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

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

**DEPARTMENT OF ECOLOGY'S
MEMORANDUM IN SUPPORT OF
MOTION FOR AUTHORIZATION
TO PERFORM A TENTATIVE
DETERMINATION**

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

**COURT CLAIM NO. 01566,
ESTATE OF TED AND AGNES
BUGNI
SUBBASIN NO. 3 (TEANAWAY
RIVER)**

Plaintiff,

v.

JAMES J. ACQUAVELLA, et al.,

Defendants.

I. INTRODUCTION

The Department of Ecology ("Ecology") has filed a motion¹ requesting this Court to enter an order that will authorize Ecology to perform a tentative determination of the extent and validity of the water right confirmed to the Estate of Ted and Agnes Bugni ("Bugni") in the Conditional Final Order Subbasin No. 3 (Teaway River) (hereinafter "CFO"). This

SCANNED

¹ Ecology's Motion for Authorization to Perform a Tentative Determination has been joined by the Yakama Nation and the United States.

**DEPARTMENT OF ECOLOGY'S
MEMORANDUM IN SUPPORT OF
MOTION FOR AUTHORIZATION TO
PERFORM A TENTATIVE
DETERMINATION**

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1 memorandum in support of the Motion for Authorization to Perform a Tentative Determination
2 is joined by the United States.

3 When it processes an application for change of a water right, Ecology is required to
4 determine whether the right is valid and eligible for change. RCW 90.03.380; *Okanogan*
5 *Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 947 P.2d 732 (1997). Ecology is
6 processing an application for change of the point of diversion of the Bugni water right under
7 Court Claim No. 01566 and is facing a predicament: the CFO confirmed the right in 2001 but
8 the Court did not consider facts concerning the right after 1997. Therefore, when the number
9 of years of possible nonuse of water under the right after the CFO was entered in 2001 is added
10 to the years of possible nonuse which occurred prior to entry of the CFO, it appears that
11 statutory relinquishment of the right may have occurred because there may have been more
12 than five successive years of nonuse. See RCW 90.14.160; Declaration of Stan Isley in
13 Support of Department of Ecology's Motion for Authorization to Perform a Tentative
14 Determination (hereinafter "Isley Declaration") at ¶ 16.

15 Ecology seeks direction from the Court in proceeding amidst this dilemma by seeking
16 permission to perform a tentative determination of the extent and validity of the Bugni right
17 based on activity since the last event during which the Court considered the extent and validity
18 of the right: the Referee's supplemental evidentiary hearing for Subbasin No. 3, which was
19 conducted on December 2, 3, 10 and 11, 1997. Ecology is not asking the Court for permission
20 to "reopen" the CFO by making another assessment of the extent and validity of the water right
21 during a period that was earlier considered by the Court in this adjudication. Ecology merely
22 seeks permission to evaluate water use under the Bugni right during a time period that was
23 never considered by the Court. This approach is lawful and does not violate the doctrines of
24 *res judicata*, collateral estoppel, or law of the case.

25 An accurate determination of the extent and validity of the Bugni right during
26 evaluation of the change application is especially important because millions of dollars in

1 public resources have been expended in efforts to restore flows in the Teanaway River under
2 the Yakima River Basin Water Enhancement Project ("YRBWEP"). Revival of a relinquished
3 water right to allow a diversion of water that has not occurred for many years in the reach just
4 above the confluence of the Teanaway River with the Yakima River would reduce stream flow
5 and harm fish restoration efforts that are finally beginning to provide favorable results.²

6 II. FACTUAL BACKGROUND

7 The Bugni water right under Court Claim No. 01566 was considered in the proceeding
8 in this adjudication for Subbasin No. 3. The initial evidentiary hearing for Subbasin No. 3 was
9 conducted by the Referee on August 5-9, 12, and 23, 1991. Based on the evidence presented at
10 that hearing, the Report of Referee Re: Subbasin No. 3 (Teanaway River), issued on January
11 25, 1996, recommended the confirmation of the subject water right, but recommended denial
12 of a separate Bugni claim to water from an unnamed spring for domestic supply. *See* Report of
13 Referee Re: Subbasin No. 3 (Teanaway River) at 48-50 and 173. Subsequently, on or about
14 April 3, 1996, Bugni filed an exception to the Referee's recommendation that a right not be
15 confirmed for use of water from the spring.

