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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR YAKIMA COUNTY

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. STATE OF WASHINGTON DEPARTMENT OF ECOLOGY Plaintiff, v. JAMES J. ACQUAVELLA, et al., Defendants.	No. 77-2-01484-5 **UNITED STATES' STATEMENT OF ISSUES REGARDING FINAL DECREE**

The United States of America submits this statement in response to the Court's "Notice Re: Final Decree Work Group" dated October 23, 2006. As directed by the Court, the United States identifies its participants for the Work Group process, responds to the Department of Ecology's "Memorandum on Issues Regarding Final Decree" dated September 21, 2006, and identifies additional issues of concern to the United States.[1]

[1] The United States is not filing this Statement with the Court, but submits it by electronic mail to Ms. Becky Johnson and Ms. Elaine Peterson in the Yakima Adjudication Referee's Office, consistent with our understanding of the directions in the Court's October 23 Notice, with the further understanding that this Statement will be posted on Ecology's website. If the Court directs the United States to file the Statement with the Clerk of the Court, counsel for the United States will do so promptly.

A. Participants for the United States

The United States will participate in the Final Decree Work Group through the following individuals:

1. Charles R. Shockey, Attorney
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2. Patrick Barry, Attorney
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3. William Ferry
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Additional federal government employees may register to participate in their official or individual capacities in order to access and receive public information produced through the Court-approved Work Group process. The United States will seek to ensure that any additional individuals participating on behalf of the United States provide the requisite email address or other appropriate information.

B. Response to Ecology's Memorandum

1. Preparing the Final Decree – the United States agrees that a process needs to be established to incorporate the individual conditional final orders (CFOs) into the Final Decree. The United States recommends that the Final Decree present the elements of each adjudicated water right in as consistent a manner as possible. With regard to Ecology's comments regarding the explanation of how various priorities of water rights will be regulated, the United States is not clear how Ecology proposes to present this matter in the context of the Final Decree. Accordingly, the United States must reserve the right to comment on this issue until the Work Group has had an opportunity to address Ecology's concern.

2. Estimated Time to Prepare the Final Decree – Ecology estimates that preparation of the Final Decree may require two years and perhaps longer, depending on completion of the remaining subbasin CFOs. No comment.

3. Service of Final Decree – Ecology proposes to use the monthly notice to inform persons that the Final Decree will be available on Ecology's website or by mailing a request to Ecology. The United States understands the difficulty inherent in providing adequate legal notice in an adjudication of this magnitude and duration, but the importance and finality of having these water rights adjudicated requires that some form of valid service must be provided to every potentially affected person. The United States will work with Ecology and other participants in the Work Group process to explore ways of ensuring service to all affected parties.

4. Preparation of Certificates – Ecology estimates that preparation of the certificates will require approximately 12 months. No comment.

5. Fees for Certificates – Ecology states that it is required by state law to charge a fee for preparing and issuing each certificate and requests that the Court order payment of all required fees to Ecology within 180 days of receiving a request for payment. The United States notes that it may be exempt, pursuant to the McCarran Amendment, from payment of these fees. In addition, for federal reserved water rights awarded under the Final Decree, the United States may be exempt from requirements related to the issuance of a state water

certificate. The United States will provide a further statement of position regarding these issues during the Work Group process and will discuss the issue of fees with Ecology and the other participants.

6. Assuring Current Ownership Information – Ecology notes the need to remind each claimant of its obligation to provide current information to Ecology. The United States agrees.

7. Defaulting Parties – Ecology estimates that nearly 6,000 persons may be in default for failure to appear. The United States repeats its concern regarding service and will discuss with Ecology and other participants the permissible means of providing service to those persons potentially in default.

8. Regulation after Adjudication – Ecology invites participants to identify areas that may require stream patrollers following completion of the adjudication. The United States will work with Ecology to address this concern.

9. Continuing Jurisdiction – Ecology requests that the Court consider retaining jurisdiction following the Final Decree. The United States will evaluate and present a further statement of position during the Work Group process with regard to the implications of continuing jurisdiction by the Yakima County Superior Court. This issue requires careful examination, in light of both (a) the limited waiver of sovereign immunity in the McCarran Amendment and (b) the 1945 Judgment entered by the United States District Court for the Eastern District of Washington in Kittitas Reclamation District v. Sunnyside Valley Irrigation District, Civil Action No. 21 (E.D.Wash.), which provides the legal basis for the establishment of the total water supply available and the mechanism for prorationing.

10. Effective Date to Determine the Extent and Validity of Water Rights – Ecology presents a discussion of the Court's Memorandum Opinion Re: Department of Ecology's Motion for Authorization to Perform a Tentative Determination" regarding the application of the Estate of Ted and Agnes Bugni (January 21, 2004). This comment raises a number of complex and difficult legal and policy issues that will require further discussion in the Work Group

process. The United States does not have a substantive position at this time in response to Ecology's Memorandum.

C. Additional Issues of Interest to the United States

1. Principles for the Final Decree – the Court's October 23 Notice indicated that "the Court believes the Final Decree should be consistent with the rulings in this case. It should be a document that assists Ecology, and as applicable, the Bureau of Reclamation, in regulating the use of water in the basin." The United States agrees with these principles and notes that, in addition to Ecology and Reclamation, the Bureau of Indian Affairs and the Yakama Nation also will have responsibilities with respect to managing or regulating certain water resources subject to the Final Decree, as identified in prior rulings in this case. Thus, the Final Decree will need to assist all of those parties, as appropriate, in regulating the use of water in the basin.

2. Ownership and Title of Water Rights for the United States – whether the Final Decree should take a consistent approach in describing the title and ownership of water rights held by the United States, including the language in certain conditional final orders referring to the United States as "trustee" for various parties. As many participants in the adjudication are aware, the United States takes the position that only Congress can impose a trusteeship responsibility on the United States. The United States is prepared to discuss various approaches to this issue in an effort to arrive at consistent language in the Final Decree.

3. Other Issues - The United States is not currently aware of any additional issues of concern, but reserves the right to raise additional issues that come to light during the Work Group process.

D. Facilitation of the Work Group Process

1. Meeting Locations

Reclamation and Ecology have agreed to provide the necessary meeting room facilities for the Work Group sessions. The meetings will be held at Ecology's Central Regional Office, Waterfall and Seafoam Conference Rooms, 15 West Yakima Avenue, Suite 200, Yakima, WA 98901, unless otherwise

announced. Reclamation may offer to host one or more meetings at the Upper Columbia Area Office, 1917 Marsh Road, Yakima, WA 98901.

2. Work Group Facilitator

Reclamation and Ecology are making arrangements to contract for the services of Roundtable Associates, Inc. of Seattle, Washington, to serve as the Facilitator for the Work Group meetings. Mr. Bob Archey of Roundtable has agreed to serve as the Facilitator throughout the Court-designated process. Mr. Archey will participate at the initial meeting scheduled for November 30, 2006, at the Ecology Central Regional Office. Reclamation and Ecology intend to have Mr. Archey serve as the chair for all Work Group meetings, subject to approval by other participants. Roundtable also will assist in preparing the two written status reports required by the Court's October 23 Notice.

Respectfully submitted this 8th day of November, 2006.

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