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

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| 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,<br><br>STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,<br>Plaintiff,<br>vs.<br><br>JAMES J. ACQUAVELLA, ET AL.,<br>Defendants | No. 77-2-01484-5<br><br>MEMORANDUM OPINION AND ORDER RE: EXCEPTIONS TO SECOND SUPPLEMENTAL REPORT OF REFEREE SUBBASIN 4 (SWAUK CREEK) |

## I. INTRODUCTION

This Court held a hearing August 8, 2002 to consider exceptions to the Second Supplemental Report of Referee for Subbasin 4 dated March 20, 2002 (Second Supplemental Report). Trendwest Investments, Inc. (Claim No. 01685), Pat & Mary Burke (Claim No. 01475), Lavinal Corporation (Claim No. 06626), Bernard P. Knoll (Claim Nos. 12061, 12062), First Creek Water Users Association (Claim No. 00648) and Liberty Mountain Ownership Association, Inc. (Claim No. 01095) filed exceptions. All parties, along with the Department of Ecology appeared and participated in the hearing. The Court ruled on some of the exceptions during the hearing and those rulings are summarized below. The Court reserved ruling on other matters until it could properly review the record. The Court, having been fully advised by the parties through written exceptions and oral argument, makes the following rulings in regard to the above named parties.

## II. ANALYSIS

a. Trendwest Investments, Inc. (Claim No. 01685)

Trendwest requested that it be recognized as the sole entity holding water rights under Claim No. 01685. The Court GRANTED that exception at the time of hearing. The water rights set forth in the Schedule of Rights at pages 100 and 116 shall be amended to identify Trendwest Investments, Inc. as the sole owner of those water rights.

b. Pat and Mary Burke (Claim No. 01475)

The Burkes filed one exception to the Supplemental Report along with a stipulation between them and Trendwest Investments. After taking testimony from Mary Burke at the August 8, 2002 hearing, the Court ruled it would accept the stipulation. The stipulation pertains to the instantaneous component of a right confirmed to the Burkes and Trendwest. Trendwest's predecessor, Hartman, and the Burkes shared a ditch known as the Burke-Hartman ditch, which diverts up to 6.0 cfs from Swauk Creek. The Referee recommended confirmation of the entire 6.0 cfs but did so on a proportionate, per acre basis as there was no historical evidence indicating how much of the diversion applied to each parcel – the Burkes were recommended a right for 39.6 acres and the Hartmans (now Trendwest) a right for 95 acres.

The evidence shows the Burkes/Hartmans have historically shared the ditch and each has used the entire 6.0 cfs on a rotational basis. Mrs. Burke testified this method was necessary in light of the physical characteristics of the ditch and would have, in all probability, been the required method from the time the ditch was constructed and shared by the three original homesteaders. Thus, there is not now, nor has there been historically, a precise division of the right to the water diverted by the Burke-Hartman ditch. Lacking anything more definitive, the Court accepts the method for division of the instantaneous component of the right proposed by the two claimants who use the ditch and each claimant will be confirmed a right to divert 3.0 cfs. No party filed an exception to the stipulation and Ecology offered no objection at the time of hearing.

Accordingly, the right set forth on page 98 of the Second Supplemental Report of Referee shall be MODIFIED at line 5.5 to read as follows:

"3.0 cfs including conveyance loss; 297 acre-feet for irrigation; 1 acre-foot per year for stock water." See Stipulation at p. 2.

Similarly, the right set forth at page 100 of the Second Supplemental Report shall be MODIFIED at line 7 to read as follows:

"0.63 cfs including conveyance loss; 150 acre feet per year for irrigation."

The right set forth at page 116 of the Second Supplemental Report shall be MODIFIED at line 16.5 as follows:

"2.37 cfs including conveyance loss; 562.5 acre-feet per year for irrigation."

The Burkes also took exception to the Referee's decision not to recommend a right for irrigation from McCallum Spring. The Referee determined the flow from McCallum Spring constituted

subirrigation and therefore no diversionary water right attached. See Second Supplemental Report at 13 citing RCW 90.03.120, Ecology v. Grimes, 121 Wn.2d 459, 466, 852 P. 2d 1044 (1993). The Referee did recommend a diversionary stock water right for McCallum Spring. The Burkes disagreed, asserting the use of the right constituted a purposeful application of the water. Ecology deferred to the Court to make a factual determination – if the Court finds the use of water to be subirrigation then Ecology believes no right is appurtenant whereas if there is a purposeful diversion and application of the water then a right is appropriate. Ecology does note the water duty may be too high in light of the irrigation method and to the extent the Court confirms a right, the agency believes quantities on par with Dunford Spring (another spring on the Burke's property) would be appropriate. See Verbatim Report of Proceedings dated August 8, 2002 at p. 41-42 (RP).

This decision hinges on the structures and use of water from McCallum Spring. It is, by no means, clear-cut. The facts are as follows. Since the 1940's when Mr. Pat Burke acquired the property in question, a ring surrounding the spring has channeled the spring water into a pipe and ultimately into a stock tank. The overflow from the tank then runs down-gradient into the original homestead and irrigates orchard, garden and pasture. According to descendants of the McCallums who settled the area, there has always been a ring and diversion to a stock tank and the water was used for the purposes described above. See RP at 28, 34. Apparently, the flow of the water has diminished since the construction of a highway between the spring and the area of use. The Burkes indicate the flow is adequate to irrigate only 10 acres whereas historically, it was capable of irrigating up to 18 acres. They also ask the Court grant them a right to divert 0.5 cfs on a continuous flow basis. Ecology's investigator determined the use to be irrigation during the September 6, 1990 investigation. SE – 11.

The Court finds there has been a purposeful diversion and conveyance to the place of actual beneficial use. The water is diverted at the spring location and conveyed through a pipe into a holding mechanism from which it is ultimately distributed. Once the water flows from the stock tank, it appears some channeling of the water has occurred. The Court does not perceive a major distinction between this method and restricting canals to facilitate overflows for flood irrigation. Further, the water has historically been utilized for a beneficial use.

However, the Court does not interpret the evidence to show the entire 0.5 cfs produced by the spring is diverted. Rather, the consistent testimony has been that water is diverted into a 2-inch pipe and then reduced to a 1-inch pipe, which runs into the stock tank. See Testimony of Pat Burke

dated March 10, 1997 at page 32. The claimant supplied no precise measurement information. Further, the non-diversionary stock and wildlife water stipulation set out at the beginning of the Report of Referee, requires 0.25 cfs be retained in natural watercourses, including springs. Thus, the Court could confirm, at most, a 0.25 cfs diversionary right in light of that limitation. Additionally, the two RCW 90.14 water right claims (WRC) that seem to apply are WRC Nos. 000185 and 052591. Although not specifically stated, the Referee may have chosen 000185 as applying to this right as the instantaneous diversion component of the recommended stock water right was set by the Referee at 0.045 cfs, which approximates the 20 gpm on the claim form. WRC No. 000185 also asserts a right to irrigate 5 acres through a diversion of 30 acre-feet per year. Further, Ecology and the Burkes stated at the hearing that a quantity similar to Dunford Springs would be acceptable -- the Referee recommended 0.067 cfs, 28.25 acre-feet for irrigation of 5 acres.

