

Tribal Sovereignty and Water Rights



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YAKAMA NATION OFFICE OF LEGAL COUNSEL

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Disclaimer:

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Presentation Road Map

1. Treaty-Reserved
Water Rights Generally
2. Applying the Tribal Water
Rights Framework
3. Looking Forward



Treaty-Reserved Water Rights Generally

“reserved water rights” = water rights implicitly reserved to the extent that water is necessary to accomplish the primary purpose(s) of a reservation

Physical reservations => priority date of the Treaty

Continued exercise of sovereign rights => priority date of time immemorial

United States v. Winans, 198 U.S. 371 (1905); *Winters v. United States*, 207 U.S. 564 (1908); *Cappaert v. United States*, 426 U.S. 128 (1976); *Arizona v. California*, 373 U.S. 546 (1963); *United States v. New Mexico*, 428 U.S. 696 (1978)

Treaty-Reserved Water Rights Generally

Additional characteristics of Treaty-reserved water rights:

1. seniority is not analyzed in terms of a “balancing test”
2. pre-empt conflicting state law
3. cannot be lost through non-use

Winters v. United States, 207 U.S. 564 (1908); *Cappaert v. United States*, 426 U.S. 128 (1976); *Colville Conf. Tribes v. Walton*, 647 F.2d 42 (1981) ; *United States v. New Mexico*, 428 U.S. 696 (1978); *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (1956)

Treaty-Reserved Water Rights Generally

Treaty -reserved water rights can include appurtenant groundwater

- *Ague Caliente Band of Cahuilla Indians v. Coachella Water Valley Dist.*, 849 F.3d 1262 (2017)

United States does not have a general trust responsibility to take affirmative action to help Tribes access Treaty-reserved water

- *Arizona et al. v. Navajo Nation et al.*, 599 U.S. 555 (2023)



Treaty-Reserved Water Rights Generally

Adjudicating Treaty-Reserved Rights in State Court:

“McCarran Amendment”

Waives federal sovereign immunity for the adjudication and administration of federal water rights, including those held for the benefit of tribes.

43 U.S.C. § 666

Applying This Framework: Examples from Yakama Nation's Treaty of 1855

Yakama Nation's Treaty
Reserved water rights and
jurisdiction:

- at times, affirmed by federal courts
- at times, adjudicated in state court
- at times, remain unadjudicated

