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# Tribe's Brief Answering Brief of State First Cause of Action

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OCT 23 1986

JAMES R. LARSEN, CLERK  
DEPUTY

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

1 UNITED STATES OF AMERICA, )  
 2 )  
 3 Plaintiff, )  
 4 )  
 5 and )  
 6 )  
 7 SPOKANE TRIBE OF INDIANS, )  
 8 )  
 9 Plaintiff-Intervenor, )  
 10 v. )  
 11 BARBARA J. ANDERSON; JAMES M. )  
 12 ANDERSON; STATE OF WASHINGTON, )  
 13 et al.; [GUST and CLARA WILLGING, )  
 14 JR.; HOWARD W. and HAROLD A. DIXON; )  
 15 FLOYD NORRIS; URBAN CHARLES )  
 16 SCHAFFNER; ALLEN O. TELLESSEN; )  
 17 THOMAS J. McLAUGHLIN; JESS SULGROVE )  
 18 JR., Defendant-Applicants], )  
 19 Defendants. )

CIVIL NO. C-72-3643-JLQ  
TRIBE'S BRIEF ANSWERING BRIEF  
OF STATE FIRST CAUSE OF ACTION

19 There follows the Tribe's closing brief in answer to the Brief of the  
20 State of Washington of October 10, 1986.

21 I. SUMMARY OF BASIC ISSUES.

22 We cannot lose sight of the basic issue in the Tribe's First Cause of  
23 Action:

24 Whether, prior to the approval of applications for  
25 water use permits by the State Department of Ecology,  
26 all such applications must be approved for issuance  
27 by the Water Master or this Court.

28 Included in this issue are the reasons why the Water Master would  
29 approve, approve with conditions, or disapprove a proposed state water use  
30 permit.

31 The overwhelming reason for approval or disapproval will be the existence  
32 of lack of existence of surplus or excess waters to support the proposed state

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1 applications.

2 The State denies that this is an issue. The bottom of Page 2 of its  
3 Brief it states:

4 Likewise, the issue of the existence of so-called  
5 "excess" or "surplus" waters in the Chamokane Creek  
6 system, which is closely associated with issue (1)  
(note: the one quoted above) is not before this court.

7 The State follows this up on Page 14 as follows:

8 Whether public waters, i.e. excess waters, are avail-  
9 able for appropriation under state law is a matter  
10 for the resolution in the state quasi-judicial and  
11 judicial forums.

12 Each court decision has restricted the regulatory power of the state to  
13 waters in excess of the reserved Indian rights. It seems, therefore, too  
14 obvious for cavil that the Water Master, in managing the use of waters in the  
15 basin, to protect the Tribe's reserved rights must constantly determine if  
16 there are any excess waters for state permittees. His duty to monitor the  
17 existence of such waters is, therefore, an integral part of the basic issue of  
18 whether he should screen for approval applications for additional state  
19 permits.

20 II. STATE DOES NOT DETERMINE EXISTENCE OF "EXCESS" WATERS.

21 By just reading the reports of examination of the seven questioned  
22 permits it is seen that the state does not, as a condition to authorizing the  
23 permits, determine that there are "excess" waters to serve them. The state  
24 just grants all the applications and, by its letter to the writer dated  
25 October 3, 1985 (Exhibit 1 in Tribe's Opening Brief) states that it will  
26 proceed with the processing of a total of 18 pending applications.

27 It is common knowledge that almost every stream passing through an  
28 irrigable agricultural area is overappropriated, with state irrigation permits  
29 sometimes totalling several times the available flow of the stream.

30 The record of this case strongly indicates that the existing state  
31 permits have utilized all the available "excess" waters. There is a strong  
32 indication that uses by these permittees must be reduced to protect against

1 the lower creek temperature breaches. Yet, the State, in the seven permit  
2 applications, goes ahead and grants them. It does not purport to follow any  
3 engineering, hydrological process to ascertain whether excess waters are  
4 available to serve the permits.

5 A review of the Reports of Examination for each of the seven applicants  
6 shows that each was considered individually, not as a whole, as to the effects  
7 of each on the aquifer and the flow of the creek. This is demonstrated as  
8 follows:

9 In Willging, Page 4, the Report of Examination finds:

10 Well interference calculations indicate no measurable  
11 effect upon game department springs.

12 ...our calculations indicate a potential effect of 1.3  
13 cfs on Chamokane Creek if the Willging well is pumped  
14 at a rate of 2000 gpm.

