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Letter to the Court from Dellwo, Rudolf & Schroeder, P.S.

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July 19, 1978

Honorable Marshall A. Neill
United States District Court
Eastern District of Washington
938 United States Courthouse
Spokane, WA 99210

Re: United States et al v. Anderson et al
Civil No. 3643, USDC, E.D. WASH.

Comment re New Mexico and California Cases

Dear Judge Neill:

Attorneys for the United States and the State of Washington have mailed you their commentary regarding the above recent U. S. Supreme Court decisions. While we as attorneys for the Spokane Tribe agree with the comments of Michael R. Thorp in behalf of the United States, we would like to add the following:

Comment re California v. U.S.

While the attorney for the State of Washington would like to parlay this decision into authority for his contentions respecting State jurisdiction over water rights on the Reservation, the distinctions are obvious.

The Reclamation Act of 1902, which is the Act in issue, provides as follows:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribtution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. 43 USCA 383

(185)

The Bureau of Reclamation always interpreted this statute as requiring it to apply for permits to the various states in its water and hydroelectric projects. The only question was to what extent the states could append conditions.

The writer agrees with the decision of the Supreme Court that the foregoing statute would make little sense if the states had no jurisdiction or power other than to just issue permits upon request.

It is notable that the Bureau of Reclamation did obtain a permit from the State of Washington for the water utilized in the fish hatchery on the Chamokane.

It is obvious that the Supreme Court's decision is based on the foregoing statute. The implication is that had the statute not existed, as it does not exist respecting any Indian Reservation, the Court would have held the opposite.

Comment re U.S. v. New Mexico

One cannot fault the Supreme Court in this case in its definition of "reserved water rights," reserved to fulfill the "purposes" for which the Gila National Forest was set aside. The problem is in its finding that those purposes included only the preservation of timber and the securing of favorable water flows.

Had it found, as it undoubtedly would find in the Chamokane case, broad purposes of esthetics, recreation, fishery, agriculture and quality of living, it would have found the reserved water rights to sustain those purposes.

Again, as in the California case, we have a number of specific statutes relating to the national forests supporting the Court's conclusions. A different set of purposes and its decision would have been different.

For example, on page 13 the Court says:

> Any doubt as to the relatively narrow purposes for which national forests were to be reserved is removed by comparing the broader language Congress used to authorize the establishment of national parks. In 1916, Congress created the National Park Service and provided that the
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> > "Fundamental purpose of said parks, monuments and reservations . . . is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same . . . unimpaired for the enjoyment of future generations." . . .

Additionally, the Court cites the Act of 1960 which broadened the purposes of national forests but indicated that while those purposes would control in the future they could not be applied retroactively.

Thus, there is no question that, given the broad purposes of the Act of 1960, or the quoted National Parks Act, the decision of the Court would have been the opposite.

Certainly, there is no question that the "purposes" of the Spokane Reservation included everything set out in the National Parks Act and much more.

Respectfully submitted,

SPOKANE INDIAN TRIBE
Intervener-Plaintiff

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By Robert D. Dellwo

RDD:fb