

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

SEP 11 PM 2 10

IN AND FOR YAKIMA COUNTY

KIM M. EATON, YAKIMA COUNTY CLERK

1 IN THE MATTER OF THE DETERMINATION)
 2 OF THE RIGHTS TO THE USE OF THE)
 3 SURFACE WATERS OF THE YAKIMA RIVER)
 4 DRAINAGE BASIN, IN ACCORDANCE WITH)
 5 THE PROVISIONS OF CHAPTER 90.03,)
 6 REVISED CODE OF WASHINGTON,)
 7 STATE OF WASHINGTON,)
 8 DEPARTMENT OF ECOLOGY,)
 9
 10 Plaintiff,)
 11
 12 vs.)
 13
 14 JAMES J. ACQUAVELLA, et al.,)
 15
 16 Defendants.)

NO. 77-2-01484-5

MEMORANDUM OPINION RE:

D.O.E. MOTION FOR SUMMARY JUDGEMENT DISMISSING CLAIM NO. 1752; SUNNYSIDE DIVISION CROSS MOTION FOR SUMMARY JUDGMENT

17 The State of Washington Department of Ecology (D.O.E.) has filed a
 18 Motion for Summary Judgement Dismissing Claim No. 1752 and Finding
 19 Neither Sunnyside Division Nor the Board of Control Hold any Water
 20 Rights. The Yakama Nation joined the D.O.E. on the issue that the
 21 separate entities within the Sunnyside Division must prove their claims
 22 on an individual basis. In response, the Sunnyside Division Board of
 23 Control (B.O.C.) made a Cross Motion for Summary Judgment, requesting
 24 that the D.O.E. motion be denied and to confirm the B.O.C. unitary
 25 Division claim for it's entities and landowners.

26 The initial main thrust of the D.O.E. motion appears to be that the
 27 Board of Control, which filed Claim No. 1752, does not hold any water
 28 rights and is therefore not a proper party to this matter. On the other

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1 hand, the B.O.C. requests that the Court confirm it's unitary claim on
2 behalf of the Board, it's member entities and the landowners within the
3 Sunnyside Division.

4 First, we should look to the claim that D.O.E. requests be
5 dismissed. Initially, there is an original typed claim prepared by the
6 B.O.C. It asserts that the claimant is all of the irrigation districts
7 and towns within the Sunnyside Division. As to priority dates, it
8 incorporates the 15 other court claim numbers of the various entities
9 within the division and sets forth the claimed priority dates in them,
10 commencing with the Konework Ditch claim dating of 1878 and on up to the
11 present.

12 Attached to that is the Court Claim Form which was filled out to
13 provide the necessary information for a claim. The Entity was listed as
14 All Irrigation Districts and Towns, Sunnyside Division. The water
15 source was the Yakima River and its tributaries; Roza 50 cfs. Legal
16 Doctrine was given as Prior Appropriation, Riparian, Public Notice and
17 Contract. As to any Court Decree, the Civil 21, 1945 Consent Decree was
18 listed. Purpose of Use: Irrigation, power generation, domestic, stock
19 water. The acres irrigated were listed as 103,570 acres maximum. Acre
20 feet of water was listed at 2,882 cfs from January 1 to December 31
21 yearly for 2,001,659 acre feet per year. The diversion point was set
22 out and the verification forms of the Court Claim Forms were executed by
23 18 agents of all the districts and towns and other claimants within the
24 Division.

25 Attached to the Court Claim Form were numerous appendices.

1 Firstly, it sets out all of the appropriations and the various deeds and
2 contracts. It lists the United States appropriation of water and all of
3 the Reservoir applications and permits. There is a description of all
4 of the main laterals and ditches within the Division. There are 15
5 pages of legal descriptions of the lands within the Division, located in
6 Yakima and Benton Counties, plus a map of the Division delineating the
7 various districts and cities. There also is a description of the pump
8 plants within the Division. Thus, we see that the claim itself contains
9 most, if not all, of the necessary foundational elements of water rights
10 claims for the various entities within the Division, all of which
11 entities individually verified the claim. It should be noted that there
12 is only one diversion from the Yakima River to serve all of the entities
13 within the Division.

14 In connection with the one point of diversion for all of the
15 entities, there is a difference of opinion regarding the chapter 90.14
16 claim which was filed by the U.S. on behalf of those sharing the
17 diversion. The 90.14 Water Rights Claim (D.O.E. Appendix 10) recites,
18 as to the name of the claimant:

19 "The Unites States of America acting through the Bureau
20 of Reclamation on its own behalf and on the behalf of all
21 persons claiming water rights furnished through the
"headworks" (? unreadable) of the Sunnyside Canal."