16 The first supplemental evidentiary hearing for Subbasin No. 3 was conducted by the
17 Referee on December 2, 3, 10, and 11, 1997. The Bugni claim under Court Claim No. 01566
18 was considered during that hearing. Based on the evidence presented at that hearing, the
19 Supplemental Report of Referee Re: Subbasin No. 3 (Teanaway River) issued on March 29,
20 1999, recommended denial of the claim to water from the spring, but maintained the
21 confirmation of the water right that is the subject of the present change application.
22 Supplemental Report of Referee Re: Subbasin No. 3 (Teanaway River) at 26-29 and 89.

23
24
25 ² In requesting permission to make a tentative determination of the validity of the Bugni water right
26 during its processing of the change application, Ecology makes no conclusion as to whether relinquishment has
actually occurred. Ecology will need to evaluate whether water has actually been used during the period from
1998 to the time that the application is evaluated, and, if not, whether any of the exceptions to relinquishment
provided under RCW 90.14.140 are applicable.

1 The Bugni claim was not the subject of any further exceptions in the Subbasin No. 3
2 proceeding, although exceptions related to other water claims were filed with the Court. The
3 Second Supplemental Report of Referee Re: Subbasin No. 3 (Teaway River) was issued on
4 August 3, 2000, and references the confirmation of the Bugni right to water from the
5 Teaway River. Second Supplemental Report of Referee Re: Subbasin No. 3 (Teaway
6 River) at 39. On December 22, 2000, Ecology filed an Amended Notice of Presentation of
7 Proposed Conditional Final Order: Subbasin No. 3 (Teaway River) in which Ecology
8 identified certain claims, seeking clarification of clerical errors in place of use or point of
9 diversion descriptions. These requested clarifications were ultimately adopted in the CFO.

10 The Conditional Final Order Subbasin No. 3 (Teaway River) was entered on
11 February 7, 2001. The CFO awarded a right based on Court Claim No. 01566 to the Estate of
12 Ted Bugni and the Estate of Agnes Bugni, with a priority date of June 30, 1885. The source of
13 the water is the Teaway River, and the right is for irrigation of 76 acres with an
14 instantaneous quantity of 1.5 cubic feet per second (cfs) and an annual quantity of 410.4 acre-
15 feet per year.

16 On February 3, 1997, the Bugni Limited Family Partnership filed an application for
17 change of the water right under Court Claim No. 01566 with Ecology. The application
18 requests a change in the point of diversion of the Bugni water right. Declaration of Robert F.
19 Barwin in Support of Department of Ecology's Motion for Authorization to Perform a
20 Tentative Determination (hereinafter "Barwin Declaration") at ¶ 4. Ecology is currently
21 processing applications for changes of rights to water in this area and has begun its evaluation
22 of the Bugni change application. *See Id.* at ¶ 3.

23 Pursuant to the cooperative approach for review of water right transfer applications in
24 the Yakima Basin supported by this Court, the Bugni change application has been reviewed by
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1 the Water Transfer Working Group.³ *Id.* at ¶ 11; *see also* Isley Declaration at ¶ 4. The Water
2 Transfer Working Group consists of representatives of Ecology, the Washington Department
3 of Fish and Wildlife, the Bureau of Reclamation, the Yakama Nation, the irrigation districts,
4 and other interests. It has its origins as an extension of the YRBWEP Conservation Advisory
5 Group and was convened by the U.S. Bureau of Reclamation (“Reclamation”) during the
6 drought response effort in the spring of 2001. The Water Transfer Working Group continues
7 as a voluntary cooperative effort among the participants. Barwin Declaration at ¶ 9.

8 The Water Transfer Working Group has determined that the eligibility of the Bugni
9 water right for change should be carefully evaluated to determine if there has been an extended
10 period of nonuse that would subject the right to statutory relinquishment under the Water
11 Code. *Id.* at ¶ 11; *see also* Isley Declaration at ¶ 16. Because of the recommendation of the
12 Water Transfer Working Group and the predicament facing the agency in processing this
13 application, described in this memorandum, Ecology has suspended its processing of this
14 change application to seek direction from the Court on how to proceed.

