

No. 36414-0

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SOVRAN, LLC, a Washington limited liability company,

Appellant,

v.

MICKELSEN DAIRY, INC., a Washington corporation; MICKELSEN PROPERTIES, a Washington general partnership, and its general partners, CLINTON P. MICKELSEN, DENNIS H. MICKELSEN, WILLIAM W. LINDEMAN and SUSAN J. LINDEMAN and their respective marital communities; MICKELSEN LAND & TIMBER, a Washington general partnership, and its general partners, CLINTON P. MICKELSEN, DENNIS H. MICKELSEN and SUSAN J. LINDEMAN and their respective marital communities,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

In 2002, Sovran, LLC (“Sovran”) and the Mickelsen defendants entered into three purchase and sale agreements for the sale of real property. The agreements contained several strict conditions which Sovran had to satisfy before the proposed sales could close. Sovran did not satisfy any of the conditions and, as a result, the agreements terminated.

Sovran sued for specific performance. The trial court ruled on summary judgment that Sovran had not satisfied the conditions and that the agreements therefore terminated.

The trial court was correct. Sovran did not satisfy the conditions precedent, was not entitled to waive them and there are no genuine issues of material fact. This Court should affirm the trial court’s decision.

II. STATEMENT OF THE CASE

The Mickelsens.

The Mickelsen family has owned and farmed a large parcel of property in Winlock, Washington since the 1930s. CP 215. Early on, the patriarch of the family foresaw the future value of water rights and, in 1951, took the unique (at that time) step of registering his water rights with the state. CP 215, 223-29. His vision was accurate and by the turn of the century, water had become a valuable commodity in western

Washington such that many people, including the Mickelsens, believed their water rights were more valuable than the agricultural land to which they were attached. CP 215.

The value of the Mickelsens' water rights is at the heart of this case. The Mickelsens' desire to realize the value of their water rights drove the negotiations between the parties and dictated the terms contained in the Purchase and Sale Agreements. *Infra* at 3-5.

The Mickelsens' property.

The property involved in this case is three contiguous parcels totaling 200 acres west and north of exit 63 off Interstate 5. Three Mickelsen entities – Mickelsen Dairy, Inc., Mickelsen Properties and Mickelsen Land & Timber – own the property. CP 214-15.

In 2000, a developer approached the Mickelsens about purchasing their property. *Id.* The parties negotiated a sale price of \$20,000 per acre but the proposed sale never closed. *Id.*

The Purchase and Sale Agreements.

Sovran is a development company with a history of sweeping into rural communities with grand development ideas. CP 330-31. In 2002, Sovran targeted Winlock, Napavine and Morton in Lewis County. CP 215. The Mickelsens were among a number of property owners whom Sovran approached about acquiring their land. CP 215, 331.

Sovran proposed to purchase the Mickelsens' property at the same price the prior developer had offered. CP 215-16. The Mickelsens were willing to sell their property at that price but only under certain conditions. *Id.* The deal they struck was the functional equivalent of an option: Sovran was given the right to purchase the Mickelsens' property if and only if they could fulfill certain conditions by a certain date. The parties' agreement was reflected in three Purchase and Sale Agreements (hereinafter, the "PSAs") with identical terms but for the selling entity, the number of acres being sold and the purchase price. CP 337-73.

The Importance of Water.

When the Mickelsens entered into negotiations with Sovran, they obviously wanted to get full value for their land. CP 215. But the Mickelsens also wanted to get full value for their water rights. *Id.* The Mickelsens own more than 270 acre feet of water and believed the full value of their water rights could be realized *only* if two things occurred: (1) their water rights were transferred to domestic use (they are currently designated for agricultural use only) and (2) their property was developed such that it would generate significant demand for domestic water. CP 215-16. The demand for domestic water would, in turn, generate user fees from which the Mickelsens could receive compensation for their water rights. *Id.*

These two goals could be accomplished only if the land and water were dealt with together. CP 216. Consequently, the Mickelsens refused to sell their land unless their water rights were going to be used in a way which would generate funds. *Id.* The Mickelsens believed that selling their land separate from their water rights would jeopardize the value of the water rights because of the state's five-year "use it or lose it" rule: if water rights are not used for a period of five years, they are relinquished to the state pursuant to RCW 90.14.160. CP 216. Thus, if the Mickelsens sold their land without the water, they would be unable to continue using their water, their water rights would revert to the state in five years and the Mickelsens would receive no value for them. *Id.*

The Mickelsens stressed these concerns to Sovran. CP 216. Sovran recognized the concerns and acknowledged the importance of tying the water rights to the land:

Sovran Development Group recognizes the importance of adequate water supply, as evidenced by secure water rights. Today's regulatory environment is difficult at best, adding the complexities and challenges of securing and maintaining water rights makes water one of the most important aspects of assuring a successful real estate project. The State of Washington's position that the water right must be used within a five year period or it is terminated further complicates the process. It is extremely difficult to "phase out" an agricultural activity, such as a dairy, because there is a very real possibility that the water rights will expire before the transition from agricultural use to real estate use is completed.

The solution to preserving water rights for the benefit of your property or our real estate development is to transfer the water rights to a municipal government. Under Washington State law municipally owned water rights do not expire and there is no requirement to use the water provided for in the water right. This “municipal government” can be the City of Winlock or a newly formed water district. The City provides a better opportunity for the water rights transfer and providing of the initial waters needed to assure the success of the real estate project.

Sovran recognizes and agrees with the Mickelsens position regarding your water rights and the potential benefit to others that may be realized by the transfer of the water rights to the City. Thus, Sovran Development Group proposes the following for the existing water rights owned and/or controlled by the Mickelsens: . . .

CP 231.

The importance of the Mickelsens’ water rights led to two critical provisions in the PSAs. Those provisions, paragraphs 18.3 and 18.4, contained conditions that Sovran had to satisfy before it could purchase the Mickelsens’ property. CP 342-43. They were negotiated into the PSAs to assure that the Mickelsens received fair compensation for their water rights. CP 216-17.

Paragraph 18.3.

The first condition precedent was set out in paragraph 18.3 of the PSAs. CP 342-43. It provided protections for both Sovran and the Mickelsens. It protected Sovran by allowing it to terminate the PSAs if it was not satisfied that a bona fide water right existed that could be

transferred to a municipality. *Id.* It protected the Mickelsens by allowing them to terminate the PSAs if there was no satisfactory agreement with the City of Winlock that adequately provided for the use of and financial reimbursement for the Mickelsens' water rights:

18.3 Water Rights Transfer: Buyer shall be satisfied that a bonafide water right exists on the property and that such right is transferable to a municipality for use as domestic, commercial and/or industrial water. Buyer and Seller shall remove such contingency no later than two hundred forty (240) days from the date of this Agreement.

Any transfer of water rights is conditioned on the ability of Buyer and Seller to enter into an agreement with the City of Winlock or other water purveyor that adequately provides for the use of and financial reimbursement for the water rights transferred. The terms of the agreement with the City of Winlock or other water purveyor must be satisfactory to the Seller and Buyer.

Buyer shall provide Seller with written termination of this Agreement in the event the conditions of the water right transfer to the City of Winlock is not satisfactory to Buyer, in Buyer's sole opinion. Failure of Buyer to provide written termination shall be deemed a satisfaction of this condition to closing.

Seller shall provide Buyer with written termination of this Agreement in the event the conditions of the water right transfer to the City of Winlock is not satisfactory to Seller, in Seller's sole opinion. Failure of Seller to provide written termination shall be deemed a satisfaction of this condition to closing.

Id.

Paragraph 18.4

The other conditions at issue were written into paragraph 18.4 of the PSAs. CP 343-44. That paragraph required Sovran to obtain the necessary government approvals for its proposed development and give notice of that fact before it could purchase the Mickelsens' property. *Id.* This provision was also critical. The Mickelsens could realize the value of their water rights only if their property was developed in such a way as to provide a population of consumers to use and pay for the water. CP 216. A population of consumers to use and pay for the Mickelsens' water could exist only if Sovran was able to complete its proposed development. *Id.* Sovran could complete its proposed development only if it obtained all the necessary government approvals for doing so. *Id.* Therefore, paragraph 18.4 was negotiated to further protect the value of the Mickelsens' water rights. CP 217.

18.4 Authorization for Property Development: Buyer, at its sole cost and expense, shall apply for and diligently prosecute governmental authorization for Buyer's intended development with the appropriate governmental agencies.

