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Tribe's Opening Brief First Cause of Action

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U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SEP 30 1986

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,)
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 Plaintiff,)
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 and)
)
 SPOKANE TRIBE OF INDIANS,)
)
 Plaintiff-Intervenor,)
)
 v.)
)
 BARBARA J. ANDERSON; JAMES M.)
 ANDERSON, State of Washington,)
 et al.; [GUST and CLARA WILLGING,)
 JR.; HOWARD W. and HAROLD A.)
 DIXON; FLOYD NORRIS; URBAN)
 CHARLES SCHAFFNER; ALLEN O.)
 TELLESSEN; THOMAS J. McLAUGHLIN;)
 JESS SULGROVE, JR., [Defendant-)
 Applicants],)
)
 Defendants.)

CIVIL NO. C-72-3643-JLQ
TRIBE'S OPENING BRIEF
FIRST CAUSE OF ACTION

The Tribe, in compliance with the Pre-trial Order setting up a briefing schedule for the Tribe's First Cause of Action hereby files its opening brief as follows:

INTRODUCTORY STATEMENT

The Tribe by its Petition of May 28, 1986, alleged two causes of action. At issue in the First Cause of Action is the issuance by the State of Washington, DOE of irrigation water withdrawal permits to seven state applicants listed within the brackets of the caption of this brief and the processing by the State of additional applications. These permits were issued

315

1 without any formal screening or clearance by this court or the
2 court appointed water master. The State DOE did this
3 deliberately, taking the position over the objections of the
4 Tribe that there is nothing in the court orders and decisions in
5 this case or in the appointment of the Water Master that
6 requires such screening and approval.

7 The Tribe contends in its petition that as a condition to
8 the approval of the issuance of additional water use permits
9 such action must be screened and approved by the Water Master or
10 by the Court. The Tribe takes the secondary position that if
11 there is a doubt as to the existence of a present legal
12 requirement for such screening and approval, the Court should
13 exercise its discretion at this time and enunciate such a
14 requirement.

15 This brief will show that this Court and the Court of
16 Appeals in a series of decisions and Orders gave the Water
17 Master broad powers and discretion to monitor and manage the use
18 of the water in Chamokane Basin to protect the priority water
19 rights. There is no question for example that the Water Master
20 can reduce or limit the use of water by non-Indian state
21 permittees to protect the Court mandated minimum flow and
22 maximum temperature of the lower creek. These powers and
23 responsibilities must include the screening of applications for
24 new permits.

25 While the several decisions do allow the state to issue
26 permits for and regulate the use of "excess or surplus" water by
27 State applicants, the State cannot just assume that excess
28 waters are available for such permits. It is the Water Master
29 or this Court, not the State of Washington, that should
30

1 determine if there are such "excess or surplus" waters to which
2 additional state issued water permits can inhere.
3

4 BACKGROUND NARRATIVE
5

6 The eastern boundary of the Spokane Indian Reservation,
7 established in 1877, is described as the East bank of Chamokane
8 Creek extending from the Northeast corner of the Reservation in
9 a curving path to the southward about 10 miles where it empties
10 into the Spokane River. The creek extends further to the North
11 from the reservation's northern boundary approximately 8 miles
12 towards Springdale, Washington.
13

14 The upper half of the creek within the Reservation is
15 subject to seasonal surface flows and dry periods. The Indian
16 name from which "Chamokane" is derived means "partly above and
17 partly below ground" and was a description of the creek as it
18 flowed through the ages. The permanent, year round flow of the
19 creek is from what are described as the "massive" or "major
20 springs" approximately five miles northerly from the Spokane
21 River. This permanent flow, averaging between 24 and 32 CFS
22 comes from these springs the year around, increased by the
23 surface runoff usually in the Spring and early Summer. The cold
24 waters, coming from these large springs, flowing down this
25 scenic creek over a beautiful falls and into the Spokane River
26 has constituted an excellent tribal fishery and recreational
27 area.

28 What is the source of the creek flow? It is what is called
29 the "Chamokane Aquifer." The record shows that this aquifer,
30 averaging about two miles wide, extends in an irregular pattern
31 between the hills and mountains to just South of Springdale.
32 Through seismic studies and test wells it was determined that

1 whereas the top aquifer of relatively loose gravel and soil
2 aggregate is from 45 to 60' deep, under that lies a tight sandy
3 clay aquifer that extends downward to the prehistoric bedrock
4 floor from 100' to 480' below the surface. The aquifer is
5 seasonally recharged by the late Fall, Winter and Spring runoffs
6 from the hills and the mountains. The water within the aquifer,
7 which holds about 25,000 acre feet, continually percolates and
8 flows in a southerly direction following the aquifer's gentle
9 grade. It flows quickly, for aquifers, in the top gravelly
10 portion but very slowly in the deeper clay sandy portion.
11 Depending on the distance upgrade from the massive springs this
12 migration of water in the upper aquifer will take two years or
13 more from the north end of the aquifer to a year or so in its
14 middle portion and a few months in the lower portions.

15 The aquifer is a closed water basin, a gravel, clay, sand
16 filled lake. All the water in it eventually finds its way out
17 through the springs as the annual recharge of about 20,000 acre
18 feet keeps it relatively full. Any water removed from the
19 aquifer is gone and that much less finds its way out of the
20 springs. For example, if a third of the aquifer annual recharge
21 is removed, the dry weather flow of the springs would be
22 proportionately reduced.

23 In the late sixties the tribe and U.S. government officials
24 began to notice that the dry weather flow of the lower creek was
25 declining. Whereas it had averaged 30 plus CFS up to that time,
26 it had measurably dropped to the mid twenties. It was noticed
27 that the flow from the springs diverted into the fish hatchery
28 had declined to such an extent that additional springs had to be
29 tapped. Upon investigation, it was found that the State of
30 Washington had issued a number of water pump irrigation permits
31 to several farmers and was in the process of issuing additional
32

1 ones. The U.S. and the Tribe alleged in their Complaints that
2 the existing permits had reduced the creek flow and that the
3 additional contemplated ones would reduce the flow much more,
4 sufficiently to endanger the fishery and recreational uses of
5 the creek.
6

7
8 PROCEDURAL BACKGROUND

9
10 Noting the decline in the summer time creek flow, the Tribe
11 and the United States began this action in 1972. The purpose
12 was to secure court rulings as follows:

13 1. That the Tribe and the U.S. for the Tribe held prior
14 and paramount Winters Rights to the natural flow of the creek as
15 an esthetic, fishery and recreational resource of the Tribe.

16 2. That the Tribe held Winters Rights, superior to any of
17 the state permittees, for the irrigation of about 8,000 acres of
18 irrigable Chamokane Basin and bench land bordering the creek
19 within the Reservation.

20 3. That the State should be enjoined from issuing any
21 additional water diversion permits.

22 4. That a minimum flow of 30 cfs be ordered and the amount
23 of water permitted to existing state permittees be reduced in
24 order to guarantee that minimum flow.

25 5. That a Water Master be appointed by the Court to monitor
26 and control the creek flow and the various permittees so that
27 the court ordered minimum flow would not be violated.

28
29 Initial Court Decision July 3, 1979

30
31 The case, after extensive, protracted trial procedures,
32 culminated in the Decision of Judge Marshall Neill of July 23,

1 1979. That decision should be studied in its entirety because
2 it is all relevant to the Tribe's First Cause of Action. Page
3 references are all to the Court's slip opinion. The Court's
4 description of the Chamokane Creek Basin, pages 2-4, is better
5 than the one above by the writer. The 35,000 acre foot figure
6 of the Court on page 45 is the total average output of the
7 creek, including surface runoff. It is to be kept in mind that
8 the average annual output of the massive springs is about
9 20,000 acre feet. That is the total amount of water in the bank
10 for any given year.

11 The Court then found that the Tribe held reserved water
12 rights for the irrigation (page 5) of approximately 8,000 acres
13 of land with a "duty" of 3 acre feet per acre or a total of
14 24,000 acre feet per year (Note: Thereby exceeding the annual
15 recharge and the annual output of the massive springs).

16 Breaking new legal ground the Court, page 9, found that the
17 Tribe held reserved water rights for fishing. Whereas the Tribe
18 had asked the Court to establish a minimum flow of 30 CFS, the
19 Court made the following findings:

20
21 The Court therefore holds that the Tribe has the
22 reserved right to sufficient water to preserve
23 fishing in Chamokane Creek.

24 The Court finds that the quantity of water needed
25 to carry out the reserved fishing purposes is
26 related to water temperature rather than simply to
27 minimum flow. The native trout cannot survive at a
28 water temperature in excess of 68 degrees F. The
29 minimum flow from the falls into Lower Chamokane
30 Creek which will maintain the water at 68 degrees F
31 varies, but is at least 20 CFS. The Court
32 therefore holds that the plaintiffs have a reserved
right to sufficient water to maintain the water
temperature below the falls at 68 degrees F or

1 less, provided that at no time shall the flow past
2 the falls be less than 20 CFS. (page 10)

3
4 The Court then found that the priority date of the Tribe's
5 rights was the date of the creation of the Reservation or 1877,
6 long prior to any State permittees rights.

