NO. 281141

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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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.

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# RESPONSE BRIEF OF APPELLANT/RESPONDENT JOHN COX DITCH COMPANY

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## I. Introduction:

Appellant/Respondent-John Cox Ditch Company ("John Cox") submits this Brief in response to the "Corrected Opening Brief of the United States" ("U.S. Brief"), the "Yakama Nation's Corrected Opening Brief" ("YN Brief"), and the "Respondent/Cross-Appellant State of Washington, Department of Ecology's Opening/Response Brief" ("DOE Brief").

The United States ("U.S."), the Yakama Nation and DOE assign error to the Trial Court's rulings on practicable, irrigable acreage and irrigable acreage for the Yakama Reservation and the denial of a storage right for the Yakama Reservation.

The Yakama Nation and DOE also assert additional assignments of Error not raised by the U.S.

John Cox will first address the Assignments of Error and Issues raised by the U.S., Yakama Nation and DOE and then address the Yakama Nation's Assignment of Error related to the Trial Court's award of a water right for "excess" water to North-side waterusers.

John Cox will not, however, respond to the Yakama Nation's and DOE's issues related to: (a) April 1 – April 15 water, (b) non-Indian allottee successors, and (c) non-diversionary stock water because resolution of these Issues does not affect John Cox's rights.

II. Response to U.S., Yakama Nation and DOE Statement of the Case:

A. Practicable, Irrigable Acreage:

The Yakama Nation's Statement of the Case (YN Brief, pp. 11-12), misstates the nature of the water rights of the non-reservation North-side waterusers.

The Statement of the Case quoted from United States vs. Ahtanum Irrigation District, 236 F.2d 321, 340 (9th Cir. 1956) ("Ahtanum I"):

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> "To the extent that the defendants are to be permitted to have any part of the use of the flow of the stream, their rights are deraigned from the agreement of 1908."

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Ahtanum I, in the sentences following the above-quoted portion of the Opinion, stated:

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> "Apart from that agreement, those defendants would have no right to the use of any of said waters except in strict subordination to 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 the use of the surplus after the interest of the Indians had been satisfied but in relation to that surplus only." 36 F.2d at 340.

***

Contrary to the Yakama Nation's assertion North-side waterusers rights derive solely from the Code Agreement, the Ahtanum I Court clearly recognized the North-side waterusers had established water rights pursuant to Washington State law.

The above statement by the Ahtanum I Court quoted by the Yakama Nation is merely a judicial recognition that absent the Code Agreement, the Treaty reserved rights of the Yakama Nation with a priority date of 1855 would have priority for the use of water from Ahtanum Creek over the later, junior, perfected State rights of the North-side waterusers.

The federal Ahtanum litigation was commenced in July, 1947, with the filing of the United States "Complaint" (YN Ex. 27).

The U.S. "Complaint", paragraphs 6 and 7, alleged in relevant part:

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"V.

> "At the time of the adoption of the Treaty of June 9, 1855, and at all times since, all of the lands within the reservation were and are arid in character. During all of the times herein mentioned, all portions of the lands embraced within the boundaries of the reservation, including lands on the reservation side of Ahtanum Creek and its tributaries, were and are adapted for and susceptible to farming and cultivation and the pursuit of agriculture. In order to make these lands productive, large quantities of water are required for the purpose of successfully and adequately irrigating them....

***

"VI.

> "Since the establishment of the Yakama Reservation on June 9, 1855, the United States has been the trustee of the Yakama tribe of Indians holding legal title to all the lands and waters of the reservation. On June 9, 1855, there was reserved sufficient waters of Ahtanum Creek and its tributaries for the needs of the Indian reservation, as they existed or might exist in the future, for irrigation, domestic and other purposes. Since June 9, 1855, the waters so reserved have not been subject to appropriation under territorial or state laws or otherwise." (Emphasis added)

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In paragraph XII of the "Complaint", the U.S. alleged the specific points of diversion and quantities of water it claimed to be entitled to divert from Ahtanum Creek as the Trustee for the Yakama Nation.

The District Court dismissed the United States "Complaint", United States vs. Ahtanum Irrigation District, 124 F.Supp. 818 (E.D. Wash. 1954). An appeal by the United States resulted in the Ahtanum I "decision" which found the Code Agreement to be valid but remanded the case to the District Court for a determination of the respective rights of the parties pursuant to the Code Agreement.

After remand, an "Order on Pre-Trial on the Merits" dated 7/20/1957 was entered (Exhibit C to Declaration of James E. Davis, CP 2314-2315). The "Agreed Facts" section of the 1957 "Pre-Trial Order", Sections XV and [X]VI, provide:

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"XV.

"South of Stream: Ahtanum Indian Irrigation Project Small Diversions:

"The land situated south of Ahtanum Creek within the Ahtanum Indian Irrigation Project and the small diversions above the main canal, for which rights to the use of water from that stream are claimed in this proceeding total approximately 5,100 acres.

