CASE NO. 21-35502

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPOKANE INDIAN TRIBE; UNITED STATES OF AMERICA
PLAINTIFFS, APPELLEES

v.

DAN SULGROVE; et al.,
OBJECTOR, APPELLANTS

v.

DAWN MINING CORP; et al.,
DEFENDANTS, APPELLEES

PETITION FOR REVIEW OF DECISION BY
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA
CIVIL CASE NUMBER S:72-cv-03643-SAB
(HONORABLE STANLEY ALLEN BASTIAN, CHIEF DISTRICT JUDGE)

PLAINTIFF'S-APPELLANT'S REPLY BRIEF

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ARGUMENT IN REPLY

The Government Parties' jurisdictional and standing arguments are a distraction from the issues before this court, which is whether the district court abused its discretion granting the Governments' request to radically modify a 40-year-old final judgment in the absence of harm caused by unanticipated change in circumstance. And, whether due process has been satisfied and whether the court can modify the determined right of non-parties to make future use of water.

A court abuses its discretion when it modifies a final judgment under Fed. R. Civ P. 60(b)(5) in the absence of a timely motion showing a substantial change in circumstances unanticipated at the time of trial absent any showing of hardship. There has been no change in circumstance, certainly none that was unanticipated at the time of trial. The Governments knew the basin was over appropriated. 3-ER-385. They knew the Tribe's reserved rights exceed the annual basin yield. Opening Brief at 7. They knew creek flows were sometimes less than the minimum reserved instream flow of 20 CFS. The United States' expert (Mr. Woodward) measured flow at 17 CFS. FER-713. Another of its experts (Mr. Navarre) confirmed higher water temperatures occurred when flow was less than 20 CFS. FER-711. Plaintiffs knew that any additional uses of water would affect stream flow. 3-ER-375. Knowing all of this they successfully advocated for exempting

water uses having *de minimis* effect from regulation. The final judgment gave them what they asked for. Now, they want a do-over.

The Governments' Answer raises jurisdictional and standing issues for the first time perhaps hedging the possibility that their privately negotiated settlement agreement goes too far. This court should not remand the case; it should not grant a do-over. This Court should reverse the lower court and affirm the exemption of certain water uses from regulation based on the finality of the judgment and the strictures of due process. The Governments should be directed to address the future use of water legislatively or administratively in the manner proscribed.

A. The Record Reflects This Case is a General Adjudication in Which the Trial Court Exercised *In Rem* Jurisdiction.

Though not expressly identified in their statement of issues, the Governments' Answer challenges the jurisdictional underpinnings of a final judgment entered 43 years ago. They contend, incorrectly, the case was not filed *in rem* and is not a general stream adjudication.[1] Answer at 33. The United States' amended complaint invoked the district court's subject matter (*in rem*) jurisdiction

[1] The Governments cite an order where the district court opined the original case was not a general stream adjudication. Answer at 34, fn 8 citing 2-ER-224. Omitted is the district court's determination that the issue is not relevant. Ironically, the same order concluded changing prior orders would require a hearing to make findings of fact with notice to landowners and an opportunity to participate. 2-ER-224-25. That never happened with the result that evidence available more than 10 years ago and relied on by the Governments (and the district court) was never subject to cross-examination.

over all the waters of Chamokane Basin, "to have its rights in and to the water of Chamokane Creek and its tributaries, declared and protected." 3-ER-492.

In an earlier proceeding, the State moved to eliminate the retained jurisdictional provision it now relies on. 3-ER-358-59. The State also moved to enjoin Plaintiffs from seeking any additional water. Id. In response to that motion, the district court acknowledged that general adjudications (like this one) are designed to close open-ended federal claims, but denied the State's motion in favor of retaining jurisdiction to modify the Tribe's rights (not those of Appellants). Id.

In briefing to the district court, the Tribe argued the "case was, and is, a general adjudication in which the court assumed full jurisdiction over all waters and uses within the Chamokane Creek Basin." FER-680 (internal signals omitted). The United States (and the Tribe as Plaintiff-Intervenor) decision not to summon all water users did not deprive the court of subject matter jurisdiction in determining that the Tribe holds senior rights to all of the water in the basin, which shall not be exercised against certain categories including *de minimis* uses that should always be available.

