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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

FILED
MAR 1 1995
KIM EASTON, YAKIMA COUNTY CLERK

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| IN THE MATTER OF THE DETERMINATION OF THE RIGHTS TO THE USE OF THE SURFACE WATERS OF THE YAKIMA RIVER DRAINAGE BASIN, IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 90.03, REVISED CODE OF WASHINGTON, STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,<br><br>Plaintiff,<br><br>vs.<br><br>JAMES J. ACQUAVELLA, et al.,<br><br>Defendants. | NO. 77-2-01484-5<br><br>FINAL ORDER RE: TREATY RESERVED WATER RIGHTS AT USUAL AND ACCUSTOMED FISHING PLACES |

THIS MATTER came before the Court pursuant to the motions filed by Sunnyside Division of Irrigation Districts, Kittitas Reclamation District, Kennewick Irrigation District, Naches-Selah Irrigation District, City of Yakima, Yakima-Tieton Irrigation District, Union Gap Irrigation District, Yakima Valley Canal Company, and Westside Irrigation Company, said motions being dated November 2, 1993 and December 22 and 23, 1993, requesting this Court:

A. To declare the Yakama Indian Nation's treaty fishing right has been diminished in the Yakima River and its tributaries; that the maximum scope of the diminished treaty water right for fish remaining is the specific "minimum instream flow" necessary to maintain anadromous fish life only at the remaining usual and accustomed fishing places still protected by the June 1885 treaty with the Yakamas;

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B. To declare that the United States and the Yakama Indian Nation are precluded from claiming water to support a fishery at any remaining usual and accustomed places not specified in its pleadings in ICC Cause No. 147;

C. To declare that the Yakama Indian Nation's treaty fishing right on Ahtanum Creek has been destroyed by actions of the United States; that if the right has been destroyed, the Yakama Indian Nation is entitled to no water for in-stream flow in Ahtanum Creek;

D. To exclude in limine introduction of any and all evidence relating to treaty fishing rights inconsistent with A, B, and C above;

E. To declare the United States and the Yakama Indian Nation are bound, precluded or estopped by this Court's May 22, 1990 "Memorandum Opinion re: Motions for Partial Summary Judgment", October 22, 1990, "Amended Memorandum Opinion" and "Amended Partial Summary Judgment" (aff'd. DOE v. YRID, 121 Wn.2d 257 (1993)), finding, concluding and determining all Yakama Indian Nation's treaty fish water rights in the Yakima River and all of its tributaries, including Ahtanum Creek, have been substantially limited or diminished to a residual right "...necessary to maintain fish life."

This Court having considered all memoranda filed by interested parties, legal arguments of counsel and documentary evidence as it relates to legal issues arising therein, and for good cause appearing, entered an order thereon on December 16, 1994.

Subsequent thereto, several parties filed Motions for Reconsideration, which motions and supporting memoranda were thoroughly considered by the Court. After legal arguments of counsel on February 9, 1995 and after further consideration by the Court,

**NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** as follows:

This Order is intended to apply to all off-reservation tributaries of the Yakima River inasmuch as they are necessary to support the "usual and accustomed" fishing places of the Yakama Indian Nation. It shall also apply to Ahtanum Creek. However, this Order is not intended to apply to Toppenish, Simcoe and Satus Creeks, except insofar as they are tributary to the Yakima River, where anadromous fish must pass through to spawn.

**IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED** as follows:

A. This Court held in the 1990 Partial Summary Judgment, as affirmed by the Washington Supreme Court, that the Yakama Indian Nation's treaty fishery right had been substantially diminished, but not completely destroyed, and the right was defined as the absolute minimum amount of water necessary to maintain anadromous fish life in the Yakima River.

B. The Yakama Indian Nation's minimum instream flow right for fish in those tributaries that presently and actually support anadromous fish availability at the "usual and accustomed" fishing stations specified in paragraph D below shall be determined in accordance with the annual prevailing conditions as they occur.

C. The Yakama Indian Nation's minimum instream flow right for fish carries a priority date of "time immemorial."

D. In regard to water rights, the United States and the Yakama Indian Nation are precluded from claiming as "usual and accustomed"

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fishing stations any other than those specified in their pleadings in the Indian Claims Commission Docket No. 147.

E. The Superintendent of the Yakima Reclamation Project (recently changed to Yakima Field Office Manager), in consultation with the Yakima River Basin Systems Operations Advisory Committee, Irrigation District and Company managers and others, shall determine and administer those water ways to maintain fish life at the usual and accustomed fishing stations as limited by ICC Cause No 147.

F. The Yakama Indian Nation's water right for fish in Ahtanum Creek has also been substantially diminished by legislative, administrative and judicial acts. As to Ahtanum Creek, the Superintendent of the Wapato Irrigation Project of the Bureau of Indian Affairs shall determine the amount of water necessary to maintain fish life according to the annual prevailing conditions as they occur.

G. As to Toppenish, Simcoe, and Satus Creeks, the superintendent of the Wapato Irrigation Project is authorized to administer those waterways depending on existing prevailing conditions.

H. If water is made available by improvements to irrigation systems or otherwise on either side of Ahtanum Creek, additional water can be devoted to "enhancement" of fish life. However, such water is subordinate to existing diversion rights as set forth in the Pope decree, U.S. v. Ahtanum Irrigation District, 330 F.2d 897 (9th Cir. 1964).

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I. The parties hereto are prohibited from introducing any and all evidence relating to water need to support the treaty fishing rights that is inconsistent with the above rulings.

Dated this 15th day of March, 1995.

Walter A. Stauffacher

Judge Walter A. Stauffacher