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Findings of Fact, Conclusions of Law, and Decree Proposed for Entry by the Department of Ecology

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CLERK, U. S. DISTRICT COURT,
SPOKANE, WASHINGTON

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

11 UNITED STATES OF AMERICA,)	
)	
12 Plaintiff,)	CIVIL NO. 3643
)	
13 v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW, AND
14 BARBARA J. and JAMES ANDERSON,)	DECREE PROPOSED FOR ENTRY
et al.,)	BY THE DEPARTMENT OF ECOLOGY
)	
15 Defendants.)	
)	

17 PROPOSED FINDINGS OF FACT

19 NATURE OF ACTION

20 1. This action was initiated by the United States as a
21 "general adjudication" (as that term is understood in western water
22 rights law) of all claims to the right to the use of the waters,
23 surface and ground, of the Chamokane Creek basin. The action was
24 brought to determine and declare the water rights of each of the
25 parties (claimants), both plaintiff-United States (in its own right
26 and on behalf of its trustee, Spokane Indian Tribe) and defendants,
27 and to obtain a decree setting forth such rights, with the date of
28 priority for each right. The United States further asks for an
29 order directing all uses of the waters of Chamokane Creek to be in
30 accord with the rights confirmed by the court.
31
32
33

1 CHAMOKANE CREEK DRAINAGE

2
3 General Location

4 2. The Chamokane Creek basin is located within the State of
5 Washington which was admitted to the United States on November 22,
6 1889. 25 Stat. 676.

7 3. The area which makes up the State of Washington (which
8 includes the Chamokane Basin) became subject to the sole sovereignty
9 of the United States by discovery and settlement and by treaties,
10 notably with Great Britain. See Treaty of June 15, 1846, 9 Stat. 869.
11 See also earlier treaties with Spain (Treaty of February 22, 1819,
12 8 Stat. 252) and Russia (Convention of April 17, 1824, 8 Stat. 869).

13 4. The Chamokane Basin is also located, in part, within the
14 Spokane Indian Reservation - a reserve established by executive order
15 of the President of the United States on January 18, 1881.

16 5. Chamokane Creek has its headwaters in the Huckleberry
17 Mountains of Southern Stevens County, Washington. From its place
18 of origin, the creek flows generally in a southeasterly direction
19 over private and state owned land through the Camas Valley (Upper
20 Chamokane area). At the northeast corner of the Reservation, it flows
21 south and southwesterly through the Walker's Prairie area to Chamokane
22 Creek Falls. From the falls, it flows south through the Lower
23 Chamokane area, discharging into the Spokane River at a point 1.4
24 miles below Long Lake. U.S. Br. at 71.

25
26 Area

27 6. There are 178 square miles in the Chamokane Creek drainage,
28 only a portion of which is in the Reservation. U.S. Br. at 71; P.E. 2.

29
30 Geology

31 7. The Chamokane Creek basin was formed through prehistoric
32 glacial action. As the glacier retreated, it left a lateral moraine

1 to a depth of 150 feet which blocks off Camas Valley, thereby pre-
2 cluding any appreciable ground water flow into the Chamokane Creek
3 basin from that area. U.S. Br. at 73.

4 8. The basin is essentially a closed area; i.e., water once
5 in the basin does not leave the basin.

6 9. The Camas Valley area is segregated from the remainder of
7 the basin in that withdrawals of ground water from that area have
8 no impact on the flow in Chamokane Creek. U.S. Reply Br. at 50;
9 Tr. 73.

10
11 Topography

12 10. The basin is situated between elevations 1,350 and 4,200
13 feet. The Walker's Prairie region strattling the boundary of the
14 Spokane Reservation, lies primarily between elevation 1,800 and
15 1,900 feet, with a distinct topograhic depression beginning west
16 of Ford, Washington. P.E. 41.

17 11. There are two tracts of land within the Chamokane Creek
18 basin portion of the Reservation which have soil characteristics
19 which, if irrigated, would allow the growing of crops. These are
20 a tract of 1,880 acres below elevation 2,100 feet (bottom land) and
21 a tract of about 6,580 acres above elevation 2,100 feet (bench
22 land). U.S. Br. at 44; P.E. 34. The 6,580 acres are timbered
23 lands in the area known as the Chamokane Bench. Tr. 225.

24
25 Weather

26 12. The Chamokane Creek drainage is a semi-arid area. There
27 are often low temperatures in the winter and high temperatures in
28 the summer.

29
30 Chamokane Creek Flows

31 13. Waters flowing in Chamokane Creek are from two general
32 sources: (1) precipitation falling on lands of the basin, which

1 flows to the stream as diverse surface runoff; and (2) precipitation
2 falling on lands of the basin which percolate downward to a water
3 bearing zone after which it migrates laterally until it breaks
4 out into Chamokane Creek. Tr. 928-60.

5 14. The flow in Chamokane Creek varies greatly depending upon
6 the year and the season. Flows have been as high as 1,430 cfs and
7 as low or less than 30 cfs. U.S. Br. at 77.

8 15. Though the flow is continuous in the creek at the north
9 boundary of the Reservation and to a point two miles south, for the
10 next five miles the creek is intermittent. Then, just above Ford,
11 and for the next three miles, massive springs contribute to a very
12 regular flow in the creek. P.E. 3-4-74-29.

13 16. These springs contribute in excess of 20 cfs to the flow
14 in Chamokane Creek, creating permanent flow in the creek, downstream
15 to its confluence with the Spokane River. P.E. 64.

16 17. Downstream from the springs and approximately one mile
17 upstream from the Spokane River are falls which provide a barrier
18 to fish attempting to travel upstream. P.E. 64; Tr. 477.

19 18. Records from the USGS gaging station located below
20 Chamokane Creek Falls indicate the following flows:

<u>Year</u>	<u>Avg. stream flow Low flow month</u>	<u>Maximum</u>	<u>Minimum</u>
1971	29.3 cfs	1,320 cfs	21 cfs
1972	26.1 cfs	332 cfs	20 cfs
1973	19.7 cfs	269 cfs	17 cfs
1974	35.3 cfs	955 cfs	22 cfs
1975	39.1 cfs	1,430 cfs	34 cfs

25
26 U.S. Br. at 77.

27
28 Chamokane Creek Temperatures and Their Effect on Fish

29 19. Because the creek is spring-fed, variation in water
30 temperature declines towards the spring source. P.E. 64 at 6.

1 20. The upper limit of a trout's tolerance is 76-77°. At
2 these temperatures, a trout eventually will die, but only after it
3 has lost its stamina and has drifted downstream. Tr. 447.

