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Ecology Division

NO. 281141-III

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/Cross-Appellant,

v.

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

Defendants/Appellants/Cross-Respondents.

REPLY BRIEF OF CROSS RESPONDENT AHTANUM IRRIGATION DISTRICT TO STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S OPENING/RESPONSE BRIEF

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1. Did the Trial Court properly rule that the determined future development exception, RCW 90. 14. 140(2)(c), applied to prevent relinquishment when the owner had a fixed plan to return, after a period of absence, and resurrect the pre-existing use of the water right?

2. Did the Trial Court properly rule that the determined future development exception, RCW 90. 14. 140(2)(c), applied to prevent statutory relinquishment of a water right based on evidence that the owner had a fixed plan that was implemented within 15 years of the prior use.

C. Restated Issues Raised by Department of Ecology as Respondent

1. Did The Trial Court Err In Limiting The United States Federal Reserved Water Right, And In Confirming A Stockwater Right To Off-Reservation Uses With A Priority Date Older Than The United States' Treaty Right

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I. RESTATEMENT OF ISSUES

A. Issues Raised by Department of Ecology as Cross Appellant

1. Did the Trial Court properly rule that the determined future development exception, RCW 90. 14. 140(2)(c), applied to prevent relinquishment when the owner had a fixed plan to return, after a period of absence, and resurrect the pre-existing use of the water right?

2. Did the Trial Court properly rule that the determined future development exception, RCW 90. 14. 140(2)(c), applied to prevent statutory relinquishment of a water right based on evidence that the owner had a fixed plan that was implemented within 15 years of the prior use.

B. Issues Raised by Department of Ecology as Respondent

1. Did The Trial Court Err In Determining That The *Ahtanum* Decree Quantified The United States' Reserved Water Right For Irrigation And Limited Its Period Of Use?

II. SUMMARY OF ARGUMENT

A. Answer to Ecology's Cross Appeal

The Trial Court properly ruled that Hagemeier's testimony supported a determined future development exception to relinquishment. The plain meaning of terms not defined in the statute show Hagemeier had a fixed plan that was implemented within the statutory period of time.

B. Answer to Ecology's Issues Raised as Respondent

The Trial Court properly quantified the YIN/US reserved water right based on evidence of practicably irrigable acreage.

III. Argument

A. Answer to Ecology's Cross Appeal

The Superior Court's Memorandum Opinion Subbasin No. 23 Exceptions stated the issue as follows:

> Merrill identified two prerequisites to the application of the determined future development exception. The first, with which this Court and Ecology both agree, is that a firmly defined, or "fixed" plan must be in place within the five years of the last date of beneficial use of water. Ecology does not dispute that the Hagemeiers had a "fixed" plan. Second, the Supreme Court held that the future development must occur within 15 years - encompassing the possibility of future development, which may occur after the 5 years of non-use ("The fixed development plans will take longer than five years to come to fruition.") Here the Court and Ecology part ways. Ecology maintains this last language means that the plans must be for a project that is of a scope that will take longer than five years to execute, i.e. large projects. Ecology argues there is no "scope" to the Hagemeier future use and no evidence that "development" is planned. According to Ecology, "development" commonly means "the act or process of growing or evolving; growth; progress." They suggest that no growth or progress is necessary to simply continue

> the pre-existing use of the water; that constitutes maintenance, but not development, of a water right. Ecology also suggests that Merrill holds the project must be one that cannot be accomplished within five years. C.P. 479 [1]

There is no question regarding the use of the water right prior to Hagemeier's purchase in 1986, and Ecology has not questioned it. It had been irrigated by previous owners Hoppis, then Burke until Hagemeier's purchase. But for his job transfer, his intent was to move onto the land and irrigate pasture and hay. Upon his return to the property in 1995, he immediately began irrigating, and has done so ever since. CP at 2842-43

Hagemeier's plan was fixed from the moment he purchased the property. But for his job transfer, the use would have continued unabated. RCW 90.14.140 (2)(c) provides:

> (2) Notwithstanding any other provisions of RCW 90.14.130 through 90.14.180, there shall be no relinquishment of any water right:
>
> (c) If such right is claimed for a determined future development to take place either within fifteen years of July 1, 1967, or the most recent beneficial use of the water right, whichever date is later;

---

[1] MEMORANDUM OPINION EXCEPTIONS TO THE SUPPLEMENTAL REPORT OF THE COURT AND PROPOSED CONDITIONAL FINAL ORDER SUBBASIN NO.23 (AHTANUM), AHTANUM IRRIGATION DISTRICT JOHNCOX DITCH COMPANY, UNITED STATES/YAKAMA NATION (21027) (Page 24)

