

NO. 281141-III
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Plaintiff/Respondent/Cross-Appellant,

v.

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

Defendants/Appellants/Cross-Respondents.

RESPONSE BRIEF OF APPELLANT/CROSS RESPONDENT
AHTANUM IRRIGATION DISTRICT TO UNITED STATES AND
YAKAMA NATION, BRIEF OF APPELLANT

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I. RESTATEMENT OF ISSUES

A. Issues Raised by US as Appellant

- a. Did the *Ahtanum* Decree preclusively determine the parameters of that water right, including irrigable acreage, right to storage, and/or period of use?
- b. Assuming the *Ahtanum* Decree preclusively determined the reservation's irrigable acreage, did the trial court err in concluding that the amount determined was 5,100 acres (resulting in the trial court's confirmation of rights for 4,107.61 acres of trust and tribal fee land on the reservation)?
- c. Assuming the *Ahtanum* Decree preclusively limited the United States' period of use to April 1 through October 1, did the trial court err in failing to confirm a future storage right for that period?
- d. Did the trial court err in including in the United States' irrigation right, hypothetical non-Indian allottee successors who may have failed to file claims in the adjudication, and in characterizing the United States as trustee for those individuals?
- e. Did the trial court err in limiting the United States' irrigation right during April 1 through April 14 to the excess over the north side 75 percent Code Agreement allocation even though the period of use for all north side recipients of Code Agreement allocations but one begins on April 15?

B. Issues Raised by YIN as Appellant

- a. Did *U.S. v. Ahtanum Irrigation District* adjudicate the right to irrigation water for the Yakama Nation?
- b. Is the Yakama Nation entitled to divert available irrigation water between April 1 and April 15 with the exception of the share available for John Cox Ditch Company, since, with the exception of John Cox, none of the north side parties with Ahtanum rights are entitled to irrigation water until April 15 each year?

- c. Is the Nation entitled to an irrigation right in its own name or the name of the United States as trustee without including non-Indian successors?
- d. Is the Yakama Nation entitled to a storage right at this time and is it precluded by *Ahtanum* from a right from October to April each year?
- e. Did the trial court correctly hold that the Yakama Nation is limited to a water right on Ahtanum for 4,107.61 acres of trust and tribal fee land?
- f. Are individual north side or off-reservation parties with adjudicated rights under *Ahtanum* each entitled to take water in excess of their adjudicated rights in this case?
- g. Are northside parties entitled to non-diversionary stockwater with a priority date senior to the Yakama Nation's irrigation rights without proof of their priority date?

C. Common Issues Raised by US and YN

The US and YN have raised issues in common. The following section combines the common issues raised by both US & YN.

1. Irrigable Acres Trust and Tribal Fee Land on the Reservation

- a. Did the *Ahtanum* cases preclusively determine or adjudicate the parameters of the United States' - Yakama Nation irrigation water right water right, including irrigable acreage? (US - 1)(YN - 1)¹
- b. Assuming the *Ahtanum* Decree preclusively determined the reservation's irrigable acreage, did the trial court err in concluding that the amount determined was 5,100 acres (resulting in the trial court's confirmation of rights for 4,107.61 acres of trust and tribal fee land on the reservation)? (US - 2) (YN - 5)

2. Storage

¹ These citations are to the respective assignments of error.

- a. Assuming the *Ahtanum* Cases preclusively limited the United States' period of use to April 1 through October 1, did the trial court err in failing to confirm a future storage right for that period? (US – 3)
- b. Is the Yakama Nation entitled to storage right at this time and is it precluded by the *Ahtanum* Cases from a right from October to April each year? (YN – 4)

3. Season

- a. Did the trial court err in limiting the United States/Yakama Nation irrigation right during *April 1 through April 14* to the excess over the north side 75 percent Code Agreement allocation even though the period of use for all north side recipients of Code Agreement allocations but one begins on April 15? (US – 5)(YN - 2)

I. SUMMARY OF ARGUMENT

1. Irrigable Acres Trust and Tribal Fee Land on the Reservation

- a. The *Ahtanum* cases, including the two pretrial orders, sufficiently established the parameters of the United States'/Yakama Nation irrigation water right, including irrigable acreage.
- b. The amount determined, 5,100 acres, resulting in the trial court's confirmation of rights for 4,107.61 acres of trust and tribal fee land on the reservation, was supported by the evidence and mandated by the *Ahtanum* cases.

