

# YAKIMA RIVER BASIN WATER RIGHTS ADJUDICATION NOTICE

February 1, 2017

No. 392

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TO ALL PARTIES AND ATTORNEYS OF RECORD:

This notice is published monthly pursuant to Pretrial Order No. 3 filed April 19, 1985, by Judge Walter A. Stauffacher of the Yakima County Superior Court in the matter of the State of Washington, Department of Ecology, Plaintiff, v. James J. Acquavella, et al., Defendants, Cause No. 77-2-01484-5.

Significant Documents Filed at the Yakima County Superior Court

December 20<sup>th</sup>, 2016 through January 18<sup>th</sup>, 2017

<u>Doc. No.</u>	<u>Date Filed</u>	<u>Document Description</u>	<u>Sponsor</u>
24,225	12-20-2016	Notice of Filing Water Right Change or Transfer, Subject to Pre-Trial Order No. 17 Re: Milton & Geraldine Downs Court Claim No. 00777 Subbasin 3 (Teaway)	Trevor Hutton Dept. of Ecology
24,226	12-20-2016	Notice of Filing Water Right Change or Transfer, Subject to Pre-Trial Order No. 17 Re: Washington State Department of Ecology Court Claim No. 01201 Subbasin 3 (Teaway)	Trevor Hutton Dept. of Ecology
24,227	12-20-2016	Notice of Filing Water Right Change or Transfer, Subject to Pre-Trial Order No. 17 Re: Hancock, Sparks, and Blais Court Claim No. 01942 Subbasin 3 (Teaway)	Trevor Hutton Dept. of Ecology
24,228	12-20-2016	Notice of Filing Water Right Change or Transfer, Subject to Pre-Trial Order No. 17 Re: Bohannon, Glen, Vetsch, and Wiley Court Claim No. 02398 Subbasin 23 (Ahtanum)	Trevor Hutton Dept. of Ecology
24,229	12-20-2016	Notice of Filing Water Right Change or Transfer, Subject to Pre-Trial Order No. 17 Re: Catholic Bishop of Yakima, Holtzinger Ranches, and Carlson Court Claim No. 02398 Subbasin 23 (Ahtanum)	Trevor Hutton Dept. of Ecology

24,230	12-20-2016	Notice of Filing Water Right Change or Transfer, Subject to Pre-Trial Order No. 17 Re: City of Mabton Court Claim No. 01724 Subbasin 7 (Reecer Creek)	Trevor Hutton Dept. of Ecology
24,231	12-20-2016	Notice of Filing Water Right Change or Transfer, Subject to Pre-Trial Order No. 17 Re: Washington Water Trust and Taneum Canal Company Court Claim No. 00411 Subbasin 6 (Taneum Creek)	Trevor Hutton Dept. of Ecology
24,232	12-20-2016	Notice of Filing Water Right Change or Transfer, Subject to Pre-Trial Order No. 17 Re: USBR Court Claim No. 01603 Major Claimant	Trevor Hutton Dept. of Ecology
24,233	12-22-2016	Order Granting Motion to Substitute Larry Dean Hull & Pia Pardi Hull for Robert Anderson Re: Court Claim No. 02398 Subbasin 23 (Ahtanum)	F. James Gavin Judge Pro-Tem
24,234	12-22-2016	Order Granting Motion to Substitute Parties and Divide Water Right Re: Battson, Henry, Westergard, and Anzures Court Claim No. 01131 Subbasin 18 (Cowiche Creek)	F. James Gavin Judge Pro-Tem
24,235	12-22-2016	Order Granting Motion to Substitute Gilberto Solis and Roza Martinez for Margarite Jorgensen Re: Court Claim No. 01245 Subbasin 23 (Ahtanum)	F. James Gavin Judge Pro-Tem
24,236	12-22-2016	United States' Joinder in the Yakama Nation's Motion for Reconsideration Re: Order on Remand Subbasin 23 (Ahtanum)	Patrick Barry Attorney
24,238	12-22-2016	Notice of Substitution of Attorneys for Washington Department of Fish & Wildlife, James R. Schwartz withdraws and Michael M. Young appears	James R. Schwartz Michael M. Young Attorneys
24,239	12-27-2016	State of Washington, Department of Ecology's Response to Yakama Nation's Motion for Reconsideration of Order on Remand Re: Subbasin 23 (Ahtanum)	David F. Stearns Assistant Attorney General
24,241	12-28-2016	The United States' Summary of its Briefing on the Final Decree and Position on the Draft Schedule of Rights	Rachel K. Roberts Attorney
24,243	12-29-2016	Joint Summary of Final Decree Issues and Issues Related to Draft Schedule of Rights Re: KRD, Roza, SSD, KID, YTID, COY, SMID, CID, UGID, EWC, WSID, YVCC, and NSID	Jeff Slothower Thomas Cowan Brian Iller Lawrence Martin Paul Dempsey Carter Fjeld Matthew Wells Attorneys
24,245	12-29-2016	Yakama Nation's Reply to AID's Response to the Yakama Nation's Motion for Reconsideration of Order on Remand and to AID's Objection and Presentation of Proposed Order Re: Subbasin 23 (Ahtanum)	Jeffrey S. Schuster Attorney

