

3-14-1978

Summary of Plaintiff's Briefs

Robert D. Dellwo

Dellwo, Rudolf, & Schroeder, P.S.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

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

MAR 14 1978

UNITED STATES OF AMERICA,)
) Plaintiff,)
v.)
BARBARA J. ANDERSON et al,)
) Defendants.)

No. 3643

J. R. FALLOQUIST, Clerk
JR
Deputy

SUMMARY OF PLAINTIFF'S BRIEFS

There follows a sequential summary of Plaintiff's and Plaintiff Tribal Intervener's briefs in captioned action. This summary is filed for the assistance of the Court and of Counsel.

1. "Compendium of Case Law Relating to Indian Water Rights," January 4, 1974, by Dellwo, Rudolf & Schroeder for the Spokane Tribe, filed January 14, 1974. Furnished before trial to supply Court and Counsel with brief summaries of the various cases up to that time relating to Indian Water Rights.

2. "Statement of Legal Position by Spokane Tribe of Indians," Intervener Plaintiff, and Memorandum of Authorities in Support Thereof, filed January 14, 1974. Summarizes the various legal positions of the Tribe with appended Legal Argument summarized in the next paragraph.

3. "Memorandum of Points and Authorities in Support of the Claim of the Spokane Indian Tribe to Rights to the Use of Water of Chamokane Creek," dated January 15, 1974, filed February 11, 1974. Note: This 48-page brief, written with the assistance of William H. Veeder, was the first comprehensive brief filed in behalf of the Tribe and was in effect a trial brief, presented before trial for the assistance of the Court and of Counsel. It should be considered a current brief for the reason that, because of its length, much of the argument and research reported therein was not repeated in subsequent briefs.

4. "Plaintiff's Pre-trial Memorandum" brief of United States, filed March 4, 1974. Like No. 3 above, was the United States' trial brief. It is much shorter because it was written with the foregoing, more comprehensive brief in mind and did not purport to repeat and duplicate all the material in the trial brief.

5. "Answering Memorandum of Spokane Tribe to Motion to Dismiss," filed June 7, 1974. Purpose of this brief was to present tribal argument that Homestead Entry and its associated Land Classification did not affect the tribal title to the undisposed of lands. It further set out the argument that the so-called "Land Restoration Act of 1958" did not actually "restore" title but halted further operation of the Homestead Act.

6. "Brief of Spokane Indian Tribe," filed January 3, 1977. This was the post trial brief and written argument of the Tribe. It is noted that on its first page it referred to the foregoing briefs and memoranda and, while itself 118 pages long and quite comprehensive, purported not to repeat in detail all the citations and argument already presented in the earlier memoranda. Because of this approach, much of the brief was a discussion of the record and an analysis of the testimony and exhibits. Beginning page 86, however, is the Tribe's legal argument. The purpose of this argument was to "update" and amplify the argument already presented in No. 3 above.

7. "Brief of the United States in Support of its Claims," filed December 30, 1976, is the post trial brief of the United States. It was prepared in close collaboration and cooperation with the Tribal attorneys in No. 6 above, is a more complete legal argument and should be read in conjunction with No. 6.

8. "Reply Brief of Spokane Indian Tribe," filed July 13, 1977. Brief of Spokane Indian Tribe in reply to the Brief of State of Washington Department of Ecology dated March 25, 1977, the Brief of Washington Department of Natural Resources of the same date, and the Brief of Defendant Boise Cascade.

9. "Supplemental Brief of Spokane Indian Tribe," filed September 28, 1977. This was filed in response to the "Supplemental Brief of the State of Washington Department of Ecology," dated September 7, 1977, and to the "Reply Brief of Department of Natural Resources," of the same date.

10. Because of its current importance and relevance, there is filed with the Court and distributed to Counsel a copy of the

Order Granting Partial Summary Judgment, dated March 6, 1978, in the case of United States and Lummi Indian Tribe v. Bel Bay Community and Water Association and the State of Washington, Case No. 303 - 7102, Western District of Washington. This is filed without comment but does contain penciled notations and underlining by the writer.

Spokane, Washington, March 13, 1978.

DELLWO, RUDOLF & SCHROEDER, P.S.

By 
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

and

LUMMI INDIAN TRIBE,

Plaintiff-in-Intervention,

v.

BEL BAY COMMUNITY AND WATER
ASSOCIATION and THE STATE
OF WASHINGTON,

Defendants,

and

WALLACE Y. ARMSTRONG and VERA
F. ARMSTRONG, his wife; IRVIN
JOHNSTON and HILDUR E. JOHNSTON,
his wife; BERT CUSHNEY and
MARIE CUSHNEY, his wife; and
GOOSEBERRY POINT COMMUNITY
AND WATER ASSOCIATION, a
corporation,

Defendants-in-Intervention.

NO. 303-71C2

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT

FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington

MAR 6 1978

JOE R. ROMANE, Clerk
By *[Signature]* Deputy

Having considered the various motions for partial summary judgment filed in this cause the Court now finds and rules as follows:

1. The Court finds only the following question to be ripe for summary judgment in that no issue of material fact

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT - 1

75

1 need be resolved prior to its determination:

2 (a) Does the State of Washington have the right
3 under any circumstance to exercise juris-
4 diction over groundwater within the boundaries
5 of the Lummi Indian Reservation?
6

7 2. The non-Indian defendants, who were at one time
8 issued well permits by the State of Washington, reside on
9 land within the exterior boundaries of the Lummi Indian
10 Reservation.

