

UNITED STATES DISTRICT COURT

APR 5 1979

DISTRICT OF MONTANA

MISSOULA DIVISION

LOU ALEKSICH, JR. CLERK  
By *Judy A. Bush*  
Deputy Clerk

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANNETTE A. ABELL; MERRILL H. ABELL; ANACONDA )  
ALUMINUM; ED ASKELSON; EILEEN ASKELSON; )  
LONNA G. BARNARD; RICHARD H. BARNARD; CHARLES )  
BAXTER; LAWRENCE E. BAXTER; LILA BAXTER; ETHEL )  
BORGEN; FLORENCE BORGEN; NORMAN BORGEN; TED BORGEN; )  
BARBARA J. BOWER; JOHN A. BOWER; HERBERT A. BREUER; )  
BEULAH BUCK; HOWARD BUCK; PHILLIP BUCK; RUSSELL )  
BUCK; SHEILA BUCK; WILMA BUCK; DAN H. BURGESS; )  
ELVIRA BURGESS; CHARLES G. CARDA; MARIE CARDA; )  
DUANE A. CARLSON; KATHLEEN M. CARLSON; EVELYN CASNE; )  
SAM CASNE; BILL CHRISTENSEN; MARGLO CHRISTENSEN; )  
ALLAN R. CLARK; EILEEN CLOUSE; JOHN CLOUSE; CITY OF )  
COLUMBIA FALLS; CONRAD LAND & CATTLE, INC.; CONRAD )  
MEMORIAL CEMETERY ASSOC.; CONRAD NATIONAL BANK; )  
FRANCIS COOMBS; W.R. COOMBS; CAROLE COSICK; DAVID )  
COSICK; GLEN DALEY; DOROTHY DANFORD; NEIL DANFORD; )  
JOAN A. DEIST; ROGER DETERT; ROSEMARY DETERT; )  
DORIS J. DUPUIS; LYLE L. DUPUIS; JAMES G. EDMISTON; )  
KATHLEEN ESLICK; PAUL ESLICK; ROBERT W. EWERT; )  
BURRELL C. FLANSBURG; FLEMING LAND PARTNERSHIP; )  
HARLEY FREDENBERG; CARTER FRITZ; CHERYL R. FRITZ; )  
DUANE O. FRITZ; EARL FRITZ; KAREN FRITZ; LOTELLA )  
FRITZ; MAE BELLE FULBRIGHT; WILLIAM FULBRIGHT; )  
ARLEE GARDNER; RICHARD GARDNER; GLEN GENTRY; SHIRLEY )  
GENTRY; ANNA I. GRAHAM; FRANCIS GRAHAM; PATRICIA )  
GRAHAM; ROBERT B. GRAHAM; JOSEPHINE K. GREGG; )  
RONALD M. GRESS; DORA A. GRIER; ARNOLD M. GROB; )  
CHRIS GROB; DALLAS GRONLEY; JANE GRONLEY; GROSSWILLER )  
DAIRY, INC.; RUTH GUINN; VIRGIL GUINN; PATRICIA )  
HAAG; PAUL HAAG; MARY ANN HAGEN; NORMAN HAGEN; )  
CATHERINE W. HARVEY; ROBERT F. HARVEY; DONALD D. )  
HAWKINS; IRIS HAWKINS; DENNIS J. HESTER; DOROTHY )  
HODGSON; MARK HODGSON; BEVERLEY HUGHES; RAYMOND )  
HUGHES; BERNIECE IVERSON; WALTER IVERSON; JOLENE )  
JACOBSON; RONALD JACOBSON; DONALD K. JENSEN; ELSIE )  
JENSEN; JAMES JENSEN; JOHN JENSEN; GLADYS M. JENSEN; )  
JANETTE S. JENSON; DONNA JOHNSON; EIVEN JOHNSON; )  
RUTH A. JOHNSON; T. FLOYD JOHNSON; THELMA M. JOHNSON; )  
VERNON R. JOHNSON; HIRAM JORGENSON; ROSE A. JORGENSON; )  
DARLENE JUMP; CITY OF KALISPELL; KALISPELL LUMBER CO.; )

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CIVIL NO.

