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APR 16 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY: _____

No. 281141 Consolidated with 28115-9-III; 28116-7-III;
28117-5-III; and 28119-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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/Respondent,

v.

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

Defendants/Appellants.

YAKAMA NATION'S CORRECTED OPENING BRIEF

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I. INTRODUCTION.

The Confederated Tribes and Bands of the Yakama Nation (hereinafter "Yakama Nation") appeal certain rulings of the Yakima County Superior Court as outlined in this brief.

II. ASSIGNMENTS OF ERROR.

A. Practicably Irrigable Acreage Standard.

1. The trial court committed error in refusing to quantify the Yakama Nation's irrigation rights in Ahtanum based on the practicably irrigable acreage standard.
2. The trial court's ruling is in error:

The Ninth Circuit apparently construed that litigation as resolving the reserved water right issue, as it more than allocated the available water for reservation use. It determined that the lands which the YIN would be able to irrigate in 1915 by way of the Wapato Project were all of the lands capable of irrigation then and for the future.

Memorandum Opinion Re: Ahtanum Watershed Practicably Irrigable Acreage (11/9/94) at p. 11, lines 5-9 (CP 1510); Memorandum Opinion Sub. 23 Exceptions (April 15, 2009) at p. 51 (CP 456) entered as part of Ahtanum Conditional Final Order (CP 129).

B. Storage Water.

3. The trial court committed error in ruling that the Nation's claim for purpose of use for storage is either premature as to the period

between April 1 and October 1 or prohibited by *U.S. v. Ahtanum Irrigation District* from October 2 to March 31 of each year.

4. The trial court was in error in its ruling that the *Ahtanum* case precludes a “right to divert and store water outside the April 1 through October 1 irrigation season”. The court incorrectly ruled that the *Ahtanum* decisions “settled the issues of season of use, quantity and acreage based on the system as built as of 1915” and “only authorized diversion of water between April 1 and October 1.” 2009 Memorandum Opinion, supra, at p. 66 entered as CFO (CP 523).

C. April 1-April 15 Water.

5. The superior court erred in ruling that the Yakama Nation is not entitled to all of the irrigation water between April 1 to April 15 each year beyond the prorata share of *Ahtanum* water available to the John Cox Ditch Company.

D. Non-Indian Allottee Successors.

6. The trial court committed error by awarding the Yakama Nation’s water right also in the name of non-Indian Successors. 2009 Memorandum Opinion at pp. 60-63,69 (CP 456) and the Order on Motions for Reconsideration (May 21, 2009) at p. 6 (CP 92) as entered

as part of the Conditional Final Order

7. The trial court erred in its ruling that the United States should have represented or did represent non-Indian allottee successors in *Acquavella* or had a duty to file claims on their behalf. 2009 Memorandum Opinion Incorporated into the Conditional Final Order.

8. The following statement by the trial court was in error:

... [a] land owner receiving water from the Wapato Irrigation Project would have a legitimate basis for believing they are covered under the claim in this adjudication filed by the United States for WIP.

Id.

E. Irrigable Acreage.

9. The trial court committed error in ruling that the irrigable land available under *Ahtanum* is limited to 4,107.61 acres of trust and tribal fee land.

10. The Court's finding below, as entered as part of the Conditional Final Order was in error:

The figure of 4,968 acres appears to have been provided by the United States and agreed to by the parties. It is not evident that the United States was claiming more acreage than the parties agreed to, regardless of Exhibit A. If the proper figure was reflected in Exhibit A, it was incumbent upon the United States, as representative of the Yakama Nation, to make a claim for that acreage.

2009 Memorandum Opinion, supra, at p. 59 (CP at 514).

11. The trial court committed error in ruling that individual northside parties with *Ahtanum* rights are entitled to water excess to their water rights on their *Pope Decree* lands. CP 753.

F. Excess Water.

12. The superior court committed error in ruling that:

The Court finds that excess water can be used, when available, on lands north of Ahtanum Creek that are confirmed rights in this proceeding, up to the 0.02 cfs per acre authorized in the appurtenant certificates.

2009 Memorandum Opinion, supra, at p. 3, lines 23-26 entered as part of Conditional Final Order.

13. The superior court committed error in ruling that northside parties with rights confirmed in *U.S. v. Ahtanum Irrigation District* can take water in excess of their rights confirmed in that case.

G. Non-Diversiónary Stockwater.

14. The trial court was in error to rule that the northside parties have a priority date for non-diversionary stockwater senior to the Yakama Nation's Treaty irrigation rights absent proof of priority date for

each party.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did *U.S. v. Ahtanum Irrigation District* adjudicate the right to irrigation water for the Yakama Nation?
2. Is the Yakama Nation entitled to divert available irrigation water between April 1 and April 15 with the exception of the share available for John Cox Ditch Company, since, with the exception of John Cox, none of the northside parties with *Ahtanum* rights are entitled to irrigation water until April 15 each year?
3. Is the Nation entitled to an irrigation right in its own name or the name of the United States as trustee without including non-Indian successors?
4. Is the Yakama Nation entitled to a storage right at this time and is it precluded by *Ahtanum* from a right from October to April each year?
5. Did the trial court correctly hold that the Yakama Nation is limited to a water right on Ahtanum for 4,107.61 acres of trust and tribal fee land?
6. Are individual northside or off-reservation parties with adjudicated rights under *Ahtanum* each entitled to take water in excess of their adjudicated rights in this case?

7. Are northside parties entitled to non-diversionary stockwater with a priority date senior to the Yakama Nation's irrigation rights without proof of their priority date?

IV. STATEMENT OF THE CASE.

A. Procedural History.

This is an appeal from the Yakima County superior court's Conditional Final Order issued for the consolidated Ahtanum Creek proceedings in *Ecology v. Acquavella*, the adjudication of the surface water rights of the Yakima Basin.¹ Ahtanum Creek forms the northern boundary of the Yakama Reservation. Report of the Court, Re: Sub. 23 (Ahtanum, et.al.) (Jan. 31, 2002) (CP 974, 1009). The parties on the off-reservation side of the Ahtanum Creek drainage have been referred to as "northside" parties in many of the decisions. The on-reservation individuals and the Nation are referred to as the "southside."

At issue in this proceeding are not only the individual claims in

¹There have been four prior appellate decisions in this case. *Department of Ecology v. Acquavella*, 100 Wn. 2d 651, 674 P. 2d 160 (1983) (*Acquavella I*); *Ecology v. Yakima Reservation Irrigation District*, 121 Wn. 2d 257, 850 P.2d 1306 (1993) (*Acquavella II*); *Department of Ecology v. Acquavella*, 131 Wn. 2d 746, 935 P.2d 595 (1997) (*Acquavella III*); *Department of Ecology v. Acquavella*, 112 Wn. App. 729, 51 P. 3d 800 (2002) (*Acquavella IV*).

Subbasin 23 (Ahtanum) but also the major claimant water rights of the United States/Yakama Nation, Ahtanum Irrigation District and John Cox Ditch Company which were consolidated for presentation in one proceeding.

The consolidated Subbasin 23 proceeding in *Acquavella* has occurred over about 15 years starting with initial hearings before the Referee and Judge Walter A. Stauffacher in 1994 and later hearings before Commissioner Sidney P. Ottem and Judge F. James Gavin. There were two major evidentiary hearings in 1994 and 2004 as well as other hearings on legal issues and supplemental evidentiary matters.

