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

IN THE MATTER OF THE DETERMINATION OF THE RIGHTS TO THE USE OF THE SURFACE WATERS OF THE YAKIMA RIVER DRAINAGE BASIN, IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 90.03, REVISED CODE OF WASHINGTON, STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Plaintiff, vs. JAMES J. ACQUAVELLA, ET AL., Defendants	No. 77-2-01484-5 REPORT OF THE COURT RE: EXCEPTIONS TO SUPPLEMENTAL REPORT OF REFEREE SUBBASIN 5 (ELK HEIGHTS)

I. INTRODUCTION

The Referee filed a Report of Referee Re: Subbasin 5 on July 7, 1997 (Report of Referee) and a Supplemental Report of Referee on May 10, 1999 (Supplemental Report). Five claimants initially filed exceptions to the Supplemental Report. This Court held a hearing September 16, 1999 to allow those claimants to present exceptions. The Court held a second hearing June 8, 2000 to allow Carl and Kay Drake to present evidence in support of their claim. This Report resolves those exceptions. The Court has provided an opportunity for filing exceptions to allow claimants to address the rulings set forth below. A Notice detailing the time frame for filing exceptions will accompany this Report.

II. ANALYSIS

a. Harold and Joann Iverson – Court Claim No. 01137

The Iversons filed two exceptions to the Supplemental Report. First, they ask that a water right be confirmed for 17 acres they own in the SW1/4SE1/4 of Section 36, T. 20N., R. 15 E.W.M. They also request an increase in their water right for lands in the NE1/4SW1/4 of Section 36, T. 20N., R. 15 E.W.M. from 11 acres to 12.7 acres.

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In the Supplemental Report, the Referee determined that the chain of title evidence was inadequate to confirm a water right to the Iversons based on the riparian doctrine for lands in the SW1/4SE1/4 of Section 36. In order for a diversionary right to be confirmed under the riparian doctrine, the record must reflect that the property in question was severed from federal ownership prior to 1917 and water had been put to beneficial use prior to 1932. Ecology v. Abbott, 103 Wn 2d 686, 695-96, 694 P 2d 1071 (1985). The Iversons submitted one deed pertinent to the lands in the SW1/4SE1/4 of Section 36 dated April 3, 1943 when the property was acquired by the Iverson family from Teofil Malavy. Supplemental Report at 37. That ownership record was insufficient to support confirmation of a water right based on the riparian doctrine.

At the exception hearing, the Court admitted into evidence four deeds that depict the chain of title from when the property left public ownership on June 6, 1902 until it was conveyed to Tom Malavy by Northwestern Improvement Company on July 22, 1936. Report of Proceedings, September 16, 1999 at pp. 32-33. The S1/2SE1/4 and S1/2SW1/4 of Section 36 were originally conveyed to S.T. Packwood on June 6, 1902. Packwood in turn conveyed those lands to E.E. Wager on April 2, 1906. E.E. Wager deeded the S1/2SE1/4 to the Northwestern Improvement Company on April 3, 1908. Northwestern Improvement Company then conveyed the property to Tom Malavy on July 2, 1936. A deed attached to those submitted by the Iversons clears confusion regarding Mr. Malavy's first name. That September 22, 1936 deed conveyed ownership of lands in the SE1/4SE1/4 from Teopil Malavy on his own behalf and as executor of the estate of Mary Malavy to John Browka. The instrument indicates that Teopil Malavy was also known as Tom Malavy. The July 22, 1936 deed between Northwestern Improvement Company and Tom Malavy also references a contract between the same parties dated June 17, 1929. Therefore, ownership of the property by Malavy prior to 1932 has been proven and is consistent with the testimony that water was used by Mr. Malavy on the property in the 1920's.

