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, STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Plaintiff, vs. JAMES J. ACQUAVELLA, ET AL., Defendants	No. 77-2-01484-5 MEMORANDUM OPINION AND ORDER RE: EXCEPTIONS TO SUPPLEMENTAL REPORT OF REFEREE SUBBASIN 9 (WILSON-NANEUM)

I. INTRODUCTION

A number of exceptions were filed to the *Supplemental Report of Court for Subbasin 9* dated October 14, 2002 (Report). The Court entered an *Order Re. Remand of Certain Subbasin 9 Claims* on February 12, 2003. A hearing was held March 13, 2003 to consider the exceptions to the Report not remanded in the February 12, 2003 Order. All parties, along with the Department of Ecology appeared and participated in the hearing. The Court made a number of oral rulings that were ultimately included in an *Order on Exceptions Subbasin No. 9* dated August 14, 2003. Other exceptions were also addressed in the August 14, 2003 Order and those ruling will not be repeated herein. Additionally, after holding a hearing and taking testimony for the exceptions remanded by this Court but prior to issuing a Second Supplemental Report, Referee Douglas Clausing retired and Ecology has advised that it will not fill the position. Therefore, this Memorandum Opinion and Order addresses the remaining exceptions retained by this Court (or resolved as set forth in the August 14, 2003 Order) as well as those remanded to the Referee. The Court, having been fully advised by the parties through written exceptions and oral argument, makes the following rulings, as set forth below in alphabetical order, in regard to the Subbasin 9 exceptions.

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II. ANALYSIS

Court Claim No. 02297 – Joseph Antonich

The Referee originally recommended a water right be confirmed under Court Claim No 02297 for the diversion of 3.2 cubic feet per second (cfs), 775 acre-feet per year from Naneum Creek. Ecology took exception to the instantaneous quantity recommended for confirmation in the first Report of Referee. The water right claim filed by a prior owner of the land pursuant to RCW 90.14 asserted a right to divert 2.0 cfs. Ecology asked that the water right be limited to the instantaneous quantity described in Water Right Claim No. 006546. Mr. Antonich did not respond to the exception, nor did he appear to oppose it at the exception hearing held on March 8, 2001. Therefore, the Court granted the exception. The Supplemental Report of Referee for Subbasin No. 9 incorporated the Court's ruling and the quantity of water authorized for use was reduced to 2.0 cfs, 775 acre-feet per year. After the supplemental report was issued, Ecology took exception to the annual quantity of water that was recommended. A continuous diversion of 2.0 cfs would result in only 677 acre-feet per year being diverted from the creek during the irrigation season. Mr. Antonich responded to this exception with a letter to the Court. He has filed a request with Ecology to amend the quantity of water claimed under Water Right Claim No. 006546. The Court remanded the claim to the Referee to consider Ecology's decision on the request to amend the claim.

Mr. Antonich appeared at the second supplemental hearing held on September 24, 2003. At that time Ecology had not made a decision on his request to amend Water Right Claim No. 006546. Exhibit No. DE-2092 was reserved for production of the decision, and there was no objection to that decision as long as a copy of the letter or order detailing the decision is part of the exhibit along with the actual decision. At this time, the exhibit has not been submitted. Until Ecology approves the request to amend the water right claim, the Court will not change the recommend quantities of water. To expedite the conclusion of this adjudication, the Court requests that Ecology act upon Mr. Antonich's request prior to entry of the Conditional Final Order.

Court Claim No. 01454 – Jay Aimone
Court Claim No. 00899 – Ruth Ann and Maurice Olney

The Court allowed the late exceptions of both parties and the claims were remanded to the Referee to take additional testimony. Cliff Gage, Mrs. Olney's father and former owner of their land, and Jay Aimone testified at the second supplemental hearing.

James Ferguson owned the property now owned by claimants at the time of the *Ferguson* decree and a portion of the Ferguson water right is appurtenant to their land. Mr. Aimone and the Olneys are taking exception to the point of diversion that was authorized in the water right recommended for confirmation. The point of diversion that was authorized is in the SE¼SW¼ of Section 16, T. 18 N., R. 19 E.W.M. The land that is irrigated lies in the S½NW¼ of Section 4, T. 17 N., R. 19 E.W.M., approximately three miles downstream from the point of diversion. The Olneys contend this diversion puts water into a ditch that has never served their property and is not capable of delivering Naneum Creek water to their land by gravity flow. Mr. Aimone takes the same position for most of his land, although he does own a 5-acre parcel that is irrigated with water from the Ferguson Ditch with its diversion in the SE¼SW¼ of Section 16. The Olneys' land and most of Mr. Aimone's land is irrigated from a diversion that is located approximately 1400 feet south and 1000 feet east of the northwest corner of Section 4, being in the SW¼NW¼ of Section 4.

The point of diversion that was recommended for the water rights in question is from a Certificate of Change, recorded in Volume 2, Page 882. Both the Olneys and Mr. Aimone have put in the record the file compiled by Ecology to document the point of diversion change. The application for change was filed in June of 1965 and sought to change the point of diversion for 3.2 cfs from Naneum Creek. The application is signed by Ben Ferguson, Mrs. Dan Bates, George Ferguson, Wally Minielly, Bessie Phelps, David Baker and Chet Morrison. In the file is a letter dated November 1965 that identifies the lands owned by each of the signatories on the application. Wally Minielly owned the land now owned by the Olneys and Ben Ferguson owned the land now owned by Mr. Aimone. The application proposes to change the diversion from a point in the NE¼SW¼ of Section 16 to a point in the SE¼SW¼ of Section 16, T. 18 N., R. 19 E.W.M. With the application is a hand drawn map, on which someone drew Naneum Creek with the P.O.D. under decree marked (presumedly the existing P.O.D.) and a ditch running south from the diversion point. The East Fork Naneum Creek is also drawn on the map and just above the south quarter corner an "x" marks P.O.D. under petition for change. Someone wrote on the map that the original ditch through the SW¼ of Section 16 has been destroyed through a land leveling program by the landowner. Water can be diverted at the proposed location in the SE¼SW¼ by construction of 250 feet of ditch. Water is carried in the creek channel some 2 miles to point of use

Mr. Aimone, who is Ben Ferguson's great-grandson, testified that both of the diversions identified on the map served the Ferguson Ditch, which has always been used to irrigate the portion

of the Ferguson land that is adjacent to the Ferguson/Naneum Road. A 5-acre portion of his land, along with land owned by his cousin and aunt (Terry Powers and Gwen Cooke) is still irrigated from the Ferguson Ditch. Ferguson Ditch parallels Ferguson/Naneum Road just to the east of his land. His understanding from talking with his family was that a portion of the ditch was destroyed in the 1960's and that the second diversion has since been used to divert water from a branch of Naneum Creek into the Ferguson Ditch. The diverted water was not put back into the creek as suggested on the map, but was put into Ferguson Ditch. Mr. Aimone emphasized that water from Ferguson Ditch could not get to most of his land or that owned by the Olneys by gravity flow. The Conner property, immediately below the Olney land is in the same situation; however, they did not take exception and, according to Mr. Aimone, have filed an application for change with Ecology.

Neither Mr. Gage nor Mr. Aimone could explain why all of the successors to the James Ferguson water right signed the application for change or why the application indicated the entire 3.2 cfs water right was to be changed. During the filing period for the Claims Registration Act, RCW 90.14, Wally Minielly filed Water Right Claim (WRC) No. 129604 for his property. It describes a point of diversion in the SW¼NW¼ of Section 4, at the location of the dam that diverts water to his property today. However, filing of this water right claim was not required. Section 90.14.041 required the filing of water right claim forms for water rights which are not based on the authority of a permit or certificate issued by Ecology or one of its predecessors. A certificate of change had issued, thereby making it unnecessary to file a claim. During the filing period, Mr. Aimone's land was still owned by Ben Ferguson. He filed WRC No. 062609, which describes a point of diversion in the SE¼SW¼ of Section 16, which is the appropriate point of diversion into Ferguson Ditch. Attached to the claim form is the legal description for the land on which water is used. The form has a section for writing the legal description and in that area Mr. Ferguson wrote "20 59 and 5.30 acres ditch enters property at 1350 feet south of NE corner of NW¼ of Sec. 4 Township 18 North Range 19 E.W.M.". That may have been Mr. Ferguson's attempt to describe the location of where water is diverted in Section 4. The dam has been described as being between 1300 and 1400 feet south of the north section line.

The claimants provided no argument as to why the Certificate of Change does not bind them as successors to the parties that signed the application. They cite no authority that would allow this Court to ignore the certificate of change issued to their predecessors. Thus, the Court must find the point of diversion was legally changed in 1965, even though that change apparently was made in

error. In order to use the point of diversion in Section 4, the claimants must follow the change process in RCW 90.03.380. The Court DENIES the exceptions of the Olneys and Mr. Aimone

Court Claim No. 01879 – Dimitri & Lenora Bader

Mr. Bader took exception and presented testimony as to the water right recommended by the Referee for confirmation in the Supplemental Report of Referee for Subbasin No. 9.

The Referee recommended confirmation of a water right to the Baders for the diversion of 1.1 cubic feet per second, 275 acre-feet per year from Whiskey Creek between March 15 to October 15 for the irrigation of 55 acres and stock watering and 0.55 cubic foot per second, 1 acre-foot per year from October 16 to December 31 for stock watering. The land is located in that portion of the SW¼ of Section 23, T. 18 N., R. 18 E.W.M. lying north and east of the Cascade Canal. The Baders seek a right to irrigate more acres, a larger quantity of water and longer season of use.

The Referee interpreted the testimony at the initial evidentiary hearing to show that 50 to 55 acres were being irrigated on the Bader property. However, the State's investigation report and Mr. Bader's testimony at the supplemental hearing indicated more acres were irrigated -- Mr. Bader testified to irrigating 83 acres while the investigation report stated 70 acres. At the second supplemental hearing Mr. Bader submitted exhibit DE-2117, which is a hand drawn map showing the location of 28 acres that are irrigated in addition to the 55 acres for which a right was previously confirmed. Reviewing the evidence that resulted in the Referee concluding there was a water right for 55 acres, the Court concludes the same rationale would apply to the additional acreage. Mr. Bader put on evidence to show that between 1.0 and 3.6 cubic feet per second and an annual quantity of 208.75 acre-feet per year is diverted from Whiskey Creek to irrigate the 28 acres. The water is diverted from the creek approximately 900 feet north of the center of Section 23 and carried in a Kittitas Reclamation District (KRD) lateral to the fields. Mr. Bader, who purchased the land in 1990, obviously does not have personal knowledge of how the field was irrigated prior to construction of the lateral. However, it is his understanding from discussions with past owners that this field has always been irrigated. Mr. Jack Carpenter, KRD's Secretary-Manager, told him the lateral was built around 1930. Even if that was the first time creek water was diverted to the land, the use is early enough to establish a right under the Riparian Doctrine (first use of water by December 31, 1932, is a requirement).

Mr. Bader is seeking to increase the quantity of water he is authorized to use for irrigating the 55 acres from 1.1 cfs and 275 acre-feet per year to 5.0 cfs and 1422 acre-feet per year. That

equals 0.09 cfs (or 41 gallons per minute) and 25.85 acre-feet per year for each acre irrigated. This is a large quantity of water, unprecedented in this area of the Kittitas valley. Mr. Bader submitted evidence to show that is actually the quantity of water that he diverted in 2003 to irrigate his land and is consistent with what he normally diverts. Mr. Bader's exception suggests evidence was put on to show this quantity has historically been used to irrigate his land. That is incorrect. The only evidence of the quantity of water being used is during Mr. Bader's ownership of the land. There is little evidence of the water quantity used by his predecessors. In fact, the only evidence in the record suggests a much smaller quantity of water was used. The water right claim that Mr. Bader's predecessor attempted to file (see Supplemental Report of Referee) with Ecology pursuant to RCW 90.14 states 450 acre-feet per year is being used to irrigate 80 acres – that is 5 acre-feet per year for each irrigated acre. Mr. Bader now claims a right to use five times that quantity.

Exhibit DE-2111 is a hand drawn map of the 55 acres and attached to it are the diversion measurements taken in 2003. Mr. Bader testified that creek water generally is not available after July 1, yet his measurements show diversions of between 1.0 and 2.0 cfs between July 1 and December 31. The Court is also concerned with the Bader's failure to distinguish natural creek flow from return flows that may result from irrigation of lands upstream of the property with water delivered by KRD. Mr. Bader's property is located in the lower reaches of Whiskey Creek, about three miles below KRD's North Branch Canal. The testimony during the various Subbasin No. 9 hearings is that land upstream from Mr. Bader is irrigated with water delivered by KRD. This creates return flow waters that are part of the Yakima Reclamation Project and water rights cannot be established for use of those return flows. The Court considered a similar exception brought by Packwood Canal Company and declined to increase the annual quantity of water awarded to Packwood. *See Memorandum Opinion and Order RE: Packwood Canal's Exceptions to Supplemental Report of Referee Subbasin 8 (Thorp)*, entered on January 28, 2000. The Court found that Packwood failed to provide evidence of what portion of the claimed quantity beyond the Referee's recommendation was natural flow or project return flow.

As previously mentioned, Mr. Bader's land is fairly far down Whiskey Creek and he has one of the lowest priority water rights on the creek. Five water rights of senior priority and one of equal priority were confirmed for lands upstream of the Bader property along Whiskey Creek. Those landowners were awarded water rights to use between 0.02 and 0.03 cfs per acre on an instantaneous basis and between 4 and 5 acre-feet per year per acre on an annual basis. There is no

other area in the basin where a landowner has established a right to anything close to the quantity claimed by Bader. Only lands along the Yakima River, considered to be the most porous and rocky ground in the valley, have received water rights for annual quantities greater than the low-teens.

The Court will not recommend such an extremely high quantity based only on the current landowner's use. Mr. Bader is rill irrigating his land, a normal irrigation practice in this area. "While customary irrigation practices common to the locality are a factor for consideration, they do not justify waste of water." *Ecology v. Grimes*, 121 Wn.2d 459, 475, 852 P.2d 1044 (1983). Other irrigators who also rill or flood irrigate do not use the quantities of water sought here.

The Court will amend the quantity of water, but not to the extent requested by the claimant. His diversion records show that in 2003 Mr. Bader diverted the higher quantities of water during the early part of the irrigation season. The Court will amend the instantaneous quantity to 2.5 cubic feet per second, but will add a provision that has been utilized by Kittitas County Superior in earlier adjudications to allow use of additional water when it is available. That provision shall state: "When water is available in excess of that needed to satisfy all existing rights, up to an additional 2.5 cfs can be diverted during the period March 1 through June 30." The annual quantity of water that will be authorized for the 55 acres will be the same as Mr. Bader is using on the 28 adjoining acres, which is 7.5 acre-feet per acre per year, or 412.5 acre-feet per year. The Court also notes that the annual quantity that Mr. Bader shows as being diverted would include water that is lost through the conveyance system. When the Referee has had sufficient evidence to distinguish conveyance water from water that makes it to the land for irrigation, conveyance water is expressed as an instantaneous quantity and not an annual quantity. In this instance, that evidence was not provided.

Mr. Bader also requested that he be allowed to begin irrigation on March 1 of each year. His diversion records show that in 2003 he did begin diverting water by March 1. The Court is aware that in some years the late winter/spring are dry and irrigating that early may be beneficial. The Court will change the irrigation season to begin March 1, but will add a provision that states irrigation can begin on March 1 only if water can be beneficially used at that time. Mr. Bader also put in evidence to show that after the end of the irrigation season he needs to divert 1 cfs for stock watering, so the quantity of water he is authorized to divert from November 1 to December 31 will be increased to 1.0 cfs, but the annual quantity for stock watering will be unchanged.

Claim No. 14379 -- Joyce Bloxham

Ms. Bloxham took exception to the Referee's denial of a claim on the basis that no RCW 90.14 claim had been filed. After further review, the claimant discovered WRC 141306 as being appurtenant to the property. There is some dispute as to whether the name of the person who filed the RCW 90.14 claim was "Barbara Stabl" or "Barbara Stahl." Ms. Bloxham purchased the land from Barbara Stahl. At the hearing, Ecology identified the claim in question and it was admitted into evidence SE – 226. SE – 226, WRC 141306, is a claim to groundwater submitted on a "short form" used by claimants asserting rights to small uses of water.

It has long been the law of the case that a claimant must demonstrate compliance with state process, either through production of a permit/certificate or an RCW 90.14 claim form. Here, Ms. Bloxham is able to identify only an RCW 90.14 that claims a small use for groundwater. That is inadequate to support her claim in this adjudication and this Court must DENY that claim.

Claim No. 02124 -- Ruth Ann Brunner and Estate of Gerald F. Brunner

Ecology took exception to the right recommended by the Referee. This matter has been before the Court before. At the initial exceptions hearing, Ecology took four exceptions to the right recommended by the Referee. The Court denied three of the four exceptions. The fourth exception pertained to place of use. The Referee found the RCW 90.14 claim and the places of use matched up and were both in Section 8. Ecology pointed out, correctly, that WRC 143469 actually claims a place of use within Section 5. The Court Ordered the matter remanded back to the Referee for one of two things to happen: 1) An explanation by the Referee as to why he interpreted the RCW 90 14 claim to support the right, or 2) Provide the claimant an opportunity to amend their claim administratively. See March 8, 2003 Verbatim Report of Proceedings at page 33. It appears neither transpired and the right was inadvertently carried forth into the Supplemental Report at page 397.

