

ee

FIRE
MAR 25 1996
KIM M. EATON, YAKIMA COUNTY CLERK
YAKIMA RIVER BASIN
WATER RIGHTS ADJUDICATION

The State of Washington, Department of Ecology v.
James J. Acquavella, et al.
Yakima County Superior Court Cause No. 77-2-01484-5

REPORT OF REFEREE

**Re: SUBBASIN NO. 4
(SWAUK)**

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

REPORT OF REFEREE - VOLUME 29

11,424

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

3 IN THE MATTER OF THE DETERMINATION)
4 OF THE RIGHTS TO THE USE OF THE)
5 SURFACE WATERS OF THE YAKIMA RIVER)
6 DRAINAGE BASIN, IN ACCORDANCE WITH) No. 77-2-01484-5
7 THE PROVISIONS OF CHAPTER 90.03,)
8)
9 THE STATE OF WASHINGTON,) REPORT OF REFEREE
10 DEPARTMENT OF ECOLOGY,) Re: Subbasin No. 4
11) (Swauk Creek)
12 Plaintiff,)
13 v.)
14 James J. Acquavella, et al.,)
15 Defendants.)
16)

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

19 I. BACKGROUND

20 This report concerns the determination of the surface water rights of the
21 Yakima River basin, specifically those rights located within Subbasin No. 4, the
22 Swauk Creek drainage basin. The criteria consisting of applicable law and bases
23 for water right determinations used by the Referee in the evaluation of claims can
24 be found in the Report of the Referee to the Court, Preface to Subbasin and Major
25 Category Reports, Volume 2, dated May 18, 1988.

26 The Referee conducted evidentiary hearings on November 18 to November 22,
27 1991.

II. FIELD INVESTIGATIONS

Field surveys were conducted by Department of Ecology (DOE) staff during late 1990, to obtain information regarding existing water use patterns in Subbasin No. 4. Aerial photographs, topographic maps, county assessor's plats, and on-site field investigations were used to prepare map exhibits showing the location of ditches, pipelines, pumps, wells and other pertinent features of the water systems.

III. WATER DUTY

The Plaintiff State of Washington submitted an exhibit entitled "Supplemental Documentary Information, Swauk Creek Subbasin No. 4", which included information on soils, climate, irrigation and farming practices, and plant needs, meant to aid the Referee in determining irrigation water requirements within the subbasin. In addition, on December 12, 1990, the Referee held a hearing during which two witnesses from the U.S. Bureau of Reclamation testified to provide general information regarding crop irrigation requirements for water delivered to farms in the upper Yakima basin. In the absence of definitive testimony or other evidence, the Referee proposes to rely upon such expert testimony, and will calculate the maximum duty of water for the various uses in Subbasin No. 4 according to the following formulae:

- A. Domestic Supply (in-house)
 and Stock Water 0.01 cfs; 1 acre-foot per
 year per residence

Domestic supply (with small
 lawn and garden) 0.01 cfs; 1 acre-foot per
 year

Domestic supply and large
 lawn and garden up to
 $\frac{1}{2}$ acre 0.02 cfs; 2 acre-feet per
 year

Stock Water 1 acre-foot per year
 (diversion)

1 B. Irrigation Water -- In most cases the claimants provided testimony about
2 the quantity of water used for irrigation. When the testimony is insufficient to
3 allow the Referee to determine with certainty the quantity of water being diverted,
4 the Referee shall use testimony of water use on neighboring lands, quantities of
5 water claimed in both the Court claim and the water right claim filed pursuant to
6 RCW 90.14., historic documents, and any other information in the record that would
7 assist in establishing an appropriate water duty. Because the soil and topographic
8 conditions vary significantly within Subbasin No. 4, no standard water duty for
9 irrigation or ditch loss will apply for the entire subbasin.

10 It should be noted that the use of water under all irrigation rights is
11 limited to the amount of water that can be beneficially applied to the number of
12 acres identified in the water right. The number of irrigated acres cannot be
13 increased in the future without obtaining an additional water right.

IV. STIPULATIONS

16 Three stipulations were adopted during the hearing, as among all claimants
17 and their counsel. The first stipulation, concerning the use of exhibits and
18 testimony, reads as follows:

19 "It is hereby stipulated by all claimants in the above-entitled cause that
20 all exhibits entered and all testimony taken at the hearing on claims held
beginning November 18, 1991, may be utilized by any party in the proof of a
claim or the contesting of a claim whenever relevant and material."

22 The second stipulates to the description of properties identified in the
claims of the defendants to this action, as follows:

24 "It is hereby stipulated that the description of lands set forth in the
claims of the respective claimants is the correct description of the lands
for which the water right is claimed and that such claim will constitute
proof of the ownership thereof in the absence of a contest as to such title."
25

1 In the third, the parties stipulated to the following in relation to
2 "non-diversionary" stock and wildlife watering use with regards to Subbasin No. 4:

3 1. Waters in natural watercourses in the subbasin shall be retained when
4 naturally available, in an amount not to exceed 0.25 cubic feet per second
(cfs), for stock water uses in such watercourses as they flow across or are
5 adjacent to lands, which are now used as pasture or range for livestock.
Retention of such water shall be deemed senior (or first) in priority,
6 regardless of other rights confirmed in this cause. Regulations of these
watercourses by the plaintiff shall be consistent with such retention
requirements.

7 2. Waters in natural watercourses in the subbasin shall be retained when
8 naturally available, in an amount not to exceed 0.25 cubic feet per second
(cfs), for wildlife watering uses in such watercourses as they flow across or
9 are adjacent to lands, which are now used as pasture or range for wildlife.
Retention of such water shall be deemed senior (or first) in priority,
10 regardless of other rights confirmed in this cause. Regulations of these
watercourses by the plaintiff shall be consistent with such retention
requirements.

11 3. Waters in naturally occurring ponds and springs (with no surface
12 connection to a stream) in the subbasin shall be retained for stock water
13 uses, when such ponds and springs are located on or adjacent to lands which
14 are now used as pasture or range for livestock. Said uses embody
15 entitlements to a level in the water bodies sufficient to provide water for
16 animals drinking directly therefrom while ranging on riparian lands, and with
the same priority as provided in paragraph 1. Regulation of the ponds and
springs by the plaintiff shall be consistent with such retention
requirements.

17 4. Waters in naturally occurring ponds and springs (with no surface
18 connection to a stream) in the subbasin shall be retained for wildlife
watering uses, when such ponds and springs are located on or adjacent to
19 lands which are now used as pasture or range for wildlife. Said uses embody
entitlements to a level in the water bodies sufficient to provide water for
wildlife drinking directly therefrom while ranging on riparian lands, and
20 with the same priority as provided in paragraph 2. Regulation of the ponds
and springs by the plaintiff shall be consistent with such retention
requirements.

21 5. Nothing in this stipulation mandates that any lands, associated with
22 water rights or water retention as provided herein, shall be reserved for
23 wildlife purposes."

V. LAND DESCRIPTIONS

In the interest of minimizing future controversy and confusion relating to confirmed rights, the Referee has chosen to reduce legal descriptions of properties to the smallest reasonable legal subdivision in which are contained the actual places of use.

VI. WATER RIGHT PRIORITIES

When the testimony and evidence leading to a confirmed right are no more specific with respect to the priority date than the year, the Referee has elected to use the 30th of June to represent the midpoint of that particular year. In those instances when the priority to be confirmed only specifies the month, the last day of that month has been used.

VII. SPECIAL ISSUES

RETURN FLOW WATER:

Some of the defendants in this subbasin are asserting rights to the use of return flow waters. The Court has used the definition of "return flow" contained in 2 Hutchins, Water Right Laws in the Nineteen Western States (1974), page 568 as follows:

"'Return flow' is water diverted for irrigation or other use that returns to the stream from which it is diverted, or to some other stream, or that would do so if not intercepted by some obstacle."

The Court considers return flow waters to include what has been characterized as waste water and seepage water. Some of the defendants who are claiming return

1 flow waters lie below the Kittitas Reclamation District (KRD) canal. The contract
2 between the United States and KRD specifically addresses return flow waters within
3 the reclamation district boundaries as follows:

4 34. (a) The United States does not abandon or relinquish any of the waste,
5 seepage or return flow waters attributable to the irrigation of the lands to
6 which water is supplied under this contract. All such waters are reserved
7 and intended to be retained for the use and benefit of the United States as a
8 source of supply for the project.

9 (b) If suitable drainage or return flow water from any part of the project
10 shall at any time be or become available at points where it can be used on
11 lands within the District, the United States may supply such water as a part
12 of the supply to which the lands in the District are entitled.

13 Therefore, return flow waters that originate from the KRD system may be
14 considered by the United States to be part of the water to which district lands are
15 entitled, or part of the four acre-feet per acre that is delivered by KRD to
16 district patrons.

17 This Court in its Limiting Agreement opinion and order and a memorandum
18 opinion related to an exception in Subbasin No. 8, Thorp, found that rights could
19 not be confirmed for the use of return flows that are the result of the application
20 of Yakima Project waters and foreign return flows, but that rights could be
21 established for return flows that originated from and return to a water course
22 within the same watershed.

23 These rulings were based on a recent Washington State Supreme Court case,
24 State of Washington, D.O.E. v. U.S. Bureau of Reclamation, et al., 118 Wn. 761, 827
25 P.2d 275 (1992), where the Supreme Court held that the appropriator of the water
26 retains its rights to use the water so long as the water remains within the
27 boundaries of the appropriator's property and that only Federal agencies and those
28 entities with whom they contract have authority to make decisions regarding the
distribution of water within a Federal irrigation project. The Supreme Court found

1 that the Federal government, through the Bureau of Reclamation, was the
2 appropriator of water in a Federal project and had control of the water until it
3 left the project boundaries.

4 Some of the claimants are asserting rights for the use of return flows
5 resulting from the use of water diverted from First Creek in the Reecer Creek
6 watershed. This return flow would be considered foreign return flows. The
7 Washington State Court of Appeals held in the case of Dodge v. Ellensburg Water
8 Co., 46 Wn. App. 77, 82 729 P.2d 631 (1986) that . . . no water rights,
9 prescriptive or otherwise, exist in these waters." In a much earlier case, Elgin
10 v. Weatherstone, 123 Wash. 429, 212 P. 562 (1923), the Washington State Supreme
11 Court ruled that foreign waters are of a vagrant or fugitive nature and may be used
12 by the first person who can take them from the stream where they are found. The
13 ruling also found that the fact that a riparian owner was first to appropriate
14 vagrant surplus waters in a creek did not give him the exclusive right to take it
15 the next year.