24,246	12-29-2016	Proposed Order Re: Motion for Reconsideration Re: Subbasin 23 (Ahtanum)	Jeffrey S. Schuster Attorney
24,248	12-30-2016	New Suncadia, LLC's Summary on Briefing on the Final Decree and Positions on the Draft Schedule of Rights	Joe Mentor, Jr. Attorney
24,250	12-30-2016	State of Washington, Department of Ecology's Summary of Final Decree Issues and Comments on Integration of the Draft Schedule of Rights	Stephen H. North David F. Stearns Assistant Attorneys General
24,252	12-30-2016	Yakama Nation's Summary of Positions on the Proposed Final Decree Briefing from 2007-2008, the Draft Schedule of Rights, and other New Issues since 2008	Jeffrey S. Schuster Attorney
24,254	12-30-2016	Motion to Substitute Dorothy Anderson for Carolyn Hayes Re: Court Claim No. 00549 Subbasin 10 (Kittitas)	Carolyn Hayes Pro Se
24,255	1-3-2017	Notice of Appearance of Thomas A. Cowan for Columbia Irrigation District	Thomas A. Cowan Attorney
24,256	1-4-2017	Motion to Substitute Ken & Cathy Carver for Stanley W. Walters Re: Court Claim No. 01715 Subbasin 16 (Upper Naches)	Mary Holleman Pro Se
24,257	1-9-2017	Motion to Substitute Jeffrey P. Raap for Clifford S. & Phyllis R. Gage Re: Court Claim No. 00499 Subbasin 10 (Kittitas)	Jeff Slothower Attorney
24,258	1-9-2017	Motion to Join D. Keith & Betty Hughes Family Trust to a portion of Court Claim No. 00177 Subbasin 31 (Richland)	Darrel Sunday Pro Se
24,259	1-9-2017	Yakima River Basin Water Rights Adjudication Notice No. 391 for January 1, 2017	Stephen H. North Assistant Attorney General
24,260	1-12-2017	Order Re: Motion for Reconsideration Re: Subbasin 23 (Ahtanum)	F. James Gavin Judge Pro-Tem
24,261	1-12-2017	Order Granting Motion to Substitute Carolyn Hayes for Dorothy Anderson Re: Court Claim No. 00549 Subbasin 10 (Kittitas)	F. James Gavin Judge Pro-Tem
24,262	1-12-2017	Order Granting Motion to Substitute Ken & Cathy Carver for Stanley & Lenora Walters Re: Court Claim No. 01715 Subbasin 16 (Upper Naches)	F. James Gavin Judge Pro-Tem
24,263	1-12-2017	Order Granting Motion to Join D. Keith & Betty Hughes Family Trust to a portion of Court Claim No. 00177 Subbasin 31 (Richland)	F. James Gavin Judge Pro-Tem
24,264	1-12-2017	Order Granting Motion to Substitute Jeffrey P. Raap for Clifford S. & Phyllis R. Gage Re: Court Claim No. 00499 Subbasin 10 (Kittitas)	F. James Gavin Judge Pro-Tem

## Contacts

Yakima County Clerk's Office - For business hours, updated forms and instructions, information on filing fees, noting motions for hearing, and obtaining copies of court documents, contact Marla Pascal at 509.574.1448 [marla.pascal@co.yakima.wa.us](mailto:marla.pascal@co.yakima.wa.us)

