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Superior Court of the State of Washington
For the County of Yakima

KIM M. EATON
YAKIMA COUNTY CLERK

Court Commissioner Sidney P. Ottem

Yakima, Washington 98901

December 24, 2003

To: Subbasin 23 Counsel and Claimants

Re: Clarification of October 8, 2003 *Memorandum Opinion Re: Ahtanum Creek Legal Issues*

The Court allowed parties to file written requests for clarification of its Memorandum Opinion Re: Ahtanum Creek Legal Issues by December 5, 2003 with the goal of facilitating the January/February, 2004 hearing. Requests were received from the Washington State Department of Natural Resources (DNR) and the Yakama Nation. This memorandum will respond to those requests.

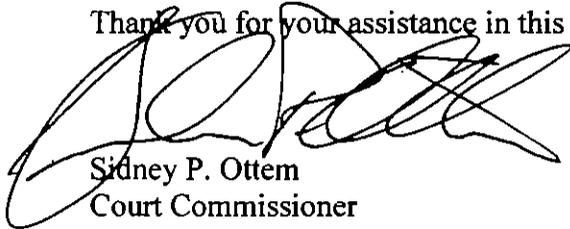
DNR asks the Court to clarify whether it will be required to resubmit the documents that it had provided as part of its briefing of Ahtanum Creek Legal Issues. DNR points out, correctly, that the Yakama Nation had until December 5, 2003 to lodge an objection to that evidence. However, the Court extended the date for filing supplemental proposed evidence until December 31, 2003 and although the DNR evidentiary issue did not specifically arise, it was reasonable for the Yakama Nation to conclude that its time for objecting to the documents submitted by DNR was also extended. The Yakama Nation indicated in a recent letter (dated December 19, 2003) that it would submit any proposed exhibits in response to the DNR by December 31, 2003. Until the Court has had the opportunity to review the Yakama Nation's objection to DNR's documents, if any, and any supporting proposed evidence, if any, the Court is unable to state conclusively whether or not DNR needs to be present at the February 2, 2004 hearing date presently reserved for the agency. If the Yakama Nation does not object, the Court does believe, as it indicated on page 28 of the October 8, 2003 Memorandum Opinion, that the record is adequate to add DNR to the list of claimants who are authorized to utilize non-diversionary stock and wildlife water.

DNR also asks a question that is a bit unclear from the Court's perspective – "It is my understanding that neither DNR nor any other claimant of non-diversionary stock water, listed in the report, would need to submit evidence of their use." To the extent DNR refers to individuals who were listed on page 344 of the Report, those parties need not submit additional evidence to support the confirmation of a right as a right has already been confirmed. However, if DNR is asking whether any party seeking a non-diversionary stock water right who has not been confirmed one to date must present evidence, the answer is most definitely yes. A non-diversionary stock or wildlife right can only be based on beneficial use similar to all other types of water rights in Washington. The ruling of this Court, in general, is that individuals in Subbasin 23 are not prohibited as a matter of law by *U.S. v. AID* from obtaining a non-diversionary stock water right in this adjudication. Proof of beneficial use is still required.

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The Yakama Nation's request for clarification concerns diversionary rights to stock water and specifically this Court's ruling in regard to Threshold Issue No. 8. The Court determined 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 use commenced after 1917, then a permit/certificate from Ecology or its predecessor would be necessary. Additionally, the claimant must also be prepared to show compliance with the 1908 Code Agreement and the Pope Decree. The Yakama Nation indicates that all claimants in Subbasin 23 would carry this burden (a proposition with which this Court agrees) and specifically indicates that three claimants who made claims to diversionary water rights would carry this burden – Gary and Ruth Hansen (Claim No. 0133 & 01082), Theodore & Wanda Mellotte (Claim Nos. 542-545) and Hiram White, Sharon White and Dorothy White (Claim No. 08454). The Court has not scheduled the Mellottes or the Hansens for appearance at the hearing because those claimants were not confirmed a diversionary stock water right and have not filed exceptions. Therefore, the Yakama Nation has no claim to challenge and its exception to those claims need not be pursued at this time. As to the Whites, they did file an exception to the Court's denial of a water right to the two springs they utilize. The Court notes the Whites do carry the burden of showing the springs are not tributary to Ahtanum Creek and were therefore not considered in *Achepohl* along with the other issues raised by the Court in its January 31, 2002 Report at pages 334-335.

Thank you for your assistance in this matter.



Sidney P. Ottem
Court Commissioner

cc: Referee's Office