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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, IN AND FOR YAKIMA COUNTY
KIM EATON
KIM EATON, YAKIMA COUNTY CLERK

IN THE MATTER OF THE DETERMINATION)
OF THE RIGHTS TO THE USE OF THE)
SURFACE WATERS OF THE YAKIMA RIVER)
DRAINAGE BASIN, IN ACCORDANCE WITH)
THE PROVISIONS OF CHAPTER 90.03,)
REVISED CODE OF WASHINGTON,)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)

NO. 77-2-01484-5

Plaintiff,

CONDITIONAL
FINAL ORDER AS A FINAL
JUDGMENT PURSUANT TO
CR 54(b) AND RAP 2.2(d)
AND PRETRIAL ORDER NUMBER
8 AS AMENDED

vs.

JAMES J. ACQUAVELLA, et al.,

Defendants.

YAKAMA INDIAN NATION
COURT CLAIM NOS. 2276
AND 7253 (AMENDMENT)

THIS MATTER has come on regularly before the Court with the Yakama Indian Nation and the United States on behalf of the Yakama Indian Nation having had its evidentiary hearing May 16, 1995. Charles E. O'Connell, Jr., attorney for the United States Department of Justice and Jeffrey S. Schuster, attorney in the Yakama Indian Nation's Office of Legal Counsel represented the defendant Yakama Indian Nation. Appearing on behalf of the plaintiff, Department of Ecology, was Mary E. McCrea, Assistant Attorney General. Charles C. Flower, attorney, represented defendant Sunnyside Division. Thomas A. Cowan, attorney, represented defendant Roza Irrigation District. John P. Gilreath, attorney,

Conditional Final Order:
Yakama Indian Nation
Water Right - 1

11,913

Handwritten initials and date: "Hue" and "9/12/96"

1 represented defendant Kittitas Reclamation District. J. Eric Gustafson
2 and Jeffrey R. Cutter, attorneys, represented Yakima Reservation
3 Irrigation District. Lawrence E. Martin, attorney, represented numerous
4 major claimant irrigation districts and canal companies. Jeffrey
5 Slothower, attorney, represented numerous subbasin water users.

6 This Court filed its Report of the Court Concerning the Water
7 Rights for the Yakama Indian Nation, Volume 25, on November 13, 1995
8 (hereinafter "Report"). Thereafter, the Court held the hearing for
9 exceptions on April 11, 1996. The Court, after reviewing the exceptions
10 and other materials filed, and after having heard argument and being
11 fully advised, filed its Supplemental Report of the Court Concerning the
12 Water Rights for the Yakama Indian Nation, dated June 21, 1996
13 (hereinafter "Supplemental Report"). This Court now enters this
14 Conditional Final Order based upon said initial Report of the Court and
15 Supplemental Report of the Court.

16 This Conditional Final Order will ultimately be incorporated into
17 a final decree that determines and integrates all of the rights of all
18 of the parties in this adjudication, at which time it shall be forwarded
19 to the Director of the Department of Ecology for issuance of
20 Certificates of Adjudicated Water Right. However, unlike other
21 claimants in this adjudication, the Yakama Indian Nation's certificate
22 shall indicate that their water right is a federally reserved right and
23 not subject to state regulation.

24 This Court having considered all memoranda and affidavits filed by
25 interested parties, legal and factual arguments of counsel, and

Conditional Final Order:
Yakama Indian Nation
Water Right - 2

1 documentary evidence as it relates to legal and factual issues arising
2 therein, and for good cause appearing, herein enters the following
3 Order:

4 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the final decree
5 shall set forth the following in regards to the Yakama Indian Nation,
6 Court Claim Nos. 2276 and 7253:

7 1. In addition to the water rights set forth in this
8 Conditional Final Order, the final decree shall contain the decisions as
9 to the Yakama Indian Nation's water right as set forth in the Amended
10 Partial Summary Judgment Entered As Final Judgment Pursuant To Civil
11 Rule 54(b), dated November 29, 1990, affirmed Ecology v. Yakima
12 Reservation Irrig. Dist., 121 Wn.2d 257, 850 P.2d 1306 (1993), and the
13 water rights established in the Final Order Re: Treaty Reserved Water
14 Rights At Usual and Accustomed Fishing Places, dated March 1, 1995. The
15 point of diversion of the Nation's diversion rights from the Yakima
16 River for its prorata share of the 720 c.f.s., the 350,000 acre-feet and
17 the flood water during the irrigation season shall be into either the
18 New Reservation Canal (SW 1/4 of Section 17, T.12N., R. 19 E.W.M.) or
19 the Old Reservation Canal (NE 1/4 NE 1/4 SW 1/4 of Section 28, T. 12 N.,
20 R.19 E.W.M.. The amount diverted into each shall be subject to the
21 historic canal capacity of each canal. The lands to which these water
22 rights pertain are as contained on pages 56-61 of the Report, Volume 25.
23 The two contracts by which the Yakima Reservation is provided 350,000
24 acre feet of irrigation water are similar to, but are not Warren Act
25 contracts. The allocation of the contractually provided irrigation

Conditional Final Order:
Yakama Indian Nation
Water Right - 3

1 water on the Reservation is a duty of the Secretary of the Interior.

2 2. The Yakama Indian Nation enjoys a federally reserved,
3 Treaty-based right, to an undiminished instream flow for Satus, Simcoe
4 and Toppenish Creeks to support fish and other aquatic life. This water
5 right carries a priority date of time immemorial. In all other
6 naturally occurring streams, ponds, and springs on the reservation, the
7 Nation enjoys a right to 0.25 cubic feet per second (cfs) for purposes
8 of wildlife and stock watering. This water right is senior to all
9 diversionary rights within the Yakama Indian Reservation.

10 3. The Yakama Indian Nation enjoys the following federally
11 reserved, Treaty-based irrigation water rights from Toppenish, Simcoe
12 and Satus Creeks.

13
14 a. Future and Idle Lands

15 <u>Area</u>	16 <u>Acreage</u>	17 <u>Annual Requirement</u> <u>Acre-feet</u>
18 Toppenish/Simcoe	19,466.5	70,051
19 <u>Satus</u>	13,329.0	55,930
20 Total	32,795.5	125,981

21 The diversion requirements and place of use for the future and idle
22 lands is more specifically set forth in Attachment D appended to the
23 Report. These future and idle lands carry a water right for an
24 instantaneous diversion of 724 cfs as more specifically set forth in
25 Supplemental Attachment "A" appended to the Supplemental Report. The
points of diversion for irrigation of these lands are set forth in
Supplemental Attachment "B" of the Supplemental Report. The purpose of

Conditional Final Order:
Yakama Indian Nation
Water Right - 4

1 use is irrigation and domestic uses. The water right carries a priority
2 date of June 9, 1855.

3 **b. Presently irrigated lands**

4	Annual		
5	Requirement		
6	<u>Area</u>	<u>Acreage</u>	<u>Acre-Feet</u>
7	Toppenish Creek	1,888.0	11,360
8	Simcoe Creek	1,351.0	8,322
9	Local Springs	18.2	115
10	<u>Satus Creek</u>	387.3	2,386
11	Total	3,626.3	22,453

12 The diversion requirements and place of use for the presently
13 irrigated lands is more specifically set forth in Attachment E appended
14 to the Report. These presently irrigated lands carry a water right for
15 an instantaneous diversion of 102 cfs as more specifically set forth in
16 the Supplemental Report, p. 16. The points of diversion for irrigation
17 of these lands are set forth in Supplemental Attachment "C" of the
18 Supplemental Report. The purpose of use is for irrigation and domestic
19 uses. The water right carries a priority date of June 9, 1855.

20 **c. Tapscott and Double Z lands**

21 The Yakama Indian Nation enjoys a federally reserved, Treaty-based
22 water right for the lands known as the "Double Z Ranch" (Claim No. 2204)
23 and the "Tapscott Claim" (Claim Nos. 2527 and 1256).

24 For the Double Z Ranch, the water right shall be appurtenant to
25 parcels #1 and #2, a total of 160 acres in the North 1/2 of the
Southwest 1/4 of Section 20, T. 10 N., R. 19 E.W.M. and the South 1/2 of

1 the Northwest Quarter of Section 29, Township 10 North, Range 19 E.W.M..
2 The instantaneous diversion shall be no more than 15 cfs and only during
3 October 1 through April 1. The purpose of use shall be for stockwater
4 and wildlife watering. The point of diversion shall be from Toppenish
5 Creek within the South 1/2 of the Northwest Quarter of Section 29,
6 Township 10 North, Range 19 E.W.M.. This equals an annual diversion of
7 5,414 acre feet. The date of priority shall be June 9, 1855.

