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Tribe's Brief Answering Brief of State 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

TRIBE'S BRIEF ANSWERING BRIEF OF STATE FIRST CAUSE OF ACTION

There follows the Tribe's closing brief in answer to the Brief of the State of Washington of October 10, 1986.

I. SUMMARY OF BASIC ISSUES.

We cannot lose sight of the basic issue in the Tribe's First Cause of Action:

> 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 this Court.

Included in this issue are the reasons why the Water Master would approve, approve with conditions, or disapprove a proposed state water use permit.

The overwhelming reason for approval or disapproval will be the existence of lack of existence of surplus or excess waters to support the proposed state

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321

applications.

The State denies that this is an issue. The bottom of Page 2 of its Brief it states:

> Likewise, the issue of the existence of so-called "excess" or "surplus" waters in the Chamokane Creek system, which is closely associated with issue (1) (note: the one quoted above) is not before this court.

The State follows this up on Page 14 as follows:

> Whether public waters, i.e. excess waters, are available for appropriation under state law is a matter for the resolution in the state quasi-judicial and judicial forums.

Each court decision has restricted the regulatory power of the state to waters in excess of the reserved Indian rights. It seems, therefore, too obvious for cavil that the Water Master, in managing the use of waters in the basin, to protect the Tribe's reserved rights must constantly determine if there are any excess waters for state permittees. His duty to monitor the existence of such waters is, therefore, an integral part of the basic issue of whether he should screen for approval applications for additional state permits.

II. STATE DOES NOT DETERMINE EXISTENCE OF "EXCESS" WATERS.

By just reading the reports of examination of the seven questioned permits it is seen that the state does not, as a condition to authorizing the permits, determine that there are "excess" waters to serve them. The state just grants all the applications and, by its letter to the writer dated October 3, 1985 (Exhibit 1 in Tribe's Opening Brief) states that it will proceed with the processing of a total of 18 pending applications.

It is common knowledge that almost every stream passing through an irrigable agricultural area is overappropriated, with state irrigation permits sometimes totalling several times the available flow of the stream.

The record of this case strongly indicates that the existing state permits have utilized all the available "excess" waters. There is a strong indication that uses by these permittees must be reduced to protect against

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the lower creek termperature breaches. Yet, the State, in the seven permit applications, goes ahead and grants them. It does not purport to follow any engineering, hydrological process to ascertain whether excess waters are available to serve the permits.

A review of the Reports of Examination for each of the seven applicants shows that each was considered individually, not as a whole, as to the effects of each on the aquifer and the flow of the creek. This is demonstrated as follows:

> In Willging, Page 4, the Report of Examination finds:
>
> Well interference calculations indicate no measurable effect upon game department springs.
>
> ...our calculations indicate a potential effect of 1.3 cfs on Chamokane Creek if the Willging well is pumped at a rate of 2000 gpm.
>
> The 168 acre feet proposed to be authorized...is considered insignificant in relation to the total quantity of water available in the basin.
>
> In McLaughlin, Page 4, the Report finds:
>
> ...our calculations indicate a potential effect of .33 cfs on Chamokane Creek if the McLaughlin well is pumped at a rate of 1000 gpm.
>
> The 210 acre feet proposed to be authorized under this application is considered insignificant in relation to the total quantity of water available in the basin. (No comment is made on effect on game dept. springs.)
>
> In Dixon, Page 4, the Report finds:
>
> ...our calculations indicate no effect on Chamokane Creek if the Dixon well is pumped at a rate of 100 gpm.
>
> The 42.6 acre feet proposed to be authorized under this application is considered insignificant in relation to the total quantity of water available in the basin. (No comment is made on effect on game dept. springs.)

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In Norris, Page 3, of Report finds:

...our calculations indicate a potential effect of 0.577 cfs on Chamokane Creek if the Norris well is pumped at a rate of 2000 gpm.

The 312 acre feet proposed to be authorized under this application is considered insignificant in relation to the total quantity of water available in the basin. (No comment is made on effect on game dept. springs.)

In Schaffner, Page 4, of Report finds:

...our calculations indicate a potential effect of 1.5 cfs on Chamokane Creek if the Schaffner well(s) are pumped at a rate of 900 gallons per minute.

The 312 acre feet proposed to be authorized under this application is considered insignificant in relation to the total quantity of water available in the basin. (No comment is made on effect on game dept. springs.)

In Sulgrove, Page 4, of Report finds:

...our calculations indicate no effect on Chamokane Creek if the Sulgrove well(s) are pumped at a rate of 750 gpm.

The 209 acre feet proposed to be authorized under this application is considered insignificant in relation to the total quantity of water available in the basin. (No comment about the game dept. springs.)

In Tellessen, Page 4, of Report finds:

The 11.4 acre feet proposed to be authorized is considered insignificant in relation to the total quantity of water available.

