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May 18, 2010

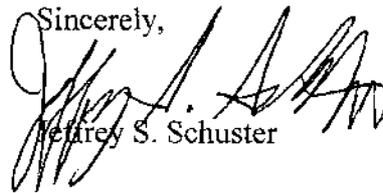
Honorable Renee S. Townsley  
Clerk/Administrator  
Washington State Court of Appeals, Division III  
P.O. Box 2159  
500 N. Cedar St.  
Spokane Wa., 99210

Re: Department of Ecology v. Acquavella, et.al., Case No. 28114-1-III;  
Consolidated with 28115-9-III; 28116-7-III;  
28117-5-III; and 28119-1-III  
Yakima County Superior Ct. No. 77-2-01484-5

Dear Ms. Townsley:

Enclosed for filing are the original and two copies of the Yakama Nation's Motion to Amend Briefing Schedule, Declaration of Jeffrey S. Schuster and a certificate of service. Please mail me back conformed copies in the enclosed stamped self-addressed envelope.

Thank you for your assistance in this matter.

Sincerely,  
  
Jeffrey S. Schuster

No. 281141 Consolidated with 28115-9-III; 28116-7-III;  
28117-5-III; and 28119-1-III

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 90.03, 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.

YAKAMA NATION'S MOTION TO AMEND BRIEFING SCHEDULE

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Attorney for the Yakama Nation

## **I. IDENTITY OF MOVING PARTY**

Appellant the Yakama Nation (hereinafter "Yakama Nation"),  
seek the relief designated in Part II.

## **II. STATEMENT OF RELIEF SOUGHT**

The Yakama Nation asks that the briefing schedule in the Clerk's letter to the parties dated May 11, 2010 be changed to provide for a fourth round of briefing in this case to (1.) allow the appellants the opportunity to file a response brief to the appeals of the other appellants, including the Department of Ecology and (2.) to file an additional reply to the responses of the other parties.

## **III. GROUNDS FOR RELIEF AND ARGUMENT.**

Under the Court's current briefing schedule, the briefs of the State of Washington Department of Ecology's (as respondent/cross appellant) and the Department of Natural Resource's (as respondent) are due May 20, 2010. The reply briefs of the other appellants/cross-respondents will then be due "30 days after the service of the respondent/cross-appellant's brief (Department of Ecology) is filed." Letter from Clerk/Administrator to Counsel (May 11, 2010).

Under the current schedule the appellants only have an opportunity to file two briefs even though the appellants are in opposition to each other. The appellants have filed an opening brief but will only have the opportunity to file one more brief in reply to the others but not a reply in

defense of their own appeals. The appellants are in the position of respondents to each other as well as to the Department of Ecology. To avoid prejudice to the appellants, each appellant must have the opportunity to file a response brief to answer the opening brief of every other appellant as well as the Departments of Ecology and Natural Resources and then file a reply brief in final defense of its own appeal.

Because this case is a consolidation of appeals in cross review from the same decisions, a fourth round of briefing is appropriate so that each of the parties can file a reply in support of its own appeal. This is allowed under RAP 10.1. RAP 10.1(f) identifies the briefs that may be filed in cases involving cross review as including the “.. (1) brief of appellant; (2.) brief of respondent/cross appellant, (3.) reply brief of the appellant/cross respondent, and (4) reply brief of cross appellant.” RAP 10.1 (h) also provides that the “... appellate court may in a particular case, on its own motion or on the motion of a party, authorize or direct the filing of briefs on the merits other than those listed in this rule.” This Court is mandated by its own rules to liberally interpret the rules “to promote justice and facilitate the decision of cases on the merits.” RAP 1.1(a). In that regard, this Court “ may waive or alter the provisions of any of these rules in order to serve the ends of justice...” RAP 1.2(c).

