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, vs. JAMES J. ACQUAVELLA, ET AL., Defendants	MEMORANDUM OPINION AND ORDER RE: EXCEPTIONS TO SUPPLEMENTAL REPORT OF REFEREE SUBBASIN 10 (KITTITAS)

I. INTRODUCTION

A number of exceptions were filed to the *Supplemental Report of Referee for Subbasin 10* dated February 26, 2004 (Supplemental Report). The Court entered a Notice Setting Time for Hearing Exceptions. Exceptions were due April 30, 2004 and a hearing set for July 8, 2004 Many exceptions were filed and the hearing expanded to July 7 - 9, 2004. On June 2, 2004, the Court ruled on two exceptions. The exception of Craig and Nancy Schnebly, Court Claim No. 02064 was granted and the Supplemental Report on page 284, line 5½, modified to authorize the use of 0.40 cubic foot per second, 136.5 acre-feet per year. Paul Sorenson's exception, Court Claim No. 01433, was granted and page 237, line 21 of the Supplemental Report clarified to show TO-1 is south of the creek and TO-7 is north of the creek. The Court also responded to Ecology's clarification request on a discrepancy between page 238, line 17 and page 296, line 3½ of the Supplemental Report and the number of acres authorized for irrigation. The Court ruled that 45 acres is correct. *Id.* at 296. The remaining exceptions are addressed below:

a. Does Cooke Creek adjudication bind parties whose predecessors did not participate?

An initial exception impacts a number of claimants whose predecessors were not parties to the prior adjudication of Cooke Creek, but who allegedly perfected a water right. The Referee

and Court had concluded the evidence presented at the initial and supplemental hearing were insufficient to find that the prior adjudication of Cooke Creek did not quiet title to all rights to use water from that creek. Predecessors to claimants Betty Dodge (and Estate of Gerald Dodge), John Nylander, Steve and Christine Rosbach and Paul Sorenson were not awarded water rights in that adjudication. Mrs. Dodge has now submitted the Lis Pendens for that case, showing the named parties and the lands addressed therein. That document supports a finding that the predecessors to Dodge, Nylander, Rosbach and Sorenson were not parties to the earlier adjudication, nor were water rights for their lands addressed. That case can bind these claimants only if their predecessors were provided the opportunity to participate and failed to do so. Therefore, rights can be awarded in this proceeding for use of Cooke Creek water if there is sufficient evidence to show that a water right was legally established.

The claimants are all asserting a right to use approximately 15 acre-feet per year for each acre irrigated and a right to divert significantly more water than was awarded to those landowners who obtained rights in the earlier adjudication of Cooke Creek. Ecology filed a reply to the post-hearing briefs objecting to the award of such a high water duty. Ecology first asserts the quantity of water in the water right claim forms filed pursuant to RCW 90 14 contain quantities that are significantly less than the amounts asserted today Second, the agency believes there is inadequate evidence to support a finding that larger quantities were used.

Many claimants are relying on engineering reports entered into evidence by Richard C. Bain, Jr., a consulting engineer hired to determine the quantity of water being used on various farms involved in the adjudication. Mr. Bain did measure diversions and estimate the quantity of water being used on the Dodge, Rosbach and Nylander property. He concluded that between 12 and 15 acre-feet per year per acre are used. The information presented by Mr. Bain in his report is in stark contrast from the findings of the Cooke Creek adjudication court beginning in 1920. There is a discussion of water duty on pages 7 and 8 of the 1921 Report of Referee, whereby the Referee concluded one cubic foot per second for each 50 acres, or 0.02 cfs per acre, and 6 acre-feet per year was sufficient to irrigate the ground. Since the claimants' predecessors were not parties to that case, they are not bound by those finding. However, this Court finds those rulings to be useful today in quantifying the water rights. Certainly the 1921 testimony and evidence would more accurately reflect the historic water use in the area as opposed to contemporary information of water use some 100 years after the water rights were established

Additionally, Nylanders submitted the complaint filed in *Elizabeth Ferguson, T J and Lily Morrison and Etta Gore v J C Sterling and W T Montgomery*. The complaint provides evidence that water from Cooke Creek was being used to irrigate the N½SW¼ of Section 21 in 1924 and the plaintiffs stated they were using 80 inches, or 1.6 cfs, senior to any rights held by Montgomery and Sterling, for the irrigation of 80 acres. Therefore, in the early 1920s, the quantity of water used to irrigate at least some land not addressed in the *Anderson* adjudication was one inch per acre, or 0.02 cfs per acre, consistent with the referee's findings in *Anderson*.

Ecology makes a valid point concerning the RCW 90.14 claims and the difference between the quantities of water claimed to be used in 1973-1974 versus what is claimed now. Dodge is also correct that the Court has used some latitude in confirming the quantity of water and not held strictly to the amount identified on the water right claim form. However, the Court generally has been reluctant to confirm quantities greatly in excess of that claimed and each decision is based on the circumstances at issue. None of these claimants addressed the difference at the hearing, and in Dodge's response to Ecology, no attempt was made to explain the difference. In some cases, specifically for Rosbach, the RCW 90.14 claim states exactly the number of days the land is irrigated, resulting in the annual quantity claimed.

Ecology is correct - in most cases, there is no evidence of how much water was being diverted when the water rights were established. However, that frequently has been the case in this adjudication. The prior adjudication provides some evidence of the quantity of water the Kittitas Superior Court found necessary to irrigate lands along this creek in the 1920's. The *Anderson* referee's report did acknowledge the benefit to the land of a heavy application of water early in the irrigation season for ground storage. In recognition of that, the Decree allows for a 100% increase in the instantaneous quantity of water to be diverted when there is sufficient water in the creek to satisfy all rights. This Court will apply that same provision to the water rights awarded to these claimants. There is no evidence that when the water rights were established for the Dodge, Nylander, Rosbach and Sorenson lands more water was being used than was awarded in the prior adjudication. Therefore, the Court will award rights to use 0.02 cfs, 6 acre-feet per year for each acre irrigated. However, each right will contain a provision that allows for the diversion of up to 0.04 cfs for each acre irrigated with a provision that limits the diversion of the additional quantities only in those times when there is sufficient water in the creek to satisfy all rights. Each claim will now be addressed separately to quantify the right that can be awarded.

John Nylander, Claim No. 01445

Mr. Nylander took exception to the Referee not confirming a right to use water diverted from Cooke Creek. Ecology also sought clarification of the number of acres authorized to be irrigated under the water right awarded for use of Parke Creek and described on pages 197 and 370 of the Supplemental Report. Nylander concurred with Ecology's position that the number of acres should be 46.2. Therefore, page 196, line 4½ and page 370, line 3, of the Supplemental Report of Referee for Subbasin 10 are modified to authorize the irrigation of 46.2 acres.

Evidence in support of this claim was offered at the Referee's evidentiary and supplemental hearings held in 1991 and 2003 respectively. The Court asked Nylander to submit a summary of the claim, which was timely received. A right is asserted to divert water from Cooke Creek for the irrigation of 31.7 acres in the N½SW¼ of Section 21, T. 17 N., R. 19 E.W.M. The complaint filed by Elizabeth Ferguson, T. J. and Lily Morrison and Etta Gore against J.C. Sterling and W. T. Montgomery et ux., provides evidence that water from Cooke Creek was used to irrigate the N½SW¼ of Section 21 in 1924. Ms. Ferguson in her complaint states the land she owns and that owned by Morrison, totaling 80 acres in the E½SW¼ of Section 21, had rights to the use of 80 inches, or 1.6 cfs, senior to any rights held by Montgomery and Sterling. Montgomery owned the NW¼SW¼ of Section 21. Therefore, in 1924 the quantity of water used to irrigate the land was one inch per acre, or 0.02 cfs per acre. The Court confirms a right based on 0.02 cfs and 6 acre-feet per year for each acre irrigated. As previously mentioned, the NW¼SW¼ and the NE¼SW¼ of Section 21 have different ownership histories that result in a finding that two separate water rights were established by the prior owners. The logic used to set the priority date for the S½NW¼ of Section 21 for claimant Dodge applies to the NW¼SW¼ of Section 21 as it emanates from the Montgomery ownership.

Therefore, the lands in the NW¼SW¼ of Section 21 will have a water right priority date of May 24, 1884. The Court estimates that 21.7 acres are irrigated in that area, resulting in a right to use 0.434 cfs, 130.2 acre-feet per year from April 1 to October 15. The remaining 10 acres is in the W½NE¼SW¼ of Section 21 and will have a June 13, 1876, date of priority, based on the William Jordin patent, for the diversion of 0.20 cfs, 60 acre-feet per year from April 1 through October 15. The point of diversion for both rights is 140 feet south and 50 feet east of the center of Section 21. As previously mentioned (see discussion beginning on page 3 line 20),

these rights will carry a provision that allows use of surplus water (up to twice the authorized instantaneous quantity) when it is available in excess of that needed to satisfy all existing rights.

Steve and Christine Rosbach, Claim No. 00467

The Rosbachs took exception to rights not being confirmed for use of Cooke Creek and to a right not being confirmed to use water from Sow Creek (also called Cherry Creek by the family) for lands in the S½SW¼ of Section 14, T. 17 N., R. 19 E.W.M. The Court will first take up the claims for Cooke Creek.

The claimant asserts a right to irrigate 25 acres in the NW¼SW¼ of Section 15, T. 17 N., R. 19 E.W.M. with Cooke Creek water. The Report of Referee, beginning on page 351, lays out the history of water use from Cooke Creek on this land and won't be repeated here. Although the claimant asserts an 1881 priority date for the right, the evidence shows the land was originally railroad land. The priority date for former railroad land is the date the map of definite location was filed with the county, which, for the property in question, was May 24, 1884. *See Sander v. Bull*, 76 Wash. 1, 135 Pac. 489 (1913). The Court confirms a right with a May 24, 1884 date of priority for the diversion from Cooke Creek of 0.50 cfs, 150 acre-feet per year from April 1 to October 15 for the irrigation of 25 acres in that portion of the NW¼SW¼ of Section 15 lying west of Cooke Creek. The authorized point of diversion shall be approximately 1200 feet east of the west quarter corner of Section 15. It appears this description represents the point set forth in WRC No. 002502. The Court notes Mr. Rosbach added a point of diversion without compliance with RCW 90.03.380. Ecology's Central Regional Office should be contacted to lawfully obtain authorization to use the second point of diversion.

The claimant also asserts a right to irrigate 20 acres with Cooke Creek water in that part of the N½NE¼ of Section 21, T. 17 N., R. 19 E.W.M. lying west of Cooke Creek. This land was part of that homesteaded by J. D. Olmstead and an 1878 priority date is requested. The evidence submitted by Dodge includes a Notice of Water Right for the N½N½ of Section 21 and shows ditches were constructed and water diverted for irrigation in 1873 or 1874. As with Dodge, the Court uses June 30, 1874, as the priority date and confirms a right to divert 0.40 cfs, 120 acre-feet per year for the irrigation of the 20 acres. The authorized point of diversion shall be 220 feet west of the northeast corner of Section 21, which the Court concludes is the diversion described in WRC No. 002530. As previously mentioned (see discussion beginning on page 3 line 20), both of the rights confirmed to Rosbach will carry a provision that allows use of surplus water

(up to twice the authorized instantaneous quantity) when it is available in excess of that needed to satisfy all existing rights.