Both the United States (US) and the Yakama Nation (YN) argue the Trial Court incorrectly quantified the US/YN reserved irrigation right without use of the practicably irrigable acres standard (hereafter PIA).

Both parties also argue the Trial Court incorrectly determined the amount of the US/YN acreage. Ahtanum Irrigation District (AID) supports both

Trial Court decisions and argues that Trial Court, in adopting certain findings and conclusion of the federal district court in *USA v. AID* Civil 312, did address the quantification issue using PIA evidence.

In the alternative, AID argues that the Trial Court's quantification of the US/YN reserved irrigation right by the percentage allocation required in *US v AID* 330 F.2d 897 (9th Cir 1964)² was the primary method of quantification, making a PIA analysis less necessary.

All parties appear to agree that the *Ahtanum* cases, beginning with *USA v. AID* Civil 312 through *US v. AID* 236 F2d 321 (9th Cir 1956)³ and *Ahtanum II* provide the legal basis for the determination of the quantification issues presented by the US & YN. AID draws different conclusions from those cases and disagrees with the premise that the trial court did not base its decision on the reservation PIA.

The Trial Court, acting at various stages through Judge Walter Stauffacher, Commissioner Sidney Ottem and Judge James Gavin made a careful analysis of the US/YN reserved irrigation right in the following decisions.

1. Memorandum Opinion Re: Ahtanum Watershed Practicably Irrigable Acreage (1994) (CP 1500-1513)
2. Report of the Court Volume 48, Part 1 (2002) (CP 974-1459)
3. Memorandum Opinion Re: Ahtanum Legal Issues (Oct. 8, 2003 (CP 942-970)

² Referred to hereafter as *Ahtanum II*

³ Referred to hereafter as *Ahtanum I*

4. Supplemental Report of the Court Concerning the Water Rights for Subbasin 23 (Ahtanum Creek) (Feb. 25, 2008) (hereinafter "Supplemental Report")(CP 539-931)
5. Memorandum Opinion Exceptions to the Supplemental Report of the Court and Proposed Conditional Final Order Subbasin No.23 (Ahtanum), Ahtanum Irrigation District, Johncox Ditch Company and United States/Yakama Nation (April 15, 2009) (CP 456-561)

It is clear that the Trial Court, Judge Stauffacher, in the Memorandum Opinion Re: Ahtanum Watershed Practicably Irrigable Acreage (1994) felt that the *Ahtanum* cases “resolved the reserved rights of the Yakama Nation in regard to diversions from Ahtanum Creek inasmuch as it [the *Ahtanum* cases] quantified the practicably irrigable acreage.” (CP 1513)

Later, Judge Gavin stated in *Memorandum Opinion Exceptions to the Supplemental Report of the Court and Proposed Conditional Final Order Subbasin No.23 (Ahtanum)*, p. 58, referring to the PIA Memo, that “the Memo. Opin. did not establish the actual acreage”. (CP 513) He did find that the *Ahtanum* cases themselves provided sufficient precedent regarding quantification of the Nations reserved right for him reach his decision.

Bearing in mind that the ultimate decision in *Ahtanum II* was a percentage allocation based on the Code Agreement, there were actually two quantifications of the Nation’s reserved right. After upholding the

validity of the Code Agreement, the percentage allocation in the Decree quantified the Nation's right. Then, based on the *Ahtanum* cases, including the evidence found in the two Pretrial Orders⁴, it was possible for the Trial Court to quantify the Nation's irrigable acres had been done, which made the consideration of additional PIA evidence unnecessary under principles of res judicata. Memorandum Opinion Supplemental Report Exceptions, April 15, 2009 (CP 513-515)

As more fully set forth in the following argument, the Trial Court's ruling on the Nation's irrigable acres is well supported by legal authority and evidence.

2. Storage

- a. The trial court was correct in failing to confirm a future storage right to the U.S. for the period April 1 through October 1. (US – 3)
- b. The Yakama Nation is not entitled to a storage right at this time is precluded by the *Ahtanum* cases from a right from October to April each year. (YN – 4)

The US/YN claim for a storage right was correctly decided by the Trial Court.

