



State of Washington
**REPORT OF EXAMINATION
 FOR TRUST WATER RIGHT**

File NR CS4-00648(AB)sb4-a
 WR DOC ID 4717208

Add or Change Purpose of Use Change Place of Use

PRIORITY DATE November 2, 1877	WATER RIGHT NUMBER Yakima Adjudication Court Claim No. 00648	TRUST TERM Permanent
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APPLICANT
 SUNCADIA LLC
 4244 BULLFROG RD STE 1
 CLE ELUM WA 98922-8717

Purpose and Quantity

This Trust water right is for the purpose of instream flows from October 16 to March 31, with quantities allocated to a primary reach in the following table. "Primary reach" means that portion of a water body that benefits from both the former consumptive use and former return flow waters of a water right.

Primary Reach		
Period	Flow (cfs)	Acre-feet
10/16-10/31	2.7264	86.517
11/01-11/30	2.7264	162.220
12/01-12/31	2.7264	167.627
01/01-01/31	2.7264	167.627
02/01-02/28	2.7264	151.405
03/01-03/31	2.7264	167.627
ANNUAL TOTAL		903.024

Trust Water Right Place of Use (See Attachment 1)

COUNTY	WATERBODY	TRIBUTARY TO	WATER RESOURCE INVENTORY AREA
Kittitas	First Creek	Swauk Creek and Yakima River	39-Upper Yakima

Datum: NAD83/WGS84

REACH	WATERBODY	RIVER MI	TWN	RNG	SEC	QQ Q	LATITUDE	LONGITUDE
Begin Primary Reach	First Creek		20N	18E	30	NW NE	47.20247	-120.62997
End Primary Reach	Yakima River	154	17N	18E	3	SW		

The primary reach begins at the original point of diversion on First Creek and extends downstream to the confluence of First Creek and Swauk Creek, downstream to the confluence of Swauk Creek and the Yakima River, and extends to the point where Reecer Creek enters the Yakima River.

**PORTION OF WATER RIGHT (Suncadia's 1877 Right)
NOT BEING CHANGED IN APPLICATION NO.: CS4-00648(AB)sb4-a**

PRIORITY DATE
November 2, 1877

WATER RIGHT NUMBER
Yakima Adjudication Court Claim No. 00648, Subbasin No. 4

WATER RIGHT HOLDER
SUNCADIA LLC, Member of the First Creek
Water User's Association (FCWUA)

MAILING ADDRESS
4244 BULLFROG RD STE 1
CLE ELUM WA 98922-8717

REMARKS: Suncadia has transferred their winter stock water right to instream flows in two parts, the non-consumptive portion, 903.024 acre-feet per year (ac-ft/yr), 2.7264 cubic feet per second (cfs) under this authorization, and the consumptive portion, 0.0346 cfs, 11.45 ac-ft/yr, under Application No. CS4-00648(AB)sb4-b.

Purpose and Quantity

Suncadia's 1877 right was described in an Order of Partition signed on November 13, 2008 as 2.315 cfs, 493.9 ac-ft/yr for the irrigation of 89.83 acres and stock watering during the irrigation season; 1.247 cfs for conveyance loss (the winter stock water portion was transferred to instream flows—see remarks above).

However, once the conditions in the change of use from 2003 (CS4-00648(A)CTCL and CS4-YRB04CC00648) have been met, and a Notice of Change has been issued pursuant to Pretrial Order No. 17, Suncadia's irrigation and stock rights during the irrigation season will be instream from April 1 to October 15 in the following quantities:

	April	May	June	July	Aug	Sep	Oct 1-15	Total
Primary Qi	1.73	1.95	2.01	2.11	2.05	1.89	1.60	
Secondary Qi	0.35	0.57	0.63	0.73	0.68	0.51	0.22	
Primary Qa	103.43	120.42	119.28	130.07	126.38	112.45	47.79	759.82
Secondary Qa	21.34	35.59	37.19	45.25	41.55	30.36	6.75	218.03

Note: For a full description of the primary and secondary reaches, see the reports for CS4-00648(A)CTCL and CS4-YRB04CC00648. The monthly quantities above vary slightly from the Order of Partition in an attempt to address rounding errors.

