

# Water Review

*A Perspective on Western Water Issues Prepared by the Family Farm Alliance and Its Members*

## WASHINGTON

# Irrigators Seek Supreme Court Review In Reclamation Contract Law Case

## OVERVIEW

Federal reclamation law governs the rights and responsibilities of landowners receiving water for irrigation from federal reclamation projects under contracts with the Bureau of Reclamation (Reclamation). Once landowners fulfill their contractual obligation to repay the cost of constructing the project works, they obtain a permanent water right and other important entitlements under reclamation law. The Grant County Black Sands Irrigation District (WASHINGTON) has petitioned the United States Supreme Court in appeal of a recent Federal Circuit Court's decision, *Grant County Black Sands Irrigation District v. United States*. The main question to be heard on appeal will be whether Reclamation can indefinitely maintain water rental agreements that do not convey the right to the use of water from a project to the landowner water user. The answer to that question has tremendous importance to farmers receiving Reclamation project water in many parts of the West.

## PARTIES TO THE PROCEEDINGS

The plaintiffs in *Grant County Black Sands Irrigation District v. United States* are the Grant County Black Sands Irrigation District and the Wil-

liamson Land Co. Petitioners represent 85 farmers within the Columbia Basin Project in central Washington State. The defendants in this case are the United States Bureau of Reclamation; the U.S. Secretary of the Interior; and key officials within Reclamation.

## SUMMARY OF THE CASE

This case involves the rights of farmers receiving water for irrigation from federal reclamation projects. Petitioners represent landowners with so-called "Section 9(e)" contracts with Reclamation to receive water from the Columbia Basin Project. They filed suit challenging Reclamation's refusal to permit them to obtain permanent water rights and other benefits under federal reclamation law.

## SUMMARY OF RECLAMATION SECTION 9(d) AND 9(e) CONTRACT LAW

In 1939, Congress amended the federal Reclamation Act by establishing two new forms of contracts that have become known as "Section 9(d)" and "Section 9(e)" contracts:

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## JUDICIAL HISTORY

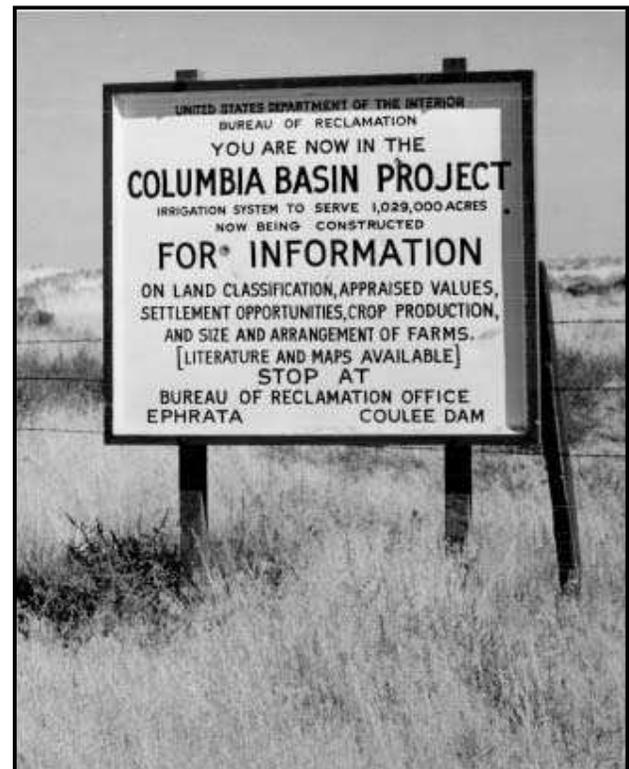
- Under Section 9(d), the Government was empowered to contract with an irrigation district to repay construction costs over a period of up to forty years (along with annual operation and maintenance costs).
- Under Section 9(e), the Government was permitted to enter into “either short- or long-term contracts to furnish water for irrigation purposes.” The amendment provided that a Section 9(e) contract (not to exceed forty years) could be developed at a rate that could produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and fixed charges.

