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Brief of the State of Washington, Department of Ecology

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

MAR 29 1977

J. R. FALLOUIST, Clerk
JH Deputy

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
BARBARA J. & JAMES ANDERSON,)
et al.,)
)
Defendants.)

CIVIL NO. 3643

BRIEF OF THE STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY

TABLE OF CONTENTS

	<u>Page</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
29	
30	
31	
32	
33	

I. INTRODUCTION 1

 A. Statement of the Proceedings 1

 B. The Chamokane Creek Drainage 3

 C. The Interests and Position(s) of the
 State of Washington 5

II. FEDERAL-STATE RELATIONSHIPS IN THE REGULATION
AND CONTROL OF WATERS WITHIN THE BOUNDARIES
OF THE STATE OF WASHINGTON 7

 A. Western Water Rights Laws 8

 B. Basis for Establishing Water Rights under
 Washington State Law 8

 C. Federal Water Rights Law - the "Reservation"
 Doctrine 10

 D. The Challenge of this General Adjudication . . 10

III. CLAIM OF THE UNITED STATES, FOR THE BENEFIT OF
THE SPOKANE INDIAN TRIBE 12

 A. Reserved Rights of the United States 12

 B. The Scope of Reserved Rights on the Spokane
 Reservation - The Search for Federal Intent. . 16

 1. Relevant Sources of Intent 17

 2. The "Purposes" of the Spokane Indian
 Reservation 18

 a. Agriculture 18

 b. Timber Production 19

 c. Fishing 20

 3. The federal intent to reserve water--
 sources 25

 4. The federal intent to reserve waters--
 quantities 27

 5. Conclusion--the Federal Reserved Right . . 29

IV. THE APPLICABILITY OF STATE WATER RIGHTS TO NON-
INDIAN LANDS WITHIN THE ORIGINAL BOUNDARIES OF
THE SPOKANE INDIAN RESERVATION 32

 A. There is a State Law Barring-Wall on the
 original boundaries of the Spokane Reservation
 - General Background 34



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33

B. The "Wall" Theory and its Piercing by State Water Rights Laws 37

1. The Acts of 1866, 1870 and 1877. 37

2. Winters v. United States 40

3. Tweedy v. Texas Company and United States v. McIntire 41

4. The Enabling Act and the Washington State Constitution 43

5. Section 7 of the General Allotment Act. 44

6. Public Law 83-280. 45

7. Tulalip Tribe v. Walker - a case directly on point. 46

C. Refocusing on Federal-State Relationships - The United States Misconceives the Basic Theories. 48

V. WATER RIGHTS ATTACHED TO LAND TRANSFERRED TO NON-INDIANS 53

A. A purchaser of an Indian allotment located within an Indian reservation acquires the reserved rights of its predecessor Indian owner 53

B. Upon Transfer of Reserved Water Rights to non-Indian Ownership for use on non-Indian lands, state water laws attach 54

VI. THE REQUESTS OF THE UNITED STATES FOR INJUNCTIVE RELIEF 56

A. Injunctive Relief is Premature. 56

B. The State has not and will not interfere with Reserved Water Rights. 56

C. There are "Surplus Waters" Available. 57

D. The Use of a Water Master 57

VII. RECAPITULATION OF THE POSITION OF THE DEPARTMENT OF ECOLOGY 58

A. Federal Reserved Rights 58

1. Domestic Rights. 58

2. Stockwatering. 58

3. Timber 58

1 I. INTRODUCTION

2 This brief is written in response to the filings entitled "Brief
3 of the United States in Support of its Claims" and "Brief of Spokane
4 Indian Tribe."

5 A. Statement of the Proceedings.

6 This suit was initiated by the United States of America, on
7 May 5, 1972, for the purpose of obtaining a decree of this Court set-
8 ting forth the rights of various claimants in and to the use of the
9 waters of Chamokane Creek and its tributaries located in Stevens
10 County, Washington. The State of Washington was joined as a defen-
11 dant along with a large number of private parties.

12 This case constitutes a federal court variation of the special
13 form of quiet title action commonly referred to in the water rights
14 law of the western states as a "general adjudication" or "general
15 determination" of water rights.^{1/} In this case all persons and
16 entities claiming water rights in Chamokane Creek and its tributaries
17 have been joined together for the purpose of proving their indivi-
18 dual claims and contesting the claims of others.

19 During a two-week period during the Summer of 1974, this Court
20 conducted a trial at which it received evidence with regard to the
21 several claims presented by the parties. The Court has now reached
22 the final stage of the proceeding with the presentation of final writ-
23 ten arguments by the parties regarding the validity of the various
24 claims to water rights. The Court will shortly be in a position to
25 enter a decree correlating the rights recognized by the Court, one as
26 against another, among the various claimants. As with most general
27 adjudication decrees, the Court may well be entering a document which
28

29 ^{1/} For a discussion of the three major variations of state proce-
30 dures - the Colorado, Wyoming, and Oregon "systems" - see
31 Hutchins, General Types of Procedures in the Western States,
32 1956 University of Texas Proceedings on Water Law 56 (1956).
33 For general discussions of general adjudication procedures see
3 Kinney, Irrigation and Water Rights, chapters 79 and 80 (2d ed.
1912); and 2 Wiel, Water Rights in Western United States, chap-
ter 51 (3rd ed. 1911). Washington's general adjudication proce-
dures are found in RCW 90.03.110 - RCW 90.03.240. See also RCW
90.44.220.

1 will determine who, during periods of water shortage, is entitled to
2 withdraw waters of Chamokane Creek and its tributaries:

- 3 (1) in what amounts,
- 4 (2) for what beneficial uses,
- 5 (3) at what points of diversion,
- 6 (4) for uses at what places, and
- 7 (5) for what periods of time.

8 The Court is also asked by the United States (as well as the Spokane
9 Indian Tribe) to confirm claimed rights of the United States relating
10 to instream flows in Chamokane Creek during the late summer months.

11 This case deals with one of the most complex of all areas of
12 law - the law of water rights. The case is made even more complicated
13 not only because it is concerned with often debated issues involving
14 fundamentals of our federal system - federal and state governmental
15 authority over allocation of rights to use waters located within a
16 state, but because it deals with newly conceived and very expansive
17 water rights claims of the United States Department of Justice made,
18 in this case, on behalf of the Spokane Indian Tribe.^{2/}

19 This litigation also involves areas of the law which have been
20 seldom, if ever, opined upon by the courts, federal or state. For
21 example, the Court is asked to announce a rule of law, never before
22 announced by any court, which would place a wall on the original
23 boundaries of an Indian reservation through which state water right
24 laws could not pierce even to the extent of applying to non-Indians
25 on lands owned by non-Indians within the boundaries. (U.S. Brief,
26 p. 81.) Another example is the request of the United States to expand
27 the federal Indian "reserved rights" doctrine far beyond the long
28 recognized scope of that doctrine by making the mutually exclusive,

30 ^{2/} A leading authority in the field has suggested that ". . . the
31 outcome of Indian water rights litigation in the courts is almost
32 as conjectural as trial by combat." Corker, Water Rights and
Federalism, 45 Col. L. Rev. 604, 627 (1956).

1 incompatible contentions that the federally reserved rights in rela-
2 tion to the establishment of the Spokane Reservation, include both the
3 right to dry up the stream during the summer months through diversions
4 for agricultural irrigation and, for the very same period, the right
5 to preserve the stream "in its natural status and keep it a free flow-
6 ing stream." (Spokane Brief, p. 61.) A third example is the request
7 of the Tribe to this Court to hold that non-Indian purchasers of
8 allotments located within the original boundaries, contrary to hold-
9 ings of the United States Supreme Court and a sister district court
10 within the Ninth Circuit, obtain no "reserved" water rights as succes-
11 sors to an Indian allottee. (Spokane Brief, p. 117.) See United
12 States v. Powers, 305 U.S. 527 (1939), and United States v. Hibner,
13 27 F.2d 909 (D. Idaho 1928).

14 In other words, this Court is asked to plow new ground in a num-
15 ber of areas of great importance not only to Indians but to the
16 various western states and their citizenry. In so requesting the
17 Court, the United States is proposing an announcement of law which
18 has the potential, if applied throughout the rest of Washington State
19 as well as the western United States, for severe detrimental impacts
20 through displacement of major cultural and economic communities.
21 Many of these communities, we should add, were developed as the result
22 of long established federally inspired land settlement policies which
23 encouraged the successful pioneering efforts so familiar to all who
24 live in the arid west. In sum, the conclusions reached by the Court
25 in this case, together with the analysis used to reach the same, will
26 have great implications reaching far beyond the relatively small
27 amounts of water in controversy in this case.

28 B. The Chamokane Creek Drainage.

29 Chamokane Creek has its headwaters in the Huckleberry Mountains
30 of southern Stevens County in Washington State. From its place of
31 origin the creek flows in a generally southeastern direction over

1 private and state owned lands until it reaches the eastern border of
2 the Spokane Indian Reservation. Thereafter the creek changes its
3 direction of flow to the south for a reach of approximately sixteen
4 miles whereupon it empties into the Spokane River at a point approxi-
5 mately 1.4 miles below Long Lake. Some of the controversy of this
6 case revolves around the fact the sixteen mile southerly flow reach
7 of Chamokane Creek constitutes the easterly boundary of the Spokane
8 Indian Reservation. (U.S. Brief, p. 17.)^{3/}

9 The Chamokane Creek drainage is a semi-arid area. Winters in the
10 area often reach low temperatures, while summer temperatures are often
11 high. The drainage is generally covered by none-too-dense pine
12 forests with some areas thereof in irrigated farm lands or in sage-
13 brush cover. (P.E. 12, 13, 83.)

14 Chamokane Creek's flows vary greatly depending upon the season
15 of the year. High flows, of up to 1430 cfs, have been reached as have
16 flows below 30 cfs during some dry months. (P.E. 15, 17A-D.)

17 The Chamokane drainage is sparsely settled. Uses of the waters
18 of the Chamokane drainage basin vary. In the upper areas of the
19 basin, north of the Spokane Reservation, waters are used primarily for
20 stockwatering. As the stream turns southward, waters of the Chamokane
21 are used for agricultural irrigation on small acreages lying east of
22 the creek outside the reservation. West of the creek (within the
23 original boundaries of the Spokane Indian Reservation) there is mini-
24 mal irrigation with most of the lands "under water" owned by non-
25 Indians. The Spokane Tribe has no present plans to irrigate new lands
26 in the Chamokane drainage portion of the original boundaries of the
27 Spokane Reservation. (Tr. 731)

28
29 ^{3/} The Spokane Indian Reservation, established by executive order
30 of President Hayes in 1881, contained approximately 155,000
31 acres. (P.E. 28). There are 178 square miles in the Chamokane
32 Creek drainage (U.S. Brief, p. 71), only a portion of which makes
up the eastern part of the reservation adjacent to and in
Chamokane Creek. (P.E. 2)

1 Waters flowing in the Chamokane Creek are derived (1) from pre-
2 cipitation falling on lands of the Chamokane drainage and entering
3 the stream as direct surface runoff, and (2) from precipitation on
4 drainage lands which percolate downward to a water bearing zone after
5 which it migrates laterally until it breaks out into Chamokane Creek.
6 (Tr. 928-60.) Whether all of this groundwater enters the creek or
7 whether a portion thereof moves to the east out of Chamokane surface
8 drainage is in question due to the differences in conclusion of the
9 experts who testified on the subject. (See the differing views of
10 Mr. Woodward, Tr. 67, and Dr. Maddox, Tr. 731.) As a general state-
11 ment, it can be said that a significant part of the precipitation
12 falling on the surface area of the Chamokane drainage ultimately
13 enters Chamokane Creek and, except where removed by acts of man or
14 nature, ultimately discharges from the creek into the Spokane River.

15 C. The Interests and Position(s) of the State of Washington.

16 Throughout this proceeding, beginning with the submission of
17 answers and continuing through the evidence presenting phase, the
18 State has participated through two of its executive branch arms. This
19 division has been accepted by the Court because of the differing
20 natures of the state government's interests involved and the two state
21 agencies separately responsible, under state organizational structures,
22 for protecting those interests.

23 The Department of Natural Resources of the State of Washington is
24 represented because, as administrator of state owned lands within the
25 Chamokane drainage, it (like other property owners similarly situated)
26 claims real property (water right) interests in Chamokane Creek. The
27 Department of Ecology of the State of Washington is also represented,
28 not because it claims specific property rights to make use of the
29 waters of Chamokane Creek, but because the State's governmental powers
30 of managing and regulating the waters of the State, established in our
31 federal system, are vested in the Department for implementation. See

1 generally Title 90 RCW and more specifically chapters 90.03 and 90.44
2 RCW. Further, the Department is mandated by state statutes to protect
3 the interests of the State in relation to various governmental deci-
4 sions pertaining to the State's waters. RCW 43.27A.090; RCW 90.54.080.
5 In this case, the State's responsibilities include support of the
6 validity of water right permits issued to non-Indians residing both
7 within and without the Spokane Reservation.

8 This brief represents the position of the State of Washington,
9 Department of Ecology. Wherever possible, we have coordinated our
10 efforts with the writers of the brief of the Department of Natural
11 Resources to avoid overlap and repetition of argument to the maximum
12 extent practicable.

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1 II. FEDERAL-STATE RELATIONSHIPS IN THE REGULATION AND CONTROL OF
2 WATERS WITHIN THE BOUNDARIES OF THE STATE OF WASHINGTON.

3 In order to develop a proper perspective for addressing the
4 issues raised in this case certain bases of federal-state relations
5 must be set forth.

6 Waters within a state's boundaries are, in our federal system,
7 subject to the jurisdictional authority of both federal and state
8 government. The authority of the federal government is derived from
9 a number of express grants of power contained in the United States
10 Constitution including powers involving, among others, commerce (U.S.
11 Const., Art. VI, cl. 2), war (U.S. Const., art. I, §8, cl. 11, 12,
12 13, and 14), treaty making (U.S. Const. art. II §2, cl. 2), property
13 (U.S. Const., art. IV, §3), and taxation for the public welfare (U.S.
14 Const. art. I, §8, cl 3). Trelease, Federal-State Relations in Water
15 Law, National Water Commission Legal Study No. 5, chapter III (1971).^{4/}
16 A state's plenary power, typically embodied in the words "police
17 powers," is recognized by the Tenth Amendment to the United States
18 Constitution. These federal and state powers over water within a
19 state's boundaries have been exercised, for the most part, concur-
20 rently throughout our nation's history. Trelease, supra, chapter IV.
21 Indeed federal congressional policy, with very minor exceptions, has
22 long favored the use of state water right laws for the allocation of
23 water rights in the nation's waters.

24 It is a fundamental base of the State of Washington that its
25 powers over waters within its boundaries, for purposes of establishing
26 "water rights," extend to all except those which have been provided a
27 preemptive "reserved status" by action of the federal government
28 through the exercise of one or more of its constitutional powers.
29 The exception embodies the proposition that where a conflict develops

31 ^{4/} This superb work, prepared by Dean Trelease as a study for the
32 National Water Commission, is a federal government document.

1 in the implementation of federal and state laws, the mandate of the
2 Supremacy Clause is "controlling" and federal law prevails. U.S.
3 Const., Art. 6, cl. 2.