Rosbach also took exception to a right not being confirmed for the use of a water source that has a variety of names. Apparently it was historically called Sow Creek, however, Mr. Rosbach's father-in-law, Andy Sorenson, refused to call it by that name and called it Cherry Creek. Maps entered by Rosbach call it Spring Creek. The Court will use the historical Sow Creek name in this discussion. Most of the land irrigated with water from Sow Creek lies in the SW¼SW¼ of Section 14 and the chain of title provided at earlier hearings does not identify when the Sorenson family acquired this portion of the land now owned by Rosbach. The evidence was sufficient to show that land in the Sven Sorensen ownership in the early 1900's was irrigated with water from Sow Creek. The Referee asked the claimant to provide evidence to show the S½SW¼ of Section 14 was owned by Sven Sorensen (the Court notes the spelling of the Sorensen name has changed over the years and uses the spelling in the document cited). The claimants supplied DE-1827, a copy of the Rosbach exception and documents in support of the exception. One document in that multi-page filing was adequate to confirm a right to Rosbach.

The claimant asserts a June 30, 1878 priority date (five years prior to the patent issuing). As stated previously, the Court will not use that method for setting the priority date. There must be evidence to support any priority date asserted by a claimant. *Memorandum Opinion Re. Priority Date – Date of Patent or Date of Entry*, dated January 19, 1995. The Court can find no basis to support an 1878 priority date. Claimant suggests the patent issued to Carl Sander who sold the land to Sorensen. However, the patent for this land issued to Benjamin Lewis who sold the land to Clemans, who then sold it to Sanders, who did ultimately sell to Sorensen. The patent issued on June 30, **1876**, two years earlier than the date suggested by claimant. Since the land is riparian to Sow Creek, rights were established under the Riparian Doctrine, with a priority date commensurate with steps taken to sever the land from Federal ownership – here June 30, 1876.

The post-hearing brief filed for the claim states on page 3, line 18 that the water right established for the property is 1.3 cfs for 47.3 acres, yet asserts a right to divert 6.7 cfs, 640 acre-feet per year. The Court will agree that 1.3 cfs is a reasonable quantity for the number of acres. The evidence is clear that much of the water diverted after the early part of the irrigation season is return flow from the various ditch companies and irrigation ditches that deliver water above this land. Therefore, the Court will confirm a right with a June 30, 1876, date of priority for the

diversion of 1 3 cfs, 236 5 acre-feet per year for the irrigation of 47.3 acres in that portion of the S½SW¼ of Section 14, T. 17 N., R. 19 E W.M. lying west of Sow Creek. The quantity is consistent with the RCW 90 14 claim filed for the property and is a reasonable estimate of the maximum natural flow that might be available from this creek. The authorized point of diversion shall be 1220 feet north and 460 feet west of the south quarter corner of Section 14, being within the SE¼SW¼ of Section 14. This is the approximate location of the diversion described in Water Right Claim No. 002506 filed pursuant to RCW 90 14.

Ecology sought clarification of the water right that was awarded for use of water from Caribou Creek. That right is described on page 316 of the Supplemental Report. At line 13, 78.7 acres is added before the legal description of the lands irrigated from POD #1 and at line 16½ 21.2 acres is added before the legal description of the lands irrigated from POD #2.

Paul J. and Virginia J. Sorenson, Claims No. 01437 and 01439

The Sorensons filed a late exception, which the Court allowed, to the Referee not recommending confirmation of a Cooke Creek right. Claim No. 01437 requests a right to irrigate 11 acres in a portion of the NE¼SW¼ of Section 21, T. 17 N., R. 19 E.W.M. and Court Claim No. 01439 asserts a right to irrigate up to 45 acres in the SW¼NE¼ and NW¼SE¼ of Section 21 with water diverted from Cooke Creek. The 1924 Kittitas County Superior Court case, *Elizabeth Ferguson, T J and Lily Morrison, and Etta Gore v. J C. Sterling and W. T Montgomery*, Complaint No. 7013, provides sufficient evidence to conclude water rights were established for use of Cooke Creek on both the SW¼NE¼ and NE¼SW¼ of Section 21 and one inch of water was used to irrigate each acre. However, the Court's ability to confirm a right under these two claims is limited by the water right claims filed pursuant to RCW 90.14. Water Right Claim No. 062721, attached to Mr. Sorenson's exception, is the only claim that clearly applies to claimant's land. It asserts a right to use 2 cfs, 100 acre-feet per year from Cooke Creek for the irrigation of 20 acres in part of the SW¼NE¼ of Section 21. This is a portion of the land for which Cornelius Hacksaw received a patent dated June 5, 1873, and is riparian to Cooke Creek. Although WRC No. 062721 states 20 acres are irrigated, the State's Investigation Report shows 22 acres. The difference is slight and the Court will confirm a right for 22 acres.

The Court will confirm a right under Court Claim No. 01439 with a June 5, 1873, date of priority for the diversion of 0.44 cfs, 110 acre-feet per year from Cooke Creek for the irrigation of 22 acres in that portion of the SW¼NE¼ of Section 21 lying southeast of Cooke Creek. The

point of diversion is located approximately 1230 feet south and 1060 feet east from the north quarter corner of Section 21 and is the diversion described in WRC No. 062721. As previously mentioned (see discussion beginning on page 3 line 20), this right will carry a provision that allows use of surplus water (up to twice the authorized instantaneous quantity) when it is available in excess of that needed to satisfy all existing rights.

The Court cannot confirm a right for the land irrigated in the NE¼SW¼ or NW¼SE¼ of Section 21 as no RCW 90.14 claim is applicable. Failure to file a claim waives and relinquishes any right that may have existed. See RCW 90.14.071. The claimant believes Water Right Claim No. 062722 filed by Dorthea Nylander applies. However that claim asserts a right to irrigate 31 acres, which is the number of acres irrigated by Nylander in the N½SW¼ of Section 21. Therefore, the Court concludes that the claim is only appurtenant to the Nylander land.

Kenneth O. and Carolyn Sorenson, Claim No. 01307

Paul Sorenson filed a late exception on behalf of his mother, Ellen Sorenson, who owns the land described in the claim. However, the claim has not been transferred to her and is still in the name of Paul's brother Ken and Ken's wife, Carolyn. A right is asserted to irrigate land in the SE¼SW¼ of Section 21 with water diverted from Cooke Creek. The Sorenson's property is similarly situated as Dodge and Nylander, where a water right was not awarded in the earlier Cooke Creek adjudication, but there is evidence of historic water use. The evidence shows the prior owner was not a named party nor was the land described in the Lis Pendens. Nor can the Court identify any pertinent water right claim filed pursuant to RCW 90.14. Failure to file a water right claim results in forfeiture of any right that may have existed. RCW 90.14.071. Mr. Sorenson points to the water right claim filed by his great-aunt, Dorthea Nylander, as potentially applying to this land. However, as pointed out above, WRC No. 062722 asserts a right to irrigate 31 acres, the number of acres irrigated by Nylander in the N½SW¼ of Section 21. The Court concludes the claim is appurtenant to the Nylander land only. Additionally, the place of use on the claim does not include lands in the SE¼SW¼ of Section 21. Lacking a RCW 90.14 claim, the Court denies a right under Court Claim No. 01307.

Larry F. Beintema and Mike and Pat McArthur, Court Claim No. 00927

The Referee was unable to recommend a water right for either of these claimants because none of the RCW 90.14 claims filed by their predecessor described the water source they use or includes their lands as the place of use. Mr. Beintema and the McArthurs submitted requests to

amend the water right claim filed for their property. *See* RCW 90.14.065. On April 28, 2005, Ecology submitted SE-166 and 167, which contain decisions on those requests.

Mr. Beintema sought Ecology's approval of a request to amend Water Right Claim (WRC) No. 115878, which asserted a right to use water from Coleman Creek to irrigate 80 acres within the W½NW¼ of Section 18. The amended claim sought to add Government Lot 3 of Section 18 to the place of use described in the claim form. Ecology is statutorily authorized to amend water right claim forms under three circumstances. The first two related to the quantity of water or manner of transporting the water. The third provision allows an amendment that is "ministerial" in nature. Ecology concluded the amendment was not ministerial in nature and denied the request. As a result of this denial, there continues to not be a water right claim filed pursuant to RCW 90.14 asserting a right to use water from Coleman Creek to irrigate Government Lot 3 of Section 18, which is where Mr. Beintema's land is located.

The McArthurs sought to amend WRC No. 115879, which asserts a right to use water from Cooke Creek for irrigation of 80 acres in the NE¼SE¼ of Section 13 and the NW¼SW¼ of Section 18. The McArthurs wished to amend WRC No. 115879 to add Coleman Creek as a source of water being used. The McArthurs own the NE¼SE¼ of Section 13 and irrigate it with both Cooke Creek and Coleman Creek water. Like Mr. Beintema, the McArthurs must assert the amendment is "ministerial" as the other two statutory provisions do not apply. Ecology concluded the amendment was not ministerial in nature and denied the request. Therefore, no RCW 90.14 claim for use of Coleman Creek water is appurtenant to the McArthur land.

The Court has consistently held that only water rights protected through compliance with RCW 90.14 can be confirmed in this proceeding. Lacking an applicable RCW 90.14 claim the Court cannot confirm rights to use Coleman Creek to either Mr. Beintema or the McArthurs. Their exceptions are therefore denied.

Palmer and Shirley Burris, Court Claim No. 00900 and Thomas J. Ringer, Court Claim No. 01744

These claimants took exception to the season of use set by the Referee for the water rights confirmed in the Supplemental Report. Thomas Nisbet, Court Claim No. 00422, along with other claimants joined this exception and will be addressed below. The Referee recommended water rights with a season of use that ends on August 15. The Referee relied on *Bull v. Meehan*, the case also used by the claimants to support their position that water rights had

been established for their lands. All three claimants are successors to the plaintiff in that case, Walter Bull. The case was settled pursuant to an October 1886 stipulation signed by the plaintiff, defendants and other water users on the creek not party to the case.

Interpretation of that stipulation is at issue. After the initial three paragraphs that provide the background, there are 15 subsequent paragraphs that were the subject of the stipulation between the parties and other water users. Paragraphs 2 through 6 contain the information critical to deciding this issue. Paragraph 2 states that "all persons having obtained water rights by constructing ditches each successive year shall constitute a class and shall be graded as hereinafter set forth; except that Walter A. Bull's rights to one-tenth of the water of the said creek as provided for hereafter shall not be affected by this grading." Paragraphs 3 through 5 describe how much water each party is entitled to and how their rights will be reduced based on the flow in the creek. The Referee interpreted these three paragraphs to be the grading system to which Walter Bull's water rights were not affected. Paragraph 6 states "that no water shall be used for irrigating purposes after the 15th day of August of each year and all water after that date shall be turned into said creek for stock purposes." The Referee concluded this paragraph was not part of the grading to which Bull was exempt. The parties argue this was an erroneous interpretation and paragraph 6 is part of the grading. In support, claimants Burris and Ringer supplied affidavits from neighboring landowners in 1897 attesting to the value of the Bull land and the nature of the water rights appurtenant to the land. The affidavits suggest the Bull land had the best water rights on the creek. The claimants also testified at the exception hearing if they stop irrigating on August 15 their crops would be negatively affected. They would not get a second cutting of timothy hay and would be unable to reseed in the fall. They have irrigated into October as long as they have owned their land.

The Court has reviewed the stipulation. Clearly, paragraphs 3, 4, and 5 describe the grading and exempt Walter Bull's water right therefrom. However, the Court does not agree that specifying the end of the irrigation season would be considered part of the grading system. A more reasonable conclusion is that by mid-August, the flow in Coleman Creek typically had decreased to the point the landowners agreed to leave the remaining water available in the creek for stock watering. At that time it would have been of utmost importance to the landowners to have a reliable source of water for livestock. Further, this case is replete with testimony about the nature of the creeks prior to construction of the irrigation ditches that resulted in the

importation of water into the area. The numerous decrees for the creeks in this part of the Kittitas Valley show that by late summer the creek flow would decline substantially and in many cases go dry. This part of Coleman Creek is below the lands served by the Kittitas Reclamation District, the Cascade Irrigation District and Ellensburg Water Company, which were all developed *after* resolution of *Bull v Meehan*. The record also shows the flow in Coleman Creek late in the irrigation season has benefited substantially from return flow and seepage from these three canals. The Court finds that water currently available in August, September and October would not have been available prior to construction of these ditches.

