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YAKIMA COUNTY WASHINGTON

**YAKIMA RIVER BASIN
WATER RIGHTS ADJUDICATION**

AUG 06 1992

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

**REPORT OF REFEREE
RE: SUBBASIN No. 21
(BURBANK)**

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

REPORT OF REFEREE - VOLUME 12

7675

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)
7 THE PROVISIONS OF CHAPTER 90.03,)

No. 77-2-01484-5

8 THE STATE OF WASHINGTON,)
9 DEPARTMENT OF ECOLOGY,)

REPORT OF REFEREE
Re: Subbasin No. 21
(Burbank)

10 Plaintiff,)
11))

12 v.)
13))

14 JAMES J. ACQUAVELLA, et. al.,)
15))

16 Defendants.)
17))

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

20 I. BACKGROUND

21 This report concerns the determination of the surface water rights of the
22 Yakima River basin, specifically those rights located within Subbasin No. 21, the
23 Burbank drainage basin. The criteria consisting of applicable law and bases for
24 water right determinations used by the Referee in the evaluation of claims can be
25 found in the Report of the Referee to the Court, Preface to Subbasin and Major
26 Category Reports, Volume 2, dated May 18, 1988.

27 The Referee conducted evidentiary hearings on May 22 and 23, 1990.

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II. FIELD INVESTIGATIONS

Field surveys were conducted by Department of Ecology (DOE) staff during 1989 on July 7, 12, 13, 20, 25, 27, and August 7, and on January 25, 1990, to obtain information regarding existing water use patterns in Subbasin No. 21. Aerial photographs, topographic maps, county assessor's plats, and on-site field investigations were used to prepare map exhibits showing the location of ditches, pipelines, pumps, wells and other pertinent features of the water systems.

III. WATER DUTY

The Plaintiff State of Washington submitted an exhibit entitled "Supplemental Documentary Information, Burbank Subbasin No. 21", which included information on soils, climate, irrigation and farming practices, and plant needs, meant to aid the Referee in determining irrigation water requirements within the subbasin. In addition, two expert witnesses for the U.S. Bureau of Reclamation testified to provide general information regarding crop irrigation requirements for water delivered to farms in the subbasin. In the absence of definitive testimony or other evidence, the Referee proposes to rely upon such expert testimony, and will calculate the maximum duty of water for the various uses in Subbasin 21 according to the following formulae:

- A. Domestic Supply (in-house)
and Stock Water0.01 cfs; 1 acre-foot per
year per residence
- Domestic supply (with small
lawn and garden).....0.01 cfs; 1 acre-foot per
year
- Domestic supply and large
lawn and garden up to
½ acre.....0.02 cfs; 2 acre-feet per
year
- Stock Water.....1 acre-foot per year
(diversion)

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1 B. Irrigation Water -- In order to be reasonably lenient about
2 irrigation cropping patterns, the Referee will use an annual water duty of
3 5 acre-feet per acre for irrigation of orchards and 6 acre-feet per acre for
4 pasture/alfalfa. Such duties represent a maximum annual water volume for
5 prevalent irrigation uses in this area and are approximately commensurate with
6 duties utilized by the DOE in quantity allocations under the water right permit
7 system.

8 The maximum rate of diversion or withdrawal will be calculated on the basis
9 of 1.0 cubic foot per second (449 gallons per minute) for each 50 acres of
10 irrigation, irrespective of the type of crop. For each irrigated acre, the
11 Referee has calculated the maximum instantaneous rate of diversion to be 0.02
12 cubic foot per second (9 gallons per minute). It is the Referee's opinion that
13 the aforementioned duties of water are reasonable maximum application rates for
14 the soil and topographic conditions in Subbasin 21.

15 It should be noted that the use of water under all irrigation rights is
16 limited to the amount of water that can be beneficially applied to the number of
17 acres identified in the water right. The number of irrigated acres cannot be
18 increased in the future without obtaining an additional water right.

19 IV. STIPULATIONS

20 Three stipulations were adopted during the hearing, as among all claimants
21 and their counsel. The first stipulation, concerning the use of exhibits and
22 testimony, reads as follows:

23 "It is hereby stipulated by all claimants in the above-entitled cause that
24 all exhibits entered and all testimony taken at the hearing on claims held
25 beginning May 22, 1990, may be utilized by any party in the proof of a
26 claim or the contesting of a claim whenever relevant and material."

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The second stipulates to the description of properties identified in the claims of the defendants to this action, as follows:

"It is hereby stipulated that the description of lands set forth in the claims of the respective claimants is the correct description of the lands for which the water right is claimed and that such claim will constitute proof of the ownership thereof in the absence of a contest as to such title."

In the third, the parties stipulated to the following in relation to "non-diversionary" stock and wildlife watering use with regards to Subbasin No. 21:

1. Waters in natural watercourses in the subbasin shall be retained when naturally available, in an amount not to exceed 0.25 cubic feet per second (cfs), for stock water uses in such watercourses as they flow across or are adjacent to lands, which are now used as pasture or range for livestock. Retention of such water shall be deemed senior (or first) in priority, regardless of other rights confirmed in this cause. Regulations of these watercourses by the plaintiff shall be consistent with such retention requirements.

2. Waters in natural watercourses in the subbasin shall be retained when naturally available, in an amount not to exceed 0.25 cubic feet per second (cfs), for wildlife watering uses in such watercourses as they flow across or are adjacent to lands, which are now used as pasture or range for wildlife. Retention of such water shall be deemed senior (or first) in priority, regardless of other rights confirmed in this cause. Regulations of these watercourses by the plaintiff shall be consistent with such retention requirements.

3. Waters in naturally occurring ponds and springs (with no surface connection to a stream) in the subbasin shall be retained for stock water uses, when such ponds and springs are located on or adjacent to lands which are now used as pasture or range for livestock. Said uses embody entitlements to a level in the water bodies sufficient to provide water for animals drinking directly therefrom while ranging on riparian lands, and with the same priority as provided in paragraph 1. Regulation of the ponds and springs by the plaintiff shall be consistent with such retention requirements.

4. Waters in naturally occurring ponds and springs (with no surface connection to a stream) in the subbasin shall be retained for wildlife watering uses, when such ponds and springs are located on or adjacent to lands which are now used as pasture or range for wildlife. Said uses embody entitlements to a level in the water bodies sufficient to provide water for wildlife drinking directly therefrom while ranging on riparian lands, and with the same priority as provided in paragraph 2. Regulation of the ponds and springs by the plaintiff shall be consistent with such retention requirements.

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5. Nothing in this stipulation mandates that any lands, associated with water rights or water retention as provided herein, shall be reserved for wildlife purposes."

V. LAND DESCRIPTIONS

In the interest of minimizing future controversy and confusion relating to confirmed rights, the Referee has chosen to reduce legal descriptions of properties to the smallest reasonable legal subdivision in which are contained the actual places of use.

VI. WATER RIGHT PRIORITIES

When the testimony and evidence leading to a confirmed right are no more specific with respect to the priority date than the year, the Referee has elected to use the 30th of June to represent the midpoint of that particular year. In those instances when the priority to be confirmed only specifies the month, the last day of that month has been used.

VII. TESTIMONY AND REFEREE'S ANALYSES

Plaintiff Testimony

Ms. Ceil Buddeke and Ms. Kerry O'Hara, Assistant Attorneys General, represented the Plaintiff State of Washington, Department of Ecology.

The State introduced into evidence the following generic exhibits:

| <u>NUMBER</u> | <u>DESCRIPTION</u> |
|---------------|--|
| SE-1 | Map -- Subbasin No. 21, with Inset A. |
| SE-2 | Map -- Inset B. |
| SE-3 | Water Right Certificates, Permits, Surface Water Claims RE: Subbasin No. 21. |
| SE-4 | Report & Supplementary Documentary Information -- Subbasin 21. |

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Additionally, oral testimony was given by Ms. Tammy Hall, Field

Investigator, Ecology Adjudication Section.

