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Record of Proceedings at the Trial, Vol. VII

Wayne C. Lenhart
Court Reporter, Spokane, Washington

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON

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

FEB 13 1976

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v)
)
 BARBARA J. ANDERSON, et al,)
)
 Defendants.)

J. R. FALLQUIST, Clerk
[Signature] Deputy

No. 3643

VOLUME VII

pgs 1201 - 1382

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1 A Yes, that's true.

2 Q Can you tell us, on there is a number of columns
3 following the subdivisions of the land, relating to
4 A/AUM, AUM's, gallons of water, contingent acres not
5 claimed, claimed, AUM's, gallons of water, total
6 claimed?

7 Can you explain what those particular
8 categories are?

9 A Well, the acres in the watershed, well, first off, of
10 course, I have the legal subdivision, which really
11 needs no description, I don't believe, the section,
12 township, and range, which identifies it on the map
13 that is shown. The acres in the tract is what is
14 shown in the records as being the acres shown in that
15 particular section on the map, in coloration, in the
16 red color, those are the State acres in that particular
17 section. The acres in the watershed, the planimeters,
18 uh, planimeters, where they, a measuring tool, to
19 determine how many acres were in the watershed, and
20 without going over to pick out one and describe it, the
21 line that goes through one of the sections, the water-
22 shed line, those lands on the inside show up in my
23 column, "Acres in Watershed".

24 The acres per AUM, AUM is Animal Unit Months,
25 which is the 30-day grazing period, forage for a 30-day

1 grazing period for a thousand-pound animal, as I have
2 used it, it takes so many acres of grazing land, or
3 the portion of acres, to sustain this animal for 30
4 days. This is a common term used in range management.
5 I have inspected the lands and used my judgment to,
6 if you will, look at the first one-- I'm sorry, the
7 first one I'm looking at reads "12" under A/AUM. This
8 means that I would say we will require 12 acres to
9 sustain one animal for one month, for a 30-day grazing
10 period. Am I right in prospectus and using an example
11 here?

12 Q Yes, that's fine.

13 A Okay.

14 Q Go right ahead.

15 A My first section that I'm looking at calls for some
16 397.88 acres in the tract. That particular one is
17 completely inside the watershed. My inspection states
18 that I needed 12 acres per AUM; therefore, if I divide
19 12 into the 397.88, I come up with a 33.16 AUM's in
20 that tract.

21 Q Which means what, then?

22 A That I can graze 33.16 animals for one month out of
23 the season, or divide that up by the number of months,
24 divide months into that, and you get the animals that
25 you could have grazing on there for that period of

1 months. In other words, if you want a six-month
2 grazing season, you could have slightly over five head
3 of cattle per month for six months.

4 Then I further went on, and based upon 15
5 gallons per head of livestock per day times 30 days
6 for a total of 500-- I'm sorry, 450 gallons per month,
7 per animal unit month, and multiplied that by AUM's,
8 and you come up with 17,906.40 gallons per tract per
9 year.

10 Q Have you done that to every portion of land shown on
11 Exhibit 23?

12 A Yes.

13 Q And have you ascertained the total gallonage that each
14 tract of land, if grazed, would be, the effective
15 animals, in a month, would utilize during the period of
16 a year?

17 A Yes.

18 Q And what is that total?

19 A The total for the livestock, I'm sorry, that would have
20 to be subtracted, because on Section 16, Township 29,
21 40 East, I have included a certain amount of gallons
22 of water for domestic and home-site purposes. Those
23 would have to be subtracted, which I have not done.

24 Q Including that figure, though, you have come up with
25 a total amount of gallons, is that correct?

1 A Yes.

2 Q Now, let me ask you this, how many acres of State-

3 owned land lie within this watershed?

4 A The State-owned acres of land within the watershed are

5 15,851.19.

6 Q Now, you have also a column in that exhibit, "Contingent

7 to Watershed", what is meant by those terms?

8 A Those are lands outside of the watershed, but in the

9 same parcel. They are just-- They are in the same

10 parcel and in the same grazing unit, without a source

11 of water outside of the watershed.

12 Q On those, under the column, "Contingent Acres Claimed",

13 what is the significance of that column?

14 A The contingent acres claimed means that there is no

15 source of water for that particular parcel outside of

16 the watershed. Contingent acres not claimed means that

17 there is a source of water for those acres outside of

18 the watershed.

19 MR. TORVE: Your Honor, I would ask that Exhibit

20 24 be admitted, then.

21 THE COURT: That's been on file, I believe?

22 MR. TORVE: Yes, it has.

23 THE COURT: Defendant's 24 is admitted.

24 (Whereupon, Defendant's Exhibit 24 was admitted

25 into evidence.)

1 Q (By Mr. Torve) Now, Mr. Isaacson, you indicated there
2 was one home site, and is there a well on that home
3 site?

4 A No, there is not a well.

5 Q Do you know whether or not any water is being diverted
6 from any surface drainage or ground water for the pur-
7 pose of that home site?

8 A Yes, there is.

9 Q And what is the type of diversion?

10 A It's just a small electric pump.

11 Q And what is the pump in, is it surface water, or--

12 A Yes.

13 Q Is that out of Chamokane Creek?

14 A It's shown on the map as a tributary of Chamokane
15 Creek, but I would be more inclined to call it an
16 intermittent stream, just surfacing continuously at
17 that point.

18 Q Mr. Isaacson, previous to this, you have indicated that
19 you examined the watershed. Have you gone over the
20 lands lying within the watershed here and inspected
21 them?

22 A Yes, I have.

23 Q What is the use that the lands are being put to at this
24 time?

25 A Timber production, grazing of livestock, recreational

1 purposes, and of course, the home site living unit.

2 Q Is there any irrigation being carried on, or actual

3 farming utilizing irrigation in any of the lands?

4 A Disregarding the home site?

5 Q Yes.

6 A Not at this point in time.

7 Q Have you examined the watershed to determine whether or

8 not there is any lands that might be potentially

9 irrigable?

10 A There are several tracts that are potentially irrigable.

11 Q And where do they lie?

12 A Using-- Well,--

13 Q I wonder if you would want to step down to Exhibit 23

14 and maybe point those out?

15 A Section 12, Township 27 North, Range 39 East, we

16 probably have 300 acres that would, could be irrigable--

17 Well, they are irrigable. In 36 of 28, 39, there are

18 300 irrigable acres, plus or minus, of course. And

19 in 16, 29, 40, there are 560 acres. In these lots of

20 Section 22 of Township 29, Range 40 East, there are

21 145 acres. And in--

22 Q Would that be--

23 A How many did I give you?

24 Q If I add that up--

25 MR. : Four.

1 MR. : Four.

2 A Four. 36-- 22-- The Department of Ecology left me

3 in the lurch--

4 (Laughter)

5 A I show in 12-27-39, 36-28-39,-- 36-30-39, there's 200

6 acres in there, with a grand total, I believe, of

7 1505 acres.

8 Q (By Mr. Torve) Are any of those lands riparian to any

9 main branch of the Chamokane Creek or its tributaries?

10 A This one here is riparian to the intermittent stream.

11 Q And what, when you point on the map, which one is that;

12 identify it by section.

13 A Section 16, Township 29 North, Range 40 East. However,

14 there is not enough water in the stream.

15 Q You may take the stand again.

16 May I have Defendant's Exhibit 25.

17 Mr. Isaacson, have these lands, or these

18 portions of them, been leased by the State of

19 Washington?

20 A They have been leased by the State of Washington to

21 various individuals.

22 Q Do you know what the purpose of those leases has been

23 over the years?

24 A Basically grazing.

25 Q Can you tell me what the earliest lease of any of the

1 lands within the watershed has been?

2 A I believe the earliest lease that I can document right
3 off and, without searching through here, is the 1906
4 lease.

5 Q Do you know what the purpose of that lease was?

6 A That was grazing.

7 Q Did you prepare a package of leases of lands within the
8 watershed?

9 A That is correct.

10 Q And let me ask you that, is that the folder that has
11 been labeled as Exhibit 25?

12 A That's what it purports to be. Do you wish me to check?

13 Q If you want to.

14 THE COURT: Are those current leases, or histori-
15 cal?

16 MR. TORVE: That's my next question, Your Honor.

17 A These are both, Your Honor, they're the oldest and the
18 newest, and without doing a lot of work, I couldn't
19 tell you whether the ones in between are in here or
20 not, but the earliest and the latest are.

21 Q (By Mr. Torve) On the tracts that have been leased.
22 Have there been portions of the lands within the
23 watershed that have not been leased?

24 A That's true.

25 THE COURT: Counsel, I think we will take our

1 afternoon recess right now. We've been going for an
2 hour and a-half. We'll be in recess for about 10
3 minutes.

4 (The afternoon recess taken
5 at this time.)

6
7 THE COURT: Proceed.

8 Q (By Mr. Torve) Mr. Isaacson--

9 MR. TORVE: I wonder if I could have Exhibits 31
10 through 36.

11 Q (By Mr. Torve) Mr. Isaacson, would you examine
12 Exhibits 31 through 36 and tell the Court what they
13 are? You have had an opportunity to look at that
14 whole package, have you not?

15 A Yes, I have. These are U.S.G.S. quads-- I'm trying to
16 find 36 before I go much further-- U.S.G.S. quads of
17 the area, including the Chamokane watershed, on which
18 I have covered in yellow highlights the State property,
19 State-owned properties.

20 Q Are those properties the exact ones that are shown on
21 Exhibit 23?

22 A That is true.

23 MR. TORVE: I wonder if the witness could have
24 Exhibit 27.

25 Q (By Mr. Torve) Mr. Isaacson, at my request, did you

1 obtain from the Department of Natural Resources, Maps
2 and Surveys Division, copies of the surveys by the
3 Government Land Office of the Spokane Indian Reserva-
4 tion and the area within the Chamokane Basin?

5 A This is correct.

6 Q And did you obtain those copies?

7 A I did.

8 Q Are those exact copies of the copies held by the
9 Division of Surveys and Maps of the Department of
10 Natural Resources?

11 A These are prints made from the negatives, yes.

12 Q Is that particular agency the official State agency
13 for the Government Land Office survey records of the
14 State of Washington?

15 A Yes.

16 Q And are the records which they keep exact copies of
17 the original Government Land Office surveys?

18 A They're photographs. What this is made from is a
19 photograph of the original, and we keep those photo-
20 graphs.

21 Q And does that Division distribute them to the citizens
22 of the State of Washington?

23 A Yes.

24 MR. TORVE: Let's see, what did you mark those
25 next two exhibits?

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THE CLERK OF THE COURT: Exhibits 67 and 68.

(Whereupon, Defendant's Exhibits 67 and 68 were marked for identification.)

MR. TORVE: I wonder if the witness could have Exhibits 67 and 68.

Q (By Mr. Torve) Mr. Isaacson, directing your attention to Exhibit 67, which I believe is the-- Well, I'll strike that-- Exhibit 68; could you tell me what Exhibit 68 is?

A 68 is a copy of State Exhibit A of the Chamokane Creek Basin, similar to the one up on the board, with practically identical coloration. The only difference is that I have marked on this map locations of sources of water that I have registered under the Water Registration Act.

Q How did you determine the location and existence of those sources of water?

A By field observation, and either measurement or platting of the area from aerial photographs.

Q Are any of those improved water sources?

A Yes, there are some.

Q And when I say "improved", what are the nature of the improvements?

A Developed springs, water piped to tanks, indication of the home sites, and, of course, pumping water out of

1 the intermittent stream.

2 Q Except for the home site, are those improvements
3 related to stock water grazing?

4 A Yes, they are.

5 Q By the way, what is the legal description of the area
6 which the home site is on?

7 A It's in-- How definitive do you wish to be? It's
8 in the Southwest Quarter of Section 16, Township 29
9 North, 40 East.

10 Q Now, you indicated there was a diversion on that; what
11 type of diversion is that, and how much water, if you
12 know, is being diverted?

13 A It's a real small centrifugal pump, probably between
14 seven and 12 gallons per minute maximum.

15 Q Do you know how long that diversion has occurred in the
16 past?

17 A The age of the pump, I have no knowledge; however, the
18 home site dates back to well before 1917.

19 Q Is there any garden or lawn area being utilized along
20 with that home site?

21 A Yes, there is.

22 MR. TORVE: May we, may the witness have Exhibit
23 20-- Well, strike that.

24 Q (By Mr. Torve) Directing your attention to Exhibit 67,
25 do you know what Exhibit 67 is?

1 A Yes.

2 Q What is that exhibit?

3 A Exhibit 67 was the attachment to a statement of claim,
4 the attachment defining claimed ownership, or claimed
5 land ownership, that was submitted with the statement
6 of claim sometime earlier.

7 Q Does that particular exhibit indicate the type of
8 State ownership--

9 A This is true.

10 Q --within the lands? Can you tell us, just generally,
11 what type of ownership we're referring to here?

12 A We're speaking of the various different grants, which
13 includes the agricultural grant, the school original
14 grant, the capitol building grant, CEP&RI, and
15 indemnity, new non-selections for those amounts that
16 we didn't receive within certain reserved areas.

17 Q On the top of that exhibit, it indicates, there is a
18 clear list number, can you just indicate what that means?

19 A The clear list number is the document-granting title
20 issued by the federal government, granting title to the
21 State for that particular property.

22 Q And I take it that's in lieu of 16's and 36's that were
23 not received, or were in federal reserve at the time of
24 statehood, is that correct?

25 A That is true.

1 Q Directing your attention to Exhibit 26--
2 MR. TORVE: I wonder if the witness could have
3 that.
4 Q (By Mr. Torve) Directing your attention to Exhibit 26,
5 and that is labeled, "Clear Lists and Patents"; can
6 you indicate what those are?
7 A These are evidence of titles to ownership of the lands
8 shown on the exhibit on the board, which number I do
9 not know.
10 Q Let me ask you this: On all 16's and 36's, has the
11 State received an actual patent from the government?
12 A Not on all of them, no. Perhaps on this watershed, they
13 may have; I have not investigated.
14 Q But, to the extent that we have there included in
15 Exhibit 26, is that correct, which you're just going
16 through?
17 A To the extent that we have in the Chamokane Basin, yes,
18 they're included in there.
19 Q Now, a portion of Exhibit 26 are in lieu selections
20 which relate to the Spokane Indian Reservation, is that
21 correct?
22 A I would have to investigate them, to be sure.
23 Q I wonder if you could take a look and determine whether
24 or not a portion of those include a package of clear
25 list numbers relating to the Spokane Indian Reservation?

1 A There is a great number of clear lists. Yes, I see
2 the first one, Clear List No. 117 lists several parcels
3 of Section 36, Township 29, Range 36 East, as being
4 used for base.

5 Q Let me ask you this, at my request, did you obtain
6 clear lists of the 16's and 36's that would have been
7 included in the Spokane Indian Reservation?

8 A Yes, I did.

9 Q And are those included in that package there?

10 A I don't know.

11 Q I wonder if you could check to determine whether the
12 package you have obtained there does appear within those
13 records.

14 A I don't-- Correct me if I'm wrong, but I believe that
15 this document here was received November 8, 1973. I
16 just got those other ones recently.

17 MR. TORVE: I wonder if I might approach the
18 exhibit?

19 MR. RUDOLPH: Your Honor, could I suggest we--
20 I don't think we have any objection if Mr. Torve would
21 state for the record exactly what he wants to get in,
22 and pertaining to it, it might be faster, and it would
23 certainly be satisfactory with us.

24 THE COURT: I thought counsel pre-examined this
25 sort of exhibit.

1 MR. TORVE: I'm sorry, the clear lists relating
2 to the Spokane Indian Reservation of, of 16's and 36's
3 within the Reservation were not in the prefiled ones,
4 and the only thing, pursuant to the 1908 Act, Your
5 Honor, the 1908 Act purported to give 16's and 36's
6 of lands classified as agricultural lands by the
7 Secretary of Interior. Subsequently, the State of
8 Washington selected in lieu lands outside of the
9 Spokane Indian Reservation for those lands that had
10 been designated by the Secretary of Interior, and it
11 was for the purpose of showing the date of the
12 selections, the in-lieu selections, and I believe they
13 are included in Exhibit 26, it just happens that the
14 pattern, the tie around the particular package, came
15 off.

16 Q (By Mr. Torve) Mr. Isaacson, directing your attention
17 briefly to Exhibit 67, there are a couple of minor
18 changes in the legal descriptions on that; did you
19 make those changes?

20 A Yes, I personally made these changes.

21 Q Did the changes then made conform to the ownership as
22 shown on Exhibit 23?

23 A That is correct.

24 MR. TORVE: Your Honor, I believe that would
25 conclude my questions with this particular witness, but

1 I would offer the Exhibits 25, 26, 27, 31 through 36,
2 and 67 and 68, that we have discussed with the witness.

3 I would also, in addition thereto, offer
4 Exhibits 28, 29 and 30. Exhibit 28 is a House
5 Congressional Resolution relating to the Spokane Indian
6 Reservation; Exhibit 29 is the 38 Lands Decision, 496,
7 of the Secretary of the Interior; Exhibit 30 is a 47
8 Lands Decision, 179, of the Secretary of the Interior;
9 and we would offer these in evidence as portions of
10 the history relating to the, of government documents
11 relating to the Spokane Indian Reservation.

12 MR. GERMERAAD: Although I have doubts as to the
13 relevancy of 28, 29 and 30, I would say that for
14 briefs, I would, I think that is where it should be
15 hammered out, and otherwise, I have no objection.

16 THE COURT: Anybody else have any objections?

17 (No response.)

18 THE COURT: They will each be admitted. I don't
19 have a record of numbers, so, counsel, you'd better
20 check with the clerk sometime before the trial is over,
21 to make sure they're all properly identified.

22 (Whereupon, Defendant's Exhibits 25, 26, 27, 28,
23 29, 30, 31, 32, 33, 34, 35, 36, 67 and 68 were admitted
24 into evidence.)

25 MR. TORVE: I have no further questions, then, of

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this witness.

CROSS-EXAMINATION

BY MR. GERMERAAD:

Q Mr. Isaacson, you described various uses that were being made of these lands; most of it was for grazing, and some stock water, as a home site. You said one thing that I wasn't clear on, you said recreation; what did you mean by recreation; how are these being used for recreation?

A There are certain streams in there that do support fish which are available to the public. There is a fairly good deer population, I have been told.

Q And this would be open for hunting?

A Yes.

Q Okay. Another question relating to all this water use, not all the water uses that you mentioned, not all those have been granted a certificate, have they, by the State Department of Ecology?

A None of them have.

Q None of them have.

MR. GERMERAAD: Thank you, Your Honor.

THE COURT: Cross by the Tribe?

1 CROSS-EXAMINATION

2 BY MR. RUDOLPH:

3 Q I wasn't clear as to the reason you're listing on,
4 I guess it's 24, why you put in the contingent to the
5 watershed, I mean, you're not pumping water outside the
6 watershed, are you?

7 A No.

8 Q Why are the contingent acreages within on your listing?

9 A Would I be permitted to go to the map? It's easier to
10 describe it on the map.

11 THE COURT: You may, if it helps.

12 Q (By Mr. Rudolph) Certainly.

13 A I would like to change the exhibit, if I may, to the
14 second copy. Well, this particular parcel, Section 12,
15 Township 27 North, Range 39 East, the watershed boun-
16 dary, as drawn, splits the parcel. On your map--
17 On that sheet there, you will find there are so many
18 acres in the watershed, first off, so many acres in the
19 parcel, there are so many acres in the watershed, and
20 so many contingent acres.

21 Now, if I have a source of water outside of
22 this line, then I do not take water for the contingent
23 acres. If my only source of water is within the
24 watershed, then I have claimed water from within the
25 watershed to take care of the grazing needs of the lands

1 outside of the watershed.

2 Q Fine. I think that's clear enough.

3 Is your pumping, and maybe you said this, and
4 I just didn't hear it, is your pumping with the small
5 electric pump, is that surface water or ground water
6 pumping?

7 A That would be surface water.

8 MR. RUDOLPH: That's all I have.

9 THE COURT: Further inquiry?

10 You may step down. Thank you, Mr. Isaacson.

11 MR. TORVE: The defendant State of Washington,
12 Department of Natural Resources, would rest its case.

13 THE COURT: Mr. Campbell?

14 MR. CAMPBELL: Your Honor, in view of the fact
15 that we have Mr. Smithpeter's permit in, we have
16 evidence of his usage, where the Tribe entitled him,
17 and the fact that his land is riparian, and due to the
18 fact the Court has viewed the area, I believe we will
19 present no other testimony.

20 THE COURT: Thank you.

21 Mr. Tracy?

22 MR. TRACY: The only thing I have at this moment
23 is, we would like to put into evidence our patents.
24 As I said today, Mr. Newhouse isn't here right now.
25 We would like to have a chance later, if we cannot

1 agree to the stipulated facts, to put him on for a few
2 minutes to testify.

3 THE CLERK OF THE COURT: These are patents for
4 Newhouse.

5 MR. TRACY: Yes.

6 THE CLERK OF THE COURT: 69.

7 (Whereupon, Defendant's Exhibit 69 was marked for
8 identification.)

9 THE COURT: Mr. Tracy, although you have no
10 witnesses, what does Defendant's Exhibit 69 purport to
11 be?

12 MR. TRACY: It purports to be Mr. Newhouse's
13 patents, photocopy of the original patents on file
14 with the Auditor of Stevens County.

15 THE COURT: Any objection to 69?

16 MR. GERMERAAD: No, Your Honor.

17 THE COURT: Admitted.

18 (Whereupon, Defendant's Exhibit 69 was admitted
19 into evidence.)

20 THE COURT: Is that all you have, Mr. Tracy, for
21 now?

22 MR. TRACY: That's all I have for now, Your Honor.

23 THE COURT: Thank you.

24 Mr. Cerutti?

25 MR. CERUTTI: Thank you, Your Honor. Mr. Seagle

1 will testify just briefly.

2 Mr. Seagle, would you step forward, please.
3 Step over to the witness stand and remain standing to
4 be sworn, please, sir.

5 MR. TRACY: Your Honor, excuse me for just a
6 moment, I hate to interrupt, but Exhibit 86 is the
7 Newhouse State File which shows our certificates, does
8 it not, for the water, and it's been admitted?

9 THE COURT: I believe so.

10 MR. RUDOLPH: Yes.

11 THE COURT: Yes.

12

13 ROBERT J. SEAGLE, defendant herein, called as a
14 witness on his own behalf,
15 having been duly sworn,
16 testified as follows:

17

18 THE CLERK OF THE COURT: Would you please state
19 your full name for the Court, spelling your last name.

20 THE WITNESS: Robert J. Seagle, S-E-A-G-L-E.

21 THE CLERK OF THE COURT: Thank you.

22

23 DIRECT EXAMINATION

24 BY MR. CERUTTI:

25 Q Mr. Seagle, your wife is Dorothy F. Seagle?

1 A Yes.

2 Q And where do you and your wife reside, Mr. Seagle?

3 A We reside at Ford, Washington, on the old Chamokane
4 Mission.

5 Q Any children still at home with you?

6 A No, they're all gone.

7 Q Mr. Seagle, perhaps you could step over to the exhibit
8 board here with me.

9 A (Does so.)

10 Q Mr. Seagle, directing your attention to Plaintiff's
11 Exhibit No. 10, I wonder if you would outline, just in
12 general, the boundaries of your property?

