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Complaint

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

MAY 5 1972

J. R. FALLQUIST, Clerk
LR Deputy

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

The United States of America,

Plaintiff,

v.

Civil No. 3643

Barbara J. Anderson, James M. Anderson,
Boise Cascade Corporation, Naomi Cook,
Raymond E. Cook, Dawn Mining Corporation,
Benedetto Dituri, Janice L. Dituri, Mary
Dituri, Victor J. Dituri, Dolores Duddy,
Paul F. Duddy, Fay Echelbarger, M. B.
Echelbarger, Lena E. Edwards, Dalph G.
Edwards, JoAnn C. Fletcher, John G.
Fletcher, Seymour A. Flood, Vera Flood,
Edward A. Franks, Irene Franks, Maude L.
Grupe, Ella E. Hall, William R. Hall,
Marion L. Lamb, Vera Mae Lamb, Esther
Luther, George Luther, Jane Doe Lyons,
Leonard E. Lyons, Arthur A. Miller,
Ruth J. Miller, Janet E. Nelson, Ruth J.
Nelson, James R. Newhouse, Jane Doe New-
house, Dorothy F. Seagle, Robert J.
Seagle, Security Investment Service,
John A. Smith, Margaret M. Smith,
A. L. Smithpeter, Fleeta L. Smithpeter,
Francis L. Smithpeter, Fred N. Stahl,
Ruth M. Stahl, Elizabeth Swiger, Kenneth
E. Swiger, Dorthy F. Taschereau, George
G. Taschereau, Trans West Company,
Washington Water Power Company, Ella M.
Watson, True H. Watson, Carol Welk,
Peter M. Welk, Clara Willging, Gust
Willging, and the State of Washington,
Lloyd Flood and Alice Flood,

Defendants.

COMPLAINT

I.

This controversy is one of which this Court has original jurisdiction under Title 28 U.S.C. §1345 in that it is a civil action commenced by the United States of America.

II.

In the present action, the United States in its own right and on behalf of the Spokane Tribe of Indians, seeks to have its rights in and to the waters of Chamokane Creek and its tributaries determined, declared and protected.

III.

Chamokane Creek arises in the Huckleberry Mountains north of the Spokane Indian Reservation and runs easterly to a point south of the town of Springdale where it abruptly turns southerly and runs along the east side of the Reservation, the east bank of the creek forming the eastern boundary of the Reservation. Chamokane Creek runs through a glacial trough varying in width from $1\frac{1}{2}$ miles at the northern boundary of the reservation to a width of $2\frac{1}{2}$ miles at a point midway along the eastern boundary of the reservation. The floor of this glacial trough is from 500 to 600 feet below the existing valley floor. As the glacial trough extends southerly, it narrows into a canyon and is dammed by an

upsurge of granitic rock approximately 2 miles north of the confluence of Chamokane Creek with the Spokane River. The upper 30 to 40 feet of the deposits within this glacial trough consist of loose water yielding materials while the glacial deposits below this upper level are more consolidated and have less water holding and yielding capacity. The ground waters within the Chamokane Trough are a part of Chamokane Creek. As the waters of Chamokane Creek flow through the glacial trough, part of the waters sink into and flow through the underground. At the end of the trough the ground waters rise to the surface and again become part of the surface flow of the creek.

Historically, Chamokane Creek has been a large rushing stream of pure water plunging through a beautiful gorge over rapids and picturesque falls. It has always had particular significance to the Spokane Tribe. It has been a ceremonial stream and has been a source of fish and game for the tribe from time immemorial.

IV.

The Spokane Indian Reservation is within the Eastern District of Washington. It was set aside and reserved by an Executive Order dated January 18, 1881, for the use and occupancy of the Spokane Tribe of Indians. In the Executive Order, the reservation is described as follows:

Commencing at a point where Chamokane Creek crosses the forty-eighth parallel of latitude; thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane River, westwardly along the southern bank thereof to a point where it enters the Columbia River; thence across the Columbia River, northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude; thence east along said parallel to the place of beginning.

V.

