

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

THE STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)

REPORT OF REFEREE
PURSUANT TO ORDER
ON EXCEPTIONS OF
JANUARY 14, 1993

Plaintiff,)

v.)

JAMES J. ACQUAVELLA, et al.,)

Defendants.)

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

The Order issued by the Court on the 14th day of January, 1993, ruled upon several exceptions to the Report of Referee for Subbasin No. 21 (Burbank), and remanded certain exceptions to the Referee, with instructions, for further evaluation and subsequent recommendations to the Court.

The matters remanded to the Referee are identified as follows:

Claimant Kenneth Lydin (Claim No. 1610) - take additional testimony and evidence relating to the two springs at issue.

Claimants Larry and Edna Drecksel (Claim No. 0760) - take testimony and evidence in support of their claim.

Claimants Duane and Alvina Dormaier (Claim No. 4706) - take additional testimony and evidence concerning issues raised.

Claimant Robert A. Eaton (Claim No. 1251) - take additional testimony and evidence concerning historic occupation of the subject property and use of Ranch House Spring.

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1 Claimant Jack W. Eaton (Claim No. 1237) - consider the Court's ruling
and take additional testimony and evidence if necessary.

2 Claimant Yakima Asphalt Paving Co. (Claim No. 0134) - take testimony
3 and evidence to document current ownership and relation of claim to
Certificate No. 4617.

4 Claimants John E. and Carol Hilton (Claims No. 0645, A4582, A4583) -
5 clarify the current status of the claims, as requested by the
Plaintiff.

6 A hearing to open the record for taking the additional testimony and
7 evidence was conducted by the Referee on May 19, 1993. The Plaintiff Department
8 of Ecology was represented by Mary McGrea, Assistant Attorney General.

9
10 COURT CLAIM NO. 4706 -- Duane and Alvina Dormaier

11 In his original report to the Court dated August 6, 1992, the Referee
12 recommended that rights to the use of waters from springs for domestic and
13 irrigation on the Dormaier property be denied. This recommendation was made on
14 the basis that (1) there was no RCW 90.14 claim filed; (2) evidence was
15 insufficient to prove that the land was severed from federal ownership prior to
16 June 6, 1917; (3) evidence was lacking to establish that water use commenced
17 prior to December 31, 1932; and (4) no proof was offered to show an appropriation
18 of water for beneficial use occurred prior to June 6, 1917. The Dormaiers took
19 exception to the recommendation, and it was remanded to the Referee for the
20 taking of additional evidence.

21 Attorney John Gilreath represented the claimants at the supplemental
22 hearing and Duane Dormaier testified. The evidence and testimony established
23 that early occupancy under the homestead provisions occurred at least as early as
24 March 30, 1917, and that use of the springs most likely commenced at the same
25 time. The claimants admitted that the RCW 90.14 claim filed by the previous

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1 owner, Emile L. Robert Jr., failed to identify the subject springs, but argued
2 that the claim had been amended by Mr. Robert's testimony during the first
3 evidentiary hearing. The Department of Ecology countered by saying the Court and
4 Referee had never amended a 90.14 claim, and cited statutory provisions to allow
5 amendments.

6 Mr. Dormaier testified that the springs surface on his property and are
7 piped to a cistern. When the pipe was blocked off over a several month period,
8 the water did not exit the spring in a natural watercourse, but disappeared into
9 the ground without ever leaving his property. It was then argued that the
10 springs were the sole property of the claimants, were not subject to
11 appropriation, and not subject to the adjudication. The state position was that
12 all waters are waters of the state, and are subject to appropriation.

13 Post hearing briefs were filed by both sides in support of their arguments.
14 On September 16, 1993, the Court entered a Memorandum Opinion holding that
15 (1) the Referee, this Court, and the Washington Supreme Court have consistently
16 upheld the statutory provisions of RCW 90.14; and (2) when water arises from
17 springs and seeps back into the ground without forming a stream or leaving the
18 owner's property, then that water is the exclusive private property of that
19 landowner. The Court cautioned that this ruling only applies to appropriations
20 of springs prior to the 1917 amendments and does not address appropriations of
21 springs that form a water course, leave the owner's property, hydrologically
22 connect to any defined surface water channel, or affect any existing rights.

