

5-30-1978

Proposed Findings of Fact

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

JUN 1 1978

J. R. FALLQUIST, Clerk
AB Deputy

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

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

Plaintiff United States of America, through its attorneys,
hereby submits the following proposed findings of fact.

Parties

1. Plaintiff is the United States of America and the jurisdiction of the Court was invoked under Title 28, Section 1345, United States Code.
2. The Spokane Tribe of Indians, as authorized by the Court in an appropriate order, intervened in this case as a plaintiff-in-intervention.
3. Defendants include the State of Washington, which was represented by its Department of Ecology and Department of Natural Resources and all other landowners within the Chamokane Creek basin who might have some claim to the waters of Chamokane Creek, its tributaries and its groundwater basin.

1 Spokane Tribe and Reservation

2 4. The Spokane Indian Reservation is located approximately
3 40 miles northwest of the City of Spokane, Washington in the
4 eastern portion of that state. The Spokane Tribe of Indians is
5 the present day tribal entity which, with respect to the matters
6 that are the subject of this litigation, is the political
7 successor in interest to the tribe which was a party to the
8 Agreement of August 18, 1877. It is recognized by the United
9 States as a currently functioning Indian Tribe maintaining a
10 tribal government. Its membership is determined in accordance
11 with its Constitution and Bylaws as approved by the Secretary of
12 the Interior. There are currently approximately 1,700 enrolled
13 members of the Spokane Tribe, 600 to 700 of whom reside on the
14 reservation. (Tr. 704-705, 720; PE-1)

15 5. Since time immemorial, the Spokanes have used and
16 occupied most of what is now Northeastern Washington State. They
17 are known to have fished as far north on the Columbia River as
18 Kettle Falls and as far south as the Snake River. Except for
19 their annual treks to what is now eastern Montana in search of
20 buffalo, they seldom ventured west of the Columbia or east of
21 Spokane Falls. (Tr. 663, 667, 694, 702)

22 6. The Spokane Tribe was made up historically of three
23 bands: the Upper, Middle and Lower bands. Each of these bands
24 tended to localize their activities in one certain area although
25 they utilized the entire tribal area as necessary in their food
26 gathering. The Upper band lived near the present day site of
27 Spokane, Washington. The Middle Spokanes resided around the
28 confluence of the Spokane and Little Spokane Rivers. The Lower
29 band lived near the confluence of the Columbia River and the
30

1 Spokane River on land which is now the Spokane Indian
2 Reservation. (Tr. 659-661, 665, 670)

3 7. The major food sources of the Spokane Indians were the
4 wild fish, animal and vegetative resources of the area. While the
5 tribal members attempted to vary their diet by gathering such
6 diverse food as deer, buffalo, camas root and bitterroots, fish
7 remained their main item of subsistence. The various waterways
8 which flowed through the area occupied by the tribe, including the
9 Columbia, Spokane and Little Spokane Rivers and Chamokane Creek
10 provided an abundant supply of several varieties of fish. Among
11 the types of fish found in the area were salmon and steelhead
12 trout (which migrated from the Pacific Ocean, up the Columbia
13 River to the upper reaches of the Columbia's tributaries to spawn)
14 and native fresh water fish including trout. The areas chosen by
15 the bands as their more or less permanent sites of residence were
16 chosen primarily because of their proximity to excellent fishing
17 spots. The Upper Spokanes lived near Spokane Falls because of the
18 fact that the salmon and steelhead couldn't ascend the falls and
19 were forced to congregate in pools below the falls making this
20 area a prime one for fishing. The Middle Spokanes chose the
21 confluence of the Spokane and Little Spokane Rivers because that
22 too was a major fishing spot. The Lower Spokanes lived from the
23 confluence of the Columbia and Spokane Rivers to Chamokane Creek
24 for the same reason. There was generally good fishing all along
25 the Spokane River to Chamokane Creek from its mouth upstream.
26 (Tr. 465, 661-662, 665, 667, 674-675, 685, 695, 809; PE-84, p. 8-9)

27 8. The United States claimed the area now embraced within
28 the State of Washington by discovery and settlement and by the
29 treaty extinguishment of conflicting claims of Spain (Treaty of
30 February 22, 1819, 8 Stat. 252), Russia (Convention of April 17,

1 1824, 8 Stat. 302), and Great Britain (Treaty of June 15, 1846, 9
2 Stat. 869). By the Act of August 14, 1848, 9 Stat. 323, the
3 United States established the Oregon Territory and provided that
4 nothing contained in said Act "shall be construed to impair the
5 rights of person or property now pertaining to the Indians in said
6 Territory, so long as such rights shall remain unextinguished by
7 treaty between the United States and such Indians" By the
8 mid-1850s, the heavy influx of white settlers into what is now the
9 State of Washington was causing the United States great concern
10 over their safety. As a result, Isaac Stevens, the first Governor
11 and Superintendent of Indian Affairs of the Washington Territory
12 was directed to negotiate treaties with the various tribes under
13 his jurisdiction with the purpose of extinguishing Indian claims
14 to the land in Washington Territory, to establish reservations for
15 the Indians and to provide for peaceful and compatible coexistence
16 of Indians and non-Indians in the area. The United States was
17 concerned with forestalling friction between Indians and settlers
18 and between settlers and the government. Governor Stevens
19 proceeded with his mission and between 1854 and 1856 negotiated
20 treaties with many of the Tribes in what is now Washington,
21 Oregon, Idaho and Montana. Each of those treaties provides for
22 the cession of land to the United States, a reservation of certain
23 land for the Indians and a guarantee of certain rights, among them
24 "[t]he right of taking fish, at all usual and accustomed grounds
25 and stations" See, e.g. 10 Stat. 1132, 12 Stat. 927 etc.

26 In 1855, Governor Stevens journeyed to what is now
27 Montana to treat with the Blackfeet. It was his stated intention
28 to meet with the Colvilles, Spokanes and Coeur d'Alenes on his
29 return trip. Having completed negotiating a treaty with the
30 Blackfeet, however, Stevens received word that a major Indian war
31

1 had begun in the western portion of the Oregon and Washington
2 territories and he deemed it advisable to return to the Puget
3 Sound area immediately. As a result, the Spokanes did not receive
4 the opportunity to negotiate for a "Stevens treaty" with its
5 specific guarantee of Indian rights which included the fishing
6 right. (PE-50)

7 9. In 1877, certain Pacific Northwest Indian Tribes were
8 again at war with the United States and wanted the bands of the
9 Spokane Tribe to join them. In order to forestall such a move,
10 the Commissioner of Indian Affairs directed Colonel E. C. Watkins,
11 an Indian Inspector in charge of all agencies in the Washington
12 Territory, to give his attention to gathering the Indians upon
13 permanent reservations. To this end, Watkins arranged to meet
14 with some of the tribes at Spokane Falls in August, 1877. The
15 council lasted from August 16 to August 18, 1877, and was attended
16 by the Lower Spokanes, Chief Garry of the Upper Spokanes and
17 representatives of several other tribes. The negotiations were
18 cordial with the representatives of the United States stressing
19 the need for peace and for the Indians to settle down on a
20 reservation and the Indians emphasizing that they wanted to remain
21 in their native areas where they would be able to continue to fish
22 while they learned to farm. An agreement was entered into between
23 the United States and the Lower Spokanes on August 18, 1877.

