

**YAKIMA RIVER BASIN
WATER RIGHTS ADJUDICATION**

FILED

MAR 25 1996

KIM M. EATON, YAKIMA COUNTY CLERK

The State of Washington, Department of Ecology v.
James J. Acquavella, et al.
Yakima County Superior Court Cause No. 77-2-01484-5

SUPPLEMENTAL REPORT OF REFEREE

**RE: SUBBASIN NO. 6
(TANEUM)**

Submitted to:
The Honorable Walter A. Stauffacher
Yakima County Superior Court

SUPPLEMENTAL REPORT OF REFEREE - VOLUME 18A

11, 426

IN 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 RIVER)
DRAINAGE BASIN, IN ACCORDANCE WITH)
THE PROVISIONS OF CHAPTER 90.03,)
THE STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Plaintiff,)
v.)
James J. Acquavella, et al.,)
Defendants.)

No. 77-2-01484-5

SUPPLEMENTAL
REPORT OF REFEREE
PURSUANT TO ORDER ON
EXCEPTIONS OF
OCTOBER 12, 1995

To the Honorable Judge of the above-entitled Court, the following report is respectfully submitted:

The Order issued by the Court on October 12, 1995, ruled upon several exceptions to the Report of Referee and remanded certain exceptions to the Referee, with instructions, for further evaluation and subsequent recommendations to the Court.

The exceptions filed by Gerald D. Detwiler and Carol L. Detwiler, Claim No. 02074 was denied by the Court in its entirety:

The exceptions granted by the Court are identified as follows:

SUPPLEMENTAL
REPORT OF REFEREE
Re: Subbasin No. 6

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2 Court Claim NO. 02180 -- Cecelia S. Buck
3 & Estate of Donald A. Buck

4 The exception filed by Cecelia S. Buck, represented by Attorney Wick Dufford,
5 was granted by the Court. Resolution of her claim will be part of the
6 determination of the claim of Cascade Irrigation District in the Major Claimant
7 Pathway.

8
9 COURT CLAIM NO. 00195 -- Mike Emerick
(A)03177

10 Mike Emerick filed an exception to the Report of Referee related to two
11 issues. One was the priority date for the right for which he was recommended and
12 the other was seeking clarification of his water right for Bruton Ditch. The
13 exception related to priority date was granted by the Court in a Memorandum Opinion
14 dated February 3, 1995, with the Court ruling that the priority date shall be
15 June 30, 1873. Mr. Emerick withdrew his exception on the other issue.

16
17 COURT CLAIM NO. 01628 -- Rod A.
& Diane Ruth Lang

18 Rod A. Lang filed an exception to the Report of Referee asking that his wife
19 be added to this claim and that his name be added to the list of claimants entitled
20 to non-diversionary stock water use under the stock water stipulation. His
21 exception was granted by the Court.

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27 SUPPLEMENTAL
28 REPORT OF REFEREE
Re: Subbasin No. 6

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2 COURT CLAIM NO. 00284 -- E.L. Knudson, Jr.
3 (A)04191 & Necia Knudson
Rocky Mountain Elk Foundation

4 E. L. Knudson, Jr. and Necia Knudson and Rocky Mountain Elk Foundation filed
5 an exception to the Report of Referee related to the priority dates recommended to
6 successors to the parties to the decree resulting from Tenem Ditch Comapny v. F. M.
7 Thorp, Fourth Judicial District at Ellensburg (October 9, 1887) (Tenem I) and
8 subsequent decrees. The Court granted this exception in a Memorandum Opinion
9 issued February 3, 1995, finding that all successor of the parties to Tenem I would
10 have a priority date of June 30, 1873. That ruling was incorporated into the Order
11 on Exceptions entered by the Court on October 12, 1995. Besides Knudson/Rocky
12 Mountain Elk Foundation, the claimants to whom this ruling applied were Springwood
13 Investment Corp., Jeff Nesmith, Mike Emerick, and Level Best, Inc..

14 On January 25, 1996, Level Best, Inc., filed a Motion to Reopen Court Claim
15 No. 00284 in order to introduce additional evidence related to the priority date
16 for the rights recommended to the Knudsons and Rocky Mountain Elk Foundation.
17 Rocky Mountain Elk Foundation responded to that motion on January 29, 1996, and
18 argument was heard during the supplemental hearing on January 30, 1996. On
19 February 28, 1996, the Court issued a Memorandum Opinion and Order denying the
20 motion. The Court restated its earlier ruling that the priority date for Rocky
21 Mountain Elk Foundation and the Knudsons, and the other claimants who are
22 successors to parties to Tenem I, would be June 30, 1873.

