

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

3 IN THE MATTER OF THE DETERMINATION)
4 OF THE RIGHTS TO THE USE OF THE)
5 SURFACE WATERS OF THE YAKIMA RIVER)
6 DRAINAGE BASIN, IN ACCORDANCE WITH) No. 77-2-01484-5
7 THE PROVISIONS OF CHAPTER 90.03,)
8 REVISED CODE OF WASHINGTON,)
9 STATE OF WASHINGTON,) MEMORANDUM OPINION AND ORDER
10 DEPARTMENT OF ECOLOGY,) RE: OBJECTIONS TO PROPOSED
11 Plaintiff,) CONDITIONAL FINAL ORDER
12 vs.) SUBBASIN 9
13 JAMES J. ACQUAVELLA, ET AL.,) (WILSON-NANEUM)
14 Defendants)
15)
16)

17 I. INTRODUCTION

18 Objections/comments were filed to the Proposed Conditional Final Order for Subbasin 9 that
19 accompanied the Court's May 20, 2004 *Memorandum Opinion and Order Re: Exceptions to the*
20 *Supplemental Report of Referee, Subbasin No. 9 (Wilson-Naneum) (Opinion)*. A hearing was held
21 September 9, 2004 to consider those objections. Prior to the hearing, the Court ruled on three
22 objections/comments that did not require additional evidence. Those rulings along with objections
23 presented at the hearing are addressed below. The Court, having been fully advised through written
24 objections and oral argument, makes the following rulings, as set forth below in alphabetical order.

25 **Dimitri and Lenora Bader, Court Claim No. 01879**

19 The Baders sought clarification of their water right and provided the parameters of a
20 proposed water right in the Referee's Schedule of Rights format. They also queried why the season
21 of use for stock water was March 15 to December 31 rather than the entire year, which is typical for
22 diversionary stock water use outside of the irrigation season. The Court sent the Bader's attorney,
23 Jeff Slothower, a letter on September 2, 2004, ruling the August 19, 2004 filing by the Baders
24 correctly described the water right awarded by the Court and the *Opinion* was modified to reflect
25 that summary. The Court also informed the Baders the stock water season of use was based on the
evidence submitted to the Referee and they could appear at the September 9 hearing if they wished
to present additional evidence in support of a right to divert water for stock the entire year. The

1 Baders appeared at that hearing, but had not received the Court's letter. Mr. Bader offered
2 testimony not directed at resolving their objection concerning the stock water season of use.

3 The Baders are satisfied with the period of use recommended by the Court. However, Mr.
4 Bader offered testimony regarding quantity of water needed to irrigate the land. In reviewing the
5 Referee's reports and the *Opinion*, Mr. Bader concluded he had presented erroneous information as
6 to the quantity of KRD water used on the land. He believes that lead to the Court awarding a right to
7 use less creek water than is appropriate. Although Mr. Bader had not filed an objection concerning
quantity of water, the Court allowed his testimony.

8 The Court reviewed this testimony, the Supplemental Report of Referee (Supplemental
9 Report) and the *Opinion*. Wilson-Naneum area water rights were heavily litigated in the late 1800's
10 and early 1900's and those courts consistently found one inch of water (in some cases one-half inch
11 of water) sufficient to irrigate the land – land located near the Bader property. This Court adopted
those findings when confirming water rights. During the Subbasin No. 9 proceedings, Mr. Bader
12 asserted a right for quantities far in excess of one inch per acre. However, in the Supplemental
13 Report, the Referee awarded quantities consistent with the prior decrees. After an exception to that
14 Report, this Court increased the quantity and now Mr. Bader asks that it be increased again based on
15 a misunderstanding as to how much water was delivered by KRD. Mr. Bader provided no evidence
16 to show the higher amount was historically used, which would be necessary to increase the quantity
of water above that previously awarded. The Court, therefore, denies Mr. Bader's exception.

17 **Ruth Ann Brunner, Claim No. 02124**

18 Mrs. Brunner objected to entry of the Proposed CFO, asking for time to allow Ecology to
19 consider her request to amend Water Right Claim (WRC) No. 143469 and she did present DE-2163
– Ecology's Order amending WRC No. 143469. The place of use on the claim now reads the
20 S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ N $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 8, T. 18 N., R. 19 E.W.M. Therefore, the Court
adopts the Referee's recommendations on pages 345 and 397 of the Supplemental Report and
21 confirms a right to Mrs. Brunner under Court Claim No. 02124 with a May 8, 1884 date of priority
for the diversion of 0.18 cfs from May 1 through June 30, 0.09 cfs in April and from July 1 through
22 October 15, 46.8 acre-feet per year for the irrigation of 9 acres and stock watering in the north 790
feet of the west 509.3 feet of the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 8, T. 18 N., R. 19 E.W.M. The point of
23 diversion is 500 feet west of the center of Section 5, being in either the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ or
24 NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, T. 18 N., R. 19 E.W.M.

1 **Victor and Darlene Boykiw, Court Claim No. 00185**

2 On August 25, 2004, the Boykiws filed an objection to entry of the Subbasin No. 9 CFO,
3 which, in the context of their claim, is essentially a late exception to the Report of Referee for
4 Subbasin No. 9 entered June 29, 2000. In that Report, the Referee did not recommend confirmation
5 of a right as claimant failed to appear in support of the claim. The Boykiws did not file an exception
6 to that report during the time frame set by the Court. Since no exception was filed, they were not
7 scheduled to appear at the Referee's supplemental hearing for Subbasin No. 9 in November 2001,
8 nor was their claim addressed in the Referee's Supplemental Report filed October 14, 2002. Over
9 the objection of neighboring landowner, Michael Moeur, and giving due consideration to the fact
10 the Boykiws missed the regular opportunities to advise the Court, their late exception was allowed
11 heard on October 27, 2004. In allowing the Boykiw's late exception, the Court specifically ruled
12 they could not challenge the water right confirmed to Moeur because Boykiws failed to comply
13 with the Court's procedures and deadlines and therefore missed the opportunity. Having reviewed
14 the evidence pertaining to the Boykiw and pertinent Moeur claims, the Court now realizes the two
15 claimants are competing for the same water right and finds as follows.

16 The Boykiws assert a right to irrigate 39.5 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ and a small area (less than
17 two acres) in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 25, T. 17 N., R. 18 E.W.M. with water diverted from
18 Spring Creek, a small stream off of the Yakima River. DE-1093, a copy of a portion of the Swigart
19 Survey often used in this case, identifies Spring Creek as Farrel Slough. At the time of the survey,
Farrel Slough left the Yakima River in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24, flowed southeast into a cutoff
channel of the Yakima River within the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 25. The claimants' land is part of what
once was a larger parcel riparian to Farrel Slough; however, at no time did the slough flow through
what is now the Boykiw property.

20 The Boykiws offered two exhibits that assist in assessing if a water right was established for
21 their land. DE-2196, a Water Appropriation Notice filed March 15, 1913 by Mary E. Barnett, states
22 she and her husband appropriated 50 inches of water from Farrell's Spring Branch (in Section 25) to
irrigate two tracts of land. One tract is in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 25 (not owned by the Boykiws)
23 and the second tract is the southerly 440 feet of the easterly 990 feet of the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 25
24 and owned by the Boykiws. The southerly tract is 10 acres in size. The notice did not state how
many acres were irrigated although these types of notices usually claim one inch of water per acre.
25 Ms. Barnett described 50 acres in the notice, which would be consistent with a claim for 50 inches.

1 DE-2197 includes documents from *R. D. and Emma Ringer and Albert T. and Edna E.*
2 *Gleason v. Charles Stone* (1945 case). The final judgment and decree addressed water rights to what
3 is now called Spring Creek. The decree awarded 50 inches to Ringer and 150 inches to Gleason.
4 Gleason owned land in Section 30 and Ringer owned the northerly 1188 feet of the easterly 1188
5 feet of the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 25. The Boykiws own a very small parcel in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of
6 Section 25, a portion of which is within the area previously owned by Ringer, but they do not
7 irrigate this portion of their land. Charles Stone, the defendant, owned considerable land, including
8 the lands described in Mary E. Barnett's Water Appropriation Notice. The *Ringer* court did not
9 quantify the Stone right, but ordered him to not interfere with Ringer and Gleason's use of water.
10 That court gave Stone the right to divert and use irrigation water from Spring Creek so long as it did
11 not interfere with the prior and superior water rights of Ringer and Gleason. Moeurs point to the
12 1945 Memorandum Opinion at page 3 where it states that Stone testified to irrigating 17 acres west
13 of the creek and 4 or 5 acres on the east side of the creek. This lead the Referee to conclude the
14 Stone right was for irrigating no more than 23 acres.
15

16 During the Referee's hearings Michael Moeur, also a successor to Stone, who owns land
17 immediately north of the Boykiw property, pursued a right to Spring Creek based on *Ringer*. The
18 Referee confirmed the 23-acre water right to Moeur. Reviewing the maps and aerial photos in the
19 record, the Court notes that Spring Creek does not flow through the Boykiw property, but does flow
20 through the Moeur property to the north. The *Ringer* Memorandum Opinion states a portion of the
irrigated land lies west of the creek and a portion lies east of the creek. Since the creek does not
flow through the Boykiw property, the irrigated land could not have been within the property they
now own. The Boykiws rely on the *Ringer* language that gave Stone the right to water from Spring
Creek as long as he did not interfere with the prior and superior rights of Ringer/Gleason. However,
the language that gave Stone the right to divert irrigation water was limited by the amount
beneficially used by the time the decree was entered.

