

he

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

FILED
MAY 14 1992

NO. 77-2-01484-5

YAKIMA COUNTY CLERK

MEMORANDUM OPINION
RE: THRESHOLD ISSUES

1 IN THE MATTER OF THE DETERMINATION)
 2 OF THE RIGHTS TO THE USE OF THE)
 3 SURFACE WATERS OF THE YAKIMA RIVER)
 4 DRAINAGE BASIN, IN ACCORDANCE WITH)
 5 THE PROVISIONS OF CHAPTER 90.03,)
 6 REVISED CODE OF WASHINGTON,)
 7 STATE OF WASHINGTON,)
 8 DEPARTMENT OF ECOLOGY,)
 9 Plaintiff,)
 10 v.)
 11 JAMES J. ACQUAVELLA, et al.,)
 12 Defendants.)

PREFACE

13 Back in 1989, the Department of Ecology (D.O.E.) initiated
 14 discussion to determine whether the Major Claimants, the D.O.E. and the
 15 United States could, by reviewing the documentary evidence in the
 16 possession of the respective parties, reach an "Agreed Statement of
 17 Facts" herein. To that end, the Court entered Pre-Trial Order No. 10 on
 18 April 5, 1990, as prepared by the D.O.E. Pursuant thereto, the parties
 19 deposited their various documents and other materials in the repository
 20 established by the Court. Discussions ensued, many meetings of the
 21 parties occurred, and a tremendous amount of time and money was expended
 22 over a lengthy period of time. After many months had passed, and upon
 23 inquiry by the Court, it was determined that major disagreements between
 24 the parties were preventing much, if any progress, ostensibly due to a
 25 change of philosophy and position by the D.O.E. from that of a

7396

1 relatively neutral party concerning this Federal project to that of a
2 more adversarial one. Upon request by the Court, the parties have
3 submitted a number of legal "threshold issues" to be determined herein
4 before further progress can be made. It is frustrating to note that a
5 substantial number of these "threshold issues" have been referred to and
6 addressed in previous memorandum opinions written by the Court. They
7 will be duly noted herein.

8 In 1902, Congress passed the Reclamation Act. (June 17, 1902, Ch.
9 1093, 32 Stat. 390). The Washington Legislature, on March 4, 1905,
10 allowed the U.S. "the right to exercise the power of eminent domain to
11 acquire the right to the use of any water...". (RCW 90.40.010). On May
12 10, 1905, the U.S. withdrew all of the then unappropriated waters from
13 the Yakima River and its major tributaries and the Yakima Project, as it
14 is known, was born. Since that date the U.S., through the Bureau of
15 Reclamation, (B.O.R.), has had the control of the Yakima River and the
16 "project waters" therein, at least insofar as the Major Claimants (M.C.)
17 are concerned. Notwithstanding this, the D.O.E. now asserts that it is
18 "mandated" to assume authority over the regulation of the appropriation,
19 diversion and use of the water, citing, in conjunction with other
20 statutes, to RCW 90.38, (1989 c. 429 § 1-9), dealing with Yakima River
21 Basin Water Rights. A close reading of that statute, however, reveals
22 that the statute is for the purpose of developing programs, with the
23 United States, to help meet the "presently unmet as well as future needs
24 of the basins". RCW 90.38.005 reads, in its entirety,

25 90.38.005 FINDINGS - PURPOSE. (1) The legislature finds that:
(a) Under present physical conditions in the Yakima river

1 basin there is an insufficient supply of water to satisfy the
2 needs of the basin; (b) Pursuant to P.L. 96-162, which was
3 urged for enactment by this state, the United States is now
4 conducting a study of ways to provide needed water through
5 improvements of the federal water project presently existing
6 in the Yakima river basin; (c) The interests of the state
7 will be served by developing programs, in cooperation with the
8 United States and the various water users in the basin, that
9 increase the overall ability to manage basin waters in order
10 to better satisfy both present and future needs for water in
11 the Yakima river basin.

12 (2) It is the purpose of this chapter, consistent with these
13 findings, to improve the ability of the state to work with the
14 United States and various water users of the Yakima river
15 basin in a program designed to satisfy both existing rights,
16 and other presently unmet as well as future needs of the
17 basin.

18 (3) The provisions of this chapter apply only to water of the
19 Yakima river basin. (Emphasis added).

20 Thus, we see that the legislature specially recognizes the Yakima
21 river basin as a federal project; that there is insufficient water in
22 the basin; that the U.S. is attempting to improve the situation to
23 supply unmet needs; and that the state should work with the U.S. to
24 develop these programs. The other cited statutes apply generally to the
25 duties of the D.O.E. to manage the water resources of the state. See
also Chapter 90.40. It should be noted that RCW 90.38.902 states:
"Nothing in this chapter shall authorize the impairment or operate to
impair any existing water rights." Therefore, this chapter cannot be
used to change any of the water rights as found herein.

Several of the "threshold issues" seem to be inextricably
intertwined, making it somewhat difficult to follow the threads of the
positions from one to the other. Nevertheless, the Court is going to
address each of the issues seriatim and will correlate them at the

1 conclusion hereof.

2
3 OWNERSHIP

4 One of a trilogy of issues that point toward the control and
5 management of the Yakima Project, as envisioned by the D.O.E., is the
6 question of the ownership of the water rights involved herein. This
7 issue has been exhaustively briefed and argued notwithstanding that this
8 Court has previously addressed this issue, albeit in a different
9 context. Some of that will be reiterated herein from the Memorandum
10 Opinion, February 16, 1982, Court Document 2515, (herein Memo. '82).

11 Initially, in Memo. '82, p. 12, the Court recognized that both
12 federal and state law hold the water right is to be appurtenant to the
13 land irrigated, as follows: "The Reclamation Act of 1902, 43 U.S.C.
14 372 provides that: "The right to the use of water acquired under
15 provisions of the reclamation law shall be appurtenant to the land
16 irrigated, and beneficial use shall be the basis, measure and the limit
17 of the right." Similarly, the Washington Legislature, by Laws of Wash.,
18 1917, c. 117 § 39 (RCW 90.03.080) provided that "the right to the use
19 of water which has been applied to a beneficial use in the state shall
20 be and remain appurtenant to the land or place upon which the same is
21 used...". This, however, is not the total story.

22 The Court went further, Memo. '82, p. 15, to state: "It should be
23 further noted, however, that even though these landowners have vested
24 property rights, the Bureau of Reclamation, the irrigation districts and
25 other diverters/appropriators of surface water still retain some rights

1 to the water they divert and deliver to the users." The Court then made
2 reference to United States v. Tilley, 124 F.2d 850, cert. denied 316
3 U.S. 691, 8th Cir. (1942). Therein, at p. 861, the 8th Circuit stated:

4 "In the sense that the right to the beneficial use of such
5 waters attaches to and follows the lands under the project or
6 canal to which the application is made, the appropriative
7 rights may be said to belong to the landowners. This right to
8 the beneficial use on the part of the landowner is, therefore,
9 in the nature of a vested right. But the owner of the
10 irrigation project or canal also has an interest in such
11 appropriative rights, by virtue of the fact that the statute
12 permits him to make the appropriation and diversion, that the
13 maintenance of such appropriative rights is necessary in
14 accomplishing the purpose of the project or canal, and that
15 the law imposes certain duties and obligations upon him in the
16 carriage, distribution, and conservation of the diverted
17 water."

