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Brief of State of Washington, Department of Ecology (Spokane Tribe of Indians "First Cause of Action")

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UNITED STATES OF AMERICA,
Plaintiff,
SPOKANE TRIBE OF INDIANS,
Plaintiff-in-Intervention
v.
BARBARA J. ANDERSON, et al,
Defendants.

CLERK OF COURT
TEMPLE OF JUSTICE
OLYMPIA NO. 3643

JUDGMENT

This matter and the issues having been duly tried and the Court having on the 23rd day of July, 1979, entered and filed herein its Memorandum Opinion and Order which contained the Court's Findings of Fact and Conclusions of Law, now, therefore, in accordance therewith, it is

ORDERED, ADJUDGED AND DECREED:

1

Reference in this Judgment to the "Chamokane Creek Basin" or "Chamokane Basin" shall be understood to include the entire Chamokane Creek system, namely the creek itself, its tributaries and its underlying groundwater basin. The creek and the underlying groundwater basin are inter-related. Ground water withdrawals in the Upper Chamokane region have no impact upon the flow of Chamokane Creek because groundwater in the Upper Chamokane region is part of a separate aquifer. However, in the Mid-Chamokane area, namely commencing in that part of the Chamokane Basin which lies between the east and west boundaries and between a point just north of the northern boundary of the Spokane Indian Reservation, on the north, and the Chamokane Falls on the south, ground water withdrawals do have an effect on and do reduce the flow of Chamokane Creek.

11

This Court has jurisdiction of the parties and of the subject matter of this action, and jurisdiction to adjudicate

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the surface and ground waters of the Chamokane Creek Basin as said Basin is described and defined in said Memorandum Opinion and Order.

III

The United States of America is the legal owner and the Spokane Tribe of Indians is the beneficial owner of reserved water rights from the surface and ground waters of the Chamokane Creek Basin in the following amounts, with the following priority dates, and for the following purposes:

a) A water right for the irrigation of 1880 irrigable acres of bottom land and approximately 6580 irrigable acres of bench lands, all of which are Indian trust lands entitled to reserved water rights in order to fulfill one of the purposes for which the Spokane Indian Reservation was created. The water duty to irrigate these 8460 acres is three (3) acre feet per year, and accordingly the United States and the Tribe own reserved water rights to the extent of 25,380 acre feet each year of ground or surface water from the Chamokane Creek Basin for the irrigation of 8460 irrigable acres of lands on the Spokane Indian Reservation. Of said irrigation water rights 23,694 acre feet each year for the irrigation of 7898 irrigable acres has a priority date of August 18, 1877, the date of the creation of the Reservation, and 1686 acre feet each year for the irrigation of 562 irrigable acres which were reacquired by the Tribe, and later returned to trust status by the Secretary of the Interior after earlier having passed from Indian ownership after allotment or homesteading, have priority dates as of the date of reacquisition for each of the tracts which make up the total of the 562 reacquired acres. Said specific priority dates are as follows:

1. For the 15 irrigable acres in the east one-half of the south one-fourth of Section 35, Township 29 North, Range 39 E.W.M. (part of Tract 1000); March 24, 1942.

2. For the 130 irrigable acres in the southwest one-quarter of Section 36, Township 29 North, Range 39 E.W.M. (part of Tracts 1000 and 1001); March 24, 1942 as to Tract 1000 and February 2, 1942 as to Tract 1001.

3. For the 130 irrigable acres in Lots 1 and 2 and the south one-half of the northeast one-quarter of Section 2, Township 28 North, Range 39 E.W.M. (part of Tract 1010); March 25, 1942.

4. For the 30 irrigable acres in Lot 2, the south one-half of the southeast one-quarter of the northeast one-quarter, the northeast one-quarter, and the southeast one-quarter of Section 23, Township 28 North, Range 39 E.W.M. (part of Tract 1007); February 7, 1942.

5. For the 49 irrigable acres in Lots 7 and 8 of Section 24, Township 28 North, Range 39 E.W.M. (part of Tract 1006); February 7, 1942.

6. For the 15 irrigable acres in the east one-half of the southeast one-quarter of Section 27, Township 28 North, Range 39 E.W.M. (part of Tract 1012); July 16, 1945.

7. For the 15 irrigable acres in the northeast one-quarter and the east one-half of the southeast one-quarter of Section 34, Township 28 North, Range 39 E.W.M. (part of Tract 1012); July 16, 1945.

8. For the 20 irrigable acres in Lots 5 and 7, east one-half of the southwest one-quarter, and the east one-half of the southeast one-quarter of Section 21, Township 29 North, Range 40 E.W.M. (part of Tract 1001); February 2, 1942.