"VI. [sic]

"Of the lands irrigated on the Indian side of the creek 925.45 acres have been patently in fee simple which said patents have been issued more than 10 years prior to the institution of this action. Since the institution of this action, additional acres in the amount of 74.55 have been patented in fee simple and 158.70 acres have been patented to Indians."

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The District Court on 1/30/1962 entered "Findings of Fact and Conclusions of Law" (Ex. DOE 136) after a trial before the District Court of the Special Master's Report.

Finding of Fact 32 provided:

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"The Statement of Agreed Facts, entered into by the parties, and set forth in the Order on Pre-Trial on the Merits on this case, is incorporated herein by reference as though fully set forth."

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The U.S. did not appeal from the "Agreed Fact" incorporated in the Findings about the total of 5,100 irrigable acreage for which the United States was claiming rights.

At the beginning of the Ahtanum subbasin proceedings, Judge Stauffacher received extensive briefing and argument about the "practicable irrigable acreage" ("PIA") issue and on 11/09/1994 entered his "Memorandum Opinion Re: Ahtanum Watershed Practicably Irrigable Acreage" ("PIA Memo"), in which he stated the issue to be resolved was:

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> "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. In Arizona vs. California, 373 U.S. 456 (1963), the United States Supreme Court adopted the 'practicably irrigable acreage' ('PIA') standard which defines the water right by determining the land base upon which the water will be used. Reservations of water for that purpose include present as well as future needs. Id. at 600. The Ninth Circuit in U.S. vs. Ahtanum Irr. Dist., 330 F.2d 897, 899 (1964), acknowledged the Arizona vs. California decision in Footnote 1. However, the Code Agreement that proportion's Ahtanum Creek's 75% to the off reservation north side of the creek and 25% to the reservation limits this determination somewhat. This court must decide if Ahtanum I and II quantified the amount of on reservation acreage susceptible to irrigation from Ahtanum Creek." (CP 51-52, PIA Memo 2-3)

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After considering Arizona vs. California, supra, Nevada vs. U.S., 463 U.S. 110, United States vs. Ahtanum Irrigation District, Civil No. 23

"Pre Trial Order Stipulated Facts", paragraphs 6 and 10, Ahtanum I and Ahtanum II, Judge Stauffacher held:

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> "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 determined irrigable acreage. This Court agrees." (CP 1503, PIA Memo 4)

After further review of the Ahtanum Federal Court cases and federal authority related to *res judicata*, particularly Nevada vs. United States, 463 U.S. 110 (1983), and Arizona vs. California, supra, Judge Stauffacher concluded:

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> "In sum, the court finds that the federal litigation, commencing as United States vs. 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 'practicable irrigable acreage' therefore, the decisions by that court in light of the principles of *res judicata* and *stare decisis* bar relitigation of the practicably irrigable acreage in the Ahtanum unit of the Wapato Irrigation Project."

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Although Judge Stauffacher ruled the prior federal litigation in the Ahtanum basin was *res judicata* of the issue of the reserved irrigation

water right for the Yakama Nation, Judge Stauffcher's "PIA Memo" did not quantify that acreage.

Commissioner Ottem in the 1/13/2002 "Report of the Court Concerning Water Rights for Subbasin 23 (Ahtanum Creek)" ("First Report") established the "practicable irrigable acreage" within the reservation for which the water right would be confirmed at 3,306.5 acres based on the claim submitted by the United States. (CP 1018, First Report, p. 42.)

After Exceptions by the Yakama Nation, Commissioner Ottem in the 2/25/2008 "Supplemental Report of the Court Concerning the Water Rights for Subbasin 23 (Ahtanum Creek)" determined the "irrigable acreage" within the reservation was 5,146.85 acres which included 924.25 acres of land owned in fee by non-Indians. (CP 1466-1476, Supplemental Report 24-34)

The Yakama Nation took exception to the Supplemental Report's determination the 5,146.85 acres of irrigable land within the reservation included the non-Indian owned land.

This issue was finally resolved in Judge Gavin's 4/15/2009 "Memorandum Opinion Exceptions to the Supplemental Report of the Court and Proposed Conditional Final Order, Subbasin No. 23 (Ahtanum)" ("Memo Opinion and CFO").

Judge Gavin reviewed and affirmed the 1994 PIA Memo's holding the decisions in Ahtanum I and II precluded a re-litigation of the "practicable, irrigable acreage" issue. (CP 512, Supplemental Report, p. 57)

The Court also found the 7/20/1957 Order on Pre-Trial on the merits of Judge Lindberg, after remand from the decision in Ahtanum I, established the law of the case about "acreage" stating at CP 514, Memo Opinion and CFO, p. 59.

