ARTICLES

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The General Adjudication of the Yakima River: Tributaries for the Twenty-First Century and a Changing Climate

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> *Westerners are ambivalent about water because they've never seen what it can create except havoc and mud.*[1]

The Yakima River Basin adjudication, the most comprehensive and ambitious stream adjudication undertaken in Washington, will soon be reduced to final decree after three decades of litigation.[2] This decree will result in confirmation of some three thousand water rights affecting several thousand water users in the Yakima Basin.[3] In the course of becoming the longest-running case in Washington legal history, this adjudication required the trial court to frequently consider issues of first impression. Naturally, the Yakima River Basin adjudication's imprint on the landscape of water law is significant and will forever change how stream adjudications are

1 GRETEL EHRLICH, THE SOLACE OF OPEN SPACES 78 (1986).

2 A draft Proposed Final Decree is currently before the Court.

3 *See* State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 6 (Wash. Super. Ct. Oct. 14, 1993) (Order Granting Partial Declaratory/Summary Judgment and for Entry of Final Judgment Pursuant to CR54(b)).

perceived and how they proceed.[4] In making its mark, the path taken by this adjudication was rarely the least resistant. Shaped by the outdated and complex history of water law, as well as the needs of a changing society, the way was not always obvious and turned on itself many times. Often, there was more mud and havoc to navigate than clear water.

The effect of a changing climate on old geography provides an opportunity to hold well-honed fixtures up to streams of new thought and thereby determine whether the status quo will erode or continue to stand. *Acquavella*, a court process used to prioritize and define the uses of surface water in the Yakima Basin, taught us much about the law and process applicable to the quantification of water rights, provided the opportunity to ascertain whether the existing model represents a preferred method of operation, and established sound legal practices for determining water rights in the twenty-first century. As we approach a climate in flux and a wide-scale modification of hydrologic patterns, the need for certainty in water use is more critical then ever. This need seems particularly evident as it appears that water availability will be impacted on a regional level and could result in areas in drastic need of supply looking to other regions that appear to have abundant supply. Before any decisions are made to artificially redirect longstanding hydrologic patterns within the United States, demand on the resource should be carefully documented in a fair and open process. Assuming that solutions and institutional responses will be identified, the minimum this generation owes to its successors are blueprints of the problems. Stream adjudications, generally creatures of state law, have long been the compass rose for such endeavors.

The following material summarizes and provides context for *Acquavella's* major rulings and attempts to aid those who find themselves in water litigation by providing a case study and a practice aid. The Article concludes by making a case for developing new interest and devoting resources toward pursuing adjudications on a West-wide, if not nationwide, basis in light of

4 The influence of *Acquavella* is already being observed as legislation has been introduced in the Washington legislature that adopts much of the model developed by the State Department of Ecology and the Yakima County Superior Court during the course of the proceeding.

the uncertainty of water supply that will occur as a result of climate change.

I
THE YAKIMA RIVER: WHAT IT IS AND WHAT IT DOES

The Yakima River watershed in south-central Washington drains an area of about 6155 square miles, nearly ten percent of the state of Washington.[5] The Yakima River begins near the crest of the Cascade Mountains between Snoqualmie Pass and Mount Daniel and flows primarily in a southeasterly direction for 215 miles to its confluence with the Columbia River near Richland.[6] A number of large tributaries flow into the Yakima, including the Naches, Tieton, Teanaway, Wenas, Ahtanum, and Cowiche.[7] Some of these rivers have been previously individually adjudicated. Numerous other small creeks and springs are tributary to the Yakima and provide significant contributions to the river's natural flow.[8] The Yakima River average annual discharge is approximately 3700 cubic feet per second (2.7 million acre-feet per year) near the confluence with the Columbia River at Kiona and 2500 cubic feet per second (1.8 million acre-feet per year) near the City of Yakima.[9]

Precipitation in the region, in regard to both quantity and seasonality, greatly affects the use and capacity of the river. Annual precipitation decreases from 108 and 92 inches at Stampede (elevation 3958 feet) and Snoqualmie (elevation 3004 feet) Passes, respectively, to 22 inches at Cle Elum (elevation 1920 feet), approximately 28 miles from Snoqualmie Pass.[10] Twenty miles farther downstream, at the City of Ellensburg (elevation 1727 feet), precipitation decreases to nine annual

5 *See* BUREAU OF RECLAMATION, U.S. DEP'T OF INTERIOR, INTERIM COMPREHENSIVE BASIN OPERATING PLAN FOR THE YAKIMA PROJECT WASHINGTON 2-1 (2002), *available at* http://www.usbr.gov/pn/programs/yrbwep/pdf/IOP14.pdf.

6 *See id.*

7 *See id.*

8 *Id.*

9 YAKIMA COUNTY PUB. SERVS. SURFACE WATER DIV., UPPER YAKIMA RIVER COMPREHENSIVE FLOOD HAZARD MANAGEMENT PLAN 2-1 (2007), *available at* http://www.yakimacounty.us/publicservices/SWMP/Chapter%202.pdf.

10 Western Regional Climate Center, Climate of Washington, http://www.wrcc.dri.edu/narratives/WASHINGTON.htm (last visited Jan. 3, 2009).

inches.[11] Approximately seventy-five percent of the precipitation falls in the period from October through March.[12] Rainfall in July and August accounts for only five percent of the annual total.[13]

Despite the lack of dependable and timely precipitation throughout the region, the Yakima Basin's unique geography affords outstanding agricultural opportunities.[14] To the west of the basin is a large water source, created by the impact of the Cascade Mountains, capable of supplying a continuous flow of water to generally level basins topped by relatively deep layers of fine, silty, highly fertile volcanic soils.[15] In addition, the region boasts a fairly long growing season.[16]

Some of the earliest agricultural water diversions took place in order to irrigate lands near a Yakima River tributary, Ahtanum Creek, at a Catholic Mission.[17] Additional ditches were soon constructed for irrigation of grain, berries, and gardens.[18] In 1881, farmers began raising alfalfa, which was considered the "great foundation crop" and led to development of more expansive ditch systems.[19] By the 1890s, farmers began to realize that irrigation enabled them to successfully grow apples, pears, and various vegetables. This knowledge led to development of even larger, though still private, ditches.[20] Great "paper projects" were undertaken with plans to irrigate all the lands between the Rattlesnake Mountains and the Columbia River, as well as with expectations of boats traveling the Yakima.[21]

11 *Id.*

12 *Id.*

13 *Id.*

14 1 W.D. LYMAN, HISTORY OF THE YAKIMA VALLEY 347 (1919) ("[T]he Yakimans might call their orchards and gardens the gift of the Cascade Mountains.").

15 *See id.* at 38.

16 Elbert E. Miller & Richard M. Highsmith, Jr., *Geography of the Fruit Industry of Yakima Valley, Washington*, 25 ECON. GEOGRAPHY 285, 286 (1949).

17 State v. Achepol, 245 P. 758, 759 (Wash. 1926).

18 1 LYMAN, *supra* note 14, at 353 (describing that the Nelson Ditch and Schanno Ditch were constructed in 1867 and 1874 respectively and were appropriations from the Naches River, one of the Yakima's major tributaries).

19 *Id.*

20 *Id.* at 357.

21 *Id.* at 354 (describing projects known as Yakima Improvement and Irrigation Company and the "Ledbetter scheme").

However, these privately financed projects failed, at least in part due to the over-appropriation of river flows,[22] and it became clear that further development would require the financial backing and planning of the federal government.[23]

Help came by way of the Reclamation Service (now the Bureau of Reclamation) pursuant to the provisions set forth in the Reclamation Act of 1902.[24] Construction of facilities to store spring runoff and ditches to convey water to lands not riparian to the Yakima River or its tributaries could only be achieved at great cost and engineering expertise.[25] The Reclamation Act excepted certain public lands from entry if such lands were susceptible to irrigation.[26] Reclamation projects were originally funded from proceeds of public land sales.[27]

Shortly after the passage of the Reclamation Act, representatives from the Bureau of Reclamation (BOR) began investigating the Yakima Basin to determine the practicability of establishing a project in the area.[28] The Secretary of the Interior set forth several conditions that had to be met in order for the federal project to occur.[29] Settlement of existing claimed water rights was likely the most important of these conditions. Through documents called "limiting agreements," over fifty entities claiming diversionary rights limited themselves to a maximum monthly diversion.[30] These agreements indicated that all of the low-water flow of the Yakima River and its tributaries had been appropriated and that storage reservoirs would need to

22 *Id.* at 358 (stating it was customary under state law to make a filing before beginning any construction work and filings typically requested amounts far in excess of need and many filings were only speculative, and as a result, "the low water flow was many times over appropriated").

23 *Id.*

24 Reclamation and Irrigation of Lands by Federal Government (McCarran Amendment), 43 U.S.C. §§ 371–660e (2006).

25 *See* 1 LYMAN, *supra* note 14, at 352–53.

26 43 U.S.C. § 432.

27 *Id.* § 391.

28 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 4 (Wash. Super. Ct. June 17, 1993) (Memorandum Opinion re: Yakima Reservation Irrigation District) [hereinafter YRID Opinion].

29 *Id.* at 13.

30 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 2–3 (Wash. Super. Ct. June 22, 1993) (Memorandum Opinion: Limiting Agreements) [hereinafter Limiting Agreements].

be built in order to accomplish additional irrigation.[31] In addition, Washington enacted the requisite state legislation to allow the United States to "withdraw" the remaining unappropriated waters for storage and later release.[32]

After entering into the limiting agreements and withdrawing, the BOR began constructing reservoirs.[33] The six reservoirs eventually constructed had a total usable storage capacity of 1.07 million acre-feet, enough water to support approximately two million households of four people for one year, and allowed development of the Yakima Reclamation Project (Yakima Project or Project), which consists of the Sunnyside Division, Yakima-Tieton Division, Kittitas Division, Roza Division, and the Kennewick Division.[34] In addition, the Wapato Irrigation Project, a subsidiary of the Yakima Project, receives water from the storage facilities.[35] In total, these seven project areas, including the Storage Division, serve over five hundred thousand acres.[36]

The river (including its tributaries) is more than a workhorse, however. The indigenous people of the area, known as the Yakama Nation (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[37] and water for agricultural production on reservation lands, the river is also a source of great spiritual power.[38] In

31 *Id.* at 3.

32 WASH. REV. CODE § 90.40.030 (2008). This section provides that if a project is certified "feasible" by the Secretary of the Interior, then the waters necessary to accomplish that project are withdrawn from appropriation for four years. This withdrawal can be extended and was so until 1951 for the Yakima Project. The withdrawal was reinstated in 1981.

33 BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, C.R. LENTZ REVIEW: YAKIMA PROJECT WATER RIGHTS & RELATED DATA 3 (1974) [hereinafter LENTZ] (stating the Bureau received the funds necessary to begin reservoir construction March 27, 1906).

34 *See* Bureau of Reclamation, U.S. Dep't of the Interior, Yakima Project, http://www.usbr.gov/dataweb/html/yakima.html (last visited Jan. 3, 2009).

35 *Id.*

36 Brief of Respondent at 6 n.8, State Dep't of Ecology v. Acquavella, 674 P.2d 160 (Wash. 1983) (No. 48892-4).

37 *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 667–68 (1979) (analyzing this relationship).

38 *Id.* at 665–66.

regard to the adjudication, the first concern for rights and uses of the Yakima River Basin system dates back to the treaty between the Yakama Nation and the United States, signed on June 9, 1855. This is one of the so-called "Steven's Treaties," which reserved to the Yakama Nation the right to take fish at "usual and accustomed" locations.[39]

In recent times, the river supports a vibrant recreational use. Throughout the country, the Yakima River is recognized as a blue ribbon trout fishery and provides river guides and fishing equipment shops with a burgeoning market.[40] During the hot summer, when temperatures typically exceed one hundred degrees Fahrenheit, local citizens descend on the river with various floating devices.[41] In the late summer, releases from one of the upriver dams on the Tieton River provide a fast-moving, high-volume flow of water that attracts whitewater enthusiasts from across the country.[42]

The Yakima area is best known for the tremendous agriculture produce that is grown in the basin and shipped worldwide. Total agricultural production in the Yakima Basin is consistently valued at over one billion dollars annually.[43] To accomplish this production of nearly twenty thousand dollars of revenue per acre, farmers and orchardists operate in reliance on

39 *Id.*; *see* Treaty with the Yakama, U.S.-Yakama Nation, art. 3, June 9, 1855, 12 Stat. 951.

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Id.

40 Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869, 932 (1997).

41 Susan Phinney, *Rafting the Yakima a Great Way for Novices to Get Their Feet Wet*, SEATTLE POST-INTELLIGENCER, Aug. 10, 2000, *available at* http://seattlepi.nwsource.com/getaways/081000/raft10.html.

42 Adriana Janovich, *Flip-Flop Turns Tieton River into Whitewater Heaven*, YAKIMA HERALD-REPUBLIC (Wash.), Sept. 6, 2008, *available at* http://www.yakimaherald.com/stories/7387.

43 CLIMATE LEADERSHIP INITIATIVE, UNIV. OF OR., IMPACTS OF CLIMATE CHANGE ON WASHINGTON'S ECONOMY 48 (2006), *available at* http://www.ecy.wa.gov/pubs/0701010.pdf.

the water supplied by the Yakima River and its tributaries.[44] The federal government, through the BOR, has primary responsibility for ensuring the continued supply of adequate water to satisfy the needs of water users in the Yakima River Basin.[45]

However, due to the increasing number of years in which water supplies have been insufficient to satisfy instream and diversionary needs, groups of local citizens have banded together at various junctures to consider different ideas for identifying water for new basin interests. For example, a private group of concerned individuals came together in 1994 to create the Yakima River Watershed Council.[46] This group's mission was to build community consensus to provide more water for the various interests in the basin and present that consensus in a planning document to be adopted by local government.[47] Similarly, in the early 2000s, a group of private interests joined together to approach Congress about the development of Black Rock Reservoir.[48] Black Rock would pump water from the Columbia River during certain periods and store up to 1.6 million acre-feet in the Yakima River Basin.[49] The Black Rock location is considerably downstream from other storage facilities in the Yakima Basin and thereby would provide the BOR flexibility in managing basin flows.[50] The Black Rock group

44 DONALD KRUG & MARIAM LANKOANDE, WASH. STATE DEP'T OF NATURAL RESOURCES, ECONOMIC ANALYSIS: FOREST PRACTICES RULE MAKING AFFECTING NORTHERN SPOTTED OWL CONSERVATION 7 (2005), http://www.dnr.wa.gov/Publications/fp_rulemkg_nsop_econ.pdf.

45 *See generally*, LENTZ, *supra* note 33.

46 *See* Yakima Basin Water Resources Agency, Summary of Watershed Planning in the Yakima Basin, http://www.yakimacounty.us/YBWRA/Summary.htm (last visited Jan. 3, 2009). The Council consists of a fifty-member board of directors headed by a chief executive officer. *Id.* The board of directors is comprised of a group of divergent interests including representatives of agriculture, environmentalists, Yakama Indian Nation, food processing, and elected local officials. *Id.* In addition, the Council receives technical advice from state and federal agency officials. *Id.*

47 *Id.*

48 *See* Yakima Basin Storage Alliance Home Page, http://www.ybsa.org (last visited Jan. 3, 2009).

49 Black Rock Specifications, Yakima Basin Storage Alliance, http://www.ybsa.org/specification.php (last visited Jan. 3, 2009).

50 *See* Yakima Basin Storage Alliance, *supra* note 48.

estimates an economic increase of nearly eight billion dollars as a result of increased storage and water-use opportunities.[51]

II
FORMATION AND PROCEDURE OF THE ADJUDICATION

The purpose of stream adjudications, such as *Acquavella*, is to determine *all* existing water rights within the drainage basin and correlate, in terms of priority, each right as to all others.[52] This process is often referred to as a unique form of quiet title action that has developed as a part of state water rights law in each of the western states.[53] Potential enlargements of existing rights and establishments of new rights are not within the jurisdiction of a court adjudicating a river basin.[54]

From January 31, 1945, until the ending stages of the *Acquavella* adjudication, the storage, distribution, and diversion of a great proportion of the surface waters of the Yakima River Basin were operated pursuant to a judgment entered in *Kittitas Reclamation District v. Sunnyside Valley Irrigation District* (1945 Consent Judgment).[55] Parties to that suit received either a proratable or non-proratable water right.[56] A proratable water right maintains a priority date of May 10, 1905, the date BOR reserved all of the then unappropriated water for development of future project lands.[57] Prorated rights share the misery proportionately when there is inadequate supply to meet all basin water requirements. A non-proratable water right carries a priority date older then May 10, 1905, and would not be subject to cutback during times of inadequate supply,[58] unless the water

51 Black Rock Economic Analysis, Yakima Basin Storage Alliance, http://www.ybsa.org/economics.php (last visited Jan. 3, 2009).

52 *See* State Dep't of Ecology v. Acquavella, 674 P.2d 160, 161 (Wash. 1983); Wilson v. Angelo, 28 P.2d 276, 278 (Wash. 1934); *see also* JOSEPH L. SAX, ET AL., LEGAL CONTROL OF WATER RESOURCES 144 (4th ed. 2006).

53 1 ROBERT EMMET CLARK ET AL., WATERS AND WATER RIGHTS § 20 (3d ed. 1988); FRANK J. TRELEASE & GEORGE A. GOULD, WATER LAW 178 (4th ed. 1986).

54 *See Wilson*, 28 P.2d at 278.

55 Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., No. 21 (E.D. Wash. Jan. 31, 1945) (order granting consent decree).

56 Donald H. Bond, *Indian Reserved Water Rights—Acquavella*, *in* WATER LAW IN TRANSITION 2–3 (1993) (citing *Kittitas Reclamation Dist.*, No. 21, at 27–29).

57 *Id.*

58 *See id.*

supply was so limited that proratable rights were completely shut off. Thankfully, that catastrophe has never occurred.

In the spring of 1977, meteorologists predicted a drought of record proportions for the Yakima Basin.[59] Projections indicated that irrigation districts holding proratable water rights would receive only six percent (eventually raised to fifteen percent) of their normal allocation.[60] A number of these districts went to federal court asking for a modification of the 1945 Consent Judgment to make all water rights proratable, including those previously demarcated non-proratable.[61] The Yakama Indian Nation sought to intervene to claim water based on their reserved rights.[62] District Judge Neill suggested a state court general adjudication.[63] During this time frame, various tribes also began asserting their long-dormant treaty rights.[64] In accordance with its trust obligation to the tribes, the federal government joined in these actions.[65]

After determining that the public would be served by a determination of rights to the waters of the Yakima River watershed,[66] the Washington Department of Ecology (Ecology) adopted Judge Neill's suggestion and filed a statement of facts together with a summons listing the 5300 known claimants.[67] The statement of facts contained the impetus for initiating the adjudication.[68] First, 1977 was a year of severe drought in the

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.* The Yakama Nation requested nearly all of the then-available water, either for irrigation purposes or for instream flows as part of its treaty fishing rights. Subsequent to this action, it sought to have these treaty rights quantified in U.S. District Court.