The Court finds the information in WRC No. 000185 together with the Dunford Spring analysis to be the most consistent with the evidence supplied in the hearings. Therefore, the Court confirms a right to divert 0.045 cfs continuously which during the irrigation season calculates to about 21 acre-feet. Therefore, the Court will use those as the parameters of the water right.

The findings of fact set forth at page 103 of the Second Supplemental Report beginning at line 1 shall be MODIFIED as follows.

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| CLAIMANT NAME: | Pat Burke & Mary Burke | Court Claim No. 01475 |
| Source: | McCallum Spring | |
| Use: | Irrigation of 5 acres and stock water. | |
| Period of Use: | April 1 through October 31 for irrigation; continuously for stock water | |
| Quantity: | 0.045 cfs; 20 acre-feet per year for irrigation and 1 acre-foot for stock water during irrigation season; 2 acre-feet during the non-irrigation season for stock water | |
| Priority Date: | May 24, 1884 | |
| Point of Diversion: | 1200 feet south and 1100 feet west of the north quarter corner of Section 3, being within the NE1/4NW1/4 of Section 3, T. 19 N., R. 17 E.W.M. | |

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| Place of Use: | That portion of the NW1/4 of Section 3, T. 19 N., R. 17 E.W.M. lying westerly of the state highway. |

c. Lavinal Corporation (Claim No. 06626)

Lavinal excepted to the Referee's denial of a water right from Swauk Creek for the purpose of mining. That denial was premised on a lack of proof of beneficial use of Swauk Creek water prior to 1932 and a lack of RCW 90.14 compliance. Lavinal now asks the Court to confirm a water right from Williams Creek as WRC No. 136707 does assert a right to 1 cfs from Williams Creek for mining use on what is now Lavinal property (formerly owned by Clifford Burcham).

Lavinal's argument regarding historic beneficial use is factually complicated and somewhat circumstantial. Mr. Frank Kerstetter was the first settler of the property now owned by Lavinal in the SE ¼ of Section 3, T. 20 N., R. 17 E.W.M. He filed both a mining claim and a Notice of Appropriation for 100 inches of Swauk Creek water. Mr. Jacob Kirsch, an area resident and miner since 1928 (and the former owner near where the Williams Creek diversion point is located) indicated the Williams Creek Ditch was used for washing gold dumps in connection with the Swauk Creek mining claims. Testimony of Jacob Kirsch, November 19, 1991, p. 32-33. Mr. J.C. Pike filed a claim for the Williams Creek water June 6, 1886. Mr. Kirsch confirmed that the Pike claim was the basis for his own RCW 90.14 claim with an 1886 priority date, a claim that is very similar to that filed by Clifford Burcham. The Burcham family eventually acquired the property and received a mining patent on May 7, 1918 and owned the property until it was sold to Lavinal in the late 1980's. Mr. Burcham filed his RCW 90.14 claim on June 14, 1974, specifying Williams Creek as the source of surface water for mining operations on his property. Clifford Burcham was still mining at the time of the sale to Lavinal and engaged in an operation requiring water.

Mr. Kirsch also testified that no water had been diverted from the Williams Creek Ditch at any point west of a heliport "for at least 15 years" prior to 1991. The land west of the heliport that was previously used for mining included the Burcham/Lavinal property. Accordingly, Lavinal has concluded that Mr. Burcham used Williams Creek for his mining operating up to about 1976 (including the period the RCW 90.14 claim was filed) and switched to a Swauk Creek diversion when the Williams Creek delivery structure collapsed. The Swauk Creek water use requires a pump, which would have not been available to early users. Lavinal has carried on the mining practice in much the same fashion as Mr. Burcham, including the water use from Swauk Creek.

In support of water use, Lavinal also supplied a letter from Clifford W. Burcham stating water had been used on the property at least dating back to the time of the mining patent on May 7, 1918. Mary Burke also declared on May 29, 2002 that:

> "It was commonly known that the miners used water for mining purposes. This includes Mr. Burcham, who used water from Williams Creek and Swauk Creek. At no time I am aware of Mr. Burcham failing to use water for any consecutive five-year period from 1967 to the purchase by the Sweeneys."

Lavinal submitted additional evidence in support of water use including the following:

1) A Notice of Water Right by Frank Kerstetter for 100 inches from Swauk Creek for the "Pawnee" Placer Mine;

2) A Warranty Deed from Frank Kerstetter and William Burcham to Eva Kerstetter and Anna Burcham dated September 1, 1915 showing a conveyance of, inter alia, the Pawnee placer claim.

3) The mining patent from the U.S. to Burchams and Kerstetters date May 7, 1918.

4) Portions of an appraisal by Lamb Hanson Lamb, dated September 23, 1990, for the Burcham claim property. This includes various materials regarding the history of mining, including the use of water through ditches where possible in the Swauk/Liberty area.

5) Photographs and a newspaper article dated November 13, 1974 that includes quotes from Cliff Burcham and photographs from his collection on various historical events.

The evidence of historic water use is somewhat circumstantial. However, when considered in totality, adequate to convince the Court water was used from Williams Creek for the purpose of mining from when that activity was commenced on the property to the current use by Lavinal. The Burcham family was engaged in mining at least from the time of patent in 1918 (and sometime before as is required under the mining law to receive a patent) through the sale to Lavinal. Mr. Clifford Burcham confirmed the use of water on the property prior to sale to Lavinal and references the 90.14 claim which asserts a right to divert from Williams Creek. The use of Williams Creek would have been more likely in the early 1900's as diversions from Swauk Creek would have been unlikely without a pump. Mrs. Mary Burke confirmed those uses dating back to childhood visits with Mr. Burcham in the 1940's. Use of Williams Creek continued until the mid-1970s when flumes failed and diversions past the heliport ceased. The Court finds that Williams Creek water was used on the Lavinal property for mining purposes dating back to at least 1915. The use from Williams Creek discontinued about 1976 and a use from Swauk Creek commenced, continuing to the present day.

That brings the Court to the legal issue of whether or not the Williams Creek right for the Lavinal property has relinquished in light of the nonuse of that source and point of diversion since at least 1976. RCW 90.14.160 establishes that a right reverts to the state if the owner voluntarily fails to use any portion of the right for 5 consecutive years. Ecology asserts the Williams Creek right has not been used for 25 consecutive years and therefore has relinquished and the use from Swauk Creek is an unauthorized change in point of diversion and use from a different source that should be terminated. Lavinal counters, stating the right has been exercised continuously during the 25-year period, albeit from another source/point of diversion and this continued use of water prevents the right from relinquishing. Both parties believe this to be a matter of first impression in Washington and have supplied citations to decisions from other states to support their arguments. Considerable discussion transpired at the hearing regarding the meaning of Russell Smith v. Water Resources Department, 152 Or. App. 88, 952 P.2d 104 (1998).

