

FILED

SEP 08 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 281141

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,

vs.

JAMES J. ACQUAVAELLA; UNITED STATES; YAKAMA NATION;
AHTANUM IRRIGATION DISTRICT; JOHN COX DITCH
COMPANY; LA SALLE HIGH SCHOOL; DONALD BRULE; SYLVIA
BRULE; JEROME DURNIL and ALBERT LANTRIP;

Defendants/Appellants/Respondents.

REPLY BRIEF OF APPELLANT/CROSS RESPONDENT
JOHN COX DITCH COMPANY TO RESPONSE BRIEFS OF
THE UNITED STATES AND YAKAMA NATION

CHARLES C. FLOWER and
PATRICK ANDREOTTI
FLOWER & ANDREOTTI
Attorneys for John Cox Ditch Company
303 East "D" Street #1
Yakima, WA 98901
Telephone: 509-248-9084

FILED

SEP 08 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 281141

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,

vs.

JAMES J. ACQUAVAELLA; UNITED STATES; YAKAMA NATION;
AHTANUM IRRIGATION DISTRICT; JOHN COX DITCH
COMPANY; LA SALLE HIGH SCHOOL; DONALD BRULE; SYLVIA
BRULE; JEROME DURNIL and ALBERT LANTRIP;

Defendants/Appellants/Respondents.

REPLY BRIEF OF APPELLANT/CROSS RESPONDENT
JOHN COX DITCH COMPANY TO RESPONSE BRIEFS OF
THE UNITED STATES AND YAKAMA NATION

CHARLES C. FLOWER and
PATRICK ANDREOTTI
FLOWER & ANDREOTTI
Attorneys for John Cox Ditch Company
303 East "D" Street #1
Yakima, WA 98901
Telephone: 509-248-9084

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
I. Introduction	1
II. Summary of Argument	1
III. Argument	4
A. North-side parties are not seeking to relitigate issues decided in both the federal <u>Ahtanum</u> cases	4
B. The <u>Acquavella</u> Trial Court has both the jurisdiction and the obligation to interpret and apply the <u>Ahtanum I</u> and <u>Ahtanum II</u> Decisions in this case	6
C. The <u>Ahtanum II</u> Decree did not determine rights of specific Code Agreement parties to water for specific parcels of land and did not limit or reduce north-side waterusers State water rights as confirmed in <u>State vs. Achepohl</u>	10
1. The state and federal standards for determining whether or not <i>res judicata</i> or <i>collateral estoppels</i> are, in practice, identical	10
2. The <u>Ahtanum II</u> decree did not determine or limit north-side waterusers Washington State water rights	11
3. North-side waterusers are entitled to divert and use water from Ahtanum creek not then being beneficially used on the Yakama Reservation	17
4. John Cox is entitled to confirmation of a post-July 10 th water right	20
5. An “excess” water right of .01 cfs per acre must be confirmed for John Cox	22
IV. Conclusion	25

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<u>Achepohl</u>	passim
<u>Badgley vs. City of New York</u> , 606 F.2d 358 (2 nd Cir. 1979)	8, 9,
<u>City of Grand Junction vs. City and County of Denver</u> , 960 P.2d 675 (Colorado Supreme Court, 1998)	9
<u>Department of Ecology vs. Acquavella</u> , 100 Wn.2d 651, 674 P.2d 160 (1983) (“ <u>Acquavella I</u> ”)	7
<u>Department of Ecology vs. Yakima Reservation Irrigation District</u> , 121 Wn.2d 257, 850 P.2d 1036 91993) (“ <u>Acquavella II</u> ”)	7, 8
<u>Kittitas Reclamation District vs. Sunnyside Valley Irrigation District</u> , Eastern District of Washington, Civil No. 21	7, 8
<u>Kittitas Reclamation District vs. Sunnyside Valley Irrigation District</u> , 626 F.2d 95, 97 (1980)	7,
<u>Kittitas Reclamation District vs. Sunnyside Valley Irrigation District</u> , 763 F.2d 1032 (9 th Cir. 1985)	8,
<u>United States vs. Ahtanum Irrigation District</u> , 236 F.2d 321 (9 th Cir. 1956) (“ <u>Ahtanum I</u> ”)	passim
<u>United States vs. Ahtanum Irrigation District</u> , 330 F.2d 897 (9 th Cir. 1964) (“ <u>Ahtanum II</u> ” or “ <u>Pope Decree</u> ”)	passim
<u>McCarran Amendment</u> , 43 USC 666	1, 2, 6

I. Introduction:

John Cox Ditch Company (“John Cox”) submits this Brief in reply to the “Yakama Nation’s Response Brief” and “Cross-Appellant Response Brief of the United States” (“U.S. Reply Brief”).

This “Reply Brief” addresses only the issues raised by the Yakama Nation and United States (“U.S.”) related to “excess” and “junior” water rights, post-July 10th water rights of north-side waterusers, and the quantity of John Cox’s “excess” water right confirmed in the Conditional Final Order.

II. Summary of Argument:

The primary question to be resolved to determine the above-described issues is the proper interpretation and application of the decision in United States vs. Ahtanum Irrigation District, 330 F.2d 897 (9th Cir. 1964) (“Ahtanum II” or “Pope Decree”).