4 21. Temperatures above the falls did not exceed the maximum
5 for the well being of trout. Tr. 454, 474-75; DOE Br. at 24.

6 22. Temperatures below the falls did on rare occasions in
7 the hot summer months exceed 68° for one or two hours. Tr. 474.
8 At those temperatures, fish will cease to feed, but will not die.
9 Tr. 474, 510, 519; P.E. 64 at 7-8; DOE Br. at 24-25.

10 11 Relationship Between Flow and Temperature

12 23. There generally is an inverse relationship between water
13 flow and maximum water temperatures in the creek.

14 24. The evidence presented at trial on the flow necessary to
15 maintain a flow 68° was confused and confusing. Tr. 457-58,
16 488-90, 601-04. It appears, however, that a flow of 20 cfs in the
17 creek would maintain a temperature adequate to protect trout. Tr. 483.

18 25. The important factor in protection of fish life, however,
19 is not the quantity of the water, but the temperature of the water.

20 21 Population Characteristics

22 26. The Chamokane Creek basin portion of the Spokane Reservation
23 is inhabited by both Indian and non-Indians residing on both Indian
24 and non-Indian land.

25 26 HISTORY

27 28 Spokane Indians

29 27. The Spokane Tribe historically consisted of three bands:
30 the upper, middle, and lower bands. Each of these bands tended to
31 localize their activities in one certain area, although they used
32 the entire tribal area from time to time. The upper band lived near

1 the present day site of Spokane, Washington. The middle band lived
2 near the confluence of the Spokane and Little Spokane Rivers. The
3 lower band lived near the confluence of the Columbia and Spokane
4 Rivers. These bands chose these spots in part because they were
5 near the great salmon runs on which they relied in substantial part
6 for their food. U.S. Br. at 11.

7 28. The three bands of the Spokane Indians also relied, through
8 a smaller part, on hunting and on gathering of various roots.
9 U.S. Br. at 11.

10

11 White Settlers

12 29. By the mid 1850s, there was a heavy influx of white
13 settlers into what is now the State of Washington. U.S. Br. at 12.

14 30. In order to preserve order in the Pacific Northwest and
15 to accommodate the influx of white settlers, the United States
16 sought to place the Spokanes and other tribes on a reservation.

17

18 Establishment of the Spokane Reservation

19 31. In August 1877 Colonel E. C. Watkins met with the Lower
20 Spokanes and some of the other tribes at Spokane Falls to negotiate
21 their placement on a permanent reservation. The meeting resulted in
22 an agreement between the United States and the Lower Spokanes whereby
23 the lower band would go upon the reservation (essentially the same
24 boundaries as the current reservation) "with the view of establish-
25 ing . . . permanent homes thereon and engaging in agricultural
26 pursuits." By November 26, 1877, the Lower Spokanes had been
27 relocated.

28 32. In the course of proceedings leading up to the 1877 agree-
29 ment, the Indians exhibited an intent to live under the laws of the
30 "white man." DOE Supp. Br. at 31.

31 33. On January 18, 1881, President Rutherford B. Hayes signed
32 an Executive Order creating the Reservation. The Reservation was

1 described as follows:

2 Commencing at a point where Chamokane (sic) Creek
3 crosses the forty-eighth parallel of latitude; thence
4 down the east bank of said creek to where it enters
5 the Spokane River; thence across said Spokane River
6 westwardly along the southern bank thereof to a
7 point where it enters the Columbia River; thence
8 across the Columbia River northwardly along its
9 western bank to a point where said river crosses
10 the said forty-eighth parallel of latitude; thence
11 east along said parallel to the place of beginning.

12 P.E. 52.

13 34. At the time of creation of the Reservation, the Upper
14 and Middle Spokanes were not located on any reservation. Accordingly,
15 by agreement of March 18, 1887, the upper and middle bands agreed
16 to move to the Coeur de'Alene Reservation where they were to receive
17 allotments of land. This agreement was ratified by Congress on
18 July 13, 1892. However, most of the Middle Spokanes ended up at
19 the Spokane Reservation. U.S. Br. at 15.

20 Opening of Reservation to Non-Indians

21 35. By Act of May 29, 1908 (35 Stat. 458), Congress authorized
22 the opening of the Reservation for homesteading on unallotted agri-
23 cultural lands. Under that act, after the allotment process is
24 completed, the Secretary of the Interior was to classify the surplus
25 land as either agricultural or timberland. The land classified as
26 agricultural land was to be opened to non-Indian settlement pursuant
27 to the homestead laws and under conditions prescribed by the
28 President. Timberland was to remain in trust for the Tribe because
29 of the importance of timber to the Tribe's economy. U.S. Br. at 47.

30 36. On June 15, 1909, the classification report was submitted.
31 82,647.5 acres were classed as timberland; 5,781.22 acres were
32 classed agricultural. Most of the agricultural land was located in
33 the eastern part of the Reservation. The land described as agri-
34 cultural was not suitable for inclusion in a forest reserve. U.S.
35 Br. at 48.

1 37. On May 22, 1909, President Taft proclaimed open for
2 homesteading "all the non-mineral, unreserved lands classified as
3 agricultural lands within the Spokane Reservation. . . ." These
4 lands were to be settled "under the provisions of the homestead laws."
5 DOE Supp. Br. at 34.

6 38. Of the lands opened up for homesteading, most were settled
7 by non-Indians. Others were never settled. By the act of May 19,
8 1958 (72 Stat. 121) the land in the Reservation which had been
9 eligible for homesteading but was never claimed was restored to
10 tribal ownership. Under this act, 77 acres were restored to tribal
11 ownership within the Chamokane Creek basin. U.S. Br. at 48-49.

12
13 Issuance of State Water Rights Permits

14 39. From time to time after the opening up of the Reservation
15 for homesteading, non-Indians in the Chamokane Creek basin, both
16 within and without the boundaries of the Reservation, sought
17 and obtained water rights under state law. These included permits
18 and certificates issued by the Department of Ecology in its prede-
19 cessor agencies. Neither the United States nor the Spokane Tribe
20 objected to the issuance of the permit on any grounds, jurisdic-
21 tional or otherwise, until recent times.

22
23 Grand Coulee Dam

24 40. The Grand Coulee Dam built by the United States cut off
25 all salmon runs which may have existed in Chamokane Creek below the
26 falls.