23 An Order of Dismissal of Duane and Alvina Dormaier, Claim No. 4706,
24 (Subbasin No. 21 - Burbank Creek) from Proceedings was entered on October 14,
25 1993. It is therefore recommended that the Report of Referee dated August 6,

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1 1992, be amended as follows: page 38 - delete the names of Duane and Alvina
2 Dormaier on line 1.

3
4 COURT CLAIM NO. 0134 -- William B. and Sally G. Douglas
5 (Formerly Yakima Asphalt Paving Company)

6 The Plaintiff Department of Ecology Request for Leave to Submit Additional
7 Evidence and for Clarification filed on October 2, 1992, indicated that Water
8 Right Certificate No. 4617 was omitted from their list of certificates and thus
9 was not included among the certificates admitted into evidence during the
10 hearing. Certificate No. 4617 was issued to Inland Securities Company in 1952,
11 authorizing a diversion within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 1, T. 13 N., R. 18 E.W.M. of
12 0.78 cfs for gravel washing. The point of diversion arises within the boundaries
13 of Subbasin 21 and should have been included among DOE's exhibits.

14 In 1980, the property involved in Certificate No. 4617 appeared to be owned
15 by Yakima Cement Products Company, which filed a Notice of Appearance, and
16 indicated it was a sister company to the Yakima Asphalt Paving Company. DOE
17 requested an opportunity to reopen its evidentiary submission to include the
18 certificate so that it could be properly disposed of by the Referee in a
19 Supplementary Report of Referee for Subbasin 21.

20 At the December 10, 1992 exceptions hearing, Attorney Charles Flower
21 represented Yakima Asphalt Paving Company, Yakima Cement Products Company, and
22 William B. and Sally G. Douglas who had acquired all right, title and interest of
23 both companies. Mr. Flower stated that his clients had no objection to opening
24 the record to include the third certificate.

25 In a February 9, 1993 letter, Kerry O'Hara, Assistant Attorney General,
26 informed the Referee that Mr. Flower had brought to their attention certain

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1 errors contained in the Plaintiff's Report to the Referee regarding Court Claim
2 No. 0134, which was recommended for confirmation. Because there had been no
3 objections to the recommendation, the same errors were carried over into the
4 Report of Referee. An examination of the Certificates of Water Right (S3-00414C
5 and 3394) upon which the recommendation was based revealed that the townships in
6 the legal descriptions were reversed. It was suggested that this be explored
7 further during the remand hearing, as the Court directed that evidence be
8 presented concerning Certificate No. 4617 and its relation to Court Claim No.
9 0134.

10 At the supplemental hearing, Mr. Flower entered into evidence copies of
11 documents showing conveyance of the property to William B. and Sally G. Douglas,
12 and a map correctly locating the property in Sections 30 and 31, T. 14 N., R. 19
13 E.W.M., and Section 6, T. 13 N., R. 19 E.W.M. In both the Plaintiff's Report and
14 the Report of Referee for Subbasin 21, Sections 30 and 31 were listed as being in
15 T. 13 N., and Section 6 in T. 14 N.

16 Entered into evidence by the state was certificate of surface water right
17 No. 4617 authorizing the diversion of 0.78 of a cubic foot per second from
18 unnamed borrow pits for the purpose of gravel washing in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 1,
19 T.13 N., R. 18 E.W.M. and in Government Lot 5, Section 6, T. 13 N., R. 19 E.W.M.,
20 with a priority date of May 16, 1947. Had this certificate been located and
21 retrieved earlier, the Referee believes the Plaintiff's Report to the Referee
22 would have included this in its recommended confirmation. Therefore, the Referee
23 recommends that an additional right be confirmed to William G. and Sally B.
24 Douglas under Claim No. 0134 for 0.78 cubic foot per second as identified in
25 Certificate No. 4617 above.

