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

KIM M. EATON

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**KIM M. EATON
YAKIMA COUNTY CLERK**

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

Memorandum Opinion Re: Unavailability of
Water

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Plaintiff,)

West Side Irrigating Company
(Court Claim No. 1629)

vs.)

JAMES J. ACQUAVELLA, ET AL.,)
Defendants)

INTRODUCTION

The Court filed a Report of the Court Concerning West Side Irrigating Company (West Side Report) on January 13, 2000. Therein, the Court determined West Side had perfected a right to divert 34,980 acre-feet from the Yakima River, but had relinquished a portion of that right (8,830 acre-feet) between 1968-1972 when the maximum diverted was 26,150 acre-feet. The Court also found that an additional 600 acre-feet were relinquished between 1980 – 1984 and established that West Side’s water right was now 25,550 acre-feet. A number of parties filed extensive exceptions to the West Side Report. A hearing was held November 8-9, 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 West Side’s water diversions during the 1968-1972 and 1980-1984 periods; 2) how water has been generally unavailable to West Side because of river and river operation changes. See November 8-9, 2001 Report of Proceedings. This Opinion reflects the Court’s findings in regard to the “unavailability of water” exception to excuse West Side’s nonuse of water. In addition, West Side 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.

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1 ANALYSIS

2 As stated above, the Court found West Side had perfected a right to divert 34,980 acre-feet
3 from the Yakima River during the 1924 irrigation season. West Side Report at 43. That amount was
4 never diverted again, although similar quantities were diverted consistently in the 1920s (prior to
5 Kittitas Reclamation District coming on-line) and diversions over 30,000 acre-feet occurred in the
6 drought years of 1977, 1987-1989. Id. at Attachment A, page 2. However in 1968-1972 and 1980-
7 1984, West Side used less water, and the Court found the relinquishment provisions set forth in
8 RCW 90.14.160 applied to reduce West Side's right to 25,550 acre-feet, with the bulk of the
9 relinquishment occurring between 1968-1972 when the maximum diverted was 26,150 acre-feet.
10 Those periods were selected as five consecutive years not interrupted by drought – drought is a
11 sufficient cause for the nonuse of water. RCW 90.14.140(1)(a). Oddly, West Side used more water
12 during drought years then non-drought years.

13 West Side contends the Court should reject the two, five-year periods, arguing they are
14 inappropriate for applying relinquishment. It provided evidence to show canal breaks occurred
15 during the 1980-1984 period and water was therefore “unavailable.” See Testimony of Kirk Riegel,
16 November 8-9, 2001 Report of Proceedings at 89, 107. West Side also provided testimony that
17 dating back to the 1940s, reduced flows in September had made it impossible to divert the amount
18 of water it could have beneficially used. See Testimony of Richard Riegel, November 8, 2001 RP at
19 p. 75. In addition to the reduced flow argument, the only evidence of nonuse for the 1968-1972
20 period stemmed from an entry in West Side's Minutes from 1972. According to those Minutes, Mr.
21 R. S. Acheson attempted to turn some of his shares into the Company on the basis he had not been
22 able to get water when needed. November 8, 2001 RP at 107.

23 Ecology did not necessarily disagree with West Side's contention that a break occurred in
24 1980 and 1983 but argued that West Side's failure to divert during that period only amounted to
25 about 1,000 acre feet of foregone water. The agency rejected West Side's contention that reduced
late season diversions were caused by water unavailability: rather, the reduced diversions were
caused by West Side itself or natural river conditions. It further sought to establish criteria for how
the “other unavailability of water” sufficient cause set forth in RCW 90.14.140 should be applied.
The agency admits a break in a water delivery system can give rise to the unavailability of water
exception, but only if the following three factors are met. First, the canal break must significantly
interrupt water diversions and deliveries. Second, the break must be caused by a natural event

1 difficult to guard against. Third, the water right holder must show that the canal was maintained in
2 good condition at the time of the canal break. Ecology also contends the diverter carries the burden
3 of establishing those criteria.

