

**FILED**

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

No. 281141

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

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IN THE MATTER OF THE DETERMINATION OF THE RIGHTS TO  
THE USE OF THE SURFACE WATERS OF THE YAKIMA RIVER  
DRAINAGE BASIN, IN ACCORDANCE WITH THE PROVISIONS OF  
CHAPTER 90.09, REVISED CODE OF WASHINGTON,

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Plaintiff/Respondent/Cross-Appellant,

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/Cross-Respondents.

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**REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT  
THE UNITED STATES TO RESPONSE BRIEFS OF  
APPELLANTS/CROSS-RESPONDENTS JOHN COX DITCH  
COMPANY AND AHTANUM IRRIGATION DISTRICT AND  
RESPONDENT/CROSS-APPELLANT  
DEPARTMENT OF ECOLOGY**

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## INTRODUCTION AND SUMMARY OF ARGUMENT

In its opening brief, the United States identified five categories of error in the trial court's adjudication of the United States' claim to a federal reserved water right in Ahtanum Creek for irrigation of trust and tribal fee land on the Yakama Reservation. Specifically, the United States argued that:

1. The trial court erred in declining to quantify and delineate the United States' irrigation water right under the Practicably Irrigable Acreage standard recognized by the U.S. Supreme Court and, instead, in delineating that water right based on the purported adjudication of the entire right in *United States v. Ahtanum Irrigation District*, 9th Cir. No. 14714. As a result, the trial court erroneously:

(a) limited the irrigation right to 4,107.61 acres;

(b) denied a right to divert water outside of the period of April 1 through October 1; and

(c) concluded it was premature to establish a storage right.

2. Assuming the *Ahtanum* Decree did preclusively determine the acreage of the irrigation right, the trial court erred in holding that it confirmed a right to the reservation for only 5,100 acres (thus limiting the irrigation right for trust and tribal fee lands to 4,107.61 acres).

3. Assuming the *Ahtanum* Decree did preclusively limit the period of use to April 1 through October 1, the trial court erred in failing to include a right for future storage of the water otherwise confirmed to the United States.

4. The trial court erred in including non-Indian allottee successors in the United States' water right and in describing the United States as their trustee.

5. The trial court erred in describing the quantity of water confirmed for the United States' irrigation water right from April 1 to April 15 in a manner that assumed all the northside Code Agreement allocations are in effect during that period.

None of the parties to the appeals disputes the United States' assignment of error on issues 4 and 5; thus it is undisputed that the trial court's ruling on those issues should be reversed. Specifically, this Court should remand and direct the trial court to eliminate non-Indian allottee successors from the United States' water right (Assignment of Error #4) and to eliminate the Code Agreement restrictions on the water right from April 1 through April 15, except with respect to the water right of the John Cox Irrigation Company (Assignment of Error #5).

Assignments of Error 1 through 3, pertaining to the major parameters of the United States' reserved irrigation water right for the Yakama Nation, are in dispute. In its response brief, the Department of

Ecology (Ecology) generally supports the United States' appeal on these issues. Ecology agrees (Br. 21-25) that the trial court erred in determining that the *Ahtanum* Decree quantified the United States' reserved water right for irrigation and in limiting its period of use and thus supports the United States' request that this Court remand the case for quantification of the United States' Indian reserved water right under the Practicably Irrigable Acreage (PIA) standard. Ecology also agrees (Br. 26-28) that the United States' reserved rights for the Yakama Nation should not be limited to diversions in the irrigation season. Finally, Ecology agrees (Br. 29-30) that, even if the United States' reserved irrigation water right for the Yakama Reservation is limited to the acreage and period of use determined by the trial court, this Court should determine that the United States has a present right to store that water.

The John Cox Irrigation Company (John Cox) and the Ahtanum Irrigation District (AID) dispute the United States' Assignments of Error 1 through 3, and contend that the trial court's ruling on these matters should be affirmed. Their arguments, which are largely addressed in the United States' opening brief, are unpersuasive. They identify no aspect of the *Ahtanum* Decree that determines the reservation's irrigable acreage or period of use or provides a basis for denying the United States a storage right. Indeed, they identify nothing in the *Ahtanum* decisions that indicate the Ninth Circuit's intent to limit the Yakama Nation's reserved water

right other than as provided by the 1908 Code Agreement – which allows non-reservation irrigators to use 75 percent of Ahtanum Creek’s natural flow – and principles of beneficial use. To the contrary, the *Ahtanum* Decree by its terms confirms to the United States and Yakama Nation a right to all the water for irrigation that can be beneficially used on the reservation, subject to the Code Agreement allocations. And the Ninth Circuit’s decisions in *Ahtanum* show the Court’s deep concern that the Code Agreement, by contractually allowing northside irrigators to use most of the Nation’s water rights, unfairly deprived the Nation of irrigation water, and those decisions thus seek to ensure the Nation has access to all the water to which it otherwise has a right.

