CASE NO. 21-35502

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPOKANE INDIAN TRIBE; UNITED STATES OF AMERICA
PLAINTIFFS, APPELLEES

v.

DAN SULGROVE; et al.,
OBJECTOR, APPELLANTS

v.

DAWN MINING CORP; et al.,
DEFENDANTS, APPELLEES

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

PLAINTIFF'S-APPELLANT'S OPENING BRIEF

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Corporate Disclosure Statement - FRAP 26.1

Chamokane Landowners Association, Inc. is a private association that does not have any parent, subsidiary, or affiliate corporate relationships.

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I. STATEMENT OF JURISDICTION

District Court jurisdiction to review federal questions is pursuant to 28 U.S.C. §1331 (Addendum 7). This Court has jurisdiction pursuant to US Const, Art III, Sec 2 (Addendum 1—3) and 28 U.S.C. § 1295(a)(l) (Addendum 4—6) to review Order Modifying Prior Court Orders, entered May 27, 2021, entered pursuant to the Order to Show Cause entered July 31, 2019, by the District Court of Montana, Judge Stanley A. Bastian presiding. See Excerpt of Record "ER" 1-ER-2—25. Appellants filed Notice of Appeal pursuant to FRAP 3(a)(l) on June 15, 2021. 2-ER-504—508.

II. STATEMENT OF THE ISSUES

1. Does a District Court have discretion to relieve parties from a forty-two-year-old final judgment under Rule 60(b)(5) (Addendum 8—10) absent a timely motion and showing unanticipated substantial changes in circumstance resulted in extreme and unexpected hardship?
2. Is proposed relief from a forty-two-year-old final judgment that includes eliminating protections for *de minimis* users suitably tailored when identified issues can be easily addressed without any modifications to the judgment?
3. Does the less stringent judicial standard for accepting consent decrees apply to an agreement that was negotiated by the parties for the purpose of eliminating the preclusive effect of a final judgment, and the publics statutory

right to use water, when application of the more liberal standard shifts the burden on to non-parties?

4. Can the State of Washington waive the public's statutory right to make *de minimis* use of water for domestic purposes in consideration for an agreement to modify a forty-two-year-old judgment?
5. Is due process violated when a District Court orders the relitigation of facts in a longstanding final judgment that affirms and protects the statutory use of water and notice to affected water users is delayed thirteen years?

III. ADDENDUM STATEMENT

Pursuant to Ninth Circuit Rule 28-2.7, all relevant constitutional provisions, regulatory authorities, and rules are set forth in an addendum which is appended to this Opening Brief.

IV. STATEMENT OF THE CASE

A. INTRODUCTION

Appellants seek reversal of a District Court order granting relief from judgment to the Spokane "Tribe," the "United States," and the "State" of Washington (referred to collectively by the District Court as the "big three" and hereafter as "Government Parties"). 2-ER-30.

In 1979, after seven years of litigation, the District Court entered a memorandum opinion and Judgment in this case. Over the years the court entered additional final

orders (the Judgment and related orders are referred to collectively as the "Anderson Decree"). The Judgement "ORDERED, ADJUDGED AND DECREED" rights to the use of all waters in the Chamokane Basin ("Basin"). 3-ER-375—385. The Spokane Tribe was decreed senior water rights for irrigation and stream flow. The combined quantification of the Tribe's water rights exceeds the annual Basin yield. Subsequent orders adding to the Tribe's reserved rights increased the delta between those rights and annual Basin yield. See FN 1 and discussion.

Because the Tribe's reserved senior rights exceed Basin yield, all junior rights *could have been* subjected to curtailment in favor of the Tribe's senior rights. However, the Tribe, and its federal trustee ("Plaintiffs"), accepted a judgment that does not subject all junior rights to curtailment. At trial, Plaintiffs put on evidence and argued in favor of findings that exempt limited categories of use from enforcement under the Anderson Decree ("*de minimis* uses"). Specifically, domestic use and a limited area of groundwater use were exempted from enforcement. 3-ER-386-404. Upon motion of the State ("Defendant") a subsequent order added stock use to the *de minimis* uses exempted from enforcement. 3-ER-346—374.

No appeal was taken from the Judgment exempting *de minimis* uses from enforcement. However, appeal was taken on other issues. Specifically, this Court ruled in 1984 that the State of Washington exercises jurisdiction over the issuance of water rights on non-reservation lands. United States v. Anderson, 736 F.2d 1358,

1365 (9th Cir. 1984). The law of the case provides that state issued rights for *de minimis* uses are exempt from enforcement. For more than 40 years property owners have obtained state issued rights for *de minimis* uses exempt from decree enforcement. The order appealed in this case eliminates the ability to obtain state issued rights free from enforcement.

In 2005, the Water Master reported that some individuals appeared to be irrigating in excess of the of ½ acre statutory exception for domestic use. 3-ER-328. In response the Government Parties asserted "it would be necessary to review the facts relied upon by the court when the 1979 and 1982 orders were signed." Id. In 2006, the District Court authorized a reexamination of findings that exempt *de minimis* uses from enforcement. 3-ER-323—325. At no time in the ensuing 13 years was notice provided to water users that their judicially determined ability to use state issued *de minimis* water rights free from decree enforcement was at issue.

The Government Parties hired the United Stated Geological Survey ("USGS") to conduct a Basin study. The USGS issued a final report in 2012. That report, which has never been examined on the record, was cited by the District Court as evidence in support of its order modifying the Anderson Decree. Notably, the USGS report simulated the effect of *de minimis* uses on stream flow to 18 gallons per minute ("GPM"). 2-ER-177. The authors are unsure because the calculated value is orders of magnitude less than anyone's ability to measure. 3-ER-314.

Following completion of the USGS report, the Government Parties spent 3 years briefing followed by 4 years negotiating their "Agreement on a Program to Mitigate for Certain Permit-Exempt Well Water Uses in Chamokane Creek under *US v. Anderson*" (hereafter "Exempt Well Agreement"). That agreement includes a program "designed to mitigate impairment resulting from certain uses that are not currently regulated under the 1979 *Anderson* Decree." However, implementation of the Exempt Well Agreement does much more than mitigate *de minimis* uses. It significantly increases the Tribe's reserved instream flow rights during high flow. 2-ER-182. It grants new water rights for thermal mitigation to replace what the Tribe voluntarily relinquished in exchange for higher minimum stream flows. 2-ER-180. It also requires relief from judgment, making *de minimis* uses subject to decree enforcement. 2-ER-179.

On July 31, 2019, the District Court issued an order to show cause why the Exempt Well Agreement and proposed modifications to the Anderson Decree should not be adopted. 1-ER-10—25. Affected property owners were given 3 months' notice. 2-ER-146—150. Appellants timely objected to the order adopting the Exempt Well Agreement on procedural, statutory, and constitutional grounds. 2-ER-97—145. Procedurally, relief from judgment imposes a burden on the moving party to timely show that unanticipated changes in circumstances have caused extreme and unexpected hardship. No motion was filed and the effect of *de minimis*

uses was not unanticipated at trial. There is no evidence of unexpected hardship. The District Court erroneously treated the Exempt Well Agreement as a consent decree and improperly shifted the burden to objectors.

Statutorily, the State of Washington improperly abdicated jurisdiction over the issuance of water rights by contracting to regulate de minimis domestic use in a manner inconsistent with RCW 90.44.050 (Addendum 13). Constitutionally, property owners did not receive notice that their rights were at issue for over 13 years, and only 3 months to object to judicial modification of those rights. The resulting evidentiary and economic prejudice deprived property owners of their due process rights. The District Court denied Appellants' objections. This appeal ensued.

B. FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW.

The state statute exempting the de minimis withdrawal of groundwater for domestic and other limited uses from permitting requirements was in effect at the time of trial and is substantially the same today as when adopted in 1945. RCW 90.44.050 (Addendum 13).

"The United States brought this action on its own behalf and as trustee for the Spokane Tribe of Indians to adjudicate the rights in and to the waters of Chamokane Creek and its tributaries." 3-ER-386. Following a bench trial, the District Court entered a memorandum opinion ("1979 Order") finding that:

> precipitation absorbed into the ground in the Upper Chamokane area becomes part of an underground reservoir unconnected to the Chamokane drainage system. . .
>
> [g]roundwater withdrawals in the Upper Chamokane region have no impact upon creek flow below the falls because groundwater in this area is part of a separate aquifer. . .
>
> Water for domestic use is not included within this Judgment as it is de minimis and should always be available.

3-ER-388, 389 and 395. The court also found the total average annual Basin yield is 35,000 acre-feet per year. 3-ER-389.

The court entered Judgment decreeing tribal reserved rights for 23,694 acre-feet to irrigate 7,898 acres and 1,686 acre-feet to irrigate 562 reacquired acres. Also at least 20 cubic feet per second ("CFS") and more if needed to maintain temperature in Chamokane Creek. 3-ER-378. Cumulatively, the Tribe's reserved irrigation and flow rights initially equaled at least 39,834 acre-feet annually.[1] The Judgment also repeated the court's earlier findings exempting upper Basin groundwater use and domestic use from the decree. 3-ER-384.

On August 23, 1982, the District Court issued a Memorandum and Order ("1982 Order"), repeating earlier findings exempting upper Basin groundwater and domestic use from the decree. In response to the state's unopposed motion to modify the judgment, the court added a new finding that:

[1] 20 CFS equates to 14,454 acre-feet annually (1 CFS for 24 hours equals 1.98 acre-feet; 1 cfs = 448.8 GPM). https://www.coloradoriverdistrict.org/water-measurement/

> The undisputed evidence is that normal stock water use (grazing related to the carrying capacity of the land) and domestic water use is de minimis and does not include impoundments. The Memorandum Opinion is therefore adjusted to reflect that these uses are not included in the judgment and should always be available.

3-ER-360—361.

The 1982 Order noted the burden rests upon a party moving to amend a finding or conclusion and denied motions that sought to reargue adjudicated facts because "[a] party who failed to prove his strongest case is not entitled to a second opportunity by moving to amend." 3-ER-348. Appeal was taken from the 1982 Order. However, the exemption of *de minimis* uses was not challenged. See United States v. Anderson, 736 F.2d 1358 (1984).

