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FILED
MAR 8 1996

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

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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. ~~KIMM 8100~~ YAKIMA COUNTY CLERK

MEMORANDUM OPINION RE:
WARREN ACT CONTRACT ISSUES

On September 30, 1993, the Department of Ecology (D.O.E.) contacted the Major Claimants (M.C.) in this adjudication. It was stated "...it has come to my attention that several of the major claimants, in addition to Sunnyside and Yakima-Tieton, have contracts with the Bureau of Reclamation that do not have a corresponding certificate of water right. It is further my understanding that Sunnyside and Yakima-Tieton do not have certificates or the state returned their applications to the Bureau as "permits are not necessary as the waters were appropriated and used before our Water Code became effective June 15, 1917." (See, DOE 50 and YTID 02). However, for many of you, no applications were filed by the Bureau and the water was not used prior to the water code. This brings forth the question of what is the legal basis for claiming the water." (D.O.E. Appendix A.)

Memorandum Opinion Re:
Warren Act Contracts - 1

11,386

1 Subsequently, at the December, 1993 evidentiary hearing of the
2 claims of Yakima Valley Canal Company, the Court observed that it had
3 expected evidence on the question of the validity of the Warren Act
4 contract between Y.V.C.C. and the U.S., in light of the D.O.E. comments
5 about that matter. Counsel for Y.V.C.C., by letter, indicated that
6 briefing of the issue may be desired by the Court and indicated there
7 were numerous other Major Claimants who would be affected by the issue.
8 The letter requested the Court's direction.

9 Accordingly, at the January, 1994 monthly water day oversight
10 hearing, the Court requested briefing on two very specific and very
11 narrow issues, which the Court set out as follows:

12 Issue 1: Does an entity with a Warren Act or storage contract
13 with the U.S., but no state certificate nor a 90.14 claim on
14 file, have a water right on proof of beneficial use of water
supplied pursuant to the contract?

15 Issue 2: Does an entity with a Warren Act or storage contract
16 entered into with the U.S., subsequent to 1917, with no state
17 certificate but who has filed a 90.14 claim, have a water
right on proof of beneficial use of water supplied pursuant to
the contract?

18 Pursuant thereto, several of the Major Claimants filed briefs in
19 support of the validity of federal contract water rights without state
20 permits or certificates being acquired by the individual delivering
21 entities. The U.S. also filed a brief supporting the legality of Warren
22 Act water rights, together with appendices setting forth U.S. contracts,
23 applications to the state and documents reflecting correspondence
24 between the U.S. and D.O.E. with respect to filing requirements.

1
2 Shortly thereafter, and apparently in response thereto, the D.O.E.
3 filed an extensive and exhaustive brief, together with Appendices A
4 through Z. As a "short answer" to the Court's specific issues, the
5 D.O.E. basically set forth the permit/certification schemes under state
6 statutes, 90.03 and 90.14, and indicated: "Failure to comply with state
7 process results in no water right being acquired." (D.O.E. Brief, p.
8 3.) It indicated that "short answers" do not address the complicated
9 history of the Yakima Basin nor allow the Court to quantify the rights
10 therein. "Ecology would, therefore, frame the issues more narrowly to
11 assist the Court in understanding the various permutations that exist in
12 the Yakima Basin as a result of the changing historical facts and
13 changing law." (D.O.E. Brief, p. 3.)

14 The D.O.E. then set forth it's own issues, as follows:

15 (1) Does an analysis of the Warren Act change depending on
16 whether or not the contracting entity is an approved or
17 unapproved unit of the Reclamation Project?

18 (2) If the answers to question 1 above is yes, are the lands
19 served by the contracting entity an approved unit of the
20 Reclamation Project?

21 (3) What impact does the 1902 Reclamation Act or the Warren
22 Act have upon state law?

23 (4) What impact, if any, do the historical facts of the
24 Yakima Reclamation Project have in answering 1 through 3
25 above? (D.O.E. Brief, p. 3-4.)

 The remaining 73 pages of the D.O.E. Brief addressed these issues,
with a good deal of recitation of historical facts and the rhetorical
and academic issues based thereon, which, in oral argument, D.O.E.
explained was not meant to be adversarial, did not take a position on

1 whether the people do or do not have a water right and was for the
2 purpose of helping the Court to understand the legal issues.
3 (Transcript, June 9, 1994, pp. 85, 86.)
4

5 The Reply Brief's filed by the Major Claimants dealt primarily with
6 responding to the various assertions and theories posited by the D.O.E.
7 The Court will also reference those theories throughout this opinion.

8 Initially, there are certain uncontroverted facts that must be
9 recognized in considering the issues raised. Irrigation of some lands
10 in the Yakima Basin commenced well before the turn of the century, and
11 Washington became a state in 1889. June 17, 1902, Congress passed the
12 Reclamation Act, (43 U.S.C. 372 et seq.), and the U.S. began assessing
13 the arid lands of the west to determine the feasibility of making them
14 productive by constructing massive water storage and delivery systems to
15 provide water to those lands. Some previous attempts by private
16 entities in the Yakima Basin were unsuccessful. (D.O.E. Brief, pp. 5-6.)

17 As noted in the U.G.I.D. Reply Brief, page 11 "...in order for the
18 State to receive the benefits of the Federal reclamation act, it was
19 necessary for the State legislature to enact irrigation laws acceptable
20 to the United States Reclamation Service." U.S. vs Anderson, 109 F.
21 Supp. 755, 759 (1953). Consequently, the Washington Legislature, in
22 order to accomplish that purpose, passed Laws of 1905, Chapter 88, Secs
23 1 - 9. The first eight sections thereof dealt with the substantive
24 parts of the act and section 9 thereof indicates "an emergency exists
25 and this act shall take effect immediately." The cooperative effort of
the U.S. and the State is evidenced by the fact that the act passed the

1 House on February 28, 1905; the Senate on March 1, 1905; and was signed
2 into law by the Governor on March 4, 1905, a time period of 5 days. On
3 May 10, 1905, the State received from the U.S. the notice of withdrawal
4 of the unappropriated waters of the Basin pursuant to section 3 of the
5 act. It is well established that the withdrawal was continued and
6 remained in effect until 1951. Clearly, this was a combined effort by
7 the State and the U.S. to initiate the Yakima Project.

8 The 1905 Act has been codified as R.C.W. 90.40.010-080. In 1919,
9 section 7 of the Act (90.40.070) had some language added that is not
10 pertinent to the issues herein. However, Laws of 1929, Chapter 95, Sec.
11 1 made substantive changes to section 4 of the Act (90.40.040). The
12 original wording stated "...secretary of the interior...may appropriate,
13 in behalf of the United States, so much of the unappropriated waters of
14 the state as may be required for the project...". To this language the
15 following was added in 1929: "...or projects, for which water has been
16 withdrawn or reserved under R.C.W. 90.40.030, including any and all
17 divisions thereof, theretofore constructed, in whole or in part, by the
18 United States or proposed to be thereafter constructed by the United
19 States..." (Emphasis added) Unquestionably, this was state recognition
20 of the on-going development and expansion of the Yakima Project.

21 The second change to section 4 of the Act is equally instructive.
22 The original wording provided that the appropriation was to be made in
23 the same manner and to the same extent as if made by a private person,
24 followed by this language which was stricken. "...except as to the time
25 for the initiation, prosecution and completion of the necessary works

1 for the utilization of the waters so appropriated; which time shall be
2 controlled by the provisions of section 3 of this act." In place of
3 this stricken language, the following was substituted "...except that
4 the date of priority as to all rights under such appropriation in behalf
5 of the United States shall relate back to the date of first withdrawal
6 or reservation of the waters so appropriated, and in case of filings on
7 water previously withdrawn under R.C.W. 90.40.030, no payment of fees
8 will be required." (Emphasis added) Here, the state was specifically
9 providing, under state law, for the unity of the entire Yakima Project
10 as it had theretofore been developed and would be further developed in
11 the future. It is interesting to note that the original act, in the
12 same section 4, provided "Such appropriation by or on behalf of the
13 United States shall inure to the United States, and its successors in
14 interest, in the same manner and to the same extent as though said
15 appropriation has been made by a private person, corporation or
16 association," (Emphasis added.) There has been no further change to
17 the 1905 act since the 1929 changes above referenced. More about this
18 1905 act later.

19 Immediately subsequent to the passage of the Act and the May 10,
20 1905 withdrawal, the U.S. had to determine the quantities of water of
21 each present diverter from the Yakima River and its tributaries that was
22 being diverted and beneficially used at that time. The U.S. and the
23 diverters determined what could be agreed to and limited, so that
24 storage and irrigation works could be constructed to store and
25 distribute the surplus waters of the flood season. To that end, the

1 U.S. entered into "limiting agreements" with the then present diverters
2 from the river system, 53 of which agreements (copies thereof) have been
3 filed with the Court. The agreements were made in 1905 and 1906. The
4 validity of those agreements has been previously addressed. With the
5 agreements in hand, the U.S. proceeded with the Yakima River Project.

6 Bumping Dam was constructed in 1909-1910; Kachess Dam was
7 constructed in 1910-1912; Clear Creek Dam was constructed in 1914; and
8 Keechelus Dam was constructed in 1913-1917. Thus, four of the present
9 six dams were completed by the time of the passage of the 1917 Water
10 Code (codified as R.C.W. 90.03). The construction of Rimrock Dam was
11 also commenced in 1917. It is abundantly clear that the Yakima Project
12 was well known to the state at that time.

13 Congress passed the Warren Act in 1911, two years after
14 construction had begun in the Yakima Project. (43 U.S.C. 523-525.) The
15 pertinent part of Section 1 of the Warren Act (§523) reads as follows:
16

17 "Whenever in carrying out the provisions of the reclamation
18 law, storage or carrying capacity has been or may be provided
19 in excess of the requirements of the lands to be irrigated
20 under any project, the Secretary of the Interior, preserving
21 a first right to lands and entrymen under the project, is
22 hereby authorized, upon such terms as he may determine to be
23 just and equitable, to contract for the impounding, storage,
24 and carriage of water to an extent not exceeding such excess
25 capacity with irrigation systems operating under section 641
of this title, and individuals, corporations, associations,
and irrigation districts organized for or engaged in
furnishing or in distributing water for irrigation. Water so
impounded, stored, or carried under any such contract shall be
for the purpose of distribution to individual water users by
the party with whom the contract is made: Provided, however,
That the water so impounded, stored, or carried shall not be
used otherwise than as prescribed by law as to lands held in
private ownership within Government reclamation projects."
(Emphasis added.)

