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Findings of Fact Proposed by the State of Washington, Department of Natural Resources

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

JUN 16 1978

J. R. FALLOQUIST, Clerk
~~THE~~ Deputy

UNITED STATES DISTRICT COURT FOR
EASTERN DISTRICT OF WASHINGTON

1 UNITED STATES OF AMERICA,)
2 Plaintiff,) CIVIL NO. 3643
3 vs.) FINDINGS OF FACT PROPOSED
4 BARBARA J. ANDERSON, et al.,) BY THE STATE OF WASHINGTON,
5 Defendants.) DEPARTMENT OF NATURAL RESOURCES

6 Proposed Findings of Fact

7 1. Action. This action was initiated by the United States in
8 its own rights and behalf of the Spokane Tribe of Indians for the
9 purpose of determining and declaring the rights of all the parties in
10 and to the use of the waters of Chamokane Creek and its tributaries
11 and for the Court to enter its decree setting forth such rights with
12 a date of priority for such rights. The action also seeks for the
13 appointment of a water master to administer and enforce the decree of
14 the Court and for an injunction against all diversions and uses of
15 the water of Chamokane Creek and its tributaries except in accordance
16 with the rights and priorities set forth in the Court's decree. The
17 action also seeks to enjoin the State of Washington from approving or
18 issuing any further permits or certificates or otherwise exercising
19 jurisdiction over the use of the waters of Chamokane Creek until fur-
20 ther order by the Court.

21 2. Jurisdiction. This Court has jurisdiction under 28 U.S.C.
22 1345. The Court has jurisdiction over the issues of state law under

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1 the doctrine of pendent jurisdiction.

2 Chamokane Creek System:

3 3. Chamokane Creek and its tributaries and the Chamokane Creek
4 basin is located entirely within the State of Washington and the United
5 States.

6 4. The State of Washington was admitted to the Federal Union on
7 November 22, 1889. 25 U.S. Stat. at large, chap. 180, p. 767. (Wash-
8 ington State Enabling Act.)

9 5. A portion of Chamokane Creek and its tributaries is also
10 located within the Spokane Indian Reservation, a reserve established
11 by Executive Order of the President of the United States on January
12 18, 1881.

13 6. Chamokane Creek has its head waters in the Huckleberry Moun-
14 tain north of the Reservation. Chamokane Creek flows generally in a
15 southeasterly direction over private and state owned lands through the
16 Camas valley, referred herein as the Upper Chamokane Area, At the
17 northeast corner of the Reservation, the Creek flows south and south-
18 westerly through the Walker's Perry Area to Chamokane Creek Falls.
19 From the Falls it flows south through the Lower Chamokane Area dis-
20 charging into the Spokane River at a point approximately 1.4 miles
21 below Long Lake.

22 7. There is approximately 178 square miles in the Chamokane
23 Creek drainage, only a portion of which is within the confines of
24 the Spokane Indian Reservation.

25 8. Chamokane Creek basin was formed through prehistoric glacial
26 action. This action left a lateral moraine to the depth of 150 feet
27 which blocks off Camas Valley, thereby precluding ground water flow
28 into the Lower Chamokane Creek basin, both inside and adjacent to the
29 Spokane Indian River Reservation.

30 9. Withdrawals of ground water from the upper basin, i.e.,
31 Camas Valley, has no impact on the flow of Chamokane Creek.

32 10. Chamokane Creek at the north line of the Reservation flows
33 continuously to a point about two miles south; for the next five miles

1 the Creek is intermittent and often dry during the summer months down
2 stream to a three mile long spring area located near the town of Ford.
3 These springs contribute approximately 20 cfs to the flow in Chamokane
4 Creek. The Creek at that point flows some three miles to Chamokane
5 Creek Falls and thereafter another mile and one-half to the Spokane
6 River.

7 11. The waters of Chamokane Creek as it flows by the Reservation
8 and the ground water of the Lower Chamokane basin on and adjacent to
9 the Reservation results from the surface flow of Chamokane Creek out
10 of the Camas Valley, the precipitation and tributaries of Chamokane
11 Creek of the Lower Chamokane Creek basin.

12 12. The ground waters of the Lower Chamokane Creek basin are
13 recharged by those precipitation occurring within the Lower Chamokane
14 Basin Drainage and winter and spring run-off of Chamokane Creek. The
15 amount of recharge varies from year to year because of changing
16 climatic patterns, freezing or nonfreezing of surface soils, speed
17 and slowness of spring thaw and run-off and other factors.