Claimant, through counsel, argues the Referee made a finding of substantial compliance in regard to this issue. That is incorrect. The Referee made a finding of substantial compliance as to the point of diversion and this Court does not disturb that finding. However, the ruling made by the Court at the initial exceptions hearing concerned the place of use of water.

Claimant also argues that because the Referee failed to consider the Court's ruling regarding the need to amend the RCW 90.14 claim as to the place of use in the Supplemental Report that the Court's order is therefore no longer valid. This argument is also not helpful. The reports filed by the Referee are only recommendations and do not become rights until they are included in a

conditional final order/decree signed by the Court. See Pretrial Order No. 5; see also RCW 90.03.200. Those recommendations do not independently stand and are subject to modification until this Court has finalized the proceeding. Here, the claimants do not receive the benefit of the Referee's oversight just as Ecology does not when the Referee has mistakenly issued Reports that overlook rulings in support of the agency's position. Here, the Court initially ordered remand of the claim to the Referee for an explanation as to how he reached the conclusion that a RCW 90.14 claim asserting a water right for lands in Section 5 supports a claim in this adjudication to lands in Section 8. Alternatively, claimant may pursue the administrative process set forth in RCW 90.14 for amending claims. According to Ecology that has not transpired and the Court must GRANT Ecology's exception and finds WRC143469 does not support the right claimed herein by the Brunners and the Referee's recommendations on pages 345 and 397 of the Supplemental Report of Referee are not accepted by the Court.

Court Claim No. 01575 – Jeffrey and Jacqueline Brunson

The Brunsons acquired the property described in Court Claim No. 01575 just before exceptions to the Supplemental Report of Referee for Subbasin No. 9 were due. Mr. Brunson filed an exception to the report to allow time to determine whether the quantity of water awarded was adequate for irrigating the land. The claim was remanded to the Referee and the Brunsons verbally withdrew the exception at the second supplemental hearing and no evidence was presented. Therefore, the Referee's recommendation for Court Claim No. 01575 will not be modified.

Court Claim No. 12929 – Jeffrey and Jacqueline Brunson
Court Claim No. 00904 – John and Anna Ludwick

Both the Brunsons and the Ludwicks took exception to the quantity of water recommended under their respective claims. Both claims were remanded to the Referee: Jeff Brunson testified on behalf of his claim while John Ludwick, Dan Brunson and James Gigstead testified in support of the Ludwick claim. The water right awarded to the Brunson authorizes the diversion of 1.0 cubic foot per second (cfs), 200 acre-feet per year for the irrigation of 20 acres – or 0.05 cubic foot per second and 10 acre-feet per year for each acre irrigated. Mr. Brunson testified to diverting 3 cubic feet per second and 560 acre-feet per year (112 for conveyance loss and 488 acre-feet per year being applied to the ground). The water right awarded to the Ludwicks was for the diversion of 1.8 cfs, 196 acre-feet per year for the irrigation of 24.5 acres – 0.07 cfs and 8 acre-feet per acre irrigated. The Ludwicks' evidence shows that 2.3 cfs and 471 acre-feet per acre have been diverted. Both

landowners attribute the high duty to the porous, rocky soils, with no water holding capacity. Their land is located approximately one mile east of the Yakima River.

Prior to the first supplemental hearing, Richard C. Bain, Jr., a consulting engineer hired by many claimants in Kittitas County, conducted a study of both the Brunson and Ludwick farms providing much of the information about the quantity of water diverted in recent years to irrigate the land. The Court has no reason to doubt Mr. Bain's measurements or his conclusions on the annual quantity of water being used to irrigate the land. However, there has been considerable testimony about return flow contributions to the lower reaches of Wilson and Naneum Creeks in Subbasin No. 9 and creeks in other neighboring subbasins. Normally, as the irrigation season progresses, the natural flow in the creeks declines. This is evidenced in the upper reaches of many of the creeks, above KRD's North Branch Canal. However, below KRD and more so below Cascade Canal and the Town Ditch, the creeks gain water as the summer progresses and return flows from lands irrigated with water from these canals migrates to the creeks. But for these return flow waters, it is very likely that Wilson Creek and the unnamed stream used by the Brunsons would not have sufficient water to allow for the diversions that were measured by Mr. Bain. Undoubtedly, a portion of the water being used to irrigate both the Brunson and Ludwick land is from foreign and/or project return flows, for which water rights cannot be awarded. However, at this point it is not possible to distinguish the return flow water from the natural creek flow. The Court considered an exception very similar to this brought by Packwood Canal Company, see the Court's *Memorandum Opinion and Order RE: Packwood Canal's Exceptions to Supplemental Report of Referee Subbasin 8 (Thorp)*, entered on January 28, 2000. The Court declined to increase the annual quantity of water awarded to Packwood. The Court found Packwood failed to provide evidence of what portion of the claimed quantity beyond the Referee's recommendation was natural flow or project return flow.

The Court also recognizes the claimants' testimony that their land is very rocky and porous, requiring constant irrigation with high volumes of water. In recognition of that, the Court will increase the quantity of water awarded, but not to the degree requested by the landowners. The Court and the Referee have previously acknowledged that claimants are diverting more water than can be awarded in the water right; return flow water can be diverted without benefit of a water right, but there is no guarantee that water will continue to be available. See *Memorandum Opinion RE: Motion for Reconsideration of Limiting Agreements* entered on April 1, 1994, pages 8- 14. The Court AMENDS the quantity of water awarded to the Brunsons under Court Claim No. 12929 on

page 300 to allow a diversion of 2.0 cfs, 300 acre-feet per year. The Court also AMENDS the quantity of water awarded to the Ludwicks under Court Claim No. 00904 to allow a diversion of 2.3 cfs, 367.5 acre-feet per year. The pertinent RCW 90.14 claims support these quantities.

Claim No. 01832 – Ron Carlson

Although Mr. Carlson did file an exception to the Supplemental Report of Referee, he appeared at the exception hearing and inquired concerning his request to amend the water right claim filed for his property pursuant to RCW 90.14. The Court reviewed the record relating to Mr. Carlson's claim and finds that as a result of an Ecology exception after issuance of the initial Report of Referee, the quantity of water awarded to Mr. Carlson was reduced to be consistent with the RCW 90.14 claim. Mr. Carlson was advised he needed to attempt to amend that water right claim if he wished to be awarded a right to use more water than was stated in the water right claim form. At the time of the first supplemental hearing, he had not yet filed his request to amend the water right claim. Apparently, he has filed with Ecology a request to amend the claim, but at the time of the exception hearing, had not received a decision. Ecology is urged to expedite review of his amendment request so a decision is made prior to entry of the Conditional Final Order.

Claim No. 02085 -- City of Ellensburg

The City of Ellensburg (City) filed an exception to the Referee's recommendation that a right not be confirmed for the City on the basis the right had been abandoned. The right claimed by the City was established by C.A. Sanders and addressed in the *Sanders v. Bull* decree. Sanders transferred to Ellensburg Water Supply Company a portion of the 1881 water right he had established; that portion being 225 inches or 4.5 cubic feet per second. Ellensburg Water Supply Company transferred it to Ellensburg Gas and Water Company which in turn transferred the right to the City of Ellensburg in 1933. The City in 1971 filed Water Right Claim No. 005764, claiming a right to divert 4.5 cfs, 3,285 acre-feet per year from Naneum Creek for municipal supply. That form indicates no water was being used as of that time. The Referee accepted that the water had been diverted up to 1958, but believed, after analyzing the totality of the evidence, that use of the right had been discontinued at that point and the delivery system was, from then on, in a state of disrepair. See Supplemental Report at 119-120. The City filed an exception to this conclusion and put on evidence to try and convince this Court the water right had not been abandoned. Although the initial finding of abandonment was made strictly by the Referee and not advanced by any party, Ecology advised that it agreed with the Referee and urged the Court to uphold the Referee's finding

Abandonment in the water right context was most recently analyzed by the Washington Supreme Court in *Okanogan Wilderness v. Twisp*, 133 Wn.2d 769, 947 P 2d 732 (1997) (*Twisp*).[1] *Twisp* involved an effort by the Town of Twisp to change a point of diversion in 1993 for a right that had been certificated back in the 1930's but not used since sometime between 1939 and 1948. In addition, the original point of diversion had been destroyed. The *Twisp* court reaffirmed the long-held view that "[a]bandonment is the intentional relinquishment of a water right." *Id.* at 781. The burden of proof of abandonment was on Ecology as the party alleging it. The *Twisp* court also identified that nonuse is not per se abandonment, however, nonuse of water "is evidence of intent to abandon, and long periods of nonuse raise a rebuttable presumption of intent to abandon, thus shifting the burden of proof to the holder of the water right to explain reasons for the nonuse." *Id.* The Supreme Court noted "courts will not lightly decree an abandonment of a property so valuable as that of water in an irrigated region." However, it also stated that the principle applies throughout arid western states, yet such states have also established that long periods of nonuse raise a rebuttable presumption of intent to abandon. *Id.* at 782. Additionally, the Court must look at the conduct of the parties to determine their intent. *Jensen v. Ecology,* 102 Wn.2d 109, 685 P.2d 1068 (1984) citing *Miller v. Wheeler,* 54 Wash. 429, 103 P. 641 (1909).

Hence, if the Referee is correct and the evidence discloses that the City of Ellensburg has not used its water since the late 1950's, then Ecology has carried its burden and that burden would shift to the City to explain the reasons for the nonuse.[2] The City supplied evidence at the exceptions hearing in an effort to convince the Court that water has been used and that no intent to abandon the water right has been established. The Court will now examine the evidence to determine if the City has exercised its water right since 1958 and, if necessary, whether the City has provided any satisfactory reasons for the nonuse of water.

In an effort to show its water right was used after 1958, the City submitted the Declaration of John Akers (admitted at trial as DE – 2077) and also had Mr. Akers testify at the May 8, 2003 hearing. Mr. Akers is the Public Works Director for the City of Ellensburg. His testimony and the documentary evidence he submitted provide the following information

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[1] The opinion is pertinent here because a point of diversion for a water right can only be transferred if the water right has been put to beneficial use (i.e. not abandoned) and would therefore not cause a detriment to other right holders. *Twisp* at 777-779. That determination is the same this Court must employ in assessing claims to water rights in a stream adjudication.

- In 1961, the City of Ellensburg leased to W. G. Taylor Logging Company "the building known as the screen house or Nanum intake building situated at the intake for the City of Ellensburg's Nanum water system." DE – 2076. In addition, the lease states that W. G. Taylor Logging Company is:

  > given the right to divert water from Nanum Creek through said intake and through the existing transmission pipeline extending from said intake facility to a point opposite or near the present logging camp situated immediately south of the first party's premises in the mouth of the Nanum canyon. The second party shall have the right to divert sufficient water for all domestic use requirements at its logging camp.

- In 1961, an agreement was signed with Bryce Baker to assume a caretaking function of the 50 acres surrounding the municipal intake. Mr. Akers testified that city records indicated the relationship between the City and Mr. Baker or his wife lasted until September, 1974. The lease specifies at page 1:

  > IT IS UNDERSTOOD AND AGREED that the city shall provide a water pump as may be necessary together with pipe in place so that water for the residence will after date hereof be taken directly from the upstream side of the City's diversion dam in Nanum Creek rather than from the Nanum transmission line in front of the house.

- From 1975 through at least 1991, the City of Ellensburg leased 110 acres to Mr. Ralph Charlton for the purpose of grazing. That property was located in the E1/2NE1/4 and E1/2SE1/4 lying North of the County Road, of Section 20, T. 19 N., R. 19 E.W.M. The lease established the maximum number of cattle to be grazed and required Mr. Charlton to repair fences. Mr. Charlton testified at the 1991 hearing before the Referee and indicated that he irrigated between 10 to 20 acres of land on property leased from the City. It was noted on cross-examination that this property is located near the diversion structure and is about five miles from the municipal boundaries of the City.

Other documents were submitted by the City as evidence of their intent not to abandon the Naneum Creek water right. Those documents include a Statement of Claim submitted by the City in the adjudication of Wilson-Naneum Creeks filed by Ecology in the early 1970's pursuant to RCW 90.03 (*Carlson*). In September, 1971, the City also filed an RCW 90.14 claim to protect the Naneum Creek water right. That RCW 90.14 claim (WRC NO. 005764) filed in 1971 asserts a right

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[2] The Court notes the relinquishment provisions in RCW 90.14.160 do not apply here because the City of Ellensburg's right is municipal in nature and the sufficient cause excusing nonuse set forth at RCW 90.14.140(2)(d) applies

for the purpose of municipal supply. The claim states that no water was used and no land irrigated at that time. Finally, the City has filed a claim and sought a water right in this adjudication with initial hearing before the Referee transpiring in 1991.

The City's intent in regard to the future use of the Naneum Creek right has been indecisive, unclear and the delivery system is non-working. In 1968, the City conducted a water supply study wherein eight plans were examined to determine the most feasible option for providing water to the City's inhabitants. DE – 1775. Of the eight plans, two included use of Naneum water. The eight plans were ranked 1 – 8 and the two plans utilizing Naneum Creek were ranked second to last and last. The study also indicated that although Naneum Creek water "once constituted a primary source of water supply for Ellensburg, it has not been used since 1958. Existing facilities (consisting of a diversion dam, screening and chlorination house, and 9 miles of 16" wood stave line) are in a state of disrepair." See page 2.4. Mr. Akers concurred that the pipelines carrying water to the City are not functional. Sections have been crushed, other sections are missing and remaining sections are "in very, very poor condition." The study also notes that water rights are established on this source for the benefit of the City in the amount of 4.5 cubic feet per second. Elsewhere in the study, the history of litigation surrounding the Naneum Creek right is set forth as are other historical plans to utilize the water, which were not implemented.

Additionally, Mr. Akers testified in regard to contemporary planning for the future use of water. Mr. Akers noted that the City has developed a system plan that was submitted and approved by the Department of Health in 2001 that included a "suggestion that, based on the use records and projections, it would be necessary to begin bringing surface water on line in 2006." Mr. Akers then proceeded to testify that the City is reviewing a number of options, some of which might include use of surface water. In order to utilize the surface water, a filtration system will be needed and Mr. Akers provided no indication that such a system was contemplated at this time.

Although there is some complexity to this issue, the Court agrees with the Referee's conclusion that the water right has been abandoned. In the alternative, the Court finds that the manner in which water has been used is not consistent with the RCW 90.14 claim (municipal purposes only) filed by the City or the water right that was held by the City. We start with the question of nonuse. The only water use since the late 1950s has been minimal at best, ranging from service to one domestic user in the 1960s and early 1970s to irrigation of between 10 and 20 acres thereafter and stock water use. That amount of water use is vastly different then the 4.5 cfs to

which the City's predecessors had established a right. Further, what little water use that did occur was near the diversion works, which is located about five miles from the municipal boundaries of Ellensburg where the place of use had been perfected. Testimony of John Akers, RP dated May 8, 2003 at p. 41. This very minor use of the water in the past 45 years differs significantly from the RCW 90.14 claim filed by the City with Ecology

Finally, there is simply no evidence that the water has been put to a municipal use since the water transferred from the Ellensburg Water Supply Company to the Ellensburg Gas and Water Company and then to the City of Ellensburg in 1933. The record shows the very small water use since 1958 differs significantly in quantity, purpose of use and place of use then the originally perfected right. A water right may be abandoned if the contemporary use differs from the use that was perfected. *See Hennings v. Water Reservoir Dept*, 50 Or. App. 121, 622 P.2d 333 (1981) (Irrigation right was presumed abandoned and cancelled by Department of Water Resources when water was only used to wet the ground for plowing one time in five year period). According to the Colorado Court,

> Nonuse can also be shown by the sporadic use over a long period of a substantially smaller quantity of water than that originally decreed, since such diminished and sporadic use over a period of years may "justify the conclusion that there was no real intention to continue the conditions of diversion and application to a beneficial use that were established, or that we assume were established, when the decree awarding the priority was entered." *Southeastern Colorado Water Conservancy Dist. v. Twin Lakes*, 770 P.2d 1231 (Colo., 1989) citing *Farmers Reservoir and Irrigation Co. v. Fulton Irrigating Ditch Co.*, 108 Colo. 482, 487, 120 P.2d 196, 199 (1941).

The Court also notes that no evidence was supplied to show that the City sought approval from Ecology for the temporary changes in water use pursuant to RCW 90.03.380

Once a long period of nonuse is established, the burden shifts to the water right holder to explain the nonuse, here the City. *See Twisp, supra,* at pages 782-83. However, acceptable justifications for an unreasonable period of nonuse are extremely limited. *Beaver Park Water, Inc v. City of Victor,* 649 P.2d at 300, 302 (1982). Evidence sufficient to rebut the presumption of abandonment must consist of more than mere subjective declarations by the owner of the water right that he did not intend to abandon the right, or that he intended to resume use of the right at some future time. *See Beaver Park,* 649 P.2d at 302; *Knapp v. Colo. River Water Conservation District,* 131 Colo. 42, 55, 279 P.2d 420, 426-27 (1955). To rebut the presumption of abandonment arising from nonuse, there must be evidence of facts or conditions that excuse the long period of

nonuse. *Knapp,* 131 Colo. at 55, 279 P.2d at 426; *see also Mason v. Hills Land & Cattle Co.,* 119 Colo. 404, 408-09, 204 P.2d 153, 155- 56 (1949).