79-33-M

COMPLAINT

ALVIN M. KELLER; FRANCES KELLER; ANNA W. KEMP; DAVID K. KEMP; )  
RONALD KIZER; RUTHIE KIZER; VERNON KNOLL; HERBERT KOENIG; )  
ROBERT KOENIG; ALMA E. KRAFT; GEORGE LAPP; KATHRYN LAPP; EDNA )  
LARSON; MARVIN LARSON; DAN LEIGHTY; SAM LEIGHTY; MARGARET R. )  
LOGAN; CLEONA LYBECK; JACK WILLARD LYBECK; RAY LYBECK; CAROL )  
SUE MAPSTON; R. WESLEY MAPSTON; VERLAND E. MARQUARDT; DEARK )  
MARQUART; STATE OF MONTANA; ALVARETTA MORIN; LEROY MORIN; )  
MELINDA MORIN; RALF MORIN; FRANK MORRISON; MILDRED MORRISON; )  
LAURA B. MUELLER; OSWALD MUELLER; MARION A. MURER; DELLA )  
McCELLAND; ELOISE F. McMILLAN; GEORGE McMILLAN; ANN S. NANCE; )  
ROY L. NANCE; EMIL NELSON; ARNOLD T. NOMMENSEN; MARIAN L. )  
OBERLANDER; RAYMOND J. OBERLANDER; ANNA CHARLENE OREM; EVERETT )  
GENE OREM; THE PACK RIVER CO., A Corp.; CLEORA PARD; PARKER )  
BROTHERS FARMS, INC.; GERALD L. PARKER; CLYDE A. PEDERSON; )  
HELEN J. PERRIN; H.W. PICKERING; PAUL V. PICKERING; V. MAXINE )  
PICKERING; CLYDE P. PIERSON; EVELYN PIERSON; PLUM CREEK LUMBER )  
CO.; HELEN POKORNSKI; LOIS H. POULSON; DOROTHY PRESTON; DWIGHT )  
PRESTON; GARRISON REDD; LETA REDD; ALBERT H. REED; GRETA M. )  
REED; NITA ROBBIN; WALTER ROBBIN; GILBERT M. RODRIGUEZ, MD., )  
Inc.; DOYLE SAMPSON; HELEN SAMPSON; PAT A. SANDERS; RALPH P. )  
SANDERS; CLYDE SCHANDELMEIR; JOHN SCHRADER; KARL SCHRADER; MARIA )  
SCHRADER; ELAINE SCHULTZE; GEORGE SCHULTZE; DELLA A. SCOTT; )  
JOHN J. SHOAL; BARBARA J. SIDERIUS; CHARLES SIDERIUS; JEROME D. )  
SIDERIUS; JAMES C. SIMMONS; SKY AIR ENTERPRISES; SLITERS, INC.; )  
A. HAROLD SMALL; J. MILTON SMALL; SNELL FARM PROPERTIES, INC.; )  
EVELYN JANE SPAHR; EDA J. STOFEL; NAOMI L. STREICH; ORRIN R. )  
STREICH; YVONNE THOMPSON; DAN B. TORGENSEN; HOWARD H. TRACHT; )  
LLOYD H. TRACHT; JAMES W. TREWEEK; CHARLES E. TRUSH; RUTH R. )  
TRUSH; DELENE P. TUFLY; KENNETH R. TUFLY; HAROLD A. TUTVEDT; )  
PAUL TUTVEDT; PAUL R. TUTVEDT; VAN ARKEN GARDENS, INC.; STEVE )  
VULLES; EMMA WAGNER; JAMES WARD; MARY DENE STOCKING WARD; )  
SHARON WARD; BARBARA L. WARNER; WILL S. WARNER; GRACE WEIFERICH; )  
WILLIAM WEIFERICH; MAE WEIMAR; NORMAN E. WENDT; CHARLES C. )  
WHITE; CLAYTON WHITE; GAIL WHITE; MARIAN J. WHITE; ALICIA )  
WHITMAN; MRS. ART WHITNEY; MAUDE B. WHITNEY; HAROLD F. YEAGER; )  
ANNABELLE MORIN ZAHN; ALLEN ZIMMERMAN; RAMOND ZIMMERMAN; )  
Defendants. )

