

NO. 281141-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

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

Plaintiff/Respondent/Cross-Appellant,

v.

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

Defendants/Appellants/Cross-Respondents.

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

James E. Davis
Talbot, Simpson & Davis, P.S.
Attorney for Appellant,
Ahtanum Irrigation District
308 N. 2nd Street
Yakima, WA 98901
(509) 575-7501
WSBA # 5089

TABLE OF CONTENTS

PAGE

I. STATEMENT OF THE ISSUES ADDRESSED BY
AHTANUM IRRIGATION DISTRICT IN REPLY 1

A. Combined US and YN issues regarding “junior” water rights,
the right to use “excess water” and the right to use excess water
after July 10.

1. *U.S. v. Ahtanum Irrigation District* did not determine
rights of specific Code Agreement parties to water for
specific parcels of land thus limiting rights previously
determined in *State v. Achepohl*.

2. The Trial Court erroneously conclude the Pope Court
had actually conducted a *de facto* adjudication of
North-side water rights.

B. Whether the trial court correctly denied the “senior” water right
claims of **Hull Ranches** because their predecessors did not file
answers and/or otherwise were not confirmed water rights in
Ahtanum.

1. Whether this Court lacks jurisdiction to change *U.S v.*
Ahtanum Irrigation District merely because of alleged
erroneous factual findings by the Federal Court
concerning Hull Ranches' Claims for water rights for
lands within Pope Decree Answers 179 and 215.

C. Whether AID’s appeals regarding the water right claims of
Richardson, Splawn, Lynde and the Chancery should be denied
because AID did not raise in the trial court the issues it seeks to
address here.

II. STATEMENT OF THE CASE 6

III. SUMMARY OF THE ARGUMENT. 15

IV. ARGUMENT. 17

CONCLUSION. 40

TABLE OF AUTHORITIES

TO BE PROVIDED

1. AID STATEMENT OF THE ISSUES ADDRESSED BY THE UNITED STATES AND YAKAMA NATION AS RESPONDENTS

- A. Combined US and YN issues regarding “junior” water rights, the right to use “excess water” and the right to use excess water after July 10.
 - A. *U.S. v. Ahtanum Irrigation District* did not determine rights of specific Code Agreement parties to water for specific parcels of land thus limiting rights previously determined in *State v. Achepohl*.
 - B. The Trial Court erroneously conclude the Pope Court had actually conducted a *de facto* adjudication of North-side water rights.
- B. Whether the trial court correctly denied the “senior” water right claims of **Hull Ranches** because their predecessors did not file answers and/or otherwise were not confirmed water rights in *Ahtanum*.
 - A. Whether this Court lacks jurisdiction to change *U.S v. Ahtanum Irrigation District* merely because of alleged erroneous factual findings by the Federal Court concerning Hull Ranches' Claims for water rights for lands within Pope Decree Answers 179 and 215.
 - B. Whether AID’s appeals regarding the water right claims of Richardson, Splawn, Lynde and the Chancery should be denied because AID did not raise in the trial court the issues it seeks to address here.

2. STATEMENT OF THE CASE

The major area of dispute in this final phase of briefing concerns the varying interpretations of the *Ahtanum* cases. The YN maintains that,

“The northside parties argue that (1) they are not bound by *United States v. Ahtanum Irrigation District*, on a number of issues, or if they are, the rulings there only act to limit the Yakama Nation's rights, not their own; (2) that, because they are not bound by the

federal court ruling, they are entitled to water in excess of that adjudicated for them in *Ahtanum*; and (3) that *Ahtanum* is in error because the northside parties claim they have new evidence proving that there is water "excess" to the rights of the Yakama Nation for so-called "junior" right holders who don't have rights under *Ahtanum*. The northside parties argue that they are, therefore, entitled to excess for northside parties who lost in *Ahtanum*, despite settled rulings that limit the northsides' rights.