4 A. Western Water Rights Laws

5 The history of the development of rights to use of waters in the
6 western United States is also essential to an understanding of this
7 case.

8 From the earliest day of the exploration and settling of the
9 western United States, federal congressional policy has been to
10 emphasize the dominancy of state law in determining water rights
11 allocation policy and water rights administration and regulation.
12 See Act of 1866 and Act of 1870, 43 U.S.C. § 661; Desert Land Act of
13 1877, 43 U.S.C. § 321; National Forest Act of 1897, 16 U.S.C. § 481;
14 Reclamation Act of 1902, 43 U.S.C. §383; Federal Power Act of 1920,
15 16 U.S.C. §802; Water Conservation Act of 1939, 16 U.S.C. 5902-1(b)(2)
16 and the Reclamation Project Act, 43 U.S.C. § 485h-4. For general
17 discussion, see Note, Federal-State Conflicts over Western Waters,
18 60 Colum. L. Rev. 967 (1960); Trelease, Federal-State Relations in
19 Water Law, Ch. IV (1971). Through a combination of common law and
20 state legislative enactments, a highly sophisticated system of proce-
21 dures and standards for establishing "water rights," together with a
22 comprehensive mechanism for determining and regulating these rights,
23 have been developed. These systems are usually found in state "water
24 codes."

25 B. Basis for Establishing Water Rights under Washington State
26 Law

27 In terms of this "general adjudication," the relevant state laws,
28 common and statutory, which a claimant may rely upon to establish
29 rights in Chamokane Creek are embodied in two water rights doctrines
30 in effect in Washington State: the riparian and the prior appropria-
31 tion. Benton v. Johncock, 17 Wash. 277 (1897); see generally 1 Clark,
32 Water and Water Rights, ch. 2 (1967).

1 The riparian doctrine, which was imported to Washington State
2 as common law from England,^{5/} is based on the concept that a person
3 owning lands, through which a stream flows, has rights to the use of
4 the stream as an incident of his land ownership. Alexander v.
5 Muenscher 7 Wn.2d 557 (1941).^{6/} Priority of a right established
6 under this doctrine is the date the first step is taken by a person to
7 remove federal lands to a non-federal ownership status. In re Alpowa
8 Creek, 129 Wash. 9, 13 (1924). This Washington State water law
9 doctrine can, of course, be relied upon by any person-Indian or
10 non-Indian.

11 The second, and undoubtedly more prominent, doctrine for estab-
12 lishing water rights is the "prior appropriation" or "appropriation"
13 doctrine of "first in time, first in right." Hunter Land Co. v.
14 Laugenour, 140 Wash. 558 (1926); and RCW 90.03.010. A number of
15 variations of this doctrine have been in effect in the State over the
16 years. Ellis v. Pomeroy Improvement Co., 1 Wash. 572 (1889). See,
17 e.g., the variation of "custom," Isaac v. Barber, 10 Wash. 124 (1894),
18 and of "notice". Wash. Sess. Laws, 1891, ch. 21. The variation now
19 in effect is the permit system which was brought into state statutory
20 law by the "surface" water code of 1917. See chapter 90.03 RCW,
21 especially RCW 90.03.250-.340. The foundation of this doctrine is
22 that a person may establish a water right by showing an intention to
23 divert water from a water body for a "beneficial use" and thereafter
24 exercise "due diligence" in carrying out that intention. Grant Realty
25 Co. v. Yearsley and Ryrrie, 96 Wash. 616, 623 (1917). If the foregoing
26 is accomplished, the priority of the right "relates back" to the date
27 of initial intention to divert. Pleasant Valley Irrigation and Power

28
29 ^{5/} RCW 4.04.010. Geddis v. Parrish, 1 Wash. 587 (1884); Crook v.
Hewitt, 4 Wash. 749 (1892).

30 ^{6/} For a good discussion of the riparian doctrine see Long, A Treat-
31 ise on the Law of Irrigation (2nd Ed. 1916). See also Hutchins,
32 Selected Problems of the Law of Water Rights in the West, 38
33 (1943); I Wiel, Water Rights in the Western United States, chap-
ter 28 et seq. (2d ed. 1912); II Farnham, Water and Water Rights,
§41 et seq. (1904); and I Kinney, Irrigation and Water Rights,
chapters 21-28 (2nd ed. 1912).

1 Co. v. Okanogan Power and Irrigation Co., 98 Wash. 401, 409 (1917).
2 Like the riparian doctrine, the prior appropriation doctrine provides
3 a basis for both Indian and non-Indians to establish water rights to
4 Chamokane Creek. Indeed the federal government has, over the years,
5 established many water rights under state law relying, for the most
6 part, upon a state prior appropriation statute specially designed for
7 the United States.^{7/} See chapter 90.40 RCW. The United States is
8 claiming water rights relying in part on state law in this Chamokane
9 proceeding. (U.S. Brief pp.31-33.)

10 C. Federal Water Rights Law - the "Reservation" Doctrine
11 Beginning with Winters v. United States, 207 U.S. 564 (1908), and
12 continuing through a series of cases, the last being Cappaert v.
13 United States, 426 U.S. 128 (1976), the United States Supreme Court
14 has announced, developed, and amplified upon a federal water right
15 doctrine known as the "reservation doctrine."^{8/} This Court made
16 doctrine, which will be discussed in detail, infra, is now well estab-
17 lished and recognized in the law. It is this doctrine which the
18 Court is asked to rely upon to support the very, very substantial
19 claim of the United States for the benefit of the Spokane Indian
20 Tribe.

21 D. The Challenge of this General Adjudication

22 Few areas of the law are more complex and to a considerable
23 extent, even at this late date, not fully developed. This is
24 especially so in the area of federal-state relationships as they
25 relate to federal reserved rights including reserved Indian rights.
26 It is essential to be well grounded in the basic concepts of Washing-
27 ton State's water laws, especially the prior appropriation doctrine,
28

29 ^{7/} For treatise discussions of the prior appropriation doctrine see
30 generally Hutchins, supra, 64; 1 Wiel, supra, chapters 5-17; III
31 Farnham, supra, sess. 649 et seq.; and 2 Kinney, supra, chapters
32 31-58.

31 ^{8/} The other major "reserved rights" case is Arizona v. California,
32 373 U.S. 546 (1963).

1 for this case relates to the difficult task of fitting special and
2 unique forms of federal reserved Indian water rights, into the feder-
3 ally encouraged and sanctioned comprehensive water use allocation
4 programs embodied in state water rights law as established in Wash-
5 ington State as well as in the other ten western states.

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1 III. CLAIM OF THE UNITED STATES, FOR THE BENEFIT OF THE SPOKANE
2 INDIAN TRIBE

3 A. Reserved Rights of the United States.

4 The foundation of the federal reserved right is, as previously
5 noted, found in Winters v. United States, supra. That case involved
6 the Fort Belknap Indian Reservation and a stream forming a boundary
7 of the reservation, the Milk River. A federal treaty established
8 the reservation in 1888. That treaty made no mention of water rights.

9 After the reservation's creation, non-Indians began to divert
10 waters from the river upstream from the stream's entry into the reser-
11 vation. These diversions were made based upon the prior appropri-
12 ation laws of the State of Montana. The upstream diversions of the
13 non-Indians caused a dewatering of the stream leaving the reach of
14 the stream bordering the Indian Reservation dry. With this back-
15 ground, the United States requested the Federal Courts to enjoin the
16 upstream non-Indian diversions to the extent necessary to protect
17 rights of the Indians.

18 The ruling of the Supreme Court was based upon a conclusion
19 that, although the treaty establishing the Fort Belknap Reservation
20 was silent with regard to water rights, the treaty impliedly reserved
21 the right of the Indians to make use of the waters of Milk River.
22 Of importance to this case, the Winters case provides the following
23 teachings:

24 1. When a reservation is established pursuant
25 to a treaty and no mention is made of water
26 rights, rights are implicitly reserved to use
27 waters in amounts necessary, not only for the
present but for the reasonable foreseeable future,
to carry out the purposes for which the reserva-
tion is created.

28 2. The priority date of such "reserved" rights
29 is the effective date of the treaty.

30 Because the non-Indians upstream diversion rights, established
31 under Montana law, had priority dates later than the 1888 priority
32

1 date of the reserved rights of the Indians, a decree was entered
2 requiring 5,000 cubic feet per second of Milk River waters to be
3 passed on to the Belknap Reservation for use on the reservation to
4 satisfy the Indians rights.

5 The Winters case has been the cornerstone of the development
6 of the federal reserved water rights doctrine which, over the years,
7 the Department of Justice has persuaded the Federal Courts to apply
8 not only to Indian reserved lands but other federal "reserved" lands
9 e.g., national forests, national monuments and wildlife refuges.
10 Arizona v. California, 373 U.S. 546, 595 (1963); Cappaert v. United
11 States, 426 U.S. 128 (1976). See also the Indian reserved rights
12 cases of Conrad Investment Co. v. United States, 161 Fed. 829 (1908),
13 and United States v. Walker River Irrigation District, 104 F. 2d 334
14 (9th Cir. 1908). Despite substantial difficulties by many western
15 states in accepting the Winters "doctrine," the State of Washington
16 has long recognized it as a viable base for establishing rights to
17 appropriate waters within the State's boundaries.^{9/}

18 One of the difficulties, assuming an impliedly reserved right
19 is found under a specific treaty, is the scope (in terms of both
20 uses and specific quantifications) of the reserved right. What
21 amounts are the Indians entitled to divert from a stream and for
22 what uses? The Winters formula does not lead directly to a specific
23 amount authorized for diversion as is the case with the prior
24 appropriation doctrine. Because almost all of the treaties and
25 executive orders involved in reported reserved Indian water rights
26 litigation have related to arid areas where viable agricultural
27 economies are contemplated for establishment by the Indians, the
28 specific measurement in cubic feet per second or some other precise
29 parameter of the right has been expanded upon by the Courts only

31 ^{9/} As an example, federal reserved rights were recognized in the
32 Washington State superior court general adjudication decree
(which was appealed in relation to other matters) in Walker v.
33 Biles-Coleman Lumber Company, 77 Wn.2d 658 (1970).

1 where the beneficial use involved has been for agricultural
2 irrigation. Arizona v. California, supra, and United States v.
3 Walker River Irrigation District, supra. In this regard, the Arizona
4 case announced a formula for determining the outside limits of an
5 Indian reserved right to irrigation to be that amount necessary to
6 irrigate Indian lands which constitute "practicably irrigable acre-
7 age." 373 U.S. at 600.

8 There are three points to be made about the federal Indian
9 reserved rights doctrine.

10 First, a court (including, we add, a state court) is an appro-
11 priate place to quantify a reserved right. See Colorado River Conser-
12 vation District v. United States, 424 U.S. 800 (1976).

13 Second, the establishment of an Indian reserved right does not
14 necessarily establish a right to use or jurisdiction over all waters
15 flowing through or located within the exterior boundaries of an
16 Indian reservation. The implied rights established by treaties or
17 executive orders only reserve rights to divert water as are necessary
18 to carry out the purposes of the reservation and no more. A simple
19 fact pattern illustrates the point. Assume for example, a thousand-
20 acre Indian reservation with a water right impliedly reserved by
21 treaty to irrigate all practicably irrigable acres on the reservation.
22 Assume further that every acre of the reservation is practicably irri-
23 gable. Assume also that within the reservation is a waterbody, like
24 the mighty Columbia River, with water sufficient to irrigate a
25 thousand-acre tract a thousand times over and more. Are all waters
26 within the reservation reserved to the Indians? Obviously they are
27 not. The reserved right of the Indians does not relate to diversion
28 rights to or control over all of the waters of the water body. It is
29 limited to the right to divert an amount necessary to take care of a
30 thousand acres at the very most. That is the upper limit of the
31 Indian reserve. That is the extent of Indian interest.

1 This aspect of the reserved rights doctrine was most clearly
2 described in Cappaert v. United States, supra. Chief Justice Burger,
3 writing for a unanimous Court emphasized the limited nature of a
4 reserved water right. In discussing the scope of the reserved water
5 right of the United States in the "pupfish" case, he used these words
6 at page 138:

7 This Court has long held that when the Federal
8 Government withdraws its land from the public domain
9 and reserves it for a federal purpose, the Govern-
10 ment, by implication, reserves appurtenant water
11 then unappropriated to the extent needed to
12 accomplish the purpose of the reservation.
13 (Emphasis added.)

14 He also noted, at page 136, that the

15 ... doctrine applies to Indian reservations
16 and other federal enclaves, encompassing water
17 rights in navigable and non-navigable streams.
18 (Emphasis added.)

19 The unanimous opinion of the Court followed, at page 141, with
20 this especially telling description of the scope of impliedly
21 reserved rights and their limited nature.

22 The implied reservation of water doctrine,
23 however, reserves only that amount of water neces-
24 sary to fulfill the purpose of the reservation,
25 no more. (Emphasis added.)

26 In other words, the establishment of a federal reservation, including
27 an Indian reservation, does not necessarily reserve all the waters
28 of the reservation to the United States' dominion and control. It
29 is limited to "no more" than necessary to carry out the purposes of
30 the reservation - a factual determination which is different for
31 every reservation.

32 Third, and most important, the scope of the reserved right
33 depends on the intent of the government in creating the reservation.
34 Winters v. United States, supra at 575-76; United States v. Walker
35 River Irrigation District, supra at 336.

36 Chief Justice Burger, writing in Cappaert, supra, at 139,
37 discussed the potential for existence of a reserved water right with

1 these words:

2 In determining whether there is a federally
3 reserved water right implicit in a federal reser-
4 vation of public land, the issue is whether the
5 Government intended to reserve unappropriated
6 and thus available water. (Emphasis added.)

7 In sum, the Department of Ecology's position is as follows:

8 1. The State recognizes the existence of federally reserved
9 rights on the Spokane Reservation of some limited nature and that
10 these rights, absent federal consent, are beyond the State's general
11 governmental authority to regulate.

12 2. The State has jurisdiction over all waters above the amount
13 necessary to satisfy the federal reserved rights and that the State
14 has jurisdiction, at the least, over these waters located on or under
15 non-Indian lands, whether former "allotments" or "homestead lands,"
16 within the original boundaries of the reservation.

17 3. Further, state laws are applicable to reserved rights held
18 by a non-Indian as the result of acquisition through purchase of an
19 Indian "allotment" which has been severed from its special federal
20 trust title status.

21 B. The Scope of Reserved Rights on the Spokane Reservation -
22 The Search for Federal Intent.

23 A most difficult assignment of this case arises from the nature
24 of the claims of the United States and the Spokane Indians. They
25 have taken the "have their cake and eat it too" approach. (Spokane
26 Brief, p. 63.) Not only is it contended that the federal government
27 impliedly reserved the right on behalf of the Spokane Indians to dry
28 up the stream during the summer months in order to irrigate Indian
29 lands, but, for the first time in any reserved rights case we are
30 aware of, they contend the same implied reserve of water rights
31 embodies the "instream use" right, in effect, of having the stream
32 flow "as it was wont to do in nature" along the lines of the "natural
33 flow" variation of the common law riparian rights doctrine. A doc-
trine which is no more if, indeed, it ever was.

