IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

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, STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Plaintiff, vs. JAMES J. ACQUAVELLA, et al., Defendants.	Case No. 77-2-01484-5 Memorandum Opinion Re Subbasin 6: Level Best Inc. Motion for Reconsideration & Exceptions of Level Best Inc. and Taneum Canal Company to Supplemental Report of Referee

Introduction

The initial evidentiary hearing for Subbasin 6 (Taneum Creek) was held on September 12, 1989. The Report of the Referee Re: Subbasin No. 6 (Taneum) (hereinafter Original Report was issued on June 9, 1994. Exceptions to the Original Report were heard and various claims were remanded to the Referee on September 8, 1994. The evidentiary hearing on the remanded claims was held on January 30, 1995 which lead to the issuance of the Supplemental Report of Referee Re: Subbasin No. 6 (Taneum) (hereinafter Supplemental Report) March 26, 1996. Again exceptions were taken and the Court heard argument on these exceptions August 11, 1996. Four issues were left

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unresolved at this hearing. The purpose of this Memorandum Opinion is to rule on these remaining issues.

Exception of Level Best Inc. Re Priority Dates

Background

Taneum Creek[1] has been the subject of two prior decrees. The first is Tenem Ditch Co. v. F.M. Thorp et al., Fourth Judicial District, Ellensburg (1888), (affirmed 1 Wash. 566 (1889)) (hereinafter Taneum I). The Taneum I decree divided the waters of Taneum Creek in a two-thirds, one-third split between the plaintiff Taneum Canal Company (hereinafter TCC) and the defendants F.M. Thorp, Margaret Thorp, and John Hale.

> "[S]aid plaintiff is the owner of the Tenems Water ditch [TCC] hereinbefore mentioned . . . and is the owner and entitled to divert by means of said ditch two thirds of the water flowing in said Tenem Creek at all times . . .
>
> That the said defendants F.M. Thorp and John E. Hale and said intervenor Margaret Thorp are the owners of one third of said Tenem Creek and are entitled to the unobstructed flow of said one third thereof down the channel of said creek or into their water ditches . . ."

Taneum I, (Decree, DE-92) at 1-2. The Taneum I court made no distinction between John Hale, F.M. Thorp and Margaret Thorp

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[1] Over the years, Taneum Creek has variously been referred to as Ienum, Ienem, Ieanum, Iaenum and Ieanum Creek. The Court will refer to the creek as Taneum Creek unless specifically citing a source with one of these alternate spellings.

within the one-third right, as it concluded their interests were identical. Id. The division was affirmed by the Washington Supreme Court. Thorpe v. Tenem Ditch Co., 1 Wash. 566 (1889).

The second decree, Tenem Ditch Co. v. James Shellenberger, et al., Kittitas County Superior Court (1906) (hereinafter Taneum II) confirmed the two-thirds, one-third split decreed in Taneum I. Between the time Taneum I and Taneum II were decided (1888-1906), all the land owned by F.M. Thorp, Margaret Thorp and John Hale had been sold to C.A. Splawn and W.D. Bruton. Therefore, Taneum II involved Splawn and Bruton, as well as numerous others, as defendants. TCC was again the plaintiff. The Taneum II court ruled as follows:

> "It is considered, Ordered, Adjudged and Decreed that as against the defendants C.A. Splawn and W.D. Bruton, the plaintiff [TCC] is the owner of and entitled to the full flow of two thirds of the waters of Tenem Creek; that as against the plaintiff the defendants Splawn and Bruton are the owners of and entitled to the full flow of one-third of the waters of said Tenem Creek, the rights of the plaintiff and of said defendants Splawn and Bruton being fixed and determined by that certain decree [Taneum I], . . . and their rights under said decree are in no wise disturbed by this decree."

Taneum II, (Decree, DE-94) at 1. Clearly then, the Taneum II court was attempting to reaffirm and continue the two-third, one-third split decreed in Taneum I.

Accordingly, in interpreting these decrees, the Referee concluded that in order for a claimant to be eligible for a

portion of the one-third resulting from the Taneum decrees, a claimant must be a successors in interest to the land of Splawn and Bruton--the defendants awarded the one-third flow in Taneum II.

