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

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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

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

I. ISSUE PRESENTED

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

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

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

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

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

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

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

II. BACKGROUND

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

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

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

a. Rights Confirmed By This Court.

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

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

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

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3 RCW 90.03.290 and RCW 90.44.060.

4 RCW 90.03.330 and RCW 90.44.060.

5 RCW 90.03.250 and RCW 90.44.060.

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

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

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

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

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

8 In terms of opportunities for comment on the applications, it is noted that the Department of Ecology provided this court's water master with copies of the seven applications and requested his comments on the applications. This action followed understandings reached by the parties at a meeting of the attorneys to the Pre-Trial Order. See page 2 of each 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.

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

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

> 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).
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> . . . .
>
> 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.

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

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

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

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

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

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

We now turn to that examination.

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

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

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

> The request of plaintiffs that the defendant State of Washington, Department of Ecology, be enjoined from issuing additional certificates or permits or accepting additional applications for diversion of waters of the Chamokane Creek Basin, is denied. Waters from the Chamokane Creek Basin presently appear to be over appropriated in light of the adjudication made in this Judgment, and if the State Department of Ecology permits additional persons to apply for water from the Chamokane Creek Basin it may be creating in them false hopes, but such actions by the State Department of Ecology would not cause irreparable harm to any of the parties to this litigation since any such future certificates, permits or applications would be subject to existing rights and would have no effect upon the water rights of the parties as adjudicated and determined by this Judgment. (Emphasis added.)

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

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

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

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

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

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

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

In the same paragraph, the Court continued:

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

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

> . . . in view of the hydrology and geography of the Chamokane Creek Basin, the State of Washington's interest in developing a comprehensive water program for the allocation of

> surplus waters weighs heavily in favor of permitting it to extend its regulatory authority to the excess waters, if any, of the Chamokane Basin. State permits issued for any such excess water will be subject to all preexisting rights and those preexisting rights will be protected by the federal court decree and its appointed water master. We do not believe there is any realistic infringement on tribal rights and protected affairs. If there is any intrusion, it is minimal and permissible under all of the circumstances of this case.

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

> In arguing that tribal regulatory authority over 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 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.)

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

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

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

We conclude this phase of the brief by redirecting the court's attention to this court's earlier denial (in 1979) of the Spokane Tribe's request for an injunction, directed to the Department of Ecology, prohibiting the state agency from "issuing additional certificates or permits or accepting applications for diversion of waters of the Chamokane Creek Basin . . . ."[9]

The import of the denial ruling of the court is clear. This Court left the state to administer its water code permitting program free of interference by the court. Intrusion into statutory decision-making as to permit applications was not contemplated. The approach developed by the court to assure the protection of senior priority water rights, including those of the Tribe, was through regulation of rights based on priorities, rather than through attempts by this court to second-guess the state process for establishing new rights with junior priorities. See Opinion of Ninth Circuit Court of Appeals of July 10, 1984, footnote 1, page i.

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9 See the full quote on page 9 hereof.

C. Response to Spokane Tribe of Indians' Contentions.

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

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

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

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

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

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

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

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

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

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

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

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10 See footnote 8.

11 See page 1, supra.

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

V. CONCLUSION

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

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

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

Dated: October ~~13~~ 10, 1986.

Respectfully submitted,

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12 RCW 43.21.130(3).