

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

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KIM P. EATON  
EX OFFICIO CLERK OF  
SUPERIOR COURT  
YAKIMA, 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. )

No. 77-2-01484-5

THE STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY )  
Plaintiff, )

Memorandum Opinion  
La Salle High School  
Subbasin 23 (Ahtanum)  
Claim Nos. 1019, A4253  
and A5469

vs. )

JAMES J. ACQUAVELLA, et. al. )  
Defendants. )

**I. BACKGROUND**

La Salle High School filed a petition to allow a late exception in Subbasin 23. On February 9, 2006 Commissioner Ottem found no party filed an objection and granted the petition. He subsequently recused himself from hearing the petition on the merits.

La Salle claims it is entitled to a senior water right allowing it to divert water annually from Ahtanum Creek from April 1 through October 15 in sufficient quantity to irrigate 40.9 acres. It is asking the court to confirm that right.

The Yakama Nation, State of Washington Department of Ecology and the USA Department of Interior oppose the petition. The Yakama Nation and USA claim that La Salle's petition should be denied, and no right should be confirmed. Ecology claims that the court should deny a senior right but confirm a "junior" right.

**II. HISTORY OF LAND OWNERSHIP**

The land in question was owned by Daniel and Jeannie Goodman. On March 25, 1941 Mr. Goodman died leaving Mrs. Goodman the sole owner of the property. She died on November 6, 1948, and the property became a part of her estate. A portion of the property was sold by the estate to Mr. Wade Langell on April 30, 1949, and the remainder

1 was sold to Mr. H. A. Richmond on June 30, 1949. Subsequently, Louis and Joyce  
2 Langell obtained ownership of the property and on May 1, 1998 sold it to La Salle. La  
3 Salle purchased 117 acres located on the north side of Ahtanum Creek (parcels A and B).  
4 It subsequently sold the northern portion retaining 35.77 acres (parcel B) adjacent to  
5 Ahtanum Creek.

### 6 **III. WATER RIGHT HISTORY**

7 Daniel and Jeannie Goodman signed the 1908 Code agreement. In the 1925  
8 *Achepohl* decision, a water right was confirmed to the Goodmans and Certificate No. 235  
9 was issued to them for the irrigation of 40.9 acres from Ahtanum Creek for a period from  
10 April 1 through October 15.

11 On July 2, 1947 the U SA as trustee for the Yakama Nation sued to invalidate the  
12 1908 Code agreement, claiming all waters of Ahtanum Creek for the Nation. (*USA v.*  
13 *AID*, 124 F. Supp. 818) The case was remanded by the 9<sup>th</sup> Circuit on July 10, 1956 (236  
14 F.2d 321). This decision is known as *Ahtanum I*.

15 The trial court made further rulings, which were appealed. The 9<sup>th</sup> Circuit decided  
16 *Ahtanum II* on March 18, 1964 (330 F.2d 897).

17 The Langells filed Court Claim No. 1019 becoming claimants in the Yakima  
18 Basin Adjudication. On February 10, 1994 the Langells presented evidence to  
19 Commissioner Ottem in an attempt to obtain a senior right to approximately 80 of their  
20 117 acres located north of Ahtanum Creek. To qualify for an award of a senior water  
21 right, Commissioner Ottem required proof of beneficial use, a predecessor or claimant  
22 signed the Code agreement, the property was adjudicated in *Achepohl* and the property  
23 was included in an answer number in *Ahtanum*. See *Memorandum Opinion RE: Ahtanum*  
24 *Creek Legal Issues*, October 8, 2003.

25 Commissioner Ottem denied the claim for senior rights, holding that the Langells  
26 did not qualify for a senior right because their land was not included in one of the answer  
27 numbers approved by *Ahtanum II*. Instead he was prepared to confirm a junior right for  
28 up to 40.9 acres. This meant that the water was available to Langells when the flow in  
the creek exceeds 62.59 cfs, and no uses, including potential storage, are being made of  
the excess water by reservation right holders. The junior right was initially not confirmed  
because the Commissioner requested that the Langells provide a legal description for the

1 40.9 acres that were being irrigated.

