

Agreement on a Program to Mitigate for Certain Permit-Exempt Well Water Uses in Chamokane Creek under *U.S. v. Anderson*

I. Introduction

The Spokane Tribe, the United States (through the Bureau of Indian Affairs) (BIA), and the State of Washington (through the Department of Ecology), collectively the Parties, have developed this Agreement on a Program to Mitigate for Certain Permit-Exempt Well Water Uses in Chamokane Creek under *U.S. v. Anderson* (referred to in this document as the “Agreement”) to mitigate for certain current and future permit-exempt well water uses in Chamokane Creek basin, improve stream conditions for fish, and address provisions of a recent order in the *United States v. Anderson* case in the federal court in Spokane (*Anderson*).

One element of the Mitigation Program (“Program”) is to construct, operate, and maintain a bank storage mitigation well using water from the Spokane River conveyed through a pipeline to augment flows in Chamokane Creek.

The mitigation well will mitigate for the current and future new residential domestic permit-exempt well uses and the current stockwater uses and future permit-exempt stock water uses that meet the criteria of section III.B.1.a below.

The Program is designed to mitigate for impairment resulting from certain uses that are not currently regulated under the 1979 *Anderson* Decree. Dkt. No. 196. Uses that meet the criteria of the Program will be mitigated, and thus not affect the instream flow provisions of the Decree.

This Program also includes commitments to provide the ability to improve water temperature conditions in the lower reach of Chamokane Creek, below the Chamokane Falls, to alleviate high water temperatures in this reach that prevent fish from moving out of the Spokane River and up into Chamokane Creek during warm water periods. The Program provides the Tribe the flexibility to import large quantities of cooler, bank storage groundwater associated with the Spokane River into the lowest reach of Chamokane Creek (below the USGS gage) during critical, high temperature periods. Pumping this imported groundwater will not impair flows in Chamokane Creek as it comes from out-of-basin.

II. Background

The federal court in *Anderson* initially determined that certain water uses for domestic and stockwater purposes were *de minimis* uses and “should always be available;” thus these uses were neither adjudicated, nor incorporated into the regulatory framework established by the *Anderson* Decree. These unquantified uses can impair the Tribe’s senior water right during the low flow periods typical of the summer months in Chamokane Creek.

The federal court ordered the parties to the case to conduct a study, in part, to determine impacts of permit-exempt wells on the flows of Chamokane Creek. The Parties engaged the USGS to conduct the studies and develop a numerical model of the watershed to estimate the impacts. The USGS studies determined that the impact to flow in Chamokane Creek from the existing permit-exempt well uses is proportional to the use. The USGS studies concluded that the combined impacts to flow in Chamokane Creek at the USGS gage (below Chamokane Falls) from domestic permit-exempt well uses and stockwater uses are equivalent to 0.04 cubic feet per second (cfs), or 18 gallons per minute (gpm), on a steady state basis.

As with all numerical models, the outputs of the USGS model could vary depending on the model's construction. Also, there is increased domestic well water use in the summer than in the winter and spring (because of use to irrigate lawns and gardens). Thus, for the purposes of this Agreement, the target volume of mitigation water to offset the impacts from existing exempt-well uses included in the Program under III.B.1.a is 36 gpm for the irrigation season, April 1 to September 30.

Based on the USGS study and other analysis, the Parties understand the following regarding groundwater and surface water in Chamokane Creek:

Most years, the summer low flow in Chamokane Creek drops below the 27 cfs Minimum Flow established by the *Anderson* Court in 1988, Dkt. No. 360, for water rights granted by Ecology thereafter (Figure 1). Even during the winter months, flows can be below the stream flow thresholds. Exceedance curves for the USGS Gage below Chamokane Falls indicate that daily average streamflow will be above 27 cfs from late January until early to mid-May, 3 out of every 4 years (75% exceedance). See Figure 2.

There is a lag-time effect of pumping groundwater, in that the effect of pumping groundwater on flows in one year may be experienced in the following year. Thus it is difficult to address both the instantaneous effect of groundwater pumping on flow as well as longer-term relationships.

Given the frequency and complexity of regulation of junior water rights, it logically follows from this hydraulic lag-time relationship that groundwater is no longer available year-round in all years for appropriation. This agreement includes a program to mitigate current and future permit-exempt well uses that meet the criteria in section III.B.1.a below.