The claimants testified that not irrigating after August 15 would result in the crop being killed. However, landowners above the three irrigation ditches have testified they frequently are not able to irrigate in August and September, but that the crops come back in the spring. See testimony in support of the McMeans and Flach claims. These claimants were testifying about hay and pasture crops. The Court does recognize that it is not ideal to stop irrigating in August and that does cause some damage to crops and reduced yields. The ideal situation would be to have water available the entire irrigation season. However, that is often not the reality.

The parties concede paragraphs 7, 8, and 9 are not part of the grading scheme, but elect to suggest that paragraph 6 would be. The Court is not prepared to reach the same conclusion. However, it is clear that today water is available in Coleman Creek in excess of that needed for stock watering during late August, September and October. The Court believes this water to be predominantly return flow water from the irrigation districts, water for which rights cannot be awarded, but which can be used to the extent available. *See Memorandum Opinion Re. Motion for Reconsideration of Limiting Agreements* (April 1, 1994), at p. 11. The Court will add to the rights a provision that makes it clear the irrigation season is for diversion of natural flow water only and that return flow waters can continue to be used to the extent they are available.

Claimants also assert that successors to other *Bull v. Meehan* parties who were awarded rights in the Report of Referee or Supplemental Report did not have their irrigation season limited to end on August 15. In many cases the *Bull v Meehan* documents did not identify the lands owned by the other parties to the case, making it difficult for the Court to determine which rights confirmed in the Reports of Referee should be subject to the same irrigation season as these claimants. The parties are invited to bring those claimants to the attention of the Court, with notice to the other claimants, and those seasons will be modified appropriately.

Ecology also sought clarification of the appropriate point of diversion for the water right recommended by the Referee for the Burris land. The analysis states the authorized point of diversion is that described in the water right claim filed for the property. However, the description of the point of diversion is not identical to that in the water right claim. The Court has reviewed the water right claim and the point of diversion that is described in the Supplemental Report. It is clear to the Court the same point is being described. The Referee appears to have used the description that is on the investigation report that Ecology prepared following a site inspection and entered into evidence at the 1991 hearing. The Court can only conclude the Referee determined that the description of the point of diversion by the Ecology staff who visited the property would be more accurate than that used by the landowner in completing the water right claim form. The Court does not alter the Referee's recommendation.

Nancy Carmody, Pat Thomason and Helen Warner, Court Claim No. 00713
Brent and Kirsten Dekoning, Court Claim No. 00676

The Court will address these two exceptions together, as similar issues relate to both exceptions and the lands have interrelated history. Carmody, et al., own the NW¼NE¼, N½NW¼ (which includes Government Lot 1) and Government Lot 2 of Section 18, T. 17 N., R. 20 E.W.M. The Dekonings own the S½NW¼ and N½SW¼ of Section 13, T. 17 N., R. 19 E.W.M. The Court will not repeat the discussion of the evidence put in the record at previous hearings. However, the Court does note the discussion regarding the Dekoning claim in the Report of Referee, pages 202 to 206 and the Supplemental Report on pages 82 to 85. Similarly, the Referee addressed the Carmody, et al. land on pages 70 to 73 of the Report of Referee and pages 257 to 262 in the Supplemental Report. The Referee found insufficient evidence to conclude water rights had been established for any of the land.

On exception, Dekonings filed documents to show water rights awarded in *Olmstead v. Hays* are now appurtenant to their land. Documents that are part of DE-1832 show that in 1907, James Watson, George and Rebecca Donald, W. M. and Geneva Lee and the W. H. Reed Co sold to William T. Sheldon all water in Park Creek for irrigation, stock and domestic purposes to be used on any land east and north of the southern and western boundaries of Lots 1 and 2 and the NE¼NW¼ and NW¼NE¼ of Section 18, T. 17 N., R. 20 E.W.M. The agreement, however, also stated the parties of the first part (Watson/Donald/Lee/Reed) reserved the right to make such disposition as they saw fit of any portion of the water that remained in the creek after reaching

points south and west of the boundaries included in the agreement. Included in DE-1832 are deeds showing that in 1907 William M. Lee and W H. Reed Co. owned all of the land that had been owned by John McEwen at the time he was awarded water rights to Park Creek in *Olmstead*. The document does not state the right being transferred is the water right awarded to McEwen in *Olmstead*. At the time of this transaction Sheldon was in possession of Government Lots 1 and 2, the NE¼NW¼ and NW¼NE¼ of Section 18. He ultimately received the patent for this land in 1911. In 1912, Sheldon sold the land to Henry Kleinberg, but specifically did so without the appurtenant water rights, and retained the right of way to maintain and operate a ditch to carry waters from Park Creek through Lot 1. The lands served by this ditch are not identified. Sheldon then sold to Peter Sorenson the water rights to Park Creek he had acquired from Watson, et al. in 1907. Peter Sorenson owned the lands now owned by the Dekonings, i.e. the S½NW¼ and N½SW¼ of Section 13.

The Court has reviewed all of the documents related to the water right awarded to John McEwen in *Olmstead*, land sales by McEwen and agreements to sell water rights. None of the documents identify the extent of the water right awarded to McEwen in *Olmstead*. At that time McEwen owned 280 acres, but there is no evidence he was irrigating the entire 280 acres. Nor is there any evidence of how much water he had a right to use. The *Olmstead* decision gave McEwen and Olmstead the right to share equally in the remaining water in Park Creek and Brush Creek after awarding John Holtz the right to use 4/5 of the water flowing in those creeks. Again, no indication was provided as to how much water was flowing in the creeks

When Watson, et al. sold the water right to Sheldon, they owned all of the land that McEwen owned at the time of the *Olmstead* decision. However, when they later sold the land, they also conveyed the land "together with all water rights and irrigation ditches." This suggests the land still had water rights. In fact, George Ferguson, a successor to McEwen for the NW¼SW¼ and SW¼NW¼ of Section 22 was a party to a dispute in 1919, wherein he alleged continued exercise of the portion of the McEwen water right appurtenant to his land and provided an affidavit from McEwen's daughter attesting to continued use of the water

When Peter Sorenson acquired the water right in 1912, he owned 160 acres (the same 160 acres now owned by the Dekonings), significantly less land than was owned by McEwen. This could be an indication only a portion of the McEwen water right was sold off the land. Neighboring landowners and claimants Paul Sorenson and Kenneth Sorenson do own most of the

McEwen land and were awarded portions of that water right in the original and supplemental reports of Referee. Rights were awarded to the Sorensons to irrigate a total of 175 acres of former McEwen land. Because neither Dekonings nor Carmody, et al., provided sufficient evidence to show they were claiming a portion of the McEwen water right, the Referee did not have any evidence the water right might not still be appurtenant to the original McEwen lands. Additionally, they did not take exception to the awards to Paul Sorenson and Kenneth Sorenson. Therefore, the Court concludes the only portion of the McEwen water right that might be appurtenant to their lands is at best 105 acres (the difference between the 280 acres once owned by McEwen and the 175 acres awarded to the Sorensons).

In 1912, then, a right to irrigate at most 105 acres was acquired by Peter Sorenson, who owned the N½SW¼ and S½NW¼ of Section 13, and presumably intended to use the water on those lands. On July 21, 1919, John and Flora Sorenson and Peter Sorenson sold to Edwin Ross all rights to the water of Park Creek evidenced by the agreement between William Sheldon and James Watson and others. However, that attempt to sell the water right was after the legislature adopted the Surface Water Code, effective June 6, 1917, now RCW 90.03, which required the State's approval prior to transferring a water right. There is no evidence that approval was obtained, resulting in the water right not transferring legally. In 1919, Edwin Ross owned the lands now owned by Carmody, et al., in the N½NW¼ and Government Lot 2 of Section 18. Carmody, et al., acknowledge the Court may find the sale of the water right to Ross invalid for failure to comply with the change procedures in the Surface Water Code.

The claimant argues that in 1919 it was still possible to establish a water right under the Riparian Doctrine for this land. There are several problems with this argument. First, if it was possible to establish a right under the Riparian Doctrine, which could have been done at any time, it was unnecessary to purchase a water right and transfer it to the land. Why then, was that done once in 1907 and again attempted in 1919? Counsel did not address why a landowner would pay to acquire a water right, when one legally could have been established for little or no cost. Second, counsel suggests the Carmody, et al., land separated from the Federal government in 1882, which would have supported the ability to establish a riparian water right. However, the patent referred to by the claimant was for the N½NW¼, NW¼NE¼ of Section 17 and the NE¼NE¼ of Section 18, both in T. 17 N., R. 20 E. W.M. Carmody, et al. own the NW¼NE¼, N½NW¼ and Government Lot 2 of Section 18, lands not included in the patent that issued in

1882. The patent that covers the claimant's land in Section 18 issued to William Sheldon on April 27, 1911. There is evidence Sheldon was on the land in 1907 when he leased it to W G Muller and purchased a water right that could be used on the land. The Court agrees with the Referee's initial determination that the record shows 1907 to be the earliest date in the record when a riparian right might have attached to the land. This is after May 10, 1905, when the U.S. withdrew all unappropriated surface waters in the Yakima River Basin. Therefore, a riparian water right could not have been established at that time, unless a release from the withdrawal was obtained from the Federal government. Perhaps the landowner knew this, which is why he acquired the water rights from Watson, et al.

Based on the foregoing, the Court finds there is no water right for use of Park Creek on the Carmody, et al. property and denies the exception. The Court will confirm a water right to Brent and Kirsten Dekoning under Court Claim No. 00676 for the lands they irrigate with water from Park Creek. They presented evidence at the last exception hearing that 55 acres are irrigated with water diverted from Park Creek; 44 acres north and 11 acres south of Park Creek. Mr. Dekoning testified that in the 1950's or 1960's the owner at that time changed the location of the point of diversion from a strictly gravity flow system to a pump on the creek. The pump currently used is capable of diverting 2.0 cubic feet per second from the creek. A dam located downstream from the pump is capable of diverting about 1.5 cubic feet per second. Mr. Dekoning testified that generally one or the other diversion is used at any given time, but in the early spring there is sufficient water to use both.

Although Mr. Dekoning testified to normally diverting between 1.5 and 2.0 cubic feet per second (and more, earlier in the season) the Court cannot conclude a water right was established for that quantity. Historic documents from the time when this water right would have been perfected indicate that one inch of water was used to irrigate each acre of land, or 0.02 cfs per acre, which would be a maximum of 1.1 cubic feet per second. Since the method for diverting the water was changed long after the water right was established, it is not possible to conclude the irrigation practices today are the same as when the right was established. The Court, therefore, confirms a right under Court Claim No. 00676 with a June 30, 1873, date of priority for the diversion from Parke Creek of 1.1 cubic feet per second, 330 acre-feet per year from April 1 through October 15 for the irrigation of 55 acres in the S½NW¼ and N½SW¼ of Section 13, T. 17 N., R. 19 E.W.M.

The Court has reviewed the briefing submitted after issuance of the Referee's Report along with exhibits entered by Carmody, et al. at the Referee's 2003 supplemental hearing and notes the Carmodys were asserting rights that stem from J. D. Olmstead, rather than John McEwen. However, at the July 2004 exception hearing, counsel for Carmodys very clearly stated they were asserting rights stemming only from McEwen. This is an important distinction, as claimants Keith and Karen Eslinger are asserting rights as successors to Olmstead and a 1919 deed from Joseph Preece to Edwin Ross, Exhibit DE-1685, suggests that those water rights had been sold to Ross, who owned what is now the Carmody land. Eslinger's specifically inquired at the exception hearing about the basis for the Carmody claim to ascertain that their claim was not materially affected by that claim. The Carmodys offered no argument or evidence that they had a portion of the Olmstead water right and the Court will not further consider that issue.