15 The Teanaway River is tributary to the Yakima River. The Yakima River basin is part
16 of what is known as the middle Columbia evolutionarily significant unit (ESU) under the
17 federal Endangered Species Act. Steelhead trout and bull trout are listed as threatened species
18 within the middle Columbia ESU. Barwin Declaration at ¶ 5. Salmon also use the Yakima
19 River system, including the Teanaway River. The Yakima basin is a priority basin for salmon
20 protection and restoration by the State of Washington and the United States. *Id.* at ¶ 6. The
21 Teanaway River subbasin is used by steelhead, bull trout, spring Chinook salmon, and resident
22 fish species. Isley Declaration at ¶ 5.

23 The Teanaway River is a highly appropriated stream. In less-than-average runoff years,
24 it has historically been common for portions of the lowermost three miles of the Teanaway
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26 ³ The Water Transfer Working Group has also been referred to in this Court as the “CAG Group” or
“CAG Subgroup.”

1 River to go dry seasonally due to the diversion of water for irrigation purposes. Barwin
2 Declaration at ¶ 7. The dry reach of the Teanaway River has created an impediment to
3 upstream and downstream movement of migratory fish species. *Id.* at ¶ 8.

4 The Teanaway River is presently and has been an area of intensive activity for
5 streamflow and salmon habitat restoration efforts under YRBWEP. Efforts in the Teanaway
6 are necessary because low flows have limited the availability of habitat for recovery of
7 jeopardized salmon species. The Yakama Nation has released coho salmon smolts into the
8 Teanaway River in recent years in an attempt to reestablish that species in the Teanaway
9 subbasin. The populations of these fish species, particularly spring Chinook salmon, have
10 increased substantially in the last several years as a result of habitat and flow improvements in
11 the Teanaway River resulting from the expenditure of millions of dollars of public funds under
12 several state, federal, and local programs. The Yakama Nation has a Treaty water right for fish
13 in the Teanaway. Isley Declaration at ¶ 5.

14 The Bonneville Power Administration (BPA) has funded the installation of three new
15 pump systems at two locations on the Teanaway River. One pump station is located
16 downstream of the Bugnis' historic point of diversion. The other pump station, which has two
17 sets of pumps serving two water user groups, is located upstream of the Bugnis' historic point
18 of diversion. *Id.* at ¶ 6. Further, MountainStar Resort Development, LLC (formerly Trendwest
19 Investments, Inc.) acquired certain rights to surface water from the Teanaway River and
20 changed their purpose of use from irrigation to instream flows to enhance flow in the lower
21 Teanaway River. *Id.* at ¶ 7.

22 The Yakama Nation, Northwest Power and Conservation Council (NPCC), and BPA
23 have spent millions of dollars to enhance salmon populations in the Teanaway River and the
24 Yakima Basin, constructing and operating the supplementation hatchery at Cle Elum and the
25 smolt acclimation and release facility on the North Fork Teanaway River. *Id.* at ¶ 8. Also,
26 Ecology, the Washington Department of Fish and Wildlife (WDFW), the Natural Resources

1 Conservation Service (NRCS), and the Kittitas County Conservation District are working with
2 Teanaway subbasin irrigators and landowners to upgrade irrigation system efficiency, reduce
3 diversionary needs, and increase instream flows. These agencies are also providing funding to
4 landowners to restore riparian vegetation and habitat in the Teanaway subbasin. *Id.* at ¶ 9.

5 YRBWEP was authorized as a program to benefit both agricultural and fishery interests
6 in the Yakima River basin. A primary goal of YRBWEP is to improve instream flows for fish
7 and wildlife. YRBWEP is implemented by Reclamation and Ecology, in cooperation with
8 many other entities. *Id.* at ¶ 10. The Teanaway River subbasin has been the focus of instream
9 flow and habitat improvement efforts by Reclamation since 1996. During the late 1990's,
10 Reclamation leased up to 20 cubic feet per second (cfs) of water from willing water right
11 holders for instream flow benefit. *Id.* at ¶ 11.

12 Moreover, Reclamation has permanently acquired one Teanaway River property with a
13 water right that the Court has authorized for instream flow enhancement in the lower
14 Teanaway River. This acquired property also has valuable wetland habitat. *Id.* at ¶ 12.
15 Reclamation has partnered with the primary funders, NPCC and BPA, on a water conservation
16 project for three different water user groups on the lower Teanaway River. This project has
17 eliminated three diversion berms and gravity-flow ditches and replaced them with efficient
18 new pump and pipeline irrigation systems. Partners on this project included Ecology, WDFW,
19 NRCS, the Yakama Nation, the local water users, and others. This project has eliminated fish
20 migration barriers caused by the diversion berms and the near total dewatering of the river at
21 certain times of the year. Approximately \$3 million of BPA/NPCC funds were spent on these
22 projects. *Id.* at ¶ 13.