The City in this case has provided little else by way of explanation as to why the water has not been used for the originally perfected purposes other then to indicate doing so would require considerable facility modifications. The City argues that the Naneum Creek water right was considered in 1968 as one of a number of alternatives for supplying future water to the municipal water users. However, a city's generalized claim that water is needed for future growth needs is insufficient to rebut the presumption *Twisp* at 784. Further, the two plans were ranked seventh and eighth out of eight proposed strategies The Naneum Creek water right was then ignored for municipal purposes until recently when the City commenced planning. However, other plans were apparently considered during the intervening 30 years that did not involve the Naneum Creek water. Finally, the diversion works and conveyance facilities are in very poor condition and could not, without substantial investments of time and money, be made to deliver municipal water.

The City also asserts that filing claims in this adjudication as well as the one commenced in Kittitas County in 1972 and also complying with the requirements of RCW 90 14 constitutes evidence of intent not to abandon. The Court can find no case to support a proposition that defending an unused water right in a lawsuit demonstrates an intent to not abandon a water right without some effort external to the lawsuit to preserve the right. Further, during the course of this proceeding, Ms. Bradley-House, the City's attorney at the time of the hearing before the Referee in 1991, suggested that at most the right would be used for irrigation of parks and that the City would never "go to the expense of building a system to renew the domestic water supply." Ms. Bradley-House then asked the Referee to amend the claim to be consistent with the evidence presented. The Court believes this adjudication only served to put the matter on the consciousness of City officials and even then no decision could be reached on what to do with the water right. Indeed, perhaps knowing these cases were in progress would have fueled the City's desire to put the rights to beneficial use. However, no such effort has ensued and the City's use of Naneum Creek water now or in the future is at best speculative. The City's claim is hereby DENIED.

Claim No. 00909 -- John N. Eaton and Robert Eaton

Ecology identified two issues related to the point of diversion for the Eaton's claim. The request for clarification pertained to the proper location for one of the points of diversion. The

Court found, as set forth in the Order on Exceptions, that the point of diversion is located approximately 1100 feet south and 50 feet east from the north quarter corner of Section 30.

The second issue identified by Ecology pertains to use of a second point of diversion by the Eatons and the agency's allegation that no RCW 90.14 claim applies to that diversion. The Referee determined that two RCW 90.14 claims are applicable to Claim No. 00909 – WRC Nos. 050930 and 050931, both filed by Mr. Lamb. WRC No. 050930 describes a right to divert 6 cfs from a point in the NW1/4 of Section 19 for irrigation of 125 acres in the NW1/4 of Section 30. WRC No. 050931 describes a right to divert 2 cfs from a point in the NW1/4 of Section 30 for irrigation of 20 acres in the NE1/4SW1/4 of Section 30. WRC No. 050931 is the basis for the right that was recommended at page 305. Ecology does not take exception to that right except for the clarification above. Ecology does except to the right recommended at page 377. There, the Referee set forth a right with two points of diversion for irrigation of 117.3 acres in the E1/2NW1/4 and a portion of Government Lot 1 in Section 30. Ecology points out that the RCW 90.14 claim that applies to that right (WRC No. 050930) only has one point of diversion (NW1/4 of Section 19) and it was improper for the Referee to recommend a second point of diversion (NW1/4 of Section 30) for this right. This issue becomes cloudy quickly as the alleged unauthorized point of diversion for the 1882 water right is properly utilized under the 1872 water right set forth at page 305 of the Supplemental Report.

Although the Eatons may utilize the point of diversion in the NW1/4 of Section 30 for irrigation of 20 acres in the NE1/4SW1/4 of Section 30 they are not authorized, without adhering to the process for adding a point of diversion set forth in RCW 90.03.380, to use that point of diversion for transport of water to their lands in the NW1/4 of Section 30. The Court has consistently ruled that only points of diversion that are described in a water right claim, certificate of change or surface water certificate can be authorized for use in water rights awarded in this adjudication. That ruling applies to the Eatons in this situation. Mr. Lamb knew where his points of diversion were for the various uses of water from Wilson Creek and the claims are unambiguous.

Claimants appear to argue that the development of Interstate 82 impacted their ability to take water at historic points. However, it was noted at the March 8 hearing that the RCW 90.14 was filed *after* I-82 was created and the RCW 90.14 claims indicate the proper locations of the points of diversion. Therefore, in reality, the Court is not requiring compliance with RCW 90.03.380 for the change in the point of diversion caused by the interstate, but rather because the claimants have

started using a second point of diversion to carry water that is not consistent with the RCW 90.14 claims. Irrespective of where the second point of diversion is located or whether it was moved when I-82 was constructed, WRC No. 050930 only described one point of diversion, and that diversion is in Section 19. Because of that, Ecology asks that the water right recommended for confirmation by the Referee be modified to authorize use of only the diversion in Section 19 and the Court GRANTS Ecology's exception. The right described on page 377 of the Supplemental Report of Referee is modified as follows: The point of diversion described beginning on line 10.5 is deleted.

As part of Eaton's response to Ecology's exception, they raised an issue concerning the quantity of water authorized to be diverted from the two diversions being utilized on the former Lamb property (land described in Court Claim No. 0909). Under Court Claim No. 0909 a water right was awarded with an 1872 priority date authorizing the withdrawal of 1.34 cubic feet per second from the diversion in Section 30. The evidence submitted through Richard Bain's Engineering Report showed 2.7 cfs is diverted from Wilson Creek in Section 30. Eaton's suggest the Referee may have misinterpreted the evidence and concluded that half of that quantity goes to the former Lamb property and half goes to the original Eaton property to the east. Bain's report also stated that 5.1 cfs is diverted in Section 19. However, the water right on page 377 authorizes the diversion of a total of 6.46 cfs. Subtracting 5.1 cfs from 6.46 cfs leaves 1.36 cfs. The Court believes that the Referee, without clear articulation, awarded the 5.1 cfs that Mr. Bain indicated was being diverted from the Section 19 diversion plus 1.36 cfs to be diverted from the Section 30 diversion (keeping in mind that Referee incorrectly believed both diversion points could be authorized). The 1.36 cfs awarded on page 377, (in addition to the 5.1 cfs measured at the diversion in Section 19), plus the 1.34 cfs awarded in the 1872 right (page 305) equals 2.7 cfs - the quantity that Mr. Bain testified was being diverted in Section 30. The Court finds the Referee recommended water rights consistent with the quantities of water being diverted as described in the Bain Report.

In granting Ecology's exception, the Court finds it is still appropriate to confirm a right to divert 6.46 cfs to irrigate the lands in the NW¼ of Section 30. Even though the Eatons have not in recent years diverted that quantity from the point in Section 19, that quantity has been put to beneficial use to irrigate the lands within the described place of use, just a portion (1.36 cfs) has been diverted from a point that cannot be authorized at this time. Consistent with its ruling in Subbasin No. 4, the Court will not penalize the Eatons for withdrawing water from an unauthorized

point of diversion by reducing the quantity of water historically diverted. The Eatons should proceed with their plans to change to a new point of diversion and comply with RCW 90.03.380.

Court Claim No. 00623 – John and Christi Eaton

The Eatons took exception to the Referee not recommending a water right for their property in the SE¼ of Section 30, T. 17 N., R. 19 E.W.M. The claim was remanded to the Referee and John Eaton testified at the second supplemental hearing. The Eatons claim a right to irrigate about 80 acres of land (described as that part of the SE¼ of Section 30 lying west of Interstate-82 [I-82]) with water diverted from Wilson Creek and a tributary slough. To support their position the land was irrigated well before the December 31, 1932 date required for rights under the Riparian Doctrine, the Eatons introduced DE-2095, a 1937 aerial photograph that includes their property. The photograph does show that the lands currently irrigated by the Eatons, and other lands now taken up by I-82 and adjacent pothole lakes, were being irrigated in 1937. Additionally, the declaration by Cliff Bird (DE-2096), who once owned adjacent land, indicates the land was being irrigated at the time it was owned by the Simmons family, who acquired it in the late 1800's and owned it until around 1970. He was aware of the Simmons Ditch, labeled the Snowden and Ross Ditch on the Swigert Survey (see DE-2018), and that it delivered water to the land now owned by the Eatons. Exhibits DE-2097 and 2098 show that Ross and Snowden also owned land in Section 30.

The Eatons also point to the complaint filed by Walter A. Bull concerning water rights on Coleman Creek. In that complaint, Bull stated he owned 1200 acres, 400 of which are irrigated with water from Coleman Creek and 640 of which are meadowlands. In the Supplemental Report for Subbasin No. 10, the Referee concluded the meadowlands would have been within the lands owned by Bull in Section 30, a portion of which is now owned by the Eatons. The Eatons reached the same conclusion. The complaint suggests the meadowlands are being irrigated, just not from Coleman Creek. The Court concludes there is sufficient evidence to conclude the Eaton's land was irrigated before December 31, 1932, and, therefore, enjoys a right under the Riparian Doctrine.

They assert a right to irrigate 80 acres; however, Exhibit DE-2017 (which appears to be a survey of the fields) shows field sizes that total 54.3 acres. The total area appears to be less than 80 acres and a portion of the land is not irrigated. According to Mr. Eaton's testimony, 7 acres in the SE¼SE¼ of Section 30 are sprinkler irrigated and the rest of the land in the W½SE¼ of Section 30 is rill irrigated. One diversion located 1100 feet south and 50 feet east of the north quarter corner of Section 30 is shown on the Swigert Survey and is the historic point of diversion. The testimony was

that 2.7 cfs is diverted at this point and Mr. Eaton seeks a right for this amount and an annual quantity of 874.5 acre-feet. However, prior to the initial evidentiary hearing, the Eatons hired Richard C. Bain, Jr., to perform an engineering study of their farm and determine the appropriate water duty. Mr. Bain's report, DE-1514, indicated that 10.6 acre-feet per year was needed for each acre that is rill irrigated, which would be 501.38 acre-feet per year for 47.3 acres. The 7 acres that are sprinkler irrigated would need 6.6 acre-feet per year for each acre, or 46.2 acre-feet per year. An additional 12 acre-feet per year is needed for stock watering. Water for the 7 acres that are sprinkler irrigated is pumped from a slough that is in the southerly portion of the property. It is not clear whether the diversion from the slough has always been used or whether that happened when the irrigation system changed to sprinklers. This diversion was measured at 0.60 cfs.

Mr. Eaton is claiming a right to divert a total of 3.3 cubic feet per second from Wilson Creek. However, as identified in the Subbasin No. 9 Report, the only water right claim filed pursuant to RCW 90.14 was Water Right Claim No. 000085, by Earl Elkington. It claimed a right to 1.6 cubic feet per second, 320 acre-feet per year. In most cases the Court has been compelled to limit the quantity that is confirmed to those described in the water right claim. However, in prior subbasin hearings, evidence was supplied that showed when landowners did not know how much water was diverted and used, Ecology employees recommended they claim the quantity of water that Ecology would issue a permit for -- 0.02 cfs and 4 acre-feet per year for each irrigated acre. That is exactly what was claimed here. While Ecology's intent was to help landowners who had no idea how much water was used, the quantity recommended was not always adequate for historic irrigation practices in the Kittitas Valley. In these instances the Court has granted rights consistent with use, rather than what was claimed and has not required the landowner to amend the claim pursuant to RCW 90.14.065. Mr. Eaton testified he is in the process of changing all of his diversion to one single diversion to serve his land and neighboring land he acquired from the Lamb family.

The Court will confirm two water rights to the Eatons with priority dates based on when the patent issued. The Eatons argued the priority date should be at least five years prior to when the patent issued as the homestead laws required occupation of the land for five years prior to the patent issuing. The Court addressed this argument in its *Memorandum Opinion Re. Priority Date – Date of Patent or Date of Entry*, dated January 19, 1995. In sum, the Court ordered the Referee to not do an automatic calculation back for the priority date; evidence must be supplied to show actual occupation. That evidence is lacking here. Therefore, the Court will use the patent date

A right is confirmed with a November 25, 1879 date of priority to divert 0.60 cubic foot per second, 46.2 acre-feet per year for the irrigation of 7 acres in that portion of the SE¼SE¼ of Section 30, T. 17 N., R. 19 E.W.M. lying west of Interstate-82. The point of diversion is located 1100 feet south and 50 feet east of the north quarter corner of Section 30, being within the NW¼NE¼ of Section 30. A right is also confirmed with a September 5, 1873, date of priority to divert 2.7 cubic feet per second, 501.38 acre-feet per year for the irrigation of 47.3 acres and 12 acre-feet per year for stock watering in that portion of the W½SE¼ of Section 30 lying west of Interstate-82. The point of diversion will also be 1100 feet south and 50 feet east of the north quarter corner of Section 30, being within the NW¼NE¼ of Section 30.

Court Claim No. 02282 & 02275 – Walter & Gail Farrar

The Farrars took exception to the Referee not recommending a water right for their property and Mr. Farrar and Mert Stampfly, a neighboring landowner, testified at the exception hearing.

The Court reviewed the evidence from all Subbasin No. 9 hearings relating to the Farrars' property and adjoining land that share the same historical ownership. It appears that much of the Referee's conclusion that a water right could not be confirmed rested on his interpretation of the Kittitas County Superior Court's rulings in *Rader v. Sander, et al.* (1917). Predecessors to the Farrars were defendants in this action. The decree established that defendants C. R. and Grace Hovey, who owned the Farrar's land along with other lands, had a right to 10 inches of water prior to that of the plaintiffs, and the plaintiffs had the first and prior rights to the use of 60 inches from Wilson Creek, subject to the 10-inch right of the Hoveys. The Referee concluded the only water right held by the Hoveys was the 10-inch right. However, a careful reading of the case leads to the conclusion that the only water rights specifically identified in the decree were those two water rights, which were the first and prior rights against other named defendants.

The Farrars assert a right based on a Notice of Appropriation filed by Christian Johnson and John Lelard regarding construction of a ditch and an 1887 appropriation of water. The Referee concluded the appropriation had not occurred, as it was not recognized in *Rader v. Sander, et al.* However, the Court concludes it was not recognized because the water right was junior to the right identified for Rader. The notice related to a ditch constructed from Wilson Creek to the Johnson ranch in the NE¼ and NE¼SE¼ of Section 30. A deed to Mrs. Elizabeth Searles in 1893 transferred a portion of the NW¼ of Section 29, along with a portion of the water right appropriated in 1887.

Mr. Farrar testified to a conversation with Floyd Minor, who lives near this property. Mr. Minor recalls the land being owned by the Thomas sisters and it being irrigated from the Seaton-Johnson Ditch, the same ditch that carries water to the property today. The Thomas sisters grew oats and other grain crops. The land is currently in pasture. The testimony indicates that 20 acres are irrigated in the easterly portion of the land. Mr. Farrar testified to diverting 1 to 2 cfs when there is sufficient water, but also asserted a right consistent with the decrees entered for the surrounding lands. The decrees for this part of the Kittitas Valley consistently awarded one inch of water, or 0.02 cfs, for each acre irrigated. Mr. Farrar testified he could divert the larger quantity only during the flood season, which in this area is generally April and May. The Court notes that many of the prior adjudications allowed for the use of excess water when there was sufficient water in the creek to satisfy all existing rights. The owners of the Farrar land during the *Sander v Jones* litigation were not a party to that case, therefore, the Farrars are not bound by that Court's rulings, which would have prevented the Court from awarding a right that included use of flood water.

Two Court Claims were filed for this property due to the land changing ownership when claims were filed in *Acquavella*. The Court confirms a right under Court Claim No. 2275, with an April 30, 1887, date of priority to Walter and Gail Farrar for the diversion of 0.40 cubic foot per second, 100 acre-feet per year for the irrigation of 20 acres and stock watering for the following described land: That portion of the SW¼NW¼ of Section 29 and the S½NE¼ of Section 30, T. 19 N., R. 19 E.W.M. described as follows: Beginning at the southwest corner of the SW¼NW¼ of Section 29; thence N 00°27'50" E 17.16 feet; thence N 89°42'26" E 330.41 feet to the true point of beginning; thence N 00°27'57" E 655.01 feet; thence S 89°42'26" W, 2937.82 feet; thence south 655.02 feet; thence N 89°42'26" E 2944.04 feet, more or less to the true point of beginning, except that portion, if any, lying within Wilson Creek County Road.

The point of diversion shall be into the Seaton-Johnson Ditch, located 50 feet south and 750 feet west from the east quarter corner of Section 18, being within the NW¼NE¼SE¼ of Section 18, T. 19 N., R. 19 E.W.M. The right will carry a provision that allows for the use of an additional 0.40 cubic foot per second when flood water is available during April and May.

