

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR YAKIMA COUNTY

3 IN THE MATTER OF THE DETERMINATION OF THE RIGHTS TO THE USE OF THE  
4 SURFACE WATERS OF THE YAKIMA RIVER DRAINAGE BASIN, IN ACCORDANCE WITH  
5 THE PROVISIONS OF CHAPTER 90.03, REVISED CODE OF WASHINGTON,  
6 STATE OF WASHINGTON,  
7 DEPARTMENT OF ECOLOGY,

8 Plaintiff,

9 vs.

10 JAMES J. ACQUAVELLA, et al.,

11 Defendants.

159  
NO.

**FILED**  
APR 01 1994

**KIM M. EATON**  
YAKIMA COUNTY CLERK

MEMORANDUM OPINION RE:  
MOTION FOR RECONSIDERATION  
OF LIMITING AGREEMENTS

12 I. INTRODUCTION

13 On October 16, 1993, this Court entered an Order applying to all  
14 signatories of limiting agreements excepting Cascade Irrigation District  
15 (CID), West Side Irrigating Company (WSIC) and Ellensburg Water Company  
16 (EWC) (hereinafter referred to as "water suppliers"). Those water  
17 suppliers then submitted factual and legal arguments to expand the  
18 Court's resolution of this matter. This Opinion will address these  
19 arguments and clarify the Memorandum Opinion entered June 16, 1993.

20 II. FACTS

21 The water suppliers making this Motion are located in the same area  
22 of the Yakima River Basin. (For a more complete profile of CID, WSIC  
23 and EWC, see Mem. Op., June 16, 1993, pp. 4-8). Geographically, their  
24 lands are near the Yakima River in Kittitas County and surrounded by the  
25 Kittitas Reclamation District (KRD), which is a division of the Yakima  
Reclamation Project. This placement near KRD is at the heart of the

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1 | dispute because runoff from those Yakima Project lands made available  
2 | more water to the water suppliers (by way of the various creeks and  
3 | drainages that run through or adjacent to the three suppliers) than had  
4 | existed before the Project's establishment. KRD was recommended a right  
5 | of 336,000 acre-feet of water in the Report of the Court, entered June  
6 | 24, 1993, at 17. Although a Conditional Final Order has yet to be  
7 | entered, and taking into account the 50% return flow rate used by the  
8 | Bureau of Reclamation (BOR) (Affidavit of James E. Esget, January 5,  
9 | 1994, at p. 4), this figure would indicate that between 150,000 -  
10 | 170,000 acre-feet should return annually to the Yakima River. Return  
11 | flow above Parker generally varies between 350,000 to 450,000 AF.  
12 | (Affidavit of Donald L. Schramm, Jr., January 5, 1994 at p. 4.)

13 | Also located in this vicinity and within the boundaries of EWC,  
14 | WSIC, CID and KRD are individuals with distinct and separate rights who  
15 | appropriate from the various small creeks and drainages. They are not  
16 | signatories to the limiting agreements. Furthermore, their rights are  
17 | being adjudicated in the subbasin pathway and are independent of the  
18 | rights of the water suppliers at issue in this Opinion.

19 | The affidavits and memoranda also make clear that the water  
20 | delivery system in the upper basin is anything but clear. By all  
21 | accounts, to determine exactly how much water is diverted from each of  
22 | the various source by the water suppliers would be very difficult and  
23 | cost prohibitive. (Sworn Statement of Richard C. Bain at 7; Affidavit  
24 | of James Esget at 3.) Another difficulty exists in trying to determine  
25 | the source of these diversions: the water flow might emanate from return  
flow (from several possible sources) or natural flow (which in turn

1 | might be the result of runoff, ground water or springs accreting through  
2 | the stream bank). It is also difficult to know how these various water  
3 | sources make their way to the Yakima River (if they in fact do).

