

NO. 86211-7

**SUPREME COURT
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,

Respondent/Cross-Appellant,

vs.

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,

Appellants/Cross-Respondents.

MOTION FOR RECONSIDERATION OF
AHTANUM IRRIGATION DISTRICT

James E. Davis, WSBA #5089
Talbot, Simpson & Davis PS
308 N. 2nd Street
Yakima, WA 98901
Attorney for Appellant-
Ahtanum Irrigation District.
509-575-7501

I.

IDENTITY OF MOVING PARTY

Ahtanum Irrigation District ("AID"), a Cross-Appellant/Respondent herein is the moving party.

II.

DECISION OF THE COURT

AID seeks reconsideration of a portion of the Court's March 7, 2013 Decision in this case ("Opinion").

III.

STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 12.4(a), AID moves the Court to reconsider and modify that portion of the Opinion holding AID's right to the use of excess water terminates May 15th of each year and hold, consistent with the Trial Court's ruling in the Conditional Final Order for Subbasin 23, and the Trial Court's Order on Motion for Reconsideration, AID has a right to divert and use excess water, when available, at any time between April 15 and July 10, without a limitation as to when during the irrigation season the excess water may be diverted

IV.

STATEMENT OF GROUNDS FOR RELIEF

The Opinion, Section 4c, pp. 42-44, states the Court affirms the Trial Court's limitations of AID's interest in excess water to a 30-day period of use, but adds an ending date of May 15, a date that was not mentioned in the trial court decisions. The Opinion, @ page 42, points out that Johncox is the only party who appears to appeal this particular limitation on excess water use. AID did not appeal the 30-day "limitation" imposed by the Trial Court because it did not contain the May 15 date limitation.

By the addition of May 15 as an end date to the use of excess water, in addition to the 30 days allowed by the Trial Court, the Opinion substantially restricts the right to the use of excess water actually confirmed by the Trial Court which imposed no temporal limitation on the use of excess water during AID's April 15 - July 10 irrigation season, but rather imposed a quantity limitation based on the Trial Court's determination excess water would be available no more than 30 days in any irrigation season.

The Trial Court's 4/15/09 "Conditional Final Order, Subbasin No. 23 (Ahtanum)" ("CFO"), beginning at CP 140, confirmed a right to excess water for each AID water user as follows, for example:

Catholic Bishop of Yakima

"Period of use: April 1 through July 10.

"Limitation of use: When water is available in excess of that needed to satisfy all confirmed rights both on and off the reservation, and any water needed to satisfy the Yakama Nation's minimum instream flow right for fish or other aquatic life, an additional 0.18 cfs and 10.69 acre-feet per year can be diverted."

The Schedule of Rights for each and every AID water user contains the same language. None include a limitation expressing May 15 as the end date for use of excess water. All are based on the 30-day limitation expressed in the "limitation" in the Schedule of Rights.

The Trial Court in ruling on John Cox's exceptions to the Supplemental Report on the issue of excess water held, "Memorandum Opinion Exceptions to Supplemental Report of the Court and Proposed Conditional Final Order of Subbasin No. 23 (Ahtanum)" ("Exceptions Opinion"), CP 498:

"The provision allowing for the use of excess water, when available, upon acres authorized for irrigation will be included in the confirmed water right. The period of time each year that excess water might be available varies significantly; however, the Court concludes it is reasonable to find that excess water would be available no more than 45 days during the spring (30 days for AID).

Rather than terminating AID's right to the use of excess water as of May 15, the Trial Court's Exceptions Opinion and the CFO clearly established the excess right may be exercised "during the authorized irrigation season", between April 15 and July 10 when excess water is available.

The date "May 15" makes its first appearance in this case in the "Cross-Appellant Response Brief of the United States", Section III, pp. 30-32, in what is clearly a misstatement by the United States of the Trial Court's holding. This misstatement by the United States was pointed out and refuted in the "Reply Brief of Appellant/Cross-Respondent John Cox Ditch Company to Response Briefs of the United States and Yakama Nation", pp. 22-25.

In ruling on the issue of John Cox's right to the use of excess water (Opinion, p. 43), the Court relied, in part, on the Declaration of Andreas Kammereck (CP 5-10). Although Mr. Kammereck's Declaration might support a conclusion there will be excess flows in Ahtanum Creek for only 45 days during the April 1 - July 10 irrigation season, it does not support and is directly contrary to any conclusion the 45 days of excess flow occur between April 1 and May 15.

Mr. Kammereck's Declaration states, CP 7:

"Using USGS data. approximately 40% of the days of

record (April 1 through July 10 over the 1910 to 1978 period of record) experience flows that were greater than the sum of the instream flow recommendation, AID diversion and WIP canal capacity. Refer to the attached Figure 2 for graph results." (Emphasis added)

Figure 2, CP 7, is a graph showing excess instream flows on June 1 in various years from 1910 through 1978. Figure 2 demonstrates frequent excess flows in June.