27
28 PURPOSES FOR WHICH RESERVATION WAS CREATED

29
30 General

31 41. The intent of the United States in creating the Reservation
32 was to place the Spokane Tribe in one place so there would be minimal

1 interference with non-Indian settlers moving west.

2 42. The history of the proceedings leading up to the Executive
3 Order creating the Reservation and the circumstances surrounding the
4 creation of the Reservation indicate that the United States and the
5 Tribe contemplated that members of the Tribe would engage in agri-
6 culture on certain lands within the Reservation. The parties also
7 contemplated that the Tribe would make use of their vast forest
8 resources on the Reservation and would continue their fishing for
9 anadromous fish and hunting and raising of game and stock.

10 43. There was reserved for the use of the Spokane Tribe waters
11 of Chamokane Creek (and other waters of the Reservation) for agri-
12 cultural irrigation, timber production, stockwatering, and domestic
13 use.

14 44. The United States and the Tribe did not intend, impliedly
15 or otherwise, use of waters of Chamokane Creek for religious or
16 ceremonial use.

17 45. The United States and the Tribe did not intend, impliedly
18 or otherwise, the use of waters of Chamokane Creek for aesthetic
19 purposes or recreational development.

20
21 Fishery

22 46. Although there may have been implied reserved waters of
23 Chamokane Creek for purposes of allowing anadromous fish upstream
24 to spawn, because of the construction of Grand Coulee Dam, and the
25 resultant elimination of those fish runs, it is unnecessary for this
26 Court to find such a fishery purpose. Any question of damages to
27 the reserved right of the Tribe by the United States constructing
28 the dam is a matter between the Tribe and the United States and is
29 not before this Court.

30 47. The United States did not intend, impliedly or otherwise,
31 to reserve waters of Chamokane Creek below the falls to be used as
32 a trout fishery, as such a purpose of the Reservation was not

1 contemplated by the parties.

2
3 STATE ISSUANCE OF WATER RIGHTS

4
5 In Chamokane Basin, Outside the Reservation

6 48. The following permits and certificates have been issued
7 by the State of Washington within the Chamokane Creek Basin:

8	Surface Water Certificate No. 294	Dec. 4, 1925
9	1675	May 13, 1940
10	1725	May 15, 1940
11	2258	Feb. 12, 1945
12	8600	Oct. 21, 1946
13	4872	March 17, 1950
14	6394	July 21, 1950
15	9100	
16	Ground Water Certificate No. 4891A	Feb. 1, 1951
17	2768	Sept. 6, 1956
18	Surface Water Application No. 20248	May 19, 1967
19	21786	August 25, 1969
20	22922	March 9, 1971
21	23503	Nov. 10, 1971
22	23551	Dec. 3, 1971
23	Ground Water Permit No. 9361	Sept. 17, 1968
24	9563	Jan. 30, 1969
25	Ground Water Application No. 10386	Sept. 3, 1969
26	10506	Mar. 18, 1969
27	11227	Sept. 11, 1970
28	11753	April 2, 1971
29	11905	May 20, 1971
30	321939	Oct. 15, 1973

31 See U.S. Reply Br. 51-58.

32 49. Neither the United States nor the Tribe has objected to
33 the issuance of any of the above-mentioned permits on jurisdictional
or other grounds until recent times.

50. Water rights issued under state law within the Chamokane
Creek basin, outside the Reservation are subject to prior rights,
including those prior rights of the Spokane Tribe.

34 In Chamokane Creek Basin, Inside the Reservation

35 51. The State of Washington has issued the following permits,
36 certificates, and applications to non-Indians on non-Indian lands

1 within the boundaries in the Chamokane Creek basin within the
2 boundaries of the reservation:

3	Certificate No. 7142	Dawn Mining Co.	August 1, 1956
4	Certificate No. 8826	Urban S. Schaffner	March 20, 1958
5	Permit No. 15894	A.L., F.L. Smithpeter	March 28, 1969
6	Application No. 11989	B. Dituri	June 23, 1971
	Application No. 320422	Urban Schaffner	July 3, 1972
	Application No. 320536	Paul Duddy	Sept. 28, 1972

7 See U.S. Br. at 81.

8 52. The State of Washington has issued a certificate to the
9 United States, through its Bureau of Reclamation authorizing the
10 use of 10 cfs of the flow of Spring Creek (tributary of Chamokane
11 Creek) for fish propagation purposes. The certificate bears a
12 priority date of October 21, 1943. None of the parties challenge
13 the validity of this certificate, presumably because all deem it
14 was issued validly by the State of Washington. U.S. Br. at 63.

15 53. The State of Washington has in the issuance of permits
16 and certificates recognized that there is a need to establish
17 minimum flows in Chamokane Creek. In the permit issued to Mr. Smith-
18 peter, there was a condition imposed that the diversions would stop
19 when the flow in the creek dropped below 20 cfs. The Court can
20 presume that similar low flow provisos would be added to any subse-
21 quent permits issued by the state in the Chamokane Creek basin.

22 54. Water rights issued under state law within the Reservation
23 as well as without the Reservation are subject to prior rights,
24 including prior rights of the Spokane Tribe.

25
26 Outside Chamokane Basin, Within Other Indian Reservations

27 55. The State of Washington has long issued permits to
28 non-Indians within the boundaries of reservations within Washington.

29 56. There have been no objections by the United States or
30 the various Indian Tribes to the state issuance of water rights
31 permits or certificates to non-Indians on non-Indian lands within
32 the boundaries of an Indian reservation in Washington until recent years.

1 57. As is the case in Washington, other western states have
2 assumed jurisdiction over water rights to non-Indians on non-Indian
3 land within the boundaries of reservations in those states.
4

5 QUANTIFICATION OF THE RESERVED RIGHT
6

7 Agriculture

8 58. There is no evidence in the record that the United States
9 intended, impliedly or otherwise, to irrigate lands covered by
10 timber at the time of the creation of the Reservation. Accordingly,
11 there can be no reservation of a water right appurtenant to those
12 lands for the purpose of agricultural irrigation. Tr. 781.

13 59. Although there is no evidence in the record detailing
14 which Reservation lands were "practicably irrigable" at the time of
15 the creation of the Reservation, the Secretary of the Interior pursuant
16 to the Act of May 29, 1908, 35 Stat. 458, surveyed unalloted lands
17 on the reservation and classified them as either timber or agricul-
18 tural. P.E. 101. Although this survey was undertaken sometime after
19 the creation of the Reservation, and the classification does not
20 indicate the true intent of the federal government as to what would
21 be irrigable agricultural land at the time the Reservation was
22 created, it appears to be the best evidence available to determine
23 that intent.

