

CC: U. S. Indian
Major Claimant

received

SEP 19 1990

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

FILED

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,

DEPT. J. MCGILL
YAKIMA COUNTY

NO. 77-2-01484-5

THE STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

AMENDED PARTIAL SUMMARY
JUDGMENT ENTERED AS
FINAL JUDGMENT PURSUANT
TO CIVIL RULE 54(b)

Plaintiff,

vs.

JAMES J. ACQUAVELLA, et al.,

Defendants.

The motion of the non-Indian irrigators for entry of summary judgment pursuant to Civil Rule 54(b) was set for hearing before the undersigned, one of the judges of the above-entitled court on Thursday, June 21, 1990, rescheduled and brought on for hearing on Wednesday, June 27, 1990, when it was continued to be heard on Tuesday, July 3, 1990. On the last date the matter was heard and the Court's Order Granting Partial Summary Judgment and for Entry of Final Judgment Pursuant to Civil Rule 54(b) was entered on July 17, 1990.

A Motion for Reconsideration was filed by the United States and was heard on September 18, 1990. The Court entered an Amendment to the Memorandum Opinion on October 27, 1990.

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I. APPEARANCES

Appearances at the hearings were by Donald H. Bond of Halverson & Applegate, attorneys for Ellensburg Water Company, Union Gap Irrigation District, Yakima Valley Canal Company, Yakima-Tieton Irrigation District, and West Side Irrigating Company; Charles C. Flower of Flower & Andreotti, attorneys for Sunnyside Valley Irrigation District; Floyd E. Ivey of Westland, Liebler, Ivey, et al., attorneys for Kennewick Irrigation District, City of Yakima and Naches-Selah Irrigation District; Thomas G. Nelson of Nelson, Rosholt, et al., attorneys for Roza Irrigation District and Kittitas Reclamation District; Vincent J. Beaulaurier of Lyon, Beaulaurier, et al., attorneys for Yakima Reservation Irrigation District; Charles E. O'Connell, Jr. of the United States Department of Justice, attorney for the Defendant-United States of America; and Ceil Buddeke, Assistant Attorney General, for Plaintiff-State of Washington, Department of Ecology.

II. MATTERS CONSIDERED

The Court read and considered all the pleadings, Motions, Affidavits, exhibits, documents, briefs and evidence described in the Court's 7/03/90 "Order Granting Partial Summary Judgment and for Entry of Final Judgment Pursuant to CR 54(b)" and attached Appendix which are incorporated herein, the Motion for

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1 Reconsideration/Clarification of the Court's Memorandum Opinion
2 re Motions for Partial Summary Judgment on behalf of the Yakima
3 Reservation Irrigation District; the Non-Indian Irrigators'
4 Motion for Entry of Summary Judgment as Final Judgment Pursuant
5 to CR 54(b) and matters referred to therein; the Affidavit of
6 Donald H. Bond in support of said Motion; the Statement of
7 Points and Authorities in support of said motion; and the
8 proposed Order Granting Partial Summary Judgment and for Entry
9 of Final Judgment Pursuant to CR 54(b) as originally served and
10 filed and as subsequently amended, served and filed; the report
11 "Currently Irrigated and Arable Lands on Public Domain Indian
12 Allotments", by HKM Associates; the United States Reply to
13 Non-Indian Irrigators' Motion for Entry of Summary Judgment as
14 Final Judgment Pursuant to CR 54(b) and Motion by Non-Indian
15 Irrigators for Stay of Proceedings; the Memorandum in Support
16 of Motion for Reconsideration and Clarification; the Memo in
17 Response to Yakima Reservation Irrigation District's Motion for
18 Reconsideration/Clarification of the Court's Memorandum
19 Opinion; the Filing of Documents in Response to Motion and
20 Reconsideration/Clarification of the Court's Memorandum Opinion
21 re: Motions for Partial Summary Judgment including the
22 Certificate as to Records of Pleadings October 1980 - January,
23 1981, Kittitas Reclamation District, et al., vs. Sunnyside
24 Valley Irrigation District, et al., Civil No. 21, dated
25 June 25, 1990, and the pleadings and papers attached thereto;
26 the Certificate of Counsel as to Excerpts in the 1980 Record,

