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Reply Brief of the United States

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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

REPLY BRIEF OF THE UNITED STATES

(152)

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REPLY BRIEF OF THE UNITED STATES

In our opening brief, we contend that the United States owns the prior and paramount rights to the surface and ground waters of Chamokane Creek and its tributaries for the benefit of the Spokane Tribe of Indians. We set forth and substantiated four rights: sufficient water to maintain Chamokane Creek as a fishery and as a free flowing recreational and esthetic stream; sufficient water to irrigate all of the irrigable acres of land within the Chamokane Creek basin portion of the Spokane Indian Reservation; 10 cfs (nonconsumptive) for fish propagation purposes at a fish hatchery; and such water as may be needed in the future to fulfill the purposes for which the Spokane Indian Reservation was created. The government also denied the validity of any water rights certificates, permits or applications issued by the state for uses within the exterior boundaries of the Spokane Reservation, sought to enjoin the further issuance of such certificates, permits and applications and sought to limit the exercise of the valid water rights of the defendants to that amount which will not interfere with the various rights of the United States.

The principal attack on our position is made in the two briefs which have been filed by the State of Washington. Defendant Boise Cascade Corporation has also filed a brief in opposition to our claims. The defendants rely on essentially the same arguments which have been consistently rejected by the United States Supreme Court since that Court's decision in Winters v. United States, 207 U.S. 564 (1908). They deny the existence of a reserved water right to maintain Chamokane Creek as a free flowing stream.*/ They deny

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*/ Department of Ecology (hereinafter, DOE) brief, pp. 20-25, 30 and 59; Department of Natural Resources (hereinafter DNR) brief, pp. 15-21; Boise Cascade brief, pp. 14-15.

the existence of a reserved water right for irrigable land.*/ As to their own rights they assert the validity of all of the water rights certificates, permits and applications heretofore issued by the State of Washington for uses within the Chamokane Creek watershed and deny that any hydrologic connection has been established between those uses and the government's rights, if any. In short, the defendants here take the absolutely incredible position that the United States and the Spokane Tribe have no rights whatsoever to the surface or ground waters of Chamokane Creek and its tributaries and that all of the relief requested by the government and the tribe should be denied.

As will be shown below, counsel for the defendants are in error as to the effect of the decisions which they cite and the decisions generally of the United States Supreme Court concerning federal reserved water rights.

As will also be shown, counsel err in their contention that the Federal Government and the tribe have somehow failed to produce sufficient evidence to establish their water rights. Indeed, a comparison of the briefs of the plaintiffs and those of the defendants with regard to a discussion of the evidence and citations to the record leads one to the inescapable conclusion that the plaintiffs have proven their case by a clear preponderance of the evidence.

The United States, therefore, replies to the briefs of the defendants as follows.

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*/ DOE brief, p. 58; DNR brief, pp. 15, 32; Boise Cascade brief, p. 13.

I

THE UNITED STATES AND THE SPOKANE TRIBE OF INDIANS HAVE ESTABLISHED THEIR CLAIMED RIGHTS TO THE SURFACE AND GROUND WATERS OF CHAMOKANE CREEK AND ITS TRIBUTARIES.

A. Decisions of the United States Supreme Court and Other Federal Courts Support the Plaintiffs' Positions in this Case.

1. Defendants concede the existence of federal reserved water rights and that the doctrine applies to ground water but misunderstand the nature and extent of the rights.

In each of their closing briefs, the defendants concede, as they must, that when the Federal Government withdraws land from the federal domain, it has the power to reserve the right to use water then unappropriated to the extent necessary to accomplish the purpose of the reservation. The Department of Ecology, for example, states that:

> Beginning with Winters v. United States, 207 U.S. 564 (1908), and continuing through a series of cases, the last being Cappaert v. United States, 426 U.S. 128 (1976), the United States Supreme Court has announced, developed, and amplified upon a federal water right doctrine known as the "reservation doctrine". [Footnote omitted] This Court made doctrine, which will be discussed in detail, infra, is now well established and recognized in the law.*/

Further, Ecology notes that:

> Despite substantial difficulties by many western states in accepting the Winters "doctrine", the State of Washington has long recognized it as a viable base for establishing rights to appropriate waters within the State's boundaries.**/ [Footnote omitted]

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*/ DOE brief, p. 10

**/ DOE brief, p. 13; Similar statements are by the Department of Natural Resources (DNR brief, p. 16) and Boise Cascade (brief, p. 6).

Thus, the issue of whether or not the United States had the power to reserve the water rights claimed by the plaintiff and plaintiff-intervenor in this case is eliminated by this admission of the defendants as well as the case law on the subject. Cappaert v. United States, 426 U.S. 128, 138 (1976); United States v. District Court for Eagle County, 401 U.S. 520, 522-523 (1971); Arizona v. California, 373 U.S. 546, 601 (1963); F.P.C. v. Oregon, 349 U.S. 435, 443-444 (1955); Winters v. United States, 207 U.S. 564, 577 (1908).

Likewise, the defendants agree that the federal reserved rights doctrine may extend to the reservation of ground water. DOE brief, p. 25; */ Boise Cascade brief, p. 3. Cappaert v. United States, supra, 426 U.S. at 142-143. Therefore, this issue is also eliminated from this case.

Apart from these concessions of the obvious, however, each of the defendants' closing briefs exhibits serious error in its interpretation of the nature and extent of federal reserved rights. The major misunderstandings may be summarized as follows:

BOISE CASCADE:

a. The federal reserved right doctrine is based upon the concept of necessity which requires the court to examine the competing interests. (Boise Cascade brief, p. 5)

b. A water right cannot be claimed for use on an Indian reservation if the tribe currently would prefer to make some other use of the water. (Boise Cascade brief, p. 13)

c. A federal reserved water right cannot be obtained for fishing, aesthetic or recreational purposes. (Boise Cascade brief, p. 14)

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*/ Having accurately stated the holding in Cappaert, however, Ecology immediately attempts to restrict the effect of that holding on this case by alleging that the hydrologic connection here is much more difficult to establish than it was in Cappaert. According to the evidence, quite the opposite is true.

DEPARTMENT OF NATURAL RESOURCES:

a. A federal reserved water right can only be held to exist if the absence of such a right would render the reservation land "valueless and uninhabitable." (DNR brief, p. 17)

b. A federal reserved water right for use on an Indian reservation is limited to agricultural purposes. (DNR brief, p. 17)

c. Even if a federal reserved water right could exist for the maintenance of a fishery, the existence of the right would depend on a showing of historical dependence on the fishery for subsistence. (DNR brief, p. 19)

DEPARTMENT OF ECOLOGY:

a. Federal reserved rights for instream flows are mutually incompatible with irrigation rights, therefore, the government and the tribe get neither. (DOE brief, pp. 2, 3, 29)

b. A water rights decree cannot be both based on irrigable acreage and left open subject to future modification. (DOE brief, p. 28)

Each of these arguments will be answered in turn.

2. The reserved right is based on the purpose of the reservation.

In our opening brief, we argued that the test to be applied in determining the existence, nature and the extent of a federal reserved water right is whether the reservation of the water was necessary to accomplish the purposes for which the reservation was created. We pointed out that the Supreme Court and other federal courts have recognized that federal reserved water rights are not limited to the right to use of water for irrigation.*/ The defendants generally disagree. First of all, Natural Resources and Boise Cascade would have this court believe that a federal reserved water right for an Indian reservation can only extend to

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*/ US brief, pp. 22-35

the right to use water for irrigation.*/ They rely on the standard argument that it was the policy of the Federal Government in establishing Indian reservations to "integrate the various Indian tribes eventually into the agrarian level of our economy." They also argue that the line of federal reserved right cases since Winters v. United States, supra, which have dealt with Indian reservations have involved only the on-reservation consumptive use of water necessary for the agricultural development of reservation lands. These contentions are neither logical nor consistent with existing case law and are refuted in pages 16-35 of our opening brief. It is firmly established that Indian reservations were created with the idea that they would be "self-sustaining". Alaska Pacific Fisheries v. United States, 248 U.S. 78, 88 (1918). This has been held to mean that the Indians would be encouraged to maintain traditional food gathering processes for subsistence and economic gain while learning new skills and trades which would become necessary for survival as aboriginal practices became restricted due to the encroachments of civilization. United States v. Washington, 384 F.Supp. 312, 355 (USDC, WD Wash., 1974) affm'd 520 F.2d 676 (C.A. 9, 1975) cert. den. 423 U.S. 1086.

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*/ DNR brief, p. 17; Boise Cascade brief, p. 14. Boise Cascade relies heavily on the case of Colorado River Water Conservation District v. Rocky Mountain Power Co., 406 P.2d 798 (Colo. 1965) for the proposition that there can be no minimum flow right for fishery purposes. Boise Cascade brief, p. 14. But that case was a state court case between private parties and construed Colorado state law. 406 P.2d at 800. Obviously, Colorado law does not apply to the claims of the government in this case. As the United States Supreme Court said in United States v. District Court for Eagle County, 401 U.S. 520, 526 (1971), a case which arose out of the Colorado state courts:

> All such questions, including the volume and scope of particular reserved rights, are federal questions which, if preserved, can be reviewed here . . . . [Emphasis added]

The court's attention is especially drawn to the recently decided case of United States v. Finch, 548 F.2d 822 (C.A. 9, 1976). This case was a criminal action in which James Junior Finch was charged with trespassing on Indian lands in violation of 18 U.S.C. 1165. The defendant had been arrested while fishing from a bank of the Big Horn River. The bank and the bed of the river at the point where Finch stood were within the exterior boundaries of the Crow Indian Reservation. The State of Montana, however, owned the bank at the spot occupied by Finch, having acquired the property by purchase. Finch held a valid state fishing license but had received no permission to fish from either the Crow Tribe of the United States.

The district court held that no entry had been made on Indian land and dismissed the charges. The ninth circuit reversed.

The portion of the opinion which is relevant to this case begins on page 832. As part of their argument that Montana owned the bed of the river and not the United States as trustee for the Crow Tribe, counsel for Finch asserted that there was no evidence that the Crow Indians used the river as a source of food and that, therefore, the government could not have intended to reserve the river bed. The court answered the argument as follows:

> Appellee misapprehends the purpose of Congress in creating the Crow Reservation. By establishing a reservation as a "permanent home" for the Crow Indians, see Treaty with the Crows of 1868, Art. 4, 2 Kapp. 1008, 1009, the Government manifestly intended to set aside lands which would provide the tribe with the food and natural resources upon which their livelihood depended. It is true that the Crow Indians, in 1868, were predominantly hunters.17/ The aim of the United States, however, was to fix the Crows in one location and to reorient their way of life toward "agricultural and other pursuits." We find it inconceivable that the United States intended to withhold from the Indians the right to sustain themselves

> from any source of food which might be available on their reservation. It must have been no mystery to the Government that the Crow Tribe, whose nomadic ways they sought to change, might eventually be forced to derive their existence from a source other than big game, should the large herds of buffalo and elk roaming the plains become extinct by accident of nature or decimation by man. Cf. Menominee Tribe of Indians v. United States, 388 F.2d 998, 1002 (C.Cls., 1967) aff'd 391 U.S. 404 (1968). We therefore decline to adopt an interpretation which would mean that the Treaty of 1868 deprived the Crow Indians of potential control over a source of food on their reservation. [Footnote omitted] 548 F.2d at 832.

