

Acquavella Working Group Facilitator's Notes – (11/30/06)

9:30 PM – 3:30 PM – Department of Ecology Yakima Conference Rooms

Discussion Agenda

- Purpose and goals of the Final Decree Working Group
- Working Group process and work plan
- Review Ecology's draft of the proposed Final Decree
- Review the issues submitted prior to meeting
- Identify other issues for Working Group discussion
- Triage issues to be addressed
- Develop a work plan to address the issues
- Begin issue discussion and resolution
- Next steps including work assignments in preparation for the next Working Group meeting

All documents referenced in these notes can be viewed and downloaded from the WA Department of Ecology website at <http://www.ecy.wa.gov/programs/wr/rights/adjhome.html#decreeworkgroup>

Purpose and goals of the Final Decree Working Group

The Court in the Acquavella adjudication has invited all parties to participate in a Working Group for the process of developing a Final Decree for this adjudication.

The goal of the Working Group is to expedite the finality of this adjudication and provide the Court, by June 14, 2007, with a report and proposal for the design of the Final Decree as a document that will assist the Department of Ecology (Ecology), and as applicable, the Bureau of Reclamation (Reclamation), in regulating the use of water in the basin.

In the alternative, parties will submit a report and list of unresolved matters and a proposed briefing schedule. The Court expects the workgroup to meet monthly over the 6 month period and produce a report of its recommendation to the Court by June 14, 2007. The Court has also requested 2 written reports on the progress of this work, as well as monthly oral reports at the water day hearings.

The Working Group agreed that their role is to bring issues to the table, engage in their discussion and develop the final report to the Court on the Draft Final Order and unresolved issues.

Additional information can be found in the "Court Notice Re: Development and Initial Meeting of Final Decree Working Group"

Working Group process and work plan

- Review Ecology's draft of the proposed Final Decree
- Review the issues submitted to the Working Group
- Triage issues to be addressed
- Develop a work plan to address the issues

- Discuss and resolve issues and amend Draft Final Decree as appropriate
- Produce list of issues not resolved by the Working Group
- Develop next steps including work assignments in preparation for the next Working Group meeting.
- Prepare Court requested reports

The Working Group membership is open and inclusive. Any party that wishes to participate in the discussion and resolution of the issues is welcome. The Working Group meetings are open public meetings.

An e-mail distribution list has been established and will be updated to include all parties who have attended a Working Group meeting or requested inclusion on the list.

In order to deal effectively with the issues raised and to focus the meeting discussions, the Working Group requests that new issues or comments on issues previously raised be introduced in writing prior to the scheduled meetings. Failure to comment or respond to any issue or statement by a party shall not be taken to be either agreement or disagreement. The documents should be sent via e-mail c/o Elaine Peterson or Becky Johnson at the Acquavella Referee's Office at epet461@ecy.wa.gov and bjoh461@ecy.wa.gov. The documents will be distributed to all on the Working Group e-mail list and posted to the Ecology website noted above.

Summary notes of each Working Group meeting will be produced by the facilitators. The notes will be reviewed by the meeting attendees prior to distribution to the e-mail list and posting to the website.

The proposed Draft Final Order (Version 1 developed by Ecology) will be the Working Group's base document. The outcomes of the issue discussions will either be incorporated as refinements to the Draft Final Order or incorporated in an Unresolved Issues Report.

Review of Ecology's draft of the proposed Final Decree and issues Identified by Working Group participants.

Documents/letters/e-mails regarding issues that the working group should consider were submitted prior to the meeting in writing by:

1. US Department of Justice
2. WA Department of Ecology
3. Yakama Nation
4. City of Yakima
5. Suncadia
6. Jay Carroll
7. Jeff Slothower
8. Fred and Ann Whitney

Each of the parties presented their issues and associated them with a section of Version 1 (V!) of the Draft Final Decree¹. Later in the meeting, each participant was asked to provide any additional comments on the Draft Final Decree and/or issues not yet raised.

¹ [Ecology's Proposed Final Decree](#) November 15, 2006

The following is a summary of the issues discussed organized by section of V1 of the proposed Draft Final Decree.

Introduction

There was some disagreement with the language used in the Introduction (page 2, lines 5 – 7). “The time for appeals of these Conditional Final Orders has now expired, and all timely filed appeals of the Condition Final Orders have been completed.”