63 *Id.*

64 John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams* (pt. 2), 9 U. DENV. WATER L. REV. 299, 321–31 (2006).

65 *See id.* at 325–31.

66 WASH. REV. CODE § 90.03.110 (2008). This section provides that Ecology, on its own initiative or upon the request of a water right claimant, may petition the superior court of the county where the water is located for a determination of the rights thereto. Ecology filed its petition on October 12, 1977.

67 Summons, State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Oct. 12, 1977).

68 *Id.* at 52.

Yakima Basin,[69] requiring Ecology to take numerous enforcement actions as to water right claims.[70] Second, the Water Resources Act of 1971 directed Ecology to develop and implement a comprehensive water resources program that would allow the Agency to make informed decisions regarding future water allocations.[71] Ecology deemed an accurate inventory of water rights as necessary to accomplish enforcement duties and carry out this statutory mandate.[72]

A. Jurisdiction

Shortly after the initial filing in state court, the United States petitioned the United States District Court for the Eastern District of Washington for removal of the adjudication to federal court.[73] Ecology, along with many water right claimants, disagreed with removal and petitioned for a remand to state superior court.[74] After the filing of numerous briefs, a decision on January 15, 1979, established jurisdiction in Yakima County Superior Court.[75]

Jurisdiction concerns in water disputes are not new, particularly when they involve unquantified, federally reserved water rights. However, federal interests in the Yakima Basin encompass not only the United States' obligation as trustee for the Yakama Nation's reserved rights but also the underlying

69 Press Release, Wash. State Dep't of Ecology, Yakima River Basin Water Enhancement Project Begins (Apr. 17, 1995), http://www.ecy.wa.gov/news/1995news/95-055.html.

70 Statement of Facts at 55, State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Oct. 11, 1977).

71 *Id.* at 56.

72 *See* Appellant's Opening Brief and Response Brief to Yakima-Tieton's, et al. Appeal at 2–3, State Dep't of Ecology v. Acquavella (*Acquavella III*), 935 P.2d 595 (Wash. 1997) (No. 63401-7).

73 Petition for Removal, Wash. Dep't of Ecology v. Acquavella, No. C-77-347 (E.D. Wash. Oct. 12, 1977) (seeking federal jurisdiction pursuant to 28 U.S.C. § 1441 (2006)).

74 Supplemental Memorandum of Department of Ecology in Support of Motion for Protective Order, Wash. Dep't of Ecology v. Acquavella, No. C-77-347 (E.D. Wash. Mar. 9, 1978).

75 Wash. Dep't of Ecology v. Acquavella, No. C-77-347 (E.D. Wash. Jan. 15, 1979) (Memorandum and Order) [hereinafter Memorandum and Order].

federal nature of the project.[76] As pointed out above, the federal government funds and operates the Yakima River Project, which affects nearly all of the water in the basin.[77] Furthermore, the district court considered the rights of twenty-five entities in its 1945 judgment.[78] Although determination of these rights amounted to ninety percent of the river's flow, the rights defined only applied to parties to the case.[79]

Despite these important federal interests, Federal District Court Judge Neill determined the *Acquavella* filing in state court was removed "improvidently and without jurisdiction" and therefore should be remanded to Yakima County Superior Court.[80] The federal judge based his ruling on a congressional policy favoring state courts for carrying out general water adjudications as expressed in the *Colorado River Water Conservation District v. United States*[81] opinion and the McCarran Amendment.[82] As allowed by section (a) of the removal statute, the McCarran Amendment provides for jurisdiction in state court when an adjudication proceeding is running concurrently with the federal court proceeding.[83]

76 *See* State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 2, 7–25 (Wash. Super. Ct. May 29, 1990) (Memorandum Opinion re: Motions for Partial Summary Judgment) [hereinafter Motions for Partial Summary Judgment].

77 *See* State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 3–5 (Wash. Super. Ct. Nov. 3, 1995) (Report of the Court Concerning the Water Rights for the Yakama Indian Nation, Volume 25) [hereinafter Report of YIN].

78 Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., No. 21 (E.D. Wash. Jan. 31, 1945).

79 *Id.* at 29–30.

80 Memorandum and Order, *supra* note 75, at 2 (quoting 28 U.S.C. § 1447 (1964), *amended by* 28 U.S.C. § 1447 (1988)).

81 *Id.* (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)).

82 Wash. Dep't of Ecology v. Acquavella, No. C-77-347, at 1 (E.D. Wash. Jan. 12, 1979) (Order of Remand to State Court).

83 28 U.S.C. § 1441 (2006); *see also Colorado River Water Conservation Dist.*, 424 U.S. at 818. The Supreme Court stated that concurrent federal proceedings risk piecemeal adjudication of water rights and thereby frustrate an adjudication's underlying purpose. Additionally, the Court cited to an absence of any proceedings in federal court, the extensive involvement of state water rights, and the great distance from the source of the dispute to the location of the federal court.

B. Notice

In a general water adjudication, joinder is required of "all known persons claiming the right" to divert water in the specified watershed.[84] From this vague statutory directive, Ecology determined which persons and entities to name as defendants in the adjudication (and thereafter serve) from two sources of records.[85] The first source from which defendants were determined was a listing of all water rights permits or certificates issued by Ecology (or its predecessors) under the 1917 Water Code.[86] The second source was the "Water Right Claims Registry,"[87] which contains all water right claims filed pursuant to the Water Right Claims Registration Act of 1969.[88] This Act requires filings for all claims except those "based on the authority of a permit or certificate issued by the department of ecology or one of its predecessors."[89] Typically, this language translates to include claims based on the riparian doctrine and prior appropriation diversions occurring prior to 1917 under state law.

Notice was also limited by certain rulings of the trial court judge. The court ordered that the adjudication apply to claims to water rights to divert, withdraw, or otherwise make use of surface waters of the Yakima River and its tributaries, including all diversionary and instream water rights.[90] The court further determined that "all irrigation districts, water distribution districts, canal companies, ditch companies, cities, towns, and other governmental entities organized pursuant to the statutes of the United States or the State of Washington" could file claims on behalf of all water users within the distribution entities'

84 WASH. REV. CODE § 90.03.120 (2008).

85 Brief of Respondent, *supra* note 36, at 12.

86 *Id.* at 13; *see generally*, WASH. REV. CODE §§ 90.03.240, .250–.611. After the enactment of the 1917 act, water rights could only be obtained through the permit/certification scheme set forth in the statute.

87 WASH. REV. CODE § 90.14.111.

88 Brief of Respondent, *supra* note 36, at 13; *see* WASH. REV. CODE §§ 90.14.031–.121.

89 WASH. REV. CODE § 90.14.041.

90 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 1 (Wash. Super. Ct. Feb. 27, 1981) (Order on Amended Motion of Defendants City of Prosser and Prosser Irrigation District of February 17, 1981).

respective boundaries.[91] A filing by such an entity would be deemed "a filing of a claim by all such water users within the boundaries of such entities for the water obtained from such entities."[92] Accordingly, individual water users within the boundaries of an irrigation district or similar entity were not required to file a claim if the irrigation district did so, although many did.[93] The court also eliminated claims solely for ground water from the adjudication and set September 1, 1981, as the date for filing claims to water rights; beyond that date claimants risked losing any such right.[94]

The *Acquavella* court ruled that procedural due process is satisfied when water-distributing entities are served with notice and thereby represent the interests of the parties to which the entities distribute water.[95] Sunnyside Valley Irrigation District had filed a motion to dismiss, arguing that section 90.03.120 of the Revised Code of Washington (RCW) requires service of summons on all individual landowners who can be ascertained in order for a general adjudication to take place and joinder of the United States pursuant to the McCarran Amendment.[96] The court denied the motion, noting that because of practical considerations of service upon over forty thousand claimants and the identity of interest between water users and water service companies, service by Ecology on water-distributing entities in the adjudication was sufficient to meet due process standards required by the Fourteenth Amendment of the U.S. Constitution and article I, section 3 of the Washington Constitution.[97]

91 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 1 (Wash. Super. Ct. June 5, 1981) (Order Clarifying Previous Order Entered on February 27, 1981).

92 *Id.* at 2.

93 *Id.*

94 *Id.*

95 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 28 (Wash. Super. Ct. June 25, 1982) (Order re: Motion to Dismiss (Sunnyside Valley Irrigation District) and Motion for Determination of Jurisdiction and Order for Joinder of Necessary Parties (Union Gap Irrigation District and Yakima Valley Canal Co.)).

96 *See id.*

97 *See id.*; *see also* WASH. REV. CODE § 90.03.120 (2008) ("[A]ny persons claiming the right to the use of water by virtue of a contract with claimant to the right to divert the same, shall not be necessary parties to the proceeding.").

C. Interplay with Ecology/Referee

After determining who needed to be served a summons and the ultimate completion of that service, the court entered an order of reference.[98] An order of reference directs the case to a referee appointed by Ecology[99] to take testimony and other factual evidence and provide a report to the court as to the recommended water rights.[100]

After taking testimony and evidence, the referee delivers a report and transcript of the hearing to the applicable superior court clerk.[101] A time is then set for a hearing in regard to the report, which is served upon all persons, agents, or attorneys who have appeared in the proceeding.[102] A party who disagrees with the decision made by the referee may take an exception in writing to the findings set forth in the report.[103] The superior court may grant the exception, deny it, or remand back to the referee to take further testimony.[104] If remanded, the procedure described above repeats and the referee may submit supplemental reports until the court enters a conditional final order.[105]

D. Qualification of the Referee

In December 1994, a claimant challenged Ecology's designation of the referee on two legal theories.[106] First, the

98 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. July 6, 1984) (Order of Reference to the Director of the Department of Ecology).

99 As noted above, legislation will be considered in the 2009 Washington state legislature that abolishes the referee and leaves those duties entirely with the court.

100 WASH. REV. CODE § 90.03.160. Donald Moos appointed David A. Akana to perform the duties of a referee. Referee Akana resigned on March 16, 1987, without hearing any testimony in the adjudication. William R. Smith was designated Yakima River Adjudication Referee on March 16, 1987, by Ecology Director Andrea Riniker.

101 *Id.*

102 *Id.*

103 *Id.* § 90.03.200.

104 *Id.*

105 *See* State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 3 (Wash. Super. Ct. Oct. 6, 1986) (Pretrial Order No. 5 re: Conditional Final Orders) [hereinafter Pretrial Order No. 5].

106 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 3 (Wash. Super. Ct. Mar. 31, 1995) (Findings of Fact and Conclusions of Law and Order on Evans'

referee had been a long-time employee of Ecology as section supervisor of the Central Regional Office—a position that required him to make numerous water rights decisions, including decisions in which the protesting claimants were parties.[107] The claimant alleged that the designation violated the appearance of fairness doctrine and would deprive claimants of a facially neutral decision maker.[108] There were no charges that the referee was actually biased.[109] The claimant also argued that RCW chapter 4.48, a general statute applying to qualifications of referees, applied to a referee in a stream adjudication.[110] According to that statute, a referee must be a licensed attorney, which the referee was not.[111]

The *Acquavella* court decided that a water rights adjudication referee is not a judicial officer and does not make final decisions resulting in an order.[112] Rather, an adjudication referee is a fact-finder, who makes only water right recommendations that can be brought before the presiding superior court judge on exception.[113] Because the appearance of fairness doctrine only applies to final decision makers, it does not apply to a stream adjudication referee.[114]

The court also determined that chapter 4.48 does not apply to water right referees.[115] The court appoints a chapter 4.48 referee, whereas Ecology appoints a referee under chapter 90.03.[116] Furthermore, a referee appointed by the court pursuant to chapter 4.48 conducts a trial and is authorized to issue orders.[117] In contrast, an adjudication referee conducts fact-finding hearings and makes recommendations to the superior court.[118]

Motion to Disqualify Douglass Clausing as Referee) [hereinafter Motion to Disqualify Clausing].

107 *Id.* at 2.

108 *Id.* at 3.

109 *Id.*

110 *Id.*

111 *Id.* at 6.

112 *Id.*

113 *Id.*; *see* WASH. REV. CODE § 90.03.200 (2008).

114 Motion to Disqualify Clausing, *supra* note 106, at 4.

115 *Id.* at 6.

116 *Id.*

117 *Id.*

118 *Id.*

Thus, the qualifications required by section 4.48.040 do not apply to a water rights referee appointed pursuant to section 90.03.160.[119]

III
PROCEEDINGS IN *ACQUAVELLA*: MEMORANDUM OPINIONS AND ORDERS

As discussed above, RCW section 90.03.160 authorized the superior court to refer an adjudication proceeding to a referee to gather facts and develop recommendations regarding quantification of water rights.[120] In 1989, the legislature amended section 90.03.160 to allow the superior court to directly hear the claims of a discrete class of defendants involved in complex adjudications (in addition to a referee) if doing so would allow the court to resolve significant issues of law and expedite the conclusion of the case.[121] The legislature made these modifications to accommodate the complexity and vastness of *Acquavella* by allowing the superior court itself to perform fact-finding functions.[122] The amendment also enabled the superior court to initially hear and decide the contentious and complex matters that were likely to be appealed from the referee to the *Acquavella* court anyway.[123]

Consistent with an earlier decision by the court, *Acquavella* was divided into four "pathways": subbasins, major claimant, Indian, and federal non-Indian.[124] As a result of the changes authorizing the court to assume more of a fact-finder role, the court conducted hearings regarding major claimant, federal reserved Indian, and federal reserved non-Indian rights.[125] The Referee generally handled the evidentiary hearing for the thirty-

119 *Id.*

120 WASH. REV. CODE § 90.03.160 (2008).

121 1989 Wash. Sess. Laws 80 (codified as WASH. REV. CODE § 90.03.160).

122 WASH. REV. CODE § 90.03.160.

123 *Id.*

124 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 2 (Wash. Super. Ct. Mar. 3, 1989) (Pretrial Order No. 8 re: Procedures for Claims Evaluation (Revised)) [hereinafter Pretrial Order No. 8].

125 *See* State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 1–2 (Wash. Super. Ct. May 14, 1992) (Order Amending Pretrial Orders Nos. 5 and 6).

one subbasins.[126] When the Referee retired in 2004, however, the court assumed all further subbasin duties.[127]

In *Acquavella*, legal issues came before the superior court primarily in two ways: pretrial and trial. Until the late 1980s, the issues were primarily pretrial. The Referee and court did not hold any evidentiary hearings and only determined water rights pursuant to motions for summary judgment. In 1993, the court began hearing evidence for the water right claims of the major claimants.[128] The court hears one major claimant's evidence at a time and produces a report in the same fashion as the referee at the conclusion of each hearing.[129] In the initial and supplemental reports, legal issues, as well as questions of fact, are often resolved. Specific legal issues arising from these reports, as well as those considered pretrial or specifically in a memorandum opinion, are the main focus of the following materials.

The first two trial court opinions relating to jurisdiction were issued in February 1982. Approximately fifty have followed. They are not considered sequentially in this Article but are arranged by subject matter. Discussion is limited to issues that have broad applicability.

A. Res Judicata/Collateral Estoppel

One of the key purposes of an adjudication is to obtain certainty and finality as to the validity of water rights and identify with particularity the demands on a stream system.[130] To

126 *See id.*

127 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 1 (Wash. Super. Ct. Dec. 15, 2000) (Pretrial Order No. 15 re: Court Commissioner Rulings) (delegating all further subbasin proceedings to the court commissioner) [hereinafter Pretrial Order No. 15].

128 *See id.* at 9, 29. A "major claimant" is a large irrigation district, canal company, city, or town. A major claimant typically has a large land base within its boundaries and diverts substantial quantities of water.

129 *Id.* at 8–25. If a major claimant disagrees with the findings of the court in that report, they file an exception with the court and a supplemental hearing is held where additional evidence is presented or legal arguments are made. The court then produces a supplemental report of the court, which resolves the exceptions to the initial report. This process ultimately results in entering of a conditional final order.

130 Nevada v. United States, 463 U.S. 110, 129 n.10 (1983).

> The policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water. . . .

achieve these goals, a court must be prepared to apply the doctrine of res judicata/collateral estoppel. While the Yakima River Basin Adjudication was the first effort to adjudicate the entire basin, numerous lawsuits and actual adjudications for discrete tributaries were conducted prior to the initiation of *Acquavella*.[131] Incorporating these prior rulings into the basin-wide adjudication was an issue that presented itself in a variety of factual scenarios. As a general principle, the court gave effect to prior decisions pursuant to statute and case law.[132]

Application of res judicata was first considered upon the motion of numerous irrigators or irrigation districts and was so fundamentally important to the adjudication that it was the first substantive issue considered.[133] Entities brought a motion asking for summary judgment on the effect of the 1945 Consent Decree[134] and asking the court to affirm "previous court judgments concerning water rights between the parties thereto."[135] Although the court did not make a specific decision,

> Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. . . . [W]here courts vacillate and overrule their own decisions . . . affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.
>
> A quiet title action for the adjudication of water rights . . . is distinctively equipped to serve these policies because it enables the court of equity to acquire jurisdiction of all the rights involved and also of all the owners of those rights, and thus settle and permanently adjudicate in a single proceeding all the rights, or claims to rights, of all the claimants to the water taken from a common source of supply.

Id. (internal quotations and citations omitted).

131 *See* Letter from Charles B. Roe, Senior Assistant Attorney Gen., Office of the Attorney Gen. of Wash., to Betty McGillen, Clerk, Yakima County Superior Court (Dec. 9, 1987) (on file with author and the Journal of Environmental Law and Litigation).

132 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. June 21, 1985) (Memorandum Opinion re: Res Judicata Motions) [hereinafter Res Judicata Motions].

133 *See id.*

134 *See* Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., No. 21 (E.D. Wash. Jan. 31, 1945) (creating this federal decree). Generally, it was the position of the senior irrigation districts that this decree established the rights of the parties thereto.