Source Location

COUNTY	WATERBODY	TRIBUTARY TO	WATER RESOURCE INVENTORY AREA			
Kittitas	First Creek	Swauk Creek	39			
SOURCE FACILITY/DEVICE	TWN	RNG	SEC	QQ Q	LATITUDE	LONGITUDE
FCWUA Ditch	20N	18E	30	NW NE	47.20247	-120.62997

800 feet south and 100 feet east of the north quarter corner of Section 30, within Government Lot 1, T. 20 N., R. 18 E.W.M.

Place of Use

S½SE¼SW¼, SW¼SW¼, W½SE¼, and the S½N½SE¼SW¼ of Section 21, and the N½NW¼, and NW¼NE¼ of Section 28, ALL in T. 19 N., R. 18 E.W.M.

Description of Water System

The FCWUA Ditch diverts water from First Creek and conveys it out of the Swauk Creek Basin and delivers irrigation and stock water into the Reecer Creek Basin for use on the lands described above.

Findings of Facts and Decisions

Upon reviewing the investigator’s report, I find all facts relevant and material to the subject application have been thoroughly investigated. Furthermore, I find the change of water right as recommended will not be detrimental to existing rights.

Therefore, I ORDER the requested change under Trust Water Application No. CS4-00648(AB)sb4-a be approved subject to existing rights.

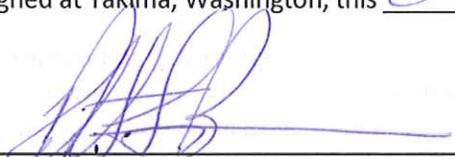
This Decision may be appealed pursuant to RCW 34.05.514(3), RCW 90.03.210(2), and Pretrial Order No. 12 entered in *State of Washington, Department of Ecology v. James Acquavella, et al.*, Yakima County Superior Court No. 77-2-01484-5 (the general adjudication of surface water rights in the Yakima River Basin). The person to whom this Decision is issued, if he or she wishes to file an appeal, must file the notice of appeal with the Yakima County Superior Court **within thirty (30) days of receipt of this Decision**. Appeals must be filed with the Superior Court Clerk’s Office, Yakima County Superior Court, 128 North 2nd Street, Yakima WA 98901, RE: Yakima River Adjudication. Appeals must be served in accordance with Pretrial Order No. 12, Section III (“Appeals Procedures”). The content of the notice of appeal must conform to RCW 34.05.546. Specifically, the notice of appeal must include:

- The name and mailing address of the appellant;
- Name and address of the appellant’s attorney, if any;
- The name and address of the Department of Ecology;
- The specific application number of the decision being appealed;
- A copy of the decision;
- A brief explanation of Ecology’s decision;
- Identification of persons who were parties in any adjudicative proceedings that led to Ecology’s decision;
- Facts that demonstrate the appellant is entitled to obtain judicial review;
- The appellant’s reasons for believing that relief should be granted; and
- A request for relief, specifying the type and extent of relief requested.

The “parties of record” who must be served with copies of the notice of appeal under RCW 34.05.542(3) are limited to the applicant of the decision subject to appeal, Ecology and the Office of the Attorney General.

All others receiving notice of this Decision, who wish to file an appeal, must file the appeal with the Yakima County Superior Court within **thirty (30) days of the date the Order was mailed**. The appeal must be filed in the same manner as described above.

Signed at Yakima, Washington, this 8th day of AUGUST 2011.



Robert F. Barwin, Acting Section Manager
Water Resources Program/CRO

INVESTIGATOR'S REPORT

BACKGROUND

On November 2, 2009, Suncadia LLC filed an application to transfer the winter stock water under Court Claim No. 00648 to instream flows. The application was accepted and assigned identifier No. CS4-00648(AB)sb4-a. This application is one of several¹ applications intended to facilitate restoration of First Creek.

