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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

THE STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Plaintiffs,)

MEMORANDUM OPINION RE:
MOTION TO JOIN PARTIES OR
DISMISS THE UNITED STATES

vs.)

JAMES J. ACQUAVELLA, ET AL,)
Defendants.)

This matter is before the Court on the motion of the United States to either join the ground water users in the Yakima River Basin or, in the alternative, dismiss the United States as a party hereto. The United States claims that without the ground water users being joined herein, this is not a "general adjudication" within the meaning of the McCarran Amendment, 43 U.S.C. §666, and therefore, the United States must be dismissed.

PAST HISTORY

This action was commenced in October, 1977, by the State Department of Ecology (DOE), following the 1977 drought, for a complete adjudication of all surface water rights in the Yakima River Drainage Basin, pursuant to R.C.W. 90.03. The stated basic purpose of the action was to determine the priority and quantity of water rights of all surface water users in the Basin in order to properly distribute whatever water is available in low- and water short years,

1 principally during the irrigation season of April through September.
2 The Yakima River Basin encompasses 6,062 square miles. (C.R. Lentz
3 Review, Yakima Project Water Rights and Related Data, December 1974,
4 page 230.) There are six water storage reservoirs with a storage
5 capacity of 1,070,700 acre feet of water. Lentz, page 49. After a
6 Motion for Removal to the United States District Court was made,
7 Judge Marshall Neill, in January, 1979, remanded the matter to this
8 Court for the adjudication of all surface water rights in the Basin.

9 On June 5, 1981, this Court entered an order clarifying the
10 proviso contained in R.C.W. 90.03.120. As part of that order, the
11 Court ruled in Paragraph 3 as follows: "Any individual obtaining
12 ground water which they use solely from a well need not file a claim
13 for such water and they are not parties to this action." (Emphasis
14 added.) Service of this order was made on 4,289 persons or water
15 supplying entities and over 2,100 claims have been filed herein by
16 surface water users.

17 The Union Gap Irrigation District (UGID) and Yakima Valley
18 Canal Company (YVCC) then filed a Motion For Determination of
19 Jurisdiction and Order for Joinder of Necessary Parties. The
20 Sunnyside Valley Irrigation District (SVID) also filed a Motion to
21 Dismiss for failure to join necessary parties. In each instance, the
22 movants were referring to service upon individual water users rather
23 than their water supplying entities. The United States filed a
24 memorandum on October 13, 1981, supporting these motions. Hearings
25 on the motions were heard on November 12, 1981; this Court issued a
26 Memorandum Opinion thereon; reconsideration was requested and
27 hearings thereon were held on April 13, 1982, with supplemental
28 briefs filed thereafter. On June 25, 1982, the Court entered its
29 order denying these motions. At no time, whether in the motions,
30 briefs or oral arguments, was the issue of the necessity for joinder

1 of ground water users in this case ever raised or mentioned.

2 The June 25, 1982, order of this Court was appealed to the
3 Washington Supreme Court and on December 22, 1983, the Supreme Court
4 affirmed the trial court's order. Ecology vs. Acquavella,
5 100 Wn2d 651. This motion to dismiss for failure to join the ground
6 water users in the basin was then filed by the United States on
7 August 13, 1984; briefs were filed by all interested parties and
8 hearing was held thereon on January 29, 1985. This opinion results
9 therefrom.

10 SURFACE AND GROUND WATER

11 To set the background for this motion, it is important to
12 consider the correlation between the surface waters and the ground
13 waters of the Yakima Basin. The surface waters under consideration
14 are those contained in the Yakima River and its tributaries. These
15 streams are principally fed by annual precipitation; run-off from
16 the snow melt in the mountains to the north; return flows through
17 drainage ditches resulting from irrigation diversions upstream; and
18 the spring run-off water captured and contained in the storage
19 reservoirs previously noted. The useable return flow, mentioned
20 above, varies from 350,000 acre feet in years of low water supply to
21 400,000 acre feet in years of heavy run-off. (Affidavit, Omni Perala,
22 attached to United States brief.) This includes surface flow as well
23 as subsurface flow.

