

UNITED STATES OF AMERICA

Attorney for the United States of America

In Re SRBA

Case No. 39576

STATE OF WASHINGTON

County of Yakima

1. I make this affidavit based upon personal knowledge, and I am competent to testify thereto.

2. I am employed by the United States Department of Interior, Bureau of Reclamation as Water Rights Program and Adjudication Manager in the Upper Columbia Area.

3. I have been employed by the U.S. Department of Interior, Bureau of Reclamation since 1997.

4. I am part of the Reclamation team involved with claims settlement in the Yakima Adjudication, including negotiation of the settlement of non-hydroelectric claims at the Chandler pumping facility.

5. I attest that the following documents are true and correct copies of the actual documents that were filed with the Acquavella Court in the Yakima Adjudication:

- A. *Report of the Court Concerning the Water Rights for the Kennewick Irrigation District, Court Claim No. 629*, dated October 16, 2001 (attached as Exhibit 1).
- B. *Stipulation Re: Kennewick Irrigation District, Claim No. 629*, filed July 12, 2001 (attached as Exhibit 2).
- C. *Stipulation Re: Factual and Legal Basis for Kennewick Irrigation District Settlement, Claim No. 629*, filed July 12, 2001 (attached as Exhibit 3). The United States is not a party to this agreement; the stipulation is attached for the Court's convenience because it was an exhibit to the Report of the Court.
- D. *Conditional Final Order as a Final Judgment Pursuant to CR 54(b) and RAP 2.2(d) and pretrial Order Number 8 as Amended, Kennewick Irrigation District, Court Claim No. 629*, dated October 16, 2001 (attached as Exhibit 4).

6. The Court's Conditional Final Order, identified in sub-paragraph D, proposed to modify the parties' stipulation by placing the United States in the position of a trustee with respect to the Kennewick Irrigation District and its water users.

7. The United States has objected to the Court's use of the term "trust" in

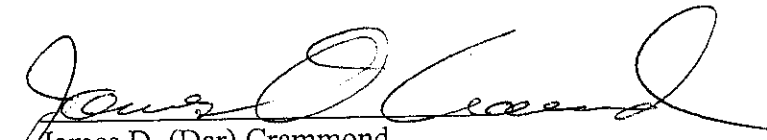
describing the relationship between the Bureau of Reclamation and Yakima Project entities with which Reclamation contracts. Evidence of this objection is presented in the following document:

- A. *United States' Exceptions to Report of the Court Concerning Water Rights for Sunnyside Division, Court Claim No. 1752*, dated March 20, 2002.

Although this document is not a direct response to the Court's Conditional Final Order in Claim No. 629, it was filed in the same court for a related claim and was intended to preserve the United States right of appeal for all claims in the Acquavella Court where the Court uses the term "trustee" in its Final Order.

8. I further attest that there has been no final decree in the Acquavella Court as to Court Claim 629.

DATED this 9th Day of April, 2003.


James D. (Dar) Crammond

SUBSCRIBED AND SWORN to before me this 9th Day of April, 2003.

Notary Public for Washington Carol A. Holcomb
Residing at: Yakima
My Commission Expires: 3/1/04

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 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

9 THE STATE OF WASHINGTON,)
10 DEPARTMENT OF ECOLOGY,)

11 Plaintiff,)

12 v.)

13 JAMES J. ACQUAVELLA, et al.,)

14 Defendants.)
15 _____)

REPORT OF THE COURT
CONCERNING THE WATER
RIGHTS FOR THE
KENNEWICK IRRIGATION
DISTRICT, COURT
CLAIM NO. 629

16 **I. INTRODUCTION**

17 The Kennewick Irrigation District, through Court Claim
18 No. 629, claims a water right from the Yakima River for
19 irrigation and domestic purposes within the boundaries of the
20 district, and hydropower to operate hydraulic pumps. The
21 Court held the pretrial conference on March 31, 1995, and the
22 evidentiary hearing on April 3-7, 1995.

23 **II. NEGOTIATIONS AND SETTLEMENT**

24 Subsequent to the evidentiary hearing, the Kennewick
25 Irrigation District (KID) entered into negotiations to settle
26 its water rights. Brian J. Iller, attorney, represented the
27 defendant KID. Alan M. Reichman, Assistant Attorney General,
28 represented the plaintiff Ecology. Charles Shockey,
attorney, represented the defendant United States. Jeffrey
S. Schuster, attorney, represented the defendant Yakama
Nation. KID, Ecology, the U.S. and the Yakama Nation

1 stipulated to KID's water rights. KID offered the Stipulation
2 (document 15279) and the Factual and Legal Basis for the
3 Settlement (document 15276) to the Court July 12, 2001. All
4 parties to this adjudication were provided an opportunity to
5 comment on or file exceptions to the Stipulation. None were
6 received. On October 11, 2001, the Court held the
7 evidentiary hearing on the Stipulation.

8 **III. CONCLUSION**

9 The Court hereby concurs with the Stipulation as
10 offered. Both the Stipulation and Factual and Legal Basis
11 for the Settlement are incorporated in and attached to this
12 Report. This constitutes final determination of the rights
13 of the Kennewick Irrigation District. The Conditional Final
14 Order for the Kennewick Irrigation District is included
15 herein.