24 Under the terms of that agreement, the Spokanes agreed to accept a
25 reservation described as follows: "Beginning at the source of the
26 Chamokan (sic) Creek in Washington Territory thence down said
27 creek to the Spokane River, thence down said river to the Columbia
28 River, thence up the Columbia River to the mouth of the Nimchin
29 Creek, thence easterly to the place of beginning." The Indians
30 further agreed "to go upon the same by the first of November next,
31 with the view of establishing our permanent homes thereon and
32

1 engaging in agricultural pursuits." On August 23, 1877, Watkins
2 reported the agreement to the Commissioner of Indian Affairs and
3 on November 26, 1877, he reported that he had been relocating the
4 Indians on the reservation. (Tr. 669-670, 686; PE-57; PE-63)

5 10. It is evident from the records which were kept of the
6 council proceedings, from the correspondence concerning the
7 negotiations and from what is generally known of the history of
8 that era, that during the treaty negotiations, a primary concern
9 of the Indians whose way of life was so heavily dependent upon the
10 harvesting of fish, was that they be allowed to remain near their
11 usual and accustomed fishing places. It was the intention of the
12 United States Government, in negotiating the Agreement of August
13 18, 1877, to make the Spokane Indians agriculturalists, although
14 not to restrict them to that, to diversify Indian economy, to
15 teach western skills and trades to the Indians and to accomplish a
16 transition of the Indians into western culture. There was no
17 intent, however, to prevent the Indians from continuing to gather
18 fish as their main food item. In fact, the Indians were
19 encouraged to continue their fishing so that the United States
20 would not have to assume the financial burden of feeding the
21 Indians while they learned to be farmers. The site of the Spokane
22 Indian Reservation was selected, therefore, as a permanent home
23 for the Spokane Indians because it had been their home since time
24 immemorial, and because it contained plentiful fisheries to
25 sustain the Indians while they developed their land and water
26 agriculturally. This combination of fish, water and land was
27 essential to their future.

28 11. In 1880, the concern of the Federal Government was
29 focused on getting formal approval for the then existing Spokane
30 Indian Reservation and coming to some sort of an agreement with
31 the Middle and Upper Spokanes concerning where they would be
32

1 located. By an order dated September 3, 1880, Brigadier General
2 Howard directed the Spokane Reservation be protected against
3 settlement until surveyed or until he received instructions to the
4 contrary. In his order, General Howard noted that Watkins had
5 promised the Spokanes an exclusive reservation and that the
6 Indians were disturbed by attempts of whites to move on to the
7 reservation. General Howard's action was discussed in a letter
8 dated November 3, 1880, from William J. Pollock, Indian Inspector,
9 to the Secretary of the Interior. Pollock noted the dependence of
10 the Spokanes generally on fishing, the proximity of the Spokane
11 Reservation to the good fishing spots and recommended that the
12 reservation be enlarged so that the rest of the Spokanes could
13 live there also. During the next year, there were several
14 exchanges of correspondence between government officials aimed at
15 formalizing the establishment of the Spokane Reservation. These
16 efforts were eventually successful and on January 18, 1881,
17 President Rutherford B. Hayes signed an Executive order which set
18 aside and reserved for the use of the Spokane Indians the
19 following described area:

20 Commencing at a point where Chemakane (sic)
21 Creek crosses the forty-eighth parallel of
22 latitude; thence down the east bank of said
23 creek to where it enters the Spokane River;
24 thence across said Spokane River westwardly
25 along the southern bank thereof to a point
26 where it enters the Columbia River; thence
27 across the Columbia River, northwardly along
28 its western bank to a point where said river
29 crosses the said forty-eighth parallel of
30 latitude; thence east along said parallel to
31 the place of beginning.

(Tr. 27-28; PE-52; PE-53; PE-54; PE-56; PE-3-1-74-17)

32 12. By letter dated July 27, 1886, John V. Wright was
instructed by the Commissioner of Indian Affairs to meet with the
Upper and Middle Spokanes and to try to get them moved onto a
reservation. An agreement was entered into on March 18, 1887.

1 The agreement was ratified by Congress on July 13, 1892. Although
2 this agreement provided that the Upper and Middle Spokanes would
3 move to the Coeur d'Alene Reservation, it is evident from the
4 parley and supporting documents that the agreement was actually
5 that they would move to the Coeur d'Alene, Jocko and Colville
6 Reservations. The 1887 parley ended with assurances that they
7 could move to the Spokane or "Lot's" Reservation and most of the
8 Middle Band did end up on the Spokane Reservation. (Tr. 671;
9 PE-48; PE-49; PE-51; PE-62)

10 13. The eastern boundary of the Spokane Indian Reservation is
11 the east bank of Chamokane Creek. The inclusion of the entire
12 creek within the boundaries of the reservation was intentional and
13 reflects the importance that the creek has had to the life of the
14 Spokane Tribe since time immemorial. Historically the Chamokane
15 Creek area was used as the Tribe's winter quarters. During the
16 summer, the Indians would gather camas and bitterroots and dry
17 salmon and store it near Chamokane Creek for winter use. In the
18 fall, the tribe would move to the Chamokane Creek area where they
19 could take advantage of its fresh, pure water which would not
20 freeze during the winter and they would be able to fish for fresh
21 trout. There were three different wintering sites on Chamokane
22 Creek which were used. The first was located at the mouth of the
23 creek. The second was near the present Boise Cascade veneer mill
24 (and was known as SKOF - TA - WEH). The third site was a little
25 above the bridge at Ford, Washington (and was known as
26 CHIMOCANE). (Tr. 665-666, 683)

27 14. In the years immediately following the agreements of 1877
28 and 1887, the fishing on and around the Spokane Indian Reservation
29 remained good. About 1907 or 1908, however, Little Falls dam was
30 built which stopped the salmon and steelhead runs in the Spokane
31
32

1 River above the dam. Later, the Grand Coulee Dam was built and
2 after that, no more salmon or steelhead runs appeared in
3 reservation waters. (Tr. 674-675)

4 15. Fish continue to be a large part of the diet of most
5 Spokane Indians. Some tribal members still smoke and dry fish and
6 use them as their staple food item. Virtually every male member
7 of the Spokane Tribe has fished or will fish on the reservation
8 sometime during his lifetime. (Tr. 763, 809, 828)

9 16. Early efforts to turn the Indians' attention to farming
10 were for the most part unsuccessful due to the problems involved
11 with clearing the land and bringing in irrigation water. While
12 individual Indians have managed to get relatively small tracts
13 under cultivation, only a few have irrigated their lands and it
14 has been only recently that the Tribe itself found large scale
15 agricultural development of land financially feasible. While the
16 most feasibly irrigable lands are in the Chamokane Creek basin,
17 the Tribe has chosen to protect and preserve Chamokane Creek as a
18 fishing, recreational and esthetic tribal resource rather than to
19 deplete and diminish it by the use of its waters for irrigation.
20 (Tr. 688, 696, 719; PE-37)

21 17. The Spokane Indian Reservation, as set aside on August
22 18, 1877, contained approximately 154,898 acres. This land was
23 held in trust by the United States for the use and benefit of the
24 Spokane Tribe under 25 U.S.C. 177. By the beginning of the
25 Twentieth Century, however, the government had begun to make
26 inroads on the property rights as reserved for the Indians. By
27 the Act of May 27, 1902 (32 Stat. 266) the mineral lands on the
28 Spokane Reservation were opened to entry by non-Indians. Lands
29 allotted to Indians, used by the government or used for school
30 purposes were excluded. This act was amended by the Act of June
31

1 19, 1902 (32 Stat. 744) which directed the Secretary of the
2 Interior to make allotments on the Spokane Reservation and to open
3 the remainder of the reservation to purchase under the mining
4 laws. There is no evidence that allotments actually took place
5 under this act. (PE-46; PE-47; DE-28, P. 987)

6 18. On May 29, 1908, Congress passed Public Law 157 which was
7 entitled "An Act to authorize the Secretary of the Interior to
8 sell and dispose of the surplus, unallotted agricultural lands of
9 the Spokane Indian Reservation, Washington, and for other
10 purposes." (35 Stat. 458). Under the provisions of that act, the
11 Secretary of the Interior was authorized and directed to cause
12 allotments of land to be made on the Spokane Reservation. After
13 the completion of the allotment process, the Secretary was to see
14 that the surplus land was classified as either agricultural or
15 timber. The land classified as agricultural was then to be opened
16 to non-Indian settlement under the provisions of the homestead
17 laws under conditions as prescribed by the President. The land
18 classified as timber land was to remain in trust for the benefit
19 of the tribe. The act closed with the provision that "nothing in
20 this Act shall be construed to deprive said Indians of the Spokane
21 Indian Reservation, in the State of Washington, of any benefits to
22 which they are entitled under existing treaties or agreements not
23 inconsistent with the provisions of this Act." Pursuant to this
24 act, allotments of land were made to individual Indians, the land
25 to be held in trust by the United States for their benefit.