3. Season

- a. Did the trial court err in limiting the United States/Yakama Nation irrigation right during *April 1 through April 14* to the excess over the north side 75 percent Code Agreement allocation even though the period of use for all north side

⁴ Civil 312 Pretrial Order Aug. 1, 1951 (YIN Ex. 353) This exhibit is not identified by CP # in either YN or US brief.
Civil 312 Pretrial Order on the Merits July 20, 1957 (CP 2307-2347)

recipients of Code Agreement allocations but one begins on April 15? (US – 5)(YN - 2)

The US/YN period of use is stated in the Memorandum Opinion Exceptions to the Supplemental Report of the Court and Proposed Conditional Final Order Subbasin No.23 (Ahtanum), Ahtanum Irrigation District, Johncox Ditch Company and United States/Yakama Nation (April 15, 2009) to be from April 1 to October 1. (CP 456-561)

II. Argument

1. Irrigable Acres Trust and Tribal Fee Land on the Reservation

As a preliminary matter, AID proposes that an analysis of the US/YN PIA was unnecessary due to the decision in *Ahtanum I* validating the 1908 Code Agreement. *Ahtanum I* @ 338 If it is assumed that the south side is entitled to 25% of the Ahtanum water from “the beginning of the irrigation in the spring of the year through July 10” and the excess during that period, all water including the excess from July 11 to Oct.1, and it is true that there is insufficient water to supply any land in excess of the 5,100 acres irrigable from the Ahtanum Irrigation Project as of 1915 the acreage established in *Ahtanum I* is more than could ever be irrigated. There is no evidence in the Subbasin 23 proceeding tending to show the feasibility of any storage capability on the south side.

To determine issues surrounding the reserved water right of the Yakama Nation, it is necessary to examine the Ahtanum cases from the

beginning, starting with the US Complaint⁵, initiating *USA v. AID*, Civil 312, on July 2, 1947. The suit was initiated, not only to seek the invalidity of the Code Agreement, but to quantify the irrigation rights of the US/YN.

Paragraphs VIII, X & XII of the complaint alleged:

VIII

In order that all of the irrigable lands on the reservation side of the Ahtanum Creek and its tributaries might be brought under cultivation by the use of the waters of Ahtanum Creek, and its tributaries, thus furthering and advancing the civilization and improvement of the Indians, the Secretary of the Interior, pursuant to appropriations made by Congress for that purpose, directed that an irrigation project be commenced and continued-to completion.

. . .

X

The United States now has ditches constructed for the irrigation of 4920.4 acres of reservation lands adaptable for the susceptible of irrigation with the waters of Ahtanum Creek and its tributaries. [sic]

. . .

XII.

By virtue of the reservation of the waters of Ahtanum Creek and its tributaries under the treaty of June 9, 1855, the United States is entitled to and claims in its own behalf and in behalf of members of the Yakima Tribe Nation of Indian the first right to the use of the following waters with the date of priority of June 9, 1855, to be measured and diverted at the government headgate located in Section 14, Township 12 North, Range 16 East of the Willamette Meridian, Yakima County, Washington:

The remainder of Paragraph XII listed specific, claimed diversion quantities from April through September.

The Prayer requested the Court (1) declare the agreement of May 9, 1908 to be invalid, (2) that the water rights identified in paragraph XII

⁵ YN Exhibit 27

of the Complaint be declared as owned and claimed by the United States and its wards, (3) adjudge the rights of properties situated north of Ahtanum Creek as being subject and subordinate to the prior rights of the United States and its Indian wards in and to the right to the use of water from Ahtanum Creek and (4) that the Court quiet the title of the United States and its Indian wards to the rights to the use of water from Ahtanum Creek described in the complaint as against the defendants and enjoin the defendants from interfering with the rights claimed.

US Brief at page 33 argues that, [T]he gravamen of the complaint, therefore was to quiet title to water for the acreage capable of being irrigated by the canals existing at that time, and to remove the primary obstacle to obtaining water for that irrigation: the Code Agreement.

Another way of saying that is that it was a request for quantification of the Nation's water right in Ahtanum Creek, as specific diversionary amounts were claimed in paragraph VII of the US Complaint.

As reflected in the Civil 312 pretrial orders, the US presented evidence of acres on the reservation that were susceptible of irrigation.

Two pretrial orders were entered, which contained agreed facts and contentions of the parties that were later cited by the Trial Court in *Acquavella*. The Memorandum Opinion Subbasin No. 23 Exceptions contained the following at page 58.

The *1951 Pre-Trial Order* (YIN Ex. 353) includes a series of *Agreed*

Facts

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

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

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

[Footnote in original]

On July 20, 1957, Judge Lindberg, U.S. District Court, entered an *Order on Pre-Trial on the Merits in U.S. v. Ahtanum*. (CP 2307-2347).