On December 9, 1988, the District Court modified judgment in response to a petition by the Tribe to increase enforceable minimum flow rate ("1988 Order"). 3-ER-340—345. The Tribe relinquished its right to flow for maintaining temperature in exchange for increasing minimum flow to 24 CFS against rights issued prior to September 13, 1988 (27 CFS for rights issued later). 3-ER- 342. This increased the Tribe's annual decreed volume to at least 42,725 acre-feet. See FN1.

On August 11, 2006, the District Court approved a request by the Government Parties to reexamine all of the findings that exempt *de minimis* uses from decree enforcement. 3-ER-323—325. Notice was not provided to any existing or prospective *de minimis* water users. The Government Parties hired the USGS to

study the Basin. The USGS issued its final report in 2012. The USGS report has never been examined on the record, so the underlying methodology and assumptions have not been established. The Government Parties admit the simulated impact of *de minimis* uses was only 18 GPM. 2-ER-177. The accuracy of USGS gaging station is plus or minus 5% or 1.2 CFS, which is 1.6 orders of magnitude greater than the simulated impact; in the words of the USGS, "the results are calculable but not measurable." 3-ER-314.

Table 2 in USGS Report also shows annual use of groundwater for Tribal and State-owned fish hatcheries increased from zero in 1989, to well over 6,000 acre-feet in 2010. 3-ER-277—278. Over the same period, public water supply increased from 73 to 187 acre-feet. Id. Meanwhile, categories that appear to include *de minimis* uses decreased overall. Id. Annual use of groundwater for irrigation dropped from 1,250 to 76 acre-feet; use of stock water dropped from 27.7 to 11.4 acre-feet; and permit exempt use increased from 23.8 to 36.7 acre-feet. The USGS Report does not disclose when the Tribe's water utility opened or differentiate by user, so it is not possible to accurately assess the effect of increased Tribal use.

With the USGS Report in hand, the Government Parties briefed their respective positions for amending the Anderson Decree. In 2014, the District Court summarized those positions and ordered:

> In reviewing the briefing, the Court has concluded that oral argument would be beneficial. Also, it would be beneficial to the Court to have the

> identification of water users in the Upper Basin, and any unnamed individuals who are using water not covered by the orders in this case.

2-ER-232—235.

The Government Parties provided a declaration that identified all claimants, residential users, residential wells, and permitted water users in the Basin. 2-ER-228—231 and 2-ER-227. In 2015, following receipt of the declaration, the District Court ordered:

> The Court believes it is necessary to hold a hearing and make findings of facts before making any changes to the Court Orders, and believes it is necessary for the Upper Basin land owners/water users to be given notice and opportunity to participate in the hearing.

2-ER-225.

Over the next four years, the requirement to provide notice was extended by a series of orders while the Government Parties negotiated their Exempt Well Agreement. No evidentiary hearing was ever conducted. The Exempt Well Agreement was presented to the District Court on April 25, 2019, in a joint report that also proposed a notice plan for affected Basin property owners. 2-ER-204—222 and 2-ER-175—203. On June 21, 2019, the Government Parties filed a Joint Motion for Order to Show Cause. 2-ER-151—174. On July 31, 2019, the District Court entered the Order to Show Cause why the Judgment and related final order should not be amended, giving December 6, 2019, as the deadline for objections. 1-ER-10—25. The certificate of mailing notice to affected property owners was entered

September 6, 2019. 2-ER-146—150. Thus, 13 years after relitigatation of adjudicated facts began, affected nonparty property owners were given notice and less than three months to object.

C. RULINGS PRESENTED FOR REVIEW

After a half century, the procedural posture of this case is extensive. Much of that history provides relevant context for the issues presented which require this court to determine whether the District Court can issue relief from a forty-two-year-old judgment without a requisite showing by the part(ies) seeking relief, and, if so, whether the decision to grant such relief infringed on the judicially determined right of property owners to the issuance of water rights under state statute, or was unreasonably delayed in violation of property owners' due process rights.

Presented for review is the District Court's Order Modifying Prior Court Orders. 1-ER-2—9. That order was entered based upon the District Court's prior Order to Show Cause. 1-ER-10—25. In objecting to the Show Cause Order, Appellants challenged whether the District Court has improperly shifted an erroneous burden from the part(ies) seeking relief from Judgment on to Appellants as non-party objectors. Appellants' objections were denied, and both orders are presented for this Court to review.

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V. SUMMARY OF THE ARGUMENT

The Government Parties contend the final Judgment must be amended after forty years to protect the Tribe's instream flow right from impairment resulting from *de minimis* uses. 2-ER-176. In the absence of a timely showing by a moving party that an unanticipated and substantial change in circumstance has resulted in extreme and unexpected hardship, the District Court lacks discretion under Fed. R. Civ. 60(b)(5) to grant this extraordinary remedy.

No Rule 60 motion was filed. Nevertheless, the District Court accepted the USGS report as evidence showing a significant change in circumstances under Rule 60. No other requisite findings were made. The USGS report was offered as evidence in support of rearguing facts determined long ago. The USGS reports an impact of 18 GPM, confirming that uses exempted from enforcement under the Anderson Decree are still *de minimis*. The Big three knew at the time of trial that *de minimis* uses could affect stream flow. The USGS modeled simulation, which confirms that fact decades later, is not evidence of any change in circumstance.

Waiting forty years to seek relief from judgment is not timely. Waiting seven years following completion of USGS report to seek relief is not timely. The matters before this Court were anticipated at the time of trial. The exemption of *de minimis* uses was fully adjudicated. The Tribe's reserved rights were found to exceed Basin yield. Its instream right exceeds the daily mean stream flow for most of the year.

Any out of stream use of the Tribe's reserved irrigation rights will necessarily impact the Tribe's instream right. This was known at the time of trial. The USGS report shows that out of stream use of water by the Tribe has increased substantially while *de minimis* uses have decreased. There is no evidence of extreme and unexpected hardship.

The relief sought is unnecessary and not suitably tailored to resolve any identified problems. The delegation of state enforcement authority to the Water Master allows for enforcement against *de minimis* water users that cheat. The State's agreement to provide 1,100 GPM (2.45 CFS or 1,771 acre-feet) for thermal mitigation water provides 60 times more water than necessary to mitigate the simulated *de minimis* effect. There is no reason to amend the Anderson Decree.

Instead of a Rule 60 motion the court granted a motion to show cause that erroneously equated the Exempt Well Agreement to a consent decree and improperly shifted the burden on to non-party objectors. A consent decree is a negotiated and enforceable resolution of a justiciable dispute. The Government Parties have no justiciable dispute, their rights were determined in a final Judgment. The only dispute at issue here is between the Government Parties and non-party property owners the Plaintiffs chose not to summon nearly half a century ago. It is not possible for a negotiated consent decree to resolve a dispute with non-parties.

It is not fair, adequate, reasonable, or in the public interest to amend a judgment that has protected *de minimis* uses of water for decades, particularly in the absence of any extreme and unexpected hardship. The Government Parties knew at the time of trial that the Tribe's reserved rights exceed the average Basin yield—by a lot. They knew out of stream (or consumptive) use of the Tribe's irrigation rights would adversely affect the Tribe's instream rights. The Tribe and its trustee could have insisted at trial that all water uses be subject to enforcement. They did not. Instead, they put on extensive expert testimony to support the contrary ruling and did not appeal. Later they relinquished the right to maintain water temperature in exchange for higher minimum flows. Now armed with evidence that decreasing *de minimis* uses can be fully mitigated by a fraction of flow the state has offered to provide for thermal mitigation, the Government Parties want relief from Judgment. Equity favors the little guys.

The Judgment of the trial court in 1979 was to exempt *de minimis* uses from enforcement. Stock use was later found to be *de minimis* at the historic carrying capacity of land. On appeal, this Court affirmed the state's jurisdiction over water rights issued on non-tribal lands. Thus, under the law of the case, upper Basin groundwater and *de minimis* domestic uses, are defined by statute. If the state believes circumstances merit reducing legal appropriations, it can exercise

legislative or rulemaking authority. It cannot do so contractually or by judicial fiat without public notice and participation.

Due process requires notice and a meaningful hearing. The right to use water is a protected property interest. Those interests were placed directly at issue in 2006 when the District Court authorized the Government Parties to reexamine findings that exclude *de minimis* uses from decree enforcement. Notice was not given. Six years later the Government Parties offered the USGS report in support of a request to overturn the final Judgment. The District Court declined and identified the need for notice and an evidentiary hearing. Notice was delayed for 7 more years. No hearing has been conducted. The right to be heard includes the meaningful examination of evidence and witnesses. The Government Parties stalled the process for over 13 years before giving non-party property owners notice and 3 months to object. That delay resulting in evidentiary and economic prejudice is a denial of due process.

VI. ARGUMENT

A. Standard of Review

A District Court's decision to grant relief under Rule 60(b) will be reviewed for abuse of discretion. Molloy v. Wilson, 878 F.2d 313, 315 (9th Cir.1989). Under the abuse of discretion standard, the reviewing Court may not simply substitute its judgment for that of the District Court but must be left with the definite conviction

that the court committed a clear error of judgment in reaching its conclusion after weighing the relevant factors. United States v. BNS, Inc., 858 F.2d 456, 464 (9th Cir.1988). District court findings are reviewed for clear error. Addington v. U.S. Airline Pilots Ass'n, 791 F.3d 967, 982 (9th Cir.2015). United States v. Estate of Hage, 810 F.3d 712, 716 (9th Cir. 2016). Whether a state may use the public's statutory right to make *de minimis* use of water for domestic purposes as consideration for an agreement to modify a forty-two-year-old judgment is a question of law. Whether due process is violated by a thirteen-year delay in providing notice to affected parties that their property interest has been place at issue in litigation is a question of law. Questions of law are reviewed *de novo*. Kohler v. Presidio Int'l, Inc., 782 F.3d 1064, 1068 (9th Cir.2015).