The *Ahtanum* litigation, by confirming the Code Agreement, made it impossible for the Yakama Nation to irrigate even the lands that are indisputably irrigable on the reservation absent the ability to store water, including water diverted outside the irrigation season. The United States’ PIA evidence identifies the amount of acreage that it is economically feasible to irrigate with such storage and expanded irrigation facilities. The PIA standard is approved by the U.S. Supreme Court as a proper method for quantifying an Indian reserved water right, and the trial court in the Yakima Basin adjudication has previously confirmed water rights to the Yakama Nation based on evidence prepared by the same methodology and the same experts as the evidence proffered by the United States in this

proceeding. This Court should remand for delineation of the parameters of the United States' reserved irrigation water right for the Yakama Nation under the PIA standard. In the alternative, if the Court determines that the *Ahtanum* Decree precludes determination of the United States' reserved irrigation water right under the PIA standard, this Court should nevertheless hold that the trial court erred in limiting that right to 4,107.61 acres and in ruling that confirmation of a storage right is premature.

#### ARGUMENT

**I. The case should be remanded to allow the United States to prove the parameters of federal reserved water right for the Yakama Nation under the Practicably Irrigable Acreage standard.**

In its opening brief (pp. 21-37), the United States established that the *Ahtanum* Decree confirmed for the reservation the right to all the Ahtanum Creek water for irrigation that it can beneficially use, subject only to the northside Code Agreement allocations (and, of course, senior water rights).<sup>1/</sup> We showed (Br. 22-27) that nothing in the Decree quantifies the reservation's irrigable acreage, sets limits on when water may be diverted, or precludes a right to storage. We further showed (Br. 27-28) that the Decree recognized that the yield of Ahtanum Creek was

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<sup>1/</sup> Rights senior to the reservation's irrigation right include the Nation's instream flow right for fish, which has a priority date of "time immemorial," and irrigation rights of the Catholic Bishop of Yakima and the Chancery, which were initiated before the reservation was established and thus exist independent of the Code Agreement. See *Ahtanum* CFO (CR 134-136).

insufficient to adequately irrigate the reservation lands which, absent the Code Agreement, could make beneficial use of all of the creek's water. Thus, as explained in our opening brief (pp. 27-28), once the Ninth Circuit upheld the Code Agreement – which allocated 75 percent of Ahtanum Creek's springtime natural flow to northside water users – the reservation was left with far less water than it needed, and determining any limits to the reservation's water rights became irrelevant and was not addressed or decided. Finally we showed (Br. 28-37) that, even assuming the *Ahtanum* Decree had ruled on parameters of the Yakama Nation's irrigation water right in that proceeding, such a ruling was limited to the irrigation systems constructed on the reservation as of 1915 and did not preclusively bar the United States from seeking to quantify the full scope of its reserved irrigation right under the PIA standard.

Thus, the parameters of the right are open for decision in this adjudication, and the matter should be remanded for consideration of the United States' evidence quantifying, under the PIA standard, the amount of water reserved from Ahtanum Creek for the trust and tribal fee land on the Yakama Reservation. That evidence shows that 6,381.3 acres of trust and tribal fee land on the reservation can be irrigated using 21,553 acre-feet (af) of water, supplied by diversions from March through December, via the creek's natural flow and expanded irrigation facilities, including a reservoir with 9,216 af storage capacity. US Exh. 115 at vi.

In its response brief, the Department of Ecology agrees with this analysis, as discussed below. John Cox and AID support the trial court's rulings, which confirmed an irrigation water right for only 4,107.61 acres of trust and tribal fee land, with diversions from only April to October, and held that the confirmation of a storage right is premature. Without a storage right, and given the existence of the Code Agreement, these rulings effectively limit the Nation to the irrigation of approximately 2,700 acres, less than half of the irrigable acreage identified by the United States. As set forth below, however, the briefs of John Cox and AID fail to identify any persuasive authority to support this analysis.

**A. Ecology agrees that the *Ahtanum* Decree did not preclusively determine the parameters of the United States' reserved irrigation water right for the Yakama Reservation and that the matter should be remanded for consideration of the United States' PIA evidence.**

In its briefing as respondent, Ecology states (Br. 20) that it “supports the argument set out by the United States in Section I of the Argument in its Corrected Brief as Appellant.” Section I of the United States' brief argued that the *Ahtanum* Decree did not preclusively determine the parameters of the United States' reserved water right for irrigation on the reservation, and that the case should be remanded for the trial court to consider the United States' PIA evidence. Ecology agrees (Br. 17-18), that although “the Ahtanum Creek area has been the subject of many lawsuits, this is the first in which quantification of the future rights

of the United States has been at issue;” that the PIA standard “has not yet been applied to Ahtanum Creek reserved waters, and it should now be applied on remand of this case to the trial court;” and that “the trial court erred in holding that the United States’ right should be limited to the amount needed to irrigate land which could be served by the 1915 irrigation system on the Yakama reservation.”