The *Acquavella* issued its Memorandum Opinion Re: Ahtanum Watershed Practicably Irrigable Acreage (1994) and an initial Report (the equivalent of a memorandum decision) in 2002. 2002 Report of the Court, supra. Following the 2002 Report the Court issued a ruling on a number of legal issues. Memorandum Opinion Re: Ahtanum Legal Issues (Oct. 8, 2003 (CP 942). This was followed, among other rulings, by the 2008 Supplemental Report of the Court Concerning the Water Rights for Subbasin 23 (Ahtanum Creek) (Feb. 25, 2008) (CP 539-931)(hereinafter "Supplemental Report") and Memorandum Opinion Exceptions to the

Supplemental Report of the Court and Proposed Conditional Final Order Subbasin No.23 (Ahtanum), Ahtanum Irrigation District, Johncox Ditch Company and United States/Yakama Nation (April 15, 2009) (CP 456). These Reports and Memoranda were, as modified, incorporated into and entered as the Conditional Final Order on appeal in this case. (CP 126, 129.)

B. Factual Background and Prior Proceedings.

Prior to *Acquavella*, issues relating to the water rights of the parties on the northside and southside of the Creek in the Ahtanum Basin have been the subject of two major lawsuits. *See, United States v. Ahtanum Irrigation Dist.*, 124 F. Supp. 818 (E.D. Wa., 1954) *rev'd and remanded*, 236 F.2d 321 (9th Cir. 1956) ("*Ahtanum I*"); 330 F. 2d 897 (9th Cir. 1964) ("Pope Decree" or "*Ahtanum II*") *petition for rehearing denied*, 338 F. 2d 307 (9th Cir. 1964)²; *In Re Achepohl*, Report of the Referee (Oct. 30, 1924) (YIN Ex. 323); *see generally*, 2002 Report, *supra*, at pp. 36-38 (CP 1012-1014). As with some other creeks in this case, there was a state court water rights adjudication for Ahtanum in the 1920's. *In Re Achepohl, supra*. *Achepohl* addressed the water rights of the north or

²"*Ahtanum*" shall refer generally in this brief to the federal court litigation in

off-reservation parties including the State of Washington in the Ahtanum valley. 2002 Report, supra, pp. 37-38. By its own terms, *Achepohl* did not include nor attempt to adjudicate water rights within the Yakama Reservation. YIN Ex. 323, *In Re Achepohl*, Report of the Referee, supra, at p. 12.

Prior to the *Achepohl* decree, individual northside parties and W.H. Code, an U.S. agent entered into an agreement concerning certain diversionary irrigation rights. The Code Agreement parties were sued in *United States v. Ahtanum Irrigation District*, supra, concerning the validity and extent of that agreement among other issues. The Code Agreement addressed a number of issues in this case which further defined and limited the rights of the individual north side Code Agreement parties in addition to the limitations established in *Achepohl*.

United States v. Ahtanum Irrigation District.

The *Ahtanum* Court ruled there that the Yakama Nation owned waters and rights to use of waters in Ahtanum Creek, and that the Yakama Treaty reserved water rights for the Yakama Nation. *Ahtanum I, supra*, 236 F.2d at 325-26.³ The Treaty represented a grant of rights *from* the Nation to the United States, not vice versa. *Id.*; *United States v. Winans*, 198 U.S. 371, 381, 49 L. Ed. 1089, 25 S.Ct. 662, 664 (1905). Under the Treaty, the quantum of the Nation's water right was "... not measured by the use being made at the time the treaty reservation was made. The reservation was not merely for present but for future use." 236 F.2d at 326. Notwithstanding this finding, the Ninth Circuit held that the United States in the Code Agreement agreed to allocate the water so that the northside parties could use 75% of the available irrigation natural flow between the beginning of the irrigation season and July 10th each year, an amount now twice reduced, in 1964 by the Ninth Circuit, and in the instant proceedings, to an aggregate 38.839 cfs subject to further reduction. *Ahtanum CFO(CP 175)*; *Ahtanum, I*, 236 F.2d at 337, 338; *Ahtanum II*, 330 F.2d at 915. Under rulings of this court and the Ninth Circuit from the beginning of the irrigation season through July 10th, the Yakama Nation got 25 % of irrigation natural flow and all excess when natural flow

exceeds 62.59 cfs. Id. After July 10th, the Yakama Nation has the right to entirety of the irrigation flows of the Creek. Id. Senior to the irrigation rights is the Yakama Nation's senior Treaty water right for fish and other aquatic life with a priority date of time immemorial. (CP 131.)

Commensurately, the rights of specific northside irrigators to any of this water derive exclusively from the Code Agreement. "To the extent that the defendants are to be permitted to have any part of the use of the flow of the stream, their rights are deraigned from the agreement of 1908." 236 F.2d at 340. This lack of legal interest held by the individual northside parties is underscored by the Ninth Circuit's agreement with the district court that the Code Agreement was "... neither conveyance nor a contract to convey an interest in the water rights of Ahtanum Creek..." *Ahtanum II*, 330 F.2d at 902. Rather, the Code Agreement did not constitute a conveyance of title to water to the north side, but simply was a "... peaceful arrangement for a practical mode of use of the waters of the stream." 330 F.2d at 903. Ownership remains with the United States as trustee for the Yakama Nation.

Ahtanum explicitly contemplated that the northside's water rights under the Code agreement were conditional, subject to reversion to the

southside when the water is not used on northside parcels. (CP 524). In its 1964 decree, the federal *Ahtanum* Court noted that “when the needs of those [northside] parties were such as to require less . . . then their rights to the use of the water was correspondingly reduced, and those of the Indians, in like measure, greater.” 330 F.2d at 913, quoting *Ahtanum I*, 236 F.2d at 341 (emphasis added).

The *Acquavella* Court Commissioner ruled that neither the Yakama Nation nor the United States were parties to *Achepohl* and therefore are not bound by the results. RP (2/3/04) at p. 9 (CP at 3724); Supplemental Report at 198 (CP 922).

V. ARGUMENT.

A. The Trial Court Incorrectly Ruled That the United States and the Yakama Nation are Precluded from Proving the Nation's Irrigation Right Under the Practicably Irrigable Acreage Standard.

The Yakama Nation asks that the Court reverse the trial court's ruling which held that the federal court *Ahtanum* rulings precluded the Nation and the United States are precluded from quantifying the Nation's irrigation water rights using the practicably irrigable acreage standard. Memorandum Opinion Re: Ahtanum Watershed Practicably Irrigable Acreage (Nov. 9, 1994) (CP 1500) entered as part of the Supplemental

Report, supra, and the Ahtanum Conditional Final Order. Questions of law involving the interpretations of the *Ahtanum* court rulings are reviewed de novo. *Ecology v. Grimes*, 121 Wn. 2d 459, 466, 852 P.2d 1044 (1993).

The United States, as trustee for the Yakama Nation, had offered evidence to show that the tribal fee land and the land held by the United States in trust for the Yakama Nation and individual tribal members are entitled to a surface water right for 6,381.3 acres of trust and tribal fee land on Ahtanum for 21,553 acre-feet under the practicably irrigable acreage standard for quantifying Indian irrigation water rights. 2002 Report at p. 44 (CP at 1022).