24 There are three principal aquifers in the Basin: the basalt
25 system, the Ellensburg Formation system, and the unconfined alluvial
26 system of the valley fill deposits. The basalt system contains both
27 confined and unconfined aquifers. Most wells in the Basin in the
28 basalt system withdraw water from the confined aquifers. Unconfined
29 ground water occurs mainly in unconsolidated sand and gravel deposits.
30 These deposits contain considerable effective ground water storage

1 and are the most important geologic units with respect to affecting
2 surface streamflow in the Basin. (Affidavit, James R. McGill,
3 attached to United States brief.) It is agreed by all parties that
4 these valley fill deposits are hydrologically connected to the
5 Yakima River and its tributaries. (Exhibit 1.) The aquifers in the
6 Basin have a potential of yielding 100 to 2,000 gallons per minute
7 from the wells. In the valley fill deposits, the potential yields
8 range from 200 to 2,300 gallons per minute. (Affidavit,
9 James R. McGill.)

10 To understand the hydrological connection between ground
11 water and in-stream flow, we turn to the affidavit of William Meyer,
12 attached to the United States brief. In part, it reads as follows:

13 "The flow of the ground water . . . is generally
14 . . . from the mountains and higher elevations
15 to the Yakima River and its tributaries
16 Pumping from wells disrupts the natural movement
17 of water in the areas near the wells, causing
18 water formerly moving toward the rivers and its
19 tributaries to be diverted to the wells instead.
20 When a well begins pumping, water discharged from
21 it is initially removed from aquifer storage, but
22 eventually aquifer storage supplies less and less
23 of the water, while diversion of water originally
24 flowing to the river or its tributaries will supply
25 more and more. The effect of the latter is to
26 diminish flow in the affected streams . . . The
27 effect is . . . multiplied by the number of wells
28 that are pumping

29 The time required for pumping to affect stream-
30 flow will vary within the basin depending on
aquifer properties and distance from the well to
the streams. This time can vary from merely hours
for wells near the river or its tributaries to years
for those wells at great distances from them. Those
aquifer properties that control the response time
between initiation of pumpage and subsequent diversion
of streamflow vary greatly within the basin and are
not well known at this time. As a result, it is not
presently possible to predict when pumpage will
affect streamflow for much of the area with much
precision even if pumpage doesn't affect
streamflow in a given year, it will affect it at a
later date. As a result antecedent ground water
conditions can produce noticeable variability in
instream flows, particularly during low flow periods
of the year in the Yakima River Basin."

1 From the records of the Department of Ecology it appears
2 there are, at the least, approximately 19,000 known claimants to
3 water rights relating to ground waters in the Basin. (Affidavit,
4 Glen Fiedler, attached to United States brief.) The vast majority of
5 these ground water rights are on the uplands; above the river on the
6 benches. (Deposition, Eugene Wallace, p. 16.) Also, the vast
7 majority of the ground water withdrawals are de minimus in nature;
8 that is to say, withdrawals of five to ten gallons per minute, one to
9 two acre feet per year. (Affidavit, Eugene Wallace, attached to
10 ████████ States brief; Wallace Deposition, p. 14.)

11 It should be noted that the map, Exhibit 1, illustrates
12 that practically all of the ground water movement is toward the
13 streams and little, if any, water movement outward from the streams
14 to recharge the aquifers occurs. Therefore, it appears that the
15 recharging of the aquifer storage waters must come either from waters
16 used for irrigation or from the annual precipitation. Although not
17 mentioned by any of the hydraulic experts in their affidavits nor by
18 counsel in their briefs or argument, it may be assumed that annually
19 the aquifer storage waters are replenished to some extent by the
20 annual precipitation and also that the annual precipitation will
21 contribute to the ground waters moving toward the streams, thus
22 reducing the effect that would prevail over the years if the water
23 was being pumped from a static source.