7
8 State Permittees Rights

9
10 Judge Neill dealt with the validity of the rights of State
11 permittees beginning page 11. This should be carefully read and
12 is somewhat confusing. The writer's interpretation of the
13 Court's findings is as follows:

14 Certain defendants such a Newhouse, Seigel and Smithpeter
15 had "perfected their water claims under State law and therefore
16 have valid water rights" which are subordinate to those of the
17 Tribe and the U.S.

18 On page 13, the Court listed these perfected, issued permits
19 along with those who had applied for permits but who had not yet
20 received them. They were listed in the order of their priority.
21 The Court then made a significant finding as follows:

22
23 In addition to the information contained in the
24 State authorization, the chart includes a finding
25 as to the effect of the maximum exercise of each
26 water right on the flow of the Chamokane Creek
27 below the falls. The purpose of making this
28 latter finding is to aid in administering the water
rights so as to maintain the flow of the Creek
below the falls at the temperature and level
required above (underlining added). (page 12)

29 It is obvious from this finding that the Court intended that
30 the issuance and use of the listed water rights would be
31 "administered" so as to protect the minimum flow and temperature
32

1 maximum. These findings of effect on the creek flow total 12.5
2 CFS or approximately half the current summer time flow of the
3 creek. The Court was therefore saying that if all of the
4 permits were issued and used at their maximum, they would reduce
5 the summer time flow of the creek by one half and the
6 administration of the creek by the water master and the Court
7 would have to control those uses so that the maximum temperature
8 and minimum flow decreed by the Court would not be breached.
9

10 On page 15, the Court denied the Tribe's petition to enjoin
11 the State from issuing additional certificates or permits. The
12 Court then said:

13
14 Although it presently appears that the water from
15 the Chamokane Basin may be over-appropriated in
16 light of this adjudication, and thus that the State
17 may be creating false hopes for persons permitted
18 to apply for water, the challenged State actions
19 will not cause irreparable harm to the parties to
20 this litigation. Any such future applications,
permits, or certificates are subject to existing
rights and thus have no effect upon the herein
adjudicated water rights of the parties.

21 Let us ask what these rights of the Tribe are that will not
22 be effected by the future applications, etc. Those rights are
23 both positive and negative. They are:

24 1. POSITIVE RIGHTS: The minimum flow of 20 CFS, the
25 maintenance of sufficient flow to prevent the breaching of the
26 68 degree maximum, irrigation rights for the 8,000 acres.

27 2. NEGATIVE RIGHTS: To so administer and monitor the
28 State permittee use of the waters so as not to endanger the
29 maintenance of the positive rights. This includes the shutting
30 down or reducing State permittees use of the water if needed to
31 maintain the minimum flow or protect the maximum temperature.
32 This would certainly include control through the water master

1 and the court of the issuance of any additional permits which
2 could endanger the tribal rights.

3
4 Appointment of a Water Master

5
6 The Court ordered the appointment of a Water Master
7 beginning page 16. There follows all of its findings and orders
8 on this subject.

9
10 The Court finds that appointment of such a Master
11 is appropriate and necessary, and therefore grants
12 this relief. Provisions relating to appointment of
13 a Master and the powers and duties of the Master
are listed below. (page 16)

14 4. The parties shall promptly confer and attempt
15 to agree upon selection of a Water Master, and
16 shall notify the Court promptly if agreement is
17 obtained. If the parties are unable to agree to a
18 selection, each party shall submit to the Court
19 within 20 days of the date of the judgment not more
20 than three proposed names with accompanying
21 background information. The Court will then
22 appoint a Water Master to carry out and enforce the
23 foregoing provisions and the instructions and
24 orders of the Court. If any proper orders, rules,
25 or directions of such Water Master, made in
26 accordance with and for the enforcement of the
27 judgment, are disobeyed or disregarded, the Water
28 Master is hereby empowered and authorized to cut
29 off the water of owners or water users so
30 disobeying or disregarding such proper orders,
31 rules or directions, and the Water Master shall
32 promptly report to the Court the said action and
the circumstances leading thereto and connected
therewith. The parties may submit within 20 days
proposed terms of employment of said Water Master,
along with terms for the payment of expenses and
compensation of the Water Master. (page 10-17)

5. Whenever the necessities of the situation
appear to the Water Master to so require, the
Master may require the owners of the water rights

1 adjudged herein to install and properly maintain
2 at their own expense a reliable, sufficient
3 measuring device whereby the water diverted or
4 pumped may be properly regulated and correctly
measured. (page 17)

5 6. The Master may require installation of devices
6 to measure and record water temperature below the
7 falls in order to regulate water diversions in
8 accordance with this judgment. The cost of making
9 such measurements shall be part of the expenses of
10 the Water Master and shall be borne by the
parties in the same fashion as other expenses of
the Master. (page 17)

11 9. Whenever any person or party is not receiving
12 the amount of water to which he is entitled under
13 this judgment, the Water Master shall, upon
14 request, regulate the necessary headgates, ditches
15 and other works (including pumps) used for the
16 diversion and application of such waters so as to
17 apportion the same as herein provided, and for that
18 purpose may enter upon the lands of any and all
19 persons having rights adjudicated herein. (page
20 18)

21 12. The Court retains jurisdiction of this suit
22 for the purpose of any order or modification of the
23 judgment that may be deemed proper in relation to
24 the subject matter in controversy. (page 19)

25 In its Judgment of September 12, 1979, the Court made the
26 following Orders regarding the Water Master:

27 The Water Master to be appointed pursuant to this
28 Judgment shall have the power to issue proper
29 orders, rules and directions made in accordance
30 with and for the enforcement of the Judgment, and
31 in the event any such orders, rules or directions
32 of the Water Master are disobeyed or disregarded,
the Water Master shall be and he is hereby
empowered and authorized to cut off the water of
the owners or water users so disobeying or
disregarding such proper orders, rules or
directions. The Water Master shall promptly
report to the Court said action and the

1 circumstances leading thereto and connected
2 therewith. (page 6)

3 The following additional provisions shall apply to
4 the Water Master to be appointed herein:

5 a) The parties, in addition to meeting for
6 the purpose of conferring and attempting to agree
7 upon the selection of a person to be appointed as
8 Water Master, shall confer and attempt to agree
9 upon terms of employment for the Water Master and
10 terms for the payment of expenses and compensation
11 of the Water Master. In the event the parties are
12 unable to agree upon such proposed terms of
13 employment and terms for the payment of his
14 expenses and compensation, then each party, in
15 addition to submitting to the Court within 20 days
16 of the date of the Judgment proposed names for
17 appointment to the Water Master position, also
18 shall submit to the Court within 20 days of the
19 date of the Judgment proposed terms of employment
20 of said Water Master and proposed terms for the
21 payment of expenses and compensation of the Water
22 Master.

23 b) In the carrying out of the duties of his
24 position and whenever the necessities of the
25 situation appear to the Water Master to so
26 require, the Water Master may require the owners of
27 the water rights adjudged in this Judgment to
28 install and properly maintain at their own expense
29 a reliable, sufficient measuring device or devices
30 whereby the water diverted or pumped may be
31 properly regulated and correctly measured.

32 d) The expenses of the Water Master shall be
paid by plaintiffs and by those defendants who
utilize the water for irrigation and who are
listed on pages 13 and 14 of the Memorandum Opinion
and Order of July 23, 1979, or by their respective
successors in the ownership of the lands to which
the water rights listed on said pages 13 and 14 are
appurtenant. The manner of apportionment of said
expenses between plaintiffs and defendants shall be
as hereinafter ordered by the Court herein. As to
the portion of the expenses allocated to
defendants, said expenses shall be paid by said
defendant water right holders on a prorata basis
prorated according to maximum use specified for
each said water right on said pages 13 and 14 or

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prorated on such other basis as may subsequently be ordered by the Court. Payment by each said water right holder of his prorata share of the expenses of the Water Master shall be a condition precedent to the right of the water right holder to continue to withdraw or divert water from the Chamokane Creek Basin and in the event any such water right holder should fail to make timely payment of his prorata share of such expenses, the Water Master is empowered and authorized to such off the water of such owner or water user in the same manner as hereinabove provided in Paragraph XIII of this Judgment.

e) Whenever any person or party does not receive the amount of water to which he is entitled under this Judgment, after taking into account the respective priorities of the parties and the quantity of water available, the Water Master, upon the request of any water right holder, shall regulate the necessary headgates, ditches and other works (including pumps) used for the diversion and application of waters from the Chamokane Creek Basin so as to apportion the same consistent with the provisions of this Judgment; and for that purpose the Water Master may enter upon the lands of any and all persons whose water rights are adjudicated by this Judgment. (page 6-8)

Subsequent Court Orders

There follows a compendium of excerpts from the Magistrate's "Report and Recommendations" dated December 21, 1981 and the subsequent orders and opinions of this court and the Court of Appeals which relate to the Tribe's First Cause of Action and especially to the Water Master.

