

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR YAKIMA COUNTY FEB 10 1995

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

11 Plaintiff,

12 vs.

13 JAMES J. ACQUAVELLA, et al.,

14 Defendants.

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

Memorandum Opinion Re:
RCW 90.14 and Substantial
Compliance

15 I. INTRODUCTION

16 A number of claimants, particularly in Subbasins 2, 6, 8, 11,
17 excepted to the Referee's denial of their claim for an adjudicated water
18 right for failure to comply with RCW 90.14. RCW 90.14, as will be
19 discussed below, required all persons claiming the right to divert water
20 (except for permit or certificate holders) to file a statement of claim
21 with the Department of Ecology (DOE). Failure to do so constituted
22 relinquishment of any such rights. RCW 90.14.071. The claimants except
23 to the rigid application of this requirement to their claims in this
24 adjudication and rely on Department of Ecology v. Adsit, 103 Wn.2d 698,
25 694 P.2d 1065 (1985) and the doctrine of substantial compliance.
Claimants also assert that timely filed RCW 90.14 claims should be
subject to amendment in this adjudication by use of RCW 90.14.065.

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1 Although the Court has ruled on these matters in open court, to
2 expedite future exception hearings, the Court will reduce its rulings to
3 writing in this Memorandum Opinion.

4 II. OPINION

5 A. 90.14 and Substantial Compliance

6 Although numerous factual permutations exist as to application of
7 RCW 90.14, this Court is particularly concerned about resolving one
8 specific exception made by numerous claimants. Essentially, these
9 claimants assert they have "substantially complied" with the intent of
10 RCW 90.14 by filing a claim in this adjudication prior to the deadline
11 for filing such claims herein. According to the claimants, the ultimate
12 recipient of this filing was DOE. This argument also relies on an act
13 of the legislature which amended RCW 90.14 to provide a 34-day window
14 period between July 28, 1985 and midnight September 1, 1985 to allow
15 individuals to obtain a certification, under specific circumstances,
16 from the Pollution Control Hearings Board (PCHB) in satisfaction of the
17 requirements of RCW 90.14.041. RCW 90.14.043. The claimants thus
18 conclude, since DOE had the same information by way of filing in this
19 adjudication that they would obtain through this 1985 legislation, the
20 DOE was somehow on notice and either should have alerted affected
21 claimants or should now accept the adjudication filing as substantial
22 compliance with RCW 90.14. See also Adsit, supra. For the following
23 reasons, the Court finds this argument to be flawed.

24 1. Adsit

25 Claimants seeking substantial compliance with RCW 90.14 cite to DOE

1 v. Adsit, 103 Wn.2d 698 (1985). Adsit involved the adjudication of
2 Chumstick Creek, to which Sunitsch Creek is tributary, initiated in
3 1979, and the determination of two of the Circle C Ranch's asserted
4 water rights. That right was initially denied by the referee for
5 failure to comply with RCW 90.14, id. at 702, although Circle C had
6 filed an "application for a permit", rather than a 90.14 form, with the
7 DOE within the time period for filing the 90.14. Circle C appealed and
8 made several arguments, most of which are particularly relevant here;
9 estoppel, substantial compliance and application of certain
10 constitutional provisions.

11 a. **Estoppel**

12 Claimants cite to the Supreme Court's decision as to
13 substantial compliance for support. However, they fail to address the
14 estoppel section of the opinion, see Adsit at 703. A close reading of
15 the estoppel section indicates that claimants' argument here is more
16 like Circle C's estoppel argument than substantial compliance. The
17 Supreme Court's rationale and analysis in denying Circle C's argument
18 disposes of claimants' argument as framed above.

19 The facts and legal argument made by Circle C are remarkably
20 similar to the argument made by claimants in this adjudication. In
21 March, 1979, the referee, who is appointed by the Director of DOE but
22 works as an arm of the superior court, referred to the period for filing
23 claims as ending June 30, 1974. Id. at 703. Two months after the
24 referee made this reference, RCW 90.14.043 was enacted (but was later
25 amended as will be discussed below) and provided a 4-month extension for

1 filing certain claims. Circle C contended DOE or the referee should
2 have notified the ranch of the extension. Id. The Adsit court, in
3 answering that argument, determined DOE had no duty to publicize passage
4 of RCW 90.14.043 and the referee, as an officer of the superior court,
5 would have acted improperly to advise one party in the proceeding how to
6 improve its legal position to the detriment of others. Id.