135 Res Judicata Motions, *supra* note 132, at 2.

it did analyze the general rules and controlling authorities to help guide the subsequent decisions of the court and the Referee.[136]

Under Washington law, the common law doctrine of res judicata applies when there is a concurrence of identity of: (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.[137] The 1917 Water Code contains two provisions that bear on a res judicata analysis: RCW sections 90.03.170 and 90.03.220.[138]

Section 90.03.170 applies to court determinations of water rights that transpired prior to the enactment of the Water Code in June 1917.[139] The statutory provision provides in part:

> A final decree adjudicating rights or priorities, entered in any case decided prior to June 6, 1917, shall be conclusive among the parties thereto and the extent of use so determined shall be prima facie evidence of rights to the amount of water and priorities so fixed as against any person not a party to said decree.[140]

As a result, the *Acquavella* court required any party claiming a right or priority under a pre-1917 decree to produce the key pleadings filed in such a case to demonstrate quantification of a water right as well as a chain of title to show the necessary privity.[141]

The provisions in section 90.03.220 also militate toward enforcing the results emanating from prior adjudications that were instituted as general adjudications pursuant to chapter 90.03.[142] That statute, enacted as part of the original 1917 Water Code provides:

> Whenever proceedings shall be instituted for the determination of the rights to the use of water, any defendant

136 *Id.* at 3.

137 State Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306, 1324 (Wash. 1993); Rains v. State, 674 P.2d 165, 168 (Wash. 1983).

138 WASH. REV. CODE §§ 90.03.170, .220 (2008).

139 *Id.* § 90.03.170.

140 *Id.*

141 Res Judicata Motions, *supra* note 132, at 3–4 (discussing production of the complaint, findings of fact, conclusions of law, decree or judgment, and appropriate chain of title).

142 WASH. REV. CODE § 90.03.220.

> who shall fail to appear in such proceedings, after legal service, and submit proof of his claim, shall be estopped from subsequently asserting any right to the use of such water embraced in such proceeding, except as determined by such decree.[143]

That statute would be at the heart of a decision by the Washington State Court of Appeals, reviewing a decision from the *Acquavella* court.[144] In *Washington Department of Ecology v. Acquavella*, Division III agreed with the trial court that a claimant in *Acquavella* who did not participate in a 1921 adjudication of the Teanaway River, a Yakima River tributary, was nevertheless barred from obtaining a right in the subsequent case.[145] The court of appeals relied on the res judicata principles set forth in section 90.03.220 and found an identity of action, subject matter, and parties.[146] The appellate court reasoned:

> Whether a water rights claim was denied or whether it was never made does not change the *final* and *general* nature of an adjudication under the Water Code. To hold otherwise would undercut the scope of both the existing rights recognized by the adjudication and those later rights acquired by permit.[147]

Consistent with the statutory provisions set forth above and its June 21, 1985, decision, the *Acquavella* court applied res judicata consistently and frequently throughout the adjudication. As discussed by the state court of appeals (set forth above), a hallmark of adjudication courts is to bring finality and permanence to the quantification of water rights.[148] A key component to accomplishing that objective is recognizing and enforcing decisions by prior courts that have addressed those rights before. The *Acquavella* court determined it would not necessarily apply prior decrees when a party could successfully show that they or their predecessors had not been served and provided an opportunity to participate in the prior proceeding.[149]

143 *Id.*

144 *See* State Dep't of Ecology v. Acquavella, 51 P.3d 800 (Wash. Ct. App. 2002).

145 *Id.* at 810.

146 *Id.* at 805–06.

147 *Id.* at 806–07 (citation omitted).

148 Nevada v. United States, 463 U.S. 110, 129–30 (1983).

149 *See, e.g.*, State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 297 (Wash. Super. Ct. Jan. 31, 2002) (Report of the Court Concerning Subbasin No. 23 (Ahtanum Creek)) [hereinafter Report of the Court Subbasin No. 23]; *see also*,

B. Yakama Nation Rulings

Decisions regarding the Yakama Nation's water right have occurred throughout the adjudication, including many of the jurisdictional questions that defined the first seven years of the case (1977–1984). In the initial years of the adjudication, the Nation did not participate on its own behalf and was represented by the United States through the Department of Justice (DOJ). In 1992, that dynamic changed.

1. Intervention

On April 8, 1992, the Nation filed a motion to intervene.[150] Pursuant to Washington Superior Court Civil Rule 24(a),[151] the Nation asserted an interest in the property that was subject to the transaction.[152] The Nation also claimed that neither the United States nor other parties had made or would make all of the arguments that the Nation requested.[153] Therefore, the Nation would "add elements to [the] proceeding that other parties would neglect."[154]

A week later, the Nation also moved the court for an order of recusal and an order reassigning the hearing to another judge in Yakima Superior Court.[155] The Nation alleged that it could not "have a fair and impartial trial of its claims before the judge presently presiding over this case."[156] The Nation also asserted that the motion and affidavit were timely fifteen years into the

State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 12 (Wash. Super. Ct. Mar. 20, 2002) (Report of Referee for Subbasin 18), *aff'd*, No. 77-2-01484-5, at 2–3 (Wash. Super. Ct. May 23, 2003) (Memorandum Opinion and Order re: Exceptions to Report of Referee for Subbasin 18 (Cowiche Creek)) [hereinafter Exceptions for Subbasin 18].

150 Memorandum in Support of Motion to Intervene at 1, State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Apr. 8, 1992).

151 WASH. C.R. 24(a).

152 Memorandum in Support of Motion to Intervene, *supra* note 150, at 1–2.

153 *Id.* at 2.

154 *Id.*

155 Motion and Affidavit for Reassignment at 1–2, State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Apr. 15, 1992).

156 Affidavit of Prejudice at 2–3, State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Apr. 15, 1992); *see also* Motion and Affidavit for Reassignment, *supra* note 155.

case because this was the Nation's first appearance and no rulings had been made when the Nation was a party.[157]

The *Acquavella* court initially denied both motions.[158] It found that intervention would unduly delay and prejudice the adjudication of the original parties' rights.[159] The motion for recusal and reassignment was denied on the grounds that the court had made numerous discretionary rulings regarding the interests of the Nation, even though those interests were represented by the DOJ.[160] Regarding intervention, the court reconsidered and granted the Nation's motion with a number of stipulations that prevented the tribe from re-arguing matters already decided or that were under advisement.[161] The Nation has participated fully since entry of that order of intervention on September 10, 1992.

2. Treaty-Reserved Rights: Yakima River and Off-Reservation Tributaries

Treaty-reserved rights gained their legal definition in *Winters v. United States*, which held that a treaty between Indian tribes and the federal government impliedly reserved waters from appropriation under state law in order to irrigate the arid lands of the Fort Belknap Reservation in Montana.[162] Over fifty years later, the U.S. Supreme Court established the mechanism for quantifying treaty-based irrigation rights of the federally reserved right doctrine. In *Arizona v. California*, a dispute involving allocation of the Colorado River, the Court established the "practicably irrigable acreage" (PIA) standard for application to Indian reservations.[163] Pursuant to that standard, the water right quantity is determined by multiplying the number of practicably irrigable acres on the reservation by the amount of water needed to irrigate each acre.

157 Affidavit of Prejudice, *supra* note 156, at 2–3.

158 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 2–3 (Wash. Super. Ct. June 11, 1992) (Order Denying Motion for Intervention).

159 *Id.* at 2.

160 *Id.* at 2–3.

161 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Sept. 10, 1992) (Reconsideration of Motion for Recusal).

162 Winters v. United States, 207 U.S. 564, 576–77 (1908).

163 Arizona v. California, 373 U.S. 546, 600–01 (1963).

In 1990, a number of irrigation districts in the Yakima Valley had filed a motion for summary judgment requesting: (1) a limit, in accordance with various acts of Congress, agencies, and the judiciary, to the maximum quantity of water the United States could claim on the Nation's behalf and (2) a determination that the maximum quantity of water provided by such governmental documents and actions settled the Nation's treaty rights to the Yakima River.[164] The *Acquavella* court agreed with most of the irrigators' arguments and granted partial summary judgment.[165] *Washington Department of Ecology v. Yakima Reservation Irrigation District*, discussed below, affirmed the specifics of that decision.[166]

a. Irrigation Rights

As a result of the ruling in the partial summary judgment limiting the treaty right, the *Acquavella* court would not apply the PIA analysis to reservation lands irrigated from the Yakima River.[167] Instead, the court found four water rights that were based on various federal statutes, contracts between the Bureau of Indian Affairs and Bureau of Reclamation, and the obligations of delivery for the BOR set forth in the 1945 Consent Judgment.[168] Those diversionary rights amount to: (1) two non-proratable rights totaling 720 cubic feet per second (305,613 acre-feet) and (2) two proratable water rights totaling 350,000 acre-feet and limited in instantaneous quantity on a monthly basis.[169] In addition, the court established rights to floodwater.[170]

The *Acquavella* court also determined that the PIA analysis did not apply to lands that would be irrigated from Ahtanum

164 Motions for Partial Summary Judgment, *supra* note 76, at 2–3.

165 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Oct. 22, 1990) (Amendment to Memorandum Opinion re: Motions for Partial Summary Judgment Dated May 22, 1990) [hereinafter Amendment to Order for Partial Summary Judgment].

166 State Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306, 1331–32 (Wash. 1993).

167 Motions for Partial Summary Judgment, *supra* note 76, at 32.

168 *Id.* at 35–37.

169 *Id.* at 37–38.

170 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 14 (Wash. Super. Ct. Nov. 9, 1994) (Memorandum Opinion re: Ahtanum Watershed Practicably Irrigable Acreage).

Creek, which serves as a portion of the northern border of the Yakama Nation's reservation.[171] Ahtanum Creek has been the source of two previous adjudications, one in the 1920s and another in the 1950s, to divide the waters between south side, Indian water users and north side, non-reservation, non-Indian water users.[172] The Bureau of Indian Affairs' predecessor also made agreements with north side, non-Indian water users, defining the scope of their diversions.[173] Based on these prior adjudications and agreements, the court ruled that the PIA standard did not apply, and the diversions and lands quantified in the prior adjudications prevailed.[174] The court did allow introduction of evidence in regard to any water projects that were constructed in the future for the benefit of the Nation's members.[175]

b. Fish Rights

The water right necessary to support the treaty-reserved fishing rights for the Yakama Nation were primarily decided in the following three trial court decisions.

(i) Yakima River

In addition to finding a treaty-reserved right for irrigation, discussed above, the *Acquavella* court also found a treaty right for fish to be a primary purpose of the United States' treaty with the Yakama Nation.[176] The federal government, relying on data derived from the "instream flow incremental methodology," claimed flows in the amount of 1.25 million acre-feet per year for fish enhancement and protection.[177] Conversely, irrigation interests contended that the Indian treaty fishing rights were extinguished.[178] Those claimants relied on the same acts of

171 *Id.* at 2, 13.

172 *Id.* at 2.

173 *Id.* at 2–3.

174 *Id.* at 13–14.

175 *Id.* at 14.

176 Amendment to Order for Partial Summary Judgment, *supra* note 165, at 55.

177 *See* Motions for Partial Summary Judgment, *supra* note 76, at 54.

178 *Id.* at 51.

Congress, contracts entered into by irrigation interests, and rulings made by the judiciary and administrative tribunals.[179]

The court, utilizing claims filed by the Nation before the Indian Claims Commission for the destruction of fish runs in the Yakima River from 1933 to 1946,[180] found the treaty right had been substantially diminished but not altogether extinguished.[181] An agreement in the proceeding before the Commission compensated the Nation for this substantial diminishment of the treaty fishing right, and the action was dismissed by the Commission with prejudice.[182] Although the court did not quantify the specific treaty right, it declared the right to be "the minimum amount of instream flow that is absolutely necessary for the mere maintenance of fish life in the river."[183] The court left the decision of determining instream flow on an annual basis to the Yakima Field Office Manager of the BOR after consulting with a panel of biologists called SOAC,[184] irrigation interests, and others.[185] This ruling was appealed to the Washington Supreme Court and affirmed in *Washington Department of Ecology v. Yakima Reservation District*.[186]

(ii) Off-Reservation Tributaries

In 1994, irrigator claimants asked the court to extend the ruling made in the 1990 partial summary judgment, which confirmed the diminished status of the fishing right in the Yakima River to all of the Nation's "usual and accustomed" fishing stations.[187] The claimants presented two requests to the

179 *Id.* at 23–29, 51–52.

180 *Id.* at 53.

181 Amendment to Order for Partial Summary Judgment, *supra* note 165, at 53–54.

182 *Id.* at 53.

183 *Id.* at 55.

184 SOAC stands for Yakima River System Operations Advisory Committee. It is comprised of fish biologists from Yakama Indian Nation, Washington Department of Fish and Wildlife, U.S. Fish and Wildlife, and the Irrigation Coalition.

185 Amendment to Order for Partial Summary Judgment, *supra* note 165, at 59.

186 State Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306, 1310 (Wash. 1993).

187 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 1 (Wash. Super. Ct. Sept. 1, 1994) (Memorandum Opinion re: Treaty Reserved Water Rights at

court: (1) limit the number of usual and accustomed fishing locations to those areas set forth in ICC Cause No. 147 and (2) find that the treaty-reserved water rights in off-reservation usual and accustomed streams were diminished in the same fashion as the right to the mainstream Yakima River had been diminished.[188] In the ICC proceeding, fourteen places were identified as being usual and accustomed fishing stations.[189] The court agreed the treaty right was limited to those locations, but the diminished right also extended to those tributaries that help to maintain fish life at the named fishing locations.[190] The court entrusted the decision as to which streams support the fishery year-in and year-out to the BOR's Yakima Field Office Manager, in consultation with the Nation, fishery biologists, irrigation districts, and others.[191] This ruling also applied to Ahtanum Creek.[192]

(iii) Flushing Flows

In 1994, during one of the worst water years on record in the Yakima Basin, a contingent of anadromous fish smolts remained in the upper basin waiting for a wave of water to sweep them downriver.[193] BOR officials managed the reservoirs to store every drop of water not needed to satisfy the Yakama Nation's treaty fishing right because the snowpack was clearly insufficient to fill the reservoirs.[194] Thus, the anticipated freshet would not naturally arrive. The group of fish biologists comprising SOAC made a unanimous request on May 3, 1994, for release of a 3500 acre-feet flushing flow from the sparse stored water supply.[195] Even though the water was released, irrigation attorneys decided

Usual and Accustomed Fishing Places) [hereinafter Usual and Accustomed Fishing Places].

188 *Id.* at 2.

189 Report of YIN, *supra* note 77, at 79–80.

190 Usual and Accustomed Fishing Places, *supra* note 187, at 15.

191 *Id.*

192 *Id.*

193 FED. COLUMBIA RIVER POWER SYS., THE COLUMBIA RIVER SYSTEM INSIDE STORY 38 (2d ed. 2001), *available at* http://www.bpa.gov/corporate/Power_of_Learning/docs/columbia_river_inside_story.pdf.

194 *See id.* at 28.

195 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 4–5 (Wash. Super. Ct. Dec. 22, 1994) (Memorandum Opinion re: "Flushing Flows").

to use the opportunity to prevent future similar releases and argued that release of the flows was either not scientifically substantiated or, alternatively, constituted the "enhancement," rather than the "maintenance," of fish life.[196]

The *Acquavella* court disagreed with the irrigation interests. In a memorandum opinion, the court took the opportunity to clarify the partial summary judgment as to what constitutes the "maintenance" of fish life and how decisions by the Yakima Field Office Manager would be reviewed.[197] First, the trial court emphasized that BOR decisions regarding fulfillment of the treaty fishing right are based on annual natural conditions; therefore, the amount of maintenance flow fluctuates to accommodate fish with the least possible water.[198] Allowing the BOR to make such decisions annually provides necessary flexibility to change operations and tailor flows to what fish need. The court determined the event at hand was a perfect example in that last-minute events allowed the BOR to reduce some of the necessary storage releases to flush the remaining smolts.[199] Putting decision-making authority in the hands of the BOR and its advisors (principally SOAC) allows for rapid, science-based decisions rather than what is often flushed through the cumbersome and nonscientific legal process.[200]

The *Acquavella* court made other clarifications as well. First, it clarified that maintenance of fish life applied to fish in all life stages rather than adult fish only, as was argued by the irrigation

196 *Id.* at 1.

197 *Id.* at 6.

198 *Id.*

> In view of ever changing circumstances, it would be inappropriate for the Court to set specific, discrete quantifications to accomplish that purpose for all times and conditions. That can be done by the SOAC Committee and the Project Superintendent on an annual basis. As was stated in *Sohappy v. Smith*,
>
> ". . . proper anadromous fishery management in a changing environment is not susceptible of rigid predeterminations. . . . the variables that must be weighed in each given instance make judicial review of state (Project Superintendent's) action, through retention of continuing jurisdiction, more appropriate than overly-detailed judicial predetermination."

Id. at 4 (citation omitted) (quoting Amendment to Order for Partial Summary Judgment, *supra* note 165, at 59).

199 *Id.* at 4–5.

200 *Id.* at 5.

coalition.[201] Additionally, the court accorded great deference to the BOR, indicating it would not disturb Agency decisions made in good faith to maintain fish life using the sparest amount of water possible.[202]

The *Acquavella* court also discussed how it would resolve similar disputes in the future. It noted that most requests would be akin to requests for injunctive relief,[203] which vests a court with broad discretionary power to shape relief to fit the particular facts, circumstances, and equities of the case before it.[204] The court indicated that something less than scientific certainty would be adequate to support the BOR's decisions, and success in achieving the intended result would also be highly regarded.[205] The BOR's accommodation of the input of all interested parties prior to making its decision was and would continue to be important in court decisions. A showing that the BOR managed the use of water to ensure the smallest possible release from storage would also be critical to future decisions.[206]

Finally, the court discussed the difference between the "enhancement" and "maintenance" of fish life; a point of great debate in the Yakima Basin.[207] In reviewing the continuing decline in all species of anadromous salmonids returning to the basin, the court made clear that whatever water is necessary must be used to save the few fish currently in the river system.[208] Exactly how much water is necessary and in what circumstances enhancement of fish life occurs remains unanswered.[209]

201 *Id.* at 6.

202 *Id.*

203 *Id.* at 8.

204 Brown v. Voss, 715 P.2d 514, 517 (Wash. 1986).

205 *See id.* at 8–9.

206 *Id.* at 11.

207 *Id.* at 11–12.

208 *Id.* at 12.

209 Other efforts have stepped forward to deal with "enhancement" of fish flows. For example, the Yakima River Water Enhancement Project Act established different methods for providing more flows for the fishery through conservation, water right and land acquisition, and operational changes. Act of Oct. 31, 1994, Pub. L. No. 103-434, §§ 1201–1212, 108 Stat. 4526, 4550–66. Additionally, the Yakima River Watershed Council, a nonprofit organization established in 1994, is putting together a consensus-based plan that will also provide more flows for the fishery through a variety of system changes.