4 |       Measuring points for diversions from the Yakima River for the  
5 | various entities are located at a place where only Yakima River  
6 | diversions are measured. However, in the case of CID, average  
7 | diversions from the Yakima River are approximately 41,468 AF whereas  
8 | CID's annual entitlement is approximately 54,600 AF. Apparently, some  
9 | adjustment was expected from these various water sources that would  
10 | bring CID in line with their annual allotment.

11 |       Also of relevance in this proceeding is the operating procedures of  
12 | the United States Bureau of Reclamation (BOR); particularly in regard to  
13 | calculation of Total Water Supply Available (TWSA). TWSA is the sum of  
14 | three quantities: all natural runoff above Parker during the irrigation  
15 | season; all return flow above Parker during the irrigation season; and  
16 | total system storage at the beginning of irrigation season. Affidavit  
17 | of Donald L. Schramm at p. 3-4. According to the "1945 Consent Decree",

18 |       "total water supply available" is defined as that amount of water  
19 | available in any year from natural flow of the Yakima River, and  
20 | its tributaries, from storage in the various Government reservoirs  
21 | on the Yakima watershed and from other sources, to supply the  
22 | contract obligations of the United States to deliver water and to  
23 | supply claimed rights to the use of water on the Yakima River, and  
24 | its tributaries, heretofore recognized by the United States."  
25 | Civil Action No. 21, January 13, 1945.

26 |       The BOR expects return flows above Parker to be between 350,000 to  
27 | 450,000 AF during the irrigation season. In calculating TWSA, BOR uses  
28 | a 50% return flow for agricultural diversions on a Basin-wide basis.  
29 | Affidavit of James Esget at 4.

1 The BOR entered into contracts with various Project water users,  
2 such as KRD, that specifically provide for return flows. They state:

3 34. (a) The United States does not abandon or relinquish any of  
4 the waste, seepage or return flow-waters attributable to the  
5 irrigation of the lands to which water is supplied under this  
6 contract. All such waters are reserved and intended to be retained  
7 for the use and benefit of the United States as a source of supply  
8 for the project.

9 (b) If suitable drainage or return-flow water from any part of  
10 the project shall at any time be or become available at points  
11 where it can be used on lands within the District, the United  
12 States may supply such water as a part of the supply to which the  
13 lands in the District are entitled.

14 Finally, CID, WSIC and EWC have been utilizing these waters for a  
15 long period of time. It appears that much of the current water  
16 diversion practice has been in place since their irrigation facilities  
17 were constructed. However, the available water supply since has been  
18 supplemented by return flow from KRD.

### 19 III. OPINION

20 Issues arising from the limiting agreements have been extensively  
21 briefed by the parties to this dispute. Many of the issues have already  
22 been addressed by the Court. See Memorandum Opinion Re: Limiting  
23 Agreements, June 16, 1993; Memorandum Opinion Re: Pacific Power & Light  
24 Limiting Agreement, January 3, 1994. However, several new issues have  
25 been presented by the parties and certain points from the June 16  
26 Opinion require clarification. The parties to this dispute  
27 characterized the issues in terms of natural and return flows and the  
28 Court will respond accordingly.

#### 29 A. Natural Flows

30 Arguments were submitted by EWC and WSIC pertaining to res

1 | judicata, collateral estoppel and state water law. The Court will  
2 | address these below.

3 |           1.    **Relationship of State and Federal Law**

4 |           The Court discussed at some length the relationship between state  
5 | and federal law as it applies to the limiting agreements. See Mem. Op.  
6 | pp. 37-43. Certain parties to this dispute misunderstood that  
7 | discussion to imply that the limiting agreements created federal  
8 | reserved water rights. The Court clarified this matter in the PP&L  
9 | Memorandum Opinion and refer interested parties to that Opinion,  
10 | specifically pages 3-8. WSIC and EWC present nothing in their memoranda  
11 | convincing this Court to abandon the rationale set forth in the above-  
12 | mentioned opinions.

