

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

IN THE MATTER OF THE DETERMINATION)
OF THE RIGHTS TO THE USE OF THE)
SURFACE WATERS OF THE YAKIMA)
RIVER DRAINAGE BASIN, IN)
ACCORDANCE WITH THE PROVISIONS OF)
CHAPTER 90.03, REVISED CODE OF)
WASHINGTON,)

No. 77-2-01484-5

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
Plaintiff,

MEMORANDUM OPINION AND ORDER
RE: EXCEPTIONS TO SUPPLEMENTAL
REPORT OF REFEREE SUBBASIN 8
(THORP)

vs.

WILLOWBROOK FARMS (CLAIM NO
0520/(A)0569)

JAMES J. ACQUAVELLA, ET AL.,
Defendants

THEILINE P. SCHEUMANN (CLAIM NO
01335)

I. INTRODUCTION

On July 10, 1997, various Subbasin 8 claimants participated in a hearing to resolve exceptions taken to the Supplemental Report of Referee for Subbasin 8. Many of the exceptions were resolved at the hearing; a few were not. This Court's December 2, 1999 Memorandum Opinion and Order clarified the record regarding the status of the unresolved claims in that subbasin. However, four claims required additional processing – Packwood Canal Company, Wynn and Catherine Vickerman, Willowbrook Farms and Theiline Scheumann (Grousemont Farms). The Vickermans submitted the necessary information regarding place of use to finalize their claim. The Court, in a Memorandum Opinion and Order Re: Packwood Canal's Exceptions to Supplemental Report of Referee Subbasin 8 dated January 28, 2000, issued its decision regarding Packwood Canal. Thus the only two claims requiring further analysis by this Court in Subbasin 8 are Willowbrook Farms, Limited – Claim No. 0520/(A) 0569 and Theiline Scheumann (Claim No. 01355).

II. ANALYSIS

a. Willowbrook Farms, Limited -- Claim No. 0520/(A) 0569

Willowbrook Farms excepted to the Referee's Supplemental Report in regard to the Referee's finding that the RCW 90.14 claim did not apply to all the lands irrigated. They also

1 asserted that because the Referee did not, in his initial Report, indicate that the 90 14 claim was
2 insufficient to support the entire place of use, the Referee is estopped from doing so in a subsequent
3 report. The claimant asked for an additional hearing in which to present the evidence they would
4 have presented had they been aware of the RCW 90 14 problem at the Referee's Supplemental
5 Hearing. The Court granted that exception. Willowbrook presented that evidence at the February
6 10, 2000 water day hearing. Concurrently, the Court requested that Willowbrook pursue
7 amendment of its claim with Ecology pursuant to RCW 90 14 065. Ecology, in an order dated June
8 2, 2000, denied Willowbrook's request to amend its RCW 90 14 claim. That order was presented to
9 Judge Stauffacher at the June 8 Oversight Hearing.¹ This claim is ready for final resolution.

10 Willowbrook's exception is relatively straightforward. It filed Water Right Claim No.
11 024277 February 16, 1973. DE - 30. On that form, it indicated that the legal description for the
12 place of use was the "SW4 of Sec. 14, T. 18N., R. 17E.W.M." Id.; February 10, 2000 Verbatim
13 Report of Proceedings at p. 10. In fact, Paul Harrel, a general partner of Willowbrook Farms,
14 indicated that the RCW 90 14 claim form was intended to apply to all the property irrigated by
15 Fogey Creek diversions. RP at 13. Willowbrook produced a map outlining the Section 14 lands and
16 the northern portion of Section 23. DE - 173. Willowbrook Farms apparently can irrigate property
17 in the SW1/4 of Section 14, along with property in the SE1/4 of Section 14 as well as property in
18 Section 23 with Fogey Creek diversions. RP at 12; DE - 173. On the form, Willowbrook claimed a
19 right to irrigate 100 acres and, according to Paul Harrel, the property described in the claim - the
20 SW1/4 - would not amount to 100 acres. RP at 12; DE -- 173. Based on its review of DE - 173, if
21 100 acres is irrigated by Willowbrook, the Court would estimate that approximately 5 of those acres
22 are in the southeast corner of the SE1/4SW1/4, approximately 25 acres in the SW1/4SE1/4, 5 acres
23 in the SE1/4SE1/4 with the vast majority of the acreage being in Section 23. Additionally, the
24 entire SW1/4 of Section 14 does appear to be irrigated, although primarily from sources other than
25 Fogey Creek. According to Mr. Harrel, the failure to list the other places of use was an oversight,
RP at 14, and Willowbrook intended that the claim should contain the additional information
regarding irrigation of the SE1/4 of Section 14 and Section 23 lands. Id.