2  
3 **IV. IS LA SALLE ENTITLED TO A SENIOR WATER RIGHT?**

4 The four-part test applied by Commissioner Ottem is the appropriate test. If La  
5 Salle meets all four requirements listed below, it is entitled to a senior water right.

6 **a. Was water beneficially applied to the land?**

7 Yes. Testimony before Commissioner Ottem establishes beneficial use of water,  
8 limited by *Achepohl*, to irrigation of 40.9 acres.

9 **b. Was a predecessor a signer of the Code Agreement?**

10 Yes. The Goodmans signed it.

11 **c. Was the property covered by *Achepohl*?**

12 Yes. Certificate No. 235 was issued to D.G. Goodman authorizing irrigation of  
13 up to 40.9 acres.

14 **d. Was the property included in an answer filed in *Ahtanum*?**

15 No. The land was not included in an answer number. Under the four-part test, La  
16 Salle is not entitled to a senior water right.

17 **V. ALTHOUGH LA SALLE HAS FAILED TO QUALIFY UNDER THE**  
18 **FOUR-PART TEST, IS IT NEVERTHELESS ENTITLED TO A SENIOR**  
19 **WATER RIGHT?**

20 La Salle argues that since Mrs. Goodman died almost eight years prior to the  
21 remand of *Ahtanum I*, and neither Richmond nor Langell were parties to *Ahtanum I* or *II*,  
22 **res judicata** is inapplicable. Consequently, *Ahtanum* does not operate to deny them their  
23 *Achepohl* water right, and it is immaterial that the property was not included in an answer  
24 number. Under the same theory, La Salle also argues it would not be bound by the July  
25 10<sup>th</sup> cutoff.

26 At the time, **F.R.C.P. 25(a)(1)** provided that upon death of a party the court could  
27 order substitution of the proper party if the claim was not extinguished by the death. If no  
28 substitution were made, the action was dismissed as to the deceased party.

In La Salle's reply brief it argues that no exceptions were taken to Commissioner  
Ottem's finding that neither Langell nor Richmond were parties to *Ahtanum*.  
Commissioner Ottem specifically found: "Ms. Goodman was a named party in the  
complaint that was filed as a part of U.S. v. AID - Langells and Richman [sic] were not."

1 (Report, Page 308).

2 During the present hearing opposing counsel inquired as to whether they should  
3 move to file late exceptions. Counsel for La Salle stated that it was unnecessary.  
4 Additional documents were admitted as exhibits and counsel were permitted to argue that  
5 which would have been included in a late exception.

6 YIN 426 establishes that Jennie Goodman was served with the summons and  
7 complaint in *Ahtanum* on September 3, 1947. Counsel appeared for her on August 13,  
8 1949 (YIN 428), and on behalf of her estate moved to dismiss the complaint against her  
9 (YIN 429). Her estate's answer was filed on September 30, 1949 (YIN 430).

10 YIN 427 establishes that H.A. Richmond was served the summons and complaint  
11 on October 27, 1949 and Wade and Esther Langell were served on October 29, 1949. On  
12 October 14, 1949 a number of individuals and entities were dropped from the rolls as  
13 defendants and successors in interest were included as defendants. Included in the  
14 additions were Wade Langell, Wade Langell and Esther Langell and H.A. Richmond.  
15 (YIN 431.)

16 The exhibits establish that La Salle's predecessors in interest were parties to  
17 *Ahtanum*. They were served with the summons and complaint.

18 La Salle argues that service of a summons and complaint does not make them  
19 parties to the case, because there is no evidence they were notified that they were being  
20 added as defendants. Lawsuits are started with the service of a summons and complaint  
21 giving notice to the served parties that they are being sued and must take action. **F.R.C.P**  
22 **25(a)(1)** does not apply. *Ahtanum* applies, and the doctrine of **res judicata** prevents  
23 LaSalle from re-litigating the claim unless La Salle is correct in its assertion that *Ahtanum*  
24 did not award individual water rights.