23 These efforts are beginning to show promising results in restoring flows and improving
24 conditions for salmon. Salmon numbers have increased dramatically as a result of the
25 Teanaway River habitat restoration efforts. Prior to project completion, an average of only one
26 spring Chinook salmon redd was counted in annual surveys conducted by Yakama Nation

1 biologists from 1980 through 1999. In many of those years, particularly in the 1980's, the redd
2 count was zero. The returning adult salmon simply could not make it past the diversion berms
3 and dewatered stretches of the river during their critical upstream migration period. In 2000
4 and 2001, the spring Chinook salmon redd count jumped to 21 each year. In 2002, the count
5 jumped to 110 redds in the Teanaway River, as returning adult salmon began to appear from
6 smolt releases from the Yakama Nation's smolt acclimation and release facility on the North
7 Fork Teanaway River. *Id.* at ¶ 14.

8 The resurrection of the 1.5 cfs diversion from the lower Teanaway River under the
9 Bugni water right would strike a severe blow to the flows of the lower Teanaway River, which
10 drop to as little as 7 cfs during late summer base flow conditions. These critically low late-
11 summer flows with associated high water temperatures already represent a limiting factor to
12 salmon production in the Teanaway River subbasin. Further dewatering of the lower
13 Teanaway River by 1.5 cfs would have a negative effect on fish populations. *Id.* at ¶ 15.

14 It has been reported that the Bugni water right has not been exercised beginning in the
15 1998 irrigation season, through the 2003 season. *See Id.* at ¶ 16.

16 III. ARGUMENT

17 When it processes an application for change of a water right under RCW 90.03.380,
18 Ecology is required to tentatively determine the extent and validity of the water right to
19 ascertain whether it is eligible for change. *Okanogan Wilderness League v. Town of Twisp*,
20 133 Wn.2d 769, 777-779, 947 P.2d 732 (1997); *Public Utility Dist. No. 1 of Pend Oreille*
21 *County v. Department of Ecology*, 146 Wn.2d 778, 790-794, 51 P.3d 744 (2002). During this
22 process, Ecology must determine whether the water right has been perfected through actual
23 beneficial use, and, if it was perfected, whether the right has been forfeited under the
24 relinquishment statute or abandoned under the common law. *Town of Twisp*, 133 Wn.2d at
25 778-779; *Pend Oreille PUD*, 146 Wn.2d at 794 ("Ecology has authority to tentatively
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1 determine whether a water right has been abandoned or relinquished when acting on an
2 application for a change in point of diversion under RCW 90.03.380.”).

3 However, because Ecology does not have the authority to finally and conclusively
4 adjudicate water rights, its tentative determination as to whether a right has been perfected, and
5 later relinquished or abandoned, cannot be a final determination of the validity and extent of
6 the water right. That authority is vested in a superior court through a general adjudication of
7 water rights. *Pend Oreille PUD*, 146 Wn.2d at 794; *Town of Twisp*, 133 Wn.2d at 779; *see*
8 *also Rettkowski v. Ecology*, 122 Wn.2d 219, 229, 858 P.2d 232 (1993).

9 Thus, when Ecology evaluates the subject change application, the final determination
10 of the extent and validity of the Bugni water right in the CFO governs, and supersedes any
11 requirement for Ecology to tentatively determine the validity and extent of the right. However,
12 in the context of a CFO, the Court only makes a final determination as to the validity of the
13 water right over the period during which the Court examined activity under the water right
14 during the adjudication as of the time of the evidentiary hearing.

15 Therefore, the question turns to what period of water use was covered in the Court’s
16 final determination of validity of the Bugni right in the CFO. By its nature, the CFO provided
17 a final determination of the water right during the period that the Court considered in this
18 adjudication. In considering the course of review of the right under Court Claim No. 01566
19 during the proceeding for Subbasin No. 3, it becomes apparent that the CFO incorporated a
20 water right determination based on evidence last taken during the supplemental evidentiary
21 hearing in December 1997. As a result, it is appropriate for the Court to authorize Ecology to
22 conduct a tentative determination of the validity and extent of the Bugni water right based on
23 activity beginning with the 1998 irrigation season up to the time when Ecology evaluates the
24 application.

