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ADJUDICATION
YAKIMA CLERK OF
THE SUPERIOR COURT
YAKIMA, WASHINGTON

FILED

OCT 14 2002

KIM M. EATON
YAKIMA COUNTY CLERK

**YAKIMA RIVER BASIN
WATER RIGHTS ADJUDICATION**

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

**SUPPLEMENTAL
REPORT OF REFEREE**

**Re: SUBBASIN NO. 9
(WILSON-NANEUM)**

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

REPORT OF REFEREE - VOLUME 43A, PART I

16,262

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

1 IN THE MATTER OF THE DETERMINATION)
2 OF THE RIGHTS TO THE USE OF THE)
3 SURFACE WATERS OF THE YAKIMA RIVER)
4 DRAINAGE BASIN, IN ACCORDANCE WITH)
5 THE PROVISIONS OF CHAPTER 90.03,)
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No. 77-2-01484-5
SUPPLEMENTAL
REPORT OF REFEREE
PURSUANT TO ORDER ON
EXCEPTIONS OF
AUGUST 9, 2001
SUBBASIN NO. 9
(WILSON-NANEUM)

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

The Order issued by the Court on the August 9, 2001, ruled upon several exceptions to the Report of Referee and remanded certain exceptions to the Referee, with instructions, for further evaluation and subsequent recommendations to the Court. The following are the claims for which exceptions were filed and remanded by the Court:

Paul Alderman and Paula Alderman, Claim No. 01823
Gerald E. Anderson and Janis Anderson, Claim No. 00666
Ida Joseph Nason Aronica & United States of America, Claim No. 01006
Glen Bach and John Libenow and Conrad Kraft, Claim No. 01960
Dimitri Bader and Lenora Bader, Claim No. 01879
Florence E. Bender & Estate of James Russell Bender, Claim No. 01841
James Bridge and Mary Bridge and Cy Morgan and Nick Parsel and Kim Parsel and Katherine M. Rasmussen, (exception by Son Vida II) Claim No. 00825
William Brown and Marilyn Brown, Claim No. 01608
Ruth Ann Brunner and Gerald F. Brunner, Claim No. 02124
Jeff T. Brunson and Jacqueline S. Brunson, Claim No. 00672
Bull Canal Company, Inc., Claim No. 00886

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1 Alan Burke, Claim No. 01181
Ruth Busby and Estate of Orren Busby, Claim No. 00857
2 Larry L. Charlton and Marilyn Charlton, Claim No. 02174
Estate of Naomi Charlton and Larry L. Charlton, Claim No. 00481
Robert G. Dier, Claim No. 0766
3 Gordon L. Dudley and Anita M. Dudley and Stefan Dudley and Susan F. Jipson and Ronald P. McGee and Joy A. McGee, Claim No. 02035
Avia S. & Janet G. Dunnagun, Claim No. 02279
4 John N. Eaton and Christi Eaton, Claim No. 00634
John N. Eaton and Robert Eaton, Claim No. 00909
5 Ellensburg; City of, Claim No. 02085
Walter L. Farrar and Gail Farrar, Claim No. 02282
6 Mark Herbert and Kathy Herbert and Lyndell G. Hobbs and Vicki Diehl-Hobbs, Claim No. 02296
7 Kayser Ranch, Inc., Claim No. 00991
Bobby F. Kennedy and Haidas Ranches, LLC and Gary Griffith and Lois Yoshida, Claim No. 01232
8 Kittitas County, Claim No. 01732
9 John H. Ludwick and Anne C. Ludwick, Claim No. 00904
10 Madeleine Villa, Inc., Claim No. 02245
11 Estate of Byrl A. McNeil and Arlene Rosenberg and Dick Van de Graaf, Jr. and Maxine Van de Graaf, Claim No. 00495
12 Ron Mitchell, Claim No. 05349
Michael Kelly Moeur, Sr. & Michael Kelly Moeur, Jr., Claim No. 02133, 02134, 02135, 02136 02137
13 Morrison Ranches, Claim No. 01264, 01265, 01266, 02167
Thomas V. & Ginger D. Morrison and Chet & Judy Morrison, and Sam Kayser Claim No. 01263
14 Brian Norelius and Kevin and Gail Weyand, Claim No. 01575
Joseph J. O'Leary and Mary E. O'Leary, Claim No. 00968
15 David Papineau, Claim No. 00535
William W. & Donna Razey and Andrew J. Schmidt and William D. Schmidt and Melva M. Schmidt, Claim No. 00577
16 Doss Roberts and Edra Roberts, Claim No. 04349
17 Jack G. Sikes and Ada M. Sikes and Larry Hansen, Claim No. 01941
George Simpson and Barbara Simpson and Ken Wolfe, Claim No. 01552
18 Richard A. Snowden, Claim No. 00366
Sorensen Properties, Claim No. 00529
19 Wallace M. Stampfly, Claim No. 00462
Walter R. Stampfly and Thelma D. Stampfly, Claim No. 00355
20 Robert G. Stewart and Shirley D. Stewart, Claim No. 00497
Charles Strickland and Linda Strickland and Walter L. Farrar and Gail Farrar, Claim No. 02275
21 Robert Swedberg and Lorene Swedberg, Claim No. 01861
Jerry Tyler and Steven Lee & Debbie Lee and Dale Lee & Sandy Lee, Claim No. 00784
22 U.S. Department of the Interior, Claim No. 00185 and 00900
J. Marilyn Wilkinson, Claim No. 00582

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Stephan A. Willard and Ruby Willard and Creekside Land & Livestock,
Inc., Claim No. 00726

1 Stephan A. Willard and Son Vida I, Claim No. 06737

2 William P. Woods and Priscilla A. Woods, Claim No. 05316

3 Ecology took exception to the recommendations for several claims. The
4 following claims were remanded to the Referee to resolve Ecology's
5 exceptions.

- 6 1. Brent Minor and Mary Minor; Matthew P. Miller and Jeane L. Miller;
7 Thomas R. Hedrick (Trust) and Janet E. Hedrick, Claim No. 00484.
8 2. Joseph Antonich, Claim No. 02297
9 3. Schaake Packing Company, Claim No. 01444
4. Harold W. & Gladys D. Jenkins, Claim No. 00930
5. Timothy E. & Marcia N. Eckert, Claim No. 00635
6. Ron G. & Toni D. Carlson, Claim No. 01832

10 The Court's ruling on all exceptions that were not remanded is
11 contained in the Order on Exceptions Subbasin No. 9 (Wilson-Naneum) filed on
12 August 9, 2001.

13 Additionally, the Court issued orders accepting late claims filed by
14 Jeff Brunson, Claim No. 12929; Joyce L. Bloxham, Claim No. 14379;
15 David & Linda Lundy, Claim No. 15629; Mill Pond Mobile Manor, Claim No.
16 15499; Ron & Sonja Mitchell, Claim No. 15630; Bernhard E. & Freda M.
17 Schneider, Claim No. 15628. The claims were scheduled to be heard at the
18 supplemental hearing. The Court also granted the motion of Robert and
19 Pamela Fulton and Jay and Tamara L. Ulmer to file late claims. Late claims
20 were never filed so evidence was not presented at supplemental hearing on
21 their behalf.

22 Hearings, for the purpose of opening the record for testimony and
23 evidence relating to the exceptions, were conducted by the Referee beginning

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on October 29, 2001. The Department of Ecology was represented by Sam
1 Bailey.

2 Following is an index of claims and claimants addressed at the
3 supplemental hearing and/or who have water rights confirmed in the Report of
4 Referee for Subbasin No. 9 and listed in the Findings of Fact herein.
5

Court Claim <u>No.</u>	<u>Name</u>	<u>Attorney</u>	<u>Page(s)</u>
01454	Jay Aimone and Jodi Larsen 2451 Ferguson Road Ellensburg WA 98926		316
05072	Don Akehurst & Barbara Akehurst 2151 Brick Mill Road Ellensburg, WA 98926		360
01823	Paul & Paula Alderman 199 S Pfenning Road Ellensburg WA 98926		22
00666	Gerald E. Anderson & Janis Anderson 1671 Thomas Road Ellensburg, WA 98926	Richard T. Cole, Attorney PO Box 499 Ellensburg WA 98926	22 374
02297	Joseph Antonich 1941 Lyons Road Ellensburg, WA 98926	Kenneth D. Beckley, Law Office of Ken Beckley 701 N Pine Street Ellensburg WA 98926-2939	28 300
01155 01156 01158	Glen Armistead Bonnie Spurrier 560 Hawk Haven Road Cle Elum, WA 98922-8421		452 453 454

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26 SUPPLEMENTAL REPORT OF REFEREE

Re: Subbasin No. 9

1	01006	Ida Joseph Nason Aronica c/o Allen Aronica 12381 Naneum Road Ellensburg, WA 98926	29 295 466
2	01960	Glen Bach 381 Rosebrier Lane Ellensburg, WA 98926	Richard T. Cole, Attorney PO Box 499 Ellensburg WA 98926
3	01879	Dimitri Bader & Lenora Bader 2602 Judge Ronald Road Ellensburg, WA 98926-9393	Jeff Slothower Lathrop Law Firm PO Box 1088 Ellensburg WA 98926
4	00903	Everett O. Barney	39
5	00928	& Lanita M. Barney P. O. Box 11081 Yakima, WA 98909-2081	Peters & Fowler 115 S Second St. Selah WA 98942
6	00708	E. Eugene Barnhart, Jr. 1850 Colockum Road Ellensburg, WA 98926	400 401
7	00708	Kenneth E. Barnhart & Susan Barnhart 2441 Schnebly Road Ellensburg, WA 98926	J. Jay Carroll, Attorney Velikanje, Moore & Shore, Inc., PS 405 E Lincoln Avenue Yakima, WA 98901
8	00708	Estate of May S. Barnhart c/o E. Eugene Barnhart 1790 Colockum Road Ellensburg, WA 98926	467
9	01831 (A) 05373	Frank J. Beard & Charlot M. Beard 7490 Naneum RD Ellensburg, WA 98926	426
10	01841	Florence E. Bender & Estate of James R. Bender 160 Tjossem RD Ellensburg, WA 98926	46 455
11	14379	Joyce L. Bloxham 3080 Rader Road Ellensburg, WA 98926	J. Jay Carroll Velikanje, Moore & Shore 405 E. Lincoln Ave. Yakima WA 98901

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Re: Subbasin No. 9

1	02206 (A) 03119 (A) 05238	Boise Cascade Corporation Legal Department PO Box 50 Boise, ID 83707	Dennis J. Dunphy, Attorney 1420 5th Avenue #3400 Seattle, WA 98101-2339	402 - 408 465, 470 471, 473
2	01718	Dwight Bolton 630 Alford Road Ellensburg, WA 98926		409
3	00825	James & Mary Bridge and Cy Morgan PO Box 99218 Tacoma WA 98499-0218	John P. Gilreath, Attorney PO Box 499 Ellensburg WA 98926-0499	52 325, 344 443
4	01608	William Brown & Marilyn Brown 5801 Naneum RD Ellensburg, WA 98926	Jeff Slothower, Attorney Lathrop Firm PO Box 1088 Ellensburg WA 98926-1088	54 435
5	02124	Ruth Ann Brunner & Estate of Gerald F. Brunner 8190 Wilson Creek Road Ellensburg, WA 98926	Richard T. Cole, Attorney PO Box 499 Ellensburg WA 98926-0499	59 345 397
6	12929	Jeff T. Brunson 1585 Tjossem Road Ellensburg, WA 98926	Lawrence E. Martin Halverson & Applegate, P.S. PO Box 22730 Yakima WA 98907-2715	63 300
7	00672	Jeff T. & Jacqueline S. Brunson 1585 Tjossem Road Ellensburg WA 98926	Lawrence E. Martin Halverson & Applegate, P.S. PO Box 22730 Yakima WA 98907-2715	62
8	00886 (A) 04207	Bull Canal Company, Inc. 1585 Tjossem Road Ellensburg, WA 98926	Lawrence E. Martin Halverson & Applegate, P.S. PO Box 22730 Yakima WA 98907-2715	69 436
9	00185 (A) 00824 (A) 02484 00900	U.S. Department of Interior Bureau of Land Management 1103 N. Fancher Spokane WA 99212-1275	Charles O'Connell, Jr. U. S. Dept. of Justice Indian Resources Section PO Box 44378 Washington, D.C. 20026-4378	126 425
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1	01181	Alan Burke	Richard T. Cole, Attorney	80
	(A) 06158	201 Church Street	PO Box 499	359
		Newark, NY 14513	Ellensburg, WA 98926-0499	375
2	00726	Shird J. Burks & Audrey E. Burks 199 2nd Ave S Baxter, TN 38544-5129	J. Jay Carroll, Attorney Velikanje, Moore & Shore, Inc., PS 405 E Lincoln Avenue Yakima, WA 98901	285 342
3	00857	Orren Busby & Ruth Busby PO Box 414 Ellensburg WA 98926	Richard T. Cole, Attorney PO Box 499 Ellensburg WA 98926-0499	85 360
4	01832	Ron G. Carlson & Toni D. Carlson 661 Carlson Road Ellensburg, WA 98926		86 461
5	00612	James F. Carmody & Dorothy Carmody 401 Curlew Road Ellensburg, WA 98926-9727	John P. Gilreath, Attorney PO Box 499 Ellensburg WA 98926-0499	346 432
6	02174	Larry L. Charlton & Marilyn Charlton 8191 Wilson Creek Road Ellensburg, WA 98926	James K. Adams, Attorney Wagner, Luloff & Adams 110 N. 5th Ave. Ste. 200 Yakima, WA 98902-2642	88 398
7	00481	Larry L. Charlton and Estate of Naomi Charlton c/o Larry L. Charlton 8191 Wilson Cr. Road Ellensburg, WA 98926	James K. Adams, Attorney Wagner, Luloff & Adams 110 N. 5th Ave. Ste. 200 Yakima, WA 98902-2642	91 444 473
8	00967	Ralph G. Charlton & Nancy L. Charlton 3151 Brick Mill Road Ellensburg, WA 98926	J. Jay Carroll, Attorney Velikanje, Moore & Shore, Inc., PS 405 E Lincoln Avenue Yakima, WA 98901	302 336
9	02232	Ralph G. Charlton 3151 Brick Mill Road Ellensburg, WA 98926	J. Jay Carroll, Attorney Velikanje, Moore & Shore, Inc., PS 405 E Lincoln Avenue Yakima, WA 98901	298 427

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Re: Subbasin No. 9

1	00724	Fred Christen & Mollie Christen PO Box 829 Kittitas, WA 98934-0829	95
2	00884	Charles W. Cole & Ethel M. Cole 18450 Summitview Road Tieton, WA 98947	410
3	01209	Curtis S. Conner & Ruth J. Conner 2471 Ferguson Road North Ellensburg, WA 98926	317
4	00740	Gwendolyn Cooke & Robert Cooke 2281 Ferguson Road North Ellensburg, WA 98926	337
5	01454	Gwendolyn Cooke	Kenneth D. Beckley,
6	(A) 04171	2281 Ferguson Road North Ellensburg, WA 98926	Law Office of Ken Beckley 701 N Pine Street Ellensburg WA 98926-2939
7	00819	Guy F. Couture & Judy A. Couture 1613 E Capitol Avenue Ellensburg, WA 98926	411
8	00726	Creekside Land & Livestock, Inc 3590 Wilson Creek Road Ellensburg WA 98926	Jeff Slothower, Attorney Lathrop Firm PO Box 1088 Ellensburg WA 98926
9	00766	Robert G. Dier & Diane C. Dier 2815 Wilson Creek Road Ellensburg, WA 98926	285
10	00603	Harvey L. Dodge 1150 Lyons RD Ellensburg, WA 98926	303
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26	SUPPLEMENTAL REPORT OF REFEREE Re: Subbasin No. 9		

1	00726	John Scott Downey 3590 Wilson Creek Road Ellensburg, WA 98926	Jeff Slothower, Attorney Lathrop Firm PO Box 1088 Ellensburg WA 98926	285 303
2	02035	Gordon L. Dudley & Anita M. Dudley 2900 Canyon Road, Trailer 51 Ellensburg, WA 98926-9668		99 376
3	02035	Stefan Dudley 25335 Bachelor Lane Bend, OR 97701-9381		99 376
4	02279	Alvia S. Dunnagun & Janet G. Dunnagun 3771 Naneum Road Ellensburg, WA 98926-7086	Richard T. Cole, Attorney PO Box 499 Ellensburg WA 98926	102 304 332
5	00598	Jeanne M. Dunning 3990 Brick Mill Road Ellensburg WA 98926		418
6	00166 (A)12208	Lorne T. Dunning & Jeanne M. Dunning 3990 Brick Mill RD Ellensburg, WA 98926		333 463
7	00634 00909	John N. Eaton & Christi Eaton 473 Thrall Road Ellensburg, WA 98926	John P. Gilreath, Attorney PO Box 499 Ellensburg WA 98926-0499	107 305 377
8	00635	Timothy E. Eckert Marcia N. Eckert 3451 Lyons Road Ellensburg WA 98926	Jeff Slothower, Attorney Lathrop Firm PO Box 1088 Ellensburg, WA 98926-1088	118 334
9	02085	Ellensburg; City of 109 E Third Suite 2 Ellensburg, WA 98926	Lawrence E. Martin Halverson & Applegate, PS PO Box 22730 Yakima WA 98907-2715	119
10	02275 02282	Walter L. & Gail Farrar 1650 Game Farm Road Ellesnburg, WA 98926-7277		266

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Re: Subbasin No. 9

1	00778 (A) 06178	Gary Melvin Galbraith & Jacquelyn J. Galbraith 1090 Thomas Road Ellensburg, WA 98926	437
2	00884	Fred K. Gerlach & Shirley E. Gerlach PO Box 1026 Ellensburg, WA 98926-1026	410
3	00605 (A) 01749	Stephen K. German & Donna German 11040 Fairview Road Ellensburg, WA 98926	369
4	02130	Earl T. & Ellen E. Glauert 1019 - 156th Ave NE, Apt 9 Bellevue, WA 98007-7210	306
5	01870	Terry E. Goodrich & Carol Goodrich PO Box 2148 Mattawa, WA 99349-0902	307
6	01232	Gary Griffith 22806 NE 64th Street Redmond, WA 98053	Richard T. Cole, Attorney PO Box 499 Ellensburg WA 98926-0499
7	01232	Haidas Ranches, LLC 2041 Kimberly Lane Ellensburg, WA 98926	Richard T. Cole, Attorney PO Box 499 Ellensburg WA 98926
8	01941	Larry Hansen 23220 SE 47th Way Sammamish, WA 98075-6818	Richard T. Cole, Attorney PO Box 499 Ellensburg WA 98926-0499
9	00903	Carol Hartlaub 24505 - 61st CT E #E Graham, WA 98338-9588	412
10	01649	Thomas Haven & Sara Haven 1006 E. 4th Avenue Ellensburg, WA 98926-3530	361
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1	00484	Thomas R. Hedrick Trust & Janet Hedrick 18240 - 150th Ave SE Renton, WA 98926	188 328 385
2	02264	LeMoyne Henderson & Alice A Henderson 100 Naneum Camp Lane Ellensburg WA 98926	460
3	02264	James Henderson & Karen Henderson 14101 Naneum RD Ellensburg, WA 98926	460
4	00663	Herbert J. Herbert & Rita Herbert 4890 Brick Mill Road Ellensburg, WA 98926	John P. Gilreath, Attorney PO Box 499 Ellensburg WA 98926-0499
5	02296	Mark Herbert & Kathy Herbert 3441 Rader Road Ellensburg, WA 98926	Richard T. Cole, Attorney PO Box 499 Ellensburg WA 98926
6	02296	Lyndell G. Hobbs & Vicki Diehl-Hobbs 10511 Fairview Road Ellensburg, WA 98926	Richard T. Cole, Attorney PO Box 499 Ellensburg WA 98926
7	00661	Kenneth R. Huber & Sharon L. Huber (no address available)	347
8	01721	John Hultquist & Nancy Hultquist 11041 Naneum RD Ellensburg, WA 98926	380
9	00930	Harold W. Jenkins & Gladys D. Jenkins 6181 Wilson Creek RD Ellensburg, WA 98926	134, 308 381, 391 392, 470
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1	00932	Patrick M. Jenkins & Vicki K. Jenkins 6221 Wilson Creek Road Ellensburg, WA 98926	Lawrence E. Martin, Attorney 134 Halverson & Applegate, PS 326 PO Box 22730 Yakima WA 98907-2715
2	02035	Susan F. Jipson 10541 Naneum Road Ellensburg WA 98926	99 382
3	01234	Sam Kayser (A) 06380 & Lonni Kayser	James K. Adams 365
4	01263	12141 Fairview Road Ellensburg, WA 98926	Wagner, Luloff & Adams 390 110 N 5th Ave. Ste. 200
5			Yakima WA 98902-2642
6	00991	Kayser Ranch, Inc. 12260 Fairview Road Ellensburg, WA 98926	James K. Adams 136, 309 Wagner, Luloff & Adams 363, 364 110 N 5th Avenue Ste. 200 445, 446
7			Yakima WA 98902-2642
8	00620	Robert O. Kelley & Paula K. Kelley 508 N Main Ellensburg, WA 98926	366 438
9	01232	Bobby F. Kennedy 802133 Crooked River Highway Prineville, OR 97754	146 413
10	02130	Joe & Sherry King 5321 Wilson Creek Road Ellensburg WA 98926-7209	306
11	01732	Kittitas County 205 W 5th Ellensburg, WA 98926	Greg Zempel 155 Prosecuting Attorney 372 205 W 5th, Room 213 Ellensburg, WA 98926
12	01128	Daniel S. Kivi 3181 North Ferguson Road Ellensburg, WA 98926-8102	319
13	00818	Adolph Kjelmyhr Merle D. Lott PO Box 1775 Ellensburg, WA 98926-1775	335
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1	00662	Robert B. & Linda W. Klindworth 1605 E Capitol Ellensburg, WA 98926	414
2	00256	Les S. Knudsen & Barbara J. Knudsen 1003 E 11th Ellensburg, WA 98926	J. Jay Carroll, Attorney Velikanje, Moore & Shore 405 E Lincoln Avenue Yakima WA 98901 343
3	01960	Conrad Kraft PO BOX 1345 Allyn, WA 98524-1345	33
4	01939	Fabian Kuchin, Jr. 1404 W Dry Creek Road Ellensburg, WA 98926	Jeff Slothower, Attorney PO Box 1088 Ellensburg WA 98926 296 339
5	01777	Jack Larson, et al. 1201 Sanders Road Ellensburg WA 98926	433
6	00784	Dale & Sandy Lee 1101 N Columbia Street Ellensburg WA 98926	273
7	00784	Steven & Debbie Lee 3090 Kilmore Road Ellensburg WA 98926-7837	273
8	00952 (A) 04815	David M. Leffert & J. Christine Leffert 8300 Naneum Road Ellensburg, WA 98926	393
9	01960	John Libenow 1111 Howard Rd Ellensburg, WA 98926	33
10	00621	Myron Linder & Sandy Linder 4961 Naneum Road Ellensburg, WA 98926	428
11	00904	John H. Ludwick & Anne C. Ludwick 11005 Main Street Bellevue WA 98004-6367	Lawrence E. Martin Halverson & Applegate PS PO Box 22730 Yakima WA 98907-2715 162 415 416

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15629	David & Linda Lundy 933 Bar 14 Road Ellensburg WA 98926	Richard T. Cole, Attorney PO Box 499 Ellensburg WA 98926-0499	172
00175	Brian Luque & Teresa Luque 1306 Greenwood Lane Centralia, WA 98531-1633		348
02245	Madeleine Villa, Inc. 5925 47th Avenue NE Marysville, WA 98270	Jeff Slothower, Attorney Lathrop Law Firm PO Box 1009 Ellensburg WA 98926	176 367
01416	Louaine A. Magnuson & Kevin Halley 10681 Naneum Road Ellensburg WA 98926		383
00769	Bernard L. Martin & Marlene F. Martin 1300 Brick Mill RD Ellensburg, WA 98926		310 327
01707	Don E. Mays & Paula Mays 5323 Wilson Creek RD Ellensburg, WA 98926	J. Jay Carroll, Attorney Velikanje, Moore & Shore, Inc. 405 E Lincoln Avenue Yakima WA 98901	311
02035	Ronald P. McGee & Joy A. McGee 2231 Thomas Road Ellensburg, WA 98926-9369	Richard T. Cole, Attorney PO Box 499 Ellensburg WA 98926-0499	99
01202	Grace M. Menig 240 Woodhouse LP Ellensburg, WA 98926		455
01669	Howard Miles 1942 Bar 14 Road Ellensburg WA 98926		384
15499	Mill Pond Mobile Manor 2900 Canyon Road #8 Ellensburg, WA 98926	Paul Dempsey, Attorney Halverson & Applegate PS PO Box 22730 Yakima WA 98907-2715	184

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1	01801	Andrew J. & Stephanie Mills 1150 Thomas Road Ellensburg WA 98926	439
2	00484	Matthey P. & Jeane L. Miller 802 S. Maple Street Ellensburg, WA 98926-3935	188 328 385
3	00899	Donna & Wally M. MinIELLY 2320 W Sylvester Street, Apt. 16 Pasco, WA 99301-4572	320
4	00484	Brent & Mary Minor 8001 Naneum Road Ellensburg WA 98926	Lawrence E. Martin, Attorney 188, 328 Halverson & Applegate PS 329, 373 PO Box 22730 385, 386 Yakima WA 98907-2715 387
5	01718	Floyd A. (Buck) & Merna Minor 7411 Wilson Creek Road Ellensburg, WA 98926	349 417
6	01717	Jean G. Minor 5490 Smithson Rd Ellensburg, WA 98926-8879	350
7	05349	Ron & Sonja Mitchell 15630 1351 Naneum Road Ellensburg, WA 98926-6967	Richard T. Cole, Attorney 192 PO Box 499 Ellensburg WA 98926-0499
8	02133	Michael Kelly Moeur, Sr.	John P. Gilreath, Attorney 196
9	02134	& Michael Kelly Moeur, Jr.	PO Box 499 418
10	02135	181 Ringer Loop	Ellensburg WA 98926-0499 456
11	02136	Ellensburg, WA 98926	468
12	02137		
13	01263	Chet Morrison & Judy Morrison Morrison Ranches 2607 Judge Ronald Road Ellensburg, WA 98926	Jeff Slothower, Attorney 215 Lathrop Law Firm PO Box 1088 Ellensburg WA 98927
14	01263	Thomas V. Morrison & Ginger D. Morrison 1607 W Dollar Way Road Ellensburg, WA 98926	215
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1	01264	Morrison Ranches	Jeff Slothower, Attorney	213, 321
	01265	2607 Judge Ronald Road	Lathrop Firm	340, 356
1	01266	Ellensburg, WA 98926	PO Box 1088	429, 469
2	01267		Ellensburg WA 98926	472
3	00598	Estate of Dorothy R. Nelson & Estate of Paul Nelson c/o Jeanne Dunning 3880 Brick Mill Road Ellensburg WA 98926		418
4	01866	G. Jay Nelson, et al. Crown J. Cattle Company 5380 Wilson Creek Road Ellensburg, WA 98926	John P. Gilreath, Attorney PO Box 499 Ellensburg WA 98926-0499	367 419
5	02232	Harriett Nichols 1001 S. Chestnut St., Unit 124 Ellensburg, WA 98926-4800		298 430
6	01575	Brian Norelius 791 Grindrod Road Ellensburg, WA 98926-7048		216 457
7	00968	Joseph J. O'Leary & Mary E. O'Leary 4091 Brick Mill Road Ellensburg, WA 98926	Jeff Slothower, Attorney Lathrop Law Firm PO Box 1088 Ellensburg WA 98926	218 313
8	00899	Maurice Olney & Ruth Ann Olney 40428 - 202nd AVE SE Enumclaw, WA 98022		320
9	00535	David Papineau 440 Ringer Loop Ellensburg, WA 98926	John P. Gilreath, Attorney PO Box 499 Ellensburg WA 98926-0499	221
10	00825	Nick & Kim Parsel 791 Look Road Ellensburg WA 98926		52, 325 344, 443
11	01451	William R. Peterson 862 Alford Road Ellensburg WA 98926	Jeff Slothower PO Box 1088 Ellensburg WA 98926	95 441
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01129	Frank Phelps PO Box 13469 Burien WA 98013-0469	224 450
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01163	Derik Pope 561 Rader Road Ellensburg, WA 98926	351
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00739	Kay E. Powers 1041 Thomas Road Ellensburg, WA 98926	395
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01454	Terry Powers	322
7	(A) 04171 2691 Ferguson Road North Ellensburg, WA 98926	
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01329	Merton Purnell 7151 Brick Mill RD Ellensburg, WA 98926	388 447 462
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00969	Larry Raap 3301 Fairview Road Ellensburg, WA 98926	323
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00825	Katherine M. Rasmussen 26781 Devonshire Road Laguna Hills, CA 92653-7511	52, 325 344, 443
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00577	William W. Razey & Donna Razey PO Box 1084 Ellensburg, WA 98926-1084	226
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00892	Ronald C. Rees	352
18	11034 - 131st Avenue N.E.	394
19	Kirkland, WA 98033	
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02232	Charles & Faye Rimer 1200 Tibbling Road Selah, WA 98942-9722	298 430
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01048	Merle Ringer 5971 Number 6 Road Ellensburg, WA 98926	Jeff Slothower, Attorney PO Box 1088 Ellensburg, WA 98926
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1	04349	Doss Roberts & Edra Roberts 3080 Thomas Road Ellensburg, WA 98926	Lawrence E. Martin, Attorney 233 Halverson & Applegate PS PO Box 22730 Yakima WA 98907-2715
2	00495	Arlene Rosenburg & Estate of Byrl A. McNeil 1411 Alford Road Ellensburg, WA 98926	181 312
3	01444	Schaake Packing Company PO Box 450 Yakima WA 98907-0450	Jeff Slothower, Attorney 235 Lathrop Law Firm 451 PO Box 1088 Ellensburg WA 98926
4	00577	Andrew J. Schmidt William D. Schmidt & Melva M. Schmidt 1131 Wilson Creek Road Ellensburg, WA 98926	Richard T. Cole, Attorney 226 PO Box 499 353 Ellensburg WA 98926 368
5	15628	Bernhard E. & Freda M. Schneider 520 Covey Run Ellensburg WA 98926	Richard T. Cole, Attorney 236 PO Box 499 440 Ellensburg WA 98926
6	00605 (A) 01749	Albert F. Scott & Dorothy Scott PO Box 2085 North Bend, WA 98045-2085	Richard T. Cole, Attorney 369 PO Box 499 Ellensburg, WA 98926-0499
7	02232	Robert Shannon & Cathy Shannon 1241 Charlton Road Ellensburg, WA 98926-7381	299 431
8	02270 01977	Mel Shenyer & Jodee Shenyer PO Box 722 Ellensburg WA 98926	Richard T. Cole, Attorney 240 PO Box 499 Ellensburg WA 98926-0499
9	01941	Jack G. Sikes & Ada M. Sikes c/o Jack Sikes, Jr. 23233 East Settler Drive Liberty Lake, WA 99019-8524	242
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01130	John L. Silva & Janet E. Silva 3451 Game Farm Road Ellensburg, WA 98926	J. Jay Carroll, Attorney Velikanje, Moore & Shore, Inc., PS 405 E Lincoln Avenue Yakima, WA 98901	370
01552	George Simpson (A) 08870 & Barbara Simpson 806 E Sanders Ellensburg, WA 98926		244
02232	Don C. Smith & Jane K. Smith 7644 SE 22ND ST Mercer Island, WA 98040-2119		299 432
02262	Patrick Smith PO Box 611 Ellensburg, WA 98926	Kenneth D. Beckley, Law Office of Ken Beckley 701 N Pine Street Ellensburg WA 98926-2939	330
01960	William Z. Smith & Jean Smith 14108 W. Casa Linda Drive Sun City West, AZ 85375-5507		33
00366	Richard A. Snowden 190 Umptanum RD Ellensburg, WA 98926		244 419
00529	Sorensen Properties 802 E Mountain View Ave Apt 240 Ellensburg, WA 98926-4805	Lawrence E. Martin Halverson & Applegate, P.S. PO Box 22730 Yakima WA 98907-2715	249, 301 314 389, 420 421
00462	Wallace M. Stampfly	Jeff Slothower, Attorney	259
00355	Walter & Thelma Stampfly 2453 Charlton Road Ellensburg WA 98926	Lathrop Law Firm PO Box 1088 Ellensburg WA 98926	442 448
00497	Robert G. Stewart & Shirley D. Stewart 1140 140th Avenue NE #D Bellevue, WA 98005-2905	John P. Gilreath, Attorney PO Box 499 Ellensburg WA 98926-0499	261 458 464

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27 Re: Subbasin No. 9

1	02311	Chester Vernon Stokes & Roma B. Stokes 9720 Wilson Creek RD Ellensburg, WA 98926	Vernon E. Fowler, Jr. Peters & Fowler 115 S Second Street Selah WA 98942	315 421 422 434
2	01870	Ralph D. & Kathryn A. Strand 1171 Brickmill RD Ellensburg, WA 98926-7216		307
3	02275	Charles Strickland & Linda Strickland 26957 Ice Harbor Drive Burbank, WA 99323-9725	Kenneth D. Beckley, Law Office of Ken Beckley 701 N Pine Street Ellensburg WA 98926-2939	266
4	05934	Clint & Becky Swanstrum 8521 Wilson Creek Road Ellensburg, WA 98926		423
5	01052	James C. Swayze		354
6	(A) 05592	& Dianne Morrison 513 N. Front Street, Ste. I Yakima, WA 98901-2351		
7	01861	Robert & Lorene Swedberg 10870 Naneum Road Ellensburg WA 98926		271 358
8	00739	Sandra Thomas		396
9	01454	P.O. Box 512		
10	(A) 04171	Ellensburg WA 98926		
11	00784	Jerry Tyler 1890 Wood House Loop Ellensburg, WA 98926	Jeff Slothower, Attorney Lathrop Firm PO Box 1088 Ellensburg WA 98926-1088	273 424
12	01006	United State of America (mail through attorney)	Charles E. O'Connell, Jr. Dept. of Justice Indian Resources Section PO Box 44378 Washington, DC 20026-4378	29 466
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26	SUPPLEMENTAL REPORT OF REFEREE Re: Subbasin No. 9			
27		20	Referee's Office 15 W. Yakima Ave Ste. 200 Yakima, WA 98902-3401	
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1	01520	Dick Van de Graaf, Jr. & Maxine Van de Graaf 1695 Midvale Road Sunnyside, WA 98944	Lawrence E. Martin Halverson & Applegate P.S. PO Box 22730 Yakima WA 98907-2715	181
2	00661	Jim Vasquez 4781 Vantage Highway Ellensburg, WA 98926		347
3	00990	Steve & Deborah Wallace 1011 Fairview Road Ellensburg WA 98926		371
4	01575	Kevin & Gail Weyand 541 Tjossem Road Ellensburg WA 98926		216 459
5	00582 05055	J. Marilyn Wilkinson 13621 Wilson Creek RD Ellensburg, WA 98926		276 449
6	00726	Stephan A. Willard & Ruby Willard 2000 124th Avenue NE Suite B 100 Bellevue, WA 98005	Richard T. Cole, Attorney PO Box 499 Ellensburg WA 98926	285 297 331
7	06737	Stephan A. Willard Son Vida I 2000 124th Avenue NE Suite B 100 Bellevue, WA 98005	Richard T. Cole, Attorney PO Box 499 Ellensburg WA 98926	281
8	01552 (A) 08870	Ken Wolfe 2420 Airport Road Ellensburg, WA 98926	Richard T. Cole, Attorney PO Box 499 Ellensburg WA 98926	244
9	05316	William P. Woods & Priscilla A. Woods 350 Bar 14 Road Ellensburg, WA 98926-7200	John P. Gilreath, Attorney PO Box 499 Ellensburg WA 98926-0499	59 355
10	01232	Lois Yoshida 2002 Schuster Parkway #203 Tacoma WA 98402-5301		146 382
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1 00363 Stanley P. Youngberg
1 (A) 01686 9140 Naneum Road
1 Ellensburg, WA 98926

2 00364 Winona P. Youngberg 357
3 (A) 01687 9140 Naneum Road
3 Ellensburg, WA 98926

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6 COURT CLAIM NO. 01823 -- Paul Alderman
6 & Paula Alderman

7 The Aldermans filed an exception to the Referee not recommending that a
8 right be confirmed to them under Court Claim No. 01823. The claim was
9 remanded to the Referee to take additional evidence. Attorney Jeff
10 Slothower appeared at the supplemental hearing representing the Aldermans
11 and stated that they were not able to find any additional evidence in
12 support of their claim and, therefore, were not pursing the exception. The
13 recommendation of the Referee remains unchanged.

14
15 COURT CLAIM NO. 00666 -- Gerald E. Anderson
16 & Janis Anderson

17 The Andersons did not make an appearance at the initial evidentiary
18 hearing in support of their claim. On June 9, 1994, the Andersons filed a
19 Motion to Allow Presentation of Evidence and Testimony Regarding Claimants
20 Claim. The Court entered an Order allowing the presentation of evidence and
21 historical documents during the exceptions hearing phase for Subbasin No.

22 9. The Andersons are represented by Attorney Richard T. Cole and Mr.
23 Anderson, along with Doss Roberts, a neighboring landowner, testified at the
24 supplemental hearing for Subbasin No. 9.

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26 SUPPLEMENTAL REPORT OF REFEREE

26 Re: Subbasin No. 9

The Andersons own a portion of the SW $\frac{1}{4}$ /SW $\frac{1}{4}$ of Section 33, T. 19 N., R. 19 E.W.M. They own a total of 9.6 acres and are seeking a right to irrigate 6 of those acres with water diverted from Naneum Creek. The land is planted in pasture and livestock drink from the irrigation ditches and directly from the creek. Water is not diverted for stock water after the end of the irrigation season. Livestock drinking directly from the creek is a non-diversionary use covered by the stock water stipulation discussed on page 4 of the Report of Referee for Subbasin No. 9. The Andersons have a right for this use by virtue of that stipulation. Water is diverted from Naneum Creek at diversion No. 2 on State's Exhibit SE-2, which is on the Swedberg property in the SW $\frac{1}{4}$ /NW $\frac{1}{4}$ of Section 33. Mr. Anderson testified that Dick Bain (Richard C. Bain, Jr., P.E., a consulting engineer who has been hired by many of the claimants in this adjudication) told him that the creek was flowing 2 cfs through his property in May of 2001. It is not clear to the Referee whether Mr. Anderson (and therefore Mr. Bain) is referring to the Naneum Creek flow or the flow in the ditch as it goes through the Anderson property.

Mr. Anderson has been familiar with this land long before he purchased it in 1977. In the early 1950's he would hunt in the area and recalled that Milton Lewis owned the land at that time, along with close to 200 acres. Mr. Lewis had commented to him that the land he bought was part of his best hay ground. Doss Robert's testimony confirms that the land was being irrigated in the 1950's and during more current times.

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The record shows that the claimants' land was part of a larger parcel
1 owned by J. L. Bennett in the late 1800's. Mr. Bennett acquired the W $\frac{1}{2}$ SW $\frac{1}{4}$,
2 SE $\frac{1}{4}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 33, T. 19 N., R. 19 E.W.M. from the Northern
3 Pacific Railroad by deed dated June 25, 1890. Bennett also homesteaded and
4 received a patent for the S $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 32. Mr. Bennett's
5 widow was a party to the Ferguson case and was awarded a Class 11 right
6 (with an 1882 date of priority) for the use of 30 inches of water from
7 Naneum Creek. The Findings of Fact that preceded the decree described the
8 lands owned by Mrs. Bennett and to which the water right would be
9 appurtenant. The John and Nancy Hultquist and Louaine A. Magnuson,
10 neighboring landowners, contend that the copy of the Findings of Fact that
11 several claimants have put into the record contains a typographical error in
12 the paragraph that describes the lands owned by Mrs. Bennett. The
13 description is "The persons described in paragraphs XLV hereof (the heirs to
14 J. L. Bennett) are the owners of the southeast quarter of the northeast
15 quarter and the east half of the southeast quarter of Section 32, the
16 northwest quarter of the southwest quarter, the south half of the southwest
17 quarter and the southwest quarter of the southeast quarter of Section 32,
18 Township 19 North of Range 19 E.W.M." The claimants point out that there is
19 no evidence that the Bennetts owned land in the SW $\frac{1}{4}$ of Section 32 and that
20 the legal description as written describes the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 32 twice.
21 The Referee also notes that when describing other lands, if all of the
22 property is in one section, the section number is only shown once. Chester
23 Vernon Stokes, Andrew Mills and Gary Galbraith are claimants who own land in
24

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the S $\frac{1}{2}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 32. The evidence they put in the record in
1 support of their claims shows that property as being owned by W. R. Thomas
2 at the time of the Ferguson case. W. R. Thomas was a named defendant in
3 Ferguson, but did not assert a claim in the proceeding. The Thomas rights
4 were determined in Thomas v. Roberts and a right was awarded in that
5 proceeding to Mr. Thomas. Mr. Hultquist testified to visiting the
6 Washington State Archive in Ellensburg and reviewing the Findings of Fact
7 that is in the archive records. According to Mr. Hultquist's testimony, the
8 copy there describes the W $\frac{1}{2}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33. Exhibit SE-641 is
9 an excerpt from that copy of the Findings of Fact. Mr. Hultquist also
10 placed in the record a copy of the transcript of testimony from the Ferguson
11 case showing the testimony in support of Mrs. Bennett's claim. That
12 testimony also refers to the land in Section 33 and the testimony was that
13 it was being irrigated.

14 The Referee concludes that sufficient evidence has been placed in the
15 record to show that a typographical error was made on the version of the
16 Findings of Fact in the record and that the 30 inch Bennett water right is
17 appurtenant to the SE $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 32 and the NW $\frac{1}{4}$ SW $\frac{1}{4}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$ of
18 Section 33. There were no claims filed in this proceeding for the lands in
19 Section 32. The claimants in this proceeding who own portions of the land
20 in Section 33, besides the Andersons, the Hultquists and Ms. Magnuson are
21 Ronald McGee, Arthur and Susan Tirotta, and Barbara Williams. The Referee
22 has recommended that rights be confirmed to the Hultquists for the
23 irrigation of 10 acres, Ms. Magnuson for 1.3 acres, the Tirottas (now
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25 SUPPLEMENTAL REPORT OF REFEREE
26 Re: Subbasin No. 9

Jipson) for 4.5 acres and Mr. McGee for 6.0 acres. Rights have been
1 recommended for a total of 21.8 acres within the area where the Ferguson
2 decree awarded a right to irrigate 30 acres. The McGees took exception to
3 the Referees recommendation and are seeking a right for an additional 2
4 acres.
5

The claimant identified Water Right Claim (WRC) No. 125944 filed by
6 Francis B. Lovall pursuant to RCW 90.14 as being appurtenant to a portion of
7 his land. WRC No. 125944 asserts a right to use 0.06 cfs, 12 acre-feet per
8 year from Map Point 21 on the East Branch of Naneum Creek for the irrigation
9 of 3 acres. The place of use is the portion of the Anderson land they
10 acquired from Mr. Lovall. Mr. Anderson testified to acquiring approximately
11 3 acres from the Lovalls. The rest of the Anderson land was acquired from
12 Margaret Huss and Joseph Sederstrom. The Referee can find no RCW 90.14
13 claims filed by either Huss or Sederstrom for using water from Naneum Creek
14 on the land now owned by the Andersons. Joseph Sederstrom filed WRC No.
15 095247 for use of Naneum Creek water on land south of the Andersons and he
16 filed WRC 118217 for use of a spring on the land now owned by the
17 Andersons. There was no evidence in the record of water from a spring being
18 used on the claimants land.
19

Failure to file a claim waives and relinquishes any right that may have
20 existed, RCW 90.14.071. As a result of there being no RCW 90.14 claim for
21 use of Naneum Creek on the portion of the property acquired from Sederstrom,
22 the Referee cannot recommend confirmation of a water right for that land.
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1 Although Mr. Anderson's testimony suggests that between 8 and 10
2 acre-feet per year is needed to irrigate, the right appurtenant to his lands
3 does not allow for use of that much water. The Court in the Findings of
4 Fact that preceded the Ferguson decree found that one inch of water (0.02
5 cfs) was sufficient for the irrigation of one acre in May and June and
6 one-half inch of water (0.01 cfs) was sufficient for the irrigation of one
7 acre the rest of the year. If that quantity of water was available the
8 entire irrigation season, no more than 5 acre-feet per year could be used.

9 Based on the foregoing, the Referee recommends that a right be
10 confirmed under Court Claim No. 00666 with a June 30, 1882, date of priority
11 for the diversion from Naneum Creek of 0.06 cubic foot per second in May and
12 June, and 0.03 cubic foot per second in April and July 1 through October 15,
13 15 acre-feet per year for the irrigation of 3 acres in an area approximately
14 described as follows: Beginning at the southeast corner of the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of
15 Section 33, T. 19 N., R. 19 E.W.M., thence N 2°10'34" W along the east
16 boundary of said SW $\frac{1}{4}$ SW $\frac{1}{4}$, 30 feet; thence S 88°39'00" W 17.79 feet; thence S
17 83°28'11" W 300.98 feet; thence N 01°54'44" W, 1034.61 feet to the true
18 point of beginning; thence S 88°39'00" W 429.16 feet; thence N 20°00'00" W
19 306.35 feet; thence N 88°39'00" E 499.19 feet; thence S 1°54'44" E 340.00
20 feet to the true point of beginning (legal description taken from Exhibit
21 DE-1829).

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26 SUPPLEMENTAL REPORT OF REFEREE
27 Re: Subbasin No. 9

1 COURT CLAIM NO. 02297 -- Joseph Antonich

2 The Department of Ecology took exception to the Referee's
3 recommendation that a right be confirmed to Joseph Antonich under Court
4 Claim No. 02297 for the diversion of 3.20 cubic feet per second in May and
5 June and 1.6 cubic feet per second in April and July 1 through October 15,
6 775 acre-feet per year for the irrigation of 155 acres and stock watering.
7 The basis for the exception was that Water Right Claim No. 06546 filed by a
8 predecessor in compliance with the requirements of RCW 90.14 asserts a right
9 to divert 2 cubic feet per second, 800 acre-feet per year from Naneum
10 Creek. Ecology's position is that the instantaneous quantity of water
11 claimed in WRC No. 006546 should be the maximum quantity awarded to Mr.
12 Antonich. The Court granted Ecology's exception, but remanded the claim to
13 allow Mr. Antonich to amend the quantity of water claimed pursuant to the
14 procedures in RCW 90.14.065.

15 Mr. Antonich was scheduled to appear at the supplemental hearing on
16 October 29, 2001, but did not make an appearance. There is no evidence that
17 he has amended WRC No. 006546 or even made an application to amend the
18 claim. Therefore, based on the Court's granting of Ecology's exception, the
19 Referee recommends that the instantaneous quantity authorized be reduced to
20 2 cubic feet per second in May and June. The rest of the recommendations
21 concerning Court Claim No. 02297 shall remain unchanged.

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25 SUPPLEMENTAL REPORT OF REFEREE

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1 COURT CLAIM NO. 01006 -- Ida Joseph Nason Aronica
2 United States of America

3 Two exceptions were filed to the Referee's recommendations for Court
4 Claim No. 01006. Allen Aronica, the claimant's son and heir to the
5 property, filed an exception concerning the priority given to the water
6 right recommended for the land in the SW $\frac{1}{4}$ of Section 28, T. 19 N.,
7 R. 19 E.W.M. and the United States filed an exception to a right not being
8 recommended for the NW $\frac{1}{4}$ of Section 28. Allen Aronica and the United States
9 appeared at the supplemental hearing in support of the exceptions. The
10 United States was represented by Mr. Charles E. O'Connell, Jr., Attorney
11 with the Department of Justice, Indian Resources Section. Testifying on
12 behalf of the United States was Ross Waples, an expert in soil science and
13 land classification employed by HKM Engineering; Gary Elwell, an expert in
14 civil engineering and hydrology also employed by HKM Engineering; Joe
15 DeMaggio, an expert agricultural engineer employed by Stetson Engineering;
16 and James Merchant, an expert agricultural economist employed by Dornbusch
17 Associates. The United States entered the following exhibits during the
18 hearing: DE-1961, Yakima (sic) Off-Reservation Allotment No. HA-355 Arable
19 Lands, Water Right Analysis and Non-Irrigation Users Report; DE-1962, Yakima
20 (sic) Indian Nation Off-Reservation Allotment No. HA-355 Water Availability
21 Investigation; DE-1963, Off-Reservation Allotment No. HA-355 Conceptual
22 Irrigation Development Plan and Irrigation Water Requirements Yakama Indian
23 Nation; DE-1964, Economic Analysis of Future Irrigation Development Yakama
24 Indian Nation, Washington, Allotment HA-355; DE-1964A, Economic Analysis of

25 SUPPLEMENTAL REPORT OF REFEREE

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Future Irrigation Development Yakama Indian Nation Allotment HA-355 Appendix

D-References. Allen Aronica also testified at the supplemental hearing and entered as Exhibit DE-1967 a copy of his exception.

The testimony presented by the United States was for Off-Reservation Public Domain Allotment No. HA-355 held in trust by the United States for the benefit of Allen Aronica, who is an enrolled member of the Yakama Nation. The land lies in the NW $\frac{1}{4}$ of Section 28, T. 19 N., R. 19 E.W.M., which is 160 acres in size. This land has never been irrigated and has historically been used for dryland cattle grazing. According to the witnesses for the United States, there are 40.9 acres that are irrigable, and the remaining land would continue to be used for dryland cattle grazing. Irrigable lands lie both east and west of Naneum Creek Road, and appear to the Referee to lie within that portion of the NW $\frac{1}{4}$ of Section 28 lying east of Naneum Creek, except the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and except the east 1200 feet of the NW $\frac{1}{4}$, both in Section 28. The cattle grazing would require 0.65 acre-foot per year for stock watering. Gary Elwell analyzed the quantity of water that would be available from Naneum Creek during irrigation season, and the existing rights that would have priority dates senior to the date asserted for the allotment to determine how much water would be available for use on the allotment. Joe DeMaggio designed an irrigation system and determined that based on the system he designed, 4.38 acre-feet per year, or 179.1 acre-feet per year could be diverted and used on the allotment. It appears from reviewing DE-1963, that the analysis was based on diverting 1.7 cubic feet per second from Naneum Creek. The report

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1 indicates that in many years 179.1 acre-feet per year will not be used
2 because the water will not be available. A right is also being asserted to
3 use 2 acre-feet per year for domestic supply. DE-1961 at page 10 suggests
4 that rural domestic water use figures are variable due to differences in
5 requirements for landscaping, gardens, etc. This suggests to the Referee
6 that the domestic water being used is outside water, such as lawn and garden
7 irrigation, car washing, etc., not a potable water supply. The 2 acre-feet
8 per year identified would be sufficient for outside use including irrigation
9 of up to one-half acre of landscape area.

10 The priority date sought for the water right is January 25, 1896, which
11 is the date that the trust patent issued for the allotment. The question on
12 whether there are Federal reserved rights on off-reservation Indian
13 Allotments was answered in the Court's Memorandum Opinion RE:
14 Off-Reservation Indian Land, dated November 12, 1992. The Court ruled at
15 page 10 ". . . that these withdrawals of land from the public domain by the
16 United States for the specific benefit and protection of its Indian wards
17 and are held in trust for them, the lands withdrawn are clearly reserved
18 lands." The Court also ruled that the reserved water is for all of the
19 "practically irrigable acreage" of each allotment. The Court also ruled
20 that the priority date would be the date the lands were reserved. Although
21 the memorandum opinion did not assign a priority date for Allotment HA-355,
22 the priority dates it did assign for other allotments was the day the trust
23 patent issued. Therefore, the Referee concludes that the appropriate
24 priority date will be January 25, 1896.

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The Referee recommends that a right be confirmed with a January 25,
1 1896, date of priority for the diversion from Naneum Creek of 1.7 cubic feet
2 per second, 179.1 acre-feet per year for irrigation of 40.9 acres; 2
3 acre-feet for domestic supply and 0.6 acre-foot per year for stock watering
4 from April 1 through October 31. The place of use shall be that portion of
5 the NW $\frac{1}{4}$ of Section 28, T. 19 N., R. 19 E.W.M. lying east of Naneum Creek,
6 except the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and except the east 1200 feet of the NW $\frac{1}{4}$ NW $\frac{1}{4}$, both in
7 Section 28. The point of diversion identified by the United States that was
8 intended for use is in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 20, T. 19 N., R. 19 E.W.M. The
9 right shall issue to the United States as Trustee for Allen Aronica.

11 Mr. Aronica took exception to the priority date for the right
12 recommended for confirmation for the SW $\frac{1}{4}$ of Section 28. This land was not
13 held in trust by the United States, but is owned by the claimant. The
14 Referee recommended a priority date of June 30, 1871, based on information
15 in the Findings of Fact for the Ferguson decree indicating that Charlie
16 Nason had settled on the land sometime prior to 1872. The record was not
17 clear on when prior to 1872 the land was settled. Mr. Aronica through his
18 exception and testimony asserts that the priority date should be consistent
19 with the signing of the treaty with the Yakama Nation in 1855. According to
20 Mr. Aronica, this land was originally settled on by the extended family of
21 Chief Owhi prior to his signing the 1855 treaty. Chief Owhi's sisters lived
22 on the land at the time the treaty was signed and when they died the land
23 was passed on to Charlie Nason and his wife. After the treaty was signed,
Charlie Nason filed under the Homestead Act and ultimately received a patent

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for the SW $\frac{1}{4}$ of Section 28. This land is riparian to Naneum Creek. Under
1 the Riparian Doctrine, the priority date for the water rights is the date
2 steps were first taken to sever the land from Federal ownership. Settling
3 on the land with the intent of acquiring title is the first step required to
4 sever the land. Based on the information provided, the Referee concludes
5 that there is sufficient evidence to show that the priority date should be
6 earlier than 1871. The exact date when the land was settled is still not in
7 the record. Mr. Aronica testified that it was prior to signing of the 1855
8 treaty, however, the priority date he is seeking is the date the treaty was
9 signed. The Referee is convinced that date, or even an earlier date is
10 appropriate. Therefore, it is recommended that the priority date for the
11 right described on page 66 beginning on line 10 and page 598, beginning on
12 line 1 be changed to June 9, 1855. Allen Aronica has not been substituted
13 for his mother on this claim. Therefore, the right will remain in her
14 name. Mr. Aronica is urged to file the substitution paperwork as soon as
15 possible.
16

COURT CLAIM NO. 01960 -- Glen Bach
17 John Libenow
18 Conrad Kraft
19

Glen C. Bach was joined to Court Claim No. 01960 as a successor to
20 William Z. and Jean Smith on August 19, 2000, shortly after the Subbasin No.
21 9 Report of Referee was filed with the Court. Mr. Bach, took exception to a
22 right not being confirmed for the property he purchased from Mr. Smith. Mr.
23 Bach, represented by Attorney Richard T. Cole, appeared and testified at the
24

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1 supplemental hearing. John Libenow and Conrad Kraft earlier bought land
2 from the Smiths, but did not file any exceptions.

3 Mr. Bach purchased approximately 4 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of
4 Section 29, T. 18 N., R. 19 E.W.M. and is asserting a right to irrigate that
5 land with water diverted from Lyle Creek. The plat map that is part of
6 Exhibit DE-1818 entered by Mr. Bach shows the acreage to be 3.78 acres.
7 Lyle Creek flows along the east edge of the property, even though the
8 State's Map Exhibit SE-2 shows Lyle creek being a short distance to the east
9 of the land described in Court Claim No. 01960. Mr. Bach testified that he
10 flood irrigates a portion of his land with water diverted from Lyle Creek.
11 Early in the irrigation season when Lyle Creek is full of water, the land is
12 subirrigated and Mr. Bach does not divert any water. As the flow in the
13 creek declines, the land dries out and he needs to divert water to irrigate
14 a pasture and his lawn. Mr. Bach's testimony indicates that he also has
15 Kittitas Reclamation District (KRD) water for his land, as he testified that
16 creek water is used especially when the KRD water is shut off or really
17 low. This testimony is in contrast to his response to a question from
18 Ecology, wherein Mr. Bach testified that Lyle Creek is the only source of
19 water for the property. It is clear, however, that early in the season the
20 land is subirrigated and later in the season water is physically diverted
21 from Lyle Creek into a ditch that is used to flood irrigate a portion of the
22 property. Mr. Bach did not testify to how many acres are irrigated with
23 water diverted from the creek. When asked if he irrigates the entire 4
24 acres, Mr. Bach responded that he had not done that, but could. Since Mr.
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Bach had only owned the land for less than two years, the fact that he had
1 not irrigated the entire 4 acres, does not mean that the entire 4 acres had
2 not previously been irrigated. However, there was no evidence one way or
3 the other.

4 Referring to the testimony offered by William Z. Smith at the intital
5 hearing, however, clears some of the confusion. Mr. Smith testified that
6 all of the land was irrigated from Lyle Creek with water placed in the creek
7 by KRD. One of the reasons the Referee declined to recommend that a water
8 right be confirmed was the suggestion from Mr. Smith's testimony that all of
9 the water diverted from the creek was water placed there by the KRD.
10

11 Mr. Bach is asserting that water rights for this land were awarded in
12 the Sander v. Jones decree and that creek water is being used. The
13 documents in the record as part of Exhibit DE-1818 show that the S $\frac{1}{4}$ NW $\frac{1}{4}$ of
14 Section 29 was originally conveyed by the Federal government to Northern
15 Pacific Railroad, who in turn sold it to William G. Liles on July 9, 1888.
16 It is not clear how long William G. Liles owned the land, as the next
17 document in the record is a mortgage dated April 9, 1892, between Andrew
18 Ford and John L. Farrell for the SE $\frac{1}{4}$ of Section 6, T. 17 N., the N $\frac{1}{4}$ SW $\frac{1}{4}$ and
19 S $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29, T. 18 N., R. 19 E.W.M. This mortgage and one between
20 Andrew Ford and L. R. Grimes referenced "together with irrigating ditches
21 and water rights appurtenant thereto, but do not mention a source of water
22 and are not sufficient for the Referee to conclude that all of the land
23 described might have had an appurtenant water right. In 1908 A. J. Damman
24 sold to Frank N. McCandless the S $\frac{1}{4}$ NW $\frac{1}{4}$ and N $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 29 with all water
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rights and water ditches appurtenant to or used in connection with said
1 tracts of land, the water right being 160 inches of water of Lyle and Wilson
2 Creek according to decree dated and filed August 12, 1890, in case of
3 Sanders vs Jones et al.

