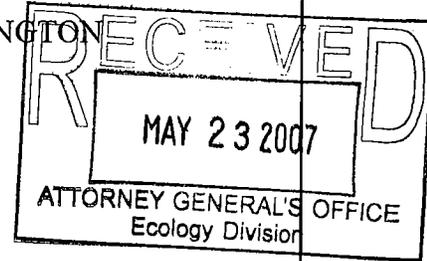


1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF YAKIMA



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

No. 77-2-01484-5

7 STATE OF WASHINGTON,
8 DEPARTMENT OF ECOLOGY,
9 Plaintiff,

) MEMORANDUM OPINION AND ORDER
) RE: OBJECTIONS TO ENTRY OF
) CONDITIONAL FINAL ORDER
) SUBBASIN 25
) (TOPPENISH)

9 vs.

10 JAMES J. ACQUAVELLA, ET AL.,
11 Defendants

12 **I. INTRODUCTION**

13 This Court held a hearing May 10, 2007 to consider objections to the *Memorandum Opinion*
14 *and Order Re: Exceptions to Report of Referee Subbasin 25 dated March 5, 2007* ("Memo. Op.").
15 Objections were timely filed by the Yakama Nation, Colleen Kent (Claim No. 1040) and the
16 Department of Ecology (Ecology). The Sunnyside Division and Mary Shattuck (Claim Number
17 00464) filed a post-hearing response. The Court, being fully advised rules as follows.

17 **II. ANALYSIS**

18 a. *Kent, Harry and Colleen:*

19 The following points, located in T. 11 N., R. 17 E.W.M., shall be added to the right set forth on
20 page 12, beginning at line 15 of the Memo. Op.:

- 21 • S½SE¼ Section 19 (South Fork Medicine Creek)
- 22 • SW¼SW¼ of Section 20 (North Fork Medicine Creek)
- 23 • W½NW¼ Section 29 (North Fork Medicine Creek)
- 24 • E½NE¼ Section 30 (South Fork Medicine Creek)

25 Additionally, a right is confirmed from Latum Creek with a June 9, 1855, priority date for the
diversion of 0.145 cfs, 30.8 acre-feet, from April 1 through October 15, for stock water and flood
irrigation of 5 acres in the S½N½SE¼SW¼, N½S½SE¼SW¼, S½N½SW¼SE¼ and

1 N $\frac{1}{2}$ S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, T. 11 N., R. 16 E.W.M. The point of diversion is in the
2 NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, T. 11 N., R. 16 E.W.M.

3 Ecology's exception to Kent asks that points of diversions from the South Fork of Medicine
4 Creek described on page 12 of the Memo. Op. be modified from the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ and
5 NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19 to "South Fork of Medicine Creek at NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ and the
6 NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19, T. 11 N., R. 17 E.W.M." This is based on Declaration of Michael
7 Thomas filed August 12, 2004. The Kent's agreed. The Court grants the exception and the Memo.
Op. is so modified.

8 b. *Ecology's Exceptions (except Kent)*

9 1. Hull, Terry and Carroll (Court Claim No. 01989)

10 Place of use should be corrected at p. 208, lines 10-11 of Report of Referee to S $\frac{1}{2}$ NE $\frac{1}{4}$,
11 NE $\frac{1}{4}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, T. 11 N., R. 16 E.W.M.

12 2. Shattuck, Mary Louise, Claim No. 0464 (Memo. Op at 12-14)

13 Ecology objects to any award of a water right in Section 35, T. 10 N., R. 19 E.W.M. based on
14 the Carrington Olney Patent in Fee Report. Ecology argues there is no evidence of irrigation of the
15 land in Allotment 201 prior to 1937, as the Report refers to irrigation of other property.
16 Additionally, there is no evidence as to when the property left Yakama Nation member ownership.
Also, the Nation wants the Court to strike language regarding inadvertent use of flood water (see
their exception B).

17 While Ecology is correct, the Court misinterpreted evidence supplied by the Shattucks, the
18 Shattucks have now supplied evidence showing the Section 35 land did not leave Indian ownership
19 until 1938. The Court had previously found the land was irrigated by 1937 based on evidence
20 supplied by the United States' expert, Mr. Ralph Saunders. The Court's award set forth in the
Memorandum Opinion is consistent with *Walton* and will remain unchanged. Ecology's exception
is DENIED. The Court strikes the reference on page 14, line 4 to floodwater.