AID made no such argument in its prior briefs. The YN misstates the AID argument, which has always been that the YN has misinterpreted the language in the *Ahtanum* cases. The AID argument has always been that its advancement of issues, such as the right to use excess water and the fact that *Ahtanum II* was an allocation of water rather than adjudication, is supported by the *Ahtanum* cases. What the Court in the *Ahtanum* cases did is based on what it asked to do, which was stated at U.S. v. AID, 330 F.2nd 897 911 (*Ahtanum II*)

After all, the primary purpose of the plaintiff's suit was to procure an adjudication, which would protect the rights of the Indians and of the government, as trustee for them, as against the claims of defendants. The government cannot be interested in a general adjudication as to the relative rights among themselves, of the various defendants. It would not be interested in their respective priority.

Ahtanum II @ 911

The U.S. complaint in U.S. v. AID requested the following relief; that the

court (1) declare the agreement of May 9, 1908 to be invalid; (2) decree to the United States and its Indian wards the water rights . . . claimed . . . and adjudge the rights of those defendants . . . north of Ahtanum Creek subordinate to the prior rights of the United States and its Indian wards; (3) quiet the title of the United States and its Indian wards in and to those rights to the use of water from Ahtanum Creek which are described in this complaint as against the defendants and forever enjoin the defendants.

There is no request for an adjudication, and ultimately, none was undertaken. What occurred was an allocation of the water of Ahtanum Creek according to the percentage division stated in the Code Agreement.

Because it affects the junior/Excess water decision of the Trial Court, AID will address the incorrect decision of the Trial Court that a de facto adjudication occurred.

A. Combined Junior/Excess/Post July 10 Issues

In its opening brief, AID summarized its view of the Junior/Excess issues as follows:

AID maintains that the water rights established in the *Achepohl Decree, supra @ fn 8*, survive *U.S. v. AID, supra @ fn 13*, 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 Decree¹, and serves as the basis for

¹ *United States v. Ahtanum Irr. Dist.*, 330 F.2d 897, 915 (9th Cir. 1964)

junior 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 Ahtanum I & II.

In its initial *Report of the Court*, the trial court held that parties who had not obtained rights in *Ahtanum II* and those who were awarded rights in *Ahtanum II*, but who were claiming more water than *the Pope Decree* authorized can be awarded "junior or excess" rights to divert water if water is available at any time after the irrigation rights of the Yakama Nation's for the Yakama Reservation and the Yakama Nation's Treaty water right for fish and other aquatic life are satisfied, even if such a right is in excess of the adjudicated right for that party. *2002 Report* at @ 110-111 (CP 1085-1086).

The YN points to the Court Commissioner's holding that "(t]he 'surplus' water availability may be further reduced if/when the federal government constructs a reservoir to retain such surplus waters to more adequately supply senior rights." *Report of the Court* @ 110 (CP 1086) The issue of whether excess rights can be limited by speculative allegations about future storage will be addressed later in this brief.

The YN then stated in its brief at page 3 that,

After exceptions were filed, the trial court changed its ruling and held that none of the northside parties could hold so-called 'Junior rights.' 2008 Supplemental Report at p. 25-27 (CP 749-751).

The superior court, after careful reexamination of the evidence and the rulings in *Ahtanum* held that:

. . . When excess is available, north side users are barred by res judicata from asserting rights to any such water except to those lands which were confirmed rights in the Pope Decree. 2008 Supplemental Report, *supra*, at p. 26 (CP at 750).

In its *Supplemental Report*, the Trial Court misinterpreted both *Ahtanum I* and *Ahtanum II*². The Court also disregarded specific language in *Ahtanum II* (the Pope Decree) in reaching its conclusion that there is no right to excess water except, under certain circumstances, for Claimants awarded a senior right.

On page 27 of the *Supplemental Report* beginning at line 17³ the Trial Court stated:

“Clearly, that Court (referring to the Ahtanum Court) believes there is no real surplus or excess water to distribute . . .”

