

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 REPORT  
TO THE COURT ON  
RECOMMENDATIONS FOR UPDATING  
THE SERVICE LIST

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY et al.

Defendants.

Under the provisions of Federal Rule of Civil Procedure 53, JOHN E. THORSON, the Federal Water Master appointed by the Court in this case,<sup>1</sup> submits his report and proposed order for amending the original Order and Judgment in this case. This report and proposed Order result from a proceeding (No. WM-03, *Updating Service List*) conducted before the Water Master to study and develop recommendations for improving the

<sup>1</sup> Order Appointing Water Master (June 10, 2008).

1 accuracy of party and water user contact information for the Lummi Decree, *i.e.*, the final  
2 Order and Judgment entered in *United States v. State of Washington*, No. C01-0047Z.  
3 Accurate service list information is necessary for the ongoing implementation and  
4 enforcement of the Lummi Decree. The Water Master recommends certain annual  
5 procedures conducted in cooperation with the Washington Department of Ecology to (a)  
6 identify apparent changes in party and water user contact information; (b) propose  
7 changes to the Court with opportunities for parties to object and respond; and (c)  
8 culminate in a Court order approving the updates to the service list.  
9

### 10 **BACKGROUND**

11  
12 As with all human affairs, people have moved and property has changed hands on  
13 the Lummi peninsula since the Lummi Decree was entered on November 20, 2007 (Docket  
14 No. 1273). In his 2009-2010 Annual Report (filed June 30, 2010), the Federal Water Master  
15 indicated:  
16

17 Since the Settlement Agreement was negotiated and approved by the Court in  
18 November 2007, the accuracy of party and water user information has degraded.  
19 Parties on the Court's service list for this proceeding have moved, died or  
20 transferred their property without in some instances notifying the Clerk of the Court  
21 of these changes. Several lawyers who represented multiple clients during active  
22 litigation in this case have withdrawn as attorneys of record and substituted their  
23 clients. Some of this client information may not be accurate or current. The  
24 Department of Ecology maintains its own list of landowners who are eligible to  
25 receive water under the state's settlement allocation, and this information changes  
26 for many of the same reasons. Additionally, the Department of Ecology's  
27 information does not in all instances conform with the Court's service list.  
28

....

[T]he Master intends to convene one or more meetings with interested parties and  
any necessary personnel from the Clerk's office and the Department of Ecology to:  
(1) learn whether the apparent problem about currency of the mailing list, as  
outlined above, is accurate; (2) investigate and document the extent of the problem;  
(3) identify and implement any improvements, not needing Court approval, that can  
be undertaken individually or collectively by the Master, Clerk's office, and

1 Department of Ecology; [and] (4) identify and propose improvements where Court  
2 approval would be necessary to implement an improvement.

3 The Master reiterated these concerns in his 2010-11 Annual Report filed June 30,  
4 2011, and indicated he was commencing a specialized proceeding before him to address  
5 these issues. For administrative and record-keeping convenience, this study was  
6 designated Water Master (WM) Proceeding No. 11-03, *Updating Service List*.

### 8 PROCEEDINGS TO DATE

9  
10 When the Water Master served his 2010-11 Annual Report on the existing service  
11 list for the Lummi Decree, he included a separate written notice to all persons on the  
12 service list announcing the commencement of WM No. 11-03. Federal Water Master's  
13 Notice of Water Master Proceeding No. WM 11-03 (*Updating Service List*) (June 30, 2011).  
14 The notice described the purpose of the proceeding and set forth the deadline (July 29,  
15 2011) and procedure for interested parties to notify the Master and become involved in the  
16 proceeding.  
17

18 As of July 29, 2011, four parties had notified the Master of their desire to participate  
19 in WM 11-03: The United States of America, the Washington Department of Ecology, Lesli  
20 Higginson, and James E. LeSage. These parties were notified of all subsequent proceedings  
21 in WM 11-03, and the United States and Department of Ecology participated actively. These  
22 proceedings have included the following:

23  
24 September 27, 2011—Scoping conference call with parties to identify problems and  
25 issues, share information about the existing condition and maintenance of the service list,  
26 and determine a schedule for the proceeding. The conference call was recorded and  
27 summarized in a minute entry.  
28

1 December 6, 2011—Master circulated a minute entry to WM 11-03 parties setting  
2 forth a proposal for annually updating the service list. Parties were requested to submit  
3 comments on the proposal by December 31, 2011; by that date, the United States and the  
4 Department of Ecology had done so.

