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KIM M. EATON
EX. CLERK OF
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
SUPERIOR COURT
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,)
DEPARTMENT OF ECOLOGY,)

Plaintiff)

vs.)

JAMES J. ACQUAVELLA, et al.,)

Defendants.)

Cause No. 77-2-01484-5

MEMORANDUM OPINION
AND RULING RE: R.C.W. 90.14.068(5)
CONSTITUTIONAL ISSUE

FILED

NOV 08 1999

KIM M. EATON
YAKIMA COUNTY CLERK

BACKGROUND

In 1969, the Washington State Legislature enacted a law which provided that "All persons using or claiming the right to withdraw or divert and make beneficial use of public surface...waters of the state...shall file with the department of ecology not later than June 30, 1974, a statement of claim for each water right asserted..." It did not apply to any water rights which were based on the authority of a permit or certificate previously issued by the department. R.C.W. 90.14.041. Thus, there was an approximate 5 year time, from 1969 to June 30, 1974, to comply with the filing requirements.

In 1979, the legislature enacted 1979 ex.s.c. 216, Sec. 4 (now R.C.W. 90.14.043) which stated "Notwithstanding any time restrictions imposed...a person may file a claim pursuant to R.C.W. 90.14.041 if such person obtains a certification from the pollution control hearings board as

1 provided in the section.” The Act was effective as of June 4, 1979 and it further stated “The board
2 shall have jurisdiction to accept petitions for certification from any person through December 31,
3 1979, and not thereafter.” Thus, for over six months persons could petition for certification and if
4 the board certified the claim, the department of ecology was directed to accept the claim for filing.

5 Once again, this opportunity to petition the pollution control hearing board was re-opened
6 from July 28, 1985 and ending on midnight September 1, 1985 (R.C.W. 90.14.044). Thus, on three
7 separate occasions, from 1969 to 1974, in 1979 and again in 1985, persons were entitled to file and
8 have their claims included in the Water Rights Claim Registry.

9 Finally, in 1997, the Legislature re-opened the Water Rights Claim Registry for the fourth
10 time. R.C.W. 90.14.068(1) provides: “(1) A new period for filing statements of claim for water
11 rights is established. The filing period shall begin September 1, 1997, and shall end at midnight June
12 30, 1998.” “A person who claims such a right and fails to register the claim as required is
13 conclusively deemed to have waived and relinquished any right, title or interest in the right.”
14 Included in this 1997 legislation, however, was the following: “This section does not apply to
15 claims for the use of surface water withdrawn in an area that is, during the period established...the
16 subject of a general adjudication proceeding for water rights in superior court under R.C.W.
17 90.03.110 through 90.03.245 and the proceeding applies to surface water rights.” R.C.W.
18 90.14.068(5). (Emphasis added)

19 Subsequent to the 1969-1974 claim period, but prior to the 1979 and 1985 re-opened filing
20 periods, the state, in October, 1977, initiated the Yakima River Basin Water Rights Adjudication.
21 The matter was initially removed to the U.S. District Court, which in turn, then returned the matter to
22 the Yakima County Superior Court pursuant to the McCarren Amendment, 43 U.S.C. Sec. 666, in
23 early 1981. The state had previously, in 1977, personally served summons in the matter on 4,289
24 persons or entities and over 2,100 claims were filed with the Court by September 1, 1981.
25 Department of Ecology vs. James Acquavella, 100 Wn2d 651, 654-655. In actuality, 2,676
26 individual claims were filed in the 31 subbasins and 40 claims were filed by Major Claimants. (It

1 should be noted that 16 of the Major Claimants are distribution entities within the Sunnyside
2 Division and will be determined concurrently).

3 To date, the Referee has conducted the evidentiary hearings in 28 of the 31 subbasins and
4 there are 199 claimants in the 3 remaining subbasins, whose evidentiary hearings will take place this
5 year, 1999. All of the Major Claimants evidentiary hearings have been held. Of the 31 subbasins,
6 14 have had their Conditional Final Orders entered after the issuance of the Referee's Reports,
7 exception hearings, remand hearings and issuance of Supplemental Reports. There have been 4
8 exception hearings to other subbasins Supplemental Reports which are awaiting Conditional Final
9 Orders. (C.F.O. s)

10 The records of the Department of Ecology (D.O.E.), as of October, 1998 showed that during the
11 1997-1998 re-opening of the Water Rights Claim Registry, 3,670 statements of claims were
12 received, 210 of which are claims in areas subject to an ongoing general adjudication of surface
13 water rights. Of that 210, 166 of them are in the area of the Yakima River Basin adjudication. The
14 D.O.E. informed these claimants by letter that their Statement of Claim would not be filed for the
15 reason that "Water use is subject of a general adjudication during this period." As a result, 81 of the
16 claimants filed appeals to the Pollution Control Hearings Board. Ten of those appeals apply to
17 claimants in which Conditional Final Orders (C.F.O.'s) have been entered in their subbasins; 30
18 apply in subbasins where only the evidentiary hearings have been held; 26 apply in subbasins where
19 the exceptions hearings to the Referee's Report have been held; 13 apply in subbasins where the
20 Referee's remand hearing has been held; and 2 apply in subbasins where the Supplemental Report of
21 the Referee has issued. Of the remaining 85 claimants who did not file appeals to the P.C.H.B., 23
22 are in subbasins where Conditional Final Orders have been entered and the other 62 are in other
23 subbasins at various stages of the proceedings. (Pittman Declaration, 10-1-1998, Document No.
24 13,479).