23 The matters remanded to the Referee were related to exceptions filed by Teanum
24 Canal Company, Claim No. 00411 and Level Best, Inc., Claim No. 01295, along with
25 Department of Ecology exceptions to those two claims. Hearings, for the purpose of
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27 SUPPLEMENTAL
28 REPORT OF REFEREE
Re: Subbasin No. 6

Referee's Office
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1 opening the record for testimony and evidence relating to the exceptions, were
2 conducted by the Referee on January 30, 1996. The matters remanded to the Referee
3 are as follows:

4
5 COURT CLAIM NO. 01295 -- Level Best, Inc.

6 Level Best, Inc., filed exceptions to the Report of Referee on three issues.
7 Their exception related to the priority date for their right was ruled on by the
8 Court in a Memorandum Opinion dated February 3, 1995, with the Court ruling that
9 the priority date for successors to the parties of Tenem I, including Level Best,
10 Inc., would be June 30, 1873. That ruling was incorporated into the Order on
11 Exceptions for Subbasin No. 6 entered by the Court on October 12, 1995. However,
12 Level Best, Inc., entered several exhibits during the supplemental hearing in what
13 appeared to be an effort to establish an earlier priority date. The Court having
14 already ruled on the exceptions related to priority date did not remand that issue
15 to the Referee for consideration. In response to Level Best, Inc.'s, Motion to
16 Reopen Court Claim No. 00284, the Court on February 28, 1996, issued a Memorandum
17 Opinion and Order denying the motion. The Court restated its February 3, 1995,
18 ruling that the successors to Tenem I, including Level Best, Inc., would share a
19 priority date of June 30, 1873, and ordered the Referee to use that priority date.
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21 The other two exceptions filed by Level Best, Inc., were to the instantaneous
22 quantity recommended and stock water not being a use recommended by the Referee.
23 The Department of Ecology's exception to the Report of Referee asked that the 14
24 acres irrigated by Level Best, Inc., with water delivered by the Kittitas
25 Reclamation District be identified. Level Best, Inc., is represented by Attorney
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27 SUPPLEMENTAL
28 REPORT OF REFEREE
Re: Subbasin No. 6

Referee's Office
15 W. Yakima Ave Ste. 200
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1 John P. Gilreath. John P. Wheatley, Jr., and Ben George testified at the
2 supplemental hearing in support of the claim.

3 According to the testimony, 30 cow/calf pairs are raised on the property and
4 are watered through the Teanum Canal Company ditch. The claimant asked the Referee
5 to use the standard water duty for stock watering of 1 acre-foot per year for 20
6 head. The claimants did not testify to the instantaneous quantity used, but a
7 diversion of 0.01 cubic foot per second for each acre-foot should be adequate.
8 Since the Teanum Canal Company transports the water used by Level Best for stock
9 watering, and conveyance water has already been allocated under their claim, no
10 additional water for conveyance will be recommended.

11 During the initial evidentiary hearing for Subbasin No. 6, the predecessor to
12 Level Best, Inc., Rod Lang, had testified to using 1.0 to 1.5 cubic feet per second
13 for irrigation. Since the testimony was not definitive concerning the
14 instantaneous quantity used, the Referee recommended that a right be confirmed for
15 1.0 cubic foot per second. Level Best, Inc. took exception to that and provided
16 testimony that 1.5 cubic feet per second is the capacity of their turnout and that
17 quantity is, in fact, what they use when they irrigate. Mr. Wheatley testified
18 that the current turnout was installed in the early 1960's and he has no knowledge
19 of the capacity of the turnout it replaced. The testimony during the supplemental
20 hearing was that 39 acres are irrigable or irrigated. The original recommendation
21 by the Referee was that a right be confirmed for the irrigation of 36 acres and
22 there was no exception to that part of the recommendation. According to Mr.
23 Wheatley's testimony, there is an area approximately three acres in size between
24 the upper and lower bench that is not actually irrigated, but benefits from water
25 applied on the upper bench.

26
27 SUPPLEMENTAL

28 REPORT OF REFEREE

Re: Subbasin No. 6

Referee's Office
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1 The Department of Ecology asked that the 14 acres that receive water delivered
2 by the Kittitas Reclamation District be identified. It has been identified as the
3 upper bench, which is the southerly portion of the property. That field is 21
4 acres in size, with 14 acres receiving KRD water.

