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U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

U.S. DISTRICT COURT, EASTERN DISTRICT OF WASHINGTON

REHEARING ORDER

MEMORANDUM* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (AUGUST 3, 2022)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPOKANE INDIAN TRIBE;
UNITED STATES OF AMERICA,

Plaintiffs-Appellees,

v.

DAN SULGROVE; LESLIE SULGROVE;
CHAMOKANE LANDOWNERS
ASSOCIATION, INC.,

Objectors-Appellants,

v.

DAWN MINING CORP; STATE OF WASHINGTON;
CHRISTOPHER M. NEWHOUSE,

Defendants-Appellees.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

No. 21-35502

D.C. No. 2:72-cv-03643-SAB

Appeal from the United States District Court for the Eastern District of Washington Stanley A. Bastian, Chief District Judge, Presiding

Argued and Submitted July 5, 2022
Portland, Oregon

Before: WATFORD, R. NELSON, and LEE, Circuit Judges.

MEMORANDUM

Objectors are Chamokane Creek Basin ("Basin") landowners who challenge the modification of a judgment that affects water rights in the Basin. We dismiss the appeal because Objectors lack standing.

1. The United States established a reservation for the Spokane Indian Tribe ("Tribe"), which included a right to Basin water to fulfill the purpose of this reservation. The United States filed the original lawsuit seeking judicial confirmation of the Tribe's water rights in the Basin. This lawsuit did not include permit-exempt users in the Basin.

After a trial, the district court found that the Tribe held a water right senior to most other Basin water users. The court also determined the water rights for the named Defendants. The court did not adjudicate the water rights of certain de minimis users, finding that these uses of water should always be available.

About 25 years later, a report showed that the Basin's water flow was not meeting the Tribe's water

right. The suspected cause was either that de minimis water users were using more water than allowed under Wash. Rev. Code § 90.44.050, or that the number of de minimis users had increased. The Tribe, the United States, and Washington ("Government Parties") proposed a settlement to fix the issue, but avoid adjudicating these users. This settlement included a provision that the United States and Tribe would not sue non-parties for drawing less than one acre-foot per year (about 900 gallons per day), and any enforcement under state law would require State approval.

The Government Parties presented the settlement to the district court and requested that the judgment be modified. The district court entered an order to show cause as to why the court should not approve the settlement and modify the judgment. The court received five objections, including a joint objection by Appellant-Objectors.

After a hearing, the district court approved the settlement and modified the judgment. Importantly, the court made the following change: "The undisputed evidence is that normal stock water use . . . and domestic water use is de minimus and does not include impoundments. The [Judgment] is therefore adjusted to reflect that these uses are not included in the judgment and should always be available," to "Water for domestic use and normal stock water use at the carrying capacity of the land without the use of impoundments is included in this Judgment, but it is neither adjudicated nor quantified at this time." Objectors appealed this decision.

2. "The standing Article III requires must be met by persons seeking appellate review." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 64 (1997). This re-

quirement is jurisdictional and cannot be waived, *see Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019), and must be considered "whether or not the issue was raised in the district court," *Maricopa-Stanfield Irrigation & Drainage Dist. v. United States*, 158 F.3d 428, 433 (9th Cir. 1998). At a minimum, standing requires that Objectors show "(1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision." *Va. House of Delegates*, 139 S. Ct. at 1950.

3. Objectors argue that the original language protected de minimus water users like them from future curtailment and regulation. They maintain that the district court performed a general stream adjudication, and that the judgment affected all water users in the Basin, not just the water users brought into court.

These arguments are flawed because the original judgment provided no protection for Objectors. First, "[a] general adjudication . . . is a process whereby all those claiming the right to use waters of a river or stream are joined in a single action to determine water rights and priorities between claimants." *State Dep't of Ecology v. Acquavella*, 674 P.2d 160, 161 (Wash. 1983). Even though the district court made some stray comments suggesting that the adjudication may be a general stream adjudication,[1] it did not do so because not all water users in the Basin were joined. Only

[1] For example, the original judgment defined the Basin "to include the entire Chamokane Creek System," and that the district court had "jurisdiction to adjudicate the surface and ground waters of the" Basin.

permitted water users were joined; de minimis water users, like Objectors, were not.

Second, Washington law directly contradicts the theory that exempt uses are protected from adjudication. "[A]n appropriator's right to use water . . . is subject to senior water rights." *Whatcom County v. Hirst*, 381 P.3d 1, 9 (Wash. 2016). This applies to permit-exempt and de minimis uses because "any withdrawal of water impacts the total availability of water," and thus "an appropriator's right to use water from a permit-exempt withdrawal is subject to senior water rights." *Id.* Even with the language in the original judgment, Objectors could have been sued at any time by senior water holders such as the Tribe.