As previously argued [Brief of Appellant/Respondent-John Cox Ditch Company, pp. 9-21 (“John Cox Opening Brief”)], the Ahtanum II Decree was an allocation of the water of Ahtanum Creek pursuant to the Code Agreement and not an adjudication of north-side water rights.

The Acquavella Trial Court and this Court have both the jurisdiction and obligation pursuant to the McCarran Amendment, 43 USC

666, to adjudicate the water rights of the U.S., including water rights held by the U.S. as trustee for the Yakama Nation and its members, and to interpret and apply the Ahtanum II decisions to properly adjudicate Ahtanum Creek, a tributary of the Yakima River.

The Acquavella Trial Court's determination Ahtanum II: (1) limited the Yakama Nation's right to divert from Ahtanum Creek to quantities of water which can be "beneficially used" on land south of Ahtanum Creek is correct, and (2) water in excess of the amount which can be "beneficially used" south of Ahtanum Creek, may be "beneficially used" north of the creek by landowners who have confirmed Washington State water rights is only partially correct.

The Acquavella Trial Court erred by limiting the right to use "excess" water of north-side waterusers who are entitled to share in the Code Agreement allocation.

The John Cox Code Agreement allocation is substantially less than its State water right confirmed in the Achepohl proceeding both as to quantity and acreage. Other north-side waterusers not entitled to share in the Code Agreement allocation also have an appurtenant State water right confirmed in the Achepohl proceeding.

Both John Cox and other north-side waterusers entitled to share in the Code Agreement allocation and those north-side waterusers who have

no Code Agreement allocation are entitled to exercise their Washington State based water rights and divert and beneficially use water from Ahtanum Creek when there is water in excess of the amount which can be beneficially used by the Yakama Nation pursuant to its treaty-reserved rights.

The Acquavella Trial Court also erred by refusing to confirm a post-July 10th water right to John Cox.

Post-July 10th diversions, like pre-July 10th diversions, to the Yakama Reservation are also limited to the amount of water which can be beneficially used.

John Cox has never abandoned or relinquished its Washington State water right to beneficially divert and use water for the entire irrigation season from April 1st to October 15th and when water is available in excess of the amount which can be beneficially used on the reservation land south of Ahtanum Creek after July 10th, John Cox is entitled to exercise its State-based water right to the extent of all available water not beneficially used on the reservation.

The Acquavella Trial Court also erred by limiting the annual quantity of “excess” water which John Cox may divert.

The quantity of water flowing through the Ahtanum watershed and the timing of the flow varies greatly from year-to-year.

John Cox is entitled to confirmation of an “excess” right equal to the amount by which its State-water right exceeds its Code Agreement allocation, which is an additional .01 cfs per acre from April 1st to July 10th and .02 cfs per acre after July 10th, when available.

III. Argument:

A. North-side parties are not seeking to relitigate issues decided in both the federal Ahtanum cases:

Both the Yakama Nation and U.S. erroneously argue John Cox and other north-side waterusers are “collaterally attacking” and seeking to relitigate issues decided in United States vs. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir. 1956) (“Ahtanum I”) and Ahtanum II, which is simply not true.

The north-side waterusers have always recognized they are bound by both the Ninth Circuit decisions in Ahtanum I and Ahtanum II.

The Washington State water rights of north-side waterusers are, except to the extent north-side waterusers are entitled to beneficial use of Ahtanum water pursuant to the Code Agreement, subordinate to all the treaty-reserved, non-beneficially used water rights of the Yakama Nation.

The “excess” and “junior” water rights asserted by the north-side waterusers before July 10th and the right to the use of “excess” water after

July 10th are subordinate to, and do not interfere in any manner with: (1) the beneficially used, treaty-reserved irrigation water rights of the U.S. as trustee for the Yakama Nation determined in Ahtanum II, or (2) the treaty-reserved instream flow right confirmed to the United States as trustee for the Yakama Nation in this proceeding.

Neither the Yakama Nation nor U.S. has argued, and there is no evidence in the record which even suggests, confirmation of north-side excess/junior rights and a post-July 10th water right which are subordinate to the treaty-reserved rights of the Yakama Nation would, or could have, any impact on the U.S. exercise of instream “fish flow” and irrigation treaty-reserved rights.

The U.S. argument (U.S. Response Brief, pp. 11-12) “excess” and “junior” rights should be denied because they are difficult to regulate is made without citation of authority and is completely without merit.

Irrigation diversions within the Ahtanum Basin are regulated and modified on a daily, and sometimes more frequent, basis based on the flow variations.

Regulation of “excess” and “junior” rights are merely a practical problem and not a legal impediment to recognizing and confirming the “excess” and “junior” rights of John Cox and other north-side waterusers.

B. The Acquavella Trial Court has both the jurisdiction and the obligation to interpret and apply the Ahtanum I and Ahtanum II

Decisions in this case:

The Yakama Nation erroneously argues (Yakama Nation Response Brief, pp. 7-8) the Acquavella Court has no jurisdiction to interpret or apply the Federal Court Decree in Ahtanum II because the Ahtanum II Court “retained jurisdiction”.