24 OBJECTION TO MOTION

25 UGID/YVCC has objected to this motion by the Unites States,
26 claiming that State vs. Acquavella, 100 Wn.2d 651, precludes the
27 Unites States from pursuing the motion and this Court from considering
28 it. As noted before, the trial court entered an order on
29 June 5, 1981, stating that ground water users were not parties to
30 this action. No application for discretionary review of that order,

1 pursuant to RAP 2.3(a), was made by any of the parties hereto. UGID/
2 YVCC filed its Motion For Determination of Jurisdiction and Order for
3 Joinder of Necessary Parties. The trial court entered its order on
4 that motion on June 25, 1982, and the Washington Supreme Court
5 affirmed on December 22, 1983. The assertion is that Acquavella,
6 supra, determines who are "necessary" parties to this action and under
7 the "law of the case doctrine", this Court and the parties are bound
8 thereby. "Under the doctrine of 'law of the case', as applied in this
9 jurisdiction, the parties, the trial court, and (the appellate courts)
10 are bound by the holdings of the (Supreme) court on a prior appeal
11 until such time as they are 'authoritatively overruled'." Greene vs.
12 Roschild, 68 Wn.2d 1, 10. However, the "law of the case" is only a
13 discretionary rule of practice. Greene, supra, p. 9, and is not an
14 inflexible rule, p. 8. The basic principles of the doctrine are set
15 forth in Highlands Plaza, Inc. vs. Viking Investment Corporation,
16 2 Wn.App. 192, 197-198, as follows:

17 "It has long been the law in this state (1) that in
18 the absence of a substantial change of evidence on
19 the second trial, questions determined or which
20 could have been determined, on the first appeal will
21 not be redetermined on the second trial and appeal
22 (cites omitted); (2) it is enough if the contention
23 advanced on the second appeal was necessarily
24 involved in the decision on the first appeal even
25 though no specific mention was made of the matter
26 (cites omitted); (3) accordingly, the decision on
27 the first appeal on substantially the same pleadings
28 and evidence becomes the law of the case, binding
29 upon the parties." (cites omitted) (Emphasis added.)

30 The UGID/YVCC and SVID motions previously filed, heard and
ruled upon related solely to the issue as succinctly stated in
Acquavella,

"The issue is whether due process requires personal
service of process on all individual water users
who get their water under contract from water
distributing entities, or whether service on those
entities is sufficient. The trial court held that
due process requirements were satisfied by service
on the entities. We affirm."

1 Nowwithstanding the caption on the UGID/YVCC motion, no one
2 mentioned anything about ground water users; no one presented any
3 evidence of any kind (such as the affidavits and exhibit filed in
4 support of and in opposition to this motion); no one presented any
5 legal authority on the question of inclusion of ground water users;
6 nor was there any mention of such ⁱⁿ oral argument. The trial court
7 addressed only that matter which was presented to it, and a close
8 reading of Acquavella, supra, clearly indicates that the Supreme Court
9 also confined itself to that one issue noted above. The issues of
10 whether ground water users must be included as parties herein and
11 whether service of process needed to be made upon individual surface
12 water users rather than their water supplying entities are quite
13 clearly separate and distinct issues based upon entirely different
14 facts, evidence and law. While it is true that the trial court
15 stated "all necessary parties are before the court" in both its
16 Memorandum Opinions and Order, the Supreme Court did not address or
17 decide that matter.

18 It is argued that the doctrine still must be applied
19 because the present issue "could have been determined on the first
20 appeal". Highland Plaza, Inc., supra. This would be applicable if
21 there was not a substantial change or evidence at the second trial or
22 if the contention advanced now was necessarily involved in the first
23 decision. Highland Plaza, Inc., supra. Neither of these conditions
24 are present here. There was no evidence re ground water or its
25 hydrological connection to the river adduced at the prior hearings;
26 no mention was made of ground water; there was nothing before the
27 court for it to rule upon. It is equally clear that the contention
28 of the necessity for joinder of ground water users could not be
29 "necessarily involved" (or involved at all) in the decision of
30 whether the service on the water supplying entities met due process

1 requirements. Restatement of Judgements 2nd, §12 states:

2 "When a court has rendered a judgment in a
3 contested action, the judgment precludes the
4 parties from litigating the question of the
5 court's subject matter jurisdiction in
6 subsequent litigation except if: (3) The
7 judgment was rendered by a court lacking
8 capability to make an adequately informed
9 determination of a question concerning its
10 own jurisdiction and as a matter of
11 procedural fairness the party seeking to
12 avoid the judgment should have the
13 opportunity belatedly to attack the court's
14 subject matter jurisdiction." (Emphasis added)

15 While comment (3) discussing this section deals mainly with
16 non-lawyer judges and courts of limited jurisdiction, the same
17 principle should apply to a trial court who has been provided with
18 no information on an issue concerning the court's subject matter
19 jurisdiction; certainly there would be no "adequately informed
20 determination".

21 It is apparent from the foregoing that there were, and now
22 are, separate jurisdictional issues that could be raised in this
23 special proceeding. The question of jurisdiction of a court may be
24 raised at any time, even on appeal. Williams vs. Paulsbo Rural
25 Telephone Ass'n, 87 Wn2d 636. It is clear that this motion should be
26 considered.

27 Finally, it is also equally clear that the Supreme Court
28 did not intend to bind this court or preclude it from hearing and
29 deciding any other constitutional or jurisdictional questions that
30 might arise. "Our decision should not be construed to prohibit any
future remedial measures the trial court finds necessary in this
case." Acquavella, supra, p. 659. Thus, I find that the "law of the
case" doctrine does not apply to the motion under consideration.

28 THE MOTION

29 As mentioned before, the United States claims that the
30 ground water users of the Yakima Basin are necessary parties hereto;

1 that without their joinder herein this is not a "general adjudication"
2 within the meaning of the McCarran Amendment, 43 U.S.C. §666 (1952);
3 and, therefore, the United States must be dismissed as jurisdiction
4 over the United States has not been obtained. The claim is that
5 because there is a hydrological connection, to some degree, between
6 the ground waters and surface waters in the Basin, any adjudication
7 of the quantification and prioritization of surface water rights for
8 management purposes in a low water year will have a direct effect upon
9 the water rights of ground water users.

10 The McCarran Amendment, in pertinent part, states:

11 "(a) Consent is given to join the United States
12 as a defendant in any suit (1) for the adjudication
13 of rights to the use of water of a river system or
14 other source, or (2) for the administration of such
15 rights, where it appears that the United States is
16 the owner of or is in the process of acquiring water
17 rights by appropriation under State law, by purchase,
18 by exchange, or otherwise, and the United States is
19 a 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" (Emphasis added)

19 The United States concedes that this McCarran Amendment
20 waives the sovereign immunity of the United States, but only if there
21 is a "general adjudication" involved. For an explanation of what
22 constitutes a "general adjudication" according to the Amendment, we
23 look to State vs. Rank, 293 F2d 340, 347 (1961):

24 "There can be little doubt as to the type of suit
25 Congress had in mind. It was not a private dispute
26 between certain water users as to their conflicting
27 rights to the use of waters of a stream system;
28 rather it was a quasi-public proceeding which in
29 the law of western waters is known as a "general
30 adjudication" of a stream system; one in which the
rights of all claimants on a stream system, as
between themselves, are ascertained and officially
stated". (Emphasis added)

29 In this present action, all necessary parties to the
30 adjudication of the rights of surface water users have been joined,

1 State vs. Acquavella, 100 Wn2d 651; the ground water users have not
2 been joined as this Court had previously stated they were not
3 necessary parties (Order, June 5, 1981). Initially, we must look to
4 the language of the Amendment itself. It states "for the adjudication
5 of rights to the use of water of a river system or other source". At
6 oral argument, the United States was unable to furnish this Court
7 with a definition of either "river system" or "or other source". Nor
8 has the Court been able to find any cases defining those terms.
9 Basically, there are only two sources of water for use - surface
10 waters and ground waters. The United States recognizes that Congress
11 was well aware of ground water as a source for irrigation by noting
12 S. Rep No. 755, 82d Cong., 1st Sess., at 3, as follows (Page 9,
13 United States Reply Brief):

