

FILED  
JAN 04 1994

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON 1994  
IN AND FOR YAKIMA COUNTY

KIM M. EATON  
YAKIMA COUNTY CLERK  
NO. 77-2-01484-5

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. )

Memorandum Opinion  
Re: Pacific Power  
and Light's Motion  
For Reconsideration  
of Limiting Agreements

**I. INTRODUCTION**

This matter originally came before the Court October 7, 1992. After considering the memoranda, affidavits, exhibits and arguments of counsel, a memorandum opinion was entered June 16, 1993. An Order was signed October 14, 1993. Pacific Power & Light Company (PP&L) moved for reconsideration on October 22, 1993 and argument took place November 4, 1993. The Court issues the following Opinion and Amended Order.

**II. DATES OF LIMITING AGREEMENTS**

In section 1 of its Brief, PP&L asks that the date of the limiting agreement's signing be changed to reflect that some agreements were entered into after 1905. The Court agrees and so amends the Order.

PP&L points out diversions totalling 1900 c.f.s. include amounts diverted by Washington Irrigation Company and the Yakima Nation, who did

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1 not sign a limiting agreement. The order is changed to accurately  
2 reflect the diversion totals and limiting agreement signatories.

3 **III. AMBIGUITY; CORRECTION OF NAME OF PARTY**

4 The Court finds that the limiting agreements between water users  
5 and the U.S. were not ambiguous. See Memorandum Opinion at 13, 32.  
6 According to the Ninth Circuit, the limiting agreements were "definite  
7 and void of ambiguity." West Side Irr. Co. v. United States, 246 Fed.  
8 212, 219 (9th Cir. 1917). Changes in this respect will not be adopted.

9 The Order shall correctly state Union Gap Irrigation District.

10 **IV. AMBIGUITY AS TO PACIFIC POWER; PROTECTION OF DIVERTERS ON THE**  
11 **WAPATOX REACH; PROTECTION OF FISH LIFE**

12 The Court makes the following rulings as to proposed language in  
13 paragraph 1.a., page 2, line 29 et. seq.. Removal of the word  
14 "unambiguously" is denied. See Section III above.

15 The language change providing for the senior diverters between the  
16 headrace and tailrace shall be included. Removal of language requiring  
17 PP&L to include in its diversion that amount necessary to satisfy  
18 contractual obligations with the Wapatox Ditch Company is denied. Other  
19 changes suggested in section 3 of PP&L's brief shall be incorporated.

20 **V. A SEPARATE 450 C.F.S. WATER RIGHT FOR POWER GENERATION**

21 The request by PP&L for a separate water right of 450 c.f.s. to be  
22 used exclusively for power generation remains PP&L's primary concern in  
23 this Motion for Reconsideration. Although its arguments are more  
24 refined, its position remains the same. Primarily, PP&L relies on the  
25 following arguments: (1) Actual beneficial use overrides the terms of

1 the limiting agreements; (2) The ambiguity of the agreement as to who  
2 should decide the amount of water within the 300-450 c.f.s. range to be  
3 delivered to PP&L; (3) The unique status of PP&L as a nonconsumptive  
4 user and non-impairing on the Yakima Project.

5 A. Relationship of State and Federal Law

6 PP&L and DOE insist the water right held by PP&L is state-based.  
7 The Court agrees. The October 14, 1993 Order Re: Limiting Agreements  
8 does not state the water right held by PP&L (or any other claimant  
9 involved in the limiting agreement dispute) is based on federal law. To  
10 what extent federal law applies is not precisely the issue to be  
11 resolved in making this decision. The limiting agreements also evince  
12 the deference needed by the BOR to carry out its contractual obligations  
13 and statutory directives. Accordingly, under federal or state law, an  
14 agreement voluntarily entered into by a user limiting their diversion  
15 and subsequent beneficial use is the measure and basis of the right.