1 1. Relevant Sources of Intent

2 Before we can begin our search for the intent of the federal
3 government to reserve rights to the Tribe, we must know what sources
4 of intent are relevant to our inquiry. The best source, of course,
5 would be a treaty. But in the absence of a treaty, an executive order
6 may be indicative of intent. As stated in United States v. Walker
7 River Irrigation District, 104 F.2d 334, 336 (9th Cir. 1939):

8 "In the Winters case, as in this, the basic question
9 for determination was one of intent - whether the
10 waters of the stream were intended to be reserved
11 for the use of the Indians, or whether the lands
12 only were reserved. We see no reason to believe
13 that the intention to reserve need be evidenced
14 by treaty or agreement. A statute or an executive
15 order setting apart the reservation may be equally
16 indicative of the intent. While in the Winters
17 case the court emphasized the treaty, there was
18 in fact no express reservation of water to be found
19 in that document. The intention had to be arrived
20 at by taking account of the circumstances, the
21 situation and needs of the Indians and the purpose
22 for which the lands had been reserved." (Emphasis
23 added; footnote omitted.)

17 The plaintiffs have cited numerous historical documents of the period
18 surrounding the creation of the reservation. To the extent these
19 speak to the intent of the parties, they are relevant to our
20 inquiry.^{10/}

21 What is not relevant are contemporary state laws^{11/} and new

23 ^{10/} One of the sources cited extensively by the Tribe is transcribed
24 minutes of proceedings leading up to the 1887 Agreement (herein-
25 after cited as "Minutes"), filed with their Brief as appendix ii.
26 These minutes, so far as we are aware, were never admitted into
evidence at the trial; indeed they were not even proposed for
admission.

27 ^{11/} Both the United States and Spokane briefs quote at length from
28 Washington State law which recognizes minimum stream flows for
the protection of fisheries and esthetics. Cited are portions
29 of RCW 90.22.010 and RCW 90.54.020. (U.S. Brief pp. 31-33;
30 Spokane Brief, pp. 86-91.) If these statutes are cited for the
purpose of proving that fisheries and esthetics are "purposes"
31 of the Spokane Indian Reservation, they of course are not sup-
portive of that point. If, however, they are cited for the
32 proposition that a governmental body has the power to protect
a stream for the purpose of fisheries or esthetics, then
33 such extensive quotation may have some relevance. However,
by the plaintiffs own admission, the relevant inquiry is
not whether the federal government may exercise its power
to reserve waters for a given purpose, but whether the
power was exercised in this case.

1 industries or "purposes" into which Indian tribes may venture.^{12/}

2 Because there was no explicit reservation of water for the
3 Spokane Indians in either the agreement of 1877 or the Executive
4 Order creating the reservation,^{13/} we therefore must turn to the
5 history surrounding the creation of the reservation to ascertain:
6 (1) the purposes for which the reservation was created and (2) the
7 waters the parties intended to tap to meet those purposes. From
8 these we can ascertain the quantity of water the parties intended
9 to reserve to meet present and future needs of the Indians on the
10 Spokane Reservation.

11 2. The "Purposes" of the Spokane Indian Reservation.

12 a. Agriculture

13 As is the case with the creation of most Indian reservations
14 in the arid west, whether by treaty or executive order, the "intent
15 is given to reduce the Indians to more compact reservations and
16 orient them in the direction of agriculture." (Spokane Brief, p. 28.)
17 The Department of Ecology has no quarrel with this purpose of the
18 reservation. There is ample evidence in the record showing that
19

20 ^{12/} The question of the degree to which an Indian tribe may transfer
21 water reserved for one purpose, such as agriculture, to another
22 purpose, such as industry, is not before the Court. However, as
23 admitted in the plaintiff's briefs, the quantity of the right
reserved depends on the purposes for which the reservation was
created, not on purposes conceived by future generations of
Indians.

24 ^{13/} The plaintiffs spend a great deal of time arguing that the
25 priority date for the Winters right is the date of the agree-
26 ment and not the date of the Executive Order. The Department
27 of Ecology takes the position the date of the Presidential Exe-
28 cutive Order of 1881 is the date of any claimed reserved rights.
29 However, if we assume that the plaintiffs are correct in that
30 the reserved right attached at the date of the agreement, then
31 the intent of the parties must be ascertained at that point,
32 looking to that agreement and the surrounding needs of all cir-
33 cumstances of the Indians. See, U.S. v. Walker River Irr. Dist.
104 F.2d at 336. To the extent the Executive Order manifests
new intent not existing in the agreement, thereby creating
different or modified purposes for the reservation, the date of
attachment of the reserved right should be the date of the order.
Because plaintiffs place a great deal of weight on the change in
reservation boundaries in the Executive Order as indicative of
intent regarding a fisheries purpose, it would be logical to
assume that, if that is indicative of a new or revised intent,
the priority date would be the date of the Executive Order. For
a lengthier discussion of the priority date of any existing
rights, see the Brief of the Department of Natural Resources.

1 there was an intent to locate the Indians on land and to teach them
2 the methods of agriculture. (P.E. 62) In the Agreement of 1877,
3 the Indians agreed "to go upon the [reservation] . . . with the
4 view of . . . engaging in agricultural pursuits." (P.E. 63). The
5 government even intended to provide the Indians with the implements
6 of agriculture. (P.E. 57.)

7 Indeed, as we previously noted, most so-called "Winters rights"
8 reservations have been for agriculture. Implicit in the federal
9 policy of placing Indians on western reservations was the policy of
10 converting them from a nomadic people, engaged in hunting, fishing,
11 and a variety of other activities, to a "civilized" people with agri-
12 culture as an economic base. As stated in Winters:

13 "It was the policy of the government, it was the
14 desire of the Indians, to change those [nomadic]
15 habits and to become a pastoral and civilized
16 people. If they should become such, the original
tract would be inadequate without changed con-
ditions." 207 U.S. at 576.

17 The Winters court concluded that "without irrigation, [these lands]
18 were practically valueless." Id. The right to waters for irrigation,
19 therefore, was implicit in the creation of the reservation. Such an
20 implied right to waters for purposes of irrigation was found in simi-
21 lar cases dealing with Indian tribes on arid western lands.

22 b. Timber Production

23 The courts have found other "purposes" to which federal reserved
24 rights apply. These purposes have either been stated expressly,
25 Cappaert v. United States, supra (preserving unique species of fish),
26 or follow so logically from the creation of the reservation, as in
27 the case of agriculture that the parties "knew" of the reservation
28 of waters, Winters v. United States, 143 Fed. 740, 745, (9th Cir.
29 1906), aff'd, 207 U.S. 564 (1908).

30 In addition to agriculture, another intended purpose of the
31 Spokane Reservation clearly within the intent of both the federal
32

1 government and Tribe was timber production. The Minutes of the
2 proceedings leading up to the 1887 agreement are clear on this.

3 At one point, Enoch stated:

4 "I know the land I want is not good. It is nothing
5 but rock. It is nothing but timber. If you give
6 me the land if it is only timber land, it is just
the same as if you gave me a crop . . ." Minutes at 33.

7 A large portion of the Spokane Indian Reservation is timberland
8 (Tr. 225) and timber has played an important part in the economy
9 of the Spokane Tribe. Although there has been substantial logging in
10 certain areas during this century which has depleted certain timber
11 stands (Tr. 781, 818), the value of the timber resource certainly was
12 within the knowledge of the Indians and the federal government at
13 the time of the creation of the reservation, and according to the
14 above quote, reserving timberland for the use by the tribe is as
15 valuable as reserving land for other crops.

16 c. Fishing

17 Beyond agriculture and timber, other purposes of the Spokane
18 Reservation are not clear.^{14/}

19 The plaintiffs assert however, that in addition to agriculture
20 and timber, the reservation was created for the purpose of fishing.
21 The Department of Ecology acknowledges that fishing may have been a
22 purpose of the reservation and water impliedly reserved for that
23 purpose. However, the record demonstrates that, except for perhaps
24 a de minimus amount, the Spokanes' fishery was not based on Chamokane
25 Creek. Rather, it was a salmon fishery based on the Columbia River
26

27 ^{14/} The State agrees the implied reserved rights of the Indians
28 include domestic and stockwatering uses normally associated with
29 farming activities. The domestic use should be based on .01 cfs
30 for family. The stockwatering uses should be the amount neces-
31 sary to water stock when grazing under natural conditions of the
32 land. In other words, the reserved right for stockwatering does
33 not include water sufficient to satisfy an intensive use of
lands for stock activities such as in the operation of a feed
lot. Normally stockwatering should be measured as an instream
value; i.e., in terms of flow. Note, however, there is evidence
in the record that use of water for stockwatering will not
affect the flow in Chamokane Creek. (Tr. 936)

1 and on the Spokane River (P.E. 55, 62; Tr. 674.) The Spokane Brief
2 at 51 contains a good description of the fishery at the times of the
3 Executive Order.

4 The fishery at that time included a marvelous river
5 system extending from above Kettle Falls on the
6 Columbia to Spokane Falls on the Spokane. Included
7 was Kettle Falls, Little Falls, the falls at what
8 is now Long Lake Dam, the Little Spokane River and
9 several other prime sites.

8 There was even a proposal to extend the reservation up the Columbia
9 River to include the fishery at Kettle Falls. (P.E. 55.)

10 There was a salmon run on Chamokane Creek, but that was
11 limited to the one mile stretch below the falls. (Tr. 675, 694-95.)
12 This was a miniscule portion of the entire salmon fishery available
13 to the Spokanes. Indeed, expressions of intent in the record as to
14 the fishery purpose of the reservation do not mention the Chamokane
15 Creek as a site for the salmon fishery.^{15/}

16 The United States, in its brief, gives great weight to the fact
17 that the Executive Order by President Hayes creating the reservation
18 included the east bank of the Chamokane Creek. This fact, they
19 assert, indicates that there is some special significance to that
20 creek, implying its value as a fish resource. (U.S. Brief, p. 20.)
21 Of course, the boundaries in the Executive Order also extend to
22 the west bank of the Columbia and to the south bank of the Spokane.
23 Chamokane Creek is not treated specially at all; it is treated as
24 any other boundary of this reservation, and no conclusions as to
25 fish can be deduced from those boundaries. We concur that the
26 drawing of the boundaries to specifically include the entirety of
27 these waters may indicate that water is important to the tribe, but
28 it does not indicate for what purposes this water is to be used, nor

30 ^{15/} The Department of Natural Resources in its Brief supports this
31 position by quoting extensively from the decision of the Indian
32 Claims Commission in Spokane Tribe v. United States, 9 Ind. Cl.
Comm. 236 (1961). We incorporate that argument by reference.

1 in what quantities. Certainly, drawing the boundary at the south
2 bank of the Spokane and the west bank of the Columbia does not mean
3 that the entire flows of those rivers are reserved for the Spokanes,
4 for fisheries, or for any other purpose. Likewise, placing the
5 boundary at the east bank of the Chamokane Creek does not automatic-
6 ally reserve the entire flow of that creek or any part thereof. See
7 Cappaert v. United States, supra. Rather, the placement of the
8 boundaries by the Executive Order can be construed as nothing but an
9 attempt to define the area of the reservation. To learn the purposes
10 of the reservation we must look elsewhere.

11 Even assuming a salmon fishery on the Chamokane was one of the
12 purposes of the reservation, that salmon fishery is no more. After
13 construction of the Grand Coulee Dam by the United States the salmon
14 runs ceased. (Tr. 675.) Any needs for waters to satisfy such
15 alleged reserved purposes being eliminated, it follows the water
16 rights to such purposes also terminate. Further, even assuming no
17 termination of water rights for protection of salmon fisheries by the
18 Grand Coulee blockage, there was compensation made to the Spokane
19 tribe for the loss of fish runs by providing them exclusive fishing
20 zones in Franklin D. Roosevelt Lake as well as other compensation.
21 16 U.S.C. §§ 835 d-e. Clearly at this point, if not earlier, any
22 reserved water rights for salmon fisheries were relinquished.^{16/}

23 Plaintiffs also assert that there is a trout fishery on the
24 Chamokane upstream from the falls and waters are impliedly reserved
25 for the maintenance of that fishery. There is very little evidence
26 of historical use of the trout fishery during "executive order" times.
27 It is limited to some testimony on wintering sites on the Chamokane
28 Creek where members of the Tribe stored their food, such as camas and
29 bitterroots and "enough" dried salmon. (Tr. 665.) The water is

31 ^{16/} To the extent this compensation is inadequate, that is a matter
32 between the Spokane tribe and the United States government.

1 fresh and pure (Tr. 666) and "they can also fish . . . for fresh
2 fish." (Tr. 666.) This is the extent of the evidence on which
3 plaintiffs contend there is intent to reserve water adequate for
4 preservation of the trout fishery on Chamokane Creek. Even if this
5 were enough evidence to deduce a purpose for which waters are
6 reserved, note the limited extent of this purpose. It is not a large
7 scale fishery. It is not a fishery on which the Spokanes depend for
8 their livelihood. At most, it is a fishery to supplement an already
9 abundantly available food supply during the winter months.

10 The plaintiffs contend that a minimum flow of 30 cfs is neces-
11 sary to preserve this limited trout fishing on Chamokane Creek. The
12 20 cfs minimum flow, they contend, does not protect the fishery.^{17/}

13 The issue is whether the 20 cfs flow is adequate to fulfill the
14 purpose of the reservation; i.e., the trout fishery intended to be
15 protected by the federal government at the time of creation of the
16 reservation. Recall that this was a limited fishery, not one on
17 which the livelihood of the tribe depended. There were "enough"
18 salmon to meet the food requirements of the Tribe. (Tr. 665.) The
19 Chamokane, however, was the site of three wintering camps for the
20 Tribe, two above the falls, one below. (Tr. 665-66.) The Indians
21 could obtain pure water from the springs and could also fish for
22 trout. At most, the Tribe has a right to water to fulfill this
23 purpose. If the 20 cfs minimum flow protects this limited fishery on
24 the creek as a whole, then the inquiry is over. The Department of
25 Ecology contends not only that the evidence does not show that a
26 30 cfs minimum flow is necessary but that a 20 cfs flow fulfills the
27 purpose of the reservation and more.

28
29 ^{17/} The 20 cfs minimum flow in Chamokane is based upon the imple-
30 mentation of State laws, designed to protect fisheries values,
31 through the embodiment of a water right permit issued to defen-
32 dant Smithpeter in 1969. See defendants' exhibit 2. The perti-
33 nent state laws are the permit system of the state water code,
RCW 90.03.250 et seq. and the various policies found in the
State statutes which require the protection of minimum flows.
RCW 90.54.020(2); Chapters 90.22 RCW and RCW 75.20.050.

1 There are two parts to the trout fishery on the Chamokane. One
2 is above the falls, the approximately five miles of the stream
3 between the falls and the springs; the other is the one mile stretch
4 below the falls to the mouth. (P.E. 64.) The plaintiff's own wit-
5 ness, Mr. Navarre, sampled water quality and water temperature at
6 two stations, one above the falls and one below. There was no evi-
7 dence of any potential water pollution problem anywhere in the stream.
8 (Tr. 451; P.E. 64, p. 22.) The evidence also shows that there is no
9 potential water temperature problem in the five-sixths of the fishery
10 above the falls. (Tr. 474-75.) The only potential problem is below
11 the falls where, Mr. Navarre testified, on several days in the
12 summer, the "maximum" temperature during the day exceeded 68°F.
13 (Tr. 474.) There is evidence that above 68°, fish will not feed and
14 some will experience some stress (Tr. 440, 471, 631.) which could
15 result in drifting downstream, possibly to the Spokane River where
16 predators presumably are waiting. (Tr. 443.)