Further, the modified judgment and settlement agreement protects Objectors more than before. The agreement states that the Government Parties will not adjudicate permit-exempt users that draw less than one acre-foot per year. This gives Objectors some legal protection where originally there was none.

4. Because Objectors cannot claim a redressable injury caused by the modification of the judgment, the appeal is DISMISSED.

DISTRICT COURT ORDER MODIFYING PRIOR COURT ORDERS (MAY 27, 2021)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

SPOKANE TRIBE OF INDIANS,

Plaintiff/Intervenor.

v.

BARBARA J. ANDERSON, ET AL.,

Defendants.

No. 2:72-CV-03643-SAB

Before: Stanley A. BASTIAN,
Chief United States District Judge.

ORDER MODIFYING PRIOR COURT ORDERS

On April 25, 2019, the Government parties finalized a Settlement Agreement. ECF No. 912-1. In June 2019, the parties asked the Court to approve the process for providing notice to landowners regarding the Settlement Agreement. The Settlement Agreement contemplates the Court modifying previous Orders

with five specific Amendments. Landowners were provided the opportunity to file objections. Five objections were filed with the Court, ECF Nos. 923, 924, 926-929[1], 930, and 932.

Due to the COVID-19 pandemic, the hearing on the proposed modifications and proposed Settlement was delayed until April 29, 2021, when it was held in Spokane, Washington. The Government parties were represented by Theodore Knight and David Harder. Alan Reichman appeared by video. Dan and Leslie Sulgrove and Chamokane Landowners Association were represented by Peter Scott. No other objectors made an appearance.

Findings

The history and summary of these proceedings have been presented in other Court orders, *see e.g.* ECF No. 919 and the Court will not repeat them here.

The Court finds the Government parties have met their burden under Fed. R. Civ. 60(b)(5) to modify the Court's previous Orders. The parties have demonstrated that significant changes of circumstances have occurred since the entry of the Court's prior Orders, *i.e.* the United States Geological Service Report, ECF No. 755-1, warranting the modification of these Orders. Additionally, the changes proposed by the parties are suitably tailored to resolve the problems created by the changed conditions. *See United States v. Asarco Inc.*, 430 F.3d 972 (9th Cir. 2005).

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[1] Dan and Leslie Sulgrove and Chamokane Landowners Association submitted a Joint Memorandum in Support of Objections to Show Cause Order, ECF No. 926.

The Court finds the objectors have not met their burden of establishing an injury traceable to the proposed modifications or that the proposed Agreement and modifications are unreasonable or illegal in some way. *See United States v. Oregon*, 913 F.2d 576 (9th Cir. 1990). Notably, it is undisputed that the Tribe's water rights are senior to the objector's water rights.

Finally, the Court concludes the parties' Settlement Agreement and proposed modifications to the Court's prior Orders are fundamentally fair, adequate, and reasonable and in the public's best interest.

Accordingly, IT IS HEREBY ORDERED:

1. The Annual Report for the 2019 Water Year, ECF No. 922, and the Annual Report for the 2020 Water Year, ECF No. 976, are accepted. The Watermaster's request for compensation and expenses is approved. The Annual Reports and fourth quarter billings are approved.

2. The Court makes the following modifications to its Prior Court Orders:

ECF No. 189,
Memorandum Opinion and Order

The Court overrules as necessary and modifies ECF No. 189, Memorandum Opinion and Order, July 23, 1979, page 3, lines 19-22, by removing the following sentence: "The precipitation absorbed into the ground in the Upper Chamokane area becomes part of an underground reservoir unconnected to the Chamokane drainage system."

The Court overrules as necessary and modifies ECF No. 189, page 4, lines 10-13, by removing the

following sentence: "Groundwater withdrawals in the Upper Chamokane region have no impact upon the creek flow below the falls because groundwater in this area is part of a separate aquifer."

The Court overrules as necessary and modifies ECF No. 189, page 4 lines 10-13 by replacing the above sentence with the following: "The aquifer in the Upper Chamokane Creek region is connected to the aquifer in the Middle Chamokane Creek Region, and ground and surface water withdrawals in the Upper Chamokane Creek region impact Creek flow below the falls."

The Court overrules as necessary and modifies ECF No. 189, page 16, lines 23-25, by removing: "2. Water for domestic use is not included within the judgment, as it is de minimus and should always be available."