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1 It is recommended that the Report of Referee dated August 6, 1992, be
2 amended as follows: page 42 - at the top of the page and on line 10, replace the
3 claimant name of Yakima Asphalt Paving Company with the current owners, William
4 G. and Sally B. Douglas; on lines 7 and 17½, the townships should be 14 instead
5 of 13; and on lines 8 and 18, the townships should be 13 instead of 14.

6
7 COURT CLAIM NO. 0760 -- Edna and Larry Drecksels

8 Edna and Larry Drecksels took exception to the Report of Referee, indicating
9 that serious personal problems had prevented their attendance at the evidentiary
10 hearings held on May 22 and 23, 1990. Larry Drecksels appeared Pro Se to testify
11 during the supplemental hearing. Evidence submitted by Mr. Drecksels established
12 that this property is part of the George Parish patent of August 1, 1872, and has
13 a similar history to that of the neighboring property owned by Mary Barrett. Ms.
14 Barrett was recommended for confirmation of a right from an unnamed stream that
15 traverses her property and cuts across the southwest corner of the Drecksels
16 property. Although Drecksels' predecessors in interest failed to file an RCW
17 90.14 claim, the only use being made of the stream by the Drecksels is for non-
18 diversionary stock water, a use covered by the non-diversionary stock and
19 wildlife stipulation. The Drecksels also receive irrigation water through the
20 Selah-Moxee Irrigation District whose claim will be considered during the
21 Evidentiary Hearings for Major Claimants.

22 It is recommended that the Report of Referee dated August 6, 1992, be
23 amended as follows: page 38 - add the names of Edna and Larry Drecksels in place
24 of Dormaier on line 1.

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COURT CLAIM NO. 1237 -- Jack W. and Beneitta Eaton
(Formerly N. N. Eaton and Sons)

In his August 6, 1992, report to the Court, the Referee recommended that the right to 4 cubic feet per second from the Yakima River asserted under this claim be denied. The recommendation was based on the fact that no RCW 90.14 claim was on file in the Department of Ecology (DOE) records. Mr. and Mrs. Jack W. Eaton, as successors to N. N. Eaton, took exception to the recommendation through attorney John Gilreath.

At the Exceptions Hearing on December 10, 1992, Attorney Gilreath noted that Eatons had filed some 49 or 50 claims registrations as required under RCW 90.14. Of these, two were for major claims: one for Squaw Creek, and one for the Yakima River. All the rest were for springs or ponds. All were on file with the DOE, except the one for the Yakima River. It seemed inconceivable to him that the Eatons had failed to file on one of the most important rights they had, and posited that the Yakima River claim had been lost by the DOE. Mr. Gilreath then recited the litany of effort that Eatons had expended in trying to rectify the error. It was his position that the Eatons had substantially complied with RCW 90.14 as defined in Ecology v. Adsit, 103 Wn.2d 698, 694 P.2d 1065 (1985).

Although the Plaintiff Department of Ecology agreed that it was possible the 90.14 had been lost, they argued that Adsit was not applicable. After hearing both sides, the Court held as a matter of law that, under the Adsit case, the Eatons had substantially complied with 90.14 and remanded Claim No. 1237 back to the Referee for taking additional evidence, if necessary.

With the Court's ruling above, plus the testimony and evidence from the May 22, 1990 evidentiary hearing, the Referee is persuaded that Eatons have proven their claim. It is, therefore, recommended that a right be confirmed for a

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1 diversion from the Yakima River, 4 cubic feet per second, 1,560 acre-feet per
2 year, for the irrigation of 180 acres, with a priority date of July 29, 1903.

3
4 COURT CLAIM NO. 1251 -- Robert A. Eaton

5 This claim for the use of Ranch House Spring for domestic and stock water
6 was originally filed by Emile L. Robert, Jr. and Victor E. Robert. In his August
7 6, 1992, report to the Court, the Referee recommended denial of the claim because
8 the record lacked evidence to indicate that the claimed uses of water started
9 prior to July 6, 1917. Robert A. Eaton, the current owner, filed an exception
10 based on the availability of additional evidence.