The DOE is, for some unknown reason, saying that, whereas the pumping of Willging, McLaughlin, Norris and Schaffner, if carried on at the rate permitted, would reduce the creek flow 3.71 cfs, the pumping in Dixon, Sulgrove and Tellessen will have no effect.

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Additionally, DOE is saying that the removal of a total of 1265 acre feet from the aquifer "is considered insignificant in relation to the total quantity of water available."

Obviously, the opposite is true. Whereas each of the permits taken separately might have little effect, all seven taken together will have a significant effect. A drop of 3.71 cfs would be a significant reduction in 24 cfs. The removal of 1265 acre feet from the aquifer would be about 1/15 of the total annual flow from the springs. This is significant.

The foregoing illustrates how the DOE, in judging the effect of the permits, judges them individually rather than as a group. The Water Master, if he has the authority to screen and approve these seven permit applications, would consider their total effect. He would find, for example, that if all seven pumped throughout the irrigation season at the rate permitted, they would cumulatively reduce the flow of the creek 6.5 cfs. He would find, however, that if they together pumped the 1265 acre feet and no more, they would diminish the flow of the springs by 1.75 cfs. He, like the writer, would be at a loss to find any validity in the figures used by the DOE. They are grossly inaccurate.

Going back to the Willging Report of Examination, the Water Master would find little basis for the various DOE computations. How can DOE divide up the basin into upper and mid basin sub surface flows and of what relevance are those figures. Whereas the report states that the present ground water discharge from the mid basin aquifer is about 16,000 acre feet per year "which includes the near constant spring flows near Ford, Washington" the more accurate figure is at least 19,000 acre feet.

Where the report states that 36,000 acre feet "leaves the basin as surface water flow," he would break that down into 19,000 acre feet coming from the springs and the balance or 17,000 acre feet leaving as surface water during the spring and early summer runoffs.

Attention is called to the letter to the undersigned from Theodore M. Olson dated October 3, 1985 attached as Exhibit 1 of the Tribe's Opening Brief. That letter brings out the true intentions of the DOE. Whereas the

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foregoing reflects the processing of the seven applications which are being currently granted, that letter lists another eleven applications which Mr. Olson says "will be processed."

The writer has analyzed those applications and they average approximately the same as the seven listed above. Assuming that they are about the same they, if granted, will in combination with the seven affect the Chamokane Creek flow proportionately more. Using our figures, which are more conservative than those of the DOE, they, in combination with these seven permits, if pumping were at the permitted limits, would reduce the flow of the creek 16.74 cfs. They would remove 3252 acre feet from the aquifer and, assuming that they keep within that limit of total amount of water removed, would reduce the flow of the creek 4.5 cfs, nearly a fifth of its dry weather flow. This is insignificant?!

III. HOW THE WATER MASTER WOULD SCREEN.

It should be obvious from the above that there is no "surplus" or "excess" water available in the Chamokane basin to support the seven permits which are being granted by the DOE. The Water Master in screening these seven permits would not, however, disapprove all of them. The writer, having consulted at length with the Water Master, predicts that he would process them somewhat as follows:

He would grant all of them the right to pump 10 gpm for domestic and stock watering use. This would amount to a maximum withdrawal of about 10 acre feet per year.

He would likely approve the applications of Dixon and Tellessen because of their remoteness from the major springs and the small amounts applied for.

As for the others, he could authorize each to pump directly from the upper creek during the late spring and early summer as long as it had a surface flow that would otherwise be wasted and would, in joining the lower creek, increase its temperature.

As to any permit for a well located from 2 to 4 miles from the major springs, he could approve them in full for the reason that the effect of the withdrawal from that distance would likely reach the springs during the winter

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months before the spring recharge period.

The Water Master could add other conditions. For example, in an individual case he could rule that the applicant could remove so much water from the aquifer if he would during the off season surface flow period conduct or hold water in recharge basins so that, by that means, the permittee would be adding approximately as much water to the aquifer as he was to later remove. This recharge could consist of early flood irrigation in which most of the water would sink into the aquifer.

The foregoing illustrates why it is actually in the interest of the applicants that the Water Master screen their applications. If he is not allowed to do so and the applications are granted carte blanche in accordance with the FINDINGS OF FACT AND ORDERS and the Reports of Examination, they are granted in gross, without conditions. Faced with such granted permits, the Water Master would have little alternative but to nullify all of them. On the other hand, if he screens them for approval, he could approve them with conditions such as those outlined above.

IV. WHO IS TO DETERMINE EXISTENCE OF SURPLUS OR EXCESS WATERS.

As each court has held, the State may regulate the use only of excess or surplus waters. The 9th Circuit put it best on Page 14 of its slip opinion when it said:

> 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.

