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CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

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

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

NO. 77-2-01484-5

MEMORANDUM OPINION: RE RES
JUDICATA MOTIONS

THE STATE OF WASHINGTON)
DEPARTMENT OF ECOLOGY,)

Plaintiff,)

vs.)

JAMES J. ACQUAVELLA, ET AL,)

Defendants.)

This action was commenced in October, 1977 by the State of Washington Department of Ecology (DOE) for a full and complete adjudication of all surface water rights in the Yakima River Drainage Basin. A Motion for Removal to the U.S. District Court was made and in January, 1979 the case was remanded to this Court by the U.S. District Court for such an adjudication. This Court entered an Order Directing Service of Summons and, with several extensions granted, ordered that all claims herein must be filed by September 1, 1981.

Upon receipt of the service of summons, various parties filed a number of motions herein. This Court has addressed all of the jurisdictional and due process motions. We now turn to the other motions made by some of the claimants. Initially, in April, 1981, Prosser Irrigation District and City of Prosser made a motion for summary judgment as to the res judicata effect of the January 31, 1945

1 Consent Decree entered in Kittitas Reclamation District, et al vs.
2 Sunnyside Valley Irrigation District, et al, Civil No. 21 (hereinafter
3 Civil 21) by the U.S. District Court, Eastern District of Washington.
4 In August, 1981 Sunnyside Valley Irrigation District (SVID) filed a
5 similar motion. Those two motions were not set for hearing by the
6 Court pending resolution of the due process and jurisdictional issues.
7 After those other matters were disposed of, the Court, in Pre-Trial
8 Order No. 2, invited all other claimants with motions similar to these
9 two motions for summary judgment to file the same and set hearings
10 thereon for January 28, 1985. A number of claimants accepted the
11 Court's invitation and all of these motions were heard on the date
12 set.

13 Joining in the two previously mentioned motions concerning the
14 1945 Consent Decree in Civil No. 21 were Yakima Valley Canal Co.
15 (YVCC); Union Gap Irrigation District (UGID); Yakima-Tieton Irrigation
16 District (YTID) and Naches-Selah Irrigation District (NSID).

17 There were nine other claimants who also filed motions. These
18 motions requested the Court to affirm either (1) previous court
19 judgments concerning water rights between the parties thereto; or (2)
20 water certificates and storage water permits issued by DOE or its
21 predecessor. Some claimants asked for both. Those making such motions
22 were: Wenas Irrigation District; Westside Irrigating Company;
23 Manashtash Ditch Company; Teanum Ditch Company; Frank W. Phelps;
24 C. James Lust, et al; John I. Haas, Inc.; Robert L. Mondor; and
25 Scott Baird, et al.

26 It should be noted that some of the court decrees or judgments
27 cited by these claimants were entered prior to 1917 and others
28 subsequent to 1917. It is interesting to note that, in at least two
29 of the claimants' requests to affirm a prior court decree, those
30 claimants admit a continuous diversion of water, to date, in an amount

1 greater than awarded to them in such decree. The Court will address
2 the motions of these nine claimants first.

3 The DOE has urged that this Court should not rule upon these
4 motions at this time, particularly as to the individual claims. As
5 previously noted, the Court invited these motions, primarily for the
6 purpose of alerting the claimants to the evidentiary problems to be
7 encountered and also to assist the Referee in ascertaining who might
8 be making such claims during the adjudicatory process. For the reasons
9 noted below, this Court cannot and will not, at this time, make any
10 definitive ruling on any of such individual motions, but the Court
11 will note the general rules which may be considered by the Court and
12 the Referee as the matter progresses.

13 The state surface water code was established by the Legislature
14 in 1917. A portion of that act provided as follows:

15 "A final decree adjudicating rights or priorities,
16 entered in any case decided prior to taking effect
17 of this act, shall be conclusive among the parties
18 thereto and the extent of use so determined shall
19 be prima facie evidence of rights to the amount of
20 water and priorities so fixed as against any person
21 not a party to said decree." R.C.W. 90.03.170
22 (Effective date - midnight June 6, 1917)

23 Accordingly, any decree of any sort entered prior to June 6, 1917
24 adjudicating water rights or priorities must be conclusive between the
25 parties thereto and their privies in this action. Helensdale Water
26 Co. vs. Blew, 146 Wn 350(1928). Any claimant herein claiming a right
27 or priority under such a decree would have to produce the necessary
28 documents (complaint, findings of fact, conclusions of law, decree or
29 judgment, chain of title, etc.) for the Referee herein, as in herein-
30 after indicated for post-1917 decrees also. Such a decree also becomes
prima facie evidence of the rights or priorities established therein
as to any claimants herein who were not parties or privy to that
decree. Any non-parties to the decree who are claimants herein would

1 have the burden of presenting substantial evidence to the Referee to
2 show that the rights or priorities set forth in the decree should not
3 be given effect in whole or in part, if there is some dispute that
4 exists herein between those who were parties to the decree and those
5 who were not parties. Thus, we can see that there are evidentiary
6 matters to be presented to the Referee, and ultimately to the Court,
7 before the Court can rule as a matter of law on these motions.