16 DATED this 16th day of October, 2001.

17
18 Walter A. Stauffacher
19 WALTER A. STAUFFACHER, JUDGE

20 ep

21 Attachments
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RECEIVED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

IN THE MATTER OF THE
DETERMINATION OF THE RIGHTS
TO THE USE OF THE SURFACE
WATERS OF THE YAKIMA
DRAINAGE BASIN, IN
ACCORDANCE WITH THE
PROVISIONS OF CHAPTER 90.03
REVISED CODE OF WASHINGTON,

THE STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
Plaintiff,

v.

JAMES J. ACQUAVELLA, et al.,
Defendants.

NO. 77-2-014845

STIPULATION

RE: KENNEWICK IRRIGATION
DISTRICT

CLAIM NO. 629

FILED

JUL 12 2001

KIM M. EATON
YAKIMA COUNTY CLERK

JUL 17 2001

The State of Washington Department of Ecology ("Ecology"), the United States, the Yakama Nation, and the Kennewick Irrigation District, after extensive Court-approved facilitated negotiations and mediation, hereby respectfully submit this stipulation to resolve Claim No. 629. The parties request that the Court include the described water rights in a Conditional Final Order and Final Decree for the U.S./KID as adjudicated water rights.

1. U.S./KID WATER RIGHTS. To be decreed in the name of the United States of America for the use and benefit of the Kennewick Division of the Yakima Project, the Kennewick Irrigation District and their water users entitled to delivery from the Kennewick Division and the Kennewick Irrigation District (collectively referred to herein as "KID") water rights sufficient to permit diversion for beneficial use of:

a. Quantity (Acre-feet)

Total quantity applied to beneficial use is 231,017 acre-feet, more fully described as follows:

i. To divert with an August 6, 1891-priority date up to and including 18,000 acre-feet per annum,

(1) of which from 15,600 up to the full 18,000 acre-feet, measured at the KID Main Canal headworks, may be diverted from the Yakima River at Prosser Dam, and

(2) of which up to 2,400 acre-feet, measured at Wanawish Dam (formerly Horn Rapids Dam), may be diverted from the Yakima River at Wanawish Dam.

ii. To divert with a May 10, 1905 priority date up to and including 213,017 acre-feet per annum, from the Yakima River at Prosser Dam, 84,674 acre-feet to be measured at the KID Main Canal headworks, and 128,343 acre-feet to be calculated from the 2 hydraulic pumps at the Chandler pumping plant.

b. Diversion Rate (Cubic Feet Per Second)

Combined total diversions to KID may not exceed 782 cfs. This is a combination of a maximum of 345 cfs measured at the KID Main Canal headworks, a maximum of 431 cfs calculated from the 2 hydraulic pumps at the Chandler pumping plant and up to an additional 6 cfs diverted at Wanawish Dam. These diversions are more fully described as follows:

i. To divert with an August 6, 1891 priority date up to and including 50 cfs, measured at KID Main Canal headworks and Wanawish Dam, and

ii. To divert with a May 10, 1905 priority date up to and including 732 cfs. This is a combination of a maximum of 301 cfs measured at the KID Main Canal headworks and a maximum of 431 cfs calculated from the 2 hydraulic pumps at the Chandler pumping plant.

c. Purposes of Use

- i. Of the rights in 1.a.i.(1) and 1.a.i.(2), above, up to 18,000 acre-feet for irrigation and other U.S./KID purposes, measured at KID Main Canal headworks and Wanawish Dam.
- ii. Of the right in 1.a.ii., above, up to 84,674 acre-feet for irrigation and other U.S./KID purposes, measured at KID Main Canal headworks.
- iii. Of the right in 1.a.ii. above, up to 128,343 acre-feet to power 2 hydraulic pumps, calculated at the Chandler pumping plant.

d. Priority Date

August 6, 1891, as to 18,000 acre-feet annually, and May 10, 1905, as to the remainder.

e. Points of Diversion

- i. Prosser Dam, 1350 feet west and 350 feet south, more or less, from the northeast corner of Section 2, T. 8 N., R. 24 E.W.M., being within the east $\frac{1}{2}$ of the northeast $\frac{1}{4}$ of the northwest $\frac{1}{4}$ of the northeast $\frac{1}{4}$ and the west $\frac{1}{2}$ of the northwest $\frac{1}{4}$ of the northeast $\frac{1}{4}$ of the northeast $\frac{1}{4}$ of said Section 2.
- ii. Chandler pumping plant, 2450 feet west and 1700 feet south, more or less from the northeast corner of Section 17, being within the west $\frac{1}{2}$ of the

northwest 1/4 of the southwest 1/4 of the northeast 1/4 of Section 17, T. 9 N., R. 26 E.W.M.

iii. KID Main Canal headworks, 200 feet east and 1100 feet north, more or less, from the southwest corner of Section 16, being within the northwest 1/4 of the southwest 1/4 of the southwest 1/4 of Section 16, T. 9 N., R. 26 E.W.M.

iv. Wanawish Dam, 2400 feet east and 3500 feet south, more or less, from the northwest corner of Section 3, being within the southeast 1/4 of the northeast 1/4 of the southwest 1/4 of Section 3, T.10 N., R. 27 E.W.M.

f. Place of Use

i. Chandler pumping plant, 2450 feet west and 1700 feet south, more or less from the northeast corner of Section 17, being within the west 1/2 of the northwest 1/4 of the southwest 1/4 of the northeast 1/4 of Section 17, T. 9 N., R. 26 E.W.M.

ii. 20,201 currently irrigated irrigable acres within the boundaries of Kennewick Irrigation District as designated by authority of the Secretary of the Interior and as described in KID Exhibit Nos. 160 through 160-42.

g. Period of Use

April 1 to October 31.

