IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF YAKIMA

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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,	
THE STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,	
Plaintiff,	
vs.	No. 77-2-01484-5
JAMES J. ACQUAVELLA, et al,	
Defendants.	

VERBATIM REPORT OF PROCEEDINGS

June 9, 1994 - 9:30 a.m.
Yakima, Washington

Oversight Hearing
before the Honorable Walter A. Stauffacher

REPORTED BY: MALINDA LULHAM, CSR

1 take that up when he arrives.

2 United States has made a motion to

3 reconsider the limiting agreements.

4 This dealt principally with the issue of

5 using the term foreign return flows. Am I

6 correct on that, Mr. O'Connell.

7 MR. O'CONNELL: Project return flows; that's

8 a more correct statement.

9 THE COURT: Your briefing was addressed to

10 the use of foreign return flows in the order; am

11 I correct on that?

12 MR. O'CONNELL: Well, yes. My briefing and

13 motion was addressed to this Court finding that

14 project return flows were, project flows diverted

15 out of the Yakima River and in showing up in

16 tributaries as project return flows. This Court

17 characterized those project return flows as being

18 foreign project return flows.

19 THE COURT: That's right. I don't think

20 we're going to need any extended argument on this

21 at all.

22 I went back and took a look at my opinion of

23 April 1, 1994. During the initial briefing on

24 this and on the motion for reconsideration and

25 now this is a motion to reconsider the

1 reconsideration and so forth so that's why I am
2 saying we don't need anymore argument on this.
3 During the briefing on the motion for
4 reconsideration there was a substantial amount of
5 briefing concerning the Dodge case and the
6 Elgin v. Witherstone case, which counsel has some
7 dispute with.
8 So in addressing those arguments in the
9 Court's opinion of April 1, 1994, I went back and
10 read it. And there was only one paragraph which
11 dealt with foreign return flows, and it came
12 under the heading actually of project return
13 flows in the subdivision of the opinion; one
14 paragraph. It starts on page 10, line 15, and it
15 goes to page 11, line 4. And it merely is
16 nothing more than a definition of, quote, foreign
17 water, unquote, meaning those which do not reach
18 a stream without the, quote, interference of the
19 human agency, unquote, or surplus waters that
20 would not in the course of nature reach
21 particular lands.
22 Now, beyond that paragraph, the opinion
23 directly and specifically refers to them as
24 project return flows; not as foreign return
25 flows, but as project return flows.

1 In the order that was entered on May 12,
2 1994, there is only one use of the word foreign
3 in the order, and it's in the whereas sections of
4 the order itself. That's the only time that word
5 foreign is used in there.
6 And in that particular whereas it says
7 (reading) whereas the waters diverted to
8 Kittitas Reclamation District and return flows
9 created pursuant thereto are foreign return
10 flows. Now, that is the only reference to
11 foreign at all. Nothing in the actual order, in
12 any part of the order refers to foreign return
13 flows or anything; they are all project flows.
14 So the word foreign is totally unnecessary
15 to the opinion and the order.
16 And so what I intend to do on this is to
17 change one word. The original order I have
18 before me - this is my copy - the original order
19 I have before me, and it's my intention on page
20 3, line 16, to cross off the word foreign and
21 label it as project. And I think that ought to
22 take care of your concerns, does it not?
23 MR. O'CONNELL: Well, does it, Your Honor?
24 THE COURT: Yes.
25 MR. O'CONNELL: If they are project return

1 flows, then what is the authority for Westside,
2 Ellensburg and Cascade for the use of those
3 return flows, project returns flows, No. 1, which
4 this Court found that the Bureau of Reclamation
5 has not abandoned?
6 THE COURT: They have not abandoned them.
7 MR. O'CONNELL: I want to bring this - this
8 has far ranging implications.
9 THE COURT: Counsel, doesn't the order say
10 that as long as they are there they can use them
11 but they have no right to them, and that the
12 United States has not abandoned and they can do
13 anything that they want with those return flows?
14 MR. O'CONNELL: Except one thing. They
15 cannot charge.
16 THE COURT: Go against the limiting
17 agreement because it wasn't considered at the
18 time of the limiting agreement.
19 MR. O'CONNELL: There is no question about
20 that. No one ever asserted or ever argued that
21 project return flows was in the thinking of when
22 the limiting agreements were executed.
23 What we're talking about, however, is an
24 authorized use for project return flows. Part of
25 their - it's not part of their entitlement.

1 Now, this Court did not have before it and
2 never had before it the question of whether or
3 not the project had the authority to charge those
4 amounts in the tributaries against the limiting
5 agreement. And I am not sure whether this Court
6 has that jurisdiction to make that determination;
7 it's internal. It's an internal administrative
8 matter to be left solely to the judgment of the
9 Bureau of Reclamation. And if their could be any
10 challenge to that, it would be in Federal Court
11 under federal law.
12 THE COURT: They never charged against them.
13 MR. O'CONNELL: This has wide ranging
14 implications.
15 We seen it brought up in the Selah/Moxee
16 claim; we saw it brought it up in the Moxee
17 claim.
18 Because of this ruling, no one is prevented
19 from merely going down to a drain in which
20 Selah/Moxee and Moxee Irrigation District are now
21 saying they have a right for some sort of
22 permissive use by reason of of this April 1
23 opinion and order. Just go down there, drop a
24 pump in the drain and pump out because the
25 project return flows are there.

