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,	No. 77-2-01484-5
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Plaintiff, vs. JAMES J. ACQUAVELLA, ET AL., Defendants	MEMORANDUM OPINION AND ORDER RE: OBJECTIONS TO PROPOSED CONDITIONAL FINAL ORDER SUBBASIN NO. 10 (KITTITAS)

I. INTRODUCTION

The Court entered a *Memorandum Opinion and Order Re: Exceptions to Supplemental Report of Referee Subbasin 10 (Kittitas)* on May 18, 2005 and distributed it, along with a Proposed Conditional Final Order for Subbasin No. 10 (CFO). The Court set August 11, 2005 as the date for entry of the CFO. Objections were filed by several parties and a hearing held on August 11, 2005. Additional hearings to address Sweet Grass Investments, LLC's motions were held on November 10, 2005, and June 8, 2006.

John Nylander, Claim No. 01445; Steve & Christine Rosbach, Claim No. 00467

Both Nylander and the Rosbachs object to the quantity of water awarded for use from Cooke Creek. The objections suggest the Court relied primarily on the earlier Cooke Creek adjudication, *State of Washington v. Anderson,* in determining the quantity to be authorized. However, the Nylanders submitted the complaint filed in *Ferguson, Morrison and Gore v. J.C. Sterling and W. T. Montgomery (Sterling).* The complaint provides convincing evidence of the quantity of water used on some of the Nylander property and on neighboring lands in the immediate area at the time water rights were established. This evidence was utilized to determine the quantity of water confirmed. The Nylander/Rosbach objections are DENIED.

Betty Dodge and Estate of Gerald Dodge, Court Claim No. 00191, (A)06383

Dodge also objects to the quantity of water award and, like Nylander and Rosbach, argues *Anderson* does not control. Dodge also points to declarations from long-time area

landowners that attest to the Dodge family irrigating the land in the same manner as it had historically been irrigated. However, the declarations do not address quantity of water. The land could be consistently irrigated in the same manner but still reflect differences in the quantity used. Dodge also points to a declaration that states Cooke Creek is dammed with a manure dam to divert all the water. They suggest this shows more water is being diverted than was confirmed by the Court. The Court does not agree. Damming of a creek is no indication of the actual quantity of water being diverted. In fact, damming the creek could be construed as a use of all available water and an indication of low flow in the creek. The only historic water use evidence in the immediate area of the Dodge property is contained in the complaints filed in *Sterling,* which the Court finds convincing. The Court **DENIES** the water duty objection.

The Court had also requested information about the instantaneous quantity of water diverted for stock watering outside the irrigation season. The evidence showed 4 acre-feet per year was used, but there was no evidence of the quantity of water being diverted. Dodge responded that 0.02 cubic foot per second is an adequate instantaneous quantity for this purpose. The Court will modify the rights confirmed to Dodge in its May 18, 2005, *Memorandum Opinion* to allow the diversion of a maximum of 0.02 cubic foot per second, 4 acre-feet per year for stock watering. The annual quantity will be divided proportionately between the four water rights previously confirmed and the rights will contain a limitation on use provision that the instantaneous quantity authorized for stock watering is not additive.

Palmer and Shirley Burris, Court Claim No. 00900; Thomas J. Ringer, Court Claim No. 01744; Thomas Nisbet, Court Claim No. 00422

These claimants took exception to the season of use set by the Referee for the water rights confirmed in the Supplemental Report. Additional exceptions by Mr. Nisbet are addressed below. The Referee recommended rights with a season of use that ends August 15. The Referee relied on *Bull v. Meehan*, the case also used by the claimants to support their position that water rights had been established for their lands. All three claimants are successors to the plaintiff in that case, Walter Bull. The case was settled pursuant to an October 1886 stipulation signed by the plaintiff, defendants and other water users on the creek not party to the case.

