

Judge Thomas S. Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES, in its own right and on  
behalf of the Lummi Nation,

NO. C01-0047Z

Plaintiff,

LUMMI NATION,

Plaintiff-Intervenor,

FEDERAL WATER MASTER'S  
ANNUAL REPORT 2008-2009

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY et al.

Defendants.

The "Settlement Agreement Regarding Uses of Groundwater on Lummi Peninsula"  
(Settlement Agreement) was entered into by the parties to resolve the claims in this case. The  
Court, by its Order and Judgment dated November 20, 2007, approved the Settlement  
Agreement. The Agreement provides for the appointment of a Water Master "to protect [the  
parties'] respective rights to the allocations set forth [in the Agreement], and to protect the  
aquifer from saltwater intrusion." Settlement Agreement at § VIII(A)(1). Section VIII(A)(1)(c)

1 of the Agreement requires the Water Master to “issue an annual report of the activities of the  
2 Water Master’s office, including requests for action, decisions or orders issued, and enforcement  
3 actions taken.” The Court, in paragraph 14 of its Omnibus Order of August 7, 2008, specified  
4 that the Water Master will file and serve the annual report on or before June 30<sup>th</sup> of each year.  
5

6 The Court appointed the undersigned as Water Master on June 10, 2008, and this is the  
7 Water Master’s Annual Report for fiscal year 2008-2009.

8 **ORIENTATION ACTIVITIES**

9 The Water Master participated in two orientation activities. First, the Court conducted a  
10 noticed informal conference on July 23, 2008, attended by several of the parties and the Water  
11 Master. As a result of the conference and its ensuing Omnibus Order, the Court clarified  
12 financial matters and many procedures to be followed by the Water Master (*e.g.*, filing of  
13 pleadings, record of pleadings, informal resolution of disputes, and preparation and service of the  
14 annual report).  
15

16 Second, on December 3, 2008, the Water Master participated in two noticed events in the  
17 Lummi Peninsula Case Area. The first was a six-hour tour of various wells and facilities in the  
18 Case Area. The Court’s law clerk accompanied the Water Master on the tour. During the tour,  
19 representative water users and officials provided background information on geography,  
20 hydrogeology, water supply and water usage in the Case Area.  
21

22 The second event (conducted in cooperation with the Lummi Nation and the Washington  
23 Department of Ecology) was a 4:00-6:00 p.m. public meeting with interested water users about  
24 the status of the case and the Water Master’s responsibilities. The major topics discussed at the  
25 meeting were the following: (a) summary of the litigation, negotiation of the settlement, and  
26 entry of the judgment; (b) dispute resolution procedures; (c) water users’ responsibilities (*e.g.*,  
27  
28

1 payment of the annual Water Master fee, well testing and reporting); and (d) questions and  
2 answers. Approximately 20 persons attended the public meeting.

3 **WEBSITE**

4 Pursuant to the Court's direction, the Water Master established and maintains a website  
5 ([http://web.me.com/johnethorson/Lummi\\_Water\\_Master/Home.html](http://web.me.com/johnethorson/Lummi_Water_Master/Home.html)) that provides information  
6 on how to initiate proceedings before the Master, the status of pending proceedings, and a  
7 compendium of the Master's claims for fees and expenses and the Court's orders in response to  
8 those claims.  
9

10 **REQUESTS FOR ACTION**

11 Seven proceedings have been commenced before the Water Master during the fiscal year.  
12 Three of these proceedings (one subsequently settled) were brought by the Department of  
13 Ecology seeking the Water Master's assistance in obtaining annual reports and recovering  
14 penalties from water users, and four of the proceedings were initiated by the Water Master to  
15 secure payment of allegedly past-due annual Eligible Landowner Fees (Settlement Agreement §  
16 IV(G)(1)). The docket of these proceedings is set forth below:  
17  
18

19 WM 09-01

*In re* Concetta J. Blaine

20 Ecology Penalty No. DE 6398-09WRNR

Filed April 8, 2009

21 May 1, 2009-Prehearing Conference (telephonic)

22 May 6, 2009-Prehearing Conference order issued (setting July 1, 2009, for Dep't of Ecology to  
23 file motion for summary judgment; July 31, 2009, for Ms. Blaine to respond; and Aug. 20, 2009,  
for any reply)