The restriction of AID's right to the use of excess water to a period ending May 15 each year, a restriction not imposed by the Trial Court, would deny AID and its water users the right to use water which they have beneficially used, when available, for over a century.

IV.

CONCLUSION

This Court's opinion imposes limitations on the use of excess water more restrictive than those imposed by the Trial Court. The additional restrictions are completely unsupported by the record.

AID's Motion for Reconsideration should be granted and the Opinion should be modified to affirm the Trial Court's confirmation to AID of an excess water right during the period April 15 through July 10 of each year.

DATED: March 26, 2013.



JAMES E. DAVIS, WSBA #5089.
Talbott, Simpson & Davis, PS
Attorneys for Cross-Appellant/Respondent
Ahtanum Irrigation District.

No. 86211-7

IN THE SUPREME COURT
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 FOR RECONSIDERATION

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

Attorney for the Yakama Nation

I. IDENTITY OF MOVING PARTY

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

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 12.4 the Yakama Nation respectfully asks that the Supreme Court's March 7, 2013 Decision in this case at page 3, n.1 be clarified to confirm that the remand for a new hearing on Northside nondiversionary stockwater rights applies not only to the Washington State Department of Natural Resources but also to the other individual Northside parties awarded a nondiversionary stockwater right by the trial court.

III. GROUNDS FOR RELIEF AND ARGUMENT.

The Court had granted the Yakama Nation's unopposed appeal of the trial court's ruling on nondiversionary stockwater and held that:

Third, the Nation claims that the trial court erred in confirming a nondiversionary stock water right to the Department of Natural Resources (DNR) with a priority date senior to all other, except the Nation's instream right to fish, without adequate evidence as to the relative priority dates. DNR does not contest this assignment of error. We remand for the entry of findings of fact on the priority dates and further conclusions of law as appropriate.

Decision, supra, at p. 3, n.1.

As the Court noted, the Nation had originally argued in its appeal that "... the trial court erred when it ruled that Northside parties have a priority date for nondiversionary stockwater rights senior to the Nation's treaty irrigation rights, absent proof of that priority date." Decision at p. 19. Although only the Washington State Department of Natural Resources responded to the

Yakama Nation's appeal on this issue, the appeal was from the trial court's ruling as to all "northside parties" whom the trial court had held had a "...priority date for non-diversionary stockwater senior to the Yakama Nation's Treaty irrigation rights absent proof of priority date for each party." Yakama Nation's Corrected Opening Brief at pp.4-5. There were a number of individual Northside parties other than the State Department of Natural Resource who were also awarded a nondiversionary stockwater right and who did not oppose the Yakama Nation's appeal on this issue. See, Memorandum Opinion Exceptions to the Supplemental report of the Court and Proposed Conditional Final Order Subbasin No. 23 (Ahtanum) (2009) (CP at 510-511); 2002 Report of the Court at pp. 114, 344 (CP 1091, 1322). The State Department of Natural Resources noted that its nondiversionary stockwater rights were confirmed later in the trial court proceedings after the other parties. Brief of Defendant /Respondent Washington State Department of Natural Resources (May 18, 2010) at p. 3. The Yakama Nation asks that the above footnote in the Court's Decision be either amended or clarified to indicate that each of the other Northside parties who were also awarded a nondiversionary stockwater rights will also each be required to prove their priority date.

The Nation asks that the footnote on page 3 be amended to read as follows:

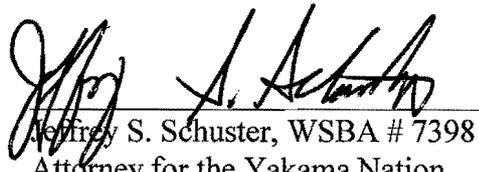
Third, the Nation claims that the trial court erred in confirming a nondiversionary stock water right to the Department of Natural Resources (DNR) and to other individual Northside parties confirmed a right with a priority date senior to all other, except the Nation's instream flow right to fish, without adequate evidence as to the relative priority date dates. DNR and the others do not contest this assignment of error. We remand for the entry of findings of fact on the priority dates and further conclusions of law as appropriate.

Court's Decision at p. 3, n. 1 (requested additional language underlined)

IV. CONCLUSION.

For the reasons stated above, the Yakama Nation respectfully asks that the Supreme Court's Decision be clarified to indicate that the Court's Decision ordering a remand for entry of findings of fact and conclusions of law on the priority dates for nondiversionary stock water rights applies not only to the Department of Natural Resources but also to the other individual Northside parties already awarded a nondiversionary stockwater right by the trial court.

Respectfully submitted this 26th day of March 2013.


Jeffrey S. Schuster, WSBA # 7398
Attorney for the Yakama Nation
P.O. Box 31197
Seattle WA., 98103
Tele. 1-206-632-0489

CERTIFICATE OF SERVICE

I certify that on March 26, 2013, I caused to be served via e-mail and U.S. mail a copy of the Yakama Nation's Motion for Reconsideration to counsel listed below.

