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

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CLERK OF  
COURT  
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, )  
STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )  
Plaintiff, )  
vs. )  
JAMES J. ACQUAVELLA, ET AL., )  
Defendants )

No. 77-2-01484-5

Memorandum Opinion Re: Unavailability of Water

Cascade Irrigation District  
(Court Claim No. 0891)

**FILED**

DEC 10 2001

**KIM M. EATON  
YAKIMA COUNTY CLERK**

**INTRODUCTION**

The Court filed a Report of the Court Concerning Cascade Irrigation District (Cascade Report) on October 8, 1999. Therein, the Court determined Cascade had perfected a right to divert 50,750 acre-feet from the Yakima River, but had relinquished a portion of that right (15,138 acre-feet) between 1980-1984 when the maximum diverted was 35,612 acre-feet. A number of parties filed extensive exceptions to the Cascade Report. A hearing was scheduled for October 25-26, 2001 for presentation of the following two issues: 1) how the sufficient cause set forth in RCW 90.14.140(1)(a) applies, if at all, to Cascade Irrigation District's water diversions during 1970 and 1982; 2) how water has been generally unavailable to Cascade because of river and river operation changes. See October 11, 2001 Report of Proceedings. This Opinion reflects the Court's findings in regard to the "unavailability of water" exception to excuse Cascade's nonuse of water. In addition, Cascade presented evidence to show the historical problems it has encountered in obtaining a full supply of water, which shall also be addressed. This Opinion does not address any other exceptions and the analysis below should not be construed as a decision by the Court on those issues.

**ANALYSIS**

As stated above, the Court found Cascade had perfected a right to divert 50,750 acre-feet from the Yakima River during the 1924 irrigation season. Cascade Report at 39. That amount was

15557

1 also diverted in the drought year of 1977. Id. at Attachment B, page 2. However from 1980-1984,  
2 Cascade used less water, and the Court found the relinquishment provisions set forth in RCW  
3 90.14.160 applied to reduce Cascade's right to 35,612 acre-feet. That period was selected because  
4 it was five consecutive years not interrupted by drought – drought is a sufficient cause for the  
5 nonuse of water. RCW 90.14.140(1)(a). The Court specifically determined the 1968-1972 period  
6 would not be used to assess relinquishment because in 1970 a slide destroyed part of the upper  
7 flume cutting off the water supply. Id. at 40. Accordingly, the “unavailability of water” exemption  
8 set forth in RCW 90.14.140(1)(a) was held to apply, thereby excusing the nonuse of water during  
9 that period. Cascade introduced additional evidence on the 1970 breakdown but none was needed  
10 because no party took exception to the Court's decision on that issue in the Cascade Report. See  
11 Department of Ecology's (Ecology) Response To Exceptions dated September 18, 2001 at p. 8.

12 Cascade contends the Court should likewise reject the 1980-1984 as a period for applying  
13 relinquishment. It provided considerable evidence to show a canal break also occurred during that  
14 period and water was therefore “unavailable.” See Testimony of William Haberman, October 25,  
15 2001 Report of Proceedings at 12-15; Testimony of Ronald Walton, October 25, 2001 RP at 48 –  
16 55; CID – 108 (photos of broken canal). Ecology did not necessarily disagree with Cascade's  
17 contention a break occurred but sought to establish criteria for how the “other unavailability of  
18 water” sufficient cause set forth in RCW 90.14.140 should be applied. The agency admits a break  
19 in a water delivery system can give rise to the unavailability of water exception, but only if the  
20 following three factors are met. First, the canal break must significantly interrupt water diversions  
21 and deliveries. Second, the break must be caused by a natural event difficult to guard against. Third,  
22 the water right holder must show that the canal was maintained in good condition at the time of the  
23 canal break. Ecology also contends the diverter carries the burden of establishing those criteria.

24 Cascade disagrees. It does not believe the criteria apply and were not set forth in RCW  
25 90.14.140. Accordingly, to the extent Ecology contends the canal has not been kept in good  
condition, Cascade believes the burden rests with the agency to make that showing. Whether  
Ecology's criteria apply and determining who has the burden of showing the adequacy of the  
canal's maintenance are the first issues for the Court to analyze.