18 This reasoning is based upon their previous holdings at page 857:

19 "Such a canal company is of the nature of a public service
20 corporation.... Its rights and duties are modified by the
21 nature of its functions. It cannot serve the public
22 generally, but only the occupiers of land lying under the
23 ditch... The law grants to corporations of this character
24 valuable rights, but with these rights are accompanying duties
25 to the landholders for the irrigation of whose land the rights
are granted...".

Also, at page 861, the Court noted: "The State has itself
recognized the unity and integration of the project by making possible
and allowing a single appropriation to be made for the benefit of all of
the lands thereunder." Thus it is in the matter sub judice.

Here, in RCW 90.40.010, we have the state granting the right, in
1905, for the U.S. to withdraw all of the then unappropriated waters of
the Yakima river and its tributaries. Pursuant thereto, the U.S. did
so, and built six storage reservoirs and numerous diversion works. It
contracted with the irrigation districts for the delivery of natural

1 flow and storage waters. RCW 90.40.040 provides that this appropriation
2 by the U.S. "shall inure to the United States, and its successors in
3 interest...". In accordance with the contracts with the U.S., the
4 irrigation districts constructed vast conveyance facilities and
5 diversion works for delivery of the water to the landholders. As such,
6 they are "successors in interest" to the portion of the water that they
7 have contracted with the U.S. to receive on behalf of the patrons of
8 their districts. In C. R. Lentz Review (hereinafter Lentz), Exhibit I
9 to this case, p. 78, it is indicated that pursuant to RCW 90.14.041, the
10 U.S. through the B.O.R., has registered 23 surface water claims with the
11 D.O.E. The Water Right Claims made by the U.S. were "on its own behalf
12 and on behalf of all persons claiming water rights furnished..." to
13 them. (See Exhibit O, Nov. 8, 1991). The Certificate of Surface Water
14 Right (Exhibit H, Nov. 7, 1991) was issued by the D.O.E. to the
15 U.S.B.O.R. for "lands within the Kittitas Reclamation District".
16 Clearly, as in U.S. v. Tilley, supra, the state has "recognized the
17 unity and integration of the project by making possible and allowing a
18 single appropriation to be made for the benefit of all of the lands
19 thereunder."

20 Accordingly, what we have here is the U.S., acting under the
21 Reclamation Act of 1902 and state law, diverting waters into its
22 reservoirs for later distribution to the ultimate beneficial users of
23 the water. The U.S. has diversion and distribution rights in those
24 waters. It has entered into contracts with the Major Claimants herein
25 for the M.C. diversions and conveyance by the M.C. of the water to the

1 landowners. Thus, in accordance with the contracts, the Major Claimants
2 also have diversion and conveyance rights in the water. It should be
3 noted that, under the contracts, with a few minor exceptions, the
4 obligation of the U.S. to deliver the water is conditional on the
5 availability of water to be supplied and the decision for the proration
6 of water among the Major Claimants rests with the Project
7 Superintendent. Thus, we see that even though the water rights are
8 unquestionably appurtenant to the lands upon which they are beneficially
9 used, that in the "unity and integration" of the Project, the U.S. and
10 the Major Claimants do retain some rights in the water for the
11 diversion, distribution and conveyance of that water within the Project,
12 albeit in a representative capacity for the landowners. Ecology v.
13 Acquavella, 100 Wn.2d 651, and as previously held in Memo. '82, p. 28,
14 "the water suppliers are trustees of the water rights for the users."
15

16 IRRIGABLE - IRRIGATED

17 The second of the trilogy of issues that are intertwined is
18 presented by the D.O.E. as follows: "Are the irrigation districts
19 limited by the number of acres that have been historically irrigated,
20 rather than the lands capable of irrigation?" To answer this, we must
21 again refer to the history of this vast Yakima Project. In the passage
22 of the Reclamation Act of 1902, supra, and the acts amendatory and
23 supplemental thereto, the U.S. Congress needed to establish a workable
24 procedure for the establishment and future operation of the various
25 reclamation projects. Therefore, it set out the methods and the

1 criteria that the Secretary of the Interior should follow to do so.
2 Those methods and procedures have been followed by the Secretary and the
3 Bureau of Reclamation herein.

4 First, it would be necessary to determine the feasibility of a
5 project. 43 U.S.C. § 371(d) & (e) provide some definition, as follows:
6 "(d) The word "project" means a Federal irrigation project authorized by
7 the reclamation law. (e) The words "division of a project" mean a
8 substantial irrigable area of a project designated as a division by
9 order of the Secretary." Under 43 U.S.C. § 373, the Secretary was
10 authorized to make "rules and regulations...necessary and proper" to
11 carry out the Act. Thus, the Secretary, in order to determine the
12 practicability of a project, was required to determine if there were
13 sufficient irrigable acres therein to support it. Of course, in order
14 to do this surveys would have to be made, maps prepared, etc. to
15 determine the irrigable acreage.

16 Then, under 43 U.S.C. § 419, if it was determined that the project
17 was feasible, he was to give public notice of the lands "irrigable"
18 under the project and the charges to be made against the acreage to
19 support the project. Under 43 U.S.C. § 440, he would require the
20 cultivation of 1/4 of the "irrigable" areas within three irrigation
21 seasons of entry and 1/2 of the "irrigable" area within five irrigation
22 seasons of entry.

23 Whenever two-thirds of the irrigable area of any project, or
24 division of a project is covered by water right contracts between the
25 U.S. and the water users, then the legally organized irrigation

1 districts shall take over the operation and maintenance of all or part
2 of the project work, subject to the regulation of the Secretary, 43
3 U.S.C. § 500, and then the U.S. shall deal with the districts, who are
4 operating in a representative capacity on the part of the landowners.
5 Ecology v. Acquavella, supra. By contract, and pursuant to 43 U.S.C.
6 § 477, the U.S. designates the irrigation districts as the fiscal agent
7 of the U.S. to collect the construction and operation and maintenance
8 charges for the project works. Pursuant to 43 U.S.C. § 492, each acre
9 of irrigable land, whether irrigated or not, shall be charged at least
10 a minimum operation and maintenance charge. "It has been held that land
11 need not be specifically benefitted to be subject to maintenance and
12 operation assessments under this statute". Foster v. Sunnyside Valley
13 Irrigation District, 102 Wn.2d 395, 402.

