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

KIM M. EATON
EXCEPTIONS CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

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,)

No. 77-2-01484-5

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
Plaintiff,

MEMORANDUM OPINION AND ORDER
RE: PACKWOOD CANAL'S EXCEPTIONS
TO SUPPLEMENTAL REPORT OF
REFEREE SUBBASIN 8 (THORP)

vs.

JAMES J. ACQUAVELLA, ET AL.,
Defendants

FILED
JAN 28 2000
KIM M. EATON
YAKIMA COUNTY CLERK

I. INTRODUCTION

On December 2, 1999 this Court resolved many of the remaining exceptions that were taken to the Supplemental Report of Referee for Subbasin 8 (Supplemental Report). See Memorandum Opinion and Order Re: Exceptions To Supplemental Report of Referee Subbasin 8, December 2, 1999. The Court did not take up the exceptions of Packwood Canal Company (Packwood) in light of an order issued by Judge Walter Stauffacher on July 8, 1999 that reserved a ruling from the Acquavella court on Packwood's exceptions until Packwood Canal v. Ecology, No. 99-2-01764-1 was decided. This Court has now rendered a decision in Packwood v. Ecology and therefore this Court is prepared to address Packwood's exceptions to the Supplemental Report.

On March 18, 1997, Packwood filed five exceptions to the Referee's recommendations in the Supplemental Report. On April 29, 1997, Packwood filed two Additional Exceptions that include the same issues as the initial five. Those exceptions involve the following recommendations of the Referee:

- a. Restricting use of intercepted water from Fogey and Robinson Canyon Creeks to those lands on which the water was used prior to the construction of the canal by the City of Ellensburg.
- b. Assigning a 1903 priority date to the Fogey Creek and Robinson Canyon Creek water rights.

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- 1 c. Failure to recommend a stock water right for the Packwood service area.
2
3 d. Recommendation of a 3 acre feet per acre (afa) water duty.
4
5 e. Failure to recommend confirmation of a water right for the Yakima River.

6 Each of these exceptions will be addressed. The two Additional Exceptions are resolved
7 through rulings on the above exceptions and the Court will also enter specific rulings on those two
8 exceptions.

9 **II. FACTUAL BACKGROUND**

10 Packwood asserts rights as successors to the interests held by the City of Ellensburg (City).
11 The City filed in 1903 a Notice of Appropriation for 150 cubic feet per second (cfs) for the purpose
12 of producing power for use in the City. It purchased land for the canal from various landowners in
13 sections 13, 24, 19, 29, 30, and 32 of Township 18 N., R. 17 and 18, E.W.M.. The canal intercepted
14 various natural and manmade watercourses and, as consideration for the purchase, the City
15 promised to allow the affected landowners to withdraw water from the canal equal to the water that
16 the canal intercepted. Those arrangements are set forth in deeds between the City and the
17 landowners. See DE 129, 130, 133, 137-139, 141. Additional agreements required the city to
18 flume water over the canal. In 1913, the City and the United States entered into a Limiting
19 Agreement (1913 Limiting Agreement) setting a limit on the amount of water the City could divert
20 from the Yakima River into the power canal. The 1913 Limiting Agreement also identified which
21 landowners were taking water from the canal. It also established the City's obligation to return as
22 much water back to the Yakima River as it diverted as modified by the City's contractual obligation
23 to deliver water to those landowners. DE-136.

24 On February 4, 1957, the City and William Packwood et al. signed two stipulations that
25 settled the City's claim for declaratory judgment and enabled the City to eliminate its responsibility
to operate the Ellensburg Power Canal. The following day, the City signed a quit claim deed
conveying to Packwood Canal Company Inc. all its right, title and interest in the power canal, right
of way, intake works, tail race, and structures.

On August 17, 1972, the Department of Ecology (Ecology) approved a change of point of
diversion and place of use for 70 cfs of the City of Ellensburg's claimed Yakima River water right.
The change authorizes transfer of a 70 cfs power generation right from the Packwood canal to the

1 Kittitas Reclamation District (KRD). As a condition of the change approval, the City of Ellensburg
2 relinquished all their remaining interest in the 150 cfs Yakima River appropriation.

3 On June 26, 1974, in response to the requirements of RCW 90.14, Packwood filed twelve
4 separate water right claims with Ecology. None of these claims describe on its face use of Yakima
5 River. However, each of the water right claims include an identical attachment which will be set
6 forth below.

6 **III. OPINION**

7 a. Place of Use – Fogey and Robinson Creek Diversions

8 The Referee recommended restricting the use of Fogey Creek and Robinson Canyon Creek
9 water to those lands within the Packwood service area to which those waters had been applied prior
10 to the construction of the canal. Supplemental Report at 63-64, 67. According to Packwood, this
11 would limit the use of Fogey Creek water to a 15-acre tract and Robinson Canyon Creek water to a
12 233-acre tract of land. Packwood argues that such a limitation is inconsistent with the evidence in
13 the record and the water intercepted by the Packwood canal should be appurtenant to all lands in the
14 Packwood service area. Essentially, so long as the use of intercepted Fogey Creek and Robinson
15 Canyon Creek flows occurred throughout the Packwood service area prior to 1917, the use could be
16 expanded without the requirement of obtaining a certificate from Ecology's predecessor. Packwood
17 cites to Ecology v. Abbott, 103 Wn.2d 686, 694 P.2d 1071 (1983). The power canal was in place
18 prior to 1917, see DE-145 (Bain Report at Summary page), and was undoubtedly intercepting water
19 from the two creeks and the intercepted flows were also being diverted to lands throughout the
20 service area.

