

No. 281141

**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 90.09, 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.

**BRIEF OF THE UNITED STATES AS CROSS-RESPONDENT TO
BRIEFS OF APPELLANTS JOHN COX DITCH COMPANY,
AHTANUM IRRIGATION DISTRICT, AND LA SALLE, ET AL.**

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**STATEMENT OF THE ISSUES ADDRESSED
BY THE UNITED STATES AS RESPONDENT**

This brief responds to the issues presented in the opening briefs of appellants John Cox Ditch Company (John Cox), Ahtanum Irrigation District (AID), and La Salle High School, *et al.* (La Salle), hereinafter referred to collectively as the Northside Appellants.

Almost all of the issues presented in the briefs of the Northside Appellants pertain to the preclusive effect of the 1964 federal court decree in *United States v. Ahtanum* (the *Ahtanum* Decree). As set forth in the United States' opening brief, that Decree resulted from a quiet title action brought by the United States, as trustee for the Yakama Nation, to determine irrigation water rights in the Ahtanum Creek basin. In *Ahtanum*, the Ninth Circuit held that, when the United States established the Yakama Reservation in 1855, it reserved the entirety of the flow of Ahtanum Creek for use on the reservation, which lies on the south side of the creek. The Court further concluded, however, that the Secretary of the Interior, pursuant to the Code Agreement signed in 1908 with northside irrigators, had contractually allowed irrigators on the northside of the creek to use 75 percent of Ahtanum Creek's natural flow from spring to July 10. See *United States v. Ahtanum Irrigation District*, 330 F.2d 897 (9th Cir. 1964) (*Ahtanum II*).

The *Ahtanum* Decree thus confirmed irrigation rights to northside landowners only for signatories to the Code Agreement, and only for the

number of acres on which water was beneficially used at the time the agreement was signed (1908), or at the time of the *Ahtanum* proceedings (1957), whichever was less. This resulted in a total allocation for the northside users of 75 percent of the creek's natural flow up to 62.59 cfs from spring to July 10.^{1/2} *Id.* at 915. The specific answer numbers and acreage for which irrigation rights were confirmed are set forth in Appendix B of *Ahtanum II. Id.*

As to reservation irrigation rights, the *Ahtanum* Decree confirmed for the Yakama Reservation 25 percent of the creek's natural flow up to 62.59 cfs from spring to July 10 and all water in excess of 62.59 cfs throughout the year that the reservation could put to beneficial use. *Id.* at 915. The *Ahtanum* Court recognized, however, that the amount of water available for the reservation fell far short of the amount needed for the irrigable acreage on the reservation. The court noted that the Yakama Nation "may now ascertain, by actual experience under the decree, just how badly they have suffered through the Code taking of their property"

^{1/2} As set forth in the United States' opening brief (pp. 16, 23), the "natural flow" of the creek that is subject to the 75/25 percent split has decreased through the years as use of water on northside Code Agreement acreage has decreased. The Code Agreement divided a flow of 76.3 cfs; the *Ahtanum* Decree divided a flow of 62.59 cfs; and the trial court's Subbasin 23 Conditional Final Order (CFO) in this adjudication divides a flow of 51.8 cfs. As the portion of the flow divided decreases, there is more excess over the divided portion that is allocated solely to the Nation. The CFO provides that all waters not used on northside parcels with valid water rights shall continue to become available for use on reservation lands. CP 177.

because “[p]lainly the waters they are here awarded will be insufficient for the irrigable lands of the Reservation.” *Id.* at 914.

With respect to the northside users’ 75 percent Code Agreement share of Ahtanum Creek’s natural flow, the Northside Appellants do not appeal the trial court’s determinations in this adjudication limiting their rights to the acreage confirmed in the *Ahtanum* Decree pursuant to Appendix B of *Ahtanum II*. The only exceptions are the fact-dependent arguments of three claimants whose appeals are set forth below in Issue 4 and addressed in Part IV of this brief.

Most of the Northside Appellants’ questions on appeal instead pertain to whether or to what extent the *Ahtanum* Decree bars northside landowners from claiming pre-1908 irrigation rights – for lands not confirmed a water right in the *Ahtanum* Decree pursuant to Appendix B of *Ahtanum II* – to so-called “excess” water. “Excess” water, as used in the trial court orders and CFO, refers to water “that 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.” See Clerk’s Papers (CP) 438 (CFO). Thus, under the trial court’s analysis, “excess” water exists only if there is water remaining after all reservation irrigation requirements, including potential future storage rights, have been satisfied at any given time. See 2008 Supp. Rep. at 23 (CP 749).

The trial court referred to claims for rights to “excess” water as claims for “junior” rights. The “junior” concept does not for the most part apply in the traditional manner here. Usually one water right is considered “junior” to another if it has a later priority date. Here, with two minor exceptions, all northside water right claims have priority dates later than the reservation’s water rights and thus are “junior” to the reservation’s rights in the traditional sense. The Code Agreement, however, alters the traditional scheme. The Code Agreement, as a contractual matter, gave the northside signatories to that agreement a right to their 75 percent share of the specified natural flow of Ahtanum Creek that is equal in priority to the reservation’s 25 percent share of that same flow, regardless of their priority dates. As a result, northside claims for water rights not based on the Code Agreement are, as a matter of practicality, “junior” to the water rights of both the reservation and the northside successors to Code Agreement signatories. The latter, in essence, are “senior” rights.

The trial court held that the *Ahtanum* Decree recognized “junior” rights to “excess” water with respect to lands for which a specific water right was confirmed in that Decree (pursuant to Appendix B of *Ahtanum II*). The trial court held that the period of use for such rights ends annually on May 15, and that they may be exercised up to 0.01 cfs per acre. The trial court held, however, that the *Ahtanum* Decree bars claims to “junior” water rights for northside lands for which water rights were not confirmed

any water rights in the *Ahtanum* Decree pursuant to Appendix B.

With this background, the issues of Northside Appellants on appeal are:

1. Whether the trial court correctly held that the *Ahtanum* Decree preclusively bars the Northside Appellants from claiming “junior” water rights to irrigate lands that were not confirmed a right in the *Ahtanum* Decree.² (See John Cox Issue No. 1; AID Issues No. 1 & 2; La Salle Issues No. 3 & 4).

2. Whether the trial court correctly determined that the Ninth Circuit’s decision in *Ahtanum II* preclusively bars all claims for northside irrigation rights, including any “junior” rights, after July 10.³ (See John Cox Issue No. 2; AID Issue No. 3.)