> "This Court is bound by the previous two decrees in determining the rights to use waters from Taneum Creek. In order for a claimant in this proceeding to enjoy a portion of the right to one-third of the creek's flow, there must be evidence that the land was owned by C.A. Splawn or W.D. Bruton in 1906 [the date of Taneum II]."

Original Report, at 8. The parties who are successors in ownership to the lands owned by Splawn and Bruton in 1906 and who are claiming a right to the one-third share of Taneum Creek are Rocky Mountain Elk Foundation, E.L. Knudson Jr., Mike Emerick, Level Best Inc., Springwood Investment and Jeff Nesmith. See Original Report; Memorandum Opinion Re: Subbasin 6 Exceptions to Priority Dates, (Doc. # 10,319) at 2. These claimants will collectively be referred to as "the one-third owners."

A number of the one-third owners took exception to the priority date awarded in the Original Report for their portion of the one-third right. At the exceptions hearing to the Original Report, Level Best (one of the one-third owners) argued that the issue of priority date was of considerable importance in allocating the one-third flow among the one-third owners.

"Level Best is not taking the position that this priority date has anything to do with the two-thirds right of Taneum Canal Company, but the priority date would only apply to those parties under the one-third that was decreed to Thorp and Hale [in Taneum I].

The original decree . . . [of] one-third to Thorp and Hale did not set priority date as between the one-third users. And I think it would be applicable and we're asking again either upon direct evidence with the documentation that we have attached already to establish those priority dates or upon remand to have the entire one-third owners go in and prove, No. 1, that they had property that was under the one-third distribution; No. 2, the dates that they started applying the water to those various properties so that the one-third . . . people can determine their priority rights on that basis."

Transcript, 9/8/94 at 56-57. Counsel for Rocky Mountain Elk Foundation (RMEF), another of the one-third owners, responded to the argument of Level Best as follows:

"I think there is [sic] two ways to look at this from the Court's perspective. Is it going to be a factual question or is it a question that can be determined as a matter of law.

. . .

The simple way to resolve this as a matter of law is that these prior decrees held that all the water had the same priority date. The alternative is to remand it for a factual hearing where everyone can drag out the patents, . . ."

Id., at 59. After hearing all the arguments on the matter, the Court stated that:

"What I am going to do in connection with this is I am going to take this under advisement and review those cases and the documents. And if anything further needs to be presented, the Court will advise counsel and we'll have at the time of the other remand

hearing, we would have a hearing on that. But I want to review those cases and those documents myself and take a look at those before. And if I can decide it as a legal matter, I will." [Emphasis added].

Id., at 69. The Court then did review the cases and documents and on February 3, 1995, came out with its decision.

"Upon review of the Tenem decrees and supporting documents submitted with the exceptions, the Court agrees with this position [the position taken by the Rocky Mountain Elk Foundation above] and rules that all of the claimants whose water rights are based on the Tenem I decree shall have the priority date of June 30, 1873. This ruling shall apply to Rocky Mountain Elk Foundation, E.L. Knudson, Jr., Mike Emerick, Level Best, Inc., Springwood Investment Corporation and Jeff Nesmith." [Emphasis added].

Memorandum Opinion Re: Subbasin 6 Exceptions to Priority Dates, Feb. 3, 1995, (Doc. # 10,319) at 2. At no point did the Court indicate to counsel that anything further needed to be presented at a remand hearing in connection with the priority date issue. Instead, the ruling was incorporated into the Court's Order on Exceptions; Subbasin No. 6 (Taneum), Oct 12, 1995, (Doc. # 11,055) at 5.

"The Court upon reviewing the prior decrees related to Taneum Creek and supporting documents filed with the exceptions ruled in a Memorandum Opinion signed February 3, 1995, that all parties to the Tenem I decree would share the same priority date, that being June 30, 1873."