21 Although this argument may have some surface appeal, there are some questions that remain
22 unanswered. First, the City of Ellensburg and the United States entered into the 1913 Limiting
23 Agreement that considered diversions and uses of water in the Packwood service area with the
24 ultimate goal of limiting diversions from the Yakima River. 1913 Limiting Agreement at p. 2 (City
25 agreed to "return the diverted water into the Yakima River, together with all accessions to the flow
by seepage; subject, however, to such water rights for irrigation as may now be vested"). That
document constitutes one of the many so-called "limiting agreements" entered into by water users
with the Bureau of Reclamation's predecessor to ensure the feasibility of the Yakima Project. The
import of those agreements was taken up by Judge Stauffacher in three opinions. Memorandum
Opinion Re: Limiting Agreements, June 16, 1993; Memorandum Opinion Re: Motion For

1 Reconsideration of Limiting Agreements, April 1, 1994; Memorandum Opinion Re: Pacific Power
2 and Light's Motion For Reconsideration of Limiting Agreements, January 3, 1994. In the tiniest of
3 nutshells, the upshot of these decisions is that the agreements are valid and binding on the parties
4 and their successors. The agreement entered into by the City of Ellensburg is binding on Packwood
5 and its shareholders as successors to the City. Hence, to the extent Packwood asserts any water
6 rights that are derivative from those originally held by the City of Ellensburg, they are limited by
7 that agreement.

8 As of July 7, 1913, six water users, together with the lands owned by them were
9 acknowledged to have rights to divert water from the power canal for irrigation purposes. 1913
10 Limiting Agreement at p. 2. Packwood finds this fact relevant as well (and relies on it to support
11 their argument) and cites to seven deeds that contain covenants allowing water to be withdrawn
12 from the canal equal to the volume of water being intercepted by the canal without restricting the
13 withdrawal to any particular water source. See DE 129, 130, 133, 137-139, 141. The Referee found
14 that the total place of use encompassed by these lands as of 1913 was approximately 424 acres.
15 Supplemental Report at 56. No party has taken exception to the Referee's conclusion that the deeds
16 encompassed 424 acres and the Court adopts it, giving due consideration to the Referee's expertise
17 in analyzing maps and legal descriptions. All of that land lies downgradient from where the canal
18 intercepts Fogey Creek. Much of the land also lies downgradient from Robinson Canyon Creek
19 with the exception of some of the property now owned by Grousemont in Sections 18 and 19 that in
20 1913 were owned by Ed Pease and Hannah Wallace.

21 The Court agrees with Packwood that once the canal began intercepting the flows from the
22 creeks, that the water could have been used on any of the land serviced by the canal up to 1913¹.
23 Until 1917, a nonriparian owner could establish an appropriative right to water by diverting it and
24 putting it to beneficial use. Abbott at 691-92. The City and the irrigators expanded the original uses
25 of Fogey and Robinson Canyon creeks by constructing the canal and putting the water to beneficial
use throughout the area served by the power canal. The 1913 Limiting Agreement appears to
support the fact that water from the canal was being used on particular lands. After that date, any
expansion of the use was contrary with the provisions of the 1913 Limiting Agreement.

¹ Normally, the 1905 federal withdrawal would also be a limit on the development of water rights during that period but the City's right relates back to 1903, prior to the withdrawal's implementation. Furthermore, the 1913 Limiting Agreement addressed the federal concern over use of Yakima basin flows.

1 The Court finds that the Fogey Creek water intercepted by the canal is appurtenant to the
2 approximate 424 acres set forth in the Limiting Agreement as quantified by the Referee. Those
3 lands are in Sections 18, 19, 29, 30 and 32, T. 18 N., R. 18 E.W.M., lying east of the Packwood
4 Canal and west of the Yakima River as more particularly set forth in the 1913 Limiting Agreement.
5 The Court finds that Robinson Canyon Creek is intercepted by the canal at such a place that most of
6 the lands in Section 19 and all of the lands in Section 18 could not be irrigated by those flows. The
7 Court believes the legal description provided by the Referee for the place of use of Robinson
8 Canyon Creek flows should also be expanded to include an additional 140 acres for lands in
9 portions of the SE1/4SW1/4 and SW1/4SE1/4 of Section 29 and portions of NE1/4NE1/4 and NE
10 1/4NW1/4 and NW 1/4NE1/4 of Section 32 T. 18 N., R. 18 E.W.M.. Those lands were also the
11 subject of the 1913 Limiting Agreement and constitute approximately an additional 140 acres to the
12 lands already identified by the Referee. Supplemental Report at 67. The Court concludes that the
13 Robinson Canyon Creeks flows are appurtenant to the 233 acres set forth in the Supplemental
14 Report and the 140 acres identified above in Sections 29 and 32.

15 b. Priority Dates

16 Packwood excepts to the Referee revisiting the priority date for the water rights from Fogey
17 and Robinson Canyon Creek quantified above. They argue that the water intercepted by the canal
18 from these creeks was given a June 30, 1885 priority date in the original report of Referee to which
19 no party took an exception. Since no party took an exception, Packwood concludes that the initial
20 decision of the Referee was res judicata and the Referee should not have changed the priority date
21 to 1903. Packwood cites to no authority in support. If not res judicata, then Packwood relies on the
22 record to support its argument that the 1885 priority date was appropriate.