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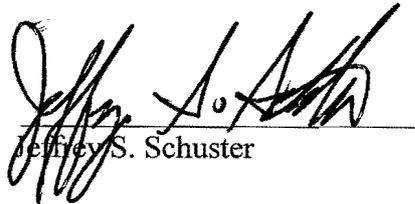
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Jeffrey S. Schuster

IN THE SUPREME COURT 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,)
)
Respondents/Cross-Appellant,)
)
vs.)
)
JAMES J. ACQUAVELLA;)
UNITED STATES; YAKAMA)
NATION; AHTANUM)
IRRIGATION DISTRICT; JOHN)
COX DITCH COMPANY;)
LA SALLE HIGH SCHOOL;)
DONALD and SYLVIA BRULE;)
JEROME DURNIL; and ALBERT)
LANTRIP; DEPARTMENT OF)
NATURAL RESOURCES;)
)
Appellants/Cross-Respondents.)
_____)

NO. 86211-7

MOTION FOR
RECONSIDERATION
OF JOHN COX
DITCH COMPANY

PATRICK ANDREOTTI, WSBA #7243
FLOWER & ANDREOTTI,
Attorney for John Cox Ditch Company.
303 East "D" Street #1
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Telephone: 509-248-9084

I.

IDENTITY OF MOVING PARTY

John Cox Ditch Company (“John Cox”), a Cross-Appellant/
Respondent herein is the moving party.

II.

DECISION OF THE COURT

John Cox seeks reconsideration of a portion of the Court’s March
7, 2013 Decision in this case (“Opinion”).

III.

STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 12.4(a), John Cox moves the Court to reconsider
and modify that portion of the Opinion holding John Cox’s right to the use
of excess water terminates May 15th of each year and hold, consistent with
the Trial Court’s ruling in the Conditional Final Order for Subbasin 23,
and the Trial Court’s Order on Motion for Reconsideration, John Cox has
a right to divert and use excess water, when available, of 6.55 cfs, 584
acre-feet per year, without a limitation as to when during the irrigation
season the excess water may be diverted.

IV.

STATEMENT OF GROUNDS FOR RELIEF

The Opinion, Section 4c, pp. 42-44, states the Court affirms the Trial Court's limitations of John Cox's interest in excess water to a 45-day period of use ending May 15.

This ruling of the Court substantially restricts the right to the use of excess water actually confirmed by the Trial Court which imposed no temporal limitation on the use of excess water during John Cox's April 1 – July 10 irrigation season, but rather imposed a quantity limitation based on the Trial Court's determination excess water would be available no more than 45 days in any irrigation season.

The Trial Court's 4/15/09 "Conditional Final Order, Subbasin No. 23 (Ahtanum)" ("CFO"), at CP 443-444, confirmed a right to excess water for John Cox as follows:

"Period of use: April 1 through July 1.

"Limitation of use: When water is available in excess of that needed to satisfy all confirmed rights both on and off the reservation, and any water needed to satisfy the Yakama Nation's minimum instream flow right for fish or

other aquatic life, an additional 6.55 cfs and 389.07 acre-feet per year¹ can be diverted.”

The CFO is clear. The “period of use” for John Cox’s excess water right is the same as the “period of use” for its primary right, April 1 – July 10 of each year.

The Trial Court in ruling on John Cox’s exceptions to the Supplemental Report on the issue of excess water held, “Memorandum Opinion Exceptions to Supplemental Report of the Court and Proposed Conditional Final Order of Subbasin No. 23 (Ahtanum)” (“Exceptions Opinion”), CP 498:

“The provision allowing for the use of excess water, when available, upon acres authorized for irrigation will be included in the confirmed water right. The period of time each year that excess water might be available varies significantly; however, the Court concludes it is reasonable to find that excess water would be available no more than 45 days during the spring. This provision would allow for the use of up to 0.02 cfs per acre (or 13 cfs) during the authorized irrigation season only when excess water is available, which would result in an additional 584 acre-feet per year being diverted.” (Emphasis added)

¹ The 389.07 acre-feet figure is a typographical error which the Trial Court corrected to 584 acre-feet per year in its 5/21/09 “Order on Motions for Reconsideration to the Memorandum Opinion and conditional Final Order Subbasin No. 23 (Ahtanum)” (“Order on Reconsideration”), CP 94.

Rather than terminating John Cox's right to the use of excess water as of May 15, the Trial Court's Exceptions Opinion and the CFO clearly establish the excess right may be exercised "during the authorized irrigation season", between April 1 and July 10 when excess water is available.

The date "May 15" makes its first appearance in this case in the "Cross-Appellant Response Brief of the United States", Section III, pp. 30-32, without any citation to the Trial Court record. This is clearly a misstatement by the United States of the Trial Court's holding. This misstatement by the United States was pointed out and refuted in the "Reply Brief of Appellant/Cross-Respondent John Cox Ditch Company to Response Briefs of the United States and Yakama Nation", pp. 22-25.

