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KIM M. EATON, YAKIMA COUNTY CLERK

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

IN THE MATTER OF THE DETERMINATION )  
OF THE RIGHTS TO THE USE OF THE )  
SURFACE WATERS OF THE YAKIMA RIVER )  
DRAINAGE BASIN, IN ACCORDANCE WITH )  
THE PROVISIONS OF CHAPTER 90.03, )  
REVISED CODE OF WASHINGTON, )  
STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )  
Plaintiff, )  
vs. )  
JAMES J. ACQUAVELLA, et al., )  
Defendants. )

NO. 77-2-01484-5

Memorandum Opinion Re:  
Motion to Limit Treaty  
Water Right For Fish to  
Natural Flow, et. seq.

I. INTRODUCTION

Kittitas Reclamation District (KRD) and Roza Irrigation District ("Roza") requested this Court to enter an order establishing:

1. The implied water right for the substantially diminished Yakama Indian Nation treaty fishing right is a "natural flow" right with a "time immemorial" date of priority.

2. When there is insufficient "natural flow" in the Yakima River and its tributaries to satisfy all of the claims of "natural flow" users (other than those guaranteed irrigation water from storage), the natural flow users' rights to natural flow should be abated in the inverse order of the date of their priorities;

3. The Department of Ecology should be required to police and enforce such natural flow rights and potential abatements.

A number of irrigation districts and water companies, the Department of Ecology (Ecology), the United States and the Yakama Indian Nation (YIN) replied. A hearing was held July 13, 1995. During that hearing, the Court granted the motion of numerous subbasin claimants,

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1 allowing those parties to submit post-hearing briefing and providing an  
2 opportunity for the movants to respond. A plethora of issues, both  
3 legal and factual, were raised which this Court will resolve below.

4 It should be noted at the outset that KRD/Roza's (hereinafter KRD  
5 as KRD submitted the bulk of the pleadings) motion is much larger in  
6 terms of its effect on the Yakima Project than it would appear on its  
7 surface. Rather than simply placing a limitation on the source of water  
8 for YIN's diminished treaty water right for fish and determining who  
9 should be abated to ensure that the right is satisfied calls into  
10 question the entire operation of the Yakima Reclamation Project, the  
11 history of water development in the Yakima River Basin and the validity,  
12 reach and meaning of the consent decree resulting from Kittitas  
13 Reclamation District, et. al. v. Sunnyside Valley Irrigation District,  
14 et. al., Civil No. 21 (January 31, 1945) (Consent Decree).

15 **II. OPINION**

16 In keeping with the tone established by KRD's quotation of  
17 Descartes (that their motion "shines by its own inner light" - KRD Reply  
18 Brief at 41), the Court will also rely on the work of a philosopher,  
19 John Locke, in noting that the Court cannot take up this matter tabula  
20 rasa. Simply put, the slate is far from blank in regard to what has  
21 transpired during this adjudication (which in turn reflects the history  
22 of water use and project development in this basin) which cannot be  
23 ignored in deciding the issues brought by KRD. Moreover, portions of  
24 previous rulings by this Court directly bear on the outcome of this  
25 motion and they will be quoted appropriately in this Opinion.

1 At the same time, there has been a major change in the use of water  
2 since the 1945 Consent Decree. When the Court ruled (and was  
3 subsequently affirmed by the Washington Supreme Court in Ecology v.  
4 Yakima Reservation Irrig. Dist., 121 Wn.2d 257,297 (1993) that YIN's  
5 treaty reserved right for fish equals an amount of water necessary to  
6 maintain anadromous fish life in the river, see Amended Partial Summary  
7 Judgment Order, November 29, 1990, a new factor was added to the water  
8 use equation. This reality was not exactly unforeseen either in light  
9 of the decisions of the federal courts interpreting the 1945 Consent  
10 Decree. See Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist.,  
11 763 F.2d 1032 (9th Cir., 1985). At its heart, this motion requires the  
12 Court to mesh management of this treaty right with the long-standing  
13 diversions of water in the basin.

14 A. Preliminary Issues

15 Before taking up the substance of KRD's motion, the Court must  
16 first determine whether their motion is premature as alleged by Ecology,  
17 the U.S. and YIN. In essence, Ecology does not believe that enough  
18 natural flow water rights have been adjudicated to allow for meaningful  
19 regulation. However, that ignores the reality that this Court can  
20 decide the merits of KRD's motion as between supposed natural flow and  
21 contract water users, en masse. Based on the present posture of the  
22 adjudication, Ecology (or other agencies assuming regulatory  
23 jurisdiction in the Basin) could not realistically be asked to determine  
24 which natural flow users would need to abate in the event of less severe  
25 water shortages. However, in the event of a massive water shortage like

1 the 1994 water year, this Court certainly can (and will) decide that as  
2 between KRD/Roza or natural flow users, who must absorb the reduction.

3 There are numerous other reasons for resolving this issue now which  
4 will address the U.S. and YIN's contentions. For example, the Court is  
5 mindful of its own preference to take these matters up orderly and  
6 thoughtfully rather than in a "last minute" or emergency posture.  
7 During wet years, water users often obtain a false sense of security,  
8 somehow persuading themselves that the dry years are behind them. It  
9 will be dry again. Further, although this matter is advertised as a  
10 "fish issue", it really touches on the fundamental operation and  
11 allocation of water in this basin. Therefore, resolution of such an  
12 issue should aid in completion of the adjudication. Hence, even though  
13 a genuine problem does not exist at this time, there has been and will  
14 be again the collision of interests that will require this matter to be  
15 resolved.

16 B. Relevant History

17 It is essentially KRD's position that we must look further into  
18 history than 1945 for the answer to the question of who should be abated  
19 to satisfy the treaty reserved right. In 1855 and before, no reservoirs  
20 existed and thus there were no users of reservoir water, especially not  
21 fish. As the basin developed, early users of water competed with the  
22 fish for diversion of the natural flow. In 1905 and the period  
23 thereafter, storage reservoirs were constructed which would allow new  
24 lands to be utilized and irrigated. According to KRD, the rights to  
25 these storage waters were separate and distinct from the water flowing

1 naturally in the basin and thus the rights were separate. Thus, entities  
2 who would limit their diversions to natural flow signed so-called  
3 "limiting agreements" while other storage users entered into specific  
4 contracts with the Bureau of Reclamation (hereinafter BOR) for delivery  
5 of water made available by the Yakima Project reservoirs and conveyance  
6 facilities.