However, what the Iversons have not demonstrated is that the SW1/4 SE1/4 lands are riparian to the unnamed creek. The Court has reviewed the map for Subbasin 5 and the unnamed creek does not run through the SW1/4SE1/4. The creek does run through the SE1/4SW1/4; until 1908, when Wager conveyed the SW1/4SE1/4 to the Northwestern Improvement Company, the S1/2SE1/4 and S1/2SW1/4 were commonly owned. See Exhibit DI-241. Neither the deed from Wager to the Northwestern Improvement Company nor any other deed submitted by the Iversons shows who owned the S1/2SW1/4 after 1908. There is also no evidence that those properties were

irrigated as one commonly owned parcel prior to the parcels being separated in 1908. Finally, since the evidence shows that water was not used on the SW1/SE1/4 until the 1920's, this Court is unable to conclude that the parcel in question was ever riparian to the water source.

In order for this Court to grant the water right, there must be separation from public ownership prior to 1917 and use by 1932 if the land is riparian. If the land is not riparian, as this Court has concluded, the Iversons must show the right was used prior to 1917. That evidence is not in the record. Because the Iversons have not proven that the land is riparian or that it was irrigated prior to 1917, this Court must DENY the exception.

Based on testimony supplied by Mr. Iverson at the September 16, 1999 Exceptions Hearing, the Court GRANTS the Iverson's second exception that the acreage in the NE1/4SW1/4 of Section 36, T. 20N., R. 15 E.W.M. be modified to confirm irrigation of 12.7 acres rather than 11 acres. It appears the entire 22-acre field is irrigated with 9.3 of those acres having a separate water right, leaving 12.7 acres irrigated with the right recommended by the Referee. The Referee's Schedule of Rights, on page 86 of the Supplemental Report, shall be so modified, to confirm a right for use of 1.8 cfs, 168.91 acre-feet per year for the irrigation of 12.7 acres.

b. Jerry and Marclyn McLane – Court Claim No. 01678

Mr. and Mrs. McLane own approximately 25 acres of property in Subbasin 5. They acquired the property in two stages from Frank and Nancy Maglietti; 15 acres in 1983 and 10 acres in 1985. They did not move to the property until 1996. The Referee found that the McLane's had not irrigated the property since they acquired the 15 acres in 1983 and the 10 additional acres in 1985. Supplemental Report at 43. The McLanes do not contest this factual finding. The Referee, pursuant to R.D. Merrill v. Pollution Control Hearing Board, 137 Wn.2d 118, 969 P.2d 458 (1999), determined that the water rights for the two parcels had been relinquished. Supplemental Report at 44. The McLanes except to this finding on various grounds, to be analyzed below.

According to RCW 90.14.160, any person who is entitled to divert water and abandons the same or voluntarily fails, without sufficient cause, to beneficially use all or any part of that right for five successive years, relinquishes that right. This Court, in the Report of the Court on Remand concerning the water right of Yakima-Tieton Irrigation District dated September 2, 1999, explained in considerable detail how relinquishment would now be applied in this adjudication and that discussion is incorporated by reference into this decision. See pages 23-35. The Court will not repeat that analysis here except to emphasize that relinquishment does not require proof of intent;

"voluntary" in 90.14.160 means nonuse absent a sufficient cause under RCW 90.14.140(1) or other exemption under RCW 90.14.140(2); a showing of non-use for five consecutive years shifts the burden of proof to the water user to rebut the non-use with evidence of excuse under the narrow categories in RCW 90.14.140. Id., at 24-25. Finally, the Court notes that R.D. Merrill requires the Court to narrowly construe the exceptions to relinquishment to give effect to the legislative intent underlying the statute's general intent of returning to the state unused water rights. R.D. Merrill, 137 Wn.2d at 140.[1]

As stated above, the McLanes did not use their water right for more than five consecutive years between 1983 or 1985 and 1998. Therefore, the burden switches to the McLanes to prove that one of the narrow categories under RCW 90.14.140 applies to their nonuse of water. R.D. Merrill, at 140. First, they argue that RCW 90.14.140(1)(d) applies and that this adjudication constitutes the "operation of legal proceedings" that prevented their use of water. The McLanes also point out, correctly, that it was the law of this case, until R.D. Merrill was decided, that the "operation of legal proceedings" sufficient cause applied when analyzing a water right claim that had gone unused for a long period of time during the pendency of this adjudication. However, this Court rejected that argument in its YTID Report on Remand and incorporates that analysis herein. See pages 28-30.

