

Side Agreements & Adjudications The Yakima Basin as Example



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- What is a Side Agreement?
- Why enter into a Side Agreement?
- Where might barriers exist?
- What effects?

Just what is a Side Agreement?

- Administrative Hearing Settlement.
- BOR/Irrigation District Contracts.
- Transfer/Sale of Water Rights (Ellensburg/KRD).
- US/Yakama Nation Quantification of Tribal Rights.
- Contract Among Parties Wholly or Partially Adopted by Adjudication Court.
- Others (Arizona)...

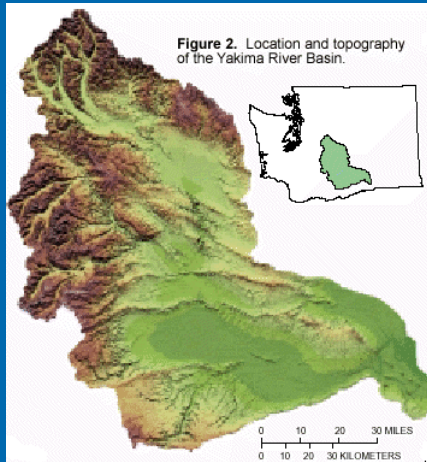


Why enter into a Side Agreement?

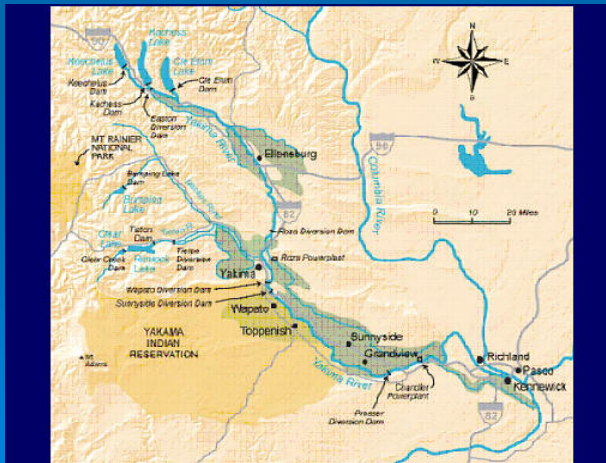
- Change in the law during pending Adjudication Proceeding (YTID).
- Flexibility (KRD).
- Conserve Time, Money, Staff, Water Resources (BOR/City of Yakima).
- Finality & Certainty.
- Others....



Yakima Adjudication Background

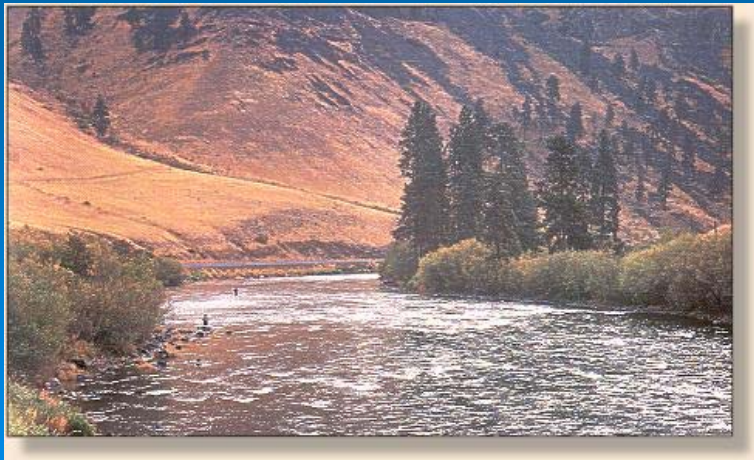


- CFO (Conditional Final Order) resolves Major Claimants (and Subbasins, etc) until conclusion of proceedings.
- The adjudication recently celebrated its 25 year anniversary.



Past Side Agreements: Limiting Agreements

- US/Irrigation District Limiting Agreements
 - Entered into when rights/claims pre-dated federal withdrawal.
 - Signatories attempted to argue inapplicable.
 - Adjudication Court held they were binding and ruled consistently with them.
 - Orders available if others interested.





YTID & Acquavella III: The Impetus for New Agreements

➤ Case Law Changed

- Washington Supreme Court opined on beneficial use standard and denied State's prior approval of "pumps and pipes" quantification (131 Wn.2d 746, 1997).
- Conditional Final Order for YTID & KRD quantified right based upon pumps and pipes making it vulnerable to appeal.
- Other "Major Claimants" have beneficial use standard and requirement to apply relinquishment affecting the amounts claimed and able to prove up – a common baseline for evaluating claims.