1. Treatment of The Practicably Irrigable Acreage Standard.

The U.S. Supreme Court has held that Indian lands held in the name of the United States have impliedly reserved a water right sufficient to satisfy the purposes of the reservation. *Winters v. United States*, 207 U.S. 564, 52 L. Ed. 340, 28 S. Ct. 207 (1908). The courts have confirmed quantification of irrigation water for these lands based upon the Practicably Irrigable Acreage (PIA) standard which determines the amount of water that can irrigate those acres at a reasonable cost. *Arizona v.*

California, 373 U.S. 546, 600, 10 L. Ed. 2d 542, 83 S.Ct. 1468 (1963);
In Re General Adjudication of All Rights in the Big Horn River System,
753 P.2d 76, 101 (Wyo. 1988). The United States submitted evidence in
this case under the *Winters* doctrine to prove a water right for the arable
Indian trust and tribal fee lands that are feasible to irrigate on the south or
Reservation side of Ahtanum Creek. USA Exs. 111-119.

In a prior appeal in this case the State Supreme Court has held that
the purposes of the Yakama Reservation are for both irrigation and fish.
Acquavella II, supra, 121 Wn. 2d at 276-277. Although the trial court did
not use the PIA standard to quantify the rights from the Yakima River
mainstem, the Court had used the same PIA standard for quantifying the
water rights for trust and tribal fee land from two other on-reservation
tributaries, the Satus and Toppenish-Simcoe Creeks. *Acquavella* Report
of the Court, Yakama Nation Vol. 25 (Nov. 13, 1995) at pp. 8-43 (CP
3913, 3924- 3959) ; Yakama Nation's Conditional Final Order (Sept. 12,
1996) at pp. 4-5 (CP at 3905-3906).

The *Acquavella* trial court held for the Satus and Toppenish
Simcoe basins that “[w]hat constitutes a ‘practicably irrigable acreage’ is a
question of fact that must be analyzed in this Report.” *Acquavella*, Report,

Vol. 25, supra, at p. 9 (CP at 3925). The Court applied existing law that a federally reserved right applied to both currently irrigated and future lands not yet irrigated. The Court held that "... even as to those lands which have not yet been developed to date, they are considered 'presently perfected rights' and do not lose their priority date for lack of beneficial use, due diligence, etc." Report, supra at p. 10 (citations omitted) (CP at 3926).

2. The Trial Court Ruling failed to Show That *U.S. v. Ahtanum Irrigation District* Quantified the Yakama Nation's Water Rights.

In the superior court Ahtanum proceedings which is the subject of this appeal, when the United States offered PIA evidence using the same experts who had prepared the evidence for Toppenish-Simcoe and Satus, opposing parties asked that the evidenced not be admitted claiming that the PIA argument had been precluded by the earlier federal court *Ahtanum* rulings. The *Acquavella* trial court held that the proper standard for measuring the Nation's rights in Ahtanum is the irrigable acreage "as already decided and given the necessary finality ... in the *Ahtanum* cases." PIA Memorandum Opinion at p. 9 (CP 1508). The trial court held that

the claim for water rights for the land under the PIA standard is barred due to res judicata citing *Nevada v. United States*, 463 U.S. 110, 77 L. Ed. 2d 509, 103 S. Ct. 2906 (1983). Because the *Ahtanum* court held that the Yakama Treaty intended to reserve water for not only present but also future uses as well (CP at 1509-1510) the *Acquavella* trial court concluded that the Ninth Circuit:

... apparently construed that litigation as resolving the reserved water right issue, as it more than allocated the available water for reservation use. It determined that the lands which the YIN would be able to irrigate in 1915 by way of the Wapato Project were all of the lands capable of irrigation then and for the future.

PIA 1994 Memo Opinion at p. 11, lines 5-9 (CP at 1510)

However, the Court admitted the evidence presented by the United States "... provisionally to the extent that it applies to future projects for the irrigation of the irrigable lands as already quantified and claimed in the *Ahtanum* proceeding." *Id.* at p. 14 (CP 1513). The *Acquavella* Court admitted the evidence because, inter alia, "... the Ninth Circuit enunciated their desire to make available more water from Ahtanum Creek for use on the south side irrigable acreage as quantified and set forth in the United States' complaint." *Id.*

After the trial court issued its Memorandum Opinion in 1994, the Court held evidentiary hearings on the parties' claims and then issued its Reports quantifying the parties' surface water rights. See, 2002 Report (CP 974); 2009 Supplemental Report (CP 539). The Yakama Nation and the United States filed exceptions to these Reports renewing their argument that the underlying 1994 Memorandum Opinion is incorrect and also arguing that the Court's 2002 Report in its determination of the irrigable acres for the trust and tribal fee lands is incorrect even under the legal standards developed by the Court in the 1994 PIA Memorandum Opinion. The superior court ultimately held that the Nation was entitled to a water right for 4,107.61 acres, substantially less than the right sought under the PIA standards for 6,381.3 acres of trust and tribal fee land. 2009 Memo Opinion (CP 512) entered as part of the Ahtanum CFO (CP 126 at 130).

The standard for the application of res judicata as quoted by the trial court is that:

Simply put, the doctrine of res judicata provides that when final judgment has been entered on the merits of a case, "[i]t is a finality as to claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195 (1877). The final "judgment puts an end to the cause of action, which

cannot be brought into litigation between the parties upon any ground whatever. " *Commissioner v. Sunnen*, 333 U.S. 591, 597, 92 L.Ed. 2d 898, 68 S. Ct. 715 (1948).

Nevada v. United States, *supra*, 463 U.S. at 129-130 (citation and footnote omitted) quoted w/approval in 1994 Memo Opinion at p. 6.⁴

Under this standard it is clear that res judicata does not bar the claim made here. First, there is no indication that the same claim or demand was at issue in both cases nor that the trial court correctly read the holding of the Ninth Circuit. The *Ahtanum* court also did not reach a judgment on the merits on quantification of the Nation's rights.

⁴Federal court decrees are given full faith and credit in the state courts with interpretations of federal court decrees done pursuant federal law. *Loveridge v. Fred Meyer, Inc.*, 72 Wn. App. 720, 724, 864 P.2d 417 (1993) *rev'd on other g'ds*, 125 Wn. 2d 759 (1995).

The presentation of the claim under the PIA standard in this case does not seek a ruling inconsistent with *Ahtanum*.⁴ The individual northside *Ahtanum* parties are each only entitled to water from the “beginning of the irrigation season” “to and including” July 10th of each year. *Ahtanum II, supra*, 330 F.2d at 915.⁵ The rights of the individual northside parties are limited to a use of a prorata share of 75 % of the irrigation water each year up through July 10th each year “... provided that the total diversion for this purpose shall not exceed 46.96 cubic feet per second ...” and when “the said measured flow exceeds 62.59 cubic feet per second defendants shall have no right to the excess...” 330 F. 2d at 915, para. I.a. .⁶ Rather, “all of the excess over that figure is awarded to the plaintiff, to the extent that the said water can be put to beneficial use.” 330 F.2d at 915, para I,b (emphasis added).). Second, there is nothing under the *Ahtanum* federal court rulings to prevent the United States and the Yakama Nation from being awarded a water right under the PIA standard for the use of water available each year from July 10th to the next spring

⁵The *Acquavella* trial court held that this meant that John Cox Ditch Company, one of the northside parties, could start irrigating each spring on April 1st and all other northside parties with *Ahtanum* rights could start on April 15th. See discussion, infra, section C.

