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KIM M. EATON
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

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, vs. JAMES J. ACQUAVELLA, ET AL., Defendants	No. 77-2-01484-5 Memorandum Opinion Re: Ahtanum Creek Threshold Legal Issues

I. Introduction

At the request of certain parties and with the goal of simplifying subsequent fact-finding hearings, this Court issued an Order Bifurcating Exceptions Hearing Re: Ahtanum Creek on May 12, 2003. Pursuant to that Bifurcation Order, the Court agreed to decide legal issues prior to proceeding with an evidentiary hearing regarding Exceptions to the Report of the Court Re: Ahtanum Creek dated January 31, 2002 (Report). On June 4, 2003, after the parties were unable to reach consensus on an agreed list of legal issues, the Court issued its Order Setting Threshold Legal Issues Re: Ahtanum Creek. The Court received Reply Briefs, which addressed the legal issues set forth in the June 4, 2003 Order as well as other issues raised by parties in Exceptions and Responses to the Court's Report. Oral argument was provided on the threshold issues on June 23-24, 2003. This Memorandum Opinion addresses those issues. The Court notes at the outset that it considered and analyzed most if not all of these issues when drafting the Report. However, the briefing preceding the February and April, 1994 hearing was very limited on most of the issues and the

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Court is better advised in reaching its conclusions herein. Therefore, the decisions in this opinion supersede any conflicting conclusions in the Report.

This opinion sets forth very little factual or legal background associated with the Ahtanum subbasin. The history of water use and litigation for the area is quite extensive. For a more complete picture of that background, the parties should consult the Report, particularly at pages 35-53 and pages 105-119. However, to decide the various threshold issues, the prior legal precedents in the Ahtanum subbasin must be analyzed and interpreted. The Court will briefly recount the prior decisions and actions that generally define the rights of Ahtanum Creek water users.

The Ahtanum Creek subbasin was a portion of the area historically used by the Yakama Nation. In about 1850, non-Indian settlement began to occur in the area and on June 9, 1855, a treaty was signed establishing a permanent reservation for the Yakama Nation. Ahtanum Creek forms part of the north boundary of that reservation. In 1908, Chief Engineer Code of the Bureau of Indian Affairs, executed an agreement between the United States and non-Indian landowners on the north side and outside of the Yakama Nation's reservation. That agreement (hereinafter 1908 Code Agreement or Code Agreement) divided the flow of Ahtanum Creek and assigned 75% to the north side users and 25% to south side or on-reservation users. The stream was the subject of a state adjudication in the mid-1920's culminating in *State of Washington v. Annie Wiley Achepohl et al.* (*Achepohl*). In 1947, the U. S. on behalf of the Yakama Nation filed a complaint to undo the 1908 Code Agreement and assert a right to a larger portion of the creek flow then the 25% reserved to the south side water users. The case is generally referred to herein as *U.S. v. AID*. That process resulted in one District Court published opinion, *United States v. Ahtanum Irrigation District*, Civil Cause No. 312 (also reported at 124 Fed. Supp. 818), and two extensive Ninth Circuit decisions. *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (*Ahtanum I*) and *United States v. Ahtanum Irrigation District*, 330 F.2d 907 (*Ahtanum II* or the Pope Decree). In addition, AID filed a petition for reconsideration which resulted in a short decision by the Ninth Circuit set forth at 338 F.2d 307.

Much of what follows constitutes this Court's effort to interpret the federal litigation culminating in the Pope Decree and to further reconcile these decisions with the *Achepohl* adjudication and prosecute this Court's job of adjudicating water rights. In regard to *U.S. v. AID*, the north side water users have argued that the Court reached the improper conclusion that the federal court litigation was an actual stream adjudication. In particular they cite to *Ahtanum II*, pages 910-912, wherein Judge Pope generally indicates the District Court did not err by not making

comprehensive adjudication findings in regard to water claims. Specifically, the *Ahtanum II* court states at page 911:

> We recognize that it would have been entirely in accord with the directions indicated in our former opinion for the court in its decree here 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 claims of the defendants.

The north side may be technically correct that the decision reached in *Ahtanum II* does not reflect findings in the precise manner as, for example, this Court might in quantifying water rights herein. The Court believes this distinction to be meaningless and insignificant for the most part (but see the discussion below in regard to Issue 5) because a parcel-by-parcel fact finding did transpire and parcel-by-parcel conclusions were set forth as a part of the Pope Decree. Granted, certificates of water right were not issued as a result. But the decisions made by the Ninth Circuit are nevertheless binding. Those decisions by the appellate court affect individual and collective water use on the north side of Ahtanum Creek (and some findings impact water users on the south side). Whether or not it was an adjudication per se, this Court is bound by the appellate court's decisions on water allocation and distribution and it will do its level best to give full effect to the results from that litigation.

Various claimants argue, depending on the issue, that interpretation and enforcement of the Pope Decree is best done by the Ninth Circuit. This Court totally agrees. However, many of the conclusions reached by that court, such as the decree itself, impact this Court's ability to perform its function of quantifying water rights. As it stated at the June 23, 2003 hearing, the Court will interpret the decree to the extent necessary to quantify rights in the subbasin.

II. <u>Analysis</u>

1. *Are the north side claimants required to show their claimed rights have been perfected and beneficial use of water on their lands has continued to the present? What proof is necessary to show use between 1908-2003? Consider all categories of claims in presenting this issue.*

Perfection and continued beneficial use of water must be proven for every claim to a water right in this adjudication. *Ecology v. Acquavella,* 131 Wn.2d 746, 935 P.2d 595 (1997). Ahtanum Creek is no different. The claimant bears the initial burden to make that showing. What makes Ahtanum Creek unique is that some claimants north of the stream have already been required to

provide evidence of beneficial use on two occasions. The effect of those prior efforts is that beneficial use up to the time of the hearing in those cases should have been analyzed. This Court proceeds from that assumption. Accordingly, without evidence to the contrary, this Court will give deference to the decisions in *Achepohl* and *U.S. v. AID*. Water users who can successfully trace their claims to a certificate issued in *Achepohl* and a Pope number in *U.S. v. AID* shall be required to provide evidence of continuous beneficial use from 1957 through the irrigation season of 2001. Ahtanum Irrigation District (AID) should be prepared to present such evidence on behalf of their water users who meet the criteria for a senior right to the extent those parties are excepting to the conclusions reached by the Court in its Report. John Cox Ditch Company (John Cox) should also be prepared to present evidence of beneficial use from 1957 through the irrigation season of 2001 to the extent it desires a right that differs from that confirmed in the Report. To the extent a water user is not asking for a different decision, then the parties need not present additional information. To the extent they are responding to an exception of another party, then they need only provide the evidence they believe necessary to address the exception.

It is this Court's finding that all questions regarding beneficial use prior to 1957 were answered by the federal court in *U.S. v. AID* for rights confirmed or denied therein. Accordingly, if the right was lessened from 1908 to 1957, that will be the extent of the right. Likewise, if a right was altogether denied based on a failure of beneficial use up through 1957, the right was either never perfected (if a right was also not confirmed in *Achepohl*) or was abandoned. Conversely, if the right increased from 1908, consistent with *Achepohl* derived certificates, a senior right will be granted for the 1908 acreage and a junior right confirmed for the 1957 acreage. Consistent with the findings in *U.S. v. AID,* the Court has already determined that it will not award senior water rights in excess of the amount set forth in the Pope Decree, which in turn reflected beneficial uses in 1908 and 1957.

For those users who cannot trace their rights to a Pope number but who are successors to individuals who were issued a certificate pursuant to the state adjudication in 1925, the inquiry is somewhat different. This Court starts with the proposition that beneficial use was analyzed in *Achepohl.* See *In Re Ahtanum Creek,* 139 Wash. 84, 245 P. 758 (1926). Indeed, according to Ecology the number of "inchoate" water rights confirmed in *Achepohl* covered at most 20% of the area and Ecology has been unable to "affirmatively identify any specific water rights confirmed in *Achepohl* that were clearly inchoate because they were not perfected through beneficial use of water

by the time that adjudication was conducted." Ecology's Reply at 2-3. Therefore, those claimants who rely on an *Achepohl* certificate alone must show beneficial use from 1925 forward. However, if the claim was somehow analyzed in *U.S. v. AID*, and a Pope right not confirmed, the analysis in that proceeding may provide some evidence of use through 1957. If a party has neither an *Achepohl* certificate nor a Pope right, it will be very difficult for this Court to confirm any water right, be it senior or junior.

