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Brief of State of Washington, Department of Ecology (Spokane Tribe of Indians "First Cause of Action")

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OCT 14 1986

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ACCEPTANCE OF SERVICE

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WASHINGTON

3 UNITED STATES OF AMERICA,)
4 Plaintiff,)
5 and)
6 SPOKANE TRIBE OF INDIANS,)
7 Plaintiff-Intervenor,)
8 v.)
9 BARBARA J. ANDERSON; JAMES M.)
10 ANDERSON, STATE OF)
11 WASHINGTON, et al.; [GUST)
12 and CLARA WILLGING, JR.;)
13 HOWARD W. and HAROLD A.)
14 DIXON; FLOYD NORRIS; URBAN)
15 CHARLES SCHAFFNER; ALLEN O.)
16 TELLESSEN; THOMAS J.)
17 McLAUGHLIN; JESS SULGROVE,)
18 JR., Defendant-Applicants],)
19 Defendants.)

Civil No. C-72-3643-JLQ

BRIEF OF
STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY
(Spokane Tribe of Indians
"First Cause of Action")

16 This brief is submitted in accordance with this Court's
17 "Pre-Trial Order Relating To Petition of Spokane Tribe of Indians,
18 Dated May 28, 1986," filed September 26, 1986 (hereafter
19 "Pre-Trial Order.")

20 I. ISSUE PRESENTED

21 The issue to be decided, as set forth in said Pre-Trial
22 Order at page 4, is a singular, narrow one:

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1 Whether, prior to the approval of applications
2 for water use permits by the State Department
3 of Ecology, all such applications must be
 approved for issuance by the Water Master or
 the Court.

4 Resolution of this issue is controlled by the words of prior
5 judgments, decrees, and orders of this court in this case. They
6 will be examined in the Argument portion which is set forth later
7 in this brief.

8 It is important here to note that certain issues are not
9 before the court in this proceeding. The issue, for example, as
10 to whether seven rulings of the State of Washington, Department of
11 Ecology (hereafter "Ecology") on water permit applications ("recog-
12 nized" by this Court in a prior order)¹ are valid as measured by
13 pertinent state statutory criteria and requirements, is not before
14 the Court for resolution. (The proper forum for resolution of
15 such invalidity challenges is the Washington State Pollution
16 Control Hearings Board. Peterson v. Department of Ecology, 92
17 Wn.2d 306, 315, 596 P.2d 285 (1979). That board, we note, is now
18 processing challenges of the Spokane Tribe of Indians (hereafter
19 "Tribe") to the seven rulings with a trial-type hearing set to
20 begin on November 17, 1986. Spokane Tribe of Indians v. Willging,
21 et al., PCHB Nos. 86-47 through 86-53.) Likewise, the issue of
22 the existence of so-called "excess" or "surplus" waters in the
23

24
25 1 See this Court's Memorandum Opinion and Order filed July 23,
 1979 at pages 13-14.

1 Chamokane Creek system, which is closely associated with issue
2 (1) just set forth, is not now before this Court. See Stempel v.
3 Department of Water Resources, 82 Wn.2d 109, 115, 508 P.2d 166
4 (1973).

5 In order to place the issue now before the Court in proper
6 focus, a short background statement is provided.

7 II. BACKGROUND

8 This case embodies a federal court version of a "general
9 adjudication" proceeding as conducted by state courts throughout
10 the west. See State v. Acquavella, 120 Wn.2d 651, 674 P.2d 160
11 (1983). The two primary objectives of such a proceeding are to
12 confirm all existing water rights on a stream and, thereafter, to
13 correlate each confirmed right as against every other in terms of
14 priority. Satisfaction of the objectives provide a base for regu-
15 lation of water rights in time of shortage. Memorandum Opinion
16 and Order entered July 23, 1979, at page 15.

17 Various water right claims were confirmed by the court with
18 dates of priority affixed thereto. See Memorandum Opinion, page 2.
19 These confirmed rights were based on either federal law (i.e., the
20 "reserved rights" or Winters doctrine)² or state law (statutory or
21 common). Memorandum Opinion, page 2.