1 The other section of Warren Act applicable hereto, Section 2,
2 (\$524) provides:

3 "In carrying out the provisions of said reclamation Act and
4 Acts amendatory thereof and supplementary thereto, the
5 Secretary of the Interior is authorized, upon such terms as
6 may be agreed upon, to cooperate with irrigation districts,
7 water users' associations, corporations, entrymen or water
8 users for the construction or use of such reservoirs, canals,
9 or ditches as may be advantageously used by the Government and
10 irrigation districts, water users' associations, corporations,
11 entrymen or water users for impounding, delivering and
12 carrying water for irrigation purposes: Provided, That the
13 title to and management of the works so constructed shall be
14 subject to the provisions of section 498 of this title:
15 Provided further, that water shall not be furnished from any
16 such reservoir or delivered through any such canal or ditch to
17 any one landowner in excess of an amount sufficient to
18 irrigate one hundred and sixty acres: Provided, That nothing
19 contained in sections 523 to 525 of this title shall be held
20 or construed as enlarging or attempting to enlarge the right
21 of the United States, under existing law, to control the
22 waters of any stream in any State." (Emphasis added.)

23 Thus, we see that the U.S. was authorized to enter into a second
24 grouping of contracts pertaining to the distribution of the waters of
25 the Yakima River Basin. As previously noted, the first group of
contracts were those where the U.S. and approximately 95% of the
entities appropriating or attempting to appropriate water within the
Basin contractually agreed that such entities would limit their
appropriations to the amounts then being beneficially used, the so-
called "limiting agreements". With the various Reclamation projects
proceeding throughout the West, by 1911 it became necessary to provide
for the diversions of water to the expanding lands coming under
productive cultivation. At the time of the passage of the Warren Act in
1911, Bumping Dam had already been completed and Kachess Dam was

1 approaching completion, clearly making additional water available later
2 into the irrigation season within the Yakima Basin.

3 Pursuant to the Warren Act, the U.S. and some of the various
4 entities within the Yakima Basin began to contract for the diversion of
5 water over and above the amounts specified in the limiting agreements,
6 which water was then applied to beneficial use to expanded lands served
7 by the entities. The existence of these contracts appears to have been
8 well known by the state. The Laws of 1889-90 established the state
9 statutory regulation of Irrigation Districts Generally, now codified in
10 R.C.W. Chapter 87.03. In 1915, two years prior to the 1917 Water Code,
11 that statute, now R.C.W. 87.03.115, was amended by Laws of 1915, Chapter
12 179, Section 4 to add this exact language to the state law:

13 "Provided, that all water, the right of the use of which is
14 acquired by the district under any contract with the United
15 States shall be distributed and appropriated by the district
16 in accordance with the acts of congress, and rules and
17 regulations of the secretary of the interior until full
reimbursement has been made to the United States, and in
accordance with the provisions of said contract in relation
thereto." (Emphasis added.)

18 The passage of this act, in 1915, makes it readily apparent that
19 the state was clearly cognizant of the ongoing proceedings and
20 development of the Yakima Project. Indeed, the specific interpretation
21 of this language has been succinctly set forth by our Supreme Court, as
22 follows:

23 "We also find it highly significant that under Washington's
24 statutes the decisions regarding distribution of water within
a federal irrigation project do not belong to the State.
25 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

1 districts. These decisions are to be made according to
2 federal laws, federal regulations and the contracts between
3 the irrigation districts and the federal government." (D.O.E.
4 vs B.O.R. 118 Wn.2d 761, 771-72) (Emphasis added). Footnote
5 7, p773 - "The Department counters that federal law generally
6 must give way to state law regarding distribution of water in
federal irrigation projects. (Cites) These authorities,
however, would seem to have no applicability here, where the
state law expressly yields to federal provisions. (Emphasis
added.)

7 This 1915 Act, together with the 1905 Act, clearly establishes that
8 the Yakima River Basin Project, as provided by state law, was to be and
9 ever since has been distinctly a federal project. There can be no
10 question that the state, as of 1915, expressly delegated the
11 distribution and management of all of the unappropriated water resources
12 withdrawn by the U.S. in 1905 within the Yakima Basin to the federal
13 government.

14 The D.O.E. has categorized the two Warren Act provisions noted into
15 three separate types of contracts. (D.O.E. Brief, p.21). As
16 characterized by D.O.E., these categories are:

- 17 Category 1: Contracts entered into by the B.O.R. for excess
18 water (Section 1);
19 Category 2: Contracts entered into by the B.O.R. that allowed
20 approved units of the project to expedite the
21 building of their project by funding the
22 construction of the works as a credit against the
23 construction charges (Section 2): and,
24 Category 3: Contracts entered into by the B.O.R. that allowed
25 private interests outside of the approved project
to help pay for the expansion of storage
(Section 2).

23 In arriving at this categorization, the D.O.E. relies considerably
24 on the Congressional Record of Reports and debate preceding the passage
25 of the act. D.O.E. Appendix G. contains a Report on the initial bill by

1 Senator Warren dated March 23, 1910. There are also included three
2 House reports: There follows 40 pages of Congressional colloquy, 34 in
3 the Senate and 6 in the House. A Conference Report was issued by the
4 committee of conference between the House and Senate on February 15,
5 1911. The act was then passed and became law on February 21, 1911. It
6 has not been amended since that date. As previously noted, the only
7 storage in the Yakima Basin that had been completed at the time of the
8 passage of the Act was Bumping Dam, completed in 1910. In addition to
9 the three categories as set forth, the D.O.E. also recognized that the
10 Warren Act allowed the Bureau of Reclamation (B.O.R.) to contract with
11 "water purveyors" rather than only individuals and eliminated the
12 residency requirements, as contained in the Reclamation Act of 1902.
13 (D.O.E. Brief, p. 21.)

14 What the Court feels is more instructive are the actions of the
15 U.S. officials, following the passage of the Act, as to the application
16 of the act to the Yakima Project. Under the date of July 5, 1912, First
17 Assistant Secretary of the Interior, Samuel Adams, wrote a letter to the
18 Director of the Reclamation Service concerning a proposed contract
19 between the U.S. and the Kittitas Reclamation District. (D.O.E. App. h)
20 Therein, Mr. Adams indicated that "...the question has arisen whether
21 the leveling of all priorities attempted by Article 3 can be legally
22 effected." "...it seems desirable to so recast the Article as to give
23 legal effect to such a plan so far as it is possible." (Emphasis
24 added.) This appears to be the first indication by the U.S. that the
25 Yakima River Basin may be treated as a unitary watershed project.

1
2 Following that we find a letter from E.W. Burr, U.S. District
3 Counsel for the U.S. Reclamation District, written May 4, 1914 to the
4 Supervising Engineer in North Yakima, concerning possible contacts with
5 Lombard-Horsley and Union Gap interests and also W.O. Bradbury.
6 Therein, Counsel Burr states: "I believe that the tendency will be,
7 since their lands are not within the lines of any approved units of the
8 project, to deem the water to be delivered under any such contract
9 excess water subject to priority in favor of the Government. I think I
10 reflect your view in saying that it is my belief that a first section
11 contract would be inequitable. (Emphasis added - D.O.E. App. N.) It
12 should be noted that prior to this letter, the first contract had been
13 entered into between the U.S. and the Kittitas Reclamation District on
14 January 18, 1913, and was written by the U.S. under the second section
15 of the Act, "leveling the priorities". Also in 1914, discussions were
16 held with respect to the Snipes Mountains, Sunnyside (Benton Extension)
17 and Outlook Irrigation District, all of which were decided to come under
18 the second section of the Act. (D.O.E. App. K, page 2.) At this
19 juncture, it is well to keep in mind that in 1915, our state added the
20 language to the state law indicating that decisions concerning water
21 rights under federal contracts are to be made according to federal law.
22 See pages 9-10 herein, and R.C.W. 87.03.115.

23 With respect to the above-mentioned W.O. Bradbury, an individual,
24 he continued to apply to obtain a contract with the U.S. for water. The
25 proposed contract was explained by District Counsel E.W. Burr in a
letter to the Chief Counsel under date of March 27, 1916. (D.O.E. App.

1 O.) Therein, Mr. Burr explained that Mr. Bradbury was not under any
2 unit of the Yakima Project "...if the word "project" be restricted to
3 those lands for which the United States does more for the land owners
4 than provide stored water. It is, of course, within the project within
5 the broad sense that all lands within the Yakima Valley which buy water
6 from the United States may be deemed to be within the Yakima project
7 since their storage rights are obtained pursuant to the expenditure of
8 reclamation moneys and the acquisition of a water right for the Yakima
9 project under the withdrawal provided for by the state statutes."

10 (Emphasis added.) To explain further, Mr. Burr indicated that while
11 these "projects", such as this individual contract and the contract with
12 the Union Gap Irrigation District are not ordinary federal reclamation
13 "projects" they "...are nevertheless projects which are more
14 advantageous to the United States in that they render more feasible the
15 carrying out of the reclamation idea of creating homes...". (Emphasis
16 his.) Thus we see the U.S. governmental philosophy as it pertains to
17 the Yakima Basin.

18 This philosophy is further exemplified by a later letter from
19 District Counsel Burr to the Chief Counsel of the U.S. Reclamation
20 Service under date of December 9, 1916. (D.O.E. App. K.) This
21 concerned proposed sales of Warren Act water to the Naches-Selah
22 Irrigation District and the Yakima Valley Canal Company, specifically
23 that such sales should be under Section 2 of the Warren Act. (D.O.E.
24 categories 2 and 3.) "...contracts with irrigation districts in the
25 Yakima Valley has been the subject of careful consideration with regard

1 to practically all of the Warren Act contracts already made. The first
2 contract was that with the Kittitas Reclamation District dated January
3 18, 1913... The view was then presented and overruled that only the
4 first section of the Warren Act was legal or applicable to the
5 situation." "...the same question was gone over...with regard to the
6 Snipes Mountain, Sunnyside (Benton Extension) and Outlook Irrigation
7 Districts and again the decision was reached to adopt the second, rather
8 than the first, section of this act." "The same question came up
9 similarly and was decided in the same way when the Union Gap Irrigation
10 District bought water under precisely the same circumstances as those
11 now being considered, namely, the securing of a supply supplemental to
12 the district's long pre-existing rights." (page 2.)