16 Return flow that naturally originates from, and returns to a water course
17 within the same watershed, is subject to a new appropriation as soon as the
18 water leaves the appropriator's land and is in, or destined for, the natural stream
19 from which it originated. An appropriator of such water must comply with the state
20 requirements for appropriation by way of obtaining a permit or certificate under
21 RCW 90.03 or proving historic use under either the Prior Appropriation or Riparian
22 Doctrines and compliance with RCW 90.14.

1 1905 FEDERAL WITHDRAWAL OF UNAPPROPRIATED WATERS:

2 The State of Washington adopted Chapter 90.40 of the Revised Code of
3 Washington (RCW) on March 4, 1905, titled "Water Rights of the United States". The
4 intent of the State Legislature was to facilitate acquisition of water rights and
5 property necessary for construction and operation of Federal irrigation projects
6 proposed under authority of the act of Congress approved June 17, 1902, the
7 "Reclamation Act".

8 The legislature provided a procedure via section RCW 90.40.030, whereby the
9 United States, through a duly authorized representative, could notify the
10 Commissioner of Public Lands for the State of Washington that the United States
11 intended to make examinations and surveys for utilization of certain specified
12 waters for a reclamation project, as provided by the 1902 Reclamation Act. On
13 May 10, 1905, the United States filed with the Commissioner of Public Lands a
14 notice withdrawing all of the unappropriated waters of the Yakima River and it's
15 tributaries from further appropriation under any law of the State of Washington.

16 There were two exceptions to the otherwise all inclusive withdrawal. The
17 first was: "Such notice shall not in any wise affect the appropriation of any water
18 theretofore in good faith initiated under any law of this state, but such
19 appropriation may be completed in accordance with the law in the same manner and to
20 the same extent as though such notice had not been given." The second exception
21 was: "No adverse claim to any of such waters initiated subsequent to the receipt by
22 the commissioner of public lands of such notice shall be recognized, under the laws
23 of this state, except as to such amount of the waters described in such notice or
24 certificate herein after provided as may be formally released in writing by a duly
25 authorized officer of the United States".

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1 Although the Federal withdrawal of 1905 has not been addressed in previous
2 subbasin proceedings, the Referee believes it is imperative that the Court be
3 presented an analysis of claims in Subbasin No. 4 that may be constrained by RCW
4 90.40. During the time period between May 10, 1905, and June 6, 1917, water rights
5 in the State of Washington could be established either under the Prior
6 Appropriation Doctrine or the Riparian Doctrine. For purposes of evaluating the
7 potential impact on aspiring appropriators in the Yakima River basin the key words
8 in RCW 90.40.030 seem to be "therefor in good faith initiated under any law of the
9 state". In the instance of a water use to be perfected under the Prior
10 Appropriation Doctrine, initiation of the right could have been accomplished by
11 posting and/or filing a Notice of Appropriation or actual construction of the
12 diversion works and delivery system. In order to recommend that a water right be
13 confirmed under the Prior Appropriation Doctrine, the evidence would have to show
14 that the Notice of Appropriation was filed or construction began on the diversion
15 facilities prior to May 10, 1905. The other, and somewhat more difficult analysis
16 is what legal constraint did the adoption of RCW 90.40 and the ensuing Federal
17 withdrawal have on unperfected riparian water rights. The Referee has concluded
18 that the significant date is when steps were first taken to separate the land from
19 the public domain, which generally is considered to establish the priority date for
20 water rights established under the Riparian Doctrine. The Referee believes that in
21 the Yakima Basin, a riparian water right could not have been established if the
22 first steps to sever the land occurred after May 10, 1905. Conversely, if the
23 first steps were taken to sever the land prior to May 10, 1905, and the right was
24 perfected by beneficial use prior to December 31, 1932, the right was "in good
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1 faith initiated" prior to the withdrawal and would bear a priority date prior to
2 the withdrawal.

3 As previously discussed, RCW 90.40.030 contains a procedure whereby a release
4 of a specific quantity of the withdrawn water could be acquired. If a release was
5 obtained and all other requirements of state law were met, a right could be
6 confirmed with a priority date subsequent to May 10, 1905. It is the intent of the
7 Referee to apply the criterion set forth above, as applicable, in evaluating the
8 various claims in Subbasin No. 4.

9

10 VII. TESTIMONY AND REFEREE'S ANALYSES

11 Plaintiff Testimony

12 Ms. Kerry O'Hara, Assistant Attorney General, represented the Plaintiff State
13 of Washington, Department of Ecology.

14 The State introduced into evidence the following generic exhibits:

15 Number Description

16 SE-1 Subbasin No. 4 Map
17 SE-2 Subbasin No. 4 Map, Insets "A" and "B"
18 SE-3 Water Right Certificates, Permits and Claim Registrations
19 SE-4 Manual of Individual Water Supply Systems
SE-5 Conveyance Loss/Gain
SE-6 Supplemental Documentary Information, Subbasin No. 4
SE-7 Irrigation Requirements for Washington - Estimates and Methodology

20 Additionally, oral testimony was given by Richard Carter, Field Investigator,
21 Ecology Adjudication Section.

22 Claimant Testimony

23 Sixty-two defendants filed statements of claim or notices of appearance. All
24 claimants and their legal counsel, if so represented, are as follows:

	<u>Court Claim No.</u>	<u>Name</u>	<u>Attorney</u>	<u>Page(s)</u>
3	00246	Reba Bailey		150, 151
4	00247	(no address available)		152
4	(A)01354			
5	00375	Richard L. Banker & Margaret L. Banker 1916 South Boundary Olympia, WA 98501		150, 152
6	01479	Mr. Marilyn Bateman & Mrs. Marilyn Bateman Lookout Mountain Ranch PO Box 1002 Roslyn, WA 98941-1002		54, 151 165
7	01690	Estate of Ed Bergdal		18, 152
8	02206	Boise Cascade Corporation	Dennis J. Dunphy,	20, 151
12	(A)03119	Legal Department	Attorney	160
13	(A)05238	PO Box 50 Boise, ID 83707	1420 5th Avenue #3400 Seattle, WA 98101-2339	
14	05721	Sheryle Bonnell C/O Bill Bonnell PO Box 21 Leavenworth, WA 98826	Kenneth D. Beckley 701 N. Pine Street Ellensburg, WA 98926-2939	38, 152
15	01062	Kenneth A. Braniff & Noreen E. Braniff 4901 NW Eldorado Blvd. Bremerton, WA 98312		23, 151 152
16	01475	Pat Burke & Mary Burke 980 Burke RD Cle Elum, WA 98922	Lawrence E. Martin Halverson & Applegate, Inc. PO Box 27730 Yakima, WA 98907-2715	24, 151 154, 155 158
17	05721	Glenn Burzenski PO Box 176 LaConner, WA 98257	Kenneth D. Beckley 901 N. Pine Street Ellensburg, WA 98926-2939	38, 152
18	05721	Selma M. Burzenski 306 Seneca Avenue NW Renton, WA 98055	Kenneth D. Beckley 901 N. Pine Street Ellensburg, WA 98926-2939	38, 152
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1	01685	Daniel V. Byrne & Martha Wyckoff Byrne 1100 E Newton Street Seattle, WA 98102	92, 151
2			
3	01423	Fred Chapman & Delores Chapman HC61 Box 1420 Cle Elum, WA 98922	18, 166
4			
5	00389	Glen W. Christianson & Dorothy Christianson 3235 NW 59th Seattle, WA 98107	150, 152
6			
7	00408	Joyce Christianson & Estate of Lyle Christianson 1528 NE 140th ST #D4 Seattle, WA 98125-3226	150, 152
8			
9	00408	Marjorie Christianson	150, 152
10	00409	5901 Phinney Avenue N #304 Seattle, WA 98103	
11			
12	01087	Darrell Clark & Mabel Clark 794 Dudley Road Thorp, WA 98946	44, 151 161
13			
14	01146	Robert C. Coe & Josephine W. Coe c/o Hidden Valley Guest Ranch HC61 Box 2060 Cle Elum, WA 98922	John P. Gilreath, Attorney PO Box 499 Ellensburg, WA 98926
15			48, 151 166
16			
17	01096	Columbia Cascade Land Company, Inc. PO Box 597 Ellensburg, WA 98926	18, 162 163
18			
19	00803	Ellensburg; City of 109 E Third Suite 2 Ellensburg, WA 98926	Paul E. Sullivan, Jr. 150, 152 Ellensburg City Attorney 420 N Pearl Street Ellensburg, WA 98926-3112
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1	01479	George E. Fahey & Natus C. Fahey Lookout Mountain Ranch 2440 - 42nd Avenue E #238 Seattle, WA 98112	54
4	00648	First Creek Water Users Assoc., Inc 13332 SE 195TH ST Renton, WA 98058-7769	Richard T. Cole 60, 153 PO Box 499 157 Ellensburg, WA 98926
6	00189	First Interstate Bank of Washington Trustee for Freda L. Penkert PO Box 9728 Yakima, WA 98909	Cone, Gilreath, Ellis, 125, 151 Cole & Korte 152 PO Box 499 Ellensburg, WA 98926
8	00184	John F. Gemmill	150, 151
9	00823	& Carol D. Gemmill 15300 Bothell Way NE Seattle, WA 98115	152
11	01561	Gold Placers, Inc. c/o Crown Resources Corporation 1675 Broadway Suite 2400 Denver, CO 80202-4624	John P. Gilreath 81, 152 PO Box 499 Ellensburg, WA 98926
14	01690	Vernon R. Gray 106 W 12th Ellensburg, WA 98926	James Schatz 18, 152 PO Box 313 Dryden, WA 98821
16	01663	William J. Grueter	Richard T. Cole 83, 152
17	(A)04913	& Patricia M. Grueter	PO BOX 499
	(A)04914	2491 Robbins Road Ellensburg, WA 98926	Ellensburg, WA 98926
19	01790	James Hanson & Susan Hanson William Hanson & Diana Hanson Michael Hanson & Ulrike Hanson 1300 Swauk Prairie RD Cle Elum, WA 98922	86, 151 152
23	01789	John J. Hanson	86, 152
24	01790	& Lila A. Hanson 1302 Swauk Prairie RD Cle Elum, WA 98922	