23 Res judicata does not apply until a final decision has been entered. See State v. Dailey, 93
24 Wn.2d 454, 458-59, 610 P.2d 357 (1980)(“Even a trial court’s oral decision has no binding or final
25 effect unless it is formally incorporated into findings of fact, conclusions of law, and judgment”).
The original decision of the Referee is not final disposition of a claim nor are the intermediate
decisions of the Court in remanding to the Referee for further factfinding a final decision. There is
no “final” decision on a claim until the Court has entered a Conditional Final Order. None has been
entered regarding Packwood or Subbasin 8. Therefore res judicata does not apply.

In regard to evidence of priority date, what the Referee found was that rights were
established prior to execution of the first agreements with the City of Ellensburg in 1903. See

1 Supplemental Report at 66. However, there was nothing in the record to evidence the date of first
2 water use. Id. Further, due to all the physical reconfiguration, the Referee was unable to determine
3 what lands were riparian to what water courses. Packwood cites to the testimony of Thomas
4 Brunson, Dan Brunson and Roger Sparks as evidence of date of water use. However, that testimony
5 is speculative and the witnesses provide no bases for the dates. Further, even though water was
6 used prior to 1903 on some of the property in the Packwood service area, it certainly was not used
7 on all of it. For instance, there is no delivery mechanism that existed prior to 1903 that would allow
8 delivery of Fogey water to the Brunson's property. Thus, use of water on some of the land in the
9 service area was facilitated by construction of the canal. The date of priority for the canal is 1903.
10 Accordingly, the Court denies the exception and affirms the recommendation of the Referee.

11 c. Stockwater Exception

12 Packwood excepts to the Referee's recommendation to not award a diversionary stockwater
13 right for the Packwood service area. It indicates that approximately 500 head of cattle use water in
14 the service area from the various sources. The Referee relied primarily on the fact that Packwood
15 did not trace their stockwater right to any particular water source. However, many of the initial
16 deeds between the water users and the City of Ellensburg indicated that the water subject to those
17 deeds could be used for stock purposes. See e.g. DE-135 Deed between J.E.Rego and City of
18 Ellensburg. The various RCW 90.14 claims filed by Packwood indicate that it registered rights to
19 use the water intercepted by the various creeks for stockwater. Compare Report of the Court Re:
20 Cascade Irrigation District, p. 56-58 (October 8, 1999). However, those same claim forms limited
21 the period of use to the irrigation season. Therefore, this Court will deny Packwood's request for a
22 diversionary stockwater right during the non-irrigation season but will grant its request to use water
23 from the canal during irrigation season as an incidental use of that irrigation supply for watering up
24 to 500 cows. See Id. at 66.

25 d. 18.8 Acre-Feet Per Acre Water Right

Packwood excepts to the Referee's recommendation of a 3 acre-feet per acre water duty and
asks this Court to award an 18.8 acre-feet per acre right. This quantity is based on Mr. Richard
Bain's analysis of the crop demand and soil characteristics. Although that water duty is consistent
with other duties in the area, see Bain Report for Grousemont's water right, the Referee's reluctance
to grant a right based on the water duty pertains more to available natural supply in the intercepted
sources, not water need. That concern is appropriate given that the law of this case prohibits

1 confirming a water right in project return flows. Memorandum Opinion Re: Motion For
2 Reconsideration of Limiting Agreements, April 1, 1994. Packwood did not quantify what
3 component of the 18.8 acre-feet was natural flow. Therefore, the Court affirms the decision of the
4 Referee and DENIES Packwood's exception.

5 The Additional Exceptions filed by Packwood rely on the same argument regarding a water
6 duty of 18.8 acre-feet per acre. Pursuant to those exceptions, Packwood asks the Court to confirm a
7 right for 334 acre-feet of Fogey Creek water and for 4020 acre-feet of Robinson Canyon Creek
8 water. Packwood has provided no evidence as to what portion of those annual quantities are return
9 flows and what portions are natural flows. Therefore, the exceptions are DENIED.

10 e. Yakima River Water Rights -- Consumptive

11 Packwood's claim to Yakima River has two components. First the Court will consider the
12 consumptive claim to water for irrigation during time periods when the water from the intercepted
13 creeks and drains is insufficient to irrigate the lands in the canal's service area. Then, if no
14 consumptive right is confirmed, a non-consumptive claim for diversion of sufficient Yakima River
15 water to raise the canal's water level high enough so that Packwood's shareholders can divert the
16 water that the canal intercepts from various streams and drains will be considered. It appears that
17 Packwood's request for non-consumptive rights from the Yakima River is only an alternative if the
18 Court does not grant a consumptive use right. The Referee recommended that Packwood not be
19 awarded any Yakima River water rights. That recommendation was based primarily on the
20 Referee's conclusion that Packwood had failed to comply with RCW 90.14, the claims registration
21 statute. Supplemental Report at 60. Packwood makes several arguments that it did comply with the
22 requirements of that statute.

23 *1. Substantial Compliance*

24 Packwood asserts that its water right claims substantially comply with the provisions of
25 RCW 90.14.051 to support a direct diversion right from the Yakima River. Essentially, a claim
substantially complies with RCW 90.14's intent if it contains the information required by the claim
form and thereby provides adequate records for administration of the state's waters and notification
that the water was being put to beneficial use. Ecology v. Adsit, 103 Wn.2d 698, 694 P.2d 1065
(1985). As has been held previously in Acquavella, "substantial compliance encompasses only
minor, technical variations from the established standard." Memorandum Opinion Re: RCW 90.14
and Substantial Compliance, p. 7 (February 10, 1995). The doctrine is "not a carte blanche excuse

1 allowing certain claimants to avoid compliance with the law at the expense of others who relied on
2 its protection.” Id. at 9.