13 "...the contract for the sale of Warren Act water has been
14 standardized to a large extent and a clause has been incorporated in
15 some seven contracts with irrigation districts substantially as follows:
16

17 "It is hereby agreed that, so far as the same may be legally
18 possible, the portions of the said Yakima Project known as the
19 Sunnyside and Tieton Units, and such other units of said
20 projects as may hereafter be constructed shall be on equal
21 footing with priority among themselves with the district,
22 insofar as the supply of water...is concerned; and the lands
23 of all other irrigation districts, water users associations,
24 corporations, entrymen or water users with whom the United
25 States may hereafter contract...and that all such contracts
hereafter made shall contain a similar declaration with
regards to priority;...In case of shortage of water in a year
of unusually low runoff, such as to make it impossible to
supply fully all of the lands in this paragraph referred to,
each said unit and each said contractor shall be entitled to
a supply of water diminished pro rata... The pro rata share
herein provided for shall be determined by the ratio of water
supply available for all portions of the Yakima project, and
for all parties making contracts of tenor similar to this
under the Reclamation law involving the waters of the Yakima

1 Basin, to the total water supply fixed and stipulated for said
2 units and parties. Delivery of such pro rata share shall be
3 received by the district in full satisfaction of the quantity
4 of water herein contracted for on behalf of the district for
5 each irrigation season. Nothing in this article contained,
however, shall be deemed to affect the priority of rights
which the district may have had to the use of water prior to
the execution of this agreement..." (pp. 3-4) (Emphasis added.)

6 The letter continues: "The plan has been to treat all of the
7 various portions of the Yakima Project, considered in its large sense,
8 alike in the matter of priorities, and also with regard to the
9 composition of the water as between the natural flow element, which is
10 free, and the storage element which necessitates reimbursement." (p.6)
11 "...both the engineers and the lawyers of the Service thus far have
12 adhered strictly to the sale of a combined natural flow and storage in
13 each water supply contracted for." (p.7). With respect to the price of
14 Warren Act water it is noted: "Much of the development of the Yakima
15 Valley will probably be under private enterprise. The Government as
16 appropriators of all the water in the river unappropriated in 1905 might
17 well stand in the position of a trustee for the entire valley,
18 announcing to all that the storage costs will not only be equitably but
19 equally apportioned among the purchasers, and thus encourage those who
20 are able to help themselves instead of relying on the United States for
21 everything and make use of the water supply available upon terms to
22 all." (p.11) (Emphasis added.)

23 Counsel for the U.S. were not alone in their concerns with respect
24 to the Yakima Project. A few days subsequent to the December 9, 1916
25 letter between counsel, Supervising Engineer Charles H. Swigart, under

1 date of December 14, 1916, wrote to A.P. Davis, Chief Engineer and
2 Director, U.S. Reclamation Service, Washington, D.C. expressing the U.S.
3 engineers viewpoints concerning the Yakima Project. (D.O.E. App. P.)
4 The position was expressed as follows: "You will probably remember that
5 after a great deal of study and thought given to the matter by a number
6 of engineers...it was decided that the entire Yakima Project should be
7 considered as a whole with the United States Reclamation Service as the
8 original appropriator of water for the entire project, in order that a
9 full water right could be furnished for all the lands of the project.
10 This original appropriation was made under the act of 1905, under which
11 act all of the unappropriated waters in the Yakima River and its
12 tributaries were withdrawn for the benefit of the United States
13 Reclamation Service for use on lands which were to be furnished a water
14 right through its operations. ...This is the principle on which the
15 policy of the Reclamation Service in regard to the water rights of the
16 project was based. Therefore all sales of water under the Warren Act
17 were made under the second section thereof, thus giving all parts of the
18 project a full water right. ...your attention is especially called to
19 the report of the Board of Engineers made to the Reclamation Commission
20 under date of February 27th, 1915, which, if I mistake not, was approved
21 by the Secretary of the Interior as the policy of the Reclamation
22 Service in regard to the water rights of the Yakima Project, the sale of
23 water under the Warren Act, and the fixing of the cost of a water right
24 under the storage system of the project. ...A reversal of this policy
25 at this time would be disastrous from many standpoints...it would

1 entirely unsettle the water right matters of the Valley. ...I
2 recommend...that no change be made in the principle fixed by the Board
3 of Engineers in the report of June 4th, 1912, and the report of February
4 27th, 1915." (Emphasis added.)

5 Thus, we see that the U.S. counsel and the U.S. engineers were
6 totally in accord, as was the state pursuant to the above-referenced
7 1915 amendment of R.C.W. 87.03.115, as to the methods to be employed in
8 the distribution of the waters of the Yakima River Basin as of 1915-
9 1916. This is further buttressed by a letter sent by the State
10 Supervisor of Hydraulics to the Secretary of the Interior on December
11 10th, 1928. (D.O.E. App. R.) It states "We have had conferences with
12 the Project Manager and the District Counsel and it appears that with a
13 slight amendment to our state law, it will be practicable for the United
14 States to file applications for state permits covering the divisions of
15 the Yakima Project, which were not initiated prior to the enactment of
16 the State Water Code in 1917. Those applications will set out the
17 requirements for completing the Yakima Project and when accepted will
18 fully protect the United States as to its water requirements for that
19 purpose." The "slight amendments" to the state law were those that were
20 enacted by the state in 1929 as the amendments to R.C.W. 90.40.040 that
21 have been previously alluded to herein, (pp. 5-6), which recognized the
22 continuing development of the project "or projects" and established the
23 same date of priority for all of the water rights under the "first
24 withdrawal or reservation of the water so appropriated." This was
25 clearly stated acquiescence in the contract language of the various U.S.

1 contracts concerning the "equal footing with priority", sharing pro rata
2 among the contractees and acknowledgement of the "total water supply
3 fixed and stipulated for said units and parties".
4

5 With this historical perspective in mind, we now turn to the
6 inquiries raised by the D.O.E. as to the contracts. First, let us
7 address the four questions, previously referenced herein, that the
8 D.O.E. used to re-frame the issues. (D.O.E. Brief, p. 3-4.) The brief
9 answers at this juncture will be expanded upon hereinafter as
10 appropriate. Question No. 1. - "Does an analysis of the Warren Act
11 change depending on whether or not the contracting entity is an approved
12 or unapproved unit of the Reclamation Project?" No-all of the contracts
13 were drawn and entered into by the U.S. pursuant to Section 2 of the
14 Warren Act with various "irrigation districts, water users associations,
15 corporations, (many of which are named herein) entrymen or water users,
16 (individuals like W.O. Bradbury) for impounding, (storage) delivering,
17 (Bradbury) and carrying water for irrigation purposes." (43.U.S.C.524)
18 Question No. 2." If the answer to question 1 above is yes, are the
19 lands served by the contracting entity an approved unit of the
20 Reclamation Project?" The answer to Question 1 was "No". Question No.
21 3 - "What impact does the 1902 Reclamation Act or the Warren Act have
22 upon state law?" The answer is "basically none," as the 1905 act, the
23 1915 act, the 1917 act (more on this later), and the 1929 act all acted
24 to place control with the U.S. Question No. 4: "What impact, if any, do
25 the historical facts of the Yakima Reclamation Project have in answering
question 1 through 3 above?" The historical facts are the basis and the

1 foundation to which the law applies to form the Yakima Basin Project as
2 it is now and has been for approximately eighty years. "Where a
3 contract exists which settles water rights, due consideration must be
4 given to such contract, lest the terms thereof be impaired by the
5 application of general laws as if no such contract existed." Madison vs
6 McNeal, 171 Wn. 669, 680.

7
8 The initial contention of the D.O.E. is that all appropriators of
9 state water, including those pursuant to a reclamation project, must
10 comply with state law. (D.O.E. Memo. p.2.) The State Acts of 1905,
11 1915 and 1929 have already been referenced herein. Also see D.O.E. vs
12 B.O.R., 118 Wn.2d 761, 771. The 1917 Act will be addressed hereafter.

13 D.O.E.'s first question dealt with "approved or unapproved unit of
14 the Reclamation Project." Attention is directed to 43 U.S.C. §413
15 reading as follows:

16 "After June 25, 1910, no irrigation project contemplated by
17 the Act of June 17, 1902, shall be begun unless and until the
18 same have been recommended by the Secretary of the Interior
19 and approved by the direct order of the President of the
20 United States." June 25, 1910, 36 Stat. 386.

21 This reference to "irrigation project" was later expanded, however
22 by 43 U.S.C. §414 (38 Stat. 690) on August 13, 1914 reading in part re
23 funding:

24 "...be submitted to Congress estimates...for carrying out any
25 or all of the purposes authorized by the reclamation law,
including the extension and completion of existing projects
and units thereof..."

Also, we find 43 U.S.C. §412 (43 Stat. 402), December 5, 1924,
making reference to "... no new project or new division of a project

1 shall be approved..." (Emphasis added to each.)

2
3 Thus, we find Congressional recognition of "projects", "divisions"
4 of projects and "units" of projects, without specific definition of what
5 constitutes each of them. It certainly seems clear that major portions
6 of a "project", necessitating large expenditures from the reclamation
7 fund, would have to be approved by the President. On the other hand, it
8 would appear to be overly burdensome to require Presidential approval
9 for each little irrigation district, canal company or individual who
10 contracts for delivery of water with the Bureau of Reclamation whether
11 within or without a designated "unit." It should be remembered that
12 after the U.S. withdrawal of all unappropriated water on May 10, 1905,
13 some 50-odd "limiting agreements" were entered into by these small
14 entities with the U.S., who thereafter maintained their diversions
15 pursuant to those contracts.

16 With respect to the Yakima Project, "...a Board of Army
17 Engineers...recommended that Sunnyside and Tieton diversions be
18 continued as primary projects, and Benton, Kittitas, and Wapato
19 divisions be developed into a general system of storage reservoirs for
20 the Yakima Valley. The recommendations of the Board were approved by
21 the President on January 5, 1911. Kennewick Highlands was...approved by
22 the President on March 7, 1931. Roza divisions was...approved by the
23 President on November 6, 1935." (D.O.E. App. C.) Thus, all of the
24 "divisions" or "units" of the "Yakima Project" have received
25 Presidential approval, leaving only adjacent small peripheral entities
receiving water through the B.O.R. without such specific approval.

1 This situation appears to have been rectified by the Reclamation
2 Reform Act of 1982, October 12, 1982, 96 Stat. 1263, codified as 43
3 U.S.C. §390aa to 390xx. The pertinent parts are as follows:

4 §390aa - "This subchapter shall amend and supplement the Act
5 of June 17, 1902, and acts supplementary thereto and
6 amendatory thereof, hereinafter referred to as Federal
Reclamation law."

7 §390bb - "As used in this subchapter:

8 (1) The term "contract" means any repayment or water service
9 contract between the United States and a district providing
10 for the payment of construction charges to the United States
11 including normal operation, maintenance and replacement costs
pursuant to Federal reclamation law.

12 (2) The term "district" means any individual or any legal
13 entity established under State law which has entered into a
14 contract or is eligible to contract with the Secretary for
15 irrigation water.

16 (4) The term "individual" means any natural person, including
17 his or her spouse and including other dependents thereof
18 within the meaning of the Internal Revenue Code of 1954.

19 (5) The term "irrigation water" means water available for
20 agricultural purposes from the operation of reclamation
21 project facilities pursuant to a contract with the Secretary.

