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YAKIMA RIVER BASIN

WATER RIGHTS ADJUDICATION

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. 10
(KITTITAS)**

Submitted to:

The Honorable Walter A. Stauffacher
Yakima County Superior Court

REPORT OF REFEREE - VOLUME 45A, PART 1

17,588

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

IN THE MATTER OF THE DETERMINATION)
3 OF THE RIGHTS TO THE USE OF THE)
SURFACE WATERS OF THE YAKIMA RIVER)
4 DRAINAGE BASIN, IN ACCORDANCE WITH)
THE PROVISIONS OF CHAPTER 90.03,)
)
5 THE STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
6)
Plaintiff,)
7)
v.)
8)
James J. Acquavella, et al.,)
9)
Defendants.)
10)

SUPPLEMENTAL
REPORT OF REFEREE
PURSUANT TO ORDER ON
EXCEPTIONS OF
DECEMBER 12, 2002
SUBBASIN NO. 10
(KITTITAS)

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

13 The Order issued by the Court on the December 12, 2002, ruled upon
14 several exceptions to the Report of Referee and remanded certain exceptions
15 to the Referee, with instructions, for further evaluation and subsequent
recommendations to the Court.

The following are the claims for which exceptions were filed

A.C.X. Trading, Inc., Brian Maier and Sheila Maier Claim No. 01958
18 Dorothy Anderson and Estate of Melvin Anderson, Claim No. 00549
Oscar L. Berger and Beverly J. Berger, Claim No. 02378
19 J. Scott Brown and Miriam Brown and Brian Norelius and Kim Norelius
and Charles S. Brown, Claim No. 01530
20 John James Cannell and Mark Charlton, Claims No. 02146 and 02147
Helen J. Clerf, Claim No. 01053
21 Howard F. Clerf and Vivian Clerf, Claim No. 01443
John S. Clerf and Janet J. Clerf, Claims No. 02141 and 02143
22 Robert H. Clerf and Sherre A. Clerf and Craig Clerf and Patricia
Clerf, Claim No. 00407
23 Robert H. Clerf and City of Kittitas, Claim No. 00476
Robert H. Clerf and Sherre A. Clerf, Claim No. 00677

25 | Supplemental Report of Referee
Subbasin No. 10

1 Cooke-Coleman LLC and Edwin Nestler and Jeannette Nestler and Mike
2 McArthur and Pat McArthur and Larry F. Beintema, Claim No. 00927
3 Betty Dodge and The Estate of Gerald Dodge, Claim No. 00190 & 00191
4 Loyal W. Erickson and Flora B. Erickson and William G. Viert and
Edgar Martinez and Holli Martinez and Steve K. Franchini and Diane
M. Franchini and Loran L. Kollmorgen and Sheila J. Kollmorgen,
Claim No. 01049
Keith R. Eslinger and Karen E. Eslinger, Claim No. 00613
Estate of Norma M. Flach, Claim No. 00683
Stephen K. German and Donna German and Cooke-Coleman LLC,
Claim No. 01141
Stephen K. German and Donna German, Albert F. Scott and Dorothy
Scott Claim No. 00605
Ronald Gibb and Douglas Gibb, Claim No. 05523
Addie L. Graaff and Estate of Gerald O. Graaff, Gary Forgey and
Brent Dekoning and Kirsten Dekoning, Claim No. 00676
Wayne L. Hanson and Lauren M. Hanson, Claim No. 01217
Larry Hansen, Jack G. Sikes and Ada M. Sikes Claim No. 01941
Don Jacobs and Judy Jacobs, Joe Jacobs and Doriene Jacobs,
Claim No. 00956
Kayser Ranch, Inc., Claim No. 00991
Sam Kayser and Lonni Kayser, Claim No. 01234
Mr. & Mrs. David Leaton, Roy C. Fann, Howard F. Clerf and Vivian
Clerf Claim No. 00844
J. Wayne McMeans and Cindy L. McMeans, Claim No. 02165 and 02166
J. Wayne McMeans and Cindy L. McMeans, John R. Gibb and Cathy S.
Gibb, Kevin W. Gibb and Julie Gibb, Claim No. 02167
John L. Miller and Laura D. Miller and Jay Bloxham and Christina
Bloxham and Larry Miller and Schiree Sullivan and Marly Onstot,
Claim No. 01010
Thomas J. Nisbet, Claim No. 00422
John Nylander, Claim No. 01445
Leland Orcutt and Burniece Orcutt and John L. Miller and Laura D.
Miller and Jay Bloxham and Christina Bloxham and Larry Miller and
Sherrie Miller and Schiree Sullivan, Claim No. 02088
Thomas J. Ringer, Claim No. 01744
Steven C. Rosbach and Christine Rosbach, Claim No. 00467
Henry J. Schnebly, et al. and Fred Schnebly and Jim Schnebly,
Claim No. 00979
Kenneth O. Sorenson and Carolyn Sorenson, Claim No. 01307
Paul J. Sorenson and Virginia R. Sorenson, Claims No. 01434 - 01437,
and 01439
Wallace M. Stampfly, Claim No. 00355
Sweet Grass Investments LLC, and Trust of Annine K. Sorenson
Claim No. 01448
Sweet Grass Investments, LLC, Claim No. 01041
Pat Thomason and Helen Warner and Nancy Carmody, Claim No. 00713
Estate of Theodore M. Wood and Geraldine Wood, Claim No. 01470

24
25 Supplemental Report of Referee
Subbasin No. 10

1 Additionally, on June 22, 2002, the Court issued an order accepting a
2 late exception filed by Palmer and Shirley Burris. The claim was scheduled
3 to be heard at the supplemental hearing. Requests to allow late exceptions
4 were also filed by Merton Purnell and Howard F. Clerf. On March 3, 2003,
5 the Court issued an order allowing those exceptions. Testimony on those
6 two exceptions was allowed during the supplemental hearing with the
7 understanding that the request would be filed with the Court.

SPECIAL ISSUES

Walter A. Bull v. Walter Meehan, et. al.

Many claimants are asserting rights as successors to Walter A. Bull for lands they believe were owned by Bull at the time of Walter A. Bull v. Walter Meehan, et. al, which was filed on April 20, 1885. The Referee in this discussion is referring to copies of the documents related to this case that were put in the record at the supplemental hearing by Thomas Nisbet as Exhibit DE-1726, tab "D". Other claimants in this proceeding have also put in copies of portions of this case. In the complaint Walter Bull stated that he owned all of Section 20, T. 17 N., R. 19 E.W.M., except the NW $\frac{1}{4}$ NW $\frac{1}{4}$, and that 160 acres in Section 20 is a timber culture. He also owned the SE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ and E $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 19, the NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30, all in T. 17 N., R. 19 E.W.M. The lands were situated on "Smith's Creek" or "Dry Creek" (what is now called Coleman Creek). He stated that 640 acres is commonly known as "meadow land", which is valuable as meadow and much of it is growing timothy and other tame grasses. He also stated that there is 400 acres that is dry land that will

Supplemental Report of Referee
Subbasin No. 10

1 not produce a crop of any kind without artifical irrigation. With
2 irrigation the plaintiff has raised valuable crops and with irrigation all
3 of the said lands are very fertile and of great value. As described in the
4 complaint, Walter A. Bull owned 1200 acres, 160 acres of which was timber
5 culture and presumably not irrigated; 640 acres were meadowland and not
6 being artificially irrigated or at least not being irrigated with Coleman
7 Creek water, and 400 acres were being irrigated with water diverted from
8 Coleman Creek.

9 The next document in the record for this case appears to be a
10 stipulated settlement of the case. The first class of water rights would
11 be those having water rights with ditches constructed in 1871 or before and
12 that each person having water rights by constructing ditches each
13 successive year would constitute a class, except that Walter A. Bull's
14 rights to one-tenth of the water of said creek shall not be affected by
15 this grading. The stipulation provided that when water was at its high
16 stage, all parties would be entitled to 160 inches of water for 160 acres
17 of land and 80 inches of water for an additional 160 acres of land. This
18 would be the upper limit for any party. It also provided for a reduction
19 for each class when the creek flow dropped. It also stated that no water
20 would be diverted for irrigation purposes after August 15 of each year and
21 after that date all water would be turned into the creek for stock
22 watering. Therefore, any water rights awarded to claimants who are
23 successors to parties to this stipulation shall have an irrigation season
24 that ends on August 15. Walter Bull's one-tenth of the flow was to be

25 Supplemental Report of Referee
 Subbasin No. 10

1 measured above William Dennis' irrigating ditch. The stipulation was
2 signed in October of 1886. The next documents for the most part are not
3 legible, but seem to be dated March of 1887 and relate to appointment of
4 the commissioner for administering the stipulation. Counsel for Thomas
5 Nisbet interprets the documents as replacing an ill commissioner (see
6 Nisbet exception, page 4); the Referee does not disagree with that
7 conclusion based on the limited wording that can be recognized.

8 The next document is a listing of each party to the case and the right
9 they are claiming. In addition to claimant name, the number of acres and
10 date the water right was initiated is identified, along with a witness to
11 substantiate the information. The eighth claim was that of Walter A.
12 Bull. He stated that he has 160 acres purchased from T. Hauser in 1871 and
13 40 acres purchased from H. M. Bryant, water for which was appropriated in
14 1871. The testimony was confirmed by T. Houser. The document as filed on
15 March 26, 1887, concludes with a statement that the commissioner was not
16 able to agree with Walter A. Bull's Claim No. 8, which involves a water
17 right for land not included in the suit when it was filed. That claim was
18 referred to the Judge. There is a note that on September 17, 1887, said
19 water right of Walter A. Bull was allowed. This notation makes it clear
20 that Bull's claim No. 8 was for lands other than those described in his
21 complaint. The earliest date of using water shown in the listing of each
22 party is 1870. The Referee interprets the stipulation to give Walter Bull
23 the senior water right amongst the named parties, but there is no
24 definitive statement of when he first began using water. Since he held the

25 Supplemental Report of Referee
Subbasin No. 10

1 senior water right, the Referee will use June 30, 1869, as the appropriate
2 priority date for successors to Walter Bull.

3 In sum, successors to Walter A. Bull would share a right to one-tenth
4 of the flow in Coleman Creek to irrigate up to 400 acres in Section 20,
5 except the NW $\frac{1}{4}$; the SE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ and E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 19, the NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$,
6 SW $\frac{1}{4}$ SE $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30, all in T. 17 N., R. 19 E.W.M. There are
7 also 160 acres in Section 20 that was a timber culture and presumably not
8 irrigated. The quantity of water that Bull had a right to divert was not
9 identified beyond one-tenth of the flow in the creek. The Bull v. Meehan
10 stipulation provided for one inch per acre up to 160 acres and one-half
11 inch per acre for an additional 160 acres. If you assumed one inch per
12 acre for the Bull water right, that would be 8 cubic feet per second for
13 400 acres. Following that same assumption, that 8 cfs is one-tenth of the
14 flow in Coleman Creek, the full flow would be 80 cfs. While there may be
15 more than 80 cfs in Coleman Creek during flood season, the Referee
16 concludes that would not be an unreasonable early irrigation season flow in
17 this particular creek. The lands Bull acquired from T. Houser and H. M.
18 Bryant, identified as Claim No. 8 would be entitled to 240 inches of water.

19 The complaint filed by Bull does not identify which of his lands were
20 being irrigated with water from Coleman Creek. However, the location of
21 the lands in relation to Coleman Creek is instructive. Coleman Creek flows
22 through the middle of Section 20 and is the only source of water in the
23 section. Coleman Creek joins Naneum Creek about 400 feet west of the
24 Section 19's east quarter corner. Naneum Creek flows through both the NE $\frac{1}{4}$

25 Supplemental Report of Referee
Subbasin No. 10

1 and SE $\frac{1}{4}$ of Section 19, flowing into Wilson Creek just south of the north
2 section line of Section 30. The Referee is very comfortable concluding
3 that the Bull land in Section 30 would not have been irrigated with water
4 diverted from Coleman Creek. Since construction of Interstate-82, most of
5 the NE $\frac{1}{4}$ of Section 30 and the S $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19 are taken up by the
6 freeway and ponds resulting from the gravel mining for the road
7 construction. It is reasonable to conclude that the land in Section 30 was
8 part of the meadowland mentioned in the complaint.

9 The land in the E $\frac{1}{4}$ NW $\frac{1}{4}$ and S $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 19 is located in an area
10 where the Referee concludes it would have been physically impossible to
11 deliver water diverted from Coleman Creek. The Bull Canal Company presented
12 evidence that lead the Referee to conclude that the NE $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$ of
13 Section 19 east of Interstate-82, the west 2172 feet of the S $\frac{1}{4}$ NW $\frac{1}{4}$, N $\frac{1}{4}$ SW $\frac{1}{4}$
14 and SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 20 were all being irrigated with water delivered by
15 Bull Canal Company. Bull Canal Company was formed around 1885 and Walter
16 Bull was one of the landowners involved in construction of the canal. Some
17 of the land irrigated with water delivered by Bull Canal Company could also
18 have been irrigated with water diverted from Coleman Creek. That land
19 would most likely be in the SE $\frac{1}{4}$ of Section 19. That would result in a
20 conclusion that the 400 acres being irrigated from Coleman Creek lies
21 within with the SE $\frac{1}{4}$ of Section 19 or in Section 20. The owners of the land
22 in Section 19 are not asserting rights to use water from Coleman Creek.
23 The land in Section 20 is now owned by Palmer and Shirley Burris, Thomas
24 Nisbet and Thomas Ringer, all three are asserting rights based on Bull v.

25 Supplemental Report of Referee
 Subbasin No. 10

1 Meehan. Ringer is asserting a right to irrigate 72 acres, see page ### of
2 this report; Nisbet is asserting a right to irrigate 190 acres, see page
3 ### and Burris is asserting a right to irrigate 84 acres, see page ###.
4 Between the three landowners, rights to irrigate a total of 346 acres are
5 asserted. See the analysis on the pages referenced for the Referee's
6 determination for each claim.

7 Prior Adjudication of Cooke Creek:

8 Several claimants own land in the area of Cooke Creek downstream of
9 the Town of Kittitas and are asserting rights to use water from Cooke
10 Creek, even though their predecessors were not awarded water rights in the
11 prior adjudication of Cooke Creek, State of Washington v. Anderson, et.
12 al., (hereinafter Anderson). At the initial evidentiary hearing for
13 Subbasin No. 10, claimants had made the assertion that the prior
14 adjudication did not address water rights for that portion of the creek
15 below the Cascade Canal. However, they presented no evidence to support
16 their position. Many claimants took exception to the Referee's
17 recommendation that water rights not be confirmed if there was not a water
18 right from the Anderson decree. At the Subbasin No. 10 exception hearing,
19 the Court remanded the exceptions on this issue with instructions. The
20 Court instructed the claimants to provide evidence in support of their
21 position, such as a copy of the Lis Pendens, the summons, the summons by
22 publication, a large scale copy of the state's map for that adjudication.
23 See the Court's Order on Exceptions entered on December 12, 2002, beginning
24 on page 15, line 17 and continuing on page 16.

25 Supplemental Report of Referee
 Subbasin No. 10

1 Both the Referee and the Court were faced with a similar issue in
2 Subbasin No. 18 (Cowiche Creek) where claimants asserted that the North
3 Fork of Cowiche Creek was not included in that adjudication. The claimants
4 making this assertion provided the Referee with copies of the Lis Pendens
and Summons. These two documents show the lands being addressed in the
5 adjudication and the names of the landowners who were made parties to the
case through personal service. These two documents were instrumental in
6 the Referee and ultimately the Court finding that the Cowiche Creek
7 adjudication did not include water rights on the North Fork of Cowiche
8 Creek.
9

10 The claimants making the same assertion for the lower part of Cooke
11 Creek were provided the same opportunity. However, not a single claimant
12 entered into evidence a copy of the Lis Pendens or the Summons, in spite of
13 the Court specifically instructing them to do so. The Referee cannot help
14 but wonder if those documents would have proved the opposite of the
15 claimants position -- that in fact the adjudication of Cooke Creek did
16 cover the lower portion of the creek and water rights just were not awarded
17 to their predecessors. The only argument by many of the claimants was to
18 again point to a very small scale copy of the adjudication map that shows
19 only a portion of lower Cooke Creek.

20 One claimant, John Nylander, did offer into evidence a copy of a
21 Kittitas County Superior Court case that the Referee believes supports the
22 claimants argument. Elizabeth Ferguson, T. J. and Lilly Morrison and Etta
Gore v. J. C. Sterling and wife, and W. T. Montgomery and wife, Kittitas
23

24
25 Supplemental Report of Referee
Subbasin No. 10

1 County Superior Court Case No. 7013, initiated on May 21, 1924. The
2 plaintiffs filed a complaint alleging the defendants use of Cooke Creek
3 water was depriving the plaintiffs of the use of the same water. The Court
4 issued a Restraining Order that limited the defendants to diverting no more
5 than two-thirds of the flow in lower Cooke Creek (also called Dry Creek).
6 That restraining order apparently ended the dispute. The lands that were
7 owned by the plaintiffs were in the SW~~NE~~ and NE~~SW~~ of Section 21,
8 T. 17 N., R. 19 E.W.M. Water rights were not awarded in Anderson for these
9 lands. The Court in its restraining order did not mention the prior
10 adjudication and it could be argued that since the restraining order was
11 entered, the Court must have concluded there was a valid right to use Cooke
12 Creek water, in spite of there not being an adjudicated right. The Referee
13 concludes this is one piece of evidence that would support a conclusion
14 that the adjudication did not include at least what is now the John
15 Nylander land. However, the Referee believes it is not conclusive.

16 The Referee continues to recommend that water rights for use of Cooke
17 Creek not be confirmed unless a right was awarded in Anderson. If the
18 claimants provide the Court with copies of the Lis Pendens or the summons
19 during the exception phase, this recommendation should be revisited.

20 Hearings, for the purpose of opening the record for testimony and
21 evidence relating to the exceptions, were conducted by the Referee
22 beginning on February 10, 2003. The Department of Ecology was represented
23 by Sam Bailey.

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25 Supplemental Report of Referee
Subbasin No. 10

1 The following index of claimants includes all those whose exceptions
2 were remanded to the Referee to take additional evidence at the
3 supplemental hearing, along with all claimants to whom water rights have
4 been awarded. Those claimants and their legal counsel, if so represented,
5 are as follows:

Court	Claim	No.	Name	Attorney	Page(s)
		01958	A.C.X. Trading, Inc. c/o John Gombos 5000 California Ave. Ste 205B Bakersfield, CA 93309-0724	Jeff Slothower, Attorney Lathrop Firm PO Box 1088 Ellensburg, WA 98926-1088	23
10	11	00289	Gerald L. Allphin & Beverly J. Allphin PO Box 844 Kittitas, WA 98934		367
12	13	00549	Melvin Anderson & Dorothy Anderson 3401 Sorenson RD Ellensburg, WA 98926		25
15	16	01149	Jack A. Baker & Becky R. Baker 6631 Cooke Canyon Road Ellensburg, WA 98926		327
17	18	00707 00708	E. Eugene Barnhart, Jr. & Hellen M. Barnhart 1850 Colockum Road Ellensburg, WA 98926		298, 299 334, 335
20	21	00707 00708	Kenneth E. Barnhart & Susan Barnhart 2441 Schnebly Road Ellensburg, WA 98926		298, 299 334, 335

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24
25 Supplemental Report of Referee
 Subbasin No. 10

1	00708	Estate of May S. Barnhart c/o E. Eugene Barnhart 1790 Colockum Road Ellensburg, WA 98926	335
2	00927	Larry F. Beintema 831 Cooke Canyon Road Ellensburg WA 98926-6975	Lawrence E. Martin Halverson & Applegate PO Box 22730 Yakima, WA 98907-2715
3			66
4			300
5			
6	02378	Oscar L. Berger & Beverly J. Berger 1271 Grindrod Road Ellensburg, WA 98926	26
7			
8	01010	Jay Bloxham	Richard T. Cole, Attorney
9	02088	& Christine Bloxham 5000 Parke Creek Road Ellensburg WA 98926	PO Box 499 Ellensburg WA 98926
10			177
11	02206	Boise Cascade Corporation	Dennis J. Dunphy, Attorney
12	A) 03119	Legal Department	1420 5th Avenue #3500
13	A) 05238	PO Box 50	to
14		Boise, ID 83707	Seattle, WA 98101
15			347
16	01530	Charles S. Brown 24621 NE 52nd Place Redmond WA 98053-8451	Richard T. Cole, Attorney
17			27
18	01530	J. Scott Brown & Miriam Brown 10245 NE 112th Avenue Kirkland WA 98033	PO Box 499 Ellensburg WA 98926
19			311
20	00900	Palmer Burris & Shirley Burris c/o Steven Burris 4870 Number 6 Road Ellensburg WA 98926-9663	Jeff Slothower, Attorney
21	02146	John James Cannell	Lathrop Law Firm
	02147	1011 Cascade Way Ellensburg, WA 98926-2326	PO Box 1088 Ellensburg WA 98927
22			31
23			265
24			
25		Supplemental Report of Referee Subbasin No. 10	35, 287
			288, 361

1	00713	Mark Charlton 4820 Fairview Road Ellensburg WA 98926-7101	James K. Adams, Attorney Wagner, Luloff & Adams 110 N. 5th Ave. Ste. 200 Yakima WA 98902	35 287 288 361
2				
3	00407	Craig Clerf & Patricia Clerf 1291 Clerf Road Ellensburg WA 98926	John P. Gilreath PO Box 499 Ellensburg WA 98926	57 319
4				
5	01053	Helen J. Clerf PO Box 807 Kittitas, WA 98934	John P. Gilreath, PO Box 499 Ellensburg, WA 98926	37, 342 344, 346
6				
7	00844	Howard F. Clerf	John P. Gilreath	43, 161
8	01443	& Vivian Clerf	PO Box 499	272, 365
9	05330	PO Box 689 Kittitas, WA 98934	Ellensburg, WA 98926	
10	02141	John S. Clerf	John P. Gilreath,	49, 53
11	02143	& Janet J. Clerf	PO Box 49	296, 317
(A) 05514		PO Box 635 Kittitas, WA 98934	Ellensburg, WA 98926	328
12				
13	00407	Robert H. Clerf	John P. Gilreath, Attorney	57
14	00677	Sherre A. Clerf 1231 Clerf RD Ellensburg, WA 98926	PO Box 499 Ellensburg, WA 98926-0499	285 319
15				
16	00476	Robert H. Clerf 1231 Clerf RD Ellensburg, WA 98926	John P. Gilreath, Attorney PO Box 499 Ellensburg, WA 98926-0499	57 319
17				
18	00740	Gwendolyn Cooke & Robert Cooke 2281 Ferguson Road North Ellensburg, WA 98926		324
19	00927	Cooke-Coleman, LLC	Jeff Slothower, Attorney	66
20	01141	c/o Gaylord Kellogg 1000 Second Avenue, Ste. 1200 Seattle WA 98104	Lathrop Law Firm PO Box 1088 Ellensburg WA 98926	133, 273 284, 290 322, 328
21				336
22				
23				
24				
25		Supplemental Report of Referee Subbasin No. 10		

1	00723	Lance Dean & Megan Dean 4080 Lyons Road Ellensburg WA 98926	304
2			
3	00676	Brent Dekoning & Kirsten Dekoning 12161 Thrall Road Ellensburg, WA 98926	82
4			
5			
6	01306	Doward Denning & Ida Denning 9492 Brick Mill Road Ellensburg, WA 98926	341
7			
8	01426	Kenneth G. Dimeo & Debbie L. Dimeo 8501 SE Grizzly Rd Madras, OR 97741	301
9			
10	00190	Betty Dodge	Jeff Slothower 85, 325
11	(A) 06383	& Estate of Gerald Dodge	Lathrop Law Firm 333, 370
12	00191	1641 Payne Road	PO Box 1088
13	(A) 02101	Ellensburg WA 98926	Ellensburg WA 98926
14	(A) 02102		
15	(A) 06384		
16	00858	Ray L. Durgan & Doris Durgan 10760 Brick Mill RD Ellensburg, WA 98926	274
17			
18	00597	Anita Edgar 1210 Watson Road Ellensburg, WA 98926	92
19			321
20	00613	Keith R. Eslinger & Karen E. Eslinger 3530 Ferguson Road South Ellensburg, WA 98926	Jamie M. Morin, Attorney 103 Mentor Law Group 297 1100 Market Place Tower 312 2025 First Avenue Seattle WA 98121
21	00683	Estate of Norma M. Flach 1681 Colockum Road Ellensburg, WA 98926	117, 289 337, 356 357, 366
22			
23			
24			
25		Supplemental Report of Referee Subbasin No. 10	

1	00676	Gary Forgey 2610 Sorenson Road Ellensburg, WA 98926	82
2	01049	Steve K. Franchini & Diane M. Franchini 23855 SE 472nd Enumclaw, WA 98022	Jeff Slothower Lathrop Law Firm PO Box 1088 Ellensburg WA 98926
3	00972	Donald L. Frye & Charlotte A. Frye 3970 Lyons RD Ellensburg, WA 98926	130 302
4	00499	Clifford S. Gage & Phyllis R. Gage 9440 Manastash Road Ellensburg, WA 98926	313
5	00605	Stephen K. German	131, 133
6	(A) 01749	& Donna German	269, 303
7	01141	11040 Fairview Road Ellensburg, WA 98926-6936	346
8	02167	John R. Gibb & Kevin W. Gibb 822 N. Ferguson Road Ellensburg WA 98926	Richard T. Cole PO Box 499 Ellensburg WA 98926
9	05522	Ronald Gibb	165
10	(A) 06435	Douglas Gibb	304
11	05523	4360 Denmark Road	
12	(A) 06436	Ellensburg, WA 98926	Lawrence E. Martin Halverson & Applegate PO Box 22730 Yakima WA 98907-2715
13	00676	Addie L. Graaff & Estate of Gerald O. Graaff 1171 Cleman RD Ellensburg, WA 98926	147 275 291
14	01557	Richard T. Cole, Attorney PO Box 499 Ellensburg, WA 98926-0499	82
15	00849	Rick Haberman 3600 Lyons Road Ellensburg, WA 98926-6631	326
16			
17			
18			
19			
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24			
25		Supplemental Report of Referee Subbasin No. 10	

1	01941	Larry Hansen 23220 SE 47th Way Sammamish, WA 98075-6818	Richard T. Cole, Attorney 151 PO Box 499 Ellensburg, WA 98926-0499
2			
3	01217	Wayne L. Hanson	149
4	01218	& Lauren M. Hanson 10690 Vantage HWY Ellensburg, WA 98926	
5	00956	Don Jacobs & Judy Jacobs Joe & Doriene Jacobs 7420 Number 6 Road Ellensburg, WA 98926	Jamie M. Morin, Attorney 153 Mentor Law Group 1100 Market Place Tower 2025 First Avenue Seattle WA 98121
6			
7			
8	00900	Calvin Jansen & Rhonda Jansen 401 McGreer Road Selah, WA 98942	31
9			
10	01058	Douglas Johnson & Nancy Johnson 3780 Road 3 NE Moses Lake, WA 98837-9679	276
11			
12			
13	02258	Gregory Jordan & Elizabeth Jordan 523 Valley Mall PKY #147 Wenatchee, WA 98802-4835	277
14			
15	01234	Sam Kayser	James K. Adams, Attorney 158
16	(A) 06380	& Lonni Kayser 12141 Fairview Road Ellensburg, WA 98926-6937	Wagner, Luloff & Adams 266 110 N. 5th Ave. Ste. 200 298 Yakima, WA 98902 299
17			
18	00991	Kayser Ranch, Inc. 12260 Fairview Road Ellensburg, WA 98926-6939	James K. Adams, Attorney 157 Wagner, Luloff & Adams 345 110 N. 5th Ave. Ste. 200 Yakima, WA 98902
19			
20	00467	Kittitas, City of PO Box 719 Kittitas, WA 98934	Lawrence E. Martin 57 Halverson & Applegate PO Box 22730 Yakima WA 98907-2715
21			
22			
23			
24			
25		Supplemental Report of Referee Subbasin No. 10	

1	01049	Loran L. Kollmorgen & Sheila J. Kollmorgen 14306 - 23rd Ave. SW Burien, WA 98166-1009	Jeff Slothower Lathrop Law Firm PO Box 1088 Ellensburg WA 98926	93
2				
3				
4	00849	Robert L. Krasean PO Box 2144 Belfair, WA 98528-2144		373
5				
6	06564	Joan G. Laws 2700 N Wenas RD Selah, WA 98942-9524		314
7				
8	00844	David Leaton & Mrs. David Leaton 411 Prater Road Ellensburg, WA 98926	Jeff Slothower Lathrop Law Firm PO Box 1088 Ellensburg WA 98926	161
9				
10	01426	Todd D. Lopeman 200 Cook Canyon Road Ellensburg, WA 98926		307
11				
12	01958	Brian Maier & Sheila Maier (mail to attorney only)	Jeff Slothower, Attorney Lathrop Firm PO Box 1088 Ellensburg, WA 98926-1088	24
13				
14	01049	Edgar Martinez & Holli Martinez 8401 Brick Mill Road Ellensburg, WA 98926	Jeff Slothower, Attorney Lathrop Firm PO Box 1088 Ellensburg WA 98926-1088	93
15				283
16				
17	01873	Michael C. Marvich 5611 Number 81 Road Ellensburg, WA 98926	Detta Marvich, Agent 8011 SE 56th Mercer Island, WA 98040-4801	317
18				
19	00927	Mike McArthur & Pat McArthur 26425 SE 39th Street Issaquah WA 98029-9164	Richard T. Cole, PO Box 499 Ellensburg WA 98926	66
20				
21	00783	Maurice McGrath & Joanna M. McGrath 1520 260th ST E Spanaway, WA 98387-9418	John P. Gilreath, Attorney PO Box 499 Ellensburg, WA 98926-0499	364
22				
23				
24				
25		Supplemental Report of Referee Subbasin No. 10		

1	02165	J. Wayne McMeans	Richard T. Cole,	165
	02166	& Cindy L. McMeans	PO Box 499	314
2	02167	820 Colockum RD	Ellensburg, WA 98926-0499	352
	(A) 05550	Ellensburg, WA 98926		
3	01010	John L. Miller	John P. Gilreath, Attorney	177
4	02088	& Laura D. Miller 2813 Airport Road Ellensburg, WA 98926-9336	PO Box 499 Ellensburg, WA 98926-0499	
5	01010	Larry Miller	Richard T. Cole	177
6	02088	& Sherrie Miller 4880 Parke Creek Road Ellensburg WA 98926	PO Box 499 Ellensburg WA 98926	
7	02247	Harry E. Moore 10363 Vantage Highway Ellensburg, WA 98926	Kenneth D. Beckley, Law Office of Ken Beckley 701 N Pine Street Ellensburg, WA 98926-2939	371
8	01252	N. N. Eaton & Sons 12771 State Route 821 Ellensburg, WA 98926		353
9	00927	Edwin Nestler & Jeannette Nestler 861 Cooke Canyon Road Ellensburg, WA 98926	Lawrence E. Martin Halverson & Applegate PO Box 22730 Yakima WA 98907-2715	66 338 362
10	00422	Thomas Nisbet 404 Angford Drive Ellensburg WA 98926-3276	John P. Gilreath PO Box 499 Ellensburg WA 98926-0499	181 267, 357 369
11	01530	Brian Norelius & Kim Norelius 791 Grindrod Road	Richard T. Cole PO Box 499 Ellensburg WA 98926	27 315
12	01445	John Nylander 9311 SE 68th Mercer Island, WA 98040	Jamie M. Morin, Attorney, Mentor Law Group 1100 Market Place Tower 2025 First Avenue Seattle WA 98121	193 370
13	01417	John Oleksy		364
14	01418	& Kim Oleksy 10291 Fairview Road Ellensburg, WA 98926-6934		

24
25 Supplemental Report of Referee
Subbasin No. 10

1	00849	Timothy Olexsy & Barbara Olexsy 101 North Anderson Street Ellensburg WA 98926	373
2			
3	01010	Marly Onstot	Richard T. Cole, Attorney 177
4	02088	PO Box 158 Ellensburg WA 98926-0158	PO Box 499 Ellensburg WA 98926-0499
5	02088	Leland Orcutt & Burniece Orcutt 1800 Fox Road Ellensburg WA 98926-7043	Richard T. Cole 177 PO Box 499 Ellensburg WA 98926-0499
6			
7	00929	Fred Palmiero & Francis Joy Palmiero 330 Number 81 Rd Ellensburg, WA 98926-9086	368
8			
9	00723	John L. Paul & Muriel G. Paul 912 E. 2nd Avenue Ellensburg, WA 98926-3416	304
10			
11	02091	Robert C. Paul	Jeff Slothower, Attorney 198
12	02092	& Margaret E. Paul P.O. Box 1278 Kittitas, WA 98934-1278	Lathrop Firm 305 PO Box 1088 320 Ellensburg, WA 98926-1088
13			
14	01150	James J. Peterson & Carolyn B. Johnson 6633 Cooke Canyon Road Ellensburg, WA 98926	329
15			
16	01329	Merton Purnell 7151 Brick Mill RD Ellensburg, WA 98926	199 308 358
17			
18	01557	Scott Repp & Mary Jo Repp 1570 Robinson Canyon Road Ellensburg, WA 98926-8022	326
19			
20	01744	Thomas J. Ringer 5750 Number 6 Road Ellensburg, WA 98926-6801	Jeff Slothower, Lathrop Law Firm 204 P.O. Box 1088 268 Ellensburg, WA 98926-1088
21			
22			
23			
24			
25		Supplemental Report of Referee Subbasin No. 10	

1	00467	Steven C. Rosbach	Richard T. Cole,	207
	00506	& Christine Rosbach	PO Box 499	316
2		2180 Ferguson Road South	Ellensburg, WA 98926-0499	
		Ellensburg, WA 98926		
3	02064	Craig P. Schnebly	Richard D. Cole, Attorney	213
4		& Nancy L. Schnebly	PO Box 499	284
		2570 Schnebly RD	Ellensburg WA 98926-0499	363
5		Ellensburg, WA 98926		
6	00979	Fred Schnebly	James K. Adams, 217, 270-	
	(A) 04783	5381 Number 81 Road	Wagner, Luloff & Adams 272, 278-	
7	(A) 05073	Ellensburg, WA 98926	110 N. 5th Avenue Ste 200 282	
			Yakima WA 98902 297, 306, 360	
8	00979	Henry J. Schnebly, et al.	James K. Adams, 217, 270-	
	(A) 04783	6281 Brick Mill RD	Wagner, Luloff & Adams 272, 278-	
9	(A) 05073	Ellensburg, WA 98926	110 N. 5th Avenue Ste 200 282	
	01097		Yakima WA 98902 285, 286, 297	
10			306, 360	
11	00979	Jim Schnebly	James K. Adams, 217, 270-	
	(A) 04783	4500 Brick Mill Road	Wagner, Luloff & Adams 272, 278-	
12	(A) 05073	Ellensburg, WA 98926	110 N. 5th Avenue Ste. 200 282	
			Yakima WA 98902 297, 306, 360	
13	00605	Albert F. Scott	Richard T. Cole, 131, 269	
14	(A) 01749	& Dorothy Scott	PO Box 499 309, 389	
		PO Box 2085	Ellensburg, WA 98926 341, 346	
15		North Bend, WA 98045-2085		
16	02196	Michael Joseph Shannon		330
		7340 Cooke Canyon RD		
17		Ellensburg, WA 98926		
18	00887	William V. Shelton	John P. Gilreath, Attorney 222	
		8411 Lyons Road	PO Box 499 340	
19		Ellensburg, WA 98926	Ellensburg, WA 98926 359	
20	01941	Jack G. Sikes		151
		& Ada M. Sikes		
21		c/o Jack Sikes, Jr.		
		23233 East Settler Drive		
22		Liberty Lake, WA 99019-8524		
23				
24				
25		Supplemental Report of Referee		
		Subbasin No. 10		

1	01962	Richard A. Slyfield & Jane Gede Slyfield 1331 Grindrod RD Ellensburg, WA 98926-5020	354
2	01448	Trust of Annine K. Sorenson c/o Emil Wilburt Sorenson, 118 - 11th Avenue Kirkland, WA 98033-5519	John P. Gilreath, Attorney 244 PO Box 499 318 Ellensburg, WA 98926
3	01334	Ellen Sorenson 3500 Moe Road Ellensburg WA 98926-8468	292
4	01307	Kenneth O. Sorenson & Carolyn Sorenson 850 Alkali Road Ellensburg, WA 98926	James E. Davis, Attorney 223 PO Box 590 306 Yakima WA 98907 318
5	00180	Leroy Sorenson	309
6	00181	& Doris Sorenson	
7	00182	c/o Joe & Billis Sorenson 221 Camino Arroyo N Palm Desert CA 92260-0379	
8	01432	Paul J. Sorenson	James E. Davis, Attorney 228
9	01433	& Virginia R. Sorenson	PO Box 590 294
10	01434	3500 Moe RD	Yakima WA 98907 295, 296
11	01435	Ellensburg, WA 98926	
12	01436		
13	01437		
14	01438		
15	01439		
16	00462	Wallace M. Stampfly	Jeff Slothower 239
17	00355	2453 Charlton Road	Lathrop Law Firm 319
18		Ellensburg, WA 98926	PO Box 1088 355
19			Ellensburg WA 98926-1088
20	00849	Dr. & Mrs. Kenneth R. Stillwell 4537 South Yakima Avenue Tacoma, WA 98408	373
21	01010	Schiree Sullivan	Richard T. Cole, Attorney 177
22	02088	PO Box 1352 Ellensburg WA 98926-1352	PO Box 499 Ellensburg WA 98926-0499
23			
24			
25		Supplemental Report of Referee Subbasin No. 10	

1	01041	Sweet Grass Investments, LLC	Richard T. Cole	244, 251
	01448	c/o Brian Sims	Attorney	318
2		823 Carriage Hill Drive	PO Box 499	
		Yakima WA 98908	Ellensburg WA 98926-0499	
3	00713	Pat Thomason	Richard T. Cole,	357
4		& Helen Warner	Attorney	
		10240 SW Wasco Way	PO Box 499	
5		Tulatin, OR 97062	Ellensburg WA 98926-0499	
6	01426	Michael P. Tomich		307
7		& Nancy Tomich		
		228 Union Avenue		
8		New Providence, NJ 07974		
9	02276	United States of America	Charles E. O'Connell, Jr.	372
	(A) 03074		United States Dept. of Justice	
	(A) 05548		Indian Resources Section	
	(A) 14495		PO Box 44378	
10			Washington, DC 20026-4378	
11	01049	William G. Viert	Jeff Slothower, Attorney	93
12		PO Box 4306	Lathrop Firm	
		Spanaway WA 98387-4020	PO Box 1088	
			Ellensburg, WA 98926-1088	
13	00261	Steve Wallace		293
14		& Deborah L. Wallace		343
15		11011 Fairview RD		
		Ellensburg, WA 98926		
16	01600	WA State Parks & Rec. Commission		323
17		Resources Development Division		356
		PO Box 42650		
		Olympia WA 98504-2650		
18	00564	Harry Waterman		331
19		6971 Cooke Canyon Road		
		Ellensburg WA 98926		
20	00720	Donald R. Weber	John P. Gilreath,	365
21		& Barbara Weber	Attorney	
		1251 Fox RD	PO Box 499	
		Ellensburg, WA 98926	Ellensburg WA 98926-0499	
22				
23				
24				
25		Supplemental Report of Referee		
		Subbasin No. 10		

1	01746	Willard A. Williams & Mildred Williams 9910 Fairview Road Ellensburg, WA 98926	342
2	01470	Estate of Theodore M. Wood 7521 Tjossem RD Ellensburg, WA 98926	Richard T. Cole, Attorney 262 PO Box 499 Ellensburg, WA 98926-0499
3	01218	Warren G. Wood & Laura A. Wood M. Leonard Wood Box 659 Kittitas, WA 98934	149
4	06343	Pamela Zupan 6011 Cooke Canyon Road Ellensburg, WA 98926	332

Claimant Testimony

Based upon the testimony and evidence provided to the Referee, the analysis of the remanded claims is as follows:

COURT CLAIM NO. 01958 -- A.C.X. Trading
Brian Maier
& Sheila Maier

A.C.X. Trading, Inc., took exception to the Referee's Report for Subbasin No. 10. They are represented by Attorney Jeff Slothower and Chris Carrow, an employee of A.C.X. Trading, testified at the supplemental hearing.