Claimant Testimony

Twenty defendants filed statements of claim or notices of appearance. All claimants and their legal counsel, if so represented, are as follows:

| Court Claim No. | Name | Attorney | Page(s) |
|-----------------------|--|----------|------------|
| 1986 | Mary E. Barrett 221 Turner Lane Yakima, WA 98901 | | 9, 38, 40 |
| 2090 | George E. Coson, III 801 Country Club Drive Yakima, WA 98901 | | 12, 39 |
| 1625 | Randy E. and Pamela S. Covey 561 Sheets Road Yakima, WA 98901 | | 13, 39 |
| 1135 | Lloyd L. and Kathryn M. Day 6611 Norman Road Yakima, WA 98901 | | 12, 39 |
| 1625 | Archie Dean c/o Jack and Susan Dean 1112 Balmora Street Lafayette, CO 80026 | | 13, 39 |
| 4706 | Duane and Alvina Dormaier 104 North 67th Avenue Yakima, WA 98908 | | 15, 38, 39 |
| 0760 | Edna and Larry Drecksel 171 Turner Lane Yakima, WA 98901 | | 17, 39 |
| 2350 | Evergreen State Properties, Inc. c/o Kenneth Kent, President 6081 East Lake Sammamish Road NE Redmond, WA 98052 | | 17, 38 |

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| | | |
|---------|--|--|
| 0050 | John Evers and Frank J. and Maravell A. | 18, 39 |
| 0682(A) | Gonsioroski | |
| 2748(A) | The Estate of Bertha and Walter Evers 2511 Beaudry Road Moxee, WA 98936 | |
| 0668 | Omer G. and Elsie A. Gress 309 South 41st Street Yakima, WA 98901 | 18, 39 |
| 0645 | John E. and Carol R. Hilton | 19 |
| 4582(A) | 2219 Fairview Avenue East #4 | |
| 4583(A) | Seattle, WA 98102 | |
| 0645 | Alan and Roxanne Leach | 19, 38, 39 |
| 4582(A) | 650 Pond Road | |
| 4583(A) | Yakima, WA 98901 | |
| 1610 | Kenneth M. and Leslie R. Lydin Route 3, Box 714 Yakima, WA 98901 | 20, 38, 39 |
| 2303 | Simon J. Martinez, et. al. 13391 Hwy 24 Moxee City, WA 98936 | Ronald E. Long, Agent 22, 39 Agro-Serv Box 4004, Chinook Tower Yakima, WA 98901 |
| 1252 | N. N. Eaton and Sons | 24, 28, 38, 39, |
| 1253 | Route 2, Box 127 | 41 |
| 1237 | Ellensburg, WA 98926 | |
| 1907 | Peoples National Bank Special Assets-WWH 756 P.O. Box 720 Seattle, WA 98111 | James P. Hutton 29, 39 P.O. Box C2550 Yakima, WA 98907 |
| 1249 | Emile L. Robert, Jr. and | 30, 31, 38, 39 |
| 1251 | Victor E. Robert 3406 Ahtanum Road Yakima, WA 98903 | |
| 1165 | Theodore A. Roy 480 Pamona Hgts. Road Yakima, WA 98901 | 33, 38, 39 |

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| | | | |
|------|---|--|----------------|
| 1653 | Selah-Moxee Irrigation District ¹ c/o Gerald Helde 1905 South 47th Avenue Yakima, WA 98908 | McArdel, Dohn, Talbot and Simpson ² 308 North 2nd St. Yakima, WA 98901 | See footnote 1 |
| 1902 | Mildred Shemeld P.O. Box 520 Stanwood, WA 98292 | James P. Hutton P.O. Box C2550 Yakima, WA 98907 | 34, 39 |
| 1206 | John E. Smets 6830 SW Bonito Road Portland, OR 97224 | | 34, 39 |
| 2276 | United State of America ³ Bureau of Reclamation | Charles E. O'Connell U. S. Dept. of Justice P. O. Box 44378 Washington, D.C. 20026-4378 | See footnote 3 |
| 1625 | Elizabeth Waid P.O. Box 305 Selah, WA 98942 | | 13, 39 |
| 0589 | Washington State Department of Natural Resources Attn: Mirian Louckers Lands and Metals Division MS LB-13 Public Lands Building Olympia, WA 98504 | Paul Silver Asst. Atty. General Public Lands Bldg. MS: QW-21 Olympia, WA 98504 | 36, 38, 39 |
| 2109 | Washington State Department of Wildlife 600 North Capitol Way Olympia, WA 98504 | William Frymire Asst. Atty. General Temple of Justice Olympia, WA 98504 | 37, 39 |

¹The Selah-Moxee Irrigation District is a Major Claimant in the Yakima River Drainage Basin adjudication proceedings. Claims filed by the district will be heard at the Evidentiary Hearings for Major Claimants.

²Since the Evidentiary Hearing, this firm name has been changed to Dohn, Talbott, Simpson, Gibson and Davis.

³The United States is a Major Claimant in the Yakima River Drainage Basis Adjudication proceedings. Claims filed by the United States will be heard at the Evidentiary Hearings for Major Claimants.

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0134 Yakima Asphalt Paving Company
0097 c/o Max Vincent, Asst. Sec.
P.O. Box 214
Yakima, WA 98901

The following claimant is the one whose claims, either in whole or in part, were recommended for confirmation (See page 5 in the Plaintiff's Report to the Referee), and to which no exceptions were taken.

| <u>Name</u> | <u>Court Claim No.</u> |
|-------------------------------|------------------------|
| Yakima Asphalt Paving Company | 0134 |

Specific elements of the proposed rights for the claimant are identified in the Findings of Fact commencing on page 42.

The remaining claims (consisting of those claims for which no recommendation for confirmation was made) were scheduled to be heard during the evidentiary trial which commenced on May 22, 1990. Based upon the testimony and evidence provided to the Referee, the analysis of all remaining claims is as follows:

COURT CLAIM NO. 1986 -- Mary E. Barrett

A Statement of Claim to the Court was filed by Mary E. Barrett claiming the use of water from an unnamed creek for irrigation of lawn, garden and 10 acres of pasture. Ms. Barrett testified in behalf of the claim during the Evidentiary Hearing.

According to Ms. Barrett's testimony, the property was originally homesteaded by George Parrish in 1872. A filing of water use with the Yakima County Auditor on August 1, 1872 was noted in Ms. Barrett's Court Claim; however,

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the Claimant did not offer a copy of the notice as evidence. The next residents of record were the Troutmans, followed by Anne Laura Lockwood.

Although the Claimant's residence was built in 1910, there are, on the property, remnants of another structure which had burned down. Ms. Barrett testified that the current residence replaced the burned structure, which she believed to be the original homestead.

An unnamed creek originates from a swamp area northeast of the Claimant's property and flows in a southerly direction through the Barrett property. Ms. Barrett stated that the creek flows continuously year-round. The property was first irrigated using rill irrigation. Pumps were installed in the creek in 1953 or 1954, apparently during Ms. Lockwood's ownership. There was an old horse-drawn ditcher on the property, and an old wooden flume ran through the yard to the grape arbor. The Troutmans told Ms. Barrett that the wooden flume was used to irrigate the area around the house and the grape arbor, which still produces grapes. Ms. Barrett testified that water from the creek has been used to irrigate the pasture and yard, possibly since 1872. Wildlife and livestock may drink from the unnamed creek, although presently there are no livestock.

Ms. Barrett purchased her property in 1955 and for a short time operated a dairy. She currently owns 16 acres lying southeasterly of I-82. A 20 acre pasture was reduced to 8 acres, when I-82 was constructed in the 1970's. A 3/4 BHP pump is installed in the creek to irrigate 1/2 acre of lawn and garden. The pasture was last irrigated in 1980, although a 5 BHP pump has been left in the pasture so it could be irrigated again.

Under Chapter 90.14, failure to beneficially use a water right without "sufficient cause" for five consecutive years subjects said water right to relinquishment for nonuse. One "sufficient cause" is the operation of legal

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1 proceedings (see Section 90.14.140(1)(d)), such as the general adjudication
2 proceedings for the Yakima River Drainage Basin, which was initiated in October
3 1977. Therefore, there is no relinquishment of the portion of the right that has
4 not been exercised since 1980.

5 Ms. Barrett is entitled to an unspecified number of shares from the Selah-
6 Moxee Irrigation District. A District standpipe discharges water into the creek
7 channel, thereby co-mingling waters from the unnamed creek and the District. Ms.
8 Barrett only gets water from the District when no one updrainage is using the
9 water and it overflows from the standpipe.

10 Water Right Claim No. 146331 was filed by Richard S. Barrett in response to
11 the Water Right Claims Registration Act, Chapter 90.14 RCW. Claiming the use of
12 water from an unnamed swamp for irrigation of 10 acres, he described the point of
13 diversion as 990 feet north and 1720 feet east from the southeast corner of
14 Section 30, being within the SE $\frac{1}{4}$ SE $\frac{1}{4}$, T. 14 N., R. 19 E.W.M. The date of first
15 use was given as 1940.

16 Ms. Barrett was certain that the yard was irrigated since 1872, the date of
17 the original homestead. She was less certain about the garden area. However, it
18 would be reasonable to conclude that, with the original homestead dating back to
19 1872, there was irrigation of a subsistence garden of as much as $\frac{1}{2}$ acre, a common
20 practice at that time.

21 Under the Prior Appropriation Doctrine, a water right can be confirmed to
22 the extent that water use was established prior to implementation of the Surface
23 Water Code on June 6, 1917. Based on the evidence and testimony, the Referee
24 concluded that there is a right to the irrigation of $\frac{1}{2}$ acre of lawn and garden
25 and 8 acres of pasture, and for both stock and wildlife water use since 1872.

