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

MEMORANDUM OPINION:

LIMITING AGREEMENTS

FILED
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KIM M. EATON
YAKIMA COUNTY CLERK

I. HISTORY

Pursuant to the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. § 372 et seq., the Bureau of Reclamation (known then as the Reclamation Service) began review and investigation into development of the Yakima watershed. What they found was an estimated 121,000 acres under irrigation from the natural flows of the Yakima River and its tributaries. By all accounts, the natural flow of these water courses was over-appropriated and accordingly no additional irrigation from natural flow would be feasible. They also found disputes between the users of these waters. These disputes owed, in part, to the many claims that were in excess of the water being beneficially used.

Because of the potential for increased agricultural production, the Bureau began hydrological studies in 1903. Recommendations were made by

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a Board of Engineers for federal funding of construction, subject to a number of conditions, including a prerequisite by the Secretary of the Interior that "no construction be undertaken until practically all private water claimants have satisfactorily adjusted their claims." Lentz pg. 9; see also United States v. West Side Irrigating Co., 230 Fed. 284, 286 (USDC E.D. WA, 1916).

The construction under consideration involved storage reservoirs. These storage facilities would catch winter flows as well as spring floods thereby availing them to later release when river waters became limited. What the Bureau envisaged was the Yakima River carrying both natural runs to those who had established rights and storage water to those who paid for it. Accordingly, the Bureau had to ensure that the claims to the natural run were limited so that storage water would not be diverted by someone with only an established claim to the natural run and so they could meet the contract requirements. This precision was necessary because the sale of storage water was the primary means for repaying the Project's cost as required by the Reclamation Act.

To satisfy the Secretary's mandate and to fulfill the goals of the Project, the Bureau used their hydrologic data to determine average August diversions for over 50 appropriators. After considerable discussion, the Bureau obtained signatures of 95% of the claimants to the natural flow of the river who agreed to limit their diversions to a certain amount. These agreements were all, in essence, as follows

> "Whereas, the Reclamation Service of the United States has been requested to investigate the water resources of the Yakima watershed with a view to the further development and increase of irrigation therein, under the provisions of the

act of Congress approved June 17, 1902 (32 Stat. 388), known as the Reclamation Act, and whereas the officers of the Reclamation Service in preliminary investigation have found that all the low-water flow of the Yakima river and its tributaries has been appropriated and is now being diverted by the various canals within said watershed and that in order to irrigate additional lands within said watershed it will be necessary to store the surplus waters of the flood season, and whereas, no irrigation project to be undertaken by the United States within the said watershed can be recommended as feasible unless the quantity of water to which each present user from the Yakima river and its tributaries is entitled be first definitely ascertained and agreed to; and whereas, the undersigned claim certain quantities of water from the Yakima river and its tributaries and are willing to limit their claim to the said waters to the quantities of water designated in the following schedule:

"Now, therefore in order to avoid litigation, to encourage the storage of water in the Yakima watershed and to secure the indirect benefit derived from further irrigation through federal enterprise, each subscriber to this agreement or to a copy thereof, differing only as to the quantities of water specified, agree to limit and does limit its respective rights of appropriation from said Yakima river and its tributaries to the above-specified amounts, provided, that it is hereby understood and agreed that the limitation of water rights as herein specified is made as a compromise, in order to secure the benefits above referred to and shall not bind any party hereto in any event, unless the determination to construct storage and irrigation works by the United States under the Reclamation Act shall be announced by the Secretary of the Interior within two years from the date upon which he is furnished with properly authenticated copies of the agreements of this form duly executed by or on behalf of such proportion of the claimants of the waters of the Yakima river and its tributaries as shall be satisfactory to the Secretary of the Interior. In witness whereof, the undersigned has caused these presents to be executed in its corporate name, by its president, and attested by its secretary, and its corporate seal to be affixed by authority of its board of directors, heretofore duly made and entered this day."

Considerable negotiation and discussion took place in reaching agreement as to the form and content of these documents. Civic groups such as Yakima Chamber of Commerce aided the United States in securing

them. Minutes from water user meetings reveal that users were informed repeatedly that they would have to limit their appropriation if this project was to proceed.

In these agreements, the water claimants voluntarily limited their diversions to certain maximum monthly quantities established at an amount actually diverted in August, 1905. The amount then typically reduced for September and October. August diversions totalled 2,095 c.f.s.. Of this quantity, nearly 1,900 c.f.s. were covered by the limiting agreements. Correspondence from Project engineers indicated that some tributaries may not maintain enough flow to warrant measuring or directly intercepting at that time.

On March 4, 1905, the other piece to the Project puzzle was put in place when the State legislature granted to the United States the right to exercise the power of eminent domain. The United States did so on May 10, 1905 by withdrawing the unappropriated waters of the Yakima Rivers and its tributaries. With a $1,750,000 authorization from the Secretary of Interior, construction of the Project soon began.

The United States continued its withdrawal of the unappropriated waters until 1951. Then, the Bureau filed application to perfect its rights in the withdrawn waters in all cases where the use began after the effective date of the 1917 Water Code, and has State certificates or permits on all its reservoirs. The withdrawal was reinstituted in 1981.

II. SPECIFIC CLAIMANT HISTORY

Of the 51 signatories, five disagree with the United States as to the meaning of the limiting agreements; West Side Irrigating Company,

Ellensburg Water Company, Cascade Irrigation District, Columbia Irrigation District and Pacific Power and Light Company. The following is a short synopsis of the history of each.

1. West Side Irrigating Company

The West Side Irrigating Company owns and operates the West Side Canal (West Side Ditch) which currently serves approximately 5,200 acres of irrigated crop land west of the Yakima River within Kittitas County. West Side was organized in 1889 and water was first appropriated in 1890. West Side Ditch is approximately 17.5 miles long running in a generally southeasterly direction from its Yakima River intake northwest of Thorp to its terminus, about four miles south of the city of Ellensburg. This ditch intercepts natural and return flows from various streams and creeks along the canal route.

Specifically, West Side makes water right claims to six streams:

	STREAMS	AVERAGE DIVERSION
A.	McCarl Creek	2.7 c.f.s.
B.	Page Canyon Creek	6.7 c.f.s.
C.	Hatfield Canyon Creek	2.8 c.f.s.
D.	Stream-north side Manastash Road	2.0 c.f.s.
E.	Stream-south side Manastash Road	3.7 c.f.s.
F.	Stream-south side Robinson Canyon Road	16.6 c.f.s.
TOTAL		34.5 c.f.s.

Additionally, West Side asserts a right to interflow, overland run-off and other drainage streams that drain into the West Side Ditch.

In 1905, West Side and the United States entered into an agreement limiting West Side's diversion from the Yakima River and its tributaries to 80 c.f.s. in April through September. Their diversion is limited to

34 c.f.s. in October. The point of diversion is upstream from each of the streams and drains currently utilized by West Side.

West Side also acquired storage rights by agreement with the United States under a Warren Act Contract to the extent of 25 c.f.s. from April 20 to September 30. West Side was also a party to the 1945 Consent Judgment entitled KRD v. SVID, Civil Action No. 21, (E.D. Wash), known as the 1945 Consent Decree.