Footnote no. 17 to the above-quoted portion of the opinion reads as follows:

> Published histories of the Crow Tribe indicate that the Crow Indians engaged principally in the hunting of large game such as elk and buffalo. Fishing was neither a primary nor an important source of food or industry. In his definitive study of the Crow Tribe, R. Lowie states:
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> > A Crow was not happy without a diet of the flesh of ruminants. Boys went out shooting rabbits for fun, but that would be starvation fare for adults. I have never met a reference to eating of fish; berries, and roots dug up by the women formed a regular part of the ancient bill of fare but only as seasoning or dessert; and the corn traded in from the Hidatsa was eaten for the sake of variety rather than as a substitute for meat.
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> R. Lowie, The Crow Indians 72 (1938)

Thus, United States v. Finch underscores and emphasizes that the purpose for the creation of Indian reservations was to provide the Indians with a permanent home and that this means the government meant to reserve for the Indians the right to continue to sustain themselves from any source of food which might be available on their reservation. If this was the purpose of the reservation and if the government must be held to have impliedly reserved sufficient

water rights to fulfill the purpose of the reservation, then it surely must follow that water rights can be reserved for uses other than irrigation.

Interestingly, the Department of Ecology agrees that the courts have found other "purposes" to which federal reserved rights apply besides irrigation.*/ Ecology would recognize reserved water rights for the Spokane Tribe for domestic use, stockwatering, timber production and irrigation**/ and "acknowledges that fishing may have been a purpose of the reservation and water impliedly reserved for that purpose."***/ However, Ecology would not recognize a water right for the preservation of the Chamokane Creek fishery because "[i]t is not a fishery on which the Spokanes depend for their livelihood."****/ As noted above, however, Finch would protect all sources of food, not just major sources.

Next, the defendants argue that reserved rights for minimum stream flows and for irrigation are mutually inconsistent and that, therefore, the plaintiffs get neither! Ecology says that the government and the tribe are "making the mutually exclusive, incompatible contentions that the federally reserved rights in relation to the establishment of the Spokane Reservation, include both the right to dry up the stream during the summer months through diversions for agricultural irrigation and, for the very same period, the right to preserve the stream 'in its natural status and keep it a free-flowing stream.'"*****/ Counsel, however, misconstrue our efforts to set forth the government's rights.

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*/ DOE brief, p. 19

**/ DOE brief, p. 58

***/ DOE brief, p. 20

****/ DOE brief, p. 23

*****/ DOE brief, pp. 3, 16

From the very outset of this litigation, the government and the tribe have made it absolutely clear that their major concern and objective is to preserve Chamokane Creek, (Amended Complaint, p. 4; Tr. 677, 700, 732, 781, 796; PE-37). The irrigation right was sought simultaneously for three reasons: (1) so that the tribe would be in a position to irrigate Chamokane Creek basin land with water in excess of that needed for minimum flow should the need arise; (2) so that the tribe would be able to irrigate all irrigable land in the basin if conditions should ever change so that a minimum flow was no longer possible or practical to maintain and (3) so that the tribe would be in a position to irrigate all irrigable land if this court or an appellate court should find that no right exists to maintain a minimum flow. It should be noted that the tribe has consistently taken the position that if it cannot maintain a minimum flow in Chamokane Creek, it will utilize the creek for agricultural development itself rather than let the defendants dry it up. (Tr. 835)

The defendants attempt to turn this most reasonable and beneficial approach against the plaintiffs. They argue that since the tribe wants to maintain the creek in its natural state and doesn't currently plan to use the water for irrigation, there can be no irrigation right. Further, since there can be no federal reserved right for minimum flow (or if there can, none was intended here) there is no minimum flow right either. Thus, the defendants would turn the tribe's plan for the use of Chamokane Creek which benefits <u>everyone</u> into a windfall for the defendants and the consequent destruction of one of eastern Washington's most beautiful streams.

A federal reserved water right for an Indian reservation does not in any way turn on the tribe's present plans for the reservation or lack thereof. Nor does it turn on whether or not

the tribe really "wants" to utilize the water consumptively or the potential availability of another source. The existence of the right, its nature and its extent is solely determined by the amount of water needed to accomplish the purpose of the reservation. Cappaert v. United States, supra, 426 U.S. at 138.

Natural Resources also argues that following Winters v. United States, supra, and Arizona v. California, supra, there must be some showing that "absence of water renders the Spokane reservation lands 'valueless'" or "that water from the river would be essential to the life of the Indian people."*/ Whether or not an absence of the water sought would render the reservation valueless and uninhabitable is not nor has it ever been the test of a reserved water right in any of the cases on the subject. The test is simply whether the reservation of water was needed to accomplish the purposes of the reservation. Cappaert v. United States, supra, 426 U.S. at 138. Indeed, it would be ironic if the United States could only reserve water if its absence rendered the land "valueless and uninhabitable" while the defendants could appropriate as much water as they desire. Surely the Federal Government, in creating Indian reservations, did not intend to condemn its Indian people to the bare subsistence level that would result from such minimal water rights.

Natural Resources further asserts that plaintiffs get no water right to Chamokane Creek because "[t]here is no evidence of historical dependence on a fishery in Chamokane Creek for subsistence by Spokane Indians."**/ Counsel is mistaken both as to the law and as to the facts. The test is not whether the fish found in Chamokane Creek either were or are "an indispensable or even important part of Spokane tribal subsistence." The test of the implied reservation is

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*/ DNR brief, p. 17

**/ DNR brief, p. 19

simply whether this was a "source of food which might be available on their reservation." United States v. Finch, supra, 548 F.2d at 832. In any event, there is ample evidence in the record to the effect that Chamokane Creek has always been important to the Spokane Tribe as a source of food, as a place of recreation and for esthetic purposes.*/

3. The quantification of known reserved water rights does not preclude provisions in the decree for future uses.

In this case, the United States and the Spokane Tribe have requested that the final decree contain a provision allowing modification to meet the future needs of the Indians.**/ Ecology agrees that "[i]t is accepted law that reserved rights extend not just to meet existing needs of the tribe, but future needs as well."***/ They also concede that a decree in a case like this can be left open for future modification. They argue, however, that the government and the tribe cannot have a decree based on both irrigable acreage and future needs. According to them, the irrigable acreage standard utilized by the Supreme Court in Arizona v. California was in lieu of the usual future modification provision. They reason that the unique circumstances of that case (i.e. a final adjudication of rights in the Colorado River Basin) mandated that some sort of outside limit be placed on Indian rights. If a decree is to contain a future modification provision, however, they feel that there is no reason to set any "outside limits." In other words, they would find the concepts of irrigable acreage and future modification to be mutually exclusive.

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*/ US brief, pp. 16-39

**/ US brief, pp. 63-66

***/ DOE brief, p. 27

We disagree. It is true that in a sense, Arizona v. California was a unique case both because of the forum (it was an original action in the Supreme Court) and the scope of the action (allocation of the waters of the Colorado River).*/ Neither the uniqueness of the circumstances, however, nor the fact that the court wanted to "finalize" the case in any way qualify the fact that the Court held that where one of the purposes of a reservation was agricultural development, there was impliedly reserved sufficient water to irrigate all irrigable acreage. 373 U.S. 600-601

We feel that in water adjudications like the one before this court, it is incumbent on the United States and the tribe to make a good faith effort to quantify all of the reserved rights of which they have knowledge. This approach benefits the government because it creates certainty as to the general extent of the reserved rights and, therefore, promotes the efficient planning of development while at the same time it benefits the junior water users because they too know the general extent of the reserved right and can proceed with their own investment and development with a certain sense of security.

Accordingly, the United States and the tribe have set forth all of the claims to the waters of Chamokane Creek of which they are currently aware. We are not, however, able to foresee what the water needs of the Spokane Tribe will be 100 or 1,000 years from now. Therefore, it remains absolutely essential that this court provide for a decree which will be modifiable whenever there are increased demands for water on the reservation.

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*/ See our discussion of Arizona v. California, US brief, pp. 65-66.

4. The existence of federal reserved water rights does not depend on a "balancing of the equities."

In its brief, defendant Boise Cascade advances the argument that "a thorough analysis of the facts in the cases invoking the implied reservation doctrine establishes that they are based upon the concept of necessity requiring an examination of the competing interests involved."*/ They then go on to argue that the "unique status of Boise Cascade in this case requires that the implied reservation doctrine give way to a more compelling private interest."**/

This argument was recently rejected by the Supreme Court in the Cappaert case:

> Nevada argues that the cases establishing the doctrine of federally reserved water rights articulate an equitable doctrine calling for a balancing of competing interests. However, an examination of those cases shows they do not analyze the doctrine in terms of a balancing test. For example, in Winters v. United States, supra, the Court did mention the use made of the water by the upstream landowners in sustaining an injunction barring their diversions of the water. The "Statement of the Case" in Winters notes that the upstream users were homesteaders who had invested heavily in dams to divert the water to irrigate their land, not an unimportant interest. The Court held that when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation.4/ 426 U.S. at 138-139

Footnote 4 concluded that:

> 4/ Nevada is asking, in effect, that the Court overrule Arizona v. California, 373 U.S. 546 (1963), and United States v. District Court for the County of Eagle, 401 U.S. 520 (1971), to the extent that they hold that

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*/ Boise Cascade brief, p. 5-6

**/ Boise Cascade brief, p. 8

> the implied reservation doctrine applies to all federal enclaves since in so holding those cases did not balance the "competing equities." Brief for Nevada, 15. However, since balancing the equities is not the test, those cases need not be disturbed. [Emphasis added]

Accordingly, the "balancing of the equities" argument must be rejected here.

It should be noted that Boise Cascade also states that "[t]he instant case presents a clear conflict between a federal and private right . . . ."*/ While this statement is perhaps of no great importance to the final outcome of this case, it emphasizes the general lack of understanding by counsel for the defendants and by the public in general of the nature of Indian property rights which are held in trust by the United States. Such rights are not "public" rights or "federal" rights in the same sense as rights which attach to national parks, national forests or public lands. They are and always have been private rights with the United States government holding title as trustee and the Indians holding the beneficial ownership. As private property rights, they deserve the same protection and respect that the defendants here want for their rights. The sooner the State of Washington and her citizens recognize this basic fact, the better for all concerned.

B. The Record in this Case Supports the Claims of the United States and the Spokane Tribe.

1. The defendants misunderstand the factual test of reserved water rights.

At the outset, Ecology correctly states that "the foundation of all reserved rights is intent, express or implied."**/

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*/ Boise Cascade brief, p. 6

**/ DOE brief, p. 25

They then, however, seem to suggest that implied intent does not satisfy the requirement at all but rather that the intent to reserve the water claimed must be shown to have been express. For example, with regard to the plaintiffs' claims to ground water, they say "[u]sing the standard set forth by the Ninth Circuit that the parties 'know' of the implied reservation, it is difficult to presume knowledge of hidden, underground waters."*/ Ecology also states that "the record does not show clearly which sources of water the federal government intended to tap to fulfill the purposes of the reservation."**/

No court has ever held that the test of a reserved right is actual or express intent to reserve. The case law is to the opposite effect. In Winters v. United States, 207 U.S. 564 (1908), the Court found that there was "a conflict of implications"***/ and resolved that conflict in favor of a reserved water right for the Fort Belknap Reservation. There had been no express reservation of water.

Other cases have set forth explicitly the factors to be considered in determining the nature and extent of a reservation of federal rights. In Alaska Pacific Fisheries v. United States, 248 U.S. 78, 87 (1918) the Court states:

> [I]t is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created - the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained.