7       The Court acknowledges that from the early days of conceptualizing  
8 and establishing the Yakima Basin Project a century ago, there has been  
9 an inconsistent understanding about what rights to storage water certain  
10 appropriators would have. KRD includes BOR reports, BOR historical  
11 documents, local newspaper accounts, BOR interoffice memorandum, etc. in  
12 its brief, all of which show that from about 1905-1926, the intent and  
13 understanding of the BOR at that time was to limit natural flow users to  
14 the use of natural flow. Interestingly enough, one of the largest  
15 impediments in carrying out this type of management was the predecessor  
16 to Ecology. In a July 13, 1926 letter from District Counsel of the  
17 Reclamation Service it was clear that the State would not take up  
18 enforcement responsibility because most of the canals lacked adjudicated  
19 rights. However, the pre-1905 water right claimants present a different  
20 perspective that shows planners envisaged combining natural flow and  
21 storage from the Project's onset. Nonetheless, the early days of this  
22 Project appear to have been saddled with the same types of discussion we  
23 are having today.

24       C. Limiting Agreements

25       When this Court took up the task of interpreting and understanding

1 the meaning of the "limiting agreements", it had only two objectives in  
2 mind: determining whether or not, pursuant to an Fox v. Ickes, 137 F.2d  
3 30 beneficial use analysis, signatories to those agreements could  
4 establish a right in excess of the amounts set forth in the agreements  
5 and if the language limiting diversions from the "Yakima River and its  
6 tributaries" really intended to include tributaries. Cascade Irrigation  
7 District, et. al., go to great pains to limit the import of those  
8 decisions (Memorandum Opinion Re: Limiting Agreements dated June 16,  
9 1993 [Order October 14, 1993]; Memorandum Opinion Re: Reconsideration of  
10 Limiting Agreements dated April 1, 1994 [Order May 12, 1994]; Memorandum  
11 Opinion Re: Pacific Power and Light's Motion For Reconsideration of  
12 Limiting Agreements and Order dated January 3, 1994). The Court  
13 essentially agrees with their position. Without beating to death a dead  
14 horse already thrice beaten, the Court believes a number of claimants  
15 have taken out of context a decision intended to cover a relatively  
16 narrow issue. In reviewing those decisions here, the Court intends that  
17 the rulings resulting from the litigation of those issues not be  
18 disturbed.

19 The three limiting agreement orders contain the following language  
20 impacting this matter. First, the initial order signed October 14, 1993  
21 (First Order), the Amended Order entered January 3, 1994 (Second Order)  
22 and the Additional Order entered May 12, 1994 (Third Order) all refer to  
23 the limiting agreements as limiting the diversions from the natural flow  
24 of the river. See, e.g. Second Order ("The Limiting Agreements limit  
25 diversions from the natural flow of the Yakima River including, where

1 applicable, water courses tributary to the Yakima River as well as all  
2 return flows"). The Court believes this statement to be entirely  
3 correct. In 1905-1906, when most of these agreements were made, no  
4 other water sources were available. However, we must be mindful that  
5 the U.S. wrote the contracts and incurred some responsibility for  
6 meeting the quantities set forth in these agreements. Regardless,  
7 whatever contractual relationships existed in 1905 would be transformed  
8 in 1945. That issue has never been before this Court.

9 Second, and probably more significant as a basis for the BOR's  
10 changed operation and KRD's confusion as to the Court's thinking, was  
11 the ruling and Second Order pertaining to Pacific Power & Light's (PP&L)  
12 water right. The uniqueness of PP&L's water right must be recognized at  
13 the outset, along with the unique way in which it is managed.

14 The Court ruled, without any mention of the dispute being addressed  
15 herein, that "[t]he terms and conditions of Pacific Power & Light  
16 Company's limiting agreement do not obligate the United States Bureau of  
17 Reclamation to provide storage flows at any time." It must be  
18 remembered that PP&L's diversion for power generation takes large  
19 volumes of water temporarily from the Yakima River, most of which  
20 eventually runs back. To allow that entity to compel storage releases  
21 to meet the 450 cfs. maximum, especially during the non-  
22 irrigating/storage season, would create great havoc in the system. See  
23 Memorandum Opinion Re: PP&L's Motion for Reconsideration p. 5  
24 ("According to BOR hydrologist James Esget, delivery of the 450 c.f.s.  
25 requested by PP&L would severely hamper storage for the upcoming (1994)

1 season as it also would have in 22 of the past 66 years.") Lastly, the  
2 Court also recognized the flexible fashion by which the BOR permitted  
3 PP&L to divert in excess of the 450 c.f.s. limit when doing so would not  
4 threaten other commitments. Second Order at 3. Hence, PP&L could "make  
5 up" any generation lost during periods of low flow. Simply put, the  
6 unique nature of PP&L's use of water makes the Court's decision in that  
7 respect of little precedential value. It should not be relied on for  
8 general guidance as to all pre-1905 water rights.

9 **D. 1945 Consent Decree**

10 Many of the parties responding to KRD's motion rely on the 1945  
11 Consent Decree to prevent abatement of their natural flow water rights  
12 during drought years. This is so even though many such entities were  
13 not parties to the Consent Decree and do not have any form of contract  
14 rights to storage or "supplemental water". Although agreeing that the  
15 Consent Decree binds the parties thereto, KRD strenuously resists the  
16 interpretation of the natural flow users and offers the Court its own  
17 spin on the import of the Consent Decree.

18 **1. Consent Decree Validity**

19 The Washington Supreme Court settled the question of whether or not  
20 the Consent Decree bound the parties to the terms contained therein.  
21 Ecology v. Yakima Reservation Irrig. Dist., 121 Wn.2d 257,297  
22 (1993) ("[W]e hold the consent judgment determined or confirmed the  
23 Indian's treaty-reserved water rights for irrigation purposes and is  
24 therefore binding on the Indians in that regard.") Although the Consent  
25 Decree was fashioned to avoid this adjudication and on its face asserts

1 to be merely a decree setting forth distribution obligations, the Court  
2 must again uphold its validity as setting forth the basic water rights  
3 of the parties. See YRID, supra. However, this motion requires that we  
4 decipher the meaning of the Consent Decree's terms and its effect on  
5 water distribution.