Judge Gavin's Memo Opinion and CFO also independently analyze the previously decided PIA issues and ultimately agreed with Commissioner Ottem's determination the total practicable irrigable acreage on the Yakama Reservation totaled 5,100 acres consisting of 4,107.61 acres of trust and tribal fee land, and 992.39 acres of fee land owned by non-Indians. (CP 511-515, Memo Opinion and CFO, pp. 56-60)

B. Confirmation of a North-side water right for water in excess of that which can be beneficially used on the Yakama Reservation:

The facts relevant to the issue of the right of North-side waterusers to have a water right confirmed, to the extent of their state water right when water is available in Ahtanum Creek in excess of the amounts which can be beneficially used on the Yakama Reservation, are described on p. 8

of the 4/07/2010 corrected "Brief of Appellant/Respondent John Cox Ditch Company" ("John Cox Opening Brief") as well as in the argument relating to "junior rights" for the use of "excess water", also in John Cox Opening Brief, pp. 21-24.

III. Argument:

A. Practicable, Irrigable Acreage:

Both the U.S. and Yakama Nation assign as error the "refusal" of the Trial Court to quantify the United States/Yakama Nation's water right based on the "practicable irrigable acreage" standard. DOE makes a similar "Assignment of Error".

Both "Assignments of Error" are clearly without merit.

The above-cited decisions by the Trial Court are simply the irrigation of the approximate 5,100 acres capable of being irrigated from the Yakama Indian Irrigation Project as it existed in 1915 would require the entire flow of Ahtanum Creek and, therefore, is all the reservation acreage which could be practicably irrigated from Ahtanum Creek.

By definition, land is "practicably irrigable" only if water is, or can be made, available for irrigation.

Judge Stauffacher conducted an extensive review, analysis and relied on the Findings and Conclusions, in both U.S. District and Appellate Courts, as the basis of his PIA Decision.

The Appeals Court Decisions in both Ahtanum I and United States vs. Ahtanum Irrigation District, 330 F.2d 897 (9th Cir. 1964) ("Ahtanum II"), clearly, unequivocally demonstrate the Appellate Courts clearly understood the nature and extent of the Yakama Nation's Treaty reserved water right included present and future use and the "practicable irrigable acreage" standard for quantifying the Yakama Nation's water rights.

In Ahtanum I, the Court considered Winters vs. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340, and cases which followed the Winters decision. The Court held:

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> "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 the present but for future use. Any other construction of the rule in the Winters case would be wholly unreasonable." 236 F.2d at 326 (Emphasis added)

***

The Ahtanum I Court, applyied Winters and its progeny to Ahtanum Creek, and held:

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"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 5,000 acres. 236 F.2d at 327.

***

"As we have said, the implied reservation of the waters of this stream extended so much thereof as was required to provide for the reasonable needs of Indians, not only as those needs existed in 1908 but as they would be measured in 1915 when the Indian ditch system had been completed. 236 F.2d at 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. 236 F.2d at 340.

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"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." 236 F.2d at 328.

***

Between the entry of the decision in Ahtanum I and the entry of the decision in Ahtanum II, the United States Supreme Court issued its

opinion in Arizona vs. California, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963), which established "practicable irrigable acreage" as the measure of the water right reserved by treaty for Indian reservations.

The Ahtanum II Court was fully aware of the "practicable irrigable acreage" standard and noted the Arizona vs. California decision at the beginning of its opinion. 330 F.2d at 899, Fn. 1.

Immediately after citing to the Arizona vs. California decision, the Ahtanum II Court stated:

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> "The record then before us [in Ahtanum I] 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 5,000 acres of 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 their right to the waters of Ahtanum Creek measured by the needs of the Indian irrigation project at that date." 330 F.2d at 899.

***

After reviewing the above-quoted portions of Ahtanum I and Ahtanum II, Judge Stauffacher, in his PIA Memo Opinion, held:

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> "This language convinces the court that the Ninth Circuit had the future irrigable needs of the YIN in mind in making the 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 south side 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 the lands which the YIN would be able to irrigate in 1915 by way of the Wapato project were all the lands capable of irrigation then and for the future.

"This also addresses the United States argument of why the Ninth Circuit awarded to the reservation those flows in excess of 62.59 cfs allocations and those waters not used beneficially by off reservation north side successors-in-interest to the signatories of the Code Agreement. The answer appears to be that the federal court correctly determined there was insufficient water to irrigate the lands designated to be irrigated by the 1915 project. Id. at 377. The U.S. also indicates as of 1987, only 2,728.7 acres of trust and tribal fee lands are being irrigated. Although the remainder of nearly 5,000 acres quantified in Ahtanum may be under the control of non-tribal irrigators, it also may be that much of the original acreage is still susceptible to irrigation, thereby supplying a destination for any surplus water. (Emphasis added)

> 'As we have said, the implied reservation of the waters of this stream extended to so much thereof as required to provide the reasonable needs of the Indians, not merely as those existed in 1908 but as they would be measured in 1915 when the Indian ditch system was completed. If we assume that this 1915 need extended to substantially all the waters of Ahtanum Creek, then the question is whether conceding of the secretary had the power to make an agreement for some workable division, can it be held that he had the power to agree to give the white settlers 75% of that which the Indians might need in 1915 and subsequent years.' (Emphasis added by Judge Stauffacher)

"Of course, Judge Pope proceeded to answer this in the affirmative.

