

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

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. 77-2-01484-5

ORDER RE: WARREN ACT
CONTRACT ISSUES

THIS MATTER came on before the above-entitled court in this adjudication by virtue of questions raised by the Washington State Department of Ecology concerning the legal basis for major claimants and others to water rights under contracts with the United States pursuant to the 1911 Warren Act for which no applications were filed under the 1917 Water Code. Accordingly, at the January 1994 monthly water day oversight hearing, the court requested briefing on issues concerning water rights of entities in regard to Warren Act or storage contracts entered into with the United States subsequent to 1917 without a permit or certificate issued by the State of Washington. Various major claimants filed briefs in support of federal contract water rights without state permits or certificates. The United States also filed a brief supporting the legality of Warren Act water rights, together with appendices containing various related documents. The Department of Ecology filed an extensive and exhaustive brief, together with

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1 appendices A-Z. The court heard oral arguments on the issues raised as
2 aforesaid and pursuant to the briefs of the parties. In response to
3 foregoing matters, this court, on March 8, 1996, issued its Memorandum
4 Opinion Re: Warren Act Contract Issues. On the basis of the foregoing,
5 the court makes the following findings:

6 **FINDINGS:**

7 1. On June 17, 1902, the Congress passed the Reclamation Act (43
8 U.S.C. §§372 et seq.) and the United States began to examine the arid
9 lands of the West to determine the feasibility of making them productive
10 by construction of massive systems to store and deliver water for
11 irrigation.

12 2. One of the areas examined by the United States was the Yakima
13 River Basin. For a reclamation project to be developed there, it was
14 necessary for the State of Washington to enact an irrigation law
15 acceptable to the United States. By cooperative efforts of the United
16 States and the State of Washington, such a law was enacted by the
17 Washington House of Representatives on February 28, 1905, by the
18 Washington Senate on March 1, 1905, and signed into law by the governor
19 March 4, 1905. See Laws 1905, Chapter 88, §§ 1-9 (now codified as RCW
20 90.40.010-080).

21 3. Enactment of the 1905 Act represented a combined effort by the
22 State of Washington and the United States to initiate the Yakima
23 Reclamation Project. It enabled the United States Reclamation Service
24 (now the Bureau of Reclamation) by notice filed May 10, 1905, to
25 withdraw, reserve and appropriate the unappropriated waters of the
26 Yakima River Basin for development of the Yakima Reclamation Project.

1 Sections 1 and 2 of the Act gave the United States the absolute right to
2 obtain and control the unappropriated state waters of the Yakima Basin.

3 The withdrawal by the United States continued with the sanction of the
4 State of Washington until 1951. Appropriation under the 1905 Act inured
5 to the United States and its successors in interest in the same manner
6 and to the same extent as if that appropriation was made by a private
7 person, corporation or association. The State of Washington recognized
8 the unity and integration of the Yakima Project in the 1905 Act which
9 specifically directs a single appropriation: notice and withdrawal,
10 diversion or storage and delivery, together with the application of
11 water to beneficial use by the landholders. See Memorandum Opinion Re:
12 Threshold Issues, May 12, 1992.

13 4. To create the physical conditions essential to the Yakima
14 Project, it was necessary to fix and limit the quantities of water that
15 could be taken from the river by existing water users. This was
16 accomplished by numerous so-called limiting agreements executed in favor
17 of the United States by the then diverters of about 90 percent of the
18 natural low water flows of the Yakima Basin. The United States was then
19 was able and proceeded to construct Bumping Dam in 1909-1910, Kachess
20 Dam in 1910-1912, Clear Creek Dam in 1914, and Keechelus Dam in 1913-
21 1917. Thus, four of the six dams for the Yakima Project were completed
22 before adoption by the State of Washington of the Water Code of 1917
23 (codified in RCW Ch. 90.03). Construction of Rimrock Dam was commenced
24 in 1917. It is clear that the Yakima Project was well known at that
25 time.

1 5. After the Bumping Lake reservoir was completed and while the
2 Kachess Lake reservoir was nearing completion to make additional water
3 available for the Yakima Project later in the irrigation season,
4 Congress passed the 1911 Warren Act which authorized the United States
5 to enter into contracts, in addition to earlier contracts for use of
6 water in the Sunnyside and Tieton divisions of the Yakima Project, for
7 distribution of water for irrigation in the Yakima Basin. Following
8 adoption of the Warren Act, the United States began to contract for
9 deliveries of additional waters. Existence of these contracts was well
10 known to the State by the time of adoption of the 1917 Water Code.

