

FILED JUN 17 1993

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

KIM M. EATON
YAKIMA COUNTY CLERK

IN THE MATTER OF THE DETERMINATION)	NO. 77-2-0148-5
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,)	
STATE OF WASHINGTON,)	
DEPARTMENT OF ECOLOGY,)	MEMORANDUM OPINION RE:
)	YAKIMA RESERVATION
Plaintiff,)	IRRIGATION DISTRICT
)	
vs.)	
)	
JAMES J. ACQUAVELLA, et al.,)	
)	
Defendants.)	

MOTION

The Yakima Reservation Irrigation District (Y.R.I.D.) has filed a motion for declaratory/summary judgment to the effect that, upon acquisition of an allotment in fee upon the Yakima Indian Reservation, the fee owner thereupon acquired a water right to an equal pro-rata share of all water available within the Wapato Irrigation Project. Although there are some factual matters to be presented, preventing a specific declaratory/summary judgment as requested, there a number of legal issues raised which can be determined herein.

SUMMARY OF HISTORICAL FACTS

The material facts concerning the quite unique development of irrigation upon the Yakima Indian Reservation are unchallenged. The Yakima Indian Reservation was established by the Treaty of June 9, 1855

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1 and was proclaimed by the President on April 18, 1859. At that time, in
2 1859, the United States Indian Service began to help the Yakima Nation
3 develop some irrigation upon the Reservation. Between 1,000 and 1,200
4 acres of land were being irrigated by 1865. The development was mainly
5 through the use of tribal funds, administered by the U.S. Indian
6 Service, now and hereinafter referred to as the Bureau of Indian
7 Affairs. (B.I.A.)

8 Then, in May, 1896, the United States, acting through the B.I.A.,
9 began to assist the Yakima Nation by commencing construction of the
10 Irwin or Old Reservation Canal. Construction of the New Reservation
11 Canal and Lateral A began in 1903, at which time the Superintendent of
12 Indian Affairs filed an appropriation for 1,000 cubic feet per second
13 (cfs) of water from the Yakima River, bordering the Reservation, to
14 protect the Indian water rights from other water appropriators on the
15 river.

16 By 1905, four main canals were being constructed and extended on
17 the Reservation: the Old Reservation Canal, the New Reservation Canal,
18 the Gilbert Canal and the Hatch Canal, along with numerous laterals. By
19 that time, irrigation water was being provided to about 17,000 acres of
20 land.

21 The construction of the Old Shearer ditch began in 1908, diverting
22 water from Satus Creek for irrigation of approximately 2,000 acres. In
23 1910, construction of a necessary drainage system was begun and by July
24 of 1912, 42 miles of drainage ditches had been completed. Laterals "A",
25 "B" and "C" were completed by late 1912 and the New Reservation Canal

1 had been extended to allow 47,000 acres to be irrigated that year.

2 Congress, in 1916, provided \$200,000.00 for the construction of the
3 Wapato Diversion Dam in the Yakima River and also funding for the
4 enlargement of the New Reservation Canal. The construction of the dam
5 was completed in 1917. The funding was to be repaid by the water users,
6 as well as operation and maintenance charges. The Act of June 30, 1919
7 (41 Stat. 27), provided for the construction of diversion dams and
8 laterals from Toppenish and Simcoe creeks and those were completed by
9 the end of 1920. Also, during 1920, work was completed on Lateral 2,
10 Drain No. 1 and the New Reservation Main Canal. Work was also commenced
11 on Lateral No. 4. The Drop No. 1 Pumping Plant and Unit 1 Pump Canal
12 were finished in 1929.

13 Improvements and expansion of the irrigation works continued. As
14 late as September, 1961, Congress authorized the Additional Works
15 Project (75 Stat. 680) to supply water to lands which could not receive
16 water by gravity flow from the existing canals and laterals. This
17 project was completed in 1975, just two years prior to the initial
18 filing of the instant action.

19 Thus, we see that from the inception of the Yakima Reservation in
20 1855 to the present day, the construction, expansion, maintenance and
21 operation of the major portion of the irrigation works upon the Yakima
22 Reservation have been directly under the supervision and management of
23 the U.S. Secretary of the Interior, acting through the Indian Service,
24 now known as the Bureau of Indian Affairs. This is all now known as the
25 Wapato Irrigation Project (W.I.P) portion of the Yakima River Basin

1 Reclamation Project. There are some other small private canals and
2 laterals on the Reservation, drawing water from the Toppenish, Simcoe
3 and Satus Creeks and their tributaries. There also may be some other
4 riparian and other appropriative rights to those streams, all of which
5 will be considered in the subbasin pathways herein.

6 While all of the foregoing was taking place, there were other
7 events occurring that helped to bring us to the current state of affairs
8 within the Wapato Irrigation Project. In 1887, Congress passed the
9 General Allotment Act, (24 Stat. 388), which would allow individual
10 members of the Yakima Nation to select either 160 acres of grazing land
11 or 80 acres of agricultural land in their individual capacities.
12 Eligible members began their selections in 1892 and in 1897, the first
13 allotments of 40 and 80 acre tracts of agricultural land were made. The
14 Act of May 27, 1902 (32 Stat. 275) provided for the sale of the
15 allotments, allowing the conveyance of "a full title to the purchaser,
16 the same as if a final patent without restriction upon the alienation
17 had been issued to the allottee."

18 The Reclamation Act, 43 U.S.C. § 390 et seq., also was passed by
19 Congress on June 17, 1902 and shortly thereafter investigation was begun
20 of the Yakima River Basin. The State of Washington passed the state
21 Irrigation Act March 4, 1905 (R.C.W. 90.40) and on May 10, 1905, the
22 U.S., pursuant thereto, withdrew all of the then unappropriated waters
23 of the Yakima River and its major tributaries. Thus was born the Yakima
24 Basin Reclamation Project. The Yakima Indian Reservation was to become
25 known as the Wapato Irrigation Project (W.I.P.) portion of the Yakima

1 Reclamation Project.

2 Congress addressed the matter of water rights on the Reservation in
3 December of 1904, by passage of an act, 33 Stat. 595, which stated in
4 part:

5 "That the Secretary of the Interior is hereby authorized, in
6 the cases of entrymen and purchasers of lands now irrigated or
7 that may hereafter be irrigated from systems constructed for
8 the benefit of the Indians, to require such annual
9 proportionate payments to be made as may be just and equitable
10 for the maintenance of said systems: provided, that in
11 appraising the value of irrigable lands, such sum per acre as
12 the Secretary of the Interior may deem proper, to be
13 determined as nearly as may be by the total cost of the
14 irrigation system or systems, shall be added as the
15 proportionate share of the cost of placing water on said
16 lands, and when the entryman or purchaser shall have paid in
17 full the appraised value of the land, including the costs of
18 providing water therefore, the Secretary of the Interior shall
19 give to him such evidence of title in writing to a perpetual
20 water right as may be deemed suitable... ." (Emphasis
21 added).