This Agreement is expressly conditioned on Buyer securing from Lewis County approvals necessary for Buyer's planned development. Seller shall cooperate with Buyer in Buyer's application for governmental approvals and shall sign any documents reasonably requested by Buyer.

Buyer shall have a period of two hundred forty (240) days from the date of this Agreement to satisfy this condition

and provide Seller with written notification that this condition has been satisfied. Failure to secure the approvals and provide such notification within such two hundred forty (240) days shall terminate the Agreement.

Notwithstanding anything to the contrary contained herein, no change shall be made to the property's comprehensive plan designation, zoning or land-use status without Seller's written consent if such change would cause Seller to lose its ability to operate a commercial dairy farm before expiration of the applicable lease periods set out in paragraph 6.

Buyer is aware that Seller has pending a request to change the designation of the property from Agricultural Resource to RDD. The parties agree Seller's RDD request may move forward. If the RDD request at any time creates a conflict with Buyer's application for governmental approvals, Buyer may request, that Seller withdraw its RDD request. Buyer's request shall be in writing. If Seller, within 20 days of receipt of such written request, does not agree to withdraw its RDD request, Buyer shall be entitled to terminate this agreement and shall be entitled to a refund of all deposits.

CP 343-44.

The Water Service Agreement.

To satisfy paragraph 18.3 of the PSAs, Sovran proposed an agreement between it, the City of Winlock and the Mickelsens whereby the Mickelsens' water rights would be converted to domestic use and transferred to the City. CP 217. The parties executed the Grand Prairie-Winlock Water Service Agreement (hereinafter, the "WSA") on April 16, 2003. CP 383-91.

Under the WSA, the Mickelsens' water rights were to be transferred to the City of Winlock for domestic water supply within a defined geographical area referred to as the "Benefit Area." CP 383, 390. The Benefit Area was part of the expanded Urban Growth Area that Sovran and the City were proposing under the Growth Management Act. CP 383, 389. Since it was not certain that the proposed expansion would be approved, the Mickelsens would not agree to give Sovran an open-ended right to transfer their water rights. CP 217. Consequently, the WSA was contingent on (1) obtaining approval of the expanded Urban Growth Area, and (2) effecting a transfer of the Mickelsens' water rights within two years, or by April 16, 2005. CP 385 at ¶ 13.

If those events occurred within two years, the Mickelsens were confident their water rights would be used by the City and that such use would generate user fees to compensate the Mickelsens for those water rights. CP 217. If those conditions were not met by April 16, 2005, however, the WSA would become null and void. CP 385.

Extension of the PSAs.

The PSAs required Sovran to satisfy the conditions in paragraphs 18.3 and 18.4 within 240 days, which ended May 7, 2003. CP 342-43. Sovran could not meet this deadline and asked the Mickelsens to extend

the deadlines 19 months to December 31, 2004. CP 217. The Mickelsens generously agreed to extend the deadlines free of charge. CP 375.

By the end of the extended deadline period, little progress had been made. CP 218. Sovran blamed this on “the City severely lacking of experienced leadership in the growth management process.” CP 241. Sovran predicted that “[t]he required growth management changes will not be complete in 2005 as promised” and asked that the PSAs be “suspended” for 18 months so Sovran would have time to satisfy the conditions precedent for purchasing the Mickelsens’ property. *Id.* If the Mickelsens would not agree, Sovran intended to abandon the PSAs. *Id.*

The Mickelsens declined Sovran’s request this time since there were few signs of progress. CP 218, 334. In response, Sovran exercised its rights under paragraph 19 to extend the PSAs for a year. CP 344. Sovran described the extensions in two ways, first as four quarterly extensions and later as four 90-day extensions. *Cf.*, CP 334, ll. 9-10 (“quarterly fees of \$45,000 per quarter”) and Appellant’s Brief at 10 (“ninety days”). This discrepancy is relevant to the deadline for termination notices under paragraphs 18.3 and 18.4 and addressed in Section G, *infra*. Four quarterly extensions would make the notices due on December 31, 2005, while four 90-day extensions would make them

due December 26, 2005. Pursuant to paragraph 19 of the PSAs, the extensions were for 90 days each. CP 344.

Sovran's failures.

In exercising its rights to extend the PSAs, Sovran admitted that as of December 21, 2004, its “work under Article 18 ‘Conditions Precedent’ of the Agreement for Purchase and Sale is not complete.” CP 243. The extensions did not help Sovran. Despite the additional 12 months, Sovran still did not obtain the government approvals as required by paragraph 18.4 or satisfy the conditions in paragraph 18.3. CP 218-19.

Not only did Sovran fail to improve its position after December 21, 2004, it actually regressed. In December 2004, the WSA was in effect. CP 385. Four months later, in April 2005, the WSA expired because Sovran did not perform its obligations thereunder. CP 219. The parties did not revive or extend the expired WSA or replace it with a new agreement. *Id.*

One of the reasons the parties did not revive the expired WSA is because the circumstances underlying that agreement changed considerably — and to the Mickelsens' detriment — between 2003 and 2005. CP 219-20. When the parties signed the WSA, the area to be served by the Mickelsens' water was quite large and included a significant amount of residential development. CP 220, 268, 389-90. The

Mickelsens were relying on that population of residential consumers to generate user fees sufficient to compensate the Mickelsens for their water rights. CP 220. The Urban Growth Area that was ultimately approved, however, was far smaller than what was proposed in 2003 and had changed from predominantly residential development to almost exclusively industrial. CP 220, 270-71. The residential development that the Mickelsens were counting on to generate user fees had been all but eliminated. CP 220. The changes in the Urban Growth Area and the corresponding reduction of potential consumers of the Mickelsens' water meant that the WSA was no longer economically viable or acceptable to the Mickelsens. CP 219-20. The Mickelsens, therefore, were not willing to revise or extend the expired WSA. *Id.*

Due to the expiration of the WSA and the changes in the Urban Growth Area, Sovran was even further from complying with paragraph 18 of the PSAs in December 2005 than it was in December 2004, when it admitted it had not satisfied the conditions. *See*, CP 243. Accordingly, on December 14, 2005, the Mickelsens gave written notice to Sovran pursuant to paragraph 18.3 terminating the PSAs. CP 219, 253-60.

The lawsuit and proceedings below.

Sovran filed this action seeking to specifically enforce the PSAs. CP 405-12. At the parties' cross motions for summary judgment, the

Lewis County Superior Court, Judge Nelson Hunt, ruled that, as a matter of law, Sovran failed to satisfy the conditions precedent in paragraphs 18.3 and 18.4 and the PSAs therefore terminated. CP 168-70.

Sovran moved for reconsideration, which was denied by order dated July 5, 2006. CP 171-72. On June 1, 2007, the trial court dismissed Sovran's remaining breach of contract claims and awarded fees and costs to the Mickelsens. CP 26-27. This appeal followed.

III. ARGUMENT

A. Summary of argument and standard of review.

Sovran had to satisfy three conditions before it had the right to purchase the Mickelsens' property. Pursuant to paragraph 18.4 of the PSAs, Sovran had to secure all government approvals necessary for its planned development and give written notice that it had done so. Pursuant to paragraph 18.3, Sovran had to effect an agreement to transfer the Mickelsens' water rights to the City of Winlock on terms acceptable to the Mickelsens that provided for the use of and compensation for those rights. If Sovran failed to do any one of these three things, the PSAs terminated and Sovran lost any right to the property. Sovran failed to satisfy not only one, but all three, of the conditions precedent. Accordingly, the trial court granted summary judgment in favor of the Mickelsens.

The trial court was correct. Sovran was not entitled to waive the conditions in paragraph 18.4 because that provision placed affirmative obligations on Sovran that benefited the Mickelsens. Moreover, Sovran failed to satisfy paragraph 18.4 in two ways, first by failing to secure the necessary government approvals and second by failing to give the required written notice to the Mickelsens. Sovran's new argument that there are questions of fact about what approvals were necessary under paragraph 18.4 is meritless and does not disturb the trial court's ruling.

Sovran also failed to satisfy paragraph 18.3 of the PSAs by failing to arrange a transfer of Mickelsens' water rights on terms acceptable to the Mickelsens. Based on Sovran's failure, the Mickelsens gave timely written notice terminating the PSAs.