Ecology’s reasoning essentially parallels that of the United States. Ecology recognizes (Br. 21) that the United States filed suit in *Ahtanum* in an attempt to invalidate the 1908 Code Agreement, in which W.H. Code, the Bureau of Indian Affairs’ Chief Engineer for the Indian Irrigation Service, had agreed that the water of Ahtanum Creek should be divided, 75 percent to the water users north of Ahtanum Creek, and 25 percent to the water users on the Yakama Reservation, south of the creek. The United States put forth proof that the then-existing irrigation system could irrigate some 5,100 acres, which the parties and the court agreed would support a right to all of the water in the creek. See Ecology Br. 22; 1957 Pre-Trial Order on the Merits (1957 PTO), Agreed Facts, ¶¶ XV, XI-XIII (Schuster Dec. of 9/10/04, Att. C, at 4-6) (CP 3681-3683); *United States v. Ahtanum Irr. Dist.*, 124 F. Supp. 818, 823-24, 827 (E.D. Wash. 1953).

As Ecology recognizes (Br. 22), although the Ninth Circuit in *Ahtanum I* held the Code Agreement was valid, it nevertheless “sought to limit any deleterious effects of the Agreement on the Yakama Nation’s

water rights.” The Ninth Circuit recognized that, as of 1915, the irrigation system on the reservation could irrigate approximately 5,000 acres, but the court did not limit the reservation to that existing use. *United States v. Ahtanum Irr. Dist*, 236 F.2d 321, 327 (9th Cir. 1956) (*Ahtanum I*). Rather, as Ecology notes (Br. 23), the Ninth Circuit discussed its opinion in *Conrad Investment Co. v. United States*, 161 F. 829 (9th Cir. 1908), in which it awarded the Indians a present right of 1666.67 inches of water, but allowed for modification of the decree if the Indians’ needs should increase in the future. In *Ahtanum I*, the Ninth Circuit explained, “It is plain from our decision in the *Conrad Inv. Co.* case,” that the “paramount right of the Indians to the waters of Ahtanum Creek” is not limited to use at any given date but extends “to the ultimate needs of the Indians as those need and requirements should grow to keep pace with the development of Indian agriculture upon the reservation.” 236 F.2d at 327.

Thus, as Ecology explains (Br. 23), the *Ahtanum* Decree ultimately quantified the individual rights of off-reservation water users, which limited the amount they could take under the Code Agreement, but did not quantify the amount of water necessary for future uses of the United States. Quantification of the United States’ right was unnecessary because, as Ecology notes (Br. 24), “even the present needs of the United States were acknowledged to amount to all the water of Ahtanum Creek.”

As Ecology recognizes, any other reading of the *Ahtanum* decisions is implausible. It is inconsistent with the Ninth Circuit's opinions to read the Decree as imposing limits on the Yakama Nation's use of water, beyond those imposed by the Code Agreement. The court construed the Code Agreement "most strongly in favor of the Indians," and thus construed it as reserving to the Indians "everything not clearly shown to have been granted" in the Code Agreement. *Ahtanum I*, 236 F.2d at 340, 341. And, as Ecology further recognizes (Br. 25), under such a reading one would have to assume that the United States and the Ninth Circuit decided to ignore the PIA standard for determining reservation water rights, which was established a year earlier by the U.S. Supreme Court in *Arizona v. California*, 373 U.S. 546 (1963). As Ecology notes, there is no basis for such an assumption: the United States was a party to *Arizona v. California*, and the Ninth Circuit cited the case in *Ahtanum II* as affirming Indian reserved water rights. See *United States v. Ahtanum Irr. Dist.*, 330 F.2d 897, 889 n.1 (9th Cir. 1964) (*Ahtanum II*). Thus, as Ecology recognizes, this case should be remanded for the trial court to quantify the United States' irrigation right based on its PIA evidence.

**B. John Cox and AID's arguments in support of the trial court's rulings fail.**

John Cox and AID's briefs add little to the analysis. To a great extent, they simply quote the trial court's 1994 PIA Opinion, which the

United States addressed in full in its opening brief. In setting forth their own arguments, they essentially make three points. First, they argue that various statements in pre-trial orders in *Ahtanum* constitute a determination or adjudication of the reservation's practicable irrigable acreage. Second, they argue that the purported determination of the reservation's irrigable acreage in the pre-trial orders has a res judicata effect on the United States, precluding it from claiming additional irrigable acreage for the reservation. Third, they contend that various statements in the Ninth Circuit's decisions in *Ahtanum* indicate that the court intended to limit the reservation's reserved water right to the approximately 5,000 acres that could be irrigated by the irrigation facilities constructed on the reservation as of 1915.

As set forth in more detail below, each of these contentions fails. First, none of the statements in the pre-trial orders constitutes an adjudication or determination, and none of them addresses the Practicably Irrigable Acreage standard for determining a reservation's full reserved water right. Second, even assuming there was such a determination, which there was not, John Cox and AID fail to show that the cause of action in *Ahtanum* was the same as the cause of action in the instant case. And third, the Ninth Circuit decisions, which express great concern for the injury caused to the Yakama Nation by the Code Agreement, evidence no intent to otherwise limit the Nation's water rights.