The Ahtanum II Court retained the following jurisdiction:

“The court reserves jurisdiction to make further orders as may be necessary to preserve and protect the rights herein declared and established, should a subsequent change in the situation or condition of the parties hereto require.”
Ahtanum II, 330 F.2d 915.

As above-noted, the “excess” and “junior” rights asserted by north-side waterusers have no impact on the rights declared and established for the Yakama Nation in the Ahtanum II decision.

Notwithstanding the Ninth Circuit’s retention of jurisdiction in Ahtanum II, the Acquavella Trial Court in this case clearly has the jurisdiction, and the obligation, to determine all the rights of the United

States as trustee for the Yakama Nation in this proceeding, including interpreting and applying the Ahtanum II decree.

This case is a general adjudication of all Yakima River Basin water rights pursuant to the McCarran Amendment, 43 USC Section 666, applies. See, Department of Ecology vs. Acquavella, 100 Wn.2d 651, 674 P.2d 160 (1983) (“Acquavella I”).

In Department of Ecology vs. Yakima Reservation Irrigation District, 121 Wn.2d 257, 850 P.2d 1036 (1993) (“Acquavella II”), the Washington State Supreme Court specifically ratified and affirmed the Acquavella Trial Court’s interpretation and application of the two (2) following federal court decisions subject to the “continuing jurisdiction” of the federal court.

In Kittitas Reclamation District vs. Sunnyside Valley Irrigation District, Eastern District of Washington Civil No. 21, the District Court in 1945 entered a “Consent Judgment” in which the federal court retained “continuing jurisdiction” over interpreting and administering the “Consent Decree”. See, Kittitas Reclamation District vs. Sunnyside Valley Irrigation District, 626 F.2d 95, 97 (1980).

The Acquavella Trial Court interpreted the Civil 21 “Consent Judgment” as quantifying the Yakama Nation’s treaty-reserved water rights within the Yakima Reclamation Project.

The Washington State Supreme Court specifically affirmed the Acquavella Trial Court's interpretation and application of the 1945 "Consent Judgment" as quantifying the Yakama Nation's irrigation water rights within the Yakima Reclamation Project. Acquavella II, 121 Wn.2d at 257.

In 1980, the U.S. District Court for the Eastern District of Washington, in Civil 21, acting pursuant to its reservation of "continuing jurisdiction", made determinations and rulings about the Yakama Nation's treaty fishing rights, a decision which was affirmed by the Ninth Circuit on appeal in Kittitas Reclamation District vs. Sunnyside Valley Irrigation District, 763 F.2d 1032 (9th Cir. 1985).

In reaching its determination of the extent of the rights of the United States as trustee for the Yakama Nation in the mainstem of the Yakima River, the Acquavella Trial Court interpreted and applied the U.S. District Court and Ninth Circuit decisions in this case which the Washington State Supreme Court affirmed. Acquavella II, 121 Wn.2d at 297.

The Yakama Nation relies on Badgley vs. City of New York, 606 F.2d 358 (2nd Cir. 1979), to support its assertion the Acquavella Trial Court in this case cannot interpret the Ahtanum II decree.

Badgley is, however, clearly distinguishable and is not controlling in this case.

In Badgley, the issue was whether or not individual citizens of the State of Pennsylvania had a right to claim damages against the City of New York for acting pursuant to a decree in a case in which the State of Pennsylvania was a party.

The Badgley Court held the Pennsylvania citizens were bound by the decree in which the State of Pennsylvania had been acting in behalf of all its citizens.

There was no issue in the Badgley case about a state court's application or interpretation of a prior federal court judgment.

In City of Grand Junction vs. City and County of Denver, 960 P.2d 675 (Colorado Supreme Court, 1998), a state water court, ruling on a water application, interpreted and applied a prior federal court decree in which the federal court had retained jurisdiction.

The Colorado Supreme Court stated the issue as:

“Consequently, the relevant question becomes: does the water court's decree effectively modify or conflict with the Blue River decree? If so, the water court exceeded its jurisdiction. If, on the other hand, the effect of the water court's decree is not to modify or impair existing decrees either by enlarging or diminishing them; [and] it leaves

them just as they were without interference (citation omitted), the water court acted within its jurisdiction.”
(Emphasis added) See, 960 P.2d at 683.

The issue in this case, therefore, is: Does the confirmation of “excess and junior water rights” and a post-July 10th water right for north-side waterusers, which are subordinate to the Yakama Nation’s treaty-reserved rights confirmed in Ahtanum II and in this case, modify or conflict with the Ahtanum II decree?

The answer is clear confirmation of those north-side rights do not in any manner modify or conflict with the Ahtanum II decree.

C. The Ahtanum II Decree did not determine rights of specific Code Agreement parties to water for specific parcels of land and did not limit or reduce north-side waterusers State water rights as confirmed in State vs. Achepohl:

1. The state and federal standards for determining whether or not *res judicata* or *collateral estoppel* are, in practice, identical:

The Yakama Nation asserts (Yakama Nation Response Brief, p. 10) the north-side waterusers Washington State water rights were actually litigated in the federal Ahtanum cases and limited by the Ahtanum II

decree so the claims to “excess” and “junior” rights and a “post-July 10th water right” are barred by *collateral estoppel*.