13 A In relation to Ford, it would be about in this area,
14 my boundaries of the land.

15 THE COURT: You're all on the east side, southeast
16 side of the creek?

17 A All on the southeast of the creek.

18 Q (By Mr. Cerutti) Does your property go right up to
19 the-- Does your property line go right up to the edge
20 of Chamokane Creek, sir?

21 A Chamokane Creek is my boundary on the west, north and
22 west.

23 Q Is there any portion of your property which is located
24 within the Spokane Indian Reservation?

25 A No.

1 Q And your personal residence is located on this property?

2 A Yes.

3 Q Do you have wells located on this property?

4 A Yes.

5 Q Would you tell the Court how many wells and indicate

6 their approximate location on the same map?

7 A I have four wells; three of them are on the south side

8 of the road, the first well, that's three on the south

9 side of the road; starting at the north well, up here, to

10 17,, and I have another well down here, just barely

11 within 17, I have one down here at the house in 20, and

12 I have a well I have never pumped out of in 19.

13 Q That's the southernmost well that you have never pumped

14 from, sir?

15 A Yes, it is.

16 Q Are there any ground waters on your property?

17 A Yes, a few springs.

18 Q Would you show the Court the location of those, please?

19 A Well, they're up in this area, this area contains three

20 to 400 acres in here, and there's numerous springs,

21 three or four, along here, and it drains out, and there

22 is another one down here, at 19.

23 Q And is there any flow of ground water across your

24 property at any time of year?

25 A Yes, in the spring. Right now, Nigger Creek is flowing

1 strong. It used to flow across, out across this field.

2 Q What is the approximate direction of flow of the--

3 Nigger Creek is its name, sir?

4 A Yes.

5 Q What is its approximate direction of flow?

6 A Well,-- Through my property?

7 Q Yes.

8 A Just about west, I would say.

9 Q And can you tract its general path, then?

10 A Well, that's it here, this line, I take it. That's a

11 man-made ditch at some time or other.

12 Q Where does this Nigger Creek join into a man-made

13 ditch, can you show the Court?

14 A Right about here. In other words, there is some hill

15 land in here, and hill land on the other side, and it

16 used to run somewhere between those hills, it used to

17 run out across the fields and subirrigate that whole

18 area in there, and these springs up above Section Line

19 20, come out, they run out and into the ground on that

20 property.

21 Q Does that man-made ditch down at the flat contain the

22 flow of Nigger Creek from that point on?

23 A Yes.

24 Q Go ahead and have a seat, if you would.

25 A (Does so.)

1 Q I take it, sir, that is the extent of ground water on
2 your property?
3 A That's all I can think of at the present time.
4 Q Excuse me, surface water, aboveground.
5 A Yes.
6 Q Approximately what total acreage do you own there, sir?
7 A Well, I have about 450 farmland, and the whole place
8 includes about 1600 acres.
9 Q 1600?
10 A Yes.
11 Q Approximately how many of those 1600 acres are normally
12 under cultivation?
13 A About 450.
14 Q And what is your normal use of those 450 acres, sir?
15 A Grow wheat and barley and hay, and pasture.
16 Q And approximately what portions of the 450 acres might
17 be normally attributable to each of those uses?
18 A Well, when Uncle lets you raise wheat, I have had up
19 to about 200 acres of wheat, and ordinarily, I have
20 about 100 acres of hay, and the other would be in
21 summer fallow, and a little in pasture.
22 Q Have you any livestock on the property, sir?
23 A Yes.
24 Q What kind of livestock, and approximately what number?
25 A About all cattle; about 80 head.

1 Q Is that about the normal livestock that you have?

2 A That's about normal. It varies some.

3 Q How long have you owned that property, sir?

4 A I bought the property in the fall of '47-- 1947.

5 Q Have you resided continually upon it ever since?

6 A Been there ever since.

7 Q When did your family first come into this general part

8 of the country?

9 A My father, my grandfather and my great-grandfather came

10 to Eastern Washington in 1885, Colfax-Palouse area.

11 Q When were the four wells put on your property, sir?

12 A 1951. That is, three of them. The south well was

13 put in later. I don't just remember the date.

14 Q Can you give us an approximate date on the south well?

15 A Well, it could have been '56 or '7, approximately, I

16 don't know for sure.

17 Q What use do you make of those four wells, sir?

18 A I irrigate, I have irrigated up to 336 acres, in that

19 area, I have two 10-horse pumps, and have a quarter-mile

20 of line, 4-inch pipe, and half a mile of line of

21 three-inch pipe, and while you're carrying a quarter of

22 a mile of pipe with a hand line, you travel approxi-

23 mately seven-eighths of a mile, and you do a little

24 physical labor in the process. If it's a four-inch

25 pipe, it will carry 200-and-some pounds of water, plus

1 your pipe. When you have to disconnect that, or you
2 make a miscue, you have to pull it out and redo it.
3 Pipe is something just anybody can't carry. You might
4 think anybody could move a pipeline over, but no so.
5 I have had grown men you pert-neared couldn't teach
6 to move pipeline. It's a seven-day job, you don't
7 stop to go to the rodeo; with just one watering, you
8 might lose it. If it's in a gravelly area, and you
9 don't get water, you can lose a crop right there, or
10 diminish it to where you would have had it in the first
11 place.

12 Q How many wells would you ever be pumping out of at any
13 one time?

14 A I have never pumped but the two wells at a time, I just
15 have the two pumps, and I move them from well to well.

16 Q How many gallons a minute can be pumped from the two,
17 working together?

18 A About 528, as close as I can figure.

19 Q And is 528 your certificate, your permitted use?

20 A 575, I believe, is my certificate, which is in a sense
21 short, because a hand line, when I got it, was obsolete,
22 it's kind of like using a two-plow tractor on a
23 thousand-acre farm, you can work at it, but you can't
24 efficiently do the job, because you just can't get over
25 the land, you can't physically move that much pipe, so

1 eventually, I suppose, I will have to move to some kind
2 of mechanical line.

3 Q What effect, if any, would that change have on the use
4 of your wells?

5 A Well, I suppose you would be pumping more water out of
6 them. In other words, I feel the State, they have a
7 kind of formula, as I understand it, a certain gallonage
8 per minute per acre is the minimum for irrigation, and
9 due to the-- If I ever expanded my pump and pipe for
10 my 336 acres, why, I'm really short of water.

11 Q Do you reasonably anticipate in the immediate future
12 that you would have, that it would be necessary for
13 you to expand to a mechanical watering system, the
14 type you are now describing?

15 A Well, all farming is expand or go under.

16 Q If you expanded in that fashion, can you give the Court
17 any estimate as to what your water needs might be at
18 that time?

19 A Well, I feel now I should have been awarded, for the
20 amount of acres I've covered, somewhere in the 1700 to
21 2000 acres, to water what my certificate calls for, that's
22 in acres, and if I--

23 Q So if you make the expansion that you have described,
24 would you then need something in the neighborhood of
25 this 2,000 gallons?

1 A I would say so, for the minimum.

2 Q Are there any draws or valleys located on your property
3 that would run generally in an east-to-west direction,
4 or northeast-southwest direction?

5 A Well, there's this draw that goes pretty generally south
6 from my main big field there.

7 Q Have you had occasion to examine the rock surfaces on
8 the two sides of the draw?

9 A ^Yes, there are different kinds of rock.

10 Q Were you able, from your past experience and knowledge,
11 to identify the two kinds of rock involved?

12 A Well, as I know it, rock, why, one side is granite, and
13 the other side is basalt.

14 Q What is the general direction that that draw runs across
15 your property, sir?

16 A Just about north and south, and the Nigger Creek, it
17 runs a little off to the south and east, but there is
18 a little draw there, but the main draw I'm speaking
19 about goes north and south.

20 Q Do I understand this joins another draw?

21 A Well, they come together at, where the ground levels
22 out, you might say.

23 Q And what direction does this other draw run?

24 A Now, that's the Nigger Creek, or--

25 Q Yes.

1 A That draw runs southeast.

2 Q Is it also composed of granite on one side and basalt
3 on the other?

4 A No, it's granite on both sides, I would say.

5 Q Have you, over the years, become at all familiar with
6 the general reputation in your community as to the
7 historical use and development of the property that
8 you presently occupy?

9 A Yes, I have talked to quite a few old timers, and I
10 have read the diaries of the Walkers and Neals (pho-
11 netic) families.

12 Q I would like to ask you, in that regard, specifically,
13 are you referring now to the book entitled, "First
14 White Women Over the Rockies", Volume II, which purports
15 to be a diary of Mary Walker as edited by one Clifford
16 M. Grewery (phonetic)?

17 A Yes.

18 Q Dated 1963?

19 A Yes. Mr. Grewery, he has been to my place twice since
20 I have been there. I have three books on the white
21 women over the Rockies, the first six white women that
22 crossed the Rockies.

23 Q Have you read other historical books of a similar
24 nature concerning this vicinity?

25 A I have read Mary Richardson Walker, which is the wife,

1 and his granddaughters, two of them, were there several
2 years ago.

3 Q Have you ever had occasion to examine ancient records
4 or letters or documents of one kind or another concern-
5 ing the history of the property?

6 A Yes, these diaries also carry some letters, and then I
7 have a letter that a man wrote in 18, or 1949, that were,
8 was to this place and spent the summer in 19-- 1885.
9 He was born in 1871. That give quite a little
10 information on the place.

11 Q On the basis of those various matters that you have
12 mentioned which have familiarized you with this history,
13 can you tell the Court when, the earliest date that
14 you're aware of that the land was first settled by non-
15 Indians, and when I say "the land", I mean the
16 specific land that you now own.

17 A Well, the Chamokane Mission was established in 1838,
18 that's 136 years ago, and they moved there at the
19 request of the Indians. There was one request, there
20 was four Indians went back to St. Louis from some part
21 of the country, three of them didn't even survive the
22 trip, the last one died in Montana, and then when Walker
23 and Neal got the Whitman Mission at Walla Walla, there
24 was a chief from the Spokane Tribe that sent a contingent
25 of about eight or nine people, and quite a bunch of

1 horses, to move them up to Chamokane, and after the
2 got down to here instead of up here,
3 they left the Chamokane Mission in about 1848 and went
4 to the Willamette Valley.

5 Q Now, the missionaries that you referred to, did they
6 include Mrs. Walker, whose diary you previously
7 referred to?

8 A That's right, and Mr. Grewery reports she had the best
9 diary of any of the missionaries that arrived in this
10 part of the country.

11 Q Do you know where the mission site was located, with
12 reference to your home that you now live in?

13 A Yes, right there.

14 Q Same place. Do you know whether or not the Walker
15 missionaries planted crops in this property?

16 A Yes, they did. They planted wheat and potatoes and
17 about 12 other garden produce.

18 Q Do you know whether they had occasion to utilize crops
19 for commercial in addition to their domestic use?

20 A Yes, they sold crops commercially to the Indians and
21 other white traders, and even some seed.

22 Q Do you know whether or not the Walker missionaries had
23 occasion to irrigate the lands they cultivated?

24 A That was mentioned in there.

25 MR. RUDOLPH: Just a minute, is that in, is that

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specific thing in one of those texts?

MR. CERUTTI: I would be happy to make the diary available, which so indicates. I did not plan to make it an exhibit, because it's a borrowed book and a valuable one, but I would certainly make it available to be read.

THE COURT: Let him answer. That can be checked out.

Q (By Mr. Cerutti) Perhaps I can rephrase the question, sir. Does the Walker diary contain any specific reference as to whether or not they irrigated their crops?

A Yes, she mentioned they irrigated in one or two places, I think, in the diary.

Q I see. And aside from whatever irrigation they did, would there have been any natural irrigation from this Nigger Creek at that particular point in time?

A Yes, it used to come out across this plain and down towards Chamokane Creek. I don't know whether it ever reached Chamokane Creek at that time, I suppose it probably did, but it covered this plain, you come to the mouth of the thing, the ground is somewhat rounded, as this alluvial sediment settled down, it's rounded slightly, very hard to see, but there are sand trails down through there where the creek run from time to

1 time.

2 Q Now, am I correct in understanding that the creek no
3 longer does that and that a man-made diversion now
4 carries it away from your property?

5 A Carries it off along the side.

6 Q Do you know whether or not the Walker missionaries
7 dug any wells upon this property, sir?

8 A She stated there in a place that they dug wells and had
9 a little trouble with it occasionally, and then another
10 place she mentioned a carbon well.

11 Q Approximately how long did the missionaries remain on
12 the property, sir?

13 A Until after the Whitman massacre in '47. They left in
14 the spring of '48, I understand.

15 Q Do you know when the land was next settled by a non-
16 Indian?

17 A In 1862, there was a man by the name of Haines (pho-
18 netic) that was a quartermaster in the army, I guess,
19 at that time, and I think he had been through there a
20 few times and he liked the looks of the place, so he
21 settled on it.

22 Q Do you know what use he made of the land and whether
23 or not he cultivated it?

24 A Well, he farmed it, I think he had cattle, maybe, first,
25 and then he farmed it, and according to this letter that

1 this man I spoke of a while ago wrote that he had
2 around 250 to 300 acres broke out in 1885.

3 Q And at that time, he had been on the property how many
4 years?

5 A Well, from '62 to '85.

6 Q Do you know, then, did the property stay in the Haines
7 family for some years?

8 A Just how many years, I don't know, but as far as I know
9 it did. Just when the next people came on, I don't
10 know. After the Haines left, they lived in the area;
11 in fact, it would be the grandchildren, I guess, of
12 the original Haines that settled there, just passed
13 away within about the last eight or 10 years, and they
14 have been there all that time.

15 Q Is it your understanding that the property passed from
16 them to others in a direct chain of title, to yourself?

17 A Yes, as far as I know. There has been two other
18 fellows that I know has farmed it, or worked on the
19 place as much as 60 years ago.

20 Q Mr. Seagle, can you tell the Court what the probable
21 effect would be upon yourself, your family, and your
22 farming operation and your livestock in the event that
23 you were forced to completely discontinue use of your
24 four wells?

25 A Well, I suppose it would put me out of the cattle

1 business. Up in that area, it's a pretty harsh country,
2 and you need a little diversification to survive it.
3 I have seen temperature changes that went from 40 below
4 to 105, and that's not exactly easy. There was one
5 year I think the Spokane weather station had 99 days
6 in a row when it froze, and that's a little over three
7 months, and I know Mrs. Walker mentioned there was one
8 three-month period in the first seven or eight years
9 they were there, that there was three months in the
10 summer when it didn't freeze, which was very unusual.

11 I have seen it freeze every month of the
12 year. Not last year, but in '72, I seeded wheat crop
13 for '73, and I never sold a kernel of wheat, had to
14 redo the complete thing, and also lost alfalfa to
15 freezing weather.

16 Q I gather you're pumping that water out through a
17 sprinkling system onto your crops, is that correct?

18 A That's right, spent many a day, in May and June. I
19 went up there when the crop was six or eight inches
20 high, and you needed your skates to change the pipe
21 because there was ice all over that stuff.

22 Q The record shows here, sir, there is also a matter
23 pending relating to your request to use a small flow
24 of ground water, or surface water, excuse me, from a
25 spring on your property; can you tell the Court what

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that relates to?

A Well, the springs, there is about three of them within a short area, and they ran out onto this ground, and about, a few years ago, why, changed this Nigger Creek from the center of my field to stop some of the cornering you have to do with the equipment, and ease to get from one side to the other, I moved this creek over next to the hill, so now these springs go directly into this creek, and of course, I intended on getting that, to legalize it only, I wanted to get the water rights on it, to keep somebody from hollering, which they hollered anyway.

Q What use do you plan to make with the water, and how much of it do you feel that you need?

A Well, at that time, I was just going to put it across the ditch that I built and let it run out, but I might want to run a little plastic pipe and run it around instead of letting it run back into the ground, but it's not too important that way.

Q Well, what would you do with that water, that surface water that you'd divert?

A Well, I'd put a little cattle pasture up there and get a little feed out of it.

Q That's apparently never been approved?

A It hasn't been approved, because the people up above

1 me, always protesting back and forth, you know, once in
2 a while people thinks you got it in for them, or some-
3 thing, when you protest, and so they protest back, and
4 some of them are up on the hill, maybe 200 elevation,
5 200 feet in elevation above, that could never get the
6 use, they're setting on solid granite.

7 Q Is it accurate to say the thing is still pending?

8 A Still setting there. Don't bother me, one way or
9 another. So, the only thing, if they wouldn't approve
10 it, I would just have to put the ditch back and let it
11 run out on the ground, and hold it in one spot, and
12 that would cover 100 feet, 200 feet, whatever it amounts
13 to, for a certain time of the year, and it would go to
14 waste, where you might cover 300 or 400 feet and get a
15 little pasture out of it.

16 MR. CERUTTI: Thank you, Mr. Seagle. I have
17 nothing further, Your Honor.

18 THE COURT: Cross?

19

20 CROSS-EXAMINATION

21 BY MR. GERMERAAD:

22 Q Mr. Seagle, did you say your present ownership is 1600
23 acres, is that correct?

24 A That's close. I don't know which way it is from 1600
25 acres.

1 Q The reason I'm asking that is, later on when you talked
2 about expanding your operation to a mechanical system,
3 you talked about needing water for 1700 to 2000 acres--

4 A No.

5 Q --or was I--

6 A No, you misunderstood me.

7 Q Did you mention a figure of 1700 to 2,000 as applying
8 to something?

9 A That was gallons. In other words, I figure I should
10 have had that for my 336 that I have a permit to
11 irrigate now, or a certificate, because, to come under
12 their figure of a certain gallonage per minute per
13 acre.

14 Q Okay, now I understand, you have cleared that up for me,
15 thank you.

16 Another thing, Mr. Seagle, I didn't understand,
17 at one point you said that in 1885 the Haines had two
18 to 300 acres broken out; what did you mean by "broken
19 out", I didn't understand your terminology?

20 A It means farmable land. In other words, they were
21 probably growing grain crops, I suppose, at that time.
22 But they mentioned also threshing, they had a horse-
23 power threshing machine.

24 Q Okay.

25 MR. GERMERAAD: Thank you. Just a second. No

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further questions by the plaintiff.

THE COURT: Cross by the Tribe?

CROSS-EXAMINATION

BY MR. RUDOLPH:

Q This pending application which you have, does that relate to the springs which you say were used by the missionaries, are those the springs?

A Whether they used these upper springs, I couldn't say. In other words, they probably couldn't help it, they were running their stock loose at that time, and they took sometimes three or four days to run them down, so they went as far as a cow could get, in, I suppose, half that time, it would be two days. Sometimes a cow can move out pretty good, so they were getting some benefit of it, no doubt, because it was running out on the land, then, as far as I know, the same as it is now.

Q Whatever year, you mentioned there's some mention in this diary of some irrigation. I would understand from that that you're referring to whatever happened from those springs running out on the ground, or from any subsurface seepage, would that be correct?

A Yeah, it would be from this Nigger Creek coming down across this plain, she ran out there, and I suppose at

1 one time, it run out a quarter or half a mile, and as
2 the springs dried up in the summer, she probably backed
3 up a little.

4 Q But there is no indication in the diary of any diversion,
5 of any man-made diversion, as such?

6 A Only ditching, I said that they ditched down probably
7 close to the buildings, close to where they lived.

8 Q And what acreage are we talking about?

9 A I don't really know what acreage they had broken out,
10 the missionaries themselves, they used three teams of
11 mules, and at one time, somewhere, I read they broke
12 out about 22 acres. Now, that's all I can tell you
13 about it, and that's the first year they were there.

14 Q And you wouldn't have any idea as to volume, in annual
15 volume, or any rate of flow used?

16 A No.

17 Q I take it from your testimony there was a period in
18 which the property was vacant after the missionaries
19 left?

20 A As far as I know, from the time they left until Haines
21 came in '62. I just don't know what happened.

22 Q And there was no irrigation by you-- You acquired the
23 land when?

24 A 1947.

25 Q And it wasn't being irrigated at that time, any part of

1 it?

2 A No.

3 Q And there was no irrigation, then, until--

4 A No, as far as I know, there wasn't. Nothing that I know

5 was irrigated, but it could have been.

6 Q There was no evidence in 1947 of any irrigation of the

7 land, then?

8 A Not by man-made, it's always been subirrigated from

9 this creek and these springs.

10 Q And then in 1951 is when you applied for your four

11 wells?

12 A Yes.

13 Q And you put in three of them in 1951, and one of them

14 in 1958?

15 A Three in '51, and I don't remember, six or seven years

16 later, as I remember, I put in the fourth one. That is

17 the one I never pumped from, the one closest to the

18 big springs.

19 Q The one you put in most recently is the one you never

20 pumped from?

21 A That's right.

22 Q Is the reason that you didn't use the fourth one, is

23 that because of the Department's order--

24 A No.

25 Q --and the reference that those three wells were within

1 the subsurface, pervious subsurface area and can affect
2 the level of Chamokane Creek?

3 A No, the Department of Water Resources has never given
4 me any orders one way or another on any of the wells,
5 as far as pumping.

6 Q And you have had some concern over the effect on the
7 water table by any diversions of anybody in the
8 Walker's Prairie area, haven't you?

9 A That's right. When anybody--

10 MR. CERUTTI: Your Honor, I don't believe the
11 witness is qualified in any way to speak to the ques-
12 tion of hydrology in terms of whether or not ground
13 diversions would affect the flow of the creek.

14 MR. RUDOLPH: I didn't ask him that, Your Honor.

15 THE COURT: I don't think that is what he really
16 asked him, counsel.

17 Do you understand the question, Mr. Seagle?

18 A Well, maybe you'd better restate it.

19 Q (By Mr. Rudolph) I said you have had concern, as a
20 landowner and a water user, you have had concern over
21 anyone in, anyone else in the Walker's Prairie area
22 being allowed to pump out of the ground, water, for use
23 on their lands, haven't you?

24 A Well, the Department requires you to, doesn't require
25 you to, what do they call it, send in a protest. In

1 other words, if anybody does pump and bother you, if
2 you don't send in a protest, I guess you're sitting
3 there with your hands in the air, and so I'm concerned
4 about the fact that I send in protests when anybody in
5 the area applies for water, because I don't know what
6 it's going to do to me.

7 Q And in the Newhouse application, you did protest and
8 said you feared there would be a lowering of the water
9 table, and that there had been some lowering of the
10 water table?

11 A The water table has been dropping, as long as I have
12 been there, as far as I know.

13 Q And you were concerned that any pumping would make it
14 drop further?

15 A As far as I know, any pumping could make it drop
16 further. I don't know.

17 MR. RUDOLPH: That's all.

18 THE COURT: Further examination?

19 MR. CERUTTI: Nothing further, Your Honor.

20 THE COURT: Thank you. You may step down, Mr.
21 Seagle.

22 Do you have other witnesses, Mr. Cerutti?

23 MR. CERUTTI: No, Your Honor, we rest the case.

24 THE COURT: Mr. Rekofke?

25 MR. REKOFKE: I can go now, or Mr. McGregor, I

1 guess his witness will be short.