Prior to addressing the merits of the exception, the Referee will respond to the status of the parties associated with the claim. Court Claim No. 01958 was originally filed by Egon and Pam Wegner, but in 1990 their interest in the claim was transferred to Yakima Valley Bank. In 1991 Brian

Supplemental Report of Referee
Subbasin No. 10

1 and Sheila Maier were substituted for Yakima Valley Bank becoming the sole
2 claimants. The claim stayed in their name until 1998, when Mr. Slothower,
3 representing A.C.X. Trading, Inc., filed a Motion to be Joined as Additional
4 Party Defendant. The Court signed the Order joining A.C.X. Trading, Inc.,
5 on August 20, 1998. When a party is joined to a claim, the named claimant
6 remains associated with the claim.

7 The exception filed by A.C.X. Trading, Inc., seeks clarification that
8 the Fire Suppression Stipulation entered by the Court applies to Subbasin
9 No. 10 and specifically to Coleman Creek as it flows through their
10 property. The evidence shows that the claimant's land, in the S $\frac{1}{2}$ SE $\frac{1}{4}$ and
11 NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 33, T. 18 N., R. 19 E.W.M. is irrigated solely with water
12 delivered by Cascade Irrigation District. Cascade spills water into Coleman
13 Creek and then the claimants divert it from the creek to a pond on the
14 property. Water is pumped from the pond for a small amount of irrigation.
15 There is also a fire suppression system that is connected to the pond.
16 Automatic sprinklers in the buildings will activate the pump if there is a
17 fire in any of the buildings. The pump can also be manually started if the
18 fire is outside the buildings. Water is diverted during the irrigation
19 season to keep the pond full. In the winter, water is diverted only if
there is a fire.

20 On December 12, 1996, the Court entered its Stipulation RE: Water Use
21 For Fire Suppression. It states that "Use of water for fire suppression is
22 a recognized emergency use and does not require a water right." It also
23 defined fire suppression as ". . . the act of extinguishing a fire, or

24
25 Supplemental Report of Referee
Subbasin No. 10

1 protecting property in the vicinity of a fire, which poses an imminent
2 threat to safety or property."

3 This stipulation would apply to Coleman Creek and to the claimant's
4 property. If there is a fire on the claimants property, water from Coleman
5 Creek can be diverted to suppress the fire. The claimant's exception,
6 therefore, is granted.

7 **COURT CLAIM NO. 00549 -- Dorothy Anderson**
8 & **Estate of Melvin Anderson**

9 Mrs. Anderson filed an exception to the Report of Referee for Subbasin
10 No. 10, seeking to have a water right for watering livestock recognized by
11 the Court. Her son, William C. Anderson, testified at the supplemental
hearing.

12 The Andersons own 157 acres in the SW $\frac{1}{4}$ of Section 24, T. 17 N.,
13 R. 19 E.W.M. Irrigation water is provided by Ellensburg Water Company, a
14 major claimant in this proceedings, whose water rights were determined by
15 the Court in the Major Claimant Pathway, see Report of the Court and
16 Supplemental Report of the Court for Ellensburg Water Company, filed on
17 February 14, 1997, and October 27, 1997, and Conditional Final Order
18 entered on March 12, 1998. The only water right the Andersons are seeking
19 in Subbasin No. 10 is a water right for their livestock drinking directly
20 from Johnson Drain. The Andersons have up to 300 head of livestock on
21 their land. Livestock drinking directly from the water source is a
22 non-diversionary use that is covered by the stock water stipulation
23 discussed on page 4 of the Report of Referee. The Andersons, therefore,

24
25 Supplemental Report of Referee
Subbasin No. 10

1 have a non-diversionary stock water right under that stipulation. No
2 additional water right or authorization is needed.

3 The Referee does note that on State's Map Exhibit SE-2 Johnson Drain
4 begins just below the Cascade Canal and flows through areas that are
5 irrigated with water delivered by Cascade Irrigation District (CID) and
6 Ellensburg Water Company (EWC). Undoubtedly some of the water flowing in
7 the drain is return flow that is seepage from those canals or is the result
8 of irrigating the surrounding lands with CID or EWC water. This water
9 would be considered foreign return flow water for which water rights cannot
10 be established (see the Report of Referee for Subbasin No. 10, beginning on
11 page 8 for a complete discussion of return flow waters). The
12 non-diversionary stock water right herein confirmed is for only whatever
13 naturally occurring surface water are flowing in Johnson Drain.
14

**COURT CLAIM NO. 02378 -- Oscar L. Berger
& Beverly J. Berger**

Oscar Berger filed an exception to the Referee not recognizing a
non-diversionary stock water right for his land. Mr. Berger appeared and
testified at the supplemental hearing.

The Bergers own approximately 9 acres in that portion of the SE~~SE~~NE of
Section 19, T. 18 N., R. 20 E.W.M. lying west of Caribou Creek. They
irrigate about 8 acres with water delivered by the Kittitas Reclamation
District (KRD). Although there is some evidence that historically a water
right to use Caribou Creek on this land may have been established, it was
obvious from Mr. Berger's testimony that only water delivered by KRD has

Supplemental Report of Referee
Subbasin No. 10

1 been used on the land for over 20 years. The Bergers do own livestock that
2 have access to Caribou Creek. The livestock drink directly from the creek
3 all year. This type of non-diversionary stock watering is covered by the
4 stock water stipulation that was discussed in detail on page 4 of the
5 Report of Referee for Subbasin No. 10. Based on the evidence presented by
6 Mr. Berger, the Referee concludes that the Bergers have a non-diversionary
7 stock water right under that stipulation equivalent to that held by those
8 claimants on the non-diversionary stock water list that is on pages 528 and
9 529 of the Report of Referee.

10 COURT CLAIM NO. 01530 -- J. Scott Brown
11 & Miriam Brown
12 Brian Norelius
13 & Kim Norelius
14 Charles S. Brown

15 The Report of Referee, Subbasin No. 10 (Kittitas), recommends
16 confirmation of a water right under Court Claim No. 01530 in the name of
17 Corneille and Robert W. Ross. The Rosses sold the land described in Court
18 Claim No. 01530 to Scott Rupp and Tom Fenz who in turn sold it to John
19 Scott and Miriam Brown, Charles Brown and Brian and Kim Norelius. On
20 April 5, 2002, exceptions to the Report of Referee were filed with the
21 Court in behalf of the property owners, the Browns and Norelius. On
22 February 19, 2003, the Court granted the motions of the Browns and Norelius
23 to be substituted for specific lands being portions of the place of use
24 under Court Claim No. 01530. John Scott Brown and Brian Norelius testified
25 at the Referee's supplemental evidentiary hearing. The claimants were all
represented by Attorney Richard Cole at the hearing.

Supplemental Report of Referee
Subbasin No. 10

1 John Scott and Miriam Brown and Charles Brown own the NE~~4~~SW~~4~~% of
2 Section 19, T. 18 N., R. 20 E.W.M. John Scott and Miriam Brown own that
3 portion of the SW~~4~~SE~~4~~% of Section 19, T. 18 N., R. 20 E.W.M. lying east of
4 Spring Creek. Brian and Kim Norelius own that portion of the SW~~4~~SE~~4~~% of
5 Section 19, T. 18 N., R. 20 E.W.M. lying west of Spring Creek.

6 John Brown testified that 10 acres are irrigated in that portion of the
7 E~~4~~NE~~4~~SW~~4~~% of Section 19, T. 18 N., R. 20 E.W.M. lying southwest of Cooke
8 Creek. This property is held in common by John Scott and Miriam Brown and
9 Charles Brown. John Scott and Miriam Brown have exclusive ownership of
10 that portion of the SW~~4~~SE~~4~~% of Section 19, T. 18 N., R. 20 E.W.M. lying east
11 of Spring Creek. A total of 12 acres are irrigated in this 13.54-acre
12 parcel. It is noted that a parcel roughly described as the west 400 feet of
13 the north 550 feet of the SW~~4~~SE~~4~~% is under ownership by the Browns and is
14 not irrigated. Brian and Kim Norelius own a 23.08-acre parcel lying in the
15 SW~~4~~SE~~4~~% of Section 19, T. 18 N., R. 20 E.W.M. lying west of Spring Creek. A
16 total of 23 acres are irrigated from Cooke Creek in this parcel.

17 The exceptions filed by claimants Brown and Norelius are as follows:

18 (A) The priority date recommended should be changed to 1871
19 consistent with Exhibit DE-1799 (A. J. Bailes statement of claim
from Anderson) and the month and year should be changed to the
beginning of the irrigation season, i.e. April 1.

20 (B) The season of use in the Report of Referee should be amended
21 to allow irrigation as soon as frost is out of the ground.

22 (C) The annual water duty recommended should be 6 - 8 acre-feet
23 per acre to reflect testimony of expert witness Richard C. Bain.

24 The priority date for the water right that was recommended for
25 confirmation is the priority date that was awarded in Anderson. The

Supplemental Report of Referee
Subbasin No. 10

1 claimants argue that the information in the statement of claim that was
2 filed by A. J. Bailes making him a party to Anderson (DE-1799) would lead
3 to a conclusion that the priority date should be 1871, not 1873. The
4 statement of claim of A. J. Bailes obviously was part of the record
5 evaluated by the Anderson Court, yet the Court still recommended an 1873
6 priority date. If the Anderson Court reached an erroneous conclusion on
7 the appropriate priority date, it was Bailes' responsibility to challenge
8 that date. Upon entry of the decree, the priority date is set and will not
9 be disturbed by this Court. Therefore, that portion of their exception is
10 denied. The claimants also ask that the month and year in the priority
11 date be changed. The Court denied that exception at the exception hearing,
12 see ruling beginning on page 6, line 25 of the Order on Exceptions filed on
December 12, 2002.

13 The Court at the exception hearing granted the exception taken by
14 numerous claimants to the irrigation season that was authorized for water
15 rights to use Cooke Creek stemming from Anderson. The Court ruled that the
16 irrigation season would be April 15, rather than May 15 as authorized by
17 the Cooke Creek certificates and that water use could begin as soon as
18 frost is out of the ground. The Referee will change the authorized
19 irrigation season to reflect the beginning date of April 15 and will add a
20 Limitation on Use section that allows use of water before April 15 if frost
21 is out of the ground and water can be beneficially used.

22 The last exception was regarding the water duty that was awarded.
23 Several claimants took exception to the annual quantity of water that was
24

25 Supplemental Report of Referee
Subbasin No. 10

1 awarded in the Report of Referee, asserting that the Referee ignored
2 testimony about the quantity of water that is needed to irrigate their land
3 and instead using a "standard water duty" that was not specific to any
4 particular land. The Court remanded this exception with instructions,
5 which begin on page 7, line 16, of the Order on Exceptions and continues to
6 page 7, line 21 $\frac{1}{2}$. For water rights on Cooke Creek that are based on the
7 Anderson decree, the Court ruled as follows:

8 ". . . when a prior decree awarded a specific instantaneous
9 quantity for each acre irrigated, the Referee can only award the
10 annual quantity that can physically be diverted during the
11 authorized irrigation season. Cooke Creek was previously
12 adjudicated and authorized the diversion of 0.02 cubic foot per
13 second for each acre irrigated; a continuous diversion of 0.02 cfs
14 would result in 5.46 acre-feet per year per acre being withdrawn
15 for use on the land."

16 Since the claimants land enjoys a right that stems from Anderson, their
17 water right is limited to no more than 5.46 acre-feet per year. The
18 initial recommendation was for 5 acre-feet per acre, which the Referee will
19 modify to 5.46 acre-feet per year per acre. Water available in Cooke Creek
20 is a combination of natural flow and return flow. The record consistently
21 shows that after the spring runoff, a high percentage of the Cooke Creek
22 water is return flow. Undoubtedly any water used by the claimants in
23 excess of 5.46 acre-feet per acre is return flow water for which a water
24 right cannot be awarded.

25 In the interest of clarifying the interest of each party to the 45 acre
water right previously recommended, the Referee will divide the right
between the three parcels irrigated and their ownership.

Supplemental Report of Referee
Subbasin No. 10

1 COURT CLAIM NO. 01530 -- Palmer Burris
2 & Shirley Burris
Calvin Jansen
& Rhonda Jansen

4 Palmer and Shirley Burris filed an exception to the Referee's
5 recommendation that a water right not be awarded for lands they now own.
6 The claimants are represented by Attorney Jeff Slothower and their son,
7 Stephen P. Burris, testified at the supplemental hearing. The Jansens no
8 longer have an interest in the lands lying in Subbasin No. 10, but continue
9 to have an interest in lands described in Court Claim No. 00900 lying in
Subbasin No. 9.

10 The Burris' own the SW_{1/4}SW_{1/4} and SE_{1/4}SE_{1/4} of Section 17, the NW_{1/4}NE_{1/4}, and
11 NW_{1/4}NW_{1/4} of Section 20 and portions of the SW_{1/4}NE_{1/4} and SW_{1/4}NW_{1/4} of Section 20, all
12 in T. 17 N., R. 19 E.W.M. and are asserting a right to irrigate a portion
13 of the land with water diverted from Coleman Creek. Exhibit DE-1629 is an
14 aerial photograph on which the claimant has outlined in blue the lands
15 irrigated with water diverted from Coleman Creek. DE-1623 is a black and
16 white aerial photograph on which the claimant has marked section lines and
17 the quarter/quarter designations within the section. Review of those
18 exhibits has assisted the Referee in describing the lands irrigated with
19 Coleman Creek water as follows: Those portions of the NE_{1/4}NE_{1/4}, SW_{1/4}NE_{1/4} and
20 SE_{1/4}NW_{1/4} all lying north of Coleman Creek, the NE_{1/4}NW_{1/4}NE_{1/4}, the SW_{1/4}NW_{1/4}NE_{1/4}, all
21 in Section 20, T. 17 N., R. 19 E.W.M. and the SW_{1/4}SE_{1/4} of Section 17,
22 T. 17 N., R. 19 E.W.M. Between 80 and 84 acres are irrigated within this
23 area. The irrigation system consists of a buried mainline that runs down

24
25 Supplemental Report of Referee
Subbasin No. 10

1 the center of the irrigated area with lateral pipe on the surface on both
2 sides of the mainline. Water delivered by Ellensburg Water Company through
3 the Town Ditch and Bull Canal Company is used on other lands owned by the
4 claimant. Mr. Burris testified that with the system that is installed,
5 water delivered by either of the two companies could not be used on the
6 land that is being irrigated with Coleman Creek water.

7 Mr. Burris entered into evidence DE-1632 and 1635, which are Kittitas
8 County Conservation District soil survey maps, one for Section 20 and one
9 for Section 17. The claimant suggests they show the fields and drainage
10 ditches that Mr. Burris' water flows out of. However, the Referee does not
11 reach the same conclusion. DE-1636 is the legend for those maps, which
12 indicates how irrigation ditches and drains would be indicated on the map.
13 The Referee can find no ditches or drains marked on the map. The fields
14 may be delineated, however, the legend does not indicate a legend for field
markings.

15 At the initial evidentiary hearing, evidence was placed in the record
16 to show that patent(s) issued to Walter A. Bull for all of the NE $\frac{1}{4}$ of
17 Section 20, except the SE $\frac{1}{4}$ NE $\frac{1}{4}$, and the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 17. A copy of the
18 patent, which was signed on April 5, 1877, was put in the record by Thomas
19 Nisbet as part of Exhibit DE-1726. The record does not show how or when
20 Walter A. Bull acquired the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 20. However, by 1885 when
21 the complaint in Walter A. Bull v. Martin Meehan et al. was filed Walter
22 Bull owned all of Section 20, except the NW $\frac{1}{4}$ NW $\frac{1}{4}$, along with other lands.
23 The complaint does not identify any lands in Section 17 that were being

24
25 Supplemental Report of Referee
Subbasin No. 10

1 irrigated by Walter Bull with water from Coleman Creek. The Referee
2 discusses this case in detail and the documents submitted by the claimants
3 on page 3 of this report and the details will not be further discussed,
4 except as they relate to the Burris claim. The complaint filed by Bull
5 does not identify which of his lands were being irrigated with water from
6 Coleman Creek. However, as discussed on pages 5 and 6, the Referee
7 concludes that the 400 acres being irrigated with water from Coleman Creek
8 lies in the SE $\frac{1}{4}$ of Section 19 and in Section 20. The priority date for the
9 water right would be 1869.

10 The claimants also offered DE-1631 in an attempt to show water use
prior to 1932. This is a copy of a 1917 lease of the S $\frac{1}{4}$ NW $\frac{1}{4}$, W $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$
(the claimant believes this quarter/quarter section is in error, as that
land was not owned by the Clerfs in 1917) of Section 20 and the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of
Section 17, between Henry Clerf and W. J. McNivin. The lease is for the
land, "together with water rights, irrigating ditches and appurtenances . . .
. The lease goes on to state that the lessee shall have the use for
irrigating said premises, 90 inches of Ellensburg Ditch Company and all
waters used upon said premises from the Bull Ditch Company. There is no
mention of use of Coleman Creek water. The NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 20, is not
mentioned at all in the lease, but may have been what was intended when the
NE $\frac{1}{4}$ SE $\frac{1}{4}$ was typed. Mr. Burris testified that neither Town Ditch (EWC) or
Bull Canal water could physically be used to irrigate the land he irrigates
from Coleman Creek and he offered photographs to show how the land slopes
from the center of the fields toward the creek in support of that.

24
25 Supplemental Report of Referee
Subbasin No. 10

1 Although Bull Ditch Company is mentioned in the lease, the Referee takes
2 note that the water right confirmed in Subbasin No. 9 to Bull Canal Company
3 does not include any of the claimant's land. Given the proximity of the
4 Burris land to Coleman Creek and it being within the area Walter Bull
5 stated he was irrigating, and the fact that the land has been irrigated
6 since at least the early 1920's, the Referee finds it is reasonable to
7 conclude that the land in the S $\frac{1}{4}$ NW $\frac{1}{4}$ and N $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 20 north and west
8 of Coleman Creek enjoys a portion of the Bull water right. Mr. Burris did
9 not provide any information on the quantity of water being used to irrigate
10 his land. The Referee concluded following analysis of the documents put in
11 the record related to Bull v. Meehan, that Walter Bull's right was most
12 likely also for one inch of water for each acre irrigated and that is the
13 quantity that will be awarded under Court Claim No. 00900. The annual
14 quantity will be based on diverting that quantity during the authorized
15 irrigation season. It is significant that the stipulation required that
16 diversion of water for irrigation cease after August 15 of each year,
17 leaving all water in the creek for stock watering. As a result of that
requirement, the authorized irrigation season will end on August 15.

18 Water Right Claim No. 048980 filed by a prior owner of the claimant's
19 land asserts a right to use 2 cubic feet per second, 1000 acre-feet per
20 year to irrigate 80 acres. Therefore, there is sufficient coverage under
21 RCW 90.14 to recommend confirmation of a right based on one inch per acre.

22 The Referee recommends that a water right be confirmed under Court
23 Claim No. 0900 with a June 30, 1869, date of priority for the diversion of

24
25 Supplemental Report of Referee
Subbasin No. 10

1 1.68 cubic feet per second, 455 acre-feet per year, from April 1 through
2 August 15, for the irrigation of 84 acres in that part of the N^WNE^W and
3 S^ENW^S of Section 20, T. 17 N., R. 19 E.W.M. lying north and west of Coleman
4 Creek. The point of diversion being used is also described in WRC No.
5 048980 and shall be described in the right being confirmed.

6
7 **COURT CLAIM NO. 02146 -- John James Cannell**
8 **02147 Mark Charlton**

9 Mark Charlton took exception to the place of use recommended by the
10 Referee for one water right awarded under Court Claim No. 02147 and the
11 Department of Ecology sought clarification of the place of use for one of
12 the water rights awarded under Court Claim No. 02146. Mr. Charlton, who is
13 represented by Attorney James Adams, testified at the supplemental
14 hearing. Anna Trombley, cartographer, testified in support of Ecology's
request for clarification.

15 Mr. Charlton's exception will be addressed first. The Referee
16 recommended confirmation of a water right for the irrigation of 50 acres
17 with water diverted from Cooke Creek with a June 30, 1871, date of
18 priority. This water right is based on Certificate No. 179 from the prior
19 adjudication of Cooke Creek. Certificate No. 179 authorized the irrigation
20 of 50 acres within Government Lot 1 of Section 31, Government Lot 4 and the
21 E^WS^W of Section 30, all in T. 18 N., R. 20 E.W.M. The place of use on the
22 certificate is 160 acres, yet the certificate authorizes the irrigation of
23 only 50 acres. The Referee in defining the place of use, reduced the area
24 to the E^WS^W of Section 30, an 80 acre area. In doing so, the Referee took

25 Supplemental Report of Referee
Subbasin No. 10

1 the position that it would not be in any one's best interest to have a 50
2 acre water right within a 160 acre area. The Referee also invited the
3 claimant to propose a different area of approximately 50 acres if he
4 preferred. Mr. Charlton took exception to the place of use proposed by the
5 Referee, asking that the place of use be the same as on Certificate No.
6 179.

7 The Referee continues to believe it is not prudent to have a place of
8 use description that is over three times the size of the acres authorized
9 for irrigation. Mr. Charlton's predecessor, John J. Cannell, testified to
10 irrigating 145 acres within the area described on the certificate.
11 Describing an area that is approximately the same size as the number of
12 acres authorized for irrigation provides certainty in identifying the lands
13 with an appurtenant water right. If there was a portion of the land that
14 was more amenable to irrigation from Cooke Creek or lands that Mr. Charlton
15 preferred to have the water right appurtenant, he was provided the
16 opportunity to provide that information, and chose not to do so.
17 Therefore, the Referee does not alter the water right described on page
18 544, lines 14 through 23.

19 Ecology sought clarification of the place of use for the water right
20 described on page 601. The place of use on lines 11 through 13 is that
21 portion of Government Lots 2 and 3 of Section 31 . . . lying northwest of
22 Caribou Creek. Ms. Trombley mapped that place of use and found that there
23 is only 33 acres in the described area. Claimant's counsel clarified for
24 the record that the irrigated lands actually lie in Government Lots 2 and 3

25 Supplemental Report of Referee
Subbasin No. 10

1 of Section 31 northwest of Caribou Creek Road. Ms. Trombley also mapped
2 this area and determined using GIS software that there are 50 acres
3 irrigated within that area. During testimony it was identified that a
4 strip of land in the northwest edge of the property was excluded from the
5 area considered by Ms. Trombley. This strip is approximately 900 feet long
6 and varies in width from 50 feet to 200 feet, most of the area being 50
7 feet wide. Ms. Trombley would not provide an opinion of how many acres
8 might be in this strip of land that does appear to be irrigated. The
9 Referee estimates it may be 1.5 acres, resulting in a conclusion that 51.5
10 acres are being irrigated in the described area. Therefore, the number of
11 acres authorized for irrigation on page 601, line 3 is reduced to 51.5
12 acres. The instantaneous quantity will remain unchanged, as Mr. Cannell had
13 testified to diverting this quantity; however, the annual quantity will be
14 reduced consistent with the reduction in the number of acres authorized for
15 irrigation, to 257.5 acre-feet per year.

16 Consistent with the Court's ruling concerning the irrigation season for
17 water rights on Cooke Creek, the period of water use for Mr. Charlton's
18 water right is changed to April 15 to September 15.

19 **COURT CLAIM NO. 01053 -- Helen J. Clerf**

20 Helen Clerf filed several exceptions to the Report of Referee for
21 Subbasin No. 10. She is represented by Attorney John P. Gilreath and her
22 nephew, John Clerf, testified at the supplemental hearing.

23 Ms. Clerf's first exception was to the water rights recommended for her
24 land in the ~~EXEM~~ of Section 9. Page 587 of the Report of Referee has a

25 Supplemental Report of Referee
Subbasin No. 10

1 typographical error on line 10; the Section number should be 9, not 4. The
2 Referee recommended an instantaneous quantity of 2.15 cubic feet per second
3 for this land, which Ms. Clerf does not take issue with. However, a water
4 right was recommended only for irrigating the 50 acres in the E $\frac{1}{2}$ NE $\frac{1}{4}$ of
5 Section 9 that lies north of the Town Ditch. Ms. Clerf is also seeking a
6 right to irrigate 30 acres lying south of the ditch. The Referee based the
7 decision on the Findings of Fact in the dispute of Gilliam v. McEwen, where
8 it is stated that the Gilliams are irrigating 50 acres north of the Town
9 Ditch with water diverted from Coleman Creek and carried in the ditch that
10 is the subject of the dispute. This language lead the Referee to conclude
11 there was only a water right for 50 acres. An earlier (1890) claim of
12 water right by Robert Gilliam stated a claim for a right to irrigate 80
13 acres in the E $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 9 with water from Coleman Creek delivered in
14 the Meehan Ditch. John Clerf at the supplemental hearing testified that
15 according to his family, when the Town Ditch was constructed, a wooden
16 flume was used to convey the creek water over the ditch to the portion of
17 the land lying south of the ditch. He personally replaced the wood flume
18 with a steel flume in 1982. The Referee concludes from the evidence
19 presented that a right was established and continues to be exercised for
20 the irrigation of 80 acres in the E $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 9. The claimant is also
21 seeking an increase in the annual quantity of water awarded for under this
22 water right. Originally the Referee awarded 400 acre-feet per year for the
23 50 acres, or 8 acre-feet per year for each irrigated acre. Mr. Clerf
24 testified that he starts irrigating this land as soon as the frost is out
25

Supplemental Report of Referee
Subbasin No. 10

1 of the ground, which typically is by March 15 and continues irrigating
2 until October 15. The claimant is seeking a water right for 911 acre-feet
3 per year based on diverting 2.15 cubic feet per second continuously from
4 March 15 until October 15. The Referee will often use this method for
5 calculating the annual quantity of water when the water right is bound by
6 one of the numerous decrees that limited the instantaneous quantity to 0.01
7 or 0.02 cubic foot per second for each irrigated acre. The claimants have
8 convinced the Referee that this is a very low quantity of water for the
9 crops grown and irrigation practices common in this area, so when there is
10 no information concerning the annual quantity of water used, the Referee
11 has assumed that water is diverted and used continuously. The Referee
12 generally does not make that assumption when the landowner is not bound by
13 one of the restrictive decrees and can prove a water right for a larger
14 instantaneous quantity, such as is the case for Ms. Clerf. The
15 instantaneous quantity is higher than 0.02 cfs per acre and a continuous
16 diversion would result in using over 11 acre-feet per acre. The evidence
17 placed in the record by Richard C. Bain, the consultant hired by the Clerf
18 family to address water use on the various Clerf properties in this area,
19 indicate water needs of between 9.9 and 10.7 acre-feet per year for each
20 irrigated acre. However, the RCW 90.14 claim filed by John Clerf (WRC No.
21 154217) covering the Helen Clerf and John and Janet Clerf properties,
22 asserts a right to use up to 1500 acre-feet per year from Coleman Creek for
23 the irrigation of 400 acres -- or 3.75 acre-feet per acre. If the Referee
24 were to award the annual quantities requested under this right and the
25

Supplemental Report of Referee
Subbasin No. 10

1 other water rights being claimed by Ms. Clerf, they would far exceed the
2 1500 acre-feet per year that was claimed in WRC No. 154217. At this point
3 the Referee will continue to recommend 8 acre-feet per acre if there is no
4 restrictive decree that dictates less annual quantity. Exhibit DE-1602 is
5 a copy of the Kittitas County Conservancy Board decision approving Ms.
6 Clerk's request to change the point of diversion authorized by the
7 Referee. The board's approval changed the diversion location from the
8 ~~NW&SE%~~ of Section 4, T. 17 N., R. 19 E.W.M. to the diversion being used
9 located 260 feet south and 1 foot west of the northeast corner of the ~~SE%~~
10 (same point as east quarter corner), in the ~~NE&NW%~~ of Section 33,
11 T. 18 N., R. 19 E.W.M.

12 Ms. Clerf also took exception to the annual quantity of water awarded
13 for the irrigation of 30 acres in the ~~SE&NE%~~ of Section 4. The Referee
14 recommended an annual quantity of 150 acre-feet per year and the claimant
15 seeks a right to use 254.23 acre-feet per year, using the same logic as
16 discussed above. The Referee will amend the annual quantity recommended
17 to be consistent with the 8 acre-feet per year that was recommended for Ms.
18 Clerf's land in Section 9. Page 584, line 5 $\frac{1}{2}$ is amended to authorize the
19 diversion of 240 acre-feet per year.

20 An exception was taken to a water right not being confirmed for the
21 irrigation of 80 acres in the ~~W&NW%~~ of Section 10. Claimants predecessor,
22 William J. McCaustland was party to the Bull vs. Meehan case. A copy of a
23 stipulation between the parties that was presented to a Kittitas County
24 Court Commissioner was entered into the record. The Referee's

25 Supplemental Report of Referee
Subbasin No. 10

1 interpretation of the document was that it recited a summary of what each
2 party claimed, while claimant's counsel suggests that it was an agreed
3 settlement of the case, binding on the parties. Counsel was not able to
4 locate any final decree in the matter. The stipulation states that
5 McCaustland owns one-half of the ditch constructed by himself and his
6 brother, that said ditch was built in 1882, through which he has
7 appropriate water for 160 acres of land. Two witnesses made statements on
8 his behalf, confirming that the ditch was built prior to the spring of
9 1883. Three commissioners signed the stipulation stating it was true to
10 the best of their knowledge. The stipulation provided that diversion of
11 water for irrigation would end on August 15 and after that the water would
12 remain in the creek for stock watering. Upon reevaluation of the evidence,
13 the Referee concludes that it is sufficient to establish the existence of a
14 water right with a June 30, 1882, priority date for the diversion of 1.6
15 cubic foot per second, 685 acre-feet per year from March 15 to August 15
16 for the irrigation of 80 acres in the NW^{1/4} of Section 10, T. 17 N.,
17 R. 19 E.W.M. The annual quantity is based on a continuous diversion of 1.6
18 cfs from March 15 to August 15. The point of diversion described in the
19 appropriate RCW 90.14 claim (WRC No. 154217) is approximately 260 feet
20 south and 1 foot west of the east quarter corner of Section 33, being
within the NE^{1/4}NE^{1/4}SE^{1/4} of Section 33.

21 An exception was taken to a water right not being confirmed for the
22 irrigation of land in the SE^{1/4} of Section 3. At the initial hearing, the
23 only historical evidence put in the record was that Northern Pacific
24

25 Supplemental Report of Referee
Subbasin No. 10

1 Railroad conveyed the property to John T. McDonald in 1890. The claimant
2 has now put into the record evidence that shows McDonald sold the land to
3 James Dysart in 1895. Then in 1897 the land was sold at a Sheriff's sale
4 to J. R. Burnham, who then sold it in 1899 to Haus Hanson. Then in 1908 it
5 was sold to Robert I. Scammon. The claimant is asking the Referee to
6 conclude that James Dysart was asserting a right to Coleman Creek water for
7 this land in the Bull vs. Meehan dispute and that the 280 acres Dysart
8 claimed a right to irrigate included the SW $\frac{1}{4}$ of Section 3. The complaint
9 in Bull vs. Meehan was filed in 1885 and the stipulation was filed on
March 26, 1887. The claimant does not explain why Dysart, who did not have
any interest in the land until 1895, would have stated in the stipulation
that he had appropriated water for this land beginning in 1872. In 1872,
this land wasn't owned by McDonald and may not even have been conveyed from
the United States to the railroad. The Referee can only conclude that
Dysart's statement was for other land that he had possession of by 1872.
The information related to conveyance of the land to Dysart and ultimately
to Scammon and reference to the Bull vs. Meehan stipulation is the only
thing put in the record in an attempt to show that a water right was
established through beneficial use prior to 1917. The Referee continues to
recommend that a water right not be confirmed under Court Claim No. 01053
for the SW $\frac{1}{4}$ of Section 3.

The last exception filed by the claimants is to the terminology used to
describe the point of diversion used in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 33. This
diversion is authorized for use in the water right described on page 584 of

Supplemental Report of Referee
Subbasin No. 10

1 the Report of Referee. The Referee and the State's Investigation Report
2 described the location as being 260 feet south and 1 foot west of the east
3 quarter corner of Section 33. The claimant asks that the location be
4 described as 260 feet south and 1 foot west of the northeast corner of the
5 SE $\frac{1}{4}$ of Section 33. These two describe the exact same point, however, the
6 east quarter corner is one of the standard section corners that have
7 consistently been used for legal descriptions through out the course of
8 this adjudication. The Referee inquired of counsel concerning the change
9 that was sought and insuring that the point of diversion is accurately
10 described was the main concern. There seemed to be some concern over the
11 diversion being described as being 1 foot west of the east quarter corner,
12 but the location proposed by the claimant also shows the diversion as being
13 1 foot west. The Referee finds there is no need to change the point of
14 diversion location described on page 584.

15 **COURT CLAIM NO. 01443 -- Howard F. Clerf**
16 **05330 & Vivian Clerf**

17 Initially, Howard F. and Vivian Clerf filed one exception to the Report
18 of Referee for Subbasin No. 10. After the supplemental hearing was
19 scheduled, they filed a motion to allow filing of a late exception. That
20 motion was granted by the Court and the late exception was filed.

21 Additionally, Ecology had one request for clarification and one exception
22 to the Referee's recommendations for Court Claims No. 01443 and 05330. All
23 exceptions and the request for clarification were remanded to the Referee.

24 The Clerfs are represented by Attorney John P. Gilreath.

25 Supplemental Report of Referee
Subbasin No. 10

1 The Clerfs were scheduled to appear at the supplemental hearing
2 scheduled for February 11, 2003. However, the day of the hearing Mr. Clerf
3 suffered a medical emergency and was unable to attend the hearing.
4 Following discussion between the Referee, Mr. Gilreath, and Sam Bailey
5 representing Ecology, it was agreed that the testimony Mr. Clerf was going
6 to offer could be submitted as a declaration that would be entered as a
7 exhibit to the supplemental hearing. Three exhibits ultimately were
8 identified and entered into the record. DE-1606 is a statement from Mr.
9 Clerf concerning the location of the point of diversion he uses from
10 Caribou Creek. It was suggested that one of Ecology's requests for
11 clarifications was concerning this diversion location. The Referee can
12 find no such clarification request, however, the point of diversion
13 authorized has been reviewed as a result of the information contained in
14 DE-1606. In light of this information, the Referee will amend the point of
15 diversion described on page 535 of the Report of Referee at line 8 to read
16 "860 feet north and 280 feet east . . ."

17 Ecology took exception to the quantity of water awarded in the water
18 right described on page 535. They cited to the Clerf v. Scammon decree
19 that awarded one-half inch of water for each acre irrigated, which for a 62
20 acre water right would result in 0.62 cubic foot per second being awarded.
21 However, the Referee recommended that a water right for the use of 1.60
22 cubic feet per second be confirmed. Mr. Clerf did not address this
23 exception in his declaration, nor did his counsel address it at the
24 supplemental hearing. However, the Referee is prepared to respond to this

25 Supplemental Report of Referee
 Subbasin No. 10

exception. The Referee did specify in the discussion of prior decrees beginning on page 12 that the water duty used in those decrees would be followed in determining how much water to award to claimants in this proceeding who are bound by those decrees. The Referee has followed that intent. In this case, the land owned by Mr. Clerf, the ~~W%SW%~~ of Section 12 was entitled to a right for 0.80 cubic foot per second (40 inches) for the entire 80 acres as awarded to a predecessor to Mr. Clerf in the Clerf v. Scammon decree (half of the 80 inches awarded for all of the ~~SW%~~ of Section 12). Within that area, the Referee was able to award a water right to irrigate 62 acres, however, Mr. Clerf's testimony was that at least 1.6 cubic feet per second has been diverted to irrigate the 62 acres that could be confirmed a water right. However, the parcel of land would only have a right to a maximum of 0.80 cubic foot per second. The water duty awarded in Clerf v. Scammon is by all accounts extremely light for this area. It would be very reasonable for a landowner who is trying to adequately irrigate his crops to reduce the irrigated acreage in order to have sufficient water for an optimum crop on the remaining land. Beneficial use of the water has continued, so there is no relinquishment of water -- the number of acres have just been reduced. The Referee recommends that the original recommendation on page 535 of the Report of Referee be amended to reduce the quantity of water to 40 inches or 0.8 cfs. The annual quantity that could be diverted based on this would be 312 acre-feet per year.

DE-1607 is Mr. Clerf's Motion to File a Late Exception to the Report of Referee and Mr. Clerf's attached declaration. The late exception was filed

Supplemental Report of Referee
Subbasin No. 10

1 as a result of Ecology's request for clarification for the legal
2 description for the place of use on page 604 of the Report of Referee,
3 beginning on line 22%. Ecology sought to have a more specific legal
4 description of the irrigated lands provided. When Mr. Clerf reviewed the
5 place of use and submitted information to Ecology, it became apparent that
6 the Referee left out a portion of the lands that are being irrigated. Mr.
7 Clerf is not seeking additional acres, just to have the place of use
8 amended to include land that lies in the SW% of Section 27. Mr. Clerf asks
9 to have the place of use amended to read: "That portion of the NE%, the
10 W%SE% and the S%SW% of Section 27, T. 18 N., R. 20 E.W.M. lying adjacent
11 or in proximity to Parke Creek, both east and west of the creek." The
12 Referee agrees with this modification of the place of use description,
13 however, this probably does not adequately address Ecology's concern. The
14 Referee's interpretation of Ecology's clarification is they were seeking to
15 have the place of use more specifically described, rather than just stating
16 that the lands lay adjacent to and in proximity to the creek. The problem
17 is that the irrigated lands do lie in a narrow strip adjacent to the creek
18 and run through the center of the NE%, through the W%SE% and along the
19 southerly portion of the SW% of Section 27. Without a survey or use of GIS
20 it is not possible to come up with a more precise legal description.
21 Neither the Referee nor Mr. Clerf have the ability without great expense to
22 create the precise legal description Ecology seeks. If they are able to do
23 so with the GIS system that Ecology uses, the Referee would welcome
24 submission of a better legal description. Lacking any offering by Ecology,

25 Supplemental Report of Referee
Subbasin No. 10

1 the Referee will amend the legal description on page 604, line 22½ to read
2 "That portion of the NE¼, the W½SE¼ and the S½SW¼ of Section 27,
3 T. 18 N., R. 20 E.W.M. lying adjacent or in proximity to Parke Creek, both
4 east and west of the creek."