26 Allotments were made to approximately 600 individuals,
27 encompassing between 60,000 and 70,000 acres. The Commissioner of
28 Indian Affairs, acting for the Secretary of the Interior then
29 ordered that the remaining land be classified as either timber or
30 agricultural. On June 15, 1909, Clair Hunt and M. F. Nourse, the
31

1 classification commissioners, submitted their report to the
2 Commissioner of Indian Affairs. In this report, they classified
3 82,647.5 acres as timberland and 5,781.22 acres as agricultural.
4 Most of the agricultural land was located on the eastern portion
5 of the reservation. In a letter dated June 15, 1909, which
6 accompanied the surplus land classification schedule to the
7 Commissioner of Indian Affairs, the commissioners explained how
8 they arrived at their final acreage figures. They stated that
9 they had relied mainly on two sources of data, a soil survey and
10 Forest Service input. The Forest Service's contribution was
11 apparently limited to its opinion that the land eventually
12 described as agricultural was not suitable for inclusion in a
13 forest reserve. No detailed soil classification study as we know
14 them today was attempted nor was any consideration given to the
15 possibility of irrigating the land. (Tr. 812-813, 1346; PE-44;
16 PE-101, PE-102)

17 19. On May 22, 1909, President Taft issued a proclamation (36
18 Stat., Part 2, 2494) in which the procedures were specified
19 whereby the non-mineral, unallotted lands classified as
20 agricultural within the Spokane Reservation were opened to
21 homesteading. In the years that followed, several non-Indian
22 families purchased tracts of this land receiving patents from the
23 United States. Not all of the land eligible for homesteading,
24 however, was claimed. (Tr. 1338; PE-43)

25 20. On September 19, 1934, Secretary of the Interior Harold
26 L. Ickes approved a recommendation that the undisposed of land on
27 the Spokane Reservation, among others, be temporarily withdrawn
28 from disposal. This action was evidently taken so that the matter
29 of the lands permanent restoration to tribal ownership could be
30 given consideration with reference to the Indian Reorganization
31

1 Act, Act of June 18, 1934 (43 Stat. 984). See 54 I.D. 559,
2 562-563.

3 21. By the Act of May 19, 1958 (72 Stat. 121), the land on
4 the Spokane Reservation which had been eligible for homesteading
5 but which had never been claimed was restored to tribal
6 ownership. Under this act, seventy-seven acres were restored to
7 tribal ownership within the Chamokane Creek basin. (Tr. 813,
8 1338; PE-98; PE-99)

9 22. At no time during the period 1909 to 1958 as there any
10 difference in the management, administration or crediting of
11 revenues by the Bureau of Indian Affairs between the unhomesteaded
12 land and general tribal land. Unhomesteaded land was treated the
13 same as general tribal land. (Tr. 904; Response of the United
14 States to Defendant's Reconstruction of the Record, p. 2)

15 23. Subsequent to the allotment of land to individual
16 Indians, a limited amount of this land was sold to non-Indians.
17 Beginning in the 1930s, the Spokane Tribe undertook a program of
18 purchasing allotments which belonged to individual Indians and had
19 remained in trust status, allotments which had passed to
20 non-Indian ownership and also purchasing land which had been
21 homesteaded. By the Act of June 10, 1968 (82 Stat. 174), as
22 amended by the Act of May 21, 1974 (88 Stat. 142 [25 U.S.C. 487]),
23 the Secretary of the Interior was authorized to purchase for the
24 tribe, lands within the Spokane Reservation. The purchased land
25 is returned to trust status where necessary. Under this act,
26 approximately 2,523.44 acres have been returned to the tribe and
27 trust status and of this amount, 1,798.11 acres are within the
28 Chamokane Creek basin. Once returned to trust status, this land
29 is managed the same as any other tribally owned land. (Tr. 814,
30 1339-1341; PE-97; PE-99)

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32 Page 12 - PROPOSED FINDINGS OF FACT

1 24. As of June 1, 1974, the land status of the Spokane
2 Reservation was as follows:

3 Tribal Trust	100,221A
4 Individual Trust	29,640A
5 Fee Ownership	21,683A
6 Government under 7 Administration 8 by BIA for Tribe	3,085A

8 (Tr. 1343; PE-100)

9
10 Chamokane Creek System

11 25. The Spokane Indian Reservation is located in northeastern
12 Washington State at the confluence of the Columbia River and the
13 Spokane River. As a result of Grand Coulee Dam, the Columbia
14 River backs up along the western edge of the reservation to form
15 the Columbia River arm of Franklin D. Roosevelt Lake. The dam
16 also causes the Spokane River to back up as far as Little Falls,
17 forming the Spokane arm of F.D.R. Lake. The reservation
18 topography varies from broad valleys and high benches on the east
19 to mountains in the north central area. High areas and meadow
20 valleys are predominant in the western part and in some of the
21 south slope areas. Relatively narrow benches skirt the Spokane
22 and Columbia arms of F.D.R. Lake with basaltic bluffs or steep
23 sand slopes forming the rim. The reservation varies in elevation
24 from 1,300 feet to over 4,000 feet. The northern portion of the
25 reservation is timberland, the southern part or southwest slopes
26 are open benches. (Tr. 31, 748, 859; PE-1; PE-3; PE-82;
27 PE-3-6-74-29, p. 6)

28 26. The major sources of surface water for the Spokane
29 Reservation are the Columbia and Spokane Rivers. In addition,
30 there are nine drainage basins on the reservation. Excluding the
31
32

1 two main rivers, Chamokane Creek and its drainage basin constitute
2 more than one half of the total on-reservation water resources.
3 (Tr. 24-25; PE-2; PE-3-6-74-29, p. 4)

4 27. Chamokane Creek has a drainage area of 178 square miles
5 with its headwaters in the Huckleberry Mountains north of the
6 reservation. The creek flows eastward through the Camas Valley
7 (Upper Chamokane area) north of and parallel to the north boundary
8 of the reservation to a point near the town of Springdale,
9 Washington, where it turns southeastward to the north line of the
10 reservation. The creek then flows south and southwesterly through
11 the mid-Chamokane or Walker's Prairie area to Chamokane Creek
12 Falls, forming the east boundary of the reservation. From the
13 falls, it flows south through the Lower Chamokane area to the
14 Spokane River. The drainage basin generally parallels the creek
15 and varies in width from about seven miles wide at the northwest
16 end to about three miles wide just north of the mouth. (Tr. 33;
17 PE-2; PE-10; PE-3-6-74-29, p. 9)

18 28. Chamokane Creek is unique in several respects. Although
19 the flow of the creek is continuous at the north line of the
20 reservation to a point about two miles south, beginning at this
21 point and for the next five miles the stream is intermittent,
22 being constantly dry during the summer months. Then, beginning
23 just above Ford, Washington, and for the next three miles, massive
24 springs have a regular flow throughout the year. These springs
25 feed the creek which is again continuous to the Spokane River.
26 This unique intermittent nature of the creek's flow was recognized
27 by the Spokane Tribe who called the creek Tshiwesch or "big stream
28 coming out of the ground." Likewise, the area just above Ford,
29 Washington was known as Chimocane meaning "over and under." (Tr.
30 26, 38, 306, 661-664; PE-3-6-74-29, p. 9)

31

32 Page 14 - PROPOSED FINDINGS OF FACT

1 29. The massive springs area is made of several large springs
2 comprising what is known as the Hatchery Springs, a group of large
3 springs comprising what are called Galbraith Springs and a number
4 of minor springs. Once the water leaves these springs, it flows
5 some three miles to the Chamokane Creek Falls. After the falls,
6 the creek flows another mile and one half to the Spokane River.
7 (Tr. 34).