R.D. Merrill held that nonuse of the water be "the result of" the legal proceedings, i.e., "that the legal proceedings prevent the use of the water." R.D. Merrill at 141-42. The McLanes have failed to persuade this Court that the Acquavella proceeding actually prevented their use of the water. R.D. Merrill instructs that the Court must interpret that sufficient cause narrowly, as the Supreme Court itself did in that case. The McLanes argue generally about the potential affects of an adjudication on water rights – that such a case might create uncertainty and thereby discourage investment in infrastructure for maximizing a water right. That argument is unpersuasive for three reasons. First, as this Court stated in the YTID Remand Report, a water right adjudication should encourage maximization of a water right and the time frame the relinquishment occurred was during the processing of this adjudication. Second, most of these water rights were initiated in the late 1800's/early 1900's. Hence the water right infrastructure has been in place for a considerable time or else a water right would never have been perfected. Finally, there may be a case that has the theoretical facts and problems set forth by the McLanes. However, it's not this one. Rather, it

[1] This statement by the Supreme Court in R.D. Merrill addresses the McLane's regarding how the Court should interpret

appears that the McLanes were unaware of the significance of the adjudication, and by virtue of living elsewhere, possibly unaware of the proceeding itself. Supplemental Report of Referee at p 44 ("the McLanes did not know that the Yakima River Adjudication was happening until 1998 and were absentee owners until 1996"); Declaration of Jerry McLane dated June 19, 1998. The Acquavella legal proceeding had no bearing on the development and use of water rights. Therefore the Court agrees with and upholds the decision of the Referee that "it is apparent that the nonuse was voluntary and did not result from the operation of the adjudication proceedings." Id.

As to the McLane's law of the case argument, after Ecology v. Acquavella, 11 Wn.2d 746 (1997) (Acquavella III) and R.D. Merrill were decided, this Court changed its opinion regarding the application of RCW 90.14.140(1)(d) to excuse the nonuse of water because this Court believed that controlling authority had made a contrary decision of law. The Court is permitted to "decline to follow a previous decision of its own or of a higher court if the controlling law changes between the time the decision was entered and the time the case is tried on remand." See Coffel v. Clallam County, 58 Wn. App. 517, 521 (1990); see also Milgard Tempering, Inc. v. Selas Corp of America, 902 F.2d 703, 715 (9th Cir. 1990). Further:

> "The appellate court's decision became the law of the case and superseded the trial court's findings on every issue that the appellate court decided. . . The trial court on remand was bound by the law of the case. The court lacked the authority to enter the same findings that the Court of Appeals had earlier invalidated. An individual trial court is not free to determine which appellate court order, if any, it chooses to follow. . . The Court of Appeals determinations . . . remain the law of the case." State v. Strauss, 119 Wn.2d 401, 412-414

To ignore the rulings in Acquavella III and R.D. Merrill would be tantamount to this Court rejecting the common law cornerstone of *stare decisis*.

Next, the McLanes argue that because they receive their water from the Younger Ditch, and there is no evidence of a reduction in the diversion into Younger Ditch, then there is no overall diminishment of diversion from the Yakima River even though the McLanes have not been using that water. This theory is argued to support the McLane's contention that the objectives of the relinquishment statute, to return unused water to the state, will not be accomplished by a relinquishment finding. Apparently, it is the case that certain users in that system use return flow, hence the initial diversion from the Yakima River will take place one way or another. However, this argument misses the point of the statute. First, if return flow is not used, somehow and some

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the "operation of legal proceedings" sufficient cause set forth in RCW 90.14.140(1)(d).

way it will likely return to the river for further use downstream by other right holders. Thus the McLane's point that water is not returned to the state in furtherance of the statute's objective is incorrect.