The statutory provisions at issue are relatively straightforward. RCW 90.14.160 provides  
any person entitled to use water who voluntarily does not for five consecutive years, without  
sufficient cause, relinquishes such right or portion thereof. RCW 90.14.140 states:

1 (1) For the purposes of RCW 90.14.130 through 90.14.180, “sufficient cause” shall be  
2 defined as the nonuse of all or a portion of the water by the owner of water right for a  
3 period of five or more consecutive years where such nonuse occurs as a result of:

3 (a) Drought, or other unavailability of water.

4 This Court has held that a canal break qualifies as the “other unavailability of water.” See  
5 Cascade Report; see also Supplemental Report Re: Yakima-Tieton Irrigation District; Conditional  
6 Final Order Re: Kennewick Irrigation District.

7 In recent decisions, the Washington Supreme Court has provided guidance on interpreting  
8 the “sufficient causes” that excuse the nonuse of water from relinquishing and also on which party  
9 carries the burden of proving a sufficient cause applies. The case cited by both Cascade and  
10 Ecology is R.D. Merrill Co. v. Pollution Bd, 137 Wn.2d 118 (1999). In terms of assigning burdens,  
11 R.D. Merrill instructs that the party asserting a right has relinquished bears the burden of proving  
12 nonuse for the five consecutive year period. Id. at 140. If the challenger succeeds, the burden of  
13 proving that the nonuse of a water right is excused by a statutory exception is on the holder of the  
14 right. Id.; see also Ecology v. Acquavella, 137 Wn.2d 746, 758 (1997). Here, Ecology met its  
15 burden of showing the reduced use of water from 1980 – 1984 as set forth in Cascade’s records  
16 showing diversions from 1924-1987. Cascade carries the burden of proving that its nonuse of water  
17 during the five-year period is excused by a statutory exception – here, the “unavailability of water.”

18 Although the Court will attempt to provide some clarification on the burden allocation, there  
19 is no question that a canal break occurred in 1982 that prevented Cascade from diverting any water  
20 in April and a reduced quantity in May. Ecology does not disagree in regard to this event. In its  
21 closing remarks, Ecology stated “Ecology believes Cascade has made a complete and good record  
22 to show that there were indeed canal breaks in 1970, 1982 and 1996, and that those breaks did cause  
23 significant decreases in the amount of water that can be diverted.” May 26, 2001 RP at 44-45. The  
24 agency also stated “we believe that a good solid record has been made in terms of those years for  
25 1970, 1982 and 1996 with the canal breaks.” Id. at p. 53. In its Report, the Court was only  
concerned with the period of 1980-1986 because it had a record of the canal break in 1970. What  
transpired after 1986 (in terms of Cascade’s ability to divert water) is not an issue before the Court  
because of the droughts that occurred from 1987 – 1994 and the lack of diversion records thereafter.

The Court finds a canal break did occur in 1982 that prevented the diversion of a full supply  
of water for that irrigation season. See testimony of William E. Haberman (Cascade Board member

1 from 1974-1991), May 25, 2001 RP at 12-15; CID – 108 (photos of broken canal). Sections of a  
2 flume were washed out where the eastern canal transitioned into a metal flume. A concrete apron  
3 supported those structures. The entire works were replaced. See testimony of Anthony Jantzer,  
4 Oct. 25, 2001 RP at 23. Cascade also established that excessive flooding caused the break. Id.; see  
5 also CID 76. Although the flood occurred in January, replacement was not feasible until April  
6 when the soil had dried allowing the concrete work to proceed. The diversions show Cascade has  
7 diverted consistently in April (although not always) with a maximum of 6,978 acre-feet diverted in  
8 1926. Users were requesting water delivery during the period the canal was inoperable. See  
9 October 25, 2001 RP at p. 64. Ecology did not refute Cascade’s evidence.