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1 The Referee recommends that a right be confirmed to Ms. Barrett under the
2 Prior Appropriation Doctrine with a priority date of August 1, 1872, in the
3 amounts of 0.18 cfs, and 50 acre-feet per year for irrigation of ½ acre of lawn
4 and garden, and 8 acres of pasture from April 1 to October 31. Stock and
5 wildlife water use on the Barrett property are covered by the non-diversionary
6 stock and wildlife stipulation.

7 The right recommended is subject to any existing rights on the property,
8 and may be affected by the amount of water provided to the Claimant's property by
9 the Selah-Moxee Irrigation District through the discharge from the standpipe.
10 The Selah-Moxee Irrigation District is a Major Claimant whose claims will be
11 considered during Evidentiary Hearings for the Major Claimants.

12 COURT CLAIM NO. 2090 -- George E. Coson, III

13 George E. Coson, III, filed a Statement of Claim with the Court asserting a
14 right to use water from the Yakima River via the New Shano Ditch and the Selah-
15 Moxee Irrigation District. Mr. Coson did not make an appearance during the
16 Evidentiary Hearing to provide testimony regarding his claim. Consequently, the
17 Referee cannot recommend confirmation of a water right to Mr. Coson.

18 The Plaintiff's Investigation Report indicates that Mr. Coson has claimed
19 surface water rights for property served by the Selah-Moxee Irrigation District.
20 Claims filed by the irrigation district will be considered during Evidentiary
21 Hearings for the Major Claimants.

22 COURT CLAIM NO. 1135 -- Lloyd L. and Kathryn M. Day

23 A Statement of Claim to the Court was submitted by Lloyd L. and Kathryn M.
24 Day for use of waters from the Roza Irrigation District and the Selah-Moxee

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1 Irrigation District. The Days did not make an appearance during the Evidentiary
2 Hearing to provide testimony regarding their claim. Therefore, the Referee
3 cannot recommend confirmation of water rights under the Day claim.

4 It is possible that use of water on this property may be covered by water
5 rights of the Roza and Selah-Moxee Irrigation Districts. The Roza and Selah-
6 Moxee Irrigation Districts are Major Claimants whose claims will be considered
7 during the Evidentiary Hearings for Major Claimants.

8 COURT CLAIM NO. 1625 -- Archie M. Dean, Elizabeth Waid, and
9 Randy and Pamela Covey

10 Connie E. Stephens submitted a Statement of Claim to the Court claiming the
11 use of waters from seepage and other sources for irrigation of 5.46 acres.
12 Archie M. Dean was substituted for Ms. Stephens, March 14, 1986. Randy and
13 Pamela Covey became additional parties to this claim on April 12, 1989, and on
14 July 18, 1989, Elizabeth Waid was joined to the claim. Mr. Dean is now deceased
15 and Ms. Waid has succeeded to his share of the property. Mr. Covey testified in
16 behalf of his portion of the claim at the Evidentiary Hearing; however, Ms. Waid
17 did not make an appearance.

18 Based on the testimony, the Covey's home was built in 1938 by a previous
19 owner, Harold Moss. Mr. Covey believes the land has been farmed since at least
20 1938, and the canal that crosses his property has been used by stock and wildlife
21 for drinking purposes. According to Mr. Covey, the testimony of a neighboring
22 claimant (Mary Barrett) would lead him to believe that his property was developed
23 and irrigated around the same time period as hers. The court claim submitted by
24 Ms. Stephens indicated that a deed was recorded August 17, 1896, with the Yakima

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County Auditor's Office in Volume A of Deeds, Page 603. A copy of the deed was not provided to the court.

Water is diverted from a swamp area located north of the property and is conveyed to and through the property in a canal which flows continually, year around.

Mr. Covey testified that he presently owns 2 acres of the subject property and has plans to purchase an additional acre. Ms. Waid owns one acre, and the remaining acreage is owned by two other unidentified parties. Mr. Covey has a 2 BHP pump installed and, using handlines, irrigates approximately 1½ acres of pasture plus the ½ acre yard around the home. He also has two steers.

No evidence or testimony was provided to establish a water use prior to June 6, 1917, under the Prior Appropriation Doctrine, or prior to December 31, 1932, as required under the Riparian Doctrine. In addition, no claim was filed for this property by Mr. Covey, Mr. Dean, Ms. Waid, or any predecessor owner, under the Water Right Claims Registration Act, Chapter 90.14 RCW. Failure to file a water right claim results in waiver and relinquishment of any right that may have existed. Therefore, the Referee cannot recommend that a right be confirmed for the Coveys or for any other party to this claim.

According to the testimony, the Coveys also receive an unspecified quantity of water from the Selah-Moxee Irrigation District. Although the supply was described as unreliable, the Selah-Moxee Irrigation District may be a source of water for the property covered by this claim. As a Major Claimant in the adjudication process, claims to water by the irrigation district will be considered during the Evidentiary Hearings for Major Claimants.

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1 Duane and Alvina Dormaier filed a Statement of Claim with the Court
2 asserting a right to use of three springs: Mud Spring No. 1, Mud Spring No. 2
3 and Mud Spring No. 3 for stock water, future domestic use and irrigation of farm
4 and orchard. Testifying in behalf of the claim during the Evidentiary Hearing
5 was Duane Dormaier.

6 During the Evidentiary Hearing Mr. Dormaier submitted exhibits and
7 presented testimony to amend his claims to the use of the water and to clarify
8 the names of springs on the Claimants' property, as follows: Mud Spring No. 1 is
9 the true name of that spring; Mud Spring No. 2 is known as the Unnamed Spring;
10 and Mud Spring No. 3 is known as Chucker Spring. These springs will be referred
11 to by the names given during the testimony.

12 Mr. Dormaier testified that his property was originally part of a homestead
13 that included the Kenneth and Leslie Lydin property, and asked that the Lydins'
14 testimony to use of water since the early 1900's also apply to the Dormaier
15 property. In 1920, the land was owned by George Jackson, and in 1930, the
16 property owner (Bohoskey) installed a cistern in Mud Spring. In 1968, Robert and
17 Sons tore down cattle pens that had been on the property. The Dormaiers
18 purchased their property from the Roberts in 1983, and began developing their
19 garden area and making improvements to the existing system.

20 During the system upgrade of Mud Springs No. 1, Mr. Dormaier found several
21 items which indicated to him that the property had been homesteaded or water used
22 in some manner: Old wood pipe, rusty steel pipe, concrete pipe and new piping;
23 square nails, buckboard springs and various types of bricks and concrete. The
24 Claimant stated that pipe had been installed in Mud Spring No. 1 and conveyed

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1 water via gravity flow down the ravine. Mr. Dormaier testified that all the
2 springs in this area have been used as a source for wildlife and livestock water.

3 Mud Spring No. 1 and the Unnamed Spring are presently used for continuous
4 wildlife and livestock water, continuous domestic supply and irrigation of 2
5 acres. Chucker Spring is presently used for wildlife and livestock water.

6 In the Plaintiff's Report, the State recommended that a non-diversionary
7 stock water and wildlife right be confirmed to the Dormaiers.

8 A claimed water right under the Prior Appropriation Doctrine can be
9 confirmed only to the extent that water use was established prior to
10 implementation of the Surface Water Code on June 6, 1917. Under the Riparian
11 Doctrine the land must have been severed from Federal ownership prior to June 6,
12 1917, and the water use must have commenced prior to December 31, 1932. No
13 evidence or testimony was submitted to substantiate uses meeting these criteria.

14 Additionally, the rights to use water under both the Prior Appropriation
15 Doctrine and the Riparian Doctrine must have been protected by the filing of a
16 Chapter 90.14 water right claim. No Chapter 90.14 Claims were filed for the
17 Dormaiers property. Failure to file, as required by the Claims Registration Act,
18 results in waiver and relinquishment of any water right that may have been
19 established.

20 Consequently, the Referee cannot recommend confirmation of water rights
21 from Mud Spring No. 1 or Unnamed Spring (Mud Spring No. 2) for domestic supply or
22 irrigation. The Referee does recommend that rights to the three springs be
23 confirmed for non-diversionary wildlife and livestock water. The stock water and
24 wildlife stipulation adequately provides for these uses.

25 The Dormaiers have submitted three Surface Water Applications to the
26 Department of Ecology under the provisions of RCW 90.03 and temporary permits

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1 have issued. Upon completion of the Yakima River Drainage Basin Adjudication,
2 water right decisions will be made on the Dormaiers' Surface Water Applications.