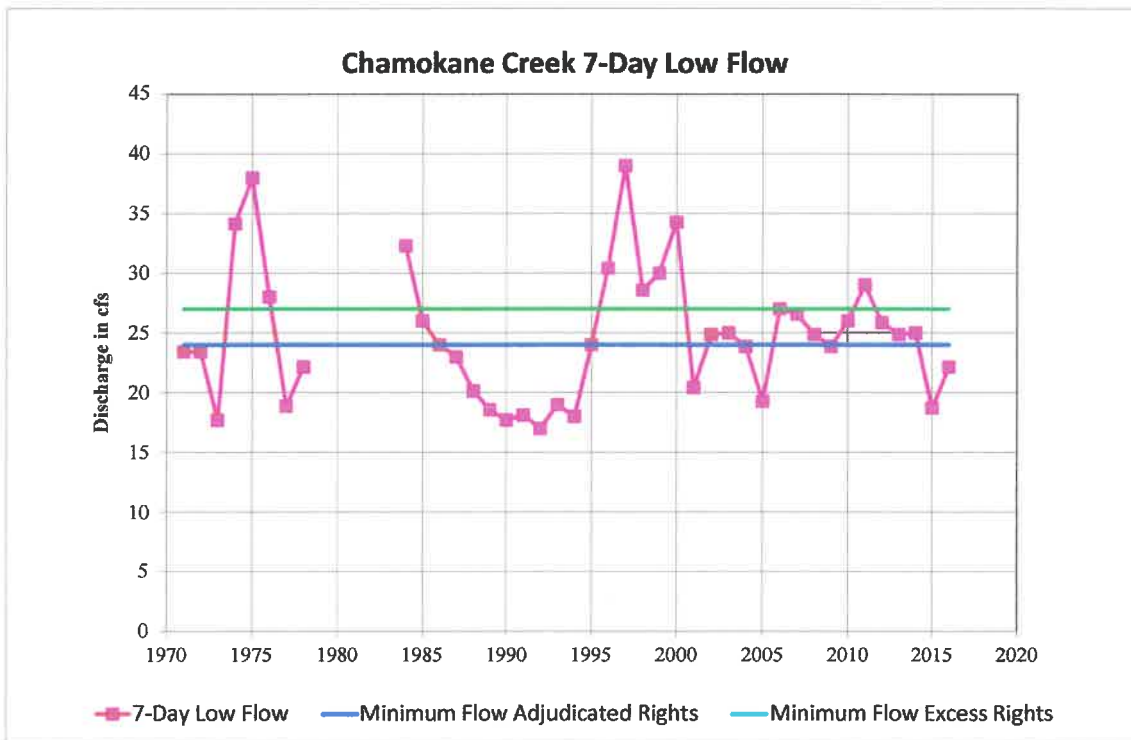


Figure 1: Summer Low Flows versus Minimum Flows in Chamokane Creek at USGS Gage

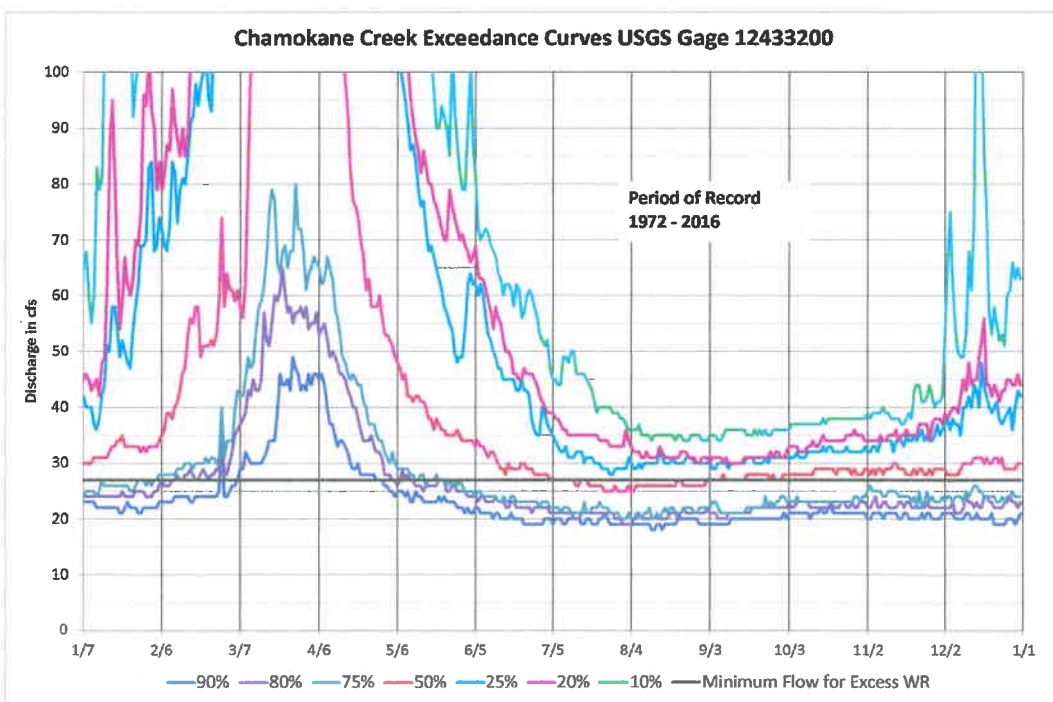


Figure 2: Chamokane Creek Exceedance Curves at USGS Gage 12433200

III. Mitigation Program

A. Actions addressing current uses that impact stream flows:

1. Ecology will cross deputize the Water Master with Ecology's regulatory authority over existing rights to carry out certain administrative actions and enhance the Water Master's review of the basin to look for improper water uses by persons under color of state law. As this will require that the Water Master spend some additional time in the basin depending on the year, Ecology will pay for the additional costs above the Water Master's current role. The delegation of authority from Ecology to the Water Master is detailed in Appendix A. This will require the *Anderson* court to approve a change in the Water Master's duties and funding. Accordingly, the Parties will move the Court to allow the *Anderson* Water Master to take this additional role to provide more comprehensive water management in Chamokane Basin (see section V.3).
2. The Parties have evaluated whether certain water uses exceed the scope of the relevant existing right or whether there are uses that have been relinquished or abandoned in part or in whole. The Parties have agreed to authorize the Water Master to commence appropriate administrative regulation or relinquishment actions when his expanded authority described in section III.A.1 is operative.
3. The Parties have investigated the four water right claims asserting a priority date senior to the Tribal water right in compliance with the requirements on page 2 of the April 2015 Order. The Parties have agreed to request the District Court in *Anderson* to allow them to first seek resolution of these claims through the Water Master once his expanded authority described in section III.A.1 is operative and the Water Master has the delegated authority to commence appropriate administrative relinquishment actions.
4. The Parties have developed a notice plan for their proposed change in the Court's prior ruling regarding the connectivity of the upper Chamokane basin groundwater to the rest of the basin in compliance with the requirements on page 3 of the April 2015 Order. The notice plan is described in Appendix B (see also section V.3).

B. Mitigation measures addressing current and future domestic and stock water uses:

1. **Mitigation Well.** This well will provide the ability to pump up to 80 gpm to Chamokane Creek. This well will mitigate for the current and future new residential domestic permit-exempt well uses and the current and future stock water use that meet the criteria of III.B.1.a. The Mitigation Well is described in Appendix C.
 - a. The criteria for eligibility for the Program are: stock-watering directly from the stream or its associated off-channel stock water tank or from any permit-exempt well, without storage impoundments, at the carrying capacity of the

land as historically practiced in the watershed; or any permit-exempt well providing domestic use not to exceed one acre-foot per year per domestic project including for both in-house use and irrigation of a lawn and/or of a noncommercial garden not exceeding one-half acre in area.

- b. The BIA will provide environmental compliance (NEPA) and archeological site evaluation (NHPA) services, and the Tribe will provide an easement without charge.
 - c. Ecology will pay the capital costs for the construction of this well and its associated pipeline. Ecology will also be responsible for all operational and maintenance costs for the mitigation well and pipeline.
 - d. Ecology or its designee will provide for the pumping of 36 gpm into Chamokane Creek to mitigate for eligible current domestic and stockwatering uses from April 1 to September 30, as described in Appendix C of this Agreement.
 - e. Ecology or its designee will increase the pumping rate in the future to mitigate for future eligible new uses, as described in Appendix C of this Agreement.
 - f. The estimate of costs utilized by the Parties in negotiating the Agreement is attached as Appendix E. The Parties reserve the right to reopen discussion on obligations to incur costs should the actual costs vary substantially from these estimates.
2. **Thermal Barrier Well.** This well will provide the ability to pump 1,100 gpm to the section of Chamokane Creek that experiences the greatest temperature problems. This approach provides benefit to the fisheries and will partially address Ecology's need to mitigate for current domestic uses that affect the tribal instream flow. The Thermal Barrier Well is described in Appendix D.
- a. The BIA will provide environmental compliance (NEPA) and archeological site evaluation (NHPA) services, and the Tribe will provide an easement without charge.
 - b. Ecology will pay for capital costs associated with construction of this well and its associated pipeline.
 - c. The Tribe will pay for operation and routine maintenance of this well. Ecology will pay for major repairs beyond normal operations and maintenance costs, and will seek and obtain funding to pay for well and pipeline replacement if it becomes necessary in the future.

3. The Water Master will monitor the Basin and notify the Parties if any use outside the criteria in section B.1.a above is likely occurring, and at that time the Parties will seek to find a means to address such water use that exceeds the above criteria for the Program.
4. When the Parties identify permit-exempt well uses in the Basin that do not meet the criteria in section B.1.a above or are outside the regulatory authority of the Water Master, including individuals irrigating commercial crops or commercially utilizing permit-exempt well water, the Parties will seek a means of regulating such uses in *Anderson* or through any other appropriate means.
5. The Parties agree to move the Court to change aspects of its earlier rulings that found small stock and domestic uses to be so small that they did not need to be included in the resolution of the claims in *Anderson*. The Parties shall request the Court to eliminate the prohibition against adjudication and regulation of these small water uses (see section V.3).

C. Elements for limiting future water use:

1. Enhanced scrutiny by the Water Master in section III.A.2 will help limit future use by allowing earlier detection of any entirely new water uses that should have a permit, expanded irrigation rights/uses, or use by permit exempt rights that exceed the criteria in section B.1.a above.
2. In any circumstance when a party or the Water Master learns that Stevens County has received an application requesting issuance of a building permit or other land use activity to allow any new non-domestic water uses, such party or the Water Master shall inform the other parties and the Water Master of such application. Upon receipt of such information, Parties may seek means of regulating potential water uses associated with such applications, in *Anderson* or through any other appropriate means.
3. Applications for any new water rights in the Chamokane Basin:
 - a. The Parties agree there is no excess groundwater or surface water available for year-round appropriation in the Chamokane Creek Basin. This conclusion is supported by and based upon the results of the 2012 USGS Scientific Investigations Report 2012-5224 (ECF No. 755-1) and the 1988 IFIM Study for Chamokane Creek¹, along with continuous USGS Chamokane Creek gauge data. Accordingly, Ecology has not issued any new permits in the basin since 1997.