The Governments' jurisdictional argument is disingenuous. The final judgment found and concluded that "water for domestic use is not included within the judgment as it is *de minimis* and should always be available." 3-ER-384. In 1982, without objection, the court entered a similar finding and conclusion

pertaining to stock use. 3-ER-361. In their Joint Motion for Order to Show Cause, the Government Parties asked the court to replace "not included" with "is included." 2-ER 164-65.[2] Decades after proving that regulation of certain uses was not required to protect the Tribe's senior rights, the Governments asked the court to modify the final judgment to regulate those rights, only to turn around in this court and argue that the district court does not have *in rem* jurisdiction over those uses.

Citing state law, the Governments insists that a general stream adjudication can only occur when all claimants are *compelled* to appear under penalty of forfeiture. Answer at 33, FN 7. The United States filed suit in federal court. The Supreme Court distinguishes private adjudications—whether claimants have priority over the United States—from general adjudications, involving the whole community of claims. United States v. Dist. Court In & For Eagle Cty., Colo., 401 U.S. 520, 525 (1971) citing Dugan v. Rank, 372 U.S. 609, 618. The trial court order stated, "[i]n this memorandum, the term "Chamokane Basin" is used to refer

[2] Clarifying the measure of uses exempt from regulation is different from modifying the judgment to regulate those uses. The trial court found the effects of stock watering at the carrying capacity of land and domestic use are *de minimis* (trivial) and ruled they should always be available. 3-ER-361 and 384. The court did not establish an upper limit for *de minimis* domestic use. In a later preceding the court recognized RCW 90.44.050 (at least tacitly) as the *de facto* measure of exempt domestic use. 3-ER-328.

to the entire system, including the creek, its tributaries, and its ground water basin." 3-ER-386, fn 1. The final judgment expressly addressed "***all waters*** in the Chamokane Basin ("Basin"). 3-ER-375—385 (***emphasis*** supplied). The Anderson Decree is a general adjudication. The Governments' jurisdictional argument fails.

B. Appellants Have Standing to Appeal from Denial of Objections the District Court Ordered Them to File.

The Governments contend changes to the judgment cannot cause injury to non-parties who therefore lack standing to object. In the next breath, they argue due process is satisfied because landowners were given notice and the opportunity (*aka* burden) to show cause why the judgment should not be amended. Answer at 57. It is difficult to see how due process can be satisfied if objections from the persons ordered to respond are non-justiciable.

The Answer invokes Article III and prudential considerations for non-party standing. It states (some 30-times) that Appellants are non-parties and so cannot be injured by modification of the judgment. Using that logic, the Government could file any claims and decide not to serve affected property owners who cannot be heard to complain. Instead of summoning all water users in 1972, the Government Plaintiffs successfully advocated for exempting certain uses from enforcement.

The decision under review adversely affected Appellants protected interests in several ways. First, the amended judgment allows for regulation of interests

previously determined to be exempt from regulation. Appellants, and hundreds of other affected property owners, have exercised those rights for over four decades, buying land, building homes, and raising families in reliance on the judgment. Granting the Governments power to shut off those uses after the fact is an actual concrete invasion of Appellants' interests.

The Governments assert no uses were exempted from regulation. Answer at 14, FN 3. If that were true, there would be no need to amend final orders and judgment. It is not true. The 2005 Master Report relied on by the Governments (see Answer at 16) expressly stated that "[d]omestic supply, stockwater, and the irrigation of up to ½ acre of non-commercial lawn and garden were ***exempt*** from regulation." 3-ER-331 (***emphasis*** added). The Master made clear that RCW 90.44.050 provides a *de facto* measure for exempt domestic use. Id. Following a hearing on the issue, the court adopted the report and determined that defining the *de minimis* "exemption" would entail a review of facts relied on by the court in entering judgment. ER-3-328-329. The Governments' response to that order proposed several issues for review including,

> what level if any of uses such as "domestic" and "stock watering" ***should be excepted from regulation*** by the U.S. v. Anderson water master due to their de "minimus" effects on Chamokane Creek?

FER-702. The uses in question were adjudged exempt from regulation in the final judgment.

Second, the final judgment provided Appellants with a clear defense to curtailment. As argued previously, alteration of a final judgment to avoid its preclusive effect is properly denied. Opening Brief at 24-25 citing Nat'l Union Fire Ins. v. Seafirst Corp., 891 F.2d 762, 767 (9th Cir.1989). The undisguised purpose of the Governments' privately negotiated agreement is to subject exempt uses to regulation. The order under review actually and concretely invades Appellants' legal/equitable defense to curtailment of their interests.