17 The Department of Ecology does not question whether there are
18 certain minor adverse effects in fish when exposed to prolonged
19 temperatures in excess of 68°, but the Department does question
20 whether these effects in this small part of the fishery are so
21 adverse as to violate the reserved rights of the Tribe in this
22 limited trout fishery.

23 There is no evidence of dead fish (Tr. 498), and the temperature
24 below the falls, even in the hottest days, did not approach 77°, the
25 temperature at which fish may die. In fact, except for the very
26 first instant the thermometer was placed in the stream, the highest
27 temperature recorded was 70°. (P.E. 64, pp. 9-10.)^{18/}

28 During the hot summer months of 1973, there were nine days on
29 which the maximum temperature exceeded 68° (P.E. 64, p. 9), but as the
30

31 ^{18/} On July 17, the recorded temperature was 73°. (P.E. 64, p. 14.)
32 On subsequent days when air temperature was higher, the tempera-
33 ture of the water did not approach this mark.

1 graphs of Mr. Navarre show, those temperature were reached for only
2 an hour or two on each of those days. (P.E. 64, p. 7-8.) These are
3 not the prolonged periods of high temperature that will force all
4 fish downstream and stop all fish from feeding causing them to die.
5 (Tr. 510, 519.) It does mean that fishing is not as good in mid-
6 afternoon as in early morning or evening, but that is a character-
7 istic of all fisheries, a fact so well known that judicial notice may
8 be taken of it.

9 The fishery protected by the 20 cfs minimum flow may not be
10 as good below the falls as above, but the fishery above the falls
11 is thriving in excess of what was "reserved" at time of creation of
12 the reservation. The Department asserts that the fishery below the
13 falls is adequate to fulfill purpose it was intended to serve. And
14 even if it does not, the fishery on the entire stretch of the Creek
15 is more than adequate, and the 20 cfs minimum flow protects this
16 fishery.

17 3. The federal intent to reserve water -- sources.

18 The United States in its brief states that "The Supreme Court's
19 decision in Cappaert is controlling on the issue of the applicability
20 of a federal reserved right to ground water." (U.S. Brief at 9.)
21 The Department of Ecology agrees with this statement to the extent it
22 means that the federal government may reserve ground waters for a
23 specific purpose, but we disagree strongly if it means that the
24 federal government always reserves ground water whenever it creates
25 a reservation for a purpose for which water is required. We reempha-
26 size that the foundation of all reserved rights is intent, express or
27 implied. If the parties intend to reserve ground water, it is so
28 reserved; if the parties intend to reserve only surface water, then
29 ground waters are not reserved. Of course, this intent may be implied
30 as well as express.

The leading case, Cappaert v. United States, is illustrative.

1 There, the Supreme Court found that surface water in the underground
2 pool in which the pupfish lived was so interconnected with the ground
3 water pumped by the defendant ranchers that there the expressly
4 reserved surface rights were protected against the ranchers who were
5 relying on junior groundwater rights to pump the groundwaters tribu-
6 tary to the surface water pool. Cappaert, supra at 143.

7 Where there is a less direct relationship between the ground
8 waters to the surface, as is the case with Chamokane Creek, an intent
9 to reserve ground water is very difficult to imply. Using the stand-
10 ard set forth by the Ninth Circuit that the parties "know" of the
11 implied reservation, it is difficult to presume knowledge of hidden,
12 underground waters.

13 There is conflicting evidence on the relationship of ground
14 water and surface water in the Chamokane Basin. The plaintiff's
15 witness, Mr. Woodward, testified that the surface and ground water in
16 the basin are a single system; appropriation from one depletes the
17 other. The State's witness, Dr. Maddox, refutes this. (Tr. 937.)
18 A fair reading of the evidence would be that a good deal of the
19 ground water is interlocked with the surface water on the Chamokane.
20 However, there is evidence that at least some appropriations of
21 ground water in the Chamokane Basin have no effect on the flow of
22 the Chamokane. (Tr. 967). Appropriations of these ground waters
23 flowing to the east and out of the drainage could not have been
24 reserved by the federal government.^{19/}

25 Likewise, the record does not show clearly which sources of water
26 the federal government intended to tap to fulfill the purposes of
27 the reservation. There is, however, substantial evidence that it was
28

29 ^{19/} Although this is an adjudication case concerning the waters of
30 Chamokane Creek, it is relevant to note that other sources of
31 water for the reservation, the Spokane and Columbia rivers, may
32 provide water to fulfill the purposes of the reservation, even
33 within the Chamokane Basin. The Tribe noted that there are
plans to irrigate lands within the Chamokane basin using waters
from the Spokane and Columbia. (Spokane Brief, p. 63.) While
the Chamokane basin comprises approximately one-sixth of the
land area of the reservation, Chamokane Creek provides only a
miniscule portion of all the water. (Tr. 183.)

1 not the Chamokane. The Spokane's never intended to use Chamokane
2 Creek for irrigation. (Tr. 730, 781.) According to the testimony of
3 Mr. McCoy:

4 ". . . the Tribe never did plan on using Chamokane
5 Creek for irrigation. We always did plan to use
6 the fertilized Spokane River for irrigation."

7 This historical view has been endorsed by a more recent Tribal Council
8 resolution declaring the Chamokane as not available for irrigation.
(Tr. 731.)

9 4. The federal intent to reserve waters -- quantities

10 It is accepted law that reserved rights extend not just to meet
11 existing needs of the Tribe, but future needs as well. This does
12 not mean the federal government writes a blank check to Indian tribes
13 when reservations are created. There are limits on the quantity of
14 water reserved, limits inherent in the capabilities of the reserva-
15 tion, limits created by the doctrine that in the water-short west
16 there will not be any waste of water, United States v. Walker River
17 Irrigation District, supra, at 340 and most important, limits set by
18 the intent of the parties.

19 If a reservation is created for the purposes of irrigation,
20 the quantity of water reserved can be no more than that amount which
21 can be put to use productively. The Supreme Court in Arizona v.
22 California, 373 U.S. 546, 600-01 (1963), set the outside limit for
23 this quantity as the "irrigable acreage" of the reservation. The
24 Court rejected the present needs test for quantities of water and
25 any test which was based on the number of Indians which may live on
26 the reservation at some time in the foreseeable future. "Irrigable
27 acreage," the Court found, was the only "feasible and fair way" to
28 determine the future needs of the Indians. Id. at 601.

29 Arizona v. California was a final adjudication of rights in the
30 Colorado River Basin. The decree was not left open for modification
31 as future needs of the Indians became apparent. If it had not been
32

1 a final adjudication, then perhaps the Court would have looked at
2 "existing needs" or reasonably foreseeable needs as the test for
3 quantity of waters reserved. But the finality of that adjudication
4 would have made this "unfair."

5 This view, that "irrigable acreage" is not necessarily the test
6 in cases in which the decree is left open for future modification,
7 is consistent with the law in the Ninth Circuit. In United States v.
8 Walker River Irrigation District, supra, at 340, the Court stated:

9 "There remains for decision the question as to the
10 quantity to which the United States is entitled. The
11 problem is one of great practical importance, and
12 a priori theories ought not to stand in the way
13 of a practical solution of it. The area of irri-
14 gable land included in the reservation is not
necessarily the criterion for measuring the
amount of water reserved, whether the standard
be applied as of 1859 or as of the present. The
extent to which the use of the stream might be
necessary could only be demonstrated by experience."

15 We quote the above not for the purpose of asking this Court to
16 reverse the "irrigable acreage" standard set in Arizona v. California.
17 Rather, we quote it for the purpose of pointing out a distinction
18 between those cases in which final decrees are issued and those in
19 which the decree is left open subject to modification upon a showing
20 by the Indians of changed needs. In this case, this is another
21 example of the Tribe wanting to have their cake and eat it too. They
22 want a decree based on irrigable acreage, but want it left open as
23 well.

24 Natural limits on the quantity reserved, such as the irrigable
25 acreage limit, are, of course, subject to the intent of the parties.
26 Although a reservation created for the purpose of irrigation may
27 have 10,000 acres considered irrigable, it does not follow that the
28 parties intended all that land be irrigated. If use of water suffi-
29 cient to irrigate all that land would deplete the stream flow so
30 that other purposes of the reservation would not be served, then an
31 intent to irrigate all irrigable lands could not be implied. Like-
32 wise, if some of the irrigable lands are intended to be used for

1 some other functions, then there could be no intended reservation of
2 waters to irrigate those lands.

3 This is the case in the Spokane Reservation. The Tribe requests
4 waters to irrigate all irrigable lands and urges the Court to include
5 as irrigable lands a substantial number of acres of timberlands.^{20/}
6 The record clearly shows that maintenance of the timber stands and
7 timber harvesting were among the original purposes of the reservation.
8 (Minutes, p. 31.) To include these timber lands in "irrigable acre-
9 age" for purposes of quantifying reserved rights would be counter to
10 one of the purposes of the reservation.^{21/}

11 Furthermore, the Tribe cannot, consistent with the intent of the
12 federal government in creating the reservation, have water adequate
13 for all alleged irrigable acreage plans and also retain 30 cfs to
14 maintain the stream for fish and aesthetics.

15 5. Conclusion -- the Federal Reserved Right

16 The quantity of water reserved to fulfill the purposes of a
17 federal reservation is not determined by simple and broad general
18 rules, such the "irrigable acreage" rule. The only applicable general
19 rule is that the quantity is based on intent. Cappaert, supra at
20 139. The intent depends on the facts of each case.

21 At least the following factual determinations must be made
22 before existing reserved rights to waters in Chamokane Creek may be
23 quantified:

24
25 ^{20/} The United States claims that 6,580 acres of the 8,460 claimed
26 as irrigable lie in the area known as the Chamokane Bench.
27 (U.S. Brief, p. 44.) However, the plaintiffs' own witness,
28 Mr. Woodward, testified that a "major block" of these lands are
29 timbered. (Tr. 225; P.E. 3-6-74-29.) The plaintiffs have not
30 produced evidence showing which of their claimed irrigable lands
are not timbered, nor which are "intended" to be irrigated from
a source other than Chamokane Creek. Indeed, there is evidence
that the Tribe never intended to irrigate lands on the Chamokane
Bench. (Tr. 734.) The Brief of Department of Natural Resources
expands on this further, an argument we incorporate by reference.

31 ^{21/} The fact that some timber stands have been depleted (Tr. 781,
32 818) is irrelevant, just as it would be irrelevant if lands
33 once irrigable and potentially productive no longer are so.
The reserved right attaches at the date of the creation of the
reservation.

1 1. Was preservation of a trout fishery on Chamokane Creek a
2 "purpose" of the reservation?

3 2. If so, was the scope of that fishery such that it is
4 preserved by the 20 cfs minimum flow?

5 3. Was agriculture a "purpose" of the reservation?

6 4. Was timber production a "purpose" of the reservation?

7 5. Was there an intent that water be reserved for irrigation
8 of lands which at the time of creation of the reservation were produc-
9 ing timber?

10 6. Was there an intent that all water reserved for use within
11 the Chamokane Basin be obtained solely from Chamokane Creek?

12 The Department of Ecology asserts that the purposes of the reser-
13 vation were limited to agriculture and timber. To the extent there is
14 a purpose of a trout fishery, it is a limited one well-protected by
15 the 20 cfs minimum flow provision of state law. Finally, there was
16 no intent to irrigate "irrigable lands" covered by timber, and there
17 was an intent to irrigate some of the non-timbered irrigable lands
18 from waters other than Chamokane Creek.

19 If the Court adopts this position, or one substantially similar,
20 it must determine from the record or from additional evidence the
21 number of acres of non-timbered "irrigable" lands within the Chamokane
22 basin which were not intended to be irrigated from sources other than
23 Chamokane Creek.

24 However, if the Court finds that the 20 cfs minimum flow does not
25 adequately protect the limited trout fishery, then it should imple-
26 ment, not a higher minimum flow, but a regulatory program which is
27 designed to retain the waters of the Chamokane Creek at temperatures
28 below 68° Farenheit. This program, the Department of Ecology contends,
29 could be worked out by various experts of the United States and State
30 of Washington, through the evaluations and calculations, of the
31 various diversion rights confirmed by this Court. The studies would
32

1 develop cause-effect relationships of various of the confirmed rights
2 on the flows in certain amounts, and especially, during what periods
3 of time. This approach would not require the Court to set a specific
4 and arbitrary minimum flow, but rather provides for a flow which will
5 serve the purposes of the reservation.

6 In the alternative, if the Court deems this approach inappro-
7 priate, the Department of Ecology urges a minimum flow of 20 cubic
8 feet per second.

9 In either case, the minimum flow setting can be supported by
10 fundamentals of state law as well as by specific implementation of
11 state prior appropriation law to Chamokane Creek as set forth in the
12 aforementioned condition of the Smithpeter permit.

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1 IV. THE APPLICABILITY OF STATE WATER RIGHTS LAWS TO NON-INDIAN LANDS
2 WITHIN THE ORIGINAL BOUNDARIES OF THE SPOKANE INDIAN RESERVATION.

3 As previously noted there are non-Indians owning lands within
4 the original boundaries of the Spokane Reservation. Some of these
5 landowners, either as owners of "homestead" or "allotted" lands,
6 claim water rights established pursuant to laws of Washington State.

7 A major concern of the State of Washington is the position taken
8 by the United States in its Brief, at page 82, that the United States
9 (and the Spokane Tribe) assert that they have exclusive jurisdiction
10 within the exterior boundaries of the reservation to manage and con-
11 trol the federal reserved water rights appurtenant to the reservation.
12 Further, the United States asserts Congress has never authorized the
13 State of Washington to assume jurisdiction over the waters of Chamo-
14 kane Creek for uses on formerly allotted or homestead land. (U.S.
15 Brief pp. 81-92.) This is a latter-day revelation by the United
16 States of the law on the subject. The State of Washington has, over
17 the years, issued numerous permits to withdraw waters on or underlying
18 non-Indian lands within the original boundaries of the various reser-
19 vations in Washington.^{22/} Only recently, and certainly not before
20 the decade of the 1970's, has the United States objected or otherwise
21 suggested the State was misconstruing the reach of its water laws by
22 extending permit issuance activities to water on or within non-Indian
23 lands within the original boundaries of a reservation.

24 The position of the United States is further described on page 82
25 of its Brief as follows:

26 "When the territory now comprising the State of Wash-
27 ington came into the ownership of the United States
28 through cession from foreign sovereigns, the United

29 ^{22/} As examples, the Court can take judicial notice that the State
30 of Washington has, over the years, been issuing permits to with-
31 draw waters located on non-Indian owned land within the original
32 boundaries of the Colville and Lummi reservations. Two of these
33 permits are the subject of litigation now pending in this court,
United States v. Walton, No. 3421, and in the Western District of
Washington, United States v. Bel Bay Water Users Association,
Civil No. 303-71C2.

1 States became the owner of the land and all rights
2 pertaining thereto, except for those interests in
3 lands and appurtenant rights established under the
4 previous sovereigns. Borax Consolidated, Ltd. v.
5 Los Angeles, 296 U.S. 161, 183-184 (1891). The
6 right to the use of the appurtenant waters on
7 these lands was a part of the bundle of rights
8 acquired by the United States in the acquiring
9 title to those lands."