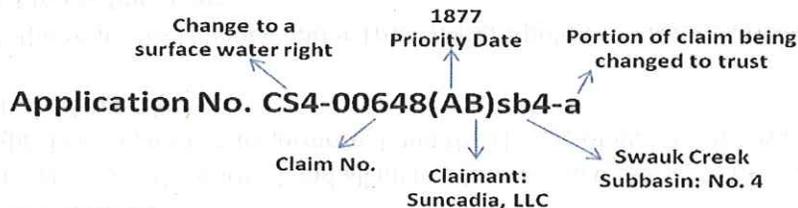
In 2010, *Agreements for Purchase of Water Rights* were effectuated between each member of the First Creek Water Users Association, Inc. (FCWUA) and Washington Water Trust (WWT), acting on behalf of Ecology. Each member agreed to sell a portion of their 1877 priority date winter stock watering rights, cease diverting into the FCWUA ditch, and transfer the right into the Trust Water Right Program for instream flows. Suncadia agreed to sell 2.761 cubic feet per second (11.45 acre-feet per year consumptive) from First Creek, which is their full authorized quantity for stock water from October 16 to March 31. However, as provided in its agreement with WWT, Suncadia notified WWT and Ecology that it would retain 11.45 acre-feet per year (the consumptive portion of its winter stock water right) by letter dated June 1, 2010. Suncadia's request to change the non consumptive portion of its winter stock water right is being addressed in this report. Similar requests made by the other FCWUA members are being addressed in separate ROE's.

History of Court Claim No. 00648

Yakima Adjudication Court Claim No. 00648 was filed by the FCWUA and confirmed in the Conditional Final Order for the Swauk Creek Subbasin No. 4 issued on January 9, 2003. Court Claim No. 00648 consists of two different water rights with priority dates of November 2, 1877 and June 1, 1881. Both water rights authorize use of the same diversion point on the north fork of First Creek, and each water right describes discrete quantities and appurtenant lands.

In 1998, Trendwest, a predecessor to Suncadia LLC, acquired a portion of Court Claim No. 00648 for irrigation and stock watering. In 2003, Ecology changed the purpose of use for a portion of Suncadia's irrigation rights to instream flow purposes. This instream flow right has been managed by Suncadia to improve flows in First Creek and Swauk Creek as part of the Suncadia Resort's water supply and mitigation program. The First Creek General Report from the 2003 ROE's provides substantial background information. Ultimately, the Suncadia instream flow right will be transferred to Ecology to be managed as a trust water right.

In 2008, Yakima Superior Court issued an order of partition and substitution for the FCWUA. The order divides the 1877 and 1881 rights among the three shareholders: J.P. Roan, Suncadia, LLC, and Jack White, Jr. The court also described Ecology's 2003 transfers to instream flows for Suncadia's mitigation. Suncadia's portion of the 1877 right is described in Table 1.



¹ The naming scheme for Suncadia's application is shown above. The other applications related to the First Creek Restoration Project follow this same pattern.

In 2008, Suncadia began negotiations with J.P. Roan and Jack White, Jr. to change ditch operations to eliminate diversion at the current headworks in the winter months and create additional flow benefits in the late summer, which would reduce the costs of screening and fish passage structures. These negotiations led to a project made up of several parts in various stages of completion, referred to as the *First Creek Restoration Project*.

This report relates to one of three applications seeking to increase winter flows in First Creek (Suncadia: CS4-00648(AB)sb4-a [this report], Roan: CS4-00648(AA)sb4-a, and White: CS4-00648(AC)sb4-a). Each member requested to change their 1877 winter stock water right to instream flow purposes and transfer the rights to trust. Analysis of other flow restoration and water banking elements of the project will be provided in subsequent ROE's.

Table 1: Suncadia's Portion of Court Claim No. 00648 with a 1877 Priority Date, Summary of Existing Attributes and Proposed Change

Attributes	Documented	Proposed
Name	Suncadia, LLC	Washington Water Trust
Priority Date / Application Date	November 2, 1877	November 2, 2009
Quantities and Period of Use	2.315 cfs; 493.9 ac-ft/yr for irrigation and stock watering during the irrigation season; 1.247 cfs for conveyance loss; 2.761 cfs, 11.45 ac-ft/yr (consumptive) for stock watering from October 16 through March 31.	2.761 cfs for instream flows from October 16 through March 31
Source	First Creek	First Creek
Point of Diversion/Withdrawal	800 ft south and 100 ft east from the north quarter corner of Section 30, within Government Lot 1, Section 30, T. 20 N., R. 18 E.W.M.	N/A
Purpose of Use	Irrigation and Stock Water	Instream Flow
Place of Use	The S½SE¼SW¼, SW¼SW¼, W½SE¼, and the S½N½SE¼SW¼ of Section 21, and the N½NW¼, and NW¼NE¼ of Section 28, ALL in T. 19 N., R. 18 E.W.M.	Instream flows in First Creek, Swauk Creek, and the Yakima River

