

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

IN THE MATTER OF THE DETERMINATION
OF THE RIGHTS TO THE USE OF THE
SURFACE WATERS OF THE YAKIMA RIVER
DRAINAGE BASIN, IN ACCORDANCE WITH
THE PROVISIONS OF CHAPTER 90.03,
REVISED CODE OF WASHINGTON

THE STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

JAMES J. ACQUAVELLA, et al.,

Defendants.

NO. 77-2-01484-5

MEMORANDUM OPINION
AND ORDER
RE: KAYSER RANCH
MOTION FOR REVISION
COURT CLAIM NO. 00991
SUBBASIN NO. 9
WILSON-NANEUM

I. Procedure and History

Hearings for Subbasin No. 9 began several years ago resulting in two Reports of Referee and two Memorandum Opinions by this Court. Following extensive motions, hearings and testimony, Court Commissioner Ottem on April 17, 2006, signed a Conditional Final Order (CFO) for Subbasin No. 9 granting Stokes' and Jenkins' exceptions, which resulted in denying Kayser Ranch (Kayser) the Olding/Galvin right. He also reduced Kayser's Naneum Creek water right by one-half effective July 1 of each year.

Kayser timely filed its motion for revision on April 26, 2006 contending that it should be awarded an 1872 Olding/Galvin water right and the right to divert that water at its chosen point of diversion. The Olding/Galvin water right was quantified in the **Ferguson** Decree for the diversion of 4.8 cfs in May and June, 2.4 cfs in April and July 1 through

1 October 15. The Referee determined this was sufficient water to irrigate 240
2 acres and that annually a maximum of 1200 acre-feet per year could be used.
3 Kayser further argues that the Naneum Creek water should not be reduced by
4 one-half on July 1 of each year.

5 Kayser claims that the Court should accept the Referee's recommendation
6 regarding its claimed water rights in Subbasin No. 9. The Court notes that
7 in his Supplemental Report, the Referee reduced the recommendation to 3.6 cfs
8 in May and June, 1.8 cfs in April and July 1 through October 15, for
9 irrigation of 180 acres and stock water. Subsequently, the Court in its
10 June 15, 2005, *Memorandum Opinion and Order Re: Objections to the Proposed*
11 *Conditional Final Order*, concluded that the right Kayser's predecessor
12 purchased from Olding/Galvin is 4.8 cfs in May and June and 2.4 cfs in April
13 and July 1 through October 15.

14 Stokes and Jenkins excepted to the recommendation in the Supplemental
15 Report of Referee. They argue collateral estoppel, contending that earlier
16 cases permanently prohibited diversion from Wilson and Naneum creeks to the
17 Adams' and their successors' property.

18 Kayser responds contending that Stokes' and Jenkins' exceptions should
19 have been denied under the doctrine of laches. It further argues that
20 collateral estoppel is inapplicable.

21 In 1911 Olding, Galvin and Wager agreed to sell Naneum Creek water
22 rights to Adams (Kayser's predecessor). Transfer and diversion of the water
23 was to occur on completion of the Kitittas Reclamation District (KRD) High
24 Line canal. In 1920 Adams released Wager from the duty to sell pursuant to
25 the 1911 agreement. The Olding-Galvin-Adams agreement was finalized in 1927
with the signing of a satisfaction of agreement.

1 Upon completion of the High Line canal in 1931, Adams began diversion
2 of the water purchased from Olding and Galvin. Earlier (1928) Adams had
3 leased acreage from Sander with Wilson Creek water rights. The state
4 hydraulics supervisor issued a temporary permit allowing Adams to divert
5 Sander water from Wilson Creek into the Adams ditch at a location above the
6 Haberman point of diversion. Haberman is a predecessor to Jenkins.

7 Upon diversion of the water, Haberman sued Sander and Adams, claiming
8 the Adams diversion of Sander water interfered with his ability to divert the
9 water to which he was entitled, causing substantial damage. (**Haberman v.**
10 **Sander**, 166 Wash. 453 (1932) [**Haberman**]) The court held the permit
11 ineffective because the change in point of diversion resulted in detriment to
12 Haberman's existing rights and permanently enjoined the diversion from Wilson
13 Creek into the Adams ditch.