24 60. Generally, the "bottom land" was intended to be agricultural
25 land, while the upper "bench land" was intended as timberland.
26 Tr. 225. Although this is somewhat of a simplification, it is
27 the best the Court can do given the type of evidence offered by
28 the plaintiffs in support of their claim.

29 This is consistent with the fact that irrigation of lands
30 substantially above the elevation of the creek would have been
31 difficult to irrigate without some pumping apparatus, and there is
32

1 no evidence in the record showing that such apparatus was contemplated
2 at the time of the creation of the reservation.

3 It also is consistent with testimony given at trial that a
4 "major block" of the bench land now is timbered, Tr. 225; P.E.
5 3-6-74-29, and that there was substantially more timber there
6 before the 1920's. Tr. 781, 818.

7 Further, it is consistent with testimony that there is no
8 intent, nor has there been, to irrigate bench lands. Tr. 226, 668.
9 If there is or has been such an intent, the water source of the
10 irrigation likely would be the Spokane River, not Chamokane Creek.
11 Tr. 227.

12 61 Accordingly, the evidence shows an intent that approxi-
13 mately 1,880 acres of "bottom land" within the Chamokane Creek basin
14 be used for agricultural purposes.

15 62. The water duty for irrigation of agricultural lands within
16 the Spokane Reservation is three acre-feet per acre. U.S. Br. at 45.

17
18 Timber

19 63. There was impliedly reserved a right to the use of water
20 of the Chamokane Creek basin for the purpose of firefighting, road
21 building and maintenance, and other timber production and harvesting
22 purposes.

23 64. Because of the nature of the need for water for timber
24 harvesting purposes, there is no need to quantify the right. Either
25 the need is de minimis (road building and maintenance) or the need
26 is for high volumes (all that is reasonably necessary) for a short
27 period (fire fighting).

28
29 Stockwatering

30 65. There is no need to quantify the right to the use of the
31 waters of Chamokane Creek for the purpose of stockwatering. The use
32 of waters for this purpose would be de minimis.

1 Domestic

2 66. There is no need to quantify the right to the use of
3 waters of Chamokane Creek for the purpose of serving the domestic
4 needs of the Spokane Tribe. The use of waters for the purpose
5 would be de minimis.

6
7 Availability of Waters

8 67. There have been in the past and it appears that from time
9 to time in the future there will be waters in the Chamokane Creek
10 basin in excess of the amounts necessary to satisfy the reserved
11 rights of the United States on behalf of the Spokane Tribe.

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1 PROPOSED CONCLUSIONS OF LAW

2
3 JURISDICTION

4 1. This Court has jurisdiction under 28 U.S.C. §1345. The
5 Court has jurisdiction over water rights claims and other issues
6 of state law under the doctrine of pendent jurisdiction.
7

8 FEDERAL AND STATE POWERS OVER WATERS

9
10 General Constitutional Framework

11 2. Under our federal constitutional system, governmental powers
12 over water are shared, with both the federal government and the
13 State of Washington empowered to establish rights to the use of
14 waters within the state. The federal government's power is found
15 in various provisions of the United States Constitution including,
16 among others, the clauses relating to Commerce (U.S. Const., Art.
17 I, §8, cl. 2), property (U.S. Const., Art. IV, §3, cl. 2), war
18 (U.S. Const., Art I, cls. 11, 12), taxation for the general welfare
19 (U.S. Const., Art I, §8, cl.1), and treaty-making, (U.S. Const.,
20 Art. II, §2, cl. 2). The State of Washington's power is contained
21 within the retained, plenary powers of state government recognized
22 by the Amendment X to the United States Constitution. See generally
23 Trelease, Federal-State Relations in Water Law (National Water
24 Commission Legal Study No. 5) Chapter III (1971).

25 3. Reserved state powers are subject to potential limitations
26 on their exercise arising largely from the "Supremacy Clause." U.S.
27 Const., Art. VI, cl. 2. Thus state powers are restricted if an
28 area of state governmental power is "preempted" or suspended,
29 expressly or implied, by federal statutory or treaty enactment.
30 Additionally, state powers over water may not, absence federal
31 approval, have applicability to waters located on federally owned
32 lands. United States v. Mayo, 319 U.S. 441 (1943).

1 4. Further limitations on the applicability of state law within
2 the state's boundaries arise from the establishment by the federal
3 government of Indian reservations. Because certain powers of self
4 government, pertaining to the control over individual Indians and
5 over Indian property interests, rest with Indian Tribes, the law
6 has developed that the state may not interfere with the exercise of
7 these limited tribal powers of self government. Mescalero Apache Tribe
8 v. Jones, 411 U.S. 145, 148 (1973); Organized Village of Kake v.
9 Egan, 369 U.S. 60, 75 (1964); Williams v. Lee, 358 U.S. 217, 221
10 (1949). See also Oliphant v. Suquamish Indian Tribe, 98 S.Ct. 1011
11 (1978); United States Department of the Interior, Federal Indian
12 Law 513 (1958).

13 5. Thus, under our federal constitution, state water right laws
14 have applicability to waters located on non-federal lands with a
15 state unless: (1) a federal statute or treaty have preempted that
16 ability to apply, or (2) the state law's application interferes with
17 the exercise of tribal government powers over Indians and Indian
18 interests.

19 This is in keeping with the long established general teachings
20 of the United States Supreme Court that state laws can apply, in
21 proper circumstances, to non-Indians and non-Indian interests within
22 the original boundaries of a reservation. Langford v. Monteith, 102
23 U.S. 145 (1880); Utah and Northern Railway v. Fisher, 116 U.S. 28
24 (1885); Thomas v. Gay, 169 U.S. 264 (1898); Draper v. United States,
25 164 U.S. 240 (1896); New York v. Martin, 326 U.S. 496 (1946);
26 United States v. Bratney, 104 U.S. 621 (1881). See also Puyallup
27 Tribe v. Washington Dept. of Game, 433 U.S. 165 (1977); Norvell v.
28 Sangre de Cristo Development Co., 372 F. Supp. 348, 353 (D.N.M.
29 1974), rev'd on grounds not relevant to this case, 519 F.2d 370
30 (10th Cir. 1975).

1 Federal-State Powers in Chamokane Basin Prior to Washington Statehood

2 6. In the context of this case, all powers over the allocation
3 of the use of waters of Chamokane Basin (based on concepts of
4 sovereignty) vested in the federal government of the United States as
5 of 1846. Treaty with Great Britain, 9 Stat. 869.

