No. 21-35502

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPOKANE TRIBE OF INDIANS; UNITED STATES OF AMERICA,
Plaintiffs / Appellees,

v.

DAN SULGROVE, et al.,
Objectors / Appellants,

v.

DAWN MINING CORP., et al.,
Defendants / Appellees

Appeal from the United States District Court for the Eastern District of Washington, No. 2:72-cv-03543-SAB (Hon. Stanley A. Bastian)

JOINT ANSWERING BRIEF OF THE SPOKANE TRIBE OF INDIANS; THE STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; AND THE UNITED STATES

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GLOSSARY

AFY	acre feet per year
cfs	cubic feet per second
gpm	gallons per minute

INTRODUCTION

The United States brought this suit in 1973 to obtain a declaration of the federal reserved water rights held for the Spokane Tribe of Indians ("Tribe") in the waters of Chamokane Creek in eastern Washington. This lawsuit was not a general stream adjudication—a judicial proceeding brought to determine the rights of all water users in a basin. Rather, it was a suit initiated by the United States only for the determination of the water rights of the Tribe and the large non-tribal water users who might have claimed rights to use water that are more senior than the Tribe's.

The district court's 1979 judgment established that the Tribe had the earliest right to instream flows as an essential component of fish habitat, plus rights to divert water for irrigation with a priority date of 1877. While the court adjudicated the Tribe's rights and many rights of the defendant basin landowners, it did not adjudicate rights based on defendants' domestic and stock water uses—because, at the time of trial, it was thought that this water use was *de minimus* and did not affect Chamokane Creek flow (and groundwater in part of the basin was thought to not even be hydrologically connected to the Creek, so withdrawals could not possibly affect Creek flow). The district court thus did not enter judgment for any such use, but the court retained continuing jurisdiction to modify its orders, as necessary.

Decades later, changed circumstances, including a new understanding of how basin ground and surface water withdrawals affect the Tribe's instream flow right, led the United States, the Tribe, and the Washington Department of Ecology to ask the district court to modify the 1979 order (as later amended) to allow the adjudication of yet-unadjudicated rights for domestic and stock water uses, if needed. The appellants here ("Objectors")—who are not parties to the underlying litigation—objected, insisting that the modifications were unwarranted and improperly stripped them, as basin domestic and stock water users, of protection the district court's prior orders somehow afforded them.

Objectors are wrong for a simple reason: they are not parties in this case. Even if the district court had once suggested protection against adjudication (and therefore potential curtailment) for *parties* in this case, it afforded no protection for these non-party Objectors. Modification of the court's prior orders cannot injure Objectors, as those orders do not bind them. And Objectors have never held a right to impair the Tribe's federal reserved rights—they have always remained subject to the prior appropriation doctrine, which directs that when the available water is inadequate to satisfy the needs of all water right holders, junior right-holders must curtail their usage, in order of priority, to allow satisfaction of senior rights, even if it means the junior user can take no water at all. Further, because of a settlement agreement between

the Government Parties, which includes a mitigation plan that will keep reasonable domestic and stock water use in the basin from impairing the Tribe's instream flow right, Objectors now have protection from adjudication and regulation that they never previously enjoyed.

STATEMENT OF JURISDICTION

(a) The district court had subject matter jurisdiction under 28 U.S.C. § 1345.

(b) This Court has jurisdiction over this appeal under 28 U.S.C. § 1291, as Objectors have appealed from a final decision of the district court granting relief under Federal Rule of Civil Procedure 60(b). *United States v. Sierra Pacific Industries, Inc.*, 862 F.3d 1157, 1166 (9th Cir. 2017).

(c) The district court entered the order from which Objectors appeal on May 27, 2021, 1-ER-2–9. Objectors filed a timely notice of appeal on June 15, 2021, 3-ER-504–08. Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether Objectors have standing to appeal from the district court's modification of a judgment that does not bind them in a case in which they are not parties.

2. Whether the court abused its discretion in granting the Government Parties' request for modest amendments to court orders that

allowed the Government Parties to effectuate a settlement agreement that will protect the Tribe's senior water rights and will not interfere with continued reasonable domestic and stock water use.

3. Whether Objectors have been deprived of due process for their yet-undetermined and unquantified water rights.

4. Whether, by entering into the Settlement Agreement, the State of Washington unlawfully delegated state legislative or administrative functions to the federal judiciary.

PERTINENT STATUTES

The addendum contains the relevant statutory provisions.

STATEMENT OF THE CASE

A. Legal background

In Washington, as in much of the western United States, private water rights are determined and regulated by the state-law doctrine of prior appropriation. Under that doctrine, water rights are acquired by the appropriation of water for beneficial uses and administered in priority based on the date of first use. When there is insufficient water to satisfy all users' needs, junior right-holders must curtail their usage, in order of priority, to satisfy senior rights: "Our cases have consistently recognized that the prior appropriation doctrine does not permit even de minimus impairments of senior

water rights." *Foster v. Washington State Dep't of Ecology*, 362 P.3d 959, 963 (Wash. 2015); *see also* RCW 90.03.010 ("as between appropriations, the first in time shall be the first in right"). In Washington, this rule also applies to groundwater: "the right of an appropriator and owner of surface water shall be superior to any subsequent right hereby authorized to be acquired in or to groundwater." RCW 90.44.030; *see also Fox v. Skagit Cty.*, 372 P.3d 784, 789 (Wash. Ct. App. 2016).

Under state law, a person or entity wishing to use water "shall make an application" to the Washington Department of Ecology "for a permit to make such appropriation." RCW 90.03.250. Ecology will then "determine what water, if any, is available for appropriation, and find and determine to what beneficial use or uses it can be applied," RCW 90.03.290. "Upon a showing satisfactory to the department that any appropriation has been perfected in accordance with the provisions of this chapter," Ecology will issue a certificate to the applicant. RCW 90.03.330.

State statutes also require permits for the withdrawal of groundwater with some exceptions—a permit is not required for the withdrawal of groundwater "for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a

day, . . . or for an industrial purpose in an amount not exceeding five thousand gallons a day." RCW 90.44.050. Water users operating under this permit-exemption statute are entitled to a water right, just as are groundwater users with a permit—for both, the right is linked to the quantity of water put to beneficial use, with a priority date based on the date of earliest beneficial use for a permit-exempt right (and the date the application was filed for a permit). RCW 90.44.050, 90.44.090.

Over a century ago, the United States Supreme Court held that the establishment of an Indian reservation impliedly reserves sufficient water to fulfill the purposes of the reservation's establishment. *Winters v. United States*, 207 U.S. 564 (1908); *see also Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262, 1268 (9th Cir. 2017). Such federal reserved rights to water differ significantly from the appropriative water rights that are typical of western states: they are not subject to state-law permitting requirements and are not based on actual diversion and beneficial use of water, but instead are implied from the establishment of the reservation of land and are measured by the amount of water needed to accomplish the purposes of the reservation. *See Agua Caliente*, 849 F.3d at 1268–69.

B. Factual background

The Spokane Tribe has inhabited parts of what is now eastern Washington since time immemorial. The United States established a reservation for the tribe in 1877. *N. Pacific Ry. v. Wismer*, 246 U.S. 283 (1918). The reservation includes approximately 160,000 acres, northwest of Spokane, Washington, and is bounded by the Columbia River on the west, the Spokane River to the south, and by the eastern bank of Chamokane Creek to the east.

Chamokane Creek—the waterway at the center of this dispute—is a tributary of the Spokane River, itself a tributary of the Columbia River, which flows to the Pacific Ocean. The Creek flows from headwaters in the Huckleberry Mountains north of the Spokane Indian Reservation. 3-ER-387. The creek flows eastward through Camas Valley—what is known as the Upper Chamokane area. 3-ER-388. The Creek then flows in a more southerly direction, meeting the northern boundary of the Reservation and continuing several miles to Chamokane Falls—the Mid-Chamokane area. The Creek then flows from the Falls to its mouth at the Spokane River—the Lower Chamokane area. 3-ER-388; *see also* 3-ER-305 (map depicting upper and middle basin).

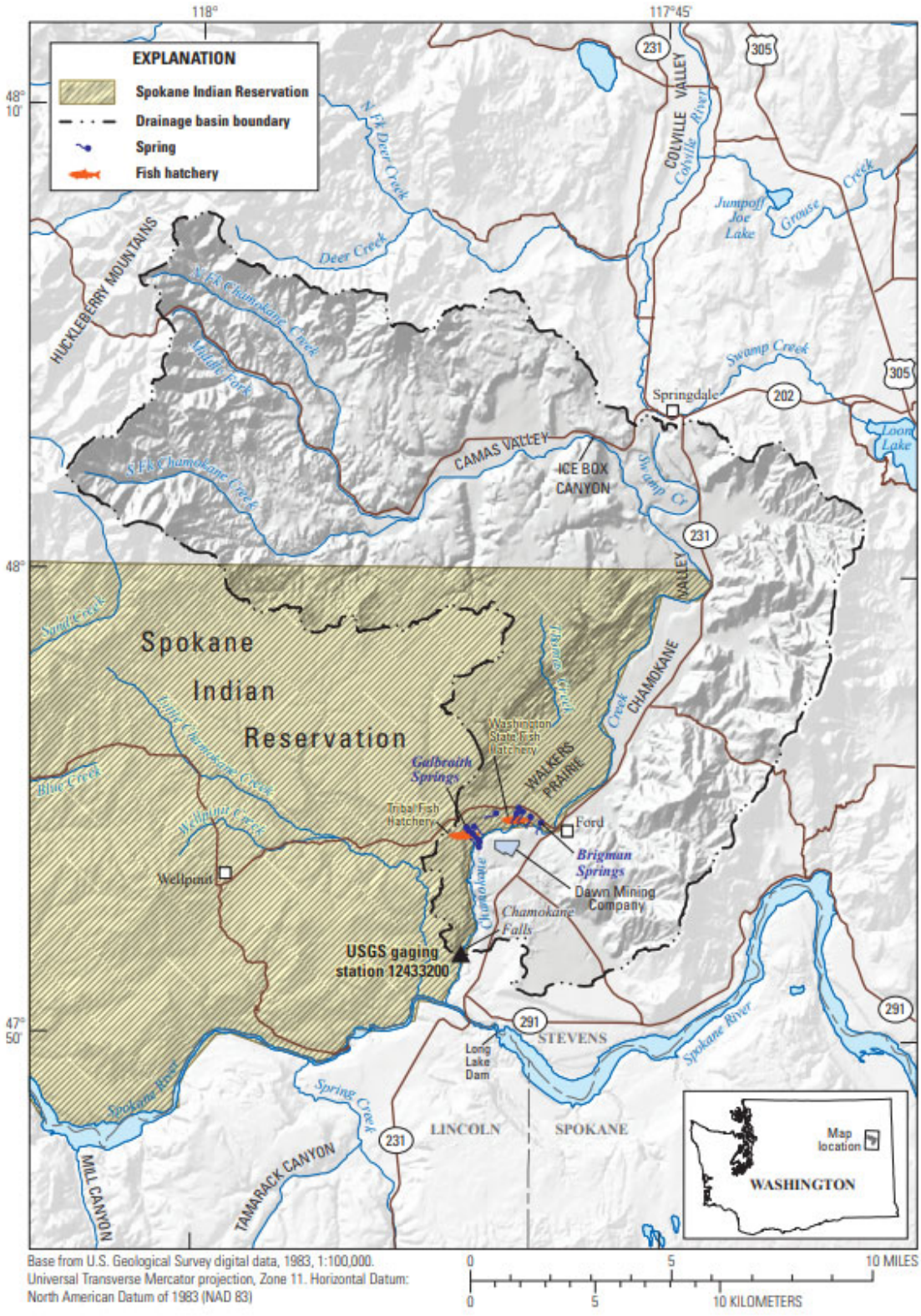

Figure 1. Location of the Chamokane Creek basin, Stevens County, Washington.

3-ER-248.

