

*These facilitator's notes reflect the general issues discussed among the individual participants in the meetings, and are part of a collaborative process to identify and potentially resolve issues associated with the Final Decree. While all participants are encouraged to voice any concerns during the meetings, failure to comment or respond to any issue or statement by another participant or in these facilitator's notes shall not be taken to be either agreement or disagreement, and shall not be used against the participants in any subsequent litigation.*

## **Acquavella Working Group Facilitator's Notes – (2/7/07)**

**1:00 PM – 5:00 PM – Department of Ecology Yakima Conference Rooms**

### **Discussion Agenda**

- Review February (#4) update to draft Proposed Final Decree
- Identify and prioritize the unresolved issues that are to be addressed by the Working Group
- Reach agreement, to the extent possible, on resolution of the issues
- Refine work plan

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/yakima\\_finaldecree\\_wg.html](http://www.ecy.wa.gov/programs/wr/rights/yakima_finaldecree_wg.html)

### **A. General**

The originally scheduled Acquavella Working Group meeting on January 11, 2007 was cancelled due to the length of the water day Court session. A conference call was held on January 25, 2007 to provide input on the 1/8/07 update of the Draft Proposed Final Decree. There were no corrections to the January 25, 2007 Facilitator's Notes.

### **C. Review of Ecology's 4th draft proposed Final Decree and issues Identified by Working Group participants.**

Ecology prepared a 4<sup>th</sup> draft proposed Final Decree for discussion. The 4<sup>th</sup> draft includes changes to specific Sections based on the discussion on the January 25, 2007 conference call. A 5<sup>th</sup> draft will be distributed prior to the March 7<sup>th</sup> meeting.

*Note: Previous meeting notes have used the term Section in referring to proposed draft Final Decree. Beginning with these meeting notes, the reference will be changed to Paragraph in order to be consistent with the term used by the Working Group.*

#### **Paragraph 1**

A question arose concerning inclusion/exclusion of Richland from the Final Order. Does Richland's water come from the area defined by the Ecology map? Ecology will bring the map to the March 7<sup>th</sup> meeting.

1b –There was general agreement<sup>1</sup> on the Wells, Schuster, Mentor, Markham small group proposal. The wording will be incorporated into the next draft Final Decree. The working group will determine at a later date where the reference to post 1905 rights belongs.

## **Paragraph 2**

The Yakama Nation (YN) is not yet in agreement with 2b and 2c.

## **Paragraph 3**

The revision on line 25 (pg 6) regarding impairment to a "surface" water right was discussed with suggestions made to make the sentence more generic. It was noted that some redundancy might not be a bad thing if it helps to set a particular Paragraph in context. In this case Paragraph #1 sets the scope to those who have surface water rights and Paragraph #3 addresses legal issues.

Ecology stated that they would leave in the phrase "surface water right" in lines 24 and 25.

## **Paragraph 4**

Ecology's position is that specific areas that will not be in schedule of rights but need to be acknowledged will be included in the Draft. The YN feels that there could be an exception for fire suppression in the Decree but the rest were determined in the context of specific CFOs and should be referenced there.

## **Paragraph 6**

The legal description would prevail over parcel numbers used for recording purposes on an adjudicated water rights certificate. Parcel numbers are normally not included in the schedule of rights unless they are part of the legal description. A Subgroup of the Final Decree Workgroup met with the four County Auditors and Assistant Secretary of State Steven Excell January 31 to get their perspectives on recording adjudicated certificates and treatment of parcel numbers (meeting agenda posted). One question was to what extent should parcel number be included on the certificate? If so, how can or should their accuracy be maintained? County auditors indicated that there is no absolute limitation on number of parcels that could be included on a certificate - normally at least one parcel number would be required. They also indicated that recording certificates would serve to provide "open and notorious notice."

A stronger case can be made for including parcel #s for single/small rights holders than for large entities with multiple rights/parcels, e.g. cities and irrigation districts. The current practice of including only point of diversion parcel numbers is not enough if the parcel numbers are to be useful for real estate/water transactions. Questions remain on whether recording of certificates is required by law. Members of the Final Decree Working group questioned the usefulness of doing so. Ecology is currently leaning toward continuing to require recording of adjudicated certificates and not to require inclusion of parcel numbers for large entities. The decision will be further informed by a March Subgroup meeting with County Auditors/staff, contact with title companies and further deliberation of the Workgroup.

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<sup>1</sup> The term "general agreement" used in the notes of the Working Group indicates that the majority of the group participating in the discussion was in agreement with the next steps to be taken and ready to move on to the next issue. It does not imply agreement to a final draft to be submitted to the Court nor acts binding any party nor will be used against the participants in any subsequent litigation.

### **Paragraph 8**

After considerable discussion, Ecology stated that they will include a list. This enables Ecology to administer in accordance with a defined list of opinions of general applicability. The list on web was developed by the AGs office and includes major orders that have come out of the case - substantive not pre-trial. The list is in the process of expert review to sort through what should be included as useful in ongoing administration of the case. The working Group was requested to review the web list.

### **Paragraph 9**

Need to include Ecology's WA state law authority (90.03) and review for further discussion - state and federal perspectives. The YN proposed language was reviewed and will be discussed again in the March 7<sup>th</sup> meeting.