Therefore, the Court finds that north side users are now estopped from claiming any right to "excess" flows, except for use on specific lands included in or deriving from an Answer number recognized in the Pope Decree. "Excess water" is that water in excess of that needed to satisfy all confirmed water rights both on and off the reservation and any water needed to satisfy the Yakama

² *US v. AID*, 236 F.2d 321 (9th 1956), 330 F.2nd 897 (9th Cir. 1964)

³ CP 748

Nation's minimum instream flow right for fish.⁴

What trends against that decision is the fact that a water duty was set at a meager .01 cfs per acre for north side uses and suggests that additional water uses would be prohibited. However, this must be placed in the unique context of Ahtanum Creek, where water was initially divided on a 75%-25% basis.

Therefore it is this Court's belief that the idea of excess water for the north side users as set forth on page 915 only exists in a percentage calculation so as to be consistent with the 1908 Code Agreement. Thus, water users on the north side of Ahtanum Creek were determined to have a right to a certain percentage as further limited by a 0.01 cfs per acre water duty. *Id.*

The Court then cited section I a. of the Pope Decree, which made the award to the North side Defendants. Included in that section is the following language:

“and provided that when the said measured flow exceeds 62.59 cubic feet per second, *defendants shall have no right to the excess, except in subordination to the higher rights of the plaintiff.*

Ahtanum II @ 915 (Emphasis added)

The Decree further provides at section (b), the award to the plaintiffs,

All of the excess over that figure is awarded to Plaintiff, *to the extent that said water can be put to beneficial use.* (Emphasis added)

The Trial Court concluded that *U.S. v. AID (Ahtanum II)* allocated all of

⁴ *Supplemental Report Re: Subbasin No. 23 @ 29* (CP 750)

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, the Court in *Ahtanum II* included excess water within the amount allocated, subject to the beneficial use requirements.

The amount claimed by the YN is based on the amount of water necessary to irrigate all of the “irrigable acres” calculated in the PIA analysis, not the currently irrigated acres. See AID Response Brief at pp. 16-18.

The US Response Brief at page 14, citing *Ahtanum II*, stated that the Trial Court and the Ahtanum Court,

. . . declared that the waters awarded to the Nation after accounting for the northside Code Agreement rights “will be insufficient for the irrigable lands of the Reservation,” thus demonstrating its determination that there was no real surplus water to distribute. *Id.* at 27 (CP 751) (quoting *Ahtanum II*, 330 F.2d at 914).

The statement that there is “no real surplus” is based upon there being insufficient water for the “irrigable lands of the Reservation”. The evidence of irrigable acres on the reservation ranged from 5,100 acres to over 6,000. The Trial Court concluded, in its *Memorandum Opinion Subbasin 23 Exceptions* at page 60, that the total irrigable acres on the Yakama Reservation was 5,100, of which 992.39 were fee land. The Mem. Opin. Further indicated that the U.S. had made an initial claim for

3,306.5 irrigated acres. AID and John Cox presented evidence that 2,500 acres were irrigated in 2007. (CP 11-50) The YN and the US calculate the Reservation water right on the basis of irrigable acres. As long as there is a difference between the irrigable and irrigated acres on the southside, there is a high probability of excess water.

A basis for the Trial Court's rulings on junior/excess rights is its decision that there is no true aggregate right for the north side arising out of the Pope Decree.

The *Report of the Court*, beginning at page 106 (CP 1082) stated:

According to Kenneth Bates, AID President in 1994, it is AID's policy to supply water to persons who were not awarded rights in the Pope Decree if water is available to do so. *Verbatim Report of Proceedings*, April 18, 1994 at 98.

Further, Mr. Bates testified that it was AID's position that the Pope Decree did not terminate any individuals water rights, but reduced the total amount of water received by the District. *Id.* at 97-98.

. . . .