Mark Charlton, Court Claims No. 02146 and 02147

Mark Charlton took three exceptions to the water rights set forth in the Supplemental Report. The first exception was to the place of use for the right recommended on pages 35-36 and 288 of the Supplemental Report. This right is based on Certificate No. 179 from the prior adjudication of Cooke Creek, which authorized the irrigation of 50 acres in Lot 1 of Section 31, and Lot 4 and the E½SW¼ of Section 30, all in T. 18 N., R. 20 E.W.M. The place of use on Certificate No. 179 is approximately 160 acres, but the water right authorizes the irrigation of 50 acres. Mr. Charlton's predecessor testified to irrigating 145 acres within the area described on Certificate No. 179, even though the water right allowed irrigation of 50 acres.

The Referee expressed concern, which the Court shares, over authorizing a place of use that significantly exceeds the number of acres confirmed for irrigation. If the land is divided and sold, the larger place of use description provides the opportunity for confusion over what lands have the appurtenant water right. The claimant argues he should have the opportunity each year to irrigate any 50 acres within the certificate's place of use and not be restricted to just one area. Ecology responded to support the Referee's determination that the place of use should be consistent with the number of acres authorized for irrigation. At the exception hearing, however, Ecology suggested there could be a limitation of use provision that would allow for a larger place of use, but clarify that in any year only 50 acres within the place of use can be irrigated. The Court will amend the place of use on page 288 to be Government Lot 1 of Section 31, and Government Lot 4 and the E½SW¼ of Section 30, all in T. 18 N., R. 20 E.W.M. The following

limitation of use shall be added: Although the described place of use is 160 acres, this water right only allows for the irrigation of 50 acres in any given year. Only one 50-acre area can be irrigated with water from Cooke Creek each year. If the land is divided and sold, the seller must clearly identify which 50 acres will have the appurtenant water right.

Another exception concerned the beginning date for the irrigation season. Pursuant to the Court's ruling in its December 12, 2002, Order on Exceptions for Subbasin No. 10, the Referee had set the irrigation as April 15 to September 15, but recognized irrigation can begin earlier if frost is out of the ground and water can be beneficially used. The claimant argues he begins irrigating as early as April 1. Ecology suggested the Court add to the claimant's rights a provision used on other rights that to allow use of water prior to April 15 if frost is out of the ground. Mr. Charlton requests changing the season to April 1 to September 15, with the caveat that water can only be used is frost is out of the ground. The Court will follow Ecology's recommendation of leaving the season as was recommended by the Referee, but add the provision that allows earlier use. The Court so ordered in the Order on Exceptions and that provision has consistently been used for other claimants on Cooke Creek. The claimant withdrew a third exception at the exception hearing concerning the number of authorized acres.

Robert and Sheree Clerf and Craig Clerf, Court Claims No. 00476, 00677, 00407

The Clerf family took exception to the Referee's recommendations regarding the referenced claims relating to use of water from Warm Springs Creek and Caribou Creek. The considerable factual material and legal argument surrounding the claims will be analyzed below.

A review of the history of water use from that source is helpful. The Court will not repeat the analysis of the evidence that supports this history of water use set forth in the Report and Supplemental Report of Referee. That evidence supports a conclusion that John Clerf, Robert Clerf's grandfather, developed Warm Springs and the creek that flows from the springs in the late 1800's and early 1900's. The flow in the creek was initially 54 inches, but through the efforts of Mr. Clerf, the flow increased to 124 inches (2.48 cfs) by 1907 when Mr. Clerf died. This water was appropriated and used to irrigate Clerf lands in Section 6, T. 17 N., R. 20 E.W.M. In 1915 -16, Mr. Clerf's widow and sons constructed three uncapped artesian wells near Warm Springs that flowed freely into Warm Springs Creek. The record does not show how much those artesian wells increased the creek flow although claimants assert the flow was increased by 5 cfs.

The Clerf's diversion from Warm Springs Creek has always been downstream of where the wells were constructed, resulting in the wells contributing to the water diverted from the creek. The Court finds that the water flowing from the wells is ground water, the rights to which are not being determined through this adjudication. The Clerfs used Warm Springs Creek as a mechanism to convey the ground water to their existing irrigation system.

No other efforts to improve the flow in Warm Springs Creek occurred after1916. As the Kittitas Reclamation District approached completion in 1930, Mary Clerf (John's widow) petitioned the district to have certain lands excluded from service because she had an adequate water supply. The lands she sought to exclude were the SE¼NE¼, NE¼SE¼, and SE¼SE¼ of Section 1, T. 17 N., R. 19 E.W.M. and the W½SW¼NW¼ and W½NE¼SW¼ of Section 6, T. 17 N , R. 20 E.W.M. The testimony in support of this request and a report by the Bureau of Reclamation indicate these lands were irrigated with Warm Springs' water. Mrs Clerf's request was granted and the lands excluded. The claimant is asserting a right to irrigate with Warm Springs' water land in Section 6 that differ from those described in the request for exclusion.

The artesian wells were capped (although the record is not entirely clear, it suggests this happened by the 1950's) and no longer contribute to Warm Springs Creek. In 1953, the Warm Springs Water Company (owned by the Clerf family) was issued Certificate of Change of point of diversion, purpose of use and place of use, recorded in Vol. 1, page 377 It authorized the change in place of use, point of diversion and purpose of use of 1.44 cubic feet per second of Warms Springs from a diversion in the NE¼NE¼ of Section 6 to a second point also in the NE¼NE¼ of Section 6. The certificate stated the water had been used for irrigation in the E½SE¼NE¼ and E½SE¼ of Section 1 and the W½SW¼NE¼ of Section 6 and would thereafter be used for municipal and domestic purposes for the Town of Kittitas. How this certificate of change impacts the Clerf's irrigation rights makes up part of their exception. The Clerfs assert the new point of diversion authorized in the certificate of change is the artesian wells constructed around 1916. Documents that are part of Ecology's administrative record for the change support that position. The certificate of change only mentions Warms Springs as the source of water. However, when the Clerf's were diverting water only for irrigation the artesian wells flowed into the creek and were then diverted from the creek below that point. The system installed to serve the Town of Kittitas takes water directly from the wells, rather than from the creek, resulting in the ground water being delivered directly to the town and eliminating the creek as a conveyance

system. Kittitas was joined to Court Claim No. 00476 and participated in the supplemental and exception hearings. If the Court determines the water it uses is surface water, the city requests a right to use 1.44 cfs, 610 acre-feet per year for municipal supply for the City of Kittitas. The Court, however, finds the source is ground water and cannot confirm a right in this proceeding.

The larger challenge facing the Court is determining what portion of the irrigation right remains appurtenant to the Clerf land. The Clerf's contend that by 1916 the flow in Warm Springs Creek was increased to approximately 7 cfs through the family's efforts and that is the extent of the water right that was established. In December 2001, which is after the wells were capped, Robert Clerf measured the flow in the creek at 4.18 cfs and suggests this is likely a conservative measurement due to the cold weather. They seek a right for 4.5 cfs for the irrigation of 215 acres. However, the record shows that prior to construction of the wells, rights had been established for use of 2.48 cfs. Since the Court has concluded that rights cannot be confirmed in this proceeding for ground water from the wells, 2.48 cfs is the maximum quantity that can be confirmed to the Clerfs. Additionally, since the wells have now been capped, the Court must presume the creek no longer benefits from water flowing out of the wells.

The certificate of change states the water had been used for irrigation on a 120-acre area (the E½SE¼NE¼ and E½SE¼ of Section 1 and the W½SW¼NE¼ of Section 6). The claimant asserts the quantity transferred, 1.44 cfs, was inadequate to irrigate 120 acres and, therefore, only a portion of the water right appurtenant to that 120 acres was transferred, leaving 406 acre-feet per year still appurtenant to the land. The Court cannot agree. The Certificate of Change clearly states the purpose of use is being changed from irrigation of lands in the E½SE¼NE¼ and E½SE¼ of Section 1 and the W½SW¼NE¼ of Section 6 to municipal supply for the Town of Kittitas. It does not say that a new purpose of use is being added as the claimant contends. The change statute, RCW 90.03.380, did not allow for the addition of a new use to a water right until 2001 – it only allowed for the purpose of use to be changed. The claimant has cited no authority to support a conclusion that in 1953 it was possible to add a new purpose of use to an existing water right. At the time Mary Clerf petitioned to have lands excluded from KRD, the creek flow was augmented by the artesian wells. Thus, the 1930 statements that lands were irrigated from Warm Springs does not assist in knowing whether the source was the springs/creek or the artesian wells. The intent of the certificate of change, however, is clear – it was to change the purpose of use from irrigation on the described lands to municipal supply. As a result of the

1953 certificate of change, the Court finds the water right for irrigating lands in the E½SE¼NE¼ and E½SE¼ of Section 1 and the W½SW¼NE¼ of Section 6 was changed to municipal supply for the City of Kittitas and no right for those lands can be confirmed.

The Clerfs assert a right to irrigate 95 acres within the E½NW¼ and N½NE¼ of Section 6, with a water duty of 8.47 acre-feet per year for each acre. The Court notes the Clerf claim and all the documents in the files suggest the Clerfs own the NE¼NW¼, but not the SE¼NW¼, of Section 6, leading the Court to conclude they actually are asserting a right to irrigate lands in the NE¼NW¼ and N½NE¼ of Section 6. No RCW 90.14 water right claim for the lands in the N½NE¼ of Section 6 was located. A review of the reports of Referee and previous exceptions of the claimants reveal the 2004 exceptions are the first time a claim was made for irrigating lands in the N½NE¼ of Section 6 and compliance with RCW 90.14 had not been addressed. Many of the documents related to settlement of the entire N½N½ of Section 6, however, the testimony and evidence of water use all related to lands in the W½ of Section 6, except for Mary Clerf's efforts to exclude land from KRD, which also mentioned the SW¼NE¼ of Section 6 (lands for which a right is not being asserted). Lacking an RCW 90.14 claim, the Court cannot confirm a right for any lands in the N½NE¼ of Section 6. The State's Exhibit Map does not show any irrigated land in this area. However, that may owe to the land not being included in the original claim filed by the Clerf family.

The Referee had recommended a right to irrigate 85 acres in parts of Government Lots 3, 4, 5, 6 and 7 of Section 6 – essentially the NE¼NW¼, W½NW¼ and W½SW¼ of Section 6. At the initial hearings the Clerfs asserted rights to irrigate this land, rather than the N½NE¼ of Section 6. Since the Court is unable to confirm a right for the land in the N½NE¼ of Section 6, the Referee's recommendation will be adopted although the instantaneous quantity will be increased to 2.48 cfs and the annual quantity to 680 acre-feet. These changes will be made to the water right described on page 285, lines 1 through 11 of the Supplemental Report.

The Clerfs also ask the Court to award a Caribou Creek right to irrigate 80 acres in the E½SW¼ of Section 1, T. 17 N., R. 19 E.W.M. The Referee found that a water right to irrigate 10 acres was recognized in the 1911 *Clerf v. Scammon* decree and was the extent of the right that could be confirmed. The Clerfs argue the flow in Caribou Creek increased after *Clerf v. Scammon* due to the family's efforts and they have a right to use the additional water. The increased flow is from the same artesian wells discussed above. When the Clerfs are not

diverting water from Warm Springs Creek, it flows into Caribou Creek and is available for them to divert and use on their lands in the SW¼ of Section 1. However, the Court has found water from the artesian wells to be ground water and won't be addressed in this adjudication. Further, the Clerfs' testimony is the wells have been capped and no longer contribute to Warm Springs Creek and Caribou Creek. The Court finds the extent of the water right for the Clerf property in the E½SW¼ of Section 1 is as described in *Clerf v. Scammon* and denies the exception.