4 West Side disagrees. It does not believe the criteria apply and were not set forth in RCW
5 90.14.140. Accordingly, to the extent Ecology contends the canal has not been kept in good
6 condition, West Side believes the burden rests with the agency to make that showing. Whether
7 Ecology's criteria apply and determining who has the burden of showing the adequacy of the
8 canal's maintenance were examined by the Court in its Memorandum Opinion Re: Unavailability of
9 Water for Cascade. In that decision the Court provided the following analysis.

10 RCW 90.14.160 provides any person entitled to use water who voluntarily does not for five
11 consecutive years, without sufficient cause, relinquishes such right or portion thereof. RCW
12 90.14.140 states:

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

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

17 This Court has held a canal break qualifies as the "other unavailability of water." See
18 Memorandum Opinion Re: Unavailability of Water (Cascade Irrigation District), December 10,
19 2001; Report of the Court Concerning Cascade; Supplemental Report Re: Yakima-Tieton Irrigation
20 District; Conditional Final Order Re: Kennewick Irrigation District.

21 In recent decisions, the Washington Supreme Court has provided guidance on interpreting
22 the "sufficient causes" that excuse the nonuse of water from relinquishing and also on which party
23 carries the burden of proving a sufficient cause applies. The case cited by both West Side and
24 Ecology is R.D. Merrill Co. v. Pollution Bd, 137 Wn.2d 118 (1999). In terms of assigning burdens,
25 R.D. Merrill instructs that the party asserting a right has relinquished bears the burden of proving
nonuse for the five consecutive year period. Id. at 140. If the challenger succeeds, the burden of
proving that the nonuse of a water right is excused by a statutory exception is on the holder of the
right. Id.; see also Ecology v. Acquavella, 137 Wn.2d 746, 758 (1997). Here, Ecology met its
burden of showing the reduced use of water from 1968 – 1972 and 1980 – 1984, set forth in
Appendix A of the West Side Report. West Side carries the burden of proving its nonuse of water
during the five-year period is excused by a statutory exception – here, the "unavailability of water."

1 However, the Memo. Op. Re: Unavailability of Water (Cascade), p.5, held as follows:

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

9 With those principles in mind, the Court turns to the facts at hand. Canal breaks occurred to
10 the West Side system in 1980 and 1983. Testimony of Kirk Riegel, November 9, 2001 Report of
11 Proceedings at p. 89-90. Those breaks required West Side to modify its delivery practice for 2-3
12 days although it did not completely shut down the canal. Ecology concedes a canal break did occur
13 in 1980 that may have led to some foregone diversions and its expert, Ray Newkirk, estimated that
14 amount to be no more than 1,000 acre-feet. Ecology further argues the 1980 break should not be
15 considered because it was self-induced and insignificant. November 9, 2001 RP at 173-74.

15 This brings the Court to the first issue. How significant does the canal break event need to
16 be in order to constitute the unavailability of water? In its closing remarks, Ecology stated in regard
17 to the 1980 canal break that "[Ecology] would submit that that's not a significant event that is going
18 to take them away from the – that is going to put them into the drought or other unavailability of
19 water category." Id. The agency also stated in regard to the 1983 canal break:

19 And certainly in 1983 the event was not significant enough to even create a mention in the
20 minutes of the Board of Directors for the meetings where it would have been discussed.

20 In fact, it is not undisputed that there was no reduction, that there was any reduction
21 in diversions by West Side. In fact Mr. Newkirk testified that there wasn't a reduction that
22 he could see in the diversion records for West Side for any of 1983. It's undisputed that
23 some fields at the end of the canal may have had a day with no water and part of a day with
24 less water, but, again, this is not the kind of significant event that the legislature had in mind
25 when they talked about drought or other unavailability of water. Id.