It is established in the John Cox Opening Brief, pp. 9-21, and further argued below, north-side Washington State water rights were not litigated and determined in the federal Ahtanum litigation.

The Ahtanum II decree clearly established all north-side rights were subordinate to the Yakama Nation treaty-reserved irrigation right, except to the extent north-side waterusers were entitled to participate in the allocation of water pursuant to the Code Agreement, but Ahtanum II did not otherwise limit or reduce the water rights confirmed in State vs. Achepohl.

2. The Ahtanum II decree did not determine or limit north-side waterusers Washington State water rights:

Contrary to the arguments of the U.S. and Yakama Nation, the Ahtanum II decree did not adjudicate or limit the state water rights of north-side waterusers.

The Ahtanum II decree only subordinated the exercise of north-side state water rights to the treaty-reserved irrigation rights of the Yakama Nation except to the extent north-side waterusers were entitled to water pursuant to the Code Agreement.

The John Cox Opening Brief, pp. 13-14, quotes the relevant text from Ahtanum II which clearly establishes the “scope” of the decree entered by the Ahtanum II Court.

The quoted text from Ahtanum II, 330 F.2d at pp. 910-912 establishes:

(a) The District Court Judgment determined the rights of the defendants (north-side waterusers) to share in the Code Agreement allocation in gross or in the aggregate rather than undertaking a tract-by-tract adjudication of north-side water rights, and

(b) The primary purpose of the United States in the Ahtanum litigation was to procure an adjudication protecting the rights of the Yakama Indians and the United States, as trustee for the Indians, against the claims of the north-side waterusers; and

(c) Regulation and adjudication of north-side water rights was appropriately left to be accomplished pursuant to the requirements of the Washington State Water Code.

This part of the Ahtanum II decision is not, as the Yakama Nation argues, *dicta*, rather, it is a specific limitation on the “scope” of the Ahtanum II decree to a determination of the in gross or aggregate rights of north-side waterusers to divert and beneficially use water pursuant to the terms of the Code Agreement, rights which, absent the Code Agreement,

would have been subordinate to the treaty-reserved irrigation rights of the Yakama Nation.

The above conclusion is substantiated by both the U.S. District Court's "Findings and Conclusions" and Exhibit "B" attached to the Ahtanum II decree itself.

The "Findings of Fact and Conclusions of Law" entered by Judge Lindberg in the District Court on 1/31/62 (DOE 36), Finding 16, stated:

"That the names of the answering defendants and the description of the properties to be considered as determining the needs in gross of the defendant north-side waterusers for irrigation water as of May 9, 1908, and the total amount thereof and the needs of said land before 1957 are as follows: ..." (Emphasis added)

Judge Lindberg then listed each defendant who filed an answer, including the answer number, defendant's name, legal description of defendant's property, the acreage of the property, acres irrigated in 1908 and acres irrigated in 1957.

For example, for answer number 5, the District Court made the following Findings:

<u>Ans.</u>		<u>Acres</u>	<u>Acres</u>
<u>No.</u>	<u>Parties</u>	<u>Irrig.</u>	<u>Irrig.</u>
		<u>1908</u>	<u>1957</u>
5	CHARLES T. CHAMBERS	67	63.7

The south half of the southeast quarter
of Section 9, Township 12 North, Range 17,
E.W.M. (80 acres)

Judge Lindberg made no Finding about which specific acres or part of Chambers' 80-acre parcel were irrigated either in 1907 or 1957, but only made a "gross" determination of the acres within that particular tract which had been irrigated.

After reviewing the District Court's "Findings", particularly above-cited "Finding of Fact" 16, the Ahtanum II Court stated at 330 F.2d p. 913:

"We have noted that the master, in findings which were approved by the court, determined the number of acres on the various parcels of land, described in several answers which were under irrigation in 1908. In general those findings cannot be said to be without support in the evidence. There are a few instances, however, in which we think that the record shows that a mistake has been made. These are listed in Appendix A attached to this Opinion. The amounts of the corrected acreage are shown in column 3 of Appendix B.

“Another circumstance requires further modification of the total irrigated acreage found by the court....The findings show that in the cases of a substantial number of these particular individuals, or their successors, their needs and uses of water decreased after 1908. We previously alluded to this, noting that the use of water on certain tracts diminished so that the irrigated acreage on these parcels in 1957 was less than that found to have existed in 1908. The result of these findings are disclosed in the final column of Appendix B....”

Appendix B of the Ahtanum II decision, 330 F.2d at p. 915, a copy of which is attached as Appendix 1, listed each answer number (with the exception of John Cox which was listed by name) the master’s findings of the amount of irrigated acres in 1908, corrections to the master’s findings for 1908 irrigated acres made by the Ahtanum II Court, the number of acres irrigated in 1957, and the lesser of the 1958 or 1957 irrigated acres.

The last column of Appendix B is then totaled and the resulting figure is 4,695.72 acres.