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*/ DOE brief, p. 26

**/ Id.

***/ 207 U.S. at 576

See also Moore v. United States, 157 F.2d 760, 762 (C.A. 9, 1946) cert. den. 330 U.S. 827.

United States v. Walker River Irr. Dist., 104 F.2d 334 (C.A. 9, 1939) is directly on point. In that case, the court first noted that:

> When the lands were set apart for Indian purposes there was no express reservation of the flow of the stream; but it is the position of the Government that there was an implied reservation of the water. 104 F.2d at 335.

The court held that the "basic question for determination was one of intent - whether the waters of the stream were intended to be reserved for the use of the Indians, or whether the lands only were reserved." 104 F.2d at 336. The court found that the intent was to be arrived at "by taking account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved." Id.

The thrust of the above-cited cases, as well as the other cases in which courts have found federal reserved water rights to exist for the benefit of Indians, is that the test of a valid reservation of water rights is whether previously unappropriated waters appurtenant to the reservation were necessary to accomplish the purposes for which the reservation was created. No case can be found in which the existence of the right turned on an actual knowledge on the part of the United States as to the existence of the body of water in question. In Tweedy v. Texas Co., 286 F.Supp. 383 (USDC, Montana, 1968) the court noted that:

> The Winters case dealt only with the surface water, but the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid - water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference. 286 F.Supp. at 385

Finally, no showing is required that the Federal Government intended to reserve water from one source instead of another. It is sufficient that the water claimed is located so as to be the most practical source for satisfaction of the Indians' requirements.

2. The evidence clearly establishes an intent to reserve sufficient water to preserve and protect Chamokane Creek and its fishery.

In our opening brief, we discussed at length the evidence which supports our contention that the United States and the Spokane Tribe intended to reserve sufficient water to preserve and protect Chamokane Creek and its fishery. See US brief, pp. 10-11, 16-22. The defendants argue that there was no such intention. The Department of Ecology makes the more reasoned and reasonable argument though it is erroneous. Ecology "acknowledges that fishing may have been a purpose of the reservation and water impliedly reserved for that purpose. However, the record demonstrates that except for perhaps a de minimus amount, the Spokanes' fishery was not based on Chamokane Creek."*/ They also argue that the fact that the eastern boundary of the reservation was drawn along the east bank of Chamokane Creek is not indicative of any intent to reserve the creek's water.

As we pointed out above, there is no requirement that the Chamokane Creek fishery must have been a large scale fishery or one upon which the Spokane Tribe depended for its livelihood. It is enough that it was a source of food available on the reservation. United States v. Finch, supra, 548 F.2d at 832. Further, the inclusion of the entire creek within the boundaries of the reservation was intentional and clearly reflects the recognized importance of the creek to the tribe. The fact that the Spokane

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*/ DOE brief, p. 20

and Columbia Rivers were also included within the reservation only indicates that they too were recognized as important to the Indians. It is interesting that nowhere in their briefs do the defendants ever answer the question which arises once they argue that the placing of the boundary line is irrelevant to the purpose of the reservation: why did the Federal Government place the boundary line on the far side of Chamokane Creek rather than in the middle of the stream as it usually did? This court can take judicial notice of the fact that where rivers or streams were utilized by the government as boundaries of Indian reservations, the line was normally drawn in the center of the stream. See, for example, Winters v. United States, supra, 207 U.S. at 565 (boundary of Fort Belknap Reservation was middle of Milk River). If that is the case, then there must have been some reason that the normal procedure was not followed on the Spokane Reservation. That reason is self-evident. Chamokane Creek was of recognized importance to the tribe, hence, it was intended that the creek be included as part of the reservation. If it were intended that the creek be part of the reservation, then it must follow that there was an intent that the creek be preserved.

If the Department of Ecology's position is at least arguable (though incorrect), that of the Department of Natural Resources is absurd. For the most part, they rely on some sort of a collateral estoppel argument that the findings of fact in the Spokane Tribe's claims case now serve to estop the government and the tribe from claiming a reserved right in Chamokane Creek. Section I C, below, is devoted to a general discussion of the effect of the Claims Commission judgment on the case but some discussion is warranted here since it concerns the factual question of whether or not the government and the tribe intended to reserve Chamokane Creek as a fishery.

First of all, Natural Resources quotes from page 16 of our opening brief*/ where we assert that the Spokane Tribe was and is a fishing people and that the site of the Spokane Reservation was selected because of the excellent fishing in the Columbia River, Spokane River and Chamokane Creek. DNR then says that "These statements are false"**/ and that findings of fact nos. 23 and 24 from the Spokane Tribe's claims case "belie them". The findings are then quoted. A reading of these findings, however, reveals that they are consistent with and directly support the government's contentions. Finding No. 24, for example, contains the statement that "From June to October the Spokanes fished the Columbia and Spokane Rivers . . . ."***/ How can a tribe fish for five months of the year and not be considered a "fishing people"? DNR also argues that there is nothing in the Claims Commission findings of fact regarding fishing in Chamokane Creek, hence, such fishing must not have existed. The claims case, however, dealt with only aboriginal areas which had been ceded to the United States, not with areas retained by the tribe for its reservation. 163 C.Cls. at 61. Since the Chamokane Creek fishery is within the reservation, it follows that it was not relevant to the claims case.

In our brief, we also substantiated the need for a minimum flow of 30 cfs in Chamokane Creek in order to preserve and maintain the fishery and the creek's recreational and esthetic values. US brief, pp. 35-39. See also Spokane Tribe's brief, pp. 81-85. The Department of Ecology, however, "contends not only that the evidence does not show that a 30 cfs minimum flow is necessary but that a 20 cfs flow fulfills the purpose of the reservation and more."****/

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*/ DNR brief, p. 18

**/ Id.

***/ Further, in The Spokane Tribe of Indians, et al. v. United States, 163 C.Cls. 58, 61 (1963), the court noted: "The Spokane Indians were a land-using and fishing group . . . ." [Emphasis added]

****/ DOE brief, p. 23

It is difficult to take the Department of Ecology seriously. As the court will recall, two witnesses testified with regard to the biological aspects and needs of the Chamokane Creek fishery. Mr. Richard J. Navarre, Assistant Program Manager of the Northwest Fisheries Program, United States Fish and Wildlife Service testified for the United States and the Spokane Tribe. Mr. Richard R. Simon, Regional Fisheries Biologist for the Washington State Department of Game testified for the defendants. The difference between the testimony of these two men in terms of actual knowledge of the Chamokane Creek fishery is striking.

Mr. Navarre conducted a serious, scientific study of the stream and its fishery. He first obtained all of the background information he could find on Chamokane Creek. (Tr. 424) He actually visited the study area a total of nine separate times. (Tr. 484) He walked the stream (Tr. 428, 433) and made numerous measurements of temperature, chemistry, food availability and fish content (Tr. 430-450). He produced a written report of his findings. (PE-64).

Mr. Simon, on the other hand, did not actually examine Chamokane Creek (Tr. 618). His "expertise" was limited to reviewing Mr. Navarre's study, listening to Mr. Navarre's testimony and giving both his critique. (Tr. 592)

In terms of substance, we believe that the best review of the evidence regarding the Chamokane Creek fishery is found in pages 35-39 of our opening brief and pages 81-85 of the tribe's brief. Ecology presents a short "review" of the evidence on pages 24-25 of their brief. Their chief arguments against a 30 cfs minimum flow might be summarized and answered as follows.

First, Ecology seems to argue that the water temperature problem only occurs below the falls and that since the area below the falls is only "one-sixth" of the fishery, the overall adverse

effect is minor and thus the 30 cfs is not justifiable. Ecology misunderstands the evidence. The area of the fishery below the falls is closer to two miles in length than the one mile suggested by defendants (Tr. 533). This is nearly one-third of the total fishery and is potentially the main fishing area due to the propensity of the trout to end up in that section of the stream. That area of the stream also has more potential for recreation development than the terrain above the falls. Further, the 30 cfs requirement is not tied solely to temperature requirements. This minimum flow is also required to protect the food production areas in the entire creek and because more water means more fish production capacity in terms of fish per acre-foot (Tr. 519).

Ecology also argues that while there may be certain "minor" adverse effects in fish when exposed to prolonged temperatures in excess of 68°, they doubt if the effect is serious enough to mandate a minimum flow requirement.*/ The evidence, however, indicates that the higher than desirable water temperatures which presently exist in lower Chamokane Creek, have already had a major adverse impact on the quality and quantity of the fishery. There is, for example, a noticeable lack of trout in that area of the creek as a result of the excessive water temperature in spite of the existence of pools and an abundant food supply. (Tr. 439, 502, 519)

Finally, Ecology argues that a minimum flow of 20 cfs is adequate to protect the fishery and states that they "would have no objection to the entry of a minimum flow for such uses based upon State law."**/ There is, however, absolutely nothing in the

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*/ In fact, they seem to indicate that temperature ranges above 68° are "characteristic of all fisheries." No citation to the record is offered in support of this statement.

**/ DOE brief, p. 59

record to support the 20 cfs flow figure. In fact, as we pointed out in our opening brief, Mr. Don Earnest, Regional Fisheries Biologist for the Washington State Department of Game stated in a letter dated August 18, 1969, that the 20 cfs minimum flow proposed by the state was "of course, an arbitrary one." (DE-3) In sharp contrast, the record is replete with evidence sustaining the 30 cfs figure proposed by the government and the tribe. See US brief, pp. 35-39

The priority date for the 30 cfs minimum flow in lower Chamokane Creek is time immemorial or August 18, 1877, at the latest.*/ Department of Natural Resources argues that a time immemorial priority date is impossible because "original Indian title to lands over which the Upper, Middle and Lower bands of Spokanes formerly roamed was extinguished by the Government on July 13, 1892."**/ As we pointed out above, the cession of land by the Indians to the United States did not include the land within the exterior boundaries of the Spokane Reservation. The Spokane Tribe of Indians, et al. v. United States, 163 C.Cls. 58, 61 (1963). Therefore, the Claims Commission judgment has nothing to do with the extent to which aboriginal rights continue to exist on the reservation. DNR also argues that the date of creation of the Spokane Reservation fixes the priority date for any Winters right.***/ They perceive the date of creation to be 1881, the date of the issuance of the Executive order. The evidence in the case proves that the Spokane Reservation was created on August 18, 1877. Brief of United States, pp. 10-16. DNR argues that our reliance on Northern Pac. Ry. Co. v. Wismer, 246 U.S. 283 (1918) is misplaced. They seem to think that Wismer is unreliable "because it was decided on stipulated and incomplete facts."****/ The fact of the matter

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*/ US brief, p. 39

**/ DNR brief, pp. 21-22

***/ Id., p. 22

****/ DNR brief, p. 24

is that Wismer, like any other lawsuit which is tried in a federal district court, heard by the court of appeals and finally reviewed by the United States Supreme Court, was handled by competent counsel who were engaged in meaningful adversary proceedings. It is true that the case was decided on stipulated facts. DNR seems to think that such a stipulation somehow taints the judgment and opinion of the court. The truth is that the district court also had before it extensive documentary evidence concerning the creation of the reservation. The transcript of the record in the case*/ as filed with the United States Supreme Court (Case No. 969, Oct. Term, 1915) lists the following documentary evidence:

Plaintiff's Exhibits

Exhibit 1:	Affidavit of Publication dated September 7, 1910.

