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

FILED

MAY 24 2001

KIM M. EATON  
YAKIMA COUNTY CLERK

No. 77-2-01484-5

plc 3

IN THE MATTER OF THE DETERMINATION )  
OF THE RIGHTS TO THE USE OF THE )  
SURFACE WATERS OF THE YAKIMA )  
RIVER DRAINAGE BASIN, IN )  
ACCORDANCE WITH THE PROVISIONS OF )  
CHAPTER 90.03, REVISED CODE OF )  
WASHINGTON, )  
STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )  
Plaintiff, )  
vs. )  
JAMES J. ACQUAVELLA, ET AL., )  
Defendants )

Memorandum Opinion and Order Re:  
Morrison's Exceptions to Report of Referee  
(Subbasin 9 Wilson - Naneum Creek)

I. INTRODUCTION

In the Report of Referee Re: Subbasin No. 9, dated June 29, 2000, Referee Clausing recommended that Kayser Ranches, Inc. (Kayser) be confirmed a right to use Naneum Creek based on a water right that had been the subject of a 1911 transfer agreement. Those rights had been established in the Ferguson Decree by persons owning land below the future High Line Canal, a prominent feature of the Kittitas Reclamation District. The party acquiring the rights pursuant to the 1911 contract put those rights to beneficial use above the High Line Canal between 1927-1933. Morrison/Morrison Ranches (Morrison) filed an exception to the Referee's recommendation. They contend that because the transfer of the water right did not physically occur until after 1917, the parties were obligated to comply with the change procedures of RCW 90.03.380.<sup>1</sup> Accordingly, an analysis by the Department of Ecology's predecessor would have been needed and there is some evidence that the transfer would impair other water rights. Therefore, the Morrisons conclude the transfer should not be given effect and no right awarded to Kayser. Haberman v. Sander, 166 Wash. 453 (1932); Lawrence v. Sander, 166 Wash. 703 (1932).

<sup>1</sup> RCW 90.03.380 states that water rights "may be transferred to another or to others and become appurtenant to any other land or place of use without loss of priority of right theretofore established if such change can be made without detriment or injury to existing rights." Similarly, points of diversion and purposes of use can be changed provided the change can take place without detriment or injury to existing rights. Ecology is responsible for such an investigation.

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1 **II. FACTS**

2 Kayser does not dispute that if the water rights were transferred to Kayser's predecessor  
3 after 1917 that the provisions of RCW 90.03.380 would apply and the transfer not given effect. See  
4 Verbatim Report of Proceedings dated March 8, 2001 at 122. Therefore, the Court's resolution of  
5 this dispute will turn on the interpretation and effect of the 1911 agreement.

6 The agreement in question was entered December, 1911 between John G. and Elizabeth  
7 Olding (Olding), J.M. and Nettie Galvin (Galvin) and H.W. and Eugenia Wager (Wager) as parties  
8 of the first part, and P.H. and Bertha Adams, parties of the second part in the agreement and also  
9 Kayser's predecessor in interest. Olding, Galvin and Wager (Olding et al.) all owned property that  
10 had been decreed rights to Naneum Creek water in Ferguson v. U.S. National Bank of Portland.

11 The lands owned by Olding et al. were located within the boundaries of Kittitas Reclamation  
12 District (KRD) and it was their aim to receive water from a KRD canal once that canal was built.  
13 Therefore, the Naneum Creek water would be expendable once the KRD supply became available.

14 The Agreement contains the following pertinent provisions:

15 [T]he parties of the first part have this day sold, and do by these presents sell and convey to  
16 the parties of the second part all of the water and water rights appurtenant to said lands and  
17 derived in any manner from Nanum, and Creeks, as hereinbefore mentioned and described;  
18 upon the following conditions and for the consideration hereinafter expressed. The said  
19 waters are to be transferred and delivered to the second parties as soon as what is known as  
20 the High Line Canal is constructed by said Kittitas Reclamation District, and as soon as  
21 water therefrom in sufficient quantities is available for the irrigation of all the lands herein  
22 described.

23 The 1911 Agreement further provides:

24 the parties of the second part agree to pay to the parties of the first part for said water when  
25 delivered as herein set forth, a sum of money sufficient to indemnify and hold the parties of  
the first part harmless from any and all bonds, levies and assessments which may be, or  
become liens upon the lands of the parties of the first part herein described by reason of the  
construction and completion of the said High Line Canal for the Kittitas Reclamation  
District and its laterals and for the purchase of storage water.

And the parties of the second part agree and obligate themselves for the carrying out  
of said condition, and for Guaranteeing the payment as herein set forth, to execute and  
deliver to the parties of the first part as soon as said water is ready to be transferred to them,  
their first mortgage. . .

And also upon all of the waters sold and to be transferred to the parties of the second  
part by the parties of the first part as herein set forth and agreed.

**III. ANALYSIS**

1 Based upon these provisions in the 1911 Agreement, the Court finds that Kayser's  
2 predecessor did have some rights that attached in 1911. Therefore, the provisions of RCW  
3 90.03.380, first enacted in 1917 do not apply. That decision is based on the following analysis.

4 RCW 90.03.010 states that "The power of the state to regulate and control the waters within  
5 the state shall be exercised as hereinafter in this chapter provided. . .Nothing contained in this  
6 chapter shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or  
7 any existing right acquired by appropriation or otherwise." The provision is clear – any right  
8 existing as of 1917 when the Water Code was passed could not be modified by the provisions of  
9 RCW 90.03. Did Kayser's predecessor have any right prior to 1917? For the following reasons,  
10 this Court believes they did.