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COMES NOW the United States of America, acting by and through the Attorney General and at the request of the Secretary of the Interior and complains and alleges as follows:

1. This action is brought by the United States in its own right and as trustee for the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, Montana, the tribal members and allottees to obtain an adjudication of the rights of the parties to appropriate and use the surface and ground waters within the Flathead River basin in Montana.

2. Jurisdiction is vested in this Court by the provisions of 28 U.S.C. 1345.

3. The term "Flathead River basin" as used in this complaint means that area encompassing the Flathead River and its tributaries from their sources to the place where the Flathead River flows into the Clarke Fork River.

4. The source of the North Fork of the Flathead River is in Canada. After crossing the Canadian border, the North Fork flows in a southerly direction, forming the eastern boundary of Glacier National Park. The Middle Fork of the Flathead River has its origin in the Flathead National Forest near Mount Field; it flows in a northwesterly direction, and constitutes a portion of the southern boundary of Glacier National Park, joining the North Fork at the Park's southwestern corner. The South Fork of the Flathead River arises in the Flathead National Forest near Danaber Mountain and flows northwesterly into Hungry Horse Reservoir. It enters the Flathead River near the Town of Hungry Horse.

5. Below the confluence of the North, Middle, and South Forks, the Flathead River flows in a southerly direction into Flathead Lake. Exiting the Lake, the Flathead River flows south through the Flathead Indian Reservation until, near the town of Dixon, it is joined by the Jocko River. At the confluence with the Jocko, the Flathead River turns and runs in a westerly direction, exits the reservation, and flows into the Clarke Fork River.

6. Major tributaries of the Flathead River include, inter alia, Little Bitterroot River, Jocko River, Camas River, Mission Creek, Crow Creek, Spring Creek, Mud Creek, Valley Creek, Finley Creek, Post Creek, Dry Creek, Spring Creek, Mill Creek, Sullivan Creek, Warm Springs Creek, Cottonwood Creek, Ravais Creek, Blue Bay Creek, Irving Creek, and Magpie Creek.

7. By the Treaty of Hellgate, 12 Stat. 975, executed July 16, 1855, between the United States and the Salish, Kootenai, and Upper Pend d'Oreilles Tribes, there was established and reserved, for the use and benefit of those tribes, the Flathead Indian Reservation.

8. The exterior boundaries of the Flathead Indian Reservation, as described in the Treaty of Hellgate of 1855, 12 Stat. 975, are as follows:

Commencing at the source of the main branch of the Jocko River, thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork below the Camash and Horse Prairie; thence northerly to, and along the divide boundary on the west of the Flathead River, to a point due west of the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along the said divide to the place of beginning.

9. The Treaty of Hellgate, establishing the Flathead Indian Reservation, reserved, for the use and benefit of the Salish and Kootenai Tribes of the Flathead Indian Reservation, the right to use waters flowing through or under the reservation in an amount sufficient to provide a homeland for tribal members and to meet the present and future needs of the tribes and their members.

10. Pursuant to the Treaty of Hellgate, supra, and the Act of April 23, 1904, 33 Stat. 302, as amended, each Indian allottee of the Flathead Reservation obtained the right to use a portion of the waters reserved for the tribes in an amount sufficient to irrigate all irrigable acres on his allotment. These rights have a priority date of July 16, 1855.

11. By the Act of April 23, 1904, 33 Stat. 302, as amended, Congress authorized the construction of the Flathead Irrigation Project to supply water to both Indian and non-Indian lands within the Flathead Indian Reservation. In order to carry out the purposes of the project, the United States filed notices of appropriations of water in an amount totalling 134,534 second feet. Said appropriations are junior to the rights of the tribes and the Indian allottees.