This Stipulation only addresses and intends to resolve all claims for the water rights in Acquavella by or for the Kennewick Irrigation District and its water users. Water rights of the United States for the Yakima Project, with the exception of the water rights for the Kennewick Irrigation District and its water users, are not finally determined

in this Stipulation.

This Stipulation and any issues contained herein, or in other writings evidencing the agreement of the parties, only applies to the specific water rights at issue here and are not intended to be an admission as to any legal or factual issue nor to waive any argument involving any of the parties or any other entities. In particular, the parties expressly renounce any intention that this Stipulation should serve to preclude the litigation or appeal of any legal issue arising from the application of the September 2, 1999 Report of the Court on Remand Re: Yakima-Tieton Irrigation District, Court Claim No. 1513, or any other decisions or orders of the Acquavella Court. Nothing in this Stipulation shall prejudice or be an admission as to the claims of the United States or Columbia Irrigation District.

2. COVENANT NOT TO SUE

KID and Ecology agree not to appeal, seek to reopen, challenge, nor support any challenge to the Yakama Nation's Conditional Final Order dated September 12, 1996, including issues litigated in the Yakama Nation's Reports of the Court Nos. 25 (Nov. 13, 1995) and 25A (June 21, 1996).

3. REQUEST FOR EXPEDITED KID REPORT

The parties respectfully request that the Court expedite the issuance of a Report of the Court for KID's water rights not inconsistent with the elements outlined in Paragraph 1 of this Stipulation.

4. **WRITTEN AGREEMENT**

In addition to the stipulation by the parties herein, a full written agreement incorporating the terms in Paragraph 1, above, and additional provisions between the parties, has been agreed upon. The Agreement itself is not intended to affect any non-signatory party.

5. **REVOCATION OF STIPULATION**

If for any reason the Court rejects, modifies, amends, or alters this Stipulation or fails to adopt a Report and Conditional Final Order with these terms on the water rights for the U.S./KID, the individual parties retain the right to revoke or rescind this Stipulation, provided that any such revocation or rescission shall not rescind Paragraph 2, above, or affect in any way the validity of the concurrent Agreement. In the event of a revocation or rescission, this Stipulation and any issues contained herein shall not be an admission as to any legal or factual issue nor waive any argument of the parties, and no party shall argue that it constitutes any such admission or waiver.

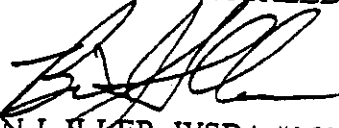
6. **CONCLUSION**

The opinion of the parties is that this Stipulation for the U.S./KID will save the parties and the Court significant time and expenses that would be necessary to litigate the complex issues regarding relinquishment and other related water issues for KID. It also promotes judicial economy and will likely shorten the Acquavella litigation.

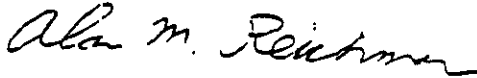
DATED this 12th day of ~~May~~, 2001.

July

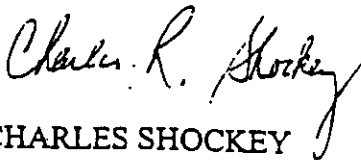
STIPULATED AND AGREED TO:



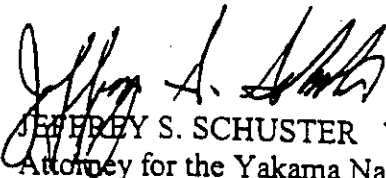
BRIAN J. ILLER, WSBA #16150
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Environmental & Natural Resources Division
Attorney for United States of America



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Attorney for the Yakama Nation

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

IN THE MATTER OF THE
DETERMINATION OF THE RIGHTS
TO THE USE OF THE SURFACE
WATERS OF THE YAKIMA
DRAINAGE BASIN, IN
ACCORDANCE WITH THE
PROVISIONS OF CHAPTER 90.03
REVISED CODE OF WASHINGTON,

THE STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

JAMES J. ACQUAVELLA, et al,

Defendants.

NO. 77-2-01484-5

STIPULATION

RE: FACTUAL AND LEGAL BASIS
FOR KENNEWICK IRRIGATION
DISTRICT SETTLEMENT

CLAIM NO. 629

FILED

JUL 12 2001

KIM M. EATON
YAKIMA COUNTY CLERK

The State of Washington Department of Ecology ("Ecology") and the Kennewick Irrigation District, after extensive Court-approved facilitated negotiations and mediation, hereby respectfully submit this stipulation to inform the Court's resolution of Claim No. 629.

