Chamokane Basin which are classed  
2 and managed for timber production. Plaintiff's Exhibits 99 and 100  
3 do not indicate tribally owned acreages within the Chamokane Basin  
4 which are reserved for this purpose.<sup>39</sup> These exhibits relate to  
5 present tribal ownership (including reacquired lands). They were  
6 related to the soil classes found there.<sup>40</sup> The United States contends  
7 that the soil class of the lands (i.e. capability of irrigation) is  
8 the sole determinant of quantifying an implied water right for  
9 irrigation purposes.<sup>41</sup> Natural Resources disagrees.

10 We have calculated from Plaintiff's Exhibit No. 101 the estimated  
11 total number of acres reserved for timber production within Chamokane  
12 Creek Basin, lying inside reservation boundaries, to be 10,104.64  
13 acres.<sup>42</sup> There is no quarrel with the fact that some of the reserved  
14 timber acres have a soil class which is capable of irrigation for  
15 agricultural purposes.<sup>43</sup> Our point is that these lands have been  
16 reserved by Congress to a specific non-agricultural use for the  
17 benefit of the Spokane Tribe. In light of an express declaration of  
18 Congressional intent to reserve these lands for timber production, no  
19 basis exists for implication of a Winters water right for agricul-  
20 tural purposes. The language of that seminal decision dispells any  
21 such notion. After finding that the Indian lands on the Fort  
22 Belknap Reservation were "practically valueless" without irrigation  
23 for agricultural development, the Court weighed the conflicting  
24

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25 <sup>39</sup> Stevens, TR 1353-1354

26 <sup>40</sup> Stevens, TR 1348, 1355

27 <sup>41</sup> U.S. Brief, pages 43 and 45.

28 <sup>42</sup> Our calculations are reasonably accurate but must be termed  
29 "estimates" because of the possibility of error in drawing a finite  
30 watershed boundary and calculating the interior acreages where it  
31 bisects a given tract.

32 <sup>43</sup> The number of acres within the tracts dedicated to timber pro-  
33 duction which are suitable for agricultural development (the Govern-  
ment's theory) is not clear from this record. To the extent that  
irrigable lands (based on their soil class) are included in the  
Government's claimed total of 8,460 acres, the total is in error.

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

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

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

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

30  
31 <sup>44</sup> The judicial progeny of Winters have all likewise made the same  
32 choice when faced with the choice of conflicting implications. None  
33 of its subsequent decisional law meets the argument here advanced.

1	6,000	(Est.) acres in Basin suitable for	45
2		agriculture (tribally owned)	
3	minus 562	acres claimed as irrigable	46
4		returned to trust status	
5	minus 77	acres claimed as irrigable	
6		returned to tribal ownership	
7		by Act of May 19, 1958	47
8	minus ?	acres reserved for timber	
9		production by act of May 29,	
10		1908	48
11		which are irrigable	
12		by soil class	
13	<hr/>		
14	?	Total irrigable acreage	
15		entitled to <u>Winters</u> water	
16		right	49

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

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26 45 Stevens, TR 1348.

27 46 U.S. Brief, page 60.

28 47 U.S. Brief, page 49.

29 48 As previously noted, the evidence submitted by plaintiffs does  
30 not establish that any particular acreage within Chamokane Basin to  
31 which the claimed Winters water right would apply.

32 49 Our confusion as to the amount of irrigable acreage claimed is  
33 compounded by Plaintiff's Exhibits 40 and 40A. These exhibits show  
34 potentially irrigable trust lands along Chamokane Creek in the amount  
35 of 2,135 acres for which 4,270 acre-feet of water are claimed as needed.

36 50 Natural Resources, in presenting this argument, does not abandon  
37 its other arguments that the Winters case does not apply to this case.

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

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

8 "It seems clear from United States v. Ahtanum Irrigation  
9 District, 236 F.2d 321 (9th Cir. 1956), cert.den. 352  
10 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957) that need  
11 and use are prerequisite to any water rights on Indian  
12 reservations." Tweedy v. Texas Co., 286 F.Supp. 383,  
13 385 (D. Mont. 1968)

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

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

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

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

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

3 The United States, however, chooses to rely upon its interpreta-  
4 tion of United States v. Arizona, 373 U.S. 546 (1963). Their  
5 contention is:

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

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

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

15 Nothing in Arizona is inconsistent with Tweedy or Ahtanum, supra.

16 Natural Resources submits that the "prerequisites" of use and need  
17 are not shown in this record. The opposite is true. No evidence has  
18 been submitted by the United States or the Spokane Tribe showing (a)  
19 the location, point of diversion or capacity of any existing or  
20 planned withdrawal from Chamokane Creek; (b) a description, irrigable  
21 area and location of reservation lands served or to be served; (c)  
22 just which lands are owned by Indians under trust or fee patent; (d)  
23 just which lands are owned by successors of Indian allottees; and (e)  
24 the quantities of water required by these lands (the duty of water  
25 for each tract).<sup>52</sup>

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

<sup>52</sup> The items listed are the evidentiary requirements approved by the  
Ninth Circuit in Ahtanum, supra.