3. On-Reservation Tributaries

Quantifying the Yakama Nation's on-reservation rights, as well as the rights held by non-Indians on the reservation, required the *Acquavella* court to resolve a number of issues of first impression: To which reservation lands does the PIA standard apply? To what landowners do the rulings in *Colville Confederated Tribes v. Walton*[210] and its progeny apply? Has the treaty right to fish been extinguished or diminished in on-reservation streams? The court's resolution of these difficult questions follows.

a. Irrigation Rights

In the specific water right analysis for the Nation's on-reservation lands, dated November 13, 1995, the *Acquavella* court determined the Nation impliedly reserved sufficient water in the 1855 Treaty to irrigate the arid lands located within the Yakama Reservation.[211] The court next determined that the PIA standard for quantifying reserved irrigation water rights remained applicable for the on-reservation tributaries[212] when the federal government had not otherwise limited those rights.[213] Determination of a practicably irrigable acre is a question of fact. It requires a court to consider scientific evidence regarding soil qualities, hydrology, engineering, and economics.[214]

The United States, on behalf of the Yakama Nation, presented numerous boxes of uncontested scientific evidence to prove the number of practicably irrigable acres.[215] First, the *Acquavella* court analyzed the evidence to determine the arable

210 Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981).

211 Report of YIN, *supra* note 77, at 7. The court looked to article V and VI of the treaty between the United States and the Yakama Nation of Indians. Treaty with the Yakama, *supra* note 39. Those articles indicate the Reservation was to be the Yakama Nation's permanent homeland and that its members would be encouraged toward an agricultural lifestyle.

212 Report of YIN, *supra* note 77*,* at 10. This differs from the decision discussed above in which the court found there was no PIA right for diversions from the Yakima River.

213 State Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306, 1316–17 (Wash. 1993); *see also* Wyoming v. Owl Creek Irrigation Dist. Members, 753 P.2d 76, 106–07 (Wyo. 1988), *aff'd sub nom.*, Wyoming v. United States, 492 U.S. 406 (1988).

214 *Owl Creek Irrigation Dist. Members*, 753 P.2d at 101–05.

215 Report of YIN, *supra* note 77, at 9–10.

land base; that is, land amenable to sustained agricultural use.[216] That analysis established a total of 107,109½ arable acres.[217] Next, the court analyzed expert evidence to determine the available water supply.[218] The United States' experts asserted that additional reservoir storage would be required to allow irrigation of any significant amount of the arable land base.[219] If those reservoir storage projects were implemented, the United States' hydrologists claimed that 35,471 acres of trust and fee lands in Toppenish, Simcoe, and Satus drainages could be irrigated.[220]

However, to be practicably irrigable, an economic component must also be considered. Because the potential irrigation would require construction of more reservoirs and conveyance systems on the reservation, a right could be confirmed for future lands only if the benefit provided by irrigation of the parcel outweighed the costs.[221] The court accepted economic analysis from the United States that established that a total of 32,795½ acres could be feasibly irrigated from a water supply of 125,981 acre-feet as developed by the proposed project.[222]

b. Fish Rights

A major claimant argued that the treaty right to fish should be diminished in on-reservation streams for the same reasons that the right had diminished in the Yakima River and other off-reservation tributaries.[223] The *Acquavella* court disagreed and found that only off-reservation, "usual and accustomed" rights had been limited by acts of Congress, agencies, and the judiciary as compensated in ICC Cause No. 147.[224] The right to take fish on the reservation was an exclusive right separately bargained for in the 1855 Treaty.[225] Therefore, the court confirmed the

216 *Id.* at 10–15.
217 *Id.* at 15.
218 *Id.* at 16–21.
219 *Id.* at 21.
220 *Id.* at 25.
221 *Id.* at 26–42.
222 *Id.* at 41.
223 *Id.* at 79–80.
224 *Id.* at 84–88.
225 *Id.* at 87.

Yakama Nation's undiminished treaty right for instream flows for the three on-reservation tributaries.[226]

c. Non-Indian Rights

Shortly after the right for the Yakama Nation had been quantified, the Yakima Reservation Irrigation District (YRID), an irrigation district comprised of non-Indian, on-reservation landowners, moved for partial summary judgment regarding their share of the water right awarded to the Nation.[227] In the 1990 Partial Summary Judgment, the *Acquavella* court granted YRID's motion as to some of the lands in the district and made certain rulings discussed below.[228]

Lands owned by YRID members are wholly within the boundaries of the Wapato Irrigation Project (WIP).[229] WIP, in turn, is located within the boundaries of the Yakama Indian Reservation.[230] WIP is one of the federal irrigation projects in the overall Yakima Project.[231] WIP consists of four smaller units: the Ahtanum, Toppenish-Simcoe, Wapato-Satus, and Additional Works.[232] The 1993 YRID opinion pertained to the Wapato-Satus Unit and the Additional Works Unit.[233] YRID landowners are successors to Yakama Nation members who received title to lands pursuant to the General Allotment Act (or the Dawes Act).[234] Because the land is within a federal project and because of pertinent federal legislation and administrative actions/contracts, the YRID asserted that its members were not governed by the law set forth in *Walton*.[235]

The *Walton* line of cases holds that lands on an Indian reservation, passing from trust status to fee, and ultimately conveyed to a non-Indian pursuant to the General Allotment

226 *Id.* at 88. Toppenish, Simcoe, and Satus creeks are the three principle drainages on the Yakama Nation Reservation.

227 YRID Opinion, *supra* note 28, at 1.

228 *Id.* at 32–33.

229 *Id.* at 8.

230 *Id.* at 3.

231 *Id.* at 2–3.

232 *Id.* at 8.

233 *See generally id.*

234 General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.).

235 *See* YRID Opinion, *supra* note 28, at 27–29.

Act[236] retain their treaty-reserved water right.[237] The water rights appurtenant to those lands are susceptible to loss based on forfeiture and abandonment.[238] However, the right obtained by non-Indians is limited to lands irrigated by the Indian allotee at the time of transfer or the amount of lands irrigated by the non-Indian within a reasonable time after obtaining title.[239]

In reaching its decision regarding lands in the Wapato-Satus and Additional Works Units, the court distinguished *Walton* on two grounds.[240] First, the water used to irrigate these lands comes from the Yakima River, which only borders and is not wholly contained within the reservation as No Name Creek was in *Walton*.[241] Second, the legislation quantifying the Yakama Nation's rights from the Yakima River, the Act of August 1, 1914, provided that this water would be needed to irrigate forty acres of each Indian allotment.[242] Some of these allotments ultimately transferred to non-Indian ownership. The Secretary of the Interior approved this schedule of allotments.

Under the authority of the Act, the Secretary also entered into contracts that conveyed to owners "a permanent right to water for irrigation purposes."[243] Owners are required to pay their "proportionate" share of the irrigation charges applicable to their land.[244] YRID members who sought to purchase allotted land did so with the understanding that the water right would be perpetual, which greatly increased the value of the land.[245] Thus, these factors made *Walton* non-applicable to the Wapato-Satus and Additional Works sections.[246] Pursuant to the agreements, so long as assessments are paid and foreclosure proceedings not

236 25 U.S.C. § 381 (2006).

237 Colville Confederated Tribes v. Walton, 647 F.2d 42, 53 (9th Cir. 1981).

238 *Id.* at 50.

239 *Id.* at 51.

240 YRID Opinion, *supra* note 28, at 6, 10.

241 *Id.* at 10.

242 *Id.* at 6.

243 *Id.* at 5.

244 *Id.*

245 *See id.* at 14.

246 *Id.* at 21.

finalized, landholders cannot lose their water right for lack of beneficial use.[247]

However, the *Acquavella* court did determine in the YRID opinion that evidence of beneficial use and due diligence would need to be proven for YRID landowners in the Toppenish-Simcoe Unit.[248] The YRID did not provide this information at its evidentiary hearing, but rather argued that the Toppenish-Simcoe Unit was part of the Wapato Irrigation Project.[249] Though no reservoir existed to serve this Unit, the YRID asserted that if one were ever constructed, YRID landowners should receive a right to water from that reservoir as a share of the Indian allotee predecessor's PIA right.[250] The court disagreed and reaffirmed the applicability of *Walton*, citing the similarities between No Name Creek and Toppenish and Simcoe creeks.[251]

The court also noted the fashion in which water was delivered. A landowner needing water so informs the WIP.[252] If water is available and paid for, then it is delivered.[253] No contracts exist guaranteeing a perpetual right in the same fashion as there had been for YRID members in the Wapato-Satus Unit.[254] In fact, the Secretary does not even have authority to enter into such contracts in the Toppenish-Simcoe Unit, for Congress never passed the requisite legislation.[255] Hence, the court referred YRID landowners in the Toppenish-Simcoe Unit to the appropriate subbasin pathway to submit evidence of beneficial use pursuant to *Walton*.[256]

247 *Id.* at 14, 19–20.

248 *Id.* at 29.

249 *See id.* at 23.

250 *See id.* at 31–32.

251 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Oct. 8, 1996) (Report of the Court Concerning the Water Rights for the Yakima Reservation Irrigation District, Volume 36).

252 *Id.* at 6–7.

253 *Id.*

254 *Id.* at 7.

255 *See id.* at 11.

256 *Id.* at 27–28.

C. State Law Versus Federal Law: Which Law Applies?

A consistent source of litigation in *Acquavella* stemmed from the presence and participation of the Bureau of Reclamation in the management and delivery of water in the Yakima Basin. The BOR became involved in the Yakima Basin shortly after the passage of the Reclamation Act.[257] Although not disputed by the Washington Department of Ecology early on in *Acquavella*, the question of who maintains "control" of the river finally came before the court in 1992 and resulted in the decision Memorandum Opinion re: Threshold Issues.[258] Many of the principles set forth in that opinion have been repeatedly applied in quantifying the specific water rights of major claimants.

The Washington Department of Ecology immediately appealed the *Acquavella* court's ruling, but the Washington Supreme Court denied discretionary review.[259] However, many of those issues returned to that court again by way of the appeal of the water right confirmed to the Yakima-Tieton Irrigation District (YTID).[260] In its decision, the supreme court upheld the trial court's ruling on three of the four appealed issues.[261] The following section breaks down many of the matters decided in Threshold Issues as well as the response by the Washington Supreme Court.

1. Threshold Issues

a. Ownership of Water Rights

Determining which entity actually owns a water right can be a more challenging question than what may seem apparent. The *Acquavella* court's memorandum opinion dated February 16, 1982, first addressed the issue of governmental ownership of

257 Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. § 371 (2006)).

258 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. May 14, 1992) (Memorandum Opinion re: Threshold Issues) [hereinafter Threshold Issues Opinion].

259 State Dep't of Ecology v. Acquavella, No. 64341-5, at 4 (Wash. Feb. 11, 1997) (order denying discretionary review).

260 State Dep't of Ecology v. Acquavella (*Acquavella III*), 935 P.2d 595, 599 (Wash. 1997).

261 *Id.* at 599–603.

water rights.[262] In Memorandum Opinion re: Threshold Issues, decided a decade later, the court again examined the pertinent decisions from the earlier opinion and reaffirmed these determinations' applicability to the issue of water right ownership.[263] A synthesis of those two opinions show that, although water rights are appurtenant to the land or place upon which the water is used, the BOR, irrigation districts, and other diverters/appropriators of surface water still retain some rights to the water they divert and deliver to users.[264] Accordingly, the adjudicated water right of those claimants who divert water pursuant to a federal contract and as part of the federal project is awarded to the United States for the benefit of the irrigation district and water users.[265]

The *Acquavella* court's analysis of various provisions of state law according deference to the federal government in bringing about the Yakima Reclamation Project was also integral to its decision. RCW section 90.40.010 allowed the federal government to withdraw all of the then-unappropriated waters of the Yakima River and its tributaries.[266] After building the six storage facilities and entering into contracts with irrigation

262 *See generally* State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Feb. 16, 1982) (Memorandum Opinion re: United States Motion to Dismiss) [hereinafter U.S. Motion to Dismiss].

263 Threshold Issues Opinion, *supra* note 258, at 4.

264 *See* United States v. Tilley, 124 F.2d 850, 860–61 (8th Cir. 1942).

265 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 7–8 (Wash. Super. Ct. Feb. 21, 2001) (Supplemental Report of the Court on Remand for the Yakima-Tieton Irrigation District, Volume 16C) [hereinafter Supplemental Report on Remand for YTID]. In regard to the Yakima-Tieton Irrigation District, the court ordered Ecology to issue the adjudicated water right to the U.S. Bureau of Reclamation as trustee for the Yakima-Tieton Irrigation District and its water users. Disagreement ensued over whether the trustee language was appropriate in light of the United States' trust obligation to the Yakama Indian Nation. The court ruled:

> The United States' contractual relationship is "akin" to the trustee relationship of irrigation districts to their patrons. The United States' role *as trustee* is defined by the terms of its contracts and Acts of Congress. Therefore, the duties of the United States as "trustee," do not impose on it any additional fiduciary duty or obligation other than the obligation to fulfill the contracts which they have drawn and issued pursuant to the Acts of Congress.

State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 11 (Wash. Super. Ct. Sept. 18, 1996) (Order re: Warren Act Contract Issues).

266 WASH. REV. CODE § 90.40.010 (2008).

districts for delivery of water made available from storage, the United States obtained the water rights from those appropriations.[267] Pursuant to state law,[268] the BOR registered twenty-three surface water claims with Ecology.[269] The United States made its water right claims "on its own behalf and on behalf of all persons claiming water rights furnished" to them.[270] The 1945 Consent Judgment memorialized the BOR's obligations incurred through contract.[271]

Although the United States reasserted federal dominance of the river in its briefs and in oral argument in appealing the *Acquavella* court's February 16, 1982, opinion, the Washington Supreme Court did not directly address the issue of ownership because it was not one of the specific issues on appeal.[272] Therefore, the supreme court's first decision essentially reinforced a multi-jurisdictional aspect of the Yakima River.

b. Irrigable Versus Irrigated

Identifying where the water is to be applied is critical in determining the extent of a diversionary water right. Ecology argued that "place of use" must be determined based on lands actually irrigated.[273] After examining several federal law provisions, however, the court concluded that, as to federal project lands, the irrigation districts only needed to present evidence on lands classified by the BOR as being irrigable to protect water rights appurtenant to that land.[274] The Yakima Project's contracts between the United States and the irrigation districts also incorporated the irrigability standard.[275]

Finally, the court relied heavily on the Washington Supreme Court's ruling in *Department of Ecology v. United States Bureau*

267 Threshold Issues Opinion, *supra* note 258, at 18; *see also* WASH. REV. CODE § 90.40.040.

268 WASH. REV. CODE § 90.14.041.

269 Threshold Issues Opinion, *supra* note 258, at 6.

270 *Id.*

271 Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., No. 21 (E.D. Wash. Jan. 31, 1945).

272 State Dep't of Ecology v. Acquavella, 674 P.2d 160, 161 (Wash. 1983).

273 Threshold Issues Opinion, *supra* note 258, at 11–12.

274 *Id.*

275 *Id.* at 11.

of Reclamation.[276] This ruling provides that decisions regarding the distribution of water within a federal irrigation project belong to the Secretary of the Interior in accordance with federal law, federal regulation, and the contracts between the irrigation districts and the federal government.[277] *Ecology* also recognized that although federal law normally gives way to state law regarding distribution of water in a federal irrigation project, such is not the case when state statutes specifically yield to federal provisions.[278]

In upholding the trial court's finding that YTID's water right was appurtenant to 27,900 irrigable acres, the supreme court primarily relied on RCW section 90.03.380.[279] That section, which defines the appurtenancy of water rights to land as well as the ability to transfer the right, allows irrigation districts to approve the change of place of use for water users within the district without Ecology oversight.[280] Thus, the court held that the water right can be shifted to any land on which the water can be beneficially used; that is, "the right can be applied to any irrigable acreage."[281] Because the number of acres irrigated any season fluctuates, the court reasoned that the irrigable, rather than the irrigated, number of acres is more useful in denoting the extent of YTID's water right.[282]

c. 1945 Consent Judgment/Beneficial Use

Perhaps the most important issue decided in Threshold Issues and eventually appealed to the Washington Supreme Court was the question of whether beneficial use defines the extent of the water right for irrigation districts containing federal project lands or whether the delivery contracts between the United States and the irrigation districts/canal companies would provide the definition and basis of the water right. Additionally, because the

276 *Id.* at 13 (citing Dep't of Ecology v. U.S. Bureau of Reclamation, 827 P.2d 275 (Wash. 1992)).

277 *Bureau of Reclamation*, 827 P.2d at 281.

278 *Id.*

279 State Dep't of Ecology v. Acquavella (*Acquavella III*), 935 P.2d 595, 602–04 (Wash. 1997).

280 WASH. REV. CODE § 90.03.380 (2008).

281 *Acquavella III*, 935 P.2d at 603.

282 *Id.*

federal contracts defining those water rights were memorialized in the 1945 Consent Judgment,[283] an examination of the beneficial use/contract dispute brought into question the continued applicability of the federal decree.

The irrigation districts argued that the 1945 Consent Judgment set forth both their historic beneficial use quantity and priority based on contracts, assessments, and the historic use recognized by the United States.[284] Therefore, evidence demonstrating what the Consent Judgment already recognized would be cumulative and a waste of judicial resources.[285] Ecology countered that because it had not been a party to the 1945 Consent Judgment, that judgment was not an adjudication of rights and was not binding on it.[286] Therefore, presentation of evidence on historic beneficial use was necessary to quantify the right.[287]

In its analysis, the *Acquavella* court acknowledged that beneficial use is the basis, measure, and limit of a water right under either federal or state law.[288] The trial court also found that although the Consent Judgment did not establish rights per se, it did recognize and memorialize the appropriations that had historically occurred.[289] However, the *Acquavella* court also recognized that changes in irrigable acreage classification as well as other modifications might have occurred, and these matters could be determined at evidentiary hearings.[290]

The *Acquavella* court began its analysis of YTID's water right quantity by restating the amounts set forth in the 1945 Consent Judgment.[291] Pursuant to that decree, the YTID would have

283 The Consent Judgment has determined diversionary rights since its entry.

284 Threshold Issues Opinion, *supra* note 258, at 14.

285 *Id*. at 2.

286 *Id.* at 16.

287 *Id.* at 26–27.

288 *Id.* at 26.

289 *Id.* at 14–15.

290 *Id.* at 16.