However, the specifics of what the Ninth Circuit ultimately decided in *Ahtanum II* is somewhat confusing when considered in conjunction with the issue discussed by Mr. Bates regarding whether the rights awarded were individual to AID members or could be used collectively by AID patrons. For example, in that decision Judge Pope analyzed the following district court conclusion of law:

That this water rights adjudication under the issues as presented herein is restricted to a determination of plaintiff's rights to the

waters of Ahtanum Creek, as originally reserved under the Treaty of 1855, so far as they were retained by the agreement of 1908, and a determination of defendants' rights, collectively, so far as they were fixed under said agreement. That these rights, under the terms of said agreement, are to be ascertained by measurement and by a percentage division *in the aggregate*, of Ahtanum Creek waters as provided therein without an adjudication of waters to or for any particular tract of lands. *Ahtanum II* at 910.

The Trial Court, in its initial *Report* further stated:

“On one hand, the *Ahtanum II* court indicated that granting an in-gross or aggregate right to AID's patrons was a proper exercise of its discretion. The main justification for this ruling was the court's concern over potential transfers and the "distribution and control functions" that were better dealt with by the state under Washington's 1917 Water Code. *Id.* at 911-12.

Second, the court also noted that the purpose of the United States in filing the suit:

was to procure an adjudication which would protect the rights of the Indians and of the Government, as trustee for them, as against claims of the defendants. The Government cannot be interested in a general adjudication as to the relative rights, among themselves, of the various defendants. *Id.*

The choice of terms used by the Ahtanum II Court is instructive. There appeared to a distinction implied between the use of the generic “adjudication” and the specific “general adjudication”, as that term is used in RCW 90.03.140, formerly RRS § 7367

“On or before the return day of such summons, each defendant shall file in the office of the clerk of said court a statement, and therewith a copy thereof for the department, containing substantially the following:

“(1) The name and post office address of defendant.

“(2) The full nature of the right, or use, on which the claim is based.

“(3) The time of initiation of such right and commencement of such use.

“(4) The date of beginning and completion of construction.

“(5) The dimensions and capacity of all ditches existing at the time of making said statement.

“(6) The amount of land under irrigation and the maximum quantity of water used thereon prior to the date of said statement and if for power, or other purposes, the maximum quantity of water used prior to date of said statement.

“(7) The legal description of the land upon which said water has been, or may be, put to beneficial use, and the legal description of the subdivision of land on which the point of diversion is located.

“Such statement shall be verified on oath by the defendant, and in the discretion of the court may be amended.”

The information provided in the Masters Report and the Trial Court’s Findings & Conclusion did not satisfy the requirements of a general adjudication. All that was provided was name of the owner and a description of the land, with the number of acres. A general adjudication of the individual northside defendants could not have been accomplished with the information at hand. That fact was recognized by Judge Pope and resulted in his conclusion that an adjudication was not necessary to simply allocate the Ahtanum Creek water according to the Code Agreement.

The U.S. Complaint in *Civil 312* did not ask for an adjudication of the individual rights of the defendants.⁵ The complaint requested, at

⁵ (YIN Exh. 27)

paragraph 2-4 of its prayer, that the court (1) declare the agreement of May 9, 1908, Exhibit B of this complaint, be invalid, (2) decree to the United States and its Indian wards the water rights hereinabove set forth as owned and claimed by the United States and its wards and adjudge the rights of those defendants whose properties are situated north of Ahtanum Creek as being subject and subordinate to the prior rights of the United States and its Indian wards and (3) quiet the title of the, United States and its Indian wards in and to those rights to the use of water from Ahtanum Creek . . . and forever enjoin the defendants, and each of them, from interfering with those rights .

