

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Jul 31, 2019**

SEAN F. MCAVOY, CLERK

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

**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.

**ORDER TO SHOW CAUSE; ATTACH. A; ATTACH. B. ~ 1**

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

### 11 I. Summary of the Proceedings

12 This action was originally filed in 1972 by the United States seeking  
13 adjudication of water rights within the Chamokane Creek System. The original  
14 case adjudicated the reserved water rights of the Spokane Tribe of Indians in the  
15 Chamokane Creek System and other irrigators and commercial water users within  
16 the Middle and Lower Chamokane Creek aquifers. The Court appointed a federal  
17 water master to regulate these rights, and the Court retained jurisdiction over the  
18 case. Further, the original orders in the case found that the aquifer in the Upper  
19 Chamokane Creek was not connected to the aquifer in the middle part of the  
20 Chamokane Creek System, and that water for domestic use and stockwater use at  
21 the carrying capacity of the land without impoundments did not impact the flow of  
22 Chamokane Creek, and was therefore de minimus, and not included within the  
23 judgment.

24 In 2006 the Court ordered the Government Parties to conduct a study to  
25 answer several questions that were presented to the Court. ECF No. 600. The  
26 United States Geological Service (USGS) investigated the impacts on stream flow  
27 by domestic and stockwater use and analyzed whether the Upper Chamokane  
28 aquifer was separate from the Middle Chamokane aquifer. The USGS found that

**ORDER TO SHOW CAUSE; ATTACH. A; ATTACH. B. ~ 2**

1 the Upper system's aquifer is connected to the Middle system's aquifer. ECF No.  
2 755-1 at Exhibit 1 pages 73-75, Report pages 58-60. Additionally, the USGS found  
3 that domestic and stockwater use can impact Chamokane Creek flows. ECF No.  
4 755-1 at Exhibit 1 pages 82-83, Report Pages 67-68. Given that these findings are  
5 contrary to this Court's original orders, the Court requested extensive briefing  
6 leading to this Court's April 8, 2015 Order, which provided the Government  
7 Parties with several directives to address the USGS's findings, and other items the  
8 Court found necessary to better administer the case under the Court's continuing  
9 jurisdiction. ECF No. 825. The April 8, 2015 Order led to the Government Parties  
10 entering into period of settlement discussions, which resulted in the Agreement,  
11 ECF No. 912, Exhibit 1, and the Government Parties' motions to modify the  
12 Court's previous orders.

## 13 **II. Summary of the Agreement**

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

24 2. The Agreement requires that the Government Parties move the Court to  
25 modify:

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

28 b) the Spokane Tribe of Indians' instream flow water right for the months of

1 March and April to protect flows that are needed to maintain fish habitat;

2 c) its previous orders and allow the federal water master to conduct water  
3 regulation pursuant to the delegation of authority from the State of Washington to  
4 allow for more comprehensive regulation of the Chamokane Creek System; and

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

### 7 **III. Summary of the Proposed Order**

8 The proposed Order will:

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

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

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

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

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

### 22 **IV. Rights of Land Owners in the Chamokane Creek System**

23 1. If you wish to object to the modifications to the Court's previous orders  
24 pursuant to the Agreement, you or your attorney must, no later than **December 6,**  
25 **2019**, file your objection on the form that is Attachment A. The form can also be  
26 found on the following website: [https://ecology.wa.gov/Water-Shorelines/Water-](https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-availability/Chamokane-Creek)  
27 [supply/Water-availability/Chamokane-Creek](https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-availability/Chamokane-Creek). Your attorney must file the  
28 document through the federal court's electronic filing system.