1 REPORT AND RECOMMENDATION OF U.S. MAGISTRATE RE MOTIONS TO
2 AMEND MEMORANDUM OPINION AND ORDER, AND JUDGMENT.
3

4 This report, etc. was filed by U.S. Magistrate Smithmore
5 Myers on December 21, 1981 as a result of motions by the various
6 parties to clarify and supplement Judge Neill's Opinion of July
7 23, 1979. The relevant portion is as follows:
8

9 The Memorandum Opinion and the Judgment provide in
10 effect that adjustments of water flow upward from
11 20 CFS may be made when necessary to maintain the
12 prescribed temperature. If the Water Master
13 finds, as a result of his recorded experience, that
14 a flow higher than 20 CFS is necessary at any time
15 to accomplish this purpose, he is empowered to make
16 the adjustment. If, over a period of time, flow
17 and temperature records demonstrate that 20 CFS
18 flow is not realistically related to the
19 maintenance of water temperature at 68°F or below,
20 at certain times of the year, or at certain air
21 temperatures, the judgment in this case is subjected
22 to modification. (page 5)

23 REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE RE
24 CHAMOKANE BASIN WATER MASTER.
25

26 Coincident with the filing by the Magistrate of the above
27 referenced Report, etc., he filed this one regarding the
28 appointment of the water master. Relevant portions are as
29 follows:
30

31 Judge Neill's Memorandum Opinion and Order (Docket
32 No. 189) and Judgment (Docket No. 196) provide for
the appointment of a Water Master to administer the
water rights in the Chamokane Basin in accordance
with the Judgment. (page 1)

It must be remembered that the Water Master has the
right to reduce or cut off authorized diversions

1 where necessary to maintain sufficient flow in the
2 lower Chamokane. (page 3)

3
4 MEMORANDUM AND ORDER GRANTING, IN PART, MOTIONS TO AMEND
5 MEMORANDUM OPINION AND ORDER
6

7 This Order by Judge Quackenbush filed on August 23, 1982 was
8 a sequel to the RECOMMENDATIONS by the Magistrate. It was the
9 final culmination in the efforts of the parties to supplement,
10 modify or clarify the Decision of Judge Neil of July 23, 1979.
11 There follows the relevant excerpts:

12
13 Groundwater withdrawals in the Mid-Chamokane area,
14 however, eventually do reduce the lower creek flow.
15 This flow reduction occurs less immediately when
16 the water removal occurs a greater distance
17 upstream from the falls. Although the effect of
18 groundwater removal near the springs sometimes is
19 immediately, the effect of groundwater removal near
20 the northern boundary of the reservation can be
21 delayed up to two years. (page 5)

22 Therefore, under the Winters doctrine the Tribe
23 has the reserved right to sufficient water to
24 preserve fishing in the Chamokane Creek. See,
25 e.g., United States v. Winans, 198 U.S. 371
26 (1905). The quantity of water needed to carry out
27 the reserved fishing purposes is related to water
28 temperature rather than to simply minimum flow.
29 Ct. Rec. 189, at 10. The volume of water needed to
30 preserve fishing in the creek below Chamokane
31 Falls, was a furiously disputed issue at trial.
32 Judge Neill held that the flow from the Falls into
Lower Chamokane Creek must be sufficient to
maintain the water temperature at 68°F or below,
and in any event, at least 20 CFS. The Tribe has
moved to amend this finding contending that current
evidence shows the 20 CFS flow is inadequate to
maintain the required temperature, and that the
minimum flow should be 30 CFS. Ct. Rec. 237 at
1-2. (page 7)

1 ...if the appointed Water Master finds, as a result
2 of his experience, that a higher flow is necessary
3 at any time to accomplish the purpose, he is
4 empowered to make the adjustment. If, however,
5 over a period of time, flow and temperature records
6 demonstrate that 20 CFS flow is not realistically
7 related to the maintenance of water temperature at
8 68° or below, the judgment is subject to
9 modification. (page 7)

10 As directed in Judge Neill's Memorandum and Order,
11 the parties conferred in an effort to agree upon
12 the individual to be appointed Water Master. They
13 were unable to agree and have made nominations.
14 The Magistrate, in a separate Report and
15 Recommendation, recommended the appointment of Ira
16 D. Woodward as Water Master. The recommendation of
17 the Magistrate is accepted and Ira D. Woodward is
18 hereby appointed Water Master of Chamokane Basin,
19 to serve at the pleasure of the Court, and under
20 the terms of Judge Neill's Order of July 23, 1979,
21 as herein amended. (page 11)

22 As discussed earlier, tribes only have reserved
23 waters based upon the primary purposes for
24 creating the reservation, and these quantified
25 reserved rights may be used in any lawful manner.
26 Therefore, retention of jurisdiction for future
27 modification is appropriate for reserved rights
28 based on primary purposes, and it would be
29 inappropriate to alter the judgment. The
30 Department's Motion is DENIED. (page 14)

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OPINION U.S. COURT OF APPEALS

25 The Tribe appealed those portions of Judge Neill's and
26 Judge Quackenbush's decisions holding that the State of
27 Washington had regulatory jurisdiction over use of water by
28 non-Indians on non-Indian land within the Reservation. The
29 U.S. appealed the portions dealing with the dates of priority
30 for reacquired land. The State did not appeal the basic
31 decisions' findings as to the extent and nature of the Tribes
32

1 reserved rights for the lower creek fishery and for irrigation
2 of the uplands.

3 While the issue of the Water Master was not before the Court
4 of Appeals, there follows excerpts from that decision relevant
5 to the Tribes First Cause of Action.
6

7
8 A water master for the Chamokane Basin has been
9 appointed, according to the terms of a judgment
10 entered on September 12, 1979, by the Honorable
11 Marshall A. Neill, United States District Judge.
12 (page 2-3)

13 B. State Regulatory Jurisdiction

14 The water rights adjudication which furnishes the
15 basis for the instant inquiry quantifies and
16 preserves tribal water rights. The district court
17 appointed a federal water master whose
18 responsibility is to administer the available
19 waters in accord with the priorities of all the
20 water rights as adjudicated. (page 14)

21 The state may regulate only the use, by non-Indian
22 fee owners, of excess water. Any permits issued
23 by the state would be limited to excess water. If
24 those permits represent rights that may be empty,
25 so be it. (page 14)

26 State permits issued for any such excess water will
27 be subject to all preexisting rights and those
28 preexisting rights will be protected by the federal
29 court decree and its appointed water master. (page
30 18)

31 In arguing that tribal regulatory authority over
32 all water within the reservation was essential, the
tribe raised the possibility that because land
owned in fee occupied most of the waterfront
property within the reservation, state regulation
of water use on fee land could effectively prevent
the tribe from exercising its water rights. We
conclude that by appointing a water master charged
with protecting all water rights and ensuring
compliance with the court decree, the district
court provided adequate safeguards. The mere

1 issuance of a state permit does not impinge on
2 tribal rights. If Washington were to approve
3 permits that granted rights to use non-existent
4 water or infringed on the tribe's prior water
5 rights, the water master would be obliged to modify
6 them or to give them no effect. (footnote page i)

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APPOINTMENT AND FINDINGS OF WATER MASTER

As aforesaid, Ira Woodward was formally appointed Water Master by the Order of Judge Quackenbush in his Decision of August 23, 1982. Problems occurred in securing funding for the Water Master's expenses and compensation. This was handled by the court beginning with its June 20, 1983 Order entitled ORDER ESTABLISHING COMPENSATION AND EXPENSE REIMBURSEMENTS FOR WATER MASTER AND FOR PAYMENT OF SAME BY NAMED DEFENDANTS.

This Order not only set up the requirements and schedules for compensation and expenses but established the pattern for the Water Master's quarterly and annual reports to the Court and the parties. This pattern has been followed to the present day with the accumulation of quarterly reports and final annual reports which have become the basis for the formal annual petitions of the Water Master to accept this annual reports and to approve the proposed compensation and expense reimbursement schedules.

The latest annual report is that for the period October 1, 1984 - September 30, 1985. There follow some excerpts relevant to the Tribe's First Cause of Action herein.

Water temperatures in the lower Chamokane have varied as much as 21.7°F between 7 am and 5 pm with initial flows at 28 to 30 CFS. The periods when the water temperatures exceeded the 68° criteria generally started between 2 pm and 3 pm and

1 extended to as late as 9 pm on 100° maximum
2 temperature days.

3 The 68° criteria was exceeded on four days in
4 May for a total of nine and a half hours. The
5 month of June recorded eight days exceeding and for
6 a total of twenty two hours. The water temperature
7 exceeded 68° on everyday during the month of July
8 for a total of 184 1/2 hours. Graphs on pages 62
9 through 72 illustrate the effect of the high
10 ambient temperatures on water temperatures and the
11 evapo-transpiration losses in creek flow.

12 During the month of July no precipitation was
13 recorded at Wellpinit and the air temperature
14 exceeded 90 degrees on 28 days with 4 over 100°.
15 The other three days were but little better at 89°,
16 87° and 84°. The weather and the large area of
17 shallow flooded cattail swamp were very conducive
18 to raising water temperatures and increasing
19 evapo-transpiration. (page 2)

20 A list of applicants interested in having
21 their applications processed, as submitted to me by
22 the State of Washington, Department of Ecology
23 would amount to a total withdrawal of over 28 cubic
24 feet per second. The greater number of these are
25 groundwater applications and if totally granted and
26 used, exceeds the base flow from the springs on
27 below normal years.

28 Allowing for the maximum of 4 acre feet per
29 acre per year for the 1320 acres applying, calls
30 for 5280 acre feet. This would amount to over 25%
31 of the average total base flow from the springs for
32 an entire year.