5  
6 May 1, 2012—Master circulated a draft Report to the Court to the WM 11-03 parties  
7 asking for final comment by May 11, 2012, before filing with the Court. The draft Report set  
8 forth the detailed recommendations to better maintain the Lummi Decree service list. The  
9 Master incorporated suggestions offered by the parties.

10  
11 In addition to the preceding events, the Master talked with Ms. Consuelo Ledesma,  
12 U.S. District Court Docketing Clerk for the Lummi case, as to how she has maintained the  
13 service list for No. C01-0047Z since commencement. With the consent of the WM 11-03  
14 parties, the Master also requested and received a written communication (dated December  
15 8, 2011, and filed in WM 11-03) from Ms. Lynn Torno, paralegal in the law firm of Raas,  
16 Johnsen & Stuen, PS, attorneys for the Lummi Nation, as to how she has kept track of  
17 Lummi case parties and water users over the years.

18  
19 The foregoing events have culminated in the findings of fact, conclusions of law, and  
20 recommendations set forth in this Report to the Court.

## 21 **FINDINGS OF FACT**

- 22  
23 1. No *lis pendens* was filed at the commencement of No. C01-0047Z.
- 24  
25 2. The initial service list for the case was prepared by the Clerk of the Court  
26 based on formal appearances in the litigation.
- 27  
28 3. During active litigation in the Lummi case, a database of all land parcels in  
the case area was created. A paralegal in the law firm representing the Lummi Nation

1 would on a regular basis compare the database to online county property records and  
2 notify the Docketing Clerk in the Office of the Clerk of the Court of any changes in  
3 ownership involving a person who had appeared in the case.

4 4. The Court entered its Order and Judgment on November 20, 2007, approving  
5 the Settlement Agreement negotiated and presented by certain of the parties.  
6

7 5. The Order and Judgment indicates that the requirements of the Order and  
8 Judgment, as well as of the approved Settlement Agreement, extend to “[a]ll parties, all  
9 persons, and all entities . . . and all of their heirs, successors, and assigns . . .,” ¶ 1, and that  
10 Court retains continuing jurisdiction in the case, ¶ 11.  
11

12 6. The Court has a specific local rule, Civil Rule (CR) 10(f), stating the obligation  
13 of attorneys and unrepresented parties to notify the Clerk of changes in contact  
14 information. This rule specifies:  
15

16 **(f) Name and Address of Parties and Attorneys**

17 Any attorney representing any party or any party not represented by an attorney  
18 must file a notice with the court of any change in address, telephone number or e-  
19 mail address. Such notice must be received by the Clerk's Office within ten days of  
20 the change. All subsequent pleadings, motions or other filings shall reflect the new  
21 address and telephone number. The address and telephone number of the party or  
22 his attorney, noted on the first pleadings, motions or other filings or as changed by  
23 individual notice, shall be conclusively taken as the last known address and  
24 telephone number of said party or attorney.  
25

26 7. Since the entry of the 2007 Order and Judgment, the service list for this case  
27 has consisted of (a) those persons (mostly attorneys) who file and receive pleadings and  
28 court communications electronically using the Court’s CM/ECF system; and (b) those  
persons who receive pleadings and court communications by traditional first-class mail.  
Approximately twenty-two persons now appear on the first list and approximately 112

1 persons now appear on the second list. One “person” on the service list may include  
2 multiple individuals, *e.g.*, spouses or family members.