7 In analyzing this section of the Adsit opinion, the Court fails to
8 understand how claimants in this adjudication could cite Adsit as
9 supporting their position rather than trying to distinguish it. The
10 facts are identical: Adsit involved an adjudication where the right was
11 denied by the referee for failure to produce a claim as required by RCW
12 90.14. The legal argument is similar: A member of DOE should have
13 alerted claimants of the opportunity to file during a statutory
14 extension of RCW 90.14's period for filing (although certain claimants
15 would go beyond even this in essentially arguing DOE should have filed
16 with the PCHB on the claimant's behalf).

17 If anything, the Adsit Court's rationale is even more appealing in
18 resolving the arguments of claimants in this adjudication. First, the
19 Supreme Court held DOE had no duty to make claimants in an adjudication
20 aware of the passage of RCW 90.14.043. Although the 1985 version
21 differed from the 1979 version before the Adsit court, the reality is
22 that claimants in this adjudication had even less to gain in being made
23 aware of the 1985 amendment. For example, the period of the filing
24 window was shorter-- 34 days as opposed to four months. The process was
25 more complex and further removed from DOE control, requiring a claimant

1 to petition the PCHB for a certification, which, if petitioner was
2 successful, the PCHB sent to DOE for recording. The right protected
3 through the 1985 process was far less valuable than what the 1979
4 extension allowed: the 1985 version carried with it RCW 90.14.044, which
5 specifically prohibited any right protected by the certification from
6 impairing any right existing prior to July 28, 1985 (hence a July 28,
7 1985 priority date; practically without value in the upper basin).

8 The Adsit rationale that DOE, during the course of a water right
9 adjudication, is not in charge of reviewing and advising unprepared
10 claimants also applies to this adjudication. To assume DOE consists of
11 just a few individuals, each with their hand in all aspects of water
12 administration, severely underestimates the size and function of that
13 agency. Given the size of the Water Resources program of the DOE, it
14 would be extremely burdensome to expect the left hand to always be in
15 contact with the right. Simply put, a claim under RCW 90.14 and a claim
16 brought pursuant to a RCW 90.03 adjudication are different and one does
17 not satisfy the requirements of another simply because an ultimate
18 recipient of these records is the DOE. Accordingly, the Court rules
19 that neither the Referee nor DOE is estopped from requiring claimants in
20 this adjudication to have filed RCW 90.14 claims in support of their
21 adjudication claims.

22 **b. Substantial Compliance**

23 Circle C ultimately succeeded in their argument that timely filing
24 the wrong form, with the right information to the right agency,
25 constituted substantial compliance with the requirements of the

1 pertinent statute. Adsit at 704. According to the Supreme Court,
2 although the form was incorrect,

3 "the substantive information the applicant supplied met the
4 legislative intent by providing adequate records for administration
5 of the state's waters and notifying the State that the water was
6 being put to beneficial use." Id.

7 This doctrine has been used by a number of claimants in this
8 adjudication, some more persuasively than others. The Court will now
9 explain its interpretation of that doctrine and how it will, generally
10 speaking, be applied in this case.

11 In response to the exception that filing a claim in this
12 adjudication substantially complies with the intent and purpose of RCW
13 90.14, this Court ruled that Adsit was not so broad. Transcript of
14 Proceedings, October 13, 1994, p. 10; see also Estoppel section above.
15 Claimants' argument failed to take into consideration that Circle C, in
16 filing the wrong form but within the required time frame, still
17 objectively manifested a specific intent to comply with the claims
18 registration statute; RCW 90.14. To file a claim in this adjudication
19 requires compliance with a totally different statutory scheme, RCW 90.03
20 et. seq., during a different time period. Claims in this adjudication
21 were not filed until at least 1981 due to resolution of the jurisdiction
22 issue, some 7 years after the date for filing claims pursuant to RCW
23 90.14. Accordingly, this ruling should be extended to preclude any
24 argument that an attempt to file in this adjudication was really a
25 specific effort to meet the requirements of RCW 90.14. The timing and
statutory schemes are too different.