¹ Barber, M.R., Scholz, A.T., and O'Laughlin, K. 1988. Predicting the Effect of Reduced Streamflow on Rainbow Trout, Brown Trout, and Sculpin Populations in Chamokane Creek using the Instream Flow Incremental Methodology (IFIM). Fisheries Technical Report No. 12. Upper Columbia United Tribes Fisheries Center, Eastern Washington University, Cheney.

- b. The IFIM study and subsequent scientific literature recognize the importance of preserving high channel maintenance flows during the spring freshet to remove sediment load and ensure adequate channel cleaning. These natural ecological processes ensure a healthy stream and promote productive trout habitat. The Parties now recognize the importance of these channel freshet flows, and the Parties agree to move the Court to adopt instream flows of 140 cfs minimum flow for the month of March and 151 cfs minimum flow for April (see section V.3). Any new excess interruptible surface water rights issued after the date of this agreement would be subject to a 27 cfs minimum flow for the other ten months of each year and these higher flows in March and April.
- c. Accordingly, if Ecology receives or is reviewing a pending application for any new water rights in the Chamokane Basin, Ecology agrees to consult with the Parties on how best to proceed prior to making a decision on such application.

IV. Monitoring and Adaptive Management

The purposes of monitoring and adaptive management for the Program are: 1) to monitor how much water is pumped into Chamokane Creek to mitigate for existing domestic and stockwater uses in the Program; and 2) to adjust the amount of mitigation water that needs to be pumped to a level that mitigates for qualifying future uses included in the Program.

The Monitoring and Adaptive Management activities are listed in Appendices C and D.

V. Other Provisions

- 1. In consideration for Ecology's agreement to take measures under this Agreement, including those related to mitigation, the United States and the Spokane Tribe agree to refrain from taking any action for regulation of permit-exempt groundwater users whose uses fall within the mitigation program eligibility criteria found in section III.B.1.a above.
 - a. The promise not to seek enforcement of the United States' and Tribe's senior water rights against small domestic and stock uses will begin on a contingent basis at the time that the three sovereigns have signed the agreement and will continue in place so long as:
 - 1. the Parties are making good faith efforts to achieve reasonable progress on the steps from agreement to the mitigation wells being operational²; and

² The currently anticipated steps after the agreement has been signed are currently understood to be and to occur in the following rough order: (1) the Court's entry of an order based on this Agreement; (2) completion of the environmental review and any necessary environmental permitting and archaeological site surveys; (3) completion of engineering and design for the pipeline and the power line; (4) procurement of any necessary rights of way; (5) construction of the power line to the well site; (6) drilling and completion of the wells; and (7) construction of the two pipelines.

2. no significant bar to completion of the mitigation wells has arisen (e.g., unable to site pipeline).
- b. The promise will become permanent when the mitigation wells are fully operational, as certified by the Water Master.
- c. The promises in a and b above are subject to the following terms and conditions:
 1. if either or both wells are ever not operational for reasons other than a force majeure or due to normal maintenance and repair, the promise will be eliminated until the well(s) are operational again;
 2. if Ecology fails to timely implement or maintain substantial compliance with its commitments in this Agreement, the promise will be eliminated until the commitments are implemented; and
 3. if the maximum pumping rate of 80 gallons per minute is reached, as specified in Appendix C.2.6, no further domestic or stockwater uses would be eligible for the mitigation program unless and until this Agreement is amended or a new agreement is reached.
2. Within seven days of the Effective Date, the Parties will inform the Court that they: (i) have all signed the Agreement; (ii) will address their obligations under the Order of April 8, 2015, ECF No. 825, in a manner consistent with the Agreement; and (iii) will file any necessary motions to effectuate the Agreement in the near future, at a time consistent with subsection 3 immediately below. Further, the Parties will seek at that time any necessary extension of the deadlines for their obligations under the April 8, 2015 Order to allow them to complete and file the pleadings identified in subsection 3 immediately below.
3. In order to modify the various parts of the Court's earlier rulings in this case identified above, the Parties agree to take the following steps within 60 days after the Effective Date:
 - a. Attorneys for the Parties will prepare two motions and associated draft orders and/or notice(s). One motion shall relate to substance, and the other motion shall relate to procedure:
 1. a substantive motion requesting the Court enter an agreed order approving the changes to prior orders generally described in sections III.A.1, III.A.4, III.B.5, III.C.3.b, and V.1, above;
 2. a procedural motion to establish a show cause proceeding as to why the Court should not enter the order described in subsection 1. immediately above and that requires any person opposing that order to file an objection

meeting certain minimum requirements within a certain timeframe. Additionally, this motion will request the establishment of a notice process to apprise relevant non-parties to *Anderson* of the order described in subsection 1. immediately above and to indicate how to object to it in the show cause proceeding.

- b. The United States and the Tribe will carry out the production, addressing, and mailing of the motions and notice(s) created by the Parties and approved for distribution by the *Anderson* Court.

VI. General Terms

1. Meet and Confer.

- a. Procedure. Any Party may request that any other Party(ies) meet in good faith to reach a mutually agreeable resolution of circumstances not foreseen in this Agreement or a dispute over the implementation of this Agreement. Thereafter, a request to Meet and Confer shall be made in writing and shall describe the nature of the unforeseen circumstance(s) or dispute, and the need to resolve the circumstance(s) or dispute. The Parties will Meet and Confer within a reasonable time to attempt to resolve the circumstance(s) or dispute. If the resolution requires an amendment to this Agreement, the Parties will follow the process in subsection VI.2. If the resolution does not require an amendment to this Agreement, the Parties will document the resolution in writing. If the Parties are unable to resolve the circumstances or dispute within a reasonable time, they may request mediation as described in subsection b.
- b. Non-Binding Mediation. If the circumstance(s) or dispute is not resolved through the procedures described in subsection a, the participating Parties may use a neutral mediator, with the costs of the mediator allocated such that the each party will pay one-third. The participating Parties shall select a mediator within 30 days. The mediation process shall be concluded not later than 60 days after the mediator is selected. The above time periods may be shortened or lengthened upon mutual agreement of the participating Parties. The participating Parties will document the resolution of the mediation in writing, and report it all Parties. Mediation under this subsection is not binding on the Parties to the mediation. If the resolution requires an amendment to this Agreement, the Parties will follow the process in subsection VI.2.

- 2. **Amendments.** The Parties may amend this Agreement only by mutual agreement of the Parties and in written form. The Parties shall submit any amendment to the Court for a modification of the associated Judgment and Order, if needed.

3. Obligations Under This Agreement.

- a. Regulatory Approvals. The Parties shall support the application for and granting of Regulatory Approvals not inconsistent with the Agreement.
- b. Defense of Agreement. Each Party shall support and defend this Agreement in each applicable venue or forum.
- c. Litigation. The form of support or defense in such action shall be left to the discretion of each Party.
- d. Obligation to Implement. Each Party shall implement each of its obligations under this Agreement in good faith and with due diligence. Any obligation identified as an obligation of all of the Parties does not obligate any individual Party to take any action itself or itself make any specific commitment other than to participate in the applicable procedures.
- e. Cooperation Among the Parties. The Parties shall cooperate in the implementation of this Agreement. A Party shall not act in a manner that results in an action or requirement that is inconsistent with the Agreement unless necessary to comply with statutory, regulatory or other legal responsibilities; in which event, the Party shall provide Timely communications to other Parties to permit Meet and Confer procedures pursuant to section VI.1.
- f. Timeliness. Each Party shall use its best efforts to timely implement its obligations. Timely shall mean: performance of an obligation or act by the deadline established in the applicable provision and otherwise in a manner reasonably calculated to achieve the bargained-for benefits of the Agreement.
- g. Cooperation. The obligation to assist in the implementation of this Agreement is joint and several to all Parties, as well as individual to each Party. In seeking funding, or using Meet and Confer procedures or litigation, as described above, each Party will be mindful of the efforts of other Parties and will seek to cooperate to achieve efficiencies and avoid duplication or other unnecessary costs or efforts.
- h. Environmental Review. Each Party shall undertake environmental review as required by applicable law when carrying out any implementing action provided for under this Agreement.