291 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 6 (Wash. Super. Ct. Apr. 12, 1994) (Report of the Court Concerning the Water Rights for the Yakima-Tieton Irrigation District, Volume 16) [hereinafter Report of the Court Concerning YTID].

been accorded a right to delivery of 114,000 acre-feet of water.[292] The trial court reduced the amounts set forth in the Consent Judgment to reflect that the safe carrying capacity of the canal would not allow the YTID to divert more than 110,700 acre-feet during the course of the irrigation season.[293]

Ecology also claimed some of the irrigation districts had not, for a number of years, diverted the amounts of water set forth in their contracts and the Consent Judgment.[294] Failure to use the rights memorialized in the Consent Judgment should therefore constitute either abandonment or relinquishment of those rights.[295] The *Acquavella* trial court refuted this argument by stating that given the way the Yakima Project is operated, there is "sufficient cause" for nonuse of water when contractual obligations are not fulfilled to accomplish increased carryover in storage reservoirs.[296] Additionally, because many of the irrigation districts are project units and therefore subject to federal laws, the provisions of RCW subsection 90.14.140(1)(e) apply. This statute allows compliance with such federal laws to constitute sufficient cause for the nonuse of water.[297] The trial court also relied on subsection 90.14.140(2)(b).[298] According to that provision, the operation of legal proceedings constitutes "sufficient cause" for nonuse of water and protects those

292 *Id.* at 7. The 1945 Consent Decree allocated water in two lumps to YTID. Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., No. 21 (E.D. Wash. Jan. 31, 1945). One schedule of delivery was adopted for 96,000 acre-feet and another delivery obligation recognized for 18,000 acre-feet. *Id.* at 6–7. At hearing and on appeal, YTID argued that the 18,000 acre-feet was "standby" water. State Dep't of Ecology v. Acquavella (*Acquavella III*), 935 P.2d 595, 602 (Wash. 1997); *see also* WASH. REV. CODE § 90.14.140(2)(b) (2008). The Superior Court did not apply the standby section, finding that there was a usage right to some of the water and that the safe carrying capacity of the canal limited the right. State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 8–9 (Wash. Super. Ct. Apr. 18, 1995) (Supplemental Report of the Court Concerning the Right for the Yakima-Tieton Irrigation District, Volume 16A). The Supreme Court addressed the issue on appeal only to say that after an appropriate beneficial use analysis is applied to YTID's right will the issue of application of RCW section 90.14.140(2)(b) be appropriate. *Acquavella III*, 935 P.2d at 602.

293 Report of the Court Concerning YTID, *supra* note 291, at 6, 30, 43.

294 Threshold Issues Opinion, *supra* note 258, at 22.

295 Report of the Court Concerning YTID, *supra* note 291, at 26; *see also Acquavella III*, 935 P.2d at 601.

296 *Acquavella III*, 935 P.2d at 602; *see also* WASH. REV. CODE § 90.14.140(2)(b).

297 WASH. REV. CODE § 90.14.140(1)(e).

298 Report of the Court Concerning YTID, *supra* note 291, at 26.

quantities from relinquishment.[299] The *Acquavella* court believed the adjudication constituted a legal proceeding and therefore tolled the relinquishment clock.[300]

On appeal, the Washington Supreme Court disagreed with the *Acquavella* court's decision on the water quantity portion established for the YTID and overturned certain conclusions reached in Threshold Issues.[301] While affirming that beneficial use is "the basis, the measure and the limit of the right to the use of water" under both state and federal law,[302] the supreme court disapproved of the trial court's failure to make a beneficial use finding.[303] According to the supreme court, utilizing canal capacity as the basis for the water right was "inconsistent with beneficial use requirements" and also inconsistent with a previous water right quantification made by the *Acquavella* court.[304] The court overturned the 110,700 acre-feet award and remanded to the trial court to determine a quantity based on diversion and actual use.[305] As to the applicability of the 1945 Consent Decree and contracts on the quantification of water rights, the court stated:

> The "allocation" of water in the 1945 Consent Decree and water delivery contracts resulted from a settlement agreement between the parties. That agreement may be binding as to the respective rights and priorities amongst the parties, but the agreement cannot be used to avoid statutory requirements and create a state-based water right to any of those parties absent such right being based on actual beneficial use.[306]

299 *Id.* RCW section 90.14.140(2)(b) was interpreted from the outset of the adjudication to toll the application of the relinquishment provisions set forth in sections 90.14.160 through 90.14.180 during the pendency of the case. This interpretation seems dubious. It would be the goal, under a beneficial use analysis and as awareness of the importance of diversions would be heightened, for diverters to use *more* water rather than less during the course of an adjudication in order to increase their award.

300 *See* Threshold Issues Opinion, *supra* note 258, at 25–26.

301 *See Acquavella III*, 935 P.2d at 601.

302 *Id.* at 600 (internal quotations omitted); *see also* Ickes v. Fox, 300 U.S. 82, 94 (1937); Neubert v. Yakima-Tieton Irrigation Dist., 814 P.2d 199, 201 (Wash. 1991).

303 *Acquavella III*, 935 P.2d at 600.

304 *Id.*; *see also* State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 2 (Wash. Super. Ct. June 1, 1994) (Conditional Final Order Concerning the Water Rights for the Kittitas Reclamation District Court Claim No. 0465).

305 *Acquavella III*, 935 P.2d at 600.

306 *Id.* (original emphasis omitted).

On remand, the *Acquavella* court heeded the supreme court's requirement that it "employ a two-step analysis when quantifying YTID's water right."[307] That directive required the *Acquavella* court to "first determine YTID's vested water right, based on evidence of past beneficial use. It should then examine [Ecology's] claim that YTID has forfeited a portion of its right through abandonment or voluntary nonuse."[308] The *Acquavella* court determined that YTID had beneficially used, and therefore perfected, a right to divert 102,409 acre-feet in the early part of the twentieth century.[309] The trial court then changed its adjudication-long practice and applied relinquishment for the first time, reducing YTID's right to 91,986 acre-feet.[310] Ultimately, the *Acquavella* court issued a supplemental report and changed the water right yet again to an annual quantity of 98,552 acre-feet.[311] This determination relied on a more specific analysis of relinquishment, and the parties finally entered into an agreement for a water right quantity that received court approval.[312]

2. Memorandum Opinion re: Warren Act Contract Issues

Ecology again asked the *Acquavella* court to explore the issue of federal/state control in the Yakima Basin. This request emerged after Ecology contacted the major claimants by letter and asserted that many of them had contracts with the BOR for a supply of water but that there was no underlying compliance with the state permit/certificate process.[313] Hence, Ecology concluded that there was no legal basis for claiming the water.[314]

307 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 11 (Wash. Super. Ct. Sept. 2, 1999) (Report of the Court on Remand for the Yakima-Tieton Irrigation District, Volume 16B) (quoting *Acquavella III*, 935 P.2d at 601) (internal quotations omitted).

308 *Id.* (quoting *Acquavella III*, 935 P.2d at 759) (internal quotations omitted).

309 *Id.* at 22.

310 *Id.* at 35.

311 Supplemental Report on Remand for YTID, *supra* note 265, at 8.

312 *See generally* State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. May 10, 2001) (Conditional Final Order of Remand as a Final Judgment Pursuant to 54(b) and RAP 2.2(d) and Pretrial Order Number 8 as Amended).

313 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 1 (Wash. Super. Ct. Mar. 8, 1996) (Memorandum Opinion re: Warren Act Contract Issues) [hereinafter Warren Act Opinion].

314 *See generally id.*

In light of this theory, the *Acquavella* court asked for briefing on two issues.[315] First, does an entity that entered into a Warren Act or storage contract with the United States have a water right on proof of beneficial use of water supplied pursuant to the contract if the entity has neither a state certificate nor an RCW chapter 90.14 claim on file?[316] Second, does an entity that entered into a Warren Act or storage contract with the United States subsequent to 1917 have a water right on proof of beneficial use of water supplied pursuant to the contract if the entity has no state certificate but has filed a chapter 90.14 claim?[317] The *Acquavella* court issued its findings in Memorandum Opinion re: Warren Act Issues,[318] analyzed below.

In reaching its decision, the *Acquavella* court analyzed the history of federal development in the basin. Pursuant to the Reclamation Act, the BOR began studying the Yakima Basin as a potential site for making the lands agriculturally productive by constructing massive water storage and delivery systems to provide water to those lands.[319] To entice BOR involvement, the state needed to pass acceptable irrigation laws.[320] The Washington Legislature subsequently passed Laws of 1905, chapter 88, sections 1–9, which enabled the United States to withdraw, reserve, and appropriate the unappropriated waters of the Yakima Basin for development of the Yakima Reclamation Project.[321] Withdrawal by the United States continued with the sanction of the state until 1951.[322]

The *Acquavella* court also noted Washington State's recognition in 1905 of the Yakima Project's unity and integration by providing in the Act for a single appropriation to serve all the lands.[323] Changes made to the 1905 Act in 1929 evinced the state's continued acquiescence to the ongoing development and

315 *Id.* at 2.

316 *Id.*

317 *Id.*

318 *Id.* at 52–53.

319 *Id.* at 4.

320 *Id.* at 4.

321 1905 Wash. Sess. Laws 88 (codified as amended at WASH. REV. CODE §§ 90.40.010–.080 (2008)).

322 Warren Act Opinion, *supra* note 313, at 5.

323 *Id.*

expansion of the Yakima Project.[324] Development continued long after the enactment of the 1917 Water Code and related the expansion of use of water and the priority date back to the original 1905 withdrawal.[325] The amendments also provided for the unity of the entire Yakima Project as it had been and would be developed.[326]

The BOR constructed four of the six storage reservoirs prior to enactment of the 1917 Water Code, and construction of another began that year.[327] In 1911, Congress passed the Warren Act, which enabled the BOR to enter into contracts for the delivery of storage water.[328] In 1915, the legislature amended RCW section 87.03.115, providing that when an irrigation district acquires the right to use water by contracting with the United States, such water shall be distributed and appropriated in conformity with the contracts, acts of Congress, and regulations of the Secretary of the Interior.[329]

As a consequence, based on the 1905 Act and the 1915 Act, the *Acquavella* court determined state law had yielded to federal law in regard to the development of the Yakima Project.[330] Section 90.03.250 also provides that nothing in the 1917 Water Code is to affect the provisions in the 1905 Act.[331] Rather, the provisions of sections 90.40.010 through 90.40.080 determine how water rights are to be obtained by the United States, and the permit/certification process set forth in chapter 90.03 does not apply to the Yakima Project.

Because its appropriation for the Yakima Project relates back to 1905, the United States could establish its right by the prior appropriation doctrine.[332] On May 10, 1905, the United States provided notice of its intent to withdraw the unappropriated

324 *Id.*

325 *Id*. at 6.

326 *Id*.

327 *Id.* at 7.

328 43 U.S.C. §§ 523–52 (2006). Ecology questioned the legality of those contracts. Although not analyzed in these materials, the trial court disagreed and found the contracts to be valid under federal and state law.

329 *See also* Dep't of Ecology v. U.S. Bureau of Reclamation, 827 P.2d 275, 281 (Wash. 1992).

330 Warren Act Opinion, *supra* note 313, at 10.

331 WASH. REV. CODE § 90.03.250 (2008).

332 Warren Act Opinion, *supra* note 313, at 30.

waters of the basin pursuant to section 90.40.030.[333] Landowners put the water to beneficial use after storage and delivery by the United States and the irrigation districts.[334] Although the 1917 Water Code did not require compliance with section 90.40.030, that provision established a similar record keeping system for United States withdrawal.[335] Eventually, Ecology issued appropriations and certifications that the project was feasible.[336] In addition, the United States has filed twenty-three claims pursuant to chapter 90.14 that cover the project contractees back to their 1905 priority date.[337] The *Acquavella* court reasoned that between the chapter 90.40 filings, the chapter 90.03 filings, and the claims filed pursuant to chapter 90.14, the United States and all contractees have complied with applicable state law.[338]

3. Memorandum Opinion re: Motion to Limit Treaty Water Right for Fish to Natural Flow[339]

This opinion is discussed here because it primarily considers whether the provisions in a federal court decree will divide up the rights of water users in a slightly different fashion than might be contemplated by state law.[340] Two wholly proratable irrigation districts moved the *Acquavella* court to enter an order establishing: (1) the implied water right for the substantially diminished Yakama Nation treaty fishing right is a "natural flow" right with a "time immemorial" date of priority; (2) when there is insufficient "natural flow" in the Yakima River and its tributaries to satisfy all of the claims of "natural flow" users (other than those guaranteed irrigation water from storage), the natural flow users' rights to natural flow should be abated in the inverse order of the date of their priorities; and (3) Ecology

333 *Id.* at 29.

334 *Id.*

335 *Id.* at 32.

336 *Id.* at 29.

337 *Id.* at 52.

338 *Id.*

339 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 1 (Wash. Super. Ct. Apr. 2, 1996) (Memorandum Opinion re: Motion to Limit Treaty Water Right for Fish to Natural Flow).

340 *Id.*

should be required to police and enforce such natural flow rights and potential abatements.[341]

Although these issues appear to be treaty-right related, they actually required an interpretation of the 1945 Consent Judgment and its effect on non-Project, pre-1905 water users.[342] In essence, the *Acquavella* court faced the choice of following the one-bucket approach set out in the Consent Judgment or imposing a two-bucket regulatory scheme whereby non-Project users' rights would be satisfied by natural flow only, and Project-based contract rights would be satisfied from storage.[343]

The court followed the dictates of the 1945 Consent Judgment, which placed all water in one bucket and then divided that bucket into proratable and non-proratable rights.[344] Non-proratables were rights recognized by the United States when it began construction of the Project in 1905. The *Acquavella* court held that prior to 1945, there was a distinction between users who would be satisfied from the natural flow of the river and those who would receive water from storage and pursuant to contract with the BOR.[345] However, the 1945 Consent Judgment resolved whatever contention existed regarding that issue and blended all water together.[346] Proratable water users appealed this decision, but the Washington Supreme Court Commissioner denied discretionary review.[347]

D. State Law Questions

1. Rights to Return Flow

Whether a water right to return flow can be established has been a continuous source of litigation in *Acquavella*. The law in regard to return flow is anything but clear, and establishing a right depends on what entity originally diverted the water, where

341 *Id.* at 1.

342 *Id.* at 9.

343 *Id.* at 17.

344 *See id.* at 18.

345 *Id.* at 22.

346 *Id.* at 18–19.

347 State Dep't of Ecology v. Acquavella, No. 64341-5, at 4 (Wash. Feb. 11, 1997) (ruling that Judge Stauffacher's July 16, 1996, order was not appealable as a matter of right and discretionary decision was denied because the decision could not be characterized as "probable error").

the water returns, or if the water would join a watercourse, either above or underground.

a. Project Return Flow

In the court's Memorandum Opinion re: Motion for Reconsideration of Limiting Agreements, the *Acquavella* court considered rights to Yakima Project return flow.[348] The lands of three major claimants are located downgradient of Kittitas Reclamation District, one of the Project units.[349] The water users asserted that the BOR had abandoned its right to use return flows since the water users had been intercepting and using such flow for a long period.[350] The *Acquavella* court decided that return flows emanating from Project diversions and application to Project lands still belonged to the BOR and could be used again.[351] This decision centered on the 1945 Consent Judgment, which included return flow in its definition of total water supply available (the methodology for determining how much water on an annual basis will be available to water users, particularly proratable interests).[352] The court also relied heavily on *Ecology v. Bureau of Reclamation*, which recognized the significance and unique position of the federal government in making reclamation project distribution decisions in respect to use of return flows.[353] The United States thus retains the right to make a different distribution decision by way of modification in the delivery system in the Yakima Project to make a second or further use of the water on Project lands within the Yakima Basin.[354] Therefore, no downgradient user could establish a water right in Project return flows.

348 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 8–10 (Wash. Super. Ct. Apr. 1, 1994) (Memorandum Opinion re: Motion for Reconsideration of Limiting Agreements).

349 *Id*. at 1.

350 *Id*. at 10.

351 *Id.* at 14.

352 *Id.* at 3.

353 *Id.* at 11 (citing Dep't of Ecology v. U.S. Bureau of Reclamation, 827 P.2d 275 (Wash. 1992)).

354 *Id.* at 13.

b. Non-Project Return Flow

The *Acquavella* court next took up return flows in its Memorandum Opinion re: Subbasin 8 Exceptions.[355] In that opinion, the *Acquavella* court extended its ruling regarding reuse of water within a federal project to all diverters.[356] Accordingly, any diverter of water can recapture used water, even under certain circumstances, when the water has left the appropriator's land and entered a natural watercourse.[357] The *Acquavella* court also made clear that it would not grant a right in *foreign*, non-Project return flows.[358] The *Acquavella* court defined foreign water as water that would not have been in or destined for a stream without human effort.[359] This definition essentially encompasses any water that appears in a watershed but did not emanate from a watercourse within that watershed. The definition of watershed in *Acquavella* essentially coincides with the subbasin boundaries. According to the *Acquavella* court, water that runs off an appropriator's land and is in, or destined for the natural stream from which it originated, becomes subject to appropriation by others.[360]

c. Use of Return Flows on New Lands

The *Acquavella* court once again analyzed rights to return flows when subbasin claimants asserted that return flow could be used on new lands by the original appropriator without a separate certificate from Ecology.[361] These claimants appealed a decision by the Referee not allowing them to reuse water on an additional eight-six acre parcel.[362] The claimants argued that

355 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 2–4 (Wash. Super. Ct. Feb. 1, 1995) (Memorandum Opinion re: Subbasin 8 Exceptions of Ivan and Mildred Hutchinson, Court Claim No. 0876, and Vernon G. and Ellen F. Meyer Court Claim No. 1875; Theiline Scheumann & Grousemont Farm, Claim No. 1335).

356 *Id.* at 1.

357 *Id.* at 2.

358 *Id.*

359 *Id.* at 2–3 (citing Elgin v. Weatherstone, 212 P. 562, 563 (Wash. 1923)).

360 *Id.* at 3.

361 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 4–5 (Wash. Super. Ct. July 16, 1996) (Memorandum Opinion re: Return Flow Exception of Harry Masterson and Mary Lou Masterson) [hereinafter Return Flow Exception of Mastersons].

362 *Id.* at 1.

once water is diverted and brought to their property, it became their personal property.[363] Although a water right cannot be established, the return flows can be used on any lands of their choosing. The return flow did not leave their property before the second diversion was made.

Relying on *Fuss v. Franks,* a Wyoming case where a diverter tried to use return flows on a different piece of property to the detriment of another diverter who had a specific water right to use the return flow, the *Acquavella* court denied the exception.[364] The two-time water user in *Fuss* argued that water legally diverted pursuant to a state certificate becomes the personal property of that diverter and therefore available to him for a further use on different lands.[365] The *Fuss* court held that "the owner of land upon which seepage . . . rises has the right to use and reuse . . . such waste waters for use only 'upon the land for which the water forming the seepage was originally appropriated.'"[366]

The *Fuss* court noted that the first appropriator could proceed to the applicable state agency and obtain another permit for use of the seepage water on lands other than those upon which the seepage arises.[367] This rule is an obvious corollary of the rationale that water is appurtenant to lands for which they are diverted. Washington statutory law is in accord.[368] Clearly, it is critical for such water to flow to the next right holder to satisfy all the rights to water in the basin.