6 7. Beginning with the establishment of the Oregon Territory in
7 1846, rights to use of waters on non-federal lands within the
8 territory, including the Chamokane basin, could be established
9 pursuant to territorial law, statutory and otherwise.

10 8. By congressional acts of 1866, 1870 and 1877, rights to use
11 waters located on federal lands, based on territorial law and the law
12 of custom, were both confirmed and authorized. Act of July 26, 1866,
13 §9, 14 Stat. 251; Act of July 9, 1870, 16 Stat. 217, amending the
14 Act of 1866; Desert Lands Act of 1877, 19 Stat. 377, 43 U.S.C. §321.

15 9. In 1881 the United States, by the executive order of
16 President Hayes, creating the Spokane Indian Reservation, reserved
17 rights to the use of waters of Chamokane Creek (as well as other
18 waters within or bordering the reservation) for the benefit of the
19 Spokane Tribe in amounts reasonably necessary to carryout the purposes
20 for which this reservation was created. These rights are implied
21 even though there was no mention of water rights whatsoever in the
22 presidential executive order creating the right. Winters v. United
23 States, 207 U.S. 564 (1908); Conrad Investment Co. v. United States,
24 161 Fed. 829 (9th Cir. 1908); and United States v. Walker River
25 Irrigation District, 104 F.2d 334 (9th Cir. 1937).

26 10. The implied rights to use the waters established by the
27 presidential executive order of 1881 did not reserve all waters
28 located within the boundaries within the Spokane Reservation, but
29 only the right to a limited amount; i.e., the amount reasonably
30 necessary to carry out the purposes for which reservation was created,
31 "and no more." Cappaert v. United States, 426 U.S. 128, 141 (1976).

1 11. The reserved rights doctrine, from its very beginnings in
2 Winters and Conrad, recognized that waters within a stream, to which
3 an implied reserved right attaches, which are in excess (or "surplus")
4 to those amounts required to satisfy a reserved right, are subject
5 to appropriation under state law. See also United States v. Ahtanum
6 Irrigation District, 330 F.2d 897 (9th Cir. 1964). Further,
7 Winters did not hold that by the creation of implied reserved rights
8 a wall was placed upon the boundaries which bars the application of
9 state water rights laws to waters within its boundaries.

10
11 Admission of Washington to United States -- Shared Powers Over Waters
12 of Chamokane Basin

13 12. With the entry of the State of Washington into the federal
14 union in 1889, the state, at that time, had authority to allocate
15 water rights applicable to all waters located on non-federally
16 owned lands. Further, the state water right laws also were appli-
17 cable to waters on federally owned lands where the federal govern-
18 ment authorized such applicability. Stated another way, generally
19 state water rights law applies to water on all non-federally owned
20 lands within a state and on all federal land to which federal law
21 applies state law.

22 13. State law also is applicable to water on non-Indian lands;
23 i.e., non-federal or non-Indian lands, within the original boundaries
24 of the Spokane Reservation portion of the Chamokane Reservation except
25 that:

26 (1) the state law may not be applied so as to impair the
27 ability of the Spokane tribe to exercise its limited powers
28 of self government over tribal members and tribal property
29 interests; and

30 (2) the state law may not be applied if Congress has by
31 treaty or statutory preemption has preempted such application.
32

1 Exercise of State Water Rights Does Not Impair Exercise of Tribal Powers

2 13. State law cannot interfere with tribal self government
3 powers over Indians and Indian interests. The state's assertion
4 of power, activated through issuance of permits establishing water
5 rights applies only to waters on non-Indian lands. The state's
6 authority is not asserted as to Indians, or to lands of Indians, or to
7 waters located on said lands, or to reserved rights of Indians.

8 (The State of Washington has long recognized the doctrine of Winters
9 reserved rights and administers its code in light of those rights.)

10 14. State permits are issued "subject to" prior rights including
11 senior reserved rights established by the presidential executive
12 order of 1881 with a priority of that date; i.e., all state based
13 rights are subject these impliedly reserved rights and during times
14 of shortage such state based rights may not be exercised as against
15 the reserved rights.

16 15. There is a substantial dispute as to whether a tribe has
17 any governmental authority over waters. However, the Court need not
18 resolve this issue. Assuming arguendo that tribal self government
19 powers over water and water rights exist, a state cannot interfere
20 with that power. State power has not been exercised in this case
21 in any way to interfere with any such Indians powers that may exist.
22 In sum, as a matter of law, the state's exercise of power in this
23 case does not and cannot interfere with any tribal powers.

24
25 There Is No Federal Preemption of State Powers by Statute or Executive
26 Order

27 16. Preemption by federal statute, the second possible base
28 for removing the applicability of state water law to waters on non-
29 Indian lands, is not to be "lightly presumed." Schwartz v. Texas,
30 344 U.S. 199 (1952).

31 17. A court should not conclude Congress legislated an ouster
32 of state authority" in the absence of an unambiguous congressional

1 mandate to that effect." Florida Lime and Avocado Growers v. Paul,
2 373 U.S. 132, 146-47 (1963). An intention of Congress to exclude
3 states from exerting their police powers must be clearly manifested.
4 Reid v. Colorado, 187 U.S. 137, 148 (1902); Napier v. Atlantic Coast
5 Line, 373 U.S. 132 (1963). This rule is of special strength where
6 a federal displacement would eliminate police powers historically
7 exercised by the states. Rice v. Santa Fe Elevator Corp., 331 U.S.
8 218 (1947); De Canas v. Bica, 424 U.S. §51 (1976).

9 18. Further the United States Supreme Court has recently stated
10 its "conviction that the proper approach is to "reconcile the opera-
11 tion of both statutory schemes with one another rather than holding
12 one completely ousted." Merrill Lynch, Pierce, Fenner and Smith v.
13 Ware, 414 U.S. 117, 127 (1973) quoting Silver v. New York Stock
14 Exchange, 373 U.S. 341, 357 (1963). See also Marshall v. Consumers
15 Power Co., 65 Mich. App. 237, 237 N.W. 2d 266 (1975).

16 19. The presidential executive order and the events surrounding
17 the order, while impliedly reserving water rights for the benefit of
18 the Spokane Tribe of 1881 reveal no intention whatsoever, either
19 express or implied, to bar the application of state law to "excess
20 waters" located on non-Indian lands within boundaries of the Spokane
21 Reservation.

