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2
3 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF YAKIMA

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

NO. 77-2-01484-5

7)
8 THE STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)

MEMORANDUM OPINION
EXCEPTIONS TO THE
SUPPLEMENTAL REPORT
OF THE COURT AND
PROPOSED CONDITIONAL
FINAL ORDER
SUBBASIN NO. 23
(AHTANUM)

9 Plaintiff,

10 v.

11 JAMES J. ACQUAVELLA, et al.,

12 Defendants.

AHTANUM IRRIGATION
DISTRICT
JOHNCOX DITCH COMPANY
UNITED STATES/
YAKAMA NATION

13 STATE OF WASHINGTON)

14 :ss
15 COUNTY OF YAKIMA)

16 The Supplemental Report of the Court RE: Subbasin No. 23 (Ahtanum), Ahtanum Irrigation
17 District, Johncox Ditch Company and United States/Yakama Nation was filed on February 25,
18 2008, along with a Proposed Conditional Final Order. Following an extension request, objections
19 and exceptions were due to be filed by June 27, 2008, and a hearing on exceptions was set for
20 October 28 – 31, 2008. Exceptions were filed by Ahtanum Irrigation District (AID), Johncox
21 Ditch Company (Johncox), the United States, the Yakama Nation, the Department of Ecology
22 (Ecology) and several individual claimants. On October 14, 2008, the Court ruled on several
23 exceptions in it's *Order Ruling on Certain Exceptions to the Supplemental Report of the*
24 *Court/Proposed Conditional Final Order, Subbasin No. 23 (Ahtanum)*. Those rulings are
25 incorporated herein. The remaining exceptions and objections are addressed herein.
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1 **I. Legal Issues**

2 **Objections related to legal issues affecting multiple claimants and water rights and not**
3 **specific to one claim.**

4 **Junior Rights**

5 AID and Johncox object to the Court ruling that rights described in this proceeding as
6 “junior rights”, i.e. rights to irrigate lands not recognized in the Pope Decree, cannot be
7 confirmed. Ecology filed a response in support of AID and Johncox objections on junior
8 rights, but opposed some of the arguments by Johncox. The Yakama Nation and the United
9 States support the Court decision denying confirmation of “junior rights”.
10

11 The concept of “junior rights” was created by the Court in its original Report filed on
12 January 31, 2002, see pages 105 to 111. The Court subsequently addressed this issue in its
13 Supplemental Report beginning on page 25; ultimately concluding that “junior rights” cannot
14 be recognized in this proceeding. The parties have offered no new arguments or evidence that
15 would convince the Court to change its rulings. Therefore, the AID and Johncox exceptions on
16 junior rights are denied. AID took this exception generally on behalf of all its patrons who had
17 previously been recognized as having a junior right, but specifically on behalf of Sylvia
18 Crocket, Hannah Nurss, and Paul Hart/Bonnie Nash.
19

20 Kathleen Hille and Roberta Buchanan also took exception to the junior right ruling.
21 Their exceptions are not addressed elsewhere in this report. These exceptions are also denied.
22

23 **Excess Water**

24 AID in its exceptions addressed “excess waters”, supporting the Court’s determination
25 that the Pope Decree provided for use of “excess waters”, but arguing that the excess waters
26 could be used for “junior rights”. The Court in the Supplemental Report ruled that excess
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1 waters, when they exist, can only be used on lands for which rights were recognized in the
2 Pope Decree and, therefore, cannot be used as “junior rights”. The Yakama Nation objects
3 (Objections 2 and 20) to the Court determination that there is “excess water” in the Ahtanum
4 basin, arguing that all of the available water is used by existing water rights. The Nation asks
5 the Court to find as a matter of law, that there is no excess water in the basin and the needs of
6 the Nation exceed the water availability.
7

8 AID points to language in the Pope Decree that supports a conclusion that excess water is
9 available for use. On page 915 of Judge Pope’s ruling, provisions are made for use of excess water.
10 Any excess water was awarded to the plaintiff (United States as trustee for the Yakama Nation)
11 “...to the extent that said water can be put to a beneficial use.” (emphasis added) The defendants
12 were given no right to excess water, “except in subordination to the higher rights of the
13 plaintiff” (emphasis added). The Court agrees with AID’s position that the Ninth Circuit would not
14 have addressed the right to use excess water if there was no excess water. Any excess water not used
15 by the Nation is available for use on the north side of the creek. However, the Court does not agree
16 with AID’s position that this excess water can be used for additional lands beyond those recognized
17 in the Pope Decree. The Court finds that any excess water can only be used by the defendants, i.e.
18 those recognized in the decree as having rights, on the lands described in Appendix B to the Pope
19 Decree – further limited to the lands for which rights are confirmed in this proceeding. The Pope
20 Decree awarded 0.01 cfs for each irrigated acre, half of the quantity of water authorized for use in the
21 certificates that issued following the earlier adjudication, the *Achepohl Decree*. The Court finds that
22 excess water can be used, when available, on lands north of Ahtanum Creek that are confirmed rights
23 in this proceeding, up to the 0.02 cfs per acre authorized in the appurtenant certificates. The reality
24 may be that in most years there will be no water in excess of that needed to satisfy the north side
25 users and the Nation’s water rights. It may also be that when there is excess water available, it may
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1 be during the time of the year when the north side users cannot make beneficial use of the water – i.e.
2 early spring. However, that does not prevent the Court from concluding that excess water can be
3 used by north side right holders when the flow exceeds the need and beneficial uses of the Nation.
4 The Nation’s objection 2 is denied as it applies to use of excess water, but is granted on the junior
5 right issue; its objection 20, which is to the provision on north side water rights that allows for use of
6 excess water, when available, is denied. Any additional water rights confirmed for lands described
7 below in answer numbers shall also carry a limitation on use provision providing for the use of
8 excess waters, but will vary slightly from the language in the Supplemental Report, as the use of
9 excess water will be limited to no more than 0.02 cfs per acre.
10

11 **Transfer of Water Rights**

12 AID also has an objection related to transfer of water rights. The objection states: “It is
13 held that a water right transfer may occur only from one senior to another . . .” AID cites no
14 authority for this conclusion, and the Court is unaware of any rulings in support of it. The
15 Court ruled in its *Memorandum Opinion Re: Ahtanum Creek Legal Issues* at page 19, line 8:
16 “that pursuant to state law, water rights can be transferred . . .If the appropriate showing is
17 made and relevant state statutes followed, a Code parcel right could be transferred to another
18 parcel.” The Court has confirmed rights in this proceeding where a Certificate of Change
19 issued under authority of RCW 90.03.380 was entered into evidence. The Ninth Circuit
20 acknowledged the process under Washington State law to transfer a water right. The Nation
21 responds that transfers cannot be used to defeat the Pope Decree and award water to “juniors”.
22 This Court is charged with determination of the valid surface water rights in the basin; not
23 determination of whether a water right can be transferred. That authority rests with Ecology
24 under the provisions of RCW 90.03.380. This Court makes no rulings on whether a specific
25 water right can or could be transferred to “junior” lands. There is nothing in Judge Pope’s
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1 ruling in the *U.S. v. Ahtanum* case that makes it impossible to transfer a water right recognized
2 in the Pope Decree if the State transfer statute is followed. Consequently, AID's objection is
3 neither denied nor granted.

4 **Irrigation Season**

5
6 The Yakama Nation took exception to two water rights confirmed by the court to the Chancery
7 with a period of use of April 1 through October 1. Ecology sought clarification of two water rights
8 in which the analysis portion of the report identifies the season of use for irrigation as April 1
9 through July 10, but the water right described in the Schedule of Rights includes a period of use
10 from April 15 through July 10. The Court ruled on those exceptions and requests for clarification
11 in its October 14, 2008 *Order Ruling on Certain Exceptions to the Supplemental Report of the*
12 *Court/Proposed Conditional Final Order Subbasin No. 23 (Ahtanum)*, wherein the Court found that
13 the correct period of use for irrigation water rights is April 15 through July 10. (Page 116 of the
14 Report of the Court)

15
16 At the exception hearing held beginning on October 28, 2008, AID addressed the season of use
17 issue, taking the position that the irrigation season begins on April 1 as shown in the surface water
18 certificates that issued following the earlier adjudication of the Ahtanum Creek basin. Both the
19 Yakama Nation and Ecology took the position that the Court had already ruled on their exceptions
20 related to irrigation season in its October 14 *Order*. The Yakama Nation also contends this is a late
21 exception and should not be considered. AID responded that they had replied to the Nation's and
22 Ecology's exceptions on this issue thereby notifying them that they were taking exception to the
23 period of use in the water rights confirmed under the AID claim.

24
25 The Court has reviewed the response filed by AID on July 25, 2008. On page 4 of the
26 response, lines 23 through 30, AID provides statements about the irrigation season, but does not
27 object to the season of use for the water rights. Page 5 begins AID's response to Ecology

1 objections and under season of use references the response to Yakama Nation. Again no specific
2 objection is raised to all of the water rights confirmed by the Court to AID patrons. At best, this
3 response could be considered to apply to the four water rights that the Yakama Nation and Ecology
4 identified, but to no other water rights.

5
6 At the exception hearing, AID referred the Court to Commissioner Ottem's October 8, 2003,
7 *Memorandum Opinion Re: Ahtanum Creek Threshold Legal Issues*, suggesting this document ruled
8 that the season of use would begin on April 1. The Court reaches a different conclusion. Season of
9 use is discussed as part of a legal issue that was identified as: "As a matter of law, are north side
10 water users entitled to water in 'late winter and early spring . . . to permit AID to recharge its
11 conveyance facilities' (Report at 44)?" (MO@20, line 6). The Court found on page 20, beginning
12 on line 24: "(I)t is well within the Court's authority to confirm a season of use for irrigation
13 beginning on April 1. **If evidence is supplied to support such a date** at the Exceptions Hearing,
14 the Court will do so."(emphasis added). Further, on page 21 at line 16½, the Court ruled: "At this
15 time, the court **may, upon admission of applicable evidence**, quantify rights that allow diversions
16 beginning April 1."(emphasis added)

17
18 Evidence in support of the season of use was discussed on page 116 of the Report of the Court,
19 wherein testimony of Forest Marshall is cited for the determination that the irrigation season for all
20 water users diverting from Ahtanum Creek to the north side of Ahtanum Creek shall be April 15 --
21 July 10. On page 35 of the Supplemental Report of the Court, the Court found the season of use to
22 be from April 15 until July 10, unless there is evidence that allows the Court to confirm a season of
23 use beginning prior to April 15.

24
25 Confirmation of a season of use beginning prior to April 15 required evidence that an earlier
26 date would be appropriate. That evidence was not provided. AID suggests that certificates
27 indicating an irrigation season of April 1 through October 31 are sufficient evidence. The Court
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1 disagrees. As with every other aspect of a water right described on a certificate, evidence of
2 beneficial use is required.

3 The Court affirms its rulings concerning the season of use in the October 13, 2008, *Order*.

4 **Department of Ecology Exceptions**

5 Many of Ecology's exceptions and requests for clarification are specific to lands within an
6 answer number or covered by a claim filed with the Court. Many of those were addressed in the
7 Court's *Order Ruling on Certain Exceptions to the Supplemental Report of the Court/Proposed*
8 *Conditional Final Order* filed on October 14, 2008. Others are addressed below under the
9 appropriate answer number or Court claim number.

10 **Ecology's exceptions not specific to one claim or water right.**

11 **Hatton/Bachelor Creeks**

12 Ecology's exception asks for clarification of the Court's intent in its ruling in the Supplemental
13 Report concerning Bachelor and Hatton Creek. In the exception, Ecology misinterprets the Court's
14 ruling, which leads to the perceived need for clarification. The Court, on page 36 of the
15 Supplemental Report ruled that the head gates installed by AID to control the flow of water into
16 Hatton and Bachelor Creeks resulted in the creeks being used as irrigation channels. AID wanted
17 authority to keep those gates open after July 10 to allow water from Ahtanum Creek to flow down
18 Hatton and Bachelor Creeks for stock watering and to consider that water to be naturally occurring
19 so that the non-diversionary stock water ruling would apply. The Court disagreed and found that
20 the terms of the Pope Decree dictated that those gates be closed because the flow in Ahtanum
21 Creek would be substantially reduced to the detriment of the Nation. Moreover, water for stock is
22 authorized for north side users in springs and naturally occurring stream channels; it is not available
23 if human efforts are required. Even though the creeks have been modified to function as irrigation
24 channels, they still are creeks and lands through which the creeks flow are riparian to those creeks

1 and entitled to non-diversionary stock water rights. After the gates are closed, any water that
2 continues to flow in Hatton and Bachelor Creeks is available for non-diversionary stock watering,
3 because no human effort is required to cause that water to be there. Livestock can drink from those
4 creeks if water is available, without the landowner being confirmed a diversionary stock water
5 right.
6

7 **AID as Agent**

8 Ecology seeks clarification of the relationship between AID and the landowners within the AID
9 boundaries who are being confirmed rights in this proceeding. As Ecology points out, most of the
10 water rights being confirmed for use on lands north of Ahtanum Creek are being confirmed under
11 the Court claim filed by AID, and AID provided most of the evidence in this proceeding that led to
12 confirmation of the water rights. However, the water rights are being confirmed in the names of the
13 landowners. During the exception hearing, Ecology's counsel emphasized that the main concern
14 that led to the exception is the desire to insure that the proceeding is not later challenged due to
15 landowners in the future arguing that they were not served, or did not have the opportunity to
16 participate in the case.
17

18 AID responded to the exception at the hearing. Having reviewed the comments made at the
19 exception hearing, the Court concludes that there is no need to clarify the relationship between AID
20 and the water users in the Ahtanum basin in order to insure that all water users are bound by the
21 decisions in this proceeding. The water users in the Ahtanum basin were served with the summons
22 in this case and provided the opportunity to file a claim on their own behalf. AID filed a claim on
23 behalf of the landowners within the district boundaries and provided the evidence it had available to
24 defend that claim. Nothing precluded individual landowners from filing their own claim or
25 appearing at the various hearings. Many of them did appear, particularly in instances where the
26 Court was initially unable to confirm a right or another party filed an exception. This Court has
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1 jurisdiction over the individual landowners. They are bound by the final rulings in this proceeding.
2 When requested, AID has provided mailing lists of landowners within the district so that the Court
3 can provide notice of the proceedings. The Court anticipates AID continuing to provide updated
4 mailing lists as they are needed and requested.

6 **Conditional Final Order (CFO) Certified for Appeal**

7 The issue of whether the CFO for the consolidated Subbasin No. 23 proceeding should contain
8 the language that certifies it for immediate appeal pursuant to CR 54(b) and RAP 2.2(d) first arose
9 in discussions related to drafting the final decree. Ecology raised the issue again in its exceptions to
10 the Supplemental Report and Proposed CFO. Ecology argues that filing appeals of the Subbasin
11 No. 23 CFO prior to entry of the final decree would not be in the best interest of the parties working
12 toward a timely resolution of the adjudication through issuance of the final decree because it would
13 delay entry of the final decree. Ecology suggests that the Subbasin No. 23 CFO could be entered at
14 the same time as the final decree. The Yakama Nation, the United States, AID and Johncox all
15 oppose Ecology's request, contending that a timely resolution of any appealable issues in Subbasin
16 No. 23 is important, and there is no reason to delay those appeals. Pre-Trial Order No. 8 was
17 amended to allow for a lengthy period of time, 240 days (eight months), for parties to review the
18 Proposed Final Decree, file objections, respond to objections and a potential Court hearing to
19 consider objections. It is reasonable to conclude that it could be at least a year after the Proposed
20 Final Decree is circulated before the final decree is entered.
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23 It is unreasonable to treat the claimants in Subbasin No. 23 differently than those in other
24 subbasins and have them wait a year or more to appeal the Court's rulings on their water rights. It
25 was pointed out during the exception hearing that it is possible that the appellate court(s) could
26 ultimately make a ruling on the Court's decision in Subbasin No. 23 that would require amending
27 the final decree if Subbasin No. 23 appeals were not addressed prior to entry of the final decree.
28

1 The Court denies Ecology's exception on the CFO being certified for appeal.

2 **II. Individual Exceptions**

3 Exceptions for lands described in specific answer numbers or under claims filed with the Court
4 are addressed below, first in answer number order and then for Court claims, in alphabetical order.

5 **Answer No. 4** – Dennis Birley, Robert Himrod, Clara Gray, Johnny L. & Patricia Clark
6 Leona & Eudelio Alvarez, Marlin J. & Joan Lindgren, Robert F.
7 Lockbeam, Jr .

8 AID's exception to the rights confirmed under Answer No. 4 identified that two parcels of land
9 that lie within Answer No. 4 were omitted from AID-8 and AID-8A, resulting in the Court not
10 confirming a water right for those lands. Dennis Birley and Robert Himrod testified at the
11 exception hearing.

12
13 Dennis Birley purchased Parcel # 171212-33403, in the fall of 2004, after the supplemental
14 hearings had been held earlier that year. The prior owner of the land had not responded to AID's
15 request for information about whether the land was irrigated with surface waters, resulting in the
16 parcel not being placed on either AID-8 or AID-8A. Mr. Birley testified that he owns 4.92 acres,
17 all irrigated, except where buildings are located. He estimated that at least four acres are irrigated
18 and perhaps as many as 4.5 acres. Exhibit AID-108, shows 3.62 acres being irrigated, however, the
19 Court concludes that the landowner's testimony is likely to be more accurate. There is a pump on
20 Stanton Creek that is used to withdraw water, and he irrigates pasture, lawn and garden area using
21 hand lines. The irrigation system was already in place when he purchased the land, and he has
22 continued irrigating using the same system.

23
24 Robert Himrod has owned Parcel #171212-33409, which currently is 3.44 acres in size, since
25 1998. He did not respond to AID's inquiries about irrigation use on his property because his wife
26 was seriously ill with cancer and little else was getting his attention. Mr. Himrod's parcel was
27 reconfigured in 2007 when he purchased one acre from his mother-in-law, Clara Gray. This acre
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1 had been confirmed a right earlier by the court and is also in Answer No. 4. Mr. Himrod also has a
2 pump on Stanton Creek. The land was being irrigated when he first acquired it and he has
3 continued to irrigate. In the early 1980's he helped irrigate the adjoining Gray property, so he has
4 been familiar with the land for over 25 years. It has consistently been irrigated during that time.
5 Mr. Himrod testified that he irrigates all of his land, except where there are buildings – estimating
6 that between 3 and 3.25 acres are being irrigated.
7

8 In the initial Report, the evidence lead the Court to conclude that the Answer No. 4 land had
9 been owned by a signor of the 1908 Code Agreement and 47.1 acres were being irrigated in 1908.
10 When Answer No. 4 was filed, 51 acres were being irrigated, leading to the conclusion that a right
11 existed for irrigating 47.1 acres if beneficial use had continued. AID presented evidence that 24.65
12 acres were continuously irrigated over the years, and the Court confirmed rights for a total of 24.65
13 acres. That acreage total did not include the Birley and Himrod land. Certificate No. 158 from the
14 prior adjudication of Ahtanum Creek, with a priority date of 1870, authorized the diversion of 0.90
15 cubic foot per second for the irrigation of 45 acres in Lot 1 (except the west 25 feet) and the
16 S $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12 and Lot 1 of Section 13, T. 12 N., R. 17 E.W.M. The point of
17 diversion authorized by the certificate is in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, T. 12 N., R. 17 E.W.M.
18 The lands owned by Mr. Birley and Mr. Himrod are located within Government Lot 1 of Section
19 12.
20
21

22 The Court confirms water rights for the Birley and Himrod land with a priority date of June 30,
23 1870, a season of use from April 15 through July 10 and a point of diversion on Stanton Creek in
24 the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, T. 12 N., R. 17 E.W.M. If the diversion used by either landowner is
25 not at the authorized location, a contact must be made with Ecology's Central Regional Office and
26 the change of point of diversion procedures in RCW 90.03.380 followed.
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1 To Robert Himrod, a right to divert 0.03 cfs, 5.16 acre-feet per year for the irrigation
2 of 3 acres in Lot 2 and Lot 3 of Short Plat 85-221, except the N 463.1 feet of Lot 3, in
3 Government Lot 1 of Section 12, T. 12 N., R. 17 E.W.M. (Parcel #171212-33409).