The phrase "determined future development" is not defined in the statute. *Pacific Land Partners, LLC v. State, Dept. of Ecology*, 150 Wash.App. 740, 208 P.3d 586, Wash.App. Div. 3, (2009), citing *R.D. Merrill*, 137 Wash.2d at 133 n. 7, 969 P.2d 458, Wash., 1999. *Pacific Land Partners* addressed the definition of "determined future development" as follows:

> In *R.D. Merrill*, 137 Wash.2d at 142-43, 969 P.2d 458, the Washington Supreme Court approved a Board (Pollution Control Hearing Board) interpretation that accords with the dictionary definition of the phrase: a "determined future development" is a firm, fixed, definitive development plan. The plan for this future development must be fixed prior to the end of the five-year period of nonuse. Id. And the development plan must be implemented within 15 years after the last beneficial use. Id. at 145, 969 P.2d 458; RCW 90.14.140(2)(c). Once a fixed development plan is established (before the end of the five-year period of nonuse), the water right holder must take some affirmative steps toward realization of the plan within the 15-year period. R.D. Merrill, 137 Wash.2d at 146, 969 P.2d 458.

Hagemeier had a firm, fixed plan. Upon his return to the land, he would resume the farming practices that had occurred on the land since 1868. [2] The plan was implemented within 15 years after the last beneficial use. The last beneficial use was by Hagemeier's most recent predecessor,

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[2] C.P. 1127-1128, 1368 - REPORT OF THE COURT CONCERNING THE WATER RIGHTS FOR SUBBASIN NO. 23 (AHTANUM CREEK) AHTANUM IRRIGATION DISTRICT JOHNCOX DITCH COMPANY UNITED STATES/YAKAMA NATION VOLUME 48 - PART 1 (PP 147-48, 389)

Burke, just prior to Hagemeier's purchase in 1986. Realization of the plan was immediate when Hagemeier returned in 1995. Use has been continuous since then. C.P. 2843[3]

Ecology cites *Pacific Land Partners* for the concept that use of a dictionary meaning is appropriate, but neglects the portion of the decision actually defining "determined future development" as "a firm, fixed, definitive development plan". Ignoring the case law definition, Ecology goes directly to the dictionary to cherry pick concepts that fit its more restrictive view of what a "determined future development" should be. Included, without any authority but Webster, is the following:

> Development commonly means "the act or process of [growing or evolving]; growth; progress."
>
> *Webster's Encyclopedic Unabridged Dictionary of the English Language* 543 (new deluxe ed. 1996).

Continuing without authority, even Webster, Ecology concludes that the "plain meaning" of the phrase leads to the conclusion that it cannot be applied to resumption of a pre-existing water use. The case law does not lead to that result.

The operative terms of RCW 90.14.140 are emphasized below.

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[3] VERBATIM REPORT OF PROCEEDINGS (VRP FEBRUARY 6, 2004)

> (2) Notwithstanding any other provisions of RCW 90.14.130 through 90.14.180, there shall be no relinquishment of any water right:
>
> (c) If such right is ***claimed*** for a ***determined future*** development to take place either within fifteen years of July 1, 1967, or the most recent beneficial use of the water right, whichever date is later;

The term "claimed" is not defined in the statute. The only case that discussed the term "claimed", in the contexts of RCW 90.14.140, is *City of Union Gap v. Washington State Dept. of Ecology*. 148 Wash.App. 519, 195 P.3d 580, Wash.App. Div. 3 (2008). The analysis in *City of Union Gap* involved whether a party had to be an owner of the water right in order to claim an exception to relinquishment. The term "claimed" was not analyzed or defined. The number 1 dictionary definition in the *NEW OXFORD AMERICAN DICTIONARY* is,

> "claim |klām| verb [reporting verb] state or assert that something is the case, typically without providing evidence or proof" [4]

The term "determined" is not defined in the statute, although *Pacific Land Partners* provides an analysis relying on *R.D. Merrill.* Ecology does not provide a definition of "determined" in its brief. The *NEW OXFORD AMERICAN DICTIONARY* definition of "determined" is

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[4] *New Oxford American Dictionary*

de·ter·mined
Pronunciation: \-'tər-mənd\
Function: *adjective*
1 : having reached a decision **:** firmly resolved <determined to be a pilot>.

