

gpc

RECEIVED
FEB 19 8 56 AM '82

BETTY MCGILLEN
EX-OFFICIO CLERK
OF SUPERIOR COURT
YAKIMA, WASHINGTON

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

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

IN THE MATTER OF THE DETER-)
MINATION 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,)

NO. 77-2-01484-5

MEMORANDUM OPINION RE:
MOTION TO DISMISS (SUNNYSIDE
VALLEY IRRIGATION DISTRICT) AND
MOTION FOR DETERMINATION OF
JURISDICTION AND ORDER FOR
JOINDER OF NECESSARY PARTIES
(UNION GAP IRRIGATION DISTRICT
AND YAKIMA VALLEY CANAL CO.)

THE STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)

Plaintiffs,)

vs.)

JAMES J. ACQUAVELLA, ET AL,)

Defendants.)

FILED
FEB 17 1982

BETTY MCGILLEN, County Clerk

The Court has had marked, and entered as exhibits herein, the affidavits filed with the court and other materials referred to in the oral presentations and briefs. A list of the exhibits is marked "Attachment A", is attached hereto, and incorporated herein.

This action was commenced in October, 1977 by the State of Washington Department of Ecology (hereinafter DOE), following the 1977 drought, for a complete adjudication of all surface water rights in the Yakima River Drainage Basin pursuant to Chapter 90.03, Revised Code of Washington. The Court will take judicial notice that the Yakima River commences at the crest of the Cascade Range near Snoqualmie Pass and flows generally southeasterly 175 miles, where it empties into the Columbia River. Major tributaries to the Yakima River are the Kachess River; the Cle Elum River; the Teanaway River; Ahtanum Creek; Toppenish Creek; Satus Creek; and the Naches

2512

1
2 River, which itself has two tributaries - the Bumping River and the
3 Tieton River.

4 According to C. R. Lentz Review, Yakima Project Water Rights
5 and Related Data, December, 1974, page 230, (hereinafter Lentz), the
6 Yakima River Basin encompasses 6,062 square miles. This area in-
7 cludes a large part of the Yakima Indian Reservation. Within this
8 area, there are 6 water storage reservoirs with a storage capacity
9 of 1,070,700 acre feet of water. Lentz, page 49. There are 6
10 hydroelectric plants - 2 operated by the U. S. Bureau of Reclamation;
11 2 operated by the U. S. Bureau of Indian Affairs, (Wapato Irrigation
12 Project); and 2 operated by Pacific Power and Light Co. Lentz, page
13 202. The Yakima Project (Bureau of Reclamation) has 1,946 miles
14 of canals and laterals and the Wapato Project (Bureau of Indian
15 Affairs), has 786 miles of canals. (These figures do not include
16 drainage canals for return flow.)

17 After this action was commenced in 1977, a Motion for
18 Removal to the U. S. District Court, Eastern District of Washington
19 was made. In January, 1979, Judge Marshall Neill remanded the
20 matter to this Court for the adjudication of all surface water rights
21 in the Basin. During this time, concerns were expressed for the
22 enhancement of water storage facilities in the Yakima River Basin.
23 Quoting from the Report of Watermaster, filed May 22, 1981, in
24 Civil No. 21, U. S. District Court, Eastern District of Washington,
25 page 7,

26 "On December 28, 1979, a feasibility study for the
27 Yakima River Basin Water Enhancement Project was
28 approved by Congress, (Public Law 96-162), 1979 U. S.
Code and Adm. News, 93 Stat. 1241.

29 This law authorized the Secretary of the Interior
30 to conduct a feasibility study for the proposed enhance-
ment of the water supply in the Yakima River Basin.

1
2 As explained in House Report 96-601 and Senate Report
3 96-248, the purpose of the proposed project is (1) to
4 provide supplemental water to lands now being irrigated
5 as well as for additional potentially irrigable lands
6 on the Yakima Indian Reservation; (2) to increase in-
7 stream flows within the Basin for maintenance of aquatic
8 life; (3) to develop a comprehensive plan for efficient
9 management of the Basin water supply and to provide a
10 basis for settlement of the conflicting water claims
11 within the Basin; and (4) to provide for additional
12 flood control and hydroelectric power generation."
13 (Emphasis added)

14 RCW 90.03.120 requires service of summons in this action
15 to be made upon all "known persons claiming the right to divert
16 water". The Department of Ecology determined this was to be all
17 persons, or their successors, who had filed claims with DOE pursuant
18 to the Water Claims Registration Act of 1967, RCW 90.14 and also
19 all persons, or their successors, who had been issued permits
20 or certificates pursuant to RCW 90.03. All of these persons were
21 personally served by professional process servers, county sheriffs'
22 personnel and DOE employees, as authorized in RCW 90.03.130.
23 Additional service was made by certified mail pursuant to the
24 statutes and the order of this Court dated October 27, 1977. As to
25 all remaining "known and unknown" persons, service was made by
26 publication for six consecutive weeks in the Yakima Herald Republic,
27 the Ellensburg Daily Record, the Pasco Tri-City Herald and the
28 Goldendale Sentinel, all newspapers of general circulation in the
29 area of adjudication. The DOE also held eight public meetings in
30 the Basin respecting this matter which attracted over 1,000 persons
to such meetings. (Affidavit, Bob Stevens - Exhibit No. 4).

Among those served was the United States, which has filed
its Notice of Appearance and filed a claim herein. The Yakima
Indian Nation, per se, was not served. In compliance with the 1967

1
2 Water Rights Claim Registration Act (RCW 90.14), the United States,
3 through the Bureau of Reclamation, has registered with the DOE
4 twenty-three surface water claims. Lentz, page 78. These permits
5 and certificates, under RCW 90.03, 90.40 and 90.14, were issued
6 to the United States as beneficial holder of such rights and have
7 been interpreted historically by DOE as inuring to the benefit of
8 the United States and not directly to the water users who may have
9 a contractual right to the use of that water with the United States.
10 (Affidavit, Glen Fiedler - Exhibit No. 3). However, the United
11 States, in diverting water through the Yakima Project and the Wapato
12 Project states it does not purport to represent all the individual
13 interest of irrigators whose lands are held in trust by the U. S.
14 (Affidavit, Robert M. Sweeney - Exhibit No. 36).