## 6 2. Consent Decree Interpretation

7 A "judgment by consent or stipulation of the parties is construed  
8 as a contract between them embodying the terms of the judgment."  
9 Washington Asphalt Co. v. Harold Kaeser Co., 51 Wn.2d 89, 91 316 P.2d  
10 126 (1957) (emphasis added); Kittitas Reclamation District v. Sunnyside  
11 Valley Irrigation District, 626 F.2d 95 (1980). "The essence of a  
12 "consent decree" is that the parties thereto have entered voluntarily  
13 into a contract setting the dispute at rest, upon which contract the  
14 court has entered judgment conforming to the terms of the agreement."  
15 Harter v. King County, 11 Wn.2d 583, 119 P.2d 919 (1942). Because the  
16 Consent Decree is to be construed as a contract between the parties  
17 thereto, the Court once again looks to the "context rule" set forth in  
18 Berg v. Hudesman, 115 Wn.2d 657 (1990) for direction on how to interpret  
19 the Consent Decree's terms. See also KRD V. SVID, supra, at 98 (The  
20 1945 Consent Decree is in many ways like a contract and a court may  
21 consider surrounding circumstances as aids in construing it.); See also  
22 Memorandum Opinion Re: Limiting Agreements, June 16, 1993; Memorandum  
23 Opinion Re: Warren Act Issues, March 8, 1996. Pursuant thereto, this  
24 Court is directed to view "the contract as a whole, the subject matter  
25 and objective of the contract, all the circumstances surrounding the

1 making of the contract, the subsequent acts and conduct of the parties  
2 to the contract, and the reasonableness of respecting interpretations  
3 advocated by the parties." Berg, page 667 quoting Stender v. Twin City  
4 Foods, Inc., 82 Wn.2d 250 (1973). The context rule applies, even if the  
5 terms of the agreement appear unambiguous. Berg at 668 quoting  
6 Restatement (Second) of Contracts § 212(2)(b).

7 a. Contract As A Whole

8 We begin with Paragraph 2 of the Consent Decree:

9 2. The obligations of the United States to deliver water  
10 from the natural flow of the Yakima River, and its  
11 tributaries, from storage in its various reservoirs on the  
12 Yakima watershed, and from other sources, to the plaintiffs,  
to the defendants, and to the lands within the Wapato Indian  
Irrigation Project, are as set forth hereafter in this  
judgment. (Emphasis added).

13 From this introductory statement, we can see that, in general,  
14 delivery of water in this project was to be from both natural flow and  
15 storage. This conclusion is buttressed by the concluding paragraph,  
16 number 20:

17 20. This judgment shall constitute a final determination of  
18 the obligation of the United States to deliver water from the  
19 Yakima River, and its tributaries, from storage from its  
20 various reservoirs in the Yakima watershed and from other  
sources to the parties to this judgment and lands within the  
Wapato Indian Irrigation Project. (Emphasis added).

21 Finally, we turn to paragraphs 18 and 19 of the Decree which  
22 contain the crucial language that has defined the operation of the  
23 Yakima Project for 50 years. Paragraph 18 begins by stating that the  
24 parties to the judgment shall have equal rights as to priority of  
25 delivery. It then contains the formula for proration, which, although

1 not artfully drafted, appears to mean that the quantities identified in  
2 the Consent Decree shall be prorated to a similar degree as the "total  
3 water supply available" (TWSA) itself is below the amount necessary to  
4 fully satisfy the rights. Paragraph 18 then provides the definition for  
5 TWSA as:

6 "that amount of water available in any year from natural flow  
7 of the Yakima River, and its tributaries, from storage in the  
8 various Government reservoirs on the Yakima watershed and from  
9 other sources, to supply the contract obligations of the  
United States to deliver water and to supply claimed rights to  
the use of water on the Yakima River, and its tributaries,  
heretofore recognized by the United States." (Emphasis added).

10 This concept of TWSA underlies the entire scheme of water delivery  
11 and management within the Yakima Project and has so for the past 50  
12 years. It operates as a "one-bucket" approach whereby all sources of  
13 water are lumped together, rather than the "two-bucket" approach  
14 advocated by KRD, Roza and Ecology.

15 In paragraph 19, it is decreed that certain rights will be excluded  
16 from the method of proration established in paragraph 18. Seven  
17 entities received specific non-prorated delivery rights as did Cascade  
18 Irrigation District for their entire right. In addition to those  
19 entities, paragraph 19 then designates a non-proratable status to:

20 "the amounts claimed by other water users of natural flow  
21 rights from the Yakima River and its tributaries, which have  
22 heretofore been recognized by the United States whether or not  
23 such users are parties to this action, and the summation of  
said amounts shall also be deducted from the total water  
supply available subject to proration." (Emphasis added).

24 Based on the terms contained within the document itself, it appears  
25 to the Court that, on balance, the Consent Decree was intended to blend  
natural flow and storage water along with all other sources of water in

1 the Yakima Basin. The Court does acknowledge, as KRD points out, that  
2 the Consent Decree does contain language limiting certain users to  
3 natural flow. See KRD Response Memorandum, p. 21. However,  
4 interpretation of such language cuts both ways. For example, use of  
5 this language also indicates that when the signatories to the Decree  
6 wanted to limit a particular user to natural flow only, they certainly  
7 knew how to do so.

8           b. Subject Matter and Objective of the Decree and  
9           Circumstances Surrounding the Decree's  
10           Making

11           The subject matter and reason for entering into the Consent Decree  
12 is set forth in paragraph 20:

13           "This judgment shall constitute a final determination of the  
14 obligation of the United States to deliver water from the  
15 Yakima River, and its tributaries, from storage from its  
16 various reservoirs in the Yakima watershed and from other  
17 sources to the parties to this judgment."

18           Additionally, the circumstances surrounding the Consent Decree's  
19 making also are telling. Initially, the action in Civil 21 (leading up  
20 to the Consent Decree) was instituted:

21           "for the purpose of having the court determine whether the  
22 United States is obligated to deliver water without charge to  
23 land within the Sunnyside Valley Irrigation District. . . in  
24 excess of that which the Bureau of Reclamation had determined  
25 the landowners were entitled to under water contracts which  
they hold. The Court was further requested to determine,  
assuming that it ruled in favor of the water users, as to the  
extent and nature of their rights so far as they relate to the  
rights of other users who are involved in the proceedings."  
(Civil Action No. 21, Statement to the Court, January 31,  
1945).

26           The first issue was resolved in Fox v. Ickes, 137 F.2d 30,  
27 certiorari denied, 320 U.S. 792, where it was held that the rights of

1 water users within SVID were to be determined on the basis of beneficial  
2 use and that the Bureau was without authority to increase the charges  
3 specified in the contracts with these water users. It was also  
4 mentioned in Fox, supra, that Civil 21 was originally conceived to be an  
5 adjudication of the water rights in the project. Id. at 35. However,  
6 having lost the battle at the Court of Appeals, the U.S. deemed it  
7 desirable to settle amicably the disputes over rights to water between  
8 users involved in the Civil 21 proceedings. See Statement To The Court,  
9 supra. Accordingly, the parties, the court and the water users had it  
10 in mind that Civil 21 was to be a basin-wide adjudication.