3. Whether the trial court correctly determined that the period of use of John Cox’s “junior” water right⁴, for its lands that were confirmed a water right in *Ahtanum*, terminates annually on May 15. (See John Cox Issue No. 3.)

² La Salle *et al.* Claim Nos. 01924 (Durnil), 1019 (La Salle), 02060 (Lantrip); John Cox Claim No. 01693. AID has not identified the specific individuals or tracts to which its appeal on this issue applies; the United States understands it to apply to AID-based claims or portions thereof that were proposed to be confirmed “junior” rights in the Schedule of Rights in the 2002 Report but were not included in the Conditional Final Order (CFO).

³ John Cox Claim No. 01693; AID does not identify the specific individuals or tracts to which its appeal on this issue applies.

⁴ Claim No. 01693.

4. Whether the trial court correctly denied the “senior” water right claims of (A) the Brules^{5/}, (B) La Salle High School,^{6/} and (C) Hull Ranches^{7/} because their predecessors did not file answers and/or otherwise were not confirmed water rights in *Ahtanum*. (See La Salle Issue No. 1 and 2; AID Issue No. 4.).

5. Whether AID’s appeals regarding the water right claims of (A) Richardson, Splawn, and Lynde^{8/} and (B) the Chancery^{9/} should be denied because AID did not raise in the trial court the issues it seeks to address here. (See AID Issues No. 5 & 6.)

STATEMENT OF THE CASE

The United States set forth the general background of the case in its opening brief as Appellant. Additional background relevant to the issues addressed herein is set forth below.

A. Factual Background

The following background is provided to aid in understanding of the arguments regarding the preclusive effect of the *Ahtanum* Decree.

The Yakama Reservation was established by treaty in 1855. Only

^{5/} Claim No. 00040.

^{6/} Claim No. 01019

^{7/} Claim based on *Ahtanum* Answer No. 179 & 215.

^{8/} Claim No. 02094; portion based on *Ahtanum* Answer No. 217.

^{9/} Claim No. 02398, based on *Ahtanum* Answer No. 46.

two of the northside irrigation water right claims in this adjudicated pre-date the reservation's establishment. See CP 135, 135 (CFO). Irrigation on the northside expanded rapidly, however. All of the northside irrigation claims in this adjudication are based on rights purportedly established no later than 1903. See 2002 Rep. at 344-479 (CP 1322-1457). Thus, all the claims for irrigation rights at issue in this adjudication originate prior to the time the Code Agreement was signed in 1908.

In 1925, the State adjudicated the relative priority dates of northside water rights in *State of Washington v. Annie Wiley Achepohl et al.*, Yakima County Cause Number 18279. Neither the United States nor the Yakama Nation were parties to *Achepohl*. 2008 Supp. Rep. at 198 (CP 722). All Northside Appellants claim state-based irrigation water rights pursuant to *Achepohl*. *Achepohl* quantified water rights of both signatories and non-signatories to the Code Agreement and, with respect to signatories, quantified rights for some lands not irrigated in 1908 when the Code Agreement was signed.¹⁹ See 2002 Rep. at 37-38 (CP 1014-1015). The determinations in the *Achepohl* proceeding were ultimately reduced to water right certificates issued by the State. *Id.*

The water duty established in *Achepohl* was 0.02 cfs per acre. *Id.* at 117 (CP 1094); see also *In re Water Rights in Ahtanum Creek, Yakima*

¹⁹ The record does not generally show why the parties who obtained *Achepohl* rights, with priority dates prior to 1908, did not sign the Code Agreement.

County, 139 Wash. 84, 245 P. 758 (1926). That determination was unsuccessfully challenged on appeal by John Cox, which argued that the water duty of 0.01 cfs per acre established in an earlier proceeding, *Benton v. Cox*, 17 Wash. 277; 49 P. 495 (1897), was the correct and binding amount. *Id.* The water duty confirmed in *Ahtanum*, without any apparent dispute, was the same as the earlier water duty of 0.01 cfs per acre. 2008 Supp. Rep. at 29 (CP 758).

The United States' suit in *Ahtanum* was in large part specifically in response to the *Achepohl* adjudication. As the United States stated in its complaint: "Although the United States was not a party to that proceeding, nor in any way bound by it, the defendants in question [named in the *Ahtanum* complaint] are asserting rights in Ahtanum Creek adverse to those of the United States and its wards pursuant to that judgment." Complaint at 11 (YIN Exh. 27). The complaint requested that the *Ahtanum* defendants "set up fully their claims to the waters of Ahtanum Creek and its tributaries." *Id.* With the limited exceptions addressed in Part IV herein, none of the Northside Appellants claim that they were not joined as defendants in *Ahtanum*.¹¹⁷ Thus, virtually all of the claims for rights at issue here were at issue in *Ahtanum* and are based on rights purportedly in use and obtained prior to the 1908 Code Agreement.

¹¹⁷ See 2008 Rep. at 188-198 (CP 912-922) identifying the limited number of claims with respect to which the claimant's predecessor had not filed an answer in *Ahtanum*.

Not all *Achepohl* rights survived in the *Ahtanum* Decree. Some holders of *Achepohl* rights were confirmed no rights in the *Ahtanum* Decree at all. Some, like John Cox, were confirmed an *Ahtanum* Decree right for only a portion of the lands confirmed a right in *Achepohl* (those irrigated in 1908 or 1957, whichever was less). The *Ahtanum* Decree barred northside irrigators from using water after July 10, regardless of their *Achepohl* period of use, and all *Ahtanum* Decree rights were confirmed a water duty of 0.01 cfs compared with the 0.02 cfs in *Achepohl*.

B. The Trial Court Proceedings

1. The 2002 Report

The question of “junior” water rights was at issue throughout most of the trial court proceedings. In the 2002 Report, the trial court initially held that, to establish an irrigation water right, a northside claimant had to show that it met four requirements. 2002 Rep. at 106 (CP 1083). First, the claimant’s predecessor had to be a signatory to the 1908 Code Agreement. Second, the claimant’s predecessor must have participated in the 1925 *Achepohl* proceeding and show compliance with state law by providing an adjudicated water right certificate. Third, the claimant, or his or her predecessor, must have filed an answer in the federal *Ahtanum* litigation and had that claim affirmed by the Ninth Circuit in *United States v. Ahtanum*, 330 F.2d 897 (9th Cir. 1964) (*Ahtanum II*). And fourth, the

claimant had to show that water has been beneficially used on the subject property since *Ahtanum* was finalized in 1964. *Id.*

The trial court rejected the contention of AID and certain other northside parties that *Ahtanum* adjudicated only an “in gross” or aggregate amount of water for the north side, to be shared among any northside users confirmed a right in *Achepohl*. *Id.* at 109 (CP 1086). Instead, the trial court concluded that the *Ahtanum* Decree confirmed individual rights because the Ninth Circuit expressly required each northside water user to submit evidence of the location and amount of its particular use, and the specific rights confirmed were set forth by answer number and acreage in Appendix B to the Ninth Circuit’s decision in *Ahtanum II*.¹² *Id.* The trial court further noted that the Ninth Circuit expressly recognized that *Ahtanum* disposed of the claims of some 456 individual parties whose tracts were not listed in Appendix B. *Id.* at 108 (CP 1085).

