NO. 281141

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Plaintiff/Respondent,

vs.

JAMES J. ACQUAVAELLA; UNITED STATES; YAKAMA NATION; AHTANUM IRRIGATION DISTRICT; JOHN COX DITCH COMPANY; LA SALLE HIGH SCHOOL; DONALD BRULE; SYLVIA BRULE; JEROME DURNIL and ALBERT LANTRIP;

Defendants/Appellants/Respondents.

BRIEF OF APPELLANT/RESPONDENT JOHN COX DITCH COMPANY

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I. Assignments of Error:

1. Yakima County Superior Court Judge, F. James Gavin, ("Trial Court") erred by denying confirmation of water rights ("Junior Rights") for land North of Ahtanum Creek with State water rights confirmed in the State Court adjudication of Ahtanum Creek, State vs. Achepohl, Yakima County Superior Court No. 18279, affirmed In Re Water Rights in Ahtanum Creek, 139 Wash. 84, 245 P. 758 (1926) ("Achepohl"), but not described in Appendix "B" of the Pope Decree [United States vs. Ahtanum Irrigation District, 330 F.2d 897 (9th Cir. 1964); also referred to as "Ahtanum II"] when water is available in Ahtanum Creek which cannot be beneficially used on the Yakama Reservation or by other "North-side" waterusers with confirmed water rights from Ahtanum Creek whose land was listed on Appendix "B" of the Pope Decree; and

2. The Trial Court erred by refusing to confirm the post-July 10 water right for John Cox when water is available in Ahtanum Creek which cannot be beneficially used for irrigation of reservation land; and

3. The Trial Court erred in computing the annual quantity for the John Cox water right for "excess water".

II. Issues Pertaining to Assignments of Error:

1. Is the Pope Decree a "general adjudication" of Ahtanum Creek pursuant to which water rights confirmed in the Achepohl adjudication of Ahtanum Creek, are denied and invalidated unless recognized in the Pope Decree? (Assignment of Error Nos. 1, 2 and 3); and

2. Is the Trial Court required to confirm a water right if a claimant has a previously confirmed right, the capacity to and has, in fact,

beneficially used water when it has been available even if the Court believes it is unlikely water will be available for beneficial use pursuant to the right? (Assignments of Error Nos. 2 and 3); and

3. Is John Cox entitled to confirmation of an "excess water right in a quantity which, when added to the quantity of the primary right confirmed in this proceeding, equals the quantity of the water right confirmed to John Cox in the Achepohl Decree? (Assignment of Error No. 3)

III. Statement of the Case:

This is an appeal by John Cox Ditch Company ("John Cox") from the 4/15/09 "Memorandum Opinion Exceptions to the Supplemental Report of the Court and Proposed Conditional Final Order, Subbasin No. 23 (Ahtanum), Ahtanum Irrigation District, John Cox Ditch Company, United States/Yakama Nation" (CP 456-531, 132-455), as modified by the 5/22/09 "Order on Motions for Reconsideration to the Memorandum Opinion and Conditional Final Order, Subbasin No. 23 (Ahtanum)" (CP 92-99)

The Ahtanum Subbasin is the final subbasin to be adjudicated in this general adjudication of the Yakima River. The Ahtanum Basin presents a unique set of factual and legal issues because Ahtanum Creek, the stream being adjudicated, forms the boundary between the Yakama Reservation on the South and non-Indian land North of the creek. The rights of the Yakama Nation are Treaty-reserved rights, those of landowners/waterusers North of the creek are based on Washington State law.

The basic factual and legal history of the Ahtanum subbasin is described in the 1/31/2002 "Report of the Court Concerning Water Rights

for Subbasin No. 23 (Ahtanum Creek)" ("First Report", pp. 35-41, CP 1,011-1017).

John Cox was formed as a private corporation in approximately 1884 to divert water from Ahtanum Creek and deliver it to non-riparian land near Tampico, Washington. (First Report, pp. 274-275, CP 1,250-1,251)

To resolve disputes between waterusers on the Yakama Nation Reservation, South of Ahtanum Creek, and non-reservation waterusers North of Ahtanum Creek ("North-side waterusers") in 1908, the United States, acting in behalf of the Yakama Nation and Yakama Reservation land, entered into the "Code Agreement" with the North-side waterusers allocating the natural flow of Ahtanum Creek for irrigation and stock water 25% to the South (Reservation) side of the creek and 75% for use North of the creek (EX DOE 132).

John Cox was a party to the Code Agreement (EX DOE 132).

John Cox was also a defendant in the Washington State Achepohl case adjudicating the Ahtanum Creek rights of North-side waterusers and, on completion of Achepohl, was issued Certificate No. 310 which evidenced John Cox's right to irrigate 926 acres and included a year-around stock water right. [5/07/1925 Decree, State of Washington vs. Achepohl, Yakima County Superior Court No. 18279 (EX DOE 136)]

A. Ahtanum I:

In 1947, the United States commenced litigation in the United States District Court for the Eastern District of Washington seeking to invalidate the Code Agreement and asserted the 1855 Treaty between the United States and the Yakamas had reserved the entire flow of Ahtanum Creek for use on the Yakama Reservation.

