5-28-1986

Spokane Tribe's Petition for Declaratory Relief, A Permanent Injunction & For An Increase In Minimum Flow

Robert D. Dellwo
Dellwo, Rudolf, & Schroeder, P.S.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff/Appellant, and SPOKANE TRIBE OF INDIANS, Plaintiff-in-Intervention/Appellant, v. BARBARA J. ANDERSON, JAMES M. ANDERSON, et al., STATE OF WASHINGTON, (GUST and CLARA WILLGING, THOMAS D. McLAUGHLIN, JESS SULGROVE, JR., HOWARD W. and HOWARD A. DIXON, FLOYD NORRIS, URBAN CHARLES SCHAFFNER, ALLEN O. TELLESSEN), RON OLSON, JAMES R. NEWHOUSE, ROBERT VICTORINO, R.J. SEAGLE, Defendants/Appellees.	D.C. NO. CV-72-3643-JLQ SPOKANE TRIBE'S PETITION FOR DECLARATORY RELIEF, A PERMANENT INJUNCTION & FOR AN INCREASE IN MINIMUM FLOW

The Spokane Tribe for its first cause of action petitions as follows:

1. It brings this action against the State of Washington and the above-named bracketed Defendants for declaratory relief and for an injunction in accordance with 28 USCS 2201, Federal Rule of Civil Procedures 57 governing the bringing of actions for Declaratory Judgments, and also in accordance with Federal Rule of Civil Procedure 65 entitled "Injunctions." This Petition does not include a petition for a preliminary injunction or temporary restraining order.

2. During the early Fall of 1985, representatives of the Washington State Department of Ecology met with the attorneys for the Spokane Tribe to notify them of the fact that they intended to process the non-Indian applications for water use permits in the Chamokane Basin that are listed on page 13 of the July 23, 1979 Decision of Judge Marshall Neill. At that time, the attorneys for the Tribe advised the Department of Ecology representatives that there was

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no surplus or excess water in the Basin to which such applications could inhere and that in any event the Decisions in this case mandated that the State screen said applications through the Water Master or this Court for approval before being granted by the State.

3. On October 4, 1985, there was received from the Department of Ecology its communication dated October 3, 1985, marked as Exhibit 1, listing the applications that were noted in the Decision of Judge Neill and the later Decision of Magistrate Meyers and advising which ones would be processed for approval by the State.

4. In response to the memorandum from the Department of Ecology, the Tribe through its attorneys responded by the letter to the officials of the Department of Ecology dated January 23, 1986, marked as Exhibit 2. Said letter is made a part of this petition by this reference. It explains the effects of the initial opinion or decision by Judge Neill and the prior and paramount reserved rights to water allocated to the Spokane Tribe. It points out that the temperature of the creek flow has exceeded the maximum of 68 degrees every single summer during the hot season despite the fact that its flow has seldom dipped to below 25 cfs. It describes the oncoming programs of the Spokane Tribe for the use of the water and concludes that there is no water in the aquifer available for pump-irrigation by non-Indian permittees that could be considered surplus or in excess of the preferential tribal needs.

5. Despite the above-described letter (Exhibit 2), the Department of Ecology on February 12, 1986 issued Findings of Fact, Orders and Reports recommending the issuance of water use permits to the bracketed Defendants to be exercised by pumping from the aquifer in the Chamokane Basin. There is marked as Exhibit 3 the Findings of Fact and Order and the report of examination in Application Number 11227 by Gust and Clara Willging, authorizing the issuance of a permit to the Willgings for pump irrigation at the rate of 2,000 GPM and 168 acre feet per year.

Similar, almost identical orders and reports for permits were finalized as to the remaining named Defendants in amounts as follows:

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Thomas J. McLaughlin, Application No. 10386
1,000 GPM and 210 maximum acre feet per year

Jess Sulgrove, Jr., Application No. 10506
750 GPM and 209 maximum acre feet per year

Howard W. and Harold A. Dixon, Application No. 11753
100 GPM and 42.6 maximum acre feet per year

Floyd Norris, Application No. 11905
2,000 GPM and 312 maximum acre feet per year

Urban Charles Schaffner, Application No. G3-20422
900 GPM and 312 maximum acre feet per year

Allen O. Tellessen, Application No. 23509
.12 CFS and 11.4 maximum acre feet per year.

The Department of Ecology has in process other applications which it, unless enjoined by this Court, plans to approve.

6. In response to the above-described issuance of reports, Findings of Fact and Orders in the listed applications, the Tribe, through its attorney, Robert D. Dellwo, filed with the Pollution Control Hearings Board of Washington its "protests and object(ions)," marked as Exhibit 4. This exhibit was a Memorandum of Law applicable to the issuance of such permits by the State. It is hereby by this reference made a part of this petition serving as a Memorandum of Law herein.

7. The Findings of Fact and Order for Willging and the other applications finds that the water involved "may be appropriated for beneficial use and that said use will not impair existing rights or be detrimental to the public welfare."

This Findings of Fact, typical of the Department of Ecology in issuing permits on Indian Reservations flies in the face of the facts and law in this case. It is a "boiler plate" finding that ignores the fact that the granting of the right will with a certainty impair the reserved water rights of the Tribe and will be detrimental to the Tribal (public) welfare. As is evident in the case and recognized by Judge Neill in his 1979 Decision, it appeared even then that the water resource had been fully appropriated and that there

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would be no excess or surplus water to serve any additional state issued water rights. The state claims that such permits do not impair or derogate the prior and paramount rights of the Tribe to the same water because of the small print caveat in each that they are "subject to existing rights." This caveat is ineffective. The permittee invariably proceeds to dig his well, install his pump irrigation equipment and to irrigate. In each case, the Tribe, to protect its rights, must initiate litigation to adjudicate the state permittees rights as being subordinate to those of the Tribe and to direct the cessation of the pumping. Such a process is time consuming, increasingly expensive and of doubtful efficacy.