3 Typically, RCW 90.14 and its claim registration requirement arise in this adjudication
4 because a water user failed to comply with the statute by filing anything with Ecology during the
5 specified time period. To support a water right, a water user must supply some statutory basis for
6 its water right – either a water right claim or a water right certificate depending on when the right
7 was first exercised. In the case at bar, Packwood did attempt to comply with RCW 90.14 and did
8 file 12 water right claims. Each claim included an identical attachment that set forth some
9 information regarding use of water from the Yakima River. The attachment stated the following:

10 Beginning in 1903 the City of Ellensburg obtained rights of way and constructed a
11 canal for power generating purposes. The canal took water from the Yakima River in the
12 E1/2NE1/4 Section 13 Twp. 18 N. Rge. 17 E.W.M. and terminated in the SE1/4NE1/4 of
13 Section 32 Twp. 18N. Rge. 17 E.W.M.

14 [The attachment then describes the location of the canal]

15 The canal intercepted landowner’s irrigation systems which provided water to lands
16 north and east of the canal and south and west of the Yakima River.

17 As a consideration in the conveyance of canal rights of way and in subsequent
18 agreements the landowners required that the City provide them with the water to which they
19 were entitled by diversion from the canal or by flume across it.

20 This procedure was followed until 1956 when the City, having abandoned its power
21 plant, turned the canal and appurtenant properties over to the landowners for operation and
22 maintenance. The Packwood Canal Company was organized in September, 1956 for this
23 purpose and received funds from the City for certain canal construction work and for annual
24 operation and maintenance.

25 The Canal Company delivers water to 800 acres of irrigated land all of which is
located north and east of the canal right of way and south and west of the Yakima River.

This water right claim is one of 12 claims filed by the Company and which are a
summary of the individual water right claims filed by the landowners using water from the
canal system from the various sources and points of diversion shown.

Packwood indicates that if the attachment and the face of the claim form are read together,
the information required by RCW 90.14.051 can be ascertained and therefore the claim is in
“substantial compliance” with the intent of the statute. RCW 90.14.051 requires each statement of
claim to include “substantially the following:”

- (1) The name and mailing address of the claimant.
- (2) The name of the watercourse or water source from which the right to divert or make use
of water is claimed, if available.
- (3) The quantities of water and times of use claimed.

- 1 (4) The legal description, with reasonable certainty, of the point or points of diversion and
places of use of waters.
- 2 (5) The purpose of use, including if for irrigation, the number of acres irrigated.
- 3 (6) The approximate dates of first putting water to beneficial use for the various amounts
and time claimed in subsection (3).
- 4 (7) The legal doctrine or doctrines upon which the right claimed is based, including if
statutory, the specific statute.
- 5 (8) The sworn statement that the claim set forth is true and correct to the best of claimant's
6 knowledge and belief.

7 Packwood, in its Memorandum in Support of Exceptions at pp. 15-21, analyzed the claims
8 to demonstrate that the necessary information required by the statute was provided either in the
9 claim or the attachment. That analysis is as follows.

10 **A. Name and Address of Claimant**

11 The attachment (or supplement – Packwood uses both terms) includes that information in
12 the upper left corner.

13 **B. Water Source**

14 Each attachment states:

15 “Beginning in 1903 the City of Ellensburg obtained water rights of way and constructed a
16 canal for power generating purposes. The canal took water from the Yakima River.”

17 The Referee determined that there was no defined diversion for an irrigation purpose -- the
18 use to which Packwood puts the water. However, as will be discussed below in the Purpose of Use
19 section, the attachment also indicates that the canal intercepts other water sources and that irrigators
20 were allowed to withdraw water from the canal in order to replace water from the intercepted water
21 courses. Once the water from the Yakima River and that from the creeks were intermingled it
22 would be very difficult indeed to determine which source was being used for which purpose.

23 **C. Quantities of Water and Times of Use**

24 This is the weakest part of Packwood's substantial compliance case. There is only one
25 quantity listed on either the claim or the attachment. However, Packwood points out a passage in
the attachment that is instructive.

The canal intercepted landowner's irrigation systems which provided water to lands
north and east of the canal and south and west of the Yakima River.

As a consideration in the conveyance of canal rights of way and in subsequent
agreements the landowners required that the City provide them with the water to which they
were entitled by diversions from the canal or by flumes across it.

1 According to Packwood, a reasonable interpretation of that passage is that the company was
2 claiming a right to provide a quantity of Yakima River water, not to exceed the quantity on the face
3 of the claim form, to replace the water in the water courses listed on the face of the claim form that
4 the canal intercepted and did not convey across the canal by flume. Packwood also states that the
5 water the farmer would take from the canal to replace his intercepted water may be from a different
6 water source than the water that would be used if the canal did not intercept it. Further, Yakima
7 River water is also necessary as a carrier of the intercepted water. Without the Yakima flows, the
8 intercepted water would not be high enough in the canal to be diverted.

8 **D. Legal Description of Points of Diversion and Place of Use**

9 The attachment states:

10 "The canal took water from the Yakima River in the E1/2NE1/4 section 13 Twp. 18 N. Rge
11 17 E.W.M. and terminated in the SE1/4NE1/4 of section 32 Twp. 18N. Rge. 18 E.W.M."

12 This passage unequivocally establishes the Yakima River point of diversion as well as where
13 the canal rejoins the river.

14 In addition, the supplement also describes the area the canal traverses and further states:

15 "The canal company delivers water to 800 acres of irrigated land all of which is located
16 north and east of the canal right of way and south and west of the Yakima River."