This Court has heretofore made no decisions on the question of whether a right relinquishes if water from a different source at a different point of diversion (POD) is utilized in lieu of the source and POD where the right was established. The Court and Referee have routinely confirmed rights when the current POD varies slightly from the location of the original POD, but always from the same source. See e.g. Report of the Court Re: Subbasin No. 23 dated January 31, 2002. The right is typically confirmed at the original point of diversion. Id. Here, the diversion now used by Lavinal from Swauk Creek is slightly upstream from where Williams Creek empties into Swauk Creek. The diversion from Swauk Creek can not, and does not, utilize the same water as would otherwise have been used at the Williams Creek diversion. However, these two sources of water are in the same general watershed and Lavinal advises that no party diverts in the section between the Swauk Creek point of diversion and where Williams Creek empties into Swauk. Whether a diversion from an altogether different, but closely connected source protects the original right will require an analysis of the relevant statutes and a review of the decisions of other states.

We start with the existing case law. Lavinal and Ecology cited several cases in support but both seem to agree that Russell-Smith v. Water Resources Dept., 952 P.2d 104 (Or. App. 1988) is most useful. The Court concurs and notes both parties urge it to follow Russell Smith. The court held:

> "The resolution is by no means clear-cut. Nevertheless, we conclude that there is no forfeiture under ORS 540.610 when a water user uses water from the designated source, and for the designated purposes, but from an unauthorized POD, for the statutory forfeiture period."

The holding is broad enough to support both Lavinal and Ecology. On one hand, the court found forfeiture did not apply even though water had not been diverted from the original POD. On the other, the holding is specific to a use from the designated source but from an unauthorized POD. However, the Russell Smith court based its decision on four factors, which are more helpful. First, Oregon's water rights laws treat "use," "beneficial use," and "point of diversion" as distinct concepts. Second, the forfeiture statute focused on "use" and "beneficial use" without any reference to "point of diversion." Third, although other Oregon statutes address unauthorized changes in points of diversion, none established forfeiture as the remedy. Finally, under the Oregon scheme, the lack of forfeiture in such a scenario will not result in water right holders engaging in unbridled and disruptive changes in points of diversion. Would these considerations be the same: 1) under Washington law; and 2) if the point of diversion was moved to a different source? It must also be noted Russell Smith did involve a change from a spring to an intermittent stream.

Like Oregon, Washington water law treats "use," "beneficial use" and "point of diversion" as distinct concepts. RCW 90.03.380 states the "right to the use of water" remains appurtenant to land and can be changed if doing so will not cause a detriment or injury to existing rights. That section makes no mention of "source." In the next sentence, the statute specifically permits the change in point of diversion if such a change can be made without detriment or injury. The third sentence states "Before any transfer of such right to use water or change of the point of diversion of water . . . ." The same distinction is continued throughout the transfer statute and makes clear the transfer of the right to use water is different then the change in point of diversion. That analysis is of some assistance and works in Lavinal's favor.

Similar to Oregon, the forfeiture statute concentrates on "use" and "beneficial use" without any reference to "point of diversion." RCW 90.14.160 does apply to "[a]ny person entitled to divert or withdraw waters. . . ." However, the statute states the right relinquishes because the right holder fails to "beneficially use all or any part of said right." In the context of the statutory provision, "all or any part of said right" refers to the water and not other elements of the water right such as the POD. This interpretation is confirmed by other language in the sentence, which states "said right or portion thereof shall revert to the state, and the waters affected by said right shall become available for appropriation." The Court would be surprised if Ecology has any interest (or authority) over abandoned points of diversion. No mention is made of "source." The Court finds RCW 90.14.160 to be concerned with the beneficial use of water and not the point of diversion or source.

There is no clear statement in the water code that forfeiture is the appropriate penalty for unauthorized changes in point of diversion or source. RCW 90.03.380 makes no such mention. Conversely, RCW 90.03.600 allows Ecology to assess civil penalties of up to one hundred dollars per day for violations of RCW 90.03. The unauthorized use of water that deprives another of their right is a misdemeanor crime. RCW 90.03.400. Those measures would appear to be the appropriate penalty in the event water is used without Ecology's authorization.

Which brings up the last consideration, and a concern expressed by Ecology at the time of hearing – what prevents water users from changing points of diversion willy-nilly without consideration of RCW 90.03.380. The answer seems to be the penalty statutes set forth above. See RCW 90.03.400 and .600. The Court recognizes this may place a considerable burden on Ecology to monitor and enforce existing decrees and permits. However, an interpretation of the statutes leads to the conclusion such enforcement is the way and the means to curtail unauthorized uses and changes of water – not a relinquishment proceeding pursuant to RCW 90.14. The legislature could have made forfeiture a penalty along with the other statutory provisions if it wanted a water right to be forfeited when a user changes the point of diversion without compliance with RCW 90.03.380.

The Court, after considering the relevant Washington statutes, holds that a water user, under these facts, does not forfeit a water right by changing the POD to a source within the same general watershed without authorization so long as water has been beneficially used in the amount authorized. Clearly, a user cannot establish a right to the new diversion – it only prevents the user from forfeiting a right to the lawful diversion point. That is particularly true under these facts where a water user proves historic beneficial use and provides an RCW 90.14 claim reflecting that historic use. For example, had Mr. Burcham and his predecessors used water from Swauk Creek historically, then switched the point of diversion to Williams Creek after 1917, then filed an RCW 90.14 claim indicating the source as Williams Creek, and then switched the POD to Swauk Creek, the Court's decision may have been different. Further, a water user who does choose to take the law in their hands in such a fashion may be subject to civil penalties and possible criminal prosecution for the "unauthorized use of water to which another person is entitled or the willful or negligent waste of water to the detriment of another."

The Court finds that a right to Williams Creek was perfected by Lavinal's predecessor and was not relinquished when an unauthorized change in point of diversion was initiated. Russell Smith; Van Tassell Real Estate & Livestock Co. v. City of Cheyenne, 54 P.2d 906 (Wyo., 1936). Although

the decision in State v. Fanning, 361 P.2d 721 (N.M. 1961) is contrary, its resolution appears to be reached under a different statutory scheme. See id. at 723 ("An unauthorized change in well location is a misdemeanor, and if the owner . . . changed the location of his well after August 21, 1931, without following the statutory procedure, and thereafter irrigated from the new well for four consecutive years, it resulted in a legal forfeiture of his water right. Irrigating from an unauthorized well must, insofar as forfeiture is concerned, be considered tantamount to not irrigating at all").

A water right will be quantified below. From its pleadings, Lavinal clearly understands that it must comply with RCW 90.03.380 prior to transferring the point of diversion to Swauk Creek. Furthermore, unless or until that change is accomplished, Lavinal is ORDERED to discontinue the use of water from Swauk Creek.

The Court has quantified a right that differs from what Lavinal requested in two ways. First, the priority date is June 6, 1886, which is consistent with the date J.C. Pike filed a water right claim from Williams Creek. Second, the Court has modified the place of use to make it consistent with the RCW 90.14 claim filed by Mr. Burcham. The following right shall be inserted at page 113, line 1 of the Schedule of Rights set forth in the Second Supplemental Report.