AID has requested this Court provide it a date through which beneficial must be demonstrated. The answer is that to the extent AID does not wish the Court to reconsider its decision on a claim for its constituents, then the analysis provided by the Court will remain the same. To the extent AID is pursuing an exception, then it must present all appropriate evidence up through the 2001 irrigation season, which is the last use of water predating the Court's Report. This is consistent with how the Court has treated other claimants in both the subbasin and major claimant pathway at the exception phase to the extent those entities filed exceptions to the Court's finding of contemporary beneficial use. For example, water claimants have been required to conduct measurements and gather evidence after the initial report issues. Therefore, that AID must do so is not unique but the Court does recognize the unusual situation that AID is in whereby it represents the interests of hundreds of water users who divert from Ahtanum Creek. AID may have individuals who maintain enough familiarity with water practices to provide evidence on behalf of the water users within the district as Forrest Marshall did during the 1994 hearing.

AID argued at the hearing that once initial perfection and beneficial use was established in the other proceedings, and then one of two things could happen to lessen the rights. A party could bring a challenge based on relinquishment or abandonment or return to federal court to prove that conditions or uses have changed resulting in a diminished use of water. This Court disagrees. As it stated above, the Court will utilize available evidence to show beneficial use through the time of the Pope Decree if available. Such a party still bears the burden of showing beneficial use from 1957 forward in light of this Court's requirement to assess abandonment/relinquishment. This burden attaches because of the Supreme Court's decisions in *Okanogan v. Twisp*, 133 Wn.2d 769 (1997), *R.D. Merrill v. Pollution Bd.*, 137 Wn.2d 118 (1999) and *Ecology v. Acquavella*, 131 Wn.2d 746 (1997). According to *Twisp*, a showing of nonuse for an extended period of time raises a rebuttable presumption of intent to abandon a water right. Similarly, under *R.D.* Merrill, a five-year consecutive nonuse places the burden on the water user to fit one of the exceptions set forth in

RCW 90.14. If a party asserting that a once valid water right is still valid, they must present beneficial use evidence to address all subsequent time periods or else a gap of nonuse will exist and the right will be vulnerable to a relinquishment/abandonment challenge. Further, the Supreme Court directed this Court to evaluate claims to water right on the basis of beneficial use and once that quantity has been established the Court was also directed to address the question of "whether the claimant has continued to use the same quantity of water up to the present day." *Acquavella III* at page 757.

This Court attempted to quantify rights in the initial report based on the evidence set forth in AID – 8 and the testimony of Forrest Marshall, former district manager, regarding the contemporary use of water by AID's patrons. To the extent it believes the Court reached the incorrect conclusion, AID must present evidence to make its case. To the extent a party other than AID believes the Court erred in reaching any specific conclusions for any AID patron based on that evidence (that AID is otherwise not challenging), then the challenging party would carry the burden.

This Court offers no comment on the notion of returning to federal court for an assessment of whether changes in use have occurred resulting in less water being used now as compared to the federal court decision in the early 1960's, other then to say such an analysis would seem to be very similar to an abandonment/relinquishment examination. This Court is performing its function pursuant to RCW 90.03 and the directives from the Supreme Court in *Acquavella III* while at the same time attempting to reconcile the decisions made by the federal court that impact the stream adjudication function. As was pointed out in oral argument, it would certainly be awkward (if not inequitable) for the Court to interpret certain parts of the Pope Decree but defer ruling on others to allow parties an opportunity to seek a decision from the federal court.

2. *Was it lawful for Ecology, at the direction of this Court, to issue in September 2002 the thirteen adjudicated certificates related to rights confirmed in Achepohl (including John Herke)?*

The Court ruled on this issue at the June 24, 2003 hearing in favor of the claimants and that decision is incorporated by reference into this Opinion. However, after further reviewing citations supplied by the Yakama Nation, this issue has been complicated by prior comments of this Court. Although the Court does not change its decision, additional analysis (set forth below) has been provided.

In general, the Yakama Nation argues that certain successors to individuals who were decreed rights pursuant to *Achepohl* but failed to pay the necessary fees to receive a certificate of water rights from Ecology or its predecessor have relinquished any remaining right if they did not file a claim pursuant to RCW 90.14 during the applicable periods. Therefore, Ecology's issuance of those certificates now is unauthorized because the right has relinquished pursuant to provisions set forth in RCW 90.14.071. The Yakama Nation also believes its position to be the law of this case, in light of rulings emanating from Subbasin 3 (Teanaway) and the Cromartys. Ecology disagrees and asserts that issuing the certificates is appropriate because RCW 90.03.240, which authorizes the agency to issue certificates, contains no specific time frames. Therefore, issuance of the certificates some 75 years later is not barred under the water code or RCW 90.14. Ecology disagrees with the Yakama Nation's interpretation of the Court's disposition of the Cromarty matter in Subbasin 3. The claimants who obtained certificates as a result of the Court's ruling in the Report obviously believe issuance was appropriate.

As this Court made clear in its oral ruling, and reiterates herein, the analysis turns on an interpretation of RCW 90.14 and the intent of that statute. Rather then tripping up unwary claimants (particularly those who have decreed water rights from an adjudication filed pursuant to RCW 90.03), the intent of the statute is to provide Ecology with an inventory of claims to water rights. This is made clear in RCW 90.14.010, which states:

> The future growth and development of the state is dependent upon effective management and efficient use of the state's water resources. The purpose of this chapter is to provide adequate records for efficient administration of the state's waters, and to cause a return to the state of any water rights which are no longer exercised by putting said waters to beneficial use.

See also *Ecology v. Adsit*, 103 Wn.2d 698, 705, 694 P.2d 1065 (1985) (Legislative intent of RCW 90.14 is to provide adequate records for administration of the state's waters and to notify the State that the water was being put to beneficial use).

With a decree setting forth specific water rights for claimants in hand along with unissued certificates of water right, it is difficult for this Court to understand how the objectives of RCW 90.14 are violated simply because the certificate has not issued. Indeed, it is obvious that Ecology is aware of the unissued certificates for those subbasins where a prior adjudication has transpired because a list of those certificates has been admitted into evidence thereby allowing the Court or the Referee to determine such is the situation for a particular claimant. There is also no correlation

between obtaining the actual certificate and continued beneficial use of water. Indeed, the existence of the decree and the unissued certificates should be some evidence to Ecology that the water rights were perfected and put to beneficial use for a certain period of time. Therefore, the Court finds the purpose of RCW 90.14 is not furthered by the interpretation asserted by the Yakama Nation.

The Yakama Nation also relies on the proceeding in Subbasin No. 3, especially in regard to Cromarty, to supports its argument. The Court has reviewed the record in regard to Subbasin No. 3 and reaches a different conclusion, while acknowledging the limitation of that record.

The discussion regarding the Cromarty claim starts in the Report of Referee for Subbasin No. 3 where the Referee indicated he was unable to locate a certificate or a claim to support the right. Any analysis of a state-based water right begins with the proposition that there must be compliance with state process by the claimant in order for the Court to confirm a water right. That compliance can only be achieved through some connection to Ecology by way of a permit, certificate or RCW 90.14 claim. In this instance, the Referee was unable to identify such a connection. The Referee noted this was another instance where a certificate had not issued due to the failure of the landowner to pay the necessary fees at the conclusion of the Amosso adjudication. Accordingly, "the Referee would not recommend confirmation of water right until the lack of certificate ha[d] been resolved." Report dated January 25, 1996 at page 64, line 19.