Who is to determine if there is any excess or surplus water? The State's position herein that that question is not even before this court. It contends that it can assume the existence of surplus water and go ahead and grant a series of permits without any formal investigation to determine if there is actually any surplus water to effectuate the permits. That this is its position is illustrated in the FINDINGS and Reports of Examinations of the seven questioned permits. In no instance does the DOE make any finding as to excess or surplus water. It just repetitively says that each permit, taken individually, is "insignificant" in relation to the total quantity of water,

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and grants the permit notwithstanding that by its own figures each permit will proportionately reduce the flow of the creek.

What is excess or surplus water is a matter of definition. That definition must be adduced by a close study of the court orders herein and the findings of the Water Master as to the developing history of the creek and its aquifer. The following is a suggested definition:

> Excess water is aquifer or creek water in excess of the amount necessary to guarantee that the minimum flow of the lower creek will not drop below 20 cfs or below a sufficient creek flow above 20 cfs to prevent the summer time temperatures of the lower creek to exceed 68 degrees F.

The Water Master reports show that the 68 degree maximum is regularly breached even with summer time flows in excess of 24 cfs.

Is there any excess or surplus water?

The answer is NO as to gross permits such as the seven questioned ones being granted by the DOE.

The answer is a qualified yes if the Water Master is authorized to screen these permits for approval with limitations and conditions as outlined above.

While the four court decisions herein are silent as to this authority on the part of the Water Master, is it not strongly implied just by the simple logic of the case?

Each of the Reports of Examination report on and summarize the decisions of the courts herein (albeit with a high degree of bias and inaccuracy). Each contains the following statements:

> The federal court has quantified the extent of the Tribe's rights in its decree, United States v. Barbara J. Anderson, et al. The State recognizes the Tribe's rights, as set forth in the decree, and all state rights issued subsequent to this decree are junior in priority to the rights of the Tribe.
>
> and
>
> It is the intent of the DOE to comply with the surface and ground water codes and with the judgments of the

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court which confirmed the right of the State of Washington to allocate surplus waters in the Chamokane Basin.

and

In all cases, water rights developed and consummated under these applications will be subject to the state's basic water law tenant (sic); first in time, first in right.

and

Any right perfected by development under this authorization is subject to regulation by the Water Master appointed by the Eastern District Federal Court, in accordance and in compliance with the court decree.

and

This authorization to make use of public waters of the state is subject to existing rights, including any existing rights held by the U.S. for the benefit of Indians under treaty or otherwise.

There is no finding that any surplus waters exist.

The plain implication is that the state will issue many permits, each "insignificant" in relation to the quantity of Chamokane water involved, and each junior to all earlier permits including the tribal rights.

We do not find any willingness of the state to issue permits only as to quantified excess or surplus waters. The state contends that the Tribe is adequately protected by the fact that these permits will be junior to the tribal rights and that the Water Master may regulate them in accordance with the minimum flow and maximum temperature strictures of the Case.

A water right is a valuable resource and in a dry land country becomes more valuable than the land itself. The state permittees will spend thousands of dollars in developing and utilizing their "rights". They will not respond to any simple order of the Water Master to reduce or eliminate their water uses. If these seven permits are issued as planned by the State, this court will be presiding over litigation concerning them ten years from now at a cost of tens of thousands of dollars to the Tribe and the U.S., not to mention the

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costs to the permittees.

Upon acceptance of the permit and conditions, the permittee may then construct the project and put the water to beneficial use in accordance with the terms of the permit. After the water has been put to beneficial use, the permittee is then entitled to a water right certificate.

The foregoing is in conformity with RCW 90.03.320, the "use it or lose it" statute which requires that a permittee, as a condition to receiving a certificate, must develop his irrigation works and put the water to beneficial use within a reasonable time or be subject to a cancellation of his permit.

A state permittee in the Chamokane Basin will be impelled to put his permit to use at great expense and he will fight for that permit if it is challenged by the Water Master.

V. CONCLUSION

Let us restate the State's conclusion in its Brief. The state contends in its conclusion that the approval of the seven questioned applications do not in any way threaten the priority water rights of the Tribe because the Water Master and the State will "regulate (them) in accordance with existing rights."

All of the state permits that were the subject of this lawsuit from the beginning contained words to the effect that they were "subject to prior rights." This did not deter the state from issuing the permits or from spending these last 14 years in litigation to protect them. The same will be true of these seven permits and the additional eleven that will be processed. The state will issue them without regard to whether there is any water at all to serve them, leaving it to the Water Master to challenge, to limit or to nullify them. The "screening" by the Water Master, according to the state, will come after the permits are granted rather than before.

Whereas, the existing court Orders only imply this screening authority of the Water Master, this court should now clarify that it exists.

DATED this 23rd day of October, 1986.

Respectfully submitted,

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