8 Substantially the same procedures would apply also to the post-
9 1917 decrees which are not covered by the statute. These claimants
10 urge that the common law doctrine of res judicata applies to those
11 decrees.

12 "Res Judicata occurs when a prior judgment has a
13 concurrence of identity of (1) subject matter;
14 (2) cause of action; (3) persons and parties; and
15 (4) the quality of the persons for or against whom
the claim is made." Rains vs. State, 100 Wn.2d 660,
663; Mellor vs. Chamberlin, 100 Wn.2d 643, 645.

16 Unquestionably, this doctrine will certainly apply to some or
17 all of these prior judgments or decrees; and, as these common law
18 principles were codified in 1917, the decrees would also be prima
19 facie evidence of the rights or priorities established therein as to
20 any non-parties to such decrees. As with the pre-1917 decrees, the
21 claimants under a post-1917 decree would have to produce to the Referee
22 all pertinent evidence of the decree to establish the preclusive effect
23 intended by it. The claimants need not go behind the decree to
24 justify the rights granted, but should certainly identify who were
25 parties thereto (and perhaps who were not); what reaches of water were
26 involved; what type of water rights were involved; specifically what
27 rights were affirmed, etc. It should be remembered that if the prior
28 action was designed and intended as a general adjudication of the
29 rights of all parties on a particular stream or tributary, any water
30 rights not mentioned in the decree were extinguished. McLeary vs.

1 Department of Game, 81 Wn.2d 647, 651. Also, in such an action, the
2 final judgment or decree will conclude the parties as to any rights
3 which might have been claimed, but were not asserted. Nevada vs.
4 United States, 77 L.Ed.2d 509, 524.

5 Even though, as noted above, rights set forth in such decrees
6 are not subject to relitigation as to the right itself, there may be
7 other factors which may have to be considered by the Referee. For
8 example, it was noted by the DOE in oral argument that prior to 1967
9 water rights could be lost through adverse possession. See
10 R.C.W. 90.14.220. Similarly, in 1967, the Legislature enacted the so-
11 called "use it or lose it" provisions; whereby any water diverter who
12 abandons or fails, without cause, to beneficially use all or any part
13 of such diversion for five successive years relinquishes the same.
14 See R.C.W. 90.14.160, 170, 180. These statutes may be applied in a
15 general adjudication such as the matter sub judice. See R.C.W. 90.14.
16 200(2) and 136. It may even be possible that a water diverter,
17 claiming under such a decree, and after being duly served herein,
18 failed to file a claim by September 1, 1981 and is thereby now
19 estopped to assert his right to water. See R.C.W. 90.02.220.

20 Certainly, if any such matters are brought to or come to the attention
21 of the Referee, it would be his duty to take evidence thereon and
22 include his findings in the Referee's Recommendations to the Court.
23 Of course, any one raising such questions would bear the burden of
24 proving the same at the hearing as set by the Referee. R.C.W. 90.03.170

25 Even though the Court, for the reasons noted, has to defer
26 ruling on these motions until after receipt of the Referee's
27 Recommendations, these issues have now been brought to the attention
28 of the Court, the claimants, and the Referee for our future guidance
29 during the evidentiary or adjudicatory process.
30

1 of 1980, the District Court ordered storage water released to protect
2 salmon redds (nest of eggs) which were threatened by low water flows.
3 That decision was appealed to the Ninth Circuit. In 1981, Roza
4 Irrigation District (Roza) filed a motion to vacate the 1945 Decree,
5 but the District Court held that it was divested of jurisdiction over
6 the 1945 Decree pending the appeal of the previous matter and the Roza
7 motion is still to be heard. The Ninth Circuit issued one opinion on
8 September 10, 1982 concerning the salmon redds, but withdrew that
9 opinion and issued another on February 6, 1985. The SVID, UGID, YVCC
10 and YTID petitioned the Ninth Circuit for rehearing of the matter en
11 banc. The Ninth Circuit requested the U.S. to respond, which was
12 done. To this Court's knowledge, nothing further has been done; ~~no~~
13 date for hearing has been set. No one knows when, or if, the Ninth
14 Circuit will grant the rehearing and the District Court remains
15 divested of jurisdiction over the Decree pending resolution of the
16 matter, per it's previous ruling.