16 Such a decision is consistent with the reasoning in Lawrence v.  
17 Southard, 192 Wash. 287 (1937), the state authority primarily relied on  
18 by PP&L. Additionally, certain factual issues make that opinion non-  
19 controlling. At issue in Lawrence were applications or contracts for  
20 water rights and delivery of water. The limiting agreements are very  
21 different from those contracts. PP&L seems to agree with this  
22 distinction. Their Motion for Reconsideration states that

23 "the reference to the limiting agreement rights as contractual  
24 rights is inaccurate. The limiting agreements did not create  
25 contractual rights on the part of diverters but limited their  
exercise of state law water rights." See PP&L's Motion for  
Reconsideration, October 22, 1993, at page 5.

1           Moreover, Lawrence concerns the obligation to deliver a certain  
2 amount, not an amount the user agreed to abide by.

3           The Lawrence rationale can also be analyzed differently in light of  
4 the objectives of the limiting agreements. Therein, the Court concluded  
5 its analysis by emphasizing the Interior Secretary was limited in the  
6 number of contracts he could enter into by the contracts themselves and  
7 the Reclamation Act (43 U.S.C.A. § 523). Id. at 302-303. The principle  
8 established is that the Secretary is limited in parcelling out the  
9 natural and storage waters by beneficial use: individuals in the  
10 Sunnyside Division who had been beneficially using certain amounts of  
11 water were to continue to receive that amount at the expense of new  
12 development within Sunnyside and in the Kittitas reclamation district.  
13 Id. Basically, Interior was to refrain from stretching itself too thin,  
14 at the expense of vested water right holders.

15           By entering into agreements limiting beneficial use appropriations,  
16 the Secretary was adhering to its statutory and contractual obligations.  
17 See United States v. Union Gap Irr. Co., 209 Fed. Rep. 274, 275 (1913).  
18 The Secretary was also trying to accomplish certain planning objectives  
19 to maximize the benefits from the water. By obtaining consent of water  
20 users to limit their diversions to an agreed beneficial use, the  
21 Secretary was able to plan storage and parcel out the water to meet his  
22 obligations. Without such agreements, users would increase their  
23 capacity (and therefore beneficial use requirements) and hinder the  
24 ability of the BOR to meet the needs of all its contractees. Id. at  
25 275, 277-278 (When water users divert more than they are entitled to in

1 the limiting agreements, the United States supply of water is diminished  
2 such that it may be unable to furnish sufficient quantities to  
3 adequately irrigate lands. The government may restrain those diversions  
4 that prejudice the operation of the project).

5 PP&L's assertion its use is non-consumptive and therefore non-  
6 impairing on the project is incorrect. According to BOR hydrologist  
7 James Esget, delivery of the 450 c.f.s. requested by PP&L would severely  
8 hamper storage for the upcoming (1994) season as it also would have in  
9 22 of the past 66 years. Affidavit of James A. Esget, p. 1-2. The BOR  
10 apparently set water-user limits in amounts they could deliver even in  
11 water-short periods. In normal and water-rich years, the BOR can  
12 deliver more than the agreements provide without impairing its  
13 obligation to deliver water to other beneficial users. Without these  
14 agreements and limitations on amounts users intend to beneficially use,  
15 the BOR could not meet the beneficial use requirements of all the water  
16 users in the Yakima Project at any given time. See, e.g., United States  
17 v. Union Gap, supra, at 275. Such a delivery failure would be at odds  
18 with the contracts, the reclamation act and the Lawrence opinion.

19 Regardless of the source of authority or the terminology used to  
20 describe it, the Secretary of Interior, as delegated to the Bureau of  
21 Reclamation, has substantial authority and flexibility to carry out the  
22 objectives of the Yakima Project. A fundamental principle of  
23 administrative law, both state and federal, is that agencies carry out  
24 the objectives of the authorizing statutes. See, e.g., Rettkowski v.  
25 Department of Ecology, 122 Wn.2d 219, 226 (1993). The Reclamation Act of

1 1902, 43 U.S.C.A. § 371 et. seq., confers necessary authority on the  
2 Secretary to construct and manage the Yakima Project. The Secretary's  
3 actions in following Congressional directives supersede and override  
4 conflicting state law. California v. United States, 438 U.S. 645 (1978).