2 THE COURT: Whichever, it's your--

3 MR. REKOFKE: I guess your witness is pretty short?

4 MR. MCGREGOR: First, Your Honor, I would like to

5 offer into evidence the Water Application Certificate

6 of Urban S. Schaffner, just for--

7 THE COURT: What is the number?

8 MR. MCGREGOR: I don't believe it's been offered

9 in.

10 THE CLERK OF THE COURT: I have one with the middle

11 initial, "C".

12 MR. MCGREGOR: Oh, excuse me, Urban Charles

13 Schaffner. It's the official State File as to his

14 application for water rights.

15 THE CLERK OF THE COURT: 70.

16 (Whereupon, Defendant's Exhibit 70 was marked for

17 identification.)

18 THE COURT: Any objection to Defendant's 70, being

19 an official file on Schaffner?

20 (No response.)

21 THE COURT: It will be admitted.

22 (Whereupon, Defendant's Exhibit 70 was admitted

23 into evidence.)

24 MR. MCGREGOR: I would like to call Paul Schaffner.

25

1 PAUL SCHAFFNER, defendant herein, called as a
2 witness on his own behalf,
3 having been duly sworn,
4 testified as follows:
5

6 THE CLERK OF THE COURT: Would you please state
7 your full name to the Court, spelling your last name.

8 THE WITNESS: Paul E. Schaffner, S-C-H-A-F-F-N-E-R.
9

10 DIRECT EXAMINATION

11 BY MR. MCGREGOR:

12 Q Mr. Schaffner, where do you reside?

13 A I have residence near Ford, Washington, about four
14 miles north of Ford, Washington.

15 Q What is your occupation, Mr. Schaffner?

16 A I am engaged in farming.

17 Q Do you now own or are you now purchasing the lands upon
18 which you reside?

19 A Yes, I am. I had purchased this land about three years
20 ago, and am paying on it.

21 Q From whom did you purchase that land?

22 A This land was purchased from my father and my mother.

23 Q I believe in evidence is an exhibit, but I'm not sure
24 of the number, it's the one with all the patent deeds
25 that indicates that one Emil Schaffner received a patent

1 deed based on a homestead.

2 MR. MCGREGOR: That is in evidence, is it not?

3 THE CLERK OF THE COURT: Yes, 71.

4 Q (By Mr. McGregor) Is it your understanding that your
5 father purchased that land from his father, Emil
6 Schaffner?

7 A That is correct. My grandfather homesteaded there in
8 1910, and my father purchased the land from him in 1926,
9 and then I purchased the land from my father and mother
10 in 1971.

11 Q Is there a creek that runs across that land?

12 A Yes, there is.

13 Q What is the name of that creek?

14 A Thomas Creek.

15 Q Is that the same Thomas Creek from which you have
16 applied, or your father applied and received a certifi-
17 cate of water right, surface water rights?

18 A This is correct.

19 MR. MCGREGOR: The certificate we speak of is
20 Exhibit 61.

21 Q (By Mr. McGregor) Is that creek a continuously-flowing
22 creek?

23 A This creek runs the entire year.

24 Q How long have you lived on or about your land?

25 A I was born and grew up, I was born in Chewelah and grew

1 up there, and lived there continuously during my first
2 18 years, and then off and on since that time.

3 Q Do you irrigate any of your land relative to your water
4 rights?

5 A I'm sorry, I didn't understand.

6 Q Did you irrigate any of your land relative to your
7 water rights?

8 A Yes.

9 Q Would you describe the exact mode of your irrigation,
10 and starting with the point where the water is taken
11 from Thomas Creek, and where the water goes, and how
12 it's eventually applied to your land?

13 A There is an earth-filled dam, or a pond there, and
14 Thomas Creek feeds into this, and I have a sprinkler
15 system, a five-horsepower electric motor, and an inlet
16 pipe, and then about a quarter of a mile, four-inch
17 mainline, and then 19 heads of sprinklers.

18 Q About how many acres do you irrigate?

19 A About 20 acres.

20 Q That is the amount of acres that you are permitted by
21 your certificate of water rights, isn't it?

22 A Correct.

23 Q Are you aware of any irrigation that occurred on that
24 land using waters of Thomas Creek prior to 1917?

25 A Yes, my father has told me that he and his father used

1 some water for ditch irrigation along the creek, where
2 they raised some potatoes and some cabbage, and sold
3 some produce.
4 Q Is a portion of that area that was previously irrigated
5 by ditch located now where the earth-filled dam is?
6 A This is correct.
7 Q How much of the year-- For what period of the year do
8 you irrigate?
9 A About the earliest would be the beginning of May, and
10 the latest would be about the middle of September.
11 Q What kind of crops do you raise?
12 A I raise some alfalfa, some grass, and also some wheat
13 and oats, and sometimes barley.
14 Q In your opinion as a farmer, one who worked the land,
15 what would occur to your 20 acres of crop were you no
16 longer entitled to use water?
17 A It would impair the farming operation. A year like last
18 year, without water, why, nothing would grow. It was
19 a hard enough struggle even with water, but without
20 water, why, it would do nothing. It would definitely
21 impair the agricultural operation there.
22 Q What disposition do you make of your crop?
23 A The crop is sold.
24 Q Have you ever sold this crop to the Spokane Tribe of
25 Indians, or members thereof?

1 A Yes, I have sold hay to Spokane Indians.

2 Q Are you aware of anyone, from your personal knowledge,
3 who uses the surface waters flowing in Thomas Creek for
4 irrigation?

5 A As long as my, back to the time that my father and
6 my grandfather came there, from 1910, on, no one has
7 ever used water from Thomas Creek for irrigation, and
8 probably never did prior to that time, since very few
9 people irrigated in those days.

10 Q Are you, from your personal knowledge, or what you have
11 learned from your father or grandfather, have any of the
12 members of the Spokane Tribe of Indians ever used the
13 water of Thomas Creek for ceremonial, recreational
14 purposes?

15 MR. RUDOLPH: I object to that, Your Honor. I
16 have allowed the hearsay up to now, but I think I'll
17 have to object to that question.

18 THE COURT: I'll sustain the objection.

19 Q (By Mr. McGregor) From your personal observation, have
20 you ever had occasion to observe members of the Spokane
21 Tribe of Indians using the waters of Thomas Creek for
22 ceremonial or recreational purposes?

23 A I have never observed any such use.

24 Q Are there any fish in Thomas Creek?

25 A No. From 1910 up to the present time, there hasn't

1 been, and probably not before that time.

2 Q Does, from your observation, does Thomas Creek ever,,
3 at any time, flow directly to, into the Chamokane Creek?

4 A No, it never has. It doesn't flow closer than about a
5 mile and a-half from the Chamokane. It's located west
6 of the Chamokane, but its general direction is not
7 towards the Chamokane at all.

8 MR. MCGREGOR: That's all the questions I have.

9 THE COURT: Cross-examination by the government?

10

11

CROSS-EXAMINATION

12 BY MR. GERMERAAD:

13 Q Mr. Schaffner, you said Thomas Creek does not flow
14 into Chamokane Creek?

15 A That is correct.

16 Q Does it just sink into the ground prior to the time it
17 would reach that area, or any other creek that you know
18 of? I'm saying-- You said it flows the year around--

19 A Yes.

20 Q --and at some point, does it simply sink into the
21 ground, then, is that what happens?

22 A Traditionally, before the earth-filled dam was built,
23 it would more or less form a swampy area, and would
24 disappear, probably some due to evaporation, I can't
25 say how much would sink, possibly some of it would sink.

1 Q How about today, what would happen?

2 A Well, the result would be much the same.

3 Q It just dissipates into a swampy area?

4 A Yes, it disappears, it becomes less, and disappears.

5 MR. GERMERAAD: Thank you.

6 THE COURT: Tribe?

7

8 CROSS-EXAMINATION

9 BY MR. RUDOLPH:

10 Q Do you have any observation, Mr. Schaffner, in an
11 average year, over the period of time you have been
12 there, and you will have to remind me how long that is,
13 You have lived out there how many years?

14 A Continuously since 1936 until 1954, which would be 18
15 years, and probably 10 more years since that time;
16 that is altogether, totaling up the time, so I would
17 say 28 years.

18 Q An average year during that period, what is Thomas
19 Creek flowing; at what size?

20 A In winter it will vary from about two feet to four feet.

21 Q You're giving in depth?

22 A Depth, about three to five inches. Some places it's
23 a little deeper, where the water might back up a little.

24 Q And is that about the flow continuously throughout the
25 season?

1 A During the summer, for instance, a summer like this
2 last summer, an unusually dry period, it will drop off
3 a little. Right now it has a good water supply, much
4 more than average.

5 Q I guess what I was trying to ask, is the flow quite
6 uniform throughout the summer?

7 A Generally, this is true.

8 Q And as Mr. Germeraad was asking, then it simply runs
9 back into the ground?

10 A Well, it disappears. I can't say for sure how much
11 goes down, but it disappears, yes.

12 Q And the source are springs which are on Tribal lands?

13 A There are two springs, as I understand, and one is on
14 Tribal land, and the other one is on individually-owned
15 Indian land.

16 Q The total length of Thomas Creek is about a mile and
17 a-half, I note from the report made in 1958. Now, is
18 this your-- No, it wasn't. This water right was
19 obtained by Urban S., and that was your father?

20 A Correct.

21 Q And were you out there at that time-- You gave the
22 years, and I just didn't catch the period.

23 A Yes, I was there in 1958.

24 Q The Department at that time estimated a half a second
25 foot, which would be somewhere in the neighborhood of

1 230, 40 gallons per minute; is that consistent with
2 what you are saying now?

3 A No, the water right is for 24.

4 Q No, no, I'm talking about the stream flow, the whole
5 stream flow, not what you take.

6 A I think that would be too high. It wouldn't be that
7 great an amount.

8 Q Now, the pending application is not by you?

9 A The application is--

10 Q Excuse me-- Not by you, by Urban Charles Schaffner,
11 and that's your brother?

12 A That's on different land.

13 Q That is on different land?

14 A Yes, I have nothing to do with that.

15 Q And you're not testifying concerning that in any way?

16 A I have no connection with that, so I'm not testifying
17 in connection with his land.

18 Q The pre-1917 use you were testifying to, I take it you
19 really don't have any specifics about that at all, to
20 what they were doing with it, or how much acreage, or
21 how much water?

22 A I know what my father has told me, that they could run
23 some water by forming a ditch, they could run some water
24 out of Thomas Creek. Now, this is all on the land that
25 his father, and later, he, owned, and run it in such a

1 way that they could row irrigate, or ditch irrigate
2 row crops, like potatoes, or cabbage, or corn, perhaps,
3 although that isn't a heavy corn-growing area. It's
4 a bit frosty.

5 Q And then there was a discontinuance of that until your
6 father applied that in 1958?

7 A Somewhere through the years, there was a discontinuance.

8 Q How many years of discontinuance was there?

9 A That, I can't state for sure.

10 Q Substantial? Are we talking about 10, 20 years?

11 A It would probably be that much.

12 MR. RUDOLPH: That's all.

13 THE COURT: Any further inquiry?

14 MR. MCGREGOR: One other question, on Redirect.

15

16 REDIRECT EXAMINATION

17 BY MR. MCGREGOR:

18 Q Counsel mentioned the fact that prior to the
19 installation of the earth-filled dam, that you had
20 testified that a swampy area occurred generally where
21 Thomas Creek more or less stopped running. For what
22 period of time would that swampy area remain there on
23 the surface?

24 A It would remain there the whole year. It would vary
25 a little, in the length of the swampy area, for instance,

1 late summer or towards fall, it would be a little
2 shorter, but it extended for some distance.

3 Q Could you state with reasonable accuracy the land area
4 that was made swampy by the discharging from Thomas
5 Creek?

6 A Where it is located?

7 Q No, kind of in feet, the size of the area that was
8 swampy?

9 A Oh, it would probably cover, in width, 10 yards, in
10 some places, that being the widest place, 10 yards, and
11 in length, perhaps a quarter of a mile.

12 MR. MCGREGOR: Thank you.

13 THE COURT: Any further questions of this witness?

14 (No response.)

15 THE COURT: You may step down. Thank you, Mr.
16 Schaffner.

17 Mr. Rekofke?

18 MR. REKOFKE: If the Court please, I will call
19 Mr. Hunt.

20

21 LEWIS D. HUNT, called as a witness on behalf
22 of the defendant Boise Cascade,
23 having been duly sworn,
24 testified as follows:
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THE CLERK OF THE COURT: Would you please state your full name for the Court.

THE WITNESS: Lewis D. Hunt.

DIRECT EXAMINATION

BY MR. REKOFKE:

Q Your address, Mr. Hunt?

A 915 South Madison Street, Colville, Washington.

Q How long have you resided there?

A Two years.

Q Prior to that, where did you live?

A I lived in a rental for a year in Colville, and previous to that, I lived in Deer Park, Washington, for 13 years.

Q And by whom are you employed at the present time?

A I'm employed with Boise Cascade Corporation.

Q In what capacity?

A As a forester.

Q I might ask you this, have you had some training, college, in forestry?

A Yes, I have a Bachelor of Science degree from the University of Idaho in Forestry.

Q And that was when?

A 1950.

Q And subsequent to your graduation from the University

1 of Idaho, what did you do?

2 A I went to work for Potlatch Forest, Incorporated, at
3 Headquarters, Idaho, in the fall of 1950. I was
4 transferred to Deer Park Pine Industry in the fall
5 of 1957, and when Boise Cascade bought Deer Park Pine
6 Industry's lands in 1971, I went to work for Boise
7 Cascade.

8 Q And what do you do as a forester for Boise Cascade?

9 A Forest management, surveying the company lands,
10 managing the company timber. I hate to admit this,
11 but I'm supposed to be an expert in timber and
12 timberland .

13 Q We won't hold you to that. Are you out in the field,
14 or do they keep you in the office?

15 A I stay in the field as much as possible. The only time
16 I'm in the office is when they catch me, actually.

17 Q All right. Now, are you familiar, Mr. Hunt, with the
18 lands owned by Boise Cascade in the Chamokane Basin
19 area?

20 A Yes, I am.

21 Q And you recognize Plaintiff's Exhibit 10, that area
22 that is outlined in red?

23 A Yes, I do.

24 Q Incidentally, do you get into that land quite a bit?

25 A Yes, I do.

1 Q Incidentally, about how many acres does Boise Cascade
2 own in that Chamokane Basin area?
3 A About 18,000 acres.
4 Q And I might just ask you this--
5 MR. REKOFKE: If we could just have Exhibit 14,
6 perhaps, placed on the board, it might be helpful.
7 Q (By Mr. Rekofke) I'm, I might ask you this, with
8 respect to lands owned by Boise Cascade in the
9 Chamokane Basin area, Mr. Hunt, approximately how much
10 of that land is actually on the Indian Reservation, and
11 I'm speaking, you know, of the Chamokane Basin area,
12 not the other land they own?
13 A 120 acres.
14 Q And that's located-- You can point it out, but that's
15 in Section 22, Township 29 North, Range 40 East, is
16 that right?
17 A That's right.
18 Q We will have you point out that in a little bit. And
19 there are also, is Boise-- Does Boise Cascade have
20 any land that is riparian or adjacent to the Chamokane
21 Creek?
22 A Yes.
23 Q And those are Sections 27 and 33 in the same township
24 and range, that is, Township 29 North and Range 40
25 East?

1 A Yes. We have lands up in the headwaters that are
2 riparian also.

3 Q Now, the other lands that you have, that Boise Cascade
4 owns in the Chamokane Basin area is generally located
5 where? Maybe you could come over to the map, and with
6 the aid of a pointer, just point out generally, and you
7 can probably even do it on that Exhibit 14, generally
8 where their land is situated.

9 A The majority of it is, from this township boundary
10 here--

11 Q Which is that?

12 A 30 North, 38 East, and this township boundary, north
13 around the rim, clear around into the eastern part of
14 30 North, 39 East, and this area.

15 Q You're indicating east of the Chamokane Creek; all
16 right.

17 A And this area-- I like this map the best.

18 Q You like the map, all right, use Exhibit 10, that's
19 fine.

20 A In this area, north boundary Section 9, in Township
21 29 North, Range 41 East; south boundary is Section 12,
22 28 North, 40 East. Now, throughout the area inside
23 here, the company owns scattered ownership all
24 through this area.

25 Q And you're pointing to an area just north of the

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Reservation boundary, and areas east of Chamokane
Creek?

A That is right, right along this line, these areas are
nearly solid ownership.

Q Yes, the ones that you described.

A Scattered other ownerships through it, but it's very
heavily company-owned.

Q All right, you might just come back and take your seat.

Now, the lands that you have described as
being owned by Boise Cascade, and I have in mind the
lands off the Reservation, there only being that one
tract on the Reservation in the Chamokane Basin area,
what type of-- What does Boise Cascade use that land
for?

A Forest management, primarily; grazing, secondarily.
And a certain amount of recreation that is incidental.

Q Is all that land you have described being owned by
Boise Cascade, is that timberland?

A Yes, except for a very few small openings that early
homesteaders had cleared.

Q And you said timber and then grazing; just explain to
the Court briefly, how do those things work together?

A Boise Cascade is a wood products industry, their prime
income is from the conversion of trees to boards, ply-
wood, paper, paper boxes--

1 Q Right. I mean, but the grazing is done on that
2 timberland, that's what I'm--

3 A This is more of an incidental-- Our charges are 12
4 cents an acre, and it doesn't get very big.

5 Q Are any of those lands Boise Cascade owns irrigated?

6 A None.

7 Q And how about the, this grazing, what type of stock do
8 you have?

9 A Range cattle.

10 Q Pardon me?

11 A Range cattle.

12 Q And other type besides cattle and sheep?

13 A Yes, we have some sheep permits periodically.

14 Q I see. And how long has that grazing been going on on
15 the lands up there?

16 A From hearsay evidence, to the turn of the century.

17 Q And now, as far as Boise Cascade's,-- You talk about
18 "timber management"; what do you mean-- How does it
19 operate, insofar as your various timberlands are
20 concerned, cutting, and so on and so forth, you might
21 just describe it briefly, how you--

22 A We manage the company lands on a sustained-yield basis,
23 wherein the older trees are cut, harvested, the younger
24 trees are allowed to grow, we're now going into the
25 intensive forestry, due to the shrinking of the land

1 base, and due to developments, highways, power lines,
2 and, of course, recreation.

3 Q Now, as far as the, I mean, for example, does Boise
4 Cascade cut a certain amount each year?

5 A Yes. We're in the process now of developing what we
6 consider to be our allowable annual cut, which can be
7 perpetuated ad infinitum, in the future.

8 Q Is that the intention of Boise Cascade, to continue the
9 use of that land as timber?

10 A Yes, for the foreseeable future.

11 Q Now, Boise Cascade has a mill, does it, at Ford?

12 A Yes.

13 Q And I think that was testified to here earlier by one
14 of the plaintiff's witnesses as a veneer plant?

15 A Yes, it is.

16 Q And what is the approximate production of that parti-
17 cular plant?

18 A I will have to check my notes.

19 Q All right. While you're doing that, that's the plant
20 that apprently employs a number of Indian workers?

21 A Yes, it does.

22 Q The majority of them are Indians?

23 A There is a contract with the Tribe on the sale down
24 there that this mill was tied to, wherein the builder
25 of the mill would hire the majority of their employees

1 from the Indians.

2 Q All right, you've done it, okay. Give me an
3 approximate figure.

4 A Their production is 45,000,000 board feet a year.

5 Q Okay. Now, do you also, also buy logs, Boise Cascade
6 buy logs or stumpage from the Indians?

7 A Yes, whenever it's available.

8 Q I see. What do you mean by "stumpage"?

9 A You buy-- It's paid for before it's cut, it's paid
10 for as standing trees, then we log it, either we log
11 it or we hire a contractor to log it.

12 Q And among these particular contractors who log either
13 this land or Boise Cascade land, are there Indians
14 employed on those--

15 A Yes, we have, I believe two independent Indian contrac-
16 tors at this time on the Spokane Reservation. Now, on
17 the Colville Reservation, there are others.

18 Q Now, let me ask you this, you testified, I think, that
19 the Boise Cascade handles their lands on a sustained-
20 yield basis?

21 A That's right.

22 Q Just briefly, what does that mean?

23 A This means that we're tree-farming timber, just like
24 Mr. Seagle is farming farms, taking crops off every
25 year, his crop of wheat will be planted one fall and

1 taken off the next fall, and ours will be planted this
2 year and taken off 100 years hence.

3 Q Do you have any particular cycle that you're operating
4 on?

5 A Up until just the last few years, in this part of the
6 country, we planned on a 40-year cutting cycle, wherein
7 you come in and take about 40 percent of the volume
8 every 40 years. Now, we hope to reduce this by inten-
9 sive management to somewhere in the neighborhood of 30
10 years.

11 Q Now, as far as-- Let me ask you this, I think you
12 already testified briefly to it, you have been over
13 these lands that Boise Cascade owns?

14 A Yes.

15 Q Are you familiar with the lands that Boise Cascade owns
16 off the Reservation?

17 A Yes.

18 Q Are you familiar with the, I might say the location of
19 the various water sources?

20 A Yes.

21 Q And, incidentally, what, do you need, does Boise Cascade
22 require water in connection with its logging operation?

23 A Yes, they do.

24 Q In connection with logging, they need the water to
25 water down the roads, to keep the dust from getting too

1 dirty, and in forest management, we need it for fire
2 protection.

3 Q And you also need it for stock water?

4 A Stock water, this is for the lessees that lease the
5 property for the stock grazing.

6 Q Now, you talked about it, or testified, I should say,
7 about the use of water for road maintenance?

8 A Yes.

9 Q Is that--

10 A This is very necessary.

11 Q Well, why-- I mean--

12 A The dust gets so deep that some of our earlier employees,
13 one of them used to drive a Volkswagen, and he swore
14 once in a while he lost it in a dust hole.

15 Q Would that require any significant or substantial amount
16 of water?

17 A Yes, it does, very much. In a dry year like last year,
18 it takes a tremendous amount of water.

19 Q I understand last year you didn't log much, though,
20 hunh?

21 A Not on company land. We did a lot of logging, but due
22 to the extreme fire hazard, and the market conditions,
23 we logged on foreign stumpage, primarily.