Ecology - A Draft Schedule of Rights (DSOR), monthly notice cut-off dates, the most recent monthly notice, and forms & instructions from the clerk's office are some of the information available on Ecology's adjudication webpage at <http://www.ecy.wa.gov/programs/vr/rights/adjhome.html>

**\*\*A new DSOR has been posted on Ecology's website and is current as of December 15, 2016\*\***

## Reminder for Noting Motions for Hearing

**Pretrial Order No. 3, section 4, states:** "Time. Because of the large number of defendants, the Court hereby enlarges the time for notice to be given or an act to be required or allowed to be done with a specified time before trial to thirty (30) calendar days after the mailing of the notice . . ." A complete copy of Pre-Trial Order No. 3 is available from the clerk's office and on Ecology's website.

Hearings before Judge F. James Gavin - Please note that all hearings will begin at 9:00 a.m.

Calendar

February 9, 2017	<b>**The February 9, 2017 Oversight Hearing has been cancelled by Order of Judge Gavin**</b>
March 9, 2017	Oversight Hearing at 9:00 a.m. at the Yakima Superior Court, Yakima County Courthouse, N. 2nd. St. and Martin Luther King Blvd., Yakima WA
April 13, 2017	Oversight Hearing at 9:00 a.m. at the Yakima Superior Court, Yakima County Courthouse, N. 2nd. St. and Martin Luther King Blvd., Yakima WA

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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

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY'S  
SUMMARY OF FINAL DECREE  
ISSUES AND COMMENTS ON  
INTEGRATION OF THE DRAFT  
SCHEDULE OF RIGHTS

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

JAMES J. ACQUAVELLA, et al.,

Defendants.

**I. INTRODUCTION**

Pursuant to the oral directive provided by the Court at the October 13, 2016, oversight hearing, as well as the Court's November 18, 2016, Order and Hearing Schedule Final Decree Summaries and Issues Related to the Draft Schedule of Rights, the State of Washington, Department of Ecology (Ecology), through its attorneys of record, Stephen H. North and David F. Stearns, Assistant Attorneys General, submits this summary of the positions Ecology took in earlier briefing on issues related to the Proposed Final Decree, and

1 its current views on integration of the Draft Schedule of Rights (DSOR) into the Final  
2 Decree.

3 On November 13, 2007, Commissioner Ottem circulated to the parties a Proposed Final  
4 Decree. Commissioner Ottem issued the Proposed Final Decree after examining and making  
5 changes to a Draft Proposed Final Decree that had been submitted by Ecology on June 11,  
6 2007. Commissioner Ottem then set dates for the parties to file initial, response, and reply  
7 briefs regarding a number of issues identified by the parties regarding the content of the  
8 Proposed Final Decree. Herein, Ecology summarizes the positions it took and the arguments  
9 it made in its filings pertaining to the Court's Proposed Final Decree. These include:

- 10 1. #20388 ECOLOGY'S REQUEST FOR REVISION OF PROPOSED FINAL  
11 DECREE (Ecology's Initial Brief).
- 12 2. #20423 ECOLOGY'S RESPONSE TO INITIAL BRIEFS ON PROPOSED FINAL  
13 DECREE (Ecology's Response).
- 14 3. #20481 ECOLOGY'S REPLY TO RESPONSE BRIEFS ON PROPOSED FINAL  
15 DECREE (Ecology's Reply).

16 The Proposed Final Decree contains an untitled introduction, and then 9 topical  
17 paragraphs. Here, Ecology summarizes its filings as each pertains to the 9 topical paragraphs in  
18 the Proposed Final Decree. Subsequently, Ecology provides its position on integration of the  
19 DSOR.

## 20 **II. SUMMARY OF ECOLOGY'S POSITIONS TAKEN REGARDING THE 21 PROPOSED FINAL DECREE**

### 22 **A. Proposed Final Decree, Introduction**

23 In Ecology's Response it objected to an introductory sentence proposed in Suncadia's  
24 Comments to the Court's Proposed Final Decree that would require Ecology to complete  
25 pending trust transfers and an exchange agreement between Ecology and the United States  
26 Bureau of Reclamation before entry of the Final Decree. The basis of Ecology's objection was  
that such a requirement could delay completion of the adjudication.

