

FILED
MAY 24 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

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,

Respondent/Cross-Appellant,

v.

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.

Appellants/Cross-Respondents.

**RESPONDENT/CROSS-APPELLANT STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY'S OPENING/RESPONSE BRIEF**

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I. INTRODUCTION

The State of Washington, Department of Ecology (“Ecology”) has filed this cross-appeal to challenge the trial court’s application of RCW 90.14.140(2)(c) to one water right claim in the Ahtanum Subbasin proceeding of the Yakima Basin water rights adjudication, Clifford and Doris Hagemeyer’s claim.¹ Specifically, Ecology argues that the trial court erred in holding that the “determined future development” exception to water rights relinquishment applied to excuse the Hagemeyers from some nine years’ nonuse of their water right claim.

Additionally, Ecology responds to certain arguments of the appellants raised in their opening briefs. As the agency charged with administering state water law, Ecology has taken positions in an effort to assist the Court in a fair and correct application of water law, particularly with respect to the complex interrelationship of tribal reserved water rights and Washington state water law.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in applying the determined future development exception to relinquishment, RCW 90.14.140(2)(c), to excuse nonuse of a water right held by the Hagemeyers when the Hagemeyers simply resumed the previous use of their water right for

¹ Ecology is considered to be the plaintiff under the general adjudications procedures of Chapter 90.03 RCW. *See, e.g.*, RCW 90.03.110.

irrigation and did not determine and carry out a future development. Clerk's Papers ("CP") at 92 (Order on Motions at 1); CP at 479, 484 (Memorandum Opinion Exceptions to the Supplemental Report of the Court and Proposed Conditional Final Order ("Memorandum Opinion") at 24, 29).

2. The trial court erred in applying the determined future development exception to relinquishment, RCW 90.14.140(2)(c), to the Hagemiers' claim because no substantial evidence supports the trial court's finding that future development was necessary to resume prior irrigation use. CP at 92, 479–80 (Order on Motions at 1; Memorandum Opinion at 24–25).

III. ISSUES

A. Cross-Appeal Issues

The following issues relate to Ecology's assignments of error:

1. Does the determined future development exception, RCW 90.14.140(2)(c), apply to prevent relinquishment when the "future development" is simply resumption of the pre-existing use of the water right consistent with previous practices of irrigation after a lapse of residence on the appurtenant property?

2. Does the determined future development exception prevent statutory relinquishment of a water right when there is no evidence in the

record that identifies the property's condition or the measures taken to redevelop land in order to resume the previously established irrigation, for example installation of irrigation equipment?

B. Response Issues

Ecology restates certain issues relating to the Appellants' assignments of error as follows:

1. Did the trial court err in determining that the federal court's *Ahtanum* decree quantified the United States' and Yakama Nation's reserved water right for irrigation and limited the period of use?

2. Even if the federal reserved water right of the United States and Yakama Nation is limited to water to irrigate 4,107.61 acres and to water from April 1 to October 1, did the trial court err in determining that the United States and Yakama Nation have no present right to store that water?

3. Should the United States be awarded a right to all water in Ahtanum Creek from April 1 to April 14, to the extent it can use the water beneficially, except for the water awarded to John Cox Ditch Company under the *Ahtanum* decree?

4. Did the trial court err in awarding North Side parties a stockwater right with a priority date senior to the United States' irrigation rights rather than one based upon the record?

5. Should water not beneficially used by the United States on behalf of the Yakama Nation be allocated under state water law?

IV. STATEMENT OF THE CASE

Collectively, the five Appellants have provided this Court with a comprehensive procedural background for this adjudication of water rights, particularly Subbasin 23.²

For purposes of this cross-appeal, Ecology provides the following additional background related to the Hagemeyer claim. The Hagemeyers purchased an irrigated piece of property in the 1980s with the intention of residing on the property and continuing its use as pasture. That intention did not come to fruition until approximately nine years later. During those nine years, no use was made of the irrigation water right appurtenant to the pasture land the Hagemeyers owned. As part of the Subbasin 23 proceedings, Mr. Hagemeyer testified on behalf of his claim to irrigation water. He acknowledged the extended periods of nonuse that exceed the statutory grace period of five years. CP at 2842–43 (Verbatim Report of Proceedings (“VRP”) (Feb. 6, 2004) at 9–10). Nevertheless, in its Memorandum Opinion for Subbasin 23, the trial court identified RCW 90.14.140(2)(c) as an excuse applicable to the Hagemeyers’ nonuse

² See Report of the Court Re: Water Rights for Subbasin No. 23 (Ahtanum Creek) Ahtanum Irrigation District, JohnCox Ditch Co., US/Yakama Nation, Vol. 48, Part 1 (“Report of the Court”) for more details. CP at 974-1459.

because they desired to resume the discontinued irrigation of their property. CP 477–80 (Memorandum Opinion at 22–25). Ecology disputed the application of this exception before the trial court³ and now appeals.

V. SUMMARY OF THE CROSS-APPEAL ARGUMENT

The superior court erred in broadly applying the determined future development exception to excuse nonuse that would otherwise constitute relinquishment of a water right. The record before the trial court did not demonstrate that the Hagemeiens complied with the requirements of the exception. Nevertheless, the trial court applied a strained and expansive construction of the exception.

Effectively, the trial court equated a determined future development with an assumed need for repairs on and cultivation-related upkeep of land and equipment previously used in the exercise of a water right; the assumed maintenance being occasioned by a lapse in residence. The deterioration of the system and land assumed by the court, and at odds with the record, distorts the bedrock principle that beneficial use is necessary to maintain one's water right. *See, e.g., Dep't of Ecology v. Grimes*, 121 Wn.2d 459, 852 P.2d 1044 (1993); *Dep't of Ecology v. Acquavella*, 131 Wn.2d 746, 935 P.2d 595 (1997); *R.D. Merrill Co. v.*

³ CP at 4274 (Ecology's Motion for Reconsideration at 6).

Pollution Control Hearings Bd., 137 Wn.2d 118, 126, 969 P.2d 458 (1999).