21 Water rights established under the Prior Appropriation or Riparian doctrines had to be put to
22 beneficial use by June 6, 1917 and December 31, 1932 respectively – many years before entry of
23 *Ringer* (1945). The only evidence of the number of acres irrigated on the Stone property is the 1945
24 *Ringer* decision, which would appear to be the extent of the right perfected at that time. The Court
concludes the limit of the Stone water right was the 23 acres irrigated at the time of the *Ringer*
action. With the former Stone land having a right to irrigate 23 acres and that right being

1 appurtenant and awarded to land now owned by the Moeurs, the Court lacks evidence to support
2 confirmation of a right to the Boykiws for use of Spring Creek. The Boykiw's exception is denied.

3 **John and Cristi Eaton, Claim No. 00634**

4 The Eatons objected to the Court's decision regarding number of acres and quantity of water
5 awarded to their property in the SE $\frac{1}{4}$ of Section 30, T. 17 N., R. 19 E.W.M. See *Opinion* at p. 21.
6 The Eatons offered DE-2167, John Eaton's Declaration of August 18, 2004. Attached to the
7 declaration is an aerial photograph depicting the fields irrigated by the Eatons, along with the
8 acreage within each field. The photograph clearly identifies the number of acres irrigated leading
9 the Court to modify the rights confirmed to the Eatons on page 21 of the *Opinion*. Line 2 of page
10 21 is amended to authorize the irrigation of 7.96 acres for the water right with a November 25, 1879
a date of priority. Line 5 is amended to authorize the irrigation of 62.54 acres for the water right with
a September 5, 1873 date of priority.

11 The Eatons also objected to the annual quantity of water awarded for their land. The annual
12 quantity of water was based on a report prepared by Richard C. Bain, Jr.'s, a consultant hired by the
13 claimants to prepare an engineering report for their farm. In that report Mr. Bain indicated 10.6
14 acre-feet per year was used to irrigate the portion of the rill-irrigated land and 6.6 acre-feet per year
15 for the sprinkler-irrigated land. The Eatons use the land to grow pasture and hay for cattle
16 production. The quantity of water set forth in Bain's report was based on those crops. The Eatons
17 request a quantity of water that would be needed if they chose to grow Timothy hay, or 14.3 acre-
18 feet per year. They point the Court to evidence that shows when Walter Bull owned their property
19 and other surrounding lands, he grew Timothy hay. The Eatons have owned the land since 1978
20 and Mr. Eaton's testimony leads the Court to conclude they have never grown Timothy hay on this
land. Timothy hay has been grown on neighboring land that is either owned or farmed by the
Eatons, so clearly Timothy hay is a crop grown in this area.

21 At the exception hearing Ecology opposed the Eaton's request to increase the annual
22 quantity per acre awarded by the Court. Ecology framed the issue as a potential partial
23 relinquishment of the water right, contending the quantity necessary to irrigate Timothy hay has not
24 been used for five consecutive years. Further, none of the sufficient causes set forth in RCW
90.14.140 to prevent relinquishment of that portion of the right has been asserted.

25 The Court does not find relinquishment (or partial relinquishment) to be the issue, as there is
insufficient evidence to show the Eatons or their predecessors used 14.3 acre-feet per year. The

only evidence of water use is that in the Bain report, which the court has relied on to quantify the water right. While the record *could* lead to a conclusion that Timothy hay may have been grown on the Eaton property in the late-1800's when Walter Bull owned the land, the record is not clear in that regard. The document discussing Timothy hay as a crop on the Bull property does not identify which specific Bull land was growing Timothy hay. In fact it states that "640 acres . . . is valuable as meadow and much of it is growing timothy and other tame grasses." DE-770 at pages 2-3 (Complaint in *Walter A. Bull v. Martin Meehan, et al.* filed on April 10, 1885). Many claimants in this adjudication have testified about growing Timothy hay in the Kittitas valley for export to Japan, where very high quality hay is required. The testimony suggests that to attain this high quality more diligent farming techniques are required than when growing hay for local use. Growing hay for the export market obviously was not done at the time the water right was established. Thus, there is a distinction between the amount of water needed to grow hay in Walter Bull's time and the amount that would be needed today. The evidence is lacking to allow the Court to conclude that a right was established for using the quantity of water Mr. Bain stated would be needed today to irrigate Timothy. Therefore, the Court will continue using 10.6 acre-feet per year for the rill irrigated land and 6.6 acre-feet per year for each acre that is sprinkler irrigated. The water right on page 21 of the *Opinion* is further modified to authorize the use of 52.54 acre-feet for the water right with the 1879 date of priority described on line 2. The quantity of water authorized on line 5 for the water right with the 1873 priority date shall be 515.16 acre-feet per year.

17 **Walter and Gail Farrar, Court Claim No. 02275**

18 The Farrars filed a Request for Clarification regarding the period of use for the water right confirmed by the Court in its May 20, 2004 *Opinion*. The Court reviewed the record and on August 19 27, 2004, sent a letter to their attorney, Jeff Slothower, ruling the period of use for the water right described on page 22 of the Court's *Opinion* should be April 1 through October 15. The Farrars were further advised they did not need to appear at the September 9 hearing if they agreed with the 21 Court's ruling. They did not appear. The *Opinion* is modified accordingly.

22 **Kayser Ranch, Claim No. 00991**

23 In its May, 20 2004 *Opinion*, the Court held that Kayser Ranch had not carried its burden of 24 showing beneficial use of the 1872 water transferred from Olding/Galvin to P. H. Adams. Further, 25 the Court found that Kayser was collaterally estopped from claiming a right to the Olding/Galvin water right based on the Kittitas County Superior Court decisions in *Haberman v. Sander & Adams*,

1 No. 8190 affirmed *Haberman v. Sander*, 166 Wash. 453 (1932) and *Lawrence v. Adams*, No. 8402,
2 Decree (April 18, 1934). Kayser responded with a variety of pleadings that were ultimately
3 consolidated as an objection to the Proposed CFO and a Motion for Reconsideration aimed at
4 changing the Court's findings regarding beneficial use and collateral estoppel. Kayser also counters
5 the allegation that its predecessor did not own a portion of the land to which the water right was
6 confirmed when the water right was first claimed by Kayser's predecessor. Vernon Stokes and Pat
7 Jenkins (collectively, Stokes) responded to Kayser's pleadings to urge this Court to adopt the same
8 rulings from its *Opinion*. During the September 9, 2004 hearing, the Court requested supplemental
9 briefing and particularly asked for the parties to examine the relationship, if any, between the
doctrines of collateral estoppel and laches. The Court will not repeat the general factual history
here but will explore facts that are alleged by the parties in support of the various contentions.

10 a. Beneficial Use

11 The Court begins by analyzing beneficial use, if any, of the Olding/Galvin water by P. H.
12 Adams and successors. The Court found, generally, in its *Opinion*, that the facts were simply too
13 vague to warrant a conclusion that Kayser's predecessor Adams had put the specific Olding/Galvin
water to beneficial use. Stokes believe this to be the correct conclusion while Kayser points to
14 various citations in the record to support its contention the Olding/Galvin water was beneficially
used. Determining beneficial use also requires an understanding of where the Olding/Galvin water
15 may have been used, which will also be analyzed below.

16 1. *Historic Use*

17 In its Memorandum In Support of Motion for Reconsideration, Kayser reviewed
18 considerable testimony to summarize the record regarding the beneficial use of water. It should be
19 noted that specific testimony was supplied by Louis Meyer and Sam Kayser regarding the use of
Adams Ditch for irrigation of Section 3, T. 18 N., R. 19 E.W.M. That land however may not have
20 been purchased by P. H. Adams until sometime in the 1920's. There has been no proof that Adams
acquired or would have attempted to acquire water rights in 1911 for land that he would not own
21 until a decade later. In fact, in its Memorandum In Support, Kayser indicates the Olding/Galvin
water was applied to lands in Section 2 and Section 35. Adams owned those lands at the time of
22 the transfer and it is more reasonable to conclude that any transfer would have been thereto. The
Court will not consider any of the evidence offered regarding irrigation of Section 3, because no
23 connection has been established between that property and the Olding/Galvin water.
24
25

1 Kayser also points out the assertion of use by Kayser set forth in the Morrison exception to
2 the Court granting a right in the Olding/Galvin right. See Morrison Exception dated December 13,
3 2000 at page 5. There, the Morrison's argued "there is specific evidence in the record from both
4 Tuffy Morrison and Bertha Morrison that when Kaysers divert water into Adams Ditch from the
Naneum creek, they dry up and significantly impair the Morrison's ability to irrigate the property."