The District Court dismissed the United States' claim, United States vs. Ahtanum Irrigation District, 124 F.Supp. 818 (E.D.Wa. 1953). The United States appealed.

The Ninth Circuit in United States vs. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir. 1956) ("Ahtanum I"), reversed the District Court decision.

The Ahtanum I Court held the 1855 Treaty-reserved water from Ahtanum Creek for the benefit of the Yakama Reservation but also held the Code Agreement was within the authority of the Secretary of the Interior and was valid.

The Ahtanum I Court also limited the rights of North-side waterusers pursuant to the Code Agreement by holding:

***

> "At any time when the needs of those parties [the North side waterusers] to that Agreement as measured in 1908, were such as to require less than the full 75% of the water to the stream, then their rights to the use of that water was correspondingly reduced and those of the Indians in like measure, greater". (Ahtanum I, at p. 341)

***

Ahtanum I also recognized the North-side waterusers could have State law water rights in any water in excess of the needs of the reservation holding at 226 F.2d 340:

***

> "To the extent that the defendants [the North side waterusers] are to be permitted to have any part of the use of that portion of the flow of the stream, their rights are deraigned from the agreement of 1908. Apart from that agreement, those defendants would have no right to the use of any of said waters except in strict subordination of the prior and better rights of the United States as trustee for the

> Indians. Of course, as between themselves, they could acquire priorities under state law in respect to their use of the surplus after the interest of the Indians had been satisfied in relation to that surplus only." (Emphasis added)

***

The Ahtanum I Court remanded the case to the District Court with directions to "... determine and adjudicate the respective rights of the parties, during which defendants must be required to show and disclose their rights and titles...." Ahtanum I, at p. 339.

On remand, the factual issues were tried to Special Master Smithmore Meyers, appointed by District Court Judge Lindberg in 1957 and after hearings lasting 135 days, Special Master Meyers made findings on the specific acres irrigated by successors of the North-side waterusers who were parties of the Code Agreement in 1957. (1/03/1962 Findings and Conclusions, U.S. vs. Ahtanum Irrigation District, U.S. District Court, Eastern District of Washington, Southern Division, No. 312, EX DOE 136)

Special Master Meyer's findings related only to North-side use during the year 1957 and the Special Master made no findings about whether or not rights previously confirmed in the Achepohl Decree had been abandoned under Washington State law.

District Court Judge Lindberg entered Findings of Fact, Conclusions of Law and Judgment which incorporated Special Master Meyer's findings. (EX DOE 136)

The United States again appealed to the Ninth Circuit.

B. Ahtanum II:

In an opinion by Ninth Circuit Judge Pope, Ahtanum II, held the acreage of the North-side waterusers which could be irrigated pursuant to

the Code Agreement allocation was the lesser of the acreage irrigated in 1908 or 1957.

The Ahtanum II Court: (1) re-evaluated the evidence presented to the Special Master, (2) determined the acreage each North-side landowner had irrigated in 1908 and in 1957, and (3) made a determination of the number of acres each North-side landowner was entitled to irrigate pursuant to the Code Agreement. (Ahtanum II, Appendices A and B, 330 F.2d at 915)

Numerous North-side landowners were found not to have been irrigating any acreage in 1957 and were denied any right to share in the Code Agreement allocation of water to North-side waterusers.

The acreage John Cox was allowed to irrigate from the Code Agreement allocation was reduced from 955 acres to 654.9 acres. (Ahtanum II, Appendix B)

The water duty for John Cox and other North-side waterusers was determined to be .02 cfs per acre in the Achepohl adjudication but the Special Master in Ahtanum II found North-side waterusers were using only .01 cfs per acre in 1957 which was adopted as the quantity "needed" by North-side waterusers by the Ahtanum II Court for the purpose of determining allocation pursuant to the Code Agreement.

The Ahtanum II, "Pope Decree", allocated the irrigation flow in Ahtanum Creek between the Yakama Reservation and North-side waterusers based on .01 cfs per acre used on the acres found on Appendix "B" to be entitled to share in the Code Agreement allocation.

The Pope Decree provided, 330 F.2d pp, 914-915:

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"It is ordered, adjudged and decreed that the waters of Ahtanum Creek shall be and are hereby divided between the parties to this action in the following manner and at the following times, to wit:

I.

"From the beginning of each irrigation season in the spring of each year, to and including the 10th day of July of each year, said water shall be divided as follows:

> "a. To defendants for use on their lands north of Ahtanum Creek, 75% of the natural flow of Ahtanum Creek as measured at the south gauging stations; provided that the total diversion for this purpose shall not exceed 46.96 cubic feet per second, and provided that when the said measured flow exceeds 62.59 cubic feet per second, defendant shall have no right to the excess, except in subordination to the higher rights of the plaintiff.
>
> "b. To plaintiff, for use of Indian reservation land south of Ahtanum Creek, 25% of the natural flow of Ahtanum Creek as measured at the south gauging stations; provided that when the natural flow so measured exceeds 62.59 cubic feet per second, all the excess over that figure is awarded to plaintiff <u>to the extent that said water can be put to beneficial use</u>.

