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 RESPONSE BRIEF

Jeffrey S. Schuster, WSBA No. 7398
P.O. Box 31197
Seattle Wa., 98103
Tele. (206) 632-0489

Attorney for the Yakama Nation

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I. INTRODUCTION.

The Confederated Tribes and Bands of the Yakama Nation (hereinafter "Yakama Nation") files this in response to the opening briefs of the other appellants.

II. SUMMARY OF ARGUMENT.

As shown in the Yakama Nation's opening brief, under current precedent the United States in the Code Agreement allowed certain individual northside parties to collectively use 75% of the natural flow irrigation water from the " beginning of each irrigation season" to July 10th each year under the terms of that Agreement and *U.S. v.Ahtanum Irrigation District.* [1] The northside parties are attempting to use this surface water adjudication to relitigate certain issues that they lost in the earlier case. The opposing parties misinterpret the Pope Decree. The Court should reject these appeals and affirm the superior court's ruling that there are not "junior" rights for those parties who did not get rights in *Ahtanum* and that *Ahtanum* had determined rights of the parties on the northside. The Court should deny the appeals of the individual appellants for the reasons outlined in this brief.

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1 *United States v. Ahtanum Irrigation Dist.*, 124 F. Supp. 818 (E.D. Wa., 1954) *rev'd and remanded,* 236 F.2d 321 (9th Cir. 1956) ("*Ahtanum I* "); 330 F. 2d 897, 915 (9th Cir. 1964) ("Pope Decree" or *"Ahtanum II") petition for rehearing denied,* 338 F. 2d 307 (9th

III. ARGUMENT.

A. The Northside Parties Are Not Entitled to Water Rights In Excess of or in Derogation of the Water Rights Adjudicated in *United States v. Ahtanum Irrigation District.*

1. The ruling in the Court Below.

The John Cox Ditch Company, La Salle High School, Donald and Sylvia Brule, Jerome Durnil and Albert Lantrip (hereinafter "La Salle") and the individuals represented by the attorney for the Ahtanum Irrigation District , 2 (hereinafter collectively the "northside parties") all appeal the trial court's ruling that the there is not a water right for what they call "junior" water rights which had not been previously confirmed in *United States v. Ahtanum Irrigation District.* John Cox Opening Br. at p. 2; AID at p.18 ; LaSalle Op. Br. at p. 26. As AID correctly noted in its opening brief, the trial court held that for an individual northside party to have a water right awarded in this case he or she must prove that they are (1.) a successor in interest to a Code Agreement party; (2.) a holder of a state right awarded in the *Achepohl* proceeding; 3 and (3.) a right confirmed in federal court in *United States v. Ahtanum Irrigation District.*

Cir. 1964). "*Ahtanum*" shall refer generally to the federal court litigation.

2 The water rights for those within AID were confirmed in the names of the individual landowners. Memo Opinion Exceptions to Supp. Report (April 15, 2009) (CP at 463).

Report of the Court (2002) at p. 106 (CP at 1081). The trial court originally, in AID's words, "created 'junior' rights"[4] by holding that (1.) those parties who had not obtained rights in *Ahtanum* and (2.) those parties who were awarded rights in *Ahtanum* but who were claiming more water than *Ahtanum* authorized can be awarded "junior or excess" rights to divert water if water is available at any time after the Yakama Nation's irrigation rights for the Yakama Reservation and the Yakama Nation's Treaty water right for fish and other aquatic life are satisfied - even if such a right is in excess of the adjudicated right for that party. 2002 Report at pp. 110-111 (CP 1085-1086).[5] The Court Commissioner held that "[t]he 'surplus' water availability may be further reduced if/when the federal government constructs a reservoir to retain such surplus waters to more adequately supply senior rights." *Id.*

After exceptions were filed, the trial court changed its ruling and held that none of the northside parties could hold so-called "junior rights." 2008 Supplemental Report at p. 25-27 (CP 749-751). The superior court,

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3 See, discussion Yakama Nation's Corrected Op. Br. (4/9/2010) at pp. 8-9.
4 Ahtanum Irrigation District Opening Br. (Mar.15, 2010) at p. 8.
5 In a later ruling the trial court confirmed that the Yakama Nation's Treaty water right for fish was for both "fish and other aquatic life" not just "fish" as referenced in the northside parties briefs. Memorandum Opinion Exceptions to the Supplemental Report (April 15, 2009) at pp. 64-65 (CP 519-520). None of the parties have appealed the ruling that the Yakama Nation has a Treaty water right for "fish and other aquatic life". *Levine v. Jefferson County,* 116 Wn. 2d 575, 581, 807 P.2d 363 (1991).

after careful reexamination of the evidence and the rulings in *Ahtanum* held that:

> After carefully scrutinizing Pope I and the Pope Decree, it is this Court's decision that the Ninth Circuit intended to adjudicate every possible right to water for landowners on the north side of Ahtanum Creek. Water rights not used on the north side would transfer to the corpus of water available to the south side users. When excess is available, north side users are barred by res judicata from asserting rights to any such water except to those lands which were confirmed rights in the Pope Decree.
>
> 2008 Supplemental Report, *supra,* at p. 26 (CP at 750).

In reaching this ruling, the superior court first confirmed that the federal court in *Ahtanum* intended to make a determination of the nature and extent of the rights to use water of each northside party who in federal court was "... again required to prove their water rights with the same particularity which was required of them in the state court proceeding in 1925." 2008 Supplemental Report, *supra,* (CP 722 at 750) *quoting Ahtanum II.* The trial court ruled that *Ahtanum* had held that there was no "excess" irrigation water available " ... to distribute because it was of the opinion the Nation was provided for so badly in the original 75%-25% spit established by the Code agreement. 2008 Supp. Report at p. 27 (CP 751). The Court quoted with approval the *Ahtanum II* holding that "...[o]bviously this finding purports to be and is a determination as to the

entire use of waters in 1908. " *Id. quoting Ahtanum II, supra,* 330 F.2d at 913 (emphasis added by *Acquavella* court).

The trial court held that the language in *Ahtanum II* limits the "... universe of those who could use the surplus water to those who succeeded in having water right confirmed under the answer numbers..." in the Pope Decree. CP at 753, lines 6-7. This was "... further limited by a 0.01 cfs per acre water duty." *Id.* lines 12-13. The Court held that "... the Court finds that north side users are now estopped from claiming any right to 'excess' flows, except for use on specific lands included in or deriving from an Answer number recognized in the Pope Decree." CP at 753. 6

On motions for revision, the northside parties appealed the decision of Court Commissioner Ottem to Judge F. James Gavin who affirmed the Court Commissioner on this issue but further defined the northside parties'rights. Memorandum Opinion on Exceptions to Supplemental Report, *supra,* (CP at 457). Judge Gavin also held that:

> ... the Court does not agree with AID's position that this excess water can be used for additional lands beyond those recognized in the Pope Decree. The Court finds that any excess water can only be used by the defendants, i.e. those recognized in the decree as having rights, on the

6 As shown in its opening brief, the Yakama Nation is appealing the Court's award of a right for the northside Pope Decree parties to use excess water, in part because this holding is inconsistent with the Court's primary holding that all of the natural flow irrigation water in the Ahtanum had been allocated and that the northside parties are limited to .01 cfs per acre. See, Yakama Nation's Correct Opening Brief at p. 43.

> lands described in Appendix B to the Pope Decree – further limited to the lands for which rights are confirmed in this proceeding.

Id.

