

FILED

APR 19 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 90.09, REVISED CODE OF WASHINGTON,

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Plaintiff/Respondent,

v.

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

Defendants/Appellants.

CORRECTED BRIEF OF APPELLANT THE UNITED STATES

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INTRODUCTION

This is an appeal from the Conditional Final Order adjudicating water rights in Subbasin No. 23, Ahtanum Creek, of the Yakima River Basin. It adjudicates, among other things, federal reserved water rights in Ahtanum Creek held in trust by the United States for the Yakama Nation.

The key question in the United States' appeal is whether the decree in a prior Ninth Circuit case, *United States v. Ahtanum Irrigation District*, precludes the United States from seeking to define the Nation's reserved water right for irrigation – including the irrigable acreage on which the water may be used, times of diversion, and storage – based on the “Practicably Irrigable Acreage” (PIA) standard. That standard has been recognized by the U.S. Supreme Court as a proper method for quantifying the reserved irrigation water right of an Indian reservation and has been applied by the trial court elsewhere in this adjudication.

In *Ahtanum*, the United States sought to invalidate a 1908 agreement, called the Code Agreement, that allocated 75 percent of Ahtanum Creek's spring and early summer flow to off-reservation users on the north side of the creek. The goal of that action was to obtain and protect the water necessary for the Ahtanum Unit of the Wapato Project, which the government built to irrigate the Yakima Indian Reservation on the south side of the creek. The Ninth Circuit agreed with the United States that Congress had reserved substantially all of Ahtanum Creek

water for the reservation, and that the Wapato Project, which extended to approximately 5,000 irrigable acres, could use all of that water. But the Court upheld the Code Agreement as a valid contractual allocation of water. Thus, the *Ahtanum* Decree, roughly described, provided that the northside successors to the Code Agreement parties had a right to 75 percent of the creek's flow until July 10, and that the reservation with the right to all Ahtanum Creek water in excess of that amount that it could beneficially use. As the Ninth Circuit recognized, that ruling left the reservation far short of the water to which it otherwise had a legal right, and sharply limited the irrigable lands that could be cultivated.

In this adjudication, the United States proffered a comprehensive PIA analysis to define the extent of the Nation's beneficial use, the only limit – but for the Code Agreement allocations – that the *Ahtanum* Decree placed on its water right. The PIA analysis, which by law focuses on both present and future irrigation use, identified 6,381.3 acres of trust and tribal fee land that could be profitably irrigated with water diverted from March through December and with an expanded irrigation system, including a storage reservoir. The trial court, however, held that the *Ahtanum* Decree – even though it awarded to the Nation all water in excess of the Code Agreement that it could beneficially use – preclusively quantified the reservation's federal reserved water right. Based on this ruling, the trial court limited the Nation's water right to 4,107.61 irrigable acres, denied

the claim to divert water to storage outside of the irrigation season, and held that the claim for storage during the irrigation season was premature. The court's rejection of the government's PIA evidence and storage rights effectively limited the Nation to the irrigation of approximately 2,700 acres of irrigable trust and tribal fee land, less than half of the irrigable acreage identified by the United States.

ASSIGNMENTS OF ERROR

A. Assignments of Error

In adjudicating 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:

1. The trial court erred in declining to quantify the United States' irrigation water right under the Practicably Irrigable Acreage standard recognized by the U.S. Supreme Court and in basing its decisions on use, period of use, and storage on *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 right to water for storage from April 1 through October 1.

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 during that period.

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.

B. Issues Pertaining to Assignments of Error

In adjudicating 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:

1. Did the *Ahtanum* Decree preclusively determine the parameters of that water right, including irrigable acreage, right to storage, and/or period of use?

2. Assuming the *Ahtanum* Decree preclusively determined the

reservation's irrigable acreage, did the trial court err in concluding that the amount determined was 5,100 acres (resulting in the trial court's confirmation of rights for 4,107.61 acres of trust and tribal fee land on the reservation)?

3. Assuming the *Ahtanum* Decree preclusively limited the United States' period of use to April 1 through October 1, did the trial court err in failing to confirm a future storage right for that period?

4. Did the trial court err in including in the United States' irrigation right hypothetical non-Indian allottee successors who may have failed to file claims in the adjudication, and in characterizing the United States as trustee for those individuals?

5. Did the trial court err in limiting the United States' irrigation right during April 1 through April 14 to the excess over the northside 75 percent Code Agreement allocation even though the period of use for all northside recipients of Code Agreement allocations but one begins on April 15?

STATEMENT OF THE CASE

A. Overview of the Yakima Basin Adjudication

The suit initiating the Yakima adjudication was filed by the Department of Ecology in 1977. The United States was joined in the Washington State Superior Court under the McCarran Amendment, 43 U.S.C. § 666. The United States operates multiple irrigation and

hydroelectric projects in the basin and is trustee for the Yakama Nation. Most of the Yakama Indian Reservation is located in the Yakima basin. *Dep't of Ecology v. Acquavella*, 100 Wash. 2d 651, 652-654, 674 P.2d 160 (1983) (*Acquavella I*). This appeal is from the last CFO to be issued prior to entry of the final decree.^{1/} It adjudicates water rights in Subbasin No. 23, Ahtanum Creek, and of four major claimants in that subbasin, including the Yakama Nation and the United States as its trustee. 2009 Mem. Op. 9 (CP 464).

B. The Adjudication and Indian Reserved Water Rights^{2/}

One of the critical aspects of the Ahtanum adjudication is the quantification of the reserved water rights for the portion of the Yakama Reservation that may be irrigated from Ahtanum Creek. Reserved water rights were first recognized by the U.S. Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908). In *Winters*, the Court held that, when an Indian reservation is established, sufficient water to meet the purposes for which the reservation was established is impliedly reserved. *Id.* at 576-

^{1/} Four appeals have been taken from prior orders: *Dep't of Ecology v. Acquavella*, 100 Wn.2d 651, 674 P.2d 160 (1983) (*en banc*); *Dep't of Ecology v. Yakima Reservation Irrigation Dist.*, 121 Wn.2d 257, 850 P.2d 1306 (1993); *Dep't of Ecology v. Acquavella*, 131 Wn.2d 746, 935 P.2d 595 (1997); *Dep't of Ecology v. Acquavella*, 112 Wn. App. 729, 51 P. 800 (2002).

^{2/} This information in this section is drawn from and summarizes background discussion in the *Report of the Court Concerning the Water Rights for the Yakama Indian Nation*, Vol. 25 (11/13/95), at 6-10 (CP 3922-3926); and, with respect to Subbasin No. 23 proceedings, the 2002 Rep. 47-49 (CP 1024-1026); the 2008 Supp. Rep. 200 (CP 924); and the 2009 Mem. Op. 61-62 (CP 516-517).

577. Such water rights, often called *Winters* rights, are federal common-law-based rights, and are not dependent upon state law or state procedures. *Cappaert v. United States*, 426 U.S. 128, 145 (1976); *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985).

As *Winters* itself established, reserved water rights exist upon the creation of an Indian reservation, thus becoming vested upon the date of a reservation's establishment. 207 U.S. at 577; see also *Arizona v. California*, 373 U.S. 546, 600 (1963) (*Arizona I*). The rights exist as vested rights even though the amount of water required for the reservation's purposes "may not be determined with absolute accuracy" at a given time. *Conrad Inv. Co. v. United States*, 161 F. 829, 832 (9th Cir. 1908); see also *Skeem v. United States*, 273 F. 93, 95 (9th Cir. 1921).³⁷ The rights are measured by the amount necessary to meet current and future needs. *Winters*, 207 U.S. at 576.