25 In March of 1998, Packwood Canal Co. filed herein a Motion to Reopen Record, Hold
26 Evidentiary Hearing, Set Briefing Date, Hold Statute Unconstitutional, and Order D.O.E. to File
Packwood's Water Right Claim to the Yakima River. Claimants Bart and Carrie Bland joined in the

1 motion which was responded to by the D.O.E. and the Yakama Indian Nation. They questioned this
2 Court's subject matter jurisdiction as the movant's had not exhausted their administrative remedies
3 before the P.C.H.B. The D.O.E. did acknowledge, however, that the movants had already filed
4 appeals to the P.C.H.B. before filing their motions. Cross motions for summary judgment were filed
5 by the movants and D.O.E. before the P.C.H.B., which ruled that it lacked jurisdiction to consider
6 constitutional issues. Numerous other parties hereto had also filed appeals with the P.C.H.B. Per
7 stipulations entered into between the claimants and the D.O.E., jurisdiction was agreed to be in this
8 court. The Court then set a briefing schedule on the issues presented. Approximately another
9 sixteen claimants joined into the proceedings once this Court assumed jurisdiction.

10
11 OPINION

12 It is the contention of the claimants herein that R.C.W. 90.14.068(5), by denying to persons
13 within an area of a general adjudication proceeding for surface water rights the right to file a water
14 right claim in the state Water Right Claims Registry, which claimants in areas not subject to such an
15 adjudication may do to prevent relinquishment of such water rights, is a violation of these claimants
16 constitutional rights. They cite to the Fourteenth Amendment of the United States Constitution
17 (Equal Protection) and to Article 1, section 12 of the Washington State Constitution (Privileges and
18 Immunities). The U.S. Fourteenth Amendment provides in pertinent part:
19
20

21 "No state shall make or enforce any law which shall abridge the
22 privileges and immunities of citizens of the United States; nor shall
23 any state deprive any person of life, liberty, or property, without due
24 process of law; nor deny to any person within its jurisdiction the equal
25 protection of the laws.",
26

1 while Article 1, sec. 12 of the State Constitution provides:

2 “No law shall be passed granting to any citizen, class of citizens, or
3 corporation other than municipal, privileges or immunities which upon
4 the same terms shall not equally belong to all citizens, or
5 corporations.”

6 Initially, with the allegation that R.C.W. 90.14.068(5) violates both the federal and the state
7 constitution, counsel refer to “... When is it appropriate for this court to resort to independent state
8 constitutional grounds to decide a case, rather than deferring to comparable provisions of the United
9 States constitution as interpreted by the United States Supreme Court?” State vs. Gunwall, 106
10 Wn2d 54, 58. “Washington courts look to the six factors outlined in State vs Gunwell, (supra), to
11 determine whether a state constitutional provision extends broader rights than the Federal
12 Constitution.” Seeley vs. State, 132 Wn2d 776, 786.

13 With reference thereto by all counsel, as later noted, State vs Gunwall, supra pp. 61-62 sets
14 forth the six factors as follows:

15 “We deem the following six nonexclusive neutral criteria...relevant to
16 determining whether, in a given situation, the constitution of the State
17 of Washington should be considered as extending broader rights to its
18 citizens than does the United States Constitution. 1. The textured
19 language of the state constitution...2. Significant differences in the
20 text of parallel provisions of the federal and state constitution...3.
21 State constitutional and common law history...4. Pre-existing state
22 law...5. Differences in structure between the federal and state
23 constitutions...6. Matters of particular state interest or local concern”.

24 It should be noted that an explanation of the meaning of each of these six factors is set forth
25 as each factor is declared in Gunwall.

26 Interestingly, in the claimants initial Motion to Reopen Record, no mention whatsoever was
made of the Gunwall factors, nor was there any reference thereto in the D.O.E. Response to Motion.
At that time, all parties made reference only to the “minimal scrutiny” or “rational basis” tests of
three inquiries as set forth in Yakima Co. Deputy Sheriff’s Ass’n vs State, 114 Wn2d 182. With the

1 actual briefing schedule set by the Court, the claimants did then refer to the Gunwall factors in their
2 Opening brief, and the D.O.E. responded thereto in it's Response brief. None of the parties referred
3 thereto in the Reply briefs, nor were the Gunwall factors referred to in oral arguments by any of the
4 parties hereto, and all parties again concentrated on the aforementioned "rational basis" test. With
5 the basically cursory reference to Gunwall by the parties, the Court will follow State vs Furman, 122
6 Wn2d 440, 448 wherein it was held:

7
8 "We will consider whether to apply our state constitutional provisions
9 more strictly than parallel federal provisions only when we are asked
10 to do so, and even then only if the argument includes proper analysis
11 of the six 'interpretive principles' outlined in State vs Gunwall,
12 106Wn2d 54." (Emphasis added)

13
14 From that directive, we then turn to American Network, Inc. vs the Utilities and
15 Transportation Commission, 113Wn2d 59, 77 wherein it was held that:

16
17 "The privileges and immunities clause of the Washington State
18 Constitution (article 1, section 12) and the equal protection clause of
19 the Fourteenth Amendment are substantially identical and have been
20 considered by this court as one issue."