22 The source of water is the Yakima River; quantity claimed is 1,316
23 cfs; annual quantity is 458,520 plus 40,056 flood waters for presently
24 used 498,576 A/F; acres claimed is 103,570 with 95,000 presently
25 irrigated; use is February through October; with first use listed as

1 April, 1880. In respect to the Legal Description of Lands on which the
2 Water is Used:

3
4 "(a) Lands within boundaries of following irrigation
5 districts: Benton, Grandview, Granger, Home, Outlook,
6 Prosser, Snipes Mountain, Sunnyside Valley, Zillah; (b) Lands
7 within cities of Grandview, Prosser, Sunnyside; (c) lands
8 served by Piety Flats Ditch Company (See Exhibit A); (d)
9 Molsee Tract (See Exhibit B); (e) lands served by Konework
10 Ditch Company (See Exhibit C); (f) Special Warren Act lands
11 (See Exhibit D). County: Yakima and Benton."

12 The noted exhibits, A through D, contained the legal descriptions
13 of the particular lands referred to. In addition, Exhibit E recited the
14 flow rights, storage rights and annual quantity for the Division, a list
15 of the operating units in the Division and a map of the Division. Thus,
16 it is clear that the U.S. filed a single, unitary 90.14 claim on behalf
17 of the entire Division and a map of the Division, although naming the
18 entities with it.

19 Of some significance to the issue of the standing of the B.O.C. to
20 present this claim is the contract of May 31, 1945 between the U.S. and
21 the Sunnyside Irrigation District. (Appendix 3, Trull Affidavit,
22 1/31/94). (Parenthetically, it should be emphasized that the Court has
23 read all of each parties submitted appendices in their entirety, without
24 reference to any opinions or assumptions thereon by the respective
25 affiants and the Court has made it's own findings as to the impact of
each document.) The referenced contract was the one whereby the U.S.
transferred all of the delivery systems of the Sunnyside Division,
except the diversion dam and headworks, to the Board of Control. (Art.
6) The Board of Control was established as the operating agent for the

1 districts and other lands receiving water pursuant to Section 6 of the
2 Act of June 17, 1902 (32 Stat. 389, now codified as U.S.C.A. 491 and
3 498). (Art. 7&8) All of the districts and other entities within the
4 Division were provided representation on the B.O.C. (Art. 9). The Board
5 was given all powers necessary for operation and maintenance of the
6 works and delivery of water therefrom. (Art. 11). There are provisions
7 for the delivery to other lands of surplus water needs available by non-
8 payment of assessments as long as the surplus water can be beneficially
9 used. (Art. 23). Of particular note, the Board is compelled to carry
10 out all contracts of every kind affecting the delivery of water and must
11 fulfill all of the obligations of the U.S. in those contracts. (Art.
12 30). The Board is required to keep accurate records of the water supply
13 and the disposition of it (Art. 34). If any disputes arise over the
14 delivery of water to any party which cannot be settled, the dispute must
15 be referred to the Superintendent of the B.O.R. for resolution (Art.
16 39). All previous contracts with the U.S. related to the Division are
17 to remain in full force and effect. (Art. 46) Thus, we see that, in
18 addition to operation, maintenance and assessments, the Board is fully
19 substituted for the U.S. in the obligations of the U.S. for the
20 diversion and delivery of water within the Division. Appendices 4
21 through 9 to the Trull affidavit are January, 1945 contracts of six of
22 the irrigation districts between the U.S. and the districts which
23 specifically recognize the B.O.C. as the Operating Agent of the Division
24 in place of the United States.

25 The transfer of the responsibility for the actual diversion of all

1 of the water from the Yakima River for the entire division from the U.S.
2 to the Board of Control was finalized by an Amendatory Contract (App.
3 11, Trull Affidavit, 1-31-94) wherein the U.S. transferred to the B.O.C.
4 "--- the care, operation and maintenance of the Sunnyside Diversion Dam
5 and Headworks ---". This contract was dated June 26, 1959 and became
6 effective as of July 1, 1959 and placed upon the B.O.C. the obligation
7 of the operation of the diversion facilities to go with the previous
8 responsibility to convey and deliver the water.
9

10 The substitution of the B.O.C. in place of the U.S. for the
11 diversion and delivery of water, in existence and operation since 1945,
12 thus makes the B.O.C. a "successor in interest" as previously noted in
13 the Memorandum Opinion re: Threshold Issues, pages 4 - 7, May 12,
14 1992. See also U.S. vs. Tilley, 124 F.2d 850 (1942). Therefore, it is
15 abundantly clear that the Board of Control has full standing to present
16 the claim on behalf of all water users for and to whom the B.O.C.
17 operates the single diversion from the Yakima River and the conveyance
18 facilities for the delivery of the water to the entities for the lands
19 within the Sunnyside Division.