Third, the final judgment, and this court's ruling on appeal, affirmed state jurisdiction over Appellants' prospective right to use water under United States v. Anderson, 736 F.2d 1358, 1365 (9th Cir. 1984). In the amended complaint, Plaintiffs prayed

> 5. For an order enjoining the State of Washington from approving, or issuing any further permits or certificates ***or otherwise exercising jurisdiction*** over the use of the waters of the Chamokane Creek until further ordered by this Court

3-ER-502 (***emphasis*** added). The court denied the requested relief. According to the final judgment,

> if the State Department of Ecology permits additional persons to apply for water from the Chamokane Creek Basin it may be creating in them false hopes. . . since any such future certificates, permits or applications would be subject to existing rights

3-ER-385. Thus, the district court ruled that any future certificates, permits and applications would be subject to the Tribe's reserved rights. It also ruled that

certain uses shall be exempt from regulation. Plaintiffs appealed from the decision allowing the state to issue further permits (because the basin is over-appropriated). Anderson, 736 F.2d at 1365. Plaintiffs did not appeal the exemption for *de minimis* and upper basin groundwater uses from regulation even though they knew the instream flow limit was unmet at times and that additional appropriations would make it worse.[3] This court ruled for the state, noting that certificates and permits might be empty, meaning subject to regulation. Id. By extension, the uses exempted from regulation are not empty.

For decades landowners have exercised their right under RCW 90.44.050, to appropriate water for permit exempt uses without being regulated under the Anderson Decree. The order under review adopts the Governments' privately negotiated agreement to subject those uses to regulation and terminate the right to appropriate any water for those uses in the future. Specifically, when the simulated effect on stream flow reaches 80 gallons per minute, further domestic or stock use will become "empty." 3-ER-183. The ruling actually and concretely invades the adjudicated right of Appellants to appropriate water for *de minimis* uses pursuant to state law without being regulated.

[3] According to the state, there are three active groundwater and six surface rights in the upper basin, all but one of which (Thompson) are regulated or interruptible. FER-580-81.

The Governments do not raise issues of causation or redressability. Having established Appellants' injury under Article III, the prudential requirements for non-parties are easily satisfied. Answer at 31 citing Citibank Int'l v. Collier-Traino, Inc., 809 F.2d 1438, 1441 (9th Cir. 1987). Appellants participated in the proceedings below by filing objections in response to the district court's order to show cause. 2-ER-97-145. It would be inequitable to dismiss objections Appellants filed pursuant to the district court's order for want of justiciability. The Governments' standing argument fails.

C. The Standard for Approving Consent Decrees Does Not Apply to Modification of a Final Judgments

The Governments' Answer focuses on their position below—that modification of a final judgment by settlement agreement should be reviewed under standards applicable to the ***approval*** of consent decrees. The Governments' unprecedented theory ignores the distinction between how judicial decisions are entered or approved and how such decisions may be modified. That confusion led the district court to impose an erroneous standard and improperly shift the burden.

Modification of a final decision is governed by rule. This court applies a flexible standard to petitions for modification under the equity provision of Fed. R. Civ. P. 60(b)(5). Bellevue Manor Associates v. United States, 165 F.3d 1249, 1256–57 (9th Cir. 1999) citing Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992).

At a minimum, the moving party must show a significant change in factual conditions or law warranting modification. United States v. Asarco Inc., 430 F.3d 972, 979 (9th Cir. 2005) citing Small v. Hunt, 98 F.3d 789, 795 (4th Cir.1996) and Rufo, 502 U.S. at 384. The proposed modification must be suitably tailored. Id. citing Rufo, 502 U.S. at 385. Courts should not modify a decree "where a party relies upon events that actually were anticipated at the time it entered into a decree." Id.

The Governments did not petition for relief under the rule. In fact, they stated "no party is seeking relief under Rule 60(b)." 2-ER-61. Instead, they moved jointly for an order to show cause why their "settlement agreement" should not be accepted, including "minor modifications" to the judgment and other final orders. 2-ER-157. The Governments then urged the court to apply the standard used by this court to approve a negotiated plan for managing salmon fisheries in United States v. Oregon, 913 F.2d 576 (9th Cir. 1990). They also advocated for imposing the burden on objectors.