Finally, the trial court properly dismissed Sovran's other claims. Since Sovran failed to satisfy the conditions precedent, its cause of action for breach of the implied duty of good faith failed as a matter of law.

This Court reviews the trial court's summary judgment rulings de novo. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003).

B. The conditions in paragraph 18.4 of the PSAs benefited the Mickelsens and therefore could not be waived by Sovran.

Sovran's primary argument is that it had the right to unilaterally waive the conditions in paragraph 18.4. Sovran makes two arguments in support, neither of which works. Sovran claims first that paragraph 18.4 benefited Sovran and therefore Sovran was entitled to waive it and, second, that paragraph 17 gave Sovran the right to waive the conditions in paragraph 18.4. Appellant's Brief at 19 and CP 326.

This is a controlling issue. If Sovran was not entitled to waive the conditions in paragraph 18.4, it loses because there is no question that Sovran did not secure the necessary government approvals *and* provide timely written notice as required by paragraph 18.4.

1. Sovran cannot waive paragraph 18.4 because that provision benefits the Mickelsens.

A party to a contract may waive a condition in a contract only if the condition was made for that party's *sole* benefit. *Mike M. Johnson, Inc. v. Spokane County*, 112 Wn. App. 462, 467, 49 P.3d 916 (2002); *CHG Int'l, Inc. v. Robin Lee, Inc.*, 35 Wn. App. 512, 514, 667 P.2d 1127 (1983); *U.S. v. Schaeffer*, 319 F.2d 907, 912 (9th Cir. 1963); 13 *Williston on Contracts*, §39:24 (4th ed. 2007). A party is not entitled to waive affirmative obligations placed upon it by contract since that would make

the obligations illusory. *See, Taylor v. Shigaki*, 84 Wn. App. 723, 730, 930 P.2d 340 (1997).

The conditions in paragraph 18.4 plainly benefited the Mickelsens by protecting the value of their water rights and therefore could not be waived by Sovran. Paragraph 18.4 required the existence of a viable, government approved development plan that would provide consumers of water to generate revenue for the Mickelsens' water rights *before* the Mickelsens had to sell their property. CP 343-44. The Mickelsens were willing to sell their land only if they could realize the value of their water rights; they could realize the value of their water rights only if their land was developed so as to provide a population of consumers to use and pay for their water; and their land could be developed only if Sovran secured all of the necessary government approvals. CP 216-17. A sale of the Mickelsens' land without an approved and permitted development put the value of the Mickelsens' water rights at risk. *Id.* Thus, paragraph 18.4 required Sovran to secure all government approvals before Sovran could purchase the Mickelsens' land and "expressly conditioned" the PSAs on satisfaction of that requirement. CP 343. As a matter of law, 18.4 benefited the Mickelsens.

The notice requirement in 18.4 also benefited the Mickelsens.¹ It unequivocally required Sovran to give written notice to the Mickelsens that it had obtained all necessary government approvals and unequivocally provided that the PSAs would terminate if such notice was not timely given. CP 343. A term obligating Sovran to give written notice to the Mickelsens inherently benefits the Mickelsens and cannot be waived by Sovran. *See, e.g., Swenson v. Lowe*, 5 Wn. App. 186, 188, 486 P.2d 1120 (1971) (the requirement of written notice is for the benefit of party who is to receive notice).

Finally, Sovran could not waive paragraph 18.4 because it imposed affirmative obligations on Sovran. Although Sovran now claims it was not required by paragraph 18.4 to do anything (Appellant's Brief at 19), its prior communications belie that claim: "Paragraph 18.4 requires the Buyer [Sovran] to secure from Lewis County approvals necessary for Buyer's planned development." CP 273. Sovran's pre-litigation admission is antithetical to its current argument. Indeed, Sovran's current argument equates the conditions in paragraph 18.4 to a buyer's feasibility contingency, where a buyer has a period of time to determine if approvals

¹ Sovran does not argue that it could waive the notice requirement. Thus, even if Sovran could waive the other condition in paragraph 18.4, it could not waive the notice requirement. Since Sovran did not give the notice required by paragraph 18.4, the PSAs terminated.

will be forthcoming before it is obligated to close. That argument is unsupported by the plain language of paragraph 18.4.

As a matter of law, paragraph 18.4 benefited the Mickelsens and Sovran was not entitled to waive it.

2. Paragraph 17 does not give Sovran the right to waive paragraph 18.4.

Paragraph 17, consistent with the legal authority above, gives Sovran the right to waive only conditions precedent to Sovran's obligation to close, i.e., conditions that are to be performed by the Mickelsens:

If any of the conditions precedent to *Buyer's [Sovran's] obligation to close* have not occurred or been satisfied on or before the specified deadline prior to the closing date, Buyer at his sole option, may . . . (b) waive such conditions precedent and proceed to closing.

CP 341.

The requirements in paragraph 18.4 are not conditions precedent to Sovran's obligation to close. Conditions to Sovran's obligation to close are things that the Mickelsens must do in order for Sovran to be obligated to close; if the Mickelsens do not perform such conditions, Sovran can either terminate the agreement or waive those conditions and proceed to closing. Rather, the requirements in paragraph 18.4 are conditions precedent to the sellers' – the Mickelsens' – obligation to close. To wit, if Sovran secures the government approvals and gives written notice as required by paragraph 18.4, the Mickelsens are obligated to close. If

Sovran does not secure the government approvals and provide written notice, the Mickelsens are not obligated to close.

Since paragraph 18.4 is a condition precedent to the Mickelsens' obligation to close, Sovran cannot, as a matter of law, waive it pursuant to paragraph 17.

C. The trial court was correct in granting summary judgment in favor of the Mickelsens because Sovran failed to satisfy the conditions precedent in paragraph 18.4 of the PSAs.

Since Sovran could not waive the conditions in paragraph 18.4 of the PSAs, the only issue remaining is whether or not Sovran satisfied those conditions. The evidence, including Sovran's own testimony, is that Sovran did not secure the government approvals necessary for its intended development and did not give the Mickelsens written notice that all approvals had been secured.

1. Sovran did not satisfy the conditions precedent in paragraph 18.4 of the PSAs because it did not secure the government approvals necessary for its intended development.

“‘Conditions precedent’ are those facts and events, occurring subsequent to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available.” *Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526 (1964), citing 3A Corbin, *Contracts* (3d ed.) §628, p. 16; *Partlow v. Mathews*, 43 Wn.2d 398, 406,

261 P.2d 394 (1953). “A condition creates no right or duty of and in itself, but is merely a limiting or modifying factor. If it is breached or does not occur, the promisee acquires no right to enforce the promise.” *U.S. v. Schaeffer*, 319 F.2d 907, 911 (9th Cir. 1963).

Paragraph 18.4 of the PSAs is a condition precedent. That paragraph required Sovran to secure government approvals for its intended development before it could purchase the Mickelsens’ property.

18.4 Authorization for Property Development: Buyer, at its sole cost and expense, shall apply for and diligently prosecute governmental authorization for Buyer’s intended development with the appropriate governmental agencies.

This Agreement is expressly conditioned on Buyer securing from Lewis County approvals necessary for Buyer’s planned development. Seller shall cooperate with Buyer in Buyer’s application for governmental approvals and shall sign any documents reasonably requested by Buyer.

Buyer shall have a period of two hundred forty (240) days from the date of this Agreement to satisfy this condition and provide Seller with written notification that this condition has been satisfied. Failure to secure the approvals and provide such notification within such two hundred forty (240) days shall terminate the Agreement.

Buyer is aware that Seller has pending a request to change the designation of the property from Agricultural Resource to RDD. The parties agree Seller’s RDD request may move forward. If the RDD request at any time creates a conflict with Buyer’s application for governmental approvals, Buyer may request, that Seller withdraw its RDD request. Buyer’s request shall be in writing. If Seller, within 20 days of receipt of such written request, does not agree to withdraw its RDD request, Buyer shall be

entitled to terminate this agreement and shall be entitled to a refund of all deposits.

CP 343-44.