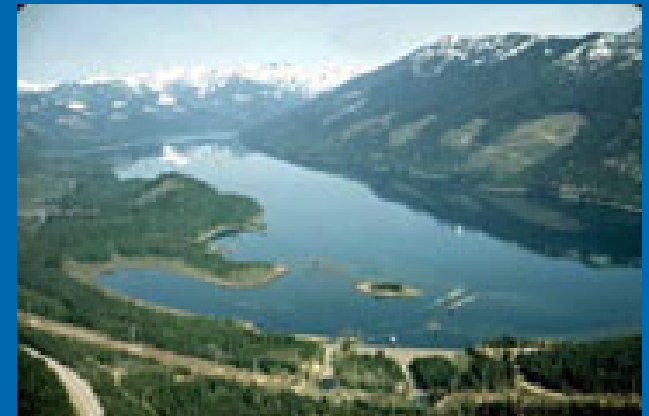
Kittitas Reclamation District: An Example of Flexibility



- Legislative Change
 - Allowed for spreading water which was previously prohibited.
 - To protect senior rights, the Yakama Nation requested and received voluntary agreement NOT to increase the area of the District and therefore no increase in consumptive use associated with legislatively authorized spreading.
 - Not a likely outcome of litigation.

Bureau of Reclamation/ US 1905 Withdrawal: Conserving Legal Resources

- US Case In Chief found lacking in First Report.
- Exceptions filed.
- Exceptions resolved through negotiated process.
- Agreed-upon evidence presented to Court.
- Streamlined Court presentation and significant reduction in filings.
- Developed/Fostered relationships among parties.
- Resulting Buy-In hopefully increases successful implementation.
- Awaiting Final Report of Court.



➤ Lake Kachess, WA

Conserving Water Resources: The City of Yakima



➤ The City of Yakima

- Allows for a transition period to implement conservation measures before certain voluntarily claims reduced.
- An agreed upon quantity.
- Agreement not to raise issue of waste before and during transition period.
- Provides certainty for municipality to manage and long-term benefits to the system through conservation and efficiency.
- Unlikely result from a judicial ruling.

Finality & Certainty



- Non-appeal language provides for finality and certainty.
- As does language limiting claims which then become precluded in the future by operation of statute.
- Others...

Protective Order

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ATTORNEY GENERAL'S OFFICE
Ecology Division

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

IN THE MATTER OF THE DETERMINATION OF THE RIGHTS TO THE USE OF THE SURFACE WATERS OF THE YAKIMA RIVER DRAINAGE BASIN, IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 90.03, REVISED CODE OF WASHINGTON,

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
Plaintiff,

vs.

JAMES J. ACQUAVELLA, et al.,
Defendants.

NO. 77-2-01484-5
PROTECTIVE ORDER
FOR MEDIATION
JAN 13 2000
KIM M. EATON
YAKIMA COUNTY CLERK

THIS MATTER came on 1/13/2000 before the Court on the Motion of the Plaintiff, Major Claimants and other parties consistent with the Court previously granting Plaintiff, Major Claimants and other parties herein an opportunity to explore a negotiated settlement of the claims asserted in the Major Claimant pathway in this case; the Court having jurisdiction of the parties and subject matter of the Major Claimant pathway; Plaintiff and Major Claimants and others represented by their respective attorneys of record; the parties and their attorneys desiring to insure the complete protection of mental impressions, conclusions, opinions, legal theories and other work product of the parties' counsel and their representatives including consultants as well as client confidences and other privileged or sensitive information, while at the same time permitting the exchange of information and participation in settlement discussions which are candid and confidential; the Court, to expedite the mediation process of certain issues in the Major Claimant surface water rights claims and other issues which may be agreed on by the

PROTECTIVE ORDER FOR MEDIATION - 1
C:ACQUAVEL/PROTECTI.ORD

LAW OFFICE OF
FLOWER & ANDREOTTI
SUITE 1, YAKIMA LEGAL CENTER
303 EAST 10TH STREET
YAKIMA, WASHINGTON 98901
(509) 248-9284

- One hurdle to agreement can be disclosure of work product and other privileged information.
- A Protective Order such as this one alleviates that concern.
- Copies available.



Hurdles



- **Court must still review and find legally sufficient basis for the stipulation.**
 - “fair reasonable and equitable and does not violate the law or public policy”
Sierra Club v. Electronic Controls Design, 909 F. 2d 1350 (9th Cir. 1990)
- **Some parties may be unwilling to sign off on a side agreement as a matter of principle.**
 - In some cases parties are still willing to agree not to appeal which creates side agreements to the side agreements.
- **What happens with the “extra” water?**
 - One of the precursors to agreements with other parties was an agreement between Ecology and BOR that claimed but not confirmed water went back to the US for TWSA – total water supply available – with a recognition that the system is over appropriated already.
 - Consequently, both the US and the State must agree to any new water rights issued.
- **Implementation – if not incorporated into a court order, lack of trust over implementation of the terms can be a hurdle.**
- **Others....**

Effects of Side Agreements

- Past side agreements serve as evidence in the current adjudication.
- Some agreements are binding by virtue of *res judicata/collateral estoppel*.
- Enforcement by private action; not government action UNLESS adopted by Court into Court Order.
 - Jurisdictional Questions re: Adjudication Court limited
 - *Keith v. Volpe*, 118 F.3d 1386 (1997) Consent Decree.
- Relationship-Building.
 - WTWG (Water Transfer Working Group).
- Precedent: Unofficially
- Others....