Cases in the early 1900s affirmed that, for reservations with a largely agricultural purpose, water is reserved for irrigation of *all* of the reservation's arable lands and related uses such as stockwatering and domestic uses. See *Conrad Inv.*, 161 F. at 832 (water reserved to make the reservation lands "productive and suitable for agricultural, stock raising,

³⁷ In addition, the rights exist and are protected even if the water is not put to beneficial use; thus, unlike state-law-based water rights, *Winters* rights are not lost by forfeiture or other non-use of water. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981) (*Walton I*).

and domestic purposes”). Courts determined that Congress reserved water to “enable the Indians to cultivate eventually *the whole of their lands* so reserved to their use,” *Skeem*, 273 F. at 95 (emphasis added), and for “the irrigation of that portion of their [reservation] lands which the evidence discloses is susceptible to irrigation,” *United States ex rel. Ray v. Hibner*, 27 F.2d 909, 911 (D. Idaho 1928).

In 1963, in *Arizona v. California*, the U.S. Supreme Court approved the special master’s quantification of reserved water rights for several Indian reservations based on the PIA standard, which calculates the amount of water sufficient to irrigate all the practicably irrigable acreage on a reservation. *Arizona I*, 373 U.S. at 600. The Court concluded that irrigable acreage provides “the only feasible and fair way” to measure reserved water for agriculture on reservations.” *Id.* at 601. A reservation’s PIA 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), *aff’d sub. nom Wyoming v. United States*, 492 U.S. 406 (1989), *overruled on other grounds, Vaughn v. State*, 962 P.2d 149 (Wyo. 1998).

PIA is a well-established standard for determining the full extent of an Indian reserved water right for an agricultural reservation. Some 25 years after *Arizona v. United States*, the U.S. Supreme Court again affirmed the quantification of Indian reserved water rights based on the

PIA standard, that time in the Big Horn Adjudication. *Id.* The Washington Supreme Court has recognized the applicability of the PIA standard in this adjudication. See *State, Dep't of Ecology v. Yakima Reservation Irrigation Dist.*, 850 P.2d 1306, 1331 (Wash. 1993). And the superior court confirmed a PIA claim for the Yakama Nation in the CFO pertaining to water rights in the Toppenish, Satus, and Simcoe creeks without challenge by any party. See *Report of the Court: Yakama Indian Nation*, Vol. 25, 11/13/95, at 10-69 (CP 3926-3985).

Winters water rights attach not only to tribally held land in a reservation, but remain with that land even if it is subsequently allotted to individual Indians. See *United States v. Powers*, 305 U.S. 527 (1939); *United States ex rel. Ray Hibner*, 27 F.2d 909 (D. Idaho 1928). Furthermore, non-Indian successors to lands with Indian reserved water rights initially acquire the same right and title to the water, although upon the lands' transfer to non-Indians they lose their trust status, and the water rights become subject to beneficial use requirements. See *Walton II*, 647 F.2d at 50-51; *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 342 (9th Cir. 1956) (*Ahtanum I*) (non-Indian purchasers of allotted lands are entitled to "participate ratably" with Indian allottees); *Skeem*, 273 F. at 95 (reserved water rights required for allotted lands not lost when Indian allottees leased those lands to non-Indians). Such water rights are often called "*Walton* water rights," and we use that terminology herein.

C. Background on the Ahtanum Creek Adjudication

Ahtanum Creek forms a part of the northern boundary of the Yakama Indian Reservation. The reservation was created in 1855 by the Treaty with the Yakima Nation, 12 Stat. 951. The creek arises on the eastern slope of the Cascade Mountains and flows 40 miles east to the confluence of the Yakima River, four miles south of the city of Yakima. 2002 Rep. 35-36 (CP 1012-1013).

There are no storage facilities on Ahtanum Creek, but there are diversion projects for irrigation. Users on the north side of the creek are served by the John Cox Ditch Company (John Cox) and the Ahtanum Irrigation District (AID). The southside users, all within the reservation boundaries, are served by the Ahtanum Unit of the Wapato Irrigation Project (Wapato Project or WIP), operated by the federal Bureau of Indian Affairs (BIA), as well as some private ditches. *Id.*; see also Schuster Dec. of 09/10/04, Att. C, at 14-15 (CP 3691-3692). Almost all the reservation land was historically allotted to individual Indians. Today the land in the reservation consists of (1) land held in trust by the United States for the Nation, (2) allotments held in trust by the United States for tribal members, and (3) fee land that was formerly allotted to Indians but subsequently patented to non-Indian owners, some of which has been repurchased by the tribe and perhaps a few individual Indians. 2009 Mem. Op. 61-62 (CP 516-517). The United States' irrigation water-right claim

at issue here pertains only to the trust and tribal fee land. See U.S. Statement of Claim, 8/31/81 (CP 3418).

In 1908, the Secretary of the Interior, on behalf of the Yakama Nation, agreed to divide the use of Ahtanum Creek irrigation water between the non-Indian irrigators on the north side of the creek and the irrigators within the boundaries of the reservation on the south side. 2002 Rep. 37 (CP 1014); *Ahtanum I*, 236 F.2d at 329. While not ceding any of the Nation's reserved water rights, the agreement assigned to the northside signatories the use of 75 percent of the creek's natural flow, leaving the south side with the use of 25 percent. The agreement is generally referred to as the Code Agreement, after the official who signed it. *Id.*

Also in 1908, Interior began the construction of the Ahtanum Unit of the Wapato Project to irrigate reservation lands south of the creek. By 1915, the Project was capable of irrigating nearly 5,000 acres. *Id.* at 327.

In 1947, the United States brought suit on behalf of the Nation against northside irrigators to challenge the legality of the Code Agreement, establish the Nation's prior *Winters* right to water for the Wapato Project, and enjoin the northside users from diverting water needed for the Project.^{4f} *Ahtanum* Complaint (YIN Exh. 27). The federal district court dismissed the suit for reasons irrelevant here. See *United*

^{4f} The *Ahtanum* litigation is discussed in the 2002 Report at 38-39 (CP 1015-1016) and in the 1994 PIA Opinion at 2-4 (CP 1501-1503).

States v. Ahtanum Irrigation Dist., 124 F. Supp. 818 (E.D. Wash. 1954). The Ninth Circuit reversed, made several substantive rulings discussed below, and remanded for further proceedings. *Ahtanum I*, 236 F.2d 321 (9th Cir. 1956). After remand, subsequent appeals resulted in a second Ninth Circuit decision, *United States v. Ahtanum Irrigation Dist.*, 330 F.2d 897 (9th Cir. 1964) (*Ahtanum II*), plus a third decision accompanying denial of rehearing, see *United States v. Ahtanum Irrigation Dist.*, 338 F.2d 307 (9th Cir. 1964) (*Ahtanum III*). The scope and meaning of the *Ahtanum* Decree is the primary issue in this appeal.

In *Ahtanum*, the Ninth Circuit held that, under the *Winters* doctrine, the 1855 Treaty reserved to the Nation for irrigation all waters of Ahtanum Creek that could be beneficially used on the reservation. *Ahtanum II*, 330 F.2d at 899; *Ahtanum I*, 236 F.2d at 335. The Court further held, however, that: (1) the 1908 Code Agreement was legally valid; (2) the Code Agreement allowed for certain water use by northside irrigators but did not convey the Nation's treaty water rights to them; (3) the rights of the northside signatories to the use of 75 percent of Ahtanum Creek water would be limited to their needs as of 1908 or their subsequent beneficial use, whichever is less; and (4) based on the water use practices in place in 1908, the northside Code Agreement allocations terminated each year on July 10. *Ahtanum II*, 330 F.2d at 899, 900, 908-910; *Ahtanum III*, 338 F.2d at 308-309. The Court made specific

determinations of irrigable acreage of each northside defendant, recognizing that after entry of the Decree there might be a need for adjustments based on the northside signatories' diminution of use, which would result in a commensurate increase in water available for the reservation. *Ahtanum II*, 330 F.2d at 909-911.