I. FACTUAL AND LEGAL BASIS

For purposes of compromising and settling differences among the parties,¹ the parties agree that the water right elements stipulated to in Paragraph 1 of the concurrently filed Stipulation Re: Kennewick Irrigation District, Claim No. 629 are supported by legally sufficient

¹The "parties" to this Stipulation for Factual and Legal Basis for Kennewick Irrigation District Settlement, Claim No. 629 are Ecology and the Kennewick Irrigation District. While the United States and the Yakama Nation are parties with Ecology and the Kennewick Irrigation District to the concurrently filed Stipulation Re: Kennewick Irrigation District, Claim No. 629, the United States and the Yakima Nation are not parties to this Stipulation.

1 evidence and consistent with the law as presently interpreted by the Court, as follows: (a) use
2 pursuant to the Bureau of Reclamation/KID repayment contracts of 1930 (Exhibit KID 11) and
3 1953 (Exhibit KID 27) as supplemented and amended to date, consistent with RCW 90.40; (b)
4 water right claims filed in this case under RCW 90.14; and (c) a permit to divert and beneficially
5 use 1,600 cfs of water on 51,000 acres (Exhibit KID 19); and (d) diversion records of the U.S.
6 Bureau of Reclamation (Exhibits KID 165 and 166).

8 For purposes of compromising and settling differences among the parties as to the water
9 rights for the U.S./KID, the parties have agreed that in 1990, the U.S./KID beneficially used
10 109,275 acre-feet of water for irrigation and other U.S./KID purposes and an additional
11 136,593.75 acre-feet of water to power hydraulic pumps. The sum of this usage is 245,868.75
12 acre-feet, of which 18,000 acre-feet is recognized to have had an 1891 priority date, and
13 227,868.75 acre-feet is recognized to have had a 1905 priority date.

15 Additionally, again only for purposes of settlement, the parties agree that KID had canal
16 breaks that prevented KID from use of a portion of its full 109,275 contract entitlement in 1981.
17 1982, 1983, 1984, 1985, 1995, 1996, and 1998. See attached declarations of Chuck Garner,
18 manager of KID, and Terry Clark, of KID. Significant disputes still remain among the parties on
19 the relinquishment statute, (RCW 90.14.140-180) and the state application/permit/certificate
20 processes (RCW 90.03.250-340) and their effect on the various parties in this adjudication. In
21 the absence of settlement, such questions (not to mention potential other questions including the
22 over fifty exceptions previously reserved by Major Claimants in Subbasin 5) are difficult, time
23 consuming, and costly to brief, resolve, and appeal. The parties note that RCW 90.14.150 states,
24 "Nothing in this chapter shall be construed to affect any rights or privilege arising from any
25
26

1 permit to withdraw public waters . . ."

2 For purposes of compromising and settling differences as to the water rights of the
3 U.S./KID, the parties agree that the U.S./KID will permanently limit its combined diversions at
4 Prosser Dam as measured at Chandler pumping plant. at the headworks of the KID Main Canal,
5 and at Wanawish Dam to a net total of 231,017 acre-feet. The foregone 14,851.75 acre-feet has a
6 1905 priority date. As a result, the 1905 U.S./KID water right for combined irrigation, pumping
7 and other U.S./KID purposes is 213,017 acre-feet. The 1891 U.S./KID water right for irrigation
8 and other U.S./KID purposes is unchanged at 18,000 acre-feet. This Stipulation only addresses
9 and intends to resolve all claims for the water rights in Acquavella by or for the Kennewick
10 Irrigation District and its water users. Water rights of the United States for the Yakima Project,
11 with the exception of the water rights for the Kennewick Irrigation District and its water users
12 are not finally determined in this Stipulation.
13
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15 This Stipulation and any issues contained herein, or in other writings evidencing the
16 agreement of the parties, only applies to the specific water rights at issue here and are not
17 intended to be an admission as to any legal or factual issue nor to waive any argument involving
18 any of the parties or any other entities. In particular, the parties expressly renounce any intention
19 that this Stipulation should serve to preclude the litigation or appeal of any legal issue arising
20 from the application of the September 2, 1999 Report of the Court on Remand Re: Yakima-
21 Tieton Irrigation District, Court Claim No. 1513, or any other decisions or orders of the
22 Acquavella Court. Nothing in this Stipulation shall prejudice or be an admission as to the claims
23 of the United States or Columbia Irrigation District.
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II. REVOCATION OF STIPULATION

If for any reason the Court rejects, modifies, amends or alters the concurrently filed Stipulation Re: Kennewick Irrigation District, Claim No. 629 or fails to adopt a Report and Conditional Final Order with the terms on the water rights for the U.S./KID specified in Paragraph 1 of the concurrently filed Stipulation Re: Kennewick Irrigation District, Claim No 629, the parties retain the right to revoke or rescind this Stipulation, provided that any such revocation or rescission shall not affect in any way the validity of the concurrent Kennewick Irrigation District Water Right Settlement Agreement. In the event of a revocation or rescission, this Stipulation and any issues contained herein shall not be an admission as to any legal or factual issue nor waive any argument of the parties, and no party shall argue that it constitutes any admission or waiver.