⁶The figure of 46.96 cfs was reduced in the *Acquavella* *Ahtanum* CFO to 38.839 cfs and is “subject to further reductions due to reversions by north-side parties.”

each year through fall and winter. After July 10th, the southside gets all of the irrigation water. The Decree state that:

After the tenth of July in each year, all of 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.

330 F.2d at 915.

There is no limitation here on the right of the Nation to use water for irrigation after October 1.⁷ Indeed, October 1 is not mentioned in *Ahtanum* nor is there any other limitation on southside rights after July 10th.

Since the United States as trustee was awarded in *Ahtanum* the excess irrigation water in the Creek and all of the irrigation water after July 10th that water is available for future use on irrigable trust and tribal fee lands on the Reservation. The United States' Exhibits 111 to 119 identifies trust and tribal fee lands that are not presently being irrigated on the south side but are capable of being irrigated with the use of this water stored during the times of the year that flood and other water is available consistent with the federal court *Ahtanum* rulings. The Yakama Nation can

CFO, Schedule of Water Rights, United States award, n.1 (CP 172).
7 The right to store water is discussed infra in Section B of this brief.

beneficially use that water if it is available. See also, YIN Exs. 17-19, 24.

Second, the quantification of Yakama Nation's water rights was not the subject of a "final judgment ... on the merits" in the federal court *Ahtanum* case as required by *Nevada*. The *Ahtanum* federal court rulings did not contain a judgment on the merits quantifying either the United States' rights as trustee nor, indeed, the rights of any non-Indians on the south or reservation side of the Creek. *See, United States v. Ahtanum Irrigation District*, Findings of Fact and Conclusions of Law (Jan. 31, 1962) at p. 5 (DOE Ex. 136). The federal Court entered specific findings for the north side parties which findings were affirmed in part by the Ninth Circuit in *Ahtanum II*. Findings and Conclusions, supra, at p. 8, *affirmed in part, reversed in part, Ahtanum II* 330 F.2d at 915-919. However, there were not any similar findings for the southside - either for the United States as trustee for the Yakama Nation nor for the individual fee land owners on the Reservation.

At most, *Ahtanum II* addressed the relative rights of the southside and northside parties under the Code Agreement and defined which northside parties are entitled to use a share of the 75 % of the irrigation water. Although the *Ahtanum* court made specific findings as to the northside parties, it did not do so for the southside. A goal of the *Ahtanum* litigation was to identify the specific northside parties who were Code Agreement signers or their successors. The only way to do this was to examine the specific rights of the northside signatories parcel by parcel and individual by individual in order to identify who were the beneficiaries, and successors to beneficiaries of the Code Agreement and the limitations on the rights of these northside parties. *Ahtanum I, supra*, 236 F.2d at 340-341. After identifying the northside parties, or their successors in interest, who also had *Achepohl* state water rights, there was a need to determine the further limitations on those rights under the *Ahtanum* litigation. There was no such intent by the court to quantify or identify the lands on the southside. See also, 2002 Report of the Court at p. 51 (CP at 1029). The trial court's citation to the undisputed proposition that the Indian irrigation system could use all of the available water, *Ahtanum I, supra*, 236 F. 2d at 326 and that the Yakama Nation is entitled

to water for future needs does not show that there was an adjudication of the Nation's right.⁸ As the Ninth Circuit's recitation of the three issues on appeal shows, the purpose of addressing the scope of the project as of 1908 or 1915 was not for purposes of quantifying the Nation's rights but to determine first did the United States as trustee have any irrigation water rights and, if so, were they greater than "25 percent of the natural flow of the stream?" *Ahtanum I*, 236 F. 2d at 324. "If the rights of the Indians, as reserved, did not exceed the 25 percent, allocated to them in 1908, it would appear that no serious question can be raised as to the validity of the 1908 agreement." 236 F. 2d at 324-325. Since the Yakama Nation's irrigation rights far exceeded the 25 % of the irrigation natural flow the court decided that it had to reach the issues of the validity of the Code Agreement.

The *Acquavella* trial court cited to the complaint in *U. S. v. Ahtanum Irrigation District* which it held "... revealed a very similar claim to the reserved rights claim being made now." *Id.* at p. 7. However, the issues in the Pope Decree and the Orr Ditch Decree were not the same.

⁸ In support of this conclusion the trial court cited to the Ninth Circuit's ruling that the Yakama Nation's reserved right for irrigation "... was not measured by the use being made at the time the treaty was made" but included future uses and needs as well. *Ahtanum I, supra*, 236 F. 2d at 325-326 quoted in 1994 Memo Opinion at pp. 9-10 (CP 1509).

As shown above, the primary goal of the federal court case was to sue northside Code Agreement signers and their successors in interest to challenge the validity of the Code Agreement. *Id.* at p. 12, ¶ 4. The *Acquavella* trial court's opinion about the need and ability of the southside to use all of the available natural flow shows that there was insufficient natural flow to satisfy the Nation's needs as a result of the federal court rulings in *Ahtanum* but not that the federal court intended to bar the Nation from developing that natural flow for future needs. The *Acquavella* Court acknowledgment at the end of the 1994 Memo Opinion, that the evidence would be admitted for future projects, shows that the Court agreed that the Ninth Circuit did not intend to preclude the Nation from later adjudicating an irrigation water right for future needs. Indeed, the *Ahtanum* court's references to the Nation's right to water for current and future needs and the reference to the WIP project as currently constructed supports the conclusion that the Nation was entitled to develop available excess water through storage for future irrigation needs.

The trial court also cited to the *United States v. Ahtanum Irrigation District* Pre-trial Order entered in that case as evidence that the United States agreed to limit the Nation's irrigation water right to use on only

certain lands. 1994 Memo Opinion, *supra*, at p. 4. *Pre-Trial Order, supra*, (Aug. 1, 1951) (YIN Ex. 353). However, the pretrial order does not support that. Pre-trial orders are to be liberally construed to embrace all of the legal and factual theories inherent in the issues defined therein. *Century Refining Company v. Hall*, 316 F. 2d 15, 20 (10th Cir. 1963). “It is a procedural tool to facilitate the trial of a lawsuit on its merits and not to defeat it on a technicality.” *Id.*

Here the Pre-Trial Order does not support the *Acquavella* trial court’s ruling. Moreover, the pretrial order was entered before final judgment and *Ahtanum II* and must be read in light of the later ruling limiting the northside and allowing the use of excess water. “... [A] pretrial order may be amended informally by a trial court’s findings ...” *Miller v. Safeco Title Insurance Co.*, 758 F. 2d 364, 368 (9th Cir. 1985).

The trial court also did not correctly read the Pre-Trial Orders. The *Ahtanum* court interpreted the Pretrial order differently than the *Acquavella* court. In reference to the earlier pre-trial orders, Judge Fee held that:

Before any discussion of the proof, reference must be made to the pre-trial order drawn by the lawyers but signed by the judge. There were no issues of fact or law to particularize the claims of the government.