8. The described protest and objection of the Tribe to the issuance of the permits was immediately docketed for review or appeal by the Washington State Pollution Control Hearings Board to be heard before Judge Harrison, Administrative Appeals Judge of the Environmental Hearings Office. He immediately got in touch with Tribal Attorney, Robert D. Dellwo (the drafter of this petition), because he doubted that the Tribe would want the matter to come within his jurisdiction. As a result of these phone calls, he agreed that if the Tribe went ahead with this petition for a declaratory-injunctive type of proceeding before the U.S. District Court, he would place the appeal in his "court" on hold until the Federal Court proceedings are completed.

9. The Tribe herein alleges, as if alleged at this point, its allegations before the Pollution Control Hearings Board which are marked as Exhibit 4. The essential allegations are as follows:

a. The Department of Ecology in its findings and order ignores the fact that the waters of Chamokane Creek Basin are at this time fully appropriated and that there are no "waters surplus to or in excess of the reserved water rights of the Tribe and of others found and approved in the decisions of this case."

c. The Findings, Orders and Reports ignore the ongoing findings of the Water Master that the maximum allowable temperature of 68 degrees F. has been breached every summer during the hot dry season (usually July 15th through August 25th) indicating the need for increased minimum flow from the presently ordered 20 cfs to at least 25 cfs.

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d. The Findings, Orders and Reports ignored the letter from the Tribal Attorney, Robert D. Dellwo, to the Department of Ecology dated January 23, 1986 (Exhibit 2 herein) which advised the Department of Ecology of the ongoing shortage of water from the major springs and the plans of the Tribe to irrigate a portion of its lands for which this Court had granted it reserved water rights for 8,300 acres, and further of its plans to augment, by a transfer of a portion of those irrigation rights to the lower stream, the lower stream flow so as to go forward with plans for fish enhancement and a fish hatchery. The letter further asked for a moratorium by the Department of Ecology of two years during which the Tribe could proceed with these plans.

e. The Findings, Orders and Reports ignored and actually demeaned and belittled the function and responsibilities of the Water Master in this case. They described his function as being ministerial and ignored the fact that in his management of the basin waters and protection of the existing water rights, any water use applications by non-Indians being processed by the Department of Ecology must be cleared and approved by him as a condition to their issuance. (Note: Attachment 4 is a summary of the portions of the decisions in this case directing the appointment of the water master and establishing his responsibilities and authority).

f. The Findings, Orders and Reports set out Findings of Fact as to the Chamokane aquifer, available waters, creek flow, etc. that contradict the findings of this Court.

10. The Department of Ecology in proceeding as it has has violated the strictures and limitations explicitly or implicitly placed upon it by the decisions herein by this Court and the Ninth Circuit Court of Appeals.

FOR A SECOND CAUSE OF ACTION, THE TRIBE PETITIONS AND ALLEGES:

11. It realleges the factual and legal matters alleged in its foregoing first cause of action. The non-bracketed Defendants named in the heading are those present water use permittees who may be affected if this cause of action is granted.

12. The initial and "parent" decision in this case is that Memorandum Opinion and Order of Judge Marshall Neill dated July 23, 1979. That decision remains essentially unchanged to this date. It in relevant points held that the Tribe has the following "Winters" or Reserved Water Rights, almost all with a priority date of 1877. (Note: Numbers are page numbers from Slip Opinion).

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a. Page 9 - "The Tribe has a reserved right to a maximum of 23,694 acre feet of ground or surface water from the basin each year for irrigation of 7,898 irrigable acres with a priority date of August 18, 1877."

b. Page 10 - "The Court finds that the quantity of water needed to carry out the reserved fishing purposes is related to water temperature rather than simply to minimum flow. The native trout cannot survive at water temperature in excess of 28 degrees F. The minimum flow from the falls in Lower Chamokane Creek which will maintain the water at 68 degrees F. varies, but is at least 20 cfs. The Court therefore holds that the Plaintiffs have a reserved right to sufficient water to maintain the water temperature below the falls at 68 degrees or less, provided that at no time shall the flow past the falls be less than 20 cfs."

c. Page 18 - "Persons whose rights are adjudicated hereby, shall be entitled to change, in the manner provided by law, the point of diversion and the place, means, manner and purpose of use of the waters to which they are so entitled or any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed herein."

13. The second relevant decision in this case is the MEMORANDUM AND ORDER GRANTING, IN PART, MOTIONS TO AMEND MEMORANDUM OPINION AND ORDER, by Judge Quackenbush dated August 23, 1982. That Decision, mostly affirming and, in some instances, clarifying the earlier decision of July 23, 1979, provided in relevant parts as follows (page numbers from slip opinion):

a. Page 7 - "If, however, over a period of time, flow and temperature records demonstrate that 20 C.F.S. flow is not realistically related to the maintenance of water temperature at 68 degrees or below, the Judgment is subject to modification."

b. Page 12 - "...thus, the Tribe has the right to sufficient water to maintain the fishery. It is settled law that when a Tribe has a vested property right in reserved water, it may use it in any lawful manner. Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981). Therefore, it is permissible for the Tribe to transfer its use of water for irrigation (a primary use) to the Tribe's fishery (also a primary use) if the Tribe wants to enhance its allotment of water to the fishery."

c. Page 13 - "Magistrate Myers concluded that since the Tribe has a prior reserved right to all or practically all of the waters of Chamokane Creek, and that any use of the waters by defendant is in strict sub-ordination to those prior rights, there seems to be no reason or necessity for the modification sought by the Department of Ecology. This Court agrees that there is no need to modify Section 22 of Judge Neill's Judgment.