17 Thus, it appears that at the present time, and perhaps only
18 temporarily, this Court is the only trial court with the proper
19 jurisdiction to resolve some of the issues presented by counsel in
20 respect to these motions. It should be noted that this adjudication
21 was remanded to this Court by the U.S. District Court in January of
22 1979 for the purpose of a general adjudication by this Court of all
23 of the surface water rights in the Yakima River Basin under our
24 comprehensive state law. All parties are agreed, either in their
25 briefs or oral argument, the Civil 21 was not a general adjudication
26 of the Yakima River. Therefore, this case is presently the only
27 general adjudication proceeding which concerns the entire Yakima River
28 Basin Watershed.

29 It has been strongly urged by Roza that this Court defer to
30 the Motion to Vacate pending before the Federal District Court. DOE

1 also indicates that the Court defer ruling on any, or some, of the
2 issues raised herein at this time. However, some of the issues,
3 particularly those raised by the U.S., appear to this Court to require
4 a definitive answer for the Referee and the claimants so that this
5 adjudication may proceed in an orderly manner; with everyone aware, in
6 a general sense, of the positions to be considered with respect to
7 the 1945 Decree as this matter progresses.

8 In the first instance, the U.S. claims that this Court should
9 defer any rulings on any issues pertaining to the 1945 Decree as a
10 matter of comity or courtesy, to the Federal Court, and also to
11 "prevent unseemly, expensive and dangerous conflicts of jurisdiction
12 and process". U.S. Brief in Opposition to Motions for Partial
13 Summary Judgment and Motions for Summary Judgment, p. 18 (U.S. Brief).
14 This issue was considered at some length in Colorado River Water
15 Conservation District vs. United States, 424 US 800, 47 L.Ed.2d 483
16 (1976). There the U.S. Supreme Court set out the test of "wise
17 judicial administration, giving regard to conservation of judicial
18 resources and comprehensive disposition of litigation". 47 L.Ed.2d
19 p. 498. Factors to be considered were the inconvenience of the federal
20 forum; the desirability of avoiding piecemeal litigation and the order
21 in which jurisdiction was obtained by the concurrent forums, supra,
22 p. 499. "The most important of these is the McCarran Amendment itself.
23 The clear federal policy evinced by that legislation is the avoidance
24 of piecemeal adjudication of water rights in a river system. - - -
25 The consent to jurisdiction given by the McCarran Amendment bespeaks
26 a policy that recognizes the availability of comprehensive state
27 systems for adjudication of water rights as the means for achieving
28 these goals." Supra, p. 499 (Emphasis added)

29 Much more recently, precisely the same arguments as made
30 herein were made in Arizona vs. San Carlos Apache Tribe, 77 L.Ed.2d

1 837(1983). After a very thorough discussion of these issues
2 (pp. 885-858), the U.S. Supreme Court concluded as follows:

3 "But the most important consideration in Colorado
4 River, and the most important consideration in any
5 federal water suit concurrent to a comprehensive
6 state proceeding must be the 'policy underlying the
7 McCarran Amendment' (cites omitted)." P. 858

8 In the present situation, we have the Federal District Court
9 retaining jurisdiction for interpretation and administration of a 1945
10 Consent Decree which distributes water to only some of the water users
11 who are all parties to the state comprehensive adjudication process
12 involving all surface waters of the Yakima Basin. That decree will
13 have some impact on the final decree herein, and, therefore, this
14 Court must, and will, if necessary, interpret the 1945 Decree to the
15 extent required as to the issues raised thereunder from time to time,
16 and if appropriate, as hereinafter noted.

17 As previously stated, Civil No. 21 was not a general adjudica-
18 tion of all of the Yakima River surface waters. "A general adjudica-
19 tion, pursuant to R.C.W. 90.03, is a process whereby all those
20 claiming the right to use waters of a river or stream are joined in a
21 single action to determine water rights and priorities between
22 claimants." (Emphasis added) State vs. Acquavella, 100 Wn.2d 651,
23 652. Inasmuch as the 1945 Decree did not cover all of the water
24 diverters in the Basin, it was not a general adjudication. Clearly,
25 however, the Consent Decree entered therein did purport to establish
26 rights and priorities between some claimants herein and the parties
27 thereto, as they understood them, to the use of Yakima River surface
28 waters. These rights and priorities were based upon some claimed
29 prior rights, Warren Act contracts, various limiting agreements, etc.
30 Also, as to the Wapato Indian Irrigation Project, which served the
Yakima Reservation, the Decree relies upon the Act of August 1, 1914,
28 Stat 582; the Act of July 1, 1940, 54 Stat 707; and the contract

1 of September 21, 1943 between the Bureau of Reclamation and the Office
2 of Indian Affairs. (Exhibit B, E-180, 181, 182). These contracts,
3 agreements, Acts, etc. should all be documented and established for
4 the Referee during the evidentiary hearings by the parties to the
5 Decree.