The trial court went on, however, to conclude that the confirmation of a right under the *Ahtanum* Decree was necessary only to establish a “senior” water right. While recognizing that the United States and Yakama Nation are not bound by *Achepohl*, the trial court sought to “harmonize” *Achepohl* and the *Ahtanum* Decree. 2002 Rep. at 110 (CP

¹² Appendix A and Appendix B to *Ahtanum II* merely make adjustments to the 1962 Findings of Fact set forth in detail in the district court’s order accompanying the district court’s version of the decree. See DOE Exh. 136 at 9-56.

1087). The court found that “there is simply not enough water supplied from Ahtanum Creek” for use on the reservation and that most reservation water users “have resorted to digging wells to supplement the insufficient supply.” 2002 Rep. at 110 (CP 1087). Nevertheless, the trial court concluded that it could award rights to northside parties to use water surplus to that used on the reservation both for lands confirmed a right in the *Ahtanum* Decree where the claimant showed it had used more water on that acreage than the 0.01 cfs allowed by that Decree and for lands not confirmed a right in the *Ahtanum* Decree. *Id.* at 110-111 (CP 1087-1088). The trial court concluded that the *Ahtanum* Decree extinguished “senior” water rights but, as there were no findings of abandonment in the *Ahtanum* Decree, did not extinguish “junior” rights. *Id.*

The United States and the Nation filed exceptions to the trial court’s proposal to confirm “junior” water rights, arguing that they were barred by the *Ahtanum* Decree. Although the “junior” rights would purportedly have a right to water only if the reservation did not fully exercise its rights, the United States and the Nation warned that, as a practical matter, such “junior” rights could not be satisfied and administered in a manner that ensured the reservation’s irrigation and fishery water rights would be protected and not prejudiced. Specifically, the Yakama Nation noted that there were no measuring and reporting mechanisms to enable prompt decisions ordering the juniors to shut off

their water diversions when the Nation needs water to satisfy its senior rights. See Yakama Nation's Rebuttal Re: Exceptions and Objections to the Report of Court (June 13, 2003), at 33-34 (CP 5411-5412).

Ecology agreed that measurement systems are not in place to determine when excess water is present and that a decision was required as to who would make such determinations and direct juniors to stop diverting water. See Department of Ecology's Exceptions and Requests for Clarification Regarding the Report of the Court (March 3, 2003), at 13 (CP 5068). Ecology identified various unaddressed concerns, including

at what point in Ahtanum Creek shall the flow be measured to determine whether excess water is present, and who shall have authority to make such a stream measurement?
Further, who shall have the responsibility of notifying junior water right holders whether excess waters are available, and who shall have the authority to determine whether "no uses, including potential storage, are being made of the excess by water holders on the reservation?"

Id.

Counsel for the United States, in hearings on the exceptions, bluntly warned that if "junior" rights were awarded, "it's going to be a nightmare to administer that, simply a nightmare." Verbatim Report of Proceedings (VRP) 2/3/2004 at 55 (CP 3774). Thus, counsel explained that not only were "junior" rights barred as a matter of law, but that "[i]t's almost unworkable to talk about junior rights in the Ahtanum basin just as a practical matter." *Id.*

As a result of those hearings, the trial court encouraged the parties to attempt to negotiate a system for undertaking the necessary monitoring. *Id.* at 63 (CP 3781). That effort, however, was put on hold while the parties waited for the trial court to determine whether it would revisit and revise its initial ruling, and it was never revived.

2. The 2008 Supplemental Report and 2009 Memorandum Opinion Exceptions

In the 2008 Supplemental Report, the trial court partially reversed its decision in the 2002 Report. The court still rejected the argument of the Yakama Nation and the United States that *Ahtanum* had held there was no “excess” water as a matter of law, concluding that surplus water would exist “during the rare occasion” when Ahtanum Creek flows are more than adequate to satisfy reservation water users *and* north side users with confirmed Pope Decree rights. 2008 Supp. Rep. at 25 (CP 749).

The court determined, however, that, in *Ahtanum*, the Ninth Circuit “intended to adjudicate every possible right to water for landowners on the north side of Ahtanum Creek.” *Id.* at 26 (CP 750). The court thus found that, when surplus water is available, northside users are barred by res judicata from asserting rights to any such water except to those lands that were confirmed rights in the Pope Decree. *Id.*

The trial court based this reading of the *Ahtanum* Decree on the fact that the Ninth Circuit: (1) expressly stated that the *Ahtanum* district

court made “a determination as to the entire use of waters in 1908,” and its exclusion of 456 defendants from that determination disposed of their claims; (2) reduced the Code Agreement rights of individual defendants whose use of water had declined since 1908, thus demonstrating that the northside users’ rights could not be enlarged; and (3) declared that the waters awarded to the Nation after accounting for the northside Code Agreement rights “will be insufficient for the irrigable lands of the Reservation,” thus demonstrating its determination that there was no real surplus water to distribute. *Id.* at 27 (CP 751) (quoting *Ahtanum II*, 330 F.2d at 914).

Despite these findings, the trial court determined that Section I.a. of the *Ahtanum* Decree affirmatively recognized the right to use any limited “excess” water available on the northside lands confirmed irrigation rights in the *Ahtanum* Decree. That provision awards 75 percent of the natural flow of the Creek from April 15 to July 10 “to defendants” and provides that “defendants shall have no right to the excess, except in subordination to the higher rights of plaintiff.” *Id.* at 27-28 (citing *Ahtanum II*, 330 F.2d at 915) (CP 751-752). The trial court concluded that this provision did not apply, however, to claims pertaining to lands denied rights in *Ahtanum*. As a result, the trial court confirmed a “junior” right to “excess” water only to *Ahtanum*-righted lands. *Id.* at 28-29 (CP 752-753). This right extends only through the floodwater season, to May 15, and in

the amount of 0.01 cfs, bringing the total water duty for such lands to a maximum of 0.02 cfs, consistent with the *Achepohl* decree. 2009 Mem. Op. at 4 (CP 459); 2009 Order on Recon. at 4 (CP 95).