Expedited Processing

This application qualifies for expedited processing under WAC 173-152-050(3)(a) whereby water right change applications may be processed prior to applications submitted at an earlier date when the proposed water use, if approved, would substantially enhance or protect the quality of the natural environment. The initial investigation and drafting of this ROE was done by Robinson & Noble, Inc. through cost reimbursement (RCW 43.21A.690 and RCW 90.03.265). Robinson & Noble worked under Cost-Reimbursement Assignment No. ROB001 (Master Contract No. C1000191). However, the First Creek Restoration Project evolved during Robinson & Noble's contract period and Ecology elected to complete the investigation on its own.

Legal Requirements for Proposed Change

The following is a list of requirements that must be met prior to authorizing the proposed changes to Court Claim No. 00648.

- **Public Notice**

Ecology prepared a public notice that addressed all of the applications associated with the First Creek Restoration Project. WWT, working as facilitator of these changes, published the notice in the Ellensburg Record on August 19 and 26, 2010. One protest letter was received. See the *Consideration of Protests and Comments* section below.

- **State Environmental Policy Act (SEPA)**

WWT submitted an Environmental Checklist (WAC 197-11-960) describing the transfer of winter stock water to instream flows and adding points of diversion in the First Creek Basin. Based on this checklist, Ecology acted as lead agency and issued a Determination of Non-Significance (DNS) on June 29, 2010 and published the determination on July 2, 2010 in the Ellensburg Record with a 14 day comment period that ended on July 13, 2010. No protest letters were received during this comment period, however, a protest letter received during the public notice protest period makes reference to concerns regarding the DNS. See the *Consideration of Protests and Comments* section below.

- **Water Resources Statutes and Case Law**

The transfer of a portion of Court Claim No. 00648 to the Yakima Basin Trust Water Program is subject to RCW 90.38.

Validity and Extent of Original Claim

Court Claim No. 00648 was confirmed in the Conditional Final Order (CFO) for the Swauk Creek Subbasin No. 4, issued on January 9, 2003. Ecology staff witnessed that the ditch was in working condition and continuously diverting water throughout those years and attempts had been made periodically to berm up the channel leading to the FCWUA ditch to capture most of the flow in First Creek. Nonuse of the full amount of the water right when the supply is not available is a sufficient cause for nonuse as defined in RCW 90.14.140(1)(a).

Ecology received a declaration from Mr. Roan stating that he sold a portion of his water rights to Trendwest (Suncadia) in 1998, but continued to raise the same number of cattle, "a full herd", and use the same amount of winter stock water on the property (as part of an agreement between the two parties). He maintained a full herd of cattle until he sold all of his cattle in 2009. This declaration was signed by Mr. Roan on March 18, 2011. Ecology requested that a definition of "full herd" be provided. On April 1, 2011, Joe Mentor, Suncadia's representative sent an e-mail to Ecology clarifying that Mr. Roan maintained 200 cow-calf pairs, depending on the availability of forage on the property and market conditions of any given year; the same number as he ran on the property at the time of the CFO, see the Report of Referee, Subbasin No. 4 (Swauk), page 79.

Review of LandSat images showed that irrigation practices did not change significantly from before and after January 9, 2003 (when the court issued its CFO for the Swauk Subbasin No. 4 confirming Claim No. 00648). Images from July or August of 1986, 1995, and 2002 through 2010 showed roughly the same amount of irrigation as what was taking place before the CFO; some years showing more and some less, but no extended periods of non-use.

Trust Water Right Place of Use

The Yakima County Adjudication confirmed FCWUA two water rights to divert from First Creek and convey it out of the First Creek/Swauk Creek Basin to lands in the Reecer Creek Basin. Alternately, water left instream from the authorized POD would remain in First Creek and contribute to the Swauk Basin. The proposed change of winter stock water to instream flows will result in increased streamflow in First and Swauk Creek, as well as a reduction in flow in Reecer Creek.

