

FILED
DEC - 4 2006

KIM M. EATON, YAKIMA COUNTY CLERK

YAKIMA RIVER BASIN
WATER RIGHTS ADJUDICATION

The State of Washington, Department of Ecology v.
James J. Acquavella, et al.

Yakima County Superior Court Cause No. 77-2-01484-5

SUPPLEMENTAL REPORT OF THE COURT
CONCERNING THE WATER RIGHTS FOR THE

**UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION**

VOLUME 56A

19,825

TABLE OF CONTENTS

I.	Introduction	1
II.	Analysis	1
	a. Previously Filed Motions	1
	b. Claim to Acquired Water Rights	2
	c. Ownership of the Water Right – ‘Trustee’ Language	2
	d. Catalog of Water Rights	5
	1. Irrigation District/Water Company’s Objections	5
	2. Sunnyside Division	6
	3. Union Gap Irrigation District	6
	4. Yakima Valley Canal Company	6
	5. Yakima-Tieton Irrigation District	6
	6. Cascade Irrigation District	6
	7. Yakama Nation	6
	8. Ecology	7
	9. Conditions	8
	10. Modifications to Existing Contracts	8
	e. Yakima Project Storage Reservoirs	9
	1. Annual Quantity	9
	2. Instantaneous Quantity	10
	3. Purpose of Use	11
	4. Priority Date	11
	5. Place of Use	11
	6. Certificate Issuance	12
	7. Conditions on Use	12
	f. Additional Diversion and Storage Structures	13
	1. Lake Easton Dam Storage	13
	2. Roza Diversion Dam Storage	14
	3. Yakima-Tieton Dam Storage	14
	4. Wapato Dam Storage	14
	5. Sunnyside Dam Storage	14
	6. Prosser Dam Storage	14
	7. French Canyon Dam Storage	14
	8. Wapatox Dam Storage	15
	g. Power Based Water Rights	16
	1. Annual Quantity	16
	2. Beneficial Use at the Roza Power Plant	17
	3. Beneficial Use at the Chandler Power Plant	17
	4. Conditions	19
	5. Permit No. 1727 Condition—Roza	20
	6. Other Reclamation Power Facilities	20

h.	Reserved and Transferred Works	21
	1. Kachess Dam Generator Building	21
	2. Easton Dam Residence	22
	3. Bumping Dam Garage	23
	4. Tieton Dam Warehouse	23
	5. Upper Columbia Area Office/Yakima Field Office (UCA/YFO)	24
	6. Chandler Power Plant Park	25
	7. Sunnyside Dam Residence	25
	8. Swauk Siphon Residence	25
	9. Cle Elum Dam Residence	26
	10. Condition	26
	11. Measurements	26
i.	Warren Act and Other Contracts	26
	1. Ownership/Trustee Language	26
	2. 1945 Consent Decree/TWSA Condition	27
	3. Flood Water Condition	27
	4. Claims Asserted by the United States	27
	a. Bruff-Boise Cascade Corporation Warren Act Contract	27
	b. United States Forest Service Memorandum of Verbal Agreement (Naches Ranger Station)	28
	c. Muoth Warren Act Contract	28
	d. Stonebraker-Payne Contract	30
	e. City of Cle Elum Water Supply Contract	30
	f. Measurement of Water Use—All Contracts/Agreements	33
III.	Summary	34

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 FOR THE COUNTY OF YAKIMA

3 IN THE MATTER OF THE DETERMINATION)
4 OF THE RIGHTS TO THE USE OF THE)
5 SURFACE WATERS OF THE YAKIMA RIVER)
6 DRAINAGE BASIN, IN ACCORDANCE WITH)
7 THE PROVISIONS OF CHAPTER 90.03,) NO. 77-2-01484-5
8 REVISED CODE OF WASHINGTON)
9 THE STATE OF WASHINGTON,) SUPPLEMENTAL REPORT
10 DEPARTMENT OF ECOLOGY,) OF THE COURT
11) CONCERNING THE
12 Plaintiff,) WATER RIGHTS FOR THE
13) UNITED STATES DEPARTMENT
14 v.) OF INTERIOR, BUREAU OF
15 JAMES J. ACQUAVELLA, et al.,) RECLAMATION, COURT
16) CLAIM NO. 02276
17 Defendants.)

12 I. INTRODUCTION

13 The Court entered its Report of the Court Concerning the Water Rights for the United
14 States Bureau of Reclamation, Volume 56, on April 14, 2005. Exceptions were filed by the
15 United States, Department of Ecology, Yakama Nation, City of Cle Elum, and the Sunnyside
16 Division, Union Gap Irrigation District, Yakima Valley Canal Company, Cascade Irrigation
17 District and Yakima-Tieton Irrigation District. The Court originally set the exception hearing
18 for August 30 through September 2, 2005. The United States requested an opportunity to
19 negotiate with other parties to resolve the issues. The Court granted the request and subsequent
20 requests for extensions. Although settlement was not reached, the issues were narrowed. The
21 hearing on exceptions was held March 15-16, 2006.

21 II. ANALYSIS

22 a. **Previously Filed Motions--Update**

23 The United States responded to the Court's request for an update on previously filed
24 motions. The United States withdrew its motion for order pendente lite regarding Yakima
25 Project return flows and its ability to recapture and redistribute those flows. Second, no
26 further action appeared to be required on Ecology's motion in limine regarding management of
27 the United States rights. The United States concurs. Third the Irrigator's asked the Court to
28 exclude evidence regarding claims to fish, wildlife and recreation. The United States is not
pursuing water rights for such uses as the Yakama Nation was granted a priority fish water

1 right. The United States did not take exception to the findings in the Report (pp. 3-5). Finally,
2 the United States wants the Report corrected to show the Court did not allow the testimony of
3 Walter Larrick, not that the United States did not offer the testimony. This is so noted.

4 **b. Claim to Acquired Water Rights**

5 The United States is no longer pursuing its claim to acquired rights pursuant to either the
6 Sunnyside Division or the Kennewick Irrigation District. The Court has entered Conditional
7 Final Orders (CFOs) for those major claimant's water rights.

8 The United States also claimed a right to all tributaries to the Yakima River above
9 Prosser Dam. This claim appeared to be a matter of administration of the waters in the basin.
10 If not, evidence was needed prior to confirming a right. Report @ 73-74. The United States
11 concurs this is a matter of administration of waters of the basin and no longer claims a separate
12 water right to those tributaries above Prosser Dam.

13 **c. Ownership of the Water Rights—'Trustee' Language**

14 The issue of ownership, which this Court has addressed many times, appears to need
15 further analysis. The United States renews its concern about use of the word "trustee" in
16 conjunction with several federal contract holders. For a variety of reasons, the United States
17 requests that it be changed to "on behalf of," which the United States views as a ministerial or
18 clerical error. As a result, it believes this language is more appropriate for those contractees
19 who currently hold a Conditional Final Order. The United States further argues that inclusion
20 of "on behalf of" will remove what it considers the last major impediment to the final decree
21 and lessen the chance for an appeal. An attempt to negotiate this issue failed. Although it does
22 not take a position on this issue, Ecology reserved the right to comment on any ministerial
23 correction brought before the Court. The Nation reserved comment on the appealability of a
24 CFO, but does not in general object to ministerial corrections to rights where CFO's have been
25 entered. See *Order for Relief From Conditional Final Order Due to Clerical Error (Subbasin*
26 *No. 5 [Elk Heights])*, June 27, 2005.

27 A process exists for ministerial corrections to a water right that is the subject of a CFO.
28 Ministerial corrections have come to the Court upon a filing of a motion, proper notice to
parties and a hearing. The Court then issues an Order as appropriate. However, ministerial
corrections have been narrowly defined by this Court and given the level of contention
regarding the issue of ownership/trustee language, coupled with the United States' position that
it may impede entry of the final decree, the Court does not believe this issue is "ministerial."

1 Yakima Valley Canal Company (YVCC), Union Gap Irrigation District (UGID) and
2 Yakima-Tieton Irrigation District (YTID) argue that their respective CFOs contain the word
3 “trustee” and should not be unilaterally altered. The United States did not appeal those CFOs.
4 Any attempt to change those CFOs should be dealt with as separate actions, not within the
5 scope of the United States water right claim. Roza Irrigation District (Roza) concurs. Any
6 change to a CFO should be voluntary and must encompass what Judge Stauffacher defined as
7 Roza’s rights. Roza believes that Judge Stauffacher, in his rulings on this issue, made his
8 intent regarding this language clear. The relationship the districts have with the United States is
9 contractual, which differs from the role the United States has regarding its fiduciary trust. The
10 meaning of “trustee” has been well-defined for purposes of the adjudication.

11 At the time of the exception hearing, Cascade Irrigation District (Cascade) was differently
12 situated as it did not yet hold a final CFO but it, like YVCC, UGID, YTID and Roza, objected
13 to the change in language suggested by the United States. The Court entered an Amended CFO
14 for Cascade on July 13, 2006 which addressed the issue of ownership. Cascade did not file an
15 appeal of this Amended CFO. The Court believes this resolves the exception by Cascade. The
16 United States did file a Notice of Appeal to the Supreme Court of Washington (Doc. #19,659).
17 The Yakama Nation has crossed-appealed the Amended CFO (Doc. #19,694).

18 In the Court’s opinion, this is water under the bridge and is a dispute only because
19 language has failed us. The strokes the Court places on the this particular canvas must be
20 carefully blended to reflect 1) the decisions which have been previously handed down in this
21 proceeding, 2) a strong reluctance to disturb existing CFOs 3) and recognition of the special
22 relationship that exists between the federal government and American Indian tribes. Here is
23 what the picture looks like so far. In *Ecology v. Acquavella*, 100 Wn.2d 651, 658, 674 P.2d
24 160 (1983) the Supreme Court recognized the relationship as being “akin to a trustee-
25 beneficiary relationship” (see also *Thorpe v. Tenem Ditch Co.*, 1 Wash. 566, 20 P. 588 (1889))
26 and that this type of distributing entity/water users relationship “has been upheld throughout the
27 years in the western United States.” Cites omitted. These rulings led the Court to find,

28 Thus, we see that our Supreme Court has specifically ruled that a water distributing
entity, such as the U.S.B.O.R., does have appropriative rights, as a trustee, to the waters
of the Yakima River Basin, contrary to the D.O.E.’s present rhetorical representation as to
the holding in *Ecology vs Acquavella*, supra. *Memorandum Opinion Re: Warren Act
Contracts*, March 8, 1996, @44, lines 11½-15½.

The Court then ruled,

1 The United States' contractual relationship is "akin" to the trustee relationship of
2 irrigation districts to their patrons. The United States' role as trustee is defined by the
3 terms of its contracts and Acts of congress. Therefore, the duties of the United States as
4 "trustee," do not impose on it any additional fiduciary duty of obligation other than the
5 obligation to fulfill the contracts which they have drawn and issued pursuant to the Acts
6 of Congress. *Order Re: Warren Act Issues*, September 18, 1996, page 11, ¶11, lines 7-
7 11½. [Emphasis Original.]

8 The Court also addressed the issue of ownership in its *Order RE: Threshold Issues*,
9 August 13, 1992.

10 IT IS HEREBY ORDERED that the rights to the waters of the Yakima River are
11 appurtenant to the land upon which the water is beneficially used; the owner of the land
12 has an interest in the water right, and the *United States, as trustee*, and the distributing
13 entities which deliver the water have an interest in the right to divert, store, convey and
14 distribute the water. ¶1, p. 1. [Emphasis Added.]

15 The United States had the opportunity to appeal the Warren Act and Threshold Issues
16 orders and elected not to do so nor did it appeal any previously issued CFO that contained the
17 "trustee" language. The Court will not unilaterally alter the language in any existing CFO. The
18 Court's previous decisions are the law of the case.

19 The United States also claims that by not changing the language there will be inconsistent
20 treatment among the contractees that could lead to litigation and confusion. A look at the
21 record reveals that the Court, when it made its determination regarding contract water rights for
22 a particular major claimant, used the term "in trust for". When the United States entered into
23 negotiations with a particular claimant, the agreed-to rights contained language "on behalf of".
24 In furtherance of completing this case, the Court accepted these settlements with the agreed-to
25 language. If the United States considers this inconsistent treatment the choice of language in
26 the respective settlements, a process in which the Court did not participate.

27 While it may not give the United States any comfort, it must be made clear that the Court,
28 in all of its rulings on this point, did not imply or confer any additional duty or responsibility on
the United States except those which already exist in the contracts. At no time did the Court
elevate it to the level of a fiduciary relationship. This Court is aware of only one entity to
which the United States owes that level of duty – the Yakama Nation. While trust may not be
the ideal word, the Court has been very clear on what the "contractual trustee relationship" is
between the United States and the contractees. "The United States' contractual relationship is
"akin" to the trustee relationship of irrigation districts to their patrons." *Ecology v. Acquavella*,

1 supra. The Court's intent must be unmistakably clear -- the scope of this contractual trust
2 relationship is narrow and not the same as the trust responsibility of the United States to tribes.
3 The Court DENIES the United States' request to change the language in any existing CFO.

4 The United States has requested that any contract right confirmed herein contain the
5 language "on behalf of". The Court will issue these rights only as requested -- to the United
6 States Department of the Interior, Bureau of Reclamation on behalf of (contractees' name).

7 **d. Catalog of Water Rights**

8 The United States offered USBR 201 (known as the "Catalog") as a summary of the
9 water rights it has an interest in or for which it has a delivery obligation. The United States
10 noted the Catalog was meant to provide consistency and to correct ministerial errors. As
11 discussed above under 'Ownership of the Water Rights—Trustee Language', there is a process
12 for correcting ministerial errors (See *Order for Relief From Conditional Final Order Due to
13 Clerical Error supra*). Ministerial corrections will not be allowed through the Catalog.

14 Several districts/companies, the Yakama Nation and Ecology filed exceptions to the
15 original Catalog claiming it contained errors and did not accurately reflect the water rights
16 embodied in previously issued CFOs. The United States amended the Catalog and submitted a
17 final version on July 21, 2006. See USBR 201B. Ecology filed a response on August 14, 2006.