4 The claimant's land is not specifically addressed in the Sanders v.
5 Jones decree or the decision that preceded the decree. The Findings of Fact
6 in the Decision described most of the land owned and irrigated by the
7 plaintiff and the defendants, but not in every case. The claimant suggests
8 that William Lyle (Lile) owned the land at the time of the Sanders v. Jones
9 dispute. William J. Lyle was a defendant, unfortunately, the land that he
10 owned and was irrigating was not described in the Decision. At paragraph 89
11 through 92, the Findings of Fact states that defendant Lyle is and for many
12 years has been the owner of the lands described in paragraph 7 of his
13 answer. That Lyle's land was settled and occupied and part of it improved
14 since 1876; and said Lyle purchased said land and all the water rights
15 thereto belonging in 1878 from James F. Keeney. It concluded that Lyle and
16 his predecessors in interest appropriated from Wilson Creek 30 inches in
17 1878 and 130 inches in 1879.
18

19 The information in the Sanders v. Jones decision concerning the history
20 of the land is not consistent with the documents entered into the record by
21 Mr. Bach. The documents show that the land was railroad land and that Mr.
22 Liles bought from the railroad in 1888, not from James F. Keeney in 1878.
23 Since the claimant's land was owned by the railroad and the map of definite
24 location was not filed until 1884, the land would not have been available
25

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for occupation in 1876. The claimant did not address these factual
1 discrepancies. A copy of the answer filed by William J. Lyle would
2 certainly answer that question. It is also significant that if it is the
3 same land, the water right awarded in Sanders v. Jones is specifically for
4 use of Wilson Creek, not Lyle Creek, the source of water for which Mr. Bach
5 is asserting a right. There is no evidence in the record to suggest that
6 Wilson Creek water is or has been used on the claimant's property. If a
7 prior owner changed from diverting from Wilson Creek to diverting from Lyle
8 Creek, the record does not suggest when that might have occurred and whether
9 compliance with the change procedures of RCW 90.03.380 should have been
10 followed (if the change happened after June 6, 1917, compliance with those
11 procedures would have been required).

The Referee still does not believe the evidence is in the record to
13 show that natural creek water is being used. Mr. Bach did not testify to
14 when he normally physically diverts water for irrigation rather than the
15 land being subirrigated. The testimony of other claimants is clear that the
16 flow in Lyle Creek declines as the summer progresses and that the time the
17 creek is flowing at the stage where it would subirrigate is prior to when
18 KRD normally begins delivering water. By the time the creek flow has
19 dropped, undoubtedly KRD water is being delivered through the creek.

Mr. Bach's counsel argues that the fact that the land is subirrigated
21 should not preclude a recommendation that a right be confirmed for the
22 entire irrigation season. He points to the complaint filed by Carl Sanders
23 in Sanders v. Jones to support his position. Mr. Cole assumed that the
24

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complaint was in the record, but stated he would enter a copy if one was
1 not already an exhibit. The Referee has reviewed the exhibit list and could
2 not identify a copy of the Sanders complaint. The Decision clearly does not
3 support Mr. Cole's argument. It states on page 2, paragraph 6:
4

"That all the lands described in the pleadings are naturally dry and arid;
5 and without irrigation will not produce crops, but with irrigation will
6 produce abundant crops of all kinds."

The words "dry and arid" do not suggest that any of the land was
7 subirrigated. A copy of the complaint in Sanders v. Wilson, which is a case
8 filed a little over 10 years after Sanders v. Jones is in the record
9 (DE-1110). That complaint and Findings of Fact and Conclusions of Law
10 (DE-1109) make it very clear that the water rights for which Mr. Sanders was
11 awarded a right were based on appropriation of water. Each of the findings
12 related to Sanders states that he appropriated and used the water for
13 irrigation and the appropriation had continued until the time of the
14 dispute.
15

Given that the prior owner had testified to using only KRD water and
16 Mr. Bach is a new owner of the land and had only irrigated the land one
17 season, the Referee is not inclined to ignore that earlier testimony without
18 actual evidence that natural creek water is being diverted. Mr. Bach did
19 not give any specifics about the use of water from the creek in 2001. Due
20 to the severe drought in 2001, KRD stopped delivering water around the end
21 of July. It would be helpful to know whether water continued to be diverted
22 from Lyle Creek after KRD stopped its deliveries.
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At the initial evidentiary hearing, Mr. Smith had testified to a
non-diversionary stock water use that would be covered by the stock water
stipulation discussed on page 4 of the Report of Referee. However, Mr.
Smith's name was not on the list of those claimants with a right under the
stipulation. Mr. Bach shall be added to that list.

The Referee declines to recommend confirmation of a water right to Mr.
Bach under Court Claim No. 01960 due to the uncertainty of whether creek
water is used on the land and the questions concerning whether a right was
established to use creek water due to the inconsistencies identified earlier
between the history of ownership of the claimant's land and the Lyle land
described in Sanders v. Jones.

COURT CLAIM NO. 01879 -- Dimitri Bader
& Lenora Bader

The Referee did not recommend confirmation of a water right under Court
Claim No. 01879 primarily due to the apparent lack of a water right claim
filed pursuant to RCW 90.14. The Baders, represented by Attorney Jeff
Slothower, took exception to the Report of Referee. Mr. Bader testified at
the evidentiary hearing. In addition, depositions of Caryl Rasmussen taken
on June 22, 1994, and Samuel W. Bailey, taken on September 29, 2001, were
entered into evidence as Exhibits DE-1853 and 1852.

As an attachment to Bader's exception, they submitted a copy of a
completed RCW 90.14 water right claim in the name of Carl C. Rasmussen.
During the period for filing RCW 90.14 water right claims, the Baders land
was owned by Carl C. and Caryl Rasmussen. The claim asserts a right to use

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1 450 acre-feet per year from Whiskey Creek for irrigation of 88 acres in the
2 SW $\frac{1}{4}$ of Section 23, T. 18 N., R. 18 E.W.M. The point of diversion described
3 is 200 feet north of the center of Section 23 in the N $\frac{1}{4}$ of Section 23. This
4 is the same diversion location identified on the State's Investigation
Report.

5 Entered as Exhibit DE-1850 is a yellow copy of the claim form, with a
6 stamp on the upper right corner showing it was received by the Department of
7 Ecology on November 26, 1971. The bottom left corner where the registration
8 number should be located is ripped off. The parties agree that this claim
9 form is not part of State's Exhibit SE-5, which is several binders
10 containing copies of water right claim forms filed for lands within Subbasin
11 No. 9. Ecology responded to Bader's exception and along with the response
12 is Candy Pittman's Declaration filed on January 26, 2001, (Doc. #14859).
13 Attached to Ms. Pittman's Declaration are copies of Ecology records that
14 show that the claim submitted by Mr. Rasmussen was returned to him rather
15 than registered. The document does not suggest why the claim was returned.
16

17 Mr. Bailey's deposition indicates that claim forms were returned when
18 they did not have the filing fee or when information was omitted from the
19 form. The instantaneous quantity section of DE-1850 is blank, suggesting
20 that is why the form would have been returned. Mr. Bailey's deposition also
21 indicates that claim forms were to be filed between 1969 and June 30, 1974.
22 During the early part of the registration period, the claims were gradually
23 being sent to Ecology and there was sufficient time and staff to review the
24 claims for completeness. If information was lacking, Ecology staff would
25

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attempt to contact the individual filing the claim by telephone. If that
1 failed, the claim was returned; generally with a form letter indicating why
2 the claim was being returned, and asking that the missing information be
3 completed and the form returned to Ecology. As the deadline for filing
4 water right claims approached, the volume of forms being sent to Ecology was
5 too large to allow the claims to be reviewed, so all of the claims received
6 with the appropriate filing fee were registered. Mrs. Rasmussen testified
7 through her deposition that they did not receive the form back from
8 Ecology.
9

Mr. Slothower argues in the exception filed on behalf of the Baders
10 that Ecology had no authority under the statute to return forms. RCW
11 90.14.061 states that:

12 "Filing of a statement of a claim shall take place and be completed upon
13 receipt by the department of ecology, at its office in Olympia, of an
14 original statement signed by the claimant or his authorized agent, and
15 two copies thereof. . . Within thirty days after receipt of a statement
16 of claim the department shall acknowledge the same by a notation on one
17 copy indicating receipt thereof and the date of receipt, . . . and shall
return said copy by certified or registered mail to the claimant at the
address set forth in the statement of claim. No statement of claim shall
be accepted for filing by the department of ecology unless accompanied by
a two dollar filing fee."

No where does it state that a claim will be returned if some of the
18 information is missing. Ecology points to RCW 90.14.051, where it states that
19 "The statement of claim for each right shall include substantially the
20 following: . . .(3) The quantities of water and times of use claimed." They
21 argue that the claim did not include the quantities of water claimed. They also
22 cite to RCW 90.14.071, arguing that a person who did not file a claim with the
23 information required by RCW 90.14.051 is conclusively deemed to have waived and
24

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1 relinquished any right, title or interest in said right." What that section
2 actually states is:

3 ". . . any person claiming the right to divert or withdraw waters of
4 the state as set forth in RCW 90.14.041, who fails to file a statement
5 of claim as provided in RCW 90.14.041, 90.14.043, or 90.14.068 and in
6 RCW 90.14.051 and 0.14.061, shall be conclusively deemed to have
7 waived and relinquished any right, title, or interest in said right."

8 If Ecology had consistently refused to register water right claim forms
9 that were missing any of the information identified in RCW 90.14.051 (1) through
10 (7), their argument would be more persuasive. The Referee has made a cursory
11 review of the RCW 90.14 claims filed prior to 1974 for lands within Subbasin No.
12

13 9. Several claims were spotted that were missing the annual quantity of water
14 claimed and used. Additionally, during 1974, when most of the water right
15 claims were filed with Ecology, there was no review of the claims to determine
16 if they were completed. Every claim received with the filing fee was
17 registered. Clearly there was inconsistent treatment by Ecology of the claims
18 being filed. Ecology cites to a Pollution Control Hearings Board decision in
19 Welch v. Ecology, PCHB No. 98-108, as providing guidance on Ecology's ability to
20 return claim forms when they are not complete. Ecology also recognizes the
21 decision is not precedential. The Referee has reviewed that decision and finds
22 distinction between the Bader situation and that in Welch. The PCHB did rule
23 that Ecology had the right to reject the claims at issued in that case because
24 the did not substantially comply with RCW 90.14.051. However, the board found
25 that the claims did not substantially comply with RCW 90.14.051(3), (4) and (5),
26 and that the claims were not to existing water use, but rather to potential
future use. The PCHB in ruling on Welch found that three of the items required

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1 by RCW 90.14.051 were omitted, where Bader's predecessor only left off a portion
2 of one of the required elements. The Referee concludes that Bader's predecessor
3 substantially complied with the requirements of RCW 90.14 and Ecology should not
4 have returned the claim form, see the Court's February 10, 1995, Memorandum
Opinion Re: RCW 90.14 and Substantial Compliance.

5 Sufficient evidence was presented at the initial evidentiary hearing to
6 allow the Referee to conclude that a water right had been established under the
7 Riparian Doctrine through beneficial use of the water prior to 1920. The land
8 was originally conveyed by the Federal government to Northern Pacific Railroad,
9 who then sold it into private ownership. The priority date for riparian rights
10 on former railroad land is May 24, 1884, the date when the map of definite
11 location was filed in Kittitas County, see Sanders v. Bull, 76 Wash. 1, 4, 135
12 Pac. 489 (1913). The claimants land lies in the SW $\frac{1}{4}$ of Section 23, T. 18 N.,
13 R. 18 E.W.M. and a right is being asserted to irrigate that portion of the land
14 lying north of the Cascade Canal. The State's Investigation Report for the
15 claim indicates that 70 acres are being irrigated, but the testimony at the
16 initial hearing was very consistent amongst the witnesses that 50 acres were
17 being irrigated. Exhibit DE-1854, which is a handwritten description of the
18 irrigation system prepared by Mr. Bader leads the Referee to conclude that 55
19 acres are being irrigated. Mr. Bader's testimony at the supplemental hearing
20 and Exhibit DE-1851 could lead to a conclusion that more acres, as many as 88,
21 are being irrigated with creek water. However, because the testimony in 1990
22 was so very specific that approximately 50 acres were being irrigated and
23 DE-1854 indicates 55 acres, the Referee will conclude that 55 acres are being
24

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irrigated with water diverted from Whiskey Creek. The claimants also are
1 assessed by Kittitas Reclamation District (KRD) for 47 acres and KRD water is
2 used after July 1.

3 In the Report of Referee, it was suggested that if the claimants were able
4 to find an RCW 90.14 claim for the property, they also provide additional
5 information about the quantity of water being used on the property. Michael
6 Mouer testified at the initial hearing that up to 5 cubic feet per second is
7 diverted to irrigate the 50 acres. The Referee found this to be an extremely
8 high quantity of water for the number of acres being irrigated. The Referee
9 reviewed Mr. Mouer's testimony and the testimony of Mr. Bader at the
10 supplemental hearing. Both testify to that quantity of water being used, but
11 the evidence does not indicate that the quantity of water used was actually
12 measured. The irrigation practice testified to by Mr. Bader also differs from
13 Mr. Mouer's practice during the 20 years he leased the land and farmed it. Mr.
14 Mouer testified that the land was continually irrigated after the season started
15 in mid-March until the end of the season. When hay was being harvested and
16 could not be irrigated, they irrigated the pasture land. Mr. Bader testified
17 that he will irrigate for four to five days and then stop for five to six days
18 and then repeat the pattern through the season.

19 The Referee noted in the initial report that there are numerous
20 miscellaneous decrees that were entered addressing water rights on neighboring
21 Wilson and Naneum Creeks. These decrees awarded rights to use one inch of water
22 in May and June and one-half inch of water the rest of the year. This would
23 result in using 0.02 or 0.01 cubic foot per second on each irrigated acre. Mr.
24

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Bader is asserting a right to use 0.10 cubic foot per second on each irrigated
1 acre, 5 to 10 times as much water as was found to be necessary in the decrees
2 that were entered in the late 1800's and early 1900's. While Mr. Bader's
3 predecessor was not a party to any of these decrees because they did not address
4 rights to Whiskey Creek, the Referee finds them to be informative of the
5 quantity of water that was routinely being used when water rights were being
6 established in this area. Although Mr. Bader and Mr. Mouer both testified to a
7 belief that up to 5 cfs is being used to irrigate the land, there is no evidence
8 this quantity is what is actually being used (no measurements were taken) and
9 there is no evidence this quantity of water was historically used when the right
10 was established. Mr. Bader testified this quantity is needed due to the soil
11 characteristics and to cover high points on the land. Lacking any documentation
12 to show that the landowner at the time the water right was established
13 appropriated the quantity of water currently being used by the claimant, the
14 Referee will not confirm a right for 5 to 10 times the quantity of water being
15 used on all the neighboring lands, and on lands with substantially senior rights
16 on Whiskey Creek.

17 Therefore, the Referee recommends that a right be confirmed under Court
18 Claim No. 01879 with a May 24, 1884, date of priority for the use of 1.1 cubic
19 foot per second, 275 acre-feet per year for the irrigation of 55 acres and stock
20 watering in that portion of the SW $\frac{1}{4}$ of Section 23, T. 18 N., R. 18 E.W.M. lying
21 north of the Cascade Canal. The point of diversion currently and historically
22 used is near the center of Section 23, approximately 200 feet north and 10 feet
23 west of the center of Section 23.

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1 Mr. Bader testified that he continues to divert water after the end of the
2 irrigation season. Some of this water is used for livestock watering, but some
3 is used to maintain wildlife habitat. The Referee cannot recommend confirmation
4 of a right to divert water for wildlife habitat, as it is clear this use was
5 developed after the Baders acquired the land, so the use clearly does not fall
6 within the right established in the late 1800's. At the time the Baders
7 developed the wildlife habitat, in order to obtain a water right compliance with
8 RCW 90.03 would have been necessary and a permit obtained. That did not occur.
9 The Referee can recommend confirmation of a right for livestock watering. The
10 diversion continues into December, until the ditch freezes. The testimony did
11 not indicate the quantity of water diverted after the end of the irrigation
12 season. Less than an acre-foot of water would be needed for watering stock from
13 the middle of October to the end of December. However, sufficient water needs
14 to be diverted to carry the water through the ditch. The Referee recommends
15 that a right be confirmed for the diversion of 0.55 cubic foot per second, 1
16 acre-foot per year for stock watering from October 16 through December 31.

17
18 COURT CLAIM NO. 01841 -- Florence E. Bender
19 & Estate of James Russell Bender

20 The Benders did not make an appearance at the initial evidentiary
21 hearing for Subbasin No. 9, resulting in the Referee recommending that a
22 water right not be confirmed. Mrs. Bender took exception to that
23 recommendation and Court Claim No. 01841 was remanded to the Referee to
24 allow presentation of evidence in support of the claim. Mrs. Bender
25 testified at the supplemental hearing.

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Mrs. Bender's property lies in the northwest corner of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of
1 Section 13, T. 17 N., R. 18 E.W.M. She owns a total of 1.72 acres and
2 irrigates her lawn and garden area with water delivered by the Tjossem
3 Ditch. Mrs. Bender estimated that she irrigates about one-half acre,
4 however, the State's Investigation Report for the claim indicates that 1
5 acre is being irrigated. The Referee believes that the state's
6 investigators are more experienced at estimating acreage and better able to
7 provide an accurate number. Initially Mrs. Bender's land was flood
8 irrigated, but for the past 10+ years water has been withdrawn from the
9 ditch using a small pump and 4 sprinklers have been used to irrigate the
10 land. Mrs. Bender did not know the horsepower of the pump, nor did the
11 state's investigation report indicate the horsepower. The Referee's
12 experience is that lawn sprinklers generally use 5 gallons per minute or
13 less, which would indicate that a maximum of 20 gallons per minute is used
14 to irrigate the land. Mrs. Bender testified that it takes 1 $\frac{1}{2}$ days to water
15 all of her land and she does that every 10 days or so. Based on that
16 irrigation practice, no more than 3 acre-feet would be used during the
17 year.
18

Mrs. Bender has been familiar with the property since the mid-1930's.
19 She remembers the house being built around 1935 and the land was being
20 irrigated from the Tjossem Ditch at that time. She and her husband acquired
21 the land in 1952 and continued the irrigation practice that was in place.
22 The SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13 is part of the land that was conveyed by the
23 railroad to R. P. Tjossem in the late 1880's. At the initial evidentiary
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hearing the only documents in the record concerning the ditch showed that by
1 1902 the Tjossem Ditch was constructed and delivering water for irrigation
2 and power to the Tjossem land in Sections 13 and 24. However, claimant
3 Michael K. Moeur, Sr., put in evidence in support of his claim that lead the
4 Referee to conclude that the Tjossem Ditch had been constructed by 1889.
5

The Referee will use June 30, 1889, as the priority date for all water
6 rights delivered through the Tjossem Ditch.

7 Water Right Claim No. 119386 was filed by Robert N. Bynum and
8 Associates asserting a right to divert 4 cubic feet per second, 1440
9 acre-feet per year from the Yakima River for the irrigation of 30 acres.
10 The place of use is five parcels, including the Bender parcel.

11 The Referee recommends that a right be confirmed under Court Claim No.
12 01842 with a priority date of June 30, 1889, for the diversion of 0.04 cfs,
13 3.0 acre-feet per year from the Yakima River for the irrigation of 1 acre in
14 the west 165 feet of the north 452 feet of the W $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13,
15 T. 17 N., R. 18 E.W.M. The point of diversion shall be in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of
16 Section 11, where the Tjossem Ditch diverts from the Yakima River.

17 As a result of the Referee determining that the appropriate priority
18 date for the rights to the Tjossem Ditch being June 30, 1889, the priority
19 date for the water rights awarded to Glen Armistead and Bonnie Spurrier,
20 Court Claim No. 01155, and Grace M. Menig, Court Claim No. 01202, shall be
21 changed from June 30, 1902, to June 30, 1889.

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1 COURT CLAIM NO. 14379 -- Joyce L. Bloxham

2 On March 14, 2000, Joyce L. Bloxham filed a claim with the Court
3 asserting a right to use waters from Naneum Creek. The Court issued an
4 Order Granting Further Processing of Claim No. 14379 Relating to Subbasin
5 No. 9 on May 11, 2000. This claim was scheduled for presentation of
6 evidence at the supplemental hearing for Subbasin No. 9. Ms. Bloxham was
7 represented by Attorney J. Jay Carroll at the supplemental hearing and she
8 testified, along with Bertha Morrison and Mike Marvich, neighboring
9 landowners.

10 Ms. Bloxham owns the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 15, T. 18 N.,
11 R. 19 E.W.M. and is asserting a right to irrigate approximately 60 acres and
12 water stock with water diverted from Naneum Creek. The diversion from the
13 creek is in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9, T. 18 N., R. 19 E.W.M. and water is
14 carried to the claimant's land in the Schnебly Ditch. The land is in
15 pasture, which is flood irrigated. Ms. Bloxham testified that she begins
16 irrigating around the first of April and by early in July there is not
17 sufficient water in the creek for her to continue irrigating solely with
18 creek water. She then calls for her KRD (Kittitas Reclamation District)
19 water, which is initially used in conjunction with creek water. The
20 Referee's impression is that in some years there is a point in the summer
21 when only KRD water is used. After irrigation season is over, water
22 continues to be diverted into the ditch for stock watering on the Bloxham
23 land and other lands through which the Schnebly Ditch flows. Ms. Bloxham

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estimated that early in the irrigation season the ditch carries 1.5 cfs and
1 after July the flow drops to half a cfs or less. At times there are up to
2 125 cow/calf pairs on the land and in the winter there may be as few as 35
3 cows, but there is always livestock drinking from the ditch. Ms. Bloxham
4 also testified that over the last two years they have had trouble getting
5 water for the livestock due to the owner where the diversion is located not
6 letting the water pass.

7 The NW $\frac{1}{4}$ of Section 15 was conveyed by the Federal government to
8 Northern Pacific Railroad, who in turn sold it in 1890 to Edwin A.
9 Carpenter. Mr. Carpenter was a party to the Ferguson decree and was awarded
10 a right with an 1891 date of priority for the use of 100 inches of water
11 from Naneum Creek for use in the NW $\frac{1}{4}$ of Section 15. The Carpenter right was
12 one of the most junior rights awarded in the Ferguson decree, which would
13 explain why KRD water is needed by mid-summer.

14 The land stayed in the Carpenter family until 1963 when Lawrence A.
15 Carpenter sold it to Barbara Brown Stahl. Ms. Bloxham acquired the land
16 from the Stahls in 1983. At that time it was irrigated in the same manner
17 as it has been during Ms. Bloxham's ownership. Bertha Morrison testified to
18 her memory of the land being irrigated when she was a child as she had to
19 cross the land when she was walking to school. She remembers it being
20 irrigated prior to the KRD Highline Canal being constructed (which would be
21 prior to 1932). Mike Marvich also testified to the land being irrigated
22 during the 25 years he has lived in the area.

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The Referee concludes from the evidence presented that a right was
1 established in 1891 to irrigate the land and water stock from Naneum Creek
2 and that beneficial use has continued. RCW 90.14, the Claims Registration
3 Act was passed by the legislature in 1967. Among other things, it required
4 the filing of a water right claim form for all water uses that were
5 initiated prior to adoption of the state's water codes. That requirement
6 would clearly apply to the right established by Edwin Carpenter in 1891.
7 The only RCW 90.14 claim form that has been identified as potentially
8 describing the water right for the claimant's land is Water Right Claim
9 (WRC) No. 141308, which was filed by Barbara B. Stahl. It describes a right
10 to divert 0.02 cfs, 4 acre-feet per year from Naneum Creek and unnamed creek
11 for the irrigation of 10 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 10, T. 18 N.,
12 R. 19 E.W.M. It also describes a point of diversion in the northwest corner
13 of the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 10, T. 18 N., R. 19 E.W.M. Mr. Carroll suggests
14 that an error was made in describing the lands on which water is used, and
15 that Mrs. Stahl wrote down the section number for where the point of
16 diversion is located rather than where the place of water use is located.
17 However, the point of diversion that serves the Bloxham property is not in
18 the northwest corner of the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 10, it is in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of
19 Section 9. If you followed Mr. Carroll's logic, the point of diversion
20 description is also in error. Mrs. Bloxham testified that the Stahls owned
21 about 160 acres in Section 10, suggesting that it was just across Carpenter
22 Road from the Bloxham property, which would place it in the S $\frac{1}{4}$ of
23 Section 10, not the NW $\frac{1}{4}$ NW $\frac{1}{4}$. However, there is nothing in the record to show
24

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1 exactly what land the Stahls did own. The Referee inquired of Mr. Carroll
2 whether he had attempted to amend WRC No. 141308 under the procedures in RCW
3 90.14.065. Mr. Carroll suggested he would pursue that process. The Referee
4 notes that even if the place of water use is amended to describe Section 15
5 instead of Section 10, a right is being claimed to irrigate only 10 acres in
6 the NW $\frac{1}{4}$ NW $\frac{1}{4}$, substantially less than the 60 acres for which Ms. Bloxham is
7 seeking a right.

8 As the record stands at this point, there is no RCW 90.14 claim that
9 describes a right to divert water from Naneum Creek to irrigate or provide
10 stock water on the lands now owned by Joyce Bloxham. Failure to file a claim
11 waives and relinquishes any right that may have existed, see RCW 90.14.071.
12 Unless and until WRC No. 141308 is amended to describe the Bloxham property,
13 or another claim is located, the Referee cannot recommend confirmation of a
14 water right under Court Claim No. 14379.

15
16 COURT CLAIM NO. 00825 -- James Bridge
17 & Mary Bridge
18 Cy Morgan
19 Nick Parsel
20 & Kim Parsel
21 Katherine M. Rasmussen

22 The Bridges and Cy Morgan submitted a claim to the Court for use of
23 waters from a branch of Wilson Creek known as Dry Creek and the Referee
24 recommended that several rights be confirmed. Son Vida II, represented by
25 Attorney Richard T. Cole, filed an exception, seeking an opportunity to
26 present evidence on the right that should be appurtenant to Parcel A. The

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claim was remanded to the Referee. Steve Willard appeared at the
1 supplemental hearing on behalf of Son Vida II.
2

The rights recommended for confirmation under Court Claim No. 00825 are
3 as follows: with a June 30, 1873 date of priority, for the diversion of 0.6
4 cfs in May and June, 0.3 cfs in April and July 1 through October 31, 150
5 acre-feet per year for the irrigation of 30 acres and stock watering in the
6 NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 25; with a June 30, 1877, date of priority 0.88 cfs in May
7 and June and 0.44 cfs in April and July 1 through October 31, 220 acre-feet
8 per year for the irrigation of 44 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section
9 25; with a June 30, 1887, date of priority 0.80 cfs in May and June, 0.40
10 cfs in April and July 1 through October 31, 200 acre-feet per year for the
11 irrigation of 40 acres and stock water in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 25; all in
12 T. 18 N., R. 18 E.W.M.
13

Apparently Son Vida II has acquired a portion of the land in the S $\frac{1}{4}$ NE $\frac{1}{4}$
14 of Section 25 and is seeking to have a different point of diversion awarded
15 for the right. Mr. Willard testified that water is diverted from the creek
16 at a point approximately 1300 feet south and 1000 feet west of the northeast
17 corner of Section 25, in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of that section. Mr. Willard testified
18 the diversion has always been at that location. However, the evidence put
19 in at the initial evidentiary hearing is that the water was being diverted
20 at a point located approximately 850 feet south of the northeast corner of
21 Section 25, in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of the section. That diversion location is also
22 described in Water Right Claim No. 125748. The Court has consistently ruled
23

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that only points of diversion described in the water right claims filed pursuant to RCW 90.14 can be confirmed for use.

Although the Referee has summarized the evidence provided and Son Vida II's position regarding the rights awarded, the Referee finds that Son Vida II has no standing regarding Court Claim No. 00826. At the supplemental hearing it was pointed out that the claim was still in the name of Bridges and Morgan. Mr. Cole stated he would see that paperwork was filed to join Son Vida II. That has not happened. The Referee notes that his office also provided Mr. Cole and Chris Bridges (claimant's son) the necessary information and forms to join Son Vida II during late 2001 and early 2002.

Having no standing, no further exception or evidence will be considered until Son Vida II is properly joined to the claim.

COURT CLAIM NO. 01608 -- William Brown
& Marilyn Brown

William and Mary Brown are successors to Linn H. and Nina A. Robinett, who filed a claim with the Court asserting a right to use waters from Naneum Creek, but did not appear at the initial evidentiary hearing to present evidence in support of the claim. The Browns were substituted for the Robinetts shortly after the evidentiary hearing for Subbasin No. 9 and filed a motion to allow presentation of evidence in support of the claim. On September 12, 1991, the Court entered an Order allowing claimants to present evidence during the exception phase for Subbasin No. 9. The Browns are represented by Attorney Jeff Slothower and Mr. Brown testified at the supplemental hearing. Additionally, Richard C. Bain, Jr., P.E. a consultant

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hired by the claimants testified through a deposition taken on October 17,
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2001. The deposition was entered as Exhibit DE-1819.

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The Brown property lies in the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 16, T. 18 N.,
R. 19 E.W.M. and they are asserting a right to irrigate 40 acres of pasture
and about an acre of lawn and landscape area. Water delivered by the
Kittitas Reclamation District (KRD) is also used on the land. The creek
water for irrigating the pasture is diverted from a branch of Naneum Creek
that is sometimes called Neally Creek near the northeast corner of the
property. A ditch carries water along the north property line and then the
pasture is rill/flood irrigated. A 1 $\frac{1}{2}$ HP pump is used to withdraw water to
irrigate the lawn and landscape area. Mr. Bain visited the property twice
in 1991 to evaluate water use. The first time, on April 12, water was not
being diverted for irrigation. The creek was flowing 2.3 cfs. On May 15
the Browns were irrigating and 1.3 cubic feet per second was measured in the
ditch that carries water to the Brown property and two small properties to
the south. The water in the ditch was a combination of creek water and KRD
water. Mr. Bain indicates that during a normal water year, when water is
used from April 1 through October 15, 399.5 acre-feet per year would be used
to irrigate the land. This appears to be based on a continuous diversion of
approximately 1 cubic foot per second, which would result in 399.5 acre-feet
being diverted during the season. The normal KRD delivery to the property
would be 160 acre-feet per year, leaving 239.5 acre-feet per year from the
creek. Mr. Bain estimated that of that quantity, 32.4 acre-feet would be
used by the two landowners further down the ditch, leaving 187.6 acre-feet

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being used by the Browns. This is not an unreasonable quantity for
1 irrigating 40 acres using a rill/flood system. Mr. Bain's report also
2 indicates that approximate 270 gallons per minute or 0.60 cubic foot per
3 second would be withdrawn from the creek using the 1½ HP pump. The Referee
4 believes an error was made in Mr. Bain's calculations. Considering the
5 pressure common in a sprinkler system and the elevation change from the
6 creek to the area being irrigated, a 1½ HP pump would be expected to
7 withdraw between 35 and 45 gallons per minute, or no more than 0.10 cubic
8 foot per second. The Referee concludes Mr. Bain misunderstood the type of
9 sprinkler being used to irrigate the lawn and landscape and thought that the
10 3/8 inch nozzle described was of the size common to rainbird sprinklers,
11 rather than a small lawn sprinkler with a diffuser that would greatly reduce
12 the quantity of water emitted from the sprinkler.
13

The State's investigation report indicates that at the time of the
14 field inspection the land was not being irrigated and the owner at that
15 time, the Robinetts, did not maintain a surface water diversion. Mr. Brown
16 testified that when he acquired the property it was being irrigated and felt
17 that information was in error. The Robinetts filed Water Right Claims (WRC)
18 No. 120772 and 120773 pursuant to the requirements of RCW 90.14. They both
19 claim rights to divert 0.02 cfs, 4 acre-feet per year for the irrigation of
20 48 acres in the NW SW ¼ of Section 16, T. 18 N., R. 19 E.W.M. The Referee
21 concludes that they were attempting to claim a right to 0.02 cfs and 4
22 acre-feet per year for each acre irrigated. WRC No. 120772 asserts a right
23 to use a branch of Naneum Creek and WRC No. 120773 asserts a right to use
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Naneum Creek itself. The points of diversion described are very near the
1 diversion locations currently being used. According to the claim forms, at
2 the time the Robinetts filed the water right claims they were not using
3 water to irrigate their land. Although the RCW 90.14 claims indicate that
4 in 1974 there was no water use and in 1988 there may have been no water use,
5 the evidence does not support a conclusion that there might have been a
6 relinquishment. Mr. Brown testified that the land had been leased prior to
7 his purchase and the leasee irrigated.

Water rights for this land were addressed in the Ferguson decree. The
9 Findings of Fact that preceded the decree stated that John Clifton possessed
10 the SW $\frac{1}{4}$ of Section 16 under contract to purchase from the State. Within the
11 SW $\frac{1}{4}$ of Section 16, 130 acres are tillable and in cultivation and water was
12 diverted for irrigation in 1885. The decree found that one inch of water
13 was sufficient for each acre irrigated in May and June and one-half inch was
14 sufficient the rest of the year. The Referee concludes that the N $\frac{1}{2}$ SW $\frac{1}{4}$ of
15 Section 16 has a right to one-half of the acres and water allocated in the
16 Ferguson decree. Bernhard E. and Freda M. Schneider are asserting rights
17 under Court Claim No. 15628 for the 14 acres they own in the N $\frac{1}{2}$ SW $\frac{1}{4}$ of
18 Section 16. See page 236 of this report for a discussion of the Schneider
19 claim. The Browns are asserting a right to irrigate 41 acres in the portion
20 of the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 16 that they own. Based on the one inch of water in
21 May and June and one-half inch the rest of the year for each irrigated acre,
22 the Browns would have a right to 0.82 cubic foot per second in May and June
23 and 0.41 cubic foot per second the rest of the year. The 187.6 acre-feet
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per year which Mr. Bain indicated in his report was used from the creek
1 could be diverted from the creek during the irrigation season based on this
2 instantaneous quantity.

3 Mr. Brown testified that he raises cattle and a few horses on the
4 land. Sometimes he sells the cattle in the fall, but at times he also keeps
5 them over the winter. When he has cows over the winter, water is diverted
6 from the creek into the irrigation ditch. The evidence indicates that 50
7 head of cattle and 3 horses are generally on the property. Based on the
8 Ferguson decree, the maximum diversion outside the irrigation season would
9 be 0.41 cubic foot per second. For the number of stock generally on the
10 property an additional 1 acre-foot outside the irrigation season would be
11 needed for stock watering.

12 The Referee recommends that a right be confirmed under Court Claim No.
13 01608 with a June 30, 1885, date of priority for the diversion of 0.82 cubic
14 foot per second in May and June and 0.41 cubic foot per second in April and
15 July 1 through October 15, 187.6 acre-feet per year for irrigation of 41
16 acres and stock watering and 0.41 cubic foot per second, 1 acre-foot per
17 year for stock watering from October 16 through March 31. The point of
18 diversion that will be recommended is the diversion into the ditch near the
19 northeast corner of the claimant's property. Although it is clear that a
20 second diversion, the pump location, has been used for a number of years, it
21 is equally clear that this diversion would not have been used when the right
22 was first established in 1885. After 1917 compliance with the change
23 procedures as now codified in RCW 90.03.380 would have been necessary.

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Pumps generally were not used to supply water for irrigation purposes until
1 well after 1917. Therefore, in order to obtain authorization to use a
2 diversion at the pump location, the Browns need to contact Ecology's Central
3 Regional Office about the process for adding a point of diversion to their
4 right.

5
6 COURT CLAIM NO. 02124 -- Ruth Ann Brunner
7 & Gerald F. Brunner
8 COURT CLAIM NO. 05316 -- William P. Woods
9 & Priscilla A. Woods

10 The Brunners filed two exceptions to the Report of Referee for Subbasin
11 No. 9. The first exception seeks to clarify the location of the point of
12 diversion that serves the property. The second exception is to the
13 Referee's determination of the extent of the historic water right on which
14 the Brunner's claim is based. Mr. Brunner is deceased and Mrs. Brunner is
15 represented by Attorney Richard T. Cole. William Wood, a neighboring
16 landowner whose right has the same legal basis, filed a reply and asked to
17 be allowed to appear at the exception on the issues addressed in the
18 Brunner's exception. Mr. Wood uses the same ditch as Mrs. Brunner, and he
19 testified on his behalf and that of Mrs. Brunner at the supplemental
20 hearing.

21 The first exception is to the point of diversion that is recommended
22 for confirmation. The Referee recommended confirmation of a point located
23 approximately 1250 feet north and 200 feet west of the south quarter corner
24 of Section 5, being within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, T. 18 N., R. 19 E.W.M.
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This is the point of diversion described in the State's Investigation Report
1 for the claim and in the Claimant Summary submitted at the evidentiary
2 hearing. The Referee notes there is a diversion at this location identified
3 on State's Map Exhibit SE-2 that is into a ditch that goes along the
4 easterly border of the Brunner property. However, according to Mr. Wood's
5 testimony this is not the diversion and ditch that is used to deliver water
6 to both the Brunner property and his own. That diversion is located
7 approximately 500 feet west of the center of Section 5, being within either
8 the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ or NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5. This diversion is into a ditch
9 that also serves the Vernon Stokes land in the W $\frac{1}{4}$ of Section 5 and then
10 continues south into Section 8. The ditch was referred to by Mr. Woods as
11 the Jude Ditch. The water right that is the basis for the Brunner and Woods
12 claims was established by James Jude.
13

Ironically, the water right claim (WRC) filed by Gerald Brunner, WRC
14 No. 143469, described a diversion in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 5, but the
15 Referee had concluded that Mr. Brunner was attempting to describe the point
16 where Dry Creek split from Wilson Creek, rather than his diversion from the
17 creek. Ecology took exception to the point of diversion that the Referee
18 recommended, asking that the diversion described in WRC No. 143469 be
19 confirmed. The Court denied the exception, accepting the Referee's
20 reasoning. Mr. Wood's testimony is clear that the diversion from the
21 natural water source is not as authorized by the Referee, but instead is at
22 diversion 70 on SE-2. The Referee amends the point of diversion described
23 in the Report of Referee for Subbasin No. 9 on page 633, at line 8 $\frac{1}{2}$ to
24

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read: 500 feet west of the center of Section 5, being within either the
1 SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ or NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, T. 18 N., R. 19 E.W.M.
2

3 WRC No. 009752 was filed by a prior owner of the Wood property. The
4 Referee had concluded that the point of diversion described on the RCW 90.14
5 claim was where water is taken out of the ditch for the irrigation system on
6 the Woods property. The Referee recommended confirmation of a point of
7 diversion in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, where it was thought the point of
8 diversion from the creek was located. The Referee concludes that WRC No.
9 009752 substantially complies with the requirements of RCW 90.14, but amends
10 the recommended point of diversion for the Woods right on page 641 to also
11 be 500 feet west of the center of Section 5, being within either the
12 SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ or NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, T. 18 N., R. 19 E.W.M.
13

14 The second exception was concerning whether James Jude had a right
15 under the Sanders v. Jones decree to use 20 inches or 30 inches of water.
16 Mr. Cole informed the Referee that he was not able to find any additional
17 information in that regard, but hoped that 30 inches would be found to be
18 correct. The issue arose when the Referee was considering exhibits entered
19 by the Brunners in support of their claim. The Findings of Fact and Decree
20 in Sanders v. Jones showed that Jude had a right to 20 inches, however, the
21 Schedule of Right that was compiled after the decree was entered, and on
22 which both the Brunners and Mr. Wood relied, showed 30 inches. The Referee
23 recommended confirmation of rights based on the Decree and Findings of Fact,
24 but invited the claimants to submit any information that could be found to
25 resolve the question.

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At the supplemental hearing, Attorney Jeff Slothower, representing
1 claimant William Peterson, put into the record a copy of the handwritten
2 version of the Sanders v. Jones decree (DE-1858). Although the handwriting
3 is difficult to read, the Referee finds that it agrees with the typed
4 version and leads to a conclusion that the extent of the Jude right is 20
5 inches as originally recommended. Therefore, that portion of the
6 recommendation stands for both the Brunner and Woods claim.
7

8 COURT CLAIM NO. 00672 -- Jeff T. Brunson
9 & Jacqueline S. Brunson

10 Court Claim No. 00672 was originally filed by Leonard L. and Loree
11 Newman. On October 23, 2000, Jeffrey T. and Jacqueline S. Brunson were
12 substituted for the Newmans. The Referee, in the Report of Referee for
13 Subbasin No. 9, did not recommend confirmation of a water right under Court
14 Claim No. 00672. The Brunsons took exception to that recommendation and
15 asked that the claim be remanded to present additional evidence of historic
16 water use. The Brunsons are represented by Attorney Lawrence E. Martin and
17 Jeff Brunson testified at the supplemental hearing.

18 During his testimony, Mr. Brunson stated that the lands formerly owned
19 by the Newmans were irrigated only with water delivered by the Bull Canal
20 Company and as long as the land is covered by the right awarded to the canal
21 company, there is no additional right to assert. The claim for Bull Canal
22 Company is addressed on page 69 of this report and review of the legal
23 description for the place of use reveals that the former Newman property is
24 within the area described.

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1 Therefore, the Referee continues to recommend that no additional right
2 beyond that recommended for Bull Canal Company be confirmed.

3 COURT CLAIM NO. 12929 -- Jeff T. Brunson

4 Jeff T. Brunson filed a claim with the Court on March 20, 1998,
5 asserting a right to use waters from an unnamed stream in Subbasin No. 9.
6 The evidentiary hearing for Subbasin No. 9 had concluded several years prior
7 to the claim being filed, therefore the first opportunity to present
8 evidence in support of the claim was at the supplemental hearing. Jeff
9 Brunson, represented by Attorney Lawrence E. Martin, testified at the
10 supplemental hearing. Additionally, Mr. Brunson hired Richard C. Bain, Jr.,
11 a professional engineer, to investigate water use on the portion of the
12 Brunson farm addressed in Court Claim No. 12929. Mr. Bain testified through
13 a deposition taken on October 17, 2001, and entered as Exhibit DE-1927.

14 Mr. Brunson owns a large farm in Sections 13, T. 17 N., R. 18 E.W.M.
15 and Section 18, T. 17 N., R. 19 E.W.M. Most of the land is irrigated with
16 water delivered by the Bull Canal Company. Bull Canal Company is a claimant
17 in this proceeding, whose rights are addressed on page 69 of this
18 supplemental report. Field 12, which is about 20 acres in size and is in
19 the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13, is irrigated with water diverted from a stream
20 that flows through the Brunson property. Court Claim No. 12929 asserts a
21 right to use that stream.

22 According to both Mr. Brunson's and Mr. Bain's testimony the stream
23 originates north of Interstate-90 in the SE $\frac{1}{4}$ of Section 12 and flows south,

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under the interstate, through the Brunson land and into Lyle Creek. The
1 origins of this water are springs both in Sections 12 and 13 and ground
2 water discharge in Section 12. There was considerable discussion about the
3 source of the spring and ground water that feeds this stream. It is notable
4 that Mr. Bain consistently refers to the water source as a drain. Mr.
5 Brunson testified that the stream flows steady all year and Mr. Bain
6 measured it in February of 1998 and 2000 at between 2.4 and 3.1 cubic feet
7 per second. Mr. Bain acknowledged that at times during the year it
8 undoubtedly captures return flow waters from fields irrigated north of the
9 Brunson farm and within the Brunson farm. However, the February
10 measurements would have reflected natural flow as the irrigation districts
11 would have been off since the prior October. Mr. Bain testified that it is
12 generally recognized that return flows in this area drain out within about
13 six weeks. Therefore, by February, he would not expect the stream to be
14 influenced at all by return flows. He noted that the flows measured in
15 February are not much different than what he measured in July. In other
16 areas of the Kittitas Valley, Mr. Bain has testified that it is common for
17 streams to flow a consistent amount over the irrigation season, but the
18 natural flow/return flow proportions reverse as the season progresses. In
19 the early spring, most of the water in the streams is natural flow with very
20 little return flow contribution and by the end of the irrigation season
21 there is very little natural flow, but a substantial amount of return flow.
22 The Referee would expect this stream to be no different and the testimony
23 does not indicate a basis for concluding that it is different.

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Given the streams location so low in the valley, in an area with
1 consistently low precipitation (as opposed to streams with headwaters in
2 higher elevations where precipitation is greater) and its being
3 characterized as a drain ditch, there would be a tendency to conclude that
4 it is a drain that captures only return flow water with very little natural
5 flow contribution. However, the wintertime measurements contradict that
6 conclusion. Additionally, Exhibit DE-1925 is a series of documents related
7 to James Watson v. Rebecca N. Bull, a Kittitas County Superior Court action
8 filed in December of 1906. James Watson owned the NW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$ and the
9 NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13, T. 17 N., R. 18 E.W.M. and Rebecca N. Bull owned the
10 SE $\frac{1}{4}$ of Section 12, T. 17 N., R. 18 E.W.M. Mr. Watson sought a restraining
11 order against Ms. Bull to prevent her from constructing ditches and
12 diverting water from the stream that flowed through her property onto the
13 Watson property. Mr. Watson's complaint and several affidavits in support
14 of the complaint indicate water diverted from a stream that appears to be
15 the stream used by Mr. Brunson, was used to irrigate the Watson land as
16 early as 1886. At that time mostly natural water would have been in the
17 stream, as the Cascade Canal and the Kittitas Reclamation District canal had
18 not yet been built. Ellensburg Water Company's Town Ditch was under
19 construction at this time and may have started serving lands. However, the
20 return flow contribution from lands irrigated with water from the Town Ditch
21 would have been considerably less than what we would see today. In fact the
22 affidavits filed in support of the defendant state that the flow of water in
23 the stream has increased over the years due to seepage from irrigation
24

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ditches in the vicinity and that the amount of water is greater than it had
1 been. The defendant's affidavit states that water from the stream and
2 slough that fed the stream was backing up on her land making it useless.
3 The answer to the complaint states that in the past six years (so between
4 1900 and 1906) the amount has doubled so that it will not drain off through
5 the natural course as it did in earlier years. In response to the
6 complaint, the Court issued a restraining order against the defendant that
7 was in place until a hearing could be held. The hearing was held in January
8 1907 and the Court denied the plaintiff's motion, stating that at that time
9 the plaintiff did not need to use water for irrigation and that he could
10 renew his motion if the defendant diverted or threatened to divert the
11 waters of the stream.

12 The Referee finds that the evidence supports a conclusion that a right
13 was established for use of the natural water in the stream. Several
14 documents were placed in the record showing when the land was first settled
15 and efforts made to sever the land from Federal ownership. Although this is
16 an odd numbered section that would have been conveyed to the railroad, David
17 W. Small settled on the land on June 10, 1872 and filed to obtain a
18 homestead patent. The homestead patent issued on June 30, 1876, for the
19 N $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13, T. 17 N., R. 18 E.W.M. Northern
20 Pacific Railroad relinquished its interest in the land in April of 1876.
21 Since the land is riparian to the stream, water rights were established
22 under the Riparian Doctrine, and in this case would have a priority date of
23 June 10, 1872, the date Small settled on the land.

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Pursuant to the requirements of RCW 90.14 Frank Billeter filed Water
1 Right Claim No. 055546. It asserts a right to divert 2 cfs, 1200 acre-feet
2 per year from a drain for the irrigation of 25 acres. The place of use is
3 the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13, T. 17 N., R. 19 E.W.M. The point of diversion is
4 described as being approximately 760 feet west and 25 feet south of the
5 northeast corner of Section 13, in the NE $\frac{1}{4}$ of Section 13. The Referee notes
6 that in describing both the point of diversion and place of use Mr. Billeter
7 used R. 19 E.W.M. when the land is in R. 18 E.W.M. Mr. Brunson testified
8 that he has filed with Ecology a request to amend the claim to correct the
9 error. However, at the time of the supplemental hearing he had received no
10 response to his request.

11 Exhibit DE-1922 is chain of title documents for the E $\frac{1}{4}$ of Section 13,
12 T. 17 N., R. 18 E.W.M. and it is clear that at the time WRC No. 055546 was
13 filed Mr. Billeter owned Mr. Brunson's land and that the correct range
14 number is R. 18 E.W.M. The point of diversion described is the point where
15 the stream goes under Interstate-90 and onto the Brunson property. The
16 actual diversion from the stream is actually in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, not in the
17 NE $\frac{1}{4}$ NE $\frac{1}{4}$ as described on the RCW 90.14 claim. The Referee has found that when
18 completing RCW 90.14 claims landowners frequently described the point of
19 diversion as being where the water source enters their land. The Referee
20 finds that WRC No. 055546 substantially complies with the requirements of
21 RCW 90.14 for describing the point of diversion and place of use, even
22 though the range number is incorrect and the diversion location is where the
23

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stream enters the property. See the Court's February 10, 1995, Memorandum
1
Opinion Re: RCW 90.14 and Substantial Compliance.

2 Mr. Brunson is asserting a right to divert 3.2 cubic feet per second,
3 448 acre-feet per year from the stream for irrigation, with an additional
4 112 acre-feet per year for conveyance loss. However, WRC No. 055546 only
5 asserted a right to divert 2 cubic feet per second and Mr. Brunson did not
6 indicate that he had requested to amend the instantaneous quantity of water
7 claimed. Additionally, it is clear from the historical documents that the
8 flow in the stream increased between 1900 and 1906, which would have been
9 the approximate time that the Cascade Canal was constructed and began
10 serving lands updrainage from the stream. The testimony is clear that
11 return flow water contributes to stream flows in this area as the natural
12 flow in the streams diminish late in the irrigation season. It is
13 reasonable to conclude that the quantity of water diverted later in the
14 irrigation season reflects use of return flow water for which the Referee
15 cannot recommend a right. While acknowledging that return flow water would
16 be contributing to the flow in the stream, Mr. Bain was not able to estimate
17 how much that contribution might be. It is clear, however, that early in
18 the season, before the irrigation districts and canal companies turn on,
19 that natural flow is used on the claimants land. There is no evidence in
20 the record of how much water is diverted from the stream and used to
21 irrigate the claimant's land. Mr. Bain's testimony indicates stream flow
22 measurements in 1998 and 2000. The amount identified in the Court claim,
23 3.2 cfs, and in the RCW 90.14 claim, 2.0 cfs, are both excessive for the
24

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number of acres being irrigated. The Referee recognizes from testimony of
1 other claimants in the subbasin, that the quantity of water needed to
2 irrigate the land is more than is needed in the area where the prior decrees
3 awarded 0.02 cubic foot per second for each irrigated acre. However,
4 lacking evidence of how much water actually is diverted and put to
5 beneficial use, the Referee will not recommend a right for five times the
6 quantity found by the Courts to be needed in other parts of the basin.
7 Keeping in mind that need, the Referee will recommend 0.05 cubic foot per
8 second and 10 acre-feet per year for each irrigated acre.

9 The Referee recommends that a right be confirmed with a June 10, 1872,
10 date of priority for the diversion of 1 cubic feet per second, 200 acre-feet
11 per year for the irrigation of 20 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13,
12 T. 17 N., R. 18 E.W.M. The point of diversion shall be 200 feet north and
13 1200 feet west of the east quarter corner of Section 13, being within the
14 SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 13.
15

16 COURT CLAIM NO. 00886 -- Bull Canal Company, Inc.
17 (A) 04207

18 Bull Canal Company, Inc., took exception to the Referee recommending
19 that rights not be confirmed for use of the Yakima River, Wilson Creek and
20 Naneum Creek. The canal company is represented by Attorney Lawrence E.
21 Martin and Jeff Brunson, President of Bull Canal Company since 1985,
22 testified at the supplemental hearing. Additional testimony was given by
23 deposition of Richard C. Bain, Jr., P.E., a professional engineer hired by
24

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the claimant. Mr. Bain's deposition was taken on October 17, 2001, and
1 entered into the record as exhibit DE-1920.

2 In support of Bull Canal Company's claim, they put into the record
3 several documents that assist in establishing a priority date, which they
4 assert should be 1884. DE-1915 is a copy of an 1885 right-of-way agreement
5 between James Watson and several individuals, including Walter Bull, for
6 construction of a ditch across property that Watson owned in Section 13,
7 T. 17 N., R. 18 E.W.M. and Section 18, T. 17 N., R. 19 E.W.M. The ditch was
8 called the Walter A. Bull irrigating ditch. DE-1917 is from the USBR
9 records and has written across the top "Copy Notice of Appropriation of
10 Water Yakima Project". On the second page, the last paragraph discusses a
11 canal built beginning in June 1886 by Walter Bull. The diversion was moved
12 in 1888 to the tail race of the City Mill, but that location was not
13 described. The canal and the appropriation of water from the Yakima River
14 was sold to the Bull Canal Company in 1904. The Referee concludes from this
15 information that in 1885 there was an intent to construct the ditch
16 documented by the right-of-way agreement and will recommend a priority date
17 of June 30, 1885, for any right on the Yakima River.
18

Bull Canal Company is asserting a right to divert 57 cubic feet per
19 second from the Yakima River, 30.2 cubic feet per second from Wilson Creek,
20 13.6 cubic feet per second from Naneum Creek #1, and 9.7 cubic feet per
21 second from Naneum Creek #2. Bull Canal diverts from the Yakima River about
22 750 feet north of the south quarter corner of Section 3, T. 17 N.,
23 R. 18 E.W.M. The canal travels to the southeast where it intercepts Wilson
24

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Creek in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11. The river water in the canal is spilled
1 into Wilson Creek and carried downstream about 800 feet where it is
2 rediverted into Bull Canal. Bull Canal crosses under Interstate-90 and
3 continues southeasterly, going under Interstate-82, intersecting Naneum #1
4 (aka Little Naneum Creek) and Naneum #2 (Naneum Creek). Historically, 1460
5 acres were irrigated from Bull Canal, but that number has decreased to 946
6 acres. A right is being asserted to irrigate those 946 acres. Almost all
7 of the land that is currently being irrigated from the canal was part of the
8 original 1460 acres. There is a fraction of an acre in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of
9 Section 12 that appears to be a small extension of a field historically
10 irrigated and less than 10 acres in the W $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13 southwest of
11 Wilson Creek and northeast of the Canyon Road that were not historically
12 irrigated. However, they do lie within the service area. The Referee
13 concludes that this minor modification of the place of use of the water does
14 not require compliance with the change procedures of RCW 90.03.380 due to
15 the acreage being within the original service area and the reduction in
16 number of acres being irrigated.

The place of use for the currently irrigated acreage is the S $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$,
18 lying northeast of the I-90 exit, except the west 293.5 feet thereof, and
19 that portion of the SE $\frac{1}{4}$ SW $\frac{1}{4}$ lying south of I-90 in Section 12; that portion
20 of the NW $\frac{1}{4}$ NW $\frac{1}{4}$ lying east of the Canyon Road, the NE $\frac{1}{4}$ NW $\frac{1}{4}$, that portion of the
21 NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ lying east of the Canyon Road, that portion SE $\frac{1}{4}$ NW $\frac{1}{4}$ lying east of
22 Wilson Creek and that portion of the E $\frac{1}{4}$ lying east and north of Wilson Creek
23 in Section 13; all in T. 17 N., R. 18 E.W.M. That portion of the W $\frac{3}{4}$ /4 lying
24

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1 west of I-82 and southwest of Bull Canal; that portion of the S $\frac{1}{2}$ SE $\frac{1}{4}$ lying
2 east of I-82, south of Tjossem Road and northwest of Little Naneum Creek,
3 and that portion of the S $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ lying south of Naneum Creek, in Section 18;
4 that portion of the NW $\frac{1}{4}$ lying east of Wilson Creek and west of I-82, that
5 portion of the NE $\frac{1}{4}$ and N $\frac{1}{2}$ SE $\frac{1}{4}$ lying east of I-82 in Section 19; the west 2172
6 feet of both the S $\frac{1}{2}$ NW $\frac{1}{4}$ and the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 20 and the SW $\frac{1}{4}$ SW $\frac{1}{4}$ in
7 Section 20, all in T. 17 N., R. 19 E.W.M.