24 Q Now, Mr.-- I have had you-- You might come over here
25 by the exhibit-- Prior to, or earlier today, I should

1 say, you might take that pointer, have you marked on
2 Exhibit 14 certain things? I just might take, first
3 of all, you have a figure of Section 33 and Section 27?
4 A Yes.
5 Q You have marked those on-- And Section 22?
6 A Yes.
7 Q Are those the three sections you previously testified
8 to when you located them on Exhibit 14?
9 A Yes.
10 Q I notice you also placed on Exhibit 14 a little square
11 there marked "No. 1", and it also has "30 AF"; what
12 does that mean?
13 A That would be the diversion point, and for 30 acre feet.
14 This is an intermittent stream, in a clay area, there
15 are pools of water there the year 'round.
16 Q All right, No. 2.
17 A No. 2 is another diversion point of 30 acre feet, and
18 this is an intermittent stream that isn't found, isn't
19 shown on the map.
20 Q Now, both of those points are near the Reservation
21 boundary, but are they on the Reservation?
22 A No.
23 Q And are they on Boise Cascade lands?
24 A Yes, they are.
25 Q All right, proceed on up through the others that you

1 have marked.

2 A No. 3, 4, 5 and 6 are all up in the headwaters of this
3 one-fourth Chamokane Creek, in this Township 30 North,
4 Range 38 East. They are all, all but No. 5, all of
5 them but No. 5 had 30 acre feet. No. 5 had 60 acre
6 feet. This is a permanent stream, the year 'round, it
7 has a lot of large beaver dams, and a lot of water
8 available, and these others, the availability is quite
9 small.

10 Q You might continue on, would you, with your--

11 A 7 is an intermittent stream in Township 30 North, 39
12 East, it has 30 acre feet. 8 is just south of there,
13 in the same township and range, it has 30 acre feet.
14 And 9 is, I believe, a well that was dug by either a
15 homesteader or sheep people many years ago, and they
16 had 30 acre feet. 10 is over in Township 29 North,
17 Range 41 East, and the headwaters of this side stream
18 here, there is an impoundment there we put in there with
19 the Cat when we were building the road. 11 is on a
20 side stream, and it's the same drainage south of there
21 and it's a small impoundage. 12 is a, shows an
22 intermittent stream on this map, but I suspect most of
23 the stream is there, but it's in a lot of gravel.
24 This is a small impoundage on it off the side of the
25 truck road. 13 is a-- I have 40 acre feet on 12, 40

1 acre feet on 11, 30 acre feet on 10, 13 has 40 acre
2 feet, and this is an area of a dozen or so springs,
3 and apparently the headwaters head over to this stream
4 here. There are many springs back in there, and
5 evidence of an old homestead, and we have a small
6 impoundage back in there.

7 Q I see 14 is marked, apparently that is the surface
8 water certificate No. 2258, which is one of the exhibits
9 here in evidence?

10 A Yes.

11 Q Now,-- You can resume the stand.

12 Now, let me ask you this, Mr. Hunt, now, you
13 said so many acre feet; is this the amount that Boise
14 Cascade is claiming the right to divert at each of those
15 locations you've identified?

16 A Yes, that is right.

17 Q Now, primarily, what would that water be used for?

18 A Primarily for grazing; used to settle the dust on the
19 roads and for putting out forest fires.

20 Q Now, is it contemplated that all of those, that water
21 is going to be used at any one given time?

22 A No.

23 Q How will it be used, that's--

24 A It will be used intermittently, when we are in there,
25 and when we need it. Now, as far as the grazing is

1 concerned, this will probably be used every year, since
2 nearly all of the property is leased, but as far as the
3 other uses are concerned, last year I don't think we
4 used a single one, and this year we may use a maximum
5 of three.

6 Q In other words, what would you guess would be the most
7 you might use in any one year, at least at this--

8 A The most?

9 Q Yeah, reasonably certain?

10 A A hundred acre feet, at the most.

11 Q Somewhere in that area?

12 A Yes, this is a maximum.

13 Q And these particular figures which you put on the board,
14 however, or on Exhibit 14, these are, I think you said,
15 testified, are the amounts you're claiming, and which
16 you plan to submit to the, apparently, to the Department
17 of Natural Resources, those figures?

18 A Yes.

19 Q You're in the process of preparing that claim now?

20 A Yes.

21 MR. REKOFKE: I believe that's all I have of this
22 witness.

23 THE COURT: Cross by the government or the Tribe?

24 MR. RUDOLPH: Your Honor, would it be appropriate
25 if I could ask this, I have been waiting until the end

1 of all of the defendants, however, Mr. Campbell indicated
2 we could take care of this, he could leave, and I did
3 want to advise the Court, and I did want to have in the
4 record, in connection with Mr. Smithpeter's file, an
5 acknowledgment by him that he did receive all the
6 various correspondence shown in the file as having
7 been directed to him, either by the Department of
8 Ecology, or by Mr. Dellwo, or any other representative
9 of the Tribe of Indians.

10 It's my understanding that Mr. Campbell is
11 willing that the record can so stipulate, and with that
12 stipulation, it would not be necessary to call Mr.
13 Smithpeter. Did I state you correctly?

14 MR. CAMPBELL: Yes. The file speaks for itself,
15 and all the documents are there.

16 MR. RUDOLPH: Well,--

17 MR. CAMPBELL: No problem.

18 MR. RUDOLPH: My question was, however, were those
19 received by Mr. Smithpeter?

20 THE COURT: Identify what exhibit you're talking
21 about.

22 MR. CAMPBELL: Yes.

23 MR. RUDOLPH: And we're referring to Plaintiff's
24 Exhibit 87.

25 MR. CAMPBELL: I so stipulate.

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THE COURT: Very good.

MR. RUDOLPH: Thank you.

MR. REKOFKE: I might just offer Defendant's Exhibit 62, Your Honor, which is just a list of Boise Cascade lands in the Chamokane Creek Basin identified by, well, by legal description, and a copy of this was given to the plaintiffs the other day; so I offer it.

THE COURT: Any objection?

MR. RUDOLPH: No objection.

THE COURT: Defendant's 62 is admitted.

(Whereupon, Defendant's Exhibit 62 was admitted into evidence.)

MR. RUDOLPH: Your Honor, one other question that does relate to Mr. Campbell also. I was going to ask, I was under the impression that answers to, or the interrogatories to all the parties, and the answers to them, were before the Court by reason of being in the file, that it was not necessary they be marked as exhibits, and placed in evidence in a trial to the Court, only in a jury case.

Now, the argument that Mr. Torve made yesterday causes me to ask for clarification, and if there is any question about it, I haven't marked, they're all in the Court file, and I haven't attempted to mark them as exhibits, but if there is any question

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about that, about that being the proper way, I think we should mark them as exhibits and have them going in, and that would be all, all interrogatories and answers thereto, which are in the file.

THE COURT: Well, I know attorneys don't always agree on this, some feel, I, and I think maybe the safe thing to do is make them exhibits, because unless they are admitted, sometimes they don't become part of the record, but you can look that over in the interim period.

MR. RUDOLPH: In the interim-- And is there any objection on anyone's part to that?

MR. REKOFKE: Not to ours.

MR. CAMPBELL: That will be fine with us.

THE COURT: All right, you can pick those out in the interim and have them marked.

MR. REKOFKE: I guess I did have one question, while they're conferring.

DIRECT EXAMINATION, Continuing:

BY MR. REKOFKE:

Q Mr. Hunt, you were, you testified you were with Deer Park Pine Industries before that?

A Right.

Q Was that area logged prior to the time Boise Cascade

1 acquired it; in other words, the general area we talked
2 about here?

3 A Parts of it were, yes.

4 Q Yes, that is what I mean. And how long has that logging
5 been conducted up in that area?

6 A Deer Park Pine Industries started operations in 1913.

7 Q 1913; all right.

8

9

CROSS-EXAMINATION

10 BY MR. RUDOLPH:

11 Q Mr. Hunt, this may be a little irrelevant, but did I
12 have you as a witness once in a timber-trespass case?

13 A No, you had me as a juror in that case.

14 Q Okay. Sorry. You confused me with your acreage-feet
15 figures; can you tell me what an acre foot of water is?

16 A No, I don't know. I'm not an expert in that.

17 Q Well, when you, on Exhibit 14, marked and wrote various
18 acre feet, and let's just take one for example; here,
19 I see six, and above it, 30 AF, and your testimony, if
20 I heard you, that meant you were claiming 30 acre feet?

21 A Right.

22 Q How big is six; can you look at your list and tell me
23 how many acres in Parcel 6?

24 MR. REKOFKE: I think, Mr. Rudolph, you're mistaken,
25 it's not a parcel; Boise owns all that land in that area.

1 This is just to identify the source of the water, the
2 box doesn't attempt to establish any particular area--
3 I mean--
4 Q (By Mr. Rudolph) Those are, well, the source, then?
5 A This is the source, yes.
6 Q Well, what does the source consist of?
7 A Most of them are intermittent streams. There is one
8 up there that we have 60 acre feet on that is a
9 permanent stream, it's a fair-sized stream.
10 Q Where is that 60 one?
11 A I think it's up-- Four--
12 Q Four, five, or six?
13 A --Around four, five, or six.
14 Q Okay, it's No. 5.
15 A Yeah.
16 Q Sixty acre feet. Is that a year 'round stream?
17 A Yes.
18 Q Are all of these diversion points located on land which
19 Boise Cascade owns?
20 A Yes.
21 Q And are all of them on streams?
22 A Streams, springs and one well.
23 Q And how do you divert the water out of the streams;
24 what are the mechanics?
25 A We make a small impoundment when we're building our roads

1 in there, put an overflow pipe in it, and there it sits,
2 and when we need it, we go and get it.

3 Q With a pump?

4 A With a water tank with a pump on it.

5 Q And is the water which you're taking out all hauled away
6 in a tank?

7 A It would normally be used within three or four or five
8 miles of the point of diversion.

9 Q And put on the roads, generally?

10 A Yes, put on the roads.

11 Q When you said you didn't use any last year, if I
12 understood you correctly, that means you didn't put
13 any on the roads last year?

14 A Not in this area, no.

15 Q I see. Will you explain to me, and let's just use the
16 one, for example, Item 5, where you claim 60 acre feet.
17 Tell us what you think you are claiming.

18 A In previous water rights adjudications, the company
19 received 20 acre feet for building a road. This is our
20 best estimate of how much water we think we need.

21 MR. RUDOLPH: Could I see Exhibit 24, please.

22 THE CLERK OF THE COURT: Plaintiff's?

23 MR. RUDOLPH: No, defendant's.

24 Q (By Mr. Rudolph) The Department of Natural Resources,
25 in effect, its claim for 15,851 acres in the watershed,

1 plus 1236 contingent, that would total, I guess, about
2 16 or 17,000 acres, and that's practically the total
3 that you testified to, isn't it, of your--

4 A 18,000.

5 Q Yes. So, we're talking about the Boise Cascade is
6 almost as big as the State of Washington?

7 A Almost.

8 MR. RUDOLPH: Would you hand that to him, Mr.
9 Hunt, please.

10 Q (By Mr. Rudolph) Now, take a look at the back page of
11 that, and you will notice the total number of gallons
12 claimed by the State of Washington for grazing, on
13 approximately 17,000 acres, and that's a million,
14 nine hundred and five thousand, eighteen gallons. Now,
15 if my computations are correct, that would amount to
16 somewhere, and I used eight gallons per cubic foot
17 instead of 7.4 or seven and a-half, or whatever it
18 is, because I didn't want to carry the fraction, but
19 that computes to something between five and six acre
20 feet for the whole 17,000 acres.

21 Now, that is why I need clarification from
22 you as to how many acre feet Boise Cascade has used,
23 and how many acre feet Boise Cascade is claiming.

24 A We have our claim on the map. None of us with Boise
25 Cascade are water experts, so we have to use whatever

1 our best estimate is.

2 Q Well, what is the total of all those acre feet which
3 you have on there; did you run a total?

4 A I haven't totaled them up; what is it, 400-and--

5 MR. GERMERAAD: 50.

6 Q (By Mr. Rudolph) That's 450 acre feet of those figures
7 which--

8 MR. GERMERAAD: Not including No. 14, Mr. Rudolph.

9 Q (By Mr. Rudolph) Okay. Now, 450 acre feet would
10 irrigate something over 150 acres of land, putting
11 three feet of water, putting water three feet deep on
12 each one of those acres.

13 Now, you're putting water on a few roads--

14 MR. REKOFKE: I'm going to object to this, Your
15 Honor. There was testimony, of course, as I recall
16 the testimony of the witness, we're not claiming to use
17 450 acre feet each year. I think the testimony was
18 that we wouldn't, probably wouldn't use over 100 acre
19 feet, I think that was the witness' testimony, and what
20 I was trying to get across is the fact, I think the
21 witness has testified, we would like to have those
22 sources available so if we're down logging in the
23 eastern part of the Chamokane Creek, we don't have to
24 go all the way up to, several, 10, 15 miles to get water.
25 We're not trying to irrigate land.

1 MR. RUDOLPH: Your Honor, if he will let me show
2 it, I will show that 100 acre feet is totally exorbi-
3 tant.

4 MR. REKOFKE: Go ahead and show it.

5 MR. RUDOLPH: Well, I'm trying, Joe.

6 THE COURT: Proceed.

7 Q (By Mr. Rudolph) Tell us again how you arrived at your
8 100 acre feet. I did tell Mr. Rekofke the other day
9 how to compute these things, but he didn't pass it on
10 to you, did he?

11 A He was testing.

12 Q Well,--

13 A What we worked out was worked out with the chief
14 forester at Boise Cascade before this trial started, and
15 I discussed it with him on the phone afterwards, after
16 discussing it with the attorney, and he felt this is
17 what we should, what we wanted, what we needed.

18 Q Well, tell me how much you have been using; what is your
19 actual total volume in a given year?

20 A We have no meters out there.

21 Q No, I'm sure you haven't. You don't have any idea of
22 what you used last year, then; you said you didn't
23 use any?

24 A On this area here, very little; other than grazing.

25 Q Are you willing to accept the State's figures on

1 computations of grazing?

2 MR. REKOFKE: I'm going to object to this, Your
3 Honor. Whether he's willing to accept it, he's really
4 a witness--

5 THE COURT: Sustained.

6 Q (By Mr. Rudolph) Well, I mean, do I understand, Mr.
7 Hunt, Boise Cascade is going to claim 450 acre feet and
8 it's not going to specify how it got that figure?

9 A This is our best estimate.

10 Q Do you have any idea as to how many gallons a minute you
11 would have to be using water in order to be using that
12 many feet a year?

13 A No.

14 Q Would you be using water at the rate of even 10 gallons
15 a minute?

16 A Well, when we need water on those roads, we use a
17 considerable amount in a hurry, and if we have a forest
18 fire, we use a considerable amount in a hurry. We
19 would, in the dry part of the year, very easily use up
20 all of the water that is available in each one of those
21 outlets, if we have a very dry year and have a fire or
22 two.

23 Q How many tanks do you have-- Tank trucks, or whatever?

24 A We have as many tanks as we can hire when it becomes
25 necessary.

1 Q Well, let me point out to you, and then I guess I might
2 as well drop it, if you took continuously throughout
3 the year 10 gallons a minute, you would wind up, and
4 that's 24 hours a day, every day of the year, you would
5 be using something like seven acre feet.

6 MR. REKOFKE: Is that a question, or an answer.
7 That is not a question.

8 MR. RUDOLPH: No, I just pointed it out to him.

9 I have no more questions.

10 THE COURT: Cross-examination by the government?

11

12

CROSS-EXAMINATION

13 BY MR. GERMERAAD:

14 Q As I understand your testimony, the densest ownership
15 by Boise Cascade is in what we referred to previously
16 in the trial as the Upper Camas Valley, is that correct?

17 A The Upper Camas Valley, and--

18 Q --is where you have the greatest concentration?

19 A And in the scooped mountain areas also.

20 Q And you mentioned some recreational use?

21 A More incidental than anything else. It's kind of a
22 public relations thing.

23 Q What, that you allow people to go on your lands to hunt
24 deer, basically?

25 A Yes.

1 Q Is Boise Cascade Company also a real estate developer
2 in this country?
3 A They have been in California, and I think, down in that
4 area, anyway, they have got a suit pretty badly.
5 Q They might also do the same thing on the--
6 MR. REKOFKE: I'm going to object, Your Honor, to
7 what they might do.
8 THE COURT: Sustained.
9 MR. GERMERAAD: Your Honor, the line of
10 questioning, I just want to establish that they are a
11 real estate developer, because they have logged areas
12 in other areas of the country and put in real estate
13 development, intensive units.
14 THE COURT: He admitted that.
15 Q (By Mr. Germeraad) You mentioned, when you went through
16 the list, 14 different water source points. Only No.
17 14 has a certificate, isn't that correct?
18 A Yes.
19 Q The other 13 points of use have no certificate or
20 permit, and you say now you're in the process of
21 putting in an application, is that correct?
22 A Yes.
23 Q But you have been using this in the past without
24 either a permit or a certificate, is that correct?
25 A Right.

1 Q You mentioned impoundment at various times, and I
2 think, if my memory serves me, only an impoundment at
3 Point 10, 11 and 13, is that what you told us, those
4 are the three impoundment points? I know in 10 and 11--
5 In 10, you started by saying that is where a Caterpillar
6 went in and kind of gouged out an area and made it an
7 impoundment?

8 A This is what they all are. I believe in some of those
9 other ones we have, I'm not sure whether we have them
10 in all of them or not, but I think one or two up in that
11 area.

12 Q And it's at those points of impoundment that you drive
13 the trucks in and take the water out?

14 A You drive up the side of it and suck it out.

15 Q Boise Cascade, in other areas-- Well, Boise Cascade
16 does log on Indian reservations, does it not?

17 A Yes.

18 Q Does the B.I.A. ever allow Caterpillar tractors to go
19 into streams on Indian lands?

20 A Yes, they do. At least, the contractors are doing it.
21 Now, I have seen nothing in writing and received no
22 notice that this shouldn't be done.

23 MR. GERMERAAD: I don't know whether it would be
24 proper at this time, but I would make a motion that
25 Boise Cascade's position should be denied at this time

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for failure to sustain a burden of proof to show in any way through this witness that they need water because of not qualifying him to testify him as to how water is computed and how it could be used.

THE COURT: I'll have to deny the motion because you know we're going to have a recess in the trial. If there is any question about that, they can supplement the records.

MR. GERMERAAD: Are there any more witnesses?

MR. REKOFKE: Yes. Are you through with this witness, counsel?

MR. GERMERAAD: Yes.

MR. TORVE: I wonder if I could just ask a couple of questions.

MR. REKOFKE: Yes.

REDIRECT EXAMINATION

BY MR. TORVE:

Q Is this a Department of Natural Resources protected fire area?

A Yes, it is.

Q And do they assist the Boise Cascade and other timber owners in putting out fires in the event there is a forest fire?

A They are the prime organization to put out the fires.

1 When there comes a lot of fires, everybody puts them
2 out.

3 Q Let me ask you this, in the water impoundments that you
4 create, they would be also available for any fire-
5 fighting agency, would they not?

6 A Yes.

7 Q Would that be true in all of the timbered countries in
8 this particular area?

9 A Yes.

10 MR. TORVE: That's all.

11 THE COURT: Someone else have a question of the
12 witness?

13 MR. CERUTTI: I have none, Your Honor.

14 THE COURT: You may step down.

15 MR. REKOFKE: I would recall Dr. Maddox for just
16 a couple of questions.

17

18 GEORGE EDWARD MADDOX, recalled as a witness on behalf
19 of the defendant, having been
20 previously sworn, testified
21 further as follows:

22

23 DIRECT EXAMINATION

24 BY MR. REKOFKE:

25 Q For the record, you're Dr. Maddox, who testified

1 previously, and you're still under the same oath?

2 A That is right.

3 Q I wonder if you would come over to Exhibit 14.

4 A (Does so.)

5 Q You recognize, of course, Exhibit 14 and what it

6 portrays?

7 A Yes, I do.

8 Q Now, showing you, for example, a little box here marked,

9 "3", and beside it, "30 acre feet". You heard the

10 testimony of the previous witness?

11 A Yes, I did.

12 Q That was, in that area, a diversion of 30 acre feet.

13 My question, Doctor, to you, is a diversion of 30 acre

14 feet, what, if any, effect will it have on the creek,

15 Chamokane Creek, in the area of the Massive Springs;

16 in other words, its discharge, in your opinion?

17 A The diversion of 30 acre feet may depend on whether it

18 was drawn all at one time, or--

19 Q Let's say period from May through September or October.

20 A I would presume the rate of withdrawal would be quite

21 slow, and I don't think it would have any effect down

22 in this area.

23 Q And I wonder if that would apply to any diversions that

24 we see in this general area, four, six, seven and so

25 on?

1 A Each, individually, I think would have the same result.
2 E If you withdraw all of them at the same time, there
3 could conceivably be a result of knocking out some
4 springs, but I don't think possibly at the gauge Mr.
5 Woodward indicated at the north end of the Reservation.
6 Q Let's say if we diverted in this area, say, approxi-
7 mately a hundred acre feet during this period of time
8 we're talking about, May through, shall we say,
9 September or October, say 30 from one and 30 from ano-
10 ther, 40 acre feet from another, what, if any, effect
11 would that total diversion have on the Chamokane Creek
12 in the area of the springs?
13 A Again, I don't think it would have any effect down
14 here. The only effect, the first major effect it would
15 have is that at the north boundary of the Reservation that
16 Mr. Woodward gave.
17 Q Why do you say it would have no effect down here at
18 the springs where they have measured discharge?
19 A Well, it was indicated in Mr. Woodward's testimony, and
20 shown on his map, there is a dry reach of the creek,
21 and the water passes the gauge at the north boundary
22 of the Indian Reservation, where it's lost, the flow
23 of the creek, during the warm weather, or during the
24 non-high runoff season, and therefore any water that is
25 diverted high on the watershed, where you indicated,

1 would have to show up on the gauge before it could
2 affect anything down at the springs, and the volume,
3 depending on the rate of withdrawal, or the volume of
4 withdrawal could be such that it might be water that
5 could be lost by evapotranspiration anyway.

6 Q Does the distance at the, that the point of diversion
7 is from the spring have any significance?

8 A Yes, I would say it did.

9 Q In what way?

10 A It's so far away, there are many thing that could
11 happen to the water between there and the point of
12 diversion.

13 MR. REKOFKE: That's all.

14 MR. GERMERAAD: I will have cross-examination,
15 Your Honor.

16

17

CROSS-EXAMINATION

18 BY MR. GERMERAAD:

19 Q Dr. Maddox, as a former math major, I have some
20 problems with your addition, because if we take three
21 with zero effect and four with zero effect and 12 other
22 zeros, we add up all of those zeros, you come up with
23 an effect. I don't see how that is possible, unless
24 each of the individual 14 also have an effect, because
25 how could you get a sum? You said that 14 withdrawals

1 would affect at the north gate, did you not?

2 A I believe I said if all withdrawals from all points,
3 I didn't say 14, I didn't, I said from all points.

4 Q There are 14 points, though, up there?

5 A If that is the case, then it would draw from 14 points.

6 MR. REKOFKE: There aren't 14 points up there,
7 counsel.

8 MR. GERMERAAD: What?

9 MR. REKOFKE: There are not 14 points up there.
10 Maybe you'd better count them.

11 MR. GERMERAAD: I've got 14 points, counting your--

12 MR. REKOFKE: In the northern area, I thought you
13 were, you're taking the whole area, I see.

14 Q (By Mr. Germeraad) In the northern area, we have 12.
15 Well, these 12 in the northern area, you said if they
16 were all working, they would have an effect on this
17 northern gauging station, is that right?