18 **1. Irrigation District/Water Company's Objections**

19 The Court has decided the issue of ownership. See "Ownership of the Water Rights—
20 'Trustee' Language" supra. Several parties took exception to the language used by the United
21 States in the original USBR 201 instead of the language contained in a claimants CFO. The
22 "on behalf of" language still remains in USBR 201B. However, the United States stated at the
23 hearing and in other documents that the Catalog was not intended to change or modify any
24 CFO. The United States further offered the following disclaimer language in USBR 201B:

25 This Catalog is intended to be a comprehensive listing of all water rights owned by the
26 United States Department of Interior, Bureau of Reclamation. The Catalog is based on
27 water right filings, Court claims, Conditional Final Orders of the Court, and other
28 relevant evident.

By the submission of this revised Catalog, the United States does not purport or intend to
modify any conditional final order (CFO). To the extent that there is a conflict between
the Catalog and a CFO, the CFO language shall govern.

This Catalog appears to have a similar purpose to that of the 1974 "C.R. Lentz Review
Yakima Project Water Rights & Related Data (Lentz Report)", CE-1. The Lentz Report

1 afforded a general overview of Yakima Reclamation Project water rights and is a useful tool.
2 Where there is a difference between 201B and a CFO, the *CFO controls*. Conditional Final
3 Orders will not be affected by nor changed by the Catalog. When appropriate, the Court may
4 rely upon the information provided in the final Catalog in analyzing the United States' claim.

5 There were other specific exceptions to the Catalog:

6 2. *Sunnyside Division*

7 Sunnyside objected to the described place of use as it did not mirror the language in its
8 agreed-to Amended Stipulation filed August 12, 2003. The United States corrected the place of
9 use to conform to the Amended Stipulation. USBR 201B @ 66, End Note 1.

10 3. *Union Gap Irrigation District*

11 Union Gap objected to the described purpose of use as it did not match its Conditional
12 Final Order. This has been corrected in USBR 201B (p. 43).

13 4. *Yakima Valley Canal Company*

14 YVCC objected to the purpose of use and source of water in the Catalog. The United
15 States provided an Erratum to the final version of the Catalog correcting the source to the
16 Naches River and purpose of use of the water right (Document #19,641, p. 50).

17 5. *Yakima-Tieton Irrigation District*

18 Yakima-Tieton objected to the proposed flood water condition placed on its North Fork
19 Cowiche Creek right as it was not included in its CFO. The United States deleted this
20 condition (Condition No. 1, p. 33).

21 6. *Cascade Irrigation District*

22 Cascade objected to the United States' failure to identify all the claimed points of
23 diversion and the priority date. The Amended CFO was entered on July 13, 2006. Five points
24 of diversion were authorized and the priority date was set at March 5, 1902. The Catalog has
25 been corrected to reflect these two specific objections by Cascade. USBR 201B @ 42.

26 The Court notes one other discrepancy in 201B. On page 42, at line 13, the location of
27 the McManamy POD is given in part as "21,980 feet south". The figure "2" may reflect this as
28 point of diversion No. 2, and is not meant to be 21,980 feet. The point, as confirmed in the
Amended CFO, is "1980 feet south".

7. *Yakama Nation*

Yakama Nation's objections to the Catalog are as follows. Both the Yakama Nation's
rights and the obligations of the United States to the Nation are not listed in the Catalog. The

1 rights of the Yakama Nation are found in its CFO, dated September 12, 1996, and other orders
2 of the Court. The Nation believed it would be helpful to include a paragraph in the catalog
3 stating this. The United States offered such language under "Purpose and Scope" as follows:

4 This Catalog does not address or list water rights of the Yakama Nation or the Yakama
5 Indian Reservation, nor does it list the rights or obligations of the United States in
6 connection with the Yakama Nation's rights. Instead, the rights of the Yakama Nation
and the Yakama Indian Reservation are addressed separately in additional Conditional
Final Orders and other Orders of this Court. See USBR 201B.

7 The Yakama Nation also discovered errors related to the Wapato Dam. The storage
8 volume at the dam is 56 acre-feet, not 21 acre-feet. There are two dams at Wapato, the west
9 dam located within the SW¼ of Section 17 and the east dam that is located within the NE¼ and
10 SE¼ of Section 17, all in T. 12 N., R. 19 E.W.M. (Dr. Stuart Crane, RP-2¹ @ 32-34). These
11 errors have been corrected in USBR 201B.

12 The Yakama Nation also requested that it be noted that the place of use is on the Yakama
13 Reservation and it is a federally reserved right of the Yakima Nation under orders of the Court.
14 The place of use is shown as "the Yakima Reclamation Project including the entire Yakima
Basin". This change is noted. USBR 201B @ 10. The Yakama Nation's CFO controls.

15 8. *Ecology*

16 Ecology asks that the disclaimer relating to the CFO's be included in the Catalog also be
17 applied to the United States water right, should there be a discrepancy between the Catalog and
18 the rights confirmed (#19,657, August 14, 2006). The United States responded on
19 September 1, 2006 (#19,681) and agrees the CFO will control and requests that it be
20 incorporated as appropriate into the CFO for the United States. The Court has reviewed the
21 Catalog, found it helpful and used it to assist it in evaluating the United States water right
22 claims. Although the Catalog has elements that will be included in the water rights for the
23 United States, it will not be included as a whole given the differences between it and certain
CFOs.

24 Condition No. 2 for West Side Irrigating Company included a reference to use of natural
25 flow from local creeks. Ecology requested that the United States correct the language in
26 Condition No. 2 to reflect the parties' stipulation that West Side may not use natural flow from
27 tributaries. See Conditional Final Order, August 11, 2005. USBR 201B was corrected at 53.

28 ¹ RP-1= Report of Proceedings, March 15, 2006; RP-2=Report of Proceedings, March 16, 2006.

1 9. *Conditions*

2 The United States also asked that the following conditions be included on its water rights.

3 a. 1945 Consent Decree/TWSA

4 “The source of water for this water right is the total water supply available, defined in the
5 1945 Consent judgment as ‘that amount of water available in any year from natural flow
6 of the Yakima River and its tributaries, from storage in the various Government
7 reservoirs on the Yakima watershed and from other sources.’”

8 b. Flood Water

9 “Flood water is subject to the availability at the discretion of the Yakima Field Office
10 manager as established in Paragraph 17 of Kittitas Reclamation District v. Sunnyside
11 Valley Irrigation District (Civ. 21 E.D. Wash.)(January 31, 1945).”

12 The Court will include these conditions on the United States’ rights. Again, the Court
13 will not reopen a CFO to include these conditions nor will it direct Ecology to include them on
14 the certificates unless written confirmation is provided by any party affected.

15 10. *Modifications to Existing Water Rights*

16 The United States asks the following modifications be noted on certain water rights:

17 a. Kittitas Reclamation District

18 The United States requests the right found in the Conditional Final Order for KRD be
19 modified in accordance with its settlement with KRD. The Court has not seen said settlement
20 and will not modify KRD’s water right. The United States also removed Condition No. 2 (p.
21 27) from KRD’s listing in USBR 201B.

22 b. Yakima-Tieton Irrigation District

23 The United States requests the rights of YTID be modified in accordance with a
24 settlement filed with the Court on December 22, 2000. After consideration of the evidence and
25 case law, the Court entered its Conditional Final Order for Yakima-Tieton Irrigation District on
26 May 10, 2001, confirming a quantity of water based on beneficial use and not the settlement.
27 The Court has not yet been provided a copy of any settlement other than the one negotiated in
28 December 22, 2000. The Court will not modify the water rights as described in YTID’s CFO
29 without the concurrence of YTID.

30 c. Cascade Irrigation District

31 The United States filed exceptions prior to issuance of the Amended CFO (July 13,
32 2006). As such, the Court simply directs the United States to the Amended CFO.

1 d. City of Ellensburg

2 The United States requests a right be confirmed based on the settlement between KRD
3 and the City (see a. Kittitas Reclamation District). Ecology withdrew its exception to the City
4 of Ellensburg's claim. The City presented a proposed CFO and noted it for filing on October
5 23, 2006. The proposed CFO was published in the November 1, 2006 Monthly Notice.

6 e. City of Yakima

7 The United States included comments that memorialized the agreed-to quantity
8 limitation. The Court entered the City's Conditional Final Order entered November 21, 2002.

9 f. West Side Irrigating Company

10 The United States included comment that memorializes the agreed-to quantity and source
11 limitation. The Court entered West Side's Conditional Final Order on August 11, 2005 .

12 **e. Yakima Project Storage Reservoirs**

13 Testimony regarding the Yakima Project storage reservoirs was provided by James D.
14 Crammond and Stephen K. Fancuillo, RP-1.

15 1. *Annual Quantity*

16 Operation of the Yakima Project is multi-faceted and complex. Active storage capacity is
17 the useable water at full capacity, not counting dead storage, and should include the surcharge
18 area. Active design capacity is the amount the reservoirs were designed to hold. The reservoirs
19 were designed to hold 1.1 million acre-feet. The surcharge amount is the additional filling of a
20 reservoir above the active design capacity. This is accomplished by installing flash boards to
21 expand the capacity of the reservoir to hold water. By using the surcharge area the United
22 States is able to safely store additional water to meet its obligations. On an ongoing basis, the
23 United States will draft down the reservoirs to meet demands and the refill the reservoirs
24 during the season. A refill event occurs when on storage control the reservoirs are evacuated to
25 meet demand and conditions exist to capture additional water to fill that space. This is done
26 throughout the season. In light of the above, the United States requests that the capacity of the
27 reservoirs be referred to as either "total active capacity storage" or "total active capacity".
28 However, in USBR 201B it is referred to as "capacity".

 The Court GRANTS this request and will use the phrase total active capacity. Total
Water Supply Available (TWSA) is the forecast of available supply based on snowpack or
predicted snowpack above the reservoirs and tributaries, current storage, precipitation, runoff
and return flows. TWSA is updated frequently during the season. Fish obligations are met first,

1 nonproratable demands are accounted for, and then the remaining is apportioned to the
2 proratables. There is on average 3.3 million acre-feet available in the basin as measure at
3 Parker. The gauge at Parker is the control point for the system. The United States manages
4 and delivers between 2.7 – 2.9 million acre-feet during the irrigation season. The remaining
5 quantity is available during the October through March period and includes flood waters. In
6 September the United States implements the “flip flop” which is a process to reduce flows in
7 the Yakima River to allow for fish spawning in the Upper Yakima. Correspondingly, the flows
8 are increased in the Tieton and Naches Rivers to supply irrigation and other uses downstream.
9 The United States has 1.7 million acre-feet in contract obligations to meet, plus fisheries and
10 other needs. Not limiting the quantity to be stored will allow the United States flexibility to
11 meet these obligations. Due to these many factors, the United States requests that the Court not
12 set a cap on the amount of water that can be stored in the reservoirs, but instead be allowed to
13 store an unlimited amount of water based on the prevailing conditions.

14 The Court GRANTS the request and will not set a limit on the amount of water that can
15 be stored in a given year. The storage water rights will indicate what the total active capacity
16 of each reservoir is, with the understanding that greater quantities will be stored and the levels
17 in the reservoirs will fluctuate as the United States manages and operates the Yakima Project
18 reservoirs during the water year.

19 The United States concurs with the quantities confirmed for the reservoirs with minor
20 exceptions. Historic evidence for Cle Elum Reservoir shows the total active capacity is 446,610
21 acre-feet, not 437,000 acre-feet. See USBR 203 - 204. This is so noted by the Court and Cle
22 Elum Reservoir is corrected to reflect the additional 9,610 acre-feet. The total active capacity
23 for Lake Kachess is 250,261 acre-feet (Yakama Nation’s Response @2-3). The United States
24 appeared to concur, however, USBR 201B still shows the capacity at 233,461 acre-feet.

25 The total active capacities for the main reservoirs, as set forth in USBR 201B are:

26	Keechelus Lake Reservoir:	166,846 acre-feet
27	Kachess Lake Reservoir:	250,261 acre-feet
28	Cle Elum Lake Reservoir:	446,610 acre-feet
	Bumping Lake Reservoir:	38,768 acre-feet
	Rimrock Lake Reservoir:	216,850 acre-feet
	Clear Lake Reservoir:	5,300 acre-feet

2. *Instantaneous Quantity*

The Court did not award an instantaneous quantity for filling the reservoirs (Report, @23-

1 25). The United States concurs with this.

2 3. *Purpose of Use*

3 The confirmed purpose(s) of use include irrigation, domestic, power, and municipal use.
4 (Report @ 25-26.) The United States requested that industrial use be included on the water
5 rights. Prior to including this use, the Court requested additional evidence on this use. The
6 United States considers industrial use to include cooling water for fruit, log transport and
7 processing, concrete manufacturing and curing, fish hatcheries, manufacturing, and dust
8 control. Crammond RP-1 @ 69. Based on the evidence provided by the United States, water
9 has been historically used for industrial purposes at certain facilities.

10 The testimony on use addresses the questions regarding use of water. The United States
11 suggests the following condition be placed on its water rights instead of listing each specific
12 beneficial use: *Filling, detention, carryover, release and delivery of water to the United States*
13 *Department of the Interior, Bureau of Reclamation and entities authorized to receive water*
14 *from the Bureau of Reclamation.* The Court GRANTS this request. The Court believes this
15 better describes the general purpose of a reservoir and is not in conflict with the diversionary
16 water rights that have been previously confirmed. Each diversionary water right contains the
17 specific purpose to which water can be put to beneficial use.

16 4. *Priority Date*

17 The United States claims a March 5, 1902 priority date for 16,800 acre-feet in Lake
18 Kachess (see Amended Conditional Final Order RE: Cascade Irrigation District, July 13, 2006).
19 The Court GRANTS this request as it is in accordance with the Amended CFO for Cascade.