21
22 The same holding has been reiterated in State vs Shawn P. 122 Wn2d 553, 559, State vs
23 Mannusier, 129 Wn2d 652, 672 and State vs Smith, 117 Wn2d 263, 28. Accordingly, we return to
24 the "minimal scrutiny" or "rational basis" test referred to in the claimants Motion to Reopen Record
25 and the D.O.E. Response to Motion and which all parties solely referred to in their oral presentations
26 to the Court. As stated in Associated Grocers vs State, 114 Wn2d 182, 187: "Using this test, the
court makes three inquiries: (1) Whether the classification applies alike to all members within the
designated class; (2) Whether some basis in reality exists for reasonably distinguishing between
those within and without the class; and (3) whether the challenged classification bears any rational
relation to the purposes of the challenged statute.", referring to Deputy Sheriff's Assn. Vs
Commissioners, 92 Wn2d 831, 835-836, which contains an explanation of each of the three
inquiries. See also De Young vs Providence Medical Center, 136 Wn2d 136.

1 Generally, the parties basically agree that there are three different classes referred to in the
2 statute: (1) Persons who had previously filed water rights claims; (2) persons who had not
3 previously filed who are living in an area which is subject to an ongoing water rights adjudication;
4 and (3) persons who had not previously filed who live in areas that are not subject to an
5 adjudication. All parties agree that the contested statute, R.C.W. 90.14.068(5), applies only to the
6 disparate treatment between the second and third noted classes, i.e., those who are allowed to file a
7 water right claim and those who are not allowed to file such a claim.

8 With reference to the three inquiries previously set forth, Associated Grocers, supra, the
9 parties agree that the first inquiry is met, acknowledging that the suspect classification does apply
10 alike to all members of the designated class, i.e., those previously non-filers who live in an area
11 subject to an adjudication. Thus, we then turn to whether there is a basis in reality for distinguishing
12 between previous non-filers who live within areas subject to an ongoing adjudication and previous
13 non-filers living in areas outside of an adjudication and whether that classification bears any rational
14 relationship to the purpose of the statute.

15 As to the “purpose” of the statute, R.C.W. 90.14.010 states: “The purpose of this chapter is
16 to provide adequate records for efficient administration of the state’s waters, and to cause a return to
17 the state of any water rights which are no longer exercised by putting said waters to beneficial use.”
18 As an explanation of the purpose, R.C.W. 90.14.020 declares: “The legislature finds that: (1)
19 Extensive uncertainty exists regarding the volume of private claims to water in the state; (2) Such
20 uncertainty seriously retards the efficient utilization and administration of the states water
21 resources....” And “(7) Water rights will gain sufficient certainty of ownership as a result of this
22 chapter to become more freely transferable...”. Thus, we see that the “purpose” of R.C.W. 90.14 is
23 to eliminate the uncertainty and attempt to establish efficient utilization and administration of the
24 state’s waters. Later, further reference will be made as to the purpose of the statute in the context of
25 the issue before us.

26 In the Motion to Reopen, the briefing and the oral arguments, the claimants, in challenging
the constitutionality of R.C.W. 90.14.068(5), acknowledge that they have the burden of proof to

1 establish that it is unconstitutional. The question then turns to the standard of proof necessary to
2 accomplish their purpose. The standard of proof was set forth succinctly in Salstrom's Vehicles,
3 Inc. vs Department of Motor Vehicles, 87 Wn2d 686, 690-691 as follows:

4
5 "One limitation upon our exercise of judicial review is the heavy
6 presumption of constitutionality accorded a legislative act...Every
7 state of facts sufficient to sustain a classification which reasonably can
8 be conceived as having existed when the law was adopted will be
9 assumed...A statute's alleged unconstitutionality must be proven
10 'beyond all reasonable doubt' before it may be struck down. These
11 principles are more than rules of judicial convenience. 'They work the
12 line of demarcation between legislative and judicial functions.'"
13 (Emphasis added).

14 "A statute's alleged unconstitutionality must be proven 'beyond all reasonable doubt' before
15 it maybe struck down", Aetna Life vs Washington Life, 83 Wn2d 523, 528. "In order to defeat a
16 legislative enactment, the court must be persuaded of its unconstitutionality beyond a reasonable
17 doubt." Ferndale Vs Friberg, 107 Wn2d 602, 608. "We generally will not declare a statute
18 unconstitutional unless it appears unconstitutional beyond a reasonable doubt." State vs Shawn P.,
19 122 Wn2d 553, 561. "The party challenging the legislation must show beyond a reasonable doubt,
20 that no state of facts exists or can be conceived sufficient to justify the challenged classification..."
21 Seeley vs State, 132 Wn2d 776, 796. Thus, it is and has been firmly established that the burden of
22 proof assigned to the claimants herein is to prove the unconstitutionality of R.C.W. 90.14.068(5)
23 'beyond a reasonable doubt'.

24 As to the second and third inquiries under the "rational basis" test, as previously noted, we
25 find the explanation of those in Deputy Sheriff's Ass'n vs Commr's, supra, pp 835-836. With
26 respect to the "basis in reality" inquiry the question is: "...do reasonable grounds exist to support
the classification's distinction between those within and without the class? The legislature's
discretion in making classes is wide and when a statutory classification is challenged, facts are
presumed sufficient to justify it." As to the "rational relationship" the criteria is "...does the
difference in treatment between those within and without the designated class serve the purposes

1 intended by the legislature? The challenger must do more than merely question the wisdom and
2 expediency of the statute. The challenger must show conclusively that the classification is contrary
3 to the legislation's purposes."

