



## Kittitas Reclamation District

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(Via Email: [hsim461@ecy.wa.gov](mailto:hsim461@ecy.wa.gov) and First-Class Mail)

Heather Simmons  
Central Regional Office  
Washington State Department of Ecology  
1250 West Alder Street  
Union Gap, WA 98903

Re: Dual Source Water Rights

Dear Heather:

This letter follows up a September 19, 2023, Teams meeting that representatives of the Kittitas Reclamation District (KRD), Roza Irrigation District (Roza) and the Yakama Nation had with Ecology staff regarding dual source water rights.<sup>1</sup>

Dual source water rights arise when an authorized place of use has two sources of water from which to raise one crop. Dual source water rights are prevalent in the Upper Yakima Basin, as there are many creeks which flow through the valley across the KRD and other irrigation purveyors' places of use. Specific to the Kittitas Reclamation District (KRD), dual source water rights arise when a landowner has land within the KRD which the KRD is obligated to deliver irrigation water to because those acres are designated as irrigable and are allotted water, and, the owner of the place of use also has a state-based water right to a creek or tributary of the Yakima River. Often times, a particular landowner may desire to sell their creek water rights and continue irrigating the authorized place of use with their KRD water.

It is KRD and Roza's position that such water transfers involving dual source water rights have a significant likelihood of negatively impacting the Total Water Supply Available (TWSA) and thus harming KRD and Roza's proratable 1905 water right. We write this

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<sup>1</sup> Dual source water rights have sometimes been referred to in the Yakima Basin as "stacked" water rights.

letter to make it clear to Ecology and to others who may review this letter that KRD and Roza will regularly and routinely object to transfers involving dual source water rights that have a negative impact on TWSA.

Historically, KRD and Roza believed that stakeholders in the basin, including Ecology, United States Bureau of Reclamation (USBR) and other irrigation purveyors recognized that transfers involving dual source water rights had an inherent risk of negatively impacting TWSA. This understanding is one of the reasons that the Water Transfer Working Group, when it developed its “box” criteria for evaluating water right transfers, included no negative impact on TWSA as a criterion.

To begin the discussion of the potential impairment created by the transfers of dual source water rights, it is appropriate to review the history of water use within the Yakima River Basin. Between 1905 and the present, there have been many events that have shaped the Yakima River system and water rights to the Yakima River and its tributaries. These events include the following:

- May 10, 1905, Federal reservation of all unappropriated waters in the basin.
- Consent Decree (Decree) (1945) – A stipulated settlement pertaining to water distribution in the basin. The Decree defined quantities of water on the main stem of the Yakima River and divided the users into proratable and non-proratable classes. The consent decree created the concept of Total Water Supply Available (TWSA).<sup>2</sup>
- Acquavella Adjudication (1977-2021) – General Adjudication proceeding filed, limited to surface water, identifying and quantifying the water rights in the Yakima Basin. A Final Decree was entered on May 9, 2019. The adjudication confirmed the 1945 Consent Decree and the concept of TWSA. The result of the rulings in Acquavella is that the Yakima River and its tributaries are fully appropriated and there is no water available for new consumptive uses.
- Yakima River Basin Water Enhancement Project (YRBWEP) (1979-present) – Feasibility level study authorized by Congress to focus on the need to assure adequate water supplies in the Yakima Basin. The implementation of conservation measures proposed by the YRBWEP reduced out-of-stream irrigation diversions. The savings resulted in more water remaining in the stream and storage.

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<sup>2</sup> The definition of TWSA from the consent decree is “that amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various Government reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States.”



- Quackenbush Decision (1980) – Required USBR to work on a means to meet the project needs through more efficient or modified means having less of an impact on the fisheries resource. This resulted in the operational procedure known as the “flip-flop”, whereby late season water is released to meet operational needs below the confluence of the Yakima River with the Naches River with water stored in the Naches River system. This results in less water when fish spawn, forcing them to build redds lower in the system or in the middle of the channel, requiring less water to maintain during the winter and increasing fish egg survival.
- Order and Determination Granting Application (1981) – An order initiated by the United States Secretary of Interior on February 17, 1981, for the diversion of surface waters in the Yakima Basin to support YRBWEP. That order has subsequently been extended.
- Development of the System Operations Advisory Committee (SOAC) (1981) – An advisory board to USBR consisting of fishery biologists representing the U.S. Fish and Wildlife Service, the Yakama Nation, the Washington Department of Fish and Wildlife, and irrigation entities represented by the Yakima Basin Joint Board.
- Acquavella Superior Court Order regarding the rights of the Yakama Nation (1990) – the treaty rights of the Yakama Nation were declared as follows:
  - The Yakama Nation has an unquantified non-proratable right with an 1855 priority date and proratable irrigation rights with a 1905 priority date.
  - The Yakama Nation has a right to the minimum flows necessary to maintain anadromous fish life in the river with a “time immemorial” priority date.
- 1994 Ecology Yakama Nation groundwater appeal settlement and its effects on diverters of ground and surface water in drought years
- Yakima Basin Groundwater Study (2011) – The United States Geological Survey (USGS) released the final report confirming that groundwater and surface water are directly connected in the Yakima Basin.