The area set aside as the Spokane Indian Reservation was part of a much larger area formerly occupied by the Spokane Tribe and used for hunting and fishing. The boundaries of the Spokane Reservation were drawn to include the beds of the streams along the boundaries with intent to reserve for the Indians the full use and enjoyment of those streams within the boundaries of the reservation. Because of non-Indian developments on the other streams that run along or through the reservation, Chamokane Creek is the only stream on the reservation that can be preserved in its natural or near natural state.

VI.

When the Spokane Indian Reservation was established in 1881, by implication there was reserved for the benefit of the Spokane Indians the right to the use of sufficient waters in and on the said reservation, including the surface and subsurface waters of the Chamokane Creek, to fulfill

the needs, present and future, of the Indians for whom the reservation was created and to fulfill the purposes for which that reservation was created, with a priority date of January 18, 1881. These uses of the waters of Chamokane Creek include but are not necessarily limited to:

A. Sufficient water to maintain Chamokane Creek as a fishery and the area of the creek within the reservation as a natural habitat for fish, wild fowl and game in fulfillment of the purposes for which that reservation was created. Sufficient water to maintain Chamokane Creek as a free-flowing recreational stream preserved in its natural or near natural state as a recreational, aesthetic and natural resource of the Spokane Tribe of Indians. A minimum flow of 30 cubic feet per second in the lower regions of the stream is necessary for these purposes.

B. Sufficient water to irrigate all the practically irrigable acres of lands within the Spokane Reservation adjacent to Chamokane Creek which are suitable for agricultural development and can be irrigated from Chamokane Creek.

C. Sufficient water for development of the lands within the Spokane Reservation along the Spokane River between the Little Chamokane Creek and the above-mentioned

Chamokane Creek for agricultural, recreational, environmental, domestic and related purposes.

D. Such other uses as are necessary for the needs of the Spokane Tribe of Indians in fulfillment of the purposes for which their reservation was created.

VII.

The United States, through its Bureau of Reclamation of the Department of the Interior, is holder of a permit issued by the State of Washington (Application No. 7372, Permit No. 5144, Certificate No. 2831), which permit bears a priority date of August 8, 1946, and owns a right to the use of ten cubic feet per second of the flow of Spring Creek a tributary of Chamokane Creek for fish propagation purposes. The point of diversion is in the S $\frac{1}{2}$ of the NE $\frac{1}{4}$, Section 24, Township 28N, Range 39E, Willamette Meridian, State of Washington. This right was acquired pursuant to the Act of October 9, 1940, ch 794, 54 Stat. 1085, as part of the fish protection program required on the Grand Coulee Dam Project. It is exercised by the State of Washington in the operation of a fish hatchery pursuant to agreement with the Secretary of the Interior. The consumptive use, consisting of evaporation from ponds, is negligible and not in conflict with the rights to the use of water held for the benefit of the Spokane Indians.

VIII.

The unauthorized use of the waters of the Chamokane Creek by the defendants, as hereinafter alleged, are wrongfully reducing the surface and ground water flow of Chamokane Creek, interfering with the flow necessary to meet the needs of the United States in its own behalf and on behalf of the Spokane Tribe as alleged. Upon information and belief, plaintiff alleges that contemplated additional uses thereof by the defendants will cause serious and irreparable damage to the water rights of the Spokane Tribe of Indians.

IX.

The State of Washington has permitted appropriation of the waters of Chamokane Creek for irrigation and other purposes and has issued certificates authorizing such appropriations under Washington State law. The issuance of these certificates and the appropriation of water under them constitute an encroachment upon the water rights reserved for the benefit of the Spokane Tribe of Indians. The following named defendants or their successors and assigns are now appropriating and claiming the right to appropriate the waters of the Chamokane Creek under certificates issued by the State of Washington:

A. M. B. Echelbarger and Fay Echelbarger, husband and wife, Certificate No. 294 for 4 second feet of water for the irrigation of 165 acres of land.

B. M.B. Echelbarger and Fay Echelbarger, husband and wife, record owner and C. P. Trans West Company in possession of Certificate No. 8600 for 1 second foot of water for the irrigation of 80 acres of land.