27 AMENDED PARTIAL SUMMARY
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1 Kittitas Reclamation District, et al. vs. Sunnyside Valley
2 Irrigation District, et al., Civil No. 21, dated June 25, 1990;
3 the matters referred to in said pleadings, affidavits,
4 memoranda and other filings; the irrigation districts' "Motion
5 to Clarify" and 11/26/90 "Affidavits" of Walter Larrick and Ron
6 Van Gundy with attachments; and other documents and pleadings
7 on file in the above-entitled cause. The Court also read and
8 considered all Memorandums and supporting documents of all
9 parties on the U.S. Motion for Reconsideration. The Court also
10 heard the arguments of counsel and was fully advised in the
11 premises, and so enters this Judgment.
12

13 III. FINAL JUDGMENT
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15 The Court in its aforesaid Order Granting Partial Summary
16 Judgment and for entry of Final Judgment Pursuant to CR 54(b)
17 made findings and determinations that the summary judgment to
18 be entered pursuant to its order was an appropriate matter to
19 be entered as a final judgment pursuant to Civil Rule 54(b) and
20 that there was no just reason for delay in the entry of said
21 summary judgment as a final order. The Court thereupon
22 directed and hereby directs that this summary judgment pursuant
23 to that order be a final judgment pursuant to Civil Rule 54(b).
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IV. JUDGMENT

Based upon the foregoing order, it is hereby:

ORDERED, ADJUDGED AND DECREED that this partial summary judgment shall be and hereby is entered as a final judgment as to the matters contained herein, *superseding the Partial Summary Judgment entered on July 19, 1990.*
IT IS FURTHER ORDERED, ADJUDGED AND DECREED as follows: *nos*

1. Basis for Reservation and Treaty Reserved Water Rights.

The treaty water rights of the Confederated Bands and Tribes of the Yakima Indian Nation (herein "Yakima Indian Nation"), its members and the United States as trustee to surface waters of the Yakima River Basin and the surface water rights of the lands on the Yakima Indian Reservation to water diverted from the Yakima River for irrigation have been fulfilled and limited by a combination of federal reserved and Washington state law water rights pursuant to the quantification of all such surface water rights by the United States in a series of Acts of Congress and administrative actions centered on the Act of August 1, 1914 (38 Stat. 604).

The treaty water rights of the Yakima Indian Nation and its members and the United States as trustee to maintain instream flows in the Yakima River and its tributaries for fish and other aquatic life have been diminished and limited by the U.S. for development of irrigation in the Yakima River Basin and the Yakima Indian Nation has been compensated for that

1 diminution by virtue of the 1968 Settlement, Stipulation and
2 Order of Dismissal in United States Indian Claims Commission
3 Docket No. 147.

4 2. Rights to Divert Water from the Yakima River to the
5 Yakima Indian Reservation.

6 a. For Irrigation: It is hereby ordered that
7 diversions of water from the Yakima River to the Yakima Indian
8 Reservation shall be limited to only the following described
9 amounts, to-wit:

10 (1) The 147 cubic feet of water per second as
11 defined by the Order of the Secretary of the Interior March 27,
12 1906, and ratified by Congress by the Act of August 1, 1914
13 (38 Stat. 604), non-proratable with a priority date of June 9,
14 1855;

15 (2) The 573 cubic feet of water per second as
16 defined and provided by Congress by the Act of August 1, 1914
17 (38 Stat. 604), non-proratable with a priority date of June 9,
18 1855;