Interpretation of that stipulation is at issue. A portion of the stipulation contains a grading system that addresses how rights will be reduced based on the flow in the creek. Additionally, a paragraph provides "that no water shall be used for irrigating purposes after the 15th day of

August of each year and all water after that date shall be turned into said creek for stock purposes." The Referee concluded this paragraph was not part of the grading to which Bull was exempt and recommended the season of use for irrigation end on August 15. The Court initially agreed. Having reviewed the stipulation and the parties' arguments, the Court now reaches a different conclusion. *Bull v. Meehan* identified water rights for dozens of landowners on Coleman Creek, however, only a handful of parties to this case have used that case to support their claim. The Court believes that has resulted in the inability to identify all of the parties to *Bull v Meehan* and, therefore, not having the shortened season consistently applied. Thus, the Court will amend the irrigation season for Burris, Ringer, Nisbet and Helen Clerf to end on October 15, consistent with other water rights on Coleman Creek.

Robert and Sheree Clerf and Craig Clerf, Court Claims No. 00476, 00677, 00407

The Clerf family took exception to the Court's finding regarding the use of water from Warm Springs Creek and Caribou Creek. The Clerfs present three main issues: 1) What is the amount of water used? According to the Clerfs, the total amount of water used is 4.5 cfs plus the wells (which the Court found to be groundwater) and that those rights by virtue of due diligence relate back to the original appropriation. 2) The groundwater right and the surface water right were used on the same land from 1917 to 1953. The groundwater portion was then transferred to the City of Kittitas. Did those lands have to be fallowed in return for the transfer of the groundwater right or are these rights completely separate and could be moved around separately. 3) If water is not used on a specific tract and leaves that property and original watercourse, can the user divert it downstream from another water course for use on different property? Related to this issue is whether the Court can grant a right in addition to that allowed by *Clerf v. Scammon*.

The evidence supports a conclusion John Clerf, Robert Clerf's grandfather, developed Warm Springs and the creek that flows from the springs in the late 1800's and early 1900's. The flow was initially 54 inches, but through the efforts of Mr. Clerf, the flow increased to 124 inches (2.48 cfs) by 1907 when Mr. Clerf died. Following the death of John Clerf, his widow Mary Clerf and her sons continued work from 1908 to 1915 by further digging into the hill to increase the surface flow to what is now estimated to be over 5 cfs. DE – 1835 at page 3, lines 24. This water was appropriated and used to irrigate Clerf lands in Section 6, T. 17 N., R. 20 E.W.M. and Section 1, T. 17 N., R. 19 E.W.M. (as diverted from Caribou Creek). See July 8, 2004 RP at page 118, lines 18-21. In 1915 -16, Mr. Clerf's widow and sons constructed

three uncapped artesian wells near Warm Springs that flowed freely into Warm Springs Creek. *Id.* The artesian wells added 1.5 to 1.67 cfs flow to the surface waters of the creek over and above the estimated 5 cfs from the developed springs. Id. The Clerf's diversion from Warm Springs Creek has always been downstream of where the wells were constructed, resulting in the wells contributing to the water diverted from the creek.

No other efforts to improve the flow in Warm Springs Creek occurred after 1916. As the Kittitas Reclamation District (KRD) approached completion in 1930, Mary Clerf (John's widow) petitioned KRD to have certain lands excluded from service because she had an adequate water supply. The lands she sought to exclude were the SE¼NE¼, NE¼SE¼, and SE¼SE¼ of Section 1, T. 17 N., R. 19 E.W.M. and the W½SW¼NW¼ and W½NE¼SW¼ of Section 6, T. 17 N., R. 20 E.W.M. The testimony in support of this request and minutes of the KRD Board of Director's meetings (see attachment S to March 8, 2002, exceptions [Doc # 15693]) indicate these lands were irrigated with Warm Springs' water. Mrs. Clerf's request was granted and the lands excluded. The claimant is asserting a right to irrigate with Warm Springs' water land in Section 6 that differs from those described in the request for exclusion.

