

**FILED**

**MAY 19 2010**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

NO. 281141

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

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

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Plaintiff/Respondent,

v.

JAMES J. ACQUAVELLA; UNITED STATES; YAKAMA NATION;  
AHTANUM IRRIGATION DISTRICT; JOHN COX DITCH  
COMPANY; and LA SALLE HIGH SCHOOL; DONALD AND  
SYLVIA BRULE; JEROME DARNIL; and ALBERY LANDTRIP,

Defendants/Appellants.

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**BRIEF OF DEFENDANT/RESPONDENT WASHINGTON STATE  
DEPARTMENT OF NATURAL RESOURCES**

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## I. INTRODUCTION

The sole issue on appeal involving Respondent Washington State Department of Natural Resources (DNR) is whether the trial court erred in confirming a non-diversionary stock water right in DNR with a priority date senior to all others, except the Yakama Nation's instream right for fish.

The Yakama Nation asks this Court to reverse and remand this issue for presentation of evidence as to the priority date. Yakama Nation's Corrected Opening Brief at 47-49. DNR concedes that the evidence it presented to the trial court does not support the priority date the court established. DNR agrees that remand is appropriate for the entry of findings and fact on the narrow issue of priority date for a non-diversionary stock water right in Subbasin 23.

## II. FACTS

DNR manages 25,640 acres of state trust lands for the support of the common schools within the boundary of Subbasin 23. Department of Natural Resources' ("DNR's") Rebuttal to Nation's Reply to DNR's Exception Regarding Non-Diversionary Stockwater Re: Subbasin 23(Ahtanum) (CP 4254-4261); Declaration of Paul Penhallegon Re: Subbasin 23 (Ahtanum) (CP 4178-4250). Washington acquired these lands at statehood by a grant from the federal government in 1889 and

through a selection of lieu lands.<sup>1</sup> *Id.* DNR's lands in Subbasin 23 have been used for grazing by the state since the beginning of the 20th century. *Id.*; see RCW 79.13.380-390 (lieu lands utilized for grazing of livestock).

In Subbasin 23, DNR claimed non-diversionary water rights for continuous stock water. Investigation Report Conducted by Keown & Zink on 4/23/1991 Re: Claim of Washington State Department of Natural (Exhibit SI-156). The Department of Ecology performed a field examination of DNR's claim on April 23, 1991. *Id.* The Investigation Report reads in part as follows:

Department of Natural Resources (DNR) has claimed water from various springs, lakes, ponds, and hydraulically connected wells. Within the subbasin on DNR lands, many natural springs, lakes, and ponds occur on these lands. Some of these lands are leased to area cattle ranchers for grazing purposes. These cattle can obtain stock water from drinking from these undeveloped natural sources. . . . A proposed stipulation regarding stock water is addressed in the Plaintiff's Report to the Referee for Subbasin 23 (Ahtanum Creek). The proposed non-diversionary stock water stipulation encompasses the watering needs of livestock when they drink directly from undeveloped natural sources.

The trial court confirmed non-diversionary stock water rights for certain claimants. Report of the Court Concerning the Water Rights for

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<sup>1</sup> The federal Enabling Act states: ". . . upon admission of [Washington, Montana, North and South Dakota] into the Union sections numbered sixteen and thirty-six in every township . . . and where such section, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto . . . in lieu of which the same is taken, are hereby granted to said States in support of the common schools. . . ." Enabling Act, § 10, 25 Stat. 676 (1889).

the Subbasin No. 23 (Ahtanum Creek), 1/31/02, p. 114 – 115 (CP 1091-1092) (*See Appendix A*). The court noted that the Yakama Nation had objected to the stock water stipulation which had been used in other subbasins, and so the court entered the substance of the stipulation in this subbasin by decision. Report of the Court at 114 (CP 1091).

DNR was not among the claimants initially confirmed as having a non-diversionary stock water right. Report of the Court at 344 (CP 1322). The trial court denied DNR's claim in its Report because DNR had not appeared at the hearing. Report of the Court at 343 (CP 1321). DNR filed an exception to the Report on the basis that the evidence and past practice in this adjudication supported confirming DNR's non-diversionary stock water claim. DNR's Exception to Report of the Court Re: Subbasin 23 – Claims No. 0589 & (A)0590 (CP 4262-4266). In rebutting various arguments raised by the Yakama Nation, DNR filed a Declaration of Paul Penhallegon, DNR Assistant Division Manager for the Product Sales and Leasing Division, which set forth information concerning the history of DNR's acquisition and use of its lands in Subbasin 23. (CP 4178-4250).