***

II.

> "After the 10th day of July in each year, all the waters of Ahtanum Creek shall be available to, and subject to diversion by the plaintiff for use on the Indian Reservation land south of Ahtanum Creek <u>to</u>

> the extent that the said water can be put to a beneficial use." (Emphasis added)

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After entry of the Pope Decree, John Cox continued to divert and deliver and its waterusers to beneficially use water, when available, consistent with its Achepohl right.

In 1989, between 908 and 1,073 acres were irrigated from the John Cox. (EX JCD 3; Testimony of Dean Frey, 4/19/94 VRP, pp. 40-41, CP __)

The John Cox share of the pre-July 10 water from Ahtanum Creek allocated to North-side users by the "Pope Decree" is 6.55 cfs.

John Cox has, however, consistently when water has been available in excess of the reservation irrigation needs and instream fish flow from the creek, diverted and beneficially used up to 18.52 cfs. (Testimony of Mark Herke, 2/27/04 VRP, pp. 23, 24, CP __)

In addition, John Cox has, after July 10, diverted and beneficially used water from Ahtanum Creek when water has been available in the creek in excess of the needs of reservation irrigation and instream flow rights.

John Cox diverted and beneficially used water after July 10th in eight (8) of eleven (11) years between 1974 and 1984 and again in 1999. (EX JCD 5; Testimony of Mark Herke, 2/27/04 VRP, p. 24, CP __)

IV. Argument:

A. The Pope Decree was limited to an "allocation" of Ahtanum Creek water between the Yakama Reservation and North-side waterusers, not an "adjudication" of North-side landowners' water rights:

The primary issue to be resolved by Division III in this John Cox appeal is the correct interpretation and application of the Pope Decree.

In his 1/22/02 First Report, pp. 105-112, CP 1082-1089, Commissioner Ottem conducted an extensive analysis of the rulings in the Pope Decree as they affected the State-based rights of North-side waterusers.

Commissioner Ottem noted: (1) there were no specific findings of abandonment of the "answer numbers" set forth in the Pope Decree, or (2) any evidence of non-use for a long period of time as required by Washington State law.

Commissioner Ottem held the Court would not enter a finding of abandonment "without specific evidence that between 1908 and 1957, water use on the 'answer number' property was reduced for a significant period of time and there was an intent to abandon that right or a portion thereof". (First Report, p. 111, CP 1087)

Commissioner Ottem then concluded the Pope Decree had not extinguished the State water rights of those owners/waterusers not listed on Appendix "B" and held:

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> "Thus, although the court can quantify rights to off-reservation waterusers who did not file answers, those rights are subordinate to the rights of reservation waterusers as they existed in 1915 and subordinate to the right of those north side users who had rights confirmed in the Pope Decree. But when the available flow exceeds 62.59 cfs and the on-reservation users are not using that excess nor is it

> being used to maintain fish life in Ahtanum creek, then other water right holders off the reservation may divert the excess flow." (Emphasis in original) (First Report, p. 110, CP 1086)

Commissioner Ottem's correct analysis and conclusion the Pope Decree did not eliminate the perfected water rights acquired pursuant to Washington State law of waterusers who did not file answers in Ahtanum II is equally applicable to North-side waterusers who were found in the Pope Decree: (1) to be irrigating less acreage in 1957 than in 1908, and (2) to the additional .01 cfs per acre provided by the Achepohl rights in excess of the .01 cfs per acre allowed by the Pope Court for North-side rights.

After hearings and briefing on Exceptions to the Court, Commissioner Ottem then issued his 2/25/08 "Supplemental Report of the Court Concerning the Water Rights for Subbasin 23 (Ahtanum Creek)" ("Supplemental Report") (Volume 48A-I, CP 722-931, Volume 48A-II, CP 539-721) in which he reconsidered his prior (1/31/02) ruling about the effect of the Pope Decree on State water rights.

The Commissioner's reconsideration of his above-stated, First Report appears to have been erroneously based on his following erroneous assumptions of fact:

1. Ahtanum I directed the District Court to adjudicate the rights of North-side waterusers.

2. The findings of Special Master Meyers and District Court Judge Lindberg was a determination about the entire use of water in 1908 which disposed of any claim that might have been made by any persons about land not listed in the findings. [Quoting from the Pope Decree, 330 F.2d at 912 (Supplemental Report, p. 27, CP 750)]

3. Commissioner Ottem was obviously, erroneously influenced by dicta in Ahtanum II, in which the Pope Court appeared to believe there was no real surplus of water in excess of the amount necessary to satisfy on-reservation needs. (Supplemental Report, p. 27, CP 750)

4. Commissioner Ottem interpreted the term "defendants" as used by the Pope Court in the "decree" section of Ahtanum II as referring only to those North-side defendants whose predecessors were parties to the Code Agreement and who were found to be irrigating North-side land in 1957. (Supplemental Report, p. 29, CP 752)