18 13. The flows in Chamokane Creek below the falls varies greatly
19 depending upon the year and the season. Flows have been as high as
20 1,430 cfs. and as low or less than 30 cfs. Flows in the Lower Chamokane
21 Creek below the falls results from waters from the springs located
22 near Ford from surface flows in Chamokane Creek and from springs near
23 the falls as well as precipitation and various tributaries to Chamokane
24 from areas below the falls.

25 14. It is impossible to determine the effect of withdrawal of
26 ground waters from Lower Chamokane basin as to the effect upon the
27 flow of waters out of the springs area by Ford and the flow below the
28 falls. This is because it is unknown whether ground waters may be
29 percolating out of the Chamokane Basin and it is also unpredictable
30 as to when such affect might occur and the possible flow of the springs
31 or the waters in Lower Chamokane Creek will be at the time of such
32 affect.

33 15. For those ground waters which may eventually find themselves

1 in the flow of the surface of Chamokane Creek. The withdrawal of
2 ground water may have a delay of nine months to one year, or possibly
3 more, on the effect of the flow of the springs or the flow over the
4 falls in Chamokane Creek. Farther upstream the pumping takes place,
5 the longer the time lag. At the north line of the Reservation or
6 above, the delay may be up to two years. Thus, there is no predict-
7 ability as to during what period of time and how it would affect the
8 flow of Chamokane in terms of total quantity of withdrawal of ground
9 waters from the Lower Chamokane Basin.

10 16. It has not been factually demonstrated that the withdrawal
11 of ground waters in the Lower Chamokane Basin has reduced the flow of
12 Chamokane Creek during any critical period for any reason.

13 Spokane Tribe and Reservation:

14 17. The Spokane Tribe historically consisted of three bands of
15 Indians: The Upper, Middle and Lower bands. All of the bands covered
16 a wide range in their quest for food. However, in their winter villages
17 or camps they tended to localize their activities in certain areas.
18 The Upper Band wintered near the present day site of Spokane, Washing-
19 ton. The Middle Spokanes resided around the confluence of the Spokane
20 and Little Spokane Rivers and the Lower Band lived near the confluence
21 of the Columbia River and the Spokane River.

22 18. The Spokanes left their winter villages in early spring and
23 spent approximately six months gathering dry land camas on the plains
24 south of the Spokane River. The Spokanes then went west to the vicin-
25 ity of Moses Lake where they spent approximately a month in social
26 activities and trading with other tribes. From June to October, the
27 Spokanes fished the Columbia and Spokane Rivers and raised horses
28 on the plains southwest of the Spokane. During August, buffalo hunt-
29 ing parties left for the plains east of the Rocky Mountains, some re-
30 turning during November and others wintering there. In December, the
31 Spokane Indians returned to their winter villages and existed on dried
32 fish, roots and game supplemented sometimes by dried moss.

33 19. British and American trappers were the first white men to

1 visit the claimed area. Thereafter, prospectors and white travelers
2 traveled through the Spokane country and eventually missionaries took
3 up settlement in the area. On August 14, 1848 Congress established
4 the Oregon territory, and on March 2, 1853 the Washington territory
5 was created. Congress authorized extinguishment of the Indian title
6 to all lands east of the Cascades in 1855. The discovery of gold near
7 Colville brought an influx of prospectors and other whites traveling
8 through the Spokane country. During 1858 the Spokanes attacked Colonel
9 Steptoes troops at Steptoes Bluff. Thereafter, Colonel George Wright
10 led a retaliatory force into the Spokane country and on September 24,
11 1858 entered into a treaty with the Spokane Tribe providing for cessa-
12 tion of all hostilities in granting whites passage through Spokane
13 country. This treaty was never presented to Congress for ratification.

14 20. On August 18, 1877 Colonel Watkins met with members of the
15 Spokane Tribes as well as the Coeur d'Alene, Pend Oreille, Chewelah,
16 Okanogan, Colville and Palus Tribes. During a council, an agreement
17 was signed for the Spokanes to go upon a tract of land north of the
18 Spokane River south of a line extending from the mouth of Numchin
19 Creek of the Columbia River east to the source of Chamokane Creek.
20 This agreement contained no cessation of land nor payment for consider-
21 ation for such agreement, nor granted any future benefits or privileges
22 to the tribes, nor was the agreement ever presented to Congress for
23 ratification.