1 In Ecology's Reply, Ecology noted that the United States had asked that the Yakama  
2 Nation be given the opportunity to provide further comments on the Proposed Final Decree  
3 after the Court issues a revised Conditional Final Order (CFO) for Subbsain No. 23. Ecology  
4 asked for the same opportunity.

5 **B. Proposed Final Decree, Paragraph 1**

6 Paragraph 1 of the Proposed Final Decree asserts that the adjudication is a "quiet title"  
7 action to all surface water rights in the Yakima River Basin. Paragraph 1 also presents an  
8 exclusive list of the types of valid surface water rights in the Yakima River Basin. Ecology  
9 offered no comments on this paragraph in any of its pleadings.

10 **C. Proposed Final Decree, Paragraph 2**

11 Paragraph 2 of the Proposed Final Decree provides that the date of the extent and  
12 validity of a water right is the date of entry of the CFO confirming that right "unless as  
13 otherwise provided by law including the prior opinions and orders of this Court." *See Proposed*  
14 *Final Decree* ¶ 2. The paragraph then lists the date each CFO was entered for each major  
15 claimant and subbasin in the adjudication.

16 Ecology's Initial Brief requested specific changes to language in this paragraph to  
17 clarify that where a water right has been changed after it was confirmed in a CFO but before  
18 entry of the Final Decree, it would be valid as of the date of Ecology's extent and validity  
19 determination of that right. *See Ecology's Initial Brief* at 1-2.

20 Ecology's Response supported the request of Kittitas Reclamation District (KRD) to  
21 add language to Paragraph 2 of the Proposed Final Decree concerning the date of  
22 determination of extent and validity. Ecology noted that this is the same language that the  
23 agency proposed in its [Draft] [Proposed] Final Decree submitted June 11, 2007. *See Ecology's*  
24 *Response* at 3.

25 Ecology's Reply also supported KRD's request that the Court amend paragraph 2  
26 regarding the date of determination of extent and validity of water rights.

1 In response to the Yakama Nation's opposition to Ecology's proposed amendment to  
2 paragraph 2 of the Proposed Final Decree, Ecology pointed out that Pre-Trial Order (PTO)  
3 No. 17 already approved the concept of incorporating Ecology's change decisions into the  
4 Final Decree (see ¶ 3(d)(ii)), and that Ecology's language would result in a Final Decree that is  
5 as current as possible when it is entered. Ecology's Reply ¶ 2.b.

6 **D. Proposed Final Decree, Paragraph 3**

7 Paragraph 3 of the Proposed Final Decree does five things. Subparagraph (a) indicates  
8 that confirmed water rights will have a priority date as shown in the Schedule of Rights, or as  
9 set forth in Paragraph 4.b of the Proposed Final Decree. In subparagraph (b), it enjoins and  
10 estops the parties, and their successors and assigns, from asserting any right, title, or interest in  
11 any existing right as of the time the Final Decree is entered, except as determined and allowed  
12 by the Final Decree. Subparagraph (c) restrains, estops, and enjoins the parties, their successors  
13 in interest, and their assigns from diverting or interfering with the use of waters adjudicated by  
14 the decree, except as provided by the Decree or as provided by law subsequent to entry of the  
15 Decree. Subparagraph (d) restrains, estops, and enjoins the parties, their successors in interest,  
16 and their assigns from taking or using water in any manner that impairs the diversion, use, or  
17 enjoyment of waters by superior users. Subparagraph (e) indicates that the Final Decree is not  
18 intended to impair the right to convey or manage water pursuant to RCW 90.03.030 or  
19 RCW 90.40.020, or consistently with orders of the Court.