17 The information in the attachment, read together, demarcates a place of use. The general
18 area can be deduced through an understanding of the various boundaries created by the river, the
19 canal and the points of diversion/reentry. Further, the place of use is limited to 800 acres.

20 **E. Purpose of Use and Number of Acres Irrigated**

21 The attachment states:

22 The canal intercepted landowner's irrigation systems which provided water to lands
23 north and east of the canal and south and west of the Yakima River.

24 As a consideration in the conveyance of canal rights of way and in subsequent
25 agreements the landowners required that the City provide them with the water to which they
were entitled by diversions from the canal or by flumes across it.

...

The Canal Company delivers water to 800 acres of irrigated land all of which is
located north and east of the canal right of way and south and west of the Yakima River.

Packwood reads these provisions to demonstrate that the Yakima River diversion constituted
replacement water to make up for the sources that were intercepted by the canal. The water

1 intercepted by the canal was originally used for irrigation and therefore the replacement water
2 would be used for irrigation purposes. The statement also indicates the number of acres irrigated
3 which complies with the request in the form and further bears on the use of the water – irrigation.

4 **F. Approximate Date of First Beneficial Use**

The supplement states:

5 Beginning in 1903 the City of Ellensburg obtained rights of way and constructed a
6 canal for power generating purposes.

7 The canal intercepted landowner's irrigation systems which provided water to lands
8 north and east of the canal and south and west of the Yakima River.

9 As a consideration in the conveyance of canal rights of way and in subsequent
10 agreements the landowners required that the City provide them with the water to which they
11 were entitled by diversions from the canal or by flumes across it.

12 The date of first beneficial use claimed by Packwood is 1903.

13 **G. The Legal Doctrine or Doctrines Upon Which the Claim is Based**

14 Packwood relies on the demarcation of the appropriation doctrine on the face of the claim
15 for the basis of its water right.

16 **H. Sworn Statement that the Claim is True**

17 Packwood argues that supplement is specifically made a part of the claim and the sworn
18 statement on the face of the claim encompasses the supplement.

19 *b. Conclusion*

20 In addition to the analysis by Packwood attempting to demonstrate that the claim contained
21 substantially the necessary information, the affidavit of Mr. Brunson shows that Packwood intended
22 the attachment to serve as a claim for Yakima River water. Contrary to the conclusion of the
23 Referee, Packwood vigorously argues that it would not ignore or forget its Yakima River water
24 right and believes the most reasonable interpretation is that the attachment was to serve as such a
25 claim. They believe this logic is particularly appealing when the Yakima River is analyzed as a
conjunctive or replacement source for its other water sources.

So long as the Yakima River diversion is limited to a "back up" or standby diversion (which
Packwood appears to accept – see Packwood's March 17, 1997 Memorandum at p. 8), the Court
agrees. To arrive at that conclusion requires some careful and creative reading along with some
inherent limitations. Because the claims each contain one quantity of diversion, they cannot be read
to support independent diversions from both the Yakima and the tributary. For example, the
Hatfield Canyon claim asserts a right to divert 18 1/2 cfs. In order for that claim to include a

1 Yakima River diversion, the maximum instantaneous quantity is the total that can be diverted from
2 both Hatfield Canyon and the Yakima River. Packwood could not divert 18 1/2 cfs from Hatfield
3 and an additional 18 1/2 cfs from the Yakima River. Finally, the 1913 Limiting Agreement, to be
4 analyzed in full below, establishes that the irrigation uses from the power canal were to be satisfied
5 from both Yakima and intercepted flows.

6 However, with these limitations in mind, it is apparent that Packwood has substantially
7 complied with RCW 90.14. Adsit indicates that two factors are critical in analyzing whether a
8 registration has substantially complied with the legislative intent of RCW 90.14: there must be
9 adequate records for administration of the state's waters and notification to the State that the water
10 was being put to beneficial use. Adsit at 704. As analyzed above, both of those factors are
11 addressed in Packwood's filing. However, in relying on one quantity for the instantaneous flow and
12 annual usage, the claim is accordingly limited regardless of whether the source is the Yakima River
13 or one of the tributaries.

14 The Court finds that Packwood has substantially complied with RCW 90.14 in regard to
15 diversions of water from the Yakima River. Their right to divert water from the Yakima River is
16 limited to the annual and instantaneous quantities listed on the claim form. To the extent that
17 Packwood asserts a right to divert 150 cfs from the Yakima River based on these claims, that
18 exception is DENIED. The maximum of all water sources that were the subject of RCW 90.14
19 claims is 45 cfs. That would represent the maximum of Packwood's right if they have provided
20 sufficient evidence to prove historic use of that quantity.

21 a. Historic Beneficial Use

22 Although the Court has ruled Packwood substantially complied with RCW 90.14 for
23 registration of its right to divert from the Yakima River, it must still show a historic beneficial use
24 of Yakima River water in order for this Court to confirm a right. In other words, the Court cannot
25 simply confirm to Packwood the amount of the right contained on the face of the water right claim
without a showing of beneficial use. Packwood requests that the Court confirm a right to divert 45
cfs from April 1 through October 31 and to apply 12,602.6 acre-feet to the land within the entire
Packwood service area. It does not define the size of the service area although an engineering
report by Richard Bain indicates that Packwood services 670 acres of irrigated land. DE-145.