The larger challenge is determining what portion of the irrigation right remains appurtenant to the Clerf land. The Clerfs contend that by 1916 the flow in Warm Springs Creek was increased to approximately 7 cfs through the family's efforts and that is the extent of the water right established. In December 2001, long after the wells were capped, Robert Clerf measured the flow in the creek at 4.18 cfs and suggests this is likely a conservative measurement due to the cold weather. They seek a right for 4.5 cfs for the irrigation of 215 acres. The Court previously determined the record showed a capacity and use of 2.48 cfs which misconstrued the evidence and now finds that prior to 1916, the Clerf family had increased the flow from Warm Springs to approximately 5 cfs. Robert Bentley, Ph.D., indicates the increased flow from Warm Springs is not a reflection of added water from KRD. The Court will consider the additional water in analyzing the Clerf's claims.

The Clerfs assert a right to irrigate 95 acres within the E½NW¼ and N½NE¼ of Section 6, with a water duty of 8.47 acre-feet per year per acre. The Clerf claim and all the documents in the files suggest they own the NE¼NW¼, but not the SE¼NW¼, of Section 6, leading the Court to conclude they are asserting a right to irrigate lands in the NE¼NW¼ and N½NE¼ of Section 6. No RCW 90.14 claim for the lands in the N½NE¼ of Section 6 was

located. A review of the Referee reports and previous exceptions of the claimants reveal the 2004 exceptions are the first time a claim was made for irrigating lands in the N½NE¼ of Section 6 and compliance with RCW 90.14 had not been previously addressed. Many of the documents related to settlement of the entire N½N½ of Section 6, however, the testimony and evidence of water use all related to lands in the W½ of Section 6, except for Mary Clerf's efforts to exclude land from KRD, which also mentioned the SW¼NE¼ of Section 6 (lands for which a right is not being asserted). Lacking an RCW 90.14 claim, the Court cannot confirm a right for any lands in the N½NE¼ of Section 6. The State's Exhibit Map does not show any irrigated land in this area. However, that may owe to the land not being included in the original Clerf family claim.

The Clerfs also ask the Court to award a Caribou Creek right to irrigate 80 acres in the E½SW¼ of Section 1, T. 17 N., R. 19 E.W.M. The Referee found, and the Court confirmed, that a water right to irrigate 20 acres was the extent of the right authorized by the 1911 *Clerf v. Scammon* decree. The Clerfs argue the flow in Caribou Creek increased after *Clerf v. Scammon* due to the family's efforts and they have a right to use the additional water. The increased flow is from the same artesian wells discussed above. When the Clerfs are not diverting water from Warm Springs Creek, it flows into Caribou Creek and is available for them to divert and use on their lands in the SW¼ of Section 1. Robert Clerf asserts that the meager award from *Clerf* was instrumental in the family's efforts to create an additional supply by 1916. See April 29, 2004 Declaration at p. 8, lines 4-9. They also request the Court to find that increased flow created by development of the springs was theirs to use. *Churchill v. Rose,* 136 Cal. 576, 69 P. 416 (1902)

The Court generally agrees with the Clerfs with the following caveats. First, the decision in *Clerf v. Scammon* (an action brought by the Clerfs ironically) was a finding as to the uses of water of Caribou Creek as of 1911. As a result, this Court cannot find that the effort by the Clerfs was a continuation of a prior effort to irrigate the property in the E1/2SW1/4 of Section 1, but a new appropriation from Warm Springs to irrigate that land. Therefore, it carries a priority as of the date the appropriation was commenced (since Warm Springs is not riparian to the property), which appears to have been sometime in 1915 -1916. Declaration of Robert Clerf at page 8, line 3. The Court will use June 30, 1915.