- This language may not be correct if the CFOs for Ahtanum Irrigation District and Subbasin 23 do not include “final for appeal: language, to avoid holding up the Final Decree while these CFOs are appealed

Section 1

This is a quiet title action to all surface water rights in the Yakima River Basin, and no valid surface water rights exist in the Yakima River Basin except:

(a) as set forth in the Final Decree, either in the schedule of rights or in paragraph 4 herein, and

(b) for surface water permits or other use authorizations, the final resolution of which is under the administrative jurisdiction of the Department of Ecology (“Ecology”) as of the date of this Final Decree. These include, but are not limited to: City of Yakima surface water permit # S4-01141P(B); City of Yakima change authorization for groundwater certificate # 938-D; Yakima-Tieton Irrigation District reservoir permit # R4-26540; and -----. Accordingly, nothing in the foregoing shall prevent or prohibit the beneficial use of water under, or the administrative recognition of, these identified surface water permits or other use authorizations that were under the administrative jurisdiction of Ecology as of the date of this Final Decree.

- The language proposed in an e-mail by the City of Yakima was included in Version 1
- A definition of the Yakima River Basin should be included
- Need to clarify the language in part b) (lines 13 – 17) was emphasized. The inclusion of changes to groundwater certificates have been authorized for surface diversion but have not yet been completed was not clear. There was some question of the relevance of including references to ground water.

Jeff Schuster, Joe Mentor and Matt Wells agreed to discuss/resolve language “off line” and suggest changes.

Section 2

The Conditional Final Orders (“CFOs”) previously entered in this action confirmed the valid surface water rights in this case, and the rights confirmed in those CFOs are integrated in this Final Decree. Each water right entered in a CFO was confirmed as of the date of entry of the CFO, so that any future determination of the extent and validity of the water right (including any determination of relinquishment) shall commence from the date of entry of the CFO. The only exceptions to that are (a) if a complete five-year period of non-use began before the entry of the CFO but did not conclude until after entry, the statutory period for relinquishment begins before the date of entry of the CFO when the non-use begins; and (2) any water right which was changed

pursuant to RCW 90.03.380 after the date of the entry of the CFO in which it was determined is affirmed as of the date of the last such change. Each water right so confirmed is set forth in the Schedule of Rights herein in an integrated order of priority.

The CFOs entered, and their dates of entry, are listed below. Amendments to the CFOs are also listed, but amendments do not change the original date of entry of a CFO. The rights in a CFO are determined as of the original date of entry, even if the CFO has been amended since that time.

- First Paragraph is awkward – (line 22) include an exception for changes entered into prior to the final decree.
- Add a statement that the schedule is a summary and, if conflict occurs, the CFO controls
- Add a 3rd exception – “as among the parties thereto, the date of any agreements entered into subsequent to the date of an affected CFO.”
- Last part is Bugni-related language and needs further discussion
- 2nd Paragraph (Page 3, lines 7 – 10) – Ecology will provide a list of amendments
- An issue was raised in the discussion of Sections 2 and 6 of the Draft Final Order relating to changes in elements of water rights, particularly those that may have occurred after a conditional final order (CFO). This might include property sales, subdivision of properties, subdivision of water right and changes in water rights. Ecology agreed to work with other participants to discuss its proposed process for sales/changes that are undocumented and for ensuring post-CFO information is accurately reflected on certificates and see if such a process can be acceptable to other parties.
- An issue was raised that Subbasins 23 and 25 have specific effective dates that are different from the date of the CFOs, so an exception should be made for them.

Section 3

Each water right confirmed shall have a date of priority as shown in the Schedule of Rights or in paragraph 4 herein. No user of a water right may exercise it so as to impair a water right with a senior priority date. A senior water right with an upstream point of diversion can not be impaired by a junior water right with a downstream point of diversion, because regulating the downstream junior water right could not provide more water to the upstream senior water right. In addition, as between water rights diverting from different streams above the confluence of those streams, no junior water right on one stream shall be regulated because a senior water right on another stream above the confluence of the streams is not receiving all the water to which the senior water right is entitled.

- Need to work on mandatory language of the 2nd sentence.
- Use injunction type language instead of “no user ... may exercise” language.
- 3rd and 4th sentences (lines 13 – 19) - Might state that “Actual impairment to be determined on a case-by-case basis” if anything needs to be said. A proposal was made, with general agreement, to take sentences 3 and 4 out.

- All agreed that the date of priority Issues will require significant discussion if the 3rd and 4th sentences are retained.

Section 4

In addition to the water rights listed in the schedule of rights, an historic water right to non-diversionary stockwater in watercourses that flow across or are adjacent to riparian lands, and in ponds or springs that are located on or adjacent to the lands, if the lands were used as pasture or range for livestock at the time of this adjudication, in amounts, priority, and with conditions as set forth in Order Re: Non-Diversionary Stockwater Rights, entered July 10, 1997 was confirmed in this adjudication. A non-diversionary right to water for wildlife was included in each CFO.

