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SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

IN THE MATTER OF THE DETERMINATION)	
OF THE RIGHTS TO THE USE OF SURFACE)	
WATERS OF THE YAKIMA RIVER)	No. 77-2-01484-5
DRAINAGE BASIN, IN ACCORDANCE WITH)	
THE PROVISIONS OF CHAPTER 90.03,)	ORDER
REVISED CODE OF WASHINGTON)	
STATE OF WASHINGTON DEPARTMENT OF)	
ECOLOGY,)	SUBBASIN NO. 23
Plaintiff,)	(AHTANUM)
v.)	
JAMES J. ACQUAVELLA, et al.)	
Defendants.)	

This matter came before the court on Remand from the Washington State Supreme Court. The Conditional Final Order (CFO) for Subbasin No. 23 (Ahtanum) was entered by the court on April 15, 2009, and constituted a final order for purposes of appeal. It was appealed by several parties. The Supreme Court on March 7, 2013, affirmed and reversed portions of the CFO, and remanded others for further consideration. Several motions for reconsideration were filed. On May 22, 2013, the Supreme Court issued an Order Changing the March 7, 2013 ruling, and on May 23, 2013 denied any further reconsideration.

The Supreme Court affirmed: 1. The trial court's determination that the decision in *United States of America vs. Ahtanum Irrigation District* was an adjudication of nontribal water rights; 2. The trial court's conclusion regarding the rights of nontribal claimants to excess water; 3. The trial court's denial of claims for LaSalle High School, Donald and Sylvia Brule, Jerome Durnil and Albert Lantrip.

The Supreme Court reversed: 1. The trial court's decision regarding the Yakama Nation's water right and right to store water; 2. The trial court's application of the future development

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1 exception under RCW 90.14.140(2)(c) for nonuse of a water right. The Supreme Court also
2 remanded the Chancery claim to correct an apparent clerical error regarding the Chancery parcel.

3 As a result of the Supreme Court's ruling on application of the future development
4 exception under RCW 90.14.140(2)(c), the water right confirmed to Clifford Hagemeyer, and
5 described on page 258 of the Supplemental Report of the Court, is withdrawn.

6 The Supreme Court also upheld three uncontested assignments of error: 1. The name on
7 the water rights confirmed to the Yakama Nation should be United States of America, Bureau of
8 Indian Affairs as trustee for the Yakama Nation and Allottees; 2. The right of the Yakama Nation
9 to divert from Ahtanum Creek should be amended to authorize diversion from April 1 to April
10 14, subject to John Cox's right and subject to minimum instream flows necessary to support fish
11 and other aquatic life; 3. The court erred in confirming a non-diversionary stockwater right for
12 the Washington State Department of Natural Resources and other individual northside parties
13 senior to all others, except the Nation's instream right to fish and other aquatic life. The issue
14 was remanded for a determination of priority date and further conclusions of law as appropriate.

15 Following briefing on the issues remanded, the court determined that the only matter
16 requiring a hearing was the extent of the PIA/storage right of the Yakama Nation and United
17 States. That hearing was held on March 12, 2015.

18 **Remanded Issues:**

19 1. Non-diversionary stock watering - On February 18, 2015, the Yakama Nation, United
20 States, Ahtanum Irrigation District, the Washington Department of Natural Resources and the
21 Washington Department of Ecology jointly filed a Motion to Amend Report of the Court
22 Concerning Water Rights For Subbasin No. 23 (Ahtanum Creek) seeking amendment of the
23 paragraph in the Report of the Court at page 114, lines 14 to 19 related to the retention of water
24 in naturally occurring water courses for stock water purposes. On April 3, 2015, the court
25 granted the motion and issued an order that resolved the remand related to retention of water in
26 natural watercourses for non-diversionary stock water for northside water users, including the
Washington State Department of Natural Resources. The Order amended the Report of the
Court Concerning Water Rights for Subbasin No. 23 (Ahtanum Creek), at page 114, lines 14
through 19 to read as follows:

1 Waters in natural watercourses in the subbasin shall be retained when naturally
2 available, in an amount not to exceed 0.25 cubic feet per second (cfs), for stock
3 water uses in such watercourses as they flow across or are adjacent to lands,
4 which are now used as pasture or range for livestock. Retention of such water
5 shall be deemed senior (or first) in priority, except as that use is inconsistent with
6 the Yakama Nation's instream right for fish which carries a priority date of "time
7 immemorial" or as that use is inconsistent with the Yakama Nation's treaty water
8 rights for irrigation which carry a priority date of June 9, 1855, in which case the
9 Nation's rights shall have priority. Regulation of these watercourses outside of
10 the Yakama Reservation by the plaintiff or, in the case of watercourses on the
11 Yakama Reservation, regulation by the United States Bureau of Indian Affairs or
12 the Yakama Nation shall be consistent with such retention requirements.