Without an increase in the amount of recharge
to the basin, any withdrawal even approaching this
amount would have a cumulative depleting effect on
the aquifer. As a cumulative depletion of the
aquifer affects both the hydraulic gradient and the
aquifer section the effect on the lower Chamokane
would be compounded.

As the 68°F criteria was exceeded to such an
extent this summer, it is evident that diurnal
water temperature variation is excessive even with
the base flows from the springs at 28 CFS. As the
massive springs and the swamp area below them lie
within the reservation, it would be logical for the
Spokane Tribe and the BIA to consider a study of

1 means of lessening the temperature variation. With
2 existing conditions, the 68°F criteria would be
3 exceeded even if no groundwater withdrawals had
4 been made. (pages 2-3)

5 Between 1971 and 1985, the base flow from the
6 massive springs below Ford fell to 20 CFS for a
7 period during 1973 and during 1977. These were
8 very dry years, 10.5" of precipitation at Wellpinit
9 in 1973 and 11.0" in 1977. The water content in
10 the snow pack at Togo Mountain snow course was 6.5"
11 in 1973 and 4.8" in 1977. These were much below
12 the 12.2" average for the years 1961 through 1980.

13 The near normal snow packs in 1978, 1979, and
14 1980, though offering a good quantity of recharge
15 waters, the annual gain in the aquifer was a slow
16 recovery from the extreme low of 1977. The absence
17 of effective snow pack in 1981 would not have
18 offered any recharge to the basin. (page 5)

14 CONCLUSIONS

15 1. The water year, October 1, 1984 through
16 September 30, 1985, found the Chamokane basin
17 hydrology less favorable than last year or the year
18 before but better than the five or six years
19 previous to 1983. The year compared favorably to
20 the year 1976, and typical of a long term mean in
21 both aquifer condition and the maintained base flow
22 of 27 cubic feet per second from the springs and
23 daily minimums as low as 24 CFS in the lower
24 Chamokane.

25 7. The State of Washington is processing
26 applications for water right permits within the
27 Chamokane basin. This action was prompted by the
28 ruling of the United States Court of Appeals for
29 the Ninth Circuit.

30 8. If stream flow were to be the sole
31 criteria in the determining of excess water, then
32 the base flow of over 27 CFS this year would exceed
the 20 CFS minimum stated in Judge Neill's decision
of 1979.

9. If a maximum water temperature, as stated
by the court, were the sole criteria for determining
excess waters, then that would have been violated

1 on 47 days and for a total of 223.5 hours during
2 this very hot dry summer.

3 11. The average base flow over a period of 14
4 years is estimated to be between 25 and 26 CFS from
5 the springs.

6 12. Further allocations of the waters of
7 excess to the condition set forth in the decision
8 of Judge Neill would require the reducing of the
9 diurnal water temperature variation irregardless of
10 the base flow, in order to maintain the stipulated
11 68°F limit of water temperature throughout the late
12 afternoons on very hot days. (pages 6-7)

13 RECOMMENDATIONS

14 5. The Court and/or the Water Master be kept
15 current of applications for water rights received
16 by the State of Washington and be involved in the
17 review process. (page 8)

18 Attention should be paid to the charts and exhibits. A
19 series of hydrographs show the monthly flow of the Chamokane
20 from 1971 through 1985 and how it annually fluctuates from month
21 to month. Page 44, et seq. is the report of variations which
22 show that except for one year the creek has breached the 68
23 degree maximum for a number of days during the hot season of
24 each year and, surprisingly, often in the late spring and early
25 summer, (caused by the outflow of heated surface water from the
26 upper reaches of the creek). Much additional cumulative
27 information is presented including the monthly fluctuation of
28 the water levels in the monitoring wells which forecast the
29 later flow from the springs. Page 110 A is a representation of
30 the seasonal depletion of the water table levels in the
31 1984-1985 season.

32 The firm impression gained from reviewing the Water Master
reports is that the present flow of the creek, minimums
averaging about 25 CFS, is not sufficient to prevent the
breaching of the 68 degree maximum during July and August of

1 each year. It becomes obvious that any additional pump
2 diversion wells will worsen that condition. The lower the
3 minimum flows dip the higher the hot weather temperature of the
4 water in the lower creek.

5 The Court's Order of January 21, 1985, approves the Water
6 Masters 1984-85 report. On page 2 of that Order, the Court made
7 specific rulings. Included is the following:

8
9 That the Water Master's request that he be authorized to
10 keep informed of the water right applications pertinent to
11 the Chamokane Creek basin submitted to the State of
12 Washington is approved.

13 In the latest Quarterly Report, the Water Master refers to
14 the State permits at issue herein, analyzes them and concludes
15 that if each utilized all of the annual acre feet permitted it
16 would result in a diminution in the firm output of the springs
17 (the dry weather flow of the creek) of 1.75 CFS. He also
18 reports the large number of days the temperature was breached
19 both in the late Spring and early Summer and during the month
20 of August. The Water Master explains that the two periods of
21 temperature breaching have two different causes. The late
22 Spring and early Summer breaching is coincident with a period of
23 time when there is still surface flow from the upper creek which
24 becomes super heated and, on dumping into the lower creek,
25 raises its temperature appreciably. One solution for this
26 temperature breach would be allowing this surplus water to be
27 pumped for irrigation, thereby removing it from the creek.
28 Another approach would be spreading it into recharge areas so
29 that it will sink into the aquifer. The reason for the
30 temperature breaches in July and August is always the com-

1 bination of low flows and high air temperatures. The solution
2 for these breaches is an increase in the minimum flows.

3 The hydrological evidence in this case and the reports of
4 the Water Master document the technical problems involved in so
5 administering the use of water by the permittees that the court
6 ordered minimum flow and temperature maximum are not breached.
7 Except for the Smithpeter permit, which authorizes pumping up to
8 2 CFS directly from the creek, all permits are for pump
9 irrigation, pumping water from the aquifer.

10 Let us assume 300 acre feet pumped during the irrigation
11 season from each of three wells, one ten miles north of the
12 major springs, one six miles and one two miles. The
13 hydrological findings in this case would indicate that it would
14 take up to two years for the effect of the furthest north
15 withdrawal to appear at the springs, up to one year for the
16 middle well and about three months for the furthest south well.

17 But the effects on the flow of the springs are not precisely
18 predictable. During these lapses of time, heavy rain periods,
19 spring runoff or drought conditions can either mask or
20 exacerbate the effects of the withdrawals. The Water Master
21 must therefore, carefully gather his annual data, accumulating
22 as he has in his last annual report his storehouse of experience
23 with the aquifer and finally predict, hopefully with some
24 accuracy, the effects of current withdrawals on next years
25 spring and creek flow. Except for the Smithpeter diversion
26 which, if used, makes its effect immediately apparent, there is
27 nothing the Water Master can do to immediately correct a
28 breaching of the minimum flow or maximum temperature. He must
29 do so in the long range.

30 As a practical matter, there has emerged a fairly accurate
31 "rule of thumb" as follows: It takes an average of one year,
32

1 spread out over a year, for an irrigation withdrawal to effect
2 the spring flows. Let us assume , therefore, the foregoing
3 hypothetical wells pumping 300 acre feet each during the 1985
4 irrigation season. 900 acre feet are removed from the aquifer
5 and the effects of that 900 acre feet of missing water are
6 delayed and stretched out over the succeeding year of 12 months
7 rather than just during the irrigation season which is one third
8 of a year. The Water Master, using this rule, will therefore
9 estimate that 900 acre feet removed for a 12 month period equals
10 2.465 acre feet a day. Using the further rule than one CFS
11 produces two acre feet a day (actually 25 inches), he concludes
12 that 1.233 CFS would produce the 900 acre feet in a year.

13 His conclusion is that the combination of these three 300
14 acre feet pump diversions will reduce the major spring flows and
15 the flow of the lower creek 1.233 CFS over a 12 month period.
16 What the Water Master is saying is that the creek flow is
17 reduced approximately 1.233 CFS from what it would have been
18 without the diversions. He doesn't guarantee that the reduction
19 will actually take place to that precise extent because it might
20 be masked or covered up by unusual recharge conditions. A
21 review of the Water Master reports, especially the last annual
22 report, will show that this aquifer is so designed that after
23 one good recharge year it can pass through a summer of drought,
24 like this last summer, without the minimum flow dropping below
25 24 CFS. On the other hand, it may take more than a year of
26 above average recharge to build the water table back to optimum
27 levels.

28 The Water Master must make his findings and juggle his
29 figures as to changing elevations of water table, immediate past
30 history of recharge, depth of snow to feed spring runoff,
31 variations in overall precipitation, seasonal changes in creek
32

1 flow and temperature variances and innumerable other factors in
2 order to predict with any accuracy the effect on the creek flow
3 of a particular pump irrigation permit.

4 The history needed for these computations is at hand and
5 leads to the following inescapable conclusions:

6 1. Additional pump irrigation permits will further deplete
7 the base flow of the creek.

8 2. The current creek flow, without any further removals,
9 must be increased in order to prevent the annual, hot dry season
10 breaching of the court ordered temperature maximums.

11 3. The Water Master should reduce the pumping from
12 presently existing permits and allow only de minimus (i.e. not
13 more than 10 GPM) withdrawals in additional permits.

