

9-7-1977

Reply Brief of the Department of Natural Resources

J. Lawrence Coniff, Jr.

Assistant Attorney General, Attorneys for Department of Natural Resources

Slade Gorton

Attorney General

Follow this and additional works at: <https://digitalcommons.law.uidaho.edu/all>

Recommended Citation

Coniff, Jr., J. Lawrence and Gorton, Slade, "Reply Brief of the Department of Natural Resources" (1977). *Hedden-Nicely Collection, All*. 262.

<https://digitalcommons.law.uidaho.edu/all/262>

This Brief is brought to you for free and open access by the Hedden-Nicely at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Hedden-Nicely Collection, All by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33

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

SEP 8 1977

J. R. FALLOQUIST, Clerk
Deputy

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,)
)
) Plaintiff,)
)
) v.)
)
) BARBARA J. & JAMES ANDERSON,)
) et al.,)
)
) DEFENDANTS.)

CIVIL NO. 3643

REPLY BRIEF OF
THE DEPARTMENT OF NATURAL RESOURCES

156
3

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF WASHINGTON

3 UNITED STATES OF AMERICA,)

4 Plaintiff,)

5 v.)

6 BARBARA J. & JAMES ANDERSON,)
7 et al.,)

8 Defendants.)

CIVIL NO. 3643

9
10 REPLY BRIEF OF THE DEPARTMENT
OF NATURAL RESOURCES

11 I. INTRODUCTION.

12 Natural Resources desires to respond to legal arguments injected
13 by the Government's Reply Brief.¹ Our arguments are limited to new
14 issues raised in response to our Opening Brief.²

15
16 SLADE GORTON
17 ATTORNEY GENERAL

18
19 J. LAWRENCE CONIFF, JR.
20 Assistant Attorney General
21 Attorneys for Department of
22 Natural Resources
23 310 Public Lands Building
24 Olympia, Washington 98504
25 (206) 753-5318

26 ¹ The Spokane Tribe's Reply Brief does not raise new legal issues
27 and will, therefore, be dealt with in a peripheral manner -- where
relevant.

² The Government's characterization of our arguments invite an "in
kind" response. (Eg: U.S. Br. p. 19 & p. 25, "absurd"; U.S. Br.
p. 2, "incredible", etc.) We decline.

1 Three subjects will be discussed. They are: (1) the effect of
2 the Indian Claims Commission award, (2) the scope of the "Winter's"
3 Doctrine, and (3) the date of priority for any "reserved" water
4 rights in favor of the Spokane Tribe of Indians. These subjects will
5 be discussed seriatum.

6
7 II. THE EFFECT OF THE INDIAN CLAIMS COMMISSION AWARD.

8 The Government seeks to avoid resolution on the merits of the
9 issue submitted by Natural Resources by arguing that Rule 8(c) F.R.C.P.
10 precludes its consideration.³ As previously noted, the award of
11 \$6,700,000.00 to the Spokane Tribe by the Indian Claims Commission
12 included the value of waters arising or located on lands over which
13 the Indians held aboriginal title.⁴ The purpose of this lawsuit,
14 filed by the Government on behalf of the Spokane Tribe, is "to
15 adjudicate the rights in and to the waters of Chamokane Creek and
16 its tributaries."⁵

17 The arguments raised by Natural Resources are two-fold. The
18 leading prong of our argument is jurisdictional. Simply put, it
19 is that the appropriation and beneficial use of waters, under state
20 law, by citizens in the Chamokane Basin may be an impairment of
21 otherwise impliedly reserved water rights. A lawsuit for vindication
22 of these rights should be properly filed with the Indian Claims
23 Commission which possesses exclusive jurisdiction to hear and
24 determine such matters. In fact the Commission's jurisdiction was
25 invoked by the Spokane Tribe and a judgment entered in their favor
26 which included the value of waters arising or located outside
27 reservation boundaries.⁶ It is hornbook law that jurisdictional

28
29 ³ U.S. Reply Br., p. 33

30 ⁴ Nat. Res. Opening Br., pp. 3 - 15.