5 The exception that was timely filed by Mr. Clerf was to the Referee not
6 recommending that a water right be confirmed from Parke Creek for the
7 irrigation of lands in Sections 17 and 18, T. 17 N., R. 20 E.W.M. In the
8 initial Report of Referee, a water right was not recommended for
9 confirmation due to lack of evidence of historic water use and the need for
10 additional information concerning use of natural flow, rather than return
11 flows generated by KRD. The Referee recognized deeds put in the record by
12 neighboring landowner, John Miller, that included the Clerf's land in
13 Sections 17 and 18. Those deeds referenced water rights to Parke Creek.
14 Attached to Howard Clerf's declaration are additional deeds for the
15 claimant's land that transfer the land along with water rights and
16 irrigation ditches. All of this leads the Referee to conclude that a water
17 right was established for using water from Parke Creek for irrigation of a
18 portion of the claimant's land. However, what continues to be missing is
19 information about the number of acres historically irrigated. There is
20 nothing in the record that would show how much land was being irrigated
21 prior to the State's field investigation in 1990. The Referee does not
22 expect the claimant to provide a witness that can testify to how many acres
23 were irrigated when the water right was established and where those acres
24 are. However, the Clerfs have lived in this area for a number of years.

25 Supplemental Report of Referee
Subbasin No. 10

1 Although they did not acquire the land in Sections 17 and 18 until 1978,
2 the Referee would expect them to have some knowledge of the land prior to
3 that date or perhaps have family members with knowledge of the land.

4 Mr. Clerf took measurements of the water sources he uses in order to
5 address the Referee's concern about distinguishing natural flow water from
6 return flows from the nearby KRD system. He measured Parke Creek, the pond
7 outlets, the diversion from Johnson Creek, Spring Creek, Parke Creek at a
8 second location and the Johnson Creek Wasteway. Measurements were taken on
9 February 27, 2002, and June 15, 2002, in order to show the difference in
10 flow between measurements taken before water is being carried in the KRD
11 canals and when KRD is in full operation. The Referee concludes these
12 measurements are sufficient to show that natural flow is available at least
13 for a portion of the irrigation season. The measurements in February 2002
14 were as follows: Parke Creek point 1, 1.0 cfs; Two Pond Outlet, 2.2 cfs;
15 Johnson Creek Diversion, 2.0 cfs; Spring Creek, 0.6 cfs; Parke Creek, 0.12
16 cfs; Pond Outlet, 0.8 cfs. There was no flow in February 2002 in the
17 Johnson Creek wasteway. The Referee notes that the first Parke Creek
18 measurement is below where Spring Creek and Johnson Creek flow into Parke
Creek.

19 The Referee is not prepared to recommend confirmation of a water right
20 to irrigate lands in Sections 17 and 18 until information is provided to
21 establish what land has historically been irrigated and the number of
22 acres. It may be the exact same land as Mr. Clerf is now irrigating and

23
24
25 Supplemental Report of Referee
Subbasin No. 10

1 for which he is asserting a water right, but there needs to be some
2 evidence of historical use in order to confirm a right.

3 COURT CLAIM NO. 02143 -- John S. Clerf
4 (A)05514 & Janet J. Clerf

5 The Clerfs filed an exception to the Referee not recommending
6 confirmation of a water right for the W $\frac{1}{4}$ of Section 12, T. 17 N.,
7 R. 19 E.W.M. The claimants are represented by Attorney John P. Gilreath
and Mr. Clerf testified at the supplemental hearing.

8 The evidence placed in the record at the original hearing lead the
9 Referee to conclude that water rights had been established for the Clerf's
10 land in the NW $\frac{1}{4}$ of Section 12. To summarize, the NW $\frac{1}{4}$ of Section 12 was
11 settled by John Holtz, however, the exact date of settlement was not
12 clear. John Holtz was a defendant in Olmstead v. Hays, concerning use of
13 Park Creek. The Findings of Fact in that case stated Holtz settled on the
14 W $\frac{1}{4}$ of Section 12 in 1871. However, the Court in Clerf v. Scammon found
15 that Holtz settled on the NW $\frac{1}{4}$ of Section 12 in 1874. The NW $\frac{1}{4}$ of Section 12
16 was owned by Mary Clerf at the time of the Clerf v. Scammon litigation in
17 1911 and a water right was awarded for the use of 80 inches (or 1.60 cfs).
18 The class of right that was awarded was based on the land being settled in
19 1874, so that is the priority date the Referee will use for any water
20 rights confirmed herein. The Findings of Fact that preceded the decree
21 found that one-half inch of water was needed for each acre irrigated. It
22 could then be concluded that 160 acres were being irrigated with the 80
23 inches. Mr. Clerf's testimony was that 63 acres have continued to be
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Supplemental Report of Referee
Subbasin No. 10

1 irrigated with water diverted from Caribou Creek. The record indicates
2 that up to 6.0 cubic feet per second has been diverted for irrigating the
3 claimants land and a right was asserted for that quantity.

4 The Referee did not recommend confirmation of a water right for the
5 claimant's land in the NW $\frac{1}{4}$ of Section 12 because there was no water right
6 claim filed pursuant to RCW 90.14 that described the land for which a water
7 right was being asserted. That problem has been remedied. The claimants
8 sought to amend Water Right Claim No. 154222 to correct an error in the
9 place of use description. That request to amend the claim was allowed and
10 Exhibit DE-1610 is a copy of the transmittal letter and order approving the
11 amendment. WRC No. 154222, as amended, asserts a right to use 3 cubic feet
12 per second, 900 acre-feet per year from Caribou Creek for the irrigation of
13 200 acres in the W $\frac{1}{4}$ of Section 12, T. 17 N., R. 19 E.W.M. The point of
14 diversion that is described is 2060 feet south and 1260 feet west of the
15 northeast corner of Section 1, in the NE $\frac{1}{4}$ of Section 1, T. 17 N.,
16 R. 19 E.W.M. The claimant did not seek to amend the quantity of water on
17 WRC No. 154222 and now is asserting a right to use the 3 cubic feet per
second on the claim form.

18 The claimant also argues that the water right to be confirmed herein
19 should not be limited to the 1.60 cubic feet per second that was awarded to
20 the property in the Clerf v. Scammon decree. The claimant's position is
21 that in the early 1900's his grandfather and grandmother (perhaps
22 great-grandparents) caused the flow in Warm Springs to increase as a result
23 of work they did in the spring area. The increased flow in Warm Springs

24
25 Supplemental Report of Referee
Subbasin No. 18

1 ultimately made its way to Caribou Creek and increased the flow in Caribou
2 Creek. That increased flow was then appropriated by the Clerf's ancestors
3 as riparian landowners. Under the Riparian Doctrine, landowners had until
4 December 31, 1932, to put to beneficial use the water for which a right was
5 being established. The Clerfs contend that in spite of the findings in
6 Clerf v. Scammon, as riparian owners their predecessors had until 1932 to
7 fully develop their riparian right under the 1874 priority date recognized
8 in Clerf v. Scammon. The evidence in the record does not suggest that
9 additional land was developed and irrigated, just additional water
10 appropriated.

11 The Referee respectfully disagrees with the claimants position. They
12 correctly state the law under the Riparian Doctrine. However, two
13 significant events limited the water right that could be appurtenant to
14 this land. First, the Clerf v. Scammon case is recognized by the parties,
15 but apparently the binding nature of the case is not being recognized. The
16 Clerfs predecessor, the plaintiff in this case, was obviously a party and
17 had an obligation to assert any rights as part of the action. Mr. Clerf
18 testified that beginning in 1905, the flow in Warm Springs was increased
19 due to the efforts of his ancestors. Six years had passed since the spring
20 flow was first increased. The plaintiff had to assert a right to that
21 water at the time the case was argued. The parties to Clerf v. Scammon are
22 bound by the rulings of the court. In 1911, the water right for the NW $\frac{1}{4}$ of
23 Section 12 was limited to 1.60 cubic feet per second.
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25 Supplemental Report of Referee
Subbasin No. 10

1 Second, the Federal government in 1905 withdrew all unappropriated
2 surface waters in the Yakima Basin. Any increased flow in Caribou Creek
3 beyond that needed to satisfy the water rights awarded in Clerf v. Scammon
4 would be unappropriated waters withdrawn by the Federal government. A
5 water right for that water could only be awarded if the claimant can show
6 that its appropriation is *di minimus* in quantity or would not have had a
7 negative affect on the Yakima Project, and obtained a release from the
8 Federal government to use the water.

9 The Referee recommends that a water right be confirmed with a June 30,
10 1874, date of priority for the diversion of 1.6 cubic feet per second,
11 684.8 acre-feet per year for the irrigation of 63 acres in that portion of
12 the SE~~NW~~¼ lying north of the railroad tracks and that portion of the NW~~NE~~¼
13 lying north of Cascade Canal, all in Section 12, T. 17 N., R. 19 E.W.M.
14 The point of diversion shall be described as 800 feet north and 1200 feet
15 west of the east quarter corner of Section 1, being within the SE~~NE~~¼ of
16 Section 1, T. 17 N., R. 19 E.W.M. This location is a more accurate
17 description of the point of diversion described in WRC No. 154222,

18 In this subbasin and others Ecology has taken exception to the quantity
19 of water awarded if there has been a reduction in the number of acres
20 irrigated from what was awarded in a decree, but the quantity of water was
21 not reduced. That is the situation here with the Clerfs. The Referee is
22 not reducing the quantity of water being awarded because the claimants have
23 continued to make beneficial use of that water. There has been no
24 allegation there is a waste of water and the Referee makes no such

25 Supplemental Report of Referee
Subbasin No. 10

1 finding. The water duty recognized in Clerf v. Scammon is very light for
2 this area and it would have been very reasonable for a landowner to reduce
3 the number of acres being irrigated in order to have sufficient water to
4 satisfactorily irrigate the remaining land. Water continues to be used
5 within the area recognized in the decree.

6 COURT CLAIM NO. 02141 -- John S. Clerf
7 & Janet J. Clerf

8 Under Court Claim No. 02141, the Clerfs took exception to the
9 description of the point of diversion location used by the Referee in the
10 water right on page 574, at line 7 $\frac{1}{2}$, and to water rights not being
11 confirmed for the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 3 and Government Lot 1 of Section 4.
12 The Clerfs are represented by Attorney John P. Gilreath and Mr. Clerf
13 testified at the supplemental hearing.

14 The first exception was to the description of the point of diversion
15 for the water right described on page 574, beginning on line 7 $\frac{1}{2}$. The
16 Referee describes the diversion as being 260 feet south and 1 foot west of
17 the east quarter corner of Section 33, being in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of
18 Section 33. The exception states that the claimant believes the proper
19 description should be 260 feet south and 1 foot west of the northeast
20 corner of the southeast quarter of Section 33. The Referee must confess to
21 not understanding the point of this exception. The dimensions south and
22 west are identical. The starting point is the same, just described in a
23 different manner. The east quarter corner is the same point as the
24 northeast corner of the southeast quarter of the section. The east quarter

25 Supplemental Report of Referee
Subbasin No. 10

1 corner is the commonly accepted method to describe this point and has
2 consistently been used by the Referee. There is no point in changing the
3 description and the Referee believes that the description proposed by the
4 claimant would be confusing to others trying to map the point of diversion
5 or interpret its location. The Referee recommends that the point of
6 diversion description not be changed.

7 The claimants also took exception to the Referee's conclusion the all
8 of the water rights appurtenant to the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 4 had
9 been sold when it was owned by James Dysart prior to entry of the Schnebly
10 v. Huss decree. Upon reviewing the claimants exception and the Findings of
11 Fact that preceded the decree, the Referee agrees with the points made by
12 the claimant in the exception. Elsie Cody and Isaac A. McVey, as executor
13 of the will of Thomas Cody, were awarded 25 inches (or 0.50 cfs) for the
14 NW $\frac{1}{4}$ NE $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 4 for 50 acres. At the intital evidentiary
15 hearing, Mr. Clerf testified to irrigating a total of 125 acres in the E $\frac{1}{4}$ E $\frac{1}{4}$
16 of Section 4. In the initial Report of Referee, a water right was
17 recommended for the irrigation of 84 acres in the E $\frac{1}{4}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ NE $\frac{1}{4}$ of
18 Section 4. That would leave 36 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 4 for which
19 a water right would be confirmed under the right awarded to Elsie Cody and
20 Isaac A. McVey. The owners of the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 4 are not
21 parties to the adjudication and, therefore, a water right is not being
22 asserted for that land. The claimant in the exception asks that 20 inches
23 of that right or 0.40 cfs and 169.5 acre-feet per year be awarded.
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25 Supplemental Report of Referee
Subbasin No. 10

1 Therefore, the Referee recommends that a water right be confirmed under
2 Court Claim No. 02141 with an April 1, 1872, date of priority for the
3 diversion of 0.40 cubic foot per second, 169.5 acre-feet per year from
4 Coleman Creek for the irrigation of 36 acres in Government Lot 1 of
5 Section 4. The point of diversion is the one discussed above in the
6 NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 33.

7 The last exception was to the Referee not recommending that a water
8 right be confirmed for the claimant's land in that portion of the NW $\frac{1}{4}$ SW $\frac{1}{4}$
9 of Section 3 lying north of the Iron Horse Trail. The Clerfs irrigate 20
10 acres with water diverted from Coleman Creek. The claimant is asserting
11 that this land is part of what was owned by James Dysart at the time of the
12 Bull v. Meehan dispute. James Dysart was a part of that action and his
13 1886 written testimony addressed the lands he owned and that he had
14 appropriated water in 1872 for irrigation of 280 acres. However, the
15 documents submitted by the claimants in exhibit DE-1605 lead to a
16 conclusion that at the time of Bull v. Meehan Dysart owned other lands.
17 Those documents show that John T. McDonald acquired the SW $\frac{1}{4}$ of Section 3
18 from Northern Pacific Railroad in 1890 (documents suggest McDonald may have
19 occupied that land as early as 1887). McDonald transferred this land to
20 Dysart in 1893. The Clerfs suggest that this 160 acres is part of the 280
21 acres to which Dysart testified. However, Dysarts testimony was in 1886,
22 before even McDonald would have occupied the land and well before Dysart
23 had any interest in the SW $\frac{1}{4}$ of Section 3. The SW $\frac{1}{4}$ of Section 3 was then
24 sold at a Sheriff's sale in 1897 to J. R. Burnham, who in 1899 sold it to

25 Supplemental Report of Referee
 Subbasin No. 10

1 Haus Hansen. In 1908, Hansen sold the W%SW% of Section 3 to R. I. Scammon
2 and this is the first deed that even mentioned water, containing the
3 following language: "together with all water rights and irrigation ditches
4 appurtenant thereto". As pointed out by the claimant, water rights for
5 this land were not addressed in any of the prior litigations. In addition
6 to creek water, water delivered by Cascade Irrigation District (CID) is
7 also used to irrigate this land. According to the Report of the Court for
8 Cascade Irrigation District (Volume 41, filed on October 8, 1999), the
9 Cascade Canal was constructed between 1903 and 1904. So, by the time the
10 deed from Hansen to Scammon referenced water rights and irrigation ditches,
11 the land would have been receiving water delivered by CID. The claimant
12 has not put any evidence in the record to show that the land was irrigated
13 with creek water at the time necessary to establish a water right (prior to
14 June 6, 1917).

15 Based on the foregoing, the Referee continues to recommend that a water
16 right not be confirmed under Court Claim No. 02141 for the W%W%SW% of
17 Section 3.

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25 Supplemental Report of Referee
Subbasin No. 10

1 COURT CLAIM NO. 00407 -- Robert H. Clerf
2 & Sherre A. Clerf
3 Craig Clerf
4 & Patricia Clerf

5 COURT CLAIM NO. 00476 -- Robert H. Clerf
6 City of Kittitas

7 COURT CLAIM NO. 00677 -- Robert H. Clerf
8 & Sherre A. Clerf

9 Under Court Claims Nos. 00677 and 00476, the Clerfs are asserting a
10 right to irrigate 195 acres in the E&SE $\frac{1}{4}$ and E&SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 1,
11 T. 17 N., R. 19 E.W.M., the NE $\frac{1}{4}$ NW $\frac{1}{4}$, W $\frac{1}{4}$ NW $\frac{1}{4}$, W $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6, T. 17 N.,
12 R. 20 E.W.M. with water diverted from Warm Springs and Warm Springs Creek.

13 According to the testimony at the initial hearing, 6 cubic feet per
14 second, 1161 acre-feet per year are diverted to irrigate those 195 acres.
15 At the supplemental hearing the claimants put into the record as part of
16 Exhibit DE-1734, documents intended to show that water rights for use of
17 Warm Springs were established prior to 1900. Tab H of that exhibit is a
18 copy of a document filed by John Clerf in 1890 stating he had appropriated
19 water from Brush Creek (aka Warm Spring Creek) as follows: On May 1, 1887,
20 20 inches into Brush Ditch used to irrigate 2 acres lying under the ditch;
21 on May 1, 1871, 40 inches into Hull Ditch for 80 acres lying under that
22 ditch; also on May 1, 1871, 20 inches into Haley Ditch used to irrigate 50
23 acres under the ditch. A total of 80 inches (or 1.60 cfs) for the
24 irrigation of 132 acres were claimed by John Clerf. At the time these
25 claims were made, it appears to the Referee that John Clerf owned the W $\frac{1}{4}$ of
Section 12 and the points of diversion described were all (except for the

Supplemental Report of Referee
Subbasin No. 10

1 first ditch) in the W $\frac{1}{2}$ of Section 12 and flowed in a direction where only
2 lands in Section 12 could have been served from the ditches. The first
3 claim for Brush Ditch described a diversion in the N $\frac{1}{2}$ N $\frac{1}{4}$ of Section 6, with
4 the ditch flowing northwesterly, which would have been into Section 31,
5 T. 18 N., R. 20 E.W.M., lands for which Clerfs are not asserting a right.

6 On May 22, 1889, John Clerf acquired from John Brush the N $\frac{1}{2}$ N $\frac{1}{4}$ of
7 Section 6, T. 17 N., R. 20 E.W.M. and in June of 1900, filed a declaratory
8 statement under the Desert Land Laws for Lots 5, 6, 7 and the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of
9 Section 6 and then diverted water from Warm Springs Creek to irrigate those
10 lands. He claimed to have diverted 100 inches of water for the land
11 acquired under the Desert Land Act. The flow of Warms Springs was
12 initially around 54 inches, but increased to 124 inches as a result of
13 Clerf's efforts to improve the flow. The documents in the record as part
14 of DE-1734 (copy of Clerk's exceptions and attachments to the exception)
15 lead to a conclusion that in the early 1900's Clerf moved water rights used
16 in the W $\frac{1}{2}$ of Section 12 to the lands in Section 6. That was before the
17 Surface Water Code was established requiring compliance with change
18 procedures before a water right could be moved from one piece of property
to another.

19 The documents are clear that John Clerf established water rights in the
20 late 1800's and in 1900 for use on land now owned by the claimants. It
21 appears from the record that John Clerf was claiming rights to use about
22 2.48 cubic feet per second from Warm Springs and Warm Springs Creek.
23 However, presently the Clerfs are asserting a right to use approximately

24
25 Supplemental Report of Referee
Subbasin No. 10

1 4.5 cubic feet per second. They contend that efforts by their family to
2 improve the flow from Warm Springs resulted in a greater flow from the
3 springs and they are entitled to a right for the larger flow. John Clerf's
4 affidavits clearly show his efforts to improve the springs flow in the
5 early 1900's, resulting in the 2.48 cubic feet per second being available
6 for use on his land. When the flow increased from 2.48 cfs to 4.5 cfs is
7 not clear. The claimant asserts it was prior to 1917, but offer nothing to
8 support that assertion. The creek was measured at 4.5 cfs, but the
9 testimony suggests it was done in recent times. Flow in the springs and
10 creek would most certainly have increased following completion of the
11 Kittitas Reclamation District (KRD) Canal in the early 1930's. In 1930,
12 Mary Clerf petitioned to have certain lands excluded from KRD. Those
13 lands were identified as the SE~~4~~NE~~4~~, NE~~4~~SE~~4~~, and SE~~4~~SE~~4~~ of Section 1,
14 T. 17 N., R. 19 E.W.M. and the W~~4~~SW~~4~~NW~~4~~, W~~4~~NW~~4~~SW~~4~~ of Section 6, T. 17 N.,
15 R. 20 E.W.M. The testimony given to support her request, including a report
16 from the Bureau of Reclamation, was that these lands were irrigated with
17 water from Warm Springs. Those lands were ultimately excluded from the
18 district. The other lands for which a water right from Warm Springs is
19 being asserted were not in the petition for exclusion.

20 In 1953, Warm Springs Water Company, owned by the Clerf family, applied
21 for and was issued Certificate of Change of point of diversion, purpose of
22 use and place of use, recorded in Vol. 1, page 377. It authorized the
23 company to change the place of use, point of diversion and purpose of use
24 of 1.44 cubic feet per second of Warm Springs from a diversion in the

25 Supplemental Report of Referee
Subbasin No. 10

1 NE~~%~~NE~~%~~ of Section 6 to a second point also in the NE~~%~~NE~~%~~ of Section 6. The
2 certificate of change stated that the water had been used for irrigation on
3 the E~~%~~SE~~%~~NE~~%~~, E~~%~~SE~~%~~ of Section 1 and W~~%~~SW~~%~~NE~~%~~ of Section 6 and will hence
4 forth be used for municipal and domestic purposes for the Town of
5 Kittitas.

6 According to the record established at the supplemental hearing, the
7 primary source of water for the City of Kittitas, as provided by Warm
8 Springs Water Company, are artesian wells and Warm Springs is only used as
9 a backup supply when sufficient water is not available from the wells. The
10 claimants stress that only a portion of the water right for Warm Springs
11 was transferred. The Referee concurs with this position. John Clerf
12 documented establishment of rights to use 2.48 cubic feet per second and
13 the certificate of change authorized changing 1.44 cubic feet per second,
14 leaving 1.04 cubic feet per second appurtenant to the claimant's land. The
15 claimants ask the Referee to conclude that water rights were established
16 for the use of more water than was documented by John Clerf, but provide
17 nothing to support this position. Robert Clerf testified that the flow in
18 Warm Springs had been measured at 4.5 cubic feet per second and are
19 asserting a right for that quantity. They also argue that even though a
20 portion of the water right was changed, the land described in the
21 certificate of change as having been previously irrigated with the water
22 being changed, continues to have a water right from Warm Springs. The
23 Referee disagrees. It is clear that the water rights established by John
24 Clerf were appurtenant to lands other than those described in the

25 Supplemental Report of Referee
Subbasin No. 10

1 certificate of change. The Certificate of change addressed use of 1.44
2 cfs, which is a reasonable quantity for irrigation of 120 acres (the
3 acreage of the land described in the certificate of change). The
4 certificate of change clearly states that the water right being transferred
5 had been used to irrigate the lands described and the purpose and place of
6 use were changed. The remaining unchanged portion of the water right is
7 appurtenant to other lands owned by the Clerfs. The Clerfs are also
8 asserting a right to irrigate land in Government Lots 3, 4, the N% of
9 Government Lot 5, the S% of Government Lot 6 and Government Lot 7, lands
10 not described in the certificate of change as being the irrigated land from
11 which the water right was transferred. They did not provide evidence of
12 how many acres are being irrigated in this portion of their land. The
13 Referee estimates that approximately 85 acres are irrigated in that portion
14 of their property.

15 The claimants also seem to be making the argument that the water right
16 changed was really the water right that was established when the artesian
17 wells were constructed around 1916 to 1917 and not the water right for use
18 of Warm Springs. However, they offer no evidence to establish that is the
19 case. Even if the wells were constructed in 1916 or 1917 and used to
20 irrigate the claimant's land, the language in the Certificate of Change is
21 clear. The right being changed is the right to use Warm Springs. The
22 agreement between Warm Springs Water Company and the Town of Kittitas, tab
23 T in Exhibit DE-1734, states that "the company owns three cubic feet per
24 second of time of water from Warm Springs and the two artesian wells, said

25 Supplemental Report of Referee
Subbasin No. 10

1 water to be taken first from the two wells and the balance, if any, from
2 said springs." (Emphasis added.) Clearly the intent is to provide water
3 from Warm Springs when necessary.

4 The Town of Kittitas appeared at the supplemental hearing through their
5 attorney Lawrence E. Martin. On behalf of the city, Mr. Martin stated they
6 were no longer asserting a right to use water from Warm Springs and rely
7 only on the artesian wells. The decision by Kittitas to not assert a right
8 to Warm Springs water in this proceeding does not negate the consequences
9 of the Certificate of Change that issued in 1952. In order for the water
10 right that was transferred from the Clerfs irrigated land to the Town of
11 Kittitas to again be appurtenant to the Clerf land, another application for
12 change in purpose of use and place of use would have to be processed and a
13 determination of the extent of the water right made by Ecology. That would
14 seemingly be a difficult process, as it appears that the springs have only
15 been used as a backup supply, so beneficial use evidence might be
16 difficult. The purpose of use that was authorized was municipal supply,
not as a backup municipal supply.

17 Based on the record established at the supplemental hearing, the
18 Referee recommends that a right be confirmed under Court Claim No. 0476
19 with a May 1, 1871, date of priority for the diversion of 1.04 cubic feet
20 per second, 432 acre-feet per year for the irrigation of 85 acres in
21 Government Lots 3 and 4 south of Warm Springs Creek, the NW $\frac{1}{4}$ of Government
22 Lot 5, the S $\frac{1}{4}$ of Government Lot 6 and all of Government Lot 7 in Section 6,
23 T. 17 N., R. 20 E.W.M.

24
25 Supplemental Report of Referee
Subbasin No. 10

1 Court Claim No. 00407 as filed asserted a right to use water from
2 Caribou Creek for the irrigation of lands in the E½SW¼ of Section 1,
3 T. 17 N., R. 19 E.W.M. At the initial evidentiary hearing they also
4 asserted a right to use water from Caribou Creek to irrigate the SW¼SW¼ of
5 Section 1 and on exception, assert a right to use water from Cooke Creek on
6 the SW¼SW¼ of Section 1.

7 At the initial evidentiary hearing, the Referee found sufficient
8 evidence to conclude that a right had been established for the use of 0.20
9 cubic foot per second, 100 acre-feet per year from Caribou Creek for the
10 irrigation of 20 acres in the E½SW¼ of Section 1 and reduced the place of
11 use to the S½SE½SW¼ of Section 1. The evidence presented was the Findings
12 of Fact and Decree in Clerf v. Scammon, as discussed on pages 115 and 116
13 of the Report of Referee. Clerf v. Scammon was decided in 1911, well after
14 the May 10, 1905, Federal withdrawal of all unappropriated surface waters
15 in the Yakima Basin. The only thing offered by the claimants to attempt to
16 establish a water right in excess of that previously recommended was
17 testimony that the flow from Warm Springs into Warm Springs Creek, which
18 ultimately flows into Caribou Creek, was increased due to work by Mr.
19 Clerf's Grandfather after 1911. The findings in Clerf v. Scammon are very
20 clear that after the first of April Caribou Creek does not carry an amount
21 in excess of the appropriations made by those identified in Conclusion of
22 Law No. 1. Any additional water flowing in Caribou Creek below where Warm
23 Springs Creek meets Caribou Creek would clearly be needed to satisfy those
24 pre-existing water rights. Additionally, any surface water not

25 Supplemental Report of Referee
Subbasin No. 10

1 appropriated by the parties to Clerf v. Scammon had been withdrawn by the
2 United States. The evidence has not been sufficient to establish when the
3 additional water was used to irrigate the increased acreage. The claimants
4 are asserting a right to divert a total of 6 cfs for the irrigation of 80
5 acres. If the claimant were to provide sufficient evidence to allow the
6 Referee to conclude that the additional usage was *di minimis* and would have
7 had no impact on the United States withdrawal, or that the Federal
8 government gave a release for the use of water, there still needs to be
9 evidence that the water was appropriated prior to June 6, 1917. That
10 evidence is lacking. Therefore, the Referee does not alter the water right
11 for use of Caribou Creek that was recommended for confirmation.

12 The claimants are also asserting a right to use water from Cooke Creek
13 to irrigate the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1. At the initial evidentiary hearing,
14 the testimony was that only water from Caribou Creek is used to irrigate
15 this land. At exception, the claimant is asserting that the water diverted
16 from Caribou Creek is really Cooke Creek water used under authorization of
17 Certificate No. 186 from the Cooke Creek Adjudication. That certificate
18 issued to Lewis Habel for a Class 6 right with an 1878 priority date,
19 authorizing the diversion of 0.70 cubic foot per second from Cooke Creek
20 for the irrigation of 35 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1. The claimant
21 suggests there is a diversion in the northeast corner of Section 36 that
22 flows into Section 1 and joins Caribou Creek and then he diverts from
23 Caribou Creek. However, the certificate authorizes a diversion in the
24 NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1. State's map SE-2 does not show a diversion in the

25 Supplemental Report of Referee
Subbasin No. 10

1 northeast corner of Section 36, nor does it show a ditch going toward
2 Caribou Creek. Mr. Clerf's testimony at the initial hearing was clear that
3 as far as he was concerned Cooke Creek water was not being used. It is
4 suggested that there is confusion over the creek names and has been over
5 the years, however, the Referee does not believe name confusion is the
6 issue. The Clerfs clearly are diverting water out of Caribou Creek to use
7 in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1. The water right claim filed pursuant or RCW
8 90.14 for use of Caribou Creek on the claimant's land does not describe the
9 SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1. After that deficiency was discovered, the claim was
10 made for use of Cooke Creek water, even though Mr. Clerf had previously
11 testified that any water they had from Cooke Creek had been abandoned.

12 The Clerfs are also apparently unaware that a prior owner of their land
13 sold the Cooke Creek water right described in Certificate No. 186. Exhibit
14 DE-322, put into the record by Harold Flach is a warranty deed by which
15 Louis Habel and Martha Habel sold to W. H. Bott "all right to water of Cook
16 Creek as granted by a decree of Kittitas County Superior Court on the 13th
17 day of August, 1921, and recorded in volume 25 of the Superior Court
18 Journal of said County on page 151, viz: Thirty Five (35) inches in Class
19 Six (6). In 1925, at the time the deed was executed, W. H. Bott owned land
20 that is now owned by the Flach family in Sections 7 and 18, T. 18 N.,
21 R. 20 E.W.M. At the initial hearing, the Flach family, represented by
22 Attorney Richard T. Cole, put on testimony to indicate that this water has
23 in fact been used on their land during both Mr. Bott's ownership of the
24 land and their ownership. The Referee did not award them a water right,

25 Supplemental Report of Referee
Subbasin No. 10

however, because Mr. Bott and Mr. Habel did not comply with the change procedures in RCW 90.03.380. Lanette Flach testified at the supplemental hearing that they are pursuing that change application.

When the Flach family put on their testimony about the Habel/Bott water right, it was not apparent that the water right was being asserted by another party in this case. At the initial hearing when they put on the evidence, Mr. Clerf did not assert a right to Cooke Creek, nor did Court Claim No. 00407 assert any kind of water right for the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1. It was not until the supplemental hearing was it clear to the Referee that two parties are asserting a right to the same certificate -- for different lands. These parties have not had the opportunity to rebut each others testimony. Therefore, the Referee will not recommend confirmation of a right to either. Exceptions must be filed and brought before the Court for resolution of the question of whose land is this right appurtenant.

COURT CLAIM NO. 00927 -- Cooke-Coleman LLC
Edwin Nestler
& Jeannette Nestler
Mike McArthur
& Pat McArthur
Larry F. Beintema

Exceptions to the Referee's recommendations under Court Claim No. 00927 were filed by Cooke-Coleman LLC, the Nestlers and the McArthurs. Larry F. Beintema was joined to the claim after exceptions were due and after the supplemental hearing. He purchased land from the Nestlers and the Referee concludes that the exceptions taken by the Nestlers would also apply to Mr.

Supplemental Report of Referee
Subbasin No. 10

1 Beintema's land. Cooke-Coleman LLC is represented by Attorney Jeff
2 Slothower, the Nestlers are represented by Attorney Lawrence E. Martin and
3 the McArthurs are represented by Attorney Richard T. Cole. Testifying at
4 the supplemental hearing were Gaylord Kellogg, representing Cooke-Coleman
5 LLC, Edwin Nestler, Mike McArthur, and Steve and Kirk German, former owners
6 of the land.

7 Mike McArthur owns the NE~~SE~~% of Section 13, T. 18 N., R. 19 E.W.M. and
8 approximately 40 acres are irrigated with water diverted from Coleman and
9 Cooke Creeks. The Referee did not recommend confirmation of a water right
10 for use of Cooke Creek because there was no water right awarded for the
11 NE~~SE~~% of Section 13 in the Anderson decree. Anderson was an adjudication
12 of Cooke Creek, in the same manner as this current case is an adjudication
13 of the Yakima River Basin, including Cooke Creek. The only valid water
14 rights for use of Cooke Creek after the decree was entered are those
15 identified in the decree. The Referee has again reviewed the decree and
16 finds no water rights awarded for the NE~~SE~~% of Section 13, nor has the
17 claimant brought any to the Referee's attention. Water rights for use of
18 Coleman Creek were addressed in the Schnebly v. Huss case that was decided
19 in 1915. Water rights for irrigating land in the NE~~SE~~% of Section 13 with
20 water from Coleman Creek lands were recognized in the Schnebly v. Huss
21 decree. However, there was no water right claim filed pursuant to RCW
22 90.14 for use of Coleman Creek water on this land. RCW 90.14 was passed by
23 the legislature in 1967 requiring that water right claims be filed for
24 water uses begun prior to adoption of the Surface Water Code in 1917. Kirk

25 Supplemental Report of Referee
Subbasin No. 10

1 German filed Water Right Claim No. 115875 asserting a right to use 4 cfs,
2 1200 acre-feet per year from Coleman Creek for the irrigation of 160 acres
3 and stock water in the E~~N~~E~~S~~ of Section 12 and the W~~N~~W~~S~~ of Section 7. The
4 Referee did recommend water rights be confirmed under Court Claim No. 00927
5 consistent with that water right claim. At the supplemental hearing Kirk
6 German testified that it was his intent to file the water right claim for
7 all lands he was irrigating with Coleman Creek water. However, the number
8 of acres being irrigated was identified as 160 acres, which is the exact
9 number of acres within the area actually described on the claim form. If
10 it were Mr. German's intent to include all the land he was irrigating from
11 Coleman Creek, it is logical that the number of acres identified as being
12 irrigated would have reflected the total number of acres he irrigated from
13 Coleman Creek, not the 160 claimed. Mr. German also filed WRC No. 115879
14 which asserts a right to use 2 cfs, 400 acre-feet per year from Cooke Creek
15 for the irrigation of 80 acres in the NE~~S~~E~~N~~ of Section 13 and the NW~~S~~SW~~N~~
16 of Section 18. This water right claim form includes half of the land now
17 owned by Mr. MacArthur, however, the source of water identified is Cooke
18 Creek not Coleman Creek. As previously mentioned, Cooke Creek was the
19 subject of an earlier adjudication that quieted title to all claims to
20 water rights. Only water rights awarded in the Anderson decree survived
21 after the adjudication. Mr. German testified that he made an error in
22 completing the forms. However, the record does not reflect any effort on
23 his part to attempt to amend the claim forms under RCW 90.14.065. The
24 Referee finds that none of the water right claims filed substantially
25

Supplemental Report of Referee
Subbasin No. 10

1 comply with the requirements of RCW 90.14 for protecting a water right to
2 use water from Coleman Creek to irrigate lands in the NE~~WSE~~^{NE} of
3 Section 13. See State of Washington v. Adsit, 103 Wn.2d 698, P.2d 1065
4 (1985). The Referee continues to recommend that water rights not be
5 confirmed under Court Claim No. 00927 for lands now owned by Mr.
6 MacArthur.

7 The exception filed by Edwin and Jeannette Nestler was to water rights
8 not being awarded for Government Lot 3 of Section 18, T. 18 N.,
9 R. 20 E.W.M. However, the presentation at the supplemental hearing makes
10 it clear they are seeking water rights for Government Lots 1, 2 and 3 of
11 Section 18, except the east 300 feet of Government Lot 3. Immediately
12 after the supplemental hearing, Larry Beintema was joined to the claim,
13 having purchased Government Lot 3 from the Nestlers. The Nestlers are
14 asserting rights to use water diverted from Cooke Creek and Coleman Creek
15 on all three lots. The record shows that they acquired the three
16 government lots in 1991 and recently sold Government Lot 3 to Larry
17 Beintema. The Referee has reviewed the testimony and evidence from the
18 initial hearing in 1991 along with the testimony and evidence presented at
19 the supplemental hearing. Although the Referee had concluded in the Report
20 of Referee that a water right was not being asserted for using Cooke Creek
21 water in Government Lots 1, 2 and 3, it is now apparent that was an
22 erroneous conclusion. Kirk German testified to using both Cooke Creek and
23 Coleman Creek water on the land he owned at the time of the evidentiary
24 hearing, which includes these three lots. Kirk German's memory of the land
25

Supplemental Report of Referee
Subbasin No. 10

1 extended back to around 1932 and he recalls the land as being irrigated by
2 his father from both creeks. He continued this practice as long as he
3 owned the land. A diversion from Cooke Creek in the SE~~4~~SW~~4~~ of Section 6,
4 T. 18 N., R. 20 E.W.M. is used to fill a ditch that parallels Cooke Canyon
5 Road into the SW~~4~~ of Section 7, where laterals bring the water into the NW~~4~~
6 of Section 18 and directly into Government Lot 1 of Section 18. There are
7 three certificates from the prior adjudication of Cooke Creek that describe
the land owned by the Nestlers and Beintema.

8 Certificate No. 183, a Class 4 right with an 1872 date of priority,
9 authorized the diversion of 0.76 cubic foot per second for the irrigation
10 of 38 acres in Lot 3 (NW~~4~~SW~~4~~) of Section 18. The point of diversion that
11 is authorized is described as being in the NE~~4~~SW~~4~~ of Section 7. There is a
12 diversion at this location, however, Mr. German's testimony did not
13 indicate whether it has been used to serve Government Lot 3. Although the
14 certificate limited water use to May 15 through September 15, the Court
15 granted exceptions concerning the appropriate irrigation season to be
16 used. The Report of Referee that preceded the Anderson decree found that
17 the normal irrigation season was April 15 through September 15, but that
18 water could beneficially be used in some cases as soon as frost is out of
19 the ground. Mr. German testified that water has in the past been used on
20 this land as soon as frost is out of the ground. That varies significantly
21 due to weather patterns. The Referee intends to recommend the April 15
22 through September 15 irrigation season, with a provision that water use may
23 begin as soon as the frost is out of the ground and water can beneficially

24
25 Supplemental Report of Referee
 Subbasin No. 10

1 be used. Mr. German also testified to using flood water on this land. The
2 Anderson decree allowed the use of surplus water when available. None of
3 the witnesses provided any evidence of how often or over how many days this
4 surplus water might be available. It is clear that the surplus water is
5 what the landowners refer to as "flood water" and can be available early in
6 the season until May or June. In other subbasins where the decrees
7 contained this surplus water language, the Referee has concluded that
8 surplus water would be available approximately 30 days during the spring
9 and has authorized use of water consistent with that. Lacking any better
10 information, the Referee will also use 30 days for water rights for Cooke
11 Creek.

