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MAY 1990

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CLERK OF
SUPERIOR COURT
YAKIMA COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND 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,)
THE STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Plaintiff,)
v.)
JAMES J. ACQUAVELLA, et al.,)
Defendants.)

NO. 77-2-01484-5
MEMORANDUM OPINION
RE: MOTIONS FOR PARTIAL
SUMMARY JUDGMENT

MOTIONS

Several motions have been filed by some of the parties hereto and other parties have joined in such motions. The moving parties, hereinafter "Movants" are as follows: Sunnyside Valley Irrigation District; Ahtanum Irrigation District; Kennewick Irrigation District; Cascade Irrigation District; Fowler Ditch Company; Moxee-Hubbard Ditch Company; Moxee Ditch Association; Naches-Cowiche Canal Company;

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SCANNED

1 Selah-Moxee Irrigation District; City of Yakima; City of Union
2 Gap; Ellensburg Water Company; Union Gap Irrigation District;
3 West Side Irrigating Company; Yakima-Tieton Irrigation
4 District; Yakima Valley Canal Company; Roza Irrigation
5 District; Kittitas Reclamation District; Naches-Selah
6 Irrigation District; Prosser Irrigation District; City of
7 Prosser; and Kiona Irrigation District.

8 The United States, hereinafter "U.S.", acting as trustee
9 for and on behalf of the Yakima Indian Nation (Y.I.N.), has
10 filed an amended/clarified claim setting forth the maximum
11 amounts of water that will be claimed by the Nation in this
12 proceeding pursuant to its reserved Treaty rights. The claim
13 is as follows: For on-reservation and certain off-reservation
14 public domain allotments present and future agricultural
15 demands - 1,030,505 acre feet of water per year; for on and
16 off-reservation non-agricultural demands - 50,000 acre feet per
17 year; and instream flow claims for enhancement and protection
18 of the Yakima River Basin's fishery - 1,250,000 acre feet per
19 year.

20 Broadly stated, the motions of the various Movants request
21 a duality of actions by the Court. Based upon various Acts of
22 Congress; executive branch of government actions; various
23 agreements between the Bureau of Reclamation and the Office of
24 Indian Affairs; the January, 1945 Consent Decree in Kittitas
25 Reclamation District et al, vs. Sunnyside Valley Irrigation
26 District et al; and other historical records, the Movants

1 request the Court: (1) to limit, in accordance with the above,
2 the maximum quantity of water which may be claimed by the U.S.
3 on behalf of the Y.I.N. and (2) based on the above records, to
4 determine that the maximum quantity of water provided by such
5 documents has settled and determined all of the Y.I.N. Treaty
6 rights for all purposes.

7
8 SUMMARY JUDGMENT

9
10 Movants have petitioned the Court for partial summary
11 judgment as previously noted. The U.S. responds that there are
12 material issues of fact that must be decided at trial.

13
14 "The purpose of summary judgment is to avoid a
15 useless trial when there is no genuine issue of
16 any material fact. If, however, there is a
17 genuine issue of material fact a trial is
18 necessary. It is the trial court's function to
19 determine whether such a genuine issue exists. The
20 burden of proving, by uncontroverted facts, that
21 no genuine issue exists is upon the moving party.
22 (Citations omitted).

23
24 When a motion for summary judgment is
25 supported by evidentiary matter, the adverse party
26 may not rest on mere allegations in the pleadings,
but must set forth specific facts showing that
there is a genuine issue for trial. If no
genuine issue of material fact exists it must then
be determined whether the moving party is entitled
to judgment as a matter of law." La Plante vs.
State, 85 Wn 2d 154, 158.

27
28 In support of these motions, and in response thereto, the
29 Movants and the U.S. have furnished to the Court a very
30 voluminous, comprehensive and detailed historical record of the

1 development of the Yakima River Basin. This history commences
2 with the negotiations leading to the Treaty of 1855 and
3 continues to the present, with the main emphasis centering on
4 the period from 1900 to 1945. The documents consist of Acts of
5 Congress; congressional hearings; reports to Congress; records
6 of governmental agencies; and correspondence between agencies
7 among other things. None of this historical material has been
8 controverted and, in fact, many of the same materials have been
9 provided by both Movants and the U.S..

10 Both in the memorandums and oral arguments, the parties
11 have vigorously argued the meaning and import of these
12 historical records to support their respective positions as to
13 the intent, scope and effect of these documents. As mentioned,
14 however, the documentary historical record has not been
15 challenged at all.

16 "An inference in law is a process of reasoning by which a
17 fact or proposition sought to be established is deduced as a
18 logical consequence from other facts, or a state of facts,
19 already proved or admitted." Shelby vs. Keck, 85 Wn.2d 911,
20 914; Dickinson vs. Edwards, 105 Wn.2d 457, 461. Thus, the
21 arguments raise an inference in law.

22 A strikingly similar situation was presented in Dennison
23 vs. Topeka Chambers Industrial Development Corp., 527 F. Supp.
24 611, Aff'd 724 F.2d 869. There the issues revolved around the
25 meaning, intent and effect of an Indian Treaty; Congressional
26 Acts of 1860, 1862 and 1968; and the historical background

1 surrounding the same as it pertained to whether certain treaty
2 land rights had been extinguished. The initial issue was
3 whether the case was suitable for summary judgment.

4 Therein, the court ruled as follows:

5 "The interpretation of the Treaty and statutes
6 are questions of law for the court to resolve.
7 Summary judgment is appropriate when a decision
8 turns on the meaning of words in a statute.
9 (Cites omitted). Likewise, the interpretation of
10 a Treaty presents a question of law which is
11 appropriately considered upon a motion for
12 summary judgment. (Cite omitted). If the court
13 believed that it required more exposure to the
14 background of this controversy, a trial might be
15 worthwhile. The court believes, however, that in
16 light of the large amount of uncontroverted
17 historical background material supplied to the
18 court by the parties, it would be a waste of both
19 judicial and legal resources to hold a trial merely
20 to decide the legal questions in this case." p. 614

21 Thus it is in this matter. An evidentiary trial could add
22 but little, if anything, to the massive amount of agreed upon
23 historial data now before the Court. With all of the
24 uncontroverted factual matter present, it then becomes a
25 question of law for the Court to interpret the meaning and
26 effects of the data furnished. This is particularly true here,
where any evidentiary trial would be to the Court and not to a
jury. Thus, a reiteration of what has already been presented
would serve no useful purpose and would be extremely wasteful
of both time and money. The Court will therefore proceed to
consider the motions for partial summary judgment.

25 ///

26 ///

1 HISTORICAL BACKGROUND

2
3 The historical background of this matter has been recited
4 in great detail in the respective memorandums filed herein.
5 There is no necessity of repeating all of it herein. As the
6 need arises, the Court will allude to whatever history, events
7 or documents that may be necessary in explanation of the issues
8 and the resolution thereof.
9

10 SCOPE OF THE OPINION

11
12 Although there was no mention made whatsoever by any of
13 the parties hereto in any of the memorandums submitted to the
14 Court, in oral argument there were allusions to the claim of
15 the U.S. on behalf of the Y.I.N. concerning "certain
16 off-reservation public domain allotments". No information,
17 either written or orally, has been provided to the Court as to
18 the location of these off-reservation "allotments"; how they
19 came about; whether water is claimed therefore under Treaty
20 rights, riparian rights, prior appropriation rights or any
21 other claim of right; the area involved; the amount of water
22 right therefore; whether they pertain to diversions from the
23 main stem of the Yakima River or from any of the numerous
24 tributaries; or even if they may have been included (or if not,
25 should have been) in any previous court proceedings throughout
26 the Yakima River Basin. Accordingly, the Court does not

1 consider these "public domain" claims in this opinion. When
2 properly identified, they will be appropriately considered.

3 Additionally, it must be recognized that the Ahtanum Unit
4 of the Yakima Reservation is physically separated from the main
5 body of the Reservation. This Unit is supplied by water solely
6 from Ahtanum Creek. The issues concerning this Unit are
7 separate and distinct from the issues to be dealt with herein
8 and have been neither briefed nor argued to the Court.

9 Also, the Toppenish, Simcoe and Satus creeks, which are
10 wholly within the Yakima Reservation, are not considered. This
11 Opinion will deal solely with rights to the use of water in and
12 from the Yakima River.

13
14 IRRIGATION

15 1855 - 1914

16
17 Historically known as "The Manifest Destiny", it was the
18 concept of the United States in the 1840's that it would
19 eventually control this nation from the Atlantic to the Pacific
20 Ocean. As a consequence, it became necessary to deal with and
21 provide for the Native Americans who occupied the mostly
22 unsettled areas of the West.

23 In 1855, at Camp Stevens, Walla Walla Valley, a Treaty
24 With The Yakima was entered into between the U.S. and the now
25 designated Yakima Indian Nation. (Movants Exh. S.1855.06.09).
26 The Treaty was ratified and proclaimed in 1859. Article 3 of

1 the Treaty secured to the Y.I.N. "The exclusive right of taking
2 fish in all the streams, where running through or bordering
3 said reservation ... as also the right of taking fish at all
4 usual and accustomed places, in common with the citizens of the
5 Territory ..." (009576). Article 5 provided for an
6 agricultural school, various necessary shops, a superintendent
7 of farming, two farmers, necessary tools and a flouring mill.
8 (009577). Article 6 thereof provided for assigning lots to
9 individuals or families in the same fashion as provided in the
10 sixth article of the Treaty with the Omahas. (009578).

11 Article 6 of the Treaty With The Omaha (Movants Exh.
12 S.1854.03.06) set up the method by which land would be allotted
13 to an Indian or Indians as their own, provided they remained
14 thereon and tilled such land. (009839-40). This allotment
15 system was further supplemented and expanded by Congress in
16 1887. (Movants Exh. S.1887.02.08).