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III. CONCLUSION

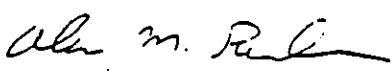
The parties assert that the agreed upon claims of the U.S./KID are supported by the facts, consistent with law, and should be accepted by the Court.

DATED this 7th day of June, 2001.

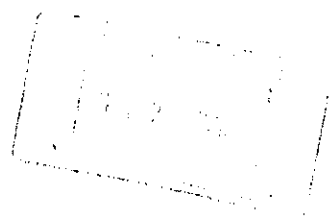
STIPULATED AND AGREED TO:


BRIAN J. ILLER, WSBA #16150
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CHRISTINE O. GREGOIRE
Attorney General


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Assistant Attorney General
Attorneys for Plaintiff
State of Washington Department of Ecology

copy to
UCA-1005



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

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)	NO. 77-2-01484-5
THE PROVISIONS OF CHAPTER 90.03,)	
REVISED CODE OF WASHINGTON,)	CONDITIONAL FINAL
STATE OF WASHINGTON,)	ORDER AS A FINAL
DEPARTMENT OF ECOLOGY,)	JUDGMENT PURSUANT TO
	CR 54(b) AND RAP 2.2(d)
Plaintiff,)	AND PRETRIAL ORDER
	NUMBER 8 AS AMENDED
v.)	
JAMES J. ACQUAVELLA, et al.,)	KENNEWICK IRRIGATION
	DISTRICT, COURT CLAIM
Defendants.)	NO. 629

THIS MATTER has come on regularly before the Court with Kennewick Irrigation District having had its evidentiary hearing on April 3-7, 1995. The following parties stipulated to KID's water rights: KID, represented by attorney Brian J. Iller, Ecology, represented by Alan M. Reichman, Assistant Attorney General, the United States, represented by attorney Charles Shockey, and the Yakama Nation represented by attorney Jeffrey S. Schuster. All parties to this adjudication were provided an opportunity to file exceptions to this stipulation. None were received. An evidentiary hearing on the stipulation was held on October 11, 2001.

CONDITIONAL FINAL ORDER
KENNEWICK IRRIGATION DISTRICT

CC:UCA 1005

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1 This Court filed its Report of the Court Concerning the
2 Water Rights for the Kennewick Irrigation District on
3 October 16, 2001. This Report incorporates the Stipulation
4 of the parties, and the Factual and Legal Basis for
5 Settlement between KID and Ecology. The Kennewick Irrigation
6 District's water rights are set forth in the Stipulation.
7 Thus, the Court considers the Report to be the final
8 resolution of the Kennewick Irrigation District's water
9 right.

10 This Conditional Final Order will ultimately be
11 incorporated into a final decree that determines and
12 integrates all of the rights of the parties in this
13 adjudication, at which time it shall be forwarded to the
14 Director of the Department of Ecology for issuance of
15 Certificates of Adjudicated Water Right.

16 Based on the foregoing, IT IS:

17 ORDERED, ADJUDGED and DECREED that the final decree
18 shall set forth the following in regards to the Kennewick
19 Irrigation District, Court Claim No. 629:

20 1. The water rights for the Kennewick Irrigation
21 District are set forth in the Stipulation (Document 15279).
22 The basis for the Stipulation is found in the Factual and
23 Legal Basis for the Settlement (Document 15276). Both
24 documents are included herein.

25 2. This Conditional Final Order, relating to the
26 confirmation of water rights to the United States, Bureau of
27 Reclamation as trustee for the Kennewick Irrigation District
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CONDITIONAL FINAL ORDER
KENNEWICK IRRIGATION DISTRICT

1 and its water users, constitutes a final order for purposes
2 of appeal [see RAP 2.2(d)], except for purposes of final
3 integration of all confirmed rights as provided in Section
4 XII of Pretrial Order No. 8, procedures for Claim Evaluation,
5 dated March 3, 1989, of this Court.
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7 DATED this 16th day of October, 2001.
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10 Walter A. Stauffacher
WALTER A. STAUFFACHER, JUDGE
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CONDITIONAL FINAL ORDER
KENNEWICK IRRIGATION DISTRICT

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

UNITED STATES' EXCEPTIONS
TO REPORT OF THE COURT
CONCERNING WATER RIGHTS
FOR SUNNYSIDE DIVISION

9 THE STATE OF WASHINGTON,
10 DEPARTMENT OF ECOLOGY,

COURT CLAIM NO. 1752

11 Plaintiff,

JAMES J. ACQUAVELLA, et al.,

Defendants.

12 The United States respectfully submits the following exceptions to the Court's Report for the
13 Sunnyside Division (Sunnyside).

14 **1. The Report erroneously states that the United States will hold water rights as "co-**
15 **trustee" with the Sunnyside Division Board of Control**

16 The Report finds that the "water rights shall issue to the United States, Bureau of
17 Reclamation and the Sunnyside Division Board of Control, as co-trustees for the member entity and
18 its water users, and with a specific place of use." Report at 22:12-15. The Report also states, in the
19 context of describing the 1945 Consent Decree entered in Kittitas Reclamation District v. Sunnyside
20 Valley Irrigation District, Civil No. 21 (E.D.Wash. 1945), that the "U.S. relationship with the
21 Sunnyside Unit/member entities and the water users/ landowners is akin to a trustee relationship.
22 See Memorandum Opinion Re: Threshold Issues, pp. 4-7." Report at 42:5-7.