The reasons for this request also arise out of the nature of this case as well as the nature of the relationship of the appellants. *Ecology v. Acquavella* is a general surface water adjudication of the Yakima Basin which has been pending in Yakima County Superior Court and before this Court and the Supreme Court. See, *Department of Ecology v. Acquavella*, 100 Wn. 2d 651, 674 P. 2d 160 (1983) (*Acquavella I*); *Ecology v. Yakima Reservation Irrigation District*, 121 Wn. 2d 257, 850 P.2d 1306 (1993) (*Acquavella II*); *Department of Ecology v. Acquavella*, 131 Wn. 2d 746, 935 P.2d 595 (1997) (*Acquavella III*); *Department of Ecology v. Acquavella*, 112 Wn. App. 729, 51 P. 3d 800 (2002) (*Acquavella IV*). In an earlier appeal before the Supreme Court - in the briefing leading to *Acquavella III* - the Supreme Court Commissioner allowed a fourth round of briefing for the cross-appellants' reply briefs on their own appeals. See, *Ecology v. Acquavella, supra*, Court Commissioner's Ruling (Feb. 27, 1996) Declaration of Jeffrey S. Schuster Identifying Exhibits (May 18, 2010).

Under Washington law, a general adjudication may be filed by Ecology as plaintiff under certain circumstances. *Acquavella IV, supra*, 51 P. 3d at 803. As a "special form of quiet title action" the Department of Ecology served numerous defendants in the Yakima Basin. *Acquavella III*,

131 Wn. 2d at 754. According to the Supreme Court, thousands of water users are defendants in *Acquavella*. 131 Wn. 2d at 750. Inevitably there have been disputes between and among the defendants as well as between Ecology and specific defendants.

This appeal from the consolidated Ahtanum subbasin rulings is no different. As shown in the Yakama Nation's opening brief, this is an appeal from the Yakima County superior court's Conditional Final Order issued for the consolidated Ahtanum Creek proceedings in *Ecology v. Acquavella*. Ahtanum Creek forms the northern boundary of the Yakama Reservation. Report of the Court, Re: Sub. 23 (Ahtanum, et.al.) (Jan. 31, 2002) (CP 974, 1009). The parties on the off-reservation side of the Ahtanum Creek drainage have been referred to as "northside" parties in many of the decisions. The on-reservation individuals and the Yakama Nation are referred to as the "southside."

Although they are co-appellants, the appellants here have been adverse to each other, with the United States and Yakama Nation adverse on most issues to those raised by the other appellants: the individuals represented by the Ahtanum Irrigation District, the John Cox Ditch Company, La Salle High School, Donald and Sylvia Brule, Jerome Darnil and Albert Lantrip (hereinafter the northside parties). Prior to the filing of

*Ecology v. Acquavella*, issues relating to the water rights of the parties on the northside and southside of the Creek in the Ahtanum Basin have been the subject of two major lawsuits. See, *United States v. Ahtanum Irrigation Dist.*, 124 F. Supp. 818 (E.D. Wa., 1954) *rev'd and remanded*, 236 F.2d 321 (9<sup>th</sup> Cir. 1956) ("*Ahtanum I*"); 330 F. 2d 897 (9<sup>th</sup> Cir. 1964) ("Pope Decree" or "*Ahtanum II*") *petition for rehearing denied*, 338 F. 2d 307 (9<sup>th</sup> Cir. 1964)<sup>1</sup>; *In Re Achepohl*, Report of the Referee (Oct. 30, 1924) (YIN Ex. 323); see generally, 2002 Report, supra, at pp. 36-38 (CP 1012-1014). There was a state court water rights adjudication for Ahtanum in the 1920's. *In Re Achepohl*, *supra*. *Achepohl* addressed the water rights of the north or off-reservation parties including the State of Washington in the Ahtanum valley. 2002 Report, supra, pp. 37-38. 2

A review of the issues on appeal and the position of the parties below demonstrate the relationship of the parties. The Yakama Nation and the United States appealed, inter alia, the superior court's Conditional Final Order denial of the Yakama Nation's practicably irrigable acreage claim; denial of a storage right as provided in the lower court's decision; the

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<sup>1</sup>"*Ahtanum*" shall refer generally in this motion to the federal court litigation in *United States v. Ahtanum Irrigation District*.