In Oregon, this court reviewed approval of plan as a consent decree and ruled the burden can be shifted to an objecting party if the "decree" is found to be the product of good faith, arms-length negotiations. Oregon, 913 F.2d at 581 citing Williams v. Vukovich, 720 F.2d 909, 921 (6th Cir.1983). As the Governments repeatedly point out, Appellants are non-parties. Unlike Oregon, negotiations

affecting Appellants interests were not arms-length because they were not invited to participate. The joint motion to show cause is instructive regarding good faith. In recounting the four-year negotiation process the Governments acknowledge "at numerous times during the negotiations, all of the Government Parties considered whether to leave the mediation and to move forward with simply complying with the April 15, 2015 Order." 2-ER-157. Compliance with that order required notice of landowners' opportunity to participate in a fact finding hearing. 2-ER-223. By negotiating privately, the Governments avoided filing a motion to modify judgment, avoided an evidentiary hearing, and shifted the burden on to the non-parties.

No authority has been cited for use of consent decrees to modify a final judgment. The standard for approval of a negotiated agreement plainly does not apply to the modification of a final judgment. The district court must have come to the same conclusion, which would explain its *sua sponte* finding the Governments had satisfied their burden under Fed. R. Civ. P. 60(b)(5). The court abused its discretion because rearguing adjudicated facts is not an unanticipated change in circumstance, and in the absence requisite harm, the unnecessary modification of a final judgment is not suitably tailored.

/ / /

1. Untested Evidence Challenging Long Adjudicated Facts Does Not Support a Finding of Changed Circumstance.

Any change in circumstance alleged in support of modification under Fed. R. Civ. P. 60(b)(5) must be viewed through the lens of foreseeability. Relief should not be granted for changes in circumstance that were anticipated. Asarco, *supra*; 3-ER-385, 400. The only thing that changed is the Governments' earlier decision not to regulate certain uses.[4] To support their change of heart, the Governments got permission to reargue facts in favor of a position opposite to the one they advocated for at trial.

Plaintiffs knew the basin was over appropriated and the decreed flow of 20 CFS was not fully satisfied. FER- 711, 713. The court found all groundwater withdrawals in the Chamokane Basin affect streamflow. ER-3-375, 389. The Governments advocated to allow ongoing and future uses of water with *de minimis* (i.e., trivial) effect on stream flow. The Court ruled they should always be available and Plaintiffs did not appeal. The effect of water use on stream flow is not unanticipated, it was central to the adjudication of facts the Governments now want changed. For that reason, the Governments failed to satisfy the standard for

[4] The Governments explain their privately negotiated settlement agreement is generous, but admit modifications are intended to allow for regulation exempt uses. Answer at 23, 39, 50, 61. They also admit the economic effect regulation will have on Appellants. Answer at 58. Because they are generous "[a]s a practical matter, it is not foreseeable" that amending the judgment will ever lead to adjudication of any exempted uses. Answer at 52. Then why do it?

modification of judgment. Asarco, *supra*. The district court abused its discretion, and its order approving modifications of prior orders should be reversed.

The Governments argue that Washington law prohibits even *de minimis* effects to senior rights, because the state cannot allow domestic uses to jump ahead of prior rights. Answer at 49 citing Fox v. Skagit Cty., 372 P.3d 784, 789 (Wash. Ct. App. 2016). Courts can, however, and for 43 years the Tribe has exercised its senior rights subordinate to *de minimis* uses exempted from regulation.

The Governments cite the USGS report as evidence permit exempt groundwater use increased by nearly 13 acre-feet over 21 years. Answer at 47. That evidence has never been subject to cross-examination but can be accepted for the purpose of discussion. The basin yield is 35,000 acre-feet. ER-3-389. Thirteen acre-feet is less than 0.037%. The USGS determined that 52% of domestic use is recharged through septic systems. 3-ER-275. The use of 0.018% of total basin yield is trivial and does not meet the threshold showing for modification. The simulated impact is 1.6 orders of magnitude less than USGS' ability to detect (i.e., trivial). 3-ER-314. The Governments' solution fails for want of a problem.