Moreover, the express statutory language limits the exception's application to a determined *future* development, not resumption of a past practice. This Court should reverse the superior court's overly broad interpretation of the exception, RCW 90.14.140(2)(c), consistent with the Washington State Supreme Court's direction to narrowly construe statutory exceptions to relinquishment. *R.D. Merrill*, 137 Wn.2d at 140.

VI. CROSS-APPEAL ARGUMENT

A. Standard Of Review

Ecology's cross-appeal involves construction of a statute, RCW 90.14.140(2)(c), that provides an exception to statutory relinquishment of a water right and the application of that statute to facts. As the state Supreme Court has repeatedly stated, the *de novo* standard of review applies to issues of law, such as construction of a statute. *City of Seattle v. Burlington N. R.R. Co.*, 145 Wn.2d 661, 665, 41 P.3d 1169 (2002). The Hagemeyers bear the burden of demonstrating the application of an exception, here the "determined future development" exception. *R.D. Merrill*, 137 Wn.2d at 140–41; RCW 90.14.140(2)(c).

In reviewing a trial court's findings of fact, however, the more deferential substantial evidence test is appropriate.

[R]eview is limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment. Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.

Ridgeview Props. v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982) (citations omitted). The substantial evidence standard is unmet when there is no evidence in the record supporting the trial court's findings.

B. The Plain Language Of RCW 90.14.140(2)(c) Precludes Its Application To Resurrect A Lapsed, Pre-Existing Use

Washington's Water Code provides for statutory relinquishment of a water right as a consequence of nonuse over a period of five successive years. RCW 90.14.170, .180, .190. Once the statutory period of five successive years of nonuse has been proven, the party asserting the continued validity of the right bears the burden of showing an applicable excuse under RCW 90.14.140. *R.D. Merrill*, 137 Wn.2d at 140–41 (citing, among others, *Acquavella*, 131 Wn.2d at 758). Because Washington law favors beneficial use of water rights,⁴ exceptions are narrowly construed. *R.D. Merrill*, 137 Wn.2d at 140.

Continuous beneficial use is necessary to maintain one's water right. *See, e.g., Grimes*, 121 Wn.2d 459; *Acquavella*, 131 Wn.2d 746;

⁴ "A strong beneficial use requirement as a condition precedent to the continued ownership of a right to withdraw or divert water is essential to the orderly development of the state." RCW 90.14.020(3).

R.D. Merrill, 137 Wn.2d at 126. Relinquishment of a water right is simply a function of whether or not beneficial use has been consistent; intention to resume a discontinued use has no bearing on statutory relinquishment. See *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 784, 947 P.2d 732 (1997) (comparing relinquishment and abandonment); and II Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* 317 (1974). Once relinquished, the water left in the stream either becomes available for new water rights or becomes part of the supply to make existing junior rights fully satisfied. *R.D. Merrill*, 137 Wn.2d at 140; see also II Hutchins at 314.

The water code provides some exceptions for the loss of a water right due to nonuse. First, the code provides for a five year grace period, applicable to nonuse for any reason whatsoever, allowing resumption of a prior use within the five years. RCW 90.14.170 (“Any person . . . who voluntarily fails . . . to beneficially use all or any part of said right . . . for any period of five successive years . . . shall relinquish such right or portion thereof . . .”); see also RCW 90.14.180, .190. Next, the code contains no fewer than 19 exceptions to statutory relinquishment to excuse nonuse of water under certain circumstances. RCW 90.14.140. As exceptions, they are to be narrowly construed. *R.D. Merrill*, 137 Wn.2d at 140; see also *City of Union Gap v. Dep’t of Ecology*, 148 Wn. App. 519,

527, 195 P.3d 580 (2008). Because the system of prior appropriation depends upon relinquishment to provide for new appropriations and to satisfy junior rights over time, the failure to narrowly apply these exceptions would negatively impact existing water right holders as well as applicants for new water rights.

RCW 90.14.140(2)(c) provides the “determined future development” exception to relinquishment at issue in this appeal. The exception excuses 15 years of nonuse as follows:

[T]here shall be no relinquishment of any water right . . . claimed for a determined future development to take place . . . within fifteen years of . . . the most recent beneficial use of the water right

RCW 90.14.140(2)(c).

R.D. Merrill is the leading case construing this exception and it identified the prerequisites to the application of the determined future development exception. The Court required that a “fixed development plan” must be in place within five years of the last date of beneficial use. *R.D. Merrill*, 137 Wn.2d at 143. Next, the Court addressed the necessary scope of a proposed development, stating that the “obvious purpose” of RCW 90.14.140(2)(c) is to “avoid relinquishment *only where fixed development plans will take longer than five years to come to fruition.*” *Id.* (emphasis added). If determined future development plans could be

completed within five years, two conclusions would follow: (1) the statutory grace period would forgive any nonuse during the development period, and (2) there would be no need for the additional 10 years of excused nonuse under the determined future development exception. Thus, to give independent meaning to both the grace period and the exception, plans for future development must not only be fixed within five years from the last use of a water right; the plans must be for a development that will take longer than five years to execute, i.e., developments sufficiently large or complex in scope that they otherwise cannot be covered under the five-year grace period.

The Water Code does not define the phrase “determined future development,” leaving the Court to “give the term its plain and ordinary meaning ascertained from a standard dictionary.” *Am. Cont’l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). *See also Pacific Land Partners, LLC v. Dep’t of Ecology*, 150 Wn. App. 740, 758, 208 P.3d 586, review denied, 167 Wn.2d 1007, 220 P.3d 209 (2009) (confirming the phrase “determined future development” has no statutory definition and, consequently, supporting use of common dictionary meanings in its analysis). Development commonly means “the act or process of [growing or evolving]; growth; progress.” *Webster’s Encyclopedic Unabridged Dictionary of the English Language* 543 (new deluxe ed. 1996). In *Union*

Gap, this Court further clarified that the word “development” refers to “a land-use-type of development,” which “as used in this exception, refers to the development (or possible development) of land.” *Union Gap*, 148 Wn. App. at 530–31. “Future” commonly means “time that is to be or come hereafter. Something that will exist or happen in time to come.” *Webster’s Encyclopedic Unabridged Dictionary of the English Language* 779 (new deluxe ed. 1996).