15 RCW 90.03.120, pertaining to whom should be served with
16 summons herein, contains the following proviso:

17 "Provided, however, that any persons claiming the
18 right to the use of water by virtue of a contract
19 with claimant to the right to divert the same, shall
not be necessary parties to the proceeding."

20 Due to some question as to the meaning and application of
21 that proviso, this Court entered an Order on June 5, 1981 which
22 provides, in pertinent part:

23 "1. That all irrigation districts, water distribution
24 districts, canal companies, ditch companies, cities,
25 towns and other governmental entities organized pur-
26 suant to the statutes of the United States or the
27 State of Washington may file claims herein on behalf
28 of all water users within their respective boundaries
29 to whom they supply water or whose lands are assessed
30 by such entity, and such filing, if timely and proper,
will be deemed by the court to be a filing of a
claim by all such water users within the boundaries
of such entities for the water obtained from such
entities. After the filing of the claim by such entities,
such individual water users who obtain their water
solely from such entities or whose lands are assessed

1
2 by such entity need not file individual claims
3 herein but may do so if they so desire.

4 '2. Any water user, whether within or without the
5 boundaries of the above described entities and whether
6 or not partially covered by the claim of such entity
7 for water obtained from such entity who directly
8 diverts any surface water (including but not limited
9 to, springs, ponds, lakes, streams, creeks or rivers)
10 must file a claim for the water so diverted on or
11 before September 1, 1981 or they may lose such water
12 right.'"

13 The DOE, on June 16, 1981, mailed copies of this order
14 to 4,289 persons and/or entities, who are the ones previously
15 served in this action. (Affidavit of Mailing filed June 26, 1981)

16 On or before September 1, 1981, over 2,100 claims had been
17 filed herein. In checking over the list of claimants, the Court
18 has determined that approximately 100 of these claimants are water
19 distributors, i. e., irrigation districts, canal companies, ditch
20 companies, water user associations, etc. Included in these water
21 distributors are 12 or 13 cities and towns and one county.

22 Pursuant to a request of this Court, over 50 of these
23 water distribution entities had affidavits filed herein in respect
24 to their operations and records, along with affidavits from others.
25 Various facts are established by these affidavits.

26 The United States, through its Yakima Reclamation Project,
27 permits diversion of water stored and carried to some 70 of these
28 distribution entities throughout the Basin. These include the
29 Bureau of Indian Affairs project, cities, irrigation division,
30 irrigation companies, corporations, companies and individuals. The
Yakima Project has the names and addresses of all these entities.
(Affidavit, William G. Gray - Exhibit No. 7).

The U. S. Bureau of Indian Affairs (Wapato Indian

1
2 Irrigation Project) has the list of names and addresses for users
3 of water on land owned by the Yakima Nation; by non-Indian fee
4 owners; by Indian fee owners; and for lands held in trust by the
5 U. S. (Affidavit, Louis B. Hilderbrand - Exhibit No. 5).

6 The Yakima County Treasurer collects the assessments for
7 14 of the irrigation districts and also has on the computer the
8 names and addresses of the water users in the Yakima-Tieton
9 Irrigation District. This information regarding water users en-
10 compasses nearly 11,000 parcels of land. (Affidavit, Dale Gray -
11 Exhibit No. 8).

12 Summarizing most of the other affidavits, the evidence
13 shows that each of these water distributors have the names and
14 addresses of the water users within their records. Some, however,
15 list other entities, who further distribute water, as one distributee
16 and then that distributee has the names and addresses of users to
17 whom it distributes water.

18 As an example of the above, the City of Yakima receives
19 water from a number of irrigation districts and canal companies, as
20 well as diverting water directly from the Naches River. The City
21 is usually listed as one distributee in the records of those districts
22 and companies. Thereafter, the City (population approximately
23 52,000) supplies 16,911 homes and businesses with domestic water
24 and 10,953 parcels of land with irrigation water. The same es-
25 sentially applies to the City of Ellensburg with a population of
26 12,000 plus. (Affidavit, J. W. McArdle - Exhibit No. 9).

27 It is also noted in various affidavits that some districts
28 obtain some, if not all, of their water through other entities'
29 distribution system, i. e. Prosser Irrigation District receiving
30

1
2 water through the Sunnyside Valley Irrigation District canals and
3 Terrace Heights Irrigation District receiving its water through
4 Roza Irrigation District canals. Each of these, however, maintain
5 records of the names and addresses of those to whom they distribute
6 water.

7 The United States has been joined as a party herein (and
8 has appeared and filed a claim herein as noted previously) under
9 what is known as the McCarran Amendment, 43 U.S.C. § 666, which
10 reads as follows:

11 "(a) Consent is given to join the United States as
12 a defendant in any suit (1) for the adjudication of
13 rights to the use of water of a river system or other
14 source, or (2) for the administration of such rights,
15 where it appears that the United States is the owner
16 of or is in the process of acquiring water rights by
17 appropriation under State law, by purchase, by ex-
18 change, or otherwise, and the United States is a
19 necessary party to such suit. The United States,
20 when a party to any such suit, shall (1) be deemed
21 to have waived any right to plead that the State
22 laws are inapplicable or that the United States is
23 not amenable thereto by reason of its sovereignty,
24 and (2) shall be subject to the judgments, orders,
25 and decrees of the court having jurisdiction, and may
26 obtain review thereof, in the same manner and to the
27 same extent as a private individual under like cir-
28 cumstances: Provided, That no judgment for costs
29 shall be entered against the United States in any
30 such suit."

(Emphasis added)

22 The Sunnyside Valley Irrigation District (SVID) has filed
23 herein a Motion to Dismiss. The Union Gap Irrigation District and
24 Yakima Valley Canal Co. have joined in a Motion for Determination of
25 Jurisdiction and Order for Joinder of Necessary Parties. Both of
26 these motions raise the same jurisdictional issues and will there-
27 fore be considered together. The thrust of the SVID motion is to
28 the effect that inasmuch as individual landowners, who can be
29 ascertained, have not been personally served, there can be no
30

1
2 "general adjudication" of their water rights and, consequently, the
3 United States is not properly a party hereto under the McCarran
4 Amendment, supra, thus preventing any meaningful adjudication of
5 water rights within the Yakima River Basin. The thrust of the
6 motion of the other two districts is for the determination of
7 whether the Court has obtained jurisdiction over the United States
8 for its claimed water rights and reserved water rights for the
9 Yakima Indian Reservation and also over the individual land owners
10 known or available; if not, then joinder of all "necessary parties"
11 to a "general adjudication" should be ordered before proceeding
12 further. The United States has filed a memorandum and argues in
13 favor of the motion by the Union Gap Irrigation District and the
14 Yakima Valley Canal Co.