It would seem then that the matter had been decided and ruled upon. However, several months later, Level Best moved to

re-open RMEF's claim on the basis of a newly discovered aerial photograph which, in Level Best's opinion, demonstrated that some of RMEF's land was not being cultivated in 1942 and had only subsequently been developed. Therefore, this land should not enjoy the same priority date as the other one-third owners. The Certification of Counsel accompanying Level Best's motion to re-open states that Level Best intended to introduce this evidence at the supplemental evidentiary hearing. Certification of Counsel (Doc. # 11,283) at 2. However, given the short time between the filing of the Motion to Re-Open and the supplemental evidentiary hearing (5-days), the Court did not rule on the Motion until after the hearing was held. At the hearing Level Best did introduce the aerial photograph into evidence. However, Level Best went further by putting additional patent information into the record in order to re-argue the priority date question. In justifying the introduction of the additional patent evidence at the supplemental evidentiary hearing on a question the Court had already ruled on, counsel for Level Best stated that:

> "[T]he Judge's decision has not taken the form of an Order, it is a Memorandum Decision. But the memorandum decision, again, has not been transcribed in the form of an order, it is not finally binding upon any party and the evidence that I am submitting will hopefully have Judge Stauffacher, give him a chance to change his mind and avoid legal error.
>
> So the documents that I am submitting go to priority date and that was the exception of Level Best as to priority dates." [Emphasis added].

Transcript 1/30/96 at 15. The Referee allowed the additional evidence over the objection of RMEF but cautioned that:

> "[T]o the extent that evidentiary documents might be entered in today in support of the various exceptions that Level Best filed, I think that if we efficiently get the records in, they can be given the weight that they should be given as we proceed into this.
>
> But I do agree that the matter of priority that it's share and share alike with a June 30, 1873 priority date for the parties with the one-third/two-third split, that's my reading." [Emphasis added].

Id., at 17.

Subsequent to the supplemental evidentiary hearing, the Court came out with its ruling on Level Best's motion to re-open. The Order read as follows:

> "B. Because the Court previously decided this precise issue and entered a final order disposing of it and because Level Best, Inc., had a full and fair opportunity to argue the issue during that phase of litigation, the doctrine of collateral estoppel applies and precludes Level Best's introduction of new evidence for the purpose of rearguing Rocky Mountain Elk Foundation's priority date.
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> C. After entry of the Order on Exception to Report of Referee, Subbasin 6 dated October 12, 1995, Level Best failed to timely motion the Court for Reconsideration pursuant to CR 59. . . ."

Order Re Motion of Level Best to Reopen Court Claim No. 00284 Rocky Mountain Elk Foundation, (Doc. # 11,369), Feb. 28, 1996 at 2 (hereinafter Motion to Re-Open).

Clearly, then, the Court ruled that further evidence regarding RMEF's priority date should not have been introduced at the exceptions hearing and should be disregarded.

Level Best pressed the issue further by filing a Motion for Reconsideration on March 11, 1996. The Motion for Reconsideration restates the arguments made at the supplemental evidentiary hearing -- "that the property owned by Rocky Mountain Elk Foundation in Section 6 and in Section 5 do not have any part of the 1/3 interest." Level Best Motion for Reconsideration, (Doc. # 11,404), March 11, 1996, at 4. In addition, despite the dicta in the Court's Memorandum Opinion in Motion to Re-Open at 4, Level Best insists that their motion for reconsideration is timely as the Courts rulings on the priority dates among the one-third owners had not taken the form of a final "judgment" within the meaning of CR 59 and 54. Assuming this is true, the Court notes that Local CR 59 for Yakima County deems that "any motion for reconsideration not heard within (30) days of the written decision shall be deemed denied." [Emphasis added] LCR 59. Therefore, the motion is deemed denied under LCR 59.

On March 18, 1996, the Referee came out with the Supplemental Report of the Referee Re: Subbasin No. 6 (Taneum) (Doc. # 11,427) (Supplemental Report). In the Report, the Referee noted that:

> "... Level Best, Inc., entered several exhibits during the supplemental hearing in what appeared to be an effort to establish an earlier priority date [than RMEF and some of the other one-third owners]. The Court having already ruled on the exceptions related to priority date did not remand that issue to the Referee for consideration. In response to Level Best, Inc.'s, Motion to Reopen Court Claim no. 00284, the Court on February 28, 1996, issued a Memorandum Opinion and Order denying the motion. The Court restated its February 3, 1995, ruling that the successors to Tenem I, including Level Best, Inc., would share a priority date of June 20, 1873, and ordered the Referee to use that priority date."

Supplemental Report, at 4. Undeterred, Level Best once again took exception arguing, as it did at the initial oversight hearing, the remand hearing, its Motion to Re-Open and its Motion for Reconsideration, that the lands owned by RMEF in Section 5 and Section 6 were not covered by the Taneum I decree. Therefore, this land is not entitled to a share of the one-third right.