¹ It was unclear from the June 8, 2000 transcript if Ecology's orders were to be made a part of the record in light of an objection lodged by Willowbrook. RP at 19-20. However, a subsequent phone call with counsel for Willowbrook, Ecology and Theilene Schumann has clarified that no party has an objection to the administrative orders being made a part of the record. They have been filed and made a part of the record.

1 By way of legal argument, Willowbrook asserts that this Court only requires substantial, not
2 perfect, compliance with the Claims Registration Act. Memorandum Opinion Re: RCW 90.14 and
3 Substantial Compliance dated February 5, 1995 (Court Doc. 10,390); See also RCW 90.14.051
4 ("The statement of claim for each right shall include substantially the following. . .")

Willowbrook also states:

5 "there are a number of instances in Subbasins 4 and 7 in particular where this issue first
6 started to come up, where the Court has allowed testimony to essentially serve as an
7 amendment to the 90.14 in this proceeding. And the Referee has recognized the fact that
8 maybe there's a section line or quartersection line or a field demarcation that isn't exact."
9 RP at 17.

10 In essence, there are two issues, sometimes overlapping, that must be resolved: Has
11 Willowbrook substantially complied with RCW 90.14.041 and can a claimant amend an RCW
12 90.14 claim through presentation of evidence in an adjudication? The Court believes the answer to
13 both questions is no. These issues have been considered and essentially resolved in the Court's
14 Memo. Op. Re: RCW 90.14.

15 First, substantial compliance, according to Ecology v. Adsit, 103 Wn 2d 698, 694 P 2d 1065
16 (1985) applies when the claimant submits the necessary substantive information to Ecology,
17 regardless of the form used, to provide the agency with "adequate records for administration of the
18 state's waters." Adsit, at 704; see also RCW 90.14.010 ("The purpose of this chapter is to provide
19 adequate records for efficient administration of the state's waters. . ."). Willowbrook admits that
20 the form does not contain the correct information but would maintain that it has provided adequate
21 information when other information about the claim is considered. RP at 17. For example, the
22 form indicates that 100 acres are claimed and Willowbrook does not irrigate 100 acres in the
23 SW1/4. From the face of the form, however, there is simply no way to know that. Rather, the claim
24 shows the place of use to be the SW1/4 and that designation could include up to 160 acres and does
25 include some of the acreage Willowbrook requests the right to irrigate. Further, most, if not all the
land in the SW1/4 is irrigated but from other sources. Consequently, the Court disagrees with
Willowbrook that it provided Ecology "adequate records for administration of the state's waters" to
the extent that WRC No. 024277 was intended to apply to lands in the SE1/4 of Section 14 and
Section 23. See Adsit, at 704. Willowbrook has not substantially complied with the requirements of
RCW 90.14 for purposes of preserving a right to irrigate lands in the SE1/4 of Section 14 and
Section 23.

1 Second, Willowbrook argues that with the additional information provided in the February
2 10, 2000 hearing, the Court has ample information to understand what Willowbrook intended when
3 it submitted its RCW 90 14 filing and should amend the claim to conform with that proof. That act,
4 however, is beyond the authority of the Court in an adjudication and has been delegated to Ecology
5 by the legislature. Judge Stauffacher has covered this ground before in his Memo. Op. Re: RCW
6 90.14 and Substantial Compliance. At page 8 of that decision, he stated:

7 The Court recognizes that some room for interpretation is necessary in analyzing the face of
8 an RCW 90 14 claim and such interpretations have occurred during the course of the
9 adjudication. This authority is necessary to allow the Court to decree a water right based
10 on all the evidence submitted during the course of a general adjudication. (Cite omitted)
11 However, the Court's authority to interpret documents in an adjudication does not extend to
12 the process set forth in RCW 90.14.065 which is strictly within the authority of the
13 Department of Ecology. The statute makes DOE's authority clear: "Any person or entity
14 may submit to the department of ecology for filing, an amendment to such a statement of
15 claim. . . ."

16 Because Willowbrook asserts the Referee and the Court have expanded the confirmation of
17 a right beyond a claim for other users,² the Court must clarify when it will broadly interpret a claim
18 and when the amendment process set forth in RCW 90.14.065 must be followed. To the extent that
19 line can be abstractly defined, the decision hinges on how far the claim in the adjudication departs
20 from the information set forth in the RCW 90.14 claim and how reasonable the variation appears.