4 To Dennis Birley, a right to divert 0.04 cfs, 6.88 acre-feet per year for the irrigation of
5 4 acres in Lot 3 of Short Plat O-40 in Government Lot 1 of Section 12, T. 12 N., R. 17
6 E.W.M. (Parcel # 171212-33403).

7 Mr. Himrod testified to acquiring one acre from Clara Gray, which is part of the parcel for
8 which a right is confirmed herein. Therefore, the water right for Clara Gray described on page 298,
9 lines 9½ - 25 is amended to authorize the diversion of 0.09 cfs, 15.48 acre-feet per year for the
10 irrigation of 9 acres. All other aspects of that water right remain unchanged.

11 Answer No. 14 – Kerry Crook
12 Carl George

13 The Court was unable to confirm a right to Kerry Crook in the Supplemental Report based on
14 information in AID 8-A and requested that further information be provided. AID filed an
15 exception. AID seeks to have the right confirmed as it was in the original Report of the Court for a
16 maximum of 14.07 acres between the two existing landowners (Report, pp. 138-139; 449). The
17 Yakama Nation did not object to this.

18 In the Report, the Court awarded an irrigation right for 14.07 acres. In the Supplemental
19 Report the Court recognized a right to 15.3 acres. Relying on the testimony of Carl George, the
20 Court awarded Mr. George a right to 6.83 acres. Supplemental Report @54-55. According to AID,
21 the Crook parcel is 9.48 acres in size, with 8.47 acres irrigated. AID Exceptions, p. 15.

22 The Court confirms a right to Kerry Crook from the North Fork of Ahtanum Creek
23 in the amounts of 0.09 cfs, 14.57 acre-feet per year for irrigation of 8.47 acres in Lot 1 of
24 Short Plat 84-39 within the SW¼NE¼ of Section 17, T. 12 N., R. 16 E.W.M. (Parcel No.
25 161217-13401).

26 The Court confirms a right to Carl George from the North Fork of Ahtanum Creek
27 in the amounts of 0.07 cfs, 11.75 acre-feet per year for irrigation of 6.83 acres within that
28 portion of Lot 2 of Short Plat 81-155 lying within the SW¼NE¼ of Section 17, T. 12 N.,
R. 16 E.W.M. (Parcel No. 161217-42404.)

1 Both rights have a priority date of June 30, 1875. The season of use is April 15 through July
2 10. The point of diversion from the North Fork of Ahtanum Creek is into the Shaw-Knox Ditch
3 located approximately 1250 feet north and 700 feet east of the southwest corner of Section 7, being
4 within the SW¼SW¼ of Section 7, T. 12 N., R. 16 E.W.M.
5

6 **Answer No. 15** - Robert M. & Donna L. McInnis
7 Gary R. McInnis
8 Jon R. & Linda S. Mulvenon
9 John Walkenhauer

9 AID filed an exception to the water rights confirmed under Answer No. 15 on behalf of John
10 Walkenhauer. Mr. Walkenhauer's parcel was omitted from AID-8A resulting in a water right not
11 being confirmed for that parcel. Mr. Walkenhauer testified at the exception hearing.
12

13 Mr. Walkenhauer owns Parcel No. 171209-41401, which lies in the NE¼SE¼ of Section 9,
14 T. 12 N., R. 17 E.W.M., within the area described in Answer No. 15. He has owned the land since
15 1986 when he purchased it from Robert McInnis, the major landowner within Answer No. 15. In
16 1986 the land was being irrigated with water diverted from Hatton Creek, which continued until
17 1997, when Mr. Walkenhauer changed the irrigation system and began using a dug well near
18 Hatton Creek as the source of water. According to the testimony, water in the well fluctuates as the
19 flow in Hatton Creek fluctuates, and the well is dry when Hatton Creek is dry. The testimony and
20 evidence show that the land has consistently been irrigated and should receive its proportionate
21 share of the water right that exists for lands within Answer No. 15.
22

23 The Court has previously determined that water rights exist for the irrigation of 20 acres in
24 Answer No. 15. This was divided amongst the six parcels that the court determined were entitled to
25 a portion of the water right. AID-8A divided the 20 acres so that each parcel received a water right
26 to irrigate about 80% of the irrigated land. AID-121 was entered during the exception hearing to
27 redistribute the 20 acre water right that is appurtenant to lands in Answer No. 15. AID-121 reduced
28

1 the water right for each parcel within Answer No. 15, including two small parcels that would be
2 reduced by hundredths of an acre. However, the Court finds that it is appropriate to reduce the
3 water right confirmed to Robert McInnis, since he sold the land to Mr. Walkenhauer.

4
5 Therefore, the water right for Robert McInnis described on page 236 of the Supplemental
6 Report, lines 8 through 25 is amended to authorize the diversion of 0.16 cfs, 27.69 acre-feet per
7 year for the irrigation of 16.10 acres. The Court confirms a right to John Walkenhauer with a
8 June 30, 1865, date of priority for the diversion from Hatton Creek of 0.02 cfs, 3.92 acre-feet per
9 year for the irrigation of 2.28 acres in Lot 1 of Short Plat 86-70 (Parcel # 171209-41401), being
10 within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 9, T. 12 N., R. 17 E.W.M. The point of diversion shall be in
11 the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9, T. 12 N., R. 17 E.W.M. If Mr. Walkenhauer intends to continue
12 using the dug well he must contact Ecology's Central Regional Office to determine if compliance
13 with the change of point of diversion procedures in RCW 90.03.380 is needed.
14

15 **Answer No. 16** - Mark and Tammi Ribail
16 James and Elaine Williams
17 Jesse West
18 Robert Anderson
19 Darryl and Deanna White
Pat and Jim Moore
George and Jodene Riches

20 **Parcel No. 161217-32406**—James and Elaine Williams;
21 **Parcel No. 161217-32407**—Mark and Tammi Ribail
Parcel No. 161217-32405—Jess West (formerly Dougherty)

22 The Court was unable to confirm a right for these three parcels under Answer No. 16.
23 Additional evidence was needed to address the issue of potential relinquishment during the time
24 period between 1991 and 1998. Supplemental Report, pp. 59-63. AID filed objections and
25 requested an opportunity to present that evidence and testimony.
26

27 Forrest Marshall, stream patrolman from 1978 until 1995, and who is still currently
28 employed by the District, testified regarding his knowledge of the irrigation practices and beneficial

1 use of water on Answer No. 16 lands. As stream patrolman, it was Mr. Marshall's responsibility to
2 deliver and measure the water within AID. In addition to his testimony, the Declaration of Forrest
3 Marshall, AID-123 was offered into evidence. AID also presented copies of aerial photos from the
4 Yakima County Assessor's web site; AID-125 is the 2005 aerial map (Attachment "B"); AID-126 is
5 the 1998 aerial map (Attachment "C"); and AID-127 is the 1992 aerial map (Attachment "C").
6
7 AID-124 shows the location of the various parcels within Answer No. 16.

8 Ted Mellotte previously owned the lands under Answer No. 16 and irrigated the property via
9 flood irrigation. Hay was grown on the property. The land in question was irrigated from 1991
10 through 1998. After Mr. Mellotte's ownership, the property was subdivided into several lots. His
11 diversion point was on the North Fork of Ahtanum Creek from Diversion No. 31. There is also a
12 pond on Parcel No. 161218-14407 (Hinson/Moore) that the Shaw-Knox Ditch dumps water into.
13 The Shaw-Knox ditch traverses the northern boundary of Parcel Nos. 161217-32405 (West), -
14 32406 (Williams) and -32407 (Ribail) and serves the Williams, Ribail and West properties. Stock
15 drink directly from the North Fork of Ahtanum Creek and the pond. The ground has historically
16 been flood irrigated and sometimes into the tree area. RP 10/30/2008 @453-478.
17

18 Mr. Marshall also testified that within Parcel 161217-32407, the Ribail property, there was
19 some amount of sagebrush, but that it was located in the eastern portion of the property and not
20 within the portion that is irrigated. The parcel is a total of 11.5 acres in size with the open area
21 being about half of that. Mr. Marshall estimates that all of the open area and some trees on the
22 property are irrigated. AID claims a right for 6 acres.
23

24 Parcel No. 161217-32405¹ was formerly owned by the Dougherty's and is now owned by
25 Jesse West. However, a right was not claimed in 2004 nor was this parcel included in AID-8A.
26

27
28 ¹Parcels No. 161217-41402, -41403 and 41404 were included in the water right the Court confirmed in its Report. These
parcels were subdivided and Parcel No. 32405 was one of the three new parcels that resulted from that subdivision.

1 AID filed a late exception and requested an opportunity to present testimony. The Court granted
2 that request and scheduled a hearing on May 11, 2006. The Dougherty's did not appear to testify
3 at that hearing, resulting in the Court not confirming a right for this land. Before the Court could
4 confirm a water right for this parcel, additional testimony on beneficial use was needed. SR @68-
5 69. Mr. Marshall provided testimony that establishes continued beneficial use of water. YIN-
6 355(3) supports this testimony and shows that a portion of the West land is irrigated. AID claims a
7 right for 5 acres.
8

9 **Authorized Points of Diversion for Williams, Ribail and West Parcels**

10 Certificate No. 203 is appurtenant to the Williams, Ribail and West property. It authorizes
11 four diversion locations: NW $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, Government Lot 4 and Government Lot 7 in
12 Section 18, T. 12 N., R. 16 E.W.M. Mr. Ribail had marked a blue "X" on US-387F, indicating
13 where he diverted water from the North Fork Ahtanum Creek. Ms. Williams also indicated that
14 they receive their water from the same location. SR @61. This location is within Government Lot
15 7 of Section 18, T. 12 N., R. 16 E.W.M. There was testimony that water is taken from the Shaw-
16 Knox ditch and dumped into a pond, and at Diversion No. 31 which is directly from the creek. The
17 Shaw-Knox ditch diverts water from the North Fork of Ahtanum Creek within Government Lot 4
18 (SW $\frac{1}{4}$ SW $\frac{1}{4}$) of Section 7, T. 12 N., R. 16 E.W.M. Diversion 31 is within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of
19 Section 17, T. 12 N., R. 16 E.W.M. (SE-174). If water is taken from any diversion location not
20 authorized under Certificate No. 203, all of which are in Section 18, the parties must file
21 applications for change with Ecology to get these points of diversion authorized.
22
23

24 **Confirmed Water Rights**

25 The Court confirms the following three water right, each with a priority date of June 30,
26 1871, season of use from April 15 through July 10 and authorized point of diversion on the North
27 Fork of Ahtanum Creek within Government Lot 7 of Section 18, T. 12 N., R. 17 E.W.M.:
28

1 To James and Elaine Williams, 0.05 cfs, 8.6 acre-feet per year for the irrigation of
2 5 acres and stock water supply. The place of use is as follows: Beginning N 89°25'40"
3 E 40.19 feet of the northwest corner of Lot 2 of SP I-8, thence N 89°25'40" E 380 feet,
4 thence S 20°05' W 1330 feet to meander line of Ahtanum Creek, thence westerly along
5 meander line 510 feet to the center line of North Fork Ahtanum Creek, thence northerly
6 along center line of creek 100 feet to a point S 26°08' W of the point of beginning, thence
7 N 26°08' E 1400 feet to the beginning, being within Government Lot 4 of Section 17, T.
8 12 N., R. 16 E.W.M. (Parcel No. 161217-32406).

6 To Mike and Tammi Ribail, 0.06 cfs, 10.32 acre-feet per year for the irrigation of 6
7 acres and stock water supply. The place of use is as follows: Beginning N 89°25'40" E
8 420.19 feet of the northwest corner of Lot 2 of SP I-8, thence N 89°25'40" E 240 feet,
9 thence S 01°16'28" E 1105 feet to the meander line of Ahtanum Creek, thence westerly
10 along meander line 730 feet to a point S 20°05' W of the point of beginning, thence N
11 20°05' W 1330 feet to beginning, being within Government Lot 4 of Section 17, T. 12 N.,
12 R. 16 E.W.M.. (Parcel No. 161217-32407).

11 To Jesse West, 0.05 cfs, 8.6 acre-feet per year for the irrigation of 5 acres and stock
12 water supply. The place of use is as follows: Beginning N 89°25'40" E 200 feet of the
13 northwest corner of Lot 1 of SP I-8, thence N 89°25'40" E 520.79 feet, thence S
14 26°08' W 1400 feet to center of North Fork Ahtanum Creek, thence northerly along center
15 line 900 feet to a point S 26°08' W of the point of beginning, thence N 26°08' E 500 feet,
16 being within Government Lot 4 of Section 17, T. 12 N., R. 16 E.W.M. (Parcel No.
17 161217-32405.)

16 The Ribails, Williams and Jess West will be added to the list of non-diversionary stock
17 water right holders.

17 **Robert S. Anderson Land, Parcel No. 161218-11412**

18 The Court had requested clarification regarding delivery of water to the Anderson land.
19 During the exception hearing, AID made a claim for this land under Answer No. 16. Testimony by
20 Lonnie Dillman on behalf of Mr. Anderson revealed that water was delivered to this land from the
21 Johncox Ditch. After reviewing the evidence and testimony, it was unclear whether Johncox, AID,
22 or both, provided water to the Anderson land in Section 18, resulting in the Court requesting
23 additional testimony on this parcel. Supplemental Report @63; 185-186.

25 Johncox responded to the Court's request for additional information regarding Robert S.
26 Anderson's land within the NE¼NE¼ of Section 18, T. 12 N., R. 16 E.W.M. Parcel No. 161218-
27 11412. According to the testimony and Declaration of Mark Herke, President of Johncox, the
28

1 Anderson land is within the Johncox service area; however, Mr. Anderson does not currently have a
2 right to use Johncox water on this particular parcel. Johncox delivers Mr. Anderson's AID water
3 via the Johncox Ditch based on prior agreements. Johncox does not maintain any recorded
4 measurements, although there is a headbox and weir at this property.
5

6 Certificate No. 295 covers the Anderson land (AID-8A). The point of diversion shall remain
7 as found on Certificate No. 295 which is in Section 7, T. 12 N., R. 16 E.W.M. Since this location
8 is not the diversion point for Johncox Ditch, which is in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, T. 12 N.,
9 R. 15 E.W.M., Mr. Anderson and AID are required to file an application to change the point of
10 diversion pursuant to RCW 90.03.380. The source on Certificate No. 295 is Ahtanum Creek. In
11 reviewing the map (SE-3) it appears that the source would be the North Fork of Ahtanum Creek.
12

13 The season of use for this Answer No. 16 right will be April 15 through July 10. See season
14 of use discussion above beginning on page 5. The Court recognizes that Johncox successfully
15 defended an April 1 date, and that Mr. Anderson takes his water from the Johncox ditch. However,
16 since Mr. Anderson is an AID patron, and there was no evidence offered establishing when he
17 begins using water, the April 1 date will not apply to his Answer No. 16 water right. He, like all
18 other AID patrons, will be entitled to a season of use beginning April 15 and shall not be authorized
19 to take water from the Johncox Ditch until that time.
20

21 The Court confirms a water right to Robert S. Anderson to divert 0.05 cfs and 8.6 acre-feet per
22 year from the North Fork Ahtanum Creek to irrigate 5 acres within Lot 2 of SP Q-74, except that
23 part lying south of the following described line: Beginning S 18°25'40" W 121.65 feet of
24 northwest corner of Lot 1, thence N 83°02' W to county road right-of-way and end of said line;
25 being within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 18, T. 12 N., R. 16 E.W.M. (Parcel No. 161218-11412). The
26 point of diversion is within Section 7, T. 12 N., R. 16 E.W.M. The priority date of this right is
27 June 30, 1882. The authorized season of use is April 15 through July 10.
28

1 **Housekeeping Issues for Certain Parcels Under Answer No. 16**

2 **Parcel No. 161218-14406:**

3 This parcel is owned by Darryl and Deanna White. Although a right was confirmed, a change
4 in point of diversion was needed. See RCW 90.03.380. Supplemental Report, pp. 64-65; 345.
5 According to AID, Hiram White has filed an application for change to correct the point of
6 diversion.

7 **Parcel No. 161218-14407:**

8 This parcel was formerly owned by the Paul and Laurie Hinson. It is now owned by Pat and
9 Jim Moore. The pond that Mr. Marshall testified about is located on the Moore property.
10 According to his testimony, stock drink directly from that pond. The Moore's name will be added
11 to the list of non-diversionary stock water right holders. The Court also had a question regarding
12 the source of diversionary stock water for the Hinson property. Water diverted into the Shaw-Knox
13 is used for stock water. Stock water use is authorized incidental to the irrigation right confirmed for
14 this parcel.

15 **Parcel No. 161218-31404:**

16 This property was formerly owned by Sharon Mangan. It is now owned by George and Jodene
17 Riches. The Riches were joined to Court Claim No. 02398.

18 **Parcel No. 161218-42010:**

19 The Court also discovered a ministerial error that requires correction regarding the water right,
20 for Marc and Sue Downs Martin. In the Supplemental Report at pp. 68, line 7, the irrigated acreage
21 for Parcel No. 161218-42010 should be 2.75 acres, not 3.67 acres. The total water right is 3.67
22 acres. Supplemental Report at p. 67, line 21½. Also, the confirmed water right on p. 341, line 10,
23 should reflect 2.75 acres. The Supplemental Report is so modified. The water right confirmed to
24
25
26
27
28

1 the Martins is for a total of 3.67 acres, with 0.92 acres in Parcel No. 161218-42009 and 2.75 acres
2 in Parcel No. 161218-42010.

3 **Answers No. 17, No. 18 and No. 21** – John P. Herke

4 The Court requested additional evidence and testimony regarding the point of diversion for
5 Answer No. 17, and point of diversion and place of use for Answers No. 18 and No. 21. Testimony
6 was provided by Mark Herke who farms the land with his father John. Evidence was offered in the
7 form of a Declaration by John Herke, AID-128; AID-149, a map, and AID-150, a summary of key
8 information pertaining to all answer numbers.
9

10 There are three points of diversion used on the Herke Ranch within these three answers. AID-
11 149, AID-150. These points of diversion on Ahtanum Creek are:

12
13 Diversion No. 1: The upper point is located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15, T. 12 N., R. 16
E.W.M. (41001)

14
15 Diversion No. 2: The lower point is located within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14, T. 12 N.,
R. 16 E.W.M. (31001)

16
17 Lesh Ditch: The third point used is within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 16, T. 12 N.,
R. 16 E.W.M. This point is used as an alternate source during times of excess water (flood
water).

