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Amended Complaint

James B. Crum
Assistant United States Attorney

John H. Germeraad
Attorney, Department of Justice

Dean C. Smith
United States Attorney

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JAN 15 1974

J. R. FALLQUIST, Clerk

UNITED STATES DISTRICT COURT *LL* Deputy

FOR THE EASTERN DISTRICT OF WASHINGTON

1 UNITED STATES OF AMERICA,)

2)
3 Plaintiff,)

4 v.)

5 BARBARA J. ANDERSON, JAMES M. ANDERSON,)

Civil No. 3643

6 BOISE CASCADE CORPORATION, NAOMI COOK,)

AMENDED COMPLAINT

7 RAYMOND E. COOK, DAWN MINING CORPORATION,)

8 BENEDETTO DITURI, JANICE L. DITURI, MARY)

9 DITURI, VICTOR J. DITURI, DOLORES DUDDY,)

10 PAUL F. DUDDY, FAY ECHELBARGER, M.B.)

11 ECHELBARGER, LENA E. EDWARDS, DALPH G.)

12 EDWARDS, JOANN C. FLETCHER, JOHN G.)

13 FLETCHER, SEYMOR A. FLOOD, VERA FLOOD,)

14 LLOYD FLOOD, ALICE FLOOD, EDWARD A.)

15 FRANKS, IRENE FRANKS, MAUDE L. GRUPE,)

16 ELLA E. HALL, WILLIAM R. HALL, MARION)

17 L. LAMB, VERA MAE LAMB, ESTHER LUTHER,)

18 GEORGE LUTHER, JANE DOE LYONS, LEONARD)

19 E. LYONS, ARTHUR A. MILLER, RUTH J.)

20 MILLER, JANET E. NELSON, RUTH J. NELSON,)

21 JAMES R. NEWHOUSE, JANE DOE NEWHOUSE,)

22 PAUL SAMUELS, MARY SAMUELS, PAUL E.)

23 SCHAFFNER, JANE DOE SCHAFFNER, URBAN S.)

24 SCHAFFNER, CORA SCHAFFNER, DOROTHY F.)

25 SEAGLE, ROBERT J. SEAGLE, SECURITY)

26 INVESTMENT SERVICE, JOHN A. SMITH,)

27 MARGARET M. SMITH, A.L. SMITHPETER,)

28 FLETTA L. SMITHPETER, FRANCIS L. SMITH-)

29 PETER, FRED N. STAHL, RUTH M. STAHL,)

30 ELIZABETH SWIGER, KENNETH E. SWIGER,)

31 DOROTHY F. TASCHEREAU, GEORGE G.)

32 TASCHEREAU, TRANS WEST COMPANY,)

WASHINGTON WATER POWER COMPANY,)

ELIA M. WATSON, TRUE H. WATSON,)

CAROL WELK, PETER M. WELK, CLARA)

WILLGING, GUST WILLGING, and the)

STATE OF WASHINGTON,)

Defendants.)

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

original

1 rights in and to the waters of Chamokane Creek and its tributaries
2 determined, declared and protected.

3 III

4 Chamokane Creek arises in the Huckleberry Mountains north
5 of the Spokane Indian Reservation and runs easterly to a point south
6 of the town of Springdale where it abruptly turns southerly and runs
7 along the east side of the Reservation, the east bank of the creek
8 forming the eastern boundary of the Reservation. Chamokane Creek
9 runs through a glacial trough varying in width from 1 1/2 miles at
10 the north boundary of the reservation to a width of 2 1/2 miles at
11 a point midway along the eastern boundary of the reservation. The
12 floor of this glacial trough is from 500 to 600 feet below the
13 existing valley floor. As the glacial trough extends southerly, it
14 narrows into a canyon and is dammed by an upsurge of granitic rock
15 approximately 2 miles north of the confluence of Chamokane Creek with
16 the Spokane River. The upper 30 to 40 feet of the deposits within
17 this glacial trough consist of loose water yielding materials while
18 the glacial deposits below this upper level are more consolidated
19 and have less water holding and yielding capacity. The ground waters
20 within the Chamokane Trough are a part of Chamokane Creek. As the
21 waters of Chamokane Creek flow through the glacial trough, part of the
22 waters sink into and flow through the underground. At the end of the
23 trough the ground waters rise to the surface and again become part
24 of the surface flow of the creek.