4 With respect to these "second and third inquiries", none of the parties specifically directed
5 their briefing and arguments to them separately, but mostly just referred to the "rational basis" test
6 generically. Therefore, the court will do somewhat the same in reference to the issues raised and
7 presented. Additionally, it should be noted that "...the rationality of a classification does not require
8 production of evidence to sustain the classification; it is not subject to courtroom fact-finding.
9 Indeed, the rational basis standard may be satisfied where the "legislative choice is based on rational
10 speculation unsupported by evidence or empirical data." De Young vs Providence Medical Center,
11 136 Wn2d 136, 147-148; Gossett vs Farmers Insurance Co., 133 Wn2d 954, 979. That being
12 recognized, almost all of the factual matters referred to in the briefing and the oral arguments are
13 matters of public record, both in legislative acts and records of this case. Further, there are other
14 factual matters, again both in public records and in this case, not referenced by the parties hereto of
15 which the Court may, and will, take judicial notice while reviewing the application of the rational
16 basis test in this matter.

17 It should be noted that Packwood Canal Co. also briefly claimed that R.C.W. 90.14.068(5)
18 violates the Due Process clause of the U.S. Constitutional Amendment 14, section 1 which provides
19 in relevant part; "No state shall...deprive any person of life, liberty or property, without due process
20 of law." The D.O.E. also briefly responded to this claim. Both of the parties rely upon the same
21 language from Weden vs San Juan County, 135 Wn2d 678, 706-7. "The inquiry as to whether the
22 statute is unduly oppressive lodges wide discretion in the court and implies a balancing of the public
23 interest against those of the (persons regulated)." "Whether a statute is unduly oppressive depends
24 on the nature of the harm to be avoided, the availability and effectiveness of less drastic measures to
25 achieve the objective, and economic losses suffered by the persons subject to the measure."

26 In presenting their respective positions on the "rational relationship to the purpose of the
statute" and "unduly oppressive" theories, with respect to the Due Process clause, both parties refer

1 to the same points and arguments as were articulated on the constitutionality issue. Hence, both the
2 Due Process and Constitutional issues will be referenced together in the Court's consideration of
3 these issues as presented.

4 The parties hereto make numerous arguments with respect to the purpose of R.C.W.
5 90.14.068. As noted previously, the stated purpose of the chapter R.C.W. 90.14 is to eliminate the
6 uncertainty as to water rights and to attempt to establish efficient utilization and administration of the
7 state's waters. Going further, the Court would call attention to the fact that the same 1997 legislature
8 that passed R.C.W. 90.14.068 also established R.C.W. 90.03.105 wherein:

9 "The legislature finds that the lack of certainty regarding water rights
10 within a water resource basin may impede management and planning
11 for water resources... Therefore, such planning units may petition the
12 department to conduct such a general adjudication and the department
13 shall give high priority to such a request in initiating any such general
14 adjudication under this chapter." (1997 c442, Sec. 301.)

15 Going even further, the 1997 legislature established Watershed Planning and stated: "The
16 purpose of this chapter is to develop a more thorough and cooperative method of determining what
17 the current water resource is in each water resource inventory area of the state..." R.C.W.
18 90.82.005; 1997 c442, Sec. 101. Additionally, the same legislature created Water Conservancy
19 Boards, finding that "Voluntary water transfer between water users can reallocate water use in a
20 manner that will result in more efficient use of water resources..." R.C.W. 90.80.005; 1997
21 c441, Sec. 1. These two chapters immediately followed chapter 440 (R.C.W. 90.14.068) with which
22 we are here concerned. Thus, it is readily apparent that the 1997 legislative was especially cognizant
23 of the water problems of the state and was clearly attempting to alleviate these problems. This
24 follows a previous legislative acknowledgment of the specific Yakima River Basin Water Rights:

25 "The legislature finds that: (1) (a) Under present physical conditions
26 in the Yakima river basin there is an insufficient supply of water to
satisfy the needs of the basin; (c) the interests of the state will be
served by developing programs, in cooperation with the United States

1 and the various water users in the basin, that increase the overall
2 ability to manage basin waters in order to better satisfy both present
3 and future needs for water in the Yakima river basin. (2) It is the
4 purpose of this chapter, consistent with these findings, to improve the
5 ability of the state to work with the United States and various water
6 users of the Yakima river basin in a program designed to satisfy both
7 existing rights and other presently unmet as well as future needs of the
8 basin.” R.C.W. 90.38.005; 1989 c429, Sec. 1.

6 One major contention of the claimants is that the legislative insertion of R.C.W. 90.14.068(5)
7 is directly contrary to the purpose of the statute, ie, another opportunity to file a claim in the Water
8 Rights Claim Registry, and that that section of the statute bears no rational relation to the statute,
9 which they contend was to provide one more opportunity for “confused” persons to avoid the harsh
10 consequences of not previously filing in the three previous claim periods, supra. They argue that
11 many people missed the informational notices, used wrong forms, etc. However, the Court will take
12 judicial notice of the statutory notice requirements for filing claims established by the legislature in
13 1969. In R.C.W. 90.14.091 (1969 ex.s. c284, Sec. 18) they set out the specific wording of the notice
14 to be given to all property owners and, in capital letters, set forth the penalty for failure to register.
15 Also, in R.C.W. 90.14.101 (1969 ex.s. c284, Sec. 19) the legislature directed the D.O.E. to put the
16 notice in writing in all newspapers with a circulation of 50,000 and at least one paper in every county
17 at least once each year for five years; broadcast the notice on each commercial television station and
18 one commercial radio station in each county at 6 month intervals for five years; post a notice in
19 every county courthouse; have each county treasurer enclose a copy of the notice with each tax
20 statement issued in 1972; and provide copies of the notice to the press service in Thurston County in
21 January of each year from 1970 through 1974. With all of that notice over that extended period of
22 time, it is difficult to accept that property owners were not aware of the requirement to file their
23 claim, especially with the re-opening of the opportunities to file in 1979 and 1985. Additionally,
24
25
26