"Further evidence demonstrating directly that the Ninth Circuit believed the United States to be making a claim for the irrigable acres on the reservation in the Ahtanum proceedings can also be

> found in their two opinions. In Ahtanum I, the court disagreed with the trial court's conclusion that the United States had improperly proceeded with proof of the YIN's rights. Rather, the Ninth Circuit approved the U.S.'s method of proof which included a showing of the location, point of diversion and capacity of each ditch constructed by YIN or the then Indian Service, as well as the description, irrigable area, and location of all reservation lands served by those ditches with water from Ahtanum Creek. Id. at 399-340." (Emphasis added by Judge Stauffacher)

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Judge Stauffacher's determination in his "PIA Memo Opinion" the Ahtanum I and Ahtanum II Courts established the PIA for the reservation from Ahtanum Creek as the acreage irrigable from the Yakima Indian Irrigation Project as it was completed in 1915 is clearly correct.

Although Judge Stauffacher's "PIA Memo Opinion" established "practicable irrigable acreage" on the reservation were the acres irrigable from the Yakima Indian Irrigation Project canals, he did not quantify the actual acreage.

The final Acquavella quantification of the PIA was by Judge Gavin in his "Memo Opinion and CFO" as follows:

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> "This Court agrees with the Court Commissioner regarding certain findings. First, the 1994 Memorandum Opinion intended to interpret the U.S. vs. Ahtanum line of cases. Second, the Memo. Opin. Did not establish the actual acreage. However, the Court finds that the 1951 Order (and Exhibit A) is but one piece of evidence available to the Court. In addition to the irrigable

acreage, Exhibit A includes the irrigated acreage, but in lesser amounts. There was also a 1951 map identifying the irrigable acreage and allotments as of 1915 (DE-150). Dr. Crane testified he determined the irrigable acreage within the boundaries of that map to be 6,466 acres. (RP 2/3/2004). Since PIA applies, the question is not what has been historically irrigated on the south-side, but the number of irrigable acres. The answer rests on analysis of the Orders and evidence.

"The 1951 Pre-Trial Order includes a series of Agreed Facts. The Court can identify 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. It is not evident that in 1951 the United States was claiming more acreage than the parties agreed to, regardless of Exhibit A. If the proper figure was

reflected in Exhibit A, it was incumbent upon the United States, as the representative of the Yakama Nation, to make a claim for that acreage.

"There is a second Order that the Court believes establishes the law of the case regarding acreage. On July 20, 1957, Judge Lindberg, U.S. District Court, entered an Order on Pre-Trial on the Merits in U.S. vs. Ahtanum. (#18,888, Declaration dated 9/10/2004, Attachment C). On July 19, 1957, the parties provided the Court their agreed facts and contentions. In this 1957 Order, not only do the number of agreed acres on the Yakima Reservation increase, but the number of fee lands increased as well:

> 'Agreed Fact XV:
>
> 'South of stream: Ahtanum Indian Irrigation Project and small diversions:
>
> 'The land situated south of Ahtanum Creek within the Ahtanum Indian Irrigation Project and the small diversions above the main canal for which rights to the use of waters from that stream are claimed in this proceeding were approximately 5,100 acres [emphasis added by Judge Gavin].
>
> 'Agreed Fact XVI.
>
> 'None 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.

"A further review of the 1957 – Pre-Trial Order on the 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 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 4,200 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 Irrigation Project, the lower canal.... (I)t delivers Ahtanum Creek water to approximately 6,200 acres of land situate in the Ahtanum Irrigation Project for the purpose of irrigating those lands.

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

"The above acreage does total 4,950 acres. Inclusion of the 158.7 acres of Indian fee land brings the total to 5,108.7 acres. With the identification of an additional 74.55 acres of Class 3 lands, the non-Indian fee land total increases from 925.45 to 1,000 acres. The Court finds the 1957 Order controls. The Court denies the Yakama Nation's exception to acreage. The Court finds that the maximum acreage to be confirmed on the Yakama Reservation south side is 5,100 acres.

