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YAKIMA RIVER BASIN

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CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

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. 12
(Shushuskin Canyon)**

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

SUPPLEMENTAL REPORT OF REFEREE - VOLUME 7A

7048

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 FOR THE COUNTY OF YAKIMA

3 IN THE MATTER OF THE DETERMINATION)
4 OF THE RIGHTS TO THE USE OF THE)
5 SURFACE WATERS OF THE YAKIMA RIVER)
6 DRAINAGE BASIN, IN ACCORDANCE WITH)
7 THE PROVISIONS OF CHAPTER 90.03,) No. 77-2-01484-5
8 REVISED CODE OF WASHINGTON,)
9 THE STATE OF WASHINGTON,) REPORT OF REFEREE
10 DEPARTMENT OF ECOLOGY,) PURSUANT TO ORDER ON
11) EXCEPTIONS OF
12) JANUARY 11, 1991
13 Plaintiff,)
14 v.)
15 JAMES J. ACQUAVELLA, et al.,)
16 Defendants.)
17)

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

20 The Order issued by the Court on the 11th day of January, 1991,
21 ruled upon several exceptions to the Report of Referee and remanded
22 certain exceptions to the Referee, with instructions, for further
23 evaluation and subsequent recommendations to the Court.

24 The matters remanded to the Referee are identified as follows:

25 Claimant Neil Leibly (Claim No. 2246) - take testimony and
26 evidence relative to this claim

27 Claimants Robert S., Jr. and Louise Acheson (Claim Nos.
28 0346, 3618, and 3618(A) - take additional testimony and
evidence relating to conveyance loss in Fogarty Ditch.

Claimants Harold E. and Theresa A. Stroh (Claim No. 0187) -
take additional testimony and evidence relating to
conveyance loss.

Pursuant to the Order of the Court, the Referee conducted an
Evidentiary Hearing on March 6, 1991, at which time the Leibly claim was

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1 heard and additional evidence relating to the conveyance loss in Fogarty
2 Ditch was taken.

3 The Referee, after reviewing the record of these proceedings,
4 together with the record of the original hearing conducted in October
5 and November 1988, concluded that: (1) testimony and evidence regarding
6 the Leibly claim were adequate for a proper determination of water
7 rights, and (2) no new evidence was presented which would enable the
8 Referee to make definitive recommendations to the Court regarding
9 quantifications of water rights for claimants Acheson and Stroh.

10 Based upon the foregoing, the Referee ordered that the March 6,
11 1991 hearing be continued to allow the Department of Ecology, either by
12 itself or in concert with the affected claimants, to conduct streamflow
13 measurements sufficient to ascertain conveyance loss and/or loss-gain
14 characteristics of Fogarty Ditch. The Referee allowed the department
15 the remainder of the 1991 irrigation season for the conduct of such
16 measurements and data collection.

17 The United States (portion of Claim No. 2276) moved the Court on
18 April 3, 1991 to amend Pretrial Order No. 8 so as to permit the United
19 States to introduce evidence and testimony at appropriate subbasin
20 hearings, (rather than the Federal reserved rights pathway) to support
21 claims for public domain Indian trust allotments. The Court, on
22 April 11, 1991, amended Pretrial Order No. 8 to allow the United States
23 to present evidence in the subbasin pathway.

24 As a result of the above, the Referee set and conducted a hearing
25 on December 18, 1991, for the purpose of (1) taking additional evidence
26 regarding flow characteristics of Fogarty Ditch and (2) take any
27

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1 evidence regarding that portion of the claim of the United States (Claim
2 No. 2276) that relates to Yakima Public Domain Allotment E604, located
3 in the W $\frac{1}{2}$ SW $\frac{1}{4}$ Section 24, T. 13 N., R. 16 E.W.M.

4 Kerry O'Hara, Assistant Attorney General, represented the
5 Department of Ecology at this hearing.

6 Based upon the record in this case, and the testimony and evidence
7 provided to the Referee, the analysis of the aforementioned remaining
8 claims is as follows:

9
10 COURT CLAIM NO. 2246 -- Neil Leibly

11 The original statement of claim filed with the Court was submitted
12 by Clarence Wines. Neil Leibly purchased from Mr. Wines in May of 1988
13 and was substituted as a claimant for Mr. Wines by Order of this Court
14 dated March 16, 1990.