To summarize, after wading through all this background, we have two items before the Court. First, a Motion for Reconsideration that, even if timely, has been deemed denied by operation of LCR 59. Second, an Exception based on information not properly in the record (at least not for use in proving priority date), dealing with an issue that has been ruled on, incorporated into an order, and carried forward in the Supplemental Report. Therefore, it would seem that the Court has adequate procedural grounds on which to deny Level Best's Motion for Reconsideration and Exceptions to the Supplemental

Report. However, in the hope of finally putting the issue to rest, the Court will address Level Best's arguments.

Argument

In their Motion for Reconsideration and their Exceptions to the Supplemental Report, Level Best did not directly reargue the issue of priority dates among the parties claiming water under Taneum I (a question which the Court has clearly ruled upon). Instead, Level Best took the alternative tack of questioning who in fact are the legitimate successors to the water decreed in Taneum I. Although the parties to which the Taneum I ruling applies were directly named and the priority date established in Memorandum Opinion Re: Subbasin 6 Exceptions to Priority Dates, Level Best still believes that there is a live controversy as to who the one-third owners are. "The Court did not rule specifically who had the valid rights under Taneum I." Level Best Exceptions at 3. Indirectly then, Level Best has again raised the priority date question. A claimant who can otherwise established a water right to Taneum Creek but is not a successor to the water decreed in the Taneum decrees, will necessarily have a junior priority date to those who are successors to the one-third right. This is because the Taneum decrees determined the most senior rights on the creek. Therefore, we are back to the priority date question, albeit from a different angle.

Level Best's argument is that owners of property in Section 5 and Section 6 do not have a valid right under Taneum I and therefore, don't share in any of the one-third flow. Since Taneum II clearly states that it does nothing to disturb the Taneum I decree, then Section 5 and Section 6 land are not included in the Taneum II decree either. Therefore, the argument goes, claimants in these sections have no present claim to the one-third flow, and their water rights, if they exist at all, would necessarily be junior to Level Best's because the Taneum decrees established the earliest rights on the creek.

Level Best bases this argument on language found in the Memorandum Opinion for Taneum I. In that Opinion, Judge Turner indicated that the one-third flow was intended for use on the "lands owned by Thorp in the fall of 1873."[2] Taneum I, Memorandum Opinion,(DE-90) at 9. Level Best argues that in the fall of 1873 Thorp did not own[3] any property in Section 5 or Section 6. According to Level Best, in the fall of 1873, Thorp owned the W½NW¼ of Section 4. Level Best Exceptions, at 5. This is the property referenced in Taneum I as being settled by F.M. Thorp prior to 1873. See Taneum I, Findings, (DE-91), ¶ III.

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[2] Level Best points to the answer of Splawn and Bruton in Taneum II (DE-94) as additional evidence that this was the intent of Judge Turner in Taneum I. However, it should be noted that the interpretation of Taneum I by the attorneys for Splawn and Bruton do not determine the meaning of the Taneum I decree.

[3] Strictly speaking, Thorp did not own any land in the fall of 1873 as no patents had issued on any of the property in question. Ownership is a term that is used loosely to reflect land in possession of the party or that is being homesteaded.

Also, Level Best asserts that F.M. Thorp "presumptively" owned the E½NW¼ and the N½SW¼ of Section 4.[4] Level Best Exceptions at 5. Level Best purports to rely on the Answer of Defendants Splawn and Bruton (DE-93)in Taneum II as proof that F.M. Thorp came into possession of this land in 1869. "The cross-complaint further indicated in the same year [1869] predecessor of Bruton (presumptively Thorp) also settled on the East half of the Northwest quarter and the North half of the Southwest quarter." Level Best Exceptions, at 5. Level Best insists that this is the only land owned by Thorp in 1873 is therefore the only land to which the one-third flow is appurtenant.

> "It is submitted that the property owned by Rocky Mountain Elk Foundation in Section 6 and Section 5 do not have any part of the 1/3rd interest. . . . The same would be true in regards to Mr. Emerick who does not have property in the W1/2 of Section 4. Any owners of the Section 5 property would, likewise, have no claim to the 1/3 water right.
>
> . . .
>
> It is not so much the priority date (June 30, 1873, even though Claimant believes the evidence produced would establish at least an 1872 priority date for the lands covered for the 1/3 right) as much as who and what lands were covered by the Taneum I Decree. Clearly, Section 6 property was not. Clearly the E1/2 of Section 4 property was not. Clearly Section 5 was not. Level Best's property in Sec. 4 was." [Emphasis in original].