14 At the same time that **Haberman** was decided, the Court also decided
15 **Lawrence v. Sander**, 166 Wash. 703 (1932) [**Lawrence**]. Although eighteen cases
16 were consolidated for trial, **Haberman** was not consolidated with the others on
17 appeal. All plaintiffs owned or had an interest in lands on Wilson creek
18 above Sander and below the Adams ditch. In a one page opinion the court
19 affirmed granting of nominal damages, costs and a permanent injunction.

20 Three years later, **Lawrence v. Adams**, 180 Wash. 696 (1935) was decided.
21 The only material distinction between **Haberman**, **Lawrence v. Sander** and
22 **Lawrence v. Adams** was diversion of water from Naneum ("Nanum" in the opinion)
23 Creek; not Wilson Creek. Because "(n)o new question or different principle
24 of law (was) presented" (page 698), the Court found **Haberman** and **Lawrence**
25 controlling and upheld the trial court's finding of material damage to
plaintiffs and affirmed the permanent injunction.

1 The parties here briefed and argued two central legal issues:
2 collateral estoppel and laches. Kayser argues that Stokes, Jenkins and their
3 predecessors had 70 years to object but did not. Consequently, they should
4 be barred from objecting to Kayser's continued diversion of Olding and Galvin
5 water from the upstream point.

6 Stokes and Jenkins respond claiming that they objected at the first
7 opportunity to do so. They further plead res judicata and collateral
8 estoppel arguing that the Supreme Court permanently prohibited Adams and all
9 subsequent owners from diverting Naneum Creek water, which would include
10 Olding/Galvin water, at any upstream point. To allow them to do so now would
11 be in direct violation of permanent injunctions.

12 Kayser responds claiming that Stokes and Jenkins failed to prove two of
13 the four required elements of collateral estoppel. Kayser argues
14 application of the doctrine will work a substantial injustice on it, and
15 identity of issues is lacking.

16 II. Decision

17 Did Adams obtain a water right in the purchase agreement with
18 Olding/Galvin?

19 Yes. Adams purchased a right with a June 30, 1872 priority date.
20 Although the 1911 agreement contained conditions that would occur after the
21 effective date of the Surface Water Code, now RCW Chapter 90.03, it was not
22 necessary to comply with those statutory requirements.

23 Was Adams' Olding and Galvin water right transferred to Kayser?

24 Yes. The record establishes with ownership of the former Adams land,
25 Kayser acquired the water right that Adams earlier obtained from
Olding/Galvin.

1 Did both Adams and Kayser make beneficial use of the Olding/Galvin
water?

2 Yes. The evidence preponderates in favor of Kayser having put the water
3 to beneficial use.

4 There is conflicting evidence on whether Adams and Kayser diverted only
5 flood water or other water and beneficially applied it to their lands. Some
6 witnesses testified that Adams and Kayser diverted flood water, but when they
7 tried to divert water later in the year, they were prohibited from doing so
8 by other users. Every time they tried to restart the flow, it would be shut
9 off.

10 Others testified that Adams and Kayser not only diverted water, but
11 every time it was shut off they reopened the ditch. The water was then used
12 to irrigate their crops. They testified that crops were consistently grown
13 and harvested on lands irrigated with Olding/Galvin water through the Adams
14 ditch.

15 While agreeing that Kayser may have diverted flood water early in the
16 year, Stokes and Jenkins deny that Kayser ever diverted Olding/Galvin water.
17 They emphasize that no claim was ever made to Olding/Galvin water by Kayser.
18 until this adjudication was filed. They also claim that no beneficial use
19 was made by Kayser principally because whenever Kayser tried to divert other
20 than flood water, the other users consistently shut off their attempts.

21 The more convincing testimony is that Adams and Kayser not only used
22 early season flood water, but they also diverted water during the irrigation
23 season. Moreover, whenever someone shut off the water, they reopened the
24 ditch and beneficially applied it to their properties using the water to
25 irrigate crops.

1 Should the Olding/Galvin water right have a priority date of June 30,
2 1872 for the amount determined by the Referee?

3 The evidence establishes a June 30, 1872 priority date. There is no
4 evidence indicating that the Olding/Galvin priority date ever changed. It
5 was transferred to Adams and Kayser with the amount being that determined
6 initially by the Referee.