Second, RCW 90.14.160 states "Any person entitled to divert . . . who voluntarily fails, without sufficient cause, to beneficially use all or any part of said right," relinquishes that right (Emphasis added.) As Ecology correctly points out, "the statute expressly requires that any person with a water right must exercise that right." Further, "beneficial use" is a far more specific term then the McLanes make it out to be.

> "'Beneficial use' is a term of art in water law, and encompasses two principal elements of a water right.
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> First, it refers to the purposes, or types of activities, for which water may be used.
>
> Second, beneficial use determines the measure of a water right. The owner of a water right is entitled to the amount of water necessary for the purposes to which it has been put, provided that purpose constitutes a beneficial use. Ecology v. Grimes, 121 Wn.2d 459, 468 (1993).

An appropriated water right is established and maintained by purposeful application of a given quantity of water to beneficial use upon land. Neubert v. Yakima-Tieton Irr. Dist., 117 Wn.2d 232 (1991); See also Ickes v. Fox, 85 F.2d 294 (9th Cir. 1936) affirmed 300 U.S. 82 rehearing denied 300 U.S. 640. Contrary to what the McLanes seem to suggest, the mere continued diversion of water satisfies only part of the appropriative requirement. The right is appurtenant to and must be applied to specific land for specific purposes.

Finally, the McLanes ask this Court to delay a decision on how relinquishment shall be applied to litigant's claims in this adjudication in order to allow the Washington State Legislature to amend the relinquishment statute during the 2000 session. In effect, the Court has inadvertently granted their request by holding this decision in abeyance while settlement discussions between YTID, other Major Claimants, Ecology, the United States and the Yakama Nation transpired. See Order Re: Exceptions of Jerry and Marclyn McLane dated April 17, 2000. The legislature did consider amendments to the relinquishment statute during the 2000 session to provide Acquavella litigants affected by the R.D. Merrill decision relief but ultimately enacted no changes. See House Bill 2099 appended to McLane's Response to the Department of Ecology's Reply to the Exceptions

of the Supplemental Report of Referee filed August 10, 1999. Accordingly, additional delays are not warranted and unnecessarily delay the completion of this adjudication

Therefore, the exception of Jerry and Marclyn McLane is hereby DENIED. The Referee's recommendation that no right be confirmed for the McLanes is AFFIRMED.

c. Scott Wilson and Jeanne O'Breen – Court Claim Nos. 11351 and 11352

The Wilson/O'Breen exception relates to the Referee's finding that any rights that might have been perfected for their lands have been relinquished for failure to register those water right claims pursuant to RCW 90.14. Supplemental Report at page 65. Two RCW 90.14 claims were filed on short forms (one claim related to an underground water source) but the Referee found that those claims relate to domestic supply only. Wilson/O'Breen attempted to utilize RCW 90.14.068 to register their water rights in 1998. Ecology refused to accept those filings in light of RCW 90.14.068(5), which states: "This section does not apply to claims for the use of surface water withdrawn in an area that is, during the period established ... the subject of a general adjudication proceeding for water rights in superior court ..." Wilson/O'Breen contend that this provision is unconstitutional and violates the Fourteenth Amendment of the United States Constitution and Article 1, section 12 of the Washington State Constitution.