"The 1957 Order, Agreed Fact XVI, and the 1951 Order include the non-Indian fee lands (Class 3 defendants) in the agreed total of 5,100 acres. Of this amount, there are currently 992.39 acres of fee land owned by individuals on the south side that are derivative of the 1855 Treaty. The Court having confirmed a separate right for those lands, the Yakama Nation is entitled to an irrigation right of 4,107.61 acres." (Emphasis added) (CP 513-515, Memo Opinion and CFO, pp. 58-60)

***

The assertion by the U.S., Yakama Nation and DOE, even assuming the Trial Court correctly determined the PIA was limited by the

federal Ahtanum litigation, the Court incorrectly quantified that acreage is without merit.

The U.S., Yakama Nation and DOE argument ignores Agreed Statement of Fact 15 in the 7/20/1957 Order on Pre-Trial on the Merits in U.S. vs. Ahtanum which was specifically incorporated in the District Court's "Findings of Fact" and "Judgment" establishing the U.S. claim to divert and use waters from Ahtanum Creek was in the approximate amount of 5,100 acres.

This Agreed Fact was proposed by the United States, was neither challenged by any part in the appeal to the Ninth Circuit, nor was it in any way modified by the decision in Ahtanum II.

All parties, including the United States and Yakama Nation, are bound by this unchallenged Finding.

Judge Gavin's use of the 5,100 acre figure in quantifying the tribal trust and Indian owned fee land component of the PIA was clearly appropriate and the use of any other figure would have been erroneous.

The Trial Court clearly determined the irrigation water right to be confirmed to the United States and Yakama Nation based on the appropriate "practicable irrigable acreage" standard.

The Assignments of Error by the U.S., Yakama Nation and DOE related to this issue must be rejected by this Court.

B. *Res Judicata* precludes relitigation of the PIA issue:

The United States, Yakama Nation and DOE assign error to the Trial Court's determination the federal Ahtanum cases preclude relitigation of the PIA issue pursuant to *res judicata.*

Judge Stauffacher's "PIA Memo Opinion" clearly establishes the applicability of *res judicata* to the PIA issue.

***

> "Considerable evidence and case law convinces this Court that res judicata applies to the PIA of the Ahtanum unit in this general adjudication. In addition to the documents filed or agreed to by the United States set forth above, there are many expressions by the Ninth Circuit in the Ahtanum cases as well as applicable decisions by the U.S. Supreme Court in the 1983 version of Arizona v. California and Nevada v. United States that support such a decision. These cases will be discussed below.
>
> "1. Nevada, Arizona v. California
>
> "The case of Nevada vs. U.S., 463 U.S. 110 (1983) applies in two ways. First, it sets out the underlying principle of res judicata, particularly as it applies in water right adjudications. Secondly, the Supreme Court applied res judicata to facts remarkably similar to the dispute at hand.
>
> "In Nevada, the United States requested on behalf of the Paiute Indians a right to additional flows from the Truckee River for the purpose of maintaining and preserving the Lahontan cutthroat trout and cui-ui fishery in Pyramid Lake. This request came approximately 30 years after a final decree had been entered in what was commonly known as the Orr Ditch litigation, United States v. Orr Water Ditch Co., et al., Equity No. 3 (Nevada), an adjudication filed in 1915 by the U.S.

"The legal issue in Nevada was whether the doctrine of res judicata would bar litigation of the U.S.'s asserted water right for fish in light of the fact that the Paiute Tribe's water rights in the Truckee River had been litigated and quantified in Orr Ditch.

"The factual and legal similarity of that proceeding to the dispute being decided by this Court is significant. The time frame is also similar. The question there before the U.S. Supreme Court is practically identical to our present adjudication: Can the United States, on behalf of an Indian nation, relitigate a reserved right that was adjudicated and decreed 30 years before, or is such a claim barred by res judicata? The Court should point out that it does not believe Nevada and its explanation of res judicata applies to the reserved right for fish in Ahtanum Creek. This is so because unlike the Paiute Tribe in Nevada, YIN here has a specifically reserved water right for fish that did not need to be quantified given the objectives of the Ahtanum cases; namely to find adequate irrigation water for complete utilization of the Wapato Project as designed in 1915. See Memorandum Opinion Re: Usual and Accustomed Fishing Places, September 1, 1994.

"According to the high court, the doctrine of res judicata provides:

> 'when a final judgment has been entered on the merits of a case, "[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' Nevada, 463 U.S. at 129-130 quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1876).

"Further, the final 'judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever.' Id. quoting Commissioner v. Sunnen, 333 U.S. 591, 597 (1948). In Washington, the elements of res judicata are specifically broken down as follows:

> 'There must be identify of (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. Mellor v. Chamberlain, 100 Wn.2d 643, 645 (1983).'

"Although much of the evidence supporting application of res judicata will be addressed in the section that parses the two Ahtanum opinions, a brief application seems appropriate at this juncture.

"The subject matter in this adjudication is the same as it was in Ahtanum I and II; the division of the water flowing in Ahtanum Creek.