22 (8) The term "project" means any reclamation or irrigation
23 project, including incidental features thereof, authorized by
24 Federal reclamation law, or constructed by the United States
25 pursuant to such law, or in connection with which there is a
repayment or water service contract executed by the United
States pursuant to such law, or any project constructed by the
Secretary through the Bureau of Reclamation for the
reclamation of lands.

(11) The term "Secretary" means the Secretary of the
Interior." (Emphasis added.)

Following these definitions, the subchapter deals with construction
costs, funding matters, etc and provides that those provisions apply to
any district entering into or amending any contracts subsequent to
October 12, 1982. However, the final section of the subchapter is
applicable in the matter sub judice. It reads as follows:

§390xx - "The provisions of any contract entered into prior to
October 1, 1981, by the Secretary with a district, which

1 define project or nonproject water, or describes the delivery
2 of water through nonproject facilities or nonproject water
3 through project facilities to lands within the district are
4 hereby authorized and validated on the part of the United
5 States." (Emphasis added.)

6 Here we have any repayment or water service contract to any
7 individual or legal entity for irrigation water for agricultural
8 purposes of any reclamation or irrigation project, including incidental
9 features thereof, for delivery of water, entered into prior to October
10 1, 1981, being specifically authorized and validated by the United
11 States. If, as the D.O.E. postulates with respect to a contract for the
12 sale of water with Yakima-Benton Irrigation District under the Warren
13 Act, such contract would appear to be "illegal" (D.O.E. Memo. p. 46)
14 because under the Warren Act the B.O.R. could not sell water, or "the
15 legality of the priority clause...is highly questionable" (D.O.E. Memo.
16 p. 29) which assumptions are based upon opinions and colloquy of
17 Congressmen prior to the passage of the Act, (D.O.E. Memo. 23-24), then
18 such illegality has been rectified by §390xx of the Reclamation Reform
19 Act. There can be no question that the Warren Act of 1911 was
20 supplementary to the Reclamation Act of 1902.

21 With respect to an "analysis" of the Warren Act, as referred to in
22 D.O.E. Question 1, that depends upon the interpretation of the contracts
23 as drawn pursuant to Section 2 of the Act. As previously noted, (p.
24 10), D.O.E. has categorized the contracts with "approved units of the
25 project" and "private interest outside of the approved project" as both
being under Section 2. As we have seen, the U.S. Counsel and Engineers
were insistent that all contracts be drawn pursuant to Section 2, so

1 that the "entire Yakima Project should be considered as a whole". (p.16
2 hereof.) The "analysis" must depend upon the interpretation of the Act
3 that was given to it by the U.S., and the other contractees in the
4 contracts.

5 The rules for interpretation of the contracts are set forth in Berg
6 vs Hudesman, 115 Wn.2d 657, as follows:

7 "The cardinal rule with which all interpretation begins is
8 that its purpose is to ascertain the intention of the
9 parties." (p.663) "...the court has sometimes held that a
10 trial court may, in interpreting contract language, consider
11 the surrounding circumstances leading to execution of the
12 agreement, including the subject matter of the contract as
13 well as the subsequent conduct of the parties, not for the
14 purpose of contradicting what is in the agreement, but for the
15 purpose of determining the parties intent." (pp.666-667)
16 Quoting from Stender vs Twin City Foods, Inc., 82 Wn.2d 250,
17 "Determination of the intent of the contracting parties is to
18 be accomplished by viewing the contract as a whole, the
19 subject matter and objective of the contract, all of the
20 circumstances surrounding the making of the contract, the
21 subsequent acts and conduct of the parties to the contract,
22 and the reasonableness of respective interpretations advocated
23 by the parties." (p.667)

24 With these instructive guidelines of "subject matter",
25 "surrounding circumstances", "subsequent conduct", and "viewing them as
a whole", the Court will again briefly reference these matters as
previously alluded to herein. With respect to the "subject matter" of
the contracts, we see that Section 2 of the Act authorized contracts
between the U.S. and the various entities for the "... impounding,
delivering and carrying water for irrigation purposes...". (page 8
herein). Also, as categorized by D.O.E. (page 10 herein), Section 2
applied to "approved units of the project" and "private interests
outside of the approved project". We see that from 1912 through 1916,

1 (pages 11-16 herein) the U.S. Counsel and Engineers were somewhat
2 adamant that all lands within the Yakima Valley should be deemed to be
3 within the project; the entire project was to be considered as a whole,
4 and there were to be equal priorities among the contractees of the total
5 water supply available. This was based upon the "surrounding
6 circumstances" of this unique and discrete Yakima River Basin, pursuant
7 to the "subject matter" of the Act. We further see that by 1916, at
8 least seven contracts had been entered into with irrigation districts
9 with these provisions contained therein. (page 14 herein). As other
10 "surrounding circumstances", the State provided in 1915, that such
11 contracts were to be interpreted pursuant to federal law, (page 9
12 herein), and in 1929 (page 5 herein) provided the unity of the Yakima
13 Project by establishing the one priority date for all contractees.
14

15 In looking at the "subsequent conduct" of the parties, they have
16 now operated under these contracts, with minor amendments, for
17 approximately eighty years now. Additionally, the pertinent provisions
18 of these contracts were included in the 1945 Consent Judgment, which
19 this Court has previously recognized in the Memorandum Opinion Re:
20 Motions For Partial Summary Judgment, dated May 22, 1990, page 38,
21 (affirmed in Department of Ecology vs Yakima Reservation Irrigation
22 District, 121 Wn.2d 257) as follows:

23 "The entry of the consent judgment constituted judicial
24 recognition of the entire history of the Yakima Project,
25 including all Congressional actions and the administrative
actions of the United States, particularly the actions of the
Department of the Interior. It confirmed and decreed the
quantifications and limitations on water usage for
approximately 90 percent of all water users in the Yakima

1 Basin, including the Yakima Indian Nation's rights. By
2 defining the "total water supply available" (TWSA), it
3 affirmed the complete control of all the water from whatever
4 source in the Yakima watershed by the United States, to be
5 determined as specified therein." (Emphasis added.)

6 Thus, "viewing as a whole" this "analysis" of the 'surrounding
7 circumstances, the subject matter, and the subsequent conduct", we see
8 that, in answer to Question 1, it makes no difference as to whether the
9 contracting entity is an approved or unapproved unit of the Project.
10 This previous recitation also disposes of Question 4 with respect to the
11 impact of the historical facts of the Project.

12 To briefly expand on the Court's answer to Question 3, (page 18
13 herein), as to the impact of the Federal Reclamation Act of 1902 or the
14 Warren Act of 1911 on state law, we need only to look to the pertinent
15 state laws as noted herein. The first state law we consider is the 1905
16 Act, now codified as R.C.W. 90.40, which was enacted to have the state
17 receive the benefits of the Federal Reclamation Act of 1902. (pp.4-6
18 herein.) The first section of the 1905 Act (R.C.W. 90.40.010) gave the
19 U.S. the right of eminent domain to "...acquire the right to the use of
20 any water...any lands or other property, for the construction,
21 operation...or control of any...system works for the storage,
22 conveyance, or use of water for irrigation purposes, and whether such
23 water, rights, lands or other property...belong to any private party,
24 association, corporation or to the state of Washington...". (Emphasis
25 added). Coupled with this right of eminent domain, the second section
of the 1905 Act, (R.C.W. 90.40.020), in its entirety, provided as
follows: "The United States shall have the right to turn into any

1 natural or artificial water course, any water that it may have acquired
2 the right to store, divert, or store and divert, and may again divert
3 and reclaim said waters from said water course for irrigation purposes
4 subject to existing rights." These first two sections of the Act very
5 definitively gave the U.S. the absolute right to obtain and control the
6 waters of the Yakima River Basin.

7
8 The next two sections of the 1905 Act (R.C.W. 90.40.030, 040)
9 specified the procedures necessary for the U.S. to assert and accomplish
10 the rights provided by the first two sections. R.C.W. 90.40.030 set
11 forth that: "Whenever the secretary of the interior...shall notify the
12 commissioner of public lands of this state that...the United States
13 intends to make examinations or surveys for the utilization of certain
14 specified waters, the waters so described shall not thereafter be
15 subject to appropriation under any law of this state...". There follows
16 a clause that prevents such "notice" from affecting any prior
17 appropriation then underway. This section of the Act continues: "If the
18 said secretary...shall...certify in writing...that the project
19 contemplated in such notice appears to be feasible...the waters
20 specified in such notice shall not be subject to appropriation under any
21 law of this state for the further period of three years...". Thus, the
22 U.S. had to give "notice" of the withdrawal of waters and "certify" that
23 the "project" would take place. The state commissioner of public lands,
24 upon receipt of the notice and certification would not then approve any
25 subsequent appropriation by any other entity. The notice was given by
the U.S. on May 10, 1905 and certification continued through December

1 31, 1951, (pages 4-5 herein) with respect to the Yakima Project.

2 R.C.W. 90.40.040, as amended by the 1929 Act, (pages 5-6 herein),
3 then provided that "Whenever said secretary...shall cause to be let a
4 contract for the construction of any irrigation works or any works for
5 the storage of water for use in irrigation or any portion or section
6 thereof, for which the withdrawal has been effected as provided...any
7 authorized officers of the United States...may appropriate...so much of
8 the unappropriated waters of the state as may be required for the
9 project, or projects...such appropriation to be made, maintained and
10 perfected in the same manner and to the same extent as though such
11 appropriation had been made by a private person, except that the date of
12 priority as to all rights under such appropriation shall relate back to
13 the date of the first withdrawal or reservation of the waters so
14 appropriated...". (Emphasis added.) Here, the state is specifically
15 providing for the appropriations, by the U.S. pursuant to the May 10,
16 1905 withdrawal notice and the certification by the U.S. There is no
17 question that contracts were let and that construction of the first
18 storage works (Bumping Dam) took place in 1909-1910. Additionally, the
19 state specified that the U.S. appropriation was for whatever amount of
20 previously unappropriated water that was to be required for the project,
21 and more importantly, mandated that all rights under that appropriation
22 were to share the same priority date, viz, May 10, 1905.