B. The District Court Erred in Amending the Final Judgment.

In 1972, the Tribe's federal trustee (and the Tribe as Intervenor Plaintiff) filed suit "in its own right and on behalf of the Spokane Tribe of Indians, seek[ing] to have it rights in and to the water of the Chamokane Creek and its tributaries determined, declared and protected." 3-ER-492—493.

Seven years later, the District Court ORDERED, ADJUDGED AND DECREED that Plaintiffs own: 1) 25,380 acre-feet of water based on the number of practicably irrigable acres, broken down as follows: 23,694 acre feet to irrigate 7,898 acres, and 1,686 acre-feet to irrigate 652 reacquired acres, and 2) a sufficient amount of water

to preserve fishing in Chamokane Creek. . . to the extent of at least 20 cfs" with such additional flow "as is necessary to maintain at all times the water temperature below the Falls at 68 [degrees] F or less." 3-ER-376—378. Cumulatively, the Tribe's reserved rights were initially determined to be at least 39,834 acre-feet annually. See FN1. The seniority of the Tribe's rights is not at issue. The question is whether the Tribe is entitled to relief from the final Judgment to allow for enforcement of the Tribe's rights against certain *de minimis* uses that were exempted from decree enforcement at trial.

Among the court's findings was a determination that the "total output of the system" averages approximately 35,000 acre-feet per year. 3-ER-389. Thus, the Tribe holds rights to more water than the Chamokane Basin produces. This is a critical fact because limitations regarding the physical availability of water dictate how the Tribe's rights will be used. The consumptive use of 25,380 acre-feet requires the year-round diversion of 35 CFS. See FN1. The maintenance of 20 CFS for instream fisheries equals 14,454 acre-feet of annual non-consumptive use.

At the time of trial Plaintiffs understood the Basin's physical limitations (i.e., increased diversion of surface and groundwater will reduce stream flow). The following finding of fact was proposed by the United States at trial.

> ***There has been in recent years, a steady increase in both surface and ground water withdrawals by non-Indians both on and adjacent to the Spokane Reservation.*** The State of Washington has issued certificates and

> permits for both surface and ground water withdrawals within the Chamokane Creek basin both on and off the reservation. To date, the State has issued certificates authorizing a total withdrawal of 20.03 cfs, and permits for another 5.95 cfs. This is a total of 25.98 cfs. The total effective reduction in Chamokane Creek from these uses is 6.62 cfs. In addition, there are applications pending for 31.74 cfs which would effectively reduce Chamokane Creek by 9.33 cfs. Thus, if all existing certificates, permits and applications were utilized to their maximum, Chamokane Creek would be effectively reduced by a total of 15.96 cfs. (Tr. 77, 88-89, 124-25; PE-14; PE-32; PE-33).

3-ER-449—450 (***emphasis*** supplied).

The Tribe accepted this proposed finding. 3-ER-405—417. Thus, Plaintiffs have always known that maintenance of streamflow for fisheries requires a trade-off. In other words, they knew more than 42 years ago that consumptive use of the Tribe's reserved water rights will impact its non-consumptive right to instream flow. On appeal this Court acknowledged the Tribe's right to exercise their reserved rights in a manner suited to the Tribe's priorities.

> The tribe is, of course, entitled to utilize its water for *any* lawful purpose. *Colville Confederated Tribes v. Walton,* 647 F.2d 42, 48 (9th Cir.1981). If the tribe chooses to use water reserved for irrigation in a non-consumptive manner, it does not thereby relinquish any of its water rights to state permittees or subject the exercise of its rights to state regulation.

United States v. Anderson, 736 F.2d 1358, 1365 (9th Cir. 1984)

Importantly, it was the United States that offered evidence to show that certain *de minimis* uses in the Basin should not be subject to enforcement. A 12-day trial was conducted over a period of four years. Seventeen witnesses were examined.

Plaintiffs admitted 102 exhibits, including quantities of technical information regarding precipitation, soils, bedrock, elevation, land capability and capacity, glacial influence, geophysical features, hydrographs, USGS flow records, climate and weather records, pumping records, ownership documents and various expert reports based on this and other information. 3-ER-486—489. Defendants admitted 72 exhibits of similar character. 3-ER-489—491.

Evidence presented in support of exempting *de minimis* uses from enforcement focused on groundwater in the upper Basin, and domestic and stock use throughout the Basin (the "*de minimis* uses"). Regarding upper Basin groundwater withdrawals, Mr. Walter L. Woodward, an expert witness for the United States, testified:

> Q If I understood your testimony correctly, there is no ground water that comes from that area in through the Lower Chamokane to the storage area?
>
> A ***Negligible***.
>
> Q Negligible. And so, as far as the people who use the, extract ground water from that area, that would have no effect on the Chamokane, would it?
>
> A ***Negligible***.

3-ER-473 (***emphasis*** supplied). Based on the testimony of Mr. Woodward and other evidence, the United States proposed the following finding of fact.

> 31. As the glacier retreated, it left a lateral moraine to a depth of 150 feet which blocks off Camas Valley thereby precluding ***any appreciable*** ground water flow into the Chamokane Creek basin from that area. (Tr. 55, 185-186, 260; PE-5; PE-6; PE-7; PE 27-1-7; PE-3-6-74-29, p. 10)

3-ER-444—445 (***emphasis*** supplied).

Regarding *de minimis* uses for domestic and stock watering, Mr. Woodward offered the following testimony on cross examination by the State:

> Q (By Mr. Torve) I believe you previously testified that the domestic uses and the stock water uses on the Reservation have little or no effect on the flow of the Chamokane creek?
>
> A ***Very minimal***.
>
> Q Would that also be true of stock water and domestic uses outside of the Reservation, like within the watershed area of the Chamokane creek?
>
> A ***Minimal***, yes.
>
> Q Did you measure any interference with the flow of Chamokane creek by reason of those utilizations?
>
> A I didn't make any measurements for them at all.
>
> Q Would you expect it possibly could not show the effect?
>
> A I'd have a ***very hard time proving any material effect*** of the smaller livestock or domestic diversions.

3-ER-479—480. (***emphasis*** supplied).

The State proposed findings to exempt domestic and stock uses as *de minimis*. 3-ER-428. The Tribe proposed no material changes to the operative findings. 3-ER-405—417.

The trial court considered the evidence and the parties' proposed findings before entering a memorandum decision and final judgment quantifying the parties' rights and ruling that the decree could not be enforced against upper Basin groundwater use or domestic uses in the Chamokane Creek drainage. 3-ER-386 *et seq.*; 3-ER-375 *et seq.* Later, without objection, the court ruled that stock water at the carrying

capacity of the land is *de minimis* and therefore exempt from decree enforcement. 3-ER-361. According to the court, "judgment entered is a final adjudication of the water rights in the Chamokane Creek basin." 3-ER-400. None of the court's rulings regarding the exemption of these *de minimis* uses were appealed.

1. Modification of the Final Judgment is Not Needed Because the Governments' Proposed Agreement Includes Other Measures that Fully Mitigates the Impact of *De Minimis* Uses and Provides for Enforcement of the Decree Against Cheaters

The District Court made several findings in support of its recent decision to modify the forty-two-year-old Judgment and related final orders. First, the court found that the Government Parties met their burden of showing changes of circumstances under Fed. R. Civ. P. 60(b)(5). The court also found that the proposed modification was suitably tailored to resolve problems. The court ruled the Exempt Well Agreement and proposed modifications are fundamentally fair, adequate, and reasonable and in the public interest; and found that appellants failed to meet their burden of showing injury traceable to the proposed modifications or that the Exempt Well Agreement and modifications are unreasonable or illegal. The District Court erred for the following reasons.

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a. The District Court Lacks Discretion Under Rule 60(b)(5) (Addendum 9—10) to Modify a Final Judgment Absent a Timely Showing that Unanticipated and Substantial Changes in Circumstance have Caused Extreme Unexpected Hardship.

In 2013, after six years of study by the USGS, the Government Parties began filing briefs in support of modifying the Judgment and other final orders. It is represented that in 2 years of extensive briefing, Rule 60 was not mentioned. Indeed, in their joint answer to Appellants' objections the Government Parties state affirmatively "no party is seeking relief under Rule 60(b)." 2-ER-61. And no motion for relief under Rule 60 has been filed. Yet, the District Court found that the Government Parties met their burden for relief from judgment under Rule 60(b)(5). 1-ER-3.

Modification under Rule 60(b)(5) is "'extraordinary relief, and requires a showing of extraordinary circumstances.'" SEC v. Worthen, 98 F.3d 480, 482 (9th Cir.1996) (quoting Transgo, Inc. v. Ajac Transmission Parts Corp., 911 F.2d 363, 365 (9th Cir.1990)). The moving party bears the burden of showing entitlement to relief. Worthen, 98 F.3d at 482. The party seeking Relief under Rule 60(b) must timely show "a substantial change in circumstances or law since the orders were entered, extreme and unexpected hardship in compliance with the injunction['s] terms, and a good reason why [the court] should modify the permanent injunction." Id. (quoting Transgo, 911 F.2d at 365) (alterations in original).

A timely motion for relief from judgment must be filed within a "reasonable time." Fed.R.Civ.P. 60(c)(1) (Addendum 10). "What constitutes 'reasonable time' depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to the other parties." Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir.1981) (per curiam). It is difficult to analyze the timeliness of a motion that was never filed. Assuming the joint motion for an order to show cause may be considered the operative request (2-ER-151—174), it came on June 21, 2019, forty years after judgment was entered, and thirteen years after the Government Parties began collecting evidence to overturn the decree exemption for *de minimis* uses. Given the demonstrated knowledge of the Government Parties at trial that *de minimis* uses would affect stream flow, the long delay in requesting relief from Judgment is not reasonable.