This is not West Side Irrigation District's first complaint about this agreement. They challenged its validity in Federal District Court in the case of United States v. West Side Irr. Co., 230 Fed. 284 (Dist. Ct., E.D. Wash. 1916) and on appeal in West Side Irr. Co. v. United States, 246 Fed. 212 (9th Cir. 1917). These cases will be discussed when applicable.

2. Ellensburg Water Company

Organized in 1885, the Ellensburg Water Company owns and operates the Town Ditch, an irrigation canal which serves approximately 10,160 acres of crop land and suburban properties on the eastside of the Kittitas Valley. The Town Ditch is approximately 23 miles long and extends from its Yakima River diversion, about six miles west of the City of Ellensburg eastward and southward, ending about one mile east of the confluence of Wilson Creek and Cherry Creek.

Ellensburg has intercepted the following sources beginning in 1889 with Reecer (Currier) Creek and ending in 1957 when they began to use Whipple Wasteway.

STREAMS		AVERAGE DIVERSION
1.	Reecer (Currier) Creek	12.7 c.f.s.
2.	Cooke Creek	3.8 c.f.s.
3.	Parke Creek	3.5 c.f.s.
4.	Johnson Drain	10.6 c.f.s.
5.	Whipple Wasteway	14.1 c.f.s.
TOTAL		44.7 c.f.s.

Ellensburg Water Company and the United States entered into a limiting agreement in 1905. The agreement allows Ellensburg to divert flows in the amounts of 125 c.f.s. for April through August, 100 c.f.s. for September, and 64 c.f.s. for October. The Ellensburg Water Company is not a party to the 1945 Consent Decree.

The Ellensburg Water Company has also had a chance to argue the effect of the limiting agreement, albeit a limited opportunity, in the case of Ellensburg Water Company v. Dodge, 46 Wn. App. 77, 729 P.2d 631 (1986), rev. den. 107 Wn.2d 1031 (1987)(one of the arguments by the appellant in that case was that he was a third party beneficiary to the limiting agreement). That case involved a dispute over the right to water from Cooke Creek.

3. Cascade Irrigation District

Cascade Irrigation District, formerly known as Cascade Canal Company, was formed in 1902 to carry out ditch construction planned by a previous organization. The Cascade Canal Company began construction of the Cascade Ditch on August 29, 1903, beginning at its intake 5 miles northwest of Thorp.

Various drainage creeks and other drainage sources exist along the Cascade Ditch and have been intercepted by it. Such flows consist of

natural runoff during spring and return flows from up gradient lands. Some of the return flow is from the Highline Canal which carries 50 c.f.s. of Cascade's water pursuant to Order Pendente Lite dated May 6, 1988. The creation of the Kittitas Reclamation District resulted in an increase in flow of the various creeks and drains. Cascade does not specify which drainage it claims a right to nor does it state a specific amount. Cascade does not claim a water right to these drainage, but requests the right to use them even if they exceed the quantity in the limiting agreement.

4. Columbia Irrigation District

Columbia Irrigation District has its diversion at Horn Rapids Dam, approximately eleven miles above the McNary Pool. This places Columbia near to where the Yakima joins with the Columbia River.

The Yakima Irrigation and Improvement Company, the CID's predecessor in interest, filed a claim of water right on August 11, 1891 for diversion of 300 c.f.s. of water from the Yakima River at the Horn Rapids Dam. By March 3, 1904 the full extent of the Yakima Irrigation and Improvement Company's water right had been transferred to the Northern Pacific Irrigation Company (NPIC).

In 1906, NPIC entered into a contract agreeing to limit their diversion from the Yakima River to 175 c.f.s in the event that the United States constructed the Yakima and Sunnyside project. A second document was also filed in Benton County that purports to be a Quit Claim Deed to the United States releasing all of NPIC's right to their appropriation in excess of 175 c.f.s.. In 1918, the NPIC transferred

the limit of its water right to Columbia. Columbia filed for a water certificate in 1981 in the amount of 300 c.f.s.. In 1985, the United States again published notice withdrawing all unappropriated water in the Yakima River in Benton County. At all times, Columbia Irrigation District has received at least the full share of their water right and many times their appropriation has exceeded this amount.

5. Pacific Power and Light

The Wapatox Ditch Company was incorporated in 1894 to provide irrigation water to lands located along the canal. The company maintained a capital stock represented by 50 c.f.s.. To deliver this quantity of water, they sought to modify an already existing canal with a diversion near the present intake of the Naches Power Canal.

On July 3, 1903, the Northwest Light & Water Company (predecessor-in-interest to Pacific) was incorporated.

On June 11, 1904, E.G. Peck and the Wapatox Ditch Company entered into an agreement whereby Peck was given the option to purchase the canal and necessary rights of way on condition that he would, on or before April 1, 1905 enlarge the ditch so that it would be adequate to carry 2,000 inches of water (50 c.f.s.) to shareholders on the Upper and Lower Wapatox ditch.

On October 3, 1904, Northwest Light filed a notice of appropriation of 1,000 c.f.s. from the Naches River 100 feet above the headgate of the Wapatox canal. On October 27, 1904, Peck assigned all of his rights under the June 11 agreement with the Wapatox Ditch Company to Northwest Light and Northwest Light correspondingly assumed the obligations of

Peck under that agreement.

On January 9 and February 9, 1906, the Wapatox Ditch Company and Northwest Light, respectively, entered into a limiting agreement with the United States. In that agreement, Northwest Light agreed to limit its claim to 1000 c.f.s. of the Naches River water to 300 c.f.s. as a minimum and 450 c.f.s. as a maximum. This claim was limited to times when the water was available after providing for the prior rights between the headrace and the tailrace. The water may only be used for power purposes and must be returned to the river except those portions required to satisfy existing contracts which amount to 51.55 c.f.s..

On November 16, 1909, J.R. Thompson investigated the Northwest Light properties and determined that the Canal had a carrying capacity of 440 c.f.s.. At that time, the power house contained one 750 KW hydrogenerator and one steam generator. Expansion was contemplated.

Northwest Light conveyed its interest in the facilities to Yakima-Pasco Power Co. on May 11, 1910, who then sold its interests to Pacific Power & Light. The canal had not been lined at this point nor had the fourth generator been installed. In 1912 and 1913 the canal was enlarged and lined. Additionally, the final generator was installed. These changes made it possible to carry over 500 c.f.s. in the canal as well as utilize 450 c.f.s plus for power generation.

Evidence submitted by Pacific reveals that from 1913 to 1977, average monthly diversions exceeding 450 c.f.s. during the nonirrigating season occurred 12 times in October, 13 times in November, 15 times in December, 6 times in January, 12 times in February and 16 times in

March. Exhibit 36. Monthly average diversions over 500 c.f.s. occurred three times in October, 5 times in November, 3 times in December, 0 times in January and February and 3 times in March.