15 In respect to the memorandum of the United States, the
16 Justice Department also presented the argument that an official
17 of the State, i. e., the Director of Ecology, cannot bring this
18 action and also act as referee herein. The State was the only other
19 party to present a memorandum on this issue, but it was not argued
20 to the Court by anyone, including the Justice Department. Firstly,
21 the case is not in a proper posture for a decision on this issue at
22 this time. Secondly, if counsel presents no argument on an issue,
23 as here, it may be presumed to be abandoned. Transamerica Insurance
24 Group v. United Pacific Insurance Co., 92 Wn.2d 21, 28-29; Roberts
25 v. Atlantic Richfield Co., 88 Wn.2d 887; State v. Williams, 96 Wn.2d
26 215. Therefore, this opinion does not address that issue.

27 The United States has been served, has entered a general
28 appearance and filed claims herein. The water rights claimed are
29 on its own behalf for National forest lands (which cover many
30

1
2 thousands of acres in the Yakima River Basin), the Yakima Firing
3 Center (U.S. Army), and also as trustee of reserved water rights
4 on behalf of the Confederated Bands and Tribes of the Yakima Indian
5 Nation. A very substantial part of the Yakima Indian Reservation
6 also lies within the Yakima River Basin. Thus, to adjudicate all
7 of the water rights within the Basin, the United States must be
8 a party herein. Due to the sovereign status of the United States,
9 this can only be accomplished through the provisions of the
10 McCarran Amendment, supra.

11 The "reserved" water rights claims by the United States
12 had their genesis in Winters v. United States, 207 U. S. 564 (1908),
13 wherein it was held that by reserving land for the use of Indians,
14 the United States also thereby impliedly reserved all necessary
15 water to the beneficial use of those lands, which water rights
16 then became appurtenant to the land. This Winters doctrine was
17 more recently applied and explained in Cappaert v. United States,
18 426 U.S. 128 (1976) wherein it was stated:

19 "...when the Federal Government withdraws its lands
20 from the public domain and reserves it for a federal
21 purpose, the Government, by implication reserves
22 appurtenant water then unappropriated to the extent
23 needed to accomplish the purpose of the reservation.
24 ...The doctrine applies to Indian Reservations and
25 other federal enclaves, encompassing water rights
26 in navigable and non-navigable streams...The implied-
27 reservation-of-water doctrine, however, reserves only
28 that amount of water necessary to fulfill the pur-
29 pose of the reservation, no more."

25 It has now been firmly established that, if properly
26 brought before the Court under the McCarran Amendment, these
27 federal reserved rights are subject to general adjudication in
28 state court proceedings for the determination of water rights.
29 "We conclude that the state court had jurisdiction over Indian
30

1
2 water rights under the Amendment". Colorado River Water Con-
3 servation District v. United States, 424 U.S. 800 (1976). See also
4 United States v. District Court in and for County of Eagle, 401 U.S.
5 520 (1971) and United States in and for Water Division No. 5, 401
6 U.S. 529 (1971).

7 "...the United States is the proper party defendant in any
8 general water rights adjudication proceeding, whether brought in
9 federal court or state court, relating to federally created water
10 rights, including those reserved for use by Indian tribes."
11 (Emphasis added). Jicarilla Apache Tribe v. United States, 601
12 Fed.2d 1116, 1127 (1979). Therefore, the "reserved" water rights,
13 as well as those claimed on its own behalf, which are now claimed
14 by the United States may be adjudicated in this proceeding.

15 In addition to these water rights claims by the United
16 States, what else then is needed to constitute this action as a
17 "general water rights adjudication proceeding"? The McCarran
18 Amendment, 43 USC §666, was passed by Congress in 1952 and, as
19 stated before, in pertinent part reads as follows:

20 "(a) Consent is given to join the United States
21 as a defendant in any suit (1) for the adjudication
22 of rights to the use of water of a river stream
23 or other source...where it appears that the
24 United States is the owner of...water rights by
appropriation under State law, by purchase, by
exchange, or otherwise, and the United States is a
necessary party to such suit."

25 In 1957, Miller v. Jennings, 243 F.2d 157, was decided.
26 In that case a Reclamation District, and five landowners claiming to
27 represent a class of water users brought suit against various Bureau
28 of Reclamation officials, eleven other individuals alleged to repre-
29 sent a class of a thousand others and the United States. Motions
30

1
2 to dismiss were made on the grounds that the United States had not
3 consented to be joined. The District Court dismissed the action and
4 the Court of Appeals, Fifth Circuit, affirmed the dismissal, stating:

5 "The United States has not given its consent to be
6 joined as a defendant in every suit involving
7 water rights. It may be made a party only in
8 suits 'for the adjudication of rights to the use
9 of water of a river system or other source.' There
10 can be an adjudication of rights with respect to
11 the upper Rio Grande only in a proceeding where
12 all persons who have rights are before the tribunal.
13 The Ninth Circuit Court of Appeals has most suc-
14 cinctly stated the doctrine in this manner: 'The
15 only proper method of adjudicating the rights on a
16 stream, whether riparian or appropriative or mixed,
17 is to have all owners of land on the watershed and
18 all appropriators who use water from the streams
19 involved in another watershed in court at the same
20 time. People of the State of California v. United
21 States, 9 Cir., 1956, 235 F.2d 647, 622.'"

22 (It should be noted, parenthetically, that the Ninth
23 Circuit case cited was brought by the United States and therefore
24 the McCarran Amendment was not involved in that matter). In
25 Miller v. Jennings, supra, the Court went on to say, quoting from
26 one of their prior decisions: "The declaratory judgment would be
27 binding only on those parties actually before the court; each new
28 party asserting his rights in the waters of the river, in the same
29 as any other court, would have the right to relitigate the questions
30 already adjudged or between those before the court."