Ecology sought clarification of the annual quantity awarded to the Clerfs for the Caribou Creek water right described on page 319 of the Supplemental Report. The quantity authorized cannot be withdrawn during the described irrigation season. The Court modifies line 16½ to authorize the diversion of 0.20 cfs, 84.89 acre-feet per year.

Cooke-Coleman, LLC, Court Claims Nos. 00927, 01141

Cooke-Coleman, LLC took two exceptions. The first concerns the number of acres authorized to be irrigated in the water right described on page 290 of the Supplemental Report. In the Supplemental Report, the Referee addressed the number of acres irrigated in the N½S½ of Section 7, T. 18 N., R. 20 E.W.M. The claimant testified to irrigating 85 acres and offered aerial photographs in support. The Referee estimated the number of irrigated acres, as shown on the aerial photographs, and revised his recommendation to 71 acres. At the exception hearing the claimant offered testimony and additional exhibits to show exactly how many acres are irrigated in each of the fields within the place of use, resulting in a finding that 83.22 acres are irrigated. The Court grants the exception and amends the water right described on page 290 at lines 3 and 5 to authorize the diversion of 1.66 cfs, 431.75 acre-feet per year for the irrigation of 83.22 acres. Line 14.5 is amended from 1.4 to 1.66 cfs and line 16.5 is amended to 98.6.

Claimant also requested a right to use springs. The evidence shows two springs, one in the NE¼NW¼ and one in the NW¼NE¼ of Section 7 flow into the irrigating system used on the property. The springs are in close proximity to Cooke Creek and flow into the creek when not used. The claimant advanced two arguments to support a water right to use springs, contingent on whether the springs were part of the water sources addressed in the earlier adjudication of Cooke Creek. The Court adopts the argument the prior adjudication addressed not only Cooke Creek, but its tributaries. The springs at issue are clearly tributary to the creek and contribute to its flow. The Court was faced with similar arguments in Subbasin No. 3 (Teanaway River) and concluded that unnamed tributaries of the Teanaway River were part of the prior adjudication

and use of those tributaries were authorized by rights confirmed in the decree/certificates. See *Order on Exceptions, Subbasin No. 3 (Teanaway)* entered on March 13, 1997. Certificate No. 204, with an 1870 priority date, authorized irrigation of the lands lying below the springs. The Court grants the exception and amends the water right described in the Supplemental Report, page 273, which is based on that certificate, to add the two springs as authorized sources of water. No other change shall be made. One spring is located approximately 100 feet south and 400 feet west of the north quarter corner of Section 7, being in the NE¼NW¼ of Section 7 and the second is located 150 feet south and 300 feet east of the north quarter corner of Section 7, being in the NW¼NE¼ of Section 7.

Keith and Karen Eslinger, Court Claim No. 00613

The Eslingers took exception to the Referee not confirming a right to use Park/Brush Creek. The Referee's decision was influenced by the Carmodys' claim a predecessor had purchased the Olmstead water right. Supplemental Report at 112. The Carmodys are no longer taking that position (see discussion above). The Court confirms a right to Eslingers as described in the Supplemental Report, page 111, to include a May 30, 1872, date of priority for the diversion of 4.0 cubic feet per second, 846.53 acre-feet per year from Park Creek from April 15 to October 31 for the irrigation of 190 acres and stock water in the W½NE¼, SE¼NW¼, NE¼SW¼, NW¼SE¼ and that portion of the NE¼NW¼ lying southeast of a line described as follows: Beginning at a point 1000 feet south of the north quarter corner; thence southwest 630 feet to the terminus of the line on the south line of the NE¼NW¼; all in Section 22, T. 17 N., R. 19 E.W.M. The point of diversion is that described in Water Right Claim (WRC) No. 060683; being 550 feet west and 50 feet south of the northeast corner of Section 22, within the NE¼NE¼NE¼ of Section 22, T. 17 N., R. 19 E.W.M. The testimony at the supplemental hearing indicated the lands in the SE¼NW¼ of Section 22 are also irrigated with water diverted from Caribou Creek, and the lands in the southerly 500 feet of the NE¼SW¼ and NW¼SE¼ are also irrigated with water delivered by Ellensburg Water Company. This right will contain a provision that identifies the additional sources of water in a limitation of use paragraph.

Estate of Norma Flach, Court Claim No. 00683

The Flach family filed several exceptions to the Supplemental Report, although many seek modification of the water rights recommended by the Referee to incorporate applications for change approved by Ecology in 2003.

The first exception is to water rights not being confirmed for use of springs on the Flach property. The Referee concluded the springs were no more than wet spots on the land prior to 1961, when with the assistance of the Soil Conservation Service (SCS), Harold Flach improved the springs and constructed ponds to collect the spring flow. Water from the ponds was then used to irrigate portions of the Flach property. The Referee found that to establish a surface water right in 1961, Mr. Flach should have obtained a permit from Ecology's predecessor agency (RCW 90.03.250, et seq.). There is no evidence that occurred. Although Lanette Flach (co-representative of her mother's estate) believes her father would have obtained any necessary permits – and the SCS would not have helped fund a project without the necessary permits – neither Ms. Flach nor Ecology presented evidence of any permits/certificates for use of the springs. The Court finds it cannot confirm a right for the springs.

The second exception is to the point of diversion for the water right confirmed by the Referee based on Certificate No. 174 from the prior Cooke Creek Adjudication. See Supplemental Report at 289. The diversion is from Cooke Creek into the Trio Ditch. The description of the point of diversion used by the Referee was taken from Investigation Report No. 2 prepared by Ecology prior to the initial evidentiary hearing. The Flach family filed several applications for change seeking authorization for changes to points of diversion made prior to their family acquiring the land. Although there was no need for an application for change for the water right described in Certificate No. 174, the point of diversion into the Trio Ditch was located and added to the water right that is based on Certificate No. 178. The location of the diversion into the Trio Ditch, as described in the Report of Examination filed on the Application for Change for Certificate No. 178 is slightly different than that used by the Referee. The claimants suggest, and the Court agrees, that the descriptions should be the same. Ecology's believes the description in the Report of Examination is more accurate as it involved use of GPS equipment. The Court grants the exception and the point of diversion described on page 289 at line 6½ is changed to read approximately 700 feet north and 2600 feet east of the west quarter corner of Section 6, being within the SE¼NW¼ of Section 6, T. 18.0 N., R. 20 E.W.M.

The third exception asks the Court to adopt the new points of diversion authorized for use after Ecology approved the application for change that was filed on the water right confirmed by the Referee based on Certificate No. 175. That water right is described on page 337 of the Supplemental Report. The Court grants this exception and lines 6½ through 7 are amended to

the following: 1) approximately 1000 feet north and 1400 feet west of the southeast corner of Section 7, being within the SW¼SE¼ of Section 7, 2) 400 feet north and 1400 feet west of the southeast corner of Section 7, being within the SW¼SE¼ of Section 7, 3) 700 feet south and 2700 feet east of the northwest corner of Section 18, being within the NW¼NE¼ of Section 18, All in T. 18 N., R. 20 E.W.M.

The fourth exception simply confirms that the only diversion being used for the water right described on page 356 of the Supplemental Report is correctly described as being 50 feet south and 850 feet west of the center of Section 7, in the NE¼SW¼ of Section 7. No change to that right is needed or asked for.

The fifth exception asks that the Court adopt the new points of diversion authorized for use after Ecology approved the application for change that was filed on the water right confirmed by the Referee based on Certificate No. 177. This water right is described on page 357 of the Supplemental Report of Referee, at lines 1 through 11. The Court grants this exception and lines 6½ through 7 are amended to the following: 1) approximately 1000 feet north and 1400 feet west of the southeast corner of Section 7, and 2) 1300 feet north and 2600 feet west of the southeast corner of Section 7, Both being within the SW¼SE¼ of Section 7, T.18 N., R. 20 E.W.M. The Court notes that the Referee confirmed a right to irrigate 32 acres and Ecology, in its tentative determination, found 30 acres were being irrigated. Ms. Flach's testimony was that between 30 and 32 acres are being irrigated. The Certificate No. 177 authorized the irrigation of 32 acres. Although it is not clear exactly how many acres are being irrigated, the difference between the 32 acres found by the Referee and the acres Ecology felt were being irrigated is small and the Court will not disturb the Referee's findings.

The sixth exception asks that the Court adopt the new points of diversion authorized for use after Ecology approved the application for change that was filed on the water right confirmed by the Referee based on Certificate No. 178 from the prior adjudication of Cooke Creek. The exception also seeks to clarify the number of acres presently and historically irrigated. The water right recommended for confirmation by the Referee is found on page 366 of the Supplemental Report of Referee. The Court grants the portion of the exception dealing with the points of diversion and lines 6½ to 7 are changed to the following: 1) 400 feet north and 1400 feet west of the southeast corner of Section 7, being within the SW¼SE¼ of Section 7, 2) 700 feet north and 2600 feet east of the west quarter corner of Section 6, being within the SE¼NW¼ of Section 6,

Both in T. 18 N., R. 20 E.W.M. The Referee found that 10 acres had historically been, and continued to be, irrigated within the place of use on Certificate No. 178. However, Ecology's tentative determination of the right found that 5.7 acres were being irrigated, based on Ms. Flach's information of where the irrigated acres are located. However, after the Report of Examination was issued, Ms. Flach realized that she had made an error and had not identified a second area of 4.3 acres that they irrigate under this water right. The evidence presented by Ms. Flach and her testimony persuades the Court that the Referee's conclusions were correct and the number of acres authorized to be irrigate on page 366 will not be changed.

Exception No. 7 concerns the water right described in Certificate No. 186 from the earlier adjudication of Cooke Creek. This water right issued to Lewis Habel and authorized the irrigation of 0.70 cubic foot per second for the irrigation of 35 acres in the SW¼SW¼ of Section 1, T. 17 N., R. 19 E.W.M. In 1925 Mr. Habel sold this water right to W. H. Bott, a prior owner of the Flach property. However, neither Mr. Habel nor Mr. Bott complied with the change procedures of the Surface Water Code adopted in 1917 and now codified as RCW 90.03.380. The Surface Water Code required that an application for change be filed with Ecology or one of its predecessor agencies prior to changing the location of a water right. If the change can be made without impairment to existing rights, then it can be approved. Since the change procedures were not complied with, the Referee did not recommend that this water be confirmed to the Flach family, but suggested they file an application for change and go through the change procedures. They had not done so at the time of the supplemental hearing in 2003, but expressed their intent to do so. During the supplemental hearing the owner of the SW¼SW¼ of Section 1, Craig Clerf, appeared and asserted a claim to this right. Ms. Flach's exception identified that she was aware that Mr. Clerf had filed an application for change on this right himself. As a result, the Flach family chose not to pursue the application for change they had filed until the Clerf's claim to this right had been addressed by the Court. The Clerfs apparently chose to not pursue their claim to this right, as they did not file an exception to the Referee's determination that a right could not be confirmed, nor did they challenge the Flach's claim to the right. However, the Court is still in the position of not being able to confirm the right to the Flach family and cannot do so until they go through the application for change process. If they choose to do so, Ecology is urged to act quickly so that if approved the Court can address this portion of their claim prior to issuance of the Conditional Final Order for Subbasin No. 10.

The last exception by the Flach family was to the Referee not including on their water rights the language that allows them to use surplus water when it is available in the spring of the year. They thought their testimony in 2003 addressed use of the surplus water, commonly called flood water, but also testified about its use at the exception hearing. The Court grants this exception and each of the water rights awarded under Court Claim No. 00683 will be amended to include language that allows them to divert twice the authorized instantaneous quantity when surplus water is available in Cooke Creek in excess of that needed to satisfy all existing rights.

