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Proposed Final Decree

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

JUN 1 1978

J. R. FALLOQUIST, Clerk
 Deputy

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

THE UNITED STATES OF AMERICA,)
)
 Plaintiff,)

SPOKANE TRIBE OF INDIANS,)
)
 Plaintiff-in-Intervention,)

Civil No. 3643

v.)

Barbara J. Anderson, James M. Anderson,)
Boise Cascade Corporation, Naomi Cook,)
Raymond E. Cook, Dawn Mining Corporation,)
Benedetto Dituri, Janice L. Dituri, Mary)
Dituri, Victor J. Dituri, Dolores Duddy,)
Paul F. Duddy, Fay Echelbarger, M. B.)
Echelbarger, Lena E. Edwards, Dalph G.)
Edwards, JoAnn C. Fletcher, John G.)
Fletcher, Seymor A. Flood, Vera Flood,)
Lloyd Flood, Alice Flood, Edward A. Franks,)
Irene Franks, Maude L. Grupe, Ella E. Hall,)
William R. Hall, Marion L. Lamb, Vera Mae)
Lamb, Esther Luther, George Luther, Jane)
Doe Lyons, Leonard E. Lyons, Arthur A.)
Miller, Ruth J. Miller, Janet E. Nelson,)
Ruth J. Nelson, James R. Newhouse, Jane)
Doe Newhouse, Dorothy F. Seagle, Robert J.)
Seagle, Security Investment Service,)
John A. Smith, Margaret M. Smith,)
A. L. Smithpeter, Fleeta L. Smithpeter,)
Francis L. Smithpeter, Fred N. Stahl,)
Ruth M. Stahl, Elizabeth Swiger, Kenneth)
E. Swiger, Dorothy F. Taschereau, George)
G. Taschereau, Trans West Company,)
Washington Water Power Company, Ella M.)
Watson, True H. Watson, Carol Welk,)
Peter M. Welk, Clara Willging, Gust)
Willging, and the State of Washington,)
)
 Defendants.)

PROPOSED
FINAL DECREE

1 Plaintiff United States of America, through its attorneys,
2 hereby submits the following proposed Final Decree.

3 This cause having been heretofore heard by the Court and, the
4 Court, having considered the arguments of counsel and the evidence
5 and having made its findings of fact and conclusions of law:

6 NOW, THEREFORE, in accordance therewith, IT IS HEREBY ORDERED,
7 ADJUDGED AND DECREED AS FOLLOWS:

8 That the parties, persons and corporations above-named and
9 their successors in interest and assigns are hereby adjudged to be
10 the owners of the water rights hereinafter specified and are
11 entitled to use from Chamokane Creek, its tributaries and its
12 groundwater basin for fishery, recreational and esthetic purposes,
13 for the irrigation of their lands, for watering livestock, for
14 domestic uses and other beneficial purposes, water in the
15 respective amounts and subject to the respective priority dates as
16 hereinafter stated:

17 I. RIGHTS OF THE UNITED STATES OF AMERICA AND SPOKANE TRIBE OF
18 INDIANS

19 Through the Agreement of August 18, 1877 and the subsequent
20 conduct of the United States Government and of the Spokane Indians
21 in ratifying and in good faith carrying out the agreement between
22 them, the United States set aside the Spokane Indian Reservation
23 for the permanent use and occupancy of the Spokane Tribe of
24 Indians. Thereby and by implication an amount of water from
25 Chamokane Creek, its tributaries and its groundwater basin become
26 reserved for the needs of the Indians on the reservation.

27 Claim No. 1

28 For the benefit of the Spokane Indian Reservation, the United
29 States and the Spokane Tribe have the right to maintain a minimum
30 flow for fishing, recreational and esthetic purposes of 30 cubic
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1 feet per second in lower Chamokane Creek at all times with a
2 priority date of time immemorial.