Further, like all rights in this case, it is subject to regulation based on priority. This finding is supported by the Clerf's own expert. Even though the Clerfs argue they "created" the availability of the water, the Declaration of Robert Bentley supports a conclusion the ultimate

destination of the "created" water (underground water that is not capable of moving downward) was a streambed. The Clerfs forced that water to the surface more immediately than might naturally have occurred, however, that does not demonstrate the ground water would not ultimately flow into a stream. Indeed, the fact the water in its natural state flowed to the surface and into Warm Springs Creek and ultimately into Caribou Creek is supportive of this conclusion. Further, all the cases cited by the Clerfs appear to concern projects instituted by the federal government and pertain to the reverse movement of water from what would be a source of higher order (e.g. the Yakima River) to one of lower order that runs back into the original water source (e.g. Caribou Creek). This decision harmonizes the reality the Clerfs did not obtain the approval of the United States when it developed the water – water which in all likelihood was heading to a stream and therefore ultimately available for use by project users. See *Memorandum Opinion Re: Return Flow Exceptions of Harry Masterson*, dated July 16, 1996 and *Ranson v. City of Boulder*, 161 Colo. 478, 424 P. 2d 122 (1967) ("flowing water is presumed to find its way into a stream and the burden of proving otherwise rests upon the party claiming that such water is not tributary.") Therefore, when that water is needed to satisfy water rights with higher priority, such as the project uses of the federal government, the Clerfs will be required to abstain from using the water on the Section 1 property.

Second, the *Clerf v. Scammon* court also established the applicable water duty at that time, which is 0.01 cfs per acre. That finding is persuasive for other uses commenced in the area during that time frame. The Clerfs already had a right to irrigate 20 of the 80 acres in the E1/2SW1/4 of Section 1 and therefore obtained by virtue of this new appropriation the right to use Warm Springs Creek water for the remaining 60 acres. Therefore the Court will confirm a right to divert 0.60 cfs for the 60 acres. Accordingly, the right will be as follows:

Claimant Name:	Craig Clerf and Patricia Clerf
Court Claim No.:	00407
Source:	Warm Springs Creek (transported through Caribou Creek)
Use:	Irrigation of 60 acres and stockwater
Period of Use:	April 1 to October 31
Quantity:	0.60 cubic foot per second, 250.6 acre-feet
Priority Date:	June 30, 1915

Point of Diversion: 300 feet North and 1000 feet East from the center of Section 1, being within the SE¼SW¼NE¼ of Section 1, T. 17 N., R. 19 E.W.M.

Place of Use: E1/2SW1/4 of Section 1, T. 17 N., R. 19 E.W.M.

The third main issue presented by the Clerfs concerns the effect of the Certificate of Change entered in 1950s. In its Memorandum Opinion, at pages 21-22, the Court determined:

> The certificate of change states the water had been used for irrigation on a 120-acre area (the E½SE¼NE¼ and E½SE¼ of Section 1 and the W½SW¼NE¼ of Section 6). The claimant asserts the quantity transferred, 1.44 cfs, was inadequate to irrigate 120 acres and, therefore, only a portion of the water right appurtenant to that 120 acres was transferred, leaving 406 acre-feet per year still appurtenant to the land. The Court cannot agree. The Certificate of Change clearly states the purpose of use is being changed from irrigation of lands in the E½SE¼NE¼ and E½SE¼ of Section 1 and the W½SW¼NE¼ of Section 6 to municipal supply for the Town of Kittitas. It does not say that a new purpose of use is being added as the claimant contends. The change statute, RCW 90.03.380, did not allow for the addition of a new use to a water right until 2001 – it only allowed for the purpose of use to be changed. The claimant has cited no authority to support a conclusion that in 1953 it was possible to add a new purpose of use to an existing water right. At the time Mary Clerf petitioned to have lands excluded from KRD, the creek flow was augmented by the artesian wells. Thus, the 1930 statements that lands were irrigated from Warm Springs does not assist in knowing whether the source was the springs/creek or the artesian wells. The intent of the certificate of change, however, is clear – it was to <u>change</u> the purpose of use from irrigation on the described lands to municipal supply. As a result of the 1953 certificate of change, the Court finds the water right for irrigating lands in the E½SE¼NE¼ and E½SE¼ of Section 1 and the W½SW¼NE¼ of Section 6 was changed to municipal supply for the City of Kittitas and no right for those lands can be confirmed.