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Regarding the Department's objection to the Tribe's right to modify the judgment, Section 10, the law is clear that the Tribe has a right to reserved water for present as well as future needs." Arizona v. California, 373 U.S. 546, 600 (1963).

14. As evidenced by Exhibit 2, the Tribe has effectively appropriated and made plans for the beneficial use of any possible remaining waters allegedly surplus to or in excess of its reserved rights as granted in the foregoing decisions. Additionally, the findings of the Water Master since his appointment have verified that the minimum flow of 20 cfs is not sufficient to guarantee in any given summer that the temperature of the water in the lower Chamokane will not rise above 68 degrees F. It has risen above that maximum every single summer. The Tribe is therefore entitled to an increase in that minimum flow, consistent with the foregoing quotations from the 1982 decision of Judge Quackenbush, to provide not only that the 68 degree maximum not be violated but to in general enhance and upgrade the fishery. In order to accomplish this objection, the Tribe has done the following:

A. It has, through a qualified fish biologist, investigated the quality of the lower Chamokane fish habitat and its reasonable potential for enhancement. His conclusions indicate that not only are the upward fluctuations in temperature jeopardizing the existing fishery, but that any program to improve it as to trout must include an increase in the minimum flow. Such an increase in minimum flow should be sufficient to bring back into service former spawning and feeding riffles and beds needed for increased fish population.

B. The Tribe has, in its promotion of the fish enhancement program, outlined in A. above, and as authorized by the quoted portions of the Decisions in this case, effectively transferred its potential usage of sufficient of its irrigation entitlement of Chamokane waters for irrigation of the irrigable lands described by Judge Neill in his July 1979 Decision to increase the minimum flow of the lower Chamokane Creek to 27.5 cfs.

C. The Tribe, as a part of its entitlement under the Northwest Power Act, is proposing the establishment of a fish hatchery in the vicinity of what is described in this case as the "major springs." The increase in the flow from these springs resulting in an increased flow in the creek will make this project more feasible.

From the foregoing, it is clear that the minimum flow must be increased

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in order to protect the lower Chamokane from annually, during the hot weather season, exceeding the 68 degree maximum ruled by the Court. Additionally, the Tribe is entitled to an increase in the minimum flow so that it can proceed with its plan to improve and enhance the fishery in the creek. This would be accomplished by the above-proposed transfer of the Tribe's irrigation right into the lower creek to increase that flow in order to make possible the fish enhancement program.

WHEREFORE, the Spokane Tribe prays that the Court enter Orders in its First Cause of Action as follows:

1. That the Court declare that in processing for approval any additional State-issued water permits or rights in the Chamokane Basin the applications therefore should be screened through the Water Master or this Court for approval or rejection. That the Court further declare that if the Water Master or the Court rejects an application, said application shall not be granted by the State of Washington.

2. That the Court issue a permanent injunction enjoining the State of Washington from effectuating the issuance of water use permits for the above-named (bracketed) Defendants without their applications being first cleared through and approved by the Water Master or by this Court.

3. That the Tribe receive and be granted such other relief as appears just and proper in the premises.

That the Court enter an order on the Tribe's Second Cause of Action as follows:

1. That it declare that the Tribe does have the legal right to transfer a portion of its irrigation right as alleged above to the lower creek in order to increase the flow from the major springs into Chamokane Creek.

2. That the minimum flow of the lower creek prescribed in the Decision of Judge Marshall Neill on July 23, 1979 as 20 CFS be increased to 27.5 CFS.

3. That the Tribe receive and be granted such other relief as appears just and proper in the premises.

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DATED this 27 day of May, 1986.

DELLWO, RUDOLF & SCHROEDER, P.S.

By: Robert D. Dellwo By GFR
ROBERT D. DELLWO
Attorneys for Spokane Tribe of Indians
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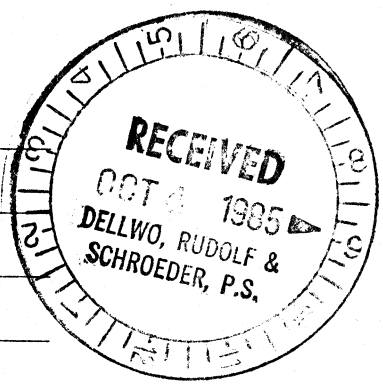
MEMORANDUM

EXHIBIT NO. 1

CHECK
INFORMATON ____
FOR ACTION ____
PERMIT ____
OTHER ____



State of Washington Department of Ecology

TO: Robert D. Dellwo/Robert M. Sweeney

FROM: Theodore M. Olson al

SUBJECT: Chamokane Creek Applications

DATE: October 3, 1985

In accordance with our meeting in Mr. Dellwo's office on October 2, 1985, we are forwarding copies of the requested applications for public waters on file with the department.

The opinion of Judge S. P. Meyers, dated July 23, 1979, lists fifteen applications. The following applications have been rejected for various causes and are no longer under consideration and the files have been sent to archives in Olympia and copies are not available.

Application Nos.

10344
11989
20248
21786
G3-20536

The following applications remain in good standing and will be processed.

Application Nos.

10386	22922
10506	23509
11227	23551
11753	G3-20422
11905	S3-21939

Additional applications have been filed with the department subsequent to the Judge Meyers' opinion and are being held for priority and will be processed.

Application Nos.