22 20. Likewise, the Court has not been cited to any federal
23 statute which preempts the applicability of state law to excess
24 waters so located and the court has not found any such statute.

25 26 The Enabling Act and Washington's Constitution

27 21. Section 4 of the federal "enabling act" admitting
28 Washington State into the Union, 25 Stat. 676, cited by plaintiffs,
29 does not bar the applicability of state water rights law to "excess
30 waters" on non-Indian lands within an Indian reservation. On its
31 face it is inapplicable for the limitations of the section provide
32 that the state disclaims "all right and title to unappropriated

1 lands" of the United States and to "lands owned or held by any
2 Indian or Indian tribe." The State of Washington, by exerting
3 authority to establish water rights applicable to non-federal and
4 to non-Indian lands, is not in violation of the "disclaimer."

5 22. The same conclusion applies to Article 26, §2, of the
6 Washington Constitution, which is identical in wording to the quoted
7 portion of the enabling act.

8 23. Portions of the same provisions of the enabling act and
9 constitution, relied upon by the plaintiffs, stating "said Indian
10 lands shall remain under the absolute jurisdiction and control of
11 the United States," likewise do not constitute a bar to state law
12 applicability. Not only does this language refer only to "said
13 Indian lands," i.e. owned or held by any Indian or Indian tribes,
14 but the U.S. Supreme Court has interpreted the "absolute juris-
15 diction" language to mean something less than "exclusive jurisdiction."
16 Organized Village of Kake v. Egan, 369 U.S. 60 (1974); see also
17 Norvell v. Sangre de Cristo Development Co., 372 F.Supp. 348 (D.N.M.
18 1974).

19
20 P.L. 83-280

21 24. Neither PL 83-280 nor its state counterpart, Chapter 37.12
22 RCW, bar the state's water laws as contended by plaintiffs. The
23 pertinent provision of PL 83-280, section 4 (28 U.S.C. §1360(b))
24 provides:

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

1 This wording is substantially the same in RCW 37.12.050. Both relate
2 only to Indian property interests. The issue of state authority
3 over Indian interests is not before the court in this case. As
4 previously pointed out, state based water rights are issued subject
5 to prior rights; therefore, such a right cannot "encumber" an earlier
6 reserved right of the Spokane Tribe. Thus, neither PL 83-280 nor
7 Chapter 37.12 RCW in any way bar the applicability of Washington
8 State's water laws to excess waters on non-Indian lands.

9
10 25 U.S.C. §381

11 25. 25 U.S.C. §381 provides:

12 In cases where the use of water for irrigation is
13 necessary to render the lands within any Indian
14 reservation available for agricultural purposes,
15 the Secretary of the Interior is authorized to
16 prescribe rules and regulations as he may deem
17 necessary to secure a just and equitable distri-
18 bution thereof among Indians residing upon any
19 such reservations; and no other appropriation
20 or grant of water by any riparian proprietor
21 shall be authorized or permitted to the damage
22 of any other riparian proprietor.

23 Emphasis supplied.

24 This act, dormant in terms of implementation for almost one hundred
25 years, is limited by its terms to "Indians." But see United States
26 v. Powers, 305 U.S. 527 (193). Likewise, it is limited to allocation
27 for "agricultural purposes."

28 So limited it cannot support the contention of the United
29 States that it places exclusive jurisdiction, as a matter of law,
30 over all waters within the original boundaries of a reservation.
31 At the most the provision's scope embodies comprehensive authority
32 over the allocation of rights, and the necessary waters related
33 thereto, impliedly reserved by treaty - an area outside the scope of
the issues raised in this case.

34 Jurisdictional History Within Spokane Reservation

35 26. In determining whether or not state laws apply within the

1 boundaries of an Indian reservation, it is relevant to look to the
2 jurisdictional history of that reservation. Oliphant v. Suquamish
3 Indian Tribe, 98 S.Ct. 1011 (1978); Rosebud Sioux Tribe v. Kneip,
4 430 U.S. 584, 603 (1977); Decoteau v. District County Court, 420
5 U.S. 425, 442 (1975).

6 27. History of the development of water rights law in the
7 western United States, commonly held understandings of that law,
8 and interpretations by the agencies responsible for the administra-
9 tion of federal water laws and federal-state relationships all
10 support the conclusion that state water rights laws have appli-
11 cability to excess waters on non-Indian lands within the original
12 boundaries of an Indian reservation.

13 28. Both the United States Department of Justice and the
14 United States Department of the Interior have, in recent years,
15 rendered the view that with regard to Indian reserves in Washington
16 State that state water rights law may be applied, under appropriate
17 facts, to excess waters on non-Indian lands within a reservation.
18 These interpretations of law are entitled to significant weight.
19 See DOE Supp. Br., App. B; 2A C. Sands, Sutherland on Statutory
20 Construction §§49.01-.09 (1973).

21 29. The views of the other prime interpreter of water law on
22 the subject, the administrators of state water codes, are also of
23 weight. 2A C. Sands, Sutherland on Statutory Construction, §§49.01-
24 .09 (1973). Washington State's administrator has applied his
25 state's law to the excess waters on non-Indian lands situation.
26 See e.g., Tulalip Tribe v. Walker, Snohomish County No. 71421 (1963).
27 His counterparts in many of the other western states have viewed the
28 reach of state water rights laws in a similar fashion.

29 30. Of great significance is that the United States in this
30 very case urges that the court confirm a water right based upon
31 state law, relying specifically on a certificate issued by the
32 administrator of the state's water code. See Amended Complaint at

1 5; U.S. Br. at 63. This act of the federal government recognizes
2 and confirms the longstanding view of the national government that
3 state water rights law can apply within the Spokane Reservation.
4 The contention by the United States in closing argument that the
5 United States obtained the right as a matter of comity does not
6 detract from the force of that conclusion. Clearly the United
7 States has full power under the constitution to establish water rights
8 on Chamokane Creek outside of state law. However, the United States
9 did not choose to establish its water right based on such power, but
10 rather obtained a state-based right and has relied upon and exercised
11 that right to use water on that basis within the reservation for
12 more than twenty-five years. The actions of the federal government
13 by word and deed, for over a quarter century, despite their very
14 recent protestations, show a long held view of the law that there is
15 no wall on the original boundaries of an Indian reservation through
16 which state water rights law cannot pierce.