In this case, the Hagemeyers purchased their land in the 1980s with the intention of residing on the property and continuing its use as pasture. That intention did not come to fruition until approximately nine years later, during which time no use was made of the irrigation water right appurtenant to the land. The trial court applied the RCW 90.14.140(2)(c) “determined future use” exemption on the basis that, during the period of nonuse, the Hagemeyers *planned* to resume the discontinued irrigation of their property. CP at 2842–43 (VRP (Feb. 6, 2004) at 9–10).

To construe an exception for determined future development to be satisfied by resumption of a discontinued use is contrary to the plain meaning of the statutory exception. By its plain statutory terms, the determined future development exception does not apply to resumption of a preexisting use of water. No growth or progress is necessary to simply resume a prior use of the water, in a fashion consistent with the prior land

use development⁵; such a practice constitutes delayed *maintenance* of a right developed in the *past*.

Further, applying the determined future development exception to the resumption of a previous use essentially duplicates the statutory grace period of five years in RCW 90.14.170, .180, and .190, and extends it to a 15-year period. Using the trial court's application of the exception, a water right could go unused for nearly 15 years so long as the holder maintained an intention to resume using the water right for the same purpose. Such an interpretation of RCW 90.14.140(2)(c) makes the five-year grace period superfluous. Courts interpret and construe statutes to give effect to all the language used, with no portions of the statute devoid of meaning or superfluous. *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (citing *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)).

In undertaking a plain language analysis, the Court must remain careful to avoid “unlikely, absurd or strained” results. *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005) (quoting *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987)). The phrase “determined future development” must mean something other than resumption of a

⁵ *Wirkkala v. Dep't of Ecology*, PCHB Nos. 94-171, -172, -173, -174 (Nov. 2, 1994); *Pacific Land Partners, LLC v. Dep't of Ecology*, PCHB No. 02-037 (May 9, 2005) (upheld on other grounds in *Pacific Land Partners, LLC*, 150 Wn. App. 740). See also *infra* Note 7.

discontinued use if this Court is to abide by statutory canons of construction. This Court should adhere to Supreme Court precedent and decline application of the determined future development exception to resuming plans that had already come to fruition in the past. The trial court's decision should be reversed.

C. The Hagemeiers Put No Evidence Into The Record Regarding The Condition Of Their Land Nor The Steps Necessary To Resume The Prior Irrigation

Even if the Court applies the determined future development exception to allow resumption of the pre-existing exercise of a water right, which it should not, the Hagemeiers put no evidence into the record regarding either the condition of their land or the steps necessary to resume the prior irrigation. In short, the Hagemeiers did not demonstrate that their circumstance equates to a determined *future* development.

Testimony indicates that prior to its purchase by the Hagemeiers in 1986, the place of use was already in productive irrigated agriculture, growing pasture grass and hay. CP at 2842 (VRP (Feb. 6, 2004) at 9). The Hagemeiers acknowledge that nine years of nonuse of water occurred (1987 through 1995). CP at 2843 (VRP (Feb. 6, 2004) at 10). In consequence, the trial court concluded that no irrigation took place on the Hagemeier property from 1986 until 1995, and that no other use was made of the water right during that period. CP at 797 (Supplemental Report of

the Court at 73). Mr. Hagemeyer's testimony attributes the cessation of irrigation to an employment-related move from the place of use.⁶ That his employment required him to move from the place of use, however, is not among the numerous exceptions contained in RCW 90.14.140. What Mr. Hagemeyer intended, and the transcript supports, was not "development" of his water right but resumption of a discontinued use upon return to the property at retirement.

Nevertheless, the trial court ruled *sua sponte* on behalf of the Hagemeyers that "land that has . . . sat idle for ten years . . . would certainly need development prior to being suitable for irrigation." CP at 479–80 (Memorandum Opinion at 24–25). This was error because nowhere does the record support this conclusion. Perhaps because the Hagemeyers did not assert this excuse, the record is without evidence to support its application. The Hagemeyers provided no evidence that "development" was planned for the "future." Rather, the Hagemeyers asserted the nonuse was attributable to an employment-related relocation.

⁶ Testimony of Clifford Hagemeyer:

Q And have you irrigated that land every year since then?

A No, because I was living on the coast from '87 till '95. Well, I bought it in '86 figuring we'd move out there, and then I got transferred with the outfit I was working for until '95. Then when I got down to '95 or [sic] they retired me, then I moved back to Yakima, and then we've been using it ever since.

Q Did anybody else do anything with it while you were gone?

A No, not to my knowledge.

CP at 2842–43 (VRP (Feb. 6, 2004) at 9–10).

To apply the determined future development exception on the Hagemeyers' behalf, the trial court assumed facts not in evidence.

The record contains no evidence, much less substantial evidence, on issues critical to proof of the exception's application, in particular to development of any sort. The record is bereft of evidence regarding the condition of the property or of the steps necessary to resume the prior irrigation. There is simply no evidence in the record that resuming irrigation on any defined scale would fulfill the "obvious purpose" of the exception for development plans that would necessarily take more than five years to implement. *R.D. Merrill*, 137 Wn.2d at 143.

This is not a matter on which the trial court can take judicial notice. Rules of Evidence ("ER") 201 Judicial Notice of Adjudicative Facts reads, in pertinent part, as follows:

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

ER 201(b). The condition of individual property can vary widely, as can the time it may take to make land productive again. Whether or not land will need a certain level of "development" is a fact-specific inquiry that is

not entirely determined by the amount of time it has been unirrigated.⁷ *Erickson v. Cook*, 67 Wash. 251, 257, 121 P. 825 (1912) (stating that “this court can *almost* take judicial notice of the fact that wild or uncleared land cannot be taken possession of by men of small means with powder and donkey engine.” (emphasis added)). Although in the criminal context, *State v. Payne*, 45 Wn. App. 528, 726 P.2d 997 (1986), explains the challenge of judicially noticing disputed facts: “This court has no means for evaluating or reviewing the . . . finding. Absent any record, we are required to conclude that it was error to find the victim particularly vulnerable because of her size.” *Payne*, 45 Wn. App. at 531. Moreover, “[f]or this court to assume facts in the record which could support a finding . . . would require impermissible speculation as to the trial court’s reasoning.” *Id.* at 531–32.