S3-23064	G3-25523
G3-23949	G3-26113
S3-24392	G3-26382
G3-24630	G3-27824

TMO:aal

Enclosures

cc: Charles B. Roe

EXHIBIT NO. 1

Eastern Washington Regional Office N. 4601 Monroe, Suite 100 Spokane, WA 99205-1295 Telephone (509) 456-2926

EXHIBIT NO. 2

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ROBERT J. ROBERTS
GARY T. FARRELL
ROBERT C. SCANLON

OF COUNSEL
WILLIAM D. ROBERTS
PAUL A. CLAUSEN

January 23, 1986

COPY
FOR YOUR RECORDS

Theodore M. Olson
State of Washington
Department of Ecology
Eastern Washington Regional Office
Suite 100
North 4601 Monroe Street
Spokane, WA 99205-1295

Re: CHAMOKANE CREEK APPLICATIONS
Your Memorandum of 10/03/85

Dear Mr. Olson:

Your memorandum listed the applications for water rights in the Chamokane Basin which you propose to process. We discussed them all with the Tribal Council and were gratified that the Council took such an active interest in them. We must bear in mind that the present Council of five is a "new generation." None of the three Councilmen during the Chamokane Creek (Anderson) case is on the Council now and none on the current Council has had, until now, an opportunity to become familiar with the detailed findings of the hydrologists, fish biologists and the Court. In reviewing the various applications and the record of the Chamokane case, the current Council became aware of the fragile nature of the Chamokane aquifer, and the effect the granting of additional water permits will have on the aquifer and the lower Chamokane.

The Tribe plans to inaugurate an updated, comprehensive water and resource study of the Reservation, including the Chamokane Basin. Out of such a study will come finalized plans for further agricultural, housing and commercial development, including the irrigation of some of the Tribal lands in the Basin.

Also under study is the Tribe's housing program and whether development should include the Chamokane aquifer with needed domestic and garden water withdrawals. Of concern to the Tribe is the possible pollution of the aquifer from septic tanks. It is inquiring into the alternative of lagoons and holding tanks.

EXHIBIT NO. 2

The Tribe is actively studying a proposed fish hatchery complex in the area of the major springs and a fishery enhancement program in the lower creek.

In view of these plans, the Tribe is asking that the State establish a moratorium on the granting and issuing of permits for at least a twenty-four month period. Every permit you would issue would be affected by and be subject to these priority activities of the Tribe.

The Spokane Tribe realizes that the aquifer is fragile and not at all inexhaustible. The Tribe will be asking its hydrologist to advise as to what additional development the aquifer can sustain without injury. The Tribe is convinced at this time that no permit exceeding 10 GPM for domestic uses could ever be issued, and is presently of the opinion that even a limited number of these permits may be foreclosed by the aquifer's capabilities.

In addition to the foregoing, the Tribe would like to make a record of the following numbered points:

1. The Court in 1979 ruled that the Tribe had prior and paramount Winters Rights to a minimum flow in the lower Chamokane of 20 cfs or whatever flow above that minimum necessary to guarantee that the temperature would not rise above 68 degrees. The Water Master has found that that temperature maximum has been breached every single summer during the hot season...This despite the fact that minimum natural flows have seldom dropped below 25 cfs. If any water permits are issued which further reduce the natural hot weather flow, the Tribe plans to seek an increase in the 20 cfs minimum flow to 27.5 cfs.

2. The Court found that the Tribe had Winters Rights to enough water to irrigate approximately 8,300 acres within or adjacent to the Chamokane Basin. With a "duty" of 3 acre feet per acre, this would mean that the Tribe could use about 25,000 acre feet for this purpose or more than the capacity of the aquifer. Such a use of the aquifer waters by the Tribe would exhaust any theoretical "surplus" waters which might otherwise be available for private water use permits.

3. The Tribe is developing long range fish and recreational enhancement plans for the lower Chamokane. This will include channel improvement to increase the fish population and will require a greater base flow of creek water. The Tribe plans to achieve this by transferring some of its irrigation-rights water in the upper basin for this purpose. The Court decision recognizes this right of transfer from one Winters Right use to another.

4. The Tribe is concerned about the growing pollution of the aquifer waters, now principally from cattle feeding, but more and more from septic tanks. The aquifer is quite shallow and vulnerable to surface pollution. The Tribe is firmly opposed to the issuance of water rights that will encourage any multiple housing development or an increase in cattle feeding operations over the aquifer.

5. Any future permit, if issued by the State, should include a notice to the permittee of the Tribe's Court-confirmed Winters Rights, its plans for water use in the basin and a clear notice that the permit is subject to the Tribe's rights and the Tribe's planned, increased use of the Chamokane waters.

Sincerely yours,

DELLWO, RUDOLF & SCHROEDER, P.S.

Robert D. Dellwo

RDD/mj

cc: Bob Sweeney
Charles Roe
Art Biggs
Superintendent
Ira Woodward, Water Master
Spokane Tribal Council

EXHIBIT NO. 3

BEFORE THE
DEPARTMENT OF ECOLOGY
STATE OF WASHINGTON

IN THE MATTER OF APPLICATION NUMBER 11227 FOR PERMIT TO APPROPRIATE PUBLIC WATERS	)))	FINDINGS OF FACT AND ORDER

Upon review of the Examiner's report, I find that all facts relevant and material to the subject application have been thoroughly investigated. Furthermore, in accordance with the Examiner's conclusions and recommendations, I find that water may be appropriated for beneficial use and that said use will not impair existing rights or be detrimental to the public welfare.

IT IS ORDER that a permit issue under Application Number 11227 authorizing appropriation of public waters in the amount, and for the use, and subject to the provisions set forth in the Examiner's report.

Chapter 43.21B RCW provides that any person who feels aggrieved by such an order may appeal to the Pollution Control Hearings Board of Washington, with a copy to the director of the Department of Ecology, within thirty (30) days of receipt of this order. Procedures for requesting a hearing may be obtained from this department.