The same source defines determine" as follows.

de·ter·mine
Pronunciation: \di-'tər-mən, dē-\
Function: *verb*
Inflected Form(s): **de·ter·mined**; **de·ter·min·ing**
transitive verb **1 a :** to fix conclusively or authoritatively
b : to decide by judicial sentence <determine a plea>
c : to settle or decide by choice of alternatives or possibilities <trying to determine the best time to go>
d : resolve <she *determined* to do better>

By use of the cited definitions, the clear intent of the language used in RCW 90.14.140(2)(c) can result in the following,

(c) If such right is ***stated or asserted*** for a ***firmly resolved*** development to take place either within fifteen years . . . .

The evidence presented by and on behalf Mr. Hagemeier shows he had stated or asserted an intent to farm the land, but was caused to move to another location; that he intended to return to implement his plan, and did so.

The framework established in *Pacific Land Partners* requires only that Hagemeier have a fixed plan in place before the expiration of five years and implement the plan within 15 years of the last beneficial use of the water right. The additional criteria, sought to be imposed by Ecology,

are without legal support and are not required for the "determined future development" exception to apply. He was not required to obtain a permit, clear the land or do any of the other indicators of "development"

Pacific Land provided further insight into the relinquishment analysis with the following:

> As noted in *R.D. Merrill*, 137 Wash.2d at 133 n. 7, 969 P.2d 458, the relinquishment statutes "define five years of nonuse as the voluntary failure to beneficially use the water right." (Emphasis in original.) Relinquishment is precluded if one of the enumerated exceptions in RCW 90.14.140 prevented beneficial use up to the end of the five-year period. *This interpretation accords with the purpose of the relinquishment statutes: to return to the state any water rights that are no longer used and to make them available to others who will put them to beneficial use.* Id. at 140, 969 P.2d 458. (emphasis added)

First, the non-use must be "voluntary", but more importantly, the purpose of the relinquishment statute is "*to return to the state any water rights that are no longer used and to make them available to others who will put them to beneficial use*". If relinquished, the likelihood of any of the Hagemeier's water right returning to the state is extremely small.

B. Answer to Ecology's Issues Raised as Respondent

Ecology argues, in its Response Argument:

> The trial court erred in holding that the United States' right should be limited to the amount needed to irrigate land which could be served

by the 1915 irrigation system on the Yakama Reservation.

> The standard for determining the future rights of an Indian agricultural reservation like the Yakama Reservation is: what amount of water is sufficient to irrigate the practicably irrigable acreage. That standard has not yet been applied to Ahtanum Creek reserved waters, and it should now be applied on remand of this case to the trial court. The trial court erred in holding that the United States' right should be limited to the amount needed to irrigate land which could be served by the 1915 irrigation system on the Yakama Reservation.[5]

The Trial Court correctly quantified the United States reserved water right relying on the *Ahtanum* cases, the 9th Circuit PIA cases and evidence presented in *U.S. v. AID*, Civil 312.

The Trial Court in *Memorandum Opinion Re: Ahtanum Watershed Practicably Irrigable Acreage, November 19, 1994*, stated the issue as follows:

> This Court must decide if Ahtanum I and II quantified the amount of on-reservation acreage susceptible to irrigation from Ahtanum Creek. CP 1501 (Mem Op P.2)
>
> From that starting point, our task in this general adjudication is to determine the amount of Ahtanum Creek water that is presently available for use on reservation lands. CP 1502

Relying on *Arizona v. California*, 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318, *Nevada v. U.S.*, 463 U.S. 110, *U.S. v. Ahtanum Irr. Dist* Civil No. 312 (Pre-Trial Order), *US v. AID* 236 F.2d 321 (Ahtanum I) and

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[5] RESPONDENT/CROSS-APPELLANT STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S OPENING/RESPONSE BRIEF P. 18

US v. AID 330 E.2d 897 (Ahtanum II), Judge Stauffacher stated in the 1994 Memorandum Opinion,

> Based on the facts set forth in these historical documents together with certain conclusions reached by the Ninth Circuit, the south-side, non-Indian irrigators conclude that the doctrine of res judicata applies to prevent relitigation of the already judicially determined irrigable acreage. This Court agrees.

Ecology argues in its "Response Brief", that there was no quantification of the amount of water necessary for future uses of the United States under the practicably irrigable acreage standard.