31 ⁵ U.S. Opening Br., p. 1

32 ⁶ Nat. Res. Opening Br., pp. 13 - 15, and Appendices attached.

1 issues may be raised at any stage of a judicial proceeding and that
2 they need not be pled.

3 The anterior prong of our argument is that the fact of payment
4 to the tune of \$6,700,000.00 to the Spokane Tribe of Indians, which
5 includes the natural resource values of the lands aboriginally held,
6 is a factor which should be considered in limiting the scope of any
7 impliedly reserved water rights. In a case such as this, where such
8 broad relief is sought,⁷ all factors may properly be considered by
9 the court in ascertainment of the amounts of water actually impliedly
10 reserved by virtue of creation of the Spokane Indian Reservation.
11 This is the very point of the lawsuit. Natural Resources does not
12 contend that all water rights were paid for or destroyed by payment
13 of \$6,700,000.00 to the Spokane Tribe. We contend that the legal
14 ability of the tribe to enjoin beneficial use of water outside
15 reservation boundaries for non-agricultural purposes has been lost
16 to the extent claimed by plaintiff. To illustrate, assume that the
17 area over which the Spokane Tribe held aboriginal title is three
18 times the size of their present reservation. Also assume that
19 water is equally and economically beneficially used over the entire
20 aboriginal area. Thus:

21

22 A - 1 unit of water	B - 1 unit of water
24 C - 1 unit of water	D - 1 unit of water (Reservation)

26

27 Natural Resources submits that, under this illustration, it is
28 unfair to give the Indians more than D with 1 unit of water, leaving
29 off-reservation areas A, B and C without any right to use water.

30

31 ⁷ The Spokane Tribe's Reply Br., p. 21, makes the point that mere
32 passage of a tribal resolution declaring the entire natural stream
33 reserved for recreation and aesthetic reasons totally precludes any
citizen's beneficial use of ground or surface waters in Chamokane
Basin pursuant to state law.

1 The fact that the Indians were paid for areas A, B and C (over which
2 they formerly held aboriginal title) including the value of the 3
3 units of water arising on them is clearly relevant to the Government's
4 claim to 4 units of water for reservation area D. This may properly
5 be considered by the court in mitigation of said claim.

6 Under the illustration set out, if there were only 2 units of
7 water available for the four parcels, the result should be 5 units
8 of water available for each of parcels A, B, C and D. Such an al-
9 location recognizes the right of the reservation Indians to share
10 equally in the water (for actual agricultural uses) but does not
11 discriminate against off-reservation non-Indian landowners. This
12 result would take into account the factor mentioned, i.e., the
13 Indian Claims Commission award and yet defines and reserves in
14 favor of the Spokane Tribe a proportionate and vested right to
15 share in the beneficial use of available water. The result con-
16 tended for by the Tribe and the Government ignores the factor of
17 the award -- and its basis -- in the relief they seek. Natural
18 Resources submits that the Indian Claims Commission judgment is a
19 valid factor to consider when fashioning relief appropriate to the
20 circumstances of this case. Rule 8(c) F.R.C.P. should not be mis-
21 construed to dis-allow this important factor from the court's
22 consideration.⁸

23 The Government, beyond its Rule 8(c) avoidance argument, also
24 doubts whether the findings of fact entered by the Indian Claims
25 Commission "can be used by a non-party to bind either the government
26 or the tribe."⁹ No citation of authority is offered in support of
27 this novel proposition and, to this writer's knowlege, none is
28 available to support it. Basic historical facts concerning the
29

30 ⁸ References to the basic statutes, legislative history and case
31 law on these points are set forth in Natural Resources Opening Brief
and will not be re-iterated here. See: pp. 8 - 11 and pp. 13 - 15.