There were numerous government approvals that Sovran was required to obtain under the Growth Management Act and other laws. The first step was for Lewis County to approve the expanded Urban Growth Area to include the Mickelsens' property. Following that, it was necessary for:

- the City of Winlock to adopt the expanded Urban Growth Area (RCW 36.70A.215 and .130);
- the City of Winlock to adopt changes to the Comprehensive Plan and capital facilities budget (*see*, RCW 36.70A.120 and .130);
- the City of Winlock to review and adopt appropriate zoning changes to the Mickelsens' property and other property in the Urban Growth Area (*id.*);
- the City of Winlock to develop and adopt development standards for the expanded Urban Growth Area (*id.*);
- Lewis County, through the Lewis County Planning Commission and the County Commissioners, to approve the Comprehensive Plan and adopt the zoning changes (RCW 36.70A.130 and .215);

- Lewis County, through the Lewis County Planning Commission and the County Commissioners, to adopt the development standards (RCW 36.70A.210; Lewis County Code Titles 17.15 and 17.20);
- Lewis County, through its Community Development Department, to review and make a determination under SEPA (RCW 43.216.031; LCC, Titles 17.05.010 - .100); and
- Lewis County and the City of Winlock to approve a binding site plan (RCW 36.70A.210; LCC, Titles 17.15 and 17.20).

Sovran did not secure the government approvals. During the three years the PSAs were in effect, Sovran obtained only one government approval, Lewis County's approval of the expanded Urban Growth Area on December 6, 2005, 20 days before the termination of the PSAs. CP 218. None of the other numerous approvals were obtained and the Mickelsens' land is still zoned agricultural resource land. *Id.*

The situation existing in December 2005 was precisely what paragraph 18.4 was meant to address. The Mickelsens were not willing to sell their land and transfer their water rights unless they were sure Sovran had government approval to develop their property. CP 216-17. When the PSAs were set to expire, Sovran had not obtained the necessary government approvals. CP 218. Thus, there was no assurance the

Mickelsens' property would be developed and, consequently, no assurance of consumers to use and pay for the Mickelsens' water. CP 220.

Although Sovran claims in its brief that the necessary government approvals were secured (Appellant's Brief at 26), there is no evidence to support that claim. First, by claiming that it waived paragraph 18.4, Sovran implicitly concedes that it did not secure the government approvals required therein. Indeed, why would Sovran claim it waived 18.4 if it had satisfied it? Second, there is no testimony in the record that Sovran secured all the necessary government approvals. Frank Kirkbride, Sovran's principal, merely states that before the expiration of the contract period, he became satisfied that Sovran *could eventually* secure all government approvals and therefore waived paragraph 18.4:

Sovran was satisfied that all necessary government approvals could now be obtained.

CP 188.

In early December, 2005, positive government action was taken which gave me confidence that the property use would change and allowed Sovran to go forward and purchase the Mickelsen property.

CP 334. Sovran's confidence that government approvals could be secured in the future, as opposed to actually securing the approvals, is insufficient to satisfy paragraph 18.4.

Sovran failed to secure the government approvals necessary for its development. Sovran therefore failed to satisfy the conditions precedent in paragraph 18.4 and the PSAs terminated as a matter of law.

2. Additionally, Sovran did not satisfy the conditions precedent in 18.4 because it failed to give the required written notice to the Mickelsens.

“The parties to a contract are at liberty to agree upon a condition precedent upon which liability shall depend.” *Partlow v. Mathews*, 43 Wn.2d 398, 406. The delivery of written notice is a common condition precedent and notice requirements are generally enforced. *Mike M. Johnson, Inc. v. Spokane County*, 112 Wn. App. 462, 467.

Here, the parties agreed that Sovran not only had to secure the necessary government approvals for its development, but also provide “written notification that this condition has been satisfied.” CP 343. If Sovran failed to provide such notice, the PSAs terminated. *Id.*

The deadline for providing written notice was December 26, 2005. Sovran did not, by that date, provide written notice to the Mickelsens that it had satisfied paragraph 18.4. The two letters that Sovran claims constituted notice were both mailed and received after December 26, 2005. CP 199 is a letter from Transnation Title Insurance (not Sovran) dated December 27, 2005, and received sometime thereafter. CP 273 is a letter from Sovran dated December 28, 2005, and received on December

30, 2005. Since Sovran did not provide written notice prior to December 26, 2005, the PSAs terminated as a matter of law.

D. There is no issue of fact regarding what specific government approvals were required under paragraph 18.4.

On appeal, Sovran argues there is a question of fact as to whether its obligation under 18.4 to secure “approvals necessary for its intended development” was satisfied when Lewis County approved the expanded Urban Growth Area. This argument should not be considered since it was not raised in the trial court below. *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 853, 50 P.3d 256 (2002). Even if it is considered, it does not present a genuine issue of material fact. There can be no dispute that Sovran secured only a single regulatory approval from Lewis County and paragraph 18.4 required more.

First, the plain language of the PSAs defeats Sovran’s argument. The PSAs were “expressly conditioned” on Sovran “securing from Lewis County approvals necessary” for its planned development. CP 343. There are a number of other references in paragraph 18.4 to approvals from government agencies. *Id.* Because the PSAs refer exclusively to the plural “approvals,” a single government approval – Lewis County’s approval of the expanded Urban Growth Area – cannot, as a matter of law, satisfy paragraph 18.4. A court cannot construe a contract to equate the

need for multiple “approvals” with a single “approval.” *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (duty of the court is to declare the meaning of what is written); *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980) (courts can neither disregard contract language the parties chose or revise it under the theory of construing it).

Sovran is a sophisticated developer with expertise in the regulatory steps required to develop land. CP 330. Sovran certainly knew the difference between securing approval of the expanded Urban Growth Area – merely the first step in the regulatory process – and the multitude of other steps necessary to ensure the viability of a development project. Had Sovran intended approval of the Urban Growth Area to be the only government approval required, paragraph 18.4 would have so stated.

Second, Sovran’s argument is defeated by its own statements demonstrating that it understood approvals beyond the expanded Urban Growth Area were required. In correspondence to the Mickelsens, for example, Sovran described the necessity of the City of Winlock’s adoption of changes to the Comprehensive Plan and the further need for “reviewing and adopting the appropriate zoning and development standard ordinances and the subsequent adoption of those by Lewis County.” CP 290. In prior correspondence, Sovran generally referred to the multiple approvals it was required to secure. *See, e.g.*, CP 234 (“Comprehensive Plan and Zoning

change approvals from Lewis County” and “necessary regulatory approvals”); CP 243 (“comprehensive plan and zoning changes”); CP 273 (“approvals”); and CP 241 (“required growth management changes”). Likewise, the fact that approval of the expanded Urban Growth Area gave Sovran confidence that “all necessary government approvals could now be obtained” (CP 188) evidences Sovran’s understanding that it was required to secure more approvals than just the Urban Growth Area. Nowhere did Sovran testify that it considered approval of the Urban Growth Area, by itself, sufficient to satisfy 18.4.

There is no question of fact regarding what specific government approvals were required under paragraph 18.4. Pursuant to the plain language of the PSAs, more than one approval was required. All the evidence in the record, including Sovran’s own statements and testimony, is consistent. Since Sovran secured only one approval, and multiple approvals were required, summary judgment was proper.

E. As a matter of law, Sovran did not satisfy the conditions precedent in paragraph 18.3 of the PSAs.

Paragraph 18.3 of the PSAs required Sovran to effect an agreement with the City of Winlock that adequately provided for the use of and compensation for the Mickelsens’ water rights. The trial court ruled that Sovran failed to satisfy this condition and that the PSAs therefore

terminated. The trial court's decision is supported by the language of 18.3, the undisputed purpose of 18.3 and Sovran's statements and actions interpreting 18.3. Sovran's argument that it only had to be satisfied that a water right existed is unsupported because it would render a majority of 18.3 superfluous and is contrary to Sovran's understanding of its contractual obligations. Sovran's argument that the WSA satisfied paragraph 18.3 is also misplaced.

1. Sovran did not satisfy paragraph 18.3 because it failed to effect an agreement with the City of Winlock that adequately provided for the use of and compensation for the Mickelsens' water rights.

The requirement of a contract dealing with and protecting the Mickelsens' water rights is implicit in the terms of paragraph 18.3.

A condition precedent may be either express, implied in fact or implied in law. *Ross v. Harding*, 64 Wn.2d 231, 236. Whether a provision in a contract is a condition, the nonfulfillment of which excuses performance, depends upon the intent of the parties to be ascertained from a fair and reasonable construction of the language used in light of all the surrounding circumstances. *Id.*

The requirement that Sovran effect a water rights agreement acceptable to the Mickelsens is best evidenced by the language of paragraph 18.3. Once Sovran was satisfied that the Mickelsens' water

rights could be transferred, it required such transfer be pursuant to an agreement that “adequately provides for the use of and financial reimbursement for the water rights transferred” with terms “satisfactory to Seller, in Seller’s sole opinion.” CP 343.