17 In the Report of the Joint Congressional Commission,
18 December 20, 1913 (hereinafter Sen.Doc. 337), counsel for the
19 Y.I.N., Carrol B. Graves, submitted a Statement and Memorandum
20 Brief and explained the Treaty by stating:

21 "...it was intended that the Indians on the
22 Yakima Reservation should become an agricultural
23 people and their lands devoted to those acts,
24 and it was within the knowledge of all the
25 parties that such use could not be made of the
26 lands without the Indians having the right to
the appurtenant waters."

(Sen.Doc. 337, pg. 96, 005543).

When the Treaty was proclaimed in 1859, the Indians

1 commenced some irrigation, having 1,000 to 1,200 acres being
2 irrigated by 1865. In May of 1896, the Indian Service
3 constructed what is now known as the Old Reservation Canal.
4 (Sen.Doc. 337, p. 72, 005545). In 1903, the New Reservation
5 Canal was constructed (id, p. 73). Interestingly, the first
6 record of a non-Indian irrigation ditch is the Nelson ditch
7 constructed in 1867, taking water from the Naches River. (See
8 Report on the Conditions on the Yakima Indian Reservation,
9 October 12, 1912, page 2). By 1912, 32,000 acres were being
10 irrigated on the then called Wapato Project. (id, pg. 12).

11 In the meantime, non-Indian settlers began occupying the
12 lands of the Yakima River Basin. The building of the Northern
13 Pacific Railroad in 1884-1886 began a "tide of immigration
14 toward the Northwest which has been flowing steadily ever
15 since". (Report on Conditions, 1912, pg. 4). By 1885, surveys
16 and construction of various canals throughout the Basin had
17 been commenced and by 1902 approximately 121,000 acres of land
18 were being irrigated by private canals. (Movants Exh.
19 0000.00.00.04, 001228-001230). At that time, the River was
20 totally overappropriated.

21 In 1902, Congress passed the Reclamation Act, authorizing
22 the Secretary of the Interior to construct irrigation works.
23 (Movants Exh. S.1902.06.17, 009912). Pursuant to requests from
24 citizens of the Valley, the Secretary commenced a study of the
25 Basin. In April, 1905, the engineers reported on the
26 feasibility of and recommended that the U.S. "enter upon the

1 development of storage and irrigation in the Yakima Basin as
2 soon and as extensively as conditions will permit." (Movants
3 Exh. 1905.04.22, 008340-1). On March 4, 1905, the Washington
4 Legislature passed an act allowing the U.S. to exercise the
5 power of eminent domain for land, water and rights of way.
6 Pursuant thereto the U.S., on May 10, 1905, withdrew and
7 appropriated all of the unappropriated waters of the Yakima
8 River and its tributaries. (Movants Exh. 1905.05.10). Also,
9 W.H. Code, Chief Engineer of the Indian Service urged the
10 Secretary to include the Yakima Reservation in the Reclamation
11 Project. (Movants Exh. 1905.11.29).

12 Due to the overappropriation of the natural flow of the
13 river, several pending lawsuits, and various other concerns,
14 the Secretary established eight conditions that had to be met
15 before the Project could proceed. (Movants Exh.
16 1905.12.12.01). These conditions, among other things, required
17 the adjustment of conflicting claims to appropriation, the
18 determination of all litigation and to clear up all matters
19 that would tend to embarrass or restrict the appropriation of
20 water. The fifth condition required "The securing to the
21 Indians on the Yakima Reservation of a sufficient water supply
22 by passage of appropriate legislation by Congress, or
23 otherwise." (id. 008452). Thus, it becomes apparent that the
24 Secretary intended to include the Reservation in the Yakima
25 Project.

26 In order to satisfy the conditions so that the Project

1 could proceed, over 95% of the appropriators signed "limiting
2 agreements", whereby they agreed to limit their diversion of
3 water. The lawsuits were settled and the U.S. purchased the
4 Sunnyside Canal from the Washington Irrigation Company. Using
5 the low water flow in August of 1905 as the basis for
6 measurement, the Secretary then arbitrarily limited the
7 Reservation to 147 c.f.s. and the Sunnyside Division to 650
8 c.f.s. for their respective diversions. It was, however,
9 contemplated that further water needs for the Reservation would
10 have to be met with storage water from the Project. (Movants
11 Exh. 1906.02.19.03). In an attempt to further implement this
12 concept, Congress passed the "Jones Act" on March 6, 1906,
13 which act would permit each Indian to sell 60 acres of their
14 80-acre allotment and out of the proceeds a water right for the
15 remaining 20 acres would be purchased. With this Act in place,
16 the Acting Secretary, on March 27, 1906, approved the Yakima
17 Project.

18 Initially, it was contested between the parties as to
19 whether or not the Secretary had the authority to impose the
20 147 c.f.s. limitation during the low water flow period of July,
21 August and September of each year. Finally, in oral argument,
22 it was conceded that this is a "non-issue" in light of the
23 actions of Congress in passing the Act of August 1, 1914.

24 The scheme set forth in the Jones Act did not work. The
25 Indians were understandably reluctant to part with their lands.
26 Consequently, the Reservation lands received only what flood

1 water was available in the spring and the 147 c.f.s. during the
2 low flow period. This was totally inadequate to grow
3 sufficient crops to meet family needs.

4 During the ensuing years, there was a tremendous amount of
5 discussion and correspondence between the Indian Office and the
6 Reclamation Service within the Department of Interior and with
7 both houses of Congress. This historical data is in the
8 record, but is entirely too voluminous to be set forth herein.
9 Suffice it to say that there was much dissatisfaction and
10 antagonism by both Indians and non-Indians about the then
11 current situation. There were continuing threats of lawsuits
12 and pleas to determine the nature and extent of the Indians'
13 water rights.

14 In the meantime, work was being done on the storage
15 reservoirs. By the end of 1908, temporary crib dams had been
16 constructed or taken over at lakes Cle Elum, Keechelus and
17 Kachess. (Movants Exh. 1908.12.31.01, 001995) Permanent
18 construction commenced at Bumping Lake in 1909 and was
19 completed in 1910, followed by Lake Kachess, 1910 to 1912.
20 Lake Keechelus was commenced in 1913 but not completed till
21 1917. Clear Creek dam was constructed in 1914. Therefore,
22 between Bumping, Kachess and Clear Creek reservoirs, there was
23 278,000 acre feet of storage by the end of 1914. Rimrock
24 (McAllister Meadows) was built from 1917 to 1925 and Cle Elum
25 was built between 1931 and 1933. For the last 57 years, no
26 additional storage has been added. (C.R. Lentz Review, p. 3).

1 Also, during this period of time, the record is replete
2 with references to various judicial rulings by the Congress and
3 all parties concerned. The U.S. Supreme Court in Lone Wolf vs.
4 Hitchcock, 23 S.Ct. 216, had declared in 1903 that Congress had
5 the plenary power to regulate Indian affairs and property
6 rights. Following this was the 1907 decision of the Circuit
7 Court, District of Montana in U.S. vs. Conrad Investment Co.,
8 156 Fed.Rptr. 123, wherein the Court, following the 9th Circuit
9 Court opinion in the Winters case, held that when the Blackfoot
10 Reservation was created, the government impliedly reserved
11 sufficient water to irrigate the arid lands of the Reservation.
12 This same proposition was put to rest in January, 1908 by the
13 U.S. Supreme Court in Winters vs. U.S., 207 U.S. 564, where in
14 affirming the 9th Circuit Court of Appeals (and inferentially
15 the Conrad case,) it stated:

16 "The power of the government to reserve the
17 waters and exempt them from appropriation
18 under the state laws is not denied, and could
19 not be. ...That the government did reserve
20 them we have decided, and for a use which
would be necessarily continued through
years." p. 575-6.

21 Thus, the question of the establishment of the reserved
22 water rights was determined, but the entire problem of the
23 quantification of those rights was squarely before Congress and
24 the Reclamation and Indian offices of the Interior Department.
25 Much dialogue and discussion amongst all took place. In 1912,
26 at the behest of the Acting Secretary of Interior, a conference

1 was held and a Report on the Conditions on the Yakima Indian
2 Reservation (hereinafter Report) was generated jointly by
3 Charles H. Swigart, Supervising Engineer, U.S. Reclamation
4 Service; Don M. Carr, Superintendent and Special Disbursing
5 Agent, Yakima Indian Reservation; and Leslie M. Holt,
6 Superintendent of Irrigation, Yakima Indian Reservation. The
7 report is dated October 22, 1912 and it provided a
8 comprehensive overview of the situation then existing on the
9 Reservation and provided various proposals for the solution to
10 the problems identified. This report was furnished to Congress
11 and the three authors also testified before a Congressional
12 committee as hereinafter noted.

13 It is interesting to note that by that time, the
14 Reservation was designated as the "Wapato Unit" of the
15 Reclamation Project, thus indicating its inclusion in the total
16 Project scheme. (Report, p. 27, 29). It is also noted that
17 they advocated the total control of the watershed by one
18 entity. (id, p. 27) In describing the Wapato Unit, they
19 identified 120 to 126,000 acres as irrigable acreage. (id, pg.
20 27).

21 This report was furnished to Congress (Movants Exh.
22 S.1913.01.22) and resulted in the appointment of a joint
23 commission of two Senators and two Representatives to
24 investigate the situation. (Movants Exh. S.1913.06.30,
25 009398-9). The Commission came to the State of Washington;
26 inspected the various units of the Project, especially the

1 Sunnyside and Wapato Units; and held public hearings on the
2 matters at North Yakima and Toppenish. (Sen.Doc. 337, p. 25,
3 00521). Hearings were also held in Washington, D.C. The
4 Report of the Joint Congressional Commission, together with all
5 of the documents and testimony considered, was filed December
6 20, 1913. (Sen.Doc. 337).