14 Further, U.S.C. 485 g (a) reads as follows: "The Secretary is
15 hereby authorized and directed in the manner herein provided to classify
16 or to reclassify, from time to time but not more often than at five-year
17 intervals, as to irrigability and productivity those lands which have
18 been, are, or may be included within any project." (Emphasis added).
19 This is clear Congressional recognition that the irrigable acreage
20 within a project, or a division of the project (such as the irrigation
21 districts), may change from time to time for a variety of different
22 reasons. In addition, the state, in RCW 90.03.380, recognizes that
23 there may be changes in the place of use of the water within the
24 districts from year to year. More on this issue later.

25 Thus, we see that Congress determined that the only feasible and

1 practical method of recovering construction costs and the on-going
2 operation and maintenance charges was by contracts between the U.S. and
3 the divisions of the project based upon the irrigable acreage within the
4 districts. This method is carried forward in the contracts between the
5 U. S. and the Major Claimants. Exhibit G, Nov. 7, 1991 is the
6 Amendatory Contract between the U.S. and the Kittitas Reclamation
7 District. It is replete with references to the "irrigable acreage" and
8 "irrigable areas" within the District. On page 8 thereof, we find:
9 "The maximum irrigable area within the District..., as adjusted from
10 time to time, shall...comprise the 'project contract unit.'" The same
11 is applicable to the Amendatory Contract between the U.S. and the
12 Kennewick Irrigation District, which references the irrigable areas and
13 acreage within the District. Exhibit Q, Nov. 8, 1991. In this
14 connection, it is interesting to note, per Exhibit H, Nov. 7, 1991, the
15 D.O.E. issued the Certificate of Surface Water Right to the U.S. for
16 "lands within the Kittitas Reclamation District." This would appear, at
17 the very least, to be a tacit recognition by the state of the "irrigable
18 acreage" formula contained in the contracts, Exhibit G.

19 Further, in RCW 87.03 dealing with irrigation districts generally,
20 we find at RCW 87.03.115, setting forth the powers and duties of the
21 boards of directors:

22 "...Provided, that all water, the right to the use of which is
23 acquired by the district under any contract with the United
24 States shall be distributed and apportioned by the district in
25 accordance with the acts of congress, and rules and
regulations of the secretary of the interior until full
reimbursement has been made to the United States, and in
accordance with the provisions of said contract in relation
thereto." (Emphasis added).

1 and manage the water rights within the district, the districts must
2 provide descriptions of the areas irrigated. The districts, on the
3 other hand, claim that they can show the place of use of the water in
4 the aggregate by the use of maps or records of the U.S. and the
5 districts of the irrigable acreages.

6 The D.O.E. denies that it is requesting a parcel-by-parcel approach
7 to identify beneficial use, diversion points, legal description, etc.
8 However, it does request a parcel-by-parcel approach one time to
9 identify the place of use. Transcript, November 8, 1991, pp. 179-183.
10 It has been previously noted in this case, that there are over 40,000
11 persons or entities who receive water from the subject river basin.
12 Ecology v. Acquavella, supra at 657. A majority of them are within the
13 districts (Major Claimants) here involved. To cover them parcel-by-
14 parcel just one time to determine the place of use (which very likely
15 would then entail legal descriptions thereof) would be an enormously
16 time-consuming and costly procedure. This Court holds that this is not
17 necessary.

18 The landowners within the districts are represented by the
19 districts as to their water rights that are appurtenant to the land.
20 Ecology v. Acquavella, supra. In so doing, the districts, pursuant to
21 the Reclamation Act, have entered into contracts with the U.S. covering
22 specific irrigable acreages. These irrigable acreages must be
23 identified by some means within the records of the U.S. and the
24 districts, even though they may somewhat fluctuate from time to time as
25 previously noted. Thus, it clearly appears that those records can be

1 produced to show the irrigable acreages within the districts. In
2 issuing the certificates as indicated in RCW 90.03.240, the state can do
3 as they have historically done in the past - issue the certificates to
4 the U. S. to cover the "irrigable lands within the
5 _____ district."

6 Now, having thusly ruled, we have received the latest decision of
7 the Washington Supreme Court, decided April 9, 1992, which states as
8 follows:

9 "We also find it highly significant that under Washington's
10 statutes the decisions regarding the distribution of water
11 within a federal irrigation project do not belong to the
12 State. Rather, they are to be made by the Secretary of the
13 Interior through the Secretary's representatives: The United
14 States Bureau of Reclamation and, by contract, the irrigation
15 districts. These decisions are to be made according to the
16 federal laws, federal regulations and the contracts between
17 the irrigation districts and the federal government."
18 (Emphasis added). Ecology v. Bureau of Reclamation, 118 Wn.2d
19 761, 771.

20 Need more be said in looking toward an Agreed Statement of Facts as
21 to the Major Claimants herein?

22 THE 1945 CONSENT DECREE

23 In Kittitas Reclamation District, et al v. Sunnyside Valley
24 Irrigation District, U.S. District Court for the Eastern District of
25 Washington, Civil No. 21, the judgment was entered on January 31, 1945.
As previously noted by this Court (Amended Memo Opinion, Oct. 22, 1990),
the parties to that action became involved in intense negotiations with
a thorough review of all of the various contracts for delivery of water
from the total water supply available. p. 33. The U.S. and almost all

1 of the Major Claimants herein were parties to that action. In
2 discussing the Decree, this Court observed:

3 (Memo, Oct. 22, 1990, p. 38). "The entry of the consent
4 judgment constituted judicial recognition of the entire
5 history of the Yakima Project, including all Congressional
6 actions and the administrative actions of the U.S.,
7 particularly the actions of the Department of the Interior.
8 It confirmed and decreed the quantifications and limitations
9 on water usage for approximately 90 percent of all water users
10 in the Yakima Basin, including the Yakima Indian Nation's
11 rights. By defining the "total water supply available"
12 (TWSA), it affirmed the complete control of all of the water
13 from whatever source in the Yakima watershed by the U.S., to
14 be delivered as specified therein. It declared the law of the
15 Yakima River and its tributaries as it was then and as it has
16 been for the past 45 years and is presently. It established
17 the certainty and finality as called for in Arizona v.
18 California, 75 L.Ed.2d 318 (1983).

19 At this juncture, the Major Claimants (most of them parties to the
20 Decree) assert that the Decree "recognizes, incorporates and confirms"
21 the beneficial use, quantity and priority of their water rights based on
22 contracts, agreements, assessments and U.S. recognized historic use. On
23 the other hand, the D.O.E. argues that the Decree does not establish
24 water rights; that the M.C. must present evidence of their
25 appropriations; that the state was not a party to the Decree and
therefore is not bound by it; and that none of the parties represented
the interests of the D.O.E., indicated in footnote 39, p. 67 of the
D.O.E. Memo, Aug. 1, 1991 to be to obtain the maximum net benefit of the
water for the people of the state, citing RCW 90.54.020.

The Court can agree, from a semantical viewpoint, that the Decree,
in and of itself and standing alone, does not establish any water
rights. That is accomplished by appropriation. What the Decree does
do, however, and as above noted, is to memorialize the appropriations

1 theretofore made.

