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Tribe's Response to States Motion for Reconsideration

Robert D. Dellwo

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AUG 10 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

J. R. FALLQUIST, Clerk
[Signature] Deputy

UNITED STATES OF AMERICA,)
Plaintiff,)
SPOKANE TRIBE OF INDIANS,) No. 3643
Plaintiff-in-Intervention,) TRIBE'S RESPONSE TO STATE'S
vs) MOTION FOR RECONSIDERATION
BARBARA J. ANDERSON, et al.,)
Defendants.)

The Spokane Tribe of Indians, through its attorneys, the undersigned, makes the following response to the Motion for Reconsideration of Memorandum Opinion and Order filed by Assistant Attorney General for the State of Washington, Theodore O. Torve, on August 1, 1979.

Said Motion should be denied because it raises no new issue of law and fact not already pleaded, litigated, briefed and argued in detail in the case in chief.

Further, said Motion is not timely being more in the nature of a motion for reconsideration or new trial properly considered after the formal entry of judgment.

This Response is based on the attached Memorandum Argument of Robert D. Dellwo, attorney for the Spokane Tribe of Indians.

Dated this 9th day of August, 1979.

DELLWO, RUDOLF & SCHROEDER, P.S.

By

[Signature]
Robert D. Dellwo

[Signature]
Kermit M. Rudolf

Attorneys for the Spokane Tribe

MEMORANDUM ARGUMENT

Defendant State of Washington, Department of Natural Resources, argues that the Court erred in failing to recognize its rights to water in the Basin, in finding that Tribal lands formerly classified as timber and grazing land had any reserved water rights and in granting a minimum flow of 20 CFS "because of a found reserve right to fish for food" which it contends is "contrary to law and is not supported by the evidence."

STATE WATER RIGHTS

The Court stated (page 12): "The Court finds that water claims of two defendants have not been perfected under State law. The claims of the Washington State Department of Natural Resources are not perfected, nor are those of Boise Cascade . . ."

The Department of Natural Resources, in claiming that this finding is erroneous, repeats its arguments and contentions previously advanced by it in its various pleadings and briefs and thoroughly considered and litigated and argued by Plaintiffs, the Department of Ecology, the Department of Natural Resources, and by the Court.

There follows a summary of the file record of the State's claims:

Department of Natural Resource's Answer. Alleges Section XVI that "the granting of lands to the State of Washington from the United States . . . carried with it full rights to the use of waters on or riparian to such lands sufficient for the needs for the full enjoyment and utilization of such lands . . ." (What has been referred to as a "Little Winters Right.")

Department of Natural Resource's Answer to Amended Complaint. Alleges Section III that the State may own one or more sections lying within the Reservation, namely Sections 16 and 36 of each township and "That the granting of such lands carried with it full rights to the use of waters on or riparian thereto," etc.

Findings of Fact Proposed by Department of Natural Resources. Proposes findings of minimal stockwatering and domestic uses of water on State lands within the watershed including a finding that the water usage on Department of Natural

Resources' lands "has a de minimus effect on the waters within the . . . basin" and that "such use occurred prior to the adjudication and 1917."

Brief of Natural Resources in Opposition to Plaintiffs' Opening Briefs. Consists primarily of an answer to Plaintiffs' Briefs. Page 36, Department of Natural Resources briefly puts forward its theory that its water rights for State lands are analogous to the Tribe's Winters Right with a priority date of 1889 (the date of statehood). It also expressed its theory that "Natural Resources' right to use water is also based on riparian usage of waters flowing through our lands . . ."

Response of State Department of Ecology to Claims by Department of Natural Resources. One would think that the Department of Ecology, the primary "water rights arm" of the State of Washington, would support Department of Natural Resources in its claims and views. Such is not the case. There follows the documentation of its reaction to Department of Natural Resources:

The Answer of Department of Ecology ignores the claims of Department of Natural Resources.

The Findings of Fact, etc. proposed by Department of Ecology not only do not contain any wording recognizing any water rights held by Department of Natural Resources in behalf of State lands but states (page 30): "Claims by the defendant Department of Natural Resources, State of Washington, based on a State 'reserved rights' concept, should be rejected."

The opening Brief of Department of Ecology acknowledges (page 5) that Department of Natural Resources is represented as an Administrator of State owned lands in the drainage area and claims interests in the Creek. It makes no further reference to Department of Natural Resources' claims.