Court Claim No. 00991 – Kayser Ranch

Kayser Ranch took several exceptions to the Referee's recommendations concerning their water rights. Ecology sought clarification of several of the water rights and Chester Vernon Stokes and Patrick Jenkins took exception to the Referee recommending confirmation of one particular

water right to Kayser Ranch. The exceptions taken by Kayser Ranch and Ecology's clarification requests were remanded to the Referee to take testimony at the second supplemental hearing. The Court retained the Stokes/Jenkins exception and held a hearing May 21, 2003 to take testimony and evidence. Most of the issues brought by Kayser Ranch and Ecology do not relate to the water right that Stokes/Jenkins are challenging. However, resolution of that exception will affect the water rights ultimately awarded to Kayser Ranch. All issues are analyzed below.

Stokes/Jenkins are challenging a water right that was purchased by a predecessor of Kayser Ranch, P. H. Adams, in 1911. After the initial Report of Referee issued, another claimant in this proceeding, Morrison Ranch, took exception to this same water right. Morrison contended that even though the water right was purchased in 1911, it was not physically transferred until 1927, after adoption of the 1917 Surface Water Code, and required approval by a state agency to change a water right. Because the change procedures in the Surface Water Code were not complied with, Morrison argued the right was never legally transferred. The Court ultimately denied that exception, ruling the sale of the water right occurred in 1911, and was well documented at that time, and therefore compliance with the Surface Water Code was not necessary.

Stokes/Jenkins are challenging the right on three fronts: They claim the Referee ruled a portion of the water right is appurtenant to lands not owned by P. H. Adams at the time the water right transferred; the water right was historically not put to beneficial use; and that the determination that the right could be transferred is contrary to the rulings in *Lawrence v. Adams* and *Haberman v. Sander & Adams*. The Court will address each of these points.

The first issue is whether the Referee correctly matched the lands with the water right transferred by Adams. Stokes/Jenkins submitted a copy of a 1912 ownership map that shows the relevant portion of Kittitas County, with the last name of the landowner. DE-2085. The map was already in evidence, having been offered by Kayser Ranch at the initial evidentiary hearing and entered as Exhibit DE-1527. It should be noted that in 1991 when the map was offered as an exhibit, other claimants objected to it being admitted, contending that it did not accurately reflect land ownership in 1912. The 1912 map shows P. H. Adams owning the S½S½ of Section 35, the N½SE¼, SE¼SW¼ and SW¼SE¼ of Section 34, T. 19 N., R. 19 E.W.M. and the SE¼NW¼ and SW¼NE¼ of Section 2, T. 18 N., R. 19 E.W.M. It also shows the government (presumably the Federal Government) owning the SE¼SE¼ of Section 34, the N½NW¼, NW¼NE¼ of Section 2.

Stokes/Jenkins also point to *Thomas v Roberts* (*Roberts*), filed in 1919 with the decree entered in 1925, in which P.H. Adams was a defendant. The Findings of Fact identified Adams' land. The Court notes the typed version in the record may have a typographical error. It states that Adams owned the E½NW¼, W½NE¼, W½NW¼, SW¼NE¼, SE¼NW¼, Lots 2 and 3, of Section 2, T. 18 N., R. 19 E.W.M. The underlined part is redundant, suggesting an error. The Findings of Fact also states Adams owned the SE¼SW¼ and SE¼, except the SE¼SE¼, in Section 34. The Findings of Fact, when describing the rights held by Adams, identifies 123⅓ inches that are prior to all of the plaintiff's rights, 100 inches that are prior to a portion of the plaintiff's rights, and 160 inches of water rights Adams acquired through Peter Kuchen that are subsequent to the rights of the plaintiff. The former Kuchen land is in the S½ of Section 34 and the NW¼ of Section 3. By 1919, P. H. Adams apparently owned the NW¼, W½NE¼ of Section 2 and NW¼ of Section 3, T. 18 N , R. 19 E.W M. and the SE¼SW¼, SW¼SE¼, N½SE¼ of Section 34 and S½S½ of Section 35, T. 19 N , R. 19 E.W.M.

A review of the 1912 map and *Roberts* persuades the Court that the NE¼ of Section 3 now owned by Kayser was not owned by P. H. Adams [3] The Referee did include the SE¼NE¼ of Section 3 in the place of use for the contested water right, so that land will be excluded from any water awarded based on the water rights purchased by P. H. Adams.

Stokes/Jenkins next argue the water right was not put to beneficial use during the time Adams owned the land and was not exercised until after Kayser Ranch acquired the land. Mr. Stokes testified to his understanding of water rights for the property now owned by Kayser Ranch. Stokes' family purchased the land he now owns (about a mile west of the Kayser property) in 1943 and his family was involved in regulating the diversions into ditches that served non-riparian lands. It was his understanding that what is now the Kayser property did not have any water rights that were higher in priority then the water rights for his own land. Mr. Stokes' most senior water right has a priority date of June 30, 1872. Fred Zumbrunnen, who lived on land in Section 4, T. 18 N , R. 19 E.W.M. from 1912, when he was born, until 1941, also testified about his understanding of the water use on the Kayser land. He testified that when water got low, the Adams Ditch (which serves the Kayser land) was cut back. He was not aware of any first class water rights (high priority) being transferred to the Kayser land while he lived on the neighboring land.

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[3] I. H. McGough owned the NE¼ of Section 3 at the time of *Roberts* (1925). Kayser did ultimately succeed to lands owned by I. H. McGough to be discussed below.

Louie Meyers, who worked for Fred Adams from 1936 to 1946 and then again for Fred Adams and then the Kaysers from 1962 to 1977, testified on behalf of the Kaysers. Hay was irrigated on the land and then it was used to graze cattle in the winter. They would irrigate into July and sometimes into August depending on the water year. Grain was also grown on some of the land. Mr. Meyers was not very familiar with the irrigation practices, but had the impression there was plenty of water. However, he did recall the water being shut off into Adams Ditch and Mr. Adams going up and turning it back on. Mr. Meyers was also familiar with land in Section 3 then owned by Mr. Stampfly. He recalls one year, after the Kaysers bought the land, plowing up 25 or 30 acres in Section 3 and irrigating a grain crop with runoff from the fields above. Unfortunately, there are no aerial photographs entered into evidence that would help in determining the area being irrigated prior to Kayser acquiring the land.

Stokes/Jenkins contend that the testimony of historical, beneficial use on the Kayser land is vague. There is no question that water was diverted into the Adams Ditch, but it is unclear whether this water was that transferred from Olding and Galvin with the 1872 priority or not. The Court acknowledges and appreciates the difficulties Kayser maintains in trying to paint the molecules and identify what water goes on what property – the Court is faced with the same dilemma. At best, the evidence presented by the two parties can be characterized as a draw. The Kaysers have not really persuaded the Court that the 1872 water was utilized – for example, where did Adams start putting the water after the KRD canal was constructed that allowed the agreement to be finalized? However, those contesting the claim have not been able to testify that specific land was not irrigated. The Court believes with conflicting testimony in the record, there needs to be other factual evidence to support the claim that the water right was not used, such as aerial photography (1937 photography has been provided in other areas of the subbasin). At best, the testimony about operation of the ditches that serve the Kayser land has shown there was disagreement about the seniority of the water rights being delivered to the Kayser property. Diversions were shut down and then reopened. That does not prove one way or the other that the Kayser property had an 1872 priority date. A water user carries the burden of proving the beneficial use of water, and although Kayser has proven the beneficial use of water generally on the property acquired from Adams, there are many questions that remain. In order to award a water right, Kayser must present something more specific that will show the evolution of irrigation on their property that identifies how the 1872 water was put to beneficial use.

Stokes/Jenkins also argue that the decisions in *Haberman v Sander*, 166 Wash. 453 (1932) and *Lawrence v. Adams*, 180 Wash. 696 (1935) bind the Court through application of the doctrine of collateral estoppel. Accordingly, in their view this Court is barred from awarding a water right to Kayser for the water right transferred to Adams from Olding. They point out that collateral estoppel requires affirmative answer to the following questions.

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?

2. Was there a final judgment on the merits?

3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

4. Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

Ecology v. YRID (Acquavella II), 121 Wn 2d 257, 850 P.2d 1306 (1993).

This matter in many respects boils down to who had the obligation to do something about the transfer. In parceling out that responsibility we look to state law in effect at the time of the transfer. According to statute, a water right was readily transferred by deed, and makes no mention of a requirement to avoid impairment of other water users. Session Laws, 1891 at Sec. 6:

> The right to the use of water acquired by appropriation may be transferred like other property by deed. The county auditor of each county in this state must keep a book in which he must record the notices provided for in this act.

Therefore, under applicable legislation, Adams complied with the law by acquiring the right to use water from Olding in deed fashion and making that agreement available to the county auditor for recording. The agreement between Olding et al. and Adams states as follows:

> [T]he parties of the first part have this day sold, and do by these presents sell and convey to the parties of the second part all of the water and water rights appurtenant to said lands and derived in any manner from Nanum, and Creeks, as hereinbefore mentioned and described; upon the following conditions and for the consideration hereinafter expressed. The said waters are to be transferred and delivered to the second parties as soon as what is known as the High Line Canal is constructed by said Kittitas Reclamation District, and as soon as water therefrom in sufficient quantities is available for the irrigation of all the lands herein described.

Since Kayser's predecessor complied with statutory law, the Court now turns to case law to determine if it supports Stokes/Jenkins argument that the issue of impairment has been decided.

The two main authorities relied on by Stokes/Jenkins are the various court decisions in *Haberman v. Sander &Adams*, Kittitas Superior Court No. 8190 affirmed *Haberman v. Sander*, 166 Wash. 453 (1932), and *Lawrence v. Adams*, No. 8402, Decree (April 18, 1934) affirmed *Lawrence v. Adams*, 180 Wash. 696 (1935). They believe those cases stand for the proposition that upstream water users, even those with a better priority, cannot divert any water to non-riparian lands that would diminish the ability of downstream riparian water users to have flows to which they were accustomed.

We start with an analysis of *Haberman v. Sander*. There, Olive Sander leased 580 acres of lands and the appurtenant water rights to Adams. Those lands and accompanying water rights bordered on Wilson Creek about four miles below the area where Wilson and Naneum Creek split again after having joined for a stretch. Adams, with the approval of the state supervisor of hydraulics, changed the point of diversion of the Sander's right to a ditch located on the combined streams of Wilson and Naneum creeks. He sought to divert that water to "approximately 600 acres of land lying five miles north of the Sander tract and about two miles east of the creek" – land owned by Adams. After receiving permission from the state, Adams began diverting much of the water through his ditch leading from the combined stream and the Habermans instituted a successful challenge to that use in Kittitas Superior Court by way of injunction with affirmation at the Supreme Court. The Habermans' land, now owned by the Jenkins who challenge Kayser's use, is riparian to Wilson Creek. Both the Habermans and Sanders were participants in a water rights dispute involving Wilson Creek water users that culminated in the 1890 decree known as *Sanders v. Jones*. That decree was important in the decision ultimately reached by the *Haberman* court, and the Supreme Court cited to the following provision at 166 Wash. 456-57:

> "Subject to all of the foregoing rights and appropriations (among which was decreed Mr. Sander's right to the use of water as above set forth), the defendants J.H. Thomas, J.H. Crawford and A. Haberman are each entitled to have the waters of said Wilson creek to flow in their accustomed channels to and upon and across their and each of their lands described in their respective answers without any material diminution in quantity or deterioration in quality."

That decree provision, along with § 7, chapter 122, Laws of 1929, p. 275 prohibiting changes in point of diversion and place of use that impair existing rights, provided the basis for the decision to grant the Haberman's request for injunctive relief.

Lawrence v. Adams, Kittitas County No. 8402 (Memorandum Opinion entered November 27, 1933; Final Decree April 18, 1934) was a case that arose from an attempt by Kayser's predecessor Adams to transfer the water rights of Wager, who along with Olding and Galvin, were the parties transferring water rights to Adams pursuant to the 1911 agreement discussed above. The Lawrences were located near the end of Naneum Creek and had junior, riparian-based rights. P.H. Adams, the predecessor to Kayser, was a defendant who attempted to transfer water from lands owned by Mrs. James Ferguson and Henry Wager, both of whom had water rights derivative of the 1907 adjudication of Naneum Creek known as *James Ferguson v. United States National Bank of Portland, et al*, Kittitas County Superior Court Cause No. 2607 (*Ferguson)*. The Court notes that Olding and Galvin, the individuals who entered into the 1911 Agreement to transfer water to Adams, also were adjudicated water rights in the *Ferguson* proceeding and their lands were located near the land owned by Wager (in Section 21, T. 18 N., R. 19 E.W.M.).

In finding for the Lawrences, the Kittitas Superior Court stated the following in its Memorandum Decision at page 4:

> I have no doubt that Adams is putting the water taken to a beneficial use, and it may be irrigating more acres than would be irrigated if the water taken were left in the Creek, but this, in my opinion, cannot alter the situation. The plaintiffs like others along the Nanum settled along this creek, and for many years have had the advantage and the benefit of this stream. It is true that they were presumed to know that the waters of Nanum Creek had been adjudicated, and that during the summer if all of those to whom water had been given under the decree hereinbefore referred to, there would be no water for them for surface irrigation, but in my opinion, they had a right also to believe and rely on the fact that these parties would use the water to be taken from this stream on the lands set out in the findings, conclusions and decree in that case, and if this was done plaintiffs would have said stream flow by their land, and would have up until a certain time of the year, some water for surface irrigation, and during the remainder of the year the benefit to be derived from the percolating waters as the stream flowed by their land.

Judge Jeffers also addressed the fact that *Ferguson*, unlike its Wilson Creek counterpart *Sanders v. Jones*, contained no language requiring flows to be maintained in streams (more specifically set forth above). The court stated the following at page 5:

> While I appreciate that the wording in the decree awarding the Wilson Creek waters, and the decree in the *Ferguson* case is different, still I am of the opinion that riparian owners along the Nanum have certain rights in and to the stream. I think the statement in *Haberman v. Sander*, 166 Wash. at page 463 is applicable here; --- "Persons acquiring land upon Wilson Creek above the Sander land, even though their claim to the waters of the creek may be junior to the Sander rights of appropriation, acquired some rights in the stream and the flow thereof, in connection with their land ownership."

He went on to ponder as follows:

> I think on small streams such as the Nanum, where people have established their homes and farmed their land relying upon certain conditions that it would be establishing a dangerous precedent to all the change in point of diversion such as is sought in this case, and I am again in accord with the *Haberman* case where it says on page 463, "It would seem that, if appellants may change the point of diversion of the Sander water, a dangerous precedent will be set, which might well result in a promiscuous scramble of water appropriators to move their intakes upstream, with the result that [sic] may evils would follows."

Finally, in the final decree entered April 18, 1934 it states:

> 1. That the defendants Fred D. Adams, Mrs. James Ferguson, Henry Wager and each of them, their heirs, administrators and assigns and their agents, their employees and all persons claiming under them and the defendants Charles J. Bartholet, Supervisor of Hydraulics, Benjamin Vaughn, Watermaster and Henry Stokes, Stream Patrolman, and each of them and their successors in office and each of them all persons claiming under or through or under authority of them or either of them, be, and they are hereby perpetually enjoined, prohibited and restrained from diverting or using any of the water owned or claimed by the defendants Mrs. James Ferguson and Henry Wager, under and by virtue of Decree No. 2607 [*Ferguson]* in the above entitled court, by the diversion of said water through what is known as the Adams ditch or by diverting the same to any other point above the lands of the plaintiffs herein.

That decision was affirmed by the Supreme Court, *Lawrence v. Adams*, 180 Wash. 696 (1935).

The message from these two interrelated cases is clear. The prior decrees of Naneum Creek (*Ferguson*) and Wilson Creek (*Sanders v.* Jones) are to be read as limiting the rightholders thereunder to the points of diversion and places of use as set forth and transfers can only be undertaken if doing so will not cause an impairment to downstream riparian users. This is particularly true for anyone trying to move a right to the Adams/Schnebly ditch.

Kayser responds to Stokes/Jenkins on the impact of *Haberman* and *Lawrence* to say these two cases are factually dissimilar to the current dispute. *Haberman* considered the challenge of a riparian Wilson Creek user to the change in point of diversion and place of use of Wilson Creek rights while *Lawrence* involved the challenge of a riparian Naneum Creek user to enjoin the use of Naneum Creek water by a non-riparian owner. Here, Stokes/Jenkins are riparian to Wilson Creek, have Wilson Creek rights and are challenging the use of Naneum Creek rights established in the *Ferguson* decree. At one time, when rights were first established in the later half of the 1800's, the

two creeks were separate but have not been for approximately 100 years. Additionally, there is undoubtedly a contribution from KRD return flow to which this Court cannot confirm rights

Although the Court appreciates the distinction that Kayser attempts to paint in resisting the collateral estoppel effects of the prior cases, this Court is not persuaded those distinctions present any real difference. *Haberman* and *Lawrence* are quite clear that the Adams ditch receiving these transfers had its point of diversion in a combined stretch of the two creeks and a review of the map submitted by Ecology shows the northerly point of diversion utilized by Kayser is located on a combined stretch in Section 28 while the other two points of diversion appear to be located below where the streams separate and before they come together again. There is no question that the Kayser diversion/use of water at the current locations would have an effect on both downstream Wilson Creek and Naneum Creek water users. The two streams are too interconnected in this area – as set forth in the *Haberman* and *Lawrence* lines of decision -- to attempt to paint the stream of origination of the various molecules of water and their ultimate destination.