The Court overrules as necessary and modifies ECF No. 189, page 16, lines 23-25, by replacing the above sentence with the following: "2. Water for domestic use is included within this judgment, but is not quantified or adjudicated at this time."

ECF No. 196, Judgment

The Court overrules as necessary and modifies ECF No. 196, Judgment, dated September 12, 1979, page 1, Section I, by removing the third sentence: "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."

The Court overrules as necessary and modifies ECF No. 196, page 1, Section I, by replacing the above sentence with the following: "The aquifer in the Upper

Chamokane Creek region is connected to the aquifer in the Middle Chamokane Creek Region, and ground and surface water withdrawals in the Upper Chamokane Creek region impact Creek flow below the falls."

The Court overrules as necessary and modifies ECF No. 196, page 10, Section XX, by removing the following: "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."

The Court overrules as necessary and modifies ECF No. 196, page 10, Section XX, by replacing the above sentence with the following: "Water for domestic use and normal stock water use at the carrying capacity of the land without the use of impoundments is included in this Judgment, but it is neither adjudicated nor quantified at this time."

ECF No. 252, Memorandum and Opinion

The Court overrules as necessary and modifies the following findings in ECF No. 252, Memorandum and Opinion Granting, in part, Motions to Amend Memorandum Opinion and Order, August 23, 1982. On page 4, lines 21-24, the Court stated: "In the Upper Chamokane Creek area, the precipitation absorbed into the ground area becomes part of an underground reservoir unconnected to the Chamokane drainage system." The Court strikes this sentence. Additionally, on page 5, lines 6-9, the Court stated: "Groundwater withdrawals in the Upper Chamokane region have no impact upon creek flow below the falls because groundwater in this area is part of a separate aquifer. Groundwater withdrawals in the Mid-Cham-

okane area, however, eventually do reduce creek flow." The Court replaces these sentences with the following: "Groundwater withdrawals in the entire Chamokane Creek area eventually do reduce creek flow."

The Court overrules the following in ECF No. 252, page 16, lines 25-30 (emphasis in original): "The undisputed evidence is that normal stock water use (grazing related to the carrying capacity of the land) and domestic water use is de minimus and does not include impoundments. The Memorandum Opinion is therefore adjusted to reflect that these uses are not included in the judgment and should always be available."

The Court adjusts the above two sentences by stating them as follows: "Water for domestic use and normal stock water use at the carrying capacity of the land without the use of impoundments is included in this Judgment, but it is neither adjudicated nor quantified at this time."

The Court further overrules as necessary and modifies another portion of this opinion that adopted a Magistrate Judge's finding that stock and domestic use was de minimis. Consistent with the above rulings regarding stock and domestic use, the Court's adoption of the Magistrate's findings is revised as follows (insertions in bold): "This Court disagrees with paragraph (a) and agrees with paragraphs (b), (c) and (d), and the Opinion and Judgment shall be so amended." ECF No. 252, page 22, lines 19-20.

ECF No. 360

The Court overrules as necessary and modifies ECF No. 360, page 3, by adding a new paragraph 4,

and renumbering existing paragraph 4 as 5 and amending, as follows:

4. Any new excess surface water rights issued after the date of this Order modifying the Court's previous Order of December 9, 1988, shall continue to be subject to a minimum flow of 27 cfs regardless of temperature for the months of May through February and shall be subject to minimum flows of 140 cfs for the month of March and 151 cfs for the month of April.

5. For the purposes of this order, "minimum flow of 24 cfs", and "minimum flow of 27 cfs" and "minimum flow of 151 and 140 cfs" shall be determined by calculating the average of the daily average flows of the previous seven days.

Water Master Modifications, ECF No. 189 and 196

The Court ordered the Government Parties in this case to provide a proposed order that summarized the powers and responsibilities of the Water Master in the Order Approving the Water Master's 2014 Report; Order to Meet and Confer, dated April 8, 2015. ECF No. 825. The Government Parties prepared and filed the Proposed Order on June 1, 2015. ECF No. 829-2. The Proposed Order provides a clear statement of the Water Master's powers and responsibilities as ordered by this Court over the course of this case. Based on the agreement of the parties and the modifications to the previous orders above, the Court adjusts the previous orders contained in ECF Nos. 189

and 196 by adding to the Water Master's powers and responsibilities the following:

> The State of Washington, through its Department of Ecology, may delegate to the Water Master duties as required to administer state water law, exclusive of the Water Master's duties under previous orders in this Case, and perform duties pursuant to the Agreement reached by the sovereign parties in this Case for the administration of the agreed upon mitigation program.
>
> The State of Washington, through its Department of Ecology, shall be responsible for funding these additional duties of the Water Master in this Case consistent with State law and the Agreement reached between the sovereign parties in this Case.

