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KIM M. EATON, YAKIMA COUNTY CLERK

EX OFFICIO  
SUSAN J. ...  
YAKIMA 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

REVISED ORDER RE: MOTION TO  
LIMIT TREATY WATER  
RIGHT FOR FISH TO  
NATURAL FLOW AND ABATE-  
MENT OF NON-PRORATABLE  
WATER RIGHTS

This matter came before the Court pursuant to the motion filed by the Kittitas Reclamation District and Roza Irrigation District requesting 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.

ORDER RE: MOTION TO LIMIT  
TREATY WATER FOR FISH - 1

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1 In response to the motion by the Kittitas Reclamation District and  
2 the Roza Irrigation District, a motion was filed by the Ellensburg Water  
3 Company, Cascade Irrigation District, West Side Irrigating Company,  
4 Selah-Moxee Irrigation District, Fowler Ditch Company, and Naches-Selah  
5 Canal Company requesting that the Court assess reasonable attorney fees  
6 against the Kittitas Reclamation District and the Roza Irrigation  
7 District to pay for the costs of defending a frivolous motion. A  
8 hearing was held on July 13, 1995, during which the Court granted the  
9 motion of certain subbasin claimants to submit posthearing briefs.

10 This Court having considered all memoranda and affidavits filed by  
11 interested parties, legal arguments of counsel, and documentary evidence  
12 as it relates to legal issues arising therein, and for good cause  
13 appearing, herein enters the following Order:

14 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion filed by  
15 Kittitas Reclamation District and Roza Irrigation District is denied for  
16 the following reasons:

17 1. The Consent Decree entered into in 1945 in Kittitas v.  
18 Sunnyside (Civil 21) (hereinafter the "Consent Decree") establishes the  
19 relative priorities as between the prorated and non-prorated water  
20 users. Whatever distinctions between natural flow and storage water  
21 sources that existed at the beginning of the century were transformed  
22 through the agreed upon terms set forth in the Consent Decree. In  
23 general, as shown under paragraph 2, 18, and 20 of the Consent Decree,  
24 delivery of water in the Yakima Basin is to be from both natural flow  
25 and storage. Pursuant to the terms of the Consent Decree, natural flow

1 and storage water along with all other sources of water in the Yakima  
2 Basin were to be blended into one "bucket"; the "total water supply  
3 available" (TWSA). When use of water must be abated to satisfy the  
4 Treaty water right for fish, such abatement of water should proceed  
5 pursuant to the terms of the Consent Decree and the orders of and  
6 priorities established by this Court.

7 2. The system of proration/non-proration is established under  
8 paragraph 19 of the Consent Decree. In times of shortage, the water  
9 rights of certain entities are subject to proration under the Consent  
10 Decree. The rights of the pre-project natural flow users, which are  
11 non-proratable users under paragraph 19 of the Consent Decree, and the  
12 rights of the non-proratable project users shall be deducted from the  
13 monthly or more frequent TWSA projections before the remaining amount of  
14 TWSA is calculated and apportioned proratably among certain federal  
15 contractees.

16 3. In times of shortage, the pre-Project, and Project 1905  
17 priority non-proratable right holders, would take precedence over the  
18 Project 1905 proratable water users. All Project 1905 priority water  
19 users, non-proratable and proratable, would take precedence over post  
20 1905 non-Project water users. Under the Consent Decree, as between  
21 proratable and non-proratable rights, the first to take a reduction  
22 would be the proratable entities. If the water situation is so poor in  
23 a particular water year that proratable users are shut down, then  
24 priority dates would come into play between and among nonproratable  
25 users.

1 4. The diminished Treaty-reserved water right for fish, with a  
2 priority date of time immemorial, takes precedence over all other rights  
3 in the Yakima Basin. There is no distinction between natural flow and  
4 storage for purposes of providing water for the Yakama Indian Nation's  
5 Treaty-reserved water right for fish. Pursuant to previous orders of  
6 this Court and the Ninth Circuit in Kittitas v. Sunnyside (Civil 21),  
7 the Bureau of Reclamation shall release or otherwise provide water from  
8 TWSA or other source, however that water is characterized, when  
9 necessary in light of annual prevailing conditions and after  
10 consultation with SOAC, irrigation districts and canal companies, and  
11 others, to satisfy the Yakama Indian Nation's Treaty-reserved water  
12 right for fish.

13 5. The question of whether the Bureau of Reclamation can or  
14 should charge pre-project users for storage water is beyond the scope of  
15 this case. However, once pre-project users' water rights are  
16 established in this adjudication, such water shall be made available  
17 from available TWSA regardless of whether the Bureau of Reclamation  
18 receives compensation for the storage component of that water.

19 6. The motion seeking CR 11 sanctions against Kittitas  
20 Reclamation District and Roza Irrigation District is denied.

21 IT IS FURTHER ORDERED that there is no just reason to delay appeal  
22 of this Order as the Rulings set forth herein shall constitute the final  
23 Order for the purpose of appeal [see RAP 2.2(d)]. The practical  
24 benefits which might result from review of the order at this stage are  
25 considerable since it involves a major threshold issue and includes pre-

1 project natural flow rights and project waters and the distinction or  
2 non-distinction thereof.

3 DATED this 16<sup>th</sup> day of July, 1996.

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5 Walter A. Stauffacher  
6 Judge Walter A. Stauffacher  
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