- YN to look at the order and discuss with Ecology

Section 5

This Court has also recognized in this adjudication that certain uses of water do not require a water right. These are:

a. Use of foreign return flows, as set forth in Memorandum Opinion Re: Motion for Reconsideration of Limiting Agreements, April 1, 1994.

b. Uses of water for fire suppression, as set forth in Stipulation Re: Water Use for Fire Suppression, December 12, 1996.

c. Use of springs that surface on claimants' property and form no regular water course off of the property and not leaving the property, hydrologically connected to any other surface water, or affecting any existing water rights, when there was beneficial use of these waters prior to enactment of the 1917 Water Code, as set forth in Opinion Re: Exception of Dwayne and Alvina Dormaier (Claim No. 4706 Re Subbasin No. 21 (Burbank Creek), September 16, 1993.

- To the extent that old court orders are referenced, they need to be attached or otherwise accessible in perpetuity. This applies to Sections 5 and 8.
- YN reserve comment regarding the order referenced in 5c.

Section 6

Ecology shall issue certificates of adjudicated water right pursuant to RCW 90.03.240 to the claimants herein whose rights are listed in the schedule of rights, provided that each claimant first pays Ecology the required fee for each certificate pursuant to RCW 90.03.470 (10) and the required fee for recording the certificate pursuant to RCW 90.03.330 (1). RCW 90.03.470(13). Each holder of a water right confirmed in this action shall pay such fees to Ecology within 180 days after Ecology has requested payment of such fees from the holder.

- The issues described in Suncadia's² comments (Joe Mentor) regarding "Integrating Conditional Final Order" will be discussed in this section.

² [Suncadia's Final Decree Comment Letter - Regarding integrating conditional final orders, prior rulings, enforcement and continuing jurisdiction](#)

- Jeff Slothower³ language has been included in Section 6.
- Is Legislative action required to waive fees for jurisdictions? Does it apply to certificates issued by US on behalf an irrigation company?
- What happens if payment is not received – what are the sanctions? Is a Court judgment sought?
- State mandated fees does not apply to Treaty and Federal Reserved Rights (FFR).
- An issue was raised in the discussion of Sections 2 and 6 of the Draft Final Order relating to changes in elements of water rights, particularly those that may have occurred after a conditional final order (CFO). See discussion under Section 2.

Section 7

Each certificate of adjudicated water right shall have a certificate number, and, if applicable, a subbasin number for ease of reference. Each right shall include the date of the CFO in which the right was determined. County parcel information, required for recording with the county auditors, shall be included on the certificates. Conditions or limitations applicable to each right, such as metering, shall be referenced on each certificate.

- Include a list of orders that need to be considered for incorporation. WG participants agreed to submit their list of orders to be considered. Ecology will query their pleadings data base to develop a list of potential orders to consider here.
- Impossible to include parcel numbers for large entities
- Reconsider the need to reference conditions or limitations such as metering and fire suppression on each certificate.
- Concern was raised about open-ended language on conditions.

Section 8

The rights integrated in this Final Decree shall be administered and interpreted in accordance with the orders entered in the course of this adjudication.

- The issues described in Suncadia's⁴ comments (Joe Mentor) regarding "Incorporation of Prior Rulings" will be discussed in this section
- Include a list of orders that need to be considered for incorporation. (see Section 7 comments)

³ [Jeff Slothower - Final Decree Issue](#)

⁴ [Suncadia's Final Decree Comment Letter - Regarding integrating conditional final orders, prior rulings, enforcement and continuing jurisdiction](#)

Section 9

The Department of Ecology has the right to administer this Decree pursuant to 43 U.S.C. § 666 except that the Yakama Indian Nation has the right as specifically set forth in orders in this action to administer water rights confirmed to the Yakama Indian Nation or its members.

- Final Decree should also address the separate regulatory and administrative authority of the Yakama Nation and/or the Bureau of Indian Affairs over other water rights in the Yakima Basin, as outlined in prior rulings of the Court.
- YN and Ecology will discuss revisions to the language in this section. - (Jeff Schuster will propose language)

Section 10

The court shall not retain continuing jurisdiction of this action once the Final Decree is entered

The issue of jurisdiction will require significant WG discussion.

- The issues described in Suncadia's⁵ comments (Joe Mentor) regarding "Continuing Jurisdiction" will be discussed in this section.
- Enforcement
- Appeals of cease and desist orders.
- Claims that did not get resolved
- Include, at very least, language to ensure issuance of a certificate in accordance with the decree and associated court orders.
- What is on schedule of rights that is not on certificate?
- Ecology requested examples of rights that might not be properly reflected.
- Some parties suggested that there shouldn't be a disclaimer of jurisdiction and that the Court to continue as place to resolve water issues – may need legislation.

Section 11

Ecology shall within 180 days after entry of this Final Decree prepare a Notice of Availability and include it in the monthly notice, and shall mail it to each party in this action with a preprinted postcard which can be mailed back to Ecology to request a copy, informing parties that a copy of the Final Decree is available (a) on Ecology's website or (b) by mail in paper or electronic format by request to Ecology, or (c) at libraries in the cities of Yakima, Ellensburg, Cle Elum, Sunnyside, and Richland.