20 Ecology's Response opposed Suncadia's request to delete subparagraph (b) from  
21 paragraph 3. The basis of Ecology's opposition was that the subparagraph only enjoins what is  
22 already estopped by law under RCW 90.03.220. *See Ecology's Response at 3.*

23 Ecology's Response also opposed two changes that the Yakama Nation proposed to  
24 subparagraph (3). Ecology's first objection was to the Yakama Nation's suggestion that the  
25 language "under applicable law" be added to the end of paragraph 3(e). Ecology stated this  
26 language was unnecessary and possibly confusing. *Id.* Ecology's second objection was to the

1 Nation's suggestion that language be added to paragraph 3(e) that states, "where there is any  
2 conflict between this final decree and any order entered in this case, the language in that order  
3 shall control." The basis of Ecology's objection was that the Proposed Final Decree does in  
4 fact amend some orders, e.g., paragraph 7 of the Proposed Final Decree amends metering  
5 orders to make them perpetual. *Id.* at 4. Moreover, Ecology made the point that paragraph 8  
6 indicates that the administration and interpretation of adjudicated rights shall be "in accordance  
7 with all of the opinions and orders entered in the course of this adjudication," meaning that a  
8 blanket rule for determining conflicts is unnecessary. *Id.*

9 **E. Proposed Final Decree, Paragraph 4**

10 Paragraph 4 of the Proposed Final Decree lists the types of water right that do not  
11 require an "adjudicated certificate."

12 Ecology's Initial Brief requested that the Court substitute the term "water right" for  
13 "certificate." The purpose of this requested change was to clarify that, subject to the exceptions  
14 listed in paragraph 4, while having an adjudicated water right is required in order to use surface  
15 water in the adjudicated area, it is not necessary to have a certificate of adjudicated water right  
16 in order to use water in the adjudicated area.

17 Ecology now notes that an amendment to RCW 90.03.240 since the time the briefing  
18 was completed on the Draft Final Decree has made Ecology's earlier position untenable.  
19 RCW 90.03.240 (as amended by Laws of 2009, ch. 332, § 15). Ecology's earlier position was  
20 based on the notion that "there would be no penalty for [the United States or the Yakama  
21 Nation] deciding not to pay fees and receive a certificate." Ecology's Initial Brief at 3. It is  
22 now apparent that the Legislature intends for payment of fees for a certificate of an adjudicated  
23 right to be mandatory for all claimants in the adjudication upon issuance of a Final Decree.  
24 Ecology therefore withdraws this revision request.

25 Ecology's Response supported the request of Ellensburg Water Company (EWC), West  
26 Side Irrigating Company (WSIC), and Cascade Irrigation District (CID) that the Court add

1 language to paragraph 4 concerning return flows, as it had included language on return flows in  
2 its [Draft] [Proposed] Final Decree. Ecology also supported comments of Linda North that her  
3 private interest in her springs not be affected by the Final Decree, and also the Yakama Nations  
4 request to change the word “adjudicated certificate” to “adjudicated water right” for the same  
5 reasons stated in Ecology’s Requests for Revision of Proposed Final Decree.

6 Ecology’s Reply noted that the Yakama Nation opposed adding language regarding  
7 return flows to paragraph 4 of the Final Decree. Ecology continued to support including an  
8 exception for return flows in paragraph 4, rather than other paragraphs in the Proposed Final  
9 Decree, to assist future readers of the Final Decree in knowing what uses are excepted from the  
10 general requirement for an adjudicated right to use water in the basin.

11 **F. Proposed Final Decree, Paragraph 5**

12 Paragraph 5 of the Proposed Final Decree provides direction to Ecology and the parties  
13 regarding Ecology’s issuance of certificates of adjudicated water rights upon entry of the Final  
14 Decree, and the requirement that parties with confirmed rights, excepting the United States and  
15 the Yakama Nation and its members, pay the required fee for each certificate.

16 Ecology’s Response objected to proposed language from Suncadia that would extend  
17 Ecology’s obligation to issue certificates to “those in which the Court has granted an Order of  
18 Substitution or an Order of Partition.” Ecology argued that this language is unnecessary  
19 because those parties for whom the Court has granted an order of substitution are “entitled to a  
20 water right by such a determination” under RCW 90.03.240.