The Clerfs restate their position that only a portion of the right consistent with the flow from the wells was transferred, leaving the remainder of the water to be used on that property. They further contend that the common law of the period would allow such a transfer and without a statute to the contrary, they could transfer a portion of the water to the Town of Kittitas.

The Court stands by its ruling in the *Memorandum Opinion*. The persuasive point remains there was a statute that did not allow what the Clerfs argue happened – essentially that it was their intent was to *add* a purpose of use to the existing water right – at that time, the law only allowed a *change* of use. Concluding that the law in effect at the time of the transfer was different than it is today is supported by the fact the legislature saw fit in 1997 to modify the statute (RCW 90.03.380) to allow transfers that would result in adding uses, as the Clerfs assert

happened in the 1950s. In addition, the Certificate of Change states the water had been used to irrigate certain lands and lists all of the land and that the point of diversion, place of use and purpose of use were being *changed* – the Court cannot read into the certificate language that does not exist whereby the lands could continue to be irrigated. The exception is **DENIED**.

The Court also reaffirms the decision from the Memorandum Opinion in light of Ecology's clarification as to the annual quantity awarded to the Clerfs for the Caribou Creek water right described on page 319 of the Supplemental Report. The quantity authorized cannot be withdrawn during the described irrigation season. The Court reaffirms that line 16½ is modified to authorize the diversion of 0.20 cfs, 84.89 acre-feet per year.

G. D. Enterprises, NW, LP (formerly Flach), Court Claim No. 00683:

G. D. Enterprises, represented by Loren Kollmorgen, asked that the Court delay entry of the Conditional Final Order to allow them time to obtain a decision on the application for change they have filed. The Court granted that request. On January 5, 2006, Loren and Sheila Kollmorgen filed with the Court a letter along with a copy of the decision on their application (Doc # 19,247). The former owners of the property, the Flach family, had presented evidence to show in the 1920's a Cooke Creek water right, described in Certificate No. 186 from the *Anderson* case, had been purchased and from that point forward used on their land. However, the owner of the land at the time of the purchase did not seek approval for the change pursuant to the requirements of the Surface Water Code, now RCW 90.03. Therefore, the Referee was not able to confirm this water right for the former Flach land until compliance with RCW 90.03 had occurred. G. D. Enterprises followed up with this process after they purchased the land.

The Kittitas County Conservancy Board approved G. D. Enterprises' application to change the point of diversion and place of use under Certificate No. 186. Ecology modified this approval. The Court confirms a right consistent with the certificate as changed by the conservancy board and modified by Ecology. The certificate, with a priority date of 1878, authorizes the diversion of 0.70 cubic foot per second from Cooke Creek between April 15 and September 15 for irrigation of 35 acres. The authorization changed the point of diversion to two points, the first being N 87°46' 50" E 2755 feet thence N 0°2'20.76" E 1353 from the southwest corner of Section 7 and the second point is located N 87°46' 50" E 1805 feet thence N 0°10'29.85" feet E 2670 feet. For purposes of this case, the Court will describe point 1 as being 1520 feet north and 80 feet east of the south quarter corner of Section 7 being within the