In ruling on the issue of John Cox's right to the use of excess water (Opinion, p. 43), the Court relied, in part, on the Declaration of Andreas Kammereck (CP 5-10). Although Mr. Kammereck's Declaration might support a conclusion there will be excess flows in Ahtanum Creek for only 45 days during the April 1 – July 10 irrigation season, it does not support and is directly contrary to any conclusion the 45 days of excess flow occur between April 1 and May 15.

Mr. Kammereck's Declaration states, CP 7:

“Using USGS data, approximately 40% of the days of record (April 1 through July 10 over the 1910 to 1978 period of record) experience flows that were greater than the sum of the instream flow recommendation, AID diversion and WIP canal capacity. Refer to the attached Figure 2 for graph results.” (Emphasis added)

Figure 2, CP 7, is a graph showing excess instream flows on June 1 in various years from 1910 through 1978. Figure 2 demonstrates frequent excess flows in June. The Kammereck Declaration is attached in its entirety as Appendix 1.

The Kammereck Declaration and Exhibits JCD 16 through 30 establish in most years when excess flows are available, those flows occur in the later part of May and early June.

The restriction of John Cox's right to the use of excess water to a period ending May 15 each year, a restriction not imposed by the Trial Court, would deny John Cox and its waterusers the right to use water which they have beneficially used, when available, for more than 125 years.

IV.

CONCLUSION

This Court's opinion imposes limitations on the use of excess water more restrictive than those imposed by the Trial Court. The additional restrictions are completely unsupported by the record.

John Cox's Motion for Reconsideration should be granted and the Opinion should be modified to affirm the Trial Court's confirmation to John Cox of an excess water right during the period April 1 through July 10 of each year:

"When water is available in excess of that needed to satisfy all confirmed water rights both on and off the reservation and any water needed to satisfy the Yakama Nation's minimum instream flow right for fish and other aquatic life, an additional 6.55 cfs, 584 acre-feet per year can be diverted.

DATED: March 25, 2013.



PATRICK ANDREOTTI, WSBA #7243.
FLOWER & ANDREOTTI,
Attorneys for Cross-Appellant/Respondent
John Cox Ditch Company.

APPENDIX 1

RECEIVED

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Department of Ecology
Yakima Referee

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THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

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,)

No. 77-2- 01484-5

DECLARATION OF ANDREAS
KAMMERECK

THE STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)

Plaintiff,)

Subbasin 23

v.)

JAMES J. ACQUAVELLA, et al.,)

Defendants.)

ANDREAS KAMMERECK, hereby certifies under penalty of perjury under
the laws of the State of Washington that the following is true and correct.

I am an engineer with Golder Associates, Inc. and have been retained by
Ahtanum Irrigation District to review historic flow data and provide a report of my
findings. Attached hereto is a document containing my findings.

Qualifications:

DECLARATION OF ANDREAS KAMMERECK - 1

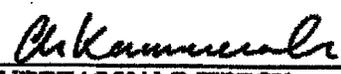
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I am an Associate Water Resources Engineer with 15 years experience in project management, assessment and analysis, design, specifications, cost estimates, permit support, and construction implementation of water resources related projects. My experience is focused on hydraulic, hydrologic, fluvial geomorphic, riverine and floodplain applications in support of pipeline projects. Typical projects include stream flow monitoring, open channel design, floodplain management and engineering, riverine dynamics evaluations, sediment transport, scour/erosion evaluations, channel migration assessments, hydraulic/hydrologic modeling, bank stabilization, fluvial geomorphic evaluations, habitat enhancement, fish passage design, pipeline corridor route location and hazards assessment, and right-of-way surface erosion and trench drainage design. I am experienced in developing and implementing field investigations of hydraulic, hydrologic, geomorphic and geologic conditions in support of engineering analysis. My experience in the planning, permitting, design, and construction of pipeline related projects offers an understanding of all phases of the work, with an emphasis on practical applications and solutions.

DATED at Redmond, Washington this 25th day of July, 2008.



ANDREAS KAMMERECK



Golder Associates Inc.
18300 NE Union Hill Road, Suite 200
Redmond, Washington 98052
Telephone (425) 883 0777
Fax (425) 882 5498



June 25, 2008

Our Ref: 083-93407.000

Talbot, Simpson & Davis, P.S.
308 North Second Street
Yakima, WA 98901

Attention: Mr. Jim Davis

RE: REVIEW OF AID FLOW DATA FOR 1998-2008

Dear Mr Davis:

This letter summarizes the results of our review of Ahtanum Irrigation District (AID) flow data. The purpose of the review was to evaluate availability of in-stream flows after considering allocations for the Wapato Irrigation District (WIP), AID, and required in-stream flows for fish

Flow data were provided by AID for flows at the North Fork Ahtanum creek gauging location. This gauge location is the same as previously used by the United States Geological Survey (USGS) up to approximately 1978. The AID flow data provided for this review covers the period of record between 1998 and 2008. These data were collected by AID between April 1 and July 10 for each year.

Golder did not review the rating curve corresponding to the reported flows or evaluate the precision and accuracy of the data. We did note that the average flow values provided were determined by a simple average of the maximum and minimum recorded values. This average does not represent the volume weighted daily average flow, which is typical for reporting of flow measurements.