17 31. The Act of March 3, 1905, P.L. 58-173, also is relevant to
18 the jurisdictional history of the reservation. It was passed in part
19 to clarify and facilitate the obtaining of water rights for proposed
20 power projects. At the time of passage, Washington law was particu-
21 larly confusing in that it recognized both the riparian doctrine
22 and the appropriation system. See Benton v. Johncox, 17 Wash. 277,
23 288, 49 P. 400 (1897); see S. Rep. No. 4378, 58th Cong., 3d Sess.
24 3 (1905); 39th Cong. Rec. 2413 (1905) (remarks of Rep. Jones). It
25 authorized the Secretary of the Interior to exercise the preemptive
26 power of the federal government to approve appropriative rights under
27 state law. United States v. Big Bend Transit Co., 42 F. Supp. 459,
28 466-67 (E.D. Wash. 1941). DOE Supp. Br. at 38-39.

29
30 Conclusion: State Law Not Precluded

31 32. Based on the foregoing, state water right law is not
32 precluded from application by federal statute or executive order or

1 state constitution or statute, or by a potential for interference
2 with the Spokane Tribe's powers of self government over Indian or
3 Indian property interests. Therefore, state law has application to
4 excess waters located on non-Indians within the original boundaries
5 of the Spokane Reservation. Accord, Tulalip Indian Tribe v. Walker,
6 Snohomish County Superior Court No. 71421 (1963).

7
8 Even If There Is Preclusion, Federal Law Grants Authority to State

9 33. The court reaches the same conclusion even if there is, as
10 a matter of law, a wall upon the original boundaries of the Spokane
11 Reservation through which state water rights law cannot reach unless
12 authorized or consented to by Congress. The court notes three
13 distinct bases which provide for such a reach of state law.

14 34. Under the Act of May 29, 1908, 35 Stat. 458, the United
15 States authorized the opening of certain lands within the Spokane
16 Reservation for entry and settlement by non-Indians. The specific
17 lands were to be designated by the Secretary of the Department of
18 the Interior through a system 911 lands as "timber" or "agricultural"
19 with the latter opened "to settlement and entry under the provisions
20 of the Homestead Laws." See also P.E. 4.3. Thus certain lands
21 within the original boundaries were severed from its special reserved
22 status and made available under the federal homestead laws. Transfers
23 of property from federal to non-federal ownership under these pro-
24 visions pass only land; no water rights pass as an incident of
25 the transfer. California-Oregon Power Co. v. Beaver Portland
26 Cement Co., 295 U.S. 142 (1935).

27 The attaching of water rights to such lands, whether taking
28 place at the time of such transfer or in the future, are matters of
29 state law. Stated otherwise, Washington State water right laws are
30 the primary if not the only means, to establish water rights avail-
31 able to a non-Indian acquiring homesteaded lands located within the
32 original boundaries of the Spokane Reservation to establish water
33 rights.

1 35. In 1953, Congress enacted P.L. 83-280, 67 Stat. 590,
2 which invited states to assume jurisdiction over criminal and civil
3 matters within the boundaries of Indian reservations. Section 7 of
4 P.L. 83-280 stated:

5 The consent of the United States is hereby given to
6 any other state not having jurisdiction with respect
7 to criminal offenses or civil causes of action, or
8 with respect to both, as provided for in this Act,
9 to assume jurisdiction at such time and in such
manner as the people of the state shall, by affirma-
tive legislative action, obligate and bind the
state to assumption thereof.

10 Washington accepted this invitation and enacted in 1957 and
11 then amended in 1963 what is now chapter 37.12 RCW. This chapter
12 assumed full "criminal and civil jurisdiction over Indians and
13 Indian territory, reservations, country and lands" with the proviso
14 that "such jurisdiction shall not apply to Indians when on their
15 tribal lands or allotted lands within an established Indian reser-
16 vation" RCW 37.12.010.

17 Over Indians on such lands, only partial subject matter juris-
18 diction was assumed over such areas as domestic relations, mental
19 illness and adoption. Full jurisdiction was allowed if the tribe
20 consented. RCW 37.12.021. On the Spokane Reservation there has been
21 no such complete assumption of jurisdiction, see American Indian
22 Policy Review Commission, Final Report 202 (1977), so P.L. 83-280
23 jurisdiction within the Spokane Reservation is complete with respect
24 to non-Indians on non-Indian lands and partial as to Indians and
25 Indian lands. As the Department of Ecology asserts jurisdiction
26 over the water rights of non-Indians, P.L. 83-280 constitutes a grant
27 of power adequate to cover all state jurisdictional assertions.

28 Although partial jurisdiction over Indians described in chapter
29 37.12 RCW is in question, Confederated Bands and Tribes of Yakima
30 Indian Nation v. Washington, 552 F.2d 1332 (9th Cir. 1977), prob.
31 juris. noted, 98 S.Ct. 1447 (1978), the remainder of the statute is
32 severable and should withstand attack. See State v. Anderson,

1 81 Wn.2d 234, 501 P.2d 184 (1972); Boeing Co. v. State, 74 Wn.2d
2 82 (1968); Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977).

3 36. Further, the Executive Order constitutes the requisite
4 grant of jurisdiction as the intent of the parties, as shown in the
5 proceedings surrounding the creation of the reservation, clearly
6 contemplated state assumption of jurisdiction. DOE Supp. Br. at 31.

7
8 Conclusion

9 37. Therefore the State of Washington, whether operating
10 directly under its constitutionally reserved powers or operating
11 with the concurrence and approval of the United States Congress, has
12 authority to establish the right to use of excess waters on non-Indians
13 lands within the original boundaries of the Spokane Reservation.
14 Any use authorized by the state respecting such excess waters on
15 the Spokane Reservation is within the context of a system of
16 priorities and would yield to any prior or subsequently initiated
17 water useage which is within the scope of prior reserved rights of
18 the United States held for the benefit of Indians or other prior
19 rights held by others.

20
21 SCOPE OF RESERVED RIGHT

22
23 General

24 38. When the federal government withdraws land from the public
25 domain and reserves it for a federal purpose, the government, by
26 implication, reserves the right to use water then unappropriated to
27 the extent necessary to fulfill the purpose of the reservation, no
28 more. Winters v. United States, 207 U.S. 564 (1908); Cappaert v.
29 United States, 426 U.S. 128, 141 (1976). [U.S. Br. at 3.]

30 39. Water rights reserved for the benefit of the Spokane Tribe
31 are of fixed magnitude and priority and are appurtenant to defined
32 lands. Arizona v. California, Masters Report at 266; [DOE Supp.