11 Attorney John Gilreath represented the claimant during the supplemental
12 hearing. Robert Eaton appeared to offer additional testimony and evidence.
13 Among the documents entered, one established that Kenneth McColl took first steps
14 to separate the SW $\frac{1}{4}$ of Section 26, T. 15 N., R. 19 E.W.M., the property now owned
15 by Mr. Eaton, at least as early as March 30, 1917. Another was a copy of a real
16 estate contract dated November 30, 1988, transferring ownership of the S $\frac{1}{2}$ of
17 Section 26 from the Roberts to Robert Eaton. Mr. Eaton testified that he uses
18 water from Ranch House Spring only for domestic and stock water.

19 Based on the record, the Referee recommends that a riparian right be
20 confirmed to Robert Eaton under Court Claim No. 1251 with a March 30, 1917, date
21 of priority for 0.2 cubic foot per second, 2 acre-feet per year for domestic and
22 lawn and garden up to 0.5 acre; and 1 acre-foot per year for stock water, from
23 Ranch House Spring.

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1 COURT CLAIMS NO. 0645, 4582A & 4583A -- Alan and Roxanne Leach

2 On October 2, 1992, Plaintiff Department of Ecology filed a Request for
3 Leave to Submit Additional Evidence and for Clarification. Included was a
4 request that the Referee clarify the current status of these claims originally
5 filed by John E. and Carol Hilton, who later joined Alan and Roxanne Leach as
6 additional parties to the claims. The Court referred this request to the
7 Referee.

8 During the Subbasin 21 evidentiary hearing on May 23, 1990, both Mr. Leach
9 and Mr. Hilton appeared to testify in support of these claims. At that time, Mr.
10 Hilton indicated that he was the previous owner of the property now owned by Mr.
11 Leach. However, neither the Plaintiff, nor the Referee questioned him about any
12 interest he may have retained in the property. The Referee just assumed that the
13 Leaches were the current owners and omitted any further reference to the Hiltons
14 in the August 6, 1992, report of referee.

15 The Plaintiff correctly asserts that the Hiltons were maintaining an
16 interest in the proceedings by joining the Leaches to the claims, and not just
17 substituting them. Therefore, it is recommended that the August 6, 1992, Report
18 of Referee be amended as follows: page 39 - insert on line 7, between Omer G. and
19 Elsie Gress and Alan and Roxanne Leach, the named claimants John E. and Carol R.
20 Hilton.

21
22 COURT CLAIM NO. 1610 -- Kenneth M. and Leslie R. Lydin

23 Kenneth M. Lydin, appearing Pro Se at the supplemental hearing, submitted a
24 sketch to show the approximate location of the two springs. According to his
25 testimony, when Mr. Lydin purchased this property, these springs flowed back into

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1 the ground without leaving the property; but because they tended to puddle near
2 the house, he piped them to the creek. Considering the similarity with the
3 Dormaier situation, he questioned whether he shouldn't chop them off so they
4 didn't flow to the creek. Mr. Lydin indicated he was looking for guidance from
5 the court.

6 Testifying that Spring No. 1 was used for domestic and livestock, Mr. Lydin
7 indicated this was the only source of water for the home on this property.
8 Before his ownership, Spring No. 2 had been piped to troughs for sheep in an open
9 field, which he has since leveled and put into pasture. This pasture is
10 irrigated from a well.

11 When questioned about an RCW 90.14 filing on these springs, Mr. Lydin
12 indicated that he had purchased this property about 1978, which would have been
13 after the filing period. If a 90.14 had been filed, it would have been by a
14 previous owner, and Mr. Lydin had no knowledge of that. However, Mr. Emile
15 Robert, the previous owner, was in attendance during the supplemental hearing and
16 reported that all his 90.14 filings had been done by a consultant, who allegedly
17 failed to include several springs on the Roberts' property.

18 Although Mr. Robert corroborated Mr. Lydin's testimony regarding the
19 history of prior domestic and stock water use on this property, the absence of a
20 90.14 claim precludes the Referee from recommending confirmation of a water right
21 to the Lydins under Claim No. 1610.