The final *Ahtanum* Decree apportioned irrigation rights in Ahtanum Creek, providing that from spring to July 10 the creek's natural flow – up to 62.59 cubic feet per second (cfs) – was divided between northside and southside users. The specified northside Code Agreement users had a right to 75 percent of that flow and the reservation to 25 percent, with “all the excess over that figure . . . awarded to [the United States] to the extent that the said water can be put to a beneficial use.” *Id.* at 915. After July 10, the Decree provided that all “all the waters of Ahtanum Creek shall be available to, and subject to diversion by, the [United States]] for use on Indian Reservation lands south of Ahtanum Creek, to the extent that the said water can be put to a beneficial use.” *Id.*

D. Trial Court Proceedings and Decision

The United States presented its case in chief in support of its claim for an irrigation water right for the Nation from Ahtanum Creek in August 1993.^{5/} It consisted of an extensive PIA analysis, including eight expert

^{5/} Trial court orders incorporated in the Ahtanum CFO include the *Memorandum Opinion: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places*, Sept. 1, 1994 (1994 Fishery Op.); *Memorandum Opinion Re: Ahtanum*

reports, which evaluated: (1) future or idle arable acreage; (2) actively or historically irrigated acreage; (3) sufficiency of water availability, including with storage, for the total irrigated or irrigable acreage; (4) cost of constructing a storage facility; (5) geotechnical suitability of potential sites for storage; (6) & (7) type and design of on-farm irrigation conveyance system and its cost; and (8) economic feasibility analysis of irrigating new lands. See US Exhs. 111-119. The analysis was prepared by most of the same experts the United States used in its claim for the Nation's water right for the Toppenish, Satus, and Simcoe tributaries, where the trial court accepted the PIA analysis in full. Compare US Exhs. 111-119 with *Report of the Court: Yakama Indian Nation*, Vol. 25, 11/13/95, at 8-42 (CP 3924-3958).

The PIA analysis for Ahtanum Creek identified 2,728.4 acres actively irrigated by natural flow and 3,652.6 acres of additional arable acreage, for a total of 6,381.3 acres of trust and tribal fee land. The

Watershed Practicably Irrigable Acreage, Nov. 9, 1994 (1994 PIA Op.); *Final Order Re: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places*, March 1, 1995 (1995 Fishery Order); *Report of the Court Concerning the Water Rights for Subbasin No. 23*, Jan. 31, 2002 (2002 Rep.); *Memorandum Opinion Re: Ahtanum Creek Threshold Legal Issues*, Oct. 3, 2003 (2003 Legal Issues Op.); *Supplemental Report of the Court Concerning the Water Rights for Subbasin No. 23*, Feb. 25, 2008 (2008 Supp. Rep.); *Order Ruling on Certain Exceptions to the Supplemental Report of the Court*, Oct. 14, 2008; *Memorandum Opinion Exceptions to the Supplemental Report of the Court and Proposed Conditional Final Order Subbasin No. 23*, April 15, 2009 (2009 Mem. Op.); *Order on Motions for Reconsideration to the Memorandum Opinion and Conditional Final Order Subbasin No. 23*, May 22, 2009 (Order on Recon.).

analysis concluded that this acreage could be irrigated using 21,553 acre-feet (af) of water, supplied by natural flow and a reservoir with 9,216 af storage capacity. US Exh. 115 at vi. The analysis also concluded that returns from growing crops on the future irrigable lands would exceed the associated costs. US Exh. 116 at 54-55.

In November 1994, the trial court issued a *Memorandum Opinion Re: Ahtanum Watershed Practicably Irrigable Acreage*, (the 1994 PIA Opinion) which concluded that the *Ahtanum* Decree quantified the reservation's practicably irrigable acreage. 1994 PIA Op. 13 (CP 1512). The court thus barred the United States from using its PIA evidence to "relitigate" that question. *Id.* at 14 (CP 1513). The court, however, provisionally accepted the evidence "to the extent it applies to future projects for the irrigation of the irrigable acres as already quantified and claimed in the *Ahtanum* proceeding." *Id.*

The 1994 PIA Opinion did not identify the irrigable acreage purportedly quantified in the *Ahtanum* Decree. The acreage number was repeatedly revisited and revised throughout the Subbasin No. 23 proceedings and was not finally determined until nearly 15 years later, in the final 2009 Memorandum Opinion. Irrigable acreage amounts for the trust and tribal fee lands were determined to be 3,306.5 acres in the 2002 Report (p. 42, CP 1019); 5,146.85 acres in the 2008 Supplemental Report (pp. 198-200, CP 922-924); and 4,107.61 acres in the 2009 Memorandum

Opinion (pp. 56-60; CP 1511-1515).

As a result of its conclusions about the *Ahtanum* Decree's preclusive effect, the trial court made three decisions about the United States' irrigation right challenged in this appeal. First, the court limited use to 4,107.61 acres of trust and tribal fee land, as opposed to the 6,381.3 acres identified in the United States' PIA analysis. 2009 Mem. Op. 60 (CP 1515). Second, the court allowed for diversions only from April 1 to October 1, as opposed to the March 1 through January 1 period on which the United States' PIA claim -- including the storage claim -- was based. *Id.* at 66 (CP 521). And third, it held that the confirmation of a storage right during irrigation season was premature, creating uncertainty about whether the United States has any right to storage as part of its reserved water right for irrigation. *Id.* at 66-67 (CP 521-522).

Otherwise, the irrigation right confirmed to the United States generally reflected the terms of the *Ahtanum* Decree and the holdings in the Ninth Circuit decisions. As required by *Ahtanum*, after providing for instream flow, the trial court adjusted the natural flow subject to Code Agreement allocations to account for the relinquishment of northside water use since the entry of the *Ahtanum* Decree, which reduced the shared flow from 62.59 cfs to 51.8 cfs. See, e.g., CP 175. The court confirmed to the United States, to the extent the water can be put to beneficial use (1) 25 percent of the adjusted natural flow from April 1 to July 10, plus all

the excess over the northside's 75 percent share for that same general period,⁶⁹ and (2) the entire flow (in excess of required instream flows) July 11 through October 1. The court provided that water allocations relinquished by nonuse on northside parcels become available for use on the south side. CP 175 n.1. In addition to the 4,107.61 acres confirmed for trust and tribal fee, the court confirmed 992.39 irrigable acres to owners of non-tribal fee who claimed water rights on the south side as successors to Indian allottees and who share pro-ratably in the reservation water right. 2009 Mem. Op. 60 (CP 515).

Despite confirming separate water rights to the non-Indian allottee successors, the trial court – over the United States' objection – identified the irrigation right confirmed to the United States as belonging to “The United States of America, Bureau of Indian Affairs, as trustee for the Yakama Nation, Allottees, *and non-Indian Allottee Successors.*”⁷⁰ CP 175 (emphasis added). Also, despite limiting all northside Code Agreement parties, except John Cox, to a period of use beginning on April 15, the CFO describes the United States' right from April 1 to April 15 as if all

⁶⁹ As discussed *infra*, p. 49, the court made a technical error in allowing for a 75 percent northside allocation from April 1 through April 14 because the period of use for all but one of the northside Code parties starts April 15.

⁷⁰ The court stated, however, that it was not imposing on the United States a trust responsibility between it and non-Indian allottee successors akin to the fiduciary relationship between it and the Nation, and that the 992.39 acres confirmed to owners of non-tribal fee acreage on the reservation were not included in the Nation's confirmed irrigable acreage. Order on Recon. 6-7 (CP 97-98).

Code Agreement parties were confirmed 75 percent share of the shared natural flow during that period.⁸⁹ *Id.*

With respect to northside rights, the trial court quantified and confirmed specific rights to the successors to *Ahtanum* Decree parties, to be supplied out of the north side's 75 percent share of the 51.8 cfs natural flow. The court limited the period of use for all but one of the northside Code water recipients to April 15 to July 10. See 2002 Rep. 117 (CP 1094); 2003 Threshold Legal Issues Op. 14-15 (CP 955-956). With respect to the northside's 75 percent share of flow during that period, the court limited each Code water recipient to 0.01 cfs per acre. In the event the south side cannot beneficially use the entire excess flow during that period, the court confirmed an additional 0.01 cfs per acre to northside Code parties. 2002 Rep. 117 (CP 1094); 2009 Mem. Op. 3 (CP 458). The court rejected the claims of northside landowners who did not have a Code Agreement allocation confirmed in *Ahtanum*. *Id.* at 25-35 (CP 749-759).⁹²

⁸⁹ The trial court also confirmed to the United States as trustee for the Yakama Nation a year-round treaty water right for fish and other aquatic life, limited to the minimum instream flow necessary to maintain fish life in the creek, with a priority date of time immemorial. 1995 Fishery Order (CP 1495-1499); 2002 Rep. 45 (CP 1022); 2009 Mem. Op. 64 (CP 519-518); CFO (CP 134). The United States does not contest that ruling.