8 The Referee will address the canal company's claim to a water right for
9 each creek and the Yakima River separately. The canal intercepts both
10 Naneum #1 and Naneum #2 and there are structures at both creeks that allow
11 for the diverted water to be spilled back into the creek immediately below
12 the diversion. The canal company is asserting a right to use 13.6 cubic
13 feet per second, 266.6 acre-feet per year from Naneum Creek. The
14 instantaneous quantity is based on the maximum quantity of water diverted
15 from Naneum Creek during the time that Richard Bain was measuring the
16 diversions. The annual quantity is based on an average of the instantaneous
17 quantities diverted. Mr. Bain measured the diversion from Naneum 1 six
18 times in 2000 and twice in 2001. In his deposition Mr. Bain testified that
19 in 2000 all of the water diverted from Naneum 1 was returned to the creek
20 and none of the water was put to beneficial use irrigating the land. On
21 July 30, 2001, Mr. Bain measured a diversion from Naneum #1 of 4.1 cubic
22 feet per second, with all but 0.50 cubic foot per second being spilled back
23 to the creek and on September 14, 2001, 5.6 cubic feet per second was
24 diverted into the ditch with no spill recorded. Two significantly different

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quantities, both considerably less than that for which a right is being
1 asserted, were measured. The testimony did not provide sufficient
2 information for the Referee to know whether the years when measurements were
3 taken reflect normal operations for the canal company. The Referee
4 acknowledges that 2001 was a drought year, which could have required some
5 modification in the way the canal company operates, but that was not
6 addressed. Water diverted between the end of July and mid-September could
7 have primarily been return flow waters from the application of water
8 delivered by Kittitas Reclamation District, Ellensburg Water Company and
9 Cascade Irrigation District. Irrespective of that, two diversions into the
10 canal, of such a disparate quantity does not provide the Referee with
11 sufficient evidence to determine the quantity of water normally diverted
12 into the canal from Naneum #1 and put to beneficial use. Additionally, the
13 Referee notes that although a right is being asserted for 13.6 cubic feet
14 per second, Water Right Claim No. 029323, as amended in 1989, asserts a
15 right to divert 10 cubic feet per second. Without more evidence of how the
16 canal company operates this diversion and additional evidence of beneficial
17 use of the water diverted from Naneum 1, the Referee cannot recommend that a
18 right be confirmed for use of this creek.
19

Naneum Creek #2 was also measured during the same timeframe as Naneum
20 #1. The diversions from the creek fluctuated widely, from a high of 53.6
21 cubic feet per second, with all of that quantity being spilled, to a low of
22 0.10 cubic foot per second, again all of that quantity being spilled. There
23 were more instances where a portion of the water diverted from Naneum #2 was
24

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left in the ditch, however, the quantity carried in the ditch and put to
1 beneficial use was significantly less than the quantity diverted. Early in
2 2000, the diversions were between 32.5 and 53.6 cubic feet per second, with
3 all of the water spilled back into the creek. Later in the season the
4 diversions dropped to a high of 7.1 cfs and a low of 0.10 cfs. The maximum
5 amount that was retained in the ditch was 3.7 cfs, with as little as 0.5 cfs
6 carried at the time of one of the measurements. Again some of the diverted
7 water was left in the canal at a time when it is very likely that return
8 flows from the irrigation districts that serve land above the Bull Canal was
9 a significant portion of the water in the creek. WRC No. 029324, as amended
10 in 1989, claims a right to divert 5 cubic feet per second from Naneum #2.
11 The point of diversion on the claim appears to be in error. It describes a
12 point 2075 feet north and 2200 feet west of the southeast corner of Section
13 19, in the SE $\frac{1}{4}$ of Section 19. Bull Canal does enter Section 19, just east
14 of the east line of the NE $\frac{1}{4}$ of Section 19. The location described is a
15 point on Naneum #1 as it flows through the west part of the SE $\frac{1}{4}$ of
16 Section 19. The described point is several hundred feet west of Naneum #2.
17 Again there was no testimony about how the canal normally operates. The
18 Referee believes that there needs to be more testimony about the
19 relationship between these two creeks and the operation of the canal system
20 before a right can be recommended for confirmation. Therefore, the Referee
21 does not recommend confirmation of a right to use Naneum #2.
22

Most of the water carried in Bull Canal is diverted from the Yakima
23 River and/or Wilson Creek. Water is diverted from the river in the SW $\frac{1}{4}$ /SE $\frac{1}{4}$
24

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of Section 3, T. 17 N., R. 18 E.W.M. and carried several hundred feet to
1 where the canal intersects Wilson Creek. The water in the canal is dumped
2 into Wilson Creek and carried in Wilson Creek about 800 feet where it is
3 rediverted into Bull Canal for delivery to the canal company patrons. The
4 U. S. Bureau of Reclamation has records of the diversions from the Yakima
5 River beginning in 1909 and continuing until 1959. There are no records for
6 the period 1959 through 1976 and then there are records for 1977 through
7 1981. The highest diversion was 57 cubic feet per second in 1929 and that
8 is the instantaneous quantity for which a right is sought. However, Water
9 Right Claim No. 029321, as amended in 1989, asserts a right to divert 45
10 cubic feet per second from the river. Review of the USBR diversion records
11 show that the canal company has consistently diverted around 45 cubic feet
12 per second over the years of record, although in 1977 through 1980 less
13 water was diverted. The canal company has infrequently diverted in excess
14 of 50 cubic feet per second. Although at this time they are asserting a
15 right to 57 cfs, when the canal company amended the claim in 1989, they
16 amended it to claim a right to 45 cfs, which has consistently been used over
17 the years.
18

Mr. Bain measured the diversion from Wilson Creek four times, twice in
19 2000 and twice in 2001. On April 28, 2000, 30.2 cfs was being diverted; on
20 July 20, 2000, no water was being diverted; on July 30, 2001, 3.4 cfs was
21 being diverted and on September 14, 2001, 8.2 cfs was being diverted. The
22 Referee finds this information to be puzzling. The testimony indicates that
23 the water diverted from the Yakima River and carried in the Bull Canal is
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1 dumped into Wilson Creek, carried downstream about 800 feet and then
2 rediverted from the creek into the ditch. The Referee would have expected
3 that the diversion from Wilson Creek would consistently be somewhat close to
4 what is diverted from the Yakima River, less conveyance loss between the
5 river and the creek. In fact, the Referee expected that the diversion might
6 equal or exceed the river diversion, as all of the irrigated lands lie
7 further down the system from Wilson Creek. Based on the evidence in the
8 record, it appears to the Referee that only Yakima River water dumped into
9 Wilson Creek is diverted and there is no Wilson Creek water actually
10 diverted. Therefore, the Referee will not recommend confirmation of a right
11 for use of Wilson Creek, but will recommend confirmation of a right to use
12 the Yakima River, with a provision that recognizes the secondary diversion
13 on Wilson Creek.

14 The claimant is asserting a right to 10,200 acre-feet per year from the
15 Yakima River. That annual quantity is based on diversions in 1929 and
16 1930. Exhibit DE-1918 is a copy of diversion records from the USBR for the
17 years 1909, 1912-1914, 1923-1958, and 1977-1981. In both 1929 and 1930 the
18 canal company diverted approximately 10,150 acre-feet per year. However,
19 since that time they have never exceeded 10,000 acre-feet per year and since
20 then the highest annual quantity they have diverted in any one year was in
21 1981 when 9,728 acre-feet per year was diverted. Over the years where there
22 are diversion records, the annual quantity of water diverted has fluctuated
23 a lot, from a low in 1936 of 2328 acre-feet per year to the high in 1981 of
24 9,728.49 acre-feet per year. During the years for which we have diversion

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1 records, there were years of drought that would have affected the amount of
2 water available for diversion, as well as years of above normal
3 precipitation that would have affected how much water needed to be diverted
4 for irrigation. The Referee also notes that in many of the years for which
5 we have measurements there would be periods in the middle of the irrigation
6 season when there were no diversion records. Most canals once they start
7 diverting water in the spring do not completely stop until the end of the
8 irrigation season, unless there is a break in the canal. The lack of
9 diversion records for several days could be an indication there may have
10 been a break in the system, however, that information is not in the record.
11 During 1929 the canal company diverted 56 to 57 cubic feet per second three
12 consecutive days in May and periodically diverted in the low 50's up until
13 1958. The evidence supports a conclusion that a right was established to
14 divert approximately 50 to 55 cfs. Although the canal company diverted
15 slightly more than 10,000 acre-feet per year in 1929 and 1930, the
16 Referee does not conclude that a right was established for that quantity.
17 Only in those two years did the diversions exceed 10,000 acre-feet per
18 year. Prior to that in the 1920's the annual quantities diverted were in
19 the area of 9600 acre-feet per year. In the 1930's and 1950's the canal
20 company diverted close to 9,000 acre-feet per year. Then in 1981, the canal
21 company diverted 9728 acre-feet per year.

22 The diversion records lead the Referee to conclude that they
23 established a right to divert approximately 9600 acre-feet per year. The
24 engineering report prepared by Mr. Bain prior to the initial evidentiary

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1 hearing indicates that between 9 and 21 acre-feet per acre is used within
2 the Bull Canal Company service area. However, the diversion records show
3 that just slightly more than 10 acre-feet per acre is the maximum that has
4 been diverted into the canal. Mr. Bain's report also indicates there is
5 conveyance loss in the ditch so that the amount of diverted water that would
6 reach the farms for use would be less than 10 acre-feet per acre.

7 Water Right Claim No. 029321 filed pursuant to RCW 90.14 originally
8 asserted a right to divert 10 cubic feet per second, 6,050 acre-feet per
9 year from the Yakima River for the irrigation of 1210 acres. In 1989 the
10 canal company filed a request to amend the claim under the provisions of RCW
11 90.14.065. Ecology granted the request to amend the quantity of water for
12 which a right is claimed to 45 cubic feet per second, 18,900 acre-feet per
13 year (DE-1916). The request to amend the claim included a statement that the
14 data filed is "based on actual flow measurements and accurately reflect the
15 actual diversions made currently and historically by the claimant."
16 Although the records reflect that occasionally the canal company diverted in
17 excess of 45 cubic feet per second, the Referee concludes that 45 cubic feet
18 per second is the quantity the canal company felt was the extent of their
19 right.

20 Bull Canal Company is seeking a right that allows for diversion of
21 water beginning in March. The diversion records indicate that from 1909
22 until 1958 they did not divert any water in March. The more recent
23 diversion records, 1977 to 1981, do reflect diversion of water in March.
24 However, the right that Bull Canal Company is asserting is based on an
25

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1 appropriation made in 1885. In order for there to be a right to divert in
2 March, diversion during that month had to have begun within a resonable
3 period after the right was established in 1885. The Referee does not
4 believe a period of over 75 years later to be a reasonable period.
5 Therefore, the season of use to be authorized shall be April 1 through
6 October 31.

7 The Referee recommends that a right be confirmed to Bull Canal Company
8 with a priority date of June 30, 1885, for the diversion of 45 cubic feet
9 per second, 9,600 acre-feet per year for the irrigation of 946 acres and
10 stock watering. The State's Investigation Report and SE-2 show the
11 diversion from the Yakima River in the S $\frac{1}{4}$ of Section 3, T. 17 N.,
12 R. 18 E.W.M., approximately 750 feet north of the south quarter corner. Mr.
13 Bain's Engineering Report, DE- 1524, also shows the diversion as being in
14 the S $\frac{1}{4}$ of Section 3. However, Water Right Claim No. 029321 both as
15 originally filed and as amended shows the diversion as being 1340 feet south
16 and 1760 feet west of the northeast corner of Section 10, which would be
17 near the center of the NE $\frac{1}{4}$ of Section 10, T. 17 N., R. 18 E.W.M. There is
18 nothing in the record to explain this discrepancy. The Court has
19 consistently held that only points of diversion described in the RCW 90.14
20 claim can be confirmed (unless there is a showing of substantial compliance
21 for the location). Therefore, the Referee will recommend a point of
22 diversion in the NE $\frac{1}{4}$ of Section 10. If in fact the claimants are using a
23 diversion in the S $\frac{1}{4}$ of Section 3, they should filed an application to change
24 the point of diversion as provided in RCW 90.03.380.

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1 COURT CLAIM NO. 01181 -- Alan Burke
2 (A) 06158

3 The claimant took exception to the Referee not recommending
4 confirmation of a water right for lands owned and irrigated in Sections 31
5 and 32, T. 18 N., R. 19 E.W.M. He is represented by Attorney Richard T.
6 Cole and Andrew Schmidt, a neighboring landowner whose parents once leased
7 the land, testified at the supplemental hearing.

8 The Referee did not recommend confirmation of a right for the lands
9 owned by the claimant in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32 due to the need to clarify
10 the Findings of Fact that preceded entry of the decree in the Ferguson
11 case. At the time of Ferguson, L. J. Holcomb owned the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32,
12 along with other land. A Class 6 right, which would have an 1882 date of
13 priority, was awarded to L. J. Holcomb for the use of 120 inches. However,
14 Findings of Fact No. 48 that addressed his lands stated that Holcomb owned
15 the NW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 22, T. 18 N., R. 19 E.W.M., not
16 Section 32. The Referee asked the claimant to research the records of the
17 Ferguson and provide evidence that an error was made in describing the
18 section number. Counsel did just that. Exhibit DE-1859 is copies of two
19 affidavits from 1911 addressing the error in the Findings of Fact and
20 stating that Holcomb did not own any land in Section 22; a Motion asking
21 Kittitas County Superior Court to correct the error; and an Order by the
22 Court correcting Findings of Fact No. 48 to show that L. J. Holcomb owned
23 the NW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32, T. 18 N., R. 19 E.W.M., had
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1 cultivated 120 acres and that the land was settled and water diverted in
2 1882.

3 The evidence presented is sufficient to allow the Referee to conclude
4 that at the time of Ferguson a right had been established with an 1882 date
5 of priority for the irrigation of 120 acres in the area then owned by
6 Holcomb. Alan Burke is the only claimant in this proceeding who is a
7 successor to L. J. Holcomb. He is irrigating 40 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of
8 Section 32 and the evidence supports a conclusion that beneficial use
9 continued over the years between the decree and Mr. Burkes purchase of the
10 land. Water Right Claim (WRC) No. 145663 was filed pursuant to RCW 90.14
11 for use of water from Naneum Creek on this land. The point of diversion is
12 described as being 30 feet south and 5 feet west of the northeast corner of
13 Section 32, in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32. The State's Map Exhibit, SE-2 does
14 not show a diversion at this point, but does show one about 800 feet west of
15 the northeast corner on what appears to be a drain, and one about 300 feet
16 south of the northeast corner of the section. The Summary of Claim filed by
17 the claimant in 1991, Docket No. 6158, describes a point of diversion in the
18 extreme northeast corner of Section 32. Therefore, the Referee will
19 recommend a point of diversion consistent with the RCW 90.14 claim and the
20 claimant summary.

21 The Referee recommends that a right be confirmed with a June 30, 1882,
22 date of priority for the diversion of 0.80 cubic foot per second in May and
23 June, 0.40 cubic foot per second July 1 through October 15, 200 acre-feet
24 per year for the irrigation of 40 acres and stock watering in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of

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1 Section 32, T. 18 N., R. 19 E.W.M. The point of diversion shall be 30 feet
2 south and 5 feet west of the northeast corner of Section 32.

3 The claimant also owns that portion of the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 31,
4 T. 18 N., R. 19 E.W.M. lying north of the Cascade Canal and is irrigating
5 approximately 18 acres. The Referee did not recommend that a right be
6 confirmed for the property due to lack of evidence that a right had been
7 established through beneficial use prior to June 6, 1917. The testimony
8 offered at the supplemental hearing has raised uncertainty in the Referee's
9 mind about the actual source of water being used. Mr. Schmidt testified
10 that a ditch comes under the road at the Burkes east property line and that
11 a plastic dam then diverts from that ditch and carries water to the west
12 along the southern portion of Game Farm Road. A red dot is on the map where
13 the plastic dam is placed. Mr. Schmidt initially testified that the source
14 of water is Lyle Creek. SE-2 shows a ditch coming from Lyle Creek onto the
15 claimants property at the red dot. However, there is also a ditch that goes
16 south through Section 30, under Game Farm Road also onto the claimants
17 property at the red dot. This ditch carries water diverted from Wilson
18 Creek near the center of the SE $\frac{1}{4}$ of Section 30. Brent Minor, who was
19 farming the land at the time of the initial evidentiary hearing, testified
20 that the water used to irrigate the land came from Wilson Creek. During
21 cross examination, Mr. Schmidt concluded he was not sure whether the water
22 came from Lyle Creek or from Wilson Creek. The Referee finds that evidence
23 presented at the initial hearing to be more compelling and concludes that
24 the source of water is Wilson Creek, with a diversion in the SE $\frac{1}{4}$ of

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1 Section 19. WRC No. 137488 filed by Blanche and Michael Burke support that
2 conclusion. It claims a right to use 0.50 cfs, 90 acre-feet per year from
3 Wilson Creek for the irrigation of that portion of the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and NE $\frac{1}{4}$ NW $\frac{1}{4}$ of
4 Section 31 lying above the Cascade Irrigation District Canal. The Burkes
5 also filed WRC No. 145062 asserting a right to use a drain to the extent of
6 2 cfs, 800 acre-feet per year for the irrigation of 18 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$
7 of Section 31. The diversion point described on the claim is the red dot on
8 the map, where the plastic dam takes water from the ditch coming from Wilson
9 Creek. The claimant summary filed in 1991 also describes the source of
10 water as Wilson Creek.

11 It appears that rights are being asserted under the Riparian Doctrine,
12 which requires proof of beneficial use prior to December 31, 1932. However,
13 Section 31 is not riparian to Wilson Creek, nor was it riparian to Wilson
14 Creek in 1912 according to a map dated January 9, 1912, Exhibit DE-1527
15 (submitted by Kayser Ranch). Therefore, any right would have been
16 established under the Prior Appropriation Doctrine, which required that
17 water be put to beneficial use prior to June 6, 1917. The claimant could
18 find no historical documents to support establishment of a right. Water
19 rights for this land were not addressed in the Sanders v. Jones action in
20 1890. Counsel argues that we should conclude from this that the owner at
21 the time was a good neighbor and didn't get into fights with his neighbors
22 over water. The lack of documents showing existence of a water right could
23 also be because the landowners took care of business and paid their bills,
24 so there was no mortgage foreclosures or crop liens. It is also argued that

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1 the actions brought by Sanders in the late 1800's and early 1900's were
2 against parties who were taking water to the detriment of Sanders. Since
3 the Burke property is south of the Sanders property, their water use would
4 not have been to the detriment of Sanders and there would have been no need
5 to make them a party to the action. The Referee finds these arguments to
6 not be persuasive. Without evidence of diversion and use of water, you
7 could just as easily conclude that the reason the claimants predecessor was
8 not a party is because there was no water being used. Mr. Burke property is
9 right above the Cascade Canal and there has been ample evidence that Wilson
10 Creek was fully appropriated and, as reflected by the litigation, highly
11 contested. Due to the existing rights evidence in the various decrees,
12 there were sufficient rights to at times dry up the creek. The diversion
13 that serves the Burke property is over a mile north and upstream of the
14 Burke property and serves the portion of the former Sanders property in the
15 E½ of Section 30.

16 The only evidence of water use that has been presented has been by
17 people who have leased the land or been familiar with it during the Burkes
18 ownership, which began in 1953. That clearly is not sufficient to conclude
19 that beneficial use of the water was being made prior to June 6, 1917.
20 Therefore, the Referee continues to not recommend confirmation of a water
21 right for the claimant's land in the NW¼NE½ of Section 31.

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1
2 COURT CLAIM NO. 00857 -- Ruth Busby
3 & Estate of Orren Busby

4 The Busbys took exception to the Referee not recommending that a right
5 be confirmed for irrigating the portion of their land that lies in the
6 E $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 29, T. 18 N., R. 19 E.W.M., while Ecology took exception
7 to the Referee recommending two points of diversion when only one was
8 described on the water right claim filed by the Busbys pursuant to RCW
9 90.14. The claimant is represented by Attorney Richard T. Cole and Harvey
10 Dodge, who farms the land testified at the supplemental hearing.

11 At the Subbasin No. 9 exception hearing, the Court denied the Busbys
12 exception, finding that the water right claim only described the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of
13 Section 29. The claim was remanded to allow the claimant the opportunity to
14 pursue amending the claim through the procedures in RCW 90.14.065. At the
15 supplemental hearing, Mr. Cole stated that it was Mrs. Busby's intent to
16 attempt to amend the claim, but nothing had been done in that regard. There
17 has been nothing presented to the Court to show that the claim has been
18 amended, so the recommendation to not confirm a right for the E $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of
19 Section 29 stands.

20 The initial recommendation to confirm a right described two points of
21 diversion, both in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 29, T. 18 N., R. 19 E.W.M.
22 Ecology's exception asks that only one diversion be authorized, as only one
23 diversion was described in the RCW 90.14 claim. The Court granted Ecology's
24 exception and remanded the claim to allow the claimant to either amend the
25

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1 90.14 claim to show two diversions or file an application for change to add
2 a point of diversion under RCW 90.03.380. The claimant has done neither.
3 However, Mr. Dodge did testify as to which of the two diversion is the
4 primary diversion that serves the land. Mr. Dodge marked the primary
5 diversion with an "A" on SE-2. That diversion is approximately 450 feet
6 south and 150 feet west of the east quarter corner of Section 29. Although
7 that location is slightly south of the dimensions used in the RCW 90.14
8 claim, both locations are in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 29 and Mr. Dodge
9 testified to changes in the creek channel that made it necessary to modify
10 the diversion location. The Referee finds that Water Right Claim No. 064729
11 substantially complies with the requirements of RCW 90.14 for the location
12 of that point of diversion (See the Court's February 10, 1995, Memorandum
13 Opinion Re: RCW 90.14 and Substantial Compliance). Page 646, lines 8
14 through 11 are modified to describe a point of diversion 450 feet south and
15 150 feet west of the east quarter corner of Section 29. All other aspects
16 of the right remain unchanged.

17
18 COURT CLAIM NO. 01832 -- Ron G. Carlson
19 & Toni D. Carlson

20 The Department of Ecology took exception to the Referee's
21 recommendation that a right be confirmed to the Carlsons for the diversion
22 of 3.20 cubic feet per second in May and June and 1.60 cubic feet per second
23 in April and July 1 through October 15. They also excepted to the right
24 having two points of diversion authorized for use. Mr. Carlson appeared at
25 the supplemental hearing to address the exceptions.

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The basis for Ecology's exceptions is Water Right Claim (WRC) No. 1
2 049412 filed by C. A. Carlson pursuant to the requirements of RCW 90.14. It
3 asserted a right to divert 2 cfs, 600 acre-feet per year from Naneum Creek
4 for the irrigation of 250 acres in the W $\frac{1}{4}$ of Section 34 and the E $\frac{1}{4}$ E $\frac{1}{4}$ of
5 Section 33, T. 19 N., R. 19 E.W.M. Only one point of diversion is
6 described, that being 1080 feet south and 570 feet east of the northwest
7 corner of Section 28, being within the NW $\frac{1}{4}$ of Section 28, T. 19 N.,
8 R. 19 E.W.M., which would be the location of the diversion into the Carlson
9 Ditch. The Keister Ditch, which diverts from the creek in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of
10 Section 28 and crosses the lower half of the claimant's land has also
11 historically been used to deliver water to the property. Although this
12 diversion is not described in WRC No. 049412, the Referee recommended that
13 diversion be authorized as it is apparent it has been used since the right
14 was initiated.

15 The Court granted Ecology's exceptions, finding that the extent of the
16 right that can be recommended for confirmation is that which was asserted in
17 WRC No. 019412. However, the Court remanded the claim to allow the Carlstons
18 an opportunity to file a request to amend WRC No. 019412 under RCW
19 90.14.065. RCW 90.14.065 provides that a claim can be amended if an error
20 was made in the estimation of the quantity of water used, if there is a
21 change in circumstance in the manner of transportation or diversion of water
22 or if the amendment is ministerial in nature.

23 Mr. Carlson stated at the supplemental hearing that he had not yet
24 completed the paperwork to seek an amendment of the quantity of water

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1 claimed in WRC No. 019412. He also is considering whether to file an
2 application for change to add a point of diversion to his water right. As
3 directed by the Court, since the water right claim has not yet been amended,
4 the Referee amends the recommendation on page 700 of the Subbasin No. 9
5 Report of Referee to change the instantaneous quantity of water authorized
6 for use to 2 cubic feet per second in May and June and 1.60 cubic feet per
7 second in April and July 1 through October 15, 600 acre-feet per year. The
8 second point of diversion that is authorized shall be removed from the
9 recommended right. All other parameters of the water right remain
10 unchanged.

11
12 COURT CLAIM NO. 02174 -- Larry L. Charlton
13 & Marilyn Charlton

14 The Charltons, represented by Attorney James Adams, took exception to
15 the Referee not recommending confirmation of a water right for the land they
16 own in the N $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 7, T. 18 N., R. 19 E.W.M. Larry Charlton
17 testified at the supplemental hearing.

18 The Charltons irrigate approximately 19 acres with water diverted from
19 Dry Creek, a branch of Wilson Creek. At the initial evidentiary hearing,
20 the testimony and evidence was sufficient for the Referee to conclude that
21 the claimants' land was being irrigated by the early 1930's. However, since
22 the land also receives water delivered by the Kittitas Reclamation District,
23 which began delivering water in this area in the early 1930's, that was not
24 sufficient evidence to show that a right had been established for use of
25 Wilson Creek. The record shows that J. W. Coon owned the property in the

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1 1880's and conveyed it to William Coon in 1890. The Charltons had put into
2 evidence documents to show that the Coons had established water rights for
3 other portions of Section 7, but not for the portion now owned by the
4 Charltons. That lack of evidence has been remedied. Exhibit DE-1748 is a
5 Notice of Water Right dated May 17, 1890, by Willian Coon stating that he
6 owned the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 8 and the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 7 and that since
7 May 8, 1884, he has been in possession of 100 inches of water from what is
8 known as Dry Creek, with the ditch taken out of the creek in Section 5,
9 T. 18 N., R. 19 E.W.M. and running southwesterly about one-half mile to his
10 ranch. He also states he is in possession of 25 inches from Wilson Creek
11 taking out of the Van Alstine Ditch and that Van Alstine had abandoned the
12 ditch and gave it to Coon and James Jude in May 1886. The Van Alstine Ditch
13 is taken out of Wilson Creek in Section 5 running in a southwest direction
14 about three-quarters of a mile to his ranch.

15 This water right notice, along with the earlier testimony, is
16 sufficient to allow the Referee to conclude that a water right was
17 established for this property for use of Dry Creek/Wilson Creek and the
18 right was initiated on May 8, 1884.

19 Water Right Claim No. 026217 was filed pursuant to RCW 90.14 by Larry
20 Charlton for this property, claiming a right to divert 2 cfs, 50 acre-feet
21 per year for the irrigation of 20 acres. One point of diversion in the
22 SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 7 is described.

23 It is clear from the documents in the record that when the water right
24 was established in the late 1800's water was delivered to the property

25
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1 through two gravity flow ditches that diverted water in the SW $\frac{1}{4}$ of
2 Section 5. However, the RCW 90.14 claim identifies a point of diversion in
3 the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 7, one of three diversions used on the property.
4 Since only one diversion was described on the claim form, the Referee can
5 authorize use of only that diversion in the right recommended for
6 confirmation. The Charltons should contact Ecology's Central Regional
7 Office about the procedures for adding points of diversion to the right
8 recommended for confirmation herein.

9 Mr. Charlton also testified that they raise livestock on the this
10 property. Dry Creek flows through the property and the livestock drink from
11 the irrigation ditches during irrigation season and from Dry Creek itself.
12 Livestock drinking directly from the water source is a non-diversionary use
13 that is covered by the stock water stipulation discussed on page 4 of the
14 initial Report of Referee. The Charltons have a right to non-diversionary
15 stock watering under that stipulation.

16 Mr. Charlton did not testify to how much water is being used to
17 irrigate his land. Although this particular piece of property was not
18 addressed in any of the prior decrees, the Referee is compelled to use the
19 guidance from those decrees as to how much water is needed to irrigate in
20 this area. Those decrees generally awarded one inch of water (or 0.02 cfs)
21 for each acre irrigated. Since the Charltons did not provide evidence of
22 how much water they use, the Referee shall do likewise for the Charltons'
23 property.

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1 The Referee recommends that a right be confirmed under Court Claim No.
2 02174 with a May 8, 1884, date of priority for the diversion of 0.38 cubic
3 foot per second, 95 acre-feet per year for the irrigation of 19 acres and
4 stock water in the N $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 7, T. 18 N., R. 19 E.W.M. The point
5 of diversion authorized shall be in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 7.

6
7 COURT CLAIM NO. 00481 -- Estate of Naomi Charlton
8 & Larry L. Charlton

9
10 Court Claim No. 00481 asserts a right to irrigate 100 acres in the
11 E $\frac{1}{2}$ NW $\frac{1}{4}$ and W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 34, T. 19 N., R. 19 E.W.M. with water diverted
12 from Naneum Creek. The Referee recommended that a right be confirmed for
13 the irrigation of 70 acres. The Charltons took exception to a right not
14 being recommended for the other 30 acres that they irrigate. The Charltons
15 are represented by Attorney James Adams and Mr. Charlton testified at the
16 supplemental hearing.

17 The land described in the claim has been in the Charlton family since
18 it separated from Federal ownership. In the record is a document that
19 appears to have been filed with Kittitas County Superior Court. It was
20 filed "In the Matter of Statement of Claim of Water Right From Naneum Creek:
21 Names of Claimants - George C. Charlton, Robert Fleming and C. A. Dibble."
22 It states that about November 1, 1886, they jointly began construction of a
23 ditch known as "The Pleasant Hill Ditch" and completed the ditch in April
24 1888. The ditch was jointly constructed in order to irrigate the lands
25 owned or claimed by each of them. The head of the ditch was described as
26 being about 1.25 miles above where Wilson and Naneum Creeks separate, near

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1 the E $\frac{1}{2}$ of Section 20, T. 19 N., R. 19 E.W.M. The lands to be irrigated were
2 described as: George C. Charlton - E $\frac{1}{2}$ NW $\frac{1}{4}$ and W $\frac{1}{2}$ NE $\frac{1}{4}$ of Sec. 34, T. 19 N., R.
3 19 E.W.M.; W. W. Dibble's claim of 100 acres in the (unreadable) Sec. 27, T.
4 19 N., R. 19 E.W.M.; and Robert Fleming - the SE $\frac{1}{4}$ of Section 28, T. 19 N.,
5 R. 19 E.W.M.

6 George C. Charlton was a defendant in Ferguson v. United States
7 National Bank of Portland, and was decreed a right for the use of 70
8 inches. The Findings of Fact and Conclusions of Law that preceded the
9 decree stated that in 1887 he diverted water from Naneum Creek for the
10 irrigation of 70 acres. The Findings of Fact also stated that one inch of
11 water was sufficient for the irrigation of one acre and that after July 1,
12 one-half inch of water was sufficient for the irrigation of one acre. It
13 is clear to the Referee that the Charlton land had, in 1901, a right with an
14 1887 date of priority for the use of 70 inches (1.4 cfs) for the irrigation
15 of 70 acres.

16 The Charltons asserted a right for 100 inches for the irrigation of 100
17 acres. During the testimony for this proceeding, there was no evidence
18 presented to show that an additional water right was legally established.
19 At the supplemental hearing, Mr. Charlton testified that he irrigates the 30
20 acres solely with flood water. The flood water is available in April, May,
21 June and sometimes in early July. He estimated that during that period he
22 uses 3 to 4 acre-feet per acre and is able to irrigate the 30 acres twice.

23 During the supplemental hearing, when asked by the Referee about the
24 legal foundation for use of the flood water, it was indicated that evidence
25

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1 was in the record from the first hearing. Further review of the prior
2 record shows that Art Carlson, who lived next door to the Charlton property
3 testified that his earliest recollection of the property was that the same
4 area was being irrigated then as now. His memory dates back to the early
5 1920's, when he was 12 to 15 years old. He recalls the same ditches serving
6 the property and hay, grain and pasture being grown. Water Right Claim No.
7 00108 was filed by Naomi Charlton for this property. Review of the Report
8 of Referee from the Carlson case and prior evidence only show that the Order
9 Pendente Lite recognizes use of 0.60 cfs for the irrigation of 30 acres with
10 an 1912 date of priority. However, review of the Maddox report does not
11 reveal any basis for the 1912 date. As mentioned in the Report of Referee,
12 1912 is after the May 10, 1905, Federal withdrawal of the unappropriated
13 surface waters in the Yakima Basin. In order to establish a water right in
14 1912, the water use would have to not affect the development of the Yakima
15 Project. Mr. Charlton in his testimony indicates that because only flood
16 water is being used, there would be no affect on the Yakima project. Naneum
17 Creek flows into Wilson Creek and ultimately into the Yakima River below the
18 storage reservoirs constructed as part of the Yakima project. Therefore,
19 flow from the creek could not contribute to storage under the project.
20 However, the creek flow does contribute to the natural flow in the river.

21 Review of the prior testimony also reveals that Mr. Charlton had
22 testified to diverting water after the irrigation season for water
23 livestock. There was considerable testimony about the affect of the
24 offseason diversions on other landowners on Naneum Creek and conflicts that
25

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1 arose in the mid-1980's. The Referee had only recommended a right for use of
2 water during irrigation season. It is clear from the evidence that water
3 has been diverted for stock watering the entire year, so that recommendation
4 will be altered to allow for diversion of 0.70 cfs and 5 acre-feet per year
5 (consumptive use) from November 1 to March 31.

6 The Referee concludes that there has been sufficient evidence presented
7 to show that a total of 100 acres have been irrigated within the Charlton's
8 ownership since prior to 1920. The basis for the 1912 date used in the
9 Order Pendente Lite is not in the record, but it is clear that the use began
10 after 1901, when the Ferguson decree was entered. A right with an 1912 date
11 of priority would be the most junior right in the basin. The Referee
12 concludes that a right can be confirmed with a 1912 date of priority. Due
13 to the extremely junior priority date and the number of senior rights, the
14 period of use shall also end on July 15, which is the latest date Mr.
15 Charlton testified to using water for this 30 acres with the junior right.

16 The claimant should be aware that during the 2001 irrigation season (a
17 drought year), several irrigation districts sought from the Court an order
18 to cease diversion for all water rights with a priority date after May 10,
19 1905, the date of the Federal withdrawal and the priority date for water
20 rights established under the withdrawal. On June 28, 2001, the order was
21 signed by the Court, see Order On Show Cause RE: Motion to Limit Post 1905
22 Water Rights, (Docket No. 15248).

23 Based on the foregoing, the Referee recommends that a right be
24 confirmed with a June 30, 1912, date of priority for the diversion of 0.60
25

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1 cubic foot per second 90 acre-feet per year from April 1 through July 15 for
2 the irrigation of 30 acres and stock water in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34,
3 T. 19 N., R. 19 E.W.M.

4
5 COURT CLAIM NO. 01451 -- Fred Christen

6 William R. Peterson

7
8 Court Claim No. 01451 was originally filed by Martha Green. On
9 February 2, 1989, Fred Christen and William R. Peterson were substituted for
10 Ms. Green. There was no appearance at the initial evidentiary hearing by
11 anyone associated with the claim, resulting in the Referee recommending that
12 a right not be confirmed. Mr. Peterson, represented by Attorney Jeff
13 Slothower, took exception and asked to have the claim remanded to allow
14 presentation of evidence in support of the claim. Mr. Peterson testified at
15 the supplemental hearing.

16 Mr. Peterson owns the SW $\frac{1}{4}$ of Section 7, T. 18 N., R. 19 E.W.M. He is
17 asserting a right to irrigate approximately 44 acres with water diverted
18 from a branch of Wilson Creek. He purchased the E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 7 in 1984
19 and then purchased the W $\frac{1}{2}$ SW $\frac{1}{4}$ from Mr. Christen in 1988, so by the time the
20 substitution papers were filed by Ms. Green, Mr. Christen no longer had any
21 interest in the land. It would be in the best interest of the parties to
22 file the paperwork to transfer Mr. Christen's interest in the claim to Mr.
23 Peterson.

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Three diversions are used to serve the irrigated land. Water is diverted from the creek in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7 and carried a short distance through two ponds and then returned to the creek. A 1 $\frac{1}{2}$ HP pump is placed on the second pond and is used to irrigate approximately 1 acre of lawn around the claimant's house. Twelve sprinklers with 3/16 inch nozzles are used to irrigate the land. Mr. Peterson testified there is very little elevation change from the pond where the pump is located to the land being irrigated. Based on the information provided, the Referee concludes that approximately 50 gallons per minute, or 0.11 cubic foot per second is being used to irrigate the 1 acre around the house. A second diversion is located near the southeast corner of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7 and is used to irrigate all of the SW $\frac{1}{4}$ lying south and east of the creek, which is 36 acres. Mr. Peterson estimated that between 0.50 and 0.75 cubic foot per second is being diverted at this point. The land is flood irrigated. A third diversion is located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7 and is used to irrigate a six acre field west of the creek in the SE $\frac{1}{4}$ of Government Lot 4 of Section 7. Mr. Peterson estimated that essentially the same quantity of water is diverted at this point as from the point used to irrigate the 36 acres. All of the land, except the lawn, is planted in either hay or pasture. Mr. Peterson testified that he begins irrigating in the middle of May and continues irrigating until the middle of October. Most of the land northwest of the creek is irrigated with water delivered by the Kittitas Reclamation District. There is no creek water used on that land (except the 6 acre field in the southeast corner of Government Lot 4). Varying numbers of

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1 livestock are on the land at different times and drink from either the
2 irrigation ditches or directly from the creek. Livestock drinking from the
3 creek is a non-diversionary use covered by the stock water stipulation
4 discussed on page 4 of the Report of Referee. Mr. Peterson, therefore, has
5 a non-diversionary stock water right under that stipulation.

6 Neighboring landowners, Arlene Rosenburg and Brent Minor, told Mr.
7 Peterson that in the 1920's there was a dairy on his land, leading him to
8 conclude the land was being irrigated at that time. Exhibit DE-1855 are
9 documents related to ownership of the claimant's land from settlement until
10 1945. The SW $\frac{1}{4}$ of Section 7 was originally conveyed by the Federal
11 Government to the Northern Pacific Railroad. The railroad conveyed it to
12 Phillip Van Alstine in 1887, who then sold it to Thomas Haley. A warranty
13 deed dated December 29, 1899, conveyed the land to John Pollock and it
14 remained in his family until 1931. Both Thomas Haley and John Pollock were
15 defendants in Sanders v. Jones (1890). Thomas Haley was awarded rights to
16 use 118 inches of water. The decision indicates the water is for lands the
17 Haley had made final proof on in 1886. This, along with evidence offered by
18 other claimants in this adjudication, lead the Referee to conclude that the
19 Haley land for which this water was awarded is in Sections 19 and 30 of
20 T. 18 N., R. 19 E.W.M. The decision does not describe the lands owned by J.
21 Pollock, just that they were acquired by N.P.R.R under its grant and that the
22 land is on Dry Creek, which is a natural channel that is a branch of Wilson
23 Creek. Pollock's grantor appropriated 20 inches of Wilson Creek water in
24 1886. The Sanders v. Jones decree allowed for the use of one inch of water

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for each acre irrigated in May and June and one-half inch the rest of the season. Therefore, it can be concluded that since 20 inches were awarded, 20 acres were being irrigated. The information from the neighboring landowners that they recall a dairy on the property in the 1920's supports a conclusion that land was being irrigated, however, there is nothing in the record to allow for a conclusion that more than the 20 acres being irrigated in 1890 were being irrigated prior to December 31, 1932, the cutoff for putting water to beneficial use under the riparian doctrine.

Water Right Claim No. 135133 was filed by Jack Green pursuant to the requirements of RCW 90.14. It asserts a right to divert 0.72 cubic foot per second, 144 acre-feet per year from 2 unnamed creeks for irrigation of 36 acres in the SW $\frac{1}{4}$ of Section 7, T. 18 N., R. 19 E.W.M. The point of diversion is described as in the northeast corner of the SW $\frac{1}{4}$ of Section 7.

The Referee concludes there is ample evidence in the record to support a conclusion that a right was established prior to 1890 and recognized in the Sanders v. Jones decree with an 1886 priority date for the use of 0.40 cfs (20 inches) for the irrigation of 20 acres. However, the evidence does not support a conclusion that more acres were irrigated prior to 1932. Additionally, WRC No. 135133 only describes one point of diversion, not the three being used by Mr. Peterson. The point of diversion to be authorized is close to the point described in WRC No. 135133 and serves the lands authorized to be irrigated.

Therefore, the Referee recommends that a right be confirmed with a June 30, 1886, date of priority for the diversion of 0.40 cubic foot per

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1 second from May 15 to June 30, 0.20 cubic foot per second July 1 through
2 October 15, 77 acre-feet per year for the irrigation of 20 acres in that
3 portion of the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, T. 18 N., R. 19 E.W.M. lying southeast
4 of the creek. The point of diversion that will be authorized is
5 approximately 900 feet south and 20 feet west of the center of Section 7, in
6 the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, T. 18 N., R. 19 E.W.M.

7
8 COURT CLAIM NO. 00766 -- Robert G. Dier

9 Robert Dier filed an exception to the Referee not recommending that a
10 right be confirmed for his property. The Court remanded the claim and it
11 was included in the schedule for the supplemental hearing. However, prior
12 to the hearing date Mr. Dier contacted the Referee's office and stated he
13 would not be making an appearance at the hearing. He, in fact, did not
14 appear at the supplemental hearing. Therefore, the Referee continues to
15 recommend that a right not be confirmed under Court Claim No. 00766.

16
17
18 COURT CLAIM NO. 02035 -- Gordon L. Dudley
19 & Anita M. Dudley
20 Stefan Dudley
Susan F. Jipson
Ronald P. McGee
& Joy A. McGee

21 The McGees, represented by Attorney Richard T. Cole, took exception to
22 the recommendations in the Report of Referee for Subbasin No. 9. Their
23 specific exceptions were to the point of diversion recommended for the right

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1 awarded for a portion of their property and to a right not being recommended
2 for the second parcel they own. Ronald McGee and Doss Roberts, a
3 neighboring landowner, testified at the supplemental hearing.

4 The McGees own two parcels, each approximately 7 acres in size, within
5 the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33, T. 19 N., R. 19 E.W.M. In the initial Report of
6 Referee, a right was recommended for what has been referred to as parcel 2.
7 The only exception the McGees took to this recommendation was to the point
8 of diversion authorized for use. The evidence they presented at the initial
9 hearing was that diversion #21 on State's Exhibit SE-2 was being used. The
10 exception and Mr. McGee's testimony at the supplemental hearing show that
11 diversion #22 actually is used. This diversion is located approximately
12 1000 feet north and 600 feet east of the southwest corner of Section 33,
13 being within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33. There were two water right claim
14 forms filed by Gordon and Anita Dudley, prior owners of the McGee property.
15 One, WRC No. 126772 describes diversion #21, while the second, WRC No.
16 126773, does not give a specific location for the point of diversion, just
17 describing it as in Section 33, T. 19 N., R. 19 E.W.M. The form does state
18 that the source of water is the Wilkinson Ditch. The ditch at diversion #21
19 is known as the Lewis Ditch or the J. I. Wilson Ditch. The Referee could
20 not locate anything that referred to the ditch from diversion #22 as being
21 the Wilkinson Ditch, however, the list of ditches that is part of SE-2 does
22 not identify any of the ditches as being the Wilkinson Ditch. Although WRC
23 No. 126773 is not very specific for the location of the point of diversion,
24 the Referee concludes it substantially complies with the requirements of RCW

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1 90.14 and adequately protects a right to use diversion #22 (See the Court's
2 February 10, 1995, Memorandum Opinion Re: RCW 90.14 and Substantial
3 Compliance). During the process of changing the point of diversion, the
4 Referee noted a typographical error in the legal description, which has been
5 corrected.

6 A right was not recommended for parcel 1 due to Mr. McGee's testimony
7 that parcel 1 was not being irrigated at the time of their purchase in
8 1990. The evidentiary hearing was held shortly after they acquired the
9 property, so they had not yet irrigated parcel 1. Mr. McGee testified at
10 the supplemental hearing that he has continuously irrigated the parcel
11 during their ownership. Of the 7 acres in the parcel, only 2 can easily be
12 irrigated; and only those 2 acres have been irrigated during the past 10
13 years. Water is pumped from the ditch using a 2 HP pump which delivers
14 water to a sprinkler irrigation system. Mr. McGee estimated that 6
15 acre-feet per year is used to irrigate the two acres. Hay is generally
16 irrigated, however, last year the land was just used for pasture for 10 head
17 of cattle. The livestock drink directly from the ditch as it passes through
18 the property. The ditch that goes through this portion of the property
19 carries water from diversion #21. The ditch continues on southeasterly and
20 carries stock water after the end of the irrigation season. Mr. Robert's
21 testimony was that he recalled the land being consistently irrigated over
22 the years. The basis for a right for this land is the same as for the other
23 parcel owned by the McGees. See pages 163 and 164 of the Report of Referee
24 for that discussion. As with other rights that flow from the Ferguson
25
26

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1 decree, the instantaneous quantity of water that can be awarded is based on
2 one inch of water in May and June and one-half inch of water the rest of the
3 year for each acre irrigated.

4 The Referee concludes there has been sufficient additional evidence
5 placed in the record to conclude that the right appurtenant to parcel 1 has
6 not relinquished due to nonuse. Therefore it is recommended that a right be
7 confirmed with a June 30, 1882, date of priority a right for the diversion
8 of 0.04 cubic foot per second in May and June, 0.02 cubic foot per second in
9 April and July 1 through October 15, 6 acre-feet per year for the irrigation
10 of 2 acres and stock watering. Additionally, it is recommended that a right
11 be confirmed for the diversion of 0.02 cubic foot per second 0.25 acre-feet
12 per year for stock watering from October 16 to March 31 each year. The
13 point of diversion for this portion of the McGee property is diversion #21
14 in the SW^{1/4}NW^{1/4} of Section 33.

15

16 COURT CLAIM NO. 02279 -- Alvia S. Dunnagun
17 & Janet G. Dunnagun

18 There was no appearance at the initial evidentiary hearing in support
19 of this claim. However, on November 20, 1991, the Dunnaguns filed a Motion
20 to Allow the Presentation of Evidence in relation to this claim. The Court
21 issued an Order May 26, 1992, stating that the Dunnaguns would be allowed to
22 introduce testimony and evidence during the exceptions hearing phase for
23 Subbasin No. 9. The Dunnaguns are represented by Attorney Richard T. Cole
24 and Mr. Dunnagun, along with Robert Schnebly, who leases and farms the land,
25 testified at the supplemental hearing.

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The Dunnaguns have owned the E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 21, T. 18 N., R. 19 E.W.M. since 1987, but have only recently moved to the area. At the time they purchased the land it was being used to raise Timothy hay and pasture for cattle and horses and that use has continued to the present. There are four fields, three are planted in Timothy hay with a grain rotation and the fourth is a 17 acre pasture. Water is diverted from Naneum Creek into the Ferguson Ditch in the NW $\frac{1}{4}$ of Section 16. Water is then taken out of the ditch at two places on the claimants' land, one just after the ditch enters the property and the second approximately 1200 feet further down the ditch. Mr. Schnebly estimated that between 1.0 and 1.5 cubic feet per second is taken from the ditch at each takeout. Only one takeout is used at a time. He also thought that between 9 and 12 acre-feet per acre was used to irrigate, but that was based on his belief that the land was similar to surrounding land that need that quantity, rather than actually measuring the quantity that is used. It takes about 7 days to irrigate the area served by each diversion and there are 10 to 12 days between each irrigation. That suggests to the Referee that there is no more than 3 to 5 days between when all of the fields are irrigated and the rotation starts again, but that the land is not continuously irrigated. Up to 50 head of livestock are on the land at various times of the year and drink directly from Ferguson Ditch. Water is carried in the ditch for stock the entire year.

23 Mr. Schnebly testified that he has lived in the general area all his
24 life and can recall the claimants' land being irrigated for as long as he

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1 can remember. A prior owner of the land, Clark Runyan, filed Water Right
2 Claim No. 121945 pursuant to the requirements of RCW 90.14. It asserts a
3 right to divert 1.6 cubic feet per second, 320 acre-feet per year from
4 Naneum Creek for the irrigation of 80 acres in the E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 16,
5 T. 18 N., R. 19 E.W.M. The point of diversion is described as being 1700
6 feet east of the northwest corner of Section 16. In the NW $\frac{1}{4}$ of Section 16,
7 Naneum Creek splits, with a branch frequently called Neally Creek flowing to
8 the east of the main Naneum Creek channel. The actual diversion into
9 Ferguson Ditch is in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 16. The Referee concludes that
10 Mr. Runyan substantially complied with the requirements of RCW 90.14 by
11 describing in his claim the location where Naneum Creek split, rather than
12 the actual diversion (See the Court's February 10, 1995, Memorandum Opinion
13 Re: RCW 90.14 and Substantial Compliance). Anyone reviewing State's Exhibit
14 SE-2 can see how difficult it is to distinguish diversions into ditches from
15 instances when the creek splits. The point of diversion that shall be
16 authorized shall be the diversion into Ferguson Ditch in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of
17 Section 16.

18 Water rights for this land were addressed in the Ferguson Decree. At
19 the time of that action, the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21 was owned by Elijah M.
20 Topliff, who was awarded a Class 2 right (with an 1872 date of priority) for
21 320 inches to be used in the NW $\frac{1}{4}$ of Section 18 and the S $\frac{1}{2}$ S $\frac{1}{2}$ of Section 21,
22 T. 18 N., R. 19 E.W.M. The place of use is 320 acres, so one inch was
23 awarded for each acre described. The NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21 was owned by F.
24 R. Clement, who was awarded a Class 4 right (with an 1874 date of priority)
25

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27

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Referee's Office
15 W. Yakima Ave Ste. 200
Yakima, WA 98902-3401

28

1 for 160 inches to be used in the N $\frac{1}{2}$ S $\frac{1}{2}$ of Section 21. Again, one inch was
2 awarded for each acre described. The Findings of Fact that preceded the
3 decree allowed for the use of one inch for each irrigated acre in May and
4 June and one-half inch the rest of the year.

5 Half of the claimants' property is within the area with the Class 2
6 right and half is in the area with the Class 4 right. A total of 80 acres
7 is owned and the claimants would have a right to 40 inches with an 1872 date
8 of priority and 40 inches with an 1874 priority (each would be cut in half
9 except in May and June). Within the 80 acres, only 58 acres are currently
10 being irrigated and as far as the Referee can determine, a right is being
11 asserted only for 58 acres. None of the witnesses testified to where within
12 the 80 acres the 58 is located. However, SE-2 shows that within the NE $\frac{1}{4}$ SW $\frac{1}{4}$,
13 that portion west of the creek is not irrigated. Lacking any better
14 information, the Referee will conclude that is the portion that is not
15 irrigated. The Referee estimates that in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ there are 35 acres
16 being irrigated, leaving 23 acres irrigated in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and will recommend
17 confirmation of a water right based on that. Although Mr. Schnebly
18 testified that 9 to 12 acre-feet per acre is needed to irrigate the land,
19 that quantity of water cannot be diverted with the instantaneous quantities
20 awarded in the Ferguson decree. The maximum that could be diverted, with
21 minimal periods of not using water, is 190 acre-feet for each 40 acre tract,
22 or a total of 380 acre-feet per year. However, WRC No. 121945 asserted a
23 right to use 320 acre-feet per year. The Court has consistently ruled that
24 the quantity of claimed on water right claims filed pursuant to RCW 90.14
25

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1 shall be the limit of the right that can be awarded in this proceeding,
2 unless the claimant amends that quantity pursuant to RCW 90.14.065. That has
3 not been done, therefore, 320 acre-feet is the maximum that can be awarded,
4 which is 5.5 acre-feet per acre. An additional 1.0 acre-foot will be
5 awarded under each right for diversionary stock watering. Rights were
6 established for the use of 1.60 cubic feet per second for the irrigation of
7 80 acres. Although the claimants have reduced the number of acres being
8 irrigated within each 40 acre tract, the testimony is clear that they have
9 continued to divert up to 1.6 cubic feet per second, which between the two
10 rights will be authorized.

11 The Referee recommends that two rights be confirmed for use of Naneum
12 Creek. They each shall authorize a diversion from the creek in the SE $\frac{1}{4}$ SW $\frac{1}{4}$
13 of Section 16, T. 18 N., R. 19 E.W.M. With a June 30, 1872, priority date,
14 a right to divert 0.80 cubic foot per second in May and June and 0.40 cubic
15 foot per second in April and July 1 through October 15, 192.5 acre-feet per
16 year for irrigation of 35 acres and 0.5 acre-foot for stock watering; 0.40
17 cubic foot per second, 0.50 acre-foot from October 16 to March 31 for stock
18 watering; all in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, T. 18 N., R. 19 E.W.M. With a
19 June 30, 1874, date of priority, a right to divert 0.80 cubic foot per
20 second in May and June and 0.40 cubic foot per second in April and July 1
21 through October 15, 126.5 acre-feet per year for irrigation of 23 acres and
22 0.5 acre-foot for stock watering; 0.40 cubic foot per second, 0.50 acre-foot
23 from October 16 to March 31 for stock watering; all in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of
24 Section 21, T. 18 N., R. 19 E.W.M.

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The testimony indicates that water delivered by the Kittitas Reclamation District is also used on this land. These rights will carry a provision that acknowledges use of that water.

COURT CLAIM NO. 00909 -- John N. Eaton
Robert Eaton

John and Robert Eaton took exception to the Referee not recommending confirmation of a water right for lands they acquired from the Lamb family. The Eatons are represented by Attorney John P. Gilreath and John Eaton testified at the supplemental hearing.

The Eatons own 145 acres in that portion of the NW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30, T. 17 N., R. 19 E.W.M. lying northeasterly of State Route 97 (the Canyon Road). They irrigate 140 acres with water diverted from Wilson Creek and a drain located in the southerly portion of the property. They grow Timothy hay with a grain rotation and pasture. The prior owners, the Lambs raised up to 140 head of cattle on this land. Mr. Eaton did not testify to how many head of livestock they have or intend to have on the land. A portion of the land is riparian to Wilson Creek and livestock drinking directly from Wilson Creek is a non-diversionary use covered by the stock water stipulation discussed on page 4 of the Report of Referee. Any livestock on the land would also have access to the irrigation ditches that convey water through the fields. John Eaton's daughter and son-in-law own a small parcel in the southwest corner of the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19, which is part of the former Lamb property.

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1 The Referee did not recommend confirmation of a water right in the
2 initial Report of Referee, having concluded there needed to be more evidence
3 that a right had been established through beneficial use of the water prior
4 to 1932. To address that need, the Eatons placed in the record several
5 deeds conveying portions of the property in the late 1800's. These deeds
6 reference existing irrigation ditches on the land and appurtenant water
7 rights.

The property was part of three different homesteads that were ultimately pieced together. The patent for the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30 issued to Luther Keach on September 5, 1873; the patent for Government Lot 2 (the SW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 30, of which the Eatons own the northeast corner (\pm 2 acres) issued to William McLeod; but the patent for the rest of the NW $\frac{1}{4}$ of Section 30 is not in the record. DE-2008 is a chain sheet for Section 30, T. 17 N., R. 19 E.W.M., but it does not clearly show to whom the patent(s) for the rest of the Eaton land issued. It is clear that sometime prior to 1882 G. W. Gillespie had acquired the N $\frac{1}{4}$ NW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30, which is much of what is now owned by the Lambs. On December 2, 1882, Gillespie sold to S. W. Maxey the N $\frac{1}{4}$ NW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30, along with other land in Sections 19, 24 and 25. S. W. Maxey and Jacob Powell filed a Water Right Statement stating that in May of 1885 Maxey constructed a ditch from Wilson Creek and appropriated 200 inches of water. The head of the ditch was into the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19 and running in a southwesterly direction about one-half mile into Section 25. A ditch carrying Wilson Creek water into Section 25 could easily have served land in the NW $\frac{1}{4}$ of Section 30. The

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1 land Maxey owned in Section 19 was sold in 1905 and 1919 with one-half of
2 the water right to Wilson Creek. That would leave one-half of the water
3 right that would be appurtenant to the Maxey land in Sections 24, 25 and
4 30. The Maxey land in the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 24 is now owned by Michael
5 Moeur, also a client of Mr. Gilreath, who is asserting a right to irrigate a
6 portion of those lands with water diverted from Wilson Creek. The owner of
7 the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 25 is not asserting a right to use Wilson Creek
8 water. The Eaton's counsel maintains that the Maxey/Powell Water Statement
9 does not apply to the Eaton property, but is to serve other property in
10 Section 25. However, no claimant owning land in Section 25 is asserting a
11 right to Wilson Creek, leaving the Referee to reach the opposite conclusion,
12 that the Maxey water right is not appurtenant to any land in Section 25, but
13 to land in Sections 24 and 30. Counsel did not provide any foundation for
14 his conclusion. He points the Referee to a 1905 deed for the land in
15 Section 19 transferring from Woodhouse to Winters one-half interest in a
16 water ditch and a water right that served the Section 19 property. The
17 Referee agrees that this document supports a conclusion that one-half of the
18 Maxey water right is appurtenant to land in Section 19, however, the Referee
19 believes that the rest of the right is appurtenant to the Lamb property in
20 Section 30 and the Moeur property in Section 24. The Referee notes that the
21 1912 Swigart Survey does not show a diversion from Wilson Creek in the
22 NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19 as described in the Maxey Notice of Water Right;
23 however, SE-2 (the State's map exhibit) does show a diversion in the NE $\frac{1}{4}$ SW $\frac{1}{4}$
24 of Section 19. In 1900 W. D. Killmore sold to Steven Woodhouse the N $\frac{1}{2}$ NW $\frac{1}{4}$
25

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1 and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30, and the E $\frac{1}{2}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19 (DE-2006,
2 2007 & 2008) and in 1905 Woodhouse sold to Winters the E $\frac{1}{2}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ SW $\frac{1}{4}$ of
3 Section 19. The Swigart survey shows two Woodhouse Ditches on Wilson Creek,
4 one diverting in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 19 and the second diverting in the
5 NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30.

6 Based on the evidence in the record, it would be easy to conclude that
7 the only Wilson Creek water right for the Eaton/Lamb property is a portion
8 of the Maxey water right, however, the Referee concludes that is not
9 appropriate. The United States, in support of their claim in Section 25 put
10 into evidence a series of aerial photographs that in addition to showing the
11 U.S. land in Section 25, also show the Eaton property in Section 30. The
12 1937 photo shows clearly that most of the property was being irrigated at
13 that time and has continued to be irrigated over the years. A portion of the
14 NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30 lying northeast of Wilson Creek does not appear to be
15 irrigated, perhaps 5 acres or so. The fact that two ditches diverting from
16 places on the creek other than described in the Maxey water right statement
17 lead the Referee to conclude that after Maxey sold the property, additional
18 rights were established, likely by Woodhouse since the two ditches were
19 named for him.

