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ENVIRONMENTAL
HEARINGS OFFICE

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

CENTER FOR ENVIRONMENTAL
LAW & POLICY,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY, and
CITIES OF RICHLAND,
KENNEWICK, PASCO and WEST
RICHLAND,

Respondents.

PCHB No. 02-216

STIPULATION, SETTLEMENT
AGREEMENT AND ORDER OF
DISMISSAL

The parties, Center For Environmental Law and Policy (CELP), the Washington State Department of Ecology (Ecology), and the Cities of Richland, Kennewick, Pasco and West Richland (collectively Quad-Cities), through their attorneys, Karen Allston and Shirley Nixon (for CELP), Assistant Attorneys General Barbara Markham and Sarah Bendersky (for Ecology), and Tom Pors (for the Quad-Cities) enter into the following:

STIPULATION

1. On November 19, 2002, Ecology issued a Report of Examination to the Quad-Cities approving with conditions application S4-30976 for a municipal, industrial, and commercial water right from the Columbia River.

2. On December 18, 2002, CELP appealed the Report of Examination to the Pollution Control Hearings Board.

3. To avoid the costs, time, and uncertainty associated with litigation, the parties have entered into the following SETTLEMENT AGREEMENT to fully and finally resolve CELP's appeal.

SETTLEMENT AGREEMENT

1. Within 30 days of dismissal of this case by the PCHB as contemplated by this SETTLEMENT AGREEMENT, Ecology will issue a water right permit to the Quad-Cities.¹ Except as modified by the terms of this SETTLEMENT AGREEMENT, the permit will be consistent with the terms contained in the November 19, 2002, Report of Examination. The permit will include the ROE conditions and Recommendations A through I, and the terms specified in paragraphs 2,3,6.7, 8, and 11 of this SETTLEMENT AGREEMENT.

2. The permit issued to the Quad-Cities will expressly specify that any time Ecology approves the use of mitigation to offset diversion increments after the first increment (the first increment is defined as the first 10 cubic feet per second (cfs) of diverted water), Ecology shall issue an order that is subject to appeal to the Pollution Control Hearings Board or any successor body with jurisdiction to hear appeals from Ecology water right decisions.

3. The permit issued to the Quad-Cities will expressly set forth the additional conservation requirements set forth in Exhibit A to this Settlement Agreement, The permit will specify that these conservation requirements will be the minimum conservation requirements that the Quad-Cities shall meet during the entire life of the permit. If the Department of Health adopts more stringent rules relating to water conservation, the Quad-Cities will plan and implement their plans to meet or exceed the more stringent rules.

4. With respect to the Quad-Cities' diversion of the first increment (10 cfs) of water, the right to divert water will be interrupted when the specified flow conditions described in Condition E are not met, unless the following mitigation for consumptive use is in place. Table 5 in the November 19, 2002 Report of Examination identifies the two groups of

water rights Ecology currently intends to use as mitigation for the first increment of Quad-Cities' water use. The first group is listed in the first 6 columns of Table 5 under the heading "Department of Ecology Trust Water Rights" (hereafter referred to as "the Buckley trust water rights"). The second group is listed in the second half of the table and labeled as the Grandview Farm Water Rights (hereafter referred to as "the Simplot water"). To make the Buckley trust water rights eligible to be considered as mitigation for the Quad-Cities' water right, Ecology will change the purpose and place of use of the Buckley water rights so that the purpose of use includes "mitigation for municipal use" and so that the place of use includes "the McNary Pool of the Columbia River". To make the Simplot water eligible to be considered as mitigation for the Quad-Cities' water right, Ecology will complete the steps necessary to put the Simplot water into trust with the purpose of use designated as "mitigation for municipal use" and the place of use designated as "the McNary Pool of the Columbia River." If Ecology is unable to complete the acquisition of the Simplot water, Ecology must acquire and put into trust other water rights from the McNary Pool of an equivalent quantity as the Simplot water. The intent of this paragraph is that trust water rights used for mitigation shall be from the McNary Pool and of equivalent quantity and period of use as shown in Table 5 of the ROE.