7 The pertinent findings and recommendations of the
8 Commission, among others, are as follows:

9
10 "1. That the allowance by the former Secretary of the
11 Interior, Mr. Hitchcock, of 147 second-feet of water
12 of the low-water flow of the Yakima River for the
13 use and benefit of the irrigable lands on the Yakima
14 Indian Reservation was when made and now is in-
15 adequate, inequitable, and unfair to said Indian
16 reservation.

17 2. From a consideration of the whole subject we believe
18 that vested rights have accrued to water users other
19 than those on said reservation and that the low-
20 water flow of the Yakima River is insufficient
21 to supply their needs and the requirements of said
22 reservation. We therefore believe that the United
23 States should provide, for the use and benefit of
24 the irrigable portion of said reservation, free
25 from storage cost and storage maintenance cost,
26 sufficient water to equal the amount to which said
reservation was equitably entitled when the finding
of Secretary Hitchcock was made.

While it is difficult to determine what this amount
should be, we are convinced that it should be not
less than one-half of the natural flow of the Yakima
River and should be sufficient to irrigate one-half
of each allotment of irrigable land on said reser-
vation." (Sen.Doc. 337, p. 25, 005521).

After several hearings on the Joint Commission Report,
Congress passed the Act of August 1, 1914. Adhering closely to
the Report, Section 22 of that Act provided:

///
///

1 "It appearing by the report of the Joint Con-
2 gressional Commission ... that the Indians of the
3 Yakima Reservation in the State of Washington, have
4 been unjustly deprived of the portion of the natural
5 flow of the Yakima river to which they are equitably
6 entitled for the purposes of irrigation, having only
7 been allowed one hundred and forty-seven cubic feet
8 per second, the Secretary of the Interior is hereby
9 authorized and directed to furnish at the northern
10 boundary of said Yakima Indian Reservation, in
11 perpetuity, enough water, in addition to the one
12 hundred and forty-seven cubic feet per second
13 heretofore allotted to said Indians, so that there
14 shall be, during the low-water irrigation season, at
15 least seven hundred and twenty cubic feet per second
16 of water available when needed for irrigation, this
17 quantity being considered as equivalent to and in
18 satisfaction of the rights of the Indians in the
19 low-water flow of the Yakima River and adequate for
20 the irrigation of forty acres on each Indian allot-
21 ment; the apportionment of this water to be made
22 under the direction of the Secretary of the
23 Interior, and there is hereby authorized to be ap-
24 propriated the sum of \$635,000 to pay for said water
25 to be covered into the reclamation fund ... "
26 (Movants Exh. S.1914.08.01, 009402).

15 Several observations are in order. First, the Report and
16 the Act both refer to the action of the Secretary in
17 establishing the 147 c.f.s. limitations during the low water
18 period of the year, at a time when there was no storage water
19 available. To reiterate, whether or not the Secretary had the
20 authority to impose this limitation makes no difference due to
21 the attempt of Congress in the Act to rectify the situation.

22 Secondly, while the 1906 "Jones Act", supra, only
23 contemplated 20 acres of each Indian allotment for irrigation
24 as sufficient for the Indians's family needs, the Report and
25 the Act specifically set forth 40 acres of each 80-acre
26 allotment to be furnished water, free of storage costs, as

1 being within the entitlement of the Indians. This doubled the
2 acreage previously contemplated, but it must be remembered that
3 by 1914, there was by then 278,000 acre feet of storage water
4 available, supra. It should also be noted, as stated in the
5 Report of Conditions, p. 12, there were only 32,000 acres being
6 irrigated in 1912. The 720 c.f.s. was calculated as follows:
7 there were 1800 allotments of 80 acres each, 40 acres of which
8 were to be irrigated; thus, there were to be 72,000 acres to be
9 irrigated at one c.f.s. per 100 acres, thereby arriving at 720
10 c.f.s. (Sen.Doc. 337, p. 367, 005694).

11 Thirdly, as noted, this water was to be furnished to the
12 Indian allotments free of all storage construction costs to the
13 Indians. The U.S., by paying for those storage costs, was
14 thereby recognizing the treaty rights of the Indians to water
15 from the Yakima River. The 72,000 acres to be furnished water
16 free from storage costs came to be known as the "A" lands of
17 the Reservation. The other 48,000 acres of the 120,000
18 irrigable acreage from the Yakima River would have to bear
19 storage costs and were to be classified as the "B" lands.

20 This brings us to the other observation. In the 1912
21 Report on Conditions and the Joint Commission Report, it was
22 consistently stated and determined that there were 120,000
23 irrigable acres that could be irrigated from the Yakima River.
24 Indeed, in the Joint Commission Report (Sen.Doc. 337) the
25 testimony is replete with many references to the 120,000
26 irrigable acres, which are too numerous to list here.

1 Consequently, Congress was clearly advised and aware of the
2 oft-stated irrigable acreage as early as 1912 and consistently
3 thereafter. Indeed, as late as 1931, Supervising Engineer
4 Engle of the Indian Service, asserted in a Report on the Yakima
5 Indian Reservation Project, that there were 120,000 irrigable
6 acres in the Wapato Unit of the Project. (U.S. App. D., Part
7 1, pp. 2-3).

8 Although, as stated, Congress was aware of the implied
9 reserved Treaty rights to water under the Winters doctrine,
10 supra, there were at that time no guidelines available to
11 assist in establishing the parameters of those rights. At
12 best, Congress could only consider what the State, in oral
13 argument, alluded to as the "reasonably foreseeable needs" of
14 the Indians as a measure of those rights at that time.

15 It was not until 1963, in Arizona vs. California, 373 U.S.
16 546, 10 L.Ed.2d 542, that the U.S. Supreme Court first
17 established the method by which the implied reserved rights
18 were to be measured. The Court therein, referring to the
19 Winters doctrine, stated:

20 "We follow it now and agree that the United
21 States did reserve the water rights for the
22 Indians effective as of the time the Indian
23 Reservations were created. ... (The Master)
24 ruled that enough water was reserved to irrigate
25 all the practically irrigable acreage on the
26 reservations. ... We have concluded, as did the
Master, that the only feasible and fair way by
which reserved water for the reservations can be
measured is irrigable acreage." 10 L.Ed.2d p. 578
(Emphasis added)

26 ///

1 Thus, it was 49 years after the Act of August 1, 1914,
2 that the "practically irrigable acreage" (PIA) standard was
3 established, as opposed to the reasonably foreseeable needs
4 previously considered by Congress.

5 The reserved rights were further defined in 1976 in
6 Cappaert vs. United States, 48 L.Ed.2d 523, as follows:

7 "This Court has long held that when the
8 Federal Government withdraws its land from
9 the public domain and reserves it for a
10 federal purpose, the Government, by implication,
11 reserves appurtenant water then unappropriated
12 to the extent needed to accomplish the purpose
13 of the reservation. ... The doctrine applies to
14 Indian Reservations and other federal enclaves,
15 encompassing water rights in navigable and non-
16 navigable streams. (p. 534.) ... The implied-
17 reservation-of-water doctrine, however, reserves
18 only that amount of water necessary to fulfill
19 the purpose of the reservation, no more." (p. 535)
20 (Emphasis added).

21 United States vs. New Mexico, 57 L.Ed.2d 1052 (1978), went
22 further in discussing the "purposes" of the implied
23 reservations of rights. In that case, the United States had
24 reserved the Gila National Forest in New Mexico as a national
25 forest. The Court held that by so doing, the United States
26 reserved sufficient water from the Rio Mimbres River to
preserve timber and a reasonable water flow, those being the
very purposes for which national forests are established, but
that there was no reserved water rights for the secondary
purposes of recreation, aesthetics, wildlife preservation, or
cattle grazing, citing to the language in Cappaert, supra. The
Court further stated:

1 "Where water is only valuable for a secondary
2 use of the reservation, however, there arises
3 the contrary inference that Congress intended,
4 consistent with its other views, that the United
States would acquire water in the same manner
as any other public or private appropriator."
(p. 1058)

5 Thus, the parameters of the implied reservation of waters,
6 as we now understand them, have been established. The purposes
7 of the Yakima Treaty of 1855 were recognized and succinctly
8 stated in the Joint Commission Report:

9 "The exclusive right of taking fish in all the
10 streams running through or bordering the res-
11 ervation was expressly reserved by the treaty
12 to the Indians. ... The controlling purpose of
13 the treaty, however, was to make possible the
permanent settlement of the Yakima Indians and
their transformation into an agricultural people."
(Sen.Doc. 337, p. 23, 005520).

14 It is the position of the movants, as presented to the
15 Court, that by this 1914 Act, it was the intent of Congress to
16 establish and quantify the reserved rights of the Yakima Nation
17 in and to the waters of the Yakima River. The U.S., in reply,
18 contends that the 1914 Act was passed to resolve the chaotic
19 conditions of the time and to correct the inequity of the
20 Secretarial limitation by supplying sufficient free water to
21 meet the Indians' needs, with no intent to limit the reserved
22 treaty rights.

23 In assessing these contentions, there are certain
24 guidelines that the Court must follow. The process which the
25 Court should adopt is set forth in Rosebud Sioux Tribe vs.
26 Kneip, 430 U.S. 584, 51 L.Ed.2d 660 (1977). While that case

1 dealt with the question of the termination of a reservation,
2 and this matter concerns the narrower issue of possible
3 delineation and quantification of water rights, it is
4 instructive as to the procedure to be followed. It is therein
5 set forth:

6 "We are guided by well-established legal
7 principles. The underlying premise is that
8 Congressional intent will control. (Cites
9 omitted) In determining this intent, we are
10 cautioned to follow "the general rule that
11 doubtful expressions are to be resolved in
12 favor of the weak and defenseless people who
13 are the wards of the nation, dependent upon its
14 protection and good faith." (Cites omitted)
15 (51 L.Ed.2d p. 664).

