

3-18-1980

# Changes Proposed by Spokane Tribe of Indians in Court's Memorandum Opinion and Order and In Judgment

Robert D. Dellwo

*Dellwo, Rudolf, & Schroeder, P.S.*

Kermit M. Rudolf

*Dellwo, Rudolf, & Schroeder, P.S.*

Follow this and additional works at: <https://digitalcommons.law.uidaho.edu/anderson>

---

## Recommended Citation

Dellwo, Robert D. and Rudolf, Kermit M., "Changes Proposed by Spokane Tribe of Indians in Court's Memorandum Opinion and Order and In Judgment" (1980). *United States v. Anderson (Spokane Tribe)*. 50.

<https://digitalcommons.law.uidaho.edu/anderson/50>

This Brief is brought to you for free and open access by the Hedden-Nicely at Digital Commons @ UIdaho Law. It has been accepted for inclusion in United States v. Anderson (Spokane Tribe) by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF WASHINGTON

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

MAR 18 1980

J. R. FALLOWST, Clerk  
Deputy

3 UNITED STATES OF AMERICA, )  
4 Plaintiff, )  
5 SPOKANE TRIBE OF INDIANS, )  
6 Plaintiff-in-Intervention) )  
7 v. )  
8 BARBARA J. ANDERSON, et al, )  
9 Defendants. )

NO. 3643

CHANGES PROPOSED BY SPOKANE  
TRIBE OF INDIANS IN COURT'S  
MEMORANDUM OPINION AND ORDER  
AND IN JUDGMENT

11 The Spokane Tribe of Indians, pursuant to instructions of the  
12 Court at the hearing February 29, 1980, submits herewith  
13 proposed changes in the Court's Memorandum Opinion and Order and  
14 in the Judgment, consistent with the Motion of the Tribe for  
15 amendments.

16 The proposed amendments necessitate revisions of pages  
17 4, 9, 10 and 11 of the Memorandum Opinion and Order and of  
18 page 4 of the Judgment. Attached hereto are proposed revisions of  
19 said pages. Language to be deleted has been placed in  
20 parentheses. Language to be added has been given double-  
21 underlining.

DATED this 7th day of March, 1980.

DELLWO, RUDOLF & SCHROEDER, P.S.

22 By Robert D. Dellwo  
Robert D. Dellwo

23 By Kermit M. Rudolf  
24 Kermit M. Rudolf  
Attorneys for Spokane Tribe of Indians

207

1 PROPOSED REVISED PAGE FOUR OF MEMORANDUM  
2 OPINION AND ORDER

3 The recharge to the basin aquifer, which comes from  
4 precipitation, varies from year to year. Water which recharges  
5 the aquifer is partially withdrawn by manmade diversions and the  
6 remainder exists over the falls. A United States Geological  
7 Survey gauge below the falls measures the total output of the  
8 drainage system, which averages approximately 35,000 acre-  
9 feet per year. Of this amount an average of 16,000 acre-feet  
10 are lost each year during the annual runoff period. The recharge  
11 storage capacity of the aquifer is approximately 19,000 acre-feet  
12 and the annual flow out of the massive springs is approximately  
13 21,000 acre-feet. The impact on the system from manmade water  
14 diversions can be calculated from the USGS measurements.

15 Groundwater withdrawals in the Upper Chamokane region have  
16 no impact upon the creek flow below the falls because  
17 groundwater in this area is part of a separate aquifer.  
18 Groundwater withdrawals in the Mid-Chamokane area, however,  
19 eventually do reduce the lower creek flow. This flow reduction  
20 occurs less immediately when the water removal occurs a greater  
21 distance upstream from the falls. Although the effect of  
22 groundwater removal near the massive springs sometimes is  
23 immediate, the effect of groundwater removal near the northern  
24 boundary of the reservation can be delayed up to two years.

25 PLAINTIFFS' CLAIMS TO WATER

26 A. The Indians' Reserved Water Rights

27 When the United States sets aside a reservation of  
28 land, it impliedly reserves water then unappropriated in  
29 sufficient quantity to fulfill the purposes for which the  
30 reservation was created. United States v. Winters, 207 U.S.  
31 564 (1908). Where surface and groundwaters are hydraulically  
32 related, as they are in this case, the reservation of water  
applies to ground as well as surface water. Cappaert v.  
United States, 426 U.S. 128, 142-143 (1976).