Id. 124 F. Supp. at 827.

The *Acquavella* trial court referenced part of the 1951 pre-trial order but ignored other parts of the pre-trial order which shows that the federal court parties intended to only stipulate to the fact that there was land actually within the project capable of being served by irrigation water. Compare, PTO (YIN Ex. 353) at p. 6, ¶ 10. Yet, the *Acquavella* trial court did not dispute that the Nation still had a water right for the “needs of the Indians as they might exist in the future.” *Ahtanum I, supra*, 236 F. 2d at 325. By the use of this narrow language in the Pre-Trial Order it is apparent that there was no intention by the United States to determine rights for other lands in the future for which water could be put to an beneficial use if the project construction would be changed and the project would be expanded. That scenario is, of course, what is being proposed by the United States.

This reference to the Pre-trial Order also ignores that the rest of the *Ahtanum* case was, of course, decided after the 1951 pre-trial order. In construing the Code Agreement as applied in the *Ahtanum* litigation we start with “...the general principle that an agreement of the character of that

executed in 1908, must be construed as reserving to the Indians, who previously owned substantially all of the waters, everything not clearly shown to have been granted." *Ahtanum I, supra*, 236 F.2d at 341. As shown above, if the northside Code Agreement lands are not or cannot put the Ahtanum Creek irrigation water to beneficial use, the water must be available for use by the Nation and the Reservation or southside lands.

B. The Trial Court Committed Error In Holding That (1.) The adjudication of a right to Have Storage Be a Purpose of Use of the Yakama Nation's Irrigation Right Was Premature and (2.) that the Yakama Nation and the United States Do not Have a Right to Divert or Store Irrigation Water From October to April.

The Yakama Nation had requested that trial court confirm that the purpose of use of its irrigation water includes the right to store the water for use during the irrigation season. The trial court denied the request first holding that the *Ahtanum* rulings preclude a "right to divert and store water outside the April 1 through October 1 irrigation season" holding that the *Ahtanum* decisions "settled the issues of season of use, quantity and acreage based on the system as built as of 1915" and only "authorize diversion of water between April 1 and October 1." 2009 Memorandum Opinion, supra, at p. 66. (CP 523).

Second, as to a right to store water during the irrigation season, the

Court ruled that the:

... request for storage water rights for the period April 1 through October 1 is premature. It is a request for a potential future storage right.

Id.

Both rulings are incorrect. In order for the Nation to beneficially use the full water right awarded by the court, undisputed evidence introduced at trial shows that the Nation must have the right to store available water. To obtain the necessary water for off-season storage (as well as storage during the irrigation season) studies done by the United States' experts have shown that storage of available water is necessary to utilize the irrigation water right. Declaration of Niel Allen -Comments Based Upon Review of Supplemental Report (June 24, 2008) (CP 3631).

Dr. Allen's declaration shows that his analysis was based upon the evidence introduced originally by the United States as part of its case in chief in this proceeding. Id. at pp. 2-3 (CP at 3632-3633). Although the trial court rejected quantification of the Yakama Nation's surface water right based upon the practicably irrigable acreage standard, the Court held that the evidence introduced by the United States would be accepted into evidence "... provisionally to the extent it applies to future projects for the

irrigation of the irrigable acres as already quantified and claimed in the *Ahtanum* proceeding.” 1994 PIA Memorandum Opinion, supra, at p. 14 (CP 1514). Whether or not the PIA standard applies, storage is needed to capture water at the times of the year it is available to irrigate at other times of the year.

Such water is not only needed (and intended by Judge Stauffacher in his 1994 superior court ruling to be provided for future projects in the 1994 Memo Opinion) but is also legally available and not prohibited by the federal court in *Ahtanum* outside of the irrigation season. As shown above, the Nation was awarded all the irrigation water after July 10th. 330 F. 2d at 915 discussed supra. The rights of the northside parties do not even begin again until the spring of the next year. 330 F.2d at 915. The October 1st cutoff of the irrigation season is not mentioned in the Pope Decree.

Commissioner Ottem, who heard the evidence at the 2004 evidentiary hearing, agreed at the Exceptions hearing in 2004 that the Nation had the right to storage after the irrigation season to provide the necessary irrigation water:

The Court does agree that right should reflect some language to that effect to indicate that the United States would be entitled to

store any flows after the irrigation season to supply a full quantity to lands with water rights within the Wapato Irrigation Project.

So I would like the right at page 347 to reflect that.

RP (2/3/2004) at p. 46, lines 13-21 (CP 3761).⁹

The *Acquavella* trial court was also wrong in ruling that it is “premature” for it to adjudicate water rights for future or currently irrigated land that might be satisfied out of storage. Unlike a state-based water right, the Yakama Nation’s federally reserved water right for irrigation in Ahtanum Creek “... was not measured by the use being made at the time the treaty was made” but included future uses and needs as well. *Ahtanum I, supra*, 236 F. 2d at 325-326. The Supreme Court has ruled that, as to Indian reserved rights, “... water was intended to satisfy the future as well as the present needs of the Indian reservations and was reserved to irrigate all the practicably irrigable acreage on the reservations.” *Arizona v. California, supra*, 373 U.S. at 600. The *Arizona v. California* court held that these rights should be quantified based upon the “irrigable acreage” *Id.* 373 U.S. at 601. These rights for irrigable lands, whether or not they are irrigated now, are “presently perfected rights” and are entitled to be adjudicated in *Acquavella*.

⁹ The reference to page 347 was to the Court’s 2002 Report for Ahtanum Creek (CP 1321).

Indeed, the *Acquavella* trial court ruled that quantification of the Nation's federally reserved right is not based upon the amount of water beneficially used but based on the PIA standard. The court noted that "[s]ince PIA applies, the question is not what has been historically irrigated on the southside, but the number of irrigable acres." 2009 Memo Opinion, supra, at p. 58 (CP 514).¹⁰

The summary of the Yakama Nation's rights in the *Acquavella* Schedule of Rights in the Conditional Final Order should include a right to store water both during and after the irrigation season to utilize the water right. Accordingly, the Nation asks that the superior court be reversed and the Court order the Schedule be amended to include the right to store the adjudicated water rights and to do so year round.

10

In other rulings, the *Acquavella* trial court held, as to trust and tribal fee land in the other basins on the Reservation, i.e., Toppenish-Simcoe and Satus subbasins, that "... even as to those lands which have not been developed to date, they are considered 'presently perfected rights' and do not lose their priority date for lack of beneficial use, due diligence, etc. *Arizona v. California*, 373 U.S. 75 L.Ed. 2d 318, 327 (1983); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) *cert. denied*, 454 U.S. 1092 (1981)." Report of the Court, Yakama Nation (Report 25) (Nov. 13, 1995) at p. 10 (CP at 3926). The trial court subsequently confirmed a water right for practicably irrigable acreage for future lands not now irrigated on Toppenish-Simcoe and Satus Creeks within the Yakama Reservation. Yakama Nation's Conditional Final Order, (Sept. 12, 1996) at p. 4 (CP at 3905).

C. The Court Should Reverse the Trial Court and Hold That the Yakama Nation is Entitled to All available Irrigation Water Between April 1 to April 15 Each Year Beyond the Prorata Share of Pope Decree Water Available to John Cox Ditch Company.