19 5. *Place of Use*

20 The confirmed place of use was *Yakima Reclamation Project*. Report @ 27. The United
21 States requests that the place of use be the *Yakima Basin*, as it believes the *Yakima*
22 *Reclamation Project* is not a functional constraint under either state or federal law. The
23 United States argues that the *Yakima Reclamation Project* has not been geographically defined.
24 As the project was intended (and is) operated as a unitary watershed, the United States believes
25 it can use water on the authorized lands within the *Yakima Basin*. See generally *Memorandum*
26 *Opinion RE: Warren Act Contracts*. Ecology requested clarification on how the change in
27 place of use will impact acreage and boundaries, specifically since part of *Kennewick Irrigation*
28 *District* is located outside of the *Yakima Basin*. The United States countered that there is no
defined boundaries for the *Yakima Reclamation Project*. A broader place of use description

1 will include the entire Kennewick Division within the place of use description. A CFO for
2 Kennewick Division was entered on October 16, 2001 based upon a settlement with Ecology.

3 At trial, the following place of use description appeared acceptable to the parties:
4 "Yakima Reclamation Project including the entire Yakima Basin." The Court confirms this
5 phrase as the place of use description for the water rights confirmed herein.

6 **6. Certificate Issuance**

7 The United States not only owns the reservoirs and associated water rights, but is
8 responsible for delivering water pursuant to state based water rights. Accordingly, the United
9 States requests that the water rights to the Yakima Project reservoirs be in the name of the
10 *United States Department of the Interior, Bureau of Reclamation on behalf of itself and other
11 entities to which it is required to supply water from storage.* The Court GRANTS this request.

12 **7. Conditions on Use**

13 The United States also requests that three conditions be placed on all of the Yakima
14 Project reservoir/storage water rights confirmed herein. There was no objection by the parties.

15 **a. Priority Date of the Stored Water**

16 The United States requests that the

17 The priority date of May 10, 1905 is for the right to store water. It does not address the
18 right to use water.

19 **b. Fill, Release and Refill of the Reservoirs**

20 The United States asks that it not be limited in its ability to store/refill the reservoirs.

21 In any given water year, the United States may fill, release from and refill this reservoir to
22 store and control available water without limitation by the static capacity above.

23 **c. Flood Control**

24 The United States also requested a right to flood control. The Court did not reach a
25 decision on this issue but recognized the use of flood water resulted in benefits to the basin.
26 Report @ 26. The United States' position is that flood control may not be a beneficial use of
27 water, but it must be managed and concurs that it provides a benefit to the basin. The United
28 States will evacuate the reservoirs to manage a significant amount inflow. This can occur in
both the winter and spring times. An inability to capture this flood water would affect project
operations. Crammond @ 61-64. The United States is also federally mandated to maximize
use of the storage facilities to provide flood control. Fanciullo @ 96. In light of this, the

1 United States asks that the following condition be placed on its water rights.

2 The United States may fill, release from and refill this reservoir for flood control
3 purposes.

4 The Court GRANTS the request and will include these three conditions on all the
5 certificates issued for the Yakima Project reservoirs.

6 **f. Additional Diversion and Storage Structures**

7 The United States asks the Court to award water rights for several smaller diversion
8 structures. Several structures predate the adoption of the Surface Water Code, Chapter 90.03,
9 adopted on June 6, 1917 and require no state issued certificate. For those that post-date the
10 1917 water code (Easton Lake, Roza dam, YTID dam and Prosser dam), the United States
11 claim that the existing permits/certificates for Kittitas, Roza, Tieton and Kennewick provide
12 the legal basis for these uses (USBR 11).

13 The Court concurs and has previously ruled on the applicability of RCW 90.03 as it
14 relates to the Yakima Project water rights. See *Memorandum Opinion Re: Warren Act*
15 *Contract Issues*, March 8, 1996; *Order RE: Warren Act Contract Issues*, September 18, 1996:

16 Except on the Yakama Indian Reservation, the water rights obtained by and through the
17 United States are to be determined by and under the provisions of R.C.W. 90.40.010-080,
18 and not under R.C.W. 90.03. Under R.C.W. Sections 90.03.250 and 90.03.460 and
19 R.C.W. 90.40.040 (which establishes the priority date of May 10, 1905), for the entire
20 Yakima Project, the application/permit/certificate process otherwise set forth in R.C.W.
21 90.03 does not apply to the United States Yakima Project. *Order Re: Warren Act Issues*,
22 page 10, ¶6, lines 8½-14.

23 The United States seeks a continuous season (October 1–September 30) for the facilities
24 and a May 10, 1905 priority date. It also asks that the conditions pertaining to priority date;
25 fill, release and refill; and flood control are to be included on the following reservoir rights.

26 The following is obtained from the testimony and declaration of Stephen K. Fanciullo and
27 corresponding exhibits (USBR 205 - 216). The water to be diverted is stored behind each of
28 the dams. The United States provided GIS photos for each structure. On the photo is an
outline of the functional reservoir area. The United States calculated the function operational
depths of the water using the “Pris-Model” along with engineering drawings to obtain the
volumes of water stored behind each dam. P. 112-115. The specific facilities are:

1. *Lake Easton Dam Storage*

This dam was completed in 1929 and is part of the Kittitas Division (KRD). Water from

1 the Yakima River is stored in Lake Easton. According to the Fanciullo Declaration, the dam is
2 located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 11, T. 20 N., R. 13 E.W.M.. According to USBR
3 201B, the location of the impounding structure is within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 11, T. 20 N.,
4 R. 13 E.W.M. Clarification is needed regarding the location of the structure. Normal storage
5 volume is 4,472 acre-feet with a total volume of 5,000 acre-feet and a maximum of 5,120 acre-
6 feet (1976). USBR 205.

6 2. *Roza Diversion Dam Storage*

7 This is part of the Roza Division (Roza) and is located on the Yakima River within the
8 NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32, NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, in T. 15 N., R. 19 E.W.M. It was
9 completed in 1939 and approximately 472 acre-feet are stored. USBR 207.

10 3. *Yakima-Tieton Dam Storage*

11 This 1908 dam impounds Tieton River water for the Tieton Division (YTID). It is
12 located within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30, T. 14 N., R. 15 E.W.M. and two acre-feet are
13 stored. USBR 208.

14 4. *Wapato Dam Storage*

15 The two dams were constructed in 1917 by the Bureau of Indian Affairs for the Wapato
16 Irrigation Project. Storage volume is 56 acre-feet and the dams are located on the Yakima
17 River within the NE $\frac{1}{4}$ and the SE $\frac{1}{4}$ (east bank dam) and the SW $\frac{1}{4}$ (west bank dam) of Section
18 17, T. 12 N., R. 19 E.W.M. USBR 5, USBR 209; Dr. Stuart Crane, RP-2 @ 32-33.

19 5. *Sunnyside Dam Storage*

20 This dam was rebuilt in 1907, impounds water from the Yakima River and storage
21 volume is 60 acre-feet. This is part of the Sunnyside Division. USBR 210. It is located within
22 the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, T. 12 N., R. 19 E.W.M.

23 6. *Prosser Dam Storage*

24 Prosser Dam is located on the Yakima River within the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 2, T. 8 N., R.
25 24 E.W.M. It was first built in 1904, and modified twice, in 1932-33 and again in 1956. It is
26 part of the Kennewick Division and Chandler system. The storage volume is 408 acre-feet.

27 7. *French Canyon Dam Storage*

28 French Canyon dam/reservoir is located on the North Fork Cowiche Creek. Water from
the North Fork is stored in the reservoir. French Canyon dam also serves as a re-regulating
reservoir using water from the Tieton River. These facilities were constructed in the 1980's.
Ecology approved the water right for French Canyon Dam through Report of Examination, R4-

1 26540. In addressing the water rights of Yakima-Tieton, the history of construction of this dam
2 was addressed. No right was confirmed by the Court as there was no water right certificate
3 associated with the dam. Report of the Court, Volume 16, @19, lines 8-17. The Court
4 confirmed a diversionary right to both the North Fork and Tieton River. See *Conditional Final*
5 *Order on Remand for Yakima-Tieton Irrigation District, Court Claim No. 1513*, May 10, 2001.

6 At the March 2006 hearing, Ecology's stated that no certificate is needed prior to the
7 Court confirming a right for French Canyon. The United States filed its Proof of Appropriation
8 form for this project with Ecology and the Court (USBR 215). The Yakama Nation took no
9 position on this issue as this dam is part of Yakima-Tieton existing facilities. The Court agrees
10 that this is the proper time for a right to be confirmed for French Canyon dam and reservoir and
11 there is evidence to support said confirmation (USBR 215).

12 The Court confirms a May 10, 1905 right to the United States Department of the Interior,
13 Bureau of Reclamation to continuously store water from the North Fork Cowiche Creek and
14 the Tieton River in French Canyon reservoir. The points of diversion are located within the:

- 15 1. SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, T. 14 N., R. 16 E.W.M. (North Fork Cowiche Creek).
- 16 2. SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30, T. 14 N., R. 15 E.W.M. (Tieton River).

17 The capacity of the reservoir behind French Canyon Dam is 1,265 acre-feet at maximum
18 pool elevation of 2,167 feet, with a one time maximum of 1,280 acre-feet. USBR 213.
19 However, in USBR 201B the capacity is listed at 1,265 acre-feet.

20 The Court GRANTS the United States request and confirms May 10, 1905 water rights
21 for each of the above storage reservoirs to the United States Department of Interior, Bureau of
22 Reclamation on behalf of itself and other entities to which it is required to supply water from
23 storage. The three conditions will be included on each right (see "7. Conditions on Use"
24 above). The season is October 1-September 30. The purpose mirrors the main reservoirs.

25 8. *Wapatox Dam Storage*

26 The Wapatox dam is located on the Naches River within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 36,
27 T. 15 N., R. 16 E.W.M. The power generation right for the Wapatox power plant was
28 addressed in Subbasin No. 19 (Lower Naches) pursuant to Court Claim No. 00496. An
October 4, 1904 water right was confirmed to Pacific Power and Light Company. A storage
right was not confirmed in the Subbasin Pathway. Any water storage behind Wapatox dam
may have held a 1904 or possibly a January 21, 1884 (Wapatox Ditch Company) priority date.

1 However, failure to be confirmed a right to store water in the Subbasin 19 proceedings results
2 in wavier of any right that may have existed upon entry of the Conditional Final Order. The
3 CFO for Subbasin No. 19 (Lower Naches) was entered on December 14, 1995.

4 The United States now claims a right with a May 10, 1905 priority date for storage of 9
5 acre-feet of water. However, it did not provided evidence to support such a right. The United
6 States did not purchase this water right from PacificCorp (dba Pacific Power and Light
7 Company) until March 10, 2003 (see Doc. #16,848). The United States held no interest in this
8 1904 water right until 2003. The May 10, 1905 withdrawal ended on December 31, 1951.
9 This Court recently ruled on the United States diverting Project (May 10, 1905) water into the
10 Wapatox Ditch: "The Court finds there is no legal basis for diversion of Project water into the
11 Wapatox Ditch for conveying irrigation water to the parties...." Order Pendente Lite RE:
12 Wapatox Power Plant, p. 3, lines 21½-22½. If the United States has no legal basis to divert
13 May 10, 1905 Project water into the ditch, then there is no 1905 water in the ditch to store
14 behind Wapatox Dam. The Court DENIES the United States claim.

13 **g. Power Based Water Rights**

14 The Court discussed at length the United States' claim to power generation at the Roza
15 and Chandler power plants. For the Roza power plant, a right was originally requested for
16 between 1,100 and 1,200 cfs and no annual quantity. For the Chandler power plant, the United
17 States originally requested a right to 1,500 cfs and 821,300 acre-feet per year. Additional
18 diversion evidence was needed prior to confirming the requested water rights. Report @27-54.

19 The United States also claimed a right to surplus waters. Additional evidence was
20 needed. The United States withdrew this request for both the Roza and Chandler power plants.

20 *1. Annual Quantity*

21 The United States requests that no annual quantity be confirmed for power generation for
22 a number of reasons. It operates the plants when there is surplus water to other needs (run-of-
23 the-river). Water is not specifically released from the reservoirs for power generation but is
24 generated by using existing (and previously allocated) Yakima River supplies. Water not put to
25 another beneficial use is returned directly to the river. The United States considers this to be
26 nonconsumptive. The United States not only takes into account the needs of the fish in the
27 bypass reaches, but also potential impact to water right holders. The United States believes it
28 has not yet generated the upper limit of power. Power is generated for use within Roza, at the
Upper Columbia Area Office/Yakima Field Office and within Kennewick. Surplus power from

1 both Roza and Chandler is marketed to Bonneville Power Administration for resale.
2 Crammond, RP-1 @66-68; Mark Pettit, RP-1 @149-153. The Court GRANTS the exception.

3 *2. Beneficial Use at the Roza Power Plant*

4 The Roza power plant is located about 10 mile downstream from the diversion point
5 within the Section 17, T. 13 N., R. 19 E.W.M. There are pumps along the Roza canal that are
6 operated with the power generated. USBR 257 is a computer drawing of the Yakima River at
7 Roza down to the UCA/YFO, the diversion dam, control gates, fish screens and bypass, canal
8 and power plant. The United States claims the instantaneous quantities should be based on
9 historic use and design capacity in the amount of 1,123 cfs and provided evidence in the form
10 of instantaneous diversion records from 1967 – 2003 and the Declaration of Mark Pettit (USBR
11 222 - 223, USBR 217). To obtain these diversion figures, Mr. Pettit used the peak power
12 generated in megawatts through use of a rating curve developed for Roza – accurate to an
13 estimated $\pm 5\%$. Again, no water is released from the reservoirs specifically for power
14 generation. The United States does not divert water during times of maintenance, repairs,
15 mossaing in the canal, and other reasons. Pettit @127.

16 A maximum of 1,123 cfs is authorized under Permit No. 1727, which ultimately led to
17 Certificate No. 8122. Calculated diversions have been at or near 1,123 cfs. Based on the
18 Pettit Declaration, it is reasonable to conclude that 1,123 cfs has been diverted during the
19 critical periods for evaluating relinquishment (1967 through 2003). Thus, the United States has
20 answered the Court’s concern regarding potential relinquishment (Report @27-32).