⁹² The court confirmed an instream flow of 0.25 cfs for northside stockwater use, with a priority date that is junior to the Nation's instream flow fishery right but senior to the Nation's irrigation right. *Id.* at 54-56 (CP 509-511). The court held that the *Ahtanum* Decree precluded claims for a diversionary stockwater right except for a right incidental to the irrigation diversion rights otherwise confirmed in the CFO. 2003 Threshold Legal Issues Op. 10-14 (CP 951-955).

SUMMARY OF THE ARGUMENT

The trial court's rulings are incorrect. By its express terms, the *Ahtanum* Decree confirms for the reservation all the Ahtanum Creek water for irrigation it can beneficially use, subject only to the northside Code Agreement allocations. Nothing in the Decree quantifies the reservation's beneficial use, sets limits on when water may be diverted, or precludes a right to storage. That is because once the Ninth Circuit upheld the Code Agreement, the reservation was left with far less water than it needed, and the definition of the reservation's water rights in *Ahtanum* became irrelevant and was not addressed or decided. The parameters of the right are thus open for decision in this adjudication. See *infra* pp. 21-28.

Even assuming the *Ahtanum* Decree determined the parameters of the irrigation water right claimed by the United States in that proceeding, the trial court erred in holding that claim preclusion barred the quantification of the Nation's full irrigation right in these proceedings based on the PIA standard. The cause of action in both proceedings is not the same. Because the United States now concedes that northside landowners have a right to the Code Agreement allocations that were the subject of the United States' complaint in *Ahtanum*, the facts and evidence relevant to the two proceedings are distinct and the United States' claims here do not impair or infringe on the northside rights. The trial court also incorrectly concluded that the United States in *Ahtanum* sought to litigate

the reservation's future irrigation rights, and that the Ninth Circuit understood its decision to address such rights. See *infra* pp. 28-37.

Even assuming that *Ahtanum* did preclusively determine the parameters of the reservation's irrigation right, the trial court erred in confirming a right for only 4,107.61 acres of irrigable trust and tribal fee land and in deeming the confirmation of a future storage right to be premature. Under the United States' best evidence of irrigable acreage in *Ahtanum*, there are 5,079.91 irrigable acres of trust and tribal fee lands. And it is not premature to confirm a right to future storage. Indian reserved water rights are typically quantified based on future storage and the recognition of such a right here would not prejudice other parties, because it is based on the quantity of water and irrigable acreage otherwise confirmed. See *infra* pp. 37-43. Thus, the principal relief sought here by the United States is for this Court to remand for quantification of the United States' irrigation right under the PIA standard or, in the alternative, to direct the trial to revise the United States' right to provide for the irrigation of 5,079.91 acres and to include a right for future storage.^{10/}

^{10/} The United States appeals two more technical matters: the inclusion in its right of hypothetical non-Indian allottee successors who may have failed to file water right claims on their own behalf, and the court's erroneous description of the quantity of the United States' water right from April 1 to April 15. These issues are set forth *infra* pp. 43-49.

ARGUMENT

I. The *Ahtanum* Decree did not preclusively determine the irrigable acreage or period of use for the United States' reserved water right for irrigation.

Based on its conclusion that the *Ahtanum* Decree preclusively quantified the reservation's irrigation water right from Ahtanum Creek, the trial court rejected the United States' PIA claim for a right to irrigate 6,381.3 acres, which is dependent on the right to divert water to storage, and instead limited the right to irrigation of 4,107.61 acres with diversions limited to the period of April 1 through October 1.

The trial court was incorrect. First, the *Ahtanum* Decree cannot bind the United States on irrigable acreage and period of use for the simple reason that the Decree did not determine those matters. Second, assuming the Decree did make such determinations (which it did not), claim preclusion does not bar the United States' PIA claim here because the causes of actions in the two proceedings are not the same. This court should thus vacate the trial court's determinations and remand for quantification of the United States' irrigation right under the PIA standard.

A. *Ahtanum* does not bind the United States on the irrigable acreage or period of use because it did not determine those matters.

The trial court concluded that the *Ahtanum* litigation "resolved the reserved rights of the Yakama Nation in regard to diversions from Ahtanum Creek inasmuch as it quantified the 'practicably irrigable

acreage.” 1994 PIA Op. 13. The court held that “principles of res judicata and stare decisis bar relitigation of the practicably irrigable acreage in the Ahtanum unit of the Wapato Irrigation Project.” *Id.* at 13-14. It is not entirely clear whether the trial court rested its decision on claim preclusion or issue preclusion. Either way, the trial court was incorrect.

This adjudication requires the determination of the irrigable acreage and period of use for the United States’ irrigation right. Thus, while claim preclusion binds a party to a judgment even as to claims that could have been but were not brought in a prior action, *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981), here claim preclusion can operate only if the judgment in *Ahtanum* – the *Ahtanum* Decree – made determinations regarding irrigable acreage and period of use, and it did not. Issue preclusion operates only where the same issue was actually litigated and necessarily decided in a prior case. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.5 (1979); *Schiro v. Farley*, 510 U.S. 222, 236 (1994). None of those requirements are satisfied here – most notably because once the United States lost its claim to northside Code Agreement water, it was patently *unnecessary* to determine the full extent of the reservation’s water right.

1. The Decree does not determine irrigable acreage or period of use.

As relevant here, the *Ahtanum* Decree confirmed to the United States the following rights:

b. To plaintiff, for use on Indian Reservation lands south of Ahtanum Creek, twenty-five percent of the natural flow of Ahtanum Creek, as measured at the north and south gauging stations; provided that when that natural flow as so measured exceeds 62.59 cubic feet per second, *all the excess over that figure is awarded to plaintiff, to the extent that the said water can be put to a beneficial use.*

* * *

II.

After the tenth day of July in each year, *all the waters of Ahtanum Creek shall be available to, and subject to diversion by, the plaintiff for use on Indian Reservation lands south of Ahtanum Creek, to the extent that the said water can be put to a beneficial use.*

Ahtanum II, 330 F.2d at 915 (emphasis added). The Decree thus confirms to the United States an irrigation right to all the flow of Ahtanum Creek that it can put to beneficial use that is in excess of the northside Code Agreement allocations and instream flow rights.

The body of the Decree specifies no limits on that beneficial use. Nor are such limits identified in the district court's "Findings of Fact and Conclusions of Law" that accompanied the Decree. The Findings of Fact included a detailed chart specifying the irrigated acreage for each of the northside Code Agreement parties, which showed that they had ceased using some of their Code Agreement allocations. Those findings were incorporated into the Decree's reduction of the Code Agreement base flow from 76.3 cfs to 62.59 cfs. See *Ahtanum* 1962 FOF ¶ 16, (DOE Exh. 136); *Ahtanum II*, 330 F.2d at 906 & Appendix B. The Findings of Fact did not, in contrast, establish the irrigable acreage on the south side of the creek.

Rather, they merely 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” and that “there is sufficient acreage on both sides of Ahtanum Creek dependent upon that Creek for irrigation waters to insure that water allocated in accordance with these findings of fact can be put to a beneficial agricultural use.” 1962 FOF ¶¶ 5, 21 (DOE Exh. 136).