Defendants' Exhibits

Exhibit A:	Indian Agreement in Council dated August 18, 1877.
Exhibit B:	Order Directing Protection of Certain Territory against Settlement by others than Indians dated September 3, 1880.
Exhibit C:	Executive Order of January 18, 1881.
Exhibit D:	Decision of Secretary of the Interior dated March 7, 1910.
Exhibit E:	Map
Exhibit F:	Excerpt from Report of Commissioner of Indian Affairs.
Exhibit G:	Letter dated May 7, 1877, from Indian Commissioner to Indian Inspector.

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*/ A copy of the transcript of the record, as well as the briefs of counsel before the Supreme Court, is in the possession of the attorneys for the United States and copies will be made available to opposing counsel or the court upon request.

Defendants' Exhibits con't

Exhibit H:	Excerpts from Record of Council held with Indians on August 16, through 18, 1877.
	Excerpts from Report of Col. Watkins, dated Lewiston, Idaho, August 23, 1877.
Exhibit I:	Excerpt from letter, dated August 18, 1877, from Inspector Watkins to General Howard.
Exhibit J:	Excerpts from letter dated August 18, 1877, from Col. Wheaton to General Horace.
Exhibit K:	Telegram dated August 23, 1877, from Wilkinson to Captain Sladen.
Exhibit L:	Letter dated, December 29, 1877, from Commissioner to Secretary of the Interior.
Exhibit M:	Letter, dated September 1, 1880, from War Department to Secretary of the Interior, etc.
Exhibit N:	Senate Record.
Exhibit O:	Order directing protection of certain territory against settlement by other than Indians etc., dated September 3, 1880.
Exhibit P:	Allotment of Isabel Moses.
Exhibit Q:	Excerpt from Report of Commissioner of Indian Affairs for 1879.
	Excerpt from Reports of Indian Commissioner for 1880 and 1881.

We also invite the court's attention to the ninth circuit's opinion in Wismer which is found at 230 Fed. 591 (C.A. 9, 1916). We have recited the above only to put to rest DNR's absurd contention that somehow Wismer is not good authority. That case turned on the date of the creation of the Spokane Reservation. It is difficult to believe that counsel for the parties to that case did not put forth their best efforts to win the case for their respective clients.*/ On the other hand, DNR relies on the Claims Commission

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*/ It should be noted that while DNR seems to criticize the efforts of counsel in Wismer, they presented very little in the way of historical evidence in this case. See DE-28 to DE-30.

findings to support the 1881 date. The actual date of the creation of the reservation was not, however, an issue before the Claims Commission and nothing in the findings of fact mitigates against the 1877 date. In fact, the findings support the August 18, 1877 date. According to the findings of the Claims Commission, on August 18, 1877, the chiefs and headmen of the Spokane Tribe signed an instrument "agreeing on behalf of their people to accept and by November 1, 1877, go upon a tract of land north of Spokane River" 9 Ind. Cl. Comm. at 240. Of extreme importance is finding no. 11 (9 Ind. Cl. Comm. at 242) which states:

> Minutes of the 1877 council, the treaty of August 18, 1877, and the report of Inspector E.C. Watkins disclose that the treaty of August 18, 1877, was intended to bind the Spokane Tribe. These instruments and the Executive Order of January 18, 1881, disclose that the reservation established by that Order was for the use and occupancy of the Spokane Tribe. Throughout the 1877 council the Spokane Tribe was represented by its head or principal chief, Garry, and by lesser chiefs.

In short, the evidence in this case, as well as the Supreme Court's decision in Wismer, are conclusive on the issue of the date the Spokane Reservation was created. It was August 18, 1877.

3. The United States and the Spokane Tribe reserved sufficient water to irrigate the irrigable acreage.

We contend that the government and the tribe are entitled to a maximum of 25,380 acre-feet of water per year to irrigate 8,460 acres of land with a priority date of August 18, 1877. See US brief, pp. 40-63. The defendants agree that agricultural development was one of the purposes of the reservation.*/ Through a series of jurisprudencial gymnastics, cleverly disguised as legal arguments, however, they deny that water was reserved from Chamokane Creek for that purpose. While we feel that our opening

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*/ DOE brief, p. 18; DNR brief, p. 15

brief, as well as that of the tribe, adequately deals with these arguments, we will address each of them briefly.

Defendants' main argument appears to be that any land classified as "timberland" under the Act of May 29, 1908, cannot now be considered as irrigable acreage for water right purposes.*/ A complete discussion of that act and its effect on the Spokane Reservation appears at pages 47 to 50 of our opening brief. It is quite clear from that discussion that the 1908 legislation has absolutely nothing whatsoever to do with the existence of reserved water rights for the land in question. The 1908 Act had a very narrow objective: to provide a mechanism whereby a limited amount of land on the Spokane Reservation would be made available to non-Indians for settlement. The method chosen for selecting the land to be opened was a simple one. A specially appointed commission surveyed the area, determined which land had timber suitable for a timber reserve and determined which of the remainder was then suitable for agricultural development. The land declared suitable for agricultural development was then opened for homesteading. The point is that the entire procedure was created for a specific, limited purpose and was based entirely on the condition of the land in 1908. Nothing in the act suggests that Congress intended to terminate reserved water rights with the 1908 Act.**/ The language of the act suggests just the contrary: "nothing in this Act shall be construed to deprive said Indians of the Spokane Indian Reservation, in the State of Washington, of any benefits to which they are entitled under existing treaties or agreements not inconsistent

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*/ DOE brief, p. 29; DNR brief, p. 29

**/ The reserved water rights sought here came into existence with the creation of the reservation in 1877 (or time immemorial), this suit merely asks judicial recognition of the rights.

with the provisions of this Act." [Emphasis added]. The fact that the land in question was covered by timber in 1908 (or today) has nothing to do with whether or not a water right exists to irrigate it. The purpose of the reservation is determined as of its date of creation. One of the purposes of this reservation was agricultural development. (PE-63). Where a purpose of a reservation was for agricultural development, there is an implied intent to also reserve sufficient water to irrigate all irrigable acreage. Arizona v. California, 373 U.S. 546 (1963). To establish the irrigable acreage, it need only be shown that the land is arable soil to which water is delivered or can be delivered and which is or can be made capable of producing crops by the construction of those facilities necessary for sustained irrigation. Such proof is in the record. The presence of trees on the land is meaningless in terms of the reserved water right.

Secondly, the defendants argue that there is no showing that the government intended to irrigate from Chamokane Creek as opposed to the Spokane or Columbia Rivers.*/ No such showing of "actual intent" is required. The record evidences that the land in question is irrigable. The federal reserve right doctrine implies an intent to reserve the water necessary for this irrigation. An essential component of this implied reservation is that it extends to the most practical and economical source of unappropriated water. The record in this case substantiates that Chamokane Creek is the most economical and logical source of water for irrigation of these lands.**/ As we stated earlier, it is true that the government and the tribe would rather preserve Chamokane Creek and irrigate from the Spokane River. This fact has nothing, however,

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*/ DOE brief, p. 58

**/ See US brief, p. 45

to do with the implied reservation of Chamokane Creek water. We respectfully suggest that if anyone should be looking to the Spokane River for irrigation water, it is the junior users on the Chamokane Creek - the defendants here!

The Department of Natural Resources also argues that the government has failed to establish a reserved right for irrigable acreage because the record does not contain evidence of "a need or use for a water right on lands within the Chamokane Basin."*/ They seem to think that the United States has the burden here of showing present need and present use in order to establish a reserved water right. For this proposition, they cite Tweedy v. Texas Co., 286 F.Supp. 383 (D. Mont., 1968) and United States v. Ahtanum Irrigation District, 236 F.2d 321 (C.A. 9, 1956) cert. den. 352 U.S. 988. They argue that the government had the duty to show:

> (a) the location, point of diversion or capacity of any existing or planned withdrawal from Chamokane Creek;
>
> (b) a description, irrigable area and location of reservation lands served or to be served;
>
> (c) just which lands are owned by Indians under trust or fee patent;
>
> (d) just which lands are owned by successors of Indian allottees;
>
> (e) the quantities of water required by these lands (the duty of water for each tract.)**/

It is probably safe to say that prior to Arizona v. California, supra, the case law was somewhat confusing as to the exact showing necessary to establish a reserved water right for agricultural purposes on an Indian reservation. The Supreme Court,

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*/ DNR brief, p. 33

**/ DNR brief, p. 34

however, aided by the superb research and analysis of Special Master Rifkind, has now settled the question. The standard is irrigable acreage. Arizona v. California, supra, 373 U.S. at 600-601. Since the standard is intended to satisfy future as well as present needs, there is no requirement of present or projected use. Neither Tweedy nor Ahtanum are to the contrary and even if they were, the Supreme Court's decision would, of course, control. Tweedy was an action for damages, not a water rights adjudication. 286 F.Supp. at 383. Since the plaintiffs could not show a present use which had been interferred with by the defendants, they could prove no damages. Here we have not alleged that the defendants have interferred with an irrigation use, we simply seek to establish the right.

United States v. Ahtanum Irrigation District, supra, was a water rights adjudication. In that case, however, the Yakima Nation had been fortunate in that the Bureau of Indian Affairs had built the Ahtanum Indian Irrigation Project many years before the suit was initiated. 236 F.2d at 327. Since the land for which the water rights were being sought was, therefore, already under irrigation the government was in a position to present evidence of actual use. The ninth circuit reviewed the government's proof and held that "[n]o more was required . . . ." 236 F.2d at 340. The court did not say that the government's proof in Ahtanum was the only method of quantifying a reserved water right.

In Arizona v. California, supra, the Supreme Court was confronted with a factual situation much more like the one before this Court: not all of the land for which water rights were claimed was actually under irrigation. Recognizing, however, that the right is for future use, as well as present, the Special Master and the Court found the rights to exist. An example of the findings of fact entered by the Special Master and approved by the Court for such land is that concerning the Chemehuevi Indian Reservation:

Findings of Fact

1. The Chemehuevi Indian Reservation was established by an order of withdrawal from entry made by the Secretary of the Interior dated February 2, 1907. [Footnote citing U.S. Ex. 1201]

2. In withdrawing lands for the Chemehuevi Indian Reservation the United States intended to reserve rights to the use of so much water from the Colorado River as would be necessary to irrigate all of the practically irrigable acreage therein and to satisfy related uses. [Footnote citing U.S. Exs. 1201, 1204, 1205, 1207]

3. There are 1,900 acres of irrigable Reservation land all located within the State of California which, together with related uses, have a maximum annual diversion requirement of 11,340 acre-feet. [Footnote citing U.S. Ex. 1210] Special Master's Report, p. 267

There is nothing in the Special Master's report or the Supreme Court's opinion to indicate a requirement that the government show location of actual or planned point of diversion or actual usage.

Even assuming, for a moment, however, that Natural Resources is correct in their argument that certain evidence is required (DNR brief, p. 34), it is interesting to note that the government and the tribe have met all of the relevant evidenciary requirements:

DNR - Suggested Requirement	U.S. and Tribe Evidence
(a) the location, point of diversion or capacity of any existing or planned withdrawal from Chamokane Creek.	not relevant (see above) but in any event the withdrawal for irrigation would be by wells located on the land to be served. (Tr. 285; PE 3-6-74-29, p. 4)
(b) a description, irrigable area and location of reservation lands served or to be served.	PE-34. See US brief, p. 44.
(c) just which lands are owned by Indians under trust or fee patent.	all acreage claimed as irrigable is trust land. PE-34
(d) just which lands are owned by successors of Indian allottees.	none of the acreage claimed as irrigable is owned by a non-Indian successor to an allottee. PE-99, PE-100, PE-34.
(e) the quantities of water required by these lands (the duty of water for each tract).	3 acre-feet applied to the land during the irrigation season. Tr. 113.*/

*/ Ecology accepts this figure. DOE brief, p. 59

It is obvious from the above that DNR still believes that evidenciary requirements pertaining to rights acquired under state law are applicable to the establishment of federal reserved rights. That is simply not the case. Cappaert v. United States, supra, 426 U.S. at 143-146.