8 2. The court last considered the Chancery water right in the Supplemental Report of the
9 Court entered on February 25, 2008. The Chancery property is part of the land addressed in
10 Answer No. 46 (Answers were filed by 221 north side individuals and John Cox in response to
11 the Complaint filed by the U.S. and provided the number of acres irrigated between 1908 and
12 1957.) In the Supplemental Report, the court found that within the lands described in Answer
13 No. 46 there was potentially a right to irrigate 60 acres. Three landowners own portions of
14 Answer No. 46 lands: The Chancery, Russell and Catherine Wilkinson and Dwinell's Central
15 Neon Company. Water rights for the land owned by Wilkinson and Dwinell are not at issue.
16 The court relied on AID-8A for division of the 60 acres between the three landowners,
17 concluding that the Chancery had a right to irrigate 23.54 acres in Parcel # 171218-21004 and
18 20.07 acres within Parcel # 171218-23001. However, in the Supplemental Report, the court
19 erroneously confirmed water rights only for the lands in Parcel # 171218-21004. The court now
20 also confirms a right with a June 30, 1889 date of priority for the diversion from Bachelor and
21 Hatton Creeks of 0.20 cfs, 35.60 acre-feet per year for the irrigation of 20.07 acres. The points
22 of diversion are within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and Government Lot 4 of Section 13, T. 12 N., R. 16
23 E.W.M. and Government Lots 1 and 2 and the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 18, T. 12 N., R. 17 E.W.M.
24 The place of use is that portion of Government Lots 1 and 2 lying north of the centerline of
25 Hatton Creek and south of Ahtanum Road in Section 18, T. 12 N., R. 17 E.W.M., (Parcel
26 #171218-23001, Answer No. 46). The right shall contain the following Limitation of Use
provision:

1 When water is available in excess of that needed to satisfy all confirmed water
2 rights both on and off the reservation and any water needed to satisfy the Yakama
3 Nation's minimum instream flow right for fish and other aquatic life, an additional 0.20
4 cfs, 11.88 acre-feet per year can be diverted.

5 3. Practicably Irrigable Acreage and Storage. The Supreme Court remanded the issue of
6 Practicably Irrigable Acreage (PIA) holding that the *Ahtanum* federal proceeding did not
7 quantify the Nation's PIA right, and the court erred in not considering the United State's 1993
8 evidence of PIA. It directed the court to consider the 1993 evidence and establish PIA. As part
9 of the PIA determination, the Supreme Court also remanded the issue of storage, for both the
10 irrigation and non-irrigation season.

11 After considerable briefing and a hearing on the issues of PIA and storage, the court
12 entered a Scheduling Order that ordered:

13 The United States' (joined in by the Yakama Nation) expert testimony and supporting
14 documentary evidence re: practicably irrigable acreage (PIA) and water storage filed in
15 1993 in this case will be considered by this Court. *Scheduling Order, January 21, 2014.*

16 It also allowed other parties to file their own expert testimony and evidence to rebut the
17 1993 evidence. The court established time lines and other requirements for doing so.

18 Expert testimony and supporting documentary evidence in response to and in rebuttal to
19 that submitted by the United States and Yakama Nation in 1993 shall be served and filed
20 on or before April 7, 2014. All direct expert testimony shall be reduced to written sworn
21 statements and, together with exhibits related thereto and the qualifications of the
22 witnesses, shall be filed on or before April 7, 2014. Any objections to the already
23 submitted 1993 evidence shall also be served and filed by April 7, 2014. *Scheduling
24 Order, January 21, 2014.*

25 On April 7, 2014, AID filed the Declaration of Beth Ann Brulotte (Brulotte Declaration)
26 which included an unsworn statement entitled "Research into the Secretary of the Interior 1942
Report (Feasibility of the Klickitat Project) By Beth Ann Brulotte, Executive Assistant/Ahtanum
Irrigation District August 27, 2013" which included many documents relating to the Klickitat
Project. The unsworn statement contains her opinion regarding the content of those Klickitat
Project documents.