21 For example, in the Supplemental Report of Referee for Subbasin 7 dated July 6, 1998, the
22 Referee in at least three instances recommended a right that varies slightly from what was set forth
23 on the claims registration form. See analysis of right for Dana & Elizabeth Lind, p. 116-120;
24 Patrick & Susan Taylor, p. 120-124; Van de Graaf Ranches, Inc., p. 135-141. The Van de Graaf's
25 water right claim issue is particularly instructive. There, the Referee concluded that historical
information demonstrated a use of water in Sections 2, 10 and 3; the water right claims however
only described Sections 2 and 10. The Referee determined that the RCW 90.14 claim for Section 2
also applied to land in Section 3 for the following reasons: 1) he noted that there was only a small
amount of land irrigated in section 3 (6 acres); 2) the Section 2 and 3 lands were part of one field
with the bulk of the field being in Section 2 (some portion of 43 + acres – the remainder being in
Section 10); 3) the proximity of the irrigation ditch to the section line lying between Sections 2 and

² The Referee also broadly interpreted a claim submitted by Willowbrook in Subbasin 7. See Supplemental Report of Referee Subbasin 7 at 143

1 3, and; 4) perhaps most importantly, the fact that the water right claim asserted a right to irrigate 50
2 acres within a 40 acre place of use. Similar considerations applied to the Lind and Taylor analyses.

3 Those factors are, for the most part, not present in Willowbrook's situation. It asserts that
4 the claim should be considered to include acreage in an entirely different quarter section as well as
5 in the quarter section they did specify. Further, it asks that acreage from an entirely different
6 section be included. Moreover, the information Willowbrook did include in the claim form was
7 reasonable on its face – a 100-acre parcel within a 160-acre quarter section. Although it appears
8 that the land in the SW1/4, the SE1/4 and Section 23 make up one contiguous field, only 5% of that
9 field appears to be in the quarter section specified in the claim.

10 In sum, it appears that two different and very separate processes are in danger of being
11 blended together in this adjudication. The claims registration process (RCW 90 14 et seq.) is wholly
12 distinct from the adjudication process (RCW 90 03 110 - 245). The statutes are in different
13 sections of the water code. Complying with the Claims Registration statute is also an entirely
14 different process than how one goes about "proving" up a water right. Admittedly, what the
15 registration form contains is crucial information for determining a water right and limits that
16 decision. Essentially, that which is not claimed is relinquished. RCW 90 14 071. However, if a
17 claim form was incorrectly completed, then the appropriate process is to administratively amend the
18 claim pursuant to RCW 90 14 065, whether the discovery of that error occurs during an adjudication
19 or otherwise.

20 The Court can accept *de minimus* variations from the claim form in very limited
21 circumstances and the Referee should be hesitant to do so. Those variations must be minor and
22 comport with the remainder of the information set forth in the claim. Adsit, at 704. But if the
23 deviation from the claim form is more than *de minimus*, as it is here, then the legislature has
24 provided an administrative remedy for claim amendments that is separate from this court process.
25 There is no authority in RCW 90 03 or 90 14 to allow a court in a general water rights adjudication
to amend or deviate from the information set forth in a claim form. Therefore, Willowbrook's
Fogey Creek water right is limited to the lands in the SW1/4 of Section 14.

In the Supplemental Report, the Referee noted Willowbrook's request that water rights be
confirmed on the basis of 0.02 cfs and 4 acre-feet per acre. Supplemental Report at 96. In WRC
No 024277, Willowbrook claimed 900 acre feet for use on 100 acres. The use of water discussed
in the Supplemental Report is consistent with the request. The Court will confirm an annual

1 diversion of that quantity for the 5 acres irrigated in the SW1/4 of Section 14, amounting to 20 acre-
2 feet per year. The RCW 90.14 claim also allows diversion of up to 3 cfs; claimants request of 0.02
3 cfs per acre multiplied by 5 acres equals .10 cfs which the Court will confirm. The Referee found
4 that Fogey Creek has a natural production lasting no longer than through the end of May. However,
5 storm events, etc. may allow diversion of water outside that time frame. Thus the period of use
6 shall be from February 1 through October 31 for irrigation purposes and stockwatering. The Date
7 of Priority on the Claim indicates "prior to 1910." The Referee determined that numerous
8 homesteads have been combined to comprise Willowbrook Farms. Supplemental Report at 96-97.
9 The homestead that encompassed the SW1/4 of Section 14 was owned by Jason R. Forgey and
10 separated from federal ownership on June 30, 1876. Because the property is riparian, that shall
11 serve as the Date of Priority. The Point of Diversion shall be 2270 feet East and 18 feet north from
12 the SW corner of Section 14 being within the SW1/4, Section 14, T. 18N., R. 17 E. W.M. The
13 place of use shall be the SE1/4SE1/4SW1/4 of Section 14, T. 18N., R. 17 E. W.M. The Referee's
14 Schedule of Rights shall be so amended.