Level Best Exceptions, at 5.

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[4] The patent to this land issued to Antwine Bertram on November 15, 1875.

Ruling

Neither the Memorandum Opinion, the Findings, nor the Decree associated with Taneum I accurately specify the place of use for the one-third water right. Consequentially, the case permits any number of plausible interpretations. The Court will concede Level Best has a plausible interpretation of Taneum I. However, it is not the only interpretation, nor does the Court think that it is the best. Instead, the Court still feels that the Taneum I ruling, when taken in its entirety and in conjunction with Taneum II, makes the best sense when interpreted as awarding to F.M. Thorp, Margaret Thorp, and John Hale one-third of the creek without restriction as to place of use.

In analyzing the Taneum Decrees, it is well to keep in mind that, despite all the discussion about the meaning of Taneum I, ultimately it is Taneum II which is controlling. Taneum II re-adjudicated Taneum Creek and supersedes Taneum I. Therefore, it is the Taneum II court's interpretation (even if erroneous), not Level Best's or the cross-complaint of Splawn and Bruton, which determines the meaning and relevance of Taneum I. Again, the ruling in Taneum II is as follows:

> "It is considered, Ordered, Adjudged and Decreed that as against the defendants C.A. Splawn and W.D.

However, Bertram sold this land to F.M. Thorp on September 15, 1874. (DE-84).

> Bruton, the plaintiff [TCC] is the owner of and entitled to the full flow of two thirds of the waters of Tenem Creek; that as against the plaintiff the defendants Splawn and Bruton are the owners of and entitled to the full flow of one-third of the waters of said Tenem Creek, the rights of the plaintiff and of said defendants Splawn and Bruton being fixed and determined by that certain decree [Taneum I], in an action therein pending wherein this plaintiff was plaintiff and F.M. Thorp and John E. Hale were defendants and Margaret Thorp and others were intervenors, and their rights under said decree are in no wise disturbed by this decree." [emphasis added].

Taneum II, (Decree, DE-94) at 1.

Level Best places a great deal of emphasis on the fact that Taneum II expressly indicates that Taneum I is "in no wise disturbed by this decree." Therefore, in Level Best's estimation, Taneum I indirectly dictates the meaning of Taneum II. In effect, however, Level Best would have this Court find ambiguity in Taneum II, where none exists, based on Level Best's understanding of Taneum I. However, the statement that Taneum II does not disturb Taneum I does not warrant this backward reasoning. Taneum II clearly grants one-third of the flow of Taneum Creek to defendants Splawn and Bruton and places no restriction on its place of use, nor does it differentiate any of this land in terms of priority date. Therefore, it seems much more reasonable that, rather than giving added (unwritten) meaning to Taneum II, the acknowledgment of Taneum I merely reflects the Taneum II court's understanding of Taneum I -- that the Taneum I court granted to F.M. Thorp, Margaret Thorp and

John Hale one-third of the creek. It is true that Judge Turner arrived at the quantity of one-third based on his calculation of the requirements of the "lands owned by him [F.M. Thorp] in the fall of 1873," but nowhere in Taneum I are the parties limited as to the place of use of that water in the future. Remember that the water code, and therefore the appurtenance requirement of RCW 90.03.380, was not enacted until 1917. While common law prior appropriation (and many decrees of that era) recognized the appurtenance of water right to land, Judge Turner, at least expressly, did not. The Decree itself makes absolutely no mention of land at all. F.M Thorp, Margaret Thorp and John Hale are simply awarded an unrestricted right to one-third of Taneum Creek. The Supreme Court upheld this decision. Thorpe v. Tenem Ditch Co., 1 Wash. 566 (1889).

Despite the arguments of Level Best, even if it were Judge Turner's intention to limit the place of use of the one-third right, it is simply impossible to determine with any precision the lands which he had in mind as being owned by F.M. Thorp in the fall of 1873. First, although the Court recognizes that property "ownership" without a patent was common in this era, F.M. Thorp technically did not own any land in 1873 because no patents had issued. Second, in 1873, Taneum I recognized that F.M. Thorp as being in possession as homestead owner of the W½NW¼ of Section 4. No other land is recognized as being "owned" or under the control of F.M. Thorp in the fall of 1873.