9. For the 110 irrigable acres in the northwest one-quarter and the west one-half of the northeast one-quarter of Section 31, Township 29 North, Range 40 E.W.M. (part of Tract 1001); February 2, 1942.

10. For the 48 irrigable acres in Lots 6 and 9, the northeast one-quarter of the northwest one-quarter, the south one-half of the northwest one-quarter, and the northwest one-quarter of the southwest one-quarter of Section 2, Township 27 North, Range 39 E.W.M. (part of Tract 1001); February 2, 1942.

IV

The irrigation water right decreed for plaintiffs in Paragraph III of this Judgment need not be appropriated continuously and put to beneficial use for irrigation purposes in order for the plaintiffs to continue as owners thereof. In the event the Tribe continues its present decision not to use Chamokane waters for irrigation of the Tribe's said 8460 acres of irrigable lands for which first priority irrigation water rights are adjudicated in plaintiffs in Paragraph III

of this Judgment, so as to preserve the esthetic and fishery uses of Chamokane Creek, such will not abrogate the Tribe's first priority right to use said reserved waters for irrigation of said irrigable acres, or any portion thereof, at a later date.

V

Plaintiffs own and hold a reserved right to a sufficient amount of water to preserve fishing in Chamokane Creek, since maintenance of the creek for fishing was a purpose for creating the Reservation. This reserved right is decreed to the extent of at least 20 cfs of water flowing from Chamokane Falls into Lower Chamokane Creek, together with such additional flow of water from the Falls into Lower Chamokane Creek as is necessary to maintain at all times the water temperature below the Falls at 68° F or less. These quantities are decreed since the quantity of water needed to carry out the Tribe's reserved fishing purposes is related to water temperature rather than simply to minimum flow. The priority date for plaintiffs' reserved water for fishing purposes at the latest is August 18, 1877, the date of the founding of the Reservation, and possibly earlier, and it is decreed that said reserved water right for fishing uses is superior to any and all of the claims of the defendants.

VI

This Judgment need not determine whether one of the purposes of the creation of the Spokane Indian Reservation was to preserve the esthetic qualities and the recreational potential of Chamokane Creek, since the amount of water decreed to plaintiffs in Paragraph V of this Judgment also will suffice to preserve the creek's esthetic and recreational qualities.

VII

The United States, through its Bureau of the Department of Interior, is the owner of a water right for the non-consumptive use of 10 cfs of the flow of Spring Creek, a tributary of Chamokane Creek, for fish propagation at the fish hatchery operated by the Bureau of Reclamation outside the exterior boundaries of the Spokane Indian Reservation. This right has a priority date of October 21, 1942, and is based on Surface Water Certificate No. 2831 issued to the United States by the State of Washington.

VIII

Certain of the defendants, some owning lands on the Spokane Indian Reservation and some owning lands outside the Reservation, are the owners of water rights for the withdrawal of surface or ground waters of the Chamokane Creek Basin, based on certificates or permits issued by the State of Washington. The location, extent, source and owners of these water rights all are listed on pages 13 and 14 of the Court's Memorandum Opinion and Order dated July 23, 1979. Said listing on pages 13 and 14 of said Memorandum Opinion and Order is hereby incorporated by reference in this Judgment and by this reference made a part hereof. The priority date of each said water right is stated on said incorporated pages 13 and 14, and all of said water rights thus specified for the defendants are inferior to the water rights herein decreed to plaintiffs for fishing purposes and likewise all are inferior to the rights herein decreed to plaintiffs for irrigation purposes excepting only to the extent that any of said defendants' water rights has a priority date earlier than the priority dates, which are either in the year 1942 or the year 1945, hereinabove specified for the reserved water for the irrigation of the Tribe's 562 reacquired acres.

IX

It is decreed that each of defendants' water rights has an effect on the flow of Chamokane Creek below the Falls. The effect of the maximum exercise of each water right decreed to defendants, on the flow of Chamokane Creek below the Falls, is as specified on pages 13 and 14 of said Memorandum Opinion and Order of July 23, 1979, and said determined effects specified on pages 13 and 14 are hereby incorporated by reference and made a part of this Judgment.