7 Should the Court authorize Kayser to divert the Olding/Galvin water at
8 any point upstream from the original Olding/Galvin point of diversion?

9 **Primary Issue.**

10 Whether Kayser should be authorized to divert Olding/Galvin water from
11 a point upstream from the original Olding/Galvin point of diversion. Although
12 it is the Court's opinion that resolution of the issue depends on whether the
13 injunctions continue to prohibit diversion, the Court will address collateral
14 estoppel and laches.

15 **Collateral estoppel.**

16 Application of this doctrine precludes Kayser from obtaining the relief
17 requested. The issue is identical, final judgments were entered, there is
18 privity and no injustice results to Kayser.

19 Although **Lawrence** involved a Naneum riparian landowner enjoining use of
20 Naneum water by a non-riparian owner, and **Haberman** a Wilson riparian
21 landowner enjoining use of Wilson water by a non-riparian owner, the issue
22 was whether diversion from a point upstream from the original point of
23 diversion should be allowed. The issue here is the same: Whether Kayser
24 should be allowed to divert water from a point upstream from the original
25 Olding/Galvin point of diversion.

1 The Supreme Court rendered final judgments on the merits. It affirmed
2 the injunctions permanently prohibiting upstream diversion, and they remain
3 in effect.

4 Kayser was not a party to the cases, but its predecessor was and had an
5 opportunity to litigate the issue. There is privity.

6 Kayser has not proven a resulting injustice. It argues dramatic
7 lessening of the value of its property and destruction of a legitimate Naneum
8 water right by Stokes and Jenkins who are owners riparian to Wilson Creek;
9 not Naneum Creek. However, the Court, not Stokes and Jenkins, prohibited
10 diversion from an upstream point after determining that moving the diversion
11 results in detriment to other rights owners. If Kayser has suffered, or will
12 continue to suffer, it is because Kayser has chosen to proceed with the
13 upstream diversion in spite of injunctions perpetually enjoining its
14 predecessor and all persons claiming under them from diverting water at a
point upstream of the original point of diversion.

15 **Laches.**

16 Laches is based on principles of equitable estoppel. It may apply if a
17 party knows or has reason to know of facts giving him or her cause to make a
18 claim against another party and unreasonably delays, to the detriment of the
19 other party, in asserting the claim. To allow the person to enforce the right
20 under the changed circumstances would result in an inequity to the other
21 party.

22 Kayser bears the burden of proving its applicability. Kayser has failed
23 to do so. The evidence does not support Kayser's claim that Stokes and
24 Jenkins and their predecessors knew or had reasonable opportunity to discover
25 that Adams and his successors were asserting the right to divert
Olding/Galvin water from the upstream location. They did not know until

1 notified of Kayser's claim in this case. Upon receiving notice they timely
2 objected. Although Adams and Kayser diverted water and applied it to their
3 property, those acts alone are insufficient notice to others that a right is
4 being claimed. Moreover, the upstream diversions are prohibited by the
5 injunctions.

6 **Present effectiveness of injunctions.**

7 Although the injunctions are permanent (in perpetuity), that does not
8 mean that subsequent, substantial changes in circumstances established by
9 credible evidence cannot eliminate the need for them. Based on the then
10 existing facts, both the trial court and Supreme Court concluded that moving
11 a diversion upstream harms downstream users. Adams and his successors
12 (Kayser) were permanently prohibited from diverting Olding/Galvin water at an
13 upstream point.

14 The burden is on Kayser to prove the reasons for granting the
15 injunctions no longer exist, and they should be terminated. If the reasons
16 for the issuance of the injunctions still exist, whether Adams and Kayser
17 continuously diverted water upstream for years, is of no help to them. Under
18 those circumstances, the diversion remains prohibited under the prior cases
19 and cannot be made lawful by persisting in doing it.

20 The prior cases have not been overruled. The injunctions remain in
21 effect and prohibit the diversions sought by Kayser.

22 Even if Kayser's pleadings can be interpreted as asking for termination
23 of the injunctions, the evidence does not support its position. There is no
24 credible evidence that upstream diversion will not be harmful to downstream
25 users.