14 In addition to the foregoing, the Water Master could permit
15 the pump irrigation from the late spring and early summer
16 surface waters which are now flowing into the lower creek
17 raising its temperature above allowable levels.

18 At this point, we ask this question: Should not the Water
19 Master, in addition to administering and controlling existing
20 pump permits to achieve the goals of the court orders herein, be
21 also charged with the responsibility of screening additional
22 state permit applications? Does it make any sense that the
23 State can just continue issuing permits only to have them
24 nullified by later Water Master action?

25
26 THE QUESTIONED SEVEN PERMITS

27
28 In 1985, the State of Washington, DOE, over the objections
29 of the Spokane Tribe, began to process for approval the
30 applications for water use permits by the seven applicants
31 bracketed in this case title. Each of the applicants was an
32

1 applicant or a successor of an applicant named in the July 23,
2 1979 decision of Judge Neill as having a viable or valid
3 application. At the Tribe's request, copies of each application
4 were furnished to the Tribe's attorney, the undersigned, and to
5 the Water Master.

6 The Tribe took the position with the DOE that it should not
7 approve the applied for permits without their being screened and
8 cleared by the Water Master or this Court. The DOE took the
9 opposite position. It contended that, while it would consult
10 with the Tribe and the Water Master, it was in no way bound by
11 the findings of either. It claimed to have the jurisdiction to
12 issue the applied for permits without any screening or approval
13 by the Water Master.

14 In due course, the DOE approved for issuance each of the
15 seven applications. Attached hereto as Exhibit I is the DOE
16 paper work regarding the application for Gust and Clara Willging
17 which is typical of the seven applications at issue herein.
18 Exhibit I consists of the following:
19

20 Application by the Willgings for an irrigation well
21 two miles north of Ford, Washington, to pump 2,000
22 GPM to irrigate the described property.

23 Letter from John L. Arnquist to Robert D. Dellwo,
24 attorney for the Spokane Tribe, enclosing "the
25 department's determination and order" and advising
26 of the rights of appeal and hearing.

27 FINDINGS OF FACT AND ORDER of the DOE ordering that
28 the permit issue and setting out the procedures for
29 appeal by any aggrieved person.

30 REPORT OF EXAMINATION by Theodore M. Olson, P.E.
31 Supervisor DOE, a six page report of Mr. Olson's
32 review of the application, his view of the
requirements of this case and his conclusion that
the permit should be issued. Note that the

1 prospective permit would be for a maximum pumpage of
2 2,000 gallons per minute (4.16 CFS). 168 acre feet
3 per year for the irrigation of 80 acres and a one
4 acre foot allowance for stock watering.

5 Memorandum dated October 3, 1985, Theodore Olson to
6 Robert D. Dellwo and Robert M. Sweeney listing the
7 various applications at issue. It lists five
8 applications that had been rejected and 10 that were
9 "in good standing and will be processed." It also
10 lists 8 additional applications which were "being
11 held for priority and will be processed."

12 As aforesaid, the Willging "file" is attached as a typical
13 file for each of the questioned applications. While the others
14 vary as to location, acres to be irrigated, amount applied for
15 and amount allowed, the wording of their respective Findings of
16 Fact and Order and the general findings in the report of
17 examination are identical.

18 A review of the seven applications and findings discloses
19 that if each pumped for 150 days, at the maximum GPM allowed
20 they would together remove 4510 acre feet from the aquifer and
21 reduce the flow of the lower creek 6.18 CFS. On the other hand,
22 assuming that each pumped the number of acre feet each is
23 allowed for the year, there would be a removal of 1265 acre feet
24 from the aquifer which, spread out over an entire year, would
25 result in a reduction of 1.75 CFS in the flow of the creek and
26 the major springs. It is probable, of course, that this
27 reduction will be still less because of the probability that not
28 all of the permittees will use all the water they are allowed
29 to. It is evident however that if the permits are effectuated
30 each must be carefully scrutinized and supervised to see to it
31 that they do not exceed the acre feet per year allowed and that
32 this pumping of water does not result in more extensive and
frequent breaches of the court ordered temperature maximum.

1 The Findings of Fact and Order finds that "said use (of
2 water) will not impair existing rights or be detrimental to the
3 public welfare." The court is invited to read the Report of
4 Examination in Willging which, except for Willging's acreage
5 amounts, etc., is identical to the reports regarding the other
6 applications. In it, Mr. Olson reports on and interprets the
7 decisions in this case and of the State water law which he
8 states is applicable. He concludes that the permits will be
9 processed and issued in accordance with state law.

10 On page 3, Mr. Olson discusses and interprets the
11 appointment of the Water Master and discusses his activities
12 and reports. He notes the findings of Judge Neill as to the
13 effect of the various applications on the stream flow and
14 generally discounts them and places his opinion above the
15 Judge's. He brushes off the Tribe's rights as follows:

17 "The concerns of the Spokane Indian Tribe relate to
18 the possibility that the State of Washington will
19 allow the appropriation of waters of the Chamokane
20 Creek Basin which belong to the Tribe. The federal
21 court has quantified the extent of the Tribe's
22 rights in the decree, United States v. Barbara J.
23 Anderson, et al. The state recognizes the Tribe's
24 rights, as set forth in the decree, and all state
25 rights issued subsequent to this decree are junior
26 in priority to the rights of the Tribe.

27 The report then concludes:

28 ...our calculations indicate a potential effect of
29 1/3 CFS on Chamokane Creek if the Willging well is
30 pumped at a rate of 2,000 gallons per minute.

31 The 168 acre feet proposed to be authorized under
32 this application is considered insignificant in
relation to the total quantity of water available in
the basin.

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The DOE then recommends the granting of the permit but then bows to the priority rights of the Tribe with the following caveats:

Any right perfected by development under this authorization is subject to regulation by the Water Master appointed by the Eastern District Federal Court, in accordance and in compliance with the Court decree (citing the case).

This authorization to make use of public waters of the state is subject to existing rights, including any existing rights held by the United States for the benefit of Indians under treaty or otherwise. Specifically, in this case, those rights have been prioritized and quantified, which include a reserved right of at least 20 CFS of water flowing from Chamokane Falls into Lower Chamokane Creek, together with such additional flow of water from the falls as is necessary to maintain at all times the water temperature below the falls at 68°F or less.

It should be obvious from the record of this case, especially the July 23, 1979 decision of Judge Neill and the cumulative Water Master reports, that no additional irrigation withdrawals can be permitted from the basin without further breaching the 68° maximum temperature decreed by Judge Neill. While the basin can tolerate de minimus pump withdrawals in the range of 10 GPM per applicant, it cannot tolerate the cumulative total of withdrawals contemplated by these seven permits and certainly not by the additional permits planned by the State.

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What is being proposed is the issuance of permits that can be immediately nullified by the Water Master.

The argument of the State is that this is of no consequence. It maintains that since each of the permits is junior in priority to the Tribal rights and subject to regulation by the Water Master, they will not impinge upon or impair the Tribal water rights. Such is true only in theory.

Each of these permittees will rely on his state issued permits. They will invest large sums of money in establishing their pump irrigation systems to develop the agricultural potential of their land. They will fight for their irrigation rights under their permits. This will entail protracted, never ending litigation to enforce the Water Master's orders and to protect the Tribal water rights.

ARGUMENT

The writer's argument, after the foregoing lengthy representations of all of the relevant records and decisions in this case, is of necessity brief. Other than the recitals in the several court orders, there is no case or statute law that can be cited. The resolution of the dilemma depends on this Court's interpretation of its previous orders and decisions and the exercise of its discretion in ruling on the authority and responsibilities of the Water Master.

This Court appointed the Water Master and gave him all of the responsibilities outlined above. He is to so manage and control the use of waters from the aquifer and the creek that the Court ordered minimum flow and maximum temperature will not be breached. To do this, he has the power to closely control

1 the water use by the State Permittees.

2 It is apparent that the Court of Appeals would agree with
3 the Tribe's position in this case. It states on page 14 of its
4 slip opinion, that "The state may regulate only the use, by
5 non-Indian fee owners, of excess water. Any permits issued by
6 the state would be limited to excess water." In its Footnote i,
7 it says "If Washington were to approve permits that granted
8 rights to use non-existent water or infringed on the Tribe's
9 prior water rights, the Water Master would be obliged to modify
10 them or to give them no effect."

11 Logically, it is the Water Master who should determine the
12 existence of excess or surplus water. The existence cannot be
13 just assumed by the state.

14 The annual reports of the Water Master disclose that the
15 temperature maximum has been breached every year but one and
16 that remedial steps must be taken to reduce the extent and
17 nature of those breaches. The Tribe is petitioning the Court
18 to increase the minimum flow to 27.5 in order to prevent these
19 annual, hot weather breaches of the temperature maximum. It is
20 suggested that the Water Master already has the power to
21 increase the minimum flow by that amount. To do so would
22 obviously entail the reduction of withdrawals by existing state
23 permittees, not to mention additional ones.

24 It seems too clear for cavil that Water Master must have the
25 authority to screen and clear additional applications for state
26 water permits before they can be issued.

27
28 CONCLUSION

29
30 The Court should affirm the Tribe's position that the law
31 of this case requires that as a condition to the approval of the
32

1 issuance of additional water use permits in the Chamokane
2 Basin, they must be screened and approved by the Water Master or
3 the Court.