23 This section of the statute also set forth that "Such appropriation
24 by or on behalf of the United States shall inure to the United States,
25 and its successors in interest, in the same manner and to the same

1 extent as though said appropriation had been made by a private person,
2 corporation or association." As had previously been noted by this Court
3 in the Memorandum Opinion Re: Threshold Issues, pp 5-6, Court Document
4 7396, May 12, 1992, "The state has itself recognized the unity and
5 integration of the project by making possible and allowing a single
6 appropriation to be made for the benefit of all of the lands
7 thereunder", citing to United States vs Tilley, 124 F.2d 850, 861.
8 (Emphasis added.) This 1905 Act, taken in it's entirety, specifically
9 directs a single appropriation: notice and withdrawal, diversion or
10 storage and delivery, together with the application of the water to
11 beneficial use by the landholders. To this we add the proviso that was
12 added to R.C.W. 87.03 by the Laws of 1915, Ch. 179, §4 which has
13 previously been discussed herein - pages 9 and 10. See also Department
14 of Ecology vs Bureau of Reclamation, 118 Wn.2d 761, 771-773 where our
15 state Supreme Court pointedly held "...the state law expressly yields to
16 federal provisions." Accordingly, it is abundantly clear that the 1902
17 Reclamation Act and the 1911 Warren Act have no impact whatsoever upon
18 state law. The state law repeatedly acquiesced in the "appropriation"
19 ie, the notice of withdrawal, diversion and application of the water to
20 beneficial use which "inured to it's successors in interest," of the
21 waters of the Yakima River Basin. As an aside, it is noted the 1905 Act
22 was entitled "Relative to Use of State Waters for Irrigation Purposes",
23 but is now entitled in the Revised Code of Washington as "Water Rights
24 of the United States". Clearly, neither the Reclamation Act nor the
25 Warren Act had any impact upon state law.

1 The D.O.E. has asserted that because R.C.W. 90.40.040 provides
2 "...such appropriation to be made, maintained and perfected in the same
3 manner and to the same extent as though such appropriation had been made
4 by a private person, corporation or association..." that therefore the
5 appropriation by the U.S., at least subsequent to the passage of the
6 1917 Water Code, must be obtained solely through the
7 application/permit/certificate procedure as set forth in now R.C.W.
8 90.03.250-340, even though recognizing that "Prior to 1917, a "private
9 person" could acquire a right in Washington state through the prior
10 appropriation doctrine." (D.O.E. Memo. p.39, l. 2-4). As noted, supra,
11 the prior appropriation doctrine called for notice and withdrawal,
12 diversion or storage and delivery with application of the water to
13 beneficial use. As of May 10, 1905, pursuant to R.C.W. 90.40.030, the
14 U.S. gave notice. Certification of the feasibility of the project was
15 given and pursuant to the notice, all of the unappropriated water in the
16 basin was then withheld from further appropriation by any others. The
17 "limiting agreements" contracts were entered into by the U.S. and it
18 began controlling the diversions pursuant thereto. Clearly, the water
19 was being put to beneficial use by the landowners to whom such
20 appropriation "inured" as "successors in interest" to the U.S. per
21 R.C.W. 90.40.040. This was approximately 12 years before the passage of
22 the 1917 water code. This "appropriation" by the U.S. was further
23 specifically recognized by the state in 1915, by providing that "all
24 water...under any contract with the U.S. shall be distributed and
25 appropriated...in accordance with the provisions of said contract," (See

1 pages 9-10 herein), and it has been noted that four of the present six
2 dams were constructed by 1917. (See p.7, supra). The "prior
3 appropriation" was again specifically recognized by the state in 1929 by
4 providing "...that the date of priority as to all rights under such
5 appropriation in behalf of the United States shall relate back to the
6 date of the first withdrawal or reservation of the waters so
7 appropriated...". Thus 12 years after the 1917 water code, the state
8 was again mandating that the appropriation by the U.S. of all of the
9 unappropriated waters of the Yakima Basin was accomplished by the filing
10 of the notice of withdrawal on May 10, 1905. Therefore, contrary to the
11 assertion of the D.O.E., R.C.W. 90.40.040 does not require compliance
12 with the application/permit/certificate processes of R.C.W. 90.03.250-
13 340 for the previously appropriated waters by the U.S. It requires that
14 the "appropriation" be made by the U.S. under the "prior appropriation"
15 doctrine.

16 D.O.E. argues that "...R.C.W. 90.03.250 does not preempt the
17 application of the permit/certification scheme contained in that statute
18 when a party is proceeding under chapter 90.40 R.C.W. However, that
19 statute does preempt the priority date scheme in that the date of
20 withdrawal, rather than the date of application, will be the priority
21 date." (D.O.E. Memo. p.41.) Conversely, the Major Claimants assert
22 that "The provisions of R.C.W. Chapter 90.40 for withdrawal and
23 appropriation were specifically exempted from the water code by R.C.W.
24 90.03.250...". (Brief in Support, etc. March 16, 1994, Document 9063,
25 p.5.)

1 Section 27, Chapter 117, 1917 Water Code (now R.C.W. 90.03.250)
2 provided that "Any person...desiring to appropriate water...shall make
3 an application...for a permit...", thus providing for the application/
4 permit process. There was a proviso in that section however that
5 stated:

6 "Provided further, That nothing in this act contained shall be
7 deemed to affect chapter 88 of the Laws of 1905 except that
8 the notice and certificate therein provided for in section 3
9 thereof shall be addressed to the state hydraulic engineer
10 after the passage of this act, and the state hydraulic
11 engineer shall exercise the powers and perform the duties
12 prescribed by said section 3." (Emphasis added.)

13 As previously noted, chapter 88, Laws of 1905 is now R.C.W.
14 90.40.010 through .080 and section 3 is 90.40.030. The "exception"
15 language of the proviso was for one purpose only. Under now 90.40.030,
16 the U.S. was to provide the notice and certificate to the state
17 "commissioner of public lands", which then imposed upon that entity the
18 "powers and duties" to prevent any subsequent appropriations for one
19 year and then such further time as the commissioner may grant. The 1917
20 Water Code, in Section 5 thereof provided:

21 "The administration of this act is imposed upon an engineer to
22 be known as the state hydraulic engineer."

23 Section 6 of the Act provided for the appointment of a state
24 hydraulic engineer; Section 7 established the personal assistance and
25 office necessities for his "department"; and section 8 imposed his
duties and powers. Section 8 (1) gave him "The supervision of public
waters within the state and their appropriation, diversion and use, and
of the various officers connected therewith." Section 8(3) indicated

1 that he shall regulate and control the diversion of water in accordance
2 with the rights thereto" and Section 8(5) provided he "shall keep such
3 records as may be necessary...".
4

5 Thus, we see that the exception language in the proviso pertained
6 specifically and only to whom the notice and certificate set forth in
7 90.40.030 should be sent and that the new entity would assume the duties
8 imposed by 90.40.030, which was to not allow any other appropriation of
9 the waters withdrawn by the U.S., as long as the project was proceeding
10 with due diligence.

11 Without the exception language, the proviso in Section 27 would
12 then read "That nothing in this act contained shall be deemed to affect
13 chapter 88 of the Laws of 1905". Period! (R.C.W. 90.40.010-080)
14 (Emphasis added.) Nothing could be clearer than that the 1917 Water
15 Code was not to apply to the now denominated "Water Rights of the United
16 States". Those water rights were to be determined solely pursuant to
17 now R.C.W. 90.40.010-080. Nonetheless, it appears that the state and
18 the U.S. used much the same permitting process or system to register the
19 water rights of the U.S. Undoubtedly, this process was parallel to the
20 "prior appropriation doctrine" process as noted, supra.

21 As to the formalized application/permit/certification process,
22 D.O.E. provided Appendix S. to it's Response Brief, setting forth the
23 "Applications, permits and certificates for reservoirs." As D.O.E.
24 indicates "These applications were filed "To Construct a Reservoir and
25 to Store for Beneficial Use the Unappropriated Waters of the State of
Washington." (D.O.E. Brief, p. 51.) The interesting thing about this

1 documentation are the dates involved. The applications for a permit
2 were on forms provided by the State of Washington Department of
3 Conservation and Development, Division of Hydraulics. The earliest
4 dates noted for the applications and/or permits show a permit issued for
5 Cle Elum Reservoir dated October 16, 1930, although construction of Cle
6 Elum Dam was not commenced until 1931. Permits for Bumping Lake and
7 Kachess Reservoir were dated July 20, 1931. A permit for Tieton
8 Reservoir was also approved on July 20, 1931, but the certificate is
9 dated January 18, 1952. The permit given by the state for Keechelus
10 Reservoir bears the date of February 8, 1963. These reservoirs had been
11 constructed and were in operation long prior thereto. (Page 7 herein).
12

13 Both the D.O.E. and the U.S. reference a letter, dated March 21,
14 1951, from the State Supervisor of Hydraulics to the Superintendent,
15 Yakima Project, Bureau of Reclamation. A copy of the letter was
16 attached to the U.S. Reply Brief. Both parties point to the second
17 paragraph thereof, which states:

18 "It seems that no further extensions are required as permits
19 have been issued out of this office for storage of water in
20 all reservoirs and for the appropriation of water for the
21 several divisions of the Yakima Project. However, no permits
have been issued the Tieton and Sunnyside units for the reason
we believe that permits are not necessary as the waters were
appropriated and used before our Water Code became effective
June 15, 1917" (Emphasis added.)

22 The "extensions" are those provided for in R.C.W. 90.40.030 and the
23 withdrawal was terminated on December 31, 1951. The letter also stated
24 "I am enclosing a list of all applications filed by the Bureau, showing
25 the status of each." The list was entitled Water Rights, Bureau of

1 Reclamation, Yakima River Basin. There are listed 11 applications in
2 numerical order from No. 3202 through No. 3212, for diversions from the
3 Yakima River and the Tieton River. No.'s 3207 through 3212 are the
4 reservoir applications for the waters of the Yakima River, the Kachess
5 River, Bumping River tributary of the Naches River, Cle Elum River, and
6 Tieton River tributary of the Naches River. From the consecutive
7 numbers of the applications, it is readily apparent that these five
8 applications for diversion from the Yakima River and Tieton River and
9 for the six storage reservoirs on the rivers named therein were all
10 filed at the same time. Thereafter, four more applications, Nos. 3251
11 through 3254, were filed, again apparently at the same time. Only one
12 date of filing was noted; that was Application No. 3251 filed November
13 12, 1930. These last four applications were for diversions from the
14 Yakima River, the Tieton River tributary to the Naches River, and one
15 each for the South Fork and North Fork of Cowiche Creek. These
16 application dates clearly coincide with the previously noted permit
17 dates for the reservoirs as contained in Appendix S to the D.O.E.
18 Response Brief, supra. The interesting fact is that all of this took
19 place approximately thirteen years after the passage of the 1917 Water
20 Code. Thus, it clearly appears that although the application/permit/
21 certificate system was mandated by 1917 Water Code, a somewhat parallel
22 system for record keeping purposes was not effectuated for the U.S.
23 withdrawal and appropriation of the Yakima Basin waters until just
24 subsequent to the passage of the 1929 Act, supra pp. 5-6, which
25 established the same priority date, ie, the ". . . date of first withdrawal

1 or reservation of the waters so appropriated ...". And again, the 1929
2 Act was passed just subsequent to the letter of December 10, 1928 from
3 the State Supervisor of Hydraulics to the Secretary of the Interior,
4 (page 17 herein), wherein the State indicated "...it will be practicable
5 for the United States to file applications for state permits covering
6 the divisions of the Yakima Project ...". To sum up all of the
7 foregoing, we have the State passing the 1905 act, (R.C.W. 90.40.010-
8 080), establishing the procedures whereby the United States could
9 accomplish the withdrawal and appropriation of then unappropriated water
10 in the Yakima Basin; we have the 1915 Act, (R.C.W. 87.03.115), providing
11 that all water rights obtained by contract with the United States were
12 to be decided under federal law; the 1917 Act, (R.C.W. 90.03.250),
13 specifying that nothing in the 1917 Act was to affect the 1905 Act; and
14 finally the 1929 Act, (R.C.W. 90.40.040), which placed the date of
15 priority of all water rights under appropriation by the United States to
16 be as of the date of first withdrawal or reservation of the water so
17 appropriated. It should be noted that the Applications for reservoir
18 permits are dated in 1931, subsequent to the passage of the 1929 Act
19 (D.O.E. App. S) and the afore-mentioned State letter of December 10,
20 1928. Only one application, Kachess, makes reference to an apparently
21 prior Permit, No. 99, with no indication of when such was issued. All
22 of the Applications do make specific reference to the 1905 Act and the
23 withdrawal of May 10, 1905.