1 THE COURT: If the Bureau allows them to.

2 MR. O'CONNELL: If the Bureau allows them

3 to.

4 Your Honor, I think, well, again, this Court

5 has found --

6 THE COURT: The Bureau would have the right

7 to tell them they can't put a pump in that drain.

8 Now, in Selah/Moxee, they have set up 24

9 specific drains from Roza to drain specifically

10 into the Selah/Moxee, but they are still not

11 charged against their limiting agreement.

12 The basic question is what is or what is not

13 to be charged against the limiting agreement.

14 MR. O'CONNELL: Yes.

15 THE COURT: And return flows were not

16 considered at the time that the limiting

17 agreements were entered into. There have been

18 return flows, both natural flows and project

19 return flows, that have been utilized by some of

20 these entities. And in so doing they have not

21 acquired a right to continue to use those. And

22 if the Bureau at any time wishes to tell them to

23 cease and desist, they have that right. They

24 have not abandoned their right to the return

25 flows. That's what the order says.

1 MR. GILREATH: Is the Court indicating that
2 it would consider a mandatory injunction?
3 THE COURT: Pardon.
4 MR. GILREATH: Is the Court indicating that
5 it might consider mandatory injunction if the
6 U.S. made application for it?
7 THE COURT: I don't know what the
8 circumstances would be. There is no way I can
9 rule on that, Counsel.
10 And if Counsel says that they would have a
11 right to take that to Federal Court, they very
12 well may.
13 MR. O'CONNELL: Is the Court indicating that
14 if the Bureau were to put - first of all, is this
15 Court's order, latest order, limited only to
16 Cascade, Westside and Ellensburg?
17 THE COURT: That's correct.
18 MR. O'CONNELL: And if the Bureau were to
19 put those three entities on notice that they were
20 no longer entitled to the use of project return
21 flows, project return flows from those
22 tributaries crossing their respective
23 jurisdictions or districts, that particular
24 notice could be enforced in this Court?
25 THE COURT: I don't know. We're getting

1 into an area which is, I think, outside the
2 question of water rights adjudication.
3 MR. O'CONNELL: That's what I am getting at,
4 Your Honor.
5 THE COURT: You're asking about jurisdiction
6 and so forth.
7 What I am ruling in this is they do not have
8 a specific right to that, but what water they do
9 take cannot be charged against their limiting
10 agreement. The United States has not abandoned
11 their return flows. I have spelled that out in
12 there.
13 And so I am just trying to determine a water
14 right situation here as opposed to - and it
15 specifically says that if the United States wants
16 to change the delivery system of KRD up there,
17 they are entitled to do so. And if somebody
18 wants to contest that, they can contest that in
19 some court that does have jurisdiction, but not
20 necessarily this Court, as dealing with water
21 rights adjudication alone.
22 MR. O'CONNELL: So conversely then, the
23 Bureau, although they may not charge the project
24 the amount of project return flows against the
25 limiting agreement, they could as they do with

1 Kennewick and all other entities downstream
2 charge for the use of that project return flows
3 as they do with - in other words, enter into a
4 contract with Kennewick. All Kennewick's water
5 is project return flows.
6 THE COURT: That's right.
7 MR. O'CONNELL: They could charge for the
8 use of that water.
9 THE COURT: They may. I think they do now.
10 MR. DAVIS: Your Honor, I think we have to
11 look at this from both sides.
12 Part of TWSA is non-project return flows
13 from Cascade and Ellensburg Water Company up in
14 the Kittitas Valley. If the U.S. could come in
15 and say you can't even use that water which flows
16 over your land, as the Court's order said we
17 could, and try to get an injunction to stop that
18 practice, then what is to stop the Cascade and
19 Ellensburg Water Company from obtaining an
20 injunction that prohibits the U.S. from
21 interfering with the non-project return flow
22 which they have not appropriated, which Cascade
23 appropriated, which Ellensburg Water Company
24 appropriated and could sell to --
25 THE COURT: There is a distinction made

1 between natural flows and project return flows.
2 MR. O'CONNELL: United States is not
3 addressing to non-project return flows, Your
4 Honor. The irrigation district, Cascade,
5 Ellensburg, Westside have a right to the use of
6 non-project return flows.
7 My focus is only on project return flows.
8 MR. DAVIS: My point is that perhaps Cascade
9 would file for an injunction to stop the Bureau
10 of Reclamation from using our project return flow
11 as part of TWSA, which they do now. It's kind of
12 a swap. They use our project return flow; we use
13 their - excuse me - non-project return flow, we
14 use their project return flow. And as I stated
15 in my reply memorandum, which I hope the Court
16 got --
17 THE COURT: Yes, I did. And basically my
18 opinion is based pretty much on what you
19 presented.
20 MR. DAVIS: I think this can be, this whole
21 problem can be solved by the Court saying and
22 recognizing that the amount of project return
23 flow which the U.S. is entitled to is determined
24 by quantification. And as long as there is that
25 amount of return flow entering the river out of

