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November 22, 2006

Commissioner Ottem
Yakima County Superior Court
County Courthouse
128 North Second Street, #323
Yakima, WA 98901

RE: Ecology v. Acquavella Final Decree

Dear Commissioner Ottem:

I am writing on behalf of Suncadia, LLC, to comment on the scope and content of the Court's Final Decree in Ecology v. Acquavella.

INTEGRATING THE CONDITIONAL FINAL ORDERS

The water code clearly details the steps necessary to complete a water right adjudication. After all evidence has been presented and exceptions heard, RCW 90.03.200 requires an adjudication court to enter a decree "determining the rights of the parties" to divert water. Once the Court enters a final decree, the statute requires Ecology to issue to each confirmed claimant a water right certificate setting forth the name and address of the claimant, the priority and purpose of the right, the period of use, the point of diversion and the place of use, the land to which said water right is appurtenant and, when applicable, the maximum quantity of water allowed.¹

Despite this clarity in the general statutory scheme, there are a number of issues where the Legislature's guidance is incomplete. My client's primary concern regards the disposition of changes of use and transfers that have been

¹ RCW 90.03.240.

authorized during the Acquavella proceeding. Water right changes of use and transfers can take many forms. Water right transfers can be limited to the question of ownership. For example, water rights subject to the court's jurisdiction may now be owned by parties other than the original claimant. Water rights subject to the court's jurisdiction have been segregated as land has been divided and sold. Water right changes of use can involve changes of place of use, purpose of use or point of diversion. The essential elements of a water right may have changed through application and authorization from Ecology since the water right was confirmed in a conditional final order.

In Pretrial Order No. 12, the Acquavella Court directed Ecology to accept and process applications for permanent transfers of surface water rights that also were subject to adjudication in the Acquavella litigation. In Pretrial Order No. 17, the Court considered the relationship between the final decree and water rights transfers that occurred prior to entry of the final decree. Specifically, the Court directed Ecology to issue a Notice of Change or Transfer for each water right approved for transfer that also is subject to this adjudication. Furthermore, the Court directed Ecology to file such Notices with the court "for incorporation by reference into the final decree."² Finally, the Court declared in Pretrial Order No. 17 that

this Court shall incorporate by reference in its final decree ... the findings and conclusions contained in pretrial orders except that, unless otherwise required by the applicant or successor in interest, this Court shall incorporate water right changes in its final decree.³

Under RCW 90.03.240, Ecology is required to issue a Certificate "to each person entitled to the diversion of water" under a final decree. Following the approval of a change of use or transfer, the person entitled to divert water is the successful applicant for a change or transfer, not to the original claimant or even the party whose claim is confirmed in a conditional final order. Similarly, there have been countless partition and substitution orders entered under Pretrial Order 7, and the parties for whom these orders have been granted also are the persons "entitled to the diversion of water" under a final decree. Consequently, the final decree should direct Ecology to issue a Certificate to the successful applicant for a change of use or transfer, and to any other successor-in-interest for whom the Court has granted an Order of Substitution or an Order of Partition for a water right otherwise subject to the Court's jurisdiction.

² Pretrial Order 17 at page 2.

³ Pretrial Order 17 at page 2. Similarly, in Pretrial Order 8 the court indicated a pretrial order was a final order except for purposes of integration.

INCORPORATION OF PRIOR RULINGS

Throughout this proceeding the Court has made a number of rulings in pretrial orders, general reports, and other rulings that may limit or define rights of any or all claimants, or prescribe the scope of the final decree. These decisions should be compiled and incorporated into the final decree. For example, two orders of general applicability issued by the Court that should be referenced in the final decree are Stipulation re: Water Use for Fire Suppression, entered December 12, 1996; and Order Requiring Metering, Measuring, and Reporting Requirements, entered September 15, 2005. These and other decisions of the Court should be incorporated into the Final Decree.

ENFORCEMENT

The Yakima Basin is overappropriated, and the rights of junior users are subject to curtailment in low water years. Ecology has authority under RCW 43.21A.064 to regulate water use, based on the decree. Once a Final Decree is entered, Ecology might issue cease and desist orders against junior users to enforce the decree. The hydraulic connection between the Yakima River and its alluvial aquifer is well-established fact.⁴ Nevertheless, groundwater users weren't joined in the Acquavella adjudication. In Rettkowski v. Ecology, the Washington Supreme Court ruled that Ecology lacked the statutory authority to regulate water rights absent a general adjudication pursuant to Chapter 90.03 RCW.⁵ According to the Rettkowski Court, "[a] general adjudication ensures that all interested parties are heard in a formal adjudicative setting and that adequate due process is afforded to all."