14 "In the arid Western States, for more than 80 years,
15 the law has been that the water above and beneath
16 the surface of the ground belongs to the public,
17 and the right to the use thereof is to be acquired
18 from the State in which it is found, which State is
19 vested with the primary control thereof." (Emphasis
20 added)

21 Therefore, at the time of the passage of the amendment in 1952,
22 Congress clearly had surface waters and ground waters in mind. When
23 using the language "river system or other source", it plainly
24 indicates that "river system" could only refer to surface waters and,
25 therefore, "other source" must refer to ground waters. "River system"
26 is the flowing water of the river and its tributaries. "Other source"
27 than a river system could only then mean subsurface waters not
28 flowing in the rivers and streams. It should also be noted that
29 "river system" and "other source" are separated by "or", meaning that
30 we must consider them in the disjunctive and not conjunctively.
Thus, Congress intended to allow the United States to be joined in an
adjudication, if it be a general one, of either surface waters or
ground waters. If Congress had intended that users of ground water

1 hydrologically connected to a river system must be joined in the
2 adjudication before consent was given to join the United States, it
3 clearly could have said so. It did not.

4 The United States lists five states in its Reply Brief, p. 9
5 (Arizona, Colorado, Montana, New Mexico and Wyoming) where in some
6 adjudications in those states in past years there have been joined
7 as parties both users of ground and surface waters. However, no dates
8 of those adjudications are noted, nor was there any case cited wherein
9 it was held that the conjunctive users were required to be joined.
10 Certainly, in some instances, it may be practical, feasible and
11 better policy under the circumstances of the particular adjudication
12 to so join them. This is the case in this state where the DOE has
13 requested combined adjudications in some cases, although the greatest
14 majority of adjudications in Washington have been of surface water
15 only. (Aff, Eugene Wallace.) Even in New Mexico, listed by the
16 United States as noted above, prior to 1956 (four years after the
17 Amendment was passed), all of the "general adjudications" in that
18 state related to surface waters of a stream system only. (Aff.,
19 S.E. Reynolds) Congress well knew that most general adjudications in
20 the Western States were of surface waters only when it quoted
21 directly from Pacific Live Stock Co. vs. Lewis, 241 U.S. 440, 447
22 (1916), a surface water only adjudication, the requisites of a
23 general adjudication, as noted in both the United States and D.O.E.
24 briefs. Within that knowledge of Congress in mind, it again is
25 readily apparent that they intended to allow surface and ground
26 water adjudications disjunctively and not conjunctively.

27 Further, as noted in the Senate Report 755, supra, Congress
28 recognized that rights to the use of water was to be acquired from
29 the State where found and the State is vested with the primary
30 control thereof. Reiterating in Arizona vs. San Carlos Apache Tribe,

1 77 L.Ed.2d 837 (1983), what it said in Colorado River Water
2 Conservation District vs. United States, 424 U.S. 800, 820 (1976),
3 the United States Supreme Court confirmed this:

4 "Indeed, we have recognized that actions seeking
5 the allocation of water essentially involves the
6 disposition of property and are best conducted
7 in unified proceedings. The consent to jurisdiction
8 given by the McCarran Amendment bespeaks a policy
9 that recognizes the availability of comprehensive
10 state systems for adjudication of water rights as
11 the means for achieving these goals." (Emphasis added)

12 In referring to the "comprehensive state systems" for the
13 conduct of adjudications, the Supreme Court well knew that the
14 various western states would have differing statutory systems for
15 such adjudications. For example, in United States vs. District Court
16 In And For the County of Eagle, 401 U.S. 520 (1971), they were
17 dealing with a comprehensive Colorado statute which had the State of
18 Colorado divided into seventy water districts, whereas in United
19 States vs. District Court In And For Water Division No. 5, 401 U.S.
20 527 (1971) (actually decided the same day), the Court recognized that
21 in 1969, Colorado had abolished the seventy water districts and
22 divided the state into seven water divisions. Clearly, therefore,
23 the Amendment would apply to any comprehensive system which the
24 various states decided best fit their respective situations. This is
25 further emphasized in the United States vs. Water Division No. 5 case,
26 supra, where the Court, in construing the new Colorado act observed:

27 "These proceedings, it is argued, do not constitute
28 general adjudications of water rights because all
29 the water users and all water rights on a stream
30 system are not involved in the referees determina-
tions. The only water rights considered in the
proceedings are those for which an application has
been filed within a particular month. It is also
said that the Act makes all water rights confirmed
under the new procedure junior to those previously
awarded. It is argued from these premises that the
proceeding does not constitute a general adjudication
which 43 U.S.C. §666 contemplated. As we said in the
Eagle County case, the words "general adjudication"
were used in Dugan vs. Rank, 372 U.S. 609, 618 to

1 indicate 43 U.S.C. §666 does not cover consent
2 by the United States to be sued in a private
3 suit to determine its rights against a few
4 claimants. The present suit, like the one in
5 the Eagle County case, reaches all claims,
6 perhaps month by month, but inclusively in
7 totality" (Emphasis added)

8 It should also be noted that the Eagle County case was
9 called a supplemental water adjudication under the Colorado statutes.
10 Thus, we see that, with the United States Supreme Court's approval,
11 a state can conduct, under its statutory scheme, a part by part
12 adjudication and even have supplemental adjudications and still have
13 those adjudications be a "general adjudication" within the meaning
14 of the Amendment.

15 In Washington, the Water Code - 1917 Act was passed. This
16 1917 Act was a very comprehensive scheme for the appropriation,
17 regulation and adjudication of water rights along the various river
18 systems of the state. It pertained solely to the rights of surface
19 water users. R.C.W. 90.02.005 et seq. It was not until 1945 that
20 the state addressed the Regulation of Public Ground Waters - the
21 "other source", which act was supplemental to the regulation of
22 surface waters. R.C.W. 90.44.020 et seq. That Act was also a
23 comprehensive scheme for the regulation and withdrawal of ground
24 waters. Each of these two acts dealt distinctively with the separate
25 subject matter of each, taking into consideration the separate nature
26 of the source of each of the water types under consideration. The
27 1945 ground water act also provided for the adjudication of the water
28 rights of ground water users, adopting the same adjudicatory
29 procedures as used for the adjudication of surface waters,
30 R.C.W. 90.44.220, although there were different purposes for the
adjudication of ground water rights. This would be to regulate
pumping in ground water zones to protect against depletion of ground
water storage areas and other ground water sources. Included in

1 R.C.W. 90.44.220 is the following language:

2 "Hereafter, in any proceedings for the adjudication
3 and determination of water rights--either rights
4 to the use of surface waters or to the use of
5 ground water, or both--pursuant to Chapter 90.03
6 R.C.W. as heretofore amended all appropriators of
7 ground water or of surface water in the particular
8 basin or area may be included as parties to such
9 adjudication, as pertinent." (Emphasis added)

10 This state's statutory scheme for water adjudications
11 provides for separate adjudications of surface water use and for
12 ground water use; it also permits, but does not require the joinder
13 of ground and surface water users in any adjudication. Clearly, where
14 it is practical, feasible and necessary they can be joined, but if
15 not practical, feasible or necessary they need not be joined
16 together. It should be noted that this provision in Washington's
17 statutory scheme for general adjudications became effective in 1945,
18 seven years before passage of the McCarran Amendment in 1952, and
19 Congress should well have been aware of these provisions when it
20 passed the amendment. Congress could have conditioned the consent to
21 join the United States on the joinder of both ground and surface
22 water users, but again, it did not. Following the rationale of the
23 Eagle County case, supra, and the Water Division No. 5 case, supra,
24 Washington's comprehensive state system for separate adjudications of
25 surface and ground water rights will still clearly constitute
26 "general adjudications". Furthermore, our Washington Supreme Court,
27 in State vs. Acquavella, 100 Wn2d 651, 652, determined this action to
28 be a "general adjudication", as follows:

29 "A general adjudication, pursuant to R.C.W. 90.03,
30 is a process whereby all those claiming the right
to use waters of a river or stream are joined in
a single action to determine water rights and
priorities between claimants." (Emphasis added)

Although clearly the ground water users could be joined
under R.C.W. 90.44, this is nonetheless a general adjudication under
R.C.W. 90.03 pertaining to surface water users only.