20 The NW $\frac{1}{4}$ of Section 30, except for Government Lot 2, is riparian to
21 Wilson Creek. Under the Riparian Doctrine, in order for there to be a water
22 right there needs to be evidence water was used prior to December 31, 1932.
23 The 1937 aerial photograph along with the Swigart survey showing the
24 Woodhouse Ditches leads the Referee to conclude that water rights were

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1 established for the land owned by Maxey and Woodhouse, that being the NW $\frac{1}{4}$ NW $\frac{1}{4}$,
2 and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30. Government Lot 2 of Section 30 (basically the
3 SW $\frac{1}{4}$ NW $\frac{1}{4}$) was settled by William McLeod who received a patent for the SE $\frac{1}{4}$ SW $\frac{1}{4}$
4 and Government Lots 2, 3 and 4 of Section 30. Wilson Creek does not flow
5 through this portion of Section 30 and there has been no evidence presented
6 to show that a water right to Wilson Creek was established for this portion
7 of the Eaton property. There is considerable evidence in the record
8 provided by claimants Robert Stewart and Michael Moeur concerning the Steen,
9 McLeod and Clark Ditch that carried water diverted from the Yakima River and
10 initially carried through the Tjossem Ditch. It would be reasonable to
11 conclude that some of the water carried in this ditch would have been used
12 on the McLeod property in Government Lot 2 and in fact the Referee reached
13 that conclusion for the land in Government Lot 2 southwest of the railroad
14 tracks, now owned by Robert Papineau. However, a right to use water from
15 the Yakima River is not being asserted and there is no evidence that Yakima
16 River water is used on their property. The priority date under the Riparian
17 Doctrine is the date steps were first taken to sever the land from Federal
18 ownership. That date is not in the record for the claimant's land in the
19 NW $\frac{1}{4}$ of Section 30. The earliest date in the record is 1882 when the land
20 was sold to Maxey. Clearly steps had been taken prior to then to sever the
21 land, but there is nothing in the record to assist the Referee in
22 determining that date. The claimant suggests that five years prior to when
23 the patent issued for the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30, or 1868, would be the
24 appropriate priority date for all of the claimants' land. The Referee
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1 strongly disagrees. The date when steps were first taken to sever the land
2 in the SW $\frac{1}{4}$ of Section 30 has no bearing on the settlement date for the NW $\frac{1}{4}$
3 of Section 30, as two different individuals settled. Using five years prior
4 to issuance of the patent is not even appropriate for lands where the patent
5 is in the record. The Referee has found that the length of time between
6 when the land is settled and when the patent issues is extremely variable
7 and does not have to be five or more years. The Court has previously ruled
8 that there needs to be some evidence in the record for establishing the
9 priority date and the Referee cannot use an automatic relation back as
10 suggested by counsel, see Court Memorandum Opinion Re: Priority Date -- Date
11 of Patent or Date of Entry, filed January 19, 1995. Lacking a more
12 definitive date, the Referee proposes to use June 30, 1882, as the priority
13 date for the NW $\frac{1}{4}$ of Section 30.

14 The land in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ was part of land settled by Luther Keach who
15 received a patent in 1873 for that land and the N $\frac{1}{2}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ of
16 Section 30. Prior to receiving the patent, the land was sold to Walter Bull
17 (in 1872). The deed transferring the land does not mention water rights or
18 irrigation ditches. There are no other documents in the record that address
19 the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30. Review of the 1937 photo shows that this land is
20 being irrigated, but does not assist in determining the source of water.
21 DE-679 (entered by Bull Canal Company) shows a diversion from Wilson Creek
22 in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30 to the Snowden Ross Ditch that goes south along
23 the line between the east and west half of Section 30. This ditch certainly
24 could have served the claimants land in the NE $\frac{1}{4}$ SW $\frac{1}{4}$. There is no indication
25

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1 of what lands were owned by Snowden or Ross. With the lands being cleared
2 and irrigated in 1937 and a diversion and ditch through the property in
3 1912, the Referee finds it is reasonable to conclude that the Eaton property
4 was being irrigated with water diverted from Wilson Creek prior to
5 December 31, 1932.

6 Based on the record, the Referee has concluded that rights were
7 established under the Riparian Doctrine to irrigate all of the claimants'
8 land, except that portion of Government Lot 2 northeast of the railroad
9 tracks (approximately 2 acres). The Referee is now faced with quantifying
10 that right.

11 Water Right Claim No. 050930 was filed by Harold Lamb asserting a right
12 to divert 6 cfs, 1800 acre-feet per year from Wilson Creek for the
13 irrigation of 125 acres in the NW $\frac{1}{4}$ of Section 30. The point of diversion is
14 in the NW $\frac{1}{4}$ of Section 19. Water Right Claim No. 050931 asserts a right to
15 divert 2 cfs, 600 acre-feet per year from Wilson Creek for the irrigation of
16 20 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30. The point of diversion is described
17 as being in the NW $\frac{1}{4}$ of Section 30.

18 Most of the evidence on water use was presented at the initial
19 evidentiary hearing. Richard C. Bain, Jr., P.E., prepared an engineering
20 report for the property, which is Exhibit DE-1515. In that report he
21 identified that 5.1 cfs is diverted from the upper diversion in Government
22 Lot 2 of Section 19 with 1.3 cfs conveyance loss, resulting in 3.8 cfs
23 reaching the property. Mr. Eaton testified that 2.7 cfs is diverted from
24 the second diversion, which is located either in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ or NW $\frac{1}{4}$ NE $\frac{1}{4}$ of
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1 Section 30 (the State's Investigation Report places it in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, while
2 WRC No. 050931 places it in the NE $\frac{1}{4}$ NW $\frac{1}{4}$). A total of 6.3 cfs then is used on
3 the property. Mr. Bain's report on page 4 discusses the irrigation patterns
4 on the fields and concludes that 1904 acre-feet per year is applied to the
5 land. This water duty is high, but Mr. Eaton testified that the land is
6 very porous and requires a lot of water to adequately irrigate. Considering
7 the location of the land in relation to the Yakima River, the Referee
8 understands the need for this much water. Much of the applied water will
9 fairly quickly migrate to the nearby Yakima River as subsurface flow. In
10 fact, there is a slough at the lower end of the property that captures some
11 of the return flow and the claimant pumps this water back onto a portion of
12 the land.

13 Mr. Eaton's testimony indicates that when Interstate-82 was constructed
14 in the 1970's the points of diversion that serve his land were changed by
15 the Highway Department. Aerial photos were placed in the record in an
16 attempt to show the historic points of diversion. It is clear to the
17 Referee that the points have changed some over the years, with exact
18 locations difficult to pin point. The diversions currently being used are
19 described in the RCW 90.14 claims that were filed for this property and
20 those locations shall be authorized herein.

21 Although the testimony has consistently stated that 140 acres are
22 irrigated, the Bain report indicates that 137.3 acres are irrigated. The
23 RCW 90.14 claim for the NE $\frac{1}{4}$ SW $\frac{1}{4}$ states that 20 acres are irrigated in that
24 area, leaving 117.3 acres irrigated in the NW $\frac{1}{4}$ of Section 30. That

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1 distinction is important since the land in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30 was
2 homesteaded separately and would have a different priority date than the
3 rest of the land. The Referee will proportionately divide the quantity of
4 water between the two rights that will be recommended for confirmation. The
5 lower diversion serves the land in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30, which is also
6 irrigated with return flow from the drain in the lower end of the property.
7 A separate right is not needed to use this return flow water, as it is
8 generated from irrigation on the claimants' land.

9 It is recommended that a right be confirmed under Court Claim No. 00909
10 with a June 30, 1872, date of priority for the diversion of 1.34 cubic feet
11 per second, 277.20 acre-feet per year from Wilson Creek for the irrigation
12 of 20 acres and stock watering in that portion of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30,
13 T. 17 N., R. 19 E.W.M. lying northeast of the Canyon Road. The point of
14 diversion shall be described as being 1100 feet south of the north quarter
15 corner of Section 30, in either the NE $\frac{1}{4}$ NW $\frac{1}{4}$ or the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 30.

16 It is also recommended that a right be confirmed with a June 30, 1882,
17 date of priority for the diversion from Wilson Creek of 6.46 cubic feet per
18 second, with 5.16 cfs being for irrigation and 1.3 cfs for conveyance loss,
19 1625.78 acre-feet per year for the irrigation of 117.3 acres and stock water
20 in the E $\frac{1}{4}$ NW $\frac{1}{4}$ and that portion of Government Lot 1 lying northeast of the
21 Canyon Road, in Section 30, T. 17 N., R. 19 E.W.M. Two points of diversion
22 shall be authorized, one in Government Lot 2 of Section 19 and the second in
23 either the NE $\frac{1}{4}$ NW $\frac{1}{4}$ or the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 30.

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1 COURT CLAIM NO. 00634 -- John N. Eaton
2 & Christi Eaton

3 The Eatons filed an exception to the Referee not recommending
4 confirmation of a water right for land they own in the E $\frac{1}{2}$ of Section 30, T.
5 17 N., R. 19 E.W.M. The Eatons are represented by Attorney John P. Gilreath
6 and Mr. Eaton testified at the supplemental hearing.

7 The Eatons own that portion of the E $\frac{1}{2}$ of Section 30, lying west of
8 Interstate 82. They irrigate approximately 80 acres from a diversion on
9 Wilson Creek located in SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 30 and a second diversion
10 located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30, T. 17 N., R. 19 E.W.M.. The Referee
11 concluded there was not sufficient evidence to conclude that a water right
12 had been established by use of Wilson Creek water prior to December 31,
13 1932, the date by which water had to be used in order for there to be a
14 right under the Riparian Doctrine. The documents in the record show that
15 Luther Keach acquired a patent that included the claimants' land in 1873 and
16 sold the land in 1882 to Walter Bull. In the late 1890's M. T. Simmons
17 acquired the property, DE-2012 and 2013. However, none of the deeds in the
18 record transferring the land make any mention of water rights or irrigating
19 ditches. In their exception the Eatons bring the Referee's attention to the
20 1912 Swigart survey that shows a headgate on Wilson Creek that feeds a ditch
21 that appears to be located where it would serve their property. A larger
22 version of the Swigart Survey was entered by Bull Canal Company as DE-679.
23 There is a headgate and diversion shown on the survey near the line between
24 the NW $\frac{1}{4}$ and NE $\frac{1}{4}$ of Section 30 that feeds the Snowden & Ross Ditch. That

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1 ditch flows south along that line and appears to flow through most of
2 Section 30. There is nothing in the record to show what lands were owned by
3 Snowden and Ross and it would be reasonable to conclude that the ditch was
4 serving lands owned or once owned by Snowden and/or Ross. The claimants put
5 in the record DE-767, which is a chain of title sheet for the SE $\frac{1}{4}$ of
6 Section 30 and neither name appears in that chain. It seems the land stayed
7 in the Simmons family until 1970, so there are no documents associated with
8 the property after it was acquired by M. T. Simmons. The Referee was able
9 to review a 1937 aerial photo for the land owned by the Eatons in the W $\frac{1}{4}$ of
10 Section 30 and that assisted in determining that water had been used on that
11 land. Unfortunately, that aerial photo does not extend into the E $\frac{1}{4}$ of
12 Section 30.

13 The claimant put into the record documents from Walter A. Bull v.
14 Martin Mehan. These documents show that Walter Bull owned approximately
15 1200 acres in Sections 19, 20 and 30, T. 17 N., R. 19 E.W.M. and as part of
16 that case was asserting rights to irrigate over 400 acres with water
17 diverted from Coleman Creek. The 400 acres were being used to grow timothy
18 hay and other tame grasses. The Referee believes that the intent was to
19 show that Walter Bull was one of the earliest settlers in this area and was
20 actively developing and irrigating his land. As pointed out in the Report
21 of Referee, the fact that Bull was claiming a right to irrigate over 400
22 acres from Coleman Creek does not assist in concluding that he was
23 irrigating part of his property from Wilson Creek. While it might be
24 reasonable to conclude that was happening due to the land being riparian to
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1 the creek, without some evidence that water was used prior to December 31,
2 1932, the Referee cannot recommend confirmation of a water right. Since it
3 is apparent that 1937 aerial photographs are available, a photograph showing
4 the E% of Section 30 would assist in that determination.

5
6 COURT CLAIM NO. 00635 -- Timothy E. Eckert
7 & Marcia N. Eckert

8 The Department of Ecology filed an exception to the quantity of water
9 recommended for confirmation under Court Claim No. 00635. The Referee
10 recommended that a right be confirmed to the Eckerts with a June 30, 1874,
11 date of priority for the use of 1.6 cubic feet per second in May and June
12 and 0.80 cubic foot per second in April and July 1 through October 31, 370
13 acre-feet per year for the irrigation of 80 acres and stock watering in the
14 W%NW% of Section 27, T. 18 N., R. 19 E.W.M. Water Right Claim No. 063562
15 filed pursuant to RCW 90.14 asserted a right to use 160 acre-feet per year.
16 Ecology's position in filing the exception is that if an error was made in
17 estimating the quantity of water being used, the claim should be amended
18 through the process in RCW 90.14.065. The Court granted Ecology's exception
19 and remanded the claim to allow the Eckerts to attempt to amend WRC No.
20 063562. The claimants appeared at the supplemental hearing through their
21 attorney, Jeff Slothower. Mr. Slothower offered Exhibit DE-1849, which is a
22 copy of Ecology's Order No. DE01WRHG-3143 granting the request to amend the
23 annual quantity of water in WRC No. 063562. With the amendment, the
24 quantities of water recommended for confirmation under Court Claim No. 00635
25 are consistent with WRC No. 063562. The Referee, therefore, recommends that

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1 the right recommended for confirmation on pages 184 and 624 of the Report of
2 Referee be affirmed.

3

4 COURT CLAIM NO. 02085 -- Ellensburg; City of

5 The City of Ellensburg, represented by Attorney Lawrence E. Martin,
6 filed an exception to the Referee not recommending that a right be confirmed
7 under Court Claim No. 02085. John Akers, the city's Public Works Director,
8 testified at the supplemental hearing.

9 The city is basing its claim on a water right established by C. A.
10 Sanders and addressed in the Sanders v. Bull decree. It is clear that in
11 1892 Sander transferred to Ellensburg Water Supply Company a portion of the
12 water right he had established with an 1881 priority date; that portion
13 being 225 inches or 4.5 cubic feet per second. The record is also now clear
14 that the Ellensburg Water Supply Company diverted water from Naneum Creek
15 and delivered it to the City of Ellensburg for use within the city. In 1911
16 Ellensburg Water Supply Company transferred the right to Ellensburg Gas and
17 Water Company and in 1933 Ellensburg Gas and Water Company transferred the
18 right to the City of Ellensburg. See Exhibits DE-1769, DE-1772 and
19 DE-1774. Transferred along with the water rights was the physical delivery
20 system. DE-1769 establishes that the water was used for in-house domestic
21 use. None of the documents reference how much water was actually being
22 diverted and/or delivered to the City of Ellensburg. Mr. Akers testified
23 that use of Naneum Creek water in the City of Ellensburg ceased in 1958 due
24 to the condition of the diversion and delivery system. The diversion

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1 structure is still in the creek, however, all the boards that would
2 facilitate diversion of water have been removed and the diversion is not
3 operational. Exhibit DE-1775 is a copy of excerpts from "A Water Supply
4 Study for the City of Ellensburg" prepared in April of 1968. Included in
5 the study is a chart showing alternate plans for water supply for the city.
6 One plan is for use of Naneum Creek. However, the chart indicates that plan
7 is "not feasible due to lack of adequate water supply . . . rejected not
8 physically feasible". The study also indicates on page 2.4 that "Nanum
9 Creek - Although the steam once constituted a primary source of water supply
10 for Ellensburg, it has not been used since 1958. Existing facilities (. .
11 .) are in a state of disrepair."

12 In spite of there not being a use of the water since 1958 and the
13 system being in a disrepair, the City of Ellensburg in 1972 filed a
14 Statement of Claim in the Carlson case and in 1971 filed Water Right Claim
15 (WRC) No. 005764 pursuant to the requirements of RCW 90.14. WRC No. 005764
16 claims a right to divert 4.5 cfs, 3,285 acre-feet per year from Naneum Creek
17 for municipal supply. The form indicates there is no water being used.

18 The question that the Referee must resolve is: Has the city abandoned
19 their water right to Naneum Creek? This water has not been used for over 40
20 years and the delivery system has not been maintained.

21 "The general rule in western water law is that nonuse is evidence of
22 intent to abandon, and long periods of nonuse raise a rebuttable
23 presumption of intent to abandon, thus shifting the burden of proof to
24 the holder of the water right to explain reasons for the nonuse."
Okanogan Wilderness League Inc. v. Town of Twisp et al., 133 Wn.2d 769,
781, 947 P.2d 732 (1997).

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1 Although the city has filed documents showing they still claim the
2 right, there has been no evidence offered to show that they are taking any
3 steps to reinitiate use of the right. Mr. Akers testified that the city
4 anticipates the incorporation of surface water treatment in the year 2006.
5 However, he did not testify that there was intent to treat and use water
6 diverted from Naneum Creek. In fact, the evidence shows that in 1968 the
7 city determined that use of Naneum Creek water was not feasible.

8 The evidence is overwhelming that Naneum Creek is overappropriated and
9 not all of the existing water rights are satisfied each year. For the past
10 40+ years the water users on the creek have been able to rely on a volume of
11 water in the creek based on the city not exercising its right. The impact
12 on these other water right holders would be significant should the city
13 resume diverting water from Naneum Creek.

14 Although the city is claiming a right to divert 4.5 cubic feet per
15 second, 3,285 acre-feet per year, there is no evidence in the record of the
16 quantity of water diverted and used when the system was operational. The
17 Supreme Court opinion in Habermann v. Ellensburg Gas & Water Co., 100 Wash.
18 229, 170 Pac. 571 (1918), which was discussed in the Report of Referee,
19 suggests that the 225 inches, or 4.5 cubic feet per second, was
20 appropriated; however, there is no evidence of how much water was used on an
21 annual basis or if that quantity was consistently diverted.

22 The Referee concludes that the city has not met its burden of proving
23 that the water right has not been abandoned and does not recommend
24 confirmation of a water right. If the city files an exception in order to
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1 rebut the presumption of abandonment caused by the long period of nonuse,
2 evidence of the annual quantity of water historically used is needed in
3 order to consider confirming a water right.

4 COURT CLAIM NO. 02296 -- Mark Herbert
5 & Kathy Herbert
6 Lyndell G. Hobbs
7 & Vicki Diehl-Hobbs

8 In the Report of Referee for Subbasin No. 9, the Referee concluded that
9 a right exists with an 1882 date of priority for the use of 0.75 cubic foot
10 per second, 150 acre-feet per year for the irrigation of 37.5 acres and
11 stock watering within the area owned by the claimants. However, there were
12 issues concerning RCW 90.14 compliance and the place of use for those 37.5
13 acres that needed to be addressed before a right could be confirmed.

14 Additionally, the Referee noted that several water right claim forms were
15 filed pursuant to RCW 90.14 for use of springs, but there was no testimony
16 about use of those springs. As a result the Referee did not recommend
17 confirmation of any rights under Court Claim No. 02296. The claimants filed
18 exception and asked to have the claim remanded to address the deficiencies
19 identified by the Referee. The claimants are represented by Attorney
20 Richard T. Cole and Mark Herbert and Lyndell Hobbs testified at the
hearing.

21 The claimants did not contest the number of acres that the Referee
22 determined could be confirmed a right. The Roberts decree stated that 25
23 inches or 25 acres were in the E $\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 10, T. 18 N.,
24 R. 19 E.W.M. Mr. Herbert, who owns this portion of the property, identified

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1 on DE-1896 approximately where those 25 acres are located, being the
2 SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 10. This was roughly drawn on
3 DE-1896 and is only 20 acres. The Referee will expand this area to include
4 an additional 5 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 10, specifically, the
5 W $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 10. The remaining 12.5 acres is in the N $\frac{1}{4}$ SE $\frac{1}{4}$ of
6 Section 10. Mr. Hobbs did not specifically testify to where those 12.5
7 acres are located, but did testify that water is taken from the Wilkins
8 Ditch and run across the north line of his property. The Referee concludes
9 from his testimony that the 12.5 acres lies in the E $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$.

10 Water Right Claim (WRC) No. 120734 was filed for the 25 acres that are
11 within the area owned by Mr. Herbert. The point of diversion described is
12 in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 10, T. 18 N., R. 19 E.W.M., which is where the
13 Wilkins Ditch enters the claimants property, rather than where it diverts
14 from the creek. Additionally, while claiming a right to irrigate 25 acres,
15 it only describes 20 acres in the place of use. The Referee finds that the
16 requirements of RCW 90.14 were substantially complied with and the claim
17 protects the right for the Herbert property in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of
18 Section 10 (See the Court's February 10, 1995, Memorandum Opinion Re: RCW
19 90.14 and Substantial Compliance). WRC No. 117960 asserts a right to
20 irrigate 21 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10. It also describes a point of
21 diversion where the ditch enters the property (in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 10,
22 T. 18 N., R. 19 E.W.M.), rather than where it diverts from the creek. The
23 Referee also finds that the requirements of RCW 90.14 were substantially
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1 complied with. The actual diversion from the creek is in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of
2 Section 28, T. 19 N., R. 19 E.W.M.

3 A right is also being asserted to use three springs that are located on
4 the portion of the property owned by the Herberts. Spring No 1 is located
5 in the northeast corner of the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 10, flows into the Wilkins
6 Ditch and is then used to irrigate about 5 acres. Springs No. 2 and 3 are
7 located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, flow into a delivery ditch that crosses the property,
8 and are used to irrigate about 15 acres. Additionally, livestock can drink
9 from the spring areas and the ditches. Livestock drinking directly from the
10 spring is a non-diversionary stock water use that is covered by the stock
11 water stipulation discussed on page 4 of the Report of Referee. Mr. Herbert
12 estimated that spring 1 flows 0.5 cfs, spring 2 flows 1 cfs and spring 3
13 flows 1.5 cfs. Both Mr. Herbert and Mr. Hobbs testified that the springs
14 flow all year, although the flow does fluctuate seasonally.

15 WRC No. 120736 was filed pursuant to RCW 90.14 for spring 1. It
16 asserts a right to use 0.01 cubic foot per second, 2 acre-feet per year for
17 stock watering in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 10. WRC No. 120737 was filed for
18 spring 2 and asserts a right to 0.03 cubic foot per second, 12 acre-feet per
19 year for stock watering and irrigation of 3 acres. WRC No. 120738 was filed
20 for spring 3 and asserts a right to 0.03 cubic foot per second, 12 acre-feet
21 per year for stock watering and irrigation of 3 acres. The place of water
22 use for springs 2 and 3 is in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 10. Clearly the only
23 right that was being asserted for spring 1 is stock watering.

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1 It generally is a challenge to provide evidence of when beneficial use
2 of springs first occurred. Both Mr. Hobbs and Mr. Herbert testified only
3 about current use of the springs. The land has been in the Hobbs family
4 since the early 1970's and the land where the springs are located was owned
5 by the Stampfly family for a long period. In order to recommend that a
6 right be confirmed for using the springs, the Referee needs some evidence of
7 historic use of these springs. Were they already developed and in use when
8 the Hobbs first acquired the land? If so, perhaps members of the Stampfly
9 family who still live in the area may be able to assist with providing
10 evidence of past use of the springs. Lacking that information, the Referee
11 cannot recommend that rights be confirmed for use of the springs.

12 The Referee does recommend confirmation of two rights under Court Claim
13 No. 02296, both with a priority date of June 30, 1882. The first right is
14 for the land owned by Mark and Kathy Herbert for the diversion from Naneum
15 Creek of 0.50 cubic foot per second in May and June and 0.25 cubic foot per
16 second in April and July 1 through October 15, 125 acre-feet per year for
17 the irrigation of 25 acres and stock watering in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, the
18 NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, and the W $\frac{1}{2}$ NE $\frac{1}{2}$ NE $\frac{1}{2}$ SW $\frac{1}{2}$ of Section 10, T. 18 N., R. 19 E.W.M. The
19 second right is recommended for Lyndell G. & Vicki Diehl Hobbs to divert
20 0.25 cubic foot per second in May and June and 0.125 cubic foot per second
21 in April and July 1 through October 15, 62.5 acre-feet per year for the
22 irrigation of 12.5 acres and stock watering in E $\frac{1}{2}$ NW $\frac{1}{2}$ SE $\frac{1}{2}$ of Section 10,
23 T. 18 N., R. 19 E.W.M.

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1 COURT CLAIM NO. 00185 -- Insurance Management, Inc.
2 (A) 00824 Central Washington University
3 (A) 02484 Victor Boykiw
4 & Darlene Boykiw
U.S. Department of the Interior

5 COURT CLAIM NO. 00900 -- G.R. Hughes; Enterprises LP
6 U.S. Department of the Interior

7 Court Claims No. 00185 and 00900 were filed asserting rights on
8 adjoining lands in Section 25, T. 17 N., R. 18 E.W.M. Claim No. 00185
9 asserts a right to irrigate 78 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 25 with
10 unidentified surface waters. The claim was originally filed by Insurance
11 Management, Inc., with Central Washington University Foundation being joined
12 to the claim as a result of acquiring the S $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 25. On
13 February 10, 1989, Victor Boykiw was substituted for Insurance Management,
14 Inc., and on January 17, 1995, the U. S. Department of Interior, Bureau of
15 Land Management was joined to the claim. Calvin and Rhonda Jansen filed
16 Court Claim No. 00900 for land in the S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 25, T. 17 N.,
17 R. 18 E.W.M. and in Sections 17 and 20, T. 17 N., R. 20 E.W.M. (the Section
18 17 and 20 lands are in Subbasin No. 10). On February 10, 1989, G. R. Hughes
19 Enterprises, LP were substituted for the Jansens for the land in Section 25,
20 and on January 17, 1995, the U. S. Department of Interior, Bureau of Land
Management was joined to that portion of the claim.

21 There was no appearance at the Subbasin No. 9 evidentiary hearing in
22 support of either of these two claims, resulting in the Referee recommending
23 that rights not be confirmed. The United States filed exceptions and asked
24 that the claims be remanded to the Referee to allow presentation of evidence

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1 for the lands the U.S. acquired. The Court granted the exception and the
2 claims were remanded to allow the United States to present their evidence.
3 No other portion of the claims were remanded. Charles E. O'Connell, Jr.,
4 Attorney with the Department of Justice, Indian Resources Section,
5 represented the United States at the supplemental hearing. Ralph Saunders,
6 with HKM Engineering, and Neal Hedges, Bureau of Land Management Wildlife
7 Biologist, testified at the supplemental hearing. David Papineau and
8 Michael Moeur, represented by Attorney John P. Gilreath, provided rebuttal
9 testimony.

10 The Bureau of Land Management acquired the E $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 25, except
11 that portion lying west of the slough which runs north and south through the
12 west side of the NE $\frac{1}{4}$ SE $\frac{1}{4}$, which is described in Court Claim No. 00185, and
13 the NE $\frac{1}{4}$ NW $\frac{1}{4}$, the north 600 feet of the NW $\frac{1}{4}$ SE $\frac{1}{4}$, the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and that portion of
14 the NE $\frac{1}{4}$ SE $\frac{1}{4}$ lying west of the slough which runs through the NE $\frac{1}{4}$ SE $\frac{1}{4}$, all in
15 Section 25, T. 17 N., R. 18 E.W.M., which is described in Court Claim No.
16 00900. Neal Hedges testified that the Bureau of Land Management acquired
17 the land in order to protect and expand the riparian habitat in this area.
18 The irrigation water will be used in the future to irrigate newly
19 established habitat areas and for bank stabilization. The reach of the
20 Yakima River adjacent to the land is important rainbow trout spawning
21 habitat.

22 Most of Section 25, including the land now owned by the United States,
23 was conveyed by the Federal government to the Northern Pacific Railroad,
24 with the patent issuing in 1896 (see DE-1012 entered by Michael Moeur).
25

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1 Very little information concerning the historical ownership of this land has
2 been put in the record. The Affidavit of Charles Stanfield, Docket No.
3 4507, provides some ownership history, stating that in the mid-1950's Mr.
4 Stanfield bought the easterly 30 acres in the S $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 25 from
5 Charles Stone and the westerly 50 acres from William McGrath. The NE $\frac{1}{4}$ SE $\frac{1}{4}$ of
6 Section 25 was owned by R. D. Ringer. Mr. Stanfield owned the S $\frac{1}{4}$ NE $\frac{1}{4}$ of
7 Section 25 until the mid-1970's when it was sold to Calvin Jansen. The
8 affidavit states that the easterly 30 acres in the S $\frac{1}{4}$ NE $\frac{1}{4}$ had not been
9 irrigated prior to when Mr. Stanfield purchased the property. The Referee
10 does not believe that the United States is asserting a right for the
11 easterly 30 acres in the S $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 25. It appears to the Referee
12 that a right is being asserted to irrigate most of the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 25,
13 and that portion of the E $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 25 lying easterly of the Yakima
14 River. Attached to Court Claim No. 00900 are three affidavits concerning
15 water rights for the land now owned by the Bureau of Land Management. The
16 affidavits were made on behalf of C. E. Stanfield in support of his efforts
17 to get a mortgage from the Federal Land Bank for the S $\frac{1}{4}$ NE $\frac{1}{4}$ and a portion of
18 the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 25. The affidavits were made by Lee G. Simmons, John
19 Hanks, Jr., and Ralph W. Waite and each state that the land has appurtenant
20 water rights from the Yakima River through what is called the Spring Branch
21 to the extent of one miners inch of water per acre for the whole farm. Mr.
22 Waite's affidavit states he personally knows that the water rights were
23 beneficially used since 1915 and Mr. Hanks states it has been used since
24 before 1913. The date on the affidavit by Mr. Simmons is not legible.

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1 The United States put into the record exhibits DE-1981 through
2 DE-1991. Each of the exhibits, except DE-1984, is three pages consisting of
3 an unaltered copy of an aerial photograph, a copy of the aerial photograph
4 with the parcels and irrigated tracts traced in colored pencil, and an
5 Autocad drawing of Section 25 showing the topography, including the Yakima
6 River and Spring Creek, the boundaries of the parcels acquired by the United
7 States and the irrigated land identified. Each exhibit number represents a
8 different year, beginning in 1937 and ending in 1998. The Referee finds
9 DE-1981 to be very compelling for determining the extent of the water right
10 established for the land that is now owned by the United States. Section 25
11 is riparian to Spring Creek and under the Riparian Doctrine, water had to be
12 put to beneficial use by December 31, 1932, in order for there to be a water
13 right under that doctrine. DE-1981 shows that within Tract 1 (in the SW $\frac{1}{4}$ NE $\frac{1}{4}$
14 of Section 25) there is 26.9 acres being irrigated. The Referee's review of
15 the aerial photograph leads to a conclusion that the remainder of Tract 1
16 was undeveloped land that had never been irrigated. Therefore, the extent
17 of the right that possibly could be recommended for confirmation within
18 Tract 1 is for the irrigation of 26.9 acres. Over the years, the area
19 irrigated has increased, with a maximum of 39 acres being irrigated. If the
20 additional land was irrigated with water diverted from Spring Creek, there
21 was no valid right for that irrigation. In 1998 (DE-1991), 26 acres were
22 being irrigated. Mr. Stanfield's affidavit does not suggest that the SW $\frac{1}{4}$ NE $\frac{1}{4}$
23 of Section 25 was not being irrigated during his ownership of the property
24 or after he sold it. Additionally, David Papineau testified to the land
25
26

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1 being irrigated with handlines at the time Calvin Jansen owned Tract 1. Mr.
2 Moeur testified to his belief that Tract 1 was irrigated from a sump or well
3 based on conversations he had with Mr. Stanfield. Mr. Stanfield's affidavit
4 did mention use of wells and that use of Spring Creek diminished when he
5 started using the wells, but the affidavit does not state that he ceased
6 irrigating from Spring Creek. In the record (DE-1977) is a copy of Ground
7 Water Certificate No. 1890-A, which issued to Charles E. Stanfield with a
8 August 31, 1953, date of priority. It authorized the withdrawal of 480
9 gallons per minute, 336 acre-feet per year for the irrigation of 84 acres in
10 the S $\frac{1}{2}$ NE $\frac{1}{4}$ and a portion of the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 25, T. 17 N., R. 18 E.W.M.
11 The Report of Examination indicates the existence of a vested right for
12 irrigation from Spring Creek.

13 In 1937 (DE-1981), 2.9 acres were being irrigated within Tract 2, which
14 is within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 25. That is the maximum number of acres
15 irrigated within Tract 2, with often there being only 1 acre irrigated.
16 However, Mr. Saunder's testimony suggests that Tract 2 was not actually
17 irrigated. His review of the aerial photographs revealed no evidence of an
18 irrigation system for this land; no surface features or sprinkler system
19 were apparent. It was Mr. Saunder's opinion that Tract 2 was wetted through
20 seepage water from Tract 1 and water seeping from a small pond that was
21 constructed on the land to the north. He found no evidence of a diversion
22 to an irrigation system for this land. The Referee has consistently
23 declined to recommend confirmation of water rights for land that is
24 subirrigated or simply benefits from seepage water from adjoining land. In
25

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1 order for there to be a water right, there needs to be an intentional
2 diversion of water from a specific source and water applied specifically for
3 irrigating. Based on the evidence presented at the supplemental hearing,
4 the Referee concludes that has never occurred for Tract 2.

5 Tract 3 (NE $\frac{1}{4}$ SE $\frac{1}{4}$ and N $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 25, northeast of Yakima River)
6 was being irrigated in 1937, with 20.2 acres being shown as irrigated on
7 DE-1981. In 1957 21.1 acres were irrigated and in 1962 20 acres were
8 irrigated. In 1971 and 1972 Tract 3 was not being irrigated, but in 1977,
9 1980 and 1984 12 to 13 acres were again being irrigated. The photos for
10 1991 and 1998 also again show Tract 3 not being irrigated. Comparing these
11 last two photos shows that the river is encroaching into Tract 3 rather
12 significantly, with very little area left to irrigate. Although there are
13 no photographs between 1991 and 1998, the testimony suggests that Tract 3
14 was not irrigated between those years. The field investigation that was
15 done by Ecology in 1988 indicates that none of the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 25,
16 which is where Tract 3 is located, was being irrigated. David Papineau
17 testified that he does not believe that Tract 3 had been irrigated for many
18 years. Charles Stanfield's affidavit in 1989 indicates that Tract 3 has not
19 been irrigated since 1975. That statement is inconsistent with the aerial
20 photographs that are in evidence for the years 1977, 1980 and 1984. The
21 Referee has reviewed those photographs and agrees with Mr. Saunders analysis
22 that the land in Tract 3 was being irrigated. The aerial photos show
23 ditches that appear to be carrying water coming from Spring Creek across
24 Tract 3. It would be reasonable to conclude those ditches were being used

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1 to irrigate Tract 3. RCW 90.14.160 - .180 provides for relinquishment of a
2 water right or portion of a right if it is not exercised for five successive
3 years. RCW 90.14.140 provides several sufficient causes for non-use of the
4 water that would prevent relinquishment. The sufficient causes include
5 drought or other unavailability of water. The Referee is aware of drought
6 conditions in several years between 1985 and 1998, however, the claimant has
7 not asserted that the drought was the reason the water right was not
8 exercised. The evidence that has been presented leads the Referee to
9 conclude that any right that may have been appurtenant to Tract 3 has
10 relinquished due to more than five consecutive years of non-use between 1985
11 and 1998 and potentially prior to 1977.

12 Water Right Claim No. 161930 was filed by Spring Creek Cattle Company,
13 Inc., pursuant to the requirements of RCW 90.14. It asserts a right to
14 divert from the Yakima River and Farrell Slough 6 cubic feet per second, 720
15 acre-feet per year for the irrigation of 120 acres and stock water in the
16 NE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ (18 acres) and NE $\frac{1}{4}$ SE $\frac{1}{4}$ (4 acres) all in
17 Section 25, T. 17 N., R. 18 E.W.M. The NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25 is not owned by
18 the Bureau of Land Management, but is owned by Michael Moeur. The point of
19 diversion described is 1460 feet west and 300 feet north of the southeast
20 corner of Section 24, being in the SE $\frac{1}{4}$ of Section 24, T. 17 N., R. 20
21 E.W.M. In 1985 the Spring Creek Cattle Company filed an application for
22 change to correct the error made in the range number for the point of
23 diversion. That application for change was approved through a Findings of
24 Fact, Conclusions and Recommendations by Ecology dated December 16, 1985
25

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1 (see DE-1978). The Findings of Fact found that at the time of the field
2 investigation, only 10 acres were being irrigated and raised the
3 possibility that any right in excess of the 10 acres potentially could have
4 been relinquished. An aerial photo is not in the record for 1985, however,
5 in 1984 51 acres were being irrigated, so the Referee is convinced there has
6 been no relinquishment on Tract 1. Certificate of Change recorded in Volume
7 104, page 275 issued on August 24, 1987, changing the point of diversion to
8 a point 2460 feet west and 300 feet north of the southeast corner of
9 Section 24, being within the SE $\frac{1}{4}$ of Section 24, T. 17 N., R. 18 E.W.M. That
10 is the point of diversion that shall be authorized herein.

11 The United States did not put in any evidence of the quantity of water
12 being diverted to irrigate the land. The Findings of Fact for the
13 application for change allowed for the use of 0.02 cubic foot per second for
14 each acre irrigated. Additionally, the affidavits that were attached to
15 Court Claim No. 0900 state the land had a right to one miner's inch per
16 acre, which is also 0.02 cubic foot per second per acre. Lastly, the Report
17 of Referee for Subbasin No. 9, on page two, stated that if the claimant was
18 not able to provide evidence of how much water was being used on the
19 property, 0.02 cubic foot per second, 5 acre-feet per year for each
20 irrigated acre would be used.

21 Therefore, the Referee recommends that a right be confirmed under Court
22 Claim No. 0900 to the United States Department of Interior, Bureau of Land
23 Management, with a May 24, 1884, date of priority for the diversion of 0.52
24 cubic foot per second, 130 acre-feet per year for the irrigation of 26 acres

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1 in the SW^{1/4}NE^{1/4} of Section 25, T. 17 N., R. 18 E.W.M., except the northerly
2 265 feet thereof. The point of diversion shall be in the SE^{1/4} of Section 24,
3 as described in the certificate of changed previously discussed. The
4 evidence presented at the supplemental hearing was not clear on whether
5 livestock have been on the property or whether the United States is
6 asserting a right for diversionary stock watering. A portion of the land is
7 adjacent to the Yakima River, and livestock drinking directly from the river
8 would be a non-diversionary stock water use covered by the stipulation
9 discussed on page 4 of the Report of Referee for Subbasin No. 9.

10 No other rights are recommended for confirmation under either Court
11 Claim No. 00185 or 00900.

12
13 COURT CLAIM NO. 00930 -- Harold W. Jenkins
14 & Gladys D. Jenkins

15 COURT CLAIM NO. 00932 -- Patrick M. Jenkins
16 & Vicki K. Jenkins

17 The Referee, in the Report of Referee for Subbasin No. 9, recommended
18 that several water rights be confirmed to the Jenkins under Court Claims No.
19 00930 and 00932. The only exception taken to those recommendations was by
20 the Department of Ecology. Ecology took exception to the priority date of
21 May 1, 1905, recommended for the water right described on pages 271 and 709
22 of the Report of Referee. Ecology pointed out that the Referee did not
23 follow the convention for assigning priority dates when the month and day
24 for the priority date is not established by the record. That convention is
25 found on page 5 of the Report of Referee. When the record does not provide

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1 evidence beyond the appropriate year for the priority date, the convention
2 is to use June 30, the midpoint of the year. The Referee did not do that,
3 rather choosing May 1.

4 Attorney Lawrence E. Martin appeared at the supplemental hearing
5 representing the Jenkins. No additional evidence was put in the record.
6 Mr. Martin argued that the date used by the Referee is reasonable and urged
7 that it not be changed. However, there continues to be no basis in the
8 record for using May 1, rather than June 30, which has been the Referee's
9 practice.

10 With no additional evidence in the record to support the May 1 date,
11 the Referee concludes that the appropriate date should be June 30, 1905.
12 However, a June 30, 1905, date of priority places the right subsequent to
13 the May 10, 1905, Federal withdrawal of the unappropriated water rights in
14 the basin. Since Wilson Creek flows into the Yakima River below all of the
15 storage reservoirs that are part of the Yakima Project, flow from this creek
16 cannot be stored by the Federal government for delivery to its contract
17 holders. However, Wilson Creek does flow into the river and any unused
18 water will contribute to the natural flow in the river that is also used by
19 the Federal contract holders. During the spring runoff, there generally is
20 sufficient natural flow water in the river to satisfy all rights. However,
21 in severe drought conditions that may not be the case. Mr. Jenkins
22 testimony indicates that in many years the creek dries up by mid-summer.
23 Considering the priority of this right, water may not be available for use
24 anyway. The claimants should be aware that during the 2001 irrigation

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1 season (a drought year), several irrigation districts sought from the Court
2 an order to cease diversion for all water rights with a priority date after
3 May 10, 1905, the date of the Federal withdrawal and the priority date for
4 water rights established under the withdrawal. On June 28, 2001, the Order
5 was signed by the court, see Order on Show Cause RE: Motion to Limit Post
6 1905 Water Rights, (Docket No. 15248).

7
8 COURT CLAIM NO. 00991 -- Kayser Ranch, Inc.

9 Kayser Ranch, Inc., represented by Attorney James Adams, took several
10 exceptions (a total of nine exceptions) to the recommendations of the
11 Referee concerning Court Claim No. 00991. Exceptions No. 7 and 8 were
12 withdrawn at the Subbasin No. 9 exception hearing and will not be considered
13 further. Exceptions 1 through 6 and 9 were remanded to the Referee and Mark
14 Kayser testified at the supplemental hearing. Morrison/Morrison Ranch took
15 exception to one of the rights recommended for confirmation under Court
16 Claim No. 00991. The Court denied that exception on May 24, 2001, in its
17 Memorandum Opinion and Order Re: Morrison's Exceptions to Report of Referee
18 (Subbasin No. 9 Wilson-Naneum Creek).

19 Exception No. 1 is to the Referee not recommending that a right be
20 confirmed based on P. H. Adams purchasing water from Peter Kuchen. During
21 the initial evaluation of testimony and evidence, nothing was in the record
22 showing the land owned by Peter Kuchen. The language in the W. R. Thomas v.
23 James T. Roberts, et al. (Roberts) Findings of Fact lead the Referee to
24 conclude that Adams had purchased only the water right from Kuchen and

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1 additional information was needed concerning what lands the right was
2 initially attached and when the purchase occurred. At the supplemental
3 hearing documents were presented to show that Kuchen previously owned
4 property that was owned by P. H. Adams at the time of the Roberts action and
5 is now owned by Kayser. Documents that are part of DE-1755 show that Peter
6 Kuchen owned the SE $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ and N $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 34, T. 19 N.,
7 R. 19 E.W.M. Already in the record were documents showing that Kuchen
8 acquired from Burlington Northern Railroad all of the NW $\frac{1}{4}$ of Section 3,
9 except the SW $\frac{1}{4}$ NW $\frac{1}{4}$. The Roberts Findings of Fact and Decree recognized a
10 right on this property for 160 inches, which would be sufficient water to
11 irrigate 160 acres. The right was initiated in 1887, which would be the
12 priority date. Therefore, the Referee concludes that a right exists with
13 the priority date of June 30, 1887, for the use of 3.20 cubic feet per
14 second for the irrigation of 160 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ and N $\frac{1}{4}$ SE $\frac{1}{4}$ of
15 Section 34 and the NW $\frac{1}{4}$ (except the SW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 3. Mr. Kayser did not
16 testify to the number of acres irrigated in Section 34, but review of SE-2
17 leads the Referee to conclude that approximately 125 acres are irrigated in
18 that part of the SE $\frac{1}{4}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ of Section 34 lying below the Adams Ditch.
19 The remaining 35 acres of this right would be appurtenant to the NW $\frac{1}{4}$ of
20 Section 3. Mr. Kayser testified that all of the NW $\frac{1}{4}$ of Section 3 is
21 irrigated with water diverted from Naneum Creek. However, none of the water
22 right claims filed pursuant to RCW 90.14 described the claimants land in the
23 NW $\frac{1}{4}$ of Section 3. The Referee cannot recommend confirmation of a water
24 right for lands if there was no RCW 90.14 claim filed to protect the right

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1 (see RCW 90.14.070, failure to file a claim waives and relinquishes any
2 right that may have existed).

3 With a June 30, 1887, date of priority, a right to divert 2.5 cfs in
4 May and June and 1.25 cfs in April and July 1 through October 15, 600
5 acre-feet per year from Wilson-Naneum Creek for the irrigation of 125 acres
6 and stock watering in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, and that portion of the SE $\frac{1}{4}$ lying below
7 Adams Ditch, all in Section 34, T. 19 N., R. 19 E.W.M. The point of
8 diversion shall be into the Adams Ditch in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ and Keister Ditch in
9 the NW $\frac{1}{4}$ SW $\frac{1}{4}$, both in Section 28, T. 19 N., R. 19 E.W.M.

10 Kaysers second and third exceptions are to the Referee recommending
11 that a water right be confirmed to irrigate lands in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of
12 Section 3. According to Mr. Kayser's testimony, the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 3 has
13 never been irrigated. The right should have been awarded for irrigation of
14 the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 3, lands that have historically been irrigated with
15 water diverted from Naneum Creek. However, Ecology responds, the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of
16 Section 3 is not described on any of the water right claims filed pursuant
17 to RCW 90.14. The Referee has reviewed the numerous claims filed and agrees
18 that the none of the claims filed described lands in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 3
19 as being irrigated. Part of the documents submitted in support of the
20 claimant's exceptions is a copy of a letter sent to Yakima County Superior
21 Court in 1989. It describes an error of omission in the Pendente Lite
22 adjudication resulting in there not being a water right recognized for two
23 pieces of their property. Property #1 is legally described as the NW $\frac{1}{4}$ of
24 Section 3, T. 18 N., R. 19 E.W.M. for which they claim a water right from

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1 case #4121 in the Superior Court of Kittitas County, "Sanders v. Bull". The
2 legal description of property number 2 is the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 3, T. 18 N.,
3 R. 19 E.W.M. They claimed a right through Case #5967 in the Superior Court
4 of Kittitas County, knowns as "Wilkins Ditch Co., v. F. C. Drake." The
5 letter concludes with the stated hope that the letter will fill the criteria
6 to get his information included when subbasin 9 comes under advisement. The
7 Court is asked to send a copy to Forrest Tevebaugh with Ecology's
8 adjudication section.

9 The claimant seems to be suggesting that this letter was an attempt to
10 amend a water right claim filed pursuant to RCW 90.14. However, it does not
11 reference a claim number, nor does it even mention RCW 90.14. The Court
12 ruled in its Order on Exceptions that sending a letter to the Court with a
13 copy to Ecology does not constitute compliance with the amendment procedures
14 in RCW 90.14.065. If the claimant continues to seek to have a right
15 confirmed for irrigating the NW $\frac{1}{4}$ and SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 3, then an
16 application to amend one of the RCW 90.14 claims needs to be filed with
17 Ecology. Since there is no RCW 90.14 claim for the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 3 and
18 the claimant has testified that the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 3 has never been
19 irrigated, the Referee withdraws the recommendation to confirm the right
20 described in the Report of Referee for Subbasin No. 9, on page 280, lines 5 $\frac{1}{2}$
21 - 9 $\frac{1}{2}$, and on page 649, lines 1 - 10. If the claimant is successful in
22 amending the 90.14 claim, evidence of when this land was first irrigated and
23 whether a portion of the transferred water right is appurtenant should be
24 provided.

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1 Exception No. 4 seeks confirmation of a water right to irrigate the
2 NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 2. Mr. Kayser testified at the supplemental hearing that
3 the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 2 is irrigated with the same water as the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of
4 Section 2 and that an error was made in the place of use description on page
5 636 of the Report of Referee. He contends the correct place of water use
6 should be the NE $\frac{1}{4}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 2 (not the NE $\frac{1}{4}$ NW $\frac{1}{4}$ and N $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ as
7 appears on lines 9 $\frac{1}{2}$ and 10). The Referee agrees that an error was made in
8 describing the place of water use on page 636. Referring to page 280, lines
9 1 - 4, the intent of the Referee was to recommend a right with a place of
10 water use in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ and N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2. Additional evidence
11 presented at the supplemental hearing and review of the evidence presented
12 at the first hearing leads the Referee to conclude that a right actually
13 exists for the entire E $\frac{1}{2}$ NW $\frac{1}{4}$ and W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 2 for the irrigation of 100
14 acres, see page 274, line 17 $\frac{1}{2}$, of the Report of Referee. The Kaysers have
15 continued to irrigate 100 acres in this area, leading the Referee to modify
16 the recommendation on page 636 to the following:
17

18 With a priority date of June 30, 1887, a right to divert 2.0 cfs in May
19 and June, 1.0 cfs in April and July 1 through October 15, 500 acre-feet per
20 year for the irrigation of 100 acres in the E $\frac{1}{2}$ NW $\frac{1}{4}$ and W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 2,
21 T. 18 N., R. 19 E.W.M. The point of diversion shall be into the Adams Ditch
22 in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, T. 19 N., R. 19 E.W.M.

23 Although the claimant testified that the NW $\frac{1}{4}$ NW $\frac{1}{4}$ has been irrigated with
24 the same water as the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 2, he offered no foundation for a
25 water right for this land. Further review of the Ferguson Findings of Fact

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1 show that Eric Larsen owned the W $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 2, along with the W $\frac{1}{4}$ SW $\frac{1}{4}$ of
2 Section 2 and the S $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3. The NW $\frac{1}{4}$ NW $\frac{1}{4}$ is part of the 160 acres
3 Larsen was irrigating at the time of the Ferguson proceeding. The decree
4 carried a special provision for the rights awarded to Keister and Larsen;
5 finding that 300 inches were used until June 15 and 150 inches used
6 thereafter. This results in less than one inch of water per irrigated acre
7 being used -- 0.75 inch per acre May 1 to June 15 and 0.375 inch per acre
8 being used after June 15. The priority date for this right is 1880. The
9 Referee estimates that Kayser is irrigating 50 acres within the W $\frac{1}{4}$ NW $\frac{1}{4}$ of
10 Section 2 and the portion of the right that would be appurtenant would be
11 0.75 cubic foot per second May 1 to June 15 and 0.375 cfs the rest of the
12 irrigation season.

13 With a June 30, 1880, priority date, a right to divert 0.75 cubic foot
14 per second May 1 through June 15 and 0.375 cubic foot per second in April
15 and June 16 through October 15, 180 acre-feet per year from Wilson-Naneum
16 Creek for the irrigation of 50 acres and stock watering in that portion of
17 the W $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 2, T. 18 N., R. 19 E.W.M. lying west of Schnebly
18 Creek. The point of diversion shall be into the Keister Ditch in the NW $\frac{1}{4}$ SW $\frac{1}{4}$
19 and Adams in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ both in Section 28, T. 19 N., R. 19 E.W.M.

20 Exception No. 5 asks that the point of diversion for irrigated lands in
21 the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and E $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 3 include the Adams Ditch and Keister/Bull
22 Ditch. The Bull Ditch is a lateral off of the Keister Ditch, so the actual
23 point of diversion for the Bull Ditch is the diversion into the Keister
24 Ditch. According to Mr. Kayser's testimony, a portion of the land described
25

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1 is above both the Keister and Bull Ditches and has been irrigated
2 historically from the Adams Ditch. The Referee has reviewed Exhibit SE-2
3 and the map supports Mr. Kayser's testimony. WRC No. 118061 describes the
4 location for both the Keister and Adams Ditches, so it is appropriate to
5 include the point of diversion into the Keister Ditch. However, when
6 reviewing the water right claims filed pursuant to RCW 90.14 in order to
7 determine whether the diversion into the Keister Ditch was described, the
8 Referee discovered (as stated when addressing exception 1) that none of the
9 water right claims describe the NW $\frac{1}{4}$ of Section 3 within the place of water
10 use. It was an error for the Referee to include any of the NW $\frac{1}{4}$ of
11 Section 3 in the water rights recommended for confirmation in the original
12 Report of Referee. The Referee withdraws the recommendation to confirm a
13 right to irrigate the NW $\frac{1}{4}$ of Section 3 as described on page 605, line 22.
14 There is other land within the Kayser ownership that the Referee has not
15 previously been able to confirm a right due to there not being a basis for
16 the right established through the evidence. The right that was recommended
17 on page 605 was based on a right being transferred in 1911 to the lands now
18 owned by Kayser. The record was not clear as to which of Kayser's irrigated
19 lands the right was transferred, so the Referee identified lands without any
20 other water right and recommended that the transferred right be confirmed
21 for those lands. Kayser Ranch is irrigating 40 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of
22 Section 3 and 120 acres in that portion of the S $\frac{1}{2}$ S $\frac{1}{2}$ of Section 35, T. 19 N.,
23 R. 19 E.W.M. lying south of Adams Ditch and the Referee was not able to
24 identify any water right appurtenant to those lands. The Referee amends the
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1 place of use on page 605, line 22, to delete the NW $\frac{1}{4}$ of Section 3 and
2 replace it with the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 3 and that portion of the S $\frac{1}{2}$ S $\frac{1}{2}$ of
3 Section 35, T. 19 N., R. 19 E.W.M. lying south of the Adams Ditch. As
4 requested in exception 5, the authorized points of diversion shall be to the
5 Adams Ditch and the Keister Ditch.

Exception No. 6 is to the Referee not recommending that a water right be confirmed for the N~~%SE%~~ of Section 3. Mr. Kayser's testimony was that this land has historically been irrigated from Naneum Creek and that use continues. The Referee reviewed the prior record and this land may have been overlooked, as the claimant's opening statement did not indicate that a right was being asserted to irrigate it with waters diverted from Naneum Creek. As far as the Referee can determine, there were no water rights awarded for this land in any of the prior decrees for the basin. It may be that one of the water rights purchased and transferred to the prior owner of the land is being excercised on this land. However, the Referee has reviewed all of the RCW 90.14 claims filed and none of them include the N~~%SE%~~ of Section 3 within the place of use. As previously stated, failure to file a water right claim pursuant to RCW 90.14 waives and relinquishes any right that may have existed (RCW 90.14.071).

20 Through the additional evidence presented at the supplemental hearing,
21 the Referee is able to determine that water rights be exist for the
22 irrigation of 720 acres owned by Kayser Ranch. The Referee is not able to
23 recommend that rights be awarded for the irrigation of land in the NW $\frac{1}{4}$, the
24 SW $\frac{1}{4}$ SW $\frac{1}{4}$ and the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 3 due to there being no RCW 90.14 claims for

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1 that land. As a result the recommendations made by the Referee are for the
2 irrigation of a total of 635 acres. If the claimant is successful in
3 attempts to modify the place of use on any of the RCW 90.14 claims, it is
4 possible that additional rights could be recommended or the existing
5 recommendations modified. Any requests to amend the water rights claims
6 should be pursued as quickly as possible so that the Court can consider them
7 during the exception hearing.

8 In additionl to the recommendations previously made in this report for
9 Kayser Ranch, the Referee recommends that the following water rights be
10 awarded under Court Claim No. 00991:

11 With a priority date of June 30, 1872, a right to divert 3.6 cubic feet
12 per second in May and June, 1.8 cubic feet per second in April and July 1
13 through October 15, 900 acre-feet per year from Wilson-Naneum Creek for the
14 irrigation of 180 acres and stock watering in that part of the W $\frac{1}{4}$ NW $\frac{1}{4}$ of
15 Section 2 lying east of Schnebly Creek, the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 3, both in
16 T. 18 N., R. 19 E.W.M. and that portion of the S $\frac{1}{4}$ S $\frac{1}{4}$ of Section 35 lying
17 south of the Adams Ditch, T. 19 N., R. 19 E.W.M. The point of diversion
18 shall be into the Adams Ditch in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, T. 19 N.,
19 R. 19 E.W.M.

20 With a priority date of June 30, 1880, a right to divert 2.4 cfs in May
21 and June and 1.2 cfs in April and July 1 through October 15, 600 acre-feet
22 per year from Wilson-Naneum Creek for the irrigation of 120 acres and stock
23 watering in the N $\frac{1}{4}$ NE $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 3, T. 18 N., R. 19 E.W.M. The

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1 point of diversion shall be into the Keister Ditch in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ and Adams
2 Ditch in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ both in Section 28, T. 19 N., R. 19 E.W.M.

3 The last exception by Kayser Ranch seeks to have a right confirmed for
4 use of flood water. Mr. Kayser testified that when there is a lot of water
5 in the creek during spring and periods of high snow melt, there is flood
6 water in the creek and it is diverted and used. The Referee has the
7 impression from comments made at the supplemental hearing that this is a
8 common practice. Mention was made of the need to fill ditches to lessen the
9 damage caused by high creek flows and flooding conditions. Mr. Kayser
10 testified that his family has always operated in this manner, however, his
11 family has only farmed in this area since 1960. The Referee has no doubt
12 use of this water is a very common practice. In fact most of the decrees in
13 this part of Kittitas County recognize these characteristics of the creek,
14 by cutting in half on July 1 the quantity of water allowed to be diverted.
15 However, the decrees limited the diversion in May and June to one inch per
16 acre and reduced the diversion to one-half inch for each irrigated acre.
17 Mr. Kayser presented nothing to show that a right had been established after
18 entry of the decrees for use of this flood water. In order for there to be
19 a right, the use had to begin prior to 1917, but after entry of the decrees,
20 since the decrees did not award rights for use of this flood water. That
21 evidence is lacking.