The total, rounded up to 4,696 acres, was the gross number of acres north of Ahtanum Creek which the Ahtanum II Court determined was entitled to a share of the Code Agreement’s allocation of 75% of Ahtanum Creek water to waterusers north of the creek and was the quantity of acres used by the Ahtanum II Court’s determination of the maximum diversion to the north side of the creek.

As with Judge Lindberg's prior "Findings", neither the Ahtanum II Court's Appendix B nor any other part of the Ahtanum II decision makes any "finding" about which particular acres owned by any answering defendant were being irrigated in 1908 or 1957, and the Ahtanum II Court made no determination about what specific north-side acres are appurtenant to the "Code allocation".

The Ahtanum II decree clearly, was inarguably limited to the Ahtanum II Court's sole determination of the amount of water which could be diverted to the north side of Ahtanum Creek pursuant to the Code Agreement terms.

All other diversions to the north side of the creek are subordinate to the Yakama Nation's treaty-reserved irrigation right and can only be exercised when there was water flowing in the creek in excess of the amount which could then be beneficially used on the reservation.

The north-side waterusers Washington State water rights were not actually litigated and were clearly not adjudicated in the federal Ahtanum I or II litigations and neither *res judicata* nor *collateral estoppel* apply to preclude the north-side waterusers, including John Cox, from asserting and obtaining confirmation of water rights in the full amount of their state rights subject only to satisfaction of the treaty-reserved, beneficially used, prior rights of the Yakama Nation.

3. North-side waterusers are entitled to divert and use water from Ahtanum Creek not then being beneficially used on the Yakama Reservation:

The Yakama Nation argues the Ahtanum I Court found the present needs of the Yakama Reservation would require use of all Ahtanum Creek water, relying on two (2) quotes from the Ahtanum I decision taken out of context (Yakama Nation’s Response Brief, p. 23):

“Contrary to AID’s argument, the Ahtanum court found that even the present needs of the Yakima Reservation for irrigation water are greater than the available supply. The court ruled that ‘... It is conceded that the present needs of the Indians are sufficient to require substantially the whole flow of the stream’. Ahtanum I, supra, 236 F.2d at 315. (Emphasis in Yakama Nation Response Brief) Indeed, the court went on to hold that ‘an award of sufficient water to irrigate the land served by the Ahtanum Irrigation Project as completed in 1915 would take substantially all of the waters of Ahtanum Creek’. 236 F.2d at 327.”

The Ahtanum I Court’s statement about the “needs” of the reservation land which could be served by the Ahtanum Indian irrigation project was based on the incorrect “assumption” all land susceptible of irrigation under the system was, in fact, being irrigated.

The full amount of land which could be irrigated from what is now the Wapato Irrigation Project has never, in fact, been irrigated. (See, Response Brief of Appellant/Respondent John Cox Ditch Company to Briefs of United States, Yakama Nation and Washington State Department of Ecology.)

The Yakama Nation's argument completely ignores the later, specific holding of the Ahtanum I Court recognizing the rights of the non-Indian north-side waterusers:

“The rights of the white settlers to the use of water were subordinate to the rights of the Indians, but they were not non-existent. Until the Indians were able to make use of the waters, there was no legal obstacle to the use of those waters by the white settlers. After the Indian irrigation works were completed, there would still be the right of the non-Indian appropriators to make use of any surplus available within the stream.” (Emphasis added) Ahtanum I, at 335.

The above holding of the Ahtanum I Court was quoted *verbatim* with approval in the Ahtanum II decision. Ahtanum II, at p. 900.

The above express recognition by both the Ahtanum I and Ahtanum II Courts the north-side waterusers had a right to divert and beneficially use water from Ahtanum Creek which was not then being beneficially used on the Yakama Reservation was incorporated in the

Ahtanum II decree which specifically limited diversions to the reservation “to the extent that the said water can be put to a beneficial use”. (Emphasis added) Ahtanum II, at p. 915.

Although the “needs” and confirmed irrigation water right for the Yakama Reservation might be great enough to account for the entire flow of Ahtanum Creek, the south-side right to actually divert water from Ahtanum Creek is limited to the actual quantity of water which can then be beneficially used on the reservation.

The quantity which can actually be put to beneficial use on the reservation is, and always has been, substantially less than the treaty-reserved irrigation right for the reservation.

To the extent there is water available from Ahtanum Creek not actually being beneficially used on the reservation, north-side waterusers with valid, appurtenant Washington State water rights may divert and use that excess Ahtanum Creek water.

John Cox and other north-side waterusers who have established in the Acquavella Trial Court proceeding their continued beneficial use of “excess” water when available are entitled to have their right to the use of that water confirmed.

4. John Cox is entitled to confirmation of a post-July 10th water right:

The Ahtanum II rulings relied on by the Yakama Nation and United States in support of their argument John Cox and other north-side waterusers are not entitled to a post-July 10th water right must be viewed in the context of what was actually decided in Ahtanum II.

As above-noted, the issue related to north-side water rights resolved by the Ahtanum II Court was the extent to which north-side waterusers were entitled to participate in the Code Agreement allocation and, based on the lack of evidence of the general availability of water and post-July 10th use, the Ahtanum II Court determined the north-side waterusers had no right to divert water pursuant to the Code Agreement after July 10th and allocated the entire flow of Ahtanum Creek to the south side of the reservation to the extent that water could be beneficially used.