The irrigation season percentage breakdowns are as follows:

April
Years Average Diversions were over 450 cfs -- 29 (45%)
Years Average Diversions were over 502 cfs -- 13 (20%)

May
Years Average Diversions were over 450 cfs -- 34 (52%)
Years Average Diversions were over 502 cfs -- 23 (35%)

June
Years Average Diversions were over 450 cfs -- 34 (52%)
Years Average Diversions were over 502 cfs -- 29 (45%)

July
Years Average Diversions were over 450 cfs -- 34 (52%)
Years Average Diversions were over 502 cfs -- 26 (40%)

August
Years Average Diversions were over 450 cfs -- 33 (51%)
Years Average Diversions were over 502 cfs -- 21 (32%)

September
Years Average Diversions were over 450 cfs -- 30 (46%)
Years Average Diversions were over 502 cfs -- 12 (18%)

III. INTERPRETATION OF THE LIMITING AGREEMENTS

In broad terms, the overriding question presented is interpretation of the so-called limiting agreements. Inherent in resolution of that issue are matters of integration, ambiguity, plain meaning and parol evidence. The Supreme Court decided those matters in Berg v. Hudesman, 115 Wn.2d 657 (1990). In light of Berg, this Court is directed to view "the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract,

the subsequent acts and conduct of the parties to the contract, and the reasonableness of respecting interpretations advocated by the parties." Berg, page 667 quoting Stender v. Twin City Foods, Inc., 82 Wn.2d 250 (1973). This is the "context rule" of contract interpretation and it applies to all agreements, even if their terms appear unambiguous. Berg at 668 quoting Restatement (Second) of Contracts § 212(2)(b). However, Berg also cautions the Court to stop short of "importing into a writing an intention not expressed therein." Berg, at 669 citing with approval J.W. Seavey Hop Corp. v. Pollock, 20 Wn.2d 337, 348 (1944). Based on this rule, all exhibits and memorandum have been analyzed and considered to determine what these limiting agreements mean.

With the context rule guidelines of Berg and Stender (set forth above) in mind, the Court now turns to the specific issues presented by the parties. The agreements between the United States and Cascade Canal Company (predecessor in interest to Cascade Irrigation District), Ellensburg Water Company and West Side Irrigation Company are nearly identical in form and arguments advanced to support their respective claims are also similar. See West Side Irrigation Co. v. Chase, 115 Wash 146 (1921)(the language and style of the limiting agreements "were, in substance, all alike"). Accordingly, they will be treated the same except where they differ. Where applicable, this section of the Opinion also resolves points advanced by Columbia Irrigation District and Pacific Power and Light.

A. Do the agreements only limit diversions from the Yakima River and not its tributaries.

Most of the arguments and evidence advanced by the districts in regard to interpretation of the limiting agreements are aimed at convincing the Court to read the agreements as only applying to appropriations from the Yakima River itself or to possibly include the Naches river and the Tieton river. In the alternative, the districts assert that the United States has waived any right it had under the agreement; consented to the appropriations of the irrigation districts; or are estopped from asserting any claim the agreements might have provided. These arguments will be taken up in turn.

Our starting point is the agreement itself. See Stender, supra, at 250. Courts have made clear that the limiting agreements are binding on the signatories thereto. West Side Irr. Co. v. United States, 246 F. 212, 217 (9th Cir. 1917). Moreover, the agreements do not seem to be ambiguous. Indeed, the Ninth Circuit in referring to the limiting agreement between the U.S. and West Side stated "[the] instrument is definite and void of ambiguity." West Side Irr. Co. v. United States, 246 Fed. 212, 219 (9th Cir. 1917). Nor do they seem ambiguous in regard to whether the agreements encompass the tributaries of the Yakima River. However, that alone does not prevent this Court from receiving and considering evidence and arguments that support the interpretation advanced by the irrigation districts. See Berg, supra, page 667.

The plain language of the limiting agreement supports the position advanced by the United States. First, the agreement applies to appropriations from the Yakima River and its tributaries, a phrase that is mentioned no less than five times in the two page agreement and in

the caption. Specifically, the agreement states "each subscriber to this agreement...agrees to limit and hereby does limit its respective rights of appropriation from said Yakima River and its tributaries to the above specified amounts." (Emphasis added). It is interesting to note that the agreement between the United States and the Northern Pacific Irrigation Company (predecessor to Columbia Irrigation District), which is notably different than the agreements with West Side and Ellensburg, limits appropriations from the Yakima River and does not refer to the tributaries.

Secondly, the agreement itself makes clear that the entire project hinged on the present users of the Yakima River and its tributaries limiting and defining their water right in order to provide storage water. The agreement also establishes that this limitation is a compromise in order to "encourage the storage of water in the Yakima water shed"; "to irrigate additional lands within the watershed"; and in order to avoid expensive litigation. These references to the "Yakima watershed" indicate that all streams were to be included by the drafters of the agreement.

The irrigation districts point to nothing in the agreement that supports their position. Rather, they primarily argue about what is not in the agreements. For example, they note that the agreements do not specify which tributaries were included in each signers limitation. (Initial Brief of West Side Irrigating Company On Limiting Agreements, page 11.) This is concededly true. However, that is always concededly true after the fact. The opposite is also true. If the irrigation

districts had such a vested interest and reliance on these small tributaries why did they not include them in quantifying their future diversion. Moreover, in none of their evidence can they point to any document fixing diversion amounts that specifically excludes the tributaries in quantifying the water right. The words chosen do not present a sufficient ambiguity to warrant a penalty to the drafter.

Intent is also determined by the objective and subject matter of the contract. Stender v. Twin City Foods, Inc., supra. The subject matter and objective of the limiting agreements was to assure the United States a sufficient water supply to facilitate further irrigation development of the basin while providing a reasonable expectation of project repayment from water users. Additionally, it sought to resolve existing disputes between water users. To accomplish these goals, the 51 agreements fixed the amount of diversion and pursuant to state statute, the United States withdrew the remaining waters in surplus of those agreements. See RCW Ch. 90.40. On this the parties seem in substantial accord. See e.g., Initial Brief of West Side Irrigation Company at pgs. 7-8; Brief of United States in Support of Limiting Agreements at 16. The subject matter and objectives of the agreement will not be obtained if construed in a manner advocated by the districts. First, the Bureau's goal of obtaining storage water to irrigate additional lands is potentially limited in years of low water supply. Second, the objective of resolving water disputes, as the necessity of this Opinion demonstrates, is frustrated by the district's interpretation.

The Court is also directed to examine the circumstances surrounding the making of the contract. Stender at 250. Based on the documents and briefs submitted, the parties appear to have engaged in thorough and impressive research. To support their argument, the irrigation districts presented four pieces of historical evidence in support of their interpretation of the parties intent at the time of the signing: the 1945 Consent Decree; Department of the Interior, Third Annual Report of the Reclamation Service, 1903-04; Report from D.C. Henney, Supervising Engineer to the Chief Engineers of the U.S. Reclamation Service; and, the Warren Contract.

Most of the evidence offered by the districts is after formation of the agreements and only serves to prove that the districts are limited in their diversion from the Yakima River. However, that in itself does not prove that the United states intended to give West Side Irrigation District, for example, water rights amounting to an additional 50% of the quantity specified in the agreement. Neither the agreement, the 1945 Consent Degree or the Warren Act Contracts provide the Irrigation Districts with any legal right to water in excess of the amount specified in the limiting agreement.

Primarily, the evidence offered by the Districts shows that at that stage of the project, the U.S. chose not to build waterworks that would collect what were at that time de minimis flows. This inaction may have been chosen for a variety of reasons, one of which may have been cost and the other the thought that the waters would eventually work their way to the Yakima. Moreover, it is easy to forget to include the

tributaries when talking about the Yakima Basin Project. For whatever reason, so long as the water is tributary to the Yakima River, the choice of what to do with it once the contract requirements are fulfilled belongs to the United States.