22 To fulfill the requirements of the statute, by 1909 a Petition for
23 Water Right within the Wapato Unit was required to be executed by all
24 applicants for patents in fee before any water could be delivered to the
25 land. Now designated as "Application for Water Right", it indicates
that the owner of the land "desires to acquire a permanent right to
water for irrigation purposes". It requires the owner to pay their
"proportionate" share of the irrigation charges applicable to their
land, as later set forth herein, and such charges are a "first lien"
against the land. The U.S., acting through the Project Engineer, also
reserves the right to refuse delivery of any water to the land upon
failure of the landowner to promptly pay the irrigation charges. It
further provides that when the irrigation charges have been paid, the

1 U.S. will then cause to be issued to the owners of the land a water-
2 right certificate to the "fact that such land has a perpetual water-
3 right attached thereto". (Y.R.I.D. brief, Exh. A1-3)

4 Before approving the Yakima Reclamation Project in 1906, the Acting
5 Secretary of the Interior had arbitrarily limited the diversion of water
6 from the Yakima River to 147 cubic feet per second (cfs). This was
7 totally insufficient and in 1912, the Secretary requested a Report on
8 the Conditions on the Yakima Indian Reservation. The Report was
9 generated jointly by Charles H. Swigart, Supervising Engineer, U.S.
10 Reclamation Service; Don M. Carr, Superintendent and Special Disbursing
11 Agent, Yakima Indian Service; and Leslie M. Holt, Superintendent of
12 Irrigation, Yakima Indian Reservation. They identified approximately
13 120,000 to 126,000 potentially irrigable acres on the Reservation.
14 Pursuant to that report, and the hearings held thereon, Congress passed
15 the Act of August 1, 1914 which provided "at least seven hundred and
16 twenty cubic feet per second of water ... for the irrigation of forty
17 acres on each Indian allotment". Also, on July 16, 1914, the Secretary
18 approved the last schedule of 1,800 eighty acre allotments. Pursuant to
19 the Act of 1914, the Interior Department designated 40 acres of each of
20 the 1800 allotments that were to receive the 720 c.f.s. from the Yakima
21 River. This constituted 72,000 acres which were then established as the
22 "A" lands. Another 48,000 acres were designated as the "B" lands of the
23 120,000 potentially irrigable acres upon the Reservation identified in
24 the aforementioned Report on the Conditions.

25 The Warren Act of 1911, passed by Congress, authorized the U.S. to

1 contract for the storage and carriage of water from the construction and
2 use of reservoirs and diversion facilities in reclamation projects.
3 Pursuant to the Act, the Bureau of Reclamation (B.O.R.) and the now
4 Bureau of Indian Affairs (B.I.A.) entered into a contract on March 9,
5 1921, to divert 250,000 acre feet of storage water from the Yakima River
6 to the Wapato Irrigation Project (W.I.P.). The water was to supply
7 irrigation to the "B" lands. Subsequently, on Sept. 3, 1936, the B.O.R.
8 and the B.I.A. entered into a contract for an additional 100,000 acre
9 feet of storage water to be diverted from the Yakima River. By the Act
10 of July 1, 1940, Congress directed that the U.S. would pay the
11 proportionate reservoir construction costs for that 100,000 acre feet as
12 part of the U.S. obligation to supply sufficient water to irrigate the
13 40 acres of each allotment which now constitute the 72,000 acres of "A"
14 lands. Thus, the irrigation charges required to be paid by the owners
15 of the "A" lands include only the construction, operation and
16 maintenance charges for the operation and maintenance of the diversion
17 and distributing system on the Wapato-Satus unit of the W.I.P. On the
18 other hand, in addition to the assessments charged to the "A" lands, the
19 "B" lands pay those assessments and are also assessed their
20 proportionate share of the construction, operation and maintenance costs
21 of the reservoir system of the Yakima Irrigation Project. The
22 obligation to pay these irrigation charges are contained in the afore-
23 mentioned "Application for Water Right", which only applies to the
24 Wapato-Satus Unit of the Wapato Irrigation Project.

25 The Wapato Irrigation Project is the largest irrigation district in

1 the federal Yakima Reclamation Project, with a total of approximately
2 136,600 acres as of August, 1962. By 1982, approximately 55% of the
3 land was Indian trust land and 45% was individually owned within the
4 W.I.P.

5 The W.I.P. consists of the Ahtanum Unit, the Toppenish-Simcoe Unit
6 and the Wapato-Satus Unit. The Additional Works Project is contained
7 within the Wapato-Satus Unit. We are not here concerned with the
8 Ahtanum Unit in that it is physically separated from the rest of the
9 Reservation by Ahtanum Ridge and derives all of its water from Ahtanum
10 Creek and its tributaries.