C. Edward A. Franks, Certificate No. 4872 for .25 second feet of water for the irrigation of 20 acres of land.

D. Fred N. and Ruth M. Stahl, husband and wife, and John G. and JoAnn C. Fletcher, Ruth J. and Janet E. Nelson, Certificate No. 9100 for .07 second feet of water for the irrigation of 35 acres of land.

E. Robert J. Seagle, Certificate No. 4891-A for 1,150 gallons per minute, 1,400 acre feet per year for the irrigation of 400 acres of land.

F. John A. Smith and Margaret M. Smith, husband and wife, Certificate No. 3386 for .02 second feet of water for domestic supply and irrigation of 2 acres of land.

G. George and Esther Luther, husband and wife, and Raymond E. and Naomi Cook, husband and wife, Certificate No. 1725 for .01 second feet for domestic supply and irrigation.

H. True H. and Ella M. Watson, Certificate No. 1675 for .01 second feet of water for domestic supply and irrigation.

I. Dalph G. Edwards and Lena E. Edwards, husband and wife, William R. Hall and Ella E. Hall, husband and wife, Certificate No. 6394 for .01 second feet of water for stockwatering purposes.

J. Boise Cascade Corporation, Certificate No. 2258 for .01 second feet of water for domestic supply and stockwatering purposes.

K. Dawn Mining Corporation, a Washington corporation, Certificate No. 7142 for 1 second foot of water for manufacturing and domestic supply purposes.

X.

Any rights that the defendants listed in paragraph IX claim, or that may be claimed by any other person claiming through any of them to the use of the waters of the Chamokane Creek, are inferior in time and quantity and subject to the prior rights reserved for the benefit of the Spokane Tribe of Indians to make beneficial use of sufficient waters of the Chamokane Creek for the current and future needs of the Indians as alleged above.

XI.

The State of Washington has allowed the appropriation of waters from the Chamokane Creek for irrigation and other purposes and has issued permits under Washington law, which

have not yet been finally approved and for which, according to the information and belief of plaintiffs, certificates have not yet been issued, to the following defendants:

A. Maude L. Grupe, record owner, and A. L. Smithpeter and Fleeta L. Smithpeter, husband and wife, and Francis L. Smithpeter, a single man, holders in possession of Permit No. 15894 for 2.5 second feet of water, 407 acre-feet per year, for the irrigation of 140 acres of land, with point of diversion from Chamokane Creek just above Chamokane Falls.

B. James R. Newhouse and Jane Doe Newhouse, husband and wife, Permit No. 9361 for 1,500 gallons per minute, 648 acre-feet per year, from 2 wells for the irrigation of 223 acres of land.

C. Peter M. Welk and Carol Welk, husband and wife, Permit No. 9563 for 50 gallons per minute, 20 acre feet per year, from a well for the irrigation of 10 acres of land.

XII.

The contemplated use by the Smithpeter defendants will reduce the flow of Chamokane Creek below their point of diversion by approximately 10 percent of the natural flow at the time of the creek's dry season flow, and will seriously impair the creek as a fishery, recreational, aesthetic and natural resource of the Spokane Tribe of Indians and unlawfully interfere with the rights to the use of the waters of Chamokane Creek reserved for the benefit of the Spokane Indians.

Unless restrained, plaintiff believes said defendants will proceed with the threatened diversions in the forthcoming irrigation season, irreparably damaging the Spokane Tribe.

Defendants Newhouse have been pumping from one or two wells, causing a substantial diminution in the flow of Chamokane Creek. The total diversion threatened by said defendants when completed, will result in a further depletion and diminution of the flow of Chamokane Creek, further impairing it as a fishery and ecological resource and irreparably damaging the Spokane Indians and unlawfully interfering with the water rights reserved for their benefit.

XIII.

Plaintiff alleges on information and belief that there now are pending before the Department of Ecology of the State of Washington additional applications wherein the applicants seek State permits for further appropriations from the Chamokane Creek. These applications include the following:

A. Groundwater Application No. 112227 filed by defendants Gust Willging and Clara Willging, husband and wife, for the withdrawal of 2,000 gallons per minute from a well for irrigation purposes.