Finally, both Ecology and Natural Resources argue with our contention that the priority date for the irrigable acreage is August 18, 1877.*/ Since we have treated this question extensively in our opening brief at pages 46-63 and to some extent in this reply brief, we will not repeat our agruments here.

C. The Department of Natural Resources Affirmative Defenses of Res Judicata, Collateral Estoppel and Payment Do Not Bar the Claims of the United States.

In their final brief, counsel for the Department of Natural Resources have come up with a series of most bizarre arguments concerning the Spokane Tribe's claims case: Spokane Tribe of Indians v. United States, 9 Ind. Cl. Comm. 236 (1961), affirmed in part, reversed in part 163 C.Cls. 58 (1963).**/ First, they argue that since the United States has extinguished the Spokane's aboriginal title to lands outside of their reservation and has compensated the tribe therefore and further since Chamokane Creek "arises" on those formerly aboriginal lands before flowing onto the reservation, that all of the tribe's rights to the water of the Creek were likewise extinguished - even rights appurtenant to reservation land. Second, they argue that if the Spokane Tribe has any claim left to Chamokane Creek, they should take it to the Indian Claims Commission. Finally, they contend that the findings of fact in the claims case have res judicata and/or collateral estoppel effect on the government's arguments here thus barring our claims.

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*/ DOE brief, p. 59; DNR brief, p. 22

**/ DNR brief, pp. 3-15

1. Department of Natural Resources has not properly raised these affirmative defenses.

This suit was filed on May 5, 1972. The Department of Natural Resources filed its answer to the complaint on May 4, 1973. Now, four years later, Natural Resources suddenly appears before this court urging res judicata, collateral estoppel and a payment theory. It is fundamental that the defendants here had a duty to set forth in their answers all of their affirmative defenses. Rule 8(c) F.R.Civ.P. A failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case. Trio Process Corp. v. L. Goldstein's Sons, Inc., 461 F.2d 66, 74 (C.A. 3, 1972) cert. den. 409 U.S. 997. Res judicata, collateral estoppel and payment are all affirmative defenses, being listed in Rule 8(c). They were not pled in DNR's answer nor the answer of any other of the defendants. They have thus been waived.

2. The extinguishment of aboriginal title has nothing to do with the existence of on-reservation reserved water rights.

Counsel for the Department of Natural Resources say that: "The nature of 'title' which the Indians possessed to the lands, waters and resources of what is now the State of Washington prior to the coming of the white man is the predicate to this case,"*/ and "[t]he question to be resolved, within the context of this suit, is whether the Spokane Tribe's aboriginal title to the lands over which they wandered has been extinguished by the United States."**/ Their basic argument as pointed out above, is that the Spokane's aboriginal title has been extinguished; that the Indians have been compensated; that the compensation included the loss of water rights; that Chamokane Creek arises on the aboriginal land; that, therefore,

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*/ DNR brief, p. 3

**/ DNR brief, p. 6

the rights to the use of Chamokane Creek were included in the bundle of rights extinguished by the United States. This non sequitur reveals a fundamental misunderstanding of the law of water rights. Ownership of a source of a stream or river has nothing to do with the existence of downstream water rights. As the ninth circuit has said:

> The suggestion that much of the water of the Ahtanum Creek originates off the reservation is likewise of no significance. The same thing was true of the Milk River in Montana; and it would be a novel rule of water law to limit either the riparian proprietor or the appropriator to waters which originated upon his lands or within the area of appropriation. Most streams in this portion of the country originate in the mountains and far from the lands to which their waters ultimately become appurtenant. United States v. Ahtanum Irr. Dist., 236 F.2d 321, 325 (C.A. 9, 1956).

Indeed, if Natural Resources were correct, virtually none of the Indian reservations in the west would be entitled to water rights since the streams appurtenant thereto "arise" on formerly aboriginal land.*/

It should also be pointed out that the claims case referred to above expressly dealt only with ceded aboriginal land, not with the land retained as the Spokane Reservation. 9 Ind. Cl. Comm. at 236; 163 C.Cls. at 61.

3. The Indian Claims Commission is not the proper forum for an assertion of a claim for water rights.

The Department of Natural Resources itself admits that "[b]y creation of the Indian Claims Commission in 1946, Congress established a forum to hear and determine all matters of a legal or equitable nature concerning Indian Tribal claims of loss, impairment

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*/ It would seem that the Winters doctrine of reserved water rights assumes a ceding of aboriginal land, since it is a reservation doctrine.

or diminishment of rights to lands and resources . . . . ."*/ [Emphasis added] Neither the government nor the tribe allege any loss, impairment or diminishment of rights in this case. To the contrary, we are before this court to gain judicial recognition of the existence of our rights so that they will be protected. We are certainly before the proper court. The existence of the Claims Commission is irrelevant.

4. The doctrines of res judicata and collateral estoppel do not bar the relief sought here.

Throughout its brief, Natural Resources urges the res judicata and collateral estoppel effect of the findings of fact entered in the Claims Commission case. See, e.g. DNR brief, pp. 11, 18 and 19. As we have shown in some of the preceding portions of this brief, those findings actually support our view of the evidence in this case. That is not to be taken, however, as an admission by the government of the relevance of those findings to the litigation. We doubt very much whether findings of fact entered in an Indian Claims Commission case can be used by a non-party to bind either the government or the tribe. In any event, those findings cannot be afforded res judicata or collateral estoppel effect in this proceeding.

Professor Moore has both defined and differentiated the doctrines of res judicata and collateral estoppel:

> The term res judicata is often used to denote two things in respect to the effect of a valid, final judgment: (1) that such a judgment, when rendered on the merits, is an absolute bar to a subsequent action, between the same parties or those in privity with them, upon the same claim or demand; and (2) that such a judgment constitutes an estoppel, between the same parties or

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*/ DNR brief, p. 13

> those in privity with them, as to matters that were necessarily litigated and determined although the claims or demand in the subsequent action is different. 1B Moore's Federal Practice para. 0.405[1] (2d Ed., 1965)

Thus, res judicata, (1) above, has become a doctrine of "claim preclusion" while collateral estoppel, (2) above, refers to "issue preclusion." These definitions and the distinction between the doctrines reflect the approach that the Supreme Court has taken in this area. Lawlor v. National Screen Service, 349 U.S. 322, 326 (1955); Cromwell v. County of Sac, 94 U.S. 351, 352 (1876).

It is obvious that the claim before this court (i.e. for reserved water rights appurtenant to the existing Spokane Reservation) is not the same claim as that before the Claims Commission (i.e. for loss of aboriginal land). Likewise, nothing in the claims case even remotely suggests that the issue of a right to the waters of Chamokane Creek was actually litigated. Thus, neither res judicata nor collateral estoppel have anything to do with the claims being asserted here.

II

THE STATE OF WASHINGTON HAS DEMONSTRATED NO AUTHORITY TO ISSUE PERMITS FOR THE APPROPRIATION OF WATER, TO MANAGE OR TO IN ANY WAY CONTROL THE RIGHT TO USE WATER WITHIN THE EXTERIOR BOUNDARIES OF THE SPOKANE INDIAN RESERVATION.

In our opening brief, we contended that the State of Washington does not have jurisdiction to manage or any way control the right to use water within the exterior boundaries of the Spokane Indian Reservation. The state disagrees. Through its Department of Ecology, it argues that:

> 1. The state recognizes the existence of federally reserved rights on the Spokane Reservation of some limited nature and that these rights, absent federan consent, are beyond the state's general governmental authority to regulate.

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

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

Ecology is correct insofar as it concedes that the state has no jurisdiction over federal reserved water rights. See, US brief, pp. 82-85. It errs, however, in its assertion of jurisdiction over any other water found on the reservation.

Before addressing Ecology's specific arguments, several points should be made. Throughout their brief, counsel for DOE insist on confusing the concepts of ownership of water rights and jurisdiction to control the use of water in a given area. For example, on page 14 of their brief, they make the statement:

> the establishment of an Indian reserved right does not necessarily establish a right to use or jurisdiction over all waters flowing through or located within the exterior boundaries of an Indian reservation.

There is no doubt but that ownership of water and jurisdiction are intertwined concepts. This is especially true where, as here, one entity owns the rights to the vast majority of all of the water in the area. In such a situation, it is only practical that the water right owning governmental entity have jurisdiction or control over all of the water. To allow some other government to control a small portion can produce nothing but confusion. In a larger sense, however, jurisdiction is an attribute of sovereignty and governmental inherent power. It is in this area that the state

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*/ DOE brief, p. 16

attempts to confuse the issue by trying to equate the extent of ownership with the extent of jurisdiction.*/

We should also point out that the very fact the State of Washington is represented by two sets of legal counsel (Ecology representing the state's governmental or "jurisdictional" interest and Natural Resources representing its proprietary or "ownership" interest) in this case refutes Ecology's attempts to equate ownership with jurisdiction.

A. The State has Shown no Congressional Authorization Allowing an Assumption of Jurisdiction Over the Waters of Chamokane Creek.

The United States, as trustee, and the Spokane Tribe "are not only landowning entities with extraordinarily valuable water rights, they are also sovereigns with wide-ranging governmental powers . . . within the boundaries of [the reservation]."**/ United States v. Mazurie, 419 U.S. 544 (1975); United States v. Kagama, 118 U.S. 375 (1886); Worchester v. Georgia, 31 U.S. 515 (1832). In this connection, the courts have consistently held that the sovereignty of the United States and of the tribes will be upheld except where it has been specifically limited by Congress. McClanahan v. Arizona Tax Comm., 411 U.S. 164, 173 (1973); Oliphant v. Schlie, 544 F.2d 1007 (C.A. 9, 1976). Considerations of state versus federal/tribal jurisdiction on an Indian reservation call for a twofold analysis: "first, what the original sovereign powers of the tribes [and the United States] were, and, then, how far and in what respects these powers have been limited." Oliphant v. Schlie, supra, 544 F.2d at 1009.

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*/ See, e.g. Ecology's "1000 acre reservation" example, DOE brief, p. 14.

**/ Pelcyger, Indian Water Rights: Some Emerging Frontiers. 21 Rocky Mountain Mineral Law Institute 743, 764 (1976).

There can be little doubt that the tribe's original sovereign powers and later those of both the tribe and the United States extended to jurisdiction over the use of water within their respective territories. Of the tribe, the Supreme Court has noted that "[t]he Indians had command of the lands and the waters - command of all their beneficial use . . . ." Winters v. United States, supra at 576, [Emphasis added]. The power of the United States was confirmed in California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162 (1935) and F.P.C. v. Oregon, 349 U.S. 435, 442 (1955).

