

9-30-1987

## Tribe's List of Witnesses

Gary T. Farrell

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

Robert D. Dellwo

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

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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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v. )  
 )  
SPOKANE TRIBE OF INDIANS, )  
 )  
Plaintiff/Intervenor, )  
 )  
BARBARA J. ANDERSON, et al., )  
 )  
Defendants. )

No. Civil 3643

TRIBE'S LIST OF  
WITNESSES

SEP 8 1987

There follows the list of witnesses the Tribe intends to call in the trial of its Second Cause of Action. This list is in accordance with the Court's STATUS CONFERENCE ORDER of June 15, 1987.

DR. ALLAN SCHOLZ, Fish Biologist, Eastern Washington University, Cheney, Washington.

The following is an outline of his testimony.

BACKGROUND

Dr. Scholz was employed approximately 3 years ago by UCUT (Upper Columbia United Tribes) constituted of the Spokane, Coeur d'Alene, Kalispel and Kootenai Tribes, Upper Columbia tribes that were the aboriginal beneficiaries of the anadromous (salmon) and resident fishery on the Columbia and its tributaries prior to their destruction by the building of dams. The N.W. Power Act (16 U.S.C. 839) contains provisions for the establishment and funding of fish development, enhancement and replacement projects and programs to stand in lieu of the lost Columbia fishery. Tribes, which suffered the greatest loss, are included in the coverage of these statutory provisions.

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1 16 U.S.C. 839, subsection (h) is specifically applicable to  
2 this case and states in part at subsection (B), "This subsection  
3 shall be applicable solely to fish and wildlife, including  
4 related spawning grounds and habitat, located on the Columbia  
5 River and its tributaries."

6 Dr. Scholz was employed by UCUT as a fish biologist and  
7 advocate to investigate the fishery losses of the four tribes and  
8 to propose fish enhancement, replacement projects and programs for  
9 each tribe.

10 He will testify to his findings with regards to the aboriginal  
11 "pre dam" fishery of the Spokane Tribe and the projects he has  
12 proposed for the Tribe to be developed and funded under the  
13 provisions of the N.W. Power Act. These are as reflected in the  
14 balance of his testimony heavily keyed to Chamokane Creek and the  
15 Chamokane aquifer.

16 HISTORICAL BASIS OF TESTIMONY

17 Included in the aboriginally owned land or territory of the  
18 Spokane Tribe was a segment of the Columbia River, its confluence  
19 with the Spokane River, all of the Spokane River up to Spokane  
20 Falls and all of its tributaries below Spokane Falls (principally  
21 the Little Spokane, Latah Creek and Chamokane Creek.)

22 This combination of the rivers and tributaries constituted  
23 one of the finest salmon and resident fisheries in the world.  
24 Scattered along the Spokane and Little Spokane Rivers were  
25 historic fishing and village sites. The Spokanes also fished the  
26 length of the Columbia from the Dalles to Kettle Falls. Little  
27 Falls and Spokane Falls were principal fisheries on the Spokane.  
28 Principal spawning areas were the Little Spokane, Latah Creek,  
29 portions of the Spokane itself and Chamokane Creek.

30 Chamokane Creek, fed by major springs five to six miles above  
31 its confluence with the Spokane, provided the Spokanes with  
32 year around pure water and resident and anadromous fish. One of

1 the Spokane's principal year around villages was on the plain  
2 adjoining the creek just before its confluence with the Spokane  
3 River.

4 The building of Little Falls Dam by the Washington Water  
5 Power Company at Little Falls forever blocked the salmon and  
6 other anadromous fish from ascending the river beyond that point.  
7 This eliminated the Chamokane as a salmon fishery but it continued  
8 as a resident fishery. In more recent years however, because of  
9 the effect of other dams on the Spokane (Long Lake, Nine Mile)  
10 and the sewage from Spokane, the resident fishery of the Spokane  
11 practically disappeared. All that was left of this historic  
12 fishery was the Chamokane, now unreplenished from the Spokane River.

13 The building of Grand Coulee and other major dams on the  
14 Columbia completed the destruction of the salmon fishery. Much of  
15 the resident fishery was also destroyed with it coming back  
16 slowly with the multiplication of wall-eyed pike and the artifi-  
17 cial planting of rainbrow trout in Roosevelt Lake. The resultant  
18 resident fishery was miniscule, almost non existent in comparison  
19 to the former, now destroyed salmon fishery.

