WASHINGTON SUPREME COURT BRINGS YAKIMA RIVER BASIN ADJUDICATION "ONE STEP CLOSER TO FINALITY"

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Dep't of Ecology v. Acquavella, et al., Washington Supreme Court No. 86211-7 (March 7, 2013)

On March 7, 2013, the Washington Supreme Court issued the latest appellate decision in the long-running adjudication of surface water rights in the Yakima River Basin. The Court's ruling addresses the Ahtanum Creek Subbasin, the final subbasin to be considered in the adjudication. Key elements of the Court's opinion involve the quantification of irrigable land on the Yakama Indian Reservation, the Yakama Indian Nation's right to store water, and application of the "determined future development" exemption from relinquishment. Because the Court remanded for further proceedings, the Yakima River adjudication – originally begun in 1977 – may continue for several more years.

Geographic and Historical Context

The Yakima River is located in south-central Washington, beginning near the crest of the Cascade Mountain Range between Snoqualmie Pass and Mt. Daniel and flowing southeasterly 215 miles to its confluence with the Columbia River near Richland, Washington. It drains an area of over 6000 square miles. Sidney P. Ottem, *The General Adjudication of the Yakima River: Tributaries for the Twenty-First Century and a Changing Climate*, 23 J. ENVTL. L. & LITIG. 275, 279 (2008). With seven major tributaries and numerous smaller creeks and springs that contribute to its natural flow, the Yakima River has an average annual discharge of approximately 3700 cfs (2.7 million acre-feet per year) near its confluence with the Columbia River. *Id*.

Ahtanum Creek, a major tributary of the Yakima River, is the location of some of the earliest-recorded agricultural diversions in the basin, undertaken to irrigate lands at a Catholic Mission. *Id.* at 280. Agriculture – accompanied by private ditch systems – expanded in the Yakima Basin through the 1800's. *Id*.

In 1855, the indigenous people of the area, now known as the Yakama Nation, signed a treaty with the United States creating the Yakama Reservation. In *Dep't of Ecology v. Yakima*

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Reservation Irrigation Dist., 121 Wn.2d 257, 850 P.2d 1306 (1993) ("*Acquavella* II"), the court recognized the purpose of the Yakama Reservation as agriculture-based activities and fishing. *Id*. at 266. The people of the Yakama Nation "maintain a strong relationship with the river that includes, but goes well beyond, its economic capability. In addition to providing the Nation with salmon to harvest and water for agricultural production on reservation lands, the river is also a source of great spiritual power." Ottem, *supra*, at 282.

The Yakima basin was dramatically altered by the federal Reclamation Act of 1902, 43 U.S.C. § 371, which authorized large federal irrigation projects to "reclaim" arid and semi-arid lands. *Dep't of Ecology v. Acquavella*, 131 Wn.2d 746, 750, 935 P.2d 595 (1997) ("*Acquavella* III"). In 1905, the Washington Legislature allowed the United States to acquire lands and water rights for reclamation projects (*see* RCW chapter 90.40), and the United States began to withdraw all unappropriated waters in the basin. *Id*. Eventually, the U.S. Bureau of Reclamation developed the Yakima Reclamation Project, consisting of reservoirs supplying irrigation water to over 500,000 acres. Ottem, *supra*, at 282.

The Yakima Adjudication

In October 1977, the Department of Ecology filed an action in superior court to seek a general adjudication of the surface water in the Yakima River Basin. *Dep't of Ecology v. Acquavella*, 100 Wn.2d 651, 652, 674 P.2d 160 (1983) ("*Acquavella* I"). A general adjudication, pursuant to RCW 90.03, is a process whereby all those claiming the right to use waters of a river are joined in a single action to determine water rights and priorities between claimants. *Id*. The Yakima adjudication involves thousands of parties. *Id*. at 653. In 1989, the superior court split the case into four "procedural pathways" to determine, in the following order, (1) federal reserved rights for Indian claims; (2) federal reserved rights for non-Indian claims, (3) state-based rights of over 25 "major" claimants; and (4) state-based rights for other claimants, by subbasin. *Acquavella* II, 121 Wn.2d at 262.