8 As for the Tapscott Claim, the Court confirms the following right
9 from Satus Creek:

- 10 (1) Instantaneous diversion - 3 c.f.s. April 1
11 through June 30; 1.56 c.f.s. July 1 through
12 October 31
- 13 (2) Annual diversion - 220 acre-feet
- 14 (3) Place of use - 52 acres in the Satus Ranch
15 Block No. 9, Lots 23, 24, 25, 26, 38, 39, 40,
41 and Parcels A, B, and C in Sections 25, 26,
35, 36, T. 8 N., R. 18 E.W.M..
- 16 (4) Season of Use - April 1 through October 31
- 17 (5) Purpose of Use - Irrigation, stock water and
18 lawn and garden
- 19 (6) Priority Date - June 9, 1855
- 20 (7) Point of Diversion - Approximately the
21 NE corner of the SE1/4NE1/4, Section 3, T. 7
N., R. 18 E.W.M.

22 Additionally, a right is confirmed for purposes of stockwatering
23 from two water holes and a sump on the place of use as described above.

24 **d. Stockwater rights**

25 The Yakama Indian Nation enjoys a federally reserved, treaty based

Conditional Final Order:
Yakama Indian Nation
Water Right - 6

1 right to numerous sites that serve as stockwatering locations. The
2 locations of those rights are contained within Attachment "B" of the
3 Affidavit of Loren Gurney (US-217) and the Affidavit of David Eddington
4 (YIN-41-42). In addition to those sites, the Court also confirms a
5 stockwater right at those locations set forth in YIN-259 inasmuch as
6 they do not overlap with those in either YIN-42 or US-217 Attachment "B"
7 All stockwater sites carry a priority date of June 9, 1855.

8 4. In partial satisfaction of the Yakama Indian Nation's
9 treaty reserved water right, the Wapato Irrigation Project, a division
10 of the Bureau of Indian Affairs of the U.S. Department of the Interior,
11 shall be entitled to divert up to 18,000 acre-feet of flood water from
12 the Yakima River starting February 15, through June 30. The
13 instantaneous diversion limit shall be 1,000 cfs. The point of
14 diversion shall be at the headworks of the Wapato Irrigation Project
15 located at the SW 1/4 of Section 17, T. 12 No., R. 19 E.W.M. known as
16 the New Reservation Canal. Such water shall only be made available
17 after all diversionary rights are satisfied as well as adequate instream
18 flows for fish life and such diversions are consistent with overall
19 Yakima Project operations. Determinations as to whether flood water
20 exists shall be made by the Yakima Field Office Manager. Flood water
21 may only be used on the "A" and "B" lands within the Wapato-Satus Unit
22 of the Yakama Indian Reservation. The floodwater right carries a
23 priority date of 1859.

24 5. In partial satisfaction of the Yakama Indian Nation's
25 treaty reserved water right, the Wapato Irrigation Project, a division

Conditional Final Order:
Yakama Indian Nation
Water Right - 7

1 of the Bureau of Indian Affairs of the U.S. Department of the Interior,
2 shall be entitled to divert into the Old Reservation Canal up to 9,490
3 acre-feet of water from November 1 to March 1. The instantaneous
4 diversion limit shall be 94 cfs. Such water will be used for stockwater
5 and wildlife purposes. The legal description for the diversion point
6 into the Old Reservation Canal for all adjudicated rights shall be the
7 NE 1/4 NE 1/4 SW 1/4 of Section 28, T.12 N., R. 19 E.W.M.. The winter
8 water diversion right shall carry a priority date of 1859.

9 6. The season of use for diversions of Yakima River flows to
10 satisfy the federally reserved, treaty-based rights other than those set
11 forth above, shall be from April 1 through October 31. The Bureau of
12 Reclamation may allow diversions into the New Reservation Canal in
13 November so long as the amounts diverted are within the overall
14 quantities set forth in the Amended Partial Summary Judgment Entered As
15 Final Judgment Pursuant To Civil Rule 54(b), dated November 29, 1990,
16 affirmed Ecology v. Yakima Reservation Irrig. Dist., 121 Wn.2d 257 and
17 the Bureau otherwise believes such diversions are consistent with
18 overall Project operations. The purpose of use for this water shall be
19 for irrigation and domestic uses incidental thereto.