21 A right is confirmed to the United States Department of the Interior, Bureau of
22 Reclamation in the amount of 1,123 cfs from the Yakima River for power generation from
23 January 1 through December 31. The point of diversion is located at the Roza diversion dam,
24 located 950 feet S 3°30’ west (975 feet south and 75 feet west) from the northeast corner of
25 Section 32, being within the NE¼NE¼ of Section 32, T. 15 N., R. 19 E.W.M. in Kittitas
26 County. GPS is 120° 28’ 40.16”W; 46° 37’5.45”N. Place of use is the Roza Power Plant in
27 the NE¼NE¼ of Section 17, T. 13 N., R. 19 E.W.M. The priority date is May 10, 1905.

28 *3. Beneficial Use at the Chandler Power Plant*

The United States requests 1,539 cfs for power generation at Chandler, the maximum
amount diverted and safely conveyed through the system. The Court needed additional
diversion records prior to determining instantaneous quantity for Chandler. The United States
claims the instantaneous quantities should be based on historic use and design capacity, not

1 safe carrying capacity. Prior to 1956, the United States generated power at a plant located
2 closer to the Prosser Dam. No records exist for that plant. The United States provided
3 maximum diversion records for Chandler from 1965 through April 2005 (USBR 219). These
4 figures are also calculated from peak power generated in megawatts using the rating curve
5 unique to the Roza² installation (USBR 217 @p. 2, ¶3, l.17). The figures developed have a
6 margin of error of ±5%. USBR 217, p. 2, ¶3. Although Chandler has been in operation since
7 1956, no other records could be found. USBR 256 is a computer drawing of the Yakima River,
8 diversion dam, control gates, fish screens, canal, power and pumping plant. Pettit, RP-1 @131-
9 132. Again, based on the Pettit Declaration, it is reasonable to conclude that factoring in the
10 margin of error, 1,537 cfs has been diverted during the critical period to evaluate
11 relinquishment period (1967 through 2003). Again, no water is released from the reservoirs
12 specifically for power generation.

12 The United States appears to claim an April 4, 1899 right to 210 cfs from January 1
13 through December 31. USBR 201B. However, the historic evidence showed the appropriation
14 was the subject of limiting agreements and the water right perfected for 210 cfs from *April 1*
15 *through October 31*. See Report @33-39; 50-52. The United States did not offer any new
16 argument as to why it should not be bound by the 1906 and 1910 limiting agreement signed by
17 the Prosser Falls group³ and which limited the season to April 1 through October 31 (Report
18 @42-46). The limiting agreements are clearly written and restrict water use to the irrigation
19 season. There was nothing in the agreements regarding use of water outside the irrigation
20 season. DOE 419, DOE 420, DOE 421. The United States is, as successor to this 1899
21 appropriation, bound by the limiting agreements. See *Order RE: Limiting Agreements*,
22 October 14, 1993; *Amended Order RE: Limiting Agreements*, January 3, 1994; and *Additional*
23 *Order RE: Limiting Agreements (Cascade Irrigation District, Ellensburg Water Company, and*
24 *West Side Irrigating Company)*, May 12, 1994. See also *United States v. West Side Irrigating*
25 *Company*, 230 Fed. 284 (1916). The United States could only acquire what the Prosser Falls
26 group had the right to sell: An April 4, 1899 right to 210 cfs from April 1 through October 31.

27 The Court DENIES the United States claim to expand the season of use to include November

28 ²Petit Declaration (USBR 217 @p. 2, ¶3, ln. 17) indicates that the Chandler figures are derived from a rating
curve “unique to the Roza installation”. The Court would ask the United States to verify these figures are unique
to the Chandler installation (as suggested in the U.S. exceptions @p. 15, lns. 13-14) or provide explanation why it
used Roza prior to CFO.

³Prosser Electric Co., Prosser Co., Prosser Falls Land & Power Co, Taylor/Kemp & E.W.R/Hanna Taylor.

1 1 through March 31 under the 1899 water right.

2 The Court confirms two Yakima River rights for nonconsumptive power generation: 1)
3 an April 4, 1899 right to divert 210 cfs from April 1 through October 31, 2) a May 10, 1905
4 priority to divert 1,329 cfs from April 1 through October 31 and to divert 1,539 cfs from
5 November 1 through March 31. The point of diversion for both rights is located approximately
6 1,350 feet west and 350 feet south from the northeast corner of Section 2, being within the
7 E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ /W $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2, T. 8 N., R. 24 E.W.M. The GPS
8 location is 119°35'29.46 W, 46°16'8.58 N. The place of use is the Chandler Power Plant
9 within the NE $\frac{1}{4}$ of Section 17, T. 9 N., R. 26 E.W.M. The right shall issue to the United States
Department of the Interior, Bureau of Reclamation

10 4. *Conditions*

11 To memorialize the “run-of-the-river” operation of the reservoirs by the United States in
12 managing its power plants, it requests that the certificates that issue for power generation
13 include certain conditions called “subordination clauses”. These conditions are also included
in the Catalog (USBR 201B). For the April 4, 1899 water right at Chandler, the condition is:

14 Reclamation will not release water from storage or divert water to the detriment of
15 irrigation, municipal or industrial water rights with priority dates senior or equal to May
16 10, 1905 or migratory fish in order to generate electric power at Chandler hydroelectric
plant.

17 A similar condition would apply to the May 10, 1905 rights at both Chandler and Roza:

18 Reclamation will not release water from storage or divert water to the detriment of co-
19 equal priority irrigation, municipal or industrial water rights or migratory fish in order to
generate electric power at {Chandler or Roza} hydroelectric plant.

20 Roza objects to including the condition on the power generation water right. The power
21 generation right has a priority date of May 10, 1905 and is co-equal to other May 10, 1905
22 priorities. Only in Permit No. 1727 is there a condition that gives preference to Roza’s
23 irrigation right over the power generation (see section 4. *Permit No. 1727 Condition-Roza*)
24 Roza relies on the power generated to run its pumps and to ensure its economic viability.
25 Although the United States has not yet had to release water from storage for power, Roza
objects to the run-of-the-river characterization of water use.

26 The conditions requested by the United States are related to management of the power
27 rights and the reservoirs. Although Roza may have a significant interest in the power
28 produced at Roza, the power generation right still belongs to the United States. If the United

1 States elects to manage the Yakima Project in the manner set forth by its witnesses (and
2 apparently does that) it has such authority. Additionally, the run-of-the-river operation would
3 be the manner in which the right has been perfected and put to beneficial use. Management of
4 the Yakima Project reservoirs rests with the United States.

5 The Court GRANTS the United States request to include the subordination clause on its
6 power generation rights at both Roza and Chandler.

7 The United States also requests that the condition pertaining to TWSA be included on all
8 three power generation rights:

9 The source of water for this water right is the total water supply available, defined in the
10 1945 Consent Judgment as "that amount of water available in any year from natural flow
11 of the Yakima River and its tributaries, from storage in the various Government
12 reservoirs on the Yakima watershed and from other sources."

13 The Court GRANTS this request.

14 *5. Permit No. 1727 Condition--Roza*

15 Permit No. 1727 preceded Surface Water Certificate No. 8122 and issued for both
16 irrigation and domestic uses within Roza Irrigation District and power use at Roza power plant.
17 It contained a provision regarding the maximum amount of water that could be diverted. The
18 United States asks that a slightly different version be included on the power generation right:

19 Within the over-all limit of 2,200 cubic feet per second on maximum combined diversion
20 for irrigation and power use (power use under Certificate of Adjudication Water right No.
21 _____) at the Roza canal headworks, diversions for Roza Division irrigation purposes shall
22 be given preference. Subject to the foregoing qualification and to the availability of water
23 and limitations on canal capacity, maximum diversions up to 1,123 cubic feet per second
24 may be made for power purposes under Certificate of Adjudication Water Right No.
25 _____⁴.

26 The difference between the original Permit provision and the above is reference to Roza's
27 right to divert 1,193 cfs and 393,000 acre-feet per year. As the Court discussed in its
28 Supplemental Report for Roza (April 5, 1994), it was not proper to include the provision on
Roza's water right (Supp. Report, @7-9). The Court will include the above provision on the
United States right to power generation at Roza.

6. Other Reclamation Power Facilities

The United States also identified other power facilities not originally claimed in its 1995

⁴The "blanks" will be filled in by Ecology upon assignment of Certificate of Water Right number.

1 case-in-chief. Those additional power facilities are:

2 a. Wapatox Power Plant

3 This plant was acquired from Pacificorp in 2002. The water rights associated with this
4 plant were addressed through Subbasin No. 19 (Lower Naches River). The power plant has
5 been dismantled and removed. The United States placed a portion of the power right into the
6 State trust program. See Order Pendente Lite RE: PacifiCorp Wapato Power House, November
7 14, 2002 (Doc. 16,324) and subsequent Order Pendente Lite RE: Bureau of Reclamation's
8 Wapatox Power Plant Water Right, April 11, 2006 (Doc. 19,462).

9 b. Amon Hydropumping Plant on the Amon Wasteway

10 This unit is located within the Kennewick Division. No diversion of additional water
11 occurs to run the Amon plant. The United States asks the use of water at the Amon Plant be
12 viewed as nonconsumptive and incidental to the water already diverted for irrigation and other
13 uses by Kennewick. The Court concurs. This incidental use requires no separate right nor will
14 one be confirmed for this incidental use of water with the Kennewick Division.

15 c. Other Power Generation Facilities

16 There are other power plants along irrigation systems in the Yakima basin that are similar
17 to the Amon plant. The Court's ruling on Amon extends to those plants as well and as long as
18 the circumstances and fact pattern remain the same. No additional water is diverted for this
19 purpose and the use is incidental to the already existing agricultural use/irrigation supply.

20 h. Reserve and Transferred Works

21 The United States claims several rights for works under the Bureau's control. At the
22 Court's request, the United States provided GPS information on the points of diversion for
23 certain facilities. Ecology had requested evidence of diversion to support the quantities
24 claimed. The United States does not measure the diversions so no records are available.
25 Ecology now believes that the quantities requested are reasonable. The Court agrees.

26 The United States investigated the sites and determined historic use. The United States
27 provided the testimony and declarations of Tony Hargroves, Sr. (USBR 227, 229, 231) and
28 maps to assist the Court. The United States provided testimony and declaration of Thomas
Leonard for the Upper Columbia Area/Yakima field Office (USBR 233) along with maps.
GPS location were obtained from USBR 201B.

1. *Kachess Dam Generator Building*

The Kachess Dam generator building is now supplied water from a well and not the

1 original source, a spring. The United States withdrew this claim. (RP-2 @8.)

2 2. *Easton Dam Residence*

3 The United States requests a right be awarded for the residence located at Easton Lake
4 Dam. The residence was constructed in 1931 and water used continuously since that time.
5 One acre of lawn irrigated around the dam tender's residence. There are outside spigots and
6 irrigation is done with garden hoses/sprinklers. Water is diverted from the Yakima River/Lake
7 Easton via gravity flow from a tap on the outlet works of the dam at a point located within the
8 SE¼NW¼ of Section 11, T. 20 N., R. 13 E.W.M. The GPS location is 121°11'17.15" W,
9 47°14'30.69" N. The United States requests that 0.02 cfs and 2 acre-feet per year be confirmed
10 for irrigation from April 1 through October 31. These quantities mirror those awarded
11 throughout Subbasin 2 (Easton). The place of use is identified on USBR 228, a map and is
12 within the SE¼NW¼ of Section 11, T. 20 N., R. 13 E.W.M. The residence is located at the
13 right-hand corner and just outside the square. The irrigated acre lies within the square.

14 The United States now uses a well to supply water to the residence. Ecology asks the
15 Court to require the United States to comply with RCW 90.03.380 to change the point of
16 diversion from a spring to a well for the domestic use. Although the United States is willing to
17 file a change application if necessary, it also argues that it can use the well under the "permit
18 exemption" under the RCW 90.44.050. RCW 90.44 is commonly called the ground water
19 code. To legally use ground water in the state a person must receive a permit with the
20 following exception, in pertinent part:

21 That any withdrawal of public ground waters for stockwatering purposes, or for the
22 watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or
23 for single or group domestic uses in an amount not exceeding five thousand gallons a day.
24 . . . is and shall be exempt from the provisions of this section, but, to the extent that it is
25 regularly used beneficially, shall be entitled to a right equal to that established by a permit
26 issued under the provisions of this chapter. . . .

27 Based on statements by the United States, the Court concludes that it will rely on RCW
28 90.44.050 for its domestic supply. Groundwater is not within the scope of this adjudication.
Thus, the United States only needs to file a change application (with either Ecology or the
Kittitas County Conservancy Board) if it elects to pursue a right through the adjudication.

 The Court confirms a right to the United States Department of the Interior, Bureau of
Reclamation, to divert from Yakima River via Lake Easton 0.02 cubic feet per second and 2
acre-feet per year for irrigation of one acre from April 1 through October 31. Both the place of

1 use and point of diversion are located within the SE¼NW¼ of Section 11, T. 20 N., R. 13
2 E.W.M. The GPS location is 121°11'17.15" W, 47°14'30.69" N. To assist with identifying the
3 irrigated acre, a copy of USBR 228 is attached to this Supplemental Report and will be
4 included in the Conditional Final Order. The priority date is May 10, 1905.