B. Groundwater Application No. 10344 by defendants Leonard E. Lyons and Jane Doe Lyons, husband and wife, for

the withdrawal of 1,000 gallons per minute from a well for the irrigation of 100 acres.

C. Surface Water Application No. 21786 by defendants Robert J. Seagle and Dorothy F. Seagle, husband and wife, for the appropriation of .33 second feet of water for stockwatering and the irrigation of 16 acres of land.

D. Surface Water Application No. 20248 by defendants Kenneth E. Sweger and Jane Doe Sweger, husband and wife, for the appropriation of .20 second feet of water for the irrigation of 20 acres.

Plaintiffs do not know the status of these applications and allege upon information and belief that there may be pending before the Department of Ecology of the State of Washington, other applications of which they have had no notice and thus have no knowledge, and that unless the State of Washington is restrained from doing so, it may issue permits on the applications listed in the preceding paragraph and on other pending applications, all of which, coupled with appropriations under certificates and existing permits, could deprive the United States of its prior rights and could destroy Chamokane Creek as a resource of the Spokane Tribe of Indians and seriously impair the rights to the use of the waters of Chamokane Creek reserved for the benefit of the Spokane Indians.

XIV.

The authority to administer and regulate the use of waters on tribal, allotted and formerly allotted, lands of the Spokane Indian Reservation has been delegated by Congress to the Secretary of the Interior.

Any of the certificates and permits heretofore issued by the State of Washington as listed in Paragraphs IX and XI, together with any other certificates or permits which may have been issued for the use of the waters of Chamokane Creek, which purport to grant any right to use water on the tribal, allotted and formerly allotted lands of the Spokane Indian Reservation are null and void. The State of Washington is without jurisdiction to issue such permits on any of the said lands.

XV.

The other defendants in this action not named in paragraphs IX, XI and XIII claim some right or interest in and to the use of waters of Chamokane Creek and its tributaries adverse to the rights of the United States and the Spokane Indians.

The claims of all of said defendants, and of any person, firm, or corporation claiming under or through said defendants, are inferior and subject to the rights of the plaintiff to the waters of the Chamokane Creek.

WHEREFORE, the plaintiff prays for judgment against the defendants as follows:

1. That each and all of the defendants be required to appear before the Court and to set forth fully their claims in and to the use of the waters of Chamokane Creek and its tributaries.

2. That the Court determine and declare the rights of each of the parties in and to the use of the waters of Chamokane Creek and its tributaries and enter its decree setting forth such rights, with the date of priority for each such right.

3. That the Court determine and decree that the United States, for and on behalf of the Spokane Tribe of Indians, has a prior reserved right to the use of sufficient waters within the Chamokane Creek to satisfy all of the needs of the Spokane Tribe of Indians both now and in the future, to fulfill the purposes for which that reservation was created, as alleged herein, with a priority date of January 18, 1881, and that any claims of the defendants to the use of the said waters are inferior and subject to the prior rights of the plaintiff, and that the defendants be permanently enjoined from making such use of said waters as will interfere with the plaintiffs' reserved rights or any of them.

4. That the Court determine and decree that the United States, through its Bureau of Reclamation of the Department of the Interior, has a right with a priority date of August 8, 1946, to the use of the waters of Spring Creek and its tributaries for a flow of ten cubic feet per second for the purpose of fish propagation which right is exercised by the State of Washington in the operation of a fish hatchery.

5. For an order enjoining the State of Washington from approving, or issuing any further permits or certificates or otherwise exercising jurisdiction over the use of the waters of the Chamokane Creek until further ordered by this Court.

6. For the appointment of a water master whose duty it will be to administer and enforce the decree of this Court entered herein in accordance with the orders and directives of this Court.

7. For an order requiring all defendants using or diverting water from the Chamokane Creek to meter or measure the same and report the amount of such use or diversion to the water master duly appointed by this Court.

8. For an order enjoining all diversions and uses of waters of Chamokane Creek and its tributaries except in accordance with the rights and priorities as set forth in the Court's decree.

9. For costs of suit.

10. And for other and further relief as the Court
deems proper.

Respectfully submitted,

DEAN C. SMITH

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