18 A I believe it would, yes.

19 Q And if the two down here are each 40 acre feet apiece,
20 or 80, not counting surface water certificate 2258,
21 if they were all being used, they could be 370 acre
22 feet, if there are 450, and you subtract 80, would be
23 370?

24 A Presumably so, yes.

25 Q Now, if the measurement at the north gaging station

1 during the summer was a little less than 700 acre feet,
2 in other words, if those were used, more than half of
3 the quantity that enters at that north gage would not
4 be there, isn't that correct?

5 A No, I couldn't make that statement.

6 Q Well, there would be at least 370 acre feet that would
7 not start the journey down to that point, anyway?

8 A I would say on an acre-foot basis, that would be correct.

9 Q And if those 12 do have an accumulative effect, each
10 and every one has a certain effect also?

11 A That is correct.

12 Q Now that we have it to the gaging station at the north
13 road, I believe you will remember Mr. Woodward's
14 testimony, and I think in your previous Cross, you
15 agreed that about a mile and a-half below the north
16 road, the surface stream disappears, correct?

17 A That is as I understand it, yes.

18 Q I believe you earlier agreed that this starts down and
19 goes into the ground water, correct?

20 A That's correct, I believe it is.

21 Q So whatever amount this 370 acre feet, plus whatever
22 Surface Water Certificate 2258 has when it reaches this
23 point, that amount of acre feet, then, does not go into
24 the ground water system of Walker's Prairie, is that
25 correct?

1 A No, I would not agree with that question as it's
2 stated.

3 Q Well, you would agree that there is 370, plus whatever
4 the surface water certificate is, that does not start
5 the journey to this point?

6 A That would be correct.

7 Q You do agree that at that point, by the north road
8 gaging station, it would diminish, and it would effect
9 that, would it not, it would diminish the flow at that
10 point?

11 A If all those 12 or 14 diversions were pumped, yes, I
12 believe it would have an effect there.

13 Q Right. And you're not telling us that in a mile and
14 a-half, that whole flow is going to evaporate, are you;
15 it does sink in, isn't that--

16 A It is. I would agree that it sinks in.

17 Q And now, if we've got some amount of water there, that
18 does not sink into the basin. Do you agree with me so
19 far?

20 A Yes, generally.

21 Q If we are to assume that there is only one exit from
22 the ground water system, and that is at the springs,
23 and since, in your experience, you have found, and can
24 locate no other exit point, that amount of acre feet,
25 then, eventually will not come out by the springs, isn't

1 that correct?

2 A No, I wouldn't agree with that.

3 Q What happens to it in between, when it goes into ground
4 water, and when, supposedly, it does not, it then
5 disappears, that negative amount, it doesn't go in,
6 somehow, doesn't affect the springs; I'm confused as
7 to how this can occur; could you fill me in?

8 A As I testified earlier, the ground water flow net would
9 indicate there is a southeasterly direction of flow in
10 that area. Now, where that flow goes to, I couldn't
11 say, but it definitely doesn't go to the springs. The
12 water that goes to the springs comes from the north and
13 west of the springs, and again, where that water
14 originates, I couldn't really say.

15 Q I'll take you back to the one point. Remember, at the
16 end of your Cross-examination on the flow net, I asked
17 you a question as to what happens if the Newhouse Well,
18 in fact, is higher than the Hill Well, and you said,
19 well, it wouldn't have that type of dramatic swing to
20 the southeast, isn't that correct?

21 A No, I don't believe I testified that. I believe I
22 testified that the ground water contour would change
23 its angle there.

24 Q And correspondingly, the flow line would also change,
25 would it not?

1 A The flow line would also change, that is correct.

2 Q And if we were to take that flow line, that flow line
3 would not be going in a southeasterly direction, the way
4 it was before?

5 A Again-- It would not be going like it was before, that
6 is correct.

7 Q Okay. If you would just assume with me, then, that we
8 have just one exit point, in a hypothetical, and that
9 exit point is the Massive Springs area; if we have 370
10 acre feet, or some less amount, that does not go into
11 the ground water system, we, would we not have that
12 370, or some lesser amount, that eventually would not
13 come out of the ground water system at the Massive
14 Springs area?

15 A If you withdraw, withdrew all of the 370 at one time,
16 or at a rate it would be withdrawn at one time, that
17 would be true, if the assumption were that the water
18 flows to one point of discharge, being the Massive
19 Springs.

20 MR. GERMERAAD: I don't think I have any further
21 questions.

22 MR. RUDOLPH: No questions.

23 THE COURT: You may step down.

24 MR. CERUTTI: Your Honor, I hate to burden the
25 record, but there has been a new area opened in this

1 last question. Could I be permitted--

2 THE COURT: You may.

3

4

REDIRECT EXAMINATION

5

BY MR. CERUTTI:

6

Q Dr. Maddox, I would like to direct your attention to
7 this proposition that at some point in time, the
8 gradient, or the water level would show that the gra-
9 dient between the Hill Well and the Newhouse Well was
10 just the opposite of what you had found; in other words,
11 that at some point in time the Newhouse Well was
12 slightly higher than the Hill Well, rather than slightly
13 lower. Assuming that that were the case, would you
14 substantially change your opinion as to the nature of
15 the ground flow under the Seagle wells, as far as its
16 direction?

17

A No, I don't believe I would. Not substantially.

18

MR. CERUTTI: Thank you, Doctor.

19

THE COURT: You may step down; thank you, Dr. Maddox.

20

Are there further defense witnesses at this

21

time?

22

(No response.)

23

THE COURT: Subject to the continuance that I guess
24 we all understand, I take it the defense rests at this
25 point?

1 MR. : Yes.
2 MR. : With the same kind of understand-
3 ing that--
4 THE COURT: All right.
5 MR. RUDOLPH: I'm not sure what that understanding
6 is.
7 THE COURT: Well, I have asked if there were any
8 further defense witnesses at this time, there are none,
9 but I'm not foreclosing the defense from putting on
10 further testimony as this trial is reconvened. This
11 raises the question of whether you want to proceed with
12 any rebuttal now or wait until the defense has put in
13 everything they elect to put in.
14 MR. GERMERAAD: One thing, Your Honor, on this
15 leaving witnesses for later, Mr. Tracy explained that
16 Mr. Newhouse was sick, and I think that's a perfectly
17 logical excuse, for him to be allowed to testify at a
18 later time, but I don't know that any of the other
19 defendants have any excuses for not bringing other
20 people, or having planned on bringing any people they
21 want in at this time.
22 MR. CERUTTI: Your Honor, I would be interested
23 in hearing the government's excuse for not having this
24 exhibit here and prefiled two months ago, that they now
25 plan to bring next summer.

1 MR. RUDOLPH: Your Honor, I think that has been
2 discussed considerably. We don't think it's necessary,
3 and I thought this has been said many times, Mr.
4 Cerutti, the question was raised by Mr. Torve, and to
5 avoid the question, it's been said, asked right at the
6 beginning, if we could supplement the record. That's
7 far different than talking about everybody bringing
8 back witnesses, and I would join with Mr. Germeraad,
9 if we're talking about bringing back witnesses other
10 than Mr. Newhouse.

11 THE COURT: That's correct. I'm not sure how we
12 can really define this, but we're not going to simply
13 reopen this case again, but it's been understood all the
14 way, there were certain things that need to be brought
15 into the record we didn't have at this time, for various
16 and sundry reasons. There has been a further indica-
17 tion that Mr. Newhouse would like to testify, but is
18 ill today, and I think that is a proper excuse to bring
19 him in later.

20 Now, I don't want to come back and have a
21 continuous trial and plow this same ground over with
22 different witnesses.

23 MR. DUFFORD: Your Honor, the Department of Ecology
24 doesn't have any intention of calling other witnesses.
25 Unfortunately, Mr. Campbell left, but I do recall at one

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point, he did say something about having some interest in calling either Mr. Ernest of the Game Department, or perhaps Mr. Kauffman, of the Department of Ecology.

The thing is, I really don't--

THE COURT: The question of Mr. Kauffman has come up, and I think if anybody wants to call him at the next stage of the trial, that has been kicked around quite a bit, I think I would have to permit that.

MR. GERMERAAD: Could I ask for an indication of what defendant would like to call Mr. Kauffman?

THE COURT: Well, I think the problem is, the one that indicated it at one time isn't here, Mr. Campbell.

MR. DUFFORD: That is what I was trying to point out, I can't really speak for him, but I do remember that he did bring that up.

THE COURT: I think it was pretty well understood, that somebody raised a question because of an exhibit that the Court let in, which somebody may want to cross-examine about, they should be made available.

Mr. McGregor?

MR. MCGREGOR: Your Honor, my client, Paul Schaffner, was made a defendant in this action on January 15th, I believe, at which time I filed a motion for continuance, which was denied me; however, from the comments of the Court, I understood I would be given

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additional time to file a brief.

THE COURT: That's correct.

MR. MCGREGOR: And I would at this time like to request, if my further research indicates to me I should bring forth additional witnesses, I be given permission to do so.

THE COURT: There was that understanding at the time I denied the motion for continuance, we had some new defendants who had not had a full opportunity, so I guess we'll just have to leave it this way, if anybody comes in with a new witness, they better have a pretty good excuse.

MR. GERMERAAD: Okay.

THE COURT: We'll review it at the time.

MR. GERMERAAD: All right, I think the plaintiff intervener would call one rebuttal witness, Mr. Woodward--

THE COURT: All right.

MR. GERMERAAD: --and as far as I know, Mr. Rudolph will ask him some questions.

MR. RUDOLPH: Did you say I was calling him now?

MR. GERMERAAD: Yes.

1 EARL CRAIG WOODWARD, recalled as a witness on behalf
2 of the plaintiff, having been
3 previously sworn, testified
4 further as follows:
5

6 DIRECT EXAMINATION

7 BY MR. RUDOLPH:

8 Q It's getting late, Mr. Woodward, and I will keep this as
9 brief as I can.

10 First, in your precipitation studies, relat-
11 ing to the Chamokane Basin, and calculations which you
12 made, what did you include within precipitation?

13 A All precipitation; snow and rain.

14 Q Now, did Dr. Maddox, at any time, when he consulted
15 you concerning your studies, did he at any time ask
16 you if you had a reading of the water level in the
17 Newhouse Well at a point relatively approximate to the
18 date of November 3, 1971?

19 A I was never asked, no.

20 Q Do you have a reading of the water surface level in the
21 Newhouse Well?

22 A Yes, I do.

23 Q On what date?

24 A On October 14th-- Wait a minute-- On the Newhouse
25 Well, yes, October 14th, we had paralleling ones.

1 Q On October 14th of what year?

2 A '71.

3 Q And what was the water surface level in the Newhouse

4 Well on October 14, 1971?

5 A 1793.3.

6 Q And what was the water surface level in the Hill Well

7 on that same date, October 14, 1971?

8 A 1791.56.

9 Q Would you do the arithmetic and tell me how much higher

10 the water surface on that day was in the Newhouse Well,

11 how much higher it was than the surface in the Hill

12 Well?

13 A It would be about 1.7 feet.

14 Q Was that reading in the Newhouse Well an actual reading?

15 A Those are actual readings.

16 Q Now, did you take a reading on November 3, 1971, in the

17 Hill Well?

18 A Yes.

19 Q And was that approximately the same as it was on October

20 14th, 1971?

21 A It had fallen off about a half a foot.

22 Q Do you know of any reason why there would have been any

23 change in water surface level of the Newhouse Well

24 between October 14, 1971 and November 3, 1971?

25 A I would see no reason for the change being any different

1 than at the Hill Well.

2 Q Do you have a field note which shows, which shows the--

3 MR. RUDOLPH: May I step over to the witness, Your
4 Honor?

5 THE COURT: Go ahead.

6 Q (By Mr. Rudolph) Well, now, I'll ask, for the record,
7 is this your field note sheet dated October 14th, 1971?

8 A Yes, it is.

9 MR. RUDOLPH: I'd better mark that for identifica-
10 tion, excuse me.

11 A There are copies of them, excuse me, this is part of
12 my file.

13 MR. RUDOLPH: Would you mark the copy as the
14 exhibit, and I will pass the original with the copy so
15 they can be compared.

16 (Whereupon, Plaintiff's Exhibit 93 was marked for
17 identification.)

18 Q (By Mr. Rudolph) Now, is that, what is that exhibit
19 number, Mr. Woodward?

20 A That's a copy of--

21 THE COURT: What is the number?

22 Q (By Mr. Rudolph) No, what is the number?

23 A 93.

24 Q Now, is Exhibit 93 a Xerox copy of your original field
25 notes?

1 A Yes.

2 Q Now, while I'm handing that to counsel to examine, do
3 you have other field notes which relate to the measure-
4 ments taken on that date?

5 A Just a moment-- These were field notes taken of the
6 elevations of the top of the wells, and this is a copy
7 of the field notes taken on April 6, '71, and at which
8 we run benches over all wells so we could measure down
9 from the top.

10 Q May I have your book so that--

11 A That book--

12 Q Okay.

13 A --is also office files.

14 Q Now, is Exhibit 94 a Xerox copy of your field notes--
15 (Whereupon, Plaintiff's Exhibit 94 was marked for
16 identification.)

17 A Yes.

18 Q --for the date April 6, 1971?

19 A Yes.

20 Q And if I understand you correctly, Exhibit 94 repre-
21 sents your measurements as to the top of the Hill Well
22 and the top of the Newhouse Well, and it was a measure-
23 ment taken on April 6, 1971?

24 A Yes.

25 MR. RUDOLPH: Exhibit 23.

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THE CLERK OF THE COURT: Plaintiff's?

MR. RUDOLPH: Yes. Were Exhibits 93 and 90-- Is it 4 and 5, or what is that other number?

THE COURT: 93 and 94. Is there any Voir Dire on the exhibits?

MR. DUFFORD: Excuse me, Your Honor, may I ask a couple of questions of the witness?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. DUFFORD:

Q This is Plaintiff's Exhibit No. 93, was marked as that?

A Could I-- Let me see it.

Q I see there is written down there, "Identification of Number of Wells", and off to the right there are some figures?

A Yes.

Q And I don't know what those figures are; what do they stand for?

A These are my field notes, I measured down from the top of the well heads, which were tied to the cosine geodetic datum from all of our wells in the Reservation in that area.

Q So what are those numbers, the distance from where-to-where?

1 A Those are the numbers I can measure down from the top
2 of the well, the top of the well itself, to measure
3 down to the top of the well.

4 Q Then the relationship of that to the U.S.G.S. data does
5 not appear on that exhibit, is that correct?

6 A On this exhibit?

7 Q Yes.

8 A It takes two of them to do it.

9 Q Okay, now, this Exhibit 94, is this, this relates to
10 April, not October?

11 MR. RUDOLPH: Yes, that is when he measured the
12 top of the well-- of the two wells.

13 Q (By Mr. Dufford) Okay, and that's what these elevations
14 are, then,-- Is that above sea level, the elevation
15 of the top of these two wells?

16 A Yes.

17 MR. DUFFORD: All right, I think I understand.

18 MR. RUDOLPH: Now, that's Exhibit 94. Does
19 anybody else want to see 94? Does anybody else want
20 to see 93?

21

22 DIRECT EXAMINATION, Continuing:

23 BY MR. RUDOLPH:

24 Q While they're still looking at that, do you have another
25 sheet on which you have done your mathematics which

1 relates the two exhibits, 93 and 94?
2 A I have, if I haven't loaned it away. Yes.
3 Q May I see it, please, and we will mark that as Exhibit
4 95.
5 (Whereupon, Plaintiff's Exhibit 95 was marked for
6 identification.)
7 MR. RUDOLPH: Do you suppose you could put it on
8 a bigger piece of paper so we don't lose it?
9 THE CLERK OF THE COURT: I will.
10 MR. RUDOLPH: Okay.
11 Q (By Mr. Rudolph) Now, Exhibit 95, would you explain
12 what that is, Mr. Woodward?
13 A Taking the elevation as shown on the other exhibits
14 for the elevation at the top of the Hill Well, which
15 was 1826.41, and I subtracted the depth down, which I
16 took on 10-14, 34.85, and I got a result of surface
17 water, surface level, of 1791.56.
18 Q Now, that's for--
19 A That was for-- On October 14th.
20 Q All right.
21 A Now, by the same process, on, I had gotten from the
22 trip out, on the date that they were discussing, the
23 November date, there was 1791.04, or a difference of
24 about a half a foot.
25 Q All right, now, do you have, do you also have the

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mathematics on there for the Newhouse Well?

A Yes. The top of the Newhouse Well of 1811.8, and the reason this was carried only to tenths instead of to hundredths, we shot a little farther, and didn't want to confuse anybody, and my measuring down at that point to this water surface from that same well rim was 1800.5, and left a water surface depth of the Newhouse Well of 1793.3.

Q How did you make the measurement from the point in each well, from the point as shown on Exhibit 94, and that's—

A You have a little extra probe to drop down there.

Q Explain that, a probe that goes down to the water surface level?

A Yes, and then it shorts out when the needle hits the water.

MR. RUDOLPH: We'll offer Exhibit 95, then, Your Honor.

MR. GERMERAAD: 93, 94 and 95, all at the same time?

MR. RUDOLPH: Yes, I guess I didn't-- I'll offer all three of them simultaneously, and they haven't had a chance to see 95 yet.

Q (By Mr. Rudolph) I think I didn't ask you, Exhibit 95, when did you do that handwriting on that?

A About five minutes ago. I dropped out for about five

1 minutes and did it.

2 Q During this day?

3 A Yes, during the day.

4 Q During the course of Mr., Dr. Maddox's testimony, in
5 fact?

6 THE COURT: Any objection to 93, 94 and 95?

7 MR. REKOFKE: I have one question on 95.

8

9

VOIR DIRE EXAMINATION

10 BY MR. REKOFKE:

11 Q You say this was made today? Let's see, you can't see
12 it from here, sorry.

13 THE COURT: That's your computations?

14 A Those computations I just completed.

15 Q (By Mr. Rekofke) Oh, the date sounds like 4--

16 A No, I stuck those on to refresh my memory of what date
17 the field surveys were done.

18 Q Oh, these are not your actual field notes?

19 A No, no, those are--

20 Q Oh, I see,

21

22

DIRECT EXAMINATION, Continuing:

23 BY MR. RUDOLPH:

24 Q Just to clear up any questions, the field notes are
25 93 and 94, and 95 is your--

1 A Scribble.

2 Q --your current scribble computation made today, from
3 those?

4 THE COURT: Plaintiff's Exhibits 93, 94 and 95 will
5 each be admitted.

6 (Whereupon, Plaintiff's Exhibits 93, 94 and 95 were
7 admitted into evidence.)

8 Q (By Mr. Rudolph) Mr. Woodward, do all of your studies,
9 including the results of what you have just been
10 testifying to, in your mind, and in your opinion, bear
11 out a general trend to the southwesterly in the Walker's
12 Creek ground water basin?

13 A South and southwesterly. In general lines, for the
14 record, to where we afterwards put the monitoring
15 wells-- That is why we put the monitoring wells there.

16 Q Would you take a look at Exhibit 23A, B and C and tell
17 us, when the Newhouse Well was pumped, was there an
18 accelerated rate of change of slope on the Hill Well?

19 A My earlier testimony indicated that, I believe it was
20 .015 per day, and then when the pumping would begin, it
21 would go to as much as, during heavy pumping, to as
22 much as .050.

23 Q And you're talking about the rate of decline--

24 A Rate of decline.

25 Q --in the Hill Well?

1 A Right.

2 Q Would there be a recovery in the Hill Well when the
3 Newhouse Well ceased pumping?

4 A At no time did we ever detect any recovery; we would
5 return immediately or right thereafter to the continual
6 downslope of the .015 that I testified to.

7 Q Do I understand the continual downslope, then, would
8 carry on from the point at which the Newhouse pumping
9 had placed it?

10 A Yes, sir. Never returned.

11 Q And do you consider; did you consider, when you
12 commenced your studies, did you consider using a flow
13 chart, or a flow net, as one of the tools to be applied?

14 A I considered that as one of the tools, and, in fact,
15 my brother did spend quite a little time trying to mess
16 with it.

17 Q What was your conclusion?

18 A I did not believe that it fit that particular area
19 because it was not homogeneous enough, and I felt it
20 would sway judgment rather to amplify it. I felt it
21 would be an erroneous tool rather than a direct tool,
22 and the Indians didn't allow me, then, to drill
23 monitoring wells to confirm my earlier concern on this
24 thing, because we did not feel that this tool would
25 work in this particular material.

1 Q Now, changing to a different subject, and it is getting
2 late, do you have with you an exhibit which relates to
3 the effect of the withdrawal by Mr. Smithpeter on the
4 flow of the Lower Chamokane?

5 A Lucky I've got big pockets. Yes.

6 Q May I have that, please, so I can have it marked as an
7 exhibit?

8 (Whereupon, Plaintiff's Exhibit 96 was marked for
9 identification.)

10 Q (By Mr. Rudolph) Handing you what has been marked for
11 identification as No. 96, briefly identify that, please,
12 Mr. Woodward.

13 A (Witness hesitates.)

14 Q Just tell us what it is, first.

15 A All right. First, it's a vertical recording chart of
16 elevations of the stream at the lower gaging station.

17 Q Now, is there a point on that exhibit which you can
18 specifically relate to a five-day period in which you
19 know that Mr. Smithpeter had just commenced pumping?

20 A Would you repeat that last part?

21 Q Yes. Following a period in which he had not been
22 pumping?

23 A I was reading a gauge that I had put at the bridge,
24 that's the Boardman Bridge, and Mr. and Mrs. Smithpeter
25 came down, and the question was, "Isn't that measurement

1 up at the gaging station enough?", and I said, "Oh,
2 I like to check myself as I go along," and I wanted to
3 get the comparison so in case I couldn't get into the
4 gaging station, that I could relatively interpret
5 anytime what was the flow, and that at sometimes, it
6 is difficult to get into the gaging station, but in any
7 event, he says, "Well, I haven't been on for five days,
8 my pump has been down for five days."

9 Q This is Mr. Smithpeter saying to you--

10 A Yes, that's what Mr. Smithpeter said to me.

11 Q And was there any more to the conversation, or is that--

12 A That was the pertinent part, yes.

13 Q Did you make a notation of that on Exhibit 96?

14 A Yes. I'd better mark it bigger. I just had it marked
15 light here, it's in this area here.

16 Q All right, you have marked it, those two brush strokes
17 there. How long a period was that?

18 A About five days.

19 MR. DUFFORD: Excuse me, I'm sorry, I hate to
20 bring this up, but there is some hearsay going in now
21 about what Mr. Smithpeter may have told Mr. Woodward,
22 and Mr. Smithpeter's attorney isn't here. I don't
23 know--

24 MR. RUDOLPH: Well,--

25 MR. DUFFORD: --if he would have found that

1 objectionable or not.

