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OFFICE OF
SUPERIOR

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
AMENDMENT TO
MEMORANDUM OPINION
RE: MOTIONS FOR PARTIAL
SUMMARY JUDGMENT DATED
MAY 22, 1990

FILED
OCT 22 1990

BETTY MCGILLEN
YAKIMA COUNTY CLERK

RECONSIDERATION

The U.S. Motion for Reconsideration is granted. The Court has reviewed all of the affidavits, together with the appendices thereto; all other material submitted by the parties; the memorandums; and has reread and reviewed pertinent sections of memorandums and materials submitted on the original motion. Pursuant thereto, the Court is withdrawing pages 53,

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1 54 and 55 of the original Memorandum Opinion and will
2 substitute therefore the amended pages attached hereto.

3 DATED this 22rd day of October, 1990.

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Walter Stauffer
JUDGE WALTER A. STAUFFER

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

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

22 See also U.S. vs. Adair, 723 F.2d 1394, 1414-15, and in
23 Cappaert vs. U.S., 48 L.Ed.2d 523, 535, the Court stated:

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

27 In 1980, the Yakima Nation was limited to a 72 hour
28 fishery at Wapato and Sunnyside dams in the interest of
29 preservation of the fish runs, U.S. vs. Oregon, supra. Thus,
30 we see that diminution of the aboriginal right can occur, as
31 the Court has ruled has occurred herein as a matter of law.

1 Although substantially diminished, the remaining reserved
2 treaty rights "... of taking fish in all the streams, where
3 running through or bordering said reservation" carried with
4 them the right to an instream flow in the river to maintain
5 fish life therein. In U.S. vs. Adair, supra, p. 1410, it was
6 held:

7
8 "...that at the time the Klamath Reservation
9 was established, the Government and the
10 Tribe intended to reserve a quantity of the
11 water flowing through the reservation not
12 only for the purpose of supporting Klamath
13 agriculture, but also for the purpose of
14 maintaining the Tribe's treaty right to hunt
15 and fish on reservation lands." (Emphasis added).

16 Thus, the treaty right to "take" fish equates into an
17 instream flow to maintain sufficient fish habitat that there
18 will be some fish to take. The "fishing right" carries with it
19 a "water right" to fulfill the "purpose" of the reservation.
20 U.S. vs. New Mexico, supra; Cappaert vs. U.S., supra.

21 The U.S., on behalf of the Y.I.N., has filed a claim
22 herein for an instream flow for fishery purposes of 1,250,000
23 acre feet of water per year. This amount is considerably more
24 than the total amount of the water capacity of the storage
25 reservoirs (1,070,700 acre feet). It is a highly substantial
26 portion of the "total water supply available". The claim is
based on developed "Instream Flow Incremental Methodology"
(I.F.I.M.), as referred to in the affidavits of Robert Tuck and
Dell Simmons and the appendices thereto. Based upon the
I.F.I.M., Mr. Simmons affidavit recommends specific instream

1 flows on a monthly basis for certain reaches of the Yakima
2 River. However, as the U.S. Memorandum states: "Admittedly,
3 these recommended flows are based on the assumption that the
4 Tribe's treaty-protected fishing rights in the Basin have
5 remained unaffected by actions of the federal government and
6 that these proposed instream flows will provide the optimum
7 habitat for anadromous fish spawning and rearing in the Basin."
8 However, as we have seen, the actions of the federal government
9 have almost totally affected the instream flows and the treaty
10 reserved rights for "optimum habitat" have been greatly
11 diminished, for which the Yakima Nation has been compensated.
12 Now, the maximum limits of the diminished treaty fishing rights
13 is the minimum amount of instream flow that is absolutely
14 necessary for the mere maintenance of fish life in the river.
15 Even as limited, however, it must be recognized that in the
16 event of an unusually low water year, these diminished treaty
17 fishing rights will take precedence over other vested rights,
18 to the extent of the limits just enunciated. When, on the
19 other hand, in water sufficient years, or as possible through
20 river regulation, more water is available, then it certainly
21 can, and should be, used for fishing enhancement.

22 As previously noted, certain contracts have been entered
23 into requiring minimum flows in the river at specified times.
24 (Lentz, p. 226). It is readily apparent from the affidavits of
25 Robert Tuck and Dell Simmons that the flows called for therein
26 are totally insufficient to maintain fish life in the river and

1 to limit the instream flows to those amounts would result in
2 complete destruction of the fishery.

3 Paragraph 17 of the 1945 Consent Decree requires that the
4 Yakima Project Superintendent, in determining proper river
5 regulation, must include the amount of water necessary to
6 protect fish life in the river below Sunnyside Dam. (Movants
7 Exh. 1945.01.31(4) p. 25-26). From the very fact that
8 anadromous fish life continues to exist in the river, it can be
9 seen that some river regulation has occurred to preserve that
10 existence.

11 The 1945 Decree contains the following: "This Court shall
12 retain jurisdiction over matters of interpretation of this
13 judgment and matters pertaining to the administration thereof."
14 (id, p. 30). In 1980, the U.S. on behalf of the watermaster
15 appointed under the Decree, requested instructions from the
16 U.S. District Court for the Eastern District of Washington as
17 to regulation of the river. High water flows had caused the
18 salmon to spawn at higher levels in the river. Closing of the
19 reservoir dams would reduce the instream flow and expose 60
20 salmon redds (nests of eggs), which would result in their
21 destruction. The District Court, after a second hearing,
22 ordered continued release of water as necessary, moving of a
23 few movable redds and construction of berms to divert water
24 onto the redds. Upon appeal to the Ninth Circuit, the Court
25 held (1) that the District Court did not exceed the scope of
26 its retained jurisdiction under the Consent Decree, and (2)

1 that the District Court was empowered to issue orders directing
2 the allocation of water within the Yakima River system. The
3 Court did not consider or decide the nature or the scope of the
4 treaty reserved fishing rights. Kittitas Reclamation District
5 vs. Sunnyside Valley Irrigation District, 763 Fed.2d 1032.
6 Thus, we see that the U.S. District Court continues to have
7 jurisdiction over the regulation of the river.