There is a "compelling interest in the finality of judgments which should not be lightly disregarded." Osborne v. U.S. Sec'y of Treasury, 37 F. Supp. 2d 1176, 1180 (D. Haw. 1997), aff'd sub nom. Osborne v. Rubin, 166 F.3d 343 (9th Cir. 1998). Once the time for appeal has passed, the interest in finality must be given greater weight. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir.1981) (per curiam). In the decades since the time for appeal lapsed, every property owner that has built, sold, or devised a home, relied on the District Court's decision to exempt *de minimis* water

uses from decree enforcement. The reasons for years of delay is unclear. Some of that time was spent negotiating an agreement to deprive *de minimis* users of judicial protection from enforcement. The fact that this was done without notice does not weigh equitably in favor of the Government Parties.

Regarding the practical ability of the litigants to learn of the grounds relied on, Appellants had no ability to do so because they were not given notice until thirteen years *after* their property rights were put at issue. The Government Parties knew in the 1970s that the Tribe holds senior rights to more water than the Basin produces. Their lead expert testified that *de minimis* uses would have a "negligible" or "minimal," effect on stream flow. 3-ER-473, 480. Knowing this, the Government Parties could have insisted upon enforcement authority over *de minimis* uses. They chose not to.

Appellants are prejudiced by modification of the final judgment. A primary hardship to be considered when a court is asked to alter a final judgment is the denial of third-parties' ability to defend against the losing party in subsequent proceedings. Nat'l Union Fire Ins. v. Seafirst Corp., 891 F.2d 762, 767 (9th Cir.1989) citing Ringsby Truck Lines, Inc. v. Western Conference of Teamsters, 686 F.2d 720, 721 (9th Cir.1982). In Seafirst, this Court affirmed denial of a request for relief from judgment where it appeared the request was motivated by a desire to avoid the preclusive effect of the judgment in future actions against non-parties. Eliminating

the preclusive effect of the prior judgment in future enforcement actions is the undisguised reason for the requested relief in this case. Under these circumstances, where the merits were fully adjudicated, equity tips in favor of honoring the preclusive effect of a final judgment.

The District Court found significant changes in circumstance evidenced by the USGS Report. That evidentiary value of that report has never been examined, but on its face, and seemingly admitted by all parties, the USGS determined that forty years of *de minimis* uses has a simulated effect many times less than anyone's ability to measure. 3-ER-314. The USGS confirmed the evidence put on by Plaintiffs at Trial, the effect of the *de minimis* uses is "negligible" and "very minimal." Even if the USGS had determined *de minimis* uses had a measurable effect, the District Court already ruled that "[a] party who failed to prove his strongest case is not entitled to a second opportunity by moving to amend a finding of fact and a conclusion of law." 3-ER-348 quoting 9 Wright & Miller, Federal Practice & Procedure, 722 (1971). When seeking amendment, "[t]he burden of showing harmful error rests on the moving party." 3-ER-348 citing Purer & Co. v. Aktiebolagep Addo, 410 F.2d 871, 878 (9th Cir. 1969). The Government Parties offered the USGS Report to reargue adjudicated facts. They failed to show any substantial change in circumstance.

The effect of *de minimis* uses was not unanticipated at trial. The issue was actively litigated. Plaintiffs proposed findings regarding the impact of "steady increase in both surface and ground water withdrawals by non-Indians both on and adjacent to the Spokane Reservation." 3-ER-449 (**emphasis** supplied). Knowing that additional withdrawals affect streamflow, the United States advocated for, and the District Court entered, findings that the *de minimis* uses should "always be available." 3-ER-360—361. That decision was not timely appealed.

As explained above, the trade-off between consumptive and non-consumptive uses was known at the time of trial. The Government Parties knew that consumptive uses by the Tribe would adversely affect its non-consumptive instream right. Anderson, 736 F.2d at 1365. Table 2 of USGS report confirms that Tribal uses have substantially increased for fish hatcheries and other purposes. 2-ER-277—278. The only thing arguably unexpected is the apparent overall decrease in *de minimis* uses. Id. Thus, it can reasonably be deduced that foreseeable "impairment" to the Tribe's protected stream flow since the time of trial has resulted from the Tribe's decision to consumptively use its water rights. There is no showing of unexpected hardship, certainly none approaching "extreme."

The District Court abused its discretion in finding that the Government Parties met the Rule 60(b)(5) burden of showing by timely motion that unanticipated substantial changes in circumstance have resulted in extreme and unexpected

hardship. The District Court's Order Modifying Prior Court Orders should be reversed.

b. The Order Modifying Prior Orders is not Suitably Tailored to Address Problems Created by Exemption of De Minimis Uses from Decree Enforcement

Even if the USGS report could reasonably be construed as evidence of a substantial change in circumstance (it cannot), this court requires proposed modifications be suitably tailored to resolve problems. Flores v. Rosen, 984 F.3d 720 (9th Cir. 2020). The entire process of relitigating previously adjudicated facts arose from a Water Master report in 2005 of a non-tribal property owner using a domestic well to irrigate 5 acres after his irrigation right was curtailed by decree enforcement. 3-ER-328—329.

The issue presented was how to enforce against cheaters who exceed allowable *de minimis* uses. In the case of stock water, *de minimis* use is limited to historic carrying capacity. 3-ER-361. In the case of domestic water *de minimis* use is defined in the exempt well statute. 3-ER-328 (referencing ½ acre domestic exemption found in RCW 90.44.050) (Addendum 13). In the case of upper Basin groundwater, *de minimis* use is defined by historic use and prospectively by RCW 90.44.050 (Addendum 13). The Exempt Well Agreement delegates State enforcement authority to the federally appointed Water Master. 1-ER-7. Appellants have never objected to measures that allow for enforcement against cheaters.

Regarding supposed impairment caused by *de minimis* uses, Appellants do not agree that anticipated *de minimis* impairment presents a valid reason for relief from Judgment. But even if it did, the Exempt Well Agreement provides mitigation water in substantially greater amounts that the simulated flow impacts. Specifically, the USGS simulated a *de minimis* impact of 18 GPM. The State agreed to provide up to 1,100 GPM mitigation water in the affected reach for thermal regulation. That is 61 times more water that the amount required to mitigate for more than forty years of *de minimis* water uses.

In this case, where equity controls, it is important to consider that in 1988, the Tribe voluntarily relinquished its right to flows for maintaining temperature in exchange for a higher minimum flow of 24 CFS (27 CFS for rights issued after the order of modification). 3-ER-342. Having spent years secretly negotiating the elimination of protection for *de minimis* uses, it is telling that the Government Parties invoked equity to modify the final judgment. They agreed to grant additional state issued rights to replace rights the Tribe voluntarily relinquished (so the Tribe now gets a minimum flow of 27 CFS *and* 2.4 additional CFS for thermal mitigation). That flow is 60 times more than what is needed to mitigate the existing impact of *de minimis* uses, and vastly more than what would be needed to mitigate any conceivable future use. Yet, somehow equity demands relief from Judgment too?

The preceding point deserves greater emphasis. At trial, the United States and the State advocated for Judgment that exempts *de minimis* uses from decree enforcement. No one appealed. Decades later the USGS simulated an 18 GPM impact from all of those uses. Now the Government Parties propose "eligibility criteria" of 1 acre-foot for all domestic uses as a contingent threshold for avoiding enforcement. 2-ER-179—180. This is substantially less than the volume allowed under RCW 90.44.050 (Addendum 13). For those that comply, the Government Parties have agreed to drill a new well that will provide up to 80 GPM to offset the modeled impact of existing and future *de minimis* uses. Id. They are not using 18 GPM as the baseline, they are using 36 GPM instead, because the USGS model "could vary depending on the model's construction" (in other words, it is not very accurate). 2-ER-177. Using 520 as the number of existing exempt wells, they developed a ratio and then apply that ratio to future domestic uses. 2-ER-199. When the simulated impact of those uses reaches 80 GPM, no more domestic water.

It can be argued that using 36 GPM as the baseline unfairly assumes more impact from existing uses and results in a much greater impact ratio for future uses that are subject to stricter eligibility criteria. But Appellants do not accept that amending the Judgment is needed, much less suitably tailored, to address issues anticipated at the time of trial. What constitutes suitably tailored relief boils down to a simple question that the Government Parties have been unable or unwilling to answer. If the State

(which advocated at trial to exempt *de minimis* uses) is providing mitigation rights to the Tribe in the amount of 1,100 GPM, why is it necessary to amend the Judgment? Appellants' answer is presented below in Section V.B. 2.

The District Court erred in determining that modification of judgment proposed by The Government Parties is suitably tailored to any problems created by exemption of *de minimis* uses from decree enforcement. The Order Modifying Prior Court Orders should be reversed.

c. An Agreement to Modify Judgment on the Merits is Not a Consent Decree and Cannot be Approved for the Purpose of Injuring Non-Party Public Interests

As shown, the Rule 60(b) burden rests on a party seeking relief from judgment. However, the Government Parties somehow persuaded the District Court to use a different standard and to shift the burden to non-parties. Instead of filing a motion for relief from judgment under Rule 60, the Government Parties filed a joint motion for an order to show cause. 2-ER-151—174. In that motion they assert that the Exempt Well Agreement is "akin to a settlement and consent decree combined." 2-ER-154. That is not a fair statement of the law.

According to the Government Parties the fair, reasonable, and adequate standard is routinely applied to water right settlement involving Indian Tribes. 2-ER-153. But this is not a settlement, it is a request for relief from judgment. A consent decree is "an agreement that the parties desire and expect will be reflected in, and be

enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992) (holding that Rule 60 applies to consent decrees). A consent decree embodying an agreement between parties is a final judgment; it is accompanied by finality as stark as an adjudication after full trial. See Delaware Valley Citizens' Council v. Commissioner of Pennsylvania, 674 F.2d 976, 981 (3d Cir.), *cert. denied,* 459 U.S. 905, 103 S.Ct. 206, 74 L.Ed.2d 165 (1982).

As the preceding authorities demonstrate, a consent decree serves the role of a final judgment where there has been no determination on the merits. There can be no reason for a consent decree when Judgment on the merits was entered in 1979, after a lengthy trial. 3-ER-375. These authorities further show that Rule 60 applies equally to requests for relief from consent decrees a final judgment. Missing is any authority that allows parties to use a consent decree (or settlement) to modify a final judgment on the merits. Hence, as argued above, the proper burden requires party(ies) seeking relief to timely show an unanticipated substantial change in circumstance caused extreme and unexpected hardship. Worthen, 98 F.3d at 482.