1 with the filing of this adjudication, the D.O.E. was required to issue a summons "...against all
2 known persons...and also all persons unknown claiming the right to divert the water involved...."
3 R.C.W. 90.03.120. Thus, all parties herein have had additional notice that their water rights were to
4 be determined, particularly with the publication of the summons and notice in each of the counties
5 affected, once a week for six consecutive weeks. R.C.W. 90.03.130. "We have expressly
6 recognized the duty of property owners to take notice of public laws affecting the control and
7 disposition of their property." Davidson vs. State, 116 Wn2d 13, 26. Thus, with the initiation of this
8 adjudication in 1977 and the service of summons and the publications thereof, plus two later re-
9 opened filing periods in 1979 and 1985, the contention that the non-claimants were "confused" is
10 without merit.
11

12 Another contention of the claimants is that the purpose of the legislative passage of R.C.W.
13 90.14.068 was to further help to create a data base in the Water Rights Claims Registry and that
14 R.C.W. 90.14.068 (5) is diametrically opposed to that purpose by not allowing persons in an area
15 undergoing an adjudication to file a water right claim. Without going further, that may appear to be
16 a reasonable premise. However, there are other factors beyond this section of the statute alone that
17 bear upon this question and it is necessary to consider those as well. As noted in State vs Shawn P.,
18 122 Wn2d 553, 563:
19

20 "Under the rational basis test, a statutory classification will be upheld
21 if any conceivable state of facts reasonably justifies the classification.
22 Such a rational basis for a legislative decision need not have actually
23 motivated the legislature's decision."

24 With all that in mind, we take note of R.C.W. 90.14.081, which states in part: "The filing of
25 a statement of claim does not constitute an adjudication of any claim to the right to use of waters as
26 between the water use claimant and the state, or as between one or more water use claimants and

1 another or others.” “...A statement of claim shall not otherwise be evidence of the priority of the
2 claimed water right.” (1969 ex. s. c284, Sec. 17). This is clearly legislative recognition that a “water
3 right claim” is no more than just a claim and it does not establish a perfected right. The complete
4 perfection of a claimed water right can only be obtained by means of an adjudication. “...legislative
5 bodies...are presumed to have full knowledge of existing statutes affecting the matter upon which
6 they are legislating.” Bennet vs Hardy, 113 Wn2d 912, 926.

7
8 Rettkowski vs Dept. of Ecology, 122 Wn2d 219, 229 sets forth a description of an
9 adjudication, as follows:

10 “A general adjudication...is a process whereby all those claiming the
11 right to use waters of a river or stream are joined in a single action to
12 determine water rights and priorities between claimants...hearings are
13 conducted by Ecology at which all parties claiming water from a
particular basin get to present evidence as to their claims, examine the
evidence of other parties claiming a right to use water, and, if
warranted, question the validity of such other competing claims...A
14 general adjudication ensures that all interested parties are heard in a
15 formal adjudication setting and that adequate due process is afforded to
16 all.” (Emphasis added)

17 As has been previously noted herein, the Legislature is and has been acutely aware of the
18 insufficient water supply in the Yakima River Basin (R.C.W. 90.38.005) and the absolute necessity
19 to specifically and legally, through adjudication, establish with certainty the water rights in this basin
20 in order to enhance the management and future planning with respect to the available supply of water
21 for use within this basin. It has consistently assisted this Court in attempting to expeditiously
22 attempt to timely complete this adjudication. See L. 1987 c73, Amendment 80, Washington
23 Constitution, and L. 1989 c80, R.C.W. 90.03.160. This adjudication will accomplish the purpose of
24 the Legislature which the mere filing of a claim in the Registry will not do and it is apparent that the
25 legislators did not wish to do anything to impede its progress. “Another limitation upon our exercise
26

1 of judicial review is the heavy presumption of constitutionality accorded a legislative act. Every
2 state of facts sufficient to sustain a classification which reasonably can be conceived of as having
3 existed when the law was adopted will be assumed.” Aetna Life vs Washington Life, 83 Wn2d 523,
4 528.