"Similarity of the cause of the action is also obvious. In Nevada, the Supreme Court in favorably comparing the similarity of the Orr Ditch litigation with that proposed by the United States, played what is considered the following trump card:

> 'For evidence more directly showing the Government's intention to assert in Orr Ditch the Reservation's full water rights, we return to the amended complaint, where it was alleged:
>
> > 16. On or about or prior to the 29th day of November, 1859, the Government of the United States, having for a long time previous thereto recognized the fact that certain Pah Ute and other Indians were, and they and their ancestors had for many years been, residing upon and using certain lands in the northern part of the said Truckee River Valley and around said Pyramid Lake ... and the said Government being desirous of protecting said Indians and their descendants in their homes, fields, pastures, fishing, and their use of said lands and waters, and in affording to them an opportunity to acquire the art of husbandry and other arts of civilization, and to become civilized, did reserve said lands from any and all forms of entry or sale and for the sole use of said Indians, and for their benefit and civilization.'

. . . .

> 'This cannot be construed as anything less than a claim for the full "implied-reservation-of-water" rights that were due the Pyramid Lake Indian Reservation.' 463 U.S. at 132.

"A review of Paragraphs IV, V, VI and VIII of the U.S.'s complaint in the Ahtanum line of cases reveals a very similar claim to the reserved rights claim being made now. (See the additional language from Ahtanum cases set forth hereafter.)

"Persons and parties and quality of the persons cannot seriously be questioned in this proceeding. The United States represented YIN in the Ahtanum cases and all the water users were required to put forth their claim. All parties were aware of the U.S.'s intention to obtain more water for use on the reservation.

"In March, 1983, the Supreme Court again tackled the issue of how final a final decree in a water rights adjudication should be in relationship to the reserved rights of an Indian nation. In the case of Arizona v. California, 460 U.S. 605, the Court was called on to revisit their quantification of the reserved rights in the original installment of that litigation, Arizona v. California, 373 U.S. 546 (1963). Essentially, the tribes involved claimed the original decree had been based on errors as to inclusion of all the irrigable acreage and that circumstances had changed allowing for irrigation of more acreage.

"At the outset of the opinion, the Court noted the PIA standard encompassed a fixed calculation of future water needs. Arizona v. California, 460 U.S. 605, 617 (emphasis in original). They also noted that while technical application of res judicata was not possible because that decision was a continuation of the original proceeding by the same court, the Supreme Court did state that a 'fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive.' Id. at 619. Furthermore,

> '[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. (Cite omitted)
>
> 'In no context is this more true than with respect to rights in real property. Abraham Lincoln once described with scorn those who sat in the basements of courthouses combing property records to upset established titles. Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open. (Cite omitted). Certainty of rights is particularly important with respect to water rights in the Western United States. The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country. The doctrine of prior appropriation, the prevailing law in the western states, is itself largely a product of the compelling need for certainty in the holding and use of water rights.
>
> '<u>Recalculating the amount of practicably irrigable acreage runs directly counter to the strong interests in finality in this case</u>.' 460 U.S. at 620 (emphasis added by Judge Stauffacher)." (CP 1503-1508, PIA Memo Opinion, pp. 4-9)

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Judge Gavin's "Memo Opinion" and "CFO", in response to Exceptions by the Yakama Nation, again addressed the *res judicata* issue, holding:

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"There are four criteria for res judicata:

> 'There must be identity of (1) subject matter; (2) cause of action; (3) person and party; and (4) the quality of the persons for or against whom the claim is made. Ecology vs. Yakima Reservation Irrigation District, 121 Wn.2d 257, 290 (1993) [a prior appeal in this case]
>
> "When comparing the Ahtanum litigation to this adjudication, the Court finds that the subject matter and cause of action are the same: determining the allocation of water from Ahtanum Creek; the persons and parties as well as the quality of the persons are also the same."

***

The United States asserts (U.S. Brief, p. 30) the criteria to be applied to determine the applicability of applying *res judicata* are described in Abramson vs. University of Hawaii, 594 F.2d 202, 206 (9th Cir. 1979):

***

> "(1) [W]hether the rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same rights; and (4) whether the two suits arise out of the same transaction or nucleus of facts."

***

Applying the standard urged by the United States does not change the result of Judge Gavin's decision.

The Ahtanum I and Ahtanum II cases not only establish North-side rights pursuant to the Code Agreement but establish the right of North-side waterusers to use water from Ahtanum Creek in excess of water which could be beneficially used to irrigate reservation land from the Yakama Indian irrigation canal and related diversions, land totaling 5,100.00 acres based on the Trial Court's PIA determination.

The right of North-side irrigators to use "excess" water would clearly be impaired if the PIA issue were relitigated and a larger quantity of PIA established.

Substantially the same U.S. evidence is presented in this case as in the prior Ahtanum proceedings.

The United States and Yakama Nation presented evidence about the quantity of reservation land which can be practicably irrigated from Ahtanum Creek and the North-side waterusers presented evidence about their appropriation and continuous beneficial use of Ahtanum Creek water.