20 It is further noted (App. 16, Trull Aff, January 31, 1994) that the
21 various entities within the Division have, as of April and May, 1991,
22 specifically requested "--- Sunnyside Valley Irrigation District and its
23 employees including the Sunnyside Division Board of Control Manager and
24 other employees ---" to represent them herein. The language used by
25 each is as follows:

"Resolved, SVID shall, in Acquavella, represent, prepare and

1 present the water right claims of District, (City) (Company)
2 its water users, and water rights of land within or assessed
3 by District (City) (Company) in an aggregate 'Division Claim'
4 of all districts, cities, towns, water users and the water
5 rights of land within the Division to all be ultimately
6 included in one (1) Division judicial determination, decision
7 or decree and one (1) Washington State water right certificate
8 after Acquavella is finally concluded."

9 This resolution was enacted by the following irrigation districts,
10 all of which used the word "District" in the resolution: Benton,
11 Granger, Outlook, Grandview, Home, Prosser, Snipes Mountain, Sunnyside
12 Valley and Zillah. In addition, the following enacted the same
13 resolution, using the word "City" or "Company" in place of "District" as
14 appropriate: City of Grandview, City of Prosser, City of Sunnyside,
15 City of Zillah, Konework Ditch Company and Piety Flat Ditch Company.

16 Thus, we have each and every entity within the entire Division
17 specifically requesting that the S.V.I.D. and Board of Control present
18 a single, unified claim herein on their behalf. With all of these
19 factual matters before us, the D.O.E. agreed in oral argument that the
20 B.O.C. could present evidence on it's behalf or as an aggregate claim
21 under Claim No.1752 (Transcript, 3-10-94, pages 28-29). In it's Reply
22 brief, D.O.E. recognized "--- that a generic proof regarding the
23 diversion works commonly relied upon by all entities within the
24 Sunnyside Division would be of assistance to the claims of the
25 individual entities." Therefore, the Court must deny the D.O.E. Motion
for Summary Judgment.

While finally conceding the standing of the B.O.C., the greatest
portion of the D.O.E. briefing and oral argument went to the issue, or

1 issues, of the type and degree of proof that will be required to be
2 presented on behalf of each entity within the division. It asserts that
3 the water rights of each individual entity within the Division must, by
4 the production of factual history, be required to be proven as to the
5 priority dates of each water right claimed; whether the right is a
6 natural flow or project water right; the specific lands to which these
7 rights are appurtenant; the purpose of the use of the water; and the
8 legal basis for the claim. It argues that the presentation as proposed
9 by the B.O.C. would constitute a "merger of all rights" form of proof
10 that would result in an unlawful taking of each individual entities, and
11 their patrons, water rights, and that there is no evidence that the
12 landowners or entities have voluntarily transferred, relinquished or
13 abandoned their water rights. It calls to our attention other natural
14 flow water users within the Yakima Basin who may be affected as to the
15 priority dates which it asserts must be established by the B.O.C., as
16 well as some entities within the Division who were not signatories to
17 the 1945 Consent Decree.

18 In response, the B.O.C. posits that since 1891 to the present, the
19 water for the Division has been appropriated and diverted in a "single,
20 unitary, unsegregated, aggregate mass", with the U.S. diverting and
21 conveying the water from 1906 to 1945 and the B.O.C. from 1945 to
22 present. It asserts that it will present proof of the member entities
23 place of use, priority dates, irrigable acreage and instantaneous and
24 annual quantities of use. It explains that it will provide evidence of
25 all of the pre-1905 natural flow rights within the Division, so that

1 senior rights will be part of the proof.

2 While there are many evidentiary documents included in the
3 appendices to the respective memorandums and affidavits, the Court
4 clearly does not have sufficient information before it at this time to
5 make a definitive ruling on the respective assertions of the parties.
6 As the presentation proceeds at the evidentiary hearing, the Court may
7 be able at that time to specifically rule on some, if not all, of the
8 issues raised at present. It may possibly be necessary for further post
9 hearing briefing to be requested. Suffice it to say, the parties are
10 now aware of the respective positions of each other and can prepare
11 their presentations accordingly.

12 DATED this 11th day of May, 1994

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16 WALTER A. STAUFFACHER
17 Judge
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