Flow data were obtained from the USGS database (<http://waterdata.usgs.gov/nwis/sw>) for the following sites: the "North Fork Ahtanum Creek near Tampico, WA" (USGS Site No. 12500500) located near the intersection of Nasty Creek Road and the Ahtanum Creek North Fork Road for the period of record between approximately 1911 and 1978, and the "South Fork Ahtanum Creek at Conrad Ranch near Tampico, WA" (USGS No. 12501000) located near the intersection of the Ahtanum South Fork Road and the BIA 147 Road for the period of record between approximately 1915 and 1977. Only data between April 1 and July 10 were reviewed for both USGS sites.

Although the periods of record for the North Fork and South Fork Ahtanum are different, we compared the average daily flows for each month on the North Fork and South Fork Ahtanum and determined that, on average, flow on the South Fork Ahtanum is approximately 27% of the flow on the North Fork. Since there is a limited record of flow measurements on the South Fork Ahtanum, adding 27% to the measured North Fork Ahtanum flows provides an estimate of the combined flow for both the South Fork and North Fork.

A time series of flow for the North Fork Ahtanum was prepared using both the AID and USGS data. The combined flow for both the North Fork and South Fork was estimated by adding 27% to each daily measurement for North Fork flows.

Recognizing the USGS data and AID data do not have overlapping periods of record at the North Fork gauging site, we compared average daily flows for the two data sets. The results showed the AID flows are approximately 30% lower than the USGS data at the North Fork gauge location. This suggests there may be a difference between rating curves for the USGS and AID flow data. We have not completed additional analysis to investigate this issue.

For each day of flow data, the following flow amounts were subtracted from the combined North and South Fork flow.

- 54 cubic feet per second (cfs) was subtracted to represent the canal capacity of the WIP canal.
- 46.96 cfs was subtracted to represent the diversion of water by AID.
- Between 30 and 90 cfs was subtracted based on the recommended in-stream flow requirements by the Yakama Nation (see Table 1). These flows were provided by AID and were not confirmed with the Yakama Nation.

TABLE 1

Summary of Yakama Nation's In-stream
Flow Requirements for Ahtanum Creek

Month	Flow (cfs)
January	25
February	30
March	50
April	60
May	90
June 1 - 10	70
June 11 - 20	50
June 21 - 30	30
July	15
August	10
September	10
October	15
November	20
December	25

The resulting residual flow was then evaluated to determine when there was a positive (greater than zero) result. AID believes that a positive (greater than zero) result represents is an "excess" flow based on its interpretation of the Pope Decree.

The results are as follows:

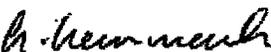
- Using the AID data, approximately 29% of the days of record (April 1 through July 10 over the 1998 to 2008 period of record) experienced flows that were greater than the sum of the in-stream flow recommendation, AID diversion and WIP canal capacity. Refer to the attached Figure 1 for a graph of the results.
- Using USGS data, approximately 40% of the days of record (April 1 through July 10 over the 1910 to 1978 period of record) experienced flows that were greater than the sum of the in-stream flow recommendation, AID diversion and WIP canal capacity. Refer to the attached Figure 2 for a graph of the results.

While there is some uncertainty as to why there is a difference between the AID data and USGS data, both data sets indicate that there is a significant period of time when flows in Ahtanum Creek are greater than the sum of the in-stream flow recommendation, AID diversion and WIP canal capacity. This "excess" does not occur every year. In some years, flows in Ahtanum Creek do not exceed the sum of the in-stream flow recommendation, AID diversion and WIP canal capacity.

Please call if there are any questions, or we can provide additional information.

Sincerely,

GOLDER ASSOCIATES INC.


Andreas Kammereck, P.E.
Associate Engineer


Robert Anderson, L.Hg.
Principal Hydrogeologist

AK/RHA/sb

Attachments: Figure 1 – Excess Flows based on AID Data
Figure 2 – Excess Flows based on USGS Data