1 It has also been argued that filing of the so-called "short form",
2 see 90.14.051 (a form supplied for documenting only minimal uses of
3 water such as stockwatering or irrigation of one-half acre) meets the
4 Adsit standard for substantial compliance in those instances where a
5 claim form to protect more expansive water uses would be required. The
6 Court disagrees. This argument, by itself, fails to account for
7 specific wording in Adsit. See, e.g., p. 704 ("the form used...
8 contained all the information required by the claims form"). More
9 importantly, it fails to meet the legislative intent of providing
10 adequate records for administration of the state's waters. See id.; see
11 also RCW 90.14.010 ("The purpose of this chapter is to provide adequate
12 records for efficient administration of the state's waters..."). The
13 Adsit court made clear that substantial compliance encompasses only
14 minor, technical variations from the established standard. This does
15 not mean that filing a short form, combined with other factors, could
16 not convince the Court of a bona fide effort to comply.

17 **c. Due Process, Takings and Equal Protection**

18 Claimants make rather casual efforts at due process, takings and
19 equal protection arguments based on the fact they would be denied
20 certain property rights by failing to comply with the RCW 90.14 claim
21 filing requirements. They cite no cases nor do they even argue how the
22 constitutional provisions apply. The Court will respond in kind. The
23 Court does not believe this statute, either in form or as applied, to be
24 at odds with the fifth or fourteenth amendments to the United States
25 Constitution. See Adsit, p. 706 ("where the water rights act applied to

1 all persons in the state claiming a right to water, as a matter of law
2 we hold the newspaper notice adequate"). At page 707, the Supreme Court
3 also summarizes as follows:

4 "Because the water right owner's own neglect causes the right to be
5 lost, we do not require compensation for the consequences of
6 neglect. The police power of the State, exercised to catalog water
rights and further their beneficial use, does not require
7 compensation for the waiver and relinquishment of unclaimed water
rights."

8 B. RCW 90.14.065

9 Certain claimants in Subbasin 8 assert that the referee should have
10 allowed and recognized an amendment to their RCW 90.14 claim filing
11 pursuant to RCW 90.14.065. Exceptions of Court Claim 2046, Gibsons and
12 Loukes. For the following reasons the Court rejects this argument.

13 The Court recognizes that some room for interpretation is necessary
14 in analyzing the face of an RCW 90.14 claim and such interpretations
15 have occurred during the course of the adjudication. See, e.g.,
16 Memorandum Opinion Re: Subbasin 6 dated February 3, 1995 (there the
17 Court interpreted a 90.14 claim to include stockwater as a purpose of
18 use even though the claim, on its face, did not so state but documents
19 attached to the claim supported such an inference). This authority is
20 necessary to allow the Court to decree a water right based on all the
21 evidence submitted during the course of a general adjudication. See RCW
22 90.03.110 et seq. However, the Court's authority to interpret
23 documents in an adjudication does not extend to the process set forth in
24 RCW 90.14.065 which is strictly within the authority of the Department
25 of Ecology. The statute makes DOE's authority clear: "Any person or

1 entity...may submit to the department of ecology for filing, an
2 amendment to such a statement of claim...". (Emphasis added). The
3 statute also states that:

4 "[t]he department shall accept any such submission and file the
5 same in the registry unless the department by written determination
6 concludes that the requirements of subsection (1), (2), or (3) of
7 this section have not been satisfied." RCW 90.14.065 (emphasis
8 added).

9 Additionally, aggrieved amendment seekers appeal to the PCHB, not
10 the Superior Court. Id.

11 Besides the separation of powers question created by claimant's
12 assertion, the Court also notes this approach would jeopardize the
13 expedient progress of this case. This it is extremely reluctant to do.

14 **III. CONCLUSION**

15 The Court will continue to evaluate RCW 90.14 claims and give them
16 an appropriate interpretation in conjunction with other evidence
17 submitted to support a claimed water right. The Court will utilize the
18 doctrine of substantial compliance, if appropriate from the evidence,
19 for minor or technical deficiencies in RCW 90.14 claims. However, the
20 Court has sought, by this opinion, to demonstrate that Adsit and
21 substantial compliance are not a carte blanche excuse allowing certain
22 claimants to avoid compliance with the law at the expense of others who
23 relied on its protection.

24 DATED this 10th day of February, 1995.

25 

Judge Walter A. Stauffacher