The *Acquavella* court also modified an earlier decision in regard to burden of proof when water is not tributary and therefore would not make its way to another diverter.[369] Although holding such water would become the personal

363 *See id.* at 6. In deciding the Mastersons case, the court relied on its earlier decision in *State Dep't of Ecology v. Acquavella*, No. 77-2-01484-5 (Wash. Super. Ct. Sept. 17, 1993) (Opinion re: Exception of Dwayne and Alvina Dormaier, Claim No. 4706 re Subbasin No. 21 (Burbank Creek)) [hereinafter Exception of Dormaiers].

364 Return Flow Exception of Mastersons, *supra* note 361, at 3 (citing Fuss v. Franks, 610 P.2d 17 (Wyo. 1980)).

365 *Fuss*, 610 P.2d at 19–21.

366 *Id.* at 20 (quoting Bower v. Big Horn Canal Ass'n, 307 P.2d 593, 602 (Wyo. 1957)).

367 *Id.* at 19–20.

368 *See* WASH. REV. CODE § 90.03.380 (2008).

369 Exception of Dormaiers, *supra* note 363, at 9.

property of the diverter if it somehow became "trapped," the evidentiary burden to prove the lack of continuity with surface or ground water fell on the diverter and not the state.[370] The *Acquavella* court also noted that the Referee should be particularly concerned about waste of water in the original diversion when enough return flows existed to irrigate an additional eighty-six acres.[371] This would be especially true if the water was to somehow become trapped, and the return flow was not available to other users.

d. Dormaier Decision

In a somewhat similar dispute, the *Acquavella* court considered the rights to spring water that arise on an owner's land and sink back into the ground without running off the owner's property or joining another watercourse.[372] The Dormaiers, claimants in one of the subbasins, did not file a claim pursuant to RCW chapter 90.14 for a small spring on their property. The facts indicated the spring arose on their property by operation of natural forces, trickled across the ground, and then seeped back into the ground without joining another surface watercourse.[373] There was no testimony that the spring water connected to an underground water source.[374] Based on these very narrow facts, the *Acquavella* court held that a spring arising on one's property and seeping back into the soil without running off the property is the landowner's exclusive property.[375] While a protectable water right could not be confirmed, the Dormaiers did not need to file a chapter 90.14 claim to protect their interest in the water.[376] This ruling only applied to pre-1917 appropriations.[377] The Masterson decision (discussed above) modified the Dormaier ruling in regard to burden of proof and

370 Return Flow Exception of Mastersons, *supra* note 361, at 7; *see also* Ranson v. Boulder, 424 P.2d 122, 123 (Colo. 1967) (stating that flowing water is presumed to find its way to a stream and the burden of proving otherwise rests upon the party claiming that such water is not tributary).

371 Return Flow Exception of Mastersons, *supra* note 361, at 8–9.

372 Exception of Dormaiers, *supra* note 363, at 1.

373 *Id.* at 3.

374 *Id.*

375 *Id.* at 9.

376 *Id.* at 10.

377 *Id.* at 9.

continuity of the water.[378] An opinion concerning the claim of Tom and Zeldia Worrell further refined Dormaier.[379]

2. RCW Chapter 90.14 Claims and Substantial Compliance

Not surprisingly, a number of claimants in the adjudication took exception to the Referee's denial of their claim for an adjudicated water right for failure to comply with the claims registration process set forth in RCW section 90.14.041. While these claimants asserted a variety of arguments, the *Acquavella* court focused on disposing of those related to substantial compliance in Memorandum Opinion re: RCW 90.14 and Substantial Compliance.[380] These claimants asserted that a party has "substantially complied" with the intent of chapter 90.14 by filing a claim in this adjudication prior to the deadline for filing such claims in the *Acquavella* action.[381]

The claimants' argument also relied on an act of the legislature that amended chapter 90.14 to provide a thirty-four-day window period in the summer of 1985 to allow individuals to obtain a certification, under specific circumstances, from the Pollution Control Hearings Board.[382] Since Ecology had the same information by way of filing in this adjudication that the Agency would obtain through the 1985 legislation, the claimants alleged that Ecology was then on notice and should have alerted affected claimants or should now accept the adjudication filing as substantial compliance.[383]

The court denied their argument on the ground that it was similar to the water user's unsuccessful estoppel argument presented in *Washington Department of Ecology v. Adsit*.[384] In

378 *See* Return Flow Exception of Mastersons, *supra* note 361, at 6–7, *clarified in* State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 3 (Wash. Super. Ct. Nov. 9, 1999) (Memorandum Opinion and Order re: Exception of Tom and Zeldia Worrell to Supplemental Report of Referee, Subbasin No. 2 (Creek Hollow)) [hereinafter Exception of Worrells Opinion].

379 Exception of Worrells Opinion, *supra* note 378, at 14–16.

380 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 1–2 (Wash. Super. Ct. Feb. 10, 1995) (Memorandum Opinion re: RCW 90.14 and Substantial Compliance) [hereinafter Substantial Compliance Opinion].

381 *Id.* at 2.

382 *Id.*

383 *Id.* at 3–4.

384 *Id.* at 3.

Adsit,[385] the Washington Supreme Court determined Ecology had no duty to publicize passage of section 90.14.043, and the Referee, as an officer of the superior court, would have acted improperly to advise one party in the proceeding how to improve its legal position to the detriment of others. Accordingly, the *Acquavella* court determined that Ecology, during the course of a stream adjudication, had no duty to advise claimants of other statutory requirements for protecting water rights.

The *Acquavella* court also analyzed the substantial compliance argument and ruled that filing a claim in the adjudication does not satisfy the requirements of chapter 90.14 because doing so does not exhibit a specific intent to comply with the statute.[386] In *Adsit*, the claimant did try to comply but failed to file the right form.[387] The claimant did, however, file the right information during the statutorily mandated period of time with the right entity—Ecology.[388] In the Yakima adjudication, the *Acquavella* court held that filing a short form[389] did not meet the *Adsit* standard for substantial compliance for protecting rights in those instances where a regular claim form to protect more expansive water uses would be required.[390] It relied on the *Adsit* ruling that all necessary information must be provided to be consistent with the legislative intent of providing adequate records for administration of the state's waters.[391] The *Acquavella* court concluded that substantial compliance would only encompass minor, technical variations from the established standard: the "[c]ourt has sought, by this opinion, to demonstrate that *Adsit* and substantial compliance are not a carte blanche excuse allowing certain claimants to avoid compliance with the law at the expense of others who relied on its protection."[392]

385 State Dep't of Ecology v. Adsit, 694 P.2d 1065 (Wash. 1985).

386 Substantial Compliance Opinion, *supra* note 380, at 5–6.

387 *Adsit*, 694 P.2d at 1068–69.

388 *Id.*

389 A short form is a form supplied for documenting only minimal uses of water.

390 Substantial Compliance Opinion, *supra* note 380, at 7.

391 *Id.* (citing *Adsit*, 694 P.2d at 1068–69).

392 *Id.* at 9.

3. Interplay Between Drinking Water Statutes and Adjudications

On August 24, 2005, the court entered its decision resolving the City of Roslyn's motion that future orders limiting the diversions of post-1905 water right holders provide an exemption for indoor domestic water use.[393] Earlier in the adjudication, the court confirmed a water right for Roslyn with a 1908 priority date.[394] During periods of shortage, the first call on the river disallows water uses with a priority date junior to May 10, 1905.[395] Roslyn believed the court had the inherent equitable authority to exclude Roslyn from such an order on the basis that doing so is consistent with the city's statutory obligation to "provide an adequate quantity and quality of water in a reliable manner at all times."[396] Roslyn requested a transition time of ten years to allow it to find and obtain approval for mitigation water, or if necessary, rule that the health provisions above prevail over anything contained in RCW chapter 90.03.[397]

While the court did not agree that the drinking water statutes take precedence over the provisions in chapter 90.03, it did determine it could exercise equitable jurisdiction to afford a remedy.[398] The court authorized a one-time, three-year transition period to allow Roslyn and other junior public water systems/domestic water users to secure senior water rights for replacement or mitigation.[399] The court did require that compensation be paid to senior water users since they had no role in creating the junior domestic water purveyor's dilemma.[400]

393 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5, at 7 (Wash. Super. Ct. Aug. 24, 2005) (Memorandum Opinion re: City of Roslyn's Motion to Revise Order Limiting Post-1905 Diversions During Periods of Water Shortage) [hereinafter City of Roslyn Opinion].

394 *Id.* at 1.

395 *Id.* at 1–2.

396 *Id.* at 2 (quoting WASH. ADMIN. CODE § 246-290-420(1) (2008)).

397 *Id.* at 2. The Washington State Department of Health was permitted to participate as amicus curiae and filed a brief that essentially echoed Roslyn's concerns and extended that concern to other public water systems serving a population of over 1800 that hold junior priority dates, which subject those rights to curtailment during times of drought. *Id.* None of those entities, except Roslyn, had developed water-system management plans.

398 *Id.* at 5–6.

399 *Id.* at 6.

400 *Id.* at 6–7.

No order has been issued as of this date as the parties are trying to mediate a solution.

4. Relinquishment After Adjudication

On January 21, 2005, the court entered its opinion concerning Ecology's motion for authorization to perform a tentative determination.[401] This decision focused on the process that compels Ecology to make a determination as to whether a water right is valid before making a decision on an application to change some element or aspect of the water right.[402] In the context of a basin where an adjudication has occurred, Ecology's determination of validity is much easier. After all, the primary purpose of such a proceeding is to quantify and validate water rights. The Agency's question in *Acquavella* pertained to Ecology's processing of change applications of water rights. Ecology asked the court to determine how far back in time the Agency should be authorized to go in analyzing historic water use when the validity of that right has been established by order in *Acquavella*.[403]

The three governments asked the court to set the date as being the day that the last hearing occurred in a particular subbasin or in regard to a specific major claimant.[404] The irrigators generally asked that the relinquishment clock begin to tick as of the date of entry of the relevant conditional final order (CFO).[405] The court determined that Ecology was barred by principles of res judicata from finding or arguing that a claimant had relinquished a water right through the entry of the applicable CFO because the Agency had been given ample opportunity to argue nonuse up through that date.[406] The court did provide an exception allowing the Agency to find

401 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Jan. 21, 2005) (Memorandum Opinion re: Department of Ecology's Motion for Authorization to Perform a Tentative Determination, Court Claim No. 01566, Estate of Ted and Agnes Bugni Subbasin No. 3 (Teanaway River)).

402 *See id.* at 3 (citing WASH. REV. CODE § 90.03.380 (2008); Okanagon Wilderness League v. Twisp, 947 P.2d 732, 737–38 (Wash. 1997)).

403 *Id.* at 10.

404 *Id.* at 6.

405 *Id.* Irrigation interests would ultimately argue that relinquishment should start to run as of the date the final decree was entered for the entire adjudication.

406 *Id.* at 9.

relinquishment if Ecology did not have an opportunity to argue that relinquishment occurred before entry of the CFO.[407]

5. Issue Presented in the Lavinal Claim

A court report entered on October 8, 2002, addressed the following issue of first impression: Does a right from a perfected point of diversion relinquish for nonuse if water has been diverted from another source for five or more consecutive years and used for the authorized purpose of the existing right?[408] Relying on *Russell-Smith v. Department of Water Resources,*[409] the court determined that relinquishment was not the proper penalty in light of the facts presented.[410] The court only confirmed the point of diversion at the historic location and required the mining interest to proceed through a transfer process.[411] The decision relied on certain statutory similarities between Washington and Oregon law.[412]

First, Oregon's water rights laws treat "use," "beneficial use," and "point of diversion" as distinct concepts.[413] Second, the forfeiture statute focused on "use" and "beneficial use" without any reference to "point of diversion."[414] Third, although other Oregon statutes address unauthorized changes in points of diversion, none established forfeiture as the remedy.[415] Finally, under the Oregon scheme, the lack of forfeiture in such a scenario will not result in water right holders engaging in unbridled and disruptive changes in points of diversion.[416]

407 *Id.* at 10–11.

408 State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Oct. 8, 2002) (Memorandum Opinion and Order re: Exceptions to Second Supplement Report of Referee Subbasin 4 (Swauk Creek)) [hereinafter Exceptions to Second Supplement Opinion].

409 Russell-Smith v. Water Res. Dep't, 952 P.2d 104, 108 (Or. Ct. App. 1998).

410 Exceptions to Second Supplement Opinion, *supra* note 408, at 7–8.

411 *Id.* at 8.

412 *Id.*

413 *Id.*

414 *Id.*

415 *Id.* at 9.

416 *Id.*

IV
TO ADJUDICATE OR NOT TO ADJUDICATE

Nearly a decade into the twenty-first century, a number of western states, including Washington, are not near finalizing the quantification of water rights. Because of the amount of time and resources required to engage in such processes, it is important to carefully consider whether stream adjudication cases continue to make sense. Essentially, the policies supporting and opposing quantifying water rights in a general adjudication remain the same today as they did a century ago. For example, one hundred years after *Winters v. United States*,[417] many tribes' reserved rights have not been quantified. Numerous other unquantified federal water rights that may be senior in a basin are another source of great uncertainty. Similarly, western communities continue to grow at tremendous rates, and cities may not know the extent and validity of the water supply or have access to purchase water rights that have been adjudicated. Finally, the impact of climate change appears to be that droughts will tend to be worse and somewhat more frequent, making regulation critical. Clearly, many water resource quantification questions still need to be answered.

The Yakima Basin adjudication experience demonstrates both the strength and weakness of the process. Having been involved in the Yakima Basin adjudication for more than ten thousand days, my sense is that fifty people might very well give fifty different explanations as to why it has or has not been worth the price. The following sections examine the pros and cons of the adjudication more closely. One key point that must be considered at the outset is that these cases offer a relatively fair process by a neutral decision maker. In regard to joinder of all parties to the Yakima Basin adjudication, Judge Stauffacher wrote:

> In the context of this matter, it should be noted that this vested property water right belongs to every beneficial user, whether it be the homeowner who irrigates his lawn and shrubs, the apple grower with 80 acres of orchard, the vineyard owner with 120 acres of grapes or the hop grower with 600 acres of hops. That water may be just as precious, or even more so, to a retired couple with a 60-foot by 100-foot lot with a vegetable

417 Winters v. United States, 207 U.S. 564 (1908).

> garden in the backyard as it would be to a hay grower with hundreds of acres of alfalfa. [418]

These words express the judge's understanding as a lifelong resident in the Yakima Basin of the importance of water, no matter the use. When a person lives in a dry place, every decision—like every drop—is important and deserves nothing less than our closest scrutiny in a full and fair process.

A. Pros

Although water collectively belongs to the public,[419] water rights are "usufructuary" property rights, and the owner has the right to divert and make a beneficial use of a non-wasteful amount of water.[420] Over time, stream flows can become fully appropriated, requiring regulation to ensure that senior water right holders are able to divert the flows to which they have a right. However, because early or senior rights predating the 1917 Water Code were not recorded, there is no truly accurate administrative inventory of water rights (diversionary or instream).[421] This predicament is further exacerbated by the prior appropriation doctrine itself, which requires continued beneficial use for water right holders to retain their interest in the stream flow.[422] Finally, many federally reserved water rights, particularly treaty-reserved water rights, remain unquantified.[423]

Until all such matters are addressed, the state regulatory agency with oversight of water resources will not have a

418 U.S. Motion to Dismiss, *supra* note 262, at 14.

419 *See, e.g.*, WASH. REV. CODE § 90.03.010 (2008) ("Subject to existing rights all waters within the state belong to the public . . . .").

420 DAVID H. GETCHES, WATER LAW IN A NUTSHELL 83 (3d ed. 1997).

421 WASH. REV. CODE §§ 90.14.010–.910. Sections 90.14.010 through 90.14.910 attempt to rectify that problem. However, during examination in an adjudication process, the extent and accuracy of those claims standing alone are not adequate to alleviate the need of an additional accounting.

422 *See id.* §§ 90.14.130–.210. Chapter 90.14, in its effort to ensure an accurate record of water rights, provides that failure to use water beneficially for five consecutive years, without sufficient cause, may result in the loss of all or that portion of the right going unused.

423 Pursuant to the McCarran Amendment, 43 U.S.C. §§ 371–660e, state courts have jurisdiction to determine federal interests in a general adjudication, including tribal rights, in a state proceeding. That waiver of sovereignty is rather unique and no other legal authority requires participation by the federal government in state court proceedings for purposes of settling water right claims.

thorough and accurate inventory of water rights. The adjudication process provides a neutral forum where evidence can be introduced to provide the most comprehensive examination of claimed rights and thereby establish an accurate database of rights. Nothing else, particularly a negotiated settlement, provides the same level of certainty and finality offered by the adjudication process.

Major benefits of an adjudication are experienced during times of shortage by allowing entities seeking to utilize the water resource to engage in planning that would otherwise lack the certainty necessary to attract investment. This reality is true regardless of which side of the development aisle one sits. Examples of these benefits are set forth below.

1. Regulation During Shortage

The focus of a stream adjudication is to create a priority of use, based on seniority, to be utilized when water supply is insufficient to meet demand. Establishing that priority in Washington (and no doubt elsewhere) can be complicated. Water users were under no obligation to register intended uses of water in Washington until 1917.[424] The Yakima River Basin was settled so long ago[425] that very few of the surface water rights are based on permits or certificates issued under the water code. In 1969, the legislature enacted the Claims Registration Act and required each entity claiming the right to use water not based on a permit/certificate to register such claims with the state.[426] These claims are not water rights, however, and quite often do not correspond with the actual use of water. Further, during the

424 *See* WASH. REV. CODE § 90.03.010 ("Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise . . . ."); *see also id.* § 90.03.250 ("Any person . . . hereafter desiring to appropriate water for a beneficial use shall make an application to the department for a permit to make such appropriation, and shall not use or divert such waters until he has received a permit from the department . . . .").

425 1 LYMAN, *supra* note 14, at 188–89. After the water right was quantified for the United States in trust for the Yakama Nation, the senior right in the Yakima Basin maintains a priority date of 1852 and is appurtenant to Catholic mission property near the Yakama Reservation. There are few water rights junior to May 10, 1905.

426 WASH. REV. CODE § 90.14.041.

course of *Acquavella*, numerous claims were found to be unsubstantiated. Thus, the claims registration concept is only helpful after moving through the filter of an adjudication. Accordingly, in times of inadequate supply, only those basins that have been adjudicated offer Ecology adequate information to perform meaningful regulation.

2. Water Marketing

Along with other parts of the state and the West generally, the Yakima Valley is an area that is growing in population.[427] There is interest in developing resorts, home sites, vineyards, and wineries.[428] All of these developments need water. Surface water in the Yakima Valley has long been considered fully, if not over appropriated.[429] With a greater understanding of the connection between ground water and surface water comes the realization that finding water for future development is difficult.