 Both the U.S. and Yakama Nation filed objections to AID's April 7th filing. Their
objections pertain to the declaration, attached statement, and the Klickitat Project documents.

1 The Declaration and Unsworn Statement: The U.S. and Nation argue that the Brulotte
2 Declaration and unsworn statement do not comply with the court's scheduling order and should
3 be stricken and not considered by the court. Moreover, the declaration does not include her
4 qualifications to be an expert witness and her testimony is contained in an unsworn statement.
5 They argue that Ms. Brulotte is not qualified as an expert witness under Rule 701 or 702.
6 Moreover, not only have the Klickitat Project documents not been authenticated, but are also
7 irrelevant.

8 In response, AID states it offered the Brulotte Declaration as the custodian of business
9 records for AID, not as an expert witness, and did not intend to rely on the Brulotte Declaration
10 or the attached unsworn statement. Consequently, AID believes the objections to the declaration
11 and statement are moot.

12 The court agrees with the U.S. and Yakama Nation. The court will not consider the
13 declaration or the attached statement as they neither comply with the Scheduling Order, nor fall
14 within Rule 701 or Rule 702. Both are stricken and are disregarded.

15 The Klickitat Project documents: AID argues that the Klickitat Project documents
16 should not be rejected based on failure to qualify Ms. Brulotte as an expert as they may have
17 some relevance to the issue of PIA and storage. The U.S. and the Yakama Nation object to
18 admission and consideration of the Klickitat Project documents not only on lack of
19 authentication, but also on relevance.

20 While the court does not accept AID's arguments and agrees with the U.S. and the
21 Yakama Nation, should this later become an issue the court should have considered, it will be
22 discussed herein.

23 In support of its arguments, the U.S. provided four declarations from the following
24 experts: Two from Paul Hamai, Review of Ahtanum Irrigation District Court Filings and
25 Changes in Dam Technology from the 1930s to Early 1990s; Ron Billstein, who assessed the
26 design and proposed construction of the Klickitat Project and compared it to the 1993 evidence;
and Daniel Gallacher, who reviewed the historic record regarding the Klickitat Project. The
U.S. also filed a number of exhibits to complete the record on the Klickitat Project.

 The majority of the documents pertaining to the Klickitat Project are from the 1930s,
1940s and 1950s although there are some documents dating back to 1910/1911. The Klickitat
Project was a significant project to divert water from the Klickitat River for hydropower

1 purposes and provision of irrigation water to the Toppenish-Simcoe areas. The Ahtanum area
2 was included because storage on Ahtanum Creek was not considered feasible and additional
3 water was needed to deal with long standing water shortages. The Klickitat Project included
4 storage reservoirs and substantive trans-basin conveyance works (tunnels, pipelines, canals) to
5 deliver water to the proposed irrigated areas in Toppenish-Simcoe and Ahtanum. The proceeds
6 from hydropower sales were to offset some of the costs of the irrigation works.

7 Although there was substantial local support for the project there was a competing project
8 on the Umatilla River. During the 1940s, the government determined that the Umatilla Project
9 could generate greater hydropower at a lower cost than the Klickitat Project and was much better
10 suited to aid in the war time effort. While attempts to gain approval of the Klickitat Project
11 extended into the 1950s, it was ultimately determined that it was not economically feasible given
12 the remote location and projected costs. The hydropower component would not adequately
13 offset the cost of providing irrigation water to the Toppenish, Simcoe and Ahtanum areas.

14 *The court's conclusions re: Klickitat Project documents:* A determination of PIA
15 involves a two-part analysis. First, it must be established that the land is arable and feasible from
16 an engineering standpoint to irrigate, and second the land must be irrigable at a reasonable cost.
17 See *In Re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753
18 P.2d 76 (1988). Given this analysis, does the Klickitat Project provide any useful information to
19 assist the court in establishing PIA and storage? The Klickitat Project documents do contain
20 general discussions of acreages, quantities of water and storage feasibility on Ahtanum Creek.
21 However, the proposed Klickitat Project had a different source of water, and the substantial
22 irrigation works, delivery systems and storage facility were based on different technical
23 standards. It was ultimately determined that the Klickitat Project would not be a cost effective
24 method for providing water.