The 1957 Order contained a number of agreed facts, including

Agreed Fact XV:

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

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

Agreed Fact XVI:

Of the lands irrigated on the Indian side of the creek, 925.45 acres

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.

have been patented in fee simple, which said patents had been issued more than ten years prior to the institution of the action. Since the institution of this action, additional acres in the amount of 74.55 have been patented in fee simple, and 158.70 have been patented to Indians. (CP 2313-2314)

Further evidence of the consideration of irrigable acres in the *Ahtanum* cases is found in the following language from *U.S. v. AID*, 236 F2d 321

It [the US complaint] presented claims and issues which required the court to determine and adjudicate the extent of the rights of the parties with respect to the waters of the stream; *Ahtanum I* @ 339

Between 1908 and 1915 the Indian Irrigation Service was engaged in the work of constructing and extending irrigation canals and ditches with headworks and means of diversion so that by 1915 the Indian lands upon the reservation susceptible of irrigation from Ahtanum Creek amounted to approximately 5000 acres.

Ahtanum I @ 327

Had there been no 1908 agreement, it seems plain that as of 1915 it would have to be said that the rights reserved in the treaty were rights to the use of water from this stream sufficient to supply the needs of this 5000 acres.

Ahtanum I @ 327

But there was a 1908 agreement that was validated in both *Ahtanum I* and *Ahtanum II*

YN Brief @ 23 makes the following argument.

As the Ninth Circuit's recitation of the three issues on appeal shows, the purpose of addressing the scope of the project as of 1908 or 1915 was not for purposes of quantifying the Nation's rights but to determine first did the United States as trustee have any irrigation water rights and, if so, were they greater than "25 percent of the natural flow of the stream?" *Ahtanum I*, 236 F. 2d at 324.

"If the rights of the Indians, as reserved, did not exceed the 25 percent, allocated to them in 1908, it would appear that no serious

question can be raised as to the validity of the 1908 agreement." 236 F. 2d at 324-325.

Since the Yakama Nation's irrigation rights far exceeded the 25 % of the irrigation natural flow the court decided that it had to reach the issues of the validity of the Code Agreement.

The three issues are found at *Ahtanum I* at 324-325, as follows:

In view of the action taken in the court below, it is apparent that we must consider the following questions, all of which are raised by the Government's specification of errors.

First, were any rights to the use of any of the waters of Ahtanum Creek reserved by the Treaty of 1855? If there were none, then the question of the validity of the agreement of 1908 need not be discussed.

Second, if it be concluded that by the treaty of 1855, rights to the use of the waters of Ahtanum Creek were reserved for the benefit of the Indians, were the rights thus reserved any greater than the 25 percent of the natural flow of the stream? If the rights of the Indians, as reserved, did not exceed the 25 percent *325 allocated to them in 1908, it would appear that no serious question can be raised as to the validity of that agreement.

Third, if the rights reserved for the Indians by the Treaty were of the extent and size claimed by the United States, that is to say, rights to sufficient waters for the needs of the Indians as they might exist in the future, then we must of necessity consider the validity and force of the 1908 agreement, for it is conceded that the present needs of the Indians are sufficient to require substantially the whole flow of the stream. If the agreement purported to deprive the Indians of rights, which actually belonged to them, then that circumstance must be considered in determining whether the Government officials in executing it exceeded their power and authority.

To determine the answer to these questions requires a quantification of the Nation's reserved water right. Since Judge Pope proceeded to consider the validity of the 1908 Agreement, he must have determined that the rights of the Nation exceeded 25%. There was sufficient evidence in the pretrial orders to make that determination.

The Yakama Nation misinterprets the language in *Ahtanum I* @ 325 and then misstates the resulting issue. The reference at page 23 of the YN Brief is to the third question Judge Pope said must be considered: “if the rights reserved for the Indians by the Treaty were of the extent and size *claimed* by the United States, . . . then we must of necessity consider the validity and force of the 1908 agreement”. [Emphasis added]

The Nation assumes and states, without reference to the record, that its “rights far exceeded the 25 % of the irrigation natural flow”. The rights of the Yakama Nation, referred to in *Ahtanum I*, were the rights *claimed* by the United States, not rights established for the Yakama Nation. For it was not until the *Ahtanum I* decision was rendered that the reserved right of the Nation was confirmed.