Several appellate cases have ensued. *Acquavella* I resolved issues regarding service of process. *Acquavella* II involved quantities of water reserved for the Yakama Nation. *Acquavella* III involved the superior court's allocation to the Yakima-Tieton Irrigation District. In *Dep't of Ecology v. Acquavella*, 112 Wn. App. 729, 51 P.3d 800 (2002) ("*Acquavella* IV"), the court of appeals addressed the *res judicata* effect of a prior adjudication of a tributary.

The Court's Decision in *Acquavella* V

The Ahtanum Creek Subbasin, known as "Subbasin Number 23" of the Yakima River Basin, is the final subbasin to be considered in the adjudication. Proceedings concerning this subbasin began in approximately 1993, culminating in an order issued in May 2009.

The Supreme Court explained that although this appears to fall into the final procedural pathway (state-based rights for other claimants by subbasin), "in fact the Ahtanum Creek

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Subbasin is 'extraordinary' among the subbasins of the Yakima River Basin." *Dep't of Ecology v. Acquavella*, Washington Supreme Court No. 86211-7, slip op. ("*Acquavella* V") at 5. Ahtanum Creek forms the northern boundary of the Yakama Indian Reservation, and the subbasin is home to major claimants including the Yakama Nation, the Ahtanum Irrigation District, and the John Cox Ditch Company as well as individual water right claimants. Individual claims and major claimants' rights were therefore consolidated for consideration in one proceeding. *Id*.

The Court began by summarizing the various prior decisions adjudicating and apportioning rights to water in Ahtanum Creek: the 1855 Treaty creating the Yakama Reservation; a 1908 agreement (the "Code Agreement") apportioning the natural flow of the creek between the Nation and users to the north of the creek; the 1926 adjudication of rights of water users situated north of the creek (*State v. Achepohl*, 139 Wash. 84, 245 P. 758 (1926)); the Ninth Circuit decision in *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956) ("*Ahtanum* I"), upholding the validity of the Code Agreement but limiting the extent of northside users' rights; and the Ninth Circuit decision in *United States v. Ahtanum Irrigation Dist.*, 330 F.2d 897 (9th Cir. 1964) ("*Ahtanum* II" or "Pope Decree"), making specific awards dividing the waters of Ahtanum Creek between the Yakama Reservation and the other users. *Acquavella* V at 10-15.

As the Court observed, synthesizing these prior decisions is "no small task." *Id*. at 10. All the claims before the Court in *Acquavella* V, although unrelated in fact, required the Court to "decide what the federal *Ahtanum* litigation accomplished." *Id*. at 27.

The following is a summary of the key issues decided by the Court.

Prior federal adjudication of rights

The Court affirmed the trial court's reliance on the federal *Ahtanum* litigation as a starting point for this adjudication. Although it began as a lawsuit to invalidate the 1908 Code Agreement, the federal *Ahtanum* litigation ultimately adjudicated the individual rights of water users on the north side of Ahtanum Creek. Accordingly, the trial court properly required parties to show they or their predecessors in interest filed an answer in the *Ahtanum* litigation in order to have a right confirmed in this adjudication. *Acquavella* V at 27-30.

Yakama Reservation's practicably irrigable acreage

The Court disagreed with the trial court's determination of the practicably irrigable acreage ("PIA") on the Yakama Reservation. Based on a 1957 pretrial order in the *Ahtanum* litigation, the superior court had concluded that the federal district court had preclusively quantified the PIA for the Reservation, and arrived at a PIA of approximately 4,100 acres after subtracting non-Indian fee land. The United States and the Yakama Nation argued that the PIA quantification is still undetermined, and that the correct PIA is approximately 6,380 acres.

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The 1957 *Ahtanum* pretrial order relied on by the superior court set forth as an "agreed fact" merely that the United States claimed approximately 5,100 acres of irrigable land. This did not amount to a finding of fact: "Nowhere in the *Ahtanum* federal district court proceedings was there a finding of fact as to the reservation's practicably irrigable acreage. Hence, it is evident that proceeding did not quantify the acreage." *Acquavella* V at 35. The Court held it was error for the superior court not to have considered the United States' evidence of practicably irrigable acreage, and remanded for a determination of the PIA for the Yakama Reservation. *Id*. at 30-36.