The provisions which gave the Mickelsens discretion to approve the terms of the transfer of their water rights and conditioned such transfer on an agreement with the City of Winlock are meaningful only if an agreement was required. If an agreement was not required and Sovran’s only obligation under paragraph 18.3 was to satisfy itself that the water rights could be transferred, the second, third and fourth paragraphs of 18.3 would be superfluous. Such interpretation is contrary to Washington law. *American Agency Life Ins. Co. v. Russell*, 37 Wn. App. 110, 114, 678 P.2d 1303 (1984) (a contractual provision should not be rendered superfluous by judicial interpretation); *Wagner v. Wagner*, 95 Wn.2d 94, 101 (court cannot disregard the contract language the parties employed); *Seattle-First Nat. Bank v. Westlake Park Assoc.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985) (interpretation which gives effect to all words in a contract is favored over one which renders some of the language meaningless or ineffective).

The implicit requirement of an agreement dealing with the Mickelsens’ water rights is not only evidenced by the language of

paragraph 18.3 but also by the undisputed purpose of that provision. The purpose of paragraph 18.3 was to protect the value of the Mickelsens' water rights; the Mickelsens believed that the full value of their water rights could be realized only if the water rights were transferred for domestic use, the property was fully developed, user fees were generated and the Mickelsens received compensation for their water from those user fees. CP 215-16. To protect their interests, the Mickelsens insisted that the transfer of their water rights be on contractual terms that were satisfactory to them in their sole opinion. CP 216-17.

Paragraph 18.3 was a three-step and two-sided process. CP 342-43. Sovran had to be satisfied that the Mickelsens' water rights could be transferred to the City of Winlock for use as a domestic water supply. This first step protected Sovran. The transfer of the water rights, however, had to be pursuant to an agreement with the City that adequately provided for the use of and compensation for the Mickelsens' water right. This second step protected the Mickelsens. If either party was unsatisfied with the conditions of the water rights transfer to the City, that party could terminate the PSAs. This third step protected both parties.

Sovran's understanding was consistent. Just months before filing this suit, Sovran admitted that paragraph 18.3 required an agreement with the City of Winlock to transfer the Mickelsens' water rights:

Paragraph 18.3 conditions the agreement on Buyer and Seller entering into an agreement with the City of Winlock or other water purveyor that adequately provides for the use of and financial reimbursement for the water rights transferred.

CP 273.

This admission was not new. On numerous occasions throughout the term of the PSAs, Sovran admitted it was required to effect an agreement with the City of Winlock for the transfer of the Mickelsens' water rights:

...The solution to preserving water rights for the benefit of your property or our real estate development is to transfer the water rights to a municipal government.

Sovran recognizes and agrees with the Mickelsens' position regarding your water rights and the potential benefit to others that may be realized by the transfer of the water rights to the City.

CP 231.

Each of the Amending Agreements change the contingency dates for regulatory approvals and water rights transfer to a specific date, not later than December 31, 2005.

CP 234.

...[Sovran] agreed to sponsor the change of use for your water rights to 'municipal.' After the City obtained the approvals for the UGA, ownership of the rights are to be transferred to Winlock. A year ago we all executed an agreement to facilitate this process.

CP 238.

Sovran entered into a Memorandum of Understanding with the City to convert the Mickelsen Dairy's water rights to

municipal use and to provide for the development of the water supply infrastructure to service the Grand Prairie area.

CP 240.

Sovran's actions were consistent with its belief. It was Sovran's understanding of paragraph 18.3 that lead to the WSA, the singular purpose of which was to satisfy paragraph 18.3's requirement for an agreement with the City of Winlock that compensated the Mickelsens for their water rights. *See*, CP 238 ("we all executed an agreement to facilitate the process" of transferring the water rights to the City). If paragraph 18.3 required nothing more than Sovran being satisfied a water right existed, there would have been no reason for negotiating and entering into the WSA.

The requirement that Sovran effect an agreement satisfactory to the Mickelsens that adequately provided for the use of and compensation for the Mickelsens' water rights is necessarily implicit in paragraph 18.3. That implication is supported by the language and purpose of 18.3 as well as Sovran's belief which is reflected in its statements and actions. Sovran's argument, in contrast, is unsupported by the record. There is no evidence that Sovran, at any time prior to filing this lawsuit, believed that 18.3 required only that it be satisfied that a water right existed. The trial

court was correct in ruling that Sovran did not satisfy paragraph 18.3 and that ruling should be affirmed on appeal.

2. The WSA did not satisfy paragraph 18.3 because it became void and therefore of no effect.

As set out above, paragraph 18.3 required an agreement to transfer the Mickelsens' water rights to domestic use under terms that would adequately provide for the use of and compensation for those rights. Sovran made two attempts to satisfy this condition. Despite failing in both attempts, Sovran claims that it nonetheless satisfied paragraph 18.3.

Sovran's first attempt to satisfy paragraph 18.3 was the WSA. In the WSA, the Mickelsens agreed to terms for the use of and compensation for their water rights. CP 383-91. The Mickelsens' agreement, however, was finite and conditioned on Sovran accomplishing certain things – transferring the Mickelsens' water rights to the City for domestic use and obtaining approval of the proposed service area – within two years. CP 385, at ¶ 13. While the Mickelsens believed their interests would be protected if Sovran could accomplish that transfer by April 2005, they were unwilling to extend their agreement beyond that date. CP 217. Sovran was unable to accomplish the transfer and otherwise satisfy the WSA by April 2005, and consequently, the WSA became void. A void contract is a mere nullity, has no legal effect and is void as to every one

whose rights would be affected by it if valid. *Carkonen v. Alberts*, 196 Wn. 575, 615, 83 P.2d 899 (1938). Since the WSA has no legal effect, it cannot, as a matter of law, satisfy the condition precedent in paragraph 18.3.

Sovran's second attempt at satisfying paragraph 18.3 was a request on December 20, 2005 – six days before the PSAs terminated – to renew the void WSA. CP 262. That proposal was rejected by the Mickelsens for two reasons. First, the proposed agreement set no deadlines for any of the regulatory steps Sovran was required to accomplish. CP 219. Second, by the time of this proposal, Sovran's development plans had changed so much that the terms of the WSA were no longer satisfactory to the Mickelsens. CP 220. Originally, the proposed Urban Growth Area was a large swath of property extending east from the City of Winlock to Interstate 5 and contained a substantial amount of residential development. *See*, CP 389. Within the Urban Growth Area was a Benefit Area that was to be served by the Mickelsens' water rights. By the time the Urban Growth Area was approved in 2005, however, it had shrunk considerably and the Benefit Area eliminated. Further, the 2005 Urban Growth Area was almost entirely industrial. *Cf.*, CP 268 and 270-71. Commercial and industrial development uses far less water. The residential development is what the Mickelsens were counting on to generate user fees. CP 220.

Thus, the reduced Urban Growth Area meant far fewer users for the Mickelsens' water rights and far less ability to generate user fees from which to compensate the Mickelsens for their water. While the original WSA, with the original Urban Growth Area and Benefit Area, was satisfactory to the Mickelsens, simply renewing the same WSA with a smaller, industrial Urban Growth Area was not financially feasible or acceptable. CP 219-20.

The difference between the Urban Growth Area proposed in 2003 (when the WSA was signed) and the Urban Growth Area approved in December 2005 is depicted in the attached Appendixes 1 and 2. The cross-hatched and shaded areas on Appendix 1 were all within the Urban Growth Area proposed in 2003. *See*, CP 389. The shaded areas on Appendix 1 compose the Benefit Area referenced in the WSA, the area that was to be served by the Mickelsens' water. CP 383, 390. The light gray areas represent proposed residential development while the dark gray areas represent proposed commercial or industrial development. Appendix 2, a scaled version of CP 270-71, shows the Urban Growth Area actually approved in 2005. It is significantly smaller than what was proposed in 2003 and, most importantly, contains virtually no residential development (light gray areas). Nearly the entire area is dark gray, or commercial/industrial development. While the Urban Growth Area on

Appendix 1 (and upon which the WSA was based) would create great demand for the Mickelsens' water, the Urban Growth Area approved in 2005 would not. That difference is the reason the terms of the WSA were not acceptable to the Mickelsens in late 2005.