3 Claim No. 2

4 In addition to water for the above-mentioned minimum flow
5 purposes, the United States and the Spokane Tribe, for the benefit
6 of the Spokane Indian Reservation, have the right to the annual
7 diversion of a maximum of 25,380 acre-feet from Chamokane Creek,
8 its tributaries or its groundwater basin necessary to supply the
9 water required for the irrigation of 1,880 acres of bottom land
10 and 6,580 acres of bench land, with the following priority dates:

11	Section	Description, Tract No.	Acreage
12	<u>Twsp. & Range</u>	<u>& Priority Date</u>	
13	1. Sec. 24, T. 28 N., R. 39 E.	NW1/4NE1/4NE1/4 8/18/1877	10
14	2. Sec. 23, T. 29N., R. 40 E.	Lot 5 8/18/1877	18.7
15	3. Sec. 35, T29N. R39E	E1/2SE1/4, T1000- 3/24/42	15.0
16	4. Sec. 36, T29N, R39E	SW1/4, T1000-3/24/42 T1001-2/2/42	130.00
17	5. Sec. 2, T28N, R39E	Lots 1 & 2, S1/2NE1/4, T1010-3/25/42	130.00
18	6. Sec. 23, T28N, R39E	Lot 2, S1/2SE1/2NE1/4, NE1/4, SE1/4, T1007- 2/7/42	30.00
19	7. Sec. 24, T28N, R39E	Lots 7 & 8, T1006- 2/7/42	49.00
20	8. Sec. 27, T28N, R39E	E1/2SE1/4, T1012- 7/16/45	15.00
21	9. Sec. 34, T28N, R39E	NE1/4, E1/2SE1/4, T1012- 7/16/45	15.00
22	10. Sec. 21, T29N, R40E	Lots 5 & 7, E1/2SW1/4, E1/2SE1/4, T1001- 2/2/42	20.00
23	11. Sec. 31, T29N, R40E	NW1/4, W1/2NE1/4, T1001- 2/2/42	110.00

1
2 12. Sec. 2, T27N,
R39E

Lots 6 & 9, NE1/4NW1/4,
S1/2NW1/4, NW1/4SW1/4,
T1001-2/2/42

48.00

3
4 The remainder of the 1,880 acres of bottom land and 6,580
5 acres of bench land have a priority date of August 18, 1877.

6 The water so allowed may be diverted from Chamokane Creek and
7 its tributaries or pumped from the groundwater basin provided that
8 the amount of water for the land to be irrigated shall not exceed
9 during any calendar year 3.0 acre feet per acre applied to the
10 land.

11 Claim No. 3

12 The United States, through its Bureau of Reclamation,
13 Department of the Interior is the holder of Surface Water
14 Certificate No. 2831 issued by the State of Washington. This
15 certificate bears a priority date of October 21, 1942, and
16 authorizes the use of 10 cfs of the flow of Spring Creek (a
17 tributary of Chamokane Creek) for fish propagation purposes. The
18 use is non-consumptive and is exercised by the State of Washington
19 in the operation of a fish hatchery pursuant to agreement with the
20 Secretary of the Interior. None of the parties to this action
21 have challenged the validity of this water rights certificate and
22 therefore the United States has a right to maintain this use
23 pursuant to the terms of the Surface Water Certificate.

24 Claim No. 4

25 For the benefit of the Spokane Indian Reservation, the United
26 States and the Spokane Tribe of Indians have the right, whenever
27 the needs and requirements of the Spokane Tribe of Indians for the
28 use of the waters of Chamokane Creek, its tributaries or
29 groundwater basin, exceed the amount of water reserved by this
30 decree, to apply to this Court for a modification of this decree.

1 II. RIGHTS OF THE DEFENDANTS

2 The parties, persons and corporations hereinafter named have
3 acquired rights to the use of the waters of Chamokane Creek, its
4 tributaries and groundwater basin pursuant to state law. These
5 water rights are valid to the extent expressed in the respective
6 water rights certificates and are subject to all senior rights.

7 1. Washington State Surface Water Certificate No. 294 is
8 issued in the name of Anna E. Cartier Van Dissel for use on land
9 north of the Spokane Indian Reservation. It has a priority date
10 of December 4, 1925, and a maximum use of 4.0 cfs.

11 2. Washington State Surface Water Certificate No. 1675 is
12 issued in the name of George Russell for use on land north of the
13 Spokane Indian Reservation. It has a priority date of May 13,
14 1940, and a maximum use of .01 cfs.

15 3. Washington State Surface Water Certificate No. 1725 is
16 issued in the name of Chris Mickelson for use on land north of the
17 Spokane Indian Reservation. It has a priority date of May 15,
18 1940, and a maximum use of .01 cfs.

19 4. Washington State Surface Water Certificate No. 2258 is
20 issued in the name of Fred J. Werth (and is now held by Boise
21 Cascade) for use on land north of the Spokane Indian Reservation.
22 It has a priority date of February 12, 1945, and a maximum use of
23 .01 cfs.