12 Government Lot 3, except the east 300 feet, is now owned by Larry
13 Beintema. The east 300 feet is approximately 9 acres, leaving 31 acres
14 owned by Mr. Beintema. The Referee recommends that a water right be
15 confirmed under Court Claim No. 00927 to Mr. Beintema with a June 30, 1872,
16 date of priority for the use of 0.62 cubic foot per second, 187.82
17 acre-feet per year from April 15 to September 15 for the irrigation of 31
18 acres in Government Lot 3 of Section 18, except the east 300 feet thereof.
19 The authorized point of diversion shall be in the NE~~X~~SW~~X~~ of Section 7. The
20 water right will have the following provision: Water use may begin prior
21 to April 15 if frost is out of the ground and water can beneficially be
22 used. When surplus water is available in excess of that needed to satisfy
23 all existing rights to Cooke Creek, an additional 0.62 cfs, 36.83 acre-feet
24

25 Supplemental Report of Referee
Subbasin No. 10

1 per year may be used. The annual quantity is based on the expectation that
2 surplus water will be available no more than 30 days during the spring.

3 Certificate No. 184 is a Class 8 right with an 1880 date of priority
4 that authorized the diversion of 0.76 cubic foot per second for the
5 irrigation of 38 acres in Government Lot 1 of Section 18. The point of
6 diversion is in the NE~~X~~SW~~X~~ of Section 7. This is the same point of
7 diversion identified in Certificate No. 183. As with Government Lot 3, Mr.
8 German testified to this land being irrigated when his father owned the
9 land, in fact, his grandfather owned Government Lots 1 and 2 when the
10 certificates issued. He also testified to flood water being used and
11 irrigation happening in some years as soon as frost is out of the ground.
12 Therefore, the Referee recommends that a water right be confirmed for the
13 Nestlers under Court Claim No. 00927 with a June 30, 1880, date of priority
14 for the use of 0.76 cubic foot per second, 230.23 acre-feet per year from
15 April 15 to September 15 for the irrigation of 38 acres in Government Lot 1
16 of Section 18. The authorized point of diversion shall be in the NE~~X~~SW~~X~~ of
17 Section 7. The water right will have the following provision: Water use
18 may begin prior to April 15 if frost is out of the ground and water can
19 beneficially be used. When surplus water is available in excess of that
20 needed to satisfy all existing rights to Cooke Creek, an additional 0.76
21 cfs, 45 acre-feet per year may be used. The annual quantity is based on
22 the expectation that surplus water will be available no more than 30 days
23 during the spring.

24
25 Supplemental Report of Referee
Subbasin No. 10

1 Certificate No. 185 is a Class 12 right with an 1886 date of priority.
2 It authorized the diversion of 0.76 cubic foot per second for the
3 irrigation of 38 acres in Government Lot 2 of Section 18. The point of
4 diversion is in the NE~~NW~~SW~~N~~ of Section 7, the same point of diversion
5 identified in Certificates No. 183 and 184. As with the other two lots,
6 Mr. German testified to this land being irrigated when his father owned the
7 land. He also testified to flood water being used and irrigation happening
8 in some years as soon as frost is out of the ground. Therefore, the
9 Referee recommends that a water right be confirmed for the Nestlers under
10 Court Claim No. 00927 with a June 30, 1886, date of priority for the use of
11 0.76 cubic foot per second, 230.23 acre-feet per year from April 15 to
12 September 15 for the irrigation of 38 acres in Government Lot 2 of
13 Section 18. The authorized point of diversion shall be in the NE~~NW~~SW~~N~~ of
14 Section 7. The water right will have the following provision: Water use
15 may begin prior to April 15 if frost is out of the ground and water can
16 beneficially be used. When surplus water is available in excess of that
17 needed to satisfy all existing rights to Cooke Creek, an additional 0.76
18 cfs, 45 acre-feet per year may be used. The annual quantity is based on
19 the expectation that surplus water will be available no more than 30 days
during the spring.

20 Water rights are also being asserted for use of water from Coleman
21 Creek. Although initially the Referee concluded that water rights were
22 being asserted for all three government lots, the testimony at the
23 supplemental hearing suggests that only Government Lots 2 and 3 can be
24

25 Supplemental Report of Referee
Subbasin No. 10

1 irrigated from the ditch that conveys water from Coleman Creek. That ditch
2 enters Government Lot 1 very close to the southwest corner of the
3 government lot. The ditch can serve most of Government Lots 2 and 3.
4 According to documents in DE-1647, in 1894 Tillman Houser sold to Clarence
5 Houser and J. W. German Lots 1 and 2 and the NW~~SW~~% of Section 18 and
6 NE~~SE~~% of Section 13. Then in 1903 Clarence Houser conveyed to J. W.
7 German his one-half interest in the land. By the time the Schnebly v. Huss
8 controversy was initiated, J. W. German owned Government Lots 1, 2 and 3 in
9 Section 18, along with the NE~~SE~~% of Section 13. William and Pernina
10 German were defendants in the Schnebly v. Huss controversy. The Findings
11 of Fact states that in 1875 or 1876 water was appropriated for the NE~~SE~~%
12 of Section 13 and the NW~~SW~~% of Section 18, which is Government Lot 3.
13 There is no mention of the lands owned by the Germans in the W~~NW~~% of
14 Section 18 (Government Lots 1 and 2). The Referee must conclude that
15 either the Court found there was no water right for that land or the
16 Germans did not assert a water right for the land. Either way, since they
17 were parties to the action, they are bound by the results. The Referee
18 herein concludes no water rights were legally established for use of water
19 from Coleman Creek in Government Lots 1 and 2. There was, however, a water
20 right recognized for Government Lot 3 of Section 18, T. 18 N., R. 20 E.W.M.
21 and the NE~~SE~~% of Section 13, T. 18 N., R. 19 E.W.M. However, the Referee
22 can find no water right claim filed pursuant to RCW 90.14 for use of
23 Coleman Creek that specifically describes that land in its place of use.
24 Water Right Claim No. 115879 does describe those lands in the place of use,

25 Supplemental Report of Referee
Subbasin No. 10

1 however, the source of water is described as Cooke Creek and the point of
2 diversion described is on Cooke Creek. Water Right Claim No. 115878
3 describes the source of water as Coleman Creek, but the place of water use
4 is the ~~WNW~~^{NE} of Section 18. Kirk German testified that he must have made a
5 mistake in filing out the claim forms, that it was his intent to claim a
6 water right for using Coleman Creek on both the ~~NESE~~^{NE} of Section 13 and
7 Government Lot 3 of Section 18. Neither he or the current landowners have
8 attempted to amend the claim pursuant to RCW 90.14.065. Nestler's counsel
9 argues that RCW 90.14 was substantially complied with through completion of
10 the claim forms that are in the record. The Referee, however, disagrees.
11 The Court claims that have been filed in no way give notice that a water
12 right for use of Coleman Creek is being asserted for either Government Lot
13 3 Section 18 or ~~NESE~~^{NE} of Section 13.

14 Substantial compliance was addressed in great detail in State of
Washington v. Adsit, 103 Wn.2d 698, 694 P.2d 1065 (1985).

15 "The substantial compliance doctrine exists specifically for those
16 situations when 'the literal expression of legislation may be
inconsistent with the general objectives or policy behind it.' . . .
17 "although the form was incorrect, the substantive information the
18 applicant supplied met the legislative intent by providing adequate
records for administration of the state's waters and notifying the
state that the water was being put to beneficial use." Adsit at 704.
See also Memorandum Opinion Re: RCW 90.14 and Substantial Compliance
19 filed February 10, 1995.

20 Here, the substantive information needed to administer the state's water is
21 missing. In one case, the source of water is not correct and in the other the
22 place of water use is not correct. Although the Referee concludes that the
23 evidence is sufficient to determine that a valid water right was established, a

24
25 Supplemental Report of Referee
Subbasin No. 10

1 water right cannot be confirmed in this proceeding due to inadequate compliance
2 with RCW 90.14. If the claimants believe they can meet the criteria in RCW
3 90.14.065 for amending a claim, they are urged to pursue that avenue.

4 Cooke-Coleman, LLC., took several exceptions related to the lands they have
5 acquired that are described in Court Claim No. 00927. The first exception is
6 to the priority date awarded for the water right described on page 555 of the
7 Report of Referee. That right authorizes the use of Coleman Creek water to
8 irrigate the NE $\frac{1}{4}$ of Section 12, T. 18 N., R. 19 E.W.M. east of Coleman Creek
9 and Government Lots 1 and 2 of Section 7, T. 18 N., R. 20 E.W.M. The Referee
10 recommended a priority date of June 30, 1872. The year for the priority date
11 is from the Schnebly v. Huss decree, which established classes of waters and
12 provided information to show the year the water right was established for each
13 class. In this case, Class 1 was identified as water rights established before
14 1873. Lacking any definitive information on when that date would have been
15 prior to 1873, the Referee chose June 30, 1872. Exhibit DE-1653, a copy of the
16 Harrison and Catherine Houser response in that case shows that water was first
17 appropriated for this land in April of 1871. Cooke-Coleman is asking that the
18 priority date be changed to April 30, 1871, and the Referee agrees with that
19 position and makes that change. The claimant is also asking that a second
20 point of diversion be authorized for this water right. The point of diversion
21 authorized is 600 feet north and 800 feet east of the center of Section 1,
22 being in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 1, T. 18 N., R. 19 E.W.M. WRC No. 115875
23 described one point of diversion, in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 1. At the initial
24 hearing, the evidence lead the Referee to conclude that only a diversion in the
25

Supplemental Report of Referee
Subbasin No. 10

1 SW~~N~~E~~S~~ of Section 1 was being used and the Referee concluded that diversion
2 described in WRC No. 115875 and the one being used in the SW~~N~~E~~S~~ of Section 1
3 were likely the same diversion and that RCW 90.14 was substantially complied
4 with. However, at the supplemental hearing, Mr. Kellogg testified to using two
5 diversions, one in the NW~~S~~E~~N~~ and one in the SW~~N~~E~~S~~ of Section 1. With only
6 one diversion being described in the water right claim, the Referee can only
7 confirm one point of diversion in this proceeding. The Referee amends the
8 water right described on page 555 of the Report of Referee to authorize the
9 diversion that is described in WRC No. 115875 and the claimant should seek to
10 add the second point of diversion through the change process identified in RCW
11 90.03.380.

12 Ecology took exception to the quantity of water authorized under this same
13 water right. The Referee recommended a right to divert 1.8 cfs, 712.80
14 acre-feet per year for the irrigation of 160 acres. This was based on the
15 Schnebly v. Huss decree that awarded one-half inch of water for each acre
16 irrigated, resulting in an award of 1.8 cfs for the irrigation of 180 acres.
17 Only 160 acres have continued to be irrigated, however, the testimony indicated
18 that 1.8 cfs is diverted -- actually more than that is diverted at times.
19 Ecology's position is that if the acres irrigated are reduced, the quantity of
20 water authorized for use must also be reduced. The Referee disagrees with that
21 position. The quantity of water awarded in the decree is less per acre than
22 landowners and consultants hired by the landowners have testified is needed to
23 adequately irrigate the land. As a result, if a landowner chooses to reduce
24 the number of acres he irrigates in order to more adequately irrigate the

25 Supplemental Report of Referee
Subbasin No. 10

1 remaining land, there is nothing in the law that would prevent that from
2 happening. The water is still being used on the area described in the water
3 right, just on fewer acres. The Referee denies this exception by Ecology.

4 Cooke-Coleman also took exception to the point of diversion authorized in
5 the water right described on page 538, as did Ecology. The certificate from
6 the Cooke Creek adjudication described a point of diversion in the SW $\frac{1}{4}$ of
7 Section 6. The testimony at the initial hearing did not describe a diversion
8 being used in the SW $\frac{1}{4}$ of Section 6, however, the Referee was bound by the
9 findings from the earlier adjudication and authorized a point of diversion
10 consistent with the certificate. The claimant was directed to pursue changing
11 the point of diversion to the location being used through the change procedures
12 in RCW 90.03.380. Mr. Kellogg testified that he located the diversion in the
13 NW $\frac{1}{4}$ of Section 6 and provided a location based on GPS technology. The Referee
14 considered whether there might have been a typographical error in describing
15 the point of diversion, but concluded it would be difficult to reach that
16 conclusion. Attached to Exhibit DE-1658, which is the Report of Referee that
17 preceded the Anderson decree, is a copy of the map that was prepared by the
18 Supervisor of Hydraulics for that adjudication. Although the scale is very
19 small, the map clearly shows three diversions from Cooke Creek in the SW $\frac{1}{4}$ of
20 Section 6. Cooke Creek flows from north to south near the center line in
21 Section 6 and the map prepared for this adjudication, SE-2, shows Cooke Creek
22 flowing through the S $\frac{1}{4}$ of Section 6 east of the centerline, which would put it
23 in the SE $\frac{1}{4}$ of Section 6. Clearly the creek channel has changed over the years,
24 which would result in points of diversion being changed. However, the Referee

25 Supplemental Report of Referee
Subbasin No. 10

1 does not believe that moving over a quarter of a mile upstream, which is where
2 the diversion located by Mr. Kellogg is at, could be excused as being due to
3 channel changes. It may be that the diversion was moved to a more stable part
4 of the creek in order to avoid having to adjust to the changing channel
5 locations, but that type of change would have to be approved by the State
6 through the change process in RCW 90.03.380. Ecology asks for a point of
7 diversion more specific than just the SW% of Section 6. The Referee did not
8 define a more specific point because that is not possible with the current
9 record. The certificate did not describe a specific point, just the SW% of
10 Section 6. There is no diversion in the SW% of Section 6 currently being used
11 by the landowner, and the map from the prior adjudication shows three
12 diversions in the SW% of Section 6. Since the claimant is not using any of
13 those diversions, the Referee presumes that efforts will be made to change the
14 point of diversion to the one being used and there is no point in trying to
further define a non-existent point of diversion.

15 Exceptions 8 and 9 filed by Cooke Coleman, LLC, were for water rights
16 awarded under both Court Claim No. 00927 and 01141. The claimant is asking
17 that the beginning of the irrigation season be changed from May 1 to April 15
18 and the annual quantity of water authorized for use be increased commensurate
19 with that change. The exception also asks that use of water as soon as frost
20 is out of the ground also be recognized. Lastly, the claimant asks that the
21 provision allowing for use of surplus water be applied to the Cooke Creek water
22 rights awarded under both claims. As previously discussed for the other
23 parties joined to Court Claim No. 00927, the Referee will modify the water

25 | Supplemental Report of Referee
| Subbasin No. 10

1 rights previously awarded to authorize an irrigation season that begins
2 April 15 each year and the annual quantity shall be increased consistent with
3 that. A provision will be added to each Cooke Creek water right that allows
4 for use of water as soon as frost is out of the ground and water can
5 beneficially be used. The provision will also allow for the use of surplus
6 water when it is available.

7 The last exception to be addressed under Court Claim No. 00927 is Exception
8 No. 7, that seeks to have a water right awarded for the SW~~X~~SE~~X~~ and SE~~X~~SW~~X~~ of
9 Section 6, T. 18 N., R. 20 E.W.M. This land was not described in any of the
10 Court claims to which Cooke Coleman has been joined, but the land is adjacent
11 to the land described in Court Claim No. 00927, leading the Referee to conclude
12 the claimant is seeking to amend that Court claim to include these lands.

13 At the time of the Anderson proceeding, the SW~~X~~SE~~X~~ and SE~~X~~SW~~X~~ of Section 6
14 was owned by Susan A. Cook and upon her death, Rufus Cook as trustee for the
15 estate. A Class 8 water right with a 1880 date of priority was awarded for
16 this land for the use of 1.52 cubic feet per second for the irrigation of 76
17 acres. Certificate No. 210 issued for this water right with a point of
18 diversion in the SW~~X~~ of Section 6, likely the same point of diversion discussed
above.

19 Because this property was not described in any of the court claims, prior
20 to the supplemental hearing no evidence was entered into the record in support
21 of a water right. The claimant pointed the Referee to the water right that was
22 awarded in Anderson in 1921, however, there has been very little evidence of
23 continued beneficial use. Steve German testified at the supplemental hearing

24
25 Supplemental Report of Referee
Subbasin No. 10

1 that his grandfather owned the land north of Gage Road and east of Cooke Canyon
2 Road, which the Referee concludes is the the land in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ of
3 Section 6. He also testified that Kirk German grew crops at one time, but for
4 as long as Steve can remember the land was used for irrigated pasture. The
5 testimony also indicates that surplus water was used when available on the
6 land. There is nothing in the record to show when the German family acquired
7 the land in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6, however, Mr. German's testimony
8 that his grandfather owned it would suggest sometime in the 1930's. Although
9 the evidence of continued beneficial use is sketchy, the Referee concludes that
10 it has been sufficient to conclude the water right reflected in Certificate No.
11 210 was not abandoned during the time frame between when the certificate issued
12 and the relinquishment statute was passed in 1967. Additionally, the evidence
13 has been sufficient to conclude the right has not relinquished since that
time.

14 Therefore, the Referee recommends that a water right be confirmed to
15 Cooke-Coleman LLC, under Court Claim No. 00927, with a June 30, 1880, date of
16 priority for the diversion of 1.52 cubic foot per second, 460.47 acre-feet per
17 year from April 15 to September 15 for the irrigation of 76 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$
18 and SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6. Again, the point of diversion that shall be
19 authorized is that described in Certificate No. 210, even though it is
20 apparent that diversion has long ago been abandoned. The claimant needs to
21 approach Ecology to change the point of diversion through RCW 90.03.380. The
22 water right shall contain the provision that allows for use of water as soon as

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24
25 Supplemental Report of Referee
Subbasin No. 10

1 it can be beneficially used after frost is out of the ground and for use of
2 surplus water.

3 COURT CLAIM NO. 00676 -- Brent Dekoning
4 & Kirsten Dekoning
5 Gary Forgey
6 Addie L. Graaff
7 & Estate of Gerald O. Graaff

8 Brent and Kirsten Dekoning filed an exception to the Referee not
9 recommending confirmation of a water right for use of Park Creek as
10 asserted under Court Claim No. 00676. The Dekonings had purchased a
11 portion of the land owned by Addie L. Graaf. On February 19, 2003, the
12 Court granted Dekonings' motion to be joined as a claimant under Court
13 Claim No. 00676. Richard T. Cole, attorney for the Dekonings, represented
14 them at the Referee's supplemental evidentiary hearing on February 26,
15 2003, and Brent Dekoning provided testimony.

16 Gary Forgey was joined as a party to Court Claim No. 00676 by Addie
17 Graaf in January of 1992. Mr. Forgey has leased and farmed the Graaf
18 property since 1977. According to Mr. Dekoning Gary Forgey continues to
19 farm the Graaf property in Section 14. The Dekonings' exception is only to
20 a right not being confirmed for their land in Section 14, T. 17 N.,
21 R. 19 E.W.M. Addie Graaf did not file an exception or make an appearance
22 at the Court's exception hearing.

23 The property Brent and Kirsten Dekoning purchased from Addie Graaf
24 includes the majority of the S $\frac{1}{4}$ NW $\frac{1}{4}$ and the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13, T. 17 N.,
25 R. 19 E.W.M. Park Creek and an unnamed drain run diagonally through the
property. Those waterways, the county rights-of-way and two excluded

Supplemental Report of Referee
Subbasin No. 10

1 parcels result in 142.6 acres of fields (DE-1802). The sources of water
2 used for irrigation are Park Creek, an unnamed drain and Cascade Irrigation
3 District (CID).

4 The CID assesses all the irrigable acres in the Dekoning property. The
5 testimony is that the CID deliveries are somewhat unpredictable and that
6 the deep soils on the property have extremely high porosity. Those factors
7 result in the need to use Park Creek water on major portions of the
8 property. Some fields are irrigated exclusively with CID water and some
9 exclusively with Park Creek water.

10 The Dekoning property is irrigated from a dam on Park Creek located
11 40 feet south and 1220 feet east from the west quarter corner of
12 Section 13, being within the NE~~NW~~SW of Section 13, T. 17 N.,
13 R. 19 E.W.M., which is near the center of the property. Water is diverted
14 to a pipeline and ditch running to the northwest and a second ditch system
15 running southwest. Those ditches are gravity flow. The northerly ditch
16 supplies water to about 20 acres between the ditch and the north bank of
17 Park Creek. The southerly ditch serves about 10 acres south of Park Creek
18 and north of the ditch. The current dam was estimated by Mr. Dekoning to
19 be 30 to 40 years old. He explained that concrete remnants of a previous
20 dam are adjacent to the current dam. Ecology's Investigation Reports also
21 describe land in Section 14 served by these ditches; however, water rights
for Section 14 are not considered herein.

22 A careful reading of the first full document in Exhibit DE-1801, a
23 Grant of Easement between The W. H. Reed Co. and Peter Sorenson dated
24

25 Supplemental Report of Referee
Subbasin No. 10

1 February 25, 1910, shows that the agreement is regarding the right-of-way
2 for a ditch to convey CID water across land east of the current Dekoning
3 property. The Cascade Canal runs south along the east section line of
4 Section 13, which correlates with the right of way description. Most of
5 the other documents in the exhibit are not very specific and just reference
6 ditches or water rights in general without describing a specific source of
7 water. The Referee, however, does take particular note of the second
8 document, which is an agreement between Peter Sorenson and The W. H.
9 Reed Company dated January 4, 1913. That agreement states that Peter
10 Sorenson is purchasing from W. T. Sheldon a certain water right to Park
11 Creek, previously conveyed by The W. H. Reed Company to Sheldon. At the
12 time of the agreement The W. H. Reed Company owned the ~~S½NE½~~ and ~~N½SW½~~ of
13 Section 13 and Peter Sorenson was giving the company and its successors the
14 right to use flood waters of Park Creek belonging to Sorenson. Water could
15 only be used if at least 400 inches of water were flowing in the creek
16 through the company's land for use on the Sorenson land. Documents put in
17 the record by neighboring claimants, Nancy Carmody, et. al., as Exhibit
18 DE-1687, show that in 1913 William T. Sheldon sold to Peter Sorenson all of
19 the rights he had in the waters of Park Creek, said rights resulting from a
20 1907 agreement between Sheldon and James Watson and others. However, there
21 is nothing in the record to show specifically what water right was being
22 conveyed. The 1907 agreement does not identify the lands owned by those
23 parties who were selling the water right. J. D. Olmstead v. S. Hayes
24 confirmed all the water of Park Creek to John McEwen and J. D. Olmstead in

25 Supplemental Report of Referee
Subbasin No. 10

1 1892. The Referee needs evidence that the sellers in the 1907 agreement
2 had a valid water right to use Park Creek as a result of being successors to
3 McEwen or Olmstead. Additionally, the Referee is not convinced that Peter
4 Sorenson could retain the right to use Park Creek on his land and also
5 convey the right to use excess water to another party.

6 Based on the proceeding analysis, the Referee recommends that water
7 rights not be confirmed under Court Claim No. 00676.

8 **COURT CLAIM NO. 00190 -- Betty Dodge**
9 (A) 06383 & The Estate of Gerald Dodge
10 00191
11 (A) 02101
12 (A) 02102
13 (A) 06384

14 Betty Dodge (Dodge) timely filed exceptions to the Referee's
15 recommendations to not confirm water rights under either Court Claim No.
16 00190 and 00191 and their amendments. The Court remanded Claim Nos. 00190
17 and 00191 to the Referee for taking additional evidence. Attorney Jeff
18 Slothower represents Betty Dodge. Thomas Jared Dodge, Robert Dodge and
19 Betty Dodge testified at the supplemental hearing and Exhibit Nos. DE-1701
20 through 1711 were admitted into the record.

21 Water rights are asserted under Court Claim Nos. 00190 for Cooke Creek
22 (sometimes referred to as Cook Creek) and 00191 for Park Creek (sometimes
23 referred to as Parke Creek). During analysis of the record, the Referee
24 took notice of several factual clarifications which will facilitate the
25 evaluation of the exceptions. On Page 131, Line 20 of the Referee's Report,
the reference to the Olmstead homestead should reflect the following

Supplemental Report of Referee
Subbasin No. 10

1 160 acres: The NE $\frac{1}{4}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 21 and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 22
2 all in T. 17 N., R. 19 E.W.M. It should also be noted that of the four
3 homestead properties discussed on Page 133 as being partially within the
4 Dodge property, the 120 acres settled by William Montgomery was not riparian
5 to Cooke Creek (map that is Exhibit No. DE-1173). The majority of the Dodge
6 land upon which Cooke Creek water is used (92 of 114 acres, Map Exhibit
7 No. DE-1183) lies within that homestead (S $\frac{1}{4}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21).
8 Review of Exhibit No. DE-1183, lead the Referee to conclude that only
9 10 acres of the NE $\frac{1}{4}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 21 lies below the Dodge Ditch
10 which conveys Cooke Creek water west, rather than the 20 acres identified on
11 Page 134, Line 22 of the Report of Referee. The remaining 12 acres appear
12 to be split between the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 22. Finally, WRC
13 No. 200024 was filed in late 1979, not in 1985 as stated on Page 133,
14 Line 4. Correction of this factual error negates the Referee's discussion
15 from Lines 4 through 10, Page 133.

16 The claimant took exception to the Referee's conclusion that water
17 rights could not be confirmed for use of Cooke Creek because no water right
18 was awarded for the property in the prior adjudication (Anderson). This
19 same exception was taken by several other claimants who own land in the same
20 area as the Dodge property. Beginning on page 8 of this report, the Referee
21 discusses the arguments presented by each of the parties and any evidence
22 presented to support the arguments. Ultimately the Referee concluded there
23 still is insufficient evidence to conclude that the prior adjudication did
24 not determine all the valid water rights for use of Cooke Creek. As a
25

Supplemental Report of Referee
Subbasin No. 10

1 result, the Referee continues to recommend that water rights not be
2 confirmed under Court Claim No. 00190 for use of Cooke Creek.

3 Dodge took exception to the Referee's determination that Park Creek
4 water rights could not be confirmed for the ~~NE 1/4 NW 1/4~~ of Section 23 and the
5 ~~SE 1/4 NE 1/4~~ of Section 22, T. 17 N., R. 19 E.W.M. Specifically asserted are the
6 following: The upper point of diversion on Park Creek currently used by
7 Dodge is located approximately 725 feet north and 1100 feet east of the
8 south quarter corner of Section 14, T. 17 N., R. 19 E.W.M., about 1500 feet
9 upstream from the historic diversion which was located near the south
10 quarter corner of Section 14, T. 17 N., R. 19 E.W.M. The latter point of
11 diversion still exists, but has been out of service since the mid-1960s when
12 the Dodges constructed the new diversion in the ~~SW 1/4 SE 1/4~~ of Section 14. They
13 further argue that the Court case J. D. Olmstead vs. Hayes, et al., May 31,
14 1892, was not a general adjudication of the waters of either Brush or Park
15 Creek; therefore, claimants' predecessors who were not parties to that case
16 were not precluded from appropriations from those creeks under either the
17 Prior Appropriation or Riparian Doctrine and evidence of beneficial use
18 prior to 1905 is in the record. Finally, claimants assert that natural flow
19 water is available in Park Creek at various times, especially during the
20 early and late irrigation seasons. Those periods include late March and
21 extend into early November. It is argued that the water in Park Creek
22 before the irrigation district canals turn on in spring and after they are
23 shut down in fall is natural flow.

24
25 Supplemental Report of Referee
Subbasin No. 10

1 Although the Court in J. D. Olmstead v. S. Hayes, et al. confirmed all
2 the waters of Brush and Park Creeks to J. D. Olmstead, John H. McEwen and
3 John Holtz in 1892, the Referee agrees with the claimants assertion that the
4 case was not a general adjudication of either of those streams. After
5 evaluating the chain of title sheets provided by Dodge, the Referee found
6 none of the defendants named in Olmstead, therefore, Dodge is not a
7 successor to any of the named parties and is not bound by the case. It is
8 clear that McEwen, Olmstead and Holtz were in possession of their extensive
9 properties, respectively, in 1872, 1872 and 1871. None of those lands
10 included parcels now owned by Dodge. The record shows portions of three
11 homesteads are now owned by Dodge. The NE~~4~~NW~~4~~ is part of the Daniel Wigle
12 homestead with a patent date of November 25, 1879. The NE~~4~~NE~~4~~ of Section 22
13 and the NW~~4~~NW~~4~~ of Section 23 are a part of the Benjamin Lewis homestead
14 which he sold on contract to A. Cleman on December 2, 1878. The SE~~4~~NE~~4~~ of
15 Section 22 is part of the former Elijah Grewell homestead, the receiver
16 receipt for which land is dated June 23, 1886. The Referee notes that the
17 Grewell homestead was not riparian to Park Creek, whereas the Lewis and
18 Wigle homesteads were riparian to that stream. Any water right confirmed
19 for the SE~~4~~NE~~4~~ of Section 22 would therefore have to be based upon the Prior
Appropriation Doctrine.

20 The record shows that the Larsen family owned the current Dodge
21 property around 1900 and the affidavit of Larsen and Indermuhle (Exhibit
22 No. DE-1200) attests to irrigation of those lands with water from Park Creek
23 in 1900. No evidence of beneficial use on this land before that date is in
24

25 Supplemental Report of Referee
Subbasin No. 10

1 the record; therefore, the earliest priority date that can be given to a
2 water right for the SE~~4~~NE~~4~~% of Section 22, T. 17 N., R. 19 E.W.M. would be
3 June 30, 1900. Under the Riparian Doctrine, the priority date for the
4 NE~~4~~NE~~4~~% of Section 22 and the NW~~4~~NW~~4~~% of Section 23 would be December 2, 1878,
5 and the priority date for the NE~~4~~NW~~4~~% of Section 23 would be November 25,
6 1879.

7 It is clear from the record that Park Creek carries large quantities of
8 return flow water from the Kittitas Reclamation District (KRD), Cascade
9 Irrigation District's (CID) Cascade Canal and Ellensburg Water Company's
10 (EWC) Town Ditch). EWC began delivery of Yakima River water in the vicinity
11 between 1885 and 1895, CID developed a delivery system about 1903 and the
12 KRD was delivering Yakima Project water in the early 1930s. Application of
13 imported irrigation water to vast areas in the Park Creek drainage basin
14 progressively altered the local hydrology not only during the irrigation
15 season, but year around. Affidavits of local property owners during
16 litigation filed in 1919, George and Rebecca Donald and Maymie and George
17 Ferguson v. Joseph Preece and John Sorenson civil 6018 (see Exhibit
18 No. DE-1717 submitted by Keith Eslinger) describes the use of Brush and Park
19 Creeks to deliver Town Ditch water and heavy reliance on seepage (return
20 flow water). Any water right herein recommended for confirmation is
21 restricted to the natural flow available. It is further recognized that EWC
22 spills some of its water into Park Creek for delivery to its patrons,
23 including Dodge.

24
25 Supplemental Report of Referee
Subbasin No. 10

1 The additional testimony and evidence put in the record regarding the
2 middle and upper points of diversion on Park Creek did not include evidence
3 as to compliance with RCW 90.03.380. The evidence shows that in the 1960s
4 Dodge moved the point of diversion from the south quarter corner of
5 Section 14 upstream about 1500 feet to the current point of diversion in the
6 SW~~N~~SE~~N~~ of Section 14, T. 17 N., R. 19 E.W.M. Exhibit No. DE-1208 is a copy
7 of an application for change of point of diversion Gerald Dodge filed with
8 the Department of Ecology (Ecology) October 23, 1980. This application was
9 made to Water Right Claim (WRC) No. 200,023 filed August 26, 1980, pursuant
10 to RCW 90.14. The record does not suggest that Ecology has acted on that
11 application for change. Therefore, the Referee will recommend confirmation
12 of a right at the historic points of diversion, one near the north quarter
13 corner of Section 23 and the lower point of diversion located 1150 feet west
14 of the north quarter corner as the historic diversion points. Both of these
15 locations are described in attachments to WRC No. 200,023. The latter point
16 serves 112 acres in the NW~~N~~NE~~N~~ of Section 23 and the E~~N~~NE~~N~~ of Section 22 and
the upper diversion serves 40 acres in the NE~~N~~NW~~N~~ of Section 23.

17 Based on the foregoing, the Referee recommends confirmation of a water
18 right based upon the Prior Appropriation Doctrine with a priority date of
19 June 30, 1900, for the diversion of 3.5 cfs; 240 acre-feet per year from
20 March 15 through November 15 for the irrigation of 40 acres and stock water
21 in the SE~~N~~NE~~N~~ of Section 22, T. 17 N., R. 19 E.W.M.. The point of diversion
22 is 1150 feet west of the north quarter corner of Section 23, T. 17 N.,
23 R. 19 E.W.M. The annual quantity recommended is 6 acre-feet per acre based

24
25 Supplemental Report of Referee
Subbasin No. 10

1 upon WRC No. 200,023 and is further supported by the limited availability of
2 natural flow water.

3 A second water right is recommended based upon the Riparian Doctrine,
4 with a priority date of December 2, 1878, for the diversion from Parke Creek
5 of 3.5 cfs, 432 acre-feet from March 15 to November 15 for the irrigation of
6 72 acres and stock water within the NE~~X~~NE~~X~~ of Section 22 and the NW~~X~~NW~~X~~ of
7 Section 23. The diversion is located 1150 feet west of the north quarter
corner of Section 23.

8 Each of the water rights authorized herein will carry a Limitation on
9 Use provision that provides that a maximum of 3.5 cfs can be diverted from
10 the diversion 1150 feet west of the north quarter corner of Section 23 at
11 any one time, as that is the capacity of this diversion. The season of use
12 and point of diversion are the same as the previously described water right.

13 The final water right recommended is also under the Riparian Doctrine,
14 with a priority date of November 25, 1879, for the diversion from Park Creek
15 of 3.5 cfs, 240 acre-feet per year from March 15 through November 15 for the
16 irrigation of 40 acres and stock water within the NE~~X~~NW~~X~~ of Section 23,
17 T. 17 N., R. 19 E.W.M. The point of diversion recommended for confirmation
18 is 100 feet north of the south quarter corner of Section 14, T. 17 N.,
19 R. 19 E.W.M. The Referee acknowledges that this diversion has not been in
20 use by the claimant since the mid-1960s; however, the diversion which is in
21 use has not been approved as required by RCW 90.03.380. It is anticipated
22 that the pending application for change on file with Ecology will be
23 addressed in the foreseeable future to address the point of diversion issue.

24
25 Supplemental Report of Referee
Subbasin No. 10

1 The record indicates that the cattle grazing on the Dodge properties
2 during the non-irrigation season have direct access to Cooke Creek or Park
3 Creek; therefore, the stock water stipulation discussed on Page 4 of the
4 Report of Referee is applicable to the two properties under Court Claim
5 Nos. 00190 and 00191. The claimant has a non-diversionary stock water right
6 under that stipulation.

7 **COURT CLAIM NO. 00597 -- Anita Edgar**

8 Ecology took exception to the quantity of water in the right
9 recommended for confirmation by the Referee under Court Claim No. 00597.
10 They brought to the Referee's attention the provisions in Schnebly v. Huss
11 concerning the quantity of water used on each acre irrigated. There was no
12 appearance in behalf of Ms. Edgar at the supplemental hearing, nor was
13 there any written response to Ecology's exception.

14 The decree in Schnebly v. Huss awarded a water right for the entire
15 homestead of John E. Voice; a portion of which is now owned by Ms. Edgar.
16 The 67.1 acres of that homestead now owned by Anita Edgar is entitled to
17 one-half minter's inch of water per acre, or 0.67 cfs. The water duty
18 awarded was very conservative. As a result it is not uncommon for
19 landowners to concentrate the confirmed water on their most productive
20 land. In this situation, the full 0.67 cfs has been consistently applied to
21 30 acres that Ms. Edgar and her predecessors have continued to irrigate.
22 No instantaneous or annual quantity has been relinquished; therefore, the

23
24
25 Supplemental Report of Referee
 Subbasin No. 10

1 Referee recommends that the quantities of water awarded be affirmed and
2 Ecology's exception be denied.

3 COURT CLAIM NO. 01049 -- Loyal W. Erickson
4 & Flora B. Erickson
5 William G. Viert
6 Edgar Martinez
7 & Holli Martinez
8 Steve K. Franchini
9 & Diane M. Franchini
10 Loran L. Kollmorgen
11 & Sheila J. Kollmorgen

12 Although Loyal W. and Flora B. Erickson and William G. Viert are named
13 parties associated with Court Claim No. 01049, evidence in the record
14 clearly indicates they have no further interest in the lands described in
15 the claim. Therefore, any water rights confirmed herein will bear the name
16 of the actual landowners, all of whom have been joined to the claim.
17 Exceptions were filed to the Report of Referee by Edgar and Holli Martinez,
18 Steve K. and Diane M. Franchini and Loran L. and Sheila J. Kollmorgen.
19 Attorney Jeff Slothower represented these parties at the supplemental
20 hearing. Loran Kollmorgen and Steve Franchini testified at the
21 supplemental hearing.

22 The Franchinis took exception to the Referee not recommending
23 confirmation of a water right to use waters from Coleman Creek for
24 irrigating a portion of the land they own in that portion of the SW~~ANW~~ of
25 Section 13, T. 18 N., R. 19 E.W.M. lying north of the KRD Canal. At the
initial hearing evidence of historical water use and documentation to
support existence of a water right was offered and won't be repeated
herein. See page 159 of the Report of Referee for Subbasin No. 10. The

26 Supplemental Report of Referee
27 Subbasin No. 10

1 Referee found that water rights for the Franchinis land was addressed in
2 the Schnebly v. Huss decree, wherein a Class 1 water right was awarded for
3 the use of 80 inches (1.60 cfs) for irrigation of the SW₁NW₄, NW₁SW₄ and
4 E₁NW₄ of Section 13. That decree allowed for the use of one-half inch of
5 water for each acre irrigated, therefore, a right to use 80 inches
6 indicated that 160 acres, or all of the land described was being
7 irrigated. The only thing that prevented the Referee from confirming a
8 water right for the land now owned by the Franchinis was compliance with
9 RCW 90.14, the Claims Registration Act. L. W. Erickson, who owned the land
10 in 1974, filed Water Right Claim (WRC) No. 071431 asserting a right to use
11 2 cfs from Coleman Creek for the irrigation of 120 acres in the E₁NW₄ of
12 Section 13 and, at least as interpreted initially by the Referee, the
13 NW₁NW₄ of Section 13. The SW₁NW₄ of Section 13, a portion of which is now
14 owned by the Franchinis, was not described. At the supplemental hearing,
15 the Franchinis introduced several documents that clearly show that at the
16 time WRC No. 071431 was filed Mr. Erickson did not own the NW₁NW₄ of
17 Section 13 (same as NW₁NW₄). Mr. Erickson is deceased, so it is not
18 possible to inquire of him concerning his intentions.