31 The holding was further applied and amplified in State
32 of California v. Rank, 293 F.2d 340, 9 Cir., (1961) when it was
33 stated:

34 "There can be little doubt as to the type of suit
35 Congress had in mind. It was not a private dispute
36 between certain water users as to their conflicting
37 rights to the use of waters of a stream system;
38 rather, it was the quasi-public proceeding which
39 in the law of western waters is known as a "general
40 adjudication" of a stream system: one in which the
rights of all claimants on a stream system, as

1
2 between themselves, are ascertained and officially
3 stated."

4 Thus, the court there concluded that the water rights
5 claims of all users on a stream system must be established inter
6 sese and, as pointed out in Miller v. Jennings, supra, this cannot
7 be established by a class action. The claimants individually must
8 be before the court. The U. S. Supreme Court agreed in Dugan v.
9 Rank, 372 U.S. 609 (1963).

10 We now proceed to determine who else, besides the United
11 States, are the proper claimants to be brought before the court in
12 order to have a general adjudication herein. The Reclamation Act
13 of 1902, 43 U.S.C. Sec. 372, provides that: "The right to the use
14 of water acquired under the provisions of the reclamation law shall
15 be appurtenant to the land irrigated, and beneficial use shall be
16 the basis, the measure and the limit of the right." Act of June 17,
17 1902, c.1093, Sec. 8. Similarly, the Washington Legislature, by
18 Laws of Wash., 1917, c.117 §39 (RCW 90.03.380) provided that "The
19 right to the use of water which has been applied to a beneficial
20 use in the state shall be and remain appurtenant to the land or
21 place upon which the same is used...."

22 The parties supporting these motions urge that by virtue
23 of these statutory provisions, the individual landowners (water
24 users) are necessary parties to this action and that due process
25 requires that they be personally served in order to be brought
26 before the court. I will take up these issues seriatim.

27 Initially, the movants rely upon Ickes v. Fox, 300 U. S.
28 82, which was an action to enjoin the Secretary of the Interior
29 from enforcing an order he had promulgated to make the water users
30 pay for any water used in excess of 3 acre-feet per acre when they

1
2 had, under contract and by beneficial use, determined 4.84 acre-feet
3 of water per acre was needed and that amount of water had been so
4 used for years. The United States claimed to be a necessary party
5 to the action, claiming ownership in the waters diverted for the
6 reclamation project, and, as the United States had sovereign
7 immunity, the action must be dismissed. The Supreme Court disagreed,
8 holding under the Reclamation Act and the Washington statutes as
9 follows:

10 "Respondents (the landowners) had acquired a
11 vested right to the perpetual use of the waters
12 as appurtenant to their lands...Although the
13 government diverted, stored and distributed the
14 water, the contention of the petitioner (U.S.)
15 that thereby ownership of the water or water rights
16 became vested in the United States is not well
17 founded. Appropriation was made not for the use
18 of the government, but, under the Reclamation Act,
19 for the use of the landowners; and by the terms of
20 the law and of the contract already referred to,
21 the water rights became the property of the land-
22 owners, wholly distinct from the property right
23 of the government in the irrigation works. ...
24 And in...the State of Washington, it has long been
25 established law that the right to the use of water
26 can be acquired only by prior appropriation for
27 a beneficial use; and that such right when thus
28 obtained is a property right, which, when acquired
29 for irrigation becomes, by state law and here by
30 express provision of the Reclamation Act as well,
part and parcel of the land upon which it is applied."

21 In another contract action, involving a real estate con-
22 tract for the sale of land, together with a water right for sufficient
23 water to beneficially irrigate said land, the Washington Supreme
24 Court in Lawrence v. Southard, 192 Wash. 287, followed the decision
25 of Ickes, supra. These cases were both contract actions and were
26 not dealing in any manner with the adjudication of water rights.
27 They stand solely for the proposition that, by appropriation
28 (which may be by direct appropriation or indirect appropriation
29
30

1
2 through the Bureau of Reclamation or an irrigation district) and
3 beneficial use, the water right then becomes appurtenant to the
4 land and is a vested property right in the landowner. In the
5 context of this matter, it should be noted that this vested property
6 water right belongs to every beneficial user, whether it be the
7 homeowner who irrigates his lawn and shrubs, the apple grower
8 with 80 acres of orchard, the vineyard owner with 120 acres of
9 grapes or the hop grower with 600 acres of hops. That water may
10 be just as precious, or even more so, to a retired couple with a
11 60-foot by 100-foot lot with a vegetable garden in the backyard
12 as it would be to a hay grower with hundreds of acres of alfalfa.
13 In considering the necessity of joinder of all of these people as
14 "necessary parties", the Court inquired of counsel as to how many
15 people were estimated to be served and joined. The answer was
16 perhaps 40,000 such personal services. However, when you consider
17 the cities and towns of Easton, Cle Elum, Ellensburg, Selah, Naches,
18 Yakima, Wapato, Toppenish, White Swan, Harrah, Zillah, Granger,
19 Sunnyside, Grandview, Prosser and Benton City, as well as all of
20 the subdivisions surrounding those municipal corporations and all
21 of the smaller 5 and 10 acre plots in the Yakima River Basin, the
22 Court would estimate that it would encompass many, many times that
23 number. As previously noted, almost 17,000 homes and businesses
24 are supplied with domestic water in Yakima alone. Per the affidavit
25 of Dale Gray, Yakima County Treasurer, he has 14 of the smaller
26 irrigation districts on his computer. These cover 11,000 parcels
27 of land. Each of these parcels use water for irrigation and
28 domestic purposes. This water, then is the absolute lifeblood
29 of this Basin; without it, none of these owners of the vested
30

1
2 property water rights could exist and the land could be barren.