2 MR. RUDOLPH: It isn't hearsay, Your Honor.

3 THE COURT: It isn't hearsay as long as he's a
4 party. I'm sorry Mr. Campbell isn't here, because he
5 may want to get into this, and we may have to give him
6 an opportunity at the resumption of the trial if he's
7 got a question about it, but we can go ahead.

8 MR. RUDOLPH: Very well. I better let them see
9 this before we go on.

10 A That's in the record, in sheet form.

11 Q (By Mr. Rudolph) And this is the original?

12 A Well, I just made it continuous, myself, yes.

13 Q And you have marked in the middle, and when we get it
14 back, I may have you mark a little more fully, but you
15 have marked here a five day period?

16 A Which he discussed.

17 Q Yes.

18 MR. TORVE: Could I ask just a question on Voir
19 Dire, Your Honor?

20

21 VOIR DIRE EXAMINATION

22 BY MR. TORVE:

23 Q For what period does this roll cover?

24 A Pardon?

25 Q For what period does this roll cover?

1 A Mr. Smithpeter's irrigation season, for whatever that
2 year is, I forget what it is-- Last year, I believe.

3 Q Is it last year?

4 A I would have to look. It's probably dated on there.

5 MR. RUDOLPH: Excuse me, I didn't ask you the
6 year this was.

7 A No, I don't know, I don't remember which one it was,
8 it must have been last year, because that was the first
9 continuous year we had it going.

10

11

DIRECT EXAMINATION, Continuing:

12

BY MR. RUDOLPH:

13

Q You're not saying that role represents the whole season,
14 are you?

15

A I'm saying that.

16

Q It does?

17

A Yes.

18

Q Oh, all right.

19

A Yes, it's a series of sheets--

20

Q Okay.

21

A --which I have removed each week and glued together.

22

Q Can you give it a month?

23

A Yes, the months are shown there, you will see where
24 the months change.

25

THE COURT: Counsel, I want to raise a question

1 as to whether we shouldn't take a dinner break and
2 come back about 8:30 and finish this up. The Reporter
3 gets pretty tired on these long--

4 MR. GERMERAAD: Isn't this your last question?

5 MR. RUDOLPH: This is my last question, so, for
6 your guidance, Your Honor.

7 THE COURT: Well, let's see if we can get it in.

8 MR. RUDOLPH: We're offering Exhibit 96.

9 MR. REKOFKE: I just have one question.

10

11 VOIR DIRE EXAMINATION

12 BY MR. REKOFKE:

13 Q How do you identify that being the date of the
14 conversation with Mr. Smithpeter?

15 A I beg your pardon?

16 Q How do you identify that as being the date of the
17 conversation with Mr. Smithpeter?

18 A I made those notes on a piece of paper I lay on the
19 seat with me as I drive along, and that conversation
20 was noted there, where I mentioned it, when I came back,
21 I did make a note of this at that time.

22 Q Oh, you did; all right.

23 A You see, we have the original ones, and then we
24 blueprint the original.

25

1 DIRECT EXAMINATION, Continuing:

2 BY MR. RUDOLPH:

3 Q On Exhibit--

4 THE COURT: Plaintiff's Exhibit 96 will be admitted.
5 (Whereupon, Plaintiff's Exhibit 96 was admitted into
6 evidence.)

7 Q (By Mr. Rudolph) On Exhibit 96, would you mark a little
8 more fully what those brush strokes are, so that we're
9 identifying that as the specific five-day period?
10 Can you write it above, so it will be--

11 MR. RUDOLPH: Could I have a--

12 A Here's a darker one.

13 Q (By Mr. Rudolph) Okay.

14 A And this here is 0.90, which would be the gauge reading
15 on the staff gauge and on the Geological Survey gauge
16 reading.

17 Q All right.

18 A Now, I think I should explain to the Court further that
19 at that time, during that period, when we were concerned
20 about the 20 second foot that was established, or
21 alluded to by the Department of Ecology, we felt that,
22 to that period, that the ones at the gauges of the
23 Geological Survey had did not show us close enough.

24 THE COURT: Mr. Woodward, I think you testified
25 to all of this earlier.

1 A Yes.

2 Q (By Mr. Rudolph) All I want you to do is to identify,
3 between these two lines, that's a period of the
4 Smithpeter pumping.

5 MR. GERMERAAD: Non-pumping.

6 A Non-pumping.

7 Q (By Mr. Rudolph) All right, would you write on each
8 side of the two lines, "Smithpeter Pumping".

9 A (Does so.)

10 Q You have written "pumping" on one side and "pumping"
11 on the other?

12 A Yes.

13 Q And I'll simply ask, does this Exhibit 96 reflect the
14 withdrawal by Mr. Smithpeter of an approximate two to
15 two and a-half second feet of water?

16 A About two that I can read, two to two and a-half second
17 feet.

18 MR. RUDOLPH: I have no other questions. Do you,
19 Mr. Germeraad?

20 MR. GERMERAAD: I'll forget it.

21 THE COURT: Is there cross-examination of Mr.
22 Woodward?

23 MR. : No.

24 MR. REKOFKE: Who wants to come back at 8:30!

25 MR. DUFFORD: I just have a couple of questions.

CROSS-EXAMINATION

1
2 BY MR. DUFFORD:

3 Q With respect to, first of all, to Mr. Smithpeter's
4 pumping, I didn't quite understand you; you said he
5 told you that there were five days that he hasn't
6 pumped, is that correct?

7 A Yes, and I also told you the reason for him making that
8 statement, because he was concerned because I was read-
9 ing this gauge.

10 Q Fine. Now, with respect to the period before that
11 five days, and the period after that five days, did you
12 go and observe that he was, in fact, pumping?

13 A I think, through my records, every time I saw him pump,
14 or saw his sprinklers going, I made notes on my weekly
15 trips.

16 Q Do you know if he was pumping before that five days and
17 after that particular five-day period?

18 A I'm sure my notes will show that.

19 Q Okay, well, can you recall, can you tell me now that
20 that is the case?

21 A I'm under oath. I will say my best recall is that he
22 was.

23 Q Do you happen to know how long he had his pump on, on
24 any particular day, before or after that period?

25 A No, I don't know that.

1 Q You don't know how constant his pumping was?

2 A I don't know that, no.

3 Q All right. Now, with respect to the Newhouse Well, the
4 information on the elevations in that well that you
5 have from October 14, do they appear in your report?

6 A (Witness hesitates.)

7 Q You had an elevation for water in the Newhouse Well on
8 October 14, 1971; does that information appear in your
9 reports?

10 A I don't believe it's in the book. I don't think it is.

11 Q Then anybody analyzing the data you put together would
12 not have the benefit of that information, is that
13 correct?

14 A They had the benefit of talking with me and discussing
15 with me, all the time they wanted. I invited them many
16 times.

17 Q Okay. Why wasn't that information in the report?

18 A Well, it's an oil-lubricated pump in the first place,
19 and it's a little bit difficult when you measure wells
20 about half full of oil.

21 Q What do you mean, it's difficult; is it hard to do; is
22 there a possibility of inaccuracy?

23 A No, you just fight the oil. Once,-- I just did it.
24 This time I thought it was more important and did it.

25 Q You did it one time?

1 A I did it several times. It was close to the time
2 referred to, so I--

3 Q What about that kind of device that you stick down
4 there, that electrical thing, could you tell me what
5 that is again?

6 A Yes, it's a terminal--

7 Q I'm sorry, I just didn't know how to describe it.

8 A --two probes, electrical, fastened to the battery, and
9 run through the negative.

10 Q Okay, how accurate is that?

11 A Exact.

12 MR. DUFFORD: Okay, thank you.

13

14 CROSS-EXAMINATION

15 BY MR. TORVE:

16 Q On that Exhibit 96, can you tell me what the scale of
17 it is, so that we can look at it and see what it is
18 actually measuring?

19 A Bring it to me, if you will. I think it's marked.
20 Should I mark specifically in the area I discussed?

21 THE COURT: No, he just wants to know the scale
22 of the chart.

23 Q (By Mr. Torve) What does the low represent on CFS,
24 and what does the high represent on CFS, if it does
25 do that?

1 A On this particular one, put in red, very light red,
2 what was the computed 20 second foot, and in this
3 particular area, one-hundredth of a foot, approximate,
4 for these purposes, one second foot.

5 Q And on the roll, I take it, your testimony is that you
6 have drawn a red line which equates the 20 CFS figure,
7 is that correct?

8 A The gross one, yes. Now, that is an approximation
9 only. The main thing is to, if we were dropping, and
10 I believe that the Department of Ecology were notified,
11 at that time, when--

12 Q All right, let me ask you this, does that graph show
13 you how long Mr. Smithpeter was pumping?

14 A No.

15 Q Does it show you a comparison of the five days, before
16 when you claim he wasn't pumping, and the five days
17 that he wasn't?

18 A Yes, it does.

19 Q And I take it your diagnosis here of two CFS less is
20 because there seemed to be less water in the next period
21 of time, is that correct?

22 A Either that, or coincidental. That's what it looked like
23 to me.

24 Q So--

25 A In my opinion.

1 Q --the graph really doesn't show an instantaneous
2 deduction that you can, with certainty, relate to his
3 pumping, then, does it?
4 A Yes.
5 Q It does?
6 A In my opinion--
7 Q Okay.
8 A --it reflects his pumping and non-pumping.
9 Q I didn't understand the answer as to why Mr. Newhouse's
10 records were not in this report.
11 A Well, I really don't know either, in particular, except
12 I was doing the, uh, I was measuring the Seagle well
13 because it was right handy, beside the road, and I
14 could reach over and lift the big tin lid off and probe
15 down and reach it. The rest of them were available to
16 me, and the first year I was in there and run a timing
17 machine with it. The second year, when I asked to do
18 the same thing, I was said, "In no way," so I did not
19 do it, so I took Mr., I took him at his word and stayed
20 away from him.
21 Q As I understand it, the Newhouse Well, though in its
22 relationship to the Hill Well, was quite important, is
23 that correct?
24 A Yes.
25 Q One last question. I had thought you had told the Court

1 in your main testimony, the Direct or Cross, at one
2 time, that in order to compute the time lag which you
3 felt occurred between the diversion out of the Newhouse
4 Well and the springs, that you computed it because it
5 was fairly homogeneous aquifer down to the springs?

6 MR. RUDOLPH: Your Honor, I didn't go into that.

7 THE COURT: I don't think this is proper Cross.

8 MR. TORVE: Well, I thought he-- I understood--

9 THE COURT: He didn't go into that on this
10 testimony, counsel. In his earlier--

11 MR. TORVE: Well, all right--

12 THE COURT: --testimony, he did.

13 MR. TORVE: All right, I will strike the question.

14 THE COURT: Anything further?

15 (No response.)

16 THE COURT: You may step down, Mr. Woodward.
17 Excuse me, I'm sorry, I didn't see you come up for
18 questioning.

19

20 CROSS-EXAMINATION

21 BY MR. TRACY:

22 Q Mr. Woodward, I thought that most of the testimony you
23 gave concerning the Hill Well and the Newhouse Well
24 indicated that they were basically on the same water
25 table at about the same level.

1 A General plane, generally transverse, yes.

2 Q And at about the same height?

3 A Within two feet, I call "generally transverse".

4 Q During all this period of study, has Newhouse's been

5 approximately two feet above that of the Hill Well?

6 A I don't know that because I didn't measure Newhouse's

7 well that often. I could compare it to any others, but

8 not his.

9 Q Well, then, how can you explain that if Newhouse's

10 water is two feet above the Hill Well's water table,

11 how can you explain the draw-down in the Newhouse Well,

12 the cone of depression affecting the Hill Well?

13 A I listened for many hours about this cone of depression

14 in this loose gravel, and I find that when you punch the

15 button off on the Newhouse Well, that it fills up

16 immediately. I never found any evidence of a difference

17 of any draw-down specific, other than your gradual

18 draw-down, or any rebound when that well went off or on.

19 Q Well, if you never found that, then, how do you

20 correlate the loss in the water in the Hill Well with

21 the loss of water in the Newhouse Well, if there is no

22 cone of depression to draw it down?

23 A I never used that cone of depression business at all,

24 which you have a pump agoin', and that's one reason

25 why I didn't go for this, uh, net. I tried to use and

1 correlate wells which were more representative, which
2 were not being pumped, and you will note that that is
3 the Hill Well, was not being pumped, and that's why I
4 used it. I'm not getting any effect of any pumping
5 out of it, outside pumping, none whatsoever. I purpose-
6 ly went away from the Hill Well to be away from the guy
7 where it couldn't affect me.

8 Q So then the Newhouse Well wasn't affected, then?

9 A Wasn't making a cone of depression, to my knowledge.

10 Q Well, then, how do you explain the draw-down in the
11 Hill Well?

12 A It seems I, even, like, out here in the Spokane Valley,
13 you get a quick draw-down, it's almost like stepping out
14 of a tub, in that loose material, and she'll pull down,
15 she'll pull down a couple of feet, and it will return
16 in an instant, you push the pump off, and she's up,
17 she doesn't stay down there until it fills this big
18 cone they're talking about. If I were talking another
19 kind of material, tighter material, perhaps if I were
20 talking basalt, I would go right along with this thing,
21 and I have listened to it several days and haven't said
22 anything, and it's bothered me.

23 Q And you say-- Let me understand this, I might not under-
24 stand here-- Are you saying that, well, then, I just
25 understood you to testify that the Hill Well--

1 MR. GERMERAAD: Maybe I can help Mr. Tracy.

2 MR. TRACY: I can help myself, if he will answer
3 my questions.

4 MR. GERMERAAD: I was just trying to cut down on
5 the time.

6 Q (By Mr. Tracy) Well, you just testified to the fact
7 that there was no recovery, the water never returned
8 up to the same level in the Hill Well?

9 A Right.

10 Q Well, now, how do you explain that?

11 A Because it was beyond the cone of influence of the
12 Newhouse Well.

13 Q If it was beyond the cone of influence of the Newhouse
14 Well, then the Newhouse Well wouldn't affect it, would
15 it?

16 A Oh, yes, it would, 'cause we're all heading downhill,
17 which I testified this, the slope of this whole plain,
18 this whole water plain is south and southwesterly and
19 it terminates in this Massive Springs area, and, as long
20 as I'm on that slope, now, I purposely have measured all
21 of those wells, and we didn't just spend the Indians'
22 money to go out and drill some wells, we had a purpose
23 for it, and that was to record the annual ups and downs
24 of the water table out here. You could not find that
25 from wells which were pumping down, and sucking down,

1 and so on.

2 Q Well, then, I, if I understand it, your testimony is
3 that the Newhouse Well's cone of depression was so
4 small it didn't even affect the Hill Well?

5 A As far as I was concerned, that was my main reason, to
6 go over where I did, on the Newhouse Well, to get beyond
7 my figure, what would be an influence, whatsoever, by the
8 cone of depression, of the Newhouse Well.

9 Q And yet the Newhouse Well is uphill-- I mean, it's up,
10 in elevation, up above this other well?

11 A No.

12 Q It isn't?

13 A The water was, yes. I thought you meant ground surface.

14 Q The ground surface is, too, isn't it?

15 A No, the ground surface is lower.

16 Q Well, would you look at Exhibit 95? Doesn't it show on
17 Exhibit 95 that the elevation of the Newhouse Well is,
18 not the water table, but the elevation of the ground
19 is 1826 feet?

20 A No, the Hill Well is 1826.41. The Newhouse Well is
21 1811.8. That's the top of the casing.

22 MR. TRACY: May I approach the witness for a
23 minute; maybe I'm all mixed up.

24 Q (By Mr. Tracy) Now, I'm pointing to a figure, and I
25 understand that your 1793.3 is the Newhouse--

1 A Water in the Newhouse, yes.

2 Q --table. I understand that 1811.8 is the surface in,
3 at the Newhouse Well?

4 A Top of the well casing.

5 Q And I understand that the depth down to water there was
6 1800.5 feet?

7 A Yes.

8 Q Or 1793.3. But now, looking at the Hill Well, I
9 understand, in reading that, that it is 1826.41?

10 A The top of the casing was higher; it sits up on top of
11 the hill.

12 Q So it is higher in elevation?

13 A The surface of the ground is higher in elevation.

14 Q That's all I was trying to ask.

15 MR. TRACY: Just a minute, Your Honor. I'd like
16 to maybe ask one further question, Your Honor.

17 THE COURT: Well, I think we're going to have to
18 recess and come back after dinner. It's 7:00 o'clock
19 and our Reporter has been going here pretty solidly.

20 MR. CERUTTI: If we could have one minute here,
21 between ourselves, Your Honor, we might be able to
22 avoid the--

23 MR. : Yes, we might.

24 MR. CERUTTI: If we could have about five minutes.

25 MR. : I keep seeing those airplanes

1 taking off.

2 MR. GERMERAAD: Do we have any more questions?

3 MR. RUDOLPH: Not here.

4 MR. REKOFKE: No further questions.

5 THE COURT: Is everybody through questioning the
6 witness?

7 MR. CERUTTI: Your Honor, I do, we have a few
8 questions of this witness.

9 THE COURT: Well, we have gone a half an hour past
10 where I was going to stop this and come back, and we can
11 go a little bit here, but this is pretty rough on the
12 Reporter.

13 MR. TRACY: Your Honor, if we could take a five-
14 or 10-minute recess, then I think it could be concluded
15 right away.

16 THE COURT: Well, if we take a recess, we're going
17 to come back at 9:00 o'clock. We've got to get this
18 thing buttoned up. We plowed the same ground here today,
19 so I'll give you a few minutes here, if you want.

20 Mr. McGregor, I guess, has not had any chance
21 at all to question this witness, has he?

22 MR. MCGREGOR: No, Your Honor, I have not.

23 THE COURT: So, I guess you'd better do the best
24 you can.

25 MR. MCGREGOR: I only have a couple of very short

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questions.

CROSS-EXAMINATION

BY MR. MCGREGOR:

Q Mr. Woodward, you testified that your brother fiddled, for a while, with flow net?

A Did I use that word?

Q Well, you used-- I forget that--

A He started the computations on the flow net, and went a day or two, and at that time is when I directed this new approach to this whole thing. It just didn't fit, in my opinion, so I aimed him into put something that would be concrete, that I know, as evidence, and I knew that someday, flow net or not, it would have to be proven.

Q Now, you testified how many years your brother has worked for you; could you restate that?

A Probably didn't testify-- Let's see, 26 years, I suppose.

Q And how many flow nets has he prepared in that 26 years?

A Well, even in-- I don't know that. I really wouldn't know that.

Q Has he prepared any?

A I'm not sure about that.

Q How many flow nets have you prepared in your career?

1 A I have avoided them, mostly.

2 Q Have you ever prepared a flow net?

3 A No.

4 MR. MCGREGOR: No further questions, Your Honor.

5 THE COURT: Anything further; last-ditch effort
6 here. All right, this case will be continued to 9:30
7 a.m., Tuesday, the 11th day of June.

8 Now, be prepared to discuss with counsel,
9 this gives you an opportunity to kind of draw these
10 things together that are now in evidence, and I think
11 we have pretty thoroughly discussed what supplemental
12 materials might come in at that time.

13 MR. DUFFORD: Your Honor, we will have some
14 discussions in the interim?

15 THE COURT: Oh, yes.

16 MR. DUFFORD: I was wondering, if it would be
17 acceptable, we talked about Xeroxing some of the State
18 files, and what I was hoping to do was to have someone
19 from the Department of Ecology come, and in company
20 with someone from the Justice Department and somebody
21 from Mr. Rudolph's office, go off and make those
22 substitutes together.

23 THE COURT: I see no objection to that.

24 MR. DUFFORD: There is one further thing I don't
25 quite know what to do about, and that is, one of our

1 files, the one for Dawn Mining, apparently was never
2 introduced into evidence.

3 Now, I don't know if Mr. McNichols thought
4 I was doing that, if, or if he, if there was some
5 slip-up and he would like to have it in evidence.

6 Is there any objection to the Dawn Mining
7 File of the State be--

8 MR. RUDOLPH: No, I think it should be in.

9 THE COURT: It should be in evidence. Does it
10 have a number?

11 THE CLERK OF THE COURT: No.

12 MR. DUFFORD: I don't know if Mr. McNichols agrees
13 with that, but I kind of gather that he would.

14 THE COURT: Well, we have a stipulation, there
15 can't be any question.

16 MR. : Your Honor, in regard to briefs,
17 will that be set up at the June 11th hearing?

18 THE COURT: I think so. We will see where we are
19 and how far you have progressed with your analysis of
20 this material.

21 MR. CERUTTI: What date was that, Your Honor;
22 June 11th; what time of day was that?

23 THE COURT: 9:30.

24 MR. CERUTTI: 9:30 in the morning?

25 THE COURT: A.M.

1 MR. : You clarified the question I had.
2 THE COURT: Yes, written briefs after oral argument
3 on that date.
4 And so, for the record-- That's Plaintiff's
5 71?
6 THE CLERK OF THE COURT: Yes.
7 THE COURT: Plaintiff's 71--
8 THE CLERK OF THE COURT: No.
9 THE COURT: --will be admitted.
10 THE CLERK OF THE COURT: No, Defendant's.
11 THE COURT: Defendant's, I'm sorry, Defendant's
12 71 will be admitted.
13 (Whereupon, Defendant's Exhibit 71 was marked for
14 identification and admitted into evidence.)
15 MR. ROE: Your Honor, did I understand we were
16 going to have oral arguments that day? I thought that
17 we were not.
18 THE COURT: Well, if you desire. I have got to
19 leave this up to counsel, how you want to play this, and
20 I think we can't really evaluate that until you have
21 assimilated all this material and analyzed it.
22 MR. ROE: It seems to me the briefs should be
23 handed to you before we do that.
24 THE COURT: I will leave that to counsel, however
25 you want to do that.

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MR. ROE: Thank you.

MR. CERUTTI: Thank you, Your Honor.

THE BAILIFF: All rise; this court stands
adjourned.

(Court adjourned 7:15 p.m.)

1 Hon. Marshall A. Neill, Judge
2 Spokane, Washington
3 Tuesday
4 June 11, 1974
5 9:30 A.M.

6 THE CLERK OF THE COURT: Civil 3643, United States
7 of America and Spokane Tribe of Indians, Intervener
8 Plaintiffs, versus Barbara J. Anderson, et. al.

9 MR. RUDOLPH: I've got a few exhibits to mark
10 here.

11 THE COURT: I think, for the record, counsel better
12 make appearances in the record, because I have no way
13 of knowing who's here and what we have, probably the
14 same cast as before, but--

15 MR. CAMPBELL: John Campbell, for Mr. Smithpeter.

16 MR. DUFFORD: Mr. Roe and Mr. Dufford for the
17 Washington State Department of Ecology.

18 MR. TORVE: T. O. Torve for the State of Washington,
19 Department of Natural Resources.

20 MR. CERUTTI: Mr. Cerutti for the Defendant Seagle.

21 MR. REKOFKE: Joe Rekofke for the Defendant Boise
22 Cascade.

23 MR. MCGREGOR: McGregor, for Defendant Schaffner.

24 MR. GERMERAAD: Mr. Germeraad for the Plaintiff
25 United States.

MR. RUDOLPH: Mr. Dellwo and Mr. Rudolph for the

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Plaintiff Spokane Tribe of Indians.