Judge Gavin went on to hold that the Pope Decree parties were further limited to the use of excess water only up to the quantity adjudicated for each northside party in the *Achepohl Decree.* Id. *Achepohl* had limited each northside party to .02 cfs per acre and the later Pope Decree had further limited the northside parties to .01 cfs per acre under the Code Agreement. *Id.* Therefore, Judge Gavin ruled that the eligible northside parties are limited to the use of this excess water only up to .02 cfs per acre as quantified in the "limitations of use" section in the Ahtanum Conditional Final Order for each listed northside party. *E.g.,* CP at 183.[7]

The northside parties now appeal this ruling arguing, *inter alia,* that they are entitled to "junior" water for various individuals who either were completely denied *Ahtanum* rights or are using water in excess of water rights they received either for land outside of the Pope Decree answer lands or in excess of the .01 cfs. The northside parties argue that (1.) they are not bound by *United States v. Ahtanum Irrigation District,* on a number of issues, or if they are, the rulings there only act to limit the

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7 Judge Gavin further ruled that the northside parties are limited to excess water for 30 days each season finding that "that would be the number of days excess water might reasonably be available." Order On Motions for Reconsideration (May 21, 2009) (CP at

Yakama Nation's rights, not their own; (2.) that, because they are not bound by the federal court ruling, they are entitled to water in excess of that adjudicated for them in *Ahtanum*; and (3.) that *Ahtanum* is in error because the northside parties claim they have new evidence proving that there is water "excess" to the rights of the Yakama Nation for so-called "junior" right holders who don't have rights under *Ahtanum*. The northside parties argue that they are, therefore, entitled to excess for northside parties who lost in *Ahtanum*, despite settled rulings that limit the northsides' rights.

2. The Court Should Reject the Northside's Arguments.

The northside parties are in error in a number of respects. First, it should be undisputed that the northside parties are bound by *Ahtanum*. *See, U.S. v. Ahtanum Irrigation District*, Order (April 4, 1988) (CP 3663, 3665), Attach. A to Declaration of Jeffrey S. Schuster Identifying Attachments In Support of Reply Brief (Sept. 10, 2004). Collateral challenges to the correctness or interpretation of the federal Court's decree in *United States v. Ahtanum Irrigation District*, over which that Court retains continuing jurisdiction, cannot be made in this Court. *Badgley v. City of New York*, 606 F.2d 358, 370-371 (2nd Cir. 1979). A judgment

94.) None of the parties except John Cox have appealed this finding.

over which the federal court had jurisdiction is not open to contradiction in any other proceeding. *In the Matter of Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. City of New Hampton,* 738 F.2d 209, 213 (7th Cir. 1984).

3. *U.S. v. Ahtanum Irrigation District* Determined Rights of Specific Code Agreement Parties to Water For Specific Parcels of Land Thus Limiting, As it Relates to the Yakama Nation's rights litigated in the federal Court, the Rights Previously Determined in the *State v. Achepohl.*

John Cox and La Salle High School both argue that *U.S. v. Ahtanum Irrigation District* did not "adjudicate" their water rights but only affirmed "... an allocation of Ahtanum Creek water between the Yakama Reservation and non-reservation land North of Ahtanum Creek." John Cox Brief at p. 12. They argue that *Ahtanum* only adjudicated the northsides' rights "in gross" and did not actually limit the individual northside rights previously adjudicated in *Acheophol.* La Salle at p. 24; John Cox at pp. 13-16.

First, the Yakama Nation is in agreement with the northside parties insofar as we agree that *Ahtanum* was not a general water right adjudication of all surface water rights in the Ahtanum Creek Basin. As the Nation has shown, *Ahtanum* did not quantify the Yakama Nation's

rights. Yakama Nation's Corrected Opening Brief (April 9, 2010) at p. 21. Where we part company with the northside parties is whether *Ahtanum* further limited their state-based water rights. The northside parties do not appear to dispute that they each need, at a minimum, to show that they had state water rights adjudicated in the *State v. Achepohl* state court adjudication. In *Ahtanum* the federal Court further determined who were the individual parties who were able to benefit from the Code Agreement as successors in interest to the original signatories. Yakama Nation's Corrected Op. Br. at pp. 22-23. In so doing the federal court identified further limits on the rights of the northside individuals.

The northside parties first incorrectly rely on state rather than federal law in applying res judicata and collateral estoppel. *Compare*, John Cox Br. at p. 19. As shown in the Nation's opening brief, federal law applies in interpreting federal court decrees such as the *Ahtanum* decree. *Yapp v. Excell Corp.*, 186 F.3d 1222 (10th Cir. 1999); *Déjà vu, Inc. v. City of Federal Way*, 96 Wn. App. 255, 262, 979 P. 2d 464, 467-468 (1999); *Loveridge v. Fred Meyer, Inc.*, 72 Wn. App. 720, 724, 864 P.2d 417 (1993) *rev'd on other gds*, 125 Wn. 2d 759 (1995). "...States cannot give those judgments merely whatever effect they would give their

own judgments, but must accord them the effect that this Court prescribes." *Semteck International, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001) (citations omitted).

The northside's argument about whether *Ahtanum* is a "general stream adjudication" misses the point. The *Acquavella* court was correct that the *Ahtanum* court reexamined the northside parties' water rights and, under the Code Agreement, further limited them. Whether or not there was an adjudication in *Ahtanum* it is clear that issues litigated there are binding in this case. "Under collateral estoppel once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action..." *Del Mar Avionics v. Quinton Instruments Co.*, 645 F. 2d 832, 835 (9th Cir. 1981).

Without having to reach the outer limits of both doctrines, it is plain that the *Ahtanum* court reached the issue here and actually litigated and limited the rights of the northside parties to take water.

Ahtanum confirmed water rights for certain specific parties for specific lands on the northside identified by the numbers assigned by the court to their answers to the United States' complaint in that case. *Ahtanum*

II, 330 F.2d at 917-919. The reason the federal court did this was simple: it needed to identify those individuals who could benefit from the Code Agreement. Absent being a successor in interest to the Code Agreement, the individual northside parties could not claim a right to a prorata share of the northside Code Agreement water. It therefore became vitally important to identify those individuals.

The *Ahtanum* district court's findings of fact precisely listed those individual northside parties who were entitled to benefit from the 75% northside irrigation water. *Ahtanum, supra,* Findings of Fact and Conclusions of Law (Jan . 30, 1962) (DOE Ex. 136). 8 The Court held that these findings as summarized in finding 17(b) "... represent the present maximum allowable diversion requirements of the defendants ...." *Id.* at finding 18, p. 58. The *Acquavella* trial court rejected the northside's arguments and held, after reviewing this, that as to the northside parties a "... a parcel-by-parcel fact finding did transpire and parcel-by-parcel conclusions were set forth as part of the Pope Decree." *Memo Opinion Re: Ahtanum Creek Legal Issues* (Oct. 8, 2003) at p. 3, lines 10-11(CP 944); *See also, LaSalle High School Memorandum Opinion,* (June 1, 2006) at pp. 4-5 (CP 935).

In *Ahtanum II* the Ninth Circuit reversed the district court due to its

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8 The *Ahtanum* findings noted that the hearings for each defendant and each parcel had gone on for some 135 days and that the Special Master's report had a "supporting record aggregating in excess of 15,000 pages of transcript and voluminous exhibits." DOE 136, at pp. 2-3.; *See also,* 2002 *Acquavella* Report of the Court (CP 1013).

failure to make specific enough findings for each party. *U.S. v. Ahtanum Irrigation District,* 330 F.2d at 901. The Ninth Circuit held that:

> Obviously we contemplated that in each case the defendant must establish that he had a right for a stated quantity or amount of water; that he must establish how he acquired it; and that this in turn could not exceed his needs.

Id. at pp. 901-902.

The Court went on to note that the rights of the northside parties had determined rights under state law but as further limited by that opinion. *Ahtanum II,* 330 F.2d at 904. The Court noted with approval its previous ruling that:

> The effect is to require the Ahtanum water users to adjudicate again their right to the use of the waters of the stream. They are not only required to establish their needs as of 1908, which was one of the purposes of the 1908 agreement, <u>but are again required to prove their water rights with the same particularity which was required of them in the state court proceeding in 1925.</u>

Id. at p. 905. (emphasis added) quoting *Ahtanum I* with approval.