8 Included in the November 28, 1980, Instructions to the
9 Watermaster, the District Court ordered:

10 (4) That the parties to this matter, and the
11 Watermaster, shall study and report to the Court
12 prior to the 1981 irrigation water delivery
13 season on means by which the needs of the Project
14 water users can be met through more efficient or
15 less extensive use of Project waters or by the
16 modification of Project operations or facilities
17 so as to have less impact on the fisheries
18 resource, including the possibility of management
19 of the various Project reservoirs and releases of
20 water so as to provide for appropriate water
21 flows during the spawning and hatching periods
22 that may be practicable while at the same time
23 providing water for irrigation purposes for users
24 within the project area."
25 (Movants Exh. 1980.11.28)

19 As a result of this order, the Yakima River System
20 Operations Advisory Committee (SOAC) was formed. It is
21 composed of fishery biologists from the Yakima Indian Nation,
22 Washington Department of Fisheries, U.S. Fish and Wildlife
23 Service and the irrigation districts. SOAC advises and assists
24 the Project Superintendent on fishery-related issues in the
25 Yakima Basin on an annual basis. (Affidavit of Harvey R.
26 Nelson, Project Superintendent). With this Committee, the

1 "flip-flop" operation was devised, wherein the upper reservoirs
2 (Keechelus, Kachess and Cle Elum) provide more water during the
3 summer irrigation season and then are reduced in release prior
4 to the spawning season, and the lower reservoirs (Bumping and
5 Tieton) are opened to provide more water for the balance of the
6 irrigation season. This allows the very uppermost reaches of
7 the river to be reduced in streamflow during the spawning,
8 incubation and emergence periods, with the dams closed for the
9 accumulation of storage water for the ensuing irrigation
10 season. The evident success of this "flip-flop" operation is
11 apparent from the continued spawning of the anadromous fish in
12 the uppermost reaches of the river.

13 Even with a successful "flip-flop" operation, there are
14 other variables that may enter into the determination, on an
15 annual basis, of how much instream flow may be necessary to
16 merely preserve fish life in the river - such things as water
17 quality, climatic and temperature changes, changes in substrate
18 locations within the stream, etc. (Appendices to Robert Tuck
19 affidavit). The material presented indicates varying opinions
20 by various agencies and experts as to which discrete amounts of
21 instream flow are required at different points of the river
22 system to maintain fish life. With the SOAC Committee, these
23 variables can be, and apparently have been, addressed on an
24 annual basis to determine the timing and the measure of
25 instream flows to maintain the fishery.

26 The Court has ruled, as a matter of law, that the maximum

1 limits of the treaty reserved fishery rights is the minimum
2 amount of instream flow necessary to simply maintain fish life
3 in the river. In view of ever changing circumstances, it would
4 be inappropriate for the Court to set specific, discrete
5 quantifications to accomplish that purpose for all times and
6 conditions. That can be done by the SOAC Committee and the
7 Project Superintendent on an annual basis. As was stated in
8 Sohappy vs. Smith, 302 F.Supp. 899, 911:

9
10 "...proper anadromous fishery management in a
11 changing environment is not susceptible of
12 rigid predetermination. ... the variables
13 that must be weighed in each given instance
14 make judicial review of state (Project
15 Superintendent's) action, through retention
16 of continuing jurisdiction, more appropriate
17 than overly-detailed judicial predetermination."

18 In this situation, as noted before, the U.S. District
19 Court, under the 1945 Consent Decree, has continuing
20 jurisdiction to oversee the administration of the Yakima
21 Project, within the legal limitation of the treaty rights as
22 established herein. Also, this Court has administrative powers
23 over the Yakima Basin during the progress of this adjudication.
24 In addition, the Court may well retain jurisdiction in the
25 decree herein to administer the Final Decree when entered.

26 The issue has been raised as to the priority date to be
given to the remaining treaty reserved fishing rights, that of
the date of the treaty or that of time immemorial. While the
possibility of an appropriation prior to June 9, 1855 being
proven herein is remote in the extreme, the Court adopts the

1 holding and the reasoning set out in U.S. vs. Adair, supra, pg.
2 1414:

3 "Such water rights necessarily carry a priority
4 date of time immemorial. The rights were not
5 created by the 1864 (1855) treaty, rather, the
6 treaty confirmed the continued existence of
these rights. (Cites omitted).

7 Therefore, the remaining treaty fishing rights in this
8 matter shall have a priority date of time immemorial.

9
10 SUMMARY

11
12 To conclude, summary judgment is appropriate as to the
13 rulings herein under the circumstances of this case.
14 Congressional and executive branch actions of the government
15 have quantified the implied reservation of treaty irrigation
16 rights from the Yakima River. The "practicably irrigable
17 acreage" standard does not apply to this unique case. The 1945
18 Consent Decree is binding as to all of the parties thereto and
19 to the Yakima Nation, by means of the United States fiduciary
20 relationship.

21 The reserved treaty fishing rights of the Yakima Nation
22 have been diminished, but have not been extinguished. The
23 maximum limit of the diminished treaty fishing right is the
24 amount of instream flow necessary for the preservation of

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anadromous fish life in the river. The diminished treaty fishing right carries a priority date of time immemorial.

Pages 1 to 52 hereof dated May 22, 1990.

Pages 53 to 61 hereof dated October 22, 1990.



JUDGE WALTER A. STAUFFER