19 The Franchinis counsel was asked about efforts to attempt to amend WRC
20 No. 071431. Mr. Slothower responded that Mr. Franchini could not certify
21 under oath that Mr. Erickson made an error, because he himself has no idea
22 how or why it happened and since Mr. Erickson is dead, Mr. Erickson cannot
23 explain what happened. It is Mr. Slothower's position that the Referee in
24 an adjudication has the latitude to interpret the claim based on the

25 Supplemental Report of Referee
Subbasin No. 10

1 evidence presented. Mr. Erickson clearly described the E~~NW~~% of Section 13
2 in the place of water use section of WRC No. 071431 and attempted to
3 describe other land in the NW%. The only other land that he owned in the
4 NW% of Section 13 was in the SW~~NW~~%. Mr. Erickson never owned the NW~~NW~~%
5 of Section 13, so it would have been unreasonable for him to include that
6 land in his RCW 90.14 claim. The Referee accepts the Franchinis argument
7 and finds there is substantial compliance with the requirements of RCW
8 90.14. State of Washington v. Adsit, 103 Wn.2d 698, 694 P.2d 1065 (1987).
9 It is recommended that a water right be confirmed to them under Court Claim
10 No. 01049 with an April 7, 1871, date of priority for the diversion of 0.20
11 cubic foot per second, 78 acre-feet per year for the irrigation of 20 acres
12 in that portion of the SW~~NW~~% of Section 13, T. 18 N., R. 19 E.W.M. lying
13 northeast of the KRD canal.

14 The Martinezes took exception to the Referee not recommending
15 confirmation of a water right to use water from an unnamed spring for
16 domestic supply in the SW~~SW~~% of Section 13 and for irrigation in the E~~NW~~%
17 of Section 13. The Kollmorgens took exception to the Referee not
18 recommending confirmation of a water right to use of the same spring for
19 domestic supply in the SE~~SW~~% and irrigation in the E~~SW~~% of Section 13.
20 The Referee identified two issues that prevented confirmation of a water
21 right. One was lack of evidence to show that a water right had been
22 established through beneficial use prior to June 6, 1917, and the other was
23 deficiencies in the water right claim filed pursuant to RCW 90.14.

24
25 Supplemental Report of Referee
Subbasin No. 10

1 At the initial evidentiary hearing, Lee Fleury, who farmed the land
2 when it was owned by the Ericksons, testified concerning two springs
3 located in the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 13. The testimony was that only one
4 spring, the westernmost spring, was being actively used, and that spring
5 supplied domestic water to the two homes and was used to irrigate land
6 south of the KRD canal in the E $\frac{1}{2}$ SW $\frac{1}{4}$ and in conjunction with Coleman Creek
7 water on land north of the KRD canal in the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 13. Mr.
8 Fleury stated that the easternmost spring was pretty much inactive. Mr.
9 Fleury had lived on the property and assisted with irrigation and farming
10 of the land for 20 years prior to the evidentiary hearing. Water Right
11 Claim No. 071432, which was filed by L. W. Erickson asserts a right to use
12 0.5 cubic foot per second, 300 acre-feet per year from an unnamed spring
13 for the irrigation of 40 acres, domestic and livestock in the E $\frac{1}{2}$ NW $\frac{1}{4}$ of
14 Section 13. The spring is described as being 1320 feet east and 940 feet
15 south of the northwest corner of Section 13, being in the NW $\frac{1}{4}$ of
16 Section 13. Mr. Fleury's testimony and other evidence presented in 1991
17 lead the Referee to conclude that Mr. Erickson intended WRC No. 071432 to
18 describe the westernmost spring.

19 The exceptions filed by Martinez and Kollmorgen suggest they are
20 seeking a right to use an unnamed spring for both domestic supply and
21 irrigation. However, Mr. Kollmorgen's testimony at the supplemental
22 hearing is quite different than that offered at the initial hearing and
23 leads to a conclusion that water rights are being sought for use of both
24 springs. However, only one water right claim form was filed pursuant to

25
Supplemental Report of Referee
Subbasin No. 10

1 RCW 90.14 and that claim only asserts a right to use one spring. On
2 DE-1747, an aerial photograph, the location described on WRC No. 071432 is
3 marked with "LE". Also marked on the photo is the location of the spring
4 ("J") that is used for domestic supply in the house on the Martinez
5 property and for domestic irrigation and stock watering at the Kollmorgen
6 house and the spring that forms a stream that is used to irrigate land
7 owned by the Martinezes north of the KRD canal and by the Kollmorgens south
8 of the canal ("L"). As evidenced by the aerial photograph, the two springs
9 that are being used are several hundred feet apart. Both springs and the
10 location described in WRC No. 071432 are in the E~~NW~~^{NE} of Section 13. The
11 Referee could easily have accepted the argument that Mr. Erickson's intent
12 was to describe either of the two springs. However, the Referee is not
13 willing to conclude that the water right claim could have been intended to
14 describe both springs. The spring location described in WRC No. 071432 is
15 due north of the spring used for irrigation only. If the Referee was left
16 to determine which spring Mr. Erickson was most likely attempting to
17 describe, it would be the spring marked with an "L" on DE-1747. The
18 Referee is very concerned that the testimony of Mr. Kollmorgen, a new owner
19 of the land, is significantly different than that of Mr. Fleury, who lived
20 on and farmed the land for 20 years. There was nothing offered to explain
the difference between the two witnesses.

21 At the evidentiary hearing held in 1991, Lee Fleury, who in addition to
22 farming the land also lived in the house now owned by Mr. and Mrs.
23 Martinez, testified that the original Erickson homestead was located north

24
25 Supplemental Report of Referee
Subbasin No. 10

1 of the KRD canal and at an unspecified time, moved to its current location
2 in the SW~~SW~~SW~~W~~ of Section 13. RP October 8, 1991, page 279. Mr. Fleury
3 also testified that when the house was located north of the canal, there
4 was no piping system to deliver water to the house. Buckets were filled
5 and carried to the house. Any water right that was established for
6 domestic supply was for a very limited supply and was for in-house use
7 only. After the house was moved to the SW~~SW~~SW~~W~~ of Section 13, the spring
8 was piped and water appropriated. Again, the date is not in the record.
9 Loran Kollmorgen testified that Henry Schnebly, who was born in 1918 and
10 grew up in the area, told him that he does not recall there ever being a
11 house north of the KRD canal. It may be that the only time there was a
12 house in the NW~~N~~ of Section 13 was before the KRD canal was built, which is
13 why Mr. Schnebly does not remember it in relation to the canal. DE-1744 is
14 a 1936 map that was part of a soil survey. This map shows structures in
15 the SW~~SW~~SW~~W~~ of Section 13, but again, nothing north of the canal.

16 The home that is owned by the Martinezes continues to receive water for
17 domestic supply from the spring. Bottled water is used for consumption,
18 but spring water is used for other purposes in the home and lawn and garden
19 irrigation. The second home that has received water from the spring is on
20 the Kollmorgen property. The home was built by Loyal Erickson, however,
21 the record is not clear on when the home was constructed. The witnesses
22 testified that the home was very old, but that does not assist in
23 determining when it was constructed and first used water from the spring.

24 Prior to 1990, water from the spring was used for in-house domestic

25 Supplemental Report of Referee
Subbasin No. 10

1 supply. However, around 1990, William Viert constructed a well near the
2 house and since that time well water has been used for in-house supply.
3 The spring continues to be used for lawn and garden irrigation around the
4 house, stock water, and to water a paddock area around the barn. No one
5 was able to estimate how much water is used or how much is produced by the
6 spring.

7 At the initial evidentiary hearing, the water source was consistently
8 referred to as a spring. However, at the supplemental hearing, it was
9 frequently called a well -- specifically a dug well. According to Mr.
10 Kollmorgen's testimony, the water source is in a concrete revetment covered
11 by a steel plate. The area is enclosed by a split rail fence. Photographs
12 put in the record by Mr. Kollmorgen shows very little vegetation in the
13 area around the water source. There is another spring that emerges to the
14 east that forms a stream that is used for irrigation purposes and stock
15 watering. There is quite a bit of vegetation around the second spring and
16 the stream. Water is delivered to the homes by gravity flow, the result of
17 an 80 foot elevation change from the water source to the homes. No one
18 knows how far below land surface the water is, however, none of the
19 witnesses has seen water flowing from the water source. The evidence that
20 was presented at the supplemental hearing is not sufficient for the Referee
21 to determine whether the water source is a well or a spring. If the water
22 source is a well, this Court would not have jurisdiction to determine
23 rights to the use of the water, as this adjudication is only determining
24 surface water rights. Use of the well would be covered by the Ground Water

25
Supplemental Report of Referee
Subbasin No. 10

1 Code, RCW 90.44. The Referee does note that the Ground Water Code was
2 adopted by the legislature in 1944. Prior to that time water rights could
3 be established through use of the water. The evidence in the record would
4 suggest that the homes were constructed prior to 1944 and there may be a
5 ground water right based on water use prior to 1944. Compliance with the
6 Claims Registration Act, RCW 90.14, would also be necessary to protect any
7 water right that may have been established.

8 The claimant is asking the Referee to conclude that Mr. Erickson
9 intended to describe the spring being used for domestic supply and made an
10 error when he completed the RCW 90.14 claim. And in spite of the S%SW% not
11 being described, proceed with confirming a water right for domestic supply
12 for two homes; or to conclude that the water source is a well and outside
13 the jurisdiction of this case.

14 The Referee cannot do either. Ignoring the place of use description on
15 the water right claim would not be appropriate. The claimants are not
16 arguing there was a typographical error or that Mr. Erickson misdescribed
17 the lands -- a right is also being asserted to use water from the spring in
18 the E%NW% of Section 13. They are arguing that the place of use should
19 have included additional lands beyond those described. The additional area
20 is not adjacent to the lands described on the claim form, so the Referee
21 cannot conclude that Mr. Erickson thought he was describing all of the
22 lands served by the spring. Mr. Erickson is dead, so there is no way to
23 determine his intentions in completing the form. The place of use on the
24 claim form does describe where the original Erickson homestead was first

25 Supplemental Report of Referee
 Subbasin No. 10

1 built. Additionally, the Referee is not convinced that it was Mr.
2 Erickson's intent to describe the spring being used for domestic supply.
3 Although the water right claim does list domestic as one of the purposes of
4 use, it also describes irrigation of 40 acres. If Mr. Kollmorgen's
5 testimony is found to be more compelling than Mr. Fleury's, a different
6 spring, over 500 feet to the east, has been used for irrigation and
7 continues to be used for irrigation. The water right claim may have been
8 intended to describe the second spring.

9 The deficiency in the water right claim is not the only thing that
10 prevents the Referee from confirming a water right for use of the spring
11 for domestic supply. Mr. Fleury's testimony at the initial hearing was
12 that before the Erickson homestead was moved, the spring was not piped.
13 Water was carried by buckets from the spring. This would establish a very
14 limited riparian water right that would be associated with a home built
15 near the spring. When the home was moved almost 3,000 feet to the south,
16 the spring was piped a significant distance to the homesite. This was an
17 appropriation of the water and there needs to be evidence that this
18 appropriation occurred prior to June 6, 1917. It appears from the chain of
19 title documents that Mr. Erickson acquired the land in Section 13 in 1904.
20 The Referee will not jump to any conclusions on how long it would have
21 taken him to build a home in the NW $\frac{1}{4}$ and then move it to the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of
22 Section 13 and the claimants have offered nothing to assist in that
23 determination. Then sometime after that, Loyal Erickson built a house in
24 the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13. The Referee is very comfortable concluding that

25 Supplemental Report of Referee
Subbasin No. 10

1 would not have happened prior to June 6, 1917. In fact, the chain of title
2 documents show that L. W. and Flora Erickson acquired the E½SW¼ of
3 Section 13 on February 3, 1932. It would be more reasonable to conclude
4 the home was built after they acquired the land, clearly during a time
5 period when the only way to establish a water right would have been through
6 the permitting procedures in RCW 90.03, the Surface Water Code.
7

7 The Referee continues to recommend that a water right not be confirmed
8 for use of water from the unnamed spring for domestic supply due to
9 non-compliance with RCW 90.14 and lack of evidence of beneficial use prior
10 to June 6, 1917. If the water source is, in fact, a well, it is outside
11 the jurisdiction of this court.

11 The Kollmorgens and Martinezes are also seeking a right to use water
12 from a second spring for irrigation. However, at the 1991 hearing, Mr.
13 Fleury testified that this spring was not being used for irrigation and
14 there was nothing in his testimony to suggest it had been used during the
15 time he was working on the land. He testified that the spring that was
16 providing domestic water was used to irrigate land in the E½NW¼ of
17 Section 13, below the spring and east of the pipeline shown on SE-2 and was
18 piped across the KRD canal. DE-1747 clearly shows the stream that flows to
19 the south from the spring area and at least two distinct ditches that could
20 be used to irrigate the land. However, the date of this aerial photo is
21 not in the record.

22 The claimants offered very little additional evidence of historical use
23 of the spring and stream that emanates from the spring. Although Mr.
24

25 Supplemental Report of Referee
Subbasin No. 10

1 Kollmorgen testified to conversation he had with Henry Schnebly about his
2 memory of homes above the canal, there was no testimony about Mr.
3 Schnebly's memory of the spring fed stream being used to irrigate any of
4 the claimants land. That being said, there is substantial evidence in the
5 record to show that the land in the NW $\frac{1}{4}$ of Section 13 has been irrigated
6 with water diverted from Coleman Creek since well before 1900. It seems
7 very reasonable to conclude that the landowners who constructed the ditch
8 from Coleman Creek would have also utilized any water sources that were on
9 the land, including the spring and stream in the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 13.
10 DE-1744, the soil survey map from 1936, does show the stream, but shows it
11 ending prior to reaching the KRD canal. However, with Mr. Fleury's
12 conflicting testimony about which spring actually is being used to irrigate
13 the land in the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 13, the Referee is not prepared to
14 recommend confirmation of a water right.

15 **COURT CLAIM NO. 00613 -- Keith R. Eslinger**
16 & Karen E. Eslinger

17 The Referee's Report for Subbasin No. 10 (Kittitas) did not recommend
18 confirmation of the water rights asserted by Keith and Karen Eslinger
19 (Eslinger) via Court Claim No. 00613. The Eslingers timely filed a series
20 of exceptions to the Referee's report through their attorney Jamie M.
21 Morin. The Court granted Eslingers' motion to allow filing of a
22 supplemental exception on April 15, 2002. Court Claim No. 00613 was
23 remanded to the Referee to allow introduction of additional testimony and
24 evidence in regards to water rights on Caribou and Park/Brush Creeks. The

25 Supplemental Report of Referee
Subbasin No. 10

1 Eslingers were represented by Attorney Jamie Morin at the supplemental
2 hearing, at which time Keith Eslinger testified and multiple exhibits were
3 admitted into the record. Richard Bain's deposition and letter report were
4 entered into evidence as Exhibit DE-1718.

5 Following presentation of evidence in 1991, the Referee had concluded
6 within the gross ownership of 202 acres, 175.3 acres are irrigated from
7 Caribou and Park/Brush Creeks. The record now indicates (Exhibit DE-1718)
8 that 190 acres can be and are from time to time irrigated with creek
9 water. That clarification indicates that the 14.7 acres upon which
10 Ellensburg Water Company deliveries are used is also irrigated with Park
11 Creek water as needed. Data contained in the Bain deposition and his
12 letter report (Figure (1), DE-1718) correct and add to the flow
13 measurements at the Caribou and Park Creek diversions. The pipelines from
14 Caribou and Park Creeks are interconnected, resulting in the 35 acres
15 irrigated from Caribou Creek also being irrigated with Park Creek water as
16 needed. The record does not indicate how the original gravity flow ditches
17 were laid out or which areas of the current ranch were irrigated from each
18 creek. However, the record clearly shows that the points of diversion for
19 Park and Caribou Creeks have been changed after adoption of the Surface
20 Water Code in 1917. There is no evidence in the record that those changes
21 were authorized in compliance with the procedure that is now codified in
22 RCW 90.03.380. Documents contained in DE-1717 (Donald v. Preece) indicates
23 that in 1919 Joseph Preece moved his diversion about one-quarter mile
24 upstream on Park Creek. It also contains a statement from Preece attesting

25 Supplemental Report of Referee
Subbasin No. 10

1 to use of Brush and Park Creek to convey his Ellensburg Water Company
2 deliveries and to his use of up to one-third of the return flow water in
3 those two creeks. His diversion in 1919 was located about 700 feet
4 downstream of the confluence of Brush Creek with Park Creek. During the
5 supplemental hearings, evidence was put in the record by claimants Carmody,
6 Thomason and Warner in support of exceptions they filed regarding Court
7 Claim No. 00713. Exhibit DE-1685 is a deed dated July 26, 1919, in which
8 Joseph Preece (Eslingers' predecessor) sold to Edwin Ross his interest in
9 Park Creek water rights. Eslinger filed with the Court "Response of Keith
10 and Karen Eslinger, Court Claim No. 00613," dated June 12, 2003, in regards
11 to the effect, or lack thereof, of the July 26, 1919, deed. Eslinger argues
12 convincingly in order for the 1919 transfer to be valid, there needed to be
13 compliance with the change procedures now described in RCW 90.03.380.
14 Eslingers contend that the water right was never transferred and has
15 continued to be used on the land they now own. The Referee noted on page
16 257 discussing the Carmody, et. al. claim that there was no evidence in the
17 record to show the basis for the water right being sold in 1907. The lands
18 owned by the sellers of the water right were not identified. The arguments
19 suggest they were successors to parties awarded rights in Olmstead v. Hays,
however, there is nothing in the record to support that argument.

20 The evidence in the record is contradictory concerning use of naturally
21 occurring creek water on the land now owned by Eslingers. The documents
22 filed by Joseph Preece in response to the complaint filed against him in
23 Donald v. Preece do not assert a right to use natural flow water from Park

24
25 Supplemental Report of Referee
Subbasin No. 10

1 Creek. His response very specifically discusses use of water turned into
2 the creek by Ellensburg Water Company (EWC) and use of seepage that is
3 flowing from lands above him irrigated with water delivered by EWC and
4 Cascade Irrigation District. Eslingers argue their water right stems from
5 when the land was settled by J. D. Olmstead and they are using water
6 awarded to Olmstead in Olmstead v. Hayes. The Court's Decision in Olmstead
7 v. Hayes states that at the time the case was filed in 1892 Olmstead owned
8 the S $\frac{1}{4}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ and W $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 22,
9 T. 17 N., R. 19 E.W.M. He was awarded, along with John H. McEwen, one-half
10 of all the waters of Park Creek and one-half of the waters remaining in
11 Brush Creek after the water awarded to defendant John Holtz is taken out.
12 In keeping with that factual pattern is the Preece Water Right Notice dated
13 June 4, 1913, whereby he asserted a right to divert all of the
14 unappropriated waste and seepage water flowing in a certain slough
15 intersecting the county road near the southwest corner of Section 14,
16 T. 17 N., R. 19 E.W.M. Preece had been using water from these streams for
17 at least 14 years in 1913, which would suggest that most of the water being
18 used was naturally occurring creek water. Preece acquired his land in 1899,
19 which suggests to the Referee that his reference to using water for 14
20 years was the length of time he personally was using water, not how long
21 water was used on the property. Water appropriated at the time the
22 Olmsteads owned the land would have been natural creek water and not return
23 flow or seepage water.

24
25 Supplemental Report of Referee
Subbasin No. 10

1 The Referee noted in the original report that Park Creek flows near the
2 southwest corner of Section 14. It should also be noted that Brush Creek
3 joins Park Creek near the southwest corner of Section 14. Cascade Canal
4 began deliveries of water to this part of the Kittitas Valley around 1910
5 and KRD did not begin delivering water until the late 1920's or early
6 1930's. The fact that Preece asserted use of seepage and return flow from
7 Brush and Park Creeks in 1919 supports a conclusion that he was claiming
8 the recently introduced return flow that likely was the result of use of
9 water from the Cascade Canal. Also supporting the relationship to Cascade
10 Canal return flow is the 1919 deed to Edwin Ross (DE-1717) which prohibited
11 use of Park Creek water west of Cascade Canal.

12 The point of diversion currently used is located 550 feet west and
13 50 feet south of the northeast corner of Section 22, T. 17 N.,
14 R. 19 E.W.M. At that point, the flow of Brush Creek has joined Park Creek;
15 therefore, a single water right to Park Creek is being considered by the
16 Referee. The point of diversion prior to 1919 was about one-quarter mile
17 downstream which appears to be near the east property line of the
18 Eslingers' land.

19 It seems likely from DE-1713 (1985 aerial photograph) that as much as
20 50 acres of land in the north portion of the Preece property could not have
21 been irrigated via gravity flow ditches from the original point of
22 diversion. It is also clear that the upstream move resulted in a point of
23 diversion above other water users (George Ferguson and George Donald,
24 DE-1717, Donald v. Preece, 1919). Preece asserted no water right to

25 Supplemental Report of Referee
Subbasin No. 10

1 natural flow during that litigation. He was using Ellensburg Water Company
2 deliveries and return flow. He stated in Donald v. Preece (DE-1717) that
3 the new point of diversion enabled him to irrigate an additional 40 acres
4 which were "impossible to adequately irrigate via deliveries from the
5 Ellensburg Water Company Canal."

6 Since Eslinger asserts perfection of riparian water rights as the basis
7 for confirmation of Park Creek rights, the chain of title is critical. All
8 of the Eslinger property was owned by J. D. Olmstead in 1892; however,
9 three separate chains of title are involved. Although the patent to
10 M. Jeanie Olmstead is dated July 1, 1874, and the patent to J. D. Olmstead
11 is dated June 5, 1873, the record J. D. Olmstead v. S. Hayes shows Olmstead
12 controlled those two homesteads in May of 1872. That evidence is
13 sufficient to prove steps had been taken to separate the land from the
14 public domain and will be relied on as the priority date for any riparian
15 water right recommended for confirmation. The NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 22,
16 T. 17 N., R. 19 E.W.M. was not included in the two Olmstead homesteads,
17 although J. D. Olmstead had acquired that 40 acres by 1892. Caribou Creek
18 runs through that parcel but Park Creek does not; therefore, the Riparian
19 Doctrine applies only as to Caribou Creek. The chain of title for that
20 small portion of the Eslinger ranch has not been provided (about 4 to
21 5 acres of the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 22).

22 In 1892 when J. D. Olmstead v. S. Hayes was litigated, Park Creek water
23 was being used on the Olmstead property including unspecified portions of
24 the Eslinger property. At the time the water rights were established, the

25 Supplemental Report of Referee
Subbasin No. 10

1 major irrigation ditches had not been constructed in this area (Town Ditch,
2 Cascade Canal, and KRD Canal); therefore, any water available had to be
3 natural flow. It is without doubt that a riparian water right had been
4 perfected somewhere within the 360 acres identified in J. D. Olmstead v.
5 S. Hayes. The entire Eslinger property lies within that 360 acres.

There are several factual matters relating to this early use of Park
Creek which have a bearing on the water right characterization. Although
the Court awarded one-half the flow of Park Creek to J. D. Olmstead, there
is no factual record as to the quantity of water available. The point of
diversion is not identified; however, it is assumed that it was downstream
from the confluence of Brush and Park Creeks. Finally, the portions of the
Olmstead land irrigated is not included in the record. Since
J. D. Olmstead v. S. Hayes was not a general adjudication, the parties
bound by the Decree, are those named as plaintiff, defendants and
intervenors. The lands of those parties, other than John Holtz,
J. D. Olmstead, John McEwen and George W. Reed, are not described in the
record. The Referee assumes that each defendant had a diversion on Brush
or Park Creek upstream of Olmstead and McEwen since interference with creek
flow was the reason for the Court case.

To the extent that a water right for diversion of Park Creek was
perfected by J. D. Olmstead, the record establishes continued use to the
current time. The construction of EWC's Town Ditch, the Cascade Canal and
Kittitas Reclamation District canals introduced huge volumes of Yakima
River water into the drainage basins of both Brush and Park Creeks.

Supplemental Report of Referee
Subbasin No. 10

1 Although there has always been natural flow in these streams each season,
2 the flow declined early in the irrigation season. There are many
3 references in the various documents in the early Court cases where parties
4 described the only flow during the irrigation season as return flow from
5 Town Ditch or Cascade Canal.

6 The Richard Bain engineering report (DE-1718) presents an analysis
7 leading to an estimated natural flow hydrograph (Exhibit 6). That estimate
8 shows the lowest flows of 3.0 cfs in September and October and the highest
9 flows in May and June (up to 33.5 cfs). These estimates present a starkly
10 different picture than the statements of early litigants who observed there
11 was no natural flow during the irrigation season.

12 The Referee concludes that the hydrology is so altered by over
13 100 years of return flow from the canals that a true picture of natural
14 flow cannot be determined. There seems to be no doubt that at some times
15 during the period of mid-March through October natural flow is available.
16 The Court in J. D. Olmstead v. S. Hayes awarded Olmstead one-half the flow
17 in Park Creek. Flow measurements taken by Richard Bain in the Eslinger
18 head ditch during 2002 ranged from a high of 8.9 cfs to a low of 4.4 cfs.
19 Those measurements were taken during late May, June, July and September,
20 when return flow waters would undoubtedly be in the creek. No attempt was
21 made on the dates of those measurements to distinguish between natural
22 flow, return flow and Town Ditch deliveries via Park Creek. The Referee
23 believes that all of those water sources could have been contributing to
24 the diverted water. That being the most likely situation, a calculation of

25 Supplemental Report of Referee
Subbasin No. 10

1 the annual diversion for the 190 irrigated acres results in the total
2 quantity of water diverted, not natural flow diverted. WRC No. 060683
3 filed by Mr. Eslinger pursuant to RCW 90.14 describes a claim to a right to
4 divert of 4.0 cfs; 900 acre-feet per year for irrigation of 202 acres
5 within the ~~W½NE½~~, ~~SE½NW½~~, part of the ~~NE½NW½~~, ~~NE½SW½~~ and the ~~NW½SE½~~ of
6 Section 22, T. 17 N., R. 19 E.W.M. As far as the Referee knows, the
7 quantities of water claimed in WRC No. 060683 have not been changed through
8 the amendment process of RCW 90.14.065. Lacking any information about the
9 percentage of water being diverted that likely would be natural flow rather
10 than return flow, the Referee concludes that the quantities of water
11 claimed in WRC No. 060683 would be a reasonable estimate. The point of
12 diversion described matches the current diversion on Park Creek.

13 The point of diversion used by the previous owner of the Eslinger
14 property (Preece) was changed to the current diversion location during the
15 spring of 1919 without complying with RCW 90.03.380. The location of the
16 previous point of diversion is not known and, of course, that location was
17 not described in WRC No. 060683, which was filed over 50 years after the
18 point of diversion was changed. Ecology has successfully argued to the
19 Court that only points of diversion described in claims filed pursuant to
20 RCW 90.14 or certificates issued under the Surface Water Code can be
21 confirmed in this adjudication. Therefore, even though a change in point of
22 diversion was made, the only point of diversion that can be authorized is
23 the one described in WRC No. 060683.

24
25 Supplemental Report of Referee
 Subbasin No. 10

1 The evidence supports a conclusion that Joseph Preece intended to
2 convey to J. D. Ross all of his interest in Park Creek natural flow water
3 originating east of the west section line of Section 18, T. 17 N.,
4 R. 20 E.W.M. That deed was executed in 1919; therefore, RCW 90.03.380 was
5 a mandatory process to obtain authorization from the state engineer to
6 change the point of diversion and place of use to Park Creek water. The
7 Referee noted that J. D. Ross bought land owned by S. Hayes (see
8 J. D. Olmstead v. S. Hayes). Lacking evidence of a certificate of change,
9 the transfer from Preece to Ross cannot be the basis for confirming a water
10 right in this proceeding, resulting in the water right remaining
11 appurtenant to the Preece property. Two parties are asserting control over
12 this water right, Eslinger and Carmody, et al. Until the evidence was
13 presented at the supplemental hearing, it was not apparent this conflict
14 existed. The Referee believes that the two parties should be provided the
15 opportunity to argue the merits of their individual positions in each
16 others presence so that counsel for each party can adequately respond. The
17 evidence submitted by Carmody, et al., is persuasive in showing that the
18 water right was sold to their predecessor. Although the evidence shows
19 that beneficial use of water was made by Carmody's predecessor, compliance
20 with the change procedures of RCW 90.03.380 is still needed to determine if
21 the change can be approved. Therefore, at this time, the Referee does not
22 recommend confirmation of a water right for use of Park/Brush Creek on the
23 Eslingers property. To resolve the issue of ownership of the water right,
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Supplemental Report of Referee
Subbasin No. 10

1 they should file an exception, provide a copy to Carmody, et. al, and be
2 prepared to argue their position at the exception hearing for this report.

3 Caribou Creek is riparian to the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and that portion of the NE $\frac{1}{4}$ NW $\frac{1}{4}$
4 of Section 22, T. 17 N., R. 19 E.W.M. owned by Eslinger. The current
5 irrigation system enables irrigation of the subject land from either
6 Caribou or Park Creek. Those sources are used conjunctively according to
7 water availability. It is not known whether the historic point of
8 diversion on Park Creek would have provided the same latitude; however, it
9 seems likely it did not. A right to irrigate a total of 35 acres with
10 water from Caribou Creek is asserted. The point of diversion described is
11 located 2100 feet west and 40 feet south from the northeast corner of
12 Section 22 where 2 cfs are diverted for irrigation (WRC No. 60685).

13 The basis for this Caribou Creek water right is both the Riparian
14 Doctrine and Prior Appropriation by J. D. Olmstead. Olmstead filed a
15 Notice of Water Right with the County Auditor on June 13, 1882. That
16 notice states that two ditches leading from Caribou Creek at points in
17 Section 15, T. 17 N., R. 19 E.W.M. delivered water to Section 22, T. 17 N.,
18 R. 19 E.W.M. dating from the years 1873 and 1874. The ditches are
19 described as having individual capacities of 500 inches of water and were
20 described as serving the north central portion of Section 22. The SE $\frac{1}{4}$ NW $\frac{1}{4}$
21 of Section 22 is riparian to Caribou Creek as part of the J. D. Olmstead
22 homestead. It would enjoy a May 31, 1872, riparian priority as the Court
23 in J. D. Olmstead v. S. Hayes (DE-1714) acknowledged that Olmstead was in
24 possession of that land in May of 1872. The NE $\frac{1}{4}$ NW $\frac{1}{4}$ was not part of the

25 Supplemental Report of Referee
Subbasin No. 10

1 Olmstead homestead and the chain of title for that land was not put into
2 the record by the Eslingers. However, the portion of the NE~~4~~NW~~4~~ of
3 Section 22 not owned by the Eslingers was owned by Andrew Sorenson at the
4 time of the initial hearing and by Steve Rosbach, his son-in-law, at the
5 time of the supplemental hearing. According to Mr. Rosbach's testimony,
6 the NE~~4~~NW~~4~~ was settled by someone named "Coates" who sold it to J. D.
7 Olmstead in 1885. By the early 1900's it was owned by members of the
8 Sorenson family and as early as 1920 it was being farmed by Andrew
9 Sorenson. The Referee previously had found that a water right could be
10 confirmed for the portion of the NE~~4~~NW~~4~~ owned by Sorenson with a June 30,
11 1873, date of priority and the facts surrounding historic use are the same
12 for the portion now owned by Eslinger. The portion of that 40 acres owned
13 and irrigated by Eslinger is not included in the place of water use
14 described on WRC No. 060685. However, only a very small part of the field
15 is in the NE~~4~~NW~~4~~, approximately 5 acres. It would have been very easy when
16 completing the form to not recognize that a small part of the irrigated
17 land was outside of the area described. The Referee finds that RCW 90.14
18 was substantially complied with for the irrigated lands lying in the NE~~4~~NW~~4~~
19 of Section 22. State of Washington v. Adsit, 103 Wn.2d 698, 694 P.2d 1065

20 Use of the waters of Caribou Creek was the subject of a civil case
21 J. D. Olmstead v. W. T. Harris, et al., 1887 (DE-1714). Olmstead sought a
22 restraining order to protect his access to sufficient Caribou/Cherry Creek
23 water to irrigate 260 acres in Section 22, T. 17 N., R. 19 E.W.M. The

24
25 Supplemental Report of Referee
Subbasin No. 10

1 result was entry of a stipulation dated April 9, 1887, which allowed the
2 defendants continued use of water, but required them to refrain from taking
3 water required by Olmstead. The Referee found DE-1714, recorded in script,
4 to be extremely difficult to read. It does not appear to identify
5 instantaneous quantities, although it does state 260 acres are totally
6 dependant on Caribou Creek water. As has been noted previously, there
7 seems to be a series of creek names for the streams in this portion of
8 Kittitas County. In this complaint, Cherry Creek, Caribou Creek and Dry
9 Creek are all named. It seems that they were all either tributary or
10 distributary to the others; however, the true physical setting was lost in
the difficult text.

11 The record does not provide the location of the original J. D. Olmstead
12 points of diversion from Caribou Creek, other than they were located in
13 Section 15, T. 17 N., R. 19 E.W.M. The current diversion used by Eslinger
14 is about 600 feet south of the north quarter corner of Section 22,
15 T. 17 N., R. 19 E.W.M. The point of diversion identified in WRC No. 060685
16 is located 2100 feet west and 40 feet south of the northeast corner of
17 Section 22. That location appears to be a change from the original
18 J. D. Olmstead diversion and the current diversion represents yet another
19 change since 1974. The provisions of RCW 90.03.380 do not appear to have
20 been complied with before either of those changes were made. The point of
21 diversion that shall be described in any water right authorized will be the
22 diversion described in WRC No. 060685.

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24
25 Supplemental Report of Referee
 Subbasin No. 10

1 Under the Riparian Doctrine, the priority date for the SE~~NW~~^{1/4} of
2 Section 22 is May 31, 1872. That date is documented in J. D. Olmstead v.
3 S. Hayes where Olmstead is acknowledged as being in possession of
4 320 acres, including the SE~~NW~~^{1/4}. Use of water from Caribou Creek began in
5 1873 or 1874 and appears to have continued to the present time on the
6 SE~~NW~~^{1/4} of Section 22. Approximately 5 acres in the SE~~NE~~^{1/4} NW^{1/4} is in the
7 same field and is irrigated from Caribou Creek, however, it would have a
8 priority date based on settlement of that land, or June 30, 1873, as
9 previously discussed. The 2 cfs claimed by RCW 90.14 WRC No. 60685 will be
10 prorated such that 5 acres in the southeast corner of the NE~~NW~~^{1/4} of
11 Section 22 would have a right to 0.29 cfs and 30 acres in the SE~~NW~~^{1/4} would
12 have a right to 1.71 cfs.

13 The appropriate annual quantity of water for the water rights is a
14 significant problem, as it is acknowledged that major portions of the flow
15 during irrigation season is return flow, for which water rights cannot be
16 awarded. WRC No. 060685 asserts an annual quantity of 158 acre-feet per
17 year for the 35 acres claimed or about 4.5 acre-feet per acre. Richard
18 Bain calculated that 528.5 acre-feet per year is necessary to adequately
19 irrigate the 35 acres. He explained that Park Creek water can also be used
20 along with Caribou Creek water on this field and no evidence as to the
21 respective quantities was provided. Lacking evidence to establish the
22 quantity of natural flow that is available on an annual basis, the Referee
23 will rely upon the 158 acre-feet claimed in RCW 90.14 WRC No. 060685 or
24

25 Supplemental Report of Referee
Subbasin No. 10

1 135.4 acre-feet for 30 acres in the SE~~4~~NW~~4~~ of Section 22 and 22.6 acre-feet
2 per year for the 5 acres in the SE~~4~~NE~~4~~NW~~4~~ of Section 22.

3 Livestock are grazed on the property seasonally with access to water
4 directly from Caribou Creek. The stock water stipulation discussed on
5 Page 4 of the initial Report of Referee covers this type of use. No other
6 right is needed for this use.
7

8 In sum, the Referee recommends that two water rights be confirmed to
9 the Eslingers under Court Claim No. 00613 for use of Caribou Creek. The
10 first is with a May 31, 1872, date of priority for the diversion of 1.71
11 cubic feet per second, 135.4 acre-feet per year for the irrigation of 35
12 acres in the SE~~4~~NW~~4~~ of Section 22. The second with a June 30, 1873, date
13 of priority for the diversion of 0.29 cubic foot per second, 22.6 acre-feet
14 per year for the irrigation of 5 acres in that portion of the SE~~4~~NE~~4~~NW~~4~~ of
15 Section 22 lying southeast of Caribou Creek.
16

17 **COURT CLAIM NO. 00683 -- Estate of Norma M. Flach**

18 Mrs. Flach took several exceptions to the Report of Referee for
19 Subbasin No. 10. The Department of Ecology also took exception to the
20 Referee's recommendations for Court Claim No. 00683. Lannette Flach, the
21 claimant's daughter, testified at the supplemental hearing.
22

23 Mrs. Flach owns over 300 acres in the S~~4~~ of Section 7 and the N~~4~~ of
24 Section 18, T. 18 N., R. 20 E.W.M. Approximately 130 acres are irrigated
25 with water diverted from Cooke Creek, Trail (Dry) Creek and springs located
on the property. The Referee recommended that several water rights be
confirmed for the Flach property. All of the water rights appurtenant to
Supplemental Report of Referee
Subbasin No. 10

1 the Flach land were also addressed in the earlier adjudication of Cooke
2 Creek and awarded in the Anderson decree. The exceptions filed by Mrs.
3 Flach seek to clarify points of diversion and/or number of acres actually
4 irrigated, along with updating the information that was provided at the
5 initial hearing. For organizational ease, the Referee will address each
6 exception in order and when one of Ecology's exceptions or request for
7 clarification is on the same water right will also address that issue.

8 Exceptions 1 and 2 provided new information about the source of water
9 for domestic supply and lawn and garden irrigation. At the time of the
10 first evidentiary hearing a spring was used for in-house domestic supply
11 and water from Trail Creek was used to water the garden and yard area
12 around the house. In 1996 the Flachs drilled a well and since that time
13 well water has been used for both in-house domestic supply and irrigation
14 of the yard and garden area.

15 The third exception was to the Referee not recommending that water
16 rights be confirmed for using springs that arise on the claimant's land.
17 Both the exception that was filed and Ms. Flach's testimony point out the
18 importance of the spring water to the family's overall farming practice.
19 The outflow from the springs have diminished over the years and in recent
20 times the springs have primarily been used for watering stock. The springs
21 are all located in the S $\frac{1}{2}$ of Section 7, however, the water right claims
22 filed by Mr. Flach pursuant to RCW 90.14 describe the springs as all being
23 in the S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 18. Mrs. Flach's exception clearly states the
24 intent to have the water right claim forms describe the springs that are

25 Supplemental Report of Referee
Subbasin No. 10

1 located in Section 7. Since Mr. Flach is deceased, it is not possible to
2 try and determine what lead to the errors on the claim forms. There is a
3 process for seeking an amendment to correct errors made when completing
4 water right claim forms filed pursuant to RCW 90.14, see RCW 90.14.065.
5 However, the Referee is not convinced that correcting the description for
6 the spring locations would result in water rights being confirmed for use
7 of the springs. In 1991 Mr. Flach testified that the springs were
8 developed after he and his wife purchased the property in 1960. In 1960,
9 the spring areas were just wet spots and there was no outflow. He worked
10 with the Soil Conservation Service (SCS) to design the best way to develop
11 the springs to increase their flow and the SCS also designed the ponds. It
12 is clear that prior to 1960 the springs were not being used.
13 Unfortunately, when the SCS provided this assistance, they neglected to
14 inform Mr. Flach of the need to obtain a water right permit in order to
15 establish a water right for use of the spring water. That was never done.
16 Therefore, there is no water right for use of the springs. This
17 adjudication can only confirm already existing water rights. New water
18 rights cannot be established. Mr. Flach apparently thought that by filing
19 the water right claim forms pursuant to RCW 90.14, he was registering his
20 water rights for the spring. However, the intent of the claims registered
21 under RCW 90.14 was to provide documentation of water rights established
22 prior to the State's Surface Water Code, which the legislature established
23 in 1917. In order for there to be a water right under the Riparian
24 Doctrine to use the springs that could have been protected by filing the
25

Supplemental Report of Referee
Subbasin No. 10

1 water right claims, there must be proof that the springs were developed and
2 first put to beneficial use prior to December 31, 1932. That is not the
3 case for these springs. Therefore, the Referee continues to recommend that
4 diversionary water rights not be confirmed for use of the springs.

