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21 **UNITED STATES DISTRICT COURT**
22 **EASTERN DISTRICT OF WASHINGTON**

23 UNITED STATES OF AMERICA,
24 Plaintiff,

25 SPOKANE TRIBE OF INDIANS,
26 Plaintiff/Intervenor,

v.

BARBARA J. ANDERSON, et al.,
Defendants.

NO. 2:72-cv-03643-SAB

08/12/2019

Without Oral Argument

1 **JOINT MOTION FOR APPROVAL OF PROCESS**
2 **TO PROVIDE NOTICE OF ORDER TO SHOW CAUSE WHY FIVE**
3 **AMENDMENTS TO PRIOR ORDERS SHOULD NOT BE ENTERED AND**
4 **MEMORANDUM IN SUPPORT**

5 **I. Motion for Approval of Notice Process**

6 On April 25, 2019, the Spokane Tribe, the State of Washington, Department
7 of Ecology, and the United States of America (collectively, the “Government
8 Parties”) filed the *Government Parties’ Report Regarding Settlement, Provision of*
9 *Notice to Water Users in the Upper Basin, and Plan to Address Pre-1877 State*
10 *Water Rights Claims* (“Government Parties’ Report”). ECF No. 912. In that
11 Report, the Government Parties notified the Court that they have entered into an
12 Agreement¹ to resolve several water rights and water rights administration issues
13 raised by the briefing in 2013 to 2015 and from the February 12, 2015 hearing. In
14 their *Joint Motion for Order to Show Cause Why Five Amendments to Prior*
15 *Orders Should Not Be Entered and Memorandum in Support* (“Joint Show Cause
16 Motion”), filed contemporaneously herewith, the Government Parties request that
17 several of the prior orders of this Court should be amended to implement their
18 Agreement that improves water management and protection of the Tribe’s instream
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25 ¹ The Government Parties executed, “Agreement on a Program to Mitigate for Certain Permit-Exempt Well Water
26 Uses in Chamokane Creek under *U.S. v. Anderson*” (Agreement) on April 22, 2019.

1 flow water right. The Joint Show Cause Motion requests that the Court enter a
2 Show Cause Order that provides water users and/or land owners in the Chamokane
3 Creek Basin with: (1) the rationale for, and text of, the proposed changes to the
4 prior Court Orders; (2) a chance to object to the Show Cause Order; and (3) an
5 opportunity to be heard on any objections to the Show Cause Order.
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7 Consistent with that request, and to provide affected persons the opportunity
8 to object to the Show Cause Order, the Government Parties additionally move the
9 Court herewith to enter an Order Directing the United States to Mail Notice of
10 Entry of the Show Cause Order Regarding Water Rights and Water Rights
11 Administration Changes to Prior Court Orders (“Joint Motion for Approval of
12 Notice Process”). As grounds in support of this request, the Government Parties
13 state:
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16 1. The scope of the provision of personal and publication notice proposed
17 by the Government Parties, and the rationale set forth for the scope of service of
18 personal notice, are reasonable and appropriate given the facts and circumstances
19 of this matter. As such, this proposed notice process comports with the
20 constitutional right to procedural due process. *See* Declaration of John Covert in
21 Support of Joint Motion for Approval of Process to Provide Notice of Show Cause
22 Order (attached hereto as **Exhibit 1** and incorporated herein by reference).
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1 2. The United States, through the Department of Justice, is willing to pay
2 the costs of mailing personal notice to the water users and/or landowners who will
3 be identified by the process described in **Exhibit 1**. The United States, through the
4 Department of Justice, is also willing to pay the costs associated with the
5 publication of notice for a period of no less than once each week, for three
6 consecutive weeks, in the Spokesman-Review and The Independent, newspapers
7 serving the Chamokane Creek Basin and Stevens County, Washington, to provide
8 further notice to potentially affected water users.
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11 3. The Government Parties have created a proposed Notice to apprise
12 affected water users and/or landowners of the Show Cause Order (attached hereto
13 as **Exhibit 2**). The Notice provides sufficient information about the requested
14 water rights and water management changes for persons to be able to determine if
15 they should file an objection, and the Notice adequately explains how and when an
16 objection should be filed.
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18 WHEREFORE, the Government Parties respectfully request this Court to
19 enter an Order Directing the United States to Mail Notice of Entry of the Show
20 Cause Order Regarding Water Rights and Water Rights Administration Changes to
21 Prior Court Orders in the form attached hereto as **Exhibit 3**, including the
22 Proposed Notice for Show Cause Order: Notice Regarding Domestic and Stock
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1 Watering from Wells in the Chamokane Creek Basin and *United States v.*
2 *Anderson* (“Notice”), attached hereto as **Exhibit 2**.

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4 **II. Memorandum in Support of Motion for Approval of Notice Process**

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6 The Government Parties propose to provide notice of the Show Cause Order
7 regarding proposed amendments to prior orders in this case to all landowners in the
8 Chamokane Basin. The Notice will be provided to all landowners in the
9 Chamokane Basin based upon execution and completion of a thorough process for
10 obtaining the most accurate, complete and current list of the addresses of all
11 landowners in the basin. *See* Declaration of John Covert in Support of Joint
12 Motion for Approval of Process to Provide Notice of Show Cause Order (**Exhibit**
13 **1**). Specifically, the Department of Ecology’s database reflects Chamokane Basin
14 landowner names and addresses which are current as of January 22, 2019. *Id.* at 2.
15 In addition to generating a list of landowner names and addresses from Ecology’s
16 database, Ecology is coordinating with personnel from Stevens County,
17 Washington’s Planning Division and Geographic Information Services Division.
18 *Id.* at 3. The purpose of these communications is to obtain a more current set of
19 landowner names and addresses in the Chamokane Basin, based upon the
20 application of a geographic information systems shape file, which demonstrates the
21 appropriate boundary of the area comprising the Chamokane Basin. *Id.* Stevens
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1 County staff are anticipated to assist Ecology with the compilation and production
2 of the requested list of landowners, and their associated addresses, just prior to
3 completion of the Notice Process described herein, immediately preceding the
4 anticipated date of service. *Id.* at 3-4.