This Court refers Wilson/O'Breen to Judge Stauffacher's November 8, 1999 Memorandum Opinion and Ruling RE: RCW 90.14.068(5). That decision is the law of this case and applies to the arguments advanced by Wilson/O'Breen. In that opinion, Judge Stauffacher ruled "[t]hat RCW 90.14.068(5) does not violate the claimants constitutional rights under the Equal Protection or Due Process clauses of Amendment 14, U.S. Constitution nor the Privileges and Immunities set forth in Article 1, Section 12, Washington State Constitution." Memo Op. at page 22. Therefore, the Court DENIES Wilson/O'Breen's exception regarding RCW 90.14.068(5)'s constitutionality.

Wilson/O'Breen also assert that WRC No. 161894 filed by Theodore Ryan in June, 1974 was intended to include a portion of their property. The Referee concluded that Mr. Ryan had perfected a right to 31 acres. Supplemental Report at page 70. However, the RCW 90.14 claim filed by Ryan asserted a right to irrigate 60 acres. Ryan's property, like the Wilson/O'Breen property is located in the NE1/4 of Section 2, Township 19 North, Range 15 E.W.M. Hence, Wilson/O'Breen deduce that the place of use on the Ryan RCW 90.14 claim must include part of the property owned by Wilson/O'Breen.

The Referee analyzed this issue in great detail in the Supplemental Report. He reached several conclusions germane to this Court's decision. First, although admitting the place of use description on the RCW 90.14 was not "typical", the Referee nonetheless concluded that it did not apply to the entire NE ¼ of Section 2, but only Tax Lots 13 and 14. Id., at 61. Second, this imperfect description led the Referee back to the analysis of the Ryan claim in an attempt to deduce Mr. Ryan's intent in filing the RCW 90.14 claim. Apparently, Mr. Ryan testified that the 60 acres was inclusive of all his irrigated land whether served by the creek, Kittitas Reclamation District or both. Finally, the Referee indicated that Mr. Ryan's intent in filing the RCW 90.14 claim is best known by Mr. Ryan – if Wilson/O'Breen believe Ryan's claim applies, why is there no such testimony? Based on the evidence before it, the Court DENIES this exception. The Referee provided plausible reasons why the RCW 90.14 claim filed by Mr. Ryan does not necessarily cover the Wilson/O'Breen property. Wilson/O'Breen have failed to provide adequate rationale to convince this Court to overturn the Referee's decision.

d. Robert and Debbie Lee Cernick – Court Claim No. 02148

The Cernicks filed with the Court a late exception to the Supplemental Report of Referee. See Court Document 13,953 filed July 2, 1999. The Court GRANTED that request to allow the late exception and accepted testimony at the September 16, 1999 hearing. The Cernicks did not file an exception to the Report of Referee nor did they appear before the Referee at the supplemental hearing. Thus, the Court must refer back to the Report of Referee for the disposition of the Cernick's claim by the Referee.

During the hearing, Mrs. Debbie Cernick testified and asked the Court to confirm a water right for irrigation of 16 acres. Mrs. Cernick indicated that there was a long history of irrigation on the property as set forth in documents already made part of the record. RP at 25. The Referee also found there was a long history of irrigation on the property. See Report of Referee at 57. The Referee found, however, that there was no legal basis for a water right in Subbasin 5. Id. The Referee determined that Water Right Claims Nos. 072968 and 072970 related to the claimants' property, but the source identified in those two claims is the Teanaway River, which is not in Subbasin 5. Id. Thus, for waters within Subbasin 5, there are no claims registered pursuant to RCW 90.14 nor any permits or certificates issued pursuant to RCW 90.03 et. seq. Mrs. Cernick testified that she believed the prior owner of the property, Mr. Rollen Stewart, had made a mistake

when he filed the RCW 90 14 claims by indicating the source was the Teanaway River rather than Subbasin 5 flows. RP at 21-22.