2 As previously noted, Congress set forth the methods by which the
3 irrigable acreages would be ascertained. It was also necessary to
4 determine the water duty to those irrigable acres to determine whether
5 the availability of water would be sufficient to feasibly support the
6 project. This was all accomplished pursuant to the Reclamation Act of
7 1902, the project was constructed, the contracts between the U.S. and
8 the districts were entered into, the water was applied to the land and
9 the appropriation was completed.

10 Prior to the entry of the Decree, the parties thereto recognized
11 that, periodically, there would be an insufficient supply of water to
12 fulfill all of the water rights set forth in the contracts.
13 Accordingly, they defined the "total water supply available" in
14 paragraph 18 of the Decree as "...the amount of water available in any
15 year ... to supply the contract obligations of the United States to
16 deliver water and to supply claimed rights to the use of water on the
17 Yakima River, and its tributaries, heretofore recognized by the United
18 States." (Emphasis added). All of the contract obligations were
19 obviously included in the Decree, reflecting the water rights claimed
20 and recognized by the U.S.. Paragraph 6 of the Decree provides that the
21 U.S. shall deliver to the Kittitas Reclamation District 342,000 acre
22 feet of water during each irrigation season. Exhibit G, Nov. 7, 1991,
23 the Amendatory Contract between the U.S. and K.R.D., in paragraph 29(b),
24 also calls for the delivery of 342,000 acre feet, thus illustrating the
25 recognition of the claimed and established appropriation in the Decree.

1 The D.O.E., as noted, asserts that it was not a party to the Decree
2 nor were its interests represented in the preparation and presentation
3 of the Decree. However, it is noted that the Amendatory Contract
4 between the U.S. and K.R.D. was effective as of May 12, 1949 and on
5 January 12, 1952, the state issued its Certificate of Surface Water
6 Right to the U.S. for the "lands within the Kittitas Reclamation
7 District". Exhibit H, Nov. 7, 1991. This clearly shows that the
8 D.O.E., or its predecessor, recognized and followed the provision of the
9 Decree. Also see Lentz, supra, pp. 74-78. It should be noted that the
10 United States and the other parties to the Decree are certainly bound
11 thereby.

12 The reasons for the D.O.E.'s present position is that the Major
13 Claimants may not have utilized all of the water as set forth in the
14 Decree and therefore, they have relinquished that water to the state.
15 This argument fails for the reasons noted in the "Use it or Lose It"
16 portion of this opinion. Also, see Ecology v. Bureau of Reclamation,
17 supra.

18 Consequently, the 1945 Consent Decree can be used as some evidence
19 in this case to assist in determining a vested water right in the
20 districts on behalf of their patrons. It is unknown if, pursuant to the
21 Reclamation Act, some of the irrigable acreages have been re-classified
22 between 1945 and the present, but that will be determined at the
23 evidentiary hearings and the present water right can be determined
24 accordingly. Once this case is concluded, inasmuch as the United States
25 and all other parties to the Decree are parties herein, then the final

1 judgment herein would supersede that Decree.

2
3 FLOOD WATERS

4 The D.O.E. has asserted that "Any flood water claim by the Major
5 Claimants pursuant to the 1945 Consent Decree should be denied". It
6 argues that no certificates of water rights have been issued by the
7 department pursuant to the Consent Decree and that the major claimants
8 have not presented evidence of prior appropriation of the flood waters.
9 It further asserts that the Consent Decree does not establish water
10 rights. (D.O.E. Memo, p. 62). (Emphasis added).

11 March 4, 1905, the State Legislature passed what is now codified as
12 RCW 90.40.010 (1905 c. 88 § 1), which allowed the U.S. "the right to
13 exercise the power of eminent domain to acquire the right to the use of
14 any water...". Pursuant to the statute, the U.S., on May 10, 1905,
15 withdrew all of the then unappropriated water of the Yakima River and
16 its major tributaries. This clearly would include the flood waters as
17 part of the natural flow of the river. This total withdrawal expired on
18 December 31, 1951, long after the completed construction of the storage
19 reservoirs and about a month short of seven years after entry of the
20 1945 Consent Decree. However, the U.S. and D.O.E. agreed, in oral
21 argument, that the same withdrawal was again applied for in 1980 or 1981
22 and is still in effect. Nevertheless, it is clear that as of May 10,
23 1905, and the institution of the Yakima Reclamation Project, the U.S.
24 had the total control of the river. The U.S. has maintained river flow
25 and canal diversion records since 1904 in the Yakima Project, Lentz, p.

1 5.

2 Construction of the storage reservoirs was commenced in 1910 and
3 the last of the six reservoirs was completed in 1933. Diversion and
4 conveyance facilities were also constructed to get the water to the
5 irrigable acreages and the U.S. contracted with the various Major
6 Claimants for the delivery of water. It is interesting to note that
7 while the actual storage capacity is 1,070,000 acre feet of water, as of
8 1974 the U.S. had contracted for the delivery of 1,741,903.9 acre feet
9 serving six major divisions of the Project and 18 smaller units. Lentz,
10 p. 49. Thus, the approximately 672,000 acre feet over and above storage
11 has to consist of the natural flow of the river, which by its very
12 definition has to include flood waters. Usually releases of water from
13 storage for irrigation purposes do not begin until the first week in
14 July of each year, so the diversions and deliveries of water up until
15 that time must come from the natural flow of the rivers.

16 The contracts between the U.S. and the major claimants routinely
17 set out a stated monthly diversion and delivery schedule during the
18 "irrigation season" of April through September or October. The 1945
19 Consent Decree closely mirrors those schedules. However, it is an
20 acknowledged fact that the U.S. has historically utilized and diverted
21 the natural flow of the river, including flood waters, outside of the
22 stated "irrigation season". These waters are utilized for such matters
23 as frost protection, spraying and "charging" or filling the delivery
24 canals before the season begins, all of which are beneficial uses. See
25 Neubert v. Yakima-Tieton Irrigation District, 117 Wn.2d 232. As stated

1 in Lentz, p. 188, "As a matter of practice, canal diversions utilizing
2 flood waters, are made to irrigation districts and canal companies,
3 usually in March, which is the month preceding scheduled canal
4 diversions. In addition, flood waters in excess of contract scheduled
5 quantities, are furnished during the monthly scheduled contract season
6 on demand if available."

7 As noted, the U.S. withdrew all of the unappropriated water as of
8 May 10, 1905. RCW 90.40.040 (1905 c. 88 § 4) provides, in part, "Such
9 appropriation by or on behalf of the United States shall inure to the
10 United States, and its successors in interest, in the same manner and to
11 the same extent as though said appropriation has been made by a private
12 person, corporation or association." (Emphasis added). Thus, as
13 previously noted elsewhere herein, when all of the waters were
14 withdrawn, including the flood waters, and were then distributed to the
15 districts that in turn conveyed them to the water users for beneficial
16 use upon the land, the appropriation was completed and the water right
17 became appurtenant to the land to which it was applied. RCW 90.40.040
18 further provides, in part, "that the date of priority as to all rights
19 under such appropriation in behalf of the United States shall relate
20 back to the date of the first withdrawal or reservation of the waters so
21 appropriated..." Thus, we see that under the doctrine of prior
22 appropriation, the right to the beneficial use of the flood waters
23 attached as of 1905.