5. CELP believes that water already placed in trust should not subsequently serve as mitigation for later appropriations. CELP does not believe that the Buckley trust water rights constitute sufficient mitigation to offset the Quad-Cities' diversion of water from the Columbia River. In the interests of settlement, however, and so long as the trust water right certificates are amended as described in the preceding paragraph, above, CELP is accepting the use of these rights as mitigation for a portion of the first 10 cfs of the Quad-Cities' diversion. The Parties agree that they will not cite the use of this mitigation, or the fact of entry into this SETTLEMENT AGREEMENT, for legal or policy precedent for future mitigation efforts.

6. To determine the amount of perpetual mitigation for the first increment of water use, Ecology has used an 80 percent consumptive use estimate. *I.e.*, Ecology has assumed that for the first 10 cfs of diverted water, there will be a consumptive use of 8 cfs. Concurrent with the times that the Quad Cities submit each successive Regional Water Forecast and Conservation Plan (RWFCP) Ecology will reevaluate this 80 percent consumptive use estimate based on then-current metering and other data showing actual water returned to the system, and will assure that the appropriate amount of water-for-water mitigation is in place. If consumptive use increases above 80%, in order to keep the diversion for the first 10 cfs not subject to interruption. Ecology will transfer into trust additional water rights from the McNary Pool to offset the additional consumptive use.

7. Any future proposed mitigation plans submitted by the Quad-Cities for review by Ecology shall be governed by the following terms:

a. Mitigation for appropriations beyond the first ten cfs will be according to the following "fifty percent or more/fifty percent or less" formula: fifty percent or more of water consumptively used by the Quad Cities during times when flows established in Condition E are not met will be mitigated by flow replacement using water upstream of the McNary Dam in the Columbia River system; the balance of the mitigation will be accounted for by fish habitat improvements that benefit Columbia River system fish at least to the same extent as would replacement water.

b. For any habitat project mitigation proposed by the Quad-Cities under this provision, the Quad-Cities will demonstrate based upon best available science and other applicable legal requirements that the proposed mitigation will benefit Columbia River system fish at least to the same extent as would replacement water.

c. In determining whether any habitat project mitigation proposed under this provision is acceptable. Ecology will consult with and give a high degree of deference to the Washington State Department of Fish and Wildlife, the Confederated Tribes and

Bands of the Yakama Nation, the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, and the Confederated Tribes of the Warm Springs Reservation of Oregon.

d. *Reopener.* During the life of the Quad-Cities' permit, any party hereto may request that the other parties accept a mitigation formula using a percentage different than the fifty or more-fifty or less percentages specified in paragraph 7a. Any agreement among the parties to revise these percentages shall be documented through a written amendment to this agreement signed by all of the parties.

8. The permit issued to the Quad-Cities will expressly specify that 10 cfs of the Quad-Cities' water right is allocated from the John Day/McNary Pools reservation for municipal water use pursuant to WAC 173-531A-050. Ecology will reduce the amount of water available from the municipal reservation established under WAC ch. 173-531A to reflect this allocation to the Quad-Cities.

9. Thirty-one days after: (a) the permit is issued, provided there are no appeals, or (b) after all appeals are finally terminated, Quad-Cities has the affirmative obligation to:

a. Withdraw all pending applications for new water rights except for certain groundwater applications that are for supplemental rights for alternate places of withdrawal. A list of all pending applications to be withdrawn pursuant to this section is attached to this agreement as Exhibit B. The City of Richland shall request to Ecology in writing that Applications G4-30990, G4-30981 and G4-30980 be issued as supplemental to the annual quantity of the Quad-Cities' permit S4-30976. The City of West Richland shall request to Ecology in writing that Applications G4-32304 and G4-32395 be issued as supplemental to the annual quantity of the Quad-Cities' permit S4-30976.

b. Abandon or voluntarily relinquish all water rights that the Quad-Cities are not currently using. A list of all water rights (represented by claims, certificates, or permits) to be abandoned or voluntarily relinquished pursuant to this section is attached to this agreement as Exhibit C.

10. Ecology considers the top three paragraphs at the top of page 11 of the November 19, 2002, Report of Examination stricken from the ROE. The permit will include no reference to the top three paragraphs at the top of page 11 of the Report of Examination or the content therein, and Ecology agrees that the language and content therein has no precedential effect.