If the Decree determined the reservation’s irrigable acreage, that number should be evident from the Decree. As demonstrated by the trial court proceedings, no such clarity exists. The 1994 PIA Opinion (p.4, CP 1503), in holding that the *Ahtanum* Decree quantified the reservation’s irrigable acreage, did not identify an acreage amount and cited provisions in which the United States claimed rights for irrigation of 4,968 acres, as well as evidence establishing that the reservation encompassed 6,072.3 irrigable acres. Subsequent proceedings determined the irrigable acreage of the trust and tribal fee lands (as distinguished from the entire reservation)^{11/} to be: 3,306.5 acres in the 2002 Report (p. 42, CP 1019); 5,146.85 acres in the 2008 Supplemental Report (pp. 198-200, CP 922-924); and ultimately 4,107.61 acres in the 2009 Memorandum Opinion

^{11/} In *Ahtanum*, the United States claimed rights for all lands irrigated by the Ahtanum Unit of the Wapato Project, without regard to the land’s status. In this adjudication, the United States claimed rights only for the trust and tribal fee lands on the reservation. Thus, to compare irrigable acreage numbers in the two proceedings, the rights of the *Walton* water right holders – holders of non-tribal fee lands – must be subtracted from the amounts discussed in *Ahtanum*.

(pp. 56-60; CP 1511-1515). The United States cannot be preclusively bound by a number that cannot even be discerned in the judgment.

Ultimately, the trial court rested its determination of irrigable acreage on Paragraph XV in the “Agreed Facts” portion of the 1957 Pre-Trial Order on the Merits in *Ahtanum*, which was incorporated into the Findings of Facts and Conclusions of Law accompanying the *Ahtanum* Decree. The paragraph stated:

The lands situated south of Ahtanum Creek within the Ahtanum Indian Irrigation Project and the small diversions above Main Canal, for which rights to the use of water from that stream are claimed in this proceeding total approximately 5100 acres.

1957 PTO, Agreed Facts ¶ XV (Schuster Dec. of 09/10/04, Att. C, at 6) (CP 3683). The court subtracted the 992.39 acres confirmed to the *Walton* water-right holders – the owners of non-tribal fee land on the reservation – and arrived at 4,107.61 irrigable acres for the United States’ right for trust and tribal fee lands. The trial court’s reliance on Paragraph XV is incorrect. The paragraph by its terms described the United States’ “claim” and only in an “approximate” amount; the 5,100 acres thus did not constitute a factual determination of what the actual number of irrigable acres were. No number in the *Ahtanum* Decree that quantifies the irrigable acreage on which the reservation’s water right may be used.

The trial court erred in concluding that the *Ahtanum* Decree limited the reservation use to the irrigation season, from April 1 to October 1, for

largely the same reasons. The *Ahtanum* Decree expressly provides the United States with the excess over the northside's Code Agreement allocations "[f]rom the beginning of each irrigation season, in the spring of each year, to and including the tenth day of July of such year." *Ahtanum II*, 330 F.2d at 915. And it provides that all the waters of the Creek that the Nation can beneficially use are available to the United States "[a]fter the tenth day of July in each year." *Id.* The Decree thus puts an express limitation on the northside Code Agreement parties' allocations – allowing use only from the beginning of the irrigation season to July 10 – while imposing no such limitation on the United States, which is allowed not only the excess during that period but "all the waters" of the creek "[a]fter the tenth day of July." *Id.* The Decree thus allows the United States to divert the water year round and does not preclude its storage.

Moreover, even Judge Stauffacher, who decided the 1994 PIA Opinion, appeared to recognize that the *Ahtanum* Decree did not limit the United States' ability to use the creek's year-round flow for storage. While Judge Stauffacher concluded that the *Ahtanum* Decree "quantified the 'practicably irrigable acreage'" of the reservation, he accepted the United States' PIA evidence "provisionally to the extent it applies to future projects for the irrigation of the irrigable acres as already quantified" in *Ahtanum*. 1994 PIA Op. 13-14 (CP 512-513). The United States' PIA evidence regarding future projects relied on storage of flows

outside of the April 1 through October 1 period. See US Exh. 117 at 82. Subsequent decisions by adjudicators other than Judge Stauffacher limiting the United States to diversions from April 1 through October 1 are thus inconsistent with the 1994 PIA Opinion.

2. Once the Code Agreement's validity was upheld, the quantification of the irrigation water right claimed by the United States was unnecessary.

Because the Decree in *Ahtanum* did not quantify or specify the period of use of the United States' irrigation water right, the trial court instead based its determinations of irrigable acreage and period of use on the parameters of the United States' *claim* in *Ahtanum*. The trial court's reliance on the claim, rather than the Decree, is incorrect. As set forth below, once the United States failed in its effort to invalidate the Code Agreement or otherwise enjoin northside Code Agreement parties from using their Code allocations, the question of the parameters of the United States' water right became irrelevant and was not decided.^{12/}

The United States' claim in the final 1962 Findings of Facts to water for approximately 5,100 acres was dependent on invalidating the

^{12/} For this and other reasons, issue preclusion also does not operate to bar the United States' PIA evidence. The purported issue in *Ahtanum* – the amount of acreage irrigable by the Wapato Project – differs from the issue the United States seeks to litigate here, which is the irrigable acreage based on the PIA standard. And, in any event, the irrigable acreage for the Project was not “necessarily decided,” because – as set forth herein – the full extent of the reservation's irrigable acreage was irrelevant once the Code Agreement was upheld and the remaining water was plainly far less than the amount the Project needed.

Code Agreement. In those Findings of Facts, the parties agreed that the yield of Ahtanum Creek was not sufficient to irrigate the lands on the reservation (¶ 5, DOE Exh. 136), so that the United States effectively claimed the creek's entire flow. Once the Ninth Circuit upheld the Code Agreement, however, the flow available to the reservation was dramatically limited. The United States continued to press for access to the northside's Code Agreement share, claiming that it was forfeited to the reservation due to waste or adverse possession, and thus continued to assert a right to the amount it could use at that time. 1957 PTO, Contentions of U.S., ¶¶ XV & XXII (Schuster Dec. of 9/10/2004, Att. C, at 15-22) (CP 3692-3699). But those claims failed as well, rendering the upper limit of the reservation's use irrelevant, and causing the litigation to focus instead on determining the limits of the northside landowners' rights under the Code Agreement. As a result, the *Ahtanum* Decree carefully limits the acreage, water quantity, and period of use of the northside users, but imposes no limits on the United States' reserved irrigation water right other than beneficial use.

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

Even if the *Ahtanum* Decree determined the parameters of the irrigation right claimed by the United States in that case, the Decree does

not preclude the United States from seeking to quantify the full scope of its reserved irrigation right under the PIA standard. That is because – whether examined under the applicable legal standards or, as the trial court did, by looking at the United States’ complaint and Ninth Circuit opinions – the causes of action in the two proceedings are not the same.

1. Under applicable legal standards, the United States’ causes of action in *Ahtanum* and this adjudication are not the same.

Because the *Ahtanum* Decree was entered in federal district court, its preclusive effect in the present adjudication is governed by federal law. *Heck v. Humphrey*, 512 U.S. 477, 488 n. 9 (1994); *Loveridge v. Fred Meyer, Inc.*, 72 Wn. App. 720, 725 864 P.2d 417 (1993). The U.S. Supreme Court has described res judicata (or claim preclusion) as the doctrine that a “final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” *Federated Department Stores*, 452 U.S. at 398. The elements necessary to establish claim preclusion are: “(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties.” *Hells Canyon Preservation Council v. U.S. Forest Service*, 403 F.3d 683, 686 (9th Cir. 2005) (citations omitted).

The question whether claim preclusion operates here rests on whether there the cause of action here is the same as in *Ahtanum*. While identity of causes of action “cannot be determined precisely by

mechanistic application of a simple test,” *Abramson v. University of Hawaii*, 594 F.2d 202, 206 (9th Cir. 1979), the following criteria have been considered:

(1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Adams v. California Dept. of Health Services, 487 F.3d 684, 689 (9th Cir. 2007); see *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165, 168 (1983).