In it 2009 *Memorandum Opinion Subbasin No. 23 Exceptions* at page 57, the Trial Court stated,

> This Court agrees with the Court Commissioner regarding certain findings. First, the 1994 *Memorandum Opinion* intended to interpret the *U.S*.v. *Ahtanum* line of cases. Second, the *Memo. Opin.* did not establish the actual acreage. CP 512
>
> While a precise amount was not stated, the Ahtanum I and II decisions set the framework for the Acquavella Court to do so.

The following portions of *Ahtanum I & II* speak to the issue.

> Between 1908 and 1915 the Indian Irrigation Service was engaged in the work of constructing and extending irrigation canals and ditches with headworks and means of diversion so that by 1915 the Indian lands upon the reservation susceptible of irrigation from Ahtanum Creek amounted to approximately 5000 acres. *US v. AID* 236 F.2d 321 @ 327.
>
> As we have said, the implied reservation of the waters of this stream extended to so much thereof as was required to provide for the reasonable needs of the Indians, not merely as those needs existed in

> 1908, but as they would be measured in 1915, when the Indian ditch system had been completed. *US v. AID* 236 F.2d 321 @ 337.
>
> The record indicates, as we have noted, that the bulk of the waters flowing in Ahtanum Creek would be required for the irrigation of the lands on the reservation which were susceptible of service through the Indian irrigation system completed in 1915. *US v. AID* 236 F.2d 321 @ 340.
>
> "It is unnecessary to consider whether, had there been no 1908 agreement, the rights of the government as trustee for the Indians would have been constantly growing ones in the years following 1915 had the irrigable area within the reservation continued to increase. It is sufficient for the purposes of this case to say that an adjudication of the rights of the United States in and to the waters of Ahtanum Creek as of 1915, would necessarily award the United States a right measured by the needs of the Indian irrigation project at that date." *US v. AID* 236 F.2d @ 328.

Additional language was found in *Ahtanum II.*

> The record then before us showed that by 1915, the Indian Irrigation Service had completed the construction of irrigation canals and ditches and other works sufficient to provide irrigation water for approximately 5000 acres on the Indian Reservation. We held that as of 1915, in the ordinary course, the Indian tribe and the owners and possessors of their land would be entitled to the right to the waters of Ahtanum Creek measured by the needs of the Indian irrigation project at that date. *US v. AID* 330 F.2d 897 @ 899.

The Ahtanum decisions determined the future needs of the YIN to be based on a PIA of "approximately 5000 acres". The quantity was fine tuned by the Acquavella Court as stated in the various reports and orders, culminating in the Conditional Final Order.

Based on the foregoing, the Trial Court found, in the 1994 PIA Memorandum Opinion,

> This language convinces the Court that the Ninth circuit had the future irrigable acreage needs of YIN in mind in making their decision. In determining that the "Ahtanum Indian irrigation project" as constructed in 1915 would take all the waters of Ahtanum Creek and that the 1908 agreement did exist, thereby limiting southside reservation use to 25% the Ninth Circuit apparently construed that litigation as resolving the reserved water right issue, as it more than allocated the available water for reservation use. It determined that the lands which the YIN would be able to irrigate in 1915 by way of the Wapato Project were all of the lands capable of irrigation then and for the future.
>
> CP 1509-1510, Memorandum Opinion Re: Ahtanum Watershed Practicably Irrigable Acreage, November 19, 1994, P 10-11

The Trial Court concluded as follows:

> In sum, the Court finds that the federal litigation, commencing as *United States v. Ahtanum Irrigation District, Civil Cause 312*, and continuing through the two Ninth Circuit cases authored by Judge Pope *resolved the reserved rights of the Yakama Nation in regard to diversions from Ahtanum Creek inasmuch as it quantified the "practicably irrigable acreage."* Therefore, the decisions by that Court, in light of principles of *res judicata and stare decisis* bar relitigation of the practicably irrigable acreage in the Ahtanum unit of the Wapato Irrigation Project. CP 1513

In *Memorandum Opinion Subbasin No. 23 Exceptions* @ 56, (CP 511) the Trial Court set out its analysis regarding the basis for its quantification of the south side reserved right. After noting that Ecology took no position regarding acreage, the Court began its analysis by referring to the 9th Circuit PIA/res judicata cases,[6] for its decision that res judicata applied, as between the Ahtanum cases and this Adjudication. Ecology's response does not challenge that finding.

The Trial Court then discussed the evidence and stipulations submitted to

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[6] *Arizona v. California*, 460 U.S. 605, 103 S. Ct. 1382, *Nevada v. U.S.*, 463 U.S. 110

the Trial Court in *U.S. v. AID*, Civil 312 and found it sufficient to support its own quantification of the south side reserved right.

