

No. 281141

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

IN THE MATTER OF THE DETERMINATION OF THE RIGHTS TO
THE USE OF THE SURFACE WATERS OF THE YAKIMA RIVER
DRAINAGE BASIN, IN ACCORDANCE WITH THE PROVISIONS OF
CHAPTER 90.09, REVISED CODE OF WASHINGTON,

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Plaintiff/Respondent,

v.

JAMES J. ACQUAVELLA; UNITED STATES; YAKAMA NATION;
AHTANUM IRRIGATION DISTRICT; JOHN COX DITCH
COMPANY; LA SALLE HIGH SCHOOL; DONALD AND SYLVIA
BRULE; JEROME DARNIL; AND ALBERT LANTRIP,

Defendants/Appellants.

**UNITED STATES' MOTION TO AMEND THE BRIEFING
SCHEDULE TO ALLOW APPELLANTS TO FILE BRIEFS AS
RESPONDENTS TO OTHER APPELLANTS (AS WELL AS THE
CROSS-APPELLANT), AND REPLY BRIEFS TO OTHER
RESPONDENTS (AS WELL AS THE CROSS-RESPONDENT)**

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I. IDENTITY OF MOVING PARTY

The United States seeks the relief identified in Part II.

II. STATEMENT OF RELIEF SOUGHT

The United States joins the Yakama Nation in moving this Court, pursuant to Rule of Appellate Procedure 10.1(h), to amend the briefing schedule to allow:

(1) the United States and the Yakama Nation, as well as the other parties designated Appellants by this Court, to file briefs as respondents to each of the other designated Appellants, as well as designated Cross-Appellant Washington Department of Ecology (Ecology), that has raised an issue adverse to them, with such briefs due 30 days after service of Ecology's brief as Cross-Appellant; and

(2) the United States and the Yakama Nation, as well as the other designated Appellants and designated Cross-Appellant Ecology, to file reply briefs as appellants, in which they may rebut the responses to their appeals by any other party, with such briefs due 30 days after service of the briefs as respondents described in (1) above.

III. FACTS RELEVANT TO THIS MOTION

This Court has designated the Washington Department of Ecology (Ecology) as Cross-Appellant/Respondent; the Department of Natural Resources (Natural Resources) as Respondent; and all other parties as Appellants/Cross-Respondents. As a result, the Court has established a

briefing schedule that treats the United States and the Yakama Nation, as well as all other designated Appellants/Cross-Respondents, as adverse to only to Ecology and Natural Resources.

In fact, as set forth in more detail in the Yakama Nation's motion, the United States and the Yakama Nation are adverse in this appeal to each of the other designated Appellants. As set forth in the briefs of the other designated Appellants, each of them seeks reversal of portions of the Conditional Final Order (CFO) that were decided in the United States' and Yakama Nation's favor. The converse is also true: the United States and Yakama Nation seek reversal of portions of the CFO that were decided in favor of the other designated Appellants.

IV. GROUNDS FOR RELIEF AND ARGUMENT

Rule 10.1(b) allows the filing of a brief as appellant, a brief as respondent, and a reply brief of appellant. As such, that rule affords each party the right to file a brief (brief as respondent) in response to arguments seeking reversal of a judgment in its favor. It also affords each appellant the right to file a brief (reply brief) defending its appeal against arguments made in the briefs of respondents.

The Court's existing briefing schedule, set forth as a traditional cross-appeal schedule, does not provide an opportunity for the designated

Appellants to respond to all appeals that seek reversal of a ruling in their favor or to defend against responses made in opposition to their appeal. That is because the cross-appeal schedule assumes the designated Appellants/Cross-Respondents are adverse only to the designated Cross-Appellant/Respondent Ecology or designated Respondent Natural Resources. As set forth in Part III *supra*, however, the designated Appellants here are, in fact, adverse to each other.^{1/}

Rule 10.1(h) authorizes the Court to direct the filing of briefs on the merits other than those listed in Rule 10.1. The United States moves the Court pursuant to Rule 10.1(h) to amend the briefing schedule as set forth in Part II. When Ecology files its appeal brief on May 20, 2010, all parties that have appealed from the CFO will have filed their briefs as appellants. Ecology and Natural Resources are also scheduled to file their briefs as respondents on that date. The next round of briefing should allow the United States and the Yakama Nation, as well as each of the other designated Appellants, to file a brief as respondent to address any

^{1/} The fact that the designated Appellants were on the same side of the “v.” in Superior Court is an artifact of the nature of a water rights adjudication. All designated Appellants claim rights to water from Ahtanum Creek, which is in limited supply; thus each claimant has the potential to be adverse to any or every other claimant. Designated Cross-Appellant Ecology is not a claimant and thus was rarely adverse to the United States or the Yakama Nation in Superior Court proceedings in this matter.

argument in an appellant's brief that seeks reversal of a portion of the CFO decided in its favor, whether set forth in the briefs of the other designated Appellants or of designated Cross-Appellant Ecology. Such briefs as respondents should have an allowable length of 50 pages and be due 30 days after Ecology and Natural Resources serve their briefs.^{2/} RAP 10.4(b), 10.2(b). The Court should then provide a final round of briefing in which the United States and the Yakama Nation, as well as each other Appellant and Cross-Appellant Ecology, may file reply briefs in defense of their appeals. Such reply briefs should have an allowable length of 25 pages and be due 30 days after service of the briefs of respondents. See RAP 10.4(b), 10.2(d).

Absent a revision of the briefing schedule, the United States and the Yakama Nation, as well as other designated Appellants, will be prejudiced in their ability to defend against challenges to portions of the CFO decided in their favor and/or to file a reply brief defending their own appeals from that CFO.^{3/} Accordingly, the briefing schedule should be

^{2/} Counsel for United States anticipates needing an extension of time for the filing of this brief, which will be addressed by separate motion.

^{3/} The United States, joined in this state court proceeding pursuant to the waiver of sovereign immunity in the McCarran Amendment, 43 U.S.C. § 666, must be accorded due process in the adjudication of its water right claims. Cf. *United States v. Oregon*, 44 F.3d 748, 765 (9th Cir. 1994).

amended as set forth herein.

CONCLUSION

For the foregoing reasons, the Court should amend the briefing schedule as follows:

(1) All designated Appellants may file briefs as respondents – in which they may respond to the briefs of every other designated Appellant as well as Cross-Appellant Ecology – which are due 30 days after service of Ecology’s brief as designated Cross-Appellant/Respondent; and

(2) All designated Appellants and designated Cross-Appellant Ecology may file reply briefs as appellants – replying to every other party that filed a brief as respondent – which are due 30 days after service of the above-described designated Appellants’ Briefs as Respondents.

Respectfully submitted,

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Dated: May 18, 2010
90-6-2-17

CERTIFICATE OF SERVICE

I certify that on May 18, 2010, I caused to be served via U.S. mail, postage prepaid, a copy of the foregoing document to:

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