15 The 168 acre feet proposed to be authorized...is considered  
16 insignificant in relation to the total quantity of water  
17 available in the basin.

18 In McLaughlin, Page 4, the Report finds:

19 ...our calculations indicate a potential effect of .33  
20 cfs on Chamokane Creek if the McLaughlin well is pumped  
21 at a rate of 1000 gpm.

22 The 210 acre feet proposed to be authorized under this  
23 application is considered insignificant in relation to the  
24 total quantity of water available in the basin. (No  
25 comment is made on effect on game dept. springs.)

26 In Dixon, Page 4, the Report finds:

27 ...our calculations indicate no effect on Chamokane Creek  
28 if the Dixon well is pumped at a rate of 100 gpm.

29 The 42.6 acre feet proposed to be authorized under this  
30 application is considered insignificant in relation to  
31 the total quantity of water available in the basin.  
32 (No comment is made on effect on game dept. springs.)

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In Norris, Page 3, of Report finds:

...our calculations indicate a potential effect of 0.577 cfs on Chamokane Creek if the Norris well is pumped at a rate of 2000 gpm.

The 312 acre feet proposed to be authorized under this application is considered insignificant in relation to the total quantity of water available in the basin.  
(No comment is made on effect on game dept. springs.)

In Schaffner, Page 4, of Report finds:

...our calculations indicate a potential effect of 1.5 cfs on Chamokane Creek if the Schaffner well(s) are pumped at a rate of 900 gallons per minute.

The 312 acre feet proposed to be authorized under this application is considered insignificant in relation to the total quantity of water available in the basin.  
(No comment is made on effect on game dept. springs.)

In Sulgrove, Page 4, of Report finds:

...our calculations indicate no effect on Chamokane Creek if the Sulgrove well(s) are pumped at a rate of 750 gpm.

The 209 acre feet proposed to be authorized under this application is considered insignificant in relation to the total quantity of water available in the basin.  
(No comment about the game dept. springs.)

In Tellessen, Page 4, of Report finds:

The 11.4 acre feet proposed to be authorized is considered insignificant in relation to the total quantity of water available.

The DOE is, for some unknown reason, saying that, whereas the pumping of Willging, McLaughlin, Norris and Schaffner, if carried on at the rate permitted, would reduce the creek flow 3.71 cfs, the pumping in Dixon, Sulgrove and Tellessen will have no effect.

1           Additionally, DOE is saying that the removal of a total of 1265 acre feet  
2 from the aquifer "is considered insignificant in relation to the total  
3 quantity of water available."

4           Obviously, the opposite is true. Whereas each of the permits taken  
5 separately might have little effect, all seven taken together will have a  
6 significant effect. A drop of 3.71 cfs would be a significant reduction in 24  
7 cfs. The removal of 1265 acre feet from the aquifer would be about 1/15 of  
8 the total annual flow from the springs. This is significant.

9           The foregoing illustrates how the DOE, in judging the effect of the  
10 permits, judges them individually rather than as a group. The Water Master,  
11 if he has the authority to screen and approve these seven permit applications,  
12 would consider their total effect. He would find, for example, that if all  
13 seven pumped throughout the irrigation season at the rate permitted, they  
14 would cumulatively reduce the flow of the creek 6.5 cfs. He would find,  
15 however, that if they together pumped the 1265 acre feet and no more, they  
16 would diminish the flow of the springs by 1.75 cfs. He, like the writer,  
17 would be at a loss to find any validity in the figures used by the DOE. They  
18 are grossly inaccurate.

19           Going back to the Willging Report of Examination, the Water Master would  
20 find little basis for the various DOE computations. How can DOE divide up the  
21 basin into upper and mid basin sub surface flows and of what relevance are  
22 those figures. Whereas the report states that the present ground water  
23 discharge from the mid basin aquifer is about 16,000 acre feet per year "which  
24 includes the near constant spring flows near Ford, Washington" the more  
25 accurate figure is at least 19,000 acre feet.

26           Where the report states that 36,000 acre feet "leaves the basin as  
27 surface water flow," he would break that down into 19,000 acre feet coming  
28 from the springs and the balance or 17,000 acre feet leaving as surface water  
29 during the spring and early summer runoffs.

30           Attention is called to the letter to the undersigned from Theodore M.  
31 Olson dated October 3, 1985 attached as Exhibit 1 of the Tribe's Opening  
32 Brief. That letter brings out the true intentions of the DOE. Whereas the

1 foregoing reflects the processing of the seven applications which are being  
2 currently granted, that letter lists another eleven applications which Mr.  
3 Olson says "will be processed."