The Government Parties shall file an amended Proposed Order identical to ECF No. 829-2, with the addition of the above language, within seven (7) days of the entry of this Order.

ECF No. 825, Registry Claims

The Government Parties described their activities related to the Court's April 8, 2015 Order, ECF No. 825 regarding water rights claims that may predate the Tribe's reserved water rights. ECF No. 912 at 12-15. The Court overrules and modifies the April 8, 2015 Order at page 2, Section 2, and strikes the requirements contained therein regarding water rights potentially senior to the Tribe's, and thereby relieves the Government Parties from that Order's requirement.

IT IS SO ORDERED. The District Court Executive is hereby directed to file this Order to counsel and the parties listed in the Court's recently updated Notice list along with the following persons:

Peter G. Scott, Law Offices,
PLLC 682 South Ferguson Ave #4
Bozeman, MT 59718-6491

Angela Lynn Forsman
5161 Gennett Rd.
Springdale, WA 99173

Martin Monroe
P.O. Box 153
Valley, WA 99181

Howard-o:padden
General Delivery
P.O. Box 365
Clayton WA 99110

Joyce Norman
4373 Drum Road
Springdale, WA 99173

DATED this 27th day of May 2021.

/s/ Stanley A. Bastian
Chief United States District Judge

ATTACHMENT A
ORDER TO SHOW CAUSE
(JULY 31, 2019)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

SPOKANE TRIBE OF INDIANS,

Plaintiff/Intervenor.

v.

BARBARA J. ANDERSON, ET AL.,

Defendants.

No. 2:72-cv-03643-SAB

Before: Stanley A. BASTIAN,
Chief United States District Judge.

ORDER TO SHOW CAUSE

The United States, the State of Washington, by the Department of Ecology, and the Spokane Tribe of Indians ("Government Parties"), in their *Report Regarding Settlement, Provision of Notice to Upper Basin, and Plan to Address Pre-1877 State Water Rights Claims* ("Report"), ECF No. 912, notified the Court that they entered into an *Agreement on a*

Program to Mitigate for Certain Permit-Exempt Well Water Uses in Chamokane Creek under U.S. v. Anderson, ("Agreement"), ECF No. 912, Exhibit 1, to resolve several water rights and water rights administration issues raised by the briefing during the period from 2013 to 2015 and from the February 2015 hearing. This Agreement improves water management in the Chamokane Creek Basin and protects the Tribe's instream flow water right. In their Report, the Government Parties also informed the Court they intend to move the Court to amend the Court's prior orders to implement their Agreement.

In a previous Order, the Court granted the parties' Joint Motion to Issue a Show Cause Order. As in the case of consent decrees and other settlements between government parties, the Court adopts the following standard for its review of any objections that may be filed in this case. Objectors to the judicial implementation of the Agreement through the modification of the Court's previous orders must meet the following burden: (1) the opponent must establish that he or she has an injury traceable to the Court's modifications of its previous orders to implement the Agreement, and (2) that the Agreement and modifications to the Court's previous orders are unreasonable or illegal in some way. *See United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990).

I. Summary of the Proceedings

This action was originally filed in 1972 by the United States seeking adjudication of water rights within the Chamokane Creek System. The original case adjudicated the reserved water rights of the Spokane Tribe of Indians in the Chamokane Creek

System and other irrigators and commercial water users within the Middle and Lower Chamokane Creek aquifers. The Court appointed a federal water master to regulate these rights, and the Court retained jurisdiction over the case. Further, the original orders in the case found that the aquifer in the Upper Chamokane Creek was not connected to the aquifer in the middle part of the Chamokane Creek System, and that water for domestic use and stockwater use at the carrying capacity of the land without impoundments did not impact the flow of Chamokane Creek, and was therefore de minimus, and not included within the judgment.

In 2006 the Court ordered the Government Parties to conduct a study to answer several questions that were presented to the Court. ECF No. 600. The United States Geological Service (USGS) investigated the impacts on stream flow by domestic and stockwater use and analyzed whether the Upper Chamokane aquifer was separate from the Middle Chamokane aquifer. The USGS found that the Upper system's aquifer is connected to the Middle system's aquifer. ECF No. 755-1 at Exhibit 1 pages 73-75, Report pages 58-60. Additionally, the USGS found that domestic and stockwater use can impact Chamokane Creek flows. ECF No. 755-1 at Exhibit 1 pages 82-83, Report Pages 67-68. Given that these findings are contrary to this Court's original orders, the Court requested extensive briefing leading to this Court's April 8, 2015 Order, which provided the Government Parties with several directives to address the USGS's findings, and other items the Court found necessary to better administer the case under the Court's continuing jurisdiction. ECF No. 825. The April 8, 2015 Order

led to the Government Parties entering into period of settlement discussions, which resulted in the Agreement, ECF No. 912, Exhibit 1, and the Government Parties' motions to modify the Court's previous orders.