11 Also on the minds of water users, distributing entities and the  
12 Bureau was this continuing question of whether natural flow should be  
13 separated from storage water for purposes of satisfying pre-project  
14 water rights. KRD goes to great length at the beginning of their  
15 Response Brief to demonstrate that pre-project water users were to be  
16 satisfied from natural flow only. Toward that end, KRD offers newspaper  
17 stories, a July 13, 1926, letter authored by the District Counsel for  
18 the Reclamation Service, and memoranda within the Bureau of Reclamation.  
19 See Attachments to KRD's Response Brief.

20 The natural flow users offer a different perspective of the events  
21 leading up to the entry of the 1945 Consent Decree. Although not  
22 directly differentiating between use of natural flow or storage for the  
23 purpose of satisfying pre-project natural flow rights, the record  
24 certainly is replete with references to the difficulty of distinguishing  
25 between natural flow and storage for contractees. See summary at

1 Cascade Irrigation District, et. al., Brief p. 6. Additionally, in  
2 light of the resounding loss they had received in the Fox litigation,  
3 perhaps the Bureau in negotiating the Consent Decree had concern about  
4 the issue of ensuring delivery of historic uses of water. By combining  
5 storage and natural flow into the TWSA, they could be certain of  
6 supplying the required amounts in the Decree and as set forth primarily  
7 in the limiting agreements.

8 Finally, the Declaration of Richard Bain (appended to the brief of  
9 Ellensburg Water Company) goes into great length as to the actual  
10 difficulty which exists in measurement of the natural flow and storage  
11 flows. See discussion on pages 28-29 infra. Without question, the  
12 objectives of the adjudication would be seriously impeded by oversight  
13 of daily, monthly and yearly disputes regarding monitoring and  
14 allocation of supposed natural flow and storage water.

15 That various theories exist on this matter does not seem  
16 particularly surprising and serve to prove that very point: In the  
17 early days of this project, whether pre-project natural flow users  
18 should be satisfied from natural flow and storage was a very live issue,  
19 about which there was much debate. A logical conclusion to that debate  
20 resulted in the drafting of the Consent Decree and its provisions for  
21 proration or nonproration from the TWSA. Although in 1996, in the midst  
22 of the full-blown adjudication the Consent Decree was trying to avoid,  
23 it may seem unwise that KRD, Roza and the U.S. agreed to the  
24 distribution terms contained within the Consent Decree, the fact remains  
25 that during those times a different mindset prevailed. The Court cannot

1 remake a decree entered into in 1945 simply because conditions have  
2 changed over the past 50 years. See Berg v. Hudesman, supra.

3 c. Subsequent Acts and Conduct of the Parties

4 The briefs of the natural flow users examine how the conduct and  
5 subsequent acts of the parties since entry of the Consent Decree has  
6 been to rely on the interpretation advanced by the natural flow users.  
7 The current state of affairs in the basin makes clear that parties have  
8 relied on a distribution pattern that KRD would now upset. Surely KRD  
9 and Roza would not bring this matter before the Court if a pattern of  
10 delivery had not been established based on the Consent Decree. Although  
11 no data is currently before the Court, judicial notice can be taken of  
12 the fact that KRD, Roza and other proratable entities' diversions have  
13 been reduced many times in short water years.

14 Courts have also expressed the need for finality in water right  
15 arrangements. See, e.g. Nevada v. United States, 463 U.S. 110 (1983).  
16 The Consent Decree was entered in lieu of a general adjudication with  
17 finality as its goal:

18 20. This judgment shall constitute a final determination of  
19 the obligation of the United States to deliver water from the  
20 Yakima River, and its tributaries, from storage from its  
21 various reservoirs. . . . Each of the parties to this cause,  
22 their grantees, successors and assigns are by this judgment  
forever enjoined and restrained from asserting any claim to or  
from interfering with any of the rights to the use or the  
delivery of those quantities of water which are recognized in  
this judgment.

23 It has been the aim of this Court to tread lightly on the already  
24 existing relationships between the parties, the financial setting  
25 throughout the valley upon which the rights to water underlies and the

1 security of water right holders to continue in their traditional  
2 enterprises. At the heart of these issues is the long-standing  
3 interpretation of the Consent Decree.

4 The declarations and affidavits of G. Lee Desmarais, Raymond  
5 Poulsen, Art E. and Scherry Sinclair, and Morrie Sorensen, See  
6 Attachments to Brief of Ellensburg Water Company and Cascade Irrigation  
7 District et. al., discuss the potential economic effects likely to occur  
8 should this Court change the long-standing interpretation of the Consent  
9 Decree. Moreover, it is not just that this upheaval will take place  
10 that concerns the Court but why it will take place. Obviously, upheaval  
11 will transpire when allocation priorities to a resource as crucial as  
12 the Yakima Basin's surface water suddenly change after a long period of  
13 recognition. Although it understands that proratable water users suffer  
14 dramatically during water short years, the Court has no grounds for  
15 sanctioning such a change.

16 Apparently, in 1977, Roza attempted to reopen the 1945 Consent  
17 Decree or otherwise have it interpreted as they do again now. Judge  
18 Marshall Neil denied this motion by Order and also stated the  
19 interpretation of the Consent Decree by the Bureau of Reclamation as to  
20 priorities and scheduling of water deliveries was reasonable and  
21 correct. See Attachments to Brief of Cascade Irrigation District.

22 d. Reasonableness of Respective Interpretations

23 It bears repeating.

24 "In addition to the amounts herein set forth which shall be  
25 excepted from paragraph 18 with respect to proration, there also  
shall be excepted from paragraph 18 [TWSA] the rights of Cascade  
Irrigation District which are recognized in paragraph 12, and the

1 amounts claimed by other water users of natural flow rights from  
2 the Yakima River and its tributaries, which have heretofore been  
3 recognized by the United States whether or not such users are  
4 parties to this action, and the summation of said amounts shall  
5 also be deducted from the total water supply available subject to  
6 proration. Exception from proration of such amounts specified in  
7 the preceding sentence from the total water supply available does  
8 not constitute a determination of the quantum or priority of such  
9 claimed rights, and is without prejudice to any of the parties to  
10 this action." Consent Decree Paragraph 19.