5 To determine if the Olding/Galvin water right was used by P. H. Adams on property he
6 owned dating back to the 1930's and the Kaysers since 1960 when they began to acquire the
7 property that makes up their ranch, the Court will review the evidentiary record working its way
from the first hearing to the present.

8 A. 1991 Hearing

9 Smoke Kayser testified he and his family have irrigated the property in much the same
10 fashion since its acquisition in 1960. When asked if he had continuously used the water Adams
11 acquired from Olding/Galvin, Mr. Kayser stated he "tried to use all the water we could get, and
when the water started dropping down in the ditch, our consumption would get lower too." January
12 8, 1991 Report of Proceedings at p. 214. Part of the water utilized to accomplish this irrigation
13 "was purchased from individuals below the Highline canal by a prior owner of the property." *Id.* at
14 213. He noted the water was shut off in August on an undisclosed number of occasions.

15 Art Carlson also testified regarding water use during the course of the 1991 hearing before
Referee Acord. He indicated that in his opinion the various ditches used by Kayser's predecessors
16 carried approximately the same amount of water in the late 1910's and early 1920's and consistently
into the period of his testimony. *Id.* at 242. The Court does not find that testimony particularly
18 helpful because they were vague impressions of a child recalled 90 years later and do not address
the nuances that are present in this claim. Further, if anything, the testimony would be adverse to
20 Kayser, as it suggests that there was no additional water diverted in the early 1930's, when the
Highline Canal was built, as was contemplated by the agreement between Adams and
21 Olding/Galvin. However, in response to a question by Mr. Stokes, Mr. Carlson did indicate that the
22 ditches that serve Kayser Ranch were always the first shut off. *Id.* at 248.

23 Also presenting testimony at the January 8, 1991 hearing was Mr. Milton Lewis who in the
mid-1930's and in the early 1920's worked on land in the general area. He was called by the
24 Morrisons in opposition to the claim of Kayser Ranch. Mr. Lewis testified, consistent with the
cases that will be analyzed below, of efforts by various riparian users downstream of the Highline

1 canal to restrain Mr. Adams from transferring water into the Adams ditch for an appropriative use.
2 He also noted that the riparian users interpreted those rulings to bar water from being transferred
3 upstream and further indicated that "water was decreed to land not to people." *Id.* at 259.
4 According to Mr. Lewis, from about 1935 to 1970, a group of riparian water users would shut the
5 Adams' ditch down by half by mid-July and down to stock water only by mid-August when the
available water supply was insufficient to satisfy other users. *Id.* at 261-62.

6 Finally, various parties obtained the deposition of Andy Gustafson on March 15, 1990. DE
7 – 1428. That deposition was ultimately published in court on January 16, 1991. Mr. Gustafson was
8 born in January, 1902 in Ellensburg and assisted his father in farming the area that is near Kayser
9 Ranch. He was a classmate of Fred Adams and indicated that water was used on the Adams
10 property prior to 1910. See Tr. at 28. Water was delivered by Adams ditch to grow hay, grain and
11 pasture to graze cattle. Mr. Gustafson noted that irrigation on the Kayser Ranch as of 1990 was as
extensive as when Adams owned the land. He did testify that irrigation was only as extensive as
12 "there was water for it" and that the ranch "didn't always have plenty of water." Tr. at 31.

13 B. May 21, 2003 Hearing

14 Although the Referee heard exceptions filed by Kayser Ranch and Sam Kayser on October
15 30, 2001, the next hearing regarding the Olding/Galvin right transpired on May 21, 2003 as a part of
the Subbasin 9 Exceptions Hearing to address an exception filed by Vernon Stokes and Pat Jenkins.
A number of witnesses testified and the relevant points of that testimony are summarized below.

16 Mr. Chester Vernon Stokes was the first witness. At the time he was 80 years old and had
lived at his address for 60 years dating his knowledge at least to the early 1940's. Mr. Stokes
17 indicated he owned land riparian to Wilson Creek and had been confirmed a right to use water from
18 that source by the Referee. He also discussed the way in which Wilson and Naneum Creeks come
19 together and then how a cement structure splits the creeks apart further downstream with about an
equal amount of water going into each stream. Mr. Stokes then discussed how Mr. Coble, the prior
20 owner of Mr. Stokes' property, informed him that the riparian water users had the right to go up and
shut the ditches serving the Kayser property to augment the water to the riparian landowners. Mr.
21 Stokes indicated he had done that on occasion in July and August between 1943 and 1970. He also
noted that he was unaware of any successful transfer from lands downstream of the KRD canal to
22 the Kayser lands that lie above the KRD canal. On cross-examination he also supplied testimony on
23 the crops that came off of certain lands that make up Kayser Ranch.
24
25

1 Next to testify was Fred Zumbrunnen, who was born and raised in the Ellensburg area and
2 had lived there since 1941. At the time of the hearing he was 90 years old. He was raised in the
3 Wilson-Naneum area and helped raise crops with his family; crops that were raised with water
4 diverted pursuant to the *Ferguson* decree. Mr. Zumbrunnen discussed water use in the Wilson-
5 Naneum subbasin and indicated that nonriparian users had their water shut off usually between
6 June 15 – July 15. Tr. at 41. This included the Adams Ditch. Mr. Zumbrunnen also indicated he
7 was unaware of any transfer of rights from riparian lands lying below the Highline canal to non-
riparian lands above that structure.

8 The Kaysers provided the testimony of Louie Meyer. At the time of the hearing he was
9 nearly 88. He first came to the Ellensburg area in June of 1936. Shortly after arriving, Mr. Meyer
10 began to work for Fred Adams and did so for the next decade. He then returned to work for Fred
11 Adams in 1962 and continued on with the Kaysers until 1977. He described the Adams' operation
12 during that time which included haying in the spring and summer and feeding cattle in the winter.
13 The water used for the irrigation came from Naneum Creek through the Adams Ditch and Mr.
14 Meyer described the diversion point and the route of the Adams Ditch. He discussed using water so
15 long as it was available in Naneum Creek and that two cuttings of hay were usually harvested. He
16 testified that water was cut off to Adams Ditch "quite a few times" and when that happened, Fred
17 Adams would "go up and see what he could get." After these visits, water would be available.
18 Mr. Meyer was somewhat unclear as to whether he participated in opening up the ditch after it had
19 been shut off, but did say that he observed Mr. Adams opening the ditch back up and using water
20 from Wilson-Naneum as long as it was available.

21 Kayser Ranch also provided the testimony of Merton Purnell, who was 70 at the time of the
22 hearing. He lived on Fairview Road just south of the "Adams place" in 1944 and did so for about 1-
2 years. He was 12 at the time and helped his family raise hay and dairy cattle. The hay was raised
23 with water diverted from the Adams Ditch. Mr. Purnell's family used the water to obtain one
24 cutting of hay and then perhaps enough to irrigate the ground one more time. He did not say how
25 much ground this involved. His family worked with Mr. Adams regarding use of the water and
would be notified by Adams when water was available from the ditch. Mr. Purnell also noted that
the land around Fred Adams house was green but was not specific on what times of the year. He
also indicated there was more water below Highline Canal in the later part of the year as opposed to
above the canal but that there was considerable water above the canal in the early part of the year.

1 The final witness at the hearing was Sam Kayser. He indicated that lands within Section 2,
2 34 and 35 are irrigated with water diverted from Wilson-Naneum via Adams Ditch. Mr. Kayser
3 also noted that the irrigation practices have been consistent since his family acquired the property in
4 the early 1960s. He pointed out that the headgate to Adams Ditch was closed by downstream water
5 users on occasion but his family's common practice was to go open it up. He testified the Kaysers
use water on all their property whenever it is available.

6 C. Ecology v. Carlson et al. (1972 hearing)

7 At the May, 2003 hearing, Kaysers submitted DE – 2087 through 2090. The Court reviewed
the those exhibits, most of which were portions of the transcript from the hearing related to the
attempt in 1972 to adjudicate Wilson-Naneum, known as Ecology v. Carlson et al. Testimony was
supplied by Mark "Smoke" Kayser, Art Carlson and Louie Meyer. The testimony will not be
recounted but the Court finds it is consistent with testimony presented at the May 21, 2003 hearing.