5 Although the Court does not believe the water rights emanate from  
6 federal law, there can be no doubt Congress intended that the Secretary  
7 of Interior (acting through the BOR) have some control in planning,  
8 constructing and operating the Yakima Project. The Secretary is given  
9 authority to enter into the limiting agreements, and rely thereon in  
10 constructing and operating the project. 43 U.S.C.A. § 373, provides:

11 "[t]he Secretary of the Interior is hereby authorized to perform  
12 any and all acts and to make such rules and regulations as may be  
13 necessary and proper for the purpose of carrying the provisions of  
14 this Act into full force and effect."

15 Section 373 confers authority on the Secretary to make rules and  
16 enter into contracts such as the limiting agreements to achieve the  
17 Reclamation Act's goals.

18 Section 419 also addresses the Secretary's authority over this  
19 matter. Therein it states that "[u]pon the determination by the  
20 Secretary of the Interior that any irrigation project is practicable, he  
21 may cause to be let contracts for the construction of the same..."  
22 (Emphasis added). That statutory mandate is clear: The Secretary was to  
23 commence construction only after evaluating and ensuring the viability  
24 of a project. See Lentz, Yakima Project Water Rights & Related Data, p.  
25 2-3 (December 1974). Furthermore, case law and the contracts themselves  
indicate that the limiting agreements were proposed and signed in order  
to ensure the project was practicable. In U.S. v. West Side Irrigating

1 Co., 230 Fed. Rep. 284, 286 (1916) the District Court stated:

2 "The Secretary of the Interior refused to approve the plan commonly  
3 known as "the Tieton and Sunnyside projects," or to enter upon the  
4 construction of irrigation works or storage reservoirs in the  
5 Yakima valley, except upon compliance with certain conditions..."

6 The West Side Court then set out those conditions including  
7 adjustment of the conflicting claims to appropriate from the Yakima  
8 River and resolution of all suits pending to prevent or restrict the  
9 diversion of water from the river. Id. Further, the Court emphasized  
10 these conditions precedent to construction were explained to water users  
11 in the Kittitas and Yakima valleys. Id. These same conditions were in  
12 the limiting agreements themselves. Clearly, the Secretary was acting  
13 pursuant to a clear statutory mandate that was made known to all the  
14 limiting agreement signatories.

15 Finally, in planning construction of the Yakima Project, the BOR  
16 acted in accordance with, and received explicit approval from, the  
17 Washington legislature. See RCW 90.40.010 et. seq. (United States  
18 granted the right to exercise power of eminent domain in acquiring  
19 rights to divert water and construct irrigation projects); See also  
20 United States v. Union Gap Irr. Dist., supra, at 274 (1913) (The United  
21 States in constructing the Yakima Project availed itself of specifically  
22 targeted state legislation). Therefore, whatever state law compliance  
23 is required by the Reclamation Act was surely satisfied when the  
24 Washington Legislature acquiesced to the United States in bringing about  
25 the construction of this important irrigation project.

Whether one wants to call this federal preemption, agency  
deference, or simply adherence to the binding obligations of a contract,

1 the terms agreed to in the limiting agreements control the diversions of  
2 the signatories thereto. In signing the agreements, they chose to limit  
3 state water law rights. Further, the BOR must be afforded the certainty  
4 provided by the limiting agreements to properly administer the water in  
5 the Yakima Basin to meet the beneficial uses of all the water users.  
6 When required to deliver more than the limits in the agreements, the  
7 ability of the BOR to meet these obligations is hampered.

8 DATED this 3<sup>rd</sup> day of January, 1994.

9  
10 Walt A. Stauffer

11 Judge  
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