8 30. The Chamokane Creek basin was formed through prehistoric
9 glacial action. While the area was affected by two glacial
10 periods, it is the later period which more directly resulted in
11 the basins current geological features. The second period
12 occurred approximately 30,000 to 40,000 years ago and it was
13 during that period that the erosional trough which generally forms
14 the basin was gouged out. It was also at this time that the
15 glacier deposited the rock it was carrying into the trough filling
16 it with what is now the basins overburden. (Tr. 44, 47, 52,
17 258-259; PE-4, PE-4a; PE-5)

18 31. The geological make of the Chamokane Creek basin clearly
19 reflects its glacial history. As the later glacier moved
20 southward carving out the trough, it was stopped on the west by
21 basalt and on the east by granite, which today are the respective
22 basin boundary walls. The glacier was stopped in its southward
23 movement by a granite dike which is located approximately one and
24 one-half miles north of the mouth of Chamokane Creek. This
25 granite dike forms the southern boundary wall of the basin. These
26 three physical barriers act to close the basin and keep ground
27 water from flowing out the sides. The entire basin is underlain
28 with granite bedrock. As the glacier retreated, it left a lateral
29 moraine to a depth of 150 feet which blocks off Camas Valley
30 thereby precluding any appreciable ground water flow into the
31

1 Chamokane Creek basin from that area. (Tr. 55, 185-186, 260;
2 PE-5; PE-6; PE-7; PE 27-1-7; PE-3-6-74-29, p. 10)

3 32. As the later glacier retreated, it dropped the material
4 it had picked up as it moved south thereby filling the basin with
5 its present overburden. The glacial recession tended to rinse out
6 the upper layers of the overburden resulting in tighter lower
7 layers and looser upper layers. The looser upper layer of
8 overburden is non-uniform, varies from 20 feet to 50 feet thick
9 and is made up of porous gravel and sand. The lower, tighter
10 layer is more uniform, varies from being quite thin on the edges
11 to as deep as 600 feet, is on the average between 50 feet to 100
12 feet thick and is made up of sand with some gravel and clay.
13 Ground water is found within both layers. While the lower layer
14 has more water in it, it does not yield it readily. The upper
15 layer, in contrast, does yield its water readily. The lower layer
16 will yield about 3 to 15 gpm and is generally used for domestic
17 purposes, the upper layer will yield around 1,000 to 1,500 gpm in
18 a typical well. (Tr. 47, 52, 55, 71-72, 199-201, 407-408, 1044;
19 PE-8; PE-9; PE-3-6-74-29, pp. 13-19; United States Reconstruction
20 of Record, p. 5)

21 33. Both the hydraulic gradient and the surface gradient in
22 the Walker's Prairie area are approximately 15 feet to the mile.
23 This drops off near Ford and from there to the falls averages
24 about 36 feet to the mile. The general direction of the gradient
25 is south and southwest. (Tr. 19, 48, 72)

26 34. The ground water flow in the Chamokane Creek basin from
27 the north line of the reservation to the Massive Springs area is
28 in a generally southwesterly direction. (Tr. 64, 187, 322, 902,
29 1309; United States Reconstruction of Record, pp. 4-5)

1 35. As the ground water flows southwesterly through the
2 Chamokane Creek basin, it surfaces either at Massive Springs or at
3 the falls. The reason for the surfacing at Massive Springs is
4 that at that point, the ground water surface intercepts the land
5 surface forcing a ground water discharge. The discharge at the
6 falls is caused by the southwesterly flowing water encountering
7 the granite dike which forces the water up and over the dike as a
8 falls. (Tr. 53-54, 1020; PE-9; United States Reconstruction of
9 Record, p. 5)

10 36. There is no evidence of any appreciable faults either
11 along the eastern or western basin boundaries or at the southern
12 dike. As a result, the Chamokane Creek basin must be considered
13 a closed basin whose total discharge of water can be measured
14 immediately below the falls. (Tr. 193, 871, 899; PE-41)

15 37. All of the water entering the Chamokane Creek basin does
16 so in the form of precipitation, either rain or snow. This
17 precipitation either sinks into the ground, runs off or is burned
18 up through evaporation or evapotranspiration. All of the
19 precipitation that enters the drainage basin is eventually
20 measured below the falls minus any manmade depletions, evaporation
21 or evapotranspiration. That portion of the precipitation which
22 sinks into the ground and joins the ground water system eventually
23 exists through Massive Springs. (Tr 67; United States
24 Reconstruction of Record, pp 5-6)

25 38. In the Huckleberry Mountains north of the reservation,
26 snow accumulates during the winter with some runoff occurring at
27 that time but most coming in the spring. As the snow melts,
28 numerous tributary streams bring the water down into Camas Valley
29 where it joins precipitation that has fallen directly into the
30 valley and either sinks into the ground or flows into Chamokane
31

1 Creek. That portion of the water joining the Camas Valley
2 underground reservoir remains in that area due to a lateral
3 moraine separating Camas Valley from the rest of the Chamokane
4 Creek basin. That portion of the runoff joining Chamokane Creek
5 flows out of Camas Valley into Walker's Prairie. Of the water
6 reaching Walker's Prairie, some enters the Chamokane Creek
7 groundwater system as recharge. Water not recharging the aquifer
8 flows out of Walker's Prairie over the falls, usually in the form
9 of spring floods. (Tr. 57, 60-69, 73, 864-865; PE-3; PE-10;
10 United States Reconstruction of Record, pp. 5-6)

11 39. Precipitation also falls on Walker's Prairie and the
12 hills surrounding the prairie. All of the water falling on the
13 hills or the prairie that is not lost to evaporation or
14 evapotranspiration either sinks into the aquifer or, in reaching
15 the Creek, flows out of the system during the spring runoff. The
16 amount of recharge, like that from Camas Valley, while averaging
17 out and being quite uniform, does vary from year to year because
18 of changing climatic patterns, freezing or nonfreezing of surface
19 soils, speed or slowness of spring thaw and runoff and other
20 factors. (Tr. 58-59, 67-69, 172, 361; PE-3-6-74-29, pp. 9-11;
21 United States Reconstruction of Record, pp. 5-6)

22 40. Thus, in a normal water year, precipitation in and around
23 the basin contributes a significant recharge to the underground
24 reservoir. Most of the water which each year recharges the
25 aquifer (except that withdrawn by wells finds its way out of the
26 Massive Springs and over the Chamokane Creek Falls. Thus the
27 total flow of Massive Springs equals the "base flow" of Chamokane
28 Creek and, because of the nature of the aquifer and its spring
29 outlets, the total flow is quite uniform throughout the year.
30 During wet seasons the Creek is enlarged by surface flows. This
31 "base flow" and
32

1 especially the dry weather flow is exclusively the outflow of the
2 recharge and therefore varies with the annual amount and nature of
3 recharge. (Tr. 62, 70, 76, 206-208; PE-31; PE-3-6-74-29, pp.
4 9-11; United States Reconstruction of Record, pp. 5-6)

5 41. The total output of the Chamokane Creek drainage system
6 is measurable at the USGS gage below the falls and measurements
7 taken there indicate an average flow of 34,000 to 35,000 acre-feet
8 per year. The difference between the 35,000 acre-feet total
9 discharge and the flow from Massive Springs is the water which
10 surfaces at the falls and that amount of water which escapes the
11 system by flowing down Chamokane Creek, usually in spring floods.
12 This latter water remains surface flow at all times, never joining
13 the ground water system. There is no significant augmentation of
14 the stream flow below the falls because the runoff from the sides
15 of the rather steep canyon contributes little water to the flow of
16 the stream, especially in the summer. (Tr. 60-61, 67, 134, 206,
17 268, 851; PE-3; PE-31)