Signed at Spokane, Washington this 12th day of February, 1986.

ANDREA BEATTY RINIKER, Director
Department of Ecology

by John L. Arnquist
JOHN L. ARNQUIST, Regional Manager

CERTIFIED MAIL

EXHIBIT NO. 3

EXHIBIT NO. 4

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OF COUNSEL
WILLIAM D. ROBERTS
PAUL A. CLAUSEN

TO: POLLUTION CONTROL HEARINGS BOARD OF WASHINGTON

RE: No. 11227 Willging, Gust & Clara
No. 10386 McLaughlin, Thomas D.
No. 10506 Sulgrove, Jess, Jr.
No. 11753 Dixon, Howard W. & Harold A.
No. 11905 Norris, Floyd
No. G3-20422 Schaffner, Urban Charles
No. 23509 Tellessen, Allen O.

Without acknowledging the jurisdiction of the Department of Ecology or of the Pollution Control Hearings Board of Washington, the Spokane Tribe of Indians, by and through the undersigned, its attorneys, hereby protests and objects to the Findings of Fact and Order in each of the foregoing applications for the following reasons.

1) The Findings and Orders ignore the Tribe's statement or letter to Mr. Theodore M. Olson of the Department of Ecology dated January 23, 1986, copy enclosed. That letter was the response and comments of the Tribe to the several applications for non-Indian water permits in the Chamokane Basin and on the Spokane Indian Reservation that were pending, and of which the foregoing listed applications were a part.

The January 23, 1986 letter on behalf of the Tribe is by this reference incorporated into this protest.

2) The granting of the listed permits is in violation of the 1979 Order of the U.S. District Court of 1979 in the case of U.S. v. Barbara J. Anderson, et al., referred to in the Reports of Examination in the captioned applications. The explanation of that case in the Reports of Examination is inaccurate.

3) There is attached and made a part hereof the writer's EXPLANATION OF UNITED STATES V. ANDERSON, ET AL. In putting this "Explanation" together, the writer extracted from each of the three decisions, that of Judge Marshall Neill of 1979, of Judge Quackenbush of 1982 and of the Ninth Circuit Court of Appeals of 1984, summaries or quotations of those portions of each decision that are relevant to the granting by the State of these additional pump irrigation permits in the Chamokane Basin.

The Findings, Judgments and Orders in this series of three decisions are res judicata, binding on all the parties. They constitute the law and facts governing the issuance of additional water permits. The State

is not free to go outside of that record and make contradictory findings of fact or interpretations of the law. If the State disagrees with any fact found by the Court or its interpretation of the law, its recourse is to petition or move the Court for an amendment or modification.

4) The examiner's Report of Examination is inaccurate in its interpretation of the Findings and Orders in U.S. v. Anderson as follows:

(a) Top of page 2 (Willging): The report speaks of the uncertainty of the rights of the several Defendants named on page 12 and 13 of the 1979 slip Opinion. Those listed by the Court as being "recognized" were and are applicants to the State of Washington for water permits. They were not recognized by the Court as actually having any issued water rights. Rather, they were recognized as having applied for water rights. The purpose of the chart was to show their order and dates of priority in accordance with State law, the amount applied for by each applicant and the effective reduction in the flow of the lower creek which would result from the maximum use of the applied for permit.

(b) Middle page 2: The report states that "The applications on file will be processed, whether the applicants were parties to the adjudication or not.....in the same manner as all other applications for the appropriation of public waters."

This statement of intent is in total disregard of the import of and the restrictions and limitations in the Anderson Decisions. What the Report is saying is that applications will be processed under State law without regard to the Decisions. The fact is that the Decisions are in many respects inconsistent with and supercede state statutes or state regulatory law. Wherever there is an inconsistency, the decisions rule and control.

What the quoted statement implies is that the State will issue water permits in the order of their application dates, "first in time, first in right," without regard to the capacity of the aquifer, the availability of waters and the prior and paramount Winters Rights found for the Tribe.

The rule of the Anderson case is that no permit should be issued by the State unless it is found and shown that the issuance of the permit will not interfere with the Tribe's preferential rights and that there is, therefore, water available to implement the permit.

(c) Top bottom third, page 2: The report mentions the letter received from the writer, attorney for the Tribe, asking for a two year moratorium to permit the completion of an updated comprehensive

water and resource study which will result in finalized plans for agricultural, housing and commercial development, including irrigation of some of the Tribal lands.

This paragraph accurately describes the letter but misconstrues its purpose and meaning. Other than mentioning it, the report ignores its implications. The letter is a notification to the Department of Ecology that, as the Court decisions already imply, there is in fact no surplus or excess water in the basin to which state issued permits can inhere.

Additionally, the letter is notice to the Department of Ecology of the appropriation by the Tribe of any theoretical surplus or excess waters for the purposes outlined in the letter. Those purposes are the enhancement of the Chamokane fishery, the establishment of a fish hatchery and the proposed irrigation of Tribal land. Any one of these would more than exhaust any alleged surplus or excess waters. It is apparent from the record of the case that any additional appropriation by the Tribe of upper aquifer or creek waters will deplete the lower stream flow necessitating the reduction in withdrawals by existing permittees. Certainly there would be no room for additional permittees.

(d) Top of page 3: The report mentions Ira Woodward the Water Master and states that "He is empowered to collect stream flow and stream temperature data and make such other studies as necessary to enforce the Court decree." The paragraph proceeds to describe some of the things Mr. Woodward does, like preparing annual reports, etc.

The report completely ignores the Water Master's authority and responsibilities which are set out in detail in the Court decisions as outlined in the attached "Explanation."