25 As stated in the "UNITED STATES' OBJECTION TO AHTANUM IRRIGATION
26 DISTRICT DECLARATION AND DOCUMENTARY EVIDENCE AND THE UNITED
STATES' RESPONSE AND REBUTTAL, INCLUDING SWORN DECLARATION
TESTIMONY AND DOCUMENTARY EVIDENCE PURSUANT TO ORDER OF
JANUARY 21, 2014: SUBBASIN 23 (AHTHANUM)":

1 The Klickitat Project documents submitted by AID, describe a different project,
2 with a different purpose, on different land, using different water and technology and
3 according to different economics. . . .AID has not and cannot make even a remote
4 connection between what was done in the 1930's and the United States' PIA claim. . . .
5 AID's inability to connect the historical documents it produced to the United States' 1993
6 Evidence demonstrates that AID has failed to establish that the evidence is relevant to the
7 United States' PIA claim. Pages 6-7.

8 The court concludes that the Klickitat Project records have no relevance to the PIA and
9 storage issues. There is no sufficient technical analysis to establish the arable lands and their
10 suitability for irrigation nor was it an economically viable project. The record does not assist the
11 court in determining PIA from Ahtanum Creek nor does it preclude confirmation of a right if
12 adequate evidence is presented. Even if AID had complied with the January 21, 2014 order, it
13 would not change the records' lack of relevance. They would still carry little or no weight with
14 the court. Moreover, 1993 documents constitute substantial, credible evidence, and conclusively
15 settle the PIA and storage issues.

16 PIA Evidence: AID, the U.S., the Yakama Nation and Ecology agree that there is
17 sufficient evidence in the record to determine PIA/storage on the Yakama Reservation from
18 Ahtanum Creek. The U.S. and Yakama Nation argue that the 1993 evidence is sufficient to
19 establish PIA and storage. Moreover, no other relevant evidence has been admitted.

20 AID argues that the Supreme Court ruled only that the 1993 evidence should be
21 considered, it did not mandate that it must be relied upon to the exclusion of all other evidence.
22 AID argues the court should consider other relevant evidence of PIA. Attached to AID's
23 September 8, 2014 Brief are portions of AID's and Johncox's Response Briefs to the Supreme
24 Court (attachments A and B). Those Response Briefs describe the other evidence that AID
25 argues this court should reconsider. The U.S. and Yakama Nation state that the evidence in
26 AID's briefs was previously considered by the Supreme Court and rejected as not providing the
basis for a PIA determination.

1950's Litigation Evidence: The evidence discussed in AID's and John Cox's Response
Briefs to the Supreme Court are the 1951 and 1957 Pre-trial Orders, both of which contained
acreage figures. This court had relied on the 1957 order in establishing the acreage for the
Nation. See also *Memorandum Opinion RE Ahtanum Watershed Practicably Irrigable Acreage*,
1994. The Supreme Court discussed both of those orders in its ruling. While the court agrees

1 with AID that the Supreme Court did not mandate consideration of the 1993 evidence to the
2 exclusion of any other evidence, there is no other credible evidence on which to rely.

3 With regards to the 1951 Pre-trial Order, the Supreme Court stated: “It would be a
4 dubious conclusion to say that the United States’ evidence of irrigable acreage incorporated into
5 the 1951 pretrial order made a preclusive quantification of the reservation’s irrigable acreage
6 when the proceeding under which the order was entered ultimately found the United States had
7 no interest whatsoever in the water.” *In Re Surface Water Rights*, 177 Wn.2d 299, 331-332, 296
8 P.3d 835 (2013).

9 With regards to the 1957 Pre-trial Order, the Supreme Court stated: “This is not
10 adequate to meet the practicably irrigable acreage standard, which must account for both present
11 and future needs to the reservation.” *In Re Surface Water Rights*, 177 Wn.2d 299, 332, 296 P.3d
12 835 (2013).

13 The Supreme Court’s ruling is clear. The 1950s Federal litigation evidence is
14 insufficient to quantify PIA or determine a storage right.