The arguments and evidence regarding intent presented by the United States is more persuasive than that presented by the districts. First and foremost, the Yakima Basin Project hinged on the storage of the unappropriated waters of the Yakima River and its tributaries. The Reclamation Act so required, see 43 U.S.C. § 372 et. seq., and this Court has so found. Memorandum Opinion, October 22, 1990 ("In order to satisfy the conditions so that the Project could proceed, over 95% of the appropriators signed 'limiting agreements,' whereby they agreed to limit their diversion of water"); see also United States v. West Side Irrigating Co., 230 Fed. 284, 286, USDC E.D. WA., 1916 (the court determined that the Secretary of the Interior would not go through with the project until all conflicting claims had been settled). Furthermore, the record is replete with documents and correspondence from Bureau Project developers emphasizing the critical role these limiting agreements would play. See, e.g. The Fourth Annual Report of the Reclamation Service, 1904-05, prepared by F.H. Newell, Chief Engineer of the Service. Essentially, absent the "limiting agreements" our adjudication would be a veryy different proceeding, if at all.

The West Side case, supra, also makes clear another relevant aspect of the agreements in regard to their reflection of the parties intent. There, the court stated in pertinent part that

> "the purpose of this agreement was not to fix or establish existing rights, but to fix and prescribe the rights which the defendant company would have and exercise in the future. The defendant was under no obligation to sign the agreement or to relinquish any rights it might have, and government was under no obligation to take up irrigation works in the Yakima valley. Both parties, however, had or claimed rights in the water of the river, and they undertook for reasons satisfactory to themselves to compromise and settle these rights. This settlement and compromise was an adequate consideration for their agreement, and their course was in full accord with the policy of the law." United States v. Westside Irrigating Co., 230 Fed. 284, 289-290 (E.D. Wash, 1916).

As the opinion states, West Side and other parties were under no obligation to sign the document. Indeed, many did not and they, just like the limiting agreement signatories, have had or will have an opportunity to bring their claim before this Court. The correspondence indicates that at the time of the signing, the water users were not urged to sign the contracts; "that it must be an act purely voluntary on their part." Letter from Engineer Noble, U.S.G.S. to Engineer Newell, U.S. Reclamation Service.

Pertinent to the Court's finding is the fact that some 46 other water claimants signed these agreements. If 90% of the signatories to these agreements believed that their rights were fixed to the amount of the 1905 agreements, and they surely must or they would be making a claim similar to that of the water users here, that must provide some evidence of the surrounding circumstances and their understanding of what they were agreeing to.

Also relevant is the fact that with one exception, approximately 20 parties who had appropriated water from the Naches River signed an identical agreement that contained no more nor less specific language

than that signed by West Side or Ellensburg. For example, parties to the Schuller & Rodenbeck Ditch limiting agreement promised to also limit their withdrawals from the "Yakima River and its tributaries" even though their diversion was from the Naches River. Two signatories to 1911 agreements calling for diversions from Wenas and Athanum creeks did contain more specific references. See Agreement with Yakima Highlands Irrigation & Land Company. All this is to say that the term "Yakima River" inherently encompasses its tributaries while the converse (that the phrase "Yakima River and its tributaries" does not include the tributaries of the Yakima) is not true.

The irrigation districts also point to the subsequent acts and conduct of the parties as indicative of their respective interpretation of the contract. The Court agrees. Berg, at 668. However, these subsequent acts lead us to essentially the same conclusion set forth by the Department of Ecology in their Response Brief at pages 9-11.

The irrigation districts argue that the Bureau of Reclamation has never measured, specifically considered, or made efforts to limit the diversions from the various tributaries at issue here. See e.g. Initial Brief Of Ellensburg Water Company On Limiting Agreements pgs. 13-15. To establish this claim, they cite to Exhibit F, Deposition of Onni Perala, former Chief of Hydrology, Yakima Basin Project at pages 70, 50, 52. However, in response to questioning by counsel for Ellensburg regarding measurement of the tributaries, Mr. Perala also stated that

> "the volume of such an undertaking would take a lot of staff to go to all of the streams and quantify all of that. It's been time and cost, time and manpower prohibitive to go in and make that assessment." Dep. of Onni Parala at 40.

Mr. Perala also stated that enforcement actions to limit diversion from these tributaries had never been taken by the Bureau because

> "we were river system regulators. We had no water rights or policing authority." Id. at page 42.

Mr. Perala also testified that a former Project superintendent had considered the sum total of diversion should be from all sources and in the amount set forth in the limiting agreement. Id.

Evidence submitted by the parties also indicates that many of these water courses were specifically considered in constructing the project. For example, in a document submitted to the Commissioner of Public Lands on December 17, 1906, Supervising Engineer D.C. Henney refers to a number of small water courses being considered for utilization and withdrawal in the Yakima Basin Project. (Certificate of Feasibility of the Yakima Reclamation Project- Exhibit 77-2-01484-5-F). Included in that group were several of the small creeks at issue here such as Park Creek and Reecer Creek.

Additionally, the affidavit of James A. Esget, Special Projects Officer, runs counter to the purported position of the Bureau advanced by the irrigation districts and exemplifies what is at the heart of this Project. In paragraph 8, he recites numerous occasions where the Bureau has taken actions to enforce the terms and conditions of the limiting agreements. Although injunctive relief has been sought in the courts (against West Side no less), the primary mechanism for achieving project success is by way of voluntary cooperation and self-limitation. This is the spirit that spawned the Project and, in times of need, is precisely

what exemplifies its continued success.

From the above, it seems clear to the Court that inaction by the Bureau was not an intentional relinquishment of the water supply. Rather, it was an economic decision. In essence, the lack of enforcement is owed to the special and expensive nature of this project. It left parties in roles they were unaccustomed to and unsure, possibly on the basis of comity, of who would finally make this decision. Moreover, the failure to enforce relates also to the vast territory this project covers. For it to proceed, certain economic choices had to be made. Because the Bureau could not monitor and trace every drop of water in the Yakima watershed, and evidence indicates they came pretty close, does not equate with an acquired right on the part of those who have benefitted. It must be kept in mind that this special arrangement also allowed the project to proceed. As beneficiaries of the project, the irrigation districts must settle for what they bargained for.

The final criteria is the reasonableness of the respective interpretations advocated by the parties. Berg, at 668. Much of what has been discussed applies toward the reasonableness of the parties' interpretation. The position of West Side et. al. is that the intent of the agreement was to determine an amount to be diverted from the Yakima River at times of low-flow and did not apply to the appropriation and use of various streams, creeks and "return" flows which flow directly into the canal down stream from the diversion. Initial Brief of West Side at 11. As set forth above, the irrigation districts have presented some evidence to support this claim. However, the purpose of the

agreements, the agreement itself and a substantial quantity of evidence submitted by the U.S. and Ecology compel this Court to construe the agreements as limiting diversions from any water course tributary to the Yakima as well as all return flows.

The reasonableness of the parties interpretations depends on an accepted definition of "tributary." Accordingly, it is helpful to see how courts have construed that term. Research brought up no cases in Washington that have specifically defined the term but courts in other western states have done so. One court defined tributary to mean "all streams flowing directly or indirectly into a river." Bull V. Siegrist, 126 P.2d 832, 834 (Or. 1942). The Colorado Supreme Court in 1904 viewed it even more broadly finding that tributaries included more than "a running natural stream which empties into another stream" but also seepage, drainage water and percolation to the larger river. Ogilvy Irrigating & Land Co. v. Insinger, 75 P. 598, 600 (Colo. 1904).