3 It should further be noted, however, that even though
4 these landowners have vested property water rights, the Bureau of
5 Reclamation, the irrigation districts and other diverters/appropri-
6 ators of surface waters still retain some rights pertaining to
7 the water they divert and deliver to the users. Thus, we see that
8 the diverter/appropriator/deliverors retain the right to bring
9 action, on behalf of the users, to prevent others from taking water
10 which belongs to the appropriators and their users. See United
11 States v. Union Gap Irrigation Co., 209 Fed. 274; Westside Irrigation
12 Co. v. United States, 246 Fed. 212; Ide v. United States, 263 U.S.
13 497. This is very clearly defined in United States v. Tilley,
14 124 F.2d 850, 861, 8 Cir., (1942), where the court stated:

15 "In the sense that the right to the beneficial use
16 of such waters attaches to and follows the lands
17 under the project or canal to which application
18 is made, the appropriative rights may be said to
19 belong to the landowners. This right to the bene-
20 ficial use on the part of a landowner is, therefore,
21 in the nature of a vested right. But the owner of
22 the irrigation project or canal also has an interest
23 in such appropriative rights, by virtue of the
24 fact that the statute permits him to make the
25 appropriation and diversion, that the maintenance
26 of such appropriative rights is necessary in accomplish-
27 ing the purpose of the project or canal, and that the
28 law imposes certain duties and obligations upon him
29 in the carriage, distribution, and conservation of
30 the diverted waters. This interest clearly is such
as to enable him to take any necessary steps to
protect the scope of the rights conferred by the
state appropriation statutes, not merely in represent-
atively securing and protecting the full measure of
beneficial use for the landowners under the project
or canal, but also in effectuating generally the
object of the project or canal as an enterprise."
(Emphasis added)

More will be said of this matter later in this opinion.

Now we turn to the question of the requirements of due
process respecting the owners of these vested property water rights.

1
2 As has been noted prior hereto, the State has personally served all
3 persons and entities, or their successors, who had previously filed
4 claims with the D.O.E. under the Water Claims Registration Act
5 of 1967, RCW 90.14, and those issued permits or certificates
6 under the Water Code of 1917, RCW 90.03. Service was also made
7 by certified mail as authorized by RCW 90.03.130, and the Court.
8 Persons or entities not found or not responding to certified mail
9 and all those unknown were served by publication in the 4 major
10 newspapers in the area for 6 consecutive weeks. (It should be
11 noted that the D.O.E. held 8 public meetings about this matter,
12 which attracted over 1,000 persons. The Court is also aware that
13 all of the news media - print, video and radio - carried many,
14 many news stories concerning the case. This, however, matters not.
15 "In addition to the requirements of the due process clause, statutory
16 service requirements are also necessary in order for the court to
17 finally adjudicate a dispute. Even though the plat sponsors had
18 actual knowledge of the pending litigation, such notice standing
19 alone is insufficient to import the statutory notice required to
20 invoke the court's in personam jurisdiction." Veradale Valley
21 Citizens Planning Committee v. Board of County Commissioners of
22 Spokane County, 22 Wn.App. 229 (1978).)

23 Relative to this matter, the statute (RCW 90.03.130)
24 provides for personal service, as in civil actions, or if authorized
25 by the court, service by certified mail with return receipt. If
26 not found, the persons or entities may then be served by publication.
27 This statute was meticulously and properly followed in this case.
28 However, the statute pertaining to who are the "necessary parties"
29 to be served herein, RCW 90.03.120, reads in pertinent part as
30

1
2 follows: "...a summons...against all known persons claiming the
3 right to divert the water involved and also all persons unknown
4 claiming the right to divert the water involved...Provided, however,
5 that any persons claiming the right to the use of water by virtue
6 of a contract with claimant to the right to divert the same, shall
7 not be necessary parties to the proceedings."

8 In view of this language, the Department of Ecology
9 apparently interpreted "known persons claiming the right to divert
10 the water" to be those persons or entities who had filed claims
11 for appropriation of surface water as previously mentioned, and
12 properly so. As to the interpretation of the proviso, application
13 was made to this Court which ultimately resulted in the entry of
14 the order herein dated June 5, 1981. Again, that order re the
15 proviso stated:

16 "1. That all irrigation districts, water distribution
17 districts, canal companies, ditch companies, cities,
18 towns and other governmental entities organized
19 pursuant to the statutes of the United States or the
20 State of Washington may file claims herein on behalf
21 of all water users within their respective boundaries
22 to whom they supply water or whose lands are assessed
23 by such entity and such filing, if timely and proper,
24 will be deemed by the court to be a filing of a
25 claim by all such water users within the boundaries
26 of such entities for the water obtained from such
27 entities. After the filing of the claim by such
28 entities, such individual water users who obtain
29 their water solely from such entities or whose lands
30 are assessed by such entity need not file individual
claims herein but may do so if they so desire.

'2. Any water user, whether within or without the
boundaries of the above described entities and whether
or not partially covered by the claim of such entity
for water obtained from such entity who directly
diverts any surface water (including but not limited
to springs, ponds, lakes, streams, creeks or rivers)
must file a claim for the water so diverted on or
before September 1, 1981 or they may lose such water
right."

1
2 As previously indicated, this order was mailed by the
3 D.O.E. on June 16, 1981 to all persons and entities previously
4 served personally or by mail herein. By the claim cut-off date of
5 September 1, 1981 over 2,100 claims had been filed. Among the
6 claimants who have filed claims herein, of course, are all of the
7 water diverting and distributing entities in the Basin.

8 R.C.W. 90.03.220 provides:

9 "Whenever proceedings shall be instituted for
10 the determination of the rights to the use of the
11 water, any defendant who shall fail to appear in
12 such proceedings, after legal service, and submit
13 proof of his claim, shall be estopped from sub-
14 sequently asserting any right to the use of such
15 water embraced in such proceeding, except as
16 determined by such decree."

17 Firstly, the court believes that it is apparent from,
18 and implicit in, the statutory proviso and the order of this
19 Court that service upon the diverting and distributing entity
20 should be considered service upon the water users to whom the
21 entity supplies water in order to bring such water users before
22 the Court. Secondly, by RCW 90.03.220, it is apparent that if
23 no claim is filed by or on behalf of such water users, after proper
24 service, they may lose their water right. Of course, it further
25 is apparent that if these water users are not served, either
26 personally or constructively through their water supplier, then
27 they are not thereafter precluded from challenging any decree or
28 judgment herein and we may not have a "general adjudication"
29 within the meaning of the McCarran Amendment and the cases con-
30 struing the same.