24 WM 09-02

*In re* Thomas Ficca

25 Ecology Penalty No. DE 6400-09WRNR

26 Filed April 8, 2009; dismissed May 6, 2009, at request of Dep't of Ecology

27 WM 09-03

28 *In re* John Rusin

1 Ecology Penalties Nos. DE 6462-09WRNR & DE 6463-WRNR  
2 Filed May 12, 2009

3 June 4, 2009-Prehearing Conference (telephonic)

4 June 9, 2009-Prehearing Conference Order issued (setting July 20, 2009, for Dep't of Ecology to  
5 file motion for summary judgment; Aug. 20, 2009, for Mr. Rusin to respond; and Sept. 8, 2009,  
6 for any reply)

7 WM 09-04

8 *In re* Julie Littleton & Monte R. Littleton

9 Alleged Failure to Pay Eligible Landowner Fee for 2008-09

10 Filed June 18, 2009

11 Answer due July 20, 2009

12 WM 09-05

13 *In re* Steve H. Hovander

14 Alleged Failure to Pay Eligible Landowner Fee for 2008-09

15 Filed June 18, 2009

16 Answer due July 20, 2009

17 WM 09-06

18 *In re* John Rusin dba Hutzpah Holdings, LLC

19 Alleged Failure to Pay Eligible Landowner Fee for 2008-09

20 Filed June 18, 2009

21 Answer due July 20, 2009

22 WM 09-07

23 *In re* Concetta J. Blaine

24 Alleged Failure to Pay Eligible Landowner Fee for 2008-09

25 Filed June 18, 2009

26 Answer due July 20, 2009

27 **DECISIONS OR ORDERS ISSUED**

28 The Water Master has not issued a final decision or order in any proceeding. As  
indicated in the above list, six of the proceedings are ongoing with final decisions or orders  
anticipated in late summer 2009.

**ENFORCEMENT ACTIONS TAKEN**

To date, the Water Master has not undertaken any final enforcement actions. Depending  
on the outcome of pending proceedings, enforcement actions may be required in some  
proceedings.

**FINANCIAL MATTERS**

In paragraph 6 of its Order Appointing Water Master (June 10, 2009), the Court directed the Clerk of the Court “to establish an account in the registry of the Court into which all monies paid pursuant to the Settlement Agreement shall be deposited. Any compensation or reimbursements to be paid to the Water Master shall be made from said account.” The Settlement Agreement also provides (in section IV(B)(2)) that the “Water Master’s office shall be funded at the initial rate in 2006 of One Hundred Thousand Dollars (\$100,000) per year.” Because the Water Master was actually appointed in 2008, the Court’s August 7, 2008, order (paragraph 2) clarified that the Water Master’s budget for the July 1, 2008, to June 30, 2009, fiscal year would be \$100,000.

The Clerk has maintained the required account since August 2008. Income has consisted of payments from the Lummi Nation, Washington Department of Ecology, individual water users, and bank interest.<sup>1</sup> As of June 16, 2009, the Financial Administrator for the District Court Clerk reported a balance of \$93,560.18. A summary of the income and expenditures from the account since its inception follows:

<b>Item</b>	<b>Amount</b>
<i>Income</i>	
Lummi Nation	\$50,000.00
Department of Ecology	22,100.00
Landowner Payments	27,500.00
Interest	194.66
<i>Total Income</i>	99,794.66
<i>Expenditures</i>	(6,234.48)
<b>June 16, 2009, Balance</b>	<b>\$93,560.18</b>

The Settlement Agreement specifies that the Lummi Nation and the “state defendants” each shall pay 50% of the budgeted costs of the Water Master’s office. The “state defendants”

<sup>1</sup> Filing fees for proceedings before the Master are deposited in a separate account.

1 are the Department of Ecology and Eligible Landowner households receiving a right to water  
2 from the allocation administered by the Department. Settlement Agreement § IV(G)(1).