11 3. Even though there is no express reservation of
12 water rights in a treaty establishing an Indian reservation,
13 there is an implied reservation of water rights sufficient
14 to accomplish the purposes of the reservation. Winters v.
15 United States, 207 U.S. 564 (1908). The doctrine of implied
16 reservation applies to groundwater as well as to surface
17 waters. Cappaert v. United States, 426 U.S. 128 (1976).

18 4. Although the State of Washington has jurisdiction
19 over water rights appurtenant to all state public lands this
20 jurisdiction does not extend to water rights appurtenant to
21 lands reserved by the federal government. Cappaert v.
22 United States, supra.

23 5. The State has expressly disavowed control over
24 Indian water rights. R.C.W. 37.12.060; Washington Constitu-
25 tion, Art. 26, § 2; Washington Enabling Act, § 4.

26 6. Waters reserved for the benefit of reservation lands
27 are governed by federal law even though certain of the
28 reservation lands have passed out of Indian ownership.
29 Tweedy v. Texas Co., 286 F. Supp. 383 (D.C. Mont. 1968).

30 7. The Court is aware of no federal statute which
31 indicates any intention on the part of Congress to confer

32 ORDER GRANTING PARTIAL
SUMMARY JUDGMENT - 2

1 upon the State of Washington jurisdiction over any water
2 rights within the boundaries of the Lummi Indian Reservation.
3 Jurisdiction must, therefore, remain in the federal govern-
4 ment. United States v. McIntire, 101 F.2d 650 (9th Cr. 1939).

5 8. Where water in excess of the needs of reservation
6 Indians is found in a stream forming one boundary of a
7 reservation, it has been held that the federal government,
8 acting through the Secretary of the Interior, has the power
9 to make an allocation of a portion of that surplus surface
10 water to non-Indians living outside the reservation
11 boundaries. After an allocation has been made by the
12 Secretary of the Interior to a number of non-Indians living
13 outside of a reservation, a state court may properly adjudi-
14 cate the relative rights of those non-Indians to that water,
15 but it has no power to make the original allocation. United
16 States v. Ahtanum Irrigation District, 236 F.2d 321 (9th
17 Cir. 1956).

18 9. The Court finds as a practical matter that if the
19 ground and surface waters within the external boundaries
20 of the Lummi Indian Reservation are to be scientifically and
21 soundly managed, that management must be concentrated in the
22 hands of a single entity. Divided authority would lead
23 inevitably to conflicting allocations and orders relative
24 to the waters. In theory, the authority could be reposed in
25 the Secretary of the Interior, in the Lummi Indian Tribe or
26 in the State of Washington. The State of Washington concedes
27 that it is powerless to make any allocation of water lying
28 below the surface of land presently under allotment to
29 members of the Lummi Indian Tribe or to determine the
30 relative rights of members of the Lummi Indian Tribe to

31 ORDER GRANTING PARTIAL
32 SUMMARY JUDGMENT - 3

1 surface or ground water found within the external boundaries
2 of the Lummi Indian Reservation. It is in consequence
3 impossible for the State of Washington to be the single entity
4 to manage and control the waters within the Lummi Indian
5 Reservation. Because that unified power of management cannot
6 be exercised by the State of Washington, it must be exercised
7 either by the Secretary of the Interior, by the Lummi Indian
8 Tribe or perhaps by the two acting together. The Court need
9 not at this time determine whether the Secretary, the Tribe,
10 or the two acting together are vested with authority to
11 manage and control the reservation waters.

12 10. The Court finds that the plaintiff is entitled to
13 partial summary judgment that the State of Washington has no
14 authority to issue permits for the appropriation of ground-
15 water within the exterior boundaries of the Lummi Indian
16 Reservation nor to manage or otherwise control groundwater or
17 the right to use groundwater within the exterior boundaries
18 of that reservation.

19 11. The Court finds that the other questions raised by
20 the various motions for summary judgment are not yet ripe
21 for disposition by way of partial summary judgment and that
22 their resolution must await the development of facts at the
23 trial of this cause on the merits.

24 Accordingly, it is ORDERED by way of partial summary
25 judgment that the State of Washington has no authority to
26 issue permits for the appropriation of groundwater within the
27 exterior boundaries of the Lummi Indian Reservation nor to
28 manage or otherwise control groundwater or the right to use
29 groundwater within the exterior boundaries of that reserva-
30 tion. All other motions for partial summary judgment

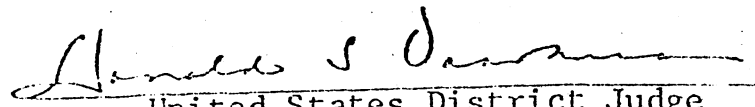
31 ORDER GRANTING PARTIAL
32 SUMMARY JUDGMENT - 4

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are DENIED.

The Clerk of this Court is instructed to send uncertified copies of this order to all counsel of record.

DATED this 31 day of March, 1978.


United States District Judge

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT - 5

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,)
 Plaintiff,) No. 3643
v.)
BARBARA J. ANDERSON et al.,)
 Defendants.)

CERTIFICATE OF SERVICE

This is to certify that on March 13, 1978, I mailed a copy of Summary of Plaintiff's Briefs submitted by the undersigned attorneys for Plaintiff-Intervener Spokane Tribe, to all parties on the attached list.

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