16 "In all cases, "the face of the Act," the
17 "surrounding circumstances," and the
18 "legislative history" are to be examined with
19 an eye toward determining what congressional
20 intent was." (id, pg. 665).

21 To the same effect, see Solem vs. Bartlett, 465 U.S. 463,
22 79 L.Ed.2d 443 (1984) and Oliphant vs. Suquamish Indian Tribe,
23 435 U.S. 191, 55 L.Ed.2d 209 (1978). With that in mind, we
24 turn to the issue at hand.

25 Looking to the face of the Act, movants point to the
26 language "this quantity being considered as equivalent to and
in satisfaction of the rights of the Indians in the low water
flow" as a Congressional expression of intent to quantify the
treaty rights. They further contend that the "rights of the
Indians" refer to all rights, both for irrigation and fish. On
the other hand, the U.S. refers to the statements "so that
there shall be, during the low-water irrigation season, at

1 least seven hundred and twenty cubic feet per second of water
2 available when needed for irrigation" and "adequate for the
3 irrigation of forty acres on each Indian allotment" as being
4 expressive of an intent only to establish a minimum amount of
5 water to be "furnished" solely for irrigation purposes during
6 the low-flow period of July through September.

7 Because of the conflicting interpretations given to the
8 specific language of the Act, it is important to then look at
9 the surrounding circumstances and the pertinent history to that
10 point in time. As previously noted, Congress was aware of the
11 necessity for the Secretary of the Interior to make some
12 discrete allocation of the overappropriated natural flow of the
13 river in 1906 in order to proceed with the Yakima Project, even
14 though it was inadequate at the time. It was aware of the
15 Winters doctrine and its obligation thereunder to supply the
16 needs of the Indians. It was aware that there were non-Indian
17 vested rights on the River and that the Reclamation Service
18 contemplated providing water to the Kittitas, Tieton and Benton
19 units, as well as the Sunnyside unit in the future. (Sen.Doc.
20 337, p. 24, 005521). It was aware of the Treaty fishing
21 rights, but concluded that the "controlling purpose" of the
22 treaty was to turn the Indians into agricultural people. (id.
23 p. 23, 005520). From the accompanying testimony to the Joint
24 Commission it knew of the chaotic conditions that were
25 threatening to embarrass the Yakima Project. It knew that
26 storage water was then available. It was also well aware that

1 there were 120,000 acres of irrigable land on the Reservation,
2 of which approximately 32,000 acres were then being irrigated.

3 With all of these factors before it, Congress therefore
4 followed precisely the recommendations of the Joint Commission,
5 contained in paragraph 2 of the report as previously set forth
6 herein. Thus, it is readily apparent that the main intent of
7 Congress, at that time, was to provide for the present needs of
8 the Indians for sufficient water to irrigate sufficient lands
9 to sustain them. With uncertainty as to the full scope of the
10 Winters doctrine, they provided for the minimum amount that
11 would be needed for irrigation on the Reservation, well knowing
12 that future reservoir construction would produce additional
13 storage water in the future. Thus, the 1914 Act, in and of
14 itself, did not quantify the totality of the treaty rights for
15 irrigation nor address the treaty fishing rights.

16 Congress enacted what is known as the Warren Act in 1911.
17 (Movants Exh. S.1911.02.21). This Act authorized the Secretary
18 of the Interior, under the reclamation law, to contract with
19 individuals, corporations, associations and irrigation
20 districts for impounding, storage and carriage of water to an
21 extent not exceeding the capacity of the project. Pursuant to
22 this Act, in the ensuing years, the Secretary entered into a
23 large number of these contracts (counsel mentioned the number
24 257 in oral argument). Although there were several different
25 forms of the contracts, all of the main provisions in all of
26 them were substantially similar.

1 A typical contract to illustrate these similar provisions
2 is that of the Union Gap Irrigation District. (Movants Exh.
3 1915.03.02). It provided that all Warren Act contractors would
4 be on equal footing with respect to priority to the use of
5 water with all other such contractors (excepting only the 650
6 c.f.s. to the Sunnyside Unit.) (id, 010092). It provided "In
7 case of shortage of water in a year of unusually low runoff,
8 such as to make it impossible to supply fully all of the lands
9 --- each said unit and each said contractor shall be entitled
10 to a supply of water diminished pro rata --- the pro rata share
11 herein provided for shall be determined by the ratio of the
12 water supply available for all portions of the Yakima Project
13 and for all parties making contracts of tenor similar to this.
14 (id, 010093). Thus, all contractors would share pro rata in
15 times of shortage. Another provision contained in all
16 contracts, although not in identical language, is exemplified
17 by Article 6 - "The United States shall not be liable for a
18 failure to impound, carry or deliver supplemental water under
19 this agreement caused by unavoidable delays in the construction
20 of said reservoirs, or for insufficient supply of water,
21 hostile diversion, drought, interruption of service made
22 necessary by repairs, damages caused by flood, unlawful acts or
23 unavoidable accidents". (id, 010095-6).

24 Therefore, all of the contracts obligated the U.S. to
25 deliver the water contracted for; provided equal priority among
26 the water users; provided that all water users would share

1 pro rata in times of shortage; and excused the U.S. from
2 liability for unavoidable contingencies or Acts of God.

3
4 1914 - 1945

5
6 We proceed onward. In 1915, the Secretary reported to the
7 House of Representatives for the provision of water to the
8 Reservation, proposing a plan to irrigate the 120,000 acres.
9 (Movants Exh. S.1915.01.05.01, 009821). He also proposed two
10 possible sites for a diversion dam across the river. In 1916,
11 Congress provided monies for the construction of the dam "for
12 the diversion ... of water provided for forty acres of each
13 Indian allotment ... and such other water supply as may be
14 available or obtainable for the irrigation of a total of one
15 hundred and twenty thousand acres of allotted Indian land on
16 said reservation." (Movants Exh. S.1916.05.18, 009406).
17 Basically, the same language was used in yearly appropriations
18 by Congress through 1921. (Movants Exh. S.1917.03.02,
19 S.1918.05.25, S.1919.06.30, S.1920.02.14, S.1921.03.03).

20 It should be noted that Congress made all of these
21 appropriations reimbursable by payment from the lands to which
22 water was being supplied. The canal system of the Wapato
23 Division was under the jurisdiction and control of the Bureau
24 of Indian Affairs.

25 During this period, extensive drainage works had been
26 constructed on the Reservation. This drainage system

1 accomplished two purposes: first, to drain much swampy,
2 unproductive land, and secondly, the recapture and reuse of a
3 substantial amount of water for further irrigation. With this
4 system in place, more and more acreage was coming under
5 cultivation. It therefore became necessary to obtain more
6 water to irrigate the increased acreage. Accordingly, the
7 Indian Bureau and the Reclamation Service entered into a
8 contract, approved by the Secretary, for the Indian Service to
9 have a perpetual diversion right for 250,000 acre feet of water
10 during the irrigation season of each year, in addition to their
11 present rights to 720 c.f.s. during the low water irrigation
12 season. This took place in 1921 and the water purchased was to
13 irrigate the aforementioned "B" lands of the reservation.
14 (Movants Exh. S.1921.03.31). The Reclamation Service would
15 control the diversions "for the proper regulation of the Yakima
16 River". (id. 005170). The contract also specifically provided
17 that the storage works of the Project would be paid by the
18 Indian Service into the Reclamation fund. (id. 005169).
19 Further, the contract specified that this water would be
20 proratable in times of shortage, along with all other Warren
21 Act contractors, as previously mentioned. (id. 005171-2). This
22 contract was modified in 1936, mainly as to the schedule for
23 delivery of the water.

24 Keechelus Reservoir had been completed in 1917, so that by
25 now, in 1921, there was 435,800 acre feet of storage water
26 available, in addition to natural flow and spring flood waters.

1 Rimrock Dam was then under construction and was finished in
2 1925. Cle Elum Dam was completed in 1933 and the total storage
3 capacity at that time, and now, was 1,070,700 acre feet. (C.R.
4 Lentz Review, Court Exh. 1, p. 3). With the completion of the
5 storage reservoirs, the Reclamation Service now had total
6 control over the waters of the Yakima River. It had committed
7 the U.S. to nearly the total water supply available by use of
8 the Warren Act contracts.

9 During this period, the record reflects a tremendous
10 amount of discussion, correspondence and differences of opinion
11 between the Reclamation Service and the Indian Service within
12 the Department of the Interior, as to how to meet the further
13 water needs of the Reservation. All of this clearly indicates
14 the intent of the government to irrigate as much productive
15 land as possible, both on and off the Reservation. There were
16 continuous references to the possibility of an adjudication
17 suit to establish the rights and priorities of all the water
18 users. This no one wanted.

19 The two Services held a conference and a report was made
20 indicating that the supply of water left available in February,
21 1936, was a maximum of 100,000 acre feet in addition to 30,000
22 acre feet released by the Tieton Unit. (Movants Exh.
23 1936.02.21.03, 002588). They suggested securing this for the
24 Reservation either through an appropriation by Congress or by a
25 charge against the land. The Director of Irrigation, U.S.
26 Indian Irrigation Service, was offered the 130,000 acre feet

1 for the Wapato Project. (Movants Exh. 1936.05.26). He
2 acknowledged that the additional 30,000 acre feet from the
3 Tieton Unit was available, but then responded:

4 "You are advised that the decision has been
5 reached that the 100,000 acre feet which it is
6 proposed will be obtained for the Wapato Project
7 is considered sufficient for the needs thereof.
8 Please so advise Mr. Moore and thank him for his
9 interest in having the matter brought to our
10 attention." (Movants Exh. 1936.06.06).