24 21. The purpose of the agreement was to relocate the Spokane
25 Tribes on the Reservation for the purpose of providing permanent homes
26 and engaging in agricultural pursuits. By November 1877, the Lower
27 Spokanes relocated on the Reservation. Thereafter, on September 3,
28 1880 the Army issued an order to protect the proposed Reservation being
29 still unsurveyed against settlement by other than Indians until the
30 survey was made or other further instructions were issued. This order
31 was based upon the plane necessity to preserve the peace until the
32 pledge of the government would be fulfilled, or other arrangements
33 accomplished. Thereafter, on January 18, 1881 President Rutherford

1 B. Hayes signed an Executive Order creating the Spokane Reservation.
2 The description of this Reservation differs from those descriptions
3 both in the order of the Army in 1880 and the proposed reservation
4 in 1877.

5 22. Only the Lower Spokanes entered the Reservation. Thereafter
6 the government attempted to persuade the Upper and Middle Spokanes to
7 move to reservations. By agreement on March 18, 1887 the Upper and
8 Middle Bands agreed to move to the Coeur d'Alene Reservation where
9 they were to receive allotments of land. This agreement was ratified
10 by Congress on July 13, 1892. However, most of the Middle Spokanes
11 moved to the Spokane Reservation.

12 23. The Act of May 27, 1902 (32 Stat. 266) opened up mineral
13 lands on the Spokane Reservation to entry by non-Indians. Lands
14 allotted to Indians used by the government were used for school purposes
15 were excluded. A joint resolution of June 19, 1902 provided that the
16 Secretary should make allotments in severalty to the Indians on the
17 Spokane Reservation and upon completement of allotments the unallotted
18 and unreserved lands were open to purchase under the mining laws.
19 (32 Stat. 744, No. 31). The Act of March 3, 1905 authorized the
20 Secretary to grant lands on the Spokane Reservation to water companies
21 and compensate the Indians therefor. As to allotted lands with full
22 power of alienation, the Secretary was authorized to use the money
23 received to purchase other suitable lands for allottees. (33 Stat.
24 1006) The Act of June 21, 1906 authorized the Secretary to sell 360
25 acres for town site purposes and provided the money received shall be
26 deposited in the treasury to the credit of the Spokane Indians. (34
27 Stat. 377) The Act of May 29, 1908 authorized the Secretary to sell
28 surplus unallotted agricultural lands on the Reservation after making
29 allotment to all lands on the Reservation who had not received allot-
30 ments and reserving lands for schools, town sites and timber lands.
31 Timber lands were to be reserved for the benefit of the Tribe and the
32 Secretary was authorized to sell timber and place the proceeds to the
33 credit of the Indians. (35 Stat. 458-460) Under that Act, the

1 Secretary was to classify also the surplus land as either agricultural
2 or timber land. The land classified as agricultural land was open to
3 non-Indian settlement pursuant to homestead lands and under conditions
4 subscribed by the President.

5 24. On June 15, 1909 the classification report was submitted.
6 82,647.5 acres were classified as timber land. 5,781.22 acres were
7 classified as agricultural. On May 22, 1909 President Taft opened
8 proclaimed land for homesteading all the nonmineral unreserved lands
9 classified as agricultural lands within the Spokane Indian Reservation.
10 Of the lands open for homesteading, most were settled by non-Indians.
11 Others were never settled. By the Act of May 19, 1958 (72 Stat. 121)
12 the land in the Reservation which had been eligible for homesteading
13 but never was claimed was restored to tribal ownership. Under this
14 Act 77 acres were restored to the tribal ownership within the Chamo-
15 kane Creek Basin. On June 29, 1940 Congress authorized the acquisition
16 of lands within the Reservation for the Columbia Basin project. One-
17 fourth of the reservoir area was set aside for use by the Spokane
18 and Colville Indians for hunting and fishing. The government compen-
19 sated the tribes for tribal lands, crediting the tribe and for in-
20 dividual lands to the accounts of the individual Indians on the books
21 of the superintendent of the Colville Indian Agency.

22 25. The original Reservation area of 154,898 acres of which
23 14,852 acres of allotted land had been patented in fee, sold or other-
24 wise alienated in 1934. In 1950 the area consisted of 138,068 acres
25 (47,828 acres trust allotted; 17,314 acres patented in fee; 89,579
26 acres tribal; 445 acres reserved by the government). Under the Act
27 of May 19, 1958, 77 acres were restored to tribal ownership within the
28 Chamokane Creek Basin that was originally classified as agricultural
29 land under the Act of May 29, 1908. Under the Act of June 10, 1968
30 (82 Stat. 174) as amended by the Act of May 21, 1974 (88 Stat. 142)
31 the Secretary of Interior was authorized to purchase for the tribe
32 lands within the Spokane Reservation. Under this Act, approximately
33 1798.11 acres are within the Chamokane Creek Basin. PE-97. Of these

1 lands, 562 acres are acres claimed as irrigable and returned to trust
2 status.