**1. *Ahtanum* did not litigate or decide the reservation's irrigable acreage.**

As set forth in the United States' opening brief (pp. 22-23), pursuant to the Code Agreement, the *Ahtanum* Decree confirmed a 25/75 percent split between the reservation and north side water users of Ahtanum Creek's natural springtime flow, measured at 62.59 cubic feet per second (cfs), with a July 10 cutoff for the northside water users. During that same period, it awarded "all the excess over that figure" to the United States "to the extent that the said water can be put to a beneficial use." *Ahtanum II*, 330 F.2d at 915. After July 10th, the Decree provided that "all the waters of Ahtanum Creek shall be available to" the United States, "to the extent that the said water can be put to a beneficial use." *Id.* Thus, the Decree confirmed to the reservation, subject to Code Agreement allocations, all the water that the reservation can beneficially use.

Further, the United States' brief (pp. 23-24) established that the Findings of Fact accompanying the *Ahtanum* Decree specified that "the yield of Ahtanum Creek is insufficient to adequately irrigate the lands either on the north or the south side of that stream." 1962 Findings of Fact (FOF) ¶ 5 (DOE Exh. 136). That finding, with respect to southside water usage, rested on the United States' showing that approximately 5,100 acres were capable of being irrigated by the irrigation ditches that existed at that time. Thus, the Decree has the effect of confirming to the United States,

with a priority date of 1855 when the reservation was established, all of the water of Ahtanum Creek, subject only to Code Agreement allocations.

John Cox and AID point to portions of various *Ahtanum* pre-trial orders to argue that the United States established the “practicably irrigable acreage” of the reservation in *Ahtanum*. This argument fails in two respects. First, *Ahtanum* plainly did not invoke the Practicably Irrigable Acreage standard. The PIA standard is a specific method for quantifying reserved water rights on Indian reservations, approved by the U.S. Supreme Court in *Arizona v. California*, 373 U.S. at 600. It provides a method for determining water necessary to satisfy “the future as well as the present needs of the Indians,” *Arizona*, 373 U.S. at 600, and generally identifies “those acres susceptible to sustained irrigation at reasonable costs,” including through the future construction and operation of storage and irrigation systems, see *In re General Adjudication of All rights to Use Water in the Big Horn River System*, 753 P.2d 76, 101 (Wyo. 1988).

The amount of acreage confirmed by the trial court, in contrast, is based on the actual irrigation capacity of the irrigation ditches that were in existence as of 1915, and does not examine storage capacity or future expansion of irrigation facilities. While the trial court confirmed irrigation rights for only 4,107.61 acres of trust and tribal fee land on the reservation, the United States’ PIA evidence – prepared by the same experts using the same methodology accepted elsewhere in this adjudication – identifies

6,381.3 irrigable acres. The trial court's ruling is *not* based on the PIA standard approved by the Supreme Court.

Second, none of the provisions of the *Ahtanum* pre-trial orders on which John Cox and AID rely constitute a determination of the irrigable acreage of the reservation. AID cites to various proffers of evidence in *Ahtanum* regarding the capacity of irrigation ditches on the reservation as set forth in the 1951 *Ahtanum* Pre-Trial Order (1951 PTO). As noted in our opening brief (pp. 24-25), however, the 1951 order does not establish the reservation's irrigable acreage because it included conflicting numbers, pertained only to the *Ahtanum* district court's 1954 decision which was reversed, and was not incorporated into the final Decree.

John Cox relies on Paragraph XV in the "Agreed Facts" in the 1957 *Ahtanum* Pre-Trial Order on the Merits (1957 PTO), which was incorporated into the Findings of Fact and Conclusions of Law accompanying the *Ahtanum* Decree. That paragraph, however, states only that the reservation lands "for which rights to the use of water from [Ahtanum Creek] *are claimed* in this proceeding total *approximately* 5100 acres." 1957 PTO, Agreed Facts ¶ XV (CP 3683). As set forth in our opening brief (p. 25), Paragraph XV by its terms describes only a "claim" of the United States – not a factual finding by the Court or stipulation of the parties as to the reservation's actual irrigable acreage – and states only an "approximate" amount of acres, which plainly does not constitute a

factual determination of irrigable acreage. In contrast, Paragraph 16 of the 1962 Findings of Fact accompanying the *Ahtanum* Decree set forth a 49-page listing of each northside answering defendant and the exact number of irrigable acres identified in each answer, determined to the tenth of an acre, identifying “the needs of said land for year 1957.” 1962 FOF ¶ 16 (DOE Exh. 136). The Ninth Circuit then carefully revised this listing to base it not on need but on actual acres irrigated, and to correct some factual errors. *See Ahtanum II*, 330 F.2d at 915 (Appendices A and B). Nothing of the kind exists for the irrigation rights of the United States. The *Ahtanum* Decree plainly does not quantify the United States’ water right, adjudicate any irrigable acreage limit for the reservation, or otherwise limit the parameters of the reservation water right, except as to the limits established pursuant to the Code Agreement.