The Governments also cite the USGS report as evidence the trial court erred in finding that groundwater use in the upper basin has no effect on stream flow. Answer at 45-46. Accepting the untested evidence for the purpose of discussion, it

does not establish a change in circumstance. The USGS doubled the estimated pumping rate in the upper basin to calculate an effect of .05 cfs (trivial) on streamflow. 3-ER-304. Putting on evidence decades later to show a trivial connection exists with the upper basin aquifer does not equal a change in circumstance. If that connection exists now, it existed then.[5] As the court stated in denial of earlier Government efforts to modify judgment, "A party who failed to prove his strongest case is not entitled to a second opportunity by moving to amend a finding of fact and a conclusion of law." 3-ER-348 citing 9 Wright & Miller, Federal Practice & Procedure, 722 (1971).

Regarding the upper basin aquifer, the Tribe briefed the court following completion of the USGS report, noting that it had little concern "[d]ue to that aquifer's small contribution to the Chamokane system." The Tribe further explained, "[t]his is especially so,

> since that aquifer's role in the system was directly raised at trial and addressed in the court's orders, and as indicated above, modification of the Judgment and Orders may be inappropriate absent "a showing of a substantial change in circumstances, unanticipated in the Court's quantification."

FER-679.

The Governments complain that new permit exempt wells have been constructed. The future domestic use of water was anticipated at trial and the

[5] Plaintiffs' expert testified the connection was negligible. Opening Brief at 19.

simulated effect of that use is trivial. Moreover, the Governments' emphasis on the threat posed by permit exempt wells overstated. The Court should understand the USGS simulated the combined effect of permit exempt ***and*** claims registry uses to be 0.02 cfs. 3-ER-309. Not much has been said about the State's claims registry. The State provided a list of registry claims to the District Court. FER-593-639. The USGS reported that registry claims consist mostly of self-supplied domestic withdrawals with some stock and small-scale irrigation. 3-ER-309. There are a lot of them, and the Court can begin to understand why the Governments may have advocated for exempting *de minimis* domestic use as a category instead of summoning all landowners. The registry also provides context for the Governments' complaint about permit exempt wells. Permit exempt wells make up a small fraction of claims modeled by the USGS. There is no evidence that the effect of *de minimis* uses is other than trivial. To the contrary, the USGS report appears to show exempt uses have declined overall. Opening Brief at 9.

2. Relief From Judgment Requires Finding that the Moving Party is Harmed By an Unanticipated Change in Circumstance.

The showing of harm required to obtain relief under the equitable provision of Fed. R. Civ. P. 60(b)(5), depends on the subject decision. Courts in the Ninth Circuit apply a continuum between decisions that protect "rights fully accrued upon facts so nearly permanent as to be substantially impervious to change" and those involving "the supervision of changing conduct or conditions." Bellevue,

165 F.3d at 1256 citing Alexis Lichine & Cie v. Sacha A. Lichine Estate Selections, Ltd., 45 F.3d 582, 585-86 (1st Cir. 1995) (citations omitted). Those in the former category require a showing of "grievous wrong" or "extreme hardship." Those in the latter category apply a lesser standard, requiring a showing that compliance has been made "more onerous," "unworkable," or "detrimental to public interest." Asarco, 430 at 979 citing Small v. Hunt, 98 F.3d 789, 795 (4th Cir.1996).

The Governments appear to take for granted that the lesser standard applies. But the judgment was the product of an adversarial process so a stronger showing of harm is required. The district court made no finding that the tribe is suffering any harm beyond what was known at the time of trial. As shown, the Governments knew at trial the minimum flow was sometimes unmet and any new uses would have an effect. There is a difference between adjudicated facts resulting in final judgment and negotiated terms resulting in a consent decree. As this Court noted,

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation.

Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco, 688 F.2d 615, 624 (9th Cir. 1982) quoting United States v. Armour & Co., 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971).

Consent decrees can and have been used to determine and protect federal reserved water rights. As the Montana district court explained,

> Through the Compact and the Settlement Act, the United States, acting as trustee for the allottees, waives and releases the allottees' *Winters* rights. This waiver becomes effective on the Settlement Act's enforceability date. The Settlement Act becomes enforceable after the Secretary publishes in the Federal Register that, *inter alia,* the Montana Water Court has approved the consent decree and any appeal process is complete.