10 Although the canal break did occur in 1982, does that qualify as the “unavailability of  
11 water” thereby breaking up the five-year period? Indeed it does. This Court has held on at least  
12 three occasions that a broken canal fits under the statutory exception to relinquishment set forth at  
13 RCW 90.14.140(1)(a). Cascade Report; Supplemental Report Re: YTID; Conditional Final Order  
14 Re: Kennewick Irrigation District. R.D. Merrill is not at odds with those rulings or this decision.  
15 Although the Supreme Court did instruct lower courts to interpret the exceptions set forth in RCW  
16 90.14.140 narrowly, it also indicated the “unavailability of water” exception may be appropriate  
17 when “hydrologic or engineering difficulties are encountered” that could make water unavailable.  
18 R.D. Merrill at 133, footnote 7. The 1982 canal break would qualify as an “engineering difficulty.”

19 That being said, the Court is mindful of Ecology’s concerns regarding a water purveyor’s  
20 negligent maintenance leading to a broken canal or some other system breakdown and receiving the  
21 benefit of RCW 90.14.140. The key is whether the nonuse is voluntary in any respect.  
22 Hypothetically, an irrigation company might fail to regularly clean its canals in the spring. Large,  
23 immovable obstacles located therein would remain and when water was diverted canal damage  
24 could result from the backup. Such a scenario could cause the Court to find the inability to use  
25 water was self-induced and the statutory exception inapplicable. Although the Court does not  
believe the statute should be interpreted as Ecology suggests, the Court finds that when a diverter,  
based on an infrastructure breakdown, seeks to avail itself of the “unavailability of water”  
exception, it carries the burden of showing a breakdown occurred preventing diversions and that the  
structure at issue had been reasonably maintained.

Did Cascade reasonably maintain the canal and did the 1982 canal break prevent the use of  
water? The testimony of Cascade’s witnesses and its exhibits are helpful in addressing both

1 questions. Ronald Walton testified the canal was examined each fall and spring for trouble spots  
2 and money budgeted to make identified repairs. The Court has no evidence such a practice falls  
3 below the maintenance program of other irrigation districts in the area. He also indicated that  
4 unavailability in the early part of the year leads to the early maturation of timothy hay or alfalfa,  
5 which results in lost plant growth. See also testimony of Jerry Goronea, October 25, 2001 RP at p.  
6 62, lines 20-23 (“We did not commence to have water deliveries until close to mid-May. We had to  
7 haul stock water. We had reduced crop size due to lack of water early in the year, and we had  
8 pasture adversely affected by the water”). Mr. Jantzer provided extensive testimony regarding the  
9 current methods of maintenance, which are consistent with Mr. Haberman’s and Mr. Walton’s  
10 testimony regarding maintenance in the early 1980s. Mr. Jantzer also noted the works were in fairly  
11 good condition when he began his duties as manager in 1996.

12 In regard to the issue of how changes in the physical condition of the river as well as river  
13 operations have affected Cascade’s ability to divert water, the Court offers no opinion. An answer  
14 to that question is not necessary to determine Cascade’s water right. The quantity perfected by  
15 Cascade relates back to a 1924 diversion. Something less than that quantity was diverted between  
16 1968-1972 and 1980 – 1984. However, in both periods a canal break or slide occurred which  
17 excused the nonuse of water for a particular year and thereby eliminated the two periods from  
18 relinquishment considerations as five consecutive years of voluntary nonuse.

19 In light of the above, the Court finds Cascade Irrigation District has perfected a right to  
20 divert 50,750 acre-feet per year. Ecology carried its burden of showing non-use of the perfected  
21 quantity between 1980-1984. Cascade met its burden of showing how its nonuse falls under RCW  
22 90.14.140(1)(a). No part of the perfected right has relinquished. Therefore, Cascade shall be  
23 confirmed a right to divert 50,570 acre-feet from the Yakima River during the irrigation season. The  
24 Court also finds that any water purveyor seeking to utilize the “unavailability of water” exception  
25 must show its canal was reasonably maintained and water was not diverted as a consequence of a  
canal breakdown. All other findings in the Cascade Report remain unchanged. The Court shall  
discuss further processing of Cascade’s water right at the February 14, 2002 hearing.

Dated this 10<sup>th</sup> day of December, 2001.

  
Sidney Ottem, Court Commissioner