11 This statement is the linchpin on which this decision hangs. The  
12 natural flow users rely on it to protect their nonprorated status which  
13 ultimately requires delivery from storage if necessary (and available)  
14 to satisfy their rights. KRD attempts to narrow the import of this  
15 language, arguing no citation is offered to support an interpretation  
16 allowing natural flow rights to be satisfied from TWSA with the  
17 remaining water prorated. KRD offers citations to a contrary factual  
18 interpretation, namely the current positions of present Bureau employees  
19 Jim Esget and Yakima Project Superintendent Brian Person, the Court and  
20 statements from the Bureau in the early period of this century. Reliance  
21 on these arguments fails to support their position.

22 First, the current position of the Bureau as to a future two-bucket  
23 operation is based primarily on their interpretation of the Court's  
24 Opinion and Order on Limiting Agreements. That interpretation, although  
25 understandable (see discussion of limiting agreements, supra), goes  
beyond the narrow issues before the Court in that litigation. As to the  
early statements by Bureau representatives, the Court readily  
acknowledges that differing interpretations as to the use of storage  
water to satisfy natural flow rights existed at that time. However, the

1 Consent Decree was entered to resolve these issues.

2 In support of their position, KRD also makes the following  
3 arguments. They state that just because natural flow users are not  
4 subject to proration does not lead to the conclusion that their rights  
5 are to be supplemented from storage water which natural flow users did  
6 not pay for. Further, it is contended, natural flow rights could not be  
7 subject to proration because that would be out-of-step with state water  
8 law and the requirement of first-in-time, first-in-right. Finally, KRD  
9 relies on the use by Mr. Connoly, the U.S. Attorney who worked on the  
10 Consent Decree, of the language "insofar as Warren Act contractors are  
11 concerned" (see Attachment A, Brief of Cascade Irrigation District et.  
12 al., apparently concluding that even if a right would not be subject to  
13 proration along with Warren Act contractors, that does not mean it could  
14 not be abated as a question of priority among other natural flow users.  
15 These arguments will be discussed below.

16 The Court disagrees with KRD's interpretation of the Consent Decree  
17 which relies on a two-bucket approach. If the Consent Decree meant to  
18 recognize two priority systems, one for non-proratable, natural flow  
19 rights and another for non-proratable and proratable, why did it not so  
20 say. Surely, in a thirty page decree it would have been little trouble  
21 to state something like "As between solely natural flow, non-proratable  
22 water users, they shall be regulated first-in-time, first-in-right, and  
23 shall have no right to delivery of storage waters when the natural flow  
24 is incapable of satisfying those rights." What the Consent Decree does  
25 say, see quotations above, is that all waters shall be blended,

1 including storage and natural flow, and the rights of pre-project  
2 natural flow users shall be deducted from the TWSA before the remaining  
3 mass of water is apportioned between federal contractees.

4 A proration/non-proration system of allocation, as between pre-1905  
5 water users and post-1905 water users is a first-in-time, first-in-right  
6 system of allocation. Within those segmented classes it may be a  
7 different story. But as KRD itself recognizes, the Consent Decree does  
8 not try to allocate water between pre-1905 users during times of  
9 horrendous water short years. See Paragraph 19 of the Decree. To do so  
10 would require an adjudication. Hence, that the interests of early  
11 natural flow users takes priority over contract interests appears to be  
12 in step with first-in-time, first-in-right.

13 KRD asserts that the last sentence of paragraph 19, supra, is  
14 essentially an escape clause, effectively nullifying the meaning of the  
15 entire paragraph. It does not. According to its own terms, entities  
16 excluded from proration still required an adjudication because, in the  
17 event available water flows were still insufficient after proration, a  
18 need remained for a system of further allocation. Because the Consent  
19 Decree was not an adjudication decree it could not go that far. Hence,  
20 acknowledging the Consent Decree did not bind the non-proratables in  
21 terms of quantity or priority paved the way for a proceeding to  
22 determine priority dates and quantities of natural flow users for the  
23 rare occasion the proratable/non-proratable system was insufficient. It  
24 was not an open door to reargue the relationship between the proratables  
25 and non-proratables.

1           Additionally, in relying on the "insofar as Warren Act users are  
2 concerned" language in the analysis of Mr. Connoly, U.S. Attorney at the  
3 time of entry of Consent Decree, KRD may be off course. Another logical  
4 conclusion emerging from the use of that language, is that as between  
5 Warren Act users and natural flow users, the natural flow users are  
6 exempt from proration. This conclusion follows from Mr. Connoly's  
7 analysis (Exhibit A, Brief of Cascade Irrigation District et. al.,  
8 paragraph 9) of paragraph 19 where he writes:

9           "Excepted from proration are those quantities of water based  
10 on rights which have been determined to have priority over  
11 users whose contracts are based on the Warren Act."

12           This interpretation is also consistent with the Court's analysis  
13 above regarding the meaning of Paragraph 19, particularly the last  
14 sentence referring to the limitations of the Consent Decree in  
15 allocation after the initial split between proratables and non-  
16 proratable users.

17           Contrary to KRD's assertions, there is significant support in the  
18 record to persuade the Court to adopt the position of the natural flow  
19 users. In a Memorandum from the Field Solicitor to the Commissioner of  
20 Reclamation, dated December 23, 1977 (Exhibit E, Memorandum of Cascade  
21 Irrigation District, et.al), it is clear the Bureau at that time agreed  
22 with the interpretation advanced by the natural flow users. On page 9,  
23 the Field Solicitor wrote:

24           "The Kittitas Reclamation District and the Roza Irrigation  
25 District urge that we acknowledge the judicial distinction  
between natural flow and storage. In the case at hand, the  
consent decree mixed the two so that the distinction is not  
pertinent. Proration is not dependent upon the distinction;  
nor is nonproration. This is evident from the decree itself,

1 the writings of those persons intimately connected with the  
2 preparation of the decree, the Statement To The Court  
3 accompanying the decree, and the statement of those appearing  
4 in court."

4 Although KRD attempts to limit the significance of this  
5 interpretation by saying this is simply the view of an attorney, the  
6 fact remains this attorney represented the interests of the Bureau of  
7 Reclamation, and with a similar issue before him as is before the Court,  
8 he determined the Bureau should not undo their river management  
9 methodology based on the Consent Decree. No doubt this particular  
10 attorney's view was instrumental in continuing this method of river  
11 management which has characterized this basin for 50 years.  
12 Furthermore, because this has been the standard operating procedure  
13 since 1945, apparently more than one Bureau official arrived at the same  
14 interpretation. Finally, in addition to the Bureau's attorney, a  
15 federal district judge reached the same conclusion in 1977 when asked to  
16 interpret the decree as suggested here by KRD. Order On Motion To  
17 Reopen Judgment and For Interpretation and Administration, Civil No. 21  
18 (April 26, 1977) (CID et. al. Exhibit D).