The Referee determined that approximately 121 acres were being irrigated from Packwood
Canal that could be traced back to the Yakima River diversions. Supplemental Report at 57. He

1 reached that conclusion presumably by tracing back from the 1913 Limiting Agreement (DE-136)
2 to determine which lands were acknowledged to be using water from the power canal to the actual
3 deeds between the owners of those lands and the City of Ellensburg. In particular, the Referee
4 concluded that three of these deeds established an additional right beyond that already held by the
5 landowner. Those landowners were W.A. Stevens (DE-138-139), J.N. Burch (DE-141) and J.E.
6 Rego (DE-134). The land encompassed by those three water users would be approximately 121
7 acres. The Court agrees with the Referee that these lands would have a water right from the
8 Yakima River.

9 The remaining question is whether the other lands (owned by Burt and Ed Pease and
10 R.E./Hannah Wallace) set forth in the 1913 Limiting Agreement would have any right to water from
11 the Yakima River even if the deeds would not seem to support a Yakima River water right. The
12 Referee has determined that the total lands in that agreement amount to 424 acres. Supplemental
13 Report at 56. There is also a deed between Joseph Hanlon and the City of Ellensburg (DE-137) not
14 mentioned in the 1913 Limiting Agreement pertaining to lands in the E1/2NE1/4 of Section 30.
15 The lands owned by Hanlon would amount to an additional 150 acres. Thus the maximum amount
16 of land potentially irrigated with Yakima River water could be approximately 574 acres. Whether
17 or not the 1913 Limiting Agreement provides evidence of different delivery obligations than the
18 deeds, and whether or not that evidence is more persuasive than the specific deeds, depends of
19 course on the contents of 1913 Limiting Agreement. The 1913 Limiting Agreement states in
20 Article 1:

21 The United States recognizes the priority of the City [of Ellensburg] over the government's
22 appropriation made under the Act of the State Legislature approved March 4, 1905, for a
23 flow of water for power purposes from the Yakima River amounting to 150 cubic feet of
24 water per second of time measured at the point of diversion as shown on the accompanying
25 map in pursuance of the City's appropriation, and filed in the records of Kittitas County on
June 27, 1903 in Vol. 3 of Water Rights at page 215, and by virtue of the beneficial use of
said flow of water by the City. The City, however, agrees to return the said flow into the
Yakima River together with accessions to the flow by seepage; subject, however, to such
water rights for irrigation as may now be vested in the following named persons or their
grantees, such rights being appurtenant respectively to the following described lands, all
being situate in township eighteen (18) North, range eighteen (18), E.W.M. (The agreement
then sets forth the six landowners and the lands that received water from the canal).
Emphasis added.

The underlined language bears on the issue before the Court. It makes clear that the City
must return to the Yakima River the same amount it diverts plus any seepage. However that

1 quantity may be reduced by the amount diverted by the six landowners. The intent of the agreement
2 as set forth by the underlined language is focused on water going back into the Yakima River. The
3 statement is ambiguous as to whether or not the rights of the parties had to be satisfied by Yakima
4 flows or from seepage. In this Court's opinion, the most reasonable interpretation is that the water
5 rights of the named landowners could be satisfied from both sources; the Yakima River and/or
6 seepage. Indeed, the entirety of Article 1 is concerned with establishing and limiting rights to the
7 Yakima River.

8 The Court reaches this conclusion for a variety of reasons. Although the deeds contain
9 specific information regarding the contractual relationships of the parties as of the date of their
10 entry, there was sufficient time between when the deeds were entered and 1913 when the Limiting
11 Agreement was entered that delivery practices could have been modified. Indeed, the City of
12 Ellensburg entered into the 1913 Limiting Agreement, not the specific landowners, and it was the
13 City that was obligated to deliver certain quantities of water. Therefore, the City recognized
14 delivery obligations to the parties as set forth in the 1913 Limiting Agreement and acknowledged
15 that those obligations could be met through delivery of Yakima River water.

16 Therefore, based on an interpretation of the 1913 Limiting Agreement, the City of
17 Ellensburg entered into an agreement whereby they acknowledged that water delivery obligations to
18 six named landowners could be satisfied through delivery of Yakima River diversions or through
19 seepage into the canal. That document is the best evidence of the rights and obligations of the
20 parties because it is more recent and provides recognition of an evolved delivery practice that is not
21 necessarily clear from the deeds themselves. Finally, the expansion of the rights occurred prior to
22 1917 and could proceed, with due diligence, through actual diversion and use.

23 The same analysis does not hold true in regard to the property owned by Joseph H. Hanlon.
24 The 1913 Limiting Agreement makes no mention of irrigation deliveries to the Hanlon property. It
25 was the only property that was the subject of a deed that included delivery obligations between the
City and the property owners that was not mentioned in the 1913 Limiting Agreement. Is this Court
precluded from granting a right from the Yakima River for the Hanlon property when it was not
made a part of the 1913 Limiting Agreement? See Memorandum Opinion Re: Limiting
Agreements, supra. The Court believes the 1913 Limiting Agreement does preclude Packwood
from claiming any rights from the Yakima River for the Hanlon property. See Order Re: Limiting
Agreements, dated October 14, 1993 at p. 2 (“[t]he limiting agreements, being free from ambiguity,

1 are binding on the respective successors-in-interest to the original signatories.”); Additional Order
2 Re Limiting Agreements, May 12, 1994 at p. 4. Further, any right the water users in that area might
3 have from the Yakima River was derivative of the actions taken by the City of Ellensburg. The City
4 was the diverting entity from the Yakima River. It was a signatory to the various deeds establishing
5 delivery obligations. Apparently, the City did not believe it was required to deliver water from the
6 Yakima River to the Hanlon property and therefore did not make any obligation to the Hanlons a
7 part of the 1913 Limiting Agreement.