11. The non-interruptibility of water use beyond the first 10 cfs requires that the Quad Cities submit a mitigation plan to Ecology for approval. Unless extraordinary circumstances exist, when the Quad-Cities proposes a mitigation plan for future diversion increments under their water right, the Quad-Cities will submit their plan at least one year before the Quad-Cities needs a final decision from Ecology. Ecology will use this one year period for public notice, consultation, and to accomplish any necessary water right trust transfers. For purposes of this section "extraordinary circumstances" is defined only as factual circumstances that establish the need for an Ecology response time of less than one year. In no case will Ecology shorten its review and decision time so as to preclude Ecology from fulfilling its public notice and consultation obligations.

12. Ecology will provide input and actively participate in the Department of Health's statewide rulemaking efforts required by the Laws of 2003, E2SHB 1338, Section 7, addressing (a) conservation requirements, (b) needs assessments and (c) needs projections for water systems plans.

13. By April 30, 2004, Ecology will complete its development of a guidance document describing how and when it will perform a "maximum net benefits analysis" in the context of water resource rulemaking. In developing this guidance document Ecology will

seek input from CELP and other interested parties. At a minimum, Ecology agrees to meet with representatives from CELP every other month between September 2003 and April 2004 to review, discuss, and consider CELP proposals regarding the scope and content of this guidance document.

14. Ecology will not file a CR 102 containing draft rule language pertaining to the rulemaking for the Columbia River pursuant to the Columbia River Regional Initiative until after Ecology receives a final report and recommendations from the National Academy of Sciences (NAS) panel.

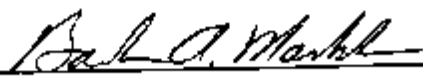
15. Subject to the limitations contained in this section, Ecology will not process any applications for new water rights permits from the Columbia River during the pendency of the Columbia River Regional Initiative process and before the date that rules related to that process become effective, or until January 1, 2005, whichever date is earlier. Ecology will abide by this suspension to the extent it is authorized to do so by law. Ecology will process applications during the suspension only: (a) if a court orders it to process an application, or (b) if an application is for a nonconsumptive use that would substantially enhance or protect the quality of the natural environment, or (c) if the agency must process an application to address a public health and safety emergency. The Quad-Cities agree not to sue or otherwise seek court orders compelling Ecology to process any pending application for a new water right from the Columbia River during the time frame set forth in this paragraph.

16. CELP agrees not to appeal, or assist anyone else in an appeal, of the permit issued pursuant to this SETTLEMENT AGREEMENT or any modification to the purpose or place of use of the Buckley trust rights, except that the permit issued may be appealed if its terms varies from the terms of this SETTLEMENT AGREEMENT. CELP and the Quad-Cities reserve the right to appeal any other future appealable orders of Ecology, including those described in paragraph 2 of this SETTLEMENT AGREEMENT.

17. Based upon the terms of this SETTLEMENT AGREEMENT, the parties jointly


request that the PCHB enter the following order dismissing this case with prejudice.

CHRISTINE O. GREGOIRE
Attorneys for Department of Ecology



Dated: 8/7/03

BARBARA A. MARKHAM, WSBA #30234
(360) 586-6749



Dated: 8/7/03

SARAH BENDERSKY, WSBA #30481
(360) 586-6770

**CENTER FOR ENVIRONMENTAL
LAW & POLICY**



Dated: 8/8/03

KAREN ALLSTON, WSBA #25336
(206) 223-8454



Dated: 8/8/03

SHIRLEY WATERS NIXON, WSBA #25756
(360) ~~453-2771~~ (206) 223-8454

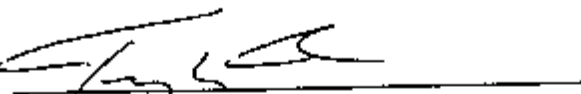
CITY OF KENNEWICK



Dated: 7-30-03

JOHN S. ZIOBRO, WSBA #25991
(509) 585-4272

CITY OF WEST RICHLAND



Dated: 7-29-03

TERRY M. TANNER, WSBA #21381
TANNER & HUI
(509) 943-0654

1 CITY OF RICHLAND


2 

Dated: 8/6/03

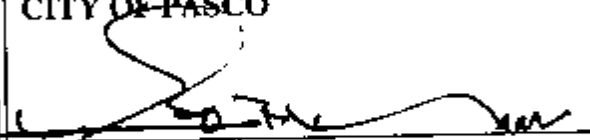
4 THOMAS O. LAMPSON, WSBA #13707
5 (509) 942-7385

