NO. 281141

COURT OF APPEALS, DIVISION III
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 WA

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Plaintiff/Respondent

vs.

JAMES J. ACQUAVELLA, YAKIMA NATION INDIAN, UNITED STATES OF AMERICA, JOHN COX DITCH CO., AHTANUM IRRIGATION DISTRICT, LA SALLE HIGH SCHOOL, DONALD AND SYLVIA BRULE, JEROME DURNIL, ALBERT LANTRIP, et al.,

Defendant/Appellants.

REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS LA SALLE HIGH SCHOOL, DONALD AND SYLVIA BRULE, JEROME DURNIL, AND ALBERT LANTRIP

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INTRODUCTION

The ultimate issue faced in this appeal is what effect to give the *Ahtanum v. AID* litigation. The trial court required claimants in this action to prove that they submitted an answer in the *Ahtanum v. AID* litigation in order to be awarded a water right in this present action. If the *Ahtanum v. AID* litigation was an "adjudication" of water rights, that could be a correct conclusion. If, as proffered by several of the appellants herein, the *Ahtanum v. AID* litigation was not an adjudication but rather was simply a proceeding to arrive at an "en gross" amount of water that the Northsiders were entitled to, then it was error for the trial court to impose this additional requirement.

The same is true for the individual claimants La Salle and Brule. When the United States and the Nation want to apply the concept of res judicata, the *Ahtanum v. AID* litigation is considered a "real" lawsuit. However, when examining the service and substitution issues raised by these claimants, the *Ahtanum v. AID* litigation is somehow not afforded "real" status

by those respondents and these so-called "procedural" issues raised by the claimants should simply be ignored. As outlined below, such is not the case.

ARGUMENT

In examining the issues presented below, a timeline of relevant is helpful.

1908	The "Code" agreement is signed which allocates 25% of the waters of the waters of Ahtanum Creek to the Reservation users (Southside) and 75% to the Northside users.
1925	The state of Washington concludes a general water adjudication pursuant to RCW 90.03 *et seq.* which is designed to adjudicate all water right claims for all Northside users on Ahtanum creek as to the 75% of Ahtanum Creek water allocated to Northside users under the Code Agreement. Neither the Yakima Indian Nation nor the United States were parties to this action. Water Rights Certificates were issued by the state of Washington to those claimants who were awarded rights. A total of 216 claimants were awarded such certificates.
7/2 1947	The United States institutes the federal action of U.S. v. Ahtanum Irrigation Dist. The suit sought to invalidate the Code agreement and named hundreds of defendants. Jennie Goodman, a widow, is one of the named defendants.

11/6 1948	Jennie Goodman (La Salle predecessor) dies.
4/30 1949	Wade Langell purchases a portion of the Goodman property.
6/30 1949	H.A. Richmond purchases the remainder of the Goodman property.
10/14 1949	The U.S. v. Ahtanum Irrigation Dist. district court enters an order to "Drop and include additional parties defendant." The first part of the order lists 134 persons that "are either deceased or no longer have any interest in lands involved in this suit and therefore should be dropped from the rolls of parties defendant herein." It is interesting to note that neither Jennie Goodman nor her estate is on the list of persons to be dropped from the lawsuit. The second part of the Order states, "That the following persons are successors in interest to the rights of the above named defendants in the above captioned case and should be included as parties defendant." It is on this second "substitution" list that Wade Langell and H.A. Richmond appear.
10/27 1949	H.A. Richmond and W.C. Cope (Brule predecessor) are served. Wade Langell is served 10/29/49. All are served with the "Summons and Complaint."
2/12 1951	Brule property is sold to Frank and Bertha Miller.
1954	District Court Judge Fee rules that the Code agreement is enforceable. An appeal is taken.

7/10 1956	The Ninth Circuit upholds Judge Fee's determination but remands the case back to the district court for further proceedings.
12/16 1959	Brule property sold to Ralph and Ivy Miller.
1/15 1962	Brule property sold to Don and Robert Herber.
3/11 1964	Brule property sold to H. J. Sieber.
3/18 1964	The Ninth Circuit hands down its second opinion in the U.S. v. Ahtanum Irrigation Dist. case.

It is against this backdrop that the claims to be addressed herein must be assessed. When that is done, the decision of the trial court should be reversed and the appellants herein should be granted the right to use the waters of Ahtanum Creek.

A. La Salle High School.

Both the U.S. and the Yakama Nation arguments miss the point. They both cite authority and rules that exist today. However, neither respondent actually discusses the Fed. R. Civ. P. 25(c) that applied at the time that these events were occurring. They discuss and cite cases that interpret the rule as

it was subsequently amended. If the rule, as it existed at the time as well as case law considering that rule are examined, it is clear that the failure to substitute another party for Jennie Goodman extinguished any claim that could be asserted in the U.S. v. Ahtanum Irrigation Dist. litigation.