The Bureau of Reclamation interpreted Section 9 (e) to permit a fundamental revision of the purposes of federal reclamation. This view casts Reclamation as a public utility that retained rights to the water it reclaimed, while giving temporary use of the water to farmers who could never thereafter payoff the construction costs and obtain a permanent right to the water as their own.

Congress responded to the potential abuse of Section 9(e) contracts in 1956. The amendment required that in “any long-term contract hereafter entered into under” Section 9(e), the Government must offer farmers a series of rights, including the right to renew the contract upon its expiration, the right to convert the contract to a Section 9(d) contract, the right to have payments made in excess of operation and maintenance costs credited toward repayment of the construction costs, and the right to obtain a permanent water right once those construction costs have been repaid. The amendment defined a “long-term contract” as “any contract the term of which is more than ten years.”

At the time the Columbia Basin Project was constructed, though petitioner in the current lawsuit owned project lands, it was believed too expensive to extend the planned facilities to irrigate their land. Thus, Reclamation did not extend irrigation canals or other distribution systems to those properties.

However, water from other Project facilities and lands seeped into the soil and migrated toward petitioners’ land underground. The introduction of the pivot sprinkler in the 1960s, together with the raised water table resulting from project seepage, eventually made irrigation of petitioners’ land possible.



Source: Rufus Woods Collection, University Archives, Central Washington University.

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At their own expense, petitioners sunk wells to capture the seepage for irrigation. When the State of Washington recognized the United States' claim to the seepage waters in 1973, it required petitioners to obtain both a state permit and a contract with the Bureau of Reclamation to use the water. Starting in 1975, the Government offered petitioners Section 9(e) contracts with an initial term of 10 years, subject to automatic extension without notice provided that the state permit has been extended for a similar period. The State of Washington did, in fact, extend petitioners' permits and in 1983 made the permits permanent.

These water users have now been operating under perpetually extending Section 9(e) contracts for approximately 35 years. The contracts require them to pay essentially the same rates as would be charged under a Section 9(d) contract. They are charged a variable annual fee for operation and maintenance equal to 75% of the fee charged to farmers elsewhere in the Project who obtain water through irrigation canals and other works operated by Reclamation. Reclamation also applies to them a fixed charge of \$1.70 per acre "for participation in Project construction repayment." Reclamation arrived at that figure through the same amortization method it uses to calculate construction repayment costs for 9(d) contracts elsewhere in the Project.

Although petitioners for more than 25 years have been paying charges comparable to those paid by

other farmers in the project with Section 9(d) contracts, Reclamation has recently taken the position that petitioners' contracts are simply short-term water rental contracts, not eligible for any of the ordinary benefits of reclamation law. These benefits include the opportunity to obtain a permanent water right or any of the entitlements specifically provided for long-term Section 9

(e) contracts in the 1956 amendment to Reclamation law.

In 2006, petitioners brought this action seeking injunctive and monetary relief against Reclamation and its officials in

the Eastern District of Washington. The district court dismissed the complaint, accepting the U.S. position that petitioners held only "short-term water service contracts" and therefore are not entitled to any of the benefits of long-term Section 9 (e) or other repayment contracts under the Act.

The appeal fell within the jurisdiction of the Federal Circuit. That court affirmed with the district court's decision. The court first held that petitioners' contracts did not fall within the scope of the 1956 amendment's protection for "long-term" Section 9(e) contracts. The court of appeals next rejected petitioners' argument that even setting aside the 1956 amendment, they are entitled to repayment rights because their Section 9(e) contracts – as a matter of statutory obligation and Government practice – impose a charge to recover construction costs of the project. It held that petitioners' Section 9(e) contracts provided none of



*Early farming operations in Eastern Washington often ended in failure due to lack of rainfall.* Source: Rufus Woods Collection University Archives, Central Washington University.

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the basic repayment benefits afforded other farmers paying nearly the same charges under Section 9(d) contracts. The court of appeals subsequently denied petitioners' petition for rehearing.

