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### From Conflict to Cooperative Water Resource Management: The Chelan Agreement and Water Resources Forum [outline]

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#### Citation Information

Frank, Jr., Bill, "From Conflict to Cooperative Water Resource Management: The Chelan Agreement and Water Resources Forum [outline]" (1993). *Water Organizations in a Changing West (Summer Conference, June 14-16)*.

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Bill Frank, Jr., *From Conflict to Cooperative Water Resource Management: The Chelan Agreement and Water Resources Forum* [outline], in *WATER ORGANIZATIONS IN A CHANGING WEST* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1993).

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**FROM CONFLICT TO COOPERATIVE WATER RESOURCE MANAGEMENT:  
THE CHELAN AGREEMENT AND WATER RESOURCES FORUM**

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**WATER ORGANIZATIONS IN A CHANGING WEST**

**NATURAL RESOURCES LAW CENTER  
UNIVERSITY OF COLORADO SCHOOL OF LAW  
June 14-16, 1993**

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The shining water that moves in the streams and rivers is not just water but the blood of our ancestors. If we sell you our land, you must remember that it is sacred, and you must teach your children that it is sacred, and that each ghostly reflection in the clear water of the lakes tells of events and memories in the life of my people. The water's murmur is the voice of my father's father. The rivers are our brothers, they quench our thirst. The rivers carry our canoes, and feed our children. If we sell you our land, you must remember, and teach your children, that the rivers are our brothers, and yours, and you must henceforth give the rivers the kindness you would give any brother.

--Chief Sealth during treaty times

## **I. BACKGROUND**

### **A. Cultural**

### **B. Federal Policy: A History of Oppression and Termination**

- 1. Pre-Constitutional Precedents (1532-1789)**
- 2. Treaty ERA (1789-1871)**
- 3. Allotments and Assimilation (1871-1928)**
- 4. Indian Reorganization (1928-1942)**
- 5. Termination (1943-1961)**
- 6. Self-Determination (1961-Present)**
- 7. Federal Indian Water Policy: 100 years of depletion and degradation of ground and surface waters**
  - a. Adjudication of Indian Water Rights**
  - b. Settlement of Indian Water Rights**

C. Legal Foundation: An Era of Conflict

1. Federal Reserved Water Rights: Winters Doctrine

- a. Priority Date: Reservation
- b. Relates to the Land: A permanent homeland for the tribe and its people
- c. Relevant Case Law

- (1) Winters v. United States, 207 U.S. 564 (1908)
- (2) Arizona v. California, 373 U.S. 546, (1963)
- (3) Cappaert v. United States, 426 U.S. 128 (1976)
- (4) United States v. New Mexico, 438 U.S. 696 (1978)
- (5) Yakima Indian Nation v. United States, Civil No. 77-129 (E.D. Wash.)
- (6) State of Washington, Dept. of Ecology v. Acquavella, et al., Civil No. 77-2-01485 (Superior Court, Yakima County, Washington)
- (7) Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 763 F.2d 1032 (CA9 1985), cert. denied 474 U.S. 1032 (1985)
- (8) Colville Confederated Tribes v. Walton, 460 F.Supp. 1320 (E.D. Wash. 1978), aff'd in part, rev'd in part, 64 F.2d 42 (CA9 1981), cert. denied, 454 U.S. 1092 (1981), enforced, 752 F.2d 397 (CA9 1985)
- (9) United States v. Anderson, Civil No. 3643 (E.D. Wash. filed May 5, 1972)