In view of this, it is the position of the moving parties
that the individual water users must be each personally served
(or at least served by certified mail with return receipt as

1
2 contained in the statute) in order to afford these individual
3 water users their constitutional right to due process on a matter
4 affecting their vested property rights. They urge, from the
5 affidavits on file herein, that the State can determine who most,
6 if not all, of the individual water users are by starting with the
7 original diverting entity and ascertaining to whom they deliver
8 water; then ascertaining from the second entity the names and
9 addresses of the persons and entities to whom they supply water
10 and so on through each supplier until we reach the ultimate water
11 user. The affidavits show, of course, that each of these entities
12 has a listing of the names and addresses of those to whom they
13 supply water.

14 The fourteenth amendment to the U. S. Constitution and
15 Article I, Section 3 of the Washington State Constitution are
16 substantially identical in that no person can be deprived of life,
17 liberty or property without due process of law. Schroeder v. City
18 of New York, 371 U. S. 208, (1962) was a case where the City wanted
19 to divert a portion of the Neversink River above the Schroeder
20 property, which would derogate from Schroeder's rights in the water
21 from the river. The statute called for notice by publication in
22 two newspapers in the county where the real estate was located
23 and posting of notice in conspicuous places in the vicinity.
24 Schroeder did not see the publications and no notice was posted
25 on her property. The Supreme Court held the statute inadequate,
26 saying:

27 "An elementary and fundamental requirement of
28 due process in any proceeding which is to be accorded
29 finality is notice reasonably calculated, under all
30 the circumstances, to apprise interested parties of
the pendency of the action and afford them an

1
2 opportunity to present their objections... The
3 general rule...is that notice by publication
4 is not enough with respect to a person whose
5 name and address are known or very easily ascertain-
6 able and whose legally protected interests are
7 directly affected by the proceedings in question."
8 (Emphasis added)

9 See also Robinson v. Hanrahan, 409 U. S. 38, (1972).

10 Both of these just cited cases rely heavily upon, and quote from,
11 the landmark case of Mullane v. Central Hanover Bank and Trust
12 Company, 339 U. S. 306 (1950).

13 In the Mullane case, the statute provided that the bene-
14 ficiaries of a number of small trusts administred in a common
15 trust could be notified of the report of the trustee and settlement
16 of accounts by newspaper publication for 4 consecutive weeks, with-
17 out naming the beneficiaries. All that the citation required was
18 the name and address of the trust company, the date the common
19 trust was established and a list of all the participating trusts.
20 The trustee had the names and addresses of the income beneficiaries.
21 The U. S. Supreme Court held these notice provisions to be inadequate
22 to constitute due process, stating that the words of the Due Process
23 Clause, "at a minimum...require that deprivation of life, liberty
24 or property by adjudication be preceded by notice and opportunity
25 for hearing appropriate to the nature of the case." (Emphasis added)
26 They held that the known and readily ascertainable beneficiaries
27 must be individually notified, although they did not require personal
28 service, allowing service by mail to be sufficient therein. How-
29 ever, Mullane does not set any hard and fast rule as to how such
30 notification must be accomplished. In recognizing that there may
be other practical considerations, they stated:

"A construction of the Due Process Clause which
would place impossible or impractical obstacles in

1
2 the way cannot be justified...An elementary and
3 fundamental requirement of due process in any pro-
4 ceeding which is to be accorded finality is notice
5 reasonably calculated, under all the circumstances,
6 to apprise interested parties of the pendency of
7 the action and afford them an opportunity to present
8 their objections. The notice must be of such nature
9 as reasonably to convey the required information...
10 and it must afford a reasonable time for those in-
11 terested to make their appearance...But if with due
12 regard for the practicalities and peculiarities of
13 the case these conditions are reasonably met, the
14 constitutional requirements are satisfied. The
15 criterion is not the possibility of conceivable
16 injury but the just and reasonable character of the
17 requirements, having reference to the subject with
18 which the statute deals." (Emphasis added)

19 Thus, they held that because of a large number of bene-
20 ficiaries with small interest in the fund, notice could be given by
21 mail as opposed to personal service in view of the expense and
22 delay that would be involved in such personal service.

23 This flexibility of the means used to meet the require-
24 ments of due process has also been recognized in this state. In
25 Olympia Forest Products, Inc. v. Chaussee Corporation, 82 Wn.2d 418
26 (1973), Justice (now Chief Justice) Brachtenbach, speaking for a
27 unanimous court, observed:

28 "However, while the minimal requisites of due process
29 are definite, their form may vary according to the
30 exigencies of the particular situation...This
flexibility means that 'A procedural rule that may
satisfy due process in one context may not necessarily
satisfy procedural due process in every case. The
procedural safeguards afforded in each situation should
be tailored to the specific function to be served by
them. Also, in determining the specific procedures
required by due process under any given set of circum-
stances, we must consider: 'The precise nature of the
interest that has been adversely affected, the manner
in which this was done, the reasons for doing it, the
available alternatives to the procedure that was
followed, the protection implicit in the office of
the functionary whose conduct is challenged, and the
balance of the hurt complained of and good accomplished.'"
(Emphasis added).

1
2 This, then, brings us to the final, ultimate and critical
3 issue in this matter, to-wit, is service upon the diverter/appro-
4 priator/supplier sufficient procedural due process to bind the
5 landowner/water user in the determination of the nature and extent
6 of his water rights?

7 It is established, in United States v. Tilley, supra, that
8 there is an element of "privity" that exists between the various
9 districts, canal companies, etc. and the landowners who beneficially
10 use the water supplied to them by such appropriators. As is true
11 in the State of Washington:

12 "Such a canal company is 'of the nature of a public
13 service corporation...Its rights and duties are modified
14 by the nature of its functions. It cannot serve the
15 public generally, but only the occupiers of land lying
16 under the ditch...The law grants to corporations of
17 this character valuable rights, but with these rights
18 are accompanying duties to the landholders for the
19 irrigation of whose land the rights are granted, and,
20 if these obligations are not fulfilled, the law will
21 interfere at the request of the party injured.'
22 United States v. Tilley, 124 F.2d 850, 857. 'The
23 State has itself recognized the unity and integration
24 of the project by making possible and allowing a
25 single appropriation to be made for the benefit of
26 all the lands thereunder.'" U. S. v. Tilley, supra,
27 page 861. (Emphasis added).
28 See also the language from this case which is quoted
29 on page 15 of this memorandum.