This issue was considered on exception by Judge Stauffacher at the June 13, 1996 oversight hearing. Ecology was then taking the position advanced by the Yakama Nation -- that failure to file a RCW 90.14 claim or perhaps a request for change resulted in any water right stemming from Amosso for which a certificate had not issued being relinquished. Certain claimants argued to the contrary and Judge Stauffacher ruled in their favor:

> I think we're in this position: We have many successors to people whose predecessors in 1921 did not completely follow through, whether it was through misunderstanding or lack of attention to what they were doing or anything else, but I can't really see in a general adjudication of this kind and in recognition of the *Amosso* decree that we should be in effect taking away those people, those present landowners water rights.

The Court did go on to clarify that certainly in the situation where a RCW 90.14 claim has been filed or a certificate of change issued by Ecology then the right will be confirmed on payment of the fee. The Order on Exceptions dated March 13, 1997 appears to capture that language only. See Order at page 6. The Yakama Nation interprets Judge Stauffacher's statements and subsequent order to mean that only in those instances will Ecology be authorized to issue a certificate. The

Court does not interpret that statement in such a fashion. Rather, Judge Stauffacher appears to be speaking generally about all individuals who obtained rights from the *Amosso* proceeding who failed to submit the necessary fees and did not receive a right as a result without regard to whether they or their successors had filed an RCW 90.14 claim or request for change in the interim, but to include those class of individuals.

Any interpretation to the contrary is inconsistent with prior and subsequent decisions of the Court. First, one must look at the subsequent treatment of the Cromarty claim. Those claimants did file RCW 90.14 claims but in many instances those claims were not consistent with the *Amosso* awards. For example, a right was ultimately confirmed to the Cromartys in Section 5 for irrigation of 93 acres based on an analysis of the certificates subsequently issued after payment of fees. See Supplemental Report at 37-38. The RCW 90.14 claim that was filed only sought irrigation of 5 acres in Section 5. In analyzing a water claim, this Court would probably be unable to make a finding of substantial compliance for 93 acres when the 90.14 claim only included 5 acres. Accordingly, to reconcile the 90.14 claim with the certificates in the fashion advocated by the Yakama Nation leads one to an untenable position that simply filing an RCW 90.14 claim, without regard to the particulars of that claim, allows for the issuance of a certificate that contains completely inconsistent information.

In any event, the Court has confirmed numerous rights during the course of the adjudication, which are based on awards in prior decrees, including to those claimants who are successors to individuals that did not obtain certificates for failure to pay fees. It has been Ecology's practice, despite its argument in Subbasin No. 3, to issues certificates emanating from prior adjudications to individuals who have paid the fees. This has been true for claimants in Subbasin Nos. 3 (Cromarty, Blackburn and Boise Cascade), 15 (Wenas), 18 (Cowiche) and perhaps 10 (Kittitas), who did not file RCW 90.14 claims or certificates of change. Therefore, it is clear that the party who originally sought the narrow application of RCW 90.14 (Ecology) did not interpret the resulting decision and order to be so narrow since it has routinely issued certificates to entities who filed claims in this adjudication and are successors to individuals who were decreed rights in prior adjudications but did not pay the necessary fees to receive a certificate.

Therefore, it is the decision here that the Court's Order on Exceptions dated March 13, 1997 does not address the situation where no intervening RCW 90.14 claim or certificate of change was filed or issued. The Court reads Judge Stauffacher's comments to allow a more expansive

interpretation. The Court believes its analysis regarding the intent of RCW 90.14 is applicable and controlling and finds that Ecology was authorized to issue the certificates upon payment of the necessary fees.

3. *For determination of rights to stock water, are the north side claimants bound by footnote 14 in U.S. v. Ahtanum Irrigation District under the doctrines of res judicata or collateral estoppel? Is the July 10 cutoff for irrigation rights relevant to stock water?*

The United States and Yakama Nation urge the Court to reconsider its decision set forth in the Report beginning at page 112, line 3, regarding the effect of the 9th Circuit's decision on stock water. Essentially, the Court found the Ninth Circuit had reached the incorrect decision in not awarding stock water rights to north side claimants, but that the decision was not firm, was not adequately reasoned or deliberated and was not the result of all parties being heard. As a result, the parties were not precluded under principles of res judicata or collateral estoppel from rearguing the issue in this adjudication. The U.S. and Yakama Nation argue that evidence was presented and a decision reached by the Ninth Circuit that was final and precludes this Court from establishing a stipulation that requires 0.25 cfs to be left in naturally occurring water sources. Any use of water by north side claimants would be part of the 75% split and curtail on July 10 of each year.

On further review, this Court believe that in general, its decision at pages 112-114 is correct in regard to both <u>non-diversionary</u> and <u>diversionary</u> stock water but does strike that analysis to the extent it implies the Ninth Circuit's decision was incorrect. This Court generally agrees with the analysis supplied by Ecology and finds the Ninth Circuit simply did not decide or consider the question of rights to non-diversionary stock water set forth above. Accordingly, the decision in *Ahtanum II*, 330 F.2d 897, does not preclude this Court from rendering a decision herein on that limited question. The Court believes its decision regarding diversionary stock water, set forth at page 115, beginning at line 9, is generally correct and the analysis below is provided only to supplement the conclusion that any "diversionary stock water right must be incidental to irrigation practices on non-riparian lands in order to be consistent with the Ninth Circuit's decision."

The fundamental characteristic of res judicata or collateral estoppel, from a federal or state law perspective, is whether one court has already decided an issue that the same parties are attempting to argue before it or another court. More specifically, res judicata precludes a claim when a 1) final judgment has been made, 2) on the merits, 3) where the claims are identical in both actions, and 4) the parties are identical or have some legally binding relationship. *Montana v. U.S.*,

440 U.S. 147 (1979); *Ecology v. Acquavella*, 121 Wn.2d 257 (1993) (*Acquavella II*). In regard to non-diversionary stock water, this Court does not believe the *Ahtanum II* court rendered a final judgment on the merits. This is evident from what that decision says and what it does not say.

Footnote 14 is the only direct discussion of stock water and states:

> The case before us does not involve any problem of use of water for domestic or stock purposes. There is no evidence of use or need for stock or domestic water in 1908. It is noted that the 1908 agreement recites that it is made for the purpose of settling the rights of the parties to make diversions for irrigation purposes. "That whereas the parties hereto claim certain quantities of water in the Ahtanum Creek, County of Yakima, State of Washington, and a right to divert the same for irrigation purposes." See *Ahtanum II* at page 908.

Footnote 14 must be read within the context underlying the entire *U.S. v. AID* litigation: <u>What did the parties bargain for in 1908 as specifically set forth in the Code Agreement</u>? Footnote 14 reveals the Ninth Circuit's attention on the <u>diversionary</u> aspect of the Code Agreement. The court points out the underlying purpose of the 1908 agreement was to settle "the rights of the parties to make <u>diversions</u> for irrigation purposes", (emphasis added), and quoted from the agreement to reach that conclusion ("That whereas the parties hereto claim certain quantities of water in the Ahtanum Creek . . . and a right to divert the same for irrigation purposes.") Perhaps the Ninth Circuit was able to reach the conclusion that there was not a <u>diversionary</u> need for stock water because the individuals who were irrigating the land were able to water stock directly from <u>non-diversionary</u> natural sources.

That Judge Pope cited to *Hardy v. Beaver County Irrigation Company*, 65 Utah 28, 234 P. 524, *McPhee v. Kelsay*, 44 Or. 193, 74 P. 401 (1903) and similar cases is instructive. The court utilized a specific quote from *McPhee* that is typical of the other cases and revealing. The quote begins "Defendant's original <u>appropriation</u> of water from North Powder river and the enlarged <u>appropriation</u> therefrom and that from Hutchinson Slough were for domestic, stock, and irrigating purposes . . ." *Ahtanum II*, 330 F.2d. at 908 (emphasis added). *Hardy* is also quoted and refers to "an appropriation of water" and an "appropriator's right." *See also* footnote 15 at page 908-909.