11 The intent of the contract is fairly straightforward. The parties entered into a present  
12 contractual relationship for future transfer of the water after a certain condition occurred – the  
13 construction of the High Line Canal. Kayser argues that building the High Line Canal was not a  
14 condition, but rather a matter of timing. The Court disagrees. A condition is "an event not certain  
15 to occur, which must occur, unless its non-occurrence is excused, before performance under a  
16 contract becomes due." Restatement Second of Contracts. The building of the High Line Canal  
17 had not occurred at the time of the contract's making and there is no evidence that its construction  
18 was in any way guaranteed. The transfer of the water clearly depended upon the canal being built.  
19 After that condition was satisfied, Adams would receive the Naneum Creek water and Olding, et al.,  
20 would receive a mortgage on property owned by Adams providing assurance that Adams would pay  
21 the construction and operation costs for delivery of the KRD water. As of 1911, the contract was  
22 formed and enforceable. The agreement, as drafted raised some questions and issues germane to  
23 this decision.

24 First, why was the agreement entered into in 1911 when the KRD canal would not carry  
25 water for another two decades? The provisions of the Agreement provide the answer. The parties  
of the first part obviously wanted a more reliable water supply than could be obtained from Naneum  
Creek and were looking to the federal government and what would become KRD for that more  
secure right. But they did not want to pay for the infrastructure that would be needed to deliver that  
water right nor the associated storage costs and therefore sold their Naneum Creek rights and in  
return received Adams promise that he would pay those costs. Commitments, reliance and  
obligations were created based on these promises – obligations that were clearly being formed prior

1 to 1917. Further, the contract was recorded and therefore available to the public for review.  
2 Without the agreement, Olding et al. had no security to contract for delivery of KRD water, which  
3 was, no doubt, relying on landowners to provide ultimate repayment of the irrigation infrastructure  
4 and delivery costs.

5 Second, although the actual transfer would not occur until around 1930, Adams certainly  
6 had some rights as of 1911 in the Naneum water. Although performance of the promises under the  
7 contract would not occur until the condition was satisfied (the building of the canal), that in and of  
8 itself does not render the contract unenforceable. That a promise given for a promise is dependent  
9 upon a condition does not render a contract illusory. Omni Group v. Seattle-First Nat'l Bank, 32  
10 Wn. App. 22, 25-27, 645 P.2d 727 (1982). Morrison essentially admits this in his Reply Brief when  
11 he states that “[c]learly, Olding could not have turned around and sold the water to another party  
12 without breaching the contract.” Olding et al. were not free to sell the Naneum Creek water to  
13 another party and Adams could enforce the terms of agreement in such an event. Therefore, the  
14 provisions of RCW 90.03.010 render the requirements set forth in RCW 90.03.380 (requiring a  
15 determination that the transfer would not impair existing rights) inapplicable to the transfer set forth  
16 in the 1911 Agreement.

17 To the extent RCW 90.03.380 would apply to the 1911 Agreement (the Court has  
18 specifically found the statute does not apply), Kayser is correct that the rights of the parties  
19 established in 1911 could not be altered by the enactment of the 1917 Water Code. Article I,  
20 Section 23 of the Washington Constitution provides: “No. . .law impairing the obligations of  
21 contract shall ever be passed.” Kayser then cites to Tremper v. Northwestern Mutual Life Insurance  
22 Co., 11 Wn.2d 461, 464, 119 P.2d 707 (1941) which holds that any legislative action which imposes  
23 new conditions on a party to a contract is a prohibited impairment. See also Metro Seattle v.  
24 O’Brien, 86 Wn.2d 339, 352, 544 P.2d 729 (1976)(Any action by the legislature which directly or  
25 indirectly diminishes the value of a contract constitutes a prohibited impairment under the  
Washington Constitution).

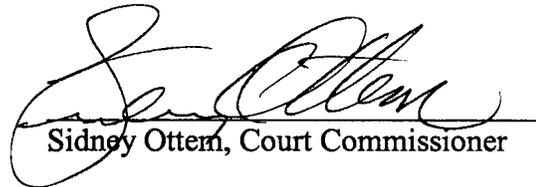
There can be no doubt that the provisions of RCW 90.03.380 would have imposed new  
conditions on the existing contract between Olding et al. and Adams. Indeed, it is precisely such a  
condition that Morrison is asking for in its exception. If the transfer provisions are applied, the  
value of the contract would not merely diminish, it would become nonexistent to Adams and their  
successors.

1 **IV. CONCLUSION**

2 Therefore, the Court finds that there were enforceable rights at the time of the Agreement's  
3 making although the actual transfer of the water would not occur until the condition was satisfied.  
4 That transfer cannot be viewed in isolation. It relates back to an agreement that was formed in 1911  
5 and led to numerous obligations and commitments between many entities. As of 1911, Adams had a  
6 presently enforceable right to Naneum Creek water once a condition was satisfied. The Court  
7 further finds that RCW 90.03.010's provision stating that nothing contained in RCW 90.03 would  
8 apply to any existing rights is controlling and compliance with RCW 90.03.380's transfer  
9 provisions is unnecessary. Finally, the Court finds that to the extent RCW 90.03.380 would apply,  
10 Article I, Section 23 of the Washington Constitution prohibits impairment of contract obligations.  
11 The legislation was enacted after 1911 and would substantially diminish or impose new conditions  
12 on the 1911 Agreement.

13 The Court hereby ORDERS that Morrison's exception to the recommendation of the  
14 Referee in regard to the claims of Kayser deriving from the 1911 agreement is DENIED.

15 Dated this 24th day of May, 2001.

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17 Sidney Ottem, Court Commissioner  
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