15 The Court will not comment on Ecology's denial of Willowbrook's claim amendment
16 request as that issue may return to this Court for consideration after a possible appeal from the
17 Pollution Control Hearings Board

18 e. Theiline P. Scheumann (Grousemont Farms) – Claim No. 01335

19 In its prior opinion, the Court addressed Theiline Scheumann's exceptions to the Referee's
20 Supplemental Report. In that opinion, the Court recommended that Ms. Scheumann pursue the
21 amendment process for one exception regarding the use of a spring in Section 24. See Exception
22 No. 5, Exceptions of Theiline Scheumann at p. 4 (filed April 30, 1997). The Referee had denied a
23 right to a spring on two grounds: The RCW 90.14 claim indicated the point of diversion was in
24 Section 25 rather than Section 24 and for failure to present evidence as to when the water was first
25 used. The Affidavit of Robert Mundy addressed the latter point to some extent regarding when the
spring was first used.

26 In its June 2, 2000 administrative decision, Ecology accepted Ms. Scheumann's request to
27 amend Water Right Claim No. 144933 and change the point of diversion from Section 25 to Section
28 24. However, Ecology denied the amendment request to change the linear description of the point
29 of diversion. With that modification, the Court will hereby GRANT Ms. Scheumann's claim to use
30 the spring. However, the Court must examine the record to determine if claimant's requested

1 quantification is supported. Further, to the extent that the spring is not located at the description set
2 forth in WRC No. 14493, Ms. Scheumann will need to comply with RCW 90.03.380 for a change in
3 point of diversion and should contact Ecology's regional office.


4 Claimant referred the Court to Exhibit B of its April 30, 1997 brief which contained the June
5 5, 1995 testimony of Robert Mundy before the Referee RP at pp. 125-127. In that testimony, Mr.
6 Mundy indicated the water is diverted from the spring on the neighbor's property through two
7 ditches and then undershoots the Packwood Canal and ultimately drains into a pond. Water is
8 diverted from the pond to irrigate land. Grousemont requests two rights for the unnamed spring --
9 one for 101 and one for 1212 acre-feet per year and has measured the natural flow of the spring and
10 determined it to be 1.1 cfs.

11 Pursuant to the analysis set forth above for Willowbrook Farms, the Court will not deviate
12 from the information provided in Water Right Claim No. 144933. The evidence is not consistent
13 with two separate rights for the spring. The spring emerges on one section and is used on another
14 and there is no evidence those two sections were homesteaded together which would be necessary
15 to support a riparian right. Further, rights that were not documented by a water right claim are
16 relinquished. RCW 90.14.071. WRC No. 144933 indicates that 1 cfs is instantaneously diverted
17 with 200 acre-feet diverted annually. The Point of Diversion described is 170 feet south and 1290
18 feet west from the northeast corner of Section 24 being within the NE1/4NE1/4 of section 24, T. 12
19 N., R. 17 E. W. M. As noted above, if the water is diverted at a different linear description, the
20 claimant should contact Ecology and comply with RCW 90.03.380 regarding a change in the point
21 of diversion. Although the claim references irrigation of 500 acres, Ms. Scheumann only asks for a
22 right to irrigate 65 acres and provide stockwater. However, based on DE - 11, Grousemont appears
23 to be using water within the SW1/4NE1/4 and the SE1/4NW1/4 of Section 19, T. 18N., R. 18
24 E. W. M. That place of use is similar to that set forth in claimant's Right No. 2 which asserted a
25 right to irrigate 60 acres. The Court will therefore confirm a right for irrigation of 60 acres. See also
DE - 11. WRC No. 144933 provides for stockwater, therefore, the diversion is supported year
around and may be used for irrigation from March 1 through October 31. The evidence regarding
Date of Priority places the date at approximately 1902 so the Court will grant the request for a date
of January 13, 1902. The Court confirms a right for the use of 1 cfs, 200 acre-feet per year for the
irrigation of 60 acres in the SW1/4NE1/4 and SE1/4NW1/4 of Section 19, T. 12N., R. 18 E. W. M.
The Referee's Schedule of Rights shall be modified accordingly.

1 **IV. CONCLUSION**

2 This Opinion and Order resolves all remaining exceptions to the Referee's Supplemental
3 Report for Subbasin 8 and shall therefore proceed to Conditional Final Order as set forth in the
4 attached Proposed Conditional Final Order.

5 Dated this 3rd day of August, 2000.

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8 Sidney Ottem, Court Commissioner
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