The same can be said for many
other Treaty Tribes within WA

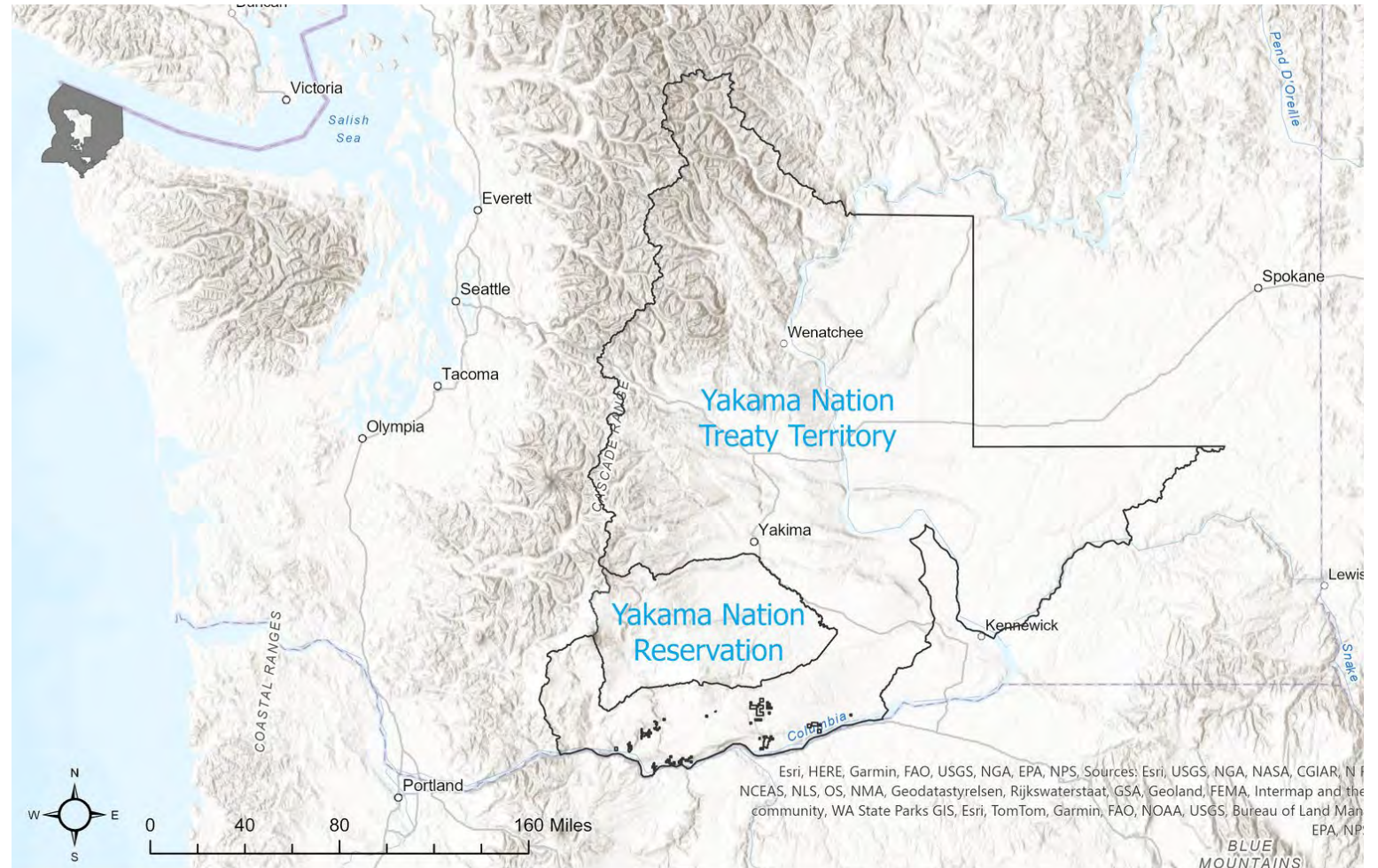


Treaty of 1855:

Article 1: > 12 million acres ceded

Article II: 1.4 million acres reserved

Article III: off-reservation rights



Yakama Nation's Water Rights For Fish

Article II

"All which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, an an Indian reservation. . ."