The total outflow of the drainage system—measured at a United States Geological Survey ("USGS") gauge below the Falls—averages around 35,000 acre-feet per year ("AFY").[1]

The district court's 1979 decree, based on the evidence at trial, stated that precipitation absorbed into the ground in the Upper Chamokane area became part of an underground reservoir unconnected to the Chamokane drainage system generally. 3-ER-388. So while groundwater withdrawals in the Mid-Chamokane area were known to reduce Lower Creek flows (because the Mid-Chamokane area groundwater was known to be part of the basin), groundwater withdrawals in the Upper Chamokane area were not thought to have any effect on those flows. 3-ER-388–89. A 2012 USGS study revealed the contrary, that the groundwater of the Upper and Lower Chamokane Creek areas *are* hydrologically connected. *See infra* pp. 17–18.

In the 1970s, there were only a few domestic and stock groundwater users in the basin. But that has changed in the intervening years. For instance, there were approximately 500 domestic wells drilled in the Basin from 1984 to 2005. SER-004–05. Pumping from permit-exempt wells increased from an estimated 24.9 to 36.7 AFY between 1980 and 2010. 3-ER-277–78.

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[1] An acre-foot is the volume of water covering one acre, one-foot deep, or 43,560 cubic feet.

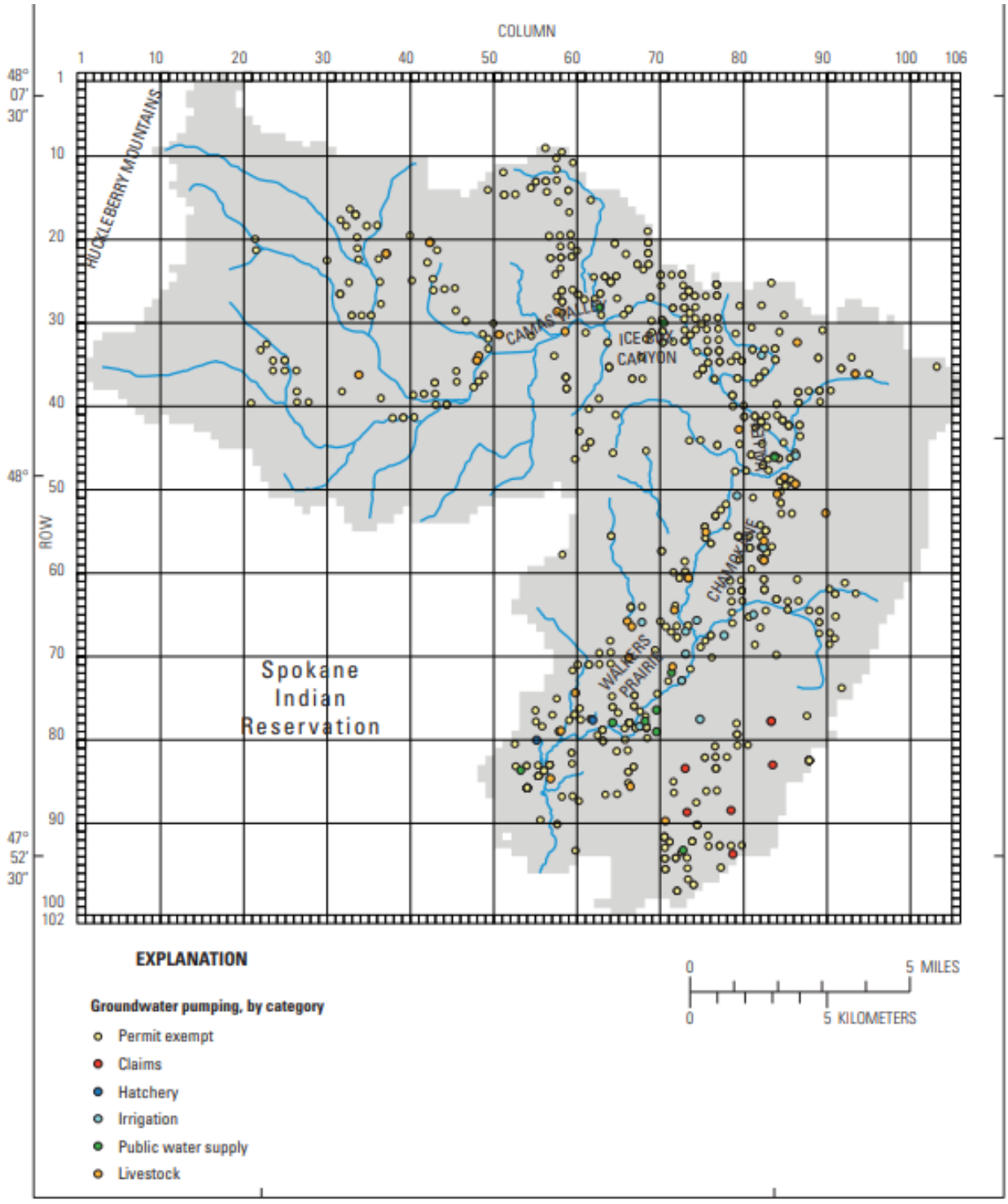

Figure 11. Location and water-use categories of model wells, Chamokane Creek basin, Washington.

3-ER-276.

C. Relevant procedural background

1. 1979 Decree and 1982 and 1988 Modifications

The United States filed this lawsuit in its capacity as trustee for the Spokane Tribe, seeking judicial confirmation of the Tribe's reserved rights to waters of Chamokane Creek, and to prevent other significant water users and claimants from impairing those rights. The Tribe intervened in the litigation early on as a plaintiff. The United States and Tribe claimed that the Tribe held both consumptive rights—such as for irrigation—and instream rights for maintenance of a viable fishery and other purposes. Defendants in the suit include the State of Washington and specified persons and entities who had a state-law application, permit, or certificate for waters in the basin. The United States did not name as defendants all water users in the basin. Nor was the suit filed as an in rem or quasi in rem suit under statutory provisions providing for joinder by notice. *See* 2-ER-224 (district court order recognizing this limited purpose of the lawsuit).

The district court, after trial, determined that the United States as trustee for the Tribe possesses a reserved right to water for irrigation, with a priority date of August 18, 1877, for the 7,898 acres of irrigable lands held continuously by the United States for the Tribe since then—totaling 23,694 AFY. 3-ER-390–92, 394. The court also determined that the Tribe holds

irrigation water rights of 1,686 AFY with 1940s priority dates for a smaller amount of irrigable lands that were lost from Indian ownership and later reacquired by the Tribe. 3-ER-392–94.

The district court also held that the United States, as trustee for the Tribe, holds a federal reserved right for a non-consumptive use: the right to water sufficient to maintain fishing by the Tribe in the Creek. 3-ER-395. The court found that "maintenance of the creek for fishing was a purpose for creating the reservation" as evidenced by the inclusion of the full breadth of the Creek within the Reservation, and by the historical—and continuing—importance of fishing to the Tribe. 3-ER-394–95.

In determining the quantity of water required to satisfy this purpose of the Reservation, the court recognized that fish viability depends on both minimum flows and maximum temperatures. The court determined the Tribe holds a right to maintain flows from the Falls into Lower Chamokane Creek to maintain the temperature of those waters at no greater than 68°F, at a flow rate of at least 20 cubic feet per second ("cfs"), depending on the flow necessary to ensure that temperatures remain below 68°F. 3-ER-395. The court did not decree the priority date for this right, but recognized that at the latest, it is 1877, and in any event "is superior to any and all of the claims of the defendants." 3-ER-395–96; 2-ER-378. In practical effect, this non-consumptive

instream flow right is larger in volume than (and senior to) the Tribe's consumptive rights for irrigation.[2]

The court also declared the water rights of the named defendants who had proven that they had perfected their claims to water rights under state law. The district court's order sets out these rights by order of seniority, listing each defendant's maximum use and the expected effective reduction on the flows of Lower Chamokane Creek. 3-ER-398–99. The court also determined that the water claims of two defendants were not perfected (omitted from the list of recognized rights). 3-ER-397. All of the declared rights of the named defendants are junior to the Tribe's instream flow right and junior to nearly all of the Tribe's irrigation rights.

The court entered an order adjudicating the water rights of the parties before it, but also retained jurisdiction over the case to "permit[] the Tribe to apply for a modification of the judgment on showing of a substantial change in circumstances, unanticipated in the Court's quantification herein, resulting in a need for water greater than the amount reserved for future needs," and, more broadly, "for the purpose of any order or modification of the judgment that

[2] The court approved the Tribe's request to use this irrigation water to support the Tribe's fishery. 3-ER-357.

may be deemed proper in relation to the subject matter in controversy." 3-ER-400, 403; 3-ER-380, 385.

The court declined to prevent the State from issuing additional certificates or permits for water use on lands within the Chamokane Basin, recognizing that "[a]ny such future applications, permits or certificates are subject to existing rights and thus have no effect upon the herein adjudicated water rights of the parties." 3-ER-400–01. The court did not adjudicate the named defendants' domestic use of water, "as it is de minimus and should always be available."[3] 3-ER-401; *see also* 3-ER-384. The court also did not adjudicate any water rights of non-parties.

The court appointed a Water Master, charged with ensuring that water use in the basin by the parties to the 1979 judgment adheres to the court's orders and with reporting to the court any deviation from those orders. 3-ER-401–02. Parties subject to the judgment pay fees for the Water Master's effectuation of this order.

[3] The district court's decree did not "exempt" all domestic use in the basin from potential regulation, or "fully adjudicate[]" rights related to that use, as Objectors assert (*see, e.g.*, Brief at 3, 7, 8, 12, 14, 17, 20, 21). The district court's decree did not have any legal effect on domestic users who were not parties to the litigation. For those domestic users who were parties, the district court's decree simply did not address those uses because they were understood to be *de minimus*.

In 1982, after several parties moved to amend the decree, the court made several changes. Most relevant here, the court clarified, with respect to unadjudicated *de minimus* uses by the named defendants, 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." 3-ER-361. The court agreed that, because this "water usage is *de minimus* and does not affect the flow of Chamokane Creek," a defendant whose water use was for domestic and stock purposes need not pay for the Water Master "so long as" the use remains *de minimus*. 3-ER-362.

In 1988, based on an agreement between the Tribe, the United States, and the State, the court modified the Tribe's instream right to reflect only flow rates, rather than a variable flow rate based on water temperature. Under this order, previously adjudicated rights and rights established between the 1979 decree and September 13, 1988, would be subject to a minimum instream flow rate of 24 cfs; later-established rights would be subject to an instream flow rate of 27 cfs. 3-ER-341–42. The change from a temperature-based standard to a flow-based standard was not a "relinquish[ment]" of rights to maintain cool stream temperatures as Objectors assert, Brief at 8, but was simply a different way to achieve the same thermal target (68°F) so that the water temperature is cool enough to provide adequate fish habitat.

2. The 2005 Water Master Report and USGS Study

In 2005, the Water Master's annual report to the court stated that stream flows had averaged well below the Tribe's 24 cfs instream flow right, and thus the Water Master had ordered all irrigation under water rights adjudicated in this case to cease, as there was no excess water for junior users. 3-ER-331. The Water Master raised two main issues potentially related to these low flows: first, that some (non-party) basin water users appeared to be irrigating more than the 1/2 acre exemption from permitting for non-commercial lawn and garden irrigation under the state permit-exempt well statute (RCW 90.44.050); second, that the number of permit-exempt wells in the basin had greatly increased in recent years. Although the Water Master did not have jurisdiction over non-party permit-exempt well users, the Water Master noted that these uses might be affecting Creek flows. 3-ER-332–35.

At the hearing for the presentation of this report, the three Government Parties (the Tribe, the United States, and the State) "advised the court it would be necessary to review the facts relied upon by the court when the 1979 and 1982 orders were signed to determine if modification of those orders is necessary based on current usage and changes in the land and water supply." 3-ER-328–29. The court in August 2006 ordered the Government Parties to undertake factual studies to answer a set of prescribed questions, including

whether the groundwater in the Upper Chamokane Creek Basin is indeed connected to the Middle and Lower Chamokane Creek areas (contrary to the understanding reflected in the court's 1979 decree) and what is the cumulative impact of permit-exempt well use on Chamokane Creek flows. 3-ER-323–24. And the court asked the parties to determine generally, "Given current conditions, what level if any of uses such as 'domestic' and 'stock watering' should be excepted from regulation by the . . . water master due to their de 'minimus' effects on Chamokane Creek?" 3-ER-323. The court first ordered a 2009 deadline for the required study, but extended the deadline on the parties' requests. *See* ECF Nos. 672, 675, 751.