25 **VI. WAS AHTANUM A STREAM ADJUDICATION, ALLOCATING**  
26 **INDIVIDUAL RATHER THAN "IN GROSS" WATER RIGHTS?**

27 La Salle claims that *Ahtanum* did not allocate individual water rights. Instead it  
28 made an "in gross" allocation. Therefore, *Ahtanum* does not bar it from claiming a senior  
water right.

Although *Ahtanum* does not specifically list all claimants and allocate water to  
each in the fashion of the present adjudication, it accomplished the same thing. Whether

1 it was titled “a water rights adjudication” or “the matter of determination of water rights”,  
2 the result was the same. *Ahtanum* has **res judicata** affect on La Salle’s claim to a senior  
3 water right. That claim is denied.

4  
5 **VII. IS LA SALLE ENTITLED TO A WATER RIGHT OTHER THAN A**  
6 **SENIOR RIGHT?**

7 Although La Salle’s predecessors in interest signed the 1908 agreement, were  
8 granted a certificate in *Achepohl*, and proved beneficial use, there is no proof that the  
9 property is associated with an answer number in *Ahtanum*. Additionally, La Salle has  
10 failed to prove that it is not bound by *Ahtanum*. Does this mean that it has no water right  
11 even though one was granted in *Achepohl*?

12 The Yakama Nation and the USA argue that La Salle has no water right, not even  
13 a “junior” water right, and absent a specific award, all available water should go to the  
14 reservation or south side of Ahtanum Creek. Ecology supports the granting of a “junior”  
15 water right.

16 **a. Do “junior”(excess water) rights exist?**

17 The issue is what to do with excess water -- that being defined by Commissioner  
18 Ottem as flow exceeding 62.59 cfs and no other uses, including potential storage, of that  
19 water are being made by reservation water right holders. Commissioner Ottem fashioned  
20 the term “junior water right” to cover excess water. He was prepared to awarded Langell  
21 a “junior” right for up to 40.9 acres.

22 Contrary to the position of the Yakama Nation and the USA, the court did not  
23 *clearly* award all water to the reservation users. While the 9<sup>th</sup> Circuit judges were highly  
24 concerned about “how badly (the Indian Tribe) suffered through the Code taking of their  
25 property” and concluded that “the waters they are here awarded will be insufficient for the  
26 irrigable lands of the reservation” (330 F.2d 897, 914), they did not specifically award **all**  
27 water to the reservation side of the creek.

28 The court awarded:

To the plaintiff, for use of Indian Reservation lands south of Ahtanum  
Creek, twenty-five per cent of the natural flow of Ahtanum Creek, as measured at  
the north and south gauging stations; provided that when that natural flow as so  
measured exceeds 62.59 cubic feet per second, all the excess over that figure is  
awarded to plaintiff, **to the extent that the said water can be put to a beneficial**

1 **use. (Page 915, Emphasis added).**

2 After the tenth day of July in each year, all the waters of Ahtanum Creek  
3 shall be available to, and subject to diversion by, the plaintiff for use on Indian  
4 Reservation lands south of Ahtanum Creek, **to the extent that the said water can  
be put to a beneficial use. (Page 915, Emphasis added).**

5 *Ahtanum* does not allocate water in excess of that which can be beneficially used  
6 on reservation land. It does award excess water to the Yakama Nation, but does not  
7 allocate what could be termed excess, excess water. This is water in excess of that which  
8 can be beneficially used on reservation lands.

9 It is clear that the judges of the 9<sup>th</sup> Circuit believed that there was insufficient  
10 water to irrigate all “the irrigable lands of the Reservation” (Page 914). This may be the  
11 reason they did not specifically address excess, excess water. While it may be highly  
12 unlikely that this water could be available, it remains possible. The issue is what to do  
with it if and when it becomes available.

13 There are a number of possible answers. Each needs further study. Somewhat  
14 reluctantly, the court is taking this issue under advisement and not determining at this time  
15 whether “junior rights” exist.

16 Although the remaining La Salle issues depend on resolution of the above issue  
17 insofar as it relates to La Salle having or not having a water right, the court can resolve  
18 some of the remaining issues.