3 COURT CLAIM NO. 0760 -- Edna and Larry Drecksel

4 Edna and Larry Drecksel submitted a Statement of Claim to the Court
5 asserting a right to use of water from the Yakima River via the Selah-Moxee
6 Irrigation District. The Drecksels failed to appear during the Evidentiary
7 Hearing in support of their claim. Therefore, the Referee recommends that the
8 claim filed by the Drecksels be denied. However, the Drecksels may receive water
9 through the Selah-Moxee Irrigation District whose claim will be considered during
10 the Evidentiary Hearings for Major Claimants.

11 COURT CLAIM NO. 2350 -- Evergreen State Properties, Inc.

12 A Statement of Claim to the Court claiming a right to use a stream and
13 water seeping from the Roza Canal for stock water was filed by Kenneth Kent on
14 behalf of Evergreen State Properties, Inc. Mr. Kent did not appear during the
15 Evidentiary Hearing to provide testimony regarding the claim.

16 The Plaintiff's Report to the Referee recommended that a right be confirmed
17 to Evergreen Properties, Inc. for non-diversionary livestock supply from an
18 unnamed spring. The non-diversionary livestock stipulation adequately covers
19 this stock water use on the Evergreen property.

20 The Referee notes that the Court Claim, Water Right Claim and the
21 Plaintiff's investigation report identify uses other than the stock water uses
22 recommended in the Plaintiff's report. Without testimony in support of those
23 claims, the Referee cannot recommend that a right be confirmed to Evergreen State
24 Properties, Inc. beyond the stock water stipulation.

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COURT CLAIM NO. 0050 AND 0682 -- John E. Evers and Frank J. and Maravell A.
Gonsioroski

Two Statements of Claim to the Court were submitted by Walter and Bertha M. Evers for use of water from a well, which had not yet been drilled, and the Moxee-Hubbard Irrigation District. On February 11, 1985, Frank J. and Maravell A. Gonsioroski and John D. Evers were substituted as heirs to the Estate of Walter and Bertha M. Evers. The Gonsioroskis and Mr. Evers failed to appear during the Evidentiary Hearing to provide testimony regarding their claim. Consequently, the Referee cannot recommend confirmation of a right to this claim. However, it is noted that the property has been served by the Moxee-Hubbard Irrigation District which is a Major Claimant whose claims will be considered during the Evidentiary Hearings for Major Claimants.

Additionally, the General Adjudication of the Yakima River Drainage Basin is for surface waters only. Groundwater sources, existing or future, are not being addressed, and the proposed well claimed by the Evers would not have been considered.

COURT CLAIM NO. 0668 -- Omer G. and Elsie A. Gress

Omer G. and Elsie A. Gress submitted a Statement of Claim to the Court asserting a right to the use of water via the Selah-Moxee Irrigation District. Mr. Gress appeared during the Evidentiary Hearing in support of his claim.

According to his testimony, Mr. Gress receives water only from the Selah-Moxee Irrigation District, and no other surface water source is used. The Selah-Moxee Irrigation District is identified as a Major Claimant and will be afforded an opportunity to present testimony and evidence at the Evidentiary Hearings for

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Major Claimants. Therefore, the Referee recommends that the individual claim filed by Omer G. and Elsie A. Gress be denied.

COURT CLAIM NO. 0645 -- Alan and Roxanne Leach

A Statement of Claim asserting a right to the use of water from an unnamed pond for irrigation of 6 acres was submitted to the Court by John E. and Carol R. Hilton. On August 4, 1989, Alan and Roxanne Leach were joined as additional parties to this claim. Mr. Leach and Mr. Hilton both testified at the Evidentiary Hearing in behalf of the claim.

The testimony indicated that Mr. Hilton purchased the property in 1969. At that time it had not been irrigated for 1 to 2 years. He irrigated pasture from the pond, which had been enlarged in 1974, and also had a few head of livestock. The property may have abutted the Yakima River at one time. It also had an unfinished home that was moved when I-82 was constructed. Mr. Hilton believed that the property may have been homesteaded 50 or 70 years ago and was probably irrigated sometime prior to his purchasing the property.

Pursuant to RCW 90.14, the Hiltons submitted Water Right Claim No. 113269 for use of 30 gallons per minute (gpm) from a pond for irrigation of 5 acres. The date of first use claimed was June 1, 1971, the same as described in Court Claim No. 0645.

The Leaches' purchased the property in 1987 and presently irrigate 4 acres of trees and pasture from this pond through the use of a 2 BHP pump that can run 10 sprinklers (handlines). Stock also water from the pond. The Claimant requested that his date of first use be changed from 1971 to 1969, the date when Hiltons purchased the property. Neither Mr. Leach nor Mr. Hilton could specifically cite an earlier date of first use through testimony or evidence.

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Without a certificated right, or proof of water use prior to June 6, 1917, under the Prior Appropriation Doctrine, or prior to December 31, 1932, under the Riparian Doctrine, the Referee has no basis for recommending confirmation of a right to this claim.

Water may be appurtenant to this land from the Selah-Moxee Irrigation District, since there is an irrigation district outfall on the property; however, there was no indication that District water is being used. As a Major Claimant, the District will have an opportunity to present testimony and evidence during the Evidentiary Hearings for its claims.

The Referee is unable to recommend that a right be confirmed for use of the pond for irrigation. The non-diversionary stock water stipulation adequately covers the stock water use on Mr. Leach's property, and the Referee recommends that a right be confirmed only for the stipulation.

COURT CLAIM NO. 1610 -- Kenneth M and Leslie R. Lydin

Kenneth M. and Leslie R. Lydin submitted a Statement of Claim to the Court asserting the use of water from an unnamed spring for continuous domestic supply and stock water. Mr Lydin appeared during the Evidentiary Hearing to provide testimony in support of their claim.

Mr. Lydin testified that his research of Kittitas County records led him to believe water had been utilized from this unnamed spring prior to 1900, for stock water and for domestic purposes by the herders. When he moved onto the property about ten years ago, there was a cookhouse and bunkhouse located amongst several cottonwood trees that appeared to have been planted some time ago, probably for shade. Although Mr. Lydin did not know the specific age of the trees, they were about three feet in diameter and he felt they had been planted many years ago.

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1 Testimony revealed that the Lydins use water from two unnamed springs, and
2 not just one as was claimed. Both are used for a maximum of 30 pairs of cows and
3 calves. The northern most spring is identified as Unnamed Spring No. 1 which is
4 used for continuous domestic supply for two residences, and for non-diversionary
5 stock water. Water is collected in a buried cistern and conveyed through a
6 series of buried tiles and a 4 inch pipeline approximately 1000 feet south to one
7 home, and from there to a second home approximately 150 feet east across the
8 driveway. Stock drink directly from this spring.

9 Mr. Lydin testified that the pipe in Unnamed Spring No. 1 conveyed water to
10 a stock trough on a second parcel (going under the road), where the pipe then
11 discharges. Mr. Lydin's neighbor, Mr. Emile Robert, had used this water in the
12 past for stock water purposes, as recently as 7 years ago.

13 The southern spring is identified as Unnamed Spring No. 2. Here, water is
14 collected in a buried cistern and conveyed through an underground pipeline to a
15 stock watering tank.

16 Other than his belief that water had been used from these springs prior to
17 1900, Mr. Lydin offered no history or documentation to establish an early
18 priority date or continuous use. Under the Prior Appropriation Doctrine, a water
19 right can be confirmed to the extent that water use was established prior to the
20 implementation of the Surface Water Code on June 6, 1917. Under the Riparian
21 Doctrine, land must have been severed from Federal ownership prior to June 6,
22 1917 and use of the water must have occurred prior to December 31, 1932.

23 In addition, no Chapter 90.14 Water Right Claim was filed by either Mr.
24 Lydin or any predecessor in interest on this property for the uses identified in
25 his testimony. Failure to file a such a claim constitutes a waiver and
26 relinquishment of any right that may have been established under the Prior

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1 Appropriation Doctrine or the Riparian Doctrine. Consequently, the Referee
2 cannot recommend that a right for domestic supply or diversionary stock water be
3 confirmed. The non-diversionary stock water stipulation adequately covers the
4 stock water use from Unnamed Spring No. 1.

5 Mr. Lydin has filed Surface Water Application No. S4-26302 with the
6 Department of Ecology and a temporary permit was issued. Final disposition of
7 that application and the temporary permit will be made by the Department of
8 Ecology upon the completion of the Yakima River Adjudication.

9 COURT CLAIM NO. 2303 -- Simon J. Martinez, et.al.

10 The Statement of Claim filed with the Court by Simon J. Martinez, et. al.
11 asserts a right to use waters from several springs in conjunction with the Yakima
12 Firing Center's livestock leasing program. Ronald Long represented Mr. Martinez
13 and testified in behalf of the claim at the Evidentiary Hearing.