The AID Litigation was initiated on July 2, 1947. Jennie Goodman was named as a party to the litigation. Jennie Goodman died on November 6, 1948. The property that La Salle ultimately purchased came out of common ownership in 1949 from the Estate of Jennie Goodman when the Estate sold that property to R.A. Richmond and Wade Langell. It is undisputed that neither Mr. Richmond, nor Mr. Langell (the purchasers in 1949) were ever substituted as parties for Jennie Goodman in the litigation.

At the time of the AID Litigation, the version of F.R.C.P. 25(a)(1), then in effect, stated that:

> If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties.

> **<u>If substitution is not so made, the action shall be dismissed as to the deceased party.</u>**

(emphasis added).

The language of F.R.C.P. 25 (a)(1) is mandatory. The failure to make a substitution within the two year period mandates the dismissal of the action as to the deceased party. *See Anderson v. Yungkau*, 392 U.S. 482, 485, 67 S.Ct. 428, 430, 91 L.Ed. 436 (1947). It does not matter whether the failure to make the substitution was a result of "excusable neglect." *See Anderson*, 392 U.S. at 484-85.

> Thus, as stated by the Circuit Court of Appeals, Rule 25 (a) operates both as a statute of limitations upon revivor and as a mandate to the court to dismiss an action not revived within the two-year period.

Anderson, 392 U.S. at 485.

The Ninth Circuit came to the same conclusion as to the application of F.R.C.P 25(a)(1):

> [T]he power to order the substitution of appellees as defendants in his place and stead was limited to the two-year period prescribed in Rule 25(a)(1). That period expired on March 27, 1946. No

> substitution was made within that period. No valid substitution could be made thereafter.

Fleming v. Sebastiani, 161 F.2d 111, 112, (9th Cir. 1947).

It is undisputed that there was never a substitution of Mr. Richmond or Mr. Langell for Mrs. Goodman in the AID Litigation. After two years from her death passed, the action was deemed dismissed as to Mrs. Goodman. At that point in time, the first trial in the AID Litigation had not even been conducted. Since no proper substitution was made and the action was to be dismissed as to Mrs. Goodman, the concept of res judicata has no bearing on the claim currently being asserted by La Salle. Accordingly, it should be granted a right to use water from Ahtanum Creek in accord with the right granted under the Achepohl adjudication since it met all other conditions to be entitled to such a use of water.

B. La Salle's Predecessor in Interest was not Served with a Lawsuit that named them as parties to the Action with respect to the La Salle property.

Here's where the U.S. and the Yakama Nation seem to dismissively downplay the alleged "procedural" nature of this argument. Far from it, this argument cuts to the heart of any lawsuit that is instituted. As previously noted, the U.S. could very well have instituted a "general stream adjudication." It chose not to do so. Instead, it named all the signators to the Code agreement in its lawsuit. The reason is simple. It did so because it was seeking to have the Code agreement declared null and void, so it named all the parties to the contract.

The problem comes in that, having chosen to institute the action in this form, the U.S. is stuck with all the trappings of a "real" lawsuit, even if it involves 5,000 defendants. This was not a class action. It was not a general water adjudication. It was an action brought by the U.S. against 5,000 individuals. Having chosen the form of the cause of action, the U.S. is stuck with the ramifications of not naming all parties and not properly

substituting parties into the lawsuit with respect to particular pieces of land.

It is undisputed that Langell and Richmond were not "substituted for" Goodman in this case. They both apparently purchased other lands within the Ahtanum subbasin and were substituted in for other individuals that originally held that interest. They may have pursued those claims or may not have done so. We don't know. What we do know is that neither individual was ever substituted for the Jennie Goodman.

As noted in the opening brief, the issue is not whether Langell and Richmond were served. Rather, the question is, "served with what." It is undisputed that they were served with a summons and complaint that did not list them as parties to the action.

Take an example. Smith sues Jones in an action. One day, while out mowing my lawn, a process server shows up and serves me with the summons and complaint for "Smith v. Jones." My name is Jay Carroll. I look at the caption and say,

"not my problem," and throw it away. That's conceptually what happened in this case. Both Langell and Richmond were served with a summons and complaint that did not list them as parties to the action. Are the U.S. and the Yakama Nation suggesting that even if you are not listed as a party, you should make some sort of guess that maybe you should be a party and defend the action in which you are not a party? That doesn't make any sense.

Appellant tried to find some sort of case law on this issue but, as one can imagine, there is not a whole lot of authority on the issue of trying to sue someone you have not sued, especially 60 years after the fact. The U.S. chose the form of lawsuit to institute in that action. It is bound by its choice. Sixty years later, it can claim that it's failure was merely "procedural," but that is not legally sufficient. There is no question that Langell and Richmond were substituted for one of the 134 parties to the litigation listed in the order. It just wasn't the Goodman (La Salle) property.

This is not horseshoes or hand grenades. Close doesn't count. Water rights are a valuable component of property. This Court should not foster the taking of those rights for something that the U.S. claims that the parties "should have known" sixty years ago. We were not there to be able to ask the parties what they were thinking at that time and those parties are now dead so asking would indeed be a moot point. La Salle's predecessor successfully presented a claim in the state adjudication. The grant of that right should now be honored. The trial court's decision should be reversed.