Based on the record before it, this Court has no way of knowing whether Mrs. Cernick is correct or not. There is no evidence in the record that bears on the intent of Rollen Stewart when he filed the RCW 90.14 claims. Further, to the extent an amendment is desired, the Cernicks must look to RCW 90.14.065 and the amendment process set forth there. This Court lacks authority to amend an RCW 90.14 claim. Finally, in this adjudication, the claimant bears the burden of proving, by preponderance of the evidence, the validity of the claim. The Cernicks have not met that burden. Accordingly, the Court DENIES the Cernick's exception. The Cernicks will only be confirmed a non-diversionary stock watering right.

e. Sky Meadows Ranch – Court Claim No. 05636

The Referee confirmed a right to Sky Meadows Ranch from a small spring in the amount of .018 cfs; 13.0 acre feet per year for a community domestic supply to 163 units. See Supplemental Report at 98. In reaching his decision, the Referee relied on Ecology v. George Theodoratus, 135 Wn.2d 582 (1998). There, the Supreme Court determined water right certificates could be quantified only on the basis of the amount of water actually put to beneficial use, not the capacity of the water delivery system. The evidence before the Referee at that time was that 163 units, rather than the 218 units set forth in Sky Meadows certificate, had actually been used and the Referee limited his decision accordingly. Supplemental Report at 54-55.

Sky Meadows excepted to the Supplemental Report, and asked for an opportunity to present additional evidence to prove that the entirety of their water right certificate had been put to beneficial use, i.e. that water had been used for at least 218 units. It also asks for clarification on how to comply with the limits of its water right given the fact that there is no physical way to separate where a given molecule of spring water ends and groundwater starts in the existing community water system. Sky Meadows also has a groundwater right and the flows diverted pursuant to that right are intermingled with the surface water at issue here.

Davell Russell testified for Sky Meadows at the October 14th, 1999 hearing. During his testimony, he indicated that Sky Meadows owns 385 lots and provides water hookups to 379 of those lots. Report of Proceedings, October 14, 1999 (RP) at 27. Out of the possible 379 lots that have hookups, Mr. Russell testified that approximately 230 units had been used. RP at 28. By use, Mr. Russell indicated that some alteration had been made to the hookup to allow easier delivery of

the water. Sky Meadows made it clear during the course of the hearing that it was only trying to divert the limit of its water right which is 218 units. RP at 42.

The Court finds that Sky Meadows has met their burden and GRANTS its exception regarding use of the water. Accordingly, the Schedule of Rights, set forth in the Referee's Supplemental Report shall be amended by changing line 3, page 98, from 163 units to 218 units. That number of units is consistent with Sky Meadows water right certificate.

The Court DENIES Sky Meadows second exception regarding compliance with its water right and the issue of commingling of its surface and groundwater rights. That is a regulatory matter between Sky Meadows and Ecology. The function of this case is to quantify surface water rights. Sky Meadows has demonstrated to the satisfaction of this Court that it supplies water to 218 units. The source of that water is, in part, surface water.

f. George and Diane Burchak – Court Claim No. 05216

On page 84 of the Supplemental Report, the Referee indicated that the place of use is in Range 25. That is a typographical error. The Range shall be changed to 15.

g. Lee Duncan – Court Claim No. 01080

The Referee recommended denying Mr. Duncan a water right in the Report of Referee dated July 7, 1997 because neither a RCW 90.14 claim nor a 90.03 permit/certificate were in evidence to support the right. Report of Referee at 68-69. Mr. Duncan filed a late exception on September 15, 1998 that Judge Stauffacher allowed during the November 12, 1998 Oversight Hearing. See Report of Proceedings dated November 12, 1998 at p. 12. Mr. Duncan's exceptions essentially concerned the filing of a water right claim when the legislature reopened the filing period commencing September 1, 1997 and ending June 30, 1998, see RCW 90.14.068(1), but excluded any claim from a basin where a general adjudication was underway. RCW 90.14.068(5). His filing during that period was apparently rejected by Ecology and Mr. Duncan wanted to preserve his right in the event the Court ruled that RCW 90.14.068(5) was unconstitutional. RP at 11-12. Judge Stauffacher ruled that the statute was constitutional. Memorandum Opinion and Ruling Re: RCW 90.14.068(5) Constitutional Issue dated November 8, 1999. Therefore, lacking an RCW 90.14 claim to support an alleged pre-1917 use of water, the exception of Mr. Duncan is hereby DENIED.