24 Certainly, paragraph 17 of the 1945 Consent Decree did not, in
25 itself, establish any water rights. It did, however, acknowledge that

1 such rights existed by stating:

2 "17. The United States shall continue to divert available
3 flood water from the Yakima River and its tributaries in
4 accordance with its practice prior to the entry of this
5 judgment, and the quantities of such water which the parties
6 to this judgment are entitled to receive shall be over and
7 above the schedules of diversion hereinabove set forth.
8 Within the meaning of this judgment, flood water is available
9 for such diversions when, as determined by the Yakima Project
10 Superintendent, there is flowing over the Sunnyside Dam flood
11 water in excess of the amount he deems necessary for proper
12 river regulation, including in said amount the amount
13 necessary to protect fish life in the river below said dam.
14 The determination by the Yakima Project Superintendent as to
15 whether flood water is available for such diversion shall be
16 binding upon the parties hereto, subject to review by the
17 court." (Emphasis added).

18 Thus, it is readily apparent from the U.S., and the other Major
19 Claimants that are parties to the Consent Decree, that appropriated
20 rights to some of the flood waters from the "project waters" had long
21 been established and recognized. This is further buttressed by the fact
22 that in 1974, the U.S. filed a Water Right Claim on behalf of the
23 Sunnyside Division which specifically claimed 40,056 acre feet of flood
24 water and a claim on behalf of the Yakima-Tieton Irrigation District
25 which references 6,838 acre feet of flood waters. (Exhibits A & B,
Dec. 12, 1991). These amounts must have come from the diversion
records kept since 1904 by the U.S., as previously noted.

It should be noted that the availability of flood waters for
diversion and distribution may vary from year to year. The type and
amount of precipitation, whether rain or snow; the amount and water
content of the snowpacks; the changing and timing of changes in
temperature; and various other factors all have major impacts on the
yearly natural flow, including flood waters, of the river. This is

1 clearly evidenced by leaving the availability of such waters to the
2 Project Superintendent (and now also the Systems Operation Advisory
3 Committee) and making that decision binding. The appropriated and
4 vested water rights will be fulfilled as water is available.

5 In respect to certification by the D.O.E., the U.S. has filed Water
6 Right Claims on its own behalf and on behalf of the persons claiming
7 water rights for "lands within the boundaries" of most of the major
8 claimants. For example, see exhibits to the court hearing of December
9 12, 1991. Based on those claims, the D.O.E., or its predecessor, have
10 issued some certificates, such as Roza and Kittitas Reclamation
11 District. Lentz, p. 188. As to the previously noted Water Right Claims
12 by the U.S. for the Sunnyside Division and the Yakima-Tieton Irrigation
13 District, which on their face reference flood waters, no certificates
14 have been issued "for the reason that water rights for those projects
15 were initiated and used before the State Water Code became effective on
16 June 15, 1917." The certificates that have been issued cover the
17 irrigation season, which would include the spring and early summer
18 natural flows and flood waters. These certificates were not issued
19 pursuant to the Consent Decree, but in recognition of the vested water
20 rights which are simply recognized by the Decree.

21 The Court has previously concluded that, "The entry of the consent
22 decree constituted judicial recognition of the entire history of the
23 Yakima Project". (Memorandum Opinion re: Motions for Partial Summary
24 Judgment, As Amended, October 22, 1990). It certainly did not establish
25 any water rights, but did memorialize the previously vested rights as

1 asserted by the U.S. and the parties thereto.

2
3 "USE IT OR LOSE IT"

4 The contracts between the U.S. and the irrigation districts specify
5 the total amount of acre feet of water that may be diverted to cover the
6 irrigable acreage stated in the contract to be within the district.
7 This is accomplished by the U.S. determining the irrigable acreage,
8 applying the appropriate water duty thereto, and arriving at the
9 requisite number of acre feet of water to be beneficially applied. In
10 the Yakima Project, the diversions are monitored and controlled by the
11 U.S. and diversion records are kept of each such diversions. The
12 contract amounts of the acre feet of water allotted to each district are
13 closely mirrored by the 1945 Consent Decree.

14 The D.O.E. claims, from the diversion records filed herein, that
15 some of the districts have not, for a number of years, diverted the
16 maximum amounts of water as set forth in their contracts and the Decree.
17 The D.O.E. argues that although the districts claim an "entitlement" to
18 the contract and Decree amounts, their water right can only be
19 established by the amount of water actually used. The department is
20 willing to stipulate that the highest water diversion by any district
21 over the 20 years period from 1957 to 1977 would be the amount to be
22 agreed to as the district's water right. Otherwise, any amount of water
23 between the highest diversion amount and the contract amount would be
24 relinquished, citing to RCW 90.14.180.

25 RCW 90.14.180 reads as follows:

"Any person hereafter entitled to divert or withdraw water of

1 the state through an appropriation...who abandons the same, or
2 who voluntarily fails, without sufficient cause, to
3 beneficially use all or any part of said right to withdraw for
4 any period of five successive years shall relinquish such
5 right or portion thereof, and such right or portion thereof
6 shall revert to the state...". In RCW 90.14.031, "person" is
7 defined as follows:

8 (1) "Person" shall mean an individual, partnership,
9 association, public or private corporation, city or other
10 municipality, county or a state agency, and the United States
11 when claiming water rights established under the laws of the
12 state of Washington." (Emphasis added).

13 It appears to be the position of the D.O.E. that if, over a period
14 of five consecutive years, there is a lesser diversion of water than the
15 full amount of the water right as set forth in the contract, the portion
16 of the contract amount not diverted shall revert to the state. Standing
17 alone, this would appear to be a relatively plausible argument.

18 First, however, it must be determined that the district has
19 "abandoned" or "voluntarily failed" to use that portion of the water
20 right. In this unique river basin of the state, the U.S. Bureau of
21 Reclamation Project Superintendent has almost total control of the
22 river. The U.S. has withdrawn all unappropriated water; it owns the
23 storage facilities, and it owns most of the diversion facilities. It
24 has to not only control the diversions for irrigation purposes, but also
25 has to provide for other usages of the water, such as hydroelectric
power and instream flows for fish. In recognition of this control by
the Yakima Project Superintendent, the 1945 Consent Decree specifies
that "The United States shall divert" the then listed amounts to each of
the districts that are parties thereto, most of the major claimants
herein. In dealing with the availability of flood waters (natural

1 flow), paragraph 17 thereof makes the determination of the
2 Superintendent binding upon the parties, subject only to review of the
3 court. The U.S. also has complete control of the release of whatever
4 storage waters are available, including "dead" storage water. Kittitas
5 Reclamation District v. Sunnyside Valley Irrigation District, 626 F.2d
6 95. Each of the contracts between the U.S. and the districts, and
7 paragraph 18 of the Decree, provide for proration, with a few
8 exceptions, of the water supply when such supply is insufficient to
9 supply the contracted amounts. The districts, of course, represent the
10 landowners within their boundaries, Ecology v. Acquavella, supra, and
11 are bound to obtain as much water for them as is available, up to the
12 contracted amounts. The districts are also contractually bound to make
13 the most economical use of the water available, such as attempting to
14 reduce conveyance losses, prevent seepage where possible and eliminate
15 wasteful practices. In view of these factors, when the district does
16 not receive their full contractual amount of water, can it be said that
17 they have "abandoned" or "voluntarily failed" to use that portion of the
18 water right that they do not receive? This would be a very difficult
19 proposition for the state to prove.