25 It must be emphasized that Ecology is not asking the Court to “reopen” the CFO for
26 Subbasin No. 3 by seeking to take a second look at historical water use under the Bugni right

1 over the period of time that was earlier considered by the Court in this adjudication. Ecology
2 is merely asking permission to evaluate historical water use activity during a period that was
3 not considered by the Court: the time from 1998 to the present.

4 This is consistent with the approach taken by this Court in the proceeding for Subbasin
5 No. 23 (Ahtanum Creek). In Subbasin No. 23, the so-called Pope Decree issued by the federal
6 Ninth Circuit Court of Appeals was issued in 1964, but the last year that historical water use by
7 the claimants was evaluated in the case was 1957. *See United States v. Ahtanum Irrigation*
8 *District*, 330 F.2d 897 (9th Cir. 1964). The Pope Decree was issued on March 18, 1964 by the
9 Ninth Circuit. In the federal litigation, the trial before the Special Master to determine
10 historical water use by the water users on the north side of Ahtanum Creek began on July 22,
11 1957, and ran until later in 1957. Report of the Court Concerning the Water Rights for the
12 Subbasin No. 23 (Ahtanum Creek), Ahtanum Irrigation District, Johncox Ditch Company,
13 United States/Yakama Nation, dated January 31, 2002, at 38. In integrating the rulings of the
14 Pope Decree in its analysis of Subbasin No. 23 water claims in this current adjudication, under
15 the res judicata doctrine, the Court has determined that it must now assess historical water use
16 activity after 1957 even though the Pope Decree was entered seven years later, in 1964. *See*
17 *Memorandum Opinion Re: Ahtanum Creek Threshold Legal Issues*, dated October 8, 2003, at
18 4. Here, in an analogous situation, historical water use related to the Bugni right after 1997
19 must be evaluated even though an order determining the water right at issue was entered by the
20 Court later than 1997, in 2001.

21 The federal Pope Decree does not bar the examination of historical water use by the
22 Subbasin No. 23 claimants in this case up to March 18, 1964 even though one of the last
23 federal court rulings in the case was issued on that date. This Court is requiring proof of
24 beneficial use of water after 1957 in Subbasin No. 23 because historical water use in the
25 federal adjudication was last considered in 1957, even though the later rulings were entered
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1 later, in the 1960s. Likewise, in this case, beneficial water use under the Bugni claim was last
2 considered in 1997, even though the CFO was entered later, in 2001.

3 A correct evaluation of the validity and extent of the Bugni right as a result of historical
4 water use activity beginning in 1998 is needed to ensure that the right is actually valid and
5 eligible for change before it is possibly approved for change by Ecology pursuant to RCW
6 90.03.380. Any approval of a water right in the Teanaway River that has actually been
7 relinquished due to an extended period of nonuse without eligibility for a statutory exception to
8 relinquishment would severely undercut efforts to restore instream flows and salmon habitat in
9 the area under YRBWEP. *See* Isley Declaration and Barwin Declaration.

10 The doctrines of res judicata, collateral estoppel, or law of the case do not command the
11 Court to deny this motion. These doctrines do not bar Ecology from evaluating historical use
12 of the Bugni right during the time period after the 1997 supplemental evidentiary hearing when
13 it processes the change application.

14 The bar of res judicata requires identity of action, subject matter, and parties. *Ecology*
15 *v. Acquavella*, 112 Wash.App. 729, 739, 51 P.3d 800 (2002) ("*Acquavella IV*"). Res judicata
16 applies to bar relitigation when the following factors are met: (1) identity of subject matter; (2)
17 identity of cause of action; (3) identity of persons and parties; and (4) identity of the quality of
18 the persons for or against whom the claim is made. A prior judgment is res judicata as to every
19 question which was properly a part of the matter adjudicated, but it does not bar litigation of
20 claims which were not in fact adjudicated. *Department of Ecology v. Yakima Reservation*
21 *Irrigation District*, 121 Wash.2d 257, 290, 850 P.2d 1306 (1993) ("*Acquavella II*").