15 The statement of claim asserts rights to the use of waters
16 from Sorenson Creek and Fogarty Ditch for the irrigation of 30 acres
17 from each source (60 acres total). A priority date of "pre 1900" was
18 claimed. The claimant was represented during the evidentiary hearing by
19 Jeffrey Slothower, Attorney at Law and Mr. Leibly offered testimony
20 during the hearing.

21 According to the record this property had been irrigated from both
22 Sorenson Creek and Fogarty Ditch for many years. The land was severed
23 from the Public Domain by Patent issued on November 4, 1895. A Notice
24 of Appropriation of Water was filed by a previous owner on May 13, 1909.
25 In the past this property had been flood irrigated but is now
26 exclusively sprinkler irrigated. Mr. Leibly stated that there exists

1 evidence of a ditch distribution network in certain areas of his farm.
2 An affidavit of a neighbor indicates that this property had been
3 irrigated for over 40 years.

4 Although the Sorenson Creek diversion was once effected by means
5 of gravity ditches this diversion is now made by means of a portable
6 gasoline driven pump and portable sprinkler system. Mr. Leibly stated
7 that he irrigates approximately five to six acres of pasture land and
8 that his pumping system produces 132 gallons per minute. He further
9 calculated, based upon the length of his irrigation season, that he
10 applies 11.65 acre-feet per acre annually to these lands. The Referee
11 believes that the aforementioned quantities are somewhat high as
12 compared to the duty of water recommended by the Plaintiff State of
13 Washington; however, Mr. Leibly's testimony indicated that the irrigated
14 land consists of very rocky soil with perhaps some Yakima River gravel
15 bars extending underneath it, which condition's may account for the
16 elevated water duty. The stock Mr. Leibly has pastured in this area
17 water directly from Sorenson Creek, to which they have free access.

18 Mr. Leibly's predecessor, Mr. Wines, filed water right claim
19 registration number 163976 in June of 1974, which filing preserved
20 rights to water associated with this source.

21 Based upon the record it is the Referee's recommendation that a
22 right be confirmed to Mr. Leibly in the amounts of 0.29 cubic feet per
23 second; 69.9 acre-feet per year for the irrigation of six acres from
24 Sorenson Creek. The point of diversion will be described as multiple
25 points of diversion along Sorenson Creek as it traverses the Leibly
26 property.

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1 Although the second source of water referred to in the statement
2 of claim is the Fogarty Ditch, the actual source of water is a well
3 situated some distance from any surface water sources. According to the
4 record this well is 18 feet in total depth and exhibits a water level of
5 from eight to ten feet below land surface. Approximately ten acres of
6 alfalfa are irrigated from the well using a 175 gallon per minute pump.
7 Stock are also pastured on this land, generally after the last cutting
8 of alfalfa during the year. The stock pastured in this location have
9 access to water from a spring and from the Yakima River.

10 The record is silent as to when the transfer of water sources was
11 made (from Fogarty Ditch to the well), however the time of transfer may
12 not be significant as it pertains to this proceeding. Any rights to the
13 waters of Fogarty Ditch have most likely been forfeited due to non-use
14 for a protracted period of time and the failure to file a claim pursuant
15 to the provisions of the water right claim registration act (Chapter
16 90.14 RCW). Additionally, the rights to the use of ground water are not
17 at issue in this proceeding and it is clear to the Referee that the use
18 of water from the well is an appropriation of ground water. The well,
19 according to Mr. Leibly's testimony, exhibits draw-down characteristics
20 typical of ground water sources. The Referee therefore cannot recommend
21 confirmation of water rights regarding the ground water source.

22 No diversions of water are made to satisfy the needs for stock
23 water on the Leibly property. The stock have free access to several
24 sources of water and the continued use of these sources should be
25 covered by the stock water stipulation identified in the original report
26 of the Referee to the Court.

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1 COURT CLAIMS NO. 0346 & 3618A -- Robert S. Jr. and Louise Acheson
2 COURT CLAIM NO. 0187 -- Harold Edward and Theresa Ann Stroh

3 Both the Achesons and the Strohs excepted to the original Report
4 of Referee in connection with this subbasin. Such exception was based
5 upon the contention that the Referee did not make sufficient allowance
6 for conveyance losses in ditches supplying their respective lands with
7 irrigation water. Mr. Acheson appeared at both the March 6 and
8 December 18, 1991 hearings and offered testimony at the earlier hearing.
9 Mr. Stroh did not appear at either hearing. Mr. Acheson was represented
10 by Hugh M. Spall, Attorney at Law at both hearings.