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

9 This view was corroborated by plaintiff's consultant who said  
10 it was the "lowest priority" to irrigate with water from Chamokane  
11 Creek.<sup>57</sup> Even with lower costs of construction of an irrigation pro-  
12 ject utilizing water from this source, plaintiff's consultant did not  
13 recommend it because "of the detrimental (sic) expected on the lower  
14 part of the Chamokane Creek."<sup>58</sup> This view is confirmed by his report.  
15 Plaintiff's Exhibit No. 29, Water Resources On The Spokane Reservation,  
16 Woodward, 1973, at page 4.

17 It is unusual to respond to a brief which seems to be at extreme  
18 variance with the desires of the client. Nevertheless, Natural  
19 Resources does not hesitate to point out these discrepancies and  
20

21 <sup>53</sup> McCoy, TR 730.

22 <sup>54</sup> McCoy, TR 731.

23 <sup>55</sup> McCoy, TR 734.

24 <sup>56</sup> Sherwood, TR 680; Galbraith, TR 781.

25 <sup>57</sup> Woodward, TR 178, 340.

26 <sup>58</sup> Plaintiff's Exhibit No. 30, Supplemental Preliminary Report -  
27 Irrigable Lands Below 2200, Spokane Indian Reservation, Woodward,  
28 1973, at page 6. The Government argues the economic feasibility of  
29 drawing water from this source and ignores its own witnesses' and the  
30 Indians' recommendation against such a proposal. U.S. Brief, page 45.  
31 This argument also is not shored up by the evidence for another rea-  
32 son. There is no basis for alleging economic feasibility because no  
33 studies were made. TR 282-283. A possible ground water development  
on Walker's Prairie for 1,045 acres via wells is the only study on  
economic feasibility reported in this record. Plaintiff's Exhibit  
30, Supplemental Preliminary Report - Irrigable Lands Below Elevation  
2200 - Spokane Indian Reservation, Woodward, 1973 at page 6. This  
1,045 acres is in the area classed as agricultural lands under the  
Act of May 29, 1908 which was opened to homestead by non-Indians.  
Its ownership status, past and present, is unclear on this record.

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

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

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

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

21 Mr. Woodward, plaintiffs' consultant, stated that stock watering  
22 and domestic water uses outside the reservation would have a very  
23 minimal effect on the flow of Chamokane Creek.<sup>59</sup> No measurement of  
24 such uses was made.<sup>60</sup>

25 Mr. Woodward also testified that ground water lying north and  
26 westerly of what he considered a lateral moraine was not related to  
27 the waters of Chamokane Creek or the ground waters lying southerly  
28 and easterly of such lateral moraine.<sup>61</sup> The lateral moraine lies in  
29 a position approximately at the northeast corner of the reservation  
30 and runs northeasterly creating a separate ground water regime that

31 \_\_\_\_\_  
32 <sup>59</sup> Woodward, TR 288.

33 <sup>60</sup> Woodward, TR 288.

<sup>61</sup> Plaintiff's Exhibit No. 10, Woodward, TR 186-187, 287.

1 does not flow into the Chamokane Basin.<sup>62</sup>

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

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

20 The lands managed by Natural Resources were obtained from the  
21 federal government pursuant to the State's "Enabling Act".<sup>66</sup>  
22 Sections 16 and 36 were directly obtained from the federal government  
23 upon admission into the Union. The balance of our lands were selected  
24 as "in lieu" (indemnity lands) to substitute for those sections 16  
25

26 <sup>62</sup> Woodward, TR 286 and 287.

27 <sup>63</sup> Isaacson, TR 1203, 1212.

28 <sup>64</sup> Isaacson, TR 1211; Defendant's Exhibit No. 68.

29 <sup>65</sup> Isaacson, TR 1206 and 1207.

30 <sup>66</sup> Defendant's Exhibit No. 67; 25 Stat. 180; Article 16, Washington  
31 State Constitution.

32  
33



1 and 36 which had been reserved by the Federal Government.<sup>67</sup> Section  
2 10 of the Enabling Act states:

3 "That upon the admission of each of said States into  
4 the Union sections numbered sixteen and thirty-six in  
5 every township of said proposed States, and where such  
6 sections, or any parts thereof, have been sold or other-  
7 wise disposed of by or under the authority of any act  
8 of Congress, other lands equivalent thereto, in legal  
9 subdivisions of not less than one-quarter section, and  
10 as contiguous as may be to the section in lieu of which  
11 the same is taken, are hereby granted to said States for  
12 the support of common schools, such indemnity lands to be  
13 selected within said States in such manner as to the  
14 legislature may provide, with the approval of the  
15 Secretary of the Interior: PROVIDED, That the six-  
16 teenth and thirty-sixth sections embraced in permanent  
17 reservations for national purposes shall not, at any  
18 time, be subject to the grants nor to the indemnity  
19 provisions of this act, nor shall any lands embraced in  
20 Indian, military, or other reservations of any character  
21 be subject to the grants or to the indemnity provisions  
22 of this act until the reservation shall have been  
23 extinguished and such lands be restored to, and become  
24 a part of, the public domain."