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1	00919	Aubrey E. Hart & Blanche M. Hart PO Box 214 Cle Elum, WA 98922	89, 151 160
2			
3	01685	Donald A. Hartman & Ruth D. Hartman Kenneth J. Hartman & Ruthie J. Hartman Donald A. & Ruth D. Hartman 1000 Hartman Road PVT Cle Elum, WA 98922	Michael Bauer 92, 151 9291 Wilson Creek Rd. 156, 159 Ellensburg, WA 98926
4			
5			
6			
7	01691	Joe Harwood & Dorothy Harwood 918 S Central Kent, WA 98031	Brian Frederick, Attorney 100, 152 Frederick & Beckley 604 N Main ST Ellensburg, WA 98926-3110
8			
9			
10	02259	David Holmquist, et al. & Christianne Holmquist Dean Tonseth Danielle Tonseth Ken Fyall Kathy Fyall 16530 Highway 10 Ellensburg, WA 98926	103, 151 152
11			
12			
13			
14			
15	01471	DeL L. Holter 1620 Liberty Road Cle Elum, WA 98922	107, 152
16			
17	01848	Nancy D. Horst & Russell B. Moye 16405 34th S Seattle, WA 98118	107, 152
18			
19			
20	05284	Peggy E. Hunt 5490 Smithson Road Ellensburg, WA 98926	111, 152
21			
22	01271	Helen R. Kirk & The Estate of Paul H. Kirk 11929 - 86th NE Kirkland, WA 98034	113, 152
23			
24	00163	Timothy M. Knoll 12054 59th Avenue S Seattle, WA 98178	113, 152
25			
26			
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1	02027	Lyle F.R. Knudson & Ruth M. Knudson 6228 129th Avenue SE Bellevue, WA 98006	150, 152
2			
3	06626	Lavinal Corporation Gerald T. Sweeney, President 37222 - 28th Avenue South Federal Way, WA 98003	114, 152
4			
5	00747	Linda L. Lewis, et al. Michelle L. Maillot Robert L. Vankirk 3210 36th Avenue South Seattle, WA 98144	18, 164
6			
7	01095	Liberty Mt. Ownership Assoc., Inc. 1815 Ilwaco Avenue NE Renton, WA 98059	18, 163
8			
9	01738	Liberty Townsite c/o Liberty Coalition 2820 Liberty Road Cle Elum, WA 98922	116, 152
10			
11	00348	Dennis Mickens & Georgiana Mickens PO Box 757 Roslyn, WA 98941-0757	117, 151 161, 162
12			
13	01555	Miner's Mining, Inc. c/o Gold Capitol; Attn: H. Sanford 2000 S Dairy Ashford St Suite 510 Houston, TX 77077-5719	150, 152
14			
15	00348	Deral S. Morrow & Wilma J. Morrow 20320 Welch RD Snohomish, WA 98290	117, 151
16			
17	05721	Janis Newbury c/o Glen Burzenski PO Box 176 La Conner, WA 98257	Kenneth D. Beckley 701 N. Pine St. Ellensburg, WA 98926-2939
18			
19	00576A	Frank Oechsner 302 Pacific Ellensburg, WA 98926	John P. Gilreath, Attorney PO Box 499 Ellensburg, WA 98926
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1	05318	Carolyn Ann Olson 4930 Smithson RD Ellensburg, WA 98926	122, 152	
3	01285	Frederick C. Porter & Margaret A. Porter 2825 Magnolia Boulevard W Seattle, WA 98118	150, 151 152	
6	02050	Wilma Preston	150, 152	
7	02051	14326 52nd Avenue W #A Edmonds, WA 98026		
8	02057	Douglas F. Sanders & Marcia H. Sanders 13328 15th NE Seattle, WA 98125	128, 152	
10	02057	Estate of Lester F. Sanders & Dollie C. Sanders 707 N 130th Street #B302 Seattle, WA 98133-7962	128, 152	
13	00519	Mary B. Shelton 10006 255th Street Court E Graham, WA 98338	Lawrence E. Martin Halverson & Applegate, P.S. PO Box 22730 Yakima, WA 98907	145, 151
16	01278	William Siepmann & Elda Irene Siepmann 20319 NE Inglewood Hill Road Redmond, WA 98053	130, 151 152	
19	00706	Karla E. Smith	134, 151	
20	(A)05228	& Richard L. Hall PO Box 83 Thorp, WA 98946	152	
21	05284	Wallace M. Stampfly Phyllis J. Stampfly Randall J. Stampfly 2453 Charlton Road Ellensburg, WA 98926	111, 152	
24				
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26				
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1	00970	Gordon C. Tang	135, 153
	01063	& Linda Tang	
2	01064	13 Diamond S Ranch	
	01065	Bellevue, WA 98004	
3	01066		
4	01144	Carla L. Thomas	141, 151
		Z Bar Ranch	153
5		911 Robbins RD	
		Ellensburg, WA 98926	
6	01144	U. S. Bank Trust Real Estate	141, 151
7		PO Box 3588 WSR781	153
		Spokane, WA 99220	
8			
9	00348	U.S. Bureau of Land Management	Charles E. O'Connell 117, 151
		915 Walla Walla Avenue	U S Dept. of Justice 153
10			
11		Wenatchee, WA 98801-1521	Indian Resources Section
12			
			PO Box 44378
			Washington DC 20026-4378
13	02267	M. Marvin Wallace	Michael R. Bauer 142, 151
		c/o Wallace Properties Group	Attorney 153
14		PO Box 161	9291 Wilson Creek Rd
		Bellevue, WA 98009	Ellensburg, WA 98926
15			
16	00576A	Paul Weaver	Richard T. Cole, Attorney 145
		& Florence A. Weaver	
17		3090 Smithson Road	PO Box 499
		Ellensburg, WA 98926	Ellensburg, WA 98926
18	00519	Paul P. Weaver	Richard T. Cole, Attorney 145, 151
19		3090 Smithson Road	PO Box 499
		Ellensburg, WA 98926	Ellensburg, WA 98926
20	00519	Robert H. Weaver	Richard T. Cole, Attorney 145, 151
21		4704 Grandview Drive West	PO Box 499
		Tacoma, WA 98466	Ellensburg, WA 98926
22	00589	WA State Dept. of Natural Resources	Paul Silver, AAG 150, 151
23	(A)00590	Agricultural Resources	DNR 153
		P.O. Box 47061	PO Box 40100
24		Olympia, WA 98504-7061	Olympia, WA 98504-0100

The following claimants are the ones whose claims, either in whole or in part, were recommended for confirmation (See pages 8 - 13 in the Plaintiff's Report to the Referee), and to which no exceptions were taken.

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Yakima, WA 98902-3401

	<u>Name</u>	<u>Court Claim No.</u>
2	Fred Chapman	01423
3	Columbia Cascade Land Co., Inc.	01096
3	Linda L. Lewis, Michelle L. Mailott & Robert L. VanKirk	00747
	Liberty Mountain Ownership Assoc., Inc.	01095

4 Specific elements of the proposed rights for the claimants are identified in
5 the Findings of Fact commencing on Page 151.

6 The remaining claims (consisting of those claims for which no recommendation
7 for confirmation was made) were scheduled to be heard during the evidentiary trial
8 which commenced on November 18, 1991. Based upon the testimony and evidence
9 provided to the Referee, the analysis of all remaining claims is as follows:
10

11 COURT CLAIM NO. 01690 -- Estate of Ed Bergdal
12 Vernon R. Gray

13 On August 28, 1981, Michael E. Cooper, attorney for the Estate of Ed Bergdal,
14 filed Claim No. 01690 with the Court. A water right is asserted for use of water
15 from Boulder Creek tributary to Williams. The quantity of water claimed is 100
16 gpm, 40 acre-feet per year for the irrigation of 4 acres and mining on the
17 unpatented H. Lode Claim, being a portion of the SE $\frac{1}{4}$ of Section 1, T. 20 N., R. 17
18 E.W.M.

19 On November 5, 1990, Vernon R. Gray was joined to the claim. Mr. Gray amended
20 Claim No. 01690 to the extent that the uses of water include not only mining and
21 irrigation but also water for two houses and fire protection. According to the
22 June 8, 1982 Quit Claim Deed from the Estate of Ed Bergdal to Vernon R. Gray, Mr.
23 Gray acquired 3.75 acres of the H. Lode Claim. The parcel transferred is
24 identified as Tract 37 of Section 1, T. 20 N., R. 17 E.W.M.

1 Mr. Gray appeared at the evidentiary hearing and provided testimony. He was
2 represented by his attorney, James Schatz, who also provided testimony in behalf of
3 Mr. Gray. The property described as the place of use in Court Claim No. 01690 is
4 not riparian to Boulder Creek. Testimony offered regarding the earliest use of
5 water via a gravity flow ditch from Boulder Creek indicates the ditch was
6 constructed during the mid-1930s. Water is used for 2 acres of irrigation to keep
7 the area green and domestic supply for two homes that are used seasonally. The
8 ditch freezes up during the winter months.

9 Water Right Claim No. 099030, filed by Ed Bergdal with the Department of
10 Ecology in compliance with RCW 90.14, asserts a right to use 100 gpm, 40 acre-feet
11 per year for mining, power generation, and domestic supply with the date of first
12 use given as April 1943. Although irrigation was not identified specifically as a
13 use on Water Right Claim No. 099030, it appears from the contents of the claim that
14 irrigation had occurred or possibly was contemplated by Mr. Bergdal.

15 Testimony was provided regarding use of water to operate a wash plant on the
16 mining claim, however, no testimony was offered as to the quantities of water used
17 for that purpose. The record does indicate that the discharge from the wash plant
18 goes into a settling pond and overflow ditch toward Boulder Creek.

19 There was no testimony to indicate when water was first used on this property.
20 The documents in the record, Water Right Claim No. 099030 and Court Claim No. 01690
21 state that water was first used in 1943 and the mid-1930s, respectively. The
22 Washington State Surface Water Code was adopted on June 6, 1917. After that date
23 the only option for obtaining an appropriative water right was to apply to a
24 predecessor agency of Ecology for a permit to develop the project and apply water
25 to a beneficial use.

1 In addition to the state Surface Water Law of general applicability to all
2 prospective water users, there was in place in the Yakima River Basin a withdrawal
3 of all the unappropriated surface water (the Federal withdrawal). A full
4 discussion relative to the implications of that withdrawal is presented on Page 8
5 of this report. Due to the lack of evidence of compliance with the permitting
6 requirements of the Surface Water Code, RCW 90.03, the Referee cannot recommend
7 confirmation of a water right.