In spite of the many references in *Ahtanum II*, maintaining the aggregate nature of the Court's analysis, the Trial Court erroneously stated in the *Report of the Court*,

Based on the analysis of the Ninth Circuit in *Ahtanum I and II*, it is the decision of this Court that there is no true "aggregate" right for AID patrons. Rather the only rights confirmed were to off-reservation users by the Ninth Circuit and those were set forth in the tabulation of answers. The quantities of those rights were then added together to ensure that the north side water use did not exceed the 75% Code Agreement limitation. *Report of the Court @ 110 (CP 1090)*

In its *Supplemental Report*, the Trial Court stated,

Section I a. of the actual Pope Order and Decree (page 915), set

forth above, also impacts this decision. First, it defines, for purposes of the Pope Decree, the class of "defendants" as being those north side users who share the 46.96 cfs - that is the amount, based on water duty, shared by those who successfully defended their water rights as set forth in the answer numbers. The provision goes on to prohibit those same "defendants" from having any right to the excess, *except* in subordination to the higher rights of the plaintiff. That language would limit the universe of those who could use the surplus water to those who succeeded in having a water right confirmed under the answer numbers.

This limit is incorrect because the use of the term "defendants" implies a much broader application. At the time the Decree was being drafted, the term "defendant" encompassed all parties who had filed an answer in US v. AID.

The Trial Court went on to say,

This conclusion [that the term "defendants" is limited to those parties listed on Ex. B] is buttressed by the fact the Ninth Circuit had also found that the findings of water use were conclusive as to the entire use of water in 1908 by north side users.

As stated, Ex. B to the Pope Decree did not list any parties at all.

The language cited is from page 912 of *Ahtanum II* where the Court was addressing the contention of the U.S. appellant that the Findings & Conclusions of the Trial Court had failed to address the claims of some 456 defendants who failed to establish beneficial use of water or the existence of water rights. The fact that these 456 defendants failed to establish claims, is completely irrelevant to the definition of the term

“defendants” in the Decree.

The Decree begins with the following preamble at page 915:

“It is ordered, adjudged and decreed that the waters of Ahtanum Creek shall be and are hereby *divided between the parties to this action* in the following manner and at the following times, to wit:”
(emphasis added)

This language is instructive because, the use of the phrase “parties to this action”, supports the broader scope of the term “defendants” as suggested above. The use of the phrase “*in the spring of each year, to and including the tenth day of July*”, in the following section, supports the AID argument that there is no basis for the US claim that the Trial Court intended the use of excess was to end on May 15.

I

From the beginning of each irrigation season, *in the spring of each year, to and including the tenth day of July* of each such year, said waters shall be divided as follows:

a. To defendants, for use of their lands north of Ahtanum Creek, seventy-five per cent of the natural flow of Ahtanum Creek, as measured at the north and south gauging stations, provided that the total diversion for this purpose shall not exceed 46.96 cubic feet per second, and provided that when the said measured flow exceeds 62.59 cubic feet per second defendants shall have no right to the excess, except in subordination to the higher rights of the plaintiff.

b. To plaintiff, for use of Indian Reservation lands south of Ahtanum Creek, twenty-five per cent of the natural flow of Ahtanum Creek, as measured at the north and south gauging stations; provided that when that natural flow as so measured exceeds 62.59 cubic feet per second, all the excess over that figure is awarded to plaintiff, to the extent that the said water can be put to a beneficial use.

. . .
e. To defendants, all the rest of the return flow in the main stem of Ahtanum Creek, and all the return flow in Hatton and Batchelor Creeks.
. . .

II

After the tenth day of July in each year, all the waters of Ahtanum Creek shall be available to, and subject to diversion by, the plaintiff for use on Indian Reservation lands south of Ahtanum Creek, to the extent that the said water can be put to a beneficial use.

The US Response Brief at page 4 maintains,

The trial court held that the *Ahtanum* Decree recognized “junior” rights to “excess” water with respect to lands for which a specific water right was confirmed in that Decree (pursuant to Appendix B of *Ahtanum II*). The trial court held that the period of use for such rights *ends annually on May 15*, and that they may be exercised up to 0.01 cfs per acre. The trial court held, however, that the *Ahtanum* Decree bars claims to “junior” water rights for northside lands for which water rights were not confirmed any water rights in the *Ahtanum* Decree pursuant to Appendix B.