THE COURT: Thank you. This matter, as counsel may recall, is a continuation of the trial. I understood that at the time we recessed the trial, there was some evidence yet to come in. Particularly, there may have been some pro se defendants who may have wanted to put in some testimony, but I have heard nothing further on it, and I knew there were some further exhibits, so we may proceed.

MR. RUDOLPH: All right, we have been trying to look these over a little, but I haven't gotten them market yet, Your Honor.

Mr. Stevens, would you take the stand, please.

JAMES H. STEVENS,

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

MR. RUDOLPH: I might say, by way of preface, Your Honor, that these matters with Mr. Stevens, and the exhibits, all relate primarily to land-status matters concerning material and maps developed by the Bureau of Indian Affairs.

THE COURT: Are these the proposed exhibits referred

1 to in your letter to all counsel, of May 16th?

2 MR. RUDOLPH: Yes, except they have been changed.

3 THE COURT: All right, go ahead.

4 THE CLERK OF THE COURT: Would you state your full
5 name to the Court, spelling your last name.

6 THE WITNESS: James Hunt Stevens, S-T-E-V-E-N-S.

7

8

DIRECT EXAMINATION

9

BY MR. RUDOLPH:

10 Q Mr. Stevens, you testified previously, at length,
11 concerning your duties as superintendent of the
12 Spokane Agency, and I'll not reiterate those questions.
13 I'll direct your attention first to the two lists--

14 MR. RUDOLPH: May I have those?

15 Q (By Mr. Rudolph) --I'm handing you Exhibits 97 and
16 98, and first, referring to 97, would you tell me,
17 first, if that was prepared within the Bureau of Indian
18 Affairs, and from material with which you generally are
19 familiar?

20 (Whereupon, Plaintiff's Exhibits 97 and 98 were
21 marked for identification.)

22 A Yes, it was.

23 Q Now, what is 97; give me the heading from that, would
24 you, please.

25 A The title is, "Chamokane Creek, Trust Lands Acquired,

1 Formerly Fee-simple Lands".

2 Q And now, 98, what is the heading of it?

3 A 98 refers to the vacant lands restored to private
4 Tribal ownership. There is a certificate on the front
5 page of 98 that certifies that this is a, those lands
6 that were restored in 1958.

7 Q Now, when you say "restored"; what does that word,
8 "restored" mean; what are you referring to?

9 A Well, these lands were opened for homestead, and the
10 particular lands referred to here were not homesteaded
11 upon, and so I guess it was just to clarify the
12 Allotment Act and to remove any possibility with a
13 problem at the time.

14 Q You're referring to the statute of 1958, is that
15 correct?

16 A Yes.

17 Q Now, what is the total acreage of the restored lands,
18 as described on Exhibit 98?

19 A Seventy-seven acres.

20 Q Now, am I correct that that is limited to the area
21 within the Chamokane Creek Basin?

22 A That's true, yes.

23 Q Now, as to Exhibit 97, give me a little more
24 explanation as to what the heading, "Trust Lands
25 Acquired, Formerly Fee-simple"?

1 A Well, these are lands that were fee lands inside the
2 Chamokane Basin on the Spokane Reservation that the
3 Tribe acquired, and returned them to trust status.
4 These fee lands could have come from either homestead
5 lands, or from allotted lands which were sold by the
6 Indian owners to non-Indians, went into a fee status,
7 and then returned to trust as the Tribe purchased them.

8 Q Now, on Exhibit 97, does this show, for individual
9 tracts, designations of numbers and dates of acquisition,
10 or dates of reacquisition might be more accurate?

11 A Yes.

12 Q Refer me to-- I'm looking at the first line, where it
13 says, it's giving a description, and then it says,
14 "T1001"; what does that refer to?

15 A This is a homestead tract, and the four numbers on the
16 tract, on the map, all are homestead lands, so this
17 would be Homestead No. T1001.

18 Q And with that number, T1001, does that appear on a
19 later exhibit which we will be offering?

20 A Yes, sir, it appears in both maps in question.

21 Q Now, on that same line where I was reading, it says,
22 "2/2/42"; does that refer to the date of reacquisition
23 by the Tribe?

24 A Yes, it does.

25 Q Now, when I say "reacquisition by the Tribe", give me

1 the status of ownership which, in fact, exists on these
2 reacquired lands.

3 A Well, they're held in trust by the United States
4 Government for the Tribe, and we treat them exactly
5 the same as any other tribally-owned land.

6 Q Now, for each of the tracts listed on Exhibit 97, is
7 the date of reacquisition shown, then?

8 A Yes.

9 Q And have you had made, under your direction and
10 supervision, a calculation of the acreages of these
11 tracts within the Chamokane Basin and without the Basin?

12 A Yes, because some of these tracts lie on the border,
13 and part of them are inside the boundary, in the Basin,
14 and some are on the outside.

15 Q What is the total, then, of the former fee lands
16 reacquired and now held in Tribal ownership, as shown
17 by Exhibit 97?

18 A This is 2523.44 acres. However, these fee lands that
19 were reacquired are only those that were within the
20 Chamokane Basin, or partially within the Chamokane
21 Basin.

22 Q So that's the total you just gave there?

23 A Yes.

24 Q Of that total which you gave there, how much of that
25 acreage is within the Chamokane Creek Basin, according

1 to your computation?

2 A 725.33 acres.

3 MR. RUDOLPH: Would you read the question and
4 answer again? I'm not sure whether you--

5 THE REPORTER: "Question: Of that total which you
6 gave there, how much of that acreage is within the
7 Chamokane Creek Basin, according to your computation?
8 Answer: 725.33 acres."

9 A Excuse me, I misunderstood. Within the Chamokane
10 Creek Basin, there is 1798.11 acres.

11 Q (By Mr. Rudolph) And the figure 725.33, is outside
12 of the Basin?

13 A Yes.

14 Q Are these two exhibits, 97 and 98, according to your
15 best information and belief, in your position as
16 Superintendent of the Spokane Agency, true and correct,
17 according to records of the Bureau of Indian Affairs
18 relating to the Spokane Reservation, and particularly
19 the Chamokane Creek Basin thereof?

20 A Yes.

21 MR. RUDOLPH: We'll offer Exhibits 97 and 98.

22 THE COURT: Have all counsel had a chance to
23 examine these exhibits?

24 MR. DUFFORD: We have.

25 THE COURT: Plaintiff's 97 and 98 are each admitted.

1 (Whereupon, Plaintiff's Exhibits 97 and 98 were
2 admitted into evidence.)

3 MR. RUDOLPH: Now, Mr. Stevens, you can't, or maybe
4 you can, referring first to what has been marked as
5 Exhibit 99, will you tell me what this purports to be?

6 (Whereupon, Plaintiff's Exhibit 99 was marked for
7 identification.)

8 A This is an ownership map of the eastern portion of the
9 Reservation which shows the, in red, the 77 acres that
10 was restored lands by the 1958 Act, and in blue, those
11 lands that lie at least partially within the Chamokane
12 Basin, which were reacquired by the Tribe.

13 Q Is the coloring, the red and the blue, an identification
14 of the restored lands and reacquired trust lands, is
15 that simply a reflection on the map of what is
16 contained in Exhibits 97 and 98?

17 A Yes.

18 Q Was this prepared by your direction and under your
19 supervision?

20 A Yes.

21 Q Now, referring to what has been marked as Exhibit 100,
22 tell me what that is.

23 (Whereupon, Plaintiff's Exhibit 100 was marked for
24 identification.)

25 A This is the map of, again, an ownership map of the

1 Reservation, which shows the same information in the
2 same colors in the Chamokane area, and--

3 Q Does this map also reflect land ownership status
4 throughout the entire Reservation?

5 A Yes, sir, it does.

6 Q And is that same question true as to Exhibit 99; in
7 addition to the colored lands, does it also show the
8 ownership status of all other lands within the
9 Chamokane Basin, inside the Reservation?

10 A Yes, it does.

11 Q I forgot to ask, on both maps, there is a dotted line
12 you have referred to that constitutes the Basin; how
13 are the confines of the Basin, or the watershed, shown
14 on the map?

15 A We have estimated the outline of the Basin by a dotted
16 line placed on the map. That would be the west outline
17 of the Basin, on the Reservation.

18 Q Now, there are figures on Exhibit 100 entitled, "Land
19 Status of Spokane Indian Reservation", identified as
20 estimated acreages as of June 1, 1974; this shows a
21 total acreage on the Reservation of 154,603 acres, of
22 which 100,221 acres are identified as tribally-owned
23 lands held in trust by the United States, 29,640 acres
24 are identified as individually-owned Indian allotment
25 lands, held in trust by the United States, 21,683 acres

1 is fee lands, and 3,085 acres are government lands
2 under administrative control of the Bureau of Indian
3 Affairs for the Spokane Tribe.

4 Now, are those figures, totaling the 154,603
5 acres, approximately correct, according to your
6 information and belief, and based on studies which you
7 have had made as Superintendent of the Spokane Agency?

8 A Yes, they are. These figures do change almost daily;
9 however, at that time, we feel this was an accurate
10 estimate.

11 MR. RUDOLPH: We'll offer Exhibits 99 and 100,
12 Your Honor.

13 THE COURT: Plaintiff's 99 and 100 are each
14 admitted.

15 (Whereupon, Plaintiff's Exhibits 99 and 100 were
16 admitted into evidence.)

17 MR. DELLWO: If the Court please, I thought counsel
18 would show some greater recognition of this milestone
19 of 100 exhibits..

20 MR. RUDOLPH: Handing you Exhibit 101, will you
21 first tell me what that is, Mr. Stevens?

22 (Whereupon, Plaintiff's Exhibit 101 was marked for
23 identification.)

24 A Yes, sir. This is a listing of the lands that were
25 classified as timberlands and the lands that were

1 classified as agricultural lands, which were vacant,
2 vacant agricultural lands, as the Allotment Act of
3 1908 required to be made.

4 Q And you're referring to within the Spokane Reservation?

5 A Yes, sir.

6 Q And that classification was made when, or as of what
7 date?

8 A June 15, 1909.

9 Q Is there a certificate attached to the exhibit?

10 A Yes, sir. The certificate states that these are
11 photocopies of the, a portion of the official records
12 in the custody of the Titles and Records Section in
13 Portland.

14 Q The certificate includes the statement that, "The
15 completeness of each page cannot be authenticated, due
16 to lack of proper equipment to copy bound volumes."
17 Can you explain a little more what that means, and what
18 does the "completeness" refer to?

19 A This was, this list was in a bound volume, and it had
20 to be photographed, and on the inside of the page, they
21 were apparently unable to get the complete description
22 of the lands, and each tract has a subdivision and a
23 land description, and on some of the pages, a portion
24 of the description is either unclear or perhaps deleted.

25 Q Does the portion of the page in each case appear,

1 however, which gives the total, the acreages and the
2 total acreages of the lands which were classified as
3 timberlands and as agricultural lands?

4 A Yes.

5 Q Can you give me those figures; first, what the total
6 classification at that time was of tracts classified
7 as timberlands?

8 A 82,647.50.

9 Q And that total appears on page 20 of Exhibit 101?

10 A Yes.

11 Q And what is the total of the tracts which were
12 classified at that time on the Spokane Reservation as
13 agricultural lands?

14 A 5781.22 acres. That's on page 22.

15 MR. RUDOLPH: We will offer Exhibit 101.

16 THE COURT: Plaintiff's Exhibit 101 will be
17 admitted.

18 (Whereupon, Plaintiff's Exhibit 101 was admitted
19 into evidence.)

20 Q (By Mr. Rudolph) Would you refer to Exhibit 102 and
21 tell me if this also came to you as a photocopy
22 furnished by the Titles and Records Section of the
23 Bureau of Indian Affairs at Portland?

24 (Whereupon, Plaintiff's Exhibit 102 was marked
25 for identification.)

1 A Yes, it did.

2 Q And I note it contains, has attached to it the same
3 form of certificate that was on Exhibit 101. Is that
4 the same reason?

5 A Yes.

6 Q Can you tell me, just briefly, the substance of the two
7 letters which are included in Exhibit 101?

8 A These are primarily--

9 Q 102, excuse me.

10 A These are primarily an explanation of the information
11 that is contained in Exhibit 101, the listing of lands.

12 Q These are-- And the letters are signed by whom?

13 A I'm not so sure I can actually read these; Clair Hunt,
14 and a Mr. Nourse, it looks like, N-O-U-R-S-E, who are
15 identified as "Commissioners to Classify and Appraise
16 Surplus Lands of the Spokane Indian Reservation".

17 Q And dated what?

18 A Both letters are dated June 15, 1909.

19 Q And they were attached, I take it, then, to the
20 description classification sheets that you testified
21 to concerning Exhibit 101?

22 A Well, they refer to them, yes.

23 MR. RUDOLPH: We'll offer Exhibit 102.

24 MR. DUFFORD: Your Honor, may I have a look at
25 those?

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THE COURT: You may.

MR. RUDOLPH: Here's a copy, if you want it.

MR. DUFFORD: We have no objection.

THE COURT: Plaintiff's 102 will be admitted.

(Whereupon, Plaintiff's Exhibit 102 was admitted into evidence.)

MR. RUDOLPH: I have no further questions of Mr. Stevens.

MR. GERMERAAD: Could you please give the witness Exhibit 13, please.

DIRECT EXAMINATION

BY MR. GERMERAAD:

Q Mr. Stevens, have you made a comparison of the current land status map, Plaintiff's Exhibit 99, which is on the board, and the land capability map, showing Class 2, 3 and 4 lands on the Spokane Reservation, Plaintiff's Exhibit-- which is below 2500-foot elevation, Plaintiff's Exhibit 13?

A Yes, I have.

Q Could you please tell us how many acres of Class 2, 3 or 4 lands within the Chamokane Basin are tribally-owned?

A In trust ownership, approximately 6,000 acres.

MR. GERMERAAD: No further questions, Your Honor.

1 THE COURT: Any defense examination of the witness?
2 (No response.)

3 THE COURT: You may step down.

4 MR. DUFFORD: Excuse me, Your Honor, we have one
5 or two questions.

6 THE COURT: All right, proceed.

7

8 CROSS-EXAMINATION

9 BY MR. DUFFORD:

10 Q Mr. Stevens, in answer to the last question of Mr.
11 Germeraad, would you tell me what that number was,
12 again?

13 A 6,000.

14 Q And--

15 A Approximately 6,000.

16 Q And you stated that was in trust status, I believe; it's
17 my recollection that his question was, which of these
18 lands are tribally owned; is there a difference?

19 A Yes. There are lands in trust status, includes, owned
20 by the Tribe, and lands which are owned by Indians, or
21 Indian heirs.

22 Q Would the latter category be allotted land?

23 A Yes.

24 Q Does the 6,000-acre figure represent both lands held
25 in trust by the Tribe and lands held in trust for

1 allottees and their heirs?

2 A If I remember correctly, I did not differentiate, so
3 I would say in trust ownership, yes.

4 Q You stated, in discussing Exhibit 99, and 100, that
5 there was a dotted line placed on the map, and that
6 represents the outlines of the drainage basin, is that
7 correct?

8 A Yes.

9 Q And these maps were prepared under your supervision?

10 A Yes, sir.

11 Q What is the source of that line?

12 A U.S.G.S. quadrangle and their contours on the quadrangle.
13 In other words, we took a U.S.G.S. quadrangle map, it
14 shows the contour intervals, and from this we sketched
15 the apparent ridge, or the separation of the two
16 watersheds, and then transferred it to the, transferred
17 it from that map to this one. It's not an exact-- It's
18 not an exact line; in other words, certainly we wouldn't
19 be able to say that line is within 10 feet of being
20 correct, correctly placed.

21 Q When you describe land as being within the Chamokane
22 Basin, you're saying there is some room for error, that
23 you're making approximations?

24 A Well, certainly that's true. I think you also have to
25 state that this is not something that is just drawn on

1 there by happenstance. We do have a reason to believe
2 that that is a line we can justify.

3 Q Does the line have any relationship to any of the work
4 done by Mr. Woodward and his description of that
5 drainage basin, or was this independently derived for
6 the purpose of preparing this exhibit?

7 A I believe that this was independently derived. Now,
8 I can't, I can't honestly say, because I don't know for
9 sure.

10 Q Well, on Exhibit 99, there are, now, it appears, five
11 kinds of land categories, one being white, with numbers
12 inside the white squares, identified as, "TRUST-
13 Individually-owned Indian Allotment or Tract"; another
14 being cross-hatched, diagonally, it says, "TRUST-
15 Tribally-owned by Spokane Tribe"; and then there are
16 fee lands, and the two colored categories that you
17 discussed in your testimony, or the two categories that
18 are color coded.

19 Now, with respect to the first two, the
20 categories of trust land, individually-owned Indian
21 allotment, and tribally-owned by Spokane Tribe, to the
22 best of your knowledge, from your examination of the
23 land records on this Indian Reservation, have those
24 two categories of land been in trust status and never
25 been any other kind of status since the creation of the

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Reservation?

A The lands that are shown as allotted, in trust status, have been in trust status throughout, from the period of time that the Reservation was formed. The lands that are shown as tribally-owned, in trust status, may have, and this would only be a very small portion of the Reservation, may have at one time been in a fee status. These would be-- I would refer there to the, this Exhibit No. 97, and this would be the blue lands. These are trust lands which are now Tribal lands, which were at one time fee lands.

Now, the other--

Q What I'm talking about are the other trust lands, tribally-owned, that are not color coded.

A They have been trust lands all along.

MR. DUFFORD: I have no further questions.

THE COURT: Anything further?

Mr. Torve?

CROSS-EXAMINATION

BY MR. TORVE:

Q Mr. Stevens, the land colored blue on either Exhibit 99 or 100, I take it, represents homesteaded lands that were reacquired, then, by purchase by the Tribe?

A Well, let me refer to the list for one moment, please.

1 Yes, they all are homestead lands.

2 Q Now, on the category of trust lands, tribally-owned,
3 I take it that category represents two things, one,
4 the lands classified as timberlands in 1908, and
5 homestead lands reacquired by purchase by the Tribe?

6 MR. GERMERAAD: Would you repeat the question?

7 THE REPORTER: "Question: Now, on the category
8 of trust lands, tribally-owned, I take it that category
9 represents two things, one, the lands classified as
10 timberlands in 1908, and homestead lands reacquired by
11 purchase by the Tribe?"

12 A The markings of trust lands, tribally-owned, does
13 include those lands that are classified as timberlands
14 in the Act of 1908. It does include those lands which
15 were classified as agricultural lands, which, perhaps,
16 which were homesteaded upon, which the Tribe reacquired,
17 those in the Chamokane Basin are colored blue; it also
18 includes vacant lands not homesteaded upon, which were
19 returned to the Tribe, which we have additionally marked
20 red on this map. It also includes lands which received
21 neither classification.

22 Q Which land--

23 A --which were not allotted.

24 Q Which were not allotted?

25 A Which were not allotted.

1 Q Did you make a study of determining what lands they
2 might have been that were not allotted?

3 A No.

4 Q That does not appear in any category in any of the
5 maps, does it?

6 A No.

7 Q Do you know whether or not, in 1908, when they
8 classified lands as timber or agricultural, there were
9 lands that were not allotted that were exclusive of
10 those two categories?

11 A Frankly, I do not know that, no, sir. I would surmise
12 that there may have been some lands which were neither
13 commercially timber nor could be used for agriculture,
14 but we have made no study on this, and so I don't have
15 that information.

16 Q So, in answer to my question, where you indicated that
17 that category may have included lands that were
18 allotted, or not allotted, outside of it, is a
19 supposition on your part at this point in time?

20 A Yes.

21 Q Now, this Exhibit 100, which shows the entire
22 Reservation-- Well, strike that, I'll ask you a
23 preliminary question.

24 On one of the exhibits which indicated the
25 vacant land restored in the Chamokane Basin, was that,

1 the 77 acres, was that restricted solely to the
2 Chamokane Basin?

3 A Yes.

4 Q My next question, then, is, on Exhibit 100, the Exhibit
5 does not purport, then, to show vacant land restored on
6 the balance of the Reservation, outside of the Chamokane
7 Basin?

8 A That's true.

9 Q The trust lands acquired formerly in fee simple, does
10 it purport to show those lands in relation to the rest
11 of the Reservation, outside the Chamokane Basin?

12 A No.

13 Q Now, you have previously indicated there are 6,000 acres
14 of presently-owned tribal lands in trust within the
15 Chamokane Basin of Class 2, 3 and 4 agricultural lands,
16 is that correct?

17 A I stated that I estimated 6,000 acres of agricultural
18 lands, 2, 3 and 4, that were in trust status inside
19 the Chamokane Basin.

20 Q Did you break that figure down as to how much of that
21 might have been in fee lands reacquired by the Tribe?

22 A No.

23 Q I take it your answer would be the same as to the
24 agricultural classified land, the 77 acres?

25 A I don't follow your reasoning there, would you make it--

1 Q Well, strike my question, and I will ask it again. Did
2 you attempt to determine what class of agricultural
3 land, if any, the 77 acres were?

4 A No. As a matter of fact, we would have included them
5 in our 6,000 if they were classified as agricultural
6 land.

7 MR. TORVE: I have no further questions.

8 THE COURT: Further cross-examination of the
9 witness?

10 MR. REKOFKE: I just have a couple of questions.

11

12

CROSS-EXAMINATION

13 BY MR. REKOFKE:

14 Q I don't want to be repetitious, but you testified the
15 lands indicated in blue were the lands that were
16 originally homesteaded that ultimately became fee
17 lands and thereafter were reacquired by the Tribe and
18 now are held in trust status, as far as the Tribe is
19 concerned?

20 A Yes, sir.

21 Q Do you know when, for example, any of this land lost
22 its, or, became fee land, any of the land indicated in
23 blue, and then, do you have any information concerning
24 when these individual tracts that are marked here
25 became fee lands?

1 A No, I don't have it here, no, sir.

2 Q That information is available?

3 A It is available. I'm not sure whether we would have the
4 records, or whether we would have to go someplace else
5 for them.

6 Q Do you have the dates when the land was reacquired by
7 the Tribe?

8 A Yes, sir, in practically every case it was in the early
9 40's, yes, sir.

10 Q The early 40's?

11 A Yes, sir.

12 Q Maybe it's been covered, I just want to clarify, you
13 have this, "TRUST-Tribally-owned by Spokane Tribe".
14 I mean, it's not, not marked in blue, I mean, it's
15 just kind of a cross-hatch; what does that represent
16 again?

17 A Well, this is the lands that, a part of the original
18 Reservation which has never been allotted, and which
19 has never been opened to homestead, it remains in
20 Tribal ownership.