The word "appropriation" has a special significance in western water law and was synonymous with a diversionary right as opposed to a riparian right – a distinction that was alive and well in Oregon when *McPhee* was decided and also in Washington when the 1908 Code Agreement was established. *See e.g. In Re Stranger Creek*, 77 Wn.2d 649 (1970) (Court considered the riparian, non-diversionary stock water rights of the Department of Natural Resources in the

appeal and did not consider the state's appropriation rights). Essentially, under a pure prior appropriation analysis, a water right could be perfected by: 1. notice of an intent to appropriate, 2. an actual diversion, and 3. application of the water to beneficial use. A. Dan Tarlock, *Law of Water Rights &* Resources, page 5-46(1989). Although the "diversion" aspect of the appropriation doctrine has withered in light of needs to "appropriate" instream uses, such was not the case when the 1908 Code Agreement was entered and the above-cited cases decided. Thus, what was at stake in *McPhee*, and by implication in *Ahtanum II*, are appropriative/diversionary rights. This analysis is consistent with AID's point, raised at oral argument, that footnote 14 also notes that there was no problem or evidence regarding domestic use. Obviously, water was used for domestic purposes in 1908 and the only remaining logical conclusion is the Ninth Circuit was analyzing the issue from the perspective of whether water was diverted/appropriated for that use.

It must also not be forgotten why the *U.S. v AID* litigation transpired: to obtain a decision by a court as to whether the 1908 Code Agreement was enforceable and if so what it meant. Keeping in mind the fundamental question of what did the parties bargain for in 1908, the Court now turns to evidence summarized by the Ninth Circuit in *Ahtanum II*, at pages 906-908, regarding the manner in which water was utilized in the Ahtanum valley in 1908. The Court found:

> The testimony revealed without conflict a very definite picture of the farming and irrigation practices in Ahtanum Valley and in the areas here involved in 1908. . . The agricultural industry in 1908 was built upon and tied to the raising of livestock. The nearby forest reserved and other available ranges in the adjoining mountains provided pasture for the ranchers' cattle; after the cattle were brought out of the hills in October, they were fed through the winter with the hay harvested early in the summer on these and with grain mainly barley, grown there also. In the early months of May and June, when the heavy run-off was appearing in the Ahtanum, the lands were irrigated and the hay and grain crops made.

Footnote 11 contains the following information:

> Another principal witness for the defendant, one who testified at length with respect to many of the defendant's lands, explained that in 1908 the whole economy in the area was such that the people raised mostly livestock and dairy cows; the livestock was pastured in the summer on the forest reserve; the ranchers cut timothy and wild hay for winter feed, and after they cut the hay they stacked it and held it for winter feeding. The cattle were brought in about October.

This evidentiary information leads the Court to the conviction that livestock were present and required some source of water for drinking purposes. Indeed, the evidence shows that livestock

were the economy ("the whole economy in the area was such that the people raised mostly livestock and dairy cows"). Perhaps the beef cattle were removed for periods of the irrigation season by many of the ranchers in order to facilitate the cutting of hay. But it is also true that dairy cattle were a part of the economic equation in the Ahtanum area and the evidence does not show those cattle were removed to the forest lands. Rather, the testimony of the witness indicated only the livestock were pastured on the forest reserve. It is not clear how many cattle were in each area during the specific parts of the year. However, there is certainly enough evidence to conclude that there were significant enough numbers in either location (mountain/forest reserve and riparian lands) in 1908 to justify the modest amount (0.25 cfs) set forth in the Court's stipulation at page 114.

Also of assistance in reaching this conclusion is Judge Stauffacher's analysis and decision regarding whether the 1908 Code Agreement and subsequent litigation in *U.S. v. AID* eliminated any claim to an instream flow for fish treaty right on behalf of the U.S./Yakama Nation. *Memorandum Opinion: Treaty Reserved Water Rights At Usual and Accustomed Fishing Places*, September 1, 1994. At page 14, he held "executive, administrative and judicial actions by the U.S. from 1908 onward, coupled with the ICC action, contributed to a water right diminishment that now equals an amount necessary to maintain fish life, no more." *See also Final Order Re: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places* dated March 1, 1995 at p. 4, paragraph F. To reach that decision, he analyzed the effect of the 1908 Code Agreement as further examined in *U.S. v. AID* and concluded, "[t]hat the Code agreement, as interpreted by the Ninth Circuit, settles and establishes all irrigation claims, there can be little doubt." (Emphasis in original). He then quoted the passages from the Code Agreement analyzed herein to show that diversionary rights were at issue. If the Code Agreement did not settle rights to non-diversionary instream flows for fishery purposes, it would seem to follow that it similarly did not consider non-diversionary uses for stock and wildlife water.

This information, coupled with the Ninth Circuit's focus on diversionary rights persuades this Court to find that the issue of non-diversionary stock water was not considered by the federal appellate court in deciding *Ahtanum II*. Therefore, this Court may, as part and parcel of a stream adjudication, establish a stipulation to require 0.25 cfs remain in naturally occurring water sources. What constitutes a "naturally occurring water source" may be debated at the evidentiary hearing. Entities who utilize those sources may be included on a list as they have in every other subbasin. This authority to use non-diversionary stock water is a year around right.

The Court's decision regarding diversionary stock water rights set forth at page 115 remains the same and is incorporated by reference herein. Essentially, diversions for stock water use are covered by the Ninth Circuit's decision in *Ahtanum II*. Therefore, no diversions for stock watering purposes may be made after July 10 through the end of the irrigation season and any use of water diverted prior to July 10 for stock water purposes must be incidental to irrigation and therefore within, and not in addition to, the quantities confirmed by the Court for irrigation. Since the Pope Decree only applies to irrigation season issues, north side water users may begin diverting water after the irrigation season concludes provided they have certificates to authorize such a diversion.

Mr. Sauer raised the issue of the effect of the Pope Decree on domestic uses of water. The Court believes this to be an issue that is partially factual in nature and would request that Mr. Sauer and/or other parties interested in this issue address it at the evidentiary hearing for their particular claims. The Court will prepare a schedule for the Sauers and others to appear and present testimony and evidence pertaining to their claim and exception.

4. *After July 10, if the flow of Ahtanum Creek exceeds the amount of water which can be beneficially used on the Yakama Reservation or for the treaty water right for fish, can water be made available for diversion by north side water claimants?*

The Ninth Circuit made the following determination in *Ahtanum II*, page 915, in regard to use of water after July 10.

> 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 beneficial use.

North side claimants read this provision to allow them to use Ahtanum Creek flows after July 10 to the extent reservation lands are unable to beneficially use those flows. The Yakama Nation acknowledges this language but notes there is rarely water available and even if there occasionally may be, the north side parties have no right to use such flows. The Yakama Nation, the United States, and Ecology refer the Court to the analysis provided by the Ninth Circuit on this issue and assert the decision that north side claimants cannot use water after July 10 is res judicata[1]. *See Ahtanum II*, 330 F.2d at 907-910. The Court agrees the *Ahtanum II* analysis is controlling and that the decision supports the position of the Yakama Nation, U.S. and Ecology.

The consistent testimony and evidence reviewed by the Ninth Circuit demonstrated to that court that the natural flows in the Ahtanum basin essentially ended around the beginning of July and that farming practices had adjusted accordingly by 1908. For example, Judge Pope wrote:

> An examination of the testimony of the witnesses on whom the defendants relied for proof of their use, or of their predecessor's use, of water for irrigation in 1908, discloses a complete unanimity as to the fact that water for irrigation was generally not available after the first of July each year; that the methods of farming then used had been adapted to that circumstance through the raising of crops which would mature or could be made through irrigation up to the first of July and that in general their type of farming was such that they did not require or need irrigation after the first of July. *Id.* at 907-908

This finding ultimately led to the conclusion and holding that:

> Water rights of the individual parties to the 1908 agreement, which were contemplated thereby, terminated in the early part of July in each year, a conclusion which must be reflected in the final judgment in this case. *Id.* at 910.