1 Br. at 23.]

2

3 Purposes of the Reservation

4 40. In determining whether or not in a given case the federal
5 government intended to reserve given quantities of water for use on
6 a federal reservation and the scope of the intended use, it is
7 relevant to look to the jurisdictional history of that reservation.
8 That history of the parties actions subsequent to the creation of the
9 reservation is relevant in the same sense that agency interpretation
10 and implementation of a statute is relevant in determining the meaning
11 of the statutes. Oliphant v. Suquamish Indian Tribe, 98 S.Ct. 1011
12 (1978); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

13 41. While reserved rights to the use of water may be implied
14 from the "purposes" for which the reservation is created, the "purposes"
15 of the reservation must have been contemplated at the time of the
16 creation of the reservation. Reserved rights attach only to those
17 intended purposes; there can be no implied reservation of water for
18 purposes not contemplated at the time of the creation of the reser-
19 vation. Arizona v. California, Masters Report at 264-65.

20 This is not to say that water may not be acquired under state
21 law for other purposes. However, the implied reserved rights created
22 by the United States for the benefit of the Spokane Tribe is fixed
23 in quantity as that amount necessary to fulfill the intended purposes
24 of the reservation at the time of the creation of the reservation.
25 United States v. Walker River Irrigation Dist., 104 F.2d 334, 336
26 (9th Cir. 1939); see Winters v. United States, 143 Fd. 740, 745
27 (9th Cir. 1906), aff'd, 207 U.S. 564 (1908); [DOE Br. at 17; U.S.
28 Reply Br. at 28.]

29 42. The determination of the purposes of the reservation is a
30 question of fact. The United States or the Tribe has the burden of
31 proving the purposes of the reservation by clear and convincing
32 evidence. The purposes may be proven by reference to the explicit

1 language of the treaty or executive order creating the reservation
2 and from the history and circumstances surrounding the creation of
3 the reservation.

4 43. Absent evidence to the contrary, it may be presumed that
5 the federal government intended to reserve water adequate to irrigate
6 all "practicably irrigable acreage" within the boundaries of the reser-
7 vation. However, where there is evidence of a purpose to use lands
8 for purposes other than agriculture, such as timber, there can be no
9 implied intent to reserve water for irrigation of those lands. Rather,
10 there is reserved water adequate to fulfill that purpose. Arizona v.
11 California, Masters Report at 260, 262.

12 13 Ground Water

14 44. While the parties may "intend" to reserve ground water in
15 addition to surface water, whether there is such an intent is a ques-
16 tion of fact.

17 45. Where there exists a hydrological connection between reserved
18 surface water and ground water, whether on or off the reservation,
19 the United States may maintain an action to enjoin appropriations of
20 ground water which interfere with prior reserved rights to surface
21 water.

22 23 Priority Date

24 46. The reserved water right of the Spokane Tribe have a priority
25 date as of the creation of the reservation by executive order of
26 January 18, 1881. Although there is authority for an earlier date
27 for the creation of the reservation, see Northern Pacific Railway Co.
28 v. Wismer, 246 U.S. 283 (1918), the reservation of the waters could
29 be accomplished only by an official act of the United States. As
30 there could be not reservation of waters by the Agreement of 1877
31 alone had there been no subsequent executive order, the date of the
32 executive order is the priority date of the reserved right of the

1 United States.

2

3 Injunctive Relief

4 47. The State of Washington has issued permits and certificates
5 for withdrawals from the Chamokane Creek basin which, if all were
6 exercised simultaneously with a reserved right of the Tribe. could
7 in a low-water year effectively dry up the creek. However, because
8 a "water right" is not a right to the water itself, but a right to
9 the use of water subject to prior rights, there is not need for
10 injunctive relief against either the state or the appropriators of
11 water. Rather, the proper course of action is to appoint a water
12 master with the authority to regulate in times of shortage, giving
13 priority, of course, to those persons holding prior rights.

14 48. The State of Washington may issue future permits and
15 certificates for appropriation of waters of the basin, both within
16 and without the boundaries of the Spokane Reservation "subject to
17 existing rights" of the United States, the Spokane Tribe, and other
18 holders of rights.

19 PROPOSED DECREE

20

21 Based on the foregoing, the court enters the following schedule
22 which confirms the rights of the parties:

23 [Note: No attempt has been to set forth the decree confirming
24 rights to the various parties. However, rights are urged for awarding
25 to the United States, based upon reserved rights concepts and state
26 law, applicable to waters within the Spokane Reservation. Further,
27 non-Indians claim based on state law should be confirmed for rights
28 applicable to waters both without and within the Spokane Reservation.
29 (The latter - waters within the reservation - relates to the Smith-
30 peter claim which involves use of waters on "homesteaded" lands
31 owned by non-Indians within the original boundaries of the Spokane
32 Reservation bordering the west bank of Chamokane Creek. Claims by

33 FINDINGS AND CONCLUSIONS

1 the defendant Department of Natural Resources, State of Washington,
2 based on a state "reserved rights" concept, should be rejected.

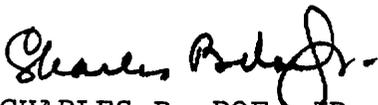
3 We do, however, suggest the following form be followed in
4 drafting the decree. This is the form used in the numerous general
5 adjudications brought in state court under chapter 90.03 RCW. We
6 include also a proposal for incorporating the reserved right of the
7 United States into the decree as well as the right of the United
8 States based on state law.

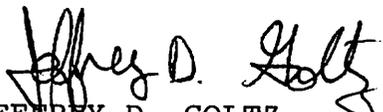
<u>Claimant</u>	<u>Quantity</u>	<u>Use</u>	<u>Source</u>
Class 1 - July 14, 1876			
John Doe	0.75 cfs	irrigation, stock, domestic	Chamokane Creek
Pt. of Diversion: (specific legal description)			
Place of Use: (specific legal description)			
Class ___ - January 18, 1881			
United States (as trustee of Spokane Indian Tribe)	5,640 ac/ft per year	irrigation	Chamokane Creek
	undefined quantities (amounts as reasonably necessary)	timber harvesting domestic, stock	Chamokane Creek
Pt. of Diversion: Any trust or allotted lands within reservation			
Place of Use: Any trust or allotted lands within reservation			
Class ___ - October 21, 1942			
United States	10 cfs.	non-consumptive, fish propagation	Spring Creek

24 DATED this 6th day of June, 1978.

25 Respectfully submitted,

26 SLADE GORTON
27 Attorney General

28 
29 CHARLES B. ROE, JR.
Senior Assistant Attorney General

30 
31 JEFFREY D. GOLTZ
32 Assistant Attorney General