24 5. Washington State Surface Water Certificate No. 3386 is
25 issued in the name of John A. Smith for use on land east of the
26 Spokane Indian Reservation. It has a priority date of July 8,
27 1946, and a maximum use of .02 cfs.

28 6. Washington State Surface Water Certificate No. 8600 is
29 issued in the name of M.B. Echelbarger for use on land northeast
30 of the Spokane Indian Reservation. It has a priority date of
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1 October 21, 1946, and a maximum use of 1.0 cfs. This surface
2 water diversion may not be exercised when Swamp Creek recedes to
3 2.0 cfs.

4 7. Washington State Surface Water Certificate No. 4872 is
5 issued in the name of Edward A. Franks for use on land north of
6 the Spokane Indian Reservation. It has a priority date of March
7 17, 1950, and a maximum use of .20 cfs.

8 8. Washington State Surface Water Certificate No. 6394 is
9 issued in the name of C. W. Noack for use on land north of the
10 Spokane Indian Reservation. It has a priority date of July 21,
11 1950, and a maximum use of .80 cfs.

12 9. Washington State Ground Certificate No. 4891A is issued
13 in the name of Robert J. Seagle for use on land east of the
14 Spokane Indian Reservation. It has a priority date of February 1,
15 1951, and now has a maximum use of 528 gallons per minute up to
16 1400 acre-feet per year.

17 10. Washington State Ground Water Certificate No. 2768 is
18 issued in the name of Ford Development Company for use on land
19 east of the Spokane Indian Reservation. It has a priority date of
20 September 6, 1956, and a maximum use of 100 gallons per minute up
21 to 160 acre-feet per year.

22 11. Washington State Surface Water Certificate No. 9100 is
23 issued in the name of Arthur A. Miller for use on land north of
24 the Spokane Indian Reservation. It has a maximum use of .7 cfs
25 not to exceed 105 acre-feet per year. The priority date is not
26 contained in the record of this case. This Surface Water
27 Certificate may not be exercised until such time as proof is
28 offered to this Court as to the priority date of this right and
29 the Court authorizes such exercise.
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1 The following defendants now hold water rights permits or
2 applications which have not yet been perfected:

3 12. Washington State Surface Water Application No. 20248 is
4 issued in the name of Kenneth Swiger for use on land east of the
5 Spokane Indian Reservation. It has a priority date of May 19,
6 1967, and a maximum use of .20 cfs.

7 13. Washington State Ground Water Permit No. 9361 is issued
8 in the name of James R. Newhouse for use on land east of the
9 Spokane Indian Reservation. It has a priority date of September
10 17, 1968, and a maximum use of 1,500 gallons per minute up to 648
11 acre-feet per year.

12 14. Washington State Ground Water Permit No. 9563 is issued
13 in the name of Peter M. Welk for use on land east of the Spokane
14 Indian Reservation. It has a priority date of January 30, 1969,
15 and a maximum use of 50 gallons per minute up to 20 acre-feet per
16 year.

17 15. Washington State Ground Water Application No. 10344 is
18 issued in the name of Leonard E. Lyons for use on land east of the
19 Spokane Indian Reservation. It has a priority date of August 6,
20 1969, and a maximum use of 1,000 gallons per minute.

21 16. Washington State Surface Water Application No. 21786 is
22 issued in the name of Robert J. Seagle for use on land east of the
23 Spokane Indian Reservation. It has a priority date of August 25,
24 1969, and a maximum use of .33 cfs.

25 17. Washington State Ground Water Application No. 10386 is
26 issued in the name of James K. Swiger for use on land east of the
27 Spokane Indian Reservation. It has a priority date of September
28 3, 1969, and a maximum use of 1,000 gallons per minute.

29 18. Washington State Ground Water Application No. 10506 is
30 issued in the name of Jess Sulgrove, Jr. for use on land east of
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1 the Spokane Indian Resevation. It has a priority date of November
2 18, 1969, and a maximum use of 2,500 gallons per minute up to 7
3 acre-feet per year.

4 19. Washington State Ground Water Application No. 11227 is
5 issued in the names of Gust and Clara Willging for use on land
6 east of the Spokane Indian Reservation. It has a priority date of
7 September 11, 1970, and a maximum use of 2,000 gallons per minute
8 up to 10 acre-feet per year.

9 20. Washington State Surface Water Application No. 22922 is
10 issued in the names of Alice M. Liepold and Frances J. Lindberg
11 for use on land east of the Spokane Indian Reservation. It has a
12 priority date of March 9, 1971, and a maximum use of .01 cfs.