30 Clearly, there is an identity of interest to the extent
that the diverter/appropriating entity must appropriate (and
protect that appropriation) and supply as much water as may be
necessary for the beneficial use of the landowners. The principle
of "privity" in water adjudication matters has been recognized
much more recently in the case of United States v. Truckee-Carson
Irrigation District, State of Nevada, 649 F.2d 1286, 9 Cir., (1981)
wherein it was stated, page 1302 et seq:

1
2 "Generally, preclusion extends no further than to
3 the parties of the prior litigation...Thus, 'judicial
4 action enforcing (the prior judgment) against the
5 person or property of the absent party is not that
6 due process which the Fifth and Fourteenth Amendments
7 required'... (Page 1303) This general rule is sub-
8 ject to an exception for persons in privity with
9 parties. Privity 'denotes a legal conclusion rather
10 than a judgmental process'...It simply represents a
11 conclusion that a person is so closely connected to
12 a party that with respect to the issues in liti-
13 gation the person's interests are essentially the
14 same as those litigated interests of the party. A
15 finding of privity, then, reflects a belief that the
16 relation between the party and non-party is so close
17 that the judgment may fairly bind the non-party...
18 Privity and fairness exist if a party represented
19 the interests of the non-party, such as a guardian
20 or fiduciary might represent a ward or beneficiary.
21 ...Thus, the general rule that non-parties are not
22 precluded is subject to the privity exception when
23 a non-party was represented in the prior proceeding."

24 See also footnote 12 on this page 1303 saying, "If a
25 person was represented in the prior proceeding, a judgment may
26 bind him even though he was not personally served." (Citing
27 Restatement (Second) of Judgments, §85(2)). Thus, we see that
28 in respect to due process requirements that need to be met in
29 order to accord finality to these proceedings, this privity
30 exception may apply if there is an identity of interest or a
fiduciary relationship between the water supplier and the water
user. (The Court is aware, of course, of the exceptions to the
privity exceptions contained in Section 86, Restatement (Second)
of Judgments. However, the Court also cannot assume that such
exceptions would apply herein.) A fiduciary relationship between
the entity and the individuals was recognized very early in
this state. In Thorpe v. Tenem Ditch Company, 1 Wash. 566
(1889), it was stated:

"...the individuals who were the proprietors of the
land incorporated themselves formally, and...transferred

1
2 the right to control the water for their individual
3 use to the corporation. This certainly would make the
4 corporation a trustee of an express trust, and the
5 transfer of the control and the ditch in actual
6 possession of that corporation would be sufficient
7 to create a title by which the corporation could sue
8 as trustee of an express trust." (Emphasis added)

9 All throughout the western United States, and down through
10 the years, this relationship between the districts and the land-
11 owners has been recognized and upheld. See Arroyo Ditch & Water
12 Co. v. Baldwin, 100 P. 874, (Cal., 1909); Park v. Park, 101 P.403,
13 (Colo., 1909); Montezuma Canal Company v. Smithville Canal Company,
14 218 U.S. 371, (Ariz., 1910); Smith v. Enterprise Irrigation District,
15 85 P.2d 1021 (Ore., 1939). In the very early case of Combs v.
16 Farmers High Line Canal & Reservoir Co., 88 P. 396, (Colorado, 1907),
17 the plaintiffs were landowners seeking to establish some appropri-
18 ative water rights. There had previously been an adjudication
19 between the Rocky Mountain Water Company, from whom they received
20 their water, and the defendants. In holding that the individual
21 plaintiffs were precluded from maintaining the action, the court
22 observed as follows:

23 "Certainly the right to the use of water for irri-
24 gation by a consumer - that is, his right as an
25 appropriator of water - is involved and connected
26 with the right of the carrier...In other words, the
27 owner of the ditch is in this proceeding regarded
28 as the representative of the consumers thereunder,
29 and while the rights of the consumers to the use of
30 the water are distinct and independent of the rights
of the carrier, which transports the water for hire,
yet the rights of the two combined constitute a
completed appropriation...[The plaintiffs] are bound
by the provisions of the former decree as to the
quantity of water they may have diverted for their
benefit by their carrier, whoever such carrier may
be...We say that these plaintiffs had due notice of,
and through their representative or trustee partici-
ated in, the former proceedings that ripened into
a decree...This court upon several occasions has held
that a ditch company, by means of which water consumers

1
2 enjoy their appropriation, is the trustee and
3 representative of the consumer for the protection
4 of the rights of the latter."
 (Emphasis added)

5 In another early Colorado case, Farmers Independent Ditch
6 Co. v. Agricultural Ditch Co., 45 P. 444 (1896), there was an
7 appropriative water right dispute between two water supply carriers.
8 There it was held that each district could act for, and bind, the
9 landowner/stockholder without the necessity of making the water
10 users parties to the action. Thus, we can see that it has been
11 firmly established, in this state and throughout the West, that
12 because of the privity of interest between the two, a water carrier
13 acts as a trustee in a representative capacity for the water
14 users. It was interesting to note, in the recitation of facts in
15 Lawrence v. Southards, supra, that in 1906, the Secretary of the
16 Interior required the landowners in the Reclamation Project to
17 incorporate into the Sunnyside Waters Users Association in order
18 to enter into a contract with the United States for delivery of
19 water to their individual lands. This appears to be a clear example
20 of the recognition that the only practical manner of dealing with
21 such a large number of individual water rights holders is through an
22 entity which can speak for all of those persons in a representative
23 capacity. Undoubtedly, this was in the minds of the Legislature
24 in 1917 when they provided the means to adjudicate, as in the in-
25 stant action, the various rights of people who seek to divert
26 surface water. (RCW 90.03). The proviso to RCW 90.03.120, as
27 amplified by this Court in the order of June 5, 1981, clearly
28 recognizes the trustee-beneficiary relationship between the water
29 diverters and the water users, and determines that the rights of the
30 users can, and will be, protected by the water suppliers because

1
2 of their joint interest in protecting their water appropriation.
3 The users are, through their suppliers, given notice and the
4 opportunity to be heard in protection of their rights.

