

**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
**[PROPOSED] ORDER TO
SHOW CAUSE WHY FIVE
AMENDMENTS TO PRIOR
ORDERS SHOULD NOT BE
ENTERED**

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

that they intend to move the Court to amend the Court's prior orders to implement their Agreement.

On June 21, 2019, the Government Parties filed two joint motions to the Court. One of them moves for an *Order to Show Cause Why Five Amendments to Prior Orders Should Not be Entered* ("Show Cause Motion"). The second is a *Joint Motion for Approval of Process to Provide Notice of Order to Show Cause Why Five Amendments to Prior Orders Should Not Be Entered and Memorandum in Support*.

In their Show Cause Motion, the Government Parties moved the Court to first 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).

Accordingly, 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.

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 at 581.

YOU ARE 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 within one hundred twenty-five - (125) days of the entry of this Order, which is _____, 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).

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 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 its 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 Proposed Order

The 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 _____ [date from page 3], 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.*

IT IS SO ORDERED.

DATED this _____ day of _____, 2019.

Stanley A. Bastien
United States District Judge

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**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. CV-72-3643-SAB

OBJECTION TO SHOW CAUSE ORDER

The person or entity named below objects to the Order to Show Cause Why Five Amendments to Prior Orders Should Not Be Entered, for the following reasons.

PLEASE TYPE OR PRINT:

FULL NAME: _____

MAILING ADDRESS: _____

E-MAIL: _____

TELEPHONE: _____

DESCRIBE: (i) Your current water use and (ii) where it is within the Chamokane Basin. _____

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DESCRIBE: (i) Your potential water use; and (ii) where it is within the Chamokane Basin. _____

DESCRIBE: The factual basis for your objection to the Show Cause Order.

DESCRIBE: The legal basis for your objection to the Show Cause Order.

DESCRIBE: How your water right(s) or potential water use(s) will be injured or harmed in a legally cognizable way by the approval of the Show Cause Order.

I understand that I (or my attorney) must attend a mandatory scheduling conference to be held at a time and place to be announced. Further procedures for hearing objections to the Show Cause Order will be determined at that conference.

Signed: _____ Dated: _____

1 If this objection is filed by an attorney on behalf of the party, the attorney must
2 enter an appearance, file the objection electronically, and sign the objection:

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By: _____
Signature of attorney

ATTORNEY'S NAME & ADDRESS: _____

TELEPHONE NUMBER: _____
E-MAIL ADDRESS: _____

Attorney for: _____
Name of party

17 This objection **must be received by the Court no later than** _____ to be
18 effective.

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20 Objectors not represented by an attorney may file an objection by mailing the
21 objection form to: U.S. District Court, P.O. Box 1493 Spokane, WA 99210.

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23 Objectors not represented by an attorney may also file your objection form at the
24 Clerk's Office for the United States District Court for the Eastern District of
25 Washington, at these addresses:

26 Spokane: Thomas S. Foley United States Courthouse
27 920 West Riverside Ave, Room 840
28 Spokane, WA 99201

1 Yakima: William O. Douglas United States Courthouse
2 25 South 3rd St, Room 201
3 Yakima, WA 98901
4

5 Richland: Richland U.S. Courthouse & Federal Building
6 825 Jadwin Avenue, Room 174
7 Richland, WA 99352
8

9 Objectors **must also serve** copies of their objection on the attorneys for:
10

11 The Spokane Tribe: Theodore Knight, Special Legal Counsel
12 Office of the Spokane Tribal Attorney
13 P.O. Box 100
14 Wellpinit, Washington 99040
15

16 The United States: David W. Harder, Assistant Section Chief
17 Env't. Div., Indian Resources Section
18 United States Department of Justice
19 999 18th Street, South Terrace, Suite 370
20 Denver, CO 80202
21

22 The Washington Dept. of Ecology:
23 Alan M. Reichman, Senior Counsel
24 Stephanie Duvall, Assistant Attorney General
25 Washington Attorney General's Office
26 Ecology Division
27 P.O. Box 40117
28 Olympia, WA 98504-0017