8 The January 4, 1904 deed between Mr. Hanlon and the City of Ellensburg (DE-137)
9 supports that interpretation. The Referee determined, correctly, that the deed provided for three
10 flumes to carry water over the canal and to replace up to 100 inches of intercepted West Side
11 Irrigating Company water for irrigation of lands in Section 30. The deed does not indicate the
12 source of water that would be used to satisfy that obligation except to state:

13 That, whereas the said second party (Ellensburg) will occupy with its canal, for a distance,
14 the ditch known as the “Rego” ditch, through which the parties of the first part have been
15 accustomed to carry water from the canal of the West Side Irrigating Company, the said
16 second party agrees to deliver to said first parties, at a point to be designated by them on the
17 lower or left bank of the canal to be constructed by said second party, the same amount of
18 water as the parties of the first part [Hanlon] shall place in said canal coming from the canal
19 of said West Side Irrigating Company, and only during the same times. Said points of
20 delivery to be on the line of said canal of the party of the second part where the same crosses
21 through the lands of the first parties, and the water to be delivered as aforesaid by the second
22 part to be for the use of the first parties in irrigating their lands lying below said city canal,
23 and not to exceed at any time the amount of one hundred inches measured under a six inch
24 pressure. Emphasis added.

25 It would seem that the amount of water that was to be delivered to Hanlon was based on the
water being intercepted by the City’s ditch from the West Side Irrigating Canal. The agreement
does not state specifically the Hanlons were limited to water intercepted from West Side canal but,
on balance, the import of the deed appears to support that interpretation. Indeed, it is not clear to
the Court as to whether this right might not be part of the West Side Irrigating Company’s right.
The rights of that water supplier have not been finally determined at this point in time. Thus, the
Court rules that failure to reference the Hanlon obligation in the 1913 Limiting Agreement together
with an interpretation of the 1904 deed results in no right being established from the Yakima River
for that property in Section 30. Similarly, no rights can be established for those entities that entered

1 into deeds to flume water over the canal and then failed to maintain those flumes. The 1913
2 Limiting Agreement establishes the maximum of the right.

3 b. Quantification

4 The 1913 Limiting Agreement does not set forth any particulars of the water rights held by
5 the water users other than general legal descriptions. Packwood is confirmed a right to irrigate 424
6 acres from diversions from the Yakima River pursuant to quantification set forth by the Referee.
7 The place of use of the water right is as set forth in the 1913 Limiting Agreement being portions of
8 the E1/2SW1/4, SW1/4SE1/4, NW1/4NW1/4 and SW1/4NW1/4 of Section 19; portions of the
9 SE1/4SW1/4, SW1/4SE1/4, and NW1/4SW1/4 of Section 29; portions of NE1/4NW1/4,
10 NW1/4NE1/4 and NE1/4NE1/4 of Section 32; portions of SW1/4SW1/4 of Section 18; and the NE
11 corner of the NE1/4NW1/4 of Section 30 all being within T. 18 N., R. 18 E.W.M., lying east of the
12 Packwood Canal and west of the Yakima River.

13 Quantification of the water right is also limited by the 1913 Limiting Agreement in that only
14 those rights held by the named diverters would be entitled to diversions from the Yakima River.
15 The 1913 Limiting Agreement does not set forth quantities but the individual deeds between the
16 diverters and the City of Ellensburg do. The Court will use the quantities set forth in those deeds.
17 These quantities are as follows with conversions into cubic feet per second (cfs) where conversions
18 are necessary.

- 19 1. Ed Pease -- (less water conveyed to Wallace) 60 inches (1.2 cfs).
- 20 2. Hannah Wallace -- 40 inches pursuant to agreement with Ed Pease (0.8 cfs).
- 21 3. Burt Pease -- 25 inches (0.5 cfs).
- 22 4. W.A. Stevens -- 5 cfs.
- 23 5. John Burch -- 500 inches (10 cfs).
- 24 6. J.E. Rego -- 300 inches from April 1- July 10 (6 cfs); 175 inches between July
25 10 and November 1 (3.5 cfs).

The total of these diversion amounts to 23.5 cfs from April 1-July 10 and 21 cfs from July 11 to
November 1. Pursuant to the Engineering Report of Richard Bain, DE 145, no adjustment will be
made for conveyance loss. See Bain Report at 12 ("On an adjusted basis no significant loss was
computed in that the small loss determined was within 5 percent of the observed flows.")

1 Diversion records maintained by Reclamation and supplied by Ecology² do provide a five-
2 year period from 1977-1981 that will assist in quantifying the right. Those records also include
3 diversions dating back to the early part of the century. However, those early records are of no
4 assistance because they include power generation diversion rights that were bargained away to
5 KRD. Accordingly, diversion records for years after that agreement was entered into will be
6 utilized. The 1977-1981 records verify that Packwood has diverted, on an instantaneous basis, 23.5
7 cfs and 21 cfs during the appropriate periods with the exception of October. In fact, they have
8 diverted in far excess of that quantity. After October 1, the largest diversion was 7 cfs on October
9 31, 1978. Therefore, the Court will limit Packwood's right to 7 cfs for the month of October. On an
10 annual, continual diversion basis, these diversions amount to 8,441.73 acre-feet, less than
11 Packwood's claim of 12,602 acre-feet. See Packwood's Quantification of Yakima River Right,
12 April 29, 1997 at p. 2. However, for use on 424 acres of land, that amounts to nearly 20 acre-feet
13 per acre. Packwood has only requested and demonstrated a need for 18.8 acre-feet per acre. See
14 Engineering Report of Richard Bain at p. 28 (DE-145). Multiplying the acreage by the requested
15 water duty of 18.8 acre-feet/acre results in annual quantity of 7971.2 acre-feet per year. Stockwater
16 will be included as an incidental use since stockwater was included on the RCW 90.14 claims and
17 historically referenced in the deeds between the City of Ellensburg and various landowners who are
18 predecessors to current Packwood shareholders. Finally, Packwood's RCW 90.14 claim limits
19 Packwood's use of Yakima River to that of an alternative or backup right whereby it can only be
20 utilized when adequate flows from the other sources intercepted by the Packwood Canal are not
21 available.