22 Kayser Ranch had an exception that asked to have the diversion into
23 Adams Ditch authorized as a point of diversion on all of the water rights
24 recommended for confirmation. That exception was withdrawn. With the
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1 additional evidence that was put in the record resulting in modifications of
2 the original recommendations, many of the rights recommended for
3 confirmation now authorize use of the point of diversion into the Adams
4 Ditch. That diversion was described on the water right claims filed
5 pursuant to RCW 90.14 for the lands for which rights are recommended.

Gary Griffith/Haidas Ranches (Frank Jones), et. al. and Richard Van de Graaf filed exceptions to the Referee's recommendation that water rights not be awarded under Court Claim No. 01232. In addition to Gary Griffith and Haidas Ranches being joined to the claim, Lois Yoshida has also been joined as a party to the claim. Attorney Richard T. Cole represents these three claimants. Richard Van de Graaf, who is represented by Attorney Lawrence E. Martin, also filed an exception; however, he has not been formally joined to the claim and, therefore, has no standing to assert a right under the claim. Testifying at the supplemental hearing were Gary Griffith, Frank Jones, Lois Yoshida, Richard Van de Graaf, Dick Daniels, who farms for Mr. Van de Graaf, and Les Sperline, who was employed by prior owners as a farm laborer and irrigator from 1949 to 1990.

22 The Referee did not recommend that water rights be confirmed for the
23 property due to the lack of evidence to show that water rights were
24 established for the claimed water sources under either the Prior
Appropriation or Riparian Doctrines. Even though the land described in

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1 Court Claim No. 01232 separated from Federal ownership as a result of
2 several different homesteads and resulting patents, it appears to the
3 Referee that it is all riparian to either Whiskey Creek or Dry Creek (a
4 branch of Wilson Creek). However, there would be different priority dates
5 for any water rights based on when steps were first taken to sever the
6 homesteads from Federal ownership. In order for there to be a water right
7 under the Riparian Doctrine, there needs to be evidence that the land
8 separated from Federal ownership prior to June 6, 1917, and water had to be
9 put to beneficial use prior to December 31, 1932, see Department of Ecology
10 v. Abbott, 103 Wn.2d 686, 694 P.2d 1071 (1985). A right could be
11 established under the Prior Appropriation Doctrine for any land that did not
12 separate from Federal ownership prior to June 6, 1917, if there is evidence
13 that water was appropriated and put to beneficial use prior to that date.
14 The Referee will address each homestead and the evidence put in the record
15 for that portion of the land separately.

16 All of Section 13, T. 18 N., R. 18 E.W.M., except a small tract in the
17 NW $\frac{1}{4}$ SW $\frac{1}{4}$, is described in the Court claim. All of Section 13 was conveyed
18 by the Federal government to Northern Pacific Railroad for potential
19 construction of a railway. The railroad eventually sold all of Section 13
20 to five individuals as follows: On June 25, 1887, sold the SE $\frac{1}{4}$ to Silas
21 Powers; on March 4, 1889, sold the S $\frac{1}{2}$ SW $\frac{1}{4}$ to William A. Griggs; on April 7,
22 1890, sold the NW $\frac{1}{4}$ to Manfred Hicks; on September 17, 1892, sold the N $\frac{1}{2}$ SW $\frac{1}{4}$
23 to a Devore (first name not provided); and on June 26, 1893, sold the NE $\frac{1}{4}$ to
24 John Pollock. Section 13 is riparian to both Whiskey Creek and Dry Creek.

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1 The priority for Riparian Rights on former railroad land in Kittitas County
2 is May 24, 1884, the date that the map of definite location was filed by the
3 railroad. Four water right notices or affidavits were put in the record as
4 part of DE-1784 in an attempt to show that a water right was established for
5 the claimants' land in Section 13. The first two, by W. C. Cornell and N.
6 Miller (or Mueller) were filed on May 31, 1890, and claim rights to water in
7 the Powers and Davidson Ditch, which diverts water from Dry Creek near the
8 northeast corner of Section 13. The capacity of the ditch is 300 inches and
9 Cornell was claiming a right to 160 inches to be used in the NE $\frac{1}{4}$ of
10 Section 24, T. 18 N., R. 18 E.W.M. -- land that is not owned by any of the
11 claimants. The second is an affidavit that also asserts a right to 160
12 inches from Dry Creek for Herman Schwingler for use on lands he owned in the
13 W $\frac{1}{2}$ NE $\frac{1}{4}$ and SE $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 24 -- again land that is not owned by the
14 claimants herein. A right is also claimed for use of an outlet branch of
15 Dry Creek arising from Dry Creek near the southwest corner of the SE $\frac{1}{4}$ of
16 Section 13, again for use on the lands owned by Herman Schwingler. Since
17 the rights are claimed for use on lands not owned by the parties to Court
18 Claim No. 01232, they are of no assistance in proving that a right exists
19 for the claimants' land.

20 The next notice is less clear. It states that N. Miller claims to be
21 entitled to 150 inches of water from the S. D. Powers Ditch, which arises
22 from Dry Creek near the southeast corner of Section 18 and runs west about
23 one-half mile and terminates in the SE $\frac{1}{4}$ of Section 13. However, a ditch
24 running one-half mile from the southeast corner of Section 18 would

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1 terminate in the SW $\frac{1}{4}$ of Section 18, not the SE $\frac{1}{4}$ of Section 13. It appears
2 that in 1890 the SE $\frac{1}{4}$ of Section 13 was owned by Jacob Mueller, not a N.
3 Miller. There are two different names on this notice, one is N. Miller and
4 then at the bottom is N. Mueller. The copy of the notice that is in the
5 record is a typed version of what was undoubtedly a handwritten notice. The
6 two different names and the description of where the ditch ends could be the
7 result of typographical errors when it was typed. The handwritten document
8 might answer the questions about the true name of the individual filing the
9 notice and the section in which the ditch terminated.

10 The fourth notice is by N. Mueller and states that he claims a right to
11 40 inches of water in the Powers and Davidson Ditch. The ditch diverts from
12 Dry Creek in the northeast corner of the SE $\frac{1}{4}$ of Section 13 and runs in a
13 southerly direction to the claimants ranch in the SE $\frac{1}{4}$ of Section 13. It
14 also states that water was appropriated in the Spring of 1881. The capacity
15 of the ditch was 300 inches (which is consistent with the first two
16 documents for lands in Section 24). The notice also states that 40 acres
17 (which would be one inch per acre) below the ditch was being covered by the
18 claim and irrigated. The Referee finds that this appropriation supports a
19 conclusion that a right was established for the diversion of 40 inches or
20 0.80 cubic foot per second from Dry Creek for the irrigation of 40 acres in
21 the SE $\frac{1}{4}$ of Section 13. This is the only document in the record for
22 Section 13 that clearly establishes the existence of a water right. In the
23 record as part of Exhibit DE-1787 and 1789 are deeds transferring portions of
24 Section 13. Most of the deeds convey the land along with "all ditches and
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1 water rights appurtenant thereto". That language suggests there may be
2 ditches constructed on the lands and a water right. However, there is
3 nothing to suggest the extent of the right that was developed and put to
4 beneficial use. DE-1789 includes copies of leases for portions of Section
5 13. Included in the leases is the statement that the leasee is to "Farm
6 said land in a manner consistent with good husbandry . . . and to irrigate
7 all of said grass to the best advantage so far as water is available
8 therefor; . . ." This language suggests to the Referee that sufficient
9 water was not available to irrigate all of the land. Mr. Sperline was able
10 to testify to the land being irrigated from 1949 to the present. However,
11 by the time Mr. Sperline became familiar with the property the Kittitas
12 Reclamation District (KRD) had constructed the Highline Canal and the land
13 was being assessed by KRD and irrigated with water delivered by the KRD.
14 The testimony by several Subbasin No. 9 claimants has made it clear that
15 after the High Line Canal was constructed and delivery of water from the
16 canal began around 1933, the flow in the various creeks increased as a
17 result of seepage from the canal and return flow water from lands irrigated
18 with KRD water flowing into the creek. The Referee cannot award water
19 rights for use of Yakima Project water, as it is not public water for which
20 a right could be established. See the Court's Memorandum Opinion Re:
21 Subbasin 8 Exceptions of Ivan adn Mildred Hutchinson, Court Claim No. 0876,
22 and Vernon G. and Ellen F. Meyer Court Claim No. 1875; Theiline Scheumann &
23 Grousemont Farm, Claim No. 1335 filed on January 31, 1995.

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1 Within Section 13 there appears to be over 400 acres that are being
2 irrigated with a portion of the water coming from either Whiskey Creek or
3 Dry Creek. However, the only documented water right is from Dry Creek for
4 the irrigation of 40 acres. There are no documents that indicate
5 establishment of a water right on Whiskey Creek. The claimant may argue
6 that water rights could have been established without having filed a Notice
7 of Water Right or any other document, however, it is just as possible that
8 no other water right was established. The Referee cannot make the
9 assumption that between 1890 and December 31, 1932, (the latest date for
10 putting water to use under the Riparian Doctrine) an additional 360+ acres
11 were irrigated with creek water without some evidence of that being
12 offered. It is not clear to the Referee who currently owns most of the
13 lands in Section 13. The documents that joined Haidas Ranch and Gary
14 Griffith indicate the land they acquired is in Section 12. Lois Yoshida
15 acquired land in Section 18. Exhibit DE-1789 indicates that the Van
16 DeGraafs acquired some land in Section 13, but the document does not
17 indicate where the land is located in Section 13. Bobby Kennedy is still a
18 named party to the claim and may still own land in Section 13.

19 The Referee recommends that a right be confirmed with a May 24, 1884,
20 date of priority for the diversion of 0.80 cubic foot per second, 200
21 acre-feet per year from Dry Creek for the irrigation of 40 acres and stock
22 watering in that portion of the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 13, T. 18 N., R. 18 E.W.M.
23 lying west of Dry Creek. The point of diversion shall be in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of
24 Section 13, which is the historical point of diversion and is identified on
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1 the water right claim (WRC No. 046380, see initial Report of Referee for
2 full discussion of claim).

3 The next area to be addressed is Section 12, T. 18 N., R. 18 E.W.M..
4 Court Claim No. 01232 describes the NE $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12. Three
5 separate homesteads include portions of this land. John Powles received a
6 patent on April 25, 1886, for the NW $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12; Jabez
7 Thomas received a patent on May 31, 1897, for the SE $\frac{1}{4}$ NE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of
8 Section 12 and other undescribed lands; and Arthur L. Tipton received a
9 patent on August 26, 1953, for the rest of the NE $\frac{1}{4}$ of Section 12 and other
10 land. Copies of the last two patents are not in the record, so the Referee
11 does not know what other lands were conveyed with the described Section 12
12 lands. The land in the NE $\frac{1}{4}$ of Section 12, except the SE $\frac{1}{4}$ NE $\frac{1}{4}$ did not
13 separate from Federal ownership until 1953. The Referee feels comfortable
14 concluding that based on the patent issuance date, the first steps to sever
15 the land from Federal ownership did not occur until after June 6, 1917.
16 Therefore, a right could only have been established under the Prior
17 Appropriation Doctrine, which means there must be evidence that water was
18 diverted and put to beneficial use on the land prior to June 6, 1917. That
19 evidence is lacking.

20 For all of the claimants' land in Section 12, the earliest date in the
21 record for use of creek water is in the 1940's. Very few documents were put
22 in the record for the Section 12 land. Those that are in the record as part
23 of DE-1786 have the language "including irrigation ditches and water rights"
24 also describe other lands besides those for which a right is being asserted

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1 under Court Claim No. 01232. As with the lands in Section 13, the Referee
2 concludes that this language is too vague to allow for a conclusion on the
3 extent of any right that might have been established under either the Prior
4 Appropriation or Riparian Doctrines for the claimants' land in Section 12.
5 The Referee continues to recommend that no water right be confirmed for the
6 land in Section 12.

7 The last area to be addressed is the NW $\frac{1}{4}$ of Section 18. A patent
8 issued to Francis M. Wright on October 2, 1889, for the E $\frac{1}{4}$ NW $\frac{1}{4}$ and Lot 1 of
9 Section 18. Lot 1 is basically the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 18. There is no
10 patent information for the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 18. Prior to the patent
11 issuing, T. T. Cooper and J. M. Thomas filed a Notice of Water Right (dated
12 August 25, 1884) claiming a right to 400 inches of water from Wilson Creek
13 for agricultural purposes, conveyed through a ditch commencing in Wilson
14 Creek in the SW $\frac{1}{4}$ of Section 8, T. 18 N., R. 19 E.W.M. and carrying water to
15 the NW $\frac{1}{4}$ of Section 18. The ditch was constructed in 1880. Additionally, T.
16 T. Cooper filed a second Notice of Water Right claiming a right to 50 inches
17 through a ditch constructed two years earlier (1882) from Dry or Mercer
18 Creek with a diversion in the SW $\frac{1}{4}$ of Section 7, T. 18 N., R. 19 E.W.M. and
19 conveyed through a ditch to the NW $\frac{1}{4}$ of Section 18 where the water is used to
20 irrigate. There is nothing in the record to indicate that either T. T.
21 Cooper or J. M. Thomas owned the land in the NW $\frac{1}{4}$ of Section 18, but it is
22 clear that they were asserting rights for that land. The deeds that later
23 conveyed this land as it was sold referenced the inclusion of water rights
24 to Wilson Creek and Dry Creek. The notice for Wilson Creek was for 400
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1 inches to be used in the NW $\frac{1}{4}$ of Section 18. However, the claimants are not
2 asserting a right to use Wilson Creek and there is no evidence Wilson Creek
3 has been used in the NW $\frac{1}{4}$ of Section 18. Clearly at the time the Notices of
4 Water Right were filed, there was distinction between Dry Creek and Wilson
5 Creek, since T. T. Cooper filed a notice for each of the creeks. The notice
6 for Wilson Creek describes a location for the diversion that is on Wilson
7 Creek, not Dry Creek. Harold Jenkins, who owns the NE $\frac{1}{4}$ of Section 18 was
8 awarded a right for use of 65 inches of water from Wilson Creek. The
9 quantity was based on the Sanders v. Jones decree, which had awarded a right
10 for 65 inches based on the beneficial use of water at the time of the decree
11 (1890).

12 Claimants' counsel has suggested that none of the land described in
13 Court Claim No. 01232 was addressed in any of the earlier decrees in the
14 area. The Referee believes that statement to be incorrect. The patent for
15 the E $\frac{1}{2}$ NW $\frac{1}{4}$ and Lot 1 of Section 18 issued to Francis M. Wright. The next
16 transaction for this land in the record is when Margaret Ann Hull sold it to
17 Joseph H. Moore on June 11, 1900. The Decision the preceded the Sanders v.
18 Jones decree, in paragraphs 75 to 77, discusses land that the Referee
19 believes is in the NW $\frac{1}{4}$ of Section 18. It states that defendant J. G. Hull
20 has a possessory right and color of title to the land described in his
21 answer and on June 9, 1888, he acquired all the interest of Francis M.
22 Wright therein. The lands are watered and immemorially have been traversed
23 by Dry Creek, an arm of Wilson Creek, which if not diverted would continue
24 to traverse and water said lands. That J. G. Hull appropriated 55 inches

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beginning in 1888. It is clear from Sanders v. Jones that even though a
Notice of Water Right was filed for 400 inches, only 55 inches had been put
to beneficial use at the time of that action in 1890. It is also clear that
although the Notice of Water Right on Dry Creek was for 50 inches, 55 inches
were actually put to beneficial use.

All of this leads the Referee to conclude that a right was established
to divert 55 inches, or 1.10 cubic feet per second, from Dry Creek for
irrigation of 55 acres in the E $\frac{1}{2}$ NW $\frac{1}{4}$ and Government Lot 1 of Section 18. The
Referee recommends that a right be confirmed to Lois Yoshida with a June 30,
1882, date of priority for the diversion of 1.10 cubic feet per second in
May and June, 0.55 cubic foot per second in April and July 1 through
October 15, 275 acre-feet per year for the irrigation of 55 acres in
Government Lot 1 and the W $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 18. The point of diversion
shall be in the SW $\frac{1}{4}$ of Section 13, again as described in WRC No. 046380.

COURT CLAIM NO. 01732 -- Kittitas County

Kittitas County did not make an appearance at the initial evidentiary
hearing, resulting in a recommendation that a water right not be confirmed
under Court Claim No. 01732. Kittitas County filed an exception, asking
that the claim be remanded to the Referee to allow presentation of evidence
in support of the claim. The exception was granted. Attorney Richard T.
Cole represented the county at the supplemental hearing and David Leffert,
who works for the Kittitas County Public Works Department as an inspector
and soils technician, Gordon Blossom, former county engineer and manager of

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1 Bowers Field from 1974 to 1980, Les Sperline and Bill Haberman, who leased
2 or farmed portions of the land, testified at the supplemental hearing.

3 The county is asserting a right to irrigate over 900 acres in the area
4 surrounding Bowers Field in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13, the E $\frac{1}{4}$ of Section 23,
5 all of Section 24, the N $\frac{1}{4}$ N $\frac{1}{4}$ of Section 25 and that portion of the NE $\frac{1}{4}$ of
6 Section 26 lying northeast of the Cascade Canal, all in T. 18 N.,
7 R. 18 E.W.M. and the W $\frac{1}{2}$ of Government Lots 3 and 4 in Section 19, the W $\frac{1}{2}$ of
8 Government Lot 1 in Section 30, T. 18 N., R. 19 E.W.M. The land is
9 irrigated with water diverted from Whiskey Creek and Mercer/Dry Creek, along
10 with water delivered by the Kittitas Reclamation District (KRD). Water
11 rights for KRD were addressed by the Court in the Major Claimant Pathway
12 (see Reports of the Court for KRD, Volumes 14 and 14A and Conditional Final
13 Order) and will not be addressed further in this report.

14 Mr. Leffert did extensive and thorough research into the historical
15 background for the county property. He prepared maps showing the settlement
16 history for different portions of the land and provided copies of historical
17 documents that appear to address water rights or at least water usage on the
18 various portions of the county property. These exhibits were entered into
19 the record at the supplemental hearing, DE-1796 - 1804, DE-1806. He also
20 prepared a map showing the leases and number of acres in each lease,
21 DE-1811. The claimant also put into the record DE-1794 which consists of a
22 large volume of documents (appears to be over 100) that appear to relate to
23 the claimant's land. The Referee did not do an extensive review of all of
24 the documents due to obvious problems with the water right claims filed

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1 pursuant to RCW 90.14. Those problems will severely limit the rights that
2 the Referee can recommend for confirmation. Therefore, the Referee will
3 only review the documents that pertain to the lands described in the RCW
4 90.14 claims.

5 The county filed Water Right Claims (WRC) No. 119776 and 119777
6 pursuant to the requirements of RCW 90.14. WRC No. 119776 asserts a right
7 to use 320 acre-feet per year from a branch of Wilson Creek for the
8 irrigation of 80 acres in the E½ of Section 23, T. 18 N., R. 18 E.W.M. The
9 point of diversion is described as being in 570 feet west of the northeast
10 corner of Section 23, which would be on Whiskey Creek. WRC No. 119777
11 asserts a right to use 320 acre-feet per year from a branch of Wilson Creek
12 for the irrigation of 80 acres in the E½ of Section 24, T. 18 N.,
13 R. 18 E.W.M. The point of diversion is described as being 1310 feet west
14 and 520 feet south of the northeast corner of Section 24, which would be on
15 Dry Creek (aka Mercer Creek). These are the only water right claims that
16 appear to be appurtenant to the claimant's property. Counsel stated that
17 the county intends to seek amendment of these water right claims through RCW
18 90.14.065. Mr. Leffert presented evidence of the intended amendments, which
19 include irrigating substantially more land in the rest of the area around
20 the airport and diverting a much larger quantity of water. The Referee does
21 not know whether the claimant has followed through with seeking the
22 amendments. However, past experiences of claimants in this proceeding who
23 have attempted to amend their water right claims to include additional land
24 and increase the number of acres have been unsuccessful. Since there is
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1 considerable uncertainty about whether the county actually will request the
2 amendments and it not being reasonable to conclude that the amendment
3 request if made will be granted, the Referee will not consider the evidence
4 placed in the record for the land not described in either of the two RCW
5 90.14 claims. Should the claimant successfully amend the claims, this
6 evidence can be reviewed and evaluated as part of the exceptions to this
7 supplemental report.

8 Most of the irrigated ground in the E $\frac{1}{4}$ of Section 24 lies in the NE $\frac{1}{4}$
9 and NE $\frac{1}{4}$ SE $\frac{1}{4}$, as a large part of the SE $\frac{1}{4}$ is part of a runway. Part of DE-1804
10 is a copy of a patent that issued to Wesley C. Cornell on July 3, 1897, for
11 the E $\frac{1}{4}$ NE $\frac{1}{4}$ and E $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24. Also in the record is a Notice of
12 Location and Appropriation of Water filed by W. C. Cornell on May 31, 1890.
13 It states that Cornell is claiming a right to 160 inches from Dry Creek
14 carried in a ditch arising in the northeast corner of the SE $\frac{1}{4}$ of Section 13
15 and running southerly to claimant's ranch in the NE $\frac{1}{4}$ of Section 24. The
16 notice states that water was appropriated in the spring of 1881 and that
17 about 160 acres are covered by the claim and irrigated with the water. In
18 1910 Harrie T. and Annie Harvey acquired the land. Part of DE-1794 is a
19 copy of an agreement between Edgar and Ida Harvey and Wesley Milton
20 concerning operation of a ditch that carried water into the NE $\frac{1}{4}$ of
21 Section 24. This particular ditch took water from a dam near the south
22 quarter corner of Section 14, which would have been on Whiskey Creek. The
23 language in the agreement suggests the ditch had been used for a number of
24 years and the parties just wanted to document their agreement on how the
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1 ditch was to be operated. It would appear that water rights were
2 established for use of both Whiskey Creek and Dry Creek/Mercer Creek. WRC
3 No. 119777 was filed describing only a point of diversion on Dry Creek, so a
4 right to that source is the only one preserved by the water right claim.
5 The notice of water right filed by W. C. Cornell indicates that 160 inches
6 were appropriated for irrigating 160 acres, or one inch per acre. Mr.
7 Leffert's testimony and exhibits leads the Referee to conclude that the
8 county is asserting a right for quantities of water consistent with that
9 which was awarded in most of the prior decrees in this basin, i.e. one inch
10 of water (0.02 cfs) for each acre until June 30 and then one-half inch of
11 water (0.01 cfs) for the remainder of the irrigation season and 4 acre-feet
12 for each acre irrigated. The decrees actually only awarded one inch of
13 water in May and June, so the quantity of water for April was also one-half
14 inch. The presentation by Mr. Leffert was that one inch per acre was being
15 claimed in April also. Since this water right and land was not specifically
16 addressed in the prior decrees, the Referee is not bound by the requirements
17 of the other decrees. There was no testimony of exactly how much water is
18 being diverted and used to irrigate any of the county's land. The testimony
19 was that at least since the 1940's pasture and hay has been irrigated. The
20 one inch/one-half inch claimed is very reasonable for irrigating these
21 crops. The Referee concludes that a right was established for use of Dry
22 Creek/Mercer Creek water on the former W. C. Cornell ranch in Section 24 and
23 the evidence shows that beneficial use has continued. Although 160 acres
24 were originally irrigated, WRC No. 119777 only preserves a right to irrigate
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1 80 acres. Considerably more than 80 acres are being irrigated in the E $\frac{1}{2}$ of
2 Section 24. The Referee must define an 80 acre area for which to recommend
3 confirmation of a right. The point of diversion described on WRC No. 119777
4 could have served the S $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$ and N $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 24, an 80
5 acre area. The Referee will recommend that as the place of use.

6 The Referee recommends that a right be confirmed with an April 30,
7 1881, date of priority for the diversion of 1.60 cubic feet per second
8 April 1 through June 30 and 0.80 cubic foot per second July 1 through
9 October 15, 320 acre-feet per year from Dry Creek/Mercer Creek for the
10 irrigation of 80 acres in the S $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$, and N $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24,
11 T. 18 N., R. 18 E.W.M. The point of diversion shall be as described in WRC
12 No. 119777, 1910 feet west and 520 feet south of the northeast corner of
13 Section 24.

14 The land in the E $\frac{1}{2}$ of Section 23 is irrigated with water diverted from
15 Whiskey Creek and it is riparian to the creek. Section 23 was originally
16 conveyed by the Federal government to Northern Pacific Railroad. The
17 priority date under the Riparian Doctrine for former railroad land is
18 May 24, 1884, the date the map of definite location for the railroad was
19 filed in Kittitas County. The railroad sold the E $\frac{1}{2}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ of Section 23
20 to A. P. Hoxaling Co. in 1892 and it was then sold numerous times in the
21 early 1900's. There is no specific evidence of establishment of a water
22 right for this land. Some of the deeds convey the land together with water
23 rights and irrigation ditches, but do not identify the extent of the water
24 right. It would not be appropriate to conclude that the entire E $\frac{1}{2}$ of

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1 Section 23 was being irrigated. There are copies of leases in the record
2 that require the appropriation of water as it may be available for
3 irrigation on the leased ground. The language suggests that water would not
4 be available for all of the land. The only clear evidence of beneficial use
5 of water in the E½ of Section 23 is the testimony of Les Sperline and Bill
6 Haberman who leased portions of the county land. Mr. Sperline's knowledge
7 of irrigation on the land begins in the 1940's. However, in order for the
8 Referee to recommend confirmation of a water right, there needs to be
9 evidence that creek water was used to irrigate the land prior to
10 December 31, 1932. That evidence is currently lacking.

11 The Referee notes that attached to exhibits DE-1796 - 1799 and 1803 are
12 excerpts from a document that the Referee believes might be useful in
13 proving the existence of water rights on some of the county property. The
14 excerpts appear to be related to Cause No. 3142, Carl A. and Olive Sander v.
15 Ellensburg Water Supply Co., vs. Charles H. Wilson, John te-o-pil, James S.
16 Dixon, Mary A. Dixon, Michael Rollinger, et al. (1903). A copy of the final
17 decree is in the record, but does not address the water rights of the
18 defendants, just the plaintiff and intervenor. If the excerpts are in fact
19 from the Court's Findings of Fact or Decision, a complete copy might prove
20 the existence of water rights for some of the county's property. No one
21 else in this proceeding has provided a copy of the Findings of Fact or
22 Decision in that case.

23 At this point there is not sufficient information in the record to
24 allow for a recommendation to confirm a water right for the lands in the E½

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1 of Section 23. Due to the lack of RCW 90.14 claims for the rest of the
2 county's land for which they are asserting rights, the Referee does not
3 recommend confirmation of water rights. If the county is successful in
4 amending their WRC Nos. 119776 and 119777, they should file an exception to
5 allow the Referee to consider the additional evidence in the record for the
6 other lands.

7
8 COURT CLAIM NO. 00904 -- John H. Ludwick
9 & Anne C. Ludwick

10 John Ludwick filed an exception to the Referee not recommending that
11 water rights be confirmed under Court Claim No. 00904. Mr. Ludwick, who is
12 represented by Attorney Lawrence E. Martin, along with Jeff Brunson who
13 farms the land, testified at the supplemental hearing. Additionally, the
14 testimony of Richard C. Bain, Jr., P.E., a consultant hired by the claimant,
15 was taken by deposition on October 17, 2001, and that testimony was entered
16 as Exhibit DE-1937.

17 The Referee did not recommend confirmation of a water right in the
18 initial Report of Referee due to the lack of evidence to show that a right
19 was established under the Riparian Doctrine through beneficial use prior to
20 December 31, 1932. Rights are being asserted to use both Lyle Creek and
21 Wilson Creek. The claimant has pointed the Referee to exhibits put in the
22 record by Bull Canal Company at the initial hearing. Exhibits DE-678, 679,
23 and 680 are copies of portions of what has generally been referred to as the
24 Swigart Survey. The Swigart Survey was conducted by the U. S. Bureau of
25 Reclamation in preparation for construction of the Yakima Irrigation

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1 Project. The survey is dated September 1912 and the portion of the survey
2 put in the record by Bull Canal Company is entitled "Lands Under Bull
3 Canal". The survey also shows the creeks flowing in the area shown on the
4 map. Wilson Creek is clearly shown on all three maps and the claimant's
5 land is riparian to Wilson Creek. Lyle Creek is shown on Map 1 as flowing
6 through the SE $\frac{1}{4}$ of Section 13, T. 17 N., R. 18 E.W.M., but is not labeled on
7 Map 2. However, the Referee concludes based on review of Map 2, that Lyle
8 Creek is either flumed over or is bisected by Wilson Creek where the two
9 intersect just north of the southeast corner of Section 13 and that Lyle
10 Creek then continues south into the NW $\frac{1}{4}$ of Section 19 until it ends at the
11 next intersection with Wilson Creek. This leads to a conclusion that the
12 claimants land in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ (Government Lot 1) of Section 19 is riparian to
13 Lyle Creek. Since Government Lots 1, 2 and 3 all separated from the Federal
14 government in one transaction, all of the land that the claimant irrigates
15 from Lyle Creek (which is within Government Lots 1 and 2) is riparian to the
16 creek. Therefore, in order to provide the existence of a water right, there
17 needs to be evidence of water use prior to December 31, 1932. The priority
18 date for a riparian right would be the date that steps were first taken to
19 sever the land from Federal ownership. Government Lots 1, 2, and 3 of
20 Section 19 are lands that were originally conveyed by the Federal government
21 to Northern Pacific Railroad. The railroad sold it to George Carver in
22 1889. The priority date under the Riparian Doctrine for former railroad
23 lands in May 24, 1884.

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1 A portion of the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 19 is also irrigated with water
2 diverted from Lyle Creek. This land has a separate ownership history. The
3 United States conveyed to William Johnston the E $\frac{1}{2}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ and the NE $\frac{1}{4}$ SW $\frac{1}{4}$
4 of Section 19 by patent dated June 5, 1873. Part of Exhibit DE-1929 are
5 documents leading up to the issuance of the patent, including affidavits
6 that show Johnston settled on the land in 1869 and by 1871 had 100 acres
7 under cultivation. This land is not riparian to Lyle Creek, so any right
8 would have been established under the Prior Appropriation Doctrine, which
9 requires evidence of first water use prior to June 6, 1917, when the State
10 Water Code was adopted.

11 Mr. Ludwick pointed the Referee to DE-679 where Fitterer Intake No. 1
12 and Intake Fitterer Ditch are both marked. The first intake is in the
13 SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 18 and appears to the Referee to be on Lyle Creek. The
14 second is in Government Lot 1 of Section 19 and is at the point where Lyle
15 Creek ends at Wilson Creek. This map does not show a ditch from either of
16 these two diversions. However, since the intent of the map was to show
17 lands served by Bull Canal, the lack of ditches is not significant. Exhibit
18 DE-1629 was put in the record by claimant Michael Moeur, who owns land south
19 of those owned by Mr. Ludwick. DE-1629 is a copy of the 1912 Swigart Survey
20 that shows this area in a smaller scale than DE-679, but shows a larger
21 area. This map does show a ditch leading south from the intake to Fitterer
22 #1 and the Referee concludes it would have been used to irrigate that
23 portion of Government Lot 1 that lies west of Wilson Creek. At that time
24 (1912), Wilson Creek made an oxbow in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 18 and
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1 Government Lot 1 of Section 19 such that there were 25 acres that was west
2 of Wilson Creek. Since then the creek has been straightened (either
3 naturally or by man), so that it flows south through Government Lot 1 and
4 any irrigated land would lie to the east of Wilson Creek and would have to
5 be served from a different ditch. The diversion location could still serve
6 this land. DE-679 indicates that 25 acres were irrigated in Government Lot
7 1 with water delivered by Bull Canal Company. Mr. Ludwick testified that
8 the land he irrigates from Lyle Creek is also irrigated with water delivered
9 by Bull Canal Company.

10 The intake for Fitterer Ditch #2 (shown on DE-1629), which is the same
11 as "Intake Fitterer Ditch" shown on DE-679, diverted water from Wilson
12 Creek, although the diversion location would have captured any Lyle Creek
13 water dumped in the creek. This ditch carried water on the west side of
14 Wilson Creek due south and would have been used to irrigate land in
15 Government Lots 2 and 3 lying west of the creek. DE-679 does not show any
16 land in either Government Lots 2 or 3 irrigated with water from Bull Canal.
17 Only the 25.8 acres in Government Lot 1 are shown as being irrigated from
18 Bull Canal at that time. All of the land in the E $\frac{1}{2}$ NW $\frac{1}{4}$ is shown as being
19 irrigated from Bull Canal and was owned by John Bull at the time of the
20 survey.

21 The record shows that F. G. Fitterer owned Government Lots 1, 2 and 3
22 of Section 19, but sold them to H. M. Luttrell in 1908, along with 1 share
23 of Bull Canal Stock. The Fitterers apparently got the land back, as they
24 again sold it in 1943. DE-1934 is a copy of an Agreement between several

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1 landowners and Mrs. P. G. Fitterer that relates to replacing a flume across
2 Wilson Creek. The flume crossed Wilson Creek in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13
3 and carried water in a ditch south of Wilson Creek. The Referee believes
4 this agreement addresses the flume that historically carried Lyle Creek
5 water across Wilson Creek into Government Lot 1 of Section 19 for use on the
6 claimant's land.

7 Also in the record is DE-1936 which is an agreement dated July 21,
8 1937, between Mrs. Ivy Tjossem and Mrs. P. G. Fitterer. The agreement gives
9 Mrs. Fitterer a right-of-way next to the east boundary of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of
10 Section 13 beginning on the south boundary of that subdivision, running
11 north to Wilson Creek for the purpose of building and maintaining an
12 irrigation ditch and head-box necessary to divert water from Wilson Creek.
13 There is no mention of where this ditch would lead or what lands would be
14 irrigated with the water from Wilson Creek. The language in the agreement
15 suggests that a new ditch and head-box are being constructed to divert water
16 from Wilson Creek. In 1937, the way to establish a water right was through
17 the application and permit procedures now codified in RCW 90.03. There is
18 no evidence that occurred. Additionally, since the channel of Wilson Creek
19 was changed, a diversion and ditch at the location described on DE-1936
20 would not be able to serve any of the Ludwick land. In fact, it may have
21 been destroyed when Wilson Creek was moved.

22 Mr. Ludwick is asserting a right to irrigate 57.9 acres in Government
23 Lots 1 and 2 east of Wilson Creek and a portion of the E $\frac{1}{4}$ NW $\frac{1}{4}$, in Section 19,
24 T. 17 N., R. 19 E.W.M. The primary crop is Timothy hay with a grain

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1 rotation that is rill irrigated. Although Mr. Ludwick did not testify to
2 currently having livestock on the property, the evidence shows that prior
3 owners of the land had cattle that would have drank from the irrigation
4 ditches. Additionally, they would have had access to Wilson Creek as it
5 flows through the property. Livestock drinking directly from the water
6 source is a non-diversionary use covered by the stock water stipulation
7 discussed on page 4 of the Report of Referee. Mr. Brunson testified that
8 this land has very gravelly, rocky soil that requires continuous irrigation.
9 Once irrigation season starts, the water is never shut off. This land is
10 also irrigated with water delivered by Bull Canal Company. Mr. Bain
11 measured the diversion from Lyle Creek in July and August of 2000 and 2001
12 and between 1.8 and 2.7 cubic feet per second was being diverted. Based on
13 that rate of diversion and Mr. Brunson's irrigation practice, Mr. Bain
14 concluded that 822.2 acre-feet per year was being diverted and used to
15 irrigate the land. The quantity of water measured would include water
16 delivered by Bull Canal Company for use on the claimant's land and return
17 flows that contribute to the flow in Lyle Creek. There is nothing in the
18 record to indicate how much water Bull Canal Company places in Lyle Creek
19 for delivery to the Ludwick property.

20 Water Right Claim No. 200011 was filed pursuant to RCW 90.14.043 by
21 Mary T. Wippel, a former owner of the claimant's property. It asserts a
22 right to divert 3 cubic feet per second, 448 acre-feet per year from Lyle
23 Creek for the irrigation of 56 acres in that portion of the NW $\frac{1}{4}$ of
24 Section 19 lying east of the channel of Wilson Creek. While the
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1 instantaneous quantity claimed is slightly higher than the highest
2 measurement, the annual quantity claimed is half that to which Mr. Bain
3 testified was being diverted. However, since the quantity measured included
4 both Lyle Creek water and Bull Canal water, the annual quantity in the RCW
5 90.14 claim may be more reflective of actual creek water use. The claimant
6 has provided no information about how much Bull Canal Company water is
7 delivered to the property and the evidence put on by the canal company did
8 not indicate that a specific quantity of water was delivered for each
9 irrigated acre. The right being recommended for confirmation for Bull Canal
10 Company allows for the diversion of slightly more than 10 acre-feet per acre
11 irrigated. Since the canal has a conveyance loss, less than 10 acre-feet
12 per acre is actually delivered to the land.

13 The Referee concludes there has been sufficient evidence put in the
14 record to show that a right was established to use water from Lyle Creek on
15 the claimant's land in Government Lots 1 and 2. This land was owned by the
16 Fitterer family and the 1912 Swigart Survey clearly shows diversions and
17 ditches that would have been used to serve that land. Additionally, the
18 right-of-way agreements are between the the Fitterer family and neighboring
19 land owners and there is no mention of the owner of the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 19
20 in any of the agreements. None of the ditches shown on the Swigart Survey
21 could have delivered water to the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 19. The Referee
22 estimates that of the 57.9 acres irrigated, 14.8 acres are in the E $\frac{1}{2}$ NW $\frac{1}{4}$ of
23 Section 19 and the rest are in Government Lots 1 and 2 of Section 19. The
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1 quantity of water that will be authorized for use shall be reduced
2 proportionate to the number of acres reduced.

3 The Referee recommends that a right be confirmed under Court Claim No.
4 00904 with a May 24, 1884, date of priority for the diversion of 2.0 cubic
5 feet per second, 334.5 acre-feet per year from Lyle Creek for the irrigation
6 of 43.1 acres and stock watering in that portion of Government Lots 1 and 2
7 lying east of Wilson Creek in Section 19. The point of diversion that is
8 used is in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 18, T. 17 N., R. 19 E.W.M. The right shall
9 carry a provision that a maximum of 612 acre-feet per year is used on this
10 land from Lyle Creek and Bull Canal Company.

11 Mr. Ludwick is asserting a right to irrigate 24.5 acres in Government
12 Lot 2 southwest of Wilson Creek and a portion of Government Lot 3 both in
13 Section 19 with water diverted from Wilson Creek. This land is in pasture
14 and is flood irrigated. Mr. Ludwick did not testify to currently having
15 livestock on this land. However, since it is pasture, it is reasonable to
16 assume animals are kept on the land and would have access to both the creek
17 and the irrigation ditches that flow through the fields. Mr. Bain measured
18 the diversion from Wilson Creek in July 2000 and July and August 2001. The
19 diversion averaged 1.8 cubic feet per second, with a maximum diversion of
20 2.3 cubic feet per second. Based on a continuous diversion of 2.3 cubic
21 feet per second (with a 0.5 cfs conveyance loss), 471 acre-feet per year
22 would be applied to the ground. Mr. Bain testified that based on his
23 discussions with the landowner and irrigator, that the quantity of water
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1 diverted and used to irrigate is consistent over the irrigation season.

2 Wilson Creek water is the only water used on this 24.5 acres.

3 As with the land irrigated from Lyle Creek, the 1912 Swigart Survey
4 clearly shows a diversion and ditch (Fitterer #2) that would have served
5 this land. The survey even shows a diversion dam on Wilson Creek at the
6 same location as the dam that now diverts water to the Ludwick property.
7 The Referee believes that prior to the change in the Wilson Creek channel
8 location, a diversion slightly upstream was used to irrigate the claimant's
9 land in Government Lots 2 and 3. However, because of the change in the
10 channel, that location does not exist any longer.

11 Water Right Claim No. 200009 was filed pursuant to RCW 90.14.043 for
12 use of Wilson Creek water. It asserts a right to divert 3.5 cubic feet per
13 second, 500 acre-feet per year for the irrigation of 61 acres in those
14 portions of Lots 2 and 3 of Section 19 lying south and west of the channel
15 of Wilson Creek. The point of diversion described on the form is 425 feet
16 north of the southwest corner of Section 18, in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 18.
17 State's Exhibit SE-2 shows a diversion at this location, however, the
18 investigation report indicates the diversion to the Ludwick property is in
19 Government Lot 2 of Section 19. None of the witnesses that testified in
20 support of the claim clearly identified the location of the point of
21 diversion from Wilson Creek. It appears that Water Right Claim No. 200009
22 also describes water use from Wilson Creek on land now owned by neighboring
23 claimants to the south, Grigg, Tyler and Lee.

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1 Although Bull Canal Company water is not directly delivered to the land
2 southwest of Wilson Creek, it is clear from the testimony that has been put
3 in the record for this claim and other neighboring claimants, that Wilson
4 Creek as it flows through this area is influenced greatly by return flow
5 water generated from irrigation with Bull Canal Company, Ellensburg Water
6 Company's Town Ditch and Cascade Irrigation District water. All of this
7 return flow would be considered foreign return flow, for which a water right
8 cannot be established, see the Courts Memorandum Opinion RE: Motion For
9 Reconsideration of Limiting Agreements, filed on April 1, 1994. Mr.
10 Bain's measurements indicate that approximately 19 acre-feet per acre is
11 being applied to this land. However, WRC No. 200009 asserts a right to use
12 approximately 8 acre-feet per acre. This is more reflective of the quantity
13 of water that the Referee believes may be naturally available from Wilson
14 Creek. The Referee shall recommend confirmation of a right to use 8
15 acre-feet per year for each acre irrigated. Should the claimant chose to
16 challenge this, he should be prepared to bring in evidence that more water
17 than that is naturally available in Wilson Creek as it flows through his
18 property.

19 Based on the foregoing, the Referee recommends that a right be
20 confirmed with a May 24, 1884, date of priority for the diversion of 1.8
21 cubic foot per second, 196 acre-feet per year for the irrigation of 24.5
22 acres and stock watering in Government Lots 2 and 3 of Section 19, except
23 the following: Beginning at the southwest corner of Section 19; thence N
24 00°20'23" W along the west boundary of said Section 19 1318.62 feet; thence
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1 N 88°53'03" E 54.05 feet to the true point of beginning; thence N 88°53'03"
2 E 1162.69 feet; thence N 00°18'19" W 632.27 feet; thence N 47°54'11" W
3 385.44 feet; thence N 54°13'22" W 1075.09 feet; thence S 00°02'59" W 1541.84
4 feet to the true point of beginning. The point of diversion that shall be
5 authorized will be as described in WRC No. 200009. If that diversion is not
6 being used, Mr. Ludwick should contact Ecology's Central Regional Office
7 about the process for changing his point of diversion to the location being
8 used.

9 COURT CLAIM NO. 15629 -- David Lundy
10 & Linda Lundy

11 David and Linda Lundy, through their Attorney Richard T. Cole, filed an
12 exception to the Report of Referee for Subbasin No. 9. The basis for their
13 exception was that their predecessors did not appear and testify at the
14 original Subbasin No. 9 hearing. Ultimately it was discovered that there
15 was no Court claim filed for the Lundys' property and the Court granted
16 their request to be allowed to file a late claim. Even though the Lundys
17 had not yet filed their claim, the Referee allowed them to present testimony
18 and evidence at the supplemental hearing, but directed that a claim be
19 filed. David Lundy testified at the supplemental hearing. Court Claim No.
20 15629 was filed on January 31, 2002.

21 The Lundys own approximately 30 acres lying approximately in the west
22 500 feet of the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and west 500 feet of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5,
23 T. 18 N., R. 19 E.W.M. They are asserting a right to irrigate their land
24 with water diverted from Wilson Creek. According to the testimony, the
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1 diversion on Wilson Creek is located slightly northeast of their property,
2 in the E $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 5. Their land is mostly in pasture and hay,
3 with lawn and fruit trees irrigated near their house. Dr. Lundy estimated
4 that 1.5 cubic feet per second is diverted to rill irrigate their land.
5 Horses on the property drink directly from Wilson Creek, which flows through
6 the property. This non-diversionary use is covered by the stock water
7 stipulation discussed on page 4 of the Report of Referee for Subbasin No.
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9. The Lundys acquired their land in 1974 and at that time it was being
10 irrigated. Although their exception states that a prior owner failed to
11 file a claim in this proceeding, the evidence indicates that the Lundys have
12 owned the land since long before the claim filing period. The evidence
13 placed in the record shows that their land is part of the land that August
14 Haberman acquired for the Northern Pacific Railroad in the late 1800's. Mr.
15 Lundy testified that they own and live in the original Haberman homestead.
16 August Haberman was a party to earlier litigation in the Wilson-Naneum
17 basin. In the Sanders v. Jones decree he was awarded a right to divert 49
18 inches of water from Wilson Creek for irrigating the land described in his
19 answer, having acquired that land from N.P.R.R. The Referee has concluded that
20 the land he acquired from N.P.R.R. is the S $\frac{1}{4}$ NE $\frac{1}{4}$ and N $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5, T. 18
21 N., R. 19 E.W.M. The Sanders decree awarded one inch of water for each acre
22 irrigated, leading to a conclusion that 49 acres were being irrigated at the
23 time of this decree. The Ferguson v. United States National Bank of
24 Portland, Oregon, et al. decree addressed rights to use water from Naneum
25

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1 Creek. It also awarded one inch of water for each acre irrigated (both
2 decrees had provisions that one inch was needed in May and June and one-half
3 inch of water the remainder of the year). The Ferguson decree awarded
4 August Haberman a right to 70 inches from Naneum Creek for use in the S $\frac{1}{4}$ NE $\frac{1}{4}$,
5 N $\frac{1}{4}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5, T. 18 N., R. 19 E.W.M. The Findings of Fact
6 that preceded the decree indicated that Haberman was irrigating 70 acres
7 with water from Naneum Creek. It is clear that August Haberman owned more
8 land than was being irrigated at the time of these two court actions. There
9 is no evidence in the record that additional water rights were developed
10 after entry of these two decrees, leading the Referee to conclude that a
11 right to irrigate 49 acres with water from Wilson Creek and a right to
12 irrigate 70 acres with water from Naneum Creek exists for the former August
13 Haberman property.

14 Most of the former August Haberman property is owned by Harold Jenkins,
15 who filed Court Claim No. 00930 in this proceeding. Mr. Jenkins appeared at
16 the initial evidentiary hearing and testified about his use of water from
17 both Wilson and Naneum Creeks. In that the testimony and evidence showed
18 that Mr. Jenkins was irrigating the portion of the former August Haberman
19 land to the full extent of the water rights that were awarded in the prior
20 decree, the Referee recommended that rights be confirmed in this proceeding
21 consistent with those past decrees. Mr. Jenkins was awarded a right for the
22 full 49 inches from Wilson Creek and the full 70 inches from Naneum Creek.
23 Now belatedly, the Lundys are appearing in this proceeding and alleging that
24 they have a portion of the water rights that have already been awarded to

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1 the Jenkins. The Lundys did not take exception to the Referee's
2 recommendations concerning the Jenkins, and the Jenkins have had no notice
3 that the Lundys are asserting a right that would be detrimental to the
4 rights already awarded to the Jenkins. Since the Lundys did not file their
5 late claim until well after the supplemental hearing, the Jenkins had no
6 notice of what was being asserted and as a result did not appear at the
7 supplemental hearing to defend against the claim being made to their
8 detriment.

9 The Referee does make note of the fact that the ownership history for
10 the Lundys' property is identical to that of the Jenkins. There was common
11 ownership until 1974 when Richard Klein sold most of the former Haberman
12 property to the Jenkins and the 30 acre tract to the Lundys. The Lundys
13 entered into evidence several very old photographs of the Haberman
14 homestead, showing the house and the immediate area around the house being
15 irrigated. The photos also show a hay field and pasture that the Lundys
16 suggest is part of the land they own. It is not possible for the Referee to
17 tell whether the photos of the fields are for the Lundy land as opposed to
18 the Jenkins land. The Lundys also put into evidence several modern day
19 photos of the land during their ownership. The photos show old fruit trees,
20 old haying equipment, an old manure spreader and pictures of the fields on
21 their property. The equipment is located on a portion of the Lundy property
22 that obviously is not irrigated. Additionally, the fields in the pictures
23 also appear to not have been irrigated in recent years.

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1 The Referee at this time will not recommend confirmation of a water
2 right to the Lundys under Court Claim No. 15629. If they choose to file an
3 exception, they must serve a copy of the exception on the Jenkins, making it
4 clear that they are asserting a right to a portion of what has previously
5 been recommended for confirmation for the Jenkins land. The Lundys should
6 also be prepared to present evidence about current irrigation practices on
7 the land, including exactly how many acres are being irrigated or have been
8 in the recent past. The State's map exhibit, SE-2, does not show the Lundys
9 property as being irrigated. If it is irrigated, it is clear that more land
10 is being irrigated than was being irrigated when it was owned by August
11 Haberman. In order to recommend confirmation of a right to the Lundys, they
12 must present convincing evidence of how many acres of the land they now own
13 was being irrigated in the late 1800's or early 1900's.

14

15 COURT CLAIM NO. 02245 -- Madeleine Villa, Inc.

16 Madeleine Villa, Inc., took exception to the Referee's recommendation
17 in the Report of Referee for Subbasin No. 9. The claimant is represented by
18 Attorney Jeff Slothower and John Downey, co-owner of Madeleine Villa, Inc.,
19 testified at the supplemental hearing.

20 Madeleine Villa, Inc. owns the S% of Section 20 and the E%SE% of
21 Section 19, both in T. 18 N., R. 19 E.W.M. They are asserting rights to
22 irrigate the E%SE% of Section 19 with water diverted from Wilson Creek and a
23 portion of the SW% of Section 20 with water diverted from Lyle Creek. The
24 first exception is to the number of acres authorized for irrigation in the

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1 right that was recommended for confirmation for use of water from Lyle
2 Creek. At the initial evidentiary hearing, Mr. Downey testified to
3 irrigating 80 acres in the SW $\frac{1}{4}$ of Section 20. In the exception and at the
4 supplemental hearing, Mr. Downey stated that the 80 acre figure was
5 incorrect. He had not referred to any documents when coming up with the 80
6 acres figure and later realized he was irrigating 104.6 acres. Exhibit
7 DE-1815 is an aerial photograph of the area on which the Soil Conservation
8 has marked the fields and the number of acres being irrigated in each
9 field. When those acres are added, the total is 104.6 acres. As discussed
10 in the initial Report of Referee, the Sanders v. Jones decree identified a
11 right to 135 inches (which according to the decree would be sufficient for
12 irrigating 135 acres) for the SW $\frac{1}{4}$ of Section 20 and "other lands acquired
13 from the Northern Pacific Railroad" (by John Haley). The claimant also took
14 exception to the season of use authorized for stock watering. A
15 diversionary right was recommended for the irrigation season, as there was
16 no testimony at the initial hearing that water was diverted after the end of
17 the irrigation season. At the supplemental hearing Mr. Downey testified
18 quite a bit about diverting Wilson Creek for stock watering after the end of
19 the irrigation season, but did not testify to doing the same with Lyle Creek
20 water. In fact he testified that Lyle Creek is not a reliable source of
21 water after the irrigation season. The Referee concludes based on Mr.
22 Downey's testimony that a right is not being asserted for stock watering
23 from Lyle Creek after the end of the irrigation season. Therefore, the
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1 stock water portion of the recommended right for use of Lyle Creek will not
2 be altered.

3 The Referee amends the recommendation in the Report of Referee for
4 Subbasin No. 9 on pages 329, lines 16½ to 21½, and 651, lines 1 to 12 to the
5 following: With a June 30, 1880, date of priority a right to divert from
6 Lyle Creek 2.1 cfs in May and June, 1.05 cfs in April and July 1 through 15,
7 523 acre-feet per year for the irrigation of 104.6 acres and stock
8 watering.

9 Madeleine Villa also took exception to the Referee not recommending
10 confirmation of a water right for land in the E½SE½ of Section 19, T. 18 N.,
11 R. 19 E.W.M. The Report of Referee beginning on page 329 discusses this
12 land and the history of development of the water right, concluding that a
13 right did exist for the irrigation of 35 acres. The evidence presented at
14 the initial hearing lead the Referee to conclude the 35 acres were located
15 in the SE½SE½ of Section 19. The only thing that prevented the Referee from
16 recommending that a right be confirmed was the water right claim form filed
17 pursuant to RCW 90.14. Water Right Claim No. 141698 asserts a right to use
18 2.0 cubic foot per second, 140 acre-feet per year from Wilson Creek for the
19 irrigation of 35 acres and stock watering in the E½SE½ of Section 20. The
20 point of diversion is described as being in the SW¼NE¼SE½ of Section 20.
21 The claimant contends that in both instances the section number should have
22 been 19 instead of 20. The actual point of diversion that is being used
23 lies in the SW¼NE¼SE½ of Section 19, at approximately the location described
24 in WRC No. 141698, if the section number were changed from 20 to 19. Wilson
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1 Creek does not even flow through Section 20. Most of the land that is owned
2 by Madeleine Villa lies in Section 20, so it is not difficult to understand
3 why a mistake could have been made. However, none of the land in Section 20
4 is irrigated with water diverted from Wilson Creek. Water from Lyle Creek
5 is used to irrigate the SW $\frac{1}{4}$ of Section 20. The land owned by the claimant
6 in the SE $\frac{1}{4}$ of Section 20 is irrigated only with water delivered by the
7 Kittitas Reclamation District (KRD).

8 The Referee's dilemma is whether there is sufficient information
9 contained in WRC No. 141698 to conclude that it met the purposes of RCW
10 90.14 or whether the claimant should attempt to amend the claim under RCW
11 90.14.065. Interpreting RCW 90.14 claims when the information on the form
12 is not consistent with the water right being asserted in this adjudication
13 has been an ongoing issue which the Court has addressed several times. See
14 the Court's February 10, 1995, Memorandum Opinion Re: RCW 90.14 and
15 Substantial Compliance; the Court's Order on Exceptions; Subbasin No. 7
16 (Reecer Creek), (November 11, 1996); and the Court's Memorandum Opinion and
17 Order Re: Exceptions to Supplemental Report of Referee Subbasin 8, (December
18 2, 1999). Each of those opinions clearly give the Referee the latitude to
19 consider the testimony and evidence presented, along with the information
20 contained in the water right claim form. However, the Court dealt with an
21 almost identical situation in Subbasin No. 8. Theilerie P. Scheumann
22 (Grousemont Farms), under Court Claim No. 01335, was asserting a right to
23 use an unnamed spring located in Section 24, T. 18 N., R. 17 E.W.M.,
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1 however, the RCW 90.14 claim that was filed stated the spring was located in
2 Section 25. The Court stated:

3 "Substantial compliance applies when the claimant provides correct
4 information to Ecology, regardless of the form used so the agency has
5 "adequate records for administration of the state's waters." Adsit, at
6 704. It is doubtful that the information provided by Grousemont can be
7 characterized as correct. However, the legislature has provided
8 Grousemont and other water users with a process for amending a claim
9 when the initial filing contained incorrect information. See RCW
10 90.14.065.". . . The Court will not issue a ruling until the statutory
11 process has been followed. The Court requests that claimant and
12 Ecology work together to amend the claim."

13 Grousemont Farms was successful in amending the water right, see the
14 Court's second Memorandum Opinion and Order RE: Exceptions to Supplemental
15 Report of Referee Subbasin 8 (Thorp). On page 6 the Court states that Ecology
16 accepted Grousemont's request to amend the water right claim to change the
17 section number from 25 to 24. The Court then confirmed a right to Grousemont
18 for using the spring. Although the claimant's counsel suggests that compliance
19 with the amendment process in RCW 90.14.065 would not be the appropriate
20 mechanism to deal with obvious error, the Court has ruled otherwise in an
21 identical situation. Based on the guidance given in the Court's prior rulings,
22 the Referee at this time does not recommend confirmation of a water right for
23 use of Wilson Creek water in the SE%SE% of Section 19. The Referee strongly
24 suggests that amendment of WRC No. 141698 be pursued prior to the exception
25 hearing for this report.

26 Mr. Downey did testify to using water from Wilson Creek for watering stock
27 after the end of the irrigation season. He removes the material from the creek
28 that causes irrigation water to be diverted into the ditch, but sufficient water
continues to be diverted and carried in the ditch to water his stock during the

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1 winter months. He did not testify to how much water that might be, however, his
2 irrigation right would allow for the use of 0.35 cubic foot per second during
3 the later part of the season and it is clear from his testimony that no more
4 than that is diverted.

5 If the claimant is successful in amending WRC No. 141698 to change the
6 section number from 20 to 19, the Referee is prepared to recommend confirmation
7 of a water right with a June 30, 1878, date of priority for the diversion of
8 0.70 cubic foot per second in May and June and 0.35 cubic foot per second in
9 April and July 1 through October 15 for irrigation of 35 acres and stock
10 watering and 0.35 cfs, 3 acre-feet per year from October 16 through March 31 for
11 stock watering. The place of use would be the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19, T. 18 N.,
12 R. 19 E.W.M.

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14 COURT CLAIM NO. 00495 -- Estate of Byrl A. McNeil
15 & Arlene Rosenberg
16 Dick Van de Graaf, Jr.
17 & Maxine Van de Graaf

18 Dick and Maxine Van De Graaf were joined to Court Claim No. 00495,
19 having purchased the S $\frac{1}{4}$ SE $\frac{1}{4}$ and W $\frac{1}{4}$ of Section 12, T. 18 N., R. 18 E.W.M. from
20 Mrs. Rosenberg. They filed an exception to the Report of Referee prior to
21 finalizing their purchase of the property, asking for the opportunity to
22 present additional evidence if their purchase of the property is finalized
23 and they find additional historical evidence. The claim was remanded to the
24 Referee. The Van De Graafs are represented by Attorney Lawrence E. Martin
25 and Mr. Van De Graaf testified at the supplemental hearing.