15 *U.S. 1993 PIA Evidence:* The U.S. and Yakama Nation offer the 1993 evidence and
16 expert testimony to prove their claim of PIA including storage on the south side of Ahtanum
17 Creek for Trust and Tribal fee lands. AID did not file an objection to the 1993 PIA evidence
18 by April 7, 2014 as required by this court’s Scheduling Order nor did it object to the July 2, 2014
19 declarations and associated evidence. The following 1993 evidence was admitted on March 15,
20 2015:

21 US 111: Direct Testimony of Ross Steven Waples, Soils Scientist and the report
22 South Side Ahtanum Creek Land Classification Investigation. Mr. Waples’ land
23 classification determined the arability of future or idle (historically irrigated lands not
24 irrigated from 1985 to 1987) trust and tribal fee lands. He used the 1976 SCS Soils
25 Survey, which generally covered the lands along Ahtanum Creek, and the Yakama
26 Nation’s Soil Survey for other lands. Soil profiles were studied, deep boring and
hydraulic conductivity tests were done. It was Mr. Waples opinion that there were
3,521.2 acres of future arable lands of which 2,221.6 acres are field/pasture and 1,299.6
acres orchard/vineyard; and 577.8 acres of idle arable lands of which 548.6 acres were
field/pasture and 29.6 acres were orchard/vineyard.

1 US 112: Direct Testimony of Ralph Saunders, Water Right Specialist and
2 Certified Photogrammetrist, and the report on South Side Ahtanum Creek Hydrographic
3 Survey Irrigated Lands. US 112 B is the Irrigated and Arable Land Base – Trust and
4 Tribal Fee lands. Mr. Saunders' survey shows which Trust and Tribal fee lands were
5 actively and historically irrigated and the type of crops grown. Mr. Saunders determined
6 there were 2,914.7 acres of Trust and Tribal fee land being actively irrigated from
7 Ahtanum Creek and 577.8 acres historically irrigated but idle 1985 to 1987.

8 US 112 included the South Side Water Supply Study by Gary E. Elwell, P.E.
9 (Attachment I). The purpose was to quantify naturally occurring surface water that
10 could be representative of long term availability. Data collection and operation
11 modeling was either conducted by Mr. Elwell or conducted under his direction. USGS
12 and/or USBR stream flow records from 1925 to 1984 were used from three locations:
13 South Fork Ahtanum Creek at Conrad Ranch, North Fork Ahtanum Creek at Tampico
14 and Ahtanum Creek at Union Gap. Where the data was insufficient, other data was
15 relied upon, analyzed and adjusted to complete the data. The study period of 1925 to
16 1984 provided data for both wet and dry cycles. It was Mr. Elwell's opinion that it could
17 be considered representative of long term conditions.

18 US 113: Direct Testimony of Gary Evan Elwell, P.E., and report on South Side
19 Ahtanum Creek, Hydrology and Hydraulics Ahtanum Dam. Mr. Elwell developed the
20 operational model used to calculate the size of the reservoir needed. He utilized the data
21 from Dr. Mesghinna regarding water requirements needed to irrigate the lands (US 116).
22 It was Mr. Elwell's opinion that it is possible to irrigate 2,728.7 acres of Trust and Tribal
23 fee lands with natural flow and 3,652.6 acres of future and idle land with natural flow and
24 reservoir/storage. A reservoir with the capacity to store 9,216 acre-feet would be
25 needed.

26 US 116: Direct Testimony of Dr. Woldezion Mesghinna. Dr. Mesghinna
prepared Depletion Study for the Ahtanum Creek basin (depletion being defined as:
Depletion = Agricultural Diversions – Return Flows + Stockpond Evaporation, Study, p.
1.) Dr. Mesghinna looked at the diversions from the North and South Forks of Ahtanum
Creek upstream of the USGS gauging station. He determined that during the study
period there was little irrigation above the North Fork and between 19.2 and 43.3 acres

1 irrigated from the South Fork. It was Dr. Mesghinna's opinion that depletions in the
2 North Fork and South Fork are very small, approximately 193 acre-feet or 1.2% of
3 15,000 acre-feet of available creek flow, and that the gauge flow can be considered equal
4 to undepleted flows (Study, p. 12).