Commissioner Ottem then erroneously concluded:

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> "Therefore, the court finds that north side users are now estopped from claiming any right to 'excess' flows except for flows on specific lands included in or deriving from an answer number recognizing the Pope decree. 'Excess water' is that water in excess of that needed to satisfy all confirmed water rights both on and off the reservation and any water needed to satisfy the Yakama Nation's minimum instream flow rights for fish." (Supplemental Report, pp. 29-30, CP 752-753)

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The above erroneous conclusion by Commissioner Ottem resulted in Commissioner Ottem's erroneous 2/25/08 Supplemental Report which denied "Junior Rights" previously recommended for confirmation in Commissioner Ottem's 1/31/02 First Report.

John Cox and other waterusers filed "Exceptions" to Commissioner Ottem's above ruling which were, after hearing, then denied by Judge Gavin in his 4/15/09 "Memorandum Opinion Exceptions

to the Supplemental Report of the Court and Proposed Conditional Final Order, Subbasin No. 23 (Ahtanum)", p. 2 (CP 457).

The fundamental error of Commissioner Ottem, and Judge Gavin relying on Commissioner Ottem's 2/25/08 "Supplemental Report", was to erroneously conclude the Pope Court had actually conducted a *de facto* adjudication of North-side water rights.

An adjudication of North-side water rights was not, however, necessary for Judge Pope's decision or the relief granted in Ahtanum II and did not, in fact, occur.

The Pope Decree was not an adjudication of non-reservation, North-side individual water rights, but was only an allocation of Ahtanum Creek water between the Yakama Reservation and non-reservation land North of Ahtanum Creek.

Although the Ahtanum II Court stated the Court's decision in Ahtanum I required an adjudication of North-side water rights, Special Master Meyers, District Court Judge Lindberg, and the Pope Court did not actually conduct any adjudication of non-reservation, North-side water rights.

The Ahtanum II Court noted at 330 F.2d 901:

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> "On remand the case was referred to a special master who made a report and recommending findings which in general were approved and accepted by the trial court. The master made no determination as to water rights as such, or as to the existence or validity of such rights under Washington law, whether based on appropriation or by virtue of riparian location." (Emphasis added)

***

The United States specifically assigned error to the District Court's failure to determine individual water rights rather than the aggregate or "in gross" rights of North-side defendants and their land.

The Pope Court specifically, expressly rejected the U.S.'s claimed error holding at Ahtanum II, at pp. 910-912:

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> "Appellant particularly complains of the district court's adjudication of the rights of defendants 'in gross' or 'in the aggregate', as stated in the conclusion number 3 previously quoted; and asserts that this treatment of the rights of the defendants as a group, or in the aggregate, is error for several reasons:
>
> ***
>
> "Appellant asserts that these directions [on remand from Ahtanum I] cannot be implemented unless the court adjudicates the water rights of each individual defendant separately and individually.
>
> ***
>
> "But, as we shall note shortly, the court in deciding upon this gross treatment, had other considerations in mind, which prompted this exercise of discretion. The whole problem is not a simple one. Clearly in some cases, a user who decides to give up farming on his land may, under Washington law, sell his rights to another. The consequences of a diminished use, or abandonment mentioned by appellant, must be weighed against the court's reason for not undertaking a tract by tract adjudication. We think the adverse effect suggested by appellant can be guarded against if the court reserves jurisdiction, as it may probably do, to modify its decree at a later time should changed conditions so require.

"We recognize that it would have been entirely in accord with the directions indicated in our former opinion for the court in its decree to adjudicate the water rights of particular tracts separately and individually. However, there are other considerations which we think warrant the district court in exercising its discretion not to extend its decree so far. After all, the primary purpose of the plaintiff's suit was to procure an adjudication which would protect the rights of the Indians and of the government, as trustee for them, as against the claims of defendants. The government cannot be interested in a general adjudication as to the relative rights among themselves, of the various defendants. It would not be interested in their respective priority. As stated in Virginia Ry. vs. Federation, 300 U.S. 515, 551, 57 S.Ct. 592, 601, 81 L.Ed. 789:

> '... the extent to which equity will go to give relief where there is no adequate remedy at law is not a matter of fixed rule. It rests rather in the sound discretion of the court.'

"One matter properly to be considered in the exercise of this discretion is the fact that the State of Washington had established through its water code, adopted in 1917, an elaborate system for adjudicating, controlling and administering generally water rights acquired under state law. Rev. Code of Wash. Ch. 90.03. This water code sets up a system for the establishment of water masters operating under a supervisor of water resources to keep track of rights and priorities, open and close head gates, and divide and regulate the use of water. A federal district court is not necessarily possessed of any better machinery and we think it is within the discretion of the court below to limit the scope of its decree so as to avoid having to assume distribution and control functions which it is in no position to exercise. As we had noted, the district court has the power to reserve the right hereafter to make any appropriate order or modification of its decree required to make such changing conditions as may hereafter develop touching and effecting the appropriate protection of the rights of the appellant." (Emphasis added)

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It is difficult to conceive the Pope Court could have made a clearer statement about the Court's intended, limited scope of its decree.