4 If the Court has doubt as to the existence of a present
5 legal requirement that such permits be screened and approved by
6 the Water Master or the Court, the Court should exercise its
7 discretion at this time and enunciate such a requirement.

8 RESPECTFULLY SUBMITTED, on this 29th day of September, 1986.
9 SPOKANE TRIBE OF INDIANS

10
11 BY: Robt. Dellwo
12 ROBERT D. DELLWO
13 Tribal Attorney
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EXHIBIT I.

\$10.00 examination fee should accompany each application.

STATE OF WASHINGTON
DEPARTMENT OF WATER RESOURCES
Division of Water Management

PRIORITY	
Date	11 Sept. 1970
Time	1530 hrs
Accepted	<i>[Signature]</i>

APPLICATION FOR A PERMIT

To Appropriate Public Ground Waters
OF THE STATE OF WASHINGTON

Application No. G. W. 11227A *(from check)*

I, Gust and Clara Willging
(Name of applicant)

of Springdale Wash 99173
(Complete post office address)

do hereby make application for a permit to appropriate the following described public ground waters of the State of Washington, subject to existing rights. This application is made under the provisions of Chap. 263 of the Session Laws of 1945, and amendments thereto of the State of Washington and subject to the rules and regulations of the Department of Water Resources.

1. The proposed appropriation will be from a well
(Well, tunnel, infiltration trench)

located 10 miles south of Springdale was or 2 miles north of Ford Wash
(Give approximate distance and direction from nearest city or town)

Area _____ Sub-area _____
(Leave blank) (Leave blank)

Zone _____
(Leave blank)

Applicant's name or number of well or other works, if any 1 Well

2. The quantity of water which applicant intends to withdraw for beneficial use is 2000
~~7000~~

gallons per minute; 10/0 acre feet per year.

3. The use or uses to which water is to be applied Hay land & Pasture

Irrigation & stock water
(Domestic supply, irrigation, municipal, manufacturing, industrial use, etc.)
continuously for stock water, May 1st through Sept. 30 for irrigation

4. The time during which water will be required each year May June July & August
~~September~~

5. Location of well or other works for withdrawal of water: In county of Stevens

(a) see Center of Section 9 Twp 28 Rge 40
(Give distance and bearing from nearest corner of section or legal subdivision)

being within the NW 1/4 of Sec. 9, Twp. 28 N., Rge. 40 E.W.M.
(Give smallest legal subdivision) (E. or W.)

or (b) If within limits of recorded platted property, town or city: Lot _____, Block _____,

of 2 1/2 miles south of Ford Wash
(Give name of plat or addition) (If within town or city, give name)

(c) Show this location on accompanying section plat. Other adequate maps or drawings will be acceptable.

*Applications Returned
9-4-70 - EED*

9. -Legal Description of Property on which water is to be used for purposes other than municipal supply:

As reduced by field examination
(Copy legal description from Aerial)

Governor
of the
(N.W. 1/4)
and to
in town

Cont'd lot 1 of Sec. 8; and NW 1/4, SW 1/4, NE 1/4, Sec. 9;
all in T. 28 N., R. 40 E. W.M.,
LESS rights of way

(S.W. 1/4)
west quarter
(NW 1/4)
Stevens
County

(On accompanying plat show location of the existing wells or works)

10. What interest do you have in the above described property? *Legal owner*

(Owner, lessee, contract buyer, etc.)

11. Do you have any other water rights appurtenant to the above described property? *No*
If so, from what source?

12. Construction work will begin on or before *November - 1970*

13. Construction work will be completed on or before *1970*

14. Water will be put to complete beneficial use on or before *1970*

Gust Willging
(Signature of applicant)

15. Name and address of owner of land on which well or works are located:

Gust Willging
(Name)

Springdale Wash
(Address)

Gust Willging
(Signature of legal landowner)

Signed in the presence of us as witnesses:

J. Newhouse
(Name)

Springdale, Wash.
(Address of witness)

(Name)

(Address of witness)

STATE OF WASHINGTON, }
COUNTY OF THURSTON. } ss.

This is to certify that I have examined the foregoing application, together with the accompanying maps and data, and return the same for correction or completion as follows:

In order to retain its priority, this application must be returned to the Department of Water Resources, with corrections, on or before *Sept*, 19 *70*.

WITNESS my hand this *16* day of *Sept*, 19 *70*.

6. DESCRIPTION OF WORKS:

(a) Well will be Drilled and have a diameter of 10 to 16 inches and an estimated depth of Do not know probably 85' feet.
(Dug or drilled)

(b) Tunnels or trenches to be described: (Attach additional sheets if needed for full description.)

(c) Distribution system to be described: 50 horsepower pump / wheel line

(d) If pumps are to be used, give size and type: I do not know yet
50 HP

(e) Give capacity and type of motor or engine to be used: do not know
2/ 50 HP 1000 gal per min.

(f) If the location of the well, tunnel, or other works is less than one-fourth mile from a natural stream or stream channel, give the distance to the nearest point on each of such channels and the difference in elevation between the stream bed and the ground surface at the source of development:
Same

(g) Ownership of each existing well or other works from which ground water is withdrawn within a radius of one-quarter mile and the distance and direction from well or other works being reported herein:

there is none within a quarter of a mile

(Name)	(Direction)	(Distance)

SUPPLY THE FOLLOWING INFORMATION ACCORDING TO USE PROPOSED:

7. For Municipal Supply: To supply the city, town, or community of....., in the county of....., having a present population of....., and an estimated population of....., in 19.....

8. For Irrigation: Number of acres to be irrigated ~~80~~ ²⁰ 80 acres. for live stock

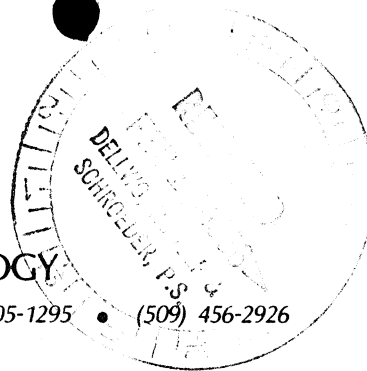
ANDREA BEATTY RINIKER
Director



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

N. 4601 Monroe, Suite 100 • Spokane, Washington 99205-1295 • (509) 456-2926

February 12, 1986



Robert D. Dellwo, Attorney
1016 Old National Bank Building
Spokane, WA 99201

Dear Mr. Dellwo:

Re: Ground Water Application No. 11227
(Gust & Clara Willging) - (Representing - Spokane Indian Tribe)

The enclosed Report of Examination constitutes the department's determination and order for the above application.

Chapter 43.21B RCW provides that any person who feels aggrieved by this order may submit an appeal to the Pollution Control Hearings Board of Washington, 4224 - 6th Ave. S.E., Bldg. 2, Rowsix, Olympia WA 98504, with a copy to the director of the Department of Ecology, Mail Stop PV-11, Olympia, WA 98504, within 30 days of receipt of this order. Procedures for requesting a hearing may be obtained from this department.

Sincerely,

John L. Arnquist
Regional Manager
EASTERN REGIONAL OFFICE

JLA:mjw

Enclosure

BEFORE THE
DEPARTMENT OF ECOLOGY
STATE OF WASHINGTON

IN THE MATTER OF APPLICATION) FINDINGS OF FACT
NUMBER 11227 FOR PERMIT TO) AND
APPROPRIATE PUBLIC WATERS) ORDER

Upon review of the Examiner's report, I find that all facts relevant and material to the subject application have been thoroughly investigated. Furthermore, in accordance with the Examiner's conclusions and recommendations, I find that water may be appropriated for beneficial use and that said use will not impair existing rights or be detrimental to the public welfare.

IT IS ORDER that a permit issue under Application Number 11227 authorizing appropriation of public waters in the amount, and for the use, and subject to the provisions set forth in the Examiner's report.

Chapter 43.21B RCW provides that any person who feels aggrieved by such an order may appeal to the Pollution Control Hearings Board of Washington, with a copy to the director of the Department of Ecology, within thirty (30) days of receipt of this order. Procedures for requesting a hearing may be obtained from this department.

Signed at Spokane, Washington this 12th day of February, 1986.

ANDREA BEATTY RINIKER, Director
Department of Ecology

by John L. Arnquist
JOHN L. ARNQUIST, Regional Manager

CERTIFIED MAIL

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
PROTESTED

**REPORT OF EXAMINATION
TO APPROPRIATE PUBLIC WATERS OF THE STATE OF WASHINGTON**

- Surface Water (Issued in accordance with the provisions of Chapter 117, Laws of Washington for 1917, and amendments thereto, and the rules and regulations of the Department of Ecology.)
- Ground Water (Issued in accordance with the provisions of Chapter 263, Laws of Washington for 1945, and amendments thereto, and the rules and regulations of the Department of Ecology.)

PRIORITY DATE September 11, 1970	APPLICATION NUMBER 11227	PERMIT NUMBER	CERTIFICATE NUMBER
--	------------------------------------	---------------	--------------------

NAME GUST AND CLARA WILLGING			
ADDRESS (STREET) HCR-463	(CITY) Spingdale	(STATE) Washington	(ZIP CODE) 99173

PUBLIC WATERS TO BE APPROPRIATED

SOURCE a well		
TRIBUTARY OF (IF SURFACE WATERS)		
MAXIMUM CUBIC FEET PER SECOND	MAXIMUM GALLONS PER MINUTE 2000	MAXIMUM ACRE-FEET PER YEAR 168
QUANTITY, TYPE OF USE, PERIOD OF USE 167 acre feet per year, from May 1 to October 1, each year, for the irrigation of		
80 acres; 1 acre foot per year, continuously, for stockwater.		