USGS prepared a two-phase study to inform the parties' understanding of the hydrogeologic structure of the Chamokane Creek Basin, as well as on the effects of various withdrawals on Creek flow. USGS completed that report, "Simulation of Groundwater and Surface-Water Resources and Evaluation of Water-Management Alternatives for the Chamokane Creek Basin, Stevens County, Washington," in 2012. 3-ER-237–322; *see also* SER-010–81. The study revealed that groundwater pumping in the Upper Creek basin does affect Creek flows below the Falls and that domestic, stock watering, and small-scale irrigation (up to a half-acre) from permit-exempt wells has a calculable effect on creek flows. When flows are seasonally low, these uses can impair the

Tribe's federal reserved right to maintain 24 cfs in the Creek, and cause curtailment of use under the adjudicated irrigation rights that are junior to the senior instream flow right. 3-ER-313–15.

3. The Settlement Agreement

While the three Government Parties agreed on the factual contours of the USGS findings and that the 1979 decree should be amended to correct factual errors about the interconnectedness of the Upper, Middle, and Lower Chamokane Creek areas, the governments did not immediately agree on how to address the water use of non-party groundwater and stock water users. *See* 2-ER-233–34. The new shared factual understanding that these water uses affected the Tribe's use of its senior water rights called into question whether these domestic and stock uses were in fact still *de minimus* and whether they should be adjudicated and regulated. The Government Parties spent the next several years working together to develop a plan that would protect both the Tribe's adjudicated senior right (and other basin landowners' adjudicated irrigation water rights) and the unadjudicated domestic and stock uses of the named defendants to the original suit and non-parties. Together, the Government Parties developed a solution that will achieve both ends and memorialized that plan in a Settlement Agreement.

Under that agreement, the State will provide funding for the construction of two wells to mitigate the effects of stock watering and groundwater use for domestic purposes (including non-commercial lawn and garden irrigation not exceeding 1/2 acre) on the Tribe's senior instream right and to ensure that the Creek waters remain viable as fish habitat. The first ("mitigation well") will be able to pump up to 80 gallons per minute ("gpm"), approximately 0.18 cfs, to mitigate the current and foreseeable future reasonable stock and domestic uses of water. The mitigation well will pump from April to September each year, and will pipe water to above the gage at Chamokane Falls.[4] The second ("thermal well") will provide the ability to pump extra volumes a much shorter distance, as needed to reduce stream temperatures during temperature critical periods when fish need cool temperatures to move upstream. Contrary to Objectors' statements, *e.g.,* Brief at 13, 14, this well is not intended to mitigate reductions of instream flows by junior users; it is only intended to address stream water temperatures. The thermal well will deliver more water than the mitigation well during the months that the thermal well is active, which is only

[4] At the start, mitigation well will run for half the year at 36 gpm, thereby mitigating the *annual* shortfall that averages to 18 gpm. *See* 2-ER-197 (contra Brief at 29).

during certain, limited times of the year.[5] Both the mitigation well and thermal well will draw water from a point along the bank of the Spokane River just downstream from the mouth of Chamokane Creek. *See* 2-ER-198 (map depicting well location and planned pipelines); 2-ER-179–82, 2-ER-197–201 (describing the wells).

[5] Objectors greatly overstate the amount of water that will be pumped from Spokane River in-bank storage and discharged into Chamokane Creek by the thermal well, based on Objectors' erroneous assumption that the well would operate year-round, rather than in late summer only when high temperatures would otherwise prevent fish movement. *See* 2-ER-201–02 (Settlement Agreement) (contra Brief at 13, 28). The thermal well will not be operated under some new State right for the Tribe, but will be a component of the Tribe's existing federal reserved right. Contra Brief at 28.

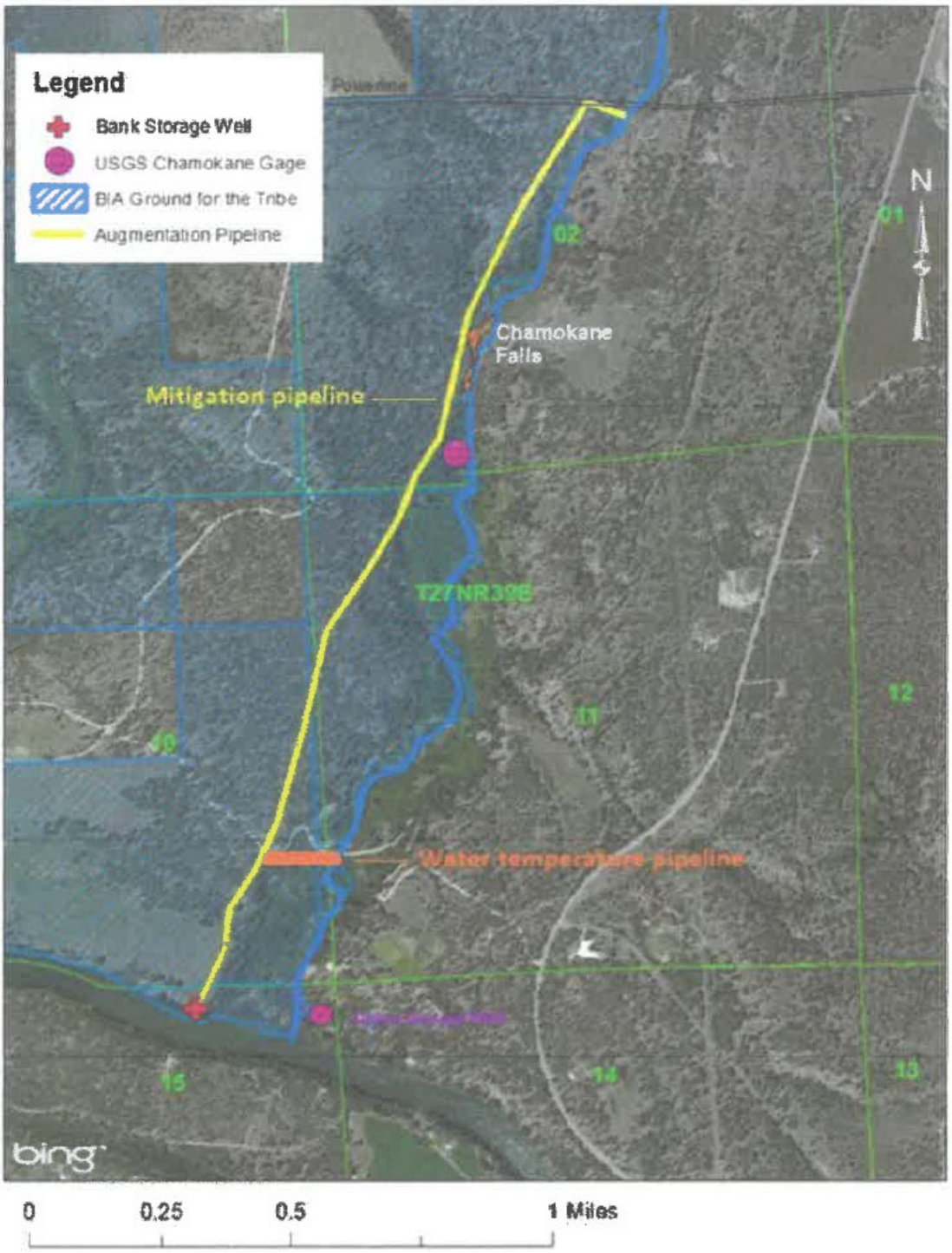

Figure C1: Map of potential wells and pipelines

2-ER-198.

The plan also provides that the Washington Department of Ecology will cross-deputize the Water Master who already oversees the administration of adjudicated rights in this case. This will allow the Waster Master to also monitor the basin for uses of water that have not been adjudicated, but which appear to potentially either conflict with state law or suggest an increase in usage that requires increased mitigation pumping, or which exceed the scope of mitigation under the settlement. 2-ER-179, 2-ER-193–94. Although the Water Master may monitor such water uses, including use by non-parties, the Water Master would not have any enforcement authority against non-parties. Instead, the Water Master could simply notify the Government Parties about such use, and the United States and Tribe could decide whether to seek to bring that non-party into this litigation so that their rights could be adjudicated and thereafter be subject to enforcement. If any enforcement under state law is necessary (i.e., for water use in excess of amounts allowed for permit-exempt wells), the State would have to approve any such action. 2-ER-193, 194.

In consideration for these and other actions, the United States and Tribe agreed in the Settlement Agreement not to bring into court domestic and stock water uses that would be offset by the settlement mitigation plan. 2-ER-182. The plan thus protects the use of Chamokane Basin waters (1) for stock watering, without impoundments, at the carrying capacity of the land, and (2)

for domestic uses, including the use of domestic well waters for indoor use and for the irrigation of lawn and garden up to one-half acre, totaling 1 AFY (an average of almost 900 gallons per day). The mitigation pumping was designed to compensate not just for existing levels of these uses, but to account for expected future residential growth as well. Thus, these reasonable uses would be fully mitigated, would not impair the Tribe's instream right, and would be protected from curtailment resulting from future potential enforcement of senior rights.

4. Modifications to 1979 Judgment/Decree

The settlement also required the Government Parties to ask the court to modify its 1979 decree (as amended) in several respects. First, they asked the court to correct statements in the decree that withdrawals in the Upper Chamokane area do not affect the Creek's flow below the Falls, as this factual understanding had been shown to be incorrect by the USGS report. Second, because the USGS study had revealed that domestic and stock uses have a small but calculable effect on stream flows and could theoretically need to be adjudicated in the future, the Government Parties asked the court to remove statements in the 1979 decree and the 1982 modification order that domestic and stock water "is *de minimus* and should always be available," and to replace these statements with a statement that these uses are "included in the

judgment" but have not been "quantified or adjudicated." 2-ER-164. Third, the Government Parties asked the court to modify the 1988 modification order to establish higher required minimum flow rates at the Chamokane Falls gage during the high-water spring thaw months of March and April, which is required to maintain the Creek channel. Finally, the Government Parties asked the court to modify the 1979 decree and judgment to memorialize the Water Master's expanded role in the basin.

5. Show Cause Order, Notice of the Settlement, Objections, and the 2019 Court Order

The Government Parties in June 2019 filed a motion asking the district court to enter an order to show cause why the court should not enter these amendments to prior orders. The Government Parties explained the settlement, the process leading to the agreement and why it was both procedurally and substantively fair, and why changed circumstances warranted the requested changes to the court's orders. 2-ER-151–72.

Additionally, as the district court ordered in 2015 when the Government Parties indicated there may be some need for adjustments to the court's past orders because of the new understanding about the interconnectedness of waters in the basin, the Government Parties also proposed a plan for giving notice to other landowners in the basin and for providing an opportunity for those landowners to lodge objections to the proposed modifications, even

though nearly all of these landowners were not (and are not) parties to the case, and were not bound by the 1979 judgment or a modification thereof. *See* ECF No. 914.[6]

The court granted those motions and approved the notice plan, which involved mailing notice to all landowners in the Chamokane Creek Basin, publishing notice in two newspapers, posting notice on websites, and holding public meetings. SER-083–84. The court issued its show-cause order on July 31, 2019, and directed landowners to provide their objections—by mail, through ECF, or in person—by December 6, 2019. SER-086–101.

The court received several objections to the proposed modifications within this three-month period. No party to the litigation objected. But several non-parties did, including the Objector-appellants here—Dan and Leslie Sulgrove and the Chamokane Landowners Association, an entity that does not itself purport to hold any water rights but is a group of Chamokane Creek Basin landowners. 2-ER-97–145. Those objections focused on the proposal to delete statements that domestic and stock water uses were *de minimus* and

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[6] Although these non-parties could not be injured by modification of a judgment to which they were not a party, the Government Parties provided notice of both their settlement and the proposed modifications to inform basin landowners about changes they might see in the basin, about protections being afforded them by the mitigation plan, and about how the Government Parties would decide, going forward, whether action to adjudicate domestic and stock uses would be necessary.

should remain available. Objectors did not object to or challenge the substance of the USGS report's conclusions. And no Objector asserted that the mitigated amount was insufficient to cover their reasonable water use. The Government Parties responded to those objections, and Objectors replied. ECF Nos. 959, 968.