11 D. Conclusion and Ruling Re: Beneficial Use

12 In its *Opinion*, the Court found the beneficial use evidence vague as to where the 1872 water
was actually used. The Court also found conflicting evidence in the record regarding the actions of
Adams/Kayser and the actions of the downstream riparians. The Court has gone to great length to
review all the evidence on this issue. Essentially, when water was low there is evidence the
downstream riparians would shut Adams Ditch down. There is also evidence that when the riparians
shut the ditch down, Adams/Kayser reopened it to provide adequate water. According to Louie
Meyer, if water was available from Wilson-Naneum Creeks, then Adams would take the necessary
actions to divert it down Adams Ditch. The Kaysers testified to a similar reaction. Considering the
prior rulings in the basin, it is not clear is why those who shut off Adams Ditch did not pursue court
action when Adams/Kayser would reopen the ditch. However, as long as Adams/Kayser continued
to divert the water even after an effort was made by the lower riparians to shut them off and no
further action was taken to stop the diversions into Adams Ditch, this Court must find that the water
was diverted and put to beneficial use. The question then becomes where was the water used.

22 2. *Place of Use*

23 Kayser asserts that Adams, in acquiring the Olding/Galvin right, intended to use the water
on portions of Sections 2, T. 18 N., R. 19 E.W.M. and Section 35, T. 19 N., R. 19 E.W.M. For this
conclusion, Kayser cites to the Report of Referee, pages 277 and 278 and *Haberman v. Sander* at
page 457. The Referee's narrative on pages 277 – 278 discusses generally the memories of Art

1 Carlson, Andy Gustafson and Milton Lewis. Mr. Carlson recalled irrigation on the ranch and
2 various ditches that served the ranch. Mr. Gustafson testified to water use on land that now
3 comprises Kayser Ranch. Mr. Lewis, who owned lands irrigated with water from Naneum Creek,
4 testified about his memory of transfers of water rights involving Adams in the late-1920's and
5 early-1930's and a court case that resulted from one attempt to transfer water. In his Report (p.
6 605), the Referee found the 1872 right was appurtenant to Section 3, T. 18 N., R. 19 E.W.M. and
7 Section 35, T. 19 R. 19 N. R. 19 E.W.M. In the Supplemental Report, the Referee modified his
8 analysis and determined the 1872 right was appurtenant to land in Sections 2 and 3, T. 18 N., R. 19
9 E.W.M. and Section 5, T. 19 N., R. 19 E.W.M. See page 309. The quote from *Haberman* states:
10 "Mr. Adams owns approximately 600 acres of land lying five miles north of the Sander tract and
about two miles east of the creek. This land Mr. Adams irrigates through a ditch leading from the
combined streams of Wilson and Naneum creeks, above the forks."

11 In an effort to give an accurate decision on this issue, the Court has reviewed the record in
regard to all of Kayser's rights, including an analysis of the Referee's findings and finds nothing
12 that specifically indicates where the transferred water would be used. For example, the agreement
13 between Olding/Galvin and Adams is silent regarding which lands the water right would be
14 transferred to. Olding/Galvin used the water on the N½N½ of Section 21, T. 18 N., R. 19 E.W.M.
15 A water right was sought for those lands in this adjudication and the Referee did not confirm one.
16 No exception was taken. Therefore, it must be determined on which lands the water rights would be
17 used. The Court believes it is reasonable to conclude that Adams would have purchased water
18 rights in 1911 from Olding/Galvin with the intent of applying them to lands he already owned or
19 had taken steps to acquire in the fairly immediate future. The record shows P.H. Adams owned the
20 following lands at the time the water right was purchased: The SE¼SW¼, and SE¼ of Section 34,
the S½S½ of Section 35, the W½NE¼ and E½NW¼ of Section 2 and the W½NW¼ of Section 2.

21 The SE¼SW¼ and SE¼ of Section 34 were acquired by Adams from Peter Kuchen – land
that also carried an 1887 water right for 160 inches. DE -1755. The S½S½ of Section 35 and the
22 E½NW¼ and W½NE¼ of Section 2 were acquired by Adams from P. H. Schnebly. The Section 2
lands carried an 1887 water right for 100 inches. DE – 1260; see also brief filed in 1931 by F.A
23 Kern on behalf of Adams (attached to James Adams's December 13, 2000 affidavit – herein after
24 "1931 Kern Brief"). No water rights appear to have been appurtenant to Section 35 land at the time
25 it was acquired by Adams. Finally, the W½NW¼ of Section 2 was acquired by P.H. Adams from

1 Charles Bull most likely between 1908 (when the land was sold by settler Erick Larsen to Bull) and
2 1919 when Adams responded to the *Thomas v. Roberts* complaint to state he owned the W½NW¼.
3 Appurtenant to that land was 33-1/3 inches with an 1880 water right. See 1931 Kern Brief.

4 In addition to these lands (most of which had existing water rights) *Thomas v. Roberts*
5 shows Adams also purchased and transferred water that derived from rights established by Topliff-
6 Clements (40 inches with 1877 priority) and A.J. Sliger (50 inches with 1877 priority). The
7 Findings of Fact in that case do not show specifically the lands to which the purchased rights are
8 appurtenant. Those water rights might reflect the quantities set forth in the 1931 Kern Brief, which
9 show 16 inches in 2nd class, 16 inches in 4th class, 8 inches in 7th class, 50 inches in 8th class and 50
inches in 10th class. The Court notes that neither the Kuchen water right nor the Olding/Galvin
water rights are mentioned in the 1931 Kern Brief.

10 Attached to a March 10, 2003 declaration of Lawrence Martin (on behalf of Stokes/Jenkins)
11 are several documents, including testimony from *Sander v. Bull*. See also Kayser's DE – 1526.
12 That 1911 testimony shows Adams irrigated the Peter Kuchen land in Section 34 (estimated to be
13 125 acres) and the Section 2 land acquired from Schnebly (estimated to be 130 acres in Section 2
and 40 acres in Section 35). It also shows Adams could irrigate into July, but then the water
14 commissioner sometimes would shut him down. Mr. Schnebly testified water sometimes was
available into August. That document also contains the testimony of Charles Bull and W.H.
15 Kiester, who in the early 1900's owned most of the Kayser land that was not part of the Adams
property, including the NW¼ of Section 3 which Kiester conveyed to Bull in 1908. Both Bull and
16 Kiester's testimony suggest some land within the NW¼ of Section 3 was irrigated with Naneum
17 Creek water and carried in the Kiester Ditch. Bull's testimony regarding water use on the NW¼ of
18 Section 3 during the 1911 *Sander v. Bull* dispute indicates he probably still owned that land at the
19 time of the transfer between Olding/Galvin and Adams and, therefore, Adams would not have
20 intended to use the water on that property.

21 Finally, the Court reviewed the 1919 complaint filed by W.R. Thomas in *Thomas v. Roberts*
22 and the answers of P. H. Adams, T. H. McGough, Edgar Battle and Frank Moreau. The Moreau
23 answer is of interest because in 1919 he owned a portion of the N½NE¼ of Section 21, T. 18 N.,
24 R. 19 E.W.M., which is part of the land owned by Olding/Galvin at the time of the 1911 agreement
to sell water to Adams. Moreau's answer suggests he purchased part of this land from Galvin in
25 1918 and considered himself to have a right as a successor to Olding/Galvin. Although Mr. Moreau

1 was a named defendant in the complaint and filed an answer, he was not mentioned in the 1919
2 Findings of Fact and Conclusions of Law, nor was he mentioned in the 1925 decree. One possible
3 conclusion is he was dismissed from the case because it became apparent he had no water right.

4 Based on the evidence above, the Court finds P. H. Adams owned the following land when
5 he purchased the water rights discussed above: The SE $\frac{1}{4}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ of Section 34, the
6 W $\frac{1}{2}$ NE $\frac{1}{4}$ and NW $\frac{1}{4}$ of Section 2 (Adams also owned the S $\frac{1}{2}$ S $\frac{1}{2}$ of Section 35 at that time, but that
7 land will be discussed separately). The *Sander v. Bull* testimony and the complaint and/or responses
8 in *Thomas v. Roberts* show the land was being irrigated at the time, which would be 1911 and 1919
9 respectively. That land was awarded water rights, but rights considered junior (1887 priority) on
10 Naneum Creek. The testimony was water was generally not available much after July. With that in
11 mind, it would be plausible that Adams would have purchased senior water rights to use on these
12 lands so that water could be used the entire irrigation season. The purchased rights had priority
dates of 1872 through 1880. It is also possible a portion of the purchased rights were used to
irrigate the Adams land in the S $\frac{1}{2}$ S $\frac{1}{2}$ of Section 35. It is not clear when that land was first irrigated.