The Government Parties advocate for a much less stringent standard based on the holding of United States v. Oregon, 913 F.2d 576, 581 (9th Cir. 1990). In that case, two government parties objected to a negotiated multi-party plan for allocating

anadromous fish harvests among various jurisdictions in the Columbia River Basin. After explaining that the plan "is not a consent decree as it is not a final judgment" the District Court fashioned a standard based on consent decrees. United States v. State of Or., 699 F. Supp. 1456, 1461 (D. Or. 1988), aff'd, 913 F.2d 576 (9th Cir. 1990). On review, this Court agreed that the allocation plan is most like a consent decree and affirmed the District Court discretion to rule that the plan was shown to be fundamentally fair, adequate, and reasonable. Oregon, 913 F.2d at 580.

The District Court in this case modified the Oregon standard and entered a finding that the Exempt Well Agreement is fundamentally fair, adequate and reasonable ***and in the public interest***. 1-ER-2. The District Court then burdened non-party objectors to show injury traceable to the proposed modifications or that the Exempt Well Agreement and modifications are unreasonable or illegal. 1-ER-11.

In Oregon, this Court acknowledged the heightened responsibility of courts to protect public and third-party interests; it then distinguished those authorities based on the objectors' party status and role in negotiating the agreement. Oregon, 913 F.2d at 581. Thus, the exercise of a court's heightened duty to protect the "public interest" when reviewing a consent decree applies to non-parties. The negotiated agreement to modify Judgment in this case strips non-party property owners of long-standing protection for their *de minimis* uses of water. Property owners were given

perfunctory notice and a right to object *after* the negotiations were completed. The District Court erred in failing to protect non-party public interests.

Turning to the burden placed on objectors, the District Court found that objectors failed to show injury traceable to relief from judgment. Respectfully, the decision to grant relief from judgment eliminated judicial protection for *de minimis* uses that has existed for more than four decades. That injury is not merely traceable to the District Court's action, it was intended.

The standard applied in Oregon is inapposite to a request for relief from final judgment. Even if that standard could be made to apply, the District Court erroneously concluded that the Government Parties negotiated their Exempt Well Agreement in the public interest when elimination of the public's interest is the intended purpose of the agreement.

2. The Governments Cannot Exercise Administrative or Legislative Powers Through a Judicial Act.

The idea that the Government Parties spent thirteen years paying for USGS studies and negotiating deals to offset a *de minimis* effect that cannot be measured defies credibility. As noted above, the effect of *de minimis* uses would be more than fully mitigated by the 1,100 GPM thermal mitigation flow called for in the Exempt Well Agreement; just as enforcement against cheaters is properly addressed by the delegation of state authority to the federal water master.

It is fair to infer that more is involved than the effect of *de minimis* uses. Clues are found in the Exempt Well Agreement, which places a cap of 80 GPM for mitigating existing and future *de minimis* uses. That water is in addition to the 1,100 GPM for thermal mitigation. Both will be pumped from wells located outside the Basin. 2-ER-179—181. If the effect can be easily mitigated, why is it necessary to impose a cap? Also, why does the agreement require the parties and the Water Master to monitor County land use decisions? 2-ER-181. It is reasonable to suspect the Government Parties opportunistically agreed to seek relief from judgment in order to regulate future land use; no more water, no more development.

This Court determined in 1984, that the state exercises jurisdiction over the issuance of new rights on non-reservation property. Anderson, 736 F.2d at 1365. The statutory authority for exempt wells addressed in the Exempt Well Agreement is RCW 90.44.050 (Addendum 13). The district also confirmed that statute as the measure of exempt domestic uses, when discussing the need to address the Water Master's enforcement authority over cheaters that irrigate more than the "½ acre domestic exemption" allowed by statute. 3-ER-328.

Under state law, the ½ acre domestic exemption is in addition to 5,000 GPD for group or single domestic use. RCW 90.44.050 (Addendum 13). Provision for stock use is found in the same statute. The eligibility criteria established in the Exempt Well Agreement allow only 1 acre-foot of water for all domestic uses. 2-

ER-197—180. The State does not have the power to limit property owners' statutory right in a judicial agreement. The Government Parties will argue that the Exempt Well Agreement does not amend the statute, and that the property owners can choose to use less water in exchange for a conditional right to use that water without being subject to decree enforcement. The problem with that argument is the State is a defendant in this case and the consideration given by the State in that agreement is elimination of judicial protection for use of water up to the statutory limit.

Appellants do not dispute the authority of the State to regulate water use; they object to doing so by contract or judicial fiat. "[T]he mixing of adjudicative and policy-making functions ... contravenes the separation of powers doctrine." See United States v. Elliott, 684 F.Supp. 1535, 1539-40 (1988). This court ruled that the State exercises jurisdiction over water uses within the basin. Anderson, 736 F.2d at 1365. The State may not use judicial powers to exercise its administrative powers. See e.g., Greater Los Angeles Council on Deafness, Inc. v. Cmty. Television of S. California, 719 F.2d 1017, 1023 (9th Cir. 1983) (holding District Courts lack authority to direct agency rulemaking).

The solution is legislative action or rulemaking. Statutory authority is provided to set aside or withdraw water subject to public notice and hearing.

> 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.

RCW 90.54.050 (Addendum 14—15). The State has used this authority to adopt rules requiring mitigation for new groundwater uses. See e.g., WAC 173-539A-040 (Addendum 11—12) (Upper Kittitas Groundwater Rule).

The power to issue water rights was confirmed by this court. Anderson *supra*. The issuance of water rights is an administrative function. Changes to statutes and rules governing the issuance of water rights requires public notice and participation. The Government Parties seem to believe they are not bound by final judgment or this Court's prior decision. The law of this case holds that state law controls the issuance of *de minimis* rights. The Government Parties cannot negotiate those laws out of existence. The Order Modifying Prior Orders should be reversed.

3. The Failure to Give Notice that Decreed Interests of Non-Party Water Users Were Placed at Issue for Thirteen Years and the Resulting Evidentiary Prejudice, Violate the Requirements of Due Process.

If this court declines to reverse the District Court's Order Modifying Prior Orders based on the finality of judgment, it should do so based on the deprivation of Appellants' due process rights. At a minimum, due process requires notice and a meaningful opportunity to be heard. Goss v. Lopez, 419 U.S. 565, 579, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975). The first step in a procedural due process analysis

is to determine whether a liberty or property interest is at stake. Board of Regents v. Roth, 408 U.S. 564, 570–71, 92 S.Ct. 2701, 2705–06, 33 L.Ed.2d 548 (1972). Water rights constitute an interest in real property. Foster v. Sunnyside Valley Irr. Dist., 102 Wn.2d 395, 400, 687 P.2d 841, 844 (1984) citing Ickes v. Fox, 300 U.S. 82, 94, 95, 57 S.Ct. 412, 416, 417, 81 L.Ed. 525 (1937). The public's interest in finality of a judgment is also a protected interest. Oregon *supra*. The first step is satisfied. Appellants are entitled to due process.

The second step in the procedural due process inquiry is to determine whether the interest holder received adequate notice and a meaningful opportunity to be heard. Metro. Water Dist. of S. California v. United States, 628 F. Supp. 1018, 1024 (S.D. Cal. 1986). In 2006, the District Court ordered the Government Parties to reexamine adjudicated facts specifically directed at determining whether *de minimis* uses should be subject to decree enforcement. Six years later, the USGS issued a report. Notice was not given to affected property owners until September of 2019. 2-ER-146—150.

The thirteen-year delay in providing notice is not merely a technical violation. The Government Parties spent that time developing evidence and laying the legal groundwork in support of modifying adjudicated findings of fact that protect property owners *de minimis* uses from enforcement. The USGS's reports were "prepared in cooperation with the United States Bureau of Indian Affairs and the

Washington State Department of Ecology." 3-ER-237. The extent of the Government Parties' involvement in preparing the evidence presented to this court is unknown.

No opportunity has been provided to examine the evidence or conduct discovery. In all litigation, a parties' ability to effectively examine evidence becomes more difficult with the passage of time. "Evidentiary prejudice" refers to the effect of unreasonable delay on a party's ability to present a full and fair defense due to the passage of time, loss of records, fading memories, unavailability of witnesses, etc. See Ultimax Cement Mfg. Corp. v. CTS Cement Mfg. Corp., 856 F. Supp. 2d 1136, 1154 (C.D. Cal. 2012) citing A.C. Aukerman Co. v. R.L. Chaides Const. Co., 960 F.2d 1020, 1035 (Fed. Cir. 1992), abrogated by SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC, 137 S. Ct. 954, 197 L. Ed. 2d 292 (2017). Both Ultimax and Aukerman, deal with patent litigation where evidentiary prejudice is presumed when a party with knowledge of facts giving rise to litigation delays for 6 years or more. Id. The same principle is applicable here. The matter was already in litigation when the Government Parties proposed reexamining adjudicated fact in 2006. The USGS report offered in support of modifying those findings was available in 2012. That evidence has never been examined on the record. Even if Appellants are given that opportunity on remand their ability to do so fairly has been irreparably prejudiced by the passage of time.

There is also the issue of economic delay which "may arise where a defendant and possibly others will suffer the loss of monetary investments or incur damages which likely would have been prevented by earlier suit." Id. For over forty years since judgment was entered, property owners invested in property and improvements dependent on *de minimis* uses of water protected from enforcement. Since 2006 that activity occurred without notice that the District Court has ordered a reexamination of the adjudicated facts that support those investments. The Government Parties appear to believe that a simulated impact of 18 GPM is evidence of extreme hardship. It cannot reasonably be argued that subjecting existing domestic use of water to curtailment has no effect on those economic interests. The Government Parties must have known that more than a decade in delayed notice would injure those property interests.