h. Carl and Kay Drake – Court Claim No. 1279

The Court granted the Drake's Motion to Allow Filing of Late Exception. See Order dated April 21, 2000. The Drakes were substituted for Walter H. Goenner and Dixie Goenner, who had

been joined to the original claim filed by GRM Ranch, and discovered that Mr Goenner had not submitted evidence at the original or supplemental hearing Therefore, the late exception asked for the opportunity to submit evidence in support of their claim that was presented to the Court June 8, 2000

The Drakes are successors to property that was originally part of the GRM Ranch which was analyzed by the Referee in his Report beginning at p 78 In that initial report, the Referee confirmed rights to various individuals who were joined to the GRM Ranch claim including Loyd and Shirley Garret, Betty Danubio, Richard and Jean Haas and Sharon Winslow and Carolyn Merrit

In regard to the rights of the Goenners, the Referee found that they were successors in interest to Tract 5 of the Airport Road Tracts, consisting of 5 acres located within Government Lot 1 of Section 31, T 20N., R 16 E.W M. The Referee also referenced the state's 1990 investigation report Based on that report, the Referee noted that there were neither diversion structures nor recent signs of irrigation at the time of the investigation Report at p 84 Because the Goenners did not appear, the Referee did not recommend a water right for that tract

Mr Drake testified on behalf of his claim and indicated that he first viewed the property in October, 1993 June 8, 2000 Verbatim Report of Proceedings at p 10 During questioning by Ecology regarding water use, Mr Drake indicated that in his opinion, the parcel was not irrigated during the 1993 irrigation season, based on the fact that tall weeds were growing on the property Id. at 14 Otherwise, Mr Drake testified that he did not know when the property had last been irrigated Id. Mr Drake did testify that historic evidence of irrigation had been discovered on the parcel by way of various ditches and remnants of garden hose RP at 10 Mr Drake did not produce any evidence that would show historic irrigation of the property

Based on the evidence presented, the Court finds that the water right appurtenant to the lands now owned by the Drakes was relinquished According to RCW 90.14.160, enacted in 1967, any person who fails to use a water right for five consecutive years relinquishes that right The only evidence bearing on beneficial use was Ecology's investigative report and Mr Drake's testimony That 1990 report indicated that there were neither diversion structures nor recent signs of irrigation at the time of the investigation Report at p 84 Mr Drake's testimony, that no irrigation had occurred at the time they purchased the property in October, 1993 generally corroborates the state's conclusion and demonstrates that no irrigation had transpired from 1990 – 1993 Based primarily

on Ecology's investigative report, the Court believes, without any evidence to the contrary, that the parcel had not been irrigated prior to 1990 for some time and at least the additional one year that would be required for the five-year relinquishment statute to apply.

Under the relinquishment statutes, a mere showing of non-use shifts the burden of proof to the water user to rebut the non-use with evidence of excuse under the narrow categories in RCW 90.14.140. R.D. Merrill v. Pollution Bd., 137 Wn.2d 118, 140-141, 969 P.2d 458 (1999). The record demonstrates that water has not been used for the statutorily required period and the Drakes have not met their burden of showing how the "nonuse falls under one of the narrow categories in RCW 90.14.140." Id. Therefore, the Court holds that whatever right was perfected and appurtenant to the property now owned by the Drakes has been relinquished. Accordingly, no water right shall be confirmed.

III. CONCLUSION

This Report addresses the Exceptions to the Supplemental Report of Referee for Subbasin 5. A Notice of Hearing On Exceptions accompanies this Report.

Dated this 3rd day of August, 2000.

Sidney Ottem, Court Commissioner