In a bootstrapping manner, the State of Washington is contending that, in the absence of the United States citing statutory or decisional law specifically holding that the state does not have jurisdictional authority over waters within the boundaries of the Spokane Indian Reservation, the state is somehow automatically vested with such authority. As pointed out very clearly above, the question is not one of whether the state has been specifically precluded from exercising jurisdiction over waters within the Spokane Indian Reservation,*/ but rather one of whether the Congress of the United States has granted such jurisdiction over waters to the State of Washington. In addition to Congress' assent to state jurisdiction over waters on the reservation, we must also determine whether such jurisdiction would infringe upon the right of the Spokane Indian Tribe to regulate waters within its boundaries (see Oliphant v. Schlie, supra; Williams v. Lee, 358 U.S. 217 (1958); Bryan v. Itasca County, 426 U.S. 373 (1976) or whether such jurisdiction would interfere with or impair a right granted or reserved

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*/ The United States does contend, however, that the Secretary of the Interior's authority under 25 U.S.C. 381, under the doctrine of preemption, does preclude the state from exercising jurisdiction over waters within the Spokane Indian Reservation.

by federal law. See United States v. Finch, 548 F.2d 822 (C.A. 9, 1976).*/

The state, in support of its jurisdictional argument, also cites the case of Organized Village of Kake v. Egan, 369 U.S. 69 (1964), presumably to imply that Indian tribes have lost their independent sovereignty long recognized since the Supreme Court's decision in the landmark case of Worcester v. Georgia, 31 U.S. 515 (1832). A review of recent Supreme Court and other federal court decisions would clearly demonstrate otherwise. See e.g., Oliphant v. Schlie, supra; Bryan v. Itasca County, supra; United States v. Finch, supra; Williams v. Lee, supra; Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976). Notwithstanding the holdings in these recent decisions regarding jurisdiction, however, it should be noted that the Supreme Court in McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) places the holding of Kake v. Egan in its proper perspective by stating:

> In Egan, we held that "'absolute' federal jurisdiction is not invariably exclusive jurisdiction," and that this language in federal legislation did not preclude the exercise of residual state authority. But that holding came in the context of a decision concerning the fishing rights of non-reservation Indians. It did not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians. [Citations omitted] [Emphasis added]

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*/ In this regard, the United States recognizes the existence of cases and instances in which state laws have been deemed to be applicable to non-Indians on an Indian reservation. These cases have been cited by the defendant State of Washington at page 37 of Ecology's brief. It should be strongly emphasized, however, that these cases relate primarily to the specialized area of taxation and to those instances of criminal activity in which one non-Indian is charged with an offense against another non-Indian while on the reservation. See, however, Oliphant v. Schlie, 544 F.2d 1007 (C.A. 9, 1976). The United States, therefore, is of the opinion that a thorough reading of the cases cited by the defendant State of Washington will clearly demonstrate that they are inapposite to the present case and to the issue to be decided here.

The plain implication of this language is that "in areas set aside for the exclusive use and control of Indians" --- such as the Spokane Indian Reservation --- the State of Washington is without residual jurisdiction.

The State of Washington considers the case of Tulalip Tribes v. Walker dispositive of the question of the state's jurisdiction over waters within the Spokane Indian Reservation.*/ With respect to this case, it should be noted first of all that the United States was not a party to this lawsuit. Secondly, it should be noted that the primary purpose for the filing of this action was to ensure that the appropriation of waters by the Union Oil Company of California, for use in the development of an oil refinery on the Tulalip Reservation, was subject to the paramount reserved rights of the Tulalip Tribes. This concern was clearly vindicated by the tribe. Thirdly, it should be noted that the Union Oil Company of California and the Tulalip Tribes of Washington both joined as plaintiffs against the State of Washington in ensuring the desired outcome of this case. Most importantly, it must be emphasized that the "Memorandum Decision" rendered by the Honorable Judge Denney in this case does not cite or mention by reference any of the cases and statutory provisions which have been relied upon by the United States in the instant case for the proposition that the State of Washington is without jurisdictional authority over waters on the Spokane Indian Reservation. In view of the peripheral question of the state's jurisdiction in the Walker case, and in view of the court's failure to discuss its legal reasoning for its decision on such an important and complex issue, the United States contends that the Walker case is not controlling.

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*/ DOE brief, p. 46

In addressing the arguments made by the United States, the defendant State of Washington begins by stating that the Acts of 1866, 1870 and 1877, in addition to the case law interpreting these acts, relied upon by the United States in support of this Motion, are inapplicable to the present case.*/ The state bases this contention on the fact that these provisions relate only to the regulation of waters on "public lands" whereas the lands in question here are not "public lands". As previously mentioned, the United States agrees with the state to the extent that the lands owned by the defendants in this cause are not "public lands" within the meaning of the above-mentioned acts. As we pointed out in our brief, however, the applicability of this statutory and decisional authority to the present case lies in the fact that it is only over waters on "public lands" which the state has jurisdictional authority. Some of the lands owned by the defendants in this case are lands which were previously owned by Indians and held in trust by the United States for the benefit of such Indians. Although at the present time these lands are not Indian owned or held in trust by the United States, they are lands which remain within the exterior boundaries of the Spokane Indian Reservation. Additionally, it should be pointed out that these lands, as a result of their presence within the exterior boundaries of the Spokane Indian Reservation, remain susceptible to being repurchased by the Spokane Indian Tribe or its members and thereby returned to trust status.

With respect to the plaintiff's contention that Section 4 of the State Enabling Act and Article 26, Section 2 of the Washington State Constitution preclude the state from exercising jurisdiction over waters within the exterior boundaries of the Spokane

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*/ DOE brief, p. 37

Indian Reservation, the state contends that although the "provisions of the Enabling Act and Washington Constitution bar this State from exercising authority to establish rights in real property interests, including reserved water rights . . ." (DOE brief, p. 44) the state's jurisdictional position is not in conflict with these provisions because the state asserts jurisdiction only over "surplus waters" on the reservation. Are these statements not patently contradictory? How could the State of Washington agree on the one hand that it has no authority to establish rights in real property interests, including reserved water rights*/ on the reservation and then claim jurisdiction over those waters they claim to be surplus to the needs of the Indians? By determining and regulating the "surplus waters", whatever they might be, the state is affecting the property interests of the tribe and its members on the reservation. Such an ambiguous, ever-changing, and checkerboard type of jurisdictional scheme put forth by the state would create an intolerable and chaotic system of water management in the face of the Spokane Tribe's and the Secretary of the Interior's responsibility to ensure the equitable apportionment of waters on the reservation. The needs of the Indians and the availability of waters on the reservation change daily, thus creating the distinct possibility that jurisdictional authority predicated on "surplus waters" would be changing on a daily basis as well. Such a method of determining jurisdiction over waters on the reservation is not sound as a legal or as a practical matter.

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*/ It should be noted that the term "land", in a statute of general nature such as the State Enabling Act, is deemed to also include waters or waters upon the land. Holmes v. United States, 53 F.2d 960 (C.A. 10, 1931); Northside Canal Co. v. Twinfalls Canal Co., 12 F.2d 311 (D. Ida., 1926); and Anderson v. Spear-Morgan Livestock Company, 79 P.2d 667 (1930).

The State of Washington, in addressing the plaintiff's contention that Section 7 of the General Allotment Act of 1887, 25 U.S.C. 381, preempts the state from exercising jurisdiction over waters on the Spokane Indian Reservation, asserts that this section of the act only applies to the distribution of waters "among individual Indians" and only for "agricultural" purposes, which the state concedes it does not have jurisdiction to regulate. It is inconceivable that the Congress of the United States intended that the secretary's authority to regulate the equitable distribution of waters on a reservation would exclude the regulation of those waters used for domestic purposes, especially where such waters were necessary to sustain the lives and the livelihood of those Indians residing on their own reservation. See United States v. Finch, supra. In this same regard, it is also inconceivable that Congress, in specifically authorizing the Secretary of the Interior to regulate equitable distribution of waters on the reservation, would have intended that the Secretary would not have the authority to manage waters utilized by non-Indians on the same reservation. As a practical matter, how can the Secretary of the Interior regulate waters equitably among the Indians on the reservation if he does not know who, where and how much water is being utilized by non-Indians on the reservation?

B. Management and Control of the Use of Water within the Exterior Boundaries of the Spokane Indian Reservation must be within the Exclusive Jurisdiction of the United States and the Spokane Tribe.

We cannot over emphasize that a finding by this court that the United States and the Spokane Tribe have exclusive jurisdiction over the use of water within the exterior boundaries of the Spokane Reservation does not mean that non-Indian landowners on the reservation have no right to water whatsoever. It only means

that the permits and certificates that they now hold are invalid. If there is indeed water above and beyond that required for the federal reserved rights then those landowners should be able to appropriate a share of that water. In California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 155 (1935) the Supreme Court held that:

> The effect of these acts [Homestead Act of July 26, 1866 as amended by the Act of July 9, 1970] is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states as the test and measure of private rights in and to the non-navigable waters on the public domain.

Thus, the question presented here is not whether state substantive law governs the appropriation of water on non-Indian owned land on the reservation, but rather is one of sovereignty - which governmental entity will administer that law? The United States and the Spokane Tribe can just as well administer and regulate non-Indians' water uses (even though some of those substantive rights may be governed by state law) as can the state itself. Since there is nothing to indicate that Congress has ever intended for the state to replace federal/tribal jurisdiction over this land, that jurisdiction must be said to remain in the United States and the tribe. McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 170-171 (1973).

Thus, there are several factors which lead to the inescapable conclusion that the United States and the tribe have retained exclusive jurisdiction over the right to the use of the water within the exterior boundaries of the Spokane Reservation. First, state jurisdiction has been preempted by federal/tribal jurisdiction. Both the United States and the tribe originally held exclusive jurisdiction on the reservation and, at least as to water rights in the

Chamokane Creek basin, this jurisdiction has never been taken away by Congress. In addition, it should be noted that the boundaries of the reservation were specifically drawn so as to include all of both Chamokane Creek and the Spokane River as they pass the reservation (PE-52). Since these waters are entirely within and a part of the reservation, state jurisdiction does not extend to them. Moore v. United States, 157 F.2d 760, 764 (C.A. 9, 1946). As to the Spokane River portion of the Reservation, Congress has found it necessary to provide specifically for the non-Indian appropriation of water. The Act of March 3, 1905 (33 Stat. 1006) (PE-45).

Second, "as a matter of both logic and sound practical administration, jurisdiction must depend on the location of the property, not on the owner's race or the title status of his property." Pelcyger, Indian Water Rights: Some Emerging Frontiers, 21 Rocky Mountain Mineral Law Institute, 743, 770 (1976). The Supreme Court has consistently resisted state jurisdictional arguments the upholding of which would have resulted in "impractical patterns of checkerboard jurisdiction". Seymour v. Superintendent, 368 U.S. 351, 358 (1962); Moe v. Salish and Kootenai Tribes, 425 U.S. 463, 479 (1976). The evidence indicates that on the Spokane Reservation as a whole, only 21,683 acres out of over 154,000 acres are in fee ownership (PE-100). Obviously, state jurisdiction over only some of these 21,683 acres would create precisely the type of "checkerboard jurisdiction" that the Supreme Court has sought to avoid.