Figure 1

Excess Flows based on AID Data

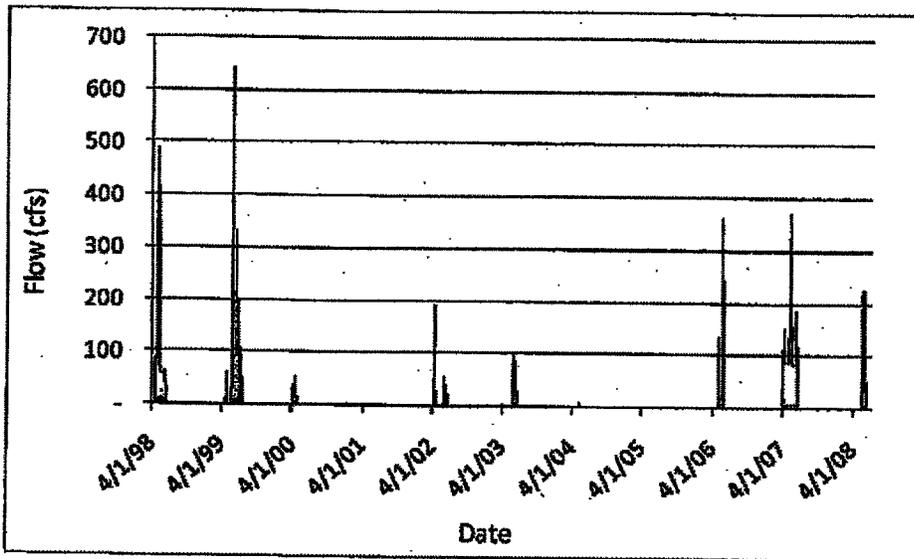
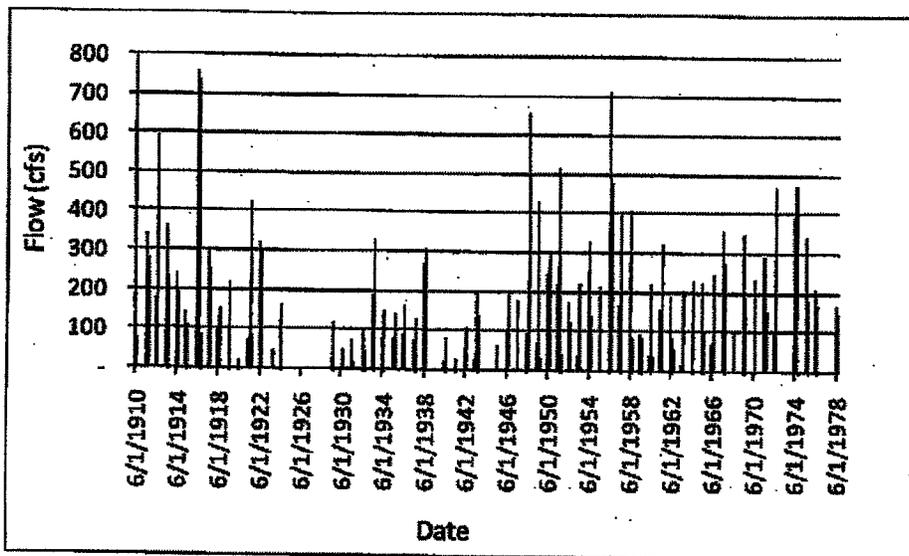


Figure 2

Excess Flows based on USGS Data



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THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

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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,)

No. 77-2- 01484-5

AFFIDAVIT OF DEBBIE J. WILSON

THE STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)

Subbasin 23

Plaintiff,)

v.)

JAMES J. ACQUAVELLA. et al.,)

Defendants.)

DEBBIE J. WILSON, hereby certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

This affidavit is attached to the Declaration of Andreas Kammereck. I have examined the document and determined that it consists of eight pages, including the affidavit page and that the document is complete and legible.

My name is Debbie J. Wilson. My business address is 308 N. 2nd Street, Yakima, WA 98901. My business telephone number is 509-575-7501. My business facsimile number is 509-453-0077.

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DATED: 7/25/08

Debbie J. Wilson
DEBBIE J. WILSON

SIGNED TO BEFORE me this 25th day of July, 2008, by Debbie J. Wilson.

Lana M. Hovland
NOTARY PUBLIC in and for the State of
Washington, residing at Yakima, WA.
My commission expires: 12-27-09



NO. 86211-7

SUPREME COURT
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,

Respondent/Cross-Appellant,

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.,

Appellants/Cross-Respondents.

MOTION FOR RECONSIDERATION OF
LA SALLE HIGH SCHOOL, DONALD AND SYLVIA BRULE

J. Jay Carroll
Halverson Northwest Law Group P.C.
Attorneys for La Salle, Brule,
Durnil and Lantrip
P.O. Box 22550
Yakima, WA 98907
509.248.6030

I. IDENTITY OF MOVING PARTY

La Salle High School and Donald and Sylvia Brule Cross-Appellants/Respondents herein are the moving party seeking the relief as set forth below.

II. STATEMENT OF RELIEF SOUGHT

La Salle and Brule seek reconsideration of a portion of the Court's March 7, 2013 decision in this case as outlined below.

III. STATEMENT OF GROUNDS FOR RELIEF

Pursuant to RAP 12.4(a), La Salle and Brule move the Court to reconsider and modify that portion of the Opinion holding: (1) With respect to La Salle, that La Salle's predecessor in interest, Jennie Goodman was substituted out of the Ahtanum litigation in conformance with FRCP 25(a) so that the predecessors in interest on the Goodman property were parties to the Ahtanum action and that there is no legal justification for excusing what this Court now deems to be "procedural" errors in a case that transpired some sixty years ago; (2) With respect to Brule, that Brule's predecessor in interest was not served in this matter, that the Court has used the incorrect standard of review and that there is no legal justification

for excusing what this Court now deems to be “procedural” errors in a case that transpired some sixty years ago.