19 (3) The 250,000 acre feet of water per annum as
20 provided under that certain Warren Act contract between the
21 Bureau of Indian Affairs (or its predecessors) and the Bureau
22 of Reclamation (or its predecessors) under Agreement dated
23 March 21, 1921, as amended September 9, 1936, ratified by
24 Congress by Act of February 24, 1938 (52 Stat. 80); and
25 restated October 23, 1943, pursuant to said Act of Congress of
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1 February 24, 1938, proratable with a priority date of May 10,
2 1905;

3 (4) The 100,000 acre feet of water per annum as
4 provided under that certain Warren Act contract between the
5 Bureau of Indian Affairs (or its predecessors) and the Bureau
6 of Reclamation (or its predecessors) under Agreement dated
7 September 9, 1936, and ratified by Congress by Act of July 1,
8 1940 (54 Stat. 707) and as provided by Congress by said Act of
9 July 1, 1940, proratable with a priority date of May 10, 1905.

10 b. For Other Purposes. It is ordered that
11 diversions of water to the Yakima Indian Reservation (over and
12 above the aforesaid diversions for irrigation purposes) for
13 commercial, industrial and other purposes are not and would not
14 be in fulfillment of the primary purposes of the Treaty with
15 the Yakimas and, accordingly, are and shall be limited to those
16 quantities of water for those purposes that may be established
17 pursuant to the Laws of the State of Washington.

18 3. Implied Reserved Indian Treaty Water Rights to
19 Instream Flows in the Yakima River and its
20 Tributaries.

21 a. It is ordered and declared that the reserved
22 treaty water rights for fish of the United States in its
23 capacity as trustee, and the Yakima Indian Nation and its
24 members have been substantially diminished.

25 b. The maximum scope of the diminished treaty water
26 right for fish remaining is the specific "minimum instream
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1 flow" necessary to maintain anadromous fish life in the river,
2 according to the annual prevailing conditions as they occur and
3 consistent with actual ~~1981-1990~~ project operations as ^{W 54}
4 described in the 11/26/90 "Affidavit" of Walt Larrick with
5 attachments and 7/23/90 "Affidavit" of Harvey R. Nelson, Jr.
6 with attachments as determined by the Project Superintendent in
7 consultation with the Yakima River Basin Systems Operations
8 Advisory Committee, Irrigation District and Company managers
9 and others.

10 c. Except as provided in subparagraph b. of this
11 Paragraph 3, the instream flows for fish shall be subject and
12 subordinate to the vested irrigation water rights, according to
13 their priority dates, to be established herein.

14 d. The priority date of the said diminished maximum
15 treaty reserved water right for the maintenance of fish and
16 aquatic life in the Yakima River and its tributaries is time
17 immemorial.

18 4. Bureau of Reclamation Operating Procedures.

19 The limitations on the Indian treaty water rights speci-
20 fied in the preceding paragraph 3 shall not prevent adoption by
21 the United States Bureau of Reclamation from time to time of
22 operating procedures to permit further instream flows for the
23 maintenance of fish and aquatic life within the Yakima River
24 and those tributaries of the Yakima River controlled by it;
25 PROVIDED, that other than as contained in subparagraph b of
26 paragraph 3, such operating procedures and instream flows shall

1 be subject, subordinate and junior to the water rights
2 described in subparagraph c of said paragraph 3.

3
4 5. 1945 Consent Judgment. It is hereby declared that
5 the Consent Judgment entered January 31, 1945 in the case of
6 Kittitas Reclamation District, et al., vs. Sunnyside Valley
7 Irrigation District, et al., United States District Court for
8 the Eastern District of Washington, Civil No. 21 (herein "Civil
9 21") reflects, recapitulates and confirms the quantification of
10 water rights described in the immediately preceding numbered
11 Paragraphs 1 and 2 of this Judgment and as between the other
12 Civil 21 parties. The Consent Judgment entered as aforesaid
13 was, in turn, confirmed by Congress in the following and other
14 Acts:

15 Act of June 30, 1954, Chap. 436 (68 Stat. 359);

16 Act of May 6, 1949 (63 Stat. 64);

17 Act of October 27, 1949 (63 Stat. 943);

18 Act of June 12, 1948 Chap. 453 (62 Stat. 382);

19 It is hereby ordered that the Consent Judgment entered
20 January 31, 1945 in the United States Court for the Eastern
21 District of Washington, Civil Cause No. 21, entitled Kittitas
22 Reclamation District, United States of America, et al.,
23 plaintiffs vs. Sunnyside Valley Irrigation District, et al.,
24 defendants, is binding upon the United States, the Confederated
25 Tribes and Bands of the Yakima Indian Nation, the members of
26 said tribes and all other Civil No. 21 parties.

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DONE IN OPEN COURT this 29th day of November, 1990.

Walter Stauffacher
JUDGE WALTER A. STAUFFACHER

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Appendix 4.2.2

Rights Recognized by the United States:

1. Allen, et al. (Kelly)
2. Amon (Benton Canal Co.)
3. Anderson Ditch
4. Basket Fort (Lasswell) Ditch
5. Beattie, Sarah S.
6. Blue Slough
7. Boise Cascade Company
8. Beck Canal
9. Broadgauge Ditch Co.
10. Buena Ditch Company
11. Bull Canal Co. (Bull Ditch)
12. Carmach and Parker Ditch
13. Cascade Canal Co. (Cascade Irrigation District)
14. Chapman Nelson Ditch
15. City of North Yakima
16. Clark Ditch
17. Columbia Irrigation District
18. Cobb Ditch (Cobb Upper Side Ditch)
19. Ellensburg Mill and Feed Ditch
20. Power Canal City of Ellensburg
21. Ellensburg Water Company ("Town Ditch")
22. Emerick Ditch
23. Farrell #2 (Stanfield)
24. Fogerty (Fogerty-Dyer) (formerly Damon Race Ditch)
25. Foster Naches Canal Co.
26. Fowler Ditch Company
27. Fowler-Union Gap-Moxee Co.-Scudder
28. Fredericks & Hunting Ditch
29. Fruitvale Schanno Irrigation Co.
30. Glead Ditch
31. Granger Ditch (Granger & Bott #1)
32. Grosscup (The Yakima Co.)
33. Hubbard Ditch Co.
34. Kelley-Lowry Ditch.
35. Kennewick Division
36. Kiona Development Co.
37. Kiona Irrigation District
38. Knoke (Ellison Braton)
39. Konewock Ditch Co.
40. LaFortune Ditch
41. Leach and White
42. Long Ditch
43. Lower Scott (John Cox, et al.)
44. Lower Scott (Powell) Ditch

45. McCormick & Long Ditch
46. Mills & Son
47. Molsee-Boepple
48. Morrissey Ditch
49. Moxee Company
50. Moxee Ditch Company
51. Moxee-Hubbard Ditch Co.
52. Naches and Cowiche Ditch Co.
53. Naches-Selah Irrigation District
54. Natches Canal Co.
55. Natches Union Ditch Co.
56. Nelson, et al., Ditch
57. New Schanno Ditch Co.
58. Nile Valley Ditch Assn.
59. Northern Pacific Irrigation Co.
60. Northern Pacific Yakima & Kittitas Irrigation Co.
[Sunnyside Valley Irrigation District (SVID)] ✓
61. Northwest Light and Water Co. (Fruitvale)
62. Northwest Light and Water Co. (Wapatox)
63. O'Connor
64. Old Union Ditch Co.
65. Olsen Ditch (Olsen, Robinson, Robertson, Anderson)
66. Piety Flat Ditch Co.
67. Prosser Falls Land & Power Co., et al. (SVID) ✓
68. R. S. & C. Irrigation Canal Co. (Strobach)
69. Richland Canal
70. Richartz Ditch
71. Rodenbeck Ditch
72. Schuller and Rodenbeck Ditch (See Ranch Rite)
73. Selah Development Co.
74. Selah & Moxee Canal Co. (Selah & Moxee Irr. District)
75. Shafer, et al. (Lowery)
76. Sinclair & Cobb Ditch
77. Sinclair Ditch (C. F. Lillie Ditch)
78. Stevens Ditch
79. South Naches Channel Group (Upper Scott & Others)
80. Symmonds, Mahlon
81. Taylor Ditch Co.
82. Tenant Ditch
83. Tjossem Ditch
84. Union Gap Irrigation Co.
85. Union Gap Irrigation District
86. Upper Scott (Lee, et al.) Ditch
87. Vertrees #1
88. Vertrees #2
89. Wapatox Ditch Co. (Upper and Lower Wapatox)
90. Washington Irrigation Canal (Sunnyside Canal) (SVID) ✓
91. Washington Irrigation Special Supplemental Lands
(SVID) ✓
92. Washington Irrigators New (Late) Supplemental (SVID) ✓
93. Westside Irrigating Co.