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VIII. FINDINGS OF FACT

I, John E. Acord, as Referee in this proceeding, having carefully examined the testimony and evidence, do hereby make the following Findings of Fact pursuant to the Order on Exceptions entered by this Court on 14 January 1993:

1. Based upon the additional testimony and evidence obtained during the supplemental hearing, the Report of Referee - Subbasin No. 21, dated August 6, 1992, should be modified as follows:

- (a) Page 38, line 1 - delete Duane and Alvina Dormaier and replace with Edna and Larry Drecksel
- (b) Page 38, line 1½ - change N.N. Eaton and Sons to Jack W. and Beneitta Eaton.
- (c) Page 39, line 6 - insert John E. and Carol R. Hilton between Omer G. and Elsie Gress and Alan and Roxanne Leach.

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(d) Page 40, line 15 - incorporate into the schedule of rights:

CLAIMANT NAME: Jack W. and Beneitta E. Eaton COURT CLAIM NO. 1253
(Formerly N. N. Eaton & Sons)

Source: Yakima River

Use: Irrigation of 180 acres

Period of Use: April 1 to October 31

Quantity: 4.0 cfs, 1560 acre-feet per year

Priority Date: July 29, 1903

Point of Diversion: 1000 feet south and 790 feet west from the north quarter corner of Section 4, being within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 4, T. 15 N., R. 19 E.W.M.

Place of Use: Those portions of Section 4, T. 15 N., R. 19 E.W.M. described as follow: the W $\frac{1}{2}$ E $\frac{1}{2}$ and the E $\frac{1}{2}$ W $\frac{1}{2}$ of the said section lying northeasterly of the Yakima River and southeasterly of S.R. 821; the N $\frac{1}{2}$ of said section lying westerly of Squaw Creek and easterly of said highway; the S $\frac{3}{4}$ S $\frac{1}{2}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$ of said section lying east of said highway. ALSO portions of the E $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ and the S $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 33, T. 16 N., R. 19 E.W.M.

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(e) Page 40, line 17 - incorporate into the schedule of rights:

CLAIMANT NAME: Robert A. Eaton COURT CLAIM NO. 1251
Source: Ranch House Spring
Use: Single domestic supply, including irrigation of one-half acre of lawn and garden and stock water
Period of Use: Continuous
Quantity: 0.2 cubic foot per second, 2 acre-feet per year for domestic supply; 1 acre-foot per year for stock water
Priority Date: March 30, 1917
Point of Diversion: 800 feet south and 600 feet west from the east quarter corner of Section 26, being within the W $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 26, T. 15 N., R. 19 E.W.M.
Place of Use: The E $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ and the W $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 26, T. 15 N., R. 19 E.W.M.

(f) Page 41, top line and line 10 - change Yakima Asphalt Paving Company to William B. and Sally G. Douglas

(g) Page 41, lines 7 and 17 $\frac{1}{2}$ - replace 13 with 14

(h) Page 41, lines 8 and 18 - replace 14 with 13

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(i) Page 41, top line - incorporate into the schedule of rights:

CLAIMANT NAME: William B. and Sally G. Douglas COURT CLAIM NO. 0134
(Formerly Yakima Asphalt Paving Company)

Source: Unnamed borrow pits

Use: Gravel washing

Period of Use: Continuous

Quantity: 0.78 cubic foot per second

Priority Date: May 16, 1947

Point of Diversion: 800 feet north and 30 feet west of the east quarter corner of Section 1, being within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 1, T. 13 N., R. 18 E.W.M.

Place of Use: Government Lot 5, Section 6, T. 13 N., R. 19 E.W.M.

(j) Page 43, line 9 $\frac{1}{2}$ - add certificate number 4617

2. The exception of Kenneth M. and Leslie R. Lydin is denied.

In conformance with RCW 90.03.240, Certificates of Adjudicated Water Right will be issued by the State of Washington to those parties for whom rights were confirmed through this proceeding.

SIGNED and DATED at Yakima
this 20th day of June, 1994.


JOHN E. ACORD, Referee

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