In April of 2015, the District Court reviewed the "extensive briefing" and ordered that affected property owners be given notice and an opportunity to participate in a hearing to find facts. 2-ER-225. More than four years later, affected property owners were given less than three months to object to evidence and proposals the Government Parties and the USGS spent thirteen years developing. No hearing was conducted. The withholding of notice and resulting evidentiary and economic prejudice has deprived Appellants of their right to due process. For that reason, the District Court's Order Modifying Prior Orders should be reversed.

III. CONCLUSION

The Government Parties were represented at trial. They knew the Tribe sought reserved rights to more water than the Chamokane Basin can produce. They knew that beneficial use of the Tribe's consumptive rights must come at the expense of the Tribe's non-consumptive instream flow rights. They also knew that increased groundwater use on non-tribal land in the Basin would impact stream flow. Knowing this they successfully advocated to exempt *de minimis* uses in the Basin from enforcement under the decree by offering evidence that the impact of such uses would be "negligible," "minimal," and "difficult to show."

Events proved them right. After years of study the USGS confirmed that decades of *de minimis* uses have impacted stream flow in amounts orders of magnitude less than anyone's ability to measure. No effort was made to quantify the impact of the Tribe's growing consumptive uses on stream flow. The Government Parties argue the USGS study is evidence of changed circumstances. But nothing has changed, the effect of *de minimis* uses remains "negligible," "minimal," and 'difficult to show.'

In requesting modification of the forty-two-year-old judgment, the Government Parties consciously avoided Rule 60, characterizing their so-called "settlement agreement" as a consent decree in hopes of getting it reviewed under a far more liberal standard. However, implementation of their agreement requires

relief from judgment. No authority gives parties the power to grant themselves relief from judgment, that power resides only with the courts.

Despite the fact that no motion was filed, or intended, the District Court granted relief from judgment under Rule 60(b)(5). In doing so, the District Court abused its discretion. After forty-two years, the Government Parties cannot timely show that the effect of *de minimis* uses was unanticipated or has caused extreme and unexpected hardship. The District Court did not make these findings and the record is devoid of supporting evidence that is substantial.

The record shows a need to clarify enforcement authority over members of the public that use water in excess of their right to do so. The settled law of the case confirms that the State of Washington exercises jurisdiction to regulate water rights on non-reservation land. As the Government Parties Agreement demonstrates, this issue, and the anticipated impacts of *de minimis* uses, can easily be addressed without modification of the final judgment. The State agreed to delegate authority to the Water Master to enforce the decree against cheaters, and to grant the Tribe a new water right that provides many times more water that was is required to mitigate the simulated impact of *de minimis* uses in the foreseeable future.

If, in the future, it can be shown that *de minimis* use of water for domestic purposes is having a material effect on senior water rights, the State can exercise its legislative or regulatory power through rulemaking. What the State cannot do

is trade away statutory rights to use water in consideration for a negotiated agreement to modify a final judgment.

Compounding abuses by the District Court and Government Parties is the lack of notice to affected property owners. The law of the case confirmed property owners' statutory right to make *de minimis* use of water. That right was put at issue in this litigation in 2006. Thirteen years later non-party property owners were given less than 3 months to protect their interests. This willful, and seemingly calculated, delay effectively deprived property owners of a meaningful opportunity to be heard. Remand would not cure this constitutional violation because of manifest evidentiary and economic prejudice. After half a century many of the original witnesses are dead. Even the USGS study is well over a decade old. All of this time, property owners have bought, sold and devised property and improvements in reliance on their established right to make *de minimis* use of water. It is fundamentally unfair to wait thirteen years before telling affected property owners that their protected rights are at issue in litigation and then give them 3 months to mount an objection.

DATED this 19th day of November, 2021

PETER G. SCOTT, LAW OFFICES, PLLC

/s/ Peter G. Scott

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

Statement of Related Cases – Circuit Court Rule 28-2.6

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

Certificate of Compliance with Circuit Court Rule 32-1

This Brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The Brief is 12,560 words and 45pages, excluding the portions exempted by Fed. R. App. P. 32(f) if applicable. The brief's size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Certificate of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the 19th day of November, 2021.

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

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 21-35502

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This brief contains 12,560 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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*(use "*s/[typed name]*" to sign electronically-filed documents)*

(Separation Page)

CASE NO. 21-35502

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPOKANE INDIAN TRIBE; UNITED STATES OF AMERICA
PLAINTIFFS, APPELLEES

v.

DAN SULGROVE; et al.,
OBJECTOR, APPELLANTS

v.

DAWN MINING CORP; et al.,
DEFENDANTS, APPELLEES

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

ADDENDUM

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In 2009, the House agreed to a resolution reported from the Committee on the Judiciary and called up as a question of the privileges of the House impeaching Federal district judge Samuel B. Kent for high crimes and misdemeanors specified in 4 articles of impeachment, some of them addressing allegations on which the judge had been convicted in a Federal criminal trial (June 19, 2009, p. __).

A resolution offered from the floor to permit the Delegate of the District of Columbia to vote on the articles of impeachment was held not to constitute a question of the privileges of the House under rule IX (Dec. 18, 1998, p. 27825). To a privileged resolution of impeachment, an amendment proposing instead censure, which is not privileged, was held not germane (Dec. 19, 1998, p. 28100).

For further discussion of impeachment proceedings, see §§ 601–620, *infra*; § 31, *supra*, and Deschler, ch. 14.

ARTICLE III.

§ 177. The judges, their terms, and compensation.

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

§ 178. Extent of the judicial power.

SECTION 2. [1]The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more

States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

§ 178a. Decisions of the Court on legislative standing.

Decisions of the Supreme Court involving legislative standing to bring cases in Federal court include Coleman *v.* Miller, 307 U.S. 433 (1939); Goldwater *v.* Carter, 444 U.S. 996 (1979); Allen *v.* Wright, 468 U.S. 737 (1984); Whitmore *v.* Arkansas, 495 U.S. 149 (1990); and, most recently, Raines *v.* Byrd, 521 U.S. 811 (1997), holding that Member plaintiffs must have alleged a "personal stake" in having an actual injury redressed, rather than an "institutional injury" that is "abstract and widely dispersed." See also the 11th amendment (§ 218, *infra*).

§ 179. Original and appellate jurisdiction of the Supreme Court.

[2]In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

§ 180. Places of trial of crimes by jury.

[3]The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

§ 181. Treason against the United States.

SECTION 3. [1]Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No

Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person Attainted.

§ 182. Punishment for treason.

ARTICLE IV.

SECTION 1. Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

§ 183. Each State to give credit to acts, records, etc., of other States.

SECTION 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

§ 184. Privileges and immunities of citizens.

[2] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

§ 185. Extradition for treason, felony, or other crime.

[3] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but

§ 186. Persons held to service or labor.

1961—Pars. (4), (5). Pub. L. 87–189 redesignated par. (5) as (4) and repealed former par. (4) which provided that appeals from the Supreme Court of Puerto Rico should be taken to the Court of Appeals for the First Circuit. See section 1258 of this title.

1959—Pars. (4) to (6). Pub. L. 86–3 redesignated pars. (5) and (6) as (4) and (5), respectively, and repealed former par. (4) which provided that appeals from the Supreme Court of Hawaii should be taken to the Court of Appeals for the Ninth Circuit. See section 91 of this title and notes thereunder.

1958—Par. (2). Pub. L. 85–508 redesignated par. (3) as (2) and repealed former par. (2) which provided that appeals from the District Court for the Territory of Alaska or any division thereof should be taken to the Court of Appeals for the Ninth Circuit. See section 81A of this title which establishes a United States District Court for the State of Alaska.

Pars. (3) to (7). Pub. L. 85–508 redesignated pars. (4) to (7) as (3) to (6), respectively.

1951—Par. (7). Act Oct. 31, 1951, added par. (7).

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1959 AMENDMENT

Amendment by Pub. L. 86–3 effective on admission of State of Hawaii into the Union, see note set out under section 91 of this title. Admission of Hawaii into the Union was accomplished Aug. 25, 1959, on issuance of Proc. No. 3309, Aug. 21, 1959, 25 F.R. 6868, 73 Stat. c74, as required by sections 1 and 7(c) of Pub. L. 86–3, Mar. 18, 1959, 73 Stat. 4, set out as notes preceding section 491 of Title 48, Territories and Insular Possessions.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85–508 effective Jan. 3, 1959, on admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85–508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

TERMINATION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE

For termination of the United States District Court for the District of the Canal Zone at end of the "transition period", being the 30-month period beginning Oct. 1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 2101 and 2201 to 2203 of Pub. L. 96–70, title II, Sept. 27, 1979, 93 Stat. 493, formerly classified to sections 3831 and 3841 to 3843, respectively, of Title 22, Foreign Relations and Intercourse.

§ 1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from a final decision of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands, in any civil action arising under, or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents or plant variety protection;

(2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title;

(3) of an appeal from a final decision of the United States Court of Federal Claims;

(4) of an appeal from a decision of—

(A) the Board of Patent Appeals and Interferences of the United States Patent and Trademark Office with respect to patent applications and interferences, at the instance of an applicant for a patent or any party to a patent interference, and any such appeal shall waive the right of such applicant or party to proceed under section 145 or 146 of title 35;

(B) the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office or the Trademark Trial and Appeal Board with respect to applications for registration of marks and other proceedings as provided in section 21 of the Trademark Act of 1946 (15 U.S.C. 1071); or

(C) a district court to which a case was directed pursuant to section 145, 146, or 154(b) of title 35;

(5) of an appeal from a final decision of the United States Court of International Trade;

(6) to review the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337);

(7) to review, by appeal on questions of law only, findings of the Secretary of Commerce under U.S. note 6 to subchapter X of chapter 98 of the Harmonized Tariff Schedule of the United States (relating to importation of instruments or apparatus);

(8) of an appeal under section 71 of the Plant Variety Protection Act (7 U.S.C. 2461);

(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5;

(10) of an appeal from a final decision of an agency board of contract appeals pursuant to section 7107(a)(1) of title 41;

(11) of an appeal under section 211 of the Economic Stabilization Act of 1970;

(12) of an appeal under section 5 of the Emergency Petroleum Allocation Act of 1973;

(13) of an appeal under section 506(c) of the Natural Gas Policy Act of 1978; and

(14) of an appeal under section 523 of the Energy Policy and Conservation Act.

