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

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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WASHINGTON

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

MAR 18 1980

J. R. FALLOWST, Clerk
Deputy

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

NO. 3643

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

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

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

DATED this 7th day of March, 1980.

DELLWO, RUDOLF & SCHROEDER, P.S.

22 By Robert D. Dellwo
Robert D. Dellwo

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

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2 OPINION AND ORDER

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5 the aquifer is partially withdrawn by manmade diversions and the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

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

25 PLAINTIFFS' CLAIMS TO WATER

26 A. The Indians' Reserved Water Rights

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

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

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OPINION AND ORDER

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

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

24 2. Reserved Water Rights for Fishing

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

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

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2 OPINION AND ORDER

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

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

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

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

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

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

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

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

16 B. The United States' Water Claim

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

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

31 DEFENDANTS' CLAIMS TO WATER

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

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

7 V

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

25 VI

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

33 VII

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