After a hearing, at which counsel for the Government Parties and Objectors appeared, *see* ECF No. 1009, the district court entered an order making the modifications to its prior orders. Although the court had initially adopted the standard of review under *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990), under which objectors must establish an injury traceable to the proposed modification and that the modification would be unreasonable or illegal, *see* SER-087, the district court's resulting order applies both the *Oregon* standard and the standard for motions under Federal Rule of Civil Procedure 60(b). 1-ER-3. The court found that the Government Parties had met their burden under FRCP 60(b) for modifying a past order because they had shown both a significant change of circumstances and that the proposed changes were suitably tailored to resolve the problems created by those changed conditions. The court also found that objectors had not established that the modifications would injure them, nor that the modifications were unreasonable, under *Oregon*. And the court concluded that the proposed modifications are

"fundamentally fair, adequate, and reasonable and in the public's best interest." 1-ER-2. Accordingly, the district court entered the requested modifications of several past orders.

This appeal by the Sulgroves and the Chamokane Landowners Association followed. The appeal primarily revolves around the district court's decision that it would replace the statement, "Water for domestic use is not included within the judgment, as it is de minimus and should always be available," with "Water for domestic use is included within this judgment, but is not quantified or adjudicated at this time."1-ER-4 (directing modifications to ECF No. 189 and specifying similar modifications to ECF Nos. 196 and 252).

SUMMARY OF ARGUMENT

Objectors present a seriously distorted picture of the factual, legal, and procedural landscape of this case, misconstruing their own status, the effect of the district court's prior orders on them, and how they are affected by the court's modifications of those orders.

Objectors are not parties in this litigation. For that reason, the district court's prior orders declining to adjudicate domestic and stock water uses could not have protected their domestic and stock uses, and the modification of those orders could not strip them of protections that they never had. Objectors' use of water from permit-exempt wells has always been subject to

the state's prior appropriation regime, and that is *not* altered in the district court's orders. Objectors thus lack standing to challenge the court's modification of orders that do not apply to or affect them.

Even if their objections could be considered, the Government Parties have shown that the requested modifications are warranted. Changed factual understanding since issuance of the prior orders now shows that it may become necessary to adjudicate in this lawsuit the domestic and stock uses of parties to protect adjudicated rights. No party has objected to this change, which was proper under the court's retained jurisdiction. And although there is a theoretical possibility that adjudication of these uses may become necessary, adjudication (and curtailment) of such uses is improbable because the Government Parties have developed a mitigation plan that will offset reasonable domestic and stock use.

Even if the Court considers Objectors' due process argument, it may reject that argument because Objectors have not been deprived of any constitutional right at all. And there was certainly no requirement that all basin landowners be notified of the simple fact that a government agency was conducting a scientific study of the basin's hydrogeology, nor that the governments were negotiating a potential way to address the impairment of the Tribe's senior rights. But the district court ordered—and the Government

Parties agreed—that basin landowners should have the opportunity to object to the proposal once it was final, and Objectors availed themselves of that opportunity.

Finally, Objectors fail to show that the State's entry into this agreement was unlawful. Objectors are incorrect that the settlement requires any legislative or rulemaking action by the State of Washington. And, again, Objectors fail to appreciate that the State's mitigation of their domestic and stock water use is a *benefit* to them, as it avoids the need to include them and other basin landowners in this litigation.

STANDARD OF REVIEW

A district court's decision to grant relief from judgment or to accept a consent decree is reviewed for abuse of discretion. *United States v. Asarco Inc.*, 430 F.3d 972, 978 (9th Cir. 2005); *Oregon,* 913 F.2d at 580. "A district court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *Asarco*, 430 F.3d at 978 (internal quotation marks and citations omitted). This Court reviews due process claims and claims of legal error de novo. *OneBeacon Ins. v. Haas Indus., Inc.*, 634 F.3d 1092, 1096 (9th Cir. 2011); *Hilao v. Estate of Marcos*, 103 F.3d 787, 780 (9th Cir. 1996).

ARGUMENT

II. Objectors lack standing to appeal.

As explained (pp. 18-23, *supra*), the Government Parties' Settlement Agreement is designed to address water supply issues in the entire Chamokane Creek Basin. In exchange for commitments by the State to fund construction of groundwater wells and related infrastructure to add to Creek flows to mitigate the effects of groundwater pumping and stock water use, the Tribe and the United States agreed that they will not seek to enforce senior federal reserved rights against any stock water and domestic use that remains within specified limits. The Settlement Agreement also empowers the Water Master to monitor domestic and stock water uses in the basin, for purposes of possible need for future enforcement actions. Because all basin water users might be subject to future enforcement actions if their use exceeds the mitigated level prescribed in the Settlement Agreement, the district court directed the Government Parties to provide notice and the opportunity to object to all basin water users, including Objectors and other non-party property owners. But it does not follow that the Objectors had standing to oppose the modification of the 1979 judgment and 1982 order, or have standing to prosecute this appeal.

A person "initiating an appeal must have standing" under Article III of the constitution. *Citibank Int'l v. Collier-Traino, Inc.*, 809 F.2d 1438, 1441 (9th

Cir. 1987) (citing *Bender v. Williamsport Area School District*, 475 U.S. 534, 548 (1986)). To meet the "irreducible constitutional minimum of standing" a person must show (1) "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent"; (2) "a causal connection between the injury and the conduct complained of"; and (3) that it is likely "that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

"In this circuit, a nonparty to the litigation on the merits will have standing to appeal the decision only in exceptional circumstances when: (1) the party participated in the proceedings below; and (2) the equities favor hearing the appeal." *Citibank Int'l*, 809 F.2d at 1441. Such circumstances exist, for example, when a non-party "is enjoined or . . . otherwise directly aggrieved by a judgment." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1277 (9th Cir. 1992); *see also New Mexico ex rel. State Engineer v. Carson*, 908 F.3d 659, 665 (10th Cir. 2018) (applying these concepts in the context of objections to a water rights settlement involving tribes). Here, there are no such exceptional circumstances.

A. Objectors' water rights have not been adjudicated or impaired.

Initially, the judgment at issue in the case—the order approving modifications to the 1979 Judgment (as previously amended)—does not affect

Objectors' water rights. The judgment does not determine the Objectors' water rights, enjoin the Objectors' water use, or otherwise impair Objectors' legal interests.

Objectors contend that they are injured because the presently-approved modifications to the 1979 Judgment deprives them of water rights recognized in the 1979 Judgment. In particular, Objectors construe the 1979 Judgment (as previously amended) as exempting domestic and stock water use in the Chamokane Creek Basin from priority administration and enforcement in relation to federal reserved rights to the full extent that such use is exempted from State-law permitting requirements. And Objectors view the recently-approved modifications to the 1979 Judgment as eliminating that exemption, and therefore their alleged right to use water out of priority.

This argument fails for two reasons. First, Objectors misconstrue the terms of the 1979 Judgment (as amended in 1982). That Judgment simply excluded domestic and stock water use from the scope of the adjudication, based on the understanding that such uses were not impacting stream flows in the Chamokane Creek and thus not impacting the federal reserved right in such stream flows. The state-law permit exemptions for specified stock water and domestic use are not guaranteed rights of use in the event of interference with senior rights. *See Dep't of Ecology v. Campbell & Gwinn, LLC*, 43 P.3d 4, 9

(Wash. 2002); *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 311 P.3d 6 (Wash. 2013). And the 1979 Judgment did not convert the state-law permit exemptions into adjudicated water rights. Properly viewed in this context, the present modification to the 1979 Judgment constitutes a determination that domestic and stock water uses are subject to possible future adjudication and enforcement if it becomes warranted.

Second, the 1979 Judgment did not adjudicate any water rights of non-parties, including Objectors. Although the United States brought this suit to determine relative rights to waters of the Chamokane Creek Basin, it was not an *in rem* general stream adjudication in which all interested persons were required to appear and in which the Court was statutorily empowered to declare the water rights of all interested persons. *Cf.* RCW 90.03.105-.245; *In re Yakima River Drainage Basin*, 296 P.3d 835, 838-39 (Wash. 2013) (describing general stream adjudication process).[7] Rather, this lawsuit was an *in personam* suit by the United States and the Tribe against named water users whose water use was understood to interfere with claimed federal reserved rights. The United States did not seek to have the district court quantify all potential water

[7] In a general stream adjudication, all persons and entities asserting a right to use water in a defined basin are compelled to state their claims under penalty of forfeiture. The resulting judgment in such a case binds all basin users—including those who forfeited potential claims—and results in a final quantification and establishment of priority for all water rights in a basin.

uses in the basin. It sought confirmation and quantification of the federal reserved rights, and only those uses that, as a practical matter at the time, posed a threat the Tribe's use of the (presumed) senior federal reserved water rights.[8] As a result, the judgment addressed *only* the rights of the named parties—the United States, the Tribe, and a finite set of water users whose rights are set forth in the district court's 1979 decree and judgment. 3-ER-379, 3-ER-389–99. Thus, even if the 1979 Judgment (as previously amended) can somehow be construed as declaring the stock water and domestic use rights of parties—rather than excluding such uses from the scope of the adjudication—such declaration of rights does not apply to *non-parties* like the Objectors. No change to a judgment *that never applied to non-parties* could even potentially alter their legal rights.

Conversely, as non-parties, the Objectors are not bound by the 1979 judgment or by the district court's modification of that judgment. Although the Government Parties, at the direction of the court, provided notice to non-party

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[8] Some district court statements obscure this fact. *See, e.g.*, 3-ER-386 ("Defendants include . . . all other persons . . . that claim an interest in the waters of Chamokane Creek"). These statements did not transform this lawsuit into a general stream adjudication when only a finite set of defendants were served and made parties to this case. And in any event, the district court clarified in 2015: "In reviewing the records, it is clear that the case was not intended to be a General Adjudication." 2-ER-224 (and further explaining the purpose of the proceeding).

basin landowners, the United States and the Tribe did not seek to join those non-party landowners as party defendants. Nor did the Objectors move to intervene in the original proceedings or to intervene as party defendants in the present post-judgment proceedings. Because Objectors had no rights established by the 1979 judgment and are not bound by that judgment as modified, Objectors have suffered no injury entitling them to appeal.

B. The Settlement Agreement beneficially impacts Objectors.

Moreover, the only impact of this lawsuit on Objectors' interests as basin water users is beneficial. Under Washington law, any groundwater user may pump up to 5,000 gallons per day without first obtaining a permit. RCW 90.44.050. But such usage remains subject to priority enforcement in favor of senior water right holders. *Campbell & Gwinn, LLC*, 43 P.3d at 9. For that reason, persons pumping less than 5,000 gallons per day have the "option" of seeking a permit to obtain a certificate of priority and amount. RCW 90.44.050. In this case, the United States and the Tribe hold federal reserved rights in the Chamokane Creek Basin that are senior to those of all private property owners. Nothing in State or federal law prohibits the United States and the Tribe from suing the Objectors or other non-party users to enjoin water uses that individually or in the aggregate impair stream flows and thus interfere

with the Tribes' senior right, notwithstanding the State's permit-exempt well statute.

In the Settlement Agreement, the United States and the Tribe agreed to forgo enforcement of their federal reserved water rights against specified stock water and domestic uses, in exchange for actions by the State of Washington that will mitigate the effect of such water use. The Objectors (and other non-parties to the underlying suit) are thus beneficiaries of the Settlement Agreement, even though they are not parties to the Settlement Agreement (or the underlying litigation) and have not therefore given up any legal rights in the Settlement Agreement or present litigation. Objectors and other basin landowners are now protected in their domestic and stock water use (if within the mitigated amount), and had no such protection before the Settlement Agreement. Simply put, the settlement (and court orders that effectuate part of that settlement) do not deprive Objectors of anything. Its effects are *positive* and *protective.*

To be sure, under the Settlement Agreement, the Objectors (and other basin water users) are protected in their domestic use only up to 1.0 AFY (or about 900 gallons per day). This is less than the 5,000 gallons per day limit for pumping without a permit. RCW 90.44.050. As just explained, however, the ability to withdraw groundwater without a permit is not, and has never been, a

right to use such water in contravention of senior water rights. So this 1.0 AFY protection (afforded by the State's provision of a mitigation well) is 1.0 AFY of protected water use that they lacked before the Settlement Agreement.