12. By the Act of May 23, 1908, 35 Stat. 251, 267, the Congress established the National Bison Range on unallotted lands within the Flathead Indian Reservation near the confluence of the Pend d'Oreille and Jocko Rivers. In establishing the Bison Range, the United States reserved waters actually used and sufficient additional waters to carry out the purposes of the Bison Range.

13. By the Act of May 11, 1910, 36 Stat. 359, 16 U.S.C. 161, the United States established the Glacier National Park which is bounded, in part, by the North Fork of the Flathead River and by the Middle Fork of the Flathead River. The Continental Divide transects the Park, and the western half of the Park lies within the Flathead River basin. In establishing the Park, the United States reserved for itself waters actually used and sufficient additional waters from the Flathead River

basin to fulfill the statutory purposes for which the Park was established -- including but not limited to, public enjoyment, preservation and management of Park resources, and protection of fish and game within the Park. In addition, the statute creating the Park reserved sufficient waters which may be necessary for the development and maintenance of any Government reclamation project. Since the Park was formed, in part, from lands then reserved for national forest purposes, the date of the establishment of the national forest is the date upon which water rights appurtenant to such lands were reserved.

By the Acts of July 1, 1916, 39 Stat. 308, 16 U.S.C. 179; March 3, 1917, 39 Stat. 1122; February 28, 1923, 43 Stat. 1324 (16 U.S.C. 164-167), Congress authorized the acquisition of additional lands for the Glacier National Park. When lands were acquired under said acts, the United States acquired all water rights appurtenant thereto and reserved for itself waters actually used and sufficient additional waters to carry out the purposes of Glacier National Park and the purposes for which the land was acquired.

By enactment of the National Park Service Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. 1, the United States reserved additional waters of the Flathead River basin to fulfill the purposes of that Act with respect to Glacier National Park.

The segments of North Fork of the Flathead River and Middle Fork of the Flathead River which form a part of the boundary of the Glacier National Park were designated for study as a component of the National Wildlife and Scenic Rivers system on October 2, 1968 [see Section 5(a)(7) of the Act of October 2, 1968, 82 Stat. 910, 16 U.S.C. 1276(a)(7)], and

designated as a component of the system by the Act of October 12, 1976, 90 Stat. 2327. These actions, by virtue of Section 13(c) of the Act of October 2, 1968, 82 Stat. 910, 917, reserved sufficient water for wild and scenic river purposes.

14. By a Proclamation of February 22, 1897, 29 Stat. 911 (effective March 1, 1978), the United States established the Flathead National Forest. The boundaries of the National Forest have been, from time to time, affected by the following Proclamations, Executive Orders, and Public Land Orders: Proclamation of June 9, 1903, 33 Stat. 2311; Executive Order of June 25, 1908; Proclamation of June 19, 1912, 37 Stat. 1752; Proclamation of June 3, 1918, 40 Stat. 1789; Proclamation of November 27, 1918, 40 Stat. 1894; Executive Order of August 22, 1919; Executive Order of June 22, 1935; Executive Order of July 29, 1935; Public Land Order of February 23, 1966 (31 F.R. 3248).

The Proclamation establishing the Flathead National Forest and the subsequent Proclamations, Executive Orders, and Public Land Orders reserved from the Flathead basin waters actually used for grazing, wildlife and fisheries management, and other purposes, as well as additional waters sufficient to fulfill forest purposes.