The Ninth Circuit went on to limit the rights of the individual northside parties to specific lands identified by specific acreage within the geographic area for each as identified by their Answer number. *Ahtanum II,* 330 F. 2d at 917-919. Having reduced the award for the northside parties, the Court held that " [i]n consequence the rights of the defendants must be measured on a basis of 4696 acres." 330 F. 2d at 914. This figure that has since been further reduced in this case based upon criteria in the *Ahtanum* federal court rulings. Memo Opin. On Exceptions (April 15, 2009) (CP 525);

Ahtanum Conditional Final Order (Apr.15, 2009) (CP 174).

This does not mean that all of the defendants sued by the United States in *Ahtanum* were ultimately able to prove that they were successors in interest to the Code Agreement or had continued to beneficially use water. Far from it. The Court in *Ahtanum* affirmatively considered - and rejected - the claims of numerous defendants sued by the United States. 2008 Supp. Report at p. 26 (CP 750). The *Acquavella* trial court quoted the Ninth Circuit's holding that the *Ahtanum* district court "... refused to adjudicate the 1908 claims of some 456 defendants who failed to establish beneficial use of water <u>or the existence of water rights belonging to them or to their predecessors in interest</u> as of that date." *Ahtanum II*, *supra,* 330 F.2d at 912 *quoted with approval* in 2008 Supp. Report, *supra* (emphasis added). *Ahtanum II* went on to rule that the district court made findings identifying other northside lands that were irrigated. "By excluding therefrom other tracts, the finding, it seems to us, adequately disposes of any claim that might have been made by other persons in respect to lands not listed in the findings." 330 F.2d at 912. Examples of some of the defendants who failed to establish their claims in *Ahtanum* include the predecessors of Hull Ranches and other parties who could not prove they had a right. *See,* discussion *infra* on Hull Ranches/Answers 179/215.[9]

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9 That the *Ahtanum* case was intended to limit the rights of specific individuals can be shown in a refutation of the argument that LaSalle High School, a northside appellant herein, made before Judge Gavin when LaSalle argued that the *Ahtanum* case could not have been intended to be an adjudication of individuals rights because there was not a *Notice of Lis*

Since the right to water for the northside parties under the *Ahtanum II* Decree is, by definition, limited to individual defendants in that case who were able to successfully prove their rights, those other individual defendants, and their successors, who did not get a right in that case cannot avoid the limitations of that ruling. *Ahtanum* made specific findings reducing the rights in specific situations for even the prevailing defendants. 330 F. 2d at 916-917. All of the northside parties who got rights are listed in *Ahtanum II* by reference to their original Answer number to the United State's complaint along with the acres on which they are entitled to use that water.

John Cox's argument that Appendix B in *Ahtanum II* did not limit the northside parties' water rights would render this part of the opinion that specifically listed each Answer number by acres, irrelevant - a result that could not have been intended by the Court. Each northside claimant was allocated a standard water duty applied to a specific place of use where the water right could be exercised, and was time-limited from "the spring of each year" to and including July 10th. *Ahtanum II, supra,* 330 F.2d at 913, 915, 917-919 (Appendix B).

John Cox has an extended quote from *Ahtanum II* that it claims supports its proposition that the federal court decision does not limit John Cox's rights. John Cox Op. Br. at pp. 13-14. However, this quote is taken

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Pendens filed. Memorandum Opinion Exceptions, *supra,* (CP 504). As the Yakama Nation showed in response to La Salle in the court below, a *Notice of Lis Pendens* was, in fact, filed in *U.S. v. Ahtanum Irrigation District. Id.* and YIN Ex. 451.

out of context. The Ninth Circuit in *Ahtanum II* preceded the quote in John Cox's brief with the statement that:

> We think we made it clear that it was necessary for the defendants and each of them to set and show what their water rights were, the lands they claimed the right to irrigate, and how they deraigned their titles.

330 F. 2d at p. 910 (emphasis added).

Following its quote from *Ahtanum*, John Cox neglects to quote the Ninth Circuit's conclusion that:

> Notwithstanding the generalizations contained in Conclusion No. 3, quoted above, the findings do set out in detail the names of the various parties defendant, referring to the numbered answers filed with a description of lands on which the right to use water is claimed, and a statement of the number of acres irrigated in 1908 on each parcel described. In the light of these findings we perceive no difficulty in drawing the proper conclusion that as of 1908 the owners of those particular parcels thus described in the findings were making use of the waters of Ahtanum Creek to irrigate the irrigable area there found, and that accordingly the several owners of those tracts had the right, as of 1908, to water for irrigation for the areas there determined.

330 F. 2d at 912.

The *dicta* cited by John Cox can thus be reconciled with the actual holdings in *Ahtanum*. What was at issue in *Ahtanum* was how those state water rights were to applied in relationship to the contract rights that each party held under the Code Agreement. Even the *Achepohl* court itself made its award conditioned on the limitations on the Code Agreement which was interpreted in the *Ahtanum* case. The Referee's Report in *Achepohl* provided that:

> No attempt has been made to adjudicate the rights of the lands in the reservation. State's Exhibit D refers to the agreement entered into between the U.S. Indian Bureau and the landowners on the north side of the creek. This agreement has been recognized by the referee and

all rights awarded herein are subject to such agreement.

Report of Referee, *State v. Achephol*, No. 19279 (Oct. 17, 1924) at p. 12 (YIN Ex. 323) (emphasis added).

That the *Ahtanum* court did indeed limit the rights to specific northside parties to specific acres and to define the rights of specific parties can be shown by the review of the adjudication of John Cox itself in that case. As with all other parties in *Ahtanum,* John Cox was required to prove its right again in 1957. By 1957, the landowners served by the John Cox ditch had stopped irrigating at least 300 acres that John Cox claims in this case. This fact was established by the testimony of John Cox's witness Mr. Tom Bates, then President of the John Cox Ditch Company, during the *Ahtanum* trial resulting in the findings at DOE Ex. 136, as follows upon questions from the John Cox attorney, Mr. Brown:

> Q (by Mr. Brown): In 1908 was there more or less land being irrigated from the Johncox ditch than there was in '57?
>
> A (by Mr. Bates): There was less in '57.
>
> Q: About how much less would you say?
>
> A: Oh, I would say 300 acres, 350.

U.S. v. AID (Transcript, Aug. 12-13, 1958) at p. 12,755 (excerpt), YIN Ex.

320.

Based on this testimony, the *Ahtanum* trial court found that irrigated acreage within the John Cox service area was reduced to 654.9 acres. 1962 Findings, *supra,* (DOE Ex. 136); *affi'd Ahtanum II,* 330 F.2d at 919, App. B. The quantity of water awarded to John Cox was accordingly reduced, as was the total diversion amount awarded to the northside defendants. 330 F.2d at 915. This Court confirmed the *Ahtanum II* award to the John Cox Ditch. Ahtanum 2008 Supp. Report at pp. 179, 184 (CP 903, 908).

AID's constituents and John Cox came out of the Pope Decree and the *Achepohl* decree with the following: a right for the specific acreage in the Pope Decree to divert up to .01 cfs per acre until July 10th of each season. The "defendants" are the specific parties and acreages listed in *Ahtanum II* as further limited in this case. *E.g.*, Memo Opinion Re: Ahtanum Creek Legal Issues, *supra*, at p. 19 (CP 960).

