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FILED
NOV 9 1994

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

NOV 9 1994

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,)

NO. ~~KIM-12-2001-84-5~~ PARTIA COUNTY CLERK

Plaintiff,

Memorandum Opinion Re:
Ahtanum Watershed
Practicably Irrigable
Acreage

vs.

JAMES J. ACQUAVELLA, et al.,

Defendants.

I. INTRODUCTION

In August, 1993, the United States filed its case-in-chief to support the reserved water rights of the Yakama Indian Nation (YIN). Included within that filing were "testimony, reports, and proposed exhibits...consist[ing] of a series of analyses, opinions and conclusions as to the identification and extent of the practicably irrigable land base within the Yakama Indian Reservation that could be irrigated from Ahtanum Creek." U.S. Brief in Support of Case-in-Chief. Prior to, and at the time of the evidentiary hearing, certain non-Indian irrigation water users holding fee lands on the reservation and the Department of Ecology (DOE) objected to U.S. proposed exhibits 111-119 on grounds of relevance. See Transcript of Hearings April 19, 1994, p. 98-113. The issue of relevancy in this context was defined and briefed as to whether the Federal courts in the Ahtanum series of cases had

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10,043

1 already quantified the maximum amount of practicably irrigable acres.
2 See United States v. Ahtanum Irr. Dist, 124 F. Supp 818 (1954) rev'd
3 United States v. Ahtanum Irr. Dist. 236 F.2d 321 (9th Cir. 1956),
4 Ahtanum I, cert. denied 352 U.S. 988 (1957); United States v. Ahtanum
5 Irr. Dist., 330 F.2d (9th Cir. 1964), Ahtanum II, cert. denied 381 U.S.
6 924 (1965). It was argued that if the Ninth Circuit quantified the PIA,
7 then allowing in documents to establish the PIA in this proceeding would
8 be unnecessary.

9 II. OPINION

10 A. Background

11 Ahtanum Creek forms a part of the northern boundary of the Yakama
12 Indian Reservation which was created by the Treaty with the Yakima
13 Nation of Indians, June 9, 1855, 12 Stat. 951. That treaty, in light of
14 Winters v. U.S., 207 U.S. 564 (1908), reserved to the YIN rights in and
15 to the waters of Ahtanum Creek. U.S. v. Ahtanum Irr. Dist., 236 F.2d
16 321, 325 (9th Cir. 1956). From that starting point, our task in this
17 general adjudication is to determine the amount of Ahtanum Creek water
18 that is presently available for use on reservation lands. In Arizona v.
19 California, 373 U.S. 546 (1963), the United States Supreme Court adopted
20 the "practicably irrigable acreage" (PIA) standard which defines the
21 water right by determining the land base upon which that water will be
22 used. Reservations of water for that purpose include present as well as
23 future needs. Id. at 600. The Ninth Circuit, in U.S. v. Ahtanum Irr.
24 Dist., 330 F.2d 897, 899 (1964) acknowledged the Arizona v. California
25 decision in footnote 1. However, the 1908 Code Agreement that
apportions Ahtanum Creek 75% to the off reservation northside of the

1 creek and 25% to the reservation limits this determination somewhat.
2 This Court must decide if Ahtanum I and II quantified the amount of on-
3 reservation acreage susceptible to irrigation from Ahtanum Creek.

4 The United States, on behalf of YIN, interprets the Ahtanum line of
5 cases to be inconclusive and non-final as to the irrigable acres on the
6 Yakama Reservation. Specifically, they point to two holdings in the
7 Pope Decree, Ahtanum II, that allow: 1). YIN, prior to July 10, to
8 divert all water in excess of the benchmark of 62.59 c.f.s. provided
9 such water can be beneficially used; 2). Water that comprises the 46.96
10 c.f.s. awarded to the northside users that is not beneficially used by
11 successors-in-interest to the 1908 agreement reverts to YIN. See
12 Ahtanum II, supra, at 913-15. They also argue that PIA includes present
13 and future needs and that the Ahtanum cases left future acres open based
14 on northside forfeitures and availability of water in excess of 62.59
15 c.f.s.. The Yakama Nation essentially agrees and supports the United
16 States' argument but reminds the Court of the rules of construction of
17 Indian treaties that were set forth, inter alia, in Department of
18 Ecology v. Yakima Reservation Irrigation District, 121 Wn.2d 257, 277-
19 278 (1993)(Courts are required to liberally construe treaty rights,
20 ambiguities are to be resolved in favor of the Indians and abrogation of
21 treaty rights are not to be "lightly inferred.").