11 The Yakima Reservation Irrigation District (Y.R.I.D.) encompasses
12 lands and members within both the Toppenish-Simcoe Unit and the Wapato-
13 Satus Unit, with the vast majority of its members being within the
14 Wapato-Satus Unit. These are two very different and distinct units of
15 the W.I.P., although they are totally under the control of and operated
16 solely by the W.I.P. The water for the Toppenish-Simcoe Unit comes from
17 Toppenish Creek, Simcoe Creek and their tributaries. These creeks arise
18 on the Reservation, flow through it and whatever water may be left
19 eventually flows into the Yakima River at the eastern boundary of the
20 Reservation. The Act of June 20, 1919 (41 Stat. 27) authorized the
21 construction of diversion dams and delivery canals for 12,000 acres
22 within the Unit. The Toppenish-Simcoe Feeder Canal had been constructed
23 by 1925. However, from the information supplied to the Court, it
24 appears that there have never been more than approximately 4,000 acres
25 irrigated within any given year nor have there been diversions from the

1 creeks of not more that approximately 20,000 acre feet in any given
2 year. The landowners within the Toppenish-Simcoe Unit are not required
3 to execute the "Application for Water Right". There is no division into
4 "A" or "B" lands in this Unit. Delivery of water by the W.I.P. is on a
5 "demand" basis. The landowner makes a request for the delivery of water
6 on a yearly basis. After arrangements have been made for the payment
7 for the delivery of the water, and if water is available, then the
8 W.I.P. will deliver the water on a pro rata basis to those requesting it
9 for as long as the water is available.

10 The lands in this Unit are not impressed with any assessments for
11 the construction, operation and maintenance costs of either the off-
12 reservation storage or the on-reservation delivery facilities. Rather,
13 as noted, they pay for their water on a yearly basis if they choose to
14 receive it.

15 The operation of the Wapato-Satus Unit by the W.I.P. presents a
16 very different and distinct set of circumstances. Firstly, it should be
17 noted that the Satus Unit has no direct diversions from the Yakima
18 River. It obtains its water from Satus Creek, some from Toppenish Creek
19 and drainage waters from the Wapato Unit. Toppenish Creek forms the
20 southern boundary of the Y.R.I.D. and the northern boundary of the Satus
21 Unit. Thus, there are no Y.R.I.D. members in the Satus Unit.

22 Secondly, as previously noted, allotments of the irrigable acres
23 within the Wapato-Satus Unit were made to designate the "A" and "B"
24 lands. Applicants for a patent in fee were required, before issuance of
25 such patent, to execute the Petition for Water Right, now designated as

1 "Application for Water Right, Wapato-Satus Unit." These set forth the
2 payment requirements for the construction, operation and maintenance of
3 the water system for both the "A" and "B" lands. Such charges became a
4 "first lien" upon the land and were included in the appraisal value of
5 the irrigable lands by the Secretary of the Interior. When the charges
6 were paid, the landowner received a "perpetual water right" that
7 attached to the land.

8 As previously noted, a little more than half of the land in the
9 W.I.P. is Indian Trust land, held for the Yakima Nation in trust by the
10 U.S. The balance of the land with which we are here concerned is held
11 in fee by both Indians and non-Indians alike. These fee lands are in a
12 "checkerboard" pattern throughout the W.I.P. Brendale v. Confederated
13 Yakima Indian Nation, 109 S. Ct. 2994 (1989).

14 Again, the water for the Wapato-Satus Unit is diverted from the
15 Yakima River, 720 cfs and 100,000 acre feet for the "A" lands and
16 250,000 acre feet for the "B" lands. It should be noted that the 720
17 cfs of water is not pro-ratable in a water short year, whereas the
18 350,000 acre feet is pro-ratable with most of the other off-reservation
19 irrigators in the water short years, but that just applies to the
20 diversions from the Yakima River. Even though the assessments are
21 different for the "A" and "B" lands, they all share pro-rata in the
22 amount of water delivered to their respective lands. The landowner pays
23 his assessment, requests delivery of the water and the W.I.P. ditch
24 rider then opens the delivery gate and provides water to the property in
25 a pro-rata basis among those requesting the water. (Nickoloff

1 Affidavit). In some instances, an irrigator will pump the water
2 contracted for directly from the delivery canal or drain. (Halvorson
3 Affidavit). Even though there are federal regulations (25 CFR 171.B)
4 that require measurement of the water, it is not measured on a parcel by
5 parcel basis. The ditch rider knows the number of acres serviced by
6 each canal and delivers the water as much as possible to each acre on a
7 pro-rata basis (Nickoloff Affidavit). Absent special circumstances,
8 water will not be delivered until the assessments are paid, although
9 some landowners have paid the assessment but have not taken delivery of
10 the water for that year (Halvorson Affidavit). However, a spread sheet
11 provided by the W.I.P. shows that as of September 23, 1991, there was an
12 accumulated deficit in assessed payments in the sum of \$3,177,094.00 for
13 the Indian trust lands and \$482,665.00 for the fee lands within the
14 W.I.P. This deficit was expected, at that time, to drop by
15 approximately \$240,000.00 for the trust lands and \$110,000.00 for the
16 fee lands. It is unclear to the Court how these acreages are, or have
17 been, dealt with in the past or to date, although the "Application for
18 Water Right" states that such assessments constitute a "first lien" upon
19 the property and may be enforced in the same manner and to the same
20 extent as mortgages are enforceable in this state. Evidence on this
21 will need to be presented.

22 In summation, we see that the U.S. Bureau of Reclamation diverts
23 the water from the Yakima River pursuant to the Reclamation Project. It
24 then comes under the direct and total control of the U.S. Bureau of
25 Indian Affairs for the conveyance and delivery of the water upon the

1 Reservation.

2
3 YAKIMA RESERVATION IRRIGATION DISTRICT

4 Originally, the Yakima Reservation Irrigation District (Y.R.I.D.)
5 was formed, in 1912, as the Yakima Reservation Water User's Association.
6 This was changed to its present form in 1920, pursuant to the laws of
7 the State of Washington, to assist the members thereof in their
8 relationships with the Bureau of Indian Affairs and the Wapato
9 Irrigation Project. Except for the southern 80 acres of Yakima County
10 Parcel #171023-23001, all of the Y.R.I.D. is within the boundaries of
11 the W.I.P.

12 As of 1991, there were 54,735.52 acres within the boundaries of the
13 Y.R.I.D. that were on its assessment rolls. As previously noted, these
14 acreages are all "fee" lands, located in a "checkerboard" fashion within
15 the boundaries of the district. These "fee" lands are held by the
16 successors in interest to the original allottees, both Indian and non-
17 Indian. (The Y.R.I.D. represents only those persons assessed by it.)

18 The Y.R.I.D. does not manage, control, operate or maintain any of
19 the diversion or distribution facilities within its boundaries. All of
20 this is under the direct supervision and control of the W.I.P.,
21 operating only subject to the U.S. obligations to the Y.R.I.D. members.