25 2 Winters v. United States, 207 U.S. 564 (1908).

1 a. Rights Confirmed By This Court.

2 In terms of confirming water rights based on state statutory
3 law, i.e., rights established under the state's surface water code
4 of 1917 and ground water code of 1945, this court set forth a
5 two-page listing of such rights. The list consists of thirty-one
6 rights in various conditions of establishment ranging from fully
7 perfected "certificate" rights³ to inchoate "permit" rights⁴ to
8 those rights, of a limited nature, in the "application" stage.⁵
9 It is as to the latter group, which under Washington law are at a
10 very early stage of the establishment procedure leading to a per-
11 fected right,⁶ that we direct the court's attention.

12 b. Processing of by the Department of Ecology Water Right
13 Applications "Recognized" By this Court.

14 The Department of Ecology began the active processing of the
15 water right permit applications, recognized as water right claims
16 by this Court in 1979, shortly after the appeals to the United
17 States Court of Appeals for the Ninth Circuit of this court's
18
19

20 3 RCW 90.03.290 and RCW 90.44.060.

21
22 4 RCW 90.03.330 and RCW 90.44.060.

23 5 RCW 90.03.250 and RCW 90.44.060.

24
25 6 See Schuh v. Department of Ecology, 100 Wn.2d 180, 667 P.2d
26 64 (1983).

1 decision (upholding the state's water right permitting authority)
2 became final. United States v. Anderson, 736 F.2d 1358 (9th Cir.
3 1984). Of the twelve court-recognized applications, only seven
4 were approved by the Department. See Supplement to Record, dated
5 October 3, 1986. The remaining five applications were, for
6 various reasons, not approved and their files closed.

7 The processing of the seven applications followed all of the
8 public notice and opportunity for comments requirements under
9 state law.⁷ See page 1 of each exhibit (Report of Examination) in
10 the Supplement to Record.⁸ Ultimately, after an extensive and
11 exhaustive evaluation following state law procedures, the Depart-
12 ment of Ecology approved the seven permits on February 12, 1986.
13 See Supplement to Record, Exhibits S-1 through S-7.

14 Rulings on these applications are not final at this time for,
15 as noted earlier, they are in a statutory review stage triggered
16

17
18 7 See RCW 90.03.290 for the processing of surface water right
19 applications and RCW 90.44.060 for the processing of ground
20 water right applications.

21 8 In terms of opportunities for comment on the applications,
22 it is noted that the Department of Ecology provided this
23 court's water master with copies of the seven applications
24 and requested his comments on the applications. This action
25 followed understandings reached by the parties at a meeting
26 of the attorneys to the Pre-Trial Order. See page 2 of each
27 Report of Examination exhibit in the Supplement of Record;
and Water Master's Annual Report to the Court for October 1,
1984-September 30, 1985, page 2, quoted at page 18 of Tribe's
Opening Brief. No such comments were received by the
Department.

1 by the Spokane Tribe of Indians. Of note, under Washington law,
2 rulings by the Department on water right applications are not
3 final until all "de novo" quasi-judicial review as well as judi-
4 cial review has been completed. Stempel v. Department of Water
5 Resources, 82 Wn.2d 109, 508 P.2d 166 (1973).

6 While not attempting to address the merits of the Department's
7 permit approval actions, we point out that each one of these
8 actions is sensitive both to the prior rights confirmed to the
9 United States for the Spokane Tribe's benefit and to this court's
10 pronouncements as to water availability in the stream system.
11 See, e.g., Supplement to Record, Exhibit S-1 at page 3 of the
12 Report of Examination. As to those prior rights, the Department's
13 approval contained in Exhibit S-1, page 4, of the Report of Exami-
14 nation provides:

15 Any right perfected by development under this
16 authorization is subject to regulation by the
17 Watermaster appointed by the Eastern District
18 Federal Court, in accordance and in compliance
19 with the court decree, United States v.
20 Barbara J. Anderson, et al., (United States,
21 Eastern District No. 3643, 1982, and United
22 States, 9th Circuit Nos. 82-3597 and 82-3625,
23 1984).