10 On page 85, the United States, citing three United States Supreme
11 Court cases,^{23/} elaborates on this quotation with the following legal
12 conclusion:

13 ". . . the State of Washington does not have
14 jurisdictional authority over the waters located
15 within the boundaries of the Spokane Indian
16 reservation"

17 The United States brief then states on the same page:

18 ". . . the determination of reserved water rights
19 within such reservation is not governed by state
20 law but rather is derived from the federal purpose
21 for which the reservation was created."

22 In other words the United States takes the position there is,
23 as a matter of law, a wall located on the original boundaries of
24 the Spokane Reservation through which state water rights laws cannot
25 pierce. Stated otherwise, regardless of the facts involved state
26 water rights law cannot penetrate that wall and have applicability
27 to non-Indians and to waters located on or under non-Indian lands.
28 The only exception to that rule according to the United States, is
29 that the Congress could, by express authorization, allow the State
30 of Washington to assume jurisdiction over the waters "on formerly
31 allotted or homestead land." (Brief of U.S., p. 85.) However, the
32 United States continues, that express authorization has not been given
33 to the State of Washington.

Let us examine these two theories: (1) the wall, and (2) the
dependency of state power on a Congressional grant of authority to a
state to regulate and manage waters.

23/ The United States cites Cappaert v. United States, supra; Federal Power Commission v. Oregon, 349 U.S. 435 (1955), and California and Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

1 A. There is a State Law Barring-Wall on the original boundaries
2 of the Spokane Reservation - General Background.

3 The United States contends that state laws have no applicability,
4 regardless of the factual circumstances, to non-Indians and to non-
5 Indian owned lands within the original boundaries of a reservation.
6 The United States cites no cases and we have found none.

7 Discussions of the general area often begin with the famous words
8 of Chief Justice Marshall written almost 150 years ago in Worcester v.
9 Georgia, 31 U.S. 515, 559-561 (1832) as follows:

10 "The Indian nations had always been considered
11 as distinct, independent political communities,
12 retaining their original natural rights, as the
13 undisputed possessors of the soil from time
14 immemorial . . . The very term "nation," so
15 generally applied to them, means "a people distinct
16 from others." The constitution, by declaring
17 treaties, already made, as well as those to be
18 the supreme law of the land, has adopted and
19 sanctioned the previous treaties with the Indian
20 nations, and consequently admits their rank among
21 those powers who are capable of making
22 treaties . . .

17 "The Cherokee Nation, then, is a distinct
18 community, occupying its own territory, within
19 boundaries accurately described, in which the
20 laws of Georgia can have no force, and which the
21 citizens of Georgia have no right to enter but
22 with the assent of the Cherokees themselves or in
23 conformity with treaties and with the acts of
24 Congress. The whole intercourse between the
25 United States and this nation is, by our consti-
26 tution and laws, vested in the government of the
27 United States. . . ."

23 These words, it must remembered, were written early in our
24 country's history before the establishment of national policies
25 which have resulted, over the years, in the reduction in the size
26 of the areas of Indian lands within original reservation boundaries
27 by allowing the removal of lands from a reserved Indian trust status
28 to ownership by non-Indians. Today, unlike 150 years ago, vast areas
29 within Washington State, originally held in trust for the benefit
30 of Indians, are owned by non-Indians, citizens who (unlike their
31 Indian citizen neighbors) are required to comply with state laws,
32

1 such as the taxation statutes, in the same manner owners of land
2 which were never a part of a reservation.

3 Justice Frankfurter discussed the changes in the past century
4 and one-half in Organized Village of Kake v. Egan, 369 U.S. 60 (1964),
5 with these words at pages 71-72:

6 "The relation between the Indians and the
7 states has by no means remained constant since
8 the days of John Marshall. In the early years, as
9 the white man pressed against Indians in the
10 eastern part of the continent, it was the policy
11 of the United States to isolate the tribes on
12 territories of their own beyond the Mississippi,
13 where they were quite free to govern themselves"

14 "As the United States spread westward, it
15 became evident that there was no place where the
16 Indians could be forever isolated. In recognition
17 of this fact the United States began to consider the
18 Indians less as foreign nations and more as a part
19 of our country"

20 On page 72 Justice Frankfurter continued that:

21 "The general notion drawn from Chief Justice
22 Marshall's opinion in Worcester v. Georgia (US)
23 6 Pet 515, 561, 8 L ed 483, 501; Kansas Indians
24 (Blue Jacket v Johnson County) (US) 5 Wall 737,
25 755-757, 18 L ed 667, 672, 673; and New York
26 Indians (Fellows v Denniston) (US) 5 Wall 761,
27 18 L ed 708, that an Indian reservation is a
28 distinct nation within whose boundaries state
29 law cannot penetrate, has yielded to closer
30 analysis when confronted, in the course of
31 subsequent developments, with diverse concrete
32 situations. By 1880 the Court no longer viewed
33 reservations as distinct nations. On the
34 contrary, it was said that a reservation was
35 in many cases a part of the surrounding State
36 or Territory, and subject to its jurisdiction
37 except as forbidden by federal law,"

38 And recently Justice White, echoing the statements of Justice
39 Frankfurter, discussed the vitality of Worcester v. Georgia, supra,
40 in Mescalero Apache Tribe v. Jones, 411 U.S. 145, 149 (1973), by
41 stating there have been "repeated statements" of the Court:

42 "... to the effect that even on reservations
43 state laws may be applied unless such application
44 would interfere with reservation self government
45 or would impair a right granted or reserved by
46 federal laws."

1 These words were written in relation to the applicability of
2 state law to Indians and Indian interests. Certainly if this is
3 the case with Indians and Indian interests, there can be no imper-
4 meable wall around a reservation which prevents the applicability
5 of state law, in every factual situation, to non-Indians and waters
6 on non-Indian lands. As noted in Surplus Trading Company v. Cook,
7 281 U.S. 647 (1930) a reservation is:

8 "... part of a state ... and her laws, civil and
9 criminal, have the same force therein as elsewhere
10 within her limits, save that they have only restricted
11 application to Indian wards"

12 For an example of cases dealing generally with the upholding of the
13 applicability of state laws to non-Indians within the original
14 boundaries see Langford v. Monteith, 102 U.S. 145 (1880); Utah and
15 Northern Railway v. Fisher, 116 U.S. 28 (1885); Thomas v. Gay,
16 169 U.S. 264 (1898); Draper v. United States, 164 U.S. 240 (1896);
17 New York v. Martin, 326 U.S. 496 (1946); and United States v.
18 Bratney, 104 U.S. 621 (1881). See also Norvell v. Sangres de Cristo
19 Development Company, Inc., 372 F. Supp. 348, 353 (D. New Mexico, 1974),
20 reversed on grounds not relevant to this case in 519 F. 2d 370 (10th
21 Cir. 1975); McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973);
22 and Williams v. Lee, 358 U.S. 217 (1959).

23 We finally note the two major treatises of Indian Law on the
24 subject. In United States Department of the Interior, Federal
25 Indian Law (1958), at page 513, this comprehensive study of Indian
26 law states the "general rule" that:

27 ". . . the Indian country within a state is not regarded
28 as an area of exclusive Federal jurisdiction but is
29 politically and governmentally a part of the State
30 in which State laws apply to the extent that they do
31 not conflict with Federal Indian law."

32 In support of this general rule on the scope of state jurisdiction
33 that treatise cites the following quotation from United States v.
McGowan, 302 U.S. 535, 539 (1983):

1 "Enactments of the Federal Government passed to
2 protect and guard the Indian wards affect the
3 operation, within the colony [or reservation]
of such state laws as conflict with the federal
enactments.

4 This view comports with the seminal treatise on Indian Law, Cohen,
5 Handbook of Federal Indian Law 121 (1940).

6 B. The "Wall" Theory and its Piercing by State Water Rights
7 Laws.

8 With this background, we turn to the specific arguments of the
9 United States in support of the contention that there is a wall around
10 an Indian reservation through which state water right laws cannot
11 pierce. As it shall be seen, the contentions provide no basis to
12 support its position but rather amounts only to a series of irrele-
13 vancies.

14 The United States, on pages 82 through 91 of its Brief, sets
15 forth a well-written statement of federal-state relationships dealing
16 with the general subject of establishing water rights applicable to
17 waters located on lands owned by the federal government. The United
18 States provides a fair description of the statutes and cases cited.
19 However, the entire presentation of the United States is irrelevant to
20 the issue to be answered here. To avoid confusion, the issue is:

21 Does the State of Washington have authority
22 to issue water rights authorizing withdrawal
23 and use of waters located on non-Indian
lands within the original boundaries of an
Indian reservation?

24 1. The Acts of 1866, 1870 and 1877. The United States first
25 cites three statutes of the mid-1800's - Acts of 1866, 1870, and
26 1877 - in combination with California-Oregon Power Co. v. Beaver
27 Portland Cement Co., 295 U.S. 142 (1935), Federal Power Commission v.
28 Oregon, 349 U.S. 435 (1955), and Cappaert v. United States, supra,
29 (1976) for the conclusion, as stated on page 85 of its brief, that
30 ". . . the State of Washington does not have jurisdictional authority
31 over the waters located within the boundaries of the Spokane Indian
32 Reservation"

1 An examination of the individual components of the combination
2 of statutes and cases warrants no such conclusion.

3 Section 9 of the Act of July 26, 1866, 14 Stat. 251, the first
4 statute cited by the United States, provides:

5 "That whenever, by priority of possession,
6 rights to the use of water for mining, agriculture,
7 manufacturing or other purposes, have vested and
8 accrued, and the same are recognized and acknowl-
9 edged by the local customs, laws and decisions of
10 courts, the possessors and owners of such vested
11 rights shall be maintained and protected in the
12 same; and the right of way for construction of
13 ditches and canals for the purposes aforesaid
14 is hereby acknowledged and confirmed . . ."

15 The United States correctly describes the historic background of this
16 statute. It fails, however, to point out and emphasize that the
17 statute constitutes a recognition in federal law that acts of with-
18 drawal of waters on federal lands for various uses by persons based
19 upon the customs and laws in local areas, which would otherwise
20 constitute trespass, were recognized by the United States as valid
21 water rights. The point to emphasize here is, of course, that the
22 statute dealt with establishing rights to waters located on public
23 lands. The lands in this case to which the State asserts its water
24 rights laws have application are privately owned land severed from
25 special federal trust ownership relationships on behalf of Indians.

26 The Act of July 9, 1870, 16 Stat. 217, amending the Act of 1866,
27 relied upon by the United States is equally irrelevant. That statute
28 provides in part:

29 ". . . all patents granted, or preemption
30 or homesteads allowed, shall be subject to
31 any vested and accrued water rights, or
32 rights to ditches and reservoirs used in
33 connection with such water rights, as may
have been acquired under or recognized by
the ninth section of the act of which this
act is amendatory."

34 Congressional intent in passing this statute is clear. Lands acquired
35 from the federal government are subject to any water rights estab-
36 lished prior to the transfer of the lands, by the federal government,
37

1 to a non-Federal ownership status. Again this is a public lands
2 statute.

3 The Desert Lands Act of 1877, 19 Stat. 377, 43 U.S.C. § 321, is
4 irrelevant for the same reason. Waters on public lands, the statute
5 provides, shall be subject to appropriation under local customs (laws)
6 of the west. This is the fair reading of the pertinent portion of
7 the Desert Land Act which provides:

8 ". . . all surplus waters over and above such
9 actual appropriation and use, together with
10 the water of all lakes, rivers and other
11 sources of water supply upon the public
12 lands and not navigable, shall remain and be
held free for the appropriation and use of
the public for irrigation, mining and manu-
facturing purposes subject to existing
rights." 19 Stat. 377 (Emphasis added).

13 The thrust of these three statutes is that the pioneers of the
14 arid western United States could enter lands owned by the federal
15 government and establish rights to withdraw waters on federal lands.
16 These statutes not only eliminated problems of trespass on public
17 lands but broadened the opportunities to establish water rights in
18 the arid western United States. In addition they established the
19 primacy of state water laws in the western states.

20 The United States seeks help from the California-Oregon Power Co.
21 case, supra. But it is misplaced. The relevant holding of that case
22 is found in the following paragraph at page 163:

23 "Nothing we have said is meant to suggest that
24 the Act [the Desert Land Act of 1877], as we construe
25 it, has the effect of curtailing the power of the
26 states affected to legislate in respect of waters
27 and water rights as they deem wise in the public
28 interest. What we hold is that following the Act
29 of 1877, if not before, all non-navigable waters
30 then a part of the public domain became publici
juris, subject to the plenary control of the desig-
nated states, including those since created out of
the territories named, with the right in each to
determine for itself to what extent the rule of
appropriation or the common law rule in respect of
riparian rights should obtain"

31 The Court, as the United States correctly notes, states that the
32 state water laws are utilized to establish water rights on waters

1 located on federally owned "public lands."

2 The United States then continues, relying upon Federal Power
3 Commission v. Oregon, supra, that the aforementioned Acts had no
4 applicability to federal "reserved" lands but only federal "public"
5 lands. Even if this contention is correct we still inquire - "So
6 what?" We are not dealing in this case with the issue of relying
7 upon state law to establish water rights on federally owned lands
8 regardless of their characterization. Instead, we are dealing with
9 the ability of a non-Indian to establish rights to use waters, located
10 on his non-Indian lands within the State of Washington, based on state
11 law.

12 In sum, the combination of mentioned mid-1800's federal statutes
13 and the Beaver Portland Cement and Pelton Dam cases relied upon by the
14 United States are not pertinent to any decision by this Court as to
15 the ability of a non-Indian to establish a water right on non-Indian
16 land within a reservation based upon state law.

17 2. Winters v. United States. The same is true of the United
18 States' reliance on the landmark Indian water rights cases of Winters,
19 supra, and Arizona v. California, supra. These cases are cited by
20 the United States for two propositions: (1) ". . . the State of
21 Washington does not have jurisdictional authority over the water
22 located within the boundaries of the Spokane Indian Reservation," and
23 (2) ". . . the determination of reserved water rights within such
24 reservation is not governed by state law but rather is derived from
25 the federal purpose for which the reservation is created." (U.S.
26 Brief at 85.)

27 As to the first contention we have already discussed the import
28 of the teachings of the Winters case. That case does not deal, in
29 any manner, with the reach of state laws inside the boundaries of a
30 reservation. Winters deals only with the nature and scope of Indian
31 reserved rights. The same is true of Arizona v. California, supra.

1 So far as the second contention, i.e. a reserved right ". . . is not
2 governed by state law . . .," we have no quarrel.^{24/}

3 3. Tweedy v. Texas Company and United States v. McIntire.

4 The United States, on pages 86 and 87 of its Brief, continues
5 its irrelevant contentions by relying upon Tweedy v. Texas Company,
6 286 F. Supp. 383, 385 (D. Mont. 1968), and United States v. McIntire,
7 101 F.2d 650 (9th Cir. 1939).