II. Summary of the Agreement

1. The Agreement provides for a program that will mitigate for domestic water users use not to exceed 1 acre-foot per year of annual water use, and stockwater use at the carrying capacity of the land without impoundments, and requires that the Government Parties move the Court to modify it previous orders to allow for the adjudication of domestic and stockwater use should individual users exceed the amount mitigated. Pursuant to the Agreement, the United States and the Spokane Tribe of Indians are not permitted to seek adjudication of the water rights for these users so long as the mitigation program is operating in accordance with the Agreement, and those users do not use water in excess of the mitigated quantity of water.

2) The Agreement requires that the Government Parties move the Court to modify:

a) its previous Orders regarding the Upper Chamokane Creek aquifer to find that it is connected to the Middle Chamokane Creek aquifer;

b) the Spokane Tribe of Indians' instream flow water right for the months of March and April to protect flows that are needed to maintain fish habitat;

c) its previous orders and allow the federal water master to conduct water regulation pursuant

to the delegation of authority from the State of Washington to allow for more comprehensive regulation of the Chamokane Creek System; and

d) its directive pertaining to adjudication of water rights in the Chamokane Creek Basin that pre-date 1877.

III. Summary of the Proposed Order

The proposed Order will:

1. make the necessary modifications to the Court's previous Orders to allow for the adjudication of domestic and stockwater use if it is not in compliance with the mitigation program;

2. increase the Spokane Tribe of Indian's instream flow right for the months of March and April that would be applicable to any new water rights issued;

3. make the necessary changes to include the Upper Chamokane aquifer in the case;

4. allow the federal water master to regulate water use pursuant to authority delegated by the State of Washington, at the State's expense; and

5. modify the April 8, 2015 Order and remove the requirements on the Government Parties regarding claims to pre-1877 water rights in the state water rights claims registry.

IV. Rights of Land Owners in the Chamokane Creek System

1. If you wish to object to the modifications to the Court's previous orders pursuant to the Agreement, you or your attorney must, no later than December 6,

2019, file your objection on the form that is Attachment A. The form can also be found on the following website: https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-availability/Chamokane-Creek. Your attorney must file the document through the federal court's electronic filing system.

You may file an objection by mailing the objection to:

US District Court
P.O. Box 1493
Spokane, WA 99210-1493

You may also deliver your objection to the Clerk's Office for the United States District Court for the Eastern District of Washington, at the following addresses:

Spokane: Thomas S. Foley United States Courthouse, 920 West Riverside Ave, Room 840 Spokane, WA 99201

Yakima: William O. Douglas United States Courthouse, 25 South 3rd St, Room 201, Yakima, WA 98901

Richland: Richland U.S. Courthouse & Federal Building, 825 Jadwin Avenue, Room 174, Richland, WA 99352

2. If no objections are made, or the objections are denied, the Court will then enter the final order including the approval of the five specific modifications to the prior court orders that are listed on Attachment B to this Order.

3. If there are objections, then the Government Parties have 60 days from the conclusion of the

objection period to provide a litigation plan to the Court, including a schedule for responses to the plan, and replies of the Government Parties, and a hearing.

4. Pursuant to the notice process that has been approved by the Court, the Government Parties are providing a copy of this Show Cause Order with a *Notice Regarding Domestic and Stock Watering From Wells in the Chamokane Creek Basin and United States v. Anderson*.

Accordingly, IT IS HEREBY ORDERED:

Any interested party is ordered to show cause why the Court should not amend its prior orders pursuant to the Agreement. This proceeding will not adjudicate your water rights, if any; but it is your only chance to object to the proposed modifications to this Court's previous orders in this case. The deadline for you to object to the Agreement and the proposed amendments to the prior orders is December 6, 2019. If persons do not object by the deadline using the form found at Attachment A, they will be bound by the decisions of the Court, even if the terms of any modifications to the Court's previous orders differ from the proposed order (Attachment B).

IT IS SO ORDERED. The District Court Executive is hereby directed to file this Order and provide copies of it to the parties listed on the most recently updated Notice list attached to the 3rd Quarter Report of the Water Master, ECF No. 916.