The AID Petition for Rehearing in Ahtanum II was directed to obtaining a post-July 10th Code Agreement allocation.

John Cox's water right confirmed in State vs. Achepohl is for the entire irrigation season, including after July 10th.

The Ahtanum II Court made no finding John Cox or other north-side waterusers had abandoned their State water right and the Acquavella Trial Court specifically declined to enter a finding of abandonment

“without specific evidence that between 1908 and 1957 water use on the ‘answer number’ property was reduced for a significant period of time and that there was an intent to abandon that right or a portion thereof”.

[1/31/2002 Report of the Court Concerning Water Rights for Subbasin No. 23 (Ahtanum Creek), p, 111, CP 1088]

John Cox’s 2/27/04 offer of proof (testimony of Mark Herke, 2/27/04 RP at pp. 24-25, CP 3356-3357 and Ex. JCD 5) established: (1) the availability of post-July 10th water, and (2) John Cox’s diversion and beneficial use of the “excess” water in years it was available after the entry of the Pope Decree, including eight (8) of eleven (11) years between 1974 and 1984 and again in 1999.

Ahtanum II did not eliminate John Cox’s post-July 10th water right confirmed in State vs. Achepohl, Ahtanum II merely held the Code Agreement allocation was inapplicable after July 10th and, therefore, John Cox’s post-July 10th right may only be exercised if there is water in Ahtanum Creek in excess of the amount necessary to satisfy the Yakama Nation’s treaty-reserved rights.

The Acquavella Trial Court’s denial of a post-July 10th water right for John Cox should be reversed and a post-July 10th water right confirmed in a quantity equal to the right confirmed for John Cox in State

vs. Achepohl, subject only to the prior treaty-reserved rights of the Yakama Nation.

5. An “excess” water right of .01 cfs per acre from April 1st to July 10th must be confirmed for John Cox:

Both the Yakama Nation (Yakama Nation Response Brief, p. 32) and U.S. (U.S. Response Brief, p. 30) assert the “excess” water right confirmed for John Cox by the Acquavella Court is limited to forty-five (45) days, terminating May 15th of each year. This assertion is clearly incorrect and without support in the record.

The Conditional Final Order Confirming John Cox’s Water Right (CP 444) confirmed the following “excess” right:

“When water is available in excess of that needed to satisfy all confirmed water rights both on and off the reservation and any water needed to satisfy the Yakama Nation’s minimum instream flow right for fish and other aquatic life, an additional 6.55 cfs, 389.07 acre-feet per year can be diverted.” (Emphasis added)

[In fact, Judge Gavin based his computation of John Cox’s “excess” water right on thirty (30) days, not forty-five (45) days of available water. (Order on Reconsideration, p. 4, CP 95)]

The “excess” right confirmed by John Cox in the CFO clearly does not terminate May 15th but may be exercised throughout the April 1st to July 10th north-side irrigating season.

The quotation from Judge Gavin’s “Order on Reconsideration” quoted at p. 31 of the U.S. Response Brief is merely an explanation of how Judge Gavin determined the “excess” water right should be less than the amount to which John Cox was entitled if “excess” water was, in fact, available throughout the entire irrigating season, is *dicta* and does not modify the “excess” right confirmed in the CFO itself.

The Declaration of Andreas Kammerick (CP 7) cited by the Yakama Nation determined:

“Using the AID data, approximately 29% of the days of record (April 1 through July 10th over the 1998-2008 period of record) experienced flows that were greater than the sum of the instream flow recommendation, AID diversion and with canal capacity ...

“Using the USGS data, approximately 40% of the days of record (April 1 to July 10 over the 1910-1978 period of record) experienced flows of record that were greater than the sum of the instream flow recommendation, AID diversion and with canal capacity. While there is some uncertainty as to why there is a difference between the AID data and the USGS data, both data sets indicate there is a significant period of time when flows in Ahtanum Creek are greater than the sum of the instream flow recommendations, AID diversions and with canal capacity. This ‘excess’ does not occur every year. In some years,

flows in Ahtanum Creek do not exceed the sum of the instream flow recommendation, AID diversion and with canal capacity.” (Emphasis added)

Because there are years in which there is no “excess” water, there are obviously other years in which the number of days during the irrigation season when “excess” water is available substantially exceed the 29%-40% figures provided by Kammerick.

John Cox provided substantial data about the flows in Ahtanum Creek (Ex. JCD 16-JCD 30), in particular Ex. JCD 29 and JCD 30, which show the variation in flow in Ahtanum Creek from year-to-year depending on the snowpack and timing of spring runoff. The exhibits show late May and early June are frequently the periods of highest flow in the Ahtanum subbasin.

The above-described exhibits also demonstrate, consistent with the Kammerick Declaration, in some years stream flow is insufficient to satisfy prior confirmed rights so there is no “excess” water, but in other years the quantity and timing of the flows in the creek is such that there is “excess” water for a substantially longer period of time than thirty (30) days.