8 In Tweedy, the non-Indian owners of surface rights to certain
9 non-Indian lands within the Blackfeet Reservation sought damages
10 from the defendant, Texas Company, on the basis the Company had
11 withdrawn ground waters within said lands thereby interfering with
12 the rights of the plaintiff in the ground waters. The precise
13 holding of the case was that plaintiff was denied a claim for
14 money damages on the basis that the plaintiffs could not establish
15 "any title in the waters as such, and there is no evidence and no
16 claim that defendant interfered with plaintiff's right to use water
17 in satisfaction of any need for it." Tweedy, supra at 385.

18 While the analysis of the case supporting its holding is
19 blurry, it appears to be based on two standard propositions of
20 western water law. First, a water right is a right to withdraw and
21 use waters of a waterbody and not a right to the corpus (or specific
22 portions) of the waters of the ground-water body. Second, a water
23 right holder cannot claim damages for an injury when another diverts
24 water from a water body unless the diversion impairs the claimant's
25 ability to satisfy his own rights. Both of these principles of water
26 usage are sound in policy as well as in law. No one can complain of
27 injury unless he is actually injured.

28 The United States cites portions of the following discussion
29 of the Court in Tweedy, at 385:

31 ^{24/} Our views on the Winters "reserved rights" doctrine were stated
32 earlier herein. See Section II.C.

1 "When the Blackfeet Indian Reservation was
2 created, the waters of the reservation were
3 reserved for the benefit of the reservation lands.
4 Winters v. United States, 207 U.S. 564, 28 S. Ct.
5 207, 52 L.Ed. 340 (1908). The Winters case dealt
6 only with the surface water, but the same implica-
7 tions which led the Supreme Court to hold that
8 surface waters had been reserved would apply to
9 underground waters as well. The land was arid -
10 water would make it more useful and whether the
11 waters were found on the surface of the land or
12 under it should make no difference.

13 "The waters being reserved are governed by
14 federal rather than state law. United States v.
15 McIntire, 101 F.2d 650 (9 Cir. 1939). This is so
16 even after the trust patents are issued and lands
17 have passed out of Indian ownership. . . ."

18 We have no disagreement with the statements of the Tweedy court
19 assuming the Court determined, citing Winters, as a matter of fact
20 that all waters within the original boundaries of the reservation
21 were reserved. The Court's opinion is not clear on that point.

22 The State of Washington has stated many times herein, as the
23 Court did in Tweedy, that federal reserved rights are governed by
24 federal law, not state law. And of course we would not have any
25 quarrel with the contention that such reserved water rights would
26 apply to all waters within a specific water body whether located under
27 trust severed non-Indian or Indian lands, or for that matter, located
28 in part under non-Indian lands outside of the original boundaries of
29 a reservation.^{25/}

30 The United States also relies on the McIntire case for two
31 propositions. It contends first that Montana's Enabling Act, with
32 its "absolute jurisdiction and control language," precludes the
33 applicability of state laws to non-Indian lands within the boundaries
34 of a reservation. The non-barring effect of the wording is discussed

35 ^{25/} The State of Washington would of course disagree with the
36 Tweedy Court if the Court, in the first sentence of the quoted
37 language of its opinion, cites Winters for the proposition that,
38 as a matter of law, all waters within a reservation are auto-
39 matically reserved regardless of the needs to satisfy the purpose
40 for which the reservation was created. Cappaert, supra, makes
41 it clear that is not the law announced in Winters.

1 in subsection 4 infra. See Organized Village of Kake v. Egan, supra
2 369 U.S. 60 (1964).

3 Second the United States relies on the language of McIntire,
4 supra at 101, which provides:

5 ". . . appellees seem to contend that
6 Michael Pablo acquired by prior appropriation the
7 rights in question by local statute or custom,
8 and that the Act of July 26, 1866, 43 U.S.C.A.
9 § 661, requires recognition of those rights.
10 That statute, however, applies only to "public"
11 lands. Winters v. United States, 9 Cir., 143 F.
12 740, 747, affirmed 207 U.S. 564, 28 S.Ct. 207,
52 L.Ed. 340. Lands which are reserved are
severed from the public domain. Leavenworth, etc.,
13 R. R. Co. v. United States, 92 U.S. 733, 745, 23
14 L.Ed. 634; United States v. Minnesota, 270 U.S.
15 181, 206, 46 S.Ct. 293, 70 L.Ed. 539. The statute
16 mentioned, therefore, does not, we think, apply
17 here."

18 We agree the Act of 1866 has been held to not constitute a basis
19 for establishing a state law based water right on federal reserved
20 lands. However, we are, in this case, dealing in this case with
21 lands no longer in the federal reserve. We are dealing only with
22 non-reserved lands within the original boundaries. The Act of 1866,
23 on its face, applies only to publicly owned land situations.

24 4. The Enabling Act and the Washington State Constitution.

25 The United States next suggests, at pages 87 and 88, that the
26 federal Enabling Act authorizing entry of the State of Washington,
27 25 Stat. 676, specifically bars non-Indians from establishing water
28 rights applicable to waters on non-Indian lands based on state laws.
29 Section 4 thereof provides in part:

30 "That the people inhabiting said proposed
31 States do agree and declare that they forever dis-
32 claim all right and title to the unappropriated
33 public lands lying within the boundaries thereof,
and to all lands lying within said limits owned
or held by any Indian or Indian tribes; and that
until the title thereto shall have been extinguished
by the United States, the same shall be and remain
subject to the disposition of the United States,
and said Indian lands shall remain under the
absolute jurisdiction and control of the Congress
of the United States." (Emphasis supplied).

1 The United States contention is that Article 26, section 2, of the
2 Washington State Constitution has the same barring effect. Section 2
3 contains the same wording as just quoted from the Enabling Act.

4 The failure of this contention is obvious. The quoted provisions
5 of the Enabling Act and the Washington Constitution bar this State
6 from exercising authority to establish rights in real property
7 interests, including reserved water rights of the Indians as estab-
8 lished by treaty. The State's position is not in conflict with these
9 provisions. To the contrary, the state expressly asserts no authority
10 over the rights of the Indians, absent federal consent. The State
11 asserts jurisdiction only over "excess waters," i.e., waters of a
12 water body on non-Indian lands not necessary to satisfy rights of
13 tribes as reserved by treaty. Further, water rights issued by the
14 State, applicable to water on non-Indian lands within a reservation,
15 are clearly subject to all prior (senior) reserved Indian rights. The
16 State's position is not only consistent with the letter but the
17 spirit of these two foundation documents providing for our State's
18 entry into the federal union.

19 We further note that the same words - ". . . under the absolute
20 jurisdiction and control of the United States. . . ." - as contained
21 in the Constitution of the State of Alaska, were construed by the
22 United States Supreme Court in Organized Village of Kake v. Egan,
23 supra. The teaching of the case, at 64-71, is that "absolute"
24 jurisdiction is not the equivalent of "exclusive" jurisdiction. Note
25 also a similar view expressed in Norvell v. Sangre de Cristo
26 Development Corp., supra.

27 5. Section 7 of the General Allotment Act. The United States
28 then suggests (at page 97 of its Brief) that section 7 of the General
29 Allotment Act of 1887, 25 U.S.C. § 381, bars state authority. Section
30 7 provides:

31

32 BRIEF OF DOE - 44

33

1 "In cases where the use of water for irrigation
2 is necessary to render the lands within any Indian
3 reservation available for agricultural purposes,
4 the Secretary of the Interior is authorized to
5 prescribe rules and regulations as he may deem
6 necessary to secure a just and equitable distri-
7 bution thereof among Indians residing upon any
8 such reservations; and no other appropriation
9 or grant of water by any riparian proprietor shall
10 be authorized or permitted to the damage of any
11 othere riparian proprietor." (Emphasis supplied.)

7 A careful examination of its wording provides no such support.

8 The section provides no sweeping preemptive water allocation policies
9 as contended for by the United States. This section simply grants to
10 the Secretary of the Interior the power to provide, among individual
11 Indians, "just and equitable" distribution of the "in gross" waters
12 of a water body reserved by treaty or executive order for the benefit
13 of the Indians. Moreover the grant of power to the Secretary per-
14 tains only to "agricultural purposes." As stated at the outset here-
15 of, the State does not claim the authority to allocate or administer
16 reserved Indian water rights among Indians generally.^{26/}

17 6. Public Law 83-280. Public Law 83-280 is relied upon by the
18 United States in support of its bar theory. (U.S. Brief, p. 88.)
19 This federal statute provides enumerated states with jurisdiction over
20 Indians and Indians rights under certain circumstances. Washington
21 State is one of the enumerated states. A portion thereof, 28 U.S.C.
22 § 1360(b), contains this exclusionary language:

23 "(b) Nothing in this section shall authorize the
24 alienation, encumbrance, or taxation of any real
25 or personal property, including water rights, belong-
26 ing to any Indian tribe, band, or community that is
27 held in trust by the United States or is subject to
28 a restriction against alienation imposed by the
29 United States; or shall authorize regulation of the
30 use of such property in a manner inconsistent with
31 any Federal treaty, agreement, or statute or with any
32 regulation made pursuant thereto; or shall confer
33 jurisdiction upon the State to adjudicate, in probate
proceedings or otherwise, the ownership or right to
possession of such property or any interest therein."
(Emphasis added.)

32 ^{26/} A major exception is the authority provided to state courts
33 in 43 U.S.C. § 666.

1 The State of Washington's companion statute containing similar
2 language is RCW 37.12.050.

3 This contention also fails for the reason so often repeated
4 herein, supra. The State of Washington does not contend for any
5 power, through P.L. 83-280, to alienate, encumber, or tax water
6 rights belonging to the Indians. For the range of views of what
7 constitutes an ". . . alienation, encumbrances . . . belonging to
8 an Indian tribe," see Snohomish County v. Seattle Disposal Co.
9 70 Wn.2d 668, 425 P.2d 22 (1967), and Rincon Band of Mission Indians
10 v. County of San Diego, 324 F. Supp. 371, 373 (S.D.Cal, 1971);
11 rev'd on other grounds, 495 F.2d 1 (9th Cir. 1974), cert. denied,
12 419 U.S. 1008 (1974).

13 Regardless of the view taken of the meaning of these words, the
14 State's assertion of authority in this case extends only to:
15 (1) non-Indians, (2) non-Indians lands, and (3) waters beyond the
16 amount required to satisfy Indian reserved rights. In addition, all
17 permits issued by the State are issued subject to prior Indian rights.
18 Thus exercise of State authority does not and cannot conflict with
19 the provisions of 28 U.S.C. § 1360(b).

20 In sum, whether the contentions of the United States are
21 examined separately or in combination, the answer is the same.
22 Nothing in any of the statutes, constitutional provisions, or cases
23 cited comes close to suggesting that there is an unpenetrable wall
24 located on the original boundaries of an Indian reservation through
25 which the State of Washington's water laws cannot pierce and have
26 application to waters, on non-Indian lands therein, which are not
27 required to satisfy Indian reserved water rights.

28 7. Tulalip Tribe v. Walker - a case directly on point. The
29 only case dealing with the validity of the "wall" theory, as it
30 relates to water rights, is the case of Tulalip Indian Tribe v.
31 Walker, Snohomish County No. 71421 (1963); copies of the court's
32 memorandum and final judgment are attached as Appendix A. In this

1 case, Judge Charles R. Denny, (later a Washington State Supreme Court
2 Justice pro tem), held that the state had authority to grant a water
3 right permit authorizing diversion of "surplus" waters from a stream
4 flowing across non-Indian lands located within the original boundaries
5 of the Tulalip Indian Reservation.

6 The facts involved in the Tulalip case are generally as follows.
7 The Tulalip Indian Reservation was authorized by a federal treaty
8 executed in 1855. Tulalip Creek, the water body involved, originates
9 north of the northern boundary of the reservation. The stream
10 enters the reservation at a point on the northern boundary after
11 which it flows in a southerly direction across the reservation
12 until it discharges into the Puget Sound on the southern boundary
13 of the reservation. During the course of its travels on the
14 reservation, the creek crosses lands, owned by a non-Indian entity,
15 free of any federal trust obligations.

16 In 1961 the owner of these non-Indian lands applied to the State
17 of Washington, pursuant to the state's "water code," RCW 90.03.250
18 et seq., for a permit to withdraw waters of Tulalip Creek for indus-
19 trial use. The point of diversion and place of use of the waters
20 proposed for withdrawal were, at all times, within the lands of the
21 non-Indian landowner. The State of Washington's Department of Water
22 Resources, after a full investigation including the evaluation of
23 the potential for interfering with Indian reserved rights, approved
24 the application and issued a permit.

25 On appeal by the Tribe to the Superior Court, the Tribe contended,
26 in effect, that there was a wall around the reservation which, as a
27 matter of law, precluded the state from granting the permit. The
28 state contended to the contrary. The Court ruled there was no wall
29 and that the state could validly issue water rights applicable to
30 "surplus" waters of Tulalip Creek. (The record before the Court as
31 contained in the Pretrial Order entered by the Court in the case
32 clearly showed there were waters in Tulalip Creek in excess of the

1 needs of the Indians both for the present and the reasonably foresee-
2 able future). The Court in a memorandum opinion wrote on this point
3 at page 1 thereof.

4 "The conclusion expressed at the close of trial
5 that the State does not have jurisdiction to grant
6 the permit in question as to surplus water over and
7 above the needs of the tribe, is erroneous . . .
8 the mistake I made at the close of the trial was
9 my failure to appreciate that the exclusive juris-
10 diction of the United States is confined to Indians.

11 "I can find no case which denies to a state the
12 power to assert its legitimate interest in the waters
13 of a non-navigable stream flowing across lands owned
14 in fee by non-Indians where only the right to the
15 use of such waters by non-Indians is involved and
16 the right to use by Indians is not affected thereby.
17 Several of the cases suggest that the State does
18 have jurisdiction under these circumstances."

19 This decision is recognized to be one of a state trial court.
20 Yet like any other decision of a one-judge court of general
21 jurisdiction, whether its validity stands the test of time depends
22 on the persuasiveness of the Court's analysis in reaching its
23 decision. Judge Denny's opinion and decision are solidly founded and,
24 on that basis, we commend them to this Court for serious consideration
25 in ruling contrary to the position taken by the United States.

26 In sum, based on the foregoing, we submit there is no basis to
27 support the wall theory developed so recently by the fertile, imagina-
28 tive minds of the salesman-lawyers of the Department of Justice.

29 C. Refocusing on Federal-State Relationships - The United
30 States Misconceives the Basic Theories.

31 At page 90 of its brief the United States gives the primary
32 "factor," in support of the "inescapable conclusion" that the
33 ". . . State of Washington does not have jurisdiction over the use of
34 waters within the exterior boundaries of the Spokane Indian Reserva-
35 tion." That first factor is ". . . there is no act of Congress pass-
36 ing this jurisdiction to the state." But does that sentence raise
37 the appropriate inquiry? It does not.

1 As we stressed at the beginning of this brief, both the United
2 States and the states have vast powers over waters within the
3 boundaries of a state. And absent federal preemption, this concept
4 of governmental concurrency of power remains valid as to all waters
5 within a state.^{27/}

6 Further the Court should be careful not to allow the issue to
7 become one of who "owns" the aforementioned waters. On page 116 of
8 its brief the Tribe suggests that federal ownership of the waters of
9 Chamokane Creek by the federal government is somehow relevant. We
10 ask the Court steer clear of this concept for it will not be produc-
11 tive in resolving the controversies of the case.