13 |           2.    **Res Judicata and Collateral Estoppel**

14 |           WSIC argues that res judicata applies to interpretation of the  
15 | limiting agreements from matters decided in U.S. v. West Side Irrigating  
16 | Co., 230 F. 284 (E.D. Wash., S.D., 1916) and West Side Irr. Co. v. U.S.,  
17 | 246 F. 212 (9th Cir., 1917). Similarly, EWC asserts that collateral  
18 | estoppel precludes the United States from re-arguing issues that were  
19 | decided in an identical context. Res judicata and collateral estoppel  
20 | are doctrines designed to prevent relitigation of already determined  
21 | causes, with res judicata generally relating to relitigation of an  
22 | entire cause and collateral estoppel applying to particular issues or  
23 | determinative facts. Bordeaux v. Ingersoll Rand Co., 71 Wn.2d 392, 395  
24 | (1967). The Court disagrees with the application of these doctrines to  
25 | the issue as suggested by EWC and WSIC. Alternatively, if such  
doctrines do apply, they would appear to be adverse to the water

1 supplier's interests.

2 a. WSIC and Res Judicata

3 To make a judgment res judicata in a subsequent action, the moving  
4 party must show: (1) identity of subject matter; (2) identity of cause  
5 of action; (3) identity of persons and parties (4) identity of the  
6 quality of the persons for or against whom the claim is made. Ecology  
7 v. YRID, 121 Wn.2d 257, 290 (1993); Bordeaux at 396. In this dispute,  
8 it is not evident to the Court that all of these ingredients are met.  
9 At most, perhaps the subject matter is similar, in that the limiting  
10 agreements were at issue in that case as they are here. However, this  
11 dispute arises within a water adjudication, whereas the West Side case  
12 was an action for injunctive relief between and involving only two  
13 parties. It did not involve the rights of numerous other water users in  
14 the basin in an examination and determination of all rights, both  
15 individually and as against each other. Moreover, no where within that  
16 opinion did the court state that it considered the relationship of the  
17 <sup>tributaries</sup> ~~and~~ nor find that such diversions should not be considered  
18 in computing the limiting agreement totals. If anything, as will be  
19 discussed below, it says the opposite. Accordingly, this issue within  
20 this adjudication does not have a concurrence of identity of cause of  
21 action, of persons and parties and in the quality of the persons for or  
22 against whom the claim is made.

23 If the doctrine does apply, it is necessary to determine precisely  
24 what the District Court decided in the 1916 case. In analyzing the  
25 opinion, there can be no doubt that what was decided was that West Side  
had limited itself to diverting 80 c.f.s. from the Yakima River. West

1 Side now argues that this should be read to mean that they were not  
2 limited in diverting from the tributaries because the District Court did  
3 not so specify. However, that conclusion seems misplaced.

4 Throughout the opinion, the Court mentions that the limiting  
5 agreement applied to diversions from the Yakima River and its  
6 tributaries. The court stated on page 287 that the Secretary refused to  
7 approve the Project until "[t]he adjustment of all conflicting claims of  
8 those who are appropriating water from the Yakima river or any other  
9 body of water...". Further, "local committees were appointed to obtain  
10 a satisfactory settlement and adjustment of all claims to water from the  
11 Yakima River and its tributaries". Next, it examined the wording of the  
12 agreement itself which refers to a self-limitation from the Yakima River  
13 and its tributaries and actions within the Yakima watershed on at least  
14 12 occasions. On page 288-289, the Court remarked on the discussions  
15 that had occurred between the government and users over settlement of  
16 claims to the Yakima River and its tributaries for months. Pursuant to  
17 such discussions, West Side made a decision to take 80 c.f.s. from the  
18 Yakima River. It seems to this Court that Judge Rudkin determined that  
19 West Side had limited their right to 80 c.f.s. from the Yakima and its  
20 tributaries and decided to take this amount from the Yakima River.