22 Res judicata does not apply in this situation because the causes of action are not
23 identical. The CFO only involved the evaluation of water use under the Bugni claim through
24 the time of the supplemental hearing in December 1997. It did not involve evaluation of the
25 validity of the water right based on activity after December 1997, up to the present time.
26 Under *Acquavella II*, the CFO did not "in fact" adjudicate the Bugni claim based on activity

1 that transpired after December 1997. The CFO did not contain any ruling on the merits with
2 regard to the validity of the water right based on activity during that period.

3 The doctrine of collateral estoppel applies where: (1) the issue decided in the prior
4 adjudication is identical with the one presented in the second action; (2) the prior adjudication
5 ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a
6 party or in privity with the party to the prior adjudication; and (4) application of the doctrine
7 does not work an injustice. *Thompson v. Department of Licensing*, 138 Wn.2d 783, 790, 982
8 P.2d 601 (1999). When an issue of fact or of law is actually litigated and determined by a
9 valid and final judgment, and the determination is essential to the judgment, the determination
10 is conclusive in any subsequent action between the parties. *St. Joseph Hospital & Health Care*
11 *Center v. Department of Health*, 125 Wn.2d 733, 744, 887 P.2d 891 (1995).

12 In this case, collateral estoppel does not apply because elements (1) and (4) are not met.
13 The issue decided in the prior adjudication is not identical to the issue which Ecology must
14 consider when it processes the application for change of water right because the CFO did not
15 make any determination of the validity and extent of the Bugni claim based on historical water
16 use activity after 1997. Further, the application of collateral estoppel in this situation would
17 work an injustice if it allows for a water right that is properly subject to relinquishment to be
18 revived. If the Bugni right has truly been relinquished, its use would result in a diversion of
19 1.5 cubic feet per second from the Teanaway River that has not occurred for several years.
20 This would reduce stream flow in a critical reach of the Teanaway River to the detriment of
21 stream flow and habitat restoration efforts under YRBWEP. This would undercut restoration
22 efforts that have cost a considerable amount of money to the taxpayers. *See Isley Declaration*
23 *and Barwin Declaration.*

24 It is anticipated that opponents to this motion may argue that res judicata and collateral
25 estoppel apply because Ecology could or should have raised the relinquishment issue after the
26 1997 supplemental hearing but before the time that the CFO was entered. Under this logic,

1 evaluation of historical water use from 1998 through the date in which the CFO was entered in
2 2001 would be barred because, even though the Court never considered the Bugni claim after
3 the supplemental hearing, Ecology and other parties were afforded opportunities later in the
4 Subbasin No. 3 proceeding to make exceptions or objections but failed to do so.

5 Any such argument that a position that the Bugni right was subject to relinquishment
6 could or should have been raised by Ecology or another party after December 1997, when the
7 Bugni right was last considered, would lack merit because five consecutive years of nonuse
8 could not have occurred by the time the CFO was entered on February 7, 2001. Only three
9 irrigation seasons transpired between the time the Bugni right was last considered in December
10 1997 and the time the CFO was issued in February 2001 (the 1998, 1999, and 2000 irrigation
11 seasons). Thus, the longest period of consecutive years of nonuse that could have occurred
12 after the right was last considered by the Court was three years, and, accordingly, there was no
13 reason for Ecology or any other party to raise an exception or objection to the Bugni claim
14 based on relinquishment before the date the CFO was entered.

15 IV. CONCLUSION

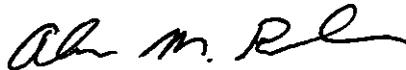
16 Based on the foregoing reasons, Ecology respectfully requests the Court to enter an
17 order authorizing it to perform a tentative determination of the validity and extent of the Bugni
18 water right based only on activity that has occurred since the final time that the right under
19 Court Claim No. 01566 was considered in this adjudication, during the Referee's supplemental
20 evidentiary hearing for Subbasin No. 3, which was conducted in December 1997. Under this
21 order, Ecology's tentative determination of the extent and validity of the Bugni water right
22 during its evaluation of the application for change of point of diversion of the Bugni right
23 would only be based on activity that has transpired from 1998 through the time when the
24 change application is evaluated.

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26 //

1 DATED this 28th day of January, 2004.

2 CHRISTINE O. GREGOIRE
3 Attorney General

4 

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