24

25 This authorization to make use of public
26 waters of the state is subject to existing
27 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

1 flow of water from the falls as is necessary
2 to maintain at all times the water temperature
below the falls at 68°F or less.

3 Against this backdrop, the Spokane Tribe of Indians asks
4 this court to invalidate the rulings of the Department of Ecology
5 and enjoin the further processing of the seven water right
6 applications at the state level. The basis for this request is
7 that the prior orders, judgments, and decrees entered in this
8 proceeding mandate that no approval decisions of the seven appli-
9 cations may be made by the Department without the prior approval
10 or authorization of this Court (acting directly or through its
11 water master).

12 In order to answer this contention, a careful examination of
13 pertinent portions of four documents entered in this court or the
14 United States Court of Appeals in this case is required. Those
15 documents, copies of which are attached hereto for the
16 convenience of the court, are:

17 (1) This court's Memorandum Opinion and Order, filed
18 July 23, 1979;

19 (2) This court's Judgment, filed September 12, 1979;

20 (3) This court's Memorandum and Order Granting, In Part,
21 Motions to Amend Memorandum Opinion and Order, filed August 23,
22 1982; and

23 (4) The Ninth Circuit Court of Appeals' Opinion, filed
24 July 10, 1984.

25 We now turn to that examination.

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III. ARGUMENT

A. Summary

Nothing in the four court documents, noted above, expressly mandates any "prior approval" role for this court in relation to any approved ruling by the Department of Ecology as to the seven water right applications recognized by this court as set forth in its Memorandum Opinion and Order of July 23, 1979. To the contrary, every relevant guidepost contained in the documents points to a contrary conclusion.

B. The Four Documents

The Tribe, in its opening brief, quotes extensively from the documents entered by this court and the Ninth Circuit Court of Appeals, especially as they pertain to water master duties. See Tribe's Opening Brief First Cause of Action, pages 9-17. While these quotations are extensive, it is interesting to note that the Tribe points to no specific provision thereof to support its "prior approval" contention.

An examination of the specific language contained in the court documents reveals the lack of a base to support the Tribe's position. We elaborate as follows:

(1) The Court's Memorandum Opinion and Order of July 23, 1979 refers to the water master and his duties, beginning at page 16. The only section mentioning state water right certificates or permits, paragraph 1 on page 16, is irrelevant to the issue to be resolved by the court. A search of other provisions

1 in the court document reveals no express or implied "prior
2 approval" mandate.

3 (2) This court's Judgment of September 12, 1979, like the
4 document described in (1) next preceding, contains no express
5 "prior approval" mandate in its water master provisions.
6 Similarly, the remainder of the document contains no such
7 mandate. It's most noteworthy provision is paragraph XXIII on
8 page 11. That paragraph states:

9 The request of plaintiffs that the defendant
10 State of Washington, Department of Ecology,
11 be enjoined from issuing additional certifi-
12 cates or permits or accepting additional
13 applications for diversion of waters of the
14 Chamokane Creek Basin, is denied. Waters from
15 the Chamokane Creek Basin presently appear to
16 be over appropriated in light of the adjudi-
17 cation made in this Judgment, and if the State
18 Department of Ecology permits additional per-
19 sons to apply for water from the Chamokane
20 Creek Basin it may be creating in them false
21 hopes, but such actions by the State Depart-
22 ment of Ecology would not cause irreparable
23 harm to any of the parties to this litigation
24 since any such future certificates, permits or
25 applications would be subject to existing
26 rights and would have no effect upon the water
27 rights of the parties as adjudicated and deter-
mined by this Judgment. (Emphasis added.)

20 The thrust of this ruling is clear. This court had no intention
21 of intruding into the Department's processing of the seven water
22 right applications (or applications filed with the Department
23 after entry of the Judgment.)