5 Both irrigation and stock water is delivered to the Level Best, Inc., property
6 through the Taneum Canal. The Referee notes that the original Report of Referee
7 contained an error in describing the Level Best, Inc., diversion from Taneum Creek.
8 Their point of diversion should be identical to that of Taneum Canal Company and
9 the metes and bounds description is off slightly. That will be corrected in the
10 supplemental report.

11 It is recommended that the right being confirmed to Level Best, Inc., under
12 Court Claim No. 01295 be amended as follows: With a priority date of June 30,
13 1873, a right for the diversion of 1.5 cubic feet per second, 150 acre-feet per
14 year from Taneum Creek for the irrigation of 36 acres; 0.03 cubic foot per second,
15 3 acre-feet per year for stock watering. The right shall carry the following
16 provision: Fourteen acres of the described land lying on the upper bench in the
17 southerly portion of the property receives water from the Kittitas Reclamation
18 District delivered through the Taneum Canal Company ditch.

19
20 COURT CLAIM NO. 00411 -- Taneum Canal Company
21 (A)03028
(A)03236

22 Taneum Canal Company (TCC) filed an exception to the Report of Referee for
23 Subbasin No. 6 that addressed four issues. The exceptions were to the period of
24 use recommended by the Referee; the Referee's characterization of a portion of the
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27 SUPPLEMENTAL
28 REPORT OF REFEREE
Re: Subbasin No. 6

Referee's Office
15 W. Yakima Ave Ste. 200
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1 water awarded to TCC as being conveyance water; to the Referee's recommendation
2 that the right be limited to 9,620 acre-feet per year; and a request that the
3 recommendation for Rocky Mountain Elk Foundation and Loel and Necia Knudson be
4 clarified. The Department of Ecology took exception to the Referee's
5 recommendation concerning the number of acres irrigated, to a right being confirmed
6 for stock watering, to the quantity of water recommended for stock watering and the
7 period of use recommended for irrigation season. TCC is represented by Attorney
8 Jeff Slothower and John P. Wheatley, Jr., Don Dyk, Ben George, Martin Dyk and Paul
9 Harrell testified at the supplemental hearing.

10 The Court, in a Memorandum Opinion signed February 3, 1995, ruled on the
11 following exceptions: Denied Ecology's exception to a right being confirmed for
12 stock watering; denied TCC's exception on conveyance loss; denies TCC's exception
13 concerning the annual quantity of water recommended by the Referee. Ecology's
14 exception related to place of use and number of acres irrigated and Ecology and
15 TCC's exception concerning the period of use were remanded to the Referee for the
16 taking of additional testimony.

17 TCC presented evidence that their service area is 3,900 acres in size with
18 3700 acres actually irrigated. The irrigated acreage was determined through
19 interviews with patrons of the company. This is the same figure used by the
20 Referee in the recommendation contained in the original Report of Referee. The
21 testimony at the supplemental hearing confirmed the testimony offered during the
22 initial hearing that irrigation can begin as early as February 20 in dry years.
23 The testimony at the original evidentiary hearing lead the Referee to believe that
24 Taneum Creek was dry by the end of June, which resulted in a recommendation by the
25 Referee that the irrigation season ends on June 30. That was clarified at the
26

1 supplemental hearing. The creek flow declines during the summer, however, the flow
2 varies according to the weather patterns and there always is some flow in the
3 creek. Mr. George testified that the low flow is generally around 10 cubic feet
4 per second. Natural creek flow is available to some extent the entire irrigation
5 season. The testimony was that the irrigation season was normally through the
6 month of October, but sometimes extended into November if a farmer was reseeding
7 timothy hay. The normal irrigation season throughout the entire Yakima Basin
8 generally is through the end of October. Although there was testimony of
9 occasionally irrigating into November, there was no specific testimony that would
10 allow the Referee to quantify that use and recommend that the irrigation season
11 extend into November.

12 The Referee recommends that the Court confirm a right to Teanum Canal Company
13 with a June 30, 1873, date of priority as follows: From February 20 to October 31,
14 61.6 cubic feet per second, 9620 acre-feet per year for irrigation, 30 acre-feet
15 per year for stock water and 18.3 cubic feet per second for conveyance loss; from
16 November 1 to February 19, 1.2 cubic feet per second, 10 acre-feet per year for
17 stock water and 28.8 cubic feet per second for conveyance.