There is also nothing in the Settlement Agreement or the modified judgment that subjects the Objectors or non-parties to penalties or an injunction if their water use exceeds the limits prescribed in the Settlement Agreement. Should their water use exceed the amounts prescribed in the Settlement Agreement, the United States and the Tribes may bring an enforcement action, e.g., as further post-judgment proceedings in this case. But in any such action, the Objectors—as non-parties to the 1979 Judgment as modified—would retain any defenses they would possess in an original water rights adjudication. In this regard, Objectors do not stand in the same position as the named parties to the 1979 judgment. The named parties are bound by the declarations in the 1979 judgment determining the federal reserved rights, and are bound by the present modification declaring that stock water and domestic uses are "included" in the 1979 judgment (based on the new hydrological understanding that Upper Basin groundwater is hydrologically connected to Creek flows). In any subsequent enforcement suit (or in a subsequent phase of this suit), the Objectors and other landowners who are (at present) non-parties to the action would not be so bound.

In short, the only impact on the non-party Objectors from the Settlement Agreement and modification order is beneficial. Under the Settlement Agreement, the Objectors enjoy legal protections for stock water and domestic use (as against senior claims of the United States and the Tribe) that did not preexist the Settlement Agreement. And they have lost no procedural or substantive rights with respect to their own water rights claims in relation to any other users. Thus, they have no basis for claiming any due process violation (*see infra* pp. 56–64) and no standing to contend that the modifications to the judgment are unlawful or unfair to the named parties to the 1979 judgment (*see infra* pp. 38–55), none of whom objected and none of whom are before this Court on appeal.

This Court may reject Objectors' appeal in its entirety for this reason alone. Plaintiffs have not shown that the settlement and order modifications alter their legal rights, *see New Mexico*, 908 F.3d at 666–67, nor that they are otherwise "directly aggrieved by a judgment," *Class Plaintiffs*, 955 F.2d at 1277, nor that they have some injury in fact sufficient to show standing under *Lujan*.

III. The district court correctly concluded that the Government Parties satisfied Rule 60(b) and *United States v. Oregon*.

Objectors first argue that the district court applied an incorrect standard of review to the joint motion to amend the 1979 judgment, that the district court should have applied Fed. R. Civ. P. 60(b) alone, and that the

Government Parties did not satisfy the requirements of Rule 60(b). While the Government Parties requested and the court approved several modifications to prior court orders to respond to changes in circumstances and to facilitate different aspects of the settlement, Objectors here focus only on the modifications that clarified that domestic and stock water uses could theoretically be subject to adjudication and eventual curtailment—events unlikely to occur because of the Government Parties' mitigation program that minimizes the possibility that such users will be subject to future adjudication.[9]

In granting the Government Parties' motion to amend its prior orders to facilitate the settlement agreement, the district court applied both Federal Rule of Civil Procedure 60(b)(5) and the standard from *Oregon*, 913 F.2d 576—subjecting the request to a more rigorous test than Objectors urge. Rule 60(b)(5) allows a court to grant "relief from a final judgment, order, or proceeding," because, among other things, "applying it prospectively is no longer equitable." This Court has described that standard as "flexible." *Jeff D. v. Kempthorne,* 365 F.3d 844, 853 (9th Cir. 2004). A judgment may be modified when changed circumstances make compliance with the old decree "more onerous, unworkable, or detrimental to the public interest." *Asarco,* 430 F.3d at

[9] Objectors' failure to develop any argument about the other modifications constitutes forfeiture of any such arguments. *See Greenwood v. Federal Aviation Administration*, 28 F.3d 971, 977 (9th Cir. 1994).

979. This court has explained that Rule 60(b) "attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." *Delay v. Gordon*, 475 F.3d 1039, 1044 (9th Cir. 2007) (citing 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2851 (2d ed. 1995)).

The concept of flexibility that is inherent in Rule 60(b) fits well with this case. That is because the district court's judgment was not final in the traditional sense, as even when entering its 1979 judgment, the court "retain[ed] jurisdiction of this matter for the purpose of any order or modification of this Judgment that may be deemed proper in relation to the subject matter and controversy." 3-ER-385; *see also* 3-ER-404. In other words, the court fully expected that it would continue to have a role to play as circumstances changed. That makes sense, given the complex nature of this case, the strong possibility of changing hydrologic or environmental circumstances, and the inability of the court to decide all potential issues that might arise in the future. *Cf. United States v. Walker River Irrigation Dist.*, 890 F.3d 1161, 1169–71 (9th Cir. 2018) (finding that the retained jurisdiction in a water rights case was necessarily broad). In 1982, the court again previewed that if the factual premises of its decisions were undermined—as they now have been—it might modify its decree. There, the court exempted *de minimus*

defendant water users from Water Master fees "so long as" their use remains *de minimus*, and acknowledged that the Tribe could "apply to the court for protection" if use became "more than *de minimus*." 3-ER-362, 367. The court put that retained jurisdiction to use long before the requests that gave rise to this appeal. The district court modified its original decree several times over the intervening years, sometimes making small corrections or clarifications, other times redefining the scale (or measure) of the Tribe's instream right. *See* 3-ER-346–74; 3-ER-340–45.

The Government Parties urged the district court to apply a different standard—that set out in *Oregon*, 913 F.2d 576. *Oregon* involved a dispute about tribes' treaty fishing rights and how those fisheries should be regulated. The case is long-running, and the district court retained jurisdiction, allowing it to periodically approve plans allocating the harvest of fish in the Columbia River system. *Id.* at 579. One such plan—negotiated and agreed to by several parties to that lawsuit—was opposed by other parties and one non-party tribe. On those objectors' appeal from the district court's approval of the plan, this Court recognized that the plan is similar to a consent decree—the product of negotiation and compromise—and applied the standard for approving consent decrees. *Id.* at 580. Under that standard, a court must be satisfied that the agreement "is at least fundamentally fair, adequate and reasonable," and that it

"conform[s] to applicable laws." *Id.* Upon that showing, the burden shifts to objecting parties to show that the agreement is unreasonable. *See id.* at 581.

Rather than adopt the Government Parties' proposed standard (which would have been reasonable, particularly given that no party to the litigation objected, and that the settlement was "fair and reasonable"), the district court applied both *Oregon* and Rule 60(b). The court first explained that the Government Parties had established changed circumstances as required to meet the 60(b) standard:

> [T]he 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).

1-ER-3. The court then *also* incorporated the *Oregon* standard, affording Objectors the opportunity to overcome the showing that the modification was warranted:

> 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.

1-ER-3. And the court, for good measure, also determined that the Government Parties had shown that the modification was warranted under *Oregon*:

> 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.

1-ER-3.

The district court's decision to apply both standards was not unreasonable given the unusual circumstances of this case. The district court had (and has) continuing jurisdiction to modify its prior orders in this case, and Government Parties have shown that the requested modifications are warranted (and that the underlying settlement *protects*, rather than injures, both parties and non-party basin water users like Objectors, *see supra* pp. 35–38).

This Court—and the Supreme Court—have recognized that requests to modify final judgments or consent decrees require a showing that there has been a "significant change either in factual conditions or in law" and that the changes are "suitably tailored" to resolve the problems created by the changed factual or legal conditions. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384, 391 (1992); *see also Asarco,* 430 F.3d at 979. The standard is "flexible," *Jeff D.,* 365 F.3d at 854, and a court's retained jurisdiction in water rights cases is necessarily broad, *see Walker River Irrigation Dist.*, 890 F.3d at 1169–71.

The Government Parties have satisfied this standard. The factual understanding of the hydrology and geology of the Chamokane Creek basin—specifically the effect of Upper Chamokane Basin groundwater withdrawals on Lower Creek flows—has changed significantly since the 1979 decree. And the threats that domestic and stock water uses pose to the Tribe's senior water right have increased, as the number of permit-exempt wells being pumped today is much greater than at the time of the original decree. SER-004–05. The requested modifications addressed this change by clarifying that the defendants' domestic and stockwater uses could potentially be adjudicated.[10] And while the district court's 1979 and 1982 orders never bound non-parties nor barred the United States and Tribe from bringing other basin users into this lawsuit for adjudication of their water rights, the modifications also ensure that there can be no confusion about which water uses are subject to possible subsequent adjudication. Further, the request for modified orders is narrowly tailored to address this factual error and change in circumstances, and to facilitate the Government Parties' Settlement Agreement—which protects basin water users (both defendants and non-parties like Objectors) from the

[10] As explained above, this change does not apply to Objectors, who were never bound by the original judgment and are not bound by any modification. Even if this Court were to understand the 1979 and 1982 orders as somehow applying to non-parties—which they do not—the modifications of those judgments are still warranted for the reasons explained here.

adjudication and curtailment that might otherwise be demanded by these changed factual circumstances. The court thus did not abuse its discretion in granting the Government Parties' request.

A. The facts and factual understanding have significantly changed since entry of the orders that the court has now modified.

Two key factual developments warrant the modification of prior court orders here: one, a development in factual understanding; the other a change in fact. Together, those changed circumstances warrant relief from parts of the district court's prior orders that incorrectly state that groundwater uses have no effect on the Tribe's senior instream flow water right, and suggest that water use for domestic and stock purposes could always remain unadjudicated.[11]

First, at the time of the 1979 decree (and for long thereafter), the parties had a shared understanding of geological and hydrologic fact: that the groundwater of the Upper Chamokane Creek basin was distinct from and not connected to the Middle and Lower Creek basin. The parties, and the court, understood that groundwater withdrawals in the Upper basin had zero effect on Lower Creek flows. The court stated, "The precipitation absorbed into the

[11] While these are distinct issues, they overlap. Some domestic water usage is likely from groundwater withdrawn from the Upper basin; domestic water is also withdrawn from other parts of the basin. And stock water may be diverted from surface flows or withdrawn from groundwater.

ground in the Upper Chamokane area becomes part of an underground reservoir unconnected to the Chamokane drainage system," and "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-ER-388, 389; *see also* 3-ER-375; 3-ER-349–50. As these statements reflect, the parties understood that Upper basin withdrawals' effect on the Tribe's instream rights was thought to be not just negligible, but *zero*. Because the purpose of this lawsuit was only to address the uses of the named defendants that might be impairing the federal reserved right, there was no need at that time, based on that understanding, to address water uses by the named defendants that did not affect that senior right (or to join any additional parties whose water uses did not affect that likely senior right).

The USGS study revealed that the originally shared understanding about the Chamokane Creek Basin geology and hydrology was incorrect. The study revealed that the basins are not distinct, and that groundwater diversions from the Upper basin therefore do affect Middle and Lower Creek flows. 3-ER-304–05. Accordingly, these developments have undermined the basis for the court's statement that Upper basin groundwater users' rights need not be adjudicated (and therefore be subject to regulation). It is now known that these water uses *do* affect stream flows, and thus may interfere with the Tribe's senior right.

Second, the factual situation has itself changed. In the 1970s, there was a very small number of groundwater users in the basin, and, in any event the effects of those uses on Creek flows would have been negligible (and many of those groundwater users were in the Upper basin, which was thought to be not hydrologically connected at all). But that has changed in the intervening years. For instance, there were about 500 domestic wells drilled in the Basin from 1984 to 2005. SER-004–05. Objectors' factual assertion that "the USGS report shows that out of stream use by the Tribe has increased substantially while *de minimis* uses have decreased" (Brief at 13) is misleading. Objectors acknowledge that the USGS report estimates that permit-exempt groundwater use increased from 23.8 to 36.7 AFY during a similar period. Brief at 9 (citing 3-ER-277–78). And many more new homes that rely on permit-exempt groundwater have been constructed from 2005 to the present time.[12]

The USGS study—the results of which Objectors have not challenged—concluded that this groundwater usage for domestic use and ground and

[12] Objectors' suggestion that the Tribe's consumptive use of groundwater has "substantially increased" is misleading at best. Brief at 26. The tribal hatchery pumps groundwater pursuant to its federal reserved right, "*and add it to the streams*, buffering the effects of other water uses in the middle basin." 3-ER-315 (emphasis added); *see also* 3-ER-275, 300 (discussing hatchery return flows). The Tribe's hatchery use is non-consumptive and it does not adversely affect Creek flows—to the contrary, it *adds* to Creek flows, because after the water is used in the hatchery, it is discharged to the Creek.

surface water for stockwatering did not just have hypothetical effects on Lower Creek flows, but actual, calculable effects. This study provided, for the first time (using computer modeling not available in the 1970s), a clear picture of how, cumulatively, these small uses can interfere with the Tribe's senior, adjudicated water right and showed that judicial protection of the Tribe's right was required. *Cf.* 3-ER-367 (recognizing that if uses become more than *de minimus*, "the Tribe may apply to the court for protection").