Crow Allottees Ass'n v. U.S. Bureau of Indian Affairs, CV 14-62-BLG-SPW, 2015 WL 4041303, at *4 (D. Mont. June 30, 2015), aff'd sub nom. Crow Allottees Ass'n v. United States Bureau of Indian Affairs, 705 Fed. Appx. 489 (9th Cir. 2017) (internal citations omitted).

The United States, and the Tribe, did not seek a negotiated consent decree in the Chamokane Basin. Instead, they invoked the subject matter jurisdiction of the district court to declare and protect their water rights. Rather than summoning all water users, they adjudicated all material facts and successfully proved regulation of certain categories of water use was unnecessary to protect Plaintiffs' rights.

Judgment accrued upon adjudicated claims are subject to principals of finality and repose. United States v. Walker River Irrigation Dist., 890 F.3d 1161, 1173 (9th Cir. 2018). Citing to principles of finality, this court has refused to consider granting relief when no Rule 60(b)(5) motion has been filed. Hook v. State of Ariz., Dep't of Corr., 972 F.2d 1012, 1017 (9th Cir. 1992). This court holds the greater interest in finality is properly applied in cases, such as this one, that deal exclusively with property interests. Bellevue, 165 F.3d at 1256–57. Timeliness is also a factor. Opening Brief at 23 citing Fed.R.Civ.P. 60(c)(1). Once the time for appeal has passed, the interest in finality must be given greater

weight. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir.1981). In general, under Rule 60(b), the moving party must show cause for delay. See e.g., Pioneer Inv. Servs. Co. v. Brunswick Assocs., 507 U.S. 380 (1993).

All of the above listed factors weigh equitably in favor Appellants greater interest in finality. The judgment was accrued on adjudicated facts not negotiated terms. The case deals exclusively with property interests. The only allegation of harm is the simulated effect exempt uses have on stream flow that the Governments knew about at trial. The Governments reference prior amendments to the judgment as support for their ability to do it again. Every time they knew about the harm now alleged and the ongoing public reliance on the judgment. The unreasonable 40-year-delay is solely attributable to the Governments.

The many substantive changes in the Governments' position over the past 50 years illustrates the need for finality. Decades ago the United States advocated for not including *de minimis* uses in the judgment, now they take the opposite position. After trial, the State wanted the retained jurisdiction provision deleted and the Tribe enjoined from seeking additional rights, now the State is advocating for modification of the judgment and offering additional rights; the Tribe told the district court this is a general adjudication, connection with the upper aquifer does not matter, and adjudicated facts cannot be modified, now it tells this court the case is not general adjudication and modification of facts is required based on evidence

of a slight connection. Meanwhile, over the decades Appellants and hundreds of other property owners acted in reliance on the finality of the Anderson Decree.

3. Concerns About Unregulated Water Use Can Be Addressed Without Modification of the Decades Old Final Judgment

The order granting modification of the prior judgment is not suitably tailored because everything the Governments are seeking to accomplish can be done without subjecting Appellants use to regulation. The Governments appear to believe that Appellants objection centers on the possibility their rights will be quantified. As stated in reply to the Governments' standing argument, Appellants object to regulation of *de minimis* uses, modification of judgment to eliminate its' preclusive effect, and imposition of a basin wide cap on future appropriation of water for *de minimis* domestic and stock uses.

Landowners can be summoned to quantify their rights. That is different from subjecting exempt uses to regulation. Quantification is only necessary for uses that exceed those previously found to have *de minimis* effect on the Tribe's rights. Any right to use of water in excess of the following determined limits could then be regulated (perfected use of GW in the upper basin, natural carrying capacity of land for stock, and RCW 90.44.050 for domestic use). The Governments argue that RCW 90.44.050 is not recognized as the standard for *de minimis* uses. It is true the judgment does not expressly identify the upper limit of *de minimis* domestic use. For more than 25 years the federal master applied RCW

90.44.050 as the *de facto* standard. 3-ER-331. That is logical because the statute governs *de minimis* uses and was enacted long before trial. Moreover, the court discussed the statute "*vis a vis* its application to individuals within the Chamokane Creek Basin" in the context of a request to define the *de minimis* exemption. ER-3-328-329.