32 ⁹ U.S. Reply Br., p. 35

1 Spokane Tribe and their dealings with the United States should not
2 be altered at convenience of a party to litigation -- even if that
3 party is the Government, itself. The "revisionist" school of history
4 has no place in this litigation.¹⁰

5
6 III. THE SCOPE OF THE "WINTERS" DOCTRINE.

7 In the outstanding analysis of Indian law by Felix S. Cohen,
8 Winters v. United States, 207 U.S. 564 (1908) is described:

9 "The Winters decision effects a prohibition against the
10 diversion of water from a stream above and outside the
11 reservation insofar as such division deprives the tribe
12 of water necessary for the irrigation of tribal lands."
13 Handbook of Federal Indian Law, Dept. of Interior, 1942
14 (Original reprinted by U. of New Mex. Press)

15 Cohen discusses the judicial progeny of Winters, circa, 1941
16 and concludes that the extent of the impliedly reserved water right
17 is to irrigate lands actually cultivated and in use or to the extent
18 reasonably necessary to supply the needs of the Indians in their
19 agricultural pursuits. Handbook, supra, pages 316 - 319.

20 As of 1941, the decisional law¹¹ (as reviewed by Cohen) did
21 not provide a basis for concluding that Indian reserved water rights
22 were for any purpose other than irrigation. Thus the Government
23 (and the Spokane Tribe) must look to recent judicial opinions to
24 provide the necessary theoretical underpinning to their claims in
25 the instant case.

26 The Government's prime reliance is upon two decisions subsequent
27 to 1941. Cappaert v. United States, 426 U.S. 128 (1976) and Arizona

28
29 ¹⁰An example is the alleged historical dependence of the Tribe
30 upon fish in Chamokane Creek. Another is the assertion of a water
31 right priority date of "time immemorial". (U.S. Opening Br., p. 16
32 and p. 39)

33
¹¹ The decisions subsequent to Winters reviewed by Cohen include:
34 United States v. Powers, 305 U.S. 527 (1939); United States v.
35 McIntire, 101 F.2d 650 (9th Cir. 1939); United States v. Parkins,
36 18 F.2d 643 (D.Wyo. 1926); Anderson v. Spear-Morgan Livestock Co.,
37 79 P.2d 667 (Mont. 1938); Conrad Inv. Co. v. United States, 161 Fed.
38 829 (9th Cir. 1908); Skeem v. United States, 273 Fed. 93 (9th Cir.
39 1921); Walker River Irr. Co. v. United States, 104 F.2d 334 (9th
40 Cir. 1939).

1 v. California, 373 U.S. 546 (1963). Neither decision overturns
2 Cohen's conclusion or supports an extension of the Winters rationale
3 beyond irrigation purposes.

4 Cappaert, supra, supports only the following proposition:

5 "The implied reservation of water doctrine, however,
6 reserves only that amount of water necessary to fulfill the
purpose of the reservation, no more." (426 U.S. at 141)

7 Cappaert, supra, does not extend the Winters implied right beyond
8 agricultural pursuits.

9 Arizona v. California, supra, was a complete river adjudication
10 between various states, federal agencies, Indian tribes and private
11 parties. The Court expressly approved the findings of Special Master
12 Simon Rifkind. Among the issues resolved by the Special Master was
13 the extent of water rights reserved to several Indian tribal claimants.

14 "I hold only that the amount of water reserved, and hence the
15 magnitude of the water rights created, is determined by
16 agricultural and related requirements, since when the water
was reserved that was the purpose of the reservation."
17 Report of Special Master, Arizona v. California, at page
265.

18 To sum up, Natural Resources submits that none of the decisions
19 interpreting and implimenting the implied Winters water right go as
20 far as the Government and the Spokane Tribe are asking this court
21 to go. There is no support in stare decisis for the position that
22 a Winters right encompasses water reserved for recreational,
23 aesthetic or cultural purposes.