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| CLAIMANT NAME: | Lavinal, Inc. | Court Claim No. 06626 |
| Source: | Williams Creek | |
| Use: | Mining | |
| Period of Use: | March 1 to November 30 | |
| Quantity: | 0.10 cfs; nonconsumptive | |
| Priority Date: | June 6, 1886 | |
| Point of Diversion: | 1600 feet west and 1730 feet north from the SE corner of Section 2, being within the NW1/4SE1/4 of Section 2, T. 20 N., R. 17 E.W.M. | |
| Place of Use: | S1/2N1/2SE1/4SE1/4 and S1/2SE1/4SE1/4 Section 3, T. 20 N., R. 17 E.W.M. | |

d. Bernard P. Knoll (Claim Nos. 12061, 12062)

Mr. Bernard Knoll filed a number of exceptions to the Second Supplemental Report and testified at the August 8, 2002 hearing. Mr. Knoll utilizes three ditches, referred to as the "USFS"

Ditch, Ditch "A" and Ditch "B" and presented his exceptions in that fashion. The Court will use the same format below. The bulk of the exceptions pertain to the "USFS" Ditch. The Court ruled on many of the exceptions at the time of hearing and took four under advisement. The oral rulings will be summarized and an analysis provided for the four matters taken under advisement.

1. *USFS (Kirsch-Pettigrew) Ditch*

Mr. Knoll asked for the USFS ditch to be renamed the Kirsch-Pettigrew Ditch. There being no objection, the Court GRANTED the exception. Second, Mr. Knoll indicated the point of diversion is just above the confluence of Cougar Gulch and Williams Creeks There being no objection, the Court GRANTED the exception. RP at p. 78.

Mr. Knoll initially believed the Referee had incorrectly quantified the conveyance flow portion of the right during the non-irrigation season and the Referee had recommended too great of a water right. However, after discussion at the hearing, Mr. Knoll seemed to understand the rationale behind the Referee's recommendation and appeared to withdraw his exception. RP at p. 78. To the extent Mr. Knoll did not withdraw his exception asking the right be reduced, the Court DENIES the exception. The instantaneous, non-irrigation season right shall remain 0.30 cfs as recommended by the Referee in the Supplemental Report at page 140, beginning at line 51/2.

Mr. Knoll also asserts a right for domestic use from Kirsch/Pettigrew ditch. The Referee denied the claim for a water right as no evidence was submitted showing water had been diverted from Williams Creek for domestic supply on the Bernard Knoll property. See Second Supplemental Report at 67 (emphasis in original). Considerable testimony was supplied by Mr. Knoll based on information he obtained from Mr. Pettigrew, a long-time resident of the area. That testimony was, in general, very difficult to follow. However, the Court interprets the facts to be as follows.

In the early 1930's, Mr. Pettigrew, moved onto the property now owned by Mr. Knoll to engage in a mining operation. He lived on that property for some time (unspecified in the record) and then moved to a parcel immediately south of the south boundary line of Mr. Knoll's property. While he lived on the Knoll property, he may have lived in a trailer, tent or perhaps constructed a cabin based on remnants of footings discovered by Mr. Knoll. While living on the Knoll property, Mr. Pettigrew may have used water directly from Williams Creek for domestic purposes. This would have occurred through dipping water with buckets. After Mr. Pettigrew moved to the area south of Mr. Knoll, he proceeded to use water from Ditch B (discussed below) and the use on the Knoll property was discontinued until Mr. Knoll acquired it.

There is little or no evidence regarding when Mr. Pettigrew made his move to the south. Since Mr. Knoll has not produced a permit or certificate, in order for the Court to confirm a right based on the riparian doctrine, the use must have been initiated by December 31, 1932. See Department of Ecology v. Abbott, 103 Wn.2d 686, 694 P.2d 1071 (1985). However, the activities of Mr. Pettigrew at that time are fairly sketchy. Further, if water was in fact used, it was done with a bucket through a dipping process, which, unlike a ditch, would leave no record and would not constitute a diversion. Rather the evidence tends to show Mr. Pettigrew moved his residence south of the Knoll property dating back into the 1920's or 1930's. The testimony of Jack Kirsch, who worked for Pettigrew beginning in about 1928, is instructive. He indicates Mr. Pettigrew always had a ditch running to his house in order to utilize Williams Creek water. See March 12, 1997 Report of Proceedings at 94. That evidence is consistent with Mr. Knoll's characterization of water use on the property south of the Knoll property, which is serviced by Ditch B. Mr. Kirsch makes no mention of the setup described by Mr. Knoll and the initiation and continued development of a water right on the Knoll property. The Court concludes that any domestic supply water right that may have been developed by Mr. Pettigrew was extremely limited and was abandoned when Mr. Pettigrew moved his residence south of the Knoll property.

The Court DENIES Mr. Knoll's request for a domestic water right from Williams Creek. The Court generally agrees with Referee's findings in the Second Supplemental Report. The evidence of historic use of water on the Knoll property is simply inadequate to confirm a water right.

Mr. Knoll requested confirmation of a quantity of water for conveyance loss for the Williams Creek diversion in the amount of 1.57 cfs. Referee Clausing recommended a water right for irrigation of 3 acres but lacked evidence to establish a quantity for conveyance loss. Supplemental Report of Referee at 65. Mr. Knoll, an engineer, diverted water into a pipe and then ran the water into the ditch and calculated the quantity based upon that diversion to be 1.91 cfs with 1.58 cfs required for conveyance. Ecology took no exception to the quantity. RP at 96.

The Court confirms a water right for conveyance loss and MODIFIES the right set forth at page 140 as follows. At line 6, the Quantity section shall read "0.30 cfs; 30 acre-feet per year for irrigation, 1 acre-foot consumptively for stock water and 1.57 cfs for conveyance water May 1 through September 30 and 0.30 cfs; 1 acre-foot consumptively for stock water from October 1 through April 30."

Mr. Knoll also asked that a mining use be confirmed in relation to this ditch. However, Mr. Knoll's predecessor failed to claim that use on the RCW 90.14 claim appurtenant to the property -- WRC No. 097175. Similar to the Court's ruling in regard to Mary B. Shelton, Claim No. 00519, failure to include that use on the claim form results in relinquishment of any right for that use. The exception is DENIED.

Mr. Knoll also asked the Court to direct Ecology to include on each certificate a statement that water may be used in the event of a fire emergency. Water may be used for fire suppression pursuant to the stipulation entered on December 12, 1996. See Document No. 12081. However, the Court does not believe there is any gain in putting such a statement on every certificate and therefore DENIES the exception.

2. *Ditch A*

Mr. Knoll filed two exceptions as to Ditch A. He first asked the Court to confirm a right to conveyance loss that results from the ditch running through his neighbor's property. Because of that seepage, a subirrigated wetland has developed. The Court DENIED that exception at the hearing. There is no diversion of water as required by the prior appropriation doctrine and Washington state law. See RCW 90.03.120; Ecology v. Grimes, 121 Wn.2d 459, 466, 852 P. 2d 1044 (1993). Further, to grant a right in this instance could require the neighbors to run water through a leaky ditch when they might otherwise decide to make it more efficient, which would, in effect, result in a waste of water.