4. The Superior Court Was Correct In Denying Water Rights For The Northside Parties Who Had Had Water Rights Denied in *U.S. v. Ahtanum Irrigation District.*

The Court should affirm the superior court's ruling that the

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4. The Superior Court Was Correct In Denying Water Rights For The Northside Parties Who Had Had Water Rights Denied in *U.S. v. Ahtanum Irrigation District.*

The Court should affirm the superior court's ruling that the

appellants cannot claim a right in this case as "juniors" after losing in *Ahtanum*. The northside parties claim that the superior court should be reversed and this Court should "create" a category of "junior" rights for those who failed to obtain a right in *Ahtanum*. *See,* AID Op. Br. at p. 8. The term "junior" is used to apply to those northside claimants in the consolidated Ahtanum subbasin who either did not get a surface irrigation right in *Ahtanum* or who obtained one but to irrigate fewer acres than for which they seek a right in *Acquavella*. There was not a category of "junior" right in *Ahtanum* before the possibility of this was raised in this case. *See,* R.P. (2/25/2004) at p. 185 (CP 4490).

Any claim by those northside parties for water beyond *Ahtanum* (whether described as "junior" or "excess" rights) has already been litigated – and lost - in *Ahtanum*. The northside parties who now seek "junior" rights are the same as, or successors in interest to, the same individual defendants in *Ahtanum* whose claims were rejected by the federal court or did not otherwise obtain a right or make a claim, either entirely, like Hull Ranches, or partially, like John Cox which seeks water to irrigate additional lands outside of and beyond its Answer lands as a supplement to that awarded in *Ahtanum*. *See*, John Cox discussion, *supra*.

and Hull Ranches, *infra*. Having rejected claims like those for John Cox to irrigate lands outside of the *Ahtanum* lands, they should not be awarded a right here by creating an entire new class of water rights for them. The Nation has already shown that the *Ahtanum* northside parties who obtained rights in that case are precluded by *Ahtanum* from obtaining water "excess" to that awarded in *Ahtanum* for the lands for which they were awarded a right. Yakama Nation's Corrected Opening Brief (April 9, 2010) at pp. 43-47. The same result is mandated even more for those who did not obtain a right in *Ahtanum* or failed to obtain water for certain parcels. Any other result would be to allow the northside parties to relitigate *Ahtanum*. As shown in the example above, parties like John Cox had either ceased to beneficially use water on certain lands as of 1957 or never had used it.

The *Acquavella* trial court correctly stated that "... the Ninth Circuit intended to adjudicate every possible right to water for landowners on the north side of Ahtanum Creek." 2008 Supplemental Report, at p. 26 lines 8-9 (CP 750).

The Ninth Circuit also held that:

> It follows also from the general principle that an agreement of the character of that executed in 1908, must be construed as reserving to the Indians, who previously owned substantially all of the waters,

everything not clearly shown to be granted.

236 F.2d at 341.

The northside parties do not dispute these *Ahtanum* rulings that held that the Ahtanum Creek flows are insufficient to satisfy the irrigation needs of the Reservation (without even factoring in the additional water needed for the Treaty water right for fish and other aquatic life) but argue that the Ninth Circuit was wrong:

> Although it is apparent the *Ahtanum II* court apparently, erroneously believed the flow of Ahtanum Creek was insufficient to satisfy the beneficial needs of the reservation land, the actual Ahtanum Creek flow, in many years, exceeds the Yakama Nation irrigation and fish flow rights ...

John Cox Br. at p. 23 (emphasis added).

John Cox made an offer of proof of evidence in the trial court below which it claimed showed that the Ninth Circuit was wrong and that that there is water "excess" to the rights of the Yakama Nation that could be used by so-called "junior" right holders. John Cox Br. at p. 23. However, new evidence is not a basis to reopen the case when it is only offered as here to dispute if a factual determination was correctly made in a prior case. *Arizona v. California,* 460 U.S. 605, 619, 103 S.Ct. 1382, 75 L.Ed. 2d 318 (1983). Under federal law "[t]he correctness of the [prior]

ruling is irrelevant. " *Starker v. United States,* 602 F. 2d 1341, 1347, n.2 (9th Cir. 1979).10

John Cox cannot avoid the preclusive effect of the *Ahtanum* case by making new arguments based upon its offer of proof. Once an issue is litigated "...it is the entire issue that that is precluded not just the particular arguments raised in support of it in the first case." *Yamaha Corp. of America v. United States,* 961 F. 2d 245, 254 (D.C. Cir. 1992) (citation omitted).

The last time that that the *Ahtanum* case heard a dispute brought to it, at that time by AID, the parties agreed that the federal court could not change the *Ahtanum* rulings as John Cox now urges:

> ... a fair construction of the District's present position is that the state court will not be asked to modify the Ahtanum decision in any respect, and that if such modification is sought it will have to result from proceedings in the instant action. Of course, this court has no more authority than does the state court to 'modify' what is presently mandatory precedent. All either court could accomplish is to implement the circuit's views.

U.S. v. Ahtanum, Order (April 7, 1988) (CP3665) (emphasis added).

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10 John Cox 's exceptions here are also founded on the argument that the *Achepohl* decree takes precedence over the later Pope Decree. However, as shown above, the *Achepohl* decree, adjudicated before *Ahtanum,* was issued with the assumption that the *Achepohl* decree was taken subject to the Code Agreement. *Id.* at pp. 15-16. Moreover, neither the Yakama Nation nor the United States were parties to the *Achepohl* nor bound to the rulings therein. R.P. (2/3/2004) at p. 9 (CP 3723-3724).

The purposes of claim and issue preclusion are to prevent re-litigation of issues that have been finally determined in previous proceedings. *Allen v. McCurry,* 449 U.S. 90, 94, 101 S.Ct. 411, 66 L. Ed. 2d 308 (1980); *Orion Tire Corp. v. Goodyear Tire & Rubber,* 268 F.3d 1133 (9th Cir. 2001). Because there is an identify of subject matter, issues, and parties, the northside cannot raise and re-litigate issues that were finally determined in the prior *U.S. v. AID* proceedings. John Cox's opportunity to challenge the findings in *U.S. v. AID* ended in 1964, after the Ninth Circuit issued its decision. It is far too late for John Cox to now complain that the Ninth Circuit's findings are incorrect. Moreover, since the *Ahtanum* retains continuing jurisdiction its jurisdiction over those issues is exclusive. *United States v. Alpine Land & Reservoir Co.,* 174 F.3d 1007, 1013 (9th Cir. 1999).

Since *U.S. v. Ahtanum Irrigation District* litigated and limited the use of the prior adjudicated rights under *Achepohl,* the northside parties are, of necessity, limited to that amount each obtained in the federal court case. Any award beyond that amount is inconsistent with *Ahtanum.* The individual northside parties can obtain neither water for land outside of the

Ahtanum Answer lands nor water for the successful defendants in *Ahtanum* in excess of what they won in that case. The purpose of the adjudication for state-based rights is to determine presently perfected rights and may not be used to " lessen, enlarge or modify existing water rights." *Ecology v. Grimes,* 121 Wn. 2d 459, 466, 852 P. 2d 1044 (1993).

AID argues that the Yakama Nation and its Reservation cannot use all of the available water at the present time so the northside should be allowed to use the excess for those who lost in *Ahtanum.* AID Opening Br. at p. 21. Contrary to AID's argument the *Ahtanum* court found that even the present needs of the Yakama Reservation for irrigation water are greater than the available supply. The Court ruled that "... it is conceded that the present needs of the Indians are sufficient to require substantially the whole flow of the stream." *Ahtanum I, supra,* 236 F.2d at 325 (emphasis added). Indeed, the Court went on to hold that " ... an award of sufficient water to irrigate the lands served by the Ahtanum Indian irrigation project system as completed in 1915 would take substantially all of the waters of Ahtanum Creek." 236 F. 2d at 327. The district court, although it was reversed on other issues by *Ahtanum I,* held that it had

tried the issue of whether the United States had proven that it is the trustee for the Nation of the"entire flow of the Ahtanum reserved by the Treaty of 1855 and therefore has the right to an injunction against anyone using any of the flow". *U.S. v. Ahtanum Irrigation District,* 124 F. Supp. 818 at 827 (E.D. Wa. 1954) (footnote omitted). Far from being *dicta* as suggested by the John Cox, it was necessary to hold whether the needs of the Reservation as of 1915 were sufficient to use all of the irrigation water in order to determine if there was an interference with that right. *Ahtanum I, supra,* 236 F. 2d at 328.