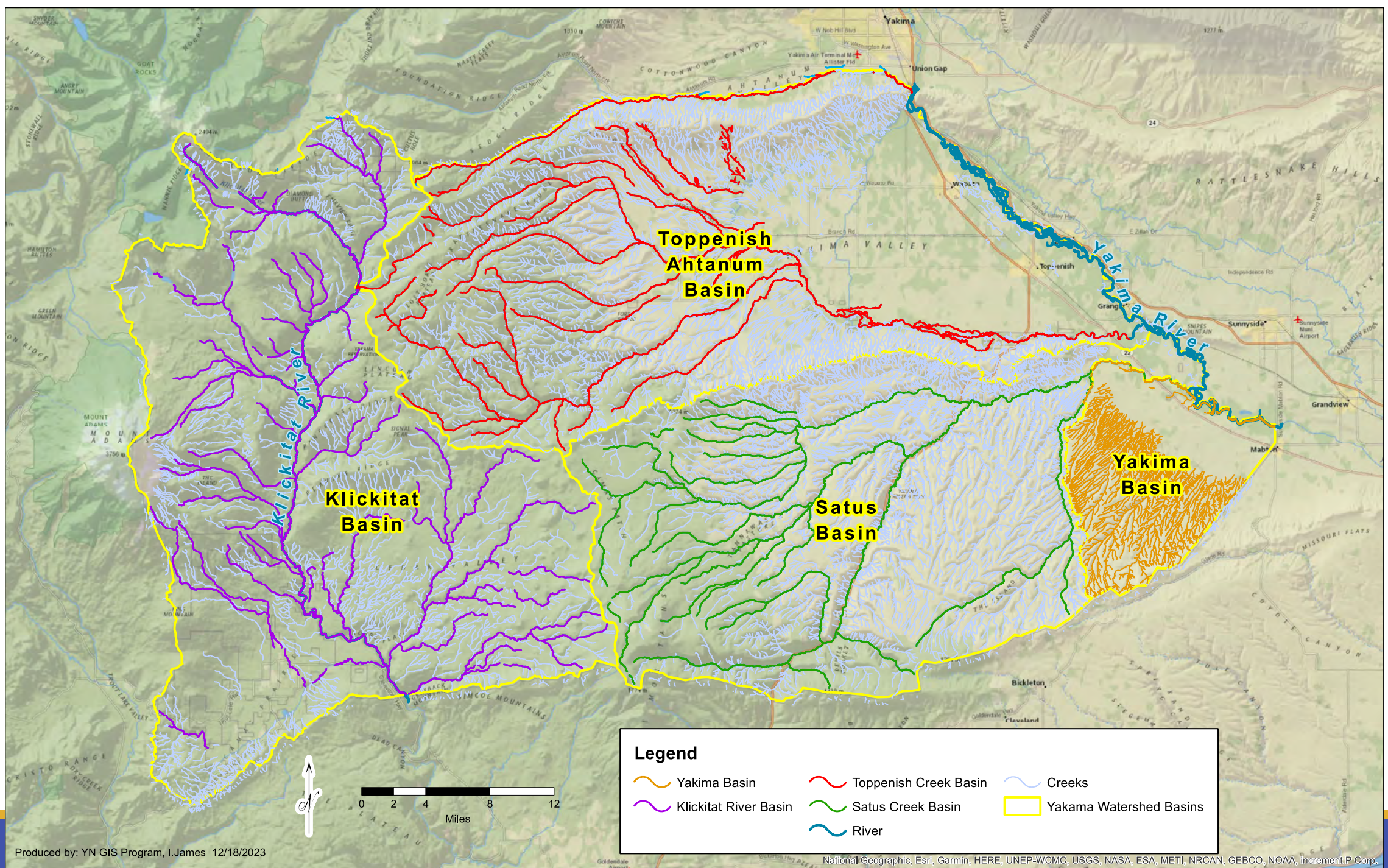
Treaty of 1855, 12 Stat. 951

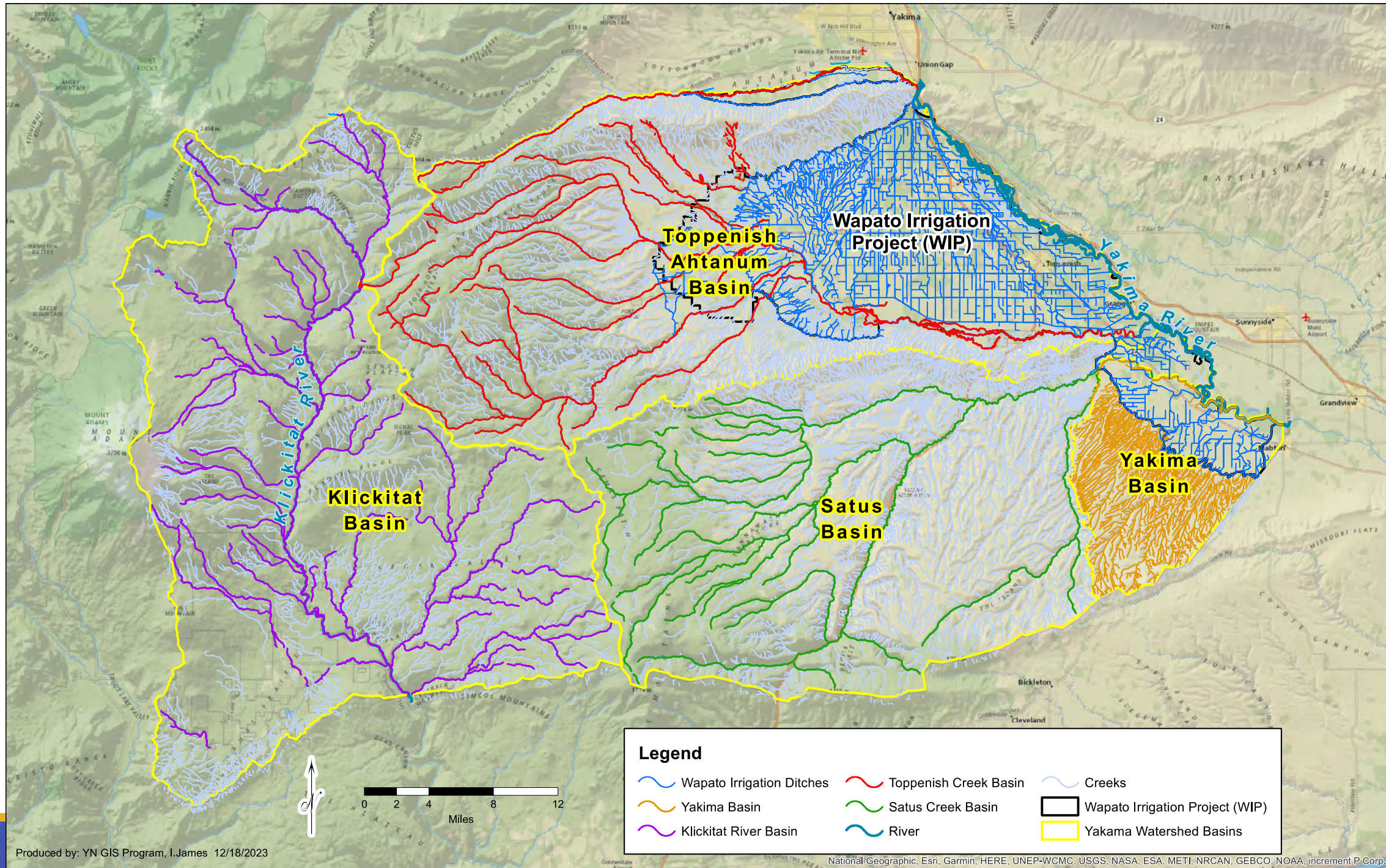


Yakama Nation's Water Rights in the Yakima Basin

Yakama Nation's on-reservation water rights include, *inter alia*

- Water for fish & wildlife
- Water for domestic purposes
- Water for agricultural purposes
 - Wapato Irrigation Project





On-Reservation Jurisdiction

RYC 60.09.05: surface water withdrawals, including adjudicated water rights

RYC 60.09.07: groundwater withdrawals

Acquavella Final Decree (May 9, 2019) at 9(a):

The Department of Ecology has statutory authority to administer and enforce this Decree, except that the Yakama Nation and/or the United States Bureau of Indian Affairs have the authority as specifically set forth in orders in this action to administer and enforce water rights either confirmed to the Yakama Nation or its members, the United States in trust for the Yakama Nation or its members, or confirmed on the Yakama Reservation.

Yakama Nation's Water Rights For Fish

Article III

“The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured . . . as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory . . .”

Treaty of 1855, 12 Stat. 951



Yakama Nation's Water Rights in the Yakima Basin



Yakama Nation's treaty-reserved right to fish holds a priority date of time immemorial for water necessary to protect fish life at all life stages

- *Kittitas Reclamation Dist.*, 763 F.2d 1032 (1985)

Yakama Nation's Water Rights in the Yakima Basin

Instream flows = most senior water right in the Yakima Basin

→ What does it mean?

“minimum instream flow necessary to maintain anadromous fish life in the river, according to annual prevailing conditions”

Surface Waters of the Yakima River Drainage Basin v. Yakima Reservation Irrigation Dist., 121 Wn.2d 257, 264 (1993)

CLAIMANT NAME:

United States of America in trust
for Yakama Nation

COURT CLAIM NO. 02276

(A) 03074

(A) 05548

(A) 07253

Certificate Number:

S4-84764-J

Subbasin:

FI Federal Reserved (Indian)

Source:

Yakima River and its tributaries

Use:

A diminished treaty water right for fish and other aquatic life

Period of Use:

N/A

Quantity:

Minimum instream flow necessary to maintain fish and other aquatic life

Priority Date:

Time Immemorial

