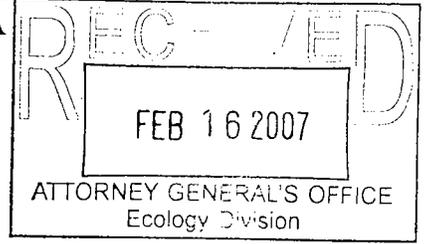


1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF YAKIMA



3 IN THE MATTER OF THE)
4 DETERMINATION OF THE RIGHTS TO)
5 THE USE OF THE SURFACE WATERS OF)
6 THE YAKIMA RIVER DRAINAGE BASIN,)
7 IN ACCORDANCE WITH THE)
8 PROVISIONS OF CHAPTER 90.03,)
9 REVISED CODE OF WASHINGTON)

No. 77-2-01484-5

MEMORANDUM OPINION AND ORDER
RE: WATER RIGHTS FOR THE
UNITED STATES OF AMERICA
COURT CLAIM NO. 02276

10 THE STATE OF WASHINGTON,
11 DEPARTMENT OF ECOLOGY,

BUREAU OF RECLAMATION

12 Plaintiff,

13 vs.

14 JAMES J. ACQUAVELLA, et al.,

15 Defendants.

16 **I. INTRODUCTION**

17 The United States of America, Bureau of Reclamation, through Court Claim No. 02276
18 asserted rights to use various surface water sources in the Yakima River Basin. The Court
19 entered its Supplemental Report of the Court Concerning the Water Rights for the United States
20 of America, Department of the Interior, Bureau of Reclamation on December 4, 2006
21 (Supplemental Report) and distributed a Proposed Conditional Final Order. Objections and
22 comments to the Supplemental Report were filed by the United States, Roza Irrigation District,
23 Wapatox Ditch Company, Yakama Nation and the Department of Ecology (Ecology). The Court
24 held a hearing February 8, 2007 to hear objections to the Supplemental Report and being fully
25 advised, finds as follows.

II. ANALYSIS

a. *United States, Bureau of Reclamation*

1. Lake Easton Dam Storage

The Court was unable to confirm a right because there were two different locations
given for the impounding structure. The correct location has been provided and a right can be
confirmed to the United States Department of the Interior, Bureau of Reclamation on behalf of

1 itself and other entities to which it is required to supply water from storage. This right will go in
2 the CFO under section "A" No. 13 to show that the impounding structure is located "within the
3 SE1/4NW1/4 of Section 11, T. 20 N., R. 13 E.W.M."

4 2. French Canyon Dam

5 Reclamation had originally provided two different storage quantities. The United States
6 requests that 1,265 acre-feet appear in the CFO as it currently does on page 3. No additional
7 action is required.

8 3. Wapatox Dam Storage

9 The United States initially objected to the Court not confirming a storage right for the
10 temporary pooling of water behind Wapatox Dam. Ecology, Wapatox and the United States
11 appear to agree that water may be temporarily pooled incidental to irrigation and in accordance
12 with historic practices, without needing a water right for that use. The United States indicates it
13 would agree that it does not require an independent right to store Project water behind the dam if
14 the "Court agrees with Ecology's position and concludes that water, in fact, may be pooled
15 temporarily behind Wapatox Diversion Dam in order to enable the diversion into the Wapatox
16 Ditch as an incidental aspect of the diversion right of the irrigation-based rights to deliver water
17 to the farmers who withdraw water from the canal." The Court does agree with Ecology's
18 position.

19 4. Chandler Power Plant

- 20 • The Court modifies the Supplemental Report at 18, lines 3-4 to show the Chandler rating
21 curve is based on the Chandler installation
- 22 • The Court modifies the Supplemental Report at 16, line 28 to remove the words "and within
23 Kennewick."
- 24 • The Court modifies the Supplemental Report at 17, lines 12-13 to state "The United States
25 does not divert water, or diverts less water, during times of maintenance, repairs, mousing of
the canal, or other reasons." The Court otherwise does not address the discussion of the
United States set forth in Footnote 2 at page 5 of its Comments since a specific action by the
Court is not requested.

5. Roza Power Plant Subordination

The Court agrees with Roza and the United States in regard to removing the language
regarding migratory fish. The Supplemental Report shall be modified accordingly at page 19,

1 lines 18-19 and in the Proposed Conditional Final Order at approximately page 5, line 11. The
2 Yakama Nation's treaty reserved right for fish and other aquatic life is the senior right in the
3 basin.

4 6. Naches Ranger Station

5 The Court identified issues regarding errors in the point of diversion as described in
6 USBR 201B, on USBR 239(b), the map, the agreement and other rights for the Emerick ditch,
7 and the place of use as described in USBR 201B. Additional evidence was needed to properly
8 assess the claim. The United States has offered clarifying statements from Mr. William
9 Garrigues (Naches Range District). A water right can now be confirmed (and will be set forth in
10 the CFO) as follows to the:

11 United States Department of the Interior, Bureau of Reclamation on behalf of the United
12 States Forest Service from the Naches River in the amounts of 0.1 cubic feet per second
13 and 17.8 acre-feet per year for irrigation of six acres and stock water. The point of
14 diversion is located 2,500 feet north and 2,100 feet west from the southeast corner of
15 Section 1, being within the NW1/4SE1/4 of Section 1, T. 16 N., R. 14 E.W.M.
16 (Emerick Ditch) and the place of use is within the SE1/4 of Section 1, T. 16 N., R. 14
17 E.W.M. The season of use is July 1 through September 30. The priority date is May 10,
18 1905.