AID's argument that the Nation cannot presently use irrigation water is based on its citation to the trial court's Memo Opinion re: Ahtanum PIA. AID Op. Br. at p. 21, n. 29. However, the *Acquavella* Court's earlier Subbasin 23 opinions were premised on the assumption that there was not excess irrigation water available beyond the needs of the Indian lands under the on-reservation and private on-reservation ditches. Memorandum Opinion Re: Ahtanum Watershed Practicably Irrigable Acreage (Nov. 5, 1994) at pp. 9-11 (CP 1508-1510). Thus the court held in 2002, in reviewing the evidence held that "...there is simply not enough water supplied from Ahtanum Creek and most water users have resorted to

digging wells to supplement the insufficient supply. " 2002 Report of the Court at p. 110 (CP 1085)

After reviewing *Ahtanum* the *Acquavella* Court held that:

> In determining that the "Ahtanum Indian irrigation project' as constructed in 1915 would take all of the waters of Ahtanum Creek and that the 1908 agreement did exist, thereby limiting south side reservation use to 25%, the Ninth Circuit apparently construed that litigation as resolving the reserved water right issue, as it more than allocated available water for reservation use. It determined that the lands which the YIN would be able to irrigate in 1915 by way of the Wapato Irrigation Project were all of the lands capable of irrigation then and for the future.

1994 Memorandum Opinion, *supra,* at p. 11 (emphasis added) (CP 1510).

Judge Stauffacher went on to hold that the Ninth Circuit awarded the Yakama Nation those flows in excess of 62.59 cfs because the "...the Federal Court correctly determined there was insufficient water to irrigate the lands designated to be irrigated by the 1915 project." Id. (citation omitted).

While (as was shown in the Nation's opening brief) the *Acquavella* court was incorrect in holding that this precluded claiming water under the practicably irrigable acreage standard, the Court did agree that even the present needs of the Reservation would use all of the

available natural flow irrigation water. In short, the northside parties cannot have it both ways. The Court in 1994 at the northside's urging ruled that all of the available irrigation water had been allocated –for present needs – so there was not more water available for trust and tribal fee land beyond the land which could be served by the Project as constructed in 1915. While we think the northside's interpretation of this as limiting the Nation's right to claim its full practicably irrigable acreage right is wrong, [11] even the current natural flow is insufficient to irrigate the irrigable land on the Reservation without having to consider future storage for the Reservation. The Yakama Nation submitted proof that, the water supply for the Reservation is insufficient, and, if additional irrigation water was available, the Nation could use it on its lands on the Yakama Reservation on Ahtanum. *See,* Affidavit of Lehigh John as Direct Testimony, YIN Ex. 19 at pp. 2-3.

The northside parties cannot now argue that, having tried to limit the trust and tribal fee land that can receive water for either present or future uses, that there is surplus water to Yakama Nation's rights available for their junior users.

AID states that "it may be true that there is sufficient irrigable land

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11 See, Yakama Nation's Corrected Opening Br. at p. 15.

on the south side to take all of the available water of Ahtanum Creek ... but the fact remains that the potential of the Ahtanum Indian Irrigation Project (sic) 12 has never been fully developed and is not at the present time fully developed." AID Br. at p. 21.

Of course, to the extent that the WIP project is not fully developed the cause is squarely with AID and other northside parties who have opposed the Nation and the United States in *Ahtanum* and opposed the PIA claim. However, a review by the United States' experts shows that even the current natural flow is insufficient to irrigate the practicably irrigable trust and tribal fee land on the Reservation and storage would be needed to fully irrigate those lands. USA Ex. 113, Direct Testimony of Gary Evan Elwell at p. 4 ("... it is evident that the natural flows would be insufficient to irrigate all of these lands and that Ahtanum reservoir was needed to supplement the insufficient natural flows.").

John Cox's offer of proof that it had been diverted more water both before and after July 10th than it was allowed under its water right is

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12 There is not a "Ahtanum Indian Irrigation Project" on the southside but, rather, the Ahtanum Unit of the Wapato Irrigation Project. USA Ex. 112 at p. 4. Moreover, it is the Yakama Nation or the U.S. as trustee that holds a water right here, not the Wapato Irrigation Project or the "Ahtanum Indian Irrigation Project." Ahtanum CFO, *supra*, (CP 174).

irrelevant if it doesn't have a right under *Ahtanum*. [13] A Treaty secured water right is reserved to meet "future as well as present needs". *Colville Tribes v. Walton,* 647 F.2d 42, 47 (9th Cir. 1981).

AID's reliance on the language in the Pope Decree on "beneficial use" is also misplaced. AID Op. Br. at p. 17. The general references to "beneficial use" in *Ahtanum* cannot grant to northside parties' rights that they don't already have in *Ahtanum*. The *Ahtanum* reference to beneficial use was limited to those parties (as limited by their water rights) who had succeeded in getting a right in that case not those who failed or never made a claim. There is no mention or consideration of the acreage or parties outside of or beyond the successful Pope Decree defendants who obtained rights. However, there is no basis for argument that the water is available for Pope Decree "juniors" who were, by definition, not successful defendants.

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13 John Cox's offer of proof which it claims shows "excess" water for its lands ignores the fact that this excess is mostly daily fluctuations in flood water. RP (2/27/2004) at pp. 32- 33 (CP 3464 -3465). It was also based on erroneous assumptions on the Reservation (WIP) canal capacity. *Id.* (CP 3472).

5. The Court Should Reject the Northside's Argument That it Is Entitled to Relitigate Whether It Can Take Any Water After July 10th.

AID and the other northside parties also appeal the *Acquavella* trial court's ruling that the northside's claim to irrigation water after July 10th each season is barred by the *Ahtanum* ruling asking for a ruling that it is entitled to divert such water if it is excess to the Yakama Nation's right. AID Op. Brief at p. 27; John Cox Op. Brief at p. 25. The *Acquavella* trial court rejected the northside's argument that they are entitled to divert any water after July 10th. Memo Opinion Re: Ahtanum Creek Legal Issues, *supra,* at pp. 14-16 (CP 955); 2008 Supp. Report (CP 907).

The issue of the right to divert water after July 10th each year was actually litigated and decided against the northside in *Ahtanum. Ahtanum* ruled that the right of John Cox and all northside parties to divert water ended after July 10th. 330 F.2d at 915. The northside argued the same thing that they are rearguing here: that they should be entitled to divert water after July 10th because they had done so in the past. The *Ahtanum* Court rejected AID's and John Cox's argument that water had ever been diverted by the northside parties after the beginning of July. 330 F.2d at 907-908, 910. The Ninth Circuit held that:

> In the light of the unanimity of the evidence upon the subject, we are compelled to hold that the water rights of the individual parties to the 1908 agreement, which were contemplated thereby, terminated in the early part of July in each year, a conclusion which must be reflected in the final judgment in this case.

Ahtanum II, 330 F.2d at 910 (footnote omitted).

Any question in *Ahtanum* that northside claimants might be entitled to a post-July 10 right was resolved against them when AID and the State of Washington were denied rehearing by the Ninth Circuit on their petition to review precisely this issue. *U.S. v. Ahtanum Irrigation District,* 338 F.2d 307 (9th Cir. 1964); YIN Ex. 309. Upon a request for rehearing before the Ninth Circuit AID was permitted by the federal court to supplement the record with 53 items of evidence, purportedly showing a late summer need and use for water, but the Ninth Circuit Court rejected the petition:

> Our further examination of the record, in the light of the petition for rehearing and the supplement thereto, convinces us that our former conclusion was right.