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At the initial evidentiary hearing, a right was asserted to irrigate the SE $\frac{1}{4}$ SW $\frac{1}{4}$ and S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 12 with water diverted from Whiskey Creek. The Referee did not recommend confirmation of a water right due to their being no evidence that a water right was legally established for the land. In an effort to resolve that lack of evidence, the Van De Graafs entered DE-1791, which includes copies of the Homestead Proof documents for the NW $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 12, and DE-1792, which includes copies of Timber Culture Proof documents for the S $\frac{1}{2}$ SE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12. The documents that are part of DE-1791 show that John Powles settled on the NW $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 12 sometime prior to 1890 and filed the homestead application on March 6, 1891. The testimony of witness statements that were required prior to issuance of the patent indicate that prior to 1898 there was 15 acres being cultivated and crops raised on part of that 15 acres for at least 7 years. The testimony of the homesteader indicates that 7 or 8 acres were being used to raise crops. The rest of the land was for grazing and about 80 acres had been fenced. Each of the forms asks what improvements are on the land. None of them indicate the existence of irrigation ditches. The Referee notes that included in DE-1791 is a letter dated December 28, 1890, from Charleton Franklin to John Powles. The letter states that in regard to the place he had homesteaded, it had been about 13 years since he homesteaded the land, which would place it around 1877. However, he goes on to describe the land as being "the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 24, T. 7 N., R. 29 W." There is a letter in DE-1791 responding to a letter from John Powles that leads the Referee to conclude that Mr. Powles had filed for

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1 a homestead in 1876, lived on the land for two years and then abandoned the
2 land and relinquished the tract. The Referee concludes that is the land
3 being discussed in the letter from Charleton Franklin, not the land for
4 which Powles ultimately received a patent.

5 DE-1792 is copies of a series of documents that lead up to issuance of
6 the patent for the NE $\frac{1}{4}$ SE $\frac{1}{4}$ and S $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12. Jabez Thomas settled on
7 land and filed an application for the land under the Timber Culture Act of
8 June 14, 1878. The Referee is not very familiar with this act, however, the
9 application filed by Thomas on September 8, 1879, indicates the purpose of
10 the act was to encourage the growth of timber on the western prairies. The
11 final affidavit filed by Thomas in 1890 prior to issuance of the patent
12 indicates that trees were planted on about 11 acres. The trees were
13 cottonwood, box elder and poplar trees. The testimony of witness documents
14 filed also indicate 11 acres were planted to trees.

15 The documents that are in the record would lead to a reasonable
16 conclusion that 7 to 8 acres were being irrigated in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{4}$ SW $\frac{1}{4}$ of
17 Section 12 when the patent issued and 11 acres were being irrigated in the
18 S $\frac{1}{4}$ SE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12 also at the time the patent issued. Part of
19 the land described in each of the patents is within the area described in
20 Court Claim No. 01232, Haidas Ranch/Gary Griffith (former Dippel Brothers).
21 Although the evidence might support a conclusion there was a water right
22 established for irrigating 8 acres and 11 acres, there is no evidence to
23 show where within the two 120 acre homesteads the irrigated land was or if
24 the irrigated land increased at a time that would result in establishment of
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1 a right for the additional acres. The Referee again concludes there has
2 been insufficient evidence provided to recommend confirmation of a water
3 right for the land in the S $\frac{1}{2}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, T. 18 N.,
4 R. 18 E.W.M.

5 COURT CLAIM NO. 15499 -- Mill Pond Mobile Manor

6 Mill Pond Mobile Manor filed Court Claim No. 15499 on November 5,
7 2001. On November 6, 2001, the Court signed an Order granting the motion to
8 file the late claim and allow taking of testimony at the supplemental
9 hearing that day. John Hughes, manager for Mill Pond Mobile Manor since
10 1985, testified at the supplemental hearing. The claimant is represented by
11 Attorney Paul Dempsey.

12 Mill Pond Mobile Manor is located in that portion of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of
13 Section 13, T. 17 N., R. 18 E.W.M. lying east of the Canyon Road. They are
14 asserting a right to use water diverted from the Yakima River and carried in
15 Tjossem Ditch to fill and maintain a pond and irrigate 2 acres of common
16 area. Water is diverted from the river and carried in Tjossem Ditch, piped
17 under the railroad tracks and the Canyon Road. A dam is on the ditch at
18 that point and a 5 HP pump is placed behind the dam to pump water into a 3
19 foot corrugated tube. The pump supplies water to the users beyond Mill Pond
20 Manor. The rest of the water then flows into Mill Pond. Water is pumped
21 from the pond to irrigate the common areas. Mr. Hughes testified that the
22 pump capacity is 110 gallons per minute (0.24 cubic foot per second). The
23 area is watered generally once or twice a week, depending on the weather.
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1 Mill Pond Mobile Manor is on land that was originally conveyed by the
2 United States to the Northern Pacific Railroad, who then sold it to R. P.
3 Tjossem and Albert Tjossem. The Tjossem family owned other land in this
4 area. The copy of 1912 Swigert Survey, put in the record by Bull Canal
5 Company as Exhibit DE-678, shows the Mill Pond in existence at that time.
6 It does not indicate whether the land around the pond was being irrigated.
7 The survey also shows the Tjossem Farm Power House being in the southeast
8 corner of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13, land not presently owned by the
9 claimant. The evidence is clear that the Tjossems constructed the Tjossem
10 Ditch sometime prior to 1902 to bring water to their property in Sections 13
11 and 24 for irrigation and to power a mill. The record does not show
12 ownership history for the land after the early 1900's until 1967, when the
13 State of Washington sold the land where the manor is located to Peter and
14 Kenneth Jensen. Mr. Hughes testified that it is the Jensens who developed
15 the mobile park. The deed contains a provision for interest in an easement
16 for a ditch from the Yakima River to be used for the purpose of conveying
17 water to the pond for filling and keeping filled said pond. The grantors
18 (State of Washington) reserved the right to use or assign any power or power
19 rights arising from the ditch and pond system. It seems clear from the
20 provision in the deed that water was being conveyed to the land to keep the
21 pond filled and for potential use in the future to generate power. Mr.
22 Hughes testified that he had no knowledge of when power was last generated.
23 There is no mention of use of the water conveyed in the ditch for
24 irrigation.

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1 RCW 90.14 required the filing of water right claims for all uses of
2 water begun prior to adoption of the surface water code in 1917 and the
3 ground water code in 1945. RCW 90.14.041 excepted from the filing
4 requirements water rights that were based on permits or certificates issued
5 by the Department of Ecology or one of its predecessor agencies. Counsel
6 for the claimant stated that they are relying on this exception from the
7 filing requirements. In 1974 Millpond Mobile Manor paid the power license
8 fee required by RCW 90.16.060. Along with the fee, a statement of claim was
9 required, showing the extent of the claim. DE-1957 is a copy of a letter
10 from Ecology acknowledging receipt of the power fee. Attached to the letter
11 is a partly completed statement of claim for the manor's use as a guide in
12 preparing future annual statements of claim and a receipt for the fee.
13 DE-1958 is a copy of a letter from Ecology informing the manor of the need
14 to pay the fee and complete the statement, a letter acknowledging receipt of
15 the fee in 1981, and a copy of the receipt for the fee. Mr. Hughes
16 testified that the fee had not been paid since he became manager of the
17 manor. The claimant seems to be arguing that payment of the fee and filing
18 the statement of claim associated with the power license fee is the
19 equivalent of have a right based on authority of a permit or certificate.
20 The Referee disagrees with this position. There is no reference in any of
21 the documents to permit or certificate. However, the Referee does conclude
22 that a person or entity completing a statement of claim associated with a
23 power license fee could reasonably conclude that they had complied with the
24 requirements of RCW 90.14 for claiming a right for power generation by

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1 submitting the statement of claim with the power license fee. The form
2 clearly identifies that it is a claim of water rights for power purposes and
3 the Referee concludes that filing this claim with Ecology substantially
4 complies with RCW 90.14 for asserting a water right for power generation.
5 Mill Pond Manor is not asserting a right to use water for power generation.
6 There is nothing on the power generation statement of claim that would
7 suggest that a right is also being asserted to use water to fill a pond or
8 to irrigate land. Although the claim was submitted to the proper agency, it
9 did not contain sufficient information to apprise the agency that a right
10 was being asserted for irrigation and filling and maintaining a pond. In
11 this case, the form did not provide the substantive information needed to
12 meet the intent of RCW 90.14.

13 RCW 90.14.071 provides that any person claiming the right to divert or
14 withdraw waters of the state who fails to file a statement of claim shall be
15 conclusively deemed to have waived and relinquished any right, title or
16 interest in said right. The Referee finds that RCW 90.14 was not
17 substantially complied with and any right that may have existed for use of
18 Yakima River water for irrigation and pond filling and maintenance has been
19 waived and relinquished due to failure to file a water right claim pursuant
20 to RCW 90.14.

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1 COURT CLAIM NO. 00484 -- Brent Minor
2 (A) 04498 & Mary Minor
3 Matthew P. Miller
4 & Jeane L. Miller
5 Thomas R. Hedrick (Trust)
6 & Janet E. Hedrick

7 The Department of Ecology took exception to the Referee recommending
8 confirmation of water rights for use of Naneum Creek on lands for which
9 there was no apparent RCW 90.14 claim for that source. The claim was
10 remanded to the Referee to address this exception. Subsequent to the Report
11 of Referee issuing, Brent Minor was substituted for Mark McWhorter on Court
12 Claim No. 00494. On May 8, 2002, Thomas R. and Janet E. Hedrick were joined
13 to the claim and on June 10, 2002, Matthew P. and Jeane L. Miller were
14 joined to the claim. Brent Minor, who is represented by Attorney Lawrence
15 E. Martin, testified at the supplemental hearing.

16 Mr. Minor bought the McWhorter property in Subbasin No. 9 around 1991,
17 but was not substituted as claimant until March 18, 2002. The Referee
18 recommended confirmation of six water rights for use of water diverted from
19 Naneum Creek. Ecology took exception to three of those recommendations, due
20 to there not being an RCW 90.14 claim for use of Naneum Creek on those
21 lands. Mr. Minor provided testimony to clarify the source of water being
22 used and the RCW 90.14 claim that had been filed for that source. The three
23 rights that have been challenged are for lands in the E $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8,
24 the SE $\frac{1}{4}$ of Section 8 and the NE $\frac{1}{4}$ of Section 17, T. 18 N., R. 19 E.W.M.
Ecology correctly identified a typographical error on page 620, where the
S $\frac{1}{4}$ NE $\frac{1}{4}$ was incorrectly described instead of the E $\frac{1}{4}$ NE $\frac{1}{4}$, which is the correct

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1 location. The Referee had recommended confirmation of a right to Naneum
2 Creek with a diversion in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 9. Mr. Minor testified that
3 the land in Sections 8 and 17 are irrigated from drains that enter his
4 property in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8 and in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 9. Under
5 further questioning it became apparent that these drains are actually
6 ditches that carry water diverted from Naneum Creek in Government Lot 4 of
7 Section 4. The drains or ditches flow south through Sections 4 and 5 onto
8 the Minor property. Although there is a diversion from Naneum Creek to the
9 ditches/drains, they most certainly also capture return flow water from the
10 fields through which they flow. These fields are irrigated with water also
11 diverted from Naneum Creek. The most westerly drain may also capture return
12 flow from lands irrigated from Wilson Creek, as there is a diversion from
13 Wilson Creek to a ditch that goes in the same general direction as the
14 drain/ditch that serves the Minor property.

15 Two RCW 90.14 claims were identified as having been filed for these two
16 ditches/drains. Water Right Claim No. 005562 was filed on a drain and
17 claims a right to divert 3 cubic feet per second, 320 acre-feet per year for
18 the irrigation of 250 acres in the E $\frac{1}{4}$ of Section 8. The point of diversion
19 is described as being 610 feet west and 800 feet south of the northeast
20 corner of Section 8, which is on the westerly drain. Water Right Claim No.
21 005564 was filed on a drain and claims a right to divert 3 cubic feet per
22 second 320 acre-feet per year for the irrigation of 400 acres in parts of
23 the W $\frac{1}{4}$ of Section 9 and SE $\frac{1}{4}$ of Section 8, as well as the SW $\frac{1}{4}$ of Section 8
24 and the NE $\frac{1}{4}$ of Section 17, T. 18 N., R. 19 E.W.M.

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1 These two water right claim forms cover the land irrigated with Naneum
2 Creek water not otherwise described in a previously identified RCW 90.14
3 claim. Although the source of water described is a drain, it is clear to
4 the Referee that Naneum Creek is the true source of water being used. An
5 examination of State's Exhibit SE-2 clearly shows how confusing it is to
6 identify creeks, ditches and drains. The Referee has in many instances
7 found that RCW 90.14 was substantially complied with when the landowner
8 described a ditch rather than the creek as the source of water and described
9 where water is taken from the ditch rather than the diversion from the
10 creek. The Court has consistently upheld these substantial compliance
11 determinations (See also the Court's February 10, 1995, Memorandum Opinion
12 Re: RCW 90.14 and Substantial Compliance). The Referee makes the same
13 conclusion for these water right claim forms. Even though they describe
14 drains as the source of water and the points of diversion described are from
15 the drain rather than from Naneum Creek, the Referee finds that RCW 90.14
16 was substantially complied with. The Referee does recommend that the rights
17 described on pages 620, 657 and 659 be amended to identify the point of
18 diversion as being in Government Lot 4 of Section 4, where the actual
19 diversion from the creek is located.

20 The Referee had recommended that a right be confirmed for the
21 irrigation of 40 acres in the SE $\frac{1}{4}$ of Section 8. This recommendation was
22 contingent upon the claimant identifying a 40 acre area to be more
23 specifically described, as it is not in anyone's best interest to authorize
24 a 40 acre right within a 160 acre place of use. Mr. Martin asked Mr. Minor
25
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1 questions in an attempt to clarify a place of use for this right. It is
2 clear from Mr. Minor's response that due to Kittitas Reclamation District
3 (KRD) water also being used in the SE% of Section 8 it is difficult to
4 identify a specific 40 acre tract for this water right to be appurtenant.
5 Since the claimant was not able to do so, the Referee will designate the
6 NE%SE% as the place of use for this water right. The recommendation of page
7 657 is also amended so that the place of use is the NE%SE% of Section 8,
8 T. 18 N., R. 19 E.W.M.

9 The last exception taken by Ecology was to the right that was awarded
10 for using Lyle Creek. They ask that the point of diversion recommended by
11 the Referee not be awarded, as it was not preserved in a RCW 90.14 claim.
12 The Referee thought this had adequately been addressed in the initial Report
13 of Referee. WRC No. 005561 was filed asserting a right to use Wilson
14 Creek. Lyle Creek is a branch of Wilson Creek that separates from the main
15 creek at the point described in WRC No. 005561 as the point of diversion.
16 The described location is not the point of diversion and never has been; it
17 is the point where the creek branches. The actual point of diversion is in
18 the NE% of Section 17. The Referee finds that RCW 90.14 was substantially
19 complied with and WRC No. 005561 protects the claimant's right to divert
20 water from Lyle Creek in the NE% of Section 17. The Referee recommends
21 there be no change to right recommended for confirmation on Lyle Creek.

22 The Referee notes that according to the Motions to be Joined filed by
23 the Millers and the Hedricks, they have acquired portions of the E% of
24 Section 8. Water rights were not awarded for irrigating all of the Minor's

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1 land in the E $\frac{1}{2}$ of Section 8. There is not enough information in the record
2 to allow the Referee to determine whether they have acquired portions of the
3 land irrigated from Naneum Creek. Almost all of the Minor property in the
4 E $\frac{1}{2}$ of Section 8 is irrigated either from Naneum Creek or with water
5 delivered by the Kittitas Reclamation District. It is recommended that Mr.
6 Minor clarify with the Millers and the Hedricks the source of irrigation
7 water for their lands and provide that information to the Court.

8

9 COURT CLAIM NO. 05349 -- Ron Mitchell

10 COURT CLAIM NO. 15630 -- Ron Mitchell
11 & Sonja Mitchell

12 Ron Mitchell filed an exception to the Report of Referee for Subbasin
13 No. 9, seeking to have a right confirmed for stock watering on his property
14 in the NW $\frac{1}{4}$ of Section 33, T. 18 N., R. 19 E.W.M. He also filed a motion to
15 allow filing of a late claim in this proceeding. Although the claim was not
16 filed until after the supplemental hearing, Mr. Mitchell presented evidence
17 in support of that claim at the supplemental hearing. The Mitchells are
18 represented by Attorney Richard T. Cole. In addition to Mr. Mitchell,
19 Richard Fischer, a former owner of the lands described in the late claim,
20 testified at the supplemental hearing.

21 A right was not awarded for the Mitchell property in the NW $\frac{1}{4}$ of
22 Section 33, T. 18 N., R. 19 E.W.M. primarily due to there being no water
23 right claim filed pursuant to the requirements of RCW 90.14, the Claims
24 Registration Act. That Act provided that failure to file a claim waives and
25 relinquishes any right that may have existed, RCW 90.14.071. Mr. Mitchell

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1 did not except to a right not being awarded for irrigation, but did take
2 exception to a right not being confirmed for diversionary stock watering.
3 He testified that he has a maximum of 160 yearlings on this property and
4 they drink from the Ferguson Ditch. The Ferguson Ditch flows north to south
5 through the easterly portion of the claimant's property. Unfortunately, the
6 lack of a water right claim filed under RCW 90.14 also prevents recommending
7 that a right be confirmed for stock water. A water right claim must be
8 filed for all diversionary water uses, including stock watering, in order
9 for a right to be confirmed in this proceeding. RCW 90.14 does not exempt
10 from the filing requirements any diversionary water use. Therefore, the
11 Referee continues to recommend that no rights be confirmed under Court Claim
12 No. 05349.

13 Court Claim No. 15630 was filed by the Mitchells on January 31, 2002.
14 It asserts a right to use 1.5 cubic feet per second from Naneum Creek for
15 the irrigation of 50 acres in the W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 16, T. 18 N.,
16 R. 19 E.W.M. The land is planted in hay, pasture, and grain crops. The
17 claimants also raise up to 60 cow/calf pairs and water them from the
18 irrigation ditches. The land is not riparian to Naneum Creek.

19 Exhibit DE-1911 contains copies of numerous historical documents
20 related to ownership of the land in the late 1800's and early 1900's. The
21 land was held by the State of Washington until 1891 when it was conveyed to
22 Martin Meehan, who then sold it to Mary C. Ames. It continued to be in the
23 Ames family until sometime after 1901. The Findings of Fact that preceded
24 the Ferguson decree stated that S. L. Ames (apparently Mary Ames' husband)
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1 possessed the NE $\frac{1}{4}$ of Section 16 under contract with the State of Washington
2 and that water had been diverted and used for irrigation beginning in the
3 spring of 1884. 100 acres were in cultivation. The decree awarded a right
4 to 100 inches with an 1884 date of priority. By 1909 the W $\frac{1}{4}$ NE $\frac{1}{4}$ of
5 Section 16 was owned by O. C. Bare who allowed an irrigation ditch to be
6 constructed by C. W. Moffett and Frank Moreau across a portion of the
7 property. Copies of a complaint between Frank Moreau and H. M. Sheppard and
8 Lillie May Sheppard and affidavits in support of the complaint are also part
9 of the exhibit. The complaint is against the owner of the E $\frac{1}{4}$ NE $\frac{1}{4}$ of
10 Section 16 and the affidavits mention a ditch other than the one at issue
11 being used to deliver water to both the E $\frac{1}{4}$ NE $\frac{1}{4}$ and W $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 16,
12 indicating that water from Naneum Creek was being used on what is now the
13 claimant's land.

14 Water Right Claim No. 005645 was filed by Richard R. Fischer pursuant
15 to the requirements of RCW 90.14. It asserts a right to use 2.4 cubic feet
16 per second, 1752 acre-feet per year from Naneum Creek for the irrigation of
17 80 acres in the W $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 16. It describes a diversion in the SE $\frac{1}{4}$ NW $\frac{1}{4}$
18 of Section 16. Mr. Fischer owned and irrigated the land from the early
19 1970's until 1979, when he sold it to Curtis Botting. In 1988 the land was
20 forfeited back to Mr. Fisher, who then sold it in 1996 to the Mitchells.

21 At the time the Mitchells bought the land water from Naneum Creek was
22 not being used. Mr. Mitchell marked on State's Exhibit SE-2 the location of
23 the diversion from Naneum Creek in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 16 and drew the
24 approximately ditch location. About two years ago, the ditch from Naneum
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1 Creek was covered over by the owner of the land through which it flowed and
2 since then there has not been a delivery system from the creek. According
3 to Mr. Fischer's testimony sometime during the time Mr. Botting owned the
4 land, he stopped irrigating with Naneum Creek water and used only water
5 delivered by the Kittitas Reclamation District (KRD). The testimony was
6 that KRD water is delivered for the 50 acres that are irrigated. Based on
7 Mr. Fischer's testimony, the Referee concludes that Naneum Creek water has
8 not been used since sometime prior to 1988. Although both Mr. Mitchell and
9 Mr. Fischer testified there was never any intent to relinquish the water
10 right, it has not been exercised for at least 15 years and perhaps more than
11 20 years. Mr. Mitchell testified that the diversion and delivery ditch was
12 removed about two years ago, Mr. Fischer indicated that the ditch and
13 diversion works were not available in 1988 when he got the land back.
14 However, it appears that when Mr. Fischer was diverting water and irrigating
15 the diversion was several hundred feet further north than the diversion Mr.
16 Mitchell indicated had been used.

17 It is apparent the beneficial use of the right has not continued since
18 sometime prior to 1988 causing the Referee to conclude that the right had
19 relinquished prior to the Mitchells acquiring the land in 1996, see RCW
20 90.14.180, and there has been no evidence offered that there was a
21 sufficient cause for the nonuse that prevented relinquishment, see RCW
22 90.14.140. Therefore, the Referee recommends that a right not be confirmed
23 under Court Claim No. 15630.

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2 COURT CLAIM NO. 02133 -- Michael Kelly Moeur, Sr.
3 02134 & Michael Kelly Moeur, Jr.
4 02135
5 02136
6 02137

7 Both the claimants and Ecology took exception to the recommendations
8 made by the Referee concerning the claims filed by the Moeurs. Ecology's
9 exceptions regarding the points of diversion authorized were denied by the
10 Court, but the remaining exceptions were remanded to the Referee. Michael
11 Moeur, Sr., testified at the supplemental hearing. The claimants are
12 represented by Attorney John P. Gilreath.

13 The Referee recommended that a right be confirmed for use of Spring
14 Creek for the irrigation of 23 acres in that portion of the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of
15 Section 25, T. 17 N., R. 19 E.W.M. lying southwest of Spring Creek. The
16 claimant did not take exception to the priority date or the number of acres
17 in the recommendation. Exception was taken to the quantity of water. At
18 the initial evidentiary hearing, the claimant did not put in any evidence of
19 the quantity of water used from Spring Creek. The Referee selected a
20 quantity that was based on what had commonly been awarded by decrees in the
21 Wilson-Naneum subbasin, but increased the quantity by 50 percent in
22 recognition of the porous soils on the claimants' land. The claimants
23 believe that quantity is not sufficient. They cite to an engineering report
24 completed by Richard C. Bain, Jr., for the neighboring Stewart property, see
25 DE-1513. That report indicates that 16.8 acre-feet per year is needed to
26 irrigate the Stewart property. Using that figure, Mr. Moeur testified that

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he needed 386.4 acre-feet per year to irrigate the 23 acres and that it would take a diversion of 1.39 cubic feet per second from the creek in order to get that annual quantity during the irrigation season. Mr. Moeur has not measured the quantity of water diverted from Spring Creek and used for irrigation and is asserting a right to what he believes is needed to adequately irrigate his land. There is no evidence in the record to show how much water Mr. Moeur has beneficially used to irrigate his land. While it is not uncommon for the Referee to use water duty information provided for neighboring land, it is not appropriate in this case. The Referee did not even award the claimed 16.8 acre-feet per acre to the Stewarts due to the lack of evidence to show there was a water right for that quantity. With the Stewarts, there at least was evidence of the instantaneous quantity of water being used, which often is the basis for determining the annual quantity of water being used on the property. While the Referee frequently does not have evidence of the quantity of water actually being used, there often is a decree that limits the quantity that legally can be diverted and when that is not case the Referee has relied on the quantity for which Ecology will issue a permit, 0.02 cubic foot per second for each acre irrigated. The Referee will not recommend confirmation of a water right for such a large quantity of water for the number of acres irrigated without evidence of beneficial use of that water. ". . . the trial court must calculate beneficial use based upon diversion and actual use, as required by the law of this state." Department of Ecology v. Acquavella, 131 Wn.2d 746,

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1 756, 935 P.2d 595 (1997). The Referee recommends that the quantity of water
2 awarded for use from Spring Creek not be altered.

3 The Referee recommended that a right be confirmed to the claimants for
4 use of water from the Yakima River for the irrigation of 117 acres. The
5 claimants took exception to the priority date and quantity of water
6 awarded. Ecology took exception to the number of acres authorized to be
7 irrigated. The Referee will first consider the priority date. Water is
8 delivered to the property from the Yakima River through the Tjossem Ditch.
9 Determining the priority date is difficult due to the lack of evidence of
10 when the Tjossem Ditch was constructed. All the documents in the record
11 from the first hearing were prepared in the early 1900's and clearly show
12 that the Tjossem Ditch was constructed and that a second ditch was (the
13 Stein, McLeod, Clark Ditch) being merged with the Tjossem. Unfortunately,
14 there is nothing in the record to show when either of these ditches was
15 first constructed. The Referee is confident that it was prior to 1900, the
16 priority date used, but there was nothing in the record that clearly
17 established the correct priority date. Most of the Moeur property is not
18 riparian to the Yakima River, so the date the land was settled or the patent
19 issued would not be the priority date. The right was established under the
20 Prior Appropriation Doctrine and under that doctrine the date is set by when
21 efforts are first made to appropriate water. In 1933 Peter Tjossem and John
22 Hanks each completed an affidavit detailing their knowledge of water use on
23 lands in the E½NW¼ of Section 24 (land now owned by neighboring claimant
24 Robert Stewart). The affidavit states that water has been delivered to the

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1 land in Section 24 for over 40 years, which put the appropriation commencing
2 around 1893. Water is delivered to this property through the Stein, McLeod,
3 Clark Ditch, which is the same ditch that delivers to the Moeur property.
4 The Moeurs are seeking a priority date of 1885, based on an affidavit by
5 Albert Tjossem. That affidavit, which is attached to Robert Stewarts Court
6 Claim (No. 00497) states that water was first appropriated into the Stein,
7 McLeod and Clark Ditch between 1880 and 1890. The affidavit, along with
8 that of Peter Tjossem and John Hanks show that in 1902 the diversion into
9 the Stein, McLeod and Clark Ditch was abandoned and the water previously
10 appropriated was to be carried in the Tjossem Ditch. The Referee agrees
11 that this affidavit supports a conclusion that a priority date earlier than
12 1900 is appropriate. The three affidavits taken together would suggest a
13 priority date close to 1890. The Referee recommends that the priority date
14 be changed to June 30, 1889.

15 The right recommended for confirmation by the Referee allowed for the
16 diversion of 3 cubic feet per second. The claimants took exception to this,
17 asking that the instantaneous quantity be increased to accommodate the
18 conveyance loss in the ditch. They testified to using 3 cfs to irrigate
19 their property. The August 31, 2001, Declaration by Richard C. Bain, Jr.,
20 indicates that he measured the water flowing in Clark Ditch, just after it
21 separated from the main Stein, McLeod, Clark Ditch and found there was
22 significant conveyance loss before it reached the Moeur property. On
23 July 15, 2001, 5.1 cfs was flowing in Clark Ditch where it separated from
24 the main ditch and 1.8 cfs reached the Moeur property. The claimant is

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1 seeking a right to divert 5 cfs. The Tjossem and Hanks affidavits show that
2 the Clark branch of the ditch carried 300 inches of water, or 6 cubic feet
3 per second to successors of Joel Clark. Two of those successors are T. W.
4 Farrell and Charlie Stone, predecessors of the Moeurs. The Moeurs are
5 claiming 250 of the 300 inches. No other party to this adjudication is
6 asserting rights under the Clark Ditch. At the initial evidentiary hearing,
7 the testimony was that the water carried in Clark Ditch is placed in a lake
8 and then pumped to the claimants' irrigation system. Mr. Bain's declaration
9 shows that 5 cfs is carried in Clark Ditch, while no more than 3 cfs reaches
10 the property and can be applied to the land. The claimant also asked that
11 the annual quantity of water be increased to 980 acre-feet per year. They
12 irrigate approximately 165 days during the irrigation season, and at rate of
13 3 cfs, 980 acre-feet per year would be used. Water Right Claim No. 018037
14 filed pursuant to RCW 90.14 asserts a right to divert 4 cfs, 1200 acre-feet
15 per year from the Yakima River for irrigation of 80 acres within the
16 claimant's land. Mr. Moeur has filed with Ecology a request to amend WRC
17 No. 018037. As far as the Referee knows, no decision has been made on the
18 request. The Court has consistently held that in most cases the quantity of
19 water claimed in a water right claim is the maximum that can be authorized
20 for use. The Referee notes that the amendment requests a right to 3 cfs,
21 980.1 acre-feet per year. An asterisk next to the 3 cfs directs the reader
22 to a statement that is attached. The statement indicates that the quantities
23 claimed are the amounts at the diversion to the claimants' property and the
24 diversion from Tjossem Ditch may be more. The Referee is interested to see
25

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1 how that lack of specificity is handled in the amendment request. The
2 Referee amends the instantaneous quantity of water authorized on page 704 of
3 the Report of Referee to 4 cfs, but will not modify the annual quantity
4 because of the conveyance loss factor.

5 Ecology took exception to the number of acres authorized for
6 irrigation. As previously mentioned WRC No. 018037 asserts a right to
7 irrigate 80 acres with water diverted from the Yakima River. The Moeurs
8 request to amend WRC No. 018037 also seeks to amend the number of acres
9 irrigated. The Referee concludes that an error was made when a right to
10 irrigate 117 acres was initially recommended for confirmation. Since WRC
11 No. 018037 only asserts a right to irrigate 80 acres, that is the limit of
12 the right that the Referee can recommend for confirmation.

13 In summary, the Referee amends the recommendation on the water right
14 from the Yakima River on page 704 of the Report of Referee to: A right with
15 a priority date of June 30, 1889, to divert 4 cubic feet per second, 831.6
16 acre-feet per year from the Yakima River for the irrigation of 80 acres and
17 stock water. The place of use and point of diversion are unchanged.

18 The Moeurs are also asserting a right to use water from Wilson Creek
19 via Farrell Ditch. The Referee did not recommend confirmation of a right to
20 use Wilson Creek because the RCW 90.14 claim, WRC No. 018039 asserted a much
21 smaller right than that being asserted herein and there was little evidence
22 of the quantity of water being put to beneficial use. The Moeurs are also
23 attempting to amend WRC No. 018039. The amendment claims a right to 9 cfs,
24 1120 acre-feet per year for the irrigation of 127 acres. That amendment has

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1 also not been approved. Richard Bain's declaration shows that on July 24,
2 2001, Farrell Ditch was measured. On that date the flow near the diversion
3 was measured at 3.38 cfs and at 2.96 cfs about 1 mile downstream. The
4 declaration indicates that the ditch was carrying slightly less than it
5 normally would and Mr. Bain indicated that 4.0 cfs would be the flow rate,
6 with a conveyance loss of 0.5 cfs. This measurement does not support a
7 right to divert the 9 cfs that is being claimed by the Moeurs.

8 Determining a priority date is complicated. The land is not riparian
9 to Wilson Creek and none of the documents in the record indicate when use of
10 Wilson Creek began. Wilson Creek is delivered to the claimants' property
11 through the Farrell Ditch (also known as the Scott Ditch). The Ringer v.
12 Stone case in 1944 discusses use of the Scott Ditch on the Stone property,
13 which is now owned by the Moeurs. However, it does not mention when that
14 water use first began. There is no information on when this ditch was first
15 constructed. Older aerial photographs put in the record by the United
16 States for neighboring land do not show enough of Section 24 to be of
17 assistance. John Scott acquired the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24 in 1890 and T. W.
18 Farrell acquired that land, along with the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 25 in 1903.
19 Very little of the Moeur's irrigated land lies in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24.
20 While deeds for the Moeur's property mention water rights on the Tjossem
21 Ditch prior to 1900, the earliest mention of the Scott or Farrell Ditch is
22 after 1900. Court Claim 02133 asserts a right with a priority date prior to
23 1903, while the Summary of Claim submitted by counsel asserts dates
24 consistent with settlement of the land. If the land was riparian to Wilson
25

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1 Creek the later assertion would have merit. It is not riparian, therefore,
2 dates of when the land left Federal control is not depositive.

3 Lacking any better information with which to establish a priority date,
4 the Referee intends to use June 30, 1900, which is after Scott acquired a
5 portion of the land, but before Farrell acquired it. Due to the constraints
6 in the claims filed pursuant to RCW 90.14, a right can be recommended for
7 the irrigation of only 31 acres. Although Mr. Bain's declaration indicates
8 that 4 cubic feet per second can be diverted and carried in the Farrell
9 Ditch, that quantity is excessive for irrigating 31 acres. Since it is
10 obvious that the claimants carry sufficient water in the ditch to assist
11 with irrigating over 100 acres, it would be appropriate to reduce the
12 instantaneous quantity to something reasonable for irrigating 31 acres. If
13 the claimant is successful in amending the water right claim form to
14 increase the number of acres irrigated, the Referee is prepared to recommend
15 confirmation of a right for up to 4 cfs from Wilson Creek. The point of
16 diversion that shall be authorized is in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13, T. 17.,
17 R. 18 E.W.M. The RCW 90.14 claim describes points in Section 24 that are on
18 the ditch that carries water from Wilson Creek, not the actual diversion
19 from the creek. Wilson Creek does not flow where the water right claim
20 describes the diversions. The Referee finds that the water right claim
21 substantially complies with the requirements of RCW 90.14 for point of
22 diversion.

23 At this time, the Referee will recommend that a right be confirmed with
24 a June 30, 1900, date of priority for the diversion of 1 cubic foot per

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1 second, 310 acre-feet per year for the irrigation of 31 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$
2 of Section 25, T. 17 N., R. 18 E.W.M.

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4 COURT CLAIM NO. 01267 -- Morrison Ranches

5 The Referee recommended that two rights be confirmed to Morrison
6 Ranches for use of Naneum Creek: With July 5, 1872, date of priority, a
7 right for the diversion of 0.40 cubic foot per second in May and June and
8 0.20 cubic foot per second in April and July 1 through October 15, 100
9 acre-feet per year for irrigation of 20 acres in a portion of the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of
10 Section 4, T. 17 N., R. 19 E.W.M. and a second right with a June 30, 1875,
11 date of priority, a right for the diversion of 0.30 cubic foot per second,
12 75 acre-feet per year for the irrigation of 15 acres and 5 acre-feet per
13 year for stock watering in the W $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 4, T. 17 N.,
14 R. 19 E.W.M. Both Ecology and Morrison Ranches took exception to portions
15 of the recommendation. Morrison Ranches is represented by Attorney Jeff
16 Slothower and Chester J. Morrison, Jr. testified at the supplemental
17 hearing.

18 Ecology's exceptions document requested clarification of the place of
19 use for the water right with the 1872 date of priority. The request states
20 that "It appears to be excluding 2 parcels, the descriptions of which do not
21 close." At the supplemental hearing Ecology's representative suggested that
22 there appeared to be a typographical error in the portion of the legal
23 description on page 612, line 12 and page 392, line 24 $\frac{1}{2}$. In both places the
24 bearing should read S 4°46' W 573.0 feet. Morrison Ranch submitted Exhibit
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1 DE-1765, which is the correct legal description for the property. The
2 Referee compared DE-1765 to the legal description in the Report of Referee
3 and the change suggested by Ecology is correct and has been made. The rest
4 of the legal description is consistent with DE-1765. The Referee notes that
5 although Ecology's request for clarification suggests that two described
6 parcels are being excluded from the legal description, when in fact the two
7 parcels are the specific lands owned and irrigated by Morrisons.

8 Morrison Ranch had also taken exception under this claim to a right not
9 being confirmed for use of water for stock watering after the end of the
10 irrigation season. Mr. Morrison testified that he has stock on this portion
11 of his property for about two months after the end of the irrigation season,
12 usually in November and December. He continues to divert approximately 0.50
13 cubic foot per second at his lower diversion in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 4,
14 T. 17 N., R. 19 E.W.M. during that time period. The livestock drink from
15 the delivery ditch. The Morrisons have a herd of about 200 cattle that is
16 moved around on their property at various times during the year. The cattle
17 would consumptively use 0.5 acre-foot from the end of the irrigation season
18 through the end of December. The Referee recommends that a right be
19 confirmed for use of 0.50 cubic foot per second, 0.50 acre-foot per year
20 (consumptive) for stock watering from October 16 through December 31. The
21 instantaneous quantity and the annual quantity of water awarded for stock
22 watering will be divided between the two water rights that were confirmed
23 under Court Claim No. 01267 based on the quantity awarded for irrigation.

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1 COURT CLAIM NO. 01266 -- Morrison Ranches
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3 Morrison Ranches, represented by Attorney Jeff Slothower, took
4 exception to the Referee not recommending that a right be confirmed for the
5 Morrison property in the W $\frac{1}{2}$ of Section 30, T. 19 N., R. 19 E.W.M. Bertha
6 Morrison and Chester J. Morrison, Jr. testified at the supplemental
7 hearing.

8 Water is diverted from Wilson Creek in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 18, and
9 carried over a mile and a half through the Seaton-Johnson Ditch. The land
10 is in pasture, which is rill irrigated with dirt ditches and gated pipe.
11 Approximately 200 head of cattle are periodically kept on this land during
12 the irrigation season and at times until the end of December. They drink
13 from the irrigation ditch. The quantity of water used to irrigate the land
14 has not been measured, however, Mr. Morrison estimated it was about 3
15 cfs.

16 Pursuant to the requirements of RCW 90.14, Chester J. Morrison filed
17 Water Right Claim No. 119598 asserting a right to use 2 cubic feet per
18 second, 4 acre-feet per year from Wilson Creek for the irrigation of 150
19 acres and stock watering. The Referee believes the intent was to claim 4
20 acre-feet per year per acre irrigated. The period of water use shown on the
21 claim is all year. The place of water use is the W $\frac{1}{2}$ of Section 30,
22 T. 19 N., R. 19 E.W.M. The point of diversion is in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of
23 Section 18, at the location of the presently used diversion.

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1 As discussed in the original Report of Referee, Victor Zumbrunnen
2 settled on the NW $\frac{1}{4}$ of Section 30, but in the fall of 1908 relinquished his
3 claim to the land. Thomas Hodgson ultimately received a patent on September
4 23, 1914. Hodgson's answer to the complaint filed in the Sanders v. Bull
5 case states that after Victor Zumbrunnen settled on the land in 1906 he
6 cultivated a small portion of the land and appropriated a small amount of
7 water. Hodgson began in the spring of 1909 to improve and cultivate his
8 land, ultimately appropriating 80 inches of water from Wilson Creek.

9 On September 21, 1911, Victor Zumbrunnen received a patent for the SW $\frac{1}{4}$
10 of Section 30. Prior to that, in 1910, he had filed a notice of water right
11 stating he had appropriate 2 cfs from Wilson Creek for irrigation, stock
12 watering and domestic supply for his land in the SW $\frac{1}{4}$ of Section 30. The
13 language in the notice leads the Referee to conclude that the water was
14 appropriated prior to when the notice was filed, but no date is given for
15 the appropriation. Also in the record as Exhibit DE-435 is a Notice of
16 Water Right filed by Victor Zumbrunnen in 1904. It asserts a right to use
17 waste waters from the NE $\frac{1}{4}$ of Section 30, T. 18 N., R. 18 E.W.M. to the
18 extent of 2 cfs on the SE $\frac{1}{4}$ of Section 30. The Morrisons are asserting that
19 the typed version of the 1904 Notice of Water Right contains errors. Bertha
20 Morrison, who is Victor Zumbrunnen's granddaughter, testified that he never
21 owned land in the SE $\frac{1}{4}$ of Section 30, nor did he own land in Section 30,
22 T. 18 N., R. 18 E.W.M. She testified that the notice should have described
23 use of water in the SW $\frac{1}{4}$ of Section 30, and the water was coming from the NE $\frac{1}{4}$
24 of Section 30, (all in T. 19 N., R. 19 E.W.M.). The claimants put in chain
25

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1 of title documents that clearly show that Victor Zumbrunnen never owned any
2 land in the SE $\frac{1}{4}$ of Section 30. The Referee is aware of many instances of
3 errors occurring when old handwritten documents are typed and filed in order
4 for there to be more legible documents. The Referee concludes that the
5 claimants have established that at the time that the water right notices
6 were filed, the only land owned by Victor Zumbrunnen in the area is in the
7 NW $\frac{1}{4}$ of Section 30, T. 19 N., R. 19 E.W.M.

8 The record suggest a different priority date for the NW $\frac{1}{4}$ of Section 30
9 than for the SW $\frac{1}{4}$ of Section 30. Based on the 1904 Notice of Water Right,
10 the Referee concludes that a right with a priority date of April 4, 1904,
11 would be appropriate for the SW $\frac{1}{4}$ of Section 30. Thomas Hodgson's answer in
12 the Sanders v. Bull case leads to a conclusion that the land in the NW $\frac{1}{4}$ of
13 Section 30 would have a June 30, 1909, date of priority. This date, of
14 course, is after the May 10, 1905, Federal withdrawal of the unappropriated
15 waters of the Yakima Basin. The Referee initially declined to confirm a
16 right to the Morrisons since the evidence showed that the priority date for
17 the right would be subsequent to the Federal withdrawal. After considering
18 the evidence presented at the supplemental hearing and the argument of
19 counsel, the Referee has reconsidered that position. Mr. Morrison testified
20 that for all of the NW $\frac{1}{4}$ of Section 30, they use what they call flood water.
21 They only divert to this property when the creek is flowing heavy following
22 warm weather in the spring that causes snow melt and brings the creek level
23 up so that all rights are being satisfied. Mr. Morrison testified that by
24 July the creek flow has diminished to the point they do not divert water,

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1 not even for stock. Frequently in the fall wet weather will again cause the
2 creek to flow stronger and they are able to divert water for stock watering
3 in late September through December. Since Wilson Creek flows into the
4 Yakima River below all of the storage reservoirs that are part of the Yakima
5 Project, flow from this creek cannot be stored by the Federal government for
6 delivery to its contract holders. However, Wilson Creek does flow into the
7 river and any unused water will contribute to the natural flow in the river
8 that is also used by the Federal contract holders. During the spring
9 runoff, there generally is sufficient natural flow water in the river to
10 satisfy all rights. However, in severe drought conditions that may not be
11 the case. The claimant needs to be aware that during the 2001 irrigation
12 season, several irrigation districts sought from the Court an Order to cease
13 diversion for all water rights with a priority date after May 10, 1905, the
14 date of the Federal withdrawal and the priority date for water rights
15 established under the withdrawal. On June 28, 2001, the Order was signed by
16 the Court, see Order On Show Cause RE: Motion to Limit Post 1905 Water
17 Rights, (Docekt No. 15248).

18 Mr. Morrison was not able to testify to how much water is diverted into
19 the ditch for use on the land in the W $\frac{1}{2}$ of Section 30, although he estimated
20 it was 3 cfs. He did testify that when only stock water is being delivered,
21 he diverts approximately 0.5 cubic foot per second for about 3 to 3 $\frac{1}{2}$
22 months. There are approximately 200 head of cattle that are on this portion
23 of his property at times during the fall. The RCW 90.14 claim that was
24 filed for this property claimed a right to divert 2.0 cubic feet per second
25

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1 for the irrigation of 150 acres. Mr. Morrison did not address why the
2 number of acres claimed in 1974 is different than what was testified to at
3 the hearing. As far as the Referee knows, there has been no effort to amend
4 the claim. Therefore, the Referee will recommend rights consistent with the
5 information in the RCW 90.14 claim. The 1911 affidavit of Thomas Hodgson
6 indicates that 80 acres were being irrigated in the NW $\frac{1}{4}$ of Section 30 and
7 the Referee will make his recommendation based on that statement, leaving 70
8 acres of the claimed 150 acres to be recommended for the SW $\frac{1}{4}$ of Section 30.

9 The Referee recommends that a right be confirmed with an April 4, 1904,
10 date of priority for the diversion of 0.93 cubic foot per second, 280
11 acre-feet per year from April 1 through October 15 for irrigation of 70
12 acres and stock water and 0.25 cubic foot per second, 0.50 acre-foot per
13 year for stock watering from October 16 through December 31 in the SW $\frac{1}{4}$ of
14 Section 30, T. 19 N., R. 19 E.W.M.

15 With a June 30, 1909, date of priority a right for the diversion of
16 1.07 cubic feet per second, 320 acre-feet per year from April 1 through
17 October 15 for the irrigation of 80 acres and stock water and 0.25 cubic
18 foot per second, 0.50 acre-foot per year for stock watering from April 16
19 through December 31 in the NW $\frac{1}{4}$ of Section 30, T. 19 N., R. 19 E.W.M.

20 Mr. Morrison also testified to using flood water in a manner that
21 suggested use of that water beyond the extent that the evidence shows rights
22 have been established. In the spring when there is rapid snow melt the
23 creek will rise to flood stage and landowners will divert and use water with
24 no regard to the recognized water rights. Many of the rights awarded in

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1 this basin are based on existing decrees that awarded specific quantities of
2 water and then reduced that quantity by half on July 1. The Referee
3 believes this was done in recognition of the spring "flood flows" and that
4 the rights awarded were based on those flows. The Referee also recognizes
5 that during extreme high flow periods, landowners will divert water into
6 ditches in order to try and prevent damage caused by the creek overflowing
7 its banks. The Referee does not believe that it is necessary to have a
8 water right in order to protect land from flood damage. The record
9 presented by the claimant also has not established that a right was
10 established for use of this water. Testimony in the initial evidentiary
11 hearing was that logging efforts in the headwaters of both Wilson and Naneum
12 Creeks have contributed to a different runoff characteristics than was
13 occurring prior to the logging. The prior decrees were predominantly
14 entered in the early 1900's, long after most of the water rights had been
15 established and did not recognize use of "flood flows" beyond the one inch
16 of water that was only available in May and June. Therefore, without
17 evidence of when this increased use of water occurred, the Referee cannot
18 recommend a right. Additionally, the RCW 90.14 claims must reflect a claim
19 to a quantity of water large enough to reflect that use.

20
21 COURT CLAIM NO. 01264 -- Morrison Ranches

22 The Referee recommended that a right be confirmed under Court Claim No.
23 01264 for the diversion of 0.40 cubic foot per second in May and June, 0.20
24 cubic foot per second in April and July 1 through October 15, 100 acre-feet

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1 per year for the irrigation of 20 acres and stock watering in that portion
2 of the SE $\frac{1}{4}$ of Section 18, T. 19 N., R. 19 E.W.M. lying between the
3 Seaton-Johnson Ditch and Wilson Creek. The Morrisons, represented by
4 Attorney Jeff Slothower, took exception to the Referee limiting the
5 diversion of water for stock watering to the irrigation season. Bertha
6 Morrison and Chester Morrison, Jr., testified at the supplemental hearing.

7 According to Mr. Morrison's testimony this land has always been used to
8 graze livestock for a few months after the end of the irrigation season.
9 Generally, stock are left on this portion of the Morrison land until the end
10 of December. There is a herd of 200 that seem to rotate between the various
11 portions of the Morrison Ranch. Mr. Morrison testified that 0.50 cubic foot
12 per second is diverted from Wilson Creek into the Seaton-Johnson Ditch for
13 stock watering after the irrigation season. Livestock grazing in the SE $\frac{1}{4}$ of
14 Section 18 drink from the ditch as it passes through Section 18. The ditch
15 continues southwest through Section 19 and into Section 30 where the water
16 in the ditch is used to water stock on the Morrison land in the W $\frac{1}{4}$ of
17 Section 30, along with land owned by others in Section 30. Mr. Morrison
18 testified that a diversion of 0.50 cubic foot per second is sufficient for
19 water stock all along the ditch.

20 The rights awarded to this portion of the Morrison property for
21 irrigation authorize use of 0.40 cfs in May and June and 0.20 cfs the rest
22 of the year. Therefore, the maximum that the Referee can award for stock
23 watering after the end of the irrigation season is 0.20 cfs. However,
24 rights are being recommended for confirmation for stock water on the lands

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1 in the W $\frac{1}{2}$ of Section 30 and authorize the use of an additional 0.50 cfs.
2 Between all of the Morrison Ranch rights using the Seaton-Johnson, a
3 diversion of up to 0.70 cfs is authorized. The Referee recommends that the
4 right described on page 398, lines 3 $\frac{1}{2}$ to 8 $\frac{1}{2}$ and on page 689, lines 1 to 10
5 be modified to include use of 0.20 cubic foot per second, 0.25 acre-foot per
6 year from October 16 to December 31 for stock watering.

7

8 COURT CLAIM NO. 01265 -- Morrison Ranches

9 The Referee recommended that a right be confirmed to Morrison Ranches
10 for the irrigation of 77 acres in the E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 4, T. 18 N.,
11 R. 19 E.W.M. with water diverted from Naneum Creek. The point of diversion
12 authorized is in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 4, as that was the diversion
13 described in the only water right claim form that was identified for the
14 property. The Morrisons took exception to the Referee only recommending one
15 point of diversion and to a right not being confirmed for stock watering
16 after the end of the irrigation season. The Court, at the exception
17 hearing, upheld the Referee's recommendation concerning the point of
18 diversion, ruling that since only one diversion was described on the RCW
19 90.14 claim, only one diversion could be recommended for confirmation. The
20 Court suggested that the claimants file an application to add a point of
21 diversion under RCW 90.03.380. The claim was remanded to address the stock
22 water exception. The claimant is represented by Attorney Jeff Slothower,
23 who advised the Referee that he had located a second water right claim filed
24 pursuant to RCW 90.14 that describes the claimant's land in the E $\frac{1}{2}$ SW $\frac{1}{4}$ of

25

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1 Section 4, T. 18 N., R. 19 E.W.M. Water Right Claim (WRC) No. 119608
2 asserts a right identical to that in WRC No. 119599, which had been
3 discussed in the Report of Referee for Subbasin No. 9 on page 399. The only
4 difference between the two water right claims is the location of the point
5 of diversion. WRC No. 119599 describes the point of diversion that was
6 included in the right recommended for confirmation. WRC No. 119608
7 describes the second point of diversion that is used by the claimants; the
8 point not included in the right recommended for confirmation. Mr. Slothower
9 had consulted with Ecology and both advocated modifying the water right to
10 include both points of diversion. The Referee agrees with this position.
11 Therefore, the water right recommended for confirmation on pages 399 and 642
12 under Court Claim No. 01265 is modified to include a second point of
13 diversion located approximately 500 feet south and 700 feet east of the
14 northwest corner of Section 4, being within Government Lot 4 (NW $\frac{1}{4}$ NW $\frac{1}{4}$) of
15 Section 4, T. 18 N., R. 19 E.W.M.

16 Chester J. Morrison, Jr., appeared at the supplemental hearing and
17 testified concerning the stock water use. Mr. Morrison testified that there
18 are livestock on this portion of their land all year, which requires them to
19 divert water the entire year. After the end of the irrigation season, they
20 continue to divert between 0.5 and 1.0 cubic foot per second. Mr. Morrison
21 did not specifically testify to the number of stock on this portion of the
22 property, however, for the other land he testified to watering a 200 head
23 herd of cattle that is moved around on their property. The Referee
24 concludes that portions of this herd are on the land in Section 4 and at

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1 times the whole herd is there, as the testimony indicates this is the only
2 land where there is stock the entire year.

3 Although Mr. Morrison testified to diverting up to 1.0 cfs for stock
4 watering, the water rights for this property are based on the Ferguson
5 decree and after July 1, the maximum that can be diverted is 0.80 cubic foot
6 per second. Based on the number of stock on the property, the Referee
7 recommends that a right be confirmed for the diversion of 0.80 cubic foot
8 per second, 1.5 acre-feet per year from October 16 through March 31 for
9 stock watering. The right will authorize use of the lower point of
10 diversion in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 4.

11
12 COURT CLAIM NO. 01263 -- Thomas V. Morrison
13 & Ginger D. Morrison
14 Sam Kayser
Chet Morrison
& Judy Morrison.

15 Chet Morrison, Jr. and Judy Morrison were joined to the referenced
16 claim, under objection from Mr. Kayser, and asserted that testimony was
17 presented by Mr. Kayser relative to land they now own. However, the Referee
18 found that the evidence presented was only for the portion of the land owned
19 by the Kaysers. Therefore, the Referee did not recommend confirmation of a
20 water right under Court Claim No. 1263 to the Morrisons. The Morrisons took
21 exception to a right not being confirmed for the land they felt was covered
22 by the claim. At the exception hearing, the Court ruled that the Morrison
23 should submit a late claim specifically for the land they owned adjacent to
24 the Kayser land described in Court Claim No. 01263. The Court ordered that
25

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1 testimony and evidence for the late claim would be taken at the Subbasin No.
2 9 supplemental hearing. Attorney Jeff Slothower, appearing on behalf of the
3 Morrisons/Morrison Ranch, advised the Referee that the Morrisons had decided
4 not to pursue filing a late claim and no further action would be taken on
5 their exception to Claim No. 01263. The Referee continues to recommend that
6 no right be confirmed to the Morrisons under Court Claim No. 01263.

7

8 COURT CLAIM NO. 01575 -- Brian Norelius
9 Kevin Weyand
& Gail Weyand

10 Kevin and Gail Weyand filed an exception to the Referee's
11 recommendation that a right not be confirmed for their land under Court
12 Claim No. 01575. Kevin Weyand testified at the supplemental hearing.

13 The Weyands acquired the portion of the land described in Court Claim
14 No. 01575 from Judith Nickerson in 1992, however, were not substituted for
15 her until March 27, 2000. The evidence presented at the initial evidentiary
16 hearing lead the Referee to conclude that a right had been established for
17 the former Nickerson property for use of Yakima River water delivered
18 through the Tjossem Ditch. However, a right was not recommended for
19 confirmation because Ms. Nickerson testified she had not used water during
20 the 3 years she had owned the land. Since there had been several years
21 between the hearing and issuance of the Report of Referee, the Referee
22 concluded that a right could not be confirmed without evidence of continued
23 beneficial use of the water.

24

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1 Mr. Weyand testified that when they moved onto the property in 1992 the
2 land was being irrigated with water from the Tjossem Ditch and they
3 continued that irrigation practice every year since. Jeff Brunson, a
4 neighboring landowner, testified that he has been familiar with the land
5 since 1989. Every year since then, he has observed some irrigation water
6 being applied to the land, even during the years that Ms. Nickerson owned
7 it. The Weyands also put into evidence DE-1944 and 1945, which are
8 statements from other neighbors of their observing water use on the Weyands
9 property.

10 The Weyands own 2.73 acres and they flood irrigate 2.5 acres of
11 pasture. Although there was not specific testimony by Mr. Weyand about
12 livestock on the property, the evidence shows that historically cattle have
13 been grazed on this land. It is a reasonable conclusion that since the land
14 is planted in pasture, it is being used for raising livestock. Mr. Weyand
15 did not testify to how much water is used when he irrigates. He did testify
16 that it takes 4 days to cover the 2.5 acres and that after he begins
17 irrigating in mid-April he does not stop until the ditch is shut off in
18 October. As discussed in the initial Report of Referee, Water Right Claim
19 No. 119386, which was filed by Robert Bynum a former owner of the land,
20 protected a right to use Yakima River water on this land.

21 Ms. Nickerson had sought a right to divert 0.5 cubic foot per second
22 for irrigating her land. That is an extremely large instantaneous quantity
23 for irrigation of 2.5 acres and there is no evidence that is the quantity of
24 water used to irrigate this land. The neighboring landowner uses 1.0 cfs to
25

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1 irrigate 9 acres, or approximately 0.1 cfs and 6 acre-feet per year per
2 acre. That also is a high quantity, but not unreasonable for flood
3 irrigation in this portion of the basin. Lacking definitive evidence of how
4 much water has been used, the Referee will use those quantities. Evidence
5 submitted by Michael Moeur in support of his claim to use water carried in
6 the Tjossem Ditch has resulted in the Referee determining that the appropriate
7 water right for the Tjossem Ditch should be June 30, 1889, which is an
8 earlier priority date than recommended in the initial Report of Referee for
9 water rights associated with this ditch. The Referee has changed the
10 priority dates for all water rights carried in the Tjossem Ditch to June 30,
11 1889.

12 The Referee concludes that a right can be confirmed to Kevin and Gail
13 Weyand with a June 30, 1889, date of priority for the diversion of 0.25
14 cubic foot per second, 15 acre-feet per year for the irrigation of 2.5 acres
15 and stock watering from April 15 through October 15. The place of use shall
16 be the south 495 feet of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13, T. 17 N., R. 18 E.W.M.
17 lying east of Bull Road and north of Tjossem Road. The point of diversion
18 shall be in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 11, T. 17 N., R. 18 E.W.M.

19
20 COURT CLAIM NO. 00968 -- Joseph J. O'Leary
21 & Mary E. O'Leary

22 Joseph J. and Mary E. O'Leary filed an exception to the Referee's
23 recommendation concerning the land owned at the time of intital hearing by
24 Kenneth E. and Susan Barnhart. The O'Learys now own that property and are
25 seeking to have a right confirmed for diverting water for livestock after

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1 the end of the irrigation season. The O'Learys are represented by Attorney
2 Jeff Slothower and Mr. O'Leary testified at the supplemental hearing.