Neither the original WSA nor Sovran's subsequent attempt to renew it satisfied the condition precedent in paragraph 18.3 and the PSAs terminated. Summary judgment was proper and the trial court should be affirmed.

F. There is no question of fact regarding the Mickelsens' exercise of discretion granted to them in the PSAs.

Sovran claims there is a question of fact as to whether the Mickelsens "found, or should have found, the terms of the water rights transfer to be satisfactory" under paragraph 18.3. Appellant's Brief at 24. Since the Mickelsens were satisfied with the terms of the WSA in 2003, Sovran argues, they should have been satisfied with those same terms in 2005 when Sovran tried to resuscitate the WSA, even though the WSA was no longer in effect and the underlying circumstances had changed drastically.

Sovran's argument is unsupported. The parties negotiated the terms of 18.3 so that the Mickelsens had the right to terminate the PSAs if they determined, "*in their sole opinion,*" that the conditions of the transfer

of their water rights were unacceptable. CP 343. The parties gave Sovran the same right. *Id.*

There is no authority that a “reasonable person” standard applies to a party’s right to reject a proposed transfer based on their “sole opinion.” One court observed that “it would seem that the factors involved in determining whether a lease is satisfactory to the lessor are too numerous and varied to permit the application of a reasonable man standard.” *Omni Group v. Seattle-First Nat’l Bank*, 32 Wn. App. 22, 26, 645 P.2d 727 (1982), citing *Mattei v. Hopper*, 51 Cal. 2d 119, 121, 330 P.2d 625 (1958). The same is true of the factors involved in determining whether the terms for transferring the Mickelsens’ water rights were satisfactory.

Further, even if the Mickelsens’ “sole opinion” was subject to an objective analysis, summary judgment was still appropriate since Sovran presented no evidence that the Mickelsens’ decision was abusive or arbitrary. *Occidental Life Ins. Co. v. Blume*, 65 Wn.2d 643, 648, 399 P.2d 76 (1965) (discretion is subject to control by the court only when necessary to prevent an abuse of discretion). When the record is devoid of evidence of fraud, malice or arbitrary conduct, the exercise of discretion is not a question of fact. *Id.*; *Old Nat’l Bank & Trust Co. v. Hughes*, 16 Wn.2d 584, 590, 134 P.2d 63 (1943).

The only evidence is that the Mickelsens rejected the WSA and terminated the PSAs to protect the value of their water rights. CP 219-20. Potential economic detriment is a valid reason for exercising one's discretion under a contract. *See, e.g., Ernst Home Center, Inc. v. Sato*, 80 Wn. App. 473, 486, 910 P.2d 486 (1996). As explained at 34-36, *supra*, the terms of the WSA were acceptable in 2003 because the timelines were limited and the proposed Urban Growth Area was large enough and contained enough residential development to create sufficient demand for the Mickelsens' water rights. By 2005, however, the timelines for transferring the water were extended indefinitely and the Urban Growth Area had shrunk, eliminating most of the residential development, decreasing the population of water users and proportionally decreasing the potential revenue for the Mickelsens' water.

The Mickelsens acted reasonably, logically and according to sound business principles. Although Sovran is unhappy with the Mickelsens' decision, there is absolutely no evidence in the record that a reasonable person would have or should have been satisfied with Sovran's lack of performance. Indeed, allowing their land to be purchased without a structure for generating compensation for their water rights would have betrayed the Mickelsens' fundamental purpose in structuring the transactions the way they did. *See*, CP 215-16.

Sovran also argues there is a question of fact raised by the implied duty of good faith, suggesting that the Mickelsens were obligated to exercise their right to terminate the PSAs in a manner that benefited Sovran. Appellants' Brief at 27.

This argument is wrong because it impermissibly extends the reach of the implied duty of good faith. The implied duty of good faith does not apply to a party's exercise of an express and unconditional contract right. *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 740-41, 935 P.2d 628 (1997). Nor does the duty of good faith require a party to affirmatively assist in the other party's performance (though the Mickelsens did assist by granting Sovran an 18-month extension for no compensation before finally terminating the PSAs out of frustration). *State v. Trask*, 91 Wn. App. 253, 272-73, 957 P.2d 781 (1998). The duty "requires only that the parties perform in good faith the obligations imposed by their agreement....There cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms." *Badgett v. Security State Bank*, 116 Wn.2d 563, 569-70, 807 P.2d 356 (1991).

The Mickelsens were entitled to stand on their rights and demand performance by Sovran. When Sovran did not propose any acceptable terms for the transfer of the Mickelsens' water rights, the Mickelsens were

entitled to terminate the PSAs pursuant to paragraph 18.3. The Mickelsens decision was reasoned and justified, as explained at 33-36, *supra*. Sovran can point to no contract term that the Mickelsens did not perform nor can Sovran point to any evidence that raises a question of fact as to whether the Mickelsens performed their contract obligations in good faith.

Sovran's arguments about a reasonable person standard and the implied duty of good faith do not present genuine issues of material fact and the trial court's ruling should be affirmed.

G. The PSAs were terminated as a result of one or both notice provisions in paragraphs 18.3 and 18.4.

Paragraphs 18.3 and 18.4 contained two separate notice provisions which provided two independent means of terminating the PSAs. First, the PSAs could be terminated pursuant to paragraph 18.3 if the Mickelsens gave written notice to Sovran that the conditions of the transfer of their water rights were not satisfactory to them in their sole opinion. CP 343. Second, the PSAs terminated pursuant to paragraph 18.4 if Sovran did not give notice to the Mickelsens that it had secured the necessary government approvals. *Id.* The PSAs were terminated under both of these provisions. The Mickelsens did give timely notice under paragraph 18.3 and Sovran did not give timely notice under paragraph 18.4.

1. Mickelsens terminated the PSAs under paragraph 18.3 by giving written notice on December 16, 2005.

The Mickelsens gave written notice of termination to Sovran on December 16, 2005. CP 219, 253-60. This notice was timely and, as a matter of law, terminated the PSAs.

Sovran originally had 240 days (or until May 7, 2003) to satisfy the conditions in paragraph 18.3 and the Mickelsens had until that same date to give written notice of termination if the conditions of the water right transfer were not satisfactory. CP 342-43. The parties then executed amendments to the PSAs extending to December 31, 2004 the time for performance under paragraph 18. CP 375-81. Thereafter, Sovran purchased four additional 90-day extensions giving the parties until December 26, 2005 to perform. CP 243.

On December 16, 2005, the Mickelsens gave Sovran “formal notice of termination” pursuant to paragraph 18.3 of the PSAs because “the conditions of the water rights transfer to the City of Winlock had not been satisfied” and “Sovran has not obtained the approvals from Lewis County as required by paragraph 18.4 of the Agreement.” CP 253-60. The notices terminated the PSAs effective December 31, 2005. *Id.*

Sovran makes two arguments as to why the Mickelsens’ notice was allegedly ineffective. Neither is supportable.

Sovran's first argument is that the Mickelsens' notice was required by December 31, 2004. Appellants' Brief at 16-17. Apparently, Sovran claims that when it purchased four 90-day extensions of the PSAs, only its rights under the PSAs were extended, *i.e.*, that Sovran had an additional 360 days to satisfy paragraph 18.3 but the Mickelsens did not have the corresponding right to reject the terms and conditions of a proposed transfer of their water rights.

Sovran's argument is wrong. Paragraph 19 of the PSAs, which gave Sovran the right to purchase the extensions, extends the "allocated time periods" of paragraph 18. CP 344. It does not limit the extensions to only Sovran's rights. Moreover, Sovran's argument is senseless because it would allow Sovran to pay \$15,000 for an extension (which the Mickelsens had no right to reject) and thereby eliminate the Mickelsens' rights to approve or reject the terms of the transfer of their water rights even though no water rights terms were in place at that time. Pursuant to the plain wording of paragraph 19, the extensions applied to all allocated time periods in paragraph 18 and the Mickelsens therefore had until December 26, 2005 to terminate the PSAs.

Sovran's second argument is that the term of the PSA expired on December 26, 2005, and the Mickelsens' notice was ineffective because it

had an “effective date” of December 31, 2005. Appellant’s Brief at 17. This is wrong too.