DATED this 31st day of July 2019.

/s/ Stanley A. Bastian
United States District Judge

ORDER GRANTING JOINT MOTIONS
(JULY 31, 2019)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

SPOKANE TRIBE OF INDIANS,

Plaintiff/Intervenor.

v.

BARBARA J. ANDERSON, ET AL.,

Defendants.

No. 2:72-CV-03643-SAB

Before: Stanley A. BASTIAN,
Chief United States District Judge.

ORDER GRANTING JOINT MOTIONS

Before the Court are The United States, the State of Washington, by the Department of Ecology, and the Spokane Tribe of Indians ("Government Parties") Joint Motion for Order to Show Cause Why Five Amendments to Prior Orders Should Not Be Entered, ECF No. 913, and Joint Motion for Approval of Process To Provide Notice of Order to Show Cause Why Five Amendments to Prior Orders Should Not

Be Entered, ECF No. 914. The motions were heard without oral argument.

1. Joint Show Cause Motion

In their Show Cause Motion, the Government Parties moved the Court to adopt the standard of review the Court should utilize in reviewing the Agreement and the proposed modifications to the Court's prior orders which are required to fully implement the Agreement. The Court, after reviewing the case law and arguments of the Government Parties, agrees with their analysis, and adopts the fair, reasonable, and adequate standard utilized by other courts in reviewing similar types of agreements between government parties. *See United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990).

The Court has reviewed the Agreement and the proposed modifications to this Court's prior orders. The Government Parties have presumptively established that the Agreement and the changes to this Court's prior orders to complete the judicial implementation of the Agreement are fair, reasonable and not contrary to law. The Court hereby grants the Government Parties' motion to issue a show cause order. The Court will issue the Show Cause Order separately.

2. Joint Motion for Approval of Process

In the Joint Motion for Approval of Process, on the scope of notice to be provided of these special proceedings, the Government Parties are requesting approval to mail the proposed Notice for Show Cause Order: Notice Regarding Domestic and Stock Watering from Wells in the Chamokane Creek Basin and *United*

States v. Anderson (Notice) of these proceedings to all landowners in the Chamokane Creek Basin. The Show Cause Order will be attached to the Notice. The Government Parties have described a reasonable process that they will employ to determine the most current and complete list of Chamokane Basin landowners and their addresses, as of the time of service.

The Court agrees that if an individual or business owns multiple parcels within the Chamokane Basin, the Government Parties only need to provide that person or business with one copy of the Notice, rather than one notice for each parcel. The Government Parties will further accomplish notice to affected water users and landowners within the Chamokane Creek Basin by publishing notice in the Spokesman-Review and The Independent, which are newspapers of general or partial circulation within the basin, by various electronic means of publication, and by holding public meetings on the Show Cause Order.

The Court has reviewed the Government Parties' motion and supporting documents, including the proposed Notice, and finds their plan to provide the specified information regarding the proposed changes to the identified group of people is correct, appropriate, and sufficient to comport with constitutional due process requirements.

Accordingly, IT IS HEREBY ORDERED:

1. The United States, Washington Department of Ecology and the Spokane Tribe of Indians Joint Motion for Order to Show Cause Why Five Amendments to Prior Orders Should Not Be Entered, ECF No. 913, is GRANTED.

2. The United States, Washington Department of Ecology and the Spokane Tribe of Indians Joint Motion for Approval of Process To Provide Notice of Order to Show Cause Why Five Amendments to Prior Orders Should Not Be Entered, ECF No. 914, is GRANTED.

3. Not later than September 6, 2019, the United States Department of Justice ("DOJ") shall send by first class mail a copy of the attached Notice, to all the water users and landowners in the Chamokane Creek Basin.

4. The DOJ shall prepare and file with the Court a certificate of mailing certifying that a copy of the Notice was placed in the United States Mail, postage prepaid, and addressed to each person in the manner set forth above.

5. The DOJ shall publish a similar, but modified, Notice (better suited for publication purposes), in the following newspapers of general or partial circulation within the Chamokane Creek Basin and Stevens County, Washington once each week for three consecutive weeks: the Spokesman-Review and The Independent.

6. Upon completion of the publication of notice in the newspapers identified in paragraph 3, the DOJ shall file with the Court proof of publication.

IT IS SO ORDERED. The District Court Executive is hereby directed to file this Order and provide copies of it to the parties listed on the most recently updated Notice list attached to the 3rd Quarter Report of the Water Master, ECF No. 916.

DATED this 31st day of July 2019.