14 Mr. Long indicated he was prepared to testify for all the springs Mr.
15 Martinez uses, both within and outside the boundaries of the Yakima Firing Center
16 (now the Yakima Training Center). It was the Referee's belief that the United
17 States Department of Defense would defend claims to the use of springs that arise
18 within the Yakima Firing Center, during Evidentiary Hearings for the Major
19 Claimants. Therefore, Mr. Long's testimony was confined to the use of Elk
20 Spring, the only spring under this claim that is within the Burbank Subbasin and
21 originates outside of the Yakima Firing Center boundaries.

22 According to Mr. Long, who relied in part on Mr. Emile Robert's testimony,
23 there were private ranches in the area, possibly as early as the 1900's. Stock
24 from the ranches would drink directly from nearby springs at the source location.

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1 In 1945, the Government condemned part of this rangeland area and created the
2 Yakima Firing Center.

3 Since the 1960's, Mr. Martinez has leased 12,000 acres in Unit 7 of the
4 Yakima Firing Center and has grazed between 500 and 600 head of cattle or their
5 equivalent in Animal Unit Months (AUM's). Water is diverted from Elk Spring, on
6 property formerly owned by Emile Robert, and piped under the freeway (I-82) to
7 five Powder River stock troughs on the leased land. Mr. Martinez began diverting
8 and conveying water into the troughs in the 1960's, but Mr. Long was unable to
9 cite a specific date. A valve on the Elk Spring system controls the diversion
10 which has also been used by Emile Robert for stock water on private property west
11 of I-82 (outside the Firing Center). Mr. Robert has sold this spring to Mr. Don
12 Lafferty, who is not a defendant in this case.

13 Neither Mr. Martinez nor the Yakima Firing Center filed a Chapter 90.14
14 Water Right Claim to divert water from Elk Spring for stock water. Under the
15 90.14 Claims Registration Act, failure to file a claim results in waiver and
16 relinquishment of any right that may have existed.

17 As a Major Claimant in these proceedings, the United States will have an
18 opportunity to present testimony and evidence at the Evidentiary Hearings for
19 Major Claimants. Any state-based rights that may exist for the Yakima Firing
20 Center will be determined at that time.

21 Additionally, no testimony or evidence was provided to establish the
22 existence of a right under the Prior Appropriation Doctrine or the Riparian
23 Doctrine. Therefore, the Referee cannot confirm a right under this claim.

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1 Statements of Claim submitted to the Court by N. N. Eaton on behalf of
2 N. N. Eaton and Sons assert use of the Yakima River for irrigation of 200 acres,
3 and of Squaw Creek for irrigation of 75 acres and stock water. The property has
4 since passed from N. N. Eaton to Mr. and Mrs. Jack W. Eaton and their son,
5 Robert. Jack W. Eaton (son of N. N. Eaton) and Ronald Long provided testimony at
6 the Evidentiary Hearing in behalf of the claims. The original court claims were
7 amended by testimony and submittal of exhibits dated May 22, 1990.

8 This property was homesteaded by Rowland A. Stebbins, who filed Notices of
9 Water Right on July 29, 1903. One notice was to use 4 cfs from the Yakima River
10 for domestic use, stock water and irrigation within the N½SE¼ and the S½NE¼ of
11 Section 4, T. 15 N., R. 19 E.W.M. Water was to be diverted by means of a current
12 wheel, and then conveyed to the property through dam reservoirs, flumes and
13 ditches. The second notice claimed an appropriative right to use 4 cfs from
14 Squaw Creek for irrigation, stock and domestic use on lands within the N½SE¼ and
15 the S½NE¼ of Section 4, T. 15 N., R. 19 E.W.M.

16 The Eaton family has owned this property since 1949 and is claiming both
17 Riparian and Appropriative rights. It was Mr. Eaton's impression that most of
18 this property was irrigated as early as 1903, although he could not specifically
19 state that all 180 acres had been historically irrigated from the Yakima River
20 diversion, nor could he describe the development schedule of prior owners.

21 The Claimants have a long-term management agreement with the Soil
22 Conservation Service (SCS) for this property. Part of the agreement includes
23 expanding irrigation from 180 acres to 200 acres, plus upgrading the pump and
24 distribution system to meet the water needs of the crops.

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1 The Eatons' irrigation from the Yakima River originally consisted of a
2 wheel flume system and a gas or diesel piston pump that delivered water up to a
3 field on the flats. Because this system was inefficient, it was replaced with
4 the current system in 1972. Mr. Eaton testified that they irrigate approximately
5 180 acres of alfalfa and grasses from the Yakima River using a 100 BHP turbine
6 pump with wheel lines and handlines. According to the testimony, this system is
7 also inefficient and does not provide an adequate quantity of water. At present,
8 the claimants use 1200 gallons per minute (2.67 cfs) and 1053 acre-feet per year.
9 Mr. Long indicated that the extremely windy conditions and sloping topography
10 require 1800 gpm or 4 cfs, and 1560 acre-feet per year to sustain irrigation on
11 these lands.

12 The Plaintiff Department of Ecology (DOE) has no record of a Chapter 90.14
13 water right claim by the Eatons for use of the Yakima River as described in Court
14 Claim No. 1237. Regarding this, the amended claim offered by Mr. Eaton during
15 the Evidentiary Hearing contained copies of the following:

16 1. An April 9, 1979 letter from Mr. N. N. Eaton to DOE noting that Water
17 Right Claims had been filed on February 27, 1974. He was sending another
18 one for the Yakima River, along with the \$2.00 fee, because he had never
19 received his copy.

20 2. A form letter sent from DOE on May 3, 1979, indicating that the claim
21 filing period had ended on June 30, 1974, and suggesting that a new water
22 right could be applied for at the Central Regional Office.

23 3. A July 11, 1979 letter From Mr. Jeffery Goltz, Assistant Attorney
24 General, returning the claim and filing fee, and stating that the time for
25 filing such claims had passed. Mr. Goltz did note parenthetically that the

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legislature recently allowed in Substitute Senate Bill 2794, section 4, late filings, and enclosed a copy of that legislation.

4. An undated letter from Jerry Eaton to DOE, stating that he, along with his father (N. N. Eaton), located, calculated and filed all water right claims for property owned by N. N. Eaton and Sons....and very definitely included the rights to water from the Yakima River. He indicated further that he didn't know why this claim would not show as being on file because it was the first one he started with and the Squaw Creek claim was second.

No testimony or evidence was offered to indicate that Eatons had attempted to file a late 90.14 Claim as suggested by Mr. Goltz. In the absence of such a Claim, the Referee must adhere to the Chapter 90.14 statutes, wherein failure to file the Water Right Claim results in waiver and relinquishment of any right that may have existed. Therefore, the Referee cannot recommend confirmation of a right to the Eatons for use of the Yakima River under Court Claim No. 1237.

Court Claim No. 1253 was amended, by testimony and an exhibit dated May 22, 1990, to use water from Squaw Creek for stock and to irrigate 50 acres instead of the 75 acres originally claimed. This includes 20 acres currently being irrigated, plus 30 acres not presently irrigated, but planned for future irrigation under their SCS management agreement.

An old home up the Squaw Creek drainage is believed to be the original Stebbins homestead. When purchased by the Eatons in 1949, the property was sprinkled and flood irrigated using ditches.

The 20 acres now being irrigated consists of two fields, both in a mixture of grass and alfalfa. One, known as the "rye patch", is approximately 12½ acres and was flood irrigated by means of a dam and ditches that were destroyed

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periodically when the creek flooded. In 1982, a five horsepower pump was installed to serve this field. The second field is about 7½ acres and is flood irrigated. Both are cut for hay about twice a year and then pastured.

Mr. Long testified that he calculated an instantaneous flow requirement of 464 gpm or 1 cfs for the 50 acres being claimed. (Note: 1 cfs actually equals 449 gpm, not 464 gpm.) Mr. Long further indicated his belief that a water duty of 8 acre-feet per acre was more appropriate for the the Eaton property, given the location, extreme wind conditions, slope and inefficient distribution system.

A Chapter 90.14 Water Right Claim was filed by N. N. Eaton for Squaw Creek, claiming 4 cfs, 2920 acre-feet per year for proposed irrigation of 75 acres and livestock. The place of use claimed is in Sections 1, 2, 3, 4 and 12, T. 15 N., R. 19 E.W.M.; Section 7, T. 15 N., R. 20 E.W.M.; Sections 34 and 35, T. 16 N., R. 19 E.W.M. The points of diversion are within the above described places of use. Date of first use claimed is July 29, 1903.

Testimony, indicating that the 30 acres planned for future irrigation may have been irrigated in the past, was inconclusive, but evidence did show that a right was established under the Prior Appropriation Doctrine in 1903. The land is also riparian to Squaw Creek and a right may have been established under the Riparian Doctrine when land separated from Federal ownership, presumably before 1903. Information in support of that possibility was not provided to the court. Therefore, the Referee recommends that a right be confirmed under the Prior Appropriation Doctrine with a priority date of July 29, 1903, an instantaneous diversion rate of 0.40 cfs, and an annual volume of 160 acre-feet for irrigating 20 acres from Squaw Creek.