Applying this standard, the cause of action in this adjudication is not the same as in the *Ahtanum* litigation. First, the northside Code Agreement parties’ rights established in the *Ahtanum* Decree will not be impaired by the United States’ PIA claim because any additional irrigation rights in that claim may be satisfied only from the excess water to which the United States has a right *after* the Code Agreement allocations are satisfied. Second, the evidence in the two actions differs because in *Ahtanum* the United States presented evidence of the acreage that could be irrigated by the Wapato Project *at that time* in order to justify its effort to invalidate the Code Agreement and enjoin the northside Code parties’ use of water. In contrast, the United States’ PIA evidence presented here accepts the limitations on reservation water use imposed by the Code Agreement and instead quantifies the acreage that the project practicably

irrigate in the *future*, with the addition of storage facilities and other infrastructure. Third, the two actions do not involve infringement of the same right. In *Ahtanum*, the United States sought to halt the northside users' diversion of water under the Code Agreement, while here, the government concedes the northside users' rights to Code Agreement allocations as adjudicated in *Ahtanum*. Finally, the *Ahtanum* litigation arose from the United States' effort to invalidate the Code Agreement, whereas here the United States is joined as a defendant in an adjudication in which it is simply required to present all water claims, present and future. Thus, the *Ahtanum* litigation arose from a different set of facts from those underlying this adjudication.

As demonstrated by the preceding analysis, an important reason why the *Ahtanum* Decree has no preclusive effect here is because the United States' PIA claim does not infringe on the rights confirmed to the Code Agreement parties in that Decree. The lack of infringement on prior adjudicated rights is a critical distinction between this case and *Nevada v. United States*, 463 U.S. 110 (1983), on which the trial court relied in part. See 1994 PIA Op. 5-9 (CP 1504-1508). Unlike in *Nevada*, the United States does not seek irrigation rights inconsistent with the *Ahtanum* Decree rights of the northside parties here. Here, the northside Code Agreement allocations are not impaired by the United States' right to the flows that exceed those allocations, and the United States' claim to define the limits

of the beneficial use of that water does not affect those allocations. Thus the causes of action in the two proceedings differ, and claim preclusion does not operate to bar the United States' PIA claim here.

2. In *Ahtanum*, the United States sought water only for present, not future, irrigation.

The trial court focused much of its analysis on assertions of the United States in the complaint and pre-trial orders and concluded that it sought to adjudicate the reservation's full reserved water right for irrigation, both present and future. It thus concluded that the United States could not quantify additional future irrigation rights in this adjudication. As a threshold matter, the court's focus on the United States' complaint was in error because, as previously established, the claim to a specified number of acres was never addressed.

In any event, the trial misinterpreted the complaint. In *Ahtanum*, the United States sought only enough water to supply the Ahtanum Unit of the Wapato Project on the reservation as constructed in 1915. The essential purpose of the United States' action in *Ahtanum* was to invalidate the Code Agreement and to obtain an injunction precluding northside users from taking water needed to supply southside irrigation canals as they existed at that time. As a result, the United States did not actively seek rights at that time for acreage it knew was irrigable but not currently served by those canals. The complaint alleged that the United States "has

ditches constructed for the irrigation of 4920.4 acres” of irrigable reservation land (¶ X), identified the waters necessary to irrigate those lands (¶¶ XI & XII), and alleged that, pursuant to the Code Agreement, the northside defendants were “asserting rights in Ahtanum Creek adverse to those of the United States and its wards” and thus were causing the latter irreparable damage (¶¶ XIII - XVI). *Ahtanum* Complaint (YIN Exh. 27).

The United States thus asked the court to: (1) require the defendants to “set up fully” their claims to waters of Ahtanum Creek; (2) declare the Code Agreement invalid; (3) “Decree to the United States and its Indian wards the water rights hereinabove set forth as owned and claimed by the United States and its wards;” and (4) “quiet the title of the United States and its Indian wards in and to those rights to the use of water from Ahtanum Creek which are described in this complaint as against the defendants” (¶ XVI). *Id.* The gravamen of the complaint, therefore was to quiet title to water for the acreage capable of being irrigated by the canals existing at that time, and to remove the primary obstacle to obtaining water for that irrigation: the Code Agreement.

It cannot reasonably be assumed that in seeking water for the Wapato Project as constructed in 1915 the United States sought to define the reservation’s full irrigation right. At the time the United States filed its complaint, case law in the Ninth Circuit plainly established that an Indian reserved water right encompassed water for all of a reservation’s irrigable

acreage. See *Skeem*, 273 F. at 95 (decided in 1921); *Hibner*, 27 F.2d at 911 (decided in 1928). The United States knew there was irrigable acreage on the south side of the creek not serviced by the Project at that time: as compared with the approximately 4,920 acres serviceable by the Project for which it claimed water rights in the complaint, in the 1951 pre-trial order the United States identified a total of 6,072.3 irrigable acres, including acreage not then served by the Project. Furthermore, by 1957, after the Ninth Circuit reversed the district court's dismissal of the United States' complaint and proceedings resumed in the district court, the United States was presenting evidence to the Special Master in *Arizona v. California* based on the PIA standard ultimately accepted by the Supreme Court – evidence that quantified irrigable acreage based in part on future storage. And the possibility of constructing storage for Ahtanum Creek had been repeatedly considered, starting with a U.S. Bureau of Reclamation study in 1907. US Exh. 114, Att. B, at 2.

Thus, at the time the trial court entered the United States' claim to water for 5,100 irrigable acres in the 1957 pre-trial order, the United States knew that water was reserved for *all* of the reservation's irrigable acres, knew that there was irrigable acreage in excess of 5,100, knew that construction of storage for Ahtanum Creek had been actively considered, and was pursuing in other litigation rights for future irrigation based on future storage projects. Under these circumstances, the United States

could not have intended its claim to water for the Wapato Project to preclude a future claim to use water on additional irrigable acreage with the aid of storage. That is even more true after the Ninth Circuit upheld the Code Agreement, which left a PIA-type claim based on future storage the only hope for ever being able to cultivate even the irrigable acreage accessible by the Wapato Project.

3. *Ahtanum I* does not foreclose a claim to future irrigation rights.

The trial court also misread the decision in *Ahtanum I* reversing the district court's dismissal of the case. The Ninth Circuit plainly understood that *Winters* water rights served a reservation's present and future needs. See *Ahtanum I*, 236 F.2d at 327-328. The Court, however, was focused on whether the Code Agreement interfered with the Nation's water rights, whether the Agreement was valid and, if so, what rights the northside users had under the Agreement at that time. In answering the first question – whether the Nation was harmed by the Code Agreement – the Court rejected arguments that the Nation only had a right to water for the 1,200 acres it was irrigating in 1908 when the Code Agreement was signed. The Court recognized that “by 1915” the reservation needed water for some 5,000 acres of land, that the 1855 treaty reserved water for such use, and that an award of water to irrigate the lands served by the canals “as completed in the year 1915 would take substantially all of the waters of

Ahtanum Creek.” *Id.* at 327. Thus, in determining whether the Code Agreement infringed on the Nation’s rights, the Court concluded:

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.

Id. at 328. Rather, the Court held that

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. (emphasis added). The Court thus deemed the United States’ proof of the acres irrigable by the Wapato Project in 1915 to be sufficient to allow it to seek a right to the northside’s Code Agreement allocation, alleviating the Court from the need to consider the existence or scope of additional, future irrigation rights.

The trial court relied in part on the Court’s statement at the end of the proceedings that the Nation ““may now ascertain, by actual experience under the Decree, just how badly they have suffered through the Code taking of their property.”” 1994 PIA Op. 12 (CP 1511) (quoting *Ahtanum II*, 330 F.2d at 914). This language, however, merely confirms that the limitations on the Nation’s water rights in the *Ahtanum* Decree were not based on the reservation’s irrigable acreage, but resulted solely from the Court’s determination that the Code Agreement was valid and its resulting

award to northside landowners of the use of water that, absent that agreement, would have been available for use by the Nation.

II. Assuming the *Ahtanum* Decree preclusively determined the reservation's irrigable acreage, the trial court erred in holding that the amount determined was 5,100 acres (resulting in 4,107.61 irrigable acres of trust and tribal fee).