12 The use by governmental units of the word "ownership" of waters
13 in various water bodies has created considerable confusion. All
14 western states, either in their constitutions or statutes, have
15 claimed ownership of the waters within their boundaries. See, e.g.,
16 Colorado Constitution, article XVI, §5, and Wyoming Constitution,
17 article VIII, §1. Washington State's "water code" declares in
18 RCW 90.03.010 that "subject to existing rights all waters within the
19 state belong to the public" To the contrary, the United
20 States has claimed ownership of waters in at least one case which
21 reached the United States Supreme Court, Nebraska v. Wyoming, 325 U.S.
22 589 (1945).

23 The use of the word "ownership" in these terms is misleading
24 and deceptive.^{28/} For discussions see Trelease, supra at 147, and
25 Meyers, Functional Analysis of Appropriation Law 23 (1971). The
26 term, we contend should not be understood to mean "own" as used in
27

28 ^{27/} For an excellent discussion of federalism and water, see Wheatley
29 and Corker, Study of the Development, Management and Use of Water
Resources on Public Lands 7 (1969).

30 ^{28/} In an extremely informative article, Trelease, Government
31 Ownership and Trusteeship of Water, 45 Colum. L. Rev. 638 (1957),
32 Dean Trelease makes the point that "ownership" is not a useful
concept.

1 the context of ownership of one's house or farm, or even of waters
2 when in a bottle. Rather, the term should be viewed in terms of
3 governmental power over a transitory natural resource. The power
4 we refer to is the power of a state and the United States to deter-
5 mine who, when, where, and for what purposes water may be removed
6 from a lake, stream, or other water body within a state's boundaries.^{29/}
7 In the exercise of these powers, the State concedes the possibility
8 that the federal government's powers could be exercised in such a
9 fashion as to preclude most, if not all, state power over the subject
10 area. This has never been done and, at least in recent years, we
11 have heard of no suggestions that federal powers should be so
12 exercised.^{30/}

13 Recognizing that governmental power, not ownership, is the
14 controlling concept in this case, the issue revolves around the
15 search for the effect of the federal government's exercise of govern-
16 mental power over waters on a state's power to regulate and control
17 the same subject matter. In this regard the cases of Winters v.
18 United States, supra, and Cappaert v. United States, supra, take us
19 a long way towards resolution of the law applicable to this case.
20 Those cases stand for the following:

21 a. The federal government may establish water rights through
22 the setting aside or reserving of public lands for special purposes,
23 and in so doing, reserve water rights, either expressly or impliedly,
24

25 ^{29/} In this regard a careful reading of the memorandum of the United
26 States will show that the federal government makes no claim of
27 "ownership" of waters. It claims ownership over lands within a
28 state and a usufruct (of a "riparian rights" nature?) in the
29 waters adjacent to the lands it owns but not in the waters them-
selves. United States Memorandum, page 11. In support thereof
it cites Borax Consolidated, Inc. v. Los Angeles, 296 U.S. 161
(1891); and Clark, Water and Water Rights, 81-82 (1967). It cites
no cases claiming ownership in all waters within a state.

30 ^{30/} The position taken by the State is, we believe, based upon a
31 well-founded analysis. The State recognizes this sovereignty-
32 ownership issue has never been expressly settled by the United
33 States Supreme Court and therefore remains open for further
development by the courts in this complex area of our federal
system. 2 Clark, Water and Water Rights, at 58 (1967).

1 in amounts necessary to carry out the purposes for which the reserved
2 lands were created.

3 b. These exercises of federal power may relate to the estab-
4 lishment of Indian reservations.

5 c. The amount of water, when impliedly reserved, is limited
6 to the amount necessary to fulfill the purposes of the reservation
7 and "no more."

8 d. These reserved rights are not subject to state water law
9 when held by the United States, i.e. State law has been preempted as
10 to applicability to these rights. But see 43 U.S.C. §666.

11 In light of the above the question revolves around whether the
12 federal government has exercised any of its many powers of control
13 over waters within the State of Washington so as to set aside the
14 applicability of state laws to waters not required to satisfy federal
15 reserved rights located on or under non-Indian lands.

16 We are not aware of any such preemptive federal action.

17 In sum, the United State's contention on page 90 states the wrong
18 inquiry. The issue is not whether the federal government has granted
19 or "passed" jurisdiction to the State. The issue is whether powers
20 recognized by the United States Constitution for implementation by
21 the State over waters have been superseded by federal action.

22 Whether preemption of state water law from applicability to
23 unreserved waters located on or under non-Indian lands within the
24 original reservation boundaries has occurred is a matter of intent
25 of Congress. The Supreme Court has set forth extremely stringent
26 tests on this point. The intention of Congress to exclude states from
27 exercising their sovereign police powers must be clearly manifested.
28 Reid v. Colorado, 187 U.S. 137, 148 (1902); Napier v. Atlantic Coast
29 Line, 272 U.S. 605, 611. That is, a court should not conclude that
30 Congress legislated an ouster of state authority ". . . in the absence
31 of an unambiguous congressional mandate to that effect." Florida
32 Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963). As stated in

1 Schwartz v. Texas, 344 U.S. 199 (1952), in relation to the super-
2 session of state powers, "(t)he exercise of federal supremacy is not
3 to be lightly presumed."

4 This brief contains discussion, in another context, which
5 deals with the alleged preemptive effects of certain federal (and
6 state) actions. See Section IV.B. Briefly we repeat that discussion.
7 As to the exercise of federal power embodied in the Winters doctrine,
8 such exercise has preemptive potential but in this case it is crystal
9 clear that, at the least during certain periods of the year, there
10 are waters in the Chamokane drainage in excess of the amounts neces-
11 sary to satisfy federally reserved rights. Therefore, there is no
12 preemptive wall barring all applicability of state law within the
13 Chamokane drainage of the Spokane Reservation.

14 Likewise the three federal acts of 1866, 1870, and 1877 deal only
15 with the applicability of state water rights laws to federally owned
16 lands in a non-reserved status. Further, the disclaimer of state
17 jurisdiction contained in Washington's Constitution, as well as in
18 its related federal "Enabling Act", deal only with lands owned or
19 held in trust for Indians not with non-Indian lands within the original
20 boundaries of a reservation. Section 7 of the general allotment act
21 is, on its face, non-preemptive in comprehensive sense. And Public
22 Law 83-280 deals only with state regulation of Indian interests not
23 non-Indian interests.

24 In sum, we are aware of no preemptive action of federal govern-
25 ment which removes the applicability of state water laws to waters,
26 on non-Indian lands within the original boundaries of a reservation,
27 which are not required to satisfy any prior reserved rights of
28 Indians. There is no state water rights law barring wall on the
29 reservation boundary. The United States has not preempted such state
30 laws from applying to such excess waters of the reservation are valid.

31

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33 BRIEF OF DOE - 52

1 V. WATER RIGHTS ATTACHED TO LAND TRANSFERRED TO NON-INDIANS

2 A. A purchaser of an Indian allotment located within an Indian
3 reservation acquires the reserved rights of its predecessor Indian
4 owner.

5 On pages 103 and 104 of its brief the Tribe raises the issue as
6 to whether a non-Indian purchaser of Indian allotment located within
7 the original boundary of the Spokane Reservation succeed to the reserved
8 right interest of the allottee. Because there are non-Indian owners
9 of allotments, severed from the federal trust status, claiming such
10 rights in this proceeding and because the State believes such a
11 claimant has a reserved water right, and further because the state
12 believes state water law comes into play once a non-Indian acquires
13 such reserves rights, the following brief discussion of the States
14 position is set forth.

15 In United States v. Powers, 305 U.S. 527 (1939), the United
16 States Supreme Court held that, pursuant to section 7 of the General
17 Allotment Act of 1887, 25 U.S.C. 381, each Indian allottee was
18 entitled to an equitable share of reserved rights to use of waters
19 of the reservation. The Court there also concluded that a non-Indian
20 purchaser of an allotment was entitled to that pro-rata share.
21 (The Supreme Court did not, however, expand on that general conclusion
22 by amplifying on the exact extent or quantification of the purchaser's
23 right; the reason being that the case was not in a proper posture
24 for the Court to rule on those issues.) See also Skeem v. United
25 States, 273 Fed. 93 (1921), and United States v. Ahtanum Irrigation
26 District 236 F.2d 321, 326 (9th cir. 1956).

27 In Anderson v. Spear-Morgan Livestock Co. 79 P.2d 667 (1938)
28 the Import of the Powers case is described as follows:

29 "The purpose of this statute is to provide
30 for the distribution of the right to use the water
31 to individual Indians. United States v. Powers, . . .
32 The right to use the water prior to a distribution
31 of it by the Secretary of the Interior may be
32 said to be inchoate in the sense that the precise
amount or extent of the right assigned to an

1 individual allottee would be undetermined, but
2 the right is vested in so far as the existence
3 of the right to use the water in the allottee
4 is concerned. This right is appurtenant to the
5 land upon which it is to be used by the allottee.
6 When the allottee became seized of fee simple title,
7 after the removal of the restrictions of the
8 trust patent, then a conveyance of the land, in
9 the absence of a contrary intention, would operate
10 to convey the right to use the water as an appurte-
11 nance. United States v. Powers, supra."

12 B. Upon Transfer of Reserved Water Rights to non-Indian Owner-
13 ship for use on non-Indians lands, state water laws attach.

14 The only case dealing directly with water rights acquired by
15 non-Indians as purchaser of a non-Indian allotment is United States
16 v. Hibner, 27 F.2d 909 (D. Idaho 1928). The Court, at page 912,
17 recited the rule which we believe is meritorious. A purchaser of an
18 allotment acquired a water right

19 ". . . for the actual acreage that was under
20 irrigation at the time title passed from the
21 Indians, and such acreage as he might from reason-
22 able diligence place under irrigation . . ."

23 with a priority date from the creation of the reservation. The
24 Court continued, relying on state law, that the purchaser could not
25 await an "indefinite period" before putting the water to beneficial
26 use.

27 The State of Washington's position closely parallels the Court's
28 position in Hibner. Purchasers of Indian allotments, in effect,
29 stand in the shoes of the Indians. A purchaser obtains a reserved
30 water right. However, once the federal trust relationship to the
31 allotment is severed, the rights of the new non-Indian become subject
32 to state water laws. As an example of the effect of the application
33 of state law, the reserved right transferred to a non-Indian area
subjected for the first time to the possibilities for partial or

1 complete loss based upon the laws of Washington State dealing with
2 abandonment or forfeiture. See RCW 90.14.130 et seq.^{31/}
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27 ^{31/} With regard to lands of the Spokane Reservation open to settle-
28 ment pursuant to the Act of 1908, 35 Stat. 458, and were there-
29 after "homesteaded," the State takes the position that the
30 homesteaders obtained no reserved rights. This on the basis
31 that the "opening" of such lands terminated any further reserved
32 rights. Whatever rights, if any, a homesteader obtained are
33 based upon state law. See California Oregon Power Co. v. Beaver
Portland Cement Co., 295 U.S. 142 (1935).

1 VI. THE REQUESTS OF THE UNITED STATES FOR INJUNCTIVE RELIEF.

2 A. Injunctive Relief is Premature

3 The United States contends that the court should enter a judgment
4 enjoining the defendants from interfering with the water rights of
5 the United States. The request is not well taken. This is a general
6 adjudication. The decree contemplated for entry in such a proceeding
7 would contain a schedule of correlative rights which sets forth who
8 is entitled to remove water during various periods of times and water
9 availability conditions. This decree should also provide for various
10 regulatory mechanisms to insure that junior right holders do not
11 infringe upon the rights of those holding senior priorities. In the
12 context of this case, where the various claimed rights have not yet
13 been "adjudicated," injunctive relief is not timely. It must be
14 presumed that parties to a judgment will comply with its provisions
15 absent a strong showing to the contrary. If after the adjudication is
16 complete, and thereafter a party to the decree infringes, or threatens
17 to infringe, upon the rights of parties to the proceeding injunctive
18 relief may well be appropriate. There is no evidence in the record
19 to support such a finding at this time. The granting of such an order
20 at this point is clearly premature.

21 B. The State has not and will not interfere with Reserved Water
22 Rights.

23 The United States also asks the Court to enjoin the issuance of
24 permits to persons owning lands within the original boundaries of
25 the Spokane Reservation. We already argued strenuously against the
26 "wall" theory espoused by the government. There is no wall.
27 The only limitation upon the state in the issuance of water rights
28 permits is that no withdrawals may be authorized which will interfere
29 with senior rights, including any of the same held by the United
30 States. The State of Washington contends there is no evidence support-
31 ing the proposition that the State has, in the past, issued any per-
32 mits which would authorize interference with the federal rights.

1 Further there is no evidence whatsoever that once this litigation is
2 completed the State will not comply with the mandate of the court.
3 The state has never contended it has power over any reserved water
4 rights of the United States absent federal statutory consent to extend
5 its power into the areas otherwise solely Federal domain. See 43 U.S.C.
6 § 666. It does not do so here. The State's powers within the
7 regional boundaries of the Spokane Reservation are limited to the
8 non-reserved waters of the Chamokane and non-Indian lands pertaining
9 thereto. There is no basis for any injunction against the State when
10 it expressly disclaims any power over or intentions to interfere
11 with reserved water rights of the United States.

12 C. There are "Surplus Waters" Available.

13 The United States asks the Court to enjoin to the State from
14 issuing water right permits applicable to the Chamokane, even when
15 the waters of that stream are outside the original boundaries of the
16 Spokane Reservation. There is no basis for entry of such an order.
17 In addition to the reasons noted in Section VI.B., immediately
18 proceeding, there is no showing that there are no waters available for
19 appropriation during all seasons of the year. Absent that condition
20 an injunction is clearly not appropriate.

21 D. The Use of a Water Master

22 The use of a water master - a stream patrolmen - is the approach
23 often taken to insure that general adjudication decrees are complied
24 with. This standard feature of western water law lessens the need
25 for courts to utilize their extraordinary powers of injunction.
26 Whether a water master is needed in the Chamokane Creek is not yet
27 ripe for decision by the Court. That decision, we submit will depend
28 largely upon the Courts evaluation of the complexity of the final
29 decree, the difficulty of its enforcement, the attitudes of the
30 parties and other factors which are not before the Court.

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33 BRIEF OF DOE - 57

1 VII. RECAPITULATION OF THE POSITION OF THE DEPARTMENT OF ECOLOGY.

2 A. Federal Reserved Rights

3 The following is a recapitulation of the reserved surface water
4 rights to the Chamokane Creek held by the United States for the bene-
5 fit of the Indians as perceived by the Department of Ecology.

6 1. Domestic rights. The United States is entitled to divert
7 waters of the Chamokane for family home, lawn and small garden
8 purposes. This amount would be de minimus.

9 2. Stockwatering. The United States is entitled to minimum
10 flows of the Chamokane so as to provide water rights adequate to
11 satisfy requirements for stock on riparian grazing lands which drink
12 directly from the stream. The amounts hereof shall only relate to
13 normal stock grazing uses of the land and shall not relate to inten-
14 sive stock uses such as feed lots. The amount too would be de minimus.

15 3. Timber. The United States is entitled to withdraw waters
16 of the Chamokane for purposes of firefighting and road and related
17 construction incident to the production of timber. The right attaches
18 to the timberlands portion of the Chamokane Basin. The extent of
19 these lands is not formally in the Record, though the Department of
20 Natural Resources in their Brief calculates on the basis of P.E. 101
21 that there are 10,164 such acres, so classified by the Act of 1908,
22 35 Stat. 458.