3 The land acquired by the O'Learys and for which the exception applies
4 is the east 1800 feet of the S $\frac{1}{2}$ N $\frac{1}{2}$ E of Section 21, T. 18 N., R. 19 E.W.M. The
5 Referee recommended that a right be confirmed with a June 30, 1872, date of
6 priority for the diversion of 1.08 cubic foot per second in May and June,
7 0.54 cubic foot per second in April and July 1 through October 15, 270
8 acre-feet per year for the irrigation of 54 acres. After the last hay
9 cutting in the fall, the claimants run 160 head of cattle in the fields
10 until the end of December. Naneum Creek does not flow through the land, so
11 water from the creek continues to be diverted for stock watering while they
12 have cattle on the property. They use a diversion that is located in the
13 SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 16, T. 18 N., R. 19 E.W.M. The Referee did not recommend
14 confirmation of a water right after the end of the irrigation season due to
15 lack of testimony concerning how much water is diverted for watering the
16 stock.

17 In response to that, the claimants entered Exhibit DE-1826, which is a
18 copy of a portion of a letter to Richard C. Bain, Jr., from Doug Warnock,
19 Kittitas County Extension Agent for the Washington State University
20 Cooperative Extension Service. Contained in the letter is a table that
21 shows the approximate total daily water intake of beef cattle. While there
22 is wide range of water intake based on the type of cattle, the Referee
23 concludes that 10 gallons per day per animal is at the upper end of the
24 potential range. Therefore, 0.40 acre-foot of should be adequate for the

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1 time when the claimants have cattle on the property after the end of the
2 irrigation season. A greater concern to the Referee was the instantaneous
3 quantity of water that continues to be diverted into the ditch after
4 irrigation ceases. That information was not directly provided by either the
5 exhibit or the testimony of the Mr. O'Leary. It is clear from the responses
6 to Ecology questions that Mr. O'Leary did not know how much water is
7 diverted after the end of the irrigation season.. He testified that it is
8 less than when he is irrigating, as KRD is shut off. The owners of the
9 cattle take care of the diversion of water. The irrigation right
10 recommended for confirmation for this property, which is based on the
11 Ferguson decree, allows for the diversion of 0.54 cubic foot per second at
12 this time of the year. The Referee concludes this is not an unreasonable
13 quantity to divert for watering 160 head of cattle from a ditch that diverts
14 and carries water over 1,000 feet to the area where the cattle are held.

15 The Referee recommends that the right recommended for confirmation in
16 the Report of Referee for Subbasin No. 9 on page 80, lines 19 $\frac{1}{2}$ to 23 $\frac{1}{2}$ and on
17 page 601 lines 1 through 10 be amended to include the diversion of 0.54 cfs,
18 0.40 acre-foot per year (consumptive use) from October 16 through
19 December 31 for stock watering and that stock water be added as a use from
20 April 1 through October 15 with no additional quantity of water during that
21 period.

22

23

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1 COURT CLAIM NO. 00535 -- David Papineau
2

3 David Papineau filed an exception to the Referee's recommendation that
4 a right not be confirmed for the claimant's land that lies in the SW $\frac{1}{4}$ of
5 Section 30, T. 17 N., R. 19 E.W.M. Mr. Papineau, represented by Attorney
6 John P. Gilreath, testified at the supplemental hearing.
7

8 Mr. Papineau through his testimony did not provide any additional
9 information that would assist in recommending confirmation of a water right
10 greater than that already recommended. The evidence shows that he irrigates
11 approximately 55 acres lying in that portion of Government Lots 2, 3 and 4
12 and the E $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30 lying west of the railroad right-of-way.
13 However, the Referee was only able to recommend confirmation of a right for
14 that portion of the property lying in Government Lot 2 of Section 30. Water
15 Right Claim (WRC) No. 024243 filed by Mr. Papineau's father identified the
16 place of water use as being in the NW $\frac{1}{4}$ of Section 30, which is where
17 Government Lot 2 is located. Government Lots 3 and 4 lie in the SW $\frac{1}{4}$ of
18 Section 30. The Referee was not able to recommend that a right be confirmed
19 due to there not being an RCW 90.14 claim for the land in the SW $\frac{1}{4}$ of
20 Section 30.

21 Mr. Papineau testified that the handwriting on the water right claim
22 form is not his fathers. He recalls his father telling him that someone
23 helped him fill out the form. Mr. Papineau opined that it was someone from
24 the Department of Ecology. However, there is no evidence that anyone from
25 the Department of Ecology provided assistance to the senior Mr. Papineau.
26

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1 The Referee has heard testimony from other Kittitas County claimants of
2 county and Federal employees assisting with completing the claim forms --
3 often with less than desirable results. There is no reason to conclude
4 based on the record that an Ecology employee assisted with completing the
5 form or contributed to incorrect information being placed on the form.

6 At the supplemental hearing, Mr. Gilreath offered testimony concerning
7 an information meeting that involved the Attorney General representing
8 Ecology in this adjudication. Jeffrey Schuster, counsel for the Yakama
9 Indian Nation, objected to Mr. Gilreath testifying on behalf of his client,
10 but the Referee allowed the statement into the record. Mr. Gilreath
11 testified that he attended an informational meeting in 1990 held at the
12 courthouse in Kittitas County at which time Mr. Charles Roe, Assistant
13 Attorney General representing Ecology, stated that RCW 90.14 claims could be
14 amended through testimony in this case (the adjudication proceeding). This
15 has been mentioned in the past by Mr. Gilreath with a little less detail
16 than what was offered at the supplemental hearing. The Referee has
17 researched the hearings held in 1990 and beginning in 1990, Mr. Roe no
18 longer represented Ecology. He retired at the end of 1989, so the hearing
19 had to have been held prior to 1990. An informational meeting was held on
20 May 11, 1989, at the Kittitas County Courthouse. It actually was a
21 pre-hearing conference for Subbasin Nos. 6 (Taneum) and 11 (Manastash). The
22 hearing was conducted by Referee John Acord and Mr. Roe was in attendance.
23 Mr. Gilreath was also at this hearing. At page 40 of the transcript, a Mr.
24 Sparks asked the following question: "A number of claims that I've been

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1 looking at as to my own farm and there are some other people that I work
2 with, too, we find that the original claim was probably not what we want to
3 claim today. Can we modify those claims? How is that handled?" Mr. Roe
4 answered: "The standard procedures in all adjudications has been people's
5 evidence has turned out to be different than what they claimed and they
6 moved the court for permission to modify their claim consistent with the
7 evidence. Absent objections that is the normal course that has been allowed
8 to happen. It is not an unusual situation."

9 Neither the question nor the answer identified what type of claim was
10 being discussed. Reviewing the discussion that preceded the questions is
11 not of any assistance. Prior to the question, there was a discussion about
12 return flow waters, Indian claims on tributaries, type of evidence necessary
13 to prove the existence of a water right. There had been no mention of RCW
14 90.14 for several pages prior to this question being asked. It is
15 impossible to know what was in the mind of Mr. Sparks when he asked the
16 question or Mr. Roe when he answered the question. However, in light of the
17 fact that RCW 90.14 claims were not being discussed, it would not be
18 reasonable to conclude that Mr. Roe's answer related to amending water right
19 claims filed pursuant to RCW 90.14.

20 Mr. Gilreath also testified that a request to amend WRC No. 024243 had
21 been filed with Ecology by Mr. Papineau. At the time of the hearing that
22 request had not been acted on and the Referee has received nothing since the
23 hearing to indicate whether the claim was successfully amended.

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Therefore, since there still is no RCW 90.14 claim for the land in the SW½ of Section 30, the Referee recommends that the original recommendation not be modified.

COURT CLAIM NO. 01129 -- Frank Phelps

Ecology took exception to a portion of the Referee's recommendation to confirm a right under Court Claim No. 01129. The first exception was to having two points of diversion authorized for use when the water right claim filed pursuant to RCW 90.14 only identified one point of diversion. The Court granted this exception and directed the Referee to remove from the right the point of diversion that was not described in the water right claim. The second exception was that a limitation on use provision be added to the right to state that the right shall not impair or affect any water right existing prior to July 28, 1985. The Court also granted that exception. However, upon review of the evidence, particularly the RCW 90.14 claim, the Referee does not believe that provision is appropriate.

In 1985, the Washington State Legislature amended RCW 90.14.043 to allow filing of water right claims. The claims were to be filed with the pollution control hearings board and the board would issue a certification if it found that the use of surface water began prior to June 7, 1917, or use of ground water began prior to June 7, 1945, and the water had been applied to beneficial use continuously. Ecology was then directed to file any claim certified by the board. RCW 90.14.044 was also adopted in 1985.

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1 and it allowed for filing of these claims between July 28, 1985 and
2 September 1, 1985, but provided that the claims would not affect or impair in
3 any respect any water right existing prior to July 28, 1985. RCW 90.14.044
4 is the basis for Ecology seeking the provision on the water right confirmed
5 to Mr. Phelps. However, close review of Water Right Claim No. 200070 and
6 200072 which were filed by Mr. Phelps were filed in 1979 and the
7 certification by the Pollution Control Hearings Board was in 1980, long
8 before RCW 90.14.044 was adopted by the legislature in 1985. The Referee
9 does not believe there is any basis to place that provision on Mr. Phelps
10 right when the law was not passed until over five years after he had filed
11 in water right claim. As far as the Referee knows there was not a similar
12 requirement in the law when it was amended in 1979 to allow for filing of
13 water right claims.

14 The Referee has removed the second point of diversion from the right
15 recommended for confirmation on page 698 of the Report of Referee. The
16 Referee recommends to the Court that the decision to place a limitation of
17 use provision on the right be reconsidered and has, therefore, not included
18 a provision on the water right.

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26 SUPPLEMENTAL REPORT OF REFEREE
27 Re: Subbasin No. 9

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2 COURT CLAIM NO. 00577 -- William W. Razey
3 & Donna Razey
4 Andrew J. Schmidt
5 William D. Schmidt
6 & Melva M. Schmidt

7
8 William W. and Donna Razey filed Court Claim No. 00577 asserting a
9 right to use water from Naneum Creek. Neither of the Razeys appeared at the
10 evidentiary hearing resulting in the Referee recommending that a water right
11 not be confirmed. On June 11, 1996, the Schmidts were joined to the claim.
12 They filed an exception to the Report of Referee, asking that the claim be
13 remanded to allow them to present evidence in support of the claim. The
14 Schmidts are represented by Attorney Richard T. Cole and Andrew Schmidt
15 testified at the supplemental hearing. Additionally, Richard C. Bain, Jr.,
16 P.E., provided testimony in support of the claim through a deposition taken
17 on October 17, 2001, and entered as Exhibit DE-1876.

18 Court Claim No. 00577 as filed by the Razeys asserts a right to
19 irrigate 58 acres in the E%SE% and E%E%W%SE% of Section 32, T. 18 N.,
20 R. 19 E.W.M. lying north of the Cascade Canal. The Schmidts are also
21 asserting a right to irrigate the SE%NE% of Section 32 and the west 165 feet
22 of the NW%NW%SW% of Section 33. The Referee notes that there is not 58
23 acres in the area described on Court Claim No. 00577, leading to a
24 conclusion that some of the land was left off the place of use description.

25 The land is pasture used to raise cattle and is flood irrigated. Water
26 is diverted from Naneum Creek at two points and from a drain that runs
27 through the Burke property to the north. An average of 80 cow/calf pairs

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1 are on this land at varying times during the year. During the irrigation
2 season they drink from the irrigation ditches. During the winter months
3 they are on land that is riparian to Naneum Creek so they can drink directly
4 from the creek. This type of non-diversionary stock watering is covered by
5 the stock water stipulation that is discussed on page 4 of the Report of
6 Referee for Subbasin No. 9. The Schmidts lease neighboring land through
7 which Naneum Creek flows. Naneum Creek does not flow through the Schmidts
8 property, but does just touch the northeast corner. One diversion (#1) is
9 located just upstream of the northeast corner of the Schmidt property and
10 the second (#3) is located about 600 feet south of the northeast corner of
11 Section 32. Mr. Bain measured both diversions in April and May of 1995.
12 The upper diversion (#1) was measured at 5.62 cfs and the lower diversion
13 (#3) was measured at 4.03 cfs. The diversion on the drainage ditch (#2) was
14 measured at 2.16 cfs. Diversion #1 is used to irrigate approximately 38
15 acre and diversion #2 is used to irrigate about 20 acres. Diversion #3 can
16 also be used to irrigate about 6 of the 38 acres normally irrigated from
17 Diversion #1. Both Diversions #1 and 3 are operated during high spring
18 flows, but are rotated as the creek flow diminishes. Thirty-eight acres of
19 the land are also assessed by the Kittitas Reclamation District (KRD) and
20 water from the district is delivered down Naneum Creek and diverted at the
21 two creek diversions. Based on the irrigation practice of the claimants and
22 the instantaneous diversion quantities measured, Mr. Bain estimated that
23 713.6 acre-feet per year is used on this property. Of that, 3.2 acre-feet
24 is used for stock watering during irrigation season. The annual quantity

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1 includes the KRD water delivered to the property. After that is deducted,
2 568.8 acre-feet per year is what Mr. Bain estimates is used from the creek
3 for the irrigation of the 58 acres and stock watering.

4 The Schmidts property was settled by three different individuals with
5 independent water rights established for at least portions of the property.
6 Several documents were put in the record as part of DE-1875 and DE-1879 for
7 the land in the SE $\frac{1}{4}$ of Section 32. It was settled by Thomas H. Wilson, who
8 received a patent in 1891. At the time of the Ferguson dispute, the SE $\frac{1}{4}$ of
9 Section 32, along with Government Lot 4 of Section 4, T. 17 N., R. 19 E.W.M.
10 were owned by J. H. Breyman and John Summerville. They owned a total of 240
11 acres and 100 acres were found to be in cultivation. According to the
12 Findings of Fact, the land was first occupied September 11, 1879 and water
13 from Naneum Creek first diverted and used in 1880 or 1881. A Class 10 water
14 right with an 1880 date of priority for 100 inches was awarded. The
15 Findings of Fact does not indicate where the 100 inches was used within the
16 240 acre area. However, no other claimant is asserting a right for any of
17 the 100 inches and it is reasonable to conclude that when the Cascade Canal
18 was built in the early 1900's, the land above the canal would have been
19 irrigated with water from the creek. There is approximately 18 acres owned
20 by the claimants in the SE $\frac{1}{4}$ of Section 32 north of the Cascade Canal and
21 irrigated with water diverted from Naneum Creek. The Ferguson decree
22 awarded one inch of water in May and June for each acre irrigated and
23 one-half inch of water the rest of the year. Therefore, the Referee
24 concludes that the 18 acres would be entitled to a right to divert 0.36
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1 cubic foot per second in May and June, and 0.18 cubic foot per second the
2 rest of the irrigation season. That would result in an annual diversion of
3 90 acre-feet per year. The Referee could find evidence of no other water
4 right for the claimant's land in Section 32.

5 Water Right Claim (WRC) No. 100013 was filed by William Razey pursuant
6 to the requirements of RCW 90.14. It asserts a right to divert 50 inches of
7 water for the irrigation of 40 acres. The place of use is not described.
8 The point of diversion is described as being 500 feet south and 20 feet west
9 of the northeast corner of Section 32 in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32. That is
10 very close to the location of the uppermost point of diversion (#1) used by
11 the claimant and will be the point of diversion authorized by the right
12 being confirmed. The Court has consistently ruled that only the points of
13 diversion described in the RCW 90.14 claim can be confirmed for use, if the
14 evidence shows they have historically been used. The place of water use is
15 missing from the claim, but with the point of diversion and source of water
16 clearly defined it would very easy for an investigator to determine the
17 lands owned by William Razey when he filed the claim and reach a conclusion
18 concerning the appropriate place of use. Therefore, the Referee finds that
19 the requirements of RCW 90.14 were substantially complied with.

20 The Referee notes that WRC No. 100012 was filed by Raymond Razey
21 asserting a right to divert 50 inches from Naneum Creek for the irrigation
22 of 32 acres. The point of diversion described is in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of
23 Section 33. This claim also does not describe the place where water is
24 used. Mr. Cole suggested that this claim also covers the Schmidt land in

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1 Section 32. The Referee does not reach the same conclusion. WRC No. 100012
2 was filed by Raymond Razey, not William Razey and there is no evidence that
3 Raymond Razey ever owned land in Section 32. Additionally, Exhibit DE-1877,
4 which is a copy of a Metzker Map of the area shows that Raymond Razey owned
5 land in the SW $\frac{1}{4}$ of Section 33. The Referee concludes that WRC No. 100012
6 was filed to cover the Raymond Razey land in the SW $\frac{1}{4}$ of Section 33 and
7 substantially complies with the requirements of RCW 90.14 for the land owned
8 by Raymond Razey in the SW $\frac{1}{4}$ of Section 33, see the Court's February 10,
9 1995, Memorandum Opinion Re: RCW 90.14 and Substantial Compliance.

10 The Referee recommends that a right be confirmed under Court Claim No.
11 00577 with a June 30, 1880, date of priority for the diversion of 0.36 cubic
12 foot per second in May and June, and 0.18 cubic foot per second, 90
13 acre-feet per year for the irrigation of 18 acres and stock watering in that
14 portion of the NE $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{2}$ E $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 32 lying north of the
15 Cascade Canal.

16 The Schmidts own approximately 1.93 acres in that portion of the west
17 165 feet of the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33, T. 18 N., R. 19 E.W.M. lying north of
18 the Cascade Canal. There were no documents put in the record for this
19 portion of the claimants' land. However, the review of the Ferguson decree
20 reveals that at the time of that action the entire SW $\frac{1}{4}$ of Section 33 was
21 owned by A. J. Sliger. The Findings of Fact state that of the 160 acres,
22 100 acres were under cultivation and that the land was first occupied and
23 waters from Naneum Creek used for irrigation in 1877. The decree awarded a
24 right with an 1877 date of priority for 100 inches. In addition to the
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1 Schmidts, claims were filed in this proceeding for land in the SW $\frac{1}{4}$ of
2 Section 33 by Kenneth and Sharon Huber and Jim Vasquez, who were confirmed a
3 right to irrigate 5 acres, and James C. Swayze and Dianne Morrison, who were
4 confirmed a right to irrigate 10 acres. Considerably less acres have been
5 confirmed than were being irrigated at the time of the Ferguson decree. The
6 testimony was sufficient for the Referee to conclude that beneficial use has
7 continued on the 1.93 acres now owned by the Schmidts.

8 The Referee recommends that a right be confirmed with a June 30, 1877,
9 date of priority for the diversion of 0.0386 cubic foot per second in May
10 and June and 0.0193 cubic foot per second in April and July 1 through
11 October 15, 9.9 acre-feet per year for the irrigation of 1.93 acres and
12 stock water in the west 165 feet of that portion of the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of
13 Section 33 lying north of the Cascade Canal. SE-2 shows a diversion located
14 approximately 10 feet south and 450 feet east of the west quarter corner of
15 Section 33. The Referee concludes that WRC No. 100012 was filed for this
16 property and claims a right in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33. The point of
17 diversion described in WRC No. 100012 is 1550 feet south and 440 feet east
18 of the northwest corner of Section 33, which is approximately 100 feet
19 upstream of the point of diversion marked on SE-2. The Referee concludes
20 that the intent in completing WRC No. 100012 was to describe the point of
21 diversion being used and due to small distance between the point described
22 and that identified by the state on SE-2, that WRC No. 100012 substantially
23 complies with the requirements of RCW 90.14 for the point of diversion. The
24 diversion shall be located as described on State's Exhibit SE-2.

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1 The last portion of the land to be addressed is the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of
2 Section 32. Very little information is in the record concerning this
3 property. On October 6, 1891, a patent issued to David Kincade for this
4 land and then later that year it was sold to N. W. Preston and then to H. J.
5 Iftigner. The only document in the record is the patent, the rest of the
6 information is from a chain of title sheet that is part of Exhibit DE-1879.
7 On May 29, 1890, David Kinkade, filed an Affidavit of Water Right for lands
8 he owned in the NE $\frac{1}{4}$ of Section 5 (DE-1878). The ditch from Naneum Creek,
9 which he constructed in April of 1883, ran through the E $\frac{1}{4}$ of Section 32 and
10 the diversion was three-quarters of a mile north of his property in
11 Section 5. It is very possible that the diversion was on or above the
12 SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32. However, there is no indication in the affidavit that
13 water from this ditch was used on any land other than in the NE $\frac{1}{4}$ of
14 Section 5. At the time the ditch was constructed, Kincade owned the SE $\frac{1}{4}$ NE $\frac{1}{4}$
15 of Section 32 and if Kincade had used water from that ditch to irrigate
16 those lands, the Referee believes it would have been mentioned. It was very
17 common in the affidavits that were filed around 1890 to describe neighboring
18 landowners who were also using the same ditch.

19 The Ferguson decree awarded water rights to all of the land surrounding
20 this 40 acre tract, but not to the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32. If the chain of
21 title sheet has the correct name, the owner was not a party to the case.
22 With all of the surrounding landowners being named parties, it seems likely
23 that the reason the landowner was not a party is because there was no water
24 use. It is possible that water use could have been developed after entry of
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1 the decree, but evidence has not been put in the record to establish that.
2 In fact, there has been no evidence of beneficial use of this land prior to
3 when the Schmidts became familiar with the land. Mr. Schmidt did testify
4 that the fences on the land are very old and that the diversion looks to be
5 very old. But that does not establish when the land was first irrigated.

6 Naneum Creek crosses the extreme northeast corner of the property,
7 making it riparian to the creek. Therefore, in order to show that a water
8 right was legally established, there needs to be evidence that beneficial
9 use, through irrigation of the 40 acres, occurred prior to December 31,
10 1932. This is about the time that KRD was extended into this area, so the
11 evidence must show that it was creek water being used, not KRD water. The
12 Referee recommends that a water right not be confirmed for this portion of
13 the property.

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15 COURT CLAIM NO. 04349 -- Doss Roberts
16 & Edra Roberts

17 The Roberts took exception to the Report of Referee for Subbasin No. 9
18 not recommending that a right be confirmed under Court Claim No. 04349. The
19 Roberts are represented by Attorney Lawrence E. Martin and Mr. Roberts
20 testified at the supplemental hearing.

21 The Referee did not recommend confirmation of a water right due to
22 there not being a water right claim filed pursuant to the requirements of
23 RCW 90.14. As part of the exception, it was argued that participation in
24 the earlier attempt to adjudicate Wilson and Naneum Creeks, in State of
25 Washington v. Carlson, substantially complied with the requirements of RCW

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1 90.14 and alternatively that the identification of a right in the George
2 Maddox Report associated with Carlson constituted a certificate, thereby,
3 eliminating the need to comply with RCW 90.14. At the exception hearing the
4 Court rejected both of these arguments, but remanded the claim to allow the
5 Roberts to further investigate whether there had been compliance with RCW
6 90.14.

7 Mr. Roberts testimony at the supplemental hearing consisted of a
8 summary of the history of the property and his father's involvement with
9 earlier litigation, specifically the Carlson case and Mr. Robert's own
10 compliance with the requirements in this proceeding. Mr. Robert's testimony
11 clearly expressed his frustration over not being awarded a right in this
12 proceeding even though beneficial use of the water has clearly been made
13 since the water right was established in the late 1800's and his father had
14 participated in the Carlson proceeding.

15 The Referee sympathizes with Mr. Robert's position. The consequences
16 of not complying with the requirements of RCW 90.14 are severe and the
17 statute does not provide any recourse if a claim is not filed. The statute
18 is very clear: ". . . any person claiming the right to divert or withdraw
19 waters of the state as set forth in RCW 90.14.041, who fails to file a
20 statement of claim . . . shall be conclusively deemed to have waived and
21 relinquished any right, title, or interest in said right." The Referee
22 cannot ignore the statute. Rights can be confirmed in this proceeding only
23 if there is compliance with the applicable laws. The Referee continues to
24 recommend that a right not be confirmed under Court Claim No. 04349.

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1 COURT CLAIM NO. 01444 -- Schaake Packing Company

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3 The Department of Ecology took exception to the legal description for
4 the place of water use on the water right recommended for confirmation in
5 the Report of Referee for Subbasin No. 9. The claimant responded to the
6 exception, offering to provide a better legal description for the lands
7 irrigated. Attorney Jeff Slothower appeared at the supplemental hearing
8 representing Schaake Packing Company and provided the legal description,
9 which was marked as Exhibit DE-1768. Ecology reviewed the exhibit and
10 stated for the record that it resolves their concern. Therefore, the right
11 recommended for confirmation in the Report of Referee for Subbasin No. 9 on
12 page 475, lines 4 to 12 and on page 699, lines 8½ to 10 is amended to have
13 the following place of use: That portion of the W½NW¼NE¼NE½ and the NW¼NE½
14 of Section 14, T. 17 N., R. 18 E.W.M. lying westerly of Wilson Creek and
15 south and east of the parcel bounded by a line described as follows:
16 Beginning at the northeast corner of said Section 14; thence S 89°41'50" W
17 along the north line of said section 1463.20 feet to the true point of
18 beginning of said described line; thence continuing along said section line
19 1068.63 feet; thence S 61°47'55" E 943.81 feet; thence N 27°40'21" E 510.00
20 feet, more or less, to the true point of beginning of said line.

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1 COURT CLAIM NO. 15628 -- Bernhard E. Schneider
2 & Freda M. Schneider
COURT CLAIM NO. 01607 -- Howard & Ruth Gibson

3 Court Claim No. 01607 was filed by Howard and Ruth A. Gibson for land
4 they owned in the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 16, T. 18 N., R. 19 E.W.M. Bernhard E.
5 and Freda M. Schneider bought this property along with other land adjoining
6 to the east and west. Rather than being joined to Claim No. 01607, they
7 elected to file a late claim. On December 13, 2001, the Court issued an
8 Order allowing the late claim and on January 31, 2002, the claim was filed.
9 Although the claim was not filed until January, the Referee allowed the
10 Schneiders to present evidence in support of their claim at the supplemental
11 hearing. The Schneiders are represented by Attorney Richard T. Cole and Mr.
12 Schneider testified at the supplemental hearing. Since the Schneiders
13 elected to file a late claim, Court Claim No. 01607 will receive no further
14 consideration.

15 The Schneiders own approximately 14 acres in the south 500 feet of the
16 N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 16, T. 18 N., R. 19 E.W.M. Although Mr. Schneiders
17 testimony was a little confusing, the Referee believes that only the
18 easterly 6 acre hay field is irrigated with water diverted from Naneum
19 Creek. This field lies east of the creek. Mr. Schneider did indicate that
20 the land west of the creek can be irrigated with creek water, however, his
21 testimony seemed to indicate that only water delivered by the Kittitas
22 Reclamation District (KRD) is used on that land. Water is diverted from
23 Naneum Creek north of the Schneider's property. Mr. Schneider had the
24 impression that water was carried to his property through the Ferguson
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1 Ditch. However, the Ferguson Ditch diverts from a branch of Naneum Creek
2 south of the Schneiders' property, in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 16. The Referee
3 believes that water is diverted from the same branch of Naneum Creek
4 (sometimes called Neally Creek). The diversion also serves the William
5 Brown property immediately north of the claimants' land. Water is carried
6 from the creek in an open ditch and the Schneiders flood irrigate their hay
7 field. Mr. Schneider testified to taking 1.5 cubic feet per second from the
8 creek. Creek water is mostly used early in the irrigation season and then
9 again later in the season. Mr. Schneider's testimony suggests that water is
10 not available for his priority during the middle part of the irrigation
11 season.

12 Water rights for the SW $\frac{1}{4}$ of Section 16 were addressed in the Ferguson
13 decree. The Findings of Fact that preceded the decree stated that John
14 Clifton possessed the SW $\frac{1}{4}$ of Section 16 under contract to purchase from the
15 State. Within the SW $\frac{1}{4}$ of Section 16, 130 acres were tillable and in
16 cultivation. The findings did not say that the 130 acres were being
17 irrigated and often the findings do say when the land is actually being
18 irrigated. John Clifton was awarded a Class 14 right with an 1885 date of
19 priority for 130 inches or 2.6 cubic feet per second for the entire SW $\frac{1}{4}$ of
20 Section 16. Besides the Schneiders, there are two other claimants in this
21 proceeding who are asserting rights based on the Clifton right. William and
22 Mary Brown, Court Claim No. 01608, are being recommended a right to 41
23 inches, or 0.82 cubic foot per second, for the irrigation of 41 acres, see
24 page 54 of this report. Myron and Sandy Linder, Court Claim No. 00621, were
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1 recommended a right to 65 inches, or 1.30 cubic feet per second, for the
2 irrigation of 63 acres, see pages 315 and 688 of the Report of Referee. Of
3 the total of 130 inches, rights have been recommended for 106 inches.

4 Three water right claims filed pursuant to RCW 90.14 appear to be
5 appurtenant to the claimants' property. Water Right Claim (WRC) No. 144861
6 was filed by Howard L. Gibson asserting a right to use 0.02 cubic foot per
7 second, 4 acre-feet per year from a branch of Naneum for the irrigation of
8 8½ acres. The place of use is a portion of the Schneider's property. WRC
9 No. 120773 was filed by Linn H. Robinett and asserts a right to use 0.02
10 cubic foot per second 4 acre-feet per year from Naneum Creek for the
11 irrigation of 48 acres in the NW SW ¼ of Section 16. WRC No. 120772 was also
12 filed by Linn H. Robinett and asserts a right to use 0.02 cubic foot per
13 second, 4 acre-feet per year from a branch of Naneum Creek for the
14 irrigation of 48 acres in the NW SW ¼ of Section 16. In all three claims the
15 Referee concludes that a right is being asserted for 0.02 cubic foot per
16 second and 4 acre-feet per year for each acre irrigated. If landowners did
17 not know how much water was being used when completing a water right claim
18 form and asked Ecology employee's for advise, those figures were generally
19 given. That is the quantity for which water right permits generally issue
20 in this part of the state. WRC Nos. 120773 and 144861 describe points of
21 diversion that are very close, both being in the NE SW ¼ of Section 16
22 (although WRC No. 144861 states the diversion is in the SW SW ¼, the
23 dimensions given place it in the NE SW ¼). WRC No. 120772 describes a point
24 of diversion also in the NE SW ¼ of Section 16, but further east on a branch

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1 of Naneum Creek. The currently used diversion is within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of
2 Section 16, but at a slightly different location than described in the
3 claims. The difference in location is insignificant enough that the Referee
4 concludes that RCW 90.14 was substantially complied with (See the Court's
5 February 10, 1995, Memorandum Opinion Re: RCW 90.14 and Substantial
6 Compliance).

7 The Referee concludes that the Schneiders have the proportionate share
8 of the Clifton water right that would be appurtenant to the 14 acres they
9 own. However, since the testimony indicates that only 6 acres are being
10 irrigated with water from Naneum Creek, the Referee will recommend
11 confirmation of a right only for the 6 acres. Although Mr. Schneider
12 testified that up to 1.5 cubic feet per second is used from the creek, the
13 right that is appurtenant to their property is limited to 0.28 cubic foot
14 per second and that quantity can only be used in May and June. The Ferguson
15 decree contained a provision that the quantity of water allocated to each
16 party could be used in May and June and one-half that quantity could be used
17 the remainder of the year.

18 Based on the foregoing, the Referee recommends that a right be
19 confirmed with a June 30, 1885, date of priority for the diversion of 0.28
20 cubic foot per second in May and June, 0.14 cubic foot per second in April
21 and July 1 through October 15, 30 acre-feet per year from a branch of Naneum
22 Creek for the irrigation of 6 acres lying in that part of the S 500 feet of
23 the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 16 lying east of Naneum Creek. The right will carry a
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1 provision that states water delivered by the Kittitas Reclamation District
2 is also used on the land.

3 COURT CLAIM NO. 01977 -- Melvin Shenyer
4 02270

5 Court Claim No. 01977 was filed by Melvin Shenyer asserting a right to
6 use water from Wilson Creek for land he owned in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13,
7 T. 17 N., R. 18 E.W.M. Mr. Shenyer did not appear at the evidentiary
8 hearing to defend the claim resulting in the Referee recommending that a
9 right not be confirmed. Mr. Shenyer was also joined to Court Claim No.
10 2270, which asserted a right to use Whiskey Creek, which is also in Subbasin
11 No. 9. There also was no appearance in support of that claim. On
12 December 14, 2000, Jay and Tamara Ulmer, represented by Attorney Richard T.
13 Cole, filed an exception to the Report of Referee for Subbasin No. 9 and
14 cited to Claim No. 02270 in the exception. The Ulmers asked to have the
15 claim remanded to allow them to present evidence. The Ulmers also filed a
16 Motion to Allow Late Filing of Statement of Claims on that same day. The
17 Court ruled that the Ulmers could either file a late claim or be joined to
18 Claim No. 02270 and if they were joined to the claim, it was remanded to
19 allow taking of testimony. The Ulmers have not been joined to any claim,
20 nor have they filed a late claim. At the supplemental hearing, the Referee
21 again pointed out the need for the Ulmers to be joined to a claim. At that
22 time Sam Bailey, representing Ecology, reviewed the two claims that are in
23 Melvin Shenyer's name and pointed out that it appears that Claim No. 1977
24 could be the appropriate claim for the Ulmers to join. The Referee reviewed
25

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1 both claims and agrees with Mr. Bailey's assessment. However, since the
2 Ulmers have not been joined to any claim nor have they filed a claim on
3 their own behalf, the Referee finds they do not have standing to pursue
4 their exception and recommends that a right not be confirmed.

5 The Referee will review the evidence presented so the Ulmers can
6 consider whether to further pursue any action. Tamara Ulmer testified at
7 the supplemental hearing. They acquired the land, being approximately 2
8 acres in the northwest corner of the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13, T. N.,
9 R. 18 E.W.M. in 1989. Water rights were not addressed during the sale.

10 The claimants land was originally conveyed by the United States to
11 Northern Pacific Railroad and then was sold to Walter Frisbee. By 1892 it
12 was owned by the Rice (or Price) family. The chain of title indicates Rice,
13 however, DE-679 entered by Bull Canal Company shows the NW $\frac{1}{4}$ of Section 13
14 being owned by the Price family. Irrespective of the name, both the chain
15 of title and DE-679 shows this part of the NW $\frac{1}{4}$ of Section 13 having shares
16 to Bull Canal Company. Mr. Cole suggests that Bull Canal Company water was
17 used on other land and not on the land owned by the Ulmers, but he offers
18 nothing to support that position. The NE $\frac{1}{4}$ NW $\frac{1}{4}$ appears to have been one
19 parcel until sometime between 1955 and 1964. It seems likely to the Referee
20 that it would have all been irrigated from the same source of water. The
21 rest of the NW $\frac{1}{4}$ of Section 13 lying northeast of the main branch of Wilson
22 Creek is irrigated with water delivered by Bull Canal Company. Water Right
23 Claim No. 014757 filed by Robert E. Brotherton pursuant to RCW 90.14 states
24 that Wilson Creek water was first used on the land in 1967. Mr. Brotherton

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1 acquired the land in 1964, so the Referee does not believe he was indicating
2 when he first had the land. It is very likely that it was Mr. Brotherton
3 who installed the system to irrigate from Wilson Creek. During the time
4 that Mr. Brotherton owned the property, the only way to establish a water
5 right was through the permit procedures in the Surface Water Code, RCW
6 90.03. There is no evidence those procedures were followed. These factors
7 would lead the Referee to recommend that a right not be confirmed, if the
8 Ulmers had standing to pursue a right under any claim in this proceeding.

9

10 COURT CLAIM NO. 01941 -- Jack G. Sikes
11 & Ada M. Sikes
Larry Hansen

12 Mr. Hansen took exception to the Referee not recommending that a water
13 right be confirmed for use of Naneum Creek water on lands he owns in the
14 NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17, T. 17 N., R. 19 E.W.M. Mr. Hansen is represented by
15 Attorney Richard T. Cole and he testified at the supplemental hearing.
16 Additionally, Marlene Watt, assistant manager with Amerititle, testified.

17 The testimony at the initial evidentiary hearing was that approximately
18 32 acres within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17 are irrigated solely with water
19 diverted from Naneum Creek. The diversion from the creek is in the NE $\frac{1}{4}$ SW $\frac{1}{4}$
20 of Section 17. The claimant also owns 70 shares from Ellensburg Water
21 Company (EWC) and that water is used to supplement the creek water on the 32
22 acres and to irrigate the remaining 38 acres that are irrigated in the NW $\frac{1}{4}$ SW $\frac{1}{4}$
23 of Section 17. Larry Hansen acquired the land in 1987 and it was being
24 irrigated at that time.

25

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The land in the N½SW¼ of Section 17 was originally settled by James Montgomery, who received a patent on January 18, 1887. The receiver's receipt for the land was signed on November 11, 1886. There was no other evidence presented concerning the history of the land. Since the land is riparian to Naneum Creek, the Riparian Doctrine would apply. In order to recommend that a water right be confirmed for the N½SW¼ of Section 17, there would need to proof of actual use of Naneum Creek water prior to December 31, 1932. Since water delivered by the EWC is also used on the land and EWC was in place by the early 1900's, the evidence would also have to show that it was creek water, not EWC water, that was being used. The claimant did not provide any additional evidence that could be used to show that the land was irrigated with Naneum Creek water prior to December 31, 1932. Mr. Hansen testified that in 1996 and old barn on the property collapsed and that the barn had an 1897 date on it. That may be evidence of early settlement of the land, however, it does not provide any evidence about use of Naneum Creek water.

17 Again, the Referee cannot recommend that a right be confirmed to the
18 claimants under Court Claim No. 01941 due to there being no evidence that a
19 water right was established for Naneum Creek through beneficial use of water
20 prior to December 31, 1932.

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2 COURT CLAIM NO. 01552 -- George Simpson
3 (A) 08870 & Barbara Simpson
4 Ken Wolfe

5 Following conclusion of the evidentiary hearing for Subbasin No. 9, Ken
6 Wolfe filed a motion to be allowed to introduce additional testimony and
7 evidence in support of Claim No. 01552. On May 26, 1992, the Court issued
8 an Order stating that the Wolfes would be allowed to present evidence and
9 testimony during the exception hearing phase for this subbasin. The Wolfe's
10 also filed an exception to the Referee not recommending that a right be
11 confirmed for their property. The claim was remanded to the Referee to take
12 additional testimony. Attorney Richard T. Cole appeared at the supplemental
13 hearing for Subbasin No. 9 and informed the Referee that the Wolfes had
14 decided not to pursue their exception. Therefore, the Referee's
recommendation that a right not be confirmed is not changed.

15
16 COURT CLAIM NO. 00366 -- Richard A. Snowden

17 Richard Snowden took exception to the Referee recommending that a right
18 not be confirmed under Court Claim No. 00336. Donald Snowden, the
19 claimant's son, testified at the supplemental hearing.

20 The claimant's property lies in that portion of the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ SE $\frac{1}{4}$ of
21 Section 11, T. 17 N., R. 18 E.W.M. lying southwest of the Burlington
22 Northern Railroad tracks. Mr. Snowden entered Exhibit No. DE-1938, a hand
23 drawn map showing the different ways water has been delivered to the Snowden
24 property over the years. According to Mr. Snowden's testimony and the map,

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1 initially water was diverted from Wilson Creek in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2,
2 just east of the railroad tracks. The delivery ditch ran parallel to and
3 just east of the tracks, crossing under the tracks near the Snowden
4 property. In the early 1920's the City of Ellensburg decided to develop the
5 land east of the railroad tracks, a few hundred feet down the ditch from the
6 diversion. They installed a culvert under the tracks and a ditch was
7 constructed west of the tracks. Water continued to be diverted from Wilson
8 Creek at the same point. Then in 1939, the city moved the point of
9 diversion a few hundred feet downstream on Wilson Creek so the diversion was
10 west of the railroad tracks, rather than east of the tracks. Even after it
11 was moved, the diversion remained in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2. Up until the
12 1940's water from a mill was dumped into Wilson Creek. The mill ditch
13 ceased being used sometime in the 1940's, ending the discharge into Wilson
14 Creek. To compensate for the lost water, a ditch was built from Mercer
15 Creek to Wilson Creek to augment the flow. Mr. Snowden acknowledges there
16 was no right to use Mercer Creek water. In the 1970's Cascade Irrigation
17 District built an undershot where the Cascade Canal crosses Wilson Creek.
18 Prior to constructing the undershot, much of the creek water was taken into
19 the Cascade Canal. After the undershot was built, the creek water continued
20 to flow downstream and carried sufficient water that the diversion from
21 Mercer Creek to Wilson ceased. For the past several years only Wilson Creek
22 water has been used. Irrigation on the Snowden property has continued
23 uninterrupted for 90+ years, however, the method of delivering the water and
24 the source of water has changed over the years.

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1 It is clear that a right was established for use of Wilson Creek water
2 on the Snowden property. Water use began sometime in the early 1900's. The
3 claimant's land is riparian to Wilson Creek and rights established under the
4 riparian doctrine have a priority date of when steps were first taken to
5 sever the land from Federal ownership. This land was originally conveyed by
6 the Federal government to the railroad company for construction of the
7 railroad. Land not used was then sold. The priority date under the
8 riparian doctrine for former railroad lands on May 24, 1884, the date the
9 map of definite location for the railroad was filed.

10 Water Right Claim (WRC) No. 043215 was filed by Richard A. Snowden
11 pursuant to the requirements of RCW 90.14. It asserts a right to use 1.5
12 cfs, 200 acre-feet per year from Mercer Creek for the irrigation of 35
13 acres. The point of diversion described is in the S $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 2, at
14 approximately the point where water was diverted from the creek between the
15 1940's and sometime in the 1970's. At the time the water right claim was
16 filed, Mercer Creek was the source of water being used, but not the source
17 of water to which a right had legally been established. The Referee is
18 aware that the channels for both Mercer Creek and the branches of Wilson
19 Creek that flow through the City of Ellensburg have been altered over the
20 years and other claimants have expressed confusion over the proper names for
21 the creek channels. The Referee concludes that due to the close proximity
22 of the two creeks and the continued beneficial use of water on the Snowden
23 property that RCW 90.14 was substantially complied with for protecting a
24 right to use Wilson Creek on the Snowden property. See the Court's

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1 February 10, 1995, Memorandum Opinion Re: RCW 90.14 and Substantial
2 Compliance.

3 The place of water use described on WRC No. 043215 is That portion of
4 the NE $\frac{1}{4}$ of Section 11, T. 17 N., R. 18 E.W.M. known as tax 27. That portion
5 of the NW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 11, T. 17 N., R. 18 E.W.M. Both tracts are
6 west of the right of way of the Burlington Northern railroad. It is clear
7 that a portion of the second area being described was omitted from the legal
8 description -- the description starts of with "That portion . . ." and then
9 does not provide a description of the portion. Mr. Snowden testified that
10 the SE $\frac{1}{4}$ was omitted from the description, along with the tax number. The
11 legal description on Court Claim No. 00366 is identical to that on WRC No.
12 043215. Mr. Snowden was provided the form to attempt to amend WRC No.
13 043215 pursuant to the requirements of RCW 90.14.065. It is not clear
14 whether he is pursuing that option. Entered in the record as Exhibit
15 DE-1940 is a summary of the changes that have been made to the water
16 delivery system over the years and is entitled "Amendments and
17 Clarifications to Court Claim No. 00366, Subbasin No. 9". The opening
18 sentence is a statement that the claimant would like to amend Water Right
19 Claim No. 043215 to change the source of water right from Mercer Creek to
20 Wilson Creek and to correct the property's legal description. The Referee
21 does not have jurisdiction to amend a water right claim filed pursuant to
22 RCW 90.14. That can only be done by following the procedures identified in
23 RCW 90.14.065. The Court has consistently held that, with minor deviations,
24 the legal description on the water right claim form shall be the area to

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1 which a right can be confirmed. Therefore, unless Mr. Snowden is successful
2 in amending WRC No. 043215 to correct the legal description, the Referee
3 cannot recommend confirmation of a water right for the portion of the
4 claimants land in the SE $\frac{1}{4}$ of Section 11.

5 There are a total of 35 acres being irrigated within the Snowden
6 property. The Referee estimates that 20 acres of the irrigated land lies
7 within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11 and the remaining 15 acres is in the NW $\frac{1}{4}$ SE $\frac{1}{4}$
8 of Section 11.

9 WRC No. 043215 asserted a right to use 1.5 cfs, 200 acre-feet for the
10 irrigation of 35 acres. That is approximately 0.04 cfs and 5.7 acre-feet
11 for each acre irrigated. Mr. Snowden did not testify to the quantity of
12 water that is diverted and used to irrigate his land. Therefore, the Referee
13 will use the per acre quantities from the water right claim, as they are
14 reasonable for the area.

15 It is recommended that a right be confirmed with a May 24, 1884, date
16 of priority for the diversion of 0.80 cubic foot per second, 114 acre-feet
17 per year from Wilson Creek for the irrigation of 20 acres in that portion of
18 the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11 lying southwest of the Burlington Northern Railroad
19 tracks. The point of diversion shall be approximately 840 feet south and
20 800 feet west of the center of Section 2, being within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of
21 Section 2. The Referee recognizes that point is not described on the RCW
22 90.14 claim, however, the point of diversion described was not legally
23 established. The recommended point of diversion is the historically used
24 point of diversion.

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2 COURT CLAIM NO. 00529 -- Sorensen Properties
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4 The Sorensens took exception to the Referee not recommending that
5 rights be confirmed under Court Claim No. 00529. On May 9, 2001, Sorensen
6 Properties were substituted for Howard and Bernice Sorensen. Sorensen
7 Properties are represented by Attorney Lawrence E. Martin. Howard and
8 Morris Sorensen testified in support of the exception through depositions
taken on September 12, 2001.

9 The Referee did not recommend confirmation of water rights because of
10 lack of evidence to show that rights were established for use of the creeks
11 prior to 1917. Although there was evidence that the land was being
12 irrigated in the early 1900's, most of the land also receives water from
13 ditch or irrigation companies, so the fact that it was being irrigated was
14 not sufficient evidence to recommend confirmation of water rights. The
15 claimant owns land in the E $\frac{1}{2}$ SE $\frac{1}{2}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ NE $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 11, the S $\frac{1}{2}$ NW $\frac{1}{4}$ and
16 SW $\frac{1}{4}$ of Section 12, part of the NW $\frac{1}{4}$ and the W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 13, T. 17 N.,
17 R. 18 E.W.M. At the initial evidentiary hearing, it appeared to the Referee
18 that the claimant was asserting a right on a pond lying in the W $\frac{1}{4}$ of
19 Section 12. It is apparent from the testimony at the depositions that the
20 pond, which was mostly constructed in 1964 during construction of
21 Interstate-90, and was enlarged in 1980, is a mechanism to capture tailwater
22 from the claimants irrigated lands. The captured tailwaters are then
23 reapplied to the land north and east of the pond. A separate right is not
24 being asserted for use of the waters pumped from the pond. A landowner has
25
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1 the right to capture and reuse his own return flows and does not need an
2 additional right to do so; see the Court's Memorandum Opinion Re: Return
3 Flow Exceptions of Harry Masterson and Mary Lou Masterson Claim No. 01467
4 and (A) 03296 Subbasin No. 3, entered on July 16, 1996.

5 Howard Sorensen, who did not testify at the initial hearing, testified
6 extensively about his knowledge of the land in the late teens and early
7 1920's. The land south of I-90 was purchased by his parents in the teens
8 and he eventually took over farming the land. The land north of I-90 was
9 owned by relatives of his wife, and he acquired the land in the 1940's. Mr.
10 Sorensen recalls hearing that his father bought the land south of I-90
11 because it had inexpensive water, in comparison to land he had previously
12 owned that was irrigated with water delivered by Cascade Irrigation
13 Company. The land south of I-90 was acquired from Mary Ellen Rice in 1919.
14 The deed transferring the land mentioned 3.5 shares of Bull Canal stock and
15 all other water rights and irrigation ditches. Mr. Sorensen had a very
16 clear memory of field 13, which is in the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 13, east of the
17 Canyon Road and south of Wilson Creek, being irrigated with water diverted
18 from Wilson Creek from a log diversion structure. This would have been in
19 the early 1920's, when Mr. Sorensen was trapping along the creek. This land
20 is riparian to Wilson Creek and, as it is former railroad land, the priority
21 date would be May 24, 1884, the date the map of definite location was filed
22 by the railroad. There are 34.5 acres irrigated with water diverted from
23 Wilson Creek. Water Right Claim No. 49533 was filed by Howard Sorensen
24 pursuant to the requirements of RCW 90.14 asserting a right to use 4 cfs,

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1 1200 acre-feet per year from Wilson Creek for the irrigation of 50 acres and
2 stock watering in the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 13. A right is being asserted to
3 divert 6 cfs for irrigating this field. The report prepared by Richard C.
4 Bain, Jr., DE-1523, indicates that 4.5 cfs is diverted from Wilson Creek and
5 carried in a ditch to the field and additional water, estimated to be about
6 1.5 cfs, enters the field from diverse points. The field is irrigated 63
7 days during the irrigation season and using 6 cfs, Mr. Bain's report states
8 that 748.4 acre-feet per year is used. Mr. Bain's report indicates that
9 this is field is on a rock bar, making it very porous and requiring a higher
10 than normal water duty. Neither Mr. Bain, nor Mr. Sorensen provided any
11 details about how the water from the diverse points enters the property if
12 there is no actual diversion. The impression left with the Referee is
13 something similar to subirrigation or seepage from the creek. The Referee
14 cannot recommend confirmation of a right to use 6.0 cfs. That quantity is
15 not diverted from the creek. Additionally, WRC No. 049533 only asserts a
16 right to divert 4 cfs from Wilson Creek. A diversion of 4.0 cubic feet per
17 second for the 63 days that the field is irrigated results in 499 acre-feet
18 being applied to the land during the irrigation season. At the intial
19 evidentiary hearing the evidence was that 110 head of cattle and 2 horses
20 are raised on the Sorenson property and have access to the creeks and
21 irrigation ditches that flow through the property.

22 The Referee recommends that a right be confirmed under Court Claim No.
23 00529 with a May 24, 1884, date of priority for the diversion from Wilson
24 Creek of 4.0 cubic feet per second, 499 acre-feet per year for the

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1 irrigation of 34.5 acres and stock watering in that portion of the E $\frac{1}{2}$ NW $\frac{1}{4}$ of
2 Section 13, T. 17 N., R. 18 E.W.M. lying southwest of Wilson Creek and east
3 of the Canyon Highway.

4 The claimant is also asserting a right to irrigate 45.3 acres and water
5 stock in that portion of the E $\frac{1}{2}$ NW $\frac{1}{4}$ lying northeast of Wilson Creek and the
6 W $\frac{1}{2}$ NE $\frac{1}{4}$ lying east of Lyle Creek, both in Section 13. Mr. Bain's Report did
7 not address water use on any of this land, suggesting that only water from
8 Bull Canal Company was used. However, Mr. Sorensen's testimony was that
9 water diverted from Lyle Creek is also used. Bull Canal Company is
10 representing its patrons and its claim is addressed on page 69 of this
11 report. There is a 24.3 acre field (field 9) in the E $\frac{1}{2}$ NW $\frac{1}{4}$ and a 21 acre
12 field (field 11) in the W $\frac{1}{2}$ NE $\frac{1}{4}$. Field 9 is within the area previously owned
13 by the Rice family. DE-678 (Bull Canal Company) shows that in 1912 101.6
14 acres were being irrigated from Bull Canal all in the NW $\frac{1}{4}$ of Section 13.
15 Field 11 is part of land that was owned by a J. Watson at the time DE-678
16 was prepared. When the map was prepared, Watson owned 160 acres in the
17 E $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{2}$ NE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13 and was irrigating 148.3 acres. The
18 W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 13 was also originally conveyed to Northern Pacific
19 Railroad, who sold it to Joseph McLeod.

20 According to Exhibit No. 1 to Howard Sorensen's deposition, water is
21 diverted from Lyle Creek in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12, just west of Bull Road
22 and carried in a ditch parallel to the road. A culvert carries Lyle Creek
23 and apparently the ditch under Interstate-90. A right is also being
24 asserted to irrigate the SW $\frac{1}{4}$ NW $\frac{1}{4}$ and that portion of the SW $\frac{1}{4}$ of Section 12

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1 lying north of I-90 and east of the pond on the Sorensen property and about
2 5 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11 with water diverted from Lyle Creek.
3 Water delivered by Ellensburg Water Company (EWC) through the Town Ditch is
4 also used on this land. A total of 125.9 acres are irrigated. EWC uses
5 Lyle Creek for delivery of its water to the Sorensen property. They spill
6 into Lyle Creek and the Sorensen's divert from Lyle Creek in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of
7 Section 12, just west of Bull Road. A ditch carries the diverted water
8 along the claimant's north property line. Mr. Bain's report indicates that
9 4 cfs is diverted from the creek and of that, 2 cfs is EWC water and the
10 remaining 2 cfs is Lyle Creek water. Mr. Sorensen testified that he has
11 been familiar with the land that is now north of I-90 since his father
12 acquired the land south of the freeway in 1919. Use of Lyle Creek water
13 today is consistent with Mr. Sorensen's memory of past use.

14 As mentioned in the Report of Referee, William Berry initially settled
15 on land that included the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, the SW $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$
16 of Section 12. He settled on the land in 1872 and received the patent in
17 1874. The documents filed in support of issuance of the patent indicate
18 that he had plowed and cultivated 140 acres of land. This land is riparian
19 to Lyle Creek, as it flows along the easterly border of the property. By
20 1912 K. O. Kohler, who is related to Howard Sorensen's wife, owned the
21 NW $\frac{1}{4}$ SW $\frac{1}{4}$ and E $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12 and 59.2 acres were being irrigated with
22 water delivered by Bull Canal. The SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12 is part of the land
23 that was settled by Jacob Galladay, who received a patent in 1890 for a
24 total of 160 acres. The documents filed in support of issuance of the
25

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1 patent stated that the land was first settled on September 25, 1882 and 120
2 acres were farmed in wheat, oats, and garden. The land homesteaded by
3 Galladay is also riparian to Lyle Creek.

4 The Referee concludes there has been sufficient evidence presented to
5 conclude that a water right was established for use of Lyle Creek water
6 through beneficial use prior to December 31, 1932. Mr. Bain's testimony was
7 that a total of 4 cfs is diverted from the creek and half of that quantity,
8 or 2 cfs, is delivered by EWC. That leaves 2 cfs of Lyle Creek water for
9 all of the land that is irrigated with Lyle Creek water. Mr. Bain's report
10 indicates that water diverted from Lyle Creek is used 152 days over the
11 irrigation season (19 days for each of 8 irrigations). A diversion of 2 cfs
12 for 152 days results in a total of 601.92 acre-feet per year being withdrawn
13 and used to irrigate the land. Between all of the fields that are irrigated
14 from the diversion on Lyle Creek (2, 3, part of 5, 9 and 11) a total of
15 171.2 acres are irrigated. Because of the different settlement histories,
16 more than one priority date is appropriate and the quantity of water and
17 acres irrigated must be divided according to that history. The land that
18 was settled by William Berry would have a priority date of June 10, 1872,
19 (the SW $\frac{1}{4}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 12 and NE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11 [85.9
20 acres]); the land settled by Jacob Galladay would have a priority date of
21 September 25, 1882, (the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12 [40 acres]); the land in
22 Section 13, all of which was originally railroad land would have a May 24,
23 1884, date of priority (45.3 acres).

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1 Water Right Claim No. 049534 was filed by Howard Sorensen pursuant to
2 the requirements of RCW 90.14. It asserts a right to divert 6 cfs, 1800
3 acre-feet per year for the irrigation of 280 acres and stock water in the
4 S $\frac{1}{4}$ NW $\frac{1}{4}$, N $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12; NE $\frac{1}{4}$ NW $\frac{1}{4}$ and W $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 13, T. 17 N.,
5 R. 18 E.W.M. The point of diversion that is described is 1300 feet east and
6 1150 feet south of the northwest corner of Section 12, in the NE $\frac{1}{4}$ of
7 Section 12. The diversion in fact is located 2600 feet east and 1150 feet
8 south of the northwest corner of Section 12 and is in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of
9 Section 12. It is obvious that Mr. Sorensen made several errors in
10 completing this claim form. The point of diversion is not correctly
11 described, by either the dimensions from the corner of the section or the
12 quarter/quarter section described. The Referee believes that Mr. Sorensen
13 was confused about the starting point for his dimensions. The point of
14 diversion would be correctly described if the starting point was at the
15 northwest corner of the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12. The source is clearly
16 identified as Lyle Creek and that creek does not flow through the area
17 described on the claim, the Referee believes that someone trying to
18 ascertain the right being asserted would be able to do so. Therefore, the
19 Referee finds that RCW 90.14 was substantially complied with for the point
20 of diversion and any right recommended for confirmation shall describe the
21 currently used (which is also the historically used) point of diversion.
22 The place of use described does not include the five acre portion of field 5
23 that extends into the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11. Because this is a small
24 extension of a field that predominantly lies in the area described in the
25

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1 RCW 90.14 claim, the Referee concludes the claimant substantially complied
2 with RCW 90.14 in describing this portion of the place of use. Similarly,
3 the place of use on the claim describes the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13. A small
4 portion of field 9 extends into the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13. Again, the
5 Referee finds that RCW 90.14 was substantially complied with. See the
6 Court's February 10, 1995, Memorandum Opinion Re: RCW 90.14 and Substantial
7 Compliance.

8 The Referee recommends that the following rights be confirmed under
9 Court Claim No. 00529 for the use of Lyle Creek. As previously mentioned,
10 Mr. Bain's measurements indicate that 2 cfs of natural creek water is being
11 diverted and that 2 cfs is divided amongst the three rights based on the
12 number of acres associated with each priority date. The point of diversion
13 for all of the rights recommended shall be 1000 feet south and 50 feet west
14 of the north quarter corner of Section 12, being within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of
15 Section 12:

16 1. With a priority date of June 10, 1872, a right to divert 1.0 cfs,
17 300.96 acre-feet per year from April 1 through October 31 for the
18 irrigation of 85.9 acres and stock water in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ of
19 Section 12 and the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11.