One valuable option when water is in limited supply is to create a water market where water rights can be transferred to new developments. Water marketing would not have been possible in the Yakima Basin were it not for the adjudication bringing certainty to the oldest, existing rights in the basin. The *Acquavella* court was involved in approving a number of water transfers to Suncadia[430] near Cle Elum, a development that would have faced considerable difficulty in finding adequate water if not for the certainty of water rights in the Yakima Basin and a relatively straightforward mechanism to transfer water rights to the resort. Along with this transfer, Suncadia purchased other

427 In the thirty-one years concluding in 2001, Yakima County's population increased by 54.6 percent to 224,500. *See* LABOR MKT. & ECON. ANALYSIS BRANCH, WASH. STATE EMPLOYMENT DEP'T, YAKIMA COUNTY PROFILE 8 (2002), *available at* http://www.wa.gov/esd/Imea/pubs/profiles/yakima.pdf.

428 YAKIMA BASIN STORAGE ALLIANCE, CRITIQUE OF THE BUREAU OF RECLAMATION BENEFITS ANALYSIS 2 (2007), *available at* http://www.ybsa.org/bor_report.php (follow "Critique of BOR Benefits Analysis" hyperlink).

429 *Id.* at 5.

430 Suncadia Resort and associated property is a large mountain resort area comprised of 272 guest rooms and suites and approximately 3700 home sites on approximately 6000 acres. Suncadia Resort Home Page, http://www.rleehicks.com/Suncadia (last visited Jan. 3, 2009).

water rights on tributaries and transferred them into instream flow to mitigate for losses resulting from the upstream transfer.[431]

A number of other examples also support the value of certainty in creating a water market. For instance, the Col Solare winery near Benton City benefited from the existence of a water market. The parcel of land on which the winery hoped to engage in grape growing and processing did not have an appurtenant water right.[432] Through water marketing, Col Solare obtained water rights for the winery and vineyard from land near Ellensburg.[433] This water also benefits instream flows in the Yakima River from its original point of diversion near Ellensburg to Benton City, where it is now being withdrawn. This stretch of river includes a section that suffers from low flows during the summer months. Additionally, although the City of Roslyn had a water right, the priority date for that right was quite junior in the basin and was subject to shutoff during times of low flow.[434] As a result, Roslyn acquired a more senior right to satisfy the needs of the community. None of these transfers would have been as readily available and concrete, if even possible, without the rights being adjudicated.

3. Legal Precedents

When procedural issues were hindering progress in the early days of *Acquavella*, thirteen smaller, less complicated adjudications were completed. Four of the rulings from *Acquavella,* as well as three from other adjudications, were appealed to either the state supreme court or the court of appeals, establishing legal precedent that can be used in future adjudications and resolving other water disputes. Many of those issues have been discussed in other sections of this Article. The *Acquavella* experience will most likely make any future adjudications more streamlined.

431 *See* Pacific Northwest National Laboratory, Suncadia Report/Cle Elum Urban Growth Area Environmental Impact Statement Project, http://energyenvironment.pnl.gov/projects/project_description.asp?id=308 (last visited Jan. 3, 2009).

432 *See* YAKIMA WATER TRANSFER WORKING GROUP, WASH. STATE DEP'T OF ECOLOGY, PROJECT DESCRIPTION (2007), *available at* http://www.ecy.wa.gov/programs/wr/ywtwg/images/pdfs/2007_37.pdf.

433 *See id.*

434 City of Roslyn Opinion, *supra* note 393, at 1–2.

4. Avoidance of Litigation

Because of the certainty of adjudicated water rights, governments and other organizations can be assured of the validity and scope of the water rights to acquire and transfer to an instream purpose. The ability to transfer water to instream flows could help avoid conflict with the Endangered Species Act and the Clean Water Act provisions. The Bureau of Reclamation, using funds from the Yakima Enhancement Project, has purchased water rights and in some instances land and water rights, fallowing the land, and transferring the water right to instream flow. Farmers with court-quantified water rights have the certainty they need to make decisions to upgrade their delivery systems. Improved efficiencies result in less water being diverted, which increases the flow in the river or tributary creeks. Environmental organizations such as Washington Water Trust and Washington Rivers Conservancy have leased or purchased water rights for either permanent or temporary transfers into the trust program and continue to work with landowners toward additional transfers. Finally, Ecology has developed the state trust program, which allows water right holders to devote water rights to instream flow purposes and thereby avoid the potential for relinquishment during periods when water is not needed.[435]

5. Certainty in an Uncertain Climate

The University of Oregon School of Law's Environmental and Natural Resources Law Newsletter recently engaged in *Sounding the Alarm*.[436] According to that story, climate change scientists warn that ten years may be the maximum time frame to reduce greenhouse gas emissions.[437] University of Oregon Law Professor Mary Wood believes governmental institutions

435 WASH. REV. CODE § 90.14.140(2)(h) (2008). This section provides that there shall be no relinquishment of any water right "[i]f such right is a trust water right under chapter 90.38 or 90.42 RCW." *Id.* Chapter 90.38 pertains to donations of water rights to a trust program while chapter 90.42 provides criteria for funding/development of conservation projects and allows the state to acquire conserved water.

436 *Sounding the Alarm*, ENGAGING THE LAW TO SUPPORT SUSTAINABILITY ON EARTH (Envtl. and Nat. Resources L., Eugene, Or.) Fall 2007, http://enr.uoregon.edu/docs/ENR_NEWSLETTER_07.pdf.

437 *Id.*

have a ten-year period in which to act before the "tipping point" is reached.[438] Essentially, "if we continue business as usual, then at some point within this coming decade, and probably sooner rather than later, we will effectively place a lock on the door of our heating greenhouse and throw out the key."[439] If climate scientists are correct, hydrologic cycles as we know them are in for massive modification. Water judges are already beginning to gear up for what looks to be a volatile period in water litigation.[440]

The Yakima Basin will not be immune from this impact. Scientists predict that even a two-degree Celsius warming will result in higher flows in the late autumn and winter months, peak runoff occurring earlier in the water year, lower spring and summer runoff, and lower annual runoff than for the historic climate condition.[441] This scenario will reduce water availability for irrigation and instream-flow needs.[442] This impact tends to affect the drought years more harshly.[443] Other members of the hydrologic community predict water users with a May 10, 1905, priority water right being "severely rationed" over half of the time compared to current reductions of roughly fourteen percent of the time.[444]

Clearly, dealing with the hydrologic developments related to global warming is "borrowing trouble." In essence, reacting to

438 Mary Christina Wood, *Nature's Trust: A Legal, Political and Moral Frame for Global Warming*, 34 B.C. ENVTL. AFF. L. REV. 577, 586 (2007).

439 *Id.*

440 Dividing the Waters, an organization comprised of judges and special masters involved in water litigation held two "science for judges" seminars on the issue of climate change.

441 MARK MASTIN & WARREN SHARP, COMPARISON OF SIMULATED RUNOFF IN THE YAKIMA RIVER BASIN, WASHINGTON, FOR PRESENT AND GLOBAL CLIMATE-CHANGE CONDITIONS 5 (2003), *available at* http://wa.water.usgs.gov/projects/yakimawarsmp/data/9EKT2_03_approved.pdf.

442 *Id.*

443 *Id.* at 8. According to Mastin and Sharp, at least ten percent of the water years can be expected to generate runoff volumes during the runoff season that are smaller than the lowest runoff years in the last fifty-six years.

444 MICHAEL J. SCOTT ET AL., CLIMATE CHANGE AND ADAPTATION IN IRRIGATED AGRICULTURE—A CASE STUDY OF THE YAKIMA RIVER 3 (2004), *available at* http://www.ucowr.siu.edu/proceedings/2004%20Proceedings.pdf (follow "Climate Change and Adaptation in Irrigated Agriculture" hyperlink on page 2 under "Session 5") (defining "Severe Rationing" as reduction of fifty percent or more of historic rights).

these predictions assumes that changes in the climate are going to occur. Responding to a changing water cycle will not assist in curbing global warming. However, taking steps to lawfully and equitably limit water demands will increase the chance that resources will be available to meet challenges as they arise. The following suggestions summarize several considerations that may prove helpful in preparing our water regime for the impact of climate change.

First, more adjudications present a valuable roadmap for creating a relationship between water supply and demand. While many processes are commenced to manage water and in fact are utilized to fashion solutions in an effort to avoid adjudications, such is tantamount to allowing someone to play a poker hand who may not have openers. While the ratio of filed claims to adjudicated certificates in the Yakima Basin has yet to be calculated, a cursory review would place the number at approximately fifty percent. That calculation is not to suggest a fifty percent reduction of the water demand. Few, if any, large water users were denied rights, although certain rights were reduced to reflect beneficial use.

Second, water users and managers need to become more realistic about the "paper" demand that may exist on some water supplies. An adjudication would provide the certainty of inventory and once completed could assist as a process to compensate individuals with water rights both junior and in excess of the mean runoff.

Finally, it may be useful to create compensation concepts that will better reward water users for not using their rights, and the compensation should increase with the severity of the water shortage. This concept can partially be managed through water marketing, but perhaps some level of government should be granted authority to acquire, sell, and lease water rights with the idea the revenue can be used as a climate change tax rebate to assist in encouraging wise choices of water use in times of shortage.

There are undoubtedly a number of ideas that have been and will be suggested to deal with the effect of climate change. No ideas that do away with rights without compensation deserve support: they are not as effective, if effective at all, without an underlying process to legitimize rights. For claimants, while winning is always preferable, an adjudication addresses the

water supply problem by simply providing a decision on, and specifics of, a water right.

B. Cons

Although an adjudication accomplishes its overriding goal of providing the baseline inventory necessary for regulation and future planning decisions, the process lends itself to criticism. Issues of accuracy, cost, and longevity of the final decree, among others, must be considered in evaluating the usefulness of the adjudication process.

1. Accuracy

For the final decree to be useful as a water rights inventory, it must be accurate. Toward that end, the Washington statutory scheme[445] utilizes superior court oversight and a common law process.[446] However, many water right claimants may only have rights to small quantities, be unable to afford counsel, or be unaware of the purpose and scope of an adjudication.[447] Given the many unknowledgeable and unwary participants, several of the underpinnings of a successful lawsuit are not present despite the presence of formal structure and processes.

The traditional litigatory element of controversy is the most notable element absent in a general stream adjudication. Common law jurisprudence relies on a disagreement between the parties involved in the action, and from this collision of views, the truth theoretically emerges. Such is the purpose of cross-examination, to elicit the truth from a disagreeing witness. Although a stream adjudication maintains many of the trappings of a typical lawsuit, for a variety of reasons it lacks this fundamental attribute of disagreement necessary to ensure a

445 WASH. REV. CODE §§ 90.03.110–.245 (2008).

446 *See id.* §§ 90.03.120–.130. This section requires the issuance and service of a summons to all known water users. *Id.* Additionally, even though an Ecology employee presides over many of the hearings, that person is vested with many of the same procedural attributes as the superior court.

447 In an over-allocated basin, where rights to flows exceed supply, confirming a water right which has gone unused often deprives other right-holders who have historically used their rights. Unfortunately, many water claimants are uncomfortable or unwilling to challenge their neighbors' rights.

complete and accurate record.[448] Because the trial court or the referee can only make decisions based on the available record, quantification as to the particulars of an individual's water rights may conceivably be rendered that do not reflect the reality of historical water use.[449]

Because the necessary controversy does not consistently occur during the evidentiary hearings, the assistant attorneys general representing Ecology are placed in the awkward position of assuming the role of interrogators. This role is arguably inappropriate for the agency charged with both providing information to conduct the hearing, and also participating, through the referee, as a decision maker.[450] The statute should be clarified to provide a clearer statement of Ecology's role. If the adjudication process is to remain a superior court function,[451] and with great likelihood that the posture of water diverters will not change, perhaps the most useful role for Ecology is that of a designated adversary. In the absence of a designated adversary, claimants unite their efforts against instream flow uses as the target during times of shortage.

2. Longevity and Cost

The obvious criticisms of adjudications are the issues of time and cost. It is not possible to suggest these cases are not costly and time-consuming. As a result, parties tend to look for streamlining opportunities. However, a fundamental role of the

448 In *Acquavella*, a number of factors may contribute to a potentially inadequate record. Many landowners appear pro se and are, therefore, unfamiliar with the court process and the subject matter of the dispute. Additionally, because the resource is limited, an adjudication pits otherwise friendly neighbors against one another, which places those relationships at risk.

449 Unfortunately, very little objective information exists to document the historic uses of water, particularly for those rights established prior to 1917. Claim forms filed pursuant to RCW chapter 90.14 are one source, but those only represent a user's best guess: many users testified to having filed claims without doing objective measurements. Additionally, many of the smaller diversions from the Yakima River and its tributaries are unmonitored thereby providing no accurate history of diversions either. Generally, the adjudication process relies on personal testimony and much evidence, which might not be admitted in a typical lawsuit, simply because it is the best and only available evidence.

450 *See* WASH. REV. CODE § 90.03.190; *see also* State Dep't of Ecology v. Adsit, 694 P.2d 1065 (Wash. 1985).

451 Many states do not utilize the courts as the main tribunal for assessing the extent and legitimacy of water rights.

court system is to provide due process and ensure justice. Generally speaking, these are not representative cases such as those involved in a class action litigation. Rather, each individual claiming a right to use water receives an opportunity for a day in court. While the right to appear in court is fundamental, it is worthwhile to explore options and ideas to limit the time in court to one day.

An adjudication is and should remain a court process.[452] As participants proceed through these complicated processes, it seems appropriate that we be prepared to offer ideas to make future cases more efficient. The *Streamlining the Water Rights General Adjudication Procedures* report (*Streamlining Report*) provides a number of excellent suggestions that should result in reduced time and resource commitments to adjudicate water rights.[453] Three suggestions seem most noteworthy: authorize Ecology to meet with claimants and offer tentative determinations, allow the use of pre-filed testimony, and make better use of existing technology.[454]

Placing Ecology in a position where it can review specific claims to water rights and make recommendations to the court at the outset of a case is a very promising suggestion.[455] The court has discussed the sometimes repetitive process of issuing reports and hearing exceptions. Each segment consumes considerable time in order to ensure due process. The *Streamlining Report* supports a two-part recommendation that could dramatically curtail the amount of time spent around the exceptions process.[456] This recommendation would allow Ecology to assume a greater role at the outset of an adjudication by performing an

452 There are numerous reasons for using courts as the forum for quantifying water rights not the least of which is the McCarran Amendment's requirement of a court process in order to involve federal interests.

453 WATER RES. PROGRAM, WASH. STATE DEP'T OF ECOLOGY, 2002 REPORT TO THE LEGISLATURE: STREAMLINING THE WATER RIGHTS GENERAL ADJUDICATION PROCEDURES (2002), *available at* http://www.ecy.wa.gov/pubs/0211019.pdf [hereinafter STREAMLINING REPORT].

454 *Id.* at 11–17.

455 However, see section above regarding the need for clarifying Ecology's role in an adjudication.

456 STREAMLINING REPORT, *supra* note 453, at 11–12.

initial determination and recommendation of the validity of water rights.[457]

For this recommendation to succeed, a claimant would be required to submit all supportive information and meet with Ecology at the time of filing the claim to participate in the adjudication.[458] Ecology would then identify problems with the existing record and establish a plan and timelines for production of that information.[459] Once that timeline was completed, Ecology would then recommend confirmation or denial of the claim and the specific elements of any recommended water right.[460] "If Ecology's decisions are not contested, the court would accept them. If contested, the judge or referee would hear the claimant's or any other party's objections to the tentative determinations . . . . [B]ased on the evidence and argument presented at [the] hearing, the court would then make its final determinations and rulings."[461] This quasi-mediation concept would help the process in a variety of ways, including providing the many pro se claimants certain expertise in developing a better record earlier, narrowing any disputes, and laying out the particulars of a water right that are easily adapted into a final court order.[462]

Allowing parties to utilize pre-filed testimony makes substantial sense in the adjudication format and presents the opportunity to save considerable hearing time. Evidentiary objections tend to be fewer in adjudication hearings than in other superior court cases. The *Streamlining Report* makes clear that adverse parties would retain the right to object to the testimony and schedule cross-examination of the declarant.[463]

Vast technological changes have transpired since most of the long-running stream adjudication cases were filed in the 1970s and 1980s. These technological advances should touch every aspect of future adjudications from preparing and filing claims to dispensing adjudicated water rights and the eventual monitoring

457 *Id.* at 11.

458 *Id.* at 11–12.

459 *Id.* at 12.

460 *Id.*

461 *Id.*

462 *Id.*

463 *Id.* at 14.

of those rights, and quite probably, in ways that cannot now be imagined. Use of advances in technology should make stream adjudications cheaper (through electronic filing, web page posting of documents, and electronic appearances) and potentially more accurate (through satellite imagery and improved modeling, mapping, and measuring).

Finally, it should be noted that Washington's Water Disputes Task Force supported development of a water court.[464] That suggestion was considered and supported by the Superior Court Judges Association and Board of Judicial Administration.[465] Development of a water court would have the unmistakable advantage over the current system by eliminating start-up and wind-down time as the venue currently changes with the location of the water resource to be adjudicated.[466] A water court model keeps the system in place and simply changes the players as the water source in question changes. A water court would also assist in addressing the Board of Judicial Administration's concern regarding the role of affidavits of prejudice in the context of a stream adjudication.[467]

V
GOOD PRACTICES

Water right adjudication is an extremely specialized area of practice, and many lawyers appear in the case with little or no understanding of the process. The following material provides some ideas for practitioners unfamiliar with this complicated and specialized proceeding. As a preliminary matter, it is helpful to remember that individuals are required to become a party to a

464 WATER CT. WORK GROUP, REPORT TO THE BOARD FOR JUDICIAL ADMINISTRATION 4 (2004), http://www.courts.wa.gov/committee/docs/Report%20FINAL.doc.

465 BD. FOR JUDICIAL ADMIN., POLICY STATEMENT BY THE BOARD OF JUDICIAL ADMINISTRATION ON WATER RIGHT ADJUDICATIONS 1–2 (2004), http://www.courts.wa.gov/committee/docs/BJA%20policy%20statement.doc.

466 *See* WASH. REV. CODE § 90.03.110 (2008).

467 Washington law allows each party to file one affidavit setting forth that the party cannot receive a fair and unbiased decision on its claims. *Id.* § 4.12.050; *see, e.g.*, Motion and Affidavit for Reassignment, *supra* note 155, at 2. Obviously, the potential of a lawsuit with thousands of parties makes the specifics of section 4.12.050 unworkable. Section 6 of the 2009 legislation would require a showing of good cause for the removal of the judge, not just an unsupported allegation that the party believes it would not receive a fair trial.

water right adjudication (and therefore often participate unwillingly) or risk losing something they believe they already have.

