

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF YAKIMA

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KIM M. E.
EXT. CLERK
SUPERIOR COURT
YAKIMA 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

No. 77-2-01484-5

THE STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

JAMES J. ACQUAVELLA, et al.,

Defendants.

Order on Motions for
Reconsideration to the
Memorandum Opinion and
Conditional Final Order
Subbasin No. 23 (Ahtanum)

Motions for Reconsideration were filed by several parties. The Court held a hearing on May 14, 2009, to hear arguments on those Motions.

Rulings

Department of Ecology

Ecology's Motion for Reconsideration related to the determined future development exception to relinquishment for Clifford and Doris Hagemier and Hiram H. and Sharon P. White is DENIED. Its request for clarification on the Hagemier place of use is GRANTED, and Parcel No. 171210-14424 is added to the place of use on the Hagemier water right.

Ecology's Motion for Reconsideration related to on-reservation jurisdiction is GRANTED. The Court's *Memorandum Opinion* is amended beginning at page 72 on

2,141

line 28 through page 73, line 2 to read as follows: The Court affirms its earlier rulings that the U.S. Bureau of Indian Affairs and/or the Yakama Nation are authorized to regulate water use within the Yakama Reservation. The language on page 3, line 1 of the Conditional Final Order is amended to be consistent with the Subbasin No. 29 CFO, and shall read as follows: As to the use of water adjudicated for Subbasin No. 23 claimants, the State is provided authority to regulate outside of the Yakama Reservation, and the Bureau of Indian Affairs and/or the Yakama Nation are authorized to regulate water use within the Reservation.

Ahtanum Irrigation District, Court Claim No. 02398

Ahtanum Irrigation District's (AID) Motion for Reconsideration is denied in part and granted in part. Its first issue on "Maximum Southside Diversion" is granted and page two of the Conditional Final Order, at line 19½ is amended to add the words "to the extent that said water can be put to beneficial use" at the end of the sentence.

AID's motion on the annual quantity calculation is DENIED. The Court has consistently used the same formula for computing the annual quantity of water in the Report of the Court and the Supplemental Report of the Court, as well as the recent *Memorandum Opinion* with no objections being raised. The formula used was $0.01 \text{ cfs} \times 1.98 \times 87 \text{ days} = 1.72 \text{ acre-feet per year per acre}$. For each water right confirmed to water right holders north of Ahtanum Creek, 1.72 was multiplied by the number of acres irrigated. The Court will continue to use that formula in its calculations.

AID's Motion on "maximum excess water calculation" is also DENIED. The Court in discussing excess water in its *Memorandum Opinion* on page 4 intended to include a statement that the annual quantity for excess water will be based on it being

available for 30 days. The Court concludes that would be the number of days excess water might reasonably be available. The annual quantity for excess water on each water right is based on the authorized instantaneous quantity (0.01 cfs per acre) times 1.98 times 30 days.

AID's motions regarding individual water rights are GRANTED as follows:

- a. Robert Benner – the source of water is changed to Bachelor Creek.
- b. James Decoto – the water right is changed to authorize the diversion of 0.38 cfs, 65.33 acre-feet per year for the irrigation of 37.98 acres.
- c. Robert and Sean Wiley – the number of acres is changed to 15.85 acres, and the annual quantity of water is changed to 27.26 acre-feet per year.
- d. James and Elizabeth Amer – the number of acres is changed to 2.41 acres, and the annual quantity is changed to 4.15 acre-feet per year.
- e. Leanne and George Amer – the number of acres is changed to 2.41 acres, and the annual quantity is changed to 4.15 acre-feet per year.

Johncox Ditch Company, Claim No. 1693:

Johncox Ditch Company (Johncox) argued five issues in its Motion for Reconsideration.

1. Johncox asks that the Court include a statement in its 2009 *Memorandum Opinion* denying its request for a right to use of excess water after July 10 for irrigation purposes and the basis for that denial. The Court GRANTS Johncox's request. The following ruling is hereby included:

The Court holds that *Ahtanum II* controls regarding diversionary uses post-July 10 through the end of the irrigation season and prohibits a diversion of water to the north side during this period. As such, no water can be diverted by Johncox during this period. See *Memorandum Opinion RE: Ahtanum Creek Legal Issues*, October

8, 2003, @14-16. See also Supplemental Report, p. 183, lines 8-10.

Johncox's request for a right to divert excess water after July 10 is DENIED.

2. Johncox requests that the typographical error in Footnote 6 of its water right in the Conditional Final Order be corrected. The Court GRANTS Johncox's request. Footnote 6 as corrected shall read in its entirety as follows:

DOE-136 indicates that the SW¼NW¼ of Section 8 is part of the Johncox claim in U.S. v. AID. JDC-1A shows that land is outside Johncox's boundaries, so it is not included in the place of use.

3. Johncox requests that the Court amend the quantification of its right to excess water during the irrigation season. Johncox wants the quantity increased to 1,309.8 acre-feet based on a continuous diversion of its authorized quantity of 6.55 cfs throughout the 101-day irrigation season. Johncox points to the Court's ruling in the *Memorandum Opinion* authorizing a maximum of 0.02 cfs (certificated amount). The Court DENIES Johncox's request. The Court determined that excess water would be available during the early spring. *Memorandum Opinion*, p. 3, lines 14 through p. 4, line 10. Although not specifically set forth, as can be seen by the confirmed water rights, the Court relied upon a 30 day availability for water users north of Ahtanum Creek. For Johncox, the Court relied upon 45 days, as Johncox's season begins on April 1, not April 15. See 2009 *Memorandum Opinion* @43, lines 1-10½. That results in 584 acre-feet per year of excess water.