11 Thus, the Indian Service rejected the additional 30,000
12 acre feet offered and indicated that the Reservation needs were
13 satisfied by the 100,000 acre feet.

14 Thereafter, a contract was entered into between the Bureau
15 of Reclamation and the Bureau of Indian Affairs, which was
16 approved by the Secretary on September 3, 1936. (Movants Exh.
17 S.1936.09.03.02). The contract indicated that the water was
18 made possible by the storage works. It states that the amount
19 of water made available by the Act of August 1, 1914, was
20 insufficient to irrigate the "A" lands. (id. 005153). It left
21 the payment for this 100,000 acre feet of storage water to
22 either an appropriation by Congress or a repayment contract
23 with the landowners. (id. 005156). It provided the same
24 priority, and pro rata sharing with Warren Act contractors
25 conditions as were contained in the 1921 contract. (id.
26 005157-8).

27 Then Senator Lewis B. Schwellenbach introduced a bill in
28 1939 to have Congress appropriate the money to pay for the
29 100,000 acre feet to fulfill the Act of August 1, 1914.

1 (Movants Exh. 1939.01.27).

2 After hearings in both Houses, the ultimate result was the
3 passage of the Act of July 1, 1940. It stated as follows:

4 "That there is hereby authorized to be
5 appropriated, out of any money in the Treasury
6 not otherwise appropriated, the sum of \$800,000,
7 and credited to the reclamation fund, to defray
8 the actual cost of furnishing an additional
9 quantity of water annually of one hundred thousand
10 acre-feet which is needed to provide adequate
11 irrigation for forty acres each of the Indian
12 allotments as contemplated by the Act of August 1,
13 1914, and as set out in the terms of the agreement
14 between the Bureau of Reclamation and the Office
15 of Indian Affairs, approved by the Secretary of
16 the Interior September 3, 1936, the same to be
17 made available in amounts not to exceed \$20,000
18 annually for forty years."

19 (Movants Exh. 1940.07.01, 010329).

20 In view of the Act of July 1, 1940, coupled with the Act
21 of August 1, 1914, the movants again contend that Congress has
22 now indicated its intent to quantify and limit the Indian
23 treaty rights to water for irrigation. The Court has
24 previously held that the 1914 Act, in and of itself, did not
25 fully evidence such an intent. In addition to the methodology
26 set forth in Rosebud, supra, Solem, supra, teaches us that we
can look "... to events that occurred after the passage of a
... Act to decipher Congress' intentions." (p. 451). Thus, we
should examine the previously enumerated events and
Congressional and administrative actions subsequent to the 1914
Act, up to and including the 1940 Act.

Undoubtedly, Congress was in 1940 providing, free of
storage and storage maintenance costs, what it felt was its

1 full and complete obligation to furnish sufficient water to
2 meet the Indian's treaty rights needs. It was aware that the
3 reservoirs had now been completed and that the Bureau of
4 Reclamation had complete control of the river. It was aware
5 that the total water supply available had been allocated by
6 Warren Act contracts and that vested water rights had accrued
7 to all such contractors. It was aware that the "B" lands then
8 had sufficient water. It was aware that the Indian Service had
9 determined that the 100,000 acre feet was sufficient to supply
10 the "A" lands without the additional 30,000 acre feet offered
11 to them. It knew that in 1914, it had set a minimum amount and
12 now, in 1940, it was its duty and its obligation, in all good
13 faith, to satisfy the treaty rights. It therefore established
14 the "de facto, if not de jure", quantification of those rights.
15 Solem, supra, p. 451. Specific reference was made to the
16 fulfillment of the recognized obligation set forth in the 1914
17 Act, where the minimum had been set. Therefore, after
18 considering all of the circumstances of the ensuing 26 years,
19 the actual quantification was established by Congress with the
20 passage of the Act of July 1, 1940.

21 In view of the Court's holding that there was
22 Congressional intent to quantify the treaty water rights in
23 1940, the question arises as to the promulgation of the
24 "practically irrigable acreage" standard to be implied to such
25 rights as set forth 23 years later in Arizona, supra. To
26 answer that question, we should turn to Arizona vs. California,

1 75 L.Ed.2d 318 (1983)(Arizona II). While Arizona II dealt with
2 the PIA standard to be applied in view of the 1963 Decree in
3 Arizona I, and the matter sub judice applies to the effect of
4 such standard to the Congressional intent expressed in the 1940
5 Act, the principles to be used are the same. The Congressional
6 intent to limit the rights are as effective as a decree,
7 inasmuch as Congress has the plenary power to do so. Lone Wolf,
8 supra. The issue in Arizona II, supra, was whether or not
9 certain "omitted" lands from the 1964 Decree should now be
10 included, under the PIA standard, so as to modify the 1963
11 Decree. The Special Master allowed the modification, but the
12 Court disagreed.

13 "In our opinion, the prior determination of
14 Indian water rights in the 1964 Decree precludes
15 relitigation of the irrigable acreage issue."

16 "... We held that the creation of the Reservation
17 implied an allotment of water necessary to "make
18 the reservation liveable." (Cites omitted)
19 (75 L.Ed.2d 318, p. 331).

20 "... a fundamental precept of common-law
21 adjudication is that an issue once determined by
22 a competent court is conclusive. (id. p. 333). In
23 no context is this more true than with respect to
24 rights in real property. ... Our reports are
25 replete with reaffirmations that questions
26 affecting titles to land, once decided, should no
longer be considered open. ... Certainty of rights
is particularly important with respect to water
rights in the Western United States. ... The
doctrine of prior appropriation, the prevailing
law in the western states, is itself largely a
product of the compelling need for certainty in
the holding and use of water rights. ... Re-
calculating the amount of practicably irrigable
acreage runs directly counter to the strong
interest in finality in this case." (id. p. 334)
"Technological advances alone ought not to call

1 for re-opening a complete decree."
2 (id. p. 337, note 18).

3 Consequently, whether the quantification and limitation of
4 implied reserved Treaty rights for water is by Court decree or
5 by the intentional act of Congress, under its plenary power so
6 to do, it was held that in the interest of certainty and
7 finality, practicably irrigable acreage which had been later
8 arrived at or obtained should not be considered, either by
9 technological advances or otherwise. This should be
10 particularly applicable to this case where it is so well
11 documented that from at least as early as 1912, Congress was
12 continuously aware that there were 120,000 irrigable acres from
13 the Yakima River on the Reservation. In view of this, and with
14 both the "A" and "B" lands having been supplied with sufficient
15 water, covering the 120,000 irrigable acres as of 1936, the
16 later promulgated "practically irrigable acreage" standard
17 should not and does not apply to this action.

18
19 THE 1945 CONSENT DECREE

20
21 In 1939, the Kittitas Reclamation District, Selah-Moxee
22 Irrigation District and the United States brought suit against
23 the Sunnyside Valley Irrigation District, certain individuals,
24 and 18 other irrigation districts, associations and companies.
25 Cascade Irrigation District was further joined as a defendant
26 at the time of the entry of the judgment. The Yakima Indian

1 Nation was not named as a party to the action, although the
2 Yakima Reservation Irrigation District was a named party.

3 Two main issues were raised by the complaint, answers and
4 cross-complaints. The first issue was whether the U.S. was
5 required to deliver water without charge to certain landowners
6 within the Sunnyside Valley Irrigation District (S.V.I.D.) over
7 and above their water contracts. That issue was resolved in
8 1943 by the decision in Fox vs. Ickes, 137 Fed. 2d 30, cert.
9 denied 320 U.S. 792. The second issue, raised principally by
10 the defendants, in effect, called for a general adjudication of
11 all of the water users in the Yakima River system. A
12 comprehensive and succinct history of the case is contained in
13 the Statement to the Court (Movants Exh. 1945.01.31(2)).

14 Following the 1943 decision of Fox, supra, all of the
15 parties became involved in intense negotiations with a thorough
16 review of all of the various contracts for delivery of water
17 from the total water supply available. The culmination of
18 those negotiations resulted in a proposed consent judgment to
19 be entered to conclude the action.

20 One of the major concerns in the proposed judgment was the
21 Yakima Nation's treaty water rights, and the priority thereof.
22 A memorandum to the Solicitor General by Clifford E. Fix, First
23 Assistant Chief Counsel, explained the position of the Bureau
24 of Reclamation concerning these rights. (Movants Exh.
25 1944.11.01). He indicated that in view of the concession of
26 the irrigation districts to make the 720 c.f.s. provided in the

1 1914 Act non-proratable, that all of the other 350,000 acre
2 feet supplied to the Yakima Reservation should be proratable.
3 William Zimmerman, the Assistant Commissioner in the Office of
4 Indian Affairs, in a letter to the Department of Interior
5 Solicitor, quite strongly urged that the additional 100,000
6 acre feet for the "A" lands should not be prorated in view of
7 the 1914 and 1940 Acts of Congress. However, W. H. Flanery,
8 Chief, Indian Division in the Office of the Solicitor, in a
9 memorandum to the Solicitor supported the Bureau of Reclamation
10 view calling for proration of the 100,000 acre feet, based on
11 his conclusion that the 1914 Act had limited the Indian treaty
12 rights. This dispute was apparently resolved by the memorandum
13 of William H. Veeder, Justice Department Attorney to the
14 Assistant Attorney General (Movants Exh. 1944.11.14.02). After
15 reviewing the history of the Yakima Project, Mr. Veeder
16 concluded as follows:

17 "The consent judgment if entered will provide
18 a basis of apportionment of the available
19 supply of water which has been agreed to by
20 the principal diverters from the stream. By
21 the entry of the consent judgment there will
22 be established a basis upon which the Bureau
23 of Reclamation or a watermaster if one is
24 appointed may divert to the users quantities
25 of water agreed upon by them without the danger
26 of encroaching upon the legally constituted
rights of others within the Project. (id. 001162)
With respect to the Indian Service the judgment
as proposed grants to that Service what appears
to be all of the rights to which it is entitled.
(id. 001165)."