24 With this distinctive pattern of State action, we can see that the
25 water rights obtained by and through the U.S. are to be determined by

1 and under the provisions of R.C.W. 90.40.010-080, and not under R.C.W.
2 90.03. "Statutes must be read together to determine legislative purpose
3 to achieve a 'harmonious total statutory scheme ... which maintains the
4 integrity of the respective statutes'." Ellensburg vs State, 118 Wn.2d
5 709, 713; Rettkowski vs Department of Ecology, 122 Wn.2d 219, 226.

6 Scattered throughout its Memo, D.O.E. makes several references to
7 the "secondary" reservoir permits set forth in R.C.W. 90.03.370,
8 maintaining that "Both a secondary and primary certificate are required
9 for rights obtained after 1917". (D.O.E. Memo. pp. 40-41.) The
10 reservoir certificates for the six reservoirs are listed by D.O.E., p.69
11 and D.O.E. Appendix S, which has copies of the certificates for all
12 reservoirs except Bumping Lake Reservoir, which D.O.E. acknowledges that
13 the certificate has not yet been issued. (D.O.E. Memo. p.71.) These
14 certificates were issued from 1952 through 1963. It should be
15 remembered that four of these reservoirs were constructed before passage
16 of the 1917 Act and a fifth reservoir construction was commenced that
17 year. (p.7 herein) Also, these certificates were not issued until at
18 least 35 years after the passage of the Act. The priority dates on all
19 of the state form certificates are stated to be May 10, 1905.
20 Parenthetically, the D.O.E. acknowledges that applications were also
21 filed by the Bureau of Reclamation for the various units of the Yakima
22 Project, (D.O.E. Memo. p.52) and permits were issued, except for the
23 Sunnyside and Tieton Units as those two were pre-1917. (D.O.E. Memo.
24 p.54.)

25 Additionally, attached to the U.S. Reply Brief is a copy of

1 "Tabulation of Water Rights to be Retained in Ownership of the United
2 States Bureau of Reclamation", which was also filed earlier herein in
3 compliance with Pretrial Order No. 10. Most of the Application numbers
4 previously referenced, (p.34 hereof), are on the tabulation list for the
5 diversions from the Yakima River, Tieton River and the North and South
6 Forks of Cowiche Creek. The six reservoir applications are not listed.
7 The other entities named in the tabulation are recorded under a
8 "registration" number as the legal basis of the claim of a water right.
9 These entities are Boise-Cascade Contract, Cascade Irrigation District,
10 West Side Canal Co., F.W. Payne Contract, Terrace Heights Irrigation
11 District, Selah-Moxee Irrigation District, Moxee Ditch Contract, Union
12 Gap Irrigation District, Broadway Irrigation District, Wapato Division,
13 Sunnyside Division, Kennewick Division, Tieton Division, Muth and
14 Funkhouser Contract, Bumping Lake, ... Merick Ditch (Naches River),
15 Naches-Selah Irrigation District, City of Yakima, Gleed Ditch Contract,
16 and Yakima Valley Canal Co. The "registration" number pertaining to
17 those twenty three contract entities are those assigned by the State to
18 the U.S. in compliance with the State of Washington's Water Right
19 Registration Act (R.C.W. 90.14.041, 90.14.071). (U.S. Reply Brief, pp.
20 1-2.) More about this later.

21 The reservoir permits were entitled "Permits to Construct a
22 Reservoir and Store for Beneficial Use the Unappropriated Waters of the
23 State of Washington", again on state printed forms. (D.O.E. Appendix
24 S.) The state "Certificate of Surface Water Right" form provided that
25 the "... right to the use of said waters has been perfected ...". Two

1 of the certificates have a typewritten interlineage of the words "for
2 the storage and", so that the phrase reads "... right for the storage
3 and use of said waters has been perfected ...". Those two are the
4 Kachess and Keechelus certificates. The other three, Cle Elum, Clear
5 Creek and Tieton simply have the printed word "use" therein.
6

7 The query posited by the D.O.E. is whether these certificates are
8 secondary certificates for the use of water or are primary certificates
9 for the storage of water. (D.O.E. Memo. p.71.) It postulates that "...
10 the mere fact that water is delivered from certificated storage works
11 would not by itself eliminate the need to obtain a certificate from the
12 state for the utilization of that water." (D.O.E. Memo. p.40.) Then,
13 D.O.E. states "If this Court determines that the above referenced
14 certificates are "secondary use certificates", the non-project
15 contracting entities (Category 3) may be covered under the
16 certificates." The D.O.E. then further notes that "Under all
17 certificates except the Tieton (Rimrock) certificate, the place of use
18 is described as "Lands being served by the Yakima Project." (D.O.E.
19 Memo. p.71) Actually, the Court has observed that both the Tieton and
20 Clear Creek reservoirs list only where the "submerged area is located"
21 under the form clause that needs "a description of the lands under such
22 right to which the water right is appurtenant, and the place where such
23 water is put to beneficial use, is as follows:" It is all of the other
24 certificates that recite, following this form language, "Lands being
25 served by Yakima Project, Bureau of Reclamation, Department of the
Interior."

1
2 Thus, we see that even if the provisions of R.C.W. 90.03.370 were
3 to apply to the water rights of the U.S. and it's successors in interest
4 under R.C.W. 90.40.010-.080, such statutory provisions have been met.
5 The pertinent parts of R.C.W. 90.03.370 with respect to "secondary"
6 permits read as follows:

7 "...the party or parties proposing to apply to a beneficial
8 use the water stored in any such reservoir shall also file an
9 application for a permit, to be known as the secondary permit
10 ... Such secondary application shall refer to such reservoir
11 as its source of water supply and shall show documentary
12 evidence that an agreement has been entered into with the
13 owners of the reservoir for a permanent and sufficient
14 interest in said reservoir to impound enough water for the
15 purposes set forth in said application. When the beneficial
16 use has been completed and perfected under the secondary
17 permit, the department shall take proof of the water users
18 under such permit and the final certificate of appropriation
19 shall refer to both the ditch and works described in the
20 secondary permit and the reservoir described in the primary
21 permit."

22 As previously noted, with the certificates being issued for the
23 "use" or "storage and use" on "Lands being served by the Yakima Project"
24 which "inures to the United States and its successors in interest" per
25 R.C.W. 90.40.040, it then becomes abundantly clear that even if the
provisions of R.C.W. 90.03.370 were to apply to the U.S., which they do
not (p.32 herein), such provisions have been met per the language used
by the State and the U.S. and the Category 3 contracting entities are
clearly covered under the certificates. It should be further noted that
nothing in R.C.W. 90.40.010-.080 requires the "successors in interest",
the ultimate beneficial users, to comply with the state certification
processes set forth in R.C.W. 90.03.

Although somewhat difficult to grasp, one of the recurring themes

1 of the D.O.E. throughout it's Memo, appears to be that the U.S. could
2 not contract out to others for the use of the "natural flow" of the
3 Yakima River, as opposed to the sale of storage water. Initially,
4 D.O.E. prefaces this assertion on Ickes vs Fox, 300 U.S. 82, 81 L.Ed.
5 525 (1937), a case involving the Sunnyside Unit of the Yakima Project.
6 With respect to "natural flow," this case is first mentioned by D.O.E.
7 in connection with the 1915 Union Gap Irrigation District contract which
8 contained the "natural flow clause", set forth as follows:

9 "The United States, will impound and store water for the
10 irrigation of the District lands in full compliance with the
11 aforesaid section of the Warren Act, and will deliver a
12 supplementary supply of stored water and natural flow of the
13 Yakima River. (Emphasis added)." (D.O.E. Memo. p.34.)

14 Parenthetically, the very first mention of Ickes vs Fox, supra,
15 (D.O.E. Memo. p.33) sets forth a quote from that case that:

16 "Although the government diverted, stored and distributed the
17 water, the contention of petitioner that thereby ownership of
18 the water or water right became vested in the United States is
19 not well founded. Appropriation was made not for the use of
20 the government, but under the Reclamation Act, for the use of
21 the landowners; and by the terms of the law and of the
22 contract already referred to, the water-rights became the
23 property of the landowners, wholly distinct from the property
24 right of the government in the irrigation works."

25 After this quote, the D.O.E. then states: "The B.O.R.'s erroneous
assumption that it was the appropriator of the water lead (sic) to a
deceptively simple result: all lands served water by contract (Warren or
other) shared the same priority date. Given the fact that the courts
have held that the B.O.R. is merely a "carrier and distributor of
water", the attempt to equalize the priority dates is flawed." This
conclusion appears to completely ignore the directives of the State by

1 passage of the 1905, 1915 and 1929 Acts, which provided for
2 "appropriation" by the U.S. and related the date of priority to all
3 rights back to the date of first "withdrawal or reservation" of the
4 waters so appropriated, under any contract with the U.S. (Pages 5, 6, 9,
5 10, 27, 28 herein)

6
7 With respect to the natural flow, the D.O.E. then states that:
8 "A category 3 contract could only be entered into for the
9 purpose of expanding the storage works. ...The B.O.R. could
10 only acquire that which it needed for the project. Union Gap
11 was not a unit of the project. It could contract for excess
12 storage water or pay for storage space in the reservoir. It
13 could not contract for natural flow as the B.O.R. did not and
14 could not have acquired natural flow water not needed for the
15 project. Under a Warren Act category 3 Contract, the B.O.R.
16 had no authority to authorize the use of natural flow."
17 (D.O.E. Memo, p.34) "...it is clear that the B.O.R.'s
18 erroneous belief that it was the appropriator resulted in it's
19 erroneous assumption that it had acquired the natural flow and
20 could authorize its use outside of a valid state-based
21 appropriation." (D.O.E. Memo, p. 35-36) Then in Footnote 50,
22 p36, D.O.E. notes "It is important to note that almost all
23 water supply contracts entered into, whether Warren Act or
24 not, contained the "natural flow clause"."