The Idaho Supreme Court considered tributaries in a context similar to ours. In Martiny v. Wells, 419 P.2d 470 (Id. 1966), the defendant constructed a ditch between Spring Creek and certain small springs to intercept water that normally fed that river by way of overland runoff and interflow. One prong of defendant's argument contended that the spring water diverted by his ditch was not tributary to Spring Creek. Id. at 471. The court held that diversion of these smaller springs was, in effect, a diversion from Spring Creek. Id. at 472 (emphasis added).

Applying that analysis to our case, the clause requiring limitations on diversions from the "Yakima River and its tributaries"

could be read as the irrigation districts request (as not including or limiting the "and its tributaries") and still come out adverse to them. Such a result follows because interception of waters hydrologically connected to the Yakima River is, in effect, an appropriation of the Yakima River itself. To read the agreements as the irrigation districts suggest requires the court to take a hydrologically unreasonable view of the Yakima watershed. This aspect of the agreement is made clear in a 12/2/16 letter from R.K. Tiffany, Project Manager, to Chief of Construction-Yakima Project. In quoting engineer D.C. Henny's report, Tiffany states "[i]t is further fact that river flow in a basin like that of the Yakima river is very complex, being affected by inflow from numerous small and unmeasured creeks, return flow from irrigated areas."

Finally, it cannot go unsaid in considering reasonableness, that if all parties to the agreements were making the same claims advanced by the irrigation districts here, the Project would go into shambles. It may be that at times the Project has enough buffer in its needed quantity of water to absorb the excess diversions of a few appropriators. It surely could not if more of the original signatories followed this course. To allow these claims flies in the face of the original cooperation that spawned the project and potentially opens up the Bureau of Reclamation to an administrative nightmare. That the Bureau has had so little enforcement responsibility must owe in part to the fact that parties assume they are constrained in their operations because of these limiting agreements.

B. Waiver and Estoppel

The irrigation districts also assert that if the United States had rights under the limiting agreement to limit diversions from all sources of water, they have subsequently waived them or are estopped from asserting them.

Waiver, as all parties concede, is the intentional and voluntary relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right. PUD of Lewis County v.WPPSS, 104 Wn. 2d 353, 365 (1985). The one claimed to have waived a right must intend to relinquish such right and his actions must be inconsistent with any other intention than to waive them. Id.

The irrigation districts present no evidence that the United States voluntarily and intentionally waived or modified the terms of the limiting agreements by oral or written agreements. Accordingly, they must argue that the conduct of the United States can only be interpreted as waiving the specified diversion limitation. Here, the districts cannot support this theory.

First, to constitute an implied waiver, "there must exist unequivocal acts or conduct evidencing intent to waive; intent will not be inferred from doubtful or ambiguous facts." Bill McCurley Chevrolet, Inc. v. Rutz, 61 Wash. App. 53, 58 (1991). Second, the Supreme Court has made clear that the United States is uniquely situated in regard to application of court rules such as waiver and estoppel. United States v. California, 332 U.S. 19, 40 (1947).

In California, the state had entered into leases with private individuals for mineral development on lands belonging to the United

States. As affirmative defenses, California argued ownership of these lands based on prescription, waiver, laches and estoppel. Id. at 23, 24, 39 and 40. The court held that these defenses did not apply in that case even if such theories were consistent with the actions and statements of federal employees. Id. at 39 and 40 (emphasis added). According to the Court, the facts showed that neither the state nor the federal government had focused attention on who had paramount rights to the property in question until the dispute arose. Id. Then the court determined that even if federal employees had been negligent in failing to recognize or assert the federal claims at an earlier date, the property should still not be forfeited because:

> "the Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." Id.

The Court agrees with the letter of this law along with its underlying meaning. The Yakima Basin Project was a federal endeavor undertaken with the cooperation of the state and all the signatories to the limiting agreements. The Project sought as a fundamental objective to obtain more water for development of the valley. The United States holds that water in trust for the benefit of the valley and as trustee it decides what will be done with the water. Because the districts rely on the inaction of a resource caretaker charged with the administration of thousands of acres of land and water to show an intent to waive, they

must make a particularly persuasive showing; one which is not made here.

Equitable estoppel is defined as requiring three elements: 1. an admission, statement or act inconsistent with the claim afterward asserted; 2. action by the other party on the faith of such admission, statement, or act; and 3. injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. P.U.D. of Lewis County v. WPPSS, 104 Wn.2d at 365.

The estoppel argument does not help the districts either. In addition to the reasoning set forth in California, supra, the irrigation districts have failed to meet the tests set forth by the Washington Supreme Court. The court in P.U.D. of Lewis County, supra, set out the estoppel criteria that the party claiming to have been injuriously influenced must have been destitute of knowledge of the true facts or without means of acquiring such facts. Here, the irrigation districts were capable of obtaining further knowledge or making further inquiries as to the scope of their diversion right either at the time of the agreement's making or at any time they wanted to design their services based on this greater quantity of water.

The Ninth Circuit has also established that estoppel claims against the federal government must meet a higher standard. In addition to those requirements set forth above, there must also be a showing of "affirmative misconduct going beyond mere negligence." Rider v. United States Postal Service, 862 F.2d 239, 240 (9th Cir. 1988). Here, even if the United States has been lax in enforcing the agreements to the letter, their actions fall short of affirmative misconduct.

C. Conclusion

Based on the preceding the Court concludes that the original contract intended to limit the diversion from the Yakima River and all its tributaries. The signatories to the agreement voluntarily consented to this limitation in order to obtain future project water and establish their water right without expensive litigation. With the Project's benefit in hand, a few of the signatories ask this Court to read the agreement as applying to the Yakima River or possibly to include the Naches and the Tieton rivers. However, the agreed amount was based on diversions from the Yakima River and all of its tributaries.

Equitable defenses relating to subsequent acts on the part of the United States and irrigation districts are also of no avail. This result owes in part to the unique position of the United States, the vastness and complexity of this project and the ability of the districts to obtain additional information regarding their original rights. Such arguments also fail because they ignore the impact on downstream and project water users who rely on the waters of the Yakima's tributaries.

IV. OTHER SOURCES OF WATER

The limiting agreements make no mention of appropriations from water sources that are not tributaries of the Yakima River. This section considers the rights of the various parties to such waters.

The only thing certain about the course that water will take is that it will flow downhill and take the path of least resistance. Consequently, it is possible that certain drainage, springs and creeks do not eventually work their way to the Yakima River. Although the

evidence is not clear, Ellensburg and West Side may intercept such classifications of water.

As West Side and Ellensburg point out, the withdrawal by the United States did not cut off appropriations of any water initiated in good faith prior to the signing of the limiting agreement. RCW 90.40.030. However, the signing of the limiting agreements limited this right and the Court now holds that this limit applies to all waters tributary to the Yakima River. Nonetheless, it is the Court's position that at the time of their evidentiary presentation, West Side Irrigation District and Ellensburg Water Company may submit evidence to show that at the time of the limiting agreement's making, they had already initiated in good faith an appropriation of non-tributary waters.