(b) The head of any executive department or agency may, with the approval of the Attorney General, refer to the Court of Appeals for the Federal Circuit for judicial review any final decision rendered by a board of contract appeals pursuant to the terms of any contract with the

United States awarded by that department or agency which the head of such department or agency has concluded is not entitled to finality pursuant to the review standards specified in section 7107(b) of title 41. The head of each executive department or agency shall make any referral under this section within one hundred and twenty days after the receipt of a copy of the final appeal decision.

(c) The Court of Appeals for the Federal Circuit shall review the matter referred in accordance with the standards specified in section 7107(b) of title 41. The court shall proceed with judicial review on the administrative record made before the board of contract appeals on matters so referred as in other cases pending in such court, shall determine the issue of finality of the appeal decision, and shall, if appropriate, render judgment thereon, or remand the matter to any administrative or executive body or official with such direction as it may deem proper and just.

(Added Pub. L. 97–164, title I, §127(a), Apr. 2, 1982, 96 Stat. 37; amended Pub. L. 98–622, title II, §205(a), Nov. 8, 1984, 98 Stat. 3388; Pub. L. 100–418, title I, §1214(a)(3), Aug. 23, 1988, 102 Stat. 1156; Pub. L. 100–702, title X, §1020(a)(3), Nov. 19, 1988, 102 Stat. 4671; Pub. L. 102–572, title I, §102(c), title IX, §902(b)(1), Oct. 29, 1992, 106 Stat. 4507, 4516; Pub. L. 106–113, div. B, §1000(a)(9) [title IV, §§4402(b)(2), 4732(b)(14)], Nov. 29, 1999, 113 Stat. 1536, 1501A–560, 1501A–584; Pub. L. 111–350, §5(g)(5), Jan. 4, 2011, 124 Stat. 3848; Pub. L. 112–29, §§7(c)(2), 19(b), Sept. 16, 2011, 125 Stat. 314, 331.)

AMENDMENT OF SUBSECTION (a)(4)(A)

Pub. L. 112–29, §7(c)(2), (e), Sept. 16, 2011, 125 Stat. 314, 315, provided that, effective upon the expiration of the 1-year period beginning on Sept. 16, 2011, and applicable to proceedings commenced on or after that effective date, subsection (a)(4)(A) of this section is amended to read as follows: "the Patent Trial and Appeal Board of the United States Patent and Trademark Office with respect to a patent application, derivation proceeding, reexamination, post-grant review, or inter partes review under title 35, at the instance of a party who exercised that party's right to participate in the applicable proceeding before or appeal to the Board, except that an applicant or a party to a derivation proceeding may also have remedy by civil action pursuant to section 145 or 146 of title 35; an appeal under this subparagraph of a decision of the Board with respect to an application or derivation proceeding shall waive the right of such applicant or party to proceed under section 145 or 146 of title 35;". See 2011 Amendment notes below.

REFERENCES IN TEXT

The Harmonized Tariff Schedule of the United States, referred to in subsec. (a)(7), is not set out in the Code. See Publication of Harmonized Tariff Schedule note set out under section 1202 of Title 19, Customs Duties.

Section 211 of the Economic Stabilization Act of 1970, referred to in subsec. (a)(11), is section 211 of Pub. L. 91–379, title II, formerly set out as an Economic Stabilization Program note under section 1904 of Title 12, Banks and Banking.

Section 5 of the Emergency Petroleum Allocation Act of 1973, referred to in subsec. (a)(12), is section 5 of Pub. L. 93–159, which was classified to section 754 of Title 15, Commerce and Trade, and was omitted from the Code.

Section 506(c) of the Natural Gas Policy Act of 1978, referred to in subsec. (a)(13), is classified to section 3416(c) of Title 15.

Section 523 of the Energy Policy and Conservation Act, referred to in subsec. (a)(14), is classified to section 6393 of Title 42, The Public Health and Welfare.

AMENDMENTS

2011—Subsec. (a)(1). Pub. L. 112–29, §19(b), amended par. (1) generally. Prior to amendment, par. (1) read as follows: "of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights, exclusive rights in mask works, or trademarks and no other claims under section 1338(a) shall be governed by sections 1291, 1292, and 1294 of this title;".

Subsec. (a)(4)(A). Pub. L. 112–29, §7(c)(2), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: "the Board of Patent Appeals and Interferences of the United States Patent and Trademark Office with respect to patent applications and interferences, at the instance of an applicant for a patent or any party to a patent interference, and any such appeal shall waive the right of such applicant or party to proceed under section 145 or 146 of title 35;".

Subsec. (a)(10). Pub. L. 111–350, §5(g)(5)(A), substituted "section 7107(a)(1) of title 41" for "section 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)(1))".

Subsec. (b). Pub. L. 111–350, §5(g)(5)(B), substituted "section 7107(b) of title 41" for "section 10(b) of the Contract Disputes Act of 1978 (41 U.S.C. 609(b))".

Subsec. (c). Pub. L. 111–350, §5(g)(5)(C), substituted "section 7107(b) of title 41" for "section 10(b) of the Contract Disputes Act of 1978".

1999—Subsec. (a)(4)(A). Pub. L. 106–113, §1000(a)(9) [title IV, §4732(b)(14)(A)], inserted "United States" before "Patent and Trademark".

Subsec. (a)(4)(B). Pub. L. 106–113, §1000(a)(9) [title IV, §4732(b)(14)(B)], substituted "Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office" for "Commissioner of Patents and Trademarks".

Subsec. (a)(4)(C). Puh. L. 106–113, §1000(a)(9) [title IV, §4402(b)(2)], substituted "145, 146, or 154(b)" for "145 or 146".

1992—Subsec. (a)(3). Pub. L. 102–572, §902(b)(1), substituted "United States Court of Federal Claims" for "United States Claims Court".

Subsec. (a)(11) to (14). Pub. L. 102–572, §102(c), added pars. (11) to (14).

1988—Subsec. (a)(1). Pub. L. 100–702 inserted ", exclusive rights in mask works," after "copyrights".

Subsec. (a)(7). Pub. L. 100–418 substituted "U.S. note 6 to subchapter X of chapter 98 of the Harmonized Tariff Schedule of the United States" for "headnote 6 to schedule 8, part 4, of the Tariff Schedules of the United States".

1984—Subsec. (a)(4)(A). Pub. L. 98–622 substituted "Patent Appeals and" for "Appeals or the Board of Patent".

EFFECTIVE DATE OF 2011 AMENDMENT

Amendment by section 7(c)(2) of Pub. L. 112–29 effective upon the expiration of the 1-year period beginning on Sept. 16, 2011, and applicable to proceedings commenced on or after that effective date, with certain exceptions, see section 7(e) of Pub. L. 112–29, set out as a note under section 6 of Title 35, Patents.

Pub. L. 112–29, §19(e), Sept. 16, 2011, 125 Stat. 333, provided that: "The amendments made by this section [en-

acting section 1454 of this title and section 299 of Title 35, Patents, and amending this section and section 1338 of this title] shall apply to any civil action commenced on or after the date of the enactment of this Act [Sept. 16, 2011]."

EFFECTIVE DATE OF 1999 AMENDMENT

Amendment by section 1000(a)(9) [title IV, §4402(b)(2)] of Pub. L. 106–113 effective on date that is 6 months after Nov. 29, 1999, and, except for design patent application filed under chapter 16 of Title 35, applicable to any application filed on or after such date, see section 1000(a)(9) [title IV, §4405(a)] of Pub. L. 106–113, set out as a note under section 154 of Title 35, Patents.

Amendment by section 1000(a)(9) [title IV, §4732(b)(14)] of Pub. L. 106–113 effective 4 months after Nov. 29, 1999, see section 1000(a)(9) [title IV, §4731] of Pub. L. 106–113, set out as a note under section 1 of Title 35, Patents.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by section 102(c) of Pub. L. 102–572 effective Jan. 1, 1993, see section 1101(a) of Pub. L. 102–572, set out as a note under section 905 of Title 2, The Congress.

Amendment by section 902(b)(1) of Pub. L. 102–572 effective Oct. 29, 1992, see section 911 of Pub. L. 102–572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–418 effective Jan. 1, 1989, and applicable with respect to articles entered on or after such date, see section 1217(b)(1) of Pub. L. 100–418, set out as an Effective Date note under section 3001 of Title 19, Customs Duties.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–622 applicable to all United States patents granted before, on, or after Nov. 8, 1984, and to all applications for United States patents pending on or filed after that date, except as otherwise provided, see section 106 of Pub. L. 98–622, set out as a note under section 103 of Title 35, Patents.

Amendment by Pub. L. 98–622 effective three months after Nov. 8, 1984, see section 207 of Pub. L. 98–622, set out as a note under section 41 of Title 35.

EFFECTIVE DATE

Section effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as an Effective Date of 1982 Amendment note under section 171 of this title.

ABOLITION OF TEMPORARY EMERGENCY COURT OF APPEALS

Section 102(d), (e) of Pub. L. 102–572 provided that:

"(d) ABOLITION OF COURT.—The Temporary Emergency Court of Appeals created by section 211(b) of the Economic Stabilization Act of 1970 [Pub. L. 91–379, formerly set out as a note under section 1904 of Title 12, Banks and Banking] is abolished, effective 6 months after the date of the enactment of this Act [Oct. 29, 1992].

"(e) PENDING CASES.—(1) Any appeal which, before the effective date of abolition described in subsection (d), is pending in the Temporary Emergency Court of Appeals but has not been submitted to a panel of such court as of that date shall be assigned to the United States Court of Appeals for the Federal Circuit as though the appeal had originally been filed in that court.