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

30 IV

31 The Spokane Indian Reservation is within the Eastern
32 District of Washington. It was set aside and reserved by an agreement

1 dated August 18, 1877, for the use and occupancy of the Spokane Tribe
2 of Indians. This agreement was entered into after a three day
3 council at Spokane Falls between the Chiefs and Headmen of the
4 Spokane Tribe of Indians and Colonel E. C. Watkins, acting in his
5 official capacity as Indian Inspector, representing the Department of
6 the Interior, and General Frank Wheaton, and Captain M. C. Wilkinson,
7 of the United States Army, representing the Department of War. In
8 that agreement, the reservation is described as follows:

9 Beginning at the source of the Chimokan Creek in
10 Washington Territory, thence down said creek to
11 the Spokane River, thence down said River to the
12 Columbia River, thence up the Columbia River to
13 the mouth of Nimchin Creek, thence easterly to the
14 place of beginning.

15 On August 23, 1877, Colonel Watkins reported the agreement
16 to his superior officer, the Commissioner of Indian Affairs. Immedi-
17 ately after the signing of this agreement and prior to November 14,
18 1877, Colonel Watkins, still acting in his official capacity, located
19 such of the said Spokane Indians as were not already residing thereon
20 upon the said reservation, and again reported this action on November 26,
21 1877, to his superior, the Commissioner of Indian Affairs, who communi-
22 cated it to the Secretary of the Interior, with his approval, on
23 December 19, 1877, who, in turn communicated it to the United States
24 Senate on January 23, 1878. These earlier actions were confirmed on
25 January 18, 1881, when President Hayes, by an Executive Order
26 formally set aside and reserved the territory described in the
27 August 18, 1877, agreement, for the use and occupancy of the Spokane
28 Indians. That Executive Order describes the reservation as follows:

29 Commencing at a point where Chemekane Creek
30 crosses the forty-eighth parallel of lati-
31 tude; thence down the east bank of said creek
32 to where it enters the Spokane River; thence

1 across said Spokane River, westwardly along the
2 southern bank thereof to a point where it enters
3 the Columbia River; thence across the Columbia
4 River, northwardly along its western bank to a
5 point where said river crosses the said forty-
6 eighth parallel of latitude; thence east along
7 said parallel to the place of beginning.

8 V

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

18 VI

19 When the Spokane Indian Reservation was established in 1877,
20 by implication there was reserved for the benefit of the Spokane
21 Indians the right to the use of sufficient waters in and on the said
22 reservation, including the surface and subsurface waters of the
23 Chamokane Creek, to fulfill the needs, present and future, of the
24 Indians for whom the reservation was created and to fulfill the pur-
25 poses for which that reservation was created, with a priority date of
26 August 18, 1877. These uses of the waters of Chamokane Creek include
27 but are not necessarily limited to:

28 A. Sufficient water to maintain Chamokane Creek as a
29 fishery and the area of the creek within the reservation as a natural
30 habitat for fish, wild fowl and game in fulfillment of the purposes
31 for which that reservation was created. Sufficient water to maintain
32 Chamokane Creek as a free-flowing recreational stream preserved in its
natural or near natural state as a recreational, aesthetic and natural

1 resource of the Spokane Tribe of Indians. A minimum flow of 30 cubic
2 feet per second in the lower regions of the stream is necessary for
3 these purposes.

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

8 C. Sufficient water for development of the lands within
9 the Spokane Reservation along the Spokane River between the Little
10 Chamokane Creek and the above-mentioned Chamokane Creek for agricul-
11 tural, recreational, environmental, domestic and related purposes.

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

15 VII

16 The United States, through its Bureau of Reclamation of
17 the Department of the Interior, is holder of a permit issued by the
18 State of Washington (Application No. 7372, Permit No. 5144, Certificate
19 No. 2831), which permit bears a priority date of August 8, 1946, and
20 owns a right to the use of ten cubic feet per second of the flow of
21 Spring Creek a tributary of Chamokane Creek for fish propagation
22 purposes. The point of diversion is in the S1/2 of the NE1/4,
23 Section 24, Township 28N, Range 39E, Willamette Meridian, State of
24 Washington. This right was acquired pursuant to the Act of October 9,
25 1940, ch 794, 54 Stat. 1085, as part of the fish protection program
26 required on the Grand Coulee Dam Project. It is exercised by the
27 State of Washington in the operation of a fish hatchery pursuant to
28 agreement with the Secretary of the Interior. The consumptive use,
29 consisting of evaporation from ponds, is negligible and not in conflict
30 with the rights to the use of water held for the benefit of the
31 Spokane Indians.