18 42. Since the USGS gaging station located below Chamokane
19 Creek falls was not established until February 1971, there are no
20 actual records for the total flow of lower Chamokane Creek until
21 that time. Records from that station indicate that the following
22 were the low month flows of lower Chamokane Creek for the period
23 since 1971:

<u>Year</u>	<u>Ave. stream flow low month</u>	<u>Minimum</u>
1971	26.1 cfs	23 cfs
1972	25.2 cfs	19 cfs
1973	19.7 cfs	17 cfs
1974	34.7 cfs	33 cfs
1975	37.8 cfs	34 cfs

1	1976	29.6 cfs	28 cfs
2	1977	20.5 cfs	17 cfs

3 1973 and 1977 reflect unusually dry years with a minimum of runoff
4 and recharge especially in the winter and spring of 1977. The
5 base flow of the stream has remained remarkably stable. (Tr. 20;
6 PE-15, 15A; PE-16, 16A; PE-17A-S3; Affidavit of Walter Woodward,
7 p. 5)

8 43. Based primarily on the interpolation of the existing flow
9 records of Fish Hatchery Springs, the following average base or
10 daily mean flows for Lower Chamokane Creek can be calculated for
11 the years prior to 1971:

12	1931-1970	average of 33 cfs
13	1961-1970	average of 30 cfs

14 (Tr. 85; PE-19, 19A; PE-36)

15 44. There is a direct relationship between the extent of
16 precipitation, the amount of water in the underground reservoir
17 and the base flow of Chamokane Creek. There has been a decline in
18 the water surface elevations and the base flow of the creek in the
19 years 1971 to 1974. There has also been a decline in the amount
20 of precipitation during this period. This drop in precipitation,
21 however, accounts for only part of the decline in water surface
22 elevations and base flow. (Tr. 361-363; PE-24, 24A; PE-25, 25A)

23 45. There has been in recent years, a steady increase in both
24 surface and ground water withdrawals by non-Indians both on and
25 adjacent to the Spokane Reservation. The State of Washington has
26 issued certificates and permits for both surface and ground water
27 withdrawals within the Chamokane Creek basin both on and off the
28 reservation. To date, the State has issued certificates
29 authorizing a total withdrawal of 20.03 cfs, and permits for
30 another 5.95 cfs. This is a total of 25.98 cfs. The total
31

1 effective reduction in Chamokane Creek from these uses is 6.62
2 cfs. In addition, there are applications pending for 31.74 cfs
3 which would effectively reduce Chamokane Creek by 9.33 cfs. Thus,
4 if all existing certificates, permits and applications were
5 utilized to their maximum, Chamokane Creek would be effectively
6 reduced by a total of 15.96 cfs. (Tr. 77, 88-89, 124-25; PE-14;
7 PE-32; PE-33)

8 46. If the withdrawals as authorized by th State of
9 Washington had not taken place during the period 1971 to 1974, the
10 base flow of Lower Chamokane Creek would have been an average for
11 that period of 33 cfs. (Tr. 87; PE-18, 18A; PE-23A-C)

12 47. The closed nature of the basin, the fact that the ground
13 water in the basin generally flows southwest to the springs and
14 the falls and the fact that the groundwater flows to and out of
15 the springs means that any ground water withdrawals in the
16 Walker's Prairie area or the diversions of water from any of the
17 streams running into it, affects the flow of the springs and hence
18 the flow of Chamokane Creek. (Tr. 77)

19 48. Defendant James R. Newhouse owns land directly to the
20 east of Chamokane Creek approximately two miles northeast of the
21 town of Ford, Washington. In 1969, Newhouse drilled a well and
22 began withdrawing water from the ground water reservoir. In 1970,
23 Newhouse's pumping began to be monitored by comparing his
24 withdrawals with the drop in water surface elevation in the Hill
25 well which was located a quarter mile to the west, on the west
26 side of Chamokane Creek. It was discovered that during the summer
27 when Newhouse was not pumping, the rate of decline in the Hill
28 well was fifteen thousandths of a foot per day. Once Newhouse
29 commenced pumping, the rate of decline in the Hill well
30 accelerated to from 30 to 50 thousandths of a foot per day, or
31

1 between two and three times the normal daily decrease. Once the
2 Newhouse well ceased pumping, the Hill well resumed its normal
3 decline but did not return to previous water levels. Defendant
4 Newhouse's pumping has drawn water from the under ground sources
5 which comprise the supply for the springs and lower Chamokane
6 Creek. Because the Newhouse well and the springs are
7 hydraulically connected, defendant Newhouse's pumping has caused
8 the water level in lower Chamokane Creek to drop. (Tr. 93-96,
9 1360-1361; PE-18, 18A; PE-23A-C)

10 49. Defendants Robert J. and Dorothy Seagle own land on the
11 east and southeast side of Chamokane Creek. Seagle had three
12 wells drilled in 1951 and one in 1956 or 1957. The later well has
13 never been used. The location of these wells adjacent to
14 Chamokane Creek and within the Chamokane Creek basin put them in
15 the same hydraulic relationship with the springs and lower
16 Chamokane Creek and within the Chamokane Creek basin put them in
17 the same hydraulic relationship with the springs and lower
18 Chamokane Creek as the Newhouse well. Thus, because the Seagle
19 wells are hydraulically connected to the springs and lower
20 Chamokane Creek, the pumping of these wells has caused the water
21 level in lower Chamokane Creek to drop. (Tr. 86, 1223-1227)

22 50. Defendants Smithpeter own land on the Spokane Indian
23 Reservation to the west of and adjacent to Chamokane Creek
24 approximately one mile north of the falls. The Smithpeter
25 withdrawal is a surface diversion directly from Chamokane Creek.
26 It has an immediate effect of withdrawing 2 1/2 cfs from the
27 stream just one mile above the falls. This has an immediate
28 effect of withdrawing up to 2-1/2 cfs from the stream and has the
29 direct effect of decreasing the flow of lower Chamokane Creek by
30 the exact amount being pumped. (Tr. 34, 99, 845, 901; PE-96;
31 DE-10)

1 51. Defendant Dawn Mining Company owns land on the Spokane
2 Indian Reservation adjacent to and west of Chamokane Creek. Dawn
3 Mining Company has a surface diversion of approximately 1 cfs from
4 the creek which has the immediate and direct effect of reducing
5 the flow in lower Chamokane Creek by 1 cfs. (Tr. 100, 840)

6 52. Any and all other defendants with ground water
7 withdrawals within the Chamokane Creek basin below Camas Valley
8 are found to be hydraulically connected with the Massive Springs
9 and lower Chamokane Creek. Any withdrawal through those wells has
10 the direct effect of reducing the flow in lower Chamokane Creek.
11 Any and all defendants making surface withdrawals from Chamokane
12 Creek or any of its tributaries anywhere within the Chamokane
13 Creek basin have the direct effect of reducing the flow in lower
14 Chamokane Creek. (Tr. 77, 105-106, 122-123; PE-14; PE-32; PE-33;
15 PE-3-6-74-29, pp. 4, 10)

16 53. While the ground water within the Chamokane Creek basin
17 percolates down gradient through the overburden from the upper
18 basin to the springs and the falls, it does so slowly thereby
19 creating a time lag in the effect a given withdrawal will have on
20 the flow of the springs or lower Chamokane Creek. There is a
21 delay of from nine months to one year in the effect on the springs
22 of pumping in the Seagle-Newhouse area. The farther upstream the
23 pumping takes place, the longer the time lag. At the north line
24 of the reservation or above, the delay may be up to two years.
25 Withdrawals near the springs have no delay in their effect.
26 Therefore, the reduction of spring flow from ground water
27 withdrawals at any given moment in time is a function of all
28 withdrawals but figuring in the time lag of each withdrawal.
29 Tr. 98, 129, 212, 131, 133, 396, 875)