To briefly summarize his duties per Anderson:

> "He will carry out the foregoing provisions and instructions and orders of the Court."
>
> "He will issue proper orders, rules and directions made in accordance with and for the enforcement of the judgment."
>
> He is "Empowered to cut off the water of owners and water users so disobeying or disregarding such proper orders, rules or directions."

Even though the Water Master was not an issue before the Ninth Circuit, that Court, as quoted in the "Explanation," looked to the Water Master as the enforcement arm of the Court to protect the Tribe against any unauthorized or unjustified use of the water by State permittees.

The reader is asked to re-read the quotations from the Ninth Circuit Opinion in the attached and then ask if the Water Master is not more than a scrivener or clerk gathering routine data. He is the one the Court looks to to enforce compliance with the Court Orders.

His primary duty is to monitor the withdrawal of waters by State permittees to insure that their withdrawals will in no way threaten the water rights of the Tribe. It should be apparent that the whole purpose of the Anderson case was to establish, recognize and protect those Tribal rights. The foregoing rationale seems to be conclusive. Yet the Report and its recommendations ignores the part the Water Master must play in the issuance of permits. He must have approved them. The Department apparently believes that it can issue the permits and that they will be presumably valid unless and until the Water Master or the Tribe challenges them. This makes no sense at all. The permit must not be issued unless the Water Master finds that in its implementation, it will not interefere with the exercise by the Tribe of its reserved Winters Rights.[1]

(e) Middle page 3: The report makes findings as to the hydrology and water capacity of the basin that are inconsistent with the findings of the Court. The Court findings are the "facts" of the case and must rule until changed by an amendment or modification.

For example, on page 4 of Judge Neill's slip Opinion, he stated that the total output of the drainage system "averages about 35,000 acre feet per year." The Tribe asked that this finding be amended. Judge Quackenbush granted the Tribe's Motion and, on page 8 of his slip Opinion, supplemented Judge Neill's finding by finding that an average of 16,000 acre feet are lost in the annual runoff, that the recharge storage capacity of the aquifer is approximately 19,000 acre feet and the annual flow out of the springs averages about 21,000 acre feet.

The findings in the Report as to the same "facts" vary considerably from the Court's findings. For example, it states that "records indicate that the ground water reservoir is recharged at a very fast rate and that any additional withdrawal for irrigation would be replenished by the 36,000 acre feet which leaves the basin as surface water flow." As found by the Court (above), at least 21,000 acre feet of this 36,000 acre feet described as "surface water flow," is the annual outflow of the springs.

The point of the foregoing is that the Department of Ecology in justifying a water use permit, may not substitute its findings and water flow figures for those of the Court and the Water Master. It is bound by the official Court and Water Master record. If, as

aforesaid, the State believes that those official findings and figures are in error or should be modified, it can seek their modification through the Water Master or the Court.

(f) Bottom, top third, page 4: The Report describes the Tribe's reserved rights as limited to the 20 cfs minimum flow or such additional flow necessary to maintain the 68 degree temperature maximum. This statement of the Tribe's rights overlooks the irrigation rights granted to the Tribe and, as aforesaid, the plans of the Tribe to utilize a portion of those irrigation rights in irrigation and in enhancement of the lower fishery.

Based on the Report of Examination, discussed in detail above, the Director of the Department of Ecology issued his Findings of Fact and Order, granting the rights in each of the captioned applications.

The Findings and Orders are void because they do not comply in any manner with the restrictions and limitations expressed or implied in the Anderson Court decisions that constitute the rule of law governing the issuance by the State of additional pump diversion permits in the Chamokane Basin. The issuance of permits by the State requires that they first be cleared through the Water Master and/or the Court.

5) The Report of Examination ignores the annual reports of the Water Master which have accumulated in the official Court file since his appointment in 1982. They verify that the 28 degree maximum has been exceeded during July and August of every year, notwithstanding the fact that the flow of the creek has seldom dropped below 24 cfs during those hot weather periods. Further, the Smithpeters and their successors, the only diverters from the creek itself, had ceased pumping water from the creek and have not done so during the 1982-1986 period. Other permittees reduced their pumping from the aquifer. We are advised that the present State permittees or their successors including the Smithpeters, will resume pumping. This resumed and increased pumping will reduce the hot weather flow of the creek by at least 4 cfs. The Water Master in his most recent quarterly report (October-December, 1985) found that after two dry seasons, especially 1985, the recharge of the aquifer had been insufficient to bring the aquifer level up to a level which would guarantee the 20 cfs minimum flow of the creek were the permittees to pump what they are entitled to. The Water Master predicted that if January through March, 1986 precipitation continued to be less than normal, a reduction in pumping by the permittees might have to be ordered.

The State of Washington was and is a principal defendant in the Anderson case. It is bound by the injunction of the Court in its 1979 Opinion. It is as follows:

"The parties, persons, and corporations hereinbeforenamed, and all persons claiming by, through or under them and their successors, are hereby forever enjoined and restrained from asserting or claiming any rights in or to the waters of Chamokane Creek, its tributaries, or its groundwater basin, except the rights specified, determined, and allowed herein; and each and all of said parties, persons and corporations, and all persons claiming by, through or under them, are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of Chamokane Creek or its tributaries or with its ground water basin so as to prevent or interfere in any manner with the diversion, use and enjoyment of the waters of any of the other persons or parties as allowed or adjudicated herein, having due regard to the relative priorities herein set forth; and each of said parties and persons is hereby enjoined and restrained from ever taking, diverting, using or claiming any of the water so decreed, in any manner or at any time so as to interfere in any way with the prior rights of any other persons or parties having prior rights under this Judgment, as herein set forth, until such person or parties having prior rights have received for their several uses the waters hereby allowed and adjudged to them."