20 The relinquishment of all or a portion of a water right must also
21 occur "without sufficient cause". To determine what that means, we turn
22 to RCW 90.14.140.

23 RCW 90.14.140 (1) (a and e) provide as follows:

24 "(1) For the purposes of the RCW 90.14.130 through 90.14.180,
25 "sufficient cause" shall be defined as the nonuse of all or a
portion of the water by the owner of a water right for a
period of five or more consecutive years where such nonuse
occurs as a result of: (a) Drought, or other unavailability

1 of water; (e) Federal laws imposing land or water use
2 restrictions either directly or through the voluntary
3 enrollment of a landowner in a federal program implementing
4 those laws, or acreage limitations, or production quotas."

5 Under (a) it seems highly unlikely that over a period of five
6 consecutive years in the Yakima River Basin, there would not be some
7 drought or water short years. Each and every year, the parties
8 anxiously follow the weather reports, survey the depth of the snow pack
9 and the water content thereof and follow the spring runoff to ascertain
10 the sufficiency or insufficiency of supply for the irrigation season.
11 As to other "unavailability of water" for irrigation, the need to
12 maintain instream flows for fish has already been mentioned.

13 Under (e) dealing with the federal laws imposing water use
14 restrictions, we have the contracts as entered into pursuant to and in
15 accordance with the Reclamation Act of 1902, which call for the
16 proration of water among the water users when the total water supply
17 called for is not available. We have a federal court judgment (1945
18 Decree) which defines, in paragraph 18, the "total water supply
19 available". All of this is under the determination, direction and
20 control of the U.S., acting by and through the Yakima Project
21 Superintendent. Therefore, it would appear that under federal laws
22 imposing water use restrictions in the operation of the Yakima Project,
23 for reasons as noted herein, that "sufficient cause" for nonuse of a
24 portion of the water is present within the districts and the Basin. See
25 Sheep Mountain Cattle Co. vs Department of Ecology, 45 Wn. App. 427.

RCW 90.14.140 (2) states:

"(2) Notwithstanding any other provisions of RCW 90.14.130
through 90.14.180, there shall be no relinquishment of any

1 water right: (b) If such right is used for a standby or
2 reserve water supply to be used in time of drought or other
3 low flow period so long as withdrawal or diversion facilities
4 are maintained in good operating condition for the use of such
5 reserve or standby water supply, or (d) if such right is
6 claimed for municipal water supply purposes under chapter
7 90.03 RCW..." (Emphasis added).

8 In the Yakima River Basin, each and every year the Project
9 Superintendent must divert for irrigation purposes the least amount of
10 water necessary, in order to attempt to provide as much "carryover" of
11 water in the storage reservoirs as is possible for use in the ensuing
12 year. It is practically impossible to forecast, a year or even six
13 months ahead of each irrigation season how much water might be
14 available. Consequently, the irrigators, as well as the Project
15 Superintendent have a vital interest in reserving as much water as
16 possible for carry over to the next season. If they do not use the full
17 contractual amount each year, in the interest of reserving that water
18 for use the following year, there is no relinquishment of their water
19 right. Also, there can be no relinquishment by those major claimants
20 who use water for municipal supply purposes.

21 BENEFICIAL USE

22 One of the issues presented is whether "beneficial use" is the
23 measure and limit of a water right and does the person who applies water
24 to a beneficial use own a water right. As previously noted in the
25 Court's Memorandum Opinion re. Motion to Dismiss, Feb. 16, 1982, p. 12,
both federal and state law require beneficial use to establish a water
right.

1 "The right to the use of water acquired under the provisions
2 of this Act shall be appurtenant to the land irrigated, and
3 beneficial use shall be the basis, the measure and the limit
4 of the right." Act of June 17, 1902, Ch. 1093, § 8, 43
5 U.S.C.A. § 372. Similarly, "The right to the use of water
6 which has been applied to a beneficial use in the state shall
7 be and remain appurtenant to the land or place upon which the
8 same is used...". RCW 90.03.380. See also RCW 90.14.020.

9 The real question posited here is the degree of specificity with
10 which the lands beneficially using the water must be identified. The
11 issue in the 1982 Memorandum, supra, was whether the individual
12 landowners who beneficially used the water were necessary parties
13 herein. It was held they were not; that a water distributing entity can
14 represent the landowners to which it distributes the water. Ecology v.
15 Acquavella, supra at 657. "There is an identity of interest between the
16 entities and water users such that the entities are fully empowered to
17 represent their water users in the present type of litigation." Thus,
18 we see that the diverting and supplying entities can establish
19 "beneficial use" of all of the water rights appurtenant to the land
20 within their boundaries.

21 As noted herein, the Reclamation Act and the contracts between the
22 U.S. and the irrigation districts, all reference the "irrigable
23 acreages" within the boundaries of the diverting entities. The
24 Secretary of the Interior may classify or reclassify these acreages as
25 to irrigability and productivity, upon request, not more than every five
years. 43 U.S.C. § 485g. The contracts between the U.S. and the
districts set forth the irrigable acreages and require the districts to
use "all proper (practicable) methods to secure (insure) the economical

1 and beneficial use of irrigation water." Exhibits G and Q, November 7-
2 8, 1991. They require the districts to "keep an accurate record of all
3 crops raised and livestock produced on lands within the District."
4 (Emphasis added). Exhibit G, p. 31; Exhibit Q, p. 47. These crop
5 reports are required to be furnished yearly, on an aggregate basis, by
6 the districts to the U.S. This is the method employed, then, to prove
7 the beneficial use of the waters on the lands within each district's
8 boundaries. It is the proof provided by the diverting entities on
9 behalf of the individual landowners within the districts. It is
10 necessarily done this way because of the possible changes in the number
11 of "irrigable" acres and the yearly changes of place of use within the
12 districts, as noted elsewhere herein, as well as some variations in the
13 types of crops produced each year. The districts furnish to the U.S.,
14 crop by crop, the number of acres for each crop and the dollar value of
15 that crop.

16 On Saturday, February 29, 1992, the Yakima Herald Republic
17 published the "Yakima Irrigation Project Crop Report" for the years
18 1988, 1989, and 1990, as furnished by the Bureau of Reclamation. The
19 Project Report lists 20 crops, the acreage of each crop and the dollar
20 value thereof for each of the three years. In 1990, 321,647 acres of
21 the 20 crops reported produced \$634,952,886.00 of value. Thus we can
22 clearly see that the yearly reports compiled by the diverting and
23 supplying entities in the aggregate can constitute proof of the
24 "beneficial use" of the water by the landowners within the boundaries of
25 the districts.