Hay produced from the 20 acres on Squaw Creek, along with hay from the lands irrigated from the Yakima River, is used to feed the cattle through the

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1 winter. Mr. Eaton estimated that they have approximately 1000 cow/calf pairs
2 which may drink water directly from Squaw Creek, as well as the other developed
3 water sources on the Eaton property (41 springs, 3 ponds--Court Claim No. 1252).

4 The Plaintiff's Report to the Referee recommends that a right be confirmed
5 to the Claimants for non-diversionary livestock and wildlife water from streams,
6 and from naturally occurring springs and ponds.

7 COURT CLAIM NO. 1252 -- N. N. Eaton and Sons

8 N. N. Eaton and Sons submitted a Statement of Claim to the Court asserting
9 a right to use 40 springs and 3 ponds for stock water. Mr. Long testified that
10 the Eatons wished to amend their court claim to add two additional springs which
11 were inadvertently left off the original court claim. However, testimony
12 identified only one additional spring--Gus Spring, which is on property formerly
13 owned by the Robert family (Court Claim No. 1251) and leased by the Eatons.

14 Eatons' Court Claim No. 1252 referenced Chapter 90.14 Water Right Claims to
15 40 springs and three ponds. Thirty-three of the 90.14 claims apply to the
16 Burbank Subbasin, 31 for springs and two for ponds:

17 **Springs:** Claim Nos. 120681, 120682, 120684, 120685, 120686, 120687, 120688,
18 120689, 120690, 120691, 120692, 120693, 120694, 120695, 120696, 120700,
19 120701, 120702, 120704, 120705, 120706, 120707, 120708, 120713, 120715,
20 120716, 120721, 120722, 120723, 120725, and 120727;

21 **Ponds:** 120683 and 120724.

22 Review of DOE records revealed two additional Chapter 90.14 claims filed by
23 the Eatons for other springs in this Subbasin: Nos. 120719 and 120726. Testimony
24 indicated that stock have historically used the springs on the property for
25 watering purposes.

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1 The remaining Chapter 90.14 claims cited in this Eaton claim appear to be
2 for springs and one pond located in Subbasin No. 10 (Kittitas). They have been
3 addressed during the Evidentiary Hearing for that subbasin.

4 The Plaintiffs Report to the Referee recommended that a right be confirmed
5 to the Eatons under Claim No. 1252 for non-diversionary livestock and wildlife
6 uses from naturally occurring springs and ponds. The fact that no testimony was
7 offered to show diversionary uses from any of the springs or ponds leads the
8 Referee to recommend that a right be confirmed to the Eatons for non-diversionary
9 stock water from each of their springs and ponds identified as being within the
10 Burbank Subbasin. The non-diversionary stock water stipulation covers the uses
11 described above.

12 Use of Gus Spring for stock water was requested by Emile Robert during his
13 testimony on Day 2 of the Burbank Evidentiary Hearing. The property containing
14 Gus Spring has been leased by the Eatons from the Roberts and the current
15 (unnamed) owner. The Referee recommends that a non-diversionary stock water
16 right also be confirmed to the Eatons for Gus Spring.

17 COURT CLAIM NO. 1907 -- Peoples National Bank of Washington

18 According to Mr. James P. Hutton, attorney for Peoples National Bank, a
19 Statement of Claim was filed with the Court in order to protect a security
20 interest in this piece of property to which water may be delivered by the Selah-
21 Moxee Irrigation District. This security interest has since been released, and
22 the Referee was advised that this claim would not be pursued.

23 The Referee recommends that the Peoples National Bank claim be denied.

24
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1 Emile L. Robert Jr. and Victor E. Robert filed a Statement of Claim to the
2 Court asserting a right to use Burbank Creek for stock water and a proposed
3 future use to irrigate 130 acres. Mr. Emile L. Robert Jr. provided testimony in
4 behalf of the Roberts' claim at the Evidentiary Hearing.

5 According to the testimony, the Roberts purchased the property identified
6 in this claim in 1966, but did not develop it for irrigation as planned. This
7 land has now been sold, but the Roberts still own approximately 1521 acres in the
8 Burbank area along the Ellensburg highway.

9 Mr. Robert testified that this area had been developed by Kenny McCall and
10 George Jackson. McCall, Jackson and the Roberts' father all started in the sheep
11 business around 1917, and ran sheep in the Wenatchee National Forest, where they
12 had adjoining allotments and were neighbors. Mr. Robert believes the Burbank
13 area has a history of being used as rangeland for livestock and stock water use.

14 No Chapter 90.14 Water Right Claim was filed for Burbank Creek by the
15 Roberts. Under the Claims Registration Act, Chapter 90.14, failure to file such
16 a claim results in waiver and relinquishment of any right which may have existed.

17 Additionally, no evidence was provided to establish the use of water for
18 irrigation purposes on this property prior to June 6, 1917, or December 31, 1932,
19 as required by the Prior Appropriation Doctrine and the Riparian Doctrine,
20 respectively. Therefore, the Referee cannot recommend confirmation of a
21 irrigation water right to the claimants.

22 The Plaintiff's Report to the Referee recommended that a right be confirmed
23 to the Roberts for non-diversionary livestock supply. The Referee concurs with
24 the recommendation.

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1 A Statement of Claim was filed with the Court by Emile L. Robert Jr. and
2 Victor E. Robert for the use of waters for continuous domestic supply and stock
3 watering from Ranch House Spring, and continuous stock watering from the
4 following springs: Windy Spring, Honeybee Spring, Elk Spring, Three Troughs
5 Spring, Horse Pasture Spring and Rose Spring. Mr. Emile Robert Jr. testified in
6 behalf of their claim during the Evidentiary Hearing.

7 Mr. Robert first corrected State's Exhibit 2, the Inset B map of Subbasin
8 21, to locate Horse Pasture Spring south of the Burbank Road, not north, and
9 within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 26, T. 15 N., R. 19 E.W.M. He explained that
10 Honeybee Spring drains into Horse Pasture Spring, and that Honeybee Spring is the
11 only spring still owned by the Roberts. His testimony did not identify the
12 owners of lands that have been sold by the Roberts, except for the parcel sold to
13 the Dormaiers as described below.

14 Mr. Robert asked to amend his claim by adding, for stock watering purposes,
15 Mud Springs No. 1 and No. 2, which had been mistakenly omitted from the list of
16 springs on the Burbank ranch. In response to questions from Ms. Buddeke, Mr.
17 Robert indicated that property containing the Mud Springs had been sold to Duane
18 and Alvina Dormaier, who have claimed use of these springs. Their claim is
19 discussed on Page 15 of this report. Further questioning revealed that the
20 Roberts had sold property containing Gus Spring in 1978, but Mr. Robert didn't
21 know the current owner. Gus Spring is presently leased by the Eaton family and
22 Mr. Jack Eaton has requested that Gus Spring be included in his family's claim
23 (No. 1252). (See Page 28 of this report.)

24 Claim No. 065698 was filed by the Roberts in response to the Chapter 90.14
25 Water Right Claims Registration Act. They claimed a domestic use of .03 cubic

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1 feet per second (cfs) from an "unnamed spring" located 1000 feet west and 600
2 feet south of the east quarter corner of Section 26, being within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of
3 Section 26. The date of first use was identified as 1914. Both Emile and Victor
4 had initialed a notation on the file copy of Claim No. 065698 that this unnamed
5 spring was Ranch House Spring.

6 On the property encompassing Ranch House Spring is a house which looked to
7 be approximately 20 years old when the Roberts purchased the property in 1966.
8 Water from Ranch House Spring is collected in a cistern, conveyed 15 feet to
9 another larger cistern, and is then conveyed through a buried pipe approximately
10 300 feet northwesterly to the residence. A second pipeline carries the water
11 from the cistern approximately 20 feet to a stock trough.

12 Other than Mr. Robert's assertions that he believed domestic water was used
13 as early as 1914 from Ranch House Spring, he offered no evidence or testimony to
14 support this. Mr. Robert's testimony dates the house back to approximately 1946,
15 not 1914. No substantial evidence, such as remnants of an old delivery system,
16 or existence of or foundations for an old home, was presented.

17 Based on the evidence, the Referee cannot recommend that a right be
18 confirmed from Ranch House Spring for domestic supply. The Plaintiff's Report to
19 the Referee recommended that a right be confirmed to Emile L. Robert Jr. and
20 Victor E. Robert for non-diversionary livestock supply. The non-diversionary
21 stock water stipulation adequately covers the stock water use on Windy Spring,
22 Honeybee Spring, Elk Spring, Three Troughs Spring, Horse Pasture Spring, and Rose
23 Spring.