32

1 VIII

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

10 IX

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

20 A. M. B. Echelbarger and Fay Echelbarger, husband and
21 wife, Certificate No. 294 for 4 second feet of water for the irriga-
22 tion of 165 acres of land.

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

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

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

32

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

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

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

10 H. True H. and Ella M. Watson, Certificate No. 1675 for
11 .01 second feet of water for domestic supply and irrigation.

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

15 J. Boise Cascade Corporation, Certificate No. 2258 for
16 .01 second feet of water for domestic supply and stockwatering
17 purposes.

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

21 X

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

29 XI

30 The State of Washington has allowed the appropriation
31 of waters from the Chamokane Creek for irrigation and other purposes
32 and has issued permits under Washington law, which have not yet been

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

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

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

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

16 XII

17 The contemplated use by the Smithpeter defendants will
18 reduce the flow of Chamokane Creek below their point of diversion
19 by approximately 10 percent of the natural flow at the time of the
20 creek's dry season flow, and will seriously impair the creek as a
21 fishery, recreational, aesthetic and natural resource of the Spokane
22 Tribe of Indians and unlawfully interfere with the rights to the
23 use of the waters of Chamokane Creek reserved for the benefit of
24 the Spokane Indians. Unless restrained, plaintiff believes said
25 defendants will proceed with the threatened diversions in the forth-
26 coming irrigation season, irreparably damaging the Spokane Tribe.

27 Defendants Newhouse have been pumping from one or two
28 wells, causing a substantial diminution in the flow of Chamokane
29 Creek. The total diversion threatened by said defendants when
30 completed, will result in a further depletion and diminution of the
31 flow of Chamokane Creek, further impairing it as a fishery and
32 ecological resource and irreparably damaging the Spokane Indians

1 and unlawfully interfering with the water rights reserved for
2 their benefit.

3 XIII

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

9 A. Groundwater Application No. 112227 filed by defendants
10 Gust Willging and Clara Willging, husband and wife, for the with-
11 drawal of 2,000 gallons per minute from a well for irrigation
12 purposes.

13 B. Groundwater Application No. 10344 by defendants
14 Leonard E. Lyons and Jane Doe Lyons, husband and wife, for
15 the withdrawal of 1,000 gallons per minute from a well for the
16 irrigation of 100 acres.

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

21 D. Surface Water Application No. 20248 by defendants
22 Kenneth E. Sweger and Jane Doe Sweger, husband and wife, for the
23 appropriation of .20 second feet of water for the irrigation of
24 20 acres.

25 Plaintiffs do not know the status of these applications
26 and allege upon information and belief that there may be pending
27 before the Department of Ecology of the State of Washington, other
28 applications of which they have had no notice and thus have no
29 knowledge, and that unless the State of Washington is restrained
30 from doing so, it may issue permits on the applications listed in
31 the preceding paragraph and on other pending applications, all of
32 which, coupled with appropriations under certificates and existing

1 permits, could deprive the United States of its prior rights and
2 could destroy Chamokane Creek as a resource of the Spokane Tribe
3 of Indians and seriously impair the rights to the use of the waters
4 of Chamokane Creek reserved for the benefit of the Spokane Indians.

5 XIV

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

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

18 XV

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

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

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

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

32

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

5 3. That the Court determine and decree that the United
6 States, for and on behalf of the Spokane Tribe of Indians, has a
7 prior reserved right to the use of sufficient waters within the
8 Chamokane Creek to satisfy all of the needs of the Spokane Tribe of
9 Indians both now and in the future, to fulfill the purposes for which
10 that reservation was created, as alleged herein, with a priority date
11 of August 18, 1877, and that any claims of the defendants to the use
12 of the said waters are inferior and subject to the prior rights of the
13 plaintiff, and that the defendants be permanently enjoined from making
14 such use of said waters as will interfere with the plaintiffs'
15 reserved rights or any of them.

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

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

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

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

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

4 9. For costs of suit.

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

7 Respectfully submitted,

8 DEAN C. SMITH
9 United States Attorney

10 By: James B. Crum *by RMB*
11 JAMES B. CRUM

12 Assistant United States Attorney
13 851 U. S. Court House
14 Box 1494
15 Spokane, Washington 99210
16 (509) 456-3811

17 John H. Gerneraad
18 JOHN H. GERMERAAD
19 Attorney, Dept. of Justice
20 Washington, D. C. 20530
21 (202) 739-2713

22 ATTORNEYS FOR PLAINTIFF