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1 You may file an objection by mailing the objection to:

2 US District Court

3 P.O. Box 1493

4 Spokane, WA 99210-1493

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

8 **Spokane:** Thomas S. Foley United States Courthouse

9 920 West Riverside Ave, Room 840

10 Spokane, WA 99201

11 **Yakima:** William O. Douglas United States Courthouse

12 25 South 3rd St, Room 201

13 Yakima, WA 98901

14 **Richland:** Richland U.S. Courthouse & Federal Building

15 825 Jadwin Avenue, Room 174

16 Richland, WA 99352

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

20 3. If there are objections, then the Government Parties have 60 days from  
21 the conclusion of the objection period to provide a litigation plan to the Court,  
22 including a schedule for responses to the plan, and replies of the Government  
23 Parties, and a hearing.

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

28 //

**ORDER TO SHOW CAUSE; ATTACH. A; ATTACH. B. ~ 5**

1 Accordingly, **IT IS HEREBY ORDERED:**

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

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

15 **DATED** this 31<sup>st</sup> day of July 2019.  
16  
17  
18



21  
22

A handwritten signature in blue ink that reads "Stanley A. Bastian".

23 Stanley A. Bastian  
24 United States District Judge  
25  
26  
27  
28

**Attachment A**

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

**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. \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

/

**ORDER TO SHOW CAUSE; ATTACH. A; ATTACH. B. ~ 7**

1 DESCRIBE: (i) Your potential water use; and (ii) where it is within the  
2 Chamokane Basin\_\_\_\_\_

3 \_\_\_\_\_  
4 \_\_\_\_\_  
5 \_\_\_\_\_  
6 DESCRIBE: The factual basis for your objection to the Show Cause Order.

7 \_\_\_\_\_  
8 \_\_\_\_\_  
9 \_\_\_\_\_  
10 DESCRIBE: The legal basis for your objection to the Show Cause Order.

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

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

22 Signed: \_\_\_\_\_ Dated: \_\_\_\_\_

23 //

24 //

25 //

26 //

27 //

28 //



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:

3 By: \_\_\_\_\_

4 Signature of attorney

5 ATTORNEY'S NAME & ADDRESS: \_\_\_\_\_

6 \_\_\_\_\_

7 \_\_\_\_\_

8 TELEPHONE NUMBER: \_\_\_\_\_

9 E-MAIL ADDRESS: \_\_\_\_\_

10 Attorney for: \_\_\_\_\_

11 Name of party

12  
13 This objection must be received by the Court no later than **December 6, 2019** to be  
14 effective.

15  
16 Objectors not represented by an attorney may file an objection by mailing the  
17 objection form to: U.S. District Court, P.O. Box 1493 Spokane, WA 99210.

18  
19 Objectors not represented by an attorney may also file your objection form at the  
20 Clerk's Office for the United States District Court for the Eastern District of  
21 Washington, at these addresses:

22 **Spokane:** Thomas S. Foley United States Courthouse  
23 920 West Riverside Ave, Room 840  
24 Spokane, WA 99201

25 **Yakima:** William O. Douglas United States Courthouse  
26 25 South 3rd St, Room 201  
27 Yakima, WA 98901

28 **Richland:** Richland U.S. Courthouse & Federal Building

**ORDER TO SHOW CAUSE; ATTACH. A; ATTACH. B. ~ 9**

1 825 Jadwin Avenue, Room 174

2 Richland, WA 99352

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

4 The Spokane Tribe: Theodore Knight, Special Legal Counsel

5 Office of the Spokane Tribal Attorney

6 P.O. Box 100

7 Wellpinit, Washington 99040

8 The United States: David W. Harder, Assistant Section Chief

9 Env't. Div., Indian Resources Section

10 United States Department of Justice

11 999 18th Street, South Terrace, Suite 370

12 Denver, CO 80202

13 The Washington Dept. of Ecology:

14 Alan M. Reichman, Senior Counsel

15 Stephanie Duvall, Assistant Attorney General

16 Washington Attorney General's Office

17 Ecology Division

18 P.O. Box 40117

19 Olympia, WA 98504-0017

**Attachment B**

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  
MODIFYING PREVIOUS  
ORDERS**

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

**ORDER TO SHOW CAUSE; ATTACH. A; ATTACH. B. ~ 11**

1 changes to the orders in this case consistent with the standards governing this case,  
2 Dkt. No. 196, at XXV. The Court last modified the Judgment in this case on  
3 December 9, 1988, Order Modifying the Minimum Flow Provisions of this Court's  
4 Memorandum Decision of July 23, 1979, Dkt. No. 360.