8

9 COURT CLAIM NO. 02206 -- Boise Cascade Corporation
10 (A)03119
11 (A)05238

12 On August 31, 1981, a comprehensive Statement of Claim was submitted to the
13 Court in behalf of Boise Cascade. The claim encompasses all of the corporation's
14 land ownerships and surface water uses within the Yakima River drainage basin.
15 Although Court Claim No. 02206 includes several parcels of land with Subbasin
16 No. 4, Boise Cascade is only asserting water rights for all of Sections 23, 24, and
17 26, along with portions of Sections 22, 27, and 34, all within T. 20 N., R. 17
18 E.W.M.

19 The basis for the claim to water from First Creek, tributary of Swauk Creek,
20 is both the Prior Appropriation and Riparian Doctrines. J.J. Hutson, attorney for
21 Boise Cascade, appeared at the evidentiary hearing and Phil Hess testified.

22 The reaches of First Creek, from which Boise Cascade diverts water, pass
23 through the S $\frac{1}{2}$ of Section 23 and the SW $\frac{1}{4}$ of Section 24, T. 20 N., R. 17 E.W.M. The
24 S $\frac{1}{2}$ of Section 23 separated from the public domain on September 30, 1896, well prior
25 to June 6, 1917 when the State Surface Water Code was adopted. Therefore, the
26 Riparian Doctrine is applicable to the extent that diversionary rights were

perfected prior to December 31, 1932. Current use of water is for riparian stock water, fire suppression, and timber management (road maintenance). Water is pumped from First Creek at a rate of 260 gallons per minute (gpm) into tanker trucks for distribution on forest roads throughout Boise Cascade's ownership in the First Creek watershed. Logging cycles are estimated to be on a five year frequency for the Section 24 "pump chance" diversion points and on a seven year frequency for Section 23. The total annual demand during any year when logging is occurring would be 0.66 acre-foot for Section 23 and 1.18 acre-feet for Section 24. The net result is that in any given year pumping may or may not be required as the logging schedule dictates, but in no case would the total annual withdrawal exceed 1.84 acre-feet for timber management. Boise's First Creek lands are leased for cattle grazing and stock have riparian access to the naturally occurring streams and springs.

Boise Cascade Lumber Company, a predecessor to Boise Cascade Corporation, initiated logging in the First Creek drainage during 1930. Water was used for logging camps in Sections 22, 23, and 24, as well as for boiler water for the steam driven locomotive engines used for transporting the logs and fire protection along the tracks. Water for the engines was provided from a water tower at the main camp headquarters in Section 22 and from the channel of First Creek, adjacent to the railroad tracks, as they traversed Sections 23 and 24, T. 20 N., R. 17 E.W.M.. The railroads were used to haul logs to the mill sites. Subsequently the method of transporting logs changed from railroads to logging trucks. Water is needed to maintain the roads built into the areas being logged. Instead of filling steam engines for transporting logs, water is used to fill water trucks used to sprinkle the roads for dust control and road maintenance.

1 Mr. Hess, in behalf of Boise Cascade, filed Water Right Claim Nos. 085719 and
2 085721 during June of 1974 in response to the requirements of the Claims
3 Registration Act, Chapter 90.14 of the Revised Code of Washington (RCW). The water
4 right claims identify, respectively, reaches of First Creek within Sections 23 and
5 24 as the location for points of diversion, to satisfy water use for stock water,
6 fire protection, and road maintenance. Each of the water right claims states that
7 the claimed and currently used instantaneous quantities of water are 5 gpm.
8 Testimony provided by Mr. Hess during the evidentiary hearing is that 260 gpm is
9 typically pumped to fill water trucks. There was no explanation offered which
10 would reconcile the differences between the claimed instantaneous quantities
11 reflected by Water Right Claim Nos. 085719 and 085721 and the testimony provided by
12 Mr. Hess. Chapter 90.14 RCW contains a procedure for seeking amendment to claims
13 through the Department of Ecology, however, Boise Cascade has not pursued that
14 process.

15 The Referee recommends confirmation of a water right from First Creek at
16 various points of diversion for "pump chances" on the channel as it traverses the
17 S $\frac{1}{2}$ of Section 23, T. 20 N., R. 17 E.W.M.. The priority date, based upon the
18 Riparian Doctrine, is September 30, 1896 for use of .011 cfs (5 gpm) not to exceed
19 1.84 acre-feet per year for timber harvesting (road maintenance). The period of
20 use to be confirmed is May 1 through December 1. The place of use shall be the S $\frac{1}{2}$
21 of Section 23 T. 20 N., R. 17 E.W.M..

22 The lands described above are leased for grazing cattle which rely on riparian
23 access to the natural springs and streams for water. The stock water stipulation
24 described on Page 4 of this report is applicable to that portion of Court Claim
25 No. 02206 which relates to nondiversionary stock watering in Sections 23, 24, and
26

1 26 and that portion of the E $\frac{1}{2}$ of Sections 22, 27, and 34, T. 20 N., R. 17 E.W.M.
2 lying within the Swauk Creek Drainage Basin.

3 The patent for the SW $\frac{1}{4}$ of Section 24 issued to Charles Hinmon on February 4,
4 1907, after the United States Bureau of Reclamation withdrew all of the
5 unappropriated waters of the Yakima River. There is no evidence in the record to
6 show steps taken to sever the land prior to the patent issuing. Were that evidence
7 available, a priority date earlier than the U. S. withdrawal may have been
8 established under the Riparian Doctrine. There also was no evidence of water use
9 prior to the withdrawal, therefore, the Referee cannot recommend confirmation of a
10 water right from First Creek under the Prior Appropriation Doctrine for the lands
11 in the SW $\frac{1}{4}$ of Section 24.

12 A specific water right is not recommended for fire suppression since it is
13 understood that during emergency situations involving wildfire all available
14 sources of water can be utilized without any right.

16 COURT CLAIM NO. 01062 -- Kenneth A. Braniff
17 & Noreen E. Braniff

18 On August 20, 1981, Kenneth A. Braniff filed with the Court a Statement of
19 Claim asserting a water right to a small spring and a pond which lie within the
20 N $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, T. 20 N., R. 17 E.W.M.. Mr. Braniff testified at the
21 evidentiary hearing that they have owned the 31 acre parcel since 1972 and no use
22 of the water, other than wildlife watering has occurred since his purchase. There
23 is no plan for development of the spring or for diversionary use of the water. On
24 October 12, 1973, Kenneth A. Braniff filed with the Department of Ecology a short
25 form Water Right Claim No. 042975 claiming a future water use from a spring for
26 stock water.

Based on the record, the Referee concludes that the wildlife stipulation discussed on Page 4 of this report adequately covers the non-diversionary use of the unnamed spring and small pond identified in Claim No. 01062. No diversionary water right is asserted by Claim No. 01062 nor is any recommended for confirmation by the Referee.

COURT CLAIM NO. 01475 -- Pat Burke
& Mary Burke

Pat and Mary Burke filed a Statement of Claim with the Court for the use of water from several surface water sources, including Swauk Creek, springs, both named (McCallum and Dunford) and unnamed, and ponds within Subbasin No. 4. The basis for the claimed water rights is stated as both the Riparian and Appropriative Doctrines.

Pat and Mary Burke were represented during the evidentiary hearing by their attorney, Lawrence Martin, of Halverson and Applegate. Testimony was provided by Pat Burke and Richard Bain, an engineering consultant retained by Pat and Mary Burke to investigate their irrigation systems and prepare a report for submittal to the Court.

Within Subbasin No. 4, the claimants own the SE $\frac{1}{4}$ of Section 28 and the NE $\frac{1}{4}$ of Section 33, T. 20 N., R. 17 E.W.M. (DE-16); the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 27 and the W $\frac{1}{2}$ of Section 34 both in T. 20 N., R. 17 E.W.M. (DE-17 and DE-18); Government Lots 3 and 4 and the S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 3, T. 19 N., R. 17 E.W.M. (DE-19 and DE-20); a portion of the south 806.1 feet of that portion of the W $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ and a portion of the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 27, T. 20 N., R. 17 E.W.M..

The Burke property is about 840 acres, of which 365 are cultivated and 138 acres are reported to be irrigated. The irrigation season runs from April 1

1 through October 31 depending upon availability of water and the weather patterns.
2 The crops grown include grain, timothy, alfalfa, and mixed hay. Taken as a whole,
3 up to 850 head of cattle are on the property during peak use periods. Distribution
4 of the stock on various parcels varies during the year, as do the number of animals
5 in each field. The highest numbers are from September until April since these
6 properties are used for wintering the stock. The primary source of water for the
7 stock during much of the year is via riparian access to the various streams, ponds,
8 and springs. Stock tanks are used in some fields and stock can drink from ditches
9 in the fields they traverse during periods when the ditches carry water. A
10 significant quantity of water is delivered to stock via the Burke Ditch during the
11 winter with up to 1.0 cubic feet per second (cfs) necessary during severe weather
12 periods.

13 The Burkes assert that the priority date for the use of Swauk Creek water is
14 1878 and that a date of 1882 is appropriate for McCallum Spring and Dunford Spring.

15 The priority date claimed for the ponds in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 27 and the
16 pond and the spring located in the NE $\frac{1}{4}$ of Section 33 of T. 20 N., R. 17 E.W.M. is
17 prior to 1864.

18 The uses of water claimed for all the sources are irrigation, stock watering,
19 agriculture, domestic, power, instream, and other beneficial uses. The acres
20 irrigated from each source, as represented by Claim No. 01475, and modified during
21 testimony are: Swauk Creek, 138 acres; McCallum Spring and associated springs,
22 18 acres; Dunford Spring and associated springs, 27 acres.

23 Since the Burkes are claiming rights based upon both the riparian and
24 appropriative doctrines, it is essential to establish the dates when actions were
25 taken to separate each parcel from public ownership.

1 The S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 27, T. 20 N., R. 17 E.W.M. was deeded from the Northern
2 Pacific Railway Company (NPRC) to Harry Needham on December 1, 1900. Contained as
3 a condition in that deed is that Mr. Needham was liable for any taxes and
4 assessments levied or assessed for the year 1895 and subsequent years. It is,
5 therefore, reasonable to assume that the NPRC had ownership interest in the
6 property in 1895, which is the earliest date in the record for this property.
7 Therefore, the date of June 30, 1895 shall be used for the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 27,
8 T. 20 N., R. 17 E.W.M. for separation from the public domain.