Mr. Knoll also excepted to the Referee's denial of a diversionary stock water right from Ditch A. The Referee found that Fred Knoll diverted from Ditch "A" or the muskrat pond just west of Ditch "A." Water flows unimpeded across a narrow part of Bernard Knoll's property. Stock drink from this water course year around. The question raised is whether this water course results from a man-made diversion or whether it's natural and conveys either return flow or spring water.

The facts are not clear -- the best the Court can determine is a diversionary process transpires that puts water into what was likely a natural channel. Fred Knoll uses the channel for irrigation as did his predecessors per the testimony of Jacob Kirsch. If water was used for irrigation it is reasonable to conclude the predecessors to the Knolls were using the channel for stock water. Thus, the Court confirms a diversionary right from Ditch "A" for stock water in the amount of 0.01 cfs, 1 acre-foot per year on a year around basis with a December 1, 1894 priority date (date of Big Nugget patent). The following right shall be inserted at line 1, page 128 of the Supplemental Report.

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| CLAIMANT NAME: | Bernard Knoll | Court Claim No. 12061 |
| Source: | Williams Creek | |
| Use: | Stock water | |
| Period of Use: | Continuously | |
| Quantity: | 0.01 cfs; 1 acre-foot per year | |
| Priority Date: | December 1, 1894 | |
| Point of Diversion: | POD "A": 1580 feet north and 130 feet east of the south quarter corner of Section 36, being within the NW1/4SE1/4 of Section 36, T. 21 N., R. 17 E.W.M. | |
| Place of Use: | That portion of Lot 4 of Joe Cromarty Short Plat 77-05 consisting of 1 acre in the E1/2SE1/4SW1/4 of Section 36 lying east of Williams Creek, T. 21 N., R. 17 E.W.M. | |

3. *Ditch B*

Mr. Knoll excepted to the Referee's recommendation of a water right from Ditch B for irrigation of 1 acre, stating he utilizes pumps to irrigate the 2 acres rather than the ditch. The Court DENIED this exception on the basis that no historical use of the water on the additional acre was demonstrated and would be unlikely since the land at issue lies above the ditch and a pump necessary for irrigation.

e. First Creek Water Users Association (Claim No. 00648)

First Creek Water Users Association (First Creek) filed two exceptions to the Referee's recommendation as set forth in the Second Supplemental Report. The first exception is somewhat general in nature and attempts to establish that First Creek shareholders have been using water on 640 acres in the service area since some time in the 1920's. The Referee only recommended a right for 350.5 acres. The basis for that exception is generally legal in nature and no new factual material was supplied. The second exception pertains to the water duty appropriate for the acreage recommended by the Referee as having rights. In support, First Creek filed the Declaration of Richard Bain dated May 30, 2002. Mr. Bain also provided testimony at the August 8, 2002 hearing as did Mr. J. P. Roan.

1. *Acreage Exception*

First Creek excepts to the Referee's recommendation that a right be confirmed for the irrigation of 350.50 acres and asserts that 640 acres are irrigated consistent with the place of use set forth in the RCW 90.14 claim. First Creek offers a variety of arguments distilled as follows. First Creek asserts the Referee utilized a too-strict interpretation of RCW 90.03.380. Second, it concludes that a confusing, "hit or miss chain of title record," should be ignored and a right confirmed because other, unspecified ownership documents show water has been used on 640 acres in the First Creek water service area. Third, it asks the Court to recognize no other party has asserted a right to the water the Referee did not recommend. Fourth, First Creek believes the testimony by Jack White established that as far as he could remember, all of the water claimed from the First Creek ditch was applied to the First Creek service area. Fifth, the preamble to the water code (90.03.310) states the provisions of RCW 90.03 et seq. should not affect "existing rights." Sixth, the Court should not penalize First Creek simply because it has not been the subject of any documented historical controversy, which could have supplied the necessary historical information to confirm a right. Similarly, the Court should recognize that many title transfers were effected in the area historically without being recorded and the water rights in question may well have been so conveyed. Seventh, to the extent the water rights were not conveyed to the owners of lands on which the water is now used, then those rights were adversely possessed in light of six decades of continuous use. Most, if not all of these arguments were addressed by the Referee in the Second Supplemental Report.

In regard to this exception, First Creek has not taken issue with any of the facts found by the Referee and has supplied no new factual material to contradict the Referee's analysis. Therefore, the Court believes it would only confuse the record and this decision to restate the facts as set forth in the Referee's reports. The Court refers to pages 60-81 of Report of Referee dated March 25, 1996; pages 25-42 of Supplemental Report dated July 6, 1998 and pages 17-61 and Appendix A of the Second Supplemental Report dated March 20, 2002. Obviously, the Referee analyzed the First Creek claim in great detail, utilizing over 80 pages to interpret and synthesize hundreds of exhibits. The Court will restate only the facts and analysis that affect this decision.

Generally, First Creek asks the Court to confirm water rights for the Wold ownership of the original Wold-Munson Ditch. The Wold-Munson Ditch provides the basis for First Creek's claim and had its genesis in Notices of Appropriation of Water Appropriation and Affidavits of Water filed by Alex Munson and Peter Wold between 1881 and 1890. The Referee recommended a water

right for much of the Munson ½ interest. The Referee also reviewed the record to trace the ownership of Wold's ½ interest and was unable to confirm water rights. Specifically, with the evidence before him, the Referee concluded as follows.

> As far as the Referee can determine, due to lack of compliance with the change procedures in RCW 90.03.380, the Wold water right is still appurtenant to the Robinson land described in DE – 357, land not served by FCWUA. The Referee declines to recommend confirmation of any water right based on the former Peter Wold undivided one-half interest in the Wold-Munson Ditch and First Creek water rights due to lack of evidence of beneficial use of the water, quantification and chain of title questions. Second Supplemental Report at 32.

The Referee successfully traced the Peter Wold component of the water right through 1916. As of that date, he determined, the water right was appurtenant to the N1/2 of Section 8, N1/2 of Section 9, E1/2E1/2 of Section 4 and the NW1/4 of Section 3, All in T. 18 N., R. 18 E.W.M.; also the SE1/4 of Section 33 and the W1/2SW1/4 of Section 34, T. 19 N., R. 18 E.W.M. That finding was based on a review of the County Water Commissioner's Schedule of First Creek Water Rights (DE – 357). The Court has reviewed SE – 1, Ecology's map depicting where water is currently used, and none of the land identified in the Water Commissioner's Schedule is now being irrigated by First Creek. The Court agrees with the Referee's finding that as of June 30, 1916, this land was the place of use of the entire Peter Wold component of the Wold-Munson Right. At that time, the land appears to have been owned by W.W. Robinson. Although Mr. Robinson recorded instruments conveying water to other parties, there was no evidence the water was actually used by those parties. Further, even if there were such evidence, there is no proof of what land was irrigated. The best evidence of use and ownership was DE – 357, the Water Commissioner's Schedule. First Creek provides no analysis nor does it point to anything in the record to counter that conclusion. The Referee was correct to follow that trail and the Court will do likewise. Thus, although there was some conveyance of the interest in the Wold component of the water right prior to 1917, the record shows the right as of June 30, 1916 was appurtenant to and had been beneficially used on the lands set forth above.