12 When established, the Olding/Galvin water right was appurtenant to the N $\frac{1}{2}$ N $\frac{1}{2}$ of Section
13 21, T. 18 N., R. 19 E.W.M. Parties to *Acquavella* who now own this land asserted a right based on
14 the award to Olding and Galvin in *Ferguson*. The Referee did not confirm a right because he
15 believed the water right had been legally transferred to Adams/Kayser Ranch. See Referee's Report
16 at pages 141-42. The evidence shows the land in Section 21 was irrigated at the time of the hearing
and the current owners thought they had a right based on *Ferguson*. They did not take exception to
17 the Referee's recommendation and therefore if the Court were to deny Kayser the use of this water
right, no party would be in a position to exercise it which is one of the most senior in the area.
18

19 The Court concludes that Adams purchased a total of 330 inches with the intent of using that
water to irrigate 330 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ of Section 34, the S $\frac{1}{2}$ S $\frac{1}{2}$ of Section 35, the
20 W $\frac{1}{2}$ NE $\frac{1}{4}$ and NW $\frac{1}{4}$ of Section 2. The evidence shows that 125 acres are irrigated in Section 34;
21 historically there were 130 acres irrigated in the W $\frac{1}{2}$ NE $\frac{1}{4}$ and E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 2, and it appears
22 that 20 acres are, and historically have been, irrigated in that part of the S $\frac{1}{2}$ S $\frac{1}{2}$ of Section 35 below
the Adams Ditch. It is not entirely clear how many acres have been irrigated in the W $\frac{1}{2}$ NW $\frac{1}{4}$ of
23 Section 2, however, it appears that close to 80 acres have been irrigated. The Court also finds that
24 this water was acquired, for the most part, with the intention of supplementing already existing
rights for the property set forth above. This conclusion is reasonable given the length of the ditches
25

utilized by Adams (most were over a mile long) and his testimony in *Sander v. Bull* that he only had rights adequate to irrigate into July. The additional water with a better priority date would have assisted Adams with both problems, as the existing right could be used for early irrigation and recharge of the ditch while the better priority water would extend the season.

Since the Court finds water has been used, it is now necessary to determine if court cases in the 1930's disallowed that use.

b. Collateral Estoppel

Stokes argues the court decisions in *Haberman v. Sander & Adams*, Kittitas Superior Court No. 8190 affirmed *Haberman v. Sander*, 166 Wash. 453 (1932), and *Lawrence v. Adams*, No. 8402, Decree (April 18, 1934) affirmed *Lawrence v. Adams*, 180 Wash. 696 (1935) precluded Adams from transferring water to non-riparian land. In its *Opinion*, the Court agreed. See pages 26-31. Collateral estoppel serves to bar relitigation of the same issues when four elements are met: identical issues, final judgment on the merits, was the party against whom the doctrine was asserted a party or in privity with a party to the prior case and will application of the doctrine work an injustice on the party against whom the doctrine is to be applied. Kayser asks that two of these elements be reexamined and urges the Court to find the issue here differs from that decided in the 1930's and/or that application of the doctrine will work an injustice on them. The Court will not consider whether there was a final judgment or whether the parties are the same (or in privity) since neither party raises those elements. The "burden of proof as to the propriety of applying collateral estoppel is on the party asserting it as a bar" – here, Stokes/Jenkins. See *Ecology v. YRID*, 121 Wn.2d 257, 296, 850 P.2d 1306 (1993).

Kayser argues the issue in *Lawrence* and *Haberman* is not identical to that before this Court and/or applying the doctrine will cause an injustice. The Court will analyze both elements in tandem because Kayser relies on the same arguments to support both elements. The Court will only summarize the *Lawrence* and *Haberman* cases and will not recite all of the particulars – parties are referred to the *Opinion* for that analysis.

Haberman (predecessor to Jenkins) involved an effort by Adams to transfer a riparian Wilson Creek water right upstream to Adams Ditch over the challenge of downstream riparian Wilson Creek users. *Lawrence* involved an effort by Adams to transfer a riparian Naneum Creek water right over the challenge of downstream riparian Naneum Creek users. Kayser argues those cases are not identical because Stokes/Jenkins are riparian landowners to Wilson Creek, objecting to

1 the upstream transfer of Naneum Creek riparian water rights. Stokes counter, indicating the status
2 of the challenger has nothing to do with the issue decided in those cases. Rather, those claimants
3 believe the issue is "whether non-riparian owners can transfer waters from riparian lands if it is
4 detrimental to existing water right holders." October 11, 2004 Memorandum in Opposition.

5 Without repeating the lengthy parsing of the two cases in the *Opinion*, this Court did
6 summarize its analysis there by stating:

7 "The message from these two interrelated cases is clear. The prior decrees of Naneum
8 Creek (*Ferguson*) and Wilson Creek (*Sanders v. Jones*) are to be read as limiting the
9 rightholders thereunder to the points of diversion and places of use as set forth and transfers
10 can only be undertaken if doing so will not cause an impairment to downstream riparian
11 users. This is particularly true for anyone trying to move a right to the Adams/Schnebly
12 ditch." May 21, 2004 Memo. Op. at 29.

13 In looking at the issue element of collateral estoppel, the Court finds Stokes correctly
14 identified the issue decided in *Lawrence* and *Haberman*. Those cases make clear that downstream,
15 riparian water users on both Wilson and Naneum Creeks were not to be harmed by the transfers of
16 waters upstream to non-riparian lands. If the protection of downstream riparian landowners was not
17 the primary focus of these cases, then why would the *Lawrence* court have felt compelled to write:

18 I think on small streams such as the Nanum, where people have established their homes and
19 farmed their land relying upon certain conditions that it would be establishing a dangerous
20 precedent to allow the change in point of diversion such as is sought in this case, and I am
21 again in accord with the *Haberman* case where it says on page 463, "It would seem that, if
22 appellants may change the point of diversion of the Sander water, a dangerous precedent
23 will be set, which might well result in a promiscuous scramble of water appropriators to
24 move their intakes upstream, with the result that [sic] may evils would follows."

25 This Court appreciates the distinction Kayser attempts to draw in showing how this dispute
involves Wilson Creek riparians protesting the upstream transfer of a Naneum Creek right and how
that differs from *Lawrence* and *Haberman*. Kayser, in essence, does not believe Stokes/Jenkins
have standing to complain about this transfer because they are not downstream Naneum riparians
bemoaning the loss of creek flow past their lands. However, the fact the parties may be situated
somewhat differently before this Court does not change the issue that was decided in the prior cases.

26 In fact, the Court believes application of *Lawrence* and *Haberman* is warranted here
27 (regardless of the fact that Stokes brought it up) as it is the duty of a stream adjudication tribunal to
28 examine prior decrees that relate to any claim to a water right. If there is some decision in those
29 decrees, regardless of who brings them to the Court's attention, that impacts the ability of the Court

1 to confirm a water right, then those prior decrees must be given effect. See Memorandum Opinion:
2 Re Res Judicata Motions, June 21, 1985. Indeed, RCW 90.03.170 states that a

3 "final decree adjudicating rights or priorities, entered in any case decided prior to June 6,
4 1917, shall be conclusive among the parties thereto and the extent of use so determined shall
be prima facie evidence of rights to the amount of water and priorities so fixed as against
any person not a party to said decree."

5 The Court recognizes *Lawrence* and *Haberman* were decided after June 6, 1917. Nonetheless,
6 those cases must be considered because they involve interpretation of *Ferguson* and *Sanders v.*
7 *Jones*, both of which fit the case profile included in RCW 90.03.170. Further, it cannot be ignored
8 the Morrisons are downstream Naneum Creek riparians who complained about the transfer.¹
Indeed, Kayser referred the Court to that testimony as evidence of Kayser's beneficial use of the
water. That places them on par with the parties in *Lawrence*. The Court wants to be clear that even
if there had been no effort by a Naneum Creek water user such as Morrison to stop the transfers, the
Court is required, in analyzing prior decrees under collateral estoppel, "to consider whether rights or
interests established in the prior judgment would be destroyed or impaired by prosecution of the
second action." *Brown v. Scott Paper Worldwide Co.*, 98 Wn.App. 349, 989 P.2d 1187 (1999). In
this adjudication, the Court has, on numerous occasions, given effect to pertinent prior court
decisions even when doing so is inconsistent with the prevailing community practice. See e.g.
Report of the Court Re: Subbasin No. 23 dated January 31, 2001.

Finally, it cannot be ignored the transfer would be to Adams Ditch which is on a combined
stretch of Wilson-Naneum. The evidence (discussed above) shows the flow of the combined stretch
is diverted back into the separate channels of the two creeks at about 50-50 below the Adams Ditch
diversion. When more water is diverted at Adams Ditch, there will be less water downstream on
both Wilson and Naneum Creeks and will therefore harm Stokes/Jenkins. The Court also relies and
incorporates by reference its previous analysis set forth in its *Opinion* at pages 27-30.

Kayser also argues application of the doctrine will work a serious injustice on it. They note
the historical and present value of Kayser's land would be lessened dramatically and Wilson Creek

1 See Exception Re: Morrison/Morrison Ranches to Kayser and Kayser Ranches Claim dated December 13, 2000. On page 5, Morrisons note there "is specific evidence in the record from both Tuffy Morrison and Bertha Morrison that when Kaysers divert water into Adams Ditch from the Nanem Creek, they dry up and significantly impair the Morrison's ability to irrigate the property in Section 4. In addition, Mr. Kayser on the witness stand acknowledged there are times when his diversion of Nanem Creek water would dry up and/or significantly reduce the stream flow below his point of diversion."