5 Thus, rather than being diametrically opposed to the re-opened filing period, the exclusion of
6 those would be claimants in an area subject to an ongoing adjudication where the water rights will be
7 completely perfected, as opposed to being only claimed in the Water Rights Registry is totally
8 logical. “Legislative bodies have very extensive powers to make classifications for purposes of
9 legislation. The test for purposes of classification is merely whether “any state of facts reasonably
10 can be conceived that would sustain the classification.” Sonitrol Northwest vs Seattle, 84 Wn2d
11 588, 590. It is clear that the legislature did not wish to establish any impediments to the legal
12 determination of specific water rights, rather than merely filing claims.
13
14

15 As an aside, some of the claimants have complained that the Referee in the Reports would
16 recite all of the evidence presented and would then deny the water right as no R.C.W. 90.14 claim
17 had been filed. There is no question that the Referee was fulfilling his responsibilities. R.C.W.
18 90.03.190 requires that the Referee “...shall also make and file in said court a full and complete
19 report as in other cases of reference in the superior court.” (Emphasis added) Thus, the Referee had
20 followed the statutory requirement and competently performed his duty.
21

22 The claimants argue that allowing them to file claims will not affect any others as their
23 present attempted claims would be subordinate to all other adjudicated rights, referring to R.C.W.
24 90.14.068(1), wherein it states: “This reopening of the period for filing statements of claim shall not
25 affect or impair in any respect whatsoever any water right existing prior to July 27, 1997. A water
26 right embodied in a statement of claim filed under this section is subordinate to any water right
embodied in a permit or certificate issued under chapter 90.03...prior to the date the statement of

1 claim is filed with the department and is subordinate to any water right embodied in a statement of
2 claim filed in the water rights claim registry before July 27, 1997.”

3 While it is correct that the priority dates for the now “would be” claimants would be
4 subordinate to all adjudicated diversion rights, there are still other considerations that must be
5 recognized. Since the inception of the federal project in the Yakima Basin in 1905, there has always
6 been concern by the water users and the U.S. Bureau of Reclamation (B.O.R.) as to the amount of
7 water available for use on a yearly basis. With the construction of the reservoirs and the U.S.
8 contracts with the water users, the B.O.R. maintains control over approximately 90% of that yearly
9 supply of water in the basin. Early on, while the reservoirs were being established, it was necessary
10 for the B.O.R. to enter into “limiting agreements” with irrigation districts and other diverters.
11 Ultimately, in 1945, it was necessary for almost all diverters and the B.O.R. to enter into the Consent
12 Decree, Civil No. 21, U.S. District Court, Eastern District of Washington. That Decree specifically
13 contained “proration” provisions during periods of an insufficient supply of water, so that what water
14 was available was proportionately diminished to the users. (para. 18)

15 In addition, the Decree indicated that proration would be based upon the Total Water Supply
16 Available (TWSA), which the Decree defined “...as that amount of water available in any year from
17 natural flow of the Yakima River , and its tributaries, from storage in the various Government
18 reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the
19 United States to deliver water and to supply claimed rights to the use of water on the Yakima River,
20 and its tributaries...” (Para. 18) (Emphasis added). Thus, since 1945 there has been and there will
21 continue to be much concern by the B.O.R. and the present water users as to the TWSA on a yearly
22 basis and the necessity to prorate the delivery of water to the water users.

23 Coupled with the TWSA concern on a yearly basis is the further yearly concern as to the
24 amount of “carryover” that may or may not be in the reservoirs at the end of each irrigation season.
25 Some “carryover” supply is an absolute necessity each and every year to cope with the ensuing
26 possibly water short year. As previously noted, the Legislature itself has found “...there is an
insufficient supply of water to satisfy the needs of the basin...” R.C.W. 90.38.005. Clearly, even in

1 a year where there is a sufficient amount of water to supply all presently existing rights, there will
2 still be much concern by those existing water right users to not further deplete the supply beyond
3 their own use so that there can be carryover for the next year, which expanding the use might reduce.
4 Therefore, even though the now “would be” claimants rights would be subordinate to all present
5 water rights users, there would still be considerable concerns by the present right holders as to the
6 TWSA and the carry over for the next year. If the proposed claims were allowed into the Water
7 Rights Claims Registry and become a part of this present Basin adjudication, clearly the present
8 parties herein will want to “...examine the evidence of other parties claiming a right to use water,
9 and, if warranted, question the validity of such other competing claims...” Rettkowski vs D.O.E.,
10 supra. It is a matter of record herein that many parties have challenged others claimed water use
11 within most, if not all, of the subbasin hearings, whether it be at the evidentiary, exceptions or
12 remand hearings.

13 The claimants are somewhat divided as to the approach to be taken in those subbasins where
14 C.F.O.’s have been entered. Some claimants contend that where the C.F.O. has been entered in a
15 subbasin that the subbasin is not subject to an ongoing adjudication and therefore, those “would be”
16 claimants in that subbasin cannot now be heard or allowed to present evidence. Other claimants
17 maintain that it is up to the Court’s discretion as to whether to re-open for hearings in a subbasin
18 with a C.F.O., indicating that those C.F.O.’s can be amended. The D.O.E. responds that in any
19 subbasin where there is a C.F.O. and new “would be” claimants, those subbasins would have to be
20 re-opened for additional evidentiary hearings, issuance of reports, exceptions hearings, remand
21 hearings, etc. D.O.E. maintains that no subbasin is completely final until all of them have been
22 adjudicated and consolidated into a final Decree. That is correct. Precedent has already been
23 established in this adjudication in that a C.F.O. was entered for subbasin 30 on March 12, 1992, but
24 was amended on May 8, 1997 to include a claimant inadvertently omitted therefrom and the C.F.O.
25 for the Kiona Irrigation District was entered in February, 1996 and was amended in May of 1996.
26 As previously noted, out of the 166 “would be” claimants herein, 36 of those are in twelve subbasins
where C.F.O.’s have been entered. (Pittman Declaration, Document 13,479) With a re-opening of

1 those 12 subbasins for additional evidentiary, exceptions and remand hearings, particularly in those
2 subbasins involving non-U.S. Project creeks and streams, the present adjudicated water right holders
3 in those subbasins will clearly become directly and deeply involved again.