One of the items was the 1951 Pre-Trial Order in U.S. v. AID, Civil 312, which included a series of Agreed Facts. The Court identified three relevant Agreed Facts dealing with acreage:

> No.6: Attached, marked "Exhibit A" and by reference made a part of this Pre-Trial Order is a tabulation relating to lands located south of Ahtanum Creek in the Yakima Indian Reservation, disclosing (1)the allotment number, (2) names of ditches, (3) dates relating to initiation and history of increases of irrigation by allotments, (4) location of points of Diversion, (5) total irrigated acreage (maximum), (6) description of irrigated acreage, (7) irrigable acreage (maximum), (8) description of irrigable acreage, and (9) comments.
>
> No. 10: The land situated south of Ahtanum Creek for which rights to the use of water from that stream are claimed in this proceeding total 4,968 [10] acres. All of that land is now, or is susceptible of being served by the Ahtanum Indian Irrigation Project system as presently constructed and as substantially completed in the year 1915.
>
> No. 13: That of the lands irrigated on the Indian side of the creek, 925.45 acres have been
> patented in fee simple which said patents had been issued more than ten years prior to the institution of this action.
>
> The figure of 4,968 acres appears to have been provided by the United States and agreed to by the parties. CP 512-213[7]

These agreed facts were specifically approved by Judge Lindberg and

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[10] The Treaty of June 9, 1855 between the United Stales of America and the Confederated Tribes of Yakima Indians reserved rights to the use of water necessary to meet the irrigation requirements of the lands south of Ahtanum Creek totaling 4,968 irrigable acres. *YIN 353,* US Contention #22.

[7] *Memorandum Opinion Subbasin No. 23 Exceptions* @ 57-58 (fn 10 appears in the Mem. Op.)

incorporated into his Findings of Fact and Conclusions of Law. CP 1503[8]

In addition, the Trial Court discussed a July 20, 1957, Order entered by Judge Lindberg, U.S. District Court, identified as "Pre-Trial on the Merits" in *U.S. v. Ahtanum, Civil 312* CP 2307-2347. The Court further noted that on July 19, 1957, the parties provided the Court their agreed facts and contentions. They included the following:

> Agreed Fact XV:
>
> South of Stream: Ahtanum Indian Irrigation Project and Small Diversions:
>
> The lands situated south of Ahtanum Creek within the Ahtanum Indian Irrigation Project and the small diversion above the Main Canal, for which rights to the use of waters from that stream are claimed in this proceeding total approximately 5100 acres.
> [Emphasis added by Trial Court.]
>
> Agreed Fact XVI:
>
> Of the lands irrigated on the Indian side of the creek, 925.45 acres have been patented in fee simple, which said patents had been issued more than ten years prior to the institution of the action. Since the institution of this action, additional acres in the amount of 74.55 have been patented in fee simple, and 158.70 have been patented to Indians.

The Acquavella Trial Court further noted, in support of the fact that its decision was based on a PIA analysis,

> A further review of the 1957 Pre-Trial Order on Merits shows that these figures were, like the 1951 agreed facts, the same figures found in the Contentions of the United States. Several Contentions of the United States are helpful in understanding the underlying basis for the agreed

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[8] Memorandum Opinion Re: Ahtanum Watershed Practicably Irrigable Acreage, November 19, 1994 @4

to 5,100 acres found in the 1957 Order.

Contention No. XI states in pertinent part:

" ... that the Main Canal delivers Ahtanum Creek water to approximately 4200 acres of land situate within the Ahtanum Irrigation project for the purpose of irrigating those lands."

Contention No. XII, in pertinent part states:

There was also constructed as part of the Ahtanum Indian lrrigation Project, the Lower Canal. ...(It) delivers Ahtanum Creek water to approximately 620 acres of land situate within the Ahtanum Indian lrrigation Project for the purpose of irrigating those lands.

Contention No. XIII contained claims to additional acres from small ditches totaling 130 acres.

Judge Stauffacher, in his 1994 PIA Opinion stated,

In Ahtanum I, the court begins by pointing to the United States' complaint which alleged that one purpose of the treaty was to enable the Yakamas to have a homeland and thereby give up their nomadic habits and till the soil. 236 F. 2d at 324. Accordingly, "the treaty operated to reserve sufficient waters of Ahtanum Creek for the Indians' needs, both present and future." Id. (emphasis in original).

