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**FILED**  
NOV 21 1995  
KIM M. EATON, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND 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, )  
  
vs. )  
  
JAMES J. ACQUAVELLA, et al., )  
  
Defendants. )

NO. 77-2-01484-5

REVISED PENDENTE LITE ORDER  
IMPLEMENTING MEMORANDUM  
OPINION RE: PETITION FOR  
TENTH ORDER PENDENTE LITE;  
CLARIFICATION OF NINTH  
ORDER PENDENTE LITE;  
AMENDMENT SIXTH ORDER  
PENDENTE LITE; EXCEPTIONS  
TO REPORT OF REFEREE  
SUBBASIN NO. 15

I. INTRODUCTION

On March 14, 1995, the Superior Court of Yakima County held the Subbasin 15 Exceptions Hearing and the Hearing regarding the various pendente lite orders for Wenas Creek. On May 22, 1995, the Honorable Judge Walter A. Stauffacher issued "Memorandum Opinion Re: Wenas Creek - Petition for Tenth Order Pendente Lite; Clarification of Ninth Order Pendente Lite; Amendment Sixth Order Pendente Lite; Exceptions to Report of Referee Subbasin No. 15." On November 9, 1995, Judge Stauffacher entered an order implementing the Findings of Fact and Conclusions of Law of the Court. On the same day, the Court heard argument on several motions for reconsideration and made rulings on said motions which shall be incorporated into this revised Findings of Fact and Conclusions of Law.

REVISED PENDENTE LITE ORDER  
IMPLEMENTING MARCH 22, 1995  
MEMORANDUM OPINION: RE WENAS  
CREEK - 1

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1 **II. FINDINGS OF FACT**

2 **A. Stock Water Stipulation/Amendment of Sixth Order**  
3 **Pendente Lite**

4 1. John and Lynn Ashbaugh petitioned the Court to amend the  
5 Sixth Order Pendente Lite by removing the 3 c.f.s. limitation from  
6 Paragraph Two of the Order, which set forth the procedures to be  
7 followed by the Wenas Irrigation District (WID) during storage season.

8 2. WID excepted to the Sixth Order Pendente Lite,  
9 specifically the provision requiring WID to release enough water to  
10 maintain a live (flowing) stream in the North Channel of Wenas Creek and  
11 a target flow of 0.25 c.f.s. at the property of Miles Yates.

12 3. John S. Mayo and Douglas Mayo (Mayos) requested that the  
13 Sixth Order Pendente Lite be implemented so as to recognize the  
14 requirement that additional storage be subject to existing rights.

15 4. Jerry, Dorothy, and Laura Longmire, as well as the Purdin  
16 Ditch Water Users, objected to the maintenance of a minimum flow of 0.25  
17 c.f.s. for non-diversionary stockwater for the entire stretch of the  
18 South Fork, contending that to do so results in a tremendous waste of  
19 water.

20 5. The Referee determined that the right to non-diversionary  
21 stock water predated any rights acquired by the WID. Report of Referee,  
22 Re: Subbasin No. 15. The court adopts by this reference pages 203-205  
23 of the Report of Referee.

24 6. The Referee's Report contains a "non-diversionary" stock  
25 watering use stipulation. Id. at 4. The stipulation requires that

1 water in natural watercourses be retained when naturally available in an  
2 amount not to exceed 0.25 c.f.s. Such water rights are to be accorded  
3 senior priority.

4 7. The parties, with the exception of Purdin Ditch, after  
5 the fact, stipulated that stockwater should receive the highest priority  
6 on the Wenas Creek.

7 8. Throughout the hearing, there was consistent testimony  
8 regarding substantial "losing stretches" on both forks of the Creek.  
9 The issue was raised as to whether passing through a sufficient amount  
10 of water to keep the losing stretches "wet" constitutes a waste of water  
11 during the non- and early irrigation seasons.