An examination of pages 907-910 convinces this Court that the Ninth Circuit was evaluating the record to reach a conclusion on the beneficial use of water in regard to the period of year in which the water was diverted. The decision is replete with that information as summarized above in the quote from pages 907-908. Based on that analysis of beneficial use, the Ninth Circuit held that water was not used after the early part of July in 1908. Once a decision is made by a court as to the extent of beneficial use, that finding then becomes the limit of the water right. *Ecology v. Acquavella (Acquavella III)*, 131 Wn.2d 746, 935 P.2d 595 (1997). A court such as this one in a later assessment of that right cannot expand the use.

AID argues that the language quoted above is similar to and should be interpreted consistent with other language in the decree entered by the Ninth Circuit. For example, Section I, paragraph a. of the decree states the north side claimants may use up to 46.96 cubic feet per second, and "provided that when the said measurement 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." Paragraph b. then states, "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." When read together, these two provisions allow north side water users to beneficially use excess water to the extent the south side cannot. AID believes Section II should be

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[1] Ecology does note the July 10 bar does not prevent non-diversionary stock water use and water use outside of the

interpreted similarly. Ecology, however, points out that Section II is conspicuously silent in this regard, and unlike Section I, the language clarifying that the north side claimants can use the water when the south side cannot make a beneficial use is missing. The Court agrees with Ecology and believes this conspicuous absence only further proves that if the Ninth Circuit had wanted the north side to have subordinate but existing rights to water after July 10, it surely knew how to say so.

If there were any doubt or ambiguity that the Ninth Circuit, in deciding *Ahtanum II*, intended for no water to be used by the north side claimants after July 10 in light of how it viewed the evidence of use in 1908, that doubt was removed by the Ninth Circuit when it ruled on the north side's petition for rehearing. The north side presented the appellate court with 53 items of evidence that they believed showed a record of beneficial use after July 10 in 1908. After reviewing those portions of the record, the Ninth Circuit concluded, "Our further examination of the record, in the light of the petition for rehearing and the supplement thereto, convinces us that our former conclusion was correct." *U.S. v Ahtanum Irr. Dist.*, 338 F.2d 307 (1964). The court then denied the petition for a rehearing. Therefore, this issue has been examined and reexamined by the Ninth Circuit and the result is clear and unmistakable: There is to be no use of water by north side users after July 10 of each irrigation season through the end of the irrigation season, and, all water is available to the south side to the extent such water can be beneficially used. This Court holds that north side users are barred, as a matter of law, from presenting evidence to support an argument for a right to water after July 10 of each irrigation season. *Ahtanum II*, 330 F.2d 907-910, 915; *U.S. v. Ahtanum Irr. Dist.*, 338 F.2d 307.

5. *When/if does unused water by the north side land owners revert to the south side? Does the Pope decision on reversion to the south side supersede the Achepohl provision that unused water goes to satisfy the next class of water right?*

This issue arises as a result of language in *Ahtanum I* and *Ahtanum II*. In its first opinion, the Ninth Circuit held:

> That at any time when the needs of those parties to that agreement, as measured in 1908, were such as to require less than the full 75 percent of the waters of the stream, then their rights to the use of the water was correspondingly reduced, and those of the Indians, in like measure, greater. *Ahtanum I*, 236 F.2d 341.

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irrigation season.

The Ninth Circuit then evaluated the evidence and reached the conclusion that in a number of cases, the uses of the 1908 signatories or their successors decreased after 1908. Rights were then confirmed by the Ninth Circuit consistent with the lesser of the number of acres irrigated in 1908 or 1957, or if a party had not been a signatory to the 1908 Code Agreement, no right was confirmed at all. *Ahtanum II* at page 913-14.

The Yakama Nation reads these provisions to require water unused by Code Agreement landowners to revert to the south side. It believes this to be true for even "intermittently unused water rights" and such flows "revert to the Nation for temporary use." The Nation reaches this conclusion based on an analysis of the Pope Decree, which in turn interprets the Code Agreement. Essentially, in the Nation's view, water not used on Code parcels is not available for use by other north side landowners, even other Code parcels, and becomes immediately available at the time of nonuse for south side use.

Ecology disagrees with the Yakama Nation and interprets the various decrees to require reversion only in the instance when relinquished water is not needed to satisfy a lower class water right on the north side. This is so because the Ninth Circuit established both individual rights as well as an aggregate quantity for north side users. Therefore, so long as water is needed to satisfy "those parties" then the *Ahtanum II* reversion language does not apply. In the end, Ecology urges the Court to follow the lead of the Pope Decree court and establish both individual instantaneous quantity rights as well as a collective instantaneous right for the entire north side. The state agency does point out that once an individual right is relinquished it is permanently gone and the overall right for the north side is similarly reduced. In a poor water year however, Ecology believes all Pope water users must have a shot at any available portion of the 75% of the stream flow that belongs to the north side.

AID directs the Court to other language in *Ahtanum II* for clarification of the *Ahtanum I* language set forth above. AID also informs the Court that it should not, indeed cannot, find any reversion because jurisdiction to engage in that task was reserved by the Ninth Circuit. The portion of *Ahtanum II* opinion relied on by AID is set forth beginning at page 910. In regard to temporary reversion, they also adopt the position of Ecology. John Cox generally agrees with Ecology and AID and generally disagrees with this Court's finding that there is no true aggregate right for north side users.

The Court agrees with all parties in some respects and disagrees with all in others although it generally concurs with the analysis set forth by Ecology. First, the *Ahtanum II* citations provided by the parties are the applicable provisions that define this decision. The task of the Court is to interpret what that language means and how it applies in this adjudication. In many respects, the decision herein reduces to the issue of whether there is an aggregate right of any kind held by the north side water users.

We start with the reversion provision itself: "at any time when the needs of those parties to that agreement, as measured in 1908, were such as to require less than the full 75 percent of the waters of the stream, then their rights to the use of the water was correspondingly reduced, and those of the Indians, in like measure, greater." *Ahtanum I* at 341. Ecology correctly points out that this provision and any resulting relinquishment applies to "those parties" – i.e. those 1908 Code parcel landowners whose needs reduced over time "such as to require less than the full 75 percent." The Yakama Nation is also correct that the Court then proceeded to quantify individual rights for the several dozen landowners who were successors to the 1908 Code Agreement signatories. AID and John Cox are correct to remind the Court of the *Ahtanum II* language beginning at page 910 where the Ninth Circuit itself notes "[t]he whole problem [in-gross north and south side versus individualized tract adjudication] is not a simple one." The court then proceeded to specifically allow some level of an aggregate right determination and did reserve jurisdiction to address this complicated aspect of the decision.

The Court modifies its finding in the Report to the extent it indicates or implies there is no aggregate right. The methodology employed by the Ninth Circuit to reach its decision relies completely on the 1908 Code Agreement and the 75% - 25% division. So in that sense there is an overall quantity shared by the north side. However, that quantity is then split up between individuals and the 75% is parceled out pursuant to *Achepohl* priorities. Those rights can be lost through relinquishment or abandonment by the individual and do not become available to other north side users. This is evident from the treatment by the Ninth Circuit in confirming individual rights on a "lesser of basis" as between quantity of use in 1908 or 1957.

This Court believes that it has been faithful in its Report to the concept of reversion as defined by the federal court and that reversion by north side users is proceeding in this case exactly as the Ninth Circuit appears to have contemplated. That is, over the course of time and when raised in the appropriate proceeding, changes in land use are slowly but relentlessly effecting a

modification and reduction in water use on the north side of Ahtanum Creek and the rights of the two side should be reapportioned. Hence, in 1957 when the evidence was submitted during the course of *U.S. v. AID*, 4,695.72 acres were irrigated. Pursuant to AID – 8, by 1994, 3,906.71 acres were irrigated. Therefore, during the 37-year period at issue, a reduction in irrigation of approximately 789 acres had transpired and the diminution of use during that time indicates, as the Ninth Circuit predicted, an abandonment or relinquishment of some water rights. *Ahtanum II* at 911. The water historically needed to irrigate that 789 acres then reverts, on a permanent basis, to the south side.