5 3. *Bumping Dam Garage*

6 In 1910 a residence was constructed at this site. In 1948 it was replaced with the garage.
7 Water at the Bumping Dam garage has been historically used for continuous domestic supply
8 and industrial purposes. The source of water is an unnamed spring located within the
9 NE¼NW¼ of Section 23, T. 16 N, R. 12 E.W.M. The GPS location is 121°18'2.74" W,
10 46°52'29.35" N. The spring is identified on USBR 230 by a small red cross just north of the
11 place of use. Spring water is conveyed via gravity flow through a ¾-inch pipe to the garage.
12 The Bumping Dam garage is also located within the NE¼NW¼ of Section 23. The place of
13 use and point of diversion are identified on USBR 230. This area is within Subbasin No. 16
14 (Upper Naches) and the water duties for in-house domestic supply are 0.01 cfs and 1 acre-foot
per year. Report of Referee, Volume 9, April 15, 1991. The United States seeks an additional

15 0.5 acre-feet for industrial uses at the garage.
16 The Court confirms a right to the United States Department of the Interior, Bureau of
17 Reclamation for continuous domestic supply and industrial from an unnamed spring in the
18 amounts of 0.01 cfs and 1.5 acre-feet per year. The authorized place of use is within
19 NE¼NW¼ of Section 23, T. 16 N, R. 12 E.W.M. The point of diversion is located within
20 NE¼NW¼ of Section 23, T. 16 N, R. 12 E.W.M. with the GPS location at 121°18'2.74" W,
46°52'29.35" N. A copy of USBR 230 is attached to this Supplemental Report and will be
21 included in the Conditional Final Order. The priority date is May 10, 1905.

22 Water is also used for fire suppression. No right will be granted for this purpose as the
23 *Stipulation RE: Water Use for Fire Suppression*, December 12, 1996, covers this use.

24 4. *Tieton Dam Warehouse*

25 The United States is no longer requesting a right to domestic and industrial plus an additional
26 0.5 acre-foot for these uses. The Court's original confirmation will stand. Report @58-59.
27 The Court confirms a right to divert water from the Tieton River to the United States,
28 Department of the Interior, Bureau of Reclamation in the amounts of 0.07 cfs and 7 acre-feet
for irrigation of 3½ acres. The point of diversion is identified on USBR 232 with a red cross
and is located within the NW¼NE¼ of Section 31, T. 14 N., R. 14 E.W.M. The GPS location

1 provided by the United States is 121°7'48.92" W, 46°39'22.28" N. The place of use is also
2 located on USBR 232 and within the NW¼NE¼ of Section 31, T. 14 N., R. 14 E.W.M. The
3 priority date is May 10, 1905. USBR 232 is attached to this Supplemental Report and will be
4 attached to the Conditional Final Order.

5 Water is also used for fire suppression. No right will be granted for this purpose as the
6 *Stipulation RE: Water Use for Fire Suppression*, December 12, 1996, covers this use.

7 5. Upper Columbia Area Office/Yakima Field Office (UCA/YFO)

8 Water is used for irrigation of two acres of lawns and industrial supply. USBR 234 is a
9 photograph of the UCA/YFO. The two irrigated acres are within the red-boxed area which is
10 within the SW¼NE¼ of Section 17, T. 13 N., R. 19 E.W.M. The point of diversion off the
11 penstock is the upper (northern) black dot on USBR 234. The point of diversion from the
12 Yakima River is at Roza Dam or 950 feet, S 3°30' west (approximately 975 feet south and 75
13 feet west) from the northeast corner of Section 32, T. 15 N., R. 19 E.W.M. USBR 201B.
14 Kittitas County. GPS location is 120°28'42.36" W, 46°36'55.40" N. USBR 258 is a map of
15 the office compound area as well as the domestic water lines. Historically water has been
16 diverted for industrial purposes, but would now be so used in an emergency only. A well
17 provides water for domestic purposes and the primary source for the industrial uses. Ecology
18 asks that the United States be directed to file a change application for an additional point to
19 include the well. The United States does not now appear to be asking for inclusion of a well on
20 the water rights but will be operating pursuant to RCW 90.44.050. The United States initially
21 asked to modify the season of use and quantity but it does not now appear to be doing so.
22 USBR 201B. The quantities and season found in Report at p. 56 will stand.

23 The Court confirms a May 10, 1905 right to the United States Department of the Interior
24 Bureau of Reclamation to divert from the Yakima River 0.032 cfs and 10 acre-feet per year for
25 irrigation of 2 acres and industrial within the SW¼NE¼ of Section 17, T. 13 N., R. 19 E.W.M.
26 The point of diversion is located 950 feet, S 3°30' west (approximately 975 feet south and 75
27 feet west) from the northeast corner of Section 32, T. 15 N., R. 19 E.W.M. in Kittitas County.
28 GPS is 120°28'42.36" W, 46°36'55.40" N. USBR 234 is attached to this Supplemental Report
and will be included in the Conditional Final Order. Season is April 1 – October 31.

There is an infiltration gallery at the Roza wasteway that is used to supply fire
suppression or firefighting-related purposes. The Court's *Stipulation RE: Water Use for Fire
Suppression*, December 12, 1996, covers this use and no separate water right shall be granted.

1 6. *Chandler Power Plant Park*

2 A right is confirmed to the United States Department of the Interior Bureau of
3 Reclamation to divert 0.01 cfs and 2½ acre-feet per year for irrigation of 0.5 acre from April 1
4 through October 31. The point of diversion from the Yakima River is 1,350 feet south and
5 1,350 feet west from the northeast corner of Section 2, being with the E½NE¼NW¼NE¼
6 and/or the W½NW¼NE¼NE¼ of Section 2, T. 8 N., R. 24 E.W.M. The GPS location provided
7 by the United States is 119°35'29.46" W, 46°16'8.58" N. Complying with the Court's request,
8 the United States provided the place of use for the Chandler Park: Within the NE¼SE¼ of
9 Section 17, T. 9 N., R. 26 E.W.M. USBR 235 is a map depicting this place of use and is
10 attached to this Supplemental Report and will also be attached to the Conditional Final Order.
The priority date is May 10, 1905.

11 7. *Sunnyside Dam Residence*

12 The point of diversion given for the Sunnyside Dam residence in USBR 201B is within
13 the NW¼SW¼ of Section 28, T. 12 N., R. 19 E.W.M. However, based on the evidence from
14 the Sunnyside Division's evidentiary hearing the Court believes it to be location within the
15 NW¼SE¼ of Section 28 (Report @5). That will be the quarter, quarter description used for
16 this right. The place of use in USBR 201B is also within the NW¼SW¼ of Section 28. Since
17 the dam tenders residence is located near the diversion point, the Court also believes USBR
201B to be in error and the place of use should be within the NW¼SE¼ of Section 28.

18 The Court confirms a right to the United States Department of the Interior Bureau of
19 Reclamation to divert from the Yakima River 0.002 cfs and 0.66 acre-foot per year for
20 irrigation of 0.15 acre from April 1 through October 31. The point of diversion is located at the
21 Sunnyside Dam headworks approximately 130 feet south and 1500 feet west from the east
22 quarter corner of Section 28, being within the NW¼SE¼ of Section 28, T. 12 N., R. 19
23 E.W.M. Complying with the Court's request, the United States provided the place of use for
24 the residence which is within the NW¼SE¼ of Section 28, T. 12 N., R. 19 E.W.M. USBR 237
25 is a map depicting this place of use and is attached to this Supplemental Report and to the
Conditional Final Order. The priority date is May 10, 1905.

26 8. *Swauk Siphon Residence*

27 The United States offered USBR 236 in response to the Court's request at p. 59 of the
28 Report. In the Report, the Swauk Siphon residence is identified as KRD's Yakima River
siphon residence (pp. 57-58). As a result, a water right is confirmed to divert 0.04 cfs and 9.2

1 acre-feet per year from the Yakima River for irrigation of 1.84 acres at the Swauk Siphon
2 residence located within the SW¼NW¼ of Section 20, T. 19 N., R. 17 E.W.M. USBR 236 is a
3 map depicting this place of use and is attached to this Supplemental Report and will be
4 included in the Conditional Final Order. The point of diversion is located approximately 3,130
5 feet south 38° east (2,500 feet south and 1,800 feet east) from the northwest corner of Section
6 11, being within the SE¼NW¼ of Section 11, T. 20 N., R. 13 E.W.M. (KRD's diversion
point). Season of use is April 1 through October 15. The priority date is May 10, 1905.

7 9. *Cle Elum Dam Residence*

8 The United States withdrew its claim for the Cle Elum Dam residence as water is
9 supplied from a well. (Report @55, Exceptions @20.)

10 10. *Condition*

11 The United States requested that the following condition be included on the water rights
12 confirmed for the reserved and transferred works:

13 The source of water for this water right is the total water supply available, defined in the
14 1945 Consent Judgment as “that amount of water available in any year from the natural
flow of the Yakima River and its tributaries, from storage in various Government
reservoirs on the Yakima watershed and from other sources.”

15 The Court GRANTS this request and this condition will be placed on all confirmed
16 Reserved and Transferred Works water rights.

17 11. *Measurements*

18 Upon issuance of a Conditional Final Order the United States shall be required to keep
19 records of all future uses of water and make them available to Ecology as needed and in
20 accordance with the orders of the Court. See *Order Requiring Metering, Measuring, and*
21 *Reporting Requirements, All Subbasins (1-31) in Benton, Kittitas, and Yakima Counties,*
22 *September 15, 2005 and Order Pendente Lite Regarding Metering, Measurement and*
Reporting Requirements, October 13, 1994.

23 i. **Warren Act and Other Contracts**

24 The United States makes a claim for water rights pursuant to several contracts and
25 agreements. There are also several general issues to resolve.

26 1. *Ownership/Trustee Language*

27 The United States requests that any water right confirmed for the Warren Act contract
28 *pursued herein* contain the language “on behalf of” instead of “as trustee for” or “in trust for”.

1 The Court GRANTS the request of the United States.

2 2. *1945 Consent Decree/TWSA Condition*

3 The United States requests the following condition be placed on its contract water rights:

4 The source of water for this water right is the total water supply available, defined in the
5 1945 Consent Judgment as “that amount of water available in any year from natural flow
6 of the Yakima River and its tributaries, from storage in the various Government
7 reservoirs on the Yakima watershed and from other sources.”

8 The Court GRANTS the request but only for water rights awarded herein. The Court will
9 not modify any contract right which is subject to an existing CFO. If the United States
10 negotiates a resolution with each contractee and provides the Court with a written confirmation
11 co-signed by each right holder, then this condition can be included in that specific water right.

12 3. *Flood Water Condition*

13 The United States asks the Court to include the following condition on those rights
14 confirmed for use of flood water:

15 Flood water is subject to availability at the discretion of the Yakima Field Office Manager
16 as established in Paragraph 17 of Kittitas Reclamation District v. Sunnyside Valley
17 Irrigation District (Civ. 21, E.D. Wash.)(January 31, 1945).”

18 Similar to the condition regarding “Total Water Supply Available” the Court will not
19 unilaterally do so. If the United States negotiates a resolution with each contractee holding a
20 right to use flood water and provides the Court with a written confirmation co-signed by each
21 right holder, then this condition can be included in that specific water right.

22 4. *Claims Asserted by the United States*

23 The United States claims several rights based on contracts/agreements. Similar to rights
24 confirmed under the “Reserved and Transferred Works” section, the United States shall keep
25 records of all future water uses beginning no later than April 1 following entry of the
26 Conditional Final Order. See *Order Requiring Metering, Measuring, and Reporting*
27 *Requirements, supra*, dated September 15, 2005.

28 The United States also included the 1945 Consent Decree/TWSA condition on each of
these claims in USBR 201B. As this is the proper time to do so, the Court will direct Ecology
to include said condition on the following confirmed water rights.

a. Bruff-Boise Cascade Corporation Warren Act Contract

The United States withdraws its claim for a water right pursuant to this contract.

1 b. United States Forest Service Memorandum of Verbal Agreement
2 (Naches Ranger Station)

3 The United States originally claimed a right for the Naches Ranger Station and the Court
4 requested further evidence to support the claim. The United States provided the Declaration of
5 William Garrigues, Hydrologist for the Naches Ranger District, a map of the point of diversion
6 (identified with a small red cross) and a map of the place of use. See USBR 238, USBR 239(a)
7 and USBR 201B. The claimed point of diversion is problematic. The point of diversion from
8 the Naches River is set forth in USBR 201B as 2,500 feet north and 2,100 feet west from the
9 southeast quarter corner of Section 1, being within NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, T. 16 N., R. 14
10 E.W.M. The location as described in USBR 201B would place the point of diversion within
11 the NW $\frac{1}{4}$ SE $\frac{1}{4}$, not the NW $\frac{1}{4}$ SW $\frac{1}{4}$. According to the Garrigues Declaration water is diverted
12 from the Emerick ditch which matches the Lentz Report (CE-1). CE-1 @65 has water diverted
13 from a point within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 1 via the Emerick Ditch. Subbasin 16 rights
14 confirmed for use of the Emerick Ditch show water is diverted from a point located 700 feet
15 south and 1200 feet east from the center of Section 1, within Government Lot 6 or
16 approximately within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ in Section 1, T. 16 N., R. 14 E.W.M. USBR 239(a)
shows the NE $\frac{1}{4}$ of Section 2 and a portion of the NW $\frac{1}{4}$ of Section 1. There is a point of
diversion marked with a red "x" however it is located in Section 2, not in Section 1.

17 Similar problems exist with the place of use. In the 1940 agreement (USBR 49) the place
18 of use is within the SE $\frac{1}{4}$ of Section 1, not the W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ (USBR 201B). The W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$
19 of Section 1 would be located west or above the actual point of diversion for the Emerick
Ditch. USBR 239(b) shows the place of use within the SE $\frac{1}{4}$ of Section 1.

20 Historic use has been addressed (USBR 238; CE-1 @65). Approximately 0.1 cfs and
21 17.8 acre-feet is diverted from the Naches River and conveyed to the Chinook Pass Work
22 Center. Water use has occurred since the early 1900's. Approximately 1400 feet of open ditch
23 and 600 feet of buried-two inch steel pipe are used to irrigate six acres of pasture area. Stock
24 have been pastured on the property as well. Water use occurs from July 1 through September
30. The priority date is May 10, 1905.

25 As can be seen, there are significant differences in the previous record and the current
26 claim. Those differences must be addressed so the Court can properly analyze the claim.

27 c. Muoth Warren Act Contract

28 The claim of the United States regarding this contract is discussed in the Report at p. 62

1 (Muoth-Muoth/Funkhouser). Several questions needed to be answer. The Lentz Report stated
2 that billing of this contract goes to two parties: Joseph Muoth in the amounts of 22.9 acre-feet
3 and Nina Funkhouser for 13.1 acre-feet. The only evidence provided pertains to the Muoth
4 portion and in the form of the Declaration of Joseph Eugene Muoth (USBR 240).