23 The United States takes exception to this finding and reiterates its continuing objection to
24 the use of the words "trustee" or "co-trustee" to describe the relationship between the United States
25 and the major claimant irrigation districts, including Sunnyside. The term "trustee" implies a
26 technically incorrect legal relationship between the parties. The United States recognizes that the
27 Court has used the term "trustee" repeatedly, but respectfully disagrees with that term and reserves
28

UNITED STATES' EXCEPTIONS TO COURT'S
REPORT FOR SUNNYSIDE DIVISION

1 its legal position, briefly summarized below.^{1/}

2 Imposing the trust concept on the contractual relationship between the United States and
3 Sunnyside must be construed in light of this Court's carefully crafted ruling in Order Re: Warren Act
4 Contract Issues, September 18, 1996. In that Warren Act ruling the Court stated, "the duties of the
5 United States, as 'trustee,' do not impose on it any additional fiduciary duty or obligation other than
6 the obligation to fulfill the contracts which they have drawn and issued pursuant to the Acts of
7 Congress." Id. at 11. The United States maintains that, as the legal duties arise from and are limited
8 to those spelled out in a bargained-for contract, there is no legal basis to superimpose the trust
9 concept or use the term "trustee," which at some future point is likely to tempt one or more non-
10 federal parties to assert rights as a beneficiary of a trust that does not exist in fact and should not be
11 construed or imposed on the United States as a matter of law.^{2/} See, e.g., United States v. Mitchell,
12 445 U.S. 535 (1980); Han v. U.S. Dept. of Justice, 45 F.3d 333, 337 (9th Cir. 1995).

13 While Congress can impose a trust upon the United States, as for example in the Federal
14 Government's dealings with Indian tribes, see United States v. Mitchell, 463 U.S. 206, 225 (1983),
15 the State of Washington and this Court cannot do so. The term "trust" properly applies to the
16 relationship between the United States and the Yakama Nation, but not to the relations between the

17
18 ^{1/} The United States previously set forth in detail its legal position and objection regarding the
19 "trust" concept to describe the Federal Government's legal relationship with the irrigation districts
20 and landowners. See United States' Motion to Amend Conditional Final Orders or Alternatively
21 Motion for Clarification and Objection to Amended Motion by Yakima-Tieton Irrigation District
22 for Changes in Proposed Conditional Final Order; United States Request for Modification of
23 Proposed Conditional Final Order (filed September 8, 1995). Rather than repeat that discussion, the
United States attaches that Motion and the Objection/Request as Exhibit A and incorporates the
discussion of the trustee issue in those documents by reference in the current Exception to the
Sunnyside Report.

24 ^{2/} The United States agrees with the Court that the Bureau of Reclamation operates the Yakima
25 Project "for the benefit of" the irrigation districts, their member entities, and individual landowners
26 who divert water for "beneficial use," as required under both federal and state law. The beneficial
27 use doctrine, however, does not support the creation of a trust, which is a separate and unique legal
28 entity. As this Court noted in the September 18, 1996, Warren Act ruling, the obligations of the
United States are defined exclusively by the duties that arise under the contract. Those duties,
however, do not extend to some vague notion of a transcendent or overarching fiduciary duty.

1 United States and the irrigation districts, their member entities, and landowners within the Yakima
2 Project with respect to the delivery of Project water. As the Court has noted, any duty owed by the
3 United States is defined according to the terms of the governing contracts.

4 The United States respectfully requests that, to avoid future litigation over the trustee-
5 beneficiary relationship, the Court substitute an alternative terminology to describe the ownership
6 of the water rights recognized in the Sunnyside Report, the forthcoming Conditional Final Order,
7 and, ultimately the Court's final decree concluding this adjudication. One appropriate alternative
8 formulation would be "to the United States on behalf [or for the benefit] of the Sunnyside Division
9 for use by its member entities and water users..." rather than "to the United States, Bureau of
10 Reclamation and the Sunnyside Division Board of Control, as co-trustees for the member entity and
11 its water users,...."

12 **2. The Court Should Treat Similarly-Situated Parties in a Fair and Equitable Manner**
13 **When Applying Legal Standards to Adjudicate Water Rights^{3/}**

14 **a. Unequal application of the state forfeiture statute to similarly situated parties**
15 **raises equal protection concerns.**

16 As the Court is aware, the September 1999 Report of the Court on Remand for the Yakima-
17 Tieton Irrigation District (YTID Remand Report) effected a significant change in its approach for
18 decreeing water rights in this adjudication. That approach was carried over and incorporated into
19 subsequent reports, including the Sunnyside Report that is the subject of the current exceptions.
20 Prior to the YTID Remand Report, this Court had conducted a substantial number of hearings, and
21 had issued reports and Conditional Final Orders (CFOs) based on those hearings, under an
22 interpretation of the state relinquishment statute that effectively relieved parties from the possibility
23 of relinquishment during the pendency of this adjudication. As the Court described in its YTID
24 Remand Report, this was based on the Court's belief that common law "intent to abandon" was

25 ^{3/} The United States is not a "person" for purposes of the constitutional due process and equal
26 protection guarantees, but the interest of the United States may enjoy the attributes of sovereign
27 immunity against unwarranted or excessive diminution in this proceeding. With respect to principles
28 of intergovernmental privileges and immunities, the United States' interests are entitled to protection
at least comparable to that accorded private parties.