A. Identify Court Personnel

While judicial officers or referees ultimately make decisions regarding quantification of water rights, other important court personnel can provide helpful information regarding the process of an adjudication. For example, early in the case, Ecology assigned two senior employees with extensive backgrounds in Washington water law to assist the court in managing *Acquavella*. While these individuals performed a variety of roles, none was more important than assisting pro se claimants and lawyers in utilizing the process. Accessing such a resource is far less awkward and less ethically complex than contacting a judicial officer.

Additionally, the county clerk assigned at least one court clerk at all times to manage the vast quantity of documents filed in the case, docket and track pleadings, and organize exhibits. These individuals also maintained the *Monthly Notice*, which contained a listing of every document filed for the previous month along with a printout to help track hearing dates and motions.

B. Become Familiar with Statutes and Key Cases

While *Acquavella*'s prolonged existence stems from many valid reasons, one area that could be improved is limiting the number of opportunities for a party to present a claim.[468] In order to do that, claimants and counsel would need to better understand the requirements that go into quantifying a water right and become more organized and efficient in the presentations. An excellent way to prepare such a presentation is to review and understand the rules that guide courts in quantifying water rights. This guidance primarily comes from prior *Acquavella* litigation, pretrial orders, statutes, and relevant appellate case law.

468 It was not uncommon for claimants to utilize three or more court hearings to present evidence and analysis.

1. Prior Litigation

One piece of potentially fertile ground that often goes unexamined is the effect of prior litigation on water usage in a particular area. These cases can arise in a variety of contexts, although disputes over water use between neighbors present the most likely area for litigation. Decisions in such cases can create an excellent historical record and serve to establish certain parameters of a water right. For example, the Yakima court relied on prior decisions to establish water duty, areas of use, season of use, type of use, point of diversion, and priority date.[469]

Occasionally, a prior trial court decision may even establish that no water right exists. Conversely, prior decisions regarding water use in an area may be established without including a particular parcel of land. The Yakima court consistently held that if sufficient proof were presented to indicate the owner at that time was not included in the summons or otherwise joined in the case, then the decisions therein could not bind the successors.[470] Typically, these cases are not found at the appellate level and therefore are more difficult to identify. However, during any discovery process, the state water resource agency may have information about prior relevant cases. Long-time residents are also a good source of information, for they may be familiar with traditional water use in the area as well as any local legal disputes over water. No matter what side of an argument a party is on, it is critical to take these prior decisions into consideration when presenting a position.

2. Pretrial Orders

Stream adjudications, potentially involving thousands of parties, require specific procedural considerations to run smoothly. In *Acquavella*, the court issued seventeen pretrial orders. These orders established the specific procedures for participating in the adjudication. They addressed the process for filing motions, evidence, notice, and hearing dates;[471] dividing up

469 *See* Report of the Court Subbasin No. 23, *supra* note 149 (examining state rights on at least two previous occasions).

470 *See* Exceptions for Subbasin 18, *supra* note 149, at 14.

471 *See* State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. July 14, 2000) (Pretrial Order No. 13 re: Review of Documents and Exhibits); State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Feb. 18, 1987)

the case;[472] joining or substituting in as a defendant;[473] processing late-filed statements of claims;[474] considering appeals from Ecology decisions regarding changes of use and transfers of water rights;[475] incorporating court commissioner rulings into an adjudication;[476] and other matters necessary to manage the adjudication. Attorneys should be aware of these orders, for these documents can be as important as state court rules in civil cases.

3. Statutes

Statutes relating to the adjudication of water rights can be found in RCW chapters 90.03 and 90.14. While each statutory provision will not be explored below, some general overview will be provided and specific attention paid to common issues and problems that have arisen in *Acquavella*. The relevant statutory provisions tend to divide themselves as procedural or substantive.

(Pretrial Order No. 6 re: Procedures Relating to Order *Pendente Lite*); State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Apr. 19, 1985) (Pretrial Order No. 3 re: Notice Procedures and Other Pretrial Matters); State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Jan. 8, 1985) (Pretrial Order No. 4 Amending Pretrial Order No. 3 re: Notice Procedures and Other Pretrial Matters); State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Sept. 17, 1981) (Pretrial Order No. 1 re: Motions in General); State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Mar. 30, 1981) (Pretrial Order No. 2 re: Pending and Other Motions).

472 *See* Pretrial Order No. 5, *supra* note 105; *see also* State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. May 23, 1991) (Pretrial Order No. 11 re: Procedural Matters Relating to Specific Major Claimants); State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Apr. 5, 1990) (Pretrial Order No. 10 re: Procedures Relating to Major Claimants); Pretrial Order No. 8, *supra* note 124.

473 *See* State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. May 18, 1988) (Pretrial Order No. 7).

474 *See* State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. June 9, 1989) (Order Relating to Processing Late Filed Statements of Claims and Related Matters, Pretrial Order No. 9).

475 *See* State Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Super. Ct. Jan. 22, 2002) (Pretrial Order No. 12 re: Procedures Relating to Changes of Use and Transfers of Surface Water Rights Subject to This Adjudication).

476 *See* Pretrial Order No. 15, *supra* note 127, at 9.

a. Procedural Statutory Considerations[477]

The specific process for conducting an adjudication is found in sections 90.03.110 through 90.03.245. In reality, most of this information is relevant to the court and Ecology, the two governmental entities primarily charged with implementing these multiparty cases. The obligation for a participant commences in sections 90.03.120 and 90.03.140, which require an entity that desires to be a defendant in such a case to "file a statement of claim."[478] This participation is not elective and failure to participate will result in a party being subsequently estopped from asserting a right in a water basin that has been adjudicated.[479] The statement of claim is important for two reasons. First, it helps Ecology and the court keep track of who constitutes a claimant. It is incumbent upon individuals acquiring property in an area that is undergoing an adjudication to determine if a claim to a water right applies to the property in question and to make sure they have filed or are part of a court claim. If a claim has already been filed for the property/water in question, motions to substitute or join parties should be filed. If no such claim exists, one should be filed if the posture of the case so allows.[480] Second, a court claim provides some information as to the particulars of the potential water right. Section 90.03.140 provides a list of information that should be included in a claim.[481] As a practical matter, the statements of claim are not technically evidence but may serve as a guide in quantifying water rights. Further, the *Acquavella* court did not limit parties to any amounts or descriptions set forth in the court claims.[482]

477 Parties should be aware of the potential changes to RCW section 90.03 in regard to the process of adjudications that are set forth in the 2009 proposed legislation.

478 WASH. REV. CODE § 90.03.120 (2008).

479 *Id.* § 90.03.220; State Dep't of Ecology v. Acquavella, 51 P.3d 800 (Wash. Ct. App. 2002).

480 The proper motion for a potential defendant trying to enter an ongoing adjudication is a "motion to allow late claim."

481 WASH. REV. CODE § 90.03.140 (requesting information such as when the right was initiated, the date of beginning and completion of construction, the dimensions and capacity of all ditches then existing, the amount of land under irrigation, the maximum quantity of water used for irrigation or other use, the legal description of the land upon which the water is used, and the legal description from where the water is diverted).

482 Limiting Agreements, *supra* note 30, at 13–23.

Anyone filing a claim with the clerk of the superior court will be assessed a fee.[483]

Some of the procedures establishing the process for the referee or court to hold hearings are set forth in sections 90.03.170, 90.03.190, and 90.03.200. Section 90.03.170 authorizes the referee to serve notice and hold a hearing for all parties that have filed a claim.[484] As a practical matter, Ecology will most likely have investigated the court claim and will submit those investigation reports for consideration as a part of the Agency's case.[485] If a claimant reviews that investigation report and agrees with its contents, the referee and court will most likely follow the specifics set forth in the report.

Once a hearing has been held, the referee or court is required to prepare and file a report together with all evidence adduced at the hearing.[486] The report must be served on all parties who participated in the hearing, and a hearing must be scheduled for the court to consider exceptions to that document.[487] Exceptions come in many forms, from a simple request to have the court reconsider the merits of the claim as already submitted to submission of new evidence and argument. In larger subbasins, exceptions hearings can go on for many days. Depending on the number and nature of exceptions filed, the court may issue a memorandum opinion; remand the matter back to the referee to take more evidence, resulting in the issuance of a supplemental report; or hold a hearing to consider additional evidence, which may result in the issuance of a supplemental report.[488] Depending on how a court chooses to interpret this provision,

483 WASH. REV. CODE § 90.03.180. This section authorizes the clerk to assess a fee as set under RCW section 36.18.020. Currently, that fee is set at two hundred dollars, although participants in *Acquavella* are charged a filing fee of twenty-five dollars, which was the fee when the case was commenced.

484 *Id.* § 90.03.170.

485 Investigation reports were filed for most all of the claims initially filed back in the early 1980s. As late claims were allowed over the course of the case, they would often not be investigated. Investigation reports contain valuable information on the specifics of the water right and allow professional agency staff with specialized expertise to evaluate the various aspects of a claimed water right. Those individuals are often better positioned to supply technical data such as legal descriptions for points of diversion and places of use as well as ditch capacity and water quantity.

486 *See* WASH. REV. CODE §§ 90.03.190, .200.

487 *See id.*

488 *See id.* § 90.03.200.

exceptions hearings as a practical matter present an opportunity for parties to address problems in their case. If no exceptions are filed, the court enters a decree concluding the proceeding, and water rights are administered consistent with the decisions set forth in the report.[489]

b. Substantive Statutory Considerations

Other statutes pertaining to the adjudication of water rights are more substantive in nature. For example, section 90.03.010 sets the stage for acquiring a right to water in Washington.[490] This statute provides that all water belongs to the public, and any right thereto shall be, after 1917, acquired through prior appropriation for a beneficial use.[491] As between appropriations, first in time is first in right. However, the statute also leaves alone any existing rights, including those based on the riparian doctrine.[492] Therefore, the first inquiry in determining whether a claim to a water right is valid is to determine if it is based on riparian or appropriative use.

Another relevant statutory consideration is encompassed in section 90.03.250.[493] This statute requires any entity seeking to appropriate water for a beneficial use after enactment of the 1917 Water Code to apply to the resource agency (Ecology) for a permit to use such flows.[494] Thus, any user claiming an appropriative right initiated after June 1917 *must* demonstrate compliance with section 90.03.250 and produce a permit/certificate. Similarly, that Agency-issued document would be the limit of the right, making the adjudication of a water right quite simple.

Not so simple, and far more the rule in the Yakima Basin, is the reality that most water rights were established prior to enactment of the 1917 Water Code. Those water right holders

489 *Id.* As a practical matter, the *Acquavella* court allowed exceptions to reports, supplemental reports, and to entry of the conditional final order (the final order issued when multiple streams are involved in an adjudication).

490 *Id.* § 90.03.010.

491 *Id.* Thereby eliminating a thirty-plus year tension in allowing both riparian and appropriative rights.

492 *Id.* ("Nothing contained in this chapter shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner . . . .")

493 *Id.* § 90.03.250.

494 *Id*.

were required to document their claims to water rights pursuant to chapter 90.14.[495] Section 90.14.041 required all persons claiming the right to withdraw or divert water to file a claim with Ecology by June 30, 1974.[496] The claims registry reopened in 1979, 1985,[497] and again from 1997 to 1998.[498] All persons claiming a right to divert water prior to 1917 *must* show a chapter 90.14 claim that applies to their alleged right.[499] Failure to identify a claim in the claims registry that applies to a water right claim results in the relinquishment of that right.[500]

4. Case Law

This Article does not attempt to consider and summarize every appellate case that could apply to stream adjudications. However, the four appellate decisions emanating from *Acquavella* provide important insight on how similar cases should proceed and consider certain substantive issues.[501] *Department of Ecology v. Grimes*,[502] *Department of Ecology v. Adsit*,[503] and *R.D. Merrill Co. v. Pollution Control Hearings Board*[504] are other cases that would be foundation reading for anyone participating in a stream adjudication in Washington.

5. Inventory of Points to Cover and Evidence to Supply

To quantify a water right, a court must have evidence to show priority date, ownership, quantity of water used, point of diversion, place of use, season of use, purpose of use, water source, any special limitations on the use of the right, and the

495 *See id.*§ 90.14.040–.910.

496 *Id.* § 90.14.041.

497 *Id.* § 90.14.043.

498 *Id.* § 90.14.068.

499 *Id.*

500 *Id.* § 90.14.071.

501 State Dep't of Ecology v. Acquavella *(Acquavella III*), 935 P.2d 595 (Wash. 1997); State Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306 (Wash. 1993); State Dep't of Ecology v. Acquavella, 674 P.2d 160 (Wash. 1983); State Dep't of Ecology v. Acquavella, 51 P.3d 800 (Wash. Ct. App. 2002).

502 State Dep't of Ecology v. Grimes, 852 P.2d 1044 (Wash. 1993).

503 State Dep't of Ecology v. Adsit, 694 P.2d 1065 (Wash. 1985).

504 R.D. Merrill Co. v. State Pollution Control Hearings Bd., 969 P.2d 458 (Wash. 1999).

legal basis.[505] A state resource agency summarizes this information in a water right certificate and enters it in its database. Any of these criteria can be the genesis of a dispute, and all are very important in regulating water use during times of inadequate supply. Further, that database contains much of the information necessary to process requests for new rights and transfers of existing rights.

Priority date creates the hierarchy to be applied during periods of inadequate supply. First in time is first in right. A priority date based on prior appropriation reflects the date steps were taken to establish the right and/or when water was first put to beneficial use. A riparian right will likely receive a priority date based on actions taken to sever the property from federal ownership.[506] Quantity of use encompasses both an instantaneous use (measured in cubic feet per second or gallons per minute) as well as an annual amount (measured in acre-feet per year). The amount of water used at any given time is critical to management during times of drought because that, along with priority date, determines which entity must cut back or shut off entirely. Annual quantities are usually tied to the purpose of water use, such as crop type, number of domestic units, or instream demands (such as fishery or recreation) in those states that recognize such uses.

Ownership determines who can use water pursuant to the right. Ownership information tends to be fluid and becomes out of date as land is transferred. However, a right remains appurtenant to specific property unless transferred. Who owns land is often less important than place of use, a legal description of where the right is appurtenant (and the number of acres irrigated if pertinent). Purpose of use describes possible uses of the water—for instance, irrigation, domestic supply, and the number of units that can be served. Point of diversion provides a geographic location for the withdrawal of water, unless the right encompasses an instream use. Season of use details the period that water can be used—the growing season for irrigation rights or perhaps annually for stock water, domestic, and municipal uses. Finally, circumstances may require inclusion of

505 *See* WASH. REV. CODE § 90.03.140.

506 Wasserburger v. Coffee, 141 N.W.2d 738, 742 (Neb. 1966); Lone Tree Ditch Co. v. Cyclone Ditch Co., 91 N.W. 352, 353 (S.D. 1902).

special limitations on the use of water, such as when water users have more than one right for a parcel, use water from multiple sources, or receive water from an irrigation entity in addition to their own right.

6. Effective Presentation Style

While case presentation is a very difficult aspect of litigation to quantify, it can assist in or detract from how a court receives information. Most decision makers would undoubtedly assert they are compelled by logic, analysis, and evidence. Water cases particularly benefit from barristers who are able to distill and present information and analysis in a logical fashion.

One tendency that should be monitored is the desire to overwhelm with factual material, especially when counsel has not created memoranda to show how the evidence tends to support a confirmation of a water right. Every water right contains certain elements, discussed above, that should be addressed. Memoranda that outline how the evidence demonstrates the elements is a very effective way to advise the court. Moreover, incorporating that data into a proposed water right, as the court would be required to do at some stage if it believes a water right is warranted, is also helpful.

As our technical capabilities become more sophisticated,[507] the work of a lawyer will become more complex. Computer modeling, satellite imagery, and aerial mapping will be more frequent, and lawyers and judges will require skills to access and present that information.

Finally, I have yet to appreciate or meet another judicial officer who likes an extremely aggressive, argumentative style. Lawyers who become too aggressive or begin to argue with the court, a witness, or opposing counsel do themselves and their client a big disservice. As the person who is in charge of the courtroom, it is difficult to think about the matter at hand when I am using my attention to control or redirect lawyers or parties. Rather than focusing the judge's attention, arguing, belittling, and other techniques draw negative attention from the judge and distract that person from serving as a fact-finder.

507 *Acquavella* was filed the same year Apple computer offered the first personal computer and the year Microsoft began operations.

VI
CONCLUSION

The general stream adjudication of the Yakima River Basin will soon conclude after thirty years of operation and with the filing of over twenty thousand pleadings. Much of the evidence and other documentary material will be archived at Central Washington University by Washington State Archives officials. While we participants may occasionally have an inkling of the significance of our work, it will be left to future generations to reflect on the meaning of this history. I sincerely hope that the quantification of water rights and the unraveling of river history will bring useful tools to the people of the Yakima Basin, whether their interest is economic or environmental. Hopefully, this recapitulation of some of the highlights of this thirty-year process will assist others who find themselves immersed in the complex and muddy waters of a general stream adjudication. While there is much yet to discover about the law that applies to the quantification and interim management of water rights, numerous issues and fact patterns have been considered and decisions entered.

A desire sometimes exists to work in the shadows, hoping the cloak of mystery can provide the cover to make something true that is not—like possible ownership of a water right. As is the case with all legal inquiry, there is no absolute truth. But water rights are only the product of a history. Naturally, how that history is interpreted is where the rubber hits the road. Trying to avoid a review of history in the hope it will emerge as something new seems misguided and potentially puts large capital in a precarious place once the truth is revealed. Knowledge, decisions, and determinations will lead to something concrete and workable, and that is the permanency that adjudications alone can provide.

As a participant in this process for much of the past fifteen years, I am pleased the case is reaching finality. Oddly, as I think about a future that will involve less—if any—of this proceeding, it is not the issues or the decisions I will miss most. While all cases take on a life of their own, an unusual attribute of stream adjudications is the opportunity to see the same people month after month, year after year. As a result, I have watched careers commence and conclude. Unfortunately, we have lost a

number of involved participants along the way, and their presence is missed, although indelibly etched upon our process.

The stories and interchange with the individuals involved in this adjudication will stay with me. As a function of this human element, the demeanor of the parties and lawyers changed over the years to become more cooperative. Accordingly, in the past five to seven years, parties agreed to confirm a tremendous number of water rights. Additionally, a working group sifted through a number of issues and ideas to present the court with a draft final decree that resolved many outstanding management and enforcement issues. While obtaining decisions from a court on various issues may have helped lay the groundwork for this collaborative opportunity, people made this happen—people with perhaps a better understanding of their commonalities and a level of trust that made conversation with a former adversary worth the risk. From my perspective, this is the place we need to be to determine how to share a precious resource, and this cooperation will serve the Yakima Basin well as we approach a hydrologic period even more uncertain than the one behind us.