20 2) With a September 25, 1882, date of priority a right to divert 0.468
21 cfs, 140.8 acre-feet per year from April 1 through October 31 for the
22 irrigation of 40 acres and stock water in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12.

23 3) With a May 24, 1884, date of priority a right to divert 0.53 cfs,
24 160 acre-feet per year from April 1 through October 31 for the

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1 irrigation of 45.3 acres and stock water in that portion of the E $\frac{1}{4}$ NW $\frac{1}{4}$
2 lying northeast of Wilson Creek and that portion of the W $\frac{1}{2}$ NE $\frac{1}{4}$ lying
3 east of Lyle Creek, all in Section 13.

4 All three of these rights will carry a provision that acknowledges the
5 use of water delivered by a ditch company. The provision on the rights for
6 land in Section 12 will also acknowledge that return flow water pumped from
7 the Sorensen's pond is also used.

8 The last right that is being asserted is to use water from Little
9 Wilson Creek (identified on SE-2 as the East Branch of Wilson Creek) to
10 irrigate and provide stock water in fields 4 and 5, which is in the E $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$
11 and NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12,
12 T. 17 N., R. 18 E.W.M. This is all part of the land settled by William
13 Berry in 1872. The land is riparian to Little Wilson Creek. A total of 35
14 acres is irrigated from Little Wilson Creek. Water is diverted from the
15 creek in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11 and carried to the property in a ditch.
16 Mr. Bain measured the diversion from Little Wilson Creek at 2.3 cubic feet
17 per second. The field is irrigate 80 days over the irrigation season for a
18 total use of 364 acre-feet per year.

19 Water Right Claim No. 049535 was filed by Howard Sorensen for use of
20 Wilson Creek with a point of diversion in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11. It
21 claims a right to divert 4 cfs, 1200 acre-feet per year from the creek for
22 stock water and to irrigate 52 acres in the E $\frac{1}{4}$ NE $\frac{1}{4}$ and NW $\frac{1}{4}$ E $\frac{1}{4}$ SE $\frac{1}{4}$ of
23 Section 11. None of the land in Section 12 irrigated with water diverted
24 from Little Wilson Creek is described in the claim form. The Referee

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1 estimates that two-thirds of the irrigated area is not described on the
2 claim form. This is significantly different than the situations previously
3 discussed by the Referee where a minor portion of the irrigated filed was
4 excluded from the place of use description, with substantially all of the
5 irrigated land being within the area described. The Referee concludes that
6 RCW 90.14 was not substantially complied with as far as protecting any right
7 that may have been appurtenant to the land in Section 12 irrigated from
8 Little Wilson Creek.

9 The Referee does recommend that a right be confirmed with a June 30,
10 1872, date of priority for the use of Little Wilson Creek to irrigate 10
11 acres in that portion of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ and NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11,
12 T. 17 N., R. 18 E.W.M. lying east of Little Wilson Creek/East Branch of
13 Wilson Creek. Although Mr. Bain measured the diversion at 2.3 cfs, that
14 quantity was being diverted to irrigate 35 acres. The Referee will not
15 recommend confirmation of a right to divert such a large quantity of water
16 when the irrigated acres are being so dramatically reduced and the diverted
17 quantity was adequate for the entire number of acres. A proportionate
18 reduction would be 0.65 cubic foot per second, 100 acre-feet per year for
19 the irrigation of 10 acres and stock watering.

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1 COURT CLAIM NO. 00355 -- Walter R. Stampfly
2 & Thelma D. Stampfly

3 COURT CLAIM NO. 00462 -- Wallace M. Stampfly

4 Wallace Stampfly filed an exception to the recommendation of the
5 Referee to not confirm a right under Court Claim No. 00462 for use of Wilson
6 Creek and the claim was remanded to the Referee to take additional
7 evidence. Ecology also sought clarification of the season of water use
8 recommended by the Referee for the right recommended for use of Naneum
9 Creek. At the supplemental hearing for Subbasin 9, Attorney Jeff Slothower,
10 representing Mr. Stampfly, withdrew the exception, as Mr. Stampfly sold his
11 property and no longer has any interest in pursuing the exception. The
12 person who purchased the property has not been joined to the claim.
13 Although no exception was taken to the rights recommended for use of Naneum
14 Creek water, at the supplemental hearing Mr. Stampfly presented evidence
15 about use of water from Naneum Creek for stock watering outside the
16 irrigation season and requested that the place of use for the water right
17 confirmed under Court Claim No. 00462 be amended to include that portion of
18 the SE $\frac{1}{4}$ of Section 28 lying south of the two ditches.

19 The Referee had recommended that a right be confirmed for use of water
20 from Naneum Creek under Court Claim No. 00462 for the diversion of 0.90
21 cubic foot per second in May and June and 0.45 cubic foot per second in
22 April and July 1 through October 15, 225 acre-feet per year for the
23 irrigation of 45 acres in the SE $\frac{1}{4}$ of Section 28 lying south of the
24 Charlton-Fleming Ditch and north of the Keister Ditch. According to Mr.
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1 Stampfly's testimony, a portion of the irrigated land also lies south of the
2 Keister Ditch. Mr. Stampfly did not testify to or request that the number
3 of acres authorized for irrigation be increased, just that the place of use
4 be amended. The Referee grants that request and the words "and north of the
5 Keister Ditch" will be removed from the place of use description for the
6 right described on page 694.

7 The Referee had also recommended confirmation of a right under Court
8 Claim No. 00355 for the diversion from Naneum Creek of 0.60 cubic foot per
9 second in May and June and 0.30 cubic foot per second in April and July 1
10 through October 15, 150 acre-feet per year for the irrigation of 30 acres in
11 the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 27 lying below the Charlton-Fleming Ditch. According
12 to Mr. Stampfly's testimony, he has livestock on the property all year that
13 drink from the Charlton-Fleming Ditch. This practice has been ongoing for
14 as long as his family has owned the property, which dates back to 1910 for
15 some of the land. They generally have approximately 300 cows and a few
16 yearlings on the land. He described the dimensions of the ditch and how
17 deep the water was in the ditch in an attempt to quantify how much water is
18 diverted and carried. He estimated that 1 cubic foot per second is
19 diverted. His testimony suggested that two ditches were used, however, the
20 rights that have been confirmed both authorize diversion into the
21 Charlton-Fleming Ditch. Although Mr. Stampfly estimated that 1 cfs was
22 diverted during the winter months, the rights awarded for the Stampfly
23 property authorize the diversion of a total of 0.75 cfs from July 1 to
24 April 30, based on the Ferguson decree. That is the maximum instantaneous
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1 quantity that can be authorized and shall be divided between the two water
2 rights in the same proportion as the irrigation right. The annual quantity
3 of water that would be needed would be approximately 5 acre-feet per year,
4 or 2 acre-feet outside the irrigation season. The Referee recommends that
5 the rights described on pages 694 and 697 of the Report of Referee for
6 Subbasin No. 9 be amended to include use of water from November 1 to
7 March 30 for stock watering.

8 Ecology's request for clarification concerning the period of use
9 pointed out that for the two rights recommended for confirmation, the period
10 of water use on pages 694 and 697 of the Report of Referee indicated that
11 the last day water was used each season was October 31. However, on those
12 same pages in the quantity of water section, October 15 is shown as the last
13 day each season water is used. The Referee has reviewed the record and
14 determined that October 31 is the end of the irrigation season.

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16 COURT CLAIM NO. 00497 -- Robert G. Stewart
17 & Shirley D. Stewart

18 The Stewarts took several exceptions to the Referee's recommendations
19 concerning Court Claim No. 00497. They are represented by Attorney John P.
20 Gilreath and Mr. Stewart testified at the supplemental hearing.
21 Additionally, Richard C. Bain, Jr., P.E., prepared two declarations, DE-2000
22 and DE-2001, which were entered as substantive evidence.

23 The first exception was to the priority date for the water right
24 recommended for the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 24, T. 17 N., R. 18 E.W.M. The Referee
25 used the date that William McLeod acquired the land, which was in 1898. The

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1 claimant suggests that the priority date should be 1886. This date is based
2 on the Receiver's Receipt for the land being dated January 16, 1889, and an
3 assumption that the land had to be occupied by the patentee by at least
4 1886. The Referee finds no basis for using that date as the priority date
5 for the water right. The land in question is not riparian to the Yakima
6 River, therefore, the water right is based on the Prior Appropriation
7 Doctrine, not the Riparian Doctrine. The priority date for a water right
8 established under the Prior Appropriation Doctrine is set by notice of an
9 intent to appropriate water, construction of a facility to divert water for
10 a beneficial use or actual diversion and beneficial use of the water.
11 Evidence of one of these three steps is needed to set the priority date.
12 There is no notice of appropriation for this property, nor is there any
13 evidence of when the ditch that serves the property was constructed. The
14 record shows that the name of the ditch that served the property is the
15 Steen, McLeod and Clark Ditch and that it was constructed prior to 1902 when
16 it was combined with the Tjossem Ditch. The Referee has reviewed the
17 various affidavits that were put in the record by both Mr. Stewart and
18 neighboring landowner Michael Moeur. The 1902 affidavit of Peter Tjossem
19 and John Hanks along with an affidavit by Albert Tjossem lead the Referee to
20 conclude that the ditch was constructed by 1890. The Referee concludes that
21 based on this evidence the priority date should be June 30, 1889.

22 The second exception is to a right not being confirmed for the
23 irrigation of 8 acres in that portion of the Stewart property lying in the
24 W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 24. Exhibits DE-2002, 2003 and 2004 show that the W $\frac{1}{2}$ NW $\frac{1}{4}$ of
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1 Section 24, along with the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 24, was conveyed by the Federal
2 government to Smith George on August 16, 1895. Smith George was an Indian
3 and the land was conveyed in accordance with what is commonly referred to as
4 the Indian Allotment Act. The Homestead Certificate states that the United
5 States will hold the land in trust for 25 years for the sole use and benefit
6 of Smith George or his heirs and at the end of the 25 years will issue a
7 patent to Smith George, his widow or heirs. On January 13, 1922, W. B.
8 Marquette conveyed to Chase E. Thompson the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 24, together
9 with all water rights and irrigating ditches, including an undivided
10 one-half interest in all the waters heretofore appropriated by G. F. Dyer or
11 his grantors or successors from the Yakima River and used upon said lands
12 and conveyed in the ditch used jointly by Tjossem, Steen, Clark and McLeod
13 and their successors. Then on June 30, 1922, the United States issued a
14 patent to C. E. Thompson (as purchaser of land included in the allotment of
15 Smith George) for the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 24.

16 The W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 24 is riparian to the Yakima River and under the
17 Riparian Doctrine the priority date would be the earliest date in the record
18 reflecting steps taken to sever the land from Federal ownership. That date
19 would be the date of the homestead certificate to Smith George, which would
20 be August 16, 1895. Under the Riparian Doctrine, water had to be put to
21 beneficial use prior to December 31, 1932, in order for there to be a water
22 right. The document conveying land from Marquette to Thompson clearly shows
23 the existence of ditches to serve the land and it would be reasonable to
24 conclude water was being used from those ditches to irrigate the land. The

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1 Yakima River has encroached into the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 24 and there is now
2 very little irrigated land. Review of maps submitted as part of the initial
3 evidentiary hearing lead the Referee to conclude there was 8 acres being
4 irrigated in that part of the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 24 lying east of the Yakima
5 River.

6 The Referee recommends that a right be confirmed with an August 16,
7 1895, date of priority for the diversion from the Yakima River of 0.27 cubic
8 foot per second, 88 acre-feet per year for the irrigation of 8 acres in that
9 portion of the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 24 lying east of the Yakima River. The
10 point of diversion shall be where the Tjossem Ditch diverts from the river
11 in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 11, T. 17 N., R. 18 E.W.M. The quantity of water
12 authorized is based on a proportionate share of the 3 cfs that was found to
13 be appurtenant to the former McLeod land and 11 acre-feet per acre. The
14 right will carry a provision that the maximum that can be diverted under
15 this right and the right confirmed for the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 24 is a total of
16 3 cubic feet per second.

17 The next exception was to the annual quantity of water awarded in the
18 water right for the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 24. The Referee recommended a total of
19 891 acre-feet per year based on a diversion of 3 cubic feet per second for
20 150 days during the irrigation season. Exhibit DE-1513, the Engineering
21 Report prepared by Richard C. Bain, Jr., P.E., for the Stewart property
22 indicated on page 5, paragraph 3 that water is used 150 days over the
23 irrigation season. The claimant's exception correctly states that Mr. Bain
24 indicated that the irrigation season ran from early April to mid-October,
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1 which is 175 days. The Referee recognized the length of the irrigation
2 season in the period of use that was authorized. However, it is not
3 uncommon for a landowner to not irrigate every single day of the irrigation
4 season. So using the 150 days in Mr. Bain's report was not unreasonable.
5 However, reviewing the report again after the supplemental hearing, the
6 Referee finds that also on page 5, in paragraph 2, Mr. Bain states that TO-1
7 is used 175 days from early April until mid-October. Rereading that entire
8 page leads to a conclusion that the land under sprinklers is irrigated 150
9 days each season and the land that is rill irrigated is irrigated 175 days.
10 Approximately half the land is irrigated for 150 days and half for 175
11 days. Therefore, the Referee will amend the recommendation as to annual
12 quantity to award 975 acre-feet per year which should accommodate irrigation
13 for the extra 15 days on the land that is rill irrigated.

14 Lastly, the claimant took exception to the Referee not recommending
15 that a right be confirmed for use of a spring or creek on the southern
16 property line. The information contained in Mr. Bain's Declaration,
17 DE-2001, makes it clear that this water source captures return flow water
18 from the irrigation of the claimant's land with water from the Yakima
19 River. The claimant is capturing his own return flow waters and reapplying
20 them to lands for which the Referee has recommended that a water right be
21 confirmed. This capture and reuse is allowed within the original water
22 right that was awarded to the Stewarts, as long as the water is captured
23 before it leaves the Stewarts land and is reused on lands that hold a water
24 right. The evidence clearly shows that is the case. Although the Referee
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1 cannot recommend confirmation of an independent water right, this use is
2 within the scope of the water right that has been awarded and consistent
3 with the Court's prior rulings on this matter, see the Court's Memorandum
4 Opinion Re: Return Flow Exceptions of Harry Masterson and Mary Lou
5 Masterson, Claim No. 01467 and (A) 03296 Subbasin No. 3, dated July 17, 1996
6 (Docket No. 11813).

7
8 COURT CLAIM NO. 02275 -- Charles Strickland
9 & Linda Strickland
Walter L. Farrar
& Gail Farrar

10 COURT CLAIM NO. 02282 -- Walter L. Farrar
11 & Gail Farrar

12 Court Claims No. 02275 and 02282 both assert rights for the irrigation
13 of 38 acres within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29 and the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 30,
14 T. 19 N., R. 19 E.W.M. with waters diverted from Wilson Creek. Due to the
15 lack of a RCW 90.14 claim for this property, and the lack of evidence of
16 historic use of water on this land, the Referee did not recommend that a
17 right be confirmed under Court Claims No. 02282 or 02275.

18 The exception filed by the Farrars addresses at length compliance with
19 RCW 90.14, the Claims Registration Act. At the time of the initial
20 evidentiary hearing, the Farrars presented little information about
21 historical water use and the record indicated that Lawrence Manly owned the
22 property during the time when water right claims were to be filed under RCW
23 90.14. Subsequent to that time it was discovered that the land was also
24 owned by Richard Klein during a portion of the claims registration period.

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1 Ralph C. Klein filed Water Right Claim No. 090378 asserting a right to use
2 waters from Naneum Stream and Wilson Stream for stock watering and
3 irrigation on lands in Sections 4, 5, 8 and 9 of T. 18 N., R. 19 E.W.M. It
4 also contained the following note: "This water right claim refers to Order
5 Pendente Lite No. 18145 in the Superior Court of the State in 1973; Note:
6 the claimant's number which Richard C. Klein, owner, and Ralph C. Klein, is
7 power of attorney, recorded in Kittitas County, is shown under the former
8 owners name of Lawrence A. Manly. Claimant No. 16, on page 5; Claimant No.
9 16 on page 9; Claimant No. 16 on page 8; Claimant No. 16 on page 10; No. 16
10 on page 14;". The Farrars argue that Water Right Claim No. 090378
11 substantially complies with the requirements of RCW 90.14, in that it
12 provides Ecology with the necessary information to manage the waters of the
13 Wilson-Naneum drainage. The Referee agrees with this assertion, having
14 addressed WRC No. 090378 as it related to lands owned by Patrick M. and
15 Vicki K. Jenkins and Harold W. and Gladys D. Jenkins beginning on page 263
16 of the Report of Referee for Subbasin No. 9. The Jenkins were in a very
17 similar situation, owning lands that were once owned by Lawrence
18 Manly/Richard Klein. The Jenkins property happened to be part of the land
19 described on the face of the document, which allowed both Ecology and the
20 Referee to locate it in the state's exhibit. That was not the case for the
21 Farrars.

22 WRC No. 0090378 refers the reader to pages 9 and 14 of the Order
23 Pendente Lite that issued for the Carlson case. Page 9 identifies a water
24 use by Lawrence Manly of 0.05 cubic foot per second for the NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ of

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1 Section 30 and part of the NW $\frac{1}{4}$ of Section 29, both in T. 19 N., R. 19 E.W.M.
2 and page 14 refers to a water use by Lawrence Manly of 2.70 cfs for 135
3 acres in the NE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30. A bill of sale for the land
4 mentions having a portion (20/135th interest) in the Lawrence Manly water
5 right. The Farrars provided little historical information at the initial
6 evidentiary hearing. However, neighboring landowner, Marilyn Wilkinson
7 provided a lot of information that is pertinent to the Farrars land, as well
8 as her own. Christian Johnson received a patent on January 11, 1890, for
9 the NE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30, T. 19 N., R. 19 E.W.M. and at some point
10 acquired a portion of the NW $\frac{1}{4}$ of Section 29, including the land now owned by
11 the Farrars. In a deed dated June 10, 1893, he transferred the land in
12 Section 30 along with the portion of the NW $\frac{1}{4}$ of Section 29 he owned to Mrs.
13 Elizabeth Searles, along with the water right appropriated in 1887.
14 Christian Johnson and John Lelard filed a Notice of Location of Ditch and
15 Water Right providing notice of construction of a ditch from the North Fork
16 Wilson Creek to the ranch of Christian Johnson in the NE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of
17 Section 30. A right was asserted for 300 inches of water with the
18 appropriation of water occurring between March 24 and April 14, 1887.

19 Two prior decrees address rights that include the Farrar land. In
20 Rader v. Sanders a right to the use of 10 inches diverted from Wilson Creek
21 above Lyle Creek for use in Section 19, W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 20, the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$
22 of Section 30 and the NW $\frac{1}{4}$ of Section 29, T. 19 N., R. 19 E.W.M. was
23 identified for C. R. and Grace Hovey as being senior to the plaintiff,
24 William H. Rader. That decree did not identify where the irrigated land was

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1 located. A copy of the transcript of testimony for Sanders v. Bull is
2 in the record as Exhibit No. DE-1526. Mr. Hovey testified that he began
3 irrigating a 20 acre orchard in 1907 and had 40 acres in cultivation. In
4 Rader v. Sanders, C. R. Hovey was decreed to have a right to 10 inches of
5 water senior to all other parties to that case. Loren Dunning under Court
6 Claim No. 00166 asserted a right to the 10 inches of water for irrigation of
7 five acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19, however, due to lack of compliance
8 with RCW 90.14 was not confirmed a right for this land. Ms. Wilkinson,
9 under Court Claim No. 05055, is asserting a right for the irrigation of 10
10 acres she owns in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19 and 13 acres on the land she owns
11 in Sections 29 and 30. Wallace Stampfly in the exception he filed suggests
12 that a right exists beyond the 10 inches recognized in Rader v. Sanders and
13 his claim was remanded to allow further testimony in that regard. However,
14 Mr. Stampfly sold his property for which this particular exception was taken
15 and did not pursue the exception. The Farrars did not address the
16 possibility that there might be a right beyond the 10 inches identified in
17 the Rader v. Sanders decree.

18 In W. R. Thomas v. James T. Roberts, Decree No. 5653, a water right was
19 identified for W. R. Thomas in the amount of 75 inches (1.5 cfs) for use in
20 the NW of Section 29 with a priority date of 1884. Jeanne Dunning and the
21 estate of Dorothy R. and Paul Nelson, under Court Claim No. 00598, are
22 asserting rights for the irrigation of 100 acres in the portion of the NW of
23 Section 29 not owned by Ms. Wilkinson or the Farrars. The Referee
24 recommended confirmation of a right to Ms. Dunning and the Nelson estate

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1 consistent with the findings in the Thomas v. Roberts decree. See the
2 discussion beginning on page 401 of the Report of Referee. The Farrars did
3 not take exception to the Referee recommending confirmation of this 75 inch
4 right to the Dunnings and have presented no information to show that
5 recommendation was in error. Only a very small portion of the Farrar
6 property is within Section 29.

7 Although the Order Pendente Lite for the Carlson case identified that
8 Lawrence Manly potentially had a right for use of 2.70 cfs for the
9 irrigation of 135 acres in the NE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30, the only
10 evidence of this "right" is the Notice of Location of Ditch and Water Right
11 filed by Christian Johnson, who owned the NE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30.
12 Since the Rader v. Sanders decree did not identify this "right" for the
13 Hoveys, the Referee does not believe that the notice, without evidence that
14 the water was beneficially used early enough to establish a right, is
15 sufficient to lead to a conclusion that a right exists.

16 The Farrars did put into evidence photographs of old ditches through
17 their property, ditches that apparently are not being used to irrigate their
18 land. The testimony did not indicate the relationship of these ditches to
19 the land currently being irrigated. Mr. Farrar's testimony clearly
20 established that a portion of the land was irrigated from the time that Mr.
21 Manly owned the property to the present. In order for there to be a water
22 right for the land, there needs to be evidence that it was irrigated prior
23 to June 6, 1917. That evidence is still lacking. Therefore, the Referee
24 continues to recommend that a right not be confirmed for the property.

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1 COURT CLAIM NO. 01861 -- Robert Swedberg

2 & Lorene Swedberg

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4 The claimants took exception to the Referee's conclusion that the Adams
5 Ditch was first used to irrigate their property after they acquired it in
6 the 1950's and to the Referee not recommending a right for a portion of
7 their land. Mr. Swedberg appeared at the supplemental hearing and testified
8 regarding the exceptions.

9
10 Attached to the exception filed by the Swedbergs and entered as
11 exhibits are several letters that convey information about delivery of water
12 from the Adams Ditch. The letters from C. A. Carlson and Floyd Minor are
13 most compelling, as they state that the Adams Ditch was serving what is now
14 the Swedberg property long before the Swedbergs acquired the land.

15 Mr. Swedberg testified that when Charles Bregg owned the property he
16 received permission from Phil Adams to use the Adams Ditch. Based on the
17 evidence presented at the supplemental hearing, the Referee concludes that
18 use of the Adams Ditch began in the early 1900's and, therefore, the point
19 of diversion into the Adams Ditch will be included on the right confirmed to
20 the Swedbergs.

21 The second exception was to the Referee not recommending confirmation
22 of a water right for 75 inches of water that Charles Bregg acquired in
23 1918. On September 26, 1918, J. B. and Annie T. Marquette sold to Charles
24 Bregg all of the waters of Naneum Creek appurtenant to the E $\frac{1}{2}$ NE $\frac{1}{4}$ of

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1 Section 5, T. 17 N., R. 19 E.W.M., including one-half of the water awarded
2 to David Kinkade in the Ferguson decree, the one-half interest being 75
3 inches in the 10th Class. David Kinkade was awarded a Class 10 right in the
4 Ferguson decree for 150 inches and he owned the E $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 5 at the
5 time the decree was entered. The Swedbergs have put into evidence documents
6 to show that the Marquettes owned the E $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 5 at the time they
7 sold the water right to Charles Bregg. Also in evidence is DE-1247, which
8 is a deed dated September 11, 1918, conveying the E $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 5 from E.
9 C. Hughes to J. B. Marquette. The deed included the following language: It
10 is agreed that possession of said premises together with all crops raised on
11 said premises may be retained by the tenant now in possession until
12 November 15, 1918, and that all rental from said premises for the year 1918
13 belong to the first parties (Hughes)." This language shows that in 1918
14 crops were being grown on the property, suggesting that water was being used
15 to irrigate the crops. Compliance with RCW 90.03.380 would not have been
16 necessary if the water right had been sold prior to June 6, 1917. The
17 Referee has seen at least one instance where a contract to sell the water
18 right was executed prior to 1917, but the actual physical transfer did not
19 happen until after 1917. In that case the Referee ruled that compliance
20 with the change procedures of the water code was not necessary, see
21 discussion of Kayser Ranch claim in the Report of Referee, beginning on page
22 271 (discussion of transfer begins on page 274). In the Swedbergs case,
23 there is no evidence that agreement was made to sell and transfer the water
24 right prior to 1917. In fact the Marquettes, who sold the water right to
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1 Charles Bregg, did not own the land until September 11, 1918, just two weeks
2 prior to when they sold the water right. Without evidence to show
3 otherwise, the Referee must conclude that the agreement to transfer the
4 right was made in 1918. Therefore, compliance with the change procedures in
5 RCW 90.03.380, the Surface Water Code, was necessary. The Referee cannot
6 recommend that a right be confirmed for the additional 1.5 cfs claimed.

The claimants can file an application for change of place of use and point of diversion at this time and go through the process to seek approval for transferring the right. However, they need to be aware that similar attempts to transfer water rights in the late 1920's and early 1930's were unsuccessful, see Haberman v. Sanders and Adams, 166 Wash. 453 (1932).

13 COURT CLAIM NO. 00784 -- Jerry Tyler
14 Steven Lee
15 & Debbie Lee
Dale Lee
& Sandy Lee

16 Jerry Tyler filed an exception to the Referee not recommending that a
17 water right be confirmed for the property. Mr. Tyler, who is represented by
18 Attorney Jeff Slothower, testified at the supplemental hearing.

19 Mr. Tyler owns approximately 8 acres in the southwest corner of
20 Government Lot 3 of Section 19, T. 17 N., R. 19 E.W.M. He is asserting a
21 right to irrigate 7.5 acres with water diverted from Wilson Creek. Mr.
22 Tyler clarified at the supplemental hearing that his land is irrigated with
23 Wilson Creek water diverted in Government Lot 4 of Section 18 and carried in
24 a ditch that flows south parallel with Woodhouse Loop Road. He testified

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1 that when he first bought the land in 1982 there was an old wooden flume
2 that was north of his property and was part of the system carrying water to
3 his land. The flume had deteriorated and leaked badly. Mr. Tyler and his
4 neighbor to the north, Mr. Grigg, tried lining the flume, but that failed.
5 They then removed the flume and constructed a new ditch in its place. Mr.
6 Tyler testified to his belief that the flume had been in use for a very long
7 time.

8 One of the Referee's concerns after the initial evidentiary hearing was
9 documents put in the record that suggested Bull Canal Company stock may be
10 appurtenant to the Tyler land. Mr. Tyler testified that there was no Bull
11 Canal stock conveyed with the property and as far as he knows water
12 delivered by Bull Canal Company has never been used on the land. This is
13 confirmed by the evidence put in the record by the canal company in support
14 of their claim. DE-679 shows the area around the Tyler property and which
15 land was served by the canal company in the early 1900's. The Tyler
16 property was not served.

17 The Referee has reconsidered the evidence placed in the record at the
18 initial hearing, along with that provided by Mr. Tyler in his exception and
19 at the supplemental hearing. The evidence shows that up until the mid to
20 late-1940's the claimant's land was owned by the Fitterer family. DE-679
21 (1912 Swigert Survey entered by Bull Canal Company) shows a diversion from
22 Wilson Creek called Fitterer Intake No. 1 at the same point as the current
23 diversion into a a ditch that flows south parallel to Woodhouse Loop Road.
24 This ditch appears to be the same ditch that Mr. Tyler testified to using.

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1 DE-679 does not show any irrigated land in Government Lot 3 of Section 19,
2 however, the purpose of the map was to show the lands irrigated from Bull
3 Canal Company, not lands irrigated from other sources.

4 The testimony at the initial hearing was that the Fitterer family was
5 irrigating the land in 1941, when the witness, Clifford Bird, first became
6 acquainted with the land. With the Fitterers having constructed a ditch to
7 the property by 1912, it is reasonable to conclude that the land was being
8 irrigated at that time. In the early 1900's the Tyler property was part of
9 a larger piece that was riparian to Wilson Creek. Therefore, the Riparian
10 Doctrine would be the basis for the right and the priority date would be the
11 date first steps were taken to sever the land. This part of Section 19 was
12 originally conveyed to Northern Pacific Railroad and then sold to George
13 Carver. The priority date under the Riparian Doctrine for former railroad
14 land is May 24, 1884.

15 At the initial evidentiary hearing, Mr. Tyler testified to using
16 approximately 40 acre-feet per year to irrigate and thought that he diverted
17 1 cubic foot per second from the ditch. The 40 acre-feet per year is very
18 reasonable for 7.5 acres, however, 1 cubic foot per second is a high
19 instantaneous quantity. The claimants water right was protected through the
20 filing of Water Right Claim No. 200009 by Mary Wippel pursuant to RCW
21 90.14. It asserts a right to divert 3.5 cubic feet per second for the
22 irrigation of 61 acres, or approximately 0.057 cubic foot per second per
23 irrigated acre. While that instantaneous quantity is higher than was
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1 recognized in the numerous miscellaneous decrees on Wilson Creek, it is not
2 unreasonable.

3 The Referee recommends that a right be confirmed under Court Claim No.
4 00784 with a May 24, 1884, date of priority for the diversion of 0.40 cubic
5 foot per second, 40 acre-feet per year for the irrigation of 7.5 acres and
6 stock watering in that portion of Government Lot 3 of Section 19 being
7 approximately the southerly 675 feet of the westerly 1200 feet. The point
8 of diversion on Wilson Creek is in Government Lot 4 of Section 18.

9
10 COURT CLAIM NO. 00582 -- J. Marilyn Wilkinson
 05055

11 Mrs. Wilkinson took exception to a right not being confirmed for use of
12 water diverted from Wilson Creek. She is asserting a right under Court
13 Claim No. 00582 for the irrigation of 13 acres in that portion of the North
14 659 feet of the NW $\frac{1}{4}$ of Section 29 west of Wilson Creek Road and the North
15 659 feet of the NE $\frac{1}{4}$ of Section 30, both in T. 19 N., R. 19 E.W.M. Ms.
16 Wilkinson is irrigating 13 acres with water diverted from Wilson Creek at a
17 point in the SE $\frac{1}{4}$ of Section 18, T. 19 N., R. 19 E.W.M. . Of the 13 acres,
18 approximately 4 are located in the NW $\frac{1}{4}$ /NW $\frac{1}{4}$ of Section 29 and 9 are in the
19 NE $\frac{1}{4}$ /NE $\frac{1}{4}$ of Section 30. Court Claim No. 05055 asserts a right for the
20 irrigation of 10 acres in the SE $\frac{1}{4}$ /SE $\frac{1}{4}$ /SE $\frac{1}{4}$ of Section 19, T. 19 N.,
21 R. 19 E.W.M. and 4.5 acres in the SW $\frac{1}{4}$ /SW $\frac{1}{4}$ /SW $\frac{1}{4}$ of Section 20, T. 19 N.,
22 R. 19 E.W.M. Livestock raised on the property drink from the irrigation
23 ditches.

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The claimants property was part of the land owned by C. R. Hovey, for

1 which he testified in the Sanders v. Bull proceeding and for which he was
2 awarded a right for 10 inches in Rader v. Sander. The Rader v. Sanders
3 decree stated that Hovey owned Section 19, the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 20 the NE $\frac{1}{4}$
4 and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30 and the west 280 feet of the NW $\frac{1}{4}$ of Section 29, but
5 did not indicate where the 10 inches was being used.

6 In the initial Report of Referee, a main factor in the recommendation
7 to not confirm a right was non-compliance with the requirements of the
8 Claims Registration Act, RCW 90.14. During the period for filing claims
9 under that act, the evidence indicated that Ms. Wilkinson's property was
10 owned by Lawrence Manly. Since then, it has been discovered that by 1974
11 the land was owned by Richard C. Klein. Ralph C. Klein filed Water Right
12 Claim No. 090378 asserting a right to use waters from Naneum Stream and
13 Wilson Stream for stock watering and irrigation on lands in Sections 4, 5, 8
14 and 9 of T. 18 N., R. 19 E.W.M. It also contained the following note:
15 "this water right claim refers to Order Pendente Lite No. 18145 in the
16 Superior Court of the State in 1973; Note: the claimant's number which
17 Richard C. Klein, owner, and Ralph C. Klein, is power of attorney, recorded
18 in Kittitas County, is shown under the former owners name of Lawrence A.
19 Manly. Claimant No. 16, on page 5; Claimant No. 16 on page 9; Claimant No.
20 16 on page 8; Claimant No. 16 on page 10; No. 16 on page 14;". It is Ms.
21 Wilkinson's position that Water Right Claim No. 090378 substantially
22 complies with the requirements of RCW 90.14, in that it provides Ecology
23 with the necessary information to manage the waters of the Wilson-Naneum
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drainage. The Referee agrees with this assertion, having addressed WRC No.

1 090378 as it related to lands owned by Patrick M. and Vicki K. Jenkins and
2 Harold W. and Gladys D. Jenkins beginning on page 263 of the Report of
3 Referee for Subbasin No. 9. The Jenkins were in a very similar situation,
4 owning lands that were once owned by Lawrence Manly/Richard Klein. The
5 Jenkins property happened to be part of the land described on the face of
6 the document, which allowed both Ecology and the Referee to locate in it the
7 state's exhibit. That was not the case for the Ms. Wilkinson.

8 WRC No. 0090378 refers the reader to pages 9 and 14 of the Order
9 Pendente Lite that issued for the Carlson case. Page 9 identifies a water
10 use by Lawrence Manly of 0.05 cubic foot per second for the NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ of
11 Section 30 and part of the NW $\frac{1}{4}$ of Section 29, both in T. 19 N., R. 19 E.W.M.
12 and page 14 refers to a water use by Lawrence Manly of 2.70 cfs for 135
13 acres in the NE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30.

14 Christian Johnson received a patent on January 11, 1890, for the NE $\frac{1}{4}$
15 and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30, T. 19 N., R. 19 E.W.M. and at some point acquired
16 a portion of the NW $\frac{1}{4}$ of Section 29, including the land now owned by Ms.
17 Wilkinson. In a deed dated June 10, 1893, he transferred the land in
18 Section 30 along with the portion of the NW $\frac{1}{4}$ of Section 29 he owned to Mrs.
19 Elizabeth Searles, along with the water right appropriated in 1887.
20 Christian Johnson and John Lelard filed a Notice of Location of Ditch and
21 Water Right providing notice of construction of a ditch from the North Fork
22 Wilson Creek to the ranch of Christian Johnson in the NE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of
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Section 30. A right was asserted for 300 inches of water with the
1 appropriation of water occurring between March 24 and April 14, 1887.

2 Two prior decrees address the land described in Court Claim No. 00582.
3 In Rader v. Sander a right to the use of 10 inches diverted from Wilson
4 Creek above Lyle Creek for use in Section 19, W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 20, the
5 NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30 and the NW $\frac{1}{4}$ of Section 29 was identified for C. R.
6 and Grace Hovey as being senior to the plaintiff, William H. Rader. That
7 decree did not identify where the irrigated land was located.

8 In W. R. Thomas v. James T. Roberts, Decree No. 5653, a water right was
9 identified for W. R. Thomas in the amount of 75 inches (1.5 cfs) for use in
10 the N $\frac{1}{2}$ of Section 29 with a priority date of 1884. Jeanne Dunning and the
11 estate of Dorothy R. and Paul Nelson, under Court Claim No. 00598, are
12 asserting rights for the portion of the N $\frac{1}{2}$ of Section 29 not owned by Ms.
13 Wilkinson. They were awarded a right to the 75 inches.

14 Mr. Manly was a party to the 1973 Order Pendente Lite, which listed a
15 potential right with an 1883 date of priority for the diversion of 0.05 cfs
16 for irrigation in the NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30 and the west 280 feet of the
17 NW $\frac{1}{4}$ of Section 29. The Wilkinson property is within this area. The 1973
18 Order Pendente Lite pursuant to State of Washington Department of Ecology v.
19 Carlson, et al. divided the Hovey 10 inches of water, giving Lorne T.
20 Dunning, Jr. 0.15 cubic foot per second for use in Section 19 and Lawrence
21 A. Manly, a predecessor of Ms. Wilkinson, 0.05 cubic foot per second for the
22 NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30 and the west 280 feet of the NW $\frac{1}{4}$ of Section 29.
23 None of the water was for the SW $\frac{1}{4}$ of Section 20. None of the reports that
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preceded issuance of the 1973 Order Pendente Lite provided any basis for
1 dividing the small right.

2 One other claimant is asserting a right to use this 10 acres Wilson
3 Creek water right. Lorne and Jeanne Dunning, under Court Claim No. 00166
4 asserted a right to irrigate 10 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19. The
5 Referee did not recommend confirmation of a right due to lack of compliance
6 with RCW 90.14. It is clear that a right was established for using 10
7 inches of water, or 0.20 cubic foot per second, for irrigating 10 acres and
8 that more than 10 acres have historically been irrigated, and continue to be
9 irrigated, within the area owned by the individual who established the
10 right. Mrs. Wilkinson is the only successor who is asserting a right and
11 also has a RCW 90.14 claim to preserve the right. Therefore, the Referee
12 recommends that a right be confirmed under Court Claim No. 00582 with a
13 June 30, 1887, date of priority for the diversion of 0.20 cubic foot per
14 second in May and June and 0.10 cubic foot per second in April and July 1
15 through October 15 for the irrigation of 10 acres and stock watering in the
16 north 659 feet of that portion of the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29 lying west of
17 Wilson Creek Road and the north 659 feet of the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 30, both
18 in T. 19 N., R. 19 E.W.M. The point of diversion is in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of
19 Section 18, T. 19 N., R. 19 E.W.M.
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1 COURT CLAIM NO. 06737 -- Stephan A. Willard
2 Son Vida I

3 On November 21, 1991, Son Vida I and Steve Willard filed Court Claim
4 No. 06737 asserting a right to divert water from Wilson Creek and two
5 unnamed springs. The Referee held the evidentiary hearings for Subbasin No.
6 9 in January of 1991, well before the late claim was filed. The Court on
7 January 9, 1992, signed an Order allowing further processing of the claim by
8 the Referee. On May 26, 1992, the Court signed an Order granting the
9 claimants the right to participate in the Subbasin No. 9 proceeding by
10 introducing their evidence and testimony through the exceptions hearing that
11 will be scheduled by the Court for Subbasin No. 9. The claimants are
12 represented by Attorney Richard T. Cole and Steve Willard testified at the
13 supplemental hearing.

14 Court Claim No. 06737 asserts a right to irrigate land in the SE $\frac{1}{4}$ and
15 E $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 25, T. 18 N., R. 18 E.W.M. lying south of the Cascade
16 Canal. According to Mr. Willard's testimony, a total of 160 acres are owned
17 and a portion is flood irrigated with water delivered by Cascade Irrigation
18 District or diverted from Mercer Creek. The claim states that 52 acres are
19 irrigated with water diverted from Wilson Creek and two unnamed springs.
20 Mr. Willard did not testify to use of any springs, nor to use of water
21 diverted from Wilson Creek. The land is planted in pasture and
22 approximately 150 pair of cattle are on the land in the fall. According to
23 the testimony, water is diverted from Mercer Creek at a point approximately
24 1300 feet south and 1000 feet east of the northeast corner of Section 25 and

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carried south in a ditch onto the property. There is an undershot under the
1 Cascade Canal approximately 500 feet south of the center of Section 25. Mr.
2 Willard did not testify to how many acres are irrigated with Mercer Creek
3 water, nor did he testify to how much water is used from Mercer Creek.
4 Although it is clear from Mr. Willard's testimony that Cascade water is used
5 to irrigate some or all of the land, he did not indicate whether the entire
6 160 acres is assessed by Cascade Irrigation District. DE-1845 is a drawing
7 that was put in the record showing the land and features on the land. Mr.
8 Willard has marked two spring locations, drainage areas (including two that
9 are shown as dry), ditches that carry wastewater and perhaps a pipeline
10 through the property. It is not clear from the record how many acres are
11 being irrigated in total and how many have been irrigated with water
12 diverted from Mercer Creek.

13 Water Right Claim (WRC) No. 125748 was filed by Bridge and Morgan,
14 prior owners of the claimants property. It asserts a right to divert 3 cfs,
15 400 acre-feet per year from a branch of Wilson Creek now designated as Dry
16 Creek for the irrigation of 114 acres. A very extensive legal description
17 is attached to the claim form and includes the lands in the SE $\frac{1}{4}$ and the
18 E $\frac{1}{2}$ S $\frac{1}{2}$ W $\frac{1}{4}$ of Section 25 owned by the claimants, along with land in the NE $\frac{1}{4}$ of
19 Section 25. WRC No. 125747 was also filed by Bridge and Morgan asserting a
20 right to use 0.50 cfs, 150 acre-feet per year from a spring for irrigation
21 of 114 acres. The place of use is the same as attached to WRC No. 125748.
22 The spring location is 3310 feet south and 1450 feet west of the northeast
23 corner of Section 25.

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The land owned by the claimants in the W $\frac{1}{4}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 25
1 was settled by Carl Sanders and William Snyder, with all of the property
2 ultimately being owned by Carl Sanders prior to 1890. Water rights for the
3 Sanders property was addressed in numerous Kittitas County Superior Court
4 actions in the late 1800's and early 1900's. In the various actions it was
5 determined that Sanders had rights to use between 850 and 1300 inches of
6 water from Wilson Creek. Numerous other claimants in the Acquavella
7 proceeding own portions of what once was Sanders land and have been awarded
8 rights based on those prior decrees. Although the earlier decrees all
9 addressed rights to use water from Wilson Creek, the Referee concludes that
10 Mercer Creek branches off of Wilson Creek and rights to use of water in
11 Mercer Creek could stem from the Sanders cases. The E $\frac{1}{4}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ of
12 Section 25 was settled by William Snyder on October 1, 1873, and the NW $\frac{1}{4}$ SE $\frac{1}{4}$
13 of Section 25 was settled by Carl Sanders on May 8, 1877.

The land owned by the claimants in the E $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 25 was settled
15 by Michael Pott, who settled on all of the SW $\frac{1}{4}$, except the NW $\frac{1}{4}$ SW $\frac{1}{4}$, and the
16 SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25. In 1890 Pott filed an Affidavit of Water Right
17 asserting that beginning in May of 1885, he constructed a ditch from Mercer
18 Creek in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25 and appropriated 2.66 cubic feet per
19 second for irrigating his lands in Section 25. A second ditch was
20 constructed, taking off of the Nicholas Rollinger Ditch that diverted from
21 Mercer Creek in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24. The Referee believes that the
22 affidavit is asserting a right to divert a total of 3 and 4/15 cfs (3.266
23 cfs) from Mercer Creek. The Referee notes that the Pott affidavit describes
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points of diviersions from Mercer Creek in an area where the creek does not
1 flow. When the airport was constructed in Sections 24 and parts of Section
2 23 and 25, Mercer Creek was rerouted. No doubt this rerouting caused
3 landowners to have to change their points of diversion. There is no
4 evidence that the prior owner of the claimants' property complied with the
5 change procedures in RCW 90.03.380 to seek authorization to change their
6 point of diversion.

7 The evidence supports a conclusion that water rights were established
8 for using water from Mercer Creek (also known as Dry Creek) to irrigate some
9 of the claimants' property. However, the Referee at this time cannot
10 recommend that a water right be confirmed. There was no evidence put in the
11 record of how many acres are irrigated with Mercer Creek water, as opposed
12 to water delivered by the Cascade Irrigation District, nor is there any
13 evidence of how much water is diverted from Mercer Creek to irrigate the
14 land. Mr. Willard testified to needing 8 or 9 acre-feet per acre to
15 irrigate; however, there is no evidence this quantity has historically or
16 currently been used.

17 Lastly, WRC No. 125748 was filed pursuant to RCW 90.14 by prior owners
18 of the claimants' land. The claim asserts a right to irrigate 114 acres.
19 The Referee has recommended confirmation of three water rights under Court
20 Claim No. 00825, which was filed by Bridge and Morgan for the property they
21 owned in the E½ of Section 25 lying northeast of the Cascade Canal. No
22 exception was taken to the recommendations under Court Claim No. 00825. The
23 three rights are for the irrigation of a total of 114 acres, exactly the

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number of acres for which a right is claimed in WRC No. 125748. The
1 claimant has not brought to the Referee's attention any other water right
2 claim that might be appurtenant to their property. This leads the Referee
3 to conclude that when Bridge and Morgan owned the property the land
4 irrigated from Mercer Creek was all north and east of the Cascade Canal.
5 The Referee notes that according to an exception filed with the Court to
6 Claim No. 00825, Son Vida II, of which Steve Willard also has an interest,
7 owns a portion of the former Bridge and Morgan land north and east of the
8 Cascade Canal.

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10 COURT CLAIM NO. 00726 -- Stephan A. Willard
11 & Ruby Willard
12 Shird J. Burks
13 & Audrey E. Burks
John Scott Downey
Creekside Land & Livestock, Inc.

14 Creekside, Inc., is a successor to John Downey for a portion of the
15 lands described in Court Claim No. 00726. They were substituted for John
16 Downey on this claim on April 2, 2002, but had previously filed an exception
17 to the recommendations contained in the Report of Referee for Subbasin No. 9
18 related to Court Claim No. 00726. The exception erroneously referenced
19 Court Claim No. 02245 and when Creeksides exception was remanded, that claim
20 number was also referenced. The evidence presented by Creekside, Inc., who
21 is represented by Attorney Jeff Slothower, clearly relates to land described
22 and considered by the Referee under Court Claim No. 00726. John Downey
23 testified at the supplemental hearing.

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Son Vida I, represented by Attorney Richard T. Cole, appeared at the
1 supplemental hearing and presented evidence in support of an exception to
2 the Referee's recommendation concerning a portion of the land described in
3 Court Claim No. 00726. Steve Willard, who is the general managing partner
4 for Son Vida I (a family limited partnership), testified at the supplemental
5 hearing. However, during the course of the testimony, it became clear that
6 Son Vida I had not filed an exception to the Referee's recommendation for
7 Court Claim No. 00726, nor had Son Vida I been joined to the claim. Counsel
8 committed to filing a motion for a late exception and filing the paperwork
9 to join Son Vida I to the claim. Subsequent to the hearing, Son Vida I
10 filed a motion to allow for a late exception. The motion was heard on
11 December 13, 2001, at which time the Court orally allowed the exception, but
12 instructed Mr. Cole to provide an Order to that affect for the Court to
13 sign. That Order was never provided, and Son Vida I has still not been
14 joined to the claim. Since Steve Willared has been joined to the claim and
15 is a partner in Son Vida I, the Referee will consider his testimony in spite
16 of Son Vida I not being joined to the claim. Any right that can be awarded
17 will be in Steve Willard's name.

The Referee will first address the exceptions filed by Creekside, Inc.
19 The land owned by Creekside is that portion of the SW $\frac{1}{4}$ lying east of Look
20 Road and the W $\frac{1}{2}$ SE $\frac{1}{4}$, all in Section 19, T. 18 N., R. 19 E.W.M. Creekside
21 took four exceptions to the Report of Referee. The first exception was to
22 the number of acres authorized for irrigation in the right discussed on
23 pages 567 and 602 of the Report of Referee. The Referee recommended that a

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right be confirmed for the irrigation of 142 acres based on the evidence
1 placed in the record at the original hearing. At the supplemental hearing,
2 Creekside, Inc., offered exhibit DE-1815, which is an aerial photograph of
3 the area on which the Soil Conservation Service has identified fields and
4 the number of acres irrigated within each field. DE-1815 shows that 146.9
5 acres are being irrigated. The instantaneous quantity of water awarded was
6 based on the limitations in the Sanders v. Jones decree, which awarded one
7 inch of water for each acre irrigated. The second exception by Creekside
8 seeks to have a right to divert water for stock watering the entire year.
9 Mr. Downey's testimony was that has been the historic practice on this
10 land. During his association with the land, there have been 150 cow/calf
11 pairs on the land. They drink both from the ditches and the creek as it
12 crosses the land. The Referee amends the recommendation on page 567
13 beginning on line 22 and on page 602 to the following: A right with a
14 June 30, 1872, date of priority for the diversion of 2.938 cubic feet per
15 second in May and June, 1.469 cubic feet per second in April and July 1
16 through October 15, 734.5 acre-feet per year for irrigation of 146.9 acres
17 and stock watering and 1.469 cubic foot per second, 3 acre-feet per year
18 from October 16 through March 31 for stock watering.

19 Creekside's third exception asks that two points of diversion be
20 included on the right recommended for confirmation. The point described in
21 the Report of Referee is .25 feet south and 950 feet west of the east quarter
22 corner of Section 19, being within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19. Review of the
23 record leads the Referee to conclude that the prior testimony about the
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location of the point of diversion had been misinterpreted. At the initial
1 hearing Mr. Downey testified that he diverted water from the creek east of
2 his northeast property corner. There is a diversion due east of that
3 corner, which the Referee concluded was Mr. Downey's point of diversion. At
4 the supplemental hearing, Mr. Downey marked on the State's Map Exhibit SE-2
5 the diversion he uses, which is just northeast of the northeast corner of
6 his property, on land owned by Ralph Strand. The diversion is located 400
7 feet north and 900 feet west of the east quarter corner of Section 19, being
8 within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 19. Mr. Downey also testified to using a
9 second diversion to irrigate the portion of the Creekside land that is south
10 of Wilson Creek. That diversion is located 1150 feet north and 1200 feet
11 east of the south quarter corner of Section 19, within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of
12 Section 19. Water Right Claim No. 123683 was filed pursuant to RCW 90.14 by
13 Donald Hay, the prior owner of all of the land described in Court Claim No.
14 00726, and describes the Creekside property. The point of diversion
15 described on WRC No. 123683 is in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32, T. 19 N.,
16 R. 19 E.W.M., which is miles upstream of the irrigated land. The point
17 described is actually not a diversion, but is where Wilson Creek and Naneum
18 Creek split. Mr. Hay did not describe on the claim form any of the points
19 where water was diverted from the creek. In responding to an exception
20 raised by Ecology, the Court ruled that this claim substantially complied
21 with the requirements of RCW 90.14 for the diversion of water from Wilson
22 Creek at the points of diversion being used to irrigate the lands described
23 in the claim. The Referee recommends that the right for the irrigation of
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the E $\frac{1}{2}$ SW $\frac{1}{4}$ and W $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 19 described on page 602 of the Report of
1 Referee for Subbasin No. 9 be amended to describe the two points of
2 diversion used by Creekside, Inc.

3 Creekside's fourth exception seeks to have a right confirmed for
4 irrigation of lands in Government Lots 3 and 4 of Section 19. At the
5 intital evidentiary hearing there was no historical evidence put in the
6 record, as this land was not addressed in the Sanders v. Jones decree.
7 DE-1813 contains the chain of title for Government Lots 3 and 4 along with
8 one deed and a parcel map. The chain of title indicates this part of
9 Section 19 was originally conveyed by the United States to Northern Pacific
10 Railroad, who sold it in 1889 to J. L. Brown. The property sold many times
11 with no mention of water rights in the deeds according to the chain of title
12 notations. A copy of a Quit Claim Deed dated March 6, 1897, is part of that
13 exhibit. The deed is between J. L. Brown, et al., and William Dunsworth,
14 whereby the Browns convey to Dunsworth one-third of all the water right and
15 ditches to convey same belonging to the Browns, said water coming from what
16 is known as Wilson Creek and spring branch and through Lot No. 4 of Section
17 19, T. 18 N., R. 19 E.W.M. Creekside argues that since one-third of the
18 water right and ditches was conveyed, there remains two-thirds that are
19 appurtenant to the Creekside land. The Referee does not make the same
20 conclusion as the claimant. The deed does convey one-third of the water
21 rights held by the Browns, but it does not state that the water right was
22 appurtenant to Government Lot 3 or 4. It says that the water was conveyed
23 through Government Lot 4. SE-2 shows an intermittent stream channel flowing
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through Government Lot 4. The record is clear that the creek channels in
1 this area have changed over the years, as have some of the ditches. The
2 language in the quit claim deed suggests that water from Wilson Creek was
3 carried through Government Lot 4 in a ditch or other channel, not that it
4 was used in Government Lot 4. The Referee concludes that the evidence is
5 still lacking to show that a right was established through beneficial use
6 prior to June 6, 1917.

7 A constraint to recommending confirmation of a water right for this
8 land that was not addressed by the claimant is the lack of a RCW 90.14 claim
9 for this property. WRC No. 123683, which was filed by Donald Hay and covers
10 the rest of the Creekside property, does not include either Government Lots
11 3 or 4 of Section 19 within the place of water use. The Referee reviewed
12 State's Exhibit SE-5, which contains copies of all of the RCW 90.14 claims
13 in this basin and printouts listing those claims and could not find one that
14 included this portion of the Creekside property. This was noted by the
15 Referee on page 567, lines 1 through 4 of the Report of Referee. The
16 Referee notes that Court Claim No. 00726 and WRC No. 123683 describe the
17 same property -- neither assert rights for Government Lots 3 and 4 of
18 Section 19.

19 Based on the foregoing, the Referee cannot recommend that rights be
20 confirmed for irrigation of any of Government Lots 3 or 4 of Section 19,
21 T. 18 N., R. 19 E.W.M.

22 The exception filed by Son Vida I was to a right not being recommended
23 for confirmation for irrigating Government Lot 1 of Section 30, T. 18 N.,
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R. 19 E.W.M. At the time of the initial hearing, Government Lot 1 was owned
1 by Don Hay. He testified that 15 acres were being irrigated within
2 Government Lot 1, but relied on the Sanders v. Jones decree as the basis for
3 the water right. Government Lot 1 is the only part of the W% of Section 30
4 that was not owned by Carl and Olive Sanders at the time of Sanders v. Jones
5 and as far as the Referee can determine was not addressed at all in the
6 decree. As counsel for Son Vida I points out, Sanders v. Jones was not an
7 adjudication of all of the rights to Wilson Creek and was binding only on
8 those named parties. The Referee has confirmed rights to other claimants
9 whose predecessors were not parties to the prior court cases in the area.
10 However, in order to do that, evidence is needed to show that a water right
11 was established. Government Lot 1 of Section 30 is not riparian to Wilson
12 Creek, therefore, in order for there to be a water right there must be
13 evidence that water was diverted and put to beneficial use on the land prior
14 to June 6, 1917. In an attempt to present that evidence, Exhibit DE-1848
15 was submitted. It contains copies of several mortgages for Government Lot 1
16 of Section 30 and one deed that conveyed the land from S. W. Farris, et ux.
17 to W. B. Dunsworth in 1908. The only reference to water rights on any of
18 the documents are the words "including all water rights and irrigating
19 ditches appertaining to said land." The Referee has seen these words on
20 numerous deeds for property where there in fact is no water right. Mr.
21 Willard testified that his familiarity with the property extends to the
22 early 1990's and that to the best of his knowledge the land had been
23 irrigated continuously. However, that testimony is not adequate to show
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that the land has been irrigated since before June 6, 1917. Mr. Willard
1 testified to seeking a right to irrigate more than 30 acres in Government
2 Lot 1 and that the land is irrigated with 2 cfs diverted from Wilson Creek.
3 The diversion is near the north quarter corner of Section 30.

4 Water Right Claim No. 123683 was filed by Donald and James Hay pursuant
5 to the requirements of RCW 90.14. It asserts a right to divert 10 cubic
6 feet per second, 2000 acre-feet per year for the irrigation of 450 acres and
7 stock water on the land owned by the Hays at the time the claim was filed.
8 The place of use includes all of the NW $\frac{1}{4}$ of Section 30, within which lies
9 Government Lot 1. Court Claim No. 00726 asserted a right to irrigate 450
10 acres, which is consistent with WRC No. 123683. The 450 acres claimed is
11 consistent with the rights awarded to Carl Sanders in the Sanders v. Jones
12 decree, which did not include Government Lot 1. The Referee has recommended
13 that rights be confirmed under Court Claim No. 00726 for the irrigation of
14 438 acres. The Referee concludes that the original claimants, the Hays,
15 were asserting a right to irrigating 15 acres within Government Lot 1, not
16 the 30+ acres sought by Son Vida I. WRC No. 123683 could be considered to
17 be adequate to cover the irrigation of an additional 15 acres beyond that
18 already confirmed, as that would result in rights to 453 acres where 450
19 were claimed, a very minor difference.

20 The Referee is not in a position to recommend confirmation of a water
21 right for Government Lot 1 of Section 30 with the evidence currently
22 presented. The evidence is not adequate to allow for a conclusion that 30+
23 acres were being irrigation prior to June 6, 1917. The evidence suggests to
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the Referee that during the Hays ownership only 15 acres were irrigated.

1 Additionally, there is no evidence of water use on this land prior to when
2 it was owned by the Hays. Nor is there evidence of when water use might
3 have begun.

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27 293

28 Referee's Office
15 W. Yakima Ave Ste. 200
Yakima, WA 98902-3401

FINDINGS OF FACT

I, DOUGLAS CLAUSING, 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 August 9, 2001:

Based upon the additional testimony and evidence obtained at either the exception hearing or the supplemental hearing, the Report of Referee - Subbasin No. 9, dated June 29, 2000, should be modified as follows:

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Referee's Office
15 W. Yakima Ave Ste. 200
Yakima, WA 98902-3401

FINDINGS OF FACT

AND

SCHEDULE OF RIGHTS

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