1 riparians will have destroyed a legitimate Naneum Creek right and achieved a right to use water
2 from Naneum Creek to which they are not riparian and have no other right. As to the second issue,
3 the Court has analyzed above the ability of Stokes/Jenkins to maintain their challenge. As to the
4 first point about value to land, Stokes/Jenkins refer the Court to *Thompson v. State Department of*
5 *Licensing*, 138 Wn.2d 783, 982 P.2d 601 (1999). There, after a thorough analysis of Washington
Appellate Court decision on the injustice prong of collateral estoppel, the Supreme Court stated:

6 In summary, the injustice prong of the collateral estoppel doctrine calls from an examination
7 primarily of procedural regularity. This is not to rule out substantive analysis entirely, as
8 when, for instance, there is an intervening change in the law, or the law applicable at the
time of the first hearing was not well-explained and required subsequent exposition. But
9 where, as here, a party to the prior litigation had a full and fair hearing of the issues, and did
not attempt to overturn an adverse outcome, collateral estoppel may apply, notwithstanding
an erroneous result. *Thompson* at 799-800.

10 This Court must, of course, adhere to that analysis. There is no allegation of procedural
11 irregularity during the prior hearings. Adams obtained a full and fair opportunity to litigate whether
12 or not a downstream riparian can transfer a water right upstream to a non-riparian if doing so harms
13 intervening water right holders. In fact, Adams was accorded the opportunity to litigate it twice and
14 on both streams at issue before this Court. The answer both times at the trial and appellate court
15 was no. Kayser attempts to distinguish the earlier rulings based on how the parties were situated as
16 compared to the parties before this Court. Those contentions were analyzed above. Nor do the
17 Kaysers cite to a change in the prevailing law that would require this Court to ignore the decisions
18 in *Lawrence* and *Haberman*. Further, there is no precedent to support Kayser's contention that a
loss in property value would authorize this Court to ignore the earlier rulings.

19 Based on the analysis above, the Court reaffirms its May 20, 2004 ruling that collateral
estoppel applies to bar relitigation of the issue resolved in *Lawrence* and *Haberman*. Any effort to
20 transfer the Olding/Galvin water right to Adams Ditch was precluded by those decisions.

21 c. Laches

22 Kayser maintains Stokes/Jenkins and their predecessors have been aware of the use of
23 Olding/Galvin water from the Adams Ditch for nearly 70 years. Kayser argues the delay by the
24 downstream riparians from acting until recently will prejudice and damage Kayser and the
challenge is barred by the doctrine of laches. Laches bars a claim if the proponent establishes that
25 (1) The other party had knowledge of the facts constituting a cause of action or a reasonable
opportunity to discover such facts; (2) there was an unreasonable delay in commencing the action;

1 and (3) the proponent of the doctrine was prejudiced by the delay. *Robin L. Miller Const. Co., Inc.*
2 v. *Coltran*, 110 Wn.App. 883, 893, 43 P.3d 67 (2002); *In re the Marriage of Sanborn*, 55 Wn.App
3 124, 127, 777 P.2d 4 (1989). The proponent of the doctrine, here Kayser, bears the burden of
4 establishing it. “The determination depends on the facts of each case and the trial court is vested
with large discretion.” *Estate of Tuott*, 25 Wn.App. 259, 261, 606 P.2d 706 (1980).

5 The facts of this case are best served by analyzing the first two prongs together. A
6 determination as to whether Stokes/Jenkins had knowledge of the relevant facts (or a reasonable
7 opportunity to discover them) or waited too long to do anything about it come from the same facts.
8 In reaching its decision, the Court relies on the factual accounting set forth above. The facts seem
9 relatively clear the downstream riparians, including Mr. Stokes, shut Adams Ditch down during
10 times of low flow. It was also established that when the ditch was shut down, Adams/Kayser would
11 reopen the ditch. The question becomes what happened next. There is no evidence to suggest
12 Stokes or other downstream riparians were aware Adams or Kayser opened the ditch back up to the
13 riparian’s detriment. There are a number of reasons that could explain this. First, given the manner
14 in which the transfer took place (that is by deed in 1911 with actual use not until the 1930’s) it is
15 conceivable the riparians had no knowledge of this transfer. Additionally, Stokes testified he
16 believed the issue of transferring riparian rights upstream for non-riparian diversion “had been dead
17 and buried in the 1930’s” and, therefore, had no knowledge of the transfer and could not have
18 brought a challenge to stop something that did not exist. Once Stokes learned Kayser was asserting
19 a right to the Olding/Galvin water in this proceeding, he brought the challenge. Based on the record
before it and in recognition Kayser bears the burden on this point, the Court finds Stokes/Jenkins
were unaware Adams or Kayser felt they were diverting the Olding/Galvin water right inconsistent
with *Lawrence* and *Haberman*. Therefore, the first two elements of laches are not satisfied.

20 The third prong of laches concerns whether the proponent, here Kayser, was prejudiced by
21 the delay. Case law states, “the main component of the doctrine is not so much the period of delay
in bringing the action, but the resulting prejudice and damage to others.” *Clark County Public*
22 *Utility District No. 1 v. Wilkinson*, 139 Wn.2d 840, 849, 991 P.2d 1161 (2000). Kayser believes its
23 prejudiced because it acquired lands based on an 1872 water right and the value will decrease
24 without such a water right. Stokes counters that Kayser is not prejudiced by not being allowed to do
something it never had a right to do in the first place. If anything, they believe the other water users
will be prejudiced by this Court creating and confirming a senior water right to Kayser that has

1 never existed. In response to the Court's question as to why Adams and then Kayser continued to
2 open up Adams Ditch after the lower riparians had shut them off during times of low flow, Stokes
3 asserts the diversion was simply an illegal use which does not morph into an 1872 water right.

4 As discussed above, this Court has changed a water use practice if there is no legal basis for
5 a water right. In Subbasin No. 23 for example, water rights were decreed in the 1920's and
6 reexamined in the 1950's in a federal proceeding. Water use in the mid-1960's proceeded
7 consistent with the 1920's state certificates rather than being modified as required in the federal
8 decree. This Court determined first in 2001 and reaffirmed in 2003 that water rights could only be
9 confirmed consistent with the federal decree. See Report of the Court for Subbasin No. 23 dated
10 January 31, 2001; see also Memorandum Opinion Re: Subbasin No. 23 Threshold Issues dated
11 October 8, 2003. Essentially, even though the water users appeared to have valid water rights in the
12 1920's, the federal court examined other historical criteria that had occurred in the area and
13 disallowed many of the water rights on a generalized legal principle.²

14 The analysis is quite similar here. Kayser's predecessor may have been legally authorized to
15 transfer a water right in 1911 to the Adams Ditch. That use of water may have occurred. However,
16 the Kittitas County Superior Court and Washington Supreme Court determined in the early-1930's,
17 based on an interpretation of the prior decrees in the area and state law, that upstream transfers of
18 Wilson and Naneum creek water would not be allowed. The Court notes those courts made the
19 decision to not allow upstream transfers of water *even though Ecology's predecessor believed the*
transfers were consistent with existing state law and would not impair existing rights. See
20 *Haberman.* Even assuming the 1911 document was not sufficient for the transfer and compliance
21 with the change procedures of the water code was required (and this Court held to the contrary), the
22 state may well have approved it as they did Adams's other efforts to transfer water rights.
23 Obviously, the state's finding that the law had been complied with made no difference in the
24 analysis by the courts that examined the transfers and this Court believes the outcome would have
25 been the same for the Olding/Galvin right. As discussed above, there is no justification to ignore
those precedents and to do so would be inconsistent with how the Court has treated other claimants
in this proceeding.

² The decision of the 9th Circuit primarily rested on an interpretation of a 1908 agreement between water users on the north side of the reservation and the United States.

1 This Court finds Kayser has not met its burden in establishing any of the elements of laches
2 and the doctrine does not apply. The Court further finds, on the basis of collateral estoppel, the
3 Olding/Galvin water right was not legally transferred to lands now owned by Kayser Ranch.
4 Kayser's objection is denied.

5 d. Water Rights To Be Confirmed

6 The Court will now address the water rights that can be confirmed to Kayser Ranch. As
7 discussed previously, evidence presented at the various hearings resulted in changes to decisions on
8 the rights that can be confirmed. Numerous water rights are appurtenant to Kayser Ranch land,
9 either as a result of original appropriations or successful transfers to the land that were recognized
10 in prior court actions. *See, e.g. Thomas v. Roberts.* However, some land owned by Kayser was not
11 described in RCW 90.14 water right claims. Kayser filed with Ecology a request to amend Water
12 Right Claim No. 118062 to increase the number of acres from 700 to 720, correct the point of
13 diversion location and amend the place of use to include land in the NW $\frac{1}{4}$ and S $\frac{1}{2}$ of Section 3.
14 Ecology denied the request to correct the point of diversion location and amend the place of use.
15 The number of acres claimed for irrigation have been increased from 700 to 720 acres. All of the
16 land described within the place of water use on WRC No. 118062 is also described on other water
17 right claim forms that Kayser filed pursuant to RCW 90.14. The erroneous point of diversion
18 description does not prevent the Court from confirming rights to Kayser. The diversion is described
19 as being from Naneum Creek in Section 2, T. 18 N., R. 19 E.W.M. Naneum Creek does not flow
through this land so, of course, there is no historic diversion point in Section 2. The Court cannot
confirm a right at a point that has not historically been used. As a result of Ecology's denial of the
request to amend the place of use, none of the water right claims filed by Kayser Ranch include the
NW $\frac{1}{4}$ and S $\frac{1}{2}$ of Section 3 in the description of lands on which water is used.