4 Candy Pittman, an Environmental Specialist IV with the D.O.E., who has been involved in
5 this adjudication since 1979, has filed three separate Declarations herein—Document 13,002 on May
6 4, 1998; Document 13,479 on Oct. 1, 1998; and Document 13,554 on Oct. 29, 1998. Therein, it is
7 pointed out that it is not feasible, as argued by the claimants, to only have one evidentiary hearing to
8 receive testimony and evidence on all 166 claims that were attempted to be filed herein. Clearly, this
9 is so. With 166 claims in 23 different subbasins, with other claimants therein who may wish to
10 challenge or contest these new claims, it is obvious that there will need to be numerous evidentiary
11 hearings in each subbasin to allow all interested parties to participate. As noted in the Declarations,
12 this will generate substantial costs for all concerned—discovery and production of evidentiary
13 documents, fees for technical experts, attorney fees and the considerable time demands for all
14 participants at the evidentiary, exceptions and remand hearings that may have to be scheduled. The
15 Declarations state that all of these hearings could add an additional five years for the completion of
16 this adjudication. While the claimants respond that this estimate is pure speculation, they fail to take
17 into account that after each of these hearings, there always needs to be considered the time needed by
18 the Referee to review and assess all of the evidence presented, the writing and publication of the
19 Reports and the necessary time scheduled for the filing of exceptions, legal briefs, etc., and further
20 hearings thereon. Thus, even if the estimate is “speculation” it clearly is a conservative one. Noting
21 again the previously mentioned legislative enactments, it is abundantly clear that the legislature is
22 very aware of the length of time already consumed by this adjudication and did not want to further
23 impede its progress, nor impose additional financial burdens upon the parties and the state herein.
24 “The rational relationship test is the most relaxed and tolerant form of judicial scrutiny under the
25 equal protection clause. Under this test, the legislative classification will be upheld unless it rests on
26 grounds wholly irrelevant to achievement of legitimate state objectives.” Davis vs Department of
Licensing, 137 Wn2d 957, 973. R.C.W. 90.14.068 (5) is clearly relevant to the state’s legitimate

1 objective of finalizing the actual adjudication of water rights, as distinguished from claims, within
2 the Yakima Basin.

3 Unquestionably, the claimants have not shown “beyond a reasonable doubt” that no state of
4 facts exist or can be conceived sufficient to justify the challenged classification. Seeley vs State,
5 *supra*, p. 796. There certainly is a “basis in reality” for reasonably distinguishing between those
6 “would be” claimants within and outside of this adjudication. Also, the difference in treatment
7 between those within and without the class established by R.C.W. 90.14.068(5) bears a “rational
8 relationship” to serve the purposes intended by the legislature, ie, to determine if there are persons
9 who wish to claim a water right within the state, but not to interfere with the present on-going legal
10 adjudication of specific water rights in some areas of the state. Deputy Sheriff’s Ass’n vs Commr’s,
11 *supra*, pp. 835-836. This classification clearly is not a violation of either the 14th Amendment, U.S.
12 Constitution (Equal Protection) nor of Article 1, Sec. 12 of the State Constitution (Privileges and
13 Immunities). Further, when we balance the public interest against those of the persons regulated,
14 there is no violation of the Due Process Clause of the U.S. Constitution, Amend. 14, Sec. 1. Weden
15 vs San Juan County, *supra*.

16 The D.O.E. has raised the issue that “If the Court Holds That R.C.W. 90.14.068(5) Does
17 Violate The Constitution, The Proper Remedy Will Be To Invalidate R.C.W. 90.14.068 In Its
18 Entirety.” It posits that “The practical effect of such invalidation of R.C.W. 90.14.068 would be to
19 eliminate the new opening of the claims filing period for all claims statewide, including the claims
20 which the claimants have sought to file, citing only to the case of Associated Grocers vs State, 114
21 Wn2d 182. It further reasons that “...in light of the inferred legislative purpose for inclusion of
22 subsection (5) there is reason to believe that the legislature would have refused to pass the statute if it
23 had known that it could not legally include subsection (5)” stating “...the only logical inference is
24 that the legislature included subsection (5) in order to avoid major set backs to this ongoing
25 adjudication through the filing of new claims and to avoid the considerable costs that would be
26 incurred in relitigating parts of the Yakima adjudication and extending the time frame for an

1 adjudication that has already been in progress since 1977.” While this is, in reality, as previously set
2 forth, a moot issue, the Court will briefly respond thereto.

3 At the outset, we look to the standards to be applied:

4 “An act of the legislature is not unconstitutional in its entirety because
5 one or more of its provisions is unconstitutional unless the invalid
6 provisions are unseverable and it cannot reasonably be believed that
7 the legislature would have passed one without the other, or unless the
8 elimination of the invalid part would render the remainder of the act
9 incapable of accomplishing the legislative purposes.” State vs.
10 Anderson, 81 Wn2d 234, 236; Guimont vs Clarke, 121 Wn2d 586,
11 613; Caritas Services vs. D.S.H.S., 123 Wn2d 391, 416; State vs
12 Crediford, 130 Wn2d 747, 760. Going further, State vs Anderson
13 explains “The constitutionality of the remaining portion of the statute
14 is subject to alternative tests, the first dependent upon whether the
15 legislature would have passed the remaining portion of the statute
16 without the unconstitutional portion, or alternatively, whether the
17 elimination of the unconstitutional portion so destroys the act as to
18 render it incapable of accomplishing the legislative purposes.”