That the *Treaty of 1855* reserved rights in and to the waters of this stream for the Indians, is plain from the decision in *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340. *Ahtanum I* @ 325

The *Ahtanum I* decision both established a reserved right to the water of the Ahtanum Creek, on behalf of the Yakamas, and with the same pen, reduced it by 75%, in recognizing the validity of the Code Agreement. Judge Pope decided the issue of the validity of the Code Agreement with the following provisions of *Ahtanum I*.

This brings us to the heart of this case and the primary question involved, namely, the problem of the validity of *331 the 1908 agreement. *Ahtanum I* @ 330

. . .

It is thus apparent that we are confronted with the necessity of passing upon the question whether the applicable statutes above quoted, by force of their own terms alone, and unaided by any established practice, or administrative ruling, regulation or interpretation from which acquiescence or implied approval by Congress might be implied, granted the Secretary power to make this agreement *335 The outcome of this suit is dependent upon our answer to that question. *Ahtanum I @ 334*

. . .

'In our opinion the very general language of the statutes makes it quite plain that the authority conferred upon the Commissioner of Indian Affairs was intended to be sufficiently comprehensive to enable him, * * * to manage all Indian affairs, and all matters arising out of Indian relations, with a just regard, not merely to the rights and welfare of the public, but also to the rights and welfare of the Indians, and to the duty of care and protection owing to them by reason of their state of dependency and tutelage. *Ahtanum I @ 336*

. . .

As we have said, the implied reservation of the waters of this stream extended to so much thereof as was required to provide for the reasonable needs of the Indians, not merely as those needs existed in 1908, but as they would be measured in 1915, when the Indian ditch system had been completed. If we assume that this 1915 need extended to substantially all of the waters of Ahtanum Creek, then the question is whether, conceding that the Secretary had the power to make an agreement for some workable division, can it be said that he had the power to agree to give to the white settlers 75 percent of that which the Indians might need in 1915 and subsequent years? *Ahtanum I @ 337*

. . .

But we are constrained to hold that since some arrangement for the apportionment of the Ahtanum waters was the sort of thing which the Secretary was authorized to do by the grant of general powers of supervision and management, he therefore had the power to make the 1908 agreement. The Secretary's mistakes, his poor judgment, his overlooking or ignoring of the true measure of the Indians' rights, his lack of bargaining skill or determination may add up to an abuse of his power, but do not negative it, or make his act ultra vires. *Ahtanum I @ 337*

The final decision of the Trial Court is misstated by the Yakama Nation in its Opening Brief where it is said,

The Yakama Nation asks that the Court reverse the trial court's ruling which held that the federal court *Ahtanum* rulings precluded the Nation and the United States are precluded from quantifying the Nation's irrigation water rights using the practicably irrigable acreage standard. (YN Brief, P. 12)

The Trial Court did not preclude the US or YN from quantifying the Nation's irrigation rights using the PIA standard, but instead ruled, in *Memorandum Opinion Re: Ahtanum Watershed Practicably Irrigable Acreage* (1994) that the irrigation right had been quantified in the *Ahtanum* cases.

In sum, the Court finds that the federal litigation, commencing as *United States v. Ahtanum Irrigation District*, Civil Cause 312, and continuing through the two Ninth Circuit cases authored by Judge Pope, resolved the reserved rights of the Yakama Nation in regard to diversions from Ahtanum Creek inasmuch as it quantified the "practicably irrigable acreage." Therefore, the decisions by that Court, in light of principles of res judicata and stare decisis, bar relitigation of the practicably irrigable acreage in the Ahtanum unit of the Wapato Irrigation Project. Any evidence submitted toward that proof will not be considered in this adjudication.
(CP 1512-1513)

In addition, Judge Stauffacher, in the 1994 PIA Memo. Opin. ruled,

With this guidance from the Supreme Court in mind, [regarding res judicata] we turn to the Ahtanum Creek and the rights asserted by the United States and YIN, to determine if they were adjudicated in the federal cases. This Court believes the Ninth Circuit has already decided and given the necessary finality to this matter in the *Ahtanum* cases. Those cases leave no doubt that the Ninth Circuit was aware of the "future right" component of PIA when they made the decision.
(CP 1509)

Judge Stauffacher continued by noting that Judge Pope had

determined that a decision on the validity of the Code Agreement would need to be made if the 25% allocation to YIN was insufficient for their "*needs ... as they might exist in the future.*" Id. at 325. The language actually used by Judge Pope in *Ahtanum I* at 325 is:

“if the rights reserved for the Indians by the Treaty were of the extent and size *claimed* by the United States, . . . then we must of necessity consider the validity and force of the 1908 agreement”.