The Pope Court was only concerned with allocating the right to the use of water from Ahtanum Creek, in gross, between the Yakama Reservation, South of the creek, and non-reservation land North of the creek.

The Pope Court specifically declined to adjudicate North-side rights and left those rights to be determined and regulated pursuant to the Washington State Water Code, subject to the rights of the Yakama Nation as determined in the Pope Decree.

The Pope Court also reviewed the Court's prior decision in Ahtanum I and concluded North-side waterusers had a right to use Ahtanum Creek water which could not be beneficially used on the reservation, stating at 330 F.2d p. 900:

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> "We went on to say 'the rights of the white settlers to the use of waters were subordinate to the rights of the Indians, that they were not non-existent. Until the Indians were able to make use of the waters, there was no legal obstacle to the use of the waters by the white settlers. After the Indian irrigation works were completed, there would still be the right of the non-Indian appropriators to make use of any surplus available within the stream'. 236 F.2d at 355 ..." (Emphasis added)

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Consistent with the holding non-reservation North-side waterusers could legally divert and use Ahtanum Creek water not beneficially used on reservation land, the Pope Court in its Ahtanum II "Decree", 330 F.2d at pp. 914-915, provided:

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> "It is ordered, adjudged and decreed that the waters of Ahtanum Creek shall be and are hereby divided between the parties to this action in the following manner and at the following times, to-wit:
>
> I.
>
> "From the beginning of each irrigation season, in the spring of each year, to and including the 10th day of July of each year, said waters shall be divided as follows:
>
> > "a. To the defendants, for the use of their lands north of Ahtanum Creek, 75% of the natural flow of Ahtanum Creek, as measured at the north and south gauging stations; provided that the total diversions for this purpose shall not exceed 49.96 cubic feet per second, and provided that when said measured flow exceeds 62.59 cubic feet per second, defendants shall have no right to the excess, except in subordination to the higher rights of the plaintiff.
> >
> > "b. To plaintiff, for use on the Indian reservation land south of Ahtanum Creek, 25% of the natural flow of Ahtanum Creek, as measured at the north and south gauging stations; provided that when the natural flow as so measured exceeds 62.59 cubic feet per second, all of the excess water over that figure is awarded to plaintiff, to the extent that said water can be put to a beneficial use.
>
> * * *

II.

> "After the 10th day of July in each year, all the waters of Ahtanum Creek shall be available to, and subject to diversion by, the plaintiff for use on Indian reservation lands south of Ahtanum Creek, to the extent that said water can be put to beneficial use." (Emphasis added)
>
> * * *

There is absolutely no question the Pope Decree limits diversion from Ahtanum Creek to the reservation both before and after July 10 to amounts which can be actually and beneficially used.

In addition, the first paragraph of the Pope Decree quoted above allocates the water of Ahtanum Creek "between the parties to this action".

The "parties to this action" can only be interpreted as being the Plaintiff, the United States as trustee for the Yakama Nation and Yakama Reservation land on the one side, and all the named North-side Defendants, including John Cox, on the other.

Section 1a of the Decree recognizes the "defendants", without limitation to any particular class of defendants, have the right to use water from Ahtanum Creek in excess of 62.59 cfs in subordination to the rights of the reservation land.

Commissioner Ottem clearly, erroneously misconstrued the above-quoted language of the Pope Decree when he stated in his 1/25/08 Supplemental Report, p. 29, CP 752:

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> "Section 1a of the actual Pope Order and Decree (page 915) as set forth above, also impacts this decision. First it defines for purposes of the Pope Decree the class of 'defendants' as being those north side users who share the 49.6 cfs, that is the amount, based on water duty, shared by

> those who successfully defended their water rights as set forth in the answer numbers."

***

Commissioner Ottem's above "misinterpretation" is based on his erroneous conclusion the Pope Decree adjudicated State water rights.

As indisputably established in pp. 12-17, supra, the Pope Decree did not adjudicate State water rights.

The Pope Decree was a determination of the in gross extent of the right of North-side waterusers to divert and use water from Ahtanum Creek pursuant to the Code Agreement.

Absent the Code Agreement, no North-side waterusers would have a right to divert from Ahtanum Creek pursuant to State water rights until the beneficial needs of the reservation land are satisfied because the Ahtanum I Court ruled the 1855 Treaty with the Yakamas reserved for the reservation all water from Ahtanum Creek which could be beneficially used on the reservation.

The legal effect of the Pope Decree is to restrict the right to enjoy the benefits of the Code Agreement to divert and use water from Ahtanum Creek before the full beneficial needs of the reservation land are satisfied to the North-side defendant owners/waterusers identified on Appendix "B" to the Decree who were: (1) successors-in-interest to signatories of the Code Agreement, and (2) who established they were continuing to irrigate from Ahtanum Creek in 1957.