22 In opposition are certain on-reservation, non-Indian water users.
23 Such water users were referred to as class III defendants in the Ahtanum
24 cases. These water users argue that the PIA was determined in Civil No.
25 312, U.S. v. Ahtanum Irr. Dist., 124 F. Supp. 818, referred to by this
Court as the Ahtanum cases. They point out in the Summons and Complaint

1 commencing Civil No. 312 (and ultimately resulting in the two Ninth
2 Circuit decisions), that the United States identified 4920.4 acres
3 susceptible to irrigation with waters from Ahtanum Creek and its
4 tributaries. Additionally, in a Civil 312 Pre-Trial Order that set
5 forth a stipulated set of facts, the following was agreed to by all
6 parties including the United States, in Paragraph 6:

7 "Attached, marked "Exhibit A" and by reference made a part of this
8 Pre-Trial Order is a tabulation relating to lands located south of
9 Ahtanum Creek in the Yakima Indian Reservation, disclosing (1) the
10 allotment number, (2) names of ditches, (3) dates relating to
11 initiation and history of increase of irrigation by allotments, (4)
location of points of diversion, (5) total irrigated acreage (6)
description of irrigated acreage, (7) irrigable acreage (maximum),
(8) description of irrigable acreage, and (9) comments." (Emphasis
added.)

12 That Pre-Trial Order also indicated in Paragraph 10 that:

13 "The lands situated south of Ahtanum Creek for which rights to the
14 use of water from that stream are claimed in this proceeding total
15 4,968 acres. All of that land is now or is susceptible of being
16 served by the Ahtanum Indian Irrigation Project system as presently
constructed and as substantially completed in the year 1915."
(Emphasis added).

17 These agreed facts were specifically approved by Judge Lindberg and
18 incorporated into his Findings of Fact and Conclusions of Law.

19 Based on the facts set forth in these historical documents together
20 with certain conclusions reached by the Ninth Circuit, the south-side,
21 non-Indian irrigators conclude that the doctrine of res judicata applies
22 to prevent relitigation of the already judicially determined irrigable
23 acreage. This Court agrees.

24 B. Res Judicata

25 Considerable evidence and case law convinces this Court that res
judicata applies to the PIA of the Ahtanum unit in this general

1 adjudication. In addition to the documents filed or agreed to by the
2 United States set forth above, there are many expressions by the Ninth
3 Circuit in the Ahtanum cases as well as applicable decisions by the U.S.
4 Supreme Court in the 1983 version of Arizona v. California and Nevada v.
5 United States that support such a decision. These cases will be
6 discussed below.

7 1. Nevada, Arizona v. California

8 The case of Nevada v. U.S., 463 U.S. 110 (1983) applies in two
9 ways. First, it sets out the underlying principle of res judicata,
10 particularly as it applies in water right adjudications. Secondly, the
11 Supreme Court applied res judicata to facts remarkably similar to the
12 dispute at hand.

13 In Nevada, the United States requested on behalf of the Paiute
14 Indians a right to additional flows from the Truckee River for the
15 purpose of maintaining and preserving the Lahontan cutthroat trout and
16 cui-ui fishery in Pyramid Lake. This request came approximately 30
17 years after a final decree had been entered in what was commonly known
18 as the Orr Ditch litigation, United States v. Orr Water Ditch Co., et
19 al., Equity No. 3 (Nevada), an adjudication filed in 1915 by the U.S..

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

24 The factual and legal similarity of that proceeding to the dispute
25 being decided by this Court is significant. The time frame is also
similar. The question there before the U.S. Supreme Court is

1 practically identical to our present adjudication: Can the United
2 States, on behalf of an Indian nation, relitigate a reserved right that
3 was adjudicated and decreed 30 years before, or is such a claim barred
4 by res judicata? The Court should point out that it does not believe
5 Nevada and its explanation of res judicata applies to the reserved right
6 for fish in Ahtanum Creek. This is so because unlike the Paiute Tribe
7 in Nevada, YIN here has a specifically reserved water right for fish
8 that did not need to be quantified given the objectives of the Ahtanum
9 cases; namely to find adequate irrigation water for complete utilization
10 of the Wapato Project as designed in 1915. See Memorandum Opinion Re:
11 Usual and Accustomed Fishing Places, September 1, 1994.