15. By Proclamation dated October 20, 1906, 39 Stat. 3260, the United States established the Lolo National Forest. The boundaries of the Lolo National Forest have, from time to time, been modified by the following Proclamations, Executive Orders, and Public Land Orders: Proclamation of November 6, 1906, 34 Stat. 3260; Proclamation of April 30, 1912, 37 Stat. 1739; Executive Order of December 12, 1931; Executive Order of

October 29, 1934; Executive Order of June 27, 1935; Executive Order of September 19, 1940 (5 F.R. 3761); Executive Order of November 5, 1951 (17 F.R. 10009); Public Land Order of May 19, 1954 (19 F.R. 3007); Public Land Order of July 1, 1956 (21 F.R. 6405); Public Land Order of July 1, 1964 (29 F.R. 9384); Public Land Order of February 23, 1966 (31 F.R. 3248).

The Proclamation establishing the Lolo National Forest and the subsequent Proclamations, Executive Orders, and Public Land Orders relevant thereto reserved waters actually used for grazing, wildlife and fisheries management, and other purposes, as well as additional waters sufficient to carry out the forest's purposes.

16. By the Act of March 3, 1909, 46 Stat. 781, 796, Congress authorized the Secretary of Interior to reserve for the benefit of the Confederated Salish and Kootenai Tribes from location, entry, sale or other appropriation all lands within the Flathead Indian Reservation that were valuable for power sites and reservoir sites. The Secretary, pursuant to this authority, reserved for the benefit of the Confederated Salish and Kootenai Tribes, five hydroelectric sites, one of which is now developed as Kerr project (FERC Project No. 5). The Treaty of Hellgate and this reservation of the hydroelectric sites carried with them a reservation of sufficient water necessary for the full development of all of the tribal power sites so reserved, with a priority date of July 16, 1855.



17. Within the Flathead River basin the United States has withdrawn a number of parcels of federally-owned land for power site purposes. Each of these withdrawals reserved with it sufficient water to carry out the purposes of the withdrawal. The withdrawals and dates of withdrawals are as follows: Power Site Reserve No. 11 (May 29, 1909); Power Site Reserve No. 19 (June 8, 1909); Power Site Reserve No. 352 (April 21, 1913); Power Site Reserve No. 397 (September 10, 1913); Power Site Reserve No. 523 (March 14, 1916); Power Site Reserve No. 678 (February 11, 1918); Power Site No. 751 (July 10, 1920); Power Site Classification No. 24 (February 13, 1922); Power Site Classification No. 47 (August 2, 1922); Power Site Classification No. 52 (February 2, 1923).

18. Non-federal entities have filed a number of applications for proposed water projects in the Flathead River basin. These include FERC (Federal Energy Regulatory Commission) Project Nos. 5, 34, 100, 868, 2135, 2163, 2164, 2223, 2253, 2285, 2293, 2507, 2652, 2776. Under Section 24 of the Federal Power Act, 16 U.S.C. 818, all lands of the United States included in the proposed water power projects are reserved for power development purposes. The filing of the applications caused to be reserved, on the date of the filing, sufficient water for power site development.

19. The tribes in conjunction with Montana Power Company filed an application with FERC to develop power projects at certain tribally-owned sites (Project 2507). Water rights for these and other tribal sites were reserved for the tribes by the Treaty of Hellgate, supra, by the

reservation made pursuant to the Act of March 3, 1909, 35 Stat. 781, 796, and the FERC application, with a priority date of July 16, 1855.

20. The Federal Energy Regulatory Commission has licensed two water power projects on the Flathead River basin - the Big Fork Hydroelectric Project No. 2652, licensed to Pacific Power and Light Company and located on the Swan River in Flathead County, Montana, and the Kerr Project No. 5, licensed to the Montana Power Company and located on the Flathead River and Flathead Lake in Flathead County, Montana. The Kerr project was licensed pursuant to the authorization contained in the Act of March 7, 1928, 45 Stat. 200, 212-213. Under Section 19(a) of the Federal Power Act, 16 U.S.C. 807(a), the United States has a right to take over either of these projects after the expiration of the project license, subject to any rights in the Kerr project which the tribes may have. By licensing the projects, the United States reserved sufficient water to operate the project.

21. By Executive Order 3503 of June 24, 1921, the United States created the Ninepipe National Wildlife Refuge on 2,021.95 acres of land. In creating the wildlife refuge, the United States reserved waters actually used and sufficient additional waters to carry out the purposes of the refuge.