<sup>2</sup> By its own terms, *Achepohl* did not include nor attempt to adjudicate water rights within the Yakama Reservation. YIN Ex. 323, *In Re Achepohl*, Report of the Referee, supra, at p. 12.

denial of all of the available irrigation water between April 1 and April 15; the decision to include the name of the non-Indian allottee successors in the name of the Yakama Nation's right.; and the rejection of the parties' proposed quantification of the Nation's irrigation right based on *U.S. v. Ahtanum Irrigation District* as interpreted by the court. The Nation also appealed other issues including the ruling that the off-reservation non-diversionary stockwater rights have a priority date senior to the Yakama Nation's irrigation right. The appellants filed briefs in opposition to the Nation in the court below on a number of these issues. *E.g.*, Memorandum Opinion Exceptions to the Supplemental Report of the Court and Proposed Conditional Final Order, Subbasin 23 (April 15, 2009) CP 456 at 511, 520.

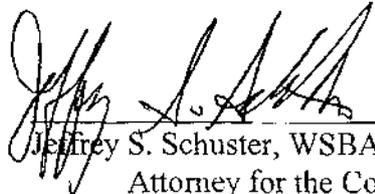
The non-Indian irrigators appealed on a variety of grounds including disputing the superior court's rulings that the *Ahtanum* court limited individual northside water rights and that there were no "junior" water rights outside of those adjudicated in *U.S. v. Ahtanum Irrigation District*. La Salle High School and the other individual parties also appeal the Court's denial of their claims based on the denial of their claims in the earlier *Ahtanum* case. The Nation opposed these parties below. *E.g.*, Memorandum Opinion, *supra*, CP 457-459 (junior claim, excess water), 495-496 (Brule, Durnil), 504 (La Salle).

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#### IV. CONCLUSION.

Ahtanum Creek like the rest of the Yakima Basin is a water short area so the claims are almost all adverse to each other. Each claimant – all of the appellants – should be treated as appellant/cross-appellees with respect to every other claimant. The appellants should each be allowed to file a response brief to the others and a reply brief in support of its own appeal. The appellants will be prejudiced if they are not given the opportunity to both file a response to all the other appellants' opening briefs and a reply in defense of our own appeals.

Respectfully submitted this 18<sup>th</sup> day of May 2010.



Jeffrey S. Schuster, WSBA # 7398

Attorney for the Confederated Tribes and  
Bands of the Yakama Nation

P.O. Box 31197

Seattle WA., 98103

No. 281141 Consolidated with 28115-9-III; 28116-7-III;  
28117-5-III; and 28119-1-III

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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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IN THE MATTER OF THE DETERMINATION OF THE RIGHTS TO THE USE OF THE  
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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.

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DECLARATION OF JEFFREY S. SCHUSTER IDENTIFYING EXHIBIT IN  
SUPPORT OF MOTION TO AMEND BRIEFING SCHEDULE.

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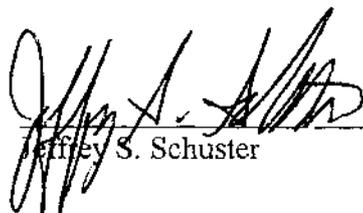
I, Jeffrey S. Schuster, testify as follows.

1. I am an attorney of record in this case. I make this declaration based upon personal  
knowledge.

2. Attached is a true and correct copy of a Ruling by the Supreme Court Commissioner in *Ecology v. Acquavella* appeal No. 63401-7 (Feb. 27, 1996) received by my office.

3. I state under penalty of perjury under the laws of the State of Washington that foregoing is true and correct.

Dated at Seattle Washington this 18<sup>th</sup> day of May 2010.

  
\_\_\_\_\_  
Jeffrey S. Schuster

THE SUPREME COURT  
STATE OF WASHINGTON

C. J. MERRITT  
SUPREME COURT CLERK

TEMPLE OF JUSTICE  
P.O. BOX 40929  
OLYMPIA, WA 98504-0929

RONALD R. CARPENTER  
DEPUTY CLERK/CHIEF STAFF ATTORNEY



RECEIVED (60) 357-2077

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Y.I.N.