3           8.       In addition to the records maintained by the Court’s electronic filing and  
4 docketing system, the Docketing Clerk in the Clerk’s Office has maintained the service list  
5 for non-CM/ECF participants on a series of paper label pages, usually with three or four  
6 names per page. This list is used by the Clerk’s office for service of Court-generated  
7 documents and relied upon by the Master and other parties when serving their own  
8 documents on persons not participating in the Court’s electronic filing system.  
9

10           9.       The Master used the Clerk’s service list for serving his 2008-09, 2009-10, and  
11 2010-11 annual reports. Of a total first-class mailing of approximately 200 persons (almost  
12 entirely unrepresented parties), twenty-eight envelopes in 2009, twelve envelopes in 2010,  
13 and eight envelopes in 2011 were returned as undeliverable (unless an address correction  
14 is obtained, the Master does not mail annual reports to those parties for whom an envelope  
15 has been returned in previous years).  
16  
17

18           10.      The Department of Ecology maintains a spreadsheet list of Lummi Decree  
19 parties and water users based on information from annual well reports submitted by water  
20 users, other records maintained by the Department, communications from water users, and  
21 county assessor information. Ecology’s records do not always correspond with those of the  
22 Clerk of the Court.  
23

24           11.      Because of the many unrepresented parties in this case, it is probable that  
25 not all parties will comply with the Court’s local rule, CR 10(f), when changing their  
26 address or transferring their property.  
27  
28







1 requirement. The Master and Ecology can make informal arrangements with the Clerk's  
2 office to obtain this information.

3 **B. ANNUAL PROCEDURE FOR UPDATING SERVICE LIST**

4  
5 It is doubtful that all parties will diligently notify the Clerk of party and contact  
6 information changes, as CR 10(f) requires. Thus, participants in WM 11-03 discussed the  
7 desirability of a more routine and reliable backup procedure. The basic recommendation is  
8 that the Clerk's service list be compared on an annual basis with Ecology's spreadsheet  
9 information to determine inconsistencies, along with other apparent changes based on  
10 returned mail or communications from water users. Using information from Ecology and  
11 these other sources, the Master, in his June Annual Report, would propose to the Court the  
12 identified updates for names and contact information (both additions and deletions). All  
13 persons on the existing service list, as well as those persons proposed for inclusion on the  
14 service list, will be served with the Annual Report. If no one objects to the proposed  
15 changes within a period of time, the Court would enter an order adopting the proposed  
16 changes to the formal service list.  
17  
18

19 The details of this recommendation are as follows:

20 1. The Master will communicate periodically with:

21  
22 (a) The appropriate staff person in the Bellingham Office of the Washington  
23 Department of Ecology as to apparent changes in the service list or the  
24 names and addresses of persons entitled to receive water under the State  
25 Allotment. The Department of Ecology may obtain this information from  
26 annual well reports submitted by water users, other records maintained by  
27 the Department, communications from water users, assessor information,  
28 and other reasonably reliable sources in the course of the Department's  
ongoing activities. The Department has no obligation to seek this  
information outside the course of its ongoing activities.

1 (b) The appropriate Docketing Clerk in the Court Clerk's office as to apparent  
2 changes in the service list resulting from pleadings, court orders, or other  
3 contact information normally relied upon by the Clerk.

4 2. The Master will also record apparent changes to the service list that  
5 periodically come to his or her attention through communications with parties and  
6 water users; undelivered minute entries, orders, and reports; undelivered Annual  
7 Reports; and other reasonably reliable sources.

8 3. Using information obtained as the result of steps 1 and 2, above, the Master  
9 annually will prepare a table setting forth apparent party changes in the service list.  
10 The table will match existing information (*e.g.*, party names, party addresses) in the  
11 service list to the proposed changes. The Master will include this table in the Annual  
12 Report to the Court, due on or before June 30 of each year. In the Annual Report, the  
13 Master will request the Court to make the necessary updates to the service list. A  
14 proposed Court order effectuating the proposed changes will be an attachment to  
15 the Annual Report.

16 4. The Annual Report will also specify that any objection to the proposed  
17 changes in the existing service list must be filed within 30 days of the filing and  
18 service of the Annual Report. The Annual Report will also include a printed form  
19 that objectors may use to state and file any objection. A word processing version of  
20 the form will also be available for downloading from the Master's website.

21 5. The Annual Report will continue to be served on the existing service list  
22 (including those persons using the Court's CM/ECF system and on those other  
23 persons who are served by first-class mail) and posted on the Master's website. The  
24 Annual Report will also be served by first-class mail on each new party (*e.g.*, new  
25 owner of the property) proposed for inclusion in the updated Service List and on  
26 each existing party with a new address proposed for inclusion in the updated  
27 Service List.