25
26 The D.O.E. does acknowledge the position taken by the U.S. counsel
27 and engineers, as noted in the December 9 and 14, 1916 letters, (D.O.E.
28 Apps. K and P and pages 13-17 herein) by quoting from District Counsel
29 Burr's letter to the effect that "...both the engineers and the lawyers
30 of the Service thus far have adhered strictly to the sale of a combined
31 natural flow and storage in each water supply contracted for.", while
32 declaring that this B.O.R. approach is not supported by the law.
33 (D.O.E. Memo. p.35.) Note that this U.S. position was established in
34 1916, prior to passage of the state 1917 Act.

1 The D.O.E. further notes that the contract entered into with the
2 Kittitas Reclamation District (K.R.D.) contained almost identical
3 "priority" and "natural flow" clauses as contained in the 1915 Union Gap
4 contract. The Roza unit contract also has such identical clauses as the
5 K.R.D. contract and was titled "Contract...for sale of water under
6 Warren Act." The Zillah Irrigation District and Granger Irrigation
7 District contracts also referenced "natural flow". D.O.E. states, re
8 the Roza contract, that "Because the B.O.R. did not have an
9 appropriative right to water captured by expanded storage, it could not
10 sell the water. ...This language appears to be illegal at worst and at
11 best extremely misleading...". (D.O.E. Memo. pp. 45-46.) As to the
12 "illegality" issue, refer to pages 21-22 herein. Further references to
13 "sale" of natural flow and storage, "...in full compliance with the
14 Warren Act" to Snipes Mountain, Outlook and Grandview are mentioned.
15 (D.O.E. Memo. pp. 56-58.)

16 As previously noted, the D.O.E. predicates it's present opinion
17 "that the B.O.R.'s erroneous belief that it was the appropriator
18 resulted in it's erroneous assumption that it had acquired the natural
19 flow and could authorize it's use outside of a valid state-based
20 appropriation.", (Emphasis added), upon the case of Ickes vs Fox, supra.
21 The quote from Ickes by the D.O.E. as just noted, supra, is followed by
22 the Ickes Court stating "The government was and remained simply a
23 carrier and distributor of the water..." which phraseology has been
24 adopted and given compelling weight by the D.O.E. in it's present
25 presentation to this Court.

1 This present position of the D.O.E. results in the conclusions
2 therefrom stated as follows:

3 "From 1902 until 1983 both the B.O.R. and the state of
4 Washington operated under the assumption that the B.O.R. was
5 the appropriator/owner of the water rights acquired under the
6 Yakima Reclamation Project. This assumption was determined to
7 be erroneous in 1937 by the federal courts in Ickes vs Fox,
8 supra...Even after the U.S. Supreme Court ruled, the state
9 believed that the Ickes vs Fox, supra, case applied to
10 internal disputes. (D.O.E. Memo, p.74) After extensive
11 briefing on this issue, the Washington Supreme Court ruled
12 consistently with the federal courts in holding that the
13 landowners, rather than the B.O.R., are the
14 appropriators/owners of the rights acquired. Ecology vs
15 Acquavella, 100 Wn.2d 651, 655. The erroneous assumption that
16 the B.O.R. was the appropriator of water substantially
17 impacted the factual history of the Yakima Reclamation
18 Project. This impact can be seen in the contracts entered
19 into by the B.O.R., in the certificates issued by the state
20 and in the negotiated outcome of the consent judgment."
21 (D.O.E. Memo, p.75) (Emphasis added.)

22 The language to which the D.O.E. refers in citing to Ecology vs
23 Acquavella, 100 Wn.2d 651, 655, that the landowners rather than the
24 U.S.B.O.R. are the "appropriators/owners" is as follows:

25 "It is clear under Washington law that, persons receiving
water under contract with water distribution entities are
owners of water rights. It has long been settled in this
state that property owners have a vested interest in their
water rights to the extent that the water is beneficially used
on the land." (Emphasis added.)

However, the real thrust of that case, dealing with procedural due
process for all individual water users was that:

"There is an identity of interest between the entities and
water users such that the entities are fully empowered to
represent their water users in the present type of litigation.
In one of our earliest decisions, this court noted the
representative capacity of these water distributing entities
was akin to a trustee-beneficiary relationship." (Ecology, pp
657-658). This court, upon several occasions, has held that
a ditch company, by means of which water consumers enjoy their

1 appropriation, is the trustee and representative of the
2 consumers for the protection of the rights of the latter."
3 (p.659) (Emphasis added.)

4 This is the total recognition by the Washington Supreme Court that
5 the U.S. B.O.R. is a "trustee" of the water rights for the benefit of
6 the beneficial users of the waters which ultimately become appurtenant
7 to their lands. A "trustee" is defined in Black's Law Dictionary, Fifth
8 Edition, as follows:

9 "In a strict sense, a "trustee" is one who holds the legal
10 title to property for the benefit of another, while, in a
11 broad sense, the term is sometimes applied to anyone standing
12 in a fiduciary or confidential relation to another..."
13 (Emphasis added.)

14 Thus, we see that our Supreme Court has specifically ruled that a
15 water distributing entity, such as the U.S.B.O.R., does have
16 appropriative rights, as a trustee, to the waters of the Yakima River
17 Basin, contrary to the D.O.E.'s present rhetorical representation as to
18 the holding in Ecology vs Acquavella, supra.

19 Additionally, it should be recalled that this Court has addressed
20 this issue on two previous occasions herein. In the Memorandum Opinion,
21 February 16, 1982, Court Document 2515, this Court stated "It should be
22 further noted, however, that even though these landowners have vested
23 property rights, the Bureau of Reclamation, the irrigation districts and
24 other diverters/appropriators of surface water still retain some rights
25 to the water they divert and deliver to the users." (p.15) It was this
opinion that was unanimously affirmed in Ecology vs Acquavella, supra,
and resulted in D.O.E.'s present conclusion previously noted that
"...until 1983 both the B.O.R. and the state of Washington operated

1 under the assumption that the B.O.R. was the appropriator/owner of the
2 water rights acquired under the Yakima Reclamation Project." Again, in
3 the Memorandum Opinion Re: Threshold Issues, May 12, 1992, Court
4 Document No. 7396, this Court held:

5 "Thus, we see that even though the water rights are
6 unquestionably appurtenant to the lands upon which they are
7 beneficially used, that in the "unity and integration" of the
8 Project, the U.S. and the Major Claimants do retain some
9 rights in the water for the diversion, distribution and
10 conveyance of that water within the Project, albeit in a
11 representative capacity for the landowners. (Citing to
12 Ecology and the previous Memo) .."the water suppliers are
13 trustees of the water rights for the users."

14 In it's conclusions, supra, D.O.E. states that until 1983 both the
15 B.O.R. and the state operated under the erroneous assumption that the
16 B.O.R. was the appropriator of the water rights, acknowledging that at
17 that time the state believed that Ickes vs Fox applied only to internal
18 disputes between the U.S. and its contractors, citing to Ecology's
19 Brief, June 27, 1983 to the state Supreme Court (S. Ct. No.48892-4),
20 p.29. That Brief was filed in support of this Court's February, 1982
21 Opinion that resulted in the affirmance, as previously noted, in Ecology
22 vs Acquavella, supra. The current position of D.O.E. about the state's
23 "erroneous assumption" is 180 degrees opposite to the reasoning
24 contained in their 1983 Brief. What is most instructive is the
25 reasoning leading up to the then D.O.E. conclusion that the Ickes case
is not applicable in this adjudication.

"...before a federal project may be constructed and put in
operation, the United States must satisfy state law by
obtaining newly established water rights based on state
law...The State of Washington's water rights laws contain
specifically tailored provisions that are designed to

1 encourage the construction and operation of federal
2 reclamation projects in Washington State. See RCW 90.40.030
3 et seq. (Brief, p.26) Of decisive impact here, these state
4 water right statutes contemplate that water rights established
5 thereunder are to be issued to and owned by the United States.
6 (Emphasis theirs) This interpretation has been followed
7 consistently through the many administrations and various
8 state agencies implementing the water code. Consistent
9 therewith, the water right permits and certificates issued
10 pursuant to RCW 90.03.250 et seq., pertaining to the Yakima
11 Project of the federal government, have been uniformly issued
12 to the United States as the title owners of the water right.
13 (Emphasis theirs) In the Yakima River system, the vast
14 majority of the waters furnished to the various district by
15 the United States Bureau of Reclamation (through rights
16 embodied in public withdrawal permits and certificates and
17 other state law-based water rights) are transferred to the
18 districts (and other entities) through "repayment contracts"
19 or "Warren Act" contracts with those entities. The districts
20 then distribute the water, as provided by state irrigation
21 district law, to the various water users of the district.
22 ...In such circumstances, the United States continues to own
23 the water right. (Brief, p.27) (Emphasis added). The
24 "ownership" issue in Ickes vs Fox, supra, related solely to a
25 dispute between the users of water and the purveyor of that
water. It was an internal dispute involving only the
respective rights of the United States and the individual
water users vis-a-vis each other; rights that are based on
contract. (Brief, p.30) (Emphasis theirs). Earlier we noted
Washington's specially tailored statute providing for the
appropriation of public waters of Washington State by the
United States for a federal reclamation project. That statute
of 1905 expressly describes the appropriation water right
acquired thereunder as one held by the United States. (Sets
out R.C.W. 90.40.040) Nothing could be clearer. Under
Washington's statute the water rights, established to provide
water for a federal reclamation project, are acquired by the
United States. (Brief, p.36) (Emphasis therein.)