1 54. Thus, the evidence substantiates that there is a direct
2 relationship between precipitation (as measured at both Wellpinit
3 and the two snow measuring stations) and the water levels in the
4 Walker's Prairie area monitoring wells. Further, there is a
5 relationship between those water levels and the flow at Fish
6 Hatchery Springs. Through the use of the precipitation records
7 and the well level measurements, qualified hydrologists are able
8 to predict with relative accuracy the base flow of lower Chamokane
9 Creek. (Tr. 869-870; PE-3-6-74-29, p. 11; PE-18, 18A; PE-19, 19A;
10 PE-24, 24A; PE-25, 25A; PE-26; PE-3-6-74-29, pp. 76-88; Affidavit
11 of Walter L. Woodward, p. 4)

12 Claims of the United States and Spokane Tribe of Indians

13 Claim No. 1

14 55. Historically, Chamokane Creek was the spawning grounds of
15 salmon and steelhead trout as well as the permanent home for
16 several species of native trout and other fish. Presently, the
17 creek is inhabited by German brown trout, rainbow trout and
18 eastern brook trout, as well as several varieties of suckers and
19 sculpins. (Tr. 463-465, 675, 695; PE-64, pp. 20-22)

20
21 56. The numbers and volume of organisms in Chamokane Creek
22 which can be utilized by trout as food compare favorably with
23 those found in other streams containing sizeable trout
24 populations. Any reduction in flow in the creek during the
25 summer, however will expose areas of the stream thus reducing the
26 food production potential. (Tr. 426, 430, 450, 491; PE-64, p.20)

27 57. The temperature of the water flowing in Chamokane Creek
28 is inversely proportional to the volume, i.e. other factors
29 remaining constant, more water means a lower temperature. The
30 water temperature is normally a fairly constant 47° F. at the
31

1 springs and begins to rise as the water moves downstream. During
2 the period July 18, to August 1, 1973, for example, and during hot
3 weather periods almost every year the maximum water temperature in
4 lower Chamokane Creek exceeded 68 degrees for substantial periods
5 of time and exceeded 60 degrees for longer periods of time. (Tr.
6 174, 451-452, 483, 772-773; PE-64, pp. 5-14, 18)

7 58. Trout of the species found in Chamokane Creek have an
8 optimum temperature range of 50° F. to 60° F. Within this range,
9 trout will grow and put on weight. The maximum water temperature
10 for a successful trout habitat is 68° F. When water temperatures
11 rise above 66° F, trout cease feeding. As the water temperature
12 rises above 68° F, trout metabolism begins to increase and the
13 fish begin to undergo physiological stress. As the stress
14 increases, the trout are no longer able to maintain their position
15 in the creek and are forced downstream, many of them eventually
16 ending up in the Spokane River. Once in the Spokane River, most
17 of the fish are unable to reenter Chamokane Creek and those which
18 do are not able to once again get above the falls. The virulency
19 of trout disease also increases above 60° F. (Tr. 440-446; PE-64,
20 pp. 13)

21 59. At present, higher than desirable water temperatures
22 exist mainly in lower Chamokane Creek from the mouth of the stream
23 to the falls. There is a noticeable lack of trout in that area of
24 the creek as a result of the excessive water temperature in spite
25 of the existence of pools and an abundant food supply. (Tr. 439,
26 502, 519)

27 60. Chamokane Creek contains high quality water more than
28 adequate to support a trout fishery. (Tr. 134, 450, 491; PE-64,
29 pp. 14, 19)

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1 61. In order to maintain a water temperature lower than 68° F
2 in lower Chamokane Creek, an average daily minimum flow of 30 cfs
3 is necessary. A minimum flow of 30 cfs would also insure the
4 protection of the entire creek in terms of food production areas
5 and would provide the living space necessary for an optimum trout
6 fishery. (Tr. 453-454, 505, 519, 532, 537)

7 62. Since 1970, the fishing in lower Chamokane Creek has
8 deteriorated until, at present, the number of trout taken is about
9 one-half of what it was in 1970. (Tr. 796)

10 63. Chamokane Creek remains today a scenic, rushing stream of
11 pure water which plunges through a beautiful gorge over rapids and
12 picturesque falls. In addition to its use as a fresh water
13 fishing area, it is used for hunting, picnicking and other
14 recreational purposes by both Indians and non-Indians. It has the
15 potential for campground development. The Spokane Tribe
16 recognizes that the Chamokane Creek area is the only undeveloped
17 area of the reservation capable of long term recreational
18 development and has acted through its tribal council to keep the
19 area in its natural state as long as possible. (Tr. 115, 172,
20 677, 732, 780; Spokane Tribe's Reconstruction of Record, p. 5;
21 PE-27; PE-37; PE-81)

22 64. The use of Chamokane Creek for recreational activities
23 including fishing, hunting, picnicking, camping and other
24 activities as well as maintenance of the creek for its esthetic
25 value is found to be the highest and best use that could be made
26 of the creek. (Tr. 178)

27 65. An average daily minimum flow of 30 cfs is necessary to
28 maintain lower Chamokane Creek for its recreational and esthetic
29 purposes and uses. (Tr. 179)

1 66. There are no feasible alternatives to the establishment
2 of a 30 cfs average daily minimum flow in lower Chamokane Creek.
3 The planting of a legal sized trout is not acceptable over the
4 long term because of the high costs involved, availability of fish
5 and the fact that native trout are a better game fish. Until a
6 minimum flow of 30 cfs is maintained and protected it will not be
7 feasible or practical to plant game fish in the stream and the
8 population of native trout will continue to dwindle. (Tr. 621,
9 646; PE-42)

10 67. The State of Washington itself is on record as supporting
11 the establishment of a minimum flow in lower Chamokane Creek for
12 fishery, recreational and esthetic purpose. (PE-87; DE-2; DE-3)

13 Claim No. 2

14 68. The character and topography of the Chamokane Creek basin
15 portion of the Spokane Indian Reservation are such that there are
16 two tracts of irrigable land upon which water will be required:
17 (1) a tract of 1,880 acres below elevation 2,100 feet (bottom
18 land) and (2) a tract of about 6,580 acres above elevation 2,100
19 feet (bench land). (Tr. 108, 111-113, 224, 559, 562; PE-11;
20 PE-12; PE-34)

21 69. With regard to the bottom land, the evidence introduced
22 at the trial established that there are 1,880 acres lying below
23 elevation 2,100 feet which are of soil class III and IV and
24 therefore, are suitable for the growing of crops if irrigated.

25 The bench land consists of 6,580 acres which is mainly
26 soil class II (PE-34)

27 70. Crops suitable for growing on the irrigable land within
28 the Chamokane Creek basin include small grains and hay above
29 elevation 2,200 feet and hay and corn below elevation 2,200 feet.
30 (Tr. 283, 570, 583)

1 71. The lands upon which the ground water of the Chamokane
2 Creek basin and surface waters of Chamokane Creek and its
3 tributaries are to be used lie in an arid region of the United
4 States. In order to make these lands productive, irrigation
5 thereof is necessary. These lands vary somewhat in texture,
6 terrain, crop use and other factors which affect the amount of
7 water necessary to irrigate different portions of these lands.
8 For proper irrigation and crop productivity during the irrigation
9 season, varying quantities of water per acre should be applied to
10 the land not to exceed three acre-feet per acre during the
11 irrigation season. (Tr. 113)

12 72. Based upon a maximum requirement of three acre-feet per
13 acre, the irrigable land on the reservation above elevation 2,100
14 feet will require a maximum of 19,740 acre-feet and the land below
15 elevation 2,100 feet a maximum of 5,640 acre-feet. This makes a
16 total irrigation requirement of 25,380 acre-feet. (Tr. 114)