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1 A Statement of Claim to the Court was filed by Theodore A. Roy asserting a
2 right to water from an unnamed spring for irrigation of 9 acres and stock water.
3 Mr. Roy testified at the Evidentiary Hearing in behalf of his claim.

4 According to the testimony, the previous owner, who was raised on the
5 property, indicated that the land had been farmed by his father. That plus the
6 existence of an old barn on the property, led Mr. Roy to believe that the
7 property had been farmed since at least 1925. Mr. Roy stated that the land
8 had been irrigated and farmed prior to installation of the Roza project about
9 1939, and may have been irrigated from a well on the property. Livestock and
10 wildlife also drank from the unnamed spring.

11 Mr. Roy testified that he purchased this property in 1973 and in 1976
12 constructed a pond to collect the spring seepage. A 5 BHP pump is installed in
13 the pond and water is distributed through handlines. Mr. Roy has had between 10
14 to 20 cattle on the property. Both stock and wildlife presently drink water from
15 the pond.

16 No testimony or evidence was offered to substantiate a use of water prior
17 to June 6, 1917, as required by the Prior Appropriation Doctrine, or by December
18 31, 1932, as required by the Riparian Doctrine. Additionally, neither Mr. Roy,
19 nor any predecessor owner of this property, filed a Water Right Claim under the
20 Claims Registration Act, Chapter 90.14, for the uses identified on the court
21 claim. Failure to file such a water right claim results in waiver and
22 relinquishment of any right that may have existed.

23 Based on the foregoing, the Referee cannot recommend confirmation of a
24 water right for irrigation to Mr. Roy. The Claimant's stock may continue to

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1 drink directly from the unnamed pond or any other stream to which they have
2 access, as provided in the non-diversionary stock water and wildlife stipulation.

3 Although Mr. Roy stated that the property was under the Roza Irrigation
4 District, there was no indication that the District supplied water to this
5 property. The Roza Irrigation District is a Major Claimant whose claims will be
6 considered during Evidentiary Hearings for the Major Claimants.

7 COURT CLAIM NO. 1902 -- Mildred Shemeld

8 Mildred Shemeld submitted a Statement of Claim to the Court for use of
9 water via the Selah-Moxee Irrigation District. According to a March 22, 1990
10 letter from her attorney, James P. Hutton, Ms. Shemeld's claim..."represents a
11 water right which will be represented by the Selah and Moxee Irrigation District
12 in the major claimant category." Therefore, the Referee recommends that the
13 individual claim by Mildred Shemeld be denied.

14 The Selah-Moxee Irrigation District is a Major Claimant and claims filed by
15 the irrigation district will be considered during the Evidentiary Hearings for
16 Major Claimants.

17 COURT CLAIM NO. 1206 and 2587(A) -- John E. Smets

18 John E. Smets submitted to the Court, two Statements of Claim, the second
19 of which amended the first. Both asserted a right to the use of water from the
20 Yakima River for irrigation of 40-60 acres of orchard. Mr. Smets testified in
21 behalf of his claim.

22 Mr. Smets' claim, as amended, is for the irrigation of a proposed 60 acres
23 within the SW $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, and the SE $\frac{1}{4}$ SW $\frac{1}{4}$ lying between the Yakima River
24

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and the State Highway in Section 33, T. 16 N., R. 19 E.W.M. The claimed date of first use is June 1, 1900.

Mr. Smets testified that when his father purchased this property in 1945, there were indications that it had been used for irrigation, stock water, and possibly recreation. On the property were remnants of two corrals and a stock watering channel from which horses drank. His father installed a pump system in the Yakima River and used a two inch black plastic pipe for irrigation. The Smets did not run stock on the property.

Mr. Smets stated that his family built a small cabin down by the river. After a flood shifted the cabin, they tore it down and moved it up on the bank as an A-frame that somebody pulled down. Then they took the lumber and built a kind of square cabin with a tin roof, four sides, a stove and a chimney. After the death of his father, the building was vandalized and finally was burned down.

Mr. Smets purchased the property from his father in 1959 or 1960. The last date he recalled irrigating was 10 or 15 years ago (approximately 1975). The claimant testified that no irrigation was presently taking place, but that he did have a development plan for future use of this property including agriculture and recreation. At present, recreational (camping) water is just picked up from the River and taken to the property. It was his opinion that use of this property for recreation and some kind of domestic purpose had occurred as early as 1900.

In response to the Water Right Claims Registration Act, Chapter 90.14, John E. and Marietta D. Smets filed Water Right Claim No. 067715. The Smets claimed four acre-feet per year for domestic use and irrigation of 20 acres within the same area as described in Court Claim No. 2587(A). In June 1974, when Claim No. 067715 was filed, no actual use of the water was taking place.

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1 Other than Mr. Smets' statement that he believes domestic and recreation
2 use have occurred on property since 1900, no evidence was offered in support of
3 his contention. Additionally, historic irrigation use prior to 1945 was
4 unsubstantiated. Under the Prior Appropriation Doctrine a claimed water right
5 can be confirmed only to the extent that water usage was established prior to
6 implementation of the Surface Water Code on June 6, 1917. Under the Riparian
7 Doctrine, use of the water must have commenced prior to December 31, 1932.
8 Although Mr. Smets has a plan for future use of water, the purpose of the Yakima
9 River Basin Adjudication is to determine the extent of historic uses, not to
10 allocate water for future beneficial uses.

11 Based on Mr. Smets testimony, the Referee cannot recommend confirmation of
12 a water right under this claim.

13 COURT CLAIM NO. 0589 -- Washington State Department of Natural Resources

14 The Washington State Department of Natural Resources (DNR) submitted a
15 Statement of Claim to the Court asserting a right to use waters from various
16 springs, lakes, ponds and hydraulically connected wells within the Burbank
17 Subbasin. The legal doctrines cited in the court claim were Riparian,
18 Appropriation and the enabling act "Trust Land Right". The DNR was not
19 represented at the Evidentiary Hearing to provide testimony in behalf of their
20 claim.

21 The Investigation Report prepared by the Plaintiff indicates that the lands
22 owned by the Claimant are being leased to N.N. Eaton and Sons (Court Claims No.
23 1252, 1253 and 1237). The Plaintiff has recommended confirmation of rights to
24 DNR for non-diversionary livestock and wildlife water from streams and from
25 naturally occurring springs and ponds. The Referee supports the recommendation.

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COURT CLAIM NO. 2109 -- Washington State Department of Wildlife

1 The Washington State Department of Wildlife filed a Statement of Claim with
2 the Court for use of water within the Burbank Subbasin. The Department of
3 Wildlife did not appear to present testimony in behalf of their claim during the
4 Evidentiary Hearing.

5 Two Surface Water Certificates issued to the Department of Wildlife
6 (formerly the Department of Game) under the State's Surface Water Code of 1917,
7 Chapter 90.03 RCW, as follows:

- 8 1. Surface Water Certificate No. 1448 issued for 0.35 cfs from Squaw
9 Creek for irrigation of 15 acres within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, T. 15 N.,
10 R. 20 E.W.M. The priority date of this certificate is December 18, 1939.
- 11 2. Surface Water Certificate No. 2135 issued for 0.01 cfs from Ten
12 Dollar Spring for stock water within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 6, T. 15 N.,
13 R. 20 E.W.M. The priority date of this certificate is December 18, 1939.

14 The described lands have been sold to the United States Army and are now
15 part of the Yakima Training Center (formerly the Yakima Firing Center). The
16 Department of Defense has claimed all water uses within the boundaries of the
17 Yakima Training Center, and is being represented by the United States. As a
18 Major Claimant, the United States' claims to use of water will be considered
19 during Evidentiary Hearings for the Major Claimants.

20 The Referee, therefore, recommends that the claim filed by the Washington
21 State Department of Wildlife be denied.

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23
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CLAIMANTS WITH RECOMMENDED NON-DIVERSIONARY STOCK WATER AND WILDLIFE RIGHTS

Mary E. Barrett
Duane and Alvina Dormaier
N. N. Eaton and Sons
Evergreen State Properties
Alan and Roxanne Leach
Kenneth M. and Leslie R. Lydin
Emile L. Robert Jr. and Victor E. Robert
Theodore A. Roy
Washington State Department of Natural Resources

CLAIMANTS LOCATED OUTSIDE OF SUBBASIN 21

One claimant, N. N. Eaton and Sons, under Court Claim No. 1252, included eight springs and one pond, all of which appear to be located outside the Burbank Subbasin. The spring and pond locations given by the claimant on the Court Claims as well as the associated Chapter 90.14 Water Right Claims indicate that they are located within Subbasin No. 10 (Kittitas). All will be considered during the Evidentiary Hearing for that subbasin.