**2. Assuming the *Ahtanum* Decree did make determinations regarding the irrigable acreage and period of use for the United States’ irrigation right, those rulings do not have preclusive effect in this adjudication.**

In its opening brief (pp. 28-37), the United States established that, even assuming the *Ahtanum* Decree confirmed irrigation water rights to the United States for a specific amount of acreage, res judicata does not operate to bar the United States from claiming a full PLA-based right in this adjudication because the causes of action in the two matters are not the same. In *Ahtanum*, the United States sought to invalidate the Code

Agreement in order to obtain the water being used by northside irrigators for the irrigation facilities that the United States had constructed on the reservation as of 1915 – an action in which the United States was essentially unsuccessful. In this proceeding, in contrast, the United States necessarily accepts the validity of the Code Agreement and the northside users’ rights to allocations of water under that Agreement, but seeks – as it must in this comprehensive adjudication – to define the full extent of the irrigation water right in Ahtanum Creek for the Yakama Nation.

The first criterion for determining whether a cause of action in two proceedings are the same is “whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action.” *Adams v. California Dept. of Health Services*, 487 F.3d 684, 689 (9th Cir. 2007). In its opening brief, the United States explained that the northside users rights established in the *Ahtanum* Decree will not be impaired by the United States’ PIA claim. The *Ahtanum* Decree only established rights in the northside users to Code Agreement allocations, which are not impaired by the United States’ PIA claim.

AID provides no response to this argument. John Cox argues (Br. 26) that the northside irrigators’ right to use “excess” water would be impaired if the United States was confirmed irrigation rights for additional acres. John Cox is wrong, and its argument is precluded by the *Ahtanum* Decree. As noted above, the 1962 Findings of Fact accompanying the

Decree declare that “the yield of Ahtanum Creek is insufficient to adequately irrigate the land either on the north or the south side of that stream.” 1962 FOF ¶ 5 (DOE Exh. 136); *see also* 1957 PTO, Agreed Facts ¶ IX (CP 3681). That finding was based, with respect to the southside reservation lands, on the United States’ proof that the irrigation ditches on the reservation could irrigate approximately 5,100 acres, which John Cox does not dispute. Thus, John Cox is bound by the finding that the 5,100 acres alone could use all the available water, leaving no excess to which John Cox has a right.

While it is true that the trial court in this proceeding confirmed John Cox a right to excess water, that ruling is in dispute and, in any event, it pertains only to water that the Yakama Nation – as a factual matter at any given time – does not put to beneficial use. It does not in any manner limit the Nation’s vested right to beneficially use for irrigation all of the water of Ahtanum Creek in excess of the Code Agreement allocations and other senior water rights. Thus, the *Ahtanum* Decree’s factual finding that the reservation’s irrigable acreage would more than use all of the flow of Ahtanum Creek grants to the United States the entire flow of the creek, subject to Code Agreement allocations, and preclusively bars John Cox and AID from claiming a vested interest in limitations on the Nation’s beneficial use. Moreover, given that the *Ahtanum* Decree awarded 75 percent of the creek’s natural flow to northside users, it is self-

evident that the 5,100 acres of reservation land that John Cox agrees are irrigable would more than use up the natural flow of Ahtanum Creek. The northside irrigators have no vested right in the Nation's failure to use all the water of Ahtanum Creek affirmed to it in the *Ahtanum* Decree, and are not prejudiced by the United States' claim to quantify the reservation's full irrigation right under the PIA standard.

Furthermore, as established in the United States' opening brief (pp. 32-35), in *Ahtanum*, the United States sought water only for present, not future, irrigation. John Cox and AID contend that the United States' complaint in *Ahtanum* claimed water for future use and thus sought quantification of the reservation's entire irrigation right. As set forth in the United States' opening brief (p. 32-33) the better reading of the complaint is that it sought to invalidate the Code Agreement and to enjoin northside users from taking water needed to supply the southside irrigation ditches as they existed at that time, and left open the potential to fully quantify the reservation's irrigable acreage in the future. This reading is supported not only by the complaint's plain language but also by the fact that, at the time the complaint was filed, it was well established in Ninth Circuit case law that an Indian reserved water right encompassed water for *all* of a reservation's irrigable acreage. *See Skeem v. United States*, 273 F. 93, 95 (9th Cir. 1921); *United States ex rel. Ray v. Hibner*, 27 F.2d 909, 911 (D. Idaho 1928). It is also supported by the fact that the Ninth Circuit

had previously granted injunctive relief of the sort sought by the United States for existing irrigation capabilities on a reservation while allowing future claims for expanded irrigation rights. *See Conrad Inv. Co. v. United States*, 161 F. 829 (9th Cir. 1908). Finally, the United States submitted evidence in *Ahtanum* identifying irrigable acreage on the reservation that was not then served by the irrigation infrastructure on the reservation, *see* 1951 PTO, Agreed Facts ¶ 6 & Exh. A (YIN Exh. 353), but did not include that acreage in the claim in its complaint. Thus, the specific acreage claims set forth in the *Ahtanum* complaint constituted a proffer of proof that the United States had a present right to enjoin the northside water users from using water under the Code Agreement, not a claim for the entire irrigation present and future irrigation right of the reservation.