17 73. The 1880 acres of bottom and 6,580 acres of bench land
18 which are owned by the United States for the benefit of the
19 Indians are similar to land now being successfully irrigated by
20 defendants east of Chamokane Creek using either surface water from
21 Chamokane Creek or ground water from the basin. The irrigation of
22 these Indian lands using these same sources is as logical as any
23 existing withdrawals or diversions. The Indian lands could be
24 irrigated from either the Spokane River or from the surface and
25 ground waters of the Chamokane Creek basin. Due to the distance
26 involved in bringing water from the Spokane River and the relative
27 proximity of the land to the surface waters and ground waters of
28 the Chamokane Creek basin, it is more economically feasible to
29 irrigate using the Chamokane Creek basin waters. It would be
30 economically feasible to irrigate these Indian lands from the
31

1 surface water and ground water of the Chamokane Creek basin. (Tr.
2 144, 178, 227, 284, 583, 852-855; PE-3-6-74-29, pp. 4, 53)

3 74. Mot of the acreage claimed as irrigable became part of
4 the reservation in 1877 and has continued in that status until
5 this day. Plaintiffs exhibits 63 (Agreement of August 18, 1877)
6 and 52 (Executive Order of January 18, 1881) establish the
7 original boundaries of the Spokane Reservation. Plaintiff's
8 exhibit 34 shows that the land claimed as irrigable is within the
9 boundaries of the reservation. Plaintiff's exhibits 99 and 100
10 show that most of the land claimed as irrigable is land which is
11 presently held in trust by the United States and was neither
12 formerly opened to homestead nor formerly non-Indian owned. Thus,
13 except as to that land which has been identified as formerly
14 opened to homestead or formerly non-Indian owned, there is no
15 evidence in the record that the acreage claimed as irrigable has
16 been in anything but trust status since 1877.

17 75. There are only 77 acres of land within the Chamokane
18 Creek basin portion of the Spokane Reservation which were opened
19 to homesteading under the Act of May 29, 1908, (35 Stat. 548),
20 were never claimed and were restored to tribal ownership under the
21 Act of May 19, 1958 (72 Stat. 121). PE-98, PE-99) Of these 77
22 acres, only 28.7 acres are claimed as irrigable. (PE-34, PE-98,
23 PE-99) The two parcels claimed as irrigable are described as:

24 NW1/4NE1/4NE1/4 sec. 24, T. 28 N., R. 39 E. (10 acres)

25 lot 5, sec. 23, T. 29 N., R. 40 E. (18.7 acres)

26 The 48.3 acre parcel is not irrigable. See, PE-98, PE-34

27 76. As has been explained above, the Act of May 29, 1908,
28 authorized both the allotment to individual Indians of reservation
29 land and the opening of certain land to homesteading. As a
30 result, small tracts of land of both types eventually ended up in
31

1 non-Indian ownership. Beginning in the 1930s, the Spokane Tribe
 2 began reacquiring some of these former reservation lands which had
 3 passed to non-Indian ownership. By the act of June 10, 1968
 4 82 Stat. 174), as amended by the Act of May 21, 1974 (88 Stat.
 5 142), the Secretary of the Interior was authorized to return such
 6 reacquired land to trust status. To date, approximately 1,798.11
 7 acres of this type of land have been returned to trust status
 8 within the Chamokane Creek basin. (PE-97; PE-99) Only a portion,
 9 however, of these 1,798.11 acres are claimed as irrigable.
 10 Plaintiff's exhibit 97 identifies the land which was formerly
 11 non-Indian owned and which has been returned to trust status. By
 12 comparing that listing to plaintiff's exhibit 34, which shows the
 13 land claimed as irrigable, the following land may be identified as
 14 that land which was formerly non-Indian owned, is now in trust
 15 status and is claimed as irrigable by the United States and the
 16 tribe:

<u>Section Twp. & Range</u>	<u>Description, Tract No. & Date of Acq. of irrigable land</u>	<u>Acreage claimed as irrigable</u>
Sec. 27, T29N, R39E	N/A	None
Sec. 34, T29N, R39E	N/A	None
Sec. 35, T29N, R39E	E1/2SE1/4, T1000- 3/24/42	15.00
Sec. 36, T29N, R39E	SW1/4, T1000-3/24/42 T1001-2/2/42	130.00
Sec. 2, T28N, R39E	lots 1 & 2, S1/2NE1/4, T1010-3/25/42	130.00
Sec. 23, T28N, R39E	Lot 2, S1/2SE1/2NE1/4, NE1/4, SE1/4, T1007- 2/7/42	30.00
Sec. 24, T28N, R39E	Lots 7 & 8, T1006-2/7/42	49.00

1	Sec. 27, T28N, R39E	E1/2SE1/4, T1012-7/16/45	15.00
2			
3	Sec. 34, T28N, R39E	NE1/4, E1/2SE1/4, T1012- 7/16/45	15.00
4	Sec. 35, T28N, R39E	N/A	None
5			
6	Sec. 19, T28N, R40E	N/A	None
7	Sec. 21, T29N, R40E	Lots 5 & 7, E1/2SW1/4, E1/2SE1/4, T1001-2/2/42	20.00
8	Sec. 22, T29N, R40E	N/A	None
9			
10	Sec. 23, T29N, R40E	N/A	None
11	Sec. 28, T29N, R40E	N/A	None
12			
13	Sec. 31, T29N, R40E	NW1/4, W1/2NE1/4, T1001- 2/2/42	110.00
14	Sec. 25, T29N, R38E	N/A	None
15			
16	Sec. 2, T27N, R39E	Lots 6 & 9, NE1/4NW1/4, S1/2NW1/4, NW1/4SW1/4, T1001-2/2/42	48.00
17			
18	Sec. 11, T27N, R39E	N/A	None
19			
		TOTAL	562.00

Claim No. 3

77. The United States, through its Bureau of Reclamation, Department of the Interior is the holder of Surface Water Certificate No. 2831 issued by the State of Washington. This certificate bears a priority date of October 21, 1942, and authorizes the use of 10 cfs of the flow of Spring Creek (a tributary of Chamokane Creek) for fish propagation purposes. The use is non-consumptive and is exercised by the State of Washington in the operation of a fish hatchery pursuant to agreement with the Secretary of the Interior. None of the parties to this action

1 have challenged the validity of this water rights certificate.

2 (PE-89)

3 Defendants' Claims

4 78. Washington State Surface Water Certificate no. 294 is
5 issued in the name of Anna E. Cartier Van Dissel for use on land
6 north of the Spokane Indian Reservation. It has a priority date
7 of December 4, 1925, and a maximum use of 4.0 cfs. The effective
8 reduction in Chamokane Creek from this maximum use is 1.08 cfs.

9 (PE-32; PE-14; DE-57)

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

16 80. Washington State Surface Water Certificate No. 1725 is
17 issued in the name of Chris Mickelson for use on land north of the
18 Spokane Indian Reservation. It has a priority date of May 15,
19 1940, and a maximum use of .01 cfs. The effective reduction in
20 Chamokane Creek from this maximum use is .01 cfs. (PE-14; PE-32;
21 DE-48)

22 81. Washington State Surface Water Certificate No. 2258 is
23 issued in the name of Fred J. Werth for use on land north of the
24 Spokane Indian Reservation. This certificate is now held by Boise
25 Cascade. It has a priority date of February 12, 1945, and a
26 maximum use of .01 cfs. The effective reduction in Chamokane
27 Creek from this maximum use is .01 cfs. (PE-14, PE-32; DE-59)

28 82. Washington State Surface Water Certificate No. 3386 is
29 issued in the name of John A. Smith for use on land east of the
30

31

32

1 Spokane Indian Reservation. It has a priority date of July 8,
2 1946, and a maximum use of .02 cfs. The effective reduction in
3 Chamokane Creek for this maximum use is .02 cfs. (PE-14; PE-32;
4 DE-53)