1 the total water supply available for distribution to the Districts. See
2 Total Water Supply Available, An indicator of Adequacy of Supply, Bureau
3 of Reclamation Abstract, attached as Exhibit P to the D.O.E. brief.
4 Also, RCW 90.40.020 provides: "The United States shall have the right
5 to turn into any natural or artificial water course, any water that it
6 may have acquired the right to store, divert, or store and divert, and
7 may again divert and reclaim said waters from said water course for
8 irrigation purposes subject to existing rights." (Emphasis added).
9 This is legislative recognition by the State of the right of the U.S. to
10 the return flows. See State of Washington, D.O.E. v. U.S. Bureau of
11 Reclamation, et al., 118 Wn.2d 761, and RCW 87.03.115.

12 "Foreign return flows" are waters that come from a different
13 watershed which may augment the natural waters of a stream or creek.
14 They do not become part of the natural waters of the creek, even after
15 they have entered it. Elgin v. Weatherstone, 123 Wash. 429, 433. The
16 users of these foreign return flows do not obtain a right thereto. "The
17 fact that they took them last year does not given them a right to take
18 them this year ... The vagrant waters of yesterday are not those of
19 today." Elgin, p. 433. Why these "foreign return flows" are even an
20 issue in this adjudication remains a great mystery. As stated in Dodge
21 v. Ellensburg Water Co., 46 Wn. App. 77: "... no water rights,
22 prescriptive or otherwise, exist in these waters."
23

24 CHANGE IN PLACE OF USE

25 RCW 90.03.380, entitled "Right to Water Attaches to Land - Transfer

1 or Change in Point of Diversion," had its genesis in the 1917 Water Act.
2 (1917 c. 117 § 39). It was amended in 1929 and 1987. It provided that
3 the right to the use of water was appurtenant to the land and further
4 provided that the water right may be transferred to others and that the
5 point of diversion may be changed and the purpose of use may be changed,
6 if there is no injury or detriment to others. For the transfer of the
7 water right, the change in the point of diversion or the change in the
8 purpose of use, application must be made and a certificate issued to do
9 so by the D.O.E.

10 Historically, since the passage of the Water Act of 1917, and even
11 prior thereto, the holder of a water right could change the place of use
12 of that water right if the proposed change was within the boundaries of
13 the same irrigation district supplying the water simply by applying to
14 the directors of the irrigation district and receiving their approval.
15 As admitted in oral argument, the D.O.E. and its predecessors have never
16 monitored or investigated the change of the place of use of a water
17 right within the boundaries of the irrigation districts because of the
18 lack of resources to do so. Nor, it is admitted, does the department
19 now have the resources to do so.

20 In one instance, where a landowner held a water right appurtenant
21 to certain lands under a contract with the district supplying the water,
22 the landowner applied to the department's predecessor, under the above-
23 cited statute, for a change of the place of the use of said water right
24 within the districts boundaries. In Wenatchee Reclamation District v.
25 Titchenal, 175 Wn. 398, (1933) the Court held that the statute did not

1 authorize the department to interfere in the relationship between the
2 district and its patron.

3 In 1991, the Legislature added three new paragraphs to the statute.
4 (Engrossed Substitute House Bill 2026, 52nd Legislature, 1991 Regular
5 Session). The first added paragraph dealt with the transfer of water
6 rights from one district to another, which would require departmental
7 approval. The third paragraph indicates that this section of the
8 statutes does not apply to trust water rights. The second amending
9 paragraph is the one which has raised the issue herein. It reads:

10 "A change in place of use by an individual water user or users
11 of water provided by an irrigation district need only receive
12 approval for the change from the board of directors of the
district if the use of water continues within the irrigation
district." Emphasis added.

13 Because it references, for the first time, a change in place of use
14 by a wateruser within district boundaries, the D.O.E. posits that,
15 although never done before and contrary to the holding in Titchenal,
16 supra, such changes now need certification by the department. The
17 argument is that this statute was intended, not to approve and sanction
18 past practice and a court holding, but is designed to give the district
19 "veto power" over such proposed transfer in the place of use. This is
20 pure sophistry. The statute clearly states that you "only need
21 approval" from the board if the change is within the district
22 boundaries.

23 This amendment helps to clarify RCW 90.03.390 dealing with
24 temporary changes of the point of diversion or place of use of water or
25 rotation in the use of water for a more economical use of the available

1 supply. This statute provides that before such changes can be made, the
2 landowner must have the permission of the water master of the district
3 in which such proposed change is located or the department. Either-or!
4 This new amendment to RCW 90.03.380 now indicates that if the change of
5 place of use is within the district's boundaries, you need only the
6 approval of the board of the district.

7 In addition, during the progress of this federal project the
8 department has issued certificates to the U.S. for "the lands within the
9 Kennewick Irrigation District", "the lands within the Roza Irrigation
10 District", "lands within the boundaries of Yakima-Tieton Irrigation
11 District", etc. Clearly, there is no need to issue another certificate
12 for a place of use within a district's boundaries, when the original
13 certificate already covers the place of use. Therefore, the department
14 need not become involved at all in a waterusers change of the place of
15 use of his water rights occurring within the boundaries of the district
16 supplying such water and he need only seek approval from the district
17 board of directors.

18
19 **REASONABLE EFFICIENCY**

20 In Appendix A (Revised) to Pretrial Order 10, paragraph VI(C)(1),
21 with respect to quantification of use, it is stated, "The irrigation and
22 other facilities, practices and delivery systems of the entity ... as
23 constructed and operated, are consistent with irrigation and other
24 relevant practices and systems customary in the locality and are
25 reasonably efficient." (Emphasis added). Contrary to it's prior

1 position, the D.O.E. has now taken the stance that "reasonable
2 efficiency" "need not be a part of this adjudication," asserting that
3 after the water rights have been established herein, "reasonable
4 efficiency" can then be delved into on a "cost-benefit analysis" basis.
5 It argues that a cost-benefit analysis is the only method for
6 determining "reasonable efficiency" and that would be too expensive and
7 time consuming in this lengthy adjudication. Further, it claims that
8 "reasonable efficiency" has not been part of the determinations of water
9 rights in the subbasins already considered herein.

10 Contrary to this last assertion, reasonable efficiency has been, at
11 the very least, impliedly referred to in each of the subbasin reports
12 through the findings pertaining to the "water duty" in each subbasin
13 reported on to date by the Referee. As an example, see pages 2 to 5 in
14 the Referee's Report to the Court for Subbasin 16. A good definition of
15 "water duty" is contained in Farmers Highline Canal and Reservoir Co. v.
16 City of Golden, (Colo.), 272 P.2d 629, 634 (1954) as follows:

17 "It is that measure of water, which, by careful management and
18 use, without wastage is reasonably required to be applied to
19 any given tract of land for such period of time as may be
adequate to produce therefrom a maximum amount of such crops
as ordinarily are grown thereon. (Emphasis added).