At page 10 of the US Response brief

As a result, the trial court confirmed a “junior” right to “excess” water only to *Ahtanum*-righted lands. *Id.* at 28-29 (CP 752-753). This right extends only through the floodwater season, to May 15, and in the amount of 0.01 cfs, bringing the total water duty for such lands to a maximum of 0.02 cfs, consistent with the *Achepohl* decree. 2009 Mem. Op. at 4 (CP 459); 2009 Order on Recon. at 4 (CP 95).

There is no reference in the Mem. Opin. or the Order on Reconsideration to an ending date for excess water.

The 2009 Mem. Op. at 3-4 (CP 459) states

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.

The Trial Court did not limit the use of excess water to May 15, but simply provided, by way of example, a season when it might be available. In Order on Reconsideration, the Trial Court referred to the Mem. Opin, and stated,

The Court determined that excess water would be available during the early spring. *Memorandum Opinion*, p. 3, lines 4 through p. 4, line 10. Although not specifically set forth, as can be seen by the confirmed water rights, the Court relied upon a 30-day availability for water users north of Ahtanum Creek.

The preamble to Section I of the Pope Decree adds support to the argument that May 15 has not been established as a limit to excess water rights. It states,

From the beginning of each irrigation season, *in the spring of each year, to and including the tenth day of July* of each such year, said waters shall be divided as follows:

There is no stated time limit, but if one were to be established, it would certainly include the month of June. The Kammerick Declaration, (CP 3-10) supports the view that excess water is available in June. JDC Exhibits 27-29 are USGS data on combined north Fork and South Fork Ahtanum

flow for various years from 1913 to 1998. The data shows that in May the average flow exceeds 200 cfs 40% of the time and in June 30%.

The US Response Brief at p. 3 states,

. . . under the trial court's analysis, "excess" water exists only if there is water remaining after all reservation irrigation requirements, including potential future storage rights, have been satisfied at any given time. See 2008 Supp. Rep. at 23 (CP 749).

Unless and until there is a viable storage facility, speculating about potential future storage should have no place in deciding the availability of excess water.

Aggregate Treatment of North-side Rights in Ahtanum II

The Court in *Ahtanum I* at 339 had found fault with the answers from the defendants.

Thus the answer of Ahtanum Irrigation District and of 'the above named defendant landowners, water users, lienholders and encumbrancers whose lands lie within the boundary of said district', is wholly uninformative as to who these water users are, what lands they claim to have the right to irrigate, or how they deraign their titles to any water rights.

. . .

Since the cause must be remanded for further proceedings in the trial court, and since those proceedings must determine and adjudicate the respective rights of the parties, during which defendants must be required to show and disclose their rights and titles, it is apparent that proper and appropriate answers must be required from all defendants. Although a pretrial order was made, it wholly failed to correct or deal with this insufficiency of the answers.

Ahtanum I @ 339

The *Ahtanum I* court was no more specific than that by instructions

regarding what was required by way of identification of claims. Even so, the U.S. seems to have assumed that more was required.

"Appellant asserts that these directions [on remand from Ahtanum I] cannot be implemented unless the court adjudicates the water rights of each individual defendant separately and individually.

Ahtanum II @ 910

It appears to have been the U.S., the appellant in U.S. v. AID, that was concerned with an individual adjudication rather than the *Ahtanum I* Court.

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

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

The Court in *Ahtanum II* concluded its analysis of aggregate vs. individual treatment with the following at 330 F. 2nd 912.

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

"One matter properly to be considered in the exercise of this discretion is the fact that the State of Washington had established

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

This treatment of the U.S. request for a general adjudication explains why other issues were addressed as they were in *Ahtanum II* and why the Trial Court in this case was incorrect in stating that the excess water right had to be connected to the rights granted to claimants awarded a senior right based on percentage allocation. If the underlying basis of the Pope Decree is an aggregate allocation, the interpretation of the paragraph I a & b language, as well as the paragraph II excess language must be interpreted in the aggregate and the scope of the term "defendants" should be widened to include all answering parties with Achepohl certificates.