5 Livestock drinking directly from the outflow from the springs is a
6 non-diversionary use that is covered by the stock water stipulation
7 discussed on page 4 of the Report of Referee. Mrs. Flach was included on
8 the list of claimants who have a non-diversionary stock water right under
9 the stipulation. Livestock on her property can continue to drink from the
10 springs. However, there is no water right to divert the water from the
springs for irrigation.

11 Exception 4 concerns the point of diversion for the water right that is
12 confirmed based on Certificate No. 174 from the prior adjudication.

13 Certificate No. 174 authorized a diversion in the SE~~%~~SE~~%~~ of Section 6.
14 However, it is the claimant's belief that the delivery ditch that is used
15 under this water right is the Trio Ditch. The diversion from Cooke Creek
16 for this ditch is in the SW~~%~~NE~~%~~ of Section 6, the ditch then goes
17 southeasterly into the SE~~%~~SE~~%~~ of Section 6 where it is flumed over Trail
18 Creek. After the first hearing, the Referee mistakenly believe that Trio
19 Ditch discharged into Trail Creek and then there was a diversion from Trail
20 Creek in the SE~~%~~SE~~%~~ of Section 6 and that is the diversion that was
21 authorized. However, Mrs. Flach's exception and Ms. Flach's testimony has
22 cleared up that misunderstanding. Ecology also took exception to the point
23 of diversion for the water right that was confirmed based on Certificate

24
25 Supplemental Report of Referee
 Subbasin No. 10

1 No. 174. Upon further consideration, the Referee believes the point of
2 diversion described on Certificate No. 174 is in error. Attached to
3 Exhibit DE-1658 entered by Cooke-Coleman, LLC is a copy of the map that was
4 prepared for the earlier adjudication. The map does not show any
5 diversions in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6, but it does show the diversion in
6 the Trio Ditch in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6 (there are two other diversions
7 on the map that could have also been into the Trio Ditch, one in the NW $\frac{1}{4}$ NE $\frac{1}{4}$
8 and one in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6). Attached to Mrs. Flach's exception is
9 a copy of the Statement of Claim filed in 1890 by J. W. McDonald, F. C.
10 Barnhart, and M. D. Cooke, who owned the land irrigated from Trio Ditch.
11 J. D. McDonald owned the land now owned by Mrs. Flach (the E $\frac{1}{4}$ SE $\frac{1}{4}$ of
12 Section 7). The statement indicates that the diversion into Trio Ditch was
13 originally near the center of Section 31, T. 19 N., R. 20 E.W.M. and in
14 1884 was moved in order to shorten the ditch and save a wastage of water to
15 a point 40 rods north and 10 rods east of the south quarter corner of
16 Section 6 (660 feet north and 165 feet east of the south quarter corner of
17 Section 6), which would be in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6. The statement also
18 says the ditch went east about one-quarter mile to Dry Gulch (another name
19 for Trail Creek) to intersect an old ditch and then followed the old ditch
20 in a southeasterly direction to the lands previously described. The map
21 from the old adjudication shows a ditch from a diversion in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of
22 Section 6, but it does not flow east to Dry Gulch/Trail Creek. It flows
23 south into the NE $\frac{1}{4}$ of Section 7. The diversion in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6
24 flows southeasterly to Dry Gulch/Trail Creek. Clearly over the years since
25

Supplemental Report of Referee
Subbasin No. 10

1 Trio Ditch was first built in 1872, there have been numerous changes to the
2 location of the diversion. However, there is nothing that suggests there
3 was a diversion from Trail Creek in the SE~~%~~SE~~%~~ of Section 6 into the
4 ditch. The Referee must conclude this was an error. What is not clear is
5 the location of the diversion that should have been described. Lacking any
6 better information, the Referee will use the location of the diversion that
7 has been in place for over 40 years, that being in the SW~~%~~NE~~%~~ of Section 6,
8 which is described in State's Exhibit SE-54 as 400 feet north and 10 feet
9 east of the center of Section 6, being in the SW~~%~~SW~~%~~NE~~%~~ of Section 6. The
10 water right described on page 545 is amended on line 7 $\frac{1}{2}$ to describe a point
11 of diversion 400 feet north and 10 feet east of the center of Section 6,
12 being within the SW~~%~~SW~~%~~NE~~%~~ of Section 6, T. 18 N., R. 20 E.W.M.

13 The next exception is to the points of diversion for the water right
14 that stems from Certificate No. 175 from the prior adjudication. That
15 certificate authorized a diversion in the NE~~%~~SE~~%~~ of Section 7. According
16 to Ms. Flach's testimony and the evidence submitted, the diversions they
17 use are in the SW~~%~~SE~~%~~ of Section 7 and the NW~~%~~NE~~%~~ of Section 18. The map
18 attached to the Anderson Report of Referee does not show a diversion in the
19 NE~~%~~SE~~%~~ of Section 7, however Trail Creek does flow through that area and a
20 diversion from Trail Creek could have served the claimant's land in
21 Section 18. Therefore, the Referee does not conclude that an error was
22 made on the certificate. It is more likely that sometime in the past the
23 point of diversion was changed without compliance with RCW 90.03.380.

24 Ecology's Request for Clarification 11(b) is on this same point of

25 Supplemental Report of Referee
 Subbasin No. 10

1 diversion. They ask that a specific point be identified, not just the
2 quarter/quarter section that the diversion is in. The Referee is reluctant
3 to make up a point when the landowner is not using the authorized
4 diversion, as it will be necessary for them to comply with RCW 90.03.380 to
5 get authorization to use the diversion that is currently being exercised.
6 And since the 1921 map does not show a diversion it is not possible to
7 identify one that likely was historically used. Ecology did not offer any
8 suggested locations and since the landowner needs to seek an application
9 for change for the diversions currently used, the Referee will not alter
10 the point of diversion location in the Report of Referee. Mrs. Flach should
11 contact Ecology's regional office to file an application for change.

12 The sixth exception was to the points of diversion authorized for the
13 water right that stems from Certificate No. 176 from the prior
14 adjudication. Certificate No. 176 describes two points of diversion, one
15 in the NE~~%~~SW~~%~~ and the other in the SW~~%~~SE~~%~~ of Section 7. The water right
16 described on page 597 of the Report of Referee authorizes one diversion,
17 located in N~~%~~NE~~%~~SW~~%~~ of Section 7 (identified as diversion F on the map that
18 is part of DE-1689). The exception asks to have a second diversion, also
19 in the NE~~%~~SW~~%~~ of Section 7 authorized for use. Mrs. Flach later withdrew
20 this exception as it was determined the second diversion doesn't exist.
21 Ecology's clarification 11(c) also concerns the point of diversion in the
22 NE~~%~~SW~~%~~ of section 7. On page 176 of the Report of Referee, the Referee
23 mistakenly stated that diversion discussed in the NE~~%~~SW~~%~~ of Section 7 was
24 at dam #1, which is not correct. Ecology's measurements placed the

25 Supplemental Report of Referee
Subbasin No. 10

1 diversion 850 feet west and 100 feet south of the center of Section 7, not
2 1300 feet west and 50 feet south of the center. The Referee has remeasured
3 the diversion and from the aerial photos and maps available, the diversion
4 appears to be 850 feet west and 50 feet south of the center of Section 7
5 and page 597, line 19 $\frac{1}{2}$, is changed to reflect that location.

6 Exception 7 is to the point of diversion authorized for the water right
7 based on Certificate No. 177 of the prior adjudication. That certificate
8 described a point of diversion in the SW~~4~~NE $\frac{1}{4}$ of Section 7 and the place of
9 use is the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 7. Ecology's clarification 11(e) asked to
10 have the point of diversion corrected also. On page 598 the diversion is
11 described as being in the SW~~4~~SE $\frac{1}{4}$ of Section 7 when it should have been
12 described as in the SW~~4~~NE $\frac{1}{4}$ of Section 7. Three diversions are used to
13 irrigate this land, two on Cooke Creek and one on Trail Creek, all at
14 locations other than that authorized in the certificate. The adjudication
15 map does not show a diversion in the SW~~4~~NE $\frac{1}{4}$ of Section 7, however, it does
16 show a diversion in the NW~~4~~SE $\frac{1}{4}$ of Section 7, the same diversion that the
17 Referee concluded was authorized by certificate No. 175. If the claimant
18 was using the diversion in the NW~~4~~SE $\frac{1}{4}$ of Section 7 to irrigate the land
19 described in Certificate No. 177, the Referee would conclude that an error
20 was made in describing the point of diversion, as the diversion is very
21 close to the center of Section 7 and could have mistakenly been thought to
22 be in the SW~~4~~NE $\frac{1}{4}$. Since other diversions are being used, the claimant
23 needs to comply with the change procedures in RCW 90.03.380 and change the
24 authorized point of diversion to those locations currently being used.
25

Supplemental Report of Referee
Subbasin No. 10

1 Mrs. Flach's exception mentions a concern that the owner of the land to the
2 north in 1991 included a copy of this certificate in his pre-submitted
3 exhibits. That would be the Steve German, now Cooke-Coleman LLC, land.
4 The Referee has reviewed the list of pre-submitted exhibits and Mr. German
5 did submit copies of the adjudication certificates that issued to William
6 Bott, most of which are appurtenant to the Flach property, not the German
7 property. The Referee also reviewed the analysis of the German claim on
8 pages 185 to 192 and none of the water rights awarded to the German
9 property was based on certificates that are appurtenant to the Flach
10 property, including Certificate No. 177. She also states that she believes
11 the property owner to the north has taken water from her. If she believes
12 that the German's successor is using water to their detriment, and the
13 German's water right has a lower priority, they can bring this to the Court
14 and seek an restraining order. However, many of the water rights
15 appurtenant to the former German property are senior in priority to most of
the water rights on the Flach property.

16 Exception No. 9 (which is the same as Ecology's clarification 11(d))
17 also is for the water right that stems from Certificate No. 177. On page
18 598 of the Report of Referee there is a typographical error in describing
19 the place of use. The place of use is incorrectly described as being in
20 the SW~~N~~E~~S~~ of Section 7, when it should be the SW~~S~~E~~N~~ of Section 7. Page
21 598, line 8~~½~~ is amended to read the SW~~S~~E~~N~~ of Section 7, T. 18 N.,
22 R. 20 E.W.M. Mrs. Flach also took exception to the number of acres
23 authorized for irrigation under that right. Certificate No. 177 authorizes

24
25 Supplemental Report of Referee
 Subbasin No. 10

1 the irrigation of 35 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 7. The Referee
2 concluded there were only 30 acres being irrigated. Ms. Flach worked with
3 the Kittitas County Conservation District in identifying fields and
4 determining the number of acres irrigated. They came up with 30 acres in
5 clearly identified fields and Ms. Flach was able to identify smaller
6 irrigated areas outside the field that added an additional 2 acres,
7 resulting in a total of 32 acres being irrigated. The Referee will amend
8 the recommendation on page 598 to increase the acres from 30 to 32.
9 Ecology in its Exception No. 2 asks that the instantaneous quantity of
10 water authorized for use be proportionately reduced, instead of allowing
11 use of the entire quantity authorized in the certificate. The Referee will
12 not make that reduction. It is clear from the claimant's testimony in this
13 subbasin that when decrees limited water rights to 0.02 cfs or less, that
14 quantity was not sufficient to adequately irrigate the land. In many
15 cases, landowners chose to reduce the number of acres in order to apply
16 more water to the remaining land. That is completely permissible within
17 the water rights as authorized. Beneficial use of the water has continued
18 to be made. Ecology has made no showing that the claimant is wasting this
water.

19 Exception No. 8 concerns the point of diversion for the water right
20 that is based on Certificate No. 178 from the prior adjudication. It
21 described a diversion in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 7. The diversion that is
22 used by the Flach family to irrigate the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 7 is in the
23 E $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 7. Again it appears that the diversion was changed

24
25 Supplemental Report of Referee
 Subbasin No. 10

1 prior to the Flach family acquiring the land without compliance with the
2 change procedures in RCW 90.03.380. They are advised to work with the
3 Department of Ecology to seek authorization to use these diversions.

4 Exceptions 10 and 11 are not really exceptions. They simply summarize
5 the points made by Mrs. Flach and bring to the Referee's attention that the
6 flow in the creeks have declined over the years, which she believes is due
7 to logging in the area that recharges the creeks, resulting in less water
being available for use than in the past.
8

9 Lastly, Ecology took exception to the number of acres authorized for
10 irrigation in the right described on page 597 of the Report of Referee and
11 discussed on page 176. The Referee authorized a right for the irrigation
12 of 8 acres and described the place of use as being that part of the ~~SE⁴SW⁴~~
13 of Section 7 lying west of Cooke Creek. Anna Trombley testified for
14 Ecology on her method for concluding that only 5.6 acres are being
15 irrigated within the area described, also see Exhibit SE-158, Ms.
16 Trombley's affidavit and a GIS map showing the field in question. Ms.
17 Flach responded by offering DE-1807, which shows the area that is being
18 irrigated also includes land east of what the Referee had called Cooke
19 Creek. She also corrected the record to reflect that the water course the
20 Referee called Cooke Creek is a ditch, not the creek. The Kittitas County
21 Conservation District also used GIS to determine the number of acres that
22 are irrigated within the area Ms. Flach identified and concluded that 8.75
23 acres are irrigated. However, the water right certificate for this land
only authorizes the irrigation of 8 acres, so the Referee's recommendation
24

25 Supplemental Report of Referee
Subbasin No. 10

1 cannot be increased beyond the 8 acres already authorized. As a result of
2 Ms. Flach identifying land as being irrigated that Ms. Trombley had not
3 considered and the GIS information provided by Kittitas County, the Referee
4 will not change the recommendation on page 597.

5 Mrs. Flach also responded to the Referee's request to identify a more
6 precise description for the 32 irrigated acres in Section 18 that will be
7 described in the water right that is described on page 579. That was
8 provided as a supplement to her exceptions. That area is (a little more
9 simply described than in the supplement): The NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 18, except
10 the southerly 200 feet thereof. This should address all of the exceptions
11 raised by Ecology and by Mrs. Flach. Again, Mrs. Flach is urged, if she
12 has not done so already, to pursue applications for change to seek
13 authorization for the points of diversion that have been used for over 40
14 years.

15 Other claimants who use water from Cooke Creek took exception to the
16 season of use that the Referee had authorized for water rights confirmed
17 for use of Cooke Creek. The certificates from the earlier adjudication had
18 a season of use from May 1 to September 15, even though the Report of
19 Referee that was adopted by the Court stated that the irrigation season
20 began on April 15 and that water could be used as soon as frost was out of
21 the ground. The Court in ruling on these exceptions allowed the season of
22 use to be modified on all Cooke Creek rights to April 15 and if the
23 claimants testified to using water as soon as frost was out of the ground,
24 that would allow under the rights confirmed in this proceeding. Mrs.

25 Supplemental Report of Referee
Subbasin No. 10

1 Flach's water rights have all been modified so that the season of use is
2 April 15 to September 15 and Ms. Flach testified that they do begin
3 irrigating as soon as frost is out of the ground, so that provision has
4 also been added.

5 Mrs. Flach is also seeking a water right based on Certificate No. 186
6 from the Cooke Creek adjudication. This certificate issued to Lewis W.
7 Habel authorizing the diversion of 0.70 cubic foot per second for the
8 irrigation of 35 acres in the SW~~X~~SW~~X~~ of Section 1, T. 17 N., R. 19 E.W.M.
9 Mrs. Flach entered into evidence Exhibit DE-322, which was also part of
10 Exhibit DE-1691, a copy of a deed from Louis W. Habel to W. H. Bott
11 conveying all right to water of Cook Creek as granted by decree of Kittitas
12 County Superior Court . . . thirty five inches of Class 6. The only water
13 right that issued to Louis Habel was described in Certificate No. 186,
14 which is a Class 6 right for 0.70 cfs, or 35 inches. The Referee was not
15 able to confirm a water right to Mrs. Flach due to Mr. Bott not having
16 complied with the change procedures in RCW 90.03.380. Ms. Flach informed
17 the Referee that they would be filing an application for change to try and
18 transfer this water right to their property. The Referee notes that Craig
19 Clerf, who has been joined to Court Claim No. 00407, and now owns the
SW~~X~~SW~~X~~ of Section 1, is asserting a right under Certificate No. 186.

20 During the initial evidentiary hearing a water right was not asserted by
21 Clerf for use of Cooke Creek water on the SW~~X~~SW~~X~~ of Section 1 and it was
22 not until exceptions were filed and the supplemental hearing was held that
23 it became clear that both Mrs. Flach and Craig Clerf are asserting to have

24
25 Supplemental Report of Referee
Subbasin No. 10

1 the right to irrigate under that certificate. Because this was not clear
2 during scheduling, they were not at the hearing on the same days and were
3 not aware of the conflict. The Referee cannot recommend confirmation of a
4 right to the Flachs until the water right has been legally transferred to
5 their land. By the same token, since there is a deed that appears to
6 transfer the water right off of the land now owned by Craig Clerf, and
7 there was testimony of non-use in 1991, the Referee has not confirmed the
8 right for use on the Clerf property. This matter will have to be addressed
9 before the Court during the exception phase for this report.

10 COURT CLAIM NO. 00972 -- Donald L. Frye
11 (A) 01749 & Charlotte A. Frye

12 The Report of Referee for Subbasin No. 10 recommended confirmation of a
13 water right from Coleman Creek under Court Claim No. 00972. The
14 instantaneous quantity recommended was 0.40 cfs for the irrigation of 38
15 acres. The Department of Ecology (Ecology) filed an exception with the
16 Court urging reduction of the instantaneous quantity to 0.38 cfs based on
17 the water duty confirmed in Schnebly v. Huss.

18 At the time of Schnebly v. Huss, A. T. Borst was the owner of 160
19 acres which included the Frye parcel. The decree awarded a right to Borst
20 for use of 1.60 cfs on that 160 acres. The Frye's own 40 acres of that
21 original 160 (NE~~XSW~~ of Section 27, T. 18 N., R. 19 E.W.M.). At one-half
22 inch per acre, the water duty in Schnebly v. Huss was very light;
23 therefore, many property owners concentrated their confirmed quantity on
24 their most productive land. In this instance, 38 of the 40 acres are and

25 Supplemental Report of Referee
Subbasin No. 10

1 have been irrigated with no reduction in the instantaneous or annual
2 quantities. There has been no relinquishment of those quantities;
3 therefore, the Referee recommends that Ecology's exception be denied and
4 the quantities recommended in the Report of Referee be affirmed.

5
6 COURT CLAIM NO. 00605 -- Stephen K. German
(A) 01749 & Donna German
7 Albert F. Scott
8 & Dorothy Scott

Stephen K. and Donna German took exception to the Referee's
recommendation for the water right awarded for the property they purchased
from the Scotts. The Germans are represented by Attorney Richard T. Cole
and Steve German testified at the supplemental hearing.

Stephen and Donna German purchased from the Scotts that portion of the
SE $\frac{1}{4}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2, lying south of the KRD's North Branch
Canal, the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 11, and that portion of the NW $\frac{1}{4}$ NE $\frac{1}{4}$
of Section 11, west and below KRD's North Branch Canal and that portion of
the SE $\frac{1}{4}$ NW $\frac{1}{4}$ north and west of the westerly bank of Spring Creek in
Section 11, all in T. 18 N., R. 19 E.W.M. Mr. German testified that within
this area he owns 150 acres and is irrigating 148 acres. When Mr. Scott
presented his evidence in 1991, he asserted a claim to use 1 cubic foot per
second from Schnebly Creek to irrigate 138 acres within the area now owned
by the Germans. Mr. Scott had filed WRC No. 097152 pursuant to RCW 90.14,
which claimed a right to use 2 cfs, 150 acre-feet per year from Schnebly
Creek for the irrigation of 138 acres within the area now owned by the
Germans. Based on the testimony at the initial hearing and WRC No. 097152,

Supplemental Report of Referee
Subbasin No. 10

1 the Referee recommended that a water right be confirmed with a June 30,
2 1869, date of priority for the diversion of 1 cfs, 150 acre-feet per year
3 from Schnebly Creek for the irrigation of 138 acres.

4 The Germans filed three exceptions to this recommendation. The first
5 exception asked that the priority date be changed from June 30, 1869, to
6 April 1, 1869, based on when the irrigation season normally starts. The
7 Court denied this exception at the exception hearing, see Order on
8 Exceptions for Subbasin No. 10, dated December 12, 2002, beginning on page
9 6, line 25. Therefore, the priority date will remain unchanged. The
10 second exception was to the water duty awarded by the Referee. The
11 assertion made at the supplemental hearing was that the water duty was
12 based on the Anderson decree. For this water right that is not the case.
13 Anderson dealt only with water rights for use of Cooke Creek and its
14 branches and tributaries. The water right awarded under Court Claim No.
15 00605 was for use of Schnebly Creek, which is not a source governed by
16 Anderson. The instantaneous quantity awarded was based on Mr. Scott's
17 claim and Mr. German has presented nothing to establish that Mr. Scott made
18 an error in that claim, both in the summary submitted by his counsel at the
19 evidentiary hearing and in the Court claim. Mr. Scott did not testify to
20 the annual quantity of water used, however, WRC No. 097152 asserted a right
21 to use 150 acre-feet per year, so that is the quantity that was recommended
22 by the Referee. As far as the Referee can determine, WRC No. 097152 has
23 not been amended. Mr. German testified in general to needing 7 or 8
24 acre-feet per acre to adequately irrigate his land. This testimony was

25
Supplemental Report of Referee
Subbasin No. 10

1 intended to apply to both the land acquired from the Scotts and land he had
2 previously owned. However, he did not testify to actually diverting and
3 using this quantity on the Scott land. He did testify that this quantity
4 included water delivered by KRD. Mr. German testified that between the two
5 diversions used to serve this land he diverts 1.5 cfs. However, Mr. Scott
6 who was the long time owner of the land claimed a right to divert 1.0 cfs.
7 The evidence is not sufficient for the Referee to determine that Mr. Scott
8 made an error in estimating the quantity of water used, rather than Mr.
9 German diverting more water than had historically been diverted by Mr.
10 Scott. Although he did not take exception to the number of acres
11 authorized for irrigation, Mr. German testified to irrigating 148 acres,
12 rather than the 138 acres recommended for confirmation. Again, Mr. German
13 did not address the discrepancy between Mr. Scott's testimony and his. Mr.
14 Scott's testimony, the Court claim, the water right claim and the state's
15 investigation report all state that 138 acres are being irrigated. Based
16 on the foregoing, the Referee does not alter the recommendation to confirm
17 a right for the diversion of 1 cfs, 150 acre-feet per year for the
irrigation of 138 acres.

COURT CLAIM NO. 01141 -- Stephen K. German
& Donna German
Cooke-Coleman LLC

Exceptions to the Referee's recommendations for Court Claim No. 01141 were filed by both the Germans and Cooke-Coleman LLC. The Germans are represented by Attorney Richard T. Cole and Cooke-Coleman LLC is represented by Attorney Jeff Slothower. Steve German and Gaylord Kellogg.

**Supplemental Report of Referee
Subbasin No. 10**

1 owner of Cooke-Coleman LLC, testified at the supplemental hearing. Ecology
2 also sought clarification of the point of diversion for the water right
3 confirmed on page 570 of the Report of Referee. The Court ruled at the
4 exception hearing that the point of diversion for that right should be in
5 the NW~~SE~~E% of Section 7, T. 18 N., R. 20 E.W.M., see Order on Exceptions
6 Subbasin No. 10 (Kittitas) entered on December 12, 2002.

7 The Referee will first address the German exceptions. Their first
8 exception asked to have the month and day in the priority date changed from
9 June 30 to April 15 to be consistent with the beginning of the normal
10 irrigation season. The Court denied this exception at the exception
hearing.

11 The second exception was to the annual water duty used by the Referee
12 for the water rights awarded. The claimants concluded that the annual
13 quantity of water awarded was based on the opinions of the referee in the
14 Anderson case. Their position is that the water duty should be based on
15 on-site studies, which would be more accurate. This exception was remanded
16 by the Court with instructions. Those instructions are on pages 7 and 8 of
17 the Order on Exceptions for Subbasin No. 10 filed on December 12, 2002.

18 The Court granted the claimants request to have the claim remanded to allow
19 further testimony of the quantity of water actually used. The Court did
20 find that the Referee "cannot recommend a quantity of water that is in
21 excess of that awarded in the prior decrees. The Referee is bound by those
22 decrees and cannot recommend confirmation of water rights beyond what was
23 awarded in those decrees." id. at 7 and 8. The water rights awarded under

24
25 Supplemental Report of Referee
Subbasin No. 10

1 Court Claim No. 01141 all authorize use of water diverted from Cooke Creek
2 and are based on water rights recognized in the Anderson decree. Anderson
3 awarded 0.02 cubic foot per second for each acre irrigated. If that
4 quantity was available the entire irrigation season described in the
certificates, a maximum of 4 acre-feet per year for each acre could be
5 applied to the land. The certificates authorized water use between May 15
and September 15, however the Report of Referee in Anderson stated that the
normal irrigation season extends from April 15 to September 15 and that
water may be beneficially applied in a great many cases as soon as the
frost is out of the ground. Although the Germans did not take exception to
the season of use authorized, Mr. German presented testimony that water is
used as soon as frost is out of the ground. His testimony was that he can
remember frost being out of the ground as early as late-February to early
March. His testimony, however, suggests this is not normally when frost is
out of the ground. Other claimants have testified to March 15 being
reflective of when frost is out of the ground. The testimony suggests to
the Referee that the date varies significantly and finding a date that all
parties can agree to and that is reasonable would be difficult. The
Referee proposes to use April 15 to September 15 as the irrigation season
based on the findings in the Anderson Report of Referee. Each water right
will carry a provision that water can be used earlier than April 15 if
frost is out of the ground.

Again, although he did not file an exception on this issue, Mr. German
testified about using flood water. The Anderson decree and the resulting

Supplemental Report of Referee
Subbasin No. 10

certificates contain a provision that allow use during the irrigation season of surplus water as remains in said stream after the quantities of water apportioned to all rights under said decree, not to exceed a one hundred percent increase over the apportionment made. So, during the irrigation season, twice the instantaneous quantity authorized can be diverted if there is sufficient water in the creek to satisfy all water rights. The use of surplus water is subject to the same priority order as the water right. Claimants have testified that Cooke Creek can flood as early as January, which is true. However, there is no evidence the water can be beneficially used at that time. The Referee also acknowledges that during extreme flood events, water will on its own accord flood into the irrigation ditches and elsewhere with no action by the landowner. The surplus water provision only applies during irrigation season. There was no testimony about how frequently this surplus water might be available or the average number of days. In other subbasins in Kittitas County with existing decrees containing this language, the Referee has increased the annual quantity of water that can be used based on the surplus water being available for use a maximum of 30 days during the spring. The period of use for the water rights awarded for lands owned by the Germans shall be amended to read April 15 to September 15 and a provision will be added allowing use of water prior to April 15 if the frost is out of the ground and will authorize use of additional water if there is surplus water in the creek.

Supplemental Report of Referee
Subbasin No. 10

1 The water rights awarded on page 552 and 570 are amended as follows:
2 On page 552, line 5, the period of use is changed to April 15 to September
3 15 and on line 6 change the acre-feet per year to 275.64 acre-feet. On
4 line 13 the following Limitation on Use is added: "When frost is out of
5 the ground before April 15, the period of use is modified to allow use of
6 water as soon as frost is out of the ground and water can beneficially be
7 used." A second Limitation on Use shall be added allowing use of surplus
8 water: "When surplus water is available in excess of that needed to
9 satisfy all existing rights, an additional 1.2 cubic feet per second may be
10 diverted. This water will normally be available approximately 30 days
11 during the spring, which would result in up to 71.28 acre-feet per year
12 being used in addition to that authorized herein."

12 Page 570 is amended as follows: On line 5 change period of use to
13 April 15 to September 15 and on line 6 change the acre-feet per year to
14 321.58 acre-feet per year. On line 13 add the following Limitation on
15 Use: "When frost is out of the ground before April 15, the period of use
16 is modified to allow use of water as soon as frost is out of the ground and
17 water can beneficially be used." A second Limitation on Use shall be added
18 allowing use of surplus water: "When surplus water is available in excess
19 of that needed to satisfy all existing rights, an additional 1.4 cubic feet
20 per second may be diverted. This water will normally be available
21 approximately 30 days during the spring, which would result in up to 83.16
22 acre-feet per year being used in addition to that authorized herein."

23
24
25 Supplemental Report of Referee
 Subbasin No. 10

1 The last exception taken by the Germans was to a water right not being
2 confirmed for use of Dry Gulch or Trail Creek. The exception asked for a
3 remand to allow evidence to be produced to show that Dry Gulch/Trail Creek
4 is not a branch of Cooke Creek and not a part of the Anderson proceeding.
5 This exception was not addressed by the Germans or their counsel, leading
6 the Referee to conclude it has been withdrawn.

7 Cooke-Coleman LLC took several exceptions to the Referee's
8 recommendations. The first was to the water right recommended for use of
9 Coleman Creek for the irrigation of 100 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 1,
10 T. 18 N., R. 19 E.W.M. and Government Lots 6 and 7 of Section 6, T. 18 N.,
11 R. 20 E.W.M. . The testimony and evidence from the initial evidentiary
12 hearing was that 135 acres are being irrigated in that part of the SE $\frac{1}{4}$ of
13 Section 1 lying east of Coleman Creek and that part of Government Lots 6
14 and 7 of Section 6 lying southwest of the delivery ditch. This right is
15 discussed on pages 186 and 187 of the initial Report of Referee and
16 summarized on page 574 of that report. The Referee limited the number of
17 acres recommended as a result of information in the Schnебly v. Huss
18 Findings of Fact and Decree. On page 6 of the Findings of Fact, it
19 states: "The defendants Harvey Huss and Dorcas J. Huss, his wife, one
20 hundred (100) acres of a tract of land described as the SE $\frac{1}{4}$ of Section 1,
21 in Township 18 N., Range 19 and the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 6, in Township 18
22 North, of Range 20 E.W.M. 100 acres." The Decree then awarded the Huss' 50
23 inches, which would be sufficient water for the irrigation of 100 acres.
24 This lead the Referee to conclude that in 1915 a water right was recognized

25 Supplemental Report of Referee
Subbasin No. 10

1 for the irrigation of 100 acres in the area owned by Huss. Cooke-Coleman's
2 counsel suggests that the Findings of Fact states that Huss owned 100 acres
3 in the SE $\frac{1}{4}$ of Section 1 and 100 acres in the W $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6. However,
4 the W $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6 is only 80 acres in size, not 100 acres. Also, if
5 that were the case, the decree would have awarded 100 inches of water not
6 50 inches. Harvey and Dorcas Huss may very well have owned more than 100
7 acres, however, at the time of the Schnebly v. Huss action, they were only
irrigating 100 acres and that is the water right which was awarded.
8

Water Right Claim No. 065951 also supports that conclusion. It was
filed by Laurin Dawes, who owned the land during the claims registration
period. He asserted a right to irrigate 100 acres within the E $\frac{1}{4}$ SE $\frac{1}{4}$ of
Section 1 and the W $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6. In 1915 a water right was recognized
for the irrigation of 100 acres and in 1974 the landowner at that time
stated he was irrigating 100 acres. There was nothing offered into the
record that convinces the Referee that a water right exists for more than
100 acres. The claimants seek to have the place of use amended to include
that portion of the W $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 1 east of Coleman Creek included in
the place of use. Claimant's counsel argues that RCW 90.14 was
substantially complied with and that omitting that land from the place of
use on WRC No. 065951 was an error that was the result of such a small
portion of the field being in the W $\frac{1}{4}$ SE $\frac{1}{4}$ and nothing on the ground that
would distinguish the quarter section lines. The Referee agrees with all
these arguments and actually made them in the initial Report of Referee,
see page 187, lines 10 through 18. The reason that the Referee only used
24

25 Supplemental Report of Referee
Subbasin No. 10

1 the place of use on the water right claim is because a water right was
2 being recommended for fewer acres than is being irrigated and claimed. In
3 order to reduce the place of use to more closely reflect the number of
4 acres authorized for irrigation, the Referee chose to not include the W%SE%
5 of Section 1, as it was not described on the RCW 90.14 claim. If the
6 claimant would like to propose a different legal description that is less
7 than the entire 135 acres, the Referee would recommend that the Court
8 accept that legal description. Otherwise, the Referee does not alter the
9 original recommendation.

10 The last two exceptions, 8 and 9, by Cooke-Coleman LLC affect all of
11 the water rights awarded for use of Cooke Creek, so the Referee will
12 consider those exceptions prior to the specific exceptions for the water
13 rights already awarded. The claimant is asking that the beginning of the
14 irrigation season be changed from May 1 to April 15 and the annual quantity
15 of water authorized for use be increased commensurate with that change.
16 The exception also asks that use of water as soon as frost protection is
17 out of the ground also be recognized. Lastly, the claimant asks that the
18 provision allowing for use of surplus water be applied to the Cooke Creek
19 water rights awarded under both claims. Although the certificate limited
20 water use to May 15 through September 15, the Report of Referee that
21 preceded the Anderson decree found that the normal irrigation season was
22 April 15 through September 15, but that water could beneficially be used in
23 some cases as soon as frost is out of the ground. Mr. German, prior owner
24 of this land, testified that water has in the past been used on this land

25 Supplemental Report of Referee
Subbasin No. 10

1 as soon as frost is out of the ground. That varies significantly due to
2 weather patterns. The Referee intends to recommend the April 15 through
3 September 15 irrigation season, with a provision that water use may begin
4 as soon as the frost is out of the ground and water can beneficially be
5 used. Mr. German also testified to using flood water on this land. The
6 Anderson decree allowed the use of surplus water when available. None of
7 the witnesses provided any evidence of how often or over how many days this
8 surplus water might be available. It is clear that the surplus water is
9 what the landowners refer to as "flood water" and can be available early in
10 the season until May or June. In other subbasins where the decrees
11 contained this surplus water language, the Referee has concluded that
12 surplus water would be available approximately 30 days during the spring
13 and has authorized use of water consistent with that. Lacking any better
14 information, the Referee will also use 30 days for water rights for Cooke
15 Creek.

16 The next exception was to the number of acres authorized for irrigation
17 in the water right described on page 546 of the Report of Referee. The
18 basis for this recommendation is on pages 188 and 189 of the Report of
19 Referee. At the initial hearing the landowners who testified, the Germans,
20 only testified to the gross number of acres being irrigated and did not
21 provide any information that would have assisted the Referee in determining
22 how many acres were being irrigated under each specific certificate that
23 had issued from the earlier Cooke Creek adjudication. That resulted in the
24 Referee using the State's Investigation Reports and map, SE-2. The Referee

25 Supplemental Report of Referee
Subbasin No. 10

1 estimated that approximately 54 acres were being irrigated. Cooke-Coleman
2 maintains it is closer to 85 acres, but provided no evidence to support
3 that number. The Referee reviewed the aerial photograph that is exhibit
4 DE-1651. All of the 40 acres in the NW~~4~~SE~~4~~ of Section 7 appears to be
5 irrigated; the claimant owns what appears to be the north 400 feet of the
6 NE~~4~~SE~~4~~, which is approximately 12 acres in size, of that 10 to 11 acres are
7 irrigated. The NE~~4~~SW~~4~~ of Section 7 is the area with the greatest area that
8 is not irrigated. There is an area on the exhibit with red cross hatching
9 that the claimant agrees is not irrigated. The Referee estimates that to
10 be 15 acres. The creek splits through this area and both branches have
riparian habitat and other small areas that do not appear to be developed.
11 The Referee estimates that a total of 20 acres is not irrigated in the
12 NE~~4~~SW~~4~~ of Section 7, leaving 20 acres irrigated. Therefore, based on
13 review of the aerial photograph, the Referee will amend the recommendation
14 to 71 acres. If the claimant still believes 85 acres are being irrigated,
15 it is suggested that he bring some evidence to support that position.

16 The recommendation on page 546 is amended to authorize the diversion of
17 1.42 cubic feet per second, 368.35 acre-feet per year from April 15 to
18 September 15 for the irrigation of 71 acres. It will contain a provision
19 that allows for the use of surplus water when it is available.

20 The next exception was to the points of diversion described in the
21 water right described on page 570 of the Report of Referee. On page 191
22 the Referee recommended confirmation of the water right and the basis for
23 the authorized points of diversion are discussed there. The certificate

24
25 Supplemental Report of Referee
Subbasin No. 10

1 that this right is based on described two points of diversion, one in the
2 SE~~%~~SE% of Section 6 and one in the NW~~%~~SE% of Section 7 and those are the
3 points that the Referee authorized for use in the right described on page
4 570. Mr. Kellogg testified in order to clarify the points of diversion
5 that are actually being used. The Referee recognizes that the diversion
6 that is authorized in the NW~~%~~SE% of Section 7 is not being used. However,
7 that is the diversion that is authorized by the certificate on which this
8 right is based. The claimant presented nothing to show that the
9 certificate is in error, leaving the Referee to conclude that at some time
10 in the past the point of diversion was changed without compliance with the
11 change provisions of RCW 90.03.380. The Referee in this adjudication
12 cannot authorize use of a diversion that was not authorized by the prior
13 adjudication, unless there is compliance with the change procedures in RCW
14 90.03.380. The Referee does not recommend changing the authorized points
15 of diversion.

16 The claimant took exception to a water right not being confirmed for
17 use of water from Cooke Creek for the irrigation of lands in Government Lot
18 6 and 7 of Section 6, T. 18 N., R. 20 E.W.M. At the time of the first
19 hearing, this land was owned by Steve German, who initially testified to
20 using Coleman Creek water to irrigate his land in Section 1, T. 18 N.,
21 R. 19 E.W.M. and Sections 6, 7 and 18, T. 18 N., R. 20 E.W.M. Later in his
22 testimony he testified to using Cooke Creek water to irrigate 200 acres of
23 his land, but did not testify as to which lands were irrigated from Cooke
24 Creek. None of Ecology's investigation reports addressed use of Cooke
25

Supplemental Report of Referee
Subbasin No. 10

1 Creek water on Government Lots 6 and 7 of Section 6. The claimant has
2 pointed the Referee to Certificate No. 187 from the prior Cooke Creek
3 adjudication. Certificate No. 187 is a Class 8 right with an 1880 date of
4 priority that authorizes the diversion of 1.6 cubic feet per second for the
5 irrigation of 80 acres in the W $\frac{1}{4}$ SW $\frac{1}{4}$ (same as Government Lots 6 and 7) of
6 Section 6. The authorized points of diversion are in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$
7 of Section 6. Steve German testified to irrigating some land north and
8 east of what was marked on SE-2 with S. German in Sections 1 and 6. The
9 Referee believes he was referring to the land that was shaded green below a
10 ditch that comes from Coleman Creek. The testimony would suggest that at
11 least during high water times water from Cooke Creek was used to irrigate
12 this area in Government Lots 6 and 7 of Section 6. However, Mr. German did
13 not testify to how much land was irrigated or how much water has been
14 diverted to irrigate this land. Mr. Kellogg also testified to some land in
15 the two government lots being irrigated with water from Cooke Creek. It
16 was suggested at the hearing that the irrigated area was visible in the
17 aerial photographs that are DE-1651 and DE-1652. If there is an irrigated
18 area north and east of the ditch from Coleman Creek, it is not obvious to
19 the Referee, unless he is mistaken on the location of the lands being
20 discussed. The Referee will not recommend confirmation of a right without
additional evidence of the location and number of acres being irrigated.