Importantly, although these uses and their effects may be small in total volume compared to the entire Chamokane Creek system, the degree of their impact is irrelevant under Washington's prior appropriation law. *See Foster*, 362 P.3d at 963. In the intervening years since the 1979 decree, the Washington Supreme Court has clarified that this is true even for groundwater uses that fall within the State's statute exempting certain wells from the state's ordinary well permit requirements, as Objectors' allegedly do. *Campbell & Gwinn*, 43 P.3d at 9. While the provisions of the State's permit-exempt well statute, simplify the process by which a well user may begin to use water, it does not exclude such use from the "basic principle of water rights acquired by prior appropriation that the first in time is the first in right." *Id.*

The Washington Supreme Court has also specifically held that such uses cannot be removed from this framework. In *Swinomish Indian Tribal*

Community, 311 P.3d 6, the court addressed the State's effort to reserve water for certain uses, including permit-exempt wells, from a rule that recognized instream flow rights in the Skagit River. The court was clear that although such reservations might significantly advance the public interest—as they would allow permit-exempt withdrawals for domestic use to continue even when flows fell below the established instream flow minimums—the intended reservations of water were unlawful because the state could not alter the priority date of domestic uses to make them "jump to the head of the line" ahead of the senior instream flow rights. *Id.* at 19*; see also Fox*, 372 P.3d at 789.

Together, these factual developments amount to significant changed circumstances that made the original judgment and prior orders modifying it (as applied to the original defendants) "more onerous, unworkable, or detrimental to the public interest." *Asarco*, 430 F.3d at 979. To be clear, the district court's statement that domestic and stock water uses were not included in the judgment and "should always be available" did not mean, as Objectors insist, that it is "law of the case" that such uses would be forever exempt from regulation.[13] *See* Brief at 42. And most crucially, that judgment did not even

[13] For one thing, while the district court noted that water for the domestic and stock uses "should" always be available, it did not state that such water "will," "shall," or "must" always be available. As the court made clear in 1982, regulation of defendants' domestic and stock water use could be necessary if it does impact stream flows. 3-ER-362, 366–67.

apply to non-parties, like Objectors. So even if Objectors' "law of the case" argument could apply if it were being made by any *defendants*—which it is not, as no defendants objected to the request for modifications—it has no purchase for *non-parties* to whom the judgment never bestowed any rights or responsibilities.

The court's statements that the Government Parties requested to be modified reflected the parties' past agreement that Upper basin and domestic/stock uses did not need to be adjudicated for practical reasons, as they were deemed to be "de minimus" and to have no impact on Lower Chamokane Creek flows, and thus no adverse effect on the senior water rights confirmed by the court. 3-ER-360–61, 3-ER-388–89, 3-ER-395. Current, more accurate facts have now undermined those premises. Correcting those statements, and clarifying that parties' domestic and stock water rights might theoretically need to be adjudicated at some point, is warranted. No party has objected to that modification, which in no way affects non-party Objectors.

B. The requests are suitably tailored and do not prejudice Objectors.

The Government Parties' request likewise satisfies the requirement that the proposed modification be "tailored to resolve the problems created by the change in circumstance." *Rufo*, 502 U.S. at 391. The requested modification is far more limited than Objectors' brief suggests—in large part because Objectors

misinterpret or misrepresent their status under the 1979 and 1982 orders. It cannot be gainsaid: Objectors are not parties. Non-parties' rights were never addressed by the district court's statements that sufficient water for domestic and stock water uses should be available.[14]

Against this corrected backdrop, the Government Parties' request that the court remove the "*de minimus*" statements in its prior orders does not affect non-parties like Objectors and is best understood as a clarification rather than a change as to parties. The deletion does not mean that defendants' domestic and stock water rights will be adjudicated, it simply clarifies that defendants' rights could in theory be adjudicated, if necessary. Nor does it newly subject non-party Objectors' rights to potential adjudication, as Objectors were *always* potentially subject to adjudication. The modification is tailored to address only the problems created by the changed factual understanding and changed

[14] Even for the parties to whom those statements did apply, the statement that sufficient water for those uses "should" be available was not a guarantee that they always would remain unadjudicated. The very purpose of this litigation was to secure the Tribe's use of federal reserved rights; the facts as understood at the time of the original decree suggested that there was no practical reason to adjudicate the uses of the defendants that were not impairing the Tribe's rights. The district court exempted such uses from the decree *at that time*, but that did not mean those uses would be exempt from adjudication *forever*, nor did it mean those uses had been adjudicated and decreed senior to the Tribe's instream flow right associated with its fishing rights.

factual circumstances, and does not reopen the court's prior judgment in broader, unwarranted ways.[15]

As a practical matter, it is not foreseeable that such adjudication (for either defendants or non-party Objectors) will actually occur because of the generous mitigation program developed by the Government Parties protects reasonable domestic and stock water uses from adjudication. Under this program, the Tribe and United States have agreed not to bring domestic and stock water users into court if their use remains within an average of about 900 gallons of domestic use per day and stock watering at the carrying capacity of the land. 2-ER-179–80, 182. No Objector has claimed that these limits are too low to cover their use, and Objectors insist that they are not complaining about the potential regulation of "cheaters" whose water use exceeds that allowed under Washington's permitting exemptions. Brief at 27. Instead, Objectors appear to object to the removal of supposed protection from adjudication and

[15] Objectors incorrectly contend that the modifications to the orders are not suitably tailored, because the only valid concerns about water use in the basin are those of "cheaters" who irrigate more than the one-half acre of lawn and garden allowed under RCW 90.44.050. Brief at 13, 27. But while the Water Master's report of such a violator in 2005 spurred action, the Government Parties' overall concern now relates to the proliferation of permit-exempt wells and the trend of declining flows and continuing curtailment of uses by holders of water rights that have senior priority to later-established permit-exempt rights, not merely "cheaters."

regulation, when in fact Objectors never held that protection previously, but *are* now afforded protection under the mitigation plan.[16]

Although Objectors do not argue that the amount of water than the State will be mitigating for domestic and stock use is inadequate, they complain that it is less than the "volume allowed under RCW 90.44.050," the State's permit-exempt well statute. Brief at 29. To begin with, Objectors are wrong to suggest that the district court's reference to "sufficient" and "de minimus" domestic and stock water somehow silently incorporated the amounts set forth in the state statute—there is no indication the district court intended that result. And of course, the district court's judgment did not apply to non-parties, just as the modified judgment also does not.

The permit-exempt well statute does not exempt domestic and stock users from the State's priority system, so that statute never provided the protection from potential adjudication and curtailment that Objectors seem to

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[16] Absent the mitigation plan (which is facilitated by the modifications to the judgment) Objectors' uses could be subject to the adjudication and regulation they apparently wish to avoid. Senior water rights must be protected under Washington's prior appropriation regime. If the mitigation plan cannot be implemented, the United States and Tribe could seek to bring non-party domestic and stock water users like Objectors into this lawsuit so that their water rights may be adjudicated and their priority dates determined. Assuming their rights are junior to the Tribe's, their water use would be curtailed just as adjudicated irrigation rights in the basin are currently regulated (i.e. shut off) when instream flow rates drop below the established federal reserved right to flows of 24 cfs.

think it does. What does provide protection from potential adjudication and curtailment is the mitigation plan, which provides a generous buffer that will obviate the need for the United States and Tribe to seek adjudication of the domestic and stock water uses by either defendants or non-parties. The 1 AFY (900 gallons per day) that basin users may enjoy under that plan while free from potential regulation is ample for domestic use (including irrigating up to a half acre) and stock use, as it is far more than most households use.[17] The 80 gpm that the State has agreed to provide ensures the availability of this amount not just for current domestic users, but also much additional water use in the future, as it can offset more than double the number of current domestic wells in the Chamokane Basin. 2-ER-199–200 (explaining that the well will first pump just 36 gpm to mitigate 520 domestic wells, but can increase to 80 gpm). Non-party water users exceeding this mitigated use level would face potential regulation here only if their overuse is observed and the United States or the Tribe brings them into this litigation for adjudication of their water right and possible regulation of their water use. (Or, if Objectors believe they need and

[17] The Environmental Protection Agency estimates that an American family of four uses about 400 gallons of water per day, about 70% indoors. *See* https://www.epa.gov/sites/default/files/2017-03/documents/ws-facthseet-indoor-water-use-in-the-us.pdf. The USGS study used a rate of 350 gallons per day for average household use. 3-ER-274. The mitigation program will allow for 2-2.5 times those rates by domestic users.

are entitled to more water than is mitigated for under this agreement, they can seek adjudication and establishment of their right under the priority system.). The mitigation plan is plainly in the public interest, as it offers these protections to basin landowners, allowing them to continue their reasonable domestic and stock water usage, at no cost to them. *Cf.* Brief at 33.

Objectors also argue that the Government Parties' request for modification was untimely and they have been prejudiced by some delay. As explained in more detail *infra* pp. 58–63 in the context of Objectors' due process arguments, there was no apparent need to seek this clarification before the Government Parties reached their Settlement Agreement. The Government Parties made their request as soon as it was reasonable to do so, after years of study and negotiation about how best to protect both the Tribe's adjudicated right and the non-adjudicated rights of water users of both defendants and non-parties. And in any event, because Objectors have not been prejudiced by the modification at all, they have not been prejudiced by its timing.

Because the Government Parties have showed that "equity requires" correction and clarification of the court's orders, *Rufo*, 502 U.S. at 391, the only possible abuse of discretion would have been if the district court had not entered those modifications. *Horne v. Flores*, 557 U.S. 433, 447 (2009). The

district court made no error in granting the Government Parties' narrow, justified, and thoroughly-considered request.

IV. Objectors have been afforded due process.

Objectors also argue that they have been deprived of due process, asserting that they were notified of the possibility that the Government Parties might request modifications to the court orders too late, or that they were given inadequate opportunity to lodge their objections. As an initial matter, because Objectors are not parties who could even potentially be injured by modification of a judgment to which they were never subject, Objectors lack any rights that could even potentially trigger due process requirements. And in any event, the Government Parties promptly notified Objectors of the government's proposal once that proposal was finalized, and Objectors had three months to submit objections to the proposed modifications. Objectors' argument that the process was inadequate overstates their own interest, misrepresents the Government Parties' lengthy process of gathering information and negotiating a settlement, and fails to acknowledge that under the settlement the Government Parties would implement a mitigation plan that affords protection to Objectors that they lacked before the agreement.

Due process requires, that at a minimum there be notice and an opportunity to be heard before deprivation of a protected interest. *Goss v. Lopez*,

419 U.S. 565, 579 (1975); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985). "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). The Supreme Court "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Id.* at 333.

Objectors' due process arguments here fail for two reasons. First, the modification of the court's prior order did not alter Objectors' rights, because Objectors are not parties to this litigation and are not subject to the district court's original or modified judgment. Second, the notice and process afforded were reasonable in any event.

A. The Government Parties have not deprived Objectors of any constitutionally protected interest.

First, and critically, the judgment does not impair the Objectors' water rights in any fashion, for the same reasons discussed above. *Supra* pp. 31–35. Objectors' rights have never been adjudicated. They are not parties in this litigation. And water uses that adversely affect senior right-holders' are *never* exempt from curtailment under Washington law, including water uses under the state's permit-exempt well statute.

Importantly, if the United States or Tribe seek to have Objectors' rights adjudicated in the future by bringing them into this case (unlikely because of the Government Parties' mitigation plan), Objectors will be afforded appropriate process at that time. Objectors will not be bound by the orders of this court proceeding to which they are not a party, and will be free to argue that they are entitled to an adjudicated water right or that their right should not be adjudicated because it does not impair the Tribe's.