6 CITIES OF RICHLAND, KENNEWICK,
7 PASCO AND WEST RICHLAND

Dated: 8/6/03

8 
9 THOMAS M. PORS, WSBA #17718
10 LAW OFFICE OF THOMAS M PORS
(206) 340-4396

11 CITY OF PASCO

12 
13 LELAND B. KERR, WSBA #6059
14 PAINE, HAMBLÉN COFFIN
15 BROOKE & MILLER LLP
(509) 735-1542

Dated: 7/29/03

17 I. ORDER OF DISMISSAL

18 This matter having come before the Pollution Control Hearings Board upon the joint
19 motion of the parties and based upon the SETTLEMENT AGREEMENT, and the Board
20 having reviewed the SETTLEMENT AGREEMENT and the records and files herein, and
21 having determined that the parties have agreed to a full and complete settlement of this appeal,
22 now, therefore,

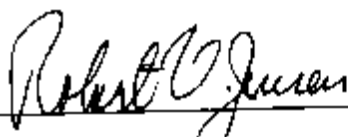
23 IT IS ORDERED that:

- 24 1. The appeal of *CELP v. Ecology and the Cities of Richland, Kennewick, Pasco*
25 *and West Richland*, PCHB No. 02-216 is dismissed with prejudice;

2. Each party is to bear its own costs and fees.

Dated this 19th day of August, 2003.

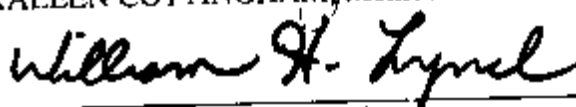
POLLUTION CONTROL HEARINGS BOARD



ROBERT V. JENSEN, Presiding



KALEEN COTTINGHAM, Member



WILLIAM H. LYNCH, Member

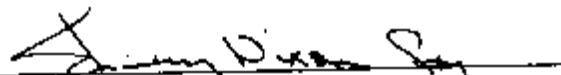
Presented by:

CHRISTINE O. GREGOIRE
Attorneys for Department of Ecology



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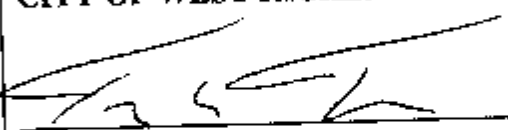


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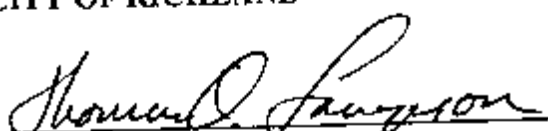
1 CITY OF KENNEWICK

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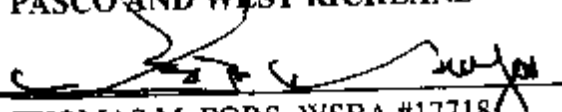
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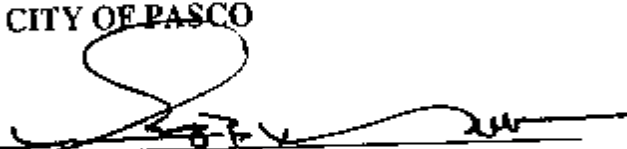
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26

H. To access water beyond the initial 10 cfs, the Quad Cities shall submit an updated RWFCP to the Department of Health and the Department of Ecology on a six-year schedule consistent with the schedule for review of water right quantities. The Quad Cities shall coordinate the preparation and completion of their individual water system plans and related supply, demand, and conservation programs. Prior to completion of the plans, the RWFCP will be completed jointly by the Quad Cities to compare demand to available supply and to evaluate the conservation achieved and the conservation projected resulting from implementation of the program described in section 6. The Quad Cities may submit the RWFCP for access to additional water, under the same process described in this condition, prior to any six-year interval if demand forecasts or other circumstances warrant earlier review. The full quantities of water recommended for a permit in this report may be appropriated in six-year increments associated with submittal of the RWFCP, and only when the applicable minimum instream flow is equaled or exceeded, or when the consumptive water use associated with appropriations under this permit is mitigated. Ecology will review the demand estimates, the water conservation elements of the plan, return flows estimates, and other relevant information contained in the plan that comprises the mitigation or flow replacement proposal. Following public comment, Ecology would approve, conditionally approve, or deny the proposed mitigation plan through an Order. If the Order denies the proposed mitigation or flow replacement proposal, then the appropriation for that 6-year increment would be subject to interruption when the flow objectives in this permit are not met, as described in Condition E-