In fact, the trial court should have inferred that if any evidence were to have been provided, it would have been unfavorable to the

⁷ While decisions of the Pollution Control Hearings Board (PCHB) are not binding on this Court, they are persuasive authority because they are issued by the administrative tribunal that reviews appeals of Ecology decisions and has specialized expertise in Washington water law. Some decisions by the PCHB are instructive on this point. In *Wirrkala*, PCHB Nos. 94-171, -172, -173, -174, a family planned to transition operation of a farm and residence from father to son upon the son’s retirement. After a decade of nonuse, a few repairs were completed in short order and demonstrated no need for such an extended development period before irrigation could resume. The PCHB thus concluded that the resumption of irrigation, even with conversion to a new irrigation system, could occur within a year and was not within the scope of “development” appropriate for the determined future development exception. Similarly, in *Pacific Land Partners*, PCHB No. 02-037, at CL 15, the Board found that irrigated agriculture of raw land could have been put into place in less than five years and that RCW 90.14.140(2)(c) is intended to “accommodate projects that take longer than five years”

Hagemeiers. *See Pier 67, Inc. v. King Cy.*, 89 Wn.2d 379, 385–86, 573 P.2d 2 (1977) (failure to produce “relevant evidence which would properly be a part of a case [and that] is within the control of a party whose interests it would naturally be to produce it” leaves the finder of fact with only one inference: “that such evidence would be unfavorable to him.”). Instead, the trial court made an unsupported finding that the Hagemeier property “would certainly need development prior to being suitable for irrigation.” CP at 480 (Memorandum Opinion at 25).

This Court should not uphold the trial court’s unsupported factual conclusion. *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wn. App. 491, 513, 857 P.2d 283 (1993). The Hagemeiers failed to meet the burden of demonstrating an applicable exception for relinquishment and the trial court’s application of the determined future development exception was error. The trial court should be reversed.

VII. SUMMARY OF THE RESPONSE ARGUMENT

A. The Trial Court Erred In Limiting The United States’ Federal Reserved Water Right, And In Confirming A Stockwater Right To Off-Reservation Uses With A Priority Date Older Than The United States’ Treaty Right

Although the Ahtanum Creek area has been the subject of many lawsuits, this is the first in which quantification of the future rights of the

United States⁸ has been at issue. The standard for determining the future rights of an Indian agricultural reservation like the Yakama Reservation is: what amount of water is sufficient to irrigate the practicably irrigable acreage. That standard has not yet been applied to Ahtanum Creek reserved waters, and it should now be applied on remand of this case to the trial court. The trial court erred in holding that the United States' right should be limited to the amount needed to irrigate land which could be served by the 1915 irrigation system on the Yakama Reservation.

The trial court also erred in holding that the United States has no right to store water, no right to take water outside the irrigation season, and no right to take all the early irrigation season water that is not being used by off-reservation irrigators. The basis for the trial court's conclusion was a 1908 agreement between the United States and off-reservation irrigators. While that agreement is valid, nothing in that agreement, or the subsequent litigation construing it, limits the United States' federal reserved water right to that extent. Agreements with tribes should be construed to favor the Indians, and all rights not clearly granted by the tribe should be retained by them.

The trial court also erred in confirming a stockwater right for off-reservation uses with a priority date senior to the 1855 treaty right of the

⁸ The United States holds a federal reserved water right on behalf of the Yakama Nation.

Yakama Nation. There was no evidence to support such an early priority date.

B. Unused Tribal Reserved Rights May Allow For Use By Non-Indians Consistent With The State Water Code

Ahtanum Irrigation District (“AID”), the John Cox Ditch Company, and La Salle High School, *et al.* assert the validity of “Junior” water rights while at the same time the Yakama Nation asserts that the entirety of Ahtanum Creek was reserved for its use. Ecology agrees with both of these assertions.

At the creation of the Yakama Reservation, the entire creek was reserved in trust for the Yakama Nation, pending confirmation in a practicably irrigable acreage proceeding (*see* Section VIII.A.1 below). Nevertheless, the United States contractually committed to allow off-reservation use of Ahtanum Creek water in what is known as the “Code Agreement.”

The federal court upheld the validity of the Code Agreement and recognized water use off-reservation of that portion of the reserved right not beneficially used on-reservation, under two criteria. First, the off-reservation use must be pursuant to the state water code and second, it must be consistent with the Code Agreement limitations on quantities. *United States v. Ahtanum Irrig. Dist.*, 330 F.2d 897, 900 (9th Cir. 1964)

(“*Ahtanum II*”) (citing *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 335 (9th Cir. 1956) (“*Ahtanum I*”). Reserved rights are present perfected rights that cannot be lost due to nonuse whether or not put to full beneficial use. *Arizona v. California*, 373 U.S. 546, 600, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963) (“*Arizona I*”). Thus, water to which the United States and Yakama Nation are entitled may go unused by them without affecting retention of their superior right. When water is not used by the United States and Yakama Nation, the federal court recognized that others then have the opportunity to make beneficial use of this water consistent with state law.⁹

VIII. RESPONSE ARGUMENTS

A. **The Trial Court Erred In Determining That The *Ahtanum* Decree Quantified The United States’ Reserved Water Right For Irrigation And Limited Its Period Of Use**

Ecology supports the argument set out by the United States in Section I of the Argument in its Corrected Brief As Appellant and the argument set out by the Yakama Nation in Sections V.A and B of its Corrected Opening Brief.

⁹ *Ahtanum II*, 330 F.2d at 900 (“white settlers had water rights (necessarily acquired under local law) . . .”); *Id.* (“[S]o far as the rights of the [Northside] defendants were concerned, [they] arose under the laws of the State of Washington.”); *Id.* at 911–12.

1. This Court should remand this case for quantification of the United States' federal reserved water right by the practicably irrigable acreage standard.