21 3. Yakama Nation

22 Ecology asks that language in the Report of Referee be modified at page 9 through page 10, line
23 7 from "was acquired from an Indian" to "was acquired from a member of the Yakama Nation" and
24 from "non-Indian purchaser" to "non-member of the Yakama Nation purchaser." The Yakama
25 Nation asks the language be stricken and Ecology stated it would not object to that result. Since the
issue encompassed in Ecology's exception is not implicated, the Court will strike the language.

1
2 4. Mission property

3 Ecology's objections as to the year the Yakama Nation reacquired the property (1987 rather
4 than 2003 – the Court referred to both dates) is granted and the Memo. Op. modified to reflect re-
5 acquisition in 1987. Ecology also asks the Court to establish a test for using the non-availability of
6 water excuse for non-use and provides a citation to the Pollution Control Hearings Board order in
7 the matter of Karl and Carol Ege v. Department of Ecology, PCHB No. 05-033, in support. The
8 Court may be willing to consider that test in future cases for state based rights, but believes doing so
9 now simply confuses the *Walton* nature of the Subbasin 25 rights and the fact such rights are federal
10 in nature. The analysis provided by the Court for this reservation property should not be considered
11 as any precedent to state-based water rights and applicability of RCW 90.14.140(1).

10 5. Administration of Water Rights

11 See Yakama Nation exception E below.

12 c. *Yakama Nation*

13 The Yakama Nation raised numerous exceptions. They are considered below in the same
14 order as the Nation's March 15, 2007 brief, to the extent applicable.

14 *YN Exception A –*

15 (a). The Nation asks that the Memo. Op. at page 6 line 25 through page 7, line 2 be modified to
16 clarify that for the Toppenish-Simcoe Unit, a right held by non-Indian landowners not be confirmed
17 to the United States, Bureau of Indian Affairs as trustee for such entities. The Court agrees and the
18 Memo. Op. is so modified.

19 (b). The Nation also asks the Memo. Op. be clarified to indicate that, in addition to the awards
20 for Sophia Blodgett and Ray Brisbois, the water rights for the other parties and properties listed are
21 also in addition to and exclusive of the rights already awarded in the Nation's CFO. Ecology notes
22 that the right of Stanley and Sharon Johnson, Court Claim 01431, was confirmed as a part of the
23 Yakama Nation's right. Ecology is correct and the Court will Grant the exception of the Nation
24 except for those lands set forth in the Memo. Op. at page 10, line 14 (the NW¼SW¼ lying
25 southeast of Highway 97 within Section 33, T. 10 N., R. 20 E.W.M.) and the Memo. Op. at page 7
is so modified.

(c). The Court GRANTS the Nation's exception and deletes Mr. Curfman from any list of
Toppenish-Simcoe users, as their right to water is from the Wapato-Satus Unit of WIP.

1 *YN Exception B* – See Section above regarding Ecology’s exception to Shattuck award.

2 *YN Exception C* – The Court GRANTS this exception regarding water duty for the Clements
3 property and modifies the Memo. Op. at page 21, lines 13-14 to use 6.0 acre-feet per acre, for a total
4 of 480 acre-feet per year.

5 *YN Exception D* – The Court GRANTS the Nation’s exception regarding point of diversion
6 for the Carroll Lawrence property and modifies the Memo. Op. at page 23, line 5 to be:

7 ...approximately 20 feet west and 20 feet south of the point of intersection of the S½SW¼
8 and the N½SE¼ of Section 23 and 700 feet east and 500 feet south of the northwest corner
9 of the SW¼ of Section 23.

10 *YN Exception E – Administration of Water Rights*

11 Consistent with the Court’s ruling in Subbasin 29, the Court GRANTS the Nation’s
12 exception concerning administration of water rights for areas on the reservation and that “the
13 Bureau of Indian Affairs and/or the Yakama Nation are authorized to regulate water use within the
14 Reservation.” See CFO Re: Subbasin 29 (Mabton-Prosser) dated May 13, 2004. Ecology asks that
15 any state-based rights on the Reservation be regulated pursuant to state law. Initially, the Yakama
16 Nation and United States did not believe there were any state-based rights on the reservation and
17 therefore this was not a justiciable controversy. See May 2, 2007 Yakama Nation Reply Brief at 3-
18 4, 8. However, at the May 10, 2007 hearing, Ecology referred the Court to the right confirmed by
19 the Referee to Michael Carey pursuant to Court Claim No. 01112. See Referee’s Report for
20 Subbasin No. 25 at 41-44. There, the Referee noted that a right had been established for the
21 irrigation of 6 acres with a June 30, 1894 water right. Therefore, this matter must be considered.
22 The Court would note that Ecology does not appear to seek regulatory authority over this right, but
23 rather to have it regulated pursuant to state law.