20 PROJECTS FOR THE SPOKANE TRIBE

21 The proposals by Dr. Scholz in behalf of the Spokane Tribe  
22 by reason of the N.W. Power Act include two major items. The  
23 first is the establishment in the area of the major springs as  
24 described below of a major fish hatchery. Its purpose will be  
25 the production of kokanee and trout to seed into Roosevelt Lake,  
26 into the Chamokane and into other lakes and streams on or near  
27 the Spokane Reservation.

28 The second project is the enhancement of the resident fishery  
29 in the Chamokane itself below the major springs.

30 FISH ENHANCEMENT PROGRAM ON THE CHAMOKANE

31 As explained above, with it now cut off by the polluted  
32 Spokane River, the Chamokane exists as a scenic year around

1 creek which during the summer is almost totally fed by the major  
2 springs. Historically, prior to the State of Washington issuing  
3 pump irrigation permits for the removal of water from the  
4 Chamokane aquifer and before various local farmers cut off or  
5 limited the various recharge areas, the base flow of the creek  
6 during the summer time lows was in excess of 30 cfs. As this  
7 case has established, that flow gradually decreased so that  
8 that base figure dropped to a low of about 22 cfs. This drop  
9 in flow had two principal causes. The primary one was the  
10 removal of water from the Chamokane aquifer by pump irrigators  
11 operating under state issued water permits.

12 A secondary cause has been the elimination by local farmers  
13 of recharge areas over the Chamokane aquifer. The year round  
14 base flow of the major springs (particularly during the summer)  
15 is dependent on the degree and extent of the annual recharge of  
16 the Chamokane aquifer, particularly during the spring runoffs.  
17 In the early years the Chamokane itself contained flat, slow  
18 flow areas which encouraged this recharge. Additionally high flows  
19 would spread out over some of the fields and sink into the  
20 ground. In recent years farmers have channeled the creek,  
21 eliminating some of the slow flow areas and, more importantly,  
22 have banked or diked it to prevent it from flowing over their  
23 lands. These activities have reduced the annual recharge, con-  
24 tributing to the drop in the base flow of the major springs and  
25 therefore of the summer time flow of the creek itself.

26 A study of the Chamokane Creek channel below the springs  
27 discloses that its historical low flow of about 30 cfs is the  
28 optimum flow for the maintenance of the resident fish population.  
29 Dr. Scholz's testimony will show that with an increased base  
30 flow up to at least 27.5 cfs the fish habitat will be vastly  
31 improved. The present low flows expose spawning beds and  
32 limit the feeding riffles and other areas so that the potential

1 fish population is reduced. This reduction is a product of the  
2 loss of spawning beds, loss of feeding areas and the periodic  
3 rise in temperatures above the optimum of below 68 degrees  
4 fahrenheit. Of these three factors the loss of spawning beds and  
5 feeding areas are the most important. The increase of the  
6 base flow to a minimum of 27.5 will protect the spawning and  
7 feeding areas and, at the same time, protect the stream from  
8 unhealthy rises in temperature.

9 TESTIMONY REGARDING PROSPECTIVE FISH HATCHERY

10 The proposed fish hatchery would be located on Indian lands  
11 now owned by tribal member Glen Galbraith a short distance west  
12 of the channel of Chamokane Creek and south of the Ford-Wellpinit  
13 Highway. At said site is a part of the complex of what is  
14 referred to in captioned case as the "major springs." These are  
15 the principal springs that feed Chamokane Creek and that, along  
16 with other large springs to the North and East produce all or  
17 most of the summer time flow of the creek.

18 These springs have a present firm flow of about 6 cfs  
19 and a temperature of 47 to 50 degrees Fahrenheit. The water is  
20 pure and well oxygenated and is suitable in quantity and  
21 quality for the prospective fish hatchery. If the average flow  
22 were to drop below the 6 cfs it will have to be augmented,  
23 presumably by wells located above the springs tapping what is  
24 described as the "lower aquifer". With the establishment and  
25 operation of this fish hatchery it is expected that it will be  
26 expanded and its production of fish increased, requiring more  
27 water from the Chamokane aquifer (the only available source).