18 The Yakama Nation objects to allocation of excess water. The right to use excess water is
19 addressed above beginning on page 3.
20

21 **Answer No. 17:** AID and Mr. Herke have provided the diversion information requested by
22 the Court. The Court confirms a right to John P. Herke, with a June 30, 1871, priority date to
23 divert 0.19 cfs, 32.34 acre-feet per year from the above three points of diversion on Ahtanum Creek
24 from April 15 through July 10 for irrigation of 18.8 acres within the following:

25 That part of Lots 1 and 2 lying south of the County Road and north of Ahtanum Creek,
26 except beginning at a point on the north line of the North Creek and 100 feet east of the
27 west line of Lot 2 to the true point of beginning; thence north to County Highway right-of-
28 way; thence east along the south line of Highway right-of-way 300 feet; thence south to
the north bank of North Creek; thence west to the point of beginning (exception also

1 known as Parcel No. 161214-13002). All in Section 14, T. 12 N., R. 16 E.W.M. (Parcel
2 No. 161214-13004).

3 **Answer No. 18:** In addition to diversion point information, the Court needed additional
4 information regarding the Government Lot and parcel number for the lands under Answer No. 18.
5 According to AID, the proper place of use is Government Lots 3 (SE $\frac{1}{4}$ NW $\frac{1}{4}$) and 4 (SW $\frac{1}{4}$ NW $\frac{1}{4}$),
6 and Parcel Nos. 161213-23001 and 161213-23002; AID-150. Although originally confirmed as
7 part of the place of use, according to AID- 150 a right is no longer being claimed for Government
8 Lot 2.
9

10 The Court confirms a right to John P. Herke with a priority date of June 30, 1900, to divert
11 0.24 cfs, 41.34 acre-feet per year from the above three points of diversion on Ahtanum Creek from
12 April 15 through July 10 for irrigation of 23.5 acres within Government Lots 3 and 4 of Section 13,
13 T. 12 N., R. 16 E.W.M (Parcel Nos. 161213-23001 and 161213-23002)

14 **Answer No. 21:** The Court also needed clarification regarding the point of diversion, which
15 Government Lots the Herke family irrigates and the corresponding parcel number. Under Answer
16 No. 21, the Herke's irrigate lands within Government Lots 3 and 4, Section 14, T. 12 N., R. 16.
17 E.W.M., lying south of the County Road (Parcel No. 161214-31001). AID-150.
18

19 Certificate No. 198 covers the Answer No. 21 lands. It authorized two points of diversion
20 within Lot 1 of Section 15, T. 12 N., R. 16 E.W.M. However, the Lesh Ditch, not Ahtanum Creek
21 flows through there. It was not uncommon for the certificates from the first adjudication to
22 describe as points of diversion the location on a ditch where water is removed, rather than where
23 the ditch takes water from the creek. According to Mr. Herke, they do not normally divert water for
24 Answer No. 21 lands via the Lesh Ditch, however, all ditches tie in at the lower end of field
25 described in Answer No. 21. Thus, the Court will confirm the Lesh Ditch (No. 3) at its headworks
26 in NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 16 as an alternate point of diversion for this right. According to Mr.
27
28

1 Herke, water is primarily provided to the Answer 21 lands from Diversion No. 1 (upper point) and
2 Diversion No. 2 (lower point) previously described. Only Diversion No. 1 (upper) is located within
3 Government Lot 1 of Section 15. While the Court is able to confirm Diversion No. 1 (upper) and
4 the Lesh Ditch (No. 3) without requiring compliance with RCW 90.03.380, it cannot do so for
5 Diversion No. 2, as it is located within the NW¼SW¼ of Section 14, T. 12 N., R. 16 E.W.M.
6 Mr. Herke and AID must comply with RCW 90.03.380 to add Diversion No. 2 to the right under
7 Answer No. 21.
8

9 The Court confirms a right to John P. Herke in the amounts of 0.08 cfs, 14.28 acre-feet from
10 the Diversion No. 1 and Lesh Ditch on Ahtanum Creek from April 15 through July 10 for irrigation
11 of 8.3 acres within Government Lots 3 and 4 of Section 14, T. 12 N., R. 16 W.W.M., lying south of
12 the County Road (Parcel No. 161214-31001). The priority date is June 30, 1871.
13

14 **Answer No. 19** - Clifford and Doris Hagemeyer

15 Both Ecology and the Yakama Nation took exception to the Court confirming a water right for
16 the portion of the lands described in Answer No. 19 owned by Clifford and Doris Hagemeyer.
17 They contend that the water right has been abandoned, or relinquished pursuant to RCW 90.14.160
18 due to more than five consecutive years of non-use without a sufficient cause. The Court found that
19 there had been more than five consecutive years of non-use, but when the non-use began,
20 Mr. Hagemeyer had a determined future development in mind that was realized in less than 15
21 years, thereby preventing relinquishment, Supplemental Report at page 73. Since Ecology and the
22 Nation offer different arguments suggesting the right has been lost, each will be addressed
23 separately.
24

25 The Nation (Objection No. 4) contends that the Court agreed with its evidence that there was
26 non-use, and that the provisions of the Pope Decree require a finding that since the water was not
27 being used on lands north of the creek, the right to use that water has transferred to the south side of
28

1 the creek, i.e. to lands within the Yakama Reservation. The Nation suggests that the Court should
2 find that the right for the Hagemeyer land has reverted to the south side due to the long history of
3 non-use under the federal standard of abandonment, rather than the state relinquishment law. The
4 Court cannot agree with this position. The general rule in western water law is that non-use is
5 evidence of intent to abandon, and long periods of non-use raise a rebuttable presumption of intent
6 to abandon, thus shifting the burden of proof to the holder of the water right to explain the nonuse,
7 *Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 947 P.2d 732, 1997. In the *Twisp*
8 case, the Court concluded a 36 year period of non-use was sufficient to raise the presumption of
9 intent to abandon. Here we have a ten year period. Additionally, Mr. Hagemeyer's testimony
10 clearly establishes that he had no intent to abandon the water right. Lacking intent, there can be no
11 finding of abandonment.
12

13
14 The Nation further argues that all water not used on north side parcels confirmed rights in
15 the Pope Decree reverts to the Yakama Nation. The Court has previously ruled on this issue in the
16 October 8, 2003 *Memorandum Opinion Re: Ahtanum Creek Legal Issues* and determined that there
17 is not an absolute, cut and dried reversion. Issue No. 5, beginning on page 16 of the opinion.
18 Specific provisions in the Pope Decree provide that "when the needs of those parties were such as
19 to require less . . . then their rights to the use of the water was correspondingly reduced and those of
20 the Indians, in like measure, greater." *Ahtanum II* at page 913. The Decree did not state that north
21 side's water rights revert to the south side if the water is not used on north side parcels. Using less
22 water one year, two years or even ten years, does not necessarily mean that the need has been
23 reduced. The evidence does not support a conclusion that the needs on the Hagemeyer property are
24 less than they were in 1908 and 1957. The Nation argues that the determination about whether the
25 water right can be recognized here should be based on the Pope Decree. The Pope Decree
26 recognized the existence of this right. The Nation's exception is denied.
27
28

1 Ecology argues that the Court misapplied the provision in RCW 90.14.140(2)(c) that a water
2 right does not relinquish “If such right is claimed for a determined future development to take place
3 either within fifteen years of July 1, 1967, or the most recent beneficial use of the water right,
4 whichever date is later;” Ecology relies on *R. D. Merrill Co. v. Pollution Control Hearings Bd.*,
5 137 Wn.2d 118, 969 P. 2d 485 (1999); *State Dep’t of Ecology v. Acquavella*, 131 Wn.2d 746, 935
6 P. 2d 595 (1997); and *City of Union Gap v. Dep’t of Ecology*, ___ Wn. App. ___, (2008) (Slip
7 Opinion wherein Division III of the Court of Appeals affirmed this Court).
8

9 *Merrill* identified two prerequisites to the application of the determined future development
10 exception. The first, with which this Court and Ecology both agree, is that a firmly defined, or
11 “fixed” plan must be in place within the five years of the last date of beneficial use of water.
12 Ecology does not dispute that the Hagemeyers had a “fixed” plan. Second, the Supreme Court held
13 that the future development must occur within 15 years – encompassing the possibility of future
14 development which may occur after the 5 years of non-use (“The fixed development plans will take
15 longer than five years to come to fruition.”) Here the Court and Ecology part ways. Ecology
16 maintains this last language means that the plans must be for a project that is of a scope that will
17 take longer than five years to execute, i.e. large projects. Ecology argues there is no “scope” to the
18 Hagemeyer future use and no evidence that “development” is planned. According to Ecology,
19 “development” commonly means “the act or process of growing or evolving; growth; progress.”
20 They suggest that no growth or progress is necessary to simply continue the pre-existing use of the
21 water; that constitutes maintenance, but not development, of a water right. Ecology also suggests
22 that *Merrill* holds the project must be one that cannot be accomplished within five years. This
23 Court disagrees.
24
25
26

27 In *Union Gap v. Ecology*, Division III held that development, as used in this exception,
28 refers to the development (or possible development) of land. Land that has not been irrigated and
Memorandum Opinion Subbasin No. 23 Exceptions – 24

1 has sat idle for ten years, as was the case with the Hagemeyers' property, would certainly need
2 development prior to being suitable for irrigation. The Court finds nothing in either *Merrill* or
3 *Union Gap* to alter the Court's finding that the water right for the Hagemeyers' land has not
4 relinquished. Ecology also cited to *State Dep't of Ecology v. Acquavella (1997)*. That case does
5 not resolve this issue. It did not address the determined future development sufficient cause.
6 Ecology's exception is denied.
7

8 **Answer No. 20** - Richard McGahan (Court Claim No. 01880)
9 Patricia Bombard (Court Claim No. 01880)
10 Robert Meyers

11 The Court has not confirmed any water rights for lands described in Answer No. 20. All three
12 of the named parties own land described in this answer and filed an exception to a water right not
13 being confirmed for the land they own. Attorney Lawrence E. Martin appeared at the exception
14 hearing on behalf of Mr. McGahan and Patricia Bombard appeared on her own behalf. Attorney
15 James E. Davis informed the Court that Mr. Meyer had been hospitalized and, therefore, would not
16 be able to appear, and would stand on his written exception.

17 The Court has previously determined there is a water right to irrigate two acres within the area
18 described in Answer No. 20. The evidence presented indicates that Mr. McGahan irrigates
19 approximately 1.46 acres on the portion of his land that is within Answer No. 20, Mr. Meyers
20 irrigates 5 acres, and Ms. Bombard irrigates between 1 and 2 acres. All of the parties testified,
21 indicating that their land was being irrigated in the 1950's when Answer No. 20 was filed. No one
22 offered an explanation of why Answer No. 20 states 2 acres are irrigated when the current evidence
23 suggests that slightly more than 8 acres are actually being irrigated.
24

25 The parties did not present definitive information that would allow the Court to determine with
26 certainty which land is the two irrigated acres described in Answer No. 20. Therefore, the Court
27 will divide the 2 acre water right equally among the three landowners, with each awarded a right to
28

1 irrigate 0.66 acres. Certificate No. 306 from the prior adjudication of Ahtanum Creek is
2 appurtenant to this land and has a priority date of 1883. The point of diversion authorized by the
3 certificate is located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and/or the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 18, T. 12 N.,
4 R. 16 E.W.M. This is the point of diversion location to be described in the three water rights. The
5 diversions used by Mr. McGahan, Ms. Bombard and Mr. Meyers are not located as authorized on
6 Certificate No. 306; therefore, they must contact Ecology's Central Regional Office and follow the
7 process in RCW 90.03.380 to change their point of diversion.
8

9 The Court confirms the following three water rights, each with a priority date of June 30, 1883,
10 a point of diversion on the North Fork of Ahtanum Creek in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ NE $\frac{1}{4}$ of
11 Section 18, T. 12 N., R. 16 E.W.M. and a season of use from April 15 through July 10:
12

13 To Richard McGahan, a right to divert 0.01 cfs, 1.14 acre-feet per year for the
14 irrigation of 0.66 acre in Lot 3 of Short Plat No. 89-139, being within that portion of the
15 NE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 18, T. 12 N., R. 16 E.W.M. lying south of the North Fork of
16 Ahtanum Creek (Portion of Parcel #161218-13404)

17 To Patricia Bombard, a right to divert 0.01 cfs, 1.14 acre-feet per year for the
18 irrigation of 0.66 acre in that portion of the west 400 feet of the N $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of
19 Section 18 T. 12 N., R. 16 E.W.M. lying southerly of the North Fork of Ahtanum Creek
20 (Portion of Parcel #161218-24005 and Parcel #161218-13017).

21 To Robert Meyers, a right to divert 0.01 cfs, 1.14 acre-feet per year for the irrigation
22 of 0.66 acre in that portion of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 18 T. 12 N., R. 16 E.W.M.,
23 lying northerly of the North Fork of Ahtanum Creek (Parcel # 161218-13008).

24 **Answer No. 22** - Richard McGahan (Court Claim No. 01880)
25 Patricia Bombard (Court Claim No. 01880)

26 In the initial Report, the Court confirmed a right for land within Answer No. 22 owned by
27 John-Ken, Inc. The United States and the Yakama Nation took exception to confirmation of the
28 right. Although AID withdrew its claim for Answer No. 22, it attempted to present evidence at the
2004 supplemental hearing on behalf of Mr. McGahan. The United States and Yakama Nation
were not prepared to respond to the evidence, so the Court did not allow Mr. McGahan to present

1 his evidence. Following conclusion of the supplemental hearing, Ms. Bombard filed a late
2 exception for her lands. When it was determined that a portion of her lands lie within Answer No.
3 22, the Court declined to rule on whether there was a water right for the Bombard land in Answer
4 No. 22. The Court instructed the claimants to file an exception to the Supplemental Report if they
5 intended to pursue a claim. Mr. McGahan and Ms. Bombard both took exception to the Court not
6 confirming a water right for the portion of their lands located within the area described in Answer
7 No. 22. The Yakama Nation's Exception No. 5 reserved the right to comment on any exceptions
8 filed for Answer No. 22. The Nation did not file a reply to this exception, but was represented in
9 court when the evidence was presented. Attorney Lawrence E. Martin appeared on behalf of
10 Richard McGahan and both Mr. McGahan and Patricia Bombard testified at the exception hearing.
11

12
13 Mr. McGahan owns Parcel No. 161218-13404, which lies in the E $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 18,
14 T. 12 N., R. 16 E.W.M. The northerly portion of the parcel is within the area described in Answer
15 No. 20 – discussed above -- and the southerly portion of the parcel lies in Answer No. 22.

16 Mr. McGahan testified to irrigating 2.5 acres of pasture within the portion of his parcel that lies in
17 Answer No. 22. Ms. Bombard owns a 7.38 acre parcel in the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and W $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of
18 Section 18, which lies partly in Answer No. 20 and partly in Answer No. 22. She estimated that
19 approximately 5 acres of the parcel are within Answer No. 22 and that half of the 5 acres are
20 irrigated with water from Ahtanum Creek. She irrigates a garden and landscape. Both
21 Mr. McGahan and Ms. Bombard testified that not only was their land being irrigated when they
22 purchased it, but also in the 1950's.
23

24 In the initial Report, the Court determined that Certificate No. 305 from the prior adjudication
25 is appurtenant to the Answer No. 22 lands. It authorized the diversion of 1.36 cfs for the irrigation
26 of 68.4 acres in Lots 2 and 3, the SE $\frac{1}{4}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 18, T. 12
27 N., R. 16 E.W.M. Answer No. 22 states that in 1908, 70 acres were being irrigated and in 1957
28

1 48.1 acres were being irrigated. Since any claim for lands owned by John-Ken, Inc. has been
2 withdrawn, Ms. Bombard and Mr. McGahan are the only landowners claiming a right for lands
3 within Answer No. 22.

4 The Court finds there has been sufficient evidence presented to conclude that beneficial use of
5 water from Ahtanum Creek has continued on the portions of the McGahan and Bombard lands
6 lying within Answer No. 22. The Court will confirm rights to Ms. Bombard and Mr. McGahan
7 with a priority date of June 30, 1883 for diversion from the North Fork of Ahtanum Creek between
8 April 15 and July 10. The point of diversion authorized is in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 18.

9 Neither party uses a diversion at this location, so they must contact Ecology for the procedures to
10 obtain approval to move the point of diversion to the location where they currently divert water.
11

12 To Mr. McGahan, a right to divert 0.03 cfs, 4.3 acre-feet per year for the irrigation
13 of 2.5 acres in that portion of Lot 3 of Short Plat No. 89-139 lying within the
14 S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 18, T. 12 N., R. 16 E.W.M. (Parcel No. 161218-13404).

15 Ms. Bombard, a right to divert 0.03 cfs, 4.3 acre-feet per year for the irrigation of
16 2.5 acres in that portion of the west 250 feet of the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 18 lying
17 southerly of the North Fork of Ahtanum Creek and that portion of the east 264.35 feet of
18 the SE $\frac{1}{4}$ NW $\frac{1}{4}$ lying northerly of the following described line: beginning at the center of
19 Section 18; thence N 01°02'14" W 633.5 feet to point A; thence 88°09'13" W 300 feet to
point of beginning of said line; thence N 88°09'13" E to point A; thence N 88° 42'00" E to
east line of the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and terminus of said line, all in Section 18, T. 12 N., R. 16
E.W.M. (Portion of Parcel No. 161218-24005).

20 **Answer No. 27** - Hiriam H. & Sharon P. White

21 Ecology filed an objection to the Court's reason for determining that the water right for
22 irrigating lands described in Answer No. 27 had not relinquished due to voluntary non-use. There
23 was no response to this objection by the Whites or counsel for AID.
24

25 The Court ruled that the right had not relinquished due to a sufficient cause for the non-use as
26 described in RCW 90.14.140(2)(b) – specifically that there is no relinquishment if the right is
27 claimed for a determined future development to take place within 15 years of the most recent
28

1 beneficial use of the water. (See pages 82 and 83 of the Supplemental Report). Although Ecology
2 agrees that the water right has not relinquished, it believes that the “operation of legal proceedings”
3 sufficient cause is the appropriate criterion for that determination. The Court agrees that is one of
4 two applicable sufficient causes: determined future development and operation of legal
5 proceedings. Ecology makes the same arguments for the White property as for the Hagemeyer
6 property in Answer No. 19 discussed above. The Court incorporates the rulings made there. As
7 with the Answer No. 19 property, the Court denies Ecology’s exception and concludes that both
8 determined future development and operation of legal proceeding sufficient causes prevent
9 relinquishment of this water right.
10

11 **Answer No. 50** - William G. and Jeannette M. Evans (Court Claim No. 01911)
12 Leanne & George R. Amer
13 James & Elizabeth Amer
14 Richard & Terry C. Welch
15 Leo Richardson

16 The Evans took exception to the Court not confirming a water right for lands owned within the
17 area described in Answer No. 50. J. Jay Carroll appeared at the exception hearing on their behalf.

18 The Court did not confirm a water right for the Evans due to lack of evidence of historical,
19 beneficial use on the land. Prior to the 2004 supplemental hearing, the Court had confirmed to
20 others who own land within Answer No. 50 all of the available water right based on evidence
21 presented at the initial hearing, which included evidence of beneficial use of the water on their land.