5 Dr. Mesghinna also prepared Design and Cost Analysis of Irrigation Conveyance
6 Facilities, and Determination of Present and Future Irrigation Water Requirements and
7 Cost Analysis of Conveyance Facilities. The irrigation system consists of diversion
8 works, canals, distribution and delivery systems including costs for upgrading existing
9 facilities to serve the future lands. There are two existing diversion works and canals on
10 Ahtanum Creek. The Upper Ahtanum Canal is designed for a maximum diversion of 191
11 cfs and is 15.5 miles long. The Lower Ahtanum Canal is designed for 16 cfs and is 5.6
12 miles long. Both would need some rehabilitation to support PIA. The proposed South
13 Fork Ahtanum canal is 3.2 miles long with a diversion capacity of 6.4 cfs. The future
14 lands will require 11,587 acre-feet per year and the presently irrigated lands will require
15 9,966 acre-feet per year, or 21,553 acre-feet per year for 6,381.3 acres (Table 12).

16 US 117: Direct Testimony of Joseph Demaggio and report On-Farm Design and
17 Cost Analysis of Irrigation Systems and On-Farm Irrigation Water Requirements. Mr.
18 Demaggio developed the irrigation system to serve idle irrigated Trust Land and new
19 Trust land. He established the water requirement needed to successfully irrigate the crops
20 and the on-farm irrigation system appropriate for the crops to be grown including costs
21 for those systems.

22 US 119: Direct testimony of James P. Merchant, Economist. Mr. Merchant
23 prepared the report Economic Analysis of Future Water Uses that details the economic
24 feasibility of irrigating new and idle Trust and Tribal fee lands. A number of factors
25 went into his analysis including crop selection, yields prices, net returns and engineering.
26 Dr. Mesghinna's cost analysis (US 116) was provided to Mr. Merchant to assist with
determining the cost ratio benefit. Mr. Merchant determined the cost benefit for each
field, pump station and the area as a whole. It was Mr. Merchant's opinion that the
returns would exceed the costs.

1 US 118: Affidavit of Lila LaDue, Supervisory Reality Specialist, Land and Titles
2 and Records Section, Bureau of Indian Affairs, Portland Office. It was her job to keep
3 current the records/titles of all Trust Lands and when those lands leave trust. Ms. LaDue
4 is authorized to authenticate and certify those documents. She provided land ownership
5 data to HKM for their use.

6 *The court's conclusions re: the 1993 PIA evidence:* The 1993 evidence is reliable and
7 credible and permits quantification of the Yakama Nation PIA. This evidence provides the
8 technical analysis for this court to determine the present and future needs of the Yakama Nation.
9 There is no other credible evidence to counter it. The total PIA is set at 6,318.3 acres (2,728.7
10 irrigated and 3,652.6 irrigable).

11 *The 1993 Storage Evidence:* The Supreme Court remanded the issue of a storage right as
12 part of the court's PIA determination (April to October). It held that the Pope Decree did not
13 foreclose a storage right during the non-irrigation season (October to April) and ordered the court
14 to determine if a water right can be awarded for that season. The U.S. provided the following
15 1993 evidence regarding the proposed dam and site:

16 US 113: Direct Testimony of Gary Evan Elwell, P.E., and report on South Side
17 Ahtanum Creek, Hydrology and Hydraulics Ahtanum Dam. Mr. Elwell developed the
18 operational model used to calculate the size of the reservoir needed. He utilized the data
19 from Mr. Mesghinna regarding water requirements needed to irrigate the lands (US 116).
20 It was Mr. Elwell's opinion that a reservoir with the capacity to store 9,216 acre-feet
21 would be needed.

22 US 114: Direct Testimony of Greg Underhill and the South Side Ahtanum Creek
23 Geotechnical Investigation report. Al Hersich also contributed to the South Side
24 Ahtanum Creek Geotechnical Investigation report. Mr. Underhill reviewed previous
25 BOR technical reports and conducted site and various geotechnical investigations to
26 determine the foundation suitability of the proposed dam site. In Mr. Underhill's
27 opinion, the area is suitable for a dam.

28 US 115: Direct Testimony of Al T. Hersich, and report on South Side Ahtanum
29 Creek Dam Design and Cost Estimate. Mr. Hersich reviewed previous BOR and other
30 technical reports. Although in the 1967 BOR report an earthen dam was selected, it was

1 Mr. Hersich's opinion that a Roller Compacted Concrete dam was the best technical
2 choice given the location and smaller quantity of water to be stored.

3 The U.S. asks for a right to store 9,216 acre-feet of water based on the 1993 evidence.
4 AID argues that this evidence is outdated, does not reflect the true cost of construction in today's
5 dollars, fails to consider any environmental factors, and the proposed dam site/inundated lands
6 are not on land owned by either the U.S. or Yakama Nation. AID questions how they will
7 acquire the land without a power of eminent domain. Moreover, there is no current evidence to
8 show the feasibility of this site. The U.S. and Nation counter that these arguments were not
9 raised by the April 7th deadline, and there are costs built into the estimates for environmental
10 studies.