The Solicitor of the Department of Interior also informed

1 the Attorney General that the proposed consent judgment met
2 with the approval of that office, (Movants Exh. 1944.11.15.01)
3 even though a later letter to the Solicitor from Mr. Zimmerman
4 of the Office of Indian Affairs again took strong issue with
5 the proration of the 100,000 acre feet for the "A" lands.
6 (Movants Exh. 1944.12.26).

7 Thus, with the dispute between the various offices within
8 the Department of the Interior resolved, the proposed judgment
9 was presented for entry on January 31, 1945. A "Statement to
10 the Court" was presented by Edward M. Connelly, U.S. Attorney
11 for the Eastern District of Washington; William H. Veeder,
12 Department of Justice Attorney; and D. G. Tyree, Assistant
13 Regional Counsel, Bureau of Reclamation. (Movants Exh.
14 1945.01.31(2)). This Statement briefly set forth the history
15 of the case and the Yakima Project, as well as basically
16 explaining what the proposed judgment would accomplish. In
17 respect to the Indian claims, the Statement recites:

18 "In addition to the water rights to which reference
19 is made above, there is involved in the litigation
20 the right of the Yakima Indian Reservation to a
21 supply of water from the Yakima River. By the Act
22 of August 1, 1914, Ch. 222, 38 Stat. 582, the
23 Congress of the United States claimed for the tribe
24 in question 720 c.f.s. of water in the low water flow
25 of the Yakima River. Over and above the 720 c.f.s.
26 the Yakima Reservation receives 350,000 acre feet
of water pursuant to agreements entered into between
the Bureau of Reclamation and the Office of Indian
Affairs. These later rights are derived from water
made available as the result of the furnishing of
storage capacity under the Warren Act. In the
proposed consent judgment, the rights last mentioned
to which the Indians are entitled are considered in

1 the same light and are subject to the same limitations
2 as other Warren Act rights." (id. p. 6). ... "The
3 Indian Service, for reasons above expressed, will
4 receive an undiminished right to 720 c.f.s. The
5 comments made with respect to the Warren Act users
6 hereafter set forth will apply to the balance of
7 the rights to which the Indian Service is entitled
8 under the judgment." (id. p. 8).

6 After the Statement was read into the record, District
7 Court Judge (formerly Senator) Lewis B. Schwellenbach, engaged
8 in the following colloquy with counsel. (Movants Exh.
9 1945.01.31(3)).

10 THE COURT: All right. Let us start out with this Indian
11 business. Is that all in the Wapato Division, Mr.
12 Veeder? I say, are all the Indian rights under
13 that?

14 MR. VEEDER: Yes, sir; paragraph 4, page 15 of the judgment.

15 THE COURT: In this 1914 Act the 720 cubic feet of water per
16 second is the amount Congress fixed?

17 MR. VEEDER: Yes, sir. I might call attention to the fact that
18 the judgment has been reviewed by the Department
19 of the Interior, which represents the Indian
20 Service, and all of the articles have been re-
21 viewed and approved. (id. p. 17). ...

22 THE COURT: In addition to this 720 cubic feet they have
23 350,000 acre feet, and the judgment provides for
24 250,000 acre feet, and 100,000 acre feet.

25 MR. VEEDER: Yes, Your Honor. There are two contracts, one the
26 original contract for 250,000 ... I beg pardon ...

1 in the contract of March 9, 1921, there are
2 250,000 feet, and subsequent to that a contract
3 for 100,000 feet was entered into, making an
4 aggregate of 350,000. (id. p. 17-18). ...

5 THE COURT: Do these contracts, in so far as they refer to the
6 250,000 feet, or the 250,000, plus the 100,000
7 feet recognize that the rights of the Indians were
8 subject to the same limitations, as anyone else,
9 under the Warren Act?

10 MR. VEEDER: Yes, Sir. There is a provision in the contract
11 that it is subject to proration. (id. p. 18).

12 After further discussion of other divisions of the Project
13 and being satisfied that the Department of the Interior had
14 reviewed and approved of the provisions concerning the Indian
15 rights, the Court signed and entered the Judgment (Movants Exh.
16 1945.01.31(4)). Paragraph 4, entitled "Wapato Indian
17 Irrigation Project," of the judgment, specifies that the U.S.
18 shall deliver the 720 c.f.s. called for in the Act of August 1,
19 1914; the 250,000 acre feet from the March 9, 1921 contract;
20 and the 100,000 acre feet in the September 3, 1936 contract to
21 the Reservation. (id. p. 13-14). Paragraph 19 excepts certain
22 deliveries of water from proration in times of shortage,
23 including the 720 c.f.s. of the Indian rights. Other than
24 these non-proratable deliveries, all of the other water rights
25 in the judgment, including the 350,000 acre feet to the
26 Reservation, are equally proratable in times of shortage from

1 the total water supply available, which is defined as follows:

2
3 "For the purposes of this judgment "total
4 water supply available" is defined as that
5 amount of water available in any year from
6 natural flow of the Yakima River, and its
7 tributaries, from storage in the various
8 Government reservoirs on the Yakima watershed
and from other sources, to supply the contract
obligations of the United States to deliver
water and to supply claimed rights to the use
of water on the Yakima River, and its
tributaries, heretofore recognized by the
United States." (id. p. 26-27).

9 The entry of the consent judgment constituted judicial
10 recognition of the entire history of the Yakima Project,
11 including all Congressional actions and the administrative
12 actions of the U.S., particularly the actions of the Department
13 of the Interior. It confirmed and decreed the quantifications
14 and limitations on water usage for approximately 90 per cent of
15 all water users in the Yakima Basin, including the Yakima
16 Indian Nation's rights. By defining the "total water supply
17 available" (TWSA), it affirmed the complete control of all of
18 the water from whatever source in the Yakima watershed by the
19 U.S., to be delivered as specified therein. It declared the
20 law of the Yakima River and its tributaries as it was then and
21 as it has been for the past 45 years and is presently. It
22 established the certainty and finality as called for in Arizona
23 II, supra.

24 The binding effect of the 1945 judgment is expressly set
25 forth therein in paragraph 20 thereof:

26 ///

1 "This judgment shall constitute a final deter-
2 mination of the obligation of the United States
3 to deliver water from the Yakima River, and its
4 tributaries, from storage from its various
5 reservoirs in the Yakima watershed and from other
6 sources to the parties to this judgment and the
7 lands within the Wapato Indian Irrigation Project.
8 Each of the parties to this cause, their grantees,
9 successors and assigns are by this judgment forever
10 enjoined and restrained from asserting any claim to
11 or from interfering with any of the rights to the use
12 or the delivery of those quantities of water which
13 are recognized in this judgment." (id. p. 29)
14 (Emphasis added).

15 Accordingly, the parties to the judgment are totally
16 precluded from asserting any claim whatsoever to the total
17 water supply now available, other than is contained in the
18 judgment. Substantially similar language was used in the Orr
19 Ditch decree, which was held to be preclusive in Nevada vs.
20 U.S., 463 U.S. 110, 77 L.Ed. 2d 509 (1983), p. 526.

21 The U.S. contends, however, that the Yakima Indian Nation
22 is not bound by the 1945 decree inasmuch as it was not a named
23 "party" to the action. The complaint filed by the U.S. and
24 others alleged that:

25 " ... the water rights of said plaintiffs and
26 all of the defendants herein and of all parties
27 having rights to receive water from the Yakima
28 Project are so inter-related and inter-dependant
29 that none of said plaintiffs nor any of the
30 defendants can be permitted to require the
31 delivery to him of more than the specified
32 amount of prorata share thereof ... without
33 depleting the common source of supply and
34 depriving some other party or parties of part of
35 the water supply to which such other party or
36 parties are entitled." (Emphasis added)
37 (Movants Exh. 1939.10.12, p. 15).

1 Thus, we can see from the broad language employed in the
2 complaint that the concerns of all the water users of the
3 Yakima Project were being brought before the Court, which would
4 also include the rights to water from the Project of the Yakima
5 Indian Nation. As previously noted, the Indian water rights
6 were specifically addressed, were the subject of considerable
7 controversy and were of direct concern to the Court. In
8 Arizona II, supra, we find the following:

9
10 "Finally, the absence of the Indian Tribes in
11 the prior proceedings in this case does not
12 dictate or authorize relitigation of their
13 reserved rights. As a fiduciary, the United
14 States had full authority to bring the Winters
15 rights claims for the Indians and bind them in
16 the litigation." (Emphasis added) p. 338.

17 A few months later, the Supreme Court further expanded and
18 explained this fiduciary relationship in Nevada vs. U.S.,
19 supra.:

20 "This Court has long recognized "the distinctive
21 obligation of trust incumbent by the Government"
22 in its dealings with Indian tribes ... (cites
23 omitted). These concerns have been traditionally
24 focused on the Bureau of Indian Affairs within the
25 Department of the Interior. (cites omitted). ...it
26 may well appear that Congress was requiring the
Secretary of the Interior to carry water on at
least two shoulders when it delegated to him both
the responsibility for the supervision of the
Indian tribes and the commencement of reclamation
projects in areas adjacent to reservation lands.
But Congress chose to do this, and it is simply
unrealistic to suggest that the Government may
not perform its obligation to represent Indian
tribes in litigation when Congress has obliged
it to represent other interests as well. In this
regard, the Government cannot follow the
fastidious standards of a private fiduciary, who

1 would breach his duties to his single beneficiary
2 solely by representing potentially conflicting
3 interests without the beneficiary's consent. The
4 Government does not "compromise" its obligation
5 to one interest that Congress obliges it to
6 represent by the mere fact that it simultaneously
7 performs another task for another interest that
8 Congress has obligated it by statute to do." p. 523.