22
23 ACQUISITION OF FEE LANDS

24 With the passage of the Allotment Acts previously mentioned, we
25 should examine the methods by which the fee lands were acquired upon

1 | this unique Yakima Reservation. The Act of December 21, 1904 (33 Stat.
2 | 595) has previously been set forth herein. Pursuant to that act, the
3 | Secretary developed the "Application for Water Right", which has
4 | previously been alluded to, which all purchasers of fee lands within the
5 | Wapato-Satus Unit of the W.I.P. were required to execute by the U.S.
6 | Again, it requires the purchaser/landowner to pay his proportionate
7 | share of all irrigation charges as applicable to both the "A" and "B"
8 | lands and such charges become a "first lien" upon the land, enforceable
9 | as mortgages are under state statutes. In return the purchaser who"...
10 | desires to acquire a permanent right to water for irrigation purposes",
11 | after all such costs are paid would receive a "water right certificate
12 | or other suitable evidence of the fact that such land has a perpetual
13 | water-right attached thereto."

14 | A Joint Commission of two Senators and two Representatives were
15 | sent to the Reservation to assess the water situation in 1913. In
16 | presenting testimony to the Commission, H. J. Snively indicated that
17 | when the lands were purchased, it was represented to the purchasers by
18 | the Indian agent on the Reservation that the purchasers would receive
19 | the same water rights that the Indians had; that any lands without water
20 | was worth but nominal sums; and that the lands were sold at a price that
21 | covered the water rights. J. C. Lynch, the Indian agent on the Yakima
22 | Reservation further buttressed that testimony by testifying that he had
23 | represented to the prospective purchasers that the Indian's water rights
24 | would be conveyed to the purchaser by deed; that the water rights were
25 | taken into consideration on the appraisal of the land; that the land was

1 practically worthless without a water right; and that some of those
2 lands sold for as high as \$200.00 per acre. (Court Exhibit
3 1913.12.20.06, 005594 et seq.)

4 Therefore, pursuant to the mandate of Congress, the land was
5 appraised for sale by the U.S. as carrying a water right; was sold on
6 the basis that a water right was conveyed along with the title to the
7 land; and that the land was purchased and paid for on that basis. It
8 was the promise of the U. S. in writing, that as long as the assessment
9 costs were paid, such land would have a "perpetual water right" attached
10 thereto. There was complete "quid-pro-quo" between the parties to the
11 transaction, the U.S. and the purchaser in fee. This same scenario was
12 held to be totally binding upon the U.S. in U.S. v. Heinrich, 12 Fed.2d
13 938.

14 15 NATURE OF THE RIGHTS

16 It is the initial position of the Y.R.I.D. that their lands, all
17 held in fee, carry with them a "federally reserved water right." The
18 U.S. does not directly dispute this assertion, instead asserting that
19 their water rights are subject to a failure to apply water to the land
20 within a reasonable time from the acquisition thereof; that such rights
21 are subject to abandonment or forfeiture; or that they can be lost
22 through non-use. Those issues will be addressed later herein.

23 First, however, it is necessary to determine the exact nature of
24 the water rights of the fee land owners. It is now without question
25 that with the creation of the Yakima Indian Reservation by the Treaty of

1 1855, there was thereby reserved sufficient waters to make the
2 Reservation habitable, Winters v. U.S., 207 U.S. 564, and that "...
3 enough water was reserved to irrigate all of the practicably irrigable
4 acreage on the Reservation". Arizona v. California, 373 U.S. 546
5 (1963). There is also no question that this continues to apply to the
6 approximately 55% of the W.I.P. which is Indian trust lands. Do these
7 "federally reserved rights" still apply to the 45% of the W.I.P. that
8 are now held in fee is the question, however.

9 First, we must look to the means by which these fee titles were
10 acquired. As previously noted, the General Allotment Act of 1887 (24
11 Stat. 388) authorized the allotment of land to Indians living on the
12 Reservation. These allotments, pursuant thereto, were to be held in
13 trust for a period of 25 years, after which period the land could be
14 patented in fee to the individual Indian. After issuance of the fee
15 patent, the Indian was entitled to convey full title to the land
16 including all appurtenances, pursuant to the Act of May 8, 1906 (34
17 Stat. 183), which had amended § 6 of the 1887 Allotment Act to allow
18 such sales. Also, the heirs of any deceased Indian to whom a trust
19 patent had been issued were allowed, subject to the approval of the
20 Secretary of the Interior, to sell and convey lands inherited, pursuant
21 to the Act of May 27, 1902 (32 Stat. 245, 275; 25 U.S. § 379).

22 For the interpretation of these various acts, we turn to U.S. v.
23 Heinrich, 12 Fed. 2d 938 (1926), as follows:

24 "The acts of February 8, 1887 (24 Stat. 388), and of May 8,
25 1906 (34 Stat. 182), are general allotment statutes, and the
latter act, which is an amendment of the former, authorizes

1 the Secretary of the Interior to issue fee-simple patents,
2 without restrictions as to alienation, to Indians who are
3 competent and capable of managing their own affairs, and
4 further that, upon the death of any Indian allottee before the
5 expiration of the trust period, the land reverts to the United
6 States, and patent to the same may be issued to the heirs of
7 the deceased allottee, or the land may be sold and proceeds
8 paid to the Indian heirs."

9 "The defendant (purchaser) acquired title to the lands in
10 question under this act, which does not provide for any
11 reservations, exception or restriction in patents issued under
12 it. Patents issued under this law ... appear to have vested
13 in defendant absolute and unconditional title."

14 "Such patents as were issued here would, without doubt,
15 include the water and ditch rights appurtenant to the land,
16 although not expressly mentioned therein."

17 "It is admitted by the government that notices of sale of the
18 lands by the United States provided for a perpetual water
19 right". (Emphasis added).

20 Thus, we see that all of the lands on the Reservation that were
21 patented in fee and then sold, or that were sold by the U.S. on behalf
22 of the heirs of a deceased Indian, would have the water and ditch rights
23 that are appurtenant to the land also being conveyed to the purchaser.
24 This was followed in U.S. v. Powers, 305 U.S. 527 (1939), wherein the
25 Supreme Court held:

"Respondents maintain that under the Treaty of 1868 waters
within the Reservation were reserved for the equal benefit of
tribal members ... and that when allotments of land were duly
made for exclusive use and thereafter conveyed in fee, the
right to use some portion of tribal waters essential for
cultivation passed to the owners. The respondents' claim to
the extent stated is well founded."