11 6. In 1915, while contracts pursuant to the Warren Act were
12 being negotiated and development of the Yakima Project was moving
13 forward, the State amended the Irrigation District statute (L. 1889-90,
14 now RCW Ch. 87.03) to add (in RCW 87.03.115) this language:

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

22 This makes it readily apparent the State was clearly cognizant of the
23 on-going proceedings for and development of the Yakima Project. The
24 1915 amendment was interpreted recently by the Washington Supreme Court
25 in Department of Ecology v. Bureau of Reclamation, 118 Wn.2d 761, 771-
26 772, where the Court said:

27 "We also find it highly significant that under Washington's
28 statutes the decisions regarding distribution of water within
a federal irrigation project do not belong to the State.
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
districts. These decisions are to be made according to

1 federal laws, federal regulations and the contracts between
2 the irrigation districts and the federal government."

118 Wn.2d @ 771-772 (emphasis supplied)

3 "The Department counters that federal law generally must give
4 way to state law regarding distribution of water in federal
5 irrigation projects. (Cites) These authorities, however, would
6 seem to have no applicability here, where the state law
7 expressly yields to federal provisions." 118 Wn.2d @ 773,
8 footnote 7 (emphasis supplied).

9 The 1915 Act, together with the 1905 Act, clearly establishes that
10 the Yakima River Basin Project, as provided by state law, was to be and
11 ever since has been distinctly a federal project. The State, as of
12 1915, expressly delegated the distribution and management of all of the
13 unappropriated water resources withdrawn by the U.S. in 1905 within the
14 Yakima Basin to the federal government.

15 7. The Reclamation Service uniformly contracted under the Warren
16 Act to provide equal priority for all water delivered under those
17 contracts and to provide for delivery of water from both storage and
18 natural flows. The contracts were made under § 2 of the Warren Act
19 which applied to both approved units of the Yakima Project and private
20 interests. From 1912 through 1916, legal counsel and engineers for the
21 Reclamation Service took the position that all lands within the Yakima
22 Basin should be deemed to be within the Yakima Project. These contracts
23 were, under the 1915 Act, to be interpreted pursuant to federal law.

24 8. The 1917 Water Code adopted by the Washington legislature in
25 general required that water rights must be acquired pursuant to an
26 application/permit/certificate system provided by that statute. The 1917
27 Code, however, provided exceptions to that requirement in RCW 90.03.250
28 and 90.03.460. A proviso in RCW 90.03.250 read and still reads:

1 "Provided further, That nothing in this act contained shall be
2 deemed to affect chapter 8 of the Laws of 1905 except that the
3 notice and certificate therein provided for in section 3
4 thereof shall be addressed to the state hydraulic engineer
after the passage of this act, and the state hydraulic
engineer shall exercise the powers and perform the duties
prescribed by said section 3." (emphasis supplied)

5 The exception language in the proviso pertains only to notice and
6 certification sent in accordance with RCW 90.40.030 and the duties of
7 the state hydraulic engineer to prevent any other appropriations of the
8 withdrawn waters. The proviso otherwise clearly provides that the 1917
Water Code did not apply to the waters withdrawn under RCW Ch. 90.40.

9 RCW 90.030.460 provides for the protection of inchoate rights:

10 Nothing in this chapter contained shall operate to effect an
11 impairment of any inchoate right to divert and use water while
12 the application of the water in question to a beneficial use
13 is being prosecuted with reasonable diligence, having due
14 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
right for irrigation or power or other beneficial use, in the
locality in question. (Emphasis supplied).

15 The state specifically mandated that the May 10, 1905, withdrawal of all
16 of the unappropriated water in the Yakima Basin should not be affected
17 by the 1917 Act. The 1917 Water Code eliminates any impairment
18 whatsoever to application in any manner by the United States of the
provisions of the Warren Act.

19 9. In 1929 the 1905 Act was amended. The amendments made then
20 provided State recognition of the on-going development and expansion of
21 the Yakima Project. They also provided that priority for water
22 withdrawn under the 1905 Act related back to the date of first
23 withdrawal or reservation of the waters appropriated. It provided for
24 the unity of the entire Yakima Project as it had been and would be
25 developed. The amendments constituted a clearly stated acquiescence by
26 the State in the language of the various Warren Act contracts concerning
the equal priority of the water rights of Warren Act contractors and an
acknowledgment of the total water supply fixed and stipulated under
those contracts.

1 10. The major divisions of the Yakima Project were approved by the
2 President of the United States. If such approval were required for the
3 smaller Warren Act contracts, that omission was cured by adoption of the
4 Reclamation Reform Act of 1982, 43 U.S.C. §§ 390aa et seq., in § 390xx,
5 which authorized and validated and rectified any illegality of those
6 Warren Act contracts.