22 At the supplemental hearing, evidence was presented showing irrigation of the property after it was
23 acquired by Mr. Evans in the 1960’s, but not prior to his purchase. Additionally, exhibit SE-174
24 appeared to show that the Evans’ property had not been irrigated by 1957.

25 Mr. Evans submitted several declarations from people familiar with his land prior to his
26 purchase. The declarations are attached to the Exception of William G. and Jeannette M. Evans,
27 filed on June 27, 2008. These declarations establish that the Evans’ property was irrigated with

1 water from Ahtanum Creek prior to and during the 1940's and 1950's. Therefore, the Court will
2 confirm a right to William G. and Jeanette M. Evans consistent with the information provided in
3 AID-8A for Answer No. 50. This will result in a reduction of the water rights confirmed to Leanne
4 & George R. Amer, James & Elizabeth Amer and Leo Richardson for their lands within Answer
5 No. 50, and described on pages 316, 317 and 326 of the Supplemental Report.
6

7 Review of the initial Report of the Court and the Supplemental Report in order to address
8 this exception brought to the Court's attention that there are two parcels described in AID-8A
9 owned by Leo Richardson for which the Court confirmed a water right, but the water right was not
10 described in the schedule of rights. Those lands, Parcel Nos. 171211-33410 and 33411, lie in the
11 SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 11, T. 12 N., R. 17 E.W.M., and AID-8A reflects that a right to irrigate 1.56
12 acres would be appurtenant to each 3 acre parcel.
13

14 The Court, therefore, modifies the water right on page 316, line 22 through page 317, line 9
15 for James and Elizabeth Amer to authorize the diversion of 0.02 cfs, 3.97 acre-feet per year for the
16 irrigation of 2.31 acres; the water right for Leanne and George R. Amer on page 317, lines 11
17 through 22 to authorize the diversion of 0.02 cfs, 3.97 acre-feet per year for the irrigation of 2.31
18 acres and the water right for Leo Richardson described on page 326 to authorize the diversion of
19 0.11 cfs, 18.78 acre-feet per year for the irrigation of 10.92 acres. All other aspects of the water
20 right remain unchanged. Additionally, on page 326 an additional water right is confirmed to Leo
21 Richardson for the diversion from April 15 through July 10 of 0.031 cfs, 5.37 acre-feet per year for
22 the irrigation of 3.12 acres in Lots 3 and 4 of Short Plat 91-59, being within the W $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of
23 Section 11, T. 12 N., R. 17 E.W.M. (Parcel # 171211-33410 and 33411). The point of diversion
24 on Ahtanum Creek is located in Government Lot 2 of Section 14, T. 12 N., R. 17 E.W.M.
25
26

27 The Court also confirms a right to William and Jeannette Evans with a June 30, 1871, date
28 of priority for the diversion from April 15 through July 10 of 0.19 cfs, 32.68 acre-feet per year for
Memorandum Opinion Subbasin No. 23 Exceptions - 30

1 the irrigation of 19 acres in Government Lot 3, Section 15, T. 12 N., R. 16 E.W.M. The point of
2 diversion on Ahtanum Creek is located in Government Lot 4 of Section 15, T. 12 N., R. 16 E.W.M.

3 Answer No. 77 – David Melero

4 The Court was unable to confirm a water right for Parcels Nos. 171212-11401 through
5 11404 due to lack of testimony regarding historic and current use. AID took exception and the
6 landowner, David Melero, testified. Mr. Melero purchased the properties in June of 1973.
7 Irrigation water was diverted from Hatton Creek and conveyed a considerable distance to his
8 property via a ditch that ran along the fence line of the Smith property. (AID-146.) Over time
9 it became more difficult for Mr. Melero to obtain his water via this system due to subdivision
10 of lands along the ditch. Mr. Melero then moved his pump/point of diversion and obtained
11 water from the Bohanan place. In 1999, Mr. Melero obtained an Order Granting Temporary
12 Change in Point of Diversion from the Court (AID-148). He current point is 1250 feet south
13 and 100 feet west of the northeast corner of Section 12, within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, T.
14 12 N., R. 17 E.W.M. in Parcel No. 171212-11404.

15
16
17 There has been a boundary line readjustment of two parcels in this area. The boundary for
18 what was Parcel No. 171212-11401 has been adjusted as follows: Parcel No. 11401 and the west
19 half of 11005 are now Parcel No. 171212-11414. The east half of 11005 is now 11006. The
20 Meleros own several parcels and two of those parcels have homes. Mr. Melero testified to the
21 following regarding their parcels. Parcel No. 171212-11404 is 2.38 acres; No.-11403 is 2.5 acres;
22 No. -11402 is 2.5 acres and has a home on it; No.-11414 is 5.14 acres; and No.-11006 is 2.43 acres
23 and has a mobile home. AID-146. The homes occupy about one-quarter acre each. Therefore,
24 each parcel with a home (11402 and 11006) will be reduced by 0.125 acre. The Meleros grow
25 hay/pasture on the property as well as raise horses.
26
27
28

1 Certificate No. 102 has a priority date of June 30, 1868 and covers the Melero lands lying
2 generally within the NE¼NE¼ of Section 12. The authorized points of diversion are within
3 NW¼NE¼ and SE¼NW¼ of Section 12, T. 12 N., R. 17 E.W.M. These are the points of diversion
4 which will be confirmed until Ecology makes its formal decision on the change application.
5 However, the Order Granting Temporary Change shall remain in effect until that time and Mr.
6 Melero can continue to divert from the point in the NE¼NE¼ of Section 12.
7

8 The Court confirms one water right to David Melero to divert a maximum of 0.15 cfs and
9 25.32 acre-feet per year from Hatton Creek for the irrigation of 14.7 acres and stock water from
10 April 15 through July 10. The authorized points of diversion are within NW¼NE¼ and SE¼NW¼
11 of Section 12, T. 12 N., R. 17 E.W.M. The priority date is June 30, 1868. The place of use and
12 quantities authorized are:
13

14	Parcel No. 171212-11402	2.38 acres	0.03 cfs	4.09 acre-feet per year
	Parcel No. 171212-11403	2.5 acres	0.03 cfs	4.3 acre-feet per year
15	Parcel No. 171212-11404	2.38 acres	0.02 cfs	4.09 acre-feet per year
	Parcel No. 171212-11414	5.14 acres	0.05 cfs	8.84 acre-feet per year
16	Parcel No. 171212-11006	2.3 acres	0.02 cfs	4.0 acre-feet per year

17 **Answer No. 106** – Eugene E. Carlson

18 The Court did not confirm a right to Mr. Carlson under Answer No. 106 due to the
19 inconsistency between the information provided in the original AID-8 and AID-8A. AID filed an
20 exception expressing intent to contact Mr. Carlson to clarify the record. At the exception hearing
21 AID explained that the Carlson family has taken over the property and had not responded to AID's
22 request for information. The Court allowed until November 30 to submit additional information.
23 None was submitted, therefore, the Court will not confirm any surface water rights for the lands
24 described in Answer No. 106.
25
26
27
28

1 **Answer No. 107** – Royal Schlepp

2 There were no exceptions filed to the water right confirmed to lands described in Answer No.
3 107. However, AID brought to the Court's attention that the parcel had been divided so there are
4 two parcel numbers associated with it. Therefore, the Court amends the water right on page 310 at
5 line 17½ to replace the parcel number with the following: 181207-31401 and 31402.
6

7 **Answer No. 132** – Donna Vetsch

8 The Court was unable to confirm a right to Donna Vetsch for Parcels Nos. 171217-11001 and
9 14001 for two reasons: First, lack of evidence of beneficial use from 1973 to 1991, and second, an
10 issue with one of the sources of water for the property. Sources include Hatton Creek and a
11 depression on the property referred to as both a spring and a shallow well. The Court requested
12 additional evidence clarifying whether that source was surface water or groundwater. AID took
13 exception to the Court's ruling on these two parcels indicating they would provide the requested
14 evidence. In addition, AID stated that Parcel No. 171217-14002 should be included in the
15 confirmed water right.
16

17 AID offered the testimony and declaration of Carl Brown (AID-133). Mr. Brown owned the
18 property from 1979 through 1993. Mr. Brown purchased the already irrigated property from Jack
19 Rutherford in 1979. However, his family owned the land next to this Rutherford place, so his
20 knowledge dates back to the late 1950's. The property was historically irrigated by the Rutherfords
21 and Mr. Brown. In 1991 he leased this property to Ray Vetsch who purchased it in 1993. During
22 Mr. Brown's ownership, he irrigated 90 to 92 acres. This testimony resolves the issue of continued
23 beneficial use.
24

25 As to source, testimony in 2003 by Jay Vetsch and in 2008 by Mr. Brown indicates that there is
26 a water source located in a depression on Parcel 171217-14002. It is 10 to 12 feet deep and is
27 located about 100 yards from Ahtanum Creek. Water is ditched away from this area to drain it so it
28

1 is less muddy. The water source was dug by hand by either Jack Rutherford or his parents. The
2 water in it fluctuates with, and reacts to, the flow of Ahtanum Creek. Mr. Brown believes that the
3 source of its water is Ahtanum Creek. There is a connection between Ahtanum Creek and the water
4 source used by Ms. Vetsch. The water source is located in Government Lot 4 of Section 17.
5

6 Compliance with RCW 90.03.380 is still required.

7 Sixteen acres within Parcel No. 171217-11001 are the subject of a Certificate of Change,
8 Vol. 1, Page 149. Ecology authorized a change in point of diversion to the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section
9 17 and place of use to the N $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17, all in T. 12 N., R. 17 E.W.M. Certificate
10 No. 175 covers the rest of the Vetsch property in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ and Government Lot 4 of
11 Section 17. Certificate No. 175 authorizes four diversion points, from which the Court authorized
12 the following three points: the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17, the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 18 and
13 Government Lot 3 of Section 17, all in T. 12 N., R. 17 E.W.M. (Report @238-239). Hatton Creek
14 flows through the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17 and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 18, and Ahtanum Creek
15 flows through Government Lot 3 of Section 17. The spring area is located in Government Lot 4 of
16 Section 17. Compliance with RCW 90.03.380 is still required. AID stated that there is a change
17 application on file with Ecology (10/30/2008 RP @589.)
18

19
20 Based on the above, the Court confirms two water rights to Donna Vetsch as follows:

21 A June 30, 1866 water right in the amounts of 0.16 cfs and 27.52 acre-feet per year
22 for irrigation of 16 acres within the N $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17, T. 12 N., R. 17 E.W.M.
(Parcel No. 171217-11001).

23 A June 30, 1870, water right in the amounts of 0.32 cfs and 54.61 acre-feet per
24 year for the irrigation of 31.75 acres within the following described tracts of land: A
25 portion of the NE $\frac{1}{4}$ NE $\frac{1}{4}$, except the north 25 feet for the County Road (Parcel No.
26 171217-11001, 9.74 acres); the north 22.40 acres of Government Lot 4 (Parcel No.
171217-14001, 9.39 acres); and Government Lot 4, except the north 22.40 acres (Parcel
No. 171217-14002, 12.62 acres).

27 The diversion points for these water rights shall be Hatton Creek from the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of
28

1 Section 17 and NW¼NW¼ of Section 18, and Ahtanum Creek from Government Lot 3 of Section
2 17, all in T. 12 N., R. 17 E.W.M. The season of use is April 15 through July 10.

3 **Answer No. 151 – Congdon Orchards**

4 The Court sought clarification from AID on the location of the point of diversion used to
5 irrigate the land owned by Congdon Orchards, Inc., within Answer No. 151. AID filed an
6 exception and provided the location. The Yakama Nation responded to the exception, contending
7 that the location provided by AID in its exception is not on any surface water source.
8

9 The evidence presented at the supplemental hearing in 2004 lead to a conclusion that water is
10 diverted from Bachelor Creek into the Hugh Bowman Ditch for delivery to the Congdon property in
11 the S½NW¼ of Section 33, T. 13 N., R. 18 E.W.M. However, Certificate No. 265 from the prior
12 adjudication of Ahtanum Creek describes a diversion in Lot 4 of Section 5, T. 12 N., R. 18 E.W.M.
13

14 The maps in the record do not show any surface water sources at this location. Evidence
15 introduced for other claimants who use water from the Hugh Bowman Ditch establishes that the
16 diversion from Bachelor Creek to this ditch is in the NE¼SE¼NW¼ of Section 10, T. 12 N.,
17 R. 17 E.W.M. (Supplemental Report @ 247 and 249). AID's exception stated that the diversion
18 was on Bachelor Creek into the Hugh Bowman Ditch in Section 10, T. 12 N., R. 18 E.W.M. – there
19 was a typographical error in the range number, undoubtedly leading to the Nation's conclusion that
20 the location was not on any surface water source.
21

22 AID presented evidence that the location on Certificate No. 265, Lot 4 of Section 5, T. 12 N.,
23 R. 18 E.W.M., is where Congdon Orchards takes water from the Hugh Bowman Ditch for
24 distribution on its property. There was much discussion during the exception hearing on whether it
25 would be necessary for Congdon Orchards to file an application to change its point of diversion,
26 since water is diverted from Bachelor Creek at a different location than on the certificate. The
27 evidence establishes that water for the Congdon property in Answer No. 151 has always been
28

1 diverted from Bachelor Creek into the Hugh Bowman Ditch with a diversion located in Section 10,
2 T. 12 N., R. 17 E.W.M. and that no physical change has happened. There was some discussion
3 about earlier maps describing Hugh Bowman as a stream instead of a ditch, but that issue is not
4 properly before the Court and will not be considered.
5

6 The Court concludes that it is not necessary for Congdon Orchards to file an application for
7 change of point of diversion. The Court will confirm a right to this claimant as described in the
8 Supplemental Report on page 154, lines 7 through 8½, with a point of diversion from Bachelor
9 Creek located 725 feet north and 325 feet west from the center of Section 10, being within the
10 NE¼SE¼NW¼ of Section 10, T. 12 N., R. 17 E.W.M. The water right will also identify that water
11 is taken from the Hugh Bowman Ditch in Lot 4 of Section 5, T. 12 N., R. 18 E.W.M.
12

13 The right is confirmed with a June 30, 1877, date of priority for the diversion from April 15
14 through July 10 of 0.78 cfs, 133.39 acre-feet per year for the irrigation of 77.55 acres in the
15 S½NW¼ of Section 33, T. 13 N., R. 18 E.W.M. (Parcel #181333-23001).
16

17 **Answer No. 178** - Douglas and Audrey Nash

18 Although AID did not file an exception to the rights confirmed under Answer No. 178, it
19 brought to the Court's attention an error regarding the number of acres that could be irrigated under
20 one of the water rights. In the Supplemental Report at page 161, lines 1 through 3 and page 264,
21 lines 13½ through 25, a right was confirmed to Douglas and Audrey Nash for the irrigation of 0.25
22 acres, however, AID suggests that the evidence was that 2.5 acres are being irrigated. Ecology
23 agreed with AID's position.

24 The Court has reviewed the evidence and finds that AID is essentially correct, although the
25 acreage should be 2.46 acres. Therefore, the right confirmed on page 161, lines 1-3 and page 264,
26 line 13- 25 is amended to authorize the diversion of 0.025 cfs, 4.23 acre-feet per year for the
27 irrigation of 2.46 acres. All other aspects of the water right remain unchanged.
28

1 Answers Nos. 179/215 - Hull Ranches

2 AID objects to the Court not confirming a right for irrigating the lands described in Answers
3 Nos. 179 and 215. A right for this land was not recognized in the Pope Decree because the owner
4 of the land in 1908 did not sign the Code Agreement. The evidence presented both as part of the
5 *U.S. v. Ahtanum* case and in this proceeding is that the land was owned by Sophia Woodhouse in
6 1908. Her son, Norman Woodhouse, was farming the land and signed the Code Agreement on her
7 behalf. However, Judge Pope ruled that was not sufficient and found that the owner of the land in
8 1908 did not sign the agreement and reversed the lower court's finding that a right could be
9 recognized for the land. This Court's consideration of Answers Nos. 179 and 215 is found on
10 pages 161, 162, and 169 of the Supplemental Report.
11

12
13 As noted on pages 162 and 169, this Court believes that incorrect information was provided the
14 Federal Court during the *Ahtanum* litigation leading to an incorrect conclusion that the owner of the
15 land in 1908 did not sign the Code Agreement. AID's exception on behalf of Hull Ranches,
16 however, suggests that the Court at that time had the same information as presented here, and
17 concluded that the signature of the landowner's son on the Code Agreement was not adequate. AID
18 asks this Court to correct an obvious and substantial error and find that the application of collateral
19 estoppel here would create an injustice.
20

21 The doctrine of collateral estoppel applies if (1) the issue decided in the prior adjudication is
22 identical with the one presented in the present action; (2) the prior adjudication ended in a final
23 judgment on the merits; and (3) the party against whom the plea is asserted was a party or in privity
24 with the party to the prior adjudication. AID argues that application of the doctrine must not work
25 an injustice. It claims it would be an injustice for this Court to apply the doctrine and conclude that
26 it is bound by the rulings in the Pope Decree regarding the lands in Answers Nos. 179 and 215.
27

28 The Yakama Nation replied to this exception noting that this Court applied the doctrine of res

1 judicata previously in its ruling on Ahtanum Watershed Practicably Irrigable Acreage and that
2 under res judicata, there is no need to consider whether there is an injustice.

3 The Nation correctly points out that the claim for this land was at issue in the Pope Decree
4 (identical issue), there was a final judgment on the merits, and Hull Ranches is in privity with the
5 party in the first proceeding (the Woodhouses). AID's argument here was also argued before the
6 Ninth Circuit. Following entry of Ahtanum II in 1964, AID filed a Petition for Writ of Certiorari
7 seeking review by the United States Supreme Court. The petition was denied. That was the
8 mechanism for AID to have Judge Pope's ruling related to Answers Nos. 179 and 215 overturned,
9 and that effort failed. AID's exceptions related to Answers Nos. 179 and 215 are denied.

10
11 **Answer No. 219** -- KLC Holdings Ltd.