28 The prospective improvement and enhancement of the Chamokane  
29 will not only be of great cultural, esthetic and fishery value  
30 to the Tribe itself but the improved Chamokane as a game  
31 fishery will be an important recreational, economic resource of  
32 the Tribe.

1 DR. JOHN BUCHANA, Hydrologist, Eastern Washington University,  
2 Cheney, Washington.

3 Dr. John Buchanan, a hydrologist-engineer and a professor  
4 at EWU has conducted hydrological studies of the Chamokane basin  
5 to establish its potential for the irrigation of tribal lands  
6 and what may be done to increase the base flow of the creek  
7 below the major springs. His testimony is summarized as follows:

8 He will professionally corroborate the testimony of Dr.  
9 Scholz as to the drop in the base flow of the creek and its causes.

10 He will largely corroborate the evidence and testimony  
11 already in the record, particularly the findings and testimony of  
12 Walter and Ira Woodward, consulting engineers, as to the extent,  
13 nature and general geology and hydrology of the Chamokane  
14 aquifer. It will differ in one major respect.

15 The Woodward brothers, principal hydrological witnesses for  
16 the United States and the Tribe in the trial of this case prior  
17 to the Judge's decision of July, 1979, testified to seismic  
18 studies of the basin from which they concluded that the Chamokane  
19 aquifer was generally composed of a top, gravelly aquifer about  
20 50' to 75' thick which was underlayed by a deep relatively  
21 impermeable layer of clay and silt extending down to bed rock  
22 in some cases as deep as 490'.

23 Dr. Buchanan's studies included the drilling of a test well  
24 through the impervious layer to bed rock. This disclosed that  
25 the impervious layer did not extend to bed rock but was itself  
26 underlayed by gravel, rock and soil similar to that in the top  
27 aquifer. Dr. Buchanan's testimony will show that this additional  
28 knowledge as to the geology of the lower aquifer will change the  
29 conclusions of the Woodwards somewhat as follows:

30 1. Under the Woodward findings shallow wells such as the  
31 Newhouse well into the upper aquifer could produce large  
32 quantities of irrigation water (in that case 2,000 cfs). Wells

1 into the lower aquifer would, because of the low permeability  
2 of the denser clay and silt, produce relatively small flows,  
3 perhaps sufficient only for domestic uses.

4 Under the Buchanan findings the lower aquifer could, with  
5 deeper wells through the impermeable layer, produce as much  
6 water as the upper aquifer.

7 2. Because of the effect of the impermeable layer on top of  
8 the lower aquifer, there could be an increased artesian effect  
9 in the lower (south) end of the aquifer so that a well into the  
10 lower aquifer might have a short range artesian effect, adding  
11 to the flow of the major springs.

12 3. The waters in the lower aquifer would be less subject  
13 to agricultural pollution than those in the upper aquifer.

14 4. The Woodward brothers testified to a total recharge  
15 capacity of the aquifer of about 23,000 acre feet. Additionally  
16 they indicated that the movement of water in the lower aquifer  
17 was exceedingly slow, slow to recharge, slow to move upward into  
18 the upper aquifer and especially slow in linear migration toward  
19 the major springs.

20 The new evidence adduced by Dr. Buchanan will somewhat  
21 increase the estimate of the recharge capacity of the combined  
22 aquifers and will indicate that the lower aquifer will recharge  
23 and move more quickly than the estimate of the Woodwards.

24 5. Because of the greater receptivity of the lower  
25 aquifer to recharge, it becomes more practical to require re-  
26 charge activities by the diversion of the waters into recharge  
27 areas by the local farmers.

28 Dr. Buchanan will testify further to methods to be followed  
29 in maintaining the optimum flows and temperatures of the lower  
30 stream. He will indicate that the flow may be stabilized into  
31 a firmer base flow in excess of 27.5 cfs by the combination of  
32 the management of the amount and time of the pump diversions



1 from the aquifer and the requiring of recharge efforts by the  
2 pump irrigators.

3  
4 IRA WOODWARD, consulting engineer, S. 3707 Latawah, Spokane,  
5 Washington 99203.

6 Mr. Woodward is the court appointed water master. His  
7 testimony will update and summarize his testimony and reports as  
8 a principal hydrologist witness and as water master as they  
9 relate to the issues in the second cause of action.