21 WSIC argues that the court, by limiting WSIC to 80 c.f.s. from the  
22 Yakima River, was condoning appropriations from other sources of water  
23 and implying that such diversions were not to be included in the  
24 limiting agreement amounts because the U.S. had not brought this issue  
25 before the Court. However, this is an implication at best and is not  
stated in the opinion itself. Furthermore, the only support for this

1 interpretation is a cite to the United States Reply Brief which talked  
2 of seepage loss in WSIC canals and how such loss would be greater "but  
3 that the canal has very large accessions from irrigated lands above."  
4 As will be discussed below, WSIC's right to capture what were non-  
5 Project flows is in accord with Washington law and the United States  
6 would have been remiss (although the case of Elgin v. Weatherstone,  
7 infra, had not been decided at that time) to challenge such water usage.

8 Although WSIC provides the Court with justification for applying  
9 res judicata at pages 3, 4 and 9 of their Memorandum, the Court will  
10 only say here that the doctrine does not apply as suggested by WSIC.

11 b. EWC and Collateral Estoppel

12 Collateral estoppel is similar. It applies when: (1) the issue  
13 decided in the prior adjudication is identical with the one presented in  
14 the present action, (2) prior allegations led to a final judgment on the  
15 merits (3) the party against whom the plea is asserted was a party or  
16 in privity with a party to the prior adjudication; and (4) application  
17 of the doctrine will not work an injustice on the party against whom the  
18 doctrine is to be applied. McDaniels v. Carlson, 108 Wn.2d 299, 738  
19 P.2d 254 (1987).

20 The Court assumes that if the issue decided in the West Side cases  
21 is the one set forth in the preceding section, than EWC would not want  
22 to have it applied to interpretation of their agreement.

23 B. Return Flows

24 The arguments presented by the parties are primarily aimed at  
25 determining who has rights to the return flows in the upper basin.  
Issues pertaining to return flows were not as fully briefed and decided

1 in the initial arguments and June 16, 1993 Opinion as were issues  
2 pertaining to natural flow. Accordingly, this Opinion will primarily  
3 consider return flows and rights (if any) to such flows.

4 The first issue is whether or not the limiting agreements applied  
5 to return flows. This Court has ruled that the limiting agreements are  
6 unambiguous as to rights from natural flow in the Yakima River and its  
7 tributary waters. Mem. Op. at 22. The Court also applied this  
8 limitation to return flows. Id. In making that decision, the arguments  
9 presented to the Court were not as well-developed in regard to return  
10 flows. On reconsideration, however, the record is more complete and the  
11 Court now finds that the agreements do not specifically address or give  
12 any indication as to whether the parties contemplated such flows in  
13 setting diversion limits. However, there is a substantial body of law  
14 that controls the use of these return flow, be they Project or non-  
15 Project return flows.

16 The second issue is whether or not all return flows are Project  
17 waters. The Court held in Limiting Agreements I that the United States  
18 has control over all Project return flows. Id. at 28; see also Mem. Op.  
19 Re: Threshold Issues, page 30; Israel v. Morton, 549 F.2d 128 (9th Cir.,  
20 1977). The water suppliers in this dispute argue strenuously that many  
21 of the drainages in the upper basin carry return flows that are not  
22 Project waters. See e.g., CID Memorandum at p. 2; Reply Brief of WSIC  
23 and EWC at 5-10. Moreover, the water suppliers dispute the BOR's claim  
24 to non-Project waters. See e.g., CID at p.5. In addition to laying  
25 claim to non-Project waters, WSIC and EWC also claim a right to capture  
all return flows, whether Project or non-Project waters. See Reply

1 Brief at p. 2. This will be discussed below.

2 The Court finds that not all return flow in the upper basin can be  
3 characterized as "Project return flow." See Isreal v. Morton, 549 F.2d  
4 128, 132 (1977) ("A distinction must be recognized between the nature of  
5 nonproject water, such as natural-flow water, and project water"). Many  
6 upper basin water rights are natural flow rights (belonging to major  
7 claimants as well as individuals) and thus were not created by the  
8 United States' efforts. See Civil Cause No. 21, January 31, 1945, at 18.