19 7. Muoth Warren Act Contract

20 The Court noted discrepancies between the declarations of the water users and USBR
21 201B but confirmed a right based on the declarations. The United States agrees with the right as
22 confirmed and no action by the Court is required.

23 8. City of Cle Elum

24 The Court identified problems with the location of the points of diversion and questioned
25 whether the place of use was correct. The Court also requested a signed contract prior to issuing
a CFO. See Supplemental Report at pp. 31-32. Those issues have been rectified.

However, there is a new issue. In the original contract it was stated that the Cle Elum
River Point of Diversion was scheduled to be completed by the end of 2005. In Mr. Charlie
Roe's December 29, 2006 letter to Mr. Jack Hockberger, he recognizes that the Court has asked
for the "currently used points of diversion from the Yakima River and Cle Elum River." He
further states that the Cle Elum River point of diversion and conveyance works are "scheduled to
be constructed and in operation in the summer of 2007." The Court can only confirm existing

1 rights. However, Ecology has approved the new location for the Cle Elum River. Therefore, the
2 Court will include the following right in the Conditional Final Order but shall authorize Ecology
3 to issue a certificate of adjudicated water right only upon notification to the Court and Ecology
4 that the structure has been constructed:

5 A May 10, 1905 water right shall be confirmed to the United States Department of the
6 Interior, Bureau of Reclamation on behalf of the City of Cle Elum in the amounts of 3 cubic feet
7 of diversion:

- 8 1. East Bank of the Cle Elum River with the SW1/4SW1/4SE1/4 of Section 30, T. 20 N., R.
9 15 E.W.M.
- 10 2. The Yakima River on the south bank from within the N1/2SE1/4SW1/4SE1/4 and
11 S1/2NE1/4SW1/4SE1/4 of Section 27, T. 20 N., R. 15 E.W.M.

12 The place of use is the City of Cle Elum, and the Laurel Hill Memorial Park Cemetery (located
13 within the NW1/4SW1/4 of Section 27, T. 20 N., R. 15 E.W.M.). DE-12 reflects the place of use
14 -- the service area is surrounded by a black dashed line.

15 The following provisions shall be placed on the right:

16 "The maximum quantity allowed under this May 10, 1905, water right and the City's water right
17 dated June 30, 1896 shall be no more than 6 cfs and 1,693 acre-feet per year."

18 9. Bumping Lake Reservoir

19 The United States asks that the "W3/4" be dropped and the location would be only the
20 NW1/4. The Court will GRANT this request and modify the proposed CFO at approximately p.
21 2, line 27 accordingly.

22 10. Chandler/Prosser Dam.

23 The Court agrees the right for Chandler Park should be corrected to read 350 feet south
24 (not 1,350 feet) and modifies the right for Chandler park in the Supplemental Report at 25, line
25 25 and the CFO at approximately p. 6, line 19. The rest of the description is correct.

11. 1945 Consent Decree/TWSA

The Court agrees that the following two conditions should be placed in the Final Decree
and so Orders. The first condition shall also be set forth in Reclamation's CFO.

- The source of water for this water right is the total water supply available, defined
in the 1945 Consent Judgment as "that amount of water available in any year from

1 natural flow of the Yakima River and its tributaries, from storage in the various
2 Government reservoirs on the Yakima watershed and from other sources.”

- 3 • Flood water is subject to availability at the discretion of the Yakima Field Office
4 Manager as established in paragraph 17 of the 1945 Consent Judgment.

5 12. Trustee Language

6 The Court agrees with Ecology, the Yakama Nation and the United States regarding
7 resolution of the “trustee” issue and shall include the following in the CFO for Reclamation:

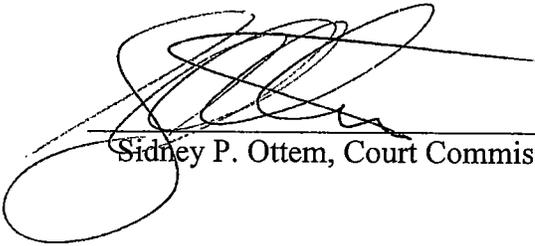
8 With the exception of the United States’ obligation to the Yakama Nation, for those water
9 rights contained in a separate CFO that the United States holds as "trustee" for another
10 party, the United States' role as "trustee" is defined by the terms of its contracts and Acts
11 of Congress. Therefore, the duties of the United States as "trustee" do not impose on it
12 any additional fiduciary duty or obligation other than the obligation to fulfill the contracts
13 which they have drawn and issued pursuant to the Acts of Congress. See Order RE:
14 Warren Act Contract Issues (September 18, 1996).

15 For all other water rights that the United States holds for a third party, the United States
16 holds those water rights on behalf of the party in question.

17 **III. CONCLUSION**

18 This Opinion resolves the objections to the Supplemental Report for the United States,
19 Department of the Interior, Bureau of Reclamation. A signed Conditional Final Order
20 accompanies this decision.

21 Dated this 14th day of February, 2007.

22 
23 _____
24 Sidney P. Ottem, Court Commissioner
25