10 He will corroborate the findings of Dr. Buchanan and the  
11 significance of Buchanan's findings as to the nature of the  
12 lower aquifer. He will corroborate the testimony of Dr. Scholz  
13 as to the effect of a base summer time flow of 27.5 cfs in the  
14 lower creek as to temperature and fish habitat.

15 Additional testimony is summarized as follows:

16 The observations of Mr. Woodward of the Chamokane basin  
17 extend back to 1972 with annual stream and temperature readings.  
18 Every summer, with the exception of one or two, the temperature  
19 of the lower stream has risen above the 68 degree maximum during  
20 the hot weather weeks in July and August. An increase in the  
21 base flow to above 27.5 cfs will largely prevent this annual  
22 breach of the temperature maximum. It will not eliminate it  
23 entirely. A better management of the stream especially in  
24 providing shade will help somewhat.

25 He will testify that the Smithpeter and some other permits  
26 have been abandoned and are now relinquished and that other  
27 permittees have not been pumping as much as authorized. As a  
28 result the firm dry weather flow of the lower creek has seldom  
29 dipped below 24 cfs. Despite that fact the 68 degree maximum  
30 has been breached every summer, thereby showing that the 20 cfs  
31 minimum to assure the 68 degree maximum is not realistic.

32 The 68 degree temperature maximum is often breached in

1 hot weather in late May and June when the stream flows, fed by  
2 surface waters, may be as much as 40 cfs. This is caused by the  
3 flow of warmed surface waters from the northern portions of the  
4 basin.

5 These early warmed waters flowing across the agricultural  
6 areas north of the Ford-Chamokane bridge could be pumped or  
7 diverted into recharge areas, adding to the aquifer recharge,  
8 firming up the later spring flow and at the same time preventing  
9 their causing breaches of the 68 degree maximum.

10 Mr. Woodward is considering requiring water users, including  
11 the Tribe, to follow recharge practices. Hypothetically an  
12 individual permittee would be granted a conditional permit. It  
13 would require him to utilize these warmed early surface waters  
14 for irrigation during May and June and also to provide diversions  
15 of these same excess waters into recharge areas. These practices  
16 will, by increasing the recharge, also increase the base flow  
17 of the major springs.

18  
19 DENNIS OLSON, Realty Specialist, Bureau of Indian Affairs,  
20 Wellpinit, Washington 99040.

21 Dennis Olson is an employee of the Bureau of Indian Affairs  
22 at the Spokane Agency at Wellpinit. As such he monitors,  
23 supervises and directs land use and realty operations of the  
24 Spokane Tribe and of its members. He is familiar with the  
25 approximately 8,000 acres of tribal land which the court in  
26 1979 found to be irrigable from Chamokane Creek and the Chamokane  
27 aquifer.

28 Mr. Olson will testify that whereas it is not economically  
29 feasible at this time for the Tribe to irrigate all or any  
30 large portion of said 8,000 acres it is economically feasible  
31 for it to irrigate approximately 1,000 acres in intensive  
32 agriculture. Said potential 1,000 acre irrigated tribal farm

1 is on the irrigable plane just west of the creek and over the  
2 aquifer. While it is predominantly tribal land with an  
3 irrigation priority date of 1877 there will be a portion, perhaps  
4 as much as 200 acres, of reacquired land which, under the orders  
5 of the court herein, have recent priority dates.

6 He will show that any agricultural projects such as this  
7 proposed one must be administered and utilized as a unit.  
8 It will require an expensive irrigation system covering land of  
9 recent priority dates irrigated along with the land with the 1877  
10 priority date. It would be impractical and uneconomical to  
11 irrigate one class of land without the other.

12 He will testify that it is therefore important that the  
13 Tribe be allowed to transfer a small portion of its early  
14 priority rights to the later priority land. Such would be done  
15 without increasing the total early priority irrigation water  
16 rights of the Tribe as found by the court.

17  
18 JOE FLETT, Chairman Spokane Tribe, Wellpinit, Washington  
19 99040.

20 Joe Flett, a long time member and chairman of the Business  
21 Council, the governing body of the Spokane Tribe, has been active  
22 for many years in tribal plans for Chamokane Creek and the  
23 tribal agricultural and recreational areas to the west of the  
24 creek.

25 He will testify to these plans and programs and will show  
26 that they include the irrigation of about 1,000 acres of  
27 irrigable agricultural land from aquifer waters and the enhance-  
28 ment of the fishery by increasing the base flow of the Chamokane  
29 and the improving of the fish habitat.