12 AID filed an exception to the Court's failure to include a parcel in the place of use for the
13 water right confirmed to KLC Holdings, Ltd for lands in Answer No. 219. At the exception
14 hearing, AID presented evidence to show that AID-8A contained an incorrect legal description for
15 Parcel #171211-13002.
16

17 The new evidence establishes that the correct legal description for Parcel #171211-13002 is the
18 N $\frac{1}{2}$ S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 11, T. 12 N., R. 17 E.W.M., which is in Answer No. 219. Therefore, the
19 Court will amend the water right described beginning on page 303, line 22 to add Parcel #171211-
20 13002 on page 304, at line 7.
21

22 **Court Claim No. 1645** - Kenneth and Renee Baggarley

23 Kenneth and Renee Baggarley filed an exception to the Court's ruling on junior rights and
24 failure to include them in the list of landowners entitled to a non-diversionary stock water
25 right.
26

27 The Baggarley's purchased their land from Mack D. and Myrtle J. Carter who had been
28 joined to Court Claim No. 01645 after purchasing land from Earl and Ardis Lewis. The Court

1 entered an Order of Substitution on December 19, 2005, joining the Baggarleys to the claim.
2 Earl and Ardis Lewis were confirmed a non-diversionary stock water right for their property
3 and listed in the Report of the Court. However, when the Court issued its Supplemental Report
4 the Baggarley's name was inadvertently left off the non-diversionary stock water list. The
5 Court grants their exception related to stock watering and their name will be included on the
6 non-diversionary stock water list. The Yakama Nation's exception related to the stock water
7 issue replies to the Baggarley exception and is addressed below beginning on page 56.
8

9 The Baggarley's second exception is to the Court's denial of their "junior" water right.
10 The Court has again reviewed the issue of junior rights beginning on page 2 above. Junior
11 water rights cannot be confirmed, and the Baggarley's exception on that issue is denied.
12

13 **Court Claim No. 01488** – Rudy Bossert; Gary and Margaret Ann King
14 Todd and Helga Braman; Steve Gottlieb

15 Ecology sought clarification of the legal description for the place of use on the water right
16 described on page 214, lines 1 through 15 and confirmed to Rudy Bossert and Gary and Margaret
17 Ann King. The legal description of the place of use is different than used in the initial Report of the
18 Court, where the same water right is described on page 352, lines 1 through 12. The Court
19 concludes that a portion of the place of use description was inadvertently omitted from the
20 Supplemental Report. Therefore, page 214, line 12 is amended to read: and 2 acres within the
21 southwest corner of the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, all in T. 12 N., R. 18 E.W.M.
22

23 Ecology also sought clarification of the legal description for the water rights confirmed on page
24 214 -215 to Todd and Helga Braman and on page 216 to Steve Gottlieb. The place of use
25 description differed from that in the Report of the Court with no explanation for the change.
26

27 The Court has reviewed the record for these two water rights. The place of use for the water
28 right confirmed to Todd and Helga Braman beginning on page 214 at line 16 was modified to

1 exclude from the place of use land that had never been irrigated (lying south of canal); however, in
2 so doing, a typographical error was made. Line 24½ should read Lot 3 of Short Plat 82-239
3 (Portion of 181212-32418). Additionally, the Court modifies the instantaneous quantity at line 20
4 to 0.006, correcting a typographical error. The place of use for the water right confirmed to Steven
5 Gottlieb on page 216, beginning on line 8 was modified to more accurately describe the land owned
6 by Mr. Gottlieb and exclude land he does not own.

8 **Court Claim No. 00040** - Donald and Sylvia Brule

9 The Brules took exception to the Court's ruling that previously recognized junior rights
10 did not exist and, therefore, a water right could not be confirmed for their land in this
11 proceeding. Attorney J. Jay Carroll appeared at the exception hearing on their behalf. Mr.
12 Brule also testified. No additional evidence was offered. The court's ruling on the junior right
13 issue above on page 2 applies to the Brules, however, they raise some issues that are unique to
14 their claim and are addressed here.

16 The claimants argue that their predecessors who owned their land between 1947 and
17 1964 were never made parties to the *U. S. v. Ahtanum* case and, therefore, cannot be bound by
18 the Pope Decree. However, the Court in reviewing the evidence offered by the Yakama Nation
19 during the hearing on the late exception by LaSalle High School found that owners of the Brule
20 land were served with the summons and complaint. The evidence submitted by Mr. Brule was
21 that his land was owned by W. C. Cope in 1947. YIN-426 is an Affidavit of Service of
22 Summons and Complaint and shows that Walter C. Cope was served on September 4, 1947
23 and YN-427, also an Affidavit of Service of Summons and Complaint shows that W. C. Cope
24 was served on October 27, 1949. The chain of title documents submitted by the Brules do not
25 indicate who owned their land in 1949, leaving the Court to conclude it was still owned by the
26 Copes.
27
28

1 Mr. Brule also argues that Spring Creek is not part of the Ahtanum basin and should be
2 considered its own entity. He argues that much of the flow in Spring Creek is the result of
3 return flow waters from land irrigated by Yakima Valley Canal Company. However, he did
4 not present any evidence to support his position. Additionally, even if the Court were to accept
5 this argument, a right cannot be confirmed for use of foreign return flow waters. See the
6 Court's May 12, 1992, *Memorandum Opinion RE: Threshold Issues*. Return flow waters in
7 Spring Creek resulting from the irrigation of lands with water delivered by Yakima Valley
8 Canal Company (which diverts from the Naches River) are "foreign return flows".

9
10 The Court cannot reach the conclusion proffered by Mr. Brule – that Spring Creek is
11 not part of the Ahtanum Basin. Water rights for the use of Spring Creek were addressed in the
12 prior adjudication of the Ahtanum Basin and a water right for Mr. Brule's land was described
13 in the Achepohl Decree that resulted from that adjudication. Certificate No. 238 was issued to
14 Mr. Brule's predecessor following entry of the decree. Spring Creek is a tributary of Ahtanum
15 Creek, flowing into Ahtanum downstream from Mr. Brule's property. If there is a hydrologic
16 basis for the position that Spring Creek is not part of the Ahtanum basin and subject to the
17 rulings in *U. S. v. Ahtanum*, it should have been pleaded and argued in that case.

18
19
20 **Court Claim No. 01924** - Jerome Durnil
Court Claim No. 02060 - Albert Lantrip

21 Mr. Durnil and Mr. Lantrip except to the Court's ruling that previously recognized junior rights
22 did not exist and therefore could not be confirmed in this proceeding. Although they presented no
23 additional evidence, they argue that water rights should be confirmed for their properties irrigated
24 with water diverted from Spring Creek. However, their predecessors did not file answers in *U. S. v.*
25 *Ahtanum*, and, as a result, were not recognized as having a water right pursuant to the Pope Decree.
26 The Court denies the exception of Jerome Durnil and Albert Lantrip. A complete discussion of the
27

1 junior right issue and the Court's ruling is above on page 2.

2 **Court Claim No. 01205** – Paul and Linda Hart

3 Ecology took exception to the Court confirming a right with a point of diversion that had been
4 moved without compliance with the change procedures in RCW 90.03.380. The Yakama Nation
5 filed a response to Ecology's exception, supporting the Court's ruling. At the exception hearing,
6 Ecology and the Nation informed the Court they had reached a compromise and asked the Court not
7 to rule on the exception, but to modify the Supplemental Report of the Court at page 203, beginning
8 on line 11½ to delete all of line 11½ through 13½ and all but "Ecology's exception is denied" on
9 line 14½. The Court grants their request and Ecology's objection is withdrawn.
10

11 In the exceptions, Ecology also sought clarification of the location of the point of diversion
12 authorized by the Court. Ecology believes that the described point of diversion is not on Ahtanum
13 Creek. Although this clarification was not addressed by Ecology during the exception hearing, the
14 Court has reviewed the evidence describing the point of diversion. The location was taken from
15 State's Exhibit SE-94, the State's Investigation Report for the Hart Claim. Since it was Ecology
16 that provided what they contend is the incorrect location for the point of diversion, it would have
17 been helpful for them to assist the Court using their GIS resources to provide a more accurate
18 location. Lacking that information, the Court will rely on the map attached to the Declaration of
19 Michael Thomas to modify the location and place the point on the creek as reflected on that map.
20
21 The water right confirmed to the Harts beginning on page 216 of the Supplemental Report is
22 amended at line 3 to describe a point of diversion located 2,000 feet south and 600 feet east of the
23 center of Section 1, being within Government Lot 7 or 9 of Section 1, T. 12 N., R. 18 E.W.M.
24

25 **Claim No. 1693** – Johncox Ditch Company

26 Johncox Ditch Company (Johncox) took exception to issues that are in common with other
27 claimants and are addressed at the beginning of this *Memorandum Opinion*. Johncox's claim to a
28 Memorandum Opinion Subbasin No. 23 Exceptions – 42

1 junior right is denied. Johncox's claim to a right to use excess water, when available, to the extent
2 that it is within the maximum 0.02 cfs per acre authorized in Surface Water Certificate No. 310 is
3 granted. A provision allowing for the use of excess water, when it is available, upon the acres
4 authorized for irrigation will be included in the confirmed water right. The period of time each year
5 that excess water might be available varies significantly; however, the Court concludes that it is
6 reasonable to find that excess water would be available no more than 45 days during the spring.
7 The provision will allow for the use of up to 0.02 cfs per acre (or 13 cfs) during the authorized
8 irrigation season only when excess water is available, which could result in an additional 584 acre-
9 feet per year being diverted.

11 Two factual issues remain.

12
13 **Robert S. Anderson Land, Parcel No. 161218-11412:**

14 Based on the testimony at the hearing on exceptions, the Court was unsure whether a right
15 was being claimed by AID or Johncox for water delivered to the Robert S. Anderson property
16 located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 18, T. 12 N., R. 16 E.W.M., Parcel No. 161218-11412.
17 Johncox responded to the questions posed by the Court in the Supplemental Report. Based on prior
18 agreements, Johncox is required to, and does, deliver AID water to Parcel No. 161218-11412 via
19 the Johncox Ditch. Johncox also stated that no Johncox water is currently used on this parcel,
20 although the land is within the greater service area of the company. That may be true, however,
21 Section 18 is not included within the place of use on Surface Water Certificate No. 310 – the
22 certificate issued to Johncox following the *Achepohl* adjudication. To legally provide water to
23 Section 18 lands, Johncox must comply with RCW 90.03.380.

25 Parcel 161218-11412 lies within the area described in Answer No. 16, therefore, the Court
26 considered the testimony and evidence provided by Johncox related to this land above under the
27 AID Answer number exceptions.

1 **Johncox Ditch Company Water Right:** The Court confirms a right to Johncox Ditch
2 Company in the amount of 6.55 cfs, 1309.8 acre-feet per year from the North Fork of Ahtanum
3 Creek for irrigation of 654.9 acres and stock water from April 1 through July 10. The point of
4 diversion is located approximately 700 feet north and 650 feet west from the east quarter corner of
5 Section 12, being within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, T. 12 N., R. 15 E.W.M. The priority date is
6 June 30, 1884.

8 **Place of use:** The place of use proposed for Johncox in both the Report and Supplemental
9 Report contained many footnotes. Those footnotes explain not only how the Court arrived at the
10 place of use, but also clarify the place of use. Footnote 3 eliminates the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 7
11 from the place of use. Although the Court requested clarification from Johncox concerning lands in
12 Section 11, none was provided. The Court has clarified the maximum number of acres in the
13 N $\frac{1}{2}$ SW $\frac{1}{4}$ (80 not 480), see Footnote 7.

15	Place of Use:	Section 3 --	SW $\frac{1}{4}$ ²
16		Section 4 --	NE $\frac{1}{4}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, and SE $\frac{1}{4}$ SE $\frac{1}{4}$;
17		Section 7 --	E $\frac{1}{2}$ SE $\frac{1}{4}$, ³
18		Section 8 --	SW $\frac{1}{4}$ NE $\frac{1}{4}$, ⁴ W $\frac{1}{2}$ SW $\frac{1}{4}$, ⁵ SE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$, ⁶
19		Section 9 --	All, except for a small amount in the N $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ outside Johncox boundary (see JDC – 1A);
20		Section 10 --	All

23 _____
24 ² JCD – 1A includes a parcel within the W $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 3 and owned by J.A. Herke. A review of DOE – 136 does not include lands within that legal description.

25 ³ DOE – 136 indicates the E $\frac{1}{2}$ E $\frac{1}{2}$ of Section 7. However, a review of JCD – 1A discloses that the lands lying in the NE $\frac{1}{4}$ are outside the boundaries of JCD and will not be included in Johncox's place of use.

26 ⁴ The Johncox Answer shows a legal description of the W $\frac{1}{2}$ NE $\frac{1}{4}$. However, JCD – 1A depicts that only about 50% of the SW $\frac{1}{4}$ NE $\frac{1}{4}$ lies within Johncox's boundaries and none of the NW $\frac{1}{4}$ NE $\frac{1}{4}$.

27 ⁵ The Court notes the Answer number includes the W $\frac{1}{2}$ SW $\frac{1}{4}$ as being a part of the Johncox. JCD – 1A indicates the SW $\frac{1}{4}$ SW $\frac{1}{4}$ lies within Johncox, but only a small amount of the NW $\frac{1}{4}$ SW $\frac{1}{4}$ lies within Johncox's boundaries

28 ⁶ DOE – 136 indicates that the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 8 is part of the Johncox claim in U.S. v. AID. JDC – 1A shows that land is outside Johncox's boundaries, so it is not included in the place of use.

1 Section 11 – N½SW¼⁷

2 Section 14 – DOE-136 does not include lands in Section 14;

3 Section 15 – N½NE¼, Lots 1, 2 and 3, N½NW¼ (except 1 acre to
4 YWCA and that land lying north of Ahtanum Creek
and south of county road);

5 Section 16 – NW¼NW¼⁸

6 Section 17 – North 12 acres of NE¼NE¼, SW¼NE¼⁹

All T. 12 N., R. 16 E.W.M.

7 Limitation of Use: When water is available in excess of that needed to satisfy all confirmed water
8 rights both on and off the reservation and any water needed to satisfy the Yakama Nation's
9 minimum instream flow right for fish and other aquatic life, an additional 6.55 cfs and 389.07 acre-
feet per year can be diverted.

10 **October 16 to March 31, Winter Stock Water Use**

11 The Court had provisionally confirmed a right to winter stock water pending receipt of
12 evidence and testimony regarding the quantity of water needed and the number of stock served
13 within the Johncox service area. Johncox provided that evidence including testimony of Mr. Herke.
14 The Yakama Nation continued to object to confirmation of water rights to winter stock. However,
15 without waiving its right to appeal, the Nation requested that any right confirmed specify the
16 amount diverted into the ditch or spilled from the ditch and identify the consumptive portion and
17 priority date.
18

19 Johncox claims a right to divert water as follows: Since diversion of water for irrigation ends
20 in July, Johncox initially must divert 2 cfs for 4 to 5 days to prime the ditch; it must then divert up
21 to 1.5 cfs to make deliveries down the ditch; and during periods of extreme cold, it must divert 3 cfs
22

23 ⁷JCD – 1A indicates that all of Section 11 is within Johncox. DOE – 136, the Answer analysis for Johncox shows only
24 the N½SW¼. However, on page 54 of DOE – 136, under J.A. Herke, the N½SW¼ of Section 11 is listed showing the
25 parcel to be 480 acres. This is somewhat confusing and the Court indicated that it may require some analysis from
Johncox. No analysis from Johncox was supplied, so the area is limited to the actual number of acres within a half
section or 320 acres.

26 ⁸ JCD – 1A includes most of the N½ of Section 16. The only reference to Section 16 in DOE – 136 is property held
then by Charley Jewett in the NW¼NW¼ for 40 acres

27 ⁹ JCD – 1A includes the NE¼ and most of the N½NW¼ in Section 17. The only reference to Section 17 in DOE –
137 were those set forth above.

1 to maintain conductivity and prevent the fish screen from freezing. Of this 3 cfs, 1.5 cfs is returned
2 to the creek via a spillway located next to the headbox. Johncox has the ability to measure not only
3 what flows down the ditch, but also the amount of water returned to the creek via the spillway.

4 Johncox requests 2.2 acre-feet per year for consumptive purposes during the winter time. In
5 addition to Mr. Herke's testimony, Johncox provided evidence in the form of two exhibits. JDC-
6 38, the North Dakota State University's Extension Service Livestock and Water bulletin AS-954,
7 July of 1999. JCD-37 is a monthly breakdown of the stock water needs within Johncox using the
8 figures found in JCD-38. Mr. Herke contacted people using the ditch to obtain the stock figures.
9 The stock figures are based on information from 2007. There are approximately 140 horses and
10 between 380 to 600 cattle. Based on the preceding information, 2.2 acre-feet are the consumptive
11 needs of the stock from October 16 to April 1. Although stock needs were higher in the 1990s,
12 Johncox believes that this quantity is sufficient.

13
14
15 The Yakama Nation requests that the priority date for Johncox's winter stock right be the same
16 as its other diversionary right. The Court agrees and that date is June 30, 1884.

17 The Court concludes that Johncox has provided sufficient evidence to answer its questions
18 from the Supplemental Report as well as addressing the Nation's concerns. The right the Court is
19 confirming to Johncox contains some inherent flexibility, due to fluctuating weather conditions. It
20 is impossible to determine when or for how long it will be extremely cold. Johncox is ordered to
21 take daily measurements of both its winter stock water diversions from the creek and, when
22 diversions are greater than 1.5 cfs, measure the discharge into the spillway. Johncox shall provide
23 those records to Ecology on the form Ecology prescribes in accordance with WAC 173-173-050
24 through 080 and 173-173-180.

25
26
27 The Court confirms a June 30, 1884, winter stock water right to Johncox Ditch Company for
28 the diversion from the North Fork of Ahtanum Creek, from October 16 through March 31, of 1.5

1 cfs and 2.2 acre-feet per year (consumptive use portion). Johncox is also authorized to divert up to
2 a maximum of 3 cfs during extremely cold conditions to allow for proper operation of the fish
3 screen and to prevent freezing. When this condition occurs, Johncox shall return to the North Fork
4 of Ahtanum Creek via the spillway the quantity diverted between 1.5 cfs and a maximum of 3 cfs.

5 The point of diversion is located approximately 700 feet north and 650 feet west from the east
6 quarter corner of Section 12, being within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, T. 12 N., R. 15 E.W.M.

7 The place of use is the same as it is for the irrigation right.

8 **Court Claim No. 02320, (A)2434** - Karen Klingele

9
10 Karen Klingele took exception to the Court not confirming a right to use water from Ahtanum
11 Creek on her property. Ms. Klingele is represented by Attorney James E. Davis, and she testified at
12 the exception hearing.
13

14 Ms. Klingele's property lies west of Tampico on the North Fork of Ahtanum Creek. She is
15 asking the Court to confirm a right to irrigate approximate one-quarter acre of landscape with water
16 from the North Fork of Ahtanum Creek. According to Ms. Klingele, she irrigates in a manner
17 consistent with the outside water use that is typically associated with a domestic supply. Her source
18 of water for domestic supply is a well that does not supply sufficient water for any landscape
19 irrigation. Ms. Klingele's knowledge of the property dates back to the 1950's when it was part of
20 the Soda Springs Resort – the rest of which is owned by Gerald and Helen Sauer. She recalls
21 someone living on the property and using water at that time and continuing to do so after the
22 parcels she purchased were separated from the rest of the resort area. Ms. Klingele seeks
23 confirmation of a right to irrigate landscape in the same manner as would have been done if creek
24 water was being used for domestic supply. The Yakama Nation filed a response opposing the
25 exception. Their position is that an irrigation water right can only be confirmed if it was recognized
26 in the Pope Decree. The prior owner of the Klingele property did not file an answer and, therefore,
27
28 Memorandum Opinion Subbasin No. 23 Exceptions - 47

1 was not recognized as having a right in the Pope Decree.