9 1. Project Return Flows

10 WSIC and EWC make several arguments to divest the U.S. of any right  
11 to Project return flows. CID would appear to concede that the U.S. has  
12 some remaining interest in Project return flows. CID Memo. at 4; CID  
13 Reply Brief at 2, 4. The U.S. asserts that Project flows are a critical  
14 component of TWSA. See generally, Affidavit of Donald Schramm.

15 Normally, rights to foreign return flows in Washington are  
16 controlled by the cases of Dodge v. Ellensburg Water Co., 46 Wn. App 77  
17 (1986) and Elgin v. Weatherstone, 123 Wash. 429, 212 P. 562 (1923).  
18 Although DOE argues otherwise, the Elgin decision and its rationale  
19 confirm that the waters diverted to KRD and return flows created  
20 pursuant thereto are foreign return flows. In deciding whether the  
21 flows at issue were foreign, the Elgin court relied heavily on Clemens  
22 Horst Co. v. New Blue Point Min. Co., 177 Cal. 637, 171 Pac. 417. The  
23 Blue Point court characterized "foreign" waters as those not reaching a  
24 stream without the "interference of human agency" or "surplus waters  
25 [that] would not in the course of nature" reach particular lands. Elgin  
at 432. Based on these cases, the Court finds that waters diverted to

1 KRD pursuant to the Yakima project are "foreign return flows."

2 Elgin and Dodge also instruct that no specific state water right  
3 can be obtained to such waters, but, once abandoned, they are available  
4 to the first capturer. Dodge at 80. Here, however, the Project water  
5 would not exist but for development on the part of the U.S. See Isreal  
6 v. Morton, supra, at 132 (Such water is not there for the taking by the  
7 landowner, but for the giving by the United States). The Washington  
8 Supreme Court also recognized the significance and unique position of  
9 the federal government in making reclamation project distribution  
10 decisions as far as return flows are concerned. Ecology v. B.O.R., 118  
11 Wn.2d 761, 827 P.2d 275 (1992). The Court will construe these lines of  
12 authority to give greatest possible effect to each. Id. at 770.

13 Contrary to the arguments of WSIC and EWC, the U.S. has not  
14 abandoned or forfeited their rights to Project return flows. This must  
15 be the case because much of the return flow eventually does make its way  
16 to the Yakima River. Furthermore, the U.S. obviously retains the intent  
17 year-after-year to reuse those return flows by delivery to Sunnyside,  
18 WIP, Kennewick Irrigation District and other Project water users down  
19 stream. CID Memo. at 5. Moreover, WSIC, EWC and CID have no right  
20 under state or federal law to require further delivery of Project return  
21 flow to their canals. See Dodge at 79-80; see also Stevens v. Oakdale  
22 Irrigation District, 13 Cal.2d 343, 90 P.2d 58, 61 (1939) ("It is the  
23 general rule, probably subject to exceptions not here involved, that the  
24 producer of an artificial flow is for the most part under no obligation  
25 to lower claimants to continue to maintain it.")

A distinction also needs to be made between abandonment of a water

1 right as opposed to abandonment of the water itself. One may abandon  
2 the water itself while not simultaneously abandoning the right to divert  
3 from the water source or make second uses of that water once applied to  
4 the land. Instructive on this point is the case of Stevens v. Oakdale  
5 Irrigation Dist., supra. That case involved a factual situation  
6 somewhat like the one before the Court. Defendant, who owned tracts of  
7 land in two watersheds, appropriated water from one watershed and  
8 imported that water into a second. Id. at 59 P.2d 59. Runoff of water  
9 in the second watershed had run into another creek and had been utilized  
10 by plaintiff for 22 years. Id. Plaintiff argued that regardless of  
11 whether a lower claimant may compel continued importation of a foreign  
12 water supply, once such water has actually been conducted into the  
13 foreign watershed and drained into a natural water course therein, the  
14 further interception or recapture of the flow by the producer may  
15 constitute a right acquired by the lower claimant. Id. at 60. The  
16 court concluded even though specific portions of imported water could be  
17 abandoned, such a practice had no bearing on the water right itself. Id.  
18 at 62. Accordingly, the down stream user had no right to compel a like  
19 abandonment in the future or to control the upstream users utilization  
20 of that water. Id. The California court made this decision even in  
21 light of the harsh implications that might result due to the downstream  
22 users development of a water conveyance system that relied on the  
23 continued use of the abandoned water. Id. The competing injustice  
24 would have harshly impacted an irrigation district that had expended  
25 considerable money in developing storage and diversion facilities, much  
like the U.S. in the present action. Id.