The Nation also asks that the Court reverse the trial court's ruling that the Yakama Nation is not entitled to divert the entirety of the available irrigation water from April 1 to April 15. See, 2009 Memorandum Opinion at pp. 69-70 (CP 526) entered as part of the Ahtanum Conditional Final Order. *Ahtanum* only grants the northside parties the right under the Code Agreement to divert 75% of the available irrigation water (subject to an upper limit as discussed supra in section A.2. of this brief) from the "beginning of each irrigation season, in the spring of each year..." until July 10th. *Ahtanum II*, 330 F. 2d at 915. However, with the exception of John Cox,¹¹ the irrigation seasons of all north side *Ahtanum* parties begins April 15, while the Nation's irrigation season begins April 1. *Ahtanum CFO* (CP 172). This means that the "beginning of the irrigation season" under *Ahtanum* does not begin for anyone but John Cox until April 15. The Nation therefore should not be subject to the 75% limitation (except for John Cox) since the only *Ahtanum* party entitled to

¹¹ In the Conditional Final Order the irrigation season for John Cox begins on April 1. (CP 436). All other northside parties with *Ahtanum* rights

water between April 1 and April 15 is John Cox. John Cox is only entitled to and it is limited to 6.55 cfs and 1309.8 acre-feet per year (CP 436) – only a portion of the available flow.

The trial court’s references to the Nation’s right to seek regulatory action against those with rights junior to the Nation if they are impairing the Nation’s rights does not address the issue of when the Code Agreement limitation on the Nation’s rights begins in April. 2009 Memo Opinion at p. 70.

Obtaining the right to divert without a limitation imposed by the Code Agreement could provide additional water during an important time of the year for crop production. As the Nation’s and the United States’ expert noted the “Yakama Nation can use spring run off for beneficial use for early irrigation if it is available.” Declaration of L. Niel Allen on Behalf of the United States and the Yakama Nation –Comments Based Upon Review of the Supplemental Report (June 24, 2008) at p. 5 (CP at 3636).

D. The Trial Court Committed Error By Including in the name of the Water Right of the Yakama Nation the Name of the Non-Indian Allottee Successors.

have an irrigation season which begins April 15th. (CP 179-435).

The trial court denied the Yakama Nation's and United States' request that the irrigation water right be held in the name of the "United States, Bureau of Indian Affairs, as trustee for the Yakama Nation and Allottees." 2009 Memorandum Opinion, supra, at pp. 63-64, 69 (CP 518-525) as enacted as part of the Conditional Final Order. The trial court held that it would leave in the phrase "non-Indian allottee successors" in the name of the Yakama Nation's water right. We understand that the superior court's inclusion of non-Indian allottee successors was intended to pertain only to such land owners who existed at the time of the CFO was entered and who had not filed a claim on their own behalf. But inclusion of such language is also wrong to the extent that this language was intended to apply to future land owners who succeed to trust or tribal fee land in the future. In reaching its ruling, the superior court stated that non-Indians who might purchase Indian land in the future could be successors to certain Indian water rights under *Colville v. Walton*. 2009 Memorandum Opinion at pp. 61-62 (CP 518-519). The Court then stated that "[f]rom a practical standpoint, the most effective method of dealing with a case of this magnitude was to allow the distribution entity to represent all of its water users." 2009 Memorandum Opinion, supra, at p.

62, lines 27-28 (CP 517). The Court stated that “... [a] land owner receiving water from the Wapato Irrigation Project would have a legitimate basis for believing they are covered under the claim in this adjudication filed by the United States for WIP.” Id.

In response to motions for reconsideration, the trial court refused to change the name of the water right to include the phrase “non-Indian allottee successors” but stated that the right awarded to the United States as trustee for the Nation did not include the separate awards made in this case to approximately 992.39 acres of fee land on the south or Reservation side of Ahtanum currently owned in fee. Order on Motions for Reconsideration to the Memorandum Opinion (May 21, 2009) at pp. 6-7 (CP 92, 98-99) entered as part of Ahtanum Conditional Final Order.

The Yakama Nation asks the Court to reverse the lower court and eliminate the phrase “non-Indian allottee successors.” The phrase “non-Indian allottee successors” should be deleted so as to clarify that the total water right available for the trust and tribal fee lands is a separate award from other current owners of nearby fee land on the Reservation who may not have filed a claim or received a water right in this case.

Whatever the trial court in 2009 may have thought was appropriate

for the United States to have done in 1977 when *Acquavella* was filed to represent all of the water users within the Reservation or the Wapato Irrigation Project, the fact is that the United States originally filed a claim in 1981 and subsequent supporting evidence only on behalf of the lands it held in trust for the Yakama Nation and allottees and the tribally owned fee land. The U.S. also provided notice of that fact and the fee land owners subsequently filed their own claims.

Since the beginning of the case as early as 1981, the United States has thus been quite clear that it was not filing surface water claims on behalf of non-Indian fee land owners within the boundaries of the Yakama Reservation. Statement of Claim of the United States of America (Sept. 1, 1981) at (CP 3391 at 3392-3393); Verbatim Report of Proceedings (June 25, 1982) at p. 4 (CP at 4045). The United States subsequently filed its claim for irrigation water and supporting evidence only for the trust and tribal fee lands. See, United States' Trial Brief Re: Major Claimants' Water Right Claims Ahtanum Creek Watershed (April 12, 1994) at pp. 16-17(CP at 4040-4041); E.g., U.S. Ex. 112, South Side Hydraulic Survey – Irrigated Lands (HKM) (1993). As the Court noted, the Nation is not claiming a right on behalf of the non-Indian fee land

owners. 2009 Memorandum Opinion, supra, at p. 57, lines 4-9.

The individual fee land owners on the south or Reservation side were on notice of this and filed their own separate claims in this case. The fee land owners obtained separate awards of water rights from the Court in their own names. See, 2002 Report of the Court at pp. 53-105 (CP 1027-1079); Supplemental Report of the Court (Sub. 23), supra, (CP 544-568); See, Ahtanum Conditional Final Order, supra, from Allan Brothers, Inc. through Eugene R. and Helen Tyler and Charles E. Vetsch & Sharon G. Vetsch through James E. Wilson and Boyce Ann Wilson. A review of the *Acquavella* Court's Ahtanum Conditional Final Order shows that about 992 acres of individual fee land on the southside were awarded separate rights. This is even more than the Class III lands on the southside identified by the *United States v. Ahtanum Irrigation District* Court of 925.45 acres. Compare, 2009 Memorandum Opinion, supra, at p. 60 lines 20-22 (CP 515). This shows that all of the identified fee land parties have been represented and not only had an opportunity to file a claim but did so. They have been awarded a right in their own names and the Nation is entitled to also have a water right in its name.

Moreover, none of the individual non-Indians on the Reservation

objected in the trial court to the award here being in the name of the United States as trustee for the trust and tribal fee lands. Nor is there any evidence of other fee land owners who did not file a claim in this case. Under the trial court's rules, failing to object, such objections and claims are now waived more than thirty years after this case was filed and 29 years after the United States filed its Statement of Claim which did not include the non-Indian fee land owners serviced by WIP. RCW §§ 90.03.200, 90.03.220.