24 What "significant events" did the legislature have in mind when it included the
25 "unavailability of water" provision with the sufficient causes set forth in RCW 90.14.140? There is
no evidence of legislative intent in the record. To date, the Court has considered breaks lasting

1 weeks or longer to fall within the statute. See *Cascade* and *Yakima-Tieton* Reports, supra. Once
2 the Court has considered water “unavailable” during any given year because of a canal break, the
3 result has been to eliminate the year from a relinquishment analysis in the same fashion as a drought
4 year. That method was based on *Ecology v. Acquavella*, 131 Wn.2d 746, 756 (1997), and the
5 Supreme Court’s preference for water rights to be based upon diversion and actual use rather than
6 calculated numbers. See Supplemental Report on Remand Re: YTID at 6-7. Eliminating those
7 years when canal breaks have occurred can break up the two periods of 1968-1972 and 1980-1986
8 often used by the Court in analyzing relinquishment. Should the reduced diversion by a water
9 purveyor for 2-3 days fit under the “unavailability of water” sufficient cause and thereby remove the
10 entire year from relinquishment considerations?

11 This Court does not believe that the inability of a water user/purveyor to divert a portion of
12 its water right for 2-3 days constitutes the unavailability of water. Although the Court understands
13 West Side’s point, expanding such a line of argument further could lead to absurd results. For
14 example, a water user could argue that the inability to divert water, even the smallest amount and
15 even for a minute or two, could be considered the “unavailability of water” and fit within the
16 meaning of the statute. The Court agrees with Ecology the statute was not so intended, particularly
17 in light of R.D. Merrill’s caution to interpret the statute narrowly. Accordingly, a line must be
18 drawn. Ecology has suggested a three-part test (outlined above) that this Court rejected in its
19 Memorandum Opinion Re: Unavailability of Water (Cascade). The Court still does not favor that
20 recommendation. Rather, it will stand by the decision set forth in the Cascade decision with the
21 following modification. Therefore, when a diverter, based on an infrastructure breakdown, seeks to
22 avail itself of the “unavailability of water” exception, it carries the burden of showing a breakdown
23 occurred preventing significant diversions and that the structure at issue had been reasonably
24 maintained.

25 What constitutes a “significant diversion” within the meaning of this analysis? First and
foremost, a diverter must show that the breakdown bears on the relinquishment analysis and would
affect the outcome. Unlike a drought, where the affects cannot possibly be known, the affects of a
broken canal do have some limitations that can be objectively analyzed. For example, when the
Court analyzed Cascade and YTID’s broken canal issues, entries of 0 would be posted on the daily
diversion charts. Assuming those entities could have diverted the maximum entitlements on those
days provides an upper end for foregone water. West Side’s situation is more ambiguous. West

1 Side indicates the canal breaks in 1980 created a scenario where diversions had to be limited for 2-3
2 days and that water users at the end of the canal received no water for that long or possibly up to a
3 week. However, the exact days the reduced diversions took place were never specifically stated.
4 The only period that seems out of character is the time period of August 13 through August 24. The
5 diversion records show West Side diverted between 49-53 cfs for those days. Assuming West Side
6 could have diverted its full quantity of 105 cfs (which, incidentally it had not done since 1968), the
7 difference over the period was very roughly 1000 acre-feet. Ecology provided an estimate that, at
8 most, 1,000 acre-feet were foregone. In 1980, West Side diverted 22,200 acre-feet. Adding 1,000
9 acre-feet to that total (23,200 acre-feet) would not change the fact that 25,550 acre-feet was the
10 maximum diverted during the 1980-1984 period. Thus, if the facts are interpreted in a way most
11 favorable to the irrigation district, the outcome of the relinquishment analysis would not change.

12 Other facts may be important as well. What type of break occurred? Were diversions
13 completely stopped or reduced? How many users were affected? What were the conditions
14 otherwise – hot, dry, cool or wet? From a beneficial use standard, did the missed diversions have an
15 impact on crops? There may be other considerations that come into play depending on the unique
16 facts of each situation. The bottom line is the Court is reluctant to draw a hard and fast line --
17 however it does wish to make it clear that not all water unavailability falls within the purview of
18 RCW 90.14.140. Accordingly, based on the evidence, the Court finds West Side has not met its
19 burden of showing that RCW 90.14.140(1)(a) is applicable to the 1980-1984 period.