As set forth above, the United States disagrees that the *Ahtanum* Decree quantified the full extent of the reservation's irrigation water right. But assuming it did, the superior court erred in concluding that it quantified the right at 5,100 irrigable acres.

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. The United States' 1947 complaint (¶ X, YIN Exh. 27) stated that the government had constructed ditches for the irrigation of 4920.1 acres. The 1951 pre-trial order specified that the United States was claiming water for 4,968 acres susceptible of being served by the Wapato Project. 1951 PTO, Agreed Facts ¶ 10; Contentions of the US ¶ 22 (YIN Exh. 353). That order also referenced "Exhibit A," which disclosed a maximum *irrigated* acreage of 5,272.7 acres (5,122 acres plus 150.7 acres on isolated allotments), and a maximum *irrigable* acreage of 6,072.3 acres (5,758.5 acres plus 324 acres on isolated allotments). *Id.* ¶ 6. The 1957 pre-trial order set forth the United States' claim to approximately 5,100 acres within and outside of the Project,

while elsewhere describing government canals as capable of serving 4,820 acres and non-governmental canals 130 acres, for a total of 4,950 acres. 1957 PTO, Agreed Facts, ¶¶ XV, XI-XIII (Schuster Dec. of 9/10/04, Att. C, at 4-6) (CP 3681-3683).

In the 2008 Supplemental Report, the court commissioner found that the most reliable figure was the irrigable acreage figure set forth in Exhibit A to the 1951 pre-trial order. Exhibit A is the only document that provides a tabulation of irrigable acreage, tied to specific properties; thus the court commissioner found this exhibit the most persuasive. 2008 Supp. Rep. 199 (CP 923). Exhibit A identifies 6,072.3 irrigable acres. The trial court subtracted the 925.45 acres of non-tribal fee *Walton* rights recognized in *Ahtanum*, leaving a total of 5,146.85 acres for the reservation. See YIN 353; 2009 Mem. Op. 58 (CP 513). The number of acres confirmed to *Walton* rights has increased since *Ahtanum*, to 992.39 acres. Subtracting that number from the irrigable acreage in Exhibit A would result in 5,079.91 irrigable acres for the reservation.

Exhibit A identifies both irrigated and irrigable acres. Since the *Ahtanum* Decree provides that the Nation has a right to all the water it can beneficially use, without specifying an amount, it is best interpreted to incorporate the United States' best evidence of the number of irrigable, rather than irrigated, acres. As the trial court noted, the Ninth Circuit indicated its awareness of the PIA standard by citing to *Arizona v.*

California, 373 U.S. 546, 600 (1963), where the standard was first elucidated, and it would have understood beneficial use on the reservation to extend to all of its irrigable acreage. Thus, if this Court rejects the United States' appeal on question 1 it should, in the alternative, hold that the United States' has a right to water for the irrigation of 5,079.91 acres.

III. Assuming the trial court correctly determined the period of use for the United States' irrigation water right is April 1 through October 1, the trial court erred in failing to expressly include the right to store water otherwise confirmed to the United States for that period.

Once *Ahtanum* upheld the Code Agreement's allocation of 75 percent of the April to July 10 flows to northside users, the reservation's ability to irrigate with the natural flow irrigation systems constructed on the southside was sharply limited. The United States' PIA evidence shows that, absent storage capability, only 2,728.7 acres of trust and tribal fee land can be irrigated. US Exh. 113, *Water Availability Investigations*, at 12. Thus, the trial court's confirmation of an irrigation water right for the United States in the amount of 4,107.61 acres (or 5,079.91 if the United States prevails on issue 2) has little meaning unless the United States has the right to store the water otherwise confirmed to it.

In its 1994 PIA Opinion, the trial court recognized the importance and legitimacy of including a future storage right in the Nation's Indian reserved water right. After concluding that *Ahtanum* preclusively determined the reservation's irrigable acreage, the trial court noted that the

Ahtanum Court recognized that the water left to the Nation after the northside Code Agreement allocations is “insufficient for watering the acreage as it existed in 1915” and that the concurring opinion in *Ahtanum* noted that the effects of the Agreement could be corrected in part “by development of future projects.” 1994 PIA Op. 14 (CP 1513). The trial court thus stated that it would “accept the evidence provisionally to the extent it applies to future projects for the irrigation of the irrigable acres as already quantified and claimed in the *Ahtanum* proceeding.” *Id.*

The court commissioner’s reports, however, did not include a future storage right in the proposed schedules of rights. The United States objected, expressing concern that, if its irrigation water right did not expressly include a right to future storage, it might subsequently be barred from claiming that its reserved water right includes the right to storage.

The trial court agreed that the United States’ water right included the right to potential future storage. The court did not deny the “request for storage water rights for the period of April 1 through October 1,” but found it to be “premature” because “[i]t is a request for a potential future storage right.” 2009 Mem. Op. 66 (CP 521). The court concluded, however, that omitting that right at this point would not bar a future claim to storage, specifically “disagree[ing] with the United States that *Arizona II* eliminates a change in infrastructure (i.e., adding storage).” *Id.* To preserve the United States’ ability to store water otherwise confirmed to it,

the trial court stated that “[a] statement will be included in the Conditional Final Order for Subbasin No. 23 allowing for some modification of the Yakama Nation’s water right” in accordance with the United States’ right “to divert the entirety of Ahtanum Creek subject to existing water rights.” *Id.* at 67 (CP 522). The CFO, however, includes no such statement.

The trial court erred in finding that it was premature to include a future storage right in the United States’ reserved water right.^{13/} It is standard practice for Indian reserved water rights to expressly award a water right for future irrigation storage projects. See *Big Horn*, 753 P.2d at 101, 103, 105 (affirming district court’s award of reserved water right for future projects for irrigable acreage); To be sure, the future projects in those proceedings specify the number of acres they will irrigate and the allowable annual diversion. See *Big Horn*, 753 P.2d at 103; *Report of the Court: Yakama Indian Nation*, Vol. 25, 11/13/95, at 8-42 (CP 3924-3958). That is because, in a typical situation, the confirmation of particular irrigable acreage and diversion rights are dependent on the addition of future storage. Such specifications are unnecessary here because the United States seeks only to store water it already has a right to divert for

^{13/} It is indisputable that water is available for storage and that it would allow the Nation to irrigate acreage already confirmed. The Nation submitted evidence demonstrating that water in excess of that needed to satisfy other confirmed rights (as set forth in the trial court’s 2002 Report) – and thus is available for the United States’ use – is available in the spring, and if stored would help satisfy the water deficit the Nation suffers in later months. Declaration of Niel Allen, 06/24/2008 (CP 3631-3635).

use on acres it already has a right to irrigate. That is, the storage water would come from the United States' confirmed right to divert all water from April 1 through October 1 in excess of the northside's Code Agreement allocation for the irrigation of 4,107.61 acres (or 5,079.91 acres if the United States prevails on question 2). The confirmation of a future storage right, therefore, does not enlarge the rights confirmed to the United States; it merely allows the United States to make full use of the water right already awarded.

Accordingly, the United States' irrigation water right in the CFO should be changed in the following manner (new text in italics). The "Use" should be for "Irrigation *and storage* for [5,0179.91] acres^{14/} and stock water." See CP 175. And a provision should be added to the "Point of Diversion" to state: "*No. 6: Location(s) to be specified for future storage right.*" *Id.* In the alternative, the "Special Terms of Use" could be altered to state: "The United States may divert *and store* the entirety of Ahtanum Creek subject to water rights allocation to users located north of Ahtanum Creek and the Nation's instream flow right." CP 177.

Even if this Court determines that the express inclusion of a future storage right is premature, the CFO should incorporate a statement – as the trial court said it would – recognizing that the United States has a potential

^{14/} The acreage is changed based on the assumption that United States prevails on question 2.

right to future storage. The trial court's confidence that the failure to expressly preserve a right for future storage as part of the federal reserved water right will not preclude a future claim to such a right may not be sufficient to safeguard that right. In such case, the United States recommends that the "Special Terms of Use" portion of the United States' irrigation water right be modified to include the statement set forth below in italics: "The United States may divert the entirety of Ahtanum Creek subject to water rights allocated to users located north of Ahtanum Creek and the Nation's instream flow right. *This water right may be modified to add a right to store any portion of such water for the irrigation and stockwater uses specified herein.*" CP 177.