3 For fiscal year 2008-2009, the Lummi Nation has paid \$50,000 representing its 50% of the  
4 \$100,000 budget for the Water Master’s office. The Department of Ecology has paid \$22,100  
5 and Eligible Landowners have paid \$27,500, bringing the total paid by the “state defendants” to  
6 \$49,600 or slightly less than their 50% allocation. The Water Master, however, has initiated  
7 proceedings against four landowners who have allegedly not paid their 2008-2009 fees. If these  
8 amounts are shown to be due and are subsequently paid, the “state defendants” will be credited  
9 with up to an additional \$500—thus satisfying the “state defendants” 2008-2009 allocation.  
10

11 In the event these additional payments are not due or are uncollectable, the “state  
12 defendants” may be slightly short in meeting their 2008-2009 allocation. The Water Master is  
13 aware the Department of Ecology takes the position that it has no obligation to make up  
14 shortages resulting from the failure of individual Eligible Landowners to pay their required  
15 annual assessments. Because of the pending collection proceedings, the Water Master reserves  
16 the opportunity to have this question determined by the Court in the event the “state defendants”  
17 ultimately do not pay their 50% allocation of the 2008-2009 Water Mater’s budget.  
18

19 The 2008-2009 fiscal year has been relatively peaceful and the Water Master’s work and  
20 expenses have been limited. The following table summarizes the Water Master’s time and  
21 expenses for that period. As can be seen, the average monthly fee has been \$604 and the  
22 average monthly expenses have been \$109.  
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Month	Fees	Expenses
July 2008	\$ 800	\$ 513
Aug.	200	0
Sept.	0	0
Oct.	400	100
Nov.	2,400	542
Dec.	100	0
Jan. 2009	0	0
Feb.	600	130
Mar.	0	0
April	450	0
May	1,000	16
June*	1,300	11
TOTAL	\$7,250.00	\$1312.00
<i>Average</i>	<i>\$604</i>	<i>\$109</i>
*Expenses through 6/25/09 (does not include Annual Report copying & service costs)		

#### **WATER MASTER BUDGET 2009-2010**

Pursuant to section IV(G)(4) of the Settlement Agreement, the Water Master is required to confer with the Department of Ecology and the Lummi Nation before June 1<sup>st</sup> of each year on a draft Water Master budget for the next fiscal year. Section IV(G)(4) also indicates that Ecology and the Lummi Nation will adopt a final budget by agreement entered into by July 1<sup>st</sup>.

The required discussions were held in May 2009, and the Department of Ecology and the Lummi Nation agreed on a final Water Master budget for fiscal year July 1, 2009, to June 30, 2010. Specifically, they agreed to continue the existing arrangement set forth in the Court's August 7, 2008, order and, accordingly, adopted a budget of \$100,000 for the 2009/2010 fiscal year. The Water Master's hourly rate will remain unchanged at \$200 per hour and he will continue his efforts to minimize his time and costs. This agreement has been communicated to the Court (letter on Water Master's website).

1 As mentioned, the Clerk's Financial Administrator reported that, as of June 16, 2009,  
2 the balance in the Water Master's account is \$93,560.18. Since this figure is less than the  
3 maximum \$200,000 carryover balance anticipated by the Settlement Agreement,<sup>2</sup> the Lummi  
4 Nation, Eligible Landowners, and the Department of Ecology will need to pay collectively an  
5 additional \$100,000 for fiscal year 2010 pursuant to the payment provisions set forth in sections  
6 IV(G)(1) & (2).  
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8 The Court's August 7, 2008, order (in paragraph 3) specifies that "[i]n subsequent years  
9 [beyond 2008/2009], Lummi Nation shall pay its share of the Water Master budget on or before  
10 August 1<sup>st</sup> of the fiscal year." Similarly, the order (in paragraph 4) provides that the Department  
11 of Ecology will pay its share of the Water Master budget by August 1<sup>st</sup> and also send Water  
12 Master fee notices by August 1<sup>st</sup>.  
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14 **CONCLUSION**

15 I appreciate the opportunity to work with the Court and the parties to successfully  
16 implement the Settlement Agreement. The parties, counsel, and Court staff have been especially  
17 helpful and cordial; and I thank them for their assistance. I hereby respectfully submit the  
18 foregoing annual report for 2008-2009.  
19

20 Dated: June 29, 2009

21 */s/ John E. Thorson*

22 \_\_\_\_\_  
23 John E. Thorson  
24 Federal Water Master  
25 Lummi Decree  
26 376 River Road West  
27 Plains, MT 59859  
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<sup>2</sup> The Settlement Agreement, section IV(G)(4), provides that this amount will be adjusted annually after 2006 using the Implicit Price Deflator.

**CERTIFICATE OF SERVICE**

The Certificate of Service has been filed separately with the Clerk of the Court. Copies of the Annual Report and the Certificate of Service have been published to the Water Master's website: [http://web.me.com/johnethorson/Lummi\\_Water\\_Master/Home.html](http://web.me.com/johnethorson/Lummi_Water_Master/Home.html) .

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