338 F.2d at 309.

John Cox admitted in the agreed facts in the *U.S. v. AID* trial that "...irrigation water is shut off from said ditch not later than the early part of July ..." Order on Pre-Trial on the Merits, Civil 21 at p. 30 (July 19, 1957). See, Declaration of Jeffrey S. Schuster Identifying Attachments In

Support of Reply Brief to Post-Trial Briefs (Sept. 10, 2004), Attachment C (CP 3677).

The evidence contradicts John Cox even in this case. John Cox relies on Mark Herke to show that there is excess water both before and after July 10th. John Cox Br. at pp. 23, 25. However, Mr. Herke's father, John Herke [14] contradicted him on cross -examination:

> Q You explained how you do flood irrigation in the areas that you've marked in red imposed on the map.
>
> A Naturally that valley falls rather hard from the west going to the east, so you put a ditch down a ridge and you just spill it over the hillside, and you move it every day.
>
> Q. Do you ever do this in the fall, or is this specifically in the spring?
>
> A. There isn't any water. You do it when you got it.
>
> Q How late could that possibly go in given irrigation season?
>
> A. <u>Once in a while it will go into July 1. There's been a year or two where it went into July , maybe the 10th or 15th or something like that, but usually the creek falls off pretty drastically in the end of June.</u>

RP. (2/25/04) at pp. 195-196 (CP 4500-4502) (emphasis added).

Mr. Herke's testimony is thus consistent with the *Ahtanum* court's finding that the northside never diverted water after July 10th each year. [15]

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14 (RP (2/25/2004) at pp. 197-198, (CP 4502-4503)

15 Other statements by AID and John Cox officials have confirmed that the northside has

6. The Court Should Reject John Cox's Appeal of the Court's Ruling Limiting it to 30 Days of "Excess" Water.

John Cox appeals from the Court's ruling finding that the right to excess water for *Pope Decree* parties is limited to no more than a total of .02 cfs/acre for 30 days or, in John Cox's case, 45 days. 16 John Cox argues that the trial court did not provide a factual justification for his opinion. John Cox Br. at p. 27. As shown above, there is not a right to excess water as a matter of law since it would be inconsistent with *Ahtanum*. However, without waiving this argument, John Cox cannot dispute that 30 days would be reasonable, if the Court reaches this issue, based upon a review of AID's report. "[C]hallenged findings will be binding on appeal if they are supported by substantial evidence in the record." *In the Matter of the Contested Election of Schoessler,* 140 Wn. 2d 368, 385, 998 P. 2d 818 (2000) (footnote omitted). AID's expert stated that "[u]sing AID data, approximately 29% of the days of record (April 2 through July 10 over the 1998 to 2008 period of record) experienced flows that were greater than the sum of the instream flow recommendations, AID diversions and WIP canal capacity." Letter from

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not taken routinely water after July 10th. *See,* (Mark Herke) R.P. (4/19/94) at p. 20 (CP 4713).

16 No other northside party appealed the ruling awarding them 30 days of "excess" water.

Robert Anderson, Golder Associates attached to Declaration of Andreas Kammerick (CP 7); (R.P. 5/14/2009) at p.73 (CP 4986). That period would be approximately 30 days.

Accordingly, the Court should reject the appeal.

B. This Court Lacks Jurisdiction to Change *U.S. v. Ahtanum v. Irrigation District* Merely Because of Alleged Erroneous Factual Findings by the Federal Court Concerning Hull Ranches' Claims for Water Rights for Lands Within Pope Decree Answers 179 and 215.

Hull Ranches appeals from the superior court's ruling that it is barred by issue preclusion from relitigating the identical claim and issue decide against it by the Ninth Circuit in *Ahtanum.* Hull Ranches' argument completely lacks any merit and should be summarily denied by this Court.

The core of Hull Ranches' argument here is that "... an obvious factual error had been made in the Findings and Conclusions made by Judge Pope." AID Opening Br. at p. 29. Hull Ranches does not dispute that its predecessor was a party to *Ahtanum,* the *Ahtanum* court denied a water right to the land owners within Answers 179 and 215 and that the present claimant is a successor in interest and in privity with the prior owners. *Id.* Nor does Hull Ranches that the identical issue is present

here. Rather, Hull Ranches argues that state law relating to collateral estoppel should be applied here and that, under that doctrine, the Court should find that collateral estoppel does not bar its effort to relitigate this issue because the opposing parties cannot prove that "application of the doctrine does not work an injustice." AID Br. *quoting Shuman v. State of Washington,* 108 Wn. App. 673, 32 P.3d 1011 (2001). As the Nation showed above, this Court lacks jurisdiction to change the *Ahtanum* ruling.

As Judge Gavin held below:

> The Nation correctly points out that the claim for this land was at issue in the Pope Decree (identical issue), there was a final judgment on the merits, and Hull Ranches is in privity with the party in the first proceeding (the Woodhouses). AID's argument here was also argued before the Ninth Circuit.

Memorandum Opinion Exceptions (CP at 493).

Hull Ranches cannot collaterally attack the *Ahtanum* ruling in this Court. First, Hull Ranches' predecessor admitted in their answers to the *Ahtanum* complaint that they were not parties to the Code Agreement. In the original answers they filed in *Ahtanum* they admitted that the 1908 owner Sophia Woodhouse was not a party to the 1908 Agreement. *Ahtanum II, supra,* 330 F. 2d at 917; AID Ex. 93 at p. 179 and at p. 215

discussed RP 2/11/2004 at pp. 76, 79 (CP 4272-4275).

Second, Hull incorrectly argues that the state law on collateral estoppel apply here. Interpretation of a federal court ruling is controlled by federal law. *See,* discussion, *supra.* [17] Third, the federal court in *Ahtanum* which has continuing jurisdiction, retain exclusive jurisdiction over this issue. *See, Cook v. Pan American World Airways, Inc.,* 771 F.2d 635, 641 (2nd Cir. 1985).

Fourth, res judicata rather than collateral estoppel applies here. The application of the doctrine of res judicata does not require that the proponent show to show that there is not an injustice. *Stark, supra.* The claims by the Woodhouses for Pope Decree water were - without question - at issue in the *Ahtanum* litigation. Under the res judicata doctrine, the northside claimants cannot collaterally attack that ruling here.

Fifth, even assuming, without conceding, that collateral estoppel is

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17 Hull Ranches and AID are correct that the Yakama Nation cited *Shuman* in response to one of the trial court's rulings on stockwater but only to show that (while not waiving the position that federal law controls) under either federal or state law AID cannot and could not relitigate the issues actually decided in *U.S. v. Ahtanum Irrigation District.* While citing to *Shuman* AID neglects to note that the Nation first argued that federal law not state law controls. Yakama Nation's Br. In Support of Exceptions (Sub. 23) (Ahtanum) (Mar 4, 2003) at p. 27 (CP 4777); Yakama Nation's Rebuttal to Exceptions,(6/13/03) (CP 4573) supra, at p. 14. In this instance it does not matter whether state or federal law controls because the claim here will fail under either state or

the appropriate doctrine, AID is incorrect that the "injustice standard," applies. *Starker v. United States,* 602 F.2d 1341 (9th Cir. 1979); "Under . . . federal law, collateral estoppel applies only where it is established that (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding." *Hydranautics v. Filmtec Corp.,* 204 F.3d 880, 885 (9th Cir. 2000); *Town of North Bonneville v. Callaway,* 10 F.3d 1505, 1508 (9th Cir. 1993).

