

6-1-1978

Proposed Conclusions of Law

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
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Thorp, Michael R. and Gillespie, James J., "Proposed Conclusions of Law" (1978). *United States v. Anderson (Spokane Tribe)*. 29.
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FILED IN THE
U. S. DISTRICT COURT
Eastern District of Washington

JUN 1 1978

J. R. FALLOQUIST, Clerk
 Deputy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

10 UNITED STATES OF AMERICA,)
11)
11 Plaintiff,) CIVIL NO. 3643
12)
12 v.)
13 BARBARA J. ANDERSON, et al.,) PROPOSED CONCLUSIONS
14) OF LAW
14 Defendants.)
15)

16 Plaintiff United States of America, through its attorneys,
17 hereby submits the following proposed Conclusions of Law.

18 1. This Court has jurisdiction of the subject matter and
19 of the parties to this action.

20 2. Through the Agreement of August 18, 1977 and the subse-
21 quent conduct of the United States Government and of the Spokane
22 Indians in ratifying and in good faith carrying out the agreement
23 between them, the United States set aside the Spokane Indian
24 Reservation for the permanent use and occupancy of the Spokane
25 Tribe of Indians. Northern Pacific Railway Company v. Wismer,
26 246 U.S. 283 (1918).

27 3. The effective date of the creation of the Spokane Indian
28 Reservation is August 18, 1877. Northern Pacific Railway Company
29 v. Wismer, supra.
30
31

1 4. Through the agreement of August 18, 1877, and the
2 resultant setting aside of the Spokane Indian Reservation, the
3 unappropriated waters in, on, under and appurtenant to the Spokane
4 Indian Reservation were withdrawn from private appropriation and
5 reserved to the extent necessary for the requirements and purposes
6 of the said reservation. Cappaert v. United States, 426 U.S. 128
7 (1976); Arizona v. California, 373 U.S. 546 (1963); Winters v.
8 United States, 207 U.S. 564 (1908).

9 5. The purposes for which the Spokane Indian Reservation
10 was set aside for the use and benefit of the Spokane Indians
11 include the provision of a permanent home for the Indians, the
12 provision of plentiful fisheries upon which the tribal members
13 could continue to sustain themselves and the provision of suitable
14 land which the Indians could begin to farm.

15 6. For the benefit of the Spokane Indian Reservation, the
16 United States and the Tribe have the right to maintain a minimum
17 flow for fishing, recreational and esthetic purposes of 30 cfs
18 in lower Chamokane Creek at all times with a priority date of
19 time immemorial.

20 7. For the benefit of the Spokane Indian Reservation, the
21 United States and the Tribe have the right to the annual diversion
22 of a maximum of 25,380 acre-feet from Chamokane Creek or its
23 ground water basin necessary to supply the water required for
24 the irrigation of 1,880 acres of bottom and 6,580 acres of bench
25 land with the following priority dates:

- 26 a. For the 28.7 acres described in FF-75: August 18,
27 1877.
28
29
30
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1 b. For the 562.00 acres described in FF-76: The date
2 of acquisition which is shown in the column entitled:
3 Description, Tract No. and Date of Acquisition of
4 irrigable land.

5 c. For the remainder of the 1,880 acres of bottom
6 and 6,580 acres of bench land: August 18, 1877.

7 8. The Spokane Indian Reservation, as originally created,
8 was entirely held in trust by the United States for the benefit
9 of the Spokane Indians. 25 U.S.C. § 177. The extinguishment
10 of Indian property rights can only be done pursuant to an act of
11 Congress. Oneida Indian Nation v. County of Oneida, 414 U.S. 661,
12 667-670 (1974); United States v. Santa Fe Pacific Railroad Co.,
13 314 U.S. 339, 347 (1941). Even when Congress acts, extinguish-
14 ments of Indian rights must be express, they will never be implied.
15 DeCoteau v. District County Court, 420 U.S. 425, 444-445 (1975);
16 Mattz v. Arnett, 412 U.S. 481, 504-505 (1973).