The *Acquavella* adjudication¹⁰ is the first action in which the federal reserved rights of the United States in the Yakima River Basin have been actually adjudicated. State water rights in the area were all adjudicated in *In Re Water Rights in Ahtanum Creek*, 139 Wash. 84, 245 P. 758 (1926) (“*Achepohl*”), but the United States’ sovereign immunity prevented the state from joining the United States as a party at that time. It is only now, after passage of the McCarran Amendment¹¹ which waived sovereign immunity of the United States in general adjudications of water rights in state courts, that the United States could be joined to this state water adjudication.

The United States brought *Ahtanum I* in an attempt to invalidate the 1908 “Code Agreement,” in which W.H. Code, the Bureau of Indian Affairs’ Chief Engineer for the Indian Irrigation Service, had agreed that the water of Ahtanum Creek should be divided, 75% to the water users north of Ahtanum Creek, and 25% to the water users on the Yakama Reservation, south of the creek. The purpose of the suit was not to obtain a quantification of the full, future extent of the United States’ water rights.

¹⁰ *Dep’t of Ecology v. Acquavella*, Yakima County Superior Court No. 77-2-01484-5.

¹¹ 43 U.S.C. § 666.

Instead, the United States simply claimed a right to all the water of Ahtanum Creek. *United States v. Ahtanum Irrig. Dist.*, 124 F. Supp. 818, 823–24, 827 (1954), *rev'd on other grounds*, *Ahtanum I*, 236 F.2d 321.

The court in *Ahtanum I* held the Code Agreement was valid, but sought to limit any deleterious effects of the Agreement on the Yakama Nation's water rights. The court was concerned that the Code Agreement had improvidently reduced the federal reserved water rights of the United States, held in trust for the Yakama Nation. *Ahtanum I*, 236 F.2d at 337, 340. The complaint had alleged that enough water had been reserved for the Indians' future needs as well as present needs. *Id.* at 324. The present needs of the Indians were set at the acreage that could be irrigated with the 1915 irrigation system, about 5000 acres. *Id.* at 327. The court noted:

Third, if the rights reserved for the Indians by the Treaty were of the extent and size claimed by the United States, that is to say, rights to sufficient waters for the needs of the Indians as they might exist in the *future*, then we must of necessity consider the validity and force of the 1908 agreement, *for it is conceded that the present needs of the Indians are sufficient to require substantially the whole flow of the stream.*

Id. at 325 (emphasis added). The court went on to state: "It is obvious that the quantum is not measured by the use being made at the time the treaty reservation was made. The reservation was not merely for present but for future use." *Id.* at 326. The court then discussed its opinion in *Conrad*

Investment Co. v. United States, 161 F. 829 (9th Cir. 1908). In that case, the court awarded the Indians a present right of 1666.67 inches of water, but allowed for modification of the decree if the Indians' needs should increase in the future. *Conrad Inv. Co.*, 161 F. at 835. Similarly, the court in *Ahtanum I* stated :

It is plain from our decision in the *Conrad Inv. Co.* case, supra, that the paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation.

Ahtanum I, 236 F.2d at 327.

Although the United States sought to quiet title to all the flow of Ahtanum Creek, ultimately the court in *Ahtanum II* did not actually adjudicate individual rights. *Ahtanum II*, 330 F.2d at 911. The court merely quantified the individual rights of off-reservation water users so as to limit the amount they could take under the Code Agreement. However, the court stated,

We assumed that on remand of this case the defendants would by answer set forth their claimed rights to the use of water, how those rights were deraigned, and what lands they claimed the right to irrigate; it was plain that the only water rights which the court would be required to measure and ascertain would be the water rights of the specific individuals who entered into the 1908 agreement.

Id. at 900. The amount of water necessary for future uses of the United States was not quantified. That was unnecessary as far as requiring the court to decide the validity of the Code Agreement, because even the present needs of the United States were acknowledged to amount to all the water of Ahtanum Creek.

Therefore, although the appellate *Ahtanum* decisions upheld the validity of the Code Agreement, the court limited that Agreement's harmful effects to the Yakama Nation by limiting the water rights of North Side irrigators to only the amount of water used to irrigate in 1908 (or less if their use had decreased since 1908), and to a water duty that would promote efficient use of the water. The court explained that the off-reservation signatories to the Code Agreement and their successors were fortunate to get any water at all, as they would have gotten none in the absence of the Agreement. *Ahtanum I*, 236 F.2d at 340.

Nothing in the *Ahtanum* appellate opinions indicates that the court was trying to place limits on the Yakama Nation's use of water, beyond those imposed by the Code Agreement. The court in *Ahtanum I* stated that it would construe the Code Agreement "most strongly in favor of the Indians," which meant it "must be construed as reserving to the Indians, who previously owned substantially all of the waters, everything not clearly shown to have been granted." *Id.* at 340, 341. The court did note

that until the Nation could use all its water beneficially, the North Side users could use any excess. The court also noted that state courts must determine water rights *vis a vis* state water right holders. *Id.* at 340. There was no restriction on the Nation's use other than that the water must be used beneficially.

To believe that the *Ahtanum II* court was quantifying the Nation's water rights and limiting the Nation's future use to only what it could have used in 1915, one would have to assume that both the United States and the Ninth Circuit had inexplicably decided to ignore the practicably irrigated acreage standard for future use established by the United States Supreme Court a year earlier in *Arizona I*. There is no basis for making such an assumption.¹² This Court should reverse the trial court's decision on this issue, and remand the case for determination of the United States' reserved right under the practicably irrigable acreage standard.

¹² Similarly, in *Arizona v. California*, 460 U.S. 605, 635–36, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983) ("*Arizona II*"), the Court rejected an argument that a stipulation on future boundary disputes bound the states to accept extensions of reservation boundaries by the United States Secretary of the Interior. "In the first place, Article II(D)(5) was a stipulated provision; it is implausible to suggest that the states would have so meekly stipulated to *ex parte* secretarial determinations beyond the reach of judicial review." *Arizona II*, 460 U.S. at 636–37. Similarly, it is implausible here to assume the United States, in stipulating to the number of acres presently irrigable with a 1915 irrigation project to show that its rights were presently impaired, intended to renounce its claims to any other future lands capable of irrigation based on practicably irrigable acreage.

