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Spokane Tribe's Suggested Changes in Proposed Findings of fact, Conclusions of Law and Final Decree Submitted by the United States of America

Robert D. Dellwo

Dellwo, Rudolf, & Schroeder, P.S.

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remained a prime site for native trout and other game fish.

(Tr. 674-675)

16. Early efforts to turn the Indians' attention to farming were for the most part unsuccessful due to the problems involved with clearing the land and bringing in irrigation water. While individual Indians have managed to get relatively small tracts under cultivation, only a few have irrigated their lands and it has been only recently that the Tribe itself found large scale agricultural development of land financially feasible. While the most feasibly irrigable lands are in the Chamokane Creek basin, the Tribe has chosen to protect and preserve Chamokane Creek as a fishing, recreational and esthetic tribal resource rather than to deplete and diminish it by the use of its waters for irrigation. While farming and country living constitute a way of life for the resident tribal members, the nature of the soils and limitation of arable acreages are such that very few tribal farmers depend on their farms as their principal source of income. (Tr. 688, 696, 719; PE-37)

18. On May 29, 1908, Congress passed Public Law 157 which was entitled "An Act to authorize the Secretary of the Interior to sell and dispose of the surplus, unallotted agricultural lands of the Spokane Indian Reservation, Washington, and for other purposes." (35 Stat. 458). Under the provisions of that act, the Secretary of the Interior was authorized and directed to cause allotments of land to be made on the Spokane Reservation. After the completion of the allotment process, the Secretary was to see that the surplus land was classified as either agricultural or timber. The land classified as agricultural was then to be opened to non-Indian settlement under the provisions of the homestead laws under conditions as prescribed by the President. The land classified as timber land was to remain in trust for the benefit of the tribe. The act closed with the provision that "nothing in this Act shall be construed to deprive said Indians of the Spokane Indian Reservation, in the State of Washington, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act." Pursuant to this act, allotments of land were made to individual Indians, the land to be held in trust by the United States for their benefit. Allotments were made to approximately 600 individuals, encompassing between 60,000 and 70,000 acres. The Commissioner of Indian Affairs, acting for the Secretary of the Interior then ordered that the remaining land be classified as either timber or agricultural. On June 15, 1909, Clair Hunt and M. F. Nourse, the classification commissioners, submitted their report to the Commissioner of Indian Affairs. In this report, they classified

82,647.5 acres as timberland and 5,781.22 acres as agricultural. Most of the agricultural land was located on the eastern portion of the reservation. In a letter dated June 15, 1909, which accompanied the surplus land classification schedule to the Commissioner of Indian Affairs, the Commissioners explained how they arrived at their final acreage figures. They stated that they had relied mainly on two sources of data, a soil survey and Forest Service input. The Forest Service's contribution was apparently limited to its opinion that the land eventually described as agricultural was not suitable for inclusion in a forest reserve. No detailed soil classification study as we know them today was attempted nor was any consideration given to the possibility of irrigating the land. Much of the land designated as timber land was actually grazing land and land suitable for dry land farming. (Tr. 812-813, 1346; PE-44; PE-101, PE-102)

32. As the later glacier retreated, it dropped the material it had picked up as it moved south thereby filling the basin with its present overburden. The glacial recession tended to rinse out the upper layers of the overburden resulting in tighter lower layers and looser upper layers. The looser upper layer of overburden is non-uniform, varies from 20 feet to 50 feet thick and is made up of porous gravel and sand. The lower, tighter layer is more uniform, varies from quite thin on the edges to as deep as 600 feet, is on the average of 50 to 350 feet thick, is made up of sand and gravel. Ground water is found within both layers. While the lower layer has more water in it, it does not yield it readily. The upper layer, in contrast, does yield its water readily. The lower layer will yield about 3 to 15 gpm and is generally used for domestic purposes, the upper layer will yield around 1,000 to 1,500 gpm in a typical well. (Tr. 47, 52, 55, 71-72, 199-201, 407-408, 1044; PE-8; PE-9; PE-3-6-74-29, pp. 13-19; United States Reconstruction of Record, p. 5)