LOCATION OF DIVERSION/WITHDRAWAL

APPROXIMATE LOCATION OF DIVERSION-WITHDRAWAL 1320 feet south and 1320 feet east from the NW corner of Sec. 9
--

LOCATED WITHIN (SMALLEST LEGAL SUBDIVISION) NW$\frac{1}{4}$	SECTION 9	TOWNSHIP N. 28	RANGE, (E. OR W.) W.M. 40 E	W.R.I.A. 54	COUNTY Stevens
--	---------------------	--------------------------	---------------------------------------	-----------------------	--------------------------

RECORDED PLATTED PROPERTY

LOT	BLOCK	OF (GIVE NAME OF PLAT OR ADDITION)
-----	-------	------------------------------------

LEGAL DESCRIPTION OF PROPERTY ON WHICH WATER IS TO BE USED

80 acres within Gov't Lot 1, Sec. 8 and NW $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Sec. 9, T. 28 N., R. 40 E.W.M.

DESCRIPTION OF PROPOSED WORKS

Well, pump and sprinkler system.

DEVELOPMENT SCHEDULE

BEGIN PROJECT BY THIS DATE:
April 1, 1987

COMPLETE PROJECT BY THIS DATE:
April 1, 1988

WATER PUT TO FULL USE BY THIS DATE:
April 1, 1989

REPORT

BACKGROUND

An application to appropriate public ground water was submitted by Gust and Clara Willging to the Department of Ecology on September 11, 1970. This application was accepted and assigned Ground Water Application No. 11227. The applicant proposes to withdraw water from a well in the amount of 2,000 gallons per minute (gpm) for continuous stockwater supply and the irrigation of 80 acres.

The proposed point of withdrawal is to be located 1320 feet south and 1320 feet east from the NW corner of Sec. 9, T. 28 N., R. 40 E.W.M., Stevens County, Washington.

This application is categorically exempt from the provisions of the State Environmental Policy Act (SEPA) of 1971, Chapter 43.21C RCW. A permit issued under this application would be classified as a Family Farm Permit under the Family Farm Water Act of 1977, Chapter 90.66 RCW.

A notice of application was duly published in accordance with RCW 90.03.280; protests were received from James K. Swiger, Washington Department of Game and the Spokane Indian Tribe.

PROTESTS

The Washington Department of Game operates the Ford Trout Hatchery and is concerned that additional ground water withdrawals will reduce spring flow at the hatchery. The hatchery is located 18,000 feet southwest of the proposed Wellgling well site. James K. Swiger has sold his land holdings in the area to Thomas D. McLaughlin and is no longer a party to this matter. Mr. Swiger protested because he had a pending application senior in time and felt that his application should be acted on before granting any others. Mr. Swiger subsequently assigned his application to T. D. McLaughlin. The Spokane Indian Tribe claim all waters within the Chamokane Creek Basin belong to the tribe and thus there are no surplus waters available for appropriation under state law. } +

In addition to the protests filed by the Game Department, Mr. Swiger and the Spokane Indian Tribe, the United States, in 1972, brought suit against persons now appropriating or applying to divert surface and ground waters of the Chamokane Creek Basin under rights issued or to be issued by the State of Washington, U.S. v. Barbara J. Anderson, et al., U.S. District Court, Eastern District Washington Civil No. 3643, to adjudicate the rights in and to the waters of Chamokane Creek and its tributaries. The court permitted the Spokane Indian Tribe to intervene as a plaintiff. The defendants included the State of Washington and all other persons and corporations who claimed an interest in the waters of Chamokane Creek.

As a result of this action, United States District Court Judge Marshal A. Neill, on September 12, 1979, ordered, adjudged and decreed certain reserved, quantified and prioritized water rights to the Spokane Indian Tribe. The decree also provided for the appointment of a Watermaster, method of payment of his expenses and a definition of his duties.

The district court retained jurisdiction of the matter for the purpose of any order or modification of the judgement.

Seven motions to amend Judge Neill's judgement were filed by the parties. Argument was heard before Magistrate Smithmore P. Myers on February 29, 1980. The parties submitted proposed changes in the Memorandum Opinion and Order. Magistrate Myers prepared and submitted his report and recommendations. Objections to the report and recommendations were filed by the parties. The matter was then referred to the district court for a final determination.

A Memorandum and Order granting, in part, the motion to amend the Memorandum Opinion and Order was signed and issued on the 23rd day of August, 1982, by United States District Judge Justin L. Quackenbush. The United States of America appealed the district court's decision to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed in part and reversed in part the decision of the district court and remanded for further proceedings in accordance with their decision.

*P-12
but subordinate*

After thirteen (13) years of litigation through the federal court system there remains unanswered questions related to the certainty of the water rights of some of the parties which were defendants in the legal proceedings. This uncertainty is especially visible in those instances where the State of Washington, Department of Ecology, had on file a request to appropriate the public waters of the State of Washington in the form of an application and the district court included these applications in a chart of recognized water rights.

Since 1917, the appropriation of public surface waters (1945 in the case of public ground waters) of the State of Washington has been subject to the surface water code, Chapter 90.03 RCW (ground water code Chapter 90.44 RCW, in the case of ground water). After their adoption, these water codes provided the only means by which a person, corporation or public entity could appropriate the public waters of the State of Washington. The appropriation procedure begins by filing an application which requests that the applicant be granted permission to appropriate public waters in specific amounts for a beneficial use. Upon receipt of the application, it is accepted and processed in accordance with the aforementioned water codes. An examination is then made to determine whether the proposal will be detrimental to existing rights and in the public interest, if there is water available for appropriation and if the proposed use is beneficial. The applicant is then notified that a permit will be issued or denied. Upon acceptance of the permit and conditions, the permittee may then construct the project and put the water to beneficial use in accordance with the terms of the permit. After the water has been put to beneficial use, the permittee is then entitled to a water right certificate which becomes appurtenant to the tract of land described in the certificate as being the place of use. No permit has been issued to the applicants included in the district court's chart of recognized water rights.

It is the intent of the Department of Ecology to comply with the surface and ground water codes and with the judgements of the court which confirmed the right of the State of Washington to allocate surplus waters in the Chamokane Basin. The applications on file will be processed, whether the applicants were parties to the adjudication or not. These applications will be processed in the same manner as all other applications for the appropriation of public waters. Permits will be issued or denied by considering the four elements previously set forth. In all cases, water rights developed and consummated under these applications will be subject to the state's basic water law tenant: first in time, first in right.

On October 2, 1985, a meeting was held in the offices of Robert Dellwo (attorney for the Spokane Indian Tribe) to review the status of pending applications for state permits. It was agreed by attorneys for the Department of Ecology, Bureau of Indian Affairs and Mr. Dellwo that comments would be submitted to the department by December 1, 1985 regarding each application.

On January 24, 1986 a letter was received from Mr. Dellwo, on behalf of the Spokane Indian Tribe, requesting a two year moratorium on the issuance of public water permits within the Chamokane Basin, while the Tribe inaugurated an updated, comprehensive water and resource study of the Reservation. The study will result in finalized plans for agricultural, housing and commercial development, including irrigation of some of the Tribal lands.

INVESTIGATION

A field investigation was conducted on November 21, 1984, by Ron Raby. A second field exam was conducted by Ted Olson on June 26, 1985. It was noted during the June field exam that the Willging land was being irrigated from a well located within the SW $\frac{1}{4}$ of Sec. 9, T. 28 N., R. 40 E.W.M., believed to be owned by James Newhouse. No authorization exists for the irrigation of the Willging land from the Newhouse well.

The Washington Department of Game enjoy Surface Water Certificate No. 2831 issued to the U.S. Bureau of Reclamation for 10 cubic feet per second for fish propagation. The sources are defined as Main Branch, East Fork and West Fork of Spring Creek. Numerous springs in the area feed these creeks. The hatchery is operated by the Department of Game to raise fish to replace losses resulting from construction of Grand Coulee Dam.

This area is underlain by pre-Tertiary plutonic and metamorphic bedrock consisting primarily of granite. Filling the valleys are glacial deposits of boulders, gravel, sand, silt, and clay, as well as material eroded off steep hillsides in the general vicinity. A seismograph profile was made across the valley at a point about $\frac{1}{4}$ mile south of this proposed well site. The depth to bedrock was determined to be 406 feet, which indicates a very narrow, steep walled valley. Glacial sediments subsequently filled the valley to its present level.

Ground water levels in the general area of this project are less than fifteen feet below land surface.

The upper Chamokane basin is considered to be that part lying north of the reservation north boundary, and includes Camas Prairie. The mid-Chamokane region includes the area from the north reservation boundary downstream to the falls, and includes Walkers Prairie. This project lies within the mid-Chamokane region.