Next, on page 326 Judge Pope addressed the quantification of the Nations reserved right:

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

Judge Pope then addressed the issue of the number of acres susceptible to irrigation. He states:

by 1915 the Indian lands upon the reservation susceptible of irrigation from Ahtanum Creek amounted to ***approximately 5000 acres***. Had there been no 1908 agreement, it seems plain that as of 1915 it would have to be said that the rights reserved in the treaty were rights to the use of water from this stream sufficient to supply the needs of this 5000 acres. *Ahtanum I* at 339

The U.S. argues this language considers only the amount of acreage available for irrigation in 1915 and not possible future developments. *Ahtanum II*, held otherwise.

The record then before us showed that by 1915, the Indian Irrigation Service had completed the construction of irrigation canals and ditches and other works sufficient to provide irrigation

water for approximately 5000 acres on the Indian Reservation. We held that as of 1915, in the ordinary course, the Indian tribe and the owners and possessors of their land would be entitled to the right to the waters of Ahtanum Creek measured by the needs of the Indian irrigation project at that date. *Ahtanum II @ 899*

"The record here shows that an award of sufficient water to irrigate the lands served by the Ahtanum Indian irrigation project system as completed in the year 1915 would take substantially all of the waters of Ahtanum Creek." *Ahtanum I @ 327*

. . . .

"It is unnecessary to consider whether, had there been no 1908 agreement, the rights of the government as trustee for the Indians would have been constantly growing ones in the years following 1915 had the irrigable area within the reservation continued to increase. It is sufficient for the purposes of this case to say that an adjudication of the rights of the United States in and to the waters of Ahtanum Creek as of 1915, would necessarily award the United States a right measured by the needs of the Indian irrigation project at that date." *Ahtanum I @ 328*

This language convinced the Court writing the PIA opinion that the Ninth circuit had quantified the future irrigable acreage needs of YIN in reaching their decision. In determining that the "Ahtanum Indian irrigation project" as constructed in 1915 would take all the waters of Ahtanum Creek and that the 1908 agreement did exist, and was valid, in limiting southside use to 25% the Trial Court ruled that the Ninth Circuit has resolved the reserved water right issue, as it more than allocated the available water for reservation use. It determined that the lands which the YN would be able to irrigate in 1915 by way of the Wapato Project were all of the lands capable of irrigation then and for the future. (CP 1508-1510)

The PIA Memorandum Opinion, found that the doctrine of res judicata applies to this issue. The Trial Court noted that considerable evidence and case law supported its decision that res judicata applies to the PIA of the Ahtanum unit in this case. The question is can the United States, on behalf of an Indian nation, relitigate a reserved right that was adjudicated and decreed years before, or is such a claim barred by res judicata? In Washington, the elements of res judicata are specifically broken down as follows:

"There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Mellor v. Chamberlain*, 100 Wn.2d 643, 645 (1983)."

The subject matter in this adjudication is the same as it was in *Ahtanum I and II*, the division of the water flowing in Ahtanum Creek. Similarity of the cause of the action is clear by examination of the US Complaint, seeking quantification of the Nation's water right. To determine that the parties are the same, one only need look to the case name in *US v. AID*.

In the case of *Arizona v. California*, 460 U.S. 605, *Arizona II*, the Court was called on to revisit their quantification of the reserved rights in the original installment of that litigation, *Arizona v. California*, 373 U.S. 546 (1963). *Arizona II* held that re-litigation of certain lands within undisputed reservation boundaries, for which the United States had not sought water rights in *Arizona I*, the so-called "omitted lands"-were not

entitled to water under res judicata principles. [460 U.S., at 626, 103 S.Ct. 1382.](#)

At the outset of the opinion, the Court noted the PIA standard encompassed a fixed calculation of future water needs. *Arizona v. California*, 460 U.S. 605, 617

A further limitation on the required use of the PIA method is found in *Ecology v. Yakima Reservation Irrig. Dist.*, 121 Wn.2d 257, 850 P.2d 1306 (1993) citing *Arizona v. California*, 460 U.S. at 620, where the Court stated, “The judicially created ‘practicably irrigable acreage’ standard thus need not be applied, as the treaty rights of the Indians were previously quantified by Congress.” A limitation on reserved water rights can also be based on a contract. *Id.*

The quantification of the US/YN irrigable acres is well supported in the Trial Court’s Memorandum Opinion Supplemental Report Exceptions, April 15, 2009 (CP 513-515) The reference to the evidence in the Pretrial Orders, *supra*, and the *Ahtanum* cases supports the Trial Court’s ruling.