5 As was argued to the Court, were it otherwise and all
6 water users were joined as parties, there would be a tremendously
7 unwieldy duplication of claims. The original diverters would
8 certainly have to file a claim; then the canal companies would feel
9 obliged to file a claim and to protect their water rights, the
10 individual landowner would have to file a claim, all of which would
11 cover the same land and water right. It seems clear to this Court,
12 however, that such duplication can be avoided. Joinder of the
13 water diverter/supplier in this action certainly provides "due
14 notice" to the entity with whom the landowners are in privity that
15 their rights may be affected. Certainly, the individuals are
16 "before the court" (Miller v. Jennings, supra) when a claim is
17 filed on their behalf by the water diverter/carrier for all of the
18 water to be beneficially used, under contract, by the landowners
19 within the boundaries of such entity.

20 Additionally, there are other "exigent circumstances" that
21 make the statutory proviso a "reasonable and available alternative"
22 to joinder of all landowners. Olympia Forest Products, Inc. v.
23 Chaussee Corporation, supra. The time and delay that would be
24 occasioned in obtaining, crosschecking, listing and contacting all
25 of the thousands of water users would be substantial. The cost,
26 both to the State and to the districts involved would be substanti-
27 ally prohibitive. As was said in Farmers Independent Ditch Co. v.
28 Agricultural Ditch Co., supra, page 448: "Under some of the ditches
29 in this state there are thousands of consumers, and it would be
30

1
2 impracticable, by reason of their number alone, to make them
3 parties to a proceeding like the one before us. Moreover, such
4 consumers change from year to year, and this furnishes an additional
5 reason against the contention of defendants in error. Courts will
6 never sanction a practice which imposes an impossible, or even an
7 unreasonable, requirement upon litigants." (Emphasis added)

8 Finally, there is an almost insurmountable problem that
9 would be faced by many thousands of water users themselves if joined
10 herein. RCW 90.03.140 sets forth what each claimant must prove
11 and provides, inter alia, (2) that they must state the full nature
12 of the right, or use, on which the claim is based; (3) the time of
13 initiation of such right and commencement of such use; (4) the
14 date of beginning and completion of construction; (5) the dimensions
15 and capacity of all ditches existing at the time of making the
16 statement; (6) the amount of land under irrigation and the maximum
17 quantity of water used thereon prior to the date of said statement...
18 (7)...the legal description of the subdivision of land on which
19 the point of diversion is located.

20 It is inconceivable to the Court that many thousands of
21 people within this Basin would be able to properly meet these re-
22 quirements for filing a claim herein. Water has been furnished to
23 much of this land since around the turn of the century, and before.
24 The land itself has been divided, sub-divided, sold and resold
25 many, many times over the years. The configurations of the various
26 parcels may have changed substantially. Only the water supplier
27 would be able to delineate the acreage involved to which it supplies
28 a certain quantity of water. Most of the individual users would
29 not have any idea of when water was first used on their land; the
30

1
2 maximum amount of water that had ever been used on it; the capacity
3 of the ditches; or the point of diversion of the water. Nor would
4 they know where or how to obtain this information. The cost to
5 each of ascertaining this would be overwhelming. Many, many people
6 have no idea where their water comes from other than a weir box
7 at the corner of their 2 1/2 or 5-acre plot or, for the homeowner
8 in a subdivision, that it comes through a pipe to his property and
9 he pays a certain sum of money each year for the water to the
10 local subdivision association. Out of sheer necessity, they must
11 and can only rely upon the water diverter/carrier entity which
12 supplies to them their water, to represent them and present a claim
13 on their behalf to obtain, or maintain, a sufficient water appropri-
14 ation for their use upon the land.

15 In summation, it is the holding of this Court that if this
16 action is a general adjudication and the Court has obtained juris-
17 diction over the necessary parties, then the United States has been
18 properly joined under the McCarran Amendment as to all federal water
19 rights, including any reserved rights for the Yakima Indian Nation.
20 Further, the Court holds that the landowners are the owners of a
21 vested property water right and that Due Process necessitates that
22 they be given notice and an opportunity to present their claims.
23 Additionally, the Court holds, under the exigent circumstances of
24 this case and pursuant to statute, that direct personal service on
25 each individual water user is not necessary; that the water suppliers
26 are trustees of the water rights for the users; and, that service
27 upon the suppliers is sufficient due process to bring all of the
28 users to whom they supply water before the court. Therefore, the
29 Court holds that such proper service having been effectuated, all
30

1
2 necessary parties are before the Court, this action is a general
3 adjudication of all surface water rights in the Yakima River Basin
4 and that the United States is a proper party defendant herein.

5 The motion of the Sunnyside Valley Irrigation District to
6 dismiss is denied. The motion for Joinder of Necessary Parties
7 by the Union Gap Irrigation District and Yakima Valley Canal
8 Co. is denied; the Court has determined jurisdiction as requested.

9 DATED this 16th day of February, 1982..
10
11

12 Walter A. Stauffer
13 JUDGE
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

- 1 EXHIBIT 21. Affidavit - Jerry D. Talbott - Ahtnaum Irrigation
District.
2
3 22. Affidavit - Walter Rowe - Wapatox Ditch Company
4
5 23. Affidavit - Gordon Hanson - R.S.& C. Irrigation Company
6
7 24. Affidavit - Paul E. Kennard - Schanno Ditch Company
8
9 25. Affidavit - Eric F. Wightman - New Schanno Ditch
Company
10
11 26. Affidavit - Richard Wachsmith - Old Union Irrigation
Company
12
13 27. Affidavit - Al Presson - Broadguage Ditch Company
14
15 28. Affidavit - Richard Wachsmith - Old Union Ditch Company
16
17 29. Affidavit - Eric F. Wightman - New Schanno Ditch Company
18
19 30. Affidavit - All Presson - Broadguage Ditch Company
20
21 31. Affidavit - Paul E. Kennard - Fruitvale Schanno Ditch
Company
22
23 32. Affidavit - Leroy Stewart - Cowychee Ditch Company
24
25 33. Affidavit - Howard Prentice - Simmons-Vaughn-Mobry
Lateral
26
27 34. Affidavit - Richard R. Matson - Nile Ditch Association
28
29 35. Affidavit - Philip E. Johnson - Gleed Canal Company
and Naches Union Ditch Co.
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50