**3. The Ninth Circuit's opinions do not evidence an intent to limit the reservation's irrigation water right, other than as provided for in the Code Agreement allocations.**

John Cox and AID quote extensively from *Ahtanum I* and from portions of the trial court's 1994 PIA opinion relying on *Ahtanum I* for the proposition that the Ninth Circuit intended to adjudicate the present and future irrigation rights of the reservation. As set forth in the United States' opening brief (pp. 35-37), however, the Ninth Circuit discussed "future" irrigation rights only to determine whether the Court needed to consider the validity of the Code Agreement, including whether Interior had the

authority to enter into the agreement. As the Ninth Circuit set forth the question, if the rights reserved for the Nation in 1855 were rights

to sufficient waters for the needs of the Indians as they might exist in the future, then we must of necessity consider the validity and force of the 1908 agreement, for it is conceded that the present needs of the Indians are sufficient to require substantially the whole flow of the stream. If the agreement purported to deprive the Indians of rights which actually belonged to them, then that circumstance must be considered in determining whether the Government officials in executing it exceeded their power and authority.

*Ahtanum I*, 236 F.2d at 325. Northside users argued that “since at the time of the 1908 agreement the area of land on the reservation then under irrigation through the Indian ditches did not exceed some 1200 acres, that the rights of the Indians were limited by those needs.” *Id.* at 327. The Ninth Circuit examined the case law on Indian reserved water rights, including *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939), which the Court recognized had confirmed a right for the Indians of 2,100 irrigable acres, even though only 1,900 were irrigated at the time of the decision. *Id.* at 328. The Ninth Circuit then turned to question before it and explained that, in contrast with *Walker River*,

It is unnecessary to consider whether, had there been no 1908 agreement, the rights of the government as trustee for the Indians would have been constantly growing ones in the years following 1915 had the irrigable area within the reservation continued to increase. It is sufficient for the purposes of this case to say that an adjudication of the rights of the United States in and to the waters of Ahtanum Creek as of 1915, would necessarily award the United

States a right measured by the needs of the Indian irrigation project at that date.

*Id.* The Ninth Circuit thus recognized that the needs of the Nation might increase in the future, but that it was unnecessary to consider that question “for the purposes of this case,” in which the Court was determining whether it needed to reach the question of the validity of the Code Agreement. Rather, the Court recognized that the government showed that, as of 1915, the reservation could make use of the creek’s entire flow, and thus the United States had a right to seek to enjoin implementation of the Code Agreement, the validity of which the Court turned to immediately after this analysis. *Id.* at 328-339.

Nothing in the *Ahtanum I* opinion indicates that the Ninth Circuit intended to narrow or limit the Nation’s water rights other than as required by the Code Agreement. The Ninth Circuit excoriated the Interior Department for “improvidently bargain[ing] away extremely valuable rights belonging to the Indians,” and public officials for “sanctimonious expressions” respecting “the generous and protective spirit which the United States properly feels toward its Indian wards,” which the Court deemed nothing “but demonstrations of a gross national hypocrisy.” *Id.* at 338. The Court construed the Code Agreement “most strongly in favor of the Indians.” *Id.* at 340. The Court was focused on the present harm that the Code Agreement caused the Indians, noting in *Ahtanum II* that “the

Indian Tribe may now ascertain, by actual experience under the decree, just how badly they have suffered through the Code taking of their property.” 330 F.2d at 914. But the Ninth Circuit, which reluctantly upheld the Code Agreement, plainly intended to impose no further limitations on the reservation’s water rights in favor of the northside water users. The *Ahtanum* Decree includes no such limitation.

**II. If the case is not remanded for consideration of the United States’ PIA evidence, the United States’ irrigation water right should be modified to confirm a water right for 5,079.91 irrigable acres of trust and tribal fee land.**

The United States established in its opening brief (pp. 37-39) that, assuming the irrigation water right for the reservation was preclusively established in *Ahtanum*, the trial court erred in concluding that it limits the Yakama Nation to a right for the irrigation of only 4,107.61 acres. The United States noted (Br. 37) that the *Ahtanum* record contains a multiplicity of irrigable acreage figures and provides a precarious basis for determining the scope of the United States’ irrigation water right. Indeed, the trial court attempted to quantify the irrigable acreage three different times between 2002 and 2009. *See* Corrected Brief of the United States as Appellant 37-38. The United States established, however, that the most reliable figure is the irrigable acreage figure set forth in Exhibit A to the 1951 Pre-Trial Order, which is the only document that provides a tabulation of irrigable acreage, tied to specific properties. 1951 PTO,

Agreed Facts ¶ 6 & Exh. A (YIN Exh. 353). Exhibit A identifies 6,072.3 irrigable acres on the reservation, of which 5,272.7 acres are identified as irrigated – *i.e.*, acres capable of being served by irrigation facilities that existed at that time. *Id.*

None of the other participants in the appeal specifically address this question, although John Cox and AID generally argue that the trial court correctly relied on the portion of the Agreed Facts in the 1957 Pre-Trial Order on the Merits in *Ahtanum*, which stated that the United States claimed a right for “approximately 5,100 acres.” As discussed *supra*, pp. 14-15, however, this “approximate” acreage, which is stated not as a fact but a “claim,” does not provide a factual finding on which the reservation’s irrigable acreage can be based.