7 11. Certificates were issued by the State of Washington to the
8 United States as trustee for the use or storage and use of water on
9 lands being served by the Yakima Project. Rights thereunder inured to
10 the United States and its successors in interest, pursuant to R.C.W.
11 90.40.040. These certificates make it abundantly clear that even if
12 the provisions of R.C.W. 90.03.370 were to apply to the Warren Act
13 contracts for the Yakima River Basin, which they do not, those
14 requirements have been met by the language used by the State and the
15 United States so that Warren Act contracting entities are clearly
16 covered under the certificates. Nothing in R.C.W. 90.40.010-.080
17 requires the successors in interest to the United States, namely the
18 ultimate beneficial users, to comply with the state certification
19 processes set forth in R.C.W. 90.03.

20 12. Historically, the Yakima Project operated on natural flows
21 until completion of Bumping Dam in 1910. Three dams (Kachess, Clear
22 Creek and Keechelus) were completed in 1917, after contracts for
23 delivery of combined natural flow and storage were made. Early
24 deliveries before storage control (about July 1) are nothing but natural
25 flow delivered pursuant to the 1945 Consent Judgment.

26 Under the Warren Act the United States could and did uniformly
27 contract for delivery of both storage and natural flows. The entire
28 project was pursued and perfected with due diligence.

13. The United States Bureau of Reclamation is owner, in trust for
and a representative of Warren Act contractees, including individuals,
and irrigation districts and companies and their respective water users,
of the waters to be delivered under the various Warren Act contracts.
Memorandum Opinion, February 16, 1982, (affirmed in Department of
Ecology v. Acquavella, 100 Wn.2d 651); Memorandum Opinion Re: Threshold
Issues, May 12, 1992. Until at least as late as 1983, Department of

1 Ecology also acknowledged that water rights established by the United
2 States under state water rights statutes were to be issued to and owned
3 by the United States. Department of Ecology cannot now change the clear
4 language of the governing statutes (the 1905, 1915 and 1929 Acts), nor
5 evade that statutory scheme. This Court has also ruled that the duties
6 of the United States as trustee do not impose on it any additional
7 fiduciary duty or obligation other than the obligation to live by the
8 contracts which they have drawn and issued pursuant to the act of
9 Congress. Verbatim Report of Proceedings, September 14, 1995, pp. 29-30.

10 14. The United States was not required to file statements of
11 claims under RCW Ch. 90.14 on behalf of those for which it delivered
12 water, but was authorized to do so and such filings were made by the
13 United States. These include the claims filed on behalf of its Warren
14 Act contractees in the Yakima River Basin. Registration of these claims
15 inured to the benefit of these contractees as successors in interest to
16 the appropriation by the United States.

17 15. The historical facts are the basis and foundation to which the
18 law applies to form the Yakima Project as it is now and has been for
19 approximately eighty years. Where a contract exists which settles water
20 rights, due consideration must be given to such contract, lest the terms
21 thereof be impaired by the application of general laws as if no such
22 contract existed. Madison v. McNeal, 171 Wash. 669, 680 (1933).

23 16. The Yakima Project has been operated for about 80 years
24 pursuant to the Warren Act contracts and applicable federal law.
25 Pertinent provisions of these contracts were included in the 1945
26 Consent Judgment entered in the United States District Court for the
27 Eastern District of Washington, Civil 21. See Memorandum Opinion Re:
28 Motions for Partial Summary Judgment, May 22, 1990, and the resulting
Partial Summary Judgment entered herein November 29, 1990, and affirmed
by the Washington Supreme Court in Department of Ecology v. Yakima
Reservation Irrigation District, 121 Wn.2d 257.

"The entry of the consent judgment constituted judicial recog-
nition of the entire history of the Yakima Project, 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

1 and limitations on water usage for approximately 90 percent of
2 all water users in the Yakima River Basin, including the
3 Yakima Indian Nation's rights. By defining the "total water
4 supply available" (TWSA), it affirmed the complete control of
all the water from whatever source in the Yakima watershed by
the United States, to be determined as specified therein."
(emphasis supplied)

5 From the beginning of the Project May 10, 1905, the United States
6 through its legal counsel, engineers and Secretary of Interior have
consistently considered the entire Yakima Basin as a unified project.
7 At least until 1983, the State took the same position. Under the 1905,
8 1915, 1917 and 1929 Acts, the Yakima Basin was to be and remain a
9 federal project. There has been no change in state law for 66 years.