Any substantial and continuous increase in such water channels after that time would be the result of Project return flows which this Court has already held belong to the United States. Memorandum Opinion Re: Threshold Issues, page 30. See also State of Washington, D.O.E. v. U.S. Bureau of Reclamation, et. al., 118 Wn.2d 761 (1992); Israel v. Morton, 549 F.2d 128, 132-33 (9th Cir., 1977)(Water obtained from a federal reclamation project is not there for the taking, by the landowner, but for the giving by the United States); Ide v. United States, 263 U.S. 505 (1923)(Project seepage that creates an artificial flow is not available to other appropriators but is subject to a second use in accomplishment of the reclamation goals). Moreover, after 1917, any new appropriations could only proceed pursuant to certification under Chapter 90.03 RCW. The appropriative right only applies to non-

tributary and non-return flow waters initiated prior to the signing of the limiting agreement. Accordingly, only that evidence which applies to such flows will be accepted in establishing a water right to them.

V. ARGUMENTS OF COLUMBIA IRRIGATION DISTRICT

The material written above applies to the points made by Columbia where applicable. Recognizing that Columbia is in somewhat of a unique position, the Court now turns to the arguments specific to them.

First, Columbia contends that the 1906 Contract and the 1911 Deed fail to comply with the statutory requirements for transferring interests in real property. The applicable Deed statute at the time of their making required:

> "[t]hat all conveyances of real estate, or of any interest therein, and all contracts creating or evidencing any incumbrance upon real estate shall be by deed. A deed shall be in writing, signed by the party bound thereby, and acknowledged by the party making it, before some person authorized by the laws of this state to take the acknowledgement of deeds."

RCW 64.04.020, formerly Remington-Ballinger's Annotated Codes Section 8746 (1888). The Legislature has stated that, a water right "shall be and remain appurtenant to the land or place upon which the same is used." RCW 90.03.380; see also Memorandum Opinion re: Motion to Dismiss, February 16, 1982, page 12. Technically, Columbia's argument that conveyance of a water right, as an interest in real estate, must be by deed is correct.

Similarly, Columbia argues that the 1906 Contract and the 1911 Deed fail to satisfy the Statute of Frauds in that they do not contain an adequate description of the property conveyed.

Columbia's arguments fail because of two doctrines; performance and estoppel. It has been the established law of this state for nearly a century that a purported deed which fails to comport with statutory requirements still serves as a contract to pass equitable title. Edson v. Knox, 8 Wash. 642, 646 (1894). The doctrine of estoppel then applies to estop the original grantor or his successors in interest from claiming under the legal title. Id.; see also Kesinger v. Logan, 113 Wn.2d 320, 326-27 (1989). The purported deed and contract, even if failing the Statute of Frauds requirements, are still valid to pass equitable title because full performance by one party removes a contract from that statute. See Rutcosky v. Tracy, 89 Wn.2d 606, 611 (1978); Becker v. Lagerquist Bros., Inc., 55 Wn.2d 425, 434 (1960). It would be disingenuous indeed for Columbia to argue at this late date that the Bureau of Reclamation has failed to perform its contractual duties.

Next, Columbia argues that NPIC lacked authority to transfer any water right to the United States. In support, they cite this Courts Memorandum Opinion on Threshold Issues, May 12, 1992 which held that the major claimants, as distributors, "do retain some rights in the water for the diversion, distribution and conveyance of that water" but essentially "the water suppliers are trustees of the water rights for the users." Conjunctively, Columbia asserts that the quit claim deed only served to transfer the limited right of a distributor.

During the period when the Project was getting underway and limiting agreements were being signed, the major claimants were determining the amount of irrigable acreage contained within their

districts and the amount of water necessary to irrigate this land. The limiting agreements and the contract and deed signed by NPIC reflect the irrigation district's best evaluation of what amount of water would be necessary to satisfy the needs of the landowners within the district. It is a reasonable exercise of the trustee's power to convey supplemental water in return for the benefits of the Project.

The case of West Side Irrigation Co. v. United States, 246 Fed. 212 (CA 9th 1917) has already resolved a nearly identical issue. There, the district argued that its officers who signed the limiting agreement did not have authority to bind the landowners. Id. at 218. The court rejected that argument stating that the landowners gave no notice to any officer of the United States that they repudiated the contract. Id. Conversely, their ten year silence was considered ratification of that agreement. Id. The same can be said here the only difference being that the silence has continued for over 85 years.

Lastly, Columbia asserts that any water right it may have lost by way of the 1906 Contract or the 1911 Deed was "recaptured" by petitioning for a certification of water right claim with the State of Washington Pollution Control Hearings Board in 1981. They consider the time between 1951 and 1981 to be a "window of opportunity" when that which was previously given away could be recaptured.

As the Department of Ecology points out, the filing of a claim is only prima facie evidence of the times of use and the quantity of water. RCW 90.14.081. It does not establish a water right. RCW 90.14.043(6). Here, Columbia's predecessor voluntarily limited their water right.

That promise was to limit their claim in the future to 175 c.f.s. No one complained then and in the meantime, millions of dollars have been spent in reliance on that promise. Columbia only has what NPIC had and to assert more is a breach of that contractual obligation.

VI. PACIFIC POWER & LIGHT

Pacific presents different limiting agreement interpretation questions. It asks the Court to read the agreement as permitting diversions for itself of a maximum 450 c.f.s. plus an additional 50 c.f.s. to satisfy its 1905 contractual obligations with the Wapatox Ditch Company. The referee found that the 450 c.f.s. diversion maximum included the 50 c.f.s. necessary to satisfy the contractual obligations. Second, Pacific argues that beneficial use overrides any contractual limitation. Finally, Pacific also asserts that the United States is obligated to deliver water from storage to meet Pacific Power's needs when: (1) the United States has reduced natural flows by diversions or storage on the Tieton river below what is required by Pacific or (2) delivery from storage is necessary to maintain a minimum diversion by Pacific of 300 c.f.s. of water for power generation.

A. Contract Rights

As to the first issue, the Court finds that the agreement unambiguously limits the diversion to 450 c.f.s.. Evidence offered by Pacific supports no differing interpretation. Further, 450 c.f.s. is not the target flow. Rather, 300-450 c.f.s. represents the range which is to be delivered. The agreement states that Pacific promises to limit its claim to 1000 c.f.s. of Naches River water to:

> "300 cu.ft. per second as a minimum and to 450 cu.ft. per second as a maximum, provided, however, the above quantities of water may be diverted only when the same is available after providing for all prior rights on the river between the headrace and tailrace of the canal belonging to the undersigned, and it is expressly understood and agreed that the water diverted shall be used exclusively for power purposes and returned to the river except those certain portions required to satisfy existing contracts with water users as follows..." (Emphasis added).

The agreement clearly limits the diversion to 450 c.f.s. maximum and contemplates that the consumptive users will take their 50 c.f.s. from this quantity. This meaning is evidenced by the language that states this diverted water may only be used for nonconsumptive purposes except those certain portions required to fulfill existing contracts. In citing to "those certain portions," the drafter had to be referring to portions of the diverted water, to wit the 300 to 450 c.f.s.. As stated above, this court cannot import a meaning into a contract that the parties did not intend. Berg, supra.