21 Q All right, thank you.

22 THE COURT: Further examination?

23 (No response.)

24 THE COURT: You may step down. Thank you, Mr.
25 Stevens.

1 Plaintiff have any further evidence?
2 MR. GERMERAAD: Nothing from us.
3 MR. RUDOLPH: And I don't have.
4 THE COURT: Any further exhibits to be presented
5 by the Department or the State?
6 MR. DUFFORD: No.
7 MR. TORVE: No.
8 THE COURT: Mr. Campbell?
9 MR. CAMPBELL: No, Your Honor.
10 THE COURT: Mr. Tracy?
11 MR. TRACY: Yes, I have Mr. Newhouse here today.
12 He's just stepped out.
13 THE COURT: Mr. Cerutti, will you have additional--
14 MR. CERUTTI: No, Your Honor.
15 THE COURT: Mr. Rekofke?
16 MR. REKOFKE: I just have the one exhibit, Your
17 Honor, which I have shown to counsel; it shows the land
18 owned by Boise Cascade in the Chamokane Basin, and
19 counsel have not objected, they have all examined it,
20 and Exhibit 72, I think, is what it is, and I would
21 offer that. For the record, it discloses the ownership
22 of Boise Cascade in the so-called "Chamokane Drainage
23 Basin area", which is marked in blue.
24 THE COURT: That's been marked as Defendant's
25 Exhibit 72, is that correct? Anyone have any objection

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to the admission of this exhibit?

(No response.)

THE COURT: Defendant's Exhibit No. 72 will be admitted.

(Whereupon, Defendant's Exhibit 72 was admitted into evidence.)

THE COURT: Mr. McGregor, do you have any--

MR. MCGREGOR: No, Your Honor.

THE COURT: Has Mr. Newhouse returned yet?

MR. TRACY: Yes, he has, Your Honor.

At this time, I would call Jim Newhouse.

MR. NEWHOUSE: I hope Your Honor will pardon my attire, but I just can't get my cast in my coat.

THE COURT: I recognize the problem.

JAMES R. NEWHOUSE, defendant herein, called as a
witness in his own behalf,
having been duly sworn,
testified as follows:

THE CLERK OF THE COURT: Please state your full name to the Court, spelling your last name.

THE WITNESS: James R. Newhouse, N-E-W-H-O-U-S-E.

1 DIRECT EXAMINATION

2 BY MR. TRACY:

3 Q Mr. Newhouse, where do you reside?

4 A About 10 miles south of Springdale.

5 Q Do you know the section, township and range numbers of
6 your land in the Chamokane area?

7 A Yes. Eight and nine-- Portions of eight and nine,
8 portions of 16, and all of Section 15.

9 Q How long have you resided there?

10 A I was born there in 1935.

11 Q Who did you acquire the land you now own from?

12 A I inherited one-half of that land in 1949 from my
13 grandfather.

14 Q Do you know who your grandfather got the land from?

15 A Yes, it was deeded to him by his father-in-law, Joseph
16 LaPrey.

17 Q Do you know when Mr. LaPrey came into the Chamokane
18 area; when he came into, onto that land?

19 A From what my family tells me, it was 1867 or 1868.

20 Q Now, when was it-- You have a home there that was built
21 on the ranch, do you not?

22 A Are you asking, to the original LaPrey residence?

23 Q Yes.

24 A That home is not on my ranch, it's on the ranch that is
25 adjacent to our property.

1 Q When was that built?

2 A I think it was about 1880.

3 Q Now, during this period of time, do you know what your
4 relatives were doing on the land?

5 A Well, from what my grandfather told me, they raised
6 cattle, sheep and horses, and some grain.

7 Q And they have, from that time to the present day?

8 A Yes.

9 Q Now, in approximately 1969, you drilled a well on your
10 land, did you not?

11 A That is correct.

12 Q You drilled that on Section 9?

13 A Yes.

14 Q And what do you do with that irrigation; do you have
15 an irrigation system on the land?

16 A Yes, I do.

17 Q What does that system irrigate?

18 A We irrigate approximately 250 acres of it.

19 Q Of what, primarily?

20 A Both grain, legume, alfalfa and pasture.

21 Q And you have been doing that since?

22 A 1969.

23 Q Now, there has been some discussion here of your not
24 having installed a flow meter. Would you tell the
25 Court what your reason is for not having installed a

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flow meter?

A Well, a discussion with Walt Woodward some time ago, I think it was when he first started his studies, the State at that time requested that I install a flow meter, and with my discussion with Walt, it was his determination, or we agreed that if I would keep track of the number of heads that were running during the day and night, during our irrigating period, it would suffice, instead of putting on a flow meter, and a flow meter, in a 10-inch mainline, will cost about a thousand dollars, and since we were having a problem at that time, it was my opinion it would be not advisable to spend \$1,000, since we could just count the heads.

Q Mr. Woodward agreed that would be a satisfactory way to keep track of the water?

A That is correct.

Q What is the cost in the system there on your place?

A It's approximately \$40,000.

Q That is in what?

A In drilling the well, the pump, the mainline, laterals, and development of the well.

Q How about your wheel lines?

A That's laterals.

Q Laterals?

1 A Yes, sir.

2 Q Now, how long do you usually run your irrigation system
3 during the year?

4 A It varies, but approximately four months: May, June,
5 July and August.

6 MR. TRACY: I have no further questions.

7 THE COURT: Cross-examination? Tribe, first.
8 Mr. Rudolph?

9

10 CROSS-EXAMINATION

11 BY MR. RUDOLPH:

12 Q Mr. Newhouse, I was under the impression that the
13 required, the requirement for the flow meter was one
14 established by the State in its permit, and not
15 established by Mr. Woodward. Am I correct in that
16 regard?

17 A That is correct.

18 Q Well, tell me a little more about this conversation
19 with Mr. Woodward. He wasn't speaking for the State
20 of Washington, was he?

21 A No.

22 Q And on what basis was he saying that any requirement
23 of the State of Washington would not be followed by
24 you?

25 A He didn't speak of any requirement for me to follow by

1 the State of Washington.

2 Q Did I understand you to testify that Mr. Woodward told
3 you if you would keep track of the number of heads and
4 inform him, that you wouldn't have to put in the meter?

5 A No, he didn't say that. He said it would be--

6 Q I understood that to be your testimony.

7 A No.

8 Q That isn't what you said?

9 A No.

10 Q All right; tell me what he said.

11 A He said it would be satisfactory for what he wanted.

12 Q He wasn't proposing, purporting to say whether it
13 complied with your obligations or not?

14 A No, that's correct.

15 Q When was this conversation?

16 A Oh, boy,-- It was in the early part of the summer, and
17 I don't recall which year it was when he first started
18 his research.

19 Q You drilled the well in 1969?

20 A Yes.

21 Q When did you first pump out of it?

22 A 1969.

23 Q And what time of year?

24 A We started pumping in August.

25 Q And do you think Mr. Woodward's conversation with you

1 was then, or some other time?

2 A No, it was the next-- We-- It was the year he started

3 his project. It was '71?

4 Q I'm not sure I remember.

5 A I don't remember.

6 Q Under the State permit, when were you to put the flow

7 meter in?

8 A I can't recall.

9 Q Does anybody know now how many gallons a minute you're

10 pumping?

11 A Does anybody know now?

12 Q Yes, accurately?

13 A If the head count is acceptable, why, yes.

14 Q What was the gallonage per minute that you pumped in

15 1969?

16 A In 1969?

17 Q Yes.

18 A It would vary, but we never used more than 180 heads

19 at one time in 1969, so it would be around, the maximum

20 would have been around 1200 gallons a minute.

21 Q Your permit was for how many?

22 A 1500.

23 Q Doesn't your permit call for two wells?

24 A Yes.

25 Q How much was the permit for, out of one well?

1 A There was nothing, I don't think there was anything in
2 the permit as to quantity of water out of one well.
3 Q It was simply a combination--
4 A Yes.
5 Q --out of the two?
6 A We didn't drill the second well.
7 Q Why did you not drill the second well?
8 A Because the first well was adequate.
9 Q How many acre feet did you take out of there in 1969?
10 A Without going back and computing the days we irrigated,
11 why, I wouldn't tell you, sir.
12 Q Did you make any measurements as to draw-down in the
13 well at the time of your 1969 pumping?
14 A Only when the well was tested.
15 Q And when was it tested?
16 A When it was-- Noonan, the well driller, when he
17 finished, he tested it, and the static level at that
18 time was 19 feet, I think, I can't recall how long he
19 pumped, but he estimated he was pumping around 2,000
20 gallons a minute, and by the time he got-- He
21 estimated that the recovery time was around 30 seconds.
22 Q How long was that test?
23 A I don't-- He just tested it the one time, and I don't
24 remember.
25 Q What was the test period?

1 A I don't remember how long he pumped.

2 Q That's a relatively brief period?

3 A I would say it's a brief period, yes.

4 Q Now, in your proof of appropriation, I notice that you
5 have stated that you irrigated 220 acres; did I under-
6 stand you to testify you were irrigating 250?

7 A There is 250 acres in our ranch. Not all of it is
8 irrigated.

9 Q Well, the testimony you just gave this morning, how
10 many acres do you testify, then, that you are irrigating?

11 A Presently?

12 Q Yes.

13 A Right now we're irrigating around 215 acres.

14 Q And how many-- Is 180 heads the maximum number of heads
15 which you have ever used?

16 A No.

17 Q What is the maximum?

18 A 215.

19 Q Those heads are rated at what size?

20 A At 50 pounds pressure, they're supposed to deliver
21 about six gallons a minute.

22 Q And you used a maximum of 215?

23 A I think that's approximately correct.

24 Q What is the size pump you have?

25 A One hundred horse.

1 Q How many gallons a minute do you feel you can produce
2 out of this one well?
3 A Out of this one well?
4 Q Yes.
5 A It would only be an estimate on my part, but I would
6 say the well could produce 2500 gallons a minute.
7 Q And with the pump that you have in the well, what do
8 you do?
9 A I think it would approximately 1750. That's what I rate
10 it at.
11 Q Do you think that every time you run that pump, you're
12 pumping 1750 gallons?
13 A No.
14 Q Why not?
15 A Because I'm only pumping what goes out through the
16 nozzles.
17 Q Those heads can't produce more than what they're
18 sometimes rated at, can't they?
19 A That's probably true, but with a system like that,
20 you can have only so many pounds of pressure on that
21 line; otherwise, you blow the heads off.
22 Q What do you do, cut the pump back?
23 A Yes, we reduce the pump.
24 Q You were testifying about your acquisition of the land.
25 If I understood, you acquired half of it in 1949?

1 A Yes.

2 Q And when, the other half?

3 A 1960-- I believe it was 1962, but I don't have quiet
4 title to it, it's a gift with a future interest, which
5 my mother still holds.

6 Q Oh, that's the other--

7 A That's the other half.

8 Q That's the other half?

9 A Yes.

10 Q Were-- There were no other wells performing any
11 irrigation on these lands prior to your drilling of the
12 well in 1969, were there?

13 A Limited, for domestic only.

14 Q Just for the house?

15 A Well, I would say it would be limited. There were two
16 or three acres there in and around the house that we
17 have irrigated. We have a well-- Actually, there is
18 three wells right close to the house.

19 Q Are those all domestic-type wells?

20 A Yes.

21 Q And what are they, deep wells or shallow wells?

22 A One is 40 feet deep, one is 30, and one is 60.

23 Q You were giving a little history about the prior
24 ownership of half of the land; do you have any deeds
25 or records which would show that land ownership?

1 A Yes, they're recorded at Pioneer, you can get them
2 from Pioneer Title Company, County Seat, Stevens
3 County.

4 Q Do you intend to offer those?

5 A We have them.

6 MR. RUDOLPH: Your Honor, the best evidence would
7 be the deed records, for whatever--

8 MR. TRACY: They already are in evidence.

9 THE COURT: I think they're in evidence.

10 MR. RUDOLPH: Are they in evidence now?

11 MR. TRACY: Yes.

12 MR. RUDOLPH: Oh, all right, fine.

13 I have no further questions.

14 THE COURT: Further examination of the witness?

15 MR. GERMERAAD: None, Your Honor.

16 THE COURT: Everybody all done?

17 MR. TRACY: I have one more.

18 THE COURT: Excuse me.

19

20 REDIRECT EXAMINATION

21 BY MR. TRACY:

22 Q Mr. Newhouse, in response to Mr. Rudolph's question
23 regarding the flow meter, didn't you also discuss the
24 need for this flow meter with the State?

25 A Yes.

1 Q And wasn't it more or less a conclusion of all parties
2 that since this matter was in litigation--

3 MR. GERMERAAD: I would object to his leading the
4 witness, Your Honor.

5 THE COURT: He can answer; there is no harm done.

6 Q (By Mr. Tracy) Wasn't it the conclusion that since the
7 matter was in litigation, it could be deferred for a
8 period of time?

9 A Yes, it was not advisable to spend \$1,000 at that time.

10 MR. TRACY: Thank you. I have no further questions.

11 THE COURT: You may step down.

12 Any parties desire to present any additional
13 evidence before we close the evidence?

14 (No response.)

15 THE COURT: All right, we will take about a 10-
16 minute recess at this time.

17 (A short recess taken at this
18 time.)

19
20 THE COURT: All of the evidence having been
21 received, there is pending a motion, or multiple
22 motions, to dismiss. The Court has read the memorandum
23 that has been submitted on that, so I would entertain
24 any oral argument that anybody wants to make in
25 supplementation of that. I assure you I have read the

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material, so unless there is something new through which you can educate the Court--

MR. GERMERAAD: Your Honor, I never received a copy, so if I could just-- If nobody else is going to say something that might trigger somebody to say something, but I would like the opportunity to say what the United States' position is. I didn't see the three motions until yesterday in Mr. Rudolph's office, so that's why I never replied.

THE COURT: Well, maybe we can summarize this a little bit by the Court indicating its concern over the motion to dismiss. In the first place, it seems to me that the basis of the motion would only apply to certain parts of the land, even if they were well taken. To dismiss the whole case because maybe some of these lands might have passed in and out, if I'm reading this motion right.

The reason I'm making this statement, correct me if I'm missing the point of this thing, that if some of these lands passed into fee ownership, came back into Tribal category of one kind or another, thereby having maybe lost whatever water rights might have been under the Tribe's rights in the Reservation would hardly permit me to dismiss the whole case. It might be that certain pieces of land might have ultimately different treatment

1 than other pieces of land.

2 Of course, I guess, inherent in that motion,
3 also, is the whole issue, I guess it's really the whole
4 ball game here, whether under the Winters' Doctrine,
5 it applies to these other uses, other than the ones
6 enumerated in the Winters case, and although the court
7 there did use broader language than the facts of the
8 case itself, I guess that's something we're going to
9 have to look into; but, nevertheless, there is, I
10 suppose, the problem that even as to lands which may
11 have passed out of Tribal ownership into full fee
12 status, thereby maybe acquiring certain water rights
13 under the State Act, then coming back in, we still have
14 the problem of, what about the overall right of the
15 Tribe under the Winters' Doctrine, whatever breadth it
16 may have. It seems to me those are the problems we
17 face.

18 I make these remarks because I don't see how
19 I could grant a motion to dismiss at this stage,
20 because I think a lot of these issues go to the very
21 heart of this whole case, but I'm, if I'm missing the
22 whole point, or the thrust of the motion, why, now is
23 the time to advise me.

24 I guess what, really, what I'm saying, in
25 substance, is that I'm not prepared to grant the

1 motion to dismiss, although the issues that are inher-
2 ent in that, I think they're still in the case, and at
3 the end, when we unravel all the knots here, that we're
4 going to be talking about the very same thing, in
5 essence.

6 MR. REKOFKE: It seems more feasible, Your Honor,
7 that, at this juncture, where all the evidence is in,
8 that perhaps we should defer argument and argue the
9 whole issue.

10 THE COURT: It's all wrapped up in the same
11 package. Now, in that regard, I recognize the problem
12 counsel has, until you can get a transcript out, I don't
13 suppose anybody can really put together all the
14 contentions that the various parties want to make. I
15 have to discuss with my reporter about the timing of
16 getting out that transcript, and unfortunately we have
17 a little problem. Beginning next week, I, and
18 including my reporter, are committed to a jury trial
19 in Seattle that could run as long as five weeks, unless
20 counsel tells us it's settled. There is no such
21 indication at the moment. I point that out only because
22 I think we face some delays in getting the transcript
23 into the hands of counsel, but assuming we can get a
24 transcript into your hands in a month or six weeks,
25 just to pick it out of the air, how much further time

1 does counsel think they need to put together their
2 summation; in other words, when are we going to get
3 this thing brought back in for final argument?
4 Anybody have any real thoughts on this matter?

5 Let me put it in another way, which may be
6 more realistic: Looking at the Court's own calendar,
7 about the first time I could just find an open date
8 here to kind of hold for a day or two on this matter,
9 and I think that's probably all that is necessary,
10 is the latter part of September, September 27th,
11 September 26th and 27th. The early part of September,
12 although I have some openings, I know that is the time
13 of the Bar meeting, and I know counsel don't want to
14 get tied up in that.

15 MR. RUDOLPH: Your Honor, could we have a little
16 discussion on the question of how it's to be argued?
17 We have given some thought to the question, and it
18 seems to me that we could well proceed with written
19 briefs and not have oral argument. Now, that's, as I
20 understand it from Mr. Germeraad, he's agreeable, and
21 the Tribe would be agreeable. I do not know what the
22 defendants' thought is, but we might well pursue that.

23 THE COURT: The Court is going to expect written
24 memoranda in advance of oral argument. I think the
25 only purpose of oral argument is to kind of fill in

1 the chinks, or anybody that does have any supplemental
2 information, that does happen, we may be having case
3 law coming out between now and then that need to be
4 brought to the Court's attention.

5 Now, I don't intend, and I hope counsel
6 understand, I'm not going to decide this case based on
7 what you tell me in a very short argument, I have got a
8 lot of reading to do, and I'm going to expect
9 memoranda from counsel pretty well in advance. This is
10 a field I have to educate myself in, as well as what
11 you fellows tried to convince me of, and I can't very
12 well set deadlines until I know when the transcript is
13 going to be ready.

14 Perhaps the thing to do is when the reporter
15 advises me he's furnished you a transcript, maybe I
16 can advise you by letter some date I can expect some
17 memoranda.

18 MR. DUFFORD: Your Honor, that would be very
19 acceptable to the State Department of Ecology, if we
20 could maybe defer scheduling a date for the final
21 argument until we know.

22 THE COURT: I really think that is what we're going
23 to have to do here.

24 MR. DUFFORD: We really would like to have the
25 opportunity to make some kind of presentation to the

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Court.

THE COURT: You will have that opportunity. I think it's helpful at times. I may be misreading something and you can straighten me out at that time.

MR. DUFFORD: Another thing that I would suggest is that the transcript is going to be relatively voluminous, and it seems to me that we probably would want, perhaps, as much as a month to go through it and look at it and try to get everything together, after it is available.

At the same time, I would like to make it clear we're not trying to delay things, but we do want to prepare adequately.

THE COURT: I see no problem about that, I'm just trying to get some feeling here about what we might come to in this.

MR. REKOFKE : Might I suggest that perhaps plaintiff and plaintiff intervener submit their briefs, and then the defendants have a certain time in which to respond.

MR. : Correct; that is what I propose.

MR. GERMERAAD: Some other possibility, Your Honor would be if the reporter felt he could publish two days at a time, that I see nothing wrong with getting the whole transcript in segments. It would give

1 counsel an opportunity to start reading and reviewing
2 the case, if he felt he could do three days at a time,
3 and every three days that he completed, he could then
4 forward to counsel.

5 THE COURT: I see nothing wrong with that. The
6 sooner you get any material, the more we can expedite
7 the matter.

8 MR. ROE: Could I just say something to Mr.
9 Dufford, looking at our own, in-house schedule, and one
10 of your former employees, Mr. Leen (phonetic) is about
11 to abandon the ship, and one other, in our division,
12 I guess, and I see some real problems, not only in
13 this, but also in a trial that is going on and on and
14 on in the Federal Power Commission that Mr. Dufford
15 and I are passing the ball back and forth, and I worry
16 about indications of September, it will be a real
17 burden, I think, on us, and while Mr. Dufford is more
18 diplomatic than I and said we didn't want a delay, I
19 shoot for a little later date.

20 THE COURT: Frankly, I threw out that September
21 27th as being the first time the Court would have an
22 opportunity to get this in and out. I'm not indicating
23 it couldn't be some later than that, but we have got to
24 get this case decided, we can't just hang on forever.

25 What I'm going to do, when I know that the

1 whole transcript is out, I will advise counsel of the
2 projected schedule, and you can holler if it doesn't
3 suit, suit you, and we can work it out. When you've
4 got this many counsel, it is a problem.

5 Is there anything further that can be done
6 today, then?

7 MR. RUDOLPH: The only question I have relates to
8 what Mr. Rekofke just said, and I am wondering whether
9 that, in this type of case, certainly in the ordinary
10 case it would be, I'm not sure it would go in this case,
11 in which the plaintiffs submit briefs and the defendants
12 answer. It seems to me the defendants have an affirma-
13 tive thing to assert, too. Could I suggest, Your Honor,
14 at least think about all parties' submitting their
15 briefs and then each have an opportunity to respond to
16 the other, rather than it go to the usual brief-and-
17 and-reply route?

18 THE COURT: Well, I have no objection to either
19 procedure, whichever is going to expedite counsel's
20 work in this thing, but I don't suppose there is going
21 to be anything new in your opening brief, we've pretty
22 well examined all the possible theories in the course
23 of this trial. I have no feeling, either way.

24 MR. ROE: May I make a suggestion? In dealing
25 with water rights adjudication generally, and I realize

1 this is a limited adjudication, but it might be
2 possible, along Mr. Rudolph's line, line of thought,
3 that you might have all the briefs, with the support
4 of their claim, some of the people around this table
5 have claims, that I don't know what we're going to do
6 about, we're only thinking about the Indian claim, but
7 there are claims of others that are in here, and there
8 may be some contest over them,, so perhaps the affirma-
9 tive side that Mr. Rudolph is talking about, is those
10 that have claims before the Court as to water rights,
11 for use, flowage rights, would assert them at the
12 opening, and then everybody respond to those at a
13 subsequent date. That's the way it's done in the
14 State water-rights cases, and it's worked out quite
15 well.

16 THE COURT: That's a sensible approach. I suppose
17 in this type of case, when it really gets down to it,
18 it isn't a case where somebody responds to something
19 else so much as trying to develop the whole theory in
20 the case, so maybe this is a case where, when I do
21 advise counsel of the time for submitting the memoranda,
22 that they all be in and give some reasonable time for
23 anybody to respond to whatever they received.

24 Well, let's do it that way, that probably
25 makes more sense. So, I'll advise counsel of the date

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when I know you have got the material in hand, and I
can give you ample time, and if you run into problems,
why, you have got the telephones, and the mails, I
guess.

Anything further?

(No response.)

THE BAILIFF: All rise; this court stands
adjourned.

* * * * *