In a much later case, dealing specifically with the Yakima
Reservation, it was directly held in U.S. v. Ahtanum Irrigation
District, 236 F.2d 321 (1956) as follows:

1 "... the so-called "Class Three Defendants", namely the
2 successors in interest of the original allottees to whom
3 patents in fee were issued, describing lands under the Indian
4 irrigation ditch."

5 "These defendants claim that as successors to certain original
6 Indian allottees or whom the waters were reserved and for the
7 benefit of whose lands the Indian ditches were constructed,
8 these defendants have acquired a vested interest in and a
9 right to the distribution of the waters diverted by the United
10 States to the same extent as if their lands were still in the
11 possession of the original allottees. That they did
12 originally acquire such a right through purchase of allotments
13 seems clear from United States v. Powers, 305 U.S. 527. That
14 case holds that white transferees of such fee patented Indian
15 allotments were equally with individual allottees beneficially
16 entitled to distribution of the waters diverted for the Indian
17 irrigation system." The Ninth Circuit went on to hold that
18 these defendants were entitled to participate pro-ratably with
19 the Indian beneficiaries of any waters decreed to the United
20 States.

21 It is interesting to note that in Civil No. 21, which culminated in
22 the entry of the 1945 Consent Decree, the Y.R.I.D. was initially named
23 as a party defendant therein while the Wapato Indian Irrigation Project
24 was not included. However, when it came to the entry of the judgment on
25 January 31, 1945, the Y.R.I.D. was dismissed as a party to the action
and all of the water rights of the Y.R.I.D. were then necessarily
included in the waters that were therein awarded to the Wapato Indian
Irrigation Project from the Yakima River. No reference was made as to
any difference between water for trust lands and water for fee lands.
From all of this, it is readily apparent that all of the rights to water
on the Reservation, whether appurtenant to trust lands or to the fee
lands of the Y.R.I.D, are federally reserved water rights.

1 BENEFICIAL USE

2 Once again, the U.S. requests the Court to re-visit the issue of
3 application of the water to a beneficial use upon the land, maintaining
4 that the Y.R.I.D. members cannot establish a water right simply through
5 their patents in fee or by their repayment contracts with the U.S., but
6 must prove actual beneficial use of the water.

7 Unquestionably, as a general rule, beneficial use must be shown to
8 establish a water right under both federal and state law. "The right to
9 the use of water acquired under the provisions of this Act shall be
10 appurtenant to the land irrigated and beneficial use shall be the basis,
11 the measure and the limit of the right." Act of June 17, 1902, Ch. 1093
12 § 8, 43 U.S.C.A. § 372. R.C.W. 90.03.380 states: "The right to the use
13 of water which has been applied to a beneficial use in the state shall
14 be and remain appurtenant to the land or place upon which the same is
15 used...".

16 It is necessary, however, to again recognize the unique set of
17 historical and factual circumstances concerning the Yakima Indian
18 Reservation and the Treaty of 1855. Pursuant to the Treaty, there was
19 impliedly reserved sufficient water to accomplish the purpose of the
20 reservation, i.e., to make the reservation habitable and capable of
21 sustaining the residents thereon. Winters v. U.S., 207 U.S. 564 (1908).
22 Subsequently, it was held that with the establishment of the
23 reservation, that "... enough water was reserved to irrigate all of the
24 practicably irrigable acreage on the reservation." Arizona v.
25 California, 373 U.S. 546 (1963). (Arizona I). It was stated therein:

1 "We follow it now (the Winters doctrine, supra) and agree that the
2 United States did reserve the water rights for the Indians effective as
3 of the time the Indian Reservations were created. This means ... that
4 these water rights ... are "present perfected rights" and as such are
5 entitled to priority ...". See also Cappaert v. United States, 426 U.S.
6 128 (1976).

7 This Court has previously held that the "practicably irrigable
8 acreage" (P.I.A.) standard was to be applied to off-reservation Indian
9 lands. (See Memo. Opinion Re: Off-Reservation Indian Land, Nov. 12,
10 1992). On the other hand, this Court, when dealing "solely with the
11 rights to the use of water in and from the Yakima River" has held that
12 the P.I.A. standard would not be applied herein, but that was only as to
13 water being diverted from the Yakima River. It was held that Congress,
14 having the plenary power to do so, had limited the Yakima Indians'
15 reserved treaty right to water for irrigation purposes. (Affirmed, Dept.
16 of Ecology v. Yakima Reservation Irrigation District, 121 Wn.2d 257.)
17 In affirming this holding, the Washington State Supreme Court stated:
18 "The language of the Act of August 1, 1914, of the contracts of 1921 and
19 1936 and of the Act of 1940, together evidence the intent of Congress to
20 limit the Yakima Indian's reserved treaty right to water for irrigation
21 purposes. It is clear that Congress intended 720 cfs, to be provided
22 without storage costs, to be nonproratable and to be first in time for
23 appropriation claims. This right is perpetual and is not limited by the
24 beneficial use doctrine under state law". (Emphasis added). Thus, we
25 see that our State Supreme Court has held that, at least as to the 720

1 cfs from the Yakima River, the "beneficial use" criteria does not apply
2 under state law.

3 Although not specifically addressed by the parties to this motion,
4 it may very well be that the P.I.A. standard would apply as to the on-
5 reservation creeks and streams. If that be so, we would again look to
6 the trilogy of the Arizona v. California cases. As previously
7 mentioned, in Arizona I, supra, the Court stated: "This means ... that
8 these water rights ... are "present perfected rights" and as such are
9 entitled to priority ...". For the definition of a "perfected right",
10 we look to Arizona II, Arizona v. California, 376 U.S. 340, 341 (1964).
11 There the Court set forth:

12 "(G) "Perfected right" means a water right acquired in
13 accordance with state law, which right has been exercised by
14 the actual diversion of a specific quantity of water that has
15 been applied to a defined area of land or to definite
16 municipal or industrial works, and in addition shall include
water rights created by the reservation of mainstream water
for use of federal establishments under federal law whether or
not the water has been applied to beneficial use." (Emphasis
added).

