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SEP 09 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 REPLY BRIEF TO AHTANUM IRRIGATION DISTRICT, JOHN COX
DITCH COMPANY, WASHINGTON STATE DEPARTMENT OF ECOLOGY, AND
WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES

Jeffrey S. Schuster, WSBA No. 7398
P.O. Box 31197
Seattle Wa., 98103
Tele. (206) 632-0489

Attorney for the Yakama Nation

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I. INTRODUCTION.

The Yakama Nation files this reply to the response briefs of the Ahtanum Irrigation District, the John Cox Ditch Company, the State of Washington Department of Natural Resources and the State of Washington Department of Ecology.

II. SUMMARY OF ARGUMENT.

This Court should grant the Yakama Nation's appeal. The Court should reverse the trial court and remand with instructions to determine the Yakama Nation's surface water right for irrigation based on the practicably irrigable acreage standard as provided in this appeal. If the Court does not reverse the trial court's ruling on the practicably irrigable acreage standard, it should rule that trial court erred in not including a future storage right in winter and erred in deciding that it was premature to award a storage right from April to July 10th each year. If the Court does not reverse the trial court on the standard for quantifying the Nation's surface irrigation water right, the Court should also rule that the Nation has a surface water right to irrigate 5,146.85 acres of trust and tribal fee land on the Reservation. Finally, the Court should hold that the northside

parties with surface water rights under *Ahtanum* do not have a right to water in excess of that awarded to them in that case.

Since there is no opposition on three issues, the Court should reverse the trial court and rule as follows:

1.) The Yakama Nation's surface water right in this case should be held in the name of the "United States, Bureau of Indian Affairs, as trustee for the Yakama Nation and allottees."

2.) The Yakama Nation should be awarded all of the natural flow irrigation water available from April 1 through April 14th each year with the exception of the amount that the John Cox Ditch Company is entitled to under *U.S. v. Ahtanum Irrigation District*.

3.) The Court should remand the case for an evidentiary on the priority dates for those northside parties previously awarded a non-diversionary stockwater right.

III. ARGUMENT.

A. Three Issues Have not Been Disputed by the Other Parties.

The Yakama Nation assigned error and appealed from the Yakima Superior Court on seven issues. Yakama Nation's Corrected Opening Br.

(April 9, 2010) at pp. 2-6. None of the parties have filed opposition to the Yakama Nation's appeal of three of these issues. On one of these issues, the priority date for non-diversionary stockwater, the Washington State Departments of Ecology and Natural Resources have filed briefs in support. As provided below, the Nation asks that the Court grant its unopposed appeal on these issues and reverse the superior court. The Department of Ecology also supported the Yakama Nation on the right to the available irrigation water between April 1 and April 14th. Department of Ecology's Opening/Response Br (May 20, 2010). at p. 31.

1. Non-Indian Allottee Successors.

In its opening brief the Yakama Nation asked this Court to reverse the trial court's ruling denying the Yakama Nation's and United States' request that the reference to the "non-Indian Allottee Successors" be deleted from the name of the Yakama Nation's right. Yakama Nation's Opening Br., *supra*, at p.33-40. The trial court had held that the right would be held in the name of the:

United States, Bureau of Indian Affairs, as trustee for the Yakama Nation, Allottees, and Non-Indian Allottee Successors.

Conditional Final Order.Ahtanum Conditional Final Order (April 15, 2009) (CP at 174), *see*, 2009 Memorandum Opinion, *supra*, at pp. 63-

64, 69 (CP 518-525). The Yakama Nation had asked that the name of the right be changed to the "United States, Bureau of Indian Affairs, as trustee for the Yakama Nation and Allottees." thereby deleting the reference to the "non-Indian allottee successors." 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.

None of the parties in their response briefs disagreed with the Yakama Nation's appeal of this issue and assignment of error. Ahtanum Irrigation District mentioned this issue in its restatement of issues but did not respond to it. Ahtanum Irrigation District Response Br. (July 14, 2010) at pp. 1-2. John Cox did not respond to this issue since it does "... not affect John Cox's rights." John Cox Ditch Company Resp.Br. (July 14, 2010) at p. 1. Nor did the other parties who filed response briefs disagree with either the United States or Yakama Nation on this issue. Department of Ecology's Opening/Response Brief (May 20, 2010); State of Washington Department of Natural Resources Brief (May 18, 2010).

Accordingly, the Yakama Nation respectfully asks this Court to reverse the trial court and rule that the reference to the "non-Indian allottees" must be eliminated from the name of the Yakama Nation's water

right.