40. Thus, in a normal water year, precipitation in and around the basin contributes a significant recharge to the underground reservoir. All of the water which each year recharges the aquifer (except that withdrawn by wells) finds its way out of the Massive Springs and over the Chamokane Creek Falls. Thus, the total flow of Massive Springs equals the "base flow" of Chamokane Creek and, because of the nature of the aquifer and its spring outlets, the total flow is quite uniform throughout the year. During wet seasons the Creek is enlarged by surface flows. This "base flow" and especially the dry weather flow is exclusively the outflow of the recharge and therefore varies with the annual amount and nature of recharge. (Tr. 62, 70, 76, 206-208; PE-31; PE-3-6-74-29, pp. 9-11; United States Reconstruction of Record, pp. 5-6)

41. The total output of the Chamokane Creek drainage system is measurable at the USGS gage below the falls and measurements taken there indicate an average flow of 34,000 to 35,000 acre-feet per year. The average outflow from the springs (base flow of the creek) indicates an average annual recharge of the ground water basin of 24,000 acre-feet. The difference between this figure and the total average flow of 35,000 acre-feet is made up of surface runoff that does not sink into the ground water system. There is no significant augmentation of the stream flow below the falls because the runoff from the sides of the rather steep canyon contributes little water to the flow of the stream, especially in the summer. (Tr. 60-61, 67, 134, 206, 268, 851; PE-3; PE-31)

51. Defendant Dawn Mining Company owns land on the Spokane Indian Reservation adjacent to and west of Chamokane Creek. Dawn Mining Company has a surface diversion of approximately 1cfs from the creek which has the immediate and direct effect of reducing the flow in lower Chamokane Creek by 1 cfs or the exact amount being pumped at any given time. (Tr. 100, 840)

72. Based upon a maximum requirement of three acre-feet per acre, the irrigable land of the tribe within the basin above 2,100 feet will require a maximum of 19,740 acre-feet and the land below elevation 2,100 feet a maximum of 5,640 acre-feet. Thus, the irrigation requirement of the irrigable tribal lands that can be feasibly irrigated from Chamokane waters would be 25,380 acre-feet. (Tr. 114)

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. While the plaintiffs question the validity of this permit it has been accepted as beneficial to the creek and none of the parties has questioned it. (PE-89)

PROPOSED CONCLUSIONS OF LAW

2. Through the Agreement of August 18, 1877 and the subsequent conduct of the United States Government and of the Spokane Indians in ratifying and in good faith carrying out the agreement between them, the United States set aside and the Spokane Tribe reserved the Spokane Indian Reservation for the permanent use and occupancy of the Spokane Tribe of Indians. Northern Pacific Railway

Company v. Wismer, supra.

5. Among the purposes for which the Spokane Reservation was established was that it provide a permanent home for the Spokane Indians, a plentiful fishery upon which the tribal members could continue to sustain themselves, suitable land which the Indians could farm and as favorable a quality of life that the lands and the waters of the Reservation were capable of providing.

20. Those defendants holding water rights permits or applications for uses on lands outside of the Spokane Reservation will have valid rights to the extent finalized by the issuances of a water rights certificate pursuant to State law. As in 18 above any such rights are subject to the reserved water rights of the United States and of the Tribe as found herein.

PROPOSED FINAL DECREE

Claim No. 2

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

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

Claim No. 3

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. Because plaintiffs agree that the fish hatchery benefits the Spokane Reservation and Chamokane Creek none of the parties to this action has challenged the validity of this water rights certificate and therefore the United States has a right to maintain this use pursuant to the terms of the Surface Water Certificate.

II. RIGHTS OF THE DEFENDANTS

The parties, persons and corporations hereinafter named have acquired rights to the use of the waters of Chamokane Creek, its tributaries and groundwater basin pursuant to state law. These water rights, while purporting to be rights for utilization of Chamokane waters, are all junior to the above described rights of the Spokane Tribe and of the United States. They are listed, however, in the order of the priority they bear to each other.

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

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

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

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

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

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

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

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

9. Washington State Ground Certificate No. 4891A is issued

in the name of Robert J. Seagle for use on land east of the Spokane Indian Reservation. It has a priority date of February 1, 1951, and now has a maximum use of 528 gallons per minute up to 1400 acre-feet per year.