To the extent a North-side defendant wateruser established its continuing rights pursuant to the Code Agreement, that defendant wateruser is entitled to share in the allocation of water to the North side of Ahtanum Creek pursuant to Section 1a of the Decree.

If a defendant failed to establish a continued right to participate in the Code Agreement allocation, that defendant could only exercise its State water right from flow in Ahtanum Creek exceeding the amount which could be beneficially used on reservation land.

Commissioner Ottem's following erroneous interpretation and ruling (Supplemental Report, p. 29, CP 752):

***

> "... north-side users are now estopped from claiming any right to 'excess' flows, except for use on specific lands included in or deriving from an 'answer number' recognized in the Pope Decree ..."

***

appears to be erroneous application of either the doctrine of *res judicata* or collateral estoppel.

Neither doctrine is, however, applicable to the claims of North-side waterusers to "excess water".

The elements of *res judicata* and collateral estoppel are described and clarified in City of Arlington vs. Central Puget Sound Growth Management Hearings Board, 164 Wn.2d 768, 791-792, 193 P.3d 1077 (2008):

***

> "'Resurrecting the same claim in a subsequent action is barred by *res judicata*.' Under the doctrine of *res judicata* or claim preclusion 'a prior judgment will bar litigation of a subsequent claim if as 'a concurrence of identity with [the] subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made'.

> 'When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is barred by collateral estoppel.' Collateral estoppel, or issue preclusion, requires '(1) identical issues, (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.'" (Citations omitted)
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Res judicata cannot be applied because there is no identity of the cause of action between the United States vs. Ahtanum I or II case and this case.

In United States vs. Ahtanum, the "cause of action" was a determination of what rights North-side waterusers had in the flow of Ahtanum Creek before the beneficial needs of reservation land was satisfied.

U.S. vs. Ahtanum I and II did not involve any issue or determination about the rights of individual North-side waterusers to divert and beneficially use water from Ahtanum Creek when: (1) water was available in excess of the beneficial needs of reservation land, and (2) because a determination of the individual rights of North-side waterusers in the "excess" was not necessary for a resolution of the issues considered and decided in U.S. vs. Ahtanum. (See, Ahtanum II, 330 P.2d at 910-912, quoted above at pp. 6-7.)

Collateral estoppel also cannot be applied because there was no identity of issues and no final judgment on the merits denying North-side water rights acquired pursuant to State law.

The only major issue in U.S. vs. Ahtanum II is, as noted above, the right of the United States as trustee for the Yakama Nation to satisfy the irrigation needs of reservation land from the flow of Ahtanum Creek before North-side waterusers diverted water from Ahtanum Creek pursuant to their Washington State water rights.

The issue of the water rights of individual North-side waterusers in flow from Ahtanum Creek in excess of the beneficial needs of reservation land was neither involved, nor was there any final judgment on the merits of individual North-side water rights. (See, Ahtanum II, 330 F.2d 910-912.)

Commissioner Ottem's decision, adopted by Superior Court Judge Gavin, North-side waterusers have no claim to "excess water" except for use on specific land recognized in Appendix "B" to the Pope Decree, is clearly erroneous and must be reversed.

B. "Junior Rights" for the use of "excess water" must be confirmed for North-side waterusers who have established a perfected Washington State water right in this proceeding.

A "Junior Right", as the term is used in this proceeding, is the right to the use of water from Ahtanum Creek when: (1) the flow in the creek exceeds the amount which is beneficially used for irrigation of reservation land, (2) the Treaty-reserved right for instream flow for fish, and (3) the rights of North-side users pursuant to the Code Agreement recognized in the Pope Decree.

There are two (2) types of North-side "Junior Rights" claimants:

(1) Claimants in this case who are recognized in the Pope Decree as being entitled to share in the Code Agreement allocation but for fewer acres than they are entitled to irrigate pursuant to the Achepohl Decree and their Washington State water right.

John Cox is a member of this group. John Cox's Achepohl right, evidenced by Certificate #310, is for 926 acres but the Pope Decree limits their share of the North-side allocation pursuant to the Code Agreement to 654.9 acres; and

(2) Claimants in this proceeding who the Pope Decree found were not irrigating in 1957 and who were denied the right to participate in the Code Agreement allocation but have valid Washington State water rights.

In his 1/31/02 First Report, Commissioner Ottem recommended confirmation of "Junior Rights" for 65 parcels/acreages which the Court subsequently denied in Commissioner Ottem's 1/25/08 Supplemental Report, including John Cox. (Supplemental Report, pp. 30-35, CP 753-758)

Notwithstanding the findings of Special Master Meyers in Ahtanum vs. United States I, each of the claimants for whom Commissioner Ottem proposed to confirm a "Junior Right" actually established the elements necessary to allow confirmation of their water right, including continuous beneficial use when water was available from the entry of the Achepohl Decree in 1925 to the present time.

As Commissioner Ottem noted in his 1/25/08 Supplemental Report, p. 30, CP 753:

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> "... it is an irony of stream adjudication that insufficient supply does not prevent a court from confirming rights unless it can be demonstrated that such a limitation on supply has prevented beneficial use."

