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**STATE OF WASHINGTON
YAKIMA COUNTY SUPERIOR COURT**

IN THE MATTER OF THE
DETERMINATION OF THE RIGHTS
TO THE USE OF THE SURFACE
WATERS OF THE YAKIMA RIVER
DRAINAGE BASIN, IN
ACCORDANCE WITH THE
PROVISIONS OF CHAPTER 90.03,
REVISED CODE OF WASHINGTON,

NO. 77-2-01484-5

ECOLOGY'S COMMENTS ON
[DRAFT] [PROPOSED] FINAL
DECREE

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

JAMES J. ACQUAVELLA, et al.,

Defendant.

The State of Washington, Department of Ecology, by its attorney, Barbara Markham, submits the following comments, and the basis for each comment, on the [Draft] [Proposed] Final Decree filed in Yakima County Superior Court on June 13, 2007:

1. In Paragraph 8, the following dates should be modified:

At Line 21, for the "Memorandum Opinion Re: Poisel v. Ecology," change the date of 6/10/2004 to 11/4/2004.

At Line 23, for the "Memorandum Opinion Re: Department of Ecology's Motion for Authorization to Perform a Tentative Determination Court Claim No. 01566, Estate of Ted and Agnes Bugni Subbasin No. 2," change the date of 11/4/2004 to 1/21/2005.

1 Basis for comment 1: Correct clerical errors in identifying the dates.

2 2. In Paragraph 8, in the appropriate chronological order, add the following to the
3 list of opinions and orders:

4 6/16/1993 Memorandum Opinion: Limiting Agreements

5 5/12/1994 Additional Order Re: Limiting Agreements (Cascade Irrigation District,
6 Ellensburg Water Company, and West Side Irrigating Company), as revised by
7 the court in a hearing on June 9, 1994.

8 9/1/1994 Memorandum Opinion: Treaty Reserved Water Rights at Usual and
9 Accustomed Fishing Places

10 Basis for comment 2: Add to the list certain opinions and orders which clarify where
11 instream flows are to be set to protect the Yakama Indian Nation's right to instream flows for
12 fish.

13 3. Revise the existing Paragraph 9 as follows:

14 9.

15 (a) The Department of Ecology has the authority to administer and enforce this Decree pursuant to
16 RCW 43.21A.064(3), RCW 43.27A.190, RCW 90.03.605, and 43 U.S.C. § 666, except that the
17 Yakama Indian Nation and/or the United States Bureau of Indian Affairs have the authority as
18 specifically set forth in orders in this action to administer and enforce water rights either confirmed
19 to the Yakama Indian Nation or its members, or confirmed on the Yakama Indian Reservation.
20 Appeals of decisions of Ecology in administering and enforcing this Decree, including decisions of
21 Ecology to enforce against junior right holders in order to protect senior water rights, including the
22 Yakama Indian Nation's right for instream flows for fish, shall be to the Pollution Control Hearings
23 Board pursuant to RCW 43.21B.110. Ecology does not have the authority to determine the
24 quantification of the Yakama Indian Nation's right for instream flows for fish. The Yakama Indian
25 Nation's right for instream flows for fish shall be determined and administered as specifically set
26

1 | forth in orders of this case. Any dispute regarding determination of the quantification of the
2 | Yakama Indian Nation's right for instream flows for fish shall be brought for resolution to this
3 | court.

4 | (b) In addition to the authority and powers to administer and enforce otherwise held by the
5 | Department of Ecology and by the Yakama Indian Nation and/or the United States Bureau of
6 | Indian Affairs, any party, including the Department of Ecology, the Yakama Indian Nation and/or
7 | the United States Bureau of Indian Affairs, may bring a motion to show cause in this court to
8 | enforce the injunctions set forth in this Decree in ¶3.

9 | Basis for comment 3: To clarify that Ecology may enforce in favor of, but may not
10 | determine quantification of, the Yakama Indian Nation's right for instream flows for fish. That
11 | quantification responsibility is with the Yakima Field Office Manager of the United States Bureau
12 | of Reclamation, in consultation with the Yakima River Basin Systems Operations Advisory
13 | Committee, for rivers and tributaries other than those for which the Superintendent of the Wapato
14 | Irrigation Project of the United States Bureau of Indian Affairs has specific authority, all pursuant
15 | to the Final Order Re: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places,
16 | dated March 1, 1995 ("Final Order"). Change the language "administered and enforced" to
17 | "determined and administered" to be consistent with the language at page 4 of the Final Order.
18 | Clarify that disputes on the quantification of Yakama Indian Nation's right for instream flows for
19 | fish shall be before this court.

20 | RESPECTFULLY SUBMITTED this 21st day of August, 2007.

21 | ROBERT M. McKENNA
22 | Attorney General

23 | 
24 | BARBARA A. MARKHAM, WSBA# 30234
25 | Assistant Attorney General
26 | Attorneys for Plaintiff
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