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Memorandum of Authorities and Fact on Behalf of Defendant State of Washington Department of Natural Resources Motion for Reconsideration of Memorandum Opinion and Order

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, SPOKANE TRIBE OF INDIANS, Plaintiff-in-Intervention, vs. BARBARA J. ANDERSON, et al, Defendants.	No. 3643 MEMORANDUM OF AUTHORITIES AND FACT ON BEHALF OF DEFENDANT STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES MOTION FOR RECONSIDERATION OF MEMORANDUM OPINION AND ORDER

The following is submitted in support of the Defendant State of Washington, Department of Natural Resources, Motion for Reconsideration of the court's Memorandum Opinion and Order previously entered herein.

STATE WATER RIGHTS

The Department submitted evidence of the use of surface water on its lands for stock water grazing. These uses have historically occurred and are evidenced by the leases submitted into evidence. The uses for such purposes have occurred since the early 1900's on the lands owned by the Department. The

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decision in effect denies a use which has been in effect for almost three-quarters of a century. See Exhibits 23 through 36 and Exhibit 67 and 68.

Evidence was also submitted that a diversion from a tributary of Chamokane Creek for use on a homesite in the southwest quarter of section 16, township 29 north, range 40 east, has occurred for domestic use lawn and garden. This homesite dates well before 1917 (Statement 1212).

The decision of the court which is based upon an interpretation of state law has not recognized any right except those granted by water certificates. This is not the law of the State of Washington.

The use of waters for stock watering purposes and the pumping for homesite lawn and garden purposes are riparian uses. The evidence indicates they occurred in the early 1900's.

Riparian rights were adopted by the State as part of the recognized water rights even though the State adopted a doctrine of prior appropriation. Benton v. Johncox (1897) 17 Wash. 277, 49 Pac. 497. Riparian owners who obtained land from the United States under homestead or other laws that are prior to appropriators had a first in right to an amount of water necessary to irrigate or use beneficially on riparian land. See Hunter Land Company v. Laugenour (1926) 140 Wash. 558, 250 Pac. 41. See also In re Alpowa Creek (1924) 129 Wash. 9, 224 Pac. 29.

In 1917 a new water code was enacted. It however specifically stated in RCW 90.03.010 that the law was not to be construed to modify riparian rights. Although contentions have been made that the 1917 water code cut off riparian rights that were not actually being put to use in 1917, no state court has so ruled. The leading case concerning this aspect is Brown v. Chase (1922) 125 Wash. 542, 217 Pac. 23. This case did away with the idea that riparian owners had a right to the undiminished flow of a

non-navigable stream. It further held that an appropriator could obtain excess waters that either directly or prospectively within a reasonable time thereafter cannot be used on riparian lands.

The Okanogan Superior Court has on two occasions ruled that the 1917 code did not cut off unused riparian rights, recognizing that the Washington court in the Brown case and in State v. American Fruit Growers (1925) 135 Wash. 156, 237 Pac. 498, did not intend to imply that 1917 was the date one determined if a potential appropriator had excess water to appropriate. That date in Brown v. Chase was the date of the application for appropriation of water. See, for various views as to when a reasonable time begins, "Washington New Water Rights Law--Improvements Needed" 44 Washington Law Review 85 (1968).

However, in this case the issue as to the effect of the 1917 code is not material since the evidence indicates that stock water has been used in the state land prior to 1917. Evidence also indicates that the homesite was established at least by 1906 in the case where withdrawals have been made by pumping directly from the tributary of Chamokane.

It is submitted that the decision is incorrect in that the state, as well as others similarly situated such as Boise Cascade, had not perfected rights to water under state law. No party has really argued to the contrary. Thus, the state should have stock water rights in addition to the right to divert for homesite purposes including the lawn and garden irrigation. It is recognized that RCW 90.14.170 has caused a loss of rights to water to irrigate on the state-owned lands, which are riparian to Chamokane, that have not been irrigated at this time. However stock water rights should be confirmed. This is especially true in light of the provisions of RCW 90.22.040 which makes it the policy to retain sufficient minimum flow to provide adequate water to satisfy stock requirements for stock on riparian lands.

The evidence shows numerous points on state land where springs and other stock watering facilities are used for the purpose of stock watering. These should be confirmed to this date. The state should be granted the amount of water it has prayed for as part of its rights regardless of the contentions as to priority and rights of reserve water rights for the Indians.

TIMBERLANDS

The state has previously argued that the Indians are not entitled to waters to irrigate those lands which have been specifically set aside for timber. This is not a question of the tribe using modern methods, it is a question that Congress has set aside specific lands for a specific reservation. They should be judged on the purpose of that reservation. This, of course, is the holding of the very recent cases in Mimbres Valley Irrigation Company v. Salopek, ____ U.S. _____, and Cappaert v. United States, 426 U.S. 128 (1976). The act of May 29, 1908, has not been amended, the trust responsibilities and the purposes for timber production have not been modified, the lands are being used for such purposes, and even though the tribe may not specifically recognize such a reservation, that is completely beyond the authority of the tribe to devote the lands to other uses. The court cannot change the reservation as required by statute. Thus, the application of Winters' rights irrigation waters to such lands is beyond the authority of the court.

The state also objects to the granting of the minimum flow for fishery purposes. It is submitted that the evidence in the case does not support the idea that the reservation was created for the purposes of trout fishery. Obviously the fishing which may have occurred in early days has now been terminated by federal activity, i.e. the building of dams. The evidence also does not indicate a use of such waters for fishing for food purposes, nor any projects or facilities which would make such

waters available for such food purposes. Furthermore, the defendant points out that in no way can waters reasonably be regulated beyond the lower falls which can be shown to have any direct causal effect on the flow. Regulation of diversions above the falls can in no way be interpreted as to when they would affect such flow and how. It is pointed out that diversions may affect winter flows which have no effect on fishery at all.

In summary, the defendant asks that the court confirm water rights to the State of Washington, Department of Natural Resources, and reconsider its position as to timber and the minimum flows for fisheries.

DATED this 30th day of July, 1979.

Respectfully submitted,

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