SUMMARY OF THE ARGUMENT

1. The trial court correctly held that the *Ahtanum* Decree, as modified and interpreted by the Ninth Circuit in *Ahtanum II*, preclusively bars the Northside Appellants' claims to "junior" water rights for lands not confirmed a water right under the Decree. The trial court correctly concluded that the Decree determined the entire rights to Ahtanum Creek water as of 1908, and that the Decree disposed of the irrigation rights claims for any lands not confirmed such rights. The United States opposed the granting of *any* "junior" rights in the trial court, and the Yakama Nation appeals the trial court's decision to grant such rights for lands that *were* confirmed specific rights in the Decree. But assuming the trial court correctly held that *Ahtanum* does not bar *all* "junior" rights, the court correctly interpreted the Decree as recognizing potential rights to "excess" waters *only* for lands confirmed an irrigation right in the Decree.

2. The trial court correctly held that the Northside Appellants are barred from claiming any irrigation rights after July 10. John Cox and AID argue that this ruling does not apply with respect to "junior" rights, which they contend were not litigated in *Ahtanum*. That is incorrect. All pre-1908 irrigation rights of the northside parties to *Ahtanum* were

implicated in that case. But, in any event, the issue of whether the Northside Appellants could show any pre-1908 beneficial use of irrigation water after July 10 was expressly litigated and decided by the Ninth Circuit in *Ahtanum II*. The question was also the subject of a rehearing petition in *Ahtanum*, which the Ninth Circuit denied after reviewing 53 record citations by northside claimants to alleged contrary evidence. The issue of the period of use of the Northside Appellants' pre-1908 irrigation rights was conclusively determined in *Ahtanum*, and issue preclusion bars any claim to the contrary in this adjudication.

3. The trial court's determination that the period of use of John Cox's "excess" water right ends on May 15 should be affirmed. The court's determination that "excess" water exists only for a limited period during the early spring is supported by record evidence submitted by the Northside Appellants themselves. And the trial court's determination to limit the period of use of such "excess" rights to the time when water is generally available is reasonable given the rarity of excess water beyond that date and the difficulty in administering such "excess" rights, particularly when the margin of "excess" is small.

4. The trial court correctly denied the following water right claims on grounds that the land for which the right was claimed had not been confirmed a water right in the *Ahtanum* Decree, for the reasons set forth below:

A. The trial court correctly found that the Brules' predecessor, W.C. Cope, was served and made a party to *Ahtanum*.

B. The trial court correctly found that the status of La Salle's predecessor, Jeannie Goodman, as a party to *Ahtanum* was not negated because the *Ahtanum* court joined rather than substituted her successors after her death.

C. The trial court correctly held that it was barred from correcting a purported error of the federal *Ahtanum* court that resulted in that court's denial of the water right claim of Hull Ranches' predecessor.

5. AID's appeal regarding the water rights for the Chancery and Richardson, Splawn, and Lynde should be denied because the errors alleged by AID – although evident 15 months prior to final judgment – are raised for the first time on appeal. AID thus has not preserved these issues for appeal.

ARGUMENT

I. The trial court correctly denied claims for “junior” irrigation rights on land not confirmed a right in the *Ahtanum* Decree.

The trial court correctly held that preclusion principles bar northside water users from claiming water rights for land not confirmed a water right in the *Ahtanum* Decree. Because the *Ahtanum* Decree was entered in federal district court, its preclusive effect in the present

adjudication is governed by federal law. *Heck v. Humphrey*, 512 U.S. 477, 488 n. 9 (1994); *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004); *Loveridge v. Fred Meyer, Inc.*, 72 Wn. App. 720, 725, 864 P.2d 417 (1993). The U.S. Supreme Court has described res judicata (or claim preclusion) as the doctrine that a “final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” *Federated Department Stores*, 452 U.S. at 398. The elements necessary to establish claim preclusion are: “(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties.” *Hells Canyon Preservation Council v. U.S. Forest Service*, 403 F.3d 683, 686 (9th Cir. 2005) (citations omitted). Claim preclusion binds a party to a judgment even as to claims that could have been but were not brought in a prior action, *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Issue preclusion, in contrast, operates only where the same issue was actually litigated and necessarily decided in a prior case. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.5 (1979); *Schiro v. Farley*, 510 U.S. 222, 236 (1994).

The *Ahtanum* Decree determined all northside irrigation rights as of 1908, and all claims to irrigation water in this present adjudication originated prior to that date. Northside irrigators were required in *Ahtanum* to “set up fully” their claims. Complaint at 11 (YIN Exh. 27). If

the northside defendants did not set forth all their claims, claim preclusion bars the introduction of additional claims here. If they did set forth such claims, they were litigated and decided in *Ahtanum*, such that issue preclusion operations. Under either analysis, all claimants to irrigation water in this proceeding, whose predecessors were joined as defendants in *Ahtanum*, are bound by the determinations in the *Ahtanum* Decree. Thus, all northside users are precluded from claiming any right to irrigation water in this adjudication unless those rights are recognized in the *Ahtanum* Decree.

The trial court agreed with this reasoning, but held that Section I.a. of the *Ahtanum* Decree preserved the right of claimants granted irrigation rights for acreage listed in Appendix B to also use “excess” water on those acres during the rare times in the spring when such water is available. That ruling is on appeal. See the Yakama Nation’s Corrected Opening Brief.. But assuming that ruling is correct, the trial court correctly determined that the *Ahtanum* Decree did not recognize a right to such “excess” water for claimants who had not been confirmed a water right in the Decree.

A. *Ahtanum* determined individual northside irrigation water rights and constituted a determination of the entire use of northside irrigation water as of 1908.

The trial court correctly held that the *Ahtanum* Decree determined individual northside irrigation water rights and precludes claims to such

rights not recognized in the Decree. The arguments of the Northside Appellants to the contrary are unsupported. The Ninth Circuit decisions in *Ahtanum I* and *Ahtanum II* plainly establish that the *Ahtanum* Decree determined the extent of rights of individual northside irrigators and disposed of the pre-1908 claims of all other northside defendants.