Berg also allows the Court to look into the subsequent acts of the parties in determining the meaning of the contract. Such conduct, as evidenced in the statistics presented by Pacific, also supports the parties' understanding to be that 300-450 c.f.s. represents a target range for diversions by Pacific. During times of low flow, the Bureau has consistently delivered the 300 c.f.s. minimum but occasionally going under this amount when the natural flow of the river did not so allow. During times of high flow and storage release, Pacific regularly receives the maximum amount of the target range with occasional opportunities to divert more. In setting a range, with a maximum and

minimum target amount, the parties would seem to have contemplated some ebb and flow in the amount of river water that would be available to the hydropower facility.

Pacific argues that so long as the interests of the United States are not impaired, the non-consumptive use of Pacific should be allowed. They also argue that their original reading of the agreement in 1910 allowed a diversion exceeding 500 c.f.s. and that they appropriately designed the facility to utilize that amount of water.

As stated above, an estoppel argument requires that the adversely affected party not have knowledge of the true facts or no means to obtain them. PUD of Lewis County v. WPPSS, 104 Wn.2d 353 (1985). Since Pacific had this opportunity, any injury they claim was self-induced. Nor does Pacific cite any authority to establish their argument that if the government's interests are unimpaired then Pacific should be allowed to appropriate to the maximum amount the facility will handle.

As to whether beneficial use overrides the limiting agreement in regard to Pacific, this Court need not decide. Regardless of the law, Pacific does not present sufficient facts to establish a water right in excess of 450 c.f.s.. An analysis of the statistics presented indicates that diversions exceeding 450 c.f.s. were no more frequent than diversions under 450 c.f.s.. Nor do the average highs outweigh the average lows. Based on the statistics presented, it appears that Pacific on balance diverted an amount within the contract parameters from April through October. Consequently, it appears that Pacific is getting precisely what it contracted for, i.e. a 300-450 c.f.s.

diversion from the Naches River, with occasional additional waters during times of surplus. Secondly, any diversions permitted by the Bureau historically are simply a gesture of good will and an attempt to get the most benefit from the water possible. The Bureau testified that when Project water is released downstream to contract users, and it does not interfere with any priority of the Bureau, they occasionally permit certain quantities to be used for additional power generation. Second Affidavit of James Esget pgs. 4-5. During the nonirrigation season such surplus waters are generally unavailable as the records echo. In permitting extra diversions during times of surplus Pacific has obtained only a benefit, not a right.

B. Storage Rights

Pacific argues that the United States is obligated to deliver water from storage to meet Pacific's appropriate rights in two instances: When the United States depletes the Tieton River flows for storage purposes and whenever the flow falls below an amount necessary to ensure the 300 c.f.s. required in the limiting agreement.

Underlying these water diversion levels are two other considerations; one imposed by the agreement and another that exists pursuant to a finding of this Court. First, the limiting agreement itself states that Pacific may only divert their minimum or maximum after it is determined that four diverters between the headrace and the tailrace have their entitled amount of water. Secondly, this Court has held that minimum instream flows sufficent for fish life must be maintained in all reaches of the river. This decision was recently

affirmed by the Supreme Court. Department of Ecology v. Yakima Reservation Irrig. Dist., 121 Wn.2d 257 (1993). The Court has deferred to the Superintendent of the Project, in consultation with the Yakima River Basin Systems Operations Advisory Committee and others, in determining this amount. Partial Summary Judgment, November 29, 1990. From these two sources it is clear that the Bureau of Reclamation has some discretion in managing the water flow. Such discretion would be necessary to accomplish the Project's goals as originally conceived.

In regard to storage release requirements, this Court saw no evidence suggesting that storage water had been contemplated by either party. What the Court now holds is that the Bureau will continue its operations in a manner essentially the same as it now does. When the natural flow of the Naches River falls below the 300 c.f.s. target minimum, the Bureau and Pacific will continue its "pass-through" method of shared reduction. During times of excessive flow, the Bureau will continue to permit Pacific to divert nonconsumptive amounts greater than the target range so long as prior rights and necessary fish flows are taken into account. There is nothing to indicate that this system does not work nor is the evidence compelling to provide Pacific with a continuous right to 450 c.f.s or storage rights when the Project falls below 300 c.f.s..

VII. WHEN DO THE LIMITING AGREEMENTS APPLY

Ellensburg et. al. argue that the limiting agreements only apply during periods of low flow or when the operation of the Yakima Project will be prejudiced. The result that follows is during the times of high

flow, the Bureau may not curb the diversions of the irrigation districts. The Court believes this interpretation to be in error.

We need look no further than the agreements themselves. The agreements contain a schedule that limits appropriations to a fixed amount. For example, West Side is permitted to divert 80 c.f.s. from April to August inclusive. The agreement also states that "it is hereby understood and agreed that the limitation of water rights as herein specified is made as a compromise." There are also limits for the months of September and October. These quantities are the measure of the right to divert and apply regardless of the river's condition.

Excess waters are typically used as storage by the Bureau. When the Bureau has satisfied its storage and delivery requirements, they no doubt permit excess diversions. However, this relationship is one in which the Bureau may give but not one whereby the districts can indiscriminately take. The districts mischaracterize this relationship by requesting a right to excessively divert in times of bountiful flow.

VIII. DOES BENEFICIAL USE OVERRIDE CONTRACT OBLIGATIONS

All of the parties challenging the limiting agreements maintain that the quantity of water put to beneficial use is the sole measurement of the water right. Any contractual limitation, under both federal reclamation and state appropriation law, must yield to actual, long-standing beneficial use. In support, parties cite to Lawrence v. Southard, 192 Wash. 287, 300 (1937); Ickes v. Fox, 300 U.S. 82, 94, 95 (1937); Neubert v. Yakima-Tieton Irr. Dist., 117 Wn.2d 232, 237 (1991); U.S. v. Alpine Land, 697 F.2d 851 (9th Cir. 1983).

A. Lawrence, Ickes, Neubert and Alpine Land Do Not Apply

This Court does not dispute that a water user who diverts or puts water to a beneficial use has obtained a water right in the extent of that water duty. Nor does the Court disagree that water delivered by contract to a landowner who then puts it to beneficial use has established a water right in that amount. However, what distinguishes these limiting agreements from the contracts in Lawrence, Ickes, Neubert, and Alpine Land is that the "user" here is, like the Bureau, only a "deliverer" of water. All the contracts in the above-cited cases involve the United States and landowners while here they involve water districts (with the exception of Pacific Power & Light).

However, no party to this dispute has cited to the Court any cases holding that beneficial use overrides limiting agreements such as those involved here. Nor is there any authority regarding an irrigation district that, on one hand agrees to limit its future diversion, then purports to have obtained a greater diversion by way of beneficial use; essentially ignoring the terms of the agreement. Accordingly, the cases cited above have only a limited application by way of analogy.

As stated, the cases cited apply on their face to water users, not water distributors. Although it has been decided that the districts as distributors have some right to water, that right can not be measured by beneficial use because the districts do not use the water beneficially by application to the land. They have an agreement to divert water with the United States and agreements with the water users to deliver. The cases cited rely on beneficial use as a measuring tool and since that

cannot be used to measure the use by the districts, the cases do not apply. Accordingly, the agreement, which limits the right to divert, is the controlling factor in this case.