The irrigable acreage identified in Exhibit A – which includes acreage capable of being irrigated by the existing facilities as well as acreage considered to be irrigable if such facilities were expanded – most closely satisfies the trial court’s 1994 PIA opinion in this proceeding precluding consideration of the United States’ PIA evidence, which viewed the *Ahtanum* litigation as determining both present and future irrigation needs for the reservation. That opinion cited to Exhibit A as proof of the irrigable acreage established in *Ahtanum*. See 1994 PIA Opinion 4 (CR 153). In addition, in the 2008 Supplemental Report, the court commissioner found that Exhibit A provided the most reliable and

persuasive evidence. *See* 2008 Supp. Rep. 199 (CP 923). Furthermore, since the *Ahtanum* Decree provides that the Nation has a right to all the water it can beneficially use, without specifying an amount, the Decree is best interpreted to incorporate the United States' best evidence of the number of irrigable, rather than irrigated acres.

Thus, if this Court does not remand for determination of the United States' reserved irrigation water right under the PIA standard, it should reverse the trial court's determination that *Ahtanum* limited the reservation's water right to 5,100 acres and hold that *Ahtanum* confirmed a right to the irrigable acreage set forth in Exhibit A to the 1951 Pre-trial Order, in the amount of 6,072.3 acres. After subtracting the irrigable acres not held in trust or tribal fee status, that should leave the United States with a right to water for the irrigation of 5,079.91 acres of trust and tribal fee land, as compared with the 4,107.61 acres confirmed by the trial court. *See* Corrected Brief of the United States as Appellant at 38.

**III. If the case is not remanded for consideration of the United States' PIA evidence, this Court should recognize that the United States has the right to storage necessary to satisfy that right.**

If this Court does not remand for determination of the United States' irrigation right under the PIA standard, only 2,728.7 acres of the Yakama Nation's trust and tribal fee land can be irrigated absent a storage right. US Exh. 113, *Water Availability Investigations* 12. As discussed in

the United States' opening brief (pp. 39-43), the trial court recognized the importance of a storage right for the Yakama Nation, and accepted the PIA evidence provisionally to the extent it applies to such future projects.

1994 PIA Op. 14 (CP 1513). Yet, while the trial court ultimately did not deny the United States' request for a storage right, the court concluded the request for a storage right was premature. 2009 Mem. Op. 66 (CP 521).

The trial court declared that a statement would be included in the Conditional Final Order that the water right could be modified to allow for storage, *id.* at 67 (CP 522), but failed to do so, leaving the United States' potentially vulnerable to a future claim by non-reservation water users that the Nation's reserved irrigation right has been fully adjudicated and does not include a right for storage.

As the United States established in its opening brief (pp. 41-43), it is not premature to include a future storage right in the United States' reserved water right. Ecology (Br. 29-30) supports this argument, recognizing (Br. 30) that the Code Agreement makes this an unusual case. Given the Code Agreement allocations, the amount of acreage served by the existing irrigation system on the reservation – on which the trial court based its determination that the Yakama Nation has a right to 4,107.61 acres – cannot be irrigated absent storage. Thus, as Ecology notes (Br. 30) it “would be a hollow award to allow the United States to irrigate 4,107.61

acres \* \* \* without the storage right needed to provide water for more than 2,728.7 acres.”

John Cox argues (Br. 28) that such a right cannot be confirmed because the United States did not provide evidence that construction of storage for the 4,107.61 acres of trust and tribal fee land was economically feasible, or evidence of a suitable on-reservation site to construct storage. AID makes similar arguments. Those arguments are wrong. PIA is a standard for *quantifying* a reservation’s irrigable acreage. A reservation’s “Practicably Irrigable Acreage” is generally deemed to be “those acres susceptible to sustained irrigation at reasonable costs.” *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 101 (Wyo. 1988). Thus, in quantifying the reservation acreage that is “practicably” irrigable, a court typically examines, among other things, the cost of storage, the design of an on-farm irrigation conveyance system and its cost; and economic feasibility analysis of irrigating new lands. *See, e.g.*, US Exhs. 111-119 (PIA evidence for this case).

Here, in contrast, the United States does not claim storage in order to quantify the irrigable acreage on the reservation. To the contrary, in this alternative argument the United States accepts the trial court’s quantification of the reservation’s irrigable acreage, which was based on *Ahtanum I* and the irrigation structures in place as of 1915, but seeks only a right to storage for the amount of acreage already confirmed. John Cox

and AID cite no principle in water law that requires a showing of economic feasibility to claim a right to store water for acreage that the United States already has a right to irrigate. Ecology agrees (Br. 30), stating there should be “no need to determine the economic feasibility or providing storage to make the water available to irrigate 4,107.61 acres.”

Also, there is no requirement, under the PIA standard or otherwise, that storage be constructed on the reservation, and neither John Cox nor AID cite any authority for that proposition. The United States’ PIA evidence identifies a location for storage upstream of the reservation, and the United States and the Nation have submitted evidence demonstrating that water in excess of that needed to satisfy other confirmed rights is available in the spring and would help satisfy the Nation’s water deficit in later months.<sup>2</sup> *See* Declaration of Niel Allen, 06/24/2008 (CP 3631-3635).