6 This Court has read (and some things re-read several times)
7 all of the materials, briefs, cases, etc., including the transcript of
8 the oral arguments, which were presented herein. However, as
9 previously noted, after argument herein and on February 6, 1985, the
10 Ninth Circuit Court of Appeals, issued for publication it's decision
11 in Kittitas Reclamation District vs. Sunnyside Valley Irrigation
12 District (Civil 21) Nos. 80-3505, 81-3002, 81-3068, 81-3069. That
13 opinion addresses several of the same issues presented to this Court.
14 This Court is bound by the decisions on those issues at this time,
15 Rains vs. State, 100 Wn.2d 663, so the Court will not decide those
16 matters herein. Broadly stated, those issues are: (1) Whether the
17 1945 Decree considered treaty fishing rights; (2) Whether the Yakima
18 Indian Nation was a party to the Decree (or was or is bound by the
19 U.S. as a trustee); (3) Whether Congress abrogated the treaty fishing
20 rights; and (4) Whether the Decree is entitled to a res judicata
21 effect between the parties thereto.

22 There were, however, several smaller issues which the Court
23 will address. There was argument and considerable briefing on the
24 issue of whether or not the Secretary of the Interior had the
25 authority, in 1905, to allocate 147 c.f.s. of water to the Indians.
26 After reading all of the materials presented, I still cannot perceive
27 why this issue was raised by the U.S. The question became entirely
28 moot when Congress passed the Act of August 1, 1914, pursuant to the
29 Report of the Joint Congressional Commission of 1913 (Exhibit G). By
30 that Act, Congress took the matter completely away from the Secretary

1 of the Interior and made it's own decision to provide 720 c.f.s. to
2 the Reservation. Thus, whether the Secretary had the authority or not
3 makes no difference herein.

4 Taking the next step, the U.S. then claims this Court cannot
5 interpret the Act of August 1, 1914 as establishing any of the Yakima
6 Nation's reserved water rights under the Winters Doctrine, U.S. vs.
7 Winters, 207 U.S. 564(1908), because that would be an amendment of the
8 act of Congress approving the 1855 treaty (in 1859) in an appropriation
9 bill and this cannot be done under the rules of Congress. This Court
10 will not interpret that Act at this time, as such interpretation is
11 implicitly with the Ninth Circuit now, as previously noted. Both
12 sides have extensively briefed the rules of Congress and how the
13 courts should consider them. Whatever may be said, however, by way of
14 ruling on the application of Congressional rules, the fact of the
15 matter remains that all parties, including the U.S., have acknowledged
16 the Act of August 1, 1914, for over seventy years. It was later
17 supplemented by the Act of July 1, 1940. It was extensively discussed
18 and considered (see Appendices to UGID-YVCC Reply Brief) by the U.S.
19 and specifically entered into the 1945 Decree. (Paragraph 4, Exhibit
20 B, E-180, 181, 182). Since that date, and for the last forty years,
21 all parties have relied on the Consent Decree. It seems a little late
22 now to claim Congress could not do what it did do, and which everyone
23 has operated under for seventy years. Again, however, the actual
24 interpretation of that Act is presently with the Ninth Circuit.

25 One further matter. The U.S. urges that the 1945 Decree did
26 not bind the U.S. or the Yakima Indian Nation, because the U.S. did
27 not waive it's sovereign immunity nor consent to a general adjudication.
28 In so doing, the U.S. ingenuously ignores much of the Complaint and
29 Petition for Declaratory Judgment filed by the U.S. in Civil No. 21
30 and implies that the actual requests for an adjudication were raised

1 in the cross-complaints of UGID, YVCC, YTID and SUID. It ignores
2 Paragraphs 18 and 32 of the body of the Complaint and also Paragraphs
3 (d) and (e) of the prayer of the complaint. (Exhibit B-E-14, 15; E-26,
4 27; E-29). Ultimately, these provisions are recognized in the U.S.
5 Brief in Opposition, p. 34, wherein they acknowledged asking "in the
6 alternative, which irrigation districts had priority to the project
7 water", which was, essentially, all of water of the Yakima River.
8 Once again, however, the questions of whether the U.S. is bound by the
9 Decree and whether the Yakima Nation is bound therein by the U.S.
10 acting as trustee, are implicit in the issues before the Ninth Circuit.
11 Even more so, they are somewhat specifically made issues therein by
12 the Petitions for Rehearing En Banc by SUID, UGID, YVCC and YTID.
13 This Court must abide by the opinion until further action thereon by
14 the Ninth Circuit and/or the Federal District Court.