5 Water is diverted from Cowiche Creek at a point located 1,170 feet north and 490 feet east
6 from the W¼ of Section 16, being within the SW¼NW¼ of Section 16, T. 13 N., R. 18
7 E.W.M. and conveyed 150 feet via a pipeline to the place of use within SW¼NW¼ of Section
8 16. The description is obtained from the Muoth Declaration and is as follows:

8 STATE ADD TO YAKIMA NO.2: LOT 8 EX THPT LY S OF FOL DESC LN BEG
9 1163.7 FT NOF W¼ COR, TH S 41°05'E 407.7 FT, THS 24°33'E 124 FT, TH S
10 45°18'E 73.7 FT FT M/L TO E LN SD TR 8 & END OF SD LN EXBEG NW COR
11 SW¼ NW¼, TH S 15.88 FT, THN 25°27'E 64.84 FT, TH N 48°49'W 32.57' FT TH S
12 59.33 FT TO BEG. See USBR 240.

11 No objection was received to the above description and it shall be included on the water right.

12 The United States claims a right to divert from Cowiche Creek 0.22⁵ cfs and 10 acre-feet
13 per year for irrigation of 2.5 acres of lawn, landscaping and pasture, and incidental domestic
14 uses. The property is known as the Cowiche Canyon Road property. The instantaneous
15 quantity is based on the nozzle size which allows for delivery of 3.5 gallon per minute per
16 sprinkler (103.5 gpm or 41.4 gallons per acre). USBR 240. Although the instantaneous quantity
17 may be higher than normal, the annual quantity claimed is 10 acre feet per year, or 4 acre feet
18 per acre irrigated, which is reasonable for this area (Subbasin No. 18 [Cowiche]).

19 The Court confirms a right to the United States, Department of the Interior Bureau of
20 Reclamation on behalf of Casper⁶ Muoth or successors to divert from Cowiche Creek 0.22 cfs
21 and 10 acre-feet for irrigation of 2.5 acres and incidental domestic uses. The priority date is
22 May 10, 1905. The diversion point is approximately 1,170 feet north and 490 feet east from
23 the W¼ of Section 16, being within the NW¼NW¼ of Section 16, T. 13 N., R. 18 E.W.M.
24 The place of use is as described above. Water may be used from April 1 through October 31.
25 USBR 241(b) is attached to this Supplemental Report and will be attached to the Conditional
26 Final Order.

25 No claim or evidence was presented on the Nina Funkhouser portion of this contract and

27 ⁵USBR 201B @63, line 6, has 0.23 cfs. In his declaration, Mr. Muoth claims 0.22 cfs.

28 ⁶USBR 201B @63, line 3, has the name "Jasper Muoth". However, the original contract was with Casper Muoth (USBR 50).

1 no right will be confirmed.

2 d. Stonebraker-Payne Warren Act Contract

3 The Court sought additional evidence regarding this contract (Report @62-63). The
4 United States provided the Declarations of Frank W. Payne (owner), USBR 242; Burt Thayer
5 (adjacent landowner and former lessee), USBR 243; A.W. Mynar, Jr. (neighboring landowner
6 and former lessee), USBR 244; and John Greer (lessee), USBR 245; as well as USBR 201B.
7 The place of use is shown on USBR 246 (aerial photo).

8 The United States claims a right to divert 0.4 cfs and 160 acre-feet per year from the
9 Yakima River to irrigate 40 acres of alfalfa and orchard grass. Water is diverted via Fogerty
10 Ditch at a point 2,500 feet north and 1,610 feet west of the southeast corner of Section 10,
11 being within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10, T. 17 N., R. 18 E.W.M. The point of delivery of the
12 water is at the head of the Damman mill race which as described is fairly close to the Fogerty
13 Ditch diversion point. The lateral turnout from the Fogarty Ditch follows Riverbottom Road
14 for about 600 feet and is also within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10. The land was originally
15 flood irrigated. In 1996, Mr. Payne installed two wheel lines which is the current irrigation
16 system. The United States claims water is used from April 1 through October 31, which is the
17 same as found in the Report of Referee RE: Subbasin No. 12 (Shushuskin Canyon), Volume 7,
18 @40. The claimed season is different than the contract which is May 1 through September 15
19 (USBR 52). The place of use is the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, T. 17 N., R. 18 E.W.M.

20 This claim is supported by the evidence provided and a right is confirmed based on the
21 above. The priority date is May 10, 1905. USBR 246 (aerial photo) is attached to this
22 Supplemental Report and will be to the Conditional Final Order. The right shall issue to the
23 United States Department of the Interior, Bureau of Reclamation on behalf of Frank Payne.

24 e. City of Cle Elum Water Supply Contract

25 The United States and the City of Cle Elum filed several exceptions to the Report.

26 1. The City's contract with the United States is not a Warren Act contract as
27 characterized in the Report. It is a water supply contract authorized under the 1939
28 Reclamation Act. This is so noted by the Court.

29 2. There is a typographical error at page 64, line 17. Cle Elum's former Mayors last
30 name is spelled Berndt. This is noted by the Court.

31 3. The Court requested a copy of Ecology's change application regarding Court
32 Claim No. 1293. This change did not pertain to the United States' rights claimed under Court

1 Claim No. 2276. USBR 252 is Ecology's decision and will be referred to as the ROE. In
2 addition to the existing point of diversion, Ecology authorized two additional points of
3 diversions in its ROE. The following locations and information was obtained from the ROE
4 and Report of Referee:

5 Original Point of Diversion from the Cle Elum River: Within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section
6 11, T. 20 N., R. 14 E.W.M. (350 feet north and 2380 feet west of the southeast corner of
7 Section 11). After the new diversion facilities are operational, the applicant intends to
8 terminate the use of the original diversion and make the associated conveyance system
9 inoperable. ROE @2; Report of Referee, Volume 3, Subbasin No. 1, @17.

10 The two new approved points are:

11 No.1. East bank of the Cle Elum River within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30, T. 20
12 N., R. 15 E.W.M. (Cle Elum River). ROE @2 and 3.

13 No. 2. The Yakima River on the south bank from within the N $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ and
14 S $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 27, T. 20 N., R. 15 E.W.M. (Yakima River). ROE @ 2 - 3.

15 However, the points of diversion identified in the draft contract (USBR 248) are:

16 11. The United States shall furnish water to an intake or intakes of the city's water
17 supply system as notified by the city, except as hereinafter in this article provided, to one of
18 both of the intakes of the city's new water supply system; said intakes to be located:

19 (a) Immediately adjacent to the east bank of the Cle Elum River in the
20 SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, Township 20 North, Range 15 East, Willamette Meridian at a point
21 approximately North 30E East from the South corner of said Section 11 (construction
22 scheduled to be completed at the end of 2005), and

23 (b) Within the Yakima River in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 27, Township 20
24 North, Range 15 East, Willamette Meridian at a point approximately 340 feet North and 1,150
25 feet West of the Southwest corner of said Section 27.

26 The Court has the following concerns regarding the locations described in the ROE and in
27 the contract. The original point of diversion described in the ROE is in the same quarter-
28 quarter as point (a) of the contract: SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11. The ROE states that use of the
original point was to be terminated upon completion of the new location on the Cle Elum
River. Yet, in the contract, point (a) was to be constructed by 2005. Additionally, the Range is
different between the ROE and contract. The ROE has Range 14 East and the contract location
is Range 15 East. USBR 201B mirrors the contract. In the ROE, diversion No. 1, the new
point on the Cle Elum River, is within Section 30. The contract contains no diversion location
in Section 30.

Yakima River: Although ROE new diversion point No. 2 and contract point (b) are both

1 described in Section 27, the quarter-quarter locations are not the same. In the ROE it's within
2 the $N\frac{1}{2}SE\frac{1}{4}SW\frac{1}{4}SE\frac{1}{4}$ and $S\frac{1}{2}NE\frac{1}{4}SW\frac{1}{4}SE\frac{1}{4}$ compared to the contract location of the
3 $SE\frac{1}{4}SE\frac{1}{4}$. USBR 201B mirrors the contract.

4 Due to the inconsistencies between the described locations, the Court is not able to
5 finalize confirmation of a water right. The annual quantity, which appeared to be holding up
6 the final contract, has been resolved (see "f" below). Wherever the actual diversions are
7 located, they must be described correctly in the contract. If the ROE is in error, the parties
8 must also notify the Court. Thus, a corrected, executed contract must be provided to the Court
9 and made part of the record *prior to entry* of the CFO.

10 4. The City states the United States, not the City, is claiming the right, with the City
11 providing evidence in support of that claim. This is also noted by the Court.

12 5. The Court provisionally approved Cle Elum's water right subject to presentation
13 of a contract. The parties have provided an unsigned contract (USBR 248) along with the
14 City's Resolution authorizing the Mayor's signature (USBR 249). USBR 248 does not yet
15 contain an annual quantity in light of the exceptions. Quantity has been decided herein. Errors
16 in the draft contract have been identified. The parties shall provide the Court a fully executed
17 contract *prior to entry* of a Conditional Final Order.

18 6. The United States claims a right to an additional 102 acre-feet per year for a total
19 of 593 acre-feet per year with a May 10, 1905 priority date. The City provided the Declaration
20 of James C. Leonhard, Director of Public Works (USBR 247), which supports the United
21 States' claim for the additional water. Ecology supports this request and asks the provision be
22 modified accordingly. The Court GRANTS the United States claim for additional water with
23 original provision will be modified to include the additional 102 acre-feet.

24 7. Purpose of Use

25 The purpose of use in the contract is municipal supply from January 1 through December
26 31 (continuous). That is also the purpose of use confirmed by the Court (Report @72). See
27 also USBR 201B.

28 8. Place of Use

There is no place of use in the contract (USBR 248). The place of use originally claimed
and approved in the Court's Report is within the City of Cle Elum and the Laurel Hill
Memorial Park Cemetery (cemetery located within the $NW\frac{1}{4}SW\frac{1}{4}$ of Section 27, T. 20 N., R.

1 15⁷ E.W.M). DE 12 reflects the place of use and the service area is surrounded by a black
2 dashed line. The Court was unable to include Town of South Cle Elum in the place of use
3 confirmation for the reasons so stated in the Report (@72).

4 USBR 201B contains what appears to be a different place of use description (as does the
5 ROE for Claim 1293). However, having received no exception to the place of use ruling in its
6 Report, the place of use will be the City of Cle Elum and the Laurel Hills Memorial Park
7 Cemetery (described above). It does not include the Town of South Cle Elum.

8 9. Court Claim No. 1293

9 The City is authorized to divert 3 cfs and 1,110 acre-feet per year from the three
10 municipal supply points of diversion with a June 30, 1896 priority date. See USBR 252;
11 Report of the Referee, Subbasin No. 1 (Cle Elum Lake), Volume 3, June 15, 1988 and
12 Conditional Final Order, June 9, 1989.

13 10. Summary

14 The Court can only provisionally confirm a water right for 3 cfs and 593 acre-feet per
15 year for continuous municipal supply to the United States Department of Interior, Bureau of
16 Reclamation on behalf of the City of Cle Elum. The place of use is the City of Cle Elum, and
17 the Laurel Hill Memorial Park Cemetery (located within the NW¹/₄SW¹/₄ of Section 27, T. 20
18 N., R. 15 E.W.M). DE 12 reflects the place of use -- the service area is surrounded by a black
19 dashed line. The priority date is May 10, 1905. The right shall contain the following provision:

20 The maximum quantity allowed under this May 10, 1905, water right and the City's water
21 right dated June 30, 1896 shall be no more than 6 cfs and 1,693 acre-feet per year.

22 No later than January 7, 2007, the United States shall provide to the Court the locations of
23 the currently used points of diversion from the Yakima River and Cle Elum River. The United
24 States shall also provide a corrected and executed contract. This contract shall be assigned a
25 new exhibit number by the Clerk.

26 f. Measurement of Water Use—All Contracts/Agreements

27 Upon issuance of a Conditional Final Order the United States shall be required to keep
28 records of all future water use and make them available to Ecology as needed and in
accordance with the orders of the Court. See *Order Requiring Metering, Measuring, and
Reporting Requirements, All Subbasins (1-31) in Benton, Kittitas, and Yakima Counties,*

⁷As corrected from Report @72, 73.

1 September 15, 2005 and *Order Pendente Lite Regarding Metering, Measurement and*
2 *Reporting Requirements*, October 13, 1994.

3 **III. SUMMARY**

4 There are a limited number of issues still to be settled prior to issuance of a Conditional
5 Final Order. The United States has until January 8, 2007 to submit evidence in support of
6 those claims for which a right could not be confirmed, for Court drafting errors only and
7 comments on the proposed CFO. Other parties will have until January 22, 2007 to provide
8 responses. The United States may reply by January 31, 2007. Based on the evidence the Court
9 will determine if another hearing is needed or if the record is sufficient to confirm rights for the
10 remaining claims. If sufficient, a signed CFO will be issued to the parties.