2. The federal reserved rights of the United States should not be limited to diversions in the irrigation season.

There is also no indication in the *Ahtanum* decisions that the United States' right to water for irrigation was limited to the irrigation season only, and only to the unstored natural flow of the river. To determine the practicably irrigable acreage, several factors must be evaluated: the availability of water, the cost of infrastructure to fully utilize that water, and whether the value of potential crops is greater than the cost of the infrastructure. *In Re General Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 101–06 (Wyo. 1988) (“*Big Horn*”). In this case, the limiting effect of the Code Agreement on the Nation's ability to irrigate with natural flow water at the beginning of the season means the Nation can maximize use of its reserved water right only by storing water in the off season.

It is immaterial to a decision on the practicably irrigable acreage whether the infrastructure to develop future lands, or funding for the infrastructure, is already in place. In this case, neither is. A federal reserved right may be based on a determination of practicably irrigable acreage without showing that the water has already been used. *Arizona I*, 373 U.S. at 600 (a water right is reserved as of the date of the treaty for water to irrigate the practicably irrigable acreage); *Ahtanum I*, 236 F.2d at

326. In that respect, quantification of a tribe's federal reserved rights in an adjudication is very different from quantification of a state based right, which must be based on actual beneficial use. *Acquavella*, 131 Wn.2d at 755. *Big Horn* held that the United States should not be required to build a storage project for future lands before a right could be affirmed for those lands.

The doctrine of reserved water rights entitles the Indians to a certain quantity of water. The requirement that they must first construct storage facilities to supply their entitlement flies in the face of the object of the reserved water right—a prior entitlement to the waters.

Big Horn, 753 P.2d at 112. It is not premature in this case for the trial court on remand to decide whether storage is a permissible element of the United States' reserved right claim, based on the infrastructure needed to produce profitable crops under the practicably irrigable acreage standard.

The practicably irrigable acreage and storage issues are intertwined with the issue of whether the Nation may use or store water outside the irrigation season. Both the Code Agreement and the *Ahtanum* case dealt only with irrigation season water. However, the "heart of the case" in *Ahtanum* was whether the Code Agreement was valid at all in limiting the reserved rights of the United States. *Ahtanum I*, 236 F.2d at 330–31. The *Ahtanum* court strictly construed the Code Agreement, as it should have, in order to limit the damage done to the Nation's federal reserved water

rights. Treaties or agreements with Indians are to be construed “in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.” *Tulee v. State*, 315 U.S. 681, 684–85, 62 S. Ct. 862, 86 L. Ed. 1115 (1942); *see also Ahtanum I*, 236 F.2d at 340.

In *Ahtanum I*, the court noted “the general principle that an agreement of the character of that executed in 1908 [the Code Agreement], must be construed as reserving to the Indians, who previously owned substantially all of the waters, everything not clearly shown to have been granted.” *Ahtanum I*, 236 F.2d at 341. It turns the *Ahtanum* case on its head to infer that because the Code Agreement dealt only with irrigation season water, the case stands for the proposition that the United States has no water rights in other seasons.

The Code Agreement made it difficult for the Nation to acquire the irrigation water it needs. It should not now be expansively construed to make that acquisition all but impossible. This Court should reverse the trial court on the issue of limiting the United States’ diversion rights to the

irrigation season, and hold that the United States has the right to take water outside the irrigation season to store it for later use.¹³

B. Even If The Federal Reserved Right Of The United States And Yakama Nation Is Limited To Water To Irrigate 4,107.61 Acres And To Water From April 1 To October 1, This Court Should Determine That The United States And Yakama Nation Have A Present Right To Store That Water

Ecology supports the argument set out by the United States in Section III of the Argument in its Corrected Brief As Appellant.

For the reasons set out in the preceding section, it is Ecology's position that this Court should determine that the United States' water right should be quantified based on practicably irrigable acreage, including a right to divert and store water whenever it can be beneficially used. However, if this Court disagrees and determines that the United States has a right to water to irrigate only 4,107.61 acres from only April 1 to October 1 each year, this Court should nevertheless determine that the United States has a right to store water it can capture during that period to irrigate those acres.

¹³ Ecology argued below that, while practicably irrigable acreage was the appropriate standard for quantifying the Nation's federal reserved rights, it was unclear whether the Nation had the right to take water outside of the irrigation season to store it for later use. Ecology raised this concern because it believed the North Side water users had a right to recharge their water delivery system outside of the irrigation season. The trial court has since ruled that the North Side users do not have such a right, and no one has appealed that ruling. CP at 4279-85 (Ecology's Brief in Response to the United States Brief in Support of Case in Chief: Reserved Rights Claims for the Ahtanum Creek, July 26, 1994).

This case is unusual in that the United States built an irrigation project to irrigate certain acres on the Yakama Reservation, but at the same time the United States through the Code Agreement limited the right of the Yakama Nation and its members to divert only 25% of the natural flow of Ahtanum Creek and its tributaries in the first three months of the irrigation season. Therefore, storage would be needed to provide water for the full number of acres to which the irrigation project could deliver water. US Ex. 113, *Water Availability Investigations*, at 12. If this Court disagrees that the United States should be allowed to prove a reserved right to all water in Ahtanum Creek (minus the Code Agreement rights of off-reservation water users), and limits the United States' right to only 4,107.61 acres, that decision necessarily determines the irrigable acres for which the United States will have a water right. There should thus be no need to determine the economic feasibility of providing storage to make the water available to irrigate 4,107.61 acres.

It would be a hollow award to allow the United States to irrigate 4,107.61 acres, however, without the storage right needed to provide water for more than 2,728.7 acres. Consequently, this Court should grant the United States a right to store water from April 1 to October 1 even if this Court limits the United States' water right more than the Code Agreement has already done.