13 21. Washington State Ground Water Application No. 11753 is
14 issued in the names of Howard W. and Harold A. Dixon for use on
15 land north of the Spokane Indian Reservation. It has a priority
16 date of April 2, 1971, and a maximum use of 100 gallons per minute.

17 22. Washington State Ground Water Application No. 11905 is
18 issued in the name of Floyd Norris for use on land northeast of
19 the Spokane Indian Reservation. It has a priority date of May 20,
20 1971, and a maximum use of 2,000 gallons per minute.

21 23. Washington State Surface Water Application No. 23509 is
22 issued in the name of Henry L. Brown for use on land north of the
23 Spokane Indian Reservation. It has a stated priority date of
24 November 10, 1971, and a maximum use of .12 cfs.

25 24. 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
29 acre-feet per year.

30 25. Washington State Ground Water Application No. 321939 is
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1 issued in the names of Richard S. and Patricia M. Krieger for use
2 on land north of the Spokane Indian Reservation. It has a stated
3 priority date of October 15, 1973, and a maximum use of 1.0 cfs.

4 To the extent that these aforementioned permits and
5 applications become finalized by the Washington State Department
6 of Ecology, they will be recognized herein as valid, subject to
7 senior rights.

8 III. JURISDICTION

9 A. The State of Washington does not have the authority or
10 the jurisdiction to issue water rights certificates, permits or to
11 accept applications for the use of water on lands within the
12 exterior boundaries of the Spokane Indian Reservation. Any such
13 certificates, permits and applications heretofore or hereafter
14 issued by the State of Washington are void to-wit:

- 15 1. Surface Water Certificate 7142 issued to Dawn Mining
16 Company, dated August 1, 1956.
- 17 2. Surface Water Certificate 8826 issued to Urban S.
18 Schaffner, dated March 20, 1958.
- 19 3. Surface Water Permit 15894 issued to A. L. and F. L.
20 Smithpeter, dated March 28, 1969.
- 21 4. Ground Water Application 11989 issued to B. Dituri, et.
22 al., dated June 23, 1971.
- 23 5. Ground Water Application 320422 issued to Urban Schaffner
24 dated July 3, 1972.
- 25 6. Ground Water Application 320536 issued to Paul Duddy,
26 dated September 28, 1972.

27 Only the Spokane Tribe by virtue of its retained sovereignty
28 or the United States by virtue of 25 U.S.C. 381 and other Acts of
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1 Congress have the authority to authorize the appropriation of
2 water surplus to the reserved rights of the Tribe within the
3 exterior boundaries of an Indian Reservation.

4 The State of Washington is, therefore, hereby permanently
5 enjoined from the issuance of water rights certificates and
6 permits or from accepting applications for the use of water on
7 lands within the exterior boundaries of the Spokane Indian
8 Reservation.

9 B. While the State of Washington does have jurisdiction to
10 issue water rights certificates and permits and to accept
11 applications for the use of water on lands outside the exterior
12 boundaries of the Spokane Indian Reservation, it now appears that
13 the waters of Chamokane Creek, its tributaries and its groundwater
14 basin are overappropriated. Therefore, until such time as this
15 Court is satisfied that the rights decreed in this case are being
16 satisfied and that there exists unappropriated waters, the State
17 of Washington is enjoined from the issuance of water rights
18 certificates and permits or from accepting applications for the
19 use of water from Chamokane Creek, its tributaries or its
20 groundwater basin.

21 IV. GENERAL PROVISIONS

22 1. Water for irrigation is allowed to be used at any time,
23 provided that the amount applied to the land during any calendar
24 year shall not exceed the quantity in acre feet allowed to the
25 land.

26 2. No owner or person or party entitled to the use of water
27 under this decree shall be allowed to use for irrigation during
28 any calendar month more than twenty-five per cent of the quantity
29 of direct water in acre feet hereby allowed for the land for the
30 season.

1 3. Except as herein specially provided no groundwater
2 withdrawal or diversion of water into any ditch or canal, in this
3 decree mentioned shall be permitted except in such amount as shall
4 be actually, reasonably necessary for the economical and
5 beneficial use for which the right of diversion is determined and
6 established by this decree. The amounts of water hereinbefore
7 allowed are declared to be sufficient for the uses herein
8 mentioned, and any and all use of water in excess of such decreed
9 amounts is declared to be wasteful, and all wasteful or excessive
10 use of water is hereby prohibited.

