SPOKANE INDIAN TRIBE V. SULGROVE AND CHAMOKANE LANDOWNERS ASSOCIATION
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This case involves a conflict between the use of groundwater under the exemption from permitting for certain uses under Washington law and senior tribal reserved water rights. *U.S. v. Anderson* is the long-running federal court case involving rights to water from Chamokane Creek, which runs through the Spokane Indian Reservation, adjacent to Stevens County, Washington. In 1972, the United States, on behalf of the Spokane Tribe, filed suit in federal court to adjudicate water rights in the Chamokane Creek Basin. In 1979, the District Court issued a decree which established an instream flow right for the Tribe to support fishing as a purpose of its Reservation. Under this right, the minimum flow of water that must be maintained in the Creek is generally 24 cubic feet per second (cfs). The District Court also confirmed irrigation water rights for the Tribe and several other non-Indian owners of fee land on the Reservation and land off the Reservation. Under the decree, water use is regulated by a court-appointed Water Master, who directs holders of irrigation rights to shut off their water use when the flow of the Creek drops below 24 cfs. During several years between 1999 and 2006, the 24 cfs instream flow right was not met, and the Water Master required the holders of irrigation water rights to curtail their water use. While the curtailment of irrigation water use became more frequent, the number of homes in the Chamokane Basin that rely on groundwater for domestic use and the irrigation of lawns and gardens steadily increased. Under Washington law, certain uses of groundwater are exempt from water right permitting requirements, and these homes receive their water supply from so-called permit-exempt wells.

The regulatory actions by the Water Master cast attention on the proliferation of permit-exempt groundwater uses in the area, and the Tribe and the United States filed a motion requesting the District Court to prevent harm to the holders of the water rights that were confirmed in this case, which have priority dates that are senior to the permit-exempt groundwater rights. The court ordered the United States and Ecology to commission the United States Geological Survey to perform a groundwater study to inform the court on issues relating to whether unadjudicated permit-exempt groundwater uses should be regulated to protect senior adjudicated rights. The USGS study was completed and indicates that there is a hydraulic connection between surface and groundwater throughout the Chamokane Basin, and that the pumping of groundwater from wells causes the reduction of flows in Chamokane Creek.

The court identified issues related to the results of the USGS study, and whether and how water rights that were not adjudicated in the 1979 decree may be regulated to prevent impairment of senior adjudicated water rights. In 2015, the District Court issued an order which required Ecology, the United States, and the Tribe (the Government Parties) to compile a listing of the Water Master's duties as prescribed in several orders that were entered earlier in the case, and to present a plan to provide notice to landowners in the Chamokane Basin to begin a process to bring them into the case so that their water use could be regulated. The Government Parties

filed a compilation of the Water Master's duties, but requested an extension for filing the notice plan to allow time for settlement discussions, which was granted by the court.

Subsequently, for over three years, Ecology engaged in mediation with the United States and the Spokane Tribe in an effort to attain a settlement that would prevent the curtailment of permit-exempt groundwater use during times when the Tribe's senior instream flow right is not met and senior irrigation rights are shut off. Ultimately, a settlement was reached, and, in April 2019, the Settlement Agreement went into effect. Among other things, the Settlement Agreement includes a mitigation plan to offset impacts on the senior rights caused by junior permit-exempt groundwater users, and an expansion of the duties of the Water Master to include state regulatory functions. The mitigation plan includes the construction and operation of two mitigation wells that will pump water at a location adjacent to the Spokane River, pipe the water, and discharge it into Chamokane Creek to augment stream flows. One of the wells will offset the effects of current and future permit-exempt well use on flows, and the other well will be operated by the Tribe to enhance flows during critical high temperature periods, in order to reduce water temperature and improve conditions for fish.

The Government Parties filed a substantive motion requesting the court to issue an order that would modify the decree and other earlier orders in the case to allow for implementation of the Settlement Agreement, and a procedural motion to establish a procedure for the court's decision-making on the proposed changes to the decree and orders. The most significant modification that the Government Parties sought was to delete provisions stating that permit-exempt groundwater uses were "de minimis" and not subject to regulation based on their priority dates relative to the senior priority water rights that were confirmed for the Tribe and other parties in the decree. In September 2019, the Government Parties sent notice to all owners of land in the Chamokane Basin, to provide them with the opportunity to file objections to the proposed modification.

Objections were filed by the appellants, and other landowners in the Basin. These objections contended that, notwithstanding the court's retention of continuing jurisdiction over the case, it could not pronounce that the permit-exempt uses are not de minimis because there had not been a significant change in circumstances since 1979, and making such uses subject to possible regulation would violate landowners' due process rights. The objections further contended that the effects on flows caused by pumping permit-exempt wells are unmeasurable and that the Government Parties have not shown that well use is causing any actual reduction in flows. While the objectors would still be able to use water from their wells because of the mitigation if their uses stay within certain reasonable limits, the objectors do not believe that their water rights should be part of any regulatory scheme at all.

In May 2021, the District Court granted the Government Parties' substantive motion and issued an Order Modifying Prior Court Orders. The Order found that the Government Parties met their burden to modify the court's previous orders by demonstrating that there had been a significant change in circumstances as a result of the proliferation of permit-exempt wells and the USGS report showing a connection between the groundwater aquifer and Chamokane

Creek. Further, the Order found that the objectors had not met their burden to establish an injury traceable to the proposed modifications or that the Settlement Agreement and the modifications are unreasonable or illegal: “Notably, it is undisputed that the Tribe’s water rights are senior to the objectors’ water rights.” The court concluded that the Settlement Agreement and proposed modifications are “fundamentally fair, adequate, and reasonable and in the public’s best interest.”

The District Court’s Order was appealed to the Ninth Circuit, which dismissed the appeal for lack of standing. The Court concluded that the federal court adjudication of certain water rights in the Chamokane Basin was not a general adjudication and did not include users of permit-exempt groundwater. Since the appellants are not included in the case and governed by its orders, they “cannot claim a redressable injury caused by modification of the judgment, and lacked standing to file suit to challenge the modification.