4. Communications with Parties to this Agreement.

- a. Any communications required by this Agreement shall be written and distributed to all Parties. Communication shall be provided by electronic mail, unless the sending Party determines that first-class mail or an alternative form of delivery is more appropriate in a given circumstance. For the purpose of communication, the list of authorized representatives of the Parties as of the Effective Date is listed in subsection b. The Parties shall maintain a current distribution list.

- b. The distribution list is comprised of the counsel of record for each Party.
- 5. **External Communications.** The Parties may develop coordinated communications about the Agreement for dissemination to the public. A Party that plans to independently communicate with the public should, in good faith, provide notice to the other Parties in an effort to maintain the collaborative intent of the Agreement.
- 6. **Treatment of Communications Related to Agreement.** To the fullest extent allowed by applicable law all documents and communications related to the development, execution, or submittal of this Agreement to any agency, court, or other entity, shall not be used as evidence, admission, or argument in any forum or proceeding for any purpose. This provision does not apply to the results of studies or other technical information developed for use by the United States or its agencies, the State, or the Spokane Tribe. This provision does not apply to any information that was in the public domain prior to the development of this Agreement or that became part of the public domain at some later time through no unauthorized act or omission by any Party.

This provision does not prohibit the disclosure of:

- a. Any information held by a Federal agency that is not protected from disclosure pursuant to 5 U.S.C. § 552, the Freedom of Information Act; or
 - b. Any information held by a state or local agency that is not protected from disclosure pursuant to RCW 42.56, the Washington Public Records Act.
- 7. **Compliance with Legal Responsibilities.** Except as otherwise expressly provided, by executing this Agreement, each Party represents that it believes that this Agreement is consistent with its statutory, regulatory, or other legal obligations for conservation, use, or management of affected resources of the Chamokane Creek basin. In the implementation of this Agreement, the Parties shall comply with all applicable legal authorities.
 - 8. **Reservation of Rights.**
 - a. Generally. Nothing in this Agreement is intended or shall be construed to affect or limit the authority or obligation of any Party to fulfill its constitutional, statutory, and regulatory responsibilities or comply with any judicial decision. Nothing in this Agreement shall be interpreted to require the United States or its agencies, the State of Washington, or the Spokane Tribe to implement any action which is not authorized by applicable law or where sufficient funds have not been appropriated for that purpose by Congress or the Washington State Legislature. The Parties expressly reserve all rights not granted, recognized, or relinquished in this Agreement.
 - b. Reservations Regarding Federal Appropriations. All actions required of the United States or its agencies in implementing this Agreement are subject to appropriations by Congress. Nothing in this Agreement shall be interpreted as or constitute a commitment or requirement that the United States or its agencies obligate or pay

funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or other Applicable Law. Nothing in this Agreement is intended or shall be construed to commit a Federal official to expend Federal funds not appropriated for that purpose by Congress. Nothing in this Agreement is intended to or shall be construed to require any official of the executive branch to seek or request appropriations from Congress to implement any provision of this Agreement. To the extent that the expenditure or advance of any money or the performance of any obligation of the United States or its agencies, or the Secretary under this Agreement is to be funded by appropriation of funds by Congress, the expenditure, advance, or performance shall be contingent upon the appropriation of funds by Congress that are available for this purpose and the apportionment of such funds by the Office of Management and Budget. No breach of this Agreement shall result and no liability shall accrue to the United States or its agencies or the Secretary in the event such funds are not appropriated or apportioned.

- c. Reservations Regarding State Appropriations. All actions required of the State of Washington, or its agencies, in implementing this Agreement are subject to appropriations by the Washington Legislature. Nothing in this Agreement shall be interpreted as, or constitute a commitment or requirement, that the State of Washington or its agencies, obligate or pay funds in violation of any applicable law. Nothing in this Agreement is intended or shall be construed to commit a State official to expend State funds not appropriated for that purpose by the Washington Legislature. Nothing in this Agreement is intended to, or shall be construed, to require any official of the executive branch to seek or request appropriations from the Legislature to implement any provision of this Agreement. To the extent that the expenditure or advance of any money, or the performance of any obligation of the State of Washington or its agencies, or the Director of the Department of Ecology under this Agreement, is to be funded by appropriation of funds by the Legislature, the expenditure, advance, or performance shall be contingent upon the appropriation of funds by the Legislature that are available for this purpose. No breach of this Agreement shall result, and no liability shall accrue, to the State of Washington, or its agencies, or the Director of the Department of Ecology, in the event such funds are not appropriated.

9. **No Pre-decisional Commitment.** Nothing in this Agreement is intended or shall be construed to be a pre-decisional commitment of funds or resources by the United States or its agencies, or the State. Nothing in this Agreement is intended or shall be construed to predetermine the outcome of any regulatory approval or other action by the United States or the State and their agencies necessary under applicable law in order to implement this Agreement.
10. **No Alteration of Environmental Review.** Nothing in this Agreement is intended or shall be construed to modify the application of NEPA, or other applicable law, to the environmental review of any action under this Agreement. The use of the word, "final," with reference to development or adoption of any action, (1) describes the schedule for such development or adoption and (2) does not modify the application of NEPA or other applicable law to such development or adoption.

11. **No Waiver of Sovereign Immunity.** Nothing in this Agreement is intended to be, or shall be construed as, a waiver of sovereign immunity by the United States, the State, or the Spokane Tribe. This Agreement does not obligate the United States or its agencies to affirmatively support this Agreement regarding any State or local legislative, administrative, or judicial action before a state administrative agency or court.
12. **No Argument, Admission, or Precedent.** Nothing in this Agreement or any of the appendices thereto shall be offered for or against a Party, including the United States and its agencies and the State and its agencies, as argument, admission, admission of wrongdoing, liability, or precedent regarding any issue of fact or law in any mediation, arbitration, litigation, or other administrative or legal proceeding, except that this Agreement may be used in any future proceeding to interpret or enforce the terms of this Agreement, consistent with applicable law. This Agreement may also be used by any Party, including the United States and its agencies and the State and its agencies, in litigation by or against non-Parties to implement or defend this Agreement. This section shall survive any termination of this Agreement.
13. **Protection of Interests.** Each Party may, in a manner consistent with this Agreement, protect, defend, and discharge its interests and duties in any administrative, regulatory, legislative or judicial proceeding.
14. **Untimely or Inadequate Funding.** If, notwithstanding best efforts in seeking the funding, the Parties do not secure adequate funding on a timely basis to perform a particular obligation, the Parties shall seek to agree to an alternative schedule and other appropriate remedies to permit the performance of that particular obligation.
15. **Severability.** This Agreement is made on the understanding that each provision is a necessary part of the entire Agreement. However, if any provision of this Agreement is held to be invalid, illegal, or unenforceable by a regulatory agency or a court of competent jurisdiction: (1) the validity, legality and enforceability of the remaining provisions of this Agreement are not affected or impaired in any way; and (2) the Parties shall negotiate in good faith in an attempt to agree to another provision (instead of the provision held to be invalid, illegal, or unenforceable) that is valid, legal, and enforceable and carries out the Parties' intention to the greatest lawful extent under this Agreement.
16. **Changed Circumstances.** If a Party believes that any event subsequent to the Effective Date impairs or threatens to impair the bargained-for benefits, the Parties shall consider whether to amend the Agreement pursuant to the Meet and Confer provisions of section VI.1.
17. **Enforcement.** Enforcement of this Agreement among the Parties is in *U.S. v. Anderson*.
18. **No Third Party Beneficiaries.** This Agreement does not create any right in the public, or any member thereof, as a non-Party beneficiary. The rights and obligations of the Parties with respect to non-Parties shall remain under applicable law.