11 4. In any case where water is obtained from two or more
12 sources, the aggregate amount of the combined waters from such
13 sources which may be used, shall not exceed the amount required
14 for such use as herein determined.

15 5. Whenever the necessities of the situation appear to the
16 Court to so require, the Court may appoint a Water Master to carry
17 out and enforce the provisions of this decree and the instructions
18 and orders of the Court and if any proper orders, rules or
19 directions of such Water Master, made in accordance with and for
20 the enforcement of this decree, are disobeyed or disregarded he is
21 hereby empowered and authorized to cut off the water of owners or
22 water users so disobeying or disregarding such proper orders,
23 rules or directions, and the Water Master shall promptly report to
24 the Court his said action in such case and the circumstances
25 connected therewith and leading thereto. The terms of employment,
26 expenses and compensation of said Water Master the payment thereof
27 and the means and methods for securing funds with which to pay the
28 same, shall be fixed by orders which the Court may hereafter from
29 time to time make. The compensation and expenses of the Water
30 Master shall be borne by the parties whose rights are adjudicated
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1 by this decree in the following manner, to-wit: One-third by the
2 United States, one-third by the State of Washington and the
3 remaining one-third by the remaining persons or corporations whose
4 rights are adjudicated by this decree. Any person feeling
5 aggrieved by any action or order of the Water Master may in
6 writing and under oath complain to the Court, after service of a
7 copy of such complaint on the Water Master and the parties hereto,
8 and the Court shall promptly review such action or order and make
9 such order as may be proper in the premises.

10 6. Whenever the necessities of the situation appear to the
11 Court to so require, the Court may require that the owners of the
12 water rights decreed herein install and properly maintain at their
13 own expense a reliable, sufficient measuring device whereby the
14 water diverted or pumped may be properly regulated and correctly
15 measured.

16 7. The quantities of water permissible to be diverted or
17 pumped on account of the several priorities herein decreed, are
18 decreed subject to the obligations of said owners to divert and
19 use water only at such times as needed and only in such amounts as
20 may be required under a reasonable, economical and beneficial use.

21 8. Persons whose rights are adjudicated hereby, their
22 successors or assigns, shall be entitled to change, in the manner
23 provided by law the point of diversion and the place, means,
24 manner or purpose of use of the waters to which they are so
25 entitled or of any part thereof, so far as they may do so without
26 injury to the rights of other persons whose rights are fixed by
27 this decree.

28 9. Whenever any person or party shall not be receiving the
29 amount of water to which he is entitled under this Decree, and a
30 Water Master having been appointed, the Water Master shall, upon
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1 request regulate the necessary headgates, ditches and other works
2 (including pumps) used for the diversion and application of such
3 waters as to apportion the same as herein provided, and for that
4 purpose may enter upon the lands of any and all persons having
5 rights adjudicated by this Decree.

6 In the case that a Water Master shall not have been appointed,
7 the person or party not receiving the amount of water to which he
8 is entitled under this Decree shall have the right to petition
9 this Court for relief.

10 10. The parties, persons, and corporations hereinbefore
11 named, and all persons claiming by, through or under them and
12 their successors, are hereby forever enjoined and restrained from
13 asserting or claiming any rights in or to the waters of Chamokane
14 Creek or its tributaries, or its groundwater basin except the
15 rights, specified, determined and allowed by this decree, and each
16 and all of said parties, persons and corporations, and all persons
17 claiming by, through or under them, are hereby perpetually
18 restrained and enjoined from diverting, taking or interfering in
19 any way with the waters of Chamokane Creek or its tributaries or
20 with its groundwater basin so as to in any manner prevent or
21 interfere with the diversion, use and enjoyment of the waters of
22 any of the other persons or parties as allowed or adjudicated by
23 this decree, having due regard to the relative priorities herein
24 set forth; and each of the said parties and persons is hereby
25 enjoined and restrained from ever taking, diverting, using or
26 claiming any of the water so decreed, in any manner or at any time
27 so as to in any way interfere with the prior rights of any other
28 persons or parties having prior rights under this decree, as
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1 herein set forth, until such persons or parties having prior
2 rights have received for their several uses the waters hereby
3 allowed and adjudged to them.

4 ll. The several parties to this suit shall pay and bear their
5 own costs.

6 DATED this 30th day of May, 1978.

7 Respectfully submitted,

8
9
10 JAMES J. GILLESPIE
11 United States Attorney

12 
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