Don and Judy Jacobs, Joe and Doriene Jacobs, Court Claim No. 00956

The Referee in the Supplemental Report found sufficient evidence to conclude water rights had been established for the Jacobs' property. However, he did not recommend confirmation of a right because the irrigated land was within three different homesteads which would result in three water rights with different priority dates and the Referee was not able to determine how many acres were irrigated within each of the initial homesteads. Additionally, the legal description on the water right claim filed pursuant to RCW 90.14 did not include any lands in the NW¼ of Section 29, T. 17 N., R. 19 E.W.M., where nearly half of the irrigated land was located. Jacobs took exception and filed a request to amend Water Right Claim No. 009772 with Ecology. The request was granted by Ecology on July 1, 2004 and a copy of that approval was entered as Exhibit DE-1829 at the July 8, 2004 exception hearing. The place of use was amended to include a portion of the S½NW¼ of Section 29. However, a portion of the irrigated land (about 20 acres) lies in the NW¼NW¼ of Section 29 and is still not covered by the water right claim. The Court also has a copy of the Jacobs' request to amend the claim form, DE-1773, and the request included lands in the W½NW¼ of Section 29. There is nothing in the record to indicate why the approval did not cover all of the land requested by the Jacobs.

WRC No. 009772 asserted a right to divert 10 cfs and 3,000 acre-feet for the irrigation of 270 acres and documents filed by the Jacobs seem to repeat that quantity when identifying their claim in this proceeding. However, at the initial evidentiary hearing, Mr. Jacobs testified that a maximum of 3 cubic feet per second is diverted from Cherry Creek to irrigate his land, see Report of Referee, page 223, lines 1 through 5. The Jacobs have irrigated 233.9 acres with this water, or 0.013 cfs for each acre irrigated. The Jacobs have one point of diversion, which diverts into two ditches, one going north of the creek and the other going south of the creek. The diversion is located 1120 feet south and 1310 feet west of the northeast corner of Section 29,

being within the SW¼NE¼NE¼ of Section 29. The Court will confirm a right to divert 0.013 cfs, 4.5 acre-feet per year for each irrigated acre as follows:

With a July 1, 1874 date of priority, a right to divert 0.478 cfs, 164.7 acre-feet per year from April 1 to October 31 for the irrigation of 36.6 acres in the SW¼NE¼ of Section 29; with a November 20, 1879 date of priority, a right to divert 1.06 cfs, 365.85 acre-feet per year from April 1 to October 31 for the irrigation of 81.3 acres in the NE¼SW¼ and that portion of the S½SW¼ of Section 29 lying north of the Badger Pocket Wasteway; with a May 24, 1884 date of priority, a right to divert 1.46 cubic feet per second, 432 acre-feet per year from April 1 to October 31 for the irrigation of 96 acres in the NW¼SW¼, the SW¼NW¼ and SE¼NW¼ of Section 29. The point of diversion for all three rights will be as described above.

The instantaneous quantity authorized to be diverted in the right set forth above is sufficient for the additional 20 acres for which the Court cannot now confirm a right. If they pursue correcting the place of use on the claim amendment, so that the NW¼NW¼ of Section 29 is described on the claim form, then the acreage and annual quantity can be increased to reflect that additional area. However, this must be done prior to entry of the Conditional Final Order.

J. Wayne and Cindy L. McMeans, Court Claims No. 02165, 02166, 02167, and (A)5550:

The claimants took several exceptions to the Supplemental Report. The first two related to water rights not being confirmed for a portion of the claimants' property in the SE¼ of Section 8 and the SW¼ of Section 17. The Referee did not recommend rights partly due to deficiencies in the water right claims filed pursuant to RCW 90.14.

For lands in Section 8, Water Right Claim No. 149923 asserts a right to irrigate lands in the E½NE¼ of Section 8 and the NW¼ of Section 17, so the lands in the SE¼ of Section 8 are not included in this or any other claim filed during the registration period. The claimant filed with Ecology a request to amend WRC No. 149923 to include the land in the SE¼ of Section 8. Ecology recently provided the Court exhibit SE-169 – its decision on the McMeans' request to amend WRC No. 149923. For the most part, Ecology granted the McMeans' request. After the amendment, WRC No. 149923 claims a right to use water from Caribou Creek for the irrigation of 224.38 acres within the NW¼ of Section 17 and the E½ of Section 8, except the NW¼NE¼ thereof, all in T. 18 N., R. 20 E.W.M.

The Referee summarized the pertinent history in the Report and Supplemental Report and recommended a right for only a portion of the property as WRC No. 149923 did not describe all

of the irrigated land – now addressed by Ecology's amendment of the claim form. The Referee recommended that a right be confirmed for the portion of the irrigated acres in the NW¼ of Section 17. In the Supplemental Report, the Referee identified that because of various settlement dates for the land in the NE¼ of Section 8 (and this extends to the land in the SE¼ of Section 8 as well), the claimant needed to provide the number of acres in each of the separate homesteads. That information was attached to the McMeans' exception to the Supplemental Report.

The evidence lead the Referee to find a maximum of 4 cfs was historically diverted to irrigate all of the land in the NW¼ of Section 17 and the E½ of Section 8 and he recommended a right to divert 2 cfs, 356 acre-feet per year for the irrigation of 110.6 acres in the NW¼ of Section 17. A total of 103.08 acres is irrigated in the E½ of Section 8, with 10 03 acres in the area homesteaded by William A. Smith (1894 date of priority) and 93.05 acres within the area homesteaded by Elizabeth Grissom (1887 priority date). The 2 cfs will be split proportionately between the two areas. The Court confirms a right with a November 5, 1887, date of priority for the diversion of 1.80 cubic feet per second, 300 acre-feet per year for the irrigation of 93.05 acres in that portion of the SE¼NE¼ southeast of Caribou Creek, the NE¼SE¼, that portion of the E½NW¼SE¼ and N½SW¼SE¼ southeast of Caribou Creek in Section 8; and with a June 9, 1894 date of priority a right to divert 0.20 cfs, 32.30 acre-feet per year for the irrigation of 10 03 acres in that portion of the NE¼NE¼ and SE¼SW¼NE¼ lying southeast of Caribou Creek in Section 8; all in T. 18 N., R. 20 E.W.M. The point of diversion for both rights shall be as set forth in WRC No. 149923, which the Court finds is located approximately 400 feet south and 125 feet east of the northwest corner of Section 9, in the NW¼NW¼ of Section 9, T. 18 N., R. 20 E.W.M. The Court believes this ruling also resolves McMeans' Exception 4.

Water Right Claim No. 160956 was filed for lands in the SW¼ of Section 17. However, a short form was utilized that was only appropriate for protecting small water rights, specifically those described in the Ground Water Code's exemption to the permit requirement. *See* RCW 90.44.050 (i.e. domestic supply, stock watering, industrial, and irrigation of up to one-half acre, if less than 5,000 gallons per day is being used). Clearly the water uses in the SW¼ of Section 17 do not meet these criteria. Claimant attempted to amend this claim and Ecology recently submitted SE-164 – Ecology's decision on the McMeans request to amend WRC No 160956. Ecology denied the request because it did not meet any of the statutory criteria that authorize an amendment. Even if the McMeans had succeeded in amending the 90.14 claim the

Court would still deny the court claim for a water right because no right was established for the SW1/4 of Section 17 (to be discussed below). The McMeans also made two arguments regarding substantial compliance with RCW 90.14 or estoppel which will not be addressed since the Court has found no right was established for this land.

The McMeans' main problem is that they failed to show a water right was established for the SW1/4 of Section 17. In the Supplemental Report, the Referee noted William Craig was the owner of the SW¼ of Section 17 at the time of *Clerf v. Scammon*. Mr. Craig was joined to the case as an intervener, but a water right was not awarded for his property. The McMeans argue that due to the timing for joining the interveners in the case, it would not be binding. However, nothing was offered to support this position and the Order joining the interveners actually contradicts the position. The *Clerf* Court joined the interveners because

> "... the Court cannot properly determine the same (referring to the case) without each and every owner of land upon Caribou or Cherry Creek being made parties here. ... to the end that all rights to the use of the waters of said creek may be settled in this action and such owners will be made parties by service upon them of a summons and amended complaint in the action ..." see DE-1641"I"

The *Clerf* Court quantified the water rights of the interveners and did so for neighboring intervener, Charles Smith, and for other lands now owned by the McMeans. Claimant stated this issue would be addressed in post-hearing briefing but no such briefing was received. In sum, the lack of a water right claim is not the basis for the Court not confirming a water right, but rather that there has been no showing a water right was established.

Exception 3 was to a water right not being confirmed for a spring described as Spring No. 5 and located approximately 200 feet south and 1100 feet east of the northwest corner of Section 17. The Referee did not recommend a right due to lack of evidence of historic water use and lack of information about how the water is currently used. Water from the spring flows into an open ditch, which is also used to deliver water diverted from Caribou Creek and used to irrigate approximately 50 acres of pasture and stock watering in the W½NW¼ of Section 17. The land is irrigated with gated pipe. Mr. McMeans testified the spring flows 1 cfs in the early part of the irrigation season and then declines to about 0.5 cfs later in the summer, but never goes dry. The flow then is recharged during the fall and winter. Mrs. McMeans researched historic county records and discovered the spring is very near a stagecoach stop. There was also an

Indian campground located near the spring, but not as close as the stagecoach stop. The claimants believe the spring was developed and first used at the stagecoach stop.

The Court finds there is sufficient evidence to show the spring was first developed and put to beneficial use early enough for a water right to have been established. Due to its location near the irrigated fields, use of the spring likely commenced when the land was first irrigated. Water Right Claim No. 149924, filed pursuant to RCW 90.14, asserts a right to divert 1 cfs, 200 acre-feet per year for the irrigation of 80 acres in the W½NW¼ of Section 17, T. 18 N., R. 20 E.W.M. The Court confirms a right for those quantities for the irrigation of 50 acres as testified to by the claimants. The W½NW¼ of Section 17 was originally conveyed by the United States to Northern Pacific Railroad, so the priority date shall be the date the map of definite location for the railroad was filed, which is May 24, 1884, for Kittitas County. The point of diversion is approximately 200 feet south and 1100 feet east of the northwest corner of Section 17, being within the NW¼NW¼ of Section 17, T. 18 N., R. 20 E.W.M.

Exception No. 5 sets forth the claimant's perception the Referee did not list the water right for flood water and late season use as reflected in the Report of Referee, on page 268, at lines 8 through 12. The Court reviewed the Report and the amended *Clerf* language referenced by the Referee. The claimant apparently fails to recognize that every water right recommended for confirmation for lands owned by Charles Smith at the time of *Clerf* is a result of the Referee finding the language cited allowed for the confirmation of water rights for the McMeans' property. As shown by Mr. McMeans' testimony, Caribou Creek goes dry through their property. The *Clerf* Court found that due to this phenomenon, water from Caribou Creek could be used on the Smith property without an adverse affect on the senior, downstream water rights. There is no separate water right for the former Smith property beyond that which the Referee recognized and which the Court has confirmed herein. Thus, exception 5 is denied.

Ecology sought clarification of the section number for the diversion points described on page 314 of the Supplemental Report. Lines 19 and 20½ should both be changed to Section 19

John L. and Laura D. Miller; Schiree Sullivan; Larry Miller; Jay and Christine Bloxham; Marly Onstot, Court Claims No. 01010 and 02088:

These claimants took exception to the Referee concluding there was insufficient evidence to show beneficial use of water during the time frame necessary to perfect water rights. They suggest the documents in the record from the early 1900's to the present consistently show water

rights were conveyed with the property and evidence of use since 1964 is sufficient. The Referee found that the claimants needed to provide evidence of water use prior to 1964

The claimants argue the Referee is requiring evidence of water use prior to 1932. The Court disagrees that was the Referee's position; however, that is the standard by which this adjudication has progressed. The claimants bear the burden of proving water rights were legally established and proof of water use only since 1964 does not accomplish that proof. The documents in the record are not conclusive and could be used to prove water rights were established for only a portion of the claimants' land, along with other lands in the area.