21 Thus, we see, beyond question, that at least as late as 1983,
22 D.O.E. acknowledged that the "...state water rights statutes contemplate
23 that water rights established thereunder are to be issued to and owned
24 by the United States." This Court has repeatedly referenced herein the
25 1905 Act (R.C.W. 90.40.010-080), the 1915 Act (R.C.W. 87.03.115), and

1 the 1929 Act (Laws of 1929, Ch. 95, Sec. 1) to illustrate this position.
2 As previously noted herein, "Statutes must be read together to determine
3 legislative purpose to achieve a 'harmonious total statutory
4 scheme...which maintains the integrity of the respective statutes.'" Ellensburg vs State, 118 Wn.2d 709, 713; Rettkowski vs D.O.E., 122 Wn.2d
5 219, 226. Further, it should be recognized that "An administrative
6 agency cannot modify or amend a statute through it's own regulation."
7 Rettkowski vs D.O.E., 122 Wn.2d 219, 227; State vs Thompson, 95 Wn.2d
8 753, 759. The D.O.E. cannot now change the clear language of these
9 Washington statutes, nor can it evade the statutory scheme by positing
10 that "... it is clear that the B.O.R.'s erroneous belief that it was the
11 appropriator resulted in it's erroneous assumption that it had acquired
12 the natural flow and could authorize it's use outside of a valid state-
13 based appropriation."
14

15 Further, as repeatedly referenced herein, the U.S. withdrawal of
16 all unappropriated waters took place May 10, 1905. Limiting agreements
17 with other diverters were executed and the diversions monitored. The
18 first storage, Bumping Dam, was not completed until 1910. Until that
19 point in time, there was nothing but "natural flow". Kachess, Clear
20 Creek and Keechelus Dams were completed by 1917, subsequent to the entry
21 of the delivery contracts for the sale of a combined natural flow and
22 storage in each water supply contracted for. As memorialized in the
23 1945 Consent Decree, specific monthly delivery amounts were established
24 for the entire irrigation season, ie, March or April through September.
25 To this day, storage control (release of stored water) does not commence

1 until approximately the first of July and therefore the early months
2 deliveries are again nothing but natural flow, delivered by and through
3 the U.S. in accordance with the contracts and the Consent Decree. The
4 deliveries by the U.S. were for "...the natural flow element, which is
5 free, and the storage element which necessitates reimbursement...both
6 the engineers and the lawyers of the Service thus far have adhered
7 strictly to the sale of a combined natural flow and storage in each
8 water supply contracted for." (See pp. 13-15 herein.)

9 D.O.E. bases it's contention that "...the B.O.R. had no authority
10 to authorize the use of natural flow..." upon language in the Warren
11 Act, 43 U.S.C. §524, which states... "Provided, that nothing contained
12 in sections 523 through 525 of this title shall be held or construed as
13 enlarging or attempting to enlarge the right of the United States, under
14 existing law, to control the waters of any stream in any state."
15 (D.O.E. Memo. pp. 34-35.) This contention, however, again ignores the
16 express provisions of the 1905, 1915 and 1929 state laws, all as
17 previously and extensively noted herein. In addition to the proviso in
18 R.C.W. 90.03.250 that specifically exempted R.C.W. 90.40.010-.080 from
19 the state application/permit/certification scheme (pp. 30-32 herein),
20 there is another section of the 1917 act worth mentioning. Laws of
21 1917, ch. 117, Sec. 43 (R.C.W. 90.03.460) reads as follows:

22
23 "Nothing in this chapter contained shall operate to effect an
24 impairment of any inchoate right to divert and use water while
25 the application of the water in question to a beneficial use
is being prosecuted with reasonable diligence, having due
regard to the circumstances surrounding the enterprise,
including the magnitude of the project for putting the water
to a beneficial use and the market for the resulting water

1 right for irrigation or power or other beneficial use, in the
2 locality in question. (Emphasis added.)

3 Here again, in the 1917 Act, the state is specifically mandating
4 that the May 10, 1905 withdrawal of all of the unappropriated water in
5 the Yakima Basin should not be affected by that Act. It directly
6 provides for the diversion and use of the water, which has to include
7 natural flow, during the ongoing development of this vast Yakima Project
8 and for the marketing of that water within the Yakima Basin. It clearly
9 eliminates any impairment whatsoever to any application in any manner by
10 the U.S. of the provisions of the Warren Act. As previously noted, (p.
11 10 herein),

12 "The Department counters that federal law generally must give
13 way to state law regarding distribution of water in federal
14 irrigation projects. (Cites) These authorities, however,
15 would seem to have no applicability here, where the state law
16 expressly yields to federal provisions." D.O.E. vs B.O.R. 118
17 Wn.2d 761, 773, footnote 7. (Emphasis added.)

18 As previously noted, D.O.E. has framed these issues "...to assist
19 the Court in understanding the various permutations that exist in the
20 Yakima Basin as a result of the changing historical facts and changing
21 law." (D.O.E. Brief, p. 3; herein p. 3.) Black's Law Dictionary, Fifth
22 Edition defines "permutation" as "The exchange of one movable subject
23 for another; barter." However, as indicated throughout herein there
24 have been no "permutations" with respect to the historical facts
25 pertaining to the Yakima Basin. From the inception of the Yakima
Project on May 10, 1905, the U.S., through it's Counsel, Engineers, and
the Secretary of the Interior have historically and consistently
considered the entire Yakima basin as a unified federal project. And,

1 as has been seen, the state, at least till 1983, also adopted the same
2 position. (Herein, pp. 45-46.) Of even greater impact, as repeatedly
3 noted herein, there have been no "permutations" as far as the state law
4 is concerned. The 1905 Act, 1915 Act, 1917 Act and 1929 Act were all
5 clearly and specifically enacted by the state to enable and to insure
6 that the Yakima Basin, insofar as the B.O.R. was concerned, was to
7 become and to remain a federal project. Note that there has been no
8 change in this state law for just short of 66 years now and the Yakima
9 Basin Project has been in existence for 90 years. Thus, there are no
10 "permutations" in the law. The "...decisions are to be made according
11 to federal laws, federal regulations and the contracts between the
12 irrigation districts and the federal government." D.O.E. vs B.O.R. 118
13 Wn.2d 761, 771-772 (1992).

14 Now, having ruled upon the various issues and contentions of the
15 D.O.E. as raised throughout its brief, the Court will now address the
16 question posed by the D.O.E. as to the "...legal basis for claiming the
17 water" in it's letter of September 30, 1993 (page 1 herein) and the
18 resulting two issues set forth by the Court (page 2 herein). Much of
19 the answers to these two questions have been already set forth herein.

20 Additionally, it is instructive to look at the provisions of R.C.W.
21 90.14 itself. R.C.W. 90.14.041 requires that: "All persons using or
22 claiming the right to withdraw or divert and make beneficial use of
23 public surface..waters of the state...shall file with the department of
24 ecology...a statement of claim for each water right asserted...". This
25 section shall not apply to any water rights which are based on the

1 authority of a permit or certificate issued by the department of ecology
2 or one of its predecessors." (Emphasis added.) In conjunction with
3 that is R.C.W. 90.14.061 which states: "...Any person required to file
4 hereunder may file through a designated representative.the United
5 States when furnishing to persons water pertaining to water rights
6 required to be filed under R.C.W. 90.14.041 shall have the right to file
7 one claim on behalf of said persons...for the total benefits of each
8 person served; provided that a separate claim shall be filed by...the
9 United States for each operating unit...and for each water source." It
10 should further be noted that this act was passed in 1967.

11 In addition to the previous references to the permits and
12 certificates issued by the state to the U.S., found in D.O.E. Appendix
13 S, (pp. 32-34 herein), listing the "Applications, permits and
14 certificates for reservoirs" and the attachment to the U.S. Reply Brief
15 (pp. 36-37 herein) of the "Tabulation of Water Rights to be Retained in
16 Ownership of the United States Bureau of Reclamation", we have the C.R.
17 Lentz Review, Court Exhibit 1, published by the U.S. Bureau of
18 Reclamation in December, 1974. Therein, at pages 75 and 76, are listed
19 all of the applications, permits and certificates, by number and date,
20 issued by the state for all six of the reservoirs. Additionally, at
21 pages 76 and 77 therein are listed the applications and permits, by
22 number and dates, for the Kittitas, Roza and Kennewick Divisions, as
23 well as the North and South Forks of Cowichee Creeks in the Tieton
24 Division. It is noted that the applications for the Sunnyside and
25 Tieton divisions were cancelled by the state as those water rights were

1 perfected prior to 1917. However, it is additionally noted that "water
2 Rights Claim Registrations have been submitted to the State for both of
3 these Divisions."
4

5 Then, at page 78, we find "In compliance with provisions of the
6 Registration Act, the United States, through the Bureau of Reclamation
7 has registered with the State of Washington Department of Ecology, 23
8 surface...water claims...." This is followed, on pages 79 and 80, by a
9 complete listing of all permit, certificate and registration numbers for
10 all reservoirs, divisions of the project and the individual contracts
11 for those surface waters.

12 Thus, with the statutory edicts of R.C.W. 90.14.041 and .061 and
13 the documented permits, certificates and registrations of record, it is
14 abundantly clear that any entity that has a Warren Act or storage
15 contract with the United States, whether entered into either prior or
16 subsequent to 1917, has a "...legal basis for claiming the water"
17 supplied pursuant to that contract upon proof of beneficial use of that
18 water. The permits, certificates and registrations of and by the United
19 States clearly "inures to its successors in interest". R.C.W.
20 90.40.040.

21 Having referenced the various contentions of the D.O.E., the Court
22 now rules as follows:

- 23 (1) That all contracts between all of the various divisions,
24 entities and individuals within the Yakima Basin and the U.S.
25 are legal and valid contracts, whether within or outside of an
"approved" unit of the Yakima Basin Project.

1
2 (2) The application/permit/certificate process set forth in
3 R.C.W. 90.03 does not apply to the U.S. Yakima River Basin
4 Project per R.C.W. 90.03.250, R.C.W. 90.03.460 and R.C.W.
5 90.40.040 which establishes the priority date of May 10, 1905
6 for the entire Yakima Project.

7 (3) While the "secondary" permit process under R.C.W.
8 90.03.370 do not apply to the Yakima Basin Project,
9 nevertheless the statutory requirements have been met by the
10 United States and the state.

11 (4) The United States was the appropriator of all of the then
12 unappropriated water for the Yakima Project as of May 10,
13 1905, thereby acquiring the right to the sale of combined
14 natural flow and storage water in it's water supply contracts.

15 (5) Pursuant to R.C.W. 90.40.010-080 (1905 Act and 1929 Act),
16 R.C.W. 87.03.115 and R.C.W. 90.03.250,460, there is no
17 violation of 43 U.S.C. Sec. 524, as these state laws expressly
18 yield to the federal provisions.

19 (6) Under the provisions of R.C.W. 90.14.041, .061 and the
20 filings made by the United States and the permits and
21 certificates issued by the state, any entity with a Warren Act
22 or storage contract with the United States does have a legal
23 water right on proof of beneficial use of water supplied
24 pursuant to the contract, whether such contract was entered
25 into either prior to or subsequent to 1917.

DATED this 8th day of March, 1996


WALTER A. STAUFFACHER
Judge