NW¼SE¼ of Section 7 and point 2 as being 50 feet south and 850 feet west from the center of Section 7, being within the NE¼SW¼ of Section 7, all in T. 18 N., R. 20 E.W.M. The place of use has been changed to the following parcel of land located in Section 18, T. 18 N., R. 20 E.W.M.: Commencing at the northwest corner of Section 18, thence N 87°46'50" E 1829 feet to the true point of beginning; thence S 35°48'37" E 926 feet; thence S 1°52'04" E 114 feet to dry creek bed; thence southerly along the dry creek bed approximately 1794 feet to the south boundary of the SE¼NW¼ of Section 18; thence westerly along the south boundary to the southwest corner of the SW¼SE¼NW¼ of Section 18; thence north to the northwest corner of the NE¼NW¼ of Section 18; thence N 87°46'50" E to the true point of beginning; excepting there from the S½NW¼SE¼NW¼ and the SW¼SE¼NW¼ of Section 18.

There are several limitations on use that have been placed on the water right as a result of approval of the application for change. Therefore, the right will have the following provisions:

1. When frost is out of the ground before April 15, the period of use is modified to allow use of water as soon as frost is out of the ground and water can be beneficially used.

2. When surplus water is available in excess of that needed to satisfy all existing rights, an additional 0.70 cfs may be diverted. This water will normally be available approximately 30 days during the spring, which would result in up to 41.58 acre-feet per year being used in addition to that authorized herein.

3. Diversion under this authorization is limited to the availability of natural flow water in Cooke Creek at the historic point of diversion in the NW¼SW¼ of Section 1, T. 17 N., R. 19 E.W.M.

4. Each year, the applicant shall monitor snow water-equivalent (SWE) measurements every two weeks from the USGS Trough SNOTEL station. On May 15 of each year, the applicant shall submit such data and notify Ecology that diversions under this water right will be adjusted according to the following criteria:
   a. In a "dry" year characterized by a SWE less than or equal to the 90% exceedance on May 1, the season of use shall be curtailed on July 1.
   b. In a "below-average" year characterized by a SWE between the 90% and 50% exceedance on May 1, the season of use shall be curtailed on July 15.
   c. In all other years, the season of use shall be curtailed subject to water availability at the authorized point of diversion; except, however, that at all times this right is subject to the senior 0.25 cfs non-diversionary stock water and habitat flows, and the applicant may not divert water from Cooke Creek from the authorized point of diversion if such flows are not satisfied.

J. Wayne and Cindy L. McMeans, Court Claims No. 02165, 02166, 02167, and (A)5550:

The McMeans argue that after the *Clerf v. Scammon* court ruled their predecessor did not have a right to use Caribou Creek, a right under the Riparian Doctrine could still be established if beneficial use of water began by 1932. In light of *Abbott*, a riparian landowner can, theoretically, commence use of their right up to the end of 1932. However, statements in *Clerf* warrant a different outcome. First, it was the intent of the *Clerf* court to get all Caribou or Cherry Creek water users before it, "to the end that all rights to the use of the waters of said creek may be settled." (Emphasis added). Second, Paragraph V of the Decree states that certain defendants and interveners (including McMeans' predecessor) "are hereby restrained and **forever** enjoined from diverting any of the waters of said Caribou Creek." (Emphasis added). Finally, the Findings of Fact state "at no time after the first of April does "Caribou Creek" carry an amount in excess of the uses made and allowed to the plaintiff and the defendants and interveners." The McMeans have offered no clear evidence the land was irrigated between the *Clerf* decision in 1911 and December 31, 1932. Further, RCW 90.03.170 provides that decrees settling water rights entered prior to 1917 are conclusive among the parties thereto and prima facie evidence as against any person not a party to said decree. Finally, the United States withdrew the surface waters in the Yakima Basin as of May, 1905; although the Court has allowed rights to minor uses of water to survive that withdrawal, the irrigation of over 100 acres is not "minor." McMeans have not addressed the impact of the withdrawal nor have they presented anything to indicate the United States granted their predecessor an exemption.