9
10 Clearly, pursuant to these teachings of the U.S. Supreme
11 Court, the United States was acting in a fiduciary relationship
12 for the Yakima Nation in the settlement of the case. The
13 entire water supply of the Yakima watershed was at issue; there
14 were specific concerns and contentions respecting the reserved
15 treaty rights; both the Office of Indian Affairs and the
16 Justice Department were deeply involved in the negotiations for
17 the settlement of the case; and the Justice Department
18 specifically represented to the Court that the Indians' water
19 rights were all included in the judgment. Therefore, the
20 actions of the Government have bound the Yakima Indian Nation
21 to the provisions of the 1945 decree as much as if the Nation
22 had been a named party therein, and the Nation is bound by the
23 preclusive effect of the decree.

24 NON-AGRICULTURAL CLAIMS

25
26 In the United States Clarified/Amended Claim on Behalf of
the Yakima Indian Nation, we find the following:

"Based upon present and projected uses for
future non-agricultural development on the
Yakima Indian Reservation and certain off-
reservation public domain allotments (e.g.

1 domestic, light industry, wildlife, mining,
2 livestock, recreation), it is presently
3 estimated that the approximate amount of
4 surface water within the Yakima River Basin
5 needed to satisfy the Tribe's/Members present
6 and future non-agricultural developments/demands
7 is 50,000 ac. ft./yr."

8 The Court, at pages 18 to 20 herein, has previously set
9 forth the parameters of the implied reservation of treaty water
10 rights. Reference is hereby made to that discussion and
11 particularly to Cappaert vs. United States, supra, and United
12 States vs. New Mexico, supra. As we have seen, the implied
13 reservation of treaty rights applies only to the primary
14 purpose of the reservation, which in this matter, has been
15 determined to be for agricultural purposes.

16 Inasmuch as the above quoted portion of the U.S. claim on
17 behalf of the Nation clearly applies to a secondary use for the
18 reservation, treaty rights are not involved and this portion of
19 the claim will have to be considered pursuant to state law.

20 FISHERY RIGHTS

21 THE TREATY OF 1855

22 Article III of the Treaty of 1855 provided as follows:

23 "The exclusive right of taking fish in all
24 the streams, where running through or
25 bordering said reservation, is further secured
26 to said confederated tribes and bands of
Indians, as also the right of taking fish at
all usual and accustomed places, in common
with citizens of the Territory, and of erecting
temporary buildings for curing them ..."
(Movants Exh. S.1855.06.09).

1 Substantially similar language was contained in all of the
2 so-called "Stevens" treaties with the various tribes of the
3 Pacific Northwest, in recognition of the supreme importance of
4 the anadromous fish to the Native Americans. The fish were not
5 only a staple of their diet, but were also part of their
6 cultural and religious heritage; therefore, these treaty
7 provisions were specifically negotiated. In Washington vs.
8 Fishing Vessel Association, 61 L.Ed.2d 823, p. 824 (hereinafter
9 Fishing Vessel), it is noted:

10 "Referring to the negotiations with the Yakima
11 Nation, by far the largest of the Indian Tribes,
12 the District Court found: "At the treaty council
13 the United States negotiators promised, and the
14 Indians understood, that the Yakimas would forever
15 be able to continue the same off-reservation food
16 gathering and fishing practices as to time, place,
17 method, species and extent as they had or were
18 exercising. The Yakimas relied on these promises
19 and they formed a material and basic part of the
20 treaty and of the Indians' understanding of the
21 meaning of the treaty.""

22 For a rather complete discussion of the habits of
23 anadromous fish; their predictability; their use by the
24 Indians; and the reasons for the diminishment of the Indians'
25 rights in the fisheries, reference is made to part I and II of
26 Fishing Vessel, supra, p. 831-835.

Based upon these specific provisions in the Treaty, the
U.S., on behalf of the Y.I.N., has included in their claim:

"Through information and data derived from the
implementation to date of the "Instream Flow
Incremental Methodology", it is presently
estimated that the total approximate amount of

1 surface water supply needed to satisfy the
2 Tribe's/Members instream flow claims for the
3 enhancement and protection of the Yakima River
Basin's fishery is 1,250,000 ac. ft/yr."

4 For the various reasons hereinafter discussed, the movants
5 contend that the Indian treaty fishing rights have been
6 extinguished.

7
8 PURPOSE

9
10 The Court has heretofore, p. 18-20, referred to the
11 "purpose" of the implied reservation of treaty water rights as
12 set forth in Cappaert and U.S. vs. New Mexico, supra. The
13 Joint Commission Report to Congress bears repeating.

14 "The exclusive right of taking fish in all the
15 streams running through or bordering the
16 reservation was expressly reserved by the treaty
17 to the Indians. ... The controlling purpose of
18 the treaty, however, was to make possible the
permanent settlement of the Yakima Indians and
their transformation into an agricultural people."
(Sen.Doc. 337, p. 23, 005520).

19 The issue then becomes whether, with irrigation for
20 agricultural reasons being a "controlling" or "primary" purpose
21 of the treaty, can a specific treaty fishing right also be a
22 "primary" purpose. This issue appears to have first been
23 discussed in Colville Confederated Tribes vs. Walton, 641 F.2d
24 42 (1981), cert. denied. There both agricultural and fishing
25 rights were involved. The Ninth Circuit held therein:

26 ///

1 "... one purpose for creating this reservation
2 was to provide a homeland for the Indians to
3 maintain their agrarian society. ... Providing
4 for a land-based agrarian society, however, was
5 not the only purpose for creating the reserva-
6 tion. The Colvilles traditionally fished for
7 both salmon and trout. Like other Pacific
8 Northwest Indians, fishing was of economic and
9 religious importance to them. ... We agree with
10 the district court that preservation of the
11 tribe's access to fishing grounds was one purpose
12 for the creation of the Colville Reservation.
13 Under the circumstances, we find an implied
14 reservation of water from No Name Creek for the
15 development and maintenance of replacement fishing
16 grounds." See also U.S. vs. Anderson, 736 F.2d 1358.

17
18 The same issue was also raised regarding the Klamath
19 Treaty in United States vs. Adair, 723 F.2d 1394, cert. denied,
20 as to whether there was an implied reservation of right for
21 fishing purposes as well as agricultural purposes. The Court
22 therein said:

23 "Under the guidelines established in Cappaert
24 and New Mexico, we find that both objectives
25 qualify as primary purposes of the 1864 Treaty
26 and accompanying reservation of land." (p. 1409).

27 Thus it is herein. Congress found a "controlling" or
28 "primary" purpose of the Treaty was to transform the Indians
29 into an agrarian society. It also recognized, however, that
30 there was also a specifically definitive fishing right
31 expressly reserved by the Indians. Therefore, the fishery
32 rights in the 1855 Treaty are a "primary" purpose of the
33 Treaty, also.

34 ///

35 ///

1 Consumptive use of water for fish purposes would occur when
2 sufficient flows would be required to maintain fish life in the
3 river beyond the lowest diversion point and the water would
4 then be "wasted" into the Columbia River. Thus, in view of
5 this basically nonconsumptive use for fishing rights, Congress
6 and the administration did not specifically address them in
7 their actions concerning irrigation issues.

8 The treaty fishing rights were, however, recognized and
9 addressed by the Government in other ways. The U.S. Fish and
10 Wildlife Service, together with the State of Washington
11 Department of Fisheries, installed fish screens at the points
12 of diversion to prevent the downstream migrating fish from
13 being destroyed in the canals. (Movants Exh. 1941.04.29). New
14 and better fish ladders were constructed at Horn Rapids and
15 Prosser Dams (id. p. 4). In reference to the fish screens, the
16 State of Washington Department of Fisheries Post Hearing Brief
17 re Subbasin 12 herein (Court Document 4124) states that as of
18 that date, November 29, 1988, there are 86 existing or pending
19 fish screen facilities in the Basin. There were also State and
20 U.S. concerns over instream flows. (Movants Exh. 1944.04.29).

21 Further recognition of the fishing rights was included in
22 the 1945 Consent Decree, supra. Paragraph 17 thereof states:

23 "17. The United States shall continue to
24 divert available flood water from the Yakima
25 River and its tributaries in accordance with
26 its practice prior to the entry of this judgment, and the quantities of such water which
the parties to this judgment are entitled to

1 receive shall be over and above the schedules
2 of diversion hereinabove set forth. Within the
3 meaning of this judgment, flood water is avail-
4 able for such diversions when, as determined by
5 the Yakima Project Superintendent, there is
6 flowing over the Sunnyside dam flood water in
7 excess of the amount he deems necessary for
8 proper river regulation, including in said
9 amount the amount necessary to protect fish life
10 in the river below said dam. The determinations
11 by the Yakima Project Superintendent as to
12 whether flood water is available for such
13 diversions shall be binding upon the parties hereto,
14 subject to review by the court." (Emphasis added).

15 Thus, the 1945 Consent Decree specifically required the
16 maintenance of a sufficient flow to maintain the fishery.

17 The U.S. continued its recognition of fish rights. It had
18 complete control and regulation of the river and "The four
19 principle concerns for optimum basin flow regulations are
20 related to: (a) Irrigation supply; (b) flood control; (c) fish
21 and wildlife enhancement; and hydropower water." (Emphasis
22 added) (Lentz Report, p. 225). January 6, 1958, a contract was
23 entered into between the Bureau of Reclamation (BOR) and the
24 Bureau of Sport Fisheries and Wildlife providing for minimum
25 streamflows over the Prosser Dam for the maintenance of fish
26 life. The BOR also strives to maintain minimum flows in the
river below Roza Dam and Sunnyside Dam for fish enhancement.
(Lentz, p. 226).