9 The N $\frac{1}{2}$ SW $\frac{1}{4}$ and the S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 27, T. 20 N., R. 17 E.W.M. was deeded from
10 the NPRC to Gustaf Nilson on May 14, 1903. This deed does not contain the same
11 reference to tax liability as contained in the deed for the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 27.
12 Therefore, the date of May 14, 1903, which is the earliest date in the record, will
13 be used for the N $\frac{1}{2}$ SW $\frac{1}{4}$ and S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 27, T. 20 N., R. 17 E.W.M.

14 Homestead Certificate No. 631 was issued by the United States to Peter
15 McCallum for the SW $\frac{1}{4}$ of Section 34, T. 20 N., R. 17 E.W.M.. This certificate
16 issued based upon application No. 2087. The Referee cannot ascertain the
17 appropriate date to apply to this document due to apparent errors on its face. A
18 literal reading is that Grover Cleveland signed the certificate on June 4, 1996.
19 That obviously is not correct. The printed form has the numbers 19 pre-printed,
20 therefore, it is impossible to arrive at a logical date prior to 1900 based upon
21 the Land Patent Certificate. It appears that the certificate was recorded at the
22 Kittitas County Courthouse on June 13, 1917. Exhibit No. DE-44, a Kittitas County
23 biography, establishes that Peter McCallum took out a homestead in the Swauk area
24 in August of 1882. It seems reasonable to conclude that Peter McCallum settled

1 upon the SW $\frac{1}{4}$ of Section 34 at that time. August 31, 1882, should be the
2 appropriate priority date for riparian rights on that property.

3 Exhibit No. DE-29 contains a set of documents which relate to the collective
4 property described as the SE $\frac{1}{4}$ of Section 28 and the NE $\frac{1}{4}$ of Section 33,
5 T. 20 N., R. 17 E.W.M.. Since this land did not separate from the public domain on
6 the same date, the Referee will describe the chain of title by separate parcels
7 within the two quarter sections. On June 4, 1896, George D. Virden was granted a
8 patent by the United States for the W $\frac{1}{2}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$, and the SW $\frac{1}{4}$ NE $\frac{1}{4}$, all within
9 Section 28, T. 20 N., R. 17 E.W.M. (DE-29). According to exhibit No. DE-33,
10 History of Klickitat, Yakima and Kittitas Counties, George Virden settled upon this
11 property in the year 1878. This 160 acre parcel is riparian to Swauk Creek. The
12 Referee feels confident that a priority date based upon the Riparian Doctrine would
13 be June 30, 1878 for this homestead.

14 James H. Kinney purchased from the NRPC the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33,
15 T. 20 N., R. 17 E.W.M., which is reflected in a deed dated November 17, 1899
16 (DE-29). This 40 acre parcel is not riparian to Swauk Creek, therefore, any water
17 right which may be appurtenant to this parcel would be based upon the Prior
18 Appropriation Doctrine.

19 William L. Virden purchased from the NRPC the NE $\frac{1}{4}$ NE $\frac{1}{4}$ and the S $\frac{1}{2}$ NE $\frac{1}{4}$ of
20 Section 33, T. 20 N., R. 17 E.W.M., which is reflected in a deed dated February 19,
21 1904. This 120 acre parcel is also not riparian to Swauk Creek.

22 Sometime prior to 1904, James Kinney apparently transferred to William Virden
23 the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, T. 20 N., R. 17 E.W.M.. On October 31, 1904, William
24 deeded that 40 acres to George D. Virden along with the balance of the NE $\frac{1}{4}$ of
25 Section 33 (DE-29).

26
27 REPORT OF REFEREE
28 Re: Subbasin No. 4

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1 A warranty deed dated March 22, 1919 transferred title for the SE $\frac{1}{4}$ of
2 Section 28 and the NE $\frac{1}{4}$ of Section 33 from George D. Virden to Norman W. Virden
3 (DE-29). This deed is the first evidence in the record that title to the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of
4 Section 28, T. 20 N., R. 17 E.W.M. was held by either William or George Virden.
5 The SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28 is clearly not riparian to Swauk Creek and cannot attain
6 riparian status due to its current, common ownership with those lands in the SE $\frac{1}{4}$
7 that are riparian. It did not separate from the public domain with the original
8 George D. Virden homestead filing for the remainder of the SE $\frac{1}{4}$ of Section 28
9 (DE-29). There is no evidence in the record of when the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28
10 separated from federal ownership.

11 A Notice of Appropriation was filed on September 20, 1889 by James H. Kinney,
12 A.B. Kenworthy, and George Virden for a 300 miners-inch (6 cfs) diversion from
13 Swauk Creek at a point on the north bank of the creek. This diversion, located
14 within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, is identified as diversion No. 1 and is shared by
15 the Burke and Hartman ranches for lands lying northwesterly of Swauk Creek in
16 Section 28, T. 20 N., R. 17 E.W.M.. The ditch extends to the south section line of
17 Section 28 within the SE $\frac{1}{4}$ SW $\frac{1}{4}$. Pat and Mary Burke are claiming a water right for
18 39.6 acres of irrigation within that portion of the SE $\frac{1}{4}$ of Section 28,
19 T. 20 N., R. 17 E.W.M. lying north of Swauk Creek. These acres are riparian to
20 Swauk Creek and the date of settlement is 1878. The Hartmans, under Court Claim
21 No. 01685, are asserting a right for the irrigation of 95 acres in Section 28 under
22 the same appropriation. Their claim is discussed in detail on page 92 of this
23 report.

24 Alice R. Burke filed Water Right Claim No. 002826 with the Department of
25 Ecology on February 19, 1971. She claimed 6 cfs from Swauk Creek for irrigation of
26

1 50 acres and stock water with a date of first use of 1892. Water use was to be
2 within Section 28.

3 On June 15, 1974, Pat Burke filed Water Right Claim No. 158023 with the
4 Department of Ecology. Although the information provided on the claim is very
5 general, the claim appears to be for water diverted from Swauk Creek for use within
6 the SE $\frac{1}{4}$ of Section 28, T. 20 N., R. 17 E.W.M. This claim may duplicate the filing
7 by Alice Burke.

8 A total of 134.6 acres are being irrigated on the Burke and Hartman Ranches
9 based on the 1889 appropriation by Kinney, Kenworthy, and Virden. Both the Burkes
10 and the Hartmans appear to be asserting a right for the entire 6 cfs under that
11 appropriation. The testimony indicates that 6 cfs is diverted into the ditch and
12 the two ranches rotate their use of the water so that only one ranch is irrigating
13 at a time, resulting in the entire flow being used on each ranch when they
14 irrigate. However, the Referee believes it would be appropriate to pro-rate the
15 quantity based on the number of acres irrigated by each claimant. There was no
16 testimony that the original appropriators rotated their water use in the same
17 manner as is being done today or when this practice was initiated. If the
18 landowners choose to rotate their use of water in order to make their irrigation
19 practice more effective, that is a private matter between them.

20 The Burkes are irrigating 39.6 acres, which is approximately 30 percent of the
21 total number of acres irrigated from this ditch and the Hartmans are irrigating
22 approximately 70 percent of the total acres. The Burkes proportionate share of the
23 water then would be 1.77 cfs, leaving 4.23 cfs for the Hartmans. The testimony was
24 that 7.5 acre-feet has typically been used for each acre irrigated, which will be
25 adopted by the Referee for this ranch. Mr. Bain used 2.5 cfs as a typical flow to
26

1 the Burke field, and with that instantaneous quantity, ten days were required for
2 each irrigation. The field was irrigated six times during the irrigation season.
3 With a reduced flow of 1.77 cfs, less transportation loss, it is probable that an
4 additional day or two would be required per irrigation in order to apply the same
5 annual quantity of water.

6 Mr. Bain's Report (DE-37) addressed conveyance loss for the entire 4200 foot
7 long ditch. Approximately 1000 feet of the ditch is concrete lined and the rest is
8 unlined. According to Mr. Bain's report, the ditch would loose an average of
9 0.06 cfs per 1,000 feet, or 0.252 cfs for the entire ditch. The conveyance loss
10 will also be prorated between the Burkes and Hartmans in the same ratio as
11 discussed previously. The Referee believes that the 6 cfs appropriated by Kinney,
12 Kenworthy, and Virden, included any conveyance loss.

13 The Referee recommends that a right be confirmed to the Burkes with a June 30,
14 1878, date of priority for the diversion from Swauk Creek of 1.69 cfs,
15 297 acre-feet per year for the irrigation of 39.6 acres, 1 acre-foot for stock
16 water and 0.08 cfs for conveyance loss, for use on that portion of the SE $\frac{1}{4}$ of
17 Section 28, T. 20 N., R. 17 E.W.M. lying north of Swauk Creek and south of the
18 Burke-Hartman Ditch.

19 Alice R. Burke filed Water Right Claim No. 002825 on February 19, 1971 with
20 the Department of Ecology pursuant to Chapter 90.14 of the Revised Code of
21 Washington (RCW). It claims a right to use 4 cfs diverted from Swauk Creek with a
22 date of first use of April, 1914. The legal description provided on Claim
23 No. 002825 for the place of use is Section 28, T. 20 N., R. 17 E.W.M. The
24 described point of diversion is within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, T. 20 N., R. 17
25 E.W.M. This diversion is identified throughout the current record as diversion

1 No. 2 (the Burke ditch). Alice Burke claimed a right for 100 acres of irrigation
2 and stock water in WRC No. 002825.

3 The Burkes are asserting a right to irrigate 98.4 acres with water diverted
4 from Swauk Creek and delivered through the Burke Ditch. That ditch diverts from
5 the creek downstream from the diversion into the Burke-Hartman Ditch. Most of the
6 land served by this ditch is rill irrigated, with about 25 acres sprinkled. Mr.
7 Bain measured the flow in this ditch on August 21 at 1.94 cfs, but thought 2 cfs
8 was more reflective of normal diversions. His report indicates that a total of
9 720 acre-feet per year is used to irrigate the land served by the Burke Ditch. Mr.
10 Bain also determined that the conveyance loss for the ditch would be 0.25 cfs. The
11 fields served by the Burke Ditch are used to pasture and winter cattle which are
12 watered from the Burke Ditch. Three hundred cow/calf pairs and 200 yearlings are
13 wintered in a typical year. The Burkes are asserting a right to divert 1 cfs,
14 17 acre-feet per year for stock watering. The number of stock watered during the
15 irrigation season was not established, however, it is clear that a relatively small
16 number are provided water. One cubic foot per second is required in the winter in
17 order to create ice bridges during extremely cold periods so the ditch will
18 continue to flow. The Referee questions the annual quantity of 17 acre-feet per
19 year, which is contained in the Bain report. Exhibit DE-48 was submitted by the
20 Burkes and it identifies water needs for various types of livestock. Based on the
21 figures in that document, 8.5 acre-feet would be sufficient for the consumptive
22 needs of the livestock during a six month period, an additional 1 acre-foot should
23 be sufficient during the irrigation season for the smaller number of stock
24 pastured.