2. April 1st -April 14th Irrigation Water Right.

The Yakama Nation also asked the Court to reverse the trial court's ruling and hold that the Yakama Nation is entitled to divert the entirety of the available natural flow irrigation water between April 1 and April 14 each year with the exception of the share that John Cox might be entitled to during that period. Yakama Nation's Opening Brief, *supra*, at pp. 2,5, 32-33. As shown, in its opening brief, with the exception of John Cox none of the northside parties with irrigation rights under the Code Agreement have a right to divert water before April 15th.¹ Only John Cox has an irrigation season that begins April 1. Accordingly, the 75 % limitation under *United States v. Ahtanum Irrigation District*² does not apply to the Yakama Nation (except insofar as John Cox is entitled to water up to its water right and water is needed for the Yakama Nation's Treaty water right for fish and other aquatic life) before April 15 and it is

¹ None of the northside parties represented by Ahtanum Irrigation District assigned error to the Court's ruling that their irrigation seasons begin April 15 so that ruling must be accepted as a verity on appeal. *Levine v. Jefferson County*, 116 Wn. 2d 575, 581, 807 P. 2d 363 (1991).

² *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).

entitled to divert the entirety of the natural flow in the creek available for irrigation.

None of the other parties have disputed this assignment of error. The Department of Ecology's brief supports the Yakama Nation on this issue. Ecology's Opening/Response Brief, *supra*, at pp. 31-33. The Department of Ecology stated that contrary to the trial court's ruling below "the United States should be awarded the right to use all the water from April 1 to April 14, to the extent it can beneficially use the water, except for the water which John Cox is allowed to take under the Pope Decree." Ecology Br. at p. 31. Accordingly, this Court should reverse the trial court and hold that the Yakama Nation and the United States as trustee for the Yakama Nation have the right to use the entirety of the Creek between April 1 and April 14 for the Yakama Nation's Treaty rights (both irrigation and fish and other aquatic life) except the water which John Cox can lawfully divert under *U.S. v. Ahtanum Irrigation District*.

3. Non-Diversiory Stockwater.

The Yakama Nation also asked this Court to rule that the *Acquavella* trial court was incorrect in holding that the non-diversiory stockwater rights for certain individual northside parties have priority

dates senior to the Yakama Nation's irrigation rights as a matter of law without any proof of their priority date. Yakama Nation's Corrected Opening Br., *supra*, at pp.4-5, 6, 47-50.

None of the parties have filed a brief opposing the Yakama Nation's appeal on this issue. The State Department of Ecology supported the Yakama Nation's argument and "asks this Court remand for entry of facts regarding priority dates." Ecology. Op/Resp. Br. at p.33. The State Department of Natural Resources "concedes that the evidence it presented to the trial court does not support the priority date the court established" and agreed that a remand is appropriate. Washington State Department of Natural Resources Brief (May 18, 2010) at p. 1.

Accordingly, the Court should reverse the trial court and order that there be a remand for the limited purpose of allowing the parties to whom the trial court already recognized a non-diversionary stockwater right the opportunity to prove their priority date.

B. Contrary to the arguments of the Northside Ahtanum Creek Parties The *U.S. v. Ahtanum Irrigation District* Ruling Does Not Preclude An Award in this Case Under the Practicably Irrigable Acreage Standard Consistent With That Case's Interpretation of the

Code Agreement.

1. Introduction.

Both John Cox and the Ahtanum Irrigation District³ disagree with the Yakama Nation's and the United States' appeals which asks that the superior court's ruling that the Nation's surface irrigation rights cannot be quantified based on the practicably irrigable acreage standard be reversed. John Cox Response Br. (July 14, 2010) at p. 10; Ahtanum Irrigation District's Response Br. (July 14, 2010) at p. 7. The Department of Ecology supported the Yakama Nation's argument on this issue set out at section V.A. and V. B. of its brief. Department of Ecology Op. Resp. Brief, *supra*, at p. 20.

The Yakama Nation had argued in its opening brief that *U.S. v. Ahtanum Irrigation District* had not quantified the Yakama Nation's surface water rights. Yakama Nation's Opening Brief at p. 15. John Cox and AID do not show that *U.S. v. Ahtanum Irrigation District* quantified the Nation's irrigation right as would be required in an adjudication. Rather, both John Cox and AID essentially rely on dicta from *U.S. v.*

³

Ahtanum Irrigation District does not hold a water right in its own name in this case but appears as agent for the individual parties in whose name surface water rights are held. 2009 Memo Opinion Exceptions (April 15, 2009) (CP 463).

Ahtanum Irrigation District concerning the size of the government irrigation works in 1915 on the southside and on statements taken out of context in pre-trial orders in *Ahtanum*⁴ to show that the Nation is precluded from claiming a surface water right in this case under the practicably irrigable acreage standard. However, none of the northside's arguments show that there is anything in the *Ahtanum* rulings precluding the Nation from quantifying its irrigation right in this case under the practicably irrigable acreage standard consistent with the Code Agreement allocation. There is also nothing in *Ahtanum* which prevents the Yakama Nation from storing water either under the practicably irrigable acreage standard or under the trial court's quantification based on the lands that can be served by the government project as completed in 1915.