3 26. The plaintiffs claim that 1880 acres lying below the
4 elevation of 2100 feet are irrigable and that there is a tract of
5 6580 acres above elevation 2100 feet. Approximately 6,000 acres of
6 this total lie within the Chamokane Creek basin. There are no present
7 plans to irrigate such lands. Plaintiff has not established how
8 much of this land was originally classified as agricultural lands,
9 and how much of this area is in a timber reserve as classified
10 under the 1908 Act. It would appear that the vast majority of lands
11 considered irrigable by the plaintiff on the bench lies within the
12 timber reserve area. Plaintiffs have failed to establish what acres
13 that are of irrigable capacity are contained in allotments made
14 prior to January 1, 1909 and not subsequently alienated.

15 Purposes of the Reservation

16 27. The United States, in creating the Reservation, intended
17 to place the members of the Spokane Tribe in one place so there
18 would be minimal interference with non-Indian settlers moving west.

19 28. The United States contemplated that members of the Tribe
20 would engage in agriculture on certain lands within the Reservation,
21 and that the Reservation would provide sites for government buildings
22 to serve as schools and other government uses.

23 29. The government intended that the waters of the Spokane and
24 Columbia Rivers would be reserved for the use of the Spokane Tribe
25 for purposes of the taking of anadromous fish as well as agricultural
26 irrigation.

27 30. The United States did not intend that the waters of Chamo-
28 kane Creek were impliedly reserved for religious or ceremonial use.

29 31. United States did not intend in creating the Spokane Indian
30 Reservation that the waters of Chamokane Creek would be reserved or
31 used for aesthetic purposes or recreational development.

32 32. The construction of the Grand Coulee Dam that resulted in
33 the elimination of anadromous fish runs make it unnecessary for this

1 Court to find a fishery purpose. The government has compensated the
2 Spokane Indian Reservation for the loss of this fishery, both through
3 the Indian Claims Commission and for settlements made pursuant to the
4 laws creating the Columbia Basin irrigation project and authorizing
5 the building of the Grand Coulee Dam and other dams.

6 33. The United States did not intend, impliedly or otherwise,
7 to reserve waters for Chamokane Creek below the falls to be used for
8 fishery purposes. No evidence was submitted that there is any pres-
9 ent contemplation of any commercial or subsistence fishery by the
10 Tribe, nor is there any evidence that such commercial or subsistence
11 fishery would be feasible. The evidence indicates that commercial
12 or subsistence fishery below the falls is not feasible.

13 34. The federal government, pursuant to settlement with the
14 Spokane Indian Tribe for the creation of the Grand Coulee Dam, the
15 creation of Lake Roosevelt, maintains a fish hatchery at Ford and
16 permits stocking of the various lakes for trout fishery and other
17 types of fishery throughout the Reservation, including the utiliza-
18 tion of Lake Roosevelt for fishing purposes.

19 35. The Spokane Indian Tribe was compensated through the
20 Indian Claims Commission in the amount of \$6,700,000 for the loss of
21 all rights to lands which the Spokane Tribe originally inhabited,
22 including all lands lying outside the Spokane Reservation. This
23 settlement included the value of lands, including water located
24 thereon, lying outside the Spokane Indian Reservation.

25 36. Spokane Indian Tribe has passed a Resolution prohibiting
26 the use of Chamokane Creek for irrigation purposes by tribal members.

27 37. Of the 6,000 acres lying below elevation, 2500 lying
28 within the Chamokane Creek basin, part of said lands are timber
29 lands classified under the 1908 Act.

30 38. No present plans are provided for irrigating by the Cham-
31 okane Creek any lands within the Chamokane Creek basin.

32 39. Lands lying within the Chamokane Creek basin that are
33 irrigable can be irrigated out of the Spokane River.

1 Fishery

2 No commercial or subsistence fishery has ever occurred in
3 Chamokane Creek. There are no present plans for any commercial or
4 subsistence fishery. The only fishery that occurs in Chamokane
5 Creek is for limited recreational fishing. Non-Indians are prohibit-
6 ed by Resolution from participating.

7 40. The Lower Chamokane Creek below the falls is not suitable
8 for commercial or subsistence fishery.

9 41. The hatchery at Ford at one time planted Chamokane Creek
10 but no longer does. However, the hatchery does plant other lakes
11 and streams located on the Reservation.

12 42. There is no evidence of any trout fishery by members of
13 the Spokane Tribe prior to the creation of the Reservation in Chamo-
14 kane Creek.

15 43. The temperatures of the waters from the massive springs
16 area remains fairly constant and increases somewhat as the water
17 flows to the falls. Thereafter, there are changes in water temper-
18 ature in the summer months in Lower Chamokane Creek.