17 This definition was followed in Arizona v. California, 75 L.Ed.2d
18 318, 327, n. 2 (1983), (Arizona III). Accordingly, we see that the
19 "beneficial use" requirement would not apply on the Yakima Nation
20 Reservation if the P.I.A. standard is to be applied to the on-
21 reservation streams and creeks. Thus, we see that under either state
22 law or federal law, the beneficial use doctrine should not apply.

23 Having considered all of that, it is the understanding of the
24 Court, from oral argument (Transcript, Nov. 21, 1991, p. 33), that the
25 yearly crop production reports required by the B.O.R. are submitted to

1 | it on an "in gross" basis covering the entire Wapato Irrigation Project,
2 | which includes the Y.R.I.D. within and as a part of it. Thus, we have
3 | the U.S., who by and through the Project Engineer of the W.I.P. collects
4 | and reports all of the crop production data for the W.I.P., including
5 | the Y.R.I.D. members, to the B.O.R. on an annual basis for the purpose
6 | of showing beneficial use of the water to the B.O.R., now insisting that
7 | the Y.R.I.D. must further prove beneficial use in order to establish
8 | their water rights, all of which is already performed by the U.S. Very
9 | interesting!

10
11 | ABANDONMENT/FORFEITURE/NON-USE

12 | The United States posits that a water right held by a fee owner of
13 | land may be forfeited, abandoned, or lost through non-use. In doing so,
14 | the U.S. asserts that the cases of Colville Confederated Tribes v.
15 | Walton, 647 F.2d 42, United States v. Anderson, 736 F.2d 1358, and
16 | United States v. Adair, 723 F.2d 1394, support this position,
17 | particularly as to the issue of non-use. Each of these cases are
18 | clearly distinguishable on their facts from the present action.

19 | In Walton II, supra, the water rights at issue arose from riparian
20 | diversions from No Name Creek, which arises from springs and flows into
21 | Omak Lake, entirely within the boundaries of the Colville Reservation.
22 | Although there were "federal water rights" involved, there was no other
23 | federal involvement in relation to those rights. None of the water
24 | rights involved were the subject of any contractual terms of any nature.
25 | It is interesting to note that under those circumstances, it was held

1 that federal and not state law would apply in respect to those rights.

2 In Anderson, supra, the U.S., on behalf of the Spokane Tribe of
3 Indians, sought an adjudication of the waters of the Chamokane Creek and
4 its tributaries. The Creek originates north of the Spokane Indian
5 Reservation and flows southerly along the eastern boundary of the
6 Reservation, much as the Yakima River forms a boundary of the Yakima
7 Reservation. Again, there was no federal project of any kind involved.
8 The case involved the water rights appurtenant to lands owned in fee by
9 non-Indians, lands which never lost trust status, and lands that had
10 left trust status, but were reacquired by the Tribe and returned to
11 trust status. Under these circumstances, with no other federal
12 involvement than being a Reservation, it was held that state water laws
13 would apply to non-tribal fee lands in the absence of any consensual
14 agreement between the non-Indian water users and the Tribe.

15 Adair, supra, involved the determination of a variety of water
16 rights upon the former Klamath Indian Reservation. The original treaty
17 in 1864 gave the Klamath hunting, fishing and agricultural water rights.
18 In 1954, Congress approved the Klamath Termination Act and the U.S.
19 acquired large portions of the former Reservation. Under the Allotment
20 Acts, and by sales by the U.S. at the time of the termination of the
21 Reservation, approximately 30% of the prior Reservation was in private
22 Indian and non-Indian ownership. Following Walton II, it was there held
23 that a non-Indian purchaser could lose their water right through non-
24 use. Once again, there was no federal project involved nor were there
25 any contractual agreements of the nature here involved.

1 In the matter sub judice, we have the unique situation involving a
2 totally federal project, administered by the Bureau of Reclamation and
3 the Bureau of Indian Affairs, through the Wapato Irrigation Project.
4 The Project Engineer "... has executed with each landowner/irrigator on
5 "Class A Land" and "Class B Land" within the Wapato Irrigation Project
6 contracts...". These contracts require the landowners to pay their
7 proportionate assessments for the operation of the Project, in return
8 for which payments they receive a "perpetual water right". (Halvorson
9 Affidavit, para. 2) and (Y.R.I.D. Exhibit A1-3). These contracts carry
10 mutually binding obligations under totally different circumstances than
11 those noted in the cited cases, particularly as far as the Wapato-Satus
12 Unit of the W.I.P. is concerned. As to those members of the Y.R.I.D.
13 within the Toppenish-Simcoe Unit, more evidence will need to be
14 presented as to the operation of that Unit, past and present, before any
15 determinations can be made as to the application of these cases to that
16 portion of the Y.R.I.D.

17 Clearly, the Y.R.I.D. members of the Wapato-Satus Unit that have
18 paid their assessments receive, in return, a perpetual water right which
19 would not be lost by non-use. Conversely, those landowners who do not
20 pay the required assessments may certainly, by contract, have their
21 water right foreclosed as in a mortgage foreclosure under state law and
22 the water right would thereby be lost. As previously noted, "absent
23 special circumstances", no water will be delivered if the assessments
24 are not paid. (Halvorson affidavit, para 4). What those special
25 circumstances might be are unknown to the Court, but again, a W.I.P.

1 spread sheet shows an accumulated deficit of approximately \$373,000.00
2 in assessed payments for the fee lands. How this deficit is managed by
3 the Project Engineer has not been disclosed as yet, but it clearly
4 appears that the only loss by "non-use" would be by the contractually
5 specified method. "Where a contract exists which settles water rights,
6 due consideration must be given to such contract, lest the terms thereof
7 be impaired by the application of general laws as if no such contract
8 existed." Madison v. McNeal, 171 Wn. 669, 680.