94. White & Leach Ditch
95. Woldale Ditch (Olson Stein Stevens)
96. Yakima Highlands Irrigation and Land Co.
97. Yakima Orchard Land Co.
98. Yakima Valley Canal Co.
99. Younger
100. City of Grandview
101. City of Prosser
102. City of Sunnyside
103. City of Yakima
104. Hillcrest Water Co.
105. Town of Zillah.
106. Zillah Development Co.

Bureau of Reclamation Storage Contracts:

1. Sunnyside Division
Prosser I.D.
Benton I.D.
Home I.D.
Snipes Mountain I.D.
Grandview I.D.
Zillah I.D.
Sunnyside Valley I.D.
Granger I.D.
Outlook I.D.
2. Yakima-Tieton I.D.
3. Cascade Canal Co. (Cascade Irrigation District)
4. Union Gap I.D.
5. City of Yakima
6. Wapato Project
7. Kittitas Reclamation District
8. City of Ellensburg
9. Roza I.D.
10. Kennewick I.D.
11. Yakima Valley Canal Co.
12. Naches-Selah I.D.
13. Broadway Irrigation Co.
14. West Side I.D.
15. Moxee Ditch Co.
16. Moxee Sub A.
17. Terrace Heights I.D.
18. Selah-Moxee I.D.
19. J. Bruff (Cascade Lbr)
20. Department of Agriculture
21. Muoth-Funkhauser
22. D. C. Vincent (Gangle)
23. M. C. Tuck (Gangle)
24. Lombard-Horsley (Deveraux)
25. W. P. Bradbury (Riggs)
26. C. S. Mead (McAllister)
27. H. Bostock (Covey)
28. H. L. Stonebraker (Boyd)
29. Boise Cascade - Bruff
30. City of Cle Elum
31. H. Covery
32. West Side Canal Co.
33. F. W. Payne
34. Emerick Ditch
35. Columbia Irrigation District
36. Esteb, Mayme, et al
37. Love, Robert V., et ux
38. Smith, David W. & Myrna H.

39. Benson, Tyrgve
40. Blaine, James A., et al
41. Coffin, G. Winthrop, et ux
42. Colville, E. F.
43. Cronkhite, Owen B., et al
44. Dyas, Dollie
45. Embree, Carl T., see Forquer, G. M.
46. Fletcher, Bert, et ux, (Re: 11r-448)
47. Fletcher, Bert, et ux (Re: 11r-489)
48. Forquer, G. M.
49. Foster, Francis W.
50. Gorman, Referd M., et ux
51. Griffin, J. J.
52. Hall & Co., W. H.
53. Holmquist, F. W., et ux
54. Irish, Asa H., et ux
55. Mead, C. S.
56. Mitchell, Mason L., et ux
57. Morrison, W. J., et ux
58. Smalling, D. K.
59. Stevens, J. Everett, et ux
60. Thomas, Jesse W., et ux
61. Waggoner, Samuel J. (See Hymans, Jacob)
62. Wees, Bruce