24 (3) This Court's Memorandum and Order Granting, In Part,
25 Motion to Amend Memorandum Opinion and Order of August 23,
26 1982, like documents (1) and (2), contains no "prior approval"

1 provisions. As to state water rights and regulatory authority,
2 this document affirms Judge Neill's July 23, 1979 ruling
3 upholding such rights and authority as set forth on page 28 of
4 the August 23, 1982 court document. The court's discussion of
5 "Water Master," at page 11, thereof is irrelevant to the issue at
6 hand.

7 (4) The Ninth Circuit Court of Appeals' Opinion of July 10,
8 1984, like the previous documents, contains no indication that
9 this court intended a "prior approval" mandate. On page 13 of the
10 Opinion, the appellate court wrote:

11 . . . we conclude that the State, not the
12 Tribe, has the authority to regulate the use
of excess Chamokane Basin waters . . .

13 In terms of water master considerations, the court wrote at
14 page 14:

15 The district court appointed a federal water
16 master whose responsibility is to administer
17 the available waters in accord with the
priorities of all the water rights as
adjudicated.

18 In the same paragraph, the Court continued:

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

23 Continuing on this subject, the Court wrote at page 18:

24 . . . in view of the hydrology and geography
25 of the Chamokane Creek Basin, the State of
26 Washington's interest in developing a compre-
hensive water program for the allocation of

1 surplus waters weighs heavily in favor of
2 permitting it to extend its regulatory author-
3 ity to the excess waters, if any, of the
4 Chamokane Basin. State permits issued for any
5 such excess water will be subject to all pre-
6 existing rights and those preexisting rights
7 will be protected by the federal court decree
8 and its appointed water master. We do not
9 believe there is any realistic infringement on
10 tribal rights and protected affairs. If there
11 is any intrusion, it is minimal and permis-
12 sible under all of the circumstances of this
13 case.

14 Finally, we note the sole footnote of the opinion, located
15 on page i. It deals with the interrelationship of the state
16 permit-issuing program and the role of the water master, as
17 follows:

18 In arguing that tribal regulatory authority
19 over all water within the reservation was
20 essential, the tribe raised the possibility
21 that because land owned in fee occupied most
22 of the waterfront property within the reserva-
23 tion, state regulation of water use on fee
24 land could effectively prevent the tribe from
25 exercising its water rights. We conclude that
26 by appointing a water master charged with
27 protecting all water rights and ensuring com-
pliance with the court decree, the district
court provided adequate safeguards. The mere
issuance of a state permit does not impinge
on tribal rights. If Washington were to
approve permits that granted rights to use
non-existent water or infringed on the tribe's
prior water rights, the water master would be
obliged to modify them or to give them no
effect. (Emphasis added.)

28 This section contains no "prior approval" provision. Rather, it
29 sets forth the role of the water master established by the Court as
30 being one of ensuring that water rights, established in the future
31 under state law, are not exercised by the holders thereof in a

1 fashion that interferes with the exercise of rights with senior
2 priorities.

3 In sum, these four court documents do not, either expressly
4 or by implication, require prior approvals of this Court of the
5 applications approved by the Department of Ecology on
6 February 12, 1986.

7 We conclude this phase of the brief by redirecting the
8 court's attention to this court's earlier denial (in 1979) of the
9 Spokane Tribe's request for an injunction, directed to the Depart-
10 ment of Ecology, prohibiting the state agency from "issuing addi-
11 tional certificates or permits or accepting applications for
12 diversion of waters of the Chamokane Creek Basin"9

13 The import of the denial ruling of the court is clear. This
14 Court left the state to administer its water code permitting
15 program free of interference by the court. Intrusion into statu-
16 tory decision-making as to permit applications was not contem-
17 plated. The approach developed by the court to assure the protec-
18 tion of senior priority water rights, including those of the
19 Tribe, was through regulation of rights based on priorities,
20 rather than through attempts by this court to second-guess the
21 state process for establishing new rights with junior priorities.
22 See Opinion of Ninth Circuit Court of Appeals of July 10, 1984,
23 footnote 1, page i.

26 9 See the full quote on page 9 hereof.