Pursuant to paragraph 20 of the PSAs, “any notice in accordance herewith shall be deemed received when delivery is received.” CP 344. Sovran received the Mickelsens’ termination notices on December 16, 2005, ten days prior to the end of the term of the PSAs. CP 259-60. Pursuant to paragraph 20, the “effective” date is irrelevant to whether the notices are timely. The PSAs dictate when notices shall be deemed received; they do not dictate when the termination must be effective.² The Mickelsens were free to give Sovran some or no additional days to satisfy the conditions precedent. The only relevant date is the date the notice was received, December 16, 2005. Accordingly, the Mickelsens’ notices were proper and timely and terminated the PSAs.

Finally, Sovran is estopped from claiming the Mickelsens’ notices were untimely. When Sovran opted to buy extensions of the PSAs, it referred to them as “quarterly” extensions, CP 334, which would have extended the terms of the PSAs to December 31, 2005, rather than

² This is because the termination notices had to have an effective date sometime after receipt. If termination was effective upon receipt and the notice was timely – delivered prior to the end of the contract term – it would improperly terminate the contract before the end of its contract term. Thus, the termination notice was required to be delivered prior to the end of the term but the PSAs were silent as to when termination was to be effective.

December 26. Faced with two potential termination dates, the Mickelsens gave notice prior to December 26, 2005 – and therefore complied with the actual terms of the PSAs – and acknowledged the terms of the PSAs extended to December 31, which accommodated Sovran’s interpretation of paragraph 20. *See*, CP 253-60. Had the Mickelsens attempted to terminate the PSAs on December 26, Sovran would now be arguing that the Mickelsens improperly terminated the PSAs five days early or that there was a question of fact about whether the intent of paragraph 19 was to give quarterly extensions. Sovran’s arguments about the effective date are disingenuous and meritless.

2. In addition, the PSAs terminated because Sovran did not give notice under paragraph 18.4.

Pursuant to paragraph 18.4, Sovran was required to give notice to the Mickelsens, prior to December 26, 2005, that all government approvals had been secured. Sovran agreed that failure to provide such notice “shall terminate” the PSAs. *See, Int’l Ass’n of Firefighters v. Spokane Airports*, 146 Wn.2d 207, 217, 45 P.3d 186 (2002) (use of the word “shall” in a contract denotes that an obligation is mandatory).

Sovran did not give the written notice required by paragraph 18.4 prior to December 26, 2005.³ The letter from Transnation, CP 199, was mailed on December 27, 2005 and received sometime later. Sovran's letter, CP 273, was not received until December 30, 2005.

Moreover, neither letter substantively satisfied paragraph 18.4 because Sovran had not secured the necessary government approvals. To wit, the Transnation letter did not state that Sovran had secured all government approvals; it stated only that a transaction was set to close. CP 199. While Sovran's letter stated that "the approvals from Lewis County were obtained" if referred only to the single UGA approval obtained on December 6, 2005. CP 273. A notice is inherently ineffective if the requisite act has not been accomplished.

Since Sovran did not provide written notice prior to December 26, 2005, the PSAs terminated pursuant to paragraph 18.4

3. Sovran's notice arguments conflict and are self-defeating.

Sovran's arguments regarding the parties' respective notice obligations conflict. Under either argument, the PSAs terminated.

If the Mickelsens' notice is untimely because it is construed as being received on December 31, 2005 (rather than December 16, 2005)

³ In reference to Sovran's allegation that the Mickelsens "miscalculated" the notice deadlines (Appellant's Brief at 12), Sovran apparently miscalculated them as well.

and the deadline for such notice was December 26, then Sovran's alleged notice is likewise untimely since neither the December 27, 2005 Transnation letter nor Kirkbride's December 30, 2005 letter was received prior to December 26, 2005. CP 199 and 273. Conversely, if Sovran's notice, which was dated and received after December 26, 2005, was timely under paragraph 18.4, then the deadline for such notice must have been December 31 and the Mickelsens' letter, which was received on December 16, 2005 and "effective" December 31 was timely under paragraph 18.3.

Sovran cannot have it both ways. Either its notice under paragraph 18.4 was not timely or the Mickelsens' notice under paragraph 18.3 was timely. In either event, the PSAs terminated as a matter of law.

4. The *Crowther v. Avis Rent-A-Car* opinion does not support Sovran's claim that the Mickelsens' notice was untimely.

Sovran's reliance on *Crowther v. Avis Rent-A-Car*, 284 F.Supp. 668 (W.D. Wash. 1968) is misplaced. That case stands for the proposition that if the effective date of a notice reduces the notice period to less than what is required under the parties' contract, the notice is untimely. In that case, the court interpreted "midnight" such that Avis gave a termination notice only 89 days prior to termination when 90 days notice was required by the contract. As a result, the court found the notice ineffective.

Crowther does not state the converse – that if a party grants the other party additional time to perform, the notice is ineffective. That is what occurred here. The Mickelsens gave Sovran until December 31, rather than December 26, to secure government approvals. Sovran was not prejudiced in any way by receiving an additional five days to secure the necessary approvals.

The reasoning in *Crowther* does not support Sovran’s contention that the Mickelsens’ notice was untimely. In fact, such reasoning was a factor in the decision to make the notices effective December 31. Because Sovran characterized them as “quarterly” extensions (CP 334), Sovran could have argued that it intended to extend the term of the PSAs to December 31, 2005. If the notices terminated the PSAs on December 26, with the Christmas holiday preceding it, Sovran would have argued that the Mickelsens’ notice prematurely and unfairly terminated the PSAs, relying on a *Crowther* type analysis. By giving an additional five days, the Mickelsens avoided that argument and a potential issue of material fact about when the extensions terminated.

H. The trial court properly dismissed Sovran’s remaining claims.

Sovran’s final argument is that there were issues of fact precluding dismissal of its claim for breach of the duty of good faith. Sovran is wrong again.

First, as a matter of law, Sovran could not maintain a claim for breach of the PSAs since it did not satisfy the conditions precedent. *Multi-Products Eng. Co. v. Bellingham Steel Products, Inc.*, 66 Wn.2d 82, 86, 401 P.2d 329 (1965) (in order to maintain action for breach, plaintiff must have complied with all conditions precedent); *Tacoma Northpark LLC v. NW LLC*, 123 Wn. App. 73, 79, 96 P.3d 454 (2004); *Atkinson v. Thrift Super Markets*, 56 Wn.2d 593, 594, 354 P.2d 709 (1960).

Second, the Mickelsens did not breach the implied duty of good faith by simply standing on their contract rights. *Badgett v. Security State Bank*, 116 Wn.2d 563, 569-70 (as a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms). As set forth *supra*, the Mickelsens were entitled to terminate the PSAs at their discretion and, given the fact that the value of their water rights was not protected, had valid reasons for exercising that discretion.

Third, there is no evidence to support Sovran's claim. The Mickelsens did not and could not "require" Sovran to make extension payments; that was Sovran's right under the PSAs, which right the Mickelsens could not reject. CP 344 at ¶ 19. The Mickelsens had previously granted Sovran a 19-month extension for free, demonstrating their good faith and belying any allegation of bad faith. CP 217-18 and

375-81. The Mickelsens' willingness to discuss "alternate proposals" to resolve the dispute created by Sovran's failure to perform under the PSAs (Appellant's Brief at 27) is further evidence of the Mickelsens' good faith. Despite this willingness – the Mickelsens were not required to discuss alternatives at all – the Mickelsens were accused of "bad faith negotiating" prompting them to avoid any further conversations with Sovran about land value, water value and other proposals. CP 140.

The trial court correctly dismissed Sovran's claim for breach of the duty of good faith and that dismissal should be affirmed.

IV. CONCLUSION

Based on the foregoing, the Mickelsens respectfully request that this Court affirm the trial court's dismissal of Sovran's claims and award the Mickelsens their attorneys' fees and costs on appeal pursuant to paragraph 24 of the PSAs.

DATED this 5th day of December, 2007.