25 This section parallels section 20 of the Organic Act establish-  
26 ing the territory of Washington in 1853<sup>68</sup> which reads:

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

43 The lands obtained through the Enabling Act were granted in  
44 trust to the State of Washington for the support of public education  
45 and certain public institutions.<sup>69</sup> The Constitutional trust includes

46 <sup>67</sup> Isaacson, TR 1213. Defendant's Exhibit No. 26 contains clear  
47 lists which are the documents which grant in lieu selections to the  
48 state pursuant to section 10 of the state's Enabling Act. Comparable  
49 state statutes reflecting the grants are RCW 79.01.076 and Chapter  
50 79.28RCW.

51 <sup>68</sup> Act of March 2, 1853, 10 Stat. 112.

52 <sup>69</sup> Lassen v. Arizona, 385 U.S. 458, 87 Sup.Ct. 584, 17 L.Ed.2d 515  
53 (1967)

1 financial support of common schools, the state penitentiary, scientific  
2 schools, normal schools, public buildings at the state capitol, state  
3 charitable institutions, juvenile reformatories and agricultural  
4 colleges.<sup>70</sup>

5 Natural Resources submits that its water rights for all the  
6 granted trust lands in question have a priority date of November 11,  
7 1889, United States v. Wyoming, 331 U.S. 440 ( ).<sup>71</sup>

8 It is further submitted that our water priority predates all  
9 reservation lands except those tracts proven to be irrigable in fact  
10 and which were never removed from trust status or classed as timber  
11 production lands. Reacquired lands assume a priority position on  
12 the date of reacquisition as established by United States v. Hibner,  
13 27 F.2d 909 (D. Ida. 1928) which are, necessarily, junior to Natural  
14 Resources.

15 Natural Resources' right to use water is also based on riparian  
16 usage of waters flowing through our lands and springs arising on  
17 them.<sup>72</sup> The legal relationship relative to priority and water use  
18 between the defendants is not in dispute in this case. The defen-  
19 dant's rights inter se are determined by state law.<sup>73</sup> We do not  
20 understand that this action is similar to comparable state water  
21 adjudications.

## 22 VII. CONCLUSION

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

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

29 <sup>70</sup> Sections 10, 15, 16 and 17, Washington State Enabling Act.

30 <sup>71</sup> Defendant's Exhibit No. 27.

31 <sup>72</sup> In re Chiliwist Creek, 77 Wn.2d 685, 466 P.2d 513 (1970); In re  
32 Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970).

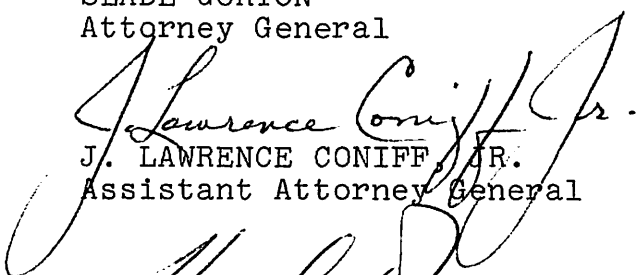
33 <sup>73</sup> RCW 90.03.110 through RCW 90.03.240.

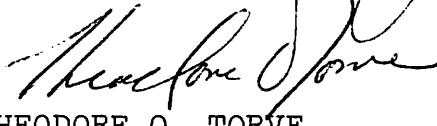
1 Scholder v. United States, 298 F.Supp. 1282, 1286-1287  
2 (D.C. Cal. S.D. 1969); rev. in part on other grounds,  
3 aff. in part, 428 F.2d 1123 (9th Cir. 1970); cert. den.  
4 400 U.S. 942 (1971).

5 DATED this 25<sup>th</sup> day of March, 1977.

6 Respectfully submitted,

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8 Attorney General

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10 J. LAWRENCE CONIFF, JR.  
11 Assistant Attorney General

12   
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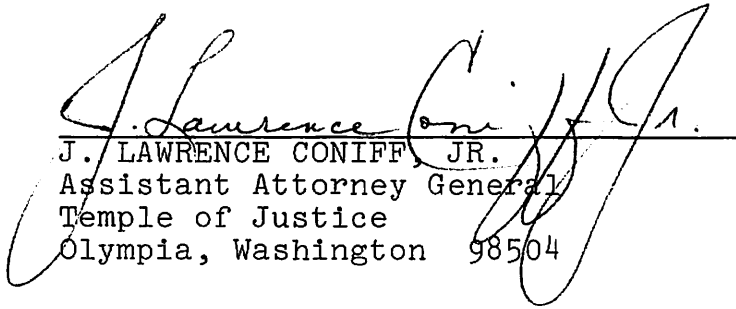
UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

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

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CERTIFICATE OF SERVICE

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



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