The trial court ruled in favor of DNR's claim in its Memorandum Opinion Re: Ahtanum Creek Threshold Legal Issues, October 9, 2003. Memorandum Opinion, p. 25-28 (CP 967-970). The court further ruled in its 2008 Supplemental Report that there was sufficient evidence of

beneficial use in the record, based on Ecology's Investigation Report and the Declaration of Paul Penhallegon, to confirm a non-diversionary stock water right in DNR. Supp. Report at 197-198 (CP 1173-1174). It added DNR to the list of claimants confirmed this right. Supp. Report at 207 (CP 1183).

### III. ARGUMENT

The non-diversionary stock water right confirmed to DNR and other claimants established a priority date as follows:

Retention of such water shall be deemed senior (or first) in priority, except as that use is inconsistent with the Yakama Nation's instream right for fish which carries a priority date of 'time immemorial,' in which case the Nation's right shall have priority.

Report of the Court at 114-115 (CP 1091-1092). DNR concedes that this priority date does not reflect the evidence in the record concerning DNR's acquisition and use of its lands in Subbasin 23, as set forth in Ecology's Investigation Report and the Declaration of Paul Penhallegon, as described above.

In *State v. Acquavella*, 131 Wn.2d 746, 755, 934 P.2d 595 (1997), the court stated the following:

In conducting a water adjudication, the trial court generally considers two elements when confirming existing rights: '(1) the amount of water that has been put to beneficial use and (2) the priority of water rights relative to each other.'

Quoting *Department of Ecology v. Grimes*, 121 Wn.2d 459, 466-67, 852 P.2d 1044 (1993). The court reversed the trial court's order confirming a water right based on an irrigation district's capacity when it had not required evidence of past beneficial use of that water. *Acquavella*, 131 Wn.2d at 756. The court remanded the matter for the trial court to calculate beneficial use based on diversion and actual use. *Id.*

This appeal concerns the second element, the priority date of the water right. As to DNR's confirmed right, the trial court's order is not based on the evidence presented for its consideration. This matter should be remanded to the trial court for entry of findings of fact as to the limited issue of priority date.

#### IV. CONCLUSION

The Court should remand this matter for entry of findings of fact regarding the priority date of DNR's non-diversionary stock water right.

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DNR concurs with the Yakama Nation that a remand is appropriate for this limited purpose.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of May, 2010.

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# **APPENDIX A**

1 made no provision for stock water) is factually inaccurate. Nor does it appear the parties were fully  
2 heard. The Court finds that the decision was not a final judgment on the merits.

3 Furthermore, application of the doctrine will work an injustice on the party against whom it  
4 will be applied. The result here is unjust if the affected parties did not get a fair opportunity to  
5 present their case and receive, in turn, a reasoned decision. The inequity rises to an even higher  
6 level when the decision rendered is not in accord with the facts. The Court finds that AID and its  
patrons will suffer an injustice if the doctrine is applied.

7 Consistent with Judge Stauffacher's ruling regarding a minimum treaty right for fish in  
8 Ahtanum Creek, this Court respectfully departs from the conclusions of the Ninth Circuit and rules  
9 that there is also a non-diversionary stock water right in Ahtanum Creek for 0.25 cfs, identical to  
10 every other subbasin in the Yakima Basin. Because the Yakama Nation objected to a stock water  
11 right for northside Ahtanum Creek users, the Court enters the following as a decision of the Court  
12 rather than as a stipulation as has occurred in other subbasins. It is the intent of the Court to  
13 establish a non-diversionary stock and wildlife watering right throughout the Ahtanum subbasin in a  
14 fashion identical to other subbasins. The non-diversionary stock and wildlife watering right shall be  
15 defined as follows:

- 16 1. Waters in natural watercourses in the subbasin shall be retained when naturally  
17 available, in an amount not to exceed 0.25 cubic feet per second (cfs), for stock  
18 water uses in such watercourses as they flow across or are adjacent to lands, which  
19 are now used as pasture or range for livestock. Retention of such water shall be  
20 deemed senior (or first) in priority, except as that use is inconsistent with the  
21 Yakama Nation's instream right for fish which carries a priority date of 'time  
22 immemorial,' in which case the Nation's right shall have priority. Regulation of  
23 these watercourses by the plaintiff shall be consistent with such retention  
24 requirements.
- 25 2. Waters in natural watercourses in the subbasin shall be retained when naturally  
available, in an amount not to exceed 0.25 cubic feet per second (cfs), for wildlife  
water uses in such watercourses as they flow across or are adjacent to lands, which  
are now used as pasture or range for wildlife. Retention of such water shall be  
deemed senior (or first) in priority, co-equal with the Yakama Nation's instream  
right for fish which carries a priority date of 'time immemorial.' Regulations of  
these watercourses by the plaintiff shall be consistent with such retention  
requirements.
3. Waters in naturally occurring ponds and springs (with no surface connection to a  
stream) in the subbasin shall be retained for stock water uses, when such ponds and  
springs are located on or adjacent to lands which are now used as pasture or range

1 for livestock. Said uses embody entitlements to a level in the water bodies sufficient  
2 to provide water for animals drinking directly therefrom while ranging on riparian  
3 lands, and with the same priority as provided in paragraph 1. Regulation of the  
4 ponds and springs by the plaintiff shall be consistent with such retention  
5 requirements.

4. Waters in naturally occurring ponds and springs (with no surface connection to a  
5 stream) in the subbasin shall be retained for wildlife watering uses, when such ponds  
6 and springs are located on or adjacent to lands which are now used as pasture or  
7 range for wildlife. Said uses embody entitlements to a level in the water bodies  
8 sufficient to provide water for wildlife drinking directly therefrom while ranging on  
9 riparian lands, and with the same priority as provided in paragraph 2. Regulation of  
10 the ponds and springs by the plaintiff shall be consistent with such retention  
11 requirements.

9 Diversionary stock water is a different issue. The Court has found that the development of  
10 the Ahtanum subbasin would require the settlers and water users to own and raise livestock. It is  
11 not clear how the animals received their water. The 1925 adjudication of Ahtanum Creek states in  
12 the final decree that "all of the lands in the above schedules are entitled to water continuously  
13 throughout the year for stock and domestic use." DOE - 133 at p. 67. Clearly some of the rights  
14 set forth in the decree are non-riparian and would therefore permit the user to divert out of the  
15 irrigation season for purposes of supplying stock water. However, that state court decision was  
16 modified considerably by the Ninth Circuit's decision in Ahtanum II, 330 F.2d 897. That decision  
17 precludes the use of all water in Ahtanum Creek after July 10 each year by northside diverters. Id.  
18 at 915. Therefore, this Court finds that the diversionary stock water right must be incidental to  
19 irrigation practices on non-riparian lands in order to be consistent with the Ninth Circuit's decision.

18 d. Point of Diversion Changes

19 The testimony and evidence shows that in many cases the points of diversion authorized for  
20 use in the certificates that issued following the 1925 Ahtanum Creek Adjudication are no longer  
21 being used. When these water rights were established in the late 1800's, gravity flow ditches were  
22 predominately used to convey the water to the irrigated lands and the land was rill or flood irrigated.  
23 Often these ditches were over a mile in length.

24 As technology advanced, many of the landowners abandoned the gravity flow ditches and  
25 installed pumps on or near their property to withdraw water from the creek. In other cases several  
small ditches were abandoned in favor of using one larger ditch resulting in landowners pumping  
their water from the ditch to lands that previously had been served by a gravity flow ditch. Many of

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BRULE; SYLVIA BRULE; JEROME  
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Defendants/Appellants.

**CERTIFICATE OF  
SERVICE**

I, Rebecca Davila, certify that on May ~~18~~<sup>19</sup> 2010, I caused to be served copies of the BRIEF OF THE WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES and this CERTIFICATE OF SERVICE on the parties or their counsel of record as follows:

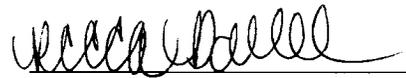
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18<sup>th</sup> day of May, 2010, at Olympia, Washington.

  
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