19 Three years later when asked to interpret the 1945 Consent Decree  
20 again, the District Court reached the same conclusion. During a court  
21 hearing, Mr. Sandlin asked that the release of flow be limited to  
22 natural flow in order to adequately protect the at-risk salmon redds.  
23 The federal judge flatly denied the request. Kittitas v. Sunnyside, Tr.  
24 at 113-114 (Oct. 29, 1980). This decision was eventually affirmed in  
25 Kittitas Reclamation District v. Sunnyside Valley Irrig. Dist., 763 F.2d

1 1032 (9th Cir., 1985) cert. denied, 474 U.S. 1032 (1985).

2         Synthesizing all of the material presented to the Court leads to  
3 the conclusion two priority systems were envisioned, but not in the  
4 manner suggested by KRD. Under the Consent Decree, in times of shortage  
5 the first to take a reduction would be the proratable entities. If the  
6 water situation was so poor, as it nearly was in 1994, that all prorated  
7 entities were shut down, then priority dates would come into play as  
8 between natural flow entities. In such a situation, the diminished  
9 treaty reserved right for fish, with a priority date of time immemorial,  
10 would be the most senior of all non-proratable water rights in the  
11 basin. That the treaty fish right, to the extent it remains, would take  
12 precedence over the rights set forth in Consent Decree was essentially  
13 the import of the federal court rulings culminating in Kittitas  
14 Reclamation District v. Sunnyside Valley Irrigation Dist, supra.

15         The Court also notes that there are certain contracts and  
16 references in the 1945 Consent Decree to diversions of water only from  
17 natural flow. The Court will state, without actually reviewing the  
18 evidence for those claimants or limiting itself to such a decision if  
19 the evidence submitted at their evidentiary trial proves otherwise, that  
20 such claimants, unlike other pre-1905 claimants, would be limited to  
21 natural flows. How to divide up the storage water was a matter left to  
22 the discretion of the BOR and if they chose to enter into contracts  
23 limiting claimants to diversions from natural flows (and stuck to such  
24 agreements during the entering of the Consent Decree) then it was  
25 certainly within their power to do so just as it was in their power to

1 enter into a settlement that supplemented these once purely natural flow  
2 rights with storage water.

3 E. Res Judicata/Collateral Estoppel

4 Although the Court does not agree that the Consent Decree is res  
5 judicata or collaterally estops KRD from litigating some of the current  
6 issues before the Court, as a matter of interpretation the Consent  
7 Decree appears to favor the natural flow users rather than KRD. For  
8 other matters that must be decided to reach an ultimate conclusion, res  
9 judicata does apply and precludes reargument.

10 Res judicata and collateral estoppel simply do not apply to  
11 regulation of the treaty reserved fish right because the water  
12 requirements for fish were never considered during the negotiations of  
13 the Consent Decree. Indeed, paragraph 19 breaks the universe of water  
14 delivery obligations into two types, "proratable" and "non-proratable"  
15 and in order to qualify as a non-proratable right, it had to be an  
16 "amount claimed by other water users . . . which have heretofore been  
17 recognized by the United States . . ." The right for fish was not at  
18 that time "recognized by the United States." Hence, those doctrines  
19 presuppose that a party has had a full and fair opportunity to litigate  
20 an issue (such as which rights should be reduced to satisfy the senior  
21 fish right), Sea-First National Bank v. Cannon, 26 Wn.App. 922,927  
22 (1980), which KRD and Roza surely have not in regard to whether the fish  
23 right is a non-proratable or proratable right.

24 In other respects res judicata does apply. Res judicata applies to  
25 bar relitigation when the following factors are met:

1 (1) identity of subject matter; (2) identity of cause of action;  
2 (3) identity of persons and parties; and (4) identity of the  
3 quality of the persons for or against whom the claim is made.  
4 Ecology v. YRID, 121 Wn.2d, 257, 290 (1993).

5 The U.S. Supreme Court examined the doctrine of res judicata in the  
6 context of water rights litigation and an attempt by the United States  
7 to reopen a consent judgment in Nevada v. United States, 463 U.S. 110  
8 (1983). The Court stated:

9 "Simply put, the doctrine of res judicata provides that when a  
10 final judgment has been entered on the merits of a case, '[i]t is  
11 a finality as to the claim or demand in controversy, concluding  
12 parties and those in privity with them, not only as to every matter  
13 which was offered and received to sustain or defeat the claim or  
14 demand, but as to any other admissible matter which might have been  
15 offered for that purpose.'" Id. quoting Cromwell v. County of Sac,  
16 94 U.S. 351, 352 (1876).

17 Whether or not the rights of the pre-1905 water right claimants  
18 extend to include use of storage water was resolved (as discussed above)  
19 in the Consent Decree. If that issue was not resolved to the  
20 satisfaction of KRD/Roza it should have been done so in 1945 because it  
21 was the aim of that litigation and entry of that decree to put an end to  
22 the bickering over what obligations the U.S. maintained as to delivery  
23 of basin water. In the Motion For Entry of Final Judgment, Statement to  
24 the Court (attached as Exhibit "B" to the brief of CID, et. al.) it is  
25 stated:

26 "The proposed judgment in so far as it pertains to the parties  
27 before the court grants judicial recognition of those rights in the  
28 natural flow of the Yakima River which existed at the time the  
29 construction of the Yakima Project was undertaken; it likewise  
30 grants recognition of the rights of the users whose claims are  
31 based upon contracts with the Bureau of Reclamation; it establishes  
32 a formula for proration, dependant upon the nature of the rights  
33 involved during a period when the available supply of water is  
34 inadequate to meet the needs of all of the water users; it enjoins  
35 and restrains the parties before the court from contesting or

1 otherwise interfering with the rights thereunder recognized. . . ."  
2 Fifty years later, after consistent interpretation by all of the  
3 parties in this adjudication, after land holder expectations of water  
4 delivery have stabilized and after economic relationships have formed  
5 pursuant to the terms of the Consent Decree, KRD cannot ask to  
6 relitigate the same cause of action. Nevada, supra. They agreed in  
7 1945 to accept the resolution to that cause of action set forth in the  
8 Consent Decree. Although that Decree did not include provisions for the  
9 fish, it did establish relative priorities as between prorated and non-  
10 prorated water users. In meshing the treaty fish right into the 50-  
11 year-old distribution pattern, this Court will not change that  
12 relationship. The same conclusion appears to have been reached by the  
13 federal district court with jurisdiction to interpret the 1945 Consent  
14 Decree when it determined in 1980 that releases of storage water would  
15 be necessary to protect the fish redds in light of YIN's superior treaty  
16 right. See KID v. SVID, supra.