Point of Diversion:

N/A

Place of Use:

N/A

Limitations Of Use:

Amended Partial Summary Judgment Entered as Final Judgment Pursuant to Civil Rule 54(b), November 29, 1990, affirmed Ecology v. Yakima Reservation Irrigation District, 121 Wn.2d 257, 850 P.2d 1306 (1993) and Final Order Re: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places, March 1, 1995, and other opinions and orders of the court.

This water right is a federally reserved right and is not subject to state regulation, law or oversight.

Yakama Nation's Water Rights in the Yakima Basin

Instream flows = most senior water right in the Yakima Basin

→ How do we work within existing resource availability?

Judicially created advisory committee "SOAC"

Yakima Basin Systems Operations Advisory Committee

National Oceanic and Atmospheric Administration

Washington Department of Fish & Wildlife

Confederated Tribes and Bands of the Yakama Nation

Yakima Basin Joint Board

Annual recommendation to the Bureau of Reclamation

Yakama Nation's Water Rights in the Yakima Basin

- How do we manage for the future?
- How are we adapting as drought becomes more frequent?

**Yakima Basin Integrated Plan =
improved water resource availability**

- * Fish passage
- * Enhanced water conservation
- * Water market-based reallocation (water banks)
- * Modifying existing irrigation structures and operations
- * Fish habitat enhancement
- * Surface storage
- * Groundwater storage

<https://yakimabasinintegratedplan.org/>

Looking Forward: Climate Change / Drought Year Implications

It is a better use of all entities' time and resources to work together on basin—wide solutions

The *Acquavella* adjudication provides a flexible model for responding to climate change



Looking Forward: Protecting Instream Flows

Instream flows for fish outside of adjudicated basins and instream flow rules set by Ecology

We need to recognize the potential for minimum instream flows to increase as climate change prompts water temperature increases



Looking Forward: Energy Demands on Water Resources

Data Centers

New alternative energy projects
permitted in Eastern Washington
without confirmed water sources

Operations of the Hydro-system



Questions?

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