19. **Successors and Assigns.** This Agreement shall be binding on and inure to the benefit of the Parties and their successors and assigns, unless otherwise specified in this Agreement.
20. **Governing Law.** A Party's performance of a contractual obligation arising under this Agreement shall be governed by (1) applicable provisions of this Agreement and (2) applicable law for obligations of that type.
21. **Entire Understanding.** This Agreement constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the subject matter of this Agreement. Other than the Appendices to this Agreement, which are attached hereto and incorporated throughout this Agreement by reference, no other document, representation, agreement, understanding or promise, constitutes any part of this Agreement.

VII. Termination

1. Termination of the Agreement.


- a. If the Court fails to amend the relevant order in *U.S. et al v. Anderson et al.* as specified in the Agreement in material part, the parties shall meet and confer according to the process outlined in this Agreement: (1) If the parties agree on any amendments to offset the Court's decision, those changes will be made pursuant to the process outlined in this Agreement; (2) If the parties after good faith negotiation cannot reach agreement on any necessary amendments arising from the Court's decision, this Agreement can be terminated by any party with ninety (90) days' notice.
- b. If the mitigation well and/or the thermal barrier well construction as specified in this Agreement becomes substantially impossible to complete, the parties shall meet and confer according to the process outlined in this Agreement to address amendments to the Agreement.
 1. If the parties agree on amendments arising from these circumstances, those changes will be made pursuant to the process outlined in this Agreement;
 2. If the parties after good faith negotiation cannot reach agreement on necessary amendments to address the loss of material benefits arising from these circumstances, this Agreement can be terminated by any party with ninety (90) days' notice.


VIII. Execution of the Agreement

1. **Authority.** Each signatory to this Agreement certifies that he or she is authorized to execute this Agreement and to legally bind the Party he or she represents. This binding effect applies to all obligations which legally may be performed under existing authorities.

2. **Counterparts.** This Agreement may be executed in counterparts. Each executed counterpart shall have the same force and effect as an original instrument as if all the signatory Parties to all of the counterparts had signed the same document.
3. **Effective Date.** The Effective Date shall be the date that the signatory Parties listed below have signed this Agreement.

For the Spokane Tribe


Carol Evans, Chairwoman
Spokane Tribe of Indians


April 15, 2019

For The United States Department of the Interior

Bryan Mercier, Regional Director
Bureau of Indian Affairs, Northwest Region

April __, 2019

For the State of Washington

Maia D. Bellon, Director
Department of Ecology

April __, 2019

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For the State of Washington



Maia D. Bellon, Director
Department of Ecology

April 15, 2019

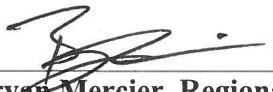
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Carol Evans, Chairwoman
Spokane Tribe of Indians

April __, 2019

For The United States Department of the Interior



Bryan Mercier, Regional Director
Bureau of Indian Affairs, Northwest Region

April 22, 2019

For the State of Washington

Maia D. Bellon, Director
Department of Ecology

April __, 2019

Appendix A: Delegation to the Water Master

Cross-Deputization of Water Master

The State of Washington, Department of Ecology (“Ecology”) will delegate its state water resources regulatory authority to the Water Master appointed by the federal court in *U.S. v. Anderson, et al. (Anderson)* for the purpose of carrying out the terms and conditions of this Agreement. Ecology will appoint the federal Water Master from *Anderson* to perform additional services in the Chamokane Basin as the state Water Master. The appointment and compensation of the Water Master when carrying out Ecology’s functions will be governed by RCW 90.03.060.

The Water Master shall perform duties and functions specified by RCW 90.03.070 to the extent needed beyond the authority held under *Anderson* and in accordance with the provisions specified in the Agreement. The Water Master shall perform such duties as required to administer state water law, exclusive of his duties under *Anderson*, as necessary, and perform necessary duties under this Agreement, as directed by Ecology’s Eastern Regional Office Water Resources Section Manager. Any state enforcement action would have to be approved by the Section Manager, consistent with Ecology enforcement policy.

For performance of these duties, including operation of the mitigation facility, the Water Master shall bill by the hour, at the current maximum compensation rates for Water Masters in the State of Washington. Water Masters are currently classified as “Environmental Scientist 5” and are compensated at Range 59, maximum compensation Step M. The Water Master will work an appropriate number of hours to fulfill the tasks described in the Agreement. Ecology’s Eastern Regional Office Water Resources Section Manager has the authority to determine if the appropriate number of hours for these duties is exceeded.

The Water Master will operate the mitigation well beginning April 1st and ending September 30th of each calendar year. The Water Master will ensure that any needed winterization of the system will be performed before the onset of freezing weather. The Water Master will stop the pump and drain the system during periods when the system could freeze.

The initial mitigation pumping rate is 36 gallons per minute (gpm).

On an annual basis (or some other time period agreed to by the Parties based on the availability of information on new housing permits in the Chamokane Basin) the Water Master will contact the county to obtain information on the number, locations, and owners of new permit-exempt wells and the Water Master will adjust the pumping rate accordingly (by using the formula identified in Appendix C.2.3).

If the Watermaster becomes aware of new, qualifying, non-tribal stockwater uses within the basin, he will increase the mitigation pumping rate of the mitigation pump by 1 gpm for every 300 additional head of stock.

The Water Master will notify the Court through his annual report what the pumping rate of the mitigation well will be for the coming April 1 through September 30 season.

The Water Master shall perform such duties as required to administer state water law, exclusive of his duties under *Anderson*, as necessary, and as directed by Ecology's Eastern Regional Office Water Resources Section Manager. Any state enforcement action would have to be approved by the Section Manager.

The Water Master shall coordinate maintenance activities of the mitigation system with Ecology promptly, and as necessary.