1. Storage

a. The trial court was correct in failing to confirm a future storage right to the U.S. for the period April 1 through October 1. (US – 3)

b. The Yakama Nation is not entitled to a storage right at this time is precluded by the *Ahtanum* cases from a right from October to April each year. (YN – 4)

The US/YN claim for a storage right was correctly decided by the

Trial Court. The Memorandum Opinion Supplemental Report

Exceptions, April 15, 2009 ruled that

Storage is not addressed in *Ahtanum I or II*. The 1994 PIA ruling found that *Ahtanum I* and *II* quantified the rights of the Yakama Nation.” The evidence admitted as part of the PIA ruling was not to be used in this adjudication. The Trial Court concluded that *Ahtanum I* and *II* preclude such an award. Those cases settled the issues of season of use, quantity and acreage based on the system built as of 1915. *Ahtanum II* @ 328

The 1994 PIA ruling stated,

Any evidence toward that proof will not be considered in this adjudication." It was allowed to the extent it applies to future projects for irrigation of the irrigable acres as already quantified and claimed in the Ahtanum proceeding.

The Supreme Court in *Arizona v. California II*, 460 U.S. 605 (1983) denied a claim for omitted acreage reasoning that there was an overriding need for certainty and finality of water rights in the west. This Court agrees.

Regarding the Yakama Nation request for authorization to divert and store water outside the April 1 - October 1 irrigation season, the Court ruled

The *Ahtanum* cases authorize diversion of water between April 1 and October 1. Although both recognize a need for more water on the Reservation and provide remedies for that additional water (reversion of water rights), they do not provide for water to be diverted during the non-irrigation season.

The Yakama Nation's request for storage water rights for the period of April 1 through October 1 is premature. It is a request for a potential future storage right.

The US and YN have consistently argued that the *Ahtanum* cases control the rights of the parties. There is nothing in the US Complaint requesting a storage right or an request to divert after October 1. YIN Ex. 27 US Complaint ¶ VII.

2. Season

- a. Did the trial court err in limiting the United States/Yakama Nation irrigation right during *April 1 through April 14* to the excess over the north side 75 percent Code Agreement allocation even though the period of use for all north side recipients of Code Agreement allocations but one begins on April 15? (US – 5)(YN - 2)

The US/YN period of use is stated in the Memorandum Opinion Exceptions to the Supplemental Report of the Court and Proposed Conditional Final Order Subbasin No.23 (Ahtanum), Ahtanum Irrigation District, Johncox Ditch Company and United States/Yakama Nation (April 15, 2009) to be from April 1 to October 1. (CP 456-561)

4. Remaining Yakama Nation Issues

- a. Are individual north side or off-reservation parties with adjudicated rights under *Ahtanum* each entitled to take water in excess of their adjudicated rights in this case?
- b. Are northside parties entitled to non-diversionary stockwater with a priority date senior to the Yakama Nation's irrigation rights without proof of their priority date?

The Court's Memorandum Opinion/Proposed CFO, entered April 15, 2009, addressed the issue of excess/junior rights and modified the "excess water" holding in the Supplemental Report, as follows:

The Court agrees with AID's position that the Ninth Circuit would not have addressed the right to use excess water if there was no excess water. Any excess water not used by the Nation is available for use on the north side of the creek. However, the Court does not agree with AID's position that this excess water can be used for additional lands beyond those recognized in the Pope Decree. The Court finds that any excess water can only be used by the defendants, i.e. those recognized in the decree as having rights, on the lands described in Appendix B to the Pope Decree - further

limited to the lands for which rights are confirmed in this proceeding. The Pope Decree awarded 0.01 cfs for each irrigated acre, half of the quantity of water authorized for use in the certificates that issued following the earlier adjudication, the *Achepohl Decree*. The Court finds that excess water can be used, when available, on lands north of Ahtanum Creek that are confirmed rights in this proceeding, up to the 0.02 cfs per acre authorized in the appurtenant certificates. The reality may be that in most years there will be no water in excess of that needed to satisfy the north side users and the Nation's water rights. It may also be that when there is excess water available, it may be during the time of the year when the north side users cannot make beneficial use of the water - i.e. early spring. However, that does not prevent the Court from concluding that excess water can be used by north side right holders when the flow exceeds the need and beneficial uses of the Nation.