The *Memorandum Opinion* has a quantity based on 45 days, which is different than the quantity in the *Conditional Final Order*, which is based on 30 days. There is a typographical error in the *Conditional Final Order* and the quantity should be and is confirmed at 584 acre-feet per year based on excess water being available a maximum of 45 days.

4. The place of use for Johncox was primarily established through two pieces of evidence. JCD-1A is a Metsker map with the company's boundaries on it. DOE 136, *U.S. v. AID*, Findings and Conclusions, January 30, 1962, contains the legal description for the lands within Johncox Ditch Company. For lands in Section 11, T. 12 N., R. 16 E.W.M. there is conflicting evidence. Clarification was sought as set forth in Footnote 7. Johncox provided clarification in its Motion. The Yakama Nation argues that any correction of DOE 136 needs to go to the Federal court for resolution. Ecology argues that the motion was not timely filed.

The Court's function is to quantify and confirm water rights within the scope of this Adjudication. To do so, it must interpret the applicable Federal decision. The Court concludes that the issue was timely filed and requires immediate resolution.

JCD-1A indicates that the N $\frac{1}{2}$ and the SW $\frac{1}{4}$ of Section 11 are owned by Herke and within the boundaries of Johncox. There are 480 acres within the N $\frac{1}{2}$ and the SW $\frac{1}{4}$. DOE 136 contains conflicting information. It indicates that the Johncox place of use includes the N $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 11 and 480 acres. However, the N $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 11 would total only 80 acres. Based on the totality of the evidence and for purposes of this water right, the Court finds that the N $\frac{1}{2}$ and the SW $\frac{1}{4}$ of Section 11 is the proper place of use. Johncox further clarified its service area within Section 11 to the N $\frac{1}{2}$ and the SW $\frac{1}{4}$ of Section 11, lying south of Cottonwood Canyon Road and totals 453.9 acres.

The Court finds that John Herke owns the N $\frac{1}{2}$ and the SW $\frac{1}{4}$ of Section 11, lying south of Cottonwood Canyon Road; these parcels total approximately 453.9 acres, and are within the boundaries of Johncox Ditch Company. The Court also finds that Johncox's water right remains limited to no more than 659.4 acres, the currently authorized acreage.

The Court modifies Johncox's water right for Section 11 lands to read as follows: Section 11 - N½ and the SW¼ of Section 11. Footnote 7 will read: Lying south of Cottonwood Canyon Road, 453.9 acres.

5. Johncox also seeks to have a beneficial use statement included in both the Yakama Nation's July 11 through October 1 water right and the Special Terms of Use provision. The Court DENIES Johncox's request to include it in the Yakama Nation's water right. The Court GRANTS Johncox's request to include it in the Special Terms of Use section. The *Memorandum Opinion* @71, lines 1-3 and @75, lines 15-17, as well as in the *Conditional Final Order* @III(3) and in the Schedule of Water Rights for the Yakama Nation are modified as follows:

All waters not used on north side Pope Decree parcels shall become available for use on the reservation lands. 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 Treaty instream flow right, to the extent that said water can be put to beneficial use.

Yakama Nation, Claim No. 2276:

The Yakama Nation asks that the Court reconsider its decision to include "Non-Indian Allottee Successors" in their water right. The United States concurs.

The Court set forth its rationale for inclusion of the Non-Indian Allottee Successors in the *Memorandum Opinion* at p. 60, lines 27½ through p.63, line 9. The Court DENIES the Yakama Nation's request. Many of the Nation's arguments remain unchanged. The Court recognizes there is a unique fiduciary trust responsibility between the United States and the Yakama Nation. The Court is not imposing a similar trust responsibility on the United States for the Non-Indian Allottee Successors.

However, to further clarify this ruling, separate water rights with 1855 priority dates

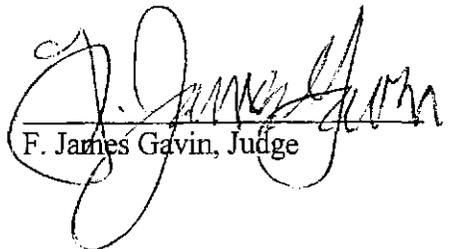
were confirmed through this adjudication and set forth in the CFO for 992.39 acres, and that acreage is NOT included in the Nation's confirmed acreage of 4,107.61 acres. See *Memorandum Opinion @60*, lines 19-24.

Gary E. and Margaret Ann King, Claim No. 01917:

The water right described on page 219, line 19-½ through p. 220, line 9, of the Supplemental Report was inadvertently left out of the schedule of rights attached to the Conditional Final Order. That 1855 right is appurtenant to a portion of Parcel #181212-32404. The Court orders that this right be included in the CFO and is attached to this Order.

This resolves the Motions for Reconsiderations.

DATED 21 of May, 2009.


F. James Gavin, Judge

Attachment: King Water Right

CLAIMANT NAME: Gary E. King
& Margaret Ann King

COURT CLAIM NO. 01917

Source: Ahtanum Creek

Use: Irrigation of 4.15 acres

Period of Use: April 1 through October 1

Quantity: 0.052 cfs; 18.26 acre-feet per year

Priority Date: June 9, 1855

Point of Diversion: 100 feet north and 300 feet west of the east quarter corner of Section 14, being within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, T. 12 N., R. 16 E.W.M.

Place of Use: That portion of the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, T. 12 N., R. 18 E.W.M., described as follows: Beginning at the northeast corner of the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12; thence south 500 feet; thence west 360 feet; thence north 500 feet; thence east 360 feet to the point of beginning (Portion of Parcel #181212-32404).

Limitations of Use: This water right is a portion of the proratable 25% of the Ahtanum Creek natural flow that is available from April 15 through July 10 for use on lands within the Yakama Reservation.