Further, although it leaned heavily on the statutory provisions prohibiting impairment through transfer in reaching its decision, there is no question that the language in the decrees mandating a flowage right was of considerable import. See *Haberman* at 461 ("It is apparent, then, that the flowage right granted by the decree to respondent would be practically worthless if the senior appropriators may at will move their points of diversion up the creek"). The *Lawrence* court even goes so far as to read such a provision into the *Ferguson* decree when no such statement was included. Kayser is partially correct when it argues that the *Haberman* and *Lawrence* courts were engaged in a riparian analysis, which might not be of a similar import at this time. However, both courts (and especially the *Haberman* Supreme Court decision) note that even though the riparian character of the water is primarily at issue, water was nonetheless diverted for irrigation.

With the above-mentioned considerations in mind, the Court finds that Jenkins/Stokes have satisfied the first three prongs of the collateral estoppel analysis in terms of identity of issues, parties and a final judgment. The Court now turns to the equitable consideration of the analysis to determine if application of the doctrine will work an injustice on Kayser, the party against whom the doctrine is to be applied.

The evidence is conflicting as to what actually happened in the 1930's and 40's, but has been analyzed above in regard to the issue of whether Adams and then Kayser used the water that was transferred from Olding and Galvin. The bottom line is that there have been long-standing

disagreements between water users over diversions into the Adams ditch. In many respects, this Court strongly believes those disagreements should have been addressed then and not some 70 years later when evidence is stale and uses of water difficult to define. Perhaps some of that uncertainly traces to the origin and use of this Olding and Galvin water. However, the Court can identify no precedent to allow it to find that an injustice has been committed on that basis when doing so would require the Court to enter a decision totally the opposite of that reached in *Haberman* and *Lawrence*. Therefore, this Court finds that the decisions in the *Haberman* and *Lawrence* lines of cases apply to the issue of transfers of water on Wilson/Naneum Creek and Kayser is collaterally estopped from claiming a right to the water subject to the 1911 Agreement between Adams and Olding/Galvin. The Stokes/Jenkins exception is granted and the Court will not confirm a water right to Kayser based on the Olding/Galvin water right.

Kayser's exceptions and Ecology's request for clarifications require the Court to review the other water rights awarded Kayser. The Court concludes there have been omissions and errors made in carrying water rights forward from the Report of Referee to the Supplemental Report of Referee. The Court will start by defining the water rights that are appurtenant to the Kayser property by virtue of rulings in the *Ferguson* decree and not the result of any transfers.

Kayser succeeded to P. H. Schnebly's water right that carries a June 30, 1887, date of priority for the use of 100 inches or 2.0 cubic feet per second for the irrigation of 100 acres in the W½NE¼ and E½NW¼ of Section 2, T. 18 N., R. 19 E.W.M. This right is accurately described on page 446 of the Supplemental Report of Referee and no modification by the Court is needed. Kayser also succeeded to Eric Larsen's water right that carries a June 30, 1880, date of priority and is appurtenant to the W½NW¼ of Section 2. This right was correctly described on page 650 of the Report of Referee, with the place of use refined to the SW¼NW¼ of Section 2, in order for the place of use to be of similar size as the number of acres authorized for irrigation. However, in responding to an exception brought by Kayser, the Referee made an error in considering the extent of the Eric Larson water right that would be appurtenant to the Kayser land. Referring to the Additional Amendatory and Supplemental Findings and Decree in *Ferguson*, the Court notes there is a substituted Findings of Fact for the Keister and Eric Larson water right. The amended findings show that Eric Larson owned the W½SW¼ and W½NW¼ of Section 2 and the S½SE¼ of Section 3, T. 18 N., R. 19 E.W.M. and had 160 acres under cultivation. The Court then concluded

that Larson had a right to 100 inches until June 15 and thereafter a right to 50 inches. So, Larson had a right to use 100 inches of water to irrigate 160 acres within a 240-acre area.

There is nothing in *Ferguson* that assists with determining where the irrigated lands are located. However, in the *Roberts* Findings of Fact it states that P. H. Adams succeeded to 33⅓ inches of that water right, which suggests the right was divided equally between each 80-acre tract For this particular water right, instead of awarding one inch per acre as was normally done in *Ferguson*, 0.625 inch of water was awarded for each acre irrigated. Therefore, 33⅓ inches could be sufficient to irrigate 53 acres. The water right described on page 364 of the Supplemental Report of Referee with a June 30, 1880, date of priority is amended to authorize the diversion of 0.66 cubic foot per second May 1 through June 15; 0.33 cubic foot per second June 16 through October 15, 139 acre-feet per year for the irrigation of 53 acres and stock watering in the W½NW¼ of Section 2, T. 18 N., R. 19 E.W.M.

The Additional Amendatory and Supplemental Findings also made substituted findings for W. H. Keister and S. S. Keister and Kayser acquired a portion of the water right awarded to the Keisters. They owned the N½NW¼, SW¼NW¼ of Section 11; SE¼SW¼ of Section 2 and the NE¼ of Section 3, T. 18 N., R. 19 E.W.M. and irrigated 240 acres with water from Nanum Creek. They were awarded 200 inches of water rights; or 0.83 inch per acre. This right is also reduced by half after June 15. Again, the *Ferguson* decree did not identify where the irrigated lands were located. However, in *Roberts*, T. H. McGough, who then owned the NE¼ of Section 3, was identified as having a right to 100 inches. The Court, therefore, amends the water right described on page 363 of the Supplemental Report of Referee and page 649 of the Report of Referee to authorize a water right for 2.0 cubic feet per second May 1 through June 15 and 1.0 cubic foot per second June 16 through October 15, 331.72 acre-feet per year for the irrigation of 120 acres in the N½NE¼ and SW¼NE¼ of Section 3. The Court notes that while the instantaneous quantity previously authorized on page 365 of the Supplemental Report was a little higher than the water right allowed, the annual quantity authorized could not have been physically diverted due to limits on the previously authorized instantaneous quantity.

Kayser also acquired rights through Peter Kuchen, with an 1887 date of priority for the use of 160 inches to irrigate 160 acres. This right was recognized in *Roberts*, but there was no information on what lands Kuchen had established a water right to irrigate. At the supplemental hearing, Kayser established that Kuchen owned lands in the SE¼SW¼, S½SE¼, and that portion of

the N½SE¼ of Section 34 lying below the Adams Ditch, T. 19 N., R. 19 E.W.M. and the NW¼ of Section 3, T. 19 N., R. 19 E.W.M. Because no water right claim was filed pursuant to RCW 90.14 for lands in the NW¼ of Section 3, the Referee awarded one inch of water for each acre irrigated in Section 34, which is 125 acres, and that right is described on page 445 of the Supplemental Report. The annual quantity of water awarded on page 445 was 500 acre-feet per year, while on page 138 the Referee recommended 600 acre-feet per year. A continuous diversion of the instantaneous quantity authorized would result in 522 acre-feet per year being diverted – it is physically not possible to divert 600 acre-feet per year. Kayser is attempting to amend a water right claim to include the NW¼ of Section 3; if accomplished the remainder of this water right can be awarded. Ecology is urged to act on the amendment request before entry of the Conditional Final Order.

The *Roberts* Findings of Fact recognized two water rights that P. H. Adams had purchased and transferred to land he owned. Those rights can only be appurtenant to lands that Adams owned at the time those rights were transferred, which would be land in the N½ of Section 2, and NW¼ of Section 3, T. 18 N., R. 19 E.W.M. and the S½ of both Sections 34 and 35, T. 19 N., R. 19 E.W.M. In light of that, the Court suggests that it would be more appropriate to divide the Kuchen water right equally between Sections 34 and 3, because any deficiency between the water right awarded in Section 34 and the irrigated acres can be covered by this purchased water right. The Court will, therefore, amend the water right described on page 445 of the Supplemental Report of Referee to authorize the diversion of 1.6 cubic feet per second in May and June and 0.80 cubic foot per second in April and July 1 through October 15, 400 acre-feet per year for the irrigation of 80 acres in the SE¼SW¼ and SW¼SE¼ of Section 34. Again, if Kayser is successful in amending the RCW 90.14 claim(s), the remainder of this right could be confirmed to lands in the NW¼ of Section 3.

Adams purchased and transferred portions of two water rights initiated in 1877 for use on his land; the first was 40 inches awarded to Topliff-Clements in *Ferguson*, and the second was 50 inches awarded to A. J. Sliger. Both rights were awarded to Kayser Ranch in the Referee's Report, see pages 634 and 635, but not carried forward to the Supplemental Report. However, the right described on page 634 (and also on page 279, lines 18½ to 25) has an error. The Referee awarded a right for 65 inches, when the *Roberts* decree only awarded a water right for 40 inches (Topliff-Clements). The Court proposes to make this right appurtenant to the remainder of the irrigated lands in Section 34, as such were owned by Adams when this water right was purchased. Thus, that right is amended to authorize a diversion of 0.80 cubic foot per second in May and June, 0.40 cubic

foot per second in April and July 1 through October 15, 200 acre-feet per year for the irrigation of 40 acres. The place of use shall be that portion of the E½SE¼ of Section 34 lying below the Adams Ditch. The two water rights for Section 34 authorize irrigation of a total of 120 acres.

The water right described on page 636 (former A. J. Sliger right) is for the irrigation of 50 acres in the NE¼NW¼ and N½NE¼NW¼ of Section 2. Obviously there is a typographical error in the place of use description. Again this is a water right that P. H. Adams purchased and transferred to his lands. There are more acres being irrigated in Section 2 than there are water rights currently awarded. The E½NW¼ and W½NE¼ of Section 2 have a water right to irrigate 100 acres within a 160-acre irrigated area. If the Sliger 50-inch right is awarded for the E½NW¼ and W½NE¼ of Section 2, there would be water rights to irrigate 150 acres within a 160-acre area – and would result in water right coverage for virtually all of the irrigated lands. Therefore, the Court will amend the place of use on the water right described on page 636 of the Report of Referee to read "The E½NW¼ and W½NE¼ of Section 2, T. 18 N., R. 19 E.W.M."

The Court has awarded rights to irrigate a total of 568 acres within Kayser Ranch with priority dates ranging from 1877 to 1887. The Court, through a process of elimination, selected lands to attach the purchased water rights and Kayser Ranch may propose a different mix. The Court will give some latitude, as long as the lands identified are covered by a water right claim filed pursuant to RCW 90.14 and were lands owned by Adams at the time of the transfers.

Court Claim No. 01732 – Kittitas County

Kittitas County (County) took exception to the Referee not confirming a right for land it owns in the E½ of Section 23, T. 18 N., R. 19 E.W.M. and Ecology took exception to the Referee's finding regarding the priority date for land in the E½ of Section 24, T. 18 N., R. 19 E.W.M.

The Referee found the priority date for the E½ of Section 24 was April 30, 1881. Ecology believes the priority date for the lands in the N½NE¼SE¼ of Section 24 should be July 3, 1897 in light of the Cornell Notice of Appropriation that only identifies lands in the NE¼ of Section 24. The 1897 date is based on the date the patent issued to Cornell. In opposition, the County produced an excerpt from the Answer to the Complaint filed in *Sander v. Wilson*. That excerpt states water was first appropriated for the E½E½ of Section 24 in 1870 by William Davidson and that use continued through the time the answer was filed in 1903. Subsequent to the exception hearing, the County filed Exhibit DE-2072, which contains several documents from *Sander v. Wilson*, including the complaint, answer, Findings of Fact and Conclusion of Law and the Decree. The Court finds

that the priority date should be June 30, 1870, and the water right on page 372 of the Supplemental Report of Referee is amended at line 7 to reflect that date.

Kittitas County filed numerous documents with its exception that lead to a finding there was sufficient evidence to confirm a water right for the County lands in the E½ of Section 23. The County is asserting a right to irrigate 160 acres, however, only a right to irrigate 80 acres was protected through the filing of Water Right Claim No. 119776 pursuant to RCW 90.14. A review of the *Sander v Wilson* documents revealed nothing that would preclude confirmation of a water right for the E½ of Section 23. The Court ruled that a water right would be awarded to Kittitas County for the diversion of 1.6 cubic feet per second, 400 acre-feet per year for the irrigation of 80 acres with a May 24, 1884, date of priority. The authorized point of diversion shall be the diversion described in the RCW 90.14 water right claim, which is approximately 50 feet south and 550 feet west of the northeast corner of Section 23, being within the NE¼NE¼ of Section 23. The claim was remanded to the Referee to allow the county to present evidence to show where the 80 acres are located in the NE¼ of Section 23. The county entered Exhibit DE-2133, an aerial photo that portrays the boundaries for the irrigated lands along with the following written legal description:

> That portion of the E½ of Section 23, T. 18 N., R. 18 E.W.M. bounded by a line described as follows: Beginning at the northeast corner of Section 23; thence S 266°46'49" W 1584.37 feet to the true point of beginning; thence N 90°00'00" W 274.36 feet; thence S 58°2'28" W 2719.91 feet; thence S 33°58'26" W 321.44 feet; thence S 15°39'34" W 2867.03 feet; thence S 17°24'18" E 274.70 feet; thence S 90°00'00" E 1679.79 feet; thence N 01°30'23" E 2511.58 feet; thence S 89°52'36" W 858.76 feet; thence N 01°47'50" E 248.44 feet; thence S 89°13'59" E 1976.88 feet; thence N 02°23'40" E 559.46 feet; thence S 90°00'00" E 521.65 feet; thence S 0°00'00" W 817.13 feet; thence S 89°32'03" W 1387.43 feet; thence S 01°26'38" W 1529.76 feet; thence N 89°50'32" E 522.07 feet; thence S 0°00'00" W 265.54 feet; thence S 89°16'18" W 516.36 feet; thence S 0°3'16" W 7734.16 feet; thence S 90°00'00" E 1255.74 feet; thence N 0°57'42" W 562.01 feet; thence S 90°00'00" E 264.93 feet; thence S 00°07'31" E 562.28 feet; thence N 89°50'45" E 1829.48 feet; thence N 00°36'42" W 1536.54 feet; thence N 89°53'30" W 867.78 feet; thence N 0°00'00" W 258.78 feet; thence S 89°56'3" E 894.44 feet; thence N 00°44'4" E 2110.98 feet; thence S 89°57'32" W 1434.55 feet; thence N 0°00'00" W 251.19 feet; thence S 90°00'00" E 1434.54 feet; thence N 0°45'0" W 1942.01 feet; thence N 89°29'31" W 1272 feet; thence N 27°17'58" W 286.13 feet; thence N 89°58'58" E 1371.80 feet; thence N 01°04'11" E 1647.37 feet; thence N 90°00'00" W 595.06 feet; thence N 00°00'00" W 228.63 feet; thence S 89°54'03" E 593.83 feet; thence N 0°1'4" E 1317.25 feet; thence S 89°32'13" W 1903.77 feet; thence N 0°24'22" E 2255.84 feet to the true point of beginning.

Court Claim No. 00952 – David and Christine Leffert

On April 16, 2003, the Lefferts filed a Motion to Allow Filing a Late Exception to the Report of Referee for Subbasin No. 9. On May 8, 2003, the Court signed an order allowing the late exception and it was filed. The order also remanded the claim to the Referee to take testimony at the second supplemental hearing. Mr. Leffert testified at the second supplemental hearing.

The Lefferts took exception to the priority date, acres, and annual quantity of water awarded by the Referee. The analysis of their claim by the Referee appears on pages 311 through 315 of the Report of Referee for Subbasin No. 9. The Court will not repeat the analysis, other than to summarize the conclusions. The Referee concluded that the water right for the Lefferts' land stemmed from a right recognized in the *Ferguson* decree for land at that time owned by J. I. Wilson. The Lefferts and Sam Kayser own all of the land for which Wilson was awarded a water right. The Referee divided the right based on the percentage of the total land owned by each claimant. The Lefferts are not objecting to the method used by the Referee to divide the water right.

This division resulted in the Referee concluding the Lefferts had a right to use 9 inches of water or 0.18 cubic foot per second. The *Ferguson* decree awarded one inch of water for each acre irrigated, which lead the Referee to confirm a right to the Lefferts for the irrigation of 9 acres. The Lefferts are irrigating 13.62 acres and request a right to irrigate the same. They do not request a greater instantaneous quantity, leading the Court to conclude they believe the right was divided correctly between them and Mr. Kayser. The Court has no doubt the Lefferts irrigate 13.62 acres; the State's Investigation Report prepared after a site visit in 1988 so confirms. However, the issue is not how many acres are currently being irrigated, but how many acres there is a valid water right to irrigate. Based on how the Wilson water right was divided, to which no exception was taken, the Lefferts have a right to irrigate 9 acres and Kayser has a right to irrigate 91 acres. In order for the Lefferts to have a right to irrigate more acres, the number of acres awarded to Kayser would have to be reduced. There has been no evidence presented to show that the division of the water right was not correct; that would require evidence of exactly what lands were actually being irrigated at the time of the *Ferguson* decree. Lefferts bear that burden of proof and Kayser would have the opportunity to rebut any challenge. Therefore, the Court denies that portion of their exception.