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

12 84. Washington State Surface Water Certificate No. 4872 is
13 issued in the name of Edward A. Franks for use on land north of
14 the Spokane Indian Reservation. It has a priority date of March
15 17, 1950, and a maximum use of .20 cfs. The effective reduction
16 in Chamokane Creek from this maximum use is .08 cfs. (PE-14;
17 PE-32; DE-43)

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

24 86. Washington State Ground Certificate no. 4891A is issued
25 in the name of Robert J. Seagle for use on land east of the
26 Spokane Indian Reservation. It has a priority date of February 1,
27 1951, and a stated maximum use of 1150 gallons per minute up to
28 1400 acre-feet per year. This use has never, however, exceeded
29 528 gallons per minute. The effective reduction in Chamokane
30 Creek from this use is .35 cfs. While there is some evidence of
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1 minor crop production on the Seagle property in the mid-1800s
2 there is no evidence that the crop production utilized in
3 appropriation of water sufficient to become a water right under
4 state law. (Tr. 697, 1228, 1234, 1241-1242; PE-14; PE-32;
5 DE-64A; Interrogatories answered by Seagle, Nos. 10, 11 and 12,
6 dated July 11, 1973)

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

13 88. Washington State Surface Water Application No. 20248 is
14 issued in the name of Kenneth Swiger for use on land east of the
15 Spokane Indian Reservation. It has a priority date of May 19,
16 1967, and a maximum use of .20 cfs. The effective reduction in
17 Chamokane Creek from this maximum use is .06 cfs. (PE-14; PE-33;
18 DE-56)

19 89. Washington State Ground Water Permit No. 9361 is issued
20 in the name of James R. Newhouse for use on land east of the
21 Spokane Indian Reservation. It has a priority date of September
22 17, 1968, and a maximum use of 1,500 gallons per minute up to 648
23 acre-feet per year. The effective reduction in Chamokane Creek
24 from this maximum use is .90 cfs. (PE-14; PE-32; PE-86)

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

1 91. Washington State Ground Water Application No. 10344 is
2 issued in the name of Leonard E. Lyons for use on land east of the
3 Spokane Indian Reservation. It has a priority date of August 6,
4 1969, and a maximum use of 1,000 gallons per minute. The
5 effective reduction in Chamokane Creek is .60 cfs. (PE-14; PE-33;
6 DE-47)

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

13 93. Washington State Ground Water Application No. 10386 is
14 issued in the name of James K. Swiger for use on land east of the
15 Spokane Indian Reservation. It has a priority date of September
16 3, 1969, and a maximum use of 1,000 gallons per minute. The
17 effective reduction in Chamokane Creek from this maximum use is
18 .60 cfs. (PE-14; PE-33; DE-55)

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

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

1 96. Washington State Surface Water Application No. 22922 is
2 issued in the names of Alice M. Liepold and Frances J. Lindberg
3 for use on land east of the Spokane Indian Reservation. It has a
4 priority date of March 9, 1971, and a maximum use of .01 cfs. The
5 effective reduction in Chamokane Creek from this maximum use is
6 .01 cfs. (PE-14; PE-33; DE-45)

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

13 98. Washington State Ground Water Application No. 11905 is
14 issued in the name of Floyd Norris for use on land northeast of
15 the Spokane Indian Reservation. It has a priority date of May 20,
16 1971, and a maximum use of 2,000 gallons per minute. The
17 effective reduction in Chamokane Creek from this maximum use is
18 1.20 cfs. (PE-14; PE-33; DE-51)

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

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

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

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

15 103. Defendant Boise Cascade Corporation owns approximately
16 18,000 acres within the Chamokane Creek basin. Some of the land
17 is adjacent to Chamokane Creek, approximately 120 acres lie within
18 the exterior boundaries of the Spokane Indian Reservation. The
19 land is used chiefly for timber production, secondarily for
20 grazing. None of the lands are irrigated. Water is required by the
21 company in connection with its logging activities and for the
22 stock which grazes its land. The following diversion points and
23 their respective quantities are claimed:

24	<u>Point No.</u>	<u>Location</u>	<u>Quantity Claimed</u>
25	1	T. 29 N., R. 40 E.	30 a/f
26	2	T. 29 N., R. 40 E.	30 a/f
27	3	T. 30 N., R. 38 E.	30 a/f
28	4	T. 30 N., R. 38 E.	30 a/f/
29	5	T. 30 N., R. 38 E.	60 a/f
30	6	T. 30 N., R. 38 E.	30 a/f

1	7	T. 30 N., R. 39 E.	30 a/f
2	8	T. 30 N., R. 39 E.	30 a/f
3	9	T. 30 N., R. 39 E.	30 a/f/
4	10	T. 29 N., R. 41 E.	30 a/f
5	11	T. 29 N., R. 41 E.	40 a/f
6	12	T. 29 N., R. 41 E.	40 a/f
7	13	T. 29 N., R. 41 E.	40 a/f

8 Testimony presented by Boise Cascade indicated that the maximum
9 use in any one year would be approximately 100 acre-feet. The
10 only claim of Boise Cascade which holds a water rights certificate
11 from the State of Washington is point no. 14 (SWC 2258, FF-81).
12 As to the remainder of these claims, there is nothing in the
13 record to indicate the basis upon which a water right is claimed.
14 The quantity of 100 acre-feet is found to be excessive for stock
15 watering and dust abatement and fire protection activities of the
16 type carried on by Boise Cascade. (Tr. 1260, 1262-1263, 1266,
17 1268-1271, 1281-1282; DE-62; DE-72)

18 104. The State of Washington owns 15,851.19 acres of land
19 within the Chamokane Creek basin. These lands are generally being
20 used for timber production, grazing of livestock and recreational
21 purposes. There is no irrigation on any of these lands. The
22 Department of Natural Resources claims 1,845,586 gallons per year
23 for use on lands within the watershed and 59,432.4 gallons per
24 year for use on lands outside the Chamokane Creek basin for a
25 total of 1,905,018.4 gallons per year. No state water rights
26 certificate has ever been issued for any of these claims and the
27 evidence shows that none of the water claimed has been put to
28 beneficial use. (Tr. 1204, 1205, 1206, 1218; DE-23; DE-24; DE-31
29 through DE-36; DE-67; DE-68)

1 105. Prior to the initiation of this lawsuit, the State of
2 Washington had issued or approved the following water rights
3 certificates, permits and applications for non-Indian
4 appropriation of water within the exterior boundaries of the
5 Spokane Reservation:

6	Certificate No. 7142	Dawn Mining Co.	August 1, 1956 (DE-19, DE-71)
7	Certificate No. 8826	Urban S. Schaffner	March 20, 1958 (DE-61)
8	Permit No. 15894	A.L., F.L. Smithpeter	March 28, 1969 (PE-87, DE-2)
9	Application No. 11989	B. Dituri, et al.	June 23, 1971 (DE-37)
10	Application No. 320422	Urban Schaffner	July 3, 1972 (DE-70)
11	Application No. 320536	Paul Duddy	September 28, 1972 (DE-40)

12 Of these, the evidence indicates that Certificate No. 8826 and
13 Application No. 320422 are each for uses of water on homestead
14 land within the reservation. The other uses are on lands as to
15 which the source of title is unclear from the record. (Tr. 1248;
16 PE-67; PE-71)

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21 106. Historically the Department of Ecology has granted more
22 water rights on streams than there is water flowing in those
23 streams. (Tr. 1062) There currently exists certificates, permits
24 and applications for water rights to Chamokane Creek in the amount
25 of 57.72 cfs which would effectively reduce Chamokane Creek 15.96
26 cfs. (Tr. 124-25; PE-32; PE-33). The State of Washington has
27 thus demonstrated that it is either unable or unwilling to
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1 properly manage the water resources of the Chamokane Creek basin,
2 especially within the exterior boundaries of the Spokane Indian
3 Reservation.

4 DATED this 30th day of May, 1978.

5 Respectfully submitted,

6 JAMES J. GILLESPIE
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8 

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