15 To sum it all up, the principles and rules per res judicata
16 may well apply to some or all of the judgments and decrees noted
17 herein, including the 1945 Consent Decree. U.S. vs. Fallbrook Public
18 Utility District, 347 Fed.2d 48(1965). The judgments and decrees may
19 very well be binding on all of the parties thereto and prima facie
20 evidence of water rights as against those not parties thereto. The
21 quality of the evidence presented by any claimant before the Referee
22 at the evidentiary hearings may well have some bearing on the weight
23 or effect to be given to each such judgment or decree.

24 One of the parties, Westside Irrigating Company, made inquiry
25 as to the question of "new" water, particularly as it may be obtained
26 from proposed enhancement projects under construction. Certainly, if
27 any of those projects were established during the progress of this
28 adjudication (see Yakima River Basin Water Enhancement Project, Phase
29 2 Status Report, April, 1985), and which this Court strongly urges, it
30 would seem to behoove the claimants to provide more detailed evidence

1 to the Referee. There are still many areas under cultivation in the
2 Valley that perhaps could use more water. Most certainly, there are
3 many hundreds of irrigable, but non-irrigated, acres in the Basin.
4 Modern irrigation technology continues to make it economically
5 feasible to supply water to some of the outlying unirrigated lands.

6 In addition, there can be considered the irrigation practices
7 that have been improved over the years since the entry of such decrees
8 or judgments. These include better management of the river itself;
9 better distribution facilities (such as lining of canals to prevent
10 seepage, etc.); better on farm management of water (from rill
11 irrigation to sprinklers to drip irrigation; and better use of return
12 flows, among others.

13 These matters, along with the possible subsequent events, per
14 statute or otherwise, heretofore mentioned should all be considered
15 and presented to the Referee at the evidentiary hearings. Then, with
16 the evidence before him, the Referee, and perhaps ultimately the
17 Court, can apply the applicable law to these judgments and decrees,
18 giving them the efficacy and impact which they deserve. These would
19 then be included in the Referee's Recommendations as to the establish-
20 ment of the water rights. Objections, of course, can be made to such
21 Recommendations and set for trial, but it should be noted that
22 frivolous objections can result in sanctions being imposed.

23 The Court has been immensely impressed with the tremendous
24 amount of background, history and evidence presented, along with the
25 excellent and exhaustive briefing of the parties. It has all been
26 read and studied. Although some of the important issues raised have
27 not been ruled on herein, for the reasons noted, it is clearly
28 apparent to the Court that we all: Court, claimants, counsel, Referee,
29 etc., are fully cognizant now of how we must address ourselves to
30 this proceeding. As to the issues not answered herein they will be,

1 and must, either by the Ninth Circuit, or if deferred by them, then
2 by this Court during the progress of this adjudication.

3 Conclusion

4 Therefore, it is the opinion of this Court that (a) the pre-
5 1917 decrees and judgments are governed by the statute and the evidence
6 presented at the hearings; (b) that as to post-1917 decrees and
7 judgments, including the 1945 Consent Decree, these shall be assessed
8 in view of the doctrine of res judicata and the evidence produced at
9 hearing; (c) that evidence produced may possibly affect the
10 preclusiveness of any such decrees and judgments; (d) that this Court
11 need not defer to the Federal courts for interpretation of the 1945
12 Decree, although this Court is bound by prior Federal decisions upon
13 the same issues; and (e) that although the 1945 Decree was not a
14 general adjudication, it may bind the parties thereto and be prima
15 facie evidence against those claimants herein who were non-parties
16 thereto. In view of all of the foregoing, this Court will defer a
17 definitive ruling on these motions, at this time, pending the receipt
18 of the evidence and the Referee's Recommendations.

19 It is requested by the Court that the DOE prepare a proposed
20 order in accordance herewith. Such order should be noted for hearing
21 on Friday, September 6, 1985 at 9:30 a.m. Also, on that date and at
22 that time, the Court will enter an order denying the previous Motion
23 to Stay and will hear the U.S. Motion for Clarification.

24 Dated this 21st day of June, 1985.

25
26
27 Walter H. Stauffer

28 JUDGE
29
30