The Court will modify the annual quantity of water. The Referee awarded 45 acre-feet per year, in spite of finding that a total of 48.43 acre-feet per year was authorized for diversion. The 48.43 acre-feet will be reduced by the 0.50 acre-foot awarded for stock watering during the

irrigation season, with 47.93 acre-feet per year authorized for irrigation. The claimant was seeking a right to use 68.1 acre-feet per year, however, that quantity could not physically be diverted during the authorized irrigation season. The Lefferts also asked for a modification of the priority date. The Referee recommended a date of June 30, 1883, and the claimants are asking for a May 1, 1883, date based on the statements in the *Ferguson* Findings of Fact that water was first appropriated in May of 1883. The Court will partially grant that exception. The priority date should be in May, but May 31, 1883, based on the convention used in this case for assigning priority dates. If only the month and year of the priority date is known, the last day of the month will be used.

The Court also notes that Ecology approved Lefferts' application to change their point of diversion location. The Lefferts appealed this decision as it relates to the extent of their water right consistent with the exception they took and addressed herein. They did not appeal the point of diversion location approved by Ecology; thus, the Court will modify the water right to reflect the new diversion location.

The water right described on page 393 of the Supplemental Report of Referee is modified as follows: On line 6½ change 45 acre-feet per year to 47.93 acre-feet per year; on line 8½ change the priority date to May 31, 1883; and on lines 9½ through 11 change the point of diversion location to 880 feet north and 2210 feet west of the center of Section 33, being within the NW¼SW¼NW¼ of Section 33, T. 19 N., R. 19 E.W.M.

Court Claim No. 15629 – David and Linda Lundy

The Lundys took exception to the Referee not recommending a water right for their property. The Lundys introduced the testimony of Dr. Lundy and evidence to show that their property was originally settled by August Haberman, who was awarded water rights in both the *Sander v. Jones* decree and the *Ferguson* decree. In fact the original Haberman home is on the Lundy property. The claimants are asserting a right to divert 0.50 cubic foot per second from a branch of Wilson Creek for the irrigation of 25 acres. Their land is located in the W½SW¼NE¼ and W½NW¼SE¼ of Section 5, T. 18 N., R. 19 E.W.M. Water is diverted from the branch of Wilson Creek in the SW¼NE¼ of Section 5, about 250 feet from their property line.

At the initial evidentiary hearing in 1991, Harold Jenkins was the only claimant asserting a right for lands homesteaded by August Haberman. The evidence presented, along with Mr. Jenkins being the only one asserting ownership of Haberman's water rights, resulted in those rights, as set

out in *Ferguson* and *Sander v. Jones,* being confirmed to the Jenkins land. No one took exception to that award.

On December 14, 2000 the Lundys filed a motion to allow the filing of a Statement of Claim and the Court orally granted that motion and remanded the claim, when it was filed, to the Referee to take testimony at the supplemental hearing. The supplemental hearing was set for November 2001 and the Lundys were scheduled to appear. They did appear and testify, but had still not filed their claim. The Referee took the testimony, but ruled it would not be considered unless a Statement of Claim was filed. The Lundys ultimately filed their claim on January 31, 2002. As far as the Court can determine, a copy of the claim was not served on any party. When the Referee analyzed the testimony that came in, along with the statement of claim, it became clear that the Lundys were asserting a right for a portion of the August Haberman water right that had already been awarded in its entirety to Harold Jenkins under Court Claim No. 00930. Neither Mr. Jenkins nor his attorney, Lawrence E. Martin, were served a copy of the claim, nor was there an exception made to the water right awarded to Mr. Jenkins. The Referee, in his Supplemental Report, discussed the Lundy's evidence, but did not recommend confirmation of a water right due to Jenkins not having notice that, in effect, the Lundys were attempting to reduce the water right awarded to the Jenkins. The Supplemental Report directed the Lundys to serve Jenkins with any exception and to make it clear they were asserting a right that would compromise the right awarded to Jenkins.

The Lundys did file an exception on December 31, 2002, however, there is no record that a copy of the exception was served on the Jenkins or their attorney. The Court remanded the Lundys' claim to the Referee with a specific instruction that the exception be served on the Jenkins. The Lundys were scheduled to appear and did appear at the second supplemental hearing held on September 26, 2003. Mr. Martin was at the hearing that day representing other clients. It is clear from the transcript of that day's proceedings that Mr. Martin had no knowledge the Lundys' exception would impact the Jenkins' water rights and he had not been provided a copy of the exception. During the post-hearing briefing scheduling this was not addressed any further.

The Court has gone to great measure to accommodate the Lundys' late exception and provide adequate notice to affected parties. In every measure, the Lundys, or their attorney, have failed to meet the Court's direction and requirements, despite repeated reminders. The Court has no choice but to deny the Lundy's claim to a water right. Because the Court is prepared to enter a

Conditional Final Order it will allow no further exceptions, without a specific showing of good cause, and the Lundys must notify the Jenkins of any such hearing.

Court Claim No. 00484 – Brent & Mary Minor
Matthew & Jeane Miller

Matthew Miller took exception to the place of use described in a water right awarded under Court Claim No. 00484. Mr. Miller testified at the second supplemental hearing and Brent Minor appeared to respond to the exception.

At the time of the first supplemental hearing, Brent and Mary Minor acquired the land described in Court Claim No. 00484 and the Referee ultimately awarded six water rights in the Supplemental Report of Referee, including a right to irrigate 40 acres in the NE¼SE¼ of Section 8, T. 18 N., R. 19 E.W.M. This finding was based on the *Ferguson* decree, which awarded a water right of 40 inches, or 0.80 cubic foot per second, for land in the SE¼ of Section 8. The decree established that an inch of water was sufficient to irrigate an acre of land, so the Referee concluded the water right was for the irrigation of 40 acres in the SE¼ of Section 8. However, most of the SE¼ of Section 8 is being irrigated, almost 160 acres total. Rather than award a 40-acre water right with a 160-acre place of use, the Referee asked Mr. Minor to identify a 40-acre place of use for this water right. Mr. Minor did not do so, resulting in the Referee selecting the NE¼SE¼ of Section 8. Mr. Miller took exception to the place of use in the water right described on page 385 of the Supplemental Report. The Millers purchased a portion of the Minor land and were joined to the claim on June 10, 2002. Mr. Miller's exception states that the land historically irrigated from the identified point of diversion is his land in the NW¼SE¼ and the N½SW¼SE¼ of Section 8. Both the Miller and Minor lands also receive water delivered by the Kittitas Reclamation District (KRD).

Mr. Miller entered into evidence pictures and an aerial photograph that traces a ditch from the authorized point of diversion on Naneum Creek to his property. The land has been irrigated from the creek during his ownership and Mr. Miller testified his land was irrigated from this ditch when owned by Mr. Minor. During Mr. Minor's testimony he did not contest Mr. Miller's position that the Miller land had been irrigated from Naneum Creek. However, he testified the land in the NE¼SE¼ of Section 8 is also irrigated from Naneum Creek. The diversion in Section 4 also serves this land. Mr. Minor described a ditch system that comes into Section 8 from the west that provides creek water to his land. Mr. Minor suggested in his testimony that since he farms for a living, it would be more appropriate for the water right to be attached to the land he owns. That cannot be the basis for the Court's decision. If it were possible to determine the 40 acres that were being

irrigating when the water right was established, that is the land to which it would be appurtenant However, that evidence is not in the record and most certainly cannot be ascertained at this point.

Mr Miller was not certain how many acres are irrigated with Naneum Creek flows. KRD assesses him for 27 acres. Lyle Creek runs north to south through the westerly portion of the property and the evidence suggests that only land east of Lyle Creek is irrigated with Naneum Creek water. Mr. Miller also testified to some high spots not being irrigated and a home being built on a portion of the property. The Court finds that less than 40 acres can be irrigated on the Miller property with water from Naneum Creek – perhaps closer to 30 acres. Almost all of the Minor land in the NE¼SE¼ of Section 8 appears to be irrigated in the aerial photograph that is DE-2135.

While the Court's preference would be to award the water right to lands that were irrigated when the right was originally established, the evidence is lacking to support that determination. The lands owned by both Mr. Minor and Mr. Miller are irrigated from Naneum Creek and according to the evidence at the initial hearing have been irrigated from the creek for some time. The only equitable solution is to divide the right in half between the two parties, resulting in the award of two rights. The right awarded to Mr. Minor on page 385 of the Supplemental Report of Referee is amended to authorize the diversion of 0.40 cfs in May and June and 0.20 cfs in April and July 1 through October 15, 100 acre-feet per year for the irrigation of 20 acres in the NE¼SE¼ of Section 8. A second right is also awarded to the Millers for the diversion of 0.40 cfs in May and June and 0.20 cfs in April and July 1 through October 15, 100 acre-feet per year for the irrigation of 20 acres in that portion of the NW¼SE¼ of Section 8 lying east of Lyle Creek, more particularly described as Lot 1 of that certain Survey recorded September 22, 1992, in Book 18 of Surveys, page 227 and 228, under Auditor's File No. 552934 and Parcel B as described on that certain Survey as recorded January 22, 1999, in Book 24 of Surveys, page 8 under Auditor's File No. 199901220046. Both rights will have the same priority date and point of diversion as is already described on page 385.

Court Claim No. 00606 – Nu-West, Inc., Now Thomas and Susan Kunst
Gerhard & Bertha Jansen

Nu-West, Inc. was joined to Court Claim No. 00606 by order of the Court on March 7, 2003, and the Court allowed Nu-West, Inc. to pursue its exception before the Referee On March 2, 2004, Thomas and Susan Kunst were substituted for Nu-West Bob Dodge, who leased the land described in Court Claim No. 00606, and Jeff Brunson, a neighboring landowner, testified at the hearing. Court Claim No. 00606 asserts a right to irrigate approximately 30 acres with water

diverted from Naneum Creek. The land lies in the SE¼SE¼ of Section 18, T. 17 N., R. 19 E.W.M. The Referee did not recommend confirmation of a water right because the evidence at the initial hearing indicated that in addition to being irrigated with water diverted from Naneum Creek, the land was also irrigated with water from Ellensburg Water Company and Bull Canal Company. Therefore, although there was evidence the land was being irrigated in the late 1890's and early 1900's, the Referee was not able to conclude that water from Naneum Creek was being used. At the second supplemental hearing, the testimony was that although some land in the SE¼SE¼ of Section 18 is irrigated with water delivered by Bull Canal Company, it is only the portion lying west of Naneum Creek. The land lying east of Naneum Creek is only irrigated with water diverted from the creek. None of the land has shares from Ellensburg Water Company.

Mr. Dodge testified that approximately 2 cfs is diverted from the creek throughout most of the irrigation season. He begins irrigating about April 1 and continues until mid-October, the only break being two, two-week periods when the field is dried to cut hay. In the fall after the last cutting of hay, cattle are sometimes grazed on the land to clean up the stubble left from the hay. Any livestock on the land drink directly from Naneum Creek, a non-diversionary use that is covered by the stock water stipulation discussed on page 4 of the initial Report of Referee for Subbasin No. 9. Nu-West, Inc. has a non-diversionary stock water right under that stipulation.

Water Right Claim (WRC) No. 048981 was filed by Ed Clerf, a prior owner of the land, asserting a right to use 2.0 cfs, 1200 acre-feet per year for the irrigation of 30 acres in the SE¼SE¼ of Section 18. Nu-West indicated it is asserting a right consistent with the quantities in the water right claim. However, the testimony indicates only 28 acres are being irrigated and a continuous diversion of 2 cfs will not result in 1200 acre-feet per year being available for use. If 2 cfs is diverted during the irrigation season, with two, two-week breaks, no more than 720 acre-feet per year can be withdrawn from the creek. However, the Court is not prepared to recommend a right for that quantity. Irrigating 28 acres with 720 acre-feet per year results in 25.7 acre-feet per year being applied to each acre irrigated. That is an extremely high quantity of water and the need and historic use of that quantity has not been established. Additionally, it is undisputed that in the lower part of the basin, Naneum Creek carries substantial amounts of return flow water, which results from imported water delivered by Cascade Canal, Town Ditch and KRD's North Branch. Additionally, a portion of that return flow water is Yakima project water. Water rights cannot be established for use of either foreign (i.e. imported) or project return flows.

Much of the land in the area of the claimants' property is irrigated with water delivered by Bull Canal Company, which was awarded a right to divert 9600 acre-feet per year for the irrigation of 946 acres, or 10 15 acre-feet per year for each irrigated acre. Lacking any evidence of the quantity of natural creek water being used on the claimant's land, and recognizing that the soils in this part of the valley are more porous as a result of being near the river bottom, the Court will confirm a right for 2 cfs and 10.15 acre-feet per year for each acre, or 284.2 acre-feet per year for irrigation of 28 acres in that portion of the SE¼SE¼ of Section 18 lying southeast of Naneum Creek. The diversion from Naneum Creek is located approximately 1150 feet south and 50 feet west of the east quarter corner of Section 18, being within the NE¼SE¼ of Section 18, T. 17 N., R. 19 E.W.M. The priority date shall be March 12, 1887, the date the patent issued, which is the earliest date in the record showing separation of the land from the Federal Government.

Court Claim No. 02133- 02137 – Michael Kelly Moeur, Sr. & Michael Kelly Moeur, Jr.

The Moeurs submitted a number of exceptions that essentially asked the Court to reanalyze the evidence before the Referee. Only one additional document was entered at the hearing – DE – 1725 (a map comparing Moeur's claimed uses and those set forth in the RCW 90 14 claims that was prepared by Ecology for a hearing before the Pollution Control Hearings Board). The Court notes that the Moeurs submitted a request to amend the RCW 90 14 claims appurtenant to the property they farm and appealed Ecology's subsequent denial to the PCHB. The Court is not clear whether any proceedings are on-going in regard to the amendment before Ecology or the PCHB.

The first issue to address is the effect of RCW 90.14 and the claims registration process on this adjudication. This issue is undoubtedly the most controversial and troubling in this litigation. It arises in so many contexts that it is nearly impossible to establish rigid rules that apply flawlessly to all situations. Yet the Court has attempted to give this issue some finality and scope to assist claimants in presenting their claims and also give the Referee some guidance in analyzing claims to water rights. The rulings on these issues have been reduced to writing on at least two notable occasions Without rewriting those decisions here, the Court believes it appropriate to summarize the key rulings because various parties are strenuously urging a departure from those precedents.

The first time the issue was explored by the Court was in its *Memorandum Opinion Re. RCW 90.14 and Substantial Compliance* dated February 10, 1995. There, the Court set out three criteria for examining RCW 90 14 compliance, stemming primarily from this Court's interpretation of *Department of Ecology v. Adsit*, 103 Wn.2d 698, 694 P.2d 1065 (1985) and the doctrine of

substantial compliance. First, there must be an objectively manifested intent to comply with the claims registration statute. Second, the documents filed to achieve compliance must contain all the information required by the claim form. Third, the filing must accomplish the legislative intent of providing adequate records to allow Ecology to administer the state's waters. See *Memo Op.* at 6-7. The *Adsit* court made clear that substantial compliance encompasses "only minor, technical variations from the established standard." *Id.* In sum, the Court determined that it would

> "utilize the doctrine of substantial compliance, if appropriate from the evidence, for minor or technical deficiencies in RCW 90.14 claims. However, the Court has sought . . . to demonstrate that *Adsit* and substantial compliance are not a carte blanche excuse allowing certain claimants to avoid compliance with the law at the expense of others who relied on its protection."

The Court next examined RCW 90.14 compliance in its *Memorandum Opinion and Order Re: Exceptions to Supplemental Report of Referee Subbasin 8 (Thorp)* dated July, 2000. There, the Court analyzed Willowbrook Farms arguments in regard to the RCW 90.14 claims registration process. First, it discussed the doctrine of substantial compliance in much the same manner as it is discussed above. Then, it considered Willowbrook's arguments that the Court could consider evidence provided during an adjudication hearing to understand what a claimant intended when it submitted its RCW 90.14 filing and should amend the claim to conform to that proof. The Court generally disagreed that it could amend a claim and stated such an act is beyond the authority of the Court in an adjudication and has been delegated to Ecology by the legislature. To reach its decision, the Court relied on its *Memo. Op. Re: RCW 90.14 and Substantial Compliance* at page 8.

> The Court recognizes that some room for interpretation is necessary in analyzing the face of an RCW 90.14 claim and such interpretations have occurred during the course of the adjudication . . . This authority is necessary to allow the Court to decree a water right based on all the evidence submitted during the course of a general adjudication. (Cite omitted) However, the Court's authority to interpret documents in an adjudication does not extend to the process set forth in RCW 90.14.065 which is strictly within the authority of the Department of Ecology. The statute makes DOE's authority clear: "Any person or entity . . . may submit to the department of ecology for filing, an amendment to such a statement of claim . . ."

Shortly before the hearing, counsel for Mouers received a decision from the PCHB that contained dicta suggesting the Court had the authority to interpret RCW 90.14 claims consistent with evidence adduced at trial. The Court stated at the March 13, 2003 hearing it would consider that issue, but wanted to analyze a decision from the Court of Appeals in regard to Willowbrook

that had the potential to impact this issue. That opinion has now been published, *Willowbrook Farms v Dep't of Ecology*, 116 Wn.App 392 (2003) and the Court perceives nothing in that decision to change the way in which it has interpreted the claims registration process including the requirement to seek amendment of a water right claim through Ecology. There, Division III upheld Judge Cooper's decision that Willowbrook had committed a ministerial error in filling out its RCW 90.14 form and amendment of that claim form by Ecology was proper.