However, if Taneum I was meant to limit the one-third right to this property, it was overruled by Taneum II because Bruton never had any interest in this property yet in Taneum II he was clearly awarded a share in the one-third flow. Third, the Taneum I court did mention land homesteaded by John Thorp in the NE¼ of Section 15 [sic—likely the Court meant 5].[5] Regardless, F.M. Thorp did not acquire any interest in this property until 1874 or after. Forth, Level Best's argument that F.M. Thorp "presumptively" owned the E½NW¼ and the N½SW¼ of Section 4 is just that, presumptive. The record indicates that F.M. Thorp purchased this property in September of 1874. Level Best points to the Answer of Defendants Splawn and Bruton (DE-93) as proof that F.M. Thorp took possession of this property in the fall of 1873. See Level Best Exceptions, at 5. What that document says is this:

> "[t]hat the predecessor in interest of defendant W.D. Bruton settled upon the said E. ½ of the N.W. ¼ and the N. ½ of the S.W. ¼ of said Section 4, as a pre-emptor in the year 1869, and from thence continued to reside thereon under the pre-emption laws of the United States, and thereafter made final proof and obtained patent from the United States thereto, ..." [Emphasis added].

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[5] It is likely that the Taneum I court acknowledged this land because it is the land John Hale owned in 1888 when Taneum I was decided (John Hale acquired this property from F.M. Thorp in July of 1884). F.M. Thorp did not purchase this property until September of 1874. However, since this is the only land ever owned in the area by John Hale, and since he is clearly awarded a right in the one-third flow, obviously this land in NE ¼ of Section 5 is included in the Taneum I ruling. This gives credence to this Court's interpretation of Taneum I as allowing the one-third flow to be used on all the land owned by F.M. Thorp, even if acquired after 1873.

Answer of Splawn and Bruton, (DE-93) at 7, ¶ V. The predecessor in interest is not named. However, the record indicates that Antwine Bertram became the patent owner, not F.M Thorp. Therefore a better presumption is that Mr. Bertram was in possession of this land in the fall of 1873.

Regardless, the point should be made. From the record, it is impossible to determine exactly who owned what in the fall of 1873 - nor does it appear to this Court that Judge Turner intended to limit the place of use of the one-third flow to just that land. What is clear is that by 1888 when Taneum I was decided, F.M. Thorp and John Hale had acquired patent to all the land in question - this is precisely the same land subsequently owned by Splawn and Bruton in 1906 when Taneum II was decided. Much of this same land is now owned by Rocky Mountain Elk Foundation, E.L. Knudson, Jr., Mike Emerick, Level Best, Inc., Springwood Investment Corporation and Jeff Nesmith.

Therefore, despite the continued arguments of Level Best, it appears clear to this Court that Taneum II awarded one-third of the flow of Taneum Creek to Splawn and Bruton without restriction as to place of use. The Taneum II court did not distinguish a particular place of use on their property or differentiate priority dates within their property. The most reasonable explanation for this would be that the court did not intend to limit the place of use within Splawn's and Bruton's property or distinguish priority dates among parcels. The

Taneum II court was clearly aware of Taneum I. Had the court interpreted Taneum I as limiting the place of use within Splawn's and Bruton's property to just Section 4 (as has been argued by Level Best), certainly it would have said so in the decree.

Therefore, this Court rules that all parties claiming a right to a portion of the one-third flow must demonstrate that they are successors in interest to the land owned by Splawn and Bruton in 1906 and have continuously beneficially used the water since. Rocky Mountain Elk Foundation, E.L. Knudson, Jr., Mike Emerick, Level Best, Inc., Springwood Investment Corporation and Jeff Nesmith are all successors in interest to Splawn and Bruton and have put on evidence of actual beneficial use sufficient to establish their water right. The Court rules they, along with TCC, share a priority date of June 30, 1873.

Proration Administration

The remaining three issues all related to exceptions taken by Taneum Canal Company (TCC). First, given that all of the parties who take water from Taneum Creek have the same priority date, TCC asked this Court to give guidance as to how Taneum Creek would be administered in times of water shortage.