However, this is not an absolute or cut-and-dried reversion. The Ninth Circuit contemplated that pursuant to state law, water rights can be transferred and it may be the case that some portion of the water rights appurtenant to those 789 acres have been transferred. If the appropriate showing is made and relevant state statutes followed, a Code parcel right could be transferred to another parcel. No party has made such an argument to date.

The Court does not agree that the Pope Decree contemplates a temporary transfer of "intermittently unused water rights" and such flows "revert to the Nation for temporary use." The reversion at issue in the Pope Decree is intended to be synonymous with state law provisions of abandonment. At that time, the relinquishment provisions of RCW 90.14 were not yet state law but the Court believes the five consecutive year non-use provision would also apply at this point in time since that statute was enacted in 1967. When that water is unused year-to-year, since there is some provision for an aggregate right as a result of the Code Agreement, the water remains available for use by the aggregate north side landowners. However, that opportunity to use otherwise unused water <u>only</u> belongs to Code parcel landowners and at a water duty of 0.01 cfs per acre as that is the limit of the aggregate right defined by the Ninth Circuit. Hence, such an opportunity would only seem likely in an instance of severe water shortage when the north side's right to 75% results in an inadequate supply for all Code parcels. In that instance, a Code parcel with a junior right might be able to utilize water from a senior Code landowner who chose to forego water use at that time so long as that water was within the 75% stream flow confirmed to the north side.

So, if the Court's numbers from the Report were to hold true through the exceptions phase (and the Court acknowledges at the outset that additional evidence will likely be presented on this issue – but the following is used for illustrative purposes) then the north side Code parcel landowners have a right to divert collectively 75% of the stream up to a maximum of 38.84 cfs. To

the extent a Code parcel landowner determines not to use their share of the water and maximum flow is otherwise available, then that water would temporarily revert to the south side. However, if the flow was low enough that the entire 38.84 cfs could not be diverted, and rights on the north side for Code parcel users were being prioritized based on *Achepohl* priorities, a senior *Achepohl*, Code parcel water user could forego use of their water and a junior *Achepohl*, Code parcel water user could utilize that water before it would revert and be available to south side water users.

6. *As a matter of law, are north side water users entitled to water in "late winter and early spring ... to permit AID to recharge its conveyance facilities" (Report at 44)?*

This issue was raised by the Yakama Nation as an exception to the Court's ruling to require the United States to leave sufficient flow in Ahtanum Creek to allow AID to recharge its conveyance facilities in the late winter and early spring. Report at 44. The Court stated:

> "After July 10, the U.S. may divert the entirety of the river with the caveats that sufficient flow must be retained in Ahtanum Creek to maintain fish life and in the late winter and early spring enough flow must be made available to permit AID to recharge its conveyance facilities."

The Yakama Nation and Ecology believe this to be an issue of res judicata in light of the decisions made by the Ninth Circuit in the Pope Decree and the prior state court adjudication resulting in the *Achepohl* decree. The briefing and argument at hearing show that the Pope Decree only addressed this issue to say that north side parties can begin diverting at the "beginning of each irrigation season, in the spring of the year." *Ahtanum II*, 330 F.2d at 915. The certificates issued as a result of *Achepohl* establish April 1 as the beginning of the irrigation season. AID and John Cox argue the Pope Decree does not necessarily control the recharge of conveyance facilities because that decision only applies to the irrigation season. Canal recharge, in their opinion, is related to irrigation, but is not in and of itself, irrigation. They also remind the Court of the practical reality in the Ahtanum watershed that early spring runoff is usually vigorous and characterized by flood events. Since the conveyance facilities and the creek system are one and the same, not facilitating the flow of water down the creek and related channels would only exacerbate flooding conditions.

Consistent with its previous findings, the Court agrees the provisions in the Pope Decree and *Achepohl* control the decision here. *See Ecology v. Acquavella*, 112 Wn.App. 729 (2002) (*Acquavella IV*). Under those two precedents, it is well within the Court's authority to confirm a season of use for irrigation beginning on April 1. If evidence is supplied to support such a date at the Exceptions Hearing, the Court will do so. Therefore, the real issue is whether this Court is

precluded as a matter of law from allowing the north side water users to divert prior to April 1 or for John Cox and/or AID to begin recharging conveyance facilities prior to April 1. The Court believes that the irrigation season (or purpose of use) encompasses recharge of conveyance facilities. *Neubert v. Yakima-Tieton Irrig. Dist.*, 117 Wn.2d 232, 239 814 P.2d 199 (1991) (Broadly construed irrigation purpose to include frost protection and any other use that contributes to the growing of crops). Therefore, an interpretation of the Pope Decree and *Achepohl* leads to the conclusion that diversions for actual irrigation can begin no earlier than April 1 and so finds as a matter of law. Therefore, any entity claiming a right to divert water based on an *Achepohl* certificate may not begin diverting prior to April 1 and all rights confirmed in this subbasin shall utilize that date as the beginning of the irrigation season.

However, AID may have authority to recharge the conveyance facilities prior to April 1 in light of a certificate that was issued by Ecology's predecessor to the district. That certificate, which was admitted into evidence along with other certificates issued by Ecology (DOE – 140), was issued in 1933 and does not include a season of use. It also shows diversions from the south and north fork of the Ahtanum system. It is not clear if or how that certificate may impact this issue but parties may wish to address this issue at the exceptions hearing. John Cox also has a certificate that includes an irrigation right for the irrigation season beginning April 1. It shall be bound by the same legal ruling as other diversionary users of water with an *Achepohl* certificate that establishes the beginning of the irrigation season as April 1.

At this time, the Court may, upon admission of applicable evidence, quantify rights that allow diversions beginning April 1.

7. *Can a north side non-party to the Pope Decree claim a senior right or a junior right?*

This Court has ruled that the Pope Decree and the *Achepohl* adjudication are binding on successors to individuals actually involved in those proceedings. Since that time, Division III of the Court of Appeals has made it clear that res judicata applies to water adjudications. *Acquavella IV*, 112 Wn.App. 729, 739 (2002); *see also* RCW 90.03.220. Therefore, in general, to receive a senior right in this adjudication, a party must show that their predecessors were confirmed rights in *Achepohl* and were determined to have an applicable right by the Ninth Circuit in *Ahtanum II*. As an extension of *Ahtanum II*, an *Acquavella* party's predecessor must also have been a signatory to the Code Agreement.

The question then arises as to whether parties to this adjudication may claim a junior or senior right if they were not parties to the prior court actions and the Code Agreement. The Court notes that this analysis does not concern claimants to springs as the claims of such individuals are unique and examined in Question 8 (except see analysis regarding DNR below to non-diversionary stock and wildlife water). This Court did not confirm senior rights to claimants who could not trace their rights to one of the answer numbers ultimately approved by the 9th Circuit in *Ahtanum* II. *See e.g. Report of the Court Subbasin* 23 at page 323. The Court invited claimants who did not receive senior rights to present evidence and argument to the effect their predecessor was not a party in *U.S. v. Ahtanum*. This is appropriate because the bar of res judicata requires identity of action, subject matter, and parties. *Acquavella IV*, 112 Wn.App. 729. If any of these are missing, then the doctrine of res judicata does not apply. The Sauers (Claim No. 2243), Pulse/Brule (0040) and Karen Klingele (Claim No. 2320) assert their predecessors were not properly joined to the *U.S. v. Ahtanum* proceeding and should not be penalized accordingly.

The Court maintains its belief that res judicata does apply in this subbasin. Generally, the Code Agreement, *Achepohl* and *U.S. v. Ahtanum* bind water users on lands north of Ahtanum Creek. It may be the case that certain landowners were left out of any of those proceedings. However, the landowner carries the burden of making that showing. Because the Ninth Circuit sought to enforce the provisions of the Code Agreement, a claimant asserting the federal proceeding was not binding on it must also show that its predecessors <u>were</u> parties to the 1908 Code Agreement. This issue is discussed more fully below.