Sixth, even if AID succeeds in avoiding the above hurtles and applying the state doctrine of collateral estoppel, this Court cannot avoid the preclusive effect of *Ahtanum* by merely deciding that the Ninth Circuit was "obviously" wrong in reversing the district court. 18 Moreover,

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federal law.

18 Without conceding that state law applies , we note that under even under state law "'injustice' means more than that the prior decision was wrong." *State Farm Mutual Auto Insurance v. Avery,* 114 Wn.App. 299, 306 (2002). The *Shuman* case cited by AID indicates that the "injustice" requirement arises primarily in state cases involving drivers license revocations where the court must decide whether a defendant in an earlier criminal prosecution had both the opportunity and incentive to litigate certain issues. The doctrine is rooted only in procedural unfairness i.e. did the party in the earlier proceeding receive a "full and fair hearing on the issue in question." *Shuman v. Dept. of Licensing, supra,* 108 Wn. App. at 678 quoting *Thompson v. Dept. of Licensing,* 138 Wn. 2d 783, 795-797, 982 P.2d 601 (1999). *Shuman,* relied upon by Hull, held that *Thompson*

allowing Hull Ranches to relitigate this issue after almost 45 years would be injustice to others, including the Yakama Nation, who have relied upon the rulings of the *Ahtanum* litigation.

Hull Ranches admits here that "[b]efore the Special Master and the Trial Court, Woodhouse did receive a full and fair hearing, presenting evidence of all of the elements necessary to establish a valid claim." AID Objections at p. 13, lines 6-7 (emphasis added). Rather, the proponents argue that the Ninth Circuit was wrong because Judge Pope made an "error" in overruling the district court on this point. *Id.* AID does not dispute that the Ninth Circuit expressly discussed and referenced Answer Nos. 179 and 215 and held as to both that they "were not owned by a 1908 signatory." *United States v. Ahtanum Irrigation District,* 330 F.2d at 917.

AID and its constituents had a full opportunity and incentive to litigate this identical issue. In fact, AID made the identical argument in *Ahtanum* that it makes here: that Ms. Woodhouse, even though she did not sign the Code Agreement, had the agreement signed for her by her son. *See*, Schuster Declaration Identifying Exhibits (Sept. 2004), *supra,* Attach.

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stands for the proposition that "... [t]he Supreme Court, examining the meaning of the 'injustice' requirement, noted that a substantively incorrect prior ruling cannot defeat collateral estoppel." *Shuman, supra,* at 678 (citation omitted); *See also, Christensen v. Grant County Hospital,* 152 Wn. 2d 299, 309, 96 P. 3d 957 (2004).

Ex. B (CP 3668). In the AID appendix submitted to the Ninth Circuit in the 1960's AID included its original Objections of Defendants to Court's Conclusions of Law and Defendants' Proposed Alternative Conclusions of Law (Aug. 2, 1961) submitted to the district court and a separate Appendix I to the Ninth Circuit titled "Tabulation of Irrigated Status of Defendants' Land." Id. In its Appendix I AID argued as to whether Ms. Woodhouse was a 1908 signer for Answer No. 179 and stated that "Sophia Woodhouse's interest signed by N. Woodhouse her son ... and who acquired her interest." Id. Appendix (Excerpt) at p. 174, n.32 (CP 3672). A footnote in AID's submission concerning Answer 215 referred back to the argument in footnote 32 for Answer 215.

AID and Ms. Woodhouse thus made, and lost the identical argument they are making before this Court. AID Br. at p. 11, lines 1-9. The Ninth Circuit need not fully explain the basis of its ruling for it to have a preclusive effect in this forum. *Friarton Estates Corp. v. City of New York,* 681 F. 2d 150, 159 (2nd Cir. 1982). Indeed, AID had the opportunity to move for rehearing on this point if it had felt that the result was so wrong. *United States v. Ahtanum Irrigation District,* 338 F.2d 307

(9th Cir. 1964) (Per Curiam).[19] In the instant case the Woodhouses were represented at the hearing, the same issue was clearly presented in the district court and decided in the merits, and, indeed, singled out for comment by *Ahtanum*. 330 F.2d at 917. The Court should deny Hull Ranches' appeal.

C. Pope Answer 46 (The Chancery).

AID asks the Court to reverse the Ahtanum Conditional Final Order to include parcels that AID believes were not properly included in the trial court's order. AID Br. at pp.13-15, 33. AID admits it failed to file exceptions to the failure to include the parcel in the schedule of rights in the Supplemental Report and did not raise the issue later until this appeal. AID Br. at p. 15. This is so despite the fact that the Chancery filed other exceptions to the Supplemental Report. AID Br. at p. 15; compare The Chancery's Objection to Proposed CFO (June 27, 2008) (CP 4177). We think that remaining silent on this error in the Schedule of rights without raising this until appeal did not preserve it for appeal and waives the right to raise it now. RAP 2.5(a).

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19 AID, which represented Hull Ranches, admitted that all of the evidence it offered at the hearing in 2004 in support of its effort to relitigate this issue had been in existence in

D. Pope Answer 217.

AID on behalf of the Answer number 217 owners asks that it be allowed to remand this to reopen the case so that it can provide proof its claim. AID failed to provide the information requested by the trial court. 2008 Supp. Report, at pp. 173-174 (CP 897-898). The time for presenting evidence for AID on this claim is long past in the case. There is not any error alleged by AID other than failure to present argument or new evidence during the time requested by the Court to do so. The Nation objects to a remand to reopen the case for this issue.

E. The Court Should Reject the Brule and La Salle Appeals.

Don Brule and LaSalle High School appeal the trial court's ruling denying both of them water rights in this case. Their argument, and the argument of Jerome Drunil and Albert Lantrip that the Court should create a "junior right" is addressed above. This section addresses Brule and La Salle's argument that they are each entitled to prove a right under the Code Agreement despite the fact that they do not prove a right in *Ahtanum.* 20

Neither La Salle nor Brule, in a joint brief, dispute that neither were

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1957 when the Pope trial occurred. R.P. (2/9/04) at pp 136-137 (CP 2676-2677).
20 Jerome Durnil and Albert Lantrip did not appeal the trial court's ruling that their predecessors were a party to *Ahtanum* but are not entitled to a right under *Ahtanum.* Compare, Memo Opinion Exceptions (CP 496); 2008 Supp. Report (CP at 190, lines 1-

awarded a right in *Ahtanum* and that both had the opportunity to litigate this issue there. Both make technical arguments that they were never properly served with the summons and complaint in the 1940's in *Ahtanum,* or, in the case of LaSalle, was never properly substituted. La Salle Corrected Op. Br. at p. 13 (Brule) p.16 (LaSalle). Both then argue they can now relitigate the issue before this Court about whether they have water rights under the Code Agreement and *Ahtanum.* La Salle Corrected Opening Brief (April 8, 2010) at pp. 12-18. Neither dispute the *Acquavella* trial court's ruling that a northside party cannot exercise a diversionary irrigation right under *Ahtanum* unless it can show that it has successfully obtained a right in *Ahtanum.*

Especially on a purely procedural ground such as this, this Court should not entertain a collateral challenge to the *Ahtanum* court's jurisdiction. *Badgley v. City of New York, supra; City of New Hampton, supra.* As discussed earlier, the *Ahtanum* court retains continuing jurisdiction. *Ahtanum II,* 330 F.2d at 915; *Ahtanum* order (CP 3664).

1. Brule.

Brule claims that his predecessor in interest, Mr. Cope, was not

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4). They do, however, join in the appeal asking the court to grant them a "junior right." Create a junior right for them. La Salle Br. at pp. 1-4 .

named in the original complaint in *Ahtanum* but admits that Mr. Cope was served with the summons and complaint. LaSalle Br. at p. 14. Rather, Brule argues that the summons and affidavit of service incorrectly listing Mr. Cope's wife's name thus, so the argument goes, invalidating the service. Brule's argument lacks merit.