Therefore, the Court remains in the same position when interpreting RCW 90.14 claims that it has been in for many years. Essentially, if an RCW 90.14 claim has been filed, the Court will review all the information contained and/or attached to the form and to the extent it substantially complies with the evidence of beneficial use, a right will be confirmed. If the information on the RCW 90.14 claim varies too far or is otherwise inconsistent with the proof of beneficial use, a claimant must utilize the amendment process to modify the claim.

The Court now turns to the specifics of the claims filed by the Moeur's predecessor to determine if the RCW 90.14 claim is substantially in accord with the historical beneficial use of water. The use of water on the Moeur property is complex and involves three sources of water – Yakima River, Spring Creek and Wilson Creek. The Court will take up the exceptions by water source in the same manner those exceptions were presented.

1. Spring Creek

Claimant takes issue with the instantaneous and annual quantity of water awarded by the Referee and not the acres irrigated (23) or priority date. The Referee recommended a water right based on a water duty of 0.03 cfs/acre (0.69 cfs) and 7 acre-feet per acre (161 acre-feet). Claimant points out that the prior decree (*Ringer/Gleason v. Stone*, Kittitas Cause No. 11052) placed no limit on the amount of water that could be diverted from Spring Creek to irrigate 23 acres except to ensure that 200 inches of water was left in the creek to irrigate properties lying below that now owned by the Moeurs. The claimants assert that each acre actually requires 16.8 acre-feet per acre based on a report done by Richard Bain for a neighbor's (Stewart) property and uses that number to arrive at an instantaneous diversion of 1.18 cfs – 1.39 cfs depending on the number of days the water is diverted. The Referee rejected this argument on two grounds – water quantity should be based on beneficial use and 16.8 acre-feet per acre was not utilized in quantifying the Stewart right. However, claimant points out that prior decrees limited the amount of water that could be used on the Steward property. The RCW 90.14 claim applicable to this property is WRC No. 018040 and

asserts a right to utilize 3 cfs and 800 acre-feet per year to irrigate 50 acres. The water duties according to that document would be 0.06 cfs and 16 acre-feet per acre – very close to the water duties requested by claimant. Therefore, resolution of this issue turns on whether 16.8 acre-feet per acres is the appropriate water duty for this property.

The Court notes at the outset that claimants have done no actual measurements to determine the quantity of water actually beneficially used from Spring Creek. Therefore, the evidence before the Court is quite general and consists of the following. One, the Referee indicated that the soils in the area are quite porous. Second, the RCW 90.14 claim does assert a water duty quite close to that requested herein. Third, Richard Bain, an engineer who has qualified as an expert in these proceedings, did produce a report in regard to the claim of Robert Stewart, which was entered into evidence (DE -- 1513). That study indicates 16.8 acre-feet per acre to be the appropriate water duty. Although that figure is quite high, similar water duties have been recommended for confirmation by the Referee for similar lands. Absent evidence to the contrary, the Court will GRANT the exception. Therefore, page 418, lines 5 and 6 shall be modified as follows:

Quantity:	1.39 cubic foot per second, 386 acre-feet per year for irrigation, 6 acre-feet per year for stock watering

2. Yakima River (Tjossem Ditch/Clark Ditch)

Similar to the issue discussed above for Spring Creek and with the same support, the claimants are asserting a right to use 16.8 acre-feet per year on each acre they irrigate with water from the Yakima River. It is reasonable to conclude that the water applied to this land immediately migrates toward the river. The Court finds that 16.8 acre-feet per year for each acre irrigated is not an unreasonable quantity of water to be used for irrigation due to the lands location next to the river. The claimants are asserting a right to divert 6 cfs, 1960 acre-feet per year from the Yakima River for the irrigation of 127 acres. Water Right Claim No. 018037 asserts a right to divert 4 cfs, 1200 acre-feet per year for the irrigation of 80 acres. The point of diversion described on the claim form is approximately where the ditch enters the Moeurs property, not where water is diverted from the Yakima River into the Tjossem Ditch. Therefore, it would not be unreasonable to conclude that the quantity of water being claimed was the quantity in the ditch as it enters the Moeur property, not the quantity actually being diverted from the Yakima River.

The evidence in the record is that 6 cfs is diverted into the Tjossem Ditch for delivery to the Moeur property and that 1.49 cfs is actually what is available for irrigating the property. The rest is

conveyance loss water. The claimant suggests that conveyance loss be expressed as both an instantaneous quantity diverted from the river and an annual quantity of water that is lost from the ditch during the irrigation season. That has not been the practice in the subbasin pathway; conveyance loss has only been expressed as an instantaneous quantity. The Court will follow that practice here. The Court finds that the prior owner of the Moeur property substantially complied with the requirements of RCW 90.14 allowing for the confirmation of a water right to use the Yakima River with a diversion in the SW¼SW¼ of Section 11, T. 17 N., R. 18 E.W.M. for the diversion of a total of 6.0 cfs, of that 4.51 cfs is conveyance loss and 1.49 cfs and 486.78 acre-feet per year is for the irrigation of 80 acres. The Court will not amend the Referee's findings that a right can only be awarded for the irrigation of 80 acres due to the significant difference between 80 and 127 acres and the water right claim form not being amended in that regard. The water right on page 456 of the Supplemental Report of Referee is amended to reflect these changes.

3. Wilson Creek (Scott/Farrel Ditch)

The claimants are asserting a right to divert 4 cfs from Wilson Creek, with 0.50 cfs being conveyance loss for the irrigation of up to 127 acres (the same acreage irrigated from the Yakima River). A right is being asserted to use 16.8 acre-feet per acre to irrigate this land. Water Right Claim No. 018039 asserts a right to divert 3 cfs, 900 acre-feet per year from Wilson Creek for the irrigation of 31 acres. Again the Referee only recommended a right to irrigate 31 acres because of the limitation on the claim form. The claimants have not been successful in amending the claim; therefore, the Court will not alter that recommendation. The point of diversion described on the form is also where the ditch enters the Moeur property, not where water is diverted from Wilson Creek. The ditch that carries Wilson Creek water was measured by Richard Bain and found to divert 4 cfs, with 3.5 cfs being delivered to the property. If 3.5 cfs is continuously delivered to the property and used for irrigation, over 1100 acre-feet per year would be used. For the 31 acres, the claimants are asserting a right to 520.8 acre-feet, which is 16.8 acre-feet per acre. The Court finds that a right can be confirmed to the Moeurs for the diversion of 4.0 cfs, 0.50 cfs in conveyance loss and 3.5 cfs, 520.8 acre-feet per year is for the irrigation of 31 acres. The right described on page 468 of the Supplemental Report of Referee is amended to reflect these changes.

Court Claim No. 00535 – David Papineau

David Papineau took exception to the Referee not recommending confirmation of a water right. The water right claim filed by Mr. Papineau's father pursuant to RCW 90.14 omitted a

significant portion of the irrigated land from the place of use. Mr. Papineau successfully amended Water Right Claim No. 024243 so that the place of use on the claim form now describes all of the land he irrigates. The Court granted Mr. Papineau's exception, ruling that a water right would be confirmed for the irrigation of 55 acres within Government Lots 2, 3 and 4 and the E½SW¼ of Section 30, T. 17 N., R. 19 E.W.M. lying west of the railroad right-of-way. The Court remanded the claim to the Referee to take testimony on the quantity of water that is used to irrigate the land.

Mr. Papineau was scheduled to appear at the second supplemental hearing scheduled for September 24, 2003. However, he had a long scheduled vacation that conflicted with the dates for the hearing. Mr. Papineau's attorney, John P. Gilreath, appeared at the supplemental hearing on his behalf and offered into evidence Exhibit DE-2093, Mr. Papineau's testimony taken by deposition on September 4, 2003. At that deposition, Mr. Papineau testified that he has two diversions. One is located 1400 feet south and 125 feet east of the northwest corner of Section 30. At this point he has a 15 HP pump. The second diversion is located 2600 feet south and 550 feet east of the northwest corner of Section 30, where there is a check dam that diverts 2 cfs and a 10 HP pump. The capacity of the two pumps is 1.5 cfs. Mr. Papineau testified to diverting 1.5 cfs, 577 acre-feet per year using the pumps and 2 cfs and 397 acre-feet per year from the check dam. Although he diverts 3.5 cfs, he is only claiming a right to use 3 cfs, due to the findings in a prior court case that addressed water rights for his land. His position is that the additional 0.5 cfs is return flow; water that he can use when it is available, but for which he cannot be awarded a water right. See the Courts April 1, 1994 *Memorandum Opinion Re. Motion for Reconsideration of Limiting Agreements*.

The annual quantity Mr. Papineau uses is extremely high. He justified needing this quantity due to the extremely porous nature of his soils and the proximity to the Yakima River. Other landowners in this area have testified to using fairly high quantities of water. In other subbasins the Referee has confirmed water rights with annual quantities consistent with what Mr. Papineau is claiming for land close to the river. In those cases, the evidence supported a conclusion the quantity of water being applied was put to beneficial use although much of the water quickly returned to the river. This is undoubtedly the case for Mr. Papineau, which would result in a finding the water is not being wasted and immediately returns to the river for reuse or contribution to the river's flow.

The Court will, therefore, confirm a water right with a June 30, 1901, date of priority for the diversion of 3.0 cubic feet per second, 974.0 acre-feet per year for the irrigation of 55 acres in that portion of Government Lots 2, 3 and 4 and the E½SW¼ of Section 30 lying west of the railroad

right-of-way. The points of diversion are located 1400 feet south and 125 feet east of the northwest corner of Section 30 being within Government Lot 2 and 2600 feet south and 550 feet east of the northwest corner of Section 30 being within Government Lot 3, both in Section 30, T. 17 N., R. 19 E.W.M. The source of water is Yakima River via Spring Creek

Court Claim No. 02311 – Chester Vernon & Roma B. Stokes

Chester Vernon Stokes initially took exception to the place of use description for one of the water rights awarded to his property in the Supplemental Report of Referee and Ecology sought clarification of two of the water rights. The Court granted Mr. Stokes exception and provided the clarifications sought by Ecology. Those rulings are summarized on pages 3 and 10 of the Court's Order on Exceptions Subbasin No. 9 (Wilson-Naneum) entered August 15, 2003. Subsequent to entry of that Order, Mr. Stokes sought to provide evidence about use of flood water on his lands. The Court so authorized and the Referee took testimony at the second supplemental hearing.

Mr. Stokes testified it is very common in the spring for the creeks, including Wilson, Dry and Whiskey Creeks, to carry what is often called flood water. This is increased flows that result from snow melt. Flood flows can be extreme, causing damage to lands and the City of Ellensburg, several miles downstream. Mr. Stokes testified that he (and his father before him) took advantage of these increase flows to divert larger quantities of water than normal in order to put moisture back into the soil and start the season with the ground adequately irrigated. The Court is familiar with prior adjudications in Kittitas County where Superior Court decrees allowed for the use of excess water when the flow in the creek was significantly more than needed to satisfy all the existing water rights. The Court believes this excess water is another way of describing flood water.

The Court recognizes the advantage of farmers using this flood water; it reduces the potential damage such flows might have by making beneficial use of the water. The lands also benefit from early season irrigation that replenishes moisture lost over the winter. In the early 1900's the Kittitas County Court specifically addressed the flow characteristics in Naneum Creek in its *Findings of Fact and Conclusions of Law* that preceded entry of the *Ferguson* Decree, resulting in one inch of water for each acre being awarded for use in the spring and one half inch beginning in July. The Court believes this reduction in July was in recognition of those flow characteristics. However, Mr. Stokes' land was not owned by a party to *Ferguson*, therefore, he is not bound by those rulings. His predecessor was a party to *Thomas v. Roberts*, which did not have the reduction of water on July 1. In order for the Court to confirm a right for use of flood water, the RCW 90.14

claims filed must assert a right to divert sufficient water to accommodate the increased diversions due to using flood water. In Mr. Stokes case, the water right claim forms asserted rights only for the quantities that the Referee has already awarded. Therefore, the Court cannot grant a right to divert any additional water. The request for a right to use flood water is, therefore, denied.

Claim No. 00366 -- Richard Snowden

Mr. Snowden's exception is the number of acres and place of use in the water right that the Referee recommended for confirmation. The recommendation was limited due to the RCW 90.14 claim that had been filed by Mr. Snowden's father. In his exception, Mr. Snowden states that he is attempting to amend the place of water use on the water right claim that was filed. If the amendment is successful, Mr. Snowden requests the Court review the evidence and confirm a right for irrigating all of the 35 acres for which a right is claimed. Nothing has been filed with the Court to indicate that Ecology has made a decision on Mr. Snowden's request to amend the water right claim. Ecology is urged to expedite review of the amendment request so that a decision can be presented to the Court prior to entry of the Conditional Final Order.

Court Claim No. 01861 – Robert & Lorene Swedberg
Ken Charlton

Exceptions to the Supplemental Report of Referee were taken by Robert Swedberg and Ken Charlton. Some of Mr. Swedberg's exceptions were addressed by the Court at the Exception Hearing held on March 12, 2003 and the rest, along with Mr. Charlton's exception, were remanded to the Referee. Larry Charlton, Ken Charlton's father, and Mr. Swedberg provided testimony.

Ken Charlton purchased a 71-acre parcel that is most of the W½NE¼ and a sliver of the NE¼NW¼ of Section 33, T. 19 N., R. 19 E.W.M. A water right was not awarded for the portion of the former Swedberg property that Mr. Charlton purchased due to the Referee's conclusion that the land was not recognized as having a water right in any of the prior decrees for Wilson-Naneum Creeks. There was evidence that the owner of the land in 1919 had purchased a water right and transferred it without complying with the change procedures in the Surface Water Code.

Mr. Charlton's exception stated his intent to try and find evidence to show that the transfer actually occurred prior to adoption of the Surface Water Code in 1917. At the supplemental hearing a record was made they were unable to find that evidence. Entered was DE-2125, chain of title documents, showing at the time of *Thomas v. Roberts* Charles Bregg owned both the NW¼ and W½NE¼ of Section 33. The copy of the Findings of Fact that preceded the Decree in *Thomas v. Roberts* stated that Charles Bregg owned the NW¼ and the W½NW¼ of Section 33, leading the

Referee to conclude he owned no land in the NE¼ of Section 33. That resulted in the water right awarded under Court Claim No. 01861 only describing the NW¼ of Section 33 as the place of use.

At the second supplemental hearing, the Referee was alerted to an error he made in interpreting the *Ferguson* decree. In the Report of Referee, when discussing Court Claim No. 01861, the Referee concluded a water right was recognized in the *Ferguson* decree for the NW¼ of Section 33, see page 542 of the Report at lines 1 through 13. The Referee misread the Findings of Fact that preceded the decree. The Swedberg property is in Section 33, T. 19 N., R. 19 E.W.M. A water right was recognized for F. S. McDonald; however, it identified that McDonald owned land in the NW¼ of Section 33, T. 18 N., R 19 E.W.M., land that is six miles downstream from the Swedberg property. This error lead to the Referee concluding that the NW¼ of Section 33, T. 19 N., R. 19 E.W.M. had a right to 100 inches of water as recognized in the *Ferguson* decree.

At the time of *Thomas v. Roberts*, the claimants' land was owned by Charles Bregg, who had a 75-inch (1.50 cfs) water right. This appears to be the water right Bregg acquired in a deed dated 1918 -- 75 inches of a 10th Class right recognized in the *Ferguson* decree. The Referee did not award this right to Mr. Swedberg due to lack of compliance with the change procedures in the Surface Water Code. However, it is apparent the *Thomas v. Roberts* Court concluded that right was appurtenant to Bregg land and recognized the water right. This Court will not disturb that ruling.

However, that is the only water right that has been identified for the property. As a result, the water right that the Referee previously awarded with an 1878 date of priority for the use of 2.0 cubic feet per second for the irrigation of 100 acres must be amended. The Court rescinds that right and awards a right with a June 30, 1880 date of priority for the diversion of 1.50 cubic feet per second in May and June, 0.75 cubic foot per second in April and July 1 through October 15, 375 acre-feet per year for the irrigation of 75 acres in the NW¼ and the E½NE¼ of Section 33. Mr. Swedberg has irrigated considerably more than 75 acres over the years, so it is not possible to divide the right between him and Charlton based on the acres that have been historically irrigated. Therefore, the Court will divide it in proportion to the area owned. Mr. Swedberg will be awarded a water right to irrigate 50 acres and Mr. Charlton will have a right to irrigate 25 acres.

Mr. Swedberg testified to using flood water on his property. He stated that when a Chinook wind causes rapid snow melt, Naneum Creek will carry flood waters that can overflow the banks of the creek naturally. During other flood events, water is actually diverted from the creek and applied to the land in excess of normal practices. Mr. Swedberg seeks to have a water right awarded for use

of this flood water. Kittitas Superior Court, in analyzing the water rights for the Swedberg/Charlton property during the period between 1919 and 1925, found a right to only 1.5 cfs. The Kittitas Court specifically addressed the flow characteristics in Naneum Creek in its *Findings of Fact and Conclusions of Law* that preceded entry of the *Ferguson* decree. It states on page one, "During the season when the snows are melting in said mountains, usually during the months of April and May, it contains a large quantity of water, which, after about the first of June, gradually diminishes until autumn . . . ." On page two the Court goes on to state "That one inch of water measured as aforesaid flowing during the spring months is necessary for the proper irrigation of an acre of said land. And one half inch for each one measured as aforesaid from and after the first day of July of each year."