The Yakama Nation argues that even if a claimant could show their predecessor was not properly joined to the *U.S. v. Ahtanum* proceeding, they are bound anyway. It asserts "the State intervened in [*U.S. v. Ahtanum*] as parens patriae on behalf of the citizens of the state and specifically on behalf of the individual patentees north of the boundary." June 25th Transcript at p. 267. The Washington Department of Natural Resources (DNR) disagrees. The Court notes that DNR provided oral argument on this issue in regard to Issue 3. Because the topics overlap in regard to DNR, the Court will decide the impact of the state's participation in *U.S. v. Ahtanum* on DNR herein along with providing its analysis on this issue in regard to non-governmental landowners.

a. Citizen non-parties

Did the state's participation in *U.S. v. AID* bind all state agencies or residents in the area? In support, the Yakama Nation cites the Court to *U.S. v. AID*, 124 F. Supp. 818, the District Court decision leading to the Pope Decree. Page 824 reads:

> The State, with the consent of all concerned, has appeared as intervenor in this proceeding to protect its rights and prerogatives as the local sovereign and as parens patriae in behalf of the individual patentees north of the boundary, who are its citizens and who claim property rights under its laws and under the decrees of its courts.

This statement must be read in context and in consideration of the status of federal water law at that time. The *U.S. v. Ahtanum* litigation was commenced by the United States to assert a right to all the water from Ahtanum Creek pursuant to the treaty signed on June 9, 1855. Further, to bestow water on reservation lands would require removal of water rights from north side lands that had been confirmed in *Achepohl*. In essence, the reason for the State of Washington's intervention, as set forth by the District Court, was primarily to ensure its laws and actions were not subsumed by federal action; that states had the power to decide how water resources within its boundaries were to be utilized. Additionally, the parcel-by-parcel adjudicative function of the *U.S. v. Ahtanum* litigation would not arise until later and required an individualized proceeding where property owners represented their own interests. Therefore, to say the state intervened in that litigation with the function of protecting individual rights on a parcel-by-parcel basis requires that the quote above be read out of context. For a state resource agency to assume such a role would seem inappropriate, as it would require the agency to advance the interests of some water claimants over those of others.

The other cases cited by the Yakama Nation do not support its arguments and are distinguishable in light of the circumstances regarding the State of Washington's participation in *U.S. v. Ahtanum*. For example, *Snyder v. Munro*, 106 Wn.2d 380, 721 P.2d 962 (1986) was an action challenging the constitutionality of RCW 44.07B, a law that established the boundaries in state legislative districts. The Washington Supreme Court held a prior effort in federal court challenging the statute was res judicata and barred the second action. The key issue was the privity of the parties in the two actions. The first lawsuit involved heads of the major political parties and several state officials including Secretary of State, Lieutenant Governor, and Attorney General. The subsequent state court action was a group of voters. The Court found their interests were represented in the first federal action. That litigation clearly applied statewide to all citizens as opposed to this dispute and *U.S. v. Ahtanum,* which ultimately analyzed the individual interests of a discrete group of landowners. Again, the intervention by the state in *U.S. v. Ahtanum* was an effort

to try to have its laws enforced. The Court is unaware of any effort by the State to put on evidence and argue beneficial use of any entity in that litigation.

City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) is similar to *Munro* and strikingly different to the case at bar. That case involved an effort by the City to obtain a license to construct a power plant on the Cowlitz River. To obtain the license from the Federal Power Commission, a public hearing was held. The Attorney General's office participated with one assistant representing the state director's official position against issuance of the license and a Special Assistant Attorney General appointed to "represent all persons of the State whose views were in conflict with the State's official position." An action was started in federal court by the State to challenge the issuance of the license and another action commenced in Superior Court to declare valid the issuance of revenue bonds to fund the project. The U.S. Supreme Court determined the federal process was the exclusive jurisdiction and that court's decision binding on all citizens of the state, who had been represented in the proceeding before the Commission. When the state went to such an effort to deliberately represent the interests of the citizens (including the appointment of a special assistant attorney general on their collective behalf) on a case that had broad regional implications, the result was subsequently binding. No evidence of such an effort by the Attorney General in *U.S. v. Ahtanum* has been supplied.

The Court finds that the citizens of the state were not represented by the State in the *U.S. v. Ahtanum* proceeding in regard to determining rights for the individual property owners. Therefore, individual landowners who were not properly joined to that proceeding are not barred from seeking a right in this adjudication. However, certain questions were decided in that litigation that must be considered by any claimant who seeks to establish a right in this stream adjudication. Specifically, the Ninth Circuit found that the 1908 Code Agreement was binding and divided all the diversionary rights to water in the Ahtanum subbasin. *Ahtanum I*, 236 F.2d 338 (1956) ("But we are constrained to hold that since some arrangement for the apportionment of the Ahtanum waters was the sort of thing which the Secretary was authorized to do by the grant of general powers of supervision and management, he therefore had the power to make the 1908 agreement"). Accordingly,

> [t]o the extent that the defendants are to be permitted to have any part of the use of that portion of the flow of the stream, their rights are deraigned from the agreement of 1908. Apart from that agreement, those defendants would have no right to the use of any of said waters except in strict subordination of the prior and better rights of the United States as trustee for the Indians. *Id.* at 340.

Of course the Ninth Circuit eventually determined rights on a parcel-by-parcel basis and only confirmed rights for successors to individuals who had signed the 1908 Code Agreement and similarly limited the extent of the right to the quantity and season of use in 1908. *See Ahtanum II*, 330 F.2d 916, Appendix A (For example, in regard to Answer 27, the Court eliminated any right for that parcel on the ground that the "Twenty acres found to have been irrigated in 1908 were in fact not owned by a 1908 signatory"). In this regard, the Ninth Circuit made the following statement as to the effort of the District Court in carrying out the appellate court's directives.

> Appellant complains that the court refused to adjudicate the 1908 claims of some 456 defendants who failed to establish beneficial use of water or the existence of water rights belonging to them or to their predecessors in interest as of that date. However, the findings of the court do disclose, as we have indicated, the lands which were in fact irrigated in 1908, and the acreage in each parcel that was so irrigated. Obviously this finding purports to be and is a determination as to the entire use of waters in 1908. By excluding therefrom other tracts, the finding, it seems to us, adequately disposes of any claim that might have been made by other persons in respect to lands not listed in the findings.

These statements convince this Court that even if an *Acquavella* claimant can prove they were not properly joined to the *U.S. v. Ahtanum* proceeding, they must also prove, as every single water user was required to do in that proceeding, that they are successors to a signatory of the 1908 Code Agreement. A successful showing of both, along with evidence of compliance with *Achepohl*, will result in the claimant sharing in the 75% award of the stream that derives from the 1908 agreement. In light of the Ninth Circuit's decision, this Court will not consider any argument that a claimant's predecessor was not given an opportunity to sign the 1908 Code Agreement. The message from the appellate court is clear that only Code Agreement successors share in the 75% of the stream's flow allocated to north side users and to hold otherwise now would be unjust to those who participated in *U.S. v. Ahtanum* and were denied senior rights.

b. *Analysis of DNR arguments and claims*

The Court now turns to whether the participation by the Attorney General in *U.S. v. Ahtanum* binds the Department of Natural Resources. Because the Court has already found that non-diversionary stock water rights were not included in *Ahtanum II*, then, obviously, participation by the Attorney General in that litigation would not bind the State on that question since it was not analyzed. But there are other considerations that make the Yakama Nation's position untenable in regard to stream adjudications. DNR relies on *State v. Pacific Tel. & Tel. Co.*, 9 Wn.2d 11, 14 (1941) for the principle that "a judgment for or against the state or an officer or agency thereof in

matters as to which such officer or agency is entitled to represent the state in litigation, is conclusive for or against the state." The test as to whether a judgment in a prior action involving officers of the state is res judicata as against the state in a second action involving the same subject matter "depends upon whether the officers have authority to represent the interests of the state in the prior action." Did the Attorney General have authority to represent the interests of DNR in *U.S. v. Ahtanum*?