2 The issue is whether an irrigation right can be confirmed if the land was not included in an
3 answer filed by parties to the *U. S. v. Ahtanum* case. As with the Sauers, the owner of the land in
4 1908 did not sign the Code Agreement. However, that may have been due to the land not being
5 irrigated, with no intent to irrigate crops on the land. The land historically has been used as a
6 resort, with most of the water being used for domestic supply and recreational purposes. The Court
7 concludes that even though a right was not recognized for this land in the Pope Decree, a right can
8 be confirmed that is consistent with domestic supply or recreational use. Evidence was presented
9 indicating that the property was used as a resort from the late 1800's to the 1950's and the water use
10 over the years has changed as use of the property changed. Once there were permanent buildings
11 for housing guests and a large swimming pool. It is reasonable to conclude that some landscape
12 irrigation occurred when the land was being used as a resort.
13
14

15 Certificate No. 317 from the prior adjudication of Ahtanum Creek is appurtenant to the
16 Klingele property. It authorized a diversion located 500 feet from the southwest corner of Section
17 8, T. 12 N., R. 15 E.W.M., which is in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8. Ms. Klingele is using a
18 diversion that is located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8. She must contact Ecology's Central
19 Regional Office about the procedure to change her point of diversion from that described in the
20 certificate to the location where she presently is diverting water.
21

22 The Court confirms a right to Ms. Klingele with a June 30, 1884, date of priority for the
23 diversion of 0.01 cfs, 0.5 acre-foot per year for domestic irrigation of 0.25 acre from April 15
24 through October 15 in the E 280 feet of the west 745 feet of that part of the E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 8,
25 T. 12 N., R. 15 E.W.M. lying between the county road and Ahtanum Creek (Parcel #151208-
26 34004). The authorized point of diversion shall be 500 feet from the southwest corner of Section 8,
27 being within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, T. 12 N., R. 15 E.W.M.
28

1 **Court Claim No. 01019** - LaSalle High School

2 LaSalle High School took exception to the Court's ruling that previously concluded that junior
3 rights did not exist and, therefore, could not be confirmed in this proceeding. Attorney J. Jay
4 Carroll appeared at the exception hearing representing LaSalle High School. No additional
5 evidence was offered.
6

7 LaSalle again argues that its predecessors were not party to *U.S. v. Ahtanum* that resulted in the
8 Pope Decree and, therefore, should not be bound by the rulings in that decree. The Court found that
9 LaSalle's predecessors were served a copy of the summons and complaint and joined to the case,
10 see the Court's June 1, 2006 *Memorandum Opinion La Salle High School, Subbasin 23 (Ahtanum)*,
11 *Claim Nos. 1019, A4253 and A5469 @4*. LaSalle argues that even though its predecessor was
12 served a copy of the summons and complaint, the predecessor wasn't named as a party in the
13 complaint; therefore, it should not be bound by the rulings in the decree. The Court is not persuaded
14 by this argument. LaSalle also questioned whether there was a Lis Pendens filed, as is commonly
15 done in an adjudication. In response, the Yakama Nation offered Exhibit YN-451, which is a copy
16 of the Lis Pendens for *U. S. v. Ahtanum, et al.*, which was filed on March 12, 1957. The Court
17 denies the exception of LaSalle High School. The discussion of the junior right issue is on page 2
18 above.
19
20

21 **Court Claim No. 02243** - Gerald F. and Helen M. Sauer

22 The Court confirmed a right under Court Claim No. 002243 for the diversion of 0.02 cfs, 2
23 acre-feet per year for continuous domestic supply and recreation. The Sauers took exception to the
24 quantity of water that was confirmed, and the Yakama Nation took exception to the Court
25 confirming a right to the Sauers. The Nation's exceptions are addressed below on page 53 of this
26 opinion where the Court considers all of the Nation's exceptions related to water rights confirmed
27
28

1 for domestic supply. Only its position on the Sauer exception is addressed here. Gerald Sauer
2 testified at the exception hearing.

3 The Sauers introduced evidence in an attempt to prove that historically more than 0.02 cfs and
4 2 acre-feet per year had been used for domestic supply and recreation on their land and that the
5 right confirmed should be for 0.04 cfs and 4 acre-feet per year. They researched public documents
6 that provided guidance in determining the quantity of water typically used for domestic supply;
7 copies of some of those documents are attached to the Sauer's exception. The Sauer's also entered
8 exhibit DE-350 providing some calculations on water usage. The Nation responded with a
9 declaration by Dr. Niel Allen in which he explains the difference between typical water usage for a
10 full-time residence versus camping where the water is predominantly used for cooking and food
11 service.
12

13
14 The evidence introduced by the Sauers establishes that historically during peak usage of the
15 property for recreation there would be 200 to 250 people at the site. The evidence also proves that
16 this usage was not constant. On some days there might be 10 to 12 people there and on others no
17 one would be on the property. It is inappropriate to confirm the annual quantity of water based on
18 an assumption of constant peak usage or daily use by many people. The Court concludes that the
19 annual quantity previously confirmed, 2 acre-feet per year, accurately reflects the historical use of
20 the property. However, the Sauers have demonstrated that the instantaneous quantity authorized is
21 inconsistent with some of the past usage, such as filling a swimming pool. Although the Court
22 notes that the swimming pool is currently not operational, it is reasonable to conclude that during
23 peak occupancy, more than 0.02 cfs would have been diverted and used. Therefore, the Court will
24 amend the right confirmed on page 379 of the supplemental report and at line 9 change the quantity
25 of water to 0.04 cfs, 2 acre-feet per year.
26
27
28

1 **Court Claim No. 02276** – Yakama Nation

2 The Yakama Nation filed several objections regarding its water rights and to the proposed
3 Conditional Final Order. The Nation, along with other claimants, objected to several legal rulings
4 which are addressed in detail at the beginning of this opinion.

5
6 **Conditional Final Order:** The Yakama Nation asks that the following stipulation between the
7 United States, Ecology and the Nation be included in the Conditional Final Order for Subbasin No.
8 23 (Ahtanum):

9 It is hereby stipulated that the description of lands set forth in the claims of the respective
10 parties is the correct description of lands for which the water right is claimed and that
11 such claim will constitute proof of ownership thereof for purposes of this adjudication
only. See Stipulation, May 19, 2005 (#18848).

12 AID and Johncox have no objection, as long as this stipulation does not pertain to any of their
13 claimants on the north-side of Ahtanum Creek. According to the Nation, the stipulation was
14 intended to “address the land within the boundaries or Indian-owned land subject to federal
15 ownership, or land of course bordering the reservation that’s on the reservation side.” Tr. @199.

16
17 For clarification once the CFO is entered, the following sentence will precede the
18 stipulation: “The preceding stipulation does not pertain to lands on the north-side of Ahtanum
19 Creek.” The Court grants this exception.

20 **Objection No. 1:** The Yakama Nation preserves its exceptions to the Courts *Memorandum*
21 *Opinion Re: Ahtanum Creek Threshold Issues* (October 3, 2003) and *Memorandum Opinion Re:*
22 *Ahtanum Watershed Practicably Irrigable Acreage* (November 9, 1994) for purposes of appeal.

23 This is noted by the Court.

24
25 **Objection No. 2:** Excess water. This issue is addressed above beginning on page 3 in the section
26 entitled Excess Waters. Based on those rulings, the Court denies the Yakama Nation’s objection.

27 **Objection No. 3:** Applicability of Washington law within the Reservation. See Objection No. 21
28

1 (page 74) for the Court's ruling.

2 **Objection No. 4:** See Answer No. 19 above beginning on page 23.

3 **Objection No. 5:** See Answer No. 22 above beginning on page 26.

4 **Objections No. 6, No. 11 and No. 12:**

5
6 The Yakama Nation has objected to the Court confirming water rights for domestic supply
7 when that use is for the entire year and includes using water for lawn, garden or landscape
8 irrigation. The specific rights being challenged are for Trail's End Lodge, Court Claim No. 01071;
9 Gerald F. and Helen M. Sauer, Court Claim No. 02243; and Dorothy R. White, Court Claim No.
10 08030. Most of the points raised by the Nation are applicable to each claim and no other
11 exceptions are raised, so they all will be addressed here. However, the Sauers had their own
12 exception that is addressed above beginning on page 51, along with the Nation's response to the
13 Sauer exception.
14

15 The Nation points to the 1908 Code Agreement and the 1964 Pope Decree as support for its
16 position that water rights cannot be confirmed for domestic supply for Sauer and Trail's End Lodge,
17 as the owners of the land did not sign the Code Agreement, nor did the Pope Decree recognize
18 water rights for the land. The court has reviewed both documents again in order to address these
19 exceptions. As discussed in the supplemental report at page 195, the parties to the Code Agreement
20 were claiming water from Ahtanum Creek for irrigation purposes, see paragraph 2 of the
21 agreement. The parties here have not provided the Court with anything that would lead to a
22 conclusion that a landowner not claiming water for irrigation was a necessary party to that
23 agreement. The evidence shows that the owner of the Sauer land developed the property for
24 recreational use; the land was not cultivated. Use of water for domestic supply began in the late
25 1800's and continues to the present. There was no use of the Trail's End Lodge property until well
26 into the 1900's. At the time the Code Agreement was signed, the land was still held by the Federal
27
28 Memorandum Opinion Subbasin No. 23 Exceptions - 52

1 government, so there was no private landowner to sign the agreement. The first use of water on the
2 property was sometime in the 1930's, so there was no water right on the property that could have
3 been claimed in the first Ahtanum Creek Adjudication. As discussed on page 197 of the
4 Supplemental Report, Trail's End Lodge complied with RCW 90.03 and was granted a permit to
5 use water, which ultimately progressed to a surface water certificate.
6

7 The purpose of *U.S. v. Ahtanum I.D., et.al.* was to determine the validity of the 1908 Code
8 Agreement. Judge Pope acknowledged in footnote 11a of *Ahtanum I* that the division of water was
9 based on the number of acres being irrigated on each side of the creek. The Court affirms its prior
10 ruling that neither the Code Agreement nor the Pope Decree precluded confirming rights for
11 domestic supply because the intent of both was to address use of water for irrigation.
12

13 If the Court continues to confirm rights for domestic supply, the Nation argues that the season
14 of use for the right should end on July 10, just as the water rights recognized in the Pope Decree
15 had a season of use that ends on July 10. It is clear from reading the Pope Decree that the decision
16 by Judge Pope to end the season of use on July 10 was based on the landowners' testimony about
17 the crops they irrigate and the availability of water from Ahtanum Creek where they divert their
18 water. See footnote 11 in *Ahtanum II*. The season of use for domestic supply is not related to crops
19 being grown. There also is no evidence that water availability is an issue for the sources being used
20 for domestic supply. Two of the claimants, Trail's End Lodge and White, use springs that are not
21 used by any other landowner. The Sauers use water from the North Fork of Ahtanum Creek,
22 upstream of all the diversions for irrigation.
23

24 The Nation objects to the court including landscape irrigation in the domestic supply water
25 right. It is their position that any irrigation beyond the rights recognized in the Pope Decree cannot
26 be recognized. The Court does not consider landscape irrigation a distinct use beyond domestic
27 supply and should not have described the purpose of use beyond domestic supply. The water rights
28

1 confirmed will be modified to reflect domestic supply as the purpose of use, recognizing that use
2 encompasses landscape irrigation.

3 In its exception, the Nation requests the Court to withdraw language in the supplemental report
4 at page 197, lines 19 -21, where the Court acknowledges statements made by Trail's End Lodge in
5 support of its claim. Trail's End Lodge, in responding to the Nation's exception testified at the
6 supplemental hearing concerning the location of the spring used, its flow and distance to Ahtanum
7 Creek. Although the Court summarized that testimony, it drew no conclusions from it, nor relied
8 on those statements in deciding to deny the Nation's exception. The Nation disagrees with the
9 statements made by Mr. Tissell on behalf of Trail's End Lodge, but had the opportunity to question
10 the witness and provide its own witnesses.
11

12 All of the water rights confirmed for domestic supply are junior in priority to the rights
13 confirmed to the Nation. The recognition of these water rights is not contrary to the Code
14 Agreement or the Pope Decree. If the Nation finds that exercising any of these rights has a negative
15 impact on its water rights, and can prove impairment, the remedy is to seek regulatory action
16 against the other water user. The Nation's exceptions 6, 11 and 12 are denied.
17

18 **Objection No. 7--Answer No. 32, Gary and Ruth Hansen;**
19 **Objection No. 10--Theodore and Wanda Mellotte, Jr.;**
20 **Objection No. 16--Non-diversionary Stock Water List**

21 The Yakama Nation objects to the Court's rulings on stock water for several reasons. First,
22 it objects to the rulings in the court's *Memorandum Opinion Re: Ahtanum Creek Threshold Issues*
23 Issue No. 3 (October 3, 2003) in order to preserve its right to appeal. This objection is noted by the
24 Court. The ruling on Issue No. 3 stands.

25 The Court confirmed non-diversionary stock water rights to several individuals located on
26 the north side. Those right holders are listed in the 2002 Report @114 and the Supplemental
27 Report @ 206 and 207, as well as on page 89 and 193 for the Hansens and the Mellottes. The
28 Memorandum Opinion Subbasin No. 23 Exceptions - 54

1 Court in the 2002 Report, page 114 acknowledged that the Nation objected to the non-diversionary
2 stock water stipulation that had been adopted in other subbasins and entered a ruling that provided
3 for a non-diversionary stock water right in the Ahtanum Basin. The Court specifically found that
4 the non-diversionary stock water right would be senior in priority, **“except as that use is**
5 **inconsistent with the Yakama Nation’s instream right for fish which carries a priority date of**
6 **‘time immemorial’, in which case the Nation’s right shall have priority.”** (emphasis added).
7
8 The Yakama Nation in its exception argues that its Treaty water rights are senior to any non-
9 diversionary stock water right and those rights cannot be impaired. This was acknowledged by the
10 Court in the Supplemental Report. The Yakama Nation believes the Court’s ruling on stock water
11 allows for that impairment. The Nation asks that those claimants confirmed a non-diversionary
12 stock water right be required to prove that their priority date is senior to that of the Tribe’s.
13

14 The Court denies the Nation’s objection as it relates to non-diversionary stock watering. It
15 is clear from the language in the Court’s ruling that the Nation’s ‘time immemorial’ rights are
16 senior to non-diversionary stock watering rights. The history of settlement of the Ahtanum valley
17 clearly establishes that raising livestock was of paramount importance and undoubtedly the
18 livestock required water. Maintaining a naturally occurring flow in the creeks for stock watering,
19 while recognizing that the Nation’s ‘time immemorial’ rights are senior, will not impair the
20 Nation’s water rights. The Court confirms non-diversionary stock water rights to:
21

22 Kenneth and Renee Baggarley – Claim No. 01645
23 Boise Cascade, Inc. – Claim No. 02206
24 Leroy and Hazel Duckworth – Claim No. 01154
25 Merritt Fines – Claim No. 02195
26 Sharon Glenn/Estate of Martha Ohms – Claim No. 01615
27 Hansen Fruit and Cold Storage Co./Park Avenue Storage Co. – Claim No. 02398
28 Gary and Ruth Hansen – Claim No. 00133, 00182
Alice Hart – Claim No. 02310
Paul and Linda Hart, Jr. – Claim No. 02310, 01205
Kathleen Hille – Claim No. 01627
Lewis and Joyce Langell – Claim No. 01019

1 Ardis and the Estate of Earl Lewis – Claim No. 01645
2 Marc and Sue Downs Martin – Claim No. 00898, 02398
3 Theodore and Wanda Mellotte, Jr. – Claim No.00543
4 Pat and Jim Moore – Claim No. 02398
5 Bonnie Nash – Claim No. 01205
6 Mark and Tammi Ribail – Claim No. 02398
7 Clarence A. and Marian Thompson – Claim No. 00830
8 Washington State Department of Natural Resources – Claim No. 00589
9 Jess West – Claim No. 02398
10 James and Elaine Williams – Claim No. 02398
11 Ervin Yoerger and Judy G. Hoeft – Claim No. 1645

12 The Nation also objects to any implication that the State has authority to regulate waters on
13 the reservation or to regulate the Nation’s water rights. The Court has no intention of giving the
14 State authority to regulate waters on the reservation or the Nation’s water right; see discussion
15 below related to the Nations Objection No. 21.

16 **Objections No. 8 and 9:** These were addressed in the Court’s October 14, 2008, *Order Ruling on*
17 *Certain Exceptions to the Supplemental Report of the Court/Proposed Conditional Final Order,*
18 *Subbasin No. 23.*

19 **Objection No. 13:** Total Acres and Fee Lands.

20 When the United States made its initial Acquavella claim on behalf of the Yakama Nation,
21 it claimed that 2,787.7 acres were irrigated and an additional 577.8 acres had been historically
22 irrigated, but were idle. This totals 3,306.5 acres and is the acreage confirmed in the Court’s initial
23 Report (@42). The Yakama Nation took exception to this figure and requested a right for 5,146.85
24 acres (2004 Exception No. 5). The Court granted this exception confirming a right to 5,146.85
25 irrigable acres. The Court included the south-side Class III defendant lands (from the Federal
26 litigation) in the acreage confirmed. See SR @24-34; 209. The Court confirmed that right for
27 “tribal trust and fee lands” as of 1915. The fee language used by the Court included all fee lands,
28 not just the Tribal fee land. In rendering his decision, the Commissioner analyzed the 1951 Pre-
Trial Order, the Ahtanum line of cases, and Judge Stauffacher’s 1994 *Memorandum Opinion RE:*

1 *Ahtanum Watershed Practicably Irrigable Acreage*. SR @198-200.

2 Acres Authorized-- Is 5,146.85 the correct irrigable acreage within the Yakama
3 Reservation?

4 The Yakama Nation filed an exception and argues that its request for 5,146.85 acres did not
5 include south-side Class III defendant lands, i.e. lands on the reservation owned in fee by non-
6 Indians. The non-Indian fee land totals 924.25 acres and should be in addition to the trust and tribal
7 fee land of 5,146.85 irrigable acres. The Nation points to Exhibit A to the 1951 Order (YIN 353).
8 The Nation is not claiming a right on behalf of the non-Indian fee land owners. SR @37-43, 211-
9 235.

10
11 AID and Johncox ask the Court to reverse the decision to increase the acreage from 3,306.5
12 acres to 5,146.85 acres. SR @198. AID argues that the Court has previously ruled on the issue of
13 acres in Judge Stauffacher's 1994 *Memorandum Opinion RE: Ahtanum Watershed Practicably*
14 *Irrigable Acreage* and the Court is bound by that ruling, as well as Ahtanum I and II, and the 1951
15 Pre-Trial Order, under the theory of res judicata. In the alternative, if the Court holds to the number
16 of acres currently confirmed, 5,146.85, those acres should include the non-Tribal fee lands. YIN
17 353, Agreed Facts, No. 13.

18
19 Ecology took no position regarding acreage, however, it did believe the quantity confirmed
20 was in error and asked the Court to review this part of the confirmation.

21 There are four criteria for res judicata:

22 There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties;
23 and (4) the quality of persons for or against who the claim is made. *Ecology v. Yakima*
Reservation Irrigation District, 121 Wn.2d 257, 290 (1993).

24 When comparing the *Ahtanum* litigation and this adjudication, the Court finds that the subject
25 matter and the cause of action are the same: determining the allocation of water from Ahtanum
26 Creek; the persons and parties, as well as quality of persons are also the same.

27
28 When the Court Commissioner adopted Yakama Nation's figure of 5,146.85 acres, the
Memorandum Opinion Subbasin No. 23 Exceptions - 57

1 Class III defendant lands were included in that figure. However, review of the Nation's 2004
2 exception shows that it sought to exclude the non-Tribal land in its claim for 5,146.85 acres (2004
3 Exception No. 5). In support of the 2004 exception and Exception No. 13, the Nation offered the
4 following mathematical breakdown*:

5
6 5,748.3 irrigable acres
7 + 324.0 isolated acres
8 6,072.3 total Tribal/Indian
9 -925.45 Class III Defendants acres
10 5,146.85 claimed acres

*Analysis of Exhibit A by Dr. Stuart Crane.