1 Wilson Creek, for instance, as equals the amount
2 that came off the project, they have no
3 complaint.
4 THE COURT: That's right.
5 MR. O'CONNELL: Your Honor, there is 50
6 percent reduction or loss by the use of the
7 project return flows. This Court has already
8 found that, recognized that and presented an
9 affidavit submitted to this Court by
10 Mr. James Esget so there necessarily cannot be
11 the same amount entering a project as entering
12 the river, re-entering the river which was
13 diverted out.
14 THE COURT: It is my understanding that the
15 project return flows in conjunction with the
16 natural return flows that came back into the
17 river, those are part of the TWSA and that those
18 flows have been consistently sufficient.
19 You know, from a semantical standpoint, I
20 think that we're perhaps arguing about something
21 that from a practical standpoint is not really
22 going to occur. We have all of the evidence and
23 the affidavits and everything else that it's
24 basically an impossibility for the Bureau or the
25 Department of Ecology or anybody else to go up

1 there and separate natural flows and project
2 return flows, to specifically measure them.
3 The Bureau measures all of the flows that
4 come back into the river as they pass through
5 these various entities.
6 As I say, we have deposition portions of
7 Mr. Peralli that says we never really have
8 measured them and we really are never going to be
9 able to because it's just too much manpower and
10 cost expensive and it isn't going to happen. The
11 only thing that possibly can happen is that
12 through delivery improvements and that sort of
13 thing in the Kittitas Reclamation District, there
14 may sometime in the future turn out to be far
15 less project return flow coming through the three
16 entities than there is at the present time.
17 That's about the only possibility there is.
18 And we're engaging in a real semantical
19 argument here that really from a practical
20 standpoint doesn't really matter that much
21 because again I think it's going to be absolutely
22 impossible from a manpower and cost effective
23 standpoint to get out there and specifically
24 measure those flows on an annual basis.
25 So I think that, again, we can take that

1 word foreign out of there because it doesn't
2 really make that much difference. But they are
3 project return flows; I don't think there is any
4 question on that.
5 MR. BOND: If Your Honor please, I don't
6 want to prolong this. And I take it the Court's
7 comments should not be taken as a ruling on
8 matters that might be presented at a later time.
9 THE COURT: I certainly don't intend them to
10 be.
11 But I think we need to focus in on what
12 we're doing as far as this case is concerned
13 which is merely establishing a water right.
14 MR. BOND: And we can talk a lot about the
15 total water supply including other peoples'
16 return flows and all of that. I don't think it
17 is going to change.
18 And I understand that my clients can re-use
19 their water as many times as they need to and
20 somebody else can capture; I understand KRD can
21 do that. So I just don't want us to get into a
22 discussion here without really having it
23 presented properly and argued and briefed that
24 will be taken later to mean more than it was
25 intended to mean.

1 THE COURT: At the present time we have a
2 pile of briefs on these limiting agreements, and
3 I think that we're just beating a dead horse to
4 death on this situation.
5 I am going to, on page 3 of the original
6 order, line 16, I am crossing off the word
7 foreign and putting in the word project,
8 initialing it, and that will take care of it.
9 MS. MULL: Your Honor, I would like the
10 record to reflect the Department of Ecology's
11 position in this record.
12 We concur wholeheartedly that the purpose of
13 this adjudication is quantifying priortized
14 rights and much of the issues of return flow are
15 regulatory issues; they are not quantification
16 issues.
17 THE COURT: Well --
18 MR. DAVIS: Your Honor, I hate to do this,
19 but I have to make one more comment in response
20 to Ms. Mull's because they are adjudication
21 issues to the extent that they were addressed.
22 The return flow was addressed in the Moxee
23 and Selah/Moxee hearings, not as a right but as a
24 reason why the diversion records appeared to be
25 lower than was necessary for the raising of the

1 crops.

2 THE COURT: Yes, I understand that, and

3 that's part of the record. That is a reason why

4 some of diversion records are low, no question

5 about it, because you're utilizing return flows

6 presently.

7 The next matter I would like to address

8 deals with the motions to extend filing

9 exceptions for Subbasins 6, 11 and 8.

10 MR. GILREATH: Your Honor, Mr. Cole of our

11 office filed a motion, which I understand is

12 joined by Mr. Slothower. I am also joining the

13 motion, and I have handed to the Court a prepared

14 order that contains blanks.

15 The situation is basically that the three

16 subbasins came up all at once at a time just at

17 the beginning of the irrigation season. There is

18 a wealth of material therein that the individuals

19 will be taking exception to.

20 Right now our individual farmers are trying

21 to live with basically 30 percent water up there

22 and they are trying to get through the initial

23 part of their irrigation season.

24 Mr. Dano, who has represented a good number

25 of individuals in the Taneum and the Manastash