C. The United States Should Be Awarded A Right To All Water In Ahtanum Creek From April 1 To April 14, To The Extent It Can Use The Water Beneficially, Except For The Water Awarded To John Cox Ditch Company Under The Pope Decree

Ecology supports the argument set out by the United States in Section V of the Argument in its Corrected Brief As Appellant and the argument set out by the Yakama Nation in Section V.C of the its Corrected Opening Brief.

Ahtanum II grants the North Side holders of water rights under the “Pope Decree,” the decree in *Ahtanum II*, a right to use 75% of the water of Ahtanum Creek from the start of the irrigation season, and the United States the right to the remaining 25%, plus all the excess not used by the North Side Pope Decree right holders. Thus, it is implicit in the *Ahtanum II* ruling that the Code Agreement reserved everything to the Indians that was not clearly granted to others. *Ahtanum I*, 236 F.2d at 341. The trial court in *Acquavella* has determined that the irrigation season begins April 1 for John Cox Ditch Company, and April 15 for the remaining Pope Decree North Side water right holders. Therefore, the United States should be awarded the right to use all the water from April 1 to April 14, to the extent it can beneficially use the water, except for the water which John Cox is allowed to take under the Pope Decree.

The trial court denied the Yakama Nation's request for this award. The trial court also held that some additional state rights that do not derive directly from the Pope Decree, including those for Trail's End, Gerald and Helen Sauer, and Karen Klingele, should be granted a right to use domestic water that was not addressed by either the Code Agreement or the Pope Decree. CP at 525 (Memorandum Opinion at 70). This again is contrary to the *Ahtanum I* court's direction that the Code Agreement reserved to the Indians everything not clearly granted to non-Indians. *Ahtanum I*, 236 F.2d at 341. Because the court in *Ahtanum* assumed that the United States would have had the right to all the water in Ahtanum Creek absent the Code Agreement, a grant to the Code Agreement signatories should be strictly construed, and no additional state law domestic water rights should be granted which are superior to those of the United States.

In sum, this Court should determine that the United States and the Yakama Nation have the right to use all the water from April 1 to April 14, to the extent the Nation can beneficially use the water, except for the water which John Cox is allowed to take under the Pope Decree. As to water that the United States cannot beneficially use, Ecology will address

the rights of junior users¹⁴ with valid state water rights in Section VIII.E of this brief, below.

D. The Trial Court Erred In Awarding North Side Parties A Stockwater Right With A Priority Date Senior To The United States' Irrigation Rights Rather Than One Based Upon The Record

Ecology supports the argument set out by the Yakama Nation in Section V.G of its Corrected Opening Brief and asks that this Court remand for entry of facts regarding priority dates.

In a general adjudication of water rights, each party claiming a right has the burden of proving the validity, extent, and priority date for that right. *Ahtanum Irrig. Dist.*, 124 F. Supp. at 827 n.13. In most other subbasins in *Acquavella*, the parties stipulated to a priority date for stockwatering. Here, the Yakama Nation objected, so no stipulation could be entered. In the absence of a stipulation, the trial court should have evaluated the evidence in the record for each claimant and should not have inferred a pre-1855 priority date. *Pier 67*, 89 Wn.2d at 385. Nevertheless, the trial court confirmed a stockwater right for the subbasin older in priority than the United States' irrigation right.

¹⁴ Junior users would include both those who were not successors to the Code Agreement signatories, such as Trail's End, Gerald and Helen Sauer, and Karen Klingele, as well as those who are, such as Ahtanum Irrigation District and John Cox Irrigation District.

The case should be remanded for entry of facts regarding priority dates for stockwatering.

E. Water Not Beneficially Used By The United States On Behalf Of The Yakama Nation Should Be Allocated Under State Water Law

A dispute at the heart of several issues raised by Appellants AID, John Cox Ditch Company, and La Salle High School, *et al.* relate to whether non-Indian individuals may make use of “excess” water on lands outside of the reservation boundaries.¹⁵ In principle, Ecology agrees with these Appellants that “excess” water can be used. Ecology believes that certain conditions, as described more fully below, pertain to the use of “excess” water consistent with the *Ahtanum II* federal court decision.

The term “excess water” as used by the federal court in the *Ahtanum II* litigation has a particular meaning differing from the way in which that term has been used elsewhere in federal water law. *See, e.g., Holly v. Confederated Tribes & Bands of the Yakima Nation*, 655 F. Supp. 557, 558 (1985) (“‘Excess’ waters are those stream waters, to be distinguished from ground water, which are over and above those used to satisfy *Winters* rights.”). Under *Ahtanum II*, the phrase includes waters

¹⁵ Brief of Appellant Ahtanum Irrigation District (“AID Opening Brief”) at 18–27 (Junior Rights/Excess Water); Brief of Appellant/Respondent John Cox Ditch Company (“John Cox Opening Brief”) at 21–24 (Section IV.B); Corrected Brief of Appellants La Salle High School, Donald and Sylvia Brule, Jerome Durnil, and Albert Lantrip at 26–27 (Section D).

that would be necessary to satisfy tribal reserved rights, *if the reserved rights were actually exercised*. *Ahtanum II*, 330 F.2d at 915.

In Subbasin 23, the entirety of Ahtanum Creek has been reserved by the United States in trust for the Yakama Nation, pending confirmation in a practicable irrigable acreage evaluation as discussed above in Section VIII.A.1. *Id.* at 899 (“[A]ll of the waters of Ahtanum Creek, or so much thereof as could be beneficially used on the Indian Reservation were, by virtue of the treaty, reserved for use by the Indian tribe upon their lands.” (citing *Arizona I*, 373 U.S. at 600)). This reservation of water occurred at the time the Yakama Nation’s reservation was created and subsequently the United States contractually allowed for the use of these reserved waters by non-tribal members in the Code Agreement as described above. *See* Section VIII.A.1.