As discussed above, the Taneum decrees establish a one-third two-third split of Taneum Creek. However, Taneum II was slightly more specific. Rather than simply dividing the creek

two-thirds to TCC and one-third to Splawn and Bruton, the court set an upper limit on their diversions.

> "That as against all of the other parties to this suit the plaintiff [TCC] is the owner of 4000 inches [80 c.f.s] of the waters of said Tenem Creek and is at all times intitled to the full flow of such an amount of water down to the head of its canal; and the defendant's Splawn and Bruton as against all of the other defendants in this action are the owners of 2000 inches [40 c.f.s] of the waters of said Tenem Creek and entitled to the full flow thereof down to the heads of their ditches; . . ."

Taneum II, Decree (DE-94), at 2. This decree was filed in May of 1906 and established the rights of the parties as of that time. However, it says nothing about the actual use of that water since. The parties must demonstrate continuous beneficial use of the water in order to be confirmed a water right in this adjudication and cannot rely exclusively on decrees and contracts to establish their right. See Memorandum Opinion Re: Threshold Issues, at 16 (1945 Consent Decree can only be used as some evidence in this case to assist in determining a vested water right but does not itself establish the right). As noted, Taneum Canal Company, Rocky Mountain Elk Foundation, E.L. Knudson, Jr., Mike Emerick, Level Best, Inc., Springwood Investment Corporation and Jeff Nesmith, all were confirmed a water right by the Referee based on the Taneum decrees. See Original Report and Supplemental Report. However, the quantities confirmed, based upon the evidence presented to the Referee, did not match the quantities decreed in Taneum II.

While TCC was confirmed a right in the full 4000 inches or 80 c.f.s., the "one-third owners" did not prove a right to the full 2000 inches or 40 c.f.s. Instead, by the Court's calculation, the one-third owners collectively were only confirmed a right to 17.47 c.f.s. Therefore, the rights confirmed no longer represent relative rights of two-thirds, one-thirds. Instead, relative to one another, TCC has 82% while the "one-third owners" have roughly 18% of the total amount confirmed from Taneum Creek.

This brings us to the issue at hand. Given that all the parties share the same priority date, in times of shortage (ie. when there is less than 97.47 c.f.s in the creek -- TCC's 80 c.f.s and the "one-third owners'" 17.47) how will the stream be apportioned? TCC argues that the Conditional Final Order for Subbasin 6, will replace the Taneum decrees. When that CFO is signed there will no longer be a two-thirds, one-thirds split because there will no longer be classes of users on Taneum Creek. Instead there will simply be water users who derive their rights from Taneum Creek who happen to share an identical priority date. Consequentially, all the water rights should be reduced pro-rata in times of shortfall, as would be the case in any basin between water users sharing the same priority date.

> "If the court were to conclude that TCC is wrong . . . it is possible that there would be periods of time during which one third (1/3) of the creek . . . exceeds the amount they [the "one-third owners"] could beneficially use. As the Court can see that is an

> incongruous result because TCC's right would be reduced to two-thirds (2/3) but the successors to Thorp and Bruton would continue to receive their full entitlement of water even though they have an equal priority date with TCC."

TCC's Rebuttal to Reply of RMEF, at 4.

Rocky Mountain Elk Foundation (RMEF) sees nothing incongruous about this result at all. Instead RMEF argues that the Court should abide by the Taneum decrees despite the maximum quantities confirmed through this adjudication. RMEF characterizes the Taneum decrees as "low-water decrees." (Tr. 9/12/96 at 65).

> "[W]hen there's plenty of water, no one cares, but when you get down to under 300 CFS, like it says you do in low-water years [presumably counsel means 300 inches which the court in Taneum I referred to as the least amount of water that is ever in Taneum Creek], that's when they decreed the 2/3-1/3 split." Id., at 69-70.

> "The decrees, again, are low-water decrees saying that when you get down to it that's how they're divided, that's what the judges in their wisdom dictated a along time ago, and that's worked up till now. What Taneum Canal Company is asking you to do is go and overturn those earlier decrees . . ." Id., at 73.

Ruling

The Court agrees with TCC and rules that during times of shortage, all water users deriving a right from the Taneum decrees shall receive a pro-rata share of the water. The Taneum decrees were intended to fairly apportion the water between TCC

and the "one-third owners." Once apportioned, the parties were enjoined from interfering with the others portion of the creek. Other than the quantity, therefore, the Taneum decrees put TCC and the "one-third owners" on equal footing. This is the reason why this Court has given all of the parties the same priority date in this adjudication.