"(2) Any case which, before the effective date of abolition described in subsection (d), has been submitted to a panel of the Temporary Emergency Court of Appeals and as to which the mandate has not been issued as of that date shall remain with that panel for all purposes and, notwithstanding the provisions of sections 291 and 292 of title 28, United States Code, that panel shall be assigned to the United States Court of Appeals for the Federal Circuit for the purpose of deciding such case."

TERMINATION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE

For termination of the United States District Court for the District of the Canal Zone at end of the "transition period", being the 30-month period beginning Oct. 1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 2101 and 2201 to 2203 of Pub. L. 96–70, title II, Sept. 27, 1979, 93 Stat. 493, formerly classified to sections 3831 and 3841 to 3843, respectively, of Title 22, Foreign Relations and Intercourse.

§ 1296. Review of certain agency actions

(a) JURISDICTION.—Subject to the provisions of chapter 179, the United States Court of Appeals for the Federal Circuit shall have jurisdiction over a petition for review of a final decision under chapter 5 of title 3 of—

(1) an appropriate agency (as determined under section 454 of title 3);

(2) the Federal Labor Relations Authority made under part D of subchapter II of chapter 5 of title 3, notwithstanding section 7123 of title 5; or

(3) the Secretary of Labor or the Occupational Safety and Health Review Commission, made under part C of subchapter II of chapter 5 of title 3.

(b) FILING OF PETITION.—Any petition for review under this section must be filed within 30 days after the date the petitioner receives notice of the final decision.

(Added Pub. L. 104–331, §3(a)(1), Oct. 26, 1996, 110 Stat. 4068.)

PRIOR PROVISIONS

A prior section 1296, added Pub. L. 97–164, title I, §127(a), Apr. 2, 1982, 96 Stat. 39, related to precedence of cases in United States Court of Appeals for the Federal Circuit, prior to repeal by Pub. L. 98–620, title IV, §402(29)(C), Nov. 8, 1984, 98 Stat. 3359.

EFFECTIVE DATE

Section 3(d) of Pub. L. 104–331 provided that: "The amendments made by this section [enacting this section and sections 1413 and 3901 to 3908 of this title and amending sections 1346 and 2402 of this title] shall take effect on October 1, 1997."

CHAPTER 85—DISTRICT COURTS; JURISDICTION

1962—Pub. L. 87–748, §1(b), Oct. 5, 1962, 76 Stat. 744, added item 1361.

1958—Pub. L. 85–554, §4, July 25, 1958, 72 Stat. 415, inserted "costs" in items 1331 and 1332.

1953—Act Aug. 15, 1953, ch. 505, §3, 67 Stat. 589, added item 1360.

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605–1607 of this title.

(Added Pub. L. 94–583, §2(a), Oct. 21, 1976, 90 Stat. 2891.)

EFFECTIVE DATE

Section effective 90 days after Oct. 21, 1976, see section 8 of Pub. L. 94–583, set out as a note under section 1602 of this title.

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, ch. 646, 62 Stat. 930; Pub. L. 85–554, §1, July 25, 1958, 72 Stat. 415; Pub. L. 94–574, §2, Oct. 21, 1976, 90 Stat. 2721; Pub. L. 96–486, §2(a), Dec. 1, 1980, 94 Stat. 2369.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §41(1) (Mar. 3, 1911, ch. 231, §24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, §1, 48 Stat. 775; Aug. 21, 1937, ch. 726, §1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Jurisdiction of federal questions arising under other sections of this chapter is not dependent upon the amount in controversy. (See annotations under former section 41 of title 28, U.S.C.A., and 35 C.J.S., p. 833 et seq., §§30–43. See, also, reviser's note under section 1332 of this title.)

Words "wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs," were added to conform to rulings of the Supreme Court. See construction of provision relating to jurisdictional amount requirement in cases involving a Federal question in *United States v. Sayward*, 16 S.Ct. 371, 160 U.S. 493, 40 L.Ed. 508; *Fishback v. Western Union Tel. Co.*, 16 S.Ct. 506, 161 U.S. 96, 40 L.Ed. 630; and *Halt v. Indiana Manufacturing Co.*, 1900, 20 S.Ct. 272, 176 U.S. 68, 44 L.Ed. 374.

Words "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity" to conform with Rule 2 of the Federal Rules of Civil Procedure.

Words "or treaties" were substituted for "or treaties made, or which shall be made under their authority," for purposes of brevity.

The remaining provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1332, 1341, 1342, 1345, 1354, and 1359 of this title.

Changes were made in arrangement and phraseology.

AMENDMENTS

1980—Pub. L. 96–486 struck out "; amount in controversy; costs" in section catchline, struck out minimum amount in controversy requirement of $10,000 for original jurisdiction in federal question cases which necessitated striking the exception to such required minimum amount that authorized original jurisdiction in actions brought against the United States, any agency thereof, or any officer or employee thereof in an official capacity, struck out provision authorizing the district court except where express provision therefore was made in a federal statute to deny costs to a plaintiff and in fact impose such costs upon such plaintiff where plaintiff was adjudged to be entitled to recover less than the required amount in controversy, computed without regard to set-off or counterclaim and exclusive of interests and costs, and struck out existing subsection designations.

1976—Subsec. (a). Pub. L. 94–574 struck out $10,000 jurisdictional amount where action is brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

1958—Pub. L. 85–554 included costs in section catchline, designated existing provisions as subsec. (a), substituted "$10,000" for "$3,000", and added subsec. (b).

EFFECTIVE DATE OF 1980 AMENDMENT; APPLICABILITY

Pub. L. 96–486, §4, Dec. 1, 1980, 94 Stat. 2370, provided: "This Act [amending this section and section 2072 of Title 15, Commerce and Trade, and enacting provisions set out as a note under section 1 of this title] shall apply to any civil action pending on the date of enactment of this Act [Dec. 1, 1980]."

EFFECTIVE DATE OF 1958 AMENDMENT

Pub. L. 85–554, §3, July 25, 1958, 72 Stat. 415, provided that: "This Act [amending this section and sections 1332 and 1345 of this title] shall apply only in the case of actions commenced after the date of the enactment of this Act [July 25, 1958]."

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court

FEDERAL RULES

OF

CIVIL PROCEDURE

DECEMBER 1, 2019

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HOUSE OF REPRESENTATIVES

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 59. New Trial; Altering or Amending a Judgment

(a) IN GENERAL.

(1) *Grounds for New Trial.* The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) *Further Action After a Nonjury Trial.* After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) TIME TO FILE A MOTION FOR A NEW TRIAL. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) TIME TO SERVE AFFIDAVITS. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) NEW TRIAL ON THE COURT'S INITIATIVE OR FOR REASONS NOT IN THE MOTION. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

Rule 60. Relief from a Judgment or Order

(a) CORRECTIONS BASED ON CLERICAL MISTAKES; OVERSIGHTS AND OMISSIONS. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) TIMING AND EFFECT OF THE MOTION.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) OTHER POWERS TO GRANT RELIEF. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) BILLS AND WRITS ABOLISHED. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 61. Harmless Error

Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

(As amended Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) AUTOMATIC STAY. Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.

(b) STAY BY BOND OR OTHER SECURITY. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or other security.

(c) STAY OF AN INJUNCTION, RECEIVERSHIP, OR PATENT ACCOUNTING ORDER. Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or receivership; or

Washington Administrative Code
Title 173. Ecology, Department of
Chapter 173-539a. **Upper Kittitas Groundwater Rule**

WAC 173-539A-040

173-539A-040. Withdrawal of unappropriated water in upper Kittitas County.

Currentness

(1) Beginning on the effective date of this **rule**, all public **groundwaters** within the **upper Kittitas** County are withdrawn from appropriation. No new appropriation or withdrawal of groundwater may occur, including those exempt from permitting, except:

(a) Uses of groundwater for a structure for which a building permit is granted and the building permit application vested prior to July 16, 2009; and

(b) Uses determined to be water budget neutral under WAC 173-539A-050.

(2) The exception for water used at structures provided in subsection (1)(a) of this section shall not apply or shall cease to apply if the structure is not completed and a water system that uses the new appropriation is not operable within the time allowed under the building permit. This shall not in any case exceed three years from the date the permit application vested. The exception is to avoid potential hardship and does not reflect ecology's view on when the priority date for a permit-exempt water right is established.

(3) Water to serve a parcel that is part of an existing group use is not a new appropriation or withdrawal if the water use to serve such parcel began within five years of the date water was first beneficially used on any parcel in the group, if the first use was prior to July 16, 2009, and the group use remains within the limit of the permit exemption.

Credits

Statutory Authority: RCW 90.54.050 and chapter 43.27A RCW. WSR 11-01-163 (Order 08-12), S 173-539A-040, filed 12/22/10, effective 1/22/11.

Current with amendments adopted through the 21-18 Washington State Register, dated September 15, 2021.Some sections may be more current. Please consult the credit on each document for more information.

WAC 173-539A-040, WA ADC 173-539A-040

End of Document

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.

[**2003 c 307 § 1**; **1987 c 109 § 108**; **1947 c 122 § 1**; **1945 c 263 § 5**; Rem. Supp. 1947 § 7400-5.]

NOTES:

Purpose—Short title—Construction—Rules—Severability—Captions—1987 c 109: See notes following RCW **43.21B.001**.

West's Revised Code of Washington Annotated
Title 90. Water Rights--Environment (Refs & Annos)
Chapter 90.54. Water Resources Act of 1971 (Refs & Annos)

West's RCWA 90.54.050

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

Currentness

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.

Credits

[1997 c 439 § 2; 1997 c 32 § 3; 1988 c 47 § 7; 1971 ex.s. c 225 § 5.]

OFFICIAL NOTES

Reviser's note: This section was amended by 1997 c 32 § 3 and by 1997 c 439 § 2, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

WAC 173-563-015--Validity--1997 c 439: "WAC 173-563-015 as it existed prior to July 27, 1997, is void." [1997 c 439 § 1.]

Application--1988 c 47: See note following RCW 90.54.030.

Notes of Decisions (2)

West's RCWA 90.54.050, WA ST 90.54.050
Current with all effective legislation of the 2021 Regular Session of the Washington Legislature.

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