2. The Decree in *Ahtanum II* Does Not Preclude Quantification Under the Practicably Irrigable Acreage Standard.

AID and John Cox ignore the actual rulings in *U.S. v. Ahtanum Irrigation District*. Since all parties agree that what is at issue is whether *Ahtanum* bars or limits the Yakama Nation's claim here, it is first important to look not at what was in the original complaint but what was

⁴ When used in this brief, "*Ahtanum*" shall mean the *United States v. Ahtanum Irrigation District* case as cited in footnote 2 in this brief and in prior briefs in this appeal.

actually determined in that case. Despite the northside's arguments about the federal court rulings, the fact is that the federal court never quantified the Yakama Nation's surface water rights in Ahtanum Creek. *Compare*, Ahtanum Conditional Final Order (CP 174-176). That was left for this case.

First, the decree in *Ahtanum* did not quantify the Yakama Nation's rights nor precludes the quantification of the Nation's irrigation rights based on the PIA standard. As shown in the Yakama Nation's opening brief the Code Agreement as interpreted in *United States v. Ahtanum Irrigation District* only affected the amount of water legally available from natural flow for irrigation for the Yakama Nation from the spring through July 10th each year. Yakama Nation's Opening Brief, *supra*, at pp. 10-11. Both northside parties ignore the rulings in the *Ahtanum* Decree which provides that John Cox and the individual northside parties represented by AID in this appeal are limited to the use of a prorata share of 75 % of the irrigation water each year up through July 10th "... 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.

.⁵ 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). The Yakama Nation only seeks the right to use for irrigation that is excess before July 10th consistent with the *Ahtanum* limitations. It is entirely consistent with the *Ahtanum* ruling to quantify the amount left under the Code Agreement and the excess based under the practicably irrigable acreage (PIA) standard.

Second, there is also nothing in 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 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.

⁵The 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.” Ahtanum CFO, Schedule of Water Rights, Yakama Nation’s award, n.1 (CP 172).

There is nothing in this ruling on the right of the Nation to prevent it from the use of this water after October 1. Ahtanum CFO (CP 174). Indeed, October 1 is not mentioned in *Ahtanum* nor is there any other limitation on southside irrigation rights after July 10th. Under the PIA standard the United States experts have shown that it is economically feasible to irrigate trust and tribal fee land on the Reservation with storage and other irrigation facilities. This includes storage of water after the irrigation season in winter for use in later irrigation seasons. See, discussion, *infra*.

Both John Cox and AID argue that language in the United States' original complaint in *U.S. v. Ahtanum Irrigation District* proves that the United States intended to seek to quantify the Nation's irrigation rights in that case. AID Br. at p. 8; John Cox Resp. at p. 2. ¹ However, both ignore the fact that *Ahtanum* never quantified the Yakama Nation's water rights. Both ignore the fact that the primary purpose of the *Ahtanum* case

¹ John Cox also argues that its right to divert water derives not only from the Code Agreement but also from state law. John Cox Br. at pp. 3-4. This is not relevant to the Nation's PIA argument. However, without conceding its relevance, John Cox does not dispute that, absent being a successor to a Code Agreement party or having land on which *Ahtanum* stated that a Code Agreement right applies, John Cox cannot obtain a right under the *U.S. v. Ahtanum* allocation to divert water. Although John Cox must also prove it has state based rights in order to obtain an *Acquavella* right (2002 Report of the Court at p. 106, CP 1081) John Cox's state based rights (including its claimed rights for land outside of or beyond the 654.9 acres approved in *Ahtanum II*, 330 F. 2d at 919) cannot be exercised absent proof that it has the right to do so under *Ahtanum*.

was to prove the Code Agreement was invalid. Yakama Nation's Op. Br. at p. 24. Once the federal court found that the Code Agreement was valid, there was no reason to determine the scope of nor quantify the Nation's rights in that case.

AID argues that the federal court had to quantify the Nation's rights so as to determine if the Nation's irrigation rights exceed 25 % of the irrigation flow of the Creek in order so that it could decide if it had to reach the issue of the validity of the Code Agreement. AID Br. at pp 11-13. However, AID only cites to language in *U.S. v. Ahtanum* discussing the percentage allocation of the creek flow from natural flow which the Yakama Nation gets for irrigation. There is a difference between the percentage allocation of the irrigation natural flow going, respectively, to the northside and southside of the Creek and the actual quantification of the southside or Yakama Nation's rights for the trust and tribal fee lands on a parcel by parcel basis once the water is diverted onto the Reservation. Unlike the northside, there was not a quantification of the water rights for specific parties or specific parcels on the Reservation. *Compare*, Yakama Nation's Response Br. at p. 8. The *Ahtanum* ruling does not include a specific quantification of the number acres or instantaneous flow for a

certain number of acres as was later included in the superior court's Conditional Final Order for Ahtanum. *Compare*, Ahtanum Conditional Final Order (CP 174).