Appendix B: Enforcement and Notice

1. As discussed in section III.A.2, the Parties evaluated whether certain individuals have irrigated outside of the scope of their water rights, or relinquished or abandoned perfected rights. Based on that evaluation, it has been determined that the water right documented by Certificate No. G3-28436C, held by Scott, is being exercised to irrigate more acreage than is authorized under the water right. Further, it has been determined that water rights documented by Claim Nos. S3-301510CL and S3-301511CL, held by Bauman, and Certificate No. G3-01805, held by Seagle/Ford, are subject to relinquishment as a result of nonuse of water for periods greater than five successive years. The Water Master is authorized to commence appropriate state administrative regulation or relinquishment actions when his expanded authority described in section III.A.1 is operative. Such actions will require proper notice in accordance with state law.
2. As discussed in section III.A.3, the Parties evaluated the four claims that assert a priority date that is senior to the Tribal water rights. Based on that evaluation, it has been determined that water rights documented by Claim Nos. S3-138157CL, S3-138158CL, S3-138159CL, and S3-138160CL, held by Seagle, are subject to relinquishment as a result of nonuse of water for periods greater than five successive years. The Water Master is authorized to commence appropriate state administrative relinquishment actions when his expanded authority described in section III.A.1 is operative. Such actions will require proper notice in accordance with state law.
3. In section III.A.4, the Parties agree to provide notice that is compliant with the upper basin notice plan required on page 3 of the April 2015 Order.
 - a. With respect to upper basin water right holder Dixon (G3-01619), who already was a party to *Anderson* and, thus received notice of the change in the scope of the case during the proceedings in 2013-15, no further notice is needed as he has had full notice of the issue.
 - b. Permit exempt well users and very small water right holders (certificate water right holders Thompson (S3-21745C), Ruse (S3-00580C), Werth (S3-*06312C), Russel (S3-*05139C), Mickelson (S3-*05140C), and Noack (S3-*09860C)). The Parties will send these water right holders notices that there is a proposed change in the scope of the *Anderson* case to include the upper basin where they live, and that they can challenge this change in the scope of the case if they intervene and oppose the motion. The Notice would also explain that the Parties have developed a mitigation plan, largely funded by Ecology, and that these water users won't be subject to regulation if the motion is successful, so long as they stay within the water use amounts described in the mitigation definition (section III.B.1.a).
 - c. There are two permit/certificate holders with priority dates *after* 1979, Scruggs (G3-27824C) and Scott (G3-28436C). Because these rights have conditions requiring that their water use must be curtailed when the Tribal

water right determined in *Anderson* is not met, further notice to them of court action that might make this possible is not needed.

4. In section III.B.1, the Parties agree on what amounts of current and future domestic and stock use the two wells will provide mitigation for and thus which water users will avoid any regulation. The Parties will send a notice by first class mail to every property holder in the Chamokane Basin that describes what amount of current and future domestic and stock water use is being mitigated for by the two wells and that permit-exempt domestic and stock use within such parameters will not be regulated in *Anderson*. The notice will describe that water use in excess of those amounts will result in the Tribe and/or the United States considering whether to commence action in *Anderson* to curtail such use during times of shortage (when the 24/27 cfs tribal instream flow is not being met) based on the domestic and stock use being junior to the tribal water right. The notice will describe that the Parties are moving to change the 1979 Judgment by including small domestic and stock uses as ones that could be regulated in the basin in *Anderson* (see section V.3).
5. The sovereigns also agree that the notice in subsection 3 above will be disseminated generally to the public through: posting in a relevant location on Ecology's website; and posting in a relevant location on the Tribe's website.

Appendix C: Mitigation Well Program

1. Mitigate for current domestic and stock water use meeting the criteria of the mitigation program

- 1.1. Permit, drill, and construct one well adjacent to the Spokane River in the NE corner of Section 15, T27N R39E on Tribal Trust land that is capable of producing up to 80 gpm. This *pump* will be located at the same facility as the temperature control pump and well described in Appendix D. below. This water will be produced from an unconsolidated *aquifer* adjacent to the Spokane River. This aquifer is in bank storage with the Spokane River. Pumping this aquifer will not impact the groundwater resources of the Chamokane Basin.
- 1.2. Permit and construct a pipeline across Tribal Trust land to convey up to 80 gpm to a location above the gage. The portion of this line between the pump and Martha Boardman Road would be in the same trench as the pipeline to convey 1,100 gpm (the temperature reduction water described in Appendix D; see figure 2).
- 1.3. The Water Master will operate the pump beginning April 1st and ending September 30th of each calendar year. The Water Master will ensure that any needed winterization of the system will be performed before the onset of freezing weather. The Water Master will stop the pump and drain the system during periods when the system could freeze.
- 1.4. The initial mitigation pumping rate for current water users is 36 gallons per minute (gpm)³.
- 1.5. This mitigation water will offset the calculated impairment to the senior right caused by the existing permit-exempt domestic water uses in the basin. The mitigation water will augment flow in Chamokane Creek and travel downstream to its return to the Spokane River at a location immediately upstream from its withdrawal point, a well in bank storage with the Spokane River. This will make it a non-consumptive use of water to the Spokane River.

³ This rate is double the rate at which USGS calculated the stream flow in Chamokane Creek at the gage is being impacted by domestic and stock watering uses in the basin. USGS' estimated impact to streamflow was assumed to be a constant, year-round impact. However, the Parties recognize that domestic water use is lower in the late-fall and winter period and agreed mitigation water should be pumped at double the amount of the estimated impact during the period April 1 through September 30.

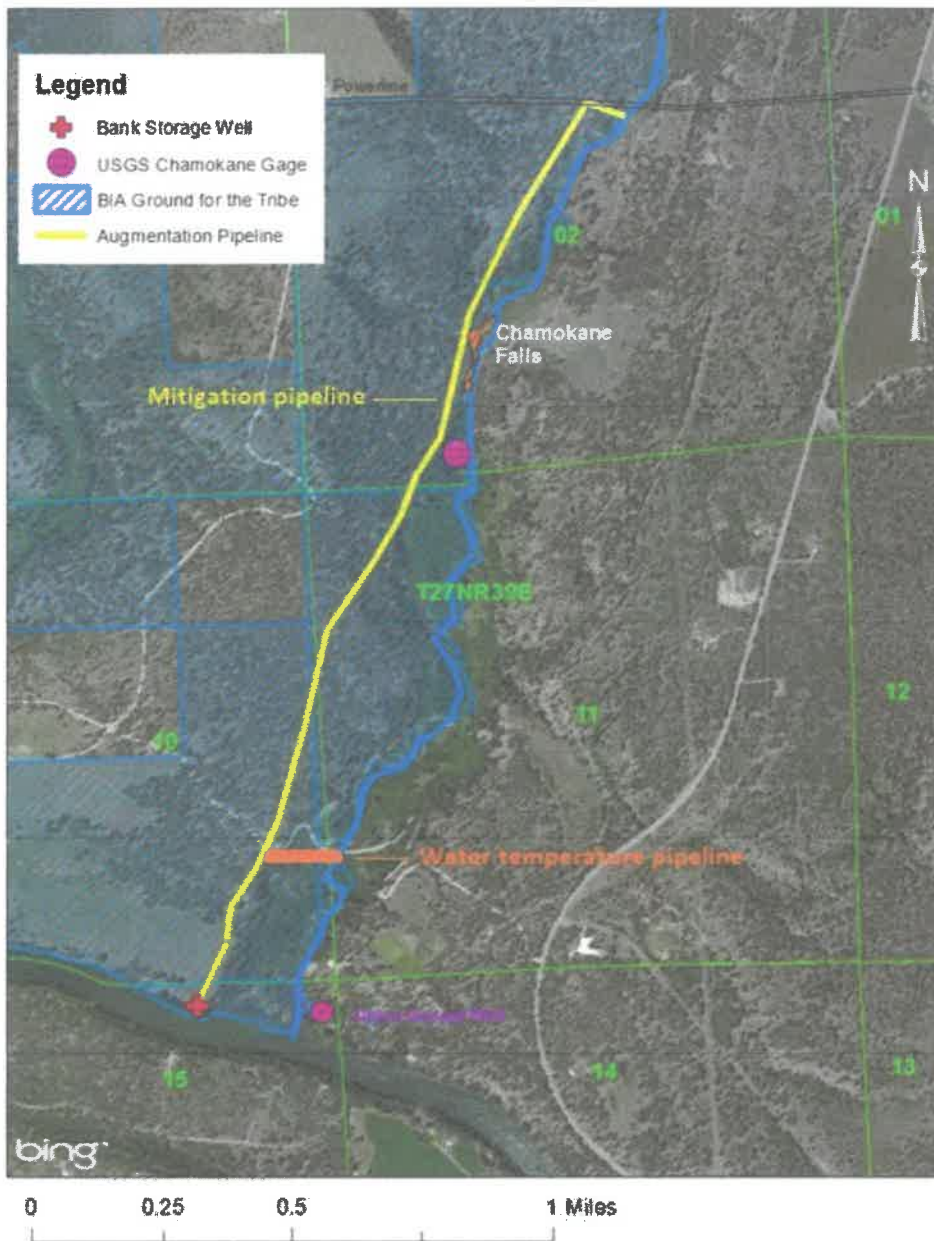


Figure C1: Map of potential wells and pipelines

2. Mitigate for future domestic and stock water use meeting the criteria of the mitigation program

2.1. The mitigation pump described in 1.1 above will have a variable speed motor capable of adjusting the flow rate. This flexibility will allow the volume of mitigation water to be adjusted to offset new domestic and stock water uses that are developed and put to

beneficial use in the Chamokane watershed that meet the mitigation plan criteria in section III.B.1.a of the agreement.