20 The Court has identified no evidence that assists West Side in its claim that water was
21 “unavailable” in 1968-1972. First, the Minute entry from 1972 whereby a West Side user attempted
22 to turn in part of his shares because he was not receiving water is unpersuasive. The inability of one
23 user to receive water can be explained in many ways that may have no relation to the sufficient
24 cause statute. No attempt was made at the hearing to connect the shareholder’s request to a canal
25 break or any other specific water unavailability. Second, the Court rejects West Side’s theory that
river conditions caused by “flip-flop” made water “unavailable.” “Flip-flop,” developed in
response to a federal court ruling, is a water management procedure utilized by the Bureau of
Reclamation to encourage salmon to construct their redds in the middle part of the river so that less
water is required to keep the eggs covered. Flows are minimized in the upper Yakima in September
and October when the salmon return to spawn. Ray Newkirk analyzed the diversion records for ten
years prior to implementation of flip-flop and the period after and saw very similar diversion

1 patterns. Accordingly, he concluded that “flip-flop” had no significant impact on West Side’s
2 ability to divert. November 8, 2001 RP at 147.

3 Third, Richard Riegel testified on behalf of West Side that water had been hard to divert in
4 the latter part of the season dating back to the 1940’s. Extreme measures had to be taken to restrict
5 the river enough to cause water to flow into the diversion structure. *Id.* at 75-77. Mr. Riegel also
6 testified that even these measures would not necessarily allow them to obtain a full amount of
7 water. The bottom line is the river conditions were regular, on-going and significantly predated
8 flip-flop. At some point, the inability to divert water requires a user to change the infrastructure,
9 adapt the farming practice to the availability or find a different source of water. It is the Court’s
10 opinion, based on a review of the record, that West Side has utilized a different source of water
11 since Kittitas Reclamation District (KRD) went on-line in the early 1930’s.

12 How West Side obtains its seasonal supply of water is complicated. This Court was
13 provided a first hand view of that system in 1994 during an agreed upon “view.” Water flows into
14 the canal from smaller creeks and other runoff. West Side essentially must “take” this water.
15 Undoubtedly, receiving inflow in this manner affects the quantities diverted at the headgate. The
16 source for much of this mid-canal inflow is undoubtedly KRD runoff as well as some natural creek
17 flow. The diversion records support this conclusion. For example, from 1912-1931, the diversions
18 fell below 30,000 acre-feet on only two occasions. From the time KRD came on line until 1992,
19 some 60 years, West Side diverted over 30,000 acre-feet during five irrigation seasons.
20 Interestingly, three of those five occurred in drought years. The Court also notes that over the past
21 25 years, there have been five drought years. Four of those drought years reflect the highest
22 quantity of diversion during that quarter century – 1973, 1977, 1987 and 1988. In that pattern of
23 diversions exists a story that should not be ignored and must be integrated into West Side’s water
24 right. Essentially, in years of plenty, KRD diverts large quantities of water – some of which runs
25 off to West Side and results in reduced diversions at the head gate. In drought years, KRD diverts
less water from the Yakima River, creating less runoff that reaches the West Side canal, and West
Side diverts more at the head gate.

26 The Court recognizes its Memo. Op. Re: Motion for Reconsideration of Limiting
27 Agreements, April 1, 1994 and subsequent order, as well as the West Side Report, may be construed
28 to affect West Side’s ability to establish a right to what is clearly project return flow. As to the
29 West Side Report, the Court was essentially following its earlier April 1, 1994 Limiting Agreements

1 decision. In that decision the Court determined West Side could not establish a right to return flow
2 but could use water if available. What must be kept in mind is that issue involved rights to water in
3 excess of limiting agreements. The decision does not necessarily impact operational decisions made
4 by the Bureau of Reclamation in regard to quantities within amounts allowed by a water purveyor's
5 limiting agreements. That distinction was recognized in the West Side Report at page 25 where
6 Judge Stauffacher wrote "[m]any of the issues that led to the Additional Order pertain to the use of
7 return flows in excess of a claimant's limiting agreement 'entitlement.'" He went on to note that
8 two claimants, Selah-Moxee Irrigation District (SMID) and Moxee Irrigation District (MID), had
9 reduced diversions from the Yakima River due to Project return flows.