The place of use for this proposed trust water right is known as the primary reach. The primary reach is the stretch of river between the original POD and the point where the historic return flows reenter the stream or river. In this case, the primary reach begins at the original point of diversion on First Creek and extends downstream to the confluence of First Creek and Swauk Creek, downstream to the confluence of Swauk Creek and the Yakima River, and extends to the point where Reecer Creek enters the Yakima River (see map: Attachment 1).

Trust Water Right Calculations

Suncadia's portion of the 1877 right under Court Claim No. 00648 authorizes the use of 2.761 cfs for winter stock watering from First Creek. Suncadia proposes to retain the 11.45 ac-ft/yr consumptive use portion. This retained quantity must therefore be subtracted from the total diversion rate of 2.761 cfs. Distributing 11.45 ac-ft evenly over the winter season equates to an instantaneous rate of 0.0346 cfs ($11.45 \text{ ac-ft} \div 167 \text{ days} \div 1.9833^2 \text{ ac-ft/day}$). Therefore, a reduced rate of 2.7264 cfs is proposed for instream flow purposes. 2.7264 cfs distributed over the winter season equates to a volume of 903.024 ac-ft/yr ($2.7264 \text{ cfs} \times 167 \text{ days} \times 1.9833 \text{ ac-ft/day}$). The monthly quantities identified on the coversheet of this ROE were calculated using the same formula ($2.7264 \text{ cfs} \times \text{days in the month} \times 1.9833 \text{ ac-ft/day}$).

Trust Water Management

Trust Water Application No. CS4-00648(AB)sb4-a is subject to the requirements of RCW 90.38. As per the *Agreement for Purchase of Water Rights*, Ecology would: 1) receive a deed for the trust water right, 2) exercise the trust water instream flow right when flows are available at the original point of diversion, 3) manage the water right in the Yakima River Basin Trust Water Right Program and issue a Certificate of Water Right in the name of the state of Washington in accordance with RCW 90.38.040(1).

Consideration of Protests and Comments

On September 24, 2010 Ecology received a protest letter from Mr. Pat Deneen, who is the manager of the Ranch on Swauk Creek, LLC. Mr. Deneen holds water rights authorizing diversions from Swauk Creek. The public notice describing this water right change also described the other proposed changes associated with the *First Creek Restoration Project*. Mr. Deneen's concerns relate to part of the First Creek Restoration Project, specifically the proposals to use First Creek water rights as mitigation for future uses within the Swauk Creek basin. Mr. Deneen questions Ecology's administration of water rights, lack of measurements of First and Swauk Creek flows, and the need for hydrologic studies. However, the protest letter did not specifically take issue with this application. These concerns were addressed in the decisions for file numbers CS4-00648(AA)sb4-b and CS4-00648(AB)sb4-b. The non-consumptive water rights proposed for trust will be owned and managed by Ecology. They will not be used to mitigate for new out-of-stream uses. Furthermore, when future use requests are submitted to Ecology to use mitigation, a water budget neural analysis and determination will be required before water may be used. These future decisions may be protested and appealed by third parties such as Mr. Deneen at that time.

² 1 cubic foot per second of water is equal to 1.9833 ac-ft/day.

Impairment Considerations

This water right has been diverted from the First and Swauk Creek basins into the Reecer Creek drainage for more than 100 years. Changing the purpose of use to instream flow, and cessation of the winter-time diversion into the Reecer Creek drainage will increase flows in First and Swauk Creeks. No existing rights within First or Swauk Creek would be impaired. No Reecer Creek water user is entitled to the continued diversion of Suncadia's portion of the FCWUA right, nor any return flow that may be associated with it. The primary reach for this water right would end at the confluence of the Yakima River and Reecer Creek. There is no secondary reach because the right proposed for change is non-consumptive. The proposed change from stock water to instream flow will not impair existing rights.

CONCLUSIONS

The transfer of winter stock water under Court Claim No. 00648 to instream flows would not impair existing rights to First Creek, downstream on Swauk Creek, or on the Yakima River.

RECOMMENDATIONS

Based on the information presented above, the author recommends that the request to transfer 2.7264 cfs, 903.024 ac-ft/yr of non-consumptive winter stock water under Court Claim No. 00648 be transferred to instream flow purposes be approved in the amounts and within the limits described on page 1 and 2.

Report by: Kelsey J Collins 8/8/11
Kelsey Collins, Water Resources Program Date

Attachment 1