1 The irrigated acres lie in that portion of the SE $\frac{1}{4}$ of Section 28 lying
2 southeast of Swauk Creek and the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, T. 20 N., R. 17 E.W.M.. As
3 previously discussed, the lands in the N $\frac{1}{2}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ were part of the William
4 Virden homestead and are riparian to Swauk Creek. Any of the land in that parcel
5 irrigated prior to December 31, 1932 would enjoy a right under the Riparian
6 Doctrine with a June 30, 1878 date of priority. The SE $\frac{1}{4}$ SE $\frac{1}{4}$ was not part of the
7 William Virden homestead, and was not riparian to Swauk Creek when it separated
8 from Federal ownership. Any right for this land would be based on the Prior
9 Appropriation Doctrine, which would require proof of water use prior to June 6,
10 1917. The NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33 was initially owned by Northern Pacific Railway and
11 then sold to James Kinney on November 17, 1899. This parcel is also not riparian
12 to Swauk Creek.

13 According to the record, Burke Ditch was constructed in 1914 by George Virden
14 and at that time 200 miner's inches (4 cfs) were appropriated for irrigating
15 100 acres in the SE $\frac{1}{4}$ of Section 28 and the NE $\frac{1}{4}$ of Section 33. The land in the
16 SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28 and the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, should enjoy a priority date of
17 June 30, 1914, under the Virden appropriation. However, the Referee does not
18 believe that a right can be recommended for those parcels. On May 10, 1905, the
19 United States withdrew all of the unappropriated waters in the Yakima River Basin
20 in order to pursue construction of the Yakima Irrigation Project. See Page 8 for a
21 detailed discussion of the withdrawal. The Referee does not believe that a water
22 right could have been established in 1914 without a release from the Federal
23 government.

24 Review of the State's map exhibit (SE-2) leads the Referee to conclude there
25 are approximately 65 acres irrigated in that portion of the SE $\frac{1}{4}$ of Section 28

1 homesteaded by William Virden lying below the Burke Ditch. This land would enjoy a
2 riparian right. The land lying above the Burke Ditch cannot be irrigated with a
3 gravity flow delivery of water, which was commonly the practice in the late 1800's
4 when the right was established. Therefore, the Refere cannot recommend
5 confirmation of a water right for those lands that cannot be served by gravity flow
6 from the Burke Ditch. According to the testimony of Richard Bain, the Burkes have
7 been diverting 2 cfs for irrigation. The Referee recommends that a water right be
8 confirmed to Pat and Mary Burke under the Riparian Doctrine, with a June 30, 1878
9 date of priority for the diversion from Swauk Creek of a total of 2.0 cfs;
10 1.75 cfs, 488 acre-feet per year for the irrigation of 65 acres and 1 acre-foot for
11 stock water and 0.25 cfs for conveyance loss from April 1 to October 31; 0.25 cfs
12 from November 1 to November 30 and February 1 through March 31, 1 cfs from December
13 1 through January 15, 8.5 acre-feet per year for stock watering from October 1 to
14 March 31. The place of use shall be that portion of the N $\frac{1}{2}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ of
15 Section 28 lying southeast of Swauk Creek, T. 20 N., R. 17 E.W.M..

16 There potentially is another ditch that may have served a portion of the Burke
17 property. There appears to the Referee to be a faint thread of a ditch above the
18 Burkes irrigated land in the SE $\frac{1}{4}$ of Section 28 showing in the aerial photo that has
19 been placed in the record. This ditch could have served the land that lies above
20 the Burke Ditch. The Burkes put into the record (DE-49) a copy of the Notice of
21 Appropriation filed on May 26, 1890 by D.W. May and B.K. May claiming a right to
22 144 miners-inches (2.88 cfs) of water from Swauk Creek with a date of initiation of
23 October 1889. The point of diversion is described only by reference to a locally
24 recognized feature "first crossing on the east side of the above creek". Reference
25 to the course of the ditch and lands to be served could only be understood with

knowledge of property owned by D.W. May and B.K. May in the years 1889 and 1890.
That evidence is not in the record.

McCallum Spring lies within the NW $\frac{1}{4}$ of Section 3, T. 19 N., R. 17 E.W.M. near the center of that quarter section. Patrick Burke filed three Water Right Claims for springs or unnamed surface water sources located within the NW $\frac{1}{4}$ of Section 3, T. 19 N., R. 17 E.W.M., Nos. 000185, 052951, and 158027. Water Right Claim No. 000185 asserts a right to 20 gallons per minute (gpm), 30 acre-feet per year for irrigation of 5 acres and stock water from a spring located approximately 1,600 feet east and 110 feet south from the northwest corner of Section 3. The priority date claimed is April 1887 and the place of use described is part of the NW $\frac{1}{4}$ of Section 3, T. 19 N., R. 17 E.W.M..

Water Right Claim No. 052951 asserts a right to 10 gpm, 16 acre-feet per year for irrigation of 10 acres and stock water with a priority date of 1887. The spring location is described as 1,500 feet east and 1,600 feet south from the northwest corner of Section 3 and the place of use is described as the NW $\frac{1}{4}$ of Section 3, T. 19 N., R. 17 E.W.M..

Water Right Claim No. 158027 asserts a right to an unspecified instantaneous and annual quantity of water from an unnamed surface water source for irrigation of 133 acres. The claim indicates that 15 acres were being irrigated in 1974. The place of use is described as the NW $\frac{1}{4}$ of Section 3, T. 19 N., R. 17 E.W.M and the point of diversion is given as within the NW $\frac{1}{4}$ of Section 3 without a specifically described location.

The Referee is faced with what appear to be conflicting facts as well as minimal detail in the form of direct testimony. The record is not clear concerning how many surface water sources are being claimed within the NW $\frac{1}{4}$ of Section 3 and

1 which of the three water right claims filed pursuant to RCW 90.14 relates to
2 McCallum Spring. The State Investigation Report No. 3 for the Burke claim provides
3 a definite description of the McCallum Spring facilities and provides a point of
4 diversion and place of use which is west of the state highway within that part of
5 Government Lot 4 excluding the north 500 feet thereof. In response to a direct
6 question from the Assistant Attorney General representing Ecology, Mr. Burke found
7 no fault with the report. Diversionary stock water is clearly supplied to two
8 stock tanks and overflow dissipates downgradient providing sub-irrigation to an
9 area of up to 18 acres. There was no testimony of the use of McCallum Spring
10 before the highway reconstruction or how it was accomplished. It does appear that
11 stock grazing east of the highway have riparian access to McCallum Spring,
12 therefore, the stock water stipulation set forth in detail on Page 4 of this report
13 is applicable to at least that portion of the NW $\frac{1}{4}$ of Section 3, lying east of the
14 state highway. If diversionary stock water was historically supplied, it will be
15 necessary for facts to be provided regarding the place of use and the carrying
16 capacity of this pasture (west of the highway).

17 The record is not sufficient for determining when the NW $\frac{1}{4}$ of Section 3 was
18 separated from the public domain. Mr. Martin referred the Referee to Exhibit DE-44
19 (McCallum Family Biographical) which contains no legal descriptions. It is likely
20 that the NW $\frac{1}{4}$ of Section 3 was purchased from the Northern Pacific Railway Company,
21 but there is nothing in the record to confirm that. The Referee has concluded that
22 a diversionary right to McCallum Spring cannot be recommended with the current
23 record. If the historic uses were riparian stock watering and sub-irrigated
24 pasture or hay, there is no basis for confirmation of an appropriative water right.

1 Dunford Spring is located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 34, T. 20 N., R. 17
2 E.W.M. east of the State Highway. Pursuant to RCW 90.14, Water Right Claim No.
3 000186 was filed by Pat Burke for a spring located 1,600 feet north and 1,600 feet
4 east from the southwest corner of Section 34, T. 20 N., R. 17 E.W.M., which would
5 be in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 34. The claim states a date of first use of March 1885
6 for 30 gpm, 45 acre-feet per year for domestic supply, stock water, and irrigation
7 of 10 acres. The place of use is within the W $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the E $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of
8 Section 33, T. 20 N., R. 17 E.W.M.. Pat Burke also filed Water Right Claim
9 No. 158026 on June 15, 1974 on what may be the same spring, although the claim
10 lacks enough detailed information to be sure.

11 Homestead Certificate No. 631 issued to Peter McCallum for the SW $\frac{1}{4}$ of
12 Section 34, T. 20 N., R. 17 E.W.M.. As discussed previously, Peter McCallum
13 reportedly settled on land in the Swauk in August 1882. The Referee proposes to
14 rely upon August 31, 1882 as the date first steps were taken to sever the land from
15 Federal ownership, which would be the priority date for any right to Dunford Spring
16 established under the Riparian Doctrine.

17 It is clear from the record that stock grazing within the SW $\frac{1}{4}$ of Section 34
18 are not totally dependant upon stock tanks for water, although tanks are fed from
19 Dunford Spring. Due to the access of stock to the spring overflow and the lack of
20 testimony as to how many head of cattle are carried on this parcel, the Referee
21 recommends that a diversionary stock water right be confirmed for .01 cfs,
22 1 acre-foot per year from Dunford Spring. The stock water stipulation set forth in
23 detail on Page 4 of this report is applicable to Dunford Spring.