21 Ecology also objected to a request of the Yakama Nation that paragraph 5 be amended  
22 to provide that certificates of right must be issued to the United States, the Yakama Nation and  
23 its members. Ecology stated that the issue litigated in the case was whether it was appropriate  
24 to issue state certificates to the Yakama Nation given that the Nation’s water rights are based  
25 on federal law. Ecology stated that the Court concluded that it was appropriate. Ecology  
26 pointed out, however, that the question of whether the Nation would have to abide by state law

1 in paying a fee before it received a state certificate was never litigated, and that Ecology  
2 requested that all parties follow statutory law regarding payment of fees. RCW 90.03.470(10),  
3 (13).<sup>1</sup>

4 **G. Proposed Final Decree, Paragraph 6**

5 Paragraph 6 of the Proposed Final Decree lists the informational requirements for each  
6 certificate of adjudicated water right, including the limitations applicable as to each right as  
7 originally confirmed or changed prior to entry of the Final Decree. Paragraph 6 also confirms  
8 that Ecology may add conditions or limitations only when processing a change or transfer  
9 application under RCW 90.03.380, or under other statutory authority, after entry of the Final  
10 Decree. Ecology offered no comment on this paragraph.

11 **H. Proposed Final Decree, Paragraph 7**

12 Paragraph 7 of the Proposed Final Decree makes perpetual certain OPLs regarding  
13 metering, measuring, and reporting. Paragraph 7 also outlines requirements that certain parties  
14 notify Ecology when a right changes ownership.

15 Ecology's Response objected to language proposed by the Yakama Nation because  
16 Ecology believed that language would modify the metering orders referenced in paragraph 7.  
17 Ecology noted that metering orders do not apply on the Yakama Reservation. Ecology also  
18 noted that if the Court amends paragraph 9 regarding the administration of the Sunnyside  
19 Division's water rights, as requested by Sunnyside, that Sunnyside also be subject to the same  
20 metering requirements as other claimants.

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23  
24 <sup>1</sup> The last sentence of paragraph 5 may need to be amended in order to reflect the  
25 current requirements of RCW 90.03.240, which, as discussed in the preceding section of this  
26 brief, have changed since the briefing on the Proposed Final Decree concluded.

1 **I. Proposed Final Decree, Paragraph 8**

2 Paragraph 8 of the Proposed Final Decree simply states that “[t]he rights integrated into  
3 this Final Decree shall be administered and interpreted in accordance with all of the opinions  
4 and orders entered in the course of [the] adjudication.”

5 Ecology’s Initial Brief requested that the Court add specific language to this paragraph  
6 to make clear that all opinions and orders of the Court, whether they are listed in the Final  
7 Decree or not, are applicable in administration of the Final Decree. Ecology also proposed that  
8 the Court add the list of orders and opinions listed in the [Draft] [Proposed] Final Decree filed  
9 by Ecology on June 13, 2007 (Doc. #20,126). The basis of Ecology’s request was to clarify and  
10 ensure that all orders and opinions of the Court are applicable to parties to the adjudication and  
11 their successors, not just parties to the adjudication. As for the listed orders and opinions that  
12 Ecology requested the Court include, Ecology sought to have selected orders and opinions  
13 included that are of widespread applicability.

14 Ecology’s Reply maintained that the Court should include Ecology’s proposed list of  
15 orders and opinions in paragraph 8 in order to reduce future litigation over administration of  
16 the Final Decree. In Ecology’s Reply, Ecology also did not oppose language proposed by the  
17 Yakama Nation or the list the Nation provided in its Response Brief Re: Proposed Final  
18 Decree.

19 **J. Proposed Final Decree, Paragraph 9**

20 Paragraph 9(a) of the Proposed Final Decree deals with administration and enforcement  
21 of the Final Decree. It provides that the Court intends to retain jurisdiction over the  
22 administration and enforcement of the Final Decree for at least three years from the date of the  
23 Final Decree’s entry. Paragraph 9(b) of the Proposed Final Decree makes clear that any party  
24 may bring a motion to show cause in this Court to enforce the injunctions in Paragraph 3 of the  
25 Final Decree.

26

1 Ecology's Initial Brief requested that the Court remove all language regarding the  
2 Court retaining jurisdiction over the administration and enforcement of the Final Decree, and  
3 instead, add language providing that appeals of administrative decisions of Ecology in  
4 administering and enforcing the Final Decree, including decisions of Ecology to enforce  
5 against junior right holders in order to protect senior right holders, and including the Yakama  
6 Nation's right for instream flows for fish, be to the Pollution Control Hearings Board pursuant  
7 to RCW 43.21B.110.