The plaintiffs claim that the Tribe holds reserved  
water rights under the Winters doctrine for irrigation of

PROPOSED REVISED PAGE NINE OF MEMORANDUM  
OPINION AND ORDER

1	Sec. 34, T28N, R39E	NE 1/4, E 1/2 SE 1/4 T1012	7/16/45	15
2	Sec. 21, T29N. R40E	Lots 5 & 7, E 1/2 SW 1/4, E 1/2 SE 1/4 T 1001	2/2/42	20
3	Sec. 31, T29N, R40E	NW 1/4, W 1/2 NE 1/4 T1001	2/2/42	110
4	Sec. 2, T27N, R39E	Lots 6 & 9, NE 1/4 NW 1/4, S 1/2 NW 1/4, NW 1/4 SW 1/4, T 1001	2/2/42	48

6 In conclusion, this Court recognizes reserved  
7 water rights for irrigation of lands within the Chamokane  
8 basin on the Spokane Indian Reservation in the following  
9 amounts. The Tribe has a reserved right to a maximum of  
10 23,694 acre-feet of ground or surface water from the basin  
11 each year for irrigation of the 7,898 irrigable acres with a  
12 priority date of August 18, 1877, the date of the creation  
13 of the reservation. For the 562 reacquired irrigable acres  
14 within the basin, the Tribe has a reserved right to a maximum  
15 of 1,686 acre-feet of water each year with a priority date  
16 of the date of reacquisition. The Tribe, consistent with its  
17 policy to preserve the esthetic, recreation and fishery uses of  
18 Chamokane Creek, up to the present time has not exercised for  
19 irrigation purposes the reserved right of 25,380 acre-feet which  
20 it has but has utilized and is entitled to have said 25,380  
21 acre-feet utilized for flow in Chamokane Creek so as to preserve  
22 the esthetic, recreation and fishery uses of Chamokane Creek. The  
23 Tribe may continue to utilize all or part of this priority reserved  
24 water right for esthetic, recreation and fishery purposes, and non-  
25 priority users should not be allowed to use any part of said 25,380  
26 acre-feet for state-permitted irrigation uses if such uses reduce the  
27 minimum stream flow below 30 c.f.s.

24 2. Reserved Water Rights for Fishing

25 Plaintiffs also assert a reserved right to suffi-  
26 cient water to preserve fish in the Creek. They therefore  
27 claim that one of the purposes for creating the Spokane  
28 Indian Reservation was to insure the Spokane Indians access  
29 to fishing areas and to fish for food. See, e.g., United  
30 States v. Winans, 198 U.S. 371 (1905).

31 The Court finds that maintenance of the creek for  
32 fishing was a purpose for creating the reservation. The  
United States acknowledged the importance of Chamokane Creek  
to the Spokane Indians by setting the eastern boundary of  
the reservation at the eastern bank of the creek, thus in-

1 PROPOSED REVISED PAGE TEN OF MEMORANDUM  
2 OPINION AND ORDER

3 cluding the breadth of the waterway within the reservation.  
4 Fish remain a staple food in the diet of the Spokane Indians.  
5 The Spokanes have reserved the exclusive right to take fish  
6 from the part of Chamokane Creek contained within the reserva-  
7 tion, and many Indians catch and use the native trout as a  
8 food source.

9 The Court therefore holds that the Tribe has the  
10 reserved right to sufficient water to preserve fishing in  
11 Chamokane Creek.

12 The Court finds that the quantity of water needed  
13 to carry out the reserved fishing purposes is related to  
14 water temperature rather than simply to minimum flow. The  
15 native trout cannot survive at a water temperature in excess  
16 of 68°F. The minimum flow from the falls into Lower Chamokane  
17 Creek which will maintain the water at 68°F varies, but is  
18 at least (20) 30 cfs. The Court therefore holds that the plain-  
19 tiffs have a reserved right to sufficient water to maintain  
20 the water temperature below the falls at 68°F or less,  
21 provided that at no time shall the flow past the falls be  
22 less than (20) 30 cfs.

23 Although the usual priority date for reserved  
24 water rights is the date of the creation of the reservation,  
25 the priority date for the water reserved for fishing uses  
26 arguably is even earlier. The Spokane Indians have used  
27 this creek for fishing purposes since "time immemorial," and  
28 therefore they claim a reserved water right with a priority  
29 date of "time immemorial."