The Governments did not ask to clarify the limits of exempt use. That asked to eliminate exempt uses. They could have moved for an order to show cause why the judgment should not be clarified for the purpose of establishing a different limit on *de minimis* domestic use (stock use is defined). If the proposed limit was reasonable, it is possible Appellants would not have objected. But the Governments' private agreement goes much further by subjecting all exempt uses to regulation and imposing a basin wide cap on future uses of water under the adjudicated exemption.

The unreasonableness of the latter point is demonstrated by the Governments' argument regarding thermal mitigation flow. The Governments provide a map and argue that thermal mitigation cannot be used to mitigate exempt uses because they are delivered at different locations. But the Tribe is not entitled to minimum flows the top of the basin. Minimum flows are measured/enforced at the USGS station below the falls. 3-ER-395. As their map shows, that is where thermal mitigation flow will be delivered. In 1988, when the Tribe gave up

thermal control in exchange for higher enforceable flows, they knew the original flow of 20 CFS was not being met and that exempt uses were having a *de minimis* effect. Now they seek to amend the judgment again even though the state has agreed to give the Tribe additional flow for thermal mitigation many times greater than the simulated effect of the Governments' earlier litigation decision. There is no reason for the second mitigation well

The Governments' privately negotiated agreement is not narrowly tailored. Modification of the final decree (or other final orders) to allow for regulation of uses exempted from regulation is not needed because any excess uses (none is alleged) can already be regulated. Nor is there any reason to impose a basin-wide cap on future uses, when the state has agreed to provide thermal flow many times greater than the amount needed to mitigate impacts that remain trivial.

D. Thirteen Year Delay in Notice of Litigation Directly Affecting Landowner Interests Does Not Satisfy Requirements of Due Process.

Building on their flawed jurisdictional and standing arguments, the Governments take the position that Objectors may be deprived of due process because they are non-parties. The Governments then lean on Goss v. Lopez for the proposition that due process was satisfied because Appellants received 3 months' notice and ten minutes of argument at a show cause hearing. Answer at 56, citing 419 U.S. 565, 579 (1975). Appellants are non-parties because the Governments decided not to summon them or their predecessors in interest. That does not mean

they have no protected interests, or that the Government failed to provide adequate process before depriving them of those interests.

The Governments assert that if Appellants are ever brought into the case, they will be given notice and the opportunity to argue their rights do not impair the Tribes'. Answer at 58. But, the trial court already exercised *in rem* jurisdiction and determined that certain uses should always be available and regulation of those uses was unnecessary to protect the Tribe's rights. The Governments contend modifications being challenged do not curtail any uses. The modifications eliminate the preclusive effect of the judgment. The do not shut off uses, they subject uses to being shut off.

The United States says the USGS study was no secret, and no process was due at the time it was finalized. Answer at 61. Neither was the adjudication of all uses in the basin a secret, and landowners have relied on it for decades, which is why the United States wanted another bite at that apple. Appellants' position is that process was due prior to the USGS study, when their determined right to make unregulated use of water was put squarely at issue.

Shortly after completion of the USGS report, the United States told the district court "[y]es the finding should be amended." FER-658. At the completion of nearly three years of briefing the court told the Governments that changing prior orders would require notice of landowners' opportunity to participate in fact

finding (evidentiary hearing). 2-ER-223. At the risk having to comply with that order (2-ER-157), the Governments negotiated four more years, resulting in a thirteen-year delay in notice of litigation affecting landowners' interests.

The Governments incorrectly assert that Appellants did not object to use of the USGS report as evidence. Appellants expressly objected to its use based on the lack of discovery and inability to effectively examine its creation.[6] 2-ER-123. Appellants developed this argument and carried it forward on appeal, specifically with reference to evidentiary and economic prejudice resulting from delayed notice of modification. Opening Brief 38-39. Applying the flexible requirements of due process, this court should find keeping affected parties in the dark for 13 years while the Governments actively litigate issues that directly affect protected interests violates the right to due process.

E. The Court's Acceptance of the Governments' Privately Negotiated Agreement Terminating Use of Water for Future Domestic Use is Legislative Act Performed Without Public Notice.