5 Accordingly, **IT IS HEREBY ORDERED:**

6 **Modifications Required for Upper Chamokane Creek Connectivity Findings**  
7 **Court Dkt. No. 189**

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

13 2. The Court overrules as necessary and modifies Court Dkt. No. 189, page  
14 4, lines 10-13, by removing the following sentence: "Groundwater withdrawals in  
15 the Upper Chamokane region have no impact upon the creek flow below the falls  
16 because groundwater in this area is part of a separate aquifer."

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

23 **Court Dkt. No. 196**

24 4. The Court overrules as necessary and modifies Court Dkt. No. 196,  
25 Judgment, dated September 12, 1979, page 1, Section I, by removing the third  
26 sentence: "Ground water withdrawals in the Upper Chamokane region have no  
27 impact upon the flow of Chamokane Creek because groundwater in the Upper  
28 Chamokane Region is part of a separate aquifer."

**ORDER TO SHOW CAUSE; ATTACH. A; ATTACH. B. ~ 12**



1 temperature for the months of May through February and shall be  
2 subject to minimum flows of 140 cfs for the month of March and 151  
3 cfs for the month of April.

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

8 **Modifications Required for Domestic and Stockwater Uses**

9 **Court Dkt. No. 189**

10 8. The Court overrules as necessary and modifies Court Dkt. No. 189, page  
11 16, lines 23-25, by removing: “2. Water for domestic use is not included within the  
12 judgment, as it is de minimus and should always be available.”

13 9. The Court overrules as necessary and modifies Court Dkt. No. 189, page  
14 16, lines 23-25, by replacing the above sentence with the following: “2. Water for  
15 domestic use is included within this judgment but is not quantified or adjudicated  
16 at this time.”

17 **Court Dkt. No. 196**

18 10. The Court overrules as necessary and modifies Court Dkt. No. 196, page  
19 10, Section XX, by removing the following: “Water for domestic use is not  
20 included within this Judgment nor adjudicated herein since the use of water for  
21 domestic purposes is deminimus and sufficient water for such domestic purposes  
22 always should be available.”

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

28 **Court Dkt. No. 252**

**ORDER TO SHOW CAUSE; ATTACH. A; ATTACH. B. ~ 14**

1 12. The Court overrules the following in Court Dkt. No. 252, page 16, lines  
2 25-30 (emphasis in original): “The undisputed evidence is that normal stock water  
3 use (grazing related to the carrying capacity of the land) and domestic water use is  
4 de minimus and does not include impoundments. The Memorandum Opinion is  
5 therefore adjusted to reflect that these uses are not included in the judgment and  
6 should always be available.”

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

8 **“Water for domestic use and normal stock water use at the carrying**  
9 **capacity of the land without the use of impoundments is included in this**  
10 **Judgment, but it is neither adjudicated nor quantified at this time.”**

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

19 **Water Master Modifications**

20 **Court Dkt. Nos. 189 and 196**

21 15. The Court ordered the Government Parties in this case to provide a  
22 proposed order that summarized the powers and responsibilities of the Water  
23 Master in the Order Approving the Water Master’s 2014 Report; Order to Meet  
24 and Confer, dated April 8, 2015. ECF No. 825. The Government Parties prepared  
25 and filed the Proposed Order on June 1, 2015. ECF No. 829-2. The Proposed Order  
26 provides a clear statement of the Water Master’s powers and responsibilities as  
27 ordered by this Court over the course of this case. Based on the agreement of the  
28 parties and the modifications to the previous orders above, the Court adjusts the  
**ORDER TO SHOW CAUSE; ATTACH. A; ATTACH. B. ~ 15**