11 *The court's conclusions re: storage:* AID did not object to the 1993 evidence nor
12 provide any relevant evidence to counter it. The Supreme Court ordered consideration of the
13 1993 evidence and ruled that the Code Agreement does not foreclose confirmation of a storage
14 right. Consideration of the 1993 evidence supports the conclusion that the Yakama Nation is
15 entitled to a storage right of 9,216 acre-feet. The court therefore confirms a right to store 9,216
16 acre-feet.

17 **Water Right:** The court grants a water right based on the 1993 evidence of Practicably
18 Irrigable Acreage including a right to storage to the United States Bureau of Indian Affairs as
19 trustee for the Yakama Nation and Allottees for Trust and Tribal Fee lands as follows:

20 **Priority Date:** June 9, 1855

21 **Source:** Ahtanum Creek and South Fork Ahtanum Creek

22 **Purpose of Use:** Irrigation and stock water

23 **Instantaneous Quantity:** Upper Ahtanum Canal: 190.8 cfs
24 Lower Ahtanum Canal: 16.0 cfs
25 South Fork Ahtanum Canal: 6.4 cfs

26 **Annual Quantity:** 21,553 acre-feet per year, including 9,966 acre-feet for presently
irrigated lands, 11,587 acre-feet for future and idle lands, and a
maximum (for July) monthly demand of 5,447 acre-feet per month.

Operational Model: Natural flow to irrigate 2,728.7 acres
Natural flow and reservoir to irrigate 3,652.6 acres
Reservoir storage capacity: 9,216 acre-feet

1 **Diversions:** Presently irrigated from March to December
2 Future irrigation from April 1 to October 1

3 **Trust and Tribal Fee Acres:** 2,728.7 irrigated acres
4 3,652.6 irrigable acres

4 **Total Practicably Irrigable Acreage:** 6,381.3 PIA acres

5 **Points of Division:** No. 1: Ahtanum Canal #1: Approximately 2700 feet south and 300 feet
6 west of the NE corner of Section 14, being within Lot 5 of the SE $\frac{1}{4}$ NE $\frac{1}{4}$
7 of Section 14, T. 12 N., R. 16 E.W.M.
8 No. 2: Ahtanum Canal #2: Approximately 2100 feet north and 700 feet
9 west of the SE corner of Section 7, being within Lot 8 of the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of
10 Section 7, T. 12 N., R. 18 E.W.M.
11 No. 3: South Fork Ahtanum Creek

9 **Place of Use:** As described in the Conditional Final Order.

10 **Limitations of Use/Special Terms of Use:**

11 From April 1 through April 14: The United States as trustee for Yakama Nation and
12 Allottee's may divert and store water from Ahtanum Creek in its entirety, subject to Johncox's
13 right and subject to minimum instream flows necessary to support fish and other aquatic life.

14 From April 15 through July 10: 25% of the natural flow of Ahtanum Creek as measured
15 at the north and south gauging stations. If the natural flow exceeds 51.8 cubic feet per second
16 (north-side users are permitted to divert 38.839 cfs which is equal to 75% of the 51.8 cfs), all the
17 excess over that figure is awarded to the United States as trustee for the Yakama Nation and
18 Allottees for Trust and Tribal fee lands, to the extent water can be put to a beneficial use. The
19 38.839 cfs is subject to further reductions due to reversions by north-side parties.

18 This water right is a portion of the proratable 25% of the Ahtanum Creek natural flow
19 that is available from April 15 through July 10 for use on lands within the Yakama Reservation.

20 All waters not used on the north side parcels with valid water rights shall become
21 available for use on the reservation lands. The United States may divert the entirety of Ahtanum
22 Creek subject to water rights allocated to users located north of Ahtanum Creek and the Nation's
23 instream flow right, to the extent that said water can be put to beneficial use.

23 From March to March 31 and July 11 to December: All waters of Ahtanum Creek not
24 used for instream fishery purposes and livestock watering shall be available to, and subject to
25 diversion by the United States, Bureau of Indian Affairs, as trustee for the Yakama Nation and
26 Allottees.