2.2. The Water Master will adjust the volume of mitigation water by using the mitigation formula and procedures identified in sections 2.3 through 2.6 below. This mitigation water will not be made available for any other types of new uses that do not meet the criteria in section III.B.1.a of the agreement.

2.3. Domestic water: On an annual basis [or some other time period based on the availability of new housing permits in the Chamokane Basin], the Water Master will contact the county to obtain information on the number, location, and owner of new permit-exempt wells and the Water Master will adjust the pumping rate to mitigate for additional qualified uses using the formula in the following example:

2.3.1. The initial mitigation pumping rate of 36 gpm is based on mitigating the water used from 520 permit exempt wells.

2.3.2. If 50 new mitigated wells are added, the additional mitigation will be calculated as follows:

(36 gpm divided by 520 wells) multiplied by 50 wells, plus 36 gpm = 39.5 gpm

2.3.3. In this example, the total mitigation water after 50 new permit exempt wells are mitigated for will be 39.5 gpm.

2.4. Stockwater: As additional stockwatering develops within the basin, the Water Master will adjust the flow rate to mitigate for additional qualified, stockwater uses using the formula in the following example:

2.4.1. The stockwater mitigation quantity incorporated into the mitigation proposal was derived from the USGS model analysis that indicates that the net impact from watering 2001 animals located within the basin causes 7 gpm of impairment to the creek. Using this ratio ($7/2001 = 0.0035$) as the basis for calculating impairment caused by new stockwater uses, we can estimate that for every additional 300 head of stock introduced into the basin, we will need to increase the stockwater mitigation water pumping rate by 1 gpm ($0.0035 \text{ gpm/head} \times 300 \text{ head} = 1 \text{ gpm}$).

2.4.2. If the Water Master becomes aware of new, qualified stockwater uses within the basin, he will increase the mitigation pumping rate by 1 gpm for every 300 additional head of stock.

2.5. The Water Master will notify the Court through his annual report what the mitigation volume pumping rate, including any additions under provisions 2.3 and 2.4 above, will be for the coming April 1 through September 30 season.

2.6. The adjustments rate of mitigation water pumping will be made in increments based on the precision to adjust the variable speed pump control system. For example, if the

smallest increment of increase is 5 gpm, the Water Master would make an upward adjustment when the Water Master identifies new qualified uses have been added in the watershed that warrant an adjustment. When the cumulative additional mitigation impacts exceed 5 gpm, the Water Master would increase the pump to the next increment, not to exceed 80 gpm.

- 2.7. In addition to the Water Master's additional authorities, the Water Master shall account for the mitigation pumping when regulating the adjudicated rights within the case area to ensure the mitigation pumping does not mask reductions in the adjudicated instream flow.

3. Monitoring and Adaptive Management for Mitigation Program

3.1 Purposes: The purposes of monitoring and adaptive management for the mitigation program are: 1) to monitor how much water need be pumped into Chamokane Creek pursuant to the mitigation program; and 2) to adapt the amount of mitigation water that needs to be pumped to a level that mitigates for qualifying future uses under the mitigation program.

3.2 Procedures for Modifying the Monitoring and Adaptive Management for Mitigation Program:

1. The Parties will review the procedures in Appendix C every five years to ensure that they are meeting the purpose of the monitoring and adaptive management program.
2. If the Water Master's annual report to the *Anderson* Court identifies implementation concerns with the procedures in Appendix C, the Parties will review the procedures within 90 days of the annual hearing and will consider revisions.
3. Any amendments to the monitoring and adaptive management program will be by mutual agreement of the Parties.

Appendix D: Description of Temperature Barrier Well

1. Water Temperature Measures

- 1.1. Permit, drill, and construct a second well adjacent to the Spokane River in the NE corner of Section 15, T27N R39E on Tribal Trust land that is capable of producing 1,100 gpm. This water will be produced from an unconsolidated aquifer adjacent to the Spokane River. This aquifer is in bank storage with the Spokane River. Pumping this aquifer will not impact the groundwater resources of the Chamokane Basin.

Permit and construct a pipeline across Tribal Trust land to convey approximately 1,100 gpm to a location near where Martha Boardman Road crosses Chamokane Creek. This line would be in the same trench as the pipeline to convey up to 80 gpm (the mitigation water described in Appendix C; see figure C1).

- 1.2. The Tribe will control, operate, and maintain the equipment to deliver 1,100 gpm during critical fish passage time periods. Depending on the water temperature in Chamokane Creek and the groundwater temperature at the well, this system should be able to lower the temperature of Chamokane Creek by 1.1 °C to 0.5 °C (Figure D.2). During the temperature critical periods, this additional cooling of Chamokane Creek water should reduce thermal fish barriers and enable fish to move upstream (see Figures D1 and D2).
- 1.3. This water will return to the Spokane River at a point just upstream from its withdrawal point, a well in bank storage with the Spokane River. This will make it a non-consumptive use of water to the Spokane River.

2. Monitoring and Adaptive Management for Water Temperature Program

Purpose: To monitor water temperature and other factors so the Spokane Tribe can implement a program to improve temperature conditions in the lowest reach of Chamokane Creek below Chamokane Falls. High water temperatures in this reach periodically prevent fish from moving out of the Spokane River into Chamokane Creek.

Monitoring Program: The Spokane Tribe will monitor water temperature, fish migration, and other factors to determine when to pump additional water into lower Chamokane Creek. The Tribe will monitor the timing and amount of water pumped and the temperature in Chamokane Creek. The tribe will assess the amount of temperature reduction in this reach, and whether the effort successfully enabled fish migration. The Spokane Tribe will adjust this program based on annual conditions to address passage and fish survival objectives.

The Tribe will provide a monitoring report that describes the operations and results of the water temperature program to the other Parties on an annual basis.

Amendments: Any amendments to the monitoring and adaptive management program will be by mutual agreement of the Parties.