1. The non-interruptibility of water use beyond the first 10 cfs requires that the Quad Cities submit a mitigation plan to Ecology for approval. Unless extraordinary circumstances exist, when the Quad Cities propose a mitigation plan for future diversion increments under their water right, the Quad Cities will submit their plan at least one year before the Quad Cities need a final decision from Ecology. Ecology will use this one year period for public notice, consultation, and to accomplish any necessary water right trust transfers. For purposes of this section "extraordinary circumstances" is defined only as factual circumstances that establish the need for an Ecology response time of less than one year. In no case will Ecology shorten its review and decision time so as to preclude Ecology from fulfilling its public notice and consultation obligations. The mitigation required for withdrawals of water in the succeeding six-year periods shall be proposed by the Quad Cities in their six-year RWFCPs for approval by the Department of Ecology.
2. Upon issuance of an Order by Ecology approving in conformance with Recommendation E of this permit one or more trust water rights or approving another replacement water program or a mitigation program proposed by the permittee to offset the full projected consumptive use during periods when flow objectives are not met, the six-year appropriation will not be conditioned as interruptible.
3. The maximum quantity of withdrawals of water requiring mitigation during the succeeding six-year periods will be presented in the RWFCPs and determined by subtracting estimated return flow from the maximum diversion amount. Return flow calculations shall be based on best available science and shall reflect seasonal conditions. During the course of that six-year period, actual quantities to be mitigated will depend on daily recording and monthly reporting of actual

water use under this permit, return flow estimates corresponding to the season of water use, and whether or not the then current flow objectives are achieved during that period.

Each RWFCP shall include a Conservation Program demonstrating how the best available and reasonable conservation technology will be implemented in the subsequent six-year period. The Conservation Program shall meet, as a minimum, current (as of date prepared) Department of Health requirements as well as the conservation conditions described below. In addition, the RWFCP with its Conservation Program shall be submitted to the Department of Ecology for review and approval consistent with the six-year schedule for reviewing water rights. The RWFCP shall propose and implement water conservation activities in the following areas: reducing leakage and unaccounted for water from the municipal water supply system; and monitoring, accounting for (separately) and reducing commercial, industrial, residential (indoor) and landscape water use. The Conservation Program shall include a detailed profile of current water use characteristics for each conservation category defined above including their total annual demand, average demand, unit demand and peak demand. Compliance with the Conservation Program for each six year period shall be a condition of the permit.

The Quad Cities RWFCP shall comply with Department of Health rules (*Conservation Planning Requirements, Washington State Department of Health PUB 331-008, March 1994*) which currently require that these plans contain, as a minimum:

Water Use Data Collection Requirements. Systems must report the best currently available data on water use for the categories of use, which are identified by the department.

Water Demand Forecast. A complete forecast, including an estimate of reduction of water use from implementation of water conservation measures must be developed.

Conservation Program. A Conservation Program must be developed and implemented. The Conservation Program elements must include Conservation Objectives; Evaluation of Conservation Measures; and Identification of Selected Conservation Activities.

If the Department of Health adopts more stringent rules relating to water conservation, the Quads Cities will plan and implement their plans to meet or exceed the more stringent rules.

In addition to the general water conservation requirements described above, the following Conservation Program activities are required as conditions of the permit. The Quad Cities will initiate development of the following program within one year after issuance of the permit and will adopt them for implementation within two years of the date of permit issuance.