Secondly, the user's right to delivery in those cases was by contract, not a limiting agreement, and the contracts contained very different and more ambiguous language. In regard to all three claimants in Fox, the contract language stated no certain and fixed amount. For example, one contract stated "that quantity of water which shall be beneficially used *** but in no case exceeding the share proportionate to irrigable acreage, of the water supply actually available as determined by the Project Manager or other proper officer of the United States." Fox v. Ickes, 137 F.2d. 30, 31 (9th Cir. 1943). Moreover, the amount to be diverted was not set at the time of the contract and was fixed only as an after thought by the Secretary to fund a project not properly authorized under the Reclamation Act. Accordingly, measure of the water right was more accurately and realistically set at a quantity based on beneficial use.

Finally, the Secretary in that case was engaged in construction of the Cle Elum dam without the approval and consent of a majority of the water-users. The Secretary's intention, according to the court, was to make a charge for any water distributed over the amount determined to be within the obligations of the contracts signed by the plaintiff's predecessors in interest (a quantity determined and rigidly applied after the fact). Indeed, the Supreme Court made reference to how the water users were to be "forced and coerced" into signing the

agreements." Ickes v. Fox, 300 U.S. 82, 92 (1937). Similarly, in Neubert v. Yakima-Tieton, supra, the determination by the Board of Directors of how the water would be preferentially used was without the approval of the aggrieved water users. Here, that is not the case.

In the case before this Court, the facts are different and call for a different analysis. The United States urges this Court to enforce the contract according to its certain and unmistakable terms which all parties in this proceeding voluntarily agreed to at the time of the signing. At the time of the construction of the Yakima Project, the irrigation districts were certainly aware of their rights and agreed to limit them to the amount fixed in the agreement in exchange for the benefits of the project. Indeed, the project would not have proceeded absent these agreements as required by the Reclamation Act. The agreements did not require an after-the-fact assessment by the Bureau of Reclamation to fix the amount of water to be furnished to the districts. To the contrary, the United States has abided by their end of the agreement and never wavered in delivering the amount of water required by the limiting agreements (sometimes more) nor has it attempted to eat away at the fixed amount to secure additional funding.

B. Do Federal Administrative Actions Preempt State Law

The irrigation districts argue that they still retain a state law appropriative right based on long standing beneficial use that overrides the limiting agreement provisions. It is this Court's finding that state water law is preempted and subsumed in regard to the making of the limiting agreements and consequently state law does not override the

provisions contained in the agreements.

Our starting point is the validity of preemption itself. The Supremacy Clause, U.S. Const. art. VI, cl. 2, is interpreted by the Supreme Court to provide that federal law should control when it actually conflicts with state law. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). However, the Reclamation Act states that beneficial use shall be the basis, measure and limit of a water right, 43 U.S.C. 372, and that nothing in the Act should be interpreted as affecting or interfering with existing state laws regarding the control, appropriation, use or distribution of water used in irrigation. 43 U.S.C. 383. There would appear to be no conflict and the United States would defer to state law regarding matters of water rights.

The U.S. Supreme Court has indicated, however, that when state prior appropriation law conflicts with a congressional directive or an authorized decision of the Secretary of Interior, then the state law must give way. Arizona v. California, 373 U.S. 546, 586 (1963)("[I]n settling the terms of his contracts[, the Secretary] is not bound by [43 U.S.C. 383] to follow state law"); City of Fresno v. California, 372 U.S. 627 (1963). Further, the Arizona Court stated "[w]here the Government, as here, has...undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws." Id.; See also, Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958)("...the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-

all objectives thereof. Conversely, a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress"). The Supreme Court clarified the Arizona and Ivanhoe holdings in California v. United States, 438 U.S. 645 (1978), deciding that state law governs when rights to water are in dispute unless state law directly conflicts with specific congressional directives.

Administrative preemption of state water law has been less fully examined. However, the case of City of Fresno v. California, 372 U.S. 627 (1963) conclusively documents the existence of such a preemption. There, a California municipal preference for water was in direct conflict with the Reclamation Act's preference for irrigation. See 43 U.S.C. 485h(c). Specifically, no water contract could be entered into unless "in the judgment of the Secretary of the Interior, it will not impair the efficiency of the project for irrigation purposes." Id. Furthermore, Section 485(c) delegated to the Secretary the authority to fix rates covering irrigation and municipal service. The Secretary's affixed rate charges together with his decision regarding service to municipalities were approved by the Supreme Court as a proper action within his delegated authority regardless of the provisions of state law. Id. at 630-632.

The question here then reduces to this: When the Secretary of the Interior, with proper authority, enters into contracts with irrigation districts to limit their state appropriative rights in order to fulfill the mission of a federal law and this Project, does such an administrative federal action continue to preempt state water law in the

future as far as it affects collection and storage of water? Under the limited facts of this case, the answer is yes.

The answer must be yes because the parties expressly or impliedly agreed to the preeminent position of federal law in regard to the collection and storage of project water. Here, the voluntary limitation of appropriative rights was the basis, measure and limit of the water right that allowed the project to proceed and provided a measure for repayment. Accordingly, it is the amounts contained within these agreements which controls and not that amount flowing from state law.

Even if we were to consider state law, we would be governed by Department of Ecology v. Bureau of Reclamation, 118 Wn. 2d 761, 771 (1992), wherein the Washington Supreme Court held:

> "We also find it highly significant that under Washington's statutes the decisions regarding distribution of water within a federal irrigation project do not belong to the State. Rather, they are to be made by the Secretary of the Interior through the Secretary's representatives: the United States Bureau of Reclamation and by contract, the irrigation districts. These decisions are to be made according to the federal laws, federal regulations and the contracts between the irrigation districts and the federal government." At page 772, in fn. 7, the Court held: "The Department counters that federal law generally must give way to state law regarding distribution of water in federal irrigation projects. See California v. United States, 438 U.S. 645, 43 U.S.C. 383. These authorities, however, would seem to have no applicability here, where the state law expressly yields to federal provisions." (Emphasis added).

Thus, even under state law, the agreements executed by and between the districts and the U.S. would be the controlling factor with respect to the agreed upon limitations of the water rights.

IX. CONCLUSION

When willing parties reach terms acceptable to all and memorialize

those terms in an agreement which is clear and unmistakable, that document should be the measure and limit of the rights of those parties. The Supreme Court recognized this in the case of Madison v. McNeal, 171 Wn. 669, 680 (1933) where it stated:

> "Where a contract exists which settles water rights, due consideration must be given to such contract, lest the terms thereof be impaired by the application of general laws as if no such contract existed."

In closing, the words of the federal District Court in United States v. West Side Irrigating Co., pages 289-90 ring loud and clear and bear repeating.

> "[T]he purpose of this agreement was not to fix or establish existing rights, but to fix and prescribe the rights which the defendant company would have and exercise in the future. The defendant was under no obligation to sign the agreement or to relinquish any rights it might have, and the government was under no obligation to take up the irrigation works in the Yakima valley. Both parties, however, had or claimed rights in the waters of the river, and they undertook for reasons satisfactory to themselves to compromise and settle these rights. This settlement and compromise was an adequate consideration for their agreement, and their course was in full accord with the policy of the law."

As West Side and Ellensburg correctly point out, "[t]he limiting agreement executed by [the two irrigation districts] during 1905-1906 created contractual rights between it and the United States." Initial Brief of Ellensburg at 8. It is not the function of this court to unmake such contracts when they were originally agreed to by well-informed and competent parties.

DATED this 16th day of June, 1993.

WALTER A. STAUFFACHER
Judge