12 9. Failure to consistently and continuously recharge the  
13 streambed during the winter resulted in the Mayo's inability to receive  
14 their class water in mid-April, 1994, a drought year. The  
15 interrelationship between off-season storage and the ability of  
16 downstream users to receive stock water and early irrigation water is  
17 more complex than simply saving water that would otherwise flow out to  
18 the Yakima River. Failure to consistently and continuously recharge the  
19 streambed during the winter resulted in 1994, in the Mayos' inability to  
20 receive their class water in mid-April of 1994. Once the streambed went  
21 dry, the ability to push water down the South Channel to the Mayos  
22 required incredible volumes of water. Hence, what seemed to be a waste  
23 of water at that point in time really was the result of a problem that  
24 had built up over the winter. Water for the South Channel can be  
25 discharged a portion at a time during the storage season, or tremendous

1 volumes can be released in the spring.

2 10. Failure to consistently and continuously recharge the  
3 streambed during the winter resulted in the Mayo's inability to receive  
4 their class water in mid-April, 1994. Retention of the water in the  
5 reservoir during the storage season caused a de-watering of the stream  
6 channel that requires a very substantial delivery of irrigation water in  
7 the early part of the season to make up for the deficit. Accordingly,  
8 the prior rights for stock water and the irrigation rights of the Mayos  
9 in early April are interrelated and must be taken into account and  
10 satisfied.

11 11. Regarding the storage rights of WID after April 1, the  
12 Referee found no basis for this right as written in the Sixth Order  
13 Pendente Lite.

14 12. Water Certificate No. R4-26435C allows storage only until  
15 April 1 of each year if water is available.

16 13. The testimony of John and Doug Mayo established that the  
17 Mayo lands with the earliest priority date actually have a diversion  
18 point downstream of where the North and South Channels of Wenas rejoin.

19 B. Clarification of Ninth Order Pendente Lite

20 1. The Mayos requested Court clarification as to whether the  
21 installation of measuring devices required in the Ninth Order Pendente  
22 Lite are to be permanent structures or temporary structures. The Mayos  
23 also requested that the Ninth Order Pendente Lite be modified to spread  
24 the costs of installation between all natural flow users, below and  
25 above Fletcher Lane, rather than first priority water users only.

1           2.    The Department of Ecology requested that permanent  
2 structures be installed on both forks, and that the structures be of a  
3 type that can accommodate seasonal flow fluctuations.

4           3.    The water users above and below Fletcher Lane, as well as  
5 WID, seem content with the temporary devices.

6           4.    Class 1, 2 and 3 water users below Fletcher Lane receive  
7 a substantial benefit from the presence of the Dam in regard to late  
8 season water availability. Class 1, 2, and 3 water users below Fletcher  
9 Lane make no payments for such a benefit.

10           C.    Stream Patrolman/Proposed Tenth Order Pendente Lite

11           1.    The Mayos asked that Mr. Warren Dickman be named water  
12 master to oversee distribution of water within the Wenas Creek basin.

13           2.    In response, WID requested that Mr. Ray Day be maintained  
14 as stream patrolman for the District and above the reservoir, and that  
15 his jurisdiction be expanded to allow him to patrol below Fletcher Lane.

16           3.    Purdin Ditch water users complained the fees for a water  
17 master, such as Mr. Dickman, were too high and should not be born by  
18 them.

19           4.    Ecology suggested that it would be best to appoint one  
20 stream patrolman for the entire watershed.

21           5.    Ecology further suggested that there is no need for a  
22 level of administration between the stream patrolman and Ecology itself.

23           6.    Most of the complaints regarding water distribution  
24 concerned decisions made during the storage season rather than the  
25 irrigation season.

1           D.    Rights to Return Flows

2           1.    WID requested that the Court make a ruling regarding  
3 return flows that run off the lands within the District boundaries. WID  
4 maintained that the Court had already decided return flow issues in  
5 other venues, and that those decisions were applicable to this subbasin.  
6 WID cited to the Court's "Memorandum Opinion Re: Motion for  
7 Reconsideration of Limiting Agreements" and "Memorandum Opinion Re:  
8 Subbasin 8 Exceptions" in support of its position.

9           E.    Purdin Ditch

10          1.    Purdin Ditch requested that they receive at least 0.25  
11 c.f.s. for purposes of non-irrigation season diversionary stockwater.