The 1917 Water Code was passed through both houses by March 7 and signed by the Governor on March 14, 1917. See Session Laws of the State of Washington 1917, page 468. According to the Explanatory preceding the Session Laws, the non-emergency laws took effect June 6, 1917, 90 days after the legislature's adjournment. Section 39 of the 1917 Water Code states:

> The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used: *Provided,*

> *however,* That said right may be transferred to another or to others and become appurtenant to any other land or place of use without loss of priority of right theretofore established if such change can be made without detriment or injury to existing rights. Before any transfer of such right to use water or change of the point of diversion of water or change of purpose of use can be made, any person having an interest in the transfer or change, shall file a written application therefor with the state hydraulic engineer, and said application shall not be granted until notice of the hearing upon said application shall be published shall be published as provided in section 20 of this act. See 1917 Session Laws at 465.

This statute is now codified at RCW 90.03.380 and the relevant portion has remained unchanged with the exception the State Hydraulic Engineer has been changed to Department and Section 20 codified at as RCW 90.03.280. Therefore, between June 30, 1916 and June 5, 1917, a transfer of the water rights might have occurred from the W.W. Robinson property set forth above to the lands currently irrigated by First Creek without following the requirements of that Code. First Creek took no such exception nor did it supply any such evidence such a transfer occurred. Consistent with the law, any change after June 6, 1917 would only occur through the process set forth above. Lacking any evidence to the contrary, the Court concludes the Wold right remained appurtenant to the land identified above owned by W. W. Robinson.

Turning to First Creek's arguments, we start with the assertion RCW 90.03.380 was applied too strictly by the Referee. The Court disagrees – the Referee has interpreted/applied the provisions of the transfer statute exactly as written. Since June 6, 1917, it has been the uninterrupted law of this state that water rights remain appurtenant to the lands on which they have been beneficially used. RCW 90.03.380. The only method for changing the place of use, the point of diversion and manner of use is through application to Ecology and the concomitant opportunity for inquiry as to injury or detriment to existing rights provided, including the necessary notice. Any doubt about the strictness of this statute was removed in 1985 when the Supreme Court decided Department of Ecology v. Abbott, 103 Wn.2d 686, 694 P.2d 1071. At issue was a historic sawmill use between the early 1920's and the early 1950's followed by an irrigation use for a similar quantity. The water user sought confirmation of a quantity of water commensurate with the amount diverted for log washing. The Abbott Court rejected that argument and stated the following.

> Since 1917, however, by statute changes in use must first be approved by the supervisor of water resources. In this case, a change in use from log washing to irrigation should be allowed only if an application to do so was filed with and approved by the supervisor of water resources. Neither Fuher nor Riddle appears to have sought approval for the change in use. Abbott at 696.

RCW 90.03.380 makes clear changes in place of use are treated identical to changes in manner of use. This Court would be remiss to ignore the holding in Abbott as well as the unmistakable provisions of RCW 90.03.380.

The second argument deals with the chain of title vis-à-vis other documents allegedly evidencing leases and containing references regarding obligations to irrigate. There is no question that legal documents are in the record showing that water rights were transferred to lands now irrigated by First Creek. This fact, however, only exacerbates the lack of compliance with RCW 90.03.380. Further, First Creek does not indicate which documents it believes provide that proof and how those records connect ownership from 1916. The record supplied by First Creek is so vast, constituting over 150 documents, the Referee was compelled to compose an exhibit table, to the Court's knowledge the first and only of its kind in the Subbasin pathway. If First Creek believed it had a legal instrument or any other proof showing the beneficial use and transfer of water to property within their service area in or about 1917, it should have pointed that exhibit out. A water user maintains the burden of proving the existence of a water right. United States v. Ahtanum Irr. Dist., 124 F.Supp 818 (1954) *rev'd on other grounds* United States v. Ahtanum Irr. Dist., 236 F.2d 321 (9th Cir. 1956). Ironically, it is not a legal document that provides the basis for the Referee's conclusion that the place of use in 1916 was Robinson's property – the Referee relied on the Water Commissioner's Schedule for that determination.

Further, the warranty deeds supplied by First Creek show that as late as the 1940's, portions of the Wold and Munson water rights were being purchased by First Creek members. Indeed, some of the First Creek area that is now alleged to have an appurtenant water right was owned by the railroad well into the 1930's. Therefore, it is not necessarily the lack of chain of title that causes First Creek's claim to fail in some respects but the presence of some deeds that make the history difficult to interpret in the manner it advocates.

Third, First Creek attempts to convince the Court that since no other party has asserted a right based on the Wold portion of the Wold-Munson Ditch, then First Creek's claim must be valid. The Court is not persuaded. The record of this adjudication is replete with reference to notices of water right that were never perfected. Indeed, such is the very point of conducting an adjudication – to allow a user to demonstrate such claims to water rights are valid. A right can be based solely on proof of historic and continuous beneficial use and compliance with state requirements such as RCW 90.14.041, RCW 90.03.380, 90.03.290 and RCW 90.03.330.

First Creek's fourth argument concerns the testimony of Jack White (now deceased) that water had been used on First Creek lands since the 1920's. That statement is technically correct but somewhat overbroad. The testimony of Jack White was taken by the Referee on November 22, 1991. Mr. White testified his father purchased land in the First Creek service area in 1929 and that he worked for his father from then until 1936 when he purchased the farm. He testified that First Creek water via the Wold-Munson ditch had been used on that farm since its purchase in 1929 and that there had been no change in water use practices on the Jack White property for 50 years, the early 1940's. Mr. White did not provide testimony regarding uses by other First Creek water users.

Even if the Court interpreted the testimony as First Creek suggests, that does not negate a claimant's obligation to demonstrate the *basis of the right* to use the water or RCW 90.03.380. First Creek has chosen to rely on the notices of water right filed by Wold and Munson as the basis of its water right. First Creek lands are not riparian to the water source. The claimant must show how the water right (if it is ultimately perfected) represented by that notice became appurtenant to the lands in question, particularly when the record shows the right in question was perfected and appurtenant to lands not owned by the claimant. The Referee successfully traced the water right to W. W. Robinson as of June 30, 1916. The right remains appurtenant to those lands. Those lands are not presently irrigated by First Creek. That water in general was used on the property at some point in the late 1920's does not negate First Creek's obligation to show how the specific right in question became appurtenant to that property. After June 6, 1917, the water code's transfer provision made the appropriate resource agency a necessary party to that transfer.