The rights involved in all three (3) cases are the same: (1) the priority in the use of and (2) quantity of irrigation water which may be diverted North and South of Ahtanum Creek.

This adjudication and the prior Ahtanum litigation are the result of the same transactional nucleus of facts: the determination of the right to the use of water from Ahtanum Creek.

No matter what criteria or standards are applied, *res judicata* precludes the United States and Yakama Nation from relitigating the amount of practicable irrigable acreage on the reservation.

C. The Trial Court correctly denied confirmation of a storage right and post-irrigation season right for the U.S./Yakama Nation:

The U.S., Yakama Nation and DOE assign error to the Trial Court's failure to confirm a storage right in, and the right to divert, water in the non-irrigation season to the United States and Yakama Nation.

The U.S. and Yakama Nation offered evidence of "future needs", including feasibility studies and economic analysis, to the Trial Court to establish the storage of natural flow from Ahtanum Creek would increase the "practicable irrigable acreage" within the reservation to a total of 6,381.3 acres of trust and tribal fee land. (U.S. Brief, p. 14)

Judge Stauffacher rejected this evidence based on his determination the PIA for reservation land had been established by the federal Ahtanum litigation.

Judge Stauffacher accepted the storage evidence presented "provisionally to the extent it applies to future projects for the irrigation of irrigable acres already quantified and claimed in the Ahtanum proceeding". (CP 1513, PIA Memo Opinion, p. 14)

No evidence was presented by the U.S. or Yakama Nation construction of storage to provide additional water for the 4,107.61 practicable, irrigable acres of trust and tribal fee land on the reservation was economically feasible.

In addition, there was no evidence presented of a suitable on-reservation site to construct storage for this purpose.

There is, absent this evidence, no basis for confirmation of a storage right for the "practicable, irrigable acreage" quantified by the Trial Court.

The parties' assertion of a right to divert water during the established non-irrigation season of October 1 to April 1 was only offered for the purpose of storing water for later use during the irrigation season.

There is no basis for confirming a non-irrigation season diversion right because there is no basis for confirming a storage right.

The Trial Court's refusal to confirm a storage right and the right to divert from Ahtanum Creek in the non-irrigation season for storage must be affirmed because (1) the practicable, irrigable acreage on the reservation is limited to acreage which can be irrigated from the existing Yakima Indian Irrigation Project and (2) there is no evidence which establishes the construction of storage is feasible to supplement water available for the reservation from the natural flow of Ahtanum Creek.

D. The Trial Court correctly confirmed "excess" water rights to North-side waterusers.

The argument of John Cox in support of the Trial Court's confirmation of "excess" water rights for North-side waterusers who have a right to participate in the Code Agreement allocation of water includes all arguments made in the Argument portion of the "John Cox Opening Brief", pp. 9-26, and the prior arguments, which are incorporated herein.

It is important to note there are two (2) classes of rights for use of excess water by North-side waterusers in the context of "excess" water rights:

(1) A North-side wateruser entitled to share in the allocation of water pursuant to Section 1A of the Pope Decree, including the right to use excess water which cannot be beneficially used on the reservation to the extent a North-side wateruser has established his continuing rights pursuant to the Code Agreement in Ahtanum II.

(2) Even if a defendant wateruser in Ahtanum II failed to establish a continued right to participate in the Code Agreement allocation, that wateruser still retains a state-based water right which may only be exercised: (1) when there is water available in Ahtanum Creek in excess of the irrigation requirements of the Yakama Reservation and (2) the North-side waterusers who established they were entitled to participate

in the Code Agreement allocation of water to the North-side of Ahtanum Creek.

The Conditional Final Order for the Ahtanum subbasin recognized the right to the use of excess water by the first class of North-side waterusers with Code Agreement rights, but not the second class of North-side waterusers who do not have Code Agreement rights, which have been identified in the Trial Court as "junior" rights.

The Trial Court awarded "excess" water rights to parties entitled to a portion of the Code Agreement allocation but denied all "junior" rights.

The fundamental flaw in the Yakama Nation's argument is its continued misinterpretation of Ahtanum II and the Pope Decree as being an adjudication of North-side water rights to Ahtanum Creek, rather than an allocation of water in Ahtanum Creek between the Yakama Reservation and non-reservation land North of the creek.

Both Commissioner Ottem and the Yakama Nation continue to erroneously urge that the Pope Decree was an adjudication of all North-side rights. (See, John Cox Opening Brief, pp. 12-15.)

The U.S. District Court did not adjudicate North-side water rights although the District Court was directed to by the Ahtanum I Court.