1 Notwithstanding all of this, in accordance with its
2 persistent efforts to avoid the Amendment, the United States insists
3 that this Court must narrowly construe it, urging that:

4 "The basic rule of federal sovereign immunity is
5 that the United States cannot be sued at all
6 without the consent of Congress. A necessary
7 corollary of this rule is that when Congress
8 attaches conditions to legislation waiving the
9 sovereign immunity of the United States, those
10 conditions must be strictly observed, and
11 exceptions thereto are not to be lightly
12 implied." Block vs. North Dakota, 75 L.Ed.2d
13 840, 853.

14 Block was a case where the Court held that when Congress
15 passed the Quiet Title Act of 1972, it thereby provided the exclusive
16 remedy for challenging title to United States held lands. The Court
17 held, at p. 852 ". . . a precisely drawn, detailed statute preempts
18 more general remedies." The above quoted basic rule does not apply
19 to the instant situation. There, actions prior to 1972 challenging
20 title to United States held lands were brought under the theory of
21 the "equal footing doctrine" or "officer's suits". The 1972 act
22 clarified how and under what conditions such quiet title actions
23 could be brought. Here, we are involved in a special proceeding to
24 which explicit consent to join the United States has been given.
25 There are no conditions attached, other than the Court interpreted
26 requirement that it be a general adjudication. Instead, in this type
27 of action, we have an express waiver of sovereign immunity solely for
28 the purpose of this type of special proceeding. The United States
29 Supreme Court has consistently given a much broader interpretation to
30 the Amendment than requested by the United States, most recently in
Arizona vs. San Carlos Apache Tribe, 77 L.Ed.2d 837, wherein they
said at p. 854:

 ". . . we are convinced that, whatever limitation
the Enabling Acts or federal policy may have
originally placed on state court jurisdiction over
Indian water rights, those limitations were

1 removed by the McCarran Amendment . . . the
2 Amendment was designed to deal with a general
3 problem arising out of limitations that
4 federal sovereign immunity placed on the
5 ability of the States to adjudicate water
6 rights." And at p. 859, "But water rights
7 adjudication is a virtually unique type of
8 proceeding, and the McCarran Amendment is
9 a virtually unique federal statute, and we
10 cannot in this context be guided by general
11 propositions." (Emphasis added) See also the
12 Colorado River case, supra; the Eagle County
13 case, supra; and the Water Division No. 5
14 case, supra.

15 Therefore, in this recognized unique type of proceeding,
16 the unique and unlimited waiver of sovereign immunity given by
17 Congress is not subject to the general propositions governing the
18 usual waiver of sovereign immunity in other areas.

19 The United States further argues that the ground water
20 users are "necessary parties" who must be joined under Civil Rule
21 19 (a). Harvey vs. County Commissioners of San Juan County,
22 90 Wn2d 473 tells us: "A necessary party is one which has a
23 sufficient interest in the litigation that the judgment cannot be
24 determined without affecting that interest or leaving it unresolved."
25 (Emphasis added) Initially, we must determine if the ground water
26 users have a sufficient interest in this litigation. This action is
27 to quantify and prioritize the water rights of persons or
28 entities diverting or withdrawing water from the rivers and streams,
29 so that in low water years (due to lack of precipitation) such
30 withdrawal of waters can be properly managed. As previously noted,
there is little, if any, movement of water from the rivers to the
aquifers; most of the ground water movement being from the aquifers
toward the stream. Therefore, management over the priority of
withdrawal of whatever waters are available in the rivers will have
almost no effect on ground water users. Bear in mind that the vast
majority of the approximately 19,000 ground water users are on the
uplands, the bench lands above the river and any water from the river