Third, state law cannot apply to non-Indians within the reservation when it would "infringe on the right of reservation Indians to make their own laws and be ruled by them". Williams v. Lee, 358 U.S. 217, 220 (1959); Fisher v. District Court, 424 U.S. 382, 386 (1976). There is hardly anything more important to a state in the arid west than its water resources. Wyoming v. Colorado, 259 U.S. 419, 467-468 (1922). The same is true of an Indian

reservation located in such a state. Winters v. United States, 208 U.S. at 576. "Thus, the regulation and control of the water resources within the reservation would be a matter at the very core of tribal sovereignty and state impairment or infringement of those crucial sovereign rights would be difficult, if not impossible, to justify." Pelcyger, Indian Water Rights: Some Emerging Frontiers, supra at 771. The proper utilization of the water resources within the Chamokane Creek basin portion of the Spokane Reservation will undoubtedly require future administration of those resources. Subjecting the same water to administration by both the state and the tribe or United States, will both create confusion and inconsistency and will undermine the present federal policy of strengthening tribal self-government. Bryan v. Itasca County, 426 U.S. 373, 388 (fn. 14) (1976).

Finally, any decision with reference to on-reservation state versus federal/tribal jurisdiction must be made against the backdrop of a continuing pattern of state disregard for Indian rights. As the Supreme Court stated in United States v. Kagama, 118 U.S. 375, 383-384 (1886):

> These Indian tribes are the wards of the nation. They are communities dependant on the United States. . . . They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.

Unfortunately, the Supreme Court's statement, made in 1886, remains true today. The Court recently had occasion to remark that "[t]here has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians." Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 678 (1974). Of the State of Washington in particular, the Ninth Circuit, (per Burns, J. concurring) has said:

> The record in this case, and the history set forth in the Puyallup and Antoine cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by district court. This responsibility should neither escape notice nor be forgotten. United States v. State of Washington, 520 F.2d 676, 693 (C.A. 9, 1975) cert. den. 423 U.S. 1086.

The state and the other defendants no doubt feel that if it is true that Indians can expect to be unfairly treated by the state, then the converse must be true and non-Indians can expect to be unfairly treated by the tribe. But this argument has been answered in Williams v. Lee, 358 U.S. 217, 223 (1959):

> It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations . . . . If this power is to be taken away from them, it is for Congress to do so.

This language was recently cited with approval in United States v. Mazurie, 419 U.S. 544, 558 (1975). The Court went on to note that, while not deciding the issue, there are potential sources of protection against arbitrary tribal action through both the courts (see 25 U.S.C. Section 1302) and the Interior Department's administrative procedures. Mazurie, supra at 558 (fn. 12).

III

RIGHT OF THE UNITED STATES AND SPOKANE TRIBE TO INJUNCTIVE RELIEF AGAINST THE DEFENDANTS.

A. Injunctive Relief Against the State of Washington.

The United States has asked this court to enjoin the State of Washington from issuing any more water rights certificates and permits within the Chamokane Creek watershed. One basis for the request is that the state has already allowed a vast over-appropriation of existing water supplies. US brief, p. 92. The other reason

is, as discussed above, that the state has no jurisdiction over the use of water on the Spokane Indian Reservation.

The Department of Ecology argues that injunctive relief should be denied because (1) it is premature; (2) the state has agreed that it will not interfere with reserved rights; and (3) there are surplus waters available.*/

Counsel are mistaken as to all three points. First, the relief sought is not premature. The record in the case substantiates our contention that the current exercise of state-issued certificates and permits are interfering with federal reserved rights. See, US brief, pp. 77-81. At a minimum, we are entitled to injunctive relief against the state so that no further interference takes place. Second, although we appreciate the state's pledge that it will never interfere with the government's reserved rights, the record, as we stated above, shows otherwise. Finally, the record is quite clear that there is no "surplus" water left to be appropriated within the Chamokane Creek watershed. Counsel for the Spokane Tribe intend to address this contention at length in their reply brief so we are content to incorporate and rely on their argument.

B. Injunctive Relief Against the Individual Defendants.

In our opening brief, we discussed at length the record of this case as it pertains to the Chamokane Creek hydrology and the effect that the use of water by the defendants has on the rights of the United States and the Spokane Tribe. See US brief, pp. 70-81 The Spokane Tribe did the same. See Spokane Tribe brief, pp. 65-80 The defendants have virtually refused to address themselves to the evidence. The Department of Ecology's discussion of the hydrological

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*/ DOE brief, pp. 56-57

facts make up less than one page of their 63 page brief.*/ They say that there is "conflicting evidence on the relationship of ground water and surface water" and that Mr. Woodward and Dr. Maddox Disagreed on the nature of that relationship. They admit that "[a] fair reading of the evidence would be that a good deal of the ground water is interlocked with the surface water on the Chamokane" but say that:

> However, there is evidence that at least some appropriations of ground water in the Chamokane Basin have no effect on the flow of the Chamokane. (Tr. 967) Appropriations of these ground waters flowing to the east and out of the drainage could not have been reserved by the federal government. [Footnote omitted]**/

We agree that ground water withdrawals in the Camas Valley have no affect on our reserved water rights. All other surface and ground water withdrawals do, however, affect our rights. See US brief, pp. 77-81. Further, a preponderance of the evidence demonstrates that there is no movement of ground water to the east and out of the basin. US brief, p. 74***/

The only other defendant to address itself to the Chamokane Creek hydrology was Boise Cascade. See, Boise Cascade brief, pp. 2-5. Boise Cascade's chief argument seems to be that since we admit that ground water withdrawals in Camas Valley have no affect on our rights, we can get no relief against this defendant. In the first

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*/ DOE brief, p. 26

**/ Id.

***/ It is true that Dr. Maddox testified to "some" easterly movement of ground water. Perhaps the court will recall, however, that it was established upon cross-examination that Dr. Maddox had inadvertently made incorrect assumptions regarding the surface water elevations of the Hill and Newhouse wells, thus rendering his flow net incorrect and his opinions on flow direction erroneous. See generally, Tr. 925-927, 1018-1019, 1073-1074, 1194-1195, 1300-1306, 1320.

place, however, not all of Boise Cascade's diversion points are in Camas Valley. PE-10 shows the division line between Camas Valley and the rest of the Chamokane Creek basin (see also Tr. 37). PE-14 shows the location of Boise Cascade's diversion points. The following points are not in Camas Valley hence have some affect on plaintiff's rights: points 2, 10, 11, 12 and 13. Of the remainder, the following, although in Camas Valley, are surface diversions hence also affect our rights: points 1, 3, 4, 5, 6, 7, 8 and 14. Only point 9 is a well hence immune from injunctive relief (tr. 1268-1270).

IV

WATER RIGHTS OF THE DEFENDANTS

The Department of Natural Resources and Boise Cascade have each filed briefs in support of their claims. The other defendants have chosen not to do so, evidently relying on their state issued certificates and permits. We have reviewed the evidence in this case and believe that the following is a fair statement of the defendants' rights:

A. Washington State Surface Water Certificate No. 294 is issued in the name of Anna E. Cartier Van Dissel for use on land north of the Spokane Indian Reservation. It has a priority date of December 4, 1925, and a maximum use of 4.0 cfs. The effective reduction in Chamokane Creek from this maximum use is 1.08 cfs. (PE-32; PE-14; DE-57)

B. Washington State Surface Water Certificate No. 1675 is issued in the name of George Russell for use on land north of the Spokane Indian Reservation. It has a priority date of May 13, 1940, and a maximum use of .01 cfs. The effective reduction in Chamokane Creek from this maximum use is .01 cfs. (PE-14; PE-32; DE-52)

C. Washington State Surface Water Certificate No. 1725 is issued in the name of Chris Mickelson for use on land north of the Spokane Indian Reservation. It has a priority date of May 15, 1940, and a maximum use of .01 cfs. The effective reduction in Chamokane Creek from this maximum use is .01 cfs. (PE-14; PE-32; DE-48)

D. Washington State Surface Water Certificate No. 2258 is issued in the name of Fred J. Werth for use on land north of the Spokane Indian Reservation. It has a priority date of February 12, 1945, and a maximum use of .01 cfs. The effective reduction in Chamokane Creek from this maximum use if .01 cfs. (PE-14; PE-32; DE-59)

E. Washington State Surface Water Certificate No. 3386 is issued in the name of John A Smith for use on land east of the Spokane Indian Reservation. It has a priority date of July 8, 1946, and a maximum use of .02 cfs. The effective reduction in Chamokane Creek for this maximum use is .02 cfs. (PE-14; PE-32; DE-53)

F. Washington State Surface Water Certificate No. 8600 is issued in the name of M.B. Echelbarger for use on land northeast of the Spokane Indian Reservation. It has a priority date of October 21, 1946, and a maximum use of 1.0 cfs. The effective reduction in Chamokane Creek from this maximum use is .27 cfs. This surface water diversion may not be exercised when Swamp Creek recedes to 2.0 cfs. (PE-14; PE-32; DE-41)

G. Washington State Surface Water Certificate No. 4872 is issued in the name of Edward A. Franks for use on land north of the Spokane Indian Reservation. It has a priority date of March 17, 1950, and a maximum use of .20 cfs. The effective reduction in Chamokane Creek from this maximum use is .08 cfs. (PE-14; PE-32; DE-43)

H. Washington State Surface Water Certificate No. 6394 is issued in the name of C.W. Noack for use on land north of the Spokane Indian Reservation. It has a priority date of July 21, 1950, and a maximum use of .80 cfs. The effective reduction in Chamokane Creek from this maximum use is .01 cfs. (PE-14; PE-32; DE-50)

I. Washington State Ground Water Certificate No. 4891A is issued in the name of Robert J. Seagle for use on land east of the Spokane Indian Reservation. It has a priority date of February 1, 1951, and a stated minimum use of 1150 gallons per minute up to 1400 acre-feet per year. This use has never, however, exceeded 528 gallons per minute. The effective reduction in Chamokane Creek from this use is .35 cfs. (Tr. 1228; PE-14; PE-32; DE-64A; Interrogatories answered by Seagle, Nos. 10, 11 and 12, dated July 11, 1973.)

J. Washington State Ground Water Certificate No. 2768 is issued in the name of Ford Development Company for use on land east of the Spokane Indian Reservation. It has a priority date of September 6, 1956, and a maximum use of 100 gallons per minute up to 160 acre-feet per year. The effective reduction in Chamokane Creek from this maximum use is .07 cfs. (PE-14; PE-32; DE-42)

K. Washington State Surface Water Application No. 20248 is issued in the name of Kenneth Swiger for use on land east of the Spokane Indian Reservation. It has a priority date of May 19, 1967, and a maximum use of .20 cfs. The effective reduction in Chamokane Creek from this maximum use is .06 cfs. (PE-14; PE-33; DE-56)

L. Washington State Ground Water Permit No. 9361 is issued in the name of James R. Newhouse for use on land east of the Spokane Indian Reservation. It has a priority date of September 17, 1968, and a maximum use of 1,500 gallons per minute up to 648 acre-feet per year. The effective reduction in Chamokane Creek from this maximum use is .90 cfs. (PE-14; PE-32: PE-86)

M. Washington State Ground Water Permit No. 9563 is issued in the name of Peter M. Welk for use on land east of the Spokane Indian Reservation. It has a priority date of January 30, 1969, and a maximum use of 50 gallons per minute up to 20 acre-feet per year. The effective reduction in Chamokane Creek from this maximum use is .04 cfs. (PE-14; PE-32; DE-58)

N. Washington State Ground Water Application No. 10344 is issued in the name of Leonard E. Lyons for use on land east of the Spokane Indian Reservation. It has a priority date of August 6, 1969, and a maximum use of 1,000 gallons per minute. The effective reduction in Chamokane Creek is .60 cfs. (PE-14; PE-33; DE-47)

