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Proposed Conclusions of Law

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. BARBARA J. ANDERSON, et al., Defendants.	CIVIL NO. 3643 PROPOSED CONCLUSIONS OF LAW

Plaintiff United States of America, through its attorneys, hereby submits the following proposed Conclusions of Law.

1. This Court has jurisdiction of the subject matter and of the parties to this action.

2. Through the Agreement of August 18, 1977 and the subsequent conduct of the United States Government and of the Spokane Indians in ratifying and in good faith carrying out the agreement between them, the United States set aside the Spokane Indian Reservation for the permanent use and occupancy of the Spokane Tribe of Indians. Northern Pacific Railway Company v. Wismer, 246 U.S. 283 (1918).

3. The effective date of the creation of the Spokane Indian Reservation is August 18, 1877. Northern Pacific Railway Company v. Wismer, supra.

4. Through the agreement of August 18, 1877, and the resultant setting aside of the Spokane Indian Reservation, the unappropriated waters in, on, under and appurtenant to the Spokane Indian Reservation were withdrawn from private appropriation and reserved to the extent necessary for the requirements and purposes of the said reservation. Cappaert v. United States, 426 U.S. 128 (1976); Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908).

5. The purposes for which the Spokane Indian Reservation was set aside for the use and benefit of the Spokane Indians include the provision of a permanent home for the Indians, the provision of plentiful fisheries upon which the tribal members could continue to sustain themselves and the provision of suitable land which the Indians could begin to farm.

6. For the benefit of the Spokane Indian Reservation, the United States and the Tribe have the right to maintain a minimum flow for fishing, recreational and esthetic purposes of 30 cfs in lower Chamokane Creek at all times with a priority date of time immemorial.

7. For the benefit of the Spokane Indian Reservation, the United States and the Tribe have the right to the annual diversion of a maximum of 25,380 acre-feet from Chamokane Creek or its ground water basin necessary to supply the water required for the irrigation of 1,880 acres of bottom and 6,580 acres of bench land with the following priority dates:

a. For the 28.7 acres described in FF-75: August 18, 1877.

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b. For the 562.00 acres described in FF-76: The date of acquisition which is shown in the column entitled: Description, Tract No. and Date of Acquisition of irrigable land.

c. For the remainder of the 1,880 acres of bottom and 6,580 acres of bench land: August 18, 1877.

8. The Spokane Indian Reservation, as originally created, was entirely held in trust by the United States for the benefit of the Spokane Indians. 25 U.S.C. § 177. The extinguishment of Indian property rights can only be done pursuant to an act of Congress. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-670 (1974); United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 347 (1941). Even when Congress acts, extinguishments of Indian rights must be express, they will never be implied. DeCoteau v. District County Court, 420 U.S. 425, 444-445 (1975); Mattz v. Arnett, 412 U.S. 481, 504-505 (1973).

The evidence in this case clearly establishes that most of the acreage claimed as irrigable became part of the reservation in 1877 and has continued in that status until this day. Thus, except as to that land which has been identified as formerly opened to homestead or formerly non-Indian owned, there is no evidence in the record that the acreage claimed as irrigable has been in anything but trust status since 1877.

9. The 28.7 acres described in FF-75 and which were opened to homestead but never claimed have never left trust status and thus retain a priority date of August 18, 1877. United States v. Celestine, 215 U.S. 278, 285 (1909); Ash Sheep Co. v. United States, 252 U.S. 159 (1920); Minnesota v. Hitchcock, 185 U.S. 373 (1902); United States v. Brindle, 110 U.S. 688 (1884).

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10. The priority dates for the 562 acres described in FF-76 are the dates the land was reacquired by the Spokane Tribe. See United States v. Walker River Irrigation District, 104 F.2d 334, 338 (9th Cir. 1939).

11. The enactment of the Act of May 29, 1908 (35 Stat. 458) did not in any way affect the Spokane Tribe's water rights for agricultural purposes. The 1908 Act had a very narrow objective: to provide a mechanism whereby a limited amount of land on the Spokane Reservation would be made available to non-Indians for settlement. Nothing in the Act suggests that Congress intended to terminate or limit reserved water rights in any way.

12. The United States and the Tribe are further entitled to sufficient water to fulfill the future needs of the Indians of the Spokane Reservation. Conrad Inv. Co. v. United States, 161 F. 829, 835 (9th Cir. 1908); United States v. Ahtanum Irrigation District, 236 F.2d 321, 327 (9th Cir. 1956), cert. denied, 352 U.S. 988.

13. The United States is entitled to the use of 10 cfs of the flow of Spring Creek for fish propagation purposes with a priority date of October 21, 1942. This use is and must remain nonconsumptive.

14. Congress, through the Desert Land Act of 1877, 19 Stat. 377, and the Acts of July 26, 1886, and July 9, 1870, 43 U.S.C. § 321, separated the public domain's water rights from its land rights.

15. The sources to which the defendants trace their land ownership passed title to the land, but not to any water rights.

16. Because the defendants have not shown this Court any water rights established prior to the Federal reservation, the

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water rights of the plaintiffs, United States and Spokane Tribe, for fishery purposes, are superior in time and right to those of the defendants.

17. The United States and the Tpokane Tribe have shown that they are entitled to injunctive relief whenever the surface diversions or ground water withdrawals by defendants threaten to reduce the flow in lower Chamokane Creek below 30 cfs.

18. The State of Washington does not have the authority or the jurisdiction to issue water rights certificates, permits or to accept applications for the use of water on lands within the exterior boundaries of the Spokane Indian Reservation. Any such certificates, permits and applications heretofore or hereafter issued by the State of Washington are void, to wit: SWC 7142, SWC 8826, SWP 15894, GWA 11989, GWA 320422, and GWA 320536 (FF-105). Only the Spokane Tribe by virtue of its retained sovereignty or the United States by virtue of 25 U.S.C. § 381 and other Acts of Congress have the authority to authorize the appropriation of water surplus to the reserved rights of the Tribe within the exterior boundaries of an Indian Reservation.

19. Those defendants holding water rights certificates for use on lands outside of the Spokane Indian Reservation have valid water rights to the extent expressed therein and subject to all senior rights, especially to the reserved water rights of the United States and of the Tribe as found herein.

20. Those defendants holding water rights permits or applications for uses on lands outside of the Spokane Reservation will have valid rights to the extent finalized by the issuances of a water rights certificate pursuant to State law.

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21. The claims of Boise Cascade (FF-103) and the State of Washington (FF-104) are rejected as not having been established in accordance with State law.

22. This Court shall retain continuing jurisdiction of this case to grant such further relief as may be found appropriate and to assure compliance with the final decree entered herein.

DATED this 30th day of May, 1978.

Respectfully submitted,

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