20 Inherent in this definition of water duty is the requirement that
21 the system be reasonably efficient. In Worden v. Alexander, 90 P.2d
22 160, (originally cited by D.O.E.) we find:

23 "The question of what quantum of water is reasonably required
24 is necessarily a complicated one, depending, as it does, upon
25 many different conditions. The character of the soil, the
area sought to be irrigated, the climatic conditions, the
location, quality and altitude of the land, the kinds of crops
to be raised, and the length of the irrigation season, must

1 all be taken into consideration and weighed, as well with such
2 other conditions as may be peculiar to each particular case.
3 (p. 162) ... In determining the amount of water which a user
4 applies to a beneficial use and to which he is entitled as
5 against a subsequent appropriator, the system of irrigation in
6 common use in the locality, if reasonable and proper under
7 existing conditions, is to be taken as the standard, although
8 a more economical method might be adopted. And an
9 appropriator cannot be compelled to divert according to the
10 most scientific method known. ... It is the policy of this and
11 all western states to require the highest and greatest
12 possible duty from the water of the state in the interest of
13 agriculture and other useful and beneficial purposes. But it
14 is equally well established that "economy should not be
15 insisted upon to such an extent as to imperil success." (p.
16 163) (Cites omitted. Emphasis added.)

17 This issue was also addressed in Fox v. Ickes, 137 F.2d 30, 35
18 wherein it was stated:

19 "A property right once acquired by the beneficial use of water
20 is not burdened by the obligation of adopting methods of
21 irrigation more expensive than those currently considered
22 reasonably efficient in the vicinity." ... (F.N. 9). While an
23 appropriator can claim only the amount which is necessary to
24 properly supply his needs, and can permit no water to go to
25 waste, he is not bound ... to adopt the best method for
utilizing the water or take extraordinary precautions to
prevent waste. He is entitled to make a reasonable use of
water according to the custom of the locality, and, as long as
he does so, other persons cannot complain of his acts. The
amount of water required to irrigate his lands should,
therefore, be determined by reference to the system used,
although it may result in some waste which might be avoided by
the adoption of another or more elaborate and extensive
distribution system." (Emphasis added).

26 Thus we see that "reasonable efficiency," according to the customs
27 of the locality, along with soil, climate, altitude, kinds of crops,
28 etc. is basically part and parcel of the water duty to be found by the
29 fact finder herein. Clearly, a "cost-benefit" analysis is neither
30 necessary nor desirable as the reasonable efficiency of use is inherent
31 in the finding of the water duty. RCW 90.03.040 prohibits the exercise

1 of eminent domain which "shall deprive any person of such quantity of
2 water as may be reasonably necessary for the irrigation of his land then
3 under irrigation to the full extent of the soil, by the most economical
4 method of artificial irrigation applicable to such land according to the
5 usual methods of artificial irrigation employed in the vicinity where
6 such land is irrigated." (Emphasis added). Even the Legislature has
7 recognized the inclusion of reasonable efficiency in the finding of
8 water duty.

9 In this adjudication, in addition to the testimony of the farmers
10 and claimants who are familiar with the character of the land, the
11 crops, etc. , in three separate subbasins and then in one hearing on
12 December 12, 1990 pertaining to the other subbasins in the Upper Basin,
13 the testimony of three expert witnesses was received, along with a large
14 number of exhibits in support of such testimony. These experts were
15 Robert Montgomery, Soil Scientist; Eldon Johns, Hydraulic Engineer; and
16 Jim Esget, Hydrologist; all from the U.S. Bureau of Reclamation. Their
17 testimony covered such topics as irrigation suitability, land
18 classification, climate information, soil information, crop information,
19 irrigation systems and management information. All of this goes to the
20 issue of a reasonably efficient water duty.

21 On June 12, 1991, the same experts presented the same type of
22 testimony, and exhibits concerning the water duty that is applicable to
23 the Lower Valley Basin. Also, at that hearing there was testimony that
24 Tom Ley of the Washington State University Extension Service had given
25 irrigation demonstrations to help farmers improve efficiency and had

1 made reports on efficiency goals. See Exhibits 12 and 13 to that
2 hearing. Again, this shows that reasonable efficiency is one criteria
3 to be considered in arriving at the duty of water.

4 It is interesting to note that the contract between the U.S. and
5 Kittitas Reclamation District (Exhibit G, Nov. 7, 1991) requires the
6 District to use "all proper methods to secure the economical and
7 beneficial use of irrigation water." (p. 15). Likewise, the contract
8 between the U.S. and Kennewick Irrigation District (Exhibit Q, Nov. 8,
9 1991) requires the District to use "all practicable methods to insure
10 the economical and beneficial use of water." (p. 19). Thus, even under
11 their water supply contracts, the Major Claimants are required to use
12 "reasonable efficiency" in their use of water.

13 Therefore, even though "reasonable efficiency" is not a discrete
14 and distinct item in this adjudication, it clearly is included as a part
15 of this adjudication. Taking into consideration all of the factors used
16 in determining water duty, and the evidence in support thereof, it does
17 not support or require a specific "cost-benefit analysis" for all of the
18 irrigable acreage. The finding of this Court as to the applicable water
19 duty would then be res judicata as to the reasonably efficient use of
20 the water up to the amount of water awarded to the irrigable acreages.

21 22 SUMMARY

23 In summary, the Court finds that the water right is appurtenant to
24 the land, but that the United States and the Major Claimants also have
25 and retain some rights in the water for the storage, diversion,

1 distribution and conveyance of those water rights. Under the acts of
2 Congress, the water rights will be apportioned to the irrigable acreages
3 within the Project divisions. The irrigable acreages can be ascertained
4 by use of the records of the United States and the districts and can be
5 proven in gross by the surveys, maps, photos, etc. thereof. The 1945
6 Consent Decree can be used as some evidence herein, but may be possibly
7 modified by evidence of subsequent changes between the United States and
8 the Major Claimants.

9 The Court finds that the flood waters are part of the natural flow
10 of the river and have been appropriated, which appropriation is
11 recognized by the 1945 Consent Decree. Even though the Major Claimants
12 may not have used all of their recognized water rights, from time to
13 time, there is no relinquishment of that right under the state statutes.
14 The beneficial use of the water can be proven, in gross, under the
15 federal laws, through the yearly crop reports required by the United
16 States to be furnished by the districts on behalf of their landowners.
17 The return flows are part of the total water supply available and the
18 United States and the districts may use them as provided in their
19 contracts. Any change in the place of use within the boundaries of a
20 district need only be approved by the district's board of directors.
21 Reasonable efficiency in the use of water is required by the contracts
22 between the United States and the districts, is inherent in the water
23 duty proven, and is an integral part of this adjudication.

24 Dated this 12th day of May, 1992.

25 Walter Stauffer
Judge