February 27, 1996

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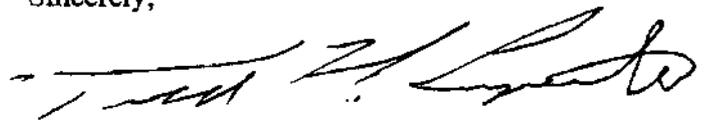
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Re: Supreme Court No. 63401-7 - State of Washington, Department of Ecology v.  
James J. Acquavella, et al.  
Yakima County No. 77-2-01484-5

Counsel:

Enclosed please find RULING, signed by the Supreme Court Commissioner on  
February 27, 1996, in the above entitled cause.

Sincerely,



RONALD R. CARPENTER  
Supreme Court Deputy Clerk

THE SUPREME COURT OF WASHINGTON

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
96 FEB 27 PM 2:27

BY C. J. HERRITT  
CLERK

IN THE MATTER OF THE  
DETERMINATION OF THE RIGHTS TO  
THE USE OF THE SURFACE WATERS  
OF THE YAKIMA DRAINAGE BASIN,  
IN ACCORDANCE WITH THE  
PROVISION OF CHAPTER 90.03  
REVISED CODE OF WASHINGTON,

THE STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,  
Respondent/  
Cross-Appellant,

v.

JAMES J. ACQUAVELLA, et al.,  
Defendants,  
UNITED STATES OF AMERICA,  
Respondent/  
Cross-Appellant,  
YAKIMA-TIETON IRRIGATION  
DISTRICT,  
Appellant.

NO. 63401-7

RULING

This ruling confirms the decisions made and arrangements addressed during my February 26, 1996 telephone conference with counsel for many of the major parties to this appeal.

On November 3, 1995, the Yakima-Tieton Irrigation District filed a motion regarding the designation of Clerk's Papers and exhibits. No party has objected to that motion. The motion is therefore granted, with the understanding that other parties may designate additional Clerk's Papers and exhibits as provided in the appellate rules.

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The brief of appellant Yakima-Tieton Irrigation District has already been filed. The remainder of the briefing shall proceed as follows:<sup>1</sup> (1) Any brief or briefs by parties which filed notices of cross-appeal but which align themselves principally with Yakima-Tieton will be due March 8, 1996. Those parties shall be considered (and may refer to themselves as) additional appellants. (2) The opening briefs of respondents and of true cross-appellants (those parties challenging the trial court's order on different grounds than appellant and the additional appellants) shall be due April 18, 1996. (3) The next stage of briefing, to be due June 17, 1996, shall include the briefs of appellant and the additional appellants which serve as their reply briefs and, as to the cross-appeals, their respondents' briefs. Any briefs by cross-appellants responding to issues raised by other cross-appellants shall also be due June 17. (4) Finally, July 15, 1996 will be the due date for the cross-appellants' reply briefs on their cross-appeals.

The Department of Ecology shall publish, in its monthly notice to all parties of record, the assignments of error and issues related to those assignments of error from each brief seeking affirmative relief from the trial court's order. The Department shall also publish in the notice the briefing schedule set out above.

  
COMMISSIONER

February 27, 1996

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<sup>1</sup> This schedule essentially grants the motion of the Department of Ecology for surrebuttal briefing. How to organize oral argument will be considered when the briefs have been filed.

No. 281141 Consolidated with 28115-9-III; 28116-7-III;  
28117-5-III; and 28119-1-III

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DONALD AND SYLVIA BRULE; JEROME DARNIL; AND ALBERT LANTRIP,

Defendants/Appellants.

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CERTIFICATE OF SERVICE

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Attorney for the Yakama Nation

I certify that on May 18, 2010, I caused to be served via e-mail and U.S. mail a copy of the Yakama Nation's Motion to Amend Briefing Schedule, Declaration of Jeffrey S. Schuster and Declaration of Service to counsel listed below.

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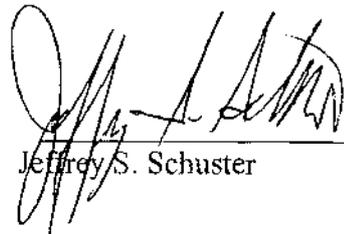
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