19 44. Temperatures above the falls do not exceed the maximum
20 for well being of trout.

21 45. Temperatures below the falls did, on rare occasions in the
22 hot summer months, exceed 68° for one or two hours.

23 46. There is a relationship between water flow and maximum
24 water temperatures. However, this relationship cannot be quantita-
25 tively ascertained because of variables such as lengths of days of
26 high temperatures, shading and other factors.

27 47. There is no predictable direct relationship between the
28 withdrawal of ground water within the Chamokane Creek Basin and the
29 temperatures of the waters during the summer months in Lower Chamo-
30 kane Creek below the falls.

31 In Term of Quantification of Tribal Water Rights

32 48. There is no necessity to quantify Indian tribal water
33 rights for irrigation purposes at the present time since no evidence

1 exists as to specific land to which rights could attach.

2 49. There is no need or necessity for quantification of the
3 rights or the need of water for timber harvesting purposes, domestic
4 purposes or stock watering purposes. The use of water for these
5 purposes would be de minimis and there is no necessity for quanti-
6 fication. Withdrawals or uses of waters of Chamokane Creek basin do
7 not affect the flow of the stream for these uses.

8 50. There is no evidence that the withdrawal of ground water
9 from the Chamokane Creek Basin for non-tribal uses affects any
10 fishing habitat in Chamokane Creek.

11 51. There is no necessity to quantify water rights for fishery
12 purposes on Chamokane Creek.

13 52. There is no necessity to quantify rights for any claimed
14 religious, ceremonial or aesthetic or recreational needs on Chamokane
15 Creek.

16 53. There is no evidence to indicate that the flow of Chamokane
17 Creek as it presently occurs is not adequate for ceremonial, religious,
18 aesthetic or recreational uses.

19 State of Washington, Department of Natural Resources' Claim.

20 54. The State of Washington, Department of Natural Resources
21 owns in fee 15,851.19 acres of land lying within the Chamokane Creek
22 Watershed. Ex. 23.

23 55. The State of Washington owns 1,236.19 acres of land conting-
24 ent to lands owned within the watershed that is used for stock pur-
25 poses in conjunction with water contained within the watershed.

26 56. The State of Washington, Department of Natural Resources'
27 lands are used for timber production, livestock grazing, recreation-
28 al purposes and a home site.

29 57. Livestock grazing requirements consist of 15 gallons per
30 day per head of livestock grazed.

31 58. The water utilized and needed for livestock grazing and
32 domestic purposes within the watershed boundary is 1,845,586 gallons
33 per year. On contingent acres, the amount utilized and needed is

1 59,432.40 gallons with a total of 1,905,018.40 gallons per year.

2 59. Included within the total water usage is 1,083,700 gallons
3 for home site uses located on the SE 1/4 of Section 16, Township 29
4 North, Range 40 East. The water is pumped directly from a tributary
5 of Chamokane Creek in the Camas Valley. The water usage predates
6 1917.

7 60. Livestock grazing occurs out of streams, ponds, springs
8 and developed water sites. The developed sites are listed on Exhibit
9 24.

10 61. The existing water usage on the State of Washington, De-
11 partment of Natural Resources' lands has a de minimis effect on the
12 waters within the Lower Chamokane basin including surface water in
13 Chamokane Creek.

14 62. The lands owned by the State of Washington, Department of
15 Natural Resources are lands granted to the State by the federal
16 government pursuant to the State's Enabling Act, an Act approved
17 February 22, 1889 (25 U.S. Stat. 180).

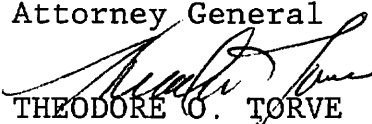
18 63. These lands are held in trust by the State of Washington
19 for various purposes, including the funding of the common schools.

20 64. Lands listed as indemnity lands on Ex. 67 are lands granted
21 by the federal government in lieu of grants not fulfilled by the
22 federal government. All indemnity lands have a priority date for
23 water usage as of statehood November 11, 1889. All other lands have
24 the priority date as indicated on Ex. 67.

25 65. Livestock has grazed on all lands within the Chamokane Creek
26 watershed since statehood, and prior thereto. Lands owned by the
27 State of Washington have been leased, the earliest lease occurring
28 in 1906.

29 66. The amount of water claimed has been beneficially used on
30 the lands both within and contingent to the watershed, all uses
31 occurring prior to the adjudication and 1917.

32 Respectfully submitted,
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Dated June 15, 1978.

Proposed Findings
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