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Insufficient supply has been a fact of life in the Ahtanum Basin for more than 100 years. See, Benton vs. Johncox, 17 Wash. 277, 49 P. 495 (1897).

In 1925, the Achepohl adjudication of North-side Ahtanum water rights, 31 classes of rights were established with priority based on the date of initiation of the appropriation.

The decree provided when the supply of water was insufficient to supply all classes, water rights in a higher class would be fully satisfied before water was given to those of a lower class. In Re Waters of Ahtanum Creek, 139 Wash. 84, 87, 245 P. 758 (1926). See, also, State ex rel Cope vs. Barnes, 158 Wash. 648, 291 P. 710 (1930), holding owners of higher class rights in the Ahtanum Basin were entitled to a full supply of their domestic and stock water in addition to irrigation water even if delivery of a full supply to them resulted in insufficient water remaining to provide the irrigation rights of lower classes.

Although it is apparent the Ahtanum II Court apparently, erroneously believed the flow of Ahtanum Creek was insufficient to satisfy the beneficial needs of the reservation land, the actual Ahtanum Creek flow, in many years, exceeds the Yakama Nation irrigation and fish flow rights and the excess creek flow entitles the North-side waterusers to divert the creek pursuant to the Code Agreement.

EX JCD 10-23, 27-31 and 36, Ahtanum Creek flow records for the years between 1911 and 2003, and the testimony of Mark Herke, 2/27/04, RP, pp. 16-23, CP __, have in the record of this case, established there is sufficient "excess" flow in Ahtanum Creek in many years for substantial periods of April, May and June to satisfy: (1) the Treaty-reserved rights for irrigation and instream fish flow, (2) Code Agreement diversionary rights of non-reservation, North-side waterusers, and (3) significant excess

Ahtanum water to provide water for non-reservation, North-side, non-Code Agreement "Junior Rights".

The Pope Decree does not preclude the use of water in excess of Treaty-reserved rights by North-side waterusers.

Although the supply of water for "Junior Rights" will, in many years, be insufficient, and in some years, non-existent, the claimants in this proceeding for whom confirmation of a "Junior Right" was originally recommended established they have preserved their water right through beneficial use whenever water has been available.

"Junior Rights" are simply an additional class of rights within the Ahtanum Creek Basin the exercise of which is subject to the rights of all higher classes, including the irrigation and fish flow rights of the Yakama Nation and North-side waterusers entitled to share in the Code Agreement allocation are satisfied in full.

John Cox established, through uncontradicted evidence it has, when water has been available, diverted and beneficially used irrigation water on the full 926 acres authorized by its Achepohl right and has diverted up to 18.52 cfs, the full instantaneous quantity authorized by its Achepohl Certificate #310.

The Trial Court's decision, based on Commissioner Ottem's obvious errors above-described on pp. 10-13, 17-21 supra, denying "Junior Rights" should be reversed and John Cox should be awarded a "Junior Right" for 271.1 acres, the difference between its Achepohl right of 926 acres and the 654.9 acres it is authorized to irrigate pursuant to the Code Agreement and the Pope Decree.

C. John Cox is entitled to confirmation of a post-July 10th irrigation right:

The Trial Court erroneously denied John Cox's claim for a post-July 10 irrigation right.

The Pope Decree, Section II, 330 F.2d p. 915, quoted in full at p. 7 supra, specifically limits post-July 10th diversions from Ahtanum Creek to the reservation to "the extent that the said water can be put to a beneficial use".

The Pope Decree did not specifically provide for post-July 10th North-side use when the flow in Ahtanum Creek was in excess of the beneficial needs of the reservation because the Court believed there would be insufficient water after July 10th to fully satisfy the reservation requirements for beneficial use.

Actual experience since entry of the Pope Decree has established, however, water is at times available in excess of the reservation needs after July 10th.

At the 2/27/04 hearing, John Cox submitted an offer of proof establishing both: (1) the availability of post-July 10th water, and (2) John Cox's diversion and beneficial use of the "excess water" in years it was available after entry of the Pope Decree. (Testimony of Mark Herke, 2/27/04 RP at pp. 24-25, CP __, EX JCD 5)

John Cox's offer of proof established John Cox diverted and beneficially used water after July 10th in eight (8) of eleven (11) years between 1974 and 1984 and again in 1999.

The Pope Decree did not adjudicate or deny John Cox a post-July 10th water right. (See, Argument, Section A, pp. 9-10, supra.)

Because John Cox can exercise its post-July 10th water right only when there is water in excess of the reservation's beneficial use

requirements confirming a post-July 10th water right to John Cox will have no adverse impact on the rights of the Yakama Nation.

Although in most years there will not be sufficient post-July 10th water for John Cox to exercise its right, insufficiency of supply is not a basis for denying confirmation of John Cox's water right.

John Cox's offer of proof established the elements required to support the confirmation of the post-July 10th water right.

The Trial Court's denial of John Cox's claim for a post-July 10th water right should be reversed and John Cox's water right confirmed subordinate only to the rights of the Yakama Nation in the flow of Ahtanum Creek for irrigation and instream flow for fish.