Although there may never be a year in which there is sufficient “excess” water for John Cox to fully exercise its “excess” right, the annual quantity of the “excess” right must be confirmed for 1,309.8 acre-feet so John Cox will have the right to make use of the full quantity of “excess” water which might be available in any one year, consistent with its Achepohl right.

IV. Conclusion:

The Ahtanum II Decree allocated water of Ahtanum Creek pursuant to the Code Agreement between the Yakima Reservation and north-side waterusers in gross. Ahtanum II did not adjudicate any north-side water rights but left the determination of those rights to proceedings pursuant to the Washington State Water Code, such as this general adjudication of the Yakima River.

To the extent north-side waterusers established in this proceeding their continued beneficial use of their rights confirmed in State vs. Achepohl, they are entitled to have a water right confirmed in this proceeding.

North-side waterusers, including John Cox, whose right to divert water pursuant to the Code Agreement is less than their Achepohl right and parties with Achepohl rights not authorized to share in the Code

allocation must have a right confirmed to the extent of their beneficial use established in this proceeding subject only to prior, treaty-reserved rights of the Yakama Nation and Code Agreement rights of other north-side waterusers.

The Ahtanum II Decree specifically limits diversions to the reservation to the amount which can be beneficially used.

Historically, the amount diverted for beneficial use has been substantially less than the treaty-reserved rights of the Yakama Nation and, in many years, there has been water in excess of beneficial reservation use available for north-side use as “excess” or “junior” rights.

The evidence submitted by John Cox has established the availability and beneficial use of water by John Cox after July 10th in many years.

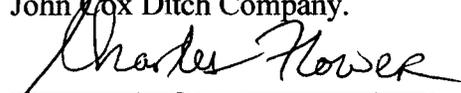
John Cox is entitled to confirmation of a .02 cfs water right or the July 10th – October 15th period subject only to beneficially used, prior treaty-reserved rights of the Yakama Nation.

John Cox is also entitled to confirmation of an “excess” right for the April 1st – July 10th period, in an annual quantity of 1,309.8 acre-feet.

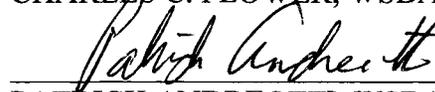
DATED: September 7, 2010.

Respectfully submitted,

FLOWER & ANDREOTTI,
Attorneys for Appellant/Cross-Respondent
John Cox Ditch Company.



CHARLES C. FLOWER, WSBA #143.



PATRICK ANDREOTTI, WSBA #7243.

C:\Documents and Settings\Patricia Kester\My Documents\PAK\johncox\appeal reply brief.docx

APPENDIX I

APPENDIX B

	Findings	Corrected 1908	Findings	Lesser
	on 1908	Acreage	on 1957	of 1908
Answer	Irrigated	See	Irrigated	Findings as
Number	Acreage	Appendix B	Acreage	Corrected
1	80		151.7	80
2	90		101.3	90
3	80		72.2	72.2
4	70	51	47.1	47.1
5	67		63.7	63.7
6	30		37.6	30
7	12		16.8	12
8	45		53.9	45
10	45		41.8	41
11	10		17.8	10
12	31	0	37.4	0
13	45		58.3	45
14	20		15.3	15.3
15	20		24.7	20
16	99		99	99
17	18.8		29.8	18.8
18	23.5		23.5	23.5
19	18.5		19.3	18.5
20	10		2.0	2.0
21	8.3		19.3	8.3
22	70	48.1	48.1	
23	25		9.0	9.0
26	80		32.7	32.7
27	55	35	24.92*	24.92
28	10		15.3	10
29	30		43.9	30
31	50		28.4	28.4
32	20		22.9	20
33	15		15.4	15
34	20		20.3	20
35	3		2.5	2.50
36	40		57.5	40
37	57		66.0	57
38	75		204.1	75
39	45		31.7	31.7
40	18		10.5	10.5
41	92		90.2	90.2
42	33		33.8	33
43	73		68.1	68.1

44	40		45.9	40
45	70		72.4	70
46	60		110.6	60
47	100		101.1	100
49	5		17.9	5
50	70		56.5	56.5
51	24		32.3	24
52	20		56.0	20
53	40	32	44.6	32
60	65		68.9	65
63	2		3.8	2
64	35		70.4	35
65	13		7.5	7.5
66	47		57.8	47
68	8		8.8	8
69	28	25	31.6	25
70	32		30.5	30.5
72	60		49.6	49.6
73	19		18.9	18.9
74	19		13.6	13.6
75	18		18.5	18
76	75		71.0	71.0
77	164		169.4	164
78	150		140.6	140.6
79	35	30	32.0	30
80	38		8.4	8.4
90	60		14.3	14.3
96	70		57.0	57.0
98	70		81.4	70
106	39		34.8	34.8
107	75		48.7	48.7
108	39		33.4	33.4
112	39		35.9	35.9
122	20		30.4	20
124	34.5	1.5	35.7	1.5
125	20		13.4	13.4
126	20		21.1	20
127	15		25.1	15
128	6.5	.5	33.3	00.5
129	10		18.5	10
130	8		13.7	8
131	4		2.6	2.6
132	50		88.0	50
133	16		28.0	16
134	5	4	12.9	4
135	16		10.6	10.6