The Department of Ecology is given authority under RCW 43.21A.064 to "regulate and control the diversion of water in accordance with the rights thereto." The rights of groundwater users haven't yet been determined. In Rettkowski v. Ecology, the Washington Supreme Court held that the Department

⁴ See e.g., U.S. Geological Survey Groundwater Study, described at <http://wa.water.usgs.gov/projects/yakimagw/summary.htm>. This doesn't necessarily mean, however, that all groundwater resources in the Yakima Basin are in hydraulic continuity with the Yakima Basin. The Yakima River crosses four large structural groundwater basins. In many areas, these groundwater basins are separated from the Yakima River's alluvial aquifer by a thick basalt layer. H. Kinnison and J. Sceva, *Effects of Hydraulic and Geologic Factors on Streamflow of the Yakima River Basin, Washington* (Geological Survey Water Supply Paper 1595 (U.S. GPO 1963)). Likewise, there may be other isolated groundwater sources. But the alluvial aquifer of the Yakima Basin and surface streams are connected and, as a general proposition, streamflows merely are a surface manifestation of the alluvial aquifer.

⁵ Rettkowski v. Department of Ecology, 122 Wn.2d 219, 221, 858 P.2d 232 (1993).

of Ecology lacks the statutory authority to issue cease and desist orders against groundwater users whose pumping had a detrimental effect on senior surface water rights.⁶ Therefore, and given due process protections required under the state and federal constitutions, and provided under RCW 90.03.110 - .245, it is doubtful the final decree can be enforced against groundwater users since they weren't joined in the proceeding.

CONTINUING JURISDICTION

Finally, questions arise regarding the Acquavella court's continuing jurisdiction after entry of the Final Decree. Once a court has obtained jurisdiction, the jurisdiction continues through subsequent proceedings arising out of the same action.⁷ Ordinarily, the concept is confined to marital dissolutions, injunctions, vacation of judgments and similar proceedings.⁸ The Washington courts have not considered this question in the context of a general adjudication under Chapter 90.03 RCW. In fact, in our review we have only found one similar case where the issue was discussed. In Orderville Irrigation Co. v. Glendale Irrigation Co., the Utah Supreme Court sustained a lower court ruling in an action to determine the relative priority of two irrigation companies under a general water adjudication. The court rejected an argument that a claim for relief under the adjudication decree was barred by principles of res judicata and laches, and the statute of limitations. The Orderville court reasoned as follows:

(I)t is important to keep in mind that we are not here concerned with the usual type of judgment. An adjudication as to the allocation of flowing water, the amount of which necessarily fluctuates from time to time, is a decree in equity as to the rights in their continuing use. It is inherent in the nature of such a decree that the court has continuing jurisdiction, when properly invoked, to see that its provisions are being complied with. Where disputes arise as to the manner or amount of use; or where there are uncertainties in the decree which give rise to a genuine dispute as to the rights of the parties concerning the use of such waters, neither the rule of res judicata nor the statute of limitations prevents resort to the courts to settle such a controversy.⁹

⁶ Rettkowski v. Department of Ecology, 122 Wn.2d 219, 221, 858 P.2d 232 (1993).

⁷ K. Tegland, 14 Washington Practice 8 (Civil Procedure § 2.2).

⁸ Id.

⁹ Orderville Irr. Co. v. Glendale Irr. Co., 17 Utah 2d 282, 285, 409 P. 2d 616 (1965).

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The Acquavella Court should address the issue of whether the Court should retain jurisdiction over the case. Jurisdictional questions arise over appeals of cease and desist orders. The alternative to continued jurisdiction by the Acquavella Court is for appeals to be heard by the Pollution Control Hearings Board, with review by Thurston County Superior Court or another appropriate court. The question of jurisdiction over appeals from changes and transfers also should be addressed. Currently, these are heard by the Acquavella Court where the water right otherwise is subject to the adjudication. Should this practice continue? Another jurisdictional question is whether this Court should retain jurisdiction to hear an appeal in the event Ecology attempts to regulate against groundwater users. Should this court retain jurisdiction in order to hear proceedings to join groundwater users? The Yakima County Superior Court may lack jurisdiction under the current case to hear certain of these issues. The Final Decree Work Group should consider whether it would be appropriate for the Legislature to provide the Acquavella court with this role, and should consider whether to provide recommendations for future changes to the adjudication statute to provide an expanded role for the Court for future water right issues in the Yakima Basin.

CONCLUSION

Whether explicitly or otherwise, the Acquavella litigation has had the effect of suspending Ecology's regulatory authority in the Yakima Basin. Now the Court's work is nearly complete. The final decree should clearly state the terms under which the Court is restoring Ecology's regulatory authority. Conversely, the final decree should clarify the procedures for enforcing the decree where and if the Acquavella Court lacks the authority or decides in its discretion not to do so. The Court should retain continuing jurisdiction over water rights subject to the adjudication, in order to enforce the final decree.

For nearly 30 years the Yakima County Superior Court has operated as a form of water court for the Yakima Basin. Water users have come to take this role for granted. The Court - and the claimants - should consider carefully whether it would be appropriate for the Acquavella Court to continue in this capacity into the future.

Sincerely,

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CC: Barbara Markham
Becky Johnson
Elaine Peterson
Final Decree Working Group