D. A pre-July 10th "excess water" right in the amount of .01 cfs for 654.9 acres should also be confirmed to John Cox.

The "Conditional Final Order" entered by the Trial Court confirmed to John Cox the right to divert an additional 6.55 cfs as an "excess water" right:

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> "When water is available in excess of that needed to satisfy all confirmed water rights both on and off the reservation and any water needed to satisfy the Yakama Nation's minimum instream flow right for fish and other acquatic life, an additional 6.55 cfs, 389.07 acre feet per year, can be diverted." (CP 443-444)

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The instantaneous flow for this "excess right" is .01 cfs per acre which, in combination with the primary right awarded, is equal to John Cox's .02 cfs per acre Achepohl right.

The annual quantity authorized of 389.07 acre feet is, however, only about one-third (1/3) of the quantity John Cox is entitled to divert at .01 cfs per acre for the April 1 through July 10 irrigation season.

Judge Gavin's 4/15/09 "Memorandum Opinion", p. 3, CP 458, held:

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> "The court finds that excess water can be used, when available, on lands north of Ahtanum Creek that are confirmed rights in this proceeding up to the .02 cfs per acre authorized in the appurtenant certificates."

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In the Court's 5/22/09 "Order on Motions for Reconsideration", the Court explained the limitation of the annual quantity for excess rights:

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> "The court in discussing excess water in its Memorandum Opinion on page 4 [CP 459] intended to include a statement that the annual quantity for excess water will be based on it being available for 30 days. The court concludes that would be the number of days excess water might reasonably be available. The annual quantity for excess water on each water right is based on the authorized instantaneous quantity (0.01 cfs per acre) times 1.98 times 30 days." (CP 92-93)

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Judge Gavin did not indicate what evidence he relied on in concluding thirty (30) days was the number of days "excess water might reasonably be available".

As noted above, insufficiency of supply is <u>not</u> a basis for denying confirmation of a right.

Limiting the use of "excess" water to thirty (30) days is contrary to John Cox's perfected State right which authorizes the diversion of .02 cfs per acre for the entire irrigating season.

If "excess water" is available, John Cox is entitled to divert and beneficially use its proportionate share of the "excess water" to the full extent of its perfected State right.

The limitation of the annual quantity of John Cox's "excess water" right should be reversed and John Cox confirmed for an "excess water" right of 1,309.8 acre-feet of annual quantity as authorized by its Achepohl Certificate #310.

V. Conclusion:

The Trial Court erroneously held the Pope Decree was an adjudication of North-side water rights which resulted in the denial and invalidation of all State North-side water rights which were not identified on Pope Decree, Appendix "B".

The Pope Decree was, however, not an adjudication of North-side rights and the Pope Court specifically stated it was not adjudicating those rights but was leaving the determination of North-side rights to be made pursuant to the Washington State Water Code.

The Trial Court, based on its erroneous conclusion about the legal effect of the Pope Decree, also improperly failed to confirm North-side waterusers' "Junior Rights" when there is water in Ahtanum Creek exceeding the Treaty fish flow right and which cannot be beneficially used for irrigation on the Yakama Reservation.

John Cox has established in the Trial Court the availability of "excess water" because John Cox has, for many years, actually diverted

and beneficially used, when available, "excess water" on its 271.1 acres not entitled to receive water pursuant to the Code Agreement allocation.

The Trial Court's decision denying confirmation of John Cox's "Junior Right" should be reversed and this case should be remanded to the Trial Court with directions to confirm John Cox's "Junior Right" of .02 cfs for 271.1 acres.

The Trial Court's erroneous interpretation of the Pope Decree and its effect on North-side water rights also resulted in the Court's refusal to confirm John Cox's post-July 10th water right.

John Cox has, however, established without contradiction in this proceeding, the availability of post-July 10th water and that John Cox diverted and beneficially used "excess water" when it was available.

The Trial Court's refusal to confirm a post-July 10th right for John Cox should be reversed and this case remanded to the Trial Court with directions it confirm John Cox's post-July 10th water right consistent with its Achepohl Certificate #310 when there is flow in Ahtanum Creek after July 10th exceeding the Yakama Nation's Treaty-reserved right for fish, and which cannot, or has not been, beneficially used on Yakama Reservation land.

The Trial Court also erred by erroneously limiting the annual quantity of "excess water" for North-side waterusers entitled to divert pursuant to the Code Agreement to a thirty (30) day diversion of water because there is, in this case, no factual basis in the record to determine thirty (30) days was the "number of days excess water might reasonably be available" and "insufficient supply" is not a basis for refusing to confirm a right.

John Cox is entitled to, and John Cox's water right for "excess water" should be confirmed in an amount equal to .01 cfs for 654.9 acres.

The Court's limitation of John Cox's "excess water" right must be reversed and remanded to the Trial Court with directions the "excess water" right confirmed for John Cox is an annual quantity of 1,309.8 acre-feet per year.

DATED: March 15, 2010.

Respectfully submitted,

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