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

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

21 Further, the final "judgment puts an end to the cause of action,
22 which cannot again be brought into litigation between the parties upon
23 any ground whatever." Id. quoting Commissioner v. Sunnen, 333 U.S. 591,
24 597 (1948). In Washington, the elements of res judicata are
25 specifically broken down as follows:

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

30 Although much of the evidence supporting application of res

1 judicata will be addressed in the section that parses the two Ahtanum
2 opinions, a brief application seems appropriate at this juncture.

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

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

9 "For evidence more directly showing the Government's intention to
10 assert in Orr Ditch the Reservation's full water rights, we return
to the amended complaint, where it was alleged:

11 16. On or about or prior to the 29th day of November, 1859,
12 the Government of the United States, having for a long time
13 previous thereto recognized the fact that certain Pah Ute and
14 other Indians were, and they and their ancestors had for many
15 years been, residing upon and using certain lands in the
16 northern part of the said Truckee River Valley and around said
17 Pyramid Lake...and the said Government being desirous of
protecting said Indians and their descendants in their homes,
fields, pastures, fishing, and their use of said lands and
waters, and in affording to them an opportunity to acquire the
art of husbandry and other arts of civilization, and to become
civilized, did reserve said lands from any and all forms of
entry or sale and for the sole use of said Indians, and for
their benefit and civilization."

18

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

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

25 Persons and parties and quality of the persons cannot seriously be
questioned in this proceeding. The United States represented YIN in the

1 Ahtanum cases and all the water users were required to put forth their
2 claim. All parties were aware of the U.S.'s intention to obtain more
3 water for use on the reservation.

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

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

21 "[t]o preclude parties from contesting matters that they have had
22 a full and fair opportunity to litigate protects their adversaries
23 from the expense and vexation attending multiple lawsuits,
24 conserves judicial resources, and fosters reliance on judicial
25 action by minimizing the possibility of inconsistent decisions.
(Cite omitted).

In no context is this more true than with respect to rights in
real property. Abraham Lincoln once described with scorn those who
sat in the basements of courthouses combing property records to
upset established titles. Our reports are replete with
reaffirmations that questions affecting titles to land, once

1 decided, should no longer be considered open. (Cite omitted).
2 Certainty of rights is particularly important with respect to water
3 rights in the Western United States. The development of that area
4 of the United States would not have been possible without adequate
5 water supplies in an otherwise water-scarce part of the country.
6 The doctrine of prior appropriation, the prevailing law in the
7 western states, is itself largely a product of the compelling need
8 for certainty in the holding and use of water rights.

9 Recalculating the amount of practicably irrigable acreage runs
10 directly counter to the strong interests in finality in this case."
11 460 U.S. at 620 (emphasis added).

12 2. United States v. Ahtanum Irrigation District

13 With this guidance from the Supreme Court in mind, we turn to the
14 Ahtanum Creek and the rights asserted by the United States and YIN, to
15 determine if they were adjudicated in the federal cases. This Court
16 believes the Ninth Circuit has already decided and given the necessary
17 finality to this matter in the Ahtanum cases. Those cases leave no doubt
18 that the Ninth Circuit was aware of the "future right" component of PIA
19 when they made the decision.

20 In Ahtanum I, the court begins by pointing to the United States'
21 complaint which alleged that one purpose of the treaty was to enable the
22 Yakamas to have a homeland and thereby give up their nomadic habits and
23 till the soil. 236 F.2d at 324. Accordingly, "the treaty operated to
24 reserve sufficient waters of Ahtanum Creek for the Indians' needs, both
25 present and future." Id. (emphasis added).

Next, Judge Pope determined a decision as to 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. On page 326 Judge Pope took the issue head on and wrote:

"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

1 reservation was made. The reservation was not merely for
2 present but for future use." Emphasis added.

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

5 "the paramount right of the Indians to the waters of Ahtanum
6 Creek was not limited to the use of the Indians at any given
7 date but this right extended to the ultimate needs of the
8 Indians as those needs and requirements should grow to keep
9 pace with the development of Indian agriculture upon the
10 reservation."

11

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

18 Although the U.S. argues this language considers only the amount of
19 acreage available for irrigation in 1915 and not possible future
20 developments, additional language in Ahtanum I, set forth below,
21 indicates a different meaning.

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

....

"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."

This language convinces the Court that the Ninth Circuit had the

1 future irrigable acreage needs of YIN in mind in making their decision.
2 In determining that the "Ahtanum Indian irrigation project" as
3 constructed in 1915 would take all the waters of Ahtanum Creek and that
4 the 1908 agreement did exist, thereby limiting southside reservation use
5 to 25%, the Ninth Circuit apparently construed that litigation as
6 resolving the reserved water right issue, as it more than allocated the
7 available water for reservation use. It determined that the lands which
8 the YIN would be able to irrigate in 1915 by way of the Wapato Project
9 were all of the lands capable of irrigation then and for the future.