24 Mr. Burke's testimony is that Dunford Spring is "a large, flowing spring that
25 comes out of the hill". In 1970 Mr. Burke estimated on WRC No. 000186 that the

1 spring produced 30 gpm. No other testimony as to instantaneous flows are in the
2 record. There are, however, several statements to the effect that flows in the
3 past 10-15 years have been lower than historic levels. The record contains a wide
4 range of claims to irrigated acres served by Dunford Spring. Water Right Claim
5 No. 000186 claims a right to irrigate 10 acres, Mr. Burke testified to 5 acres
6 currently benefitting from subirrigation. The record is limited or conflicting
7 concerning the extent of the water right perfected by 1932. The Referee believes
8 that the 30 gpm reflected in Water Right Claim No. 000186 is consistent with the
9 2-inch gravity flow pipe and the shallow ditches described by the state
10 investigators (SE-11). The evidence leads the Referee to believe that 5 acres of
11 irrigation by diversion and ditch is the most probable level of development, with
12 subirrigation benefitting substantially more acres in a good water year.

13 Based upon the above, it is recommended that a right be confirmed with a
14 priority date of August 31, 1882, for the irrigation of 5 acres from Dunford Spring
15 with a maximum instantaneous rate of diversion of .067 cfs (30 gpm) from April 1
16 through October 31, 28.25 acre-feet per year. The annual quantity of 28.25
17 acre-feet per year is based on a continuous use of 0.067 cfs during the authorized
18 irrigation season. The place of use is the W $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the E $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of
19 Section 34, T. 20 N., R. 17 E.W.M..

20 The last use of domestic water from Dunford Spring was reported to be around
21 1970-71 when the house served by the spring burned down. Since there was no
22 testimony of continued domestic use after 1971, the Referee cannot recommend
23 confirmation of a water right as the right which was perfected appears to have
24 relinquished due to nonuse, RCW 90.14.160.

1 The final sources of water claimed by Pat and Mary Burke are an unnamed spring
2 and an excavated pond located within the NE $\frac{1}{4}$ of Section 33 and an excavated pond in
3 the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 27, all in T. 20 N., R. 17 E.W.M.. The spring in Section 33
4 is used for non-diversionary stock water. The stock water stipulation set forth in
5 detail on Page 4 of this report covers that use. The excavated ponds are not
6 natural surface water sources and, therefore, the Stock Water Stipulation is not
7 applicable to them.

Pat and Mary Burke have claimed unspecified quantities of water from various sources for purposes such as agricultural, domestic, power, instream, fires, emergencies, and other beneficial uses. The Referee cannot recommend confirmation of specific diversionary water rights for any of the listed uses as the record does not provide a basis upon which judgement can be made. It is recognized, however, that water required to suppress a fire is taken from any available source and that a water right is not required for that emergency use.

15 The Burke Ranch as described in this report is used to sustain a cattle
16 operation which is highly dependent upon riparian access to the named and unnamed
17 streams and springs previously discussed. The stock water stipulation described in
18 detail on Page 4 of this report is applicable to all of the naturally occurring
19 surface water sources within the ranch boundaries.

24 Glenn Burzenski, as agent for Selma Burzenski, Sheryle Bonnell, and Janis
Newbury, filed a Statement of Claim with the Court on October 22, 1990 for the use

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1 of several unnamed springs, Price Creek, Williams Creek, and an unnamed tributary
2 of Williams Creek. On December 14, 1990 the Court signed an Order approving Claim
3 No. 05721 for further processing in this proceeding.

4 The claimants were represented by attorney Kenneth D. Beckley. Glenn
5 Burzenski, as agent for the claimants, testified at the evidentiary hearing; as did
6 Richard C. Bain, Jr., a consultant hired by the claimants. Mr. and Mrs. Newbury
7 attended the hearing, but did not testify.

8 The property encompassed by Claim No. 05721 is held in common by Mr. Burzenski
9 who has 50% ownership, Mrs. Newbury with 25%, and Mrs. Bonnell also with 25%
10 ownership. The claimants' property, Homestead Entry Survey (HES) No. 161, is
11 comprised of approximately 62 acres lying within the E $\frac{1}{2}$ E $\frac{1}{2}$ of Section 36,
12 T. 21 N., R 17 E.W.M. and W $\frac{1}{2}$ of Section 31, T. 21 N., R 18 E.W.M. The parcel lies
13 in the bottom of the drainages of Williams and Price Creeks in a long narrow
14 configuration, one mile east of the town site of Liberty.

15 Testimony and exhibits provided by Mr. Burzenski and Mr. Bain indicate that
16 there are a total of six diversion points from the creeks that flow through HES
17 No. 161. Diversion numbers 1 and 2 are on Price Creek at the easterly property
18 corner. Diversion numbers 3 and 4 are on Williams Creek below the confluence with
19 Price Creek. Diversion number 5 is on an unnamed stream, tributary to Williams
20 Creek, located near the northern tip of HES No. 161. Diversion number 6 is on an
21 unnamed tributary to Williams Creek located in the southeast corner of HES No. 161.
22 In addition to the stream diversions there are spring areas adjacent to the two
23 unnamed streams and near corner No. 12 of HES No. 161, (domestic spring).

24 Crops historically grown on the property include pasture, timothy, oats, and
25 garden vegetables, etc. Stock have historically been grazed on the property with

1 up to 125 head of cattle present during peak periods. The property is irrigated
2 via gravity flow ditches and/or flood irrigation.

3 Mr. Bain visited the property on June 7 and August 14, 1991 to measure ditch
4 diversions and observe the irrigation practices, etc. His report, DE-11, indicates
5 58 acres are being irrigated, but no details or basis for that figure were
6 provided. The best graphic detail as to irrigated areas and ditch locations
7 appears to be provided by Exhibit SE-2 which is based upon field observations and
8 aerial photograph analysis conducted by the state's investigator. The state's
9 Investigation Report, SE-10, indicates that 53 acres were being irrigated (in
10 season).

11 It appears that several springs on the property contribute to the growth of
12 forage via natural subirrigation rather than diversions and ditch systems. The
13 county road, creek channels, and areas developed for the farmstead are
14 non-irrigable land, and land upgradient from the ditches is not irrigated. A 1977
15 aerial photograph including the Burzenski property, DE-15, placed in the record for
16 claimants Robert Weaver and Mary Shelton, Court Claim No. 00519, further emphasizes
17 the physical limitations to the irrigable acreage.

18 Mr. Bain's report contains instantaneous values for diversions 1-6, both for
19 observed flows during the 1991 season and for individual ditch capacities
20 (estimated maximums). The report shows maximum diversions of 0.50 cfs from point
21 of diversion (POD) No. 1, Price Creek; 0.60 cfs from POD No. 2, Price Creek;
22 1.0 cfs from POD No. 3, Williams Creek; 0.50 cfs from POD No. 4, Williams Creek;
23 0.50 cfs from POD No. 5, northerly unnamed stream; and 0.30 cfs from POD No. 6,
24 southerly unnamed stream. Mr. Bain's report reverses the numbers for POD 5 and 6.
25
26
27

1 The Referee has adjusted for that such that the numbers as set forth above reflect
2 those on exhibit SE-2.

3 Mr. Bain's report also provides annual water duty calculations based upon
4 measured diversions, an expected irrigation season of mid-April through
5 mid-October, and the number of acres irrigated. These calculations are highly
6 dependent upon professional judgement since the various streams fluctuate widely
7 during the irrigation season and from year to year, dependent upon the
8 precipitation and weather patterns. The results of Mr. Bain's analysis indicate
9 that 11.7 acre-feet of water per acre was the appropriate water duty for the
10 irrigated lands in HES No. 161. Mr. Bain characterizes the fields as being
11 developed in a "hilly gully", which is clearly reflected in the photographs
12 included in exhibits DE-11 and DE-15. Testimony provided by Mr. Bain is that the
13 upper hillside areas of the property, above the ditches, are not irrigated.
14

15 The primary source of stock water is riparian access to the stream channels
16 and springs, although they obviously can drink from the irrigation ditches. Water
17 can also be provided to the stock through the domestic spring pipeline, however, no
18 testimony was offered which indicates regular deliveries for stock water from that
19 source. The spring supplies water to the cabin via a 1 $\frac{1}{4}$ " pipeline by gravity flow.
20 The spring is described as being located 600 feet east and 200 feet south of the W $\frac{1}{4}$
21 corner of Section 31, T. 21 N., R. 18 E.W.M., within Government Lot 11. The spring
22 water is used within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 36, T. 21 N., R. 17 E.W.M..
23

24 The various water sources identified in Court Claim No. 05721 are all within
25 HES No. 161 and are tributary to Williams Creek. The property is riparian to the
26 sources.
27

1 The evidence provided in exhibit DE-10-B and D establishes that Mr. Dodge
2 Alley filed Homestead Entry No. 03643 on January 4, 1910 for the property now
3 identified as HES No. 161. The patent was ultimately signed on January 16, 1929.
4 The patent contains standard language as to conveyance of appurtenances, etc.,
5 including any "vested and accrued water rights". The Referee concludes that no
6 specific water right was granted or confirmed by the patent document nor was any
7 existing right excluded from transfer to Dodge Alley. Although Mr. Alley filed for
8 Homestead Entry in 1910, he is reported to have settled on the property in 1904
9 (exhibit DE-10).

10 HES No. 161 may have been settled as early as 1886 by Archie Morrison and
11 Andrew Flodine (exhibit DE-10). Included in that exhibit is a copy of Dodge
12 Alley's answer in the case of Salem Mining Company vs. Dodge Alley. The answer
13 indicates that Morrison and Flodine did settle on the land, then owned by Alley, in
14 1886 and appropriated 200 inches of water under six inch pressure from Williams
15 Creek and that use had continued to the time the answer was filed. However, the
16 Referee believes that lacking a copy of the Court's Findings of Facts and Decree
17 related to Salem Mining Company vs. Dodge Alley, Superior Court of Kittitas County
18 Cause No. 7962, the references to water use and settlement in 1886 cannot be relied
19 upon.

20 The United States withdrawal of the unappropriated surface waters in the
21 Yakima River Basin in 1905 occurred prior to the Homestead Entry Application for
22 HES No. 161. It is important to establish that water was appropriated or steps
23 taken to sever the land from Federal ownership prior to the withdrawal date.

24 In June of 1974 Selma Burzenski filed Water Right Claim (WRC) No. 151990,
25 pursuant to the Revised Code of Washington (RCW) 90.14, claimimg a right to

1 irrigate 62 acres, which is essentially the entire property. No instantaneous or
2 annual quantity was provided, nor were any sources other than Williams Creek
3 identified, or any purpose of use claimed other than irrigation.