20 The Court has previously discussed the water rights that are appurtenant to the claimant's
21 land. (See page 13, *supra*, and also the *Opinion* beginning on page 31). The Court's confirmation
22 of rights in that opinion was influenced by Kayser's attempts to amend WRC No. 118062. Since
that effort was not successful, the Court will revisit and restate all the rights that can be confirmed.

23 With a June 30, 1887 date of priority a right to divert 3.2 cubic feet per second in May and
24 June, 1.6 cubic feet per second in April and July 1 through October 15, 625 acre-feet per year for
25 the irrigation of 125 acres and stock water in SE $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$ and that portion of the N $\frac{1}{2}$ SE $\frac{1}{4}$
lying below the Adams Ditch in Section 34, T. 19 N., R. 19 E.W.M. (as successor to Kuchen)

With a June 30, 1887 date of priority, a right to divert 2.0 cubic feet per second in May and June, 1.0 cubic foot per second in April and July 1 through October 15, 500 acre-feet per year for the irrigation of 100 acres and stock watering in the E $\frac{1}{2}$ NW $\frac{1}{4}$ and W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 2, T. 18 N., R. 19 E.W.M. (as successor to Schnebly).

With a June 30, 1880 date of priority a right to divert 0.66 cubic foot per second May 1 through June 15; 0.33 cubic foot per second June 16 through October 15, 139 acre-feet per year for the irrigation of 53 acres and stock watering in the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 2, T. 18 N., R. 19 E.W.M. (as successor to Larsen).

With a June 30, 1880 date of priority a right to divert 2.0 cubic feet per second May 1 through June 15 and 1.0 cubic foot per second June 16 through October 15, 331.72 acre-feet per year for the irrigation of 120 acres and stock water in the N $\frac{1}{2}$ NE $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 3, T. 18 N., R. 19 E.W.M. (as successor to Keister).

Two water rights with priority dates of 1877 were acquired by P. H. Adams and recognized in *Thomas*. However, that decree was not specific as to place of use only indicating they were used on lands owned by Adams. One is a 50 inch right acquired from A. J. Sliger. The Court awarded this right to the Kayser lands in the E $\frac{1}{2}$ NW $\frac{1}{4}$ and W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 2 and nothing was submitted to alter the right previously confirmed. The second water right is 40 inches awarded to Topliff-Clements. The Court originally confirmed this right for use in Section 34 in the event Kayser amended its 90.14 claim and a portion of the Kuchen water right could be awarded to the NW $\frac{1}{4}$ of Section 3. Since that did not happen, the entire Kuchen water right has been confirmed herein for all of the irrigated land in Section 34 (see above). Therefore, the right confirmed beginning on page 33, line 24 of the May 20, 2004 Opinion is withdrawn. The evidence shows about 20 acres are irrigated with Naneum Creek water in that portion of the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, T. 19 N., R. 19 E.W.M. below the Adams Ditch. Additionally, Kayser irrigates close to 80 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 2 with Naneum Creek water, yet the right the Court confirmed only allows irrigation of 53 acres (Larson right). The Court will confirm a right to Kayser with a June 30, 1877 date of priority for the diversion of 0.80 cubic foot per second in May and June and 0.40 cubic foot per second in April and July 1 through October 15, 200 acre-feet per year for the irrigation of 20 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35 below the Adams Ditch and 20 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 2. Because the land in the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 2 will have two water rights with different

1 priority dates (1877 and 1880), if Kayser sells a portion of the land, they must designate the water
2 right appurtenant to the portion they sell – priority date, quantities of water, place of use.

3 The Court is not able to confirm rights for the irrigation of any of the Kayser Ranch land in
4 the NW $\frac{1}{4}$ and S $\frac{1}{2}$ of Section 3, T. 18 N., R. 19 E.W.M.

4 **David and Linda Lundy, Claim No. 15629**

5 The Lundys objected to the Court not confirming a water right for their property due to
6 repeated failures to provide notice to a neighboring landowner who would be negatively affected by
7 the Lundys receiving a right. The water right originally established for lands that include the
8 Lundys was awarded entirely to Harold and Gladys Jenkins as the only successor to August
9 Haberman to file a claim and appear in this proceeding. The Lundys filed a late claim, but did not
10 provide notice to the Jenkins they were asserting a claim to a portion of the water right already
11 awarded to the Jenkins. The Lundys appeared at the hearing through their attorney, Richard T. Cole.

12 Without any advanced notice to the Court or to any party, Mr. Cole and Attorney Lawrence
13 E. Martin, who represents the Jenkins, orally presented to the Court a settlement between the two
14 parties. Chester Vernon Stokes who was in attendance at the hearing on another matter objected to
15 the settlement and presented testimony. Originally, it was the intention of the Court to adopt the
16 settlement. However, after reconsidering the context that gave rise to the proposed settlement, the
17 Court now believes that all Subbasin 9 parties should have notice of the proposed stipulation and
18 will allow comments for a 30-day period from the date of the entry of this decision.

19 If no objection is filed, the settlement will be adopted and would provide the following two
20 rights. The water right awarded to the Jenkins under Court Claim No. 00930 and described on
21 page 391 is modified on line 3 $\frac{1}{2}$ to authorize the irrigation of 50 acres and on lines 5 $\frac{1}{2}$ to 7 to
22 authorize the diversion of 1.0 cubic foot per second in May and June and 0.50 cubic foot per second
23 in April and July 1 through October 15, 250 acre-feet per year for irrigation and 3.5 acre-feet per
24 year for stock watering. The Court would confirm a right to Robert and Linda Lundy, under Court
25 Claim No. 15629 with a June 30, 1883, date of priority to divert from Naneum Creek 0.40 cubic
foot per second in May and June and 0.20 cubic foot per second in April and from July 1 through
October 15, 100 acre-feet per year for the irrigation of 20 acres in the following described lands:

That portion of the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and that portion of the W $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 5,
T. 18 N., R. 19 E.W.M. bounded by a line described as follows: Beginning at the
southwest corner of said Section 5, thence N 88°27'34" E along the south boundary
of said section, 2400.47 feet to the southwest corner of said W $\frac{1}{2}$ SE $\frac{1}{4}$; thence N

1 1°53'57" E along the west boundary of said W½SE¼, 1851.85 feet to the true point
2 of beginning; thence N 1°53'57" E along said west boundary 2241.29 feet to the
3 northwest corner of said SW¼NE¼; thence N 88°01'17" E 554.27 feet; thence S
4 1°08'54" W 659.57 feet; thence S 2°32'39" E 495.97 feet; thence S 1°02'45" E
5 840.30 feet; thence S 87°03'12" W 106.79 feet; thence S 1°09'35" E 145.91 feet;
6 thence S 87°28'48" W 281.95 feet; thence S 5°50'53" W 116.28 feet; thence N
7 86°34'07" W 255.83 feet to the true point of beginning.

8
9 The point of diversion from Naneum Creek will be identical to that of the Jenkins – 350 feet
10 south and 400 feet west from the northeast corner of Section 5, being within Government Lot 1 of
11 Section 5, T. 18 N., R. 19 E.W.M. If this is not the location where the Lundys divert their water,
12 they should apply to Ecology for authorization to change their point of diversion.

13 **Michael K. Moeur Sr. and Michael K. Moeur Jr., Court Claims No. 02133 – 02137**

14 In its *Opinion*, the Court modified the Referee's recommendation for these rights. Moeur
15 took exception to the annual quantity and authorized number of acres. At the time the *Opinion* was
16 entered, the Moeurs had requests to amend the pertinent RCW 90.14 claims pending with Ecology.
17 On January 13, 2005, the Moeurs and Ecology filed a joint stipulation indicating the claims were
18 amended and providing recommendations resolving the pending exceptions. The Court adopts the
19 stipulation and amends the rights in the *Opinion* at pages 45 and 46 (which had modified the water
20 rights recommended by the Referee in the Supplemental Report) as follows: Page 456 of the
21 Supplemental Report, lines 5 and 6 are modified to authorize the diversion of 6 cfs, 978.15 acre-feet
22 per year for on farm irrigation, 12 acre-feet per year for stock water; and a Limitation of Use is
23 added at line 15 as follows: The maximum on-farm use under this right and the right to Wilson
24 Creek (Claim No. 02134) on the described property will not exceed 2133.6 acre-feet per year. Page
25 468 of the Supplemental Report is modified at line 5½ to authorize the diversion of 4 cfs, 1143.45
 acre-feet per year for on-farm irrigation and a Limitation of Use is added at line 15 as follows: The
 maximum on-farm use under this right and the right to the Yakima River (Claim No. 02136) on the
 described property will not exceed 2133.6 acre-feet per year.