Memorandum Opinion/Proposed CFO – CP 458-459

AID maintains that the water rights established in the *Achepohl Decree*, *State v. Achepohl*, Yakima County Superior Court Cause No. 18279, May 7, 1925, survive *U.S. v. AID*,⁶ and may be satisfied out of the excess water identified in the Pope Decree, in the priority established in the Achepohl Certificates. The concept of “excess water” is clearly stated in sections I a. and b. and section II of the Pope Decree²⁴, and serves as the basis for junior/excess rights established in the Achepohl Decree.

Section II of the Pope Decree conditions the grant of all the water of Ahtanum Creek to Reservation lands after July 10 of each year, upon the requirement of beneficial use. Unless and until lands on the reservation are developed to the extent to beneficially use the water awarded in the CFO, it is available to the North side pursuant to the express language in

⁶ *United States v. Ahtanum Irr. Dist.*, 330 F.2d 897 (9th Cir. 1964)

Ahtanum I & II.

The Trial Court concluded that *U.S. v. AID (Ahtanum II)* allocated all of the natural flow available for irrigation to the north and south side. That is a correct statement of the decision, but what the Court neglected to consider is that by specific reference to excess water, *Ahtanum II* included excess water within the amount allocated, subject to the beneficial use requirements. The language in the Pope Decree awards specific amounts of natural flow to the north and south sides with the requirement that the excess must be beneficially used on the south side if it's use is to be deprived to the north side.

The Trial Court referred to various portions of *Ahtanum II*, which state that the Ahtanum Indian Irrigation Project would take substantially all of the waters of Ahtanum Creek. It may be true that there is sufficient irrigable land on the south side to take all of the available water of Ahtanum Creek, and that might be the case if it were not for the 1908 Code Agreement²⁸, but the fact remains that the potential of the Ahtanum Indian Irrigation Project has never been fully developed and is not at the present time fully developed. Somewhat just over one-half of the PIA has ever been under irrigation.⁷

The Nation's argument is based on the assumption that as constructed the Wapato Project could use all of the available water.

⁷ Memorandum Opinion Ahtanum PIA, CP 1500

The operable word is “could”, not “has”. There is no arguing that if sufficient land is developed on the south side which, by the use of recognized water duties, was in fact irrigated, there may be no excess water. But, unless or until that circumstance occurs, there are occasions when the flow in the Ahtanum Creek and its tributaries is sufficient to produce excess water over and above all other Pope Decree uses. See Kammereck Declaration.

Whether there is or is not excess water should not be dependent upon the quantity of irrigable land on the south side, but on the day-to-day needs on the south side for beneficial use. Irrigable acres are relevant to the paper water right of the Yakama Nation. Irrigated acres are relevant to the existence of excess water.

The court in *Ahtanum II* then cited the above-referenced portion of *Ahtanum I* specifically adopting the language in *Ahtanum I*, which granted the right of white settlers the use of waters *subordinate to the rights of the Indians to the extent of beneficial use by the Indians*. The *Ahtanum II* court stated:

Obviously those rights, so far as the Indians were concerned, arose from the provisions of the treaty, insofar as the rights of defendants were concerned, arose under the laws of the State of Washington. *Ahtanum II* at 900

The court in *Ahtanum II* went on to fashion its decree with specific reference to the above-quoted language from *Ahtanum I* as adopted in *Ahtanum II*. The decree at I a., by use of the phrase “*except in*

subordination to the higher rights of the plaintiff”, makes a direct reference to the above-quoted language from *Ahtanum I*.

Post July 10 Excess Water

The same argument can be made as to section II, the post-July 10 section of the decree as it too places the beneficial use requirement on the water to be used after the 10th of July on the south side. The Trial Court made the erroneous conclusion that section I b. is the only reference to the use of excess water by the Defendants. The Court disregards section II of the Decree, which allocates all water after the 10th of July to the Plaintiff for use on the reservation, *to the extent that said water can be put to beneficial use*. What is to happen to water that cannot be beneficially used on the reservation after July 10? If it would be wasted, or used in excess of instantaneous rights on land now developed, AID maintains that *Ahtanum I & II* allow use on the North side after July 10, to the extent it is available.

IV. Conclusion

AID requests that the Trial Court be affirmed on each and every assignment of error raised by the US and YN.

Respectfully submitted this 14th day of July, 2010.

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