The Ninth Circuit first made its intent clear in its remand to the district court in *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956) (*Ahtanum I*). There, the Ninth Circuit admonished the district court that “the defendants should have been required to appear by answer and set forth their claims of right to the use of the waters of the stream.” *Ahtanum I*, 236 F.2d at 339. The Ninth Circuit found defendants’ answers insufficient because they were “wholly uninformative as to who these water users are, what lands they claim to have the right to irrigate, or how they deraign their titles to any water rights.” *Id.* The Ninth Circuit directed that on remand the district court must “determine and adjudicate the respective rights of the parties, during which defendants must be required to show and disclose their rights and titles.” *Id.*

The Ninth Circuit was even more specific in *Ahtanum II*. On appeal after remand, the Ninth Circuit noted that the northside defendants, in a petition for certiorari from *Ahtanum I*, recognized that *Ahtanum I* required northside water users “to completely readjudicate their rights by requiring them to establish their needs as measured fifty years ago.”

Ahtanum II, 330 F.2d at 905. The defendants declared that the effect of the Ninth Circuit’s decision “is to require the Ahtanum water users to adjudicate again their right to use waters from the stream” and that the defendants were “again required to prove their water rights with the same particularity which was required of them in the state court proceeding in 1925,” – referring to the *Achepohl* adjudication. *Id.* The *Ahtanum* defendants thus plainly understood *Ahtanum I* to require an adjudication of their rights akin to the traditional state-based adjudication in *Achepohl*. The Ninth Circuit declared this to be a “correct understanding of the meaning of our mandate.” *Id.* at 905.

After confirming this interpretation of its mandate, the Ninth Circuit, in *Ahtanum II*, examined the evidence presented on remand and made parcel-by-parcel adjustments to the irrigated acreage figures, set forth in Appendix A and Appendix B to the court’s opinion. *Id.* at 915. Most important is how the Ninth Circuit addressed the United States’ concern that the district court refused to adjudicate the claims of some 456 defendants who failed to establish a right to water. The Ninth Circuit concluded that the district court’s findings identifying the acreage in each parcel that was irrigated in 1908 “is a determination as to the entire use of waters in 1908” and that the exclusion of other tracts “adequately disposes of any claims that might have been made by other persons in respect to lands not listed in the findings.” *Id.* at 913.

The contentions of the Northside Appellants that the *Ahtanum* Decree simply allocated an amount of water to the northside users as a whole fails in the face of the Ninth Circuit's explicit characterization of its holdings to the contrary. To be sure, the Ninth Circuit upheld the district court's decision "to limit the scope of its decree so as to avoid its having to assume distribution and control functions which it is in no position to exercise." *Id.* at 912. The court thus recognized that the district court was not required to adjudicate particular tracts in the manner of a state water adjudication so as to establish "the relative rights, among themselves, of the various defendants." *Id.* at 911. But those determinations have no effect here. The Ninth Circuit expressly held that the exclusion of particular irrigation rights from the *Ahtanum* Decree disposed of those claims.

The trial court also correctly recognized that *Ahtanum* determined the entire northside use of irrigation water as of 1908. In *Ahtanum I*, the Ninth Circuit admonished the district court that it must "mak[e] a complete adjudication of the rights of the parties," and noted that the record was insufficient "for a complete adjudication of the rights of the parties in this stream." 236 F.2d at 341, 342. *Ahtanum II* described the adjudication as "a determination as to the entire use of waters in 1908." *Id.* at 913. Thus the exclusion from the *Ahtanum* Decree of the Northside Appellants claiming a "junior" right here bars those claims.

B. Assuming the trial court correctly held that the *Ahtanum* Decree recognized any “junior” rights to “excess” water, the trial court correctly held that such recognition extended only to land confirmed a water right in the Decree.

The trial court rested its conclusion that the *Ahtanum* Decree allowed for “excess” water to be used on tracts confirmed a water right in *Ahtanum*, and only on such tracts on Section I.a. of the Decree, which states:

I. From the beginning of each irrigation season, in the spring of each year, to and including the tenth day of July of each year, said water shall be divided as follows:

a. To defendants, for use on their lands north of Ahtanum Creek, seventy-five per cent of the natural flow of Ahtanum Creek, as measured at the north and south gauging stations, provided that the total diversion for this purpose shall not exceed 46.96 cubic feet per second, and provided that when the said measured flow exceeds 62.59 cubic feet per second, *defendants shall have no right to the excess, except in subordination to the higher rights of the plaintiff.*

Ahtanum II, 330 F.2d at 915 (emphasis added). The question of whether this language affirmatively recognizes that northside irrigators confirmed a right to the 75 percent Code Agreement share have an “excess” water right is on appeal. See Yakama Nation’s Corrected Opening Brief. However, assuming that this language *does* recognize such a right, the trial court correctly held that the right is limited to the individual tracts confirmed a water right in Appendix B of the Decree. As set forth above, the Decree plainly adjudicated individual rights, such that the 75 percent flow

allocation of Section I.a. of the Decree pertains only to the tracts of land for which such water rights were recognized.

The Northside Appellants contend that “defendants” in Section I.a. of the Decree refers to all defendants joined in *Ahtanum*. That is plainly inconsistent with the Ninth Circuit’s express holding that the Decree disposes of water right claims for the tracts of the 456 defendants not included in Appendix B, as discussed *supra*, Part I.A. It is also inconsistent with the Northside Appellants’ litigating posture in this case, in which they have not argued that the trial court erred in confirming water rights for specific tracts which instead should be shared by all northside users; have not questioned the trial court’s reduction of the 75 percent northside share based on nonuse on specific tracts identified in Appendix B; and have not contested that continued reductions of use on those tracts cause such northside allocations to revert to the reservation. Accordingly, the trial court correctly held that Section I.a. of the Decree pertains only to the lands identified in Appendix B of *Ahtanum II*.

C. If this Court determines that the trial court erred in denying “junior” rights for lands not water-righted in *Ahtanum*, it should recognize that the trial court has discretion on remand to limit or deny such rights to the extent that their exercise would prejudice the rights of reservation water users.

In the event this Court determines that the *Ahtanum* Decree does not bar the “junior” claims for land not adjudicated a water right under that

Decree, it should nevertheless allow the trial court discretion to limit or deny any such rights to the extent that the court determines that such rights cannot be feasibly administered in a manner that would not affect other water rights, including the United States' instream fish flows for the Yakama Nation and the reservation irrigation water rights. As set forth *supra*, pp. 11-12, Ecology, the Yakama Nation, and the United States all recognized that "junior" rights to "excess" water could not be adequately administered under existing systems.