12          2.    Jerry Longmire testified that stockwater has historically  
13 been used from the Purdin Ditch.

14          3.    The Referee's Report for Subbasin 15 did not confirm any  
15 non-irrigation season, diversionary stockwater rights for Purdin Ditch.

16          4.    Purdin Ditch shall have a certificated right to .25 cfs  
17 non-irrigation season diversionary stockwater.

18          F.    Measuring Devices And Reporting Requirements

19          1.    Ecology recommended installation of measuring devices  
20 that meet Ecology standards at the individual turnouts.

21          2.    Mr. Ray Day testified that all the diversions have some  
22 type of measuring device or a facsimile thereof, although many are in a  
23 state of disrepair.

24          3.    Ecology requested that all changes of diversion of 0.5  
25 c.f.s. or greater be reported to the stream patrolman.

1 4. Measuring devices and reporting are presently being  
2 installed through much of the Yakima River basin.

3 5. Ecology also requested that Purdin Ditch and WID repair  
4 and clean debris away from their measuring and diversion facilities.

5 **III. CONCLUSIONS OF LAW**

6 **A. Amendment of Sixth Order Pendente Lite**

7 1. The Court agrees with the determination of the Referee  
8 that the right to non-diversionary stockwater predates any rights  
9 acquired by the WID, and incorporates those findings accordingly.

10 2. The Court will give great deference to the stipulation of  
11 the parties that stockwater should receive the highest priority on the  
12 Wenas Creek.

13 3. Based on its findings, the Court DENIES Purdin Ditch's  
14 exception as to the priority of the non-diversionary stockwater.

15 4. The Court will not follow the decision of Judge Loy in  
16 Nesland v. Hallauer, Cause No. 77-2-000625-7, in relation to the  
17 existence of "waste" of water by passing through enough water to keep  
18 losing stretches "wet" during non- and early irrigation seasons.

19 5. The prior rights for stockwater and the irrigation rights  
20 of the Mayos in early April are interrelated and must be taken into  
21 account and satisfied.

22 6. Furthermore, the Court is unaware of any appellate  
23 decision which defines distribution of water to diverters by way of a  
24 porous natural channel as "waste." The record does not support such a  
25 finding. "Waste" is defined as "the amount of flow diverted in excess

1 of reasonable needs under customary practices." See Memorandum Opinion,  
2 p. 5.

3 7. Discharging the water in the South Channel a portion at  
4 a time during the storage season is more in line with proper river  
5 management.

6 8. Based on the Findings and Conclusions listed herein, the  
7 Court MODIFIES the Sixth Order Pendente Lite to eliminate the 3 c.f.s.  
8 reservoir outflow ceiling during the storage season, and to require the  
9 WID to pass a portion of water necessary to attempt to maintain a live,  
10 "flowing" stream (approximately 0.25 c.f.s.) in all reaches of the North  
11 and South Channels. The Court shall require this amount of water to be  
12 determined by the stream patrolman in consultation with the Department  
13 of Ecology.

14 9. Specifically, the Sixth Order Pendente Lite shall be  
15 AMENDED to read at paragraph 2:

16 a. Wenas Irrigation District is never  
17 required to release more water than what is  
18 measured at the inflow into the reservoir (the  
19 natural flow).

20 b. Subject to (a) above, Wenas Irrigation  
21 District shall release the amount of water  
22 necessary to attempt to maintain a live  
23 "flowing" stream in all reaches of the North  
24 and South Channel subject to the discretion of  
25 the watermaster; the amount of water necessary  
is to be determined by the Court-appointed  
stream patrolman in consultation with the  
Department of Ecology. Wenas Irrigation  
District shall attempt to maintain the "target  
flow". "Target flow" is defined as 0.25  
c.f.s. as measured by the stream patrolman in  
all reaches of the North and South Channel of  
Wenas Creek by the Department of Ecology.

1           10. The Court agrees with the Referee that there is no basis  
2 for the claimed storage rights after April 1 of WID in the Sixth Order  
3 Pendente Lite, and accordingly AMENDS paragraph 1 of the Sixth Order to  
4 reduce the ending date of storage from April 20 to April 1.