21 The last exception to be addressed is to the Referee not awarding water
22 rights for use of springs on the land now owned by Cooke-Coleman. Both Mr.
23 German and Mr. Kellogg testified specifically about two springs that are

24
25 Supplemental Report of Referee
Subbasin No. 10

1 marked on both SE-2 and DE-1651. The westerly spring is in the NE~~ANW~~^{NW} of
2 Section 7 and flows into Cooke Creek. The water is then diverted along
3 with other Cooke Creek water further downstream. The easterly spring is
4 located in the NW~~ANE~~^{NE} of Section 7 and flows into an irrigation ditch that
5 carries water diverted from Cooke Creek. At the initial evidentiary
6 hearing, the Germans asserted a right to use these springs, but the
7 evidence at that time indicated that any development and use of the springs
8 was in the 1970's, a time when in order to establish a water right
9 compliance with the permit requirements of RCW 90.03, the Surface Water
10 Act, was needed. At the supplemental hearing, neither of the two witnesses
11 addressed when use of the springs began. Counsel pointed the Referee to
12 the Anderson decree, to support their argument that use of spring and drain
13 water is allowed in the decree. The Referee takes note specifically of
14 paragraph 7, which is circled in the copy of the decree Cooke-Coleman
entered as Exhibit DE-1657. That paragraph states:

15 That each of the parties to whom water is awarded under this decree,
16 and his or her successors, shall in no way prevent the waste and
seepage resulting from the irrigation of their said respective lands
from returning to the main stream of Cooke Creek for the benefit of
those below.

17 This paragraph suggests to the Referee that the landowners don't have a
right to develop and use the springs and drains, but need to allow that
water to flow back into Cooke Creek for use by downstream water right
holders. Nothing in the decree suggests that water rights for use of these
springs were recognized. The testimony suggests to the Referee that the
flow from these springs either contributes to the creek flow or naturally

24
25 Supplemental Report of Referee
Subbasin No. 10

1 flows into the irrigation distribution ditches. DE-1659 is copies of two
2 water right claims filed pursuant to RCW 90.14 that the claimant contends
3 describe the two springs. WRC No. 115871 describes a spring located 1880
4 feet south and 1900 feet west from the northeast corner of Section 7, which
5 is in the SW~~NE~~^{SW}NE~~W~~^W of Section 7. This location would be about 1200 feet
6 south of the easterly spring, but in the same quarter section. WRC No.
7 115877 describes a spring 40 feet south and 1140 feet east of the northwest
8 corner of Section 7, which would be in the NW~~NE~~^{NE}W~~W~~^W of Section 7, also in the
9 same quarter section as the westerly spring, and about 1200 feet west of
10 the western spring. Were there sufficient evidence to show that a water
11 right was established as a result of development of the springs and
12 diversion by December 31, 1932 (as required to establish a right under the
13 Riparian Doctrine), the Referee would consider whether these water right
14 claim forms substantially comply with the requirements of RCW 90.14 --
15 given the fact that the description of the spring locations are over 1,000
16 feet from the actual springs. However, the Referee does not need to go
17 there, as there is not sufficient evidence to conclude there is a water
18 right to use the springs that would need protection under RCW 90.14. The
19 Referee does acknowledge that flow from these springs contributes to the
20 water available for use on the claimant's land. The springs are on the
21 claimant's land and no rights exist for their use. Therefore, only action
22 by the claimant would result in a change in those circumstances. The
23 Referee continues to recommend that water rights not be confirmed for use
24 of the springs.

25
Supplemental Report of Referee
Subbasin No. 10

1 COURT CLAIM NO. 05523 -- Ronald Gibb
2 (A) 06436 Douglas Gibb

3 Douglas Gibb took one exception to the Referee's recommendations
4 concerning Court Claim No. 05523. Ecology took three exceptions and sought
5 clarifications on two issues. The Gibbs are represented by Attorney
6 Lawrence E. Martin.

7 In a letter ruling dated May 31, 2002, the Court granted Mr. Gibb's
8 exception. He had asked that a Limitation on Use provision be placed on
9 his water rights described on page 536 and 547 stating that the land may
10 also be irrigated with water delivered by Cascade Irrigation District. At
11 the exception hearing held on June 13, 2002, the Court ruled on two of
12 Ecology's exceptions and their requests for clarification. Those rulings
13 are contained in the Court's Order on Exceptions dated December 12, 2002,
14 but will be summarized herein. A typographical error in the water right
15 claim number described on pages 196 and 197 was corrected. The point of
16 diversion location described on page 547 is near enough the point described
17 in the water right claim to not warrant a change. The annual quantity of
18 water awarded on page 536, line 18.5 is changed to 390 acre-feet per year
19 and on page 547, line 5.5 it is changed to 429 acre-feet per year. The
20 last exception by Ecology was remanded to the Referee to take additional
evidence.

21 That exception asks to have the area authorized for irrigation on page
22 547, lines 10 to 11.5 reduced from 110 acres to 95 acres. Ecology's
23 position is that the right-of-ways should be eliminated, which reduce the
24

25 Supplemental Report of Referee
Subbasin No. 10

1 area in the place of use to 95 acres. Mr. Gibb was scheduled to appear at
2 the supplemental hearing on February 25, 2003. Mr. Gibb's attorney
3 informed Ecology that Mr. Gibb agreed with their position that only 95
4 acres were being irrigated and would not be appearing to contest their
5 exception. Therefore, the Referee reduces the number of acres authorized
6 for irrigation on page 547, line 3.5 to 95 acres and amends the legal
7 description at line 11½ to add the words "excluding right-of-way for county
8 road."

9 Also filed with the Court is a decision by the Kittitas County
10 Conservancy Board approving Mr. Gibb's application for change to add two
11 points of diversion to this water right. Ecology modified that approval to
12 require the the diversion be metered and to reflect the Court's rulings on
13 Ecology's exceptions. Mr. Gibb appealed that modification. This Court
14 certified to the Pollution Control Hearings Board the portion of the appeal
15 that dealt with Ecology's legal ability to add the metering provision to
16 the approval. The portion of the appeal that was to the annual quantity of
17 water in the water right was retained by the Court pursuant to Pre-Trial
18 Order No. 12. Mr. Martin orally informed the Court that Mr. Gibb would be
19 withdrawing that appeal, however, the Court has seen no document formally
20 withdrawing the appeal. Nevertheless, Mr. Gibb's lack of appearance at the
21 supplemental hearing and his attorneys assertion that Mr. Gibb agreed with
22 Ecology's position supports that conclusion. The water rights on pages 547
23 and 536 are amended to add the points of diversion approved by the
24 conservancy board. Those points are: 1650 feet north and 1320 feet west

25 Supplemental Report of Referee
 Subbasin No. 10

1 of the southeast corner of Section 11, being in the N $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11,
2 T. 17 N., R. 19 E.W.M. and 825 feet north and 1815 feet west of the
3 southeast corner of Section 11, being within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11,
4 T. 17 N., R. 19 E.W.M.

5
6 COURT CLAIM NO. 01217 -- Wayne L. Hanson
7 & Lauren M. Hanson

8 COURT CLAIM NO. 01218 -- Warren G. Wood
9 & Laura A. Wood
M. Leonard Wood
Wayne L. Hanson
& Lauren M. Hanson

10 Wayne and Lauren Hanson filed exceptions to the Referee's
11 recommendations that water rights not be confirmed under either of the two
12 Court Claims. The Hansons are represented by Attorney Richard T. Cole and
13 Warren Wood and Wayne Hanson testified at the supplemental hearing.

14 Warren Wood, who is Lauren Hanson's father, has been familiar with the
15 land since around 1946. His father, W. G. Wood acquired the land in the
16 1940's and Warren Wood inherited it in 1975. The claimants are asserting
17 rights to use water from Caribou Creek to irrigate approximately 70 acres
18 in the NE $\frac{1}{4}$ of Section 1, T. 17 N., R. 19 E.W.M. At the time the decree was
19 entered in Clerf v. Scammon, the land was owned by R. I. Scammon and water
20 rights were not awarded to Mr. Scammon in that decree. The Referee did not
21 recommend that a water right be confirmed for this land as there was no
22 evidence that a water right was legally established following entry of the
23 decree.
24

25 Supplemental Report of Referee
Subbasin No. 10

1 Mr. Wood's testimony at the supplemental hearing confirms that the
2 Referee's recommendation was appropriate. According to Mr. Wood, who has
3 been familiar with the land since the mid-1940's, water is not used until
4 the Kittitas Reclamation District (KRD) begins spilling water into Caribou
5 Creek in the spring. In fact, Mr. Wood testified there is no water in the
6 creek until that time. The land is assessed by KRD and Mr. Wood's
7 testimony is very clear that it is KRD water that is being diverted from
8 Caribou Creek and used to irrigate the land described in both Court
9 Claims. KRD is a major claimant in this proceeding and its water rights
10 were determined by the Court in the Major Claimant Pathway. See Report of
11 the Court and Supplemental Report of the Court, Volumes 14 and 14A, entered
12 on June 24, 1993, and April 5, 1994, respectively, and the Conditional
13 Final Order for Kittitas Reclamation District entered by the Court on
14 June 1, 1994. Water rights for individuals served by KRD are not addressed
15 in the subbasin pathway.

16 Mr. Hanson testified about the irrigation practices on the land and
17 entered exhibits to show existence of irrigation ditches in the 1930's and
18 1940's. However, KRD was delivering water in this area at that time.
19 Based on Mr. Wood's testimony, it is clear that Caribou Creek water is not
20 being used on the claimant's land and hasn't been for at least 50 years.
21 There continues to be no evidence to show that water rights were legally
22 established for use of Caribou Creek on this land. Therefore, the Referee
23 continues to recommend that water rights not be confirmed under Court
24 Claims Nos. 01217 and 01218.

25 Supplemental Report of Referee
Subbasin No. 10

1 COURT CLAIM NO. 01941 -- Larry Hansen
2 Jack G. Sikes
3 & Ada M. Sikes

4 Larry Hansen took exception to the Referee not recommending that a
5 water right be confirmed under Court Claim No. 01941. Mr. Hansen is
6 represented by Attorney Richard T. Cole. Ron Poulsen, who leases and farms
7 the land, testified at the hearing, along with Marlene Wyatt, who works for
Amerititle.

8 Mr. Hansen owns the NE~~1/4~~SE~~1/4~~ of Section 17, T. 17 N., R. 19 E.W.M. and
9 is asserting a right to irrigate the entire 40 acres with water diverted
10 from Coleman Creek. The Referee did not recommend confirmation of a water
11 right due to lack of evidence to show that the land was irrigated with
12 water diverted from Coleman Creek prior to December 31, 1932, the date by
13 which water had to be used in order to establish a water right under the
14 Riparian Doctrine. The Referee also suggested that evidence of the actual
15 quantity of water diverted and used to irrigate the land would be helpful.

16 Mr. Poulsen testified to his irrigation practice. In a dry year, he
17 will begin irrigating in late March or early April and will continue
18 irrigating until sometime in October. If he plants a new seeding of hay in
19 the fall, he will irrigate until the first of November. He has not
20 actually measured the quantity of water diverted from the creek, but
21 believes it to be 2 cubic feet per second. Water is diverted from the
22 creek using boards to raise the creek level so that it will flow into a
23 pipe and then into a ditch. Mr. Poulsen also testified that the the entire
24 40 acres is assessed by Ellensburg Water Company (EWC), who delivers water

25 Supplemental Report of Referee
Subbasin No. 10

1 to the property down Coleman Creek. Some years he will begin irrigating
2 before EWC turns on. Mr. Poulsen's knowledge of the property began around
3 1980.

4 The only effort to show historical water use was through the chain of
5 title sheet and documents attached to the chain of title. Those documents
6 show that there were crop mortgages for the property beginning in 1913 and
7 continuing into the 1930's. The land has consistently been leased and the
8 only logical reason for leasing the land would be for farming. The later
9 deeds reference water rights and irrigating ditches. They also reference
the need to pay for water charges and water stock.
10

11 As the Referee stated in the initial Report of Referee, the fact that
12 the land was being irrigated in the 1920's and 1930's is not sufficient to
13 prove that a water right was established for use of Coleman Creek. The
14 water right for EWC was established in 1885, see Report of the Court
15 Concerning the Water Rights for Ellensburg Water Company, Volume 37, and
16 the Court's Supplemental Report, Volume 37A. Water delivered through EWC's
17 Town Ditch was available to the claimants land by the late 1800's. The
18 claimant has offered no new evidence that shows Coleman Creek water, not
19 EWC water, was being used to irrigate the land prior to 1932. Lacking that
20 evidence, the Referee cannot recommend confirmation of a water right. The
21 Referee continues to recommend that a right not be confirmed under Court
Claim No. 01941.
22
23
24

25 Supplemental Report of Referee
Subbasin No. 10

1 COURT CLAIM NO. 00956 -- Don Jacobs
2 & Judy Jacobs
3 Joe Jacobs
4 & Doriene Jacobs

5 The Jacobs took exception to the Referee not recommending confirmation
6 of a water right for use of Cherry Creek water on their land. They are
7 represented by Attorney Jamie Morin and Don Jacobs testified at the
8 supplemental hearing.

9 The claimants land lies in the NW $\frac{1}{4}$, SE $\frac{1}{4}$, SW $\frac{1}{4}$, SW $\frac{1}{4}$, NW $\frac{1}{4}$ and
10 SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 29, T. 17 N., R. 19 E.W.M. A right is being asserted to
11 use 6 cfs diverted from Cherry Creek to irrigate 270 acres. Several
12 factors lead to the Referee not recommending confirmation of a water right
13 and each were addressed at the supplemental hearing. Joe Jacobs and Frank
14 Everett, Jr., who sold the land to the Jacobs, testified at the initial
15 hearing. That testimony lead the Referee to conclude that a portion of the
16 land in the NW $\frac{1}{4}$ of Section 29 was first irrigated in 1988. Approximately
17 75 acres in the NW $\frac{1}{4}$ of Section 29 are on the top of and sides of a hill.
18 Since 1988 that land has been sprinkler irrigated with water pumped from a
19 settling pond (along with commingled ground water). Water diverted from
20 Cherry Creek is piped to the pond and then pumped onto the hill. The
21 Referee concluded from the testimony that 1988 was the first time this land
22 had been irrigated. No information was provided about how the hill could
23 have been irrigated with a gravity flow system. Don Jacobs addressed that
24 at the supplemental hearing, although he did not have a lot of specific
25 information. The point of diversion from Cherry Creek has been moved in

Supplemental Report of Referee
Subbasin No. 10

1 the past and at one time a diesel pump was located a few hundred feet
2 downstream from the current diversion. Mr. Jacobs believes that pump was
3 used to lift water to the top of the hill to a weir box. From there the
4 land was flood irrigated by gravity flow. All of the claimant's land is
5 riparian to Cherry Creek so water rights would have been established under
6 the Riparian Doctrine, which requires beneficial use of water prior to
7 December 31, 1932. It was not common practice to use pumps prior to 1932,
8 but it did occasionally happen. Eric T. Moe, a neighboring landowner at
9 the time of the initial evidentiary hearing, testified that a diesel pump
10 was used on Cherry Creek beginning around 1929. Mr. Moe acquired land
11 adjoining the Jacobs property prior to 1920 and is the one who installed
12 the pump. The diversion that serves the Jacobs property also serves the
13 Moe property (now owned by Nisbet). Mr. Moe's testimony, however, suggests
14 that the pump was small and would not have been able to lift enough water
15 to irrigate the hill side. See page 181 for a discussion of the Nisbet/Moe
16 claim. The Referee had concluded that the pump installed in the 1920's was
17 not of a sufficient size to irrigate the former Moe land, let alone that
18 land and what is now the Jacob property. The Jacob property that is at
19 creek level in the southerly portion of the NW $\frac{1}{4}$ and in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and S $\frac{1}{4}$ of
20 Section 29 could have been irrigated by the gravity flow systems commonly
in use in the late 1800's and early 1900's.

21 At the initial evidentiary hearing, Mr. Everett presented sufficient
22 testimony and evidence to allow the Referee to conclude that some of the
23 land had been irrigated with water diverted from Cherry Creek since the

24
25 Supplemental Report of Referee
Subbasin No. 10

1 early 1900's. However, much of the documentation indicated that the
2 landowners were assessed by Cascade Irrigation District (CID). The Referee
3 is aware that CID uses many of the creeks around Ellensburg and Kittitas
4 for delivery of its water. If the land was also irrigated with water
5 delivered by CID, proof of water use in the early 1900's did not
6 necessarily establish that natural flow water from Cherry Creek was being
7 used. At the supplemental hearing Mr. Jacobs made it clear that the land
8 is not assessed by CID and water delivered by CID is not used on his land.
9 Also entered into evidence is a declaration by Tony Jantzer, CID manager,
10 stating that the Jacobs land is outside of the CID boundaries and is not
assessed by CID.

11 The evidence submitted during the supplemental hearing clarifies the
12 nature of the water being used during the early 1920's allowing the Referee
13 to conclude that water rights were established for some of the Jacobs land
14 under the Riparian Doctrine. Under the Riparian Doctrine, the priority
15 date for the water rights is set when steps are first taken to sever the
16 land from Federal ownership. A portion of the Jacobs land was originally
17 conveyed to Northern Pacific Railroad and then sold to private ownership.
18 The priority date for former railroad lands is the date the map of definite
19 location was filed by the railroad, which was May 24, 1884, for Kittitas
20 County. So the land in the NW $\frac{1}{4}$, NW $\frac{1}{4}$ SW $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 29 would have
21 that priority date. For land that is settled under the homestead laws, the
22 first step to sever the land is settlement. The land in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of
23 Section 29 was first occupied by Patrick Lynch in 1874, which would then be

24
25 Supplemental Report of Referee
Subbasin No. 10

1 the priority date for water rights for the land irrigated in the SW~~NE~~%.
2 The land in the S%SW% and NE%SW% of Section 29 was first occupied by
3 Patrick Lynch in 1879, which would be the priority date for water rights
4 for that portion of the land. The claimant has provided evidence to show
5 the total number of acres irrigated north and south of the creek, but not
6 how many acres are irrigated within the three areas that would have
7 different priority dates. In the past when this situation arose, the
8 Referee has attempted to estimate the number of acres. This effort
9 generally has failed with both the claimant and Ecology taking exception to
10 those estimates. Therefore, the Referee will not attempt to estimate the
11 number of acres that would be irrigated within each area that would have a
12 different priority date. Additionally, the water right claim filed by Mr.
13 Everett in 1972 pursuant to RCW 90.14 did not describe any land in the NW%
14 and the SE%SW% of Section 29. The Jacobs have filed a request to amend
15 that water right claim through the procedures of RCW 90.14.065, see Exhibit
16 DE-1773. However, there has been nothing entered into the record to show
17 the results of this attempt. Until the claimants are successful in their
18 efforts to amend the Water Right Claim that was filed by their predecessor,
19 the Referee cannot recommend confirmation of a water right for land in the
NW% and the SE%SW% of Section 29.

20 At this time, while the Referee recognizes that sufficient evidence has
21 been presented to conclude water rights were legally established under the
22 Riparian Doctrine for the Jacobs land, it is recommended that water rights
23 not be confirmed under Court Claim No. 00956. The evidence is adequate to

24
25 Supplemental Report of Referee
Subbasin No. 10

1 confirm rights if the claimant during the exception phase for this report
2 supplies evidence to show how many acres are irrigated in each of the
3 separately settled areas and is successful in amending Water Right Claim
4 No. 007278.

5 **COURT CLAIM NO. 00991 -- Kayser Ranch, Inc.**

6 Kayser Ranch Inc. filed an exception to the Report of Referee for
7 Subbasin No. 10. The Referee did not recommend confirmation of a water
8 right for a portion of the claimants land due to there not being an RCW
9 90.14 claim for that specific land. The exception was to the Referee not
10 retaining jurisdiction over Court Claim No. 00991 until the RCW 90.14
11 claim, Water Right Claim No. 118060, has been amended. Attorney James K.
12 Adams appeared at the exception hearing representing Kayser Ranch. Kayser
13 Ranch has submitted a request to amend Water Right Claim No. 118060,
14 specifically concerning the place of use description and quantity of water
15 being used. Kayser Ranch is simply seeking the opportunity to have Court
16 Claim No. 00991 reevaluated after the amendment process is complete. In
17 the past the Court has held open subbasins in order to allow Ecology to
18 consider requests for amendments of RCW 90.14 claims and no doubt will
19 continue to do so if necessary for the Kayser Ranch claim.

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25 Supplemental Report of Referee
Subbasin No. 10

1 COURT CLAIM NO. 01234 -- Sam Kayser
2 (A) 06380 & Lonni Kayser

3 Sam Kayser took exception to the Referee not recommending that a water
4 right be confirmed under Court Claim No. 01234. Mr. Kayser, represented by
5 Attorney James K. Adams, appeared and testified at the supplemental
6 hearing.

7 Several factors lead to the Referee not recommending confirmation of a
8 water right, including confusion over the exact land for which a water
9 right was being asserted. Mr. Kayser clarified at the supplemental hearing
10 that he is seeking a water right for the use of water diverted from
11 Schneebly Creek for the irrigation of 17 acres in that portion of the SE~~%~~SW~~%~~
12 of Section 2, T. 18 N., R. 19 E.W.M. lying north of the Kittitas
13 Reclamation District's North Branch Canal. Mr. Kayser submitted exhibit
14 DE-1599, which consists of chain of title documents related to land that
15 includes the SE~~%~~SW~~%~~ of Section 2. These documents show that the land was
16 originally settled by William Kiester, who received a patent on June 5,
17 1873, for the SE~~%~~SW~~%~~ of Section 2 and the NW~~%~~NW~~%~~ and SW~~%~~NW~~%~~ of Section 11,
18 all in T. 18 N., R. 19 E.W.M. Mr. Kayser's counsel referred the Referee to
19 pages 400 and 401 of the Subbasin No. 10 Report of Referee, where the
20 evidence presented by Albert Scott is discussed. Mr. Scott owns that
21 portion of the SE~~%~~SW~~%~~ of Section 2 lying south of the North Branch Canal
22 and the historical evidence placed in the record by Mr. Scott is also
23 applicable to the Kayser property. Mr. Scott's exhibit (DE-968) shows that
24 Mr. Kiester arrived in the Kittitas valley in 1868 and settled on the land

25 Supplemental Report of Referee
Subbasin No. 10

1 in 1869. That evidence also shows that Kiester constructed a ditch from
2 Naneum Creek that discharged into Schnebly Creek and that co-mingled Naneum
3 and Schnebly Creek waters were diverted for irrigating the SE~~%SW%~~ of
4 Section 2. The record is clear that the entire SE~~%SW%~~ of Section 2 was
5 under one ownership until after 1929 when the then owner, E. L. Clark,
6 deeded less than 5 acres to KRD for construction of the North Branch Canal
7 (DE-1599). The claimants land is riparian to Schnebly Creek and under the
8 Riparian Doctrine, the priority date for the water right is the date steps
9 were first taken to sever the land from Federal ownership, which would be
when the land was first settled (1869).

10 Mr. Kayser testified that he leased the land beginning in 1975 and
11 continued the irrigation practice that was in place at the time. He
12 irrigates alfalfa hay and then uses the land for pasture after the hay is
13 harvested. Water is diverted from the creek at one point into two ditches.
14 Mr. Kayser testified to diverting 1.5 cfs into one ditch and 1.0 cfs into
15 the second ditch when water was available. Mr. Kayser did not testify to
16 watering stock after the end of the irrigation season. Since the land is
17 riparian to the creek, the Referee will conclude the livestock have access
18 to and drink directly from Schnebly Creek, a non-diversionary use covered
19 by the stock water stipulation that was discussed on page 4 of the Subbasin
20 No. 10 Report of Referee. The Referee finds that the Kaysers have a
21 non-diversionary right under that stipulation.

22 Water Right Claim (WRC) No. 062731 was filed by Jacob Kooy, the prior
23 owner of the Kayser land, pursuant to the provisions of RCW 90.14. He

24
25 Supplemental Report of Referee
Subbasin No. 10

1 asserted a right to divert 1.0 cfs, 64 acre-feet per year from Schnebly
2 Creek for the irrigation of 16 acres in part of the SE~~X~~SW~~X~~ of Section 2.
3 The point of diversion is described as 1330 feet east and 50 feet south of
4 the west quarter corner of Section 2, in the NW~~X~~NE~~X~~SW~~X~~ of Section 2. The
5 Referee does not believe this is the diversion location to which Mr. Kayser
6 testified, however, it is the diversion preserved by the RCW 90.14 claim.
7 If in fact Mr. Kayser is using a different point of diversion, he should
8 contact Ecology's Central Regional Office about the process for changing
9 the point of diversion pursuant to RCW 90.03.380.

10 Based on the information in the record from both Mr. Kayser's
11 presentation and that of Albert Scott at the initial evidentiary hearing,
12 the Referee recommends that a water right be confirmed under Court Claim
13 No. 01234 with a June 30, 1869, date of priority for the use of water from
14 Schnebly Creek for irrigation of 17 acres in the SE~~X~~SW~~X~~ of Section 2.
15 Although WRC No. 062731 asserts a right to 16 acres, the 17 acres testified
16 to by Mr. Kayser is an insignificant difference from what was claimed,
17 therefore, complying with the intents of RCW 90.14. On the other hand, Mr.
18 Kayser testified to diverting up to 2.5 cfs from Schnebly Creek when it is
19 available, WRC No. 062731 asserts a right to 1.0 cfs and the Referee can
20 only recommend confirmation of a water for the quantity of water claim.
21 Additionally, 2.5 cfs is an extremely high instantaneous quantity for the
22 irrigation of only 17 acres. The Referee recommends that a right be
23 confirmed for the diversion of 1.0 cfs, 64 acre-feet per year as claimed in
24 WRC No. 062731.

25 Supplemental Report of Referee
Subbasin No. 10

1 COURT CLAIM NO. 00844 -- David Leaton
2 & Mrs. David Leaton
3 Roy C. Fann
Howard F. Clerf
& Vivian Clerf

4 Court Claim No. 00844 was originally filed by Roy C. Fann. On
5 December 14, 1989, Howard F. and Vivian Clerf filed a Motion to Substitute
6 Parties, seeking to be substituted for Mr. Fann. However, since Mr. Fann
7 did not sign the motion, it was treated as a motion to join additional
8 parties and the Clerfs were joined to the claim. On December 12, 1990,
9 David Leaton filed a Motion to be Joined as an Additional Party to Court
10 Claim No. 00844 and Mr. Leaton was subsequently joined by Order of the
11 Court. There was no appearance at the initial evidentiary hearing in
12 support of this claim, resulting in the Referee not recommending
13 confirmation of a water right. Mr. and Mrs. David Leaton filed an
14 exception and asked that the claim be remanded to the Referee so that they
15 could present evidence in support of the claim. Mr. Leaton, who is
16 represented by Attorney Jeff Slothower, testified at the supplemental
17 hearing.

18 Court Claim No. 00844 asserts a right to irrigate 10 acres and water
stock from unnamed springs. The property described in the claim and now
19 owned by Mr. Leaton is a portion of the NW~~1/4~~NW~~1/4~~ of Section 17, T. 17 N.,
20 R. 20 E.W.M. Mr. Leaton and his wife, Julie, acquired the land in 1984
21 from Arley W. and Doris I. Cassidy, the stepson and daughter-in-law to Roy
22 Fann the original claimant. DE-1739 contains chain of title documents for
23 the property, showing that the NW~~1/4~~NW~~1/4~~ of Section 17 was conveyed from the

24
25 Supplemental Report of Referee
Subbasin No. 10

1 United States to William M. Johnston by patent dated May 11, 1904. Deeds
2 included in Exhibit DE-1739 show this and other land was conveyed several
3 times in the early to mid-1900's, and the deeds reference water rights and
4 irrigation ditches.

5 When the Leatons acquired the land, a home was being constructed, but
6 was unfinished; they have since finished the home. Mr. Leaton testified to
7 there being two ponds on the property, both spring-fed. The smaller pond
8 is used for domestic supply in the house. A 1½ HP pump is used to pump
9 water from the pond up to the home that is at a higher elevation than the
pond. The water is also used to irrigate landscape around the house. Mr.
10 Leaton testified that prior to the time that the field inspection was
11 conducted before the 1991 evidentiary hearing, KRD water (2 acres are
12 assessed by KRD) was used to irrigate approximately 6 acres. A gravity
13 flow system is used to deliver KRD water to the property. Mr. Leaton
14 testified that the inspector told him that if he wasn't using water out of
15 the ponds, he might lose the right to use the ponds. Since then he has
16 been using the ponds to irrigate the 6 acres of pasture. Mr. Leaton
17 provided no evidence that the ponds were used for irrigation prior to the
18 field investigation in 1989.

19 Mr. Leaton has found evidence of an older home that previously was on
20 his property. There are also two barns that he has refurbished. He
21 believes those barns have been on the property since before 1930. The
22 barns had in the past been used to raise and slaughter turkeys and water
23 from the ponds was piped to the barns for the turkeys.

24
25 Supplemental Report of Referee
Subbasin No. 10

1 Although Mr. Leaton is currently using the ponds to irrigate about 6
2 acres, at the supplemental hearing, he also asserted a right to use the
3 smaller spring-fed pond for domestic supply and stock watering. He is
4 asserting a right to 5,000 gallons per day. There is no well on the land,
5 which lead Mr. Leaton to conclude that the spring-fed pond must have been
6 the water source historically used on the property. The water system to
7 the barns is very old and has not been replaced since Mr. Leaton bought.
8 The system to the house was in place when he bought, but it has been
9 upgraded since that time.

10 Three water right claims were filed by Roy C. Fann pursuant to the
11 requirements of RCW 90.14. Water Right Claim (WRC) No. 052083 asserts a
12 right to use 5,000 gallons per day from a spring for domestic supply and
13 stock water in the NW~~4~~NW~~4~~ of Section 17. The described location of the
14 spring is 1370 feet south and 900 feet east of the northwest corner of
15 Section 17, being in the NW~~4~~ of Section 17. This is very close to the
16 location of the smaller pond drawn on State's Exhibit SE-2, just a couple
17 hundred feet south of the actual location of the pond. The Referee
18 concludes WRC No. 052083 substantially complies with RCW 90.14 for the
19 smaller pond being used for domestic supply. State of Washington v. Adsit,
20 103 Wn.2d 698, 694 P.wd 1065 (1985). WRC No. 052081 asserts a right to use
21 300 acre-feet per year from a spring for irrigation of 40 acres and stock
22 water in the NW~~4~~NW~~4~~ of Section 17 and the NE~~4~~NE~~4~~ of Section 18. Lastly,
23 WRC No. 048106 asserts a right to use 200 gallons per minute (the Referee
24 is assuming an intent to circle gallons per minute, as 200 cubic feet per

25 Supplemental Report of Referee
Subbasin No. 10

1 second would not make sense) from Parke Creek for the irrigation of 30
2 acres and stock water in part of the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and part of the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of
3 Section 17. All of the water right claims state that water was first used
4 in 1930.

5 Although the water right claim forms state water was first used in
6 1930, the claimant offered nothing to support that date. The chain of
7 title documents indicate that in 1930 the land, along with neighboring
8 land, was owned by Charles T. Payne and John M. Payne. The Paynes owned
9 the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17 and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 18. Although
10 there is evidence of another home having been on the property, with the
11 Paynes owning so much land, it is not possible with the evidence currently
12 in the record to conclude they would have had a home on the portion of
13 the land now owned by the Leatons or that they would have used water from
14 the small pond for domestic supply. Mr. Leaton's counsel correctly states
15 that under the Riparian Doctrine, evidence of water use prior to
16 December 31, 1932, is all that is necessary to show that a water right was
17 properly established. The Referee concludes the evidence has not been
18 sufficient to reach that conclusion. Therefore, the Referee recommends
19 that no right be confirmed under Court Claim No. 00844. The livestock on
20 the claimants land may have access to the ponds, which would allow them to
21 drink directly from the ponds. This type of non-diversionary stock water
22 use is covered by the stock water stipulation discussed beginning on page
23 4. Mr. Leaton would have a right under that stipulation.
24

25 Supplemental Report of Referee
Subbasin No. 10

1 COURT CLAIM NO. 02165 -- J. Wayne McMeans
2 02166 & Cindy L. McMeans

3 COURT CLAIM NO. 02167 -- J. Wayne McMeans
4 (A) 05550 & Cindy L. McMeans
John R. Gibb
& Cathy S. Gibb
Kevin W. Gibb
& Julie Gibb

5
6 Exceptions to the Report of Referee for Subbasin No. 10 were filed by
7 both the McMeans and by the Gibbs. All of the claimants are represented by
8 Attorney Richard T. Cole. Wayne and Cindy McMeans testified at the
9 supplemental hearing. There was no appearance by the Gibbs.

10 The Referee will first address the exception filed by the Gibbs. The
11 Gibbs exception identifies a typographical error in the place of use
12 description for the water right confirmed under Court Claim No. 02165 for
13 use of water diverted from Cooke Creek. The Referee has reviewed pages 273
14 and 564 of the Report of Referee and agrees that page 564, at line 24, has
15 a typographical error in the Section number. The appropriate section
16 number is 19, not 18, and that correction has been made to the water right
17 confirmed.

18 The second exception by the Gibbs was to the water duty awarded, which
19 is approximately 5 acre-feet per year for each acre irrigated. The Gibbs
20 in their exception state that the actual usage of water is greater than
21 what was awarded by the Court. They also state that the Anderson case
22 should not be controlling and an actual on-site study would be the "best
23 evidence." In addition, the claimants should be allowed to double their
24 diversion during flood circumstances. The Court remanded this portion of

25 Supplemental Report of Referee
Subbasin No. 10

1 the exception with direction to the Referee. The Court ruled that water
2 rights awarded herein based on the Anderson decree, which is the prior
3 adjudication of Cooke Creek, are limited to 0.02 cfs for each acre
4 irrigated and that a continuous diversion of that quantity would result in
5 5.46 acre-feet being used on the land during the authorized irrigation
6 season. The Court stated that the Referee is bound by the prior decrees
7 and cannot recommend confirmation of water rights beyond what was awarded
8 in those decrees. See pages 7 and 8 of the Court's Order on Exceptions for
9 Subbasin No. 10, filed on December 12, 2002. The claim was remanded to
10 allow presentation of testimony about use of flood water, however, the
11 Gibbs did not make an appearance at the supplemental hearing. In fact,
12 their attorney did not seem to recognize that the Gibbs had filed an
13 exception. The Referee recommends that the quantity of waer awarded not be
14 modified.

15 The last exception filed by the Gibbs was to June 30 being the month
16 and day associated with priority dates. The Referee has used June 30 as
17 the month and day for priority dates when the record only provides
18 sufficient evidence to determine the appropriate year for the priority
19 date. This has been the practice since the inception of the adjudication.
20 The Gibbs suggest that the month and day should be the beginning of the
21 irrigation season. The Court denied this exception at the exception
22 hearing, finding that the priority date is driven by many different
23 factors, including date of first settlement, date the patent issued and
24

25 Supplemental Report of Referee
 Subbasin No. 10

1 date first steps were taken to appropriate water. None of which have
2 anything to do with the irrigation season.

3 At the time of the supplemental hearing, the Gibbs had not been joined
4 to any of the claims filed by the McMeans. Their exception references
5 Court Claim No. 02165 and a water right was awarded under that claim for
6 land that apparently is now owned by the Gibbs. That Claim asserted rights
7 to use water from Cooke Creek in the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 18 and the E $\frac{1}{2}$ NE $\frac{1}{4}$ and
8 NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19, T. 18 N., R. 20 E.W.M. However, the Motion to be
9 Joined as Additional Parties cites Court Claim No. 02167, resulting in the
10 Court issuing an Order joining them to that claim. A water right was also
11 confirmed under Court Claim No. 02167 for the irrigation of 20 acres in the
12 NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19. The exception filed by the Gibbs states they now own
13 the E $\frac{1}{2}$ NE $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19. The Referee concludes that joining them
14 to Court Claim No. 02167 was appropriate, however, it is very important
15 that they also get joined to Court Claim No. 02165, since a water right was
16 also awarded under that claim for land they now own.

17 The McMeans filed several exceptions as a result of the Referee not
18 recommending confirmation of water rights for most of their land. The
19 Referee will first address the lands owned by the McMeans in the E $\frac{1}{2}$ of
20 Section 8 and the NW $\frac{1}{4}$ of Section 17. The evidence presented at the initial
21 hearing showed that by the early 1900's this land was owned by Charles
22 Smith. Three separate patents cover the land and were addressed in detail
23 on pages 266, 267 and 268 of the Report of Referee and will not be repeated
here. Charles Smith was an intervener in Clerf v. Scammon. The initial

24
25 Supplemental Report of Referee
Subbasin No. 10

1 decree that was entered on April 27, 1911, stated that several defendants
2 and intervenors, including Charles Smith ". . . are hereby restrained and
3 forever enjoined from diverting any of the waters of said Caribou Creek . . .
4 ." Mr. Smith filed a motion to amend the decree and on May 29, 1911, the
5 Court entered Supplemental Findings and Decree that allowed Smith to use
6 water from Caribou Creek on his lands "Provided that when the waters of
7 Caribou Creek where it flows across the lands of the defendants Smith and
8 wife, . . . sink and do not flow beyond the lower boundaries of said land,
9 that the said defendants be allowed to use said waters at said time and
10 when such conditions exist, . . ." The Referee concluded that this language
11 recognized a right for Smith to use Caribou Creek water on his lands with
12 certain conditions. The claimants suggest the case was not a comprehensive
13 determination of the water rights for use of Caribou Creek because it was
14 an action that preceded adoption of the Surface Water Code in 1917. The
15 Referee agrees with this position. It was not a comprehensive adjudication
16 of the water rights on Caribou Creek, but was an action that was binding on
17 the named parties and their successors. The claimants put into the record
18 Exhibit DE-1641, which contains numerous documents. Exhibit "I" is the
19 Order of the Court by which Charles Smith is joined to the case as an
intervenor. The Order states in the first paragraph that:

20 ". . . the Court cannot properly determine the same (referring to
21 the case) without each and every owner of land upon Caribou or
Cherry Creek being made parties here.

22 ". . . to the end that all rights to the use of the waters of
said creek may be settled in this action and such owners will be
made parties by service upon them of a summons and amended
complaint in the action . . ."

24
25 Supplemental Report of Referee
Subbasin No. 10

1 It is clear that the Court intended the proceeding to determine all the valid
2 water rights to Caribou Creek. That was the point of joining the intervenors who
3 were not previously parties. It may be that the case did not proceed in the same
4 manner as would seem appropriate today, but there is no doubt that Charles Smith
5 was joined as an intervenor and participated in the case. The Findings of the
6 Court and the Supplemental Decree are binding on Smith and his successors, the
7 McMeans.