18 Teanum Canal Company also sought clarification of the rights recommended to
19 Rocky Mountain Elk Foundation and Loel and Necia Knudson. It appears to the
20 Referee that this exception was resolved during colloquy at the exception hearing.
21 That issue was not remanded to the Referee, nor did the Court issue a ruling
22 applicable to that issue.

FINDINGS OF FACT

I, Doug Clausing, as Referee in this proceeding, having carefully examined the testimony and evidence, do hereby make the following Findings of Fact pursuant to the Order on Exceptions entered by this court on October 12, 1995:

Based upon the additional testimony and evidence obtained at either the exception hearing or the supplemental hearing, the Report of Referee - Subbasin No. 6, dated May 9, 1994, should be modified as follows:

Page 42, Add Rod and Diane Ruth Lang to list of claimants recommended non-diversionary stock water and wildlife rights.

Page 44, Teanum Canal Company, Claim No. 00411 -

Line 5 - change period of use to: February 20 to October 31 for irrigation; continuous for stock water.

Page 45, Springwood Investment Corp., Claim No. 01943 -

Line 9 - change priority date to: June 30, 1873

Page 46, Jeff Nesmith, Claim No. 01811 -

Line 6 - change priority date to: June 30, 1873

Page 49, Rod A. Lang, Claim No. 01628 -

Line 1 - add Diane Ruth Lang

Page 49, Mike Emerick, Claim No. 00195

Line 18 - change priority date to: June 30, 1873

Page 50, E. L. Knudson, Jr. & Necia Knudson; Rocky Mountain Elk Foundation, Claim No. 00284

Line 8 - change priority date to June 30, 1873

Page 51, Mike Emerick, Claim No. 00195

Line 8, change priority date to June 30, 1873

Page 52, (now) Level Best, Inc., Claim No. 01295; change to the following:

SUPPLEMENTAL

REPORT OF REFEREE

Re: Subbasin No. 6

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1 CLAIMANT NAME: **Level Best, Inc.** COURT CLAIM NO. 01295
2 Source: Taneum Creek
3 Use: Irrigation of 36 acres and stock water
4 Period of Use: April 1 to October 15 for irrigation; continuous for stock
5 water
6 Quantity: 1.50 cubic feet per second, 150 acre-feet per year for
7 irrigation; 0.03 cubic foot per second, 3 acre-feet per
8 year for stock water
9 Priority Date: **June 30, 1873**
10 Point of Diversion: 300 feet north and 1,000 feet east of the west quarter
11 corner of Section 5, being within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 5,
12 T. 18 N., R. 17 E.W.M.
13 Place of Use: That portion of the W $\frac{1}{2}$ of Section 4, T. 18 N.,
14 R. 17 E.W.M. described as follows: A tract of land
15 bounded by a line beginning at the northwest corner of the
16 SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 4; thence N 87°07'E, 688.8 feet to the
17 true point of beginning; thence N 24°45' W, 532.3 feet;
18 thence N 0°05' W, 496.6 feet; thence N 14°14' W, 176.7
19 feet; thence N 6°44' W, 247 feet; thence N 77°16' E, 299.4
20 feet; thence N 9°56' E, 540.0 feet; thence N 24°47' E, 200
21 feet; thence N 70°48' E, 507 feet to the south boundary
22 line of the right of way of the county road; thence S
23 55°51' E along the south boundary line of the right of way
24 of said county road, 1098.8 feet; thence along the arc of
25 the curve on the south and west boundary line of the right
26 of way of said county road, 702.4 feet; thence S 0°33' W
27 along the west boundary line of the right of way of said
28 county road, 1090.4 feet; thence S 87°04' W, 1961.3 feet
to the true point of beginning. EXCEPT that portion lying
south of Interstate Highway 90.
Limitations of Use: Fourteen acres of the above described land lying on the
upper bench in the southerly portion of the property
receives water from the Kittitas Reclamation District
delivered through the Teanum Canal Company ditch.

SUPPLEMENTAL

REPORT OF REFEREE

Re: Subbasin No. 6

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1 The aforementioned changes shall be incorporated into the Report of Referee
2 dated May 9, 1994.
3

4 SIGNED and DATED at Yakima, Washington, this 18th day of March,
5 1996.
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7 
8 DOUGLAS CLAUSING, Referee
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27 SUPPLEMENTAL
28 REPORT OF REFEREE
Re: Subbasin No. 6

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