17 F. Use of Storage Water Without Payment

18 KRD and the U.S. make one argument that is difficult for the Court  
19 to deal with. Essentially, how can a purely natural flow user, who has  
20 no storage delivery contracts with the U.S., take delivery of water that  
21 was made available by construction of reservoirs they did not pay for.  
22 According to the KRD and the U.S., the Bureau is without statutory  
23 authority to enter into such an arrangement.

24 Although allowing pre-1905 natural flow users to take diversions  
25 from storage without paying for it is a troubling matter, that issue is

1 beyond the scope of this case. Our task is to analyze historic  
2 diversions and memorialize water rights accordingly. If the U.S.  
3 chooses to seek compensation or not for such diversions is a question  
4 for the Bureau to take up as a matter of policy or financial  
5 responsibility within the agency. However, once historic diversions are  
6 documented and incorporated into a water right, such amounts of water  
7 shall be made available to the diverting entities.

8 G. Distinguishing Natural Flow From Storage Water

9 Although KRD, Roza and the State ask the Court to distinguish  
10 between natural flow and storage water for purpose of allocating water  
11 for the treaty reserved fish right, the Court does not hold the opinion  
12 that doing so is truly possible. There are numerous examples of the  
13 resulting problems.

14 For example, as the Yakama Indian Nation points out, KRD  
15 contradicts its own stance on the necessity for distinguishing the two  
16 kinds of flows. At page 12 of its brief, KRD writes:

17 It may well be that the Bureau, in operation of the project, may be  
18 required to momentarily trap then release natural flow waters so as  
19 to create pulses of water on a routine, periodic basis without  
20 impacting what it would normally store, i.e. decrease natural flow  
going over the dam by 200 cfs for two days -- then wait a week then  
release 200 cfs per day for two days.

21 As we can see, if this scenario presents a question of whether  
22 momentarily trapped natural flow can or cannot be characterized as  
23 "storage water" (and thus available for instream uses) then the Court,  
24 the Bureau, and water users will find themselves in a position of  
25 needing to draw bright lines about what is stored water and what is only  
momentarily trapped water. Is water trapped for five days "storage

1 water" or does it need to be retained for 30 days to so qualify or just  
2 exactly what is the standard? Indeed, the U.S. refers to the process as  
3 "amassing and storing the natural flow". See Reply Brief at 8.  
4 Frankly, this is a dialogue the Court does not wish to participate in  
5 and sanctioning it threatens the progress and results of this  
6 adjudication. And, in order that there may be no linguistic confusion  
7 about this down the road, the Court has already ruled that the Bureau  
8 may release "trapped", "delayed", "sequestered", "reserved", "hoarded",  
9 "accumulated", "stockpiled" or dare we say it "stored" water.  
10 Memorandum Opinion Re: Flushing Flows. So has the federal district  
11 court. See Kittitas Reclamation Dist. v. Sunnyside Valley Irr., 763  
12 F.2d 1032, 1034 (9th Cir., 1985).

13 The Court itself has previously discussed the difficulty in  
14 separating storage from natural flow water. During the August 11, 1994  
15 oversight hearing, the Court said the following in regard to a question  
16 about segregating natural flow and storage:

17 "It is very difficult, in fact, it is impossible to distinguish  
18 basically what is coming down the river and say, well, this part of  
19 it is natural flow and this part is storage especially when you  
20 start using storage water about the first of July of every year; in  
21 fact, they started earlier than that this year. So who is to say  
22 that the water in the river is actually natural flow or storage."  
23 Report of Proceedings August 11, 1994 pp. 51-52.

24 We do not know what effect artificially storing water in a  
25 hydrological system actually has on the stream. Does it prevent natural  
26 storage that would otherwise take place, which although not efficient,  
27 would make available and for a longer season more "natural flow."  
28 Such scientific testimony is not before the Court. But given the model

1 of Wenas Creek, see discussion below, one certainly must wonder.  
2 Ellensburg Water Company also posits such matters at pages 7 and 8 of  
3 their Response Brief.

4 Moreover, how does KRD/Roza account for runoff from natural flow  
5 users that makes its way into the river in late summer. Unlike project  
6 return flows, which this Court has held belong to the United States, see  
7 Memorandum Opinion Re: Reconsideration of Limiting Agreements (April 1,  
8 1994), return flow that emanates from a a non-foreign natural flow use  
9 is available for reallocation and would be available to senior right  
10 holders. Compare Department of Ecology v. Bureau of Reclamation, 118  
11 Wn.2d 761, 827 P.2d 275.

12 1. Wenas Creek Model

13 Although a few parties to this adjudication ask the Court to  
14 recognize a legal distinction between natural flow and storage waters to  
15 do so would be a meaningless exercise. Such a distinction may be  
16 convenient for theoretical categorization and filling out paper, but it  
17 does not appear to work in practice. As evidence, this Court cites the  
18 parties to the model of Wenas Creek.

19 The claimants to Wenas Creek waters have been before this Court  
20 such a disproportionate amount of time as compared to other areas of the  
21 basin that it is worth noting. In fact, the Court is working on its  
22 Tenth Order Pendente Lite for that drainage. In addition, there have  
23 been numerous opportunities to interpret and apply prior Pendente Lite  
24 Orders. In sum, the watershed is a model of water right chaos.

25 There may be many reasons for the regulatory problems that occur in

1 the Wenas watershed. Surely one of them, however, is the artificial  
2 distinction between storage water and natural flow recognized in that  
3 subbasin. For example, the catalyst of a recent four-day trial was a  
4 disagreement about storage season practices and early irrigation season  
5 water availability. The Court eventually ruled that storage of water  
6 during the winter months had so dewatered the stream that natural flow  
7 users had been unable to provide drinking water to stock during those  
8 months and ultimately required a massive release of water from storage  
9 in early April to refill the waterbeds thereby pushing water downstream  
10 to high priority natural flow users. See Memorandum Opinion Re: Wenas  
11 Creek, June 1, 1995. From this example, one can see that when storage  
12 interests become segregated from, or pitted against natural flow  
13 interests, conflict over whether certain flows are one or the other can  
14 drive a divisive stake between common resource users.