22. By Executive Order of June 25, 1921, the United States created the Pablo Wildlife Refuge on 2,541.95 acres of land. By establishing the wildlife refuge, the United States reserved waters actually used and sufficient additional waters to carry out the purposes of the refuge.

23. Pursuant to Acts of Congress dated July 31, 1939, 53 Stat. 1142, and December 13, 1944, 58 Stat. 801, the United States established the Creston National Fish Hatchery. In order to fulfill the purposes of the fish hatchery, the United States has obtained, pursuant to state law, the following water rights: In March 1895, the United States filed for 3,000 miner's inches (75 second feet) of spring water from Patterson Creek (now called Mill Creek); this was modified on July 21, 1942, when an additional filing was made reducing the amount to 24.25 second feet; on July 17, 1961, the United States filed for an additional 20 second feet. In addition, the fish hatchery has the right, under state law, to pump ground water at the rate of 72 gallons per minute from a well drilled in 1957 and 400 gallons per minute from a well drilled in 1958.

24. In conjunction with the Hungry Horse Dam and Reservoir in Flathead County, the United States Bureau of Reclamation has, by filings pursuant to Montana law, obtained the right to use 3 second feet of water from Lion Lake for irrigation, agricultural and domestic use (filed December 6, 1945; posted January 16, 1946), and 3,500,000 second feet of water from the South Fork of the Flathead River for generation of hydroelectric power, improvement of navigation, regulation of the flow of the South Fork of the Flathead River, irrigation, reclamation of arid lands, controlling floods, and for other beneficial purposes (posted June 16, 1947; filed July 3, 1947).

25. The United States has reserved for itself, since 1959, sufficient ground water to supply two wells at Kalispell Air Force Station. One well pumps 103,800 gallons per month from a depth of 337 feet, and the other well pumps 134,500 per month from a depth of 278 feet.

26. On May 14, 1973, the United States established the Swan River National Wildlife Refuge, north of the town of Swan Lake. The refuge was located on 1,568.81 acres of land purchased by the United States. When the United States acquired the land, it obtained all water rights appurtenant thereto.

27. The United States Postal Service maintains numerous post offices within the Flathead River basin, some of which have a right to use ground water for drinking and sanitation purposes.

28. Plaintiff is informed and believes that each of the defendants claim, under color of the laws of the State of Montana, rights to use water from the Flathead River or its tributaries. Plaintiff believes that all such claimed rights are junior to the rights of the Confederated Tribes and tribal members and the rights of the United States.

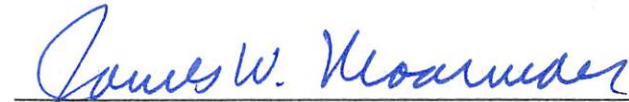
29. The water rights claimed by the parties exceed the amount of water available in the Flathead watershed. If defendants are able to exercise the full rights they claim, they will interfere with the rights of the Confederated Tribes and tribal members and the rights of the United States.

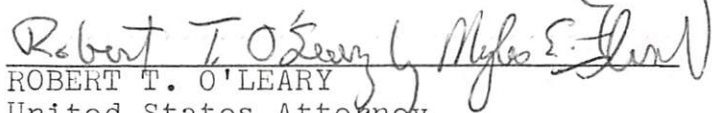
WHEREFORE, plaintiff prays:


(1) That each defendant be required to appear before this Court and fully set forth his claim in and to the use of water from the Flathead River Basin;

(2) For a decree establishing the respective rights of the parties, inter sese, to use the surface and ground waters of the Flathead River basin and recognizing the reserved and appropriated water rights of the United States and the Confederated Salish and Kootenai Tribes and their members as set forth above.

Respectfully submitted,

  
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JAMES W. MOORMAN  
Assistant Attorney General  
Land and Natural Resources Division  
Department of Justice  
Washington, D. C. 20530

  
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