/s/ Stanley A. Bastian
United States District Judge

PROPOSED ORDER
MODIFYING PREVIOUS ORDERS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

SPOKANE TRIBE OF INDIANS,

Plaintiff/Intervenor.

v.

BARBARA J. ANDERSON, ET AL.,

Defendants.

No. 2:72-CV-03643-SAB

Before: Stanley A. BASTIAN,
Chief United States District Judge.

This Court entered an Order to Show Cause on ___, 2019. ECF No. ___. In the Show Cause Order, the Court specified a process by which landowners within the Chamokane Creek Basin: (1) were provided notice of the Government Parties' Settlement Agreement and the proposed amendments to the prior orders of this Court; and (2) were given an opportunity to object to the modifications and amendments to the Court's prior orders that were proposed by the Government Parties.

On ____, 2019, the Court held a hearing on the proposed modifications to the prior orders [and no objections were filed] [and objections were filed and found to be without substance]. On the basis of the record filed in this matter and the arguments presented at the hearing, the Court concludes that the Settlement is fair and reasonable and the Government Parties have shown that circumstances warrant changes to the orders in this case consistent with the standards governing this case, Dkt. No. 196, at XXV. The Court last modified the Judgment in this case on December 9, 1988, Order Modifying the Minimum Flow Provisions of this Court's Memorandum Decision of July 23, 1979, Dkt. No. 360.

Accordingly, IT IS HEREBY ORDERED:

Modifications Required for Upper Chamokane Creek Connectivity Findings

Court Dkt. No. 189

1. The Court overrules as necessary and modifies Court Dkt. No. 189, Memorandum Opinion and Order, July 23, 1979, page 3, lines 19-22, by removing the following sentence: "The precipitation absorbed into the ground in the Upper Chamokane area becomes part of an underground reservoir unconnected to the Chamokane drainage system."

2. The Court overrules as necessary and modifies Court Dkt. No. 189, page 4, lines 10-13, by removing the following sentence: "Groundwater withdrawals in the Upper Chamokane region have no impact upon the creek flow below the falls because groundwater in this area is part of a separate aquifer."

3. The Court overrules as necessary and modifies Court Document 189 page 4 lines 10-13 by replacing the above sentence with the following: "The aquifer in the Upper Chamokane Creek region is connected to the aquifer in the Middle Chamokane Creek Region, and ground and surface water withdrawals in the Upper Chamokane Creek region impact Creek flow below the falls."

Court Dkt. No. 196

4. The Court overrules as necessary and modifies Court Dkt. No. 196, Judgment, dated September 12, 1979, page 1, Section I, by removing the third sentence: "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."

5. The Court overrules as necessary and modifies Court Dkt. No. 196, page 1, Section I, by replacing the above sentence with the following: "The aquifer in the Upper Chamokane Creek region is connected to the aquifer in the Middle Chamokane Creek Region, and ground and surface water withdrawals in the Upper Chamokane Creek region impact Creek flow below the falls."

Court Dkt. No. 252

6. The Court overrules as necessary and modifies the following findings in Court Dkt. No. 252, Memorandum and Opinion Granting, in part, Motions to Amend Memorandum Opinion and Order, August 23, 1982. On page 4, lines 21 24, the Court stated: "In the Upper Chamokane Creek area, the precipitation absorbed into the ground area becomes part of an

underground reservoir unconnected to the Chamokane drainage system." The Court strikes this sentence. Additionally, on page 5, lines 6-9, the Court stated: "Groundwater withdrawals in the Upper Chamokane region have no impact upon creek flow below the falls because groundwater in this area is part of a separate aquifer. Groundwater withdrawals in the Mid-Chamokane area, however, eventually do reduce creek flow." The Court replaces these sentences with the following: "Groundwater withdrawals in the entire Chamokane Creek area eventually do reduce creek flow."

Modifications Required for Spring Instream Flow

Court Dkt. No. 360

7. The Court overrules as necessary and modifies Court Dkt. No. 360, page 3, by adding a new paragraph 4, and renumbering existing paragraph 4 as 5 and amending, as follows:

4. Any new excess surface water rights issued after the date of this Order modifying the Court's previous Order of December 9, 1988, shall continue to be subject to a minimum flow of 27 cfs regardless of temperature for the months of May through February and shall be subject to minimum flows of 140 cfs for the month of March and 151 cfs for the month of April.

5. For the purposes of this order, "minimum flow of 24 cfs", and "minimum flow of 27cfs", and "minimum flow of 151 and 140 cfs" shall be determined by calculating the

average of the daily average flows of the previous seven days.