The Governments argue Objectors never had a right to impair the Tribe's (or any other senior right holders') water rights. Answer at 64. But that is exactly

[6] Once again, Governments to emphasize the non-party status of Appellants and then argue Appellants are powerless, this time because evidence is undisputed. The Appellants made a limited appearance to file objections. FER-578-579. They objected to the lack of discovery and noted numerous available defenses if they are joined, including but not limited to, latches, waiver, and estoppel. 2-ER-100, 108, 113, 123.

what the 1979 judgment allows, which the Governments knew and accepted. The basin was over-appropriated at the time of trial. The Tribe was awarded more rights that the basin produces. Any consumptive Tribal use must come at expense of instream flow. The court ruled that any additional use of water would affect stream flow. Stream flow was known to drop below the protected limit. The Governments decided not to summon an overwhelming majority of registered claimants, then proved those uses were *de minimis* and should always be available. No appeal was taken from that decision. The judgment plainly allows uses of water, known to impair senior rights, to be exercised without being subject to regulation for protection of the Tribe's senior rights.

The Governments also assert, again incorrectly, "water uses that adversely affect senior right holders are never exempt from curtailment under Washington law." Answer at 57. The Washington State Supreme court recognized the so-called 'Code Agreement' effectively subordinated the Tribe's Winters doctrine rights, and but for that agreement, the

> Northside users would have no right under state law to apportion any part of the Ahtanum Creek flow, "except in strict subordination of the prior and better rights of the United States as trustee for the Indians.

In re Yakima River Drainage Basin, 177 Wn.2d 299, 314, 296 P.3d 835, 842 (2013), as corrected (May 22, 2013) citing United States v. Ahtanum Irr. Dist., 236 F.2d 321, 340 (9th Cir. 1956)

The history of the Code Agreement is complex, but the clear result is subordination of senior federal Winters Doctrine reserved rights to junior state rights. A similar result accrued under the facts of this case.

The Governments dispute application of RCW 90.44.050 as limit of uses exempted from regulation. They do not dispute the federal master applied that as the *de facto* standard for decades. It can be argued that the limit of some uses under the statute are not the same as what is provided for in the judgment. For example, stock use under the judgment is the natural carrying capacity of the land without impoundment, while stock use under the statute is not so limited. If the Governments think the statute is too generous, they can file and serve a motion to clarify the limit of uses exempt from regulation under the judgment.

Importantly, under the final judgment the appropriation of water for *de minimis* domestic and stock use, whatever that limit is found to be, is allowable under state law. The Governments assert that nothing in their settlement agreement affects Appellants' rights under state law. That is not true. Counties may not issue building permits unless water is physically ***and*** legally available. Whatcom Cty. v. Hirst, 186 Wn.2d 648, 687, 381 P.3d 1, 18 (2016). For new homes that means a legal source of domestic water. Without water no building permit can issue—to say nothing of owners' ability to secure financing. By agreeing to subject domestic uses to regulation under the judgment and capping the

mitigation limit at 80 gpm, the State has effectively abrogated Appellants right to appropriate water for domestic use under state law, a right affirmed by this Court's holding that the State properly exercises jurisdiction over the appropriation of water on non-tribal land. It is unclear what the State obtained in consideration for abrogating Appellants determined right to make unregulated *de minimis* use of water. The district court abused its discretion. If the State wants to further restrict its citizens' access to water for *de minimis* domestic (and other) use it must do so legislatively or through rulemaking.

CONCLUSION

For reasons set forth above, and in previous filings with this Court, Appellants respectfully request the district court's decision to modify its earlier prior decisions be reversed and for an order prohibiting regulation of water uses exercised in accordance those earlier final judgment and orders.

DATED this 25th day of April, 2022

PETER G. SCOTT, LAW OFFICES, PLLC

/s/ Peter G. Scott

Peter G. Scott, Attorneys for Dan Sulgrove, et al.

Statement of Related Cases – Circuit Court Rule 28-2.6

Dan Sulgrove, Leslie Sulgrove and Chamokane Landowners Association, Inc. are not aware of any related cases.

Certificate of Compliance with Circuit Court Rule 32-1

This Brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The Brief is 6,312 words, excluding the portions exempted by Fed. R. App. P. 32(f) if applicable. The brief's size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the 25th day of April, 2022.

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/s/ Peter G. Scott

Peter G. Scott, Attorneys for Dan Sulgrove, et al.

The undersigned certifies that the foregoing content of this copy is identical to that of the Appellant's Reply Brief [doc. ___] in all respects.

PETER G. SCOTT, LAW OFFICES, PLLC

/s/ Peter G. Scott

Peter G. Scott, Attorneys for Dan Sulgrove, et al.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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