W.R.
Judge Neill appointed Ira Woodward as Watermaster. He is empowered to collect stream flow and stream temperature data and make such other studies as necessary to enforce the court decree. Mr. Woodward prepares annual reports describing the past surface and ground water conditions based upon winter snowpack and anticipated runoff and recharge. For the water year October 1, 1983, to September 30, 1984, he identified unusually high precipitation and associated high runoff and ground water recharge. This condition resulted in record high ground water levels and well above average surface water flows in Chamokane Creek.

+
During the summer, 1985 stream flow records in the vicinity of Ford reveal well above average stream flow, however, the stream temperature was above the court decreed 68° F on several occasions, indicating daily air temperature has significantly more influence on stream temperature than ground water withdrawals.

court figures
Using fifty-three years of precipitation records and seven years of stream gauging records, the average annual amount of water available for surface runoff or ground water recharge is about 29,000 acre feet in the upper Chamokane Basin and about 23,000 acre feet in the mid Chamokane Basin.

court figures
The annual contribution of ground water by subsurface flow from the upper basin to the mid basin is about 6,000 acre feet. About 23,000 acre feet of water runs off as surface flow from the upper basin and would be available to recharge the basin aquifer or to flow through the mid basin as surface water.

The annual contribution to the mid basin aquifer from the mid basin runoff is about 10,000 acre feet. About 13,000 acre feet of surface water runs off annually from the mid basin and is, therefore, available for the recharge of the mid basin aquifer or to runoff as surface water.

The present ground water discharge from the mid basin aquifer is about 16,000 acre feet per year, which includes the near constant spring flows near Ford, Washington, the contribution made by ground water to the flows of mid Chamokane Creek and the withdrawal of water for irrigation. The monitoring wells located near Ford, Washington, indicate that this ground water discharge causes the average annual ground water level to fluctuate about ten feet.

The maximum amount of ground water storage available in the upper or mid basin is not known. However, records indicate that the ground water reservoir is recharged at a very fast rate and that any additional withdrawal for irrigation would be replenished by the 36,000 acre feet which leaves the basin as surface water flow. *not correct*

Res J.
Judge Neill's opinion contained a finding as to the effect of the maximum exercise of each water right on the flow of Chamokane Creek below the falls. This impact on the stream from man made water diversions can be calculated from the U.S. Geological Survey (USGS) gauge measurements. Judge Neill's chart sets forth the effective reduction of flow of Chamokane Creek below the falls based upon the quantity of water diverted under a right. This writer made an effort to obtain specific information as to the formula used or procedure employed to determine the "effective reduction" figure to no avail. The court appointed Watermaster and expert witnesses from the trial were also contacted, along with a review of the court exhibits, with similar results.

CONSIDERATION OF PROTESTS

The protests of the Game Department and the Spokane Tribe concern potential well interference with their rights. To evaluate this condition, potential well interference calculations were made employing the Theis non-equilibrium equation. The aquifer parameters used in the calculations were 75,000 gallons per day per foot for coefficient of transmissivity and 0.25 for storage. At a discharge rate of 2,000 gallons per minute for a pumping period of 150 days, the drawdown at a 1,000 foot radius will be approximately 8.0 feet. At 2000 feet, the drawdown will be approximately 4.0 feet for the same period.

The concerns of the Spokane Indian Tribe relate to the possibility that the State of Washington will allow the appropriation of waters of the Chamokane Creek Basin which belong to the Tribe. The federal court has quantified the extent of the Tribe's rights in its decree United States v. Barbara J. Anderson, et al. The state recognizes the Tribe's rights, as set forth in the decree, and all state rights issued subsequent to this decree are junior in priority to the rights of the Tribe.

Mr. Swiger's (Thomas D. McLaughlin) Application No. 10386 has been processed and a Report of Examination issued.

CONCLUSIONS AND RECOMMENDATIONS

Well interference calculations indicate no measurable effect upon the Game Department springs.

Additionally, our calculations indicate a potential effect of 1.3 cubic feet per second on Chamokane Creek if the Willging well is pumped at a rate of 2000 gallons per minute.

The 168 acre feet proposed to be authorized under this application is considered insignificant in relation to the total quantity of water available in the basin.

Washington State University Agriculture Department Circular No. 512 was used as a guide for determining seasonal amounts of irrigation water by geographic location. These amounts are calculated on a 70% system efficiency from the two year frequency table and for maximum irrigation water requirements. Based upon data in this circular, a maximum water duty for this area is 25.0 inches per acre, for an annual allotment of 167 acre feet, for the irrigation of 80 acres and 1 acre foot for continuous stockwater.

It is the conclusion of this examiner that: public ground water is available for appropriation for a beneficial use; that stockwater and irrigation are beneficial uses; that the appropriation of such water will not impair existing rights or be detrimental to the public welfare.

It is recommended that this application for a public ground water permit be approved in the amount of 2000 gallons per minute, 168 acre feet per year, for the irrigation of 80 acres and stockwater, subject to the following provisions:

"Any right perfected by development under this authorization is subject to regulation by the Watermaster appointed by the Eastern District Federal Court, in accordance and in compliance with the court decree, United States v. Barbara J. Anderson, et al. (United States, Eastern District No. 3643, 1982, and United States, 9th Circuit Nos. 82-3597 and 82-3625, 1984)."

"The amount of water granted is a maximum limit that shall not be exceeded and the water user shall be entitled only to that amount of water within the specified limit that is beneficially used and required for the actual crop grown on the number of acres and the place of use specified."

"This authorization to make use of public waters of the state is subject to existing rights, including any existing rights held by the United States for the benefit of Indians under treaty or otherwise. Specifically, in this case, those rights have been prioritized and quantified, which include a reserved right of at least 20 cubic feet per second of water flowing from Chamokane Falls into Lower Chamokane Creek, together with such additional flow of water from the falls as is necessary to maintain at all times the water temperature below the falls at 68° F or less."

"A certificate of water right will not be issued until a final examination is made."

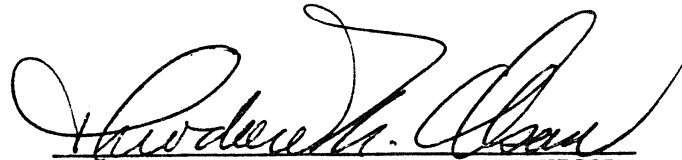
"Installation and maintenance of an access port as described in Ground Water Bulletin No. 1 is required. An airline and gage may be installed in addition to the access port."

"All water wells constructed within the state shall meet the minimum standards for construction and maintenance as provided under RCW 18.104 (Washington Water Well Construction Act of 1971) and Chapter 173-160 WAC (Minimum Standards for Construction and Maintenance of Water Wells)."

"A well log of the completed well shall be submitted by the driller to the Department of Ecology within thirty (30) days of completion of this well. This well log shall be complete and all information concerning the static water level in the completed well in addition to any pump test data shall be submitted as it is obtained."

"That portion of this authorization relating to irrigation is classified as a Family Farm Permit in accordance with Chapter 90.66 RCW (Initiative Measure No. 59). This means the land being irrigated under this authorization shall comply with the following definition: Family Farm - a geographic area including not more than 2,000 acres of irrigated agricultural lands, whether contiguous or noncontiguous, the controlling interest in which is held by a person having a controlling interest in no more than 2,000 acres of irrigated agricultural lands in the State of Washington which are irrigated under water rights acquired after December 8, 1977. Furthermore, the land being irrigated under this authorization must continue to conform to the definition of a family farm."

Signed at Spokane, Washington
this 12th day of February, 1986



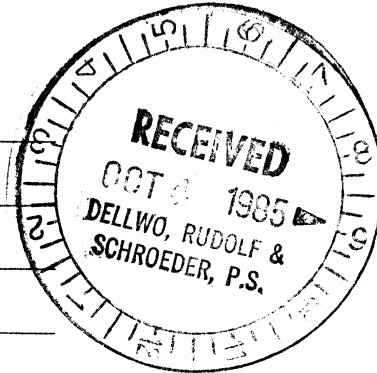
THEODORE M. OLSON, P.E., SUPERVISOR
Resource Management Division
Department of Ecology

MEMORANDUM

CHECK
INFORMATION _____
FOR ACTION _____
PERMIT _____
OTHER _____

TO: Robert D. Dellwo/Robert M. Sweeney
FROM: Theodore M. Olson *al*
SUBJECT: Chamokane Creek Applications

DATE: October 3, 1985



State of
Washington
Department
of Ecology



In accordance with our meeting in Mr. Dellwo's office on October 2, 1985, we are forwarding copies of the requested applications for public waters on file with the department.

The opinion of Judge S. P. Meyers, dated July 23, 1979, lists fifteen applications. The following applications have been rejected for various causes and are no longer under consideration and the files have been sent to archives in Olympia and copies are not available.

Application Nos.

- 10344
- 11989
- 20248
- 21786
- G3-20536

The following applications remain in good standing and will be processed.

Application Nos.

- 1 10386 6 22922
- 3 10506 7 23509
- 2 11227 8 23551
- A 11753 9 G3-20422
- 3 11905 S3-21939

Additional applications have been filed with the department subsequent to the Judge Meyers' opinion and are being held for priority and will be processed.

Application Nos.

- S3-23064 8 G3-25523 4
- G3-23949 2 G3-26113 5
- D S3-24392-1 G3-26382 6
- G3-24630 3 G3-27824 7

TMO:aal

Enclosures

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