4 The writer has analyzed those applications and they average approximately  
5 the same as the seven listed above. Assuming that they are about the same  
6 they, if granted, will in combination with the seven affect the Chamokane  
7 Creek flow proportionately more. Using our figures, which are more conser-  
8 vative than those of the DOE, they, in combination with these seven permits,  
9 if pumping were at the permitted limits, would reduce the flow of the creek  
10 16.74 cfs. They would remove 3252 acre feet from the aquifer and, assuming  
11 that they keep within that limit of total amount of water removed, would  
12 reduce the flow of the creek 4.5 cfs, nearly a fifth of its dry weather flow.  
13 This is insignificant?!

14 III. HOW THE WATER MASTER WOULD SCREEN.

15 It should be obvious from the above that there is no "surplus" or  
16 "excess" water available in the Chamokane basin to support the seven permits  
17 which are being granted by the DOE. The Water Master in screening these seven  
18 permits would not, however, disapprove all of them. The writer, having  
19 consulted at length with the Water Master, predicts that he would process them  
20 somewhat as follows:

21 He would grant all of them the right to pump 10 gpm for domestic and  
22 stock watering use. This would amount to a maximum withdrawal of about 10  
23 acre feet per year.

24 He would likely approve the applications of Dixon and Tellessen because  
25 of their remoteness from the major springs and the small amounts applied for.

26 As for the others, he could authorize each to pump directly from the  
27 upper creek during the late spring and early summer as long as it had a  
28 surface flow that would otherwise be wasted and would, in joining the lower  
29 creek, increase its temperature.

30 As to any permit for a well located from 2 to 4 miles from the major  
31 springs, he could approve them in full for the reason that the effect of the  
32 withdrawal from that distance would likely reach the springs during the winter

1 months before the spring recharge period.

2 The Water Master could add other conditions. For example, in an in-  
3 dividual case he could rule that the applicant could remove so much water from  
4 the aquifer if he would during the off season surface flow period conduct or  
5 hold water in recharge basins so that, by that means, the permittee would be  
6 adding approximately as much water to the aquifer as he was to later remove.  
7 This recharge could consist of early flood irrigation in which most of the  
8 water would sink into the aquifer.

9 The foregoing illustrates why it is actually in the interest of the  
10 applicants that the Water Master screen their applications. If he is not  
11 allowed to do so and the applications are granted carte blanche in accordance  
12 with the FINDINGS OF FACT AND ORDERS and the Reports of Examination, they are  
13 granted in gross, without conditions. Faced with such granted permits, the  
14 Water Master would have little alternative but to nullify all of them. On the  
15 other hand, if he screens them for approval, he could approve them with  
16 conditions such as those outlined above.

17 IV. WHO IS TO DETERMINE EXISTENCE OF SURPLUS OR EXCESS WATERS.

18 As each court has held, the State may regulate the use only of excess or  
19 surplus waters. The 9th Circuit put it best on Page 14 of its slip opinion  
20 when it said:

21 The state may regulate only the use, by non-Indian  
22 fee owners, of excess water. Any permits issued by  
23 the state would be limited to excess water.

24 Who is to determine if there is any excess or surplus water? The State's  
25 position herein that that question is not even before this court. It contends  
26 that it can assume the existence of surplus water and go ahead and grant a  
27 series of permits without any formal investigation to determine if there is  
28 actually any surplus water to effectuate the permits. That this is its  
29 position is illustrated in the FINDINGS and Reports of Examinations of the  
30 seven questioned permits. In no instance does the DOE make any finding as to  
31 excess or surplus water. It just repetitively says that each permit, taken  
32 individually, is "insignificant" in relation to the total quantity of water,



1 and grants the permit notwithstanding that by its own figures each permit will  
2 proportionately reduce the flow of the creek.

3 What is excess or surplus water is a matter of definition. That defi-  
4 nition must be adduced by a close study of the court orders herein and the  
5 findings of the Water Master as to the developing history of the creek and its  
6 aquifer. The following is a suggested definition:

7 Excess water is aquifer or creek water in excess  
8 of the amount necessary to guarantee that the  
9 minimum flow of the lower creek will not drop below  
10 20 cfs or below a sufficient creek flow above 20  
11 cfs to prevent the summer time temperatures of the  
12 lower creek to exceed 68 degrees F.

12 The Water Master reports show that the 68 degree maximum is regularly  
13 breached even with summer time flows in excess of 24 cfs.