A review of the *Ahtanum* district court's findings of facts and conclusions of law fails to show the quantification of the southside's rights which AID claims occurred. *Compare, United States v. Ahtanum Irrigation District*, Findings of Fact and Conclusions of Law (Jan. 31, 1962) DOE Ex. 136. As the Nation has shown, the court had determined rights for specific parties on the northside or off-reservation side of Ahtanum Creek. Yakama Nation's Response Br., *supra*, at p. 8, 10-13. The district court's findings specifically included a chart for each northside party identifying the specific number of acres irrigated by each defendant. DOE Ex. 136 at p. 38. Those acreage figures were further adjusted on appeal. *Ahtanum II*, *supra*, 330 F.2d at 916-919. By contrast, the federal court in *Ahtanum* did not list specific acreage or otherwise quantify the southside's rights for either the Yakama Nation or the individual fee land owners on the Reservation. The court's omission of a list of specific quantities for specific acres shows that the Court did not think it was necessary to do so to resolve this case and did not intend

to quantify the Nation's rights. The district court only stated that "... there is sufficient acreage on both sides of Ahtanum Creek dependent upon that Creek for irrigation waters to insure that water allocated in accordance with these findings of fact to can be put to beneficial use." DOE Ex. 136 at p. 59, ¶ 21.

Whatever the United States' original intentions were in 1947 when the federal court case was filed, there, in fact, ended up being no actual ruling quantifying the Nation's rights. AID quotes from *Ahtanum* stating that:

... by 1915 the Indian lands upon the reservation susceptible of irrigation from Ahtanum Creek amounted to approximately 5000 acres...

AID Resp. Br. at p. 16 quoting *Ahtanum I*, at 339 (sic).²

Yet, there is no indication that the federal court intended this to be a quantification or other limitation of the Nation's rights. Surely, the reference to the acreage as being "approximately" 5,000 acres shows that the federal court did not intend to actually identify the actual acreage to be served. Indeed, the reference to the southside acreage as being "approximately" 5,000 acres shows exactly the opposite of what John Cox

²The correct citation that AID probably intended was 236 F. 2d at 327.

and AID argues. The Ninth Circuit, as with the district court, knew how to specifically identify the lands to be served by the Nation's rights if it had intended to do so. Rather, the court ruling was merely a confirmation that the United States had made something in the nature of an offer of proof to show that the United States had sufficient irrigable land being irrigated on the Reservation on Ahtanum Creek to show that the Court needed to reach the issue of whether the Code Agreement was valid. Yakama Nation's Op. Br. at pp. 22-23.

With this in mind, we agree with Ecology that the *Ahtanum* court sought to limit the negative effects of the Code Agreement and could not have intended to further limit the rights to the extent suggested by the northside parties. Ecology Br. at p. 22. Although the *Ahtanum* court found that the Code Agreement was valid, it was clearly troubled by the bad judgment of the Indian Agent W.H. Code in signing this agreement. *Ahtanum II*, 330 F. 2d at 337. "... [W]e can readily perceive that the Secretary of the Interior, in acting as he did, improvidently bargained away extremely valuable rights belonging to the Indians." *Id.* With this history in mind the Ninth Circuit intended to narrowly construe the Code Agreement, since it like other agreements involving Indian water rights are

to be “construed most strongly in favor of the Indians.” 236 F. 2d at 340. This is consistent with the other federal rules of construction applied in this case that the Agreement must be liberally construed in favor of the Yakama Nation with all ambiguities resolved in its favor. *Ecology v. Yakima Reservation Irrigation District*, 121 Wn. 2d 257, 277, 850 P. 2d 1306 (1993) (*Acquavella II*).

The errors in AID arguments are further shown by its misconception that the Yakama Nation intended to claim water rights in this case inconsistent with the *U.S. v. Ahtanum Irrigation District*. Compare, AID Br. at p. 17. Rather, the Nation seeks confirmation of a water right so that it can develop the water available to within the restrictions of *Ahtanum*.

John Cox also asks for affirmance of the court below based on the trial court’s reliance on the *Ahtanum* court’s pretrial orders. John Cox Response Br. at pp. 18-19. However, as shown previously the pretrial orders only showed lands that could be served by the Wapato Irrigation Project on Ahtanum Creek as of 1915 from the natural flow of the Creek. Yakama Nation’s Op. Br. at p. 26. There is no indication that the pretrial order was intended to determine or limit water rights for the future if the

water in the Creek could be developed.

John Cox also claims that [a]ll parties ... are bound by this unchallenged Finding” apparently referring again to the “approximately 5000 acres” discussed above. John Cox Resp. Br. at p. 19. Yet John Cox does not dispute that by its own language the pre-trial order only describes the government project “as presently constructed and as substantially completed in the year 1915.” John Cox Br. at p. 16 quoting 1951 pretrial order (emphasis added). This limited language does not describe the “needs of the Indians as they might exist in the future.” *Ahtanum I*, 236 F. 2d at 325, see, Yakama Nation’s Op. Br. at p. 26. Although the northside parties try to link this language together, there is nothing in *Ahtanum* which shows that the court there intended to preclude the Nation from ever developing the land and diversion works on the Reservation in the future to better use the water beyond the constructed works as they existed in 1915.