Next, Judge Pope determined a decision as to the validity of the Code Agreement would need to be made if the 25% allocation to YIN was insufficient for their "needs ... as they might exist in the future." Id. at 325. On page 326 Judge Pope took the issue head on and wrote:

This brings us to a discussion of the question of quantum of waters reserved. It is obvious that the quantum is not measured by the use being made at the time the treaty reservation was made. The reservation was not merely for present but for future use." [Emphasis added by Trial Ct.]

Judge Stauffacher noted at page 10 of his 1994 PIA Opinion that Judge Pope addressed the issue of the number of acres susceptible to irrigation as follows:

> "the paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation."
>
> "by 1915 the Indian lands upon the reservation susceptible of irrigation from Ahtanum Creek amounted to approximately 5000 acres. Had there been no 1908 agreement, it seems plain that as of 1915 it would have to be said that the rights reserved in the treaty were rights to the use of water from this stream sufficient to supply the needs of this 5000 acres."

Although the U.S. argued this language considerd only the amount of acreage available for irrigation in 1915 and not possible future developments, Judge Stauffacher cited additional language in *Ahtanum I*, which showed otherwise.

> "The record here shows that an award of sufficient water to irrigate the lands served by the Ahtanum Indian irrigation project system as completed in the year 1915 would take substantially all of the waters of Ahtanum Creek."

The 1994 PIA Opinion concluded that:

> This language convinces the Court that the Ninth circuit had the future irrigable acreage needs of YIN in mind in making their decision. In determining that the "Ahtanum Indian irrigation project" as constructed in 1915 would take all the waters of Ahtanum Creek and that the 1908 agreement did exist, thereby limiting southside reservation use to 25%, the Ninth Circuit apparently construed that litigation as resolving the reserved water right issue, as it more than allocated the available water for reservation use. It determined that the lands which the YIN would be able to irrigate in 1915 by way of the Wapato Project were all of the lands capable of irrigation then and for the future.

No evidence has been submitted by any party that that there have any improvements or additions to the Ahtanum Wapato Irrigation system since

1915, nor any increase in the practicably irrigable acreage.

Based upon the foregoing, it is clear that the Trial Court quantified the YIN/US reserved right recognizing that the PIA standard had been addressed and applied by the Federal Court in the *Ahtanum* cases, had been thoroughly considered by Judge Stauffacher in the 1994 PIA Opinion and the Court Commissioner in the initial report.

Those cases leave no doubt that the Ninth Circuit was aware of the "future right" component of PIA when they made the decision and properly quantified the US/YIN reserved water right.

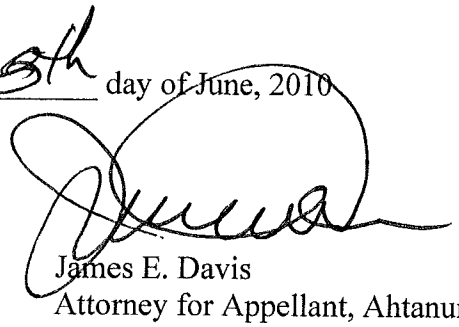
Ecology refers to *Conrad Investment Co.* v. *United States,* 161 F. 829 at 835 (9th Cir. 1908) where the court awarded the Indians a present right of 1666.67 inches of water, but allowed for modification of the decree if the Indians' needs should increase in the future. The Conrad case is not authority for the rule suggested by Ecology, that the PIA standard should apply in this case to the future needs of the YIN. Conrad was decided in 1907 when there was no irrigation system yet in place for the Indian land. Here, the Ahtanum WIP works were already in place, allowing a PIA analysis to proceed. Judge Pope provided the framework for the future PIA analysis and the Acquavella Court finished the job.

VI. Conclusion

1. This Court should affirm the Trial Court decision that Hagemeier's testimony supported a determined future development exception to relinquishment.

2. This Court should further affirm the Trial Court quantification of the United States' reserved water right for irrigation and limited its period of use?

Respectfully submitted this 18th day of June, 2010



James E. Davis
Attorney for Appellant, Ahtanum Irrigation District
WSBA # 5089

VIII. CERTIFICATE OF SERVICE

THE UNDERSIGNED STATES:

1. That I am over the age of 18 years, am a resident of the State of Washington, not a party hereto and am competent to testify herein.

2. On the below subscribed date, I sent, via e-mail, AND regular, first class mail, the subjoined BRIEF OF APPELLANT AHTANUM IRRIGATION DISTRICT to:

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Assistant Attorney General
State of Washington
Department of Ecology
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 18th day of June, 2010 at Yakima, Washington.

JAMES E. DAVIS