8 In spite of the arguments made by the McMeans, it seems to the Referee that
9 the water right they are asserting is consistent with the determination by the
10 Court in Clerf v. Scammon. Mr. McMeans testified that Caribou Creek does go dry
11 as it flows through their property and their use of water begins in the spring
12 when the frost comes out of the ground until sometime in late May or June. After
13 that the creek is dry and they do not divert water. He did not identify when
14 frost comes out of the ground, however, other claimants in this area generally
15 have used March 15 as the earliest date they begin diverting water for
16 irrigation. He did testify that flooding can occur as early as late January,
17 however, that obviously is long before frost is out of the ground, so applying
18 water to the ground would not be a beneficial use of the water. Mr. McMeans
19 testified they divert water from the creek in the northeast corner of Section 8
20 into a ditch. The record is very confusing on the quantity of water they divert
21 at this point. According to the transcript for February 12, 2003, on page 43,
22 line 8, Mr. McMeans initially testified that when there is lots of water he
23 diverted 2 cfs at that diversion. However, on page 48, with prompting from
counsel, he testified that during flood stage the ditch was full and

24
25 Supplemental Report of Referee
Subbasin No. 10

1 approximately 4 cfs was being diverted. However, that testimony was not direct
2 testimony from the claimant, but agreeing with statements made by counsel. The
3 Referee finds the direct testimony of the witness without leading questions to be
4 more compelling. The testimony also suggested that during high flood stages
5 water overflows from the creek filling the ditch, rather than the landowner
6 diverting the water intentionally. The testimony for the other diversions used
7 by the claimants was similar; suggesting that during flood stages the landowner
8 does not intentionally divert water, but that it overflows the creek and fills
9 the ditch. Based on this testimony, the Referee is not inclined to recommend
10 confirmation of a quantity of water that is in the ditch merely through the
11 natural flooding of the creek and not by manipulation by the landowner. The
12 testimony, therefore suggests that at diversion 1, A, B and C, 2 cfs is diverted
13 and 1 to 1.5 cfs is diverted at diversion D. Diversions 1 and B serve 120 acres
14 in Section 8, diversion A, C and D serve 200 acres in Section 17. Mr. McMeans
15 was asked questions concerning the annual quantity of water used on his land and
16 he testified to trying to apply one inch of water for each acre. When Ecology
17 inquired about using up to 5 acre-feet per acre, Mr. McMeans testified they could
18 not get that much. It is clear from the testimony that although up to 6 cfs can
19 be diverted from the three diversions, that quantity is not sustained and between
20 May and June the creek goes dry. The 200 inches that Mr. McMeans testified to
21 using is only 16.6 acre-feet per year, leading the Referee to conclude Mr.
22 McMeans estimate was in error. Based on the limited availability of water to
23 which Mr. McMeans testified, 3 acre-feet per year per acre seems reasonable.
24

25 Supplemental Report of Referee
Subbasin No. 10

1 Initially, the Referee was not able to identify a water right claim that had
2 been filed for use of Caribou Creek on the claimant's land in Section 8. The
3 claimants identified Water Right Claim (WRC) No. 149923 that was filed by Jack
4 Rosenberg. It asserts a right to use 10 cfs, 2000 acre-feet per year from
5 Caribou Creek for the irrigation of 240 acres in the E~~N~~E% of Section 8 and the
6 NW% of Section 17. The only point of diversion that is described is near the
7 northwest corner of Section 9, T. 18 N., R. 20 E.W.M., just off of the claimant's
8 land. The number of acres for which a right is claimed is the total number of
9 acres within the place of water use described. However, it also is close to the
10 number of acres actually irrigated by the McMeans in the E% of Section 8 and the
11 NW% of Section 17 -- but the SE% of Section 8 is not described. There still has
12 not been a water right claim identified for the claimants land in the SE% of
13 Section 8. The claimants did not address this at the exception hearing.

14 The Referee estimates that there are approximately 45 acres irrigated in the
15 the NE% of Section 8. This area extends a little bit into the SW~~N~~E% of
16 Section 8 and technically outside the area described in WRC No. 149923, however,
17 the portion of the field in the SW~~N~~E% is a very minor part of the total area and
18 it would have been difficult for the landowner to distinguish that it was outside
19 the E~~N~~E%. Therefore, the Referee finds there is substantial compliance with RCW
20 90.14 for all of the irrigated lands in the NE% of Section 8. State of Washington
21 v. Adsit, 103 Wn.2d 698, 694 P.2d 1065 (1985). The land in the NE~~N~~E% and SW~~N~~E%
22 would share a common priority date of June 9, 1894, while the land in the SE~~N~~E%
23 would have a priority date of November 5, 1887. The Referee is not able to
24 accurately determine how many acres would be covered by each priority date. The

25 Supplemental Report of Referee
 Subbasin No. 10

1 Referee is prepared to recommend that a water right be confirmed for use of
2 Caribou Creek on those acres. It is suggested that the claimants either on their
3 own or working with Ecology and their GIS technician, determine the number of
4 acres and quantity of water used to irrigate those acres, and provide that
5 information as part of an exception to this report. With that information a
6 water right can be confirmed for the NE $\frac{1}{4}$ of Section 8.

7 The record is adequate for the Referee to recommend confirmation of a water
8 right with a May 24, 1884, date of priority for the diversion of 2 cubic feet per
9 second, 356 acre-feet per year from March 15 to June 15 for the irrigation of
10 110.6 acres in the NW $\frac{1}{4}$ of Section 17. In spite of the testimony about the
11 various diversions on Caribou Creek that are used by the claimants, the Referee
12 can only recommend the diversion that was described on the water right claim
13 filed for the property, which is in the NW $\frac{1}{4}$, NW $\frac{1}{4}$, NW $\frac{1}{4}$ of Section 9.

14 The claimant's also irrigate approximately 88 acres in the SW $\frac{1}{4}$ of Section 17,
15 with water diverted from Caribou Creek. The SW $\frac{1}{4}$ of Section 17 was owned by
16 William A. Craig at the time of the Clerf v. Scammon controversy. Like Charles
17 Smith, William Craig was joined to the case as an intervenor in the middle of the
18 case. The preceding discussion about the binding nature of the case on the
19 intervenors applies to Craig as well as Smith. The only distinction is that
20 Craig did not file an objection to the decree. The Referee will not go into
21 further discussion of the applicability of the Clerf v. Scammon decree, beyond
22 concluding that Craig and his successors are bound by that case.

23 In addition to William Craig not being awarded a water right in Clerf v.
Scammon, the biggest hurdle for the McMeans to overcome with regard to the SW $\frac{1}{4}$ of

24
25 Supplemental Report of Referee
Subbasin No. 10

1 Section 17 is compliance with RCW 90.14, the Claims Registration Act. The water
2 right claim in the record with the SW% of Section 17 identified is WRC No.
3 160956. This is on what is commonly referred to as a "short form". It is
4 distinguished from the "long form" by the information requested on the form and
5 the water uses for which the form could be used. The long form asks for specific
6 information about the source of water, quantity of water claimed and used, date
7 of first water use, purpose of use, including number of acres irrigated, location
8 of the point of diversion, legal description of lands on which water is used and
9 legal doctrine upon which the claim is based. The short form, however, only asks
10 for the name of the water source and legal description of lands on which water is
11 used. The purpose of water use can be indicated by marking the boxes in front of
12 domestic, stock watering, irrigation (lawn and garden) or other use. RCW
13 90.14.051 was modified in 1973 to allow use of the short form. It specifically
14 provided that the ". . . any claim for diversion or withdrawal of surface or
15 ground water for those uses described in the exemption from the permit
16 requirements of RCW 90.44.050 may be filed on a short form to be provided by the
17 department. . ." The water uses that are exempt from the permit requirements of
18 RCW 90.44.050 are stock watering, watering of a lawn or noncommercial garden not
19 exceeding one-half acre in area, or for single or group domestic uses and
20 industrial purpose in an amount not exceeding 5,000 gallons per day. Clearly
21 diverting sufficient water to irrigate 88 acres is not one of those uses. This
22 issue was briefed post-hearing and responded to by Ecology. Counsel for McMeans
23 argues that McMeans predecessor Jack Mihalcik substantially complied with the
24 requirements of RCW 90.14 and the rulings in Department of Ecology v. Adsit, 103

25
Supplemental Report of Referee
Subbasin No. 10

1 Wn.2d 698, 694 P.2d 1065 (1985) supports their argument. In Adsit the Supreme
2 Court held that Circle C Ranch had substantially complied with the requirements
3 of RCW 90.14 by providing all of the requested information, but on an application
4 for water right form rather than a water right claim form. As pointed out by
5 Ecology, the factual situation that led to the Adsit ruling is different than
6 what we have here. Circle C provided all of the requested information, just on
7 the wrong form. In the situation with Mr. Milhalcik, he used the wrong form and
8 as a result did not provide the necessary information to prevail on a substantial
9 compliance argument. The form he filled out does not state the quantity of water
10 being used or claimed, it does not state the number of acres irrigated, it does
11 not identify the date water was first used, nor does it identify where water is
12 diverted from the creek. The form in no way gives the state or any one else
13 notice that a water right to irrigate 88 acres is being asserted. The
14 substantial compliance argument fails. The Court in Acquavella has dealt with
15 this issue in the past and consistently ruled that filing a short form with just
16 the information requested on the form does not comply with the requirements of
17 RCW 90.14. See Memorandum Opinion RE: RCW 90.14 and Substantial Compliance,
18 filed on February 10, 1995, at page 7. The Referee continues to recommend that a
19 water right not be confirmed for the claimants land in the SW $\frac{1}{4}$ of Section 17 due
to lack of compliance with RCW 90.14.

20 The claimants are also asserting rights to use springs that arise on their
21 property and Mr. McMeans testified concerning use of those springs. Spring No. 1
22 is located near the southwest corner of the SE $\frac{1}{4}$ of Section 8. The spring's
23 outflow is piped to a metal trough that is about 900 feet from the spring.

24
25 Supplemental Report of Referee
Subbasin No. 10

1 Overflow is piped into Caribou Creek. Mr. McMeans estimated that the spring
2 flows approximately 6 gallons per minute. It is used solely for stock watering.
3 Spring No. 2, known as Grissom Spring, is located a few hundred feet northeast of
4 spring No. 1. Flow from the spring is supposedly used to irrigate about 20 acres
5 in the NW $\frac{1}{4}$ of Section 17. There is, however, no diversion works or distribution
6 system from the spring to the 20 acres. Outflow from the spring enters Caribou
7 Creek and flows downstream where it is diverted from the creek for irrigation in
8 the NW $\frac{1}{4}$ of Section 17. The Referee concludes it would not be appropriate to
9 confirm a right for this water separate from that being confirmed for use of
10 Caribou Creek. After the spring's flow reaches the creek it is no different than
11 the other water in the creek. In order for there to be a separate right, the
12 McMeans would have to put in evidence that the spring was developed and ditched
13 or piped to the property and an irrigation system distinct from that for Caribou
14 Creek used. That evidence is lacking. Additionally, compliance with RCW 90.14
15 is again an issue. There are no RCW 90.14 claims identified for springs located
16 in Section 8. That alone prevents the Referee from recommending confirmation of
17 any water rights for the two springs in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 8. Spring No. 3 is
18 located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17 and is used to irrigate 12 acres that lie
19 southeast of a pipeline shown on SE-2 and northwest of Caribou Creek. Mr.
20 McMeans estimated that the flow from the spring was 0.50 cfs. The only water
21 right claim form filed at all for the SW $\frac{1}{4}$ of Section 17 is the one previously
22 identified, WRC No. 160956, filed by Jack Mihalcik, on the short form. As
23 previously mentioned that could only be used to protect a small right for stock
24 watering and irrigation of one-half acre of lawn or noncommercial garden. Mr.
25

Supplemental Report of Referee
Subbasin No. 10

1 McMeans testimony suggests that the actual irrigation that is accomplished is
2 from allowing the spring flow to spread on the ground as it naturally flows. He
3 did not mention any irrigation system or piping from the spring. As long as that
4 is the actual practice, that can continue without benefit of a water right.
5 However, the Referee cannot recommend confirmation of a water right primarily due
6 to lack of compliance with RCW 90.14. Additionally, the claimants did not
7 provide any historic use information for this spring.

8 Spring 4 is actually a couple of springs that emerge in an area the claimants
9 call Spring Gulch. These springs are used for non-diversionary stock watering,
10 so no additional water right beyond that provided in the stock water stipulation
11 on page 4 in the Report of Referee is needed. The McMeans are on the list of
12 claimants with non-diversionary stock water rights on pages 528 and 529 of the
13 Report of Referee.

14 The last spring, No. 5, is located about 1300 feet east of the northwest
15 corner of Section 17, on the property line between the McMeans and their neighbor
16 to the north, Mr. Barnhart. Mr. McMeans testified this spring flows between 0.50
17 and 1 cfs and is used for irrigation. There are 80 acres in the NW~~1/4~~ of
18 Section 17 that the water can be put on. Mr. McMeans did not testify to the
19 method of using this spring for irrigation or the type of distribution system to
20 get the spring water to the fields. The picture of the spring that is in Exhibit
21 DE-1641, labeled BBB, does not show any form of development. In fact the spring
22 appears to be on the banks of a stream that flows through both the Barnhart and
23 McMean property. In order to recommend confirmation of a right to use this
24 spring for irrigation, more information is needed about the method used to

25
Supplemental Report of Referee
Subbasin No. 10

1 distribute the water and when the water was first used. It appears that Jack
2 Rosenberg filed a water right claim for this spring. WRC No. 149924 asserts a
3 right to use 1 cfs, 200 acre-feet per year from an unnamed spring for the
4 irrigation of 80 acres in the NW~~W~~ of Section 17. The spring location is
5 described as being 190 feet south and 1110 feet east of the northwest corner of
6 Section 17, which is only a few hundred feet from the spring location identified
7 on SE-2. The Referee does not recommend confirmation of a water right for use of
8 this spring lacking that additional information.

9
10 COURT CLAIM NO. 01010 -- John L. Miller
11 & Laura D. Miller
12 Jay Bloxham
13 & Christina Bloxham
14 Larry Miller
15 Schiree Sullivan
16 Marly Onstot

17 COURT CLAIM NO. 02088 -- Leland Orcutt
18 & Burniece Orcutt
19 John L. Miller
20 & Laura D. Miller
21 Jay Bloxham
22 & Christina Bloxham
23 Larry Miller
24 & Sherrie Miller
25 Schiree Sullivan

Exceptions were filed to the Referee not recommending confirmation of a
water right under the two referenced Court claims. Attorney Richard T.
Cole represents Jay and Christina Bloxham, Larry and Sherrie Miller,
Schiree Sullivan and Marly Onstot. Mr. Cole's clients, who jointly filed
the exceptions, were all joined to the claims after the Report of Referee
for Subbasin No. 10 was filed.

Supplemental Report of Referee
Subbasin No. 10

1 Court Claim No. 02088 asserts a right to irrigate land in the N $\frac{1}{4}$ SE $\frac{1}{4}$ of
2 Section 8 with water from Park Creek. At the 1991 evidentiary hearing the
3 claim was amended to include lands in the E $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8. All of the
4 land owned by Mr. Cole's clients is within the area for which Claim No.
5 02088 asserts a water right. Court Claim No. 01010 asserts a right to
6 irrigate lands in the E $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ north of the railroad tracks, the E $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$
7 and NW $\frac{1}{4}$ of Section 9. The E $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ is part of the land owned by Jay and
Christina Bloxham and Marly Onstot.

8 The parties who filed the exceptions purchased land from John Miller,
9 who in turn had purchased the land from Leland Orcutt, who originally filed
10 Court Claim No. 2088. Jay and Christina Bloxham own Tract F, which is 21.4
11 acres and lies mostly in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 8, although a small
12 triangular portion of the tract lies in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8. Larry
13 and Sherrie Miller own Tract E, which is predominantly in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ and
14 the northerly 200 feet of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 8, and is 20.1 acres in
15 size. Marly Onstot owns Tract G, which is in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ and the north 200
16 feet of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 8, and is 25.3 acres. Schirre Sullivan owns
17 Tract D, which is in the W $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, the north 200 feet of the W $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ and
18 NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, and is 20.0 acres in size.

19 Prior to the land being subdivided, it was all irrigated as one
20 parcel. John Miller had a 10 HP pump on the creek that delivered water to
21 handlines. Use of that system continued for a few years after the
22 subdivision with Jay Bloxham operating the system and irrigating his land
23 and the neighboring lands. About 4 or 5 years ago that ended and the 10 HP

24
25 Supplemental Report of Referee
Subbasin No. 10

1 pump is only used to irrigate the Bloxham land. Ms. Sullivan has a PTO
2 driven pump that is used to withdraw water from the creek to irrigate her
3 parcel. Mr. Bloxham testified that the 10 HP pump is capable of withdrawing
4 300 gallons per minute from the creek. The testimony leads the Referee to
5 conclude that during Mr. Miller's ownership of the land the 300 gallons per
6 minute was used to irrigate all of the land. However, in recent years that
7 quantity has been used to only irrigate the Bloxham portion of the land.
8 If there is a water right for the use of 300 gallons per minute, that right
9 is for the entire area Mr. Miller irrigated, not just the Bloxham
property.

10 Leland Orcutt testified that when he owned the land he used a 5 HP pump
11 to irrigate the land. Both Mr. Orcutt and Mr. Bloxham testified that the
12 land irrigated from the creek lies south of the creek. The land north of
13 the creek is irrigated with water delivered by the Kittitas Reclamation
14 District (KRD). Mr. Orcutt testified that a total of 32 acres is irrigated
15 both north and south of the creek. He testified to irrigating 6 to 8 acres
16 with creek water, although Mr. Cole suggested it might be 15 acres. Mr.
17 Orcutt acknowledged it might be, but thought that number was too high.
18 Although the line of questioning kept referring to the 15 acres, Mr.
19 Orcutt testified to only irrigating at most 8 acres. All of the current
20 landowners have livestock or have recently had livestock that drink
21 directly from the creek. This type of non-diversionary stock watering is
22 covered by the stock water stipulation discussed on page 4 of the Report of
23 Referee. Mr. Miller was included on the list of claimants who have a

24
25 Supplemental Report of Referee
Subbasin No. 10

1 non-diversionary stock water right under the stipulation. As successors to
2 Mr. Miller, the current landowners would also have a right under that
3 stipulation.

4 The claimants put in the record several documents to support their
5 assertion that there is a historic right to irrigate the land with Parke
6 Creek water. Some of the documents are duplicates of exhibits entered at
7 the initial hearing. The land was not in one ownership when it left public
8 ownership. The E $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8 was settled by
9 Socrates T. McElfech, with earliest evidence of steps to sever the land
10 being the receivers receipt dated June 6, 1888. Frank L. Ash settled on
11 the E $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, and SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6 and the receivers receipt for
12 this land is dated November 11, 1891. DE-1756 is a copy of an agreement
13 between the Chicago, Milwaukee and St. Paul Railroad and Grace Ross dated
14 October 12, 1910. This agreement relates to Ms. Ross providing an easement
15 for construction of the railroad and the railroad agreeing to construct a
16 road from the bottom land of Park Creek in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8 to a
17 point of crossing the railroad right-of-way. The railroad company was to
18 also lay pipe for irrigating, not to exceed 14 inches to be placed under
19 the railroad at the approximate location of the present irrigation ditch.
20 The chain of title document, DE-1754, indicates that Ross owned the E $\frac{1}{4}$ SW $\frac{1}{4}$
21 and NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 8. However, DE-614 is a document conveying this land
22 from J. D. Ross and Grace Ross to Edwin Ross, along with the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of
23 Section 18, the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17. DE-1760 is a deed
24 conveying the same land from Edwin Ross to Craig Fitterer Company. All of

25 Supplemental Report of Referee
Subbasin No. 10

1 the land conveyed in the deed is in proximity of Park Creek and water
2 rights are being asserted by parties that currently own the NW of
3 Section 17 and the NE~~4~~NE~~4~~ of Section 18. Howard Clerf is asserting a water
4 right for these same lands and the deeds entered in support of Court Claim
5 No. 02088 also support a conclusion that water rights were established for
6 the Clerf property, see page 43 for a discussion of the Clerf claim. There
7 has been no evidence of water use specifically on the claimants land prior
8 to when Mr. Orcutt became familiar with the land in 1964. The Referee
9 certainly does not expect the claimants to be able to provide live
10 testimony of what was being irrigated prior to 1932, however, evidence of
11 water use specifically on the lands for which a water right is asserted is
12 needed prior to 1964.

13 The Referee concludes there is still insufficient evidence in the
14 record to show that water rights were legally established for the
15 claimant's land through beneficial use of water prior to December 31,
16 1932. Therefore, the Referee does not recommend confirmation of a water
17 right.

18 **COURT CLAIM NO. 00422 -- Thomas Nisbet**

19 Exceptions to the Report of Referee were timely filed by Thomas J.
20 Nisbet, successor in interest to Eric T. Moe, and the exception was
21 remanded for presentation of additional evidence. The Referee did not
22 recommend confirmation of water rights under Court Claim No. 00422 due to
23 there being insufficient evidence to show that water rights had been
24 legally established for the land. On November 18, 2002, the Court granted

25 Supplemental Report of Referee
Subbasin No. 10

1 Eric T. Moe's motion to substitute Thomas J. Nisbet as claimant under Court
2 Claim No. 00422. Attorney John P. Gilreath represented Thomas Nisbet's
3 interest at the supplemental hearing and Thomas J. Nisbet testified. Mr.
4 Nisbet has been involved with the operation of Hillcrest Farms since 1965
5 and acquired the property from Eric S. Moe in 1995.

6 Three exhibits were offered and admitted into the record at the
7 hearing. The entire exception document filed with the Court by Nisbet was
8 admitted as DE-1726, including Attachments "A" through "K." Exhibit
9 DE-1728 is a 1937 U. S. Department of Agriculture soil survey map of
10 Section 20, T. 17 N., R. 19 E.W.M. The final exhibit (DE-1727) is a table
11 of stream flow measurements taken on Cherry Creek during the years 2000 and
12 2001.

13 The land for which water rights are asserted lies in the E $\frac{1}{4}$, lying
14 southeast of Coleman Creek, and the SW $\frac{1}{4}$, lying east of Bull Ditch in
15 Section 20, the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 21, the NE $\frac{1}{4}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 29,
16 all in T. 17 N., R. 19 E.W.M., and is called Hillcrest Farms. The NW $\frac{1}{4}$ NW $\frac{1}{4}$
17 of Section 21 is irrigated solely with water delivered by the Ellensburg
18 Water Company (EWC) and it does not appear to the Referee that the claimant
19 is seeking a right to irrigate this land with creek water.

20 The land in Section 20 is part of the land owned by Walter A. Bull at
21 the time he filed his complaint in Bull v. Meehan. Since several claimants
22 in this proceeding are claiming rights as successors to Bull, the case and
23 the conclusions the Referee reached about the Bull water rights are
24 discussed on page 3. Nisbet asserts that Walter Bull's one-tenth flow of

25 Supplemental Report of Referee
Subbasin No. 10

1 Coleman Creek stipulated to by the parties in Bull v. Meehan would be
2 appurtenant to 190 acres of his land in Section 20, T. 17 N., R. 19 E.W.M.
3 and he should be awarded all of the Bull right to one-tenth of Coleman
4 Creek. While the Referee does agree that most of the water right is
5 appurtenant to land in Section 20, two other claimants own land that is
6 part of the former Bull ownership, are asserting rights as his successor
7 and continue to irrigate their land with Coleman Creek water. The Referee
8 has concluded that lands owned by Thomas Ringer and Palmer Burris have a
9 portion of the Bull water right, see discussions on page 204 and 31
respectively.

10 The claimant is asserting rights under the Riparian Doctrine. Under
11 that doctrine, if efforts to sever the land began before 1917 when the
12 Surface Water Code was adopted and use of water was made prior to
13 December 31, 1932, a water right was legally established. All of the
14 claimants land, however, was not riparian to the claimed water sources at
15 the time the land was settled and patents issued. Ultimately, the land in
16 Section 20 that Nisbet owns was part of the Walter Bull land, but some of
17 it was initially settled by other people and then sold. The chain of title
18 that is part of DE-1726(B) suggests that the E $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ SW $\frac{1}{4}$ of
19 Section 20 were settled by William Beers and then sold to Walter Bull.
20 This land is not riparian to Coleman Creek and to the extent it was not
21 being irrigated by 1917 (perhaps even 1905, the date of the Federal
22 withdrawal), water rights could only be established under the permit system
23 in the Surface Water Code, now RCW 90.03. The current alignment of Coleman
24

25 Supplemental Report of Referee
 Subbasin No. 10

1 Creek shown on State's Exhibit SE-2 would result in a conclusion that the
2 land Walter Bull received a patent for in 1892 is riparian. However,
3 DE-1728, which is 1937 U. S. Dept. of Agriculture Soil Survey Map, would
4 lead to a different conclusion. On that map Coleman Creek flows through
5 the N~~NE~~E% and SW~~NE~~E% of Section 20, but not the SE~~NE~~E%, which would result
6 in the land in the SE~~NE~~E%, E~~SE~~E% and SW~~SE~~E% of Section 20, not being
7 riparian to Coleman Creek. The Referee invites further argument to the
8 appropriate weight to be given to Exhibit DE-1728. All of the land that
9 Walter Bull was irrigating when he filed his complaint in 1884 and was
10 awarded a right to one-tenth of the creek flow would have a right,
11 regardless of whether it is riparian to the creek or not. However, the
12 claimant acknowledges that additional land was developed and irrigated
13 after 1922. Under the riparian doctrine, new lands developed and irrigated
14 at that time would still enjoy a water right.

15 The Referee must determine if it would have been possible to irrigate
16 the claimed 190 acres with water diverted from Coleman Creek and delivered
17 by gravity flow. The claimant suggests that the historic point of
18 diversion on Coleman Creek is marked on Exhibit DE-1726(J) as 2640 feet
19 north of the southeast corner of Section 17, T. 17 N., R. 19 E.W.M. The
20 elevation at this point is 1510 feet m.s.l. and is about three-quarters of
21 a mile north of the lands to be irrigated. When the ditch enters the E% of
22 Section 20, it splits, with one branch going southerly along the east line
23 of Section 20 and the other paralleling Coleman Creek into the SW% and
24 serving land not owned by Nisbet. These ditches are not shown on Exhibit

25 Supplemental Report of Referee
Subbasin No. 10

1 DE-1728 (the Soil Survey Map). Most of the Nisbet property in Section 20
2 is at an elevation above 1500 feet. The Referee does not believe that the
3 land above 1500 feet could have been irrigated from this gravity flow
4 ditch. The land below 1500 feet is approximately 70 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$ of
5 Section 20. The Referee cannot conclude that 190 acres were irrigated by
6 gravity flow. The exception asserts that an additional 260 acres were
7 irrigated with Coleman Creek water after installation in 1922 of the 12
8 inch wooden pipeline and siphons. However, Eric Moe had testified that
9 this wooden pipeline was used to deliver water from the Town Ditch (EWC) to
10 the crest of the ridge allowing irrigation of all the land above the
11 Coleman Creek gravity ditch (called the Walter Bull Ditch) that serves as
12 the westerly property line in Section 20. The pipeline also extended into
13 Section 29, T. 17 N., R. 19 E.W.M., to an area not owned by Walter Bull and
14 not under the Walter Bull Ditch. Mr. Nisbet's testimony suggests there
15 were two 12-inch wooden pipelines installed, however, Mr. Moe did not
16 mention the second pipeline at all during his testimony. Additionally, Mr.
17 Nisbet's testimony suggests there was no pump used, just wooden pipe and
18 siphons. However, there is not enough elevation change or distance from the
19 diversion on Coleman Creek to gain sufficient pressure to lift the water up
20 the hill. This is one area where Mr. Moe's testimony and that of Mr. Nisbet
21 were contradictory. The Referee finds more credibility in Mr. Moe's
22 testimony since he was the one that installed the system and should have
23 the most knowledge of how it historically operated. Eric T. Moe's
24 testimony indicates that in 1948 he changed the point of diversion on

25
Supplemental Report of Referee
Subbasin No. 10

1 Coleman Creek to a 30 HP pump located near the center of the NE $\frac{1}{4}$ of
2 Section 20. On that date, Coleman Creek water could be delivered through
3 the unified pipeline to any of the 320 acres to which irrigation water was
4 delivered. Thomas Nisbet asserts a water right from Coleman Creek for
5 160 acres, but also desires the latitude to deliver this water to any of
6 the 320 acres. The Referee concludes, based on consideration of all of the
7 evidence placed in the record regarding Court Claim No. 00422 that the
8 portion of Walter A. Bull right to Coleman Creek that is appurtenant to the
9 claimants land is for the irrigation of 70 acres in the E $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 20
10 and irrigation of the rest of the land occurred in the 1940's when the only
11 way to establish a water right was through the permit process of RCW
12 90.03. As mentioned in the discussion of the Bull v. Meehan dispute on
13 page 3, in the stipulation entered into by the parties to settle the case
14 it was agreed that all diversion of water would cease on August 15 and
15 water would be left in the creek for stock watering. Therefore, the
16 irrigation season for the water right confirmed herein where the foundation
17 for the right is found in that case, will end on August 15.

18 Therefore, the Referee recommends that a right be confirmed with a
19 June 30, 1869, date of priority for the diversion from Coleman Creek of 1.4
20 cubic feet per second, 374 acre-feet per year from April 1 through August
21 15 for the irrigation of 70 acres in the E $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 20, T. 17 N.,
22 R. 19 E.W.M. WRC No. 002662 filed by Eric Moe describes a point of
23 diversion located near the center of the NE $\frac{1}{4}$ of Section 20. That obviously
24 is not the historic point of diversion, however, the historic point of

25 Supplemental Report of Referee
Subbasin No. 10

1 diversion has not been preserved in any RCW 90.14 water right claim.
2 Ecology has successfully argued that only points of diversion described in
3 either water right certificates or water right claims filed pursuant to RCW
4 90.14 can be confirmed in this proceeding. Therefore, the Referee
5 recommends that the point of diversion be described as the point in WRC No.
6 002662.

7 A right to use Coleman Creek water on the lands in Section 29 is also
8 being asserted. This land is at the highest elevation on the Nisbet
9 property and is not riparian to Coleman Creek. The land was not part of
10 what Walter A. Bull owned at the time of Bull v. Meehan and the claimant
11 has offered nothing to suggest that this portion of the land was irrigated
12 prior to 1917. In fact, as discussed above for the highest land in
13 Section 20, the Referee believes that the evidence supports a conclusion
14 that it was not irrigated until the 1940's when a larger pump was installed
15 on the creek and the irrigation system upgraded. Therefore, the Referee
16 does not recommend confirmation of a water right to use Coleman Creek for
irrigation on this land.

17 The Referee notes that testimony suggests that more information can be
18 gleaned from Exhibit DE-1728, the U. S. Department of Agriculture Soil
19 Survey of Section 20, than the Referee can detect. After studying Page 3
20 of Symbols and the soils map (DE-1728), the Referee does not agree with
21 claimants' interpretation, finding no pipelines or ditches indicated. The
22 Referee believes that the "dashed lines" used to designate boundaries of
23 soil type were mistaken for ditch or pipe symbols by Nisbet. Although the

24
25 Supplemental Report of Referee
Subbasin No. 10

1 legend page suggests that any existing ditches or pipelines would be shown
2 on the map, none are shown.

3 The Referee believes that a second change of point of diversion was
4 made and/or a new Coleman Creek water right initiated in the early 1950s.
5 That new use was to divert Coleman Creek water into Town Ditch and thence
6 into the Town Ditch pipeline during the season when Town Ditch was not
7 operated. That diversion provides continuous flow for fire protection and
8 stock water on Hillcrest Farms. The flow-through water can be spilled over
9 the ridge and down to Cherry Creek or into Coleman Creek as desired. The
10 only consumed water is for stock water for up to 400 cattle from November 1
11 through March 15; however 400 acre-feet per year are claimed. The record
12 seems to indicate that use of Coleman Creek water during the fall and
13 winter began after a major fire occurred on Hillcrest Farms in the early
14 1950s. If that impression is incorrect, the earliest date that winter
15 diversion would have been possible was in 1922 when the Town Ditch pipeline
16 was constructed. The current mode of operation is to run water through the
17 pipeline continuously during the fall and winter with spill water going
18 either to Cherry Creek and/or Coleman Creek. Stock tanks are filled for
19 200 to 400 head of cattle and a stand pipe is provided for fire truck
20 connection at the farmstead located in the extreme northeast corner of the
21 property. The Referee concludes that use of Coleman Creek water as
22 described above is not covered by a riparian or prior appropriation water
23 right and no evidence has been provided that a permit or certificate exists
24 under authority of RCW 90.03.250. Therefore, it is recommended that a

25 Supplemental Report of Referee
 Subbasin No. 10

1 water right not be confirmed for use of Coleman Creek for wintertime stock
2 watering and fire protection. The Court entered a Stipulation RE: Water
3 Use For Fire Suppression on December 12, 1996. This stipulation provided
4 that water use for fire suppression is a recognized emergency use that does
5 not require a water right. Therefore, if there is a fire that posses a
6 threat to life or property, the claimant can use the system that is
7 installed for fire suppression or protection.

8 The claimant asserts that Cherry Creek water was used prior to the late
9 1930s to early 1940s; however, very limited detail of that use is in the
10 record. Eric T. Moe testified that in 1910 a wooden dam was adjacent to
11 his southeast property corner. It was shared with the adjoining land
12 owners to the south and west, delivering water to irrigation ditches
13 serving those lands. The ditch along the north side of Cherry Creek
14 appears to have been near the south boundary of Hillcrest Farms. In 1929 a
15 diesel pump was installed on Cherry Creek and Eric T. Moe testified that a
16 "small change" in irrigated acres was made. He did not provide any further
17 facts about the size of the pump or distribution system. During the period
18 between 1938 to 1942 (when electric power was first available), Eric T. Moe
19 installed a 40 HP electric pump on Cherry Creek. However, Mr. Nisbet
20 maintains that in 1929 it was possible to pump water from Cherry Creek up
21 to the top of the hill and commingle it with Coleman Creek water. This
22 testimony is at odds with that of Mr. Moe, who the Referee concludes would
23 have the best knowledge of historic water use, since he was the one doing
24 the irrigation. Beginning around 1942, Cherry Creek water could be

25 Supplemental Report of Referee
Subbasin No. 10

1 delivered to any of the land under the unified pipeline and the larger 40
2 HP pump. Thomas Nisbet is asserting a water right for 160 acres, but
3 desires latitude to serve any of the 320 acres under the system. The use of
4 Cherry Creek water for irrigation prior to 1932 appears to have been
5 minimal and restricted to a gravity ditch along the southern edge of
6 Hillcrest Farms in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29. The ridge on
7 Hillcrest Farms runs down to Cherry Creek, thus leaving little area where a
8 gravity ditch could supply irrigation water.

9 The Referee concludes that the Riparian Doctrine for use of Cherry
10 Creek applies only to the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29, T. 17 N.,
11 R. 19 E.W.M. The evidence is that at the earliest date (1929) that Cherry
12 Creek water may have been used for irrigation on any land in Section 20,
13 the only legal basis upon which a water right could be confirmed is
14 RCW 90.03.250. There is no evidence that a permit or certificate was
15 obtained for the expanded use of Cherry Creek within Section 20. An
16 irrigation right can be confirmed for use of Cherry Creek for irrigation of
17 some land in Section 29. The Referee estimates there is no more than 20
18 acres at an elevation low enough that it could have been irrigate by either
19 gravity flow or the small pump that was placed on the creek in 1929.
20 Quantifying that right is a challenge, as all of the information on water
21 use is based on use of larger, electric pumps and not a gravity flow
22 system. Lacking any better information, the Referee will confirm a right
23 based on using one inch of water per acre. Although they did not deal with
24 water use on Cherry Creek, disputes concerning water use on Caribou Creek

25 Supplemental Report of Referee
 Subbasin No. 10

1 and Coleman Creek, along with the adjudication of Cooke Creek, allowed for
2 the use of one inch of water, or 0.02 cubic foot per second, for each acre
3 irrigated. The Referee recognizes that more than this is being used to
4 irrigate the land now, but the claimant has acknowledged that Cherry Creek
5 is heavily influenced by return flow waters from KRD, EWC and Cascade
6 Irrigation District. It would not be unreasonable to conclude that the
7 additional water being used is return flow. In fact, the claimant asks
8 that if a right cannot be confirmed that the Referee recognize the
9 existence of this return flow water. The Court has previously ruled that
10 rights cannot be established for use of foreign return flows or return
11 flows that are the result of use of Yakima Project water. When they are
12 available, these return flows can be used by the first taker, but there is
13 no guarantee they will continue to be available for future use. Beginning
14 on page 8 of the Report of Referee for Subbasin No. 10 return flow waters
15 are discussed in detail, along with this Court's prior rulings on that
16 issued.

17 The land in Section 29 was railroad land and under the Riparian
18 Doctrine the priority date would be the date the map of definite location
19 was filed, which is May 24, 1884. The Referee recommends confirmation of a
20 water right with a May 24, 1884, date of priority for the diversion of 0.40
21 cubic foot per second, 160 acre-feet per year for the irrigation of 20
22 acres in the NW~~NE~~NE_{1/4} of Section 29. The point of diversion that is
23 currently being used, which is approximately the location as described in
24 WRC No. 002663 shall be authorized.

25 Supplemental Report of Referee
Subbasin No. 10

1 The final source of water used on Hillcrest Farms is Park Creek. The
2 use was ongoing in early 1898 when Erik Moe purchased the land in
3 Section 20 where Park Creek water is applied for irrigation of 19.5 acres.
4 The point of diversion, ditch and place of use are the same now as then.

5 The record indicates that 19.5 acres in the E~~N~~SE~~N~~ of Section 20,
6 T. 17 N., R. 19 E.W.M. has been irrigated by gravity ditch from Park Creek
7 from before 1898 when Erik Moe purchased the property. Lacking a
8 definitive date of first use of Park Creek water on the E~~N~~SE~~N~~ other than
9 before 1898, the Referee recommends confirmation of a priority date of
10 June 30, 1897, for irrigation of 19.5 acres from a point of diversion
11 located 1280 feet south and 90 feet west from the center of Section 21,
12 T. 17 N., R. 19 E.W.M. being within the SE~~N~~E~~S~~SW~~N~~. WRC No. 02666 was filed
13 by Eric T. Moe asserting a water right on Park Creek in the quantities of
14 1.5 cfs; 130 acre-feet for irrigation of 20 acres within the following
15 portion of the E~~N~~SE~~N~~ of Section 20: Beginning at a point 30 feet west from
16 the SE~~N~~ corner of said section; thence west 1000 feet; thence N 63° E
17 1240 feet; thence N 55° E 840 feet, to the west right-of-way of Moe Road;
18 thence south 1720 feet, along said right-of-way to the point of beginning,
19 EXCEPT 0.48 acre in the southeast corner thereof.

20 Richard Bain's engineering report for Eric T. Moe's Court Claim
21 No. 00422 concludes that the water duty for this ranch is 9.7 acre-feet per
22 acre. No conflicting evidence is in the record; therefore, the Referee
23 recommends a total of 189 acre-feet for irrigation of 19.5 acres from Park
24 Creek.

25 Supplemental Report of Referee
Subbasin No. 10