11 This Court agrees with the Court Commissioner regarding certain findings. First, the 1994
12 *Memorandum Opinion* intended to interpret the *U.S. v. Ahtanum* line of cases. Second, the *Memo.*
13 *Opin.* did not establish the actual acreage. However, the Court finds that the 1951 Order (and
14 Exhibit A) is but one piece of evidence available to the Court. In addition to the irrigable acreage,
15 Exhibit A includes the irrigated acreage, but in lesser amounts. There was also a 1951 map
16 identifying the irrigable acreage and allotments as of 1915 (DE-150). Dr. Crane testified he
17 determined the irrigable acreage within the boundaries of that map to be 6,466 acres. (RP
18 2/3/2004). Since PIA applies, the question is not what has been historically irrigated on the south-
19 side, but the number of irrigable acres. The answer rests on analysis of the Orders and evidence.

20 The 1951 Pre-Trial Order includes a series of Agreed Facts. The Court can identify three
21 relevant Agreed Facts dealing with acreage:

22 No. 6: Attached, marked "Exhibit A" and by reference made a part of this Pre-Trial Order
23 is a tabulation relating to lands located south of Ahtanum Creek in the Yakima Indian
24 Reservation, disclosing (1) the allotment number, (2) names of ditches, (3) dates relating to
25 initiation and history of increases of irrigation by allotments, (4) location of points of
26 diversion, (5) total irrigated acreage (maximum), (6) description of irrigated acreage, (7)
27 irrigable acreage (maximum), (8) description of irrigable acreage, and (9) comments.
28

1 No. 10: The land situated south of Ahtanum Creek for which rights to the use of water
2 from that stream are claimed in this proceeding total 4,968¹⁰ acres. All of that land is now
3 or is susceptible of being served by the Ahtanum Indian Irrigation Project system as
4 presently constructed and as substantially completed in the year 1915.

5 No. 13: That of the lands irrigated on the Indian side of the creek, 925.45 acres have been
6 patented in fee simple which said patents had been issued more than ten years prior to the
7 institution of this action.

8 The figure of 4,968 acres appears to have been provided by the United States and agreed to
9 by the parties. It is not evident that in 1951 the United States was claiming more acreage than the
10 parties agreed to, regardless of Exhibit A. If the proper figure was reflected in Exhibit A, it was
11 incumbent upon the United States, as the representative of the Yakama Nation, to make a claim for
12 that acreage.

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

19 Agreed Fact XV:

20 South of Stream: Ahtanum Indian Irrigation Project and Small Diversions:

21 The lands situated south of Ahtanum Creek within the Ahtanum Indian Irrigation
22 Project and the small diversion above the Main Canal, for which rights to the use of waters
23 from that stream are claimed in this proceeding total approximately 5100 acres.

[Emphasis added.]

24 Agreed Fact XVI:

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

¹⁰ The Treaty of June 9, 1855 between the United States 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.

1 A further review of the 1957 Pre-Trial Order on Merits shows that these figures were, like the
2 1951 agreed facts, the same figures found in the Contentions of the United States. Several
3 Contentions of the United States are helpful in understanding the underlying basis for the agreed to
4 5,100 acres found in the 1957 Order.

5
6 Contention No. XI states in pertinent part:

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

10 Contention No. XII, in pertinent part states:

11 There was also constructed as part of the Ahtanum Indian Irrigation Project, the Lower
12 Canal. . . .(It) delivers Ahtanum Creek water to approximately 620 acres of land situate
13 within the Ahtanum Indian Irrigation Project for the purpose of irrigating those lands.
14 Contention No. XIII contained claims to additional acres from small ditches totaling 130
15 acres.

16 The above acreages total 4,950 acres. Inclusion of the 158.7 acres of Indian fee land brings
17 the total to 5,108.7 acres. With the identification of an additional 74.55 acres of Class III lands, the
18 non-Indian fee land total increased from 925.45 to 1,000 acres. The Court finds that the 1957
19 Order controls. The Court denies the Yakama Nation’s exception to acreage. The Court finds that
20 the maximum acreage to be confirmed on the Yakama Reservation/south-side is 5,100 acres.

21 The 1957 Order, Agreed Fact XVI and the 1951 Order include the non-Indian fee lands (Class
22 III defendants) in the agreed to total of 5,100 acres. Of this amount, there are currently 992.39 acres
23 of fee land owned by individuals on the south side that are derivative of the 1855 Treaty. The
24 Court having confirmed a separate right for those lands, the Yakama Nation is entitled to an
25 irrigation right of 4,107.61 acres.

26 In 1957 there was no agreement by the parties to increase the annual quantity. Thus, the
27 award of 4.4 acre-feet per acre remains confirmed.

28 b. Tribal, Indian and Non-Indian fee lands. The Yakama Nation took exception to the

1 Court awarding it a water right to “tribal trust and fee lands” and asks that this language be changed
2 to “trust and tribal fee”. The Nation argues that in *U.S. vs. AID* the United States filed a claim on
3 behalf of Indian land, not the lands owned by the non-Indians. Those landowners (Class III
4 defendants) filed their own court claims. In *Acquavella*, south-side fee landowners received water
5 rights in their own name.
6

7 Both *Ahtanum I* and *Ahtanum II* discuss fee lands entitled to a right on the reservation. The
8 Court restating its original 1956 rulings said:

9 We held that as of 1915, in the ordinary course, the Indian tribe and the owners and
10 possessors of their land would be entitled to the right to the waters of Ahtanum Creek
11 measured by the needs of the Indian irrigation project at that date.” *Ahtanum II*
@899.

12 The Court included both Tribal fee land and non-Tribal or non-Indian fee land in its analysis
13 of the evidence.

14 1957 Order, Agreed Fact XVI:

15 Of the lands irrigated on the Indian said of the creek, 925.45 acres have been patented in
16 fee simple which said patents had been issued more than ten years prior to the institution
17 of the action. Since the institution of this action, additional acres in the amount of 74.55
18 have been patented in fee simple, and 158.70 have been patented to Indians. Emphasis
added.

19 It is clear that Agreed Fact XVI includes the acreage patented in fee simple in the total
20 acreage (“of the lands irrigated on the Indian side”). This is also true in the 1951 Order.

21 Between 1951 and 1957, the non-Indian patented fee land increased by 74.55 acres to 1000
22 acres. If the Court were to limit the Yakama Nation’s request to “tribal fee” that could potentially
23 eliminate valid claims by non-Indian successor’s to Indian allotments. This the Court will not do,
24 based on *Colville Confederated Tribes v. Walton*, 647 F.2d 42, (9th Cir. 1981).
25

26 The *Walton* court ruled as follows regarding the right acquired by non-Indian purchasers:

27 First, the extent of an Indian allottee’s right is based on the number of irrigable acres
28 he owns. If the allottee owns 10% of the irrigable acreage in the watershed, he is
entitled to 10% of the water reserved for irrigation (i.e., a “ratable share”). This

1 follows from the provision for an equal and just distribution of water needed for
2 irrigation.

3 A non-Indian purchaser cannot acquire more extensive rights to reserved water than
4 were held by the Indian seller. Thus, the purchaser's right is similarly limited by the
5 number of irrigable acres he owns.

6 Second, the Indian allottee's right has a priority as of the date the reservation was
7 created. This is the principal aspect of the right that renders it more valuable than the
8 rights of competing water users, and therefore applies to the right acquired by a non-
9 Indian purchaser. In the event there is insufficient water to satisfy all valid claims to
10 reserved water, the amount available to each claimant should be reduced
11 proportionately.

12 Third, the Indian allottee does not lose by non-use the right to a share of reserved
13 water. This characteristic is not applicable to the right acquired by a non-Indian
14 purchaser. The non-Indian successor acquires a right to water being appropriated by
15 the Indian allottee at the time title passes. The non-Indian also acquires a right, with
16 a date-of-reservation priority date, to water that he or she appropriates with
17 reasonable diligence after the passage of title. If the full measure of the Indian's
18 reserved water right is not acquired by this means and maintained by continued use,
19 it is lost to the non-Indian successor. 647 F.2d at 50-51.

20 Moreover:

21 This standard is particularly applicable for Ahtanum Creek given the Ninth Circuit's decision
22 in *Walton II* relies on its earlier decision in *U.S. v. Ahtanum Irrigation District*, where it was
23 held non-Indian purchasers of allotted lands are entitled to "participate ratably" with Indian
24 allottees in the use of reserved waters. 236 F.2d at 342. Essentially, the *Walton* cases are
25 only an elaboration of a standard initially established in *Ahtanum*. Report @47-49.

26 Some south-side landowners filed their own court claims and have been confirmed water rights.

27 However, it was not mandatory that a water user within a district, city or other water supplier do so:

28 That all irrigation districts, water distribution districts, canal companies, ditch companies,
cities, towns and other governmental entities organized pursuant to the statutes of the United
States or the State of Washington may file claims herein on behalf of all water users within
their respective boundaries to who they supply water or whose lands are assessed by such
entities.....After the filing of the claim by such entities, such individual water users who
obtain their water solely from such entities or whose lands are assessed by such entity need
not file individual claims herein but may do so if they so desire. *Ecology v. Acquavella*, 100
Wn.2d 651, 655 (1983) (*Acquavella I*), quoting from Judge Stauffacher's June 5, 1981
Order.

There is a well established "identity of interest between the entities and water users such that the
entities are fully empowered to represent their water users in the present type of litigation." *Id.*

@657. From a practical standpoint, the most effective method of dealing with a case of this
magnitude was to allow the distribution entity to represent all its water users. A landowner receiving

1 water from the Wapato Irrigation Project would have a legitimate basis for believing they are covered
2 under the claim in this adjudication filed by the United States for WIP.

3 This Court will not disregard Federal law and potentially circumvent the rights of those non-
4 Indian landowners who are rightful beneficiaries of a prorata share of a Federal Reserved right. The
5 Court denies the Yakama Nation's claim to exclude any non-Indian fee land from its water right. The
6 criteria set forth in *Walton* apply. The right will issue for "Tribal trust and fee lands".

7
8 The Court awards a right to the Yakama Nation to divert from Ahtanum Creek 18,073.48
9 acre-feet per year for the irrigation of 4,107.61 acres.

10
11 **Objection No. 14:** The Yakama Nation objects the language used by the Court Commissioner in
12 the section on quantity of their water right. That objection will be addressed in Objection No. 19
13 which pertains to the water right for the Yakama Nation.

14 **Objection No. 15:** In the Supplemental Report, the Court granted Exception No. 23 to the Report.
15 The Nation agrees with this ruling, but in this objection reserves the right to utilize other forums
16 and remedies in addition to a ground water adjudication to address ground water issues. This is
17 noted by the Court.

18
19 **Objection No. 17 and 18:** These exception were addressed in the Court's October 14, 2008, *Order*
20 *Ruling on Certain Exceptions to the Supplemental Report of the Court/Proposed Conditional Final*
21 *Order, Subbasin No. 23.*

22 **Objection No. 19:** The Yakama Nation asks the Court to modify its water right, as awarded on
23 pages 209-211 of the Supplemental Report, consistent with their objections as follow:

24
25 1. Name of Claimant. The Court granted the right to: United States, Bureau of Indian
26 Affairs, as trustee for the Yakama Nation, Allottees, and Non-Indian Allottee Successors. SR
27 @209. The Yakama Nation objects to the inclusion of "non-Indian Allottee Successors".

1 The Court has ruled on this issue previously under Objection No. 13(b). That ruling is
2 incorporated herein. Non-Indian Allottee Successors will be included for the reasons stated in that
3 section. This exception is denied. See also *Walton* at 50-51.

4 2. Use. See Objection No. 13(a) regarding acres. Those rulings are incorporated herein.
5 The Court denies the Nation's objections for the reasons stated in that section.
6

7 a. Treaty right for fish: The Yakama Nation asks that a Treaty right for fish and other
8 aquatic life be confirmed as part of their Federal Reserved right. Ecology believes that PIA is a
9 limitation on quantity and not on use and any uses previously recognized by the Court are
10 allowable. AID argues that the Court's *Order RE; Treaty Reserved Water rights at Usual and*
11 *Accustomed Fishing Places* (March 1, 1995) recognizes the Treaty right is for fish, and does not
12 include "other aquatic life".
13

14 Does the Treaty right for fish include "other aquatic life"? The Court believes this question
15 has previously been answered by the *Acquavella* court. See the 1996 Supplemental Report
16 regarding the Yakama Nation's water rights, pp. 27-30. Ellensburg Water Company claimed that
17 *Ecology v. Yakima Reservation Irrigation District*, 121 Wn.2d 257 (1993) limited the Yakama
18 Nation's Treaty reserved right to anadromous fish only. In response to that objection, Judge
19 Stauffacher stated,
20

21 Although the Court has not been perfectly consistent in referring to the diminished treaty
22 right as applying to all fish, the Amended Partial Summary Judgment, the ICC Claim, the
23 affidavit of Dr. Barbara Lane and the Treaty itself certainly support an interpretation
24 contrary to that advanced by EWC. Yakama Nation SR @pp. 29-30. See also *Order RE;*
Treaty Reserved Water rights at Usual and Accustomed Fishing Places (March 1, 1995)

25 The Court believes it is appropriate to issue a year around time immemorial water right for
26 fish and other aquatic life for Ahtanum Creek. A separate right will be awarded for that purpose
27 and the following statement included in the water right.
28

1 Water for the Treaty water right for fish and other aquatic life as recognized in orders of the
2 Court.

3 b. Storage. The Nation also requests a right for storage to fully supply from Ahtanum
4 Creek all of the Nation's Treaty water rights. It argues that *Ahtanum I* and *II*, and the Court in its
5 *Memorandum Opinion RE: Ahtanum Watershed Practicable Irrigable Acreage* recognize that
6 future needs of the Nation must be provided for, the acreage is established, and storage should be
7 included as a component of the water right.

8 The United States argues that the time and place to make a claim for all of the Yakama
9 Nation's water rights is in this adjudication. The Nation must prove both their present and future
10 uses now, as a future claim would be precluded. See *Arizona v. California II* (1983).

11 AID and Johncox believe there is no legal basis to support a claim for storage. The Court's
12 PIA ruling addresses existing and future uses, although future use was in the context of irrigable
13 acres of up to approximately 5,000 acres. Storage is not specifically addressed in *Ahtanum I or II*.
14 The evidence admitted as part of the PIA ruling was not to be used in this adjudication. Johncox
15 further argues that any Treaty right for storage would be inchoate since there is no storage facility in
16 the basin. Johncox suggests that the Court include a provision in the Final Decree allowing for
17 modification of the Reservation rights if there becomes a need for additional water to meet the
18 purposes of the Reservation (Res. @4-8).

19 The Court in rendering its PIA decision, and over the objections of other parties, allowed the
20 United States to present evidence on future needs that included feasibility studies and economic
21 analysis. The Court stated "Any evidence toward that proof will not be considered in this
22 adjudication." It was allowed "to the extent it applies to future projects for irrigation of the irrigable
23 acres as already quantified and claimed in the Ahtanum proceeding." The Court found that *Ahtanum*
24 *I* and *II* quantified the rights of the Yakama Nation. Judge Stauffacher further stated:
25
26
27
28

1 However, that does not mean the evidence cannot be admitted at this time....the
2 Ninth circuit enunciated their desire to make available more water from Ahtanum Creek
3 for use on the south side irrigable acreage as quantified and set forth in the United States'
4 complaint. The Court of Appeals considered the 25% allocation insufficient for watering
5 the acreage as it existed in 1915. Cites omitted. That is why the Ahtanum court provided
6 for the use on the reservation of any surplus water that became available or was
7 relinquished by the pertinent northside users. The court is also mindful of Judge
8 Chamber's concurring opinion in regard to Congress's ability to correct some of the effect
9 of the 1908 Agreement by development of future projects. Accordingly, the Court will
10 accept the evidence provisionally to the extent it applies to future projects for the irrigation
11 of irrigable acres as already quantified and claimed in the Ahtanum proceeding.
12 *Memorandum Opinion RE: Ahtanum Watershed Practicably Irrigable Acreage @14.*

13 It is the United States' position that if it does not make the claim for storage in the
14 *Acquavella* proceeding, it will be precluded from making any claim in the future. *Arizona v.*
15 *California II*, 460 U.S. 605 (1983). One of the issues before the Court in *Arizona II* was whether
16 water rights for omitted lands could later be obtained. The Supreme Court denied the claim for
17 omitted acreage reasoning that there was an overriding need for certainty and finality of water rights
18 in the west. This Court agrees.

19 The Yakama Nation is seeking authorization to divert and store water outside the April 1
20 through October 1 irrigation season. The Court concludes that *Ahtanum I* and *II* preclude such an
21 award. Those cases settled the issues of season of use, quantity and acreage based on the system
22 built as of 1915. The *Ahtanum* cases authorize diversion of water between April 1 and October 1.
23 Although both recognize a need for more water on the Reservation and provide remedies for that
24 additional water (reversion of water rights), they do not provide for water to be diverted during the
25 non-irrigation season. The Court denies the Yakama Nation's claim to an October 2 through
26 March 31 storage right.

27 The Yakama Nation's request for storage water rights for the period of April 1 through
28 October 1 is premature. It is a request for a potential future storage right. The Court also disagrees
with the United States that *Arizona II* eliminates a change in infrastructure (i.e. adding storage).

1 A statement will be included in the Conditional Final Order for Subbasin No. 23 allowing
2 for some modification of the Yakama Nation's water right in accordance with section "g" below
3 (use of available water under certain circumstances and the authority of the United States to divert
4 the entirety of Ahtanum Creek subject to existing water rights).

5
6 3. Period of use. The Nation requests a year around right be confirmed for purposes of
7 their Treaty fish and other aquatic life.

8 The Court grants this request and will issue a separate Ahtanum Creek water right for this time
9 immemorial use.

10 Johncox requests that the irrigation right be limited to April 1 to October 1 in accordance
11 with the Pope Decree. The Court grants this clarification.

12
13 4. Quantity: The Yakama Nation objected to several elements of the quantity.

14 a. The instantaneous quantity is as set forth in the Report at page 347. The right is
15 currently confirmed as follows:

16 April 1 through July 10: 25% of the natural flow of Ahtanum Creek, as measured at the
17 north and south gauging stations. If the natural flow exceeds 51.8 cubic feet per second
18 (north side users are permitted to divert 38.839 cfs, which is equal to 75% of 51.8 cfs), all
19 the excess over that figure is awarded to the United States as trustee for the Yakama
20 Nation, allottees and non-Indian successors to allottees, to the extent water can be put to
21 beneficial use. From July 11 through October 1: All waters of Ahtanum Creek not used
22 for instream fishery purposes and livestock watering shall be available to, and subject to
23 diversion by the United States, Bureau of Indian Affairs, as trustee for the Yakama Nation,
24 allottees and non-Indian successors to allottees. SR @200, lines 9-16.

25 The Nation asks that the above section be replaced with the following language:

26 April 1 through July 10 portion of the right and immediately prior to "25%": "a
27 prorata share (i.e. a proportionate share based upon a percentage of trust and tribal
28 fee land on the south side to the total south side land entitled to water) of 25%;"

For the July 11 through October 1 portion of the right, the Nation asks for the
following immediately after 1: "a prorata share of all waters of Ahtanum Creek from
all sources, in excess of the senior Treaty water right for fish and aquatic life, shall be
available to, and subject to diversion for irrigation and storage for trust and tribal
fee land which can be served by the Wapato Irrigation Project or private ditches on
the south or Reservation side of the Creek."