Secondly, the Court committed error in holding that the Nation's water right needed to be in the name of potential successors in interest who may or may not buy tribal and in the future in order to protect their rights under applicable case law. First, the Nation does not dispute that, under the law of the case in *Acquavella, Colville v. Walton*, 647 F.2d 42 (9th Cir. 1981) would apply in determining the water right of any non-Indian party who purchased Indian land on the Reservation later. However, those future parties, if they ever buy such land, will ultimately need to obtain a water right in their own name just as have the current allottee successors. Under *Walton*, a non-Indian purchaser of allotted Indian land on the Reservation would be entitled to a ratable share of the

federally reserved right for the land if the water is being used on the property when the land went out of Indian ownership or was put to use with due diligence thereafter. *Walton, supra*, 647 F. 2d at 51; *Colville v Walton*, 752 F.2d 397, 402 (9th Cir. 1985) (*Walton III*). *Walton* has been applied without dispute by any party in the Ahtanum. 2002 Ahtanum Report, supra, at pp. 46- 47 (CP 1023). There is no reason or basis, then, to impose some condition on the Nation's land on behalf of others who may or may not ever purchase land.

Despite the trial court's ruling, there is no basis to assume that future, as yet unknown successors in interest to Indian land can be awarded a future interest in water rights. Indeed, until the non-Indian actually has purchased or otherwise obtained title to such land, it would not be possible to know if they even have a water right. The Nation and its members are entitled to water in this adjudication for presently held land for "... future as well as present needs." *Walton I, supra*, 647 F. 2d at 47; *United States v. Ahtanum Irrigation District, supra*. By contrast, under the *Walton* line of cases non-Indians who later purchase that Indian land are not entitled to a water right until they have not only actually purchase or own such land that is being irrigated but have started or

continued to irrigate it with due diligence after title transfers.

Accordingly, there is not basis to conclude that such future non-Indian owners, if they exist, even would necessarily have a water right to protect here.

E. Even if the Trial Court Correctly Quantified the Yakama Nation's Right Based on the *U.S. v. AID* Judgment, the Indian Lands That Should Receive a Water Right Are Not Limited to 4,107.61 acres as Held By the Trial Court.

Even if the trial court was correct (which we do not concede) that the Yakama Nation's surface water right here is limited by *Ahtanum*, the trial court incorrectly rejected the Nation's argument that there are 5,146.85 acres of irrigable and irrigated trust and tribal fee land on the southside.

The Court Commissioner who heard the evidence on this matter ruled that the "5,146.85 acres of tribal trust and fee lands can be served on the Reservation pursuant to the project as constructed in 1915." Court's Supplemental Report, supra at p. 200, lines 1-2. (CP 924). The Court denied the Nation's exception to clarify that the Court Commissioner's ruling was intended to apply to 5,146.85 acres of trust and tribal fee. 2009 Memorandum Opinion at p. 60. The Court held that the evidence

introduced before the Court Commissioner, including the two *U.S. v. Ahtanum Irrigation District* pre-trial orders, showed that the 5,146.85 acres included non-Indian fee land on the south or Reservation side as well and held, that deducting that from the total southside award, the Yakama Nation's water right was for only 4,107.61 acres. Memorandum Opinion Sub. 23 Exceptions at p. (CP 456, 515).

The trial court's ruling was in error. The Court ruled that it would ignore Exhibit A to the 1951 Pre-trial Order because "regardless of Exhibit A" he thought that the United States was only claiming '4,968 acres" for the trust and tribal fee on the southside and that "[i]f the proper figure was reflected in Exhibit A, it was incumbent upon the United States ... to make a claim for that acreage." Memo Opinion at p. 59 lines 8-11, CP at 514.

The Court incorrectly disregarded the more detailed Exhibit A to the 1951 Pre-Trial order in interpreting what the federal court decided. The trial court primarily relied on the later 1957 Pre-Trial Order which lists yet another figure for the acres "claimed in this proceeding are "approximately 5100 acres." *Id.* at p. 59. This was a different figure than the 1951 Pretrial Order which listed 4,968 acres. 2009 Memorandum

Opinion at pp. 59-60. (CP 514-515). Faced with this inconsistency, it was reasonable to review the more detailed list in Exhibit A attached to and incorporated into the 1951 Pre-Trial Order on the southside lands under the WIP upper and lower canals which showed a figure of 5,748.3 acres for both Indian and non-Indian lands. RP (2/3/04) at p. 25 (CP at 3740). When other isolated allotments on other ditches on the southside is included the evidence showed that the total acreage on the south side is 6,072.3 acres of both irrigated and irrigable acres. Id. at p. 25 (CP at 3740).

There was also introduced at trial a contemporaneously produced Bureau of Indian Affairs map of the Ahtanum Unit of the Wapato Irrigation Project (DE Ex. 150) as well as the Exhibit A to the 1951 Pre-Trial Order. A review of the BIA map shows that there are 6,466 acres of land were actually within the boundaries of the Ahtanum Unit of WIP. RP. (2/3/04) at p. 26 (CP 3741). DE Ex. 150 was a map which "...contains basically the irrigable acres on the south side WIP project ..." RP (2/3/04) at p. 26, lines 16-20 (CP 3741).

Evidence presented at trial showed that the figure of approximately 6,400 irrigable acres includes the Class III fee lands on the

Reservation which amounted to a little less than 1,000 acres. RP (2/3/04) at p. 28 (see discussion supra) (CP 3743). Subtracting the Class III fee lands of 925.45 acres from the 6,466 acre figure in DE-150 gives us a figure of 5,541.76 acres for the Indian trust and tribal fee lands on the southside. Subtracting the non-Indian lands of 925.45 acres from the 6,072.3 acres based upon Exhibit A gives us a figure of 5,146.85 acres of trust and tribal fee lands land on the southside. If the higher figure of the fee land southside claimants who were awarded a right in *Acquavella* is used, the acreage for the trust and tribal fee lands is still significantly higher. The Nation asks that the superior court be reversed and this case be remanded for a new hearing. The evidence shows that there is a significant amount of irrigable land on the southside. The Nation should not be limited in the land it can irrigate here.

F. The Court Should Reverse the Trial Court's Ruling That Excess Water for Individual Northside *U.S. v. Ahtanum Irrigation District* Parties.

The trial court ruled that "... north side users are now estopped from claiming any right to 'excess' flows, except for use on specific lands included in or deriving from an Answer number recognized in the Pope Decree." Supplemental Report at p. 29, lines 21-23 (CP at 753). The

Court went on to define “excess” water as that water “... in excess of that needed to satisfy all confirmed water rights both on and off the reservation and any water needed to satisfy the Yakama Nation’s minimum instream flow for fish.” *Id.* at pp. 29-30.

The Nation agrees that the federal court *Ahtanum* parties are precluded from claiming any water right beyond their individual adjudicated rights for the defendants in *Ahtanum* who obtained rights in that case. The Nation disagrees that the northside *Ahtanum* parties can obtain a right in this case excess to their adjudicated rights.