11 Dated this 4th day of December, 2006.

12 
13 Sidney P. Ottem, Court Commissioner

- 14 Attachments A-USBR 228
15 B-USBR 230
16 C-USBR 232
17 D-USBR 234
18 E-USBR 235
19 F-USBR 236
20 G-USBR 237
21 H-USBR 241(b)
22 I-USBR 246
23
24
25
26
27
28

ATTACHMENT A - USBR 228



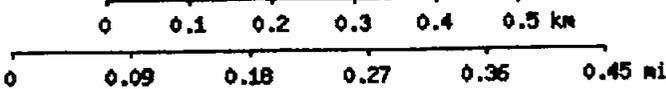
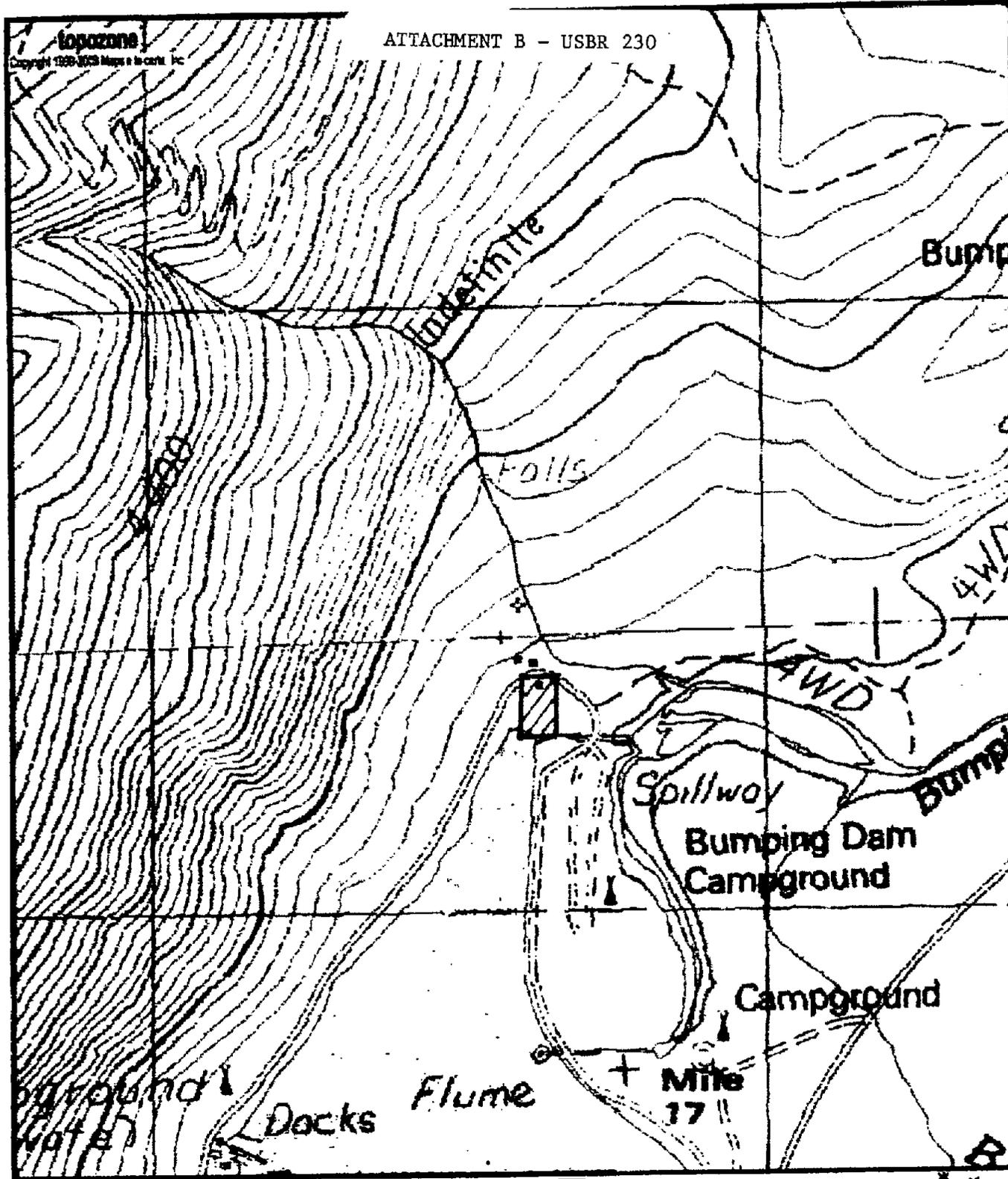
Easton Dam Residence



1.0 Acres within the Designated Area

Sec 11 T20N R13E WM

77-2-01434-5 DATE 3/15/2006
 WA Dept of Ecology VS ACQUAVELLA, ET AL
 PI _____ DI USBR 228
 PE _____ DE USBR 228



Map center is UTM 10 629503E 5192715N (WGS84/NAD83)

Goose Prairie quadrangle

Projection is UTM Zone 10 NAD83 Datum

M=17.721

G=1.241

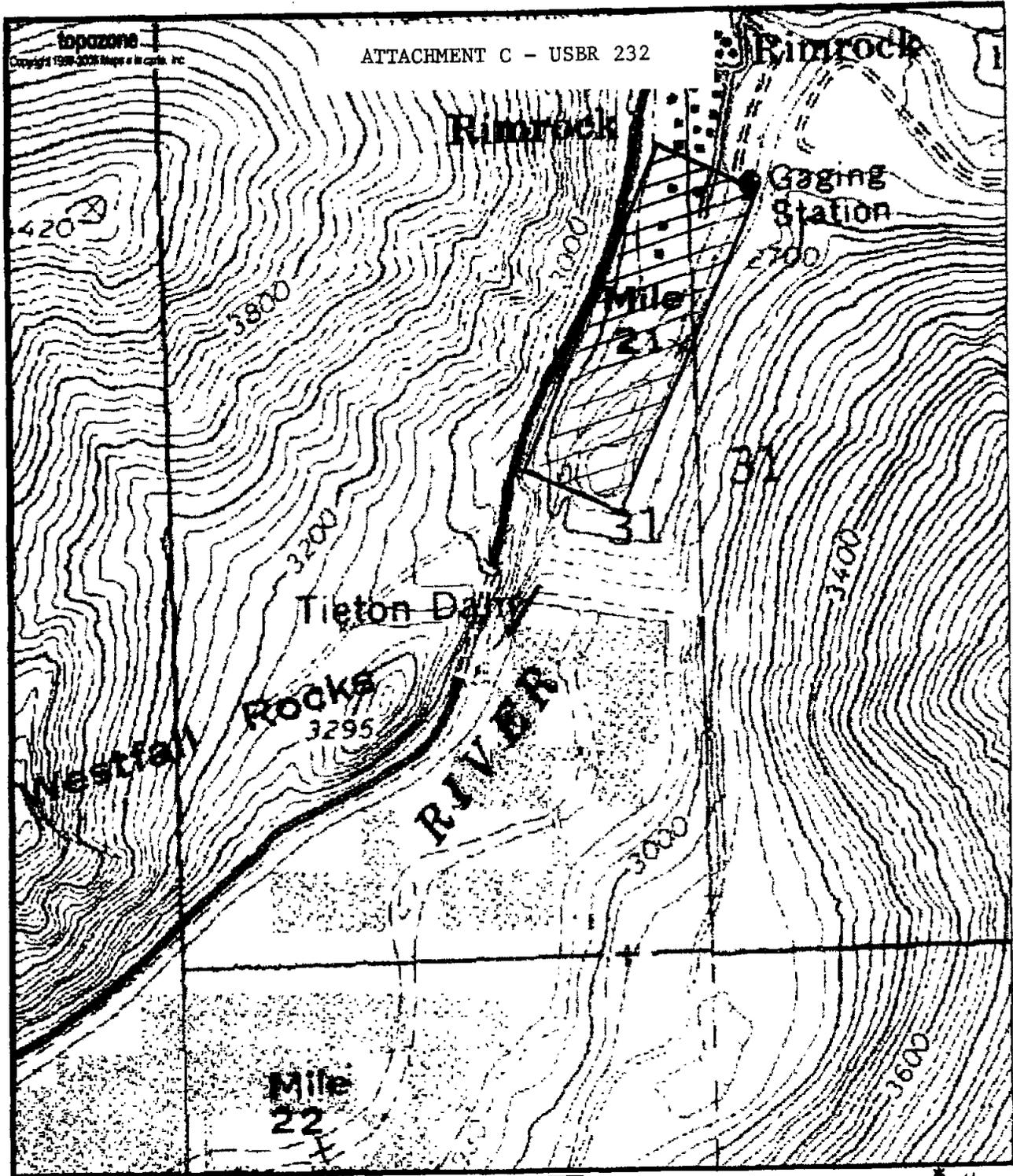
LEGEND



0.5 ACRES within the designated area. + indicates point of diversion

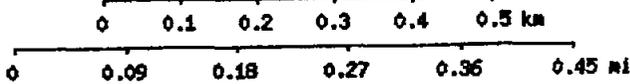
TIETON DAM WAREHOUSE

SEC 31 T14N R14E WM



ATTACHMENT C - USBR 232

topozone
Copyright 1998-2008 Maps & More, Inc.



Map center is UTM 10 643058E 5168696N (WGS84/NAD83)

Rimrock Lake quadrangle

Projection is UTM Zone 10 NAD83 Datum

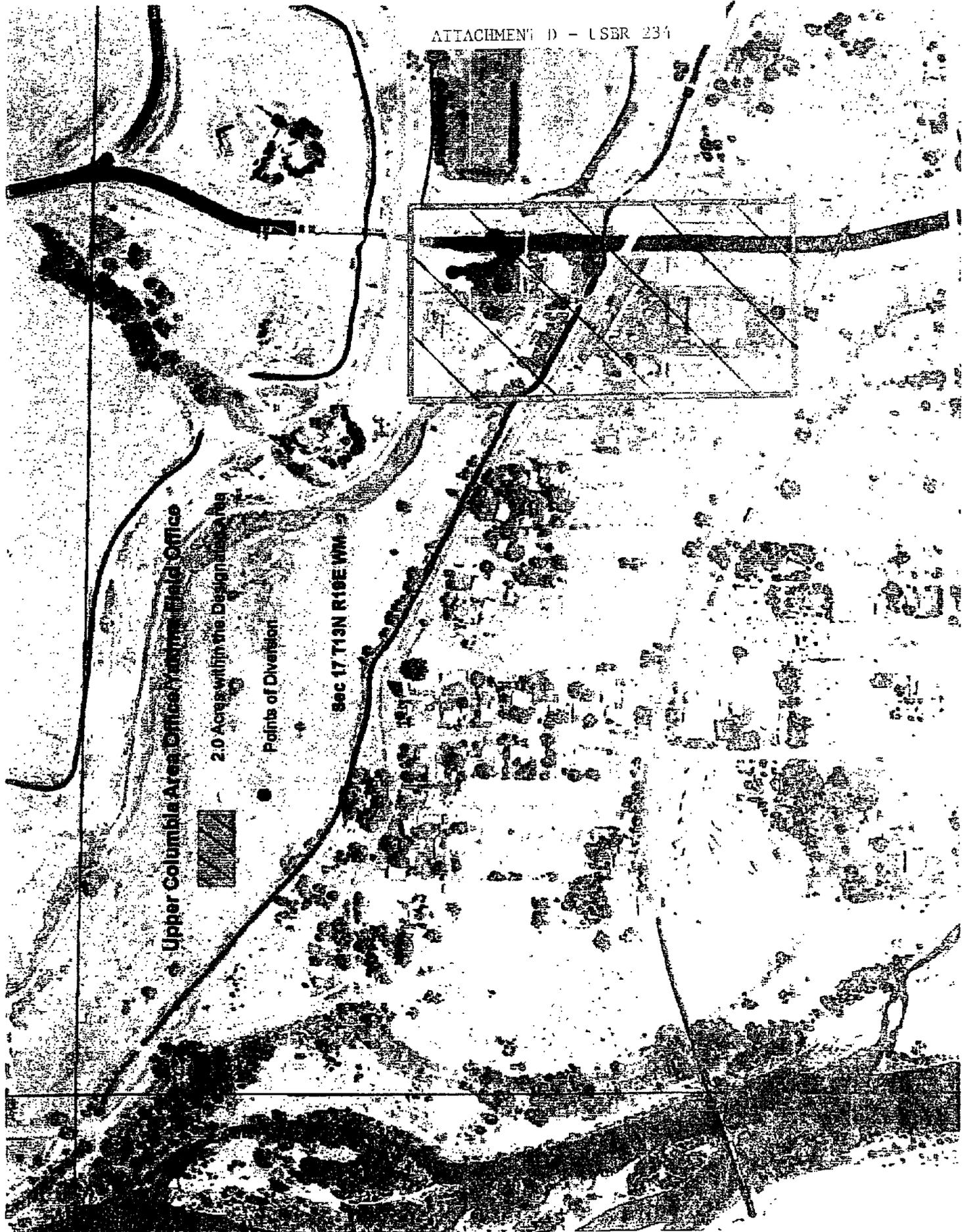


3.5 ACRES within the designated area + point of diversion

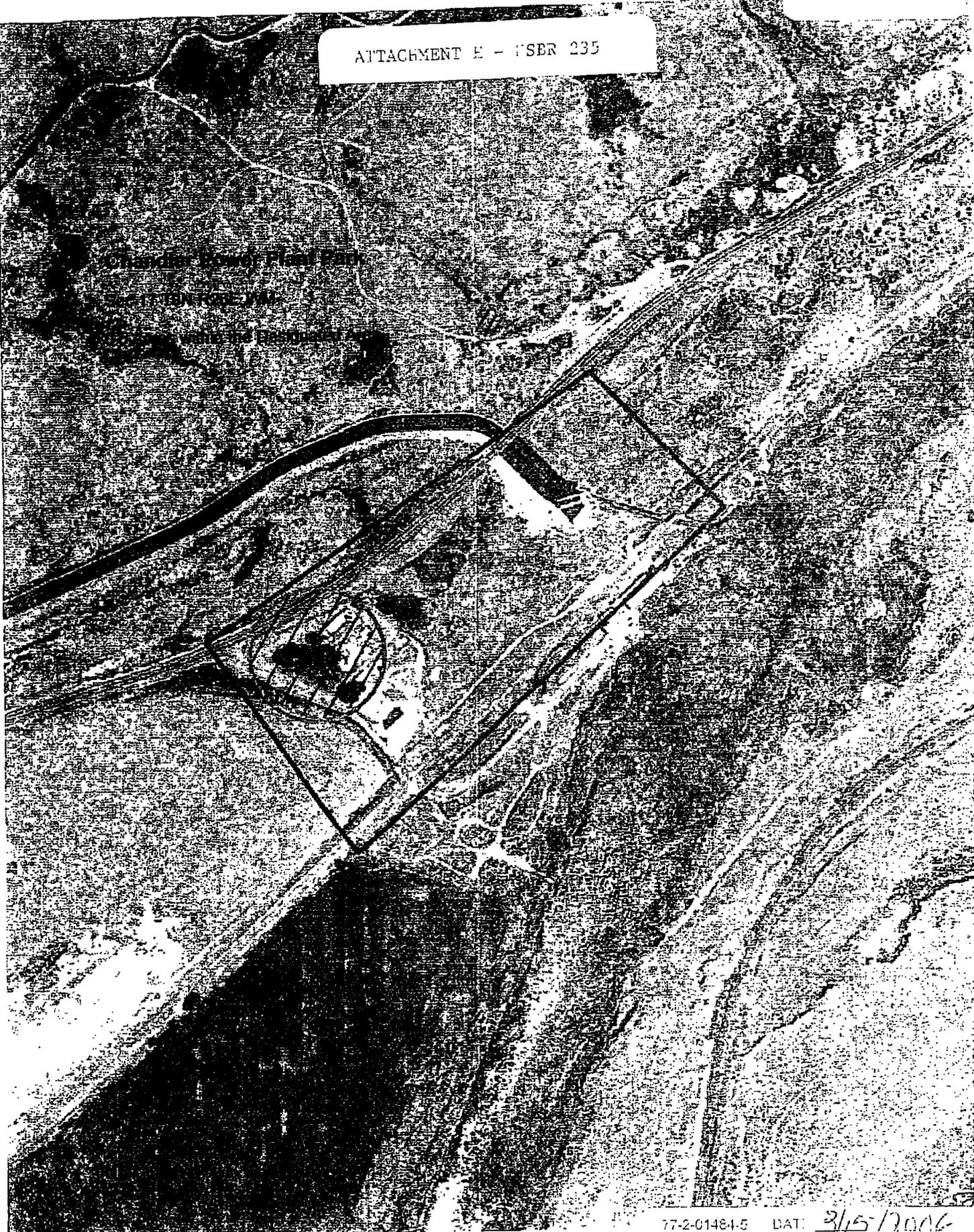
<http://www.topozone.com/print.asp?z=10&n=5168696.00016911&e=643058.000013628...>