5           11. Only Ecology can modify or change a water right  
6 certificate to authorize future uses or seasonal changes pursuant to RCW  
7 90.03.250 - .340.

8           12. Although the Mayos divert at a different point on the  
9 South Channel pursuant to seasonal/temporary permits from Ecology, only  
10 after they receive a permanent certificate from Ecology authorizing this  
11 change will they be able to require continued diversions down the South  
12 Channel for Class 1, first priority water. Should Ecology not grant  
13 such a change on a permanent or seasonal/temporary basis, then it would  
14 appear that no Class 1, first priority rights to irrigation water exists  
15 for them on the South Fork.

16           B. Clarification of Ninth Order Pendente Lite

17           1. The Court REAFFIRMS the Ninth Order Pendente Lite as to  
18 the necessity for the measuring devices in light of the continued  
19 antagonism and mistrust among water users who utilize Wenas Creek. The  
20 Court will defer to the expertise of Ecology in relation to achieving  
21 accuracy and certainty by way of permanent measuring devices.

22           2. The Court hereby ORDERS that the appropriate permanent  
23 measuring devices and structures which will ensure a high level of  
24 accuracy, as determined by Ecology, be installed at Fletcher Lane.

25           3. All parties shall assist Ecology in any fashion Ecology

1 requires in regards to the installation of the permanent measuring  
2 devices.

3 4. The Court hereby ORDERS that all natural flow users in  
4 Wenas Creek shall be responsible for payment of 25% of the installation  
5 and operation costs of measuring devices, on a proportionate basis  
6 determined on acreage and use. See Attachment A.

7 5. Because the First Priority Water Users primarily benefit  
8 from installation of the measuring devices, the Court further ORDERS the  
9 First Priority Users to pay for 50% of the installation and operation  
10 costs of the measuring devices. See Attachment A.

11 6. The Court ORDERS that WID is to pay for 25% of the  
12 installation and operation costs of the measuring devices. See  
13 Attachment A.

14 7. The Court requests Ecology to make these assessments and  
15 submit a schedule for the Court's approval. See Attachment A.

16 8. The permanent measuring devices shall be installed and  
17 operational by April 1, 1996. Temporary measuring devices, as approved  
18 by Ecology, shall be utilized until that date.

19 C. Proposed Tenth Order Pendente Lite

20 1. The Court agrees with Ecology, and accordingly ORDERS one  
21 stream patrolman to be appointed for the entire watershed, with no level  
22 of administration between the stream patrolman and Ecology.

23 2. The Court hereby ORDERS that from October 17 of each  
24 year, or at the point where releases for irrigation cease and storage  
25 commences, whichever is earlier, Mr. Warren Dickman shall serve as

1 stream patrolman for the entire basin. Mr. Dickman will serve until  
2 approximately March 31 of the following year, or when water storage  
3 ceases, which ever comes later. If Mr. Dickman is not offered the  
4 position as stream patrolman or refuses to accept this responsibility,  
5 then Ecology shall appoint a replacement after consultation with the  
6 water users of Wenas Creek.

7           3. The Court further ORDERS that from April 1 of each year,  
8 or whenever storage ceases thereafter, Mr. Ray Day shall assume  
9 responsibility as stream patrolman for the entire Wenas Creek basin.  
10 Mr. Day's duties will continue until October 15 each year or until  
11 releases cease for irrigation purposes and storage commences, whichever  
12 is earliest. If Mr. Day is not offered the position as stream patrolman  
13 or refuses to accept this designation, then Ecology shall appoint a  
14 replacement after consultation with the natural flow users and the WID.

15           4. WID may hire another ditch rider for water distribution  
16 within their boundaries; however, such decisions will be subject to the  
17 oversight of the appointed stream patrolman.

18           5. All stream patrolman or ditch riders retained under this  
19 order shall have the right of access to all measuring devices and  
20 diversion devices.

21           6. The irrigation stream patrolman shall regulate diversions  
22 pursuant to the 1921 Wenas Decree until a Conditional Final Order for  
23 Wenas Creek is entered in this adjudication.