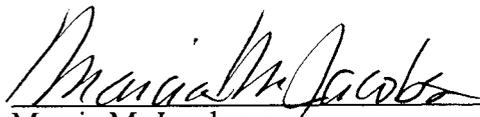
RYAN, SWANSON & CLEVELAND, PLLC

By  _____
Kevin A. Bay, WSBA #19821
Attorneys for Respondents

DECLARATION OF SERVICE

I declare that on the 5th day of December 2007, I caused to be served the foregoing document on counsel for Appellant, as noted, at the following addresses:

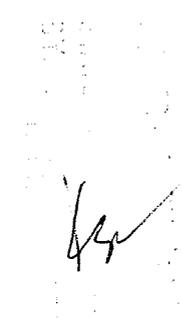
James Hermsen, Esq.
Brian W. Grimm, Esq.
Dorsey & Whitney, LLP
US Bank Center
1420 Fifth Avenue, Suite 3400
Seattle, WA 98101



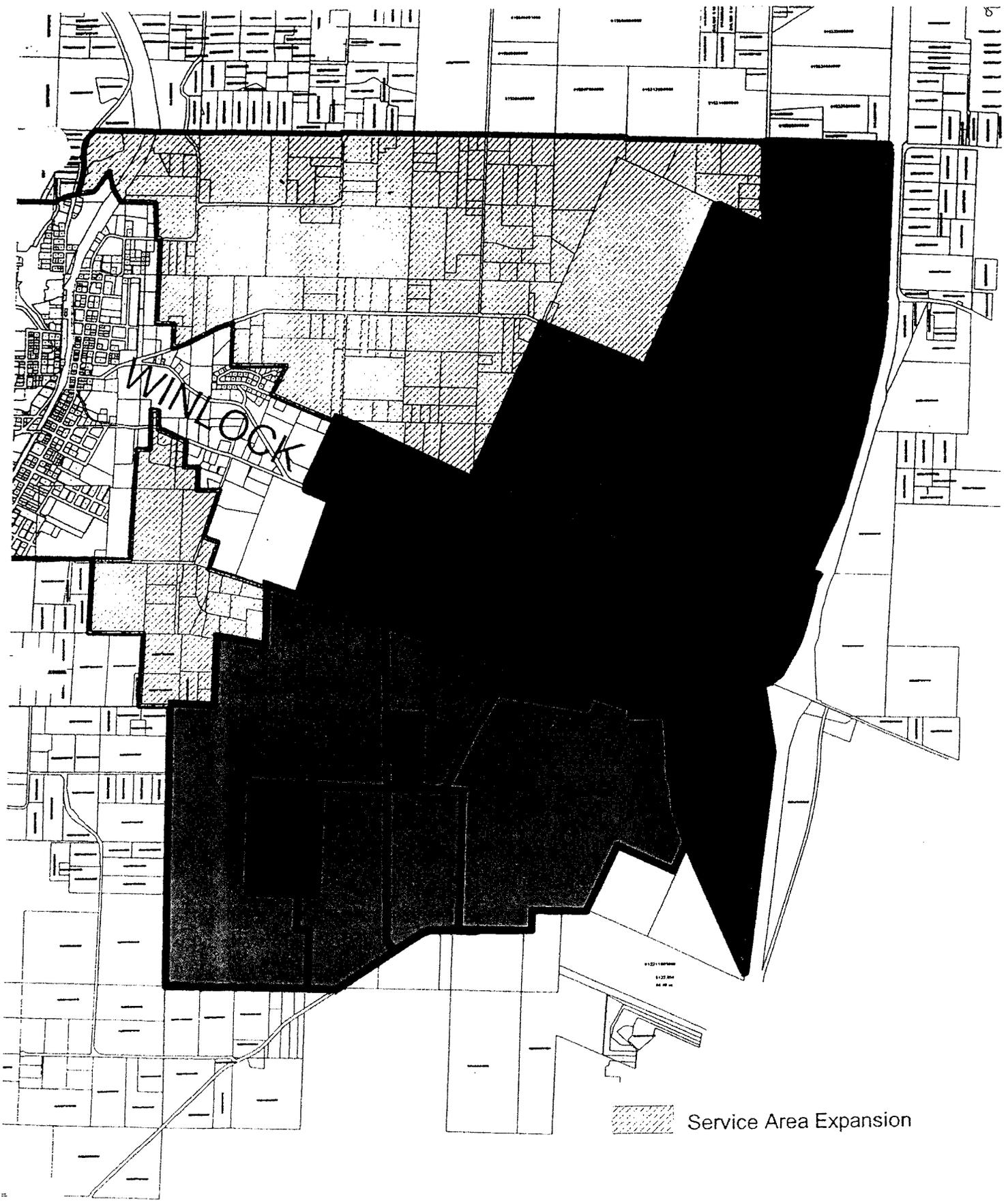
Marcia M. Jacobson

Dated: December 5, 2007

Place: Seattle, WA

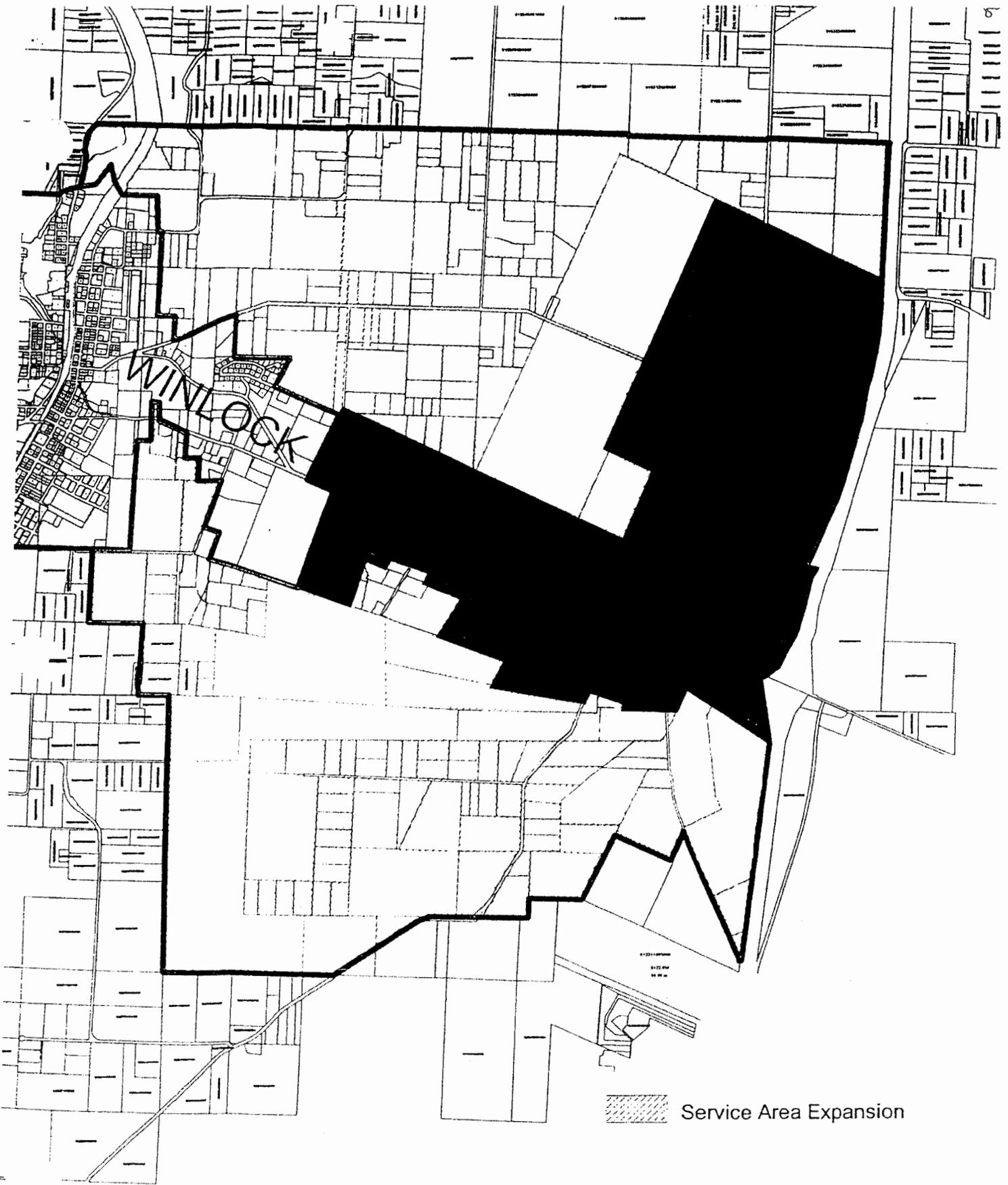


APPENDIX 1



City of Winlock
SERVICE AREA EXPANSION

APPENDIX 2



City of Winlock
SERVICE AREA EXPANSION