The only parties on the northside who are entitled to any water are those who obtained rights as one of the defendants in *Ahtanum* and who are listed in that case. 330 F.2d at 917. The *Acquavella* court rejected the argument of certain opposing parties that the fact, under the language of *Ahtanum*, that excess is awarded to plaintiff” to the extent that the said water can be put to beneficial use” somehow means that this creates a right for the other group of northside parties who had failed to obtain a right as a successor to a Code Agreement party in *U.S. v. Ahtanum Irrigation District*. Supplemental Report, supra. For those same reasons, the Nation disagrees that a right to “excess” water can be provided for the

other group of parties on the off-reservation side – those individual northside Pope Decree party who had successfully obtained a right in *Ahtanum* beyond that provided to them in that case any more than excess can be provided to the unsuccessful defendants in *Ahtanum*.

The *Acquavella* trial court correctly stated that “... the Ninth Circuit intended to adjudicate every possible right to water for landowners on the north side of Ahtanum Creek.” Supplemental Report, supra, at p. 26 lines 8-9 (CP 750). The trial court correctly rejected the right of those parties who do not have *Ahtanum* or *Pope Decree* rights to take “excess” and there is no reason that this should not apply to the *Ahtanum* northside parties themselves. Supplemental Report (CP 749). The northside parties are each limited to a specific water duty of .01 cfs per acre which limitation “... suggests that additional water uses would be prohibited.” Supplemental Report at p. 29 (CP 753). Each northside party cannot divert more than that and does not have a water right for more than that which was adjudicated for them. None of the northside parties have disputed that their *Ahtanum* right is limited to .01 cfs per acre. Since each northside party is limited to .01 cfs per acre, the courts lack authority to grant them more. An adjudication cannot be used to expand existing

rights. *Grimes*, supra, 121 Wn. 2d at 459.

Since neither the Yakama Nation nor the United States were parties to the State court *Achepohl Decree* we are not bound by the result nor need to allow the northside parties to take water in excess of what they got in *Ahtanum*. Supplemental Report at p. 198.

The Yakama Nation's rights to the waters of Ahtanum Creek include all of the waters of the Creek with the exception of the award to the specific north side parcels that derive their rights from the *Pope Decree*. The rulings in *United States v. Ahtanum Irrigation District* show that there is not "excess" water as a matter of law for uses beyond the irrigation rights of the northside parties who have rights under *Ahtanum* and southside parties and the Yakama Nation's Treaty water right for fish and other aquatic life. This extensive ownership by the Nation is shown by the Ninth Circuit's holding in 1956 that: "... the present needs of the Indians are sufficient to require substantially the whole flow of the stream." *Ahtanum I*, *supra*, 236 F.2d 321 at 325. The Ninth Circuit held that:

It follows also from the general principle that an agreement of the character of that executed in 1908, must be construed as reserving to the Indians, who previously owned substantially all

of the waters, everything not clearly shown to be granted.

236 F.2d at 341.

This court should rule that there is not excess water as a matter of law since the lower court and the *Ahtanum* court have held that there is not sufficient water in the system now to satisfy even the Yakama Nation's and the Reservation's rights. In discussing the irrigation system on the Yakama Reservation the Court held that "[t]he Federal Court correctly determined that there was insufficient water to irrigate the lands designated to be irrigated by the 1915 project." 1994 Memorandum Opinion, supra, at p. 11 (CP 1511). While, as was discussed, this was not intended to preclude a PIA award, if there is insufficient water for the southside absent development of storage, there is no basis to believe there is "excess" for the northside.

G. The Trial Court Was Incorrect To Rule that the North Side Parties Have a Priority Date For Non-Diversionary Stockwater Senior to the Yakama Nation's Treaty Irrigation Rights Absent Proof of that Priority Date.

The trial court had recognized a priority date for certain north side parties to take non-diversionary stockwater from Ahtanum Creek with a priority date which the court ruled was "... senior (or first) in priority, except as that use is inconsistent with the Yakama Nation's instream flow

for fish and other aquatic life which carries a priority date of 'time immemorial' in which case the Nation's right shall have priority." 2002 Report of the Court, supra, at p. 114 (CP 1090) enacted as part of the CFO. The *Acquavella* superior court had originally proposed that the parties agree to adoption of this as a stipulation in the Ahtanum proceedings as had been recommended for other subbasins in the case. Id. However, as the 2002 Report noted, the Yakama Nation objected to the adoption of the stipulation. Yakama Nation's Response to Proposed Stipulation (April 15, 1994) (CP 3389).

The trial court properly held that the Yakama Nation's Treaty water rights for irrigation has a priority date of June 9, 1855 and that its Treaty water right for fish and other aquatic life has a priority date of time immemorial. Ahtanum Conditional Final Order, supra, Schedule of Rights (CP 130, 177) ; 2009 Memo Opinion Sub. 23 Exceptions, supra at pp. 74-75 (CP 530). The trial court was wrong in ruling as a matter of law that all of the non-diversionary stockwater right holders have as a priority date senior to June 9, 1855. There is no evidence that any of them listed began use earlier than that date.

The Court should reverse this ruling and remand with instructions

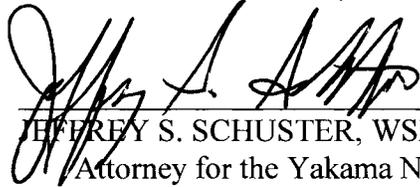
that the court hold a hearing so that each of the parties who has claimed a non-diversionary stockwater right can present evidence as to their priority date. That has not been done. Under state law in an water right adjudication “[t]o confirm existing rights, the referee must determine two primary elements of a water right: (1.) the amount of water that has been put to beneficial use and (2) the priority of water rights relative to each other.” *Ecology v. Grimes, supra*, 121 Wn. 2d at 466 (citation omitted). “ In order to properly prioritize competing claims, it is necessary to examine when a use was begun, whether the claim had been filed pursuant to the water rights claim registration act, RCW 90.14, and whether it had been lost or diminished over time.” *Rettkowski v. Department of Ecology*, 122 Wn. 219, 228, 858 P. 2d 232 (1993). Some parties such as the State Department of Natural Resources, were awarded a non-diversionary stockwater right on thousands of acres of land. They should be required to establish their priority date upon remand. There were also a number of parties who also had irrigation rights. Thus, as example, Gary and Ruth Hansen have a priority date of June 30, 1875 for one of their irrigation rights. (CFO at 381). There is no evidence that the Hansen’s have a non-diversionary stockwater right that is any earlier than 1875. The Court

should reverse the trial court and hold that the listed parties do not have a priority date for non-diversionary stockwater any earlier than the date they can prove when they can establish their priority date.

VI. CONCLUSION.

For the reasons stated above, the Yakama Nation respectfully requests that the superior court 's rulings be reversed and remanded.

Respectfully submitted this ^{9th}~~7th~~ day of April 2010.



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FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 281141 Consolidated with 28115-9-III; 28116-7-III;
28117-5-III; and 28119-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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/Respondent,

v.

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

Defendants/Appellants.

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I certify that on April 9, 2010, I caused to be served via e-mail and U.S. mail a copy of the Yakama Nation's Corrected Opening Brief and Declaration of Service to counsel listed below.

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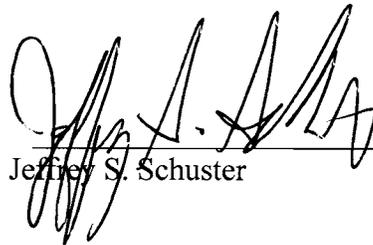
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