Department of Ecology, in its Supplemental Brief, page 42, deals specifically with the claims of Department of Natural Resources on page 42. It outlines the claims of Department of Natural Resources that on statehood the State received certain lands with their own "Little Winters Rights." The Department of Ecology Brief says: "We are not persuaded." The Department of Ecology then argues that as these lands passed to the States "Only land was transferred . . . No water rights were involved" and that any water rights . . . "were to be established pursuant to State law." and that "there were no federal water rights such as federal reserved rights transferred." The Department of Ecology concluded: "On this basis, assuming the correctness of our interpretation of the very sketchy statement of analysis provided in the Brief of Department of Natural Resources in support of its claim, the claim of a "Little Winters right should be denied."

DEPARTMENT OF NATURAL RESOURCES
IS GOVERNED BY STATE LAW

Neither the State nor Department of Natural Resources, Its Administrator, has made any effort to perfect the water rights claims it has for State lands in the Chamokane Basin. Department of Natural Resources makes no contention that it has complied with State law. This is the reason it relies on its novel theories of riparian and "Little Winters Rights."

Department of Natural Resources is governed just as any landowner by the requirements of RCW 90.16.010 for the appropriation of water in the State of Washington. It has made no such appropriation. The State has argued repeatedly that Federal reserved rights, including those of Indian Tribes, should be quantified and made known. It would seem that the State itself would follow its own laws with regard to the quantification of its claimed rights.

Department of Natural Resources seems to have a hopeless task to exempt itself from the purview of RCW 90.14. This is the Act of 1967 requiring all persons who might have unregistered pre-1917 or riparian rights to register them. Notices of this Act were sent to every taxpayer.

RCW 90.14.020 points out the need for such registration because of the "extensive uncertainty" existing as to the various claims.

RCW 90.14.030 Definitions includes ". . . a state agency, and the United States of America . . ." as being included in the definition of "person."

RCW 90.14.090 sets out the form of "Water Rights Notice" as follows:

"WATER RIGHTS NOTICE

"Every person, including but not limited to an individual, partnership, association, public or private corporation, city or other municipality, county, state agency and the STATE OF WASHINGTON, and the United States of America, when claiming water rights established under the laws of the state of Washington, are hereby notified that all water rights or claimed water rights relating to the withdrawal or diversion of public surface or ground waters of the state, except those water rights based upon authority of a permit or certificate issued by the Department of Water Resources or one of its predecessors, must be registered with the Department of Water Resources, Olympia, Washington not later than June 30, 1974. FAILURE TO REGISTER AS REQUIRED BY LAW WILL RESULT IN A WAIVER AND RELINQUISHMENT OF SAID WATER RIGHT OR CLAIMED WATER RIGHT. For further information contact the Department of Water Resources, Olympia, Washington, for a copy of the act and an explanation thereof. [Added by Laws 1st Ex Sess 1969 ch 284 sec 18.]

"Reviser's Note: Powers, duties and functions of the department of water resources transferred to the department of ecology: See RCW 43.21A.060 and note following."

The Department of Natural Resources failed to register any claim for water rights in the Chamokane drainage basin.

DEPARTMENT OF NATURAL RESOURCES' CONTENTIONS
RE TIMBER LANDS AND MINIMUM FLOW

The balance of Department of Natural Resources' Motion and appended Memorandum are merely a brief rehash of the basic positions it took throughout the case that were covered extensively in the various briefs and rejected by the Court. In effect, they would reargue the whole lawsuit.

These matters should not be reconsidered. They could more appropriately be the subject of motions for new trial and are of course the grist for the expected appeal by the Department of Natural Resources.

CONCLUSION

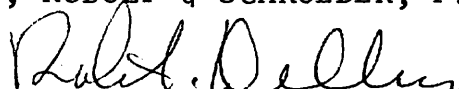
The State of Washington, Department of Natural Resources' Motion for Reconsideration of the Memorandum Opinion should be denied.

Dated this 9th day of August, 1979.

Respectfully submitted,

DELLWO, RUDOLF & SCHROEDER, P.S.

By


Robert D. Dellwo

Attorneys for the Spokane Tribe


UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,)
 Plaintiff,) No. 3643
SPOKANE TRIBE OF INDIANS,)
 Plaintiff-in-Intervention,)
 vs)
BARBARA J. ANDERSON, et al.,)
 Defendants.)

CERTIFICATE OF SERVICE

This is to certify that on August 9, 1979, I mailed a copy of the Spokane Tribe's Response to State's Motion for Reconsideration to all parties on the attached list.

DELLWO, RUDOLF & SCHROEDER, P.S.

By  _____
Robert D. Dellwo

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