There is no evidence to show DNR's interests were in any way represented and/or considered during the *U.S. v. Ahtanum* litigation and the results therefrom are not binding on this Court. First, it must be remembered that in this adjudication, Ecology and DNR are on different sides of the "v." Ecology is the plaintiff and DNR is one of the thousands of defendant water claimants. *U.S. v. Ahtanum* was not an adjudication pursuant to RCW 90.03 and proceeded in federal court. Ecology did not assume its usual role in an adjudication of providing factual information to the court, which it maintains pursuant to its authority to administer the Water Code. The common denominator in that litigation and this adjudication would be Ecology's interest in ensuring that state water laws are applied in a manner the agency deems to be correct. In general, it does not seek a water right on its own behalf.[2] DNR's role on the other hand is far different and is premised on a fundamental need to supply water to domestic and native animals utilizing the lands it owns. Its sole purpose is to obtain a water right for such uses. DNR would not share Ecology's interest in ensuring state water law is applied correctly (except to obtain a water right) which would have made its participation unnecessary in *U.S. v. Ahtanum*.

The Court finds DNR is not precluded from receiving a non-diversionary stock water right for its lands. The agency was not a party to the Pope Decree and the Court has determined that *Ahtanum II* did not consider non-diversionary stock water rights. Because the decision in *Ahtanum II* was based on an interpretation of the 1908 Code Agreement, the Court also finds that non-diversionary stock water rights can be confirmed independent of that agreement since it also would not apply to non-diversionary uses. As the Ninth Circuit's discussion of 1908 water uses illustrates, cattle were grazed in the mountainous, remote lands during the summer months. Obviously, water had to be obtained from somewhere and the only source at that time would have been naturally

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[2] That may not be true in those instances where Ecology has set instream flows.

occurring sources. Therefore, the evidence exists to show the use of non-diversionary sources such as those on DNR lands.

The final barrier to this Court confirming non-diversionary stock water rights to DNR is the effect of *Achepohl* on its claims. This Court found generally in its Report that diversionary claims to springs had to be brought before the court during *Achepohl* or be barred by res judicata. *Dep't of Ecology v. Acquavella*, 112 Wn.App. 729, 739 (2002); *see also* RCW 90.03.220. DNR has demonstrated through the Declaration of Paul Penhallegon dated June 6, 2003 that *Achepohl* was concerned with diversionary uses of water and did not consider any claims DNR had to non-diversionary stock water. Toward that end, the lis pendens identified only two tracts of land (124 acres) out of over 25,000 owned by the agency. A diversionary right was ultimately confirmed for 80 of those 124 acres in the name of Wallace Wiley. The map attached to the Referee's Report in *Achepohl* also demonstrated the adjudication was focused on areas proximate to the creek and tributaries. Finally, in the statement of facts submitted by the Supervisor of Hydraulics attached to the Penhallegon Declaration it states:

> That all the persons named as defendants in the caption of this petition are the names of all known persons claiming the right to divert the waters of Ahtanum Creek and its tributaries, the right to diversion of the water of said creek which it is sought hereby to be determined.
>
> WHEREFORE your petitioner prays that an order of the Court be issued fixing a day certain for hearing upon this petition and that a summons be issued out of this Court in the name of the State of Washington to all known persons claiming the right to divert the waters of Ahtanum Creek and its tributaries. . ..

DNR sets forth further arguments to supports its contention that non-diversionary stock water rights were not considered in the *Achepohl* litigation including additional citations to the Referee's Report showing the geographic area covered by the adjudication was determined by a survey of irrigated lands (Referee's Report at 4) recapitulation of lands involved showed 965 acres under the John Cox ditch and a total of 10,310 acres are being irrigation the Ahtanum Creek. Referee's Report at 12. The Referee also described the extent of use in terms of the number of acres that can be irrigated and that "any" person taking water from Ahtanum Creek and its tributaries maintain measuring devices. Referee's Report at 82-84. Finally the decree, at page 2, indicates the:

> Parties hereto and their successors in interest be and they hereby are entitled to divert from Ahtanum Creek and its tributaries the amount of water specified in the classification hereinafter set forth . . ..

Based on the analysis above, the Court finds that DNR is not barred by res judicata resulting from the 1908 Code Agreement, *Achepohl* and *U.S. v. AID*. The agency shall be added to the list of claimants authorized to utilize non-diversionary stock and wildlife water consistent with the stipulations set forth at pages

8. *Are claimants to north side springs that are tributary to Ahtanum Creek subject to Achepohl, the Pope Decree and/or the Code Agreement?*

This Court determined in its Report that "if a spring forms or joins a live flowing water course that ultimately flows into Ahtanum Creek then any right to such water must have been preserved in the *Achepohl* adjudication if the initiation of the right predates the commencement of that adjudication. If the right was initiated after the 1925 adjudication, [claimant] would need to follow the permit/certificate process set forth RCW 90.03." *See e.g. Report* at 334-335. Only the Yakama Nation provided briefing on this issue asking the Court to extend its decision regarding springs in *Memorandum Opinion and Order Re: Exception of Tom and Zeldia Worrell to Supplemental Report of Referee, Subbasin No. 22 (Wide Hollow)* dated November 8, 1999. That decision, which summarizes other relevant opinions in this adjudication[3] establishes that

> "landowners who initiated pre-1917 uses of small springs and seepage, that in the natural course of events, arise and return to the earth without joining or forming a water course or leaving the owner's property have a prior right to those small water sources." *Id.* at 12.

However, the individual asserting such a right carries the burden to prove such waters fit this situation. Otherwise, the Yakama Nation and Ecology believe the Court's ruling is correct and that an individual seeking a right to use a spring must show compliance with the 1908 Code Agreement, *Achepohl,* and the Pope Decree. The Court agrees with the Yakama Nation's exception and finds that any individual who asserts a claim to a spring on the basis that it is not tributary to Ahtanum Creek carries the burden of establishing that fact. Otherwise, the Court leaves its ruling alone except to say that it applies to diversionary uses of water only. The Court's decisions above regarding non-diversionary stock water uses of water would still apply to this issue and claimants who seek such a limited use of springs are not bound by the Code Agreement, *Achepohl* or the Pope Decree.

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[3] *Opinion Re: Exception of Dwayne and Alvina Dormaier* dated September 16, 1993; *Memorandum Opinion Re: Return Flow Exceptions of Harry Masterson and Mary Lou Masterson* dated July 16, 1996.

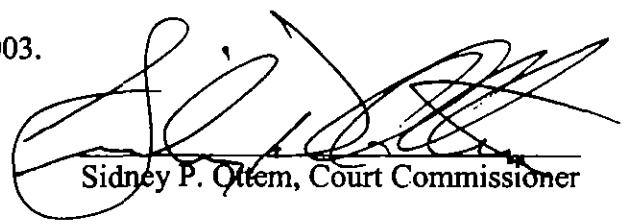
9. *Are north side water users bound by the rulings set forth in the Pope Decree in regard to place of use, beginning and ending dates of season, and instantaneous and annual quantities?*

As was discussed at the June 25, 2003 hearing, this question is essentially a compilation of many of the other issues analyzed above. The Court's rulings in regard to those questions should be considered herein. Although *U.S. v. AID* may not have been an adjudication per se, it was about as close as it gets. Landowners were brought in as parties, evidence relating to their water right claims was taken during numerous weeks of trial, and water rights were determined and decreed. Furthermore, the Ninth Circuit made numerous findings during the course of its two decisions and the Court believes that the issues it decided are res judicata in this adjudication. Consistent with the analysis in the other questions, the Court finds that the issues decided by the Ninth Circuit include, to some level of specificity, place of use, beginning and ending dates of season, and instantaneous and annual quantities. Where necessary and to the extent the Ninth Circuit's decisions leave any ambiguity on these issues, this Court will fill the gaps.

II. CONCLUSION

This opinion addresses the legal issues in Subbasin No. 23. Accordingly, a date must be scheduled for an evidentiary hearing to address the factual exceptions to the Report. The Court would expect to take up this topic at pre-hearing conference hereby set for November 13, 2003.

Dated this 8th day of October, 2003.



Sidney P. Ottem, Court Commissioner