10 "For SMID, the Court ruled that there was a specific and quantifiable amount of water
11 associated with the impact from Yakima Project return flows. The Court awarded an
12 additional amount of water above what was reflected in SMID's diversion records. The
13 Court denied MID's claim for failure to offer proof of impact." Id. at 26.

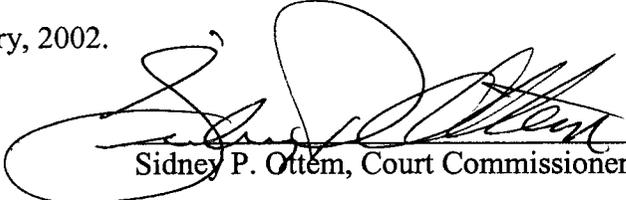
14 Indeed, RCW 90.40.020 could not be more clear regarding the United States' right to utilize
15 any natural or artificial water course to deliver water to which it has acquired a right to store or
16 divert "and may again divert and reclaim said waters from said water course for irrigation purposes
17 subject to existing rights." West Side and the United States entered into a Warren Act contract
18 August 1, 1922 for delivery of 8,200 acre-feet on an annual basis. In addition, West Side entered
19 into a limiting agreement with the United States. The United States does not appear to be inflexible
20 in regard to the Court considering Project return flows when quantifying West Side's right. In his
21 Second Affidavit of Loren G. Kjelgaard, the former Yakima Adjudication Manager states at page 3:
22 "Reclamation does not oppose considering return flows when establishing a water right for WSIC
23 as long as all flows entering their system are measured and reported to Reclamation and the return
24 flows are included in their limiting agreement." Mr. Kjelgaard further counsels that all return flows
25 are part of TWSA and should be counted against the limiting agreements. The Court is willing to
consider this issue in regard to uses of return flow that do not exceed any contract/agreement limits
with the United States.

The Court acknowledges the potential issues associated with a return flow analysis. It also
acknowledges that this matter has not been the subject of a hearing to date as the November 8-9,
2001 hearing was limited to the issue of canal breaks and water unavailability. Accordingly, no
rulings are being made at this time. However, based on a review of the record, the above analysis
appears more in line with West Side's historical use of water and seems to warrant more exploration

1 then do RCW 90.14.140's sufficient causes. Indeed, even if this Court were to reconsider its
2 decision as to the effect of RCW 90.14.140(1)(d) (the "operation of legal proceedings" sufficient
3 cause) on relinquishment, West Side's right would not substantially improve as the bulk of the
4 relinquishment occurred in 1968-1972, prior to the filing of this adjudication.

5 In light of the above, the Court finds West Side Irrigating Company has perfected a right to
6 divert 34,980 acre-feet (1924). Ecology carried its burden of showing non-use of the perfected
7 quantity between 1968-1972. During that period, West Side diverted a maximum of 26,150 acre-
8 feet thereby relinquishing 8,830 acre-feet. West Side has not met its burden of showing how its
9 nonuse during that period falls under RCW 90.14.140(1)(a). Ecology also carried its burden of
10 showing non-use of the 26,150 acre-feet from 1980-1984. During that period, West Side diverted a
11 maximum of 25,550 acre-feet thereby relinquishing 600 acre-feet. West Side has not met its burden
12 of showing how its nonuse during that time falls under RCW 90.14.140(1)(a). Portions of the vested
13 right have therefore relinquished. West Side shall be confirmed a right to divert 25,550 acre-feet
14 from the Yakima River during the irrigation season. The Court also finds that any water purveyor
15 seeking to utilize the "unavailability of water" exception must show its canal was reasonably
16 maintained and a significant amount of water was not diverted as a consequence of a canal
17 breakdown. All other findings in the West Side Report remain unchanged except as noted above.
18 The Court shall discuss further processing of West Side's water right at the April 11, 2002 hearing.

19 Dated this 8th day of February, 2002.

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Sidney P. Ottem, Court Commissioner