9 The Ellensburg Water Co., et al, have indicated that, pursuant to
10 § 6 of the General Allotment Act of 1877, once a fee patent to the land
11 has been issued by the Secretary of the Interior, the Secretary has no
12 further interest therein and the property rights to the land are then
13 governed by state law. In support of this proposition, the Court is
14 cited to South Carolina v. Catawaba Indian Tribe, 476 U.S. 498; Larkin
15 v. Paugh, 276 U.S. 431, and Dillion v. Antler Land Company, 507 F.2d
16 940. Each of these cases deal with issues pertaining to the title to
17 the land. The South Carolina case, supra, dealt with the application of
18 the state's statute of limitations laws to the title to the land.
19 Larkin, supra, stands for the proposition that when the Secretary of the
20 Interior issues a patent, the Secretary no longer had authority over the
21 title to the land, due to the removal of the trust restrictions, and
22 therefore, the title was determined by state law. In Dillion, supra,
23 the issues involved the running of the statute of limitations and the
24 question of adverse possession under state law subsequent to the
25 issuance of the fee patent. Again, these are questions pertaining to

1 the title to the land. In the matter before the Court, the Secretary of
2 the Interior, even though patent in fee titles to the land have been
3 issued, has specifically, by contract with the landowners, and continued
4 control of the federal project, retained a specific interest in and to
5 the water rights appurtenant to that land. Thus, at least as to those
6 fee lands which receive water administered by the W.I.P. of the Yakima
7 Reclamation Project, the Secretary retains and does have a specific
8 interest in those water rights of the Y.R.I.D. members.

9 As previously indicated, these Y.R.I.D. rights are federally
10 reserved rights. The U.S. has cited to several cases within the Yakima
11 Reclamation Project, such as Ickes v. Fox, 300 U.S. 82, Lawrence v.
12 Southard, 73 P.2d 722, and others to the effect that state water law
13 does apply herein. In Cappaert v. United States, 48 L.Ed.2d 523, 537,
14 fn. 9, the U.S. Supreme Court distinguishes those cases thusly: "None
15 involve a federal reservation and all involve a determination whether
16 water rights had vested under state law. Here a federal reservation is
17 involved and neither the Cappaerts or their predecessors in interest had
18 any vested water rights in 1952 when the United States water rights
19 vested".

20 Here, the federal reserved rights to the water diverted from the
21 Yakima River carry a vested date of June, 1855 as to 720 cfs and a date
22 of May 10, 1905 as to the other 350,000 acre feet that is proratable.
23 Department of Ecology v. Yakima Reservation Irrigation District, 121
24 Wn.2d 257. As to the on-reservation creeks and streams, the federal
25 reserved rights to those would also be as of the date of the treaty of

1 1855.

2 The U.S. cites to R.C.W. 90.14.160, 170 and 180, which statutes
3 deal with abandonment through non-use of appropriative and riparian
4 water rights without sufficient cause. These statutes may apply to
5 those water rights on the Reservation outside of the W.I.P. and the
6 Y.R.I.D., which the Court does not now decide. However, the state
7 statute that applies here is R.C.W. 87.03.115 which states:

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

16 As has been established, the Y.R.I.D. as an entity, does not
17 distribute or apportion any of the water; that is done by the U.S.
18 Wapato Irrigation Project. However, the individual members of the
19 Y.R.I.D., within the Wapato-Satus Unit, all do have direct contracts
20 with the U.S., which contracts provide for full reimbursement to the
21 U.S. and by which the landowner then receives a perpetual water right.
22 Thus, we see that this particular state law applies specifically to this
23 unique project. This statute was interpreted by our State Supreme Court
24 in Department of Ecology v. Bureau of Reclamation, 118 Wn. 2d 761, 771
25 as follows:

26 "We also find it highly significant that under Washington's
27 statutes the decisions regarding distribution of water within
28 a federal irrigation project do not belong to the State.
29 Rather, they are to be made by the Secretary of the Interior
30 through the Secretary's representatives: the United States
31 Bureau of Reclamation and, by contract, the irrigation

1 districts. These decisions are to be made according to the
2 federal laws, federal regulations and the contracts between
3 the irrigation districts and the federal government." On page
4 772, fn. 7, we find: "The Department counters that federal
5 law generally must give way to state law regarding
6 distribution of water in federal irrigation projects. See
7 California v. United States, 438 U.S. 645, 43 U.S.C. §383.
8 These authorities, however, would seem to have no
9 applicability here, where the state law expressly yields to
10 federal provisions." (Emphasis added).

11 With this statute, and the Supreme Court's interpretation thereof,
12 we see that the contracts of the Y.R.I.D. members calling for full
13 reimbursement of costs to the U.S. and the U.S. in turn providing for
14 the apportionment and the distribution of the waters pursuant to the
15 contracts, which specify the grant of a "perpetual water right", the
16 state statutes relating to abandonment and forfeiture do not apply to
17 the Wapato-Satus Unit members of the Y.R.I.D. Thus, any "abandonment"
18 or "forfeiture" of those water rights would occur only pursuant to the
19 provisions of the contracts between the Y.R.I.D. members and the U.S.;
20 to wit, non payment of the assessments. Otherwise, the contracts grant
21 a "perpetual water right" without reference to any abandonment or
22 forfeiture.

23 REASONABLE TIME/DUE DILIGENCE

24 Relying upon Colville Confederated Tribes v. Walton, 647 F.2d 42,
25 (Walton II), the U.S. asserts that there are a number of Y.R.I.D.
members owning lands that were not irrigated by the allottee at the time
of transfer out of Indian ownership or that irrigation of the tract was
not commenced within a reasonable time subsequent to the transfer. In

1 support of this position the U.S. submitted an affidavit of Ronald
2 Billstein, which stated there was evidence of this non-irrigation or
3 lack of diligence. No such evidence was then presented and the
4 affidavit was totally conclusory in it's assertions. Later, the U.S.
5 submitted a supplemental affidavit of Mr. Billstein pertaining to seven
6 tracts of land which he claims were not irrigated when title passed or,
7 again, where "irrigation was not commenced within a reasonable time".
8 He lists six tracts where he asserts that water rights claims were filed
9 for an entire tract, but his study shows no evidence of continued
10 irrigation on part or all of the tract. For all 13 tracts, he sets
11 forth the claimed acreage, the allotment number, the legal description
12 of the land and the date of first sale - nothing more. The dates of
13 first sale range from 1906 to 1918, a period of 12 years at the time of
14 the virtual inception of the W.I.P. There is no reference to when
15 irrigation was begun on any of the tracts nor what would constitute a
16 "reasonable time" in which to commence irrigation of the land.