1 C. Response to Spokane Tribe of Indians' Contentions.

2 A major portion of the Tribe's Opening Brief, from page 5
3 through page 17, is made up of quotations from the four documents
4 we have just reviewed. Interestingly, nowhere in that brief is
5 the court directed to any words in the documents that lend cre-
6 dence to a "prior approval" role for the court (or its water
7 master) as contended by the Tribe.

8 Beginning on page 17, the Spokane Tribe's brief discusses
9 another Court-issued document - an Order Establishing Compensation
10 and Expense Reimbursements For Water Master and for Payment of
11 Same by Named Defendants of June 23, 1983. This Order relates in
12 part to the filing of quarterly and annual reports to the court.

13 The Tribe then brings the court's attention to the water
14 master's report for the period of October 1, 1984 - September 30,
15 1985, by setting forth extended quotations therefrom, including
16 one "conclusion" and one "recommendation" of the water master
17 which we specially note. The "conclusion," as quoted in the
18 Tribe's Opening Brief as conclusion 7 on page 19, states:

19 7. The State of Washington is processing
20 applications for water right permits within
the Chamokane Basin.

21 The "recommendation" quoted on page 20 of the Tribe's brief,
22 provides:

23 5. The Court and/or the Water master be kept
24 current of applications for water rights

1 received by the State of Washington and
2 be involved in the review process.

3 Thereafter, by Order entered on January 21, 1985, following
4 along the lines of the "recommendation" of the water master's
5 report, the Court stated:

6 That the Water Master's request that he be
7 authorized to keep informed of the water
8 right applications pertinent to the Chamokane
9 Creek basin submitted to the State of
10 Washington is approved. (Emphasis supplied.)

11 The point to be made here is that the Department has been
12 completely faithful to this "keep informed" direction of the Court
13 in the context of the seven applications at issue.¹⁰

14 The Tribe repeatedly asserts, with extensive argument and
15 analysis, that the seven applications approved by the Department
16 will impair the exercise of prior rights of the Tribe relating to
17 instream flows. See Tribe's Opening Brief, page 8. This asser-
18 tion of mixed law and fact (with which the Department obviously
19 disputes) is not relevant to resolve the sole issue before the
20 Court in this proceeding.¹¹ That dispute is one for resolution in
21 Spokane Tribe of Indians v. Department of Ecology, supra, now
22 pending before the state Pollution Control Hearings Board.
23 Whether public waters, i.e., excess waters, are available for

24
25 10 See footnote 8.

26 11 See page 1, supra.

1 appropriation under state law is a matter for the resolution in
2 the state quasi-judicial and judicial forums.

3 V. CONCLUSION

4 The primary request of the Tribe, i.e., a request for a court
5 declaration that the seven water right applications involved
6 herein must be approved by this court (or its water master) before
7 they could be approved by the state, should be denied. Nothing
8 contained in any of the judgments, orders, and decisions of this
9 court or the Ninth Circuit Court of Appeals sets forth such a
10 requirement.

11 The secondary request of the Tribe, that such a "prior
12 approval" requirement should now be established if its primary
13 request is denied, should also be rejected. There is no showing
14 that the action of the Department of Ecology in approving the
15 seven water right applications threatens the prior rights of the
16 Tribe. The Department of Ecology's permit approvals are fully and
17 unequivocally conditioned to ensure the full protection of prior
18 water rights confirmed in this proceeding, including expressly the
19 early priority water rights of the Tribe. That protection is not
20 only assured by this court's water master but, independently, by

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1 the statutory duties placed upon the Department to "regulate in
2 accordance with existing rights."¹²

3 Dated: October ~~13~~¹⁰, 1986.

4 Respectfully submitted,

5 KENNETH O. EIKENBERRY
6 Attorney General

7 *Charles B. Roe, Jr.*
8 CHARLES B. ROE, JR.
9 Senior Assistant Attorney General

10 Attorney for Defendant, State
11 of Washington, Department of
12 Ecology

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26 ¹² RCW 43.21.130(3).