IV. The United States did not claim water rights for non-Indian allottee successors and does not hold water rights in trust for such individuals, and the claim should be revised accordingly.

The superior court incorrectly included non-Indian allottee successors in the United States' irrigation water right (CP 175), resulting in two interrelated problems. First, the right includes non-Indian allottee successors – *Walton* water right holders – in the United States' water right, even though the United States claimed water rights only on behalf of 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. Second, the right describes the United States as trustee for non-Indian allottee successors, even though the trial court has acknowledged that the

United States does not have a fiduciary duty to users of water from its irrigation projects, and even though such individuals may obtain their water from private ditches and not from the Wapato Project.

A. The trial court erred in including non-Indian allottee successors in the United States' irrigation water right.

There reservation encompasses three types of land: (1) land held in trust by the United States for the Nation in its original reservation status; (2) trust allotments – land that was allotted to individual Indians from the reservation and has continually remained in tribal member ownership and has retained its trust statuses; and (3) fee land – allotted land that was sold out of Indian ownership, lost its trust status, and was patented in fee simple status. Much of the fee land remains in non-Indian ownership, but some has been reacquired by individual Indians and by the Nation. By definition, none of the fee land is held in trust by the United States.

The United States filed its water right claim only on behalf of the land held by the Nation – whether it is trust or fee land – and the trust allotments held by its members. See United States' Statement of Claim, 8/31/81 (CP 3418); Supplemental Mem. Op. Re: Motion to Dismiss, 6/24/82 (CP 4617-4618); United States' Brief in Support of Case-in-Chief, 6/16/94 (CP 4011-4024). The United States refers to this land as “trust and tribal fee” land.

Thus, individual owners of fee land, whether Indian or non-Indian, had to and did file water right claims on their own behalf. As a result of these filings, the trial court confirmed water rights for 992.39 acres of on-reservation, non-tribal fee land. 2009 Mem. Op. 60 (CP 515). In determining the allowable irrigable acreage for the United States' water right, the court started with the 5,100 on-reservation acres it determined were approved in the *Ahtanum* litigation and subtracted the acreage confirmed for individual fee lands, resulting in an award to the United States of 4,107.55 acres. *Id.* The remaining acreage should, therefore, consist only of trust and tribal fee land.

The trial court rested its decision to include the non-Indian allottee successors on the Washington Supreme Court's decision in *Department of Ecology v. Acquavella*, 100 Wn.2d 651, 674 P.2d 160 (1983) (*en banc*) (*Acquavella I*). *Acquavella I* held that where water distributors filed claims on behalf of water users with whom they have contracts, the individual users did not need to file individual claims, and the Department of Ecology did not need to serve summons upon them individually. The trial court here concluded that, as a result of that decision, there could be non-Indians who succeeded to trust allotments since the entry of the *Ahtanum* Decree who did not file individual claims on the assumption that the United States was representing them in the adjudication. 2009 Mem. Op. 62-63 (CP 517-518). The court concluded that "[a] landowner

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

The trial court is incorrect. The trial court order affirmed by *Acquavella I* provided that water distributors “*may* file claims herein on behalf of” their water users and that “[a]fter the filing *of the claim by such entities*” a water user who obtained its water solely from such entity “need not file individual claims herein.” 100 Wn. 2d at 654 (emphasis added). The order thus permits, but does not require, a water distributor to file on behalf of its users, and the waiver from filing an individual claim applies only where such a claim is in fact filed.

That waiver does not apply here. The United States did not file claims for Ahtanum Creek water for the Wapato Project. In the United States’ Statement of Claim, only the first claim was pertinent to the Ahtanum subbasin, and it stated that the United States claimed rights “on behalf of the Yakima Nation and its members.” CP 3418. Consistent with that claim, the PIA evidence the United States sought to introduce pertained solely and specifically to trust and tribal fee land and not to non-tribal fee. Thus, the conditions of the order affirmed in *Acquavella I* were not met. because the United States did not file for Ahtanum Creek rights in its capacity as a water distributor, nor did it file on behalf of the water users. Indeed, a claim by the United States for the Wapato Project would

meet the needs of neither the Nation nor the *Walton* right holders because lands of both types of users are irrigated not only by the Project but also by private canals. Thus, all the water rights claimed by the United States in Subbasin No. 23 are for specific lands, not for irrigation projects.

The trial court did not identify any southside water users who had not been served and who had not filed individual claims. But if there are such individuals, the error lies not with the United States, but with the trial court for failing to require service to join the individuals that the United States expressly stated it did not represent. The *Acquavella I* Court anticipated such a situation, noting that “at some point in this lengthy adjudication the trial court may find it necessary to require service of process, or some other remedy, to protect the interests of water users not adequately represented by their distributing entities” and cautioned that its decision “should not be construed to prohibit any future remedial measures the trial court finds necessary in this case.” 100 Wn. 2d at 659.

The inclusion of non-Indian allottee successors in the United States’ water right is unnecessary and inconsistent, and it leaves the United States uncertain as to the amount or irrigable acreage confirmed for the Nation.^{15/} They should be deleted from the United States’ right.

^{15/} The United States does not understand the trial court to have included potential *future* non-Indian allottee successors in its water right, and such inclusion would be incorrect as such individuals – like the existing *Walton* right holders, would need to claim rights on their own behalf, not through a relationship with the United States.

B. The trial court erred in characterizing the United States as trustee for non-Indian allottee successors.

Assuming the non-Indian allottee successors are correctly included in the United States' irrigation water right, the trial court erred in characterizing the United States as "trustee" for those successors. The trial court's only basis for that characterization is its assumption that such landowners would receive water from the Wapato Project. As noted above, however, the southside irrigated land and the land served by the Project are not co-extensive; rather some of the land is irrigated by private ditches. The United States has no duty or legal relationship with owners of non-trust or non-tribal land on those ditches. Since the court only speculated that there may be non-Indian allottee successors who did not file water right claims, it is unknown whether any such hypothetical landowners obtain their water from the Wapato Project.

Furthermore, the trial court previously recognized that the United States does not have a fiduciary duty to federal project water users and that "trustee" is not the appropriate term to characterize that relationship. See *Amended CFO, U.S. Dept. of Interior Bureau of Reclamation Court Claim No. 02276, 3/12/07, at 9-10 (CP 3650-3651)*. Where – as here – the United States made a timely objection to the use of the word "trustee" in such circumstances, the trial court agreed to describe the United States as holding water rights "on behalf of" its water users. *Id.* Such a change is

particularly warranted here, where the CFO uses the word “trustee” to describe both the relationship of the United States to the Nation – to which the United States does have a fiduciary duty – and non-tribal entities to which it does not. Thus, if the non-Indian allottee successors are not deleted from the United States’ right, the United States should be described as holding the right “on behalf of” those individuals.

V. The description of the United States’ irrigation right from April 1 to April 15 is inaccurate.

The trial court erred in its description of the United States’ irrigation right for the period of April 1 through April 14. The CFO 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. With the exception of John Cox, however, the irrigation seasons of all northside Code parties begins on April 15, so they have no right to a Code Agreement allocation before that time. See 2003 Threshold Legal Issues Op. 14-15 (CP 955-956); CFO (CP 182-454 (John Cox at 437)). The United States is therefore entitled to use all flow available for irrigation, except the John Cox share, 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 vacate the trial court's determinations of irrigable acreage and period of use 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

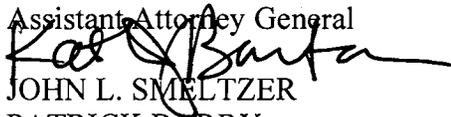
(a) change the irrigation use to 5,079.91 acres; and

(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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 15, 2010, I caused to be served via U.S. mail, postage prepaid, a copy of the foregoing document to:

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