O. Washington State Surface Water Application No. 21786 is issued in the name of Robert J. Seagle for use on land east of the Spokane Indian Reservation. It has a priority date of August 25, 1969, and a maximum use of .33 cfs. The effective reduction in Chamokane Creek from this maximum use is .10 cfs. (PE-14; PE-33; DE-64B)

P. Washington State Ground Water Application No. 10386 is issued in the name of James K. Swiger for use on land east of the Spokane Indian Reservation. It has a priority date of September 3, 1969, and a maximum use of 1,000 gallons per minute. The effective reduction in Chamokane Creek from this maximum use is .60 cfs. (PE-14; PE-33; DE-55)

Q. Washington State Ground Water Application No. 10506 is issued in the name of Jess Sulgrove, Jr. for use on land east of the Spokane Indian Reservation. It has a priority date of November 18, 1969, and a maximum use of 2,500 gallons per minute up to 7 acre-feet per year. The effective reduction in Chamokane Creek from this maximum use is 1.50 cfs. (PE-14; PE-33; DE-54)

R. Washington State Ground Water Application No. 11227 is issued in the names of Gust and Clara Willging for use on land east of the Spokane Indian Reservation. It has a priority date of September 11, 1970, and a maximum use of 2,000 gallons per minute up to 10 acre-feet per year. The effective reduction in Chamokane Creek from this maximum use is 1.20 cfs. (PE-14; PE-33; DE-60)

S. Washington State Surface Water Application No. 22922 is issued in the names of Alice M. Liepold and Frances J. Lindberg for use on land east of the Spokane Indian Reservation. It has a priority date of March 9, 1971, and a maximum use of .01 cfs. The effective reduction in Chamokane Creek from this maximum use is .01 cfs. (PE-14; PE-33; DE-45)

T. Washington State Ground Water Application No. 11753 is issued in the names of Howard W. and Harold A. Dixon for use on land north of the Spokane Indian Reservation. It has a priority date of April 2, 1971, and a maximum use of 100 gallons per minute. It does not affect the flow in Chamokane Creek. (PE-14; PE-33; DE-39)

U. Washington State Ground Water Application No. 11905 is issued in the name of Floyd Norris for use on land northeast of the Spokane Indian Reservation. It has a priority date of May 20, 1971, and a maximum use of 2,000 gallons per minute. The effective reduction in Chamokane Creek from this maximum use is 1.20 cfs. (PE-14; PE-33; DE-51)

V. Washington State Surface Water Application No. 23509 is issued in the name of Henry L. Brown for use on land north of the Spokane Indian Reservation. It has a stated priority date of November 10, 1971, and a maximum use of .12 cfs. The effective reduction in Chamokane Creek from this maximum use is .04 cfs. (PE-14; PE-33; DE-38)

W. Washington State Surface Water Application No. 23551 is issued in the name of John Luper for use on land northeast of the Spokane Indian Reservation. It has a stated priority date of December 3, 1971, and a maximum use of 2.0 cfs not to exceed 250 acre-feet per year. The effective reduction in Chamokane Creek from this maximum use is .54 cfs. (PE-14; PE-33; DE-46)

X. Washington State Ground Water Application No. 321939 is issued in the names of Richard S. and Patricia M. Krieger for use on land north of the Spokane Indian Reservation. It has a stated priority date of October 15, 1973, and a maximum use of 1.0 cfs. This use is nonconsumptive. (PE-14; PE-33;DE-44)

Y. Washington State Surface Water Certificate No. 9100 is issued in the name of Arthur A. Miller for use on land north of the Spokane Indian Reservation. Its stated priority date is missing from our records. Its maximum use is .7 cfs not to exceed 105 acre-feet per year. The effective reduction in Chamokane Creek is .20 cfs. (PE-14; PE-32; DE-49)

Z. Defendant Boise Cascade Corporation owns approximately 18,000 acres within the Chamokane Creek basin. Some of the land is adjacent to Chamokane Creek, approximately 120 acres lie within the exterior boundaries of the Spokane Indian Reservation. The land is used chiefly for timber production, secondarily for grazing. None of the lands are irrigated. Water is required by the company in connection with its logging activities and for the stock which grazes its land. The following diversion points and their respective quantities are claimed:

Point No.	Location	Quantity Claimed
1	T. 29 N., R. 40 E.	30 a/f
2	T. 29 N., R. 40 E.	30 a/f
3	T. 30 N., R. 38 E.	30 a/f
4	T. 30 N., R. 38 E.	30 a/f

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Point No.	Location	Quantity Claimed
5	T. 30 N., R. 38 E.	60 a/f
6	T. 30 N., R. 38 E.	30 a/f
7	T. 30 N., R. 39 E.	30 a/f
8	T. 30 N., R. 39 E.	30 a/f
9	T. 30 N., R. 39 E.	30 a/f
10	T. 29 N., R. 41 E.	30 a/f
11	T. 29 N., R. 41 E.	40 a/f
12	T. 29 N., R. 41 E.	40 a/f
13	T. 29 N., R. 41 E.	40 a/f
14		SWC 2258 - .01 cfs

Testimony presented by Boise Cascade indicated that the maximum use in any one year would be approximately 100 acre-feet. The only claim of Boise Cascade which holds a water rights certificate from the State of Washington is point no. 14. As to the remainder of these claims, there is nothing in the record to indicate the basis upon which a water right is claimed. The quantity of 100 acre-feet is excessive for stock watering, dust abatement and fire protection activities of the type carried on by Boise Cascade. (Tr. 1260, 1262-1263, 1266, 1268-1271, 1281-1282; DE-62; DE-72) The United States, however, has no objection to the court authorizing Boise Cascade to utilize water in reasonable amounts for these purposes.

AA. The State of Washington owns 15,851.19 acres of land within the Chamokane Creek basin. These lands are generally being used for timber production, grazing of livestock and recreational purposes. There is no irrigation on any of these lands. The Department of Natural Resources claims 1,845, 586 gallons per year for use on lands within the watershed and 59,432.4 gallons per year for use on lands outside the Chamokane Creek basin for a total of

1,905,018.4 gallons per year. No state water rights certificate has ever been issued for any of these claims. (Tr. 1204, 1205, 1206, 1218; DE-23; DE-24; DE-31 through DE-36; DE-67; DE-68)

The Department of Natural Resources, however, attempts to base its claims upon a truly ingeneous "state reserved rights" argument. Their argument might be summarized as follows. Upon the admission of the State of Washington to the Union in 1889, sections 16 and 36 were granted by the Federal Government to the state for the support of public education and certain public institutions. DNR then states that "Natural Resources submits that its water rights for all the granted trust lands in question have a priority date of November 11, 1889. United States v. Wyoming, 331 U.S. 440 (1947)"*/ We are unaware of any decision of any court which has so held. Nothing in United States v. Wyoming, supra, indicates the existence of "state reserved rights" in connection with school lands. That case was a suit by the United States against Wyoming and the Ohio Oil Company to establish the Federal Government's title to certain land claimed by the state and to recover for oil which the oil company had extracted from the lands under the lease from the state. The land in question was claimed by the state as school land. The Supreme Court held that the lands in question did not belong to Wyoming having been placed in a petroleum reserve by the United States after statehood but before the official survey had taken place. 331 U.S. at 454. If it stands for anything, this case stands for the proposition that neither the enactment of a state's enabling act nor statehood itself vest any sort of "absolute" rights in the state to school lands. The case certainly does not support a "state reserved rights" theory.

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*/ DNR brief, p. 39

To the contrary, the law is well settled that the state itself must acquire substantive water rights either pursuant to state law or through its power of eminent domain. See, e.g. In re Stranger Creek, 77 Wn.2d 649, 657, 466 P.2d 508 (1970).

Natural Resources also claims that its rights are based on riparian usage. We have no doubt but that the state may establish riparian water rights in its trust lands, to the same extent that such rights could be established by a private owner. In re Stranger Creek, supra. Here, however, the state has not done so. The existence and continuation of riparian rights under the law of the State of Washington are dependent upon beneficial use. United States v. Ahtanum Irr. Dist., 330 F.2d 897, 904 (C.A. 9, 1964). The state has failed to demonstrate that the water claimed in now being beneficially used. There was general testimony that state lands were being used for timber production, livestock and recreational purposes. (Tr. 1205). But the state's witness, Mr. Isaacson admitted that no land was being irrigated. (Tr. 1206). Having failed to delineate which of their claimed water uses are now being beneficially used, Natural Resources' claims must be denied inclusion in this decree.

The above completes our listing of the rights of the defendants according to the record in this case. Two water rights certificates, one permit and three applications were not listed because they are void as a matter of law, having been issued by the state for use on the Spokane Reservation. See, US brief, p. 81.

We have also declined to discuss the issue of whether or not non-Indian successors to allottees get any share of an Indian allottee's reserved water right. Ecology would like to make this an issue in the case.*/ There is, however, absolutely no evidence

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*/ DOE brief, pp. 53-54

in the record which would indicate that any of the defendants are in fact successors in interest to Indian allottees. Nor have any of the defendants' based their claims on such a theory, having chosen instead to rely on their state authorized water rights certificates and permits. We believe that this case is complex enough without the inclusion of issues which are not necessary to a decision. We urge the court to disregard Ecology's argument regarding this issue. Should the court invite the government's views on the question then we would, of course, be happy to respond.

V

CONCLUSION

In the "conclusion" sections of their respective briefs,*/ counsel for the State of Washington do themselves discredit by resorting to arguments which mirror the state's continuing reluctance to recognize either Indian sovereignty or Indian property rights. Ecology, for example, argues that the reason the Federal Government is before this court presenting these claims on behalf of the Spokane Tribe is to make "up for misdeeds and sins of the past." They quote Dean Trelease as having written that "[j]ustice to Indians may not mean giving them everything they ask."**/ They contend that a decision favorable to the United States and the tribe will have an "extremely high potential for the agony of displacement" of non-Indian interests.

Natural Resources implies that we are attempting to arouse the sympathy of the court and urges the court to "apply sound legal concepts and precedent to the resolution of the question presented herein."

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*/ DOE brief, pp. 61-63; DNR brief, pp. 39-40

**/ Counsel for the Department of Ecology quote and cite Mr. Trelease's works liberally throughout their brief. See, e.g. DOE brief, pp. 7, 8, 49, 61, 63. Mr. Trelease is a respected

We do not base our claims on past injustices done to the Indians. We believe them to be firmly grounded in the law and the record of this case. It is true that to some extent, a decision favorable to the government and the tribe will adversely affect some defendants. But in a sense, this is simply another "confrontation between the 'manifest destiny' of the westward movement of American civilization and the rights of the native American Indians to their lands." United States v. Southern Pac. Transp. Co., 543 F.2d 676, 680 (C.A. 9, 1976). We believe that the court must confirm our rights to the surface and ground waters of Chamokane Creek and that "[a]lthough it may appear harsh [to subordinate the rights of the defendants to the rights of the Federal Government and the tribe, the court must] conclude that an even older policy of Indian law compels this result." United States v. Southern Pac. Transp. Co., supra, 543 F.2d at 699.

**/ con't

authority in the field of water law. His writings should be read, however, against the backdrop of the fact that he is perhaps the spokesman for the state point of view. Mr. Trelease is currently a Special Assistant Attorney General for the State of Wyoming in the Big Horn River adjudication. In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, No. 4993, in the District Court for the Fifth Judicial District, Wyoming in which case the United States is a defendant.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

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

CERTIFICATE OF SERVICE

This is to certify that on the 14th day of June, 1977, I mailed a copy of the Reply Brief of the United States to all parties on the attached list.

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