X

This Judgment is a final adjudication of the water rights in the Chamokane Creek Basin, and the quantification of plaintiffs' reserved rights is based upon the amount necessary to irrigate all of the practicably irrigable acreage on the Reservation which may be irrigated from said Chamokane waters and as such is designed to meet the future as well as the present needs of the Tribe. The Court,

however, does retain jurisdiction over the adjudication of the water rights in the Chamokane Creek Basin and it is decreed that the Tribe may apply for modification of this Judgment upon a showing of a substantial change in circumstances, unanticipated in the Court's quantification made in said Memorandum Opinion and Order of July 23, 1979, and in this Judgment, resulting in a need for water greater than the amount which has been reserved to the plaintiffs for the Tribe's future needs.

XI

Any future application to the State of Washington or the issuance of any permits or certificates by the State of Washington shall be subject to the priority of the herein adjudicated water rights of the parties.

XII

The employment of a Water Master to supervise the appropriation of waters from the Chamokane Creek Basin and to assure that water is appropriated and used consistent with and in conformity with this Judgment is decreed to be appropriate and necessary and such Water Master shall be appointed as soon as possible. The parties shall promptly confer and attempt to agree upon the selection of a Water Master and shall notify the Court promptly if agreement is reached. If the parties are unable to agree to the selection of a Water Master, each party shall submit to the Court within 20 days of the date of the Judgment not more than three proposed names with accompanying background information. The Court will then appoint a Water Master to carry out and enforce this Judgment and the instructions and orders of the Court.

XIII

The Water Master to be appointed pursuant to this Judgment shall have the power to issue proper orders, rules and directions made in accordance with and for the enforcement of the Judgment, and in the event any such orders, rules or directions of the Water Master are disobeyed or disregarded, the Water Master shall be and he is hereby empowered and authorized to cut off the water of the owners or water users so disobeying or disregarding such proper orders, rules or directions. The Water Master shall promptly report to the Court said action and the circumstances leading thereto and connected therewith.

XIV

The following additional provisions shall apply to the Water Master to be appointed herein:

a) The parties, in addition to meeting for the purpose of conferring and attempting to agree upon the selection of a person to be appointed as Water Master, shall confer and attempt to agree upon terms of employment for the Water Master and terms for the payment of expenses and compensation of the Water Master. In the event the parties are unable to agree upon such proposed terms of employment and terms for the payment of his expenses and compensation, then each party, in addition to submitting to the Court within 20 days of the date of the Judgment proposed names for appointment to the Water Master position, also shall submit to the Court within 20 days of the date of the Judgment proposed terms of employment of said Water Master and proposed terms for the payment of expenses and compensation of the Water Master.

b) In the carrying out of the duties of his position and whenever the necessities of the situation appear to the Water Master to so require, the Water Master may require the owners of the water rights adjudged in this Judgment to install and properly maintain at their own expense a reliable, sufficient measuring device or devices whereby the water diverted or pumped may be properly regulated and correctly measured.

c) The Water Master may require installation of devices to measure and record water temperatures below Chamokane Falls in order to regulate water diversions in accordance with this Judgment. The cost and expenses of installation of said measuring devices and the making of said measurements and recording the water temperatures shall be part of the expenses of the Water Master and shall be shared by the parties in the same fashion as other expenses of the Water Master.

d) The expenses of the Water Master shall be paid by plaintiffs and by those defendants who are listed on pages 13 and 14 of the Memorandum Opinion and Order of July 23, 1979, or by their respective successors in the ownership of the lands to which the water rights listed on said pages 13 and 14 are appurtenant. The manner of apportionment of said expenses between plaintiffs and defendants shall be as hereinafter ordered by the Court herein. As to the portion of the expenses allocated to defendants, said expenses shall be paid by said defendant water right holders on a prorata basis prorated according to maximum use specified for each said water right on said pages 13 and 14 or prorated-----

on such other basis as may subsequently be ordered by the Court. Payment by each said water right holder of his prorata share of the expenses of the Water Master shall be a condition precedent to the right of the water right holder to continue to withdraw or divert water from the Chamokane Creek Basin and in the event any such water right holder should fail to make timely payment of his prorata share of such expenses, the Water Master is empowered and authorized to cut off the water of such owner or water user in the same manner as hereinabove provided in Paragraph XIII of this Judgment.

e) Whenever any person or party does not receive the amount of water to which he is entitled under this Judgment, after taking into account the respective priorities of the parties and the quantity of water available, the Water Master, upon the request of any water right holder, shall regulate the necessary headgates, ditches and other works (including pumps) used for the diversion and application of waters from the Chamokane Creek Basin so as to apportion the same consistent with the provisions of this Judgment; and for that purpose the Water Master may enter upon the lands of any and all persons whose water rights are adjudicated by this Judgment.