30 The priority date for reserved water for fishing  
31 at the latest is the date of the creation of the reservation,  
32 and the Court need not rule on whether the priority date is  
"time immemorial." Under either priority date, the Tribe's  
reserved water rights for fishing uses are superior to any

1 PROPOSED REVISED PAGE ELEVEN OF MEMORANDUM  
2 OPINION AND ORDER

3 and all of defendant's claims. (See discussion of defendants'  
4 water claims, below.)

5 3. Reserved Water Rights for Esthetic and  
6 Recreational Purposes

7 It is also unnecessary to determine whether one of  
8 the purposes of the creation of the reservation was to  
9 preserve the esthetic qualities and recreational potential  
10 of the creek. The Court has determined above plaintiffs'  
11 reserved right to the amount of water required to maintain  
12 the water temperature below the falls at 68°F or less in  
13 order to preserve fishing. This amount of water will also  
14 suffice to preserve the creek's esthetic and recreational  
15 qualities.

16 B. The United States' Water Claim

17 The United States, through its Bureau of Reclamation,  
18 Department of Interior, claims a right to water as the holder  
19 of Surface Water Certificate No. 2831. This Certificate,  
20 issued by the State of Washington, bears a priority date of  
21 October 21, 1942. It authorizes the non-consumptive use of  
22 10 cfs of the flow of Spring Creek, a tributary of Chamokane  
23 Creek, for fish propagation at the fish hatchery operated by  
24 the Bureau of Reclamation just inside the exterior boundaries of  
25 the Spokane Indian Reservation. (Because the authorization is  
26 for the use of water outside exterior boundaries of the  
27 Indian reservation,) None of the parties in this action have  
28 challenged the validity of this Certificate.

29 The Court holds that the United States has a valid  
30 right to water as authorized in this Certificate.

31 DEFENDANTS' CLAIMS TO WATER

32 Defendants assert various claims to water which  
rely on water rights certificates, permits, or applications  
issued by the State of Washington. Plaintiffs resist those  
claims of defendants which relate to land within the exterior  
boundaries of the reservation, asserting that the state has

1 PROPOSED REVISED PAGE FOUR OF JUDGMENT

2 of this Judgment, so as to preserve the esthetic and fishery  
3 uses of Chamokane Creek, such will not abrogate the Tribe's  
4 first priority right to use said reserved waters for irrigation  
5 of said irrigable acres, or any portion thereof, at a later  
6 date.

7 V

8 Plaintiffs own and hold a reserved right to a sufficient  
9 amount of water to preserve fishing in Chamokane Creek,  
10 since maintenance of the creek for fishing was a purpose for  
11 creating the Reservation. This reserved right is decreed to  
12 the extent of at least (20) 30 cfs of water flowing from Chamokane  
13 Falls into Lower Chamokane Creek, together with such additional  
14 flow of water from the Falls into Lower Chamokane Creek as  
15 is necessary to maintain at all times the water temperature  
16 below the Falls at 68° F or less. These quantities are  
17 decreed since the quantity of water needed to carry out the  
18 Tribe's reserved fishing purposes is related to water temperature  
19 rather than simply to minimum flow. The priority date for  
20 plaintiffs' reserved water for fishing purposes at the  
21 latest is August 18, 1877, the date of the founding of the  
22 Reservation, and possibly earlier, and it is decreed that  
23 said reserved water right for fishing uses is superior to  
24 any and all of the claims of the defendants.

25 VI

26 This Judgment need not determine whether one of the  
27 purposes of the creation of the Spokane Indian Reservation  
28 was to preserve the esthetic qualities and the recreational  
29 potential of Chamokane Creek, since the amount of water  
30 decreed to plaintiffs in Paragraph V of this Judgment also  
31 will suffice to preserve the creek's esthetic and recreational  
32 qualities.

33 VII

34 The United States, through its Bureau of the Department  
35 of Interior, is the owner of a water right for the non-  
36 consumptive use of 10 cfs of the flow of Spring Creek, a  
37 tributary of Chamokane Creek, for fish propagation at the  
38 fish hatchery operated by the Bureau of Reclamation (outside) inside  
39 the exterior boundaries of the Spokane Indian Reservation.  
40 This right has a priority date of October 21, 1942, and is  
41 based on Surface Water Certificate No. 2831 issued to the  
42 United States by the State of Washington.