The United States has been awarded all the water in excess of the northside Code Agreement rights that it can put to beneficial use on the 4,107.61 confirmed acres of irrigable trust and tribal fee land. The United

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<sup>2</sup> The trial court did not issue a final ruling quantifying the reservation’s irrigable acreage until it issued its 2009 Memorandum Opinion, at which time it also issued the Conditional Final Order in this matter. *See* 2009 Mem. Op. 56-60 (CP 1511-1515).). Thus there was no opportunity for the United States to prepare and submit evidence on the parameters of the storage right needed to supply water for that irrigable acreage. The United States does not believe it needs to submit such evidence for a storage right to be confirmed, but if this Court determines that it does, the case should be remanded to allow the United States to do so.

States seeks only to store water that it already has a right to divert, for use on acreage it already has a right to irrigate. Thus, if this Court does not remand for determination of the United States' right under the PIA standard, it should direct the trial court to include a right to storage in the United States' irrigation right for the Yakama Nation, as set forth in the United States' opening brief at pages 42-43.

**IV. The title of the United States' irrigation water right should be modified to delete non-Indian allottee successors from that right, which no party disputes.**

In its opening brief, the United States established (Br. 43-49) that the trial court incorrectly included non-Indian allottee successors in the United States' irrigation water right, even though the United States claimed water rights only on behalf of the Yakama Nation's trust and tribal fee land and even though there are no known non-Indian allottee successors who did not file individual claims for southside water rights. The United States noted that the inclusion of non-Indian allottee successors in the United States' water right is unnecessary and inconsistent and leaves the United States uncertain as to the amount of irrigable acreage confirmed for the Nation.

No party disputes the United States' appeal on this issue. John Cox (Br. 1) states that it "will not \* \* \* respond to the Yakama Nation's and DOE's issues related to \* \* \* non-Indian allottee successors." AID recognizes that the United States raised this issue (Br. 2) but does not

address it. Ecology's response brief is silent on this issue. For the reasons set forth in the United States' opening brief, and because there is no opposition to the United States' appeal on this issue, the non-Indian allottee successors should be deleted from the United States' irrigation right for the Yakama Nation.

**V. The description of the United States' irrigation right from April 1 to April 14 is incorrect.**

As set forth in the United States' opening brief (pp. 49-50), the Conditional Final Order provides that, from April 1 through July 10, the United States has the right to its 25 percent allocation of the Code Agreement natural flow plus all the excess over the northside's 75 percent Code Agreement allocation. That provision is incorrect with respect to the period of April 1 through April 14. The only northside party that has a confirmed Code Agreement allocation during that period is John Cox; the irrigation season for all other northside parties confirmed a Code Agreement-based right begins on April 15. See 2003 Threshold Legal Issues Op. 14-15 (CP 955-956); CFO (CP 182-454 (John Cox at 437)). Thus, the United States is entitled to use all flow available for irrigation, except the John Cox Code Agreement share (and senior rights), from April 1 through April 14.

No party disputes the United States' appeal on this issue. Ecology (Br. 31-32) agrees that "[t]he United States should be awarded a right to

all water in Ahtanum Creek from April 1 to April 14, to the extent it can use the water beneficially, except for the water awarded to John Cox Ditch Company under the Pope Decree.” John Cox states (Br. 1) that it “will not \* \* \* respond to the Yakama Nation’s and DOE’s issues related to \* \* \* April 1 - April 15 water.” AID (Br. 21) states no position on this issue, merely noting that the trial court’s 2009 Memorandum Opinion states that the period of use of the United States/Yakama Nation water right is from April 1 to October 1, which is non-responsive to the question in any event.

Thus, for the reasons set forth in the United States’ opening brief, and because there is no dispute on this issue, this Court should remand to the trial court for correction of the description of the United States’ irrigation right during the from April 1 through April 14.

### **CONCLUSION**

For the foregoing reasons, with respect to the United States’ irrigation reserved water right:

(1) This Court should reverse the trial court’s determinations of irrigable acreage, period of use, and that a storage right is premature, and remand for quantification of the water right under the PIA standard.

(2) In the alternative, absent a remand for proceedings under the PIA standard, this Court should direct the trial court to

(a) change the irrigation use to 5,079.91 acres and

(b) confirm a future right for storage within the parameters of the right as otherwise confirmed.

(3) This Court should direct the trial court to eliminate non-Indian allottee successors from the United States' water right or, in the alternative, eliminate the characterization of the United States as trustee for such individuals.

(4) This Court should direct the trial court to correct the description of the United States' irrigation right from April 1 through April 14 to recognize that, during that period, the United States has the right to all the waters it can beneficially use for irrigation, subject to the Code Agreement allocation to John Cox.<sup>3</sup>

Respectfully submitted,

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90-6-2-17

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<sup>3</sup> The United States mistakenly omitted this claim for relief from the Conclusion in its Corrected Brief as Appellant, but the United States plainly claimed this relief on pages 49-50 of that brief.

**CERTIFICATE OF SERVICE**

I certify that on September 7, 2010, I caused to be served via U.S. mail, postage prepaid, a copy of the foregoing document to:

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