For the purposes of the following conservation program elements, the term "implement" means obtaining and expending funding for capital facilities and operational staff, program assessment, and monitoring and reporting associated

with each program element in a manner and on a schedule to achieve, and once achieved to maintain, the stated goal or target.

i. Leak Detection Program

The Quad Cities shall implement a program to reduce leakage and unaccounted for water for each water supply system within the Quad Cities area. Leakage and unaccounted for water includes water loss due to leaking water mains and smaller distribution lines and inefficient fixtures, including inaccurate metering. Unaccounted for or unmetered water consumption also includes uses such as street sweeping, contractors, flushing hydrants, dust control, and erosion control by the Cities, County and private parties. The goal of the program is to reduce unaccounted for water to no more than 10% of the total diversion by 12/31/2010-The improvements to achieve the goal that are not concluded by 2010 must be identified and incorporated in the State approved Water System Plan for the city's capital improvement program with a completion date of no more than 2016.

ii. Large Meter Testing Program

The Quad Cities shall implement a program by December 31, 2005 to test all large meters (greater than 2-inches diameter, primarily used in commercial/industrial connections) and repair or replace all meters found to be defective. The testing and maintenance program will continue after the December 31,2005 date on a schedule consistent with the manufacturers recommendations.

iii. Residential Meter Repair/Replacement Program

The Quad Cities shall implement a program by December 31, 2005 to test and repair or replace all residential water meters on a schedule consistent with manufacturers' recommendations. The testing and replacement program will continue after the December 31,2005 date on an appropriate schedule to ensure that the users meters are reasonably accurate.

iv. Residential Retrofit Program

The Quad Cities shall implement a residential retrofit program by December 31, 2004 to provide the public with low-flow shower heads, toilet tank displacement bags, leak detection tablets and other residential water conservation measures. The initial program will be completed by December 31,2008.

v. Source Metering Replacement and Improvement

The Quad Cities shall implement a source metering replacement and improvement program by December 31, 2005 to ensure that all water sources are accurately monitored.

vi. Develop a Water Audit Program for Large Water Users

The Quad Cities shall develop and implement a water audit program for large (commercial, industrial and institutional) water users. At least 50% of the large water users will be audited by December 31, 2007 and the remainder of the audits completed by 2010. The water audit program shall continue on an ongoing repeat schedule for those large customers where the audit suggests that reasonable additional water use reduction is possible.

vii. Develop a Joint Plan with Irrigation Districts to address Urban Area Irrigation Needs

The Quad Cities shall pursue development of a Joint Plan with Irrigation Districts whose service areas overlap with the Quad Cities service area. The Plan shall address irrigation water supplies for landscape use (e.g., which entity supplies landscape water and Quad Cities policies on serving those areas) and landscape water demands during water-short periods when Irrigation Districts may prorate their water users. This plan will be completed by December 31, 2009.

viii. Develop an Integrated Water Shortage and Drought Response Plan

The Quad Cities shall develop an integrated Water Shortage and Drought Response Plan for periods when water demands exceed allowed diversions. This plan will be completed by December 31, 2007.

ix. Develop a recommended School Education Program

The Quad Cities will work with the school districts within the UGA for the Quad Cities to define appropriate classroom materials and assist the school districts with implementation of the program. The plan will be outlined and a recommended program be adopted for initial implementation by the cities within two years from the issuance of the permit. The implementation in the schools will be on the schedule approved by the school districts.

x. Develop a General Public Education Program.

The Quad Cities will develop a public education program as committed to in the Regional Water Supply Plan that will include outreach to all customers emphasizing the efficient use of both indoor and outdoor watering, consumptive use records on water bills, the promotion of water efficient devices such as low flow shower heads, and regional publications explaining conservation programs. This program shall be developed by December 31, 2005 and implemented on an on-going basis.

**Quad Cities
Water Rights for Settlement
Exhibit B - Pending Applications to be Withdrawn**

Water Right Number	Instantaneous Quantity (gpm)^	Annual Quantity (Acre-Feet)	Source	Priority
<i>Applications to be Withdrawn</i>				
Pasco				
G3-29957	2,500	4,032	Wellfield	April 16,1996
S3-29979	7,181	6,400	Columbia River	August 6,1996
Richland				
G4-30262	250		Well	May 24,1990
S4-30185	5,660	2,042	Columbia River	November 22, 1989