### REACTION OF WATER USERS

Counsel for the water users believe the appeals court decision sanctions the Government's ability to prevent farmers who appropriate and put project water to beneficial use from ever acquiring a permanent right to that water. In *Grant County Black Sands Irrigation District v. United States*, the Federal Circuit Court of Appeals decided that "section 9(e) codified the Bureau of Reclamation's pre-existing practice of taking a 'water rental' approach" with section 9(e) water service contracts," meaning that 9(e) water service contracts are "'utility type' contracts distinct from 9(d) contracts and the repayment-type contracts envisioned by the 1902 Act."

That decision cannot be squared with the statute and the decisions of other courts, says Ron Ady, part of the legal team for the irrigators.

"*Grant County* says water service contracts do not repay", adds Ron Christensen, counsel for the Grant County Black Sands Irrigation District. "The U.S. is using short-term 'water utility contracts' which impose the costs of ordinary repayment contracts but provide few of the benefits".

It has been a fundamental principle of reclamation law from the beginning that the United States does not own the water it collects, but rather the water becomes the property of the landowners who appropriate it and put it to beneficial use in irrigation.

"The U.S. has resisted this principle, attempting to arrogate to itself the power to decide who should receive project water, how much, and for how

long," said Ron Christensen, counsel for the Grant County Black Sands Irrigation District. "The Supreme Court has repeatedly been required to intervene to restore the statutory order Congress intended, and should do so again here."

"Moreover, the decision will have broad implications for water users throughout the West," said Ady.

### WEST-WIDE IMPLICATIONS FOR RECLAMATION WATER USERS

The United States has made extensive use of Section 9(e) contracts in places like California's Central Valley, which govern water distribution to millions of acres of reclamation project land.

"Our water users and other landowners like them have invested substantially in farms that are viable only if provided with adequate water from the Project," said Ady. "Diminishment of their entitlement, even for a single year, can have catastrophic consequences."

For example, some landowners irrigating under Section 9(e) contracts draw water to irrigate orchards that have taken years of tending without producing any revenue before reaching a productive age. A single year of inadequate irrigation can destroy an orchard, and with it, a family's business and lifetime savings.

Christensen and Ady fear that, unless the Supreme Court intervenes, farmers irrigating under perpetually extending Section 9(e) contracts will never be able to repay their share of construction costs and become free of construction indebtedness.

Whether title to water is held by the Government or by farmers can have other consequences as well. For example, who owns project water rights could affect whether (or how) the Endan-

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gered Species Act and the National Environmental Policy Act apply to the administration of reclamation projects.

“There is no reasonable prospect that the Government will alter course without the Supreme Court’s intervention,” said Christensen. “The Court should, as it has often done in the past, grant certiorari to remind the Government of its limited authority under reclamation law and restore to western farmers the important rights Congress intended to provide them.”

### NEXT STEPS

Grant County Black Sands Irrigation District is requesting support of the District's Petition for Certiorari just submitted to the United States Supreme Court in appeal of the Federal Circuit Court's decision, *Grant County Black Sands Irrigation District v. United States*, 579 F.3d 1345 (2009).

“Specifically, we need to find those who would give permission to have their names included on an amicus curiae brief, or friend of the court brief prepared for them in support of the District's petition to the United States Supreme Court,” said Christensen. “We would also welcome anyone who would like to file their own amicus curiae brief or who would be willing to help write one and would be glad to coordinate with them.”

The major benefit of this effort is having the amicus brief filed, which draws attention to the petition and substantially increases its chances of being granted.

Counsel for GCBSID filed the petition for certiorari with the United States Supreme Court on July 16, 2010 and all amicus briefs are due no later than **August 23, 2010**, but the Court requires notification of the amicus brief be filed no later than **August 13, 2010**.

“So, time is short and we need whatever immediate help you can give,” said Christensen.

### IMPORTANT LINKS

The deadline for submitting Amicus Briefs to the United States Supreme Court is **August 23, 2010**, while the notification deadline is **August 13, 2010**. The Supreme Court docket no. is 10-116.

The Federal Circuit’s *Grant County* decision can be downloaded at: <http://www.ca9c.uscourts.gov/images/stories/opinions-orders/08-1354.pdf>.

The GCBSID petition to the Supreme Court can be downloaded at:

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