f) The maximum temperature reached by the waters in Lower Chamokane Creek during summer hot spells is directly related to the quantity of water coming from the massive springs. The flow of these massive springs is affected by the defendants' pump diversions of ground water from the aquifer of the Chamokane Basin but the effect of such pump diversions on the flow from the massive springs is delayed because of the slow speed of percolation of water through the aquifer. This delay varies from six months to at least a year, depending on the distances of the pump diversions from the springs area. Therefore, because of this the effect of one year's pumping in reducing the flow from the massive springs and thus in increasing the maximum water temperatures in the Lower Chamokane, does not appear until the following year. Accordingly, when the Water Master, through his stream flow and temperature findings and other studies in any given year, determines that continued pump diversions of ground water from the aquifer by any of the defendants that year is likely to reduce the hot weather flow of Lower Chamokane Creek for the next year to a quantity

that maximum temperatures of more than 68° F degrees are likely for the waters of the Creek, he shall forthwith order the reduction of such pumping by said defendants to the extent he believes necessary to assure the maintenance during the following year of a maximum temperature of 68° F or less in the waters below Chamokane Falls, as decreed in Paragraph V of this Judgment.

XV

The quantities of water permitted to be diverted or pumped pursuant to the priorities established in this Judgment are subject to the obligations of said water right owners or water users to divert and use water only at such times as needed and only in such amounts as may be required under a reasonable, economical and beneficial use.

XVI

The persons whose water rights are adjudicated by this Judgment, their successors or assigns in the ownership of the lands to which said water rights are appurtenant, 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 entitled or any part thereof, so far as they may do so without injury to the rights of other persons whose water rights are fixed by this Judgment; provided, however, that in addition to other requirements which may exist for such change, the person desiring to make such change shall apply to and obtain the approval of the Water Master for such requested change.

XVII

The claims of the Washington State Department of Natural Resources, one of the defendants herein, were not perfected in accordance with the requirements of State law and all claims of defendant Washington State Department of Natural Resources are rejected.

XVIII

The claims of Boise Cascade, one of the defendants herein, were not perfected in accordance with the requirements of State law except as to one diversion point only and the claims of defendant Boise Cascade are rejected except as to a water right from diversion point 14 as provided in WSSW Certificate No. 2258.

XIX

Water for which irrigation rights have been adjudicated by this Judgment may be used by the water right holder at any time unless restricted by the provisions of the state

certificate or permit upon which the water rights are based, provided that the amount of water applied to the land during any calendar year shall not exceed the amount awarded to that land by this Judgment.

XX

Water for domestic use is not included within this Judgment nor adjudicated herein since the use of water for domestic purposes is de minimus and sufficient water for such domestic purposes always should be available.

XXI

In any case where a water right holder obtains water from two or more sources the aggregate of the combined waters from such sources which may be used shall not exceed the amount permitted for such use as herein determined and specified by this Judgment.

XXII

The persons and corporations who are parties to this action, or who are named or referred to in this Judgment or who are listed on pages 13 and 14 of the Memorandum Opinion and Order of July 23, 1979, which by reference is incorporated in this Judgment, and all persons claiming by, through or under said persons and corporations, 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 ground water basin, except the rights specified, determined and allowed by this Judgment; 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, persons and corporations 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.

XXIII

The request of plaintiffs that the defendant State of Washington, Department of Ecology, be enjoined from issuing additional certificates or permits or accepting additional applications for diversion of waters of the Chamokane Creek Basin, is denied. Waters from the Chamokane Creek Basin presently appear to be over appropriated in light of the adjudication made in this Judgment, and if the State Department of Ecology permits additional persons to apply for water from the Chamokane Creek Basin it may be creating in them false hopes, but such actions by the State Department of Ecology would not cause irreparable harm to any of the parties to this litigation since any such future certificates, permits or applications would be subject to existing rights and would have no effect upon the water rights of the parties as adjudicated and determined by this Judgment.

XXIV

The several parties to this action shall pay and bear their own costs.

XXV

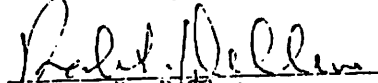
The Court retains jurisdiction of this matter for the purpose of any order or modification of this Judgment that may be deemed proper in relation to the subject matter and controversy.

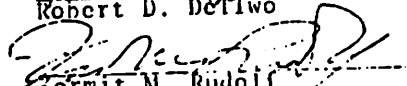
DATED this 12 day of September, 1979.

MARSHALL A. NEILL

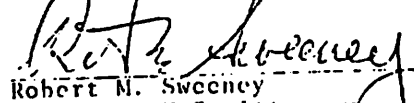
UNITED STATES DISTRICT JUDGE

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