The approval of each of the named permits and especially their collective approval by the Department of Ecology is a flagrant violation of this injunction.

DATED this 7th day of March, 1986.

SPOKANE TRIBE OF INDIANS

By: Robert D. Dellwo by DJ
ROBERT D. DELLWO
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EXHIBIT NO. 4

EXPLANATION OF UNITED STATES V. ANDERSON

There follows an explanation of the decisions in the above-captioned case insofar as they are relevant to the granting by the State of additional pump irrigation permits in the Chamokane Basin.

1. Original Decision - July 24, 1979

Held that the Tribe has Winters (Reserved) Rights with a priority date of 1877 to the waters of the aquifer and of Chamokane Creek as follows:

(a) For the irrigation of 1,880 acres of bottom land and 6,580 acres of bench land with a water duty of 3 acre feet per year or a total Winters Right of 25,000 acre feet per year.

(b) For the irrigation of unclaimed homestead land in the basin (28.7 acres) with a priority date of 1877.

(c) For the protection of the fishery in the creek--a minimum flow of 20 cfs or whatever larger flow is necessary to maintain the water temperature in the water below the falls at 68 degrees or below.

(d) The Court retained jurisdiction to permit the Tribe to apply for modifications to accomodate "substantial change in circumstances" requiring more water.

(e) As to reacquired allotments, the Court held that the Tribe's water rights had a priority date of the date of reacquisition rather than the earlier date.

(f) The Court, while not finding that the waters were already over appropriated, implied that "they may be over appropriated in the light of this decision."

On behalf of the State of Washington, the Court held as follows:

(a) It denied the Tribe and the United States an injunction to prevent the State from issuing additional permits.

(b) It held that existing State issued water permits and any future ones were subordinate to the prior and paramount rights of the Tribe as outlined above.

(c) The State of Washington had jurisdiction to issue permits to non-Indians for surplus or "excess" waters subject, however, to the prior and paramount rights of the Tribe.

The Court ordered the appointment of a Water Master and outlined his duties as follows:

(a) He would carry out the "foregoing provisions and the instructions and orders of the Court." (Note: This implies that he must monitor the use of waters in the basin and the issuance of additional permits so as to protect what the Court found to be the Tribal preferential rights as outlined above).

(b) He would issue "proper orders, rules and directions made in accordance with and for the enforcement of the judgment." In doing this, he was empowered to "cut off the water of owners and water users so disobeying or disregarding such proper orders, rules or directions."

(c) He was authorized to require water meters, etc. so as to better monitor the water use by the various users.

(d) He "may require installation of devices to measure and record water temperature below the falls in order to regulate water diversions in accordance with this judgment."

The Court further provided:

(a) All water was to be used "only at such times as needed and only in such amounts as may be required under a reasonable, economical and beneficial use."

(b) Those whose rights were adjudicated in the case "shall be entitled to change, in the manner provided by law, the point of diversion and the place, means, manner or purpose of use of the waters to which they are so entitled or any part thereof..." (Note: Therefore, the Tribe is entitled to change a purpose of use from irrigation to the fishery or from priority lands to lands of later priority).

In addition to the foregoing, the Court "forever enjoined and restrained" all persons from asserting, claiming or using any of the waters except as adjudicated in the Decision and from in any way interfering with the use by other parties of their adjudicated rights.

2. Decision of Judge Quackenbush - August 23, 1982

Judge Quackenbush validated and confirmed all of the Tribe's Winters (Reserved) Rights as outlined in the original 1979 Decision.

(a) He denied the Tribe's Motion to increase the minimum flow to 25 cfs. but recognized that the 68 degree maximum must be maintained and "if the appointed Water Master finds...that a higher flow is necessary at any time to accomplish the purpose, he is empowered to make the adjustment" and "if...over a period of time, flow and temperature records demonstrate that 20 cfs flow is not realistically related to the maintenance of water temperature at 68 degres or below, the judgment is subject to modification."

(b) He found that the annual recharge capacity of the aquifer is approximately "19,000 acre feet, with an annual flow out of the springs of about 21,000 acre feet."

(c) The Court recognized that the Tribe's reserved irrigation rights and water for its fishery were valid Winters Rights and that the "Tribe now desires to transfer water used for irrigation to the preservation of the fishery in the lower Chamokane area." The Court then held:

> "It is settled law that when a Tribe has a vested property right in reserved water, it may use it in any lawful manner... .....therefore, it is permissible for the Tribe to transfer its use of water for irrigation (a primary use) to the Tribe's fishery (also a primary use) if the Tribe wants to enhance its allotment of water to the fishery."

(Note: The Court in saying this, did so knowing that the Tribe was not then or now actually using any of the water for irrigation. It is therefore apparent that the Court was holding that the Tribe could transfer a portion of its irrigation water right to enhance or increase the lower creek stream without having to put that water to irrigation use before such transfer).

(d) Recognizing that the State issued permits were subordinate and inferior to the Tribal rights, he found that "the law is clear that the Tribe has a right to reserved water for present as well as future needs."

(e) The Court found that the State may regulate "excess waters" on land owned by non-Indians inside the Reservation and that "the mere creation of the Spokane Indian Reservation does not pre-empt State regulatory jurisdiction over surplus nonreserved waters on the Reservation." The Court then recognized that in the exercise by the Tribe of its Winters Rights in irrigation, "they would consume all or substantially all of the water in the Creek," and that "the Indian water right for preservation of the lower Chamokane fisheries requires that State recognized diversions be reduced when necessary to keep the flow up and the temperature down in the Creek below Chamokane Falls."

(f) The Court made no changes in the status of the Water Master. It rejected the State's move to select the Water Master and appointed Ira D. Woodward, the nominee of the Tribe and the United States.