20 7. This Order contains no quantification nor expresses any
21 opinion on the Yakama Indian Nation's water right to the flows of
22 Ahtanum Creek. That right shall be quantified in another report
23 specific to that subbasin.

24 8. The Department of Ecology shall issue a Certificate of
25 Adjudicated Water Right to the United States, in trust for the Yakama

Conditional Final Order:
Yakama Indian Nation
Water Right - 8

1 Indian Nation as to those water rights from Toppenish, Simcoe and Satus
2 Creek specifically set forth in this Conditional Final Order as well as
3 the instream flow rights for fish set forth in the Amended Partial
4 Summary Judgment Entered As Final Judgment Pursuant To Civil Rule 54(b),
5 dated November 29, 1990, affirmed Ecology v. Yakima Reservation Irrig.
6 Dist., 121 Wn.2d 257, 850 P.2d 1306 (1993) and the water rights
7 established in Final Order Re: Treaty Reserved Water Rights At Usual and
8 Accustomed Fishing Places, dated March 1, 1995. The Department of
9 Ecology shall issue a Certificate of Adjudicated Water Right to the
10 United States, Bureau of Indian Affairs as trustee for the Yakama Indian
11 Nation and water users within the Wapato-Satus Unit of the Wapato
12 Irrigation Project all within the Yakama Indian Reservation for the
13 irrigation water rights set forth in the Amended Partial Summary
14 Judgment Entered As Final Judgment Pursuant To Civil Rule 54(b), dated
15 November 29, 1990 affirmed Ecology v. Yakima Reservation Irrig. Dist.,
16 121 Wn.2d 257, 850 P.2d 1306 (1993).

17 9. None of the Yakama Indian Nation's surface water rights
18 in the Yakima Basin are subject to state law or oversight. The
19 allocation of water, once diverted onto the Yakama Indian Reservation at
20 the Wapato Irrigation Project diversion points, remains a duty of the
21 Bureau of Indian Affairs through the Wapato Irrigation Project, subject
22 to the requirements of federal law.

23 10. This Conditional Final Order, relating to the
24 confirmation of water rights to the United States, Bureau of Indian
25 Affairs as trustee for the Yakama Indian Nation and to the United

1 States, Bureau of Indian Affairs as trustee for the water users within
2 the Wapato Irrigation Project constitutes a final order for purposes of
3 appeal [see RAP 2.2(d)], except for purposes of final integration of all
4 confirmed rights as provided in Section XII of Pretrial Order No. 8,
5 procedures for Claim Evaluation, dated March 3, 1989, of this Court.

6 There is no just reason to delay appeal of this Order, as the
7 rulings herein set forth constitute the final order for purposes of
8 appeal. The benefits from final resolution in this case of the issues
9 in this order call for a determination that this is an appealable order
10 pursuant to RAP 2.2(d) and CR 54(b).

11 An immediate appeal of the Conditional Final Order will likely, as
12 a practical matter, prevent a waste of judicial resources and prevent a
13 waste of the resources for the parties to this case. Absent the
14 separate appeal of Conditional Final Orders, the parties and the Court
15 will be involved in a single appeal of numerous, separate, discrete and
16 diverse claims from separate hearings. A combined appeal of all such
17 claims at the end of this adjudication will be unwieldy and unmanageable
18 and result in substantial waste of judicial resources and the resources
19 of the parties.

20 The claims adjudicated pursuant to this Conditional Final Order are
21 asserted by one, and less than all of the parties, and are less than all
22 of the multiple claims of other major claimants and other parties.

23 Numerous claims remain unadjudicated. Orderly judicial
24 administration of this adjudication requires continued processing of all
25 claims which remain unadjudicated.

Conditional Final Order:
Yakama Indian Nation
Water Right - 10

1 The claims adjudicated by this Conditional Final Order are separate
2 and discrete claims apart from the remaining multiple claims in this
3 case.

4 The claims which would be reviewed on appeal from this Conditional
5 Final Order are not likely to be rendered moot by the continuing
6 proceedings before this Court.

7 DATED this 12th of September, 1996.

8
9 Walter A. Stauffacher
10 Walter A. Stauffacher, Judge
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