136	50		74.7	50
137	20		44.5	20
138	30		25.4	25.4
140	35		21.4	21.4
142	25		38.0	25.0
143	40		34.7	34.7
145	20		76.9	20
151	150		119.7	119.7
160	10	10.71	11.4	10.71
163	8	7.57	9.8	7.57
164	70		75.8	70
165	10		8.7	8.7
166	5		3.5	3.5
167	10		13.7	10
168	7		16.0	7
170	35	31.92	10.5	10.5
172	10		18.0	10
176	30		5.7	5.7
178	50		30.7	30.7
179	35	0	31.6	0
187	4	4.16	5.0	4.16
188	30	30.64	32.6	30.64
189	5.8	4.47	5.8	4.47
191	86		85.9	85.9
215	55	0	34.9	0
216	170		195.1	170
217	65		88.6	65
219	70		123.0	70
220	85	77.25	79.5	77.25
221	58	49	64.1	49
John Cox	955	954.9	954.9	654.9
				4,695.72
				acres

NO. 281141

FILED

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

SEP 08 2010

COURT OF APPEALS
DIVISION III
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,)

CERTIFICATE OF SERVICE
BY MAIL AND EMAIL

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)

Plaintiff/Respondent,)

vs.)

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

Defendants/Appellants.)

Pursuant to RCW 9A.72.085, I CERTIFY that on 9/07/2010, I emailed and mailed in a properly stamped (first-class) and addressed envelope and deposited in the United States mail at Yakima, Washington, a copy of the title/cover sheet to "Reply Brief of Appellant/Respondent John Cox Ditch Company to Response Briefs of the United States and Yakama Nation" to:

CERTIFICATE OF SERVICE - 1

C:\DOCUMENTS AND SETTINGS\PATRICIA KESTER\MY DOCUMENTS\PAKUJOHNCOX\COURT OF APPEALS CERTIFICATE OF SERVICE.DOC

LAW OFFICE OF

FLOWER & ANDREOTTI
SUITE 1, YAKIMA LEGAL CENTER
303 EAST "D" STREET
YAKIMA, WASHINGTON 98901
(509) 248-9084

1
2
3 Sharonne O'Shea
4 Barbara Markham
5 Assistant Attorney General
6 P. O. Box 40117
7 Olympia, WA 98504-0117
8 Email: SharonneO@atg.wa.gov; BarbaraM@atg.wa.gov

9
10 Jeffrey S. Schuster
11 P. O. Box 31197
12 Seattle, WA 98103
13 Email: jeffschuster@worldnet.att.net

14 James E. Davis
15 Talbott, Simpson, et al.
16 308 North 2nd Street
17 Yakima, WA 98901
18 Email: jdavis@talbotlaw.com

19 Patrick Barry
20 Department of Justice
21 Environment and Natural Resource Division
22 Indian Resources Section
23 P. O. Box 44378, L'Enfant Plaza Station
24 Washington, D.C. 20026-4378
25 Email: Patrick.Barry@USDOJ.gov

26 Katherine J. Barton
27 Department of Justice
28 Appellate Section
29 Environment and Natural Resource Division
30 P. O. Box 23795, L'Enfant Plaza Station
31 Washington, D.C. 20026-3796
Email: Katherine.barton@usdoj.gov

John Jay Carroll
Velikanje Halverson PC
P. O. Box 22550
Yakima, WA 98907-2550
Email: jcarroll@vhlegal.com

28 CERTIFICATE OF SERVICE - 2

29 C:\DOCUMENTS AND SETTINGS\PATRICIA KESTER\MY DOCUMENTS\PAK\JOHNCOX\COURT OF APPEALS CERTIFICATE OF
SERVICE.DOC

LAW OFFICE OF
FLOWER & ANDREOTTI
SUITE 1, YAKIMA LEGAL CENTER
303 EAST "D" STREET
YAKIMA, WASHINGTON 98901
(509) 248-9084

1
2
3 Thomas Swegle
4 U.S. DOJ/ENRD
5 P. O. Box 4390
6 Ben Franklin Station
7 Washington D.C. 20044
8 Email: Thomas.swegle@usdoj.gov

9
10
11 Adrienne E. Smith
12 Assistant Attorney General
13 1125 Washington Street SE
14 P.O. Box 40100
15 Olympia, WA 98504-0100
16 Email: AdrienneS@ATG.WA.GOV

17
18 I CERTIFY under penalty of perjury under the laws of the State of Washington that the
19 foregoing is true and correct.

20
21 DATED: 9/07/2010.

22
23
24
25
26
27
28
29
30
31


32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

C:\DOCUMENTS AND SETTINGS\PATRICIA KESTER\MY DOCUMENTS\PAK\JOHN COX\COURT OF APPEALS CERTIFICATE OF SERVICE.DOC

LAW OFFICE OF
FLOWER & ANDREOTTI
SUITE 1, YAKIMA LEGAL CENTER
303 EAST "D" STREET
YAKIMA, WASHINGTON 98901
(509) 248-9084