1 to those users would be minimal. Turning to the movement of ground
2 water toward the river, we can see that some pumping may affect the
3 ground water flow to the river, possibly necessitating the
4 regulation of pumpage from those wells which may have an effect
5 within a given year. However, again, it appears that most pumping
6 which might affect the ground water movement could take years, if
7 ever, depending on precipitation, to have an affect upon the river
8 and thus, little if any regulation of pumping for that reason may
9 ever be necessary. Also, we must consider that "Those aquifer
10 properties that control the response time between initiation of
11 pumpage and subsequent diversion of streamflow vary greatly within
12 the basin and are not well known at this time. As a result, it is not
13 presently possible to predict when pumpage will affect streamflow
14 for much of the area with much precision." (Aff. William Meyer)
15 (Emphasis added) If not enough is known at the present time, then it
16 would be difficult, if not impossible, to regulate the ground water
17 usage so as to have an impact on the streamflow of surface waters.
18 Thus, it does not appear that the 19,000 ground water users have much
19 interest at all in this litigation. The unknown quantities of the
20 aquifer and the amount of pumpage therefrom, which makes impossible
21 the prediction of when pumpage may affect streamflow, clearly
22 demonstrates how impractical it would be to try and add 19,000 ground
23 water users to this present action.

24 Can we determine the rights of surface water users without
25 affecting the rights of ground water users? Certainly. Determining
26 the amount of water a diverting surface water user can put to
27 beneficial use and prioritizing that right with other surface water
28 diverters' rights will not affect the rights of ground water users;
29 only the later possible regulation or administration of pumping
30 rights, in accordance with their priorities, would have an effect

1 upon their rights. To follow the United States argument, this Court
2 would have to quantify all the water available, as opposed to
3 quantifying and prioritizing the rights to whatever water is available.
4 The amount of water available can be predicted from year to year,
5 depending upon the annual precipitation, but it can hardly be
6 quantified, at least not now, as the United States suggests. Further,
7 the statute creating and regulating ground water rights in 1945
8 provides that all surface water rights "shall be superior to any
9 subsequent right hereby authorized to be acquired in or to ground
10 water". R.C.W. 90.44.030. Thus, some priority between surface and
11 ground water users has been established by statute. In view of all
12 this, the ground water users clearly have very little interest in
13 this action and are not necessary parties hereto.

14 Finally, and somewhat peripherally, the United States
15 acknowledges the authority of the state to regulate the use of ground
16 water pursuant to R.C.W. 90.44, but claims that this would not apply
17 within the boundaries of the Yakima Indian Reservation. The
18 argument is posited thusly:

19 "Lastly, we recognize that the State is statutorily
20 empowered to control withdrawals in the basin but
21 only as to that pumping occurring outside the
22 boundaries of the Yakima Indian Reservation. The
23 State's regulatory authority does not extend to
24 pumping occurring within the reservation. (Cites
25 omitted.) It has not yet been determined to what
26 extent ground water will serve lands within (sic)
27 reservation that are identified as being practicably
28 irrigable, but judging from the amount of pumping
29 presently occurring in the basin, it is reasonable
30 to assume that a large percentage of the reservation
lands will be served from ground water aquifers."
(U.S. Reply Brief, p. 14)

The Court need not rule on this assertion at this time.
There is nothing in the files and records herein to indicate that
the state has or has not attempted to exercise any such regulatory
action within the reservation to this date. Further, in view of all

1 of the foregoing discussion of the United States' motion, it appears
2 to the Court that it is highly unlikely that the State would be able
3 to, nor would it attempt to, control irrigation water to be diverted
4 from the river by the regulation of the pumping of ground water
5 within the near future or in the context of this action. Therefore,
6 it appears that this is not a justiciable issue for decision by the
7 Court at this time. To sum it all up, I hold that the ground water
8 users are not necessary parties to this action; that the McCarran
9 Amendment does not require the joinder of ground water users in order
10 for this action to be a general adjudication; that the United States
11 is a proper party hereto; and that the Court does have jurisdiction
12 over the United States herein. The motion for joinder, or in the
13 alternative, for dismissal is denied.

14 DATED this 12th day of March, 1985.

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18 Walter Stauffer
19 JUDGE
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