14 Is there any excess or surplus water?

15 The answer is NO as to gross permits such as the seven questioned ones  
16 being granted by the DOE.

17 The answer is a qualified yes if the Water Master is authorized to screen  
18 these permits for approval with limitations and conditions as outlined above.

19 While the four court decisions herein are silent as to this authority  
20 on the part of the Water Master, is it not strongly implied just by the simple  
21 logic of the case?

22 Each of the Reports of Examination report on and summarize the decisions  
23 of the courts herein (albeit with a high degree of bias and inaccuracy). Each  
24 contains the following statements:

25 The federal court has quantified the extent of the  
26 Tribe's rights in its decree, United States v. Barbara J.  
27 Anderson, et al. The State recognizes the Tribe's  
28 rights, as set forth in the decree, and all state rights  
29 issued subsequent to this decree are junior in priority  
30 to the rights of the Tribe.

31 and

32 It is the intent of the DOE to comply with the surface  
and ground water codes and with the judgments of the

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court which confirmed the right of the State of Washington to allocate surplus waters in the Chamokane Basin.

and

In all cases, water rights developed and consummated under these applications will be subject to the state's basic water law tenant (sic); first in time, first in right.

and

Any right perfected by development under this authorization is subject to regulation by the Water Master appointed by the Eastern District Federal Court, in accordance and in compliance with the court decree.

and

This authorization to make use of public waters of the state is subject to existing rights, including any existing rights held by the U.S. for the benefit of Indians under treaty or otherwise.

There is no finding that any surplus waters exist.

The plain implication is that the state will issue many permits, each "insignificant" in relation to the quantity of Chamokane water involved, and each junior to all earlier permits including the tribal rights.

We do not find any willingness of the state to issue permits only as to quantified excess or surplus waters. The state contends that the Tribe is adequately protected by the fact that these permits will be junior to the tribal rights and that the Water Master may regulate them in accordance with the minimum flow and maximum temperature strictures of the Case.

A water right is a valuable resource and in a dry land country becomes more valuable than the land itself. The state permittees will spend thousands of dollars in developing and utilizing their "rights". They will not respond to any simple order of the Water Master to reduce or eliminate their water uses. If these seven permits are issued as planned by the State, this court will be presiding over litigation concerning them ten years from now at a cost of tens of thousands of dollars to the Tribe and the U.S., not to mention the

1 costs to the permittees.

2 Upon acceptance of the permit and conditions, the permittee may then  
3 construct the project and put the water to beneficial use in accordance with  
4 the terms of the permit. After the water has been put to beneficial use, the  
5 permittee is then entitled to a water right certificate.

6 The foregoing is in conformity with RCW 90.03.320, the "use it or lose  
7 it" statute which requires that a permittee, as a condition to receiving a  
8 certificate, must develop his irrigation works and put the water to beneficial  
9 use within a reasonable time or be subject to a cancellation of his permit.

10 A state permittee in the Chamokane Basin will be impelled to put his  
11 permit to use at great expense and he will fight for that permit if it is  
12 challenged by the Water Master.

13 V. CONCLUSION

14 Let us restate the State's conclusion in its Brief. The state contends  
15 in its conclusion that the approval of the seven questioned applications do  
16 not in any way threaten the priority water rights of the Tribe because the  
17 Water Master and the State will "regulate (them) in accordance with existing  
18 rights."

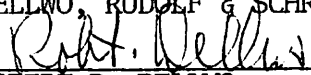
19 All of the state permits that were the subject of this lawsuit from the  
20 beginning contained words to the effect that they were "subject to prior  
21 rights." This did not deter the state from issuing the permits or from  
22 spending these last 14 years in litigation to protect them. The same will be  
23 true of these seven permits and the additional eleven that will be processed.  
24 The state will issue them without regard to whether there is any water at all  
25 to serve them, leaving it to the Water Master to challenge, to limit or to  
26 nullify them. The "screening" by the Water Master, according to the state,  
27 will come after the permits are granted rather than before.

28 Whereas, the existing court Orders only imply this screening authority of  
29 the Water Master, this court should now clarify that it exists.

30 DATED this 23rd day of October, 1986.

31 Respectfully submitted,

32 DELLWO, RUDOLF & SCHROEDER, P.S.

  
ROBERT D. DELLWO  
Tribal Attorney

TRIBE'S BRIEF ANSWERING BRIEF  
OF STATE FIRST CAUSE OF ACTION - 10

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