12/15/2005

ATTACHMENT D - USBR 234



ATTACHMENT E - USBR 235



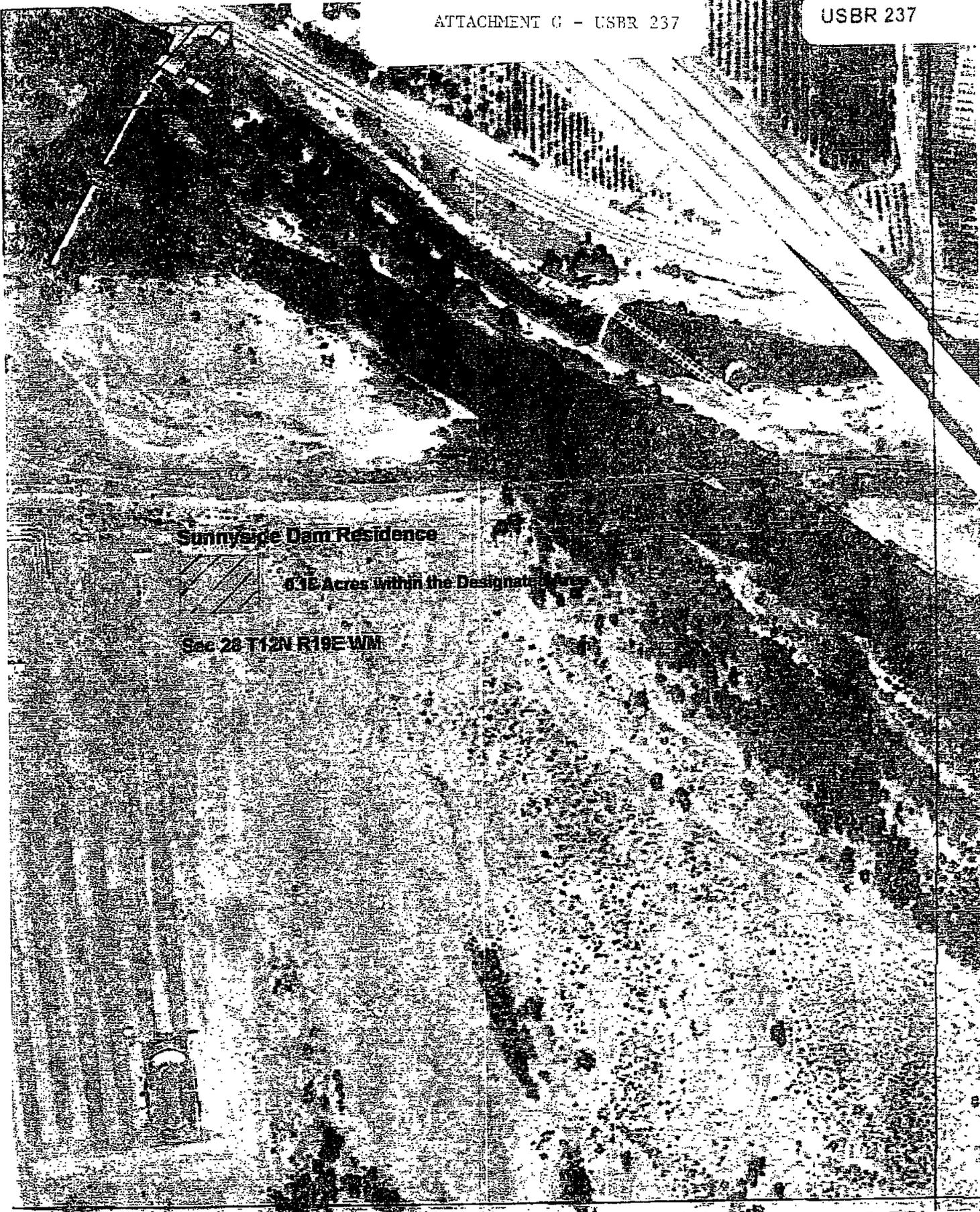
77-2-01484-5 DATE: 3/15/2006
 WA Dept. of Ecology VS ACCUAVILLA ET AL
 PI _____ DI USBR 235
 PE _____ DEL USBR 235

Sec 20 R19N T17E W4M

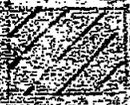


Swauk Siphon Residence
1.84 Acres within the Designated Area

77-3-01484-5 DATE 3/15/2006
WA Dept of Ecology VS ACQUAFELLA, ET AL
PL _____ DI USBR 236
PE _____ DE USBR 236



Sunnyside Dam Residence



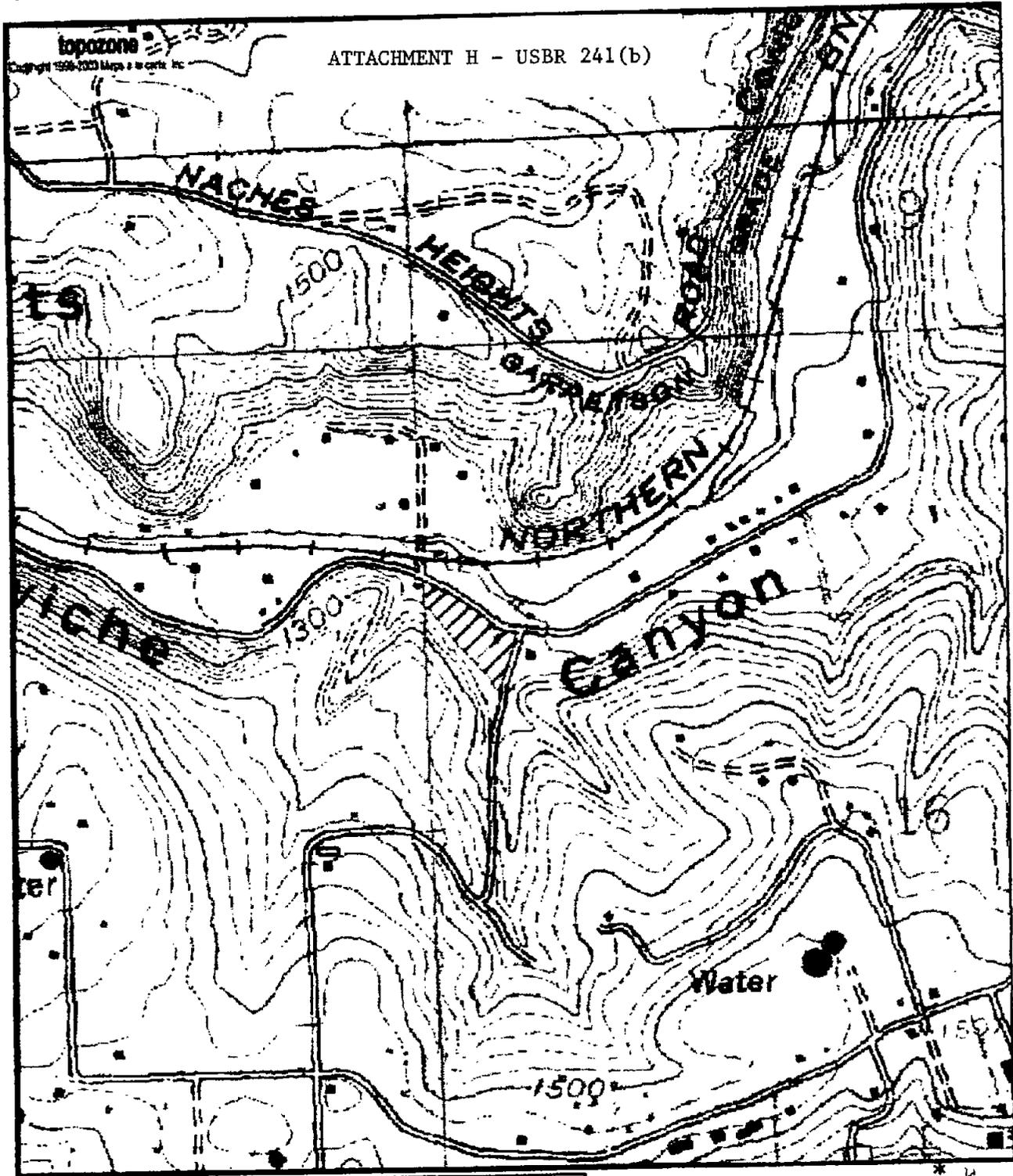
636 Acres within the Designated Area

Sec 28 T12N R19E WM

77-2-01484-5 DATE 3/15/2006
 WA Dept of Ecology VS ACQUAVELLA, ET AL
 FI _____ BY USBR 237
 PE _____ ED USBR 237

MUOTH WARREN ACT CONTRACT

SEC 16 T13N R18E WM



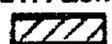
Map center is UTM 10 684385E 5165532N (WGS84/NAD83)

Yakima West quadrangle

Projection is UTM Zone 10 NAD83 Datum

M=17.464
G=1.751

POINT OF DIVERSION

 2.5 Acres within the designated area.

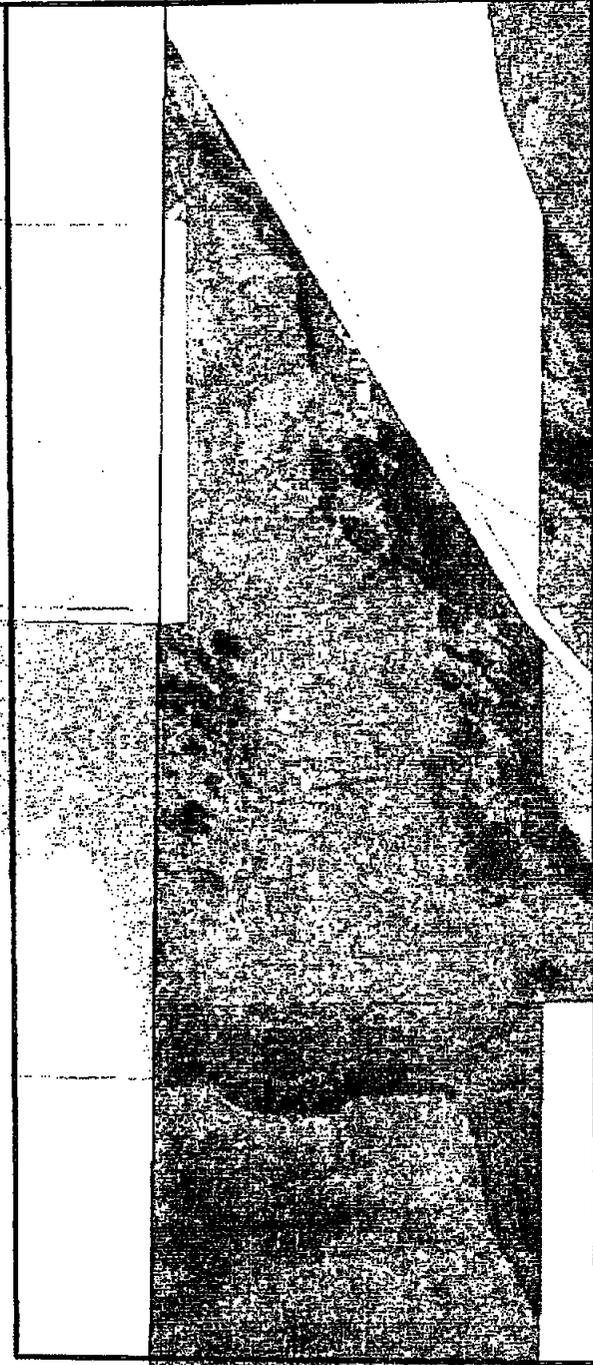
<http://www.topozone.com/print.asp?z=10&n=5165532.00018068&c=6843>

77-2-01484-5 DATE: 3/15/2006
 WA Dept of Ecology VS ACQUAVELLA ET AL
 PI _____ DI USBR 241(b)
 PE _____ DE USBR 241(b)

Payne Warren Act Contract

40.0 Acres within the Designated Area

Sec. 14 T7N R18E WM



77-2-01484-5 DATE 3/15/2006
WA Dept of Ecology VS ACQUAVELA, LT AL
PI _____ DI USBR 246
PE _____ DE USBR 246