8 The basis of Ecology's request was that the Court lacks the authority to retain  
9 jurisdiction over appeals of Ecology decisions in administering the Final Decree and that the  
10 Legislature has lodged jurisdiction over appeals of Ecology's administrative decisions with the  
11 Pollution Control Hearings Board. *See* Ecology's Initial Brief at 5-11. Ecology also sought to  
12 clarify that it may enforce in favor of the Yakama Nation's right for instream flows for fish,  
13 but that it cannot quantify that right. *Id.* at 10.

14 Ecology's Response addressed requests made by several parties regarding the language  
15 in Paragraph 9, noting that several parties joined the comments of Roza Irrigation District and  
16 Suncadia. Ecology's responses to each party that made substantive comments to paragraph 9 of  
17 the Final Decree are listed below.

18 **a. Ecology's Response to Comments of KRD**

19 Ecology opposed KRD's comments regarding this Court retaining jurisdiction for the  
20 same reasons Ecology offered in its Requests for Revision of Proposed Final Decree. *See*  
21 Ecology's Response at 7. Ecology requested the Court to amend paragraph 9(a) to be  
22 consistent with state law.

23 **b. Ecology's Response to Comments of Roza Irrigation District**

24 Ecology offered rebuttal to legal argument put forth by Roza that the Court should  
25 retain jurisdiction over the administration and enforcement of the Final Decree. Ecology  
26 pointed out that Roza's argument that jurisdiction over Ecology's administrative enforcement

1 decisions should remain with the Court because Ecology lacks administrative enforcement  
2 powers against the United States and the Nation is an invalid concern because Ecology has  
3 little or no room for administrative enforcement against the Yakama Nation and Ecology may  
4 never attempt administrative enforcement against the United States or Yakama Nation. *See*  
5 Ecology's Response at 7-9. Ecology pointed out that state law makes clear that upon  
6 conclusion of a general adjudication, responsibility for administering the adjudicated water  
7 rights falls on Ecology and that Ecology's decisions are appealable to the Pollution Control  
8 Hearings Board (PCHB). Ecology argued that any change to this statutory scheme should be  
9 made by the Legislature and not this Court. *Id.* at 9.

10 **c. Ecology's Response to Comments of Suncadia**

11 Ecology argued against Suncadia's position that the Court has continuing jurisdiction to  
12 administer the Final Decree by pointing out that Suncadia largely cited to case law from other  
13 states. Otherwise, Ecology's arguments here mirror those it made in response to other parties  
14 arguing in favor of continuing jurisdiction. *Id.* at 10.

15 **d. Ecology's Response to Comments of the United States**

16 Ecology responded to five proposed steps for enforcement set out by the United States.  
17 Particularly with respect to the United States' steps three and four, pertaining to enforcement of  
18 the Nation's minimum instream flow rights, Ecology noted that while it takes its responsibility  
19 for enforcing the Final Decree seriously, it is not the only entity with responsibility to enforce  
20 the Final Decree. Ecology pointed to paragraph 9(b), which allows any party to bring an action  
21 for injunctive relief in this Court.

22 Ecology also opposed the request of the United States that the Court retain permanent  
23 jurisdiction over appeals of Ecology's administrative decisions for the reasons stated in  
24 response to Roza and in Ecology's Initial Brief at pages 6-9.

1           e.       **Ecology's Response to Comments of the Yakama Nation**

2           Ecology reiterated its position regarding appeals of Ecology's administrative decisions  
3 on changes or transfers of water rights. Ecology also responded to multiple language change  
4 requests that the Nation sought to Paragraph 9(a), some of which were not objectionable to  
5 Ecology. *See Ecology's Response* at 12.