10 Except on the Yakama Indian Reservation, with this distinctive
11 pattern of State action, the water rights obtained by and through the
United States are to be determined by and under the provisions of R.C.W.
12 90.40.010-080, and not under R.C.W. 90.03. Statutes must be read
13 together to determine legislative purpose to achieve a harmonious total
14 statutory scheme which maintains the integrity of the respective
statutes. Ellensburg v. State, 118 Wn.2d 709, 713; Rettkowski v.
15 Department of Ecology, 122 Wn.2d 219, 226.

16 ON THE BASIS OF the documents, briefs and other matters submitted
17 to it in connection with questions raised by the Department of Ecology
relating to the water rights of users of water under Warren Act
18 contracts with the United States in the Yakima River Basin, its
Memorandum Opinion Re: Warren Act Contract Issues dated March 8, 1996,
19 and its above Findings, the Court hereby:

20 **ORDERS, ADJUDGES AND DECLARES:**

21 1. The Bureau of Reclamation may contract for delivery of project
22 water to any location or for any use within the basin consistent with
state and federal law. Areas where project water is used in accordance
23 with contracts with the Bureau of Reclamation are within the boundaries
of the federal reclamation project.

24 2. State statutes contemplate that water rights established for
25 the project be issued to and be owned by the United States in trust for
26 its contractees and their water users.

1 3. Analysis of the Warren Act does not change depending on
2 whether or not the contract entity is an approved or unapproved unit of
3 the project.

4 4. The 1902 Reclamation Act, and the 1911 Warren Act are
5 consistent with state law. The 1905, 1915, 1917, and 1929 State Acts
6 placed all control of the Project with the United States.

7 5. All contracts between all of the various divisions, entities
8 and individuals within the Yakima Basin and the United States are legal
9 and valid contracts, whether within or outside of an 'approved' unit of
10 the Yakima Project.

11 6. Except on the Yakama Indian Reservation, the water rights
12 obtained by and through the United States are to be determined by and
13 under the provisions of R.C.W. 90.40.010-080, and not under R.C.W.
14 90.03. Under R.C.W. Sections 90.03.250 and 90.03.460 and R.C.W.
15 90.40.040 (which establishes the priority date of May 10, 1905, for the
16 entire Yakima Project), the application/permit/certificate process
17 otherwise set forth in R.C.W. 90.03 does not apply to the United States
18 Yakima Project.

19 7. The "secondary" permit process under R.C.W. 90.03.370 does not
20 apply to the Yakima Basin Project. Nevertheless, the statutory
21 requirements for such permits have been met by the United States and the
22 State of Washington.

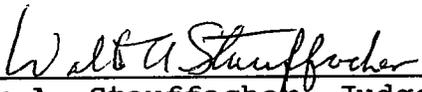
23 8. The United States was the appropriator of all of the then
24 unappropriated water for the Yakima Project as of May 10, 1905, thereby
25 acquiring the right to contract for delivery of combined natural flow
26 and storage water in its water supply contracts.

27 9. There is no violation of 43 U.S.C. Sec. 524 (Warren Act of
28 1911, § 2), because under R.C.W. 90.40.010-080 (the 1905 and 1929
Acts), RCW 87.03.115 (the 1915 Act), and R.C.W. 90.03.250 and 460 (in
the 1917 Water Code), the state laws specifically authorized the
withdrawal of all of the unappropriated waters of the Yakima River
Basin, the diversion and use of that water (including natural flows),
and the allocation of that water within the Yakima River Basin by the
United States, and provide that the state laws expressly yield to the
federal provisions.

1 10. Under the provisions of R.C.W. 90.14.041 and .061 and the
2 filings made by the United States and the permits and certificates
3 issued by the State of Washington to the United States as trustee, any
4 entity with a Warren Act or storage contract with the United States does
5 have a legal water right on proof of beneficial use of water supplied
6 pursuant to the contract, whether such contract was entered into either
7 prior to or subsequent to 1917. This does not apply to the contracts
8 for the Yakama Indian Reservation.

9 11. The United States' contractual relationship is "akin" to the
10 trustee relationship of irrigation districts to their patrons. The
11 United States' role as trustee is defined by the terms of its contracts
12 and Acts of Congress. Therefore, the duties of the United States as
13 "trustee," do not impose on it any additional fiduciary duty or
14 obligation other than the obligation to fulfill the contracts which they
15 have drawn and issued pursuant to the Acts of Congress.

16 DATED this 18th day of September, 1996.

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Walter A. Stauffacher, Judge