19 As to the first alternative test, it has previously been noted that the legislature has on three
20 separate occasions, from 1969 to 1974, in 1979 and again in 1985, opened up the filing of claims in
21 the Water Right Claims Registry, without the inclusion of the language in subsection (5). Clearly,
22 the legislature would have, and has done so, passed the remaining portion of the act without
23 subsection (5). It should be further noted that the latter two openings were subsequent to the
24 commencement of this adjudication. Secondly, even without subsection (5), the act is clearly
25 capable of accomplishing the legislative purpose, ie, “...to eliminate the uncertainty and attempt to
26 establish efficient utilization and administration of the state’s waters.”, supra p. 7., albeit in a more
costly and time consuming fashion in an adjudication area. The elimination of subsection (5) would
not completely destroy the act’s purpose. With the ever rapidly increasing population in this state
and the increasing demands for water, the 1997 legislature gave special attention to water concerns
as previously referred to herein. (R.C.W. 90.03.105; R.C.W. 90.80.005; R.C.W. 90.82.005).

1 Therefore, it seems clear that the legislature would have re-opened the Registry with or without
2 subsection (5), as previously stated.

3 The D.O.E. further argues that the severance clause contained in R.C.W. 90.14.910 should
4 not be applied in this instance. That section sets forth:

5 “If any provision of this act or the application thereof to any person or
6 circumstance is held invalid, the act can be given effect without the
7 invalid provision or application; and to this end the provisions of this
8 act are declared to be severable. This act shall be liberally construed to
effectuate its purpose. (L. 1967, c 233 Sec. 26) (Emphasis added)

9 The D.O.E. again cites to Associated Grocers vs. State, supra, arguing that the Court therein
10 “...reasoned that it would be improper to judicially amend the statute by making the exemption
11 apply to a group which the legislature did not expressly state should qualify for the exemption”
12 stating that “...making the Registry opening applicable to the classification of claimants to water
13 subject to an ongoing adjudication would be contrary to the clear intent of the legislature that this
14 classification is not to be afforded such a privilege.” Further, D.O.E. claims that “The proper course
15 of action would be to invalidate R.C.W. 90.14.068 in its entirety and then let the legislature
16 determine the proper course of action. If the R.C.W. 90.14.068 is invalidated for failing to provide
17 the same privilege to similarly situated classification of claimants, then the legislature would have
18 the opportunity to decide whether the Registry opening should have been available to all parties who
19 filed claims, including those seeking water subject to an ongoing adjudication, or to no claimants
20 whatsoever.”

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23 However, Associated Grocers is not applicable to the matter sub judice. Therein, it was set
24 forth that: “In this case, the trial court considered the statute as a whole and its legislative purpose
25 and concluded that the Legislature created a single class of taxpayers under R.C.W. 82.04.270 and
26 that the Legislature included distributors, as well as wholesalers, within that class. The plain

1 language of the statute supports the trial court's conclusions." "This court has consistently treated
2 distributors and wholesalers as members of a single class under the statute and its forerunners." Pp.
3 187-188 (Emphasis added).

4 As previously noted, in the legislative act pertinent hereto, there are two distinct and separate
5 classes-those "would be" claimants who live in an area of an ongoing adjudication and those who
6 live in areas not subject to an adjudication, with the two separate classes being distinctly created by
7 the legislature and everyone in each class treated exactly the same. This is directly inapposite to the
8 situation in Associated Grocers, where it was held there was but a single class. Additionally, the
9 severance clause in Associated Grocers is quite lengthy and very detailed as compared to the simple
10 and direct severance clause herein as to how it should be applied and specifically to whom.

11 "...where a severability clause is present in legislation, we have found such a clause to provide the
12 necessary assurance that the Legislature would have enacted the appropriate sections of the
13 legislation despite the unconstitutional sections. Gerberding vs Munro, 134 Wn2d 188, 196.

14 Although not adhered to by any of the parties hereto, the Court has noted that the severance
15 clause herein (R.C.W. 90.14.910) was enacted in 1967 and the amendment to that act under
16 consideration here was passed in 1997. However, that fact does not affect the viability of the
17 severance clause herein. "The legislature should not be required to enact a new severability clause
18 for every act every time it is amended. We hold that, absent a contrary legislative intent in the
19 amendment, an amendment to an act containing a severability clause is upon enactment covered by
20 that clause." Caritas Services vs. D.S.H.S., 123 Wn2d 391, 417. Therefore, the severance clause
21 herein does apply to this present amendment to the act under consideration. Thus, the Court holds,
22 even though this is a moot issue, that even if R.C.W. 90.14.068(5) was to be held unconstitutional,
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1 the invalid subsection can, and should be, severed from the rest of the amendment. In view of all of
2 the foregoing, the Court therefore:

3 Rules: That R.C.W. 90.14.068(5) does not violate the claimants constitutional rights under
4 the Equal Protection or Due Process clauses of Amendment 14, U.S. Constitution nor the Privileges
5 and Immunities set forth in Article 1, Section 12, Washington State Constitution.

6 Dated this 8th day of November, 1999

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8 Walter Stauffacher
9 Judge

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