11 In his original report to the Court the Referee recommended
12 confirmation of an irrigation right to Mr. Acheson in the amounts of
13 14.32 cubic feet per second; 3580 acre-feet per year for the irrigation
14 of 358 acres. No transportation loss in the waterway supplying the
15 Acheson lands (Fogarty Ditch) was allowed since at that time the
16 testimony indicated that the ditch gains rather than loses water
17 throughout its length. The lack of allowance for transportation loss
18 precipitated the Acheson exception.

19 The hearing conducted on March 6, 1991, did not yield sufficient
20 quantitative evidence to enable the Referee to make any modification to
21 his original recommendations. As a result, the Referee required the
22 Department of Ecology to conduct measurements of Fogarty Ditch during
23 the 1991 irrigation season to determine the loss/gain characteristics of
24 Fogarty Ditch, and to report to the Referee when such activities have
25 been accomplished. Notification to the Referee was made and the Referee

1 scheduled the December 18, 1991, hearing to receive the Departments'
2 findings into evidence.

3 During the hearing testimony was given by Richard S. Carter,
4 Hydrogeologist for the Department of Ecology Adjudication Section and
5 Rynear Huffman, Supervisor of the Field Investigations Unit Department
6 of Ecology Adjudication Section. A report entitled "Conveyance
7 Loss/Gain" (exhibit SE-S3) was entered into the record. This report
8 describes the Department's measurement activities on Fogarty Ditch
9 during the 1991 irrigation season and presents conclusions based upon
10 the measurements.

11 In his original report to the Court regarding Subbasin No. 12,
12 dated April 24, 1990, the Referee did not calculate and recommend
13 conveyance loss for Fogarty Ditch. The Referee stated that: "No
14 transportation loss for Fogarty Ditch will be provided since testimony
15 shows that this ditch gains, rather than loses water throughout its
16 length." Claimant Acheson took exception contending that losses do
17 exists, generally depending on irrigation activities of neighboring
18 water users located up-gradient from Fogarty Ditch.

19 The measurements and conclusions contained in the Department's
20 investigation report represent three separate ditch reaches along
21 Fogarty Ditch, and such measurements were taken at three different times
22 during the irrigation season. No indication of adjacent up-gradient
23 irrigation activities were noted. The Department's findings were as
24 follows:

25 May 29, 1991 - upper measuring area - 2.2% loss per 1000 feet
26 July 23, 1991 - middle measuring area - 2.7% loss per 1000 feet
27 September 19, 1991 - lower measuring area - 0.4% loss per 1000 feet

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1 Attorney Spall has argued in his brief to the Referee that the
2 losses in Fogarty Ditch may be higher than the Departments' measurements
3 would suggest. He cites factors such as non-uniform weather patterns,
4 the existence of gravel bars crossing Fogarty Ditch, and the potential
5 for decreased return flow into Fogarty Ditch due to cessation of some
6 up-gradient irrigation practices resulting from non-confirmation of
7 several claims to water rights within this adjudication proceeding. Mr.
8 Spall has further suggested that the Referee elect to use a figure of
9 4.2% loss per 1000 feet which is based upon an incremental portion of
10 the Departments measurements.

11 It is clear to the Referee that his original finding of no
12 losses in Fogarty Ditch is not realistic, considering the subsequent
13 record. However, what is not clear is the precise value to attach to
14 conveyance losses. The Departments findings, although accurate, may not
15 properly reflect the average of losses through the entire length of
16 Fogarty Ditch.

17 The Department of Ecology, in other subbasins (specifically
18 Subbasin 19-Lower Naches River) has testified to generalized
19 transportation losses for typical ditches and ditch systems. The values
20 suggested by the Department range from 8% per mile (1.5% per 1000 feet)
21 to 15% per mile (2.8% per 1000 feet). In addition, the Department has
22 identified an overall loss of 5% for operational spills.