24           7. The irrigation stream patrolman shall ensure that all  
25 First Priority water rights, Class 1, 2, and 3, are satisfied before any

1 junior natural flow users divert water.

2           8. The Court hereby ORDERS that assessments to fund payment  
3 of Mr. Dickman's salary shall be paid by the natural flow users in Wenas  
4 Creek on a per acre basis. An exact schedule shall be drawn up by  
5 Ecology in consultation with natural flow users on Wenas Creek and  
6 presented to this Court for approval.

7           9. The Court hereby ORDERS that Mr. Day's salary is to be  
8 paid as follows: 50% by WID, and 50% by all other natural flow users.  
9 The 50% allocation to natural flow users will be paid primarily by  
10 senior irrigators on a per acre basis. A schedule shall be drawn up by  
11 Ecology in consultation with WID and natural flow users and presented to  
12 the Court for approval. All parties shall work cooperatively and  
13 amicably with Ecology in achieving these assessments.

14           10. In all other respects, the Petition for Tenth Order  
15 Pendente Lite is hereby DENIED, including assessments for performance of  
16 hydrological studies.

17           D. Rights to Return Flows

18           1. The Court agrees with WID that the Court decisions on  
19 return flow issues in other venues apply to the Wenas Subbasin.

20           2. The Court hereby ORDERS that WID may capture and utilize  
21 its storage water return flows within its boundaries, and that once the  
22 water leaves the District boundaries, the water is subject to allocation  
23 based on seniority and prior rights. However, the senior right holders  
24 cannot compel continued flows that emanate from storage and the District  
25 may make further use of that water as it sees fit.

1           3.     The Court ORDERS that District patrons may only divert  
2 storage waters unless those patrons also have a senior right to any  
3 remaining natural flows. Natural flows not used to satisfy natural flow  
4 senior rights within the District must pass through the District  
5 boundaries and be made available for diversion by senior water right  
6 holders below Fletcher Lane.

7           E.     Purdin Ditch

8           1.     The Court does recognize Purdin Ditch non-irrigation  
9 season, diversionary stockwater rights of up to .25 c.f.s. Purdin Ditch  
10 does not need to re-state this claim at the Remand Hearing before the  
11 Referee.

12          F.     Measuring Devices And Reporting Requirements

13          1.     The Court hereby ORDERS that measuring devices that meet  
14 the standards of Ecology be installed at all individual turnouts.

15          2.     The Court hereby ORDERS that all changes in diversion of  
16 0.5 c.f.s. or greater shall be reported to the stream patrolman.

17          3.     The Court hereby ORDERS that the stream patrolman shall  
18 report any failures to comply with the metering or reporting  
19 requirements to Ecology. At that time, Ecology may proceed with  
20 appropriate enforcement action, including issuance of cease and desist  
21 orders.

22          4.     The Court hereby ORDERS that WID repair the upper weir of  
23 the reservoir in a timely manner after receipt of the appropriate  
24 permit.

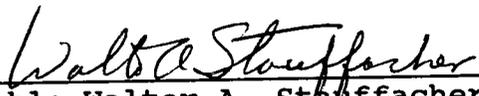
25          5.     The Court further ORDERS that Purdin Ditch shall repair,

1 at its own expense, their diversion headworks where the Ditch takes off  
2 from the South Fork of the Wenas Creek, and this work shall be completed  
3 no later than April 1, 1996.

4 G. Court Opinion

5 The opinion of the Court dated May 22, 1995, of the Honorable Judge  
6 Walter A. Stauffacher is attached hereto and incorporated herein by this  
7 reference. This order supersedes the Pendente Lite Order Implementing  
8 Memorandum Opinion Re: Petition For Tenth Order Pendente Lite;  
9 Clarification of Ninth Order Pendente Lite; Amendment Sixth Order  
10 Pendente Lite; Exceptions to Report of Referee Subbasin No. 15 entered  
11 by the Court on November 9, 1995.

12 DATED this 21<sup>st</sup>-day of November, 1995, in Yakima, Washington.

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16 Honorable Walter A. Stauffacher  
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