IV. STATEMENT OF GROUNDS FOR RELIEF

A. La Salle

The issue presented in this motion is not actually an issue. It is undisputed that La Salle’s predecessor in interest was Jennie Goodman, a widow. She was served with a copy of the federal *Ahtanum* lawsuit on September 3, 1947. Jennie Goodman died about a year later, on November 6, 1948. The Goodman estate sold the property to two separate persons: (1) Wade Langell on April 30, 1949 and (2) H.A. Richmond on June 30, 1949. (CP 935). It is undisputed that neither Langell nor Richmond were ever substituted into the action for Goodman.

Thus, the undisputed state of the record is that the proper party, Jennie Goodman was indeed served with the *Ahtanum* lawsuit. It is undisputed that she died on November 6, 1948. It is equally undisputed that no predecessor in interest to the Goodman land was substituted for her in the action. These facts are undisputed.

Thus, the only issue is to apply these undisputed facts to the application of FRCP 25(a) **as it existed in 1948**. Yes, FRCP was amended in 1963. However, as it existed in 1948, FRCP 25(a) provided:

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

(emphasis added).

This Court's opinion states that the rule **as it existed in 1948** made it totally discretionary for the trial court to allow substitution. While this statement is "somewhat" true, the discretion allowed deals with a motion that is made within the two year period after the time of the party's death:

And even within that two year period substitution could not be made unless the executor or administrator was served 'Before final settlement and distribution of the estate.' That statute, like other statutes of limitations, was a statute of repose. It was designed to keep short the time within which actions might be revived so that the closing and distribution of estates might not be interminably delayed.⁵ That policy is reflected in Rule 25(a). **Even within the two year period substitution is not a matter of right; the court 'may' order substitution but it is under no duty to do so.** Under the Rule, as under the statute, the

settlement and distribution of the estate might be so far advanced as to warrant a denial of the motion for substitution within the two year period. **In contrast to the discretion of the court to order substitution within the two year period is the provisions of Rule 25(a) that if substitution is not made within that time the action 'Shall be dismissed' as to the deceased. The word 'shall' is ordinarily 'The language of command'.** *Esco e v. Zerbst*, 295 U.S. 490, 493, 55 S.Ct. 818, 819, 820, 79 L.Ed. 1566. And when the same Rule uses both 'may' and 'shall', the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory. See *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 360, 15 S.Ct. 378, 380, 39 L.Ed. 450.

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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 v. Ungkau, 329 U.S. 482, 485, 91 L.Ed. 436, 67 S.Ct. 428 (1947)(emphasis added)

Thus, this Court was correct in the proposition that discretion can be exercised by the trial court under FRCP 25(a), as it existed in 1948. However that “discretion” was only as to whether a substitution would be allowed if an appropriate motion was made within the two year time frame set forth in the rule. **There is no issue of fact in this case that no such motion was made. There**

was no “discretion” to be exercised because no motion was made. *Anderson* is clear on the second point. If no motion for substitution is made, the action shall be dismissed as to the deceased party.

Take a look at the Notes from the Advisory committee when FRCP 25(a) was changed in 1963:

Present Rule 25(a)(1), together with present Rule 6(b), results in an inflexible requirement that an action be dismissed as to a deceased party if substitution is not carried out within a fixed period measured from the time of the death [2 years]. The hardships and inequities of this unyielding requirement plainly appear from the cases. See, e.g., *Anderson v. Yungkau*, 329 U.S. 482, 67 S.Ct. 428, 91 L.Ed. 436 (1947); *Iovino v. Waterson*, 274 F.2d 41 (1959), cert. denied, *Carlin v. Sovino*, 362 U.S. 949, 80 S.Ct. 860, 4 L.Ed.2d 867 (1960); *Perry v. Allen*, 239 F.2d 107 (5th Cir.1956); *Starnes v. Pennsylvania R.R.*, 26 F.R.D. 625 (E.D.N.Y.), aff'd per curiam, 295 F.2d 704 (2d Cir.1961), cert. denied, 369 U.S. 813, 82 S.Ct. 688, 7 L.Ed.2d 612 (1962); *Zdanok v. Glidden Co.*, 28 F.R.D. 346 (S.D.N.Y.1961). See also 4 Moore's *Federal Practice* ¶25.01[9] (Supp.1960); 2 Barron & Holtzoff, *Federal Practice & Procedure* § 621, at 420-21 (Wright ed.1961).

The amended rule establishes a time limit for the motion to substitute based not upon the time of the death, but rather upon the time information of the death is provided by means of a suggestion of death upon the record, i.e. service of a statement of the fact of the death. Cf. Ill. Ann. Stat., c. 110, § 54(2) (Smith-

Hurd 1956). The motion may not be made later than 90 days after the service of the statement unless the period is extended pursuant to Rule 6(b), as amended. See the Advisory Committee's Note to amended Rule 6(b). See also the new Official Form 30.

FRCP 25(a) Notes of Advisory Committee on 1963 amendments to Rules.

Note that the Advisory Committee cites *Anderson* as one of the cases standing for the “inflexible requirement” that substitution occur within two years of death or the case be dismissed.