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

11. Washington State Surface Water Certificate No. 9100 is issued in the name of Arthur A. Miller for use on land north of the Spokane Indian Reservation. It has a maximum use of .7 cfs not to exceed 105 acre-feet per year. The priority date is not contained in the record of this case. This Surface Water Certificate may not be exercised until such time as proof is offered to this Court as to the priority date of this right and the Court authorizes such exercise.

The following defendants hold uncompleted applications and permits for water rights which are junior to those listed above as already having Washington State certificates and junior to the rights of the United States and of the Spokane Tribe:

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

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

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

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

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

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

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

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

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

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

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

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

24. Washington State Surface Water Application No. 23551 is issued in the name of John Luper for use on land northeast of the Spokane Indian Reservation. It has a stated priority date of December 3, 1971, and a maximum use of 2.0 cfs not to exceed 250 acre-feet per year.

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

To the extent that these aforementioned permits and applications become finalized by the Washington State Department of Ecology, they will be recognized herein as valid, subject to senior rights, namely those found hereinabove for the United States and the Spokane Indian Tribe.

III. JURISDICTION

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

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

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

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

B. While the foregoing certificates, permits and applications are void because of the lack of authority or jurisdiction for the State of Washington to have issued or to issue them, it is also the Judgment of the Court that, assuming such jurisdiction existed or does exist, they are junior to the prior and superior rights of the United States and of the Spokane Tribe as found above.

C. While the State of Washington does have jurisdiction to issue water rights certificates and permits and to accept applications for the use of water on lands outside the exterior boundaries of the Spokane Indian Reservation, it now appears that the waters of Chamokane Creek, its tributaries and its groundwater basin are overappropriated. Therefore, until such time as this Court is satisfied that the rights decreed in this case are being satisfied and that there exists unappropriated waters, the State of Washington is enjoined from the issuance of water rights

certificates and permits or from accepting applications for the use of water from Chamokane Creek, its tributaries or its groundwater basin.

Dated this 23d day of June, 1978.

Respectfully submitted,

DELLWO, RUDOLF & SCHROEDER, P.S.

By Robert D. Dellwo
Robert D. Dellwo

Attorneys for Plaintiff-Intervener
Spokane Indian Tribe

1016 Old National Bank Bldg.
Spokane, WA 99201
Tel.: (509) 624-4291

MICHAEL R. THORP
c/o United States Attorney
U. S. Courthouse
Seattle, WA 98104

JAMES J. GILLESPIE
United States Attorney
JAMES B. CRUM
Assistant United States Attorney
851 United States Courthouse
Box 1494
Spokane, WA 99210

WILLARD ZELLMER
PATRICK CERUTTI
Attorneys at Law
555 Lincoln Building
Spokane, WA 99201

CHARLES ROE
Assistant Attorney General
Department of Ecology
Olympia, WA 98504

ROBERT McNICHOLS
Attorney at Law
Fifth Floor, Spokane & Eastern Bldg.
Spokane, WA 99201

JOHN McRAE
Attorney at Law
911 West Sprague Avenue
Spokane, WA 99204

FRED N. and RUTH M. STAHL
Hunters Star Route
Springdale, WA 99173

KENNETH and ELIZABETH SWIGER
P. O. Box 706
Ford, WA 99013

LEONARD E. LYONS
P. O. Box 84
Springdale, WA 99173

JOHN F. CAMPBELL
Attorney at Law
1306 Washington Mutual Bldg.
Spokane, WA 99201

LAWRENCE L. TRACY
Attorney at Law
Ries & Kenison
P. O. Drawer 610
Moses Lake, WA 98837

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JOSEPH J. REKOFKE
Attorney at Law
Fifth Floor, Spokane & Eastern Bldg.
Spokane, WA 99201

THEODORE O. TORVE
Assistant Attorney General
Department of Natural Resources
Olympia, WA 98504

THEODORE S. MCGREGOR
Paulsen Building
Spokane, WA 99201

MYLES E. FLINT
Chief, Indian Resources Section
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530