26 **Don Snowden, Court Claim No. 00366**

27 Mr. Snowden responded to the Court's *Opinion* by supplying a copy of Ecology's decision
28 to amend Water Right Claim No. 043215. The place of use was amended to read:

29 That portion of the NE¼ of Section 11, T. 17 N., R. 18 E.W.M. known as Tax 27 and a
30 portion of the N½SE¼ of Section 11, T. 17 N., R. 18 E.W.M., both tracts west of the right-
31 of-way of the Burlington Northern Railroad.

1 The Referee confirmed a right for only the portion of the Snowden property lying in the
2 NE $\frac{1}{4}$ of Section 11 as the SE $\frac{1}{4}$ of Section 11 was not within the place of use described in WRC No.
3 043215. As a result of Ecology's amendment, the Court notified Mr. Snowden by letter dated
4 September 2, 2004, that the Supplemental Report for Subbasin No. 9 at page 419 is modified to
5 confirm a water right with a May 24, 1884 date of priority for the diversion of 1.75 cfs, 350 acre-
6 feet per year for the irrigation of 35 acres in that part of the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 11,
7 T. 17 N., R. 18 E.W.M., lying southwest of the right-of-way of the Burlington Northern Railroad.
8 The authorized point of diversion is 840 feet south and 800 feet west of the center of Section 2,
9 within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, T. 17 N., R. 18 E.W.M.

9 **Chester Vernon and Roma B. Stokes, Claims No. 02311, 02312, 02313 and 02314**

10 Mr. Stokes filed two objections to the CFO. The first is to a water right recommended in the
11 Supplemental Report on page 434. The instantaneous quantity was cut in half in April and July 1
12 through October 15 consistent with the *Ferguson* Decree. Mr. Stokes correctly asserts this right
13 was addressed in *Thomas v. Roberts*, not *Ferguson*, which did not reduce the quantity of water that
14 could be used during the irrigation season. Thus, the Court modifies the Referee's recommendation
15 on page 434 to authorize the diversion of 0.31 cubic foot per second, 47.79 acre-feet per year for
irrigation and 1 acre-foot per year for stock water from April 15 through October 15.

16 Mr. Stokes second objection was to a water right not being confirmed under Court Claim
17 No. 02314 for irrigating 8 acres in that part of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5 T. 18 N., R. 19 E.W.M.
18 lying west of Dry Creek. A water right was recommended for irrigating 40 acres in that part of the
19 E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 5, lying west of Wilson Creek and that portion of the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5
20 lying north of KRD's North Branch Canal. Ecology sought clarification of the place of use for this
right, noting the irrigated lands in the E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 5 were west of Dry Creek, not Wilson
21 Creek. Mr. Stokes did not object to that clarification so the Court modified the place of use as
22 Ecology requested. The Court reviewed Ecology's map, SE-2, and the land Mr. Stokes indicates
23 was omitted lies west of Dry Creek in the northwest corner of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5. Thus, the
8 acres irrigated in that area is covered by the water right previously confirmed.

24 However, modifying the place of use as Ecology requested results in irrigated land lying east
of Dry Creek being excluded from the authorized place of use. DE-1555 is an aerial photo taken in
25 1977. Mr. Stokes has drawn Dry Creek on the photo in green and ditches using black ink. Below

1 diversion 70 the ditch splits and an irrigated field lies between the two ditches. The Court again
2 modifies the place of use described on page 422 of the Supplemental Report at line 12½ to read the
3 NE¼SW¼, except the easterly 400 feet thereof and the W½SE¼SW¼ . None of Mr. Stokes's
4 exhibits show how many acres are irrigated in the area described in Court Claim No. 02314. The
5 court claim asserts a right to irrigate 56 acres, however, the State's investigation report indicates 40
6 acres are irrigated. If the land in the northwest corner of the NE¼SW¼ of Section 5 is 8 acres as
7 Mr. Stokes suggests, it does not appear that more than 40 acres in total are irrigated within the area
8 described in the court claim. The Court estimates that no more than 20 acres are irrigated in the
9 SW¼SW¼, and less than 15 acres in the field east of Dry Creek (in fact DE-2166 depicts 9.8 acres
10 in the field east of Dry Creek). Therefore, the Court will not alter the number of acres.

11 Mr. Stokes and Robert Swedberg jointly filed an objection to the Court not awarding a right to
12 use flood water on their property. Their objection states 1) that use of flood water began with the
13 earliest settlers and Kittitas County has done nothing to regulate that use; 2) the Court should
14 recognize the beneficial aspects of using flood water; and 3) that in spite of the rulings in the
15 *Ferguson Decree*, flood water has been used and the Court should establish a flood water policy for
16 Kittitas County. This issue was addressed at length in the Court's *Opinion*. See pages 48-49. The
17 doctrine of res judicata requires the Court to carry the *Ferguson* decisions forward. Using water
18 without a valid water right benefits the landowner, but is still not legal and could operate to the
19 detriment of others. The claimants suggest there is no detriment to others when flood water is used.
20 Even if that were true, that does not make the water use legal. Beneficial use is just one element of
21 establishing a water right. See discussion regarding Kayser above. For lands not bound by *Ferguson*
22 the quantity of water claimed in the RCW 90.14 water right claim must be sufficient to cover the
23 flood water use. Mr. Stokes was already awarded water rights for the quantities of water claimed
24 for his land that were not addressed in *Ferguson*. The exception is denied.

25 **Robert and Lorene Swedberg, Claim No. 01861**

26 Robert Swedberg filed two objections to the Proposed CFO. The first objection was to the
27 instantaneous quantity for the water right being cut in half on July 1. Mr. Swedberg reminds the
28 Court his water right was addressed in *Thomas v. Roberts*, which did not require a 50% reduction in
29 the quantity of water on July 1. In its May 2004 *Opinion*, the Court incorrectly attributed the water
30 right confirmed to Mr. Swedberg to a *Ferguson* award (which did require the July 1 reduction).

31 *Thomas v. Roberts* did show that the owner of Mr. Swedberg's land at that time, Charles Bregg, had

1 a right to 75 inches for his land. Additionally, Mr. Swedberg identified a typographical error in the
2 Court's *Opinion* on page 50, line 19. The correct place of use for the water right should be the
3 W½NE¼ and the NW¼ of Section 33. Therefore, the Court modifies the water right confirmed on
4 page 50 beginning on line 17½ to authorize the diversion of 1.50 cubic feet per second from April 1
through October 15 or the irrigation of 75 acres in the NW¼ and W½NE¼ of Section 33, T. 19 N.,
5 R. 19 E.W.M. The exception Mr. Swedberg filed jointly with Chester Vernon Stokes concerning
6 rights to use flood water was addressed and denied under the Stokes exceptions above.

7 **David and Louise Wright, Court Claim No. 00984**

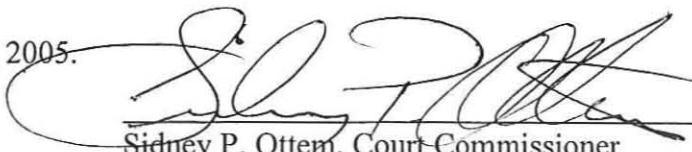
8 Ecology took exception to the Court confirming a Naneum Creek water right in its May 20,
9 2004 *Opinion*. The evidence along with the Court's statement on page 57, line 8 of the *Opinion*
lead Ecology to conclude the Wright's land was not irrigated with Naneum Creek water since 1995.
10 As that period exceeds five consecutive years, Ecology believed the water right had relinquished.
11 At the September 9, 2004 hearing, Dr. Wright testified he has pumped from Naneum Creek every
12 year, except this past year. The Court orally denied Ecology's exception and struck the following
13 sentence from its Opinion beginning on line 8: "Since he has resorted to pumping, only water from
14 Wilson Creek has been used to irrigate the land."

15 **II. CONCLUSION**

16 This Opinion resolves objections to the Proposed Conditional Final Order for Subbasin No.
17 9. However, since notice was not provided regarding a stipulation reached between Lundys and
18 Jenkins, the Court cannot finalize the CFO. If no objection regarding that settlement is received by
19 July 10, 2005, the Court will finalize and distribute the CFO. If an objection is lodged, a hearing
will be held July 28, 2005. The basis for the objection and a summary of evidence to be presented
shall be included with any such objection and served on the Lundys and Jenkins.

20 Parties may file objections to this Memorandum Opinion no later than July 10, 2005.
21 However, the Court will review objections (if any) and notify parties if a hearing will be provided.
The Court will allow late exceptions only after a showing of good cause.

22
23 Dated this 15th day of June, 2005.

24 
25 Sidney P. Ottem, Court Commissioner