Modifications Required for Domestic and Stockwater Uses

Court Dkt. No. 189

8. The Court overrules as necessary and modifies Court Dkt. No. 189, page 16, lines 23-25, by removing: "2. Water for domestic use is not included within the judgment, as it is de minimus and should always be available."

9. The Court overrules as necessary and modifies Court Dkt. No. 189, page 16, lines 23-25, by replacing the above sentence with the following: "2. Water for domestic use is included within this judgment but is not quantified or adjudicated at this time."

Court Dkt. No. 196

10. The Court overrules as necessary and modifies Court Dkt. No. 196, page 10, Section XX, by removing the following: "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."

11. The Court overrules as necessary and modifies Court Dkt. No. 196, page 10, Section XX, by replacing the above sentence with the following: "Water for domestic use and normal stock water use at the carrying capacity of the land without the use of impoundments is included in this Judgment, but it is neither adjudicated nor quantified at this time."

Court Dkt. No. 252

12. The Court overrules the following in Court Dkt. No. 252, page 16, lines 25-30 (emphasis in original): "The undisputed evidence is that normal stock water use (grazing related to the carrying capacity of the land) and domestic water use is de minimus and does not include impoundments. The Memorandum Opinion is therefore adjusted to reflect that these uses are not included in the judgment and should always be available."

13. The Court adjusts the above two sentences by stating them as follows:

> "Water for domestic use and normal stock water use at the carrying capacity of the land without the use of impoundments is included in this Judgment, but it is neither adjudicated nor quantified at this time."

14. The Court further overrules as necessary and modifies another portion of this opinion that adopted a Magistrate Judge's finding that stock and domestic use was de minimis. Consistent with the above rulings regarding stock and domestic use, was de minimis. Consistent with the above rulings regarding stock and domestic use, the Court's adoption of the Magistrate's findings is revised as follows (insertions in bold): "This Court disagrees with paragraph (a) and agrees with paragraphs (b), (c) and (d), and the Opinion and Judgment shall be so amended." Dkt. No. 252, page 22, lines 19-20.

Water Master Modifications

Court Dkt. Nos. 189 and 196

15. The Court ordered the Government Parties in this case to provide a proposed order that summarized the powers and responsibilities of the Water Master in the Order Approving the Water Master's 2014 Report; Order to Meet and Confer, dated April 8, 2015. ECF No. 825. The Government Parties prepared and filed the Proposed Order on June 1, 2015. ECF No. 829-2. The Proposed Order provides a clear statement of the Water Master's powers and responsibilities as ordered by this Court over the course of this case. Based on the agreement of the parties and the modifications to the previous orders above, the Court adjusts the previous orders contained in Court Dkt. Nos. 189 and 196 by adding to the Water Master's powers and responsibilities the following:

> The State of Washington, through its Department of Ecology, may delegate to the Water Master duties as required to administer state water law, exclusive of the Water Master's duties under previous orders in this Case, and perform duties pursuant to the Agreement reached by the sovereign parties in this Case for the administration of the agreed upon mitigation program.
>
> The State of Washington, through its Department of Ecology, shall be responsible for funding these additional duties of the Water Master in this Case consistent with State law and the Agreement reached between the sovereign parties in this Case.

16. The Government Parties shall file an amended Proposed Order identical to ECF No. 829-2, with the addition of the above language, within seven-(7) days of the entry of this Order.

Registry Claims

Court ECF No. 825

17. The Government Parties described their activities related to the Court's April 8, 2015 Order, ECF No. 825 regarding water rights claims that may predate the Tribe's reserved water rights. ECF No. 912 at 12-15. The Court overrules and modifies the April 8, 2015 Order at page 2, Section 2, and strikes the requirements contained therein regarding water rights potentially senior to the Tribe's, and thereby relieves the Government Parties from that Order's requirement

DATED this ___ day of ___, 2019.

/s/ Stanley A. Bastian
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (OCTOBER 12, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPOKANE INDIAN TRIBE;
UNITED STATES OF AMERICA,

Plaintiffs-Appellees,

v.

DAN SULGROVE; LESLIE SULGROVE;
CHAMOKANE LANDOWNERS
ASSOCIATION, INC.,

Objectors-Appellants,

v.

DAWN MINING CORP; STATE OF WASHINGTON;
CHRISTOPHER M. NEWHOUSE,

Defendants-Appellees.

No. 21-35502

D.C. No. 2:72-cv-03643-SAB
Eastern District of Washington, Spokane

Before: WATFORD, R. NELSON,
and LEE, Circuit Judges.

ORDER

The panel has unanimously voted to deny the petition for panel rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for panel rehearing and rehearing en banc are DENIED.