30 His general testimony will be corroborative of that of the  
31 foregoing witnesses.

32 He will testify that the Tribe has, under the 1979 decree

1 of Judge Neill, irrigation rights for 8,600 acres with a duty of  
2 3 acre feet per acre or a total water duty of more than 24,000  
3 acre feet. He will show that whereas such irrigation would  
4 "dry up the creek" utilizing all of the recharge storage  
5 potential of the aquifer, the Tribe has no intent to use so  
6 much water. It will limit its irrigation at least in the  
7 foreseeable future to not more than 1,000 acres with the use of  
8 not more than 3,000 acre feet of water.

9 The major hope of the Tribe is that by increasing the base-  
10 minimum flow of the lower creek, it will be improved and enhanced  
11 as a recreational resource and fishery as testified to by the  
12 other witnesses. In this regard he will point out that the  
13 Business Council wishes to transfer a portion of its 24,000  
14 acre feet irrigation water right to the creek below the springs  
15 in an amount necessary to achieve a minimum-base flow of 27.5  
16 cfs. He hopes however that by better upstream and aquifer  
17 management and the diversion of late spring water surface waters  
18 into recharge areas the lower spring flow will be augmented so  
19 that it will not be necessary to transfer a portion of the tribal  
20 irrigation water right or to reduce or shut down any of the state  
21 permittees.

22 In addition to the foregoing the Tribe may call two other  
23 witnesses whose identities are not known at this time. One may  
24 be the land services officer of the Portland Area Office of the  
25 BIA and another a fish biologist. The testimony of these  
26 prospective witnesses will be similar to and corroborative of  
27 Allan Scholz and Dennis Olson.

28 DATED this 30<sup>th</sup> day of Sept, 1987.

29 DELLWO, RUDOLF & SCHROEDER, P.S.

30  
31   
32 GARY T. FARRELL

  
ROBERT D. DELLWO

Attorneys for the Spokane Tribe

TRIBE'S LIST OF WITNESSES - 11

~~SEP 30 1987~~

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, )  
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Plaintiff, ) No. Civil 3643  
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v. ) AFFIDAVIT OF MAILING  
 )  
SPOKANE TRIBE OF INDIANS, )  
 )  
Plaintiff/Intervenor, )  
 )  
BARBARA J. ANDERSON, et al., )  
 )  
Defendants. )

STATE OF WASHINGTON )  
 ) ss.  
County of Spokane )

KATHY JENSEN, being first duly sworn on oath, deposes and says: That I am a citizen of the United States and of the State of Washington, living and residing in Spokane County in the State of Washington; that I am over the age of twenty-one (21) years, not a party to the above-entitled action and am competent to be a witness herein; that on the 30<sup>th</sup> day of September, 1987, affiant deposited in the United States mail, properly stamped and addressed envelopes directed to:

Mr. Ira Woodward Water Master W. 905 Riverside Ave. Spokane, WA 99201	Mr. Robert Sweeney Asst. U.S. Attorney P.O. Box 1494 Spokane, WA 99210
Mr. Ron Olson 3197 Frontera Way Burlingame, CA 94010	Mr. Robert Victorino 1021 University Ave. Salinas, CA 93901
Paul Schaffner Ford, WA 99013	Mr. James R. Newhouse Ford, WA 99013
Mr. R.J. Seagle Box 34 Ford, WA 99013	Spokane Tribe of Indians Box 100 Wellpinit, WA 99040

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Robert Fenton  
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Larry Cox  
Regional Solicitor's Office  
Suite 607, Lloyd 500 Bldg.  
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Portland, OR 97232

Superintendent  
Bureau of Indian Affairs  
Wellpinit, WA 99040

Mr. Charles Roe  
Assistant Attorney General  
Temple of Justice  
Olympia, WA 98504

Steven Carroll  
Land & Natural Resources Div.  
Indian Resources Section  
P.O. Box 44378  
Washington, D.C. 20026-4378

said envelopes containing:

- 1) Tribe's List of Witnesses.

*Kathy Jensen*  
KATHY JENSEN

SUBSCRIBED AND SWORN to before me this 30<sup>th</sup> day of September, 1987.

*Richard L. Hageman*  
Notary Public in and for the State  
of Washington, residing at Spokane  
My Appointment Expires: 3/15/90