Fifth, the preamble to the water code (90.03.010) states the provisions of RCW 90.03 et seq. should not affect "existing rights." That provision is very general and applies primarily to the appropriation of water. The Court does not read the Referee's analysis to dispute the appropriation of the water right predating the water code. Nor does it appear to dispute any transfers that occurred prior to the enactment of the water code. Rather, it was the transfer of the right subsequent to the passage of the 1917 Water Code that has created the problem. RCW 90.03.380 simply serves to make the water right appurtenant to the land upon which it had been beneficially used and that no future transfers could occur without an examination by the state as to whether they interfere with existing rights. Abbott also makes clear that RCW 90.03.380 applies to changes even when the initial uses predated its adoption.

First Creek also asks the Court to not penalize it simply because it has not been the subject of any documented historical controversy, which could have supplied the necessary historical information to confirm a right. Contrary, to First Creek's position, the Wold-Munson right was the subject of controversy, resulting in several court decrees that assisted in determining the extent of the rights and lands to which it was appurtenant. Similarly, First Creek suggests the Court should recognize that many title transfers were effected in the area historically without being recorded and the water rights in question may have been so conveyed. As this Court has previously noted, the claimant to a water right bears the burden of supplying the evidence to support the confirmation of a right. The Court must have an evidentiary basis to support confirmation of a right.

Finally, First Creek argues the Referee should have accepted its adverse possession argument and confirmed water rights to First Creek on that basis. The Referee went to some length in the first Supplemental Report to document his concerns with the adverse possession claim. First Creek apparently supplied no additional information or analysis after the Supplemental Report and the Referee made no additional findings other then to note the active water market in the area, as reflected by the plethora of deeds in the record. Accordingly, it appears that any changes in the water right's place of use were bargained for and not obtained through the use of adverse possession. Supplemental Report at 50. With that addition the Court will examine the Supplemental Report to determine the Referee's rationale for denying the adverse possession argument.

The Referee stated the adverse possession theory failed primarily for lack of evidence. Supplemental Report at 40. He noted prescriptive rights are not favored by the law and the burden of proving the existence of a prescriptive right is placed upon the one who would benefit. Further, the use must be open, notorious, exclusive, hostile and continuous. It must deprive the owner of his right to use the water and cause damage. The Referee concluded First Creek had not provided any evidence to show it acquired the right through adverse possession, or that the use was open, notorious, exclusive, and hostile or that it deprived the landowner of his water and caused damage. There was no record as to what lands or owners First Creek acted against, whether such entities had knowledge of that use and that the use was uninterrupted.

Even if the Court accepted the adverse possession argument, the failure to comply with RCW 90.03.380 remains a barrier unless that adverse possession was accomplished prior to 1917. Indeed, in light of the passage of that statute along with the rest of the provisions in RCW 90.03 and 90.14, this Court seriously questions whether a water right can be the subject of adverse possession

to the extent the adverse use is initiated after 1917. This result follows for two reasons. First, as of June 6, 1917, a transfer of a water right can only be accomplished through the transfer statute. Second, the goal of a centralized permit/certificate method for administering water rights is inconsistent with prescription. Ecology would be unable to perform its delegated function of ensuring that third parties can rely on their water rights if it cannot properly inventory the existing uses of water when transfer or permitting decisions are made. Accordingly, First Creek, like any other water user, has essentially two opponents it must conquer in order to win an adverse possession argument – the water right holder and Ecology. It is no different then purchasing a water right. To transfer a water right, a prospective water user must obtain title from the prior owner and permission from Ecology. Similarly, an adverse possessor may obtain title vis-à-vis another water user but doing so still does not allow the actual water right to transfer without RCW 90.03.380 compliance.

McCleary v. Dep't of Game, 91 Wn.2d 647, 591 P.2d 778 (1979) is instructive. There, the Supreme Court rejected the Department of Game's argument that a prior owner had established the necessary elements for a prescriptive claim by using water since 1945. The McCleary Court stated:

> The 1924 decree is a barrier to this claim. Its effect was to transfer to the state, for management through the appropriation permit procedure, those rights not otherwise allocated in the decree. Adverse possession may not be acquired against the state. *Id.* at 652.

Just as the permitting/certification of new water rights was handed to Ecology in 1917 for any new claims to water rights, so has the oversight of transfers of water rights. The Supreme Court has said there can be no adverse possession against the state. Similarly, the flipside of adverse possession is abandonment or relinquishment – for someone to take a water right someone has to lose it. The effect of abandonment/relinquishment is not to place the right with another entity but rather to transfer it to the state for reallocation pursuant to the permit/certificate process. That result is also necessary because the function of assigning water rights is not simply between one user and another – there are third party impairments and public interest matters to investigate. That function is short-circuited through an adverse possession process. Such results led many states to abolish prescription as a way to obtain appropriative water rights.[1] First Creek provided no analysis as to

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[1] Arizona (Ariz. Rev. Stat. § 45-188), Nevada (Nevada Revised Stat. § 533.060) Montana (Mont. Code Ann §85-2-301(3)) and Utah (Utah Code Ann. § 73-3-1). See also A. Dan Tarlock, Law of Water Rights & Resources, Page 5-79-80 (1989).

how the water it has allegedly taken by adverse possession can escape this statutory provision, or to the contrary, was accomplished prior to the statute's passage.

There is simply a lack of evidence to support any and all of First Creek's arguments in regard to the fate of the Wold portion of the Wold-Munson right. Additionally, its adverse possession analysis is incomplete and otherwise unpersuasive pursuant to the analysis above. The exception is therefore DENIED.

2. Water Duty

First Creek took exception to the per acre water duty of 3.83 acre feet per year recommended by the Referee. Rather, it asserts the appropriate water duty should be 5.72 acre-feet per year per acre. First Creek submitted the Declaration of Richard Bain in support and also provided the testimony of Mr. Bain and Mr. Roan.

The Referee had originally assigned a water duty of 5 acre-feet per acre per year. See Supplemental Report at 42. First Creek excepted to that water duty and requested 7 acre-feet per acre. In support, First Creek offered a letter report authored by Mr. Bain. However, the Referee concluded from the report that Mr. Bain was actually identifying a lesser use of between 2.14 acre-feet/acre and 4.20 acre-feet per acre on an annual basis. Referee Clausing then utilized an aggregate quantity of water that First Creek diverts during a plentiful year (2688 acre-feet) reduced that by a conveyance loss of 50% (identified by the Referee in Supplemental Report) and divided by 350.50 acres. That resulted in a recommendation of 3.83 acre-feet.