First, Brule does not dispute that the federal district court properly substituted Mr. Cope's name as an additional defendant in *Ahtanum*. *U.S. v. Ahtanum Irrigation District,* Order to Drop and Include Additional Parties Defendant (Oct. 14, 1949) (YIN Ex. 431). There is no evidence presented that either Mr. Cope or his successors ever filed an answer in *Ahtanum* claiming a right here nor appealed or challenged that order in *Ahtanum* substituting him as a defendant. *See,* 2008 Supp. Report at p. 190 (CP 914). Having failed to appeal the order joining him as a defendant, the Cope's successors should be estopped from challenging that decision in this forum.

Second, there is no merit to the argument that any error in the name of his wife would invalidate service here. *Id.* Although focusing on the name of Mr. Cope's wife (La Salle Br. at p. 14) Mr. Brule does not dispute the trial court's finding that the correct Mr. Cope was served. Although

the complaint was initially listed in the name of "Walter G. Cope" (YIN Ex. 27) the affidavit of service clarified that the defendant was "Walter G. Cope, whose true name is Walter C. Cope". YIN Ex. 426 at p. 2. In the complaint and in both affidavits of service Mr. Cope's wife is listed as "Rose Cope." The trial court found that "YIN-426 is an Affidavit of Service of Summons and Complaint and shows that Walter C. Cope was served on September 4, 1947 and YN-427, also an Affidavit of Service of Summons and Complaint shows that W. C. Cope was served on October 27, 1949." Memo Opinion Exceptions at p. 40 (CP at 495).

Third, even if Mr. Brule is not bound by *Ahtanum* can relitigate the *Ahtanum* case, his claim would still fail. He would not be able to prove that he is a successor to the original Code Agreement and thus still cannot succeed here. Mr. Brule did not assign error either in the assignments of error or in his brief to the *Acquavella* trial court's finding that:

> The Brule property lies in the SE¼NW¼ and W½SE¼NE¼ of Section 1. DE-321 is a chain of title for this land, which shows a different ownership history than for the other claimants. When the 1908 agreement was prepared and signed by water users, the ownership of the Brule land changed frequently. It may have been owned by D. L.Savage or George H. Fresh. Neither signed the 1908 Agreement.

2008 Supp. Report at p. 190 (CP 914).

Having failed to assign error to this finding either in its assignments or the brief itself, it must be taken as a verity in this appeal. *Levine v. Jefferson County, supra.* If the Court decides that Brule is not bound by *Ahtanum* it must still hold that his predecessors did not sign the Code Agreement.

2. La Salle High School.

La Salle argues that the *Ahtanum* district court failed in the 1940's to properly substitute the new owners to whom the property was transferred thus requiring that the "action be dismissed as to the deceased party." LaSalle Br. at p. 17 quoting Fed. R. Civ. P. 25 (a)(1). The *Acquavella* trial court held that La Salle High School's predecessors' had been properly served with the summons and complaint and joined as defendants in *Ahtanum.* Mem Opinion Re: La Salle High School (June 1, 2006) at p. 4 (CP at 935); Memorandum Opinion Exceptions, *supra* (CP 504). The superior court held that an order had been entered in *Ahtanum* which expressly added Wade Langell and H.A. Richmond, the successors interest to the Goodman property, as defendants in *Ahtanum.* Memo Opinion (CP 935); Order to Drop and Include Additional Parties

Defendant (Oct. 14, 1949) YIN Ex. 431.

There is no dispute that LaSalle's predecessor, Jennie Goodman, was properly served with the summons and complaint but died soon after. La Salle Br. at p. 16. Mr. Langell and Mr. Richmond were subsequently served later that same month with the summons and complaint in *U.S. v. Ahtanum Irrigation District.* YIN Ex. 427.

The Court should affirm the superior court. First, La Salle neglects to mention that Ms. Goodman had filed a motion to dismiss the complaint in *Ahtanum* against her (YIN Ex. 429) and her estate answered the federal court complaint. YIN Ex. 430; *See,* La Salle Memo Opinion, *supra,* (CP 932 at 935). La Salle's predecessors were on notice of this issue but failed to obtain a ruling from the federal district court nor to appeal the failure of the *Ahtanum* district court to grant them a right.

Second, even if the Court should reach the merits of this procedural argument, La Salle's arguments should be rejected. La Salle argues that under Fed. R. Civ. P. 25(a) the lawsuit against its predecessors should have been dismissed due to failure to substitute for a deceased party. One early court ruling has suggested that a transferee

successor, as here, is more properly considered under Fed.R. Civ. P. 25 (c) as a party to be joined rather than as a party to be substituted under Rule 25(a). *Vaidenback v. Busiek,* 1 F.R.D. 366 (E.D. Ill. 1940) *aff'd on other g'ds,* 126 F. 2d 893 (7th Cir. 1942). Federal Rule 25 (c) provides that:

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

Id.

The federal district court had broad discretion to handle transfers of title by either continuing the "... action in its original posture, to order substitution of the party ... or to join the transferee of the interest..." *First American Savings Bank v. Westside,* 639 F. Supp. 93 (W. D. Wa., 1986); *See, Sun-Made Raison Growers of California v. California* 73 F. 2d 282, 284 (9th Cir. 1959); *McComb v. Row River Lumber Co.,* 177 F. 2d 129 (9th Cir. 1949).

La Salle's efforts to avoid the consequences of the failure of its predecessor to assert its rights in a timely manner in the correct court is similar to the situation of an appellant in a recent Ninth Circuit case

where the appellant attempted to avoid being bound by an earlier default judgment against its predecessor by trying instead to intervene or be joined as new party. *In Re: Bernal,* 207 F. 3d 595 (9th Cir. 2000). However the Court quoted *Wright and Miller* which stated that Rule 25 (c) does not:

> … require that anything be done after an interest has been transferred. The action may be continued by or against the original party, and the judgment will be binding on his successor in interest even though he is not named."
>
> *Id.* 207 F.3d at 598 *quoting, Wright and Miller,* § 1958.

The Ninth Circuit criticized the appellant for trying to avoid the default of its predecessor stating that the appellant "acquired whatever rights it may have in the property, if any, only by virtue of the assignment…and must therefore stand in [its] shoes with respect to all phases of the litigation." *Id. paraphrasing with approval, Deauville Ass. v. Murrell,* 180 F.2d 275, 277 (5th Cir. 1950).

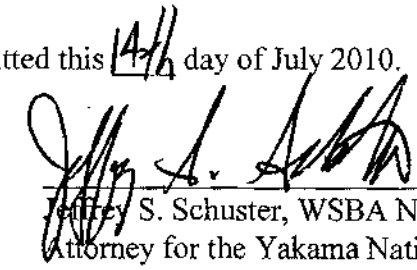
Here the *Ahtanum* entered an Order formally substituting La Salle's predecessors as defendants. If LaSalle's predecessors thought this was incorrect or was insufficient to protect their rights the place to raise it was in federal district court in the 1940's or 1950's. As the *Bernal* court

noted quoting *Deauville* the fact that the *Ahtanum* rulings may be adverse to La Salle's interests "...would not justify our disturbing all prior orders and decrees entered in this controversy and unfavorable..." to La Salle. *Id*

IV. CONCLUSION.

For the reasons stated above, the Court should affirm the Superior Court's rulings that the *United States v. Ahtanum Irrigation District* adjudicated rights of individual parties on the northside of Ahtanum Creek. The Court should affirm the trial court's ruling that there are not "junior" irrigation rights on the northside of Ahtanum Creek outside of the those determined in *Ahtanum.* The Court should deny the individual appeals for the reasons stated in this brief.

Respectfully submitted this 14th day of July 2010.



Jeffrey S. Schuster, WSBA No. 7398
Attorney for the Yakama Nation.