1           The Court holds that in allowing the water suppliers to use this  
2 water before it eventually runs into the Yakima River, the U.S. is  
3 making a distribution decision as to water in which it still retains  
4 rights. DOE v. BOR at 771-772; Oakdale Irr. Dist, supra. However, this  
5 does not mean that the U.S. can charge the amounts captured by the water  
6 suppliers against their limiting agreements. No evidence was presented  
7 by any party persuading the Court that Project return flows were  
8 considered and appropriations thereto limited at the time of the  
9 agreement's making. Rights and uses of those waters are governed by  
10 case law rather than the agreement which was made by the parties.

11           Conversely, the water suppliers have no right nor should have any  
12 expectation that this distribution decision continue as it historically  
13 has. See Dodge at 79-80; DOE v. BOR at 772 (No rights to Project return  
14 flow can be granted by the DOE because doing so would undermine the  
15 distribution decisions of the BOR); Oakdale Irr. Dist., supra; United  
16 States v. Haga, 276 F. 41, 43 (Dist. Id., 1921)("[O]ne who by the  
17 expenditure of money and labor diverts appropriable water from a stream,  
18 and thus makes it available for fruitful purposes, is entitled to its  
19 exclusive control..."). The U.S. retains the right to make a different  
20 distribution decision by way of modification in the KRD delivery system  
21 or some other system change in an effort to make a second or further use  
22 of the water on Project lands within the Yakima Basin. DOE v. BOR,  
23 supra; Morton v. Isreal, supra; Ide v. U.S., 263 U.S. 497, 506 (1924).

## 24           2.    Non-Project Return Flows

25           The Affidavit of Richard Bain indicates that return flows emanate  
from sources other than the Project and have been used since before the

1 institution of the Project. As discussed above and as a practical  
2 matter, the United States is in a unique position as far as capture of  
3 its return flows is concerned because of the U.S.'s need for the water  
4 downstream to satisfy contractual requirements. DOE v. BOR; Ide; see  
5 also Jensen v. Department of Ecology, 102 Wn.2d 109, 114-15, 685 P.2d  
6 1068 (1984). Based on the decisions in Dodge and Elgin, supra, this  
7 Court would not have any basis for granting any specific right in non-  
8 Project return flow. The withdrawal statute, RCW 90.40.030, would not  
9 apply to such waters because they are only subject to right of capture  
10 and not appropriation. Accordingly, the water suppliers may continue to  
11 use such waters subject only to their availability.

12 IV. CONCLUSION

13 The Court finds that the limiting agreements restricted EWC, WSIC  
14 and CID in diverting natural flow from the Yakima River and its  
15 tributaries to the amount contained within the agreements. The issues  
16 decided by this Court were not specifically resolved in the previous  
17 West Side litigation. However, the limiting agreements did not consider  
18 utilization of return flow. Accordingly, although the BOR retains  
19 rights in its Project waters and may decide to recapture them, it may  
20 not charge such amounts against the limits set forth in the limiting  
21 agreements. Other foreign or imported return flows are available to the  
22 first entity capable of capturing them.

23 Dated this 15<sup>th</sup> day of April, 1994.

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Judge Walter Stauffacher