23 In the case of the Fogarty Ditch, after careful consideration of
24 the evidence and uncertainties relating to conveyance loss
25 characteristics, the Referee has elected to skew quantity
26 recommendations in favor of the water user. Therefore, the Referee will
27

1 utilize a 4.2% per 1000 feet loss characteristic, a total ditch length
2 of 11,200 feet between the diversion on the Yakima River and the Acheson
3 property, or a total percentage loss of 47. These data would result in
4 a diversion rate from the Yakima River of 27.01 cubic feet per second
5 (14.32 cubic feet per second for "on-farm" use and 12.69 cubic feet per
6 second conveyance loss). No annual volumetric rate (acre-feet per year)
7 will be allocated for conveyance loss since such water has only the
8 discreet purpose of physically supporting irrigation water delivered to
9 the farm for beneficial use and is not "lost" to the river system. In
10 most circumstances, and most likely Fogarty Ditch, "conveyance loss"
11 water returns to its source (Yakima River) within a relatively short
12 period of time, probably within a few days.

13 It is therefore recommended by the Referee that his report dated
14 April 24, 1990, be amended as follows: page 38 - delete line 5-1/2 and
15 add 27.01 cfs (14.32 cfs-irrigation, 12.69 cfs-conveyance loss); 3580
16 acre-feet per year.

17 It should be noted that were the Referee to use the Departments
18 generic ditch loss recommendations (15% per mile plus 5%), the diversion
19 from the Yakima River would approximate 23 cubic feet per second.

20 The Referee's original recommendation regarding the rights of
21 Harold Edward and Theresa Ann Stroh will remain undisturbed as no new
22 evidence was offered to alter that recommendation.

23
24 COURT CLAIM NO. 2276 -- United States of America

25 The above referenced claim represents the total scope of the
26 rights asserted by the United States on behalf of the Yakima Indian
27

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1 Nation and its members to fulfill the treaty of June 9, 1855 between the
2 United States and the Confederated Tribes and Bands of the Yakima Nation
3 and to satisfy the future as well as the present needs of the Yakima
4 Reservation established by that treaty. Only a specific portion of the
5 overall claim of the United States is under consideration in the
6 proceedings relating to Subbasin No. 12, that being the rights
7 associated with Yakima Public Domain Allotment 604 (W $\frac{1}{2}$ SW $\frac{1}{4}$ Section 24,
8 Township 17 North, Range 18 E.W.M.). The United States is asserting
9 rights under Federal Law to sufficient water to fulfill the purposes for
10 which that allotment was reserved.

11 During the hearing the United States was represented by Charles
12 O'Connell, Assistant United States Attorney. Testimony was given by
13 Ross Waples, HKM Associates, consulting engineering firm, Gary E.
14 Elwell, Civil Engineer, HKM Associates, Joseph DeMaggio, Agricultural
15 and Civil Engineer, Stetson Engineers, and James Merchant, Economist,
16 David Dornbusch & Company. Testimony regarding investigations of the
17 property in question by the Department of Ecology was given by Forest
18 Tevebaugh, Field Investigator, Ecology Adjudication Section.

19 The Referee has previously advised in the "Preface to Subbasin and
20 Major Category Reports" dated May 18, 1988 that the acquisition of
21 rights to the use of water by the United States can be accomplished
22 through two avenues, Federal Law and State Law. Under Federal Law the
23 most prominent and of most concern in this proceeding is the concept of
24 reserved water rights. The right of the United States to reserve water
25 for use upon land reserved by the United States has been confirmed by
26 the U.S. Supreme Court (Winters v. United States, 207 US 564 (1908)).
27

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1 The Court found that the treaty creating the Reservation by implication
2 reserved waters for use upon the Reservation. It is the Referee's
3 belief that the intent of the United States in creating the Reservation
4 was to make provision for a home for early Indian settlers and a
5 potential for livelihood through pursuit of agricultural practices.

6 As Federally Reserved rights relate to Yakima Public Domain
7 Allotment 604 the Referee proposes to confirm rights for irrigation and
8 other purposes which are in concert with the purpose of the Reservation.
9 The measure of this right, unlike that of other Non-Federally derived
10 rights, is not based upon State law, and the extent of present or
11 historical irrigation is not a limiting factor. Furthermore, it is the
12 intent of the Referee to quantify the reserved right of the United
13 States based upon the number of acres which could be irrigated using the
14 test of "practicable irrigable acreage".