1 required for statutory forfeiture and that the filing of this adjudication in 1977 tolled the operation
2 of the relinquishment statute. See YTID Remand Report at 24.

3 In the YTID Remand Report, however, the Court changed its interpretation of the
4 relinquishment statute based on its analysis of the more recent Washington State Supreme Court
5 decisions in Dep't of Ecology v. Acquavella, 131 Wn.2d 746, 935 P.2d 595 (1997)(Acquavella III),
6 Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997), and
7 R.D. Merrill Co. v. Pollution Control Hearings Board, 137 Wn.2d 118, 969 P.2d 458 (1999). This
8 Court stated that the "legal proceedings" exemption from relinquishment provided under the Revised
9 Code of Washington (RCW) will not "necessarily protect any other claims in this adjudication that
10 are not already the subject of a Conditional Final Order." YTID Remand Report at 30.

11 The Court's language in the YTID Remand Report implies that this adjudication will
12 establish two classes of state water right claimants: (1) those parties issued a CFO designating their
13 rights prior to the YTID Remand Report; and (2) those parties issued a CFO after the YTID Remand
14 Report. The former would escape the current relinquishment analysis, while the latter would be
15 subjected to a far stricter relinquishment analysis.

16 Fundamental fairness and equal protection concerns arise from enforcing different
17 interpretations of the relinquishment statute to private parties that are similarly situated in all relevant
18 respects *except* for the time at which their report is issued. Such disparate treatment would seem
19 contrary to the fundamental tenet that similarly situated parties should be treated similarly under the
20 law, particularly when those parties are claimants involved in the same legal proceeding. The
21 application of differing law based solely on the relative timing of the interlocutory decisions within
22 this water rights adjudication -- well in advance of a final decree -- raises serious concerns about
23 equal application of laws that the United States believes should be redressed, at a minimum, through
24 uniform principles governing the rights of all private parties.

25 **b. Application of the state forfeiture statute state-based water rights with differing**
26 **periods of use may raise equal protection and fundamental fairness concerns.**

27 Fairness and equal protection are also concerns if rights are quantified based on differing
28 evidentiary burdens. The State of Washington commenced this adjudication in the Superior Court

1 for Yakima County in October, 1977, by filing a Statement of Facts which prayed for a judgment
2 "adjudicating and determining the relative rights to the use of the surface waters of the drainage
3 basin of the Yakima River and its tributaries by diversion or otherwise for beneficial uses and
4 determining the extent and priority of the rights of all persons claiming such right to use."
5 Statement, p. 61, lines 12-16 (emphasis added).

6 Since that time, claimants generally have produced evidence of their beneficial use of water
7 up to the time of their hearing. Due to the lengthy and ongoing nature of these proceedings, a
8 substantial number of years often have intervened between the evidentiary hearings and the
9 production of resultant reports and CFOs for various claimants. As a result, claimants who are
10 similarly situated in all relevant respects nonetheless may be subject to adjudication of rights based
11 not only on different law, but also on different periods of exposure to the State's relinquishment
12 statute. Burdens placed on claimants could substantially, as the underlying evidence would vary,
13 both as to the proof required to rebut the application of relinquishment and to the proof of continuing
14 beneficial use of water rights.

15 The United States submits that, in order to establish "relative" water rights among the parties
16 to the adjudication, a necessary prerequisite is to establish a common period of relevant diversion
17 records against which to evaluate and confirm water rights and a common "closing" date for the
18 inquiry. As the Washington Supreme Court stated in Dep't of Ecology v. Acquavella, 100 Wash.2d
19 651, 652 (1983)(Acquavella I), an adjudication "is a process whereby all those claiming the right
20 to use waters of a river or stream are joined in a single action to determine water rights and priorities
21 between claimants." In a general stream adjudication fundamentally concerned with the rights
22 between and among adversarial claimants, the evaluation process must share an underlying time
23 frame upon which the claims are judged, in order to ensure fair, equal, and direct comparison of the
24 use among claimants.

25 The availability and concomitant use of water in the Yakima basin is highly variable, not
26 only annually but within irrigation seasons. Non-use by a claimant of water during any particular
27 period may be attributable to factors specific to the claimant, to system-wide operations, or even to
28

1 the actions of another claimant. Unless the same period of use is applied to determine the rights of
2 all claimants, the Court cannot appropriately account for the relative effects of each claimant's use
3 on other claimants. This risks the development of disjointed reports of rights that are disassociated
4 from the actual interrelated use of Yakima basin resources at any time.