The Court in 2005 granted the McMeans' request to allow sufficient time to appeal Ecology's denial of their claim amendment request. Over a year has elapsed since the McMeans indicated they were pursuing that appeal. Counsel agreed to submit to the Court copies of the PCHB appeal, along with any subsequent documents related to any Kittitas County Superior Court action, yet nothing has been filed since the August 2005 hearing, leading the Court to conclude the appeal was not pursued. The Court finds there is no valid right for the McMeans property in the SW¼ of Section 17, T. 19 N., R. 20 E.W.M. and therefore no reason to withhold entering the CFO for Subbasin No. 10. The Court herein **DENIES** the McMeans objection.

Jay and Christine Bloxham; Court Claims No. 01010 and 02088:

The Bloxhams filed an objection to the Court not confirming a water right for the portion of the land described in the two claims they now own, pointing out their land is included in the

place of use for Water Right Claim No. 152574 filed pursuant to RCW 90.14. They also filed the Declaration of Jay Bloxham, which states 10 acres have been consistently irrigated since they acquired the land and that Leland Orcutt confirmed his irrigation of 8 of the 10 acres now irrigated by the Bloxhams. The declaration was submitted in response to the finding there was no evidence of historic water use. "Historic water use" means uses initiated prior to the 1917 Water Code (non-riparian land requires use prior to 1917 and riparian land requires use prior to the end of 1932). The Bloxham declaration provides evidence of water use beginning in 1962 when Leland Orcutt acquired the property. There continues to be a lack of evidence of any beneficial use of water on the Bloxham property prior to 1962. Thus, the objection is **DENIED**.

Thomas J. Nisbet, Court Claim No. 00422

In addition to the irrigation season objection discussed on page 3, Nisbet objects to a right not being awarded for water use from Coleman Creek to irrigate land in the NW¼NE¼ of Section 29, T. 17 N., R. 19 E.W.M. Nisbet based his Coleman Creek claim on *Bull v. Meehan*, however, Bull did not own this land at the time of that dispute. Documents attached to the objection show Bull acquired the NW¼NE¼ of Section 29 shortly after the Findings of Fact was filed in that case (1887). It has been established Bull was irrigating almost 200 acres surrounding the NW¼NE¼ of Section 29 when he acquired this land, and Nisbet argues it is reasonable to conclude Bull would have extended the system to the 20 acres irrigated from Coleman Creek in the NW¼NE¼. However, Mr. Nisbet also seeks to have a right confirmed to irrigate all of the irrigated land in the NW¼NE¼ of Section 29 with water diverted from Cherry Creek. The Referee recommended in the Supplemental Report a right to irrigate 20 acres in the NW¼NE¼ of Section 29 with Cherry Creek. Mr. Nisbet now seeks a right to irrigate all of the NW¼NE¼ of Section 29 that lies north of Cherry Creek, which is 35.5 acres (more or less). The exception seeking a right to irrigate from Cherry Creek an additional 15.5 acres was apparently overlooked in the *Memorandum Opinion*. The Court has reviewed the evidence and argument for both exceptions. The Court believes the NW¼NE¼ of Section 29 was irrigated with water from Cherry Creek during the appropriate time frame for establishing a right under the Riparian Doctrine and amends the right described on page 357, lines 12 to 20, of the Supplemental Report to authorize the diversion from Cherry Creek of 0.71 cubic foot per second, 284 acre-feet per year for the irrigation of 35.5 acres and stock watering. All other aspects of the right remain unchanged. However, the evidence is less convincing for confirming a right to irrigate a

portion of that land with water from Coleman Creek. Although it is possible Bull may have extended his irrigation system to irrigate this land, there is no evidence this actually happened. Additionally, about the time Bull acquired this land he apparently came under financial difficulty and ultimately lost all of his land. It is just as possible that he was not financially in a position to develop any more land by the time he had title to the NW¼NE¼ of Section 29.