Both of the northside parties also argue that the Nation’s right to claim water under the PIA standard is limited by the Ninth Circuit’s statement that, under the Code Agreement, there would be insufficient water in Ahtanum Creek to irrigate all of the arable land on the

Reservation in the Ahtanum drainage. John Cox Resp. Br. at p.10; AID Response Br. at p. 7. First, as shown above, the *Ahtanum* case did not actually quantify the Nation's rights. The needs of the government project on the Reservation as of 1915 as referenced in the pre-trial orders only showed that the immediate needs of the project as of that date exceeded the 25 % of the natural flow.

Second, the current system is a natural flow system that was developed without storage. Although there are insufficient natural flows both northside parties ignore evidence that irrigation of the Reservation either under the PIA standard or for the lands under the Project as constructed as of 1915 can be improved by development of storage. As part of the United States' proof of the practicably irrigable acreage on the Reservation from Ahtanum for the trust and tribal fee lands, the U.S. provided proof of a water right for 2,728.4 acres actively irrigated and a water right for an additional 3,652.6 acres of additional arable trust and tribal fee land. United States Corrected Op. Br. (Mar. 15, 2010) at pp. 14-15. The United States case evaluated, among other things, the sufficiency of water availability, including with storage, for the total irrigated and irrigable acreage. *Id.*, USA Exs. 111-119. The U.S.

evidence showed “... the need for storage to meet irrigation demands...” Declaration of Niel Allen (June 24, 2008) at p. 2, lines 22-25 (CP 3632). The PIA claim showed that “... storage from Ahtanum flows during the entire year (non-irrigation season and early irrigation season high flows) are needed.” *Id.* at lines 26-27. John Cox concedes that:

The U.S. and Yakama Nation offer evidence of ‘future needs’, including feasibility studies and economic analysis, to the Trial Court to establish the storage of natural flow from Ahtanum Creek would increase the ‘practicable irrigable acreage’ within the reservation to a total of 6,391.3 acres of trust and tribal fee land. (U.S. Brief p. 14).

John Cox Br. at p. 27.

The trial court’s reference to the fact that the natural flow was insufficient to irrigate the lands to which water could be delivered by the 1915 project should thus not be taken as a bar to mitigation being allowed by the development of storage and improved irrigation facilities.

Since the trial court did not quantify the Nation’s right based on the practicably irrigable acreage standard, the trial court must be reversed and the case remanded so that the Court can quantify the right based on the PIA standard and address the storage issue at that time.

Moreover, the reference in the *Ahtanum* pre-trial order to the “Indian Irrigation Service” works (John Cox Br. at p. 16) does not include other

lands including those served by private ditches. The purpose of an adjudication for federally reserved rights is to determine the rights of all of the irrigable lands not merely the lands currently serviced by the government project. *See, Colville v. Walton*, 647 F. 2d 42, 47 (9th Cir. 1981).

The northside's argument that there is insufficient water for the land serviced by the government works as of 1915 is also inconsistent with the northsides' position on excess water for themselves. Without even getting to the storage issue, it is evident that AID and John Cox thinks there is water "excess" to the *Ahtanum*/Pope Decree allocations for themselves - just not any "excess" for the Yakama Nation. Thus John Cox argues that the Nation cannot claim any "excess" beyond that "approximately 5,100 acres capable of being irrigated from the Yakama Indian Irrigation Project (sic) as it existed in 1915" because the project as of 1915 would require "the entire flow of Ahtanum Creek" and, therefore, there would be no more water available for other lands. John Cox Resp. Br. at p. 10. Yet later in the same brief John Cox argues that there is excess water for the northside because "...the reservation has never been fully irrigated and the Treaty -reserved right has never been fully

exercised...” John Cox at p. 33. If, however, there is surplus or excess water for the northside, there must be “excess” also for the Yakama Nation. The northside parties should not be allowed to make a bad situation worse. *See, Ahtanum II*, 330 F. 2d at 914.

Second, even if the Nation is not fully using its right at any time, there is not a basis to refuse to quantify it under the PIA standard. First, the Nation does not lose its right by non-use. Federally reserved rights are presently perfected rights that cannot be lost due to nonuse whether or not put to full beneficial use. *Arizona v. California*, 373 U.S. 546, 600, 83 S.Ct. 1468, 10 L. Ed.2d 542 (1963). Second, unlike state-based rights, federally reserved rights can be quantified under the PIA standard without putting the water to beneficial use. Indian reserved rights can be quantified based on claims for water for future uses including water used from future storage reservoirs. *In Re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P. 2d 76, 103 (1988).

C. The Northside Parties Have Failed To Show that the Yakama Nation is Not Entitled To Have a Right to Store Water As Part of its Irrigation Right.