2. Treaty Reserved Rights

- a. Priority Date: Time Immemorial

- b. Relates to right of fishing
- c. Relevant Case Law

- (1) United States v. Winans, 198 U.S. 371 (1903)
- (2) Menominee Tribe v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968)
- (3) Whitefoot v. United States 293 F.2d 658 (Ct.Cl. 1961) cert. denied 369 U.S. 818, 82 S.Ct. 629, 7 L.Ed.2d 784 (1962)
- (4) Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252 (D.D.C. 1972 and 1973)
- (5) Washington v. Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)
- (6) United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974)(the "Boldt decision), aff'd 520 F.2d 676 (CA9 1975), cert. denied, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976)
- (7) Umatilla v. Alexander, 440 F. Supp. 553 (D.Or. 1977)
- (8) United States v. Adair, 478 F. Supp. 336 (D.Or. 1979)
- (9) No Oilport! v. Carter, 520 F.Supp. 334 (W.D. Wash. 1981)
- (10) United States v. Oregon, 657 F.2d 1009 (CA9 1981)
- (11) United States v. Washington (Phase II), 506 F.Supp. 187 (W.D. Wash. 1980), vacated in part, aff'd in part, 759 F.2d 1353 (CA9 1985)
- (12) Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 763 F.2d 1032 (CA9 1985), cert. denied 474 U.S. 1032 (1985)
- (13) Muckleshoot Tribe of Muckleshoot Indian Reservation v. Puget Sound Power and Light Company and City of Auburn, No. 472-72C2V (W.D. Wash.), Order of Oct. 8, 1986
- (14) Joint Board of Control of the Flathead, Mission, and Jocko Irrigation District v. United States 646 F.Supp. 410 (D.Mont.

1986), rev'd 832 F.2d 1127 (CA9, cert. denied, 486 U.S. 1007, 108 S.Ct. 1732, 10 L.Ed.2d 196 (1986))

(15) N.W. Indian Cemetery Ass'n v. Peterson, 565 F.Supp. 591 (N.D. Calif. 1983), 764 F.2d 581 (CA9 1985), 795 F.2d 688 (CA9 1986), rev'd on other grounds sub nom Lyng v. N.W. Indian Cemetery Protection Association, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988)

(16) Muckleshoot v. Hall, 698 F.Supp. 1504 (W.D. Wash. 1988)

### 3. Sovereignty: Control and Management of Water Resources

## II. UNITED STATES V. WASHINGTON

A. Phase I "In exchange for the territory, the tribes retained . . . the right of taking fish at usual and accustomed grounds and stations is further secured . . . (Stevens Treaties)

B. Phase II: " . . . implicitly incorporated in the treaties fishing clause is the right to have the fishery habitat protected from man-made despoliation. . . . "The most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken." U.S. v. Wash., Phase II, 506 F.Supp. at 203.

1. Access to and from the sea
2. An adequate supply of good quality water
3. Sufficient amount of suitable gravel for spawning and egg incubation
4. An ample supply of food
5. Sufficient shelter

C. Impact to the Fish Resource

1. Hydropower Dams



2. **Water Flows**
3. **Forest Practices**
4. **Agricultural Practices**
5. **Urbanization**

### **III. ERA OF COOPERATION: "WIN-WIN"**

- A. **Puget Sound Management Plan "Co-Management"**
- B. **Northwest Power Plan**
- C. **US-Canada Salmon Treaty**
- D. **Watershed Planning**
- E. **Timber-Fish-Wildlife Agreement and Watershed Analysis**
- F. **Puyallup Agreement**
- G. **Puget Sound Water Quality Authority: Nonpoint Planning**
- H. **Chelan Agreement**

### **IV. CHELAN AGREEMENT: A COOPERATIVE WATER RESOURCE MANAGEMENT APPROACH**

- A. **Apprehension to address water resources**
  1. **Cultural and Spiritual Relationship to Water**
  2. **Limitation to future tribal needs**
- B. **However, an Era of Cooperation**
- C. **Management and Consensus v. Litigation-Settlement or Majority rule**
- D. **Risk v. Rights--Flexibility v. Certainty**
- E. **Local/Regional Control v. State Decision-making**
- F. **Protection and Restoration of Instream Flows: Can the Instream Flow Policy and Trust Water Rights Mechanism work to avoid potential litigation?**
- G. **Work Products**

1. **Regional Planning Guidelines**
2. **Critical Situations Guidelines**
3. **Trust Water Rights Mechanism**
4. **Hydraulic Continuity Policy**
5. **Instream Flow Policy**
6. **Draft Groundwater Policy**

**H. Where do we go now?**

1. **Coordination and recommendations to Ecology and the legislature**
2. **Implementation of policies and procedures**
3. **Identification of budget and funding**
  - a. **Administration**
  - b. **Enforcement**
  - c. **Instream Flow Studies**
  - d. **Hydraulic Continuity Studies**
  - e. **Data Management**
  - f. **New regional planning initiatives**
  - g. **Conservation and Trust Water Rights**
4. **Future Policy Development**
  - a. **Water quality/quantity**
  - b. **Linking water resource management with natural resource and land management**
  - c. **Conservation**
  - d. **Continuing Role of the Water Resource Forum**