6 The Government Parties proposed that all landowners receive one copy of
7 the Notice by first-class mail which is common and applicable to every landowner
8 in the Chamokane Basin. (**Exhibit 2**). The Government Parties recognize that
9 some landowners may own multiple tracts of land in the basin. In the interest of
10 economy and in an effort to reduce duplication, the Notice process will be
11 complete and sufficient if each landowner receives only one Notice, rather than
12 multiple copies of the same Notice equal to the number of tracts of land any given
13 landowner may own. There is no benefit to providing the same landowner with
14 multiple notices, notwithstanding the additional costs that would be incurred by
15 sending additional notices. The Government Parties contend that compiling and
16 mailing the additional notices would only result in the unnecessary expenditure of
17 resources associated with multiple mailings of the same documents to the same
18 landowner, without actually providing any additional notice.

22 In addition to personal service on all the known, potentially affected water
23 users and/or landowners as described above, the Government Parties propose to
24 provide notice by publication in the Spokesman-Review and The Independent,
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1 which are newspapers of general or partial circulation in the Chamokane Creek
2 Basin and Stevens County, Washington. The Government Parties propose to
3 utilize the Spokesman-Review and The Independent to provide notice to the basin
4 to apprise persons likely to be affected by the proposed amendments.
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6 Personal service by mail to all known landowners potentially affected by the
7 settlement reached in this case by the Government Parties is a presumptively valid
8 means of effecting notice in order to comply with the constitutional right to
9 procedural due process. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S.
10 306, 318-20, 70 S.Ct. 652 (1950). Notice by publication in multiple newspapers
11 satisfies the Government Parties' obligation to any other current or potential future
12 water right holder whose address is "unknown" at this point. *Id.*, 339 U.S. at 317,
13 70 S.Ct. at 658. The Government Parties have established a valid means of
14 providing notice by personal service to potentially affected landowners whose
15 addresses are known, and by publication notice to any others, in the Chamokane
16 Basin.
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20 The content of the Notice that the Government Parties propose to serve on
21 all the landowners of the Chamokane Basin as described above, and by
22 publication, is appropriate and adequate for the circumstances of this proceeding.
23 Under the *Mullane* standard, notice must be "reasonable calculated, under all the
24 circumstances, to apprise interested parties of the pendency of the action and afford
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1 them an opportunity to present their objections.” *Mullane*, 339 U.S. at 314, 70
2 S.Ct. at 657. “The right to be heard has little reality or worth unless one . . . can
3 choose for himself whether to appear or default, acquiesce or contest.” *Id.*; *see*
4 *also City of West Covina v. Perkins*, 525 U.S. 234, 240, 119 S.Ct. 678, 142 L.Ed.
5 2d 636 (1999) (citing *Mullane* for this proposition). *Rojas v. Johnson*, 305 F.
6 Supp. 3d 1176, 1184 (W.D. Wash. 2018). “The notice must be of such nature as
7 reasonably to convey the required information . . . and it must afford a reasonable
8 time for those interested to make their appearance[.]” *Mullane*, 339 U.S. 306 at 314
9 (internal citation omitted). It must “apprise interested parties of the pendency of
10 the action.” *Williams v. Mukasey*, 531 F.3d 1040, 1042 (9th Cir. 2008).

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14 Consistent with the above standards, the Government Parties’ proposed
15 Notice generally explains: (1) the settlement reached by the Government Parties;
16 (2) the changes to prior orders in the *Anderson* case that are being proposed to
17 carry out the settlement; (3) the mitigation program sponsored by the Government
18 Parties; (4) the process to review the settlement and the proposed changes to prior
19 orders; (5) how landowners may learn more about the settlement and the proposed
20 changes; and (6) when and how to file an objection to the settlement and the
21 proposed changes. **Exhibit 2**. The Government Parties’ Notice entirely satisfies
22 the necessary standards for the type of information that should be included in a
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1 proper notice. *Id.*; *Rojas*, 305 F. Supp. 3d at 1184 (citing *Mullane*, 339 U.S. at
2 314).

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4 In sum, the scope of service and the contents of the Notice proposed by the
5 Government Parties plainly satisfy the applicable legal requirements, and satisfy
6 the right to due process. The Court accordingly should adopt the proposed Order
7 and attendant Notice that are attached hereto as **Exhibits 2 and 3**.

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10 Dated: June 21, 2019

11 Respectfully submitted,

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LIST OF EXHIBITS

Exhibit No.

Title

- 1 Declaration of John Covert in Support of Joint Motion for Approval of Process to Provide Notice of Show Cause Order
- 2 Proposed Notice for Show Cause Order. Notice Regarding Domestic and Stock Watering From Wells in the Chamokane Creek Basin and United States v. Anderson
- 3 Proposed Order Directing the United States to Mail Notice of Entry of the Show Cause Order Regarding Water Rights and Water Rights Administration Changes to Prior Court Orders

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CERTIFICATE OF SERVICE

I certify that on the 21ST day of June, 2019, I electronically filed the foregoing “JOINT MOTION FOR APPROVAL OF PROCESS TO PROVIDE NOTICE OF SHOW CAUSE ORDER” with the Clerk of the U.S. District Court by using the CM/ECF system which will send notification of such filing to the following parties of record:

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and by depositing in the United States mail, postage pre-paid, to the persons on the attached service list who do not have an email address.

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