24 Our opening brief sets forth Natural Resources position on the
25 issues of:

26 (a) failure of proof of entitlement to particular irrigable
27 acreages (Opening Br., pp. 31 - 36)

28 (b) alienated lands are not entitled to reserved water
29 rights (pp. 25 - 29)

30 (c) Congressional classification of lands for timber
31 production supercedes any "implied" water right for
32 agricultural purposes (pp. 29 - 31)

33 Those arguments will not be rehashed except to point out that neither

1 the Government nor the Tribe has satisfactorily answered them.

2 One minor point remains. At page 42 of its Reply Brief, the
3 Government seems to take the position that repurchase of alienated
4 land within the reservation somehow reverts it with a Winters type
5 of water right with its original priority. No authority is cited
6 for this proposition. United States v. Hibner, 27 F.2d 909 (D.Ida.
7 1928) is the complete answer to this contention.¹²

8
9 IV. THE PRIORITY FOR ANY WINTERS' WATER RIGHT ON THE SPOKANE
RESERVATION IS JANUARY 18, 1881.

10 Natural Resources maintains that, until some formal action is
11 taken by either the Executive or Congress, no basis exists for
12 establishing a priority date for impliedly reserved water rights.
13 Northern Pac. Ry. v. Wismer, 246 U.S. 283 (1918) was decided upon
14 stipulated and incomplete facts.¹³ We submit that Spokane Tribe v.
15 United States, 9 Ind. Cl. Comm. 236, 240-245 (1961) accurately sets
16 out the historical facts. The Spokane Reservation was created by
17 Executive Order on January 18, 1881. That is the priority date for
18 Winters water rights. This was the method used by Special Master
19 Simon Rifkind in Arizona v. California, supra, which was approved
20 by the Supreme Court. For example, the Chemehuevi Indian Reservation
21 was created by an order of withdrawal from entry made by the Secretary
22 of Interior dated February 2, 1907. That date is the priority.
23 (Master's Report, page 267). The Cocopah Indian Reservation was
24 established by an Executive Order of September 27, 1917. That date
25 is the priority. (Master's Report, pages 267 - 268). Similar
26 priorities were established for the Yuma Reservation, Colorado River
27 Reservation, Fort Mohave Reservation, and for national forests,
28 recreation areas, parks, memorials, monuments and lands administered
29 by the Bureau of Land Management. (Master's Report, pages 268 - 304).

30
31 ¹² We cover this point at pages 28 - 29 of our Opening Brief.

32 ¹³ Obviously, we don't agree with Government that this contention
33 is "absurd". U.S. Reply Br. at p. 25.

1 The priority date for the Spokane Reservation should be January
2 18, 1881.

3
4 V. CONCLUSION.

5 Natural Resources stands by its recommendation that this court
6 "apply sound legal concepts and precedent to the resolution of the
7 questions presented herein". We do not share the Government's view
8 that such a recommendation is a professional "discredit".¹⁴

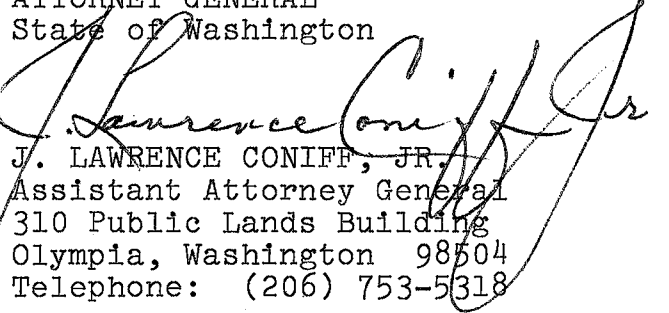
9 "Federal Indian law does exhibit a systematic inter-
10 connectedness of parts, but to discover and define the
11 common standards, principles, concepts, and modes of
12 analysis that run through this massive body of statutes
and decisions is an analytical task of the first order."
(Forward by Nathan R. Margold, Solicitor General, 1940,
Handbook of Federal Indian Law, U. of New Mexico Reprint.)