17 The Court has previously noted herein the long and lengthy history
18 of the gradual development of the irrigation systems on the Reservation,
19 commencing as early as 1896 and finally culminating with the completion
20 of the Additional Works Project in 1975. On the face of it, it would
21 clearly appear that many of the allegedly suspect parcels may not have
22 been susceptible to being irrigated when purchased, or within a
23 "reasonable time" thereafter, due to a lack of or the then inadequacy of
24 proper diversion or delivery systems to get the water to those lands.
25 If those systems were not then available, that would certainly not

1 constitute a lack of "due diligence" on the part of the landowner in
2 applying water to the land.

3 As previously noted, by the Act of December, 1904 (33 Stat. 595),
4 Congress required the Secretary of the Interior to include the costs of
5 an irrigation system in appraising the value of the Irrigable lands on
6 the Reservation and further provided that when the purchaser paid that
7 appraised value, the purchaser would receive "a perpetual water right as
8 may be deemed suitable...". Thus, it appears that Congress clearly
9 intended that by purchasing the land at the appraised value, including
10 the cost of the systems, the "purchasers of lands now irrigated or that
11 may hereafter be irrigated from systems constructed ...", such
12 purchasers would receive a perpetual water right as the water became
13 available over the years of development.

14 Additionally, the Court has already addressed the issue of the
15 application of the "beneficial use" doctrine to the Reservation under
16 Arizona v. California, 376 U.S. 340, and Department of Ecology v. Yakima
17 Reservation Irrigation District, 121 Wn.2d 257. Inasmuch as that
18 doctrine is not applicable to the Reservation, under either federal or
19 state law, the criteria of application within a "reasonable time" or
20 lack of "due diligence" under the Walton II, supra, criteria also would
21 not be applicable to this unique project.

22 23 PRIORITY DATES

24 The question has been raised as to the priority dates of the water
25 rights of the Y.R.I.D. members. Their priority dates will be, and are,

1 the same priority dates as those of the Wapato Irrigation Project,
2 inasmuch as the water is to be shared pro-rata within the W.I.P.
3 Pursuant to Winters v. U.S., 207 U.S. 564, the reserved waters for the
4 Yakima Reservation would carry a priority date as of the date of the
5 Treaty of June 9, 1855. This Court has heretofore held that the Treaty
6 date will apply to the 720 cfs provided by Congress from the Yakima
7 River. The Court also held that the 350,000 acre feet of storage water
8 from the Yakima River would have a priority date of May 10, 1905. These
9 priority dates for the water from the Yakima River have been affirmed in
10 Dept. of Ecology v. Y.R.I.D., 121 Wn.2d 257.

11 As to any water rights that may derive from the on-reservation
12 streams and creeks, again under the Winters doctrine, supra, those
13 rights would carry a priority date of June 9, 1855 inasmuch also as they
14 are on a pro-rata basis with the other lands within the Wapato
15 Irrigation Project.

16

17

QUANTIFICATION

18 The Y.R.I.D. is claiming a pro-rata share of all water delivered to
19 the Wapato-Satus unit of the W.I.P., but further insists on receipt of
20 a minimum of 5.77 acre feet per acre. In response, the U.S. recites
21 that this minimum amount may not be necessary to irrigate certain crops
22 and as to lands not being irrigated, it does not take into account such
23 matters as evapotranspiration loss, system efficiency, soil
24 characteristics, cropping patterns, return flows, etc.

25 Y.R.I.D. has gone into an exhaustive recitation of the research of

1 records undertaken to illustrate, year by year, the quantity of water
2 diverted from the Yakima River, the irrigated acreage to which it was
3 applied and the average annual diversion in acre feet per acre. These
4 records were a variety of different official Reports, Maps, Hydrographs,
5 correspondence, and in later years, Bureau of Reclamation Crop
6 Production Reports. These were then presented in graph form for the
7 years 1919 through 1985.

8 It is a historical fact, to which all parties are agreed, that
9 there have never been specific measurements of the on-farm deliveries.
10 As previously indicated, the ditch rider of the W.I.P. delivers the
11 water available to each acre on a pro-rata basis (Nickoloff Affidavit).
12 "If there is insufficient water, all water is diverted pro-rata on the
13 basis of the owner's irrigable acres as compared to all irrigable acres
14 within their unit." (Nickoloff, p.3). This applies to both the Wapato-
15 Satus and Toppenish-Simcoe Units of the W.I.P. Additionally, those
16 members of the Wapato-Satus Unit are required by the "Application for
17 Water Right" to only pay their "proportionate" share of the costs of
18 delivering the water. Those in the Toppenish-Simcoe Unit apparently
19 only pay for whatever water they receive, although it is unclear to the
20 Court how they arrive at and apply this sum.

21 It should further be noted that the 350,000 acre feet of storage
22 waters to be supplied to the Reservation each year are pro-ratable in
23 water short years, apparently to all of the lands, both "A" and "B".
24 While the water short years are taken into consideration by the Y.R.I.D.
25 in arriving at the "average" annual diversions over approximately 65

1 the U.S., as long as the required assessments are paid, the landowners
2 are entitled to a perpetual water right. These are federally reserved
3 water rights and are shared pro-rata with all other water rights within
4 the W.I.P. The beneficial use doctrine does not apply to these federal
5 reserved rights. As long as the assessments are paid, doctrines of
6 abandonment, forfeiture and nonuse are not applicable. Nor are the
7 doctrines of "application within a reasonable time" or "due diligence".
8 As to the 350,000 acre feet of storage water from the Yakima River, the
9 priority date is May 10, 1905; the 720 cfs from the Yakima River and the
10 on-reservation rights within the W.I.P. have a priority date of June 9,
11 1855. The Y.R.I.D. members are entitled to share pro-rata in the water
12 supply available, but are not entitled to any required minimum.

13 There are some factual questions to be resolved in connection with
14 the Toppenish-Simcoe Unit of the W.I.P. and the historical methods of
15 the handling of delinquencies in the payment of assessments.

16 DATED this 14th day of June, 1993.

17
18 Walter Stauffer
19 Judge
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