The other case cited by this Court, *Sun-Maid Raisin Growers of Cal. v. Cal. Packing Corp.*, 273 F.2d 282, 284 (9th Cir. 1959) has absolutely no application to these issues presented here. Read the case.

Sun-Maid Raisin has nothing to do with a party death. Nothing. It is an “assignment” case dealing with trademarks. It deals with the application of FRCP 25(c) **not FRCP 25(a)**. Close, but not the same sub-section.

Substitution or joinder is not mandatory where a transfer of interest has occurred. *Rule 25(c)*. . . .

Sun-Maid Raisin, 273 F.2d at 283.

The bottom line is that this Court should reconsider its decision as to La Salle based upon the application of FRCP 25(a) for the simple reason that the Court is wrong. The case law is clear. It's not an "interpretation" issue. If no substitution is made within the two year period the case "shall" be dismissed.

La Salle does not quite know how to respond to the "procedural" exclusion that the Court seems to be creating. There is no citation to any authority to support any such procedural exception to review of the issues presented. If the Court would point La Salle to such authority, we would certainly address it. The issue is ultimately one of the application of res judicata. Our position is that La Salle's predecessor was dismissed from the action by operation of FRCP 25(a) and therefore res judicata cannot apply. That is not a "procedural" argument.

B. Brule

Brule likewise seeks reconsideration of the Court's decision on two grounds. First, the Court employed the wrong standard of review by applying a "substantial evidence" standard.

Since the record with respect to this issue (as well as the similar issue presented by Appellant La Salle) is based entirely on written materials, this Court stands in the same position as the trial court and the standard of review is *de novo*. See *Laffranchi v. Lim*, 146 Wn. App. 376, 381-82 & ¶ 14, 190 P.3d 97 (2008). This is not a “substantial evidence” issue. This Court must take ownership of the decision that is made. The review is *de novo* and, if after viewing the documents at issue the Court renders a decision, Brule must live with that decision. However, this Court must take that first step and make its own, independent decision based on the record.

Mr. Brule attached a true and accurate copy of a chain of title that he had done with respect to his property. The *U.S. v. Ahtanum* case was started in 1947. At that time, the owners of the property he currently owns were W.C. Cope and Inez Cope. (Appendix A). W.C. Cope and Inez Cope were not named as defendants in the *U.S. v. Ahtanum* case.

The Trial Court had a different take on that issue. It noted that under the service of process documents introduced into evidence, there was a Walter C. Cope and a W.C. Cope who were

initially served. However, a closer look at these documents shows that it was not the same owners. The affidavit of service identifies substitute service of process on Mr. Cope's wife, ROSE. (Appendix B; YIN 371). However, as noted in the chain of title documents submitted by Mr. Brule, Mr. Cope's wife's name was INEZ. Thus, from a starting point, the Trial Court erred since the evidence was insufficient to demonstrate that a predecessor in interest was a party to the federal *Ahtanum* litigation.

This Court must review these documents and come to its own conclusion. Remember, *res judicata* is an affirmative defense. It is not Brule's burden to show that his predecessor in interest was not a proper party to *Ahtanum*. It is one of the other defendant's burden of proof to show that they were. That proof is totally lacking.

As to the second element, as addressed above with La Salle, there is no justification for the establishment of a "procedural" exception to review of matters before this Court. It is undisputed that none of the subsequent owners of the Brule property were joined as parties to the action. How can *res judicata* apply to persons that were not parties to the action? This is not a "procedural" issue. It is

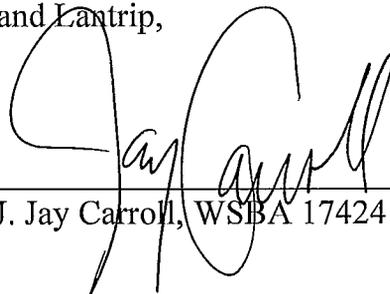
a res judicata issue and because it is undisputed that subsequent owners of the Brule property were not parties to Ahtanum, no res judicata effect can exist.

V. **CONCLUSION**

This Court should reconsider its opinion as it relates to La Salle and Brule. As set forth above, there is no “procedural” exception to review of these issues. With respect to La Salle, FRCP 25(a) mandated the dismissal of its predecessor interest and therefore there could be no res judicata effect. As to Brule, there was no proper service and there was no proper substitution so that res judicata could apply. This Court should reconsider its opinion and reverse the trial court’s decisions in this regard.

Respectfully submitted this 27 day of March, 2013.

Halverson | Northwest Law Group 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 March 27, 2013, I sent, via e-mail and regular, first class mail, the foregoing *Motion for Reconsideration* to:

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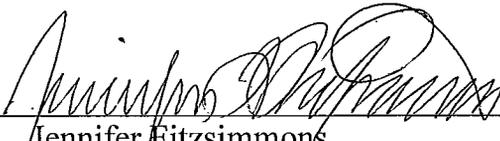
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DATED this 27th day of March, 2013.

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By: 
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