As water managers and stakeholders, we are all aware that the United States Bureau of Reclamation (Reclamation) manages the fully appropriated surface water supply in the Yakima Basin by calculating the TWSA available. Surface water supply is then matched with all the known demands, and if adequate supplies are not available, the United States Bureau of Reclamation begins to ration proratable water users in the Basin, including KRD, Roza, and the Wapato Irrigation Project, all of which hold 1905 priority dates.

As a result of these events, surface water right holders in the Yakima Basin now fall into one of three categories:

1. Senior pre-Yakima Project water users; with a priority date prior to May 10, 1905; or
2. Proratable Yakima Project water users with a May 10, 1905 priority date. Proratable water users, like KRD and Roza, are water users who agreed to participate in the federal government's Yakima Reclamation Project on May 10, 1905. During water short years, the water supplies of the proratable water users can be rationed (or "pro-rationed") based upon Reclamation's estimate of the total available in the Yakima Basin; or
3. Junior water users with post May 10, 1905 priority dates.

Ecology, in any change or transfer decision<sup>3</sup> under RCW 90.03.380 must decide whether other water right holders, both junior and senior, will be impaired by the proposed change or transfer. Impairment is an adverse impact on the physical availability of water for a beneficial use that is entitled to protection. In Washington, water is subject to the "prior appropriation" and "first in time, first in right" doctrines of water law, which do not permit any impairment, even a *de minimis* impairment, of a senior or junior water right. *Foster v. Dep't of Ecology*, 184 Wn.2d 465, 471, 362 P.3d 959, 961 (2015).

KRD and Roza have spent years and tens of millions of dollars creating efficiencies in their irrigation delivery systems so that they can extend their irrigation season in the years when they are prorated. KRD and Roza intend to continue to spend tens of millions of dollars in the coming years creating additional efficiencies in their irrigation systems so that they can deliver irrigation water later in years when there is prorationing and to address the impacts to the KRD and Roza systems as a result of climate change. Based upon this financial outlay and the harm that KRD and Roza water users suffer and incur when there is prorationing, KRD and Roza intend to closely monitor each change and transfer decision that involves a dual source water right and where necessary challenge those transfers in order to protect every ounce of TWSA. Litigation can be avoided if Ecology and owners of dual source water rights understand the following principals that KRD and Roza will use to make decisions on dual source water rights:

1. All crops (including pasture and turf) have an established consumptive use (CU) which means – regardless of how much water you apply to the crop – the crop only consumes a finite amount of water. The rest of the water applied eventually returns to the system. If an irrigator has two sources of water and they remove one source, the CU for the crop doesn't change.
2. If the removed water source is not consumed again there is no impact to TWSA because there is no increase in consumptive use.

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<sup>3</sup> The same issue applies in the issuance of a new water right whether it be surface water right or a ground water right.



3. If, however, the removed water source is put to a new consumptive use (irrigation of additional lands, expansion of the season of use, new domestic uses, etc.) then there is increased CU and if the removed source has a priority date before 1905 then there is an increase in the non pro-ratable use of water which results in a decrease in the TWSA available to satisfy pro-ratable users like the KRD and Roza. This results in impairment of all pro-ratable users' water rights, including the KRD and Roza.
4. There are two primary ways to avoid impairment. One, do not consume the removed water source; or two, structure the transfer so there is no net increase in CU. This can be accomplished through fallowing of the place of use.
5. Land classified as irrigable by the USBR cannot be permanently fallowed.<sup>4</sup> With land classified as irrigable, the only way to separate the two sources is to not use the removed water for consumptive purposes or to fallow<sup>5</sup> the acreage that is classified as non-irrigable.

KRD delivers this letter to you as notice to Ecology, Reclamation and Basin water users so that individuals know in advance of a proposed change or transfer involving dual source water rights what KRD and Roza's position will be.

If you have any questions or concerns with regard to what we have said in this letter, please contact us so that we may discuss them in greater detail.

Sincerely,

  
Urban B. Eberhart  
Secretary/Manager  
Kittitas Reclamation District

Sincerely,  
  
Scott Revell  
Secretary/Manager  
Roza Irrigation District

cc: Chris Kossik, Ecology  
Danielle Squeochs, Yakama Nation  
Chad Stuart, USBR  
Tom Tebb, Ecology

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<sup>4</sup> KRD and Roza have contractual obligation to deliver water to any land classified as irrigable that is in their respective service areas. This contractual obligation dates to the late 1940's. KRD and Roza will deliver water to the irrigable land when requested to do so.

<sup>5</sup> Fallow means to apply no irrigation water to the place of use and to take steps to ensure no vegetation with a consumptive use, as defined in the Washington Irrigation Guide (WIG), grows in the fallowed place of use.