15           2.    **Declaration of Richard Bain**

16           A similar view regarding the results of separating natural flow  
17 from storage is expressed by Richard Bain, an engineer who has  
18 participated as an expert in numerous hearings conducted by this Court  
19 and in the subbasin pathway. In his Declaration (appended to the brief  
20 of Ellensburg Water Company) he concludes:

21           "In my professional opinion if the Roza and KRD motion were granted  
22 it would not be possible to reliably distinguish natural flows from  
23 storage waters or to establish a workable means of prediction of  
24 water available to natural flow diverters or to equitably regulate  
25 diversions. Based on the facts set forth in this declaration I  
conclude that any attempt to curtail natural flow users and to take  
fish flows from senior natural flow rights rather than storage is  
too complex, too volatile, too inaccurate, too inequitable and too  
devastating to established parties and rights."

1                   3.    Conclusion

2                   One can see that distinguishing natural flows from stored flows is  
3 a risky and nebulous proposition. Should this "molecule painting" form  
4 of river regulation be sanctioned, the Court is well aware of the  
5 outcome. Disputes over sources of flow will be ceaseless. Finger  
6 pointing over storage and early season diversions will also transpire.

7 III. ATTORNEYS FEES

8                   Ellensburg Water Company, Cascade Irrigation District, West Side  
9 Irrigating Company, Selah-Moxee Irrigation District, Fowler Ditch  
10 Company, and Naches-Cowiche Canal Company request the Court to assess  
11 reasonable attorney fees against KRD and Roza to pay for the costs of  
12 defending a frivolous motion. All parties rely on Civil Rule 11, which  
13 authorizes the Court to impose appropriate sanctions for reasonable  
14 expenses incurred because of the filing of the pleading, motion or legal  
15 memorandum including a reasonable attorney fee.

16                   CR 11 requires a party or attorney who signs a motion or legal  
17 memorandum to do so with the knowledge or belief that their arguments  
18 are "well grounded in fact" and:

19                   "warranted by existing law or a good faith argument for the  
20 extension, modification, or reversal of existing law, and that it  
21 is not interposed for any improper purpose, such as to harass or to  
cause unnecessary delay or needless increase in the cost of  
litigation."

22                   Ellensburg Water Company advises this Court that it "must restrain  
23 the parties to the Acquavella litigation from spawning endless new  
24 litigation or to upset issues already decided every time one of the  
25 parties, or their attorneys, have a new theory." Memorandum at 17.

1 Additionally, they point to the costs incurred by the respondents to  
2 KRD/Roza's motion compared to the unsubstantiated, three-page pleading  
3 filed by the movants. The Court also understands the significance of  
4 the motion and its potential impact on established rights.

5 Although it is a close call, the Court denies this request for the  
6 following reasons. First, because this is a water rights adjudication  
7 with thousands of parties, a variety of factual and legal issues do  
8 present themselves which require specific briefing. Although the Court  
9 believes the Consent Decree and cases interpreting that decree readily  
10 cover the issues presented, it cannot be denied that integration of the  
11 treaty fish right into the TWSA pattern of distribution has never been  
12 squarely addressed. Second, in reading the limiting agreement  
13 decisions, the Court does acknowledge how KRD's interpretation might  
14 have formed as to the meaning of those decisions in regard to use of  
15 storage water. Finally, KRD and Roza as well as their counsel have  
16 historically participated with distinction in this adjudication. Their  
17 arguments have often pushed the edge of our understanding. However,  
18 filing the three-page pleading was ill-advised, expensive and should be  
19 done very cautiously in the future as we try to bring this proceeding to  
20 a conclusion.

#### 21 IV. CONCLUSION

22 How to integrate the treaty reserved water right for fish into the  
23 existing water allocation scheme presents difficult problems. Making  
24 that operational change has and will require reduction of junior  
25 proratable rights in many years. However, a reading of the 1945 Consent

1 Decree together with certain documents illuminating its intent convinces  
2 this Court to abide by the long-standing interpretation of that decree  
3 given by local water users, federal employees and various federal  
4 courts. Whatever distinctions between natural flow and storage water  
5 sources existed at the beginning of the century were transformed by the  
6 Total Water Supply Available concept and the water users excepted from  
7 proration of such a supply. As between these proratable and non-  
8 proratable entities, some system of allocation can be determined as it  
9 historically has been by the Bureau of Reclamation. However, as Ecology  
10 and this Opinion point out, regulation between natural flow users,  
11 should it ever be required, will require a complete adjudication decree  
12 from this case.

13 Therefore, the Court gives the following answers to the three  
14 issues set forth by KRD.

15 1. Is the implied water right for the diminished treaty  
16 fishing right a "natural flow" right with a "time  
immemorial" date of priority?

17 The treaty reserved right is a water right with a priority date of  
18 time immemorial. It may be satisfied from the natural constituent of  
19 the TWSA. However, if in times of shortage and the Project  
20 Superintendent so determines, storage water may be released to maintain  
21 fish pursuant to the orders and rulings of this Court and the Ninth  
22 Circuit.

23 2. Who should abate to provide flows for the fish in times  
24 of shortage?

25 Abatement should proceed pursuant to the terms of the 1945 Consent  
Judgment and by way of the TWSA concept. The proratable/non-proratable

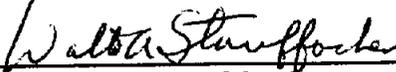
1 mechanism is the most equitable and will cause the least disruption to  
2 existing rights. Moreover, it is not possible, at every given moment,  
3 to distinguish between artificially "interrupted" flows (i.e. "stored  
4 water") and those that have not been artificially interrupted (i.e.  
5 "natural flow").

6 3. Should Ecology be required to regulate natural flow  
7 rights when abatement is necessary?

8 Although an answer to this question is premature and was not  
9 briefed by the parties, it is the Court's belief that the United States  
10 (who built the six reservoirs and entered into limiting agreements as  
11 well as delivery contracts with most if not all of the major water  
12 diverters in the valley) should ensure the delivery of the appropriate  
13 amounts of water to the necessary entities who have signed limiting  
14 agreements or otherwise have delivery contracts with the U.S.. The  
15 Court's Memorandum Opinion Re: Warren Act Issues, to some extent,  
16 addresses these issues. However, that leaves plenty of state  
17 involvement in the basin throughout the subbasins. Nonetheless, at this  
18 point, the Court essentially agrees with Ecology that an order to  
19 commence regulating natural flow users on the basis of priority dates is  
20 premature.

21 Counsel for the Yakama Indian Nation shall prepare an order for  
22 presentation at the appropriate water day.

23 DATED this 2<sup>nd</sup> day of April, 1996.

24   
25 Walter A. Stauffacher  
Judge