It is also noted that the Court had concluded in its *Memorandum Opinion* that the RCW 90.14 claims filed by Eric I. Moe claim rights to irrigate a total of 180 acres. The Court found substantial compliance allowing confirmation of a water right to irrigate 194.12 acres. The Court is not prepared to reach the same conclusion for irrigating 214.12 acres. Lacking evidence this land was irrigated with Coleman Creek water prior to 1917 and RCW 90.14 claims that do not support the assertion of a right to 214.12 acres, the Court will not confirm a right to use Coleman Creek water to irrigate the NW¼NE¼ of Section 29. This portion of the exception is **DENIED**.

Sweet Grass Investments, LLC, Court Claims No. 01041 and 01448

Sweet Grass noted the water right confirmed under Court Claim No. 01041 on page 40 of the Court's *Memorandum Opinion* did not contain a season of use. Consistent with other rights confirmed to Sweet Grass and other claimants in the area, the season of use shall be April 1 to October 15. Sweet Grass submitted to Ecology a request to Amend Water Right Claim (WRC) No. 137444 filed pursuant to RCW 90.14. Ecology granted a portion of the claim amendment and denied a portion. Sweet Grass appealed the denied portion to the Pollution Control Hearings Board. That appeal was ultimately settled prior to hearing. The only material part of the amendment that affects the right being confirmed is the number of acres authorized for irrigation. The Court in its *Memorandum Opinion* on page 40 confirmed a right to irrigate 80 acres – the number of acres identified on WRC No. 137444. The amendment increases the number of acres to 94. Therefore, the Court modifies the water right confirmed on page 40, lines 19 through 25 to authorize the diversion of 2.7 cfs, 799 acre-feet per year for the irrigation of 94 acres in that portion of the SE¼ of Section 29, T. 17 N., R. 19 E.W.M. lying north of Thrall Road.

Sweet Grass also seeks to have the Annine Sorenson Trust removed from the water right confirmed by the Referee in the Supplemental Report. A Motion was filed on September 20, 2006 and noted for hearing for October 12. However, at that hearing, Sweet Grass requested the

matter be continued and the Court granted the request. The Annine Sorenson Trust on October 6, 2006 filed a motion transferring its remaining interest in Court Claim No. 01448 to Dick and Wanda Robinson, resulting in the Court issuing an order of substitution. Subsequently the trust filed a second motion that substitutes Sweet Grass Investments for the trust. As a result of reviewing these motions, the Court concludes there is sufficient information in the record to show Sweet Grass is the sole owner of the land for which water rights have been confirmed under Court Claim No. 01448 and Sweet Grass Investments will be the sole name on the rights.

Sweet Grass informed the Court in June that it had filed with the Kittitas County Conservancy Board an application to change the point of diversion confirmed by the Court on page 39 of the *Memorandum Opinion* at lines 15 to 17. Sweet Grass asked that the CFO not be entered until after August to allow the conservancy board time to approve the application for change. The Court has not heard whether a decision has been made on that application. The Court has signed the CFO – if the point of diversion change is approved, the Court expects to receive a notice pursuant to the process set up in Pre-Trial Order No. 17.

The Court also entered a November 20, 2006 Order making clear that the only water rights confirmed under Court Claim No. 01448 are appurtenant to lands owned by Sweet Grass.

Department of Ecology Comments:

Ecology indicated which claim amendment decisions were appealed to the PCHB and are discussed above – it also noted Douglas Gibbs' appeal to the PCHB was dismissed. Ecology also asks the Court to correct /delete items related to Jacobs and Nisbet from the proposed CFO that are in fact not in the CFO. Ecology references pages from the *Memorandum Opinion*, however, its comments suggest they are in the CFO. Since they are not in the CFO, no further action is necessary. Lastly, Ecology states that as of June 15, 2005, it had no record of an application for change filing by the Flach family. As noted above, between June 15 and when Ecology filed its comments, G. D. Enterprises filed a change application mooting this comment.

Dated this 4th day of December, 2006.

Sidney P. Ottem, Court Commissioner