### **Paragraph 10**

Continuing jurisdiction was briefly discussed and a "discussion matrix" was introduced. Jurisdiction will be a major focus of the March 7<sup>th</sup> meeting. The "discussion matrix" is attached. Please review and add items to the matrix. Any other ideas on jurisdiction before the meeting will be helpful. Please send you ideas to [roundtable@roundtableassociates.com](mailto:roundtable@roundtableassociates.com).

### **Pending Appeals**

Pending appeals pending/potential that might require reopening a portion of the case are primarily fro sub basins 23 and 25 (still open) and sub basin 10 appeals on some water rights. Resolve currently open appeals. There is no need to wait until all appeals have been exhausted before entering the Final Decree.

Charlie Shockey will distribute a white paper including proposal for further discussion - 2/23.

### **Draft Motion - Pretrial #8**

Ecology presented their draft motion to amend pretrial order No. 8. The intent of the amended order is to describe the process for review of the draft Final Order and issuance of the Final Order. A timeline will be prepared to clarify the process and facilitate further review at the March 7<sup>th</sup> meeting.

### **Written Report to the Court – 2/22/07**

The first written report is due to the Court in February. A proposed outline for the report and a working group review process was discussed at the February meeting.

The nature of the "product" of the working group came up during the discussion of Section 2 of the draft. The assumption was that it will consist of a report to the Court in June 2007 to include:

1. A draft of a proposed Final Decree to the Court by Ecology's proposal with other parties then given an opportunity to respond as they deem appropriate.
2. Identification of the issues that could not be agreed to by the working group and the nature of the disagreements. The work group discussed the need for a list of unresolved issues and Ecology will request clarification from the Court on February 8, 2007 water day.

The participants cautioned that it may be late in 2008 before a Final Decree is a reality with the schedule of rights deemed accurate and all issues resolved by the Court.

*Note: On 2/12/07 Ecology reported that Commissioner Ottem said he would be OK with not listing the unresolved issues. He also wanted Ecology to file a draft Proposed Final Decree, and for other parties to file objections. He would then set up a briefing schedule, if necessary, for those issues he wanted addressed.*

*He'd like the status report to be in the March Bulletin, so it will have to be to the Office of the Referee no later than the 22d. A day or so earlier would be helpful.*

*The proposed report was sent to the work group for comments on 2/13/07 with a request to send responses as quickly as possible (nlt close of business on Friday, 2/16/07.*

### **2007 Working Group Meeting Schedule**

Meetings have been held monthly on Court water days (2<sup>nd</sup> Thursday). The schedule was changed to reflect the potentially busy water day Court schedules. Beginning in February, the working group will meet on the Wednesday prior to water day as follows:

March 7, 2007	Noon – 4:00 PM	Yakima - Ecology Conference Rooms
April 11, 2007	Noon – 4:00 PM	Yakima - Ecology Conference Rooms
May 9, 2007	Noon – 4:00 PM	Yakima - Ecology Conference Rooms <sup>2</sup>

### **Participants**

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<sup>2</sup> May meeting will be held as needed to meet June Court date for final product.

**Next Meeting**

**Wednesday, March 7, 2007 – Noon PM – 4:00 PM – Ecology Yakima Conference Rooms**

Please check Attachment #1 for work that needs to be accomplished prior to the February meeting. All Work Group documents are available on the Ecology website  
[http://www.ecy.wa.gov/programs/wr/rights/yakima\\_finaldecree\\_wg.html](http://www.ecy.wa.gov/programs/wr/rights/yakima_finaldecree_wg.html)

Notes prepared 2/12/2007 by R. Archey, Roundtable Associates

**Next steps including work in preparation for Working Group meetings**

*Attachment 1 will include Next Steps and action items from previous meetings as well as the meeting covered by these notes. The date in ( ) is the meeting date where work was identified.*

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- A) **Final Decree Issuance prior to completion of appeals** - (US DOJ) and (WA Ecology) will research whether it is appropriate to issue a final decree before all appeals are concluded (12/06, 2/07).  
**Status:** In progress (DOJ, Ecology) – discussion paper by end of February
- B) **Process for ensuring accuracy of certificates** - 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. (11/06).
- C) **Recording of certificates** - Ecology will complete the analysis of whether recording of adjudication certificates is in fact required. Ecology will prepare draft language, as necessary, on recording of certificates, need for parcel numbers for certificate recording, reporting of ownership and enforcement. It will include input as feasible from counties, a title company, etc. Working Group participants, including Joe Mentor (property owners), Matt Wells (cities), Jeff Schuster (Yakama Nation) and Larry Martin (Irrigation districts) will consult with Ecology on the development of this discussion paper (11/06, 1/07, 2/07).
- D) **Notification Process** - Ecology will propose an efficient, effective, inclusive process to provide adequate legal notice for comments on the proposed final decree (11/06, 2/07).  
**Status:** Draft in form of motion to amend Pretrial Order No. 8 prepared for discussion at February. Timeline will be prepared to facilitate further discussion at March meeting (Ecology, Roundtable)
- E) **Jurisdiction post issuance of Final Decree** - To facilitate the jurisdiction discussion, a matrix will be developed including specific jurisdiction and potential jurisdictional issues. (12/06, 2/07)  
**Status:** Focused discussion at March 2007 meeting (Roundtable, Ecology, WG participants)
- F) **Consistency with Trust language** - US will present options (11/06)  
**Status:** In progress (USDOJ and DOI)