1 Reduction of Naneum Creek diversions by one-half

2 James Ferguson vs. The United States National Bank of Portland, Oregon
3 et al, (Ferguson) was a 1901 Kittitas County adjudication of Naneum Creek.
4 Kayser's predecessors were parties to that case. Pursuant to Ferguson, water
5 rights for use of Naneum Creek water were reduced by one-half on July 1 of
6 each year. Kayser claims it is inequitable to continue that reduction
7 because Naneum contributes 80 percent of the water to the Wilson-Naneum
8 system, and water rights on Wilson Creek are not reduced, although it only
9 contributes 20 percent of the water. Kayser seeks remand to Commissioner
10 Ottem for further testimony and findings.

11 RCW 90.03.170 provides in part:

12 A final decree adjudicating rights or priorities, entered in any case
13 thereto and the extent of use so determined shall be prima facie
14 evidence of rights to the amount of water and priorities so fixed as
against any person not a party to said decree.

15 Ferguson adjudicated Naneum water rights. It reduces Naneum use by
16 one-half on July 1 of each year. Kayser's predecessor was a party. It is
17 conclusive as to Kayser's predecessor and to Kayser. Kayser's motion for
18 remand is denied. Ferguson applies. Res judicata bars Kayser from claiming
19 water rights not allowed by Ferguson. Kayser's Naneum water rights are
20 reduced by one-half on July 1 of each year.

21 **Conclusion**

22 1. Point of diversion.

23 Although the Olding/Galvin water right is to be confirmed to Kayser, a
24 point of diversion, other than at the original point cannot be allowed. In
25 purchasing the Olding/Galvin right Adams took a chance he would be allowed to

1 transfer that water to his land and divert at an upstream point. However,
2 court orders prohibited him from doing so.

3 Adams purchased a water right with a point of diversion. That point of
4 diversion was a ditch that provided water for the Olding/Galvin lands about
5 three miles below the Adams land. Adams unsuccessfully attempted to transfer
6 other water rights upstream to the point of diversion for his land. Kayser
7 owns the Olding/Galvin water right. Kayser attempted to maintain the Adam's
8 point of diversion, but that use cannot be authorized. Whether Kayser has
9 access to the original point of diversion is not presently at issue.
10 Nevertheless, Kayser should not be denied ownership of what may be a valuable
11 asset, the confirmed water right.

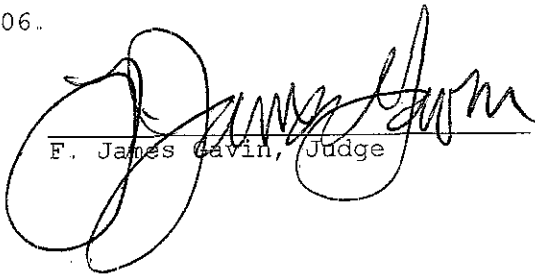
12 Place of use.

13 When Adams purchased the right the place of use was Olding/Galvin lands
14 accessible by a ditch. Neither Adams nor Kayser purchased those lands and
15 did not irrigate them. Instead they diverted water at an upstream point and
16 irrigated their own lands. To establish the Olding/Galvin lands as the
17 places of use of this right requires ignoring the beneficial use to which
18 Adams and Kayser put the water on their lands. The only reasonable place of
19 use is the land irrigated by Adams and then Kayser.

20 The Court confirms the water right to Kayser with a June 30, 1872
21 priority date for the diversion of 4.8 cfs in May and June and 2.4 cfs in
22 April and from July 1 to October 15, 1200 acre-feet per year for the
23 irrigation of 240 acres and stock water at the original point of diversion,
24 approximately 1200 feet north and 1000 feet west of the center of Section 16,
25 in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 16, T. 18 N., R. 19 E.W.M. That is what Adams
purchased and transferred to Kayser. The place of use is 240 acres in the

1 SE $\frac{1}{4}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ of Section 34, the S $\frac{1}{2}$ S $\frac{1}{2}$ of Section 35, T. 19 N., R. 19 E.W.M.
2 the W $\frac{1}{2}$ NE $\frac{1}{4}$ and NW $\frac{1}{4}$ of Section 2, T. 18 N., R. 19 E.W.M., which is the Kayser
3 land that was owned by Adams when the water right was acquired. The Naneum
4 water is reduced by one-half on July 1 of each year.

5 Dated this 8 day of November, 2006..

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8 F. James Gavin, Judge
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