VIII. FINDINGS OF FACT

I, JOHN E. ACORD, as Referee in this proceeding, having carefully examined the testimony and evidence and having investigated Subbasin No. 21, do hereby make the following Findings of Fact:

1. That the waters of Subbasin No. 21 and lands irrigated or waters otherwise utilized therefrom are situated in both Yakima and Kittitas Counties.

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2. That the claims to any diversionary or withdrawal rights within Subbasin No. 21 of the following named claimants are denied in their entirety for reason set forth in the body of this report:

George E. Coson, III
L. Lloyd and Kathryn M. Day
Archie Dean, Elizabeth Waid, Randy and Pamela Covey
Duane and Alvina Dormaier
Edna and Larry Drecksell
N. N. Eaton (1237)
John Evers
Frank J. and Maravell A. Gonsioroski
Omer G. and Elsie A. Gress
Alan and Roxanne Leach
Kenneth M. and Leslie R. Lydin
Simon J. Martinez, et.al.
Peoples National Bank of Washington
Emile L. Robert Jr. and Victor E. Robert (1249 & 1251)
Thoedore A. Roy
Mildred Shemeld
John Smets
Washington State Department of Natural Resources
Washington State Department of Wildlife

3. That the name of the claimant(s), court claim number(s), sources of water, uses for which rights have been established, time periods when water may be used, amounts of water designated in the right, priority of water right, location of points of diversion, and description of lands to which water rights are appurtenant are as follows:

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CLAIMANT NAME:

Mary E. Barrett

COURT CLAIM NO. 1986

Source:

Unnamed Creek

Use:

Irrigation of $\frac{1}{2}$ acre of lawn and garden;
and 8 acres of pasture

Period of Use:

April 1 to October 31

Quantity:

0.18 cfs, 50 acre-feet per year

Priority Date:

August 1, 1872

Point of Diversion:

No. 1: 200 feet north and 75 feet west of the southeast
corner of Section 30, being within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of
Section 30, T. 14 N., R. 19 E.W.M. ($\frac{1}{2}$ acre);

No. 2: 800 feet north and 350 feet west of the southeast
corner of Section 30, being within the E $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of
Section 30, T. 14 N., R. 19 E.W.M. (8 acre pasture);

Place of Use:

Within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ lying east of I-82, except the west 550
feet of the east 689 feet of the south 350 feet and the
State Highway, in Section 30, T. 14 N., R. 19 E.W.M.

Limitation of Use:

The right herein confirmed is subject to any right that
may exist from the Selah Moxee Irrigation District. The
total combined use shall not exceed the above confirmed
quantities.

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CLAIMANT NAME: N. N. Eaton and Sons COURT CLAIM NO. 1253

Source: Squaw Creek

Use: Irrigation of 20 acres

Period of Use: April 1 to October 31

Quantity: 0.40 cfs, 160 acre-feet per year

Priority Date: July 29, 1903

Point of Diversion: No. 1: 100 feet south and 500 feet west from the northeast corner of Section 4, being within Government Lot 1 (NE $\frac{1}{4}$ NE $\frac{1}{4}$) of Section 4, T. 15 N., R. 19 E.W.M.

No. 2: 800 feet north and 100 feet east of the south quarter corner of Section 34, being within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 34, T. 16 N., R. 19 E.W.M.

Place of Use: No. 1: A portion of Government Lot 1 (N $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$) of Section 4, a portion of Government Lot 2 (E $\frac{1}{2}$ E $\frac{1}{2}$ E $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$) and that portion of Government Lot 4 (NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 3, all lying south of Squaw Creek in T. 15 N., R. 19 E.W.M. (12.5 acre rye patch);

No. 2: A portion of the S3/4SW $\frac{1}{4}$ SE $\frac{1}{4}$ and the S3/4SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 34, lying south of Squaw Creek, in T. 16 N., R. 19 E.W.M.; and a portion of Government Lot 3 (N $\frac{1}{2}$ N $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$) in Section 3, T. 15 N., R. 19 E.W.M. (7.5 acres).

All in Kittitas County.

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CLAIMANT NAME: Yakima Asphalt Paving Company COURT CLAIM NO. 0134

Source: An unnamed slough tributary to the Yakima River
Use: Washing sand and gravel
Period of Use: Continuous
Quantity: 2.0 cfs
Priority Date: July 14, 1948
Point of Diversion: 35 feet north and 1300 feet east from the southwest corner of Section 31, being within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 31, T. 13 N., R. 19 E.W.M.
Place of Use: NW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 6, T. 14 N., R. 19 E.W.M. in Yakima County

CLAIMANT NAME: Yakima Asphalt Paving Company COURT CLAIM NO. 0134

Source: An unnamed slough tributary to the Yakima River
Use: Washing gravel
Period of Use: February 1 to November 30
Quantity: 1.1 cfs, 120 acre-feet per year
Priority Date: March 2, 1971
Point of Diversion: 35 feet north and 1300 feet east from the southwest corner of Section 31, being within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 31, T. 13 N., R. 19 E.W.M.
Place of Use: NW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 6, T. 14 N., R. 19 E.W.M. in Yakima County
Limitations of Use: The entire opening of the diversion intake shall be tightly screened at all times with wire mesh having openings with dimensions not greater than 0.125 (1/8) inch.

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1 4. All prior claims to rights for surface water from Subbasin No. 21,
2 including those claims filed under the provisions of Chapter 90.14 RCW, are
3 denied, unless expressly provided for herein. The "Water Rights Claims Registry"
4 directed by RCW 90.14.111 should be supplemented with appropriate notations to
5 the records of those claims specifically identified in the "Water Right Claims"
6 section of Plaintiff's Exhibit No. SE-3.

7 5. The following Certificates of Water Right, issued by the Department
8 of Ecology or its predecessor agencies of the State of Washington, will be made
9 null and void:

10 Certificates of Surface Water Right

11 3394

12 S3-00414C

13 In conformance with RCW 90.03.240, Certificates of Adjudicated Water Right
14 will be issued to those parties for whom rights were confirmed through this
15 proceeding.

16 IX. CONCLUSIONS OF LAW

17 Confirmation of Rights

18 The priority date, source, point of diversion, location, maximum
19 instantaneous diversion rate, annual quantity, period of use, nature of
20 beneficial use, and place of use which are shown in the foregoing Findings of
21 Fact for each claimant therein referred are recommended to be confirmed as water
22 rights of those claimants.

23 Duty of Water

24 Unless otherwise specified, the diversion of water from sources of water
25 contained within Subbasin No. 21 for irrigation purposes shall be limited, at a

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1 maximum, to 1.0 cubic-foot per second for each 50 acres irrigated, not to exceed
2 during each irrigation season, a total of 5 acre-feet per acre for orchards and 6
3 acre-feet per acre for alfalfa/pasture.

4 Irrigation Season

5 Unless otherwise identified within a specific water right, the irrigation
6 season shall be defined as that period from April 1 to and including October 31
7 of each year. The Referee recognizes that extraordinary circumstances may
8 dictate the application of water prior to or subsequent to the defined irrigation
9 season, and, in that event, express approval from the Department of Ecology must
10 be obtained annually prior to such deviation.

11 Certificates of Adjudicated Water Right

12 Upon entry of the final decree in this action, and upon payment of the
13 statutory fee prescribed in RCW 90.03.470(11), together with the appropriate
14 county auditor recording fee, the Director of the Department of Ecology is
15 required to issue Certificates of Adjudicated Water Right in accordance with the
16 provisions of RCW 90.03.240.

17 Administration of Water

18 The use of Subbasin No. 21 waters should be regulated by the Department of
19 Ecology on the basis of Certificates of Adjudicated Water Rights issued as a
20 result of this proceeding, and on the basis of any permits and certificates that
21 may have issued outside of this proceeding under appropriation procedures of
22 Chapter 90.03 RCW. When available water in Subbasin No. 21 is insufficient to
23 supply all rights, and upon a finding that regulation is required, the Department
24

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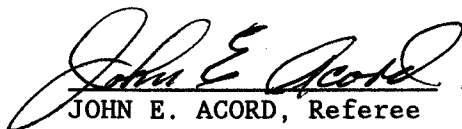
may regulate junior water rights in the interest of satisfying senior water rights.

Whenever regulation of junior water rights is necessary, the Department may enter at reasonable times upon the lands of any and all parties having rights and shall regulate diversion facilities so as to apportion the waters as herein adjudicated.

Confirmation of a water right does not guarantee nor imply that right-of-way or trespass rights exist upon private or public lands for the diversion and/or distribution system of that water.

As provided by Chapter 90.03.360 RCW and Chapter 508-64 WAC, any person authorized to use surface water from Subbasin No. 21 may be required to provide and maintain, at the water user's expense, proper diversion works and/or measuring devices. Design, installation, maintenance, and operation of such works and measuring devices will be as prescribed by the Department.

SIGNED and DATED at YAKIMA
this 6th day of AUGUST, 1992.


JOHN E. ACORD, Referee

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