A right is asserted under the Riparian Doctrine, which is appropriate if the water source flows through or adjacent to the lands on which water is used. The claimants use water from a stream that flows from the northeast through the E½ of Section 8 and is a tributary to a stream demarcated as Park Creek. SE-2 (State's Map Exhibit). The stream utilized is unnamed on SE-2

The Court will review the documents submitted by the claimants. Exhibit DE-756 is an agreement between Chicago Milwaukee and Puget Sound Railway Company and Grace W. Ross dated October 12, 1910, wherein the railway agrees to construct a road from the bottom land of Park Creek situated in the SE¼SW¼ of Section 8, T. 17 N., R. 20 E.W.M. to a point of crossing of the right-of-way of said railroad. The railway company also agreed to lay a pipe for irrigating purposes to be placed underneath the railway embankment at approximately the location of a present irrigation ditch. However, this document does not identify the lands served by the irrigation ditch that was being replaced by the pipeline. Nor is it clear what land was owned by Grace Ross in 1910. DE-1857 is a 1925 deed conveying from J. D. and Grace Ross to Edwin Ross the NE¼NE¼ of Section 18, the N½NW¼ and NW¼NE¼ of Section 17 and the SW¼NE¼, E½SW¼ and NW¼SE¼ of Section 8, together with all water rights in Park Creek and all other water rights appurtenant to the said lands. Considerably more land was conveyed than is now owned by these claimants and only a portion of the claimants' land is described. Additionally, the deed is dated 15 years after the agreement between Ms. Ross and the railway company. There is no evidence she owned the same lands in 1910 as were conveyed in 1925. The agreement indicates a pipeline would be constructed under the railroad at the location of an existing irrigation ditch. The source of water being used by the claimants and for which they assert a right flows through the property. It is not necessary to run a pipe under the railroad to get water to the property. The claimants further suggest the easement and pipeline were

necessary to convey runoff water off the land and under the railroad. The Court does not reach the same conclusion. The language supports a conclusion the pipeline was delivering irrigation water either to different land or a different water source was being used, or both.

Exhibits DE-1757, 1854 and 1855 are documents from the 1920's that convey the E½SW¼, NW¼SE¼ and SW¼NE¼ of Section 8, including water right in Park Creek and all other water rights appurtenant to said land. Of the parties joined to Court Claims No. 01010 and 02088, only Larry Miller and Schiree Sullivan own land within that part of Section 8. The only document in the record referencing water rights for the lands owned by the rest of the claimants is the 1964 deed conveying land from Allen Lay to Leland and Burniece Orcutt. There are no documents in the record for the E½SE¼ of Section 8, except a mortgage agreement between Frank Ash and the Pennsylvania Mortgage and Investment Company. The chain of title indicates that the receivers receipt that preceded issuance of the patent is dated 1891.

The Court takes note of information in both the Report and Supplemental Report of Referee. Leland Orcutt, who filed Court Claim No. 02088, which describes the N½SE¼ of Section 8, testified to irrigating about 8 acres while the claimants assert rights to irrigate 20 acres. The testimony at the exception hearing shows the Bloxhams irrigate 10 acres, Ms. Onstot 3 acres, Mr. Miller 4 acres and Ms. Sullivan 3 acres. Mr. Orcutt did not indicate the location of the 8 acres he irrigated, except that it was south of the creek. The Referee also noted that no RCW 90.14 claim applies to the land in the E½SW¼ of Section 8. Failure to file a water right claim waives and relinquishes any right that may have existed. RCW 90.14.071.

In sum, there are documents that transfer land including the E½SW¼ and NW¼SE¼ of Section 8, and those documents include language suggesting there are water rights to Park Creek appurtenant to the land. No such documents exist for the E½SE¼ of Section 8, the location of over half of the irrigated lands. The only evidence of beneficial use of water on any of the land is after 1964. There is no RCW 90.14 water right claim for the land in the E½SW¼ of Section 8. The owner of the land from 1964 to the early 1980's testified to irrigating 8 acres, not the 20 acres for which a water right is claimed. The claimants have argued the language in the deed referencing water rights is proof water was being used on the land. The Court does not reach the same conclusion. There may be documents that may purport to show the existence of a water right, but without beneficial use of the water, the right does not exist.

The claimants also argue this land is far from town and the only reason any one would settle on it would be for farming and that should support the conclusion that water was beneficially used. However, after reviewing the history of the land it is not clear that anyone settled on the land long enough to make any use of it until the time that the Kittitas Reclamation District (KRD) was extended into the area. The claimants have testified a portion of their land (the largest portion) is irrigated with KRD water. The Court will not make assumptions on when beneficial use of water may have begun without better evidence. Lacking any evidence of beneficial use of water prior to the 1960's, coupled with evidence that the use was expanded in recent years, the Court will not confirm water rights under Court Claims No. 01010 and 02088.

Thomas J. Nisbet, Court Claim No. 00422

In addition to the exception to the period of use for irrigation discussed on page ###, the claimant also took exception to the quantity of water, number of acres, and place of use for the water rights recommended by the Referee. In the Supplemental Report, the Referee found that all of the Nisbet land being irrigated by Walter Bull at the time of *Bull v. Meehan* would have a Coleman Creek right based on that case. The Referee also concluded that due to the gravity flow system historically used, only those lands lying below 1510 feet m.s.l. could have been irrigated by gravity flow. The Referee estimated 70 acres in the E½SE¼ of Section 20 would have historically been irrigated and recommended such a right. The claimant does not challenge the Referee's finding that only lands below 1510 feet m.s.l. could have been irrigated by the gravity flow system, but contends 214.12 acres lie below that contour and were historically irrigated.

Mr. Nisbet provided an aerial photograph prepared by the Kittitas County Conservation District showing the contours and delineating the lands lying below 1510 m.s.l. A ditch carries water diverted from Coleman Creek near the east quarter corner of Section 17 into the E½ of Section 20, where the ditch splits and one branch continues south through the E½ of Section 20 into the NE¼ of Section 29. The Referee apparently concluded the westerly branch only served land not owned by Nisbet. However, the claimant testified to the ditch being used to irrigate lands below 1510 m.s.l. in the N½SE¼NE¼, SW¼NE¼, SE¼SE¼NW¼, E½SW¼ and SW¼SW¼ of Section 20. The conservation district indicated on the aerial photo that a total of 221.68 acres are irrigated below 1510 m.s.l. at a location that was served by the gravity flow ditch. However, Mr. Nisbet notes there are 7.56 acres on the photo that were not owned by Bull and should not be included in the water right awarded based on the Bull ownership.

The claimant did not address the water right claim filed pursuant to RCW 90.14 by Eric T. Moe. WRC No. 002662 asserts a right to divert 1600 gallons per minute (3.56 cfs) 1065 acre-feet per year from Coleman Creek for the irrigation of 160 acres. The date of first water use claimed was 1895, just before the Moe family began acquiring the former Bull property. The place of use is drawn on a map attached to the claim form and appears to be the same area for which Mr. Nisbet is now asserting a right to irrigate 214.12 acres. Mr. Moe also filed WRC No. 002665, claiming a right to use 200 gallons per minute, 200 acre-feet per year from Coleman Creek in the NE¼NE¼ and SE¼NE¼ of Section 20. The date of first water use is 1925. Mr. Moe testified additional lands were developed after 1922. The number of acres irrigated was not described. However, in the other claim Mr. Moe asserted a right to use 10 gpm for each acre irrigated. Assuming Mr. Moe was also claiming 10 gpm for each acre irrigated in WRC No. 002665, then a right is being asserted to irrigate 20 acres. Each claim describes a different point of diversion. Therefore, the RCW 90.14 claims assert rights to irrigate a total of 180 acres. The claimant did not address the difference between the acreages claimed.

The claimant asks the Court to conclude that all of the land that lies below 1510 m.s.l. was irrigated at the time it was owned by Walter Bull and would then enjoy a right based on his appropriations. The testimony in prior hearings was the Moes increased the number of acres irrigated over the years. October 15, 1991 RP beginning on page 212. Mr. Moe consistently asserted a right to irrigate 160 acres with Coleman Creek water. See WRC No. 002662, Court Claim No. 00422 and his testimony. Although the Court may confirm rights in excess of what is described on a RCW 90.14 claim and the claimant has the ability to amend the claim form, a right can only be confirmed for the lands historically irrigated – prior to 1932 for riparian lands and prior to 1917 for lands covered by the Prior Appropriation Doctrine. The claimant is relying on *Bull v. Meehan* as the basis for the water rights claimed. However, there is no evidence that Walter Bull owned the Nisbet land in the N½ of Section 29. It is acknowledged the irrigated lands in the NE¼NE¼ and NE¼NW¼ of Section 29 should be excluded from the water rights being confirmed. However, the Court makes the same conclusion for the NW¼NE¼ of Section 29. Although the Moe family did acquire this land in 1898 as part of the land acquired from Scottish Mortgage Company, it had not been previously owned by Walter Bull. Merely acquiring the land along with former Bull land does not convey a portion of the Bull water right. The Court estimates half of the NW¼NE¼ of Section 29 is irrigated, or about 20 acres. Thus,

194.12 acres were below 1510 m.s.l. and owned by Bull at the time of the dispute and currently being irrigated. Evidence of when the Section 29 land was first irrigated is not in the record.

The Court will confirm a right under Court Claim No. 00422 for the lands owned by Walter Bull during *Bull v. Meehan*. Although the RCW 90.14 claims assert rights to irrigate 180 acres, rather than 194.12, the Court finds substantial compliance and confirms a right for 194.12 acres. The historical point of diversion is in the N½ of Section 9, T. 17 N., R. 19 E.W.M., however, this point is only described on WRC No. 002665, which includes 20 acres. WRC No. 002662 describes the point of diversion in Section 20 that was installed in 1938 without compliance with RCW 90.03.380's change procedures. Although typically the Court confirms points of diversions described in the water right claim forms, the Court cannot confirm the point of diversion in Section 20 since the claimant has not complied with the change procedures required by RCW 90.03.380. The claimant has acknowledged the need to do so. Therefore, the Court will confirm a right with the point of diversion in the N½ of Section 9.

The Court will modify the water right on page 267 of the Supplemental Report as follows: On line 3 change to irrigation of 194.12 acres; on line 5 change to 3.88 cubic feet per second, 776.48 acre-feet per year; line 6½ to 8 change to 800 feet south of the north quarter corner of Section 9, being within the S½N½N½ of Section 9, T. 17 N., R. 19 E.W.M.; and change the place of use beginning on line 9 to: That portion of the NE¼NE¼ lying southeast of Coleman Creek, the S½NE¼ lying southeast of Coleman Creek and below 1510 feet m.s.l., the E½SE¼ and E½SW¼SE¼ lying below 1510 feet m.s.l., the SW¼SW¼NW¼SE¼, the E½SW¼, the SE¼NW¼SW¼ and the E½SW¼SW¼, all in Section 20, T. 17 N., R. 19 E.W.M.

Ecology sought clarification of the water right described on page 357 of the Supplemental Report. The priority date is incorrect and line 17 should be changed to May 24, 1884. The agency also suggests the point of diversion authorized at line 18 "does not match" that authorized in Water Right Claim No. 002663. The Court disagrees. While the dimensions are not identical, it seems clear that the diversion described in the water right claim is the diversion that was authorized by the Referee on page 357. No clarification should be necessary.