19 **b. If La Salle does have a water right, on how much acreage can it be  
20 applied?**

21 Although the Langells owned 117 acres, they were granted a 40.90 acre water  
22 right by *Achepohl*. Commissioner Ottem was prepared to confirm the 40.90 right, but  
23 found the evidence unclear as to which 40.9 acres within the 117 acres were entitled to  
the right. He required further proof of the specific acreage to which the right applies.

24 An issue exists as to the number of acres La Salle owns. Mr. Briffett’s chart and  
25 figures included in exhibit 346 indicate he determined that La Salle owns 38.4 acres  
26 (261.5 6400 square foot sections on his grid divided by 43,560 square feet per acre equals  
27 38.4 acres). The “Yakima County-Washington Land Information Portal” document in  
28 exhibit 346 indicates the parcel size to be 35.77 acres. Mr. Briffett’s acreage is an  
estimate. The parcel document is not. The court concludes La Salle owns 35.77 acres.

1 Mr. Briffett testified that La Salle has an extensive water system, covering much if  
2 not all the land La Salle owns. He estimates that the parking, tennis courts, chapel, and  
3 other buildings and improvements occupy 3.39 acres. He estimates that there are 35.01  
4 acres ( $38.4 - 3.39 = 35.01$ ) being irrigated.

5 Mr. Briffett's total acreage is about 7.5% higher than the actual acreage. It is  
6 reasonable to assume his estimate of non-irrigable acreage is off by the same percentage.  
7 7.5% of 3.39 = .25. The improvements, therefore, occupy 3.14 acres.

8 The court concludes that La Salle owns 32.63 irrigable acres. La Salle  
9 nevertheless believes the court should confirm a right for 40.90 acres.

10 The remainder of the original 117 acres was sold by La Salle. The grantees are, to  
11 this court's knowledge, not parties to this adjudication. There is evidence that water has  
12 historically been beneficially used on at least a portion of that parcel:

- 13 1. Commissioner Ottem found as to the 117 acres: "Adequate  
14 evidence of water use was provided in testimony by Mr. Langell  
15 for irrigation of 80 acres." (page 309);
- 16 2. *Achepohl* allowed up to 40.90 acres to be irrigated; and
- 17 3. Mr. Briffett testified that although there does not seem to currently  
18 be any water used on the sold parcel, historically there was some  
19 water on it.

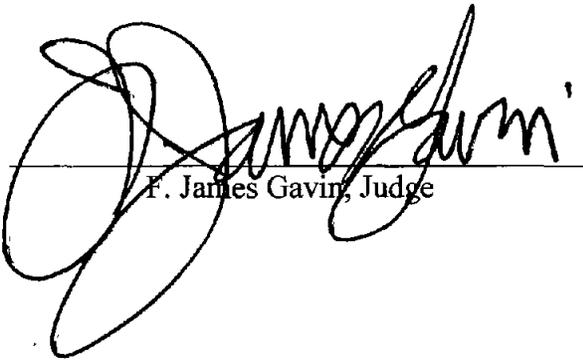
20 Obviously, some water was used on the property sold by La Salle. How much and  
21 when is unknown. "Once appropriated, the right to use a given quantity of water becomes  
22 appurtenant to the land." *Neubert v. Yakima - Tieton Irrigation District*, 117 Wn.2d 232,  
23 237 (1991); *Lawrence v. Southard*, 192 Wash. 287, 300, 73 P.2d 722 (1937); RCW  
24 90.03.380. When land changes hands, water rights transfer with the land unless those  
25 rights have been specifically withheld. The sales agreement would indicate such. La  
26 Salle has not provided evidence that the rights were withheld from the lands they sold.

27 This court cannot award La Salle sufficient water to irrigate 40.90 acres when it  
28 no longer owns 40.90 acres, especially when evidence establishes historical water use on  
the sold parcel. If water use has ceased on parcel A, then relinquishment of the right is an  
issue which must be addressed. See *Ecology v. Acquavella*, 131 Wn.2d 746, 757, 935  
P.2d 595 (1997)(*Acquavella III*).

There is no way to determine what to do with the remaining 7.37 acres under the

1 record provided to the court. Perhaps consideration should be given to making the new  
2 owner(s) a party to this adjudication.

3  
4 Dated this 1 day of June, 2006.

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F. James Gavin, Judge