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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

MAR 1 1995

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

NO. 77-2-01484-5A COUNTY CLERK

Plaintiff,

FINAL ORDER RE: TREATY RESERVED
WATER RIGHTS AT USUAL AND
ACCUSTOMED FISHING PLACES

vs.

JAMES J. ACQUAVELLA, et al.,

Defendants.

THIS MATTER came before the Court pursuant to the motions filed by Sunnyside Division of Irrigation Districts, Kittitas Reclamation District, Kennewick Irrigation District, Naches-Selah Irrigation District, City of Yakima, Yakima-Tieton Irrigation District, Union Gap Irrigation District, Yakima Valley Canal Company, and Westside Irrigation Company, said motions being dated November 2, 1993 and December 22 and 23, 1993, requesting this Court:

A. To declare the Yakama Indian Nation's treaty fishing right has been diminished in the Yakima River and its tributaries; that the maximum scope of the diminished treaty water right for fish remaining is the specific "minimum instream flow" necessary to maintain anadromous fish life only at the remaining usual and accustomed fishing places still protected by the June 1885 treaty with the Yakamas;

Order Re: Treaty Reserved
Water Rights at Usual and
Accustomed Fishing Places - 1

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- 1 B. To declare that the United States and the Yakama Indian Nation
2 are precluded from claiming water to support a fishery at any
3 remaining usual and accustomed places not specified in its
4 pleadings in ICC Cause No. 147;
- 5 C. To declare that the Yakama Indian Nation's treaty fishing
6 right on Ahtanum Creek has been destroyed by actions of the
7 United States; that if the right has been destroyed, the
8 Yakama Indian Nation is entitled to no water for in-stream
9 flow in Ahtanum Creek;
- 10 D. To exclude in limine introduction of any and all evidence
11 relating to treaty fishing rights inconsistent with A, B, and
12 C above;
- 13 E. To declare the United States and the Yakama Indian Nation are
14 bound, precluded or estopped by this Court's May 22, 1990
15 "Memorandum Opinion re: Motions for Partial Summary Judgment",
16 October 22, 1990, "Amended Memorandum Opinion" and "Amended
17 Partial Summary Judgment" (aff'd. DOE v. YRID, 121 Wn.2d 257
18 (1993)), finding, concluding and determining all Yakama Indian
19 Nation's treaty fish water rights in the Yakima River and all
20 of its tributaries, including Ahtanum Creek, have been
21 substantially limited or diminished to a residual right
22 "...necessary to maintain fish life."

23 This Court having considered all memoranda filed by interested
24 parties, legal arguments of counsel and documentary evidence as it
25 relates to legal issues arising therein, and for good cause appearing,
entered an order thereon on December 16, 1994.

Subsequent thereto, several parties filed Motions for
Reconsideration, which motions and supporting memoranda were thoroughly
considered by the Court. After legal arguments of counsel on February
9, 1995 and after further consideration by the Court,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as
follows:

1 This Order is intended to apply to all off-reservation tributaries
2 of the Yakima River inasmuch as they are necessary to support the "usual
3 and accustomed" fishing places of the Yakama Indian Nation. It shall
4 also apply to Ahtanum Creek. However, this Order is not intended to
5 apply to Toppenish, Simcoe and Satus Creeks, except insofar as they are
6 tributary to the Yakima River, where anadromous fish must pass through
7 to spawn.

8 IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED as follows:

9 A. This Court held in the 1990 Partial Summary Judgment, as
10 affirmed by the Washington Supreme Court, that the Yakama Indian
11 Nation's treaty fishery right had been substantially diminished, but not
12 completely destroyed, and the right was defined as the absolute minimum
13 amount of water necessary to maintain anadromous fish life in the Yakima
14 River.

15 B. The Yakama Indian Nation's minimum instream flow right for fish
16 in those tributaries that presently and actually support anadromous fish
17 availability at the "usual and accustomed" fishing stations specified in
18 paragraph D below shall be determined in accordance with the annual
19 prevailing conditions as they occur.

20 C. The Yakama Indian Nation's minimum instream flow right for fish
21 carries a priority date of "time immemorial."

22 D. In regard to water rights, the United States and the Yakama
23 Indian Nation are precluded from claiming as "usual and accustomed"

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1 fishing stations any other than those specified in their pleadings in
2 the Indian Claims Commission Docket No. 147.

3 E. The Superintendent of the Yakima Reclamation Project (recently
4 changed to Yakima Field Office Manager), in consultation with the Yakima
5 River Basin Systems Operations Advisory Committee, Irrigation District
6 and Company managers and others, shall determine and administer those
7 water ways to maintain fish life at the usual and accustomed fishing
8 stations as limited by ICC Cause No 147.

9 F. The Yakama Indian Nation's water right for fish in Ahtanum
10 Creek has also been substantially diminished by legislative,
11 administrative and judicial acts. As to Ahtanum Creek, the
12 Superintendent of the Wapato Irrigation Project of the Bureau of Indian
13 Affairs shall determine the amount of water necessary to maintain fish
14 life according to the annual prevailing conditions as they occur.

15 G. As to Toppenish, Simcoe, and Satus Creeks, the superintendent
16 of the Wapato Irrigation Project is authorized to administer those
17 waterways depending on existing prevailing conditions.

18 H. If water is made available by improvements to irrigation
19 systems or otherwise on either side of Ahtanum Creek, additional water
20 can be devoted to "enhancement" of fish life. However, such water is
21 subordinate to existing diversion rights as set forth in the Pope
22 decree, U.S. v. Ahtanum Irrigation District, 330 F.2d 897 (9th Cir.
23 1964).

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1 I. The parties hereto are prohibited from introducing any and all
2 evidence relating to water need to support the treaty fishing rights
3 that is inconsistent with the above rulings.

4 Dated this 1st day of March, 1995.

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6 Walter A. Stauffacher
7 Judge Walter A. Stauffacher
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