15 The testimony and evidence presented have convinced the Referee
16 that using the test of practicable irrigable acres that 25.1 acres of
17 land satisfies that test. The development plan proposed by the
18 witnesses for the United States is to install a 20 BHP pump on the
19 Yakima River and to deliver water by means of a pipeline into the area
20 to be irrigated. The distribution of water in the field will be by a
21 system of furrows. It was further proposed that the crop to be grown
22 would be Timothy hay and alfalfa. (Although probably not relevant to
23 the Reserved Rights doctrine there was some indication during testimony
24 that a small portion, less than two acres, of this land may have been
25 irrigated in the past from Fogarty Ditch; however, the duration and
26 history of this use was not evident.)

1 Through testimony and evidence presented the United States has
2 demonstrated that it is both practicable and economically feasible to
3 irrigate 25.1 acres of land, and as a consequence thereof, the Referee
4 recommends confirmation of right for 1.40 cubic feet per second; 123.2
5 acre-feet per year for the irrigation of 25.1 acres. An additional 0.28
6 acre-feet per year is allowed to satisfy the demand for stock water
7 which amount is based upon the estimate of the claimants' expert
8 witnesses. An assertion was also made for rights to the use of ground
9 water for a well for domestic supply. Notwithstanding the fact that
10 shallow ground water may be in hydraulic continuity with the Yakima
11 River and other proximal watercourses, it is the opinion of the Referee
12 that the rights to the use of this ground water are beyond the scope of
13 this adjudication proceeding and will not be addressed.

14 The priority date of this proposed right shall be fixed as of
15 June 9, 1855, the date of establishment of the reservation.

17 FINDINGS OF FACT

18
19 I, William R. Smith, as Referee in this proceeding, having
20 carefully examined the testimony and evidence, do hereby make the
21 following findings of fact pursuant to the Order of Remand entered by
22 this Court on the 11th day of January, 1991:
23

24 1. Based upon the additional testimony and evidence obtained
25 during the supplemental hearing, the Report of Referee - Subbasin No. 12
26 dated April 24, 1990, should be modified as follows:
27

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(a) Page 38, line 5 1/2 - delete, and replace with "27.01 CFS
(14.32 cfs - irrigation, 12.69 cfs - conveyance loss); 3580
acre-feet per year"

(b) Page 40, line 16 - incorporate into the schedule of rights:

CLAIMANT NAME: United States of America COURT CLAIM NO. 2276

Source: Yakima River

Use: Irrigation of 25.1 acres (1.40 cfs; 123.2 acre-feet per year) and
stock water (0.01 cfs; 0.28 acre-feet per year)

Period of Use: April 1 through October 31 for irrigation,
continuously for stock water

Quantity: 1.41 cubic feet per second; 123.48 acre-feet per year

Priority Date: June 9, 1855

Point of Diversion: 750 feet south and 400 feet east of the west
quarter corner of Section 24, being within the
NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24, T. 17 N., R. 18 E.W.M.

Place of Use: Yakima Public Domain Allotment 604 (W $\frac{1}{2}$ SW $\frac{1}{4}$, Section 24,
T. 17 N., R 18 E.W.M.)

CLAIMANT NAME: Neil Leibly COURT CLAIM NO. 2246

Court: Sorenson Creek

Use: Irrigation of 6 acres

Period of Use: April 1 to October 31

Quantity: 0.29 cubic feet per second, 69.9 acre-feet per year

Priority Date: November 4, 1895

Point of Diversion: Multiple points of diversion between points
located 1300 feet north and 12 feet east, and
350 feet north and 1950 feet east of the center
of Section 23, being within the S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section
23, T. 17 N., R. 18 E.W.M.

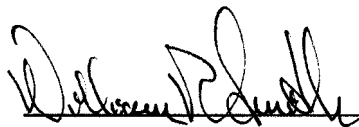
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1 Place of Use: That portion of the S¹/₂NE¹/₄ of Section 23, T. 17 N., R.
2 18 E.W.M. lying northerly of Sorenson Creek and
3 westerly of the Yakima River.

4 The aforementioned changes shall be incorporated into the Report
5 of Referee dated April 24, 1990, by reference.

6 2. The exception of Harold E. and Theresa A. Stroh is denied.

7 SIGNED and DATED at Olympia, Washington, this 3^d day of
8 MARCH, 1992.

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11 WILLIAM R. SMITH, Referee
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