28 6. Any objection to the proposed changes in the Service List must be filed  
according to Federal Rules of Civil Procedure 53(f), concerning Master's reports,  
and the Court's normal local rules (including the electronic filing rules for  
attorneys). The time period for objecting to the report, however, is extended to 30  
days. Persons filing a paper objection, however, may serve only the Master,  
Department of Ecology, Lummi Nation, and the United States.

7. Pursuant to Rule 53(f), the Court will review any objection and, if necessary,  
conduct further proceedings (or direct the Master to conduct further proceedings)  
to resolve any objection. Once objections are resolved, the Court will enter an order  
making the appropriate changes in the Service List. The Master may assist the Court  
in the drafting of the order.

1 8. Once the Court enters the order originally recommended by the Master (Step  
2 3) or following proceedings to resolve objections to the recommended order (Step  
3 7), and any appeal concerning the order has been finally resolved, the modified  
4 Service List will supersede all previous service lists for Case No. C01-0047Z. Those  
5 persons no longer entitled to receive water under the State Allotment will not be  
6 included on the Service List, and any obligation to serve them shall cease.

7 9. The foregoing process will be repeated annually.

8 While the amendment to the November 2007 Order and Judgment does not need to  
9 include all the foregoing detail, some basic authorization is necessary. Consequently, the  
10 Master suggests the following abbreviated text for the Order and Judgment, which is  
11 proposed as new subparagraphs to paragraph 11 of the Order and Judgment (underlining  
12 indicates new text):

13 (a) In the Annual Report required by Section VIII.A.1.c of the Settlement Agreement,  
14 the Master will recommend any necessary changes to the service list maintained by  
15 the Clerk for this case. In preparing recommended service list changes, the Master  
16 will use the procedure described in the Master's June 29, 2012, Report to the Court,  
17 Recommendations for Updating the Service List, which has been approved by the  
18 Court. Within 30 days of service of an Annual Report recommending service list  
19 changes, parties or persons proposed for inclusion in or removal from the service  
20 list may file an objection pursuant to Federal Rules of Civil Procedure 53(f). If the  
21 objection is limited to a specific recommended service list change, the objection may  
22 be served only on the Master, United States of America, Lummi Nation, and  
23 Washington Department of Ecology.

24 (b) Pursuant to Rule 53(f), the Court will review any objection and, if necessary,  
25 conduct further proceedings (or direct the Master to conduct further proceedings)  
26 to resolve any objection. Once objections are resolved, the Court will enter an order  
27 making the appropriate changes in the Service List. The Master may assist the Court  
28 in the drafting of the order.

29 (c) Once the Court enters the order originally recommended by the Master or  
30 following proceedings to resolve objections to the Master's recommended order,  
31 and any appeal concerning the order has been finally resolved, the modified Service  
32 List will supersede all previous service lists for Case No. C01-0047Z. Those persons  
33 no longer entitled to receive water under the State Allotment will not be included on  
34 the modified Service List, and any obligation to serve them shall cease.

1 **CONCLUSION**

2 Based on the foregoing Findings of Fact, Conclusions of Law, Recommendations, and  
3 other discussion, the Master moves the Court to:  
4

5 1. Amend the Order and Judgment entered November 20, 2007 (Docket No.  
6 1273), by adding to paragraph 11 the proposed language set forth in Recommendation A,  
7 *Requiring Parties to Notify Court, supra*, and also set forth in the proposed order, attached  
8 as Attachment A;

9  
10 2. Amend the Order and Judgment entered November 20, 2007 (Docket No.  
11 1273), by adding to paragraph 11 the proposed language set forth in Recommendation B,  
12 *Annual Procedure for Updating Service List, supra*, and also set forth in the proposed order,  
13 attached as Attachment A; and

14  
15 3. Approve the detailed annual procedure for updating the service list  
16 described in steps 1 through 9 as set forth in Recommendation B, *Annual Procedure for*  
17 *Updating Service List, supra*.

18 **NOTICE OF TIME FOR OBJECTION**

19  
20 Federal Rule of Civil Procedure 53(f)(2) provides: "A party may file objections to—  
21 or a motion to adopt or modify—the master's order, report, or recommendations no later  
22 than 21 days after a copy is served, unless the court sets a different time."