Simply put, while Objectors are correct that "subjecting existing domestic use of water to curtailment" would have an economic effect on these water users, Brief at 39, they are incorrect in asserting that they are now subject to such curtailment. Moreover, any such curtailment is unlikely given the generous mitigation plan that allows for current and significant future groundwater use. But if bringing Objectors into this lawsuit to adjudicate their rights and regulate their use becomes necessary, Objectors will be afforded notice and the opportunity to be heard.

B. The timing of the notice to Objectors and the process afforded for objections were both reasonable.

Even assuming that Objectors could show that they have suffered deprivation of some property interest, they have shown no constitutional inadequacy in the procedures accompanying the deprivation. Objectors had notice of the settlement and proposed modifications to court orders when any

notice requirement was triggered—indeed, they lodged their objections and were heard at a hearing. No more was required.

What constitutes "due process" is context-dependent: it "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews*, 424 U.S. at 334 (internal quotation marks omitted). And what may trigger constitutional notice and hearing requirements is highly context specific as well. The notice requirement is triggered not just by the *speculative potential* for some future deprivation. Instead, the requirement attaches to government actions that are "to be accorded finality," *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 13 (1978) (internal quotations omitted). In practice, this means that the mere "threat" of deprivation of a constitutionally-protected interest or "being subject to an investigation, without more," is insufficient to trigger the constitutional due process requirement. *Dees v. County of San Diego*, 960 F.3d 1145, 1152 (9th Cir. 2020). When it is triggered, courts have routinely held that notice can occur as late as the actual deprivation hearing itself. *See, e.g.*, *Pena v. Kindler*, 863 F.3d 994, 998 (8th Cir. 2017); *Merrifield v. Bd. of Cty. Comm'rs for Cty. of Santa Fe*, 654 F.3d 1073, 1078 (10th Cir. 2011).

Here, Objectors received notice when the Government Parties asked the district court to help implement the settlement by modifying several prior

orders. Objectors complain that they were not given notice much earlier—long before there was any understanding as to whether a settlement and modification of orders might even be necessary—claiming that they were due notice that the USGS was studying the hydrology of the Chamokane Creek Basin, or how various withdrawals, whether groundwater or surface water, affect Creek flows. No such notice would have been appropriate, much less required. The study was a fact-finding mission, not an action with any impact on the Objector's water rights (even if the later modification of the 1979 judgment somehow can be seen to have impact such rights, which it cannot). And the results of this scientific study were not preordained. The study may have concluded that groundwater withdrawals in the Upper Basin had zero effect on Lower Creek flows—that was one of the questions the study was meant to answer. *See* 3-ER-328–29.[18]

[18] And as a practical matter, the USGS study was no secret. USGS scientists held information sessions and worked with landowners to gather data from wells, and at least one local newspaper reported on the ongoing study. *See, e.g.*, http://spokanewatersheds.org/files/documents/080625-WRIA-54-Meeting-Summary_1.pdf (noting presentation by USGS about the ongoing study); https://www.spokesman.com/stories/2010/dec/16/stevens-county-aquifers-mapped/ (describing ongoing study); SER-064, 3-ER-317 (USGS gratefully acknowledging the help of landowners). The studies have also been published on the USGS website since October 2012. *See* https://pubs.er.usgs.gov/publication/sir20125224.

There was also no process due to Objectors at the time the results of that study were finalized—indeed, that was just the first step in determining "whether future modification of the 1979 decision is warranted." 2-ER-232. At that time, with the clarity afforded by the study about the effects of groundwater withdrawals on Creek flows, it was not certain what legal actions, if any, the United States or Tribe would take. As explained above, domestic and stock water uses were previously unadjudicated. After the USGS study, the United States or Tribe could theoretically have sought to bring non-parties like Objectors into this litigation, and to have their rights adjudicated and regulated. But any such action was never certain, and indeed the United States and Tribe have not sought to bring domestic and stock water users into this adjudication. And had the United States or Tribe taken that step, Objectors would of course have had opportunity to make their arguments about whether their rights should be adjudicated, and, if so, what their rights should be. In other words, the USGS report itself did not trigger any change in Objectors' legal rights, and upon the completion of that report, there were only *questions* about steps that the United States and Tribe could take that would, once taken, trigger the need to afford potentially affected parties due process.

Rather than embark on a massive project to adjudicate all groundwater uses in the basin, the Government Parties negotiated a compromise to avoid a

process that would inevitably lead to many groundwater users rights being assigned priority dates so junior that their use would have to be curtailed to protect the Tribe's senior right. After several years of negotiation, the Government Parties reached their Settlement Agreement and requested the district court to modify several prior orders. This was the very earliest that Objectors' rights could have been even potentially affected by any government action, if one accepts Objectors' understanding that they were somehow subject to the judgment of a lawsuit in which they were not a party. Certainly before this point—in 2019—there was no government action "to be accorded finality." *Memphis Light*, 436 U.S. at 13. Accordingly, even assuming notice was due to Objectors at all, no notice was due before then.

Finally, Objectors argue—with minimal development—that the notice period was inadequate and that they did not have adequate opportunity to be heard through an evidentiary hearing. Objectors do not explain why three months provided insufficient time for them to lodge their objections to the settlement. *See* Brief at 39. Indeed, from Objectors' own participation in that process, it appears the process was sufficient. And again, due process requirements are context-specific: due process "is a flexible concept—that the processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and

the particular circumstances under which the deprivation may occur." *Walters v. National Assoc. of Radiation Survivors*, 473 U.S. 305, 320 (1985). And, critically, there was no need for an evidentiary hearing because Objectors did not challenge the findings in the USGS report, nor did any party—thus the material facts underlying the government's request for a modification of court orders were undisputed.[19] Particularly given that the modification does not actually constitute a deprivation of any constitutionally-protected right of Objectors, and that if any such deprivation may occur in the future the due process requirement would be triggered, the process afforded to Objectors was more than reasonable.

For these reasons, even if the due process requirements were triggered at all, the timing and process provided satisfied those requirements.

V. The State of Washington has not unlawfully delegated any state legislative or administrative function to the federal courts by entering into the Settlement Agreement.

Finally, Objectors speculate that the true purpose of the Settlement Agreement and mitigation plan is to regulate land use in the Chamokane Creek Basin, and contend that the State has unlawfully limited its citizens' statutory rights through a judicial agreement. Brief at 34. Objectors' arguments

[19] And because Objectors are not parties to this litigation in any event, they could challenge those findings in the future if they are ever brought into this lawsuit.

are baseless, as Objectors again misrepresent the mitigation plan and misunderstand the interaction of the State's permit-exempt well statute and the long-established prior appropriation system in Washington. Objectors imagine that the State has contracted away Objectors' rights, but Objectors have *never* had a right to impair the Tribe's (or other senior right-holders') water rights.

First, the idea that the Government Parties are secretly vying to prevent basin development is belied by the mitigation program that *facilitates* further development in the basin. Under that program, the State will fund construction of a mitigation well that will supply 80 gpm of water to offset domestic and stock water use in the basin. This is ample water for not just current permit-exempt uses, but for the addition of many such uses that can occur through the development of new homes in the future. The mitigation plan does not forbid additional development (or use that exceeds the mitigated 1 AFY per home); such use will simply fall outside the protections provided by the mitigation. The United States and Tribe have agreed not to seek adjudication and regulation of uses that fall within this mitigation level, but uses above this level are potentially subject to adjudication and regulation (as were *all* such uses before the Settlement Agreement). The State's decision to provide this mitigation is a *benefit* to current and future basin landowners, as it significantly reduces the chance that the United States and Tribe will seek to have them

brought into this litigation so their rights may be adjudicated and regulated (while also ensuring that the Tribe's senior right is not impaired and that senior irrigation rights are not curtailed in favor of unadjudicated water uses).

Objectors' contention that the State has delegated land use regulation to the district court and federal Water Master is also incorrect. Stevens County, and not the State, regulates land use and development on land located outside the Spokane Reservation in the Chamokane Basin; the County is not a party to this suit, and no aspect of the order modifications (or the Settlement Agreement) deprive Stevens County of its land use regulatory authority. The Water Master has no land-use regulation powers. The Water Master will simply keep the Government Parties apprised of water uses that appear to exceed the mitigated amounts for domestic and stock uses and will monitor the number of new users for purposes of adjusting the operation of the mitigation well to increase the amount of water that is pumped and discharged to offset the effects of new uses on stream flows. *See* 2-ER-192–94. But neither the Water Master nor the federal court will be involved in land use or development matters, as Objectors contend.

Objectors' argument that "[t]he State does not have the power to limit property owners statutory right in a judicial agreement," and that "the consideration given by the State in that agreement is elimination of judicial

protection for use of water up to the statutory limit," Brief at 35, lack merit for many of the same reasons already discussed. Most fundamentally, Objectors are wrong that, through the orders in this case, they have "judicial protection for use of water up to the statutory limit" under RCW 90.44.050, which allows the use of up to 5,000 gallons of water per day for domestic use, and additional water for non-commercial lawn and garden irrigation, and stock watering. For one thing, the district court's orders never applied to Objectors at all. For another, the court never provided permanent protection for such domestic and stock water use, even for parties in this lawsuit—it simply declined to adjudicate those rights of defendants *at that time*. Further, the court's 1979 and 1982 statements that domestic and stock water uses "should always be available" did not mention or consider all the uses listed under RCW 90.44.050, or adopt the amounts listed there. It certainly did not decree that permit-exempt well users would forever have the right to use the amounts allowed under the permitting exemptions (including 5.6 AFY for domestic use), even if such use impaired or required curtailing of adjudicated senior rights.

So even if the court's orders *had* applied to Objectors (which they did not) and had suggested some enduring protection of these uses (which they did not), the orders did not bootstrap RCW 90.44.050's permit-exempt well

definition into the relevant orders, but rather addressed only "sufficient" water for domestic and stock uses. The mitigation program provides sufficient water for domestic and stock uses, without interruption, meaning it will remain available, just as the court said it "should" (but not "shall" or "must"). And this statute provides an exemption from the state well permit process, but does *not* provide an exemption from the State's prior appropriation regime, which applies equally to permit-exempt wells. So Objectors, for these many reasons, had no "statutory right" that the State has somehow now "limit[ed]."

Objectors also inaptly argue that the State has unlawfully used its "judicial powers to exercise its administrative powers," but Objectors identify no requirement for "legislative action or rulemaking" that precluded the State from entering into the Settlement Agreement or requesting modification of the court's prior orders. Brief at 35. The Court retained jurisdiction to modify orders in this case. The State is a party to the litigation and is authorized to settle aspects of the case with the other Government Parties, as it did here. The district court's modifications to its prior orders were within the court's power under its retained jurisdiction and in accordance with Rule 60(b), and those modifications were appropriate to resolve the dispute prompting the settlement. The State lawfully chose to enter into that settlement based on what it deemed to be in the State's best overall interests—including those of

current and future basin landowners. The Department of Ecology did not have to adopt a rule and the Washington Legislature did not have to enact a new statute for the State to agree to provide mitigation in exchange for the Tribe and the United States agreeing not to seek adjudication and regulation of domestic and stock water uses, where those users can only be regulated if they are first brought into this case (just as they could have been before the settlement).

For this reason, *Greater Los Angeles Council on Deafness, Inc. v. Cmty. Television of S. California*, 719 F.2d 1017, 1023 (9th Cir. 1983), in which this Court held that the district court could not require the U.S. Attorney General and two federal agencies to promulgate regulations, provides no support for Objectors' argument.

And Objectors are also incorrect in suggesting that the Settlement Agreement is tantamount to setting aside or withdrawing water, and in relying on a state statute that directs the process for doing so. Brief at 36 (citing RCW 90.54.050). That statute authorizes Ecology to withdraw water from being available for appropriation in an area of the state, which the State has done for an area in Kittitas County by adopting a rule that withdrew all public groundwater from appropriation and then exempted limited uses from that prohibition. *See* WAC 173-539A-040. Here, there has been no withdrawal of

water from further appropriation; there is simply a mitigation program that has a cap. Objectors and other water users are free to exceed that cap, but if they do so, their use will not be mitigated and they may be subject to having their water rights adjudicated and regulated. Moreover, unlike areas like Kittitas County, the Chamokane Basin is an area which is governed by a federal court decree involving water rights, and the State is not required to adopt a rule pursuant to RCW 90.54.040 in order to reach a settlement in the litigation.