In his Declaration and during the hearing, Mr. Bain, a consulting engineer recognized as an expert on water matters in this adjudication, basically changed the inputs set forth above. First, relying on USGS stream flow data from the 1974 irrigation season, he determined the annual aggregate diversion to be 3085.3 acre-feet based on a March 15 through October 31 season of use. That, however, is not the recommended irrigation season – the Referee has recommended April 1 through October 15, which would reduce the irrigation season use by 120 acre-feet. With that modification, the annual diversion would be 2965.3 acre-feet. Mr. Bain then identified a conveyance loss of 35% based on soil characteristics and water use patterns. That would result in an on-farm use of 1,927.45 acre-feet during the identified irrigation season and 5.5 acre-feet per acre based on 350.50 acres. The Court accepts Mr. Bain's analysis as modified and determines the annual quantity portion of the right to be 1,927.45 acre-feet, resulting in an on-farm use of 5.5 acre-feet per acre. Ecology did not object to the overall quantity set forth by Mr. Bain. It did point out

Mr. Bain's analysis relied on a diversion analysis that maximized the use of the available water supply. Thus, First Creek's exception to add additional acres could not result in additional quantities of water. Although the point is moot since the Court denied First Creek's exception to add acres, the Court does agree with Ecology. The overall quantity of 1,927.45 acre-feet of water is the most First Creek can divert whether it irrigates 10 acres or 10,000. Adding additional acres would only serve to lessen the amount of water per acre available for use.

Changing the percentage of conveyance loss also requires the Court to modify the instantaneous quantities set forth in the Schedule of Rights at pages 97 and 101. There, the Referee relied on per acre water duty established by the historic decrees. Here the Court will start with the fact that 13.9 cfs has been historically diverted. See Declaration of Richard Bain dated July 19, 1996. If a 35% conveyance loss factor is used, that leaves 9.035 cfs for on-farm use. The Court will then divide that proportionately between the senior (1877 – 4.693 cfs) and junior (1881 – 4.795 cfs) rights. The Court will similarly divide the conveyance loss quantity proportionately between the senior (1877 – 2.283) and the junior (1881 – 2.582). The Court recognizes that this may result in the First Creek lands receiving a larger per acre instantaneous quantity then the prior decrees authorized. However, in light of potential shortages of water, certain users may have reduced the acreage irrigated to ensure the acres that were irrigated received an adequate supply. The Court believes its decision is consistent with the prior decrees so long as the total quantity confirmed does not exceed the amount the decrees authorized on an overall basis to First Creek lands.

The Court Orders the following modifications to First Creek's 1877 water right set forth at page 97. Beginning at line 6, the section following quantity should be changed as follows:

| | |
|---|---|
| Quantity: | 4.24 cfs; 904.45 acre-feet per year for irrigation and stock watering during irrigation season; 2.283 cfs for conveyance loss; 6.523 cfs, 27 acre-feet per year (consumptive) for stock watering from October 16 through March 31. |

The Court Orders the following modifications to First Creek's 1881 water right set forth at page 101. Beginning at line 6, the section following quantity should be changed as follows:

| | |
|---|---|
| Quantity: | 4.795 cfs; 1023 acre-feet per year for irrigation and stock watering during irrigation season; 2.582 cfs for conveyance loss. |

f. Liberty Mountain Ownership Association, Inc. (Claim No. 01095)

Liberty Mountain was recommended a water right in the Report of Referee for Subbasin 4 dated March 25, 1996. Liberty Mountain did not pursue an exception to the Report nor did it file an exception to the Supplemental Report of Referee issued July 6, 1998. However, after the initial right was carried into the Schedule of Rights set forth in the Second Supplemental Report, Liberty Mountain filed exceptions and did appear at the August 8, 2002 hearing in support thereof. With some reluctance in light of missed earlier opportunities, the Court agreed to consider the exceptions.

Liberty Mountain takes exception to the priority date, the source of water, and the quantity of water set forth in the Report of Referee.[2] The Report provides no analysis and notes the proposed right was recommended for confirmation in the Plaintiff's Report. See Report at 17. The basis for that recommendation is obviously a Certificate of Water Right issued to Liberty Mountain in 1969. See SE – 3; Certificate of Water Right Record No. 22, Page 10944. The right recommended includes the terms set forth in that certificate: a priority date of June 30, 1965; a quantity of 0.014 cfs, 5 acre-feet per year and a source of two unnamed springs located in Spring Lot C and Park Lot A, both within the Plat of Liberty Mountain No. 1, Section 18, T. 21 N., R. 18 E.W.M.

Liberty now asks for a domestic right based upon a patent issued to John A Nicholson with a priority date of October 22, 1915. They provided testimony that Mr. Nicholson may have been on the property as early as 1911. Liberty's arguments were not well synthesized, but it seems to assert that language regarding water rights in the federal patent provides the property some sort of federal right that passed with the property. It asks for a substantially higher quantity – 0.0775 cfs and 27.5 acre-feet per year through diversions from eight unnamed springs.

The Court is unaware of any federal reserved water right that attaches to federal patents – rather what Liberty refers to is standard patent language and would, in fact, be directed at some other entity that might have developed a water right pursuant to state law that crossed the property now owned by Liberty. Thus any right that Liberty's predecessor might have perfected would need to conform to state law. RCW 90.14 is the applicable state law and to preserve a right for a cabin constructed by Nicholson prior to 1917 a claim pursuant to that statute must have been filed with Ecology. Robert and Afton Langhurst filed WRC 145945 on June 17, 1974 and did so on the so-called short form, which applies to very small quantities of water. See RCW 90.14.051; RCW

[2] Liberty Mountain also requested a change in the point of contact which the Court has noted and utilized.

90.44.050 (exempting from permit requirements groundwater withdrawals under 5,000 gallons per day). Liberty attempted at the hearing to link this 90.14 claim with the original Nicholson cabin. The deed attached to the short form provides the following property description – "Lot 16 Liberty Mountain Unit 1, as per plat thereof recorded in Book 4 of Plats, Page 34, of records of the Kittitas County Auditor." Lot 16 lies within Section 18, T. 21 N., R. 18 E.W.M. The claim also indicates a use of 10 gallons per minute, 1 acre-foot per year from Ryan Creek and springs. The Langhursts used the water for domestic purposes including irrigation of lawn and garden.

This decision hinges on the connection between the historical use of water at the location of the Nicholson cabin and the right claimed by the Langhursts in the WRC Claim No. 145945. Failure to substantially comply with the claim requirements of RCW 90.14 results in the relinquishment of any right. RCW 90.14.071. The RCW 90.14 claim form would be the maximum extent of the right and Liberty's request far exceeds the amount set forth in the claim.

Although some evidence was produced regarding the historic and continued use of water at the original Nicholson cabin, the connection between the use and the RCW 90.14 claim filed by the Langhursts is too vague to allow the Court to confirm a right. Further, there is some question regarding the relationship between the certificate Ecology issued to Liberty Mountain and any right that might have been perfected by Nicholson and his successors. Liberty Mountain's exception is therefore DENIED and their right shall remain as quantified in the Report of Referee.

## III. CONCLUSION

The Court ORDERS that the claims addressed in this Opinion are modified to reflect the Court's findings. The Court further ORDERS that those decisions be included in the Referee's Schedule of Rights set forth in the Second Supplemental Report. This Memorandum Opinion and Order resolves the exceptions to the Second Supplemental Report. Subbasin 4 shall therefore proceed to Conditional Final Order as set forth in the Proposed Conditional Final Order accompanying this Opinion. A Notice of Entry is also included.

Dated this 8th day of October, 2002.

Sidney Ottem, Court Commissioner