24 This Court explored the administrative authority issue with some particularity in the
25 Subbasin No. 23 Report dated January 31, 2002 at page 49-50. The Court held that:

 ...state law does not apply to lands that were allotted from the original reserved right and
 have now transferred to non-Indian ownership. Although the factual situation in Anderson
 is more like the Ahtanum scenario, the Court finds the decision in Walton III controlling.
 Most importantly, the water at issue here is part of the Yakama Nation’s reserved waters,
 and therefore governed by federal law. See Walton III at 400. Because the water at issue is
 part of the Yakama Nation’s reserved right, and not “excess water,” to accord the state
 regulatory authority over those rights would threaten the Nation’s right to self-government.

1 In Subbasin No. 25, the issue is different. First, this right does relate to Simcoe Creek, a
2 stream totally within the boundaries of the Yakama Nation's Reservation and only applies to 6 acres
3 out of the hundreds of acres that were confirmed rights from Simcoe Creek. Therefore, it is
4 appropriate that the Yakama Nation maintain regulatory authority over the right consistent with its
5 right to self-government. However, the right was quantified and confirmed on the basis of state law
6 and is therefore a creature of state law. Thus it shall be regulated pursuant to state law by the
7 Yakama Nation for purposes of relinquishment and be exercised in priority. The right cannot be
8 transferred off the reservation without the consent of the Yakama Nation and/or the United States.
9 Ecology's exception is GRANTED to that limited extent. See *Holly v. Totus*, 655 F. Supp. 548
(1983) *aff'd without opinion*, 812 F.2d 714 (9th Cir. 1987); *Colville Confederated Tribes v. Walton*,
752 F.2d 397, 400 (9th Cir., 1985); *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).

10 *YN Exception F* – The Court GRANTS the Nation's exception to include the following point
11 of diversion for the Pheasant Holdings property and modifies the Memo. Op. at page 30
12 accordingly:

13 1320 feet west and 660 feet south of the center of Section 27, T. 10 N., R. 19 E.W.M.

14 d. *Sunnyside Division*

15 The Sunnyside Division supplied a Response dated May 14, 2007 where it expressed
16 concern that any of the Subbasin 25 proceedings relating to administration of water rights not apply
17 to it even though a small portion of Sunnyside Valley Irrigation District resides within the Yakama
18 Reservation boundaries. Specifically, Sunnyside asks the Court to “confirm that its water rights are
19 to be administered similar to other state based water rights” and that the “administration of
20 Sunnyside Division's water rights is with the State of Washington, the Bureau of Reclamation and
21 Sunnyside Valley Irrigation District.” Response at 2, lines 16-18, 27-30.

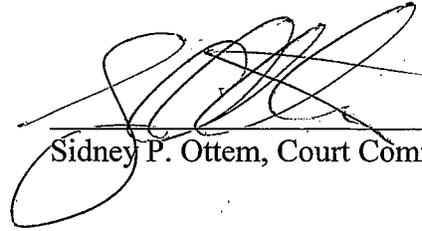
22 The Court would note that this issue, if there is one, was not brought before the Court timely
23 for the Subbasin No. 25 proceedings. Objections to entry of the Conditional Final Order were to be
24 filed by April 16, 2007. This matter was not brought before the Court by that date and for that
25 reason the Court will not consider it. Secondly, it is not clear if this is a Subbasin No. 25 issue. The
Court is unaware of any diversions by Sunnyside Division or its member entities from Toppenish
Creek. Additionally, the Response indicates the land lies west of Mabton – a location that was more
likely the subject of Subbasin No. 29 (Mabton-Prosser). A CFO was entered May 13, 2004 for that
subbasin. Finally, any water right relating to lands within Sunnyside Division were considered and

1 confirmed pursuant to a Conditional Final Order entered August 14, 2003 and were the subject of a
2 stipulation and consent decree between the parties, including the United States and Yakama Nation.
3 This Court will not consider any issues that relate in any fashion to that Conditional Final Order.
4 This administration question, if there is one, might be best considered during the process of
developing the Final Decree.

5 **III. CONCLUSION**

6 The Court ORDERS that the claims addressed in this Opinion are modified to reflect the
7 Court's findings. A Conditional Final Order accompanies this Memorandum Opinion.

8 Dated this 21st day of May, 2007.

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11 _____
12 Sidney P. Ottem, Court Commissioner
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