In sum, there has been no "judicial fiat" by the State. Brief at 35. The State made a reasonable and well-supported decision to enter into a settlement that allows domestic and stock water use to continue and increase—at no cost to landowners—while ensuring that adjudicated water rights, including those held by other landowners, are not impaired. This agreement allows the non-party basin landowners to avoid protracted and costly litigation through expansion of this case, which might otherwise be required to determine the water rights and associated priority dates of all basin landowners. Objectors may have imagined that they were forever protected from that adjudication process, but that belief was supported by neither the facts, the law, nor the procedural history of this case.

CONCLUSION

For all the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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Date March 3, 2022

ADDENDUM

RCW 90.03.010
Appropriation of water rights—Existing rights preserved.

The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this chapter provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right. Nothing contained in this chapter shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise. They shall, however, be subject to condemnation as provided in RCW 90.03.040, and the amount and priority thereof may be determined by the procedure set out in RCW 90.03.110 through 90.03.240.

RCW 90.03.250
Appropriation procedure—Application for permit—Temporary permit.

Any person, municipal corporation, firm, irrigation district, association, corporation or water users' association hereafter desiring to appropriate water for a beneficial use shall make an application to the department for a permit to make such appropriation, and shall not use or divert such waters until he or she has received a permit from the department as in this chapter provided. The construction of any ditch, canal or works, or performing any work in connection with said construction or appropriation, or the use of any waters, shall not be an appropriation of such water nor an act for the purpose of appropriating water unless a permit to make said appropriation has first been granted by the department: PROVIDED, That a temporary permit may be granted upon a proper showing made to the department to be valid only during the pendency of such application for a permit unless sooner revoked by the department: PROVIDED, FURTHER, That nothing in this chapter contained shall be deemed to affect RCW 90.40.010 through 90.40.080 except that the notice and certificate therein provided for in RCW 90.40.030 shall be addressed to the department, and the department shall exercise the powers and perform the duties prescribed by RCW 90.40.030.

RCW 90.03.290
Appropriation procedure—Department to investigate—Preliminary permit—Findings and action on application.

(1) When an application complying with the provisions of this chapter and with the rules of the department has been filed, the same shall be placed on record with the department, and it shall be its duty to investigate the application, and determine what water, if any, is available for appropriation, and find and determine to what beneficial use or uses it can be applied. If it is proposed to appropriate water for irrigation purposes, the department shall investigate, determine and find what lands are capable of irrigation by means of water found available for appropriation. If it is proposed to appropriate water for the purpose of power development, the department shall investigate, determine and find whether the proposed development is likely to prove detrimental to the public interest, having in mind the highest feasible use of the waters belonging to the public.

(2) (a) If the application does not contain, and the applicant does not promptly furnish sufficient information on which to base such findings, the department may issue a preliminary permit, for a period of not to exceed three years, requiring the applicant to make such surveys, investigations, studies, and progress reports, as in the opinion of the department may be necessary. If the applicant fails to comply with the conditions of the preliminary permit, it and the application or applications on which it is based shall be automatically canceled and the applicant so notified. If the holder of a preliminary permit shall, before its expiration, file with the department a verified report of expenditures made and work done under the preliminary permit, which, in the opinion of the department, establishes the good faith, intent, and ability of the applicant to carry on the proposed development, the preliminary permit may, with the approval of the governor, be extended, but not to exceed a maximum period of five years from the date of the issuance of the preliminary permit.

(b) For any application for which a preliminary permit was issued and for which the availability of water was directly affected by a moratorium on further diversions from the Columbia river during the years from 1990 to 1998, the preliminary permit is extended through June 30, 2002. If such an application and preliminary permit were canceled during the moratorium, the application and preliminary permit shall be reinstated

until June 30, 2002, if the application and permit: (i) Are for providing regional water supplies in more than one urban growth area designated under chapter **36.70A** RCW and in one or more areas near such urban growth areas, or the application and permit are modified for providing such supplies, and (ii) provide or are modified to provide such regional supplies through the use of existing intake or diversion structures. The authority to modify such a canceled application and permit to accomplish the objectives of (b)(i) and (ii) of this subsection is hereby granted.

(3) The department shall make and file as part of the record in the matter, written findings of fact concerning all things investigated, and if it shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare, it shall issue a permit stating the amount of water to which the applicant shall be entitled and the beneficial use or uses to which it may be applied: PROVIDED, That where the water applied for is to be used for irrigation purposes, it shall become appurtenant only to such land as may be reclaimed thereby to the full extent of the soil for agricultural purposes. But where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, having due regard to the highest feasible development of the use of the waters belonging to the public, it shall be duty of the department to reject such application and to refuse to issue the permit asked for.

(4) If the permit is refused because of conflict with existing rights and such applicant shall acquire same by purchase or condemnation under RCW **90.03.040**, the department may thereupon grant such permit. Any application may be approved for a less amount of water than that applied for, if there exists substantial reason therefor, and in any event shall not be approved for more water than can be applied to beneficial use for the purposes named in the application. In determining whether or not a permit shall issue upon any application, it shall be the duty of the department to investigate all facts relevant and material to the application. After the department approves said application in whole or in part and before any permit shall be issued thereon to the applicant, such applicant shall pay the fee provided in RCW **90.03.470**: PROVIDED FURTHER, That in the event a permit is issued by the department upon any application, it shall be its duty to notify the director of fish and wildlife of such issuance.

(5) The requirements of subsections (1) and (3) of this section do not apply to water resource mitigation pilot projects for which permits are issued in reliance upon water resource mitigation of impacts to instream flows and closed surface water bodies under RCW **90.94.090**.

RCW 90.03.330
Appropriation procedure—Water right certificate.

(1) Upon a showing satisfactory to the department that any appropriation has been perfected in accordance with the provisions of this chapter, it shall be the duty of the department to issue to the applicant a certificate stating such facts in a form to be prescribed by the director, and such certificate shall thereupon be recorded with the department. Any original water right certificate issued, as provided by this chapter, shall be recorded with the department and thereafter, at the expense of the party receiving the same, be transmitted by the department to the county auditor of the county or counties where the distributing system or any part thereof is located, and be recorded in the office of such county auditor, and thereafter be transmitted to the owner thereof.

(2) Except as provided for the issuance of certificates under RCW 90.03.240 and for the issuance of certificates following the approval of a change, transfer, or amendment under RCW 90.03.380 or 90.44.100, the department shall not revoke or diminish a certificate for a surface or ground water right for municipal water supply purposes as defined in RCW 90.03.015 unless the certificate was issued with ministerial errors or was obtained through misrepresentation. The department may adjust such a certificate under this subsection if ministerial errors are discovered, but only to the extent necessary to correct the ministerial errors. The department may diminish the right represented by such a certificate if the certificate was obtained through a misrepresentation on the part of the applicant or permit holder, but only to the extent of the misrepresentation. The authority provided by this subsection does not include revoking, diminishing, or adjusting a certificate based on any change in policy regarding the issuance of such certificates that has occurred since the certificate was issued. This subsection may not be construed as providing any authority to the department to revoke, diminish, or adjust any other water right.

(3) This subsection applies to the water right represented by a water right certificate issued prior to September 9, 2003, for municipal water supply purposes as defined in RCW 90.03.015 where the certificate was issued based on an administrative policy for issuing such certificates once works for diverting or withdrawing and distributing water for municipal supply purposes were constructed rather than after the water had been placed to actual beneficial use. Such a water right is a right in good standing.

(4) After September 9, 2003, the department must issue a new certificate under subsection (1) of this section for a water right represented by a water right permit only for the perfected portion of a water right as demonstrated through actual beneficial use of water.

RCW 90.44.030
Chapter not to affect surface water rights.

The rights to appropriate the surface waters of the state and the rights acquired by the appropriation and use of surface waters shall not be affected or impaired by any of the provisions of this supplementary chapter and, to the extent that any underground water is part of or tributary to the source of any surface stream or lake, or that the withdrawal of groundwater may affect the flow of any spring, water course, lake, or other body of surface water, the right of an appropriator and owner of surface water shall be superior to any subsequent right hereby authorized to be acquired in or to groundwater.

RCW 90.44.050
Permit to withdraw.

After June 6, 1945, no withdrawal of public groundwaters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided: EXCEPT, HOWEVER, That any withdrawal of public groundwaters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or as provided in RCW 90.44.052, or for an industrial purpose in an amount not exceeding five

thousand gallons a day, is and shall be exempt from the provisions of this section, but, to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter: PROVIDED, HOWEVER, That the department from time to time may require the person or agency making any such small withdrawal to furnish information as to the means for and the quantity of that withdrawal: PROVIDED, FURTHER, That at the option of the party making withdrawals of groundwaters of the state not exceeding five thousand gallons per day, applications under this section or declarations under RCW 90.44.090 may be filed and permits and certificates obtained in the same manner and under the same requirements as is in this chapter provided in the case of withdrawals in excess of five thousand gallons a day.

RCW 90.44.090
Certificate of vested rights.

Any person, firm or corporation claiming a vested right to withdraw public groundwaters of the state by virtue of prior beneficial use of such water shall, within three years after June 6, 1945, be entitled to receive from the department a certificate of groundwater right to that effect: PROVIDED, That the issuance by the department of any such certificate of vested right shall be contingent on a declaration by the claimant in a form prescribed by the department, which declaration shall set forth: (1) the beneficial use for which such withdrawal has been made; (2) the date or approximate date of the earliest beneficial use of the water so withdrawn, and the continuity of such beneficial use; (3) the amount of water claimed; (4) if the beneficial use has been for irrigation, the description of the land to which such water has been applied and the name of the owner thereof; and (5) so far as it may be available, descriptive information concerning each well or other works for the withdrawal of public groundwater, as required of original permittees under the provisions of RCW 90.44.080: PROVIDED, HOWEVER, That in case of failure to comply with the provisions of this section within the three years allotted, the claimant may apply to the department for a reasonable extension of time, which shall not exceed two additional years and which shall be granted only upon a showing of good cause for such failure.

Each such declaration shall be certified, either on the basis of the personal knowledge of the declarant or on the basis of information and belief. With respect to each such declaration there shall be publication, and findings in the

same manner as provided in RCW 90.44.060 in the case of an original application to appropriate water. If the department's findings sustain the declaration, the department shall approve said declaration, which then shall be recorded at length with the department and may also be recorded in the office of the county auditor of the county within which the claimed withdrawal and beneficial use of public groundwater have been made. When duly approved and recorded as herein provided, each such declaration or copies thereof shall have the same force and effect as an original permit granted under the provisions of RCW 90.44.060, with a priority as of the date of the earliest beneficial use of the water.

Declarations heretofore filed with the department in substantial compliance with the provisions of this section shall have the same force and effect as if filed after June 6, 1945.

The same fees shall be collected by the department in the case of applications for the issuance of certificates of vested rights, as are required to be collected in the case of application for permits for withdrawal of groundwaters and for the issuance of certificates of groundwater withdrawal rights under this chapter.

RCW 90.54.050
Setting aside or withdrawing waters—Rules—Consultation with legislative committees—Public hearing, notice—Review.

In conjunction with the programs provided for in RCW 90.54.040(1), whenever it appears necessary to the director in carrying out the policy of this chapter, the department may by rule adopted pursuant to chapter 34.05 RCW:

> (1) Reserve and set aside waters for beneficial utilization in the future, and
> (2) When sufficient information and data are lacking to allow for the making of sound decisions, withdraw various waters of the state from additional appropriations until such data and information are available. Before proposing the adoption of rules to withdraw waters of the state from additional appropriation, the department shall consult with the standing committees of the house of representatives and the senate having jurisdiction over water resource management issues.

Prior to the adoption of a rule under this section, the department shall conduct a public hearing in each county in which waters relating to the rule are located. The public hearing shall be preceded by a notice placed in a newspaper of general circulation published within each of said counties. Rules adopted hereunder shall be subject to review in accordance with the provisions of RCW 34.05.240.