The northside parties argument against the right to store the necessary water to irrigate land on the southside lacks merit. The trial court's ruling was done as part of its quantification of the Nation's right under the trial court's standard that the right would be quantified based upon the trust and tribal fee lands that "... can be served on the Reservation pursuant to the project as constructed in 1915." Court's 2008 Supp. Report at p. 200 (CP 924). The Nation has shown above that the storage is and can be an integral part of the quantification based on the practicably irrigable acreage standard. After the trial court refused to apply the PIA standard, it refused to recognize storage as part of the quantification of the right for the lands that can be served by the Project as constructed in 1915. AID's and John Cox's arguments against a reversal of the trial court lack merit and should be rejected.

1. April - July 10th Storage.

Both northside parties dispute the Yakama Nation's argument that the trial court should have ruled that the Nation has a presently perfected right to storage in the future rather than ruling it was premature. Neither party disputes that, as part of the federally reserved right for the

Reservation, the Nation need not show that it is putting water to beneficial use now as stored water in order to have a right confirmed. Yakama Nation's Op. Br. at p. 30. Rather, both either argue that there is either not a right to store water as part of the federally reserved right at all or, in the case of AID, argues that it is barred because the United States did not plead a right to this water in its original complaint in *Ahtanum*. AID Br. at p. 20. As shown above, whether under the PIA standard or the trial court's standard, a federally reserved right can include a right to store water now or in the future. *Big Horn, supra*. A federally reserved right need not show that water is beneficially used to be perfected. *see, discussion of Arizona v. California, supra*; Yakama Nation's Op. Br. at p. 30.

AID claims that there "... is not evidence in the Subbasin 23 proceeding tending to show the feasibility of any storage capability on the south side." AID Br. at p. 7. Yet, as shown in our opening briefs, (as John Cox apparently agrees) the United States introduced evidence showing that practicably irrigable acreage and that, in order to irrigate those lands, it was necessary to construct storage on Ahtanum Creek. USA 111-119. As the evidence shows, this includes the right to store water as part of the

incidence of the practicably irrigable acreage right. See discussion, *supra*. This included the right to store water during the irrigation season. Even if based on a different standard for quantification under the trial court's ruling, there is no reason not to allow the storage right to be quantified.

John Cox disputes that there is evidence to show that there was evidence "... presented ... [of] construction of storage to provide additional water for 4,107.61 practicable, irrigable acres of trust and tribal fee land was economically feasible." John Cox Br. At p. 28. However, the PIA standard is not relevant to the 4,107.61 acre figure. This acreage figure was calculated by the *Acquavella* superior court based not on the PIA standard but on the standard of how many acres are within the Project as constructed as of 1915. Memo Opinion Exceptions (April 15, 2009) at pp. 56-60 (CP 511-514). The northside parties do not point to any authority, nor is there any, that we need to show economic feasibility for storage to prove the 4,100 acres figure (or the larger figure urged by the Nation; see Yakama Nations' Op. Br. at p. 40) since the only issue under the trial court's criteria is how many acres are within the U.S. government's Ahtanum project as constructed as of 1915. As to the need for storage, the northside parties have never refuted Dr. Niel Allen, the

Nation's and U.S.'s expert at trial, who indicated that storage is also needed to irrigate the lands within the Ahtanum Unit of WIP as constructed in 1915. Declaration of L. Niel Allen on behalf of United States and Yakama Nation (June 27, 2008) (CP 3633) at p. 3.

2. July 11th to April Storage Right.

The northside parties also argue for affirmance of the trial court's ruling that there is not a right to storage from July 11 to April. As shown in the Yakama Nation's opening brief, this argument should be rejected.

AID argues that there is not a right to store water after July 10th because the *Ahtanum* decree is silent on the issue. AID Resp. Br. at 19.

³ The northside parties do not cite any authority in support of their argument that silence in the U.S. complaint in *Ahtanum*, especially as to winter water, means that the Nation lacks authority to store it. AID Br. at p. 20. Rather, silence more likely means that there was no intent by the United States to waive the right to store water. Moreover, the impact of the Code Agreement on the Yakama Nation's rights, by definition, only runs from the spring to July 10th each year. *Ahtanum II, supra*, 330 F. 2d

³ As Ecology notes, AID itself does not have a right to winter water. DOE Opening/Response Br., *supra*, at p. 29, n.13.

at 915. Lacking any limitation on the Yakama Nation's rights between July 10th and the next spring, there is nothing in the Code Agreement or the *Ahtanum* decision construing it that bars winter storage. Lacking any limitation under *Ahtanum* on the Yakama Nation's water rights outside of the spring- July 10th period, there is no reason why United States and the Yakama Nation cannot claim the right to store water at least for the lands under the project as of 1915.

Second, storage is necessary in times other than the irrigation season in order to provide water to irrigate all of the land under the government project as constructed in 1915. Niel Allen declaration, *supra*.

As Dr. Allen showed, storage of water during times that it is available is necessary in order to have it for the times during the summer when it is needed for irrigation.

John Cox also raises an argument for the first time in this case, when it states, without any citation to the record or law that:

In addition, there was no evidence presented of a suitable on-reservation site to construct storage for this purpose.