1 The Nation argues that the non-Indian fee land should not be included in their water right.
2
3 The Court denies this exception. The right as currently awarded does not distinguish tribal fee from
4 either Indian or non-Indian fee lands. See Objection No. 13(b). The Nation has a confirmed right
5 to Ahtanum Creek, not all sources. Comparison of this clarification to the right confirmed in the
6 Supplemental Report results in the conclusion that no change is warranted. The right remains as
7 awarded in the Supplemental Report at page 209, lines 12-19

8
9 b. The Yakama Nation asks that a footnote be included after 51.8 cfs as follows: "The
10 38.839 cfs is subject to further reductions due to reversions by north-side parties." It argues that
11 this reversion is provided for in the Pope Decree, is based on the total individual rights on the
12 north-side and, as recognized by the Court Commissioner, is subject to reduction (see 2002 Report).

13 The *Ahtanum* cases allow for reversion of water from the north-side to the south-side.
14 We hold that any time when the needs of those parties to that agreement, as measured in
15 1908, were such as to require less than the full 75 percent of the waters of the stream, then
16 their rights to the use of the water was correspondingly reduced, and those of the Indians,
in like measure, greater. *Ahtanum I* @341.

17 The total acres on the north-side were considered. As those acres reduced so did the
18 respective north-side water right.

19 The findings show that in the cases of a substantial number of these particular individuals,
20 or their successors, their needs and uses of water decreased after 1908. We previously
alluded to this, noting that the use of water on certain tracts diminished so that the irrigated
21 acreage on these parcels in 1957 was less than that found to have existed in 1908.
Ahtanum II, @913.

22 The passage of almost 50 years had a bearing on the Pope court finding a diminishment of
23 the use. Additionally, water rights can be transferred under State Law, RCW 90.03.380. See also
24 *Ahtanum II* @911. Under what circumstances these reversions could occur was not decided. It
25 will not be decided here. However, the Nation's requested footnote is within the rulings of the
26 Pope Decree. The Court grants the Nation's exception, and this footnote will be included on their
27
28

1 water right.

2 c. "Non-Indian Allottee Successor" language must be eliminated. The Nation argues that
3 there would be duplication in water rights. For the reasons stated under Objection No. 13(b) and
4 incorporated herein, there will be no duplication. This exception is denied.

5 d. Eliminate reference to livestock watering. Granted. See Objections Nos. 7, 10 and 16.

6 e. Off-Season Water Right—October 2 through March 31. The Yakama Nation asks that
7 the following provision be included in their water right to allow for diversion of water during the
8 off-season:

9 October 2 to March 31 a prorata share of all waters of Ahtanum Creek, in excess of that
10 used for the Treaty water right for fish and other aquatic life, for irrigation and storage
11 from all sources so as to supply a full annual quantity to trust and tribal fee land which can
12 be served by the Wapato Irrigation Project or private ditches on the south or Reservation
side of the Creek.

13 The Court neither grants a right to storage nor makes a distinction between tribal and other
14 fee lands. Neither this Court nor the *Ahtanum* cases confirmed a right for irrigation prior to
15 April 1 or after October 1. For purposes of the Treaty water right for fish and other aquatic life
16 confirmed herein, the Court believes this provision is unnecessary. This exception is denied.

17 f. The Nation asks that they be allowed to use all of the available creek water from April
18 1 until April 15 when the north side is not authorized to take water. The only exception would be
19 for those Pope Decree rights confirmed herein authorized to divert water beginning on April 1.
20 Against Trail's End, whose priority date is June 30, 1974, the Nation wants to be able to exercise
21 their right based on seniority.
22

23 The Nation suggests inclusion of the following provision:

24 April 1 to April 14. All waters of Ahtanum Creek for irrigation and storage from all
25 sources so as to supply a full annual quantity to trust and tribal fee land which can be
26 served by the Wapato Irrigation Project or private ditches on the south or Reservation side
27 of the Creek with the exception of the appropriate share of water for any party under the
Pope Decree whose right begins on April 1st.

1 The Court denies the Yakama Nation's request to include this provision. The Court has
2 confirmed some rights (Trail's End, Gerald and Helen Sauer and Karen Klingele) that are not
3 directly derived from the Pope Decree. If the Yakama Nation believes its Treaty water right is
4 being impaired by others, they must seek regulatory action against those water users. The claimed
5 impairment cannot be based solely on priority date. This ruling also applies to the right confirmed
6 to Dorothy White (a domestic right was established on lands that were confirmed a right in the
7 Pope Decree). Any impairment must be established by evidence independent of the priority date.
8 See section entitled "Yakama Nation Objections 6, 11 and 12".
9

10 g. The total diversion quantity should be changed to allow delivery from all available
11 sources. The Yakama Nation also provides suggested language.
12

13 22,646.14 acre-feet per year plus a prorate share of excess water above 51.8 cfs to be
14 provided from storage, natural flow and all other sources as provided above plus any water
15 available through reversion from the north side of Ahtanum Creek under *U.S. v. Ahtanum
16 Irrigation District* so as to supply a full annual quantity to trust and tribal fee lands which
17 can be served by the Wapato Irrigation Project on the Reservation or the private ditches on
18 the Reservation.
19

20 Based on prior rulings in this *Memorandum Opinion*, the request for clarification is denied.
21 The quantity claimed by the Yakama Nation is denied, based on the Court's ruling regarding
22 acreage. There is no right for storage (Exception No. 13). The Nation's right is to Ahtanum Creek,
23 not all sources. Reversion of water is discussed in Exception 19(4)(b) wherein the Court granted
24 the Nation's request to place a footnote on their water right regarding reversion.
25

26 The next clarification sought by the Nation is:

27 All waters not used on north side Pope Decree parcels shall become available for use on
28 the reservation lands. The United States may divert the entirety of the river subject to
water rights allocated to users located north of Ahtanum Creek and the Nation's instream
flow right.

The Court, in its Supplemental Report @202, authorized the inclusion of this provision on the
Nation's water right. However, based on the rulings of the Court herein, it is modified as follows:

1 All waters not used on north side parcels with valid water rights shall become available for
2 use on the reservation lands. The United States may divert the entirety of Ahtanum Creek
3 subject to water rights allocated to users located north of Ahtanum Creek and the Nation's
4 Treaty instream flow right.

4 This use of water is separate from the reversion of water issue.

5 5. Priority Date: The Nation wants its two priority dates clarified: June 9, 1855, for its
6 diversionary uses and time immemorial for its Treaty water right for fish and other aquatic life. The
7 Court grants this request.

8 6. Special Use sections. The Yakama Nation wants the following two provisions attached
9 to its irrigation and stock water right:

10 Provision No. 1: Treaty Water Right for Fish and Other Aquatic Life.

11 The above diversionary water rights to irrigation and related uses shall be in addition to
12 and junior to the Yakama Nation's Treaty water right for fish and other aquatic life as
13 recognized in previous orders of the Court.

14 The Court grants this request and modifies it by changing "related uses" to stock water.

15 Provision No. 2: Individual Fee Land on the South or Reservation Side.

16 Individual fee lands listed in the February 2008 Report for Ahtanum on the south or
17 Reservation side including Allen Brothers, claim 1120, on page 211 through Withers and
18 McGuire, claim number 1229 on page 235 are entitled to a prorata share of available
19 natural flow, in excess of the Treaty water right for fish and other aquatic life, up to the
20 amount awarded in the proceeding subject to the same limitations and allocation rules
21 applicable to trust and tribal fee lands on the south or Reservation side of the Creek;
22 provided that, the individual non-Indian fee land lands shall not be entitled to any storage
23 water.

24 Based on the rulings in this *Memorandum Opinion*, the Court denies the Nation's request for
25 inclusion of this provision. Storage is not a matter for this Court to consider at this time.

26 7. The Yakama Nation provided clarification regarding their points of diversion. See
27 Yakama Nation's Memorandum (#20,845) and Declaration of L. Niel Allen (#20,846). Those
28 points as described are included in the irrigation right.

Objection No. 20: This objection was addressed beginning on page 3 as part of Excess Waters.

Objection No. 21: The Yakama Nation objects to the Conclusions of Law in the Supplemental
Memorandum Opinion Subbasin No. 23 Exceptions - 71

1 Report to the extent it, or the United States as its trustee, is required to pay fees in order to receive
2 certificates for its water rights confirmed in the adjudication. Ecology's position is that it is not
3 necessary for the Nation or the United States as trustee to receive certificates for the water rights
4 confirmed, but if they desire certificates, the adjudication statute requires that certificate fees be
5 paid prior to issuance of the certificate.
6

7 This issue has been briefed and argued in connection with drafting the final decree. The Court
8 has not ruled on this issue. It has implications in subbasins other than Subbasin No. 23 and on the
9 Nation's water rights decided outside of this proceeding. The Court will rule on the issue in
10 connection with the final decree. Language in the Conclusions of Law portion of the Supplemental
11 Report was intended by the Court to recognize there may be circumstances where payment of the
12 fee may not be necessary. The second paragraph on page 388, under Conclusions of law states:
13

14 "Upon entry of the final decree in this action, *and when appropriate*, upon payment of
15 the statutory fee prescribed in RCW 90.03.470(11), together with the county auditor
16 recording fee, the Direction of the Department of Ecology shall issue Certificates of
17 Adjudicated Water Right in accordance with the provisions of RCW 90.03.240."(emphasis
18 added)

19 The Nation also objects to any Conclusion of Law that purports to authorize Ecology to
20 administer the Yakama Nation water rights or any water rights diverted onto the Yakama
21 Reservation. The Nation did not point to any specific language in the Conclusions of Law that
22 would lead to a conclusion that the Court was recognizing this ability. The objection cites to the
23 requirement that any person or entity authorized to use surface waters in Subbasin No. 23 is
24 required to have a proper diversion works and measuring device. However, that requirement cites
25 to the Court's September 15, 2005, *Order Requiring Metering, Measuring and Report*
26 *Requirements, All Subbasins (1-31) in Benton, Kittitas and Yakima Counties*. That order excludes
27 the portions of Subbasin No. 23, as well as Subbasins 25, 27 and 29 lying within the exterior
28 boundaries of the Yakama Reservation. The Court affirms its earlier rulings that Ecology does not

1 have jurisdiction to regulate surface water rights within the boundaries of the Yakama Reservation
2 and that regulation within the reservation is to be done by the Bureau of Indian Affairs or the
3 Yakama Nation. As acknowledged by the Nation in its objection, inherent in the Ninth Circuit's
4 rulings is the requirement that diversions of water from Ahtanum Creek, both to the north side and
5 to the south, be measured. Whether the Nation's and/or the United States need to have adequate
6 measuring devices installed is governed by the Pope Decree.
7

8 The Court finds that the Conclusions of Law neither require the Nation or United States to pay
9 fees for issuance of certificates, nor grant the state jurisdiction to administer the Nation's water
10 rights or other water rights diverted onto the Yakama Reservation.
11

12 **WATER RIGHTS:**

The Court confirms two water rights as follows:

13 Claimant Name: United States, Bureau of Indian Affairs, as trustee for the Yakama Nation,
14 Allottees, and Non-Indian Allottee Successors.

15 Source: Ahtanum Creek

16 Use: Irrigation of 4,107.61 acres and stock water.

17 Period of Use: April 1 through October 1

18 Quantity: From April 1 through July 10: 25% of the natural flow of Ahtanum
19 Creek, as measured at the north and south gauging stations. If the
20 natural flow exceeds 51.8 cubic feet per second (north-side users are
21 permitted to divert 38.839¹¹ cfs which is equal to 75% of 51.8 cfs), all
22 the excess over that figure is awarded to the United States as trustee for
the Yakama Nation, Allottees, and Non-Indian Allottee Successors, to
the extent water can be put to a beneficial use.

23 From July 11 through October 1: All waters of Ahtanum Creek not used
24 for instream fishery purposes shall be available to, and subject to diversion
25 by the United States as trustee for the Yakama Nation, Allottees, and Non-
Indian Allottee Successors.

26 Annual Quantity: 18,073.48 acre-feet per year.
27

28 ¹¹ The 38.839 cfs is subject to further reductions due to reversions by north-side parties.

1 Priority Date: June 9, 1855

2 Points of Diversion: No. 1: Ahtanum Canal #1: Approximately 2700 feet south and
3 300 feet west of the NE corner of Section 14, being within Lot
4 5 of the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, T. 12 N., R. 16 E.W.M.
5 No. 2: Ahtanum Canal #2: Approximately 2100 feet north and 700 feet
6 west of the SE corner of Section 7, being within Lot 8 of the NE $\frac{1}{4}$ SE $\frac{1}{4}$
7 of Section 7, T. 12 N., R. 18 E.W.M.
8 No. 3: Unnamed Canal: Approximately 100 feet north and 800 feet
9 east of the SW corner of Section 18, being within Lot 11 of the
10 SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 18, T. 12 N., R. 16 E.W.M.
11 No. 4: Unnamed Canal: Approximately 1200 feet north and 2400
12 feet west of the SE corner of Section 16, being within Lot 7 of the
13 SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 16, T. 12 N., R. 16 E.W.M.
14 No. 5: Unnamed Canal: Approximately 1600 feet south and 1700
15 feet east of the NW corner of Section 24, being within Lot 6 of the
16 NW $\frac{1}{4}$ of Section 24, T. 12 N., R. 15 E.W.M.

17 Place of Use: T. 12 N., R. 19 E.W.M.

18 Section 7 - A portion of the S $\frac{1}{2}$ NW $\frac{1}{4}$ and N $\frac{1}{2}$ SW $\frac{1}{4}$

19 T. 12 N., R. 18 E.W.M.

20 Section 3 - That portion of the S $\frac{1}{2}$ S $\frac{1}{2}$ lying south of Ahtanum Creek.
21 Section 7 - That portion of the S $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ south of
22 Ahtanum Creek and that portion of the E $\frac{1}{2}$ E $\frac{1}{2}$ SE $\frac{1}{4}$ south of Ahtanum
23 Creek.

24 Section 8 - That portion lying south of Ahtanum Creek except that
25 portion of the NE $\frac{1}{4}$ lying north of Ahtanum Canal #2.

26 Section 9 - All of Section 9 except the SE $\frac{1}{4}$.

27 Section 10 - The NE $\frac{1}{4}$ NW $\frac{1}{4}$; NW $\frac{1}{4}$ NE $\frac{1}{4}$, except the
28 NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ and except the N $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$; N $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$
and N $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, and a portion of the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$.

Section 11 - A portion of the NE $\frac{1}{4}$ NW $\frac{1}{4}$ and the NE $\frac{1}{4}$ except
the W $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$.

Section 12 - That portion of the NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ NW $\frac{1}{4}$.

Section 16 - That portion of the NW $\frac{1}{4}$ NW $\frac{1}{4}$ north of Ahtanum Canal
#1

Section 17 - The N $\frac{1}{2}$ NW $\frac{1}{4}$ and the NW $\frac{1}{4}$ NE $\frac{1}{4}$.

Section 18 - That portion lying north of Ahtanum Canal #1.

23 T. 12 N., R. 17 E.W.M.

24 Section 13 - That portion lying south of Ahtanum Creek and north of
25 Ahtanum Canal #1.

26 Section 14 - The W $\frac{1}{2}$ lying south of Ahtanum Creek. That portion of
27 the E $\frac{1}{2}$ NE $\frac{1}{4}$ south of Ahtanum Creek. That portion of the E $\frac{1}{2}$ SE $\frac{1}{4}$
and SW $\frac{1}{4}$ SE $\frac{1}{4}$ north of Ahtanum Canal #1.

28 Section 15 - That portion lying south of Ahtanum Creek except the
SW $\frac{1}{4}$ SW $\frac{1}{4}$.

1 Section 16 - The SW¹/₄, that portion of the SE¹/₄NW¹/₄ and the
S¹/₂NE¹/₄ south of Ahtanum Creek and the NE¹/₄SE¹/₄.

2 Section 17- That portion of the S¹/₂ south of Ahtanum Creek except
the NW¹/₄SW¹/₄ and except that portion south of Ahtanum Canal #1.

3 Section 18- That portion of the NW¹/₄SE¹/₄ south of Ahtanum Creek
and north of Ahtanum Canal #1.

4 Section 21- That portion of the N¹/₂N¹/₂ north of Ahtanum Canal #1.

5 Section 22- That portion of the N¹/₂N¹/₂ north of Ahtanum Canal #1.

6 Section 23- That portion of the N¹/₂NW¹/₄NW¹/₄ north of Ahtanum
Canal #1.

7 **T. 12 N., R. 16 E.W.M.**

8 Section 13- That portion of the NW¹/₄NW¹/₄SE¹/₄ and NE¹/₄SE¹/₄
south of Ahtanum Creek and north of Ahtanum Canal #1.

9 Section 15 - That portion of the S¹/₂ lying south of Ahtanum Creek
and north of unnamed canal.

10 Section 18 - That portion of the S¹/₂S¹/₂ lying south of Ahtanum
11 Creek and north of unnamed canal.

12 **T. 12 N., R. 15 E.W.M.**

13 Section 26- That portion of Government Lots 2 and 3 lying south of
the South Fork of Ahtanum Creek and north of the unnamed ditch.

14 **Special Terms of Use:**

15 All waters not used on north side parcels with valid water rights shall become available for
16 use on the reservation lands. The United States may divert the entirety of Ahtanum Creek
subject to water rights allocated to users located north of Ahtanum Creek and the Nation's
17 instream flow right.

18 The above diversionary water rights to irrigation and stock water shall be in addition to
and junior to the Yakama Nation's Treaty water right for fish and other aquatic life as
19 recognized in previous orders of the Court.

20 Claimant Name: United States, Bureau of Indian Affairs, as trustee for the Yakama
21 Nation

22 Source: Ahtanum Creek

23 Use: Treaty water right for fish and other aquatic life

24 Period of Use: January 1 through December 31.

25 Quantity: Water for the Treaty water right for fish and other aquatic life as
26 recognized in orders of the Court.

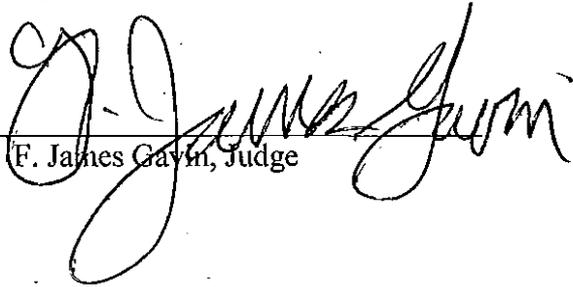
27 Priority Date: Time Immemorial.

1
2 **III. Summary**

3 The landowners north of Ahtanum Creek confirmed rights in this proceeding are required to
4 install measuring devices consistent with the Court's September 15, 2005, *Order Requiring*
5 *Metering, Measuring, and Reporting Requirements, All Subbasins (1-31) in Benton, Kittitas, and*
6 *Yakima Counties.*

7 This concludes the proceedings for Subbasin No. 23 (Ahtanum), including those related to
8 Ahtanum Irrigation District, Johncox Ditch Company and the United States/Yakama Nation.
9 Contemporaneous with filing of this *Memorandum Opinion*, a signed Conditional Final Order is
10 entered.
11

12 Signed this 15 day of April, 2009.

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15 F. James Gaym, Judge
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