17 The evidence in this case clearly establishes that most of
18 the acreage claimed as irrigable became part of the reservation
19 in 1877 and has continued in that status until this day. Thus,
20 except as to that land which has been identified as formerly
21 opened to homestead or formerly non-Indian owned, there is no
22 evidence in the record that the acreage claimed as irrigable has
23 been in anything but trust status since 1877.

24 9. The 28.7 acres described in FF-75 and which were opened
25 to homestead but never claimed have never left trust status and
26 thus retain a priority date of August 18, 1877. United States
27 v. Celestine, 215 U.S. 278, 285 (1909); Ash Sheep Co. v. United
28 States, 252 U.S. 159 (1920); Minnesota v. Hitchcock, 185 U.S.
29 373 (1902); United States v. Brindle, 110 U.S. 688 (1884).

1 10. The priority dates for the 562 acres described in FF-76
2 are the dates the land was reacquired by the Spokane Tribe. See
3 United States v. Walker River Irrigation District, 104 F.2d
4 334, 338 (9th Cir. 1939).

5 11. The enactment of the Act of May 29, 1908 (35 Stat. 458)
6 did not in any way affect the Spokane Tribe's water rights for
7 agricultural purposes. The 1908 Act had a very narrow objective:
8 to provide a mechanism whereby a limited amount of land on the
9 Spokane Reservation would be made available to non-Indians for
10 settlement. Nothing in the Act suggests that Congress intended
11 to terminate or limit reserved water rights in any way.

12 12. The United States and the Tribe are further entitled
13 to sufficient water to fulfill the future needs of the Indians
14 of the Spokane Reservation. Conrad Inv. Co. v. United States,
15 161 F. 829, 835 (9th Cir. 1908); United States v. Ahtanum
16 Irrigation District, 236 F.2d 321, 327 (9th Cir. 1956), cert.
17 denied, 352 U.S. 988.

18 13. The United States is entitled to the use of 10 cfs of
19 the flow of Spring Creek for fish propagation purposes with a
20 priority date of October 21, 1942. This use is and must remain
21 nonconsumptive.

22 14. Congress, through the Desert Land Act of 1877, 19 Stat.
23 377, and the Acts of July 26, 1886, and July 9, 1870, 43 U.S.C.
24 § 321, separated the public domain's water rights from its land
25 rights.

26 15. The sources to which the defendants trace their land
27 ownership passed title to the land, but not to any water rights.

28 16. Because the defendants have not shown this Court any
29 water rights established prior to the Federal reservation, the
30

1 water rights of the plaintiffs, United States and Spokane Tribe,
2 for fishery purposes, are superior in time and right to those
3 of the defendants.

4 17. The United States and the Tpokane Tribe have shown that
5 they are entitled to injunctive relief whenever the surface diver-
6 sions or ground water withdrawals by defendants threaten to reduce
7 the flow in lower Chamokane Creek below 30 cfs.

8 18. The State of Washington does not have the authority or
9 the jurisdiction to issue water rights certificates, permits or
10 to accept applications for the use of water on lands within the
11 exterior boundaries of the Spokane Indian Reservation. Any such
12 certificates, permits and applications heretofore or hereafter
13 issued by the State of Washington are void, to wit: SWC 7142,
14 SWC 8826, SWP 15894, GWA 11989, GWA 320422, and GWA 320536 (FF-105).
15 Only the Spokane Tribe by virtue of its retained sovereignty or
16 the United States by virtue of 25 U.S.C. § 381 and other Acts of
17 Congress have the authority to authorize the appropriation of
18 water surplus to the reserved rights of the Tribe within the
19 exterior boundaries of an Indian Reservation.

20 19. Those defendants holding water rights certificates for
21 use on lands outside of the Spokane Indian Reservation have valid
22 water rights to the extent expressed therein and subject to all
23 senior rights, especially to the reserved water rights of the
24 United States and of the Tribe as found herein.

25 20. Those defendants holding water rights permits or appli-
26 cations for uses on lands outside of the Spokane Reservation
27 will have valid rights to the extent finalized by the issuances
28 of a water rights certificate pursuant to State law.