Water Temperature in Lower Chamokane Creek

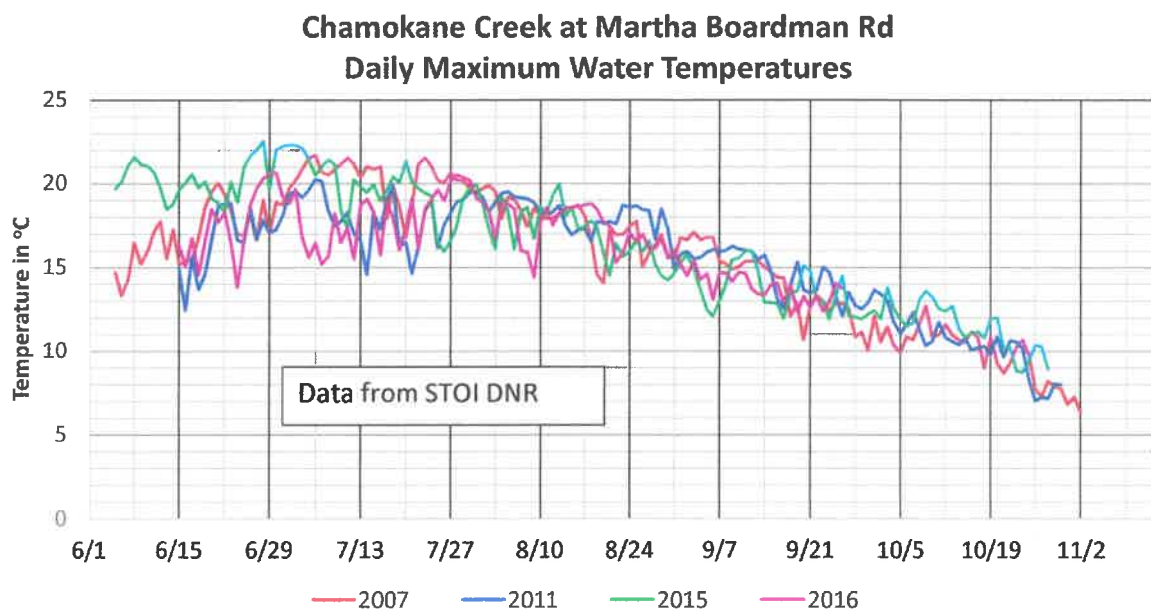


Figure D1: Summer water temperatures in the lowest reach of Chamokane Creek.

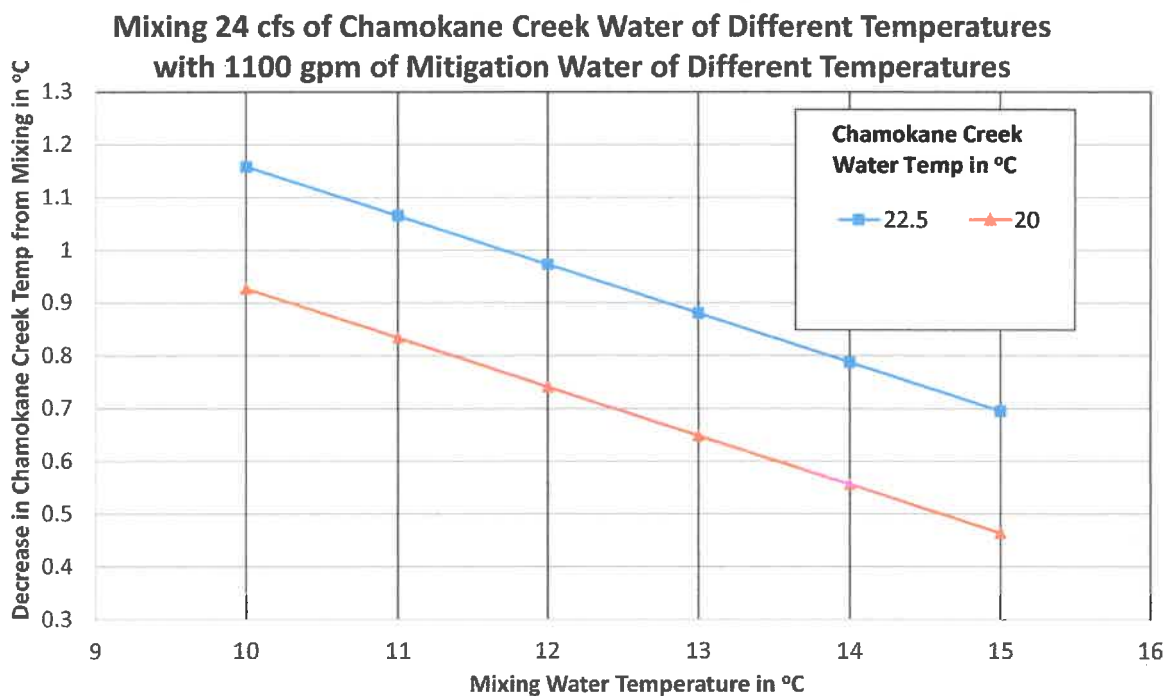


Figure D2: Results of mixing water calculations showing Chamokane Creek temperature reductions from augmenting Chamokane flows with 1100 gpm of out-of-basin groundwater.

Appendix E: Cost Estimates

Cost Estimates for U.S. v. Anderson Agreement

Item	Description	Quantity	Unit	Unit Price	Total
1	Mobilization	1	LS	\$ 131,550.00	\$ 131,550.00
2	Overhead and Profit	1	LS	\$ 190,130.00	\$ 190,130.00
3	Temporary Erosion and Sediment Control (TESC)	1	LS	\$ 26,310.00	\$ 26,310.00
4	Mitigation Well	1	LS	\$ 107,500.00	\$ 107,500.00
5	Mitigation Well and Transmission Pipeline	1	LS	\$ 451,700.00	\$ 451,700.00
6	Thermal Barrier Well	1	LS	\$ 297,000.00	\$ 297,000.00
7	Thermal Barrier Well Transmission Pipeline	1	LS	\$ 233,600.00	\$ 233,600.00
8	Electrical Service Improvements	1	LS	\$ 110,000.00	\$ 110,000.00
9	Site Security	1	LS	\$ 5,000.00	\$ 5,000.00
10	Gravel Access Road	1	LS	\$ 62,700.00	\$ 62,700.00
11	Cultural Resources Construction Observer	1	LS	\$ 48,000.00	\$ 48,000.00
Subtotal Construction					\$ 1,663,490.00
Contingency 30%					\$ 500,000.00
Engineering and Design 15%					\$ 340,000.00
Construction Support 5%					\$ 84,000.00
Legal and Administration 10%					\$ 167,000.00
Tax 7.6%					\$ 127,000.00
Permitting					\$ 47,500.00
Total					\$ 2,928,990.00

Item Assumptions

- Mobilization assumed to be 10% of Items #4 - #10.
- Overhead and Profit assumed to be 15% of Items #4 - #10.
- TESC assumed to be 2% of Items #4 - #10.
- Approximate cost per linear foot (LF) of discharge pipeline is \$32/LF. To obtain total item cost, an additional \$29,700 is added to the total linear foot cost for the blow off valves, air/vac assemblies, and construction of the outfall channel. Discharge pipeline material will be high-density polyethylene (HDPE) DR11. Pipe installation includes 3 foot burial depth bedded on crushed rock with 75% native, 25% import trench backfill. 4" crushed surfacing top course (CSTC) will be provided for restoration of roadway impacted by installation of the Mitigation Well pipeline.
- Includes cost for drilling, construction, and testing of well as provided in GeoEngineers' Preliminary Production Well Design and Costing report. Also includes cost for pump, motor, flow meter, electrical/controls, and enclosure. Water treatment will not be required.
- Approximate cost per linear foot (LF) of discharge pipeline is \$53/LF. To obtain total item cost, an additional \$23,600 is added to the total linear foot cost for trench dewatering and construction of the outfall channel. Discharge pipeline material will be HDPE DR11. Pipe installation includes 3 foot burial depth bedded on crushed rock with 75% native, 25% import trench backfill. 6" CSTC will be provided for restoration of roadway impacted by installation of the Thermal Barrier Well pipeline.
- Three-phase power will be installed crossing Chamokane Creek from the UGM Camp to the proposed well site.
- Site security includes a new steel wire mesh fenced enclosure with access gate around the proposed wells.
- New gravel access road to be constructed at 15' width with 6" CSTC.
- Full time construction observant from Washington State Department of Natural Resources required.