- Schedule based in CFOs but changes may have occurred. Need to have process where people can provide input to mistakes made in schedule

⁵ ibid

- Need to consider how best to provide adequate legal notice for comments on the proposed final decree
 - Ecology will propose an efficient, effective, inclusive process
 - Reference to Pretrial 8, p 25 for decree submission. Is an amendment to the Pretrial Order necessary?
 - Also apply to proposed final decree

Section 12

Each party to this action or the party's successors in interest shall inform Ecology within 90 days of any change in address or change in ownership of a water right confirmed in this action.

- How will this process work?
- How will this affect future owner who is not part of this final decree?
- What action will Ecology take?
- Can Ecology require notification – water conveyed with property transfer?

Other issues for Working Group discussion

Ahtanum - Not yet resolved but should be within 4 - 6 months.

- Jay Carroll issues are somewhat related - reserve appeal rights.
- What is Impact on final decree?
- What, if any, language is suggested for either the Ahtanum CFO and /or the Final decree?

US - Consistency with Trust language

- What will court do on the CFO's
- US will present options

Whitney e-mail – Concerns covered in proposed final decree (Sections 2 and 8)

Develop a work plan to address the issues

Time did not allow for development of a specific work plan at this meeting. There was general agreement to proceed with the discussion/resolution of issues, using the proposed Draft Final Decree and a Draft Unresolved Issues document to focus the Working Group's efforts.

Areas where legislation may be needed

- Continuing jurisdiction of the court
- Ability for Ecology to waive fees for certificates and for recording with the counties
- Eliminate county requirement for parcel numbers in any land record

Next steps including work assignments in preparation for the Working Group meetings

12/14/2006 Meeting

Identify areas where 2007 Legislation is desired. (Ecology and All)

- Jurisdiction - Permit Court to maintain continuing jurisdiction (PCHB appeals)
- Fees - Recording
- Recording Requirements - Parcel Numbers

Version 2 of Draft Final Decree to include response to issues as discussed at the November meeting (Ecology)

Identify Working Group priorities and schedule times/meetings for discussion (Proposed discussion priorities and schedule – Roundtable)

1/11/2007 Meeting

Organize an on-line Reference Library (Ecology, Roundtable) - Identify documents to post to website, e.g. relevant statutes, relevant orders and opinions (Daskins v Livers 181 Washington 370), Other state/court decisions, etc

Section 2 - The CFOs entered, and their dates of entry, are listed below. Amendments to the CFOs are also listed, but amendments do not change the original date of entry of a CFO. The rights in a CFO are determined as of the original date of entry, even if the CFO has been amended since that time. **Ecology will provide list of amendments**

Sections 2 and 6 - **Ecology agreed to work with other participants to discuss its proposed process for sales/changes that are undocumented** and for ensuring post-CFO information is accurately reflected on certificates and see if such a process can be acceptable to other parties.

Section 7 and 8 – List of orders that need to be considered for incorporation into Draft Final Decree. **WG participants agreed to each submit their list of orders to be considered. Ecology will query their pleadings data base to develop a list of potential orders to consider here.**

As Soon As Reasonable in 2007

Section 1 - Need to work on mandatory language of the 2nd sentence. **Jeff Schuster, Joe Mentor and Matt Wells agreed to discuss/resolve language “off line” and suggest changes.**

Section 4 - Order regarding Non-Diversionary Stockwater Rights - **YN to look at the order and discuss with Ecology**

Section 9 – YN water right administration. **YN and Ecology will discuss revisions to the language in this section.**

Section 11 – Notice - **Ecology will propose an efficient, effective, inclusive process to provide adequate legal notice for comments on the proposed final decree**

Consistency with Trust language - **US will present options**

2006/2007 Working Group Meeting Schedule

Meetings will be held monthly on Court water days (2nd Thursday) through April 1007 or as required. They will begin after the Court session, usually around 11AM.

December 14, 2006	9:30AM – 3:30PM	Yakima - Reclamation Field Office
January 11, 2007	11AM – 3:30PM	Yakima - to be announced
February 8, 2007	11AM – 3:30PM	Yakima - to be announced
March 8, 2007	11AM – 3:30PM	Yakima - to be announced
April 12, 2007	11AM – 3:30PM	Yakima - to be announced

Participants

Matthew Wells	Attorney – City of Yakima	mattheww@prestongates.com
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Stuart Crane	YN	cranes@yakama.com
Bob & Marianna Archey	Facilitators	roundtable@roundtableassociates.com

Italics indicate participation via conference call

Next Meeting

Thursday, December 14, 2006
9:30 AM – 3:00 PM – Reclamation Field Office Conference Room

Notes prepared 12/04/2006 by R. Archey, Roundtable Associates