13 We submit that such a task requires the application of sound
14 legal concepts and precedent to the facts of this case.

15 DATED this 7th day of September, 1977.

16 Respectfully submitted,

17 SLADE GORTON
18 ATTORNEY GENERAL
State of Washington

19 
20 J. LAWRENCE CONIFF, JR.
21 Assistant Attorney General
22 310 Public Lands Building
Olympia, Washington 98504
23 Telephone: (206) 753-5318

32 _____
33 ¹⁴ U.S. Reply Br., pages 60 - 61.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

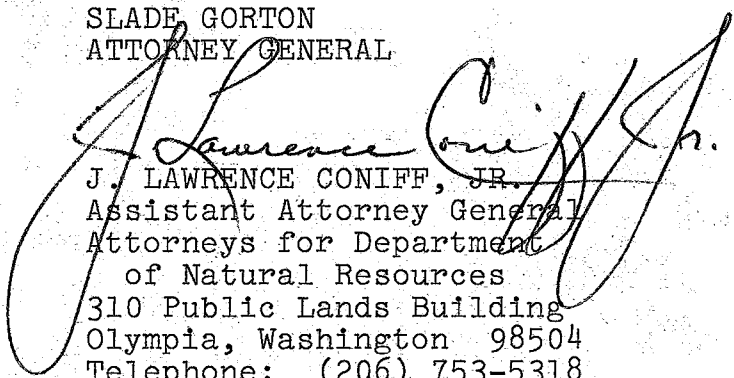
UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
BARBARA J. & JAMES ANDERSON,)
et al.,)
)
Defendants.)

CIVIL NO. 3643

CERTIFICATE OF SERVICE

This is to certify that on the 7th day of September, 1977, I mailed a copy of the Reply Brief of the Department of Natural Resources to all parties on the attached list.

SLADE GORTON
ATTORNEY GENERAL


J. LAWRENCE CONIFF, JR.
Assistant Attorney General
Attorneys for Department
of Natural Resources
310 Public Lands Building
Olympia, Washington 98504
Telephone: (206) 753-5318

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33

ROBERT S. LINNELL
Acting United States Attorney
JAMES B. CRUM
Assistant United States Attorney
851 United States Courthouse
Box 1494
Spokane, Washington 99210

ROBERT DELLWO
KERMIT RUDOLPH
Attorneys at Law
1016 Old National Bank Building
Spokane, Washington 99201

WILLARD ZELLMER
PATRICK CERUTTI
Attorneys at Law
555 Lincoln Building
Spokane, Washington 99201

CHARLES ROE
Assistant Attorney General
Department of Ecology
Olympia, Washington 98504

ROBERT McNICHOLS
Attorney at Law
Fifth Floor, Spokane & Eastern Building
Spokane, Washington 99201

JOHN McRAE
Attorney at Law
911 West Sprague Avenue
Spokane, Washington 99204

FRED N. and RUTH M. STAHL
202 Mt. View Drive
Pullman, Washington 99163

KENNETH and ELIZABETH SWIGER
P. O. Box 706
Ford, Washington 99013

LEONARD E. LYONS
P. O. Box 84
Springdale, Washington 99173

JOHN F. CAMPBELL
Attorney at Law
1306 Washington Mutal Bank Building
Spokane, Washington 99201

LAWRENCE L. TRACY
Attorney at Law
Ries & Kenison
P. O. Drawer 610
Moses Lake, Washington 98837

JOSEPH J. REKOFKE
Attorney at Law
Fifth Floor, Spokane & Eastern Building
Spokane, Washington 99201

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33

MICHAEL R. THORP
Attorney, U.S. Department of Justice
Land and Natural Resources Division
10th and Pennsylvania Avenue, N.W.
Washington, D. C. 20530