18 c. Non-consumptive Rights

19 Packwood states in its March 17, 1997 Memorandum that its non-consumptive claim is in
20 the alternative.

21 If this court does not hold that the attachment to Packwood's 90.14 claim forms constitutes
22 substantial compliance with RCW 90.14.051 for the purpose of serving as a claim to the
23 Yakima River, it requests that the Court confirm a right to divert up to 30 cfs from the
24 Yakima River during the irrigation season, provided there is a simultaneous return of 30 cfs

25 ² Ecology agreed to provide the Court and Packwood with the diversion records during the course of the court hearing
for Packwood's exceptions. See Report of Proceedings July 10, 1997 at p. 121-122. Packwood was provided a copy of
those records on October 13, 1999 and has not objected to the records being admitted. Therefore, the Court will admit
the records as DE-S172 and use them for quantifying Packwood's right.

1 or more to the rivers..Such a use would be non-consumptive of Yakima River water. Id. at
2 27.

3 The Court has held that Packwood substantially complied with RCW 90.14 when it filed its
4 claims in 1974. Therefore, the Court will not consider and DENIES Packwood's claim to
5 nonconsumptive uses of water from the Yakima River.

6 d. Conclusion

7 The Referee's Schedule of Rights shall be modified to include the following water right for
8 Packwood Canal Company.

9 CLAIMANT NAME: **Packwood Canal Company, Inc.**

10 Source: Yakima River

11 Use: Irrigation of 424 acres and incidental stockwater

12 Period of Use: April 1 to October 31

13 Quantity: 23.5 cfs from April 1 to July 10, 21 cfs from July 11 to
14 October 1, 7 cfs from October 2 to October 31; 7971.2
15 acre-feet per year only as a backup when those
16 quantities are unavailable from natural flow of the
17 intercepted sources.

18 Priority Date: June 30, 1903

19 Point of Diversion: SE1/4NE1/4 of Section 13, T. 18, R. 18 E.W.M..

20 Place of Use: As set forth in the 1913 Limiting Agreement between
21 the United States and City of Ellensburg being portions
22 of the E1/2SW1/4, SW1/4SE1/4, NW1/4NW1/4 and
23 SW1/2NW1/4 of Section 19; portions of the
24 SE1/4SW1/4, SW1/4SE1/4, and NW1/4SW1/4 of
25 Section 29; portions of NE1/4NW1/4, NW1/4NE1/4
and NE1/4NE1/4 of Section 32; portions of
SW1/4SW1/4 of Section 18; and the NE corner of the
NE1/4NW1/4 of Section 30 all being within T. 18 N.,
R. 18 E.W.M., lying east of the Packwood Canal and
west of the Yakima River.

Limitation on Use: The maximum instantaneous diversion from the
Yakima River, Fogey Creek, Robinson Canyon Creek
and Hatfield Creek shall not exceed the total of
quantity set forth above.

1 **IV. CONCLUSION**

2 The Court GRANTS the following exceptions of Packwood:

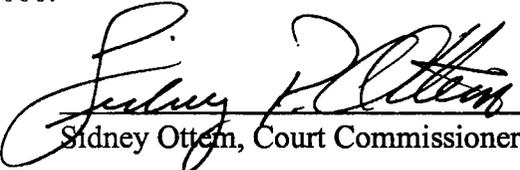
- 3 1. Use of Fogey Creek water shall be appurtenant to 424 acres. The place of use shall
4 be the same as that described herein for the Yakima River water right.
- 5 2. Use of Robinson Canyon Creek water shall be appurtenant to 373 acres. That place
6 of use shall be as set forth on page 129 of the Schedule of Rights as modified to
7 include 140 acres in portions of the SE1/4SW1/4 and SW1/4SE1/4 of Section 29 and
8 portions of NE1/4NE1/4 and NE1/4NW1/4 and NW1/4NE1/4 of Section 32 T. 18N.,
9 R. 18 E.W.M..
- 10 3. The right to use water for stockwater shall be an incidental use of the irrigation right.
- 11 4. Packwood has substantially complied with RCW 90.14 and perfected a right to the
12 Yakima River as set forth above to be used only as an alternative supply.

13 The Court DENIES the following exceptions of Packwood:

- 14 1. The priority date for Fogey Creek water and Robinson Canyon Creek water shall be
15 June 30, 1903 as recommended by the Referee.
- 16 2. The water duty of 18.8 acre feet will not be used to quantify the rights to Fogey
17 Creek and Robinson Canyon Creek water.

18 All other parameters of Packwood's water rights remain as set forth in the Supplemental
19 Report Referee for Subbasin 8 and the Court's Memorandum Opinion and Order Re: Exceptions to
20 Supplemental Report of Referee Subbasin 8, filed December 2, 1999 (Doc. # 14209).

21 Dated this 28th day of January, 2000.

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Sidney Ottem, Court Commissioner