23 Respectfully submitted,

24 DATED June 29, 2012

25  
26 /s/ *John E. Thorson*

27 \_\_\_\_\_  
28 John E. Thorson  
Federal Water Master  
Lummi Decree

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

---

376 River Road West  
Plains, MT 59859  
(406) 826-0500  
johnethorson@mac.com

1  
2  
3  
4  
5  
6  
7  
8  
9

**ATTACHMENT A: PROPOSED COURT ORDER**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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

NO. C01-0047Z

12 Plaintiff,

13 LUMMI NATION,

14 Plaintiff-Intervenor,

[PROPOSED] ORDER

15 v.

16 STATE OF WASHINGTON,  
17 DEPARTMENT OF ECOLOGY et al.

18 Defendants.  
19  
20

21 No objection to the Water Master's Report to the Court on Recommendations for  
22 Updating the Service List (May \_\_, 2012) (Docket No. \_\_\_\_), having been filed or received  
23 within the time specified by Fed. R. Civ. P. 53(f)(2), the Court now enters the following  
24 Order:  
25  
26  
27  
28

1 The Water Master's Report is approved including the detailed annual procedure for  
2 updating the service list described in steps 1 through 9 as set forth in Recommendation B,  
3 *Annual Procedure for Updating Service List.*

4 The Order and Judgment dated November 20, 2007, Docket No. 1273, is hereby  
5 AMENDED as follows:  
6

7 Paragraph 11 of the 2007 Order and Judgment is amended so that it now reads  
8 (underlining indicates new text):  
9

10 **Continuing Jurisdiction.** The Court shall retain jurisdiction of this case to modify  
11 this Order and Judgment upon motion of the parties, to appoint a Water Master and  
12 to replace the same as might be necessary from time to time, to decide appeals from  
13 decisions of the Water Master, and to resolve disputes regarding the annual budget  
14 of the Water Master. So long as the Court retains continuing jurisdiction, all parties  
15 to this action and their heirs, assigns, and successors in interest shall comply with  
16 the Court's local rule requiring attorneys and unrepresented parties to notify the  
17 Clerk of any change in address, telephone number or e-mail address (Local Civil  
18 Rule (CR) 10(f) and any subsequent revision or restatement of this rule). Parties  
19 also shall notify the Clerk of any changes in party or contact information resulting  
20 from changes in the ownership of real property subject to the provisions of this  
21 Order and Judgment and the Settlement Agreement.

22 (a) In the Annual Report required by Section VIII.A.1.c of the Settlement Agreement,  
23 the Master will recommend any necessary changes to the service list maintained by  
24 the Clerk for this case. In preparing recommended service list changes, the Master  
25 will use the procedure described in the Master's June 29, 2012, Report to the Court,  
26 Recommendations for Updating the Service List, which has been approved by the  
27 Court. Within 30 days of service of an Annual Report recommending service list  
28 changes, parties or persons proposed for inclusion in or removal from the service  
list may file an objection pursuant to Federal Rules of Civil Procedure 53(f). If the  
objection is limited to a specific recommended service list change, the objection may  
be served only on the Master, United States of America, Lummi Nation, and  
Washington Department of Ecology.

(b) Pursuant to Rule 53(f), the Court will review any objection and, if necessary,  
conduct further proceedings (or direct the Master to conduct further proceedings)  
to resolve any objection. Once objections are resolved, the Court will enter an order  
making the appropriate changes in the Service List. The Master may assist the Court  
in the drafting of the order.

1 (c) Once the Court enters the order originally recommended by the Master or  
2 following proceedings to resolve objections to the Master's recommended order,  
3 and any appeal concerning the order has been finally resolved, the modified Service  
4 List will supersede all previous service lists for Case No. C01-0047Z. Those persons  
5 no longer entitled to receive water under the State Allotment will not be included on  
6 the modified Service List, and any obligation to serve them shall cease.

7 IT IS SO ORDERED.

8 DATED this \_\_\_ day of July 2012.

9 \_\_\_\_\_  
10 Thomas S. Zilly  
11 United States District Judge  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

The Certificate of Service of this Report has been filed separately with the Clerk of the Court. The Notice and Certificate of Service have been published to the published to the Water Master’s website: [www.lummiwatermaster.com](http://www.lummiwatermaster.com).