The problems that prevent adequate administration of "junior" rights include the lack of (1) mechanisms for determining the extent of needs of senior rights at any given time, including instream flows and irrigation rights; (2) monitoring of flows to determine when excess is available, the measurement and reporting of diversions to all northside users; and (3) the ability to shut off water to juniors quickly and promptly when excess flows cease. These problems are are complicated by the fact that any "excess" flows would generally result only from floodwaters, which may arise and diminish in short amounts of time.

The trial court repeatedly found that "excess" water would rarely be available. See 2009 Mem. Op. at 3 (CP 458) (The reality may be that in most years there will be no water in excess of that needed to satisfy the north side users and the Nation's water rights); *id.* at 3-4 (CP 458-459) (noting that "when there is excess water available, it may during the time

of the year when the north side users cannot make beneficial use of the water – *i.e.*, early spring”); *id.* at 20 (CP 475) (equating excess water with floodwater); *id.* at 43 (CP 498) (“it is reasonable to find that excess water would be available no more than 45 days during the spring”); 2008 Supp. Rep. at 25 (CP 749) (“Surplus water would exist during the rare occasion when Ahtanum Creek flows are adequate to satisfy reservation water users and north side users who have Pope Decree rights beneficially used after that decree was entered.”); *id.* at 27 (CP 751) (noting that the *Ahtanum II* court “believed there is no real surplus or excess water to distribute because it was of the opinion the Nation was provided for so badly in the original 75%-25% split established by the Code agreement”); *id.* at 30 (CP 754) (“the Court agrees the evidence and prior rulings on the issue are fairly consistent that excess water will be rare”); 2006 La Salle Mem. Op. at 6 (CP 937) (“While it may be highly unlikely that this water could be available, it remains possible.”); 2003 Legal Issues Op. at 14 (CP 941) (“The Yakama Nation * * * notes there is rarely water available [after July 10]”); 2002 Rep. at 52 (CP 1029) (noting that “numerous water right claimants presented evidence that rarely, if ever, had adequate water been available to irrigate the reservation lands”); *id.* at 110 (CP 187) (“there is simply not enough water supplied from Ahtanum Creek [for use on the reservation] and most water users have resorted to digging wells to supplement the insufficient supply”).

Accordingly, if this Court determines that the trial court erred in denying “junior” rights for land not confirmed a water right in Appendix B of the *Ahtanum* Decree, it should instruct the trial court that it has discretion to limit or deny such rights as necessary to ensure that “senior” water rights are protected from infringement by the exercise of such “junior” rights.

II. The *Ahtanum* Decree plainly precludes all northside claimants from asserting claims for irrigation water rights after July 10.

While the parties may debate the extent to which the *Ahtanum* Decree is binding on the parties to this adjudication, one issue that was plainly litigated and necessarily decided in *Ahtanum*, with respect to all northside irrigation rights, is their period of use. The *Ahtanum* Court repeatedly held that northside irrigation rights end on July 10 of each year and rejected the northside users’ arguments to the contrary. Nevertheless, John Cox and AID argue that “junior” water rights are not barred that ruling in *Ahtanum* and that such rights should extend through the summer to October 1.

John Cox and AID are plainly incorrect. In its opinion on legal threshold issues, the trial court rejected the northside parties’ argument that *Ahtanum* did not bar them from using purported “excess” water after July 10. The court noted that “[t]he consistent testimony and evidence reviewed by the Ninth Circuit demonstrated to that court that the natural

flows in the Ahtanum basin essentially ended around the beginning of July and that farming practices had adjusted accordingly by 1908.” 2003 Legal Issues Op. at 14 (CP 941). The trial court found that the Ninth Circuit thus had made a decision as to the extent of beneficial use, ““which finding then becomes the limit of the water right.”” *Id.* (quoting *Ecology v. Acquavella (Acquavella III)*, 131 Wn.2d 746, 935 P.2d 595 (1997)).

The trial court’s reading of *Ahtanum* is correct. In its 1964 opinion, the Ninth Circuit found:

An examination of the testimony of the witnesses on whom the defendants relied for proof of their use, or of their predecessor’s use, of water for irrigation in 1908, discloses a complete unanimity as to the fact that water for irrigation was generally not available after the first of July each year; that the methods of farming then used had been adapted to that circumstance through the raising of crops which would mature or could be made through irrigation up to the first of July and that in general their type of farming was such that they did not require or need irrigation after the first of July.

Ahtanum II, 330 F.2d. at 907-908. The Ninth Circuit thus held that the northside parties water rights “terminated in the early part of July in each year, a conclusion which must be reflected in the final judgment in this case.” *Id.* at 910.

The litigation of the question did not end there, however. The northside defendants filed a petition for rehearing with the Ninth Circuit, arguing that its conclusion on this point was wrong and that substantial evidence in the record showed use of water by northside parties after July

10. *United States v. Ahtanum Irrigation District*, 338 F.2d 307, 308 (9th Cir. 1964) (*Ahtanum III*); see also YIN Exh. 309. The Ninth Circuit requested petitioners to file a supplement to their petition identifying such evidence, and the petitioners complied, 53 items of evidence purportedly supporting their argument. The Ninth Circuit reviewed this evidence but found it unpersuasive. The Court explained:

We have gone through each of these items, referring to the appropriate pages of the record. We had previously read all of these portions of the record in arriving at the conclusion stated in our opinion. Our further examination of the record, in light of the petition for rehearing and the supplement thereto, convinces us that our former conclusion was right.

Id. at 308-309.

Finally, while the trial court found that the *Ahtanum* Decree left open the possibility for northside defendants that there could be water in excess of the rights expressly recognized in the Decree before July 10 – a finding with which the Yakama Nation and the United States disagree – the Decree *excludes* such language with respect to the period after July 10. The trial court thus concluded: “This issue has been examined and reexamined by the Ninth Circuit and the result is clear and unmistakable: There is to be no use of water by north side users after July 10 of each irrigation season through the end of the irrigation season.”

Thus, even if this Court concludes that the *Ahtanum* Decree does not preclude the claims of northside parties’ to “junior” rights to water

purportedly not beneficially used on the reservation, it nevertheless does plainly operate to bar *all* northside claims to water after July 10. With the exception of the individual rights addressed *infra*, Part IV, none of the Northside Appellants claiming “junior” water rights contend that they were not joined as parties in *Ahtanum*. The issue of the period of use of all pre-1908 irrigation water rights was litigated and necessarily decided in *Ahtanum*. Thus, all northside claimants are bound by this ruling.

III. The trial court properly limited John Cox’s “junior” right to “excess” water to a 45-day period of use ending May 15.