John Cox Br. at p.28.

In so arguing John Cox seems to assume that it is necessary under the PIA or some other standard to prove that there is an on-reservation site

for storage. However, John Cox does not cite any authority in support of this argument. There is not a requirement for quantifying a federally reserved right that a storage site needs to be located on the Yakama Reservation. The *Ahtanum* court confirmed that the location of an Indian reservation did not affect the federally reserved water rights appurtenant to the Yakama Reservation. *Ahtanum I*, 236 F. 2d at 325. The location of Ahtanum Creek as the northern boundary of the Reservation or the “...suggestion that much of the water of the Ahtanum Creek originates off the reservation is likewise of no significance.” *Id.* “The Indians did not surrender any part of their right to the use of Ahtanum Creek regardless of whether the Creek became the boundary or whether it flowed entirely within reservation.” 236 F. 2d at 326 (footnote omitted). John Cox’s argument is foreclosed by this ruling. If the location of the Creek in relation to the Reservation boundary is not relevant, neither is the location of any storage site.

D. The Northside Parties Failed to Prove That They Can Claim a Water Right In Excess of That Awarded to Them In *U.S. v. Ahtanum Irrigation District*.

John Cox's and AID do not dispute that they ask for water rights in excess of what they were awarded by the *U.S. v. Ahtanum Irrigation District*. The Nation has previously explained why those parties who did not obtain a right in *Ahtanum* should not be entitled to a so-called "junior" right created by the superior court. Yakama Nation's Response Br. at p. 17. The same arguments apply here as explained in the Nation's opening brief to parties who obtained a right in *Ahtanum* but who now seek a right in excess of that awarded in that case for use on their Pope Decree lands. The *Ahtanum* court litigated the entirety of the available natural flow in Ahtanum Creek and there is not water remaining for additional water for the northside parties who have water rights under the Code Agreement. Yakama Nation's Op. Br. at p. 45. Accordingly their arguments should be rejected by this Court. John Cox and AID do not seem to dispute the core of the Yakama Nation's argument that all that was awarded to the individual northside parties in *Ahtanum* was a right to take water limited by a specific water duty of .01 cfs per acre and that "... additional water uses would be prohibited." Yakama Nation's Op. Br. at p. 45 quoting 2008 Supp. Report (CP 753). John Cox argues that it is entitled to divert water beyond what it had in *Ahtanum* up a water duty of .02 cfs - an

amount it failed to get in *Ahtanum*.

John Cox pins its opposition on the argument rejected by the Court below that, in fact, *Ahtanum* did not actually limit its rights:

The fundamental flaw in the Yakama Nation's argument is its continued misinterpretation of Ahtanum I and the Pope Decree as being an adjudication of North-side water rights to Ahtanum Creek, rather than an allocation of water in Ahtanum Creek between the Yakama Reservation and non-reservation lands North of the Creek.

John Cox Br. at p. 30.

Yet John Cox fails to refute the Yakama Nation's argument in its response brief that the Pope Decree did, in fact, act to limit the individual northside rights. Yakama Nation's Response Br. at pp.8-17. Any other result would render large parts of the *Ahtanum* decision irrelevant. John Cox ignores the detailed findings in *U.S. v. Ahtanum* limiting the acres that the specific successful northside *Ahtanum* parties can irrigate. 330 F. 2d at 916-919. The *Ahtanum* court held that each of the defendants in that case, identified by the answer they filed, had to "... set up and show what their

water rights were...” 330 F. 2d at 910; see Yakama Nation’s Resp. Br. at p. 15.⁴

AID and John Cox rely on their argument that its members are each entitled to excess water because the Nation has not been using its full water right. AID argues that “... [t]he Nation’s argument is based on the assumption that as constructed the Wapato Project could use all of the available water.” AID Br. At p. 23. AID then goes on to argue:

There is no arguing that if sufficient land is developed on the south side which by the use of recognized water duties, was in fact irrigated, there may be no excess water.

AID Resp. Br. At p. 24.

The Court should reject AID’s argument since it is AID and John Cox themselves who seek to erect barriers to the Yakama Nation using its right. First, as we have shown, it is not an assumption but a ruling in *U.S. v. Ahtanum Irrigation District* that held as a matter of law that all of the available natural flow water for irrigation has been litigated on Ahtanum.

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John Cox asserts that the Nation is incorrect in arguing that *U.S. v. Ahtanum Irrigation District* did not limit the northside parties to .01 cfs per acre. John Cox Resp. Br. at p. 32. John Cox misunderstands the Yakama Nation brief which cited to the federal court lawsuit *U.S. v. Ahtanum Ir. District. Compare*, Yakama Nation’s Op. Br. at p. 45, p. 8 n.2. It is true but irrelevant that the state court *Achepohl* decree awarded .02 cfs per acre since the federal court later limited that right.