10 This also addresses the United State's argument of why the Ninth
11 Circuit awarded to the reservation those flows in excess of the 62.59
12 c.f.s. allocations and those waters not used beneficially by off-
13 reservation northside successors-in-interest to the signatories of the
14 Code Agreement. The answer appears to be that the Federal Court
15 correctly determined there was insufficient water to irrigate the lands
16 designated to be irrigated by the 1915 project. Id. at 337. The U.S.
17 also indicates as of 1987 only 2728.7 acres of trust and tribal fee
18 lands are being irrigated. Although the remainder of the nearly 5000
19 acres quantified in Ahtanum may be under control of non-tribal
20 irrigators, it also may be that much of that original acreage is still
21 susceptible to irrigation; thereby supplying a destination for any
22 surplus water.

23 "As we have said, the implied reservation of the waters of
24 this stream extended to so much thereof as was required to
25 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,

1 conceding that the Secretary had the power to make an
2 agreement for some workable division, can it be said that he
3 had the power to agree to give to the white settlers 75% of
4 that which the Indians might need in 1915 and subsequent
5 years? Id. (emphasis added).

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

7 Further evidence demonstrating directly that the Ninth Circuit
8 believed the United States to be making a claim for the irrigable acres
9 on the reservation in the Ahtanum proceeding can also be found in their
10 two opinions. In Ahtanum I, the court disagreed with the trial court's
11 conclusion that the United States had improperly proceeded with proof of
12 YIN's rights. Rather, the Ninth Circuit approved of the U.S.'s method
13 of proof, which included a showing of the location, point of diversion
14 and capacity of each ditch constructed by YIN or the then Indian
15 Service, as well as the description, irrigable area, and location of all
16 reservation lands served by those ditches with water from Ahtanum Creek.
17 Id. at 339-340 (Emphasis added).

18 Finally, throughout the Ahtanum opinions, Judge Pope repeatedly
19 refers to the injustice of the 1908 water giveaway. For example, in
20 Ahtanum I at 337, the court writes:

21 "With an opportunity to study the history of the Winter's rule, as
22 it has stood now for nearly 50 years, we can readily perceive that
23 the Secretary of the Interior, in acting as he did, improvidently
24 bargained away extremely valuable rights belonging to the Indians."

25 In Ahtanum II, he issues perhaps his most poignant statement,
lamenting:

"Thus the Indian Tribe may now ascertain, by actual experience
under the decree, just how badly they have suffered through the
Code taking of their property. Plainly the waters they are here
awarded will be insufficient for the irrigable lands of the
Reservation. Just how insufficient they can soon tell." 330 F.2d
914. Emphasis added.

1 Why would the Ninth Circuit make these statements if they did not
2 feel something had been lost. Specifically, the Nation had been
3 deprived of water that rightfully belonged to them. With the loss of
4 water, however, attaches a corresponding inability to irrigate land. As
5 demonstrated above, the Court of Appeals clearly recognized this in
6 assuming that irrigation of the lands slated for development in 1915
7 could not be accomplished.

8 Judge Pope also took the next step, suggesting that redress for
9 this taking by the Secretary of Interior be addressed in a different
10 venue and acknowledged that such was precisely the case. Ahtanum I at
11 339 ("our holding that the Secretary acted within his powers means that
12 we are giving to his conduct in this regard the characteristics as an
13 act of appropriation as that which was found to have been accomplished
14 in Shoshone Tribe v. U.S.....); see also footnote 25 as to YIN's filing
15 of a claim based on the 1908 agreement with Indian Claims Commission.

16 Finally, it bears repeating that the Ninth Circuit was aware of the
17 PIA standard as set forth in Arizona v. California when they issued the
18 final 1964 ruling. See 330 F.2d at 899, footnote 1.

19 **III. CONCLUSION**

20 In sum, the Court finds that the federal litigation, commencing as
21 United States v. Ahtanum Irrigation District, Civil Cause 312, and
22 continuing through the two Ninth Circuit cases authored by Judge Pope
23 resolved the reserved rights of the Yakama Nation in regard to
24 diversions from Ahtanum Creek inasmuch as it quantified the "practicably
25 irrigable acreage." Therefore, the decisions by that Court, in light of
principles of res judicata and stare decisis bar relitigation of the