C. The Brule Claim Should Likewise be Approved.

From an initial standpoint, both the U.S. and the Yakama Nation make the argument that the Court "found" that no Brule predecessor signed the Code agreement. That's not what the court "found." That's not why the claim was denied. While, as quoted by the U.S. and the Nation, the court did note that there were a significant amount of changes in ownership on the

property, it did not "find" that previous owners were not signators to the Code agreement. As noted by the U.S., that would have been the end of the discussion with respect to the Court's analysis. However, it did go on to do the analysis and that is what Brule took exception to in this appeal.

Secondly, the U.S. makes the assertion that Brule did not raise the "party" argument at the time of the exception. This assertion is not true. In paragraph 4 of the exception, Brule notes that there had been a significant change in ownership in the property during the pendency of the Ahtanum litigation and that there had been no substitutions so that the case had no application to Brule. The issue was raised. There was no waiver.

The same argument that La Salle makes is equally applicable here. The U.S. chose the form of action to bring. It had several different option but chose to sue individuals. It even acknowledged that it had an obligation to dismiss and add parties in 1949 when it entered such an Order. However, that is

the first, and last, time that the U.S. did so. Maybe it thought that properties would not change hands in the intervening 15 years. If that's the guess it made, it was wrong. This was not a "one size fits all" lawsuit. The U.S. sued specific individuals. Its failure to keep up with the transfers was not fatal to its cause of action. That failure simply afforded those subsequent transferees to the properties drawing water from Ahtanum creek to come before the court and argue that they are not bound by any judgment that was entered. Having made its choice, the U.S. is now, sixty years later, stuck with it. The Brule claim should be granted since its predecessor in interest was not substituted as a party in the action.

D. Arguments As To All Appellants.

This case presents the issue of "dueling res judicata" issues. On the first front, we have the Washington court's general adjudication that purported to allocate the 75% share of water to the Northside users under the Code agreement.

> Twenty-five percent of the water of the streams is owned by the United States and controlled and administered by the Indian Bureau for the use and benefit of the Yakima Indian lands under irrigation, leaving 75 percent of the waters to be adjudicated herein.

In re Ahtanum Creek, 139 Wash. at 88.

Thus, the question presented for this court is how to reconcile the two decisions. In 1925, the state of Washington finalized a general adjudication to allocate the 75% of Ahtanum creek that was available for use by the Northsiders. It issued 216 water rights certificate in the furtherance of this endeavor. In 1947, the U.S. instituted an action to invalidate the Code agreement. That effort failed and the Court affirmed the 75-25 split set forth in the Code agreement. However, the federal court took a second step to put a number to the 75-25 split with respect to the number of acres irrigated on the Northside. That culminated in the 1964 decision where the Court set forth the "in gross" split of water.

The solution is simple and allows res judicata effect to both actions. The "in gross" determination of the amount of water to be awarded, on a primary basis, to the Northside users can be as set forth in the U.S. v. Ahtanum Irrigation Dist. case. However, the allocation of that amount of water to the Northside water users must be made in accordance with the 1925 water adjudication wherein the court allocated that 75% share. This interpretation gives effect to both actions and preserves the res judicata effect to both actions.

This solution recognizes the inherent conflict in "piecemeal" adjudications or proceedings that were permitted to occur before the passage of the McCarran Amendment, 43 U.S.C. § 666, wherein Congress allowed the joinder of the U.S., and Indian tribes, in water adjudication actions.

> The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudications of water rights in a river system. . . . This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially

> involve the disposition of property and are best conducted in unified proceedings.

U.S. v. Akins, 424 U. S. 800, 819, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

Unfortunately in this case, we do have actions that were instituted prior to the enactment of the McCarran Amendment. We do have "piecemeal" decisions related to water rights. The question is how this Court will reconcile those piecemeal decisions. The solution outlined above is the solution. It gives effect to both determinations and allows for the certainty desired.

The U.S. v. Ahtanum Irrigation Dist. litigation was not an adjudication. However, to give effect to the decision, it should be read in concert with the 1925 general adjudication decision that was rendered that did allocate the 75% share of the waters of Ahtanum creek. Accordingly, it was error for the court in this case to require an "answer" to be filed in the U.S. v. Ahtanum Irrigation Dist. case in order to be entitled to an award of a water right.

CONCLUSION

For the reasons set forth above, the trial court's decision should be reversed and all of these appellants should be awarded a water right in the waters of Ahtanum creek consistent with the certificates of water right issued in the 1925 general adjudication.

Respectfully submitted this 7th day of September, 2010.

VELIKANJE HALVERSON P.C.
Attorneys for Appellants La Salle, Brule, Durnil and Lantrip,

By: _____
J. Jay Carroll, WSBA 17424

CERTIFICATE OF SERVICE

I, JENNIFER FITZSIMMONS, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am the assistant to J. Jay Carroll, the attorney for La Salle High School, Donald and Sylvia Brule, Jerome Durnil and Albert Lantrip, and am competent to be a witness herein.

On September 7th, 2010, I caused to be mailed by U.S. Mail, postage pre-paid, the original and one copy of the foregoing document to the following:

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