John Cox contends (Br. 2, 26-28) that the trial court erred in limiting its right to “excess” water to a 45-day period ending on May 15. John Cox contends that the trial court did not indicate what evidence it relied on in concluding that this was the period during which excess water might reasonably be available, and that insufficiency of water supply is not a basis for denying confirmation of a right.

Contrary to John Cox’s assertion, record evidence submitted by the Northside Appellants themselves – specifically AID – supports the trial court’s decision. In approving John Cox’s claim for “excess” water, the trial court explained that “[t]he period of time each year that excess water might be available varies significantly; *however, the Court concludes that it is reasonable to find that excess water would be available no more than 45 days during the spring.*” 2009 Mem. Op. at 43 (CP 498). The court

thus explained that “[t]he provision will 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 could result in an additional 584 acre feet per year being diverted.” *Id.*

John Cox filed a motion for reconsideration, asserting that the computation of the annual quantity of John Cox's right to use “excess water” was incorrect. In its order on reconsideration, the trial court denied John Cox’s motion on this point, explaining:

The Court determined that excess water would be available during the early spring. Memorandum Opinion p. 3, lines 14 through p. 4, line 10. Although not specifically set forth, as can be seen by the confirmed water rights, the Court relied upon a 30 day availability for water users north of Ahtanum Creek. For Johncox, the Court relied upon 45 days, as Johncox’s season begins on April 1, not April 15. See 2009 Memorandum Opinion @ 43, lines 1-10 1/2. That results in 584 acre-feet per year of excess water.

2009 Order on Recon. at 4 (CP 95).

Thus, it is clear that the trial court’s computation of John Cox’s “excess” water right is based on the court’s recognition that the existence of excess water would be rare, and would be in the spring when there was floodwater. See *supra*, pp. 25-26. That recognition is supported by the Declaration of Andreas Kammereck, submitted by AID, which attaches a letter reviewing AID flow data for 1998-2008. CP 5-10. The letter finds that, on average “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 instream flow recommendation, AID diversion and WIP canal capacity.” CP 7. The period from April 1 through July 10 consists of 101 days, so that 29 percent of those days is essentially 29 days. That is even shorter than the 45-day period of use, starting April 1, that the trial court confirmed for John Cox’s excess right. In addition, a graph at the end of the letter shows that those days all occur at the very beginning of that period (CP 8), consistent with the trial court’s decision that the excess water was available in early spring. Thus, the Kammereck letter provides ample record support, by the northside users themselves, for the trial court’s decision.

Finally, the trial court properly limited the period of use for the John Cox “excess” water right to time when excess water is generally shown to be available. The court’s recognition of the limited availability of such water, combined with the difficulty of measuring and managing “excess” water and water rights, as discussed *supra*, pp. 11-12, made it reasonable for the district court to limit “excess” water rights to the time of year – during springtime floods – when the United States’ and Yakama Nation’s rights are least likely to be prejudiced by the exercise of such rights. Thus, this Court should affirm the trial court’s decision to limit the period of use of John Cox’s “excess” right from April 1 through May 15.^{13/}

^{13/} John Cox is the only Northside Appellant to appeal the period of use of the confirmed “excess” water right. Thus, if this Court ruled in favor of John Cox’s position on this issue, that ruling would be effective as to John Cox alone. See,

IV. The trial court properly denied claims of the Brules, La Salle High School, and Hull Ranches for lack of confirmed water rights in the *Ahtanum* Decree.

The briefs of AID and La Salle High School seek reversal of the trial court's denial of their claims to "senior" water rights – which participate in the 75 percent northside share of the Code Agreement natural flows – to three claimants whose lands were not confirmed a water right in the *Ahtanum* Decree. In this part of their argument, the claimants do not contend that the *Ahtanum* Decree is not binding as a general matter, but argue that it does not bind them because their predecessors (1) were not properly served or maintained as parties in *Ahtanum*, or (2) in the case of Hull Ranches, were improperly denied a water right in *Ahtanum*. For the reasons set forth below, the trial court correctly rejected these arguments.

A. The Brules

The Brules claim a water right (Claim No. 0040) for irrigation of 43 acres and stockwater from April 15 to July 10. See 2002 Rep. at 322 (CP 1300). The trial court held that their claim to a "senior" water right was precluded because a predecessor of theirs was a party to the federal *Ahtanum* adjudication but their property was not confirmed a water right in the *Ahtanum* Decree. 2009 Mem. Op. at 40-41 (CP 495-496). The Brules

e.g., *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("we do not consider arguments raised for the first time in reply briefs; assignments of error that are not argued are waived").

contend that their predecessors were not parties to *Ahtanum*.

As a threshold matter, it is immaterial whether the Brules can show their predecessors were not parties to *Ahtanum* because they fail to meet another of the four requirements for establishing a water right in this adjudication. Specifically, the trial court found that the Brules failed to establish that their predecessor-in-interest had signed the 1908 Code Agreement. See 2008 Supp. Rep. at 190 (CP 914). The Brules never disputed this finding or submitted evidence to refute it. The trial court's decision may be affirmed on this alternate ground alone. See *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (unchallenged findings of fact "are verities on appeal").

In any event, the trial court correctly found that the Brules' predecessor, W.C. Cope, had been made a party to *Ahtanum*. The trial court addressed the Brules' contention (La Salle Br. 13-14) that service was made on a different W.C. Cope because the summons showed a different name for the wife than that of their predecessor. That contention was rejected in the 2008 Supplemental Report as follows:

In 1947, when the Summons and Complaint were filed, the Brule land was owned by W.C. and Inez Cope. The copy of the Summons and Complaint that is part of DE-321 lists a Walter G. and Rose Cope, which arguably could be different people than the owners of the Brule land. However, YIN-370 includes a copy of the Affidavit of Service for the initial summons and complaint, stating that Walter G. Cope is actually Walter C. Cope, who was served on September 4, 1947, and that W.C. Cope was also served

on October 27, 1949, when additional parties were added to the case. The Court concludes that the Brules' predecessors were properly served notice in *U.S. v. Ahtanum* and had an obligation to answer the complaint. Nothing in the record indicates an answer was filed.