23 4. Irrigation. The United States is entitled to an irrigation
24 right for the agricultural lands of the Chamokane drainage which are
25 (1) irrigable, (2) not counted as timbered lands, and (3) not
26 "intended" to be irrigated out of the Spokane or Columbia rivers.
27 There is not adequate evidence in the Record to identify this amount,
28 but given the extent of timberland (particularly on the Chamokane
29 Bench, which contains most of the claimed irrigable lands) and the
30 statements of plaintiff's own witnesses as to the intentions of the
31 Tribe to irrigate only from the Spokane and Columbia rivers, this
32 figure approaches zero. To the extent there is a right, there would

1 be a duty of three acre-feet per acre. The irrigation season is from
2 April 1 to October 1.

3 5. Fisheries, Ceremonial, and Recreational. This is the claim
4 which creates the greatest difficulty. Based on the evidence present-
5 ed in this case we do not believe the United States intended, when
6 it created the Spokane Reservation, to preserve the Chamokane Creek
7 "as it was wont to do in nature" during the summer months. At the
8 most, it appears a much lesser base flow may have been contemplated
9 for recreation and fishery uses. In any event based on policies of
10 state law, the State of Washington has concluded that 20 cubic feet
11 per second satisfies the fisheries, recreational and other beneficial
12 use requirements for the stream. Therefore, the State would have no
13 objection to the entry of a minimum flow for such uses based upon
14 State law.

15 B. Priority Dates.

16 In relation to the foregoing, we believe the priority dates
17 should be as follows:

18 1. 1881 is the priority date for all rights pertaining to all
19 lands within the original boundaries of the reservation which have
20 been, at all times subsequent to 1881, held in a special trust status
21 by the United States for the benefit of the Indians.

22 2. 1958 is the priority date for all rights pertaining to all
23 lands which were reinstated to the reservation pursuant by the Act
24 May 19, 1958 (72 Stat. 121).

25 3. Lands reacquired by the United States or by the Spokane
26 Tribe should have the following priority dates:

27 a. Reacquired allotted lands - 1881.

28 b. Reacquired homestead lands - the date of reacquisition.

29 4. As to non-Indian holders of allotments of land within the
30 original boundaries of the Spokane Indian Reservation they are
31 entitled to 1881 priority date for the rights held as successors to
32 an allottee.

33 BRIEF OF DOE - 59

1 5. As to non-Indian holders of lands within the original
2 boundaries of a reservation acquired under the "homestead" law of
3 1905, they acquire no reserved rights. All rights of such landowners
4 may be claimed only upon the basis of state law.

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1 VIII. CONCLUSION

2 The conclusions reached by the Court in this case have extremely
3 serious implications for all of the western United States. The United
4 States and the Tribe, through latter day revelation of the law, make
5 very expansive claims on behalf of itself and the Tribe, both in terms
6 of water quantities and governmental powers. The policies supporting
7 these claims - making up for the misdeeds and sins of the past - are
8 very attractive to anyone who examines the history of the western
9 United States.

10 Yet there are countervailing policies which must not be lost
11 from view. Most of the development of the west is based on well
12 recognized federal and state water allocation policy of longstanding.
13 Displacement of these developments because of the loss of water rights
14 would play havoc with our entire economic structure not to mention
15 the potentials for social disruption. Dean Trelease, in his National
16 Water Commission treatise, reached this conclusion on the issue of
17 Indian reserved rights:

18 "Justice to Indians may not mean giving them every-
19 ting they ask. Justice to Indians cannot be injustice
20 to non-Indians; there must be justice to both or
the word is inapplicable." Trelease, Federal-State
Relations in Water Law 174 (1971).

21 The Chamokane Creek is a small creek flowing through a sparsely
22 settled land. The granting of the claims made by the United States,
23 in this case, would displace only a relatively few. (Yet as to those
24 few with long-standing water rights, who have justifiably relied upon
25 state laws and the lack of any grand assertions of expansive claims
26 of water for Indians for a century, the effect is personal and very
27 substantial.) The broader concern is the precedential value of the
28 policies announced by this court. The coattail effect of this case
29 on decisions for other streams, with larger volumes and more valuable
30 non-Indian interests involved, has extremely high potential for the
31 agony of displacement previously noted.

32

33 BRIEF OF DOE - 61

1 When the teachings of Winters, Arizona v. California and
2 Cappaert are applied to the facts of this case, we urge the scheme for
3 quantification of reserved rights contained in our "recapitulation"
4 be accepted by the court. By following this course we believe the
5 Court will reach a reasonable interpretation of the federal intent as
6 to impliedly reserving water rights for lands within the Spokane
7 Reservation.

8 As to the application of state water laws to waters on non-Indian
9 lands within the original boundaries of the reservation, we urge the
10 Court to reject any suggestion there is an impermeable wall on the
11 boundaries. The state has many legitimate interests within the reser-
12 vation relating to the non-Indians and their property on the reserva-
13 tion. So long as the laws of the state relating to there interests
14 do not interfere either with the Tribe's ability to govern and protect
15 its own property interests or with federal statutes, the state laws
16 should remain valid. In this case, the state asserts its law apply
17 only to non-Indians, to non-Indian lands, and to waters in excess of
18 those necessary to satisfy federal reserved rights. The state labors
19 no desire, overtly, covertly, or otherwise, to allocate, regulate, or
20 manage the federally reserved Indian rights of the Spokane Reserva-
21 tion. The State, in this case, only asserts its legitimate constitu-
22 tional powers to regulate all waters within the state's boundaries
23 except those placed in a reserved category through one the several
24 powers vested in the federal government by the United States Consti-
25 tution.

26 In recent years the concept of "cooperative federalism" has
27 grown dramatically. This policy trend is not only embodied in many,
28 many recent enactments of Congress,^{32/} but more importantly by the
29 United States Supreme Court. Note, The Preemption Doctrine Shifting

31 ^{32/} Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C.
32 1251; Coastal Zone Management Act of 1972, 16 U.S.C. §1451 and
1452; and Deep Water Ports Act of 1974, 33 U.S.C. 150(a).

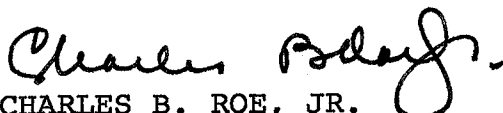
1 Perspectives on Federalism and the Burger Court, 75 Colum. L. Rev.
2 623 (1975).

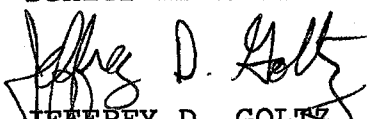
3 We urge the Court to base its deliberations, leading to the
4 development of a decree, on this new and promising spurt of coopera-
5 tion among governments in our federal system. If the Court is so
6 guided, legitimate interests of both federal and state governments
7 will be better served and no government will preempt from its proper
8 role. Likewise, the judge faced with the unhappy task of resolving
9 water right disputes of will have achieved the "smallest injustice
10 possible."^{33/}

11 DATED: March 28, 1977.

12
13 Respectfully submitted,

14
15 SLADE GORTON
16 Attorney General

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18 CHARLES B. ROE, JR.
19 Senior Assistant Attorney General

20 
21 JEFFREY D. GOLTZ
22 Assistant Attorney General

23 Attorneys for State of
24 Washington, Department
25 of Ecology
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31 ^{33/} Trelease, Federal-State Relations in Water Law 174 (1971).

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

In the Matter of the Requests of
UNION OIL COMPANY OF CALIFORNIA for
Appropriation Permits under
Applications No. 15989 and 15990;

THE TULALIP TRIBES OF WASHINGTON
and THE TULALIP TRIBES,

Appellants,

-vs-

MURRAY G. WALKER as Supervisor of
the Division of Water Resources,
Department of Conservation,

Respondent.

No. 71421

MEMORANDUM DECISION

Further consideration of the above named case convinces
me:

(1) That the lands reserved by treaty for the use and
occupancy of the Indians carries with it all water rights appurtenant
to said lands; and if said lands are reserved to the Tribe such water
right is held as a tribal right.

(2) That such water rights cover both present and future
needs.

(3) That the order of the Supervisor of the Division of
Water Resources is made subject to existing rights which includes the
right of the Indian tribe to the beneficial use of water in the stream,
both present and future.

(4) The conclusion expressed at the close of the trial
that the State does not have jurisdiction to grant the permit in
question as to surplus water over and above the needs of the tribe,
is erroneous. The Union Oil Company holds title in fee and enjoys the
same right to water as that of the Indian allottees who originally
held title. The mistake which I made at the close of the trial was

my failure to appreciate that the exclusive jurisdiction of the United States is confined to Indians.

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

The Federal statute which provides that the Secretary of the Interior shall make a just and equitable division of water among Indians on a reservation is limited to water necessary and used for irrigation. The water here in question is not, has not, and there is no reason to believe will be used for irrigation.

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

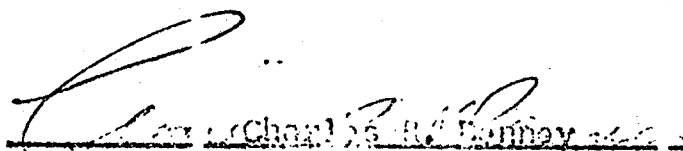
The fact that Public Law 280 excludes any adjudication of water rights does not control this case. The state is not attempting to regulate or adjudicate the water rights of the Tribe.

I have read all of the cited cases. The press of work does

not permit me to take the time to discuss them; indeed, counsel have demonstrated in the preparation of their excellent briefs that they are fully competent to do so.

Findings and decree will enter affirming the action of the Supervisor, with the modification that such order does not adjudicate nor affect the rights of the Tribe in the water of the stream, both present and future.

DATED this 9th day of January 1963.


~~Charles H. Bunney~~
J U D G E.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SNOHOMISH COUNTY

In the Matter of the Requests of)	
UNION OIL COMPANY OF CALIFORNIA for)	
Appropriation Permits under)	
Applications Nos. 15989 and 15990;)	
)	
THE TULALIP TRIBES OF WASHINGTON)	
and THE TULALIP TRIBES,)	No. 71421
)	
Appellants,)	FINDINGS OF FACT
)	AND
vs.)	CONCLUSIONS OF LAW
)	
MURRAY G. WALKER as Supervisor of)	
the Division of Water Resources,)	
Department of Conservation,)	
State of Washington,)	
)	
Respondent.)	

The above entitled proceeding came before the above-entitled court, the Honorable Charles R. Denney presiding, on the 4th day of December, 1962.

The appellants The Tulalip Tribes of Washington, and The Tulalip Tribes appeared by their counsel, Bell, Ingram and Smith of Everett, Washington, Lewis A. Bell of counsel. The respondent Murray G. Walker as Supervisor of Water Resources, Department of Conservation, State of Washington, was represented by the Attorney General of the State of Washington, Charles B. Roe, Jr., Assistant Attorney General.

This matter comes to the court on appeal, pursuant to RCW 90.03.080, by the Tulalip Tribes of Washington, and The Tulalip Tribes, both corporations.

The appellants have challenged the jurisdiction of the Supervisor of Water Resources to issue the order, dated April 23,

1961, which authorized Union Oil Company of California to divert up to eight second feet of water from the west fork of Tulalip Creek at a point located on lands owned by the Union Oil Company of California within the boundaries of the Tulalip Indian Reservation, Snohomish County, Washington, and to utilize said waters for a consumptive use for the purpose of oil refinery operations on the aforesaid lands owned by Union Oil Company of California.

On the basis of the record, having carefully considered the return of the Supervisor of Water Resources, the pre-trial order, the evidence admitted at time of trial, and the written memorandums and oral argument of counsel the court makes the following:

FINDINGS OF FACT

I

The "Admitted Facts" set forth in paragraphs 1 through 18 of Section II of the Pre-Trial Order, dated November 30, 1962, as agreed to by the parties and entered in this proceeding, are accepted by this court as the findings of fact, and adopts the same by this reference as though set forth in full.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

I

This court has jurisdiction of the parties and subject matter involved in this proceeding.

II

The Treaty of Point Elliott, through which lands were reserved for the use and benefit of the Indians, impliedly reserved for the benefit of the Indians the right to withdraw and utilize waters in amounts reasonably necessary to carry out the purposes for which the reservation was created; and if said lands are reserved to the appellants, such water right is held as a tribal right.

III

The reserved rights to utilize the waters of Tulalip Creek include amounts reasonably necessary to satisfy not only the present needs but the future needs of the Indians, should the requirements of the Indians to carry out the purposes for which the reservation was created, expand.

IV

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

V

The Supervisor of Water Resources has jurisdiction over all waters flowing in Tulalip Creek across the lands of Union Oil Company which are surplus to amounts necessary to satisfy the needs of the tribe as reserved by the Treaty of Point Elliott.

VI

The order of the Supervisor of Water Resources relates solely to said surplus waters and is made subject to existing rights,

which include the reserved rights of the Indian tribe to the beneficial use of the water in Tulalip Creek, both present and future.

VII

The order of the Supervisor of Water Resources does not attempt to adjudicate the rights of any claimant, including the appellants, to the use of the waters of Tulalip Creek, nor is the right of any Indian affected by the order.

VIII

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

IX

Respondent supervisor is entitled to a judgment affirming the order appealed from with the modification that said order state it does not adjudicate nor affect the rights of the tribe in the waters of the stream, both present and future, and is entitled to recover from appellants' his costs herein.

DONE IN OPEN COURT this 7th day of Feb., 1963.

Charles R. Deaney
J U D G E

Presented by

CHARLES B. RICE, JR.
Assistant Attorney General

Presentment waived this ___
day of _____, 1963.

Hewes A. Bell

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SNOHOMISH COUNTY

In the Matter of the Requests of
UNION OIL COMPANY OF CALIFORNIA for
Appropriation Permits under
Applications Nos. 15989 and 15990;

THE TULALIP TRIBES OF WASHINGTON
and THE TULALIP TRIBES,

Appellants,

vs.

MURRAY G. WALKER as Supervisor of
the Division of Water Resources,
Department of Conservation,
State of Washington,

Respondent.

No. 71421

JUDGMENT

On the basis of the Findings of Fact and Conclusions of
Law entered herein this day

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That that certain order of the respondent Supervisor
of Water Resources, dated May 23, 1961, authorizing Union Oil
Company of California to withdraw waters from Tulalip Creek, ap-
pealed from herein, be affirmed with the modification that such order
"does not adjudicate nor affect the rights of the appellants in the
water of the stream, both present and in the future."

2. That the respondent Supervisor recover from appellants
his costs and disbursements herein to be taxed.

DONE IN OPEN COURT this 7th day of February, 1963.

Charles R. Donney
J U D G E

Presented by:

CHARLES B. ROE, JR.
Assistant Attorney General

Presentment Waived this _____ day
of _____, 1963.

LEWIS A. BELL

1 CERTIFICATE OF SERVICE

2 I certify that I mailed a copy of the foregoing document to
3 all parties on the following list on March 28, 1977, with
4 postage prepaid:

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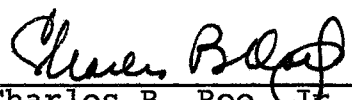
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