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In re Yakima River Drainage Basin, 296 P.3d 835 (Wash. 2013)

WASHINGTON

In re Yakima River Drainage Basin, 296 P.3d 835 (Wash. 2013) (holding, in a dispute between the Yakima Nation and non-tribal landowners over the adjudication of Yakima River Basin water rights, (i) the Yakima Nation's practicably irrigated acreage needed to be re-calculated; (ii) the Yakima Nation had a right to store water in the Yakima River; (iii) non-tribal users had rights to excess water, within certain limitations; and (iv) the future development exception should narrowly applied).

The Yakima River Basin ("Basin") has been the subject of several cases and agreements, dating back to the 1855 Treaty between the United States and the Yakima Nation ("Nation"), which created the Yakima Reservation. Under the well-known *Winters Doctrine*, reservation of land by the federal government for the creation of an Indian Reservation is generally accompanied by an implied water right sufficient in quantity to meet all present and future water needs of tribal members on the reservation. In 1908, the Bureau of Indian Affairs (on behalf of the Nation) and the US Secretary of the Interior entered into the so-called "Code Agreement," which apportioned the waters of Ahtanum Creek. Under the Code Agreement, the Nation received twenty-five percent of the natural flow of the Creek and the non-tribal Northside users received seventy-five percent of the flow.

Beginning in 1977, Washington has endeavored to complete a basin-wide adjudication of all water rights in the Basin. The adjudication culminated in the current conflict between the United States, the Nation, the Washington Department of Ecology ("DOE"), Ahtanum Irrigation District ("AID"), John Cox Ditch Company, the Washington Department of Natural Resources ("DNR"), and several individual water users. The parties, as appellants and cross-appellants before the Supreme Court of Washington, brought various challenges to the Yakima County Superior Court's ("trial court") final order determining the parties' respective water rights in the Basin. The Washington Court of Appeals transferred the case to the Court for direct review.

The Court considered four major issues on appeal: (i) whether various cases and agreements prior to, and since, 1977 effectively determined the Northside users' water rights and/or the Nation's practicably irrigable acreage - which is the measure of water necessary to irrigate all the irrigable acreage on a reservation; (ii) whether non-Nation water users had a right to excess water; (iii) whether the Nation had a right to storage of water; and (iv) whether the trial court correctly applied the future use exception.

First, the Court decided the threshold question of whether previous litigation in the Yakima River Basin determined the terms of Northside users' water rights. The Court held the *United States v. Ahtanum Irr. Dist.* litigation in 1956 was an adjudication of the water rights for the Northside users, and, therefore, the Court need not adjudicate those rights again. After settling this threshold question, the Court moved on to the question of what practicably irrigable acreage the Nation held. The Court reversed the trial court's determination regarding the Nation's irrigable acreage on the grounds the trial court relied on old documents that were approximate claims rather than findings of

fact. As a result, the Court remanded the issue of the quantification of the Nation's practicably irrigable acreage.

Next, the Court addressed the question of whether previous agreements or cases provided a right to the Nation for water storage in the Yakima River. The Court held a plain language reading of the Pope Decree, the most recent federal court opinion on the Yakima River Basin, granted such a right to the Nation. The Court remanded that issue, as well, to the trial court to include a storage right in its calculations of the Nation's irrigable acreage.

The Court then turned to the question of whether the Northside users had a right to take in any excess water from the Yakima River after the Nation received its share of the water. The Court upheld the trial court's ruling granting excess water to qualifying Northside users, stating their right to excess water existed regardless of whether or not there would, in reality, ever be excess water.

The Court also upheld the limitations the trial court placed on excess water rights. Based on its reading of the Pope Decree, the Court held Northside users only have excess water rights until July 10th of each year. Additionally, the Pope Decree imposed a time limit of either thirty or forty-five days, during which the Northside user could collect excess water. The Court upheld the trial court's ruling validating the forty-five day period because the trial court based its decision on a sufficient amount of evidence, including ten years of water flow data that indicated when there was usually excess water. The Court, however, refused to extend an allowance of excess water rights to junior rights users, which are those users not recognized by the Pope Decree. The Court reasoned that entities not party to the Code Agreement were not included in the Pope Decree and, as such, do not have a place in the allocation of water rights for the Yakima River Basin.

After settling the issues of water use, the Court turned to the question of how to correctly apply the "future development exception." The Court reversed the trial court on this issue, which had found that the resumption of irrigation fit within the definition of the exception. The Court held the trial court had applied the exception too broadly. The Court further held the exception applied narrowly to those instances in which steps toward actual development within a defined span of time are satisfied. Merely resuming irrigation does not suffice.

Accordingly, the Court remanded the case to the trial court for further factual findings on the Nation's practicably irrigable acreage and excess water rights; upheld the Northside users' rights to excess water, within certain limitations; and reversed the trial court's determination on an individual Northside user's future development excuse for nonuse of its water rights.

Shannon Love

INTERNATIONAL

NEW ZEALAND

New Zealand Māori Council v. Attorney General, SC 98/2012 [2013] NZSC 6 (Supreme Court of New Zealand) (holding (i) the partial privatization