

8-1-1979

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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Recommended Citation

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

AUG 1 1979

J. R. FALLOQUIST, Clerk
[Signature] Deputy

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WASHINGTON

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

10
11 The following is submitted in support of the Defendant
12 State of Washington, Department of Natural Resources, Motion
13 for Reconsideration of the court's Memorandum Opinion and Order
14 previously entered herein.

15 STATE WATER RIGHTS

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

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Memo. of Authorities - One

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

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

9 The decision of the court which is based upon an interpret-
10 ation of state law has not recognized any right except those
11 granted by water certificates. This is not the law of the State
12 of Washington.

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

16 Riparian rights were adopted by the State as part of the
17 recognized water rights even though the State adopted a doctrine
18 of prior appropriation. Benton v. Johncox (1897) 17 Wash. 277,
19 49 Pac. 497. Riparian owners who obtained land from the United
20 States under homestead or other laws that are prior to appropriators
21 had a first in right to an amount of water necessary to irrigate
22 or use beneficially on riparian land. See Hunter Land Company v.
23 Laugenour (1926) 140 Wash. 558, 250 Pac. 41. See also In re Alpowa
24 Creek (1924) 129 Wash. 9, 224 Pac. 29.

25 In 1917 a new water code was enacted. It however specifically
26 stated in RCW 90.03.010 that the law was not to be construed to
27 modify riparian rights. Although contentions have been made that
28 the 1917 water code cut off riparian rights that were not actually
29 being put to use in 1917, no state court has so ruled. The
30 leading case concerning this aspect is Brown v. Chase (1922)
31 125 Wash. 542, 217 Pac. 23. This case did away with the idea
32 that riparian owners had a right to the undiminished flow of a
33 Memo. of Authorities - Two

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

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

14 However, in this case the issue as to the effect of the
15 1917 code is not material since the evidence indicates that stock
16 water has been used in the state land prior to 1917. Evidence
17 also indicates that the homesite was established at least by
18 1906 in the case where withdrawals have been made by pumping
19 directly from the tributary of Chamokane.

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

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

7 TIMBERLANDS

8 The state has previously argued that the Indians are not
9 entitled to waters to irrigate those lands which have been
10 specifically set aside for timber. This is not a question of the
11 tribe using modern methods, it is a question that Congress has
12 set aside specific lands for a specific reservation. They should
13 be judged on the purpose of that reservation. This, of course,
14 is the holding of the very recent cases in Mimbres Valley Irrigation
15 Company v. Salopek, ____ U.S. _____, and Cappaert v. United States,
16 426 U.S. 128 (1976). The act of May 29, 1908, has not been
17 amended, the trust responsibilities and the purposes for timber
18 production have not been modified, the lands are being used for
19 such purposes, and even though the tribe may not specifically
20 recognize such a reservation, that is completely beyond the
21 authority of the tribe to devote the lands to other uses. The
22 court cannot change the reservation as required by statute. Thus,
23 the application of Winters' rights irrigation waters to such
24 lands is beyond the authority of the court.

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

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

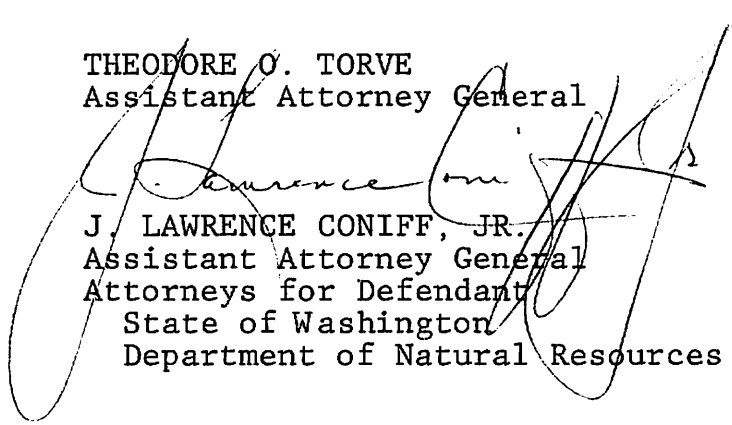
8 In summary, the defendant asks that the court confirm
9 water rights to the State of Washington, Department of Natural
10 Resources, and reconsider its position as to timber and the
11 minimum flows for fisheries.

12 DATED this th 30 day of July, 1979.

13 Respectfully submitted,

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