That the Yakima Indian Nation continued its fishing
activities is readily apparent. It was a party to a negotiated
agreement with Washington and Oregon in 1977 establishing
management techniques for anadromous fish spawning above

1 Bonneville Dam for preservation of the species. United States
2 vs. State of Oregon, 657 F.2d 1009, 1011 (1981). In 1980, a
3 Y.I.N. tribal biologist discovered 60 salmon redds between the
4 confluences of the Cle Elum and Teanaway Rivers, on the Yakima
5 River, that needed protection to survive, which ultimately
6 resulted in improved management methods for the protection of
7 the spawning salmon. Kittitas Reclamation District vs.
8 Sunnyside Valley Irrigation District, 763 F. 2d 1032 (1985),
9 cert. denied.

10 Unquestionably, as we have seen, Congress and the
11 Executive Branch concentrated their efforts over the years on
12 providing irrigation water to these arid lands, taking into
13 consideration the basically nonconsumptive use of water for
14 fisheries. But we also see from the documented history that
15 parallel actions were being taken also by the U.S., the State
16 and the Indian Nation to preserve and protect the fisheries of
17 the Yakima River. With these parallel actions being taken by
18 the U.S. agencies, and others, it is clear that there was no
19 Congressional intent, either express or implied, to limit or
20 extinguish the specifically reserved treaty fishing rights.

21
22 INDIAN CLAIMS COMMISSION

23
24 The Indian Claims Commission (I.C.C.), was created by the
25 Indian Claims Commission Act of 1946, 60 Stat. 1055, for the
26 purpose of determining Indian claims against the U.S. and to

1 determine the amount of compensation for claims found to be
2 valid.

3 Pursuant to the Act, the Yakima Indian Nation filed
4 several claims before the I.C.C., three of which were land
5 claims and one, Docket No. 147, was a claim for fishery rights.
6 (Movants Exh. 1968.11.14, 010207-010214). It alleged, in
7 Paragraph XIII, thereof, that by construction of Bonneville and
8 Grand Coulee Dams on the Columbia the U.S. "drowned out and
9 destroyed completely numerous valuable spawning grounds of the
10 salmon" which "decreased the value of property rights of
11 petitioner". (id. 010212-3). Paragraph XIV alleged that
12 between 1933 and 1946, fish runs had been depleted twenty
13 percent and were only worth four-fifths of their previous
14 value. (id. 010213). Paragraph XVI alleged that the U.S.:

15
16 "... in improvidently and unlawfully constructing
17 power and irrigation dams in the Yakima, Naches,
18 Tieton and Klickitat Rivers and their tributaries,
19 and in improvidently, negligently and unlawfully
20 failing to install fish screens in irrigation canals
21 and laterals, in permitting the pollution of streams,
22 has completely destroyed all of the usual and
23 accustomed fishing locations of petitioner herein-
24 above described located in and immediately adjacent
25 to the Yakima, Naches, Tieton and Klickitat rivers
26 and their tributaries." (id. 010213). It alleged that
"... the salmon and other valuable food fish ceased
to run in any material numbers, completely destroying
valuable property rights ..." (id. 010214).

23 Evidence was taken on the land claims, various rulings
24 were made, appeals were heard by the U.S. Court of Claims with
25 remands to the I.C.C. and in June, 1967, negotiations were
26 commenced between the parties. Claim No. 147, the fish issue,

1 was still in preparation for trial. (id. 010189). A
2 "Stipulation of Settlement" was agreed upon and was approved by
3 the Yakima Tribal Council, the Yakima General Council and the
4 Deputy Commissioner of Indian Affairs. The agreement covered
5 Docket Nos. 47, 147, 160 and 164 and stated that "the
6 disposition of each and all of said cases is part and parcel of
7 the settlement herein." (id. 010199). "Entry of final judgment
8 ... shall constitute a final determination of all claims
9 asserted or which could have been asserted by the Yakima Tribe
10" (id. 010202). On November 14, 1968, the I.C.C. entered
11 the final judgment, which awarded the Tribe \$2,100,000.00 for
12 Docket Nos. 47 and 164. It provided "That the claims in Docket
13 Nos. 147 and 160 be, and are hereby, dismissed with prejudice".
14 Based upon the allegations of the petition filed with the
15 I.C.C. that "all of the usual and accustomed fishing locations"
16 had been "completely destroyed", the movants urge that by the
17 dismissal of the claim with prejudice, the judgment compensated
18 the Tribe for the totality of the fishing rights and therefore
19 such rights are fully extinguished. On the other hand, the
20 U.S., through the affidavit of Paul M. Niebell, the attorney
21 who represented the Tribe on the claim, indicate that the claim
22 was only for the diminishment of the treaty rights. Language
23 alleging both complete destruction and diminishment of the
24 rights can be found in a close reading of the petition. No
25 factual evidence on the petition was ever presented to the
26 I.C.C. From the facts as we know them, from the documented

1 history noted herein, the Tribe would not and could not have
2 been able to prove the complete destruction of the fishery
3 prior to 1946. Thus, it appears that the real gravamen of the
4 cause of action was for the diminution of the treaty fishing
5 rights.

6 The movants further assert the preclusive effect of the
7 judgment dismissing Docket No. 147 with prejudice. "Res
8 judicata occurs when a prior judgment has a concurrence of
9 identity in four respects with a subsequent action. There must
10 be identity of (1) subject matter; (2) cause of action; (3)
11 persons and parties; and (4) the quality of the persons for or
12 against whom the claim is made." Mellor vs. Chamberlin, 100
13 Wn.2d 643, 645. See also Rains vs. State, 100 Wn.2d 660. Here
14 the subject matter is the same, i.e., the Indian Treaty fishing
15 rights. The causes of action are the same - - the existence
16 and scope of those fishery rights. The persons and parties are
17 the Tribe and the U.S., including those in privity with the
18 U.S., and therefore, the third and fourth conditions are also
19 met. Therefore, the final judgment entered by the I.C.C. is
20 preclusive as to this action.

21 In U.S. vs. Dann, 865 F.2d 1528, the issue was whether
22 title to Indian lands had been extinguished by the filing of a
23 claim and an award from the I.C.C. obtained. Therein, it was
24 stated:

25 "... the claims award could not itself extin-
26 guish the title. ... The Claims Commission had

1 no jurisdiction to extinguish title on its own
2 authority; it simply had jurisdiction to award
3 damages for takings or other wrongs that occurred
4 on or before August 18, 1946. ... It is true
5 that the taking was not actually litigated - but
6 the payment of the claims award establishes
7 conclusively that a taking occurred." (p. 1536).

8 Consequently, we see that the award of \$2,100,000.00 and
9 the dismissal of Docket No. 147 conclusively established the
10 diminution of the Yakima Indian Nation's treaty reserved
11 fishing rights.

12 QUANTIFICATION

13 It is clear that a reserved treaty fishing right may be
14 limited in its application, particularly when it is competing
15 with other vested rights. In Fishing Vessel, 61 L.Ed.2d, p.
16 846, we find:

17 "... the central principle here must be that
18 Indian treaty rights to a natural resource that
19 once was thoroughly and exclusively exploited by
20 the Indians secures so much as, but no more
21 than, is necessary to provide the Indians with
22 a livelihood - that is to say, a moderate living."

23 See also U.S. vs. Adair, 723 F. 2d 1394 and in Cappaert
24 vs. U.S., 48 L.Ed.2d 523, 535, the Court stated:

25 "The implied reservation-of-water doctrine,
26 however, reserves only that amount of water
27 necessary to fulfill the purpose of the
28 reservation, no more." (Emphasis added).

29 In 1980, the Yakima Nation was limited to a 72 hour
30 fishery at Wapato and Sunnyside dams in the interest of

1 conservation of the fish runs, U.S. vs. Oregon, supra. Thus,
2 we see that diminution of the aboriginal right can occur, as
3 the Court has ruled herein.

4 Paragraph 17 of the 1945 Consent Decree, requires that the
5 Yakima Project Superintendent, in determining proper river
6 regulation, must include the amount of water necessary to
7 protect fish flow in the river below Sunnyside dam. (Movants
8 Exh. 1945.01.31(4) p. 25-26). Also, as previously noted,
9 certain contracts have been entered into requiring minimum
10 flows in the river at specified times for migration and the
11 river regulations generally maintain minimum flows below Roza
12 and Sunnyside dams. (Lentz, p. 226). Therefore, these
13 documents set forth the scope of the diminished treaty right to
14 water, that is to say, sufficient instream flow to maintain the
15 fishery as it now exists and no more.

16 17 SUMMARY

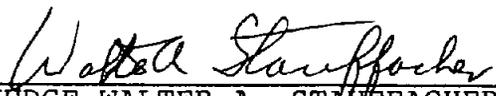
18
19 To conclude, summary judgment is appropriate under the
20 circumstances of this case. Congressional and executive branch
21 actions of the government have quantified the implied
22 reservation of treaty irrigation rights. The "practicably
23 irrigable acreage" standard does not apply to this unique case.
24 The 1945 Consent Decree is binding as to all the parties
25 thereto and to the Yakima Nation, by means of the United States
26 fiduciary relationship. A diminished treaty fishing right

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still exists, but it cannot derogate from the rights of the parties to the 1945 Consent Decree, other than to the extent of merely maintaining the fish life in the river.

The movants will prepare a proposed order for presentation in accordance herewith.

DATED this 22nd day of May, 1990.



JUDGE WALTER A. STAUFFACHER