It is clear from the foregoing language from *Ahtanum II* that the Ex. B list of northside parties and land was simply a means to determine the total number of acres on the northside, which, together with the ½ inch per acre found in the 1962 Findings & Conclusions at numbers 15 & 17, allowed

the Court to calculate the percentage allocation required by the Code Agreement.

At page 10 of its Response Brief, YN maintains,

The *Acquavella* court was correct that the *Ahtanum* court reexamined the northside parties' water rights and, under the Code Agreement, further limited them. Whether or not there was an adjudication in *Ahtanum* it is clear that issues litigated there are binding in this case.

After citing a case dealing generally with collateral estoppel, the YN Response brief goes on to say,

Without having to reach the outer limits of both doctrines, it is plain that the *Ahtanum* court reached the issue here and actually litigated and limited the rights of the northside parties to take water.

Ahtanum confirmed water rights for certain *specific parties for specific lands* on the northside identified by the numbers assigned by the court to their answers to the United States' complaint in that case. *Ahtanum II*, 330 F.2d at 917-919. (The Ex. B pages)

The reason the federal court did this was simple: it needed to identify those individuals who could benefit from the Code Agreement. Absent being a successor in interest to the Code Agreement, the individual northside parties could not claim a right to a prorata share of the northside Code Agreement water. It therefore became vitally important to identify those individuals.

This argument is not supported by the language in *Ahtanum II* that “The government cannot be interested in a general adjudication as to the relative

rights among themselves, of the various defendants. It would not be interested in their respective priority.” In fact, the Decree doesn’t even list parties.

B. Whether the trial court correctly denied the “senior” water right claims of **Hull Ranches** because their predecessors did not file answers and/or otherwise were not confirmed water rights in *Ahtanum*.

The facts supporting Hull Ranches claim that an egregious error, committed by the Ahtanum II Court have been previously stated on several occasions, the latest being in the AID Opening Brief at pp. 29-33. Those facts will not be restated here, nor will the legal argument, except to provide an addition legal authority regarding claim preclusion.

. . . even if there is identity in the successive actions, a final judgment on the merits, in a proper tribunal, claim preclusion does not automatically follow. While there are strong policies arguing for finality, there are other, equally strong and possibly countervailing, policies in the law. Res judicata is a court-created concept and is subject to flexible, pragmatic application. Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*" 60 WASH. LAW REV. 805, 826 (1985).

C. Whether AID’s appeals regarding the water right claims of Richardson, Splawn, Lynde and the Chancery should be denied because AID did not raise in the trial court the issues it seeks to address here.

The US argues against the Appellate Court correcting a clerical error or omission of the trial court for the reason that the omission went unnoticed until after the CFO was entered.

It is argued AID failed to preserve these issues for appeal, and this Court should decline to address them. *See* RAP 2.5(a). It is further argued that the appellate court generally will not consider issues raised for the first time on appeal. US Response Brief @ 39

The US misstates RAP 2.5(a), which reads:

The appellate court *may refuse* to review any claim of error, which was not raised in the trial court.

The case relied upon by the US is *State v. Kirkman*, 159 Wn.2d 918

Although it is within the discretion of the Appellate Court to decline to review the clear oversight of one parcel in thousands, it is also within the Courts discretion to correct the clerical error.

CR 60 (a) provides that “Clerical mistakes may be corrected after review is accepted pursuant to RAP 7(e), which gives authority to the trial court to modify a decision on review.

CONCLUSION

AID requests that the Court of Appeals issue an opinion consistent with the argument and authority presented.

Respectfully submitted this 7th day of September, 2010.

TALBOTT, SIMPSON & DAVIS, PS
Attorneys for Ahtanum Irrigation District

By: _____
JAMES E. DAVIS, WSBA# 5089