3. The Ninth Circuit Appeals Decision - July 10, 1984

The Tribe appealed that portion of the Decision holding that the State had jurisdiction to regulate the use of "excess waters" by non-Indians on the Reservation. The U.S. appealed the finding of the Court, that the date of priority for Tribal reacquired lands was the date of reacquisition rather than the earlier date of the formation of the Reservation (1877). There follows references to the portions of the decision relevant to the issuance of the current state issued water permits:

(a) It found that there were three general categories of land involved in the litigation: Lands owned in fee by non-Indians, Indian lands that never left trust status and lands which were removed from trust status but subsequently reacquired by the Tribe and returned to trust. Of the latter lands, there were lands opened to homesteading but never claimed, lands allotted to Indians but later sold to non-Indians and lands opened for homesteading which were acquired by non-Indians.

(b) The Court did not disturb the priority date (1877) as to lands that never left trust status and as to lands opened for homesteading but never claimed.

(c) The Court modified somewhat the District Court decision as to the priority dates for reacquired lands: As to reacquired homesteaded lands, "they will carry a priority as determined under State law;" as to perfected water rights but where there were no perfected rights, "a priority date as of the date of reacquisition." The Court left the priority date of reacquired, formerly alloted lands undisturbed (date of acquisition) except to grant them what we call "Walton Rights" as to the former allottees' rights shared with the Tribe not lost by reason of non-use which passed to the Non-Indian purchasers. These rights would have their original priority date of 1877.

The Court ruled against the Tribe in its appeal on state regulatory jurisdiction, stating that "We agree with the rational of the District Court..."

(i) It held, "We conclude that the State, not the Tribe, has authority to regulate the use of excess Chamokane Basin waters by non-Indians on non-Tribal, i.e. fee, land."

(ii) It held that this jurisdiction did not threaten the Tribe because "the water rights adjudication which furnishes

> the basis for instant inquiry quantifies and preserves the Tribal water rights. The District Court appointed a Federal Water Master whose responsibility is to administer the available waters in accordance with the priorities of all the waters rights adjudicated." (Emphasis added).

and that

> "Central to our decision is the fact that the interest of the state in exercising its jurisdiction will not infringe on the Tribal right of self government nor impact on the Tribe's economic welfare because those rights have been quantified and will be protected by the Federal Water Master....."

and that

> "State permits issued for any such excess water will be subject to all pre-existing rights and those pre-existing rights will be protected by the Federal Court Decree and its appointed Water Master."

In that fashion, the Ninth Circuit upheld the appointment and authority of the Water Master.

Highlighting the importance of the Water Master, the Court referred to him in Footnote No. 1, stating:

> ".....the Tribe raised the possibility that because land owned in fee occupied most of the waterfront property within the Reservation, state regulation of water use on fee land could effectively prevent the Tribe from exercising its water rights. We conclude that by appointing a Water Master charged with protecting all water rights and insuring compliance with the Court Decree, the District Court provided adequate safeguards. The mere issuance of a state permit does not infringe on Tribal rights. If Washington were to approve permits that granted rights to use non-existent water or infringed on the Tribe's prior water rights, the Water Master would be obliged to modify them or to give them no effect."

(Note: From the foregoing, it is apparent that the Water Master has broad, discretionary authority to monitor, clear and regulate the issuance by the State of any additional water permits. It is inconceivable that the State permits would have any validity unless cleared by the Water Master).

CERTIFICATE OF MAILING

I hereby certify that on this 7th day of March, 1986, I served the foregoing documents on all parties of record in this proceeding by mailing a copy thereof, properly addressed with postage prepaid, to the following:

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Monica Jones
MONICA JONES

CERTIFICATE OF MAILING

I hereby certify that on this 13th day of March, 1986, I served the foregoing PROTEST AND OBJECTIONS TO FINDINGS OF FACT AND ORDER on all parties of record in this proceeding by mailing of a copy thereof, properly addressed with postage prepaid, to the following:

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Spokane Tribal Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff/Appellant, and SPOKANE TRIBE OF INDIANS, Plaintiff-in-Intervention/Appellant v. BARBARA J. ANDERSON, JAMES M. ANDERSON, et al., STATE OF WASHINGTON, (GUST and CLARA WILLGING, THOMAS D. McLAUGHLIN, JESS SULGROVE, JR., HOWARD W. and HOWARD A. DIXON, FLOYD NORRIS, URBAN CHARGLES SCHAFFNER, ALLEN O. TELLESSEN), RON OLSON, JAMES R. NEWHOUSE, ROBERT VICTORINO, R.J. SEAGLE, Defendants/Appellees.	D.C. NO. CV-72-3643-JLQ AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) ss.
County of Spokane)

MONICA JONES, being first duly sworn upon oath, deposes and says: That she is a citizen of the United States and of the State of Washington, living and residing in Spokane County, that she is over the age of twenty-one (21) years, not a party to this action and competent to be a witness therein; that on the 27th day of May, 1986, affiant deposited in the U.S. mail, properly stamped and addressed envelopes directed to:

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AND COURTESY COPIES TO:

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Portland, OR 97232

Superintendent
Spokane Indian Agency
Bureau of Indian Affairs
Wellpinit, WA 99040

said envelopes containing the SPOKANE TRIBE'S PETITION FOR DECLARATORY RELIEF, A PERMANENT INJUNCTION AND FOR AN INCREASE IN MINIMUM FLOW.

Monica Jones
MONICA JONES

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SUBSCRIBED AND SWORN to before me this 27th day of May, 1986.

Jean P. Bruegeman
NOTARY PUBLIC in and for the State
of Washington, residing at Spokane.
My commission expires 10/25/87.

LAW OFFICES
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