2008 Supp. Rep. at 190 (CP 914). The trial court provided further explanation in the 2009 Memorandum Opinion, reiterating that the evidence showed that W.C. Cope, who the evidence shows owned the land in 1947, was served in 1949. 2009 Mem. Op. at 40 (CP 495). The court explained that “[t]he chain of title documents submitted by the Brules do not indicate who owned their land in 1949, leaving the Court to conclude it was still owned by the Copes.” *Id.*

The Brules argue (Br. 14-15) that, even if the correct Cope was initially served and made a party to *Ahtanum*, res judicata still does not operate against them because there is no evidence that any of the subsequent transferees of the property during the litigation were substituted as parties. This argument does not provide a basis for reversal because the Brules raise it for the first time on appeal. See RAP 2.5(a). The Brules previously noted that the transferees were not substituted as parties, but only as part of their argument that none of their predecessors had been served, not as an independent basis for finding that they were not bound by the *Ahtanum* Decree.^{14/} Thus, the trial court did not and had no

^{14/} See Exception of Donald P. Brule, June 26, 2008, attached to opening brief of La Salle High School et al.

occasion to address this issue. In any event, as set forth below, Federal Rule of Civil Procedure 25(c) does not require a court to substitute or join transferees of property that is the subject of litigation.

B. La Salle High School

La Salle High School claims a water right (Claim No. 1019) for the irrigation of 40.9 acres. 2006 Mem. Op. La Salle at 1 (CP 932). A predecessor-in-interest to La Salle, Jeannie Goodman, was a signatory of the Code Agreement and was served with the *Ahtanum* complaint and summons. *Id.* at 3-4 (CP 934-935). Ms. Goodman died during the litigation, and her property, which became part of her estate, was sold in part to Wade Langell and in part to H.A. Richmond. *Id.* at 1-2 (CP 932-933). Both were served with the *Ahtanum* complaint and summons, and both were added to the litigation rolls as defendants. *Id.* at 4 (CP 935). The property was not included in one of the answer numbers approved in *Ahtanum*. *Id.* at 2 (CP 933).

La Salle contends the trial court erred in holding that the lack of a confirmed right in the *Ahtanum* Decree barred its claim here, arguing that Goodman's successors-in-interest were not substituted as parties as purportedly required by Federal Rule of Civil Procedure 25(a)(1). La Salle further argues that the summons and complaint served on Langell and Richmond was insufficient because it did not list them as parties.

The trial court correctly rejected these arguments. As the trial

court recognized, Rule 25(a)(1) does not govern here; it is a rule with the purpose of allowing dismissal as to the deceased, so that the closing of estates might not be delayed. See *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947). When property transfers, Rule 25(c) gives the court discretion to substitute the transferee as a party, but the court has discretion to join the party instead. See *Sun-Maid Raisin 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). Accordingly, the trial court correctly held that service of the *Ahtanum* summons and complaint on Richmond and Langell gave them notice that they were being sued and must take action. See *United Food & Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir.1984) (“Even if the summons fails to name all of the defendants * * * dismissal is generally not justified absent a showing of prejudice.”) (citations omitted).

C. Hull Ranches

Hull Ranches appeals the trial court’s denial of its claim to a water right pursuant to *Ahtanum* Answer Nos. 179 and 215. See AID Br. at 28-33. The trial court denied this claim because, in *Ahtanum*, the Ninth Circuit found that these answers indicated that the land had not been owned by a signatory of the 1908 Code Agreement and thus rejected their water right claims. See 2002 Rep. at 257 (CP 1235) (citing *Ahtanum II*, 330 F.2d at 917 (Appendix A) & 900).

On appeal, Hull Ranches contends that, at the time of the Code Agreement, the land was owned by Sophia Woodhouse, but was occupied and farmed by her son, Norman Woodhouse, who signed the Code Agreement. 2008 Supp. Rep. at 162, 169. Hull Ranches thus argues that the Ninth Circuit erred, and collateral estoppel should not operate against it because doing so would work an injustice. The trial court correctly rejected this argument concluding that, AID, which participated in the *Ahtanum* adjudication, could and should have sought correction of the matter at that time in federal court. See 2009 Mem. Opp. at 38 (CP 494). In any event, the *Ahtanum* Court retains jurisdiction over the Decree, see *Ahtanum II*, 330 F.2d at 915, and any challenge to the correctness of the decisions in that case must be brought in that court.); *G.C. and K.B. Investments, Inc. v. Wilson*, 326 F.3d 1096, 1109 (9th Cir. 2003) (state courts may not collaterally attack federal judgments).

V. This Court should decline to review issues AID raises for the first time on appeal regarding water rights of (1) Richardson, Splawn, and Lynde; and (2) the Chancery.

AID asks this Court to remand the judgment on two water rights due to purported oversights on the part of AID and/or the trial court. This Court should reject that request because the matters that AID seeks to correct were both evident long before the trial court's entry of the CFO, and AID did not ask the trial court to address them.

AID first addresses water rights claimed by Claudia Richardson,

Benn and Carol Splawn, and David J. and Christine Lynde (Claim No. 2094) for land that was confirmed a water right in the *Ahtanum* Decree under Answer No. 217. See 2002 Rep. at 266 (CP 1244); 2008 Supp. Rep. at 173 (CP 897). The 2002 Report provisionally approved the water right subject to AID producing an *Achepohl* water right certificate. See 2002 Rep. at 266 (CP 1244). AID subsequently submitted a certificate, but the 2008 Supplemental Report expressly required AID to address certain inconsistencies regarding the certificate before the water right could be confirmed. See 2008 Supp. Rep. at 173-174 (CP 897-898). AID never addressed those inconsistencies, and the trial court did not confirm a water right for those lands.

The second water right AID seeks to alter is for the Chancery (Claim No. 02398). AID contends that the CFO omitted a water right for one of three Chancery parcels that the trial court had otherwise approved. The water right for that parcel, however, was first omitted in the 2008 Supplemental Report, and AID took no action to correct the omission.

AID had nearly 14 months between the entry of the February 25, 2008 Supplemental Report and the April 15, 2009 CFO to ask the trial court to address these matters, but did not do so. AID thus failed to preserve these issues for appeal, and this Court should decline to address them. See RAP 2.5(a). This Court generally will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926,

155 P.3d 125 (2007). Indeed, this Court has specifically rejected an appeal based, as here, on “an obvious omission” in entry of judgment where the appellants “did not call the oversight to the trial court's attention” and thus “have not done their part in saving the lower court from error.”

Bloomquist v. Buffelen Mfg. Co., 47 Wn.2d 828, 831, 289 P.2d 1041, 1043 (1955). The Court should similarly reject the appeal here.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's judgment on each of the matters appealed by the Northside Appellants, as discussed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 14, 2010, I caused to be served via U.S. mail, postage prepaid, a copy of the foregoing document to:

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