Yakama Reservation storage rights

The superior court had ruled that the United States' "request for a potential future storage right" for the Yakama Reservation from April to October was premature. The United States appealed this ruling, contending that it is asking for a right to store water "it already has a right to divert for use on acres it already has a right to irrigate." *Acquavella* V at 37. The Court held it was not premature to grant a storage right for the Yakama Reservation, and remanded for the superior court to conduct fact finding on the question of the Reservation's storage needs as part of its PIA determination. *Id*. at 36-37.

The superior court had also ruled that *Ahtanum* I and II precluded any storage right for the Reservation from October to April. Here as well, the Court disagreed, holding that the Pope Decree does not foreclose a storage right outside the irrigation season. The extent of this storage right must also be considered on remand as part of the PIA determination. *Id*. at 37-38.

Rights to "excess" water

The Court held that the superior court properly concluded that as a matter of law water "in excess of that needed to satisfy all confirmed water rights both on and off the reservation and any water needed to satisfy the Yakama Nation's minimum instream flow right for fish" could be available for qualifying northside parties. The Yakama Nation argued that there is no excess water as a matter of law because the Nation's treaty-reserved rights require that all water not specifically granted to the northside parties reverts back to the reservation. The Nation also argued that because there is insufficient water in Ahtanum Creek to satisfy even the needs of the Reservation, there is no basis to confirm any right to excess water for northside parties.

The Court held that the Pope Decree "altered the traditional scheme of treaty-reserved rights in that it granted excess water to the reservation *to the extent it can be put to beneficial use.*" *Acquavella* V at 39 (emphasis in original). The Court also rejected the Nation's arguments about insufficient water, citing cases recognizing the irony that in a stream adjudication insufficient supply does not prevent a court from confirming rights: "The qualifying Northside parties may hold the right regardless of whether it will be fulfilled." The Court affirmed all the superior court's rulings as to "excess" water, including various limits imposed on the exercise of those rights. *Id*. at 38-47.

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"Determined future development" exemption from relinquishment

The Court reversed the superior court's ruling confirming a water right to the individual claimants Clifford and Doris Hagemeier, who bought irrigated land in 1986 intending to live on it and use it as pasture. Career obligations "kept them from carrying out their plans for nearly nine years," during which time no use was made of the land. Ecology had argued that the Hagemeiers relinquished their irrigation right through a continuous period of nonuse, but the superior court ruled that land that had sat idle "would certainly need development prior to being suitable for irrigation." *Id*. at 49. The Supreme Court disagreed, holding that the Hagemeiers' plan to resume irrigation of land after a lengthy period of nonuse was not sufficient to support the "determined future development" exemption from relinquishment: "Nothing in Clifford Hagemeier's testimony indicates that the Hagemeiers took any steps toward 'development,' even if development is considered as an intent to resume irrigation during the nine years the land sat idle." *Id*.

From the facts outlined by the Court, this appears to be a rather unremarkable application of the Washington relinquishment statute and the "determined future development" exemption set forth in RCW 90.14.140(2)(c). However, based on the timing of the Hagemeiers' nonuse of their irrigation right, one could speculate that they believed at the time that nonuse of water was allowed under an entirely different relinquishment excuse: the "operation of legal proceedings" excuse in RCW 90.14.140(1)(d). Such an assumption would have been consistent with preliminary rulings by the superior court in *Acquavella* and with a decision by the Pollution Control Hearings Board involving nonuse during an adjudication (*Attwood v. Ecology*, PCHB No. 82-58, 1983 WL 197279 (1983)). However, in 1999 – well after the Hagemeiers had resumed irrigation – the Supreme Court overturned *Attwood*, announcing in *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 141-42, 969 P.2d 458 (1999), that the "operation of legal proceedings" excuse applies only where the legal proceedings prevent use of water. The Hagemeiers' predicament illustrates one hazard of an adjudication process that stretches over decades while the law continues to evolve.

Conclusion and Implications

Concluding its opinion by commending the trial court and the parties "for their diligent work over the many years they have lived with this case," the Court stated that its decision "advances this adjudication one step closer to finality." *Acquavella* V at 56. The end may be one step closer, but it is not yet in sight. With the remand for determination of practicably irrigable acreage and storage rights for the Yakama Reservation, it appears that recent predictions of the imminent conclusion of the Yakima River Basin adjudication may have been premature.

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