However, as argued already, the Yakama Nation need not always make full beneficial use of its reserved waters. Reserved rights are present perfected rights at the time of the reservation’s creation and are not dependent upon the state-based concept of beneficial use for creation and continued validity. *Arizona I*, 373 U.S. at 600; *see Ahtanum I*, 236 F.2d at 327–28; *see also* Section VIII.A.1, *supra*, and John Cox Opening Brief at 18 (“[T]he *Ahtanum I* Court ruled the 1855 Treaty with the Yakamas reserved for the reservation all water from Ahtanum Creek which could be

beneficially used on the reservation.”). Consequently, the *Ahtanum I* court recognized this potentially “unused” or “excess” reserved water may be utilized by others via the state-based priority system, so long as that water remains unused:

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. And 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.

Ahtanum II, 330 F.2d at 900 (citing *Ahtanum I*, 236 F.2d at 335).

This “unused” reserved water the federal court termed “excess” water. The United States, on behalf of the Yakama Nation, has no obligation to forego full beneficial use in order that “excess” water remains available for others’ use. AID Opening Brief at 28 (“The right to use excess water is much like the right to use [foreign] return flow. It can be used if it is present but there can be no right to require it to be present.”); see also *United States v. Anderson*, 736 F.2d 1358, 1365 (1984) (“Any permits issued by the state would be limited to excess water. If those permits represent rights that may be empty, so be it.”). But, during those years when the full reservation quantities are not beneficially used, others may make use of the water consistent with the state’s water code. *Ahtanum II*, 330 F.2d at 900, 911–12, *supra*.

It is this set of rights to make use of excess water that have been termed “Junior” water rights in this subbasin and that have been the subject of briefing by AID, John Cox Ditch Company, and La Salle High School, *et al.* Ecology agrees with these parties to the extent that the federal court decreed that the unused reserved right quantities can be used off-reservation through state law and under certain conditions described in detail below.

Generally speaking, the federal court found that the Ahtanum Creek flow diminished so significantly by July 10 that water no longer actually flowed in portions of the creek bed. *Ahtanum II*, 330 F.2d at 906. As a consequence, livestock-based agriculture was the norm in the valley with hay fields irrigated by early spring water and harvested in summer. *Id.* Consistent with these natural time periods, the federal court identified categories of potentially unused or “excess” water and authorized its use accordingly when interpreting the Code agreement:

From the beginning of each irrigation season . . . to and including the tenth day of July of each such year

[W]hen the said measured [stream] flow exceeds 62.59 cubic feet per second defendants [Northside users] shall have no right to the excess, except in subordination to the higher rights of the plaintiff.

To plaintiff [United States on behalf of the Yakama Nation] . . . when that natural flow as so measured exceeds

62.59 cubic feet per second . . . to the extent that the said water can be put to a beneficial use.

....

[On July 11th of each year and thereafter], 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.

Thus, the United States, on behalf of the Yakama Nation, may make beneficial use of any amount of Ahtanum Creek flow above 62.59 cfs during the first part of the irrigation season, ending July 10. If so used, there is no “excess” water available for the North Side users during this time of the year. However, to the extent that the United States does not make beneficial use of water over and above 62.59 cfs, the federal court has authorized the “excess” water to be used consistent with state law.

From July 11 onward the United States, on behalf of the Yakama Nation, has the right to fully exercise the reserved right without limitation by contract rights granted via the Code Agreement “to the extent that the said water can be put to a beneficial use.” *Id.* Again, the court is authorizing non-reservation use of water by non-tribal members off-reservation when the United States, on behalf of the Yakama Nation, does not make full beneficial use of its reserved right. However, because the Yakama Nation’s reserved right is not based upon state law principles of

beneficial use and the federal court allocated the entire stream to the Nation, there is no basis for the Nation's withdrawals to conclude upon the expiration of an October 1 irrigation season. Thus, this category of potentially available excess water extends from July 11 through resumption of the irrigation season the following calendar year, based on state law.

This allocation by the federal court is consistent with the *Ahtanum* court's repeated statement.

The rights of the white settlers to the use of the waters were subordinate to the rights of the Indians, but they were not nonexistent. 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. And 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.

Ahtanum II, 330 F.2d at 900 (quoting *Ahtanum I*, 236 F.2d at 335).

The authority of non-reserved right users to use the "excess" water is limited by state-based authorization to make use of the water. *Id.* at 900 ("white settlers had water rights (necessarily acquired under local law)"); *id.* ("[S]o far as the rights of the [Northside] defendants were concerned, [they] arose under the laws of the State of Washington."). In most cases, this will be a certificate from the *Achepohl* decree that has been continuously beneficially used, as confirmed by the trial court.

However, it would also include more junior rights acquired under state law after the *Achepohl* adjudication. *Achepohl*, 139 Wash. 84.

To summarize: the federal court allocated the full quantity of Ahtanum Creek to the United States, in trust for the Yakama Nation. The federal court then upheld the Code Agreement, which gave the off-reservation signatories the first right to 75% of the flow during the irrigation season. The court construed the Code Agreement favorably to the Indians, and gave them the right to use everything not clearly granted to others. Finally, the federal court confirmed that anyone wishing to use “unused” or “excess” water not used by the Yakama Nation must abide by state law parameters when exercising their ability to make use of the unused federal reserved water. This Court should allow water, not beneficially used by the United States on behalf of the Yakama Nation, to be allocated under state water law consistent with the federal court’s rulings.

IX. CONCLUSION

Ecology respectfully requests the Court to overturn the trial court’s ruling with respect to the Hagemeyers’ water claim, hold that the determined future development exception does not apply to excuse their nonuse of water, and hold that they not be confirmed a water right in the *Acquavella* adjudication. Further, Ecology requests this Court to overturn

the trial court on the other issues to which Ecology responds herein, and to remand this matter to the trial court for further proceedings as necessary.

RESPECTFULLY SUBMITTED this 20 day of May, 2010.

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B:

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,

v.

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.

CERTIFICATE OF
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 20th day of May, 2010, I caused to be served Respondent/Cross-Appellant State of Washington, Department of Ecology's Opening/Response Brief in the above-captioned matter upon the parties herein as indicated below:

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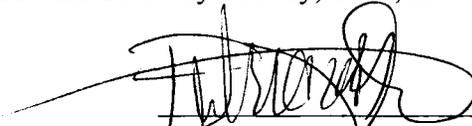
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of May, 2010, in Olympia, Washington.



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