The Court finds these statements to document the quantity of water that was being used during that time. As a successor to Mr. Bregg, a party to that action, Mr. Swedberg is bound by the rulings and his water right is limited to what was recognized in the final decree. The *Jones v Sander* Decree on Wilson Creek similarly allowed for the use of one inch of water in the spring and reduced the rights to one half inch of water for each acre beginning in July. These rulings, of course, only constrain the water rights for parties to those actions. Other landowners awarded water rights in this basin were not parties to either proceeding and are, therefore, not bound by the rulings. While the Court recognizes the advantage of farmers using flood water (reducing potential damage to lands that otherwise would be flooded and replenishing soil moisture lost over the winter) the Court is constrained from granting Mr. Swedberg's exception due to the prior rulings cited above.

Lastly, Mr. Swedberg asked that the Court not enter a Conditional Final Order in this subbasin until Ecology made a decision on his application for change. That decision was made in August of 2003 and not appealed. The decision does not alter the Court's recommendations herein.

Court Claim No. 01952 – Estate of Glen Turner; Carol Phelps; Joy Turner

Don Phelps filed an exception to the Report of Referee for Subbasin No. 9 on behalf of Claim No. 01952. The claim was remanded to the Referee to take additional evidence. Mr. Phelps exception was to be heard September 25, 2003. On September 23, 2003, Attorney Lawrence E. Martin, representing Mr. Phelps, filed a request for continuance, having just learned that his client was out of the country. The Court denied the request for continuance. At the hearing three exhibits were introduced but no testimony offered. Don Phelps is the son-in-law of Glen and Joy Turner and Carol Phelps' husband. Both Mr. Turner and Mrs. Phelps are deceased. Mr. Phelps has not been joined to the claim and appears to be representing the interest of his mother-in-law, and the Estates

of Mr. Turner and Mrs. Phelps. There was no appearance at the initial evidentiary hearing for Subbasin No. 9, resulting in the Referee recommending that no water right be confirmed. There is no evidence about water use on this land.

The evidence does show that at the time of the *Ferguson* decree, the portion of the land for which a Naneum Creek water right is claimed was owned by J. S. Dysart. At that time Dysart owned Lots 1 and 2 and the SW¼NE¼ of Section 4, T. 17 N., R. 19 E.W.M., the SE¼SE¼, N½SE¼ and SW¼SE¼ of Section 33, T. 18 N., R. 19 E.W.M. The land for which a Naneum Creek right is being asserting is a portion of the NW¼SE¼ of Section 33. The *Ferguson* Court found that Dysart had settled on his land in 1873 and appropriated 100 inches of water from Naneum Creek to irrigate a portion of his land. The Findings of Fact stated that only a portion of the land was irrigated from Naneum Creek and the rest irrigated from another, unidentified, source of water. Dysart owned 280 acres, but water rights to Naneum Creek had only been established for the irrigation of 100 acres. The *Ferguson* Court did not identify which 100 acres were irrigated from Naneum Creek. Water Right Claim No. 141311, filed by Glenn Turner pursuant to RCW 90.14, claims a right to divert 2 cfs, 150 acre-feet per year from Naneum Creek for the irrigation of 30 acres in part of the NW¼SE¼ of Section 33, T. 18 N., R. 19 E.W.M.

Although evidence does show a prior owner was awarded a right in *Ferguson,* the record does not show the land described in Court Claim No. 01952 was the portion irrigated from Naneum Creek. Further, if a Naneum Creek water right was perfected for this land, there is no evidence that beneficial use continued. The Court cannot confirm a right under Court Claim No. 01952.

Claim No. 00495 -- Dick and Maxine Van de Graaf

The Van de Graafs ask the Court to take a second look at the evidence reviewed by the Referee and urge that a conclusion different then that reached by the Referee is warranted. The Van de Graafs are asserting a right to irrigate 120 acres in the SE¼SW¼ and S½SE¼ of Section 12, T. 18 N., R. 18 E.W.M. The Referee reviewed the evidence and found that possibly as many as 8 acres were irrigated historically in the NW¼SE¼ and E½SW¼ of Section 12 and 11 acres in the S½SE¼ and NE¼SE¼ of Section 12. The Referee denied the claim on the basis that claimants could not prove where on the 120 acres the water was used or if the water had been used on the other land encompassed in the property descriptions not owned by the Van de Graafs. Further, there was no evidence to show if the use of water had expanded prior to 1932.

In their exception, the Van de Graafs refer the Court to DE – 1781 submitted by attorney Richard Cole on behalf of Claim No. 01232. DE – 1781 includes various chain of title documents, such as leases and deeds, and the Van de Graafs assert those documents provide information of water use or grazing, or contain other references to use of the property during the early part of the century. Most of the documents included within DE – 1781 are deeds and interests in land related to Section 13, T. 18 N., R. 18 E.W.M. Although the Court understands the argument that Section 13 lands may have been part of the larger holdings patented to Powles and Thomas and uses of water on the property therein may correlate to uses on Section 12 lands, that argument simply confirms the problem identified by the Referee. There is nothing to tie together these land interest documents for Section 13 and specific uses of water in Section 12. There may have been water uses in the two areas of Section 12, but water rights are appurtenant to specific parcels of lands and there must be evidence showing which acres were historically irrigated.

The Van de Graafs also direct the Court's attention to the testimony of Mr. Les Sperline, who testified before the Referee on October 31, 2001. Claimants are correct that Mr. Sperline gave detailed testimony regarding the use of water in Section 12 and 13. However, Mr. Sperline stated that he was only aware of water use beginning in 1949. He did indicate, as set forth on page 65 of the transcript, that Section 12 lands had been irrigated prior to his connection to the property in light of what he observed when he first arrived on the property. The Court could consider that statement to be evidence of use for a few years predating 1949. However, in order to establish a water right under the riparian doctrine, uses of water had to be initiated prior to 1932. Mr. Sperline's testimony cannot be stretched 17 years.

The Court agrees with the Referee's conclusion. The evidence as to historical use is simply too vague to allow the Court to quantify a water right. Therefore, Claim No. 00495 is DENIED.

Court Claim No. 16,728 – Charles T. Weidenbach

Charles T. Weidenbach filed Court Claim No. 16,728 on February 27, 2003. The Court considered this late claim at the March 13, 2003, exception hearing for the Supplemental Report of Referee, Subbasin No. 9 (Wilson-Naneum), allowed the claim and remanded it to the Referee to take testimony at the second supplemental hearing. That hearing was held on September 24, 2003, and Mr. Weidenbach appeared and presented testimony.

The claimant owns 110 acres lying in the S½SE¼ of Section 21 and the N½NE¼ of Section 28, T. 18 N., R. 19 E.W.M. and asserts a right to irrigate 100 acres with Naneum Creek

water. Kittitas Reclamation District (KRD) also assesses this land. Water is diverted from Naneum Creek at three points. Mr. Weidenbach describes the first as being located 5 feet south and 435.72 feet east of the northwest corner of the S½SE¼ of Section 21. There, a check dam diverts water into two concrete laterals, one running east and one running west of the creek to irrigate 40 acres. The second diversion is described as being 448 feet south and 510 feet east of the northwest corner of the S½SE¼ of Section 21. There, a dam funnels flows into a 15-inch pipe that conveys water to the east to irrigate 50 acres and a 12-inch pipe conveys water to the west to irrigate 10 acres. A third diversion is used to serve about 16 acres of land leased from the Federal Aviation Administration. The Federal government filed no claim for this land, so it will not be addressed further.

All of the land is planted in timothy hay with an oat rotation and is rill irrigated. In the fall, after the last cutting of hay, cattle are grazed to clean up the stubble. When livestock are on the land they drink from the irrigation ditches when they carry water and from Naneum Creek. Livestock drinking directly from the creek is a non-diversionary stock water use covered by the stock water stipulation discussed on page 4 of the Report of Referee for Subbasin No. 9. Mr. Weidenbach has a right to non-diversionary stock watering under that stipulation. Mr. Weidenbach was not able to provide information as how much water is diverted at the two points of diversion. He believes he uses between 6 and 8 acre-feet per year on each acre he irrigates. He receives 4 acre-feet per year from KRD and the rest from the creek.

Mr. Weidenbach points to the *Ferguson* decree to show the existence of a water right for his land. At the time of *Ferguson* Elijah M. Topliff owned the property at issue (Mr. Weidenbach thought his land was owned by I. M. Rollinger at the time of *Ferguson*) who received two water rights. A Class 2 water right with an 1872 date of priority was awarded to Topliff for 160 acres in the S½S½ of Section 21 and a Class 4 right with an 1874 date of priority was awarded to Topliff for 160 acres in the N½NE¼ of Section 28 and the W½NW¼ of Section 27. Both rights were to irrigate 160 acres; thus, a water right for each acre was awarded in the *Ferguson* decree.

Also in the record from the initial Subbasin No. 9 hearing is a copy of what has been referred to as a "Schedule of Rights" from the *Ferguson* case. It describes the class of water right, number of inches, description of land where the water is used and name of owner. The schedule states that in 1896 Elijah Topliff became the owner of 800 acres along the Naneum Stream, which carried decreed water in five different classes. In selling this land in different tracts, the water was pooled and each acre of land carried with it one inch of water, one-fifth of which was from each

class. Topliff had 320 inches of Class 2 water, 320 inches of Class 4 water and 160 acres of Class 7 water, which leads the Court to conclude the narrative in the schedule had an error, because Topliff had water rights from three different classes and as a result each acre of land carried one inch of water, one-third of which was from each class. At the time of the schedule, the Weidenbach land was owned by T. M Rollinger (which is the name Mr. Weidenbach was familiar with). Therefore, Mr. Weidenbach's land would have a right to 110 inches of water; 36.6 acres with an 1872 priority date, 36.6 acres with an 1874 priority date and 36.6 acres with an 1877 date of priority. Since this pooling of the water apparently occurred in 1896, well before the Surface Water Code was passed in 1917, the Court will recognize that division of the water right

The land has been in Mr. Weidenbach's family since 1974 and was being irrigated at the time of purchase. Prior to that, a Mr. Castle owned it. He did not know who owned it immediately prior to Mr. Castle, but understood the Rollinger family owned it for 30 or 40 years. The Court finds the evidence supports a conclusion that a water right to use Naneum Creek was established between 1872 and 1877 and beneficial use has continued. However, as far as the Court can determine there was no water right claim filed for this water right between 1969 and 1974 during the Claims Registration Act. That act was passed by the State Legislature in 1967 and required water right claims be filed for all water uses that began prior to adoption of the Surface Water Code in 1917 or the Ground Water Code in 1945. RCW 90.14.041 states:

> All persons using or claiming the right to withdraw or divert and make beneficial use of public surface or ground waters of the state, except as provided in this section, RCW 90.14.043 and 90.14.068, shall file with the department of ecology not later than June 30, 1974, a statement of claim for each water right asserted on a form provide by the department. Neither this section or 90.14.068 shall apply to water rights which are based on the authority of a permit or certificate issued by the department of ecology or one of its predecessors . . .

The water rights appurtenant to the claimants land clearly fit that category. The Court reviewed the record and can find no water right claim that asserts a right to use Naneum Creek on the claimant's property. Ecology did identify Water Right Claim No. 124761 filed by Henry Weidenbach, the claimant's step-father, which described use of a well for domestic supply. This suggests the elder Mr. Weidenbach was aware of the law, but only filed a claim for use of the well and not the creek.

Failure to file a water right claim as described above waives and relinquishes any water right that may have existed. RCW 90.14.071 states:

> " . . any person claiming the right to divert or withdraw waters of the state as set forth in RCW 90 14.041, who fails to file a statement of claim as provided in RCW 90.14.041, 90.14 043, or 90.14.068 and in RCW 90.14.051 and 90.14 061, shall be conclusively deemed to have waived and relinquished any right, title, or interest in said right "

This issue has arisen many times in this proceeding and the Court has consistently held this statute does not provide any latitude -- failure to file a claim waives/relinquishes any water right that existed. Thus, a right cannot be confirmed to Charles Weidenbach under Court Claim No. 16728.

Court Claim No. 00984 – David and Louise Wright

The Wrights acquired the land described in Court Claim No 00984 in 1995, after the initial evidentiary hearing, but before the Report of Referee was filed They became aware of this case in 2002, filed an exception and were substituted for Farmers Home Administration Mr Wright and Clifford Bird, a former owner of the property, testified at the second supplemental hearing.

The claimant's property is in Government Lot 4 and the E½SW¼ of Section 19, T. 17 N., R. 19 E.W.M. The Referee's review of the record led him to conclude that water rights had been established for the land now owned by the Wrights. Mr Bird had testified at that hearing, providing evidence of water use from 1940 through the late 1970's when he sold to Timothy O'Neill. Mr. Bird also complied with the requirements of RCW 90.14, filing Water Right Claim Nos. 033787 and 033788 for use of Naneum and Wilson Creeks. At the time of the 1991 hearings, the land was held by Farmers Home Administration. The United States defended the water rights, but did not have a witness to provide evidence of continued beneficial use. Therefore, the Referee did not recommend confirmation of a water right.

The State conducted an investigation of the property in 1988 and found that 100 acres were being irrigated; 90 acres with water diverted from Wilson Creek and 10 acres with water diverted from Naneum Creek. Mr. Wright testified that he purchased the property in 1995. Prior to his purchase, while it was held by Farmers Home Administration, the land was leased and farmed. John Eaton, a neighboring landowner who farms considerable land in this area, leased it for many years. Mr. Eaton had intended to testify, however, due to a family emergency, he was unable to attend the hearing. It was decided that Mr Eaton would supply a declaration or participate in a deposition to demonstrate his farming practice on the land. Neither has been supplied.

An unidentified renter prior to Mr. Wright's purchase left boards in the diversion dams over the winter and a flood destroyed the diversion dam. After his purchase, Mr. Wright attempted to

replace the dam, but was told by the Department of Fish and Wildlife he could not get the necessary authorizations to reinstall a dam. Since that time, he has used a temporary dam, a PTO-driven pump and presently two electrical pumps to irrigate the land since he acquired it in 1995.

The Court concludes there has been sufficient evidence presented to show beneficial use of the water right has continued. Mr. Wright has not been able to present evidence of how much water was diverted from the creeks when the dams were place due to their destruction. The quantity of water diverted during his ownership is 2.089 cfs. The main irrigation pump withdraws 2.0 cfs and a second pump withdraws 0.089 cfs, which is used to irrigate the area around their home. Wilson Creek and Naneum Creek are very close together in the northerly part of the property. Since he has resorted to pumping, only water from Wilson Creek has been used to irrigate the land. However, the evidence shows that two water rights, one on Wilson Creek and one on Naneum Creek were established and historically used on the land. The Court will confirm a right based on the historical use. Mr. Wright testified to 16 acres being irrigated from Naneum Creek, however, WRC No. 033787 filed by Cliff Bird states 8 acres were irrigated and the investigation reports shows 10 acres.

A right is confirmed under Court Claim No. 00984 with a October 29, 1884, date of priority for the diversion of 0.20 cubic foot per second, 50 acre-feet per year from Naneum Creek for the irrigation of 10 acres in the north 1000 feet of that portion of the NE¼SW¼ of Section 19, T. 17 N., R. 19 E.W.M. lying west of Interstate-82. The authorized point of diversion shall be approximately 10 feet south and 50 feet west of the center of Section 19, in the NE¼SW¼ of Section 19.

The Court also confirms a right with an October 29, 1884, date of priority for the diversion of 1.9 cubic foot per second, 450 acre-feet per year from Wilson Creek for the irrigation of 90 acres in Government Lot 4 and the E½SW¼ of Section 19, T. 17 N., R. 19 E.W.M. lying west of Interstate-82, excluding those 10 acres, described as the north 1000 feet of the NE¼SW¼, irrigated from Naneum Creek. The authorized point of diversion shall be approximately 300 feet south and 850 feet west of the center of Section 19 in the NE¼SW¼ of Section 19.

The Court recognizes that the authorized diversions are at the location of the destroyed dams and not the pumping locations. The claimants should seek authorization from the Department of Ecology to change their points of diversion, as required in RCW 90.03.380.

1. Stipulations Regarding Property Descriptions

Ecology filed various stipulations that resolved concerns it had over property descriptions in the Referee's Supplemental Report that were either unclear or overlapped with neighboring lands. Those stipulations will be included in the Schedule of Rights.

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 Schedule of Rights set forth in the Supplemental Report. This Memorandum Opinion and Order resolves all exceptions to the Supplemental Report. A notice of entry and proposed conditional final order will be included with this decision. As mentioned previously, the Court urges Ecology to take action on all pending requests filed by Subbasin No. 9 claimants to amend water right claims filed pursuant to RCW 90.14.

Dated this 20th day of May, 2004.

Sidney P. Ottem, Court Commissioner