6           f.       **Ecology's Response to Comments of Yakima-Tieton Irrigation District,  
7           Yakima Valley Canal Company, and Union Gap Irrigation District**

8           In Ecology's Reply, Ecology summarily responded to multiple parties concerning the  
9 PCHB's authority to review Ecology's enforcement decisions after the adjudication is closed.  
10 Again, Ecology argued (1) that the PCHB's authority includes review of Ecology's  
11 enforcement decisions after adjudication, (2) that the PCHB's review of Ecology's  
12 enforcement decisions does not violate the separation of powers doctrine, and (3) that only the  
13 Legislature may make policy decisions on appropriate avenues for appeal. Ecology's Reply at  
14 3-6. Particularly with respect to this last point, Ecology argued that the parties' policy  
15 arguments in favor of this Court retaining jurisdiction over appeals of Ecology's enforcement  
16 orders do not take precedence over express statutory language that provides for the PCHB's  
17 exclusive authority to review those decisions in the first instance. *Id.* at 5-6. Ecology also  
18 argued that the Court's authority to retain jurisdiction did not include the authority to review  
19 Ecology's administrative decisions without first going through the administrative process  
20 established by the Legislature. *Id.* at 6.

21           **III.    ECOLOGY'S COMMENTS ON INTEGRATION OF THE DSOR**

22           At the November oversight hearing, counsel for the United States raised an issue  
23 regarding integration of Ecology's DSOR into the Final Decree. The primary question is  
24 whether Ecology's DSOR will be integrated into the Final Decree and, if so, which description  
25 of a right would control in the event that there are discrepancies between the DSOR and the  
26 schedules of rights confirmed in the CFOs as later modified by any subsequent PTO No. 17

1 notices. The Court invited commentary on this issue at that hearing and again through its Order  
2 and Hearing Schedule, Final Decree Summaries and Issues Related to The Draft Schedule of  
3 Rights dated November 18, 1016.

4 RCW 90.03.240 directs that “[u]pon the court’s final determination of the rights to  
5 water, the department [of Ecology] shall issue to each person entitled to a water right by such a  
6 determination, a certificate of adjudicated water right, setting forth” the confirmed attributes of  
7 the right “and specific provisions or limitations or both under which the water right has been  
8 confirmed.” Ecology has prepared and maintained the DSOR in order to be ready to carry out  
9 its statutory duty to issue certificates that reflect the rights that this Court has confirmed in the  
10 various CFOs it has entered and that have been changed through the procedures set forth in  
11 PTO No. 17.

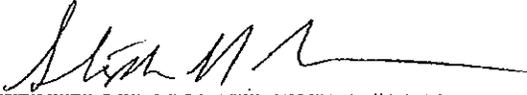
12 Ecology’s main concern with the notion of fully “integrating” the DSOR into the Final  
13 Decree is the danger of introducing inconsistencies into Court’s rulings, thereby introducing  
14 into the Final Decree confusion about the rights that have been confirmed. Although Ecology  
15 has made every attempt to ensure the DSOR is as accurate as possible, to date several parties  
16 have spotted ministerial errors in the DSOR where the rights therein did not exactly mirror the  
17 rights as they were confirmed by the Court in a CFO. It therefore seems entirely possible that  
18 there may be more such inconsistencies between the rights as they appear in the DSOR and the  
19 rights confirmed by this Court and subsequently changed through the PTO No. 17 process.  
20 Elevating the DSOR to the level of a definitive statement of the parties’ confirmed rights could  
21 be unfair to the parties who diligently reviewed their rights as they were confirmed in the CFO  
22 but who would now have their rights modified at the last minute due to potential errors in the  
23 DSOR. Thus, Ecology recommends that the DSOR remain separate from and not integrated  
24 into the Final Decree.

25 However, if, for the parties’ ease of reference, this Court finds it desirable to attach a  
26 copy of the DSOR to the Final Decree, Ecology urges the Court to make it abundantly clear

1 that the DSOR is simply meant to be a ministerial collation of the information that is contained  
2 in the CFOs and PTO No. 17 notices. The Final Decree should state that if there are any  
3 discrepancies between the information in the DSOR and the rights confirmed in the CFOs or  
4 subsequently changed, the CFOs and PTO No. 17 notices control, and Ecology is authorized to  
5 issue a certificate in conformity therewith without first seeking an order *nunc pro tunc* to  
6 modify the schedule of rights appended to the Final Decree.

7 RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of December 2016.

8 ROBERT W. FERGUSON  
9 Attorney General

10   
11 STEPHEN H. NORTH, WSBA #31545  
12 DAVID F. STEARNS, WSBA #45257  
13 Assistant Attorneys General  
14 Attorneys for Plaintiff  
15 State of Washington, Department of Ecology  
16 (360) 586-6770

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