The failure of the District Court to adjudicate North-side water rights was specifically assigned as "error" by the United States in its

Ahtanum II appeal but the U.S. Assignment of Error was specifically rejected by the Ahtanum II Court, which held at 330 F.2d 910-912:

***

> "Appellant particularly complains of the federal district court's adjudication of the rights of defendants 'in gross' or 'in the aggregate' as stated in Conclusion No. 3 previously quoted; and asserts this treatment of the rights of the defendants as a group, or in the aggregate is error for several reasons.
>
> ***
>
> "But as we shall note shortly, the court in deciding upon this gross treatment and other considerations in mind which prompted this exercise of discretion.
>
> ***
>
> "We recognize that it would have been entirely in accord with the direction 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. ...
>
> ***
>
> "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. ... 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."
>
> ***

Ahtanum II did not adjudicate or invalidate any North-side water rights perfected pursuant to Washington State law.

Ahtanum II merely determined which North-side waterusers retained the right, as of 1964, to share in the Code Agreement allocation of water to the North-side of Ahtanum Creek.

To the extent the holders of perfected Washington State water rights are not entitled to share in the Code Agreement allocation, their state rights were subordinate to, and could only be exercised after, the Treaty reserved water rights of the Yakama Reservation land had been fully satisfied.

The Yakama Nation's assertion (YN Brief, p. 45) "none of the north side parties have disputed that their Ahtanum right is limited to .01 cfs per acre" is not correct.

John Cox asserted otherwise in the Trial Court and in John Cox's Opening Brief (John Cox Opening Brief, Assignment of Error 3, p. 2, and IV. Argument, Section D, pp. 26-28), it is entitled to a primary and "excess" water right totaling .02 cfs per acre.

As noted above, Ahtanum II did not adjudicate or invalidate any North-side water rights.

Pursuant to its Water Right Certificate issued in State vs. Achepohl, John Cox has a right to divert .02 cfs per acre and is, therefore, entitled to divert .01 cfs per acre as an "excess" water right in addition to the .01 cfs per acre it is entitled to divert as a participant in the Code Agreement allocation.

The Yakama Nation's argument (YN Brief, p. 47) the Court should rule there is not excess water as a matter of law because the Ahtanum Court held there is not sufficient water in the system to satisfy the Yakama Nation and reservation's rights is also without merit.

Although it is true the Ahtanum Court held satisfaction of the reservation water right would take all the flow of the creek, as a matter of fact, the practicable irrigable acreage on the reservation has never been fully irrigated and the Treaty-reserved right has never been fully exercised so as to take the entire flow of Ahtanum Creek, at least before July 10 of any year.

As of 1987, only 2,728.7 acres of trust and tribal fee land was being irrigated on the reservation (CP 1510, "PIA Memo Opinion", p. 11) and, in 2004, the number of acres actually irrigated on the reservation was just over 2,000. (Declaration of Richard V. Haapala in Support of John Cox Ditch Company's Initial Post-Exception Hearing Brief, CP 11-50)

The Pope Decree, 330 F.2d at 914-915, specifically limited the diversionary rights of the Yakima Reservation and reservation waterusers to amounts of water which can be "beneficially used".

The Trial Court's confirmation of "excess" water rights for North-side waterusers is entirely consistent with the Pope Decree and the water rights of North-side waterusers perfected pursuant to state law.

The Yakama Nation and its water rights are in no way prejudiced by the confirmation of "excess" water rights for North-side waterusers.

The Trial Court correctly confirmed "excess" water rights for North-side water rights and the confirmation of the North-side "excess" water rights should be affirmed, provided, however, specifically stated in John Cox's Opening Brief, pp. 26-28, the quantity of the excess right confirmed should be increased to .01 cfs per acre for the entire irrigation season.

## IV. Conclusion:

The Assignments of Error asserted by the United States, Yakama Nation and DOE which are addressed above should be denied and this Court should affirm the Trial Court's Judgment:

(1) Determining the practicable irrigable acreage within the Yakama Reservation; and

(2) Determining the United States as Trustee for the Yakama Nation was entitled to confirmation of a water right of 4,107.61 acres of tribal trust and Indian owned fee land; and

(3) Determining the federal Ahtanum litigation, United States vs. Ahtanum Irrigation District, Eastern District of Washington Civil No. 312, Ahtanum I and Ahtanum II, are *res judicata* on the issue of practicable, irrigable acreage on the Yakima Reservation; and

(4) Denying confirmation of a water right to the United States as trustee for the Yakama Nation for storage and for diversion from Ahtanum Creek during the non-irrigation season between October and April; and

(5) Confirming an "excess" water right to North-side waterusers entitled to participate in the Code Agreement allocation, except the limitation of the excess right which should be corrected as stated in John Cox's Opening Brief, pp. 26-28.

DATED: July 14, 2010.

Respectfully submitted,
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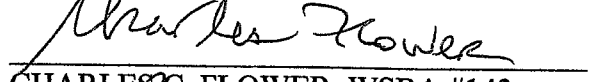

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