5 The Acquavella III decision does not preclude the use of a common date for relinquishment
6 analysis by this Court. The Washington State Supreme Court simply said that this Court should
7 "examine DOE's claim that YTID has forfeited a portion of its right through abandonment or
8 voluntary nonuse." Acquavella III at 759. This examination certainly allows this Court to reconcile
9 the analysis of forfeiture claims in a general stream water rights adjudication to achieve its
10 fundamental purpose -- establishing relative rights among parties and insuring equitable treatment
11 in determining those rights. The Supreme Court could have expanded upon its analysis to mandate
12 a particular type of application, but declined to do so, preferring instead to maintain this Court's
13 broad discretion to formulate a procedure to reconcile the obligations of this adjudication and the
14 goal of the Washington State Legislature.^{4/}

15 In sum, the United States believes that the current course of applying different relinquishment
16 standards to claimants presents serious problems of unequal treatment and threatens to undermine
17 the fundamental purpose of this adjudication to establish relative rights among all private beneficial
18 users. These problems can be avoided through the consistent application of a common end date
19 against which all claims would be adjudged. The United States submits that, among the options
20 available, the year 1982 provides an appropriate date, as claims were filed at that time.

21
22
23 ^{4/} Future enforcement action taken by the State, either administratively or judicially, necessarily
24 will focus on the individual conduct and future rights of claimants in this adjudication. By its nature,
25 an enforcement action only allows for assessment of individual conduct without the opportunity to
26 address differing application to others similarly situated. If the State were to apply the
27 relinquishment statute to a party in a way that were inconsistent with the application in this
28 proceeding, the State could not remedy the resulting unfairness. Unless the Court establishes a
uniform baseline to determine the relative rights in this proceeding, the State cannot apply the law
equally to all parties in any future enforcement matter.

1 c. **If relinquishment is applied against some claimed diversion rights, the United**
2 **States supports the Court's findings and conclusions that the United States**
3 **would retain the storage, operational, and proprietary rights it currently holds**
 and has historically exercised for "One Bucket" management of the basin's
 "Total Water Supply Available."

4 The United States understands the Court's Report for Sunnyside to prescribe that any
5 relinquished water by Sunnyside would remain with or revert to the United States for use in fulfilling
6 Yakima Project purposes, including, but not limited to, the United States' many contractual and
7 Treaty obligations within the basin, plus its commitments to fish, wildlife, and recreation. To ensure
8 a complete record as part of the Sunnyside Report, the United States submits the attached Affidavit
9 of Loren G. Kjeldgaard in Support of the United States Exceptions to the Report of the Court for the
10 Sunnyside Division, which summarizes the United States's position regarding the importance of
11 managing the Yakima Project through the "one-bucket" approach in place since the 1945 Consent
12 Decree and emphasizing the importance to the entire Basin of maintaining the integrity of the "total
13 water supply available" (TWSA) concept.^{5/} The United States opposes, and reserves the right to
14 contest, any ruling by this Court that undermines TWSA and the one-bucket system of managing
15 the Project.^{6/}

16
17 ^{5/} With the understanding that the Court continues to regard the concept of TWSA and the one-
18 bucket approach discussed in this section, the United States does not take exception to the Court's
19 analysis of the 1890 appropriation (Report at 25-51), although the United States does urge the Court
20 to consider carefully all exceptions filed relating to the unitary nature of water appropriated for the
21 Sunnyside Division as a whole. Provided that the United States can continue to operate the Yakima
22 Project under the one-bucket approach established under the 1945 Consent and recognized by this
23 Court, then any relinquished water would revert to TWSA. If, however, the Court were to grant
24 exceptions filed by other parties in a manner that would undermine the viability of the 1945 Consent
25 Decree and the Bureau of Reclamation's management of the TWSA one-bucket approach, then the
26 United States reserves the right to contest any such ruling.

27 ^{6/} Most major claimant evidentiary proceedings were completed by 1995. If the Washington
28 Department of Ecology were to assert relinquishment under the state statute with respect to water
rights held in the name of the United States, the United States would reserve the right to contest any
such application of state law. As such reserved rights are not implicated here, that concern of the
United States need not be addressed in the absence of a real cases or controversy involving the
federal interests.

1
2
3 **Summary and Request for Relief**

4 For the reasons set forth in these Exceptions, the attached exhibit, and the accompanying
5 affidavit, and for such further reasons as may be submitted in the response and reply briefs and at
6 the hearing in this matter, the United States requests that the Court grant the United States'
7 Exceptions and rule on the exceptions filed by the other parties in accordance with the United States'
8 position.

9 Respectfully submitted this 20th day of March, 2002.

10 THOMAS L. SANSONETTI
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12 
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28

Certificate of Service

I certify that on this 14th day of April 2003, I caused to be served true and correct copies of the listed documents to the parties identified below.

1. **UNITED STATES' REPLY TO EMMETT IRRIGATION DISTRICT'S
RESPONSE TO UNITED STATES' MOTION FOR SUMMARY JUDGMENT**
2. **AFFIDAVIT OF JAMES D. (DAR) CRAMMOND**

via hand delivery:

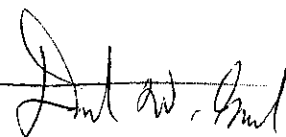
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United States' Reply to Emmett Irrigation District's Response to United States' Motion for Summary Judgment