See, Yakama Nation's Op. Br. at p. 43. There is not excess water for either "juniors" who failed to obtain a right in federal court or those who were limited to .01 cfs per acre. Second, AID, after erecting obstacles in this case that it hopes will prevent the Nation from using its surface water right - including its argument that there is not sufficient water to irrigate the lands on the reservation (AID Response Br. at p. 7) - now argues that AID can benefit from this and use the "excess". The Yakama Nation has shown that if excess water was available it could use it. Eg., YIN Exs. 17, 19. The Court should reject these arguments raised by AID in support of its claim to excess water.

AID makes similar unsupported arguments concerning water after July 10th. AID Resp. Br. To the Yakama Nation at p.25. As previously shown, that issue has been litigated and lost by AID. The northside parties do not have a right to take water after July 10th. Yakama Nation's Response Br. at p. 29. AID makes several arguments on page 25 of its unsupported by any citation. AID does not indicate what it means by "waste" or water "used in excess of instantaneous rights" so the court should disregard that argument since it is not supported by citations of

authority. *McKee v. American Home Products Corp.*, 113 Wn. 2d 701, 705, 782 P. 2d 1045 (1989).

E. If the Court Does Not Reverse the Trial Court and Remand for Reconsideration Under the PIA Standard, The Court Should Rule that the Indian Lands That Can Be Served by the BIA Project as Constructed in 1915 Are 5,146.85 Acres of Trust and Tribal Fee Lands.

The Yakama Nation showed that the superior court was incorrect in ruling that there are 5,146.85 acres of trust and tribal fee lands which can be served by the government irrigation project on the Yakama Reservation. Yakama Nation's Op. Br. at 40. None of the other parties other than the United States specifically addresses this issue although AID and John Cox seem, without argument, to support the trial court's argument on this point.

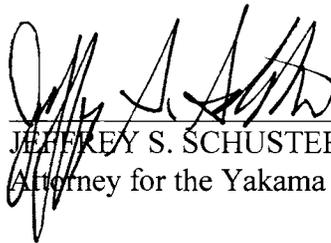
As shown in the Nation's opening brief, if this Court reaches the issue of the determination of the lands which can be served by the government project on the Reservation, it should hold that the superior court incorrectly interpreted the documents. Among other errors outlined in the Nation's opening brief, the trial court committed error in not relying on the

Exhibit A to the 1951 Pre-Trial Order in *U.S. v. Ahtanum Irrigation District*. Yakama Nation's Op. Br. at p. 41. Exhibit A was by the far the most detailed listing of lands that could be served by the BIA's irrigation works as of 1951. Although there were other inconsistent figures identifying Indian land on the Reservation, Exhibit A was the most detailed parcel by parcel list. This Court should reverse the trial court and rule that, if the Court quantifies the Yakama Nation's rights based on the identification of the land under the project it should hold that the Yakama Nation is entitled to a water right for 5,146.85 acres of trust and tribal fee land.

IV. CONCLUSION.

For the reasons stated above, the Court should reverse the superior court and remand for a new evidentiary hearing.

Respectfully submitted this ^{7th} day of September 2010.



JEFFREY S. SCHUSTER, WSBA #7398
Attorney for the Yakama Nation

CERTIFICATE OF SERVICE.

I certify that on September 7, 2010, I caused to be served via e-mail and U.S. mail a copy of the foregoing document to counsel listed below.

Adrienne E. Smith
Asst. Attorney General
1125 Washington St. S.E.
P.O. Box 40100
Olympia Wa., 98504-0100

Jay Carroll
Velikanje Halverson
405 East Lincoln Ave.
P.O. Box 22550
Yakima Wa., 98907
jcarroll@vhlegal.com

Sharonne O'Shea/Barbara Markham
Assistant Attorney General
Ecology Division
P.O. Box 40117
Olympia, WA 98504-0117
SharonneO@ATG.WA.GOV.
BarbaraM@atg.wa.gov

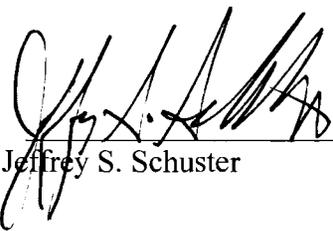
James E. Davis
Talbott, Simpson, & Davis, P.S.
308 North Second Street
Yakima, WA 98907-0590
jdavis@talbottlaw.com

Patrick Barry, U.S. Department of Justice
Environ. & Natural Resources Div.-Indian Resources
L'Enfant Plaza Station
P.O. Box 44378
Washington, D.C. 20026-4378
Patrick.Barry@usdoj.gov

Katherine J. Barton, Appellate Section
Environmental and Natural Resources Div.
P.O. Box 23795
L'Enfant Plaza Station

Washington, D.C. 20026-3795
KatherineBarton@usdoj.gov

Charles Flower/Patrick Andreotti
Flower & Andreotti
Suite 1, Yakima Legal Center
303 East "D" Street, Suite 1
Yakima, WA 98901
flowand2@charter.net



Jeffrey S. Schuster