However, through no fault of TCC, the "one-third owners" collectively have not used their decreed 2000 inches or 40 c.f.s. of Taneum Creek water. The Taneum decrees, (or any decree, or contract for that matter) don't operate to perpetually guarantee a water right. See Memorandum Opinion Re: Threshold Issues, at 16. Water rights are determined through beneficial use and can be lost through forfeiture and abandonment. See Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769. As the Referee did not confirm to the "one-third owners" their full 40 c.f.s entitlement, the Court can only assume that the water was never put to beneficial use or has since been abandoned or relinquished.

For this Court to continue the two-thirds, one-third split in times of water shortage, is not to leave the parties on an equal footing, but to force TCC to bear a disproportionate share of the proration burden. Therefore, Taneum Creek will no longer be divided on a two-thirds, one-third basis during times of shortage. Instead, all water users deriving a right from the

Taneum decrees shall receive their pro-rata share of the creek, based upon their present adjudicated right.

Irrigation vs. Conveyance Loss Distinction

Also, TCC has repeatedly taken exception to the Referee's characterization of part of their water right as conveyance water. In Memorandum Opinion Re: Subbasin 6 Exceptions of Taneum Canal Co. & Department of Ecology to Taneum Canal Co., (Doc. # 10,320), Feb. 3, 1995, at 3, the Court specifically ruled on the issue. However, due to some confusion, TCC again raised the exception at the oversight hearing held Sept. 12, 1996.

The Court maintains its previous position. See Id. Conveyance is a beneficial use of water. Only legally wasteful conveyance is not a beneficial use. Nothing in the record indicates that TCC's conveyance water is being legally wasted. All irrigation rights include conveyance water whether it is specifically differentiated from the irrigation water or not. The distinction between conveyance and irrigation water in TCC's right was made by the Referee simply because TCC presented very specific information on that point. However, distinguishing conveyance water from irrigation water in no way implies that TCC is not entitled to divert both conveyance and irrigation water at its headgate.

Taneum Canal Company's Irrigation Season

Finally, TCC took exception to its irrigation season ending on October 31st. TCC insists that "[s]pecifically in dry years it is necessary to irrigate new seeding timothy hay, . . . into November to ensure the viability of the new seeding." Taneum Canal Company's Exception to the Supplemental Report of the Referee: Subbasin 6, (Doc. # 11640), May 14, 1996, at 1. In the report of the Supplemental Report, the Referee stated that:

> "The normal irrigation season throughout the entire Yakima Basin generally is through the end of October. Although there was testimony of occasionally irrigating into November, there was no specific testimony that would allow the Referee to quantify that use and recommend that the irrigation season extend into November." [Emphasis added].

Supplemental Report, at 8. In response, TCC stated,

> "The evidence indicated that the use in November was related to climate and crop patterns. The use is not extensive.
>
> Given the decreed right [Taneum decrees] and the nature of the use it is not necessary to make a specific quantification of the November use. The right should extend from February 20 to November 15th of each year." [Emphasis added].

Taneum Canal Company's Exception to the Supplemental Report of the Referee: Subbasin 6, (Doc. # 11640), May 14, 1996, at 2.

> "[T]here is no real need to quantify what's used in that period of time because it's the overall right. It's already been quantified in both an instantaneous amount and an acre-feet per year limitation." [Emphasis added].

(Tr. 9/12/96 at 60). The Court interprets these statements to mean that TCC is not asking for any additional water. Therefore, as there is testimony that a minimal amount of water is occasionally used for seeding of timothy hay in November, the Court will extend TCC's irrigation season to November 15th. TCC's instantaneous diversion rate and acre-feet per year limitation shall remain the same.

Conclusion

The Court has ruled that all parties (including TCC and all of the "one-third owners") claiming a water right based on the Taneum decrees share the same priority date of June 30, 1873. In addition, during times of water shortage when not all of these rights can be met, all water users deriving a right from the Taneum decrees shall receive a pro-rata share of the water. The Court denies TCC exception to part of its right being characterized as conveyance water and grants the extension of TCC's irrigation season to November 15.

Dated this 23rd day of July, 1998.

Walter A Stauffacher

Judge Walter A. Stauffacher