Sweet Grass Investments, LLC, Court Claims No. 01041 and 01448

The claimant took exception to the Referee not recommending water rights for three parcels. As part of the exception process, the claimant filed with Ecology a request to amend Water Right Claim No. 137444, a claim submitted by a prior owner on a portion of the

claimant's land. There was also briefing and argument about comments made by the Assistant Attorney General (AAG) representing Ecology at the initial evidentiary hearing in 1991. At that hearing claimant's counsel moved to amend the claim to conform to the testimony provided. The AAG indicated no objection. The Referee clearly stated he could not amend the water right claim filed pursuant to RCW 90.14. Now it is being argued that Ecology must approve the request to amend WRC No. 137444, because in 1991, the AAG did not object to the request to amend the "claim". The Court denied this exception at the hearing and reiterates its ruling since the issue was revived in the post-hearing briefing. Not objecting to the claimant's motion to amend the court claim does not impact Ecology's ability to decide under RCW 90.14.065 on whether to approve the request to amend the RCW 90.14 claim. Ecology's decision on the RCW 90.14.065 amendment request must be governed by statute and pertinent case law.

Claimant's exception for Court Claim No. 01448 pertains to a right not being confirmed for a 13-acre parcel in the SE¼NE¼ of Section 29 irrigated with Johnson Creek (aka Wipple Creek) water. The Referee found the land is not riparian to Johnson Creek and there must be evidence of beneficial use of water from the creek prior to the Federal Government's 1905 withdrawal of the surface waters in the basin. The claimant argues that while the land is not riparian to Johnson Creek, it is riparian to Parke Creek and historically irrigated with Parke Creek water. Sometime between 1936 and 1950 Parke Creek was rerouted and as a result the diversion was moved from Parke Creek to Johnson Creek. If the Court agrees, then evidence Parke Creek water was used to irrigate the 13-acre field prior to December 31, 1932 is needed.

The Court has reviewed the evidence in support of this claim. The E½NE¼ of Section 29 was sold several times in the late 1890's and early 1900's. The documents included the language "together with water rights." One document provided more specific information that allows the Court to conclude water rights were appurtenant to the property. The deed specifically discusses harvesting of crops and use of the proceeds from the crop sales to make payments to the seller. The Court finds this convincing and will confirm a right with a priority date of July 1, 1874, which is consistent with when the patent issued for all of the E½NE¼ of Section 29. However, the Court will not confirm the right for the source of water currently being used. The evidence shows the right was established for use of Parke Creek and when neighboring landowners rerouted the course of Parke Creek, the prior owner of this land moved the diversion from Parke Creek to Johnson Creek. This happened in the 1940's or 1950's, when the landowner should

have complied with the provisions of RCW 90.03.380 to obtain approval from Ecology's predecessor to change the location of the point of diversion. There is no evidence that occurred.

The Court has previously ruled when addressing exceptions in Subbasin No. 4 (Swauk) that a water right is not forfeited if the landowner moves from one source to another without compliance with the change procedures; however, the right can only be confirmed on the source originally developed. See the Court's Memorandum Opinion and Order RE: Exceptions to Second Supplemental Report of Referee, Subbasin 4 (Swauk Creek) pages 5 – 10, dated October 8, 2002. Sweetgrass suggests the RCW 90.14 claim filed by the prior owner was attempting to describe the former diversion from Parke Creek in the NW¼ of Section 28. The Court will confirm this diversion, recognizing that it is no longer being used and there actually is not a flowing creek at this point. However, the claimant needs to comply with the change procedures in RCW 90.03.380 for authorization to use the current diversion location.

The exception requests that a right be confirmed for using 0.56 cfs and 204.1 acre-feet per year for 13 acres – over 15 acre-feet per year per acre. The right for the claimant's remaining land in the E½NE¼ of Section 29 allowed the use of up to 8.5 acre-feet per year for each irrigated acre. The claimant has offered nothing to show that when the right was established almost twice the water was used to irrigate these 13 acres. Therefore, the Court will award a quantity consistent with the claimant's other land. The Court confirms a right with a July 1, 1874, date of priority for the diversion from Parke Creek of 0.56 cfs, 110.5 acre-feet per year from April 1 to October 31 for the irrigation of 13 acres in the SE¼NE¼ of Section 29, T. 17 N., R. 19 E.W.M. The point of diversion shall be in the NE¼NW¼ of Section 28.

Sweet Grass Investments is making a similar argument for lands described in Court Claim No. 01041. The Referee had originally recommended that a water right be confirmed for use of Cherry Creek for irrigation of 68 acres in the S½SW¼ and SE¼ of Section 29. The claimant took exception and new evidence lead the Referee to conclude that rights to the use of Wipple or Johnson Creek were being asserted. As with the 13 acres in the SE¼NE¼ of Section 29, the evidence shows that a right was originally established for using Parke or Cherry Creek (the name of the creek changes). When the creek channel was changed sometime in the 1940's or 1950's the landowner at the time moved to a diversion on Johnson Creek (aka Wipple Creek). This change in point of diversion and source of water does not prevent a water right from being confirmed. However, since the change procedures of RCW 90.03.380 were not

followed, the Court can only confirm a right to the source originally used. The claimant must go through the change procedures to obtain approval for the currently used point of diversion.

The claimant filed a request with Ecology to amend Water Right Claim No. 137444 pursuant to RCW 90.14. Much of the original form was left blank, although it does appear a right was asserted to irrigate 80 acres in Section 29 with water diverted from either Cherry or Wipple Creek with a point of diversion in Section 21, T. 17 N., R. 19 E.W.M. The amendment would result in the claim asserting a right to divert 4.72 cfs, 1117.3 acre-feet per year from Cherry and Johnson Creeks for the irrigation of 109 acres in the SE¼ and S½SW¼ of Section 29 lying south of Wipple Wasteway. Ecology submitted SE-169, which is a copy of the decision approving a portion of the request and denying many of the amendment requests. Many of the requested amendments are not material to the Court deciding Sweet Grass's exceptions and will not be addressed herein. Ecology granted the request to amend the instantaneous quantity to 4.72 cfs, but denied the request to amend the annual quantity used. Ecology also denied the request to increase the number of acres irrigated from 80 to 109 acres. Brian Sims, representing Sweet Grass Investments, testified a total of 5 cfs is diverted for use on his land, along with that of Keith Eslinger and John Nylander, with 2.7 cfs reaching his land. Although the water right claim was successfully amended to 4.72 cfs, the Court concludes the evidence shows that 2.7 cfs is diverted for use on this land. The Court would propose to use the same water duty for this land as for the neighboring lands (8.5 acre-feet per year per acre) even though a right is asserted to use 10 25 acre-feet per acre. Evidence this larger annual quantity has been used is lacking.

The Referee previously found WRC No. 137444 substantially complied with RCW 90 14 for asserting a right to Cherry Creek, and the Court will not disturb that finding. As a result, the Court confirms a right to Sweet Grass Investments under Court Claim No. 01041 with a May 24, 1884, date of priority for the diversion of 2.7 cfs, 680 acre-feet per year from Cherry Creek for the irrigation of 80 acres in that portion of the SE¼ of Section 29 lying north of Thrall Road. The correct point of diversion to describe is a challenge. WRC No. 137444 does not assist, as the section number is not legible – it could be Section 21, 28 or 29, T. 17 N., R. 19 E.W.M. Sweet Grass attempted to amend the claim to describe two distinct points of diversion, but that request was denied. The Referee found that a diversion 600 feet south and 20 feet west of the northeast corner of Section 29 could be authorized. The Court will use this diversion location.

Geraldine Wood, Court Claim No. 01470

Mrs. Wood took exception to a water right not being confirmed for her property. She owns that portion of the NW¼ of Section 14, T. 17 N., R. 19 E.W.M. lying below the Ellensburg Water Company's Town Ditch and claims a right to irrigate between 30 and 35 acres with water diverted from Caribou Creek. The State's Investigation Report shows 30 acres are irrigated and Water Right Claim (WRC) Nos. 003545 and 026855 both state that 30 acres are irrigated.

The argument submitted by Mrs. Wood lacks substantive information. However, the exception attaches a declaration by Ruth Keyes that provides the information the Referee was lacking. The land now owned by Mrs. Wood was purchased by Ms. Keyes' grandfather, Christian Jacobson, in 1913. She grew up on the property and her father farmed and irrigated the land with water diverted from Caribou Creek. Ms. Keyes' father told her the Hollenbecks, who owned the land before her grandfather, irrigated from Caribou Creek prior to her family acquiring the land. The land is riparian to Caribou Creek and under the Riparian Doctrine, the priority date for a water right on the creek would be the date efforts were first taken to separate the land from Federal ownership. The patent for most of the NW¼ of Section 14 issued to John B. Brush on February 10, 1875 and is the appropriate document for establishing the priority date.

John Gibb, who leases the property, testified about the water use. He estimated he diverts between 1 and 1.5 cfs total from the creek and between 9 and 12 acre-feet per year might be used to irrigate the land. See Report of Referee, page 506, beginning at line 1. At the exception hearing Mr. Gibb testified to diverting 1.5 cfs to the east of the creek and 2 cfs to the west. He also testified that he irrigates between 25 and 30 acres west of the creek and 15 acres to the east. This is quite a contrast to the testimony at the initial evidentiary hearing that between 1 and 1.5 cfs is being diverted in total to irrigate 30 acres. The reason for the change was not explained.

Ecology submitted SE-168, a copy of the decision by Ecology on a request by Mrs. Wood to amend WRC No. 026855. Mrs. Wood apparently attempted to amend the water right claim to assert a right to use 2 cfs, 400 acre-feet per year to irrigate 55 acres. Ecology denied the request to amend the claim, finding that the requests did not fit any of the statutory requirements that must be met in order for Ecology to approve a request to amend under RCW 90.14.065.

The Court will confirm a right to Mrs. Wood under Court Claim No. 01470, but will limit the right to the quantities and number of acres in the water right claims filed by Mr. Wood in the early 1970's. The Court finds those claims to be the most accurate reflection of the use by Mr. Wood and his predecessors. Therefore, the Court confirms a right with a February 10, 1875, date

of priority for the diversion of 1 0 cubic foot per second, 150 acre-feet per year for the irrigation of 30 acres in that portion of the S½NW¼ of Section 14 lying below the Town Ditch. The point of diversion is 850 feet north and 1225 feet east of the west quarter corner of Section 14, being within the SW¼NW¼ of Section 14. This is the approximate location described in the water right claims, although more accurately described based on the state's investigation reports.

Department of Ecology Requests for Clarification

Ecology sought clarification on the rights of four claimants who had no other exceptions. None of the parties appeared at the exception hearing. The Court rules as follow

Boise Cascade Corporation, Claim No. 02206

The place of use for Boise Cascade's water right on page 352 of the Supplemental Report, at line 10, is changed to the NW¼NW¼NE¼ of Section 31,T. 20 N., R. 20 E.W.M.

Helen Clerf, Claim No. 01053

Page 342 of the Supplemental Report at line 15½ is modified to change the season of use to March 15 to August 15 consistent with the Referee's findings on page 41 of the Supplemental Report and the annual quantity on line 16½ is changed to 679.14 acre-feet per year

John and Janet Clerf, Claim No. 02143

The annual quantity on page 317, line 5 in the Supplemental Report is changed to 628.36 acre-feet per year.

Wallace Stampfly, Claim No. 00355 and 00462

The pod locations described on pages 242 and 355 are essentially the same, with the difference being only 30 feet. No change is needed. On page 319 of the Supplemental Report at line 5, change the annual quantity to 31 acre-feet per year.

Dated this 18th day of May, 2005.

Sidney P. Ottem, Court Commissioner