4 The Referee finds ample evidence in the record regarding historic water uses
5 for irrigation, stock, and domestic supply, however, the priority date and number
6 of acres historically irrigated are not established by the current record. Water
7 Right Claim No. 151990 does not, on its face, specifically cover the various water
8 sources, purposes of use, or quantities. Failure to file a water right claim
9 pursuant to RCW 90.14 waives and relinquishes any right that may have existed for
10 that source, RCW 90.14.071.

11 The number of acres developed and irrigated by ditch systems prior to
12 December 31, 1932 is of particular interest. The Referee is convinced that the
13 irrigated area is somewhat less than the claimed 58 acres. If the claimant can get
14 beyond the lack of RCW 90.14 claims for the other water sources used, besides
15 Williams Creek, testimony would be necessary as to the acres served from each
16 source.

17 Finally, with sources of riparian stock water scattered around the property it
18 seems unlikely that any significant quantity of water has been delivered to the
19 livestock from the domestic spring system. Testimony in the record simply
20 indicates that water could be supplied to the stock from the domestic spring. Mr.
21 Bain has testified that 5 acre-feet per year are necessary to supply 125 head of
22 cattle. That volume of water would reflect year around use by 125 cattle. The
23 Referee is convinced that a historic right to riparian stock water is appropriate.
24 A diversionary stock water right is not being recommended because no water right
25 claim was filed on any surface water source for that purpose and insufficient
26

1 testimony was offered as to the seasonal fluctuations in resident stock and their
2 use of water from the multitude of sources on the property. The stock water
3 stipulation discussed on Page 4 of this report covers non-diversionary stock
4 watering.

Based on the testimony and evidence, the Referee cannot recommend confirmation of water rights under Court Claim No. 05721 except riparian stock water.

7

8

COURT CLAIM NO. 01087 -- Darrell Clark
& Mabel Clark

10 On August 21, 1981, Darrell D. and Mabel Clark filed with the Court Statement
11 of Claim No. 01087. The claim asserts a right to Yakima River water for irrigation
12 of 140 acres. Darrell Clark appeared at the evidentiary hearing, provided
13 testimony, and offered historic documents in support of the claim.

The Clarks own the following lands which were purchased from Norah M. Haison
in 1946: The south 315 feet of the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 33 lying westerly of the
Northern Pacific Railway right of way; the S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 33, EXCEPT that part
northeasterly of the Northern Pacific Railway right of way; that portion of the SE $\frac{1}{4}$
of Section 33 lying northerly of the Yakima River.

Pursuant to the Revised Code of Washington (RCW) 90.14, Mr. Clark filed with the Department of Ecology on March 4, 1974 Water Right Claim No. 128012, which asserts essentially the same water right as Court Claim No. 01087, that being a right to divert 28 cfs from the Yakima River for the irrigation of 140 acres.

23 Exhibit No. DE-97 is a deed from Northern Pacific Railway Company (NPRC) to
24 Benjamin D. Garrison for the S $\frac{1}{2}$ NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ of Section 33, T. 19 N., R. 17
25 E.W.M. dated August 17, 1904. Mr. Garrison was subject to any tax assessments due

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1 and payable prior to July 27, 1899. This document would indicate NPRC had an
2 interest in the land by that date. The land described in the deed from NPPRC to
3 Garrison is riparian to the Yakima River. July 27, 1899 is the earliest date in
4 the record reflecting steps taken to sever the land from Federal ownership. Any
5 rights established under the Riparian Doctrine would enjoy that priority date.

6 There are no documents in the record showing the history of settlement of the
7 $N\frac{1}{2}NE\frac{1}{4}$ and the $SE\frac{1}{4}$ of Section 33, T. 19 N., R. 17 E.W.M.. Clearly the title history
8 is separate from that of the $S\frac{1}{2}NE\frac{1}{4}$ and the $NW\frac{1}{4}$ of said section. Portions of the
9 irrigation practice under Claim No. 01087 lie within the $N\frac{1}{2}NE\frac{1}{4}$ and the $SE\frac{1}{4}$ of
10 Section 33, T. 19 N., R. 17 E.W.M..

11 Exhibit No. DE-99 is a 1970 statement from Zona Barigar and Dot Barigar, who
12 are daughters of William R. Crawford, who owned farmlands in Sections 28 and 33 in
13 the late 1800's into the early 1900's. Their sister and brother-in-law owned the
14 land now owned by the Clarks. They state that an irrigation ditch was constructed
15 one mile downstream from the Cascade Irrigation District point of diversion by
16 their father and Doyle Garrison, their brother-in-law, to serve lands, including
17 those now owned by the Clarks. They also state that after the Cascade Canal was
18 constructed in 1904, their father had no further interest in the ditch and Doyle
19 Garrison continued using it. The Clarks bought from the estate of Doyle Garrison's
20 wife, Norah Garrison Haison.

21 After studying exhibit DE-101 (1977 aerial photo) it appears that
22 approximately 50 acres within the $S\frac{1}{2}NE\frac{1}{4}$ of Section 33 were irrigated in 1977. The
23 Referee's assessment of the photograph is that 22 acres south of the old river
24 channel brush line and 28 acres north of the brushline were being irrigated.
25 Although exhibit SE-2 depicts a substantial area of irrigation within the $SE\frac{1}{4}$ of

1 Section 33 at the time of the field investigation, the 1977 photograph appears to
2 reflect native vegetation.

3 There was no testimony or evidence presented concerning the quantity of water
4 diverted into the ditch, whether there is a conveyance loss associated with
5 transporting the water to the Clark property or the annual quantity of water needed
6 to irrigate the crops grown. Based on the current record, the Referee recognizes
7 the existence of a water right from the Yakima River for 50 acres of land lying
8 within the S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 33, T. 19 N., R. 17 E.W.M.. In order to determine
9 whether there is a water right for the remainder of the land, the Referee would need
10 an explanation of why the 1977 aerial photograph seems to reflect native
11 vegetation, rather than irrigated fields.

12 In 1965 an agreement was signed between Darrell and Mabel Clark and the
13 Cascade Irrigation District (CID) whereby CID would carry from the CID point of
14 diversion sufficient water to serve the Clark Ditch. This agreement resulted in
15 the point of diversion for the Clark Ditch being moved upstream approximately one
16 mile. The change in point of diversion was apparently accomplished without
17 compliance with the requirements of the Washington State Surface Water Code, RCW
18 90.03.380 (procedures for authorization to change points of diversion). In 1991
19 the point of diversion was again changed due to failure of the CID main canal below
20 the turnout to the Clark Ditch. The CID elected to eliminate the upper canal
21 reach, including that portion through which the deliveries to the Clark Ditch were
22 made. As of the date of this report the water supply for irrigation of the Clark
23 lands within the area described in Claim No. 01087 are served via a pumping plant
24 on the Yakima River.

1 It is also apparent that significant changes in irrigation practices have
2 occurred since 1991 when the CID installed a river pump station to serve the Clark
3 Ditch. This change was necessary because the old flume of the CID washed out
4 during the 1990-1991 winter season. Testimony provided during the evidentiary
5 hearing for the CID claim indicates that the pump was installed to honor the Clark
6 delivery agreement dated June 26, 1965 (Exhibit DE-103). The record does not
7 contain a description of the point of diversion for the CID installed Clark Flats
8 pump or the capacity of that pump.

9 Due to the lack of testimony about the quantity of water used, the Referee
10 must determine an appropriate water duty. It is recommended that a right be
11 confirmed to Darrell and Mabel Clark with a July 27, 1899, date of priority for the
12 diversion of 1.0 cubic foot per second, 250 acre-feet per year for the irrigation
13 of 50 acres in S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 33. The point of diversion shall be 220 feet north
14 and 300 feet east of the center of Section 28, being within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of
15 Section 28, T. 19 N., R. 17 E.W.M., which is the original point of diversion
16 utilized for the Clark property. The Clarks should contact the Ecology's Central
17 Regional Office concerning the procedures for obtaining authorization under RCW
18 90.03.380 to change the point of diversion to the location currently being used.

19 Although stock water was not a use included in Statement of Claim No. 01087,
20 stock are grazed on the property. The water source for these animals is the Yakima
21 River, the old flood channel or ponds. The stock drink directly from those various
22 sources, which is covered by the stock water stipulation discussed on Page 4 of
23 this report.

1
2 COURT CLAIM NO. 01146 -- Robert C. Coe
3 & Josephine W. Coe

4 Robert C. and Josephine Coe filed Court Claim No. 01146 for the use of waters
5 from Swauk Creek, two ponds, and a spring located on property known as Hidden
6 Valley Ranch. Attorney John P. Gilreath represented the claimants and Matthew Coe
7 testified at the evidentiary hearing in behalf of his parents, Robert C. and
8 Josephine W. Coe.

9 The Coes are claiming a right to divert water from three points on Swauk Creek
10 for irrigation of a total of 49 acres in the W $\frac{1}{2}$ of Section 33 and the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of
11 Section 32, both in T. 20 N., R. 17 E.W.M.. Point of diversion No. 1 serves a
12 gravity flow ditch that delivers water to 12 acres in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ and W $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of
13 Section 33. The point of diversion is 160 feet west and 75 feet north from the
14 south quarter corner of Section 28, in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28, T. 20 N.,
15 R. 17 E.W.M.

16 Point of diversion No. 2 is an excavated reservoir adjacent to the west bank
17 of Swauk Creek. A 10 BHP electric pump delivers water from the reservoir through a
18 sprinkler system to 23 acres in the E $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, and NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of
19 Section 33. The diversion is located 1140 feet west and 340 feet south of the
20 center of Section 33, within the W $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said section.

21 Point of diversion No. 3 diverts from the creek 1040 feet west and 990 feet
22 south of the center of Section 33, in the W $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said section, to a gravity
23 flow ditch. Approximately 14 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33 and the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of
24 Section 32 are irrigated from this ditch.

25 Irrigation water is utilized as available and needed between April 15 and
26 October 15. Stock water for cattle and horses is claimed from the stream channels

1 and a pond located near the west line of the SE $\frac{1}{4}$ of Section 33. The stock have
2 riparian access to the bodies of water.

3 A right is also being asserted for use of a spring serving the guest ranch
4 facilities and the farmstead in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33, including diversionary
5 stock water. Surface Water Certificate (SWC) No. S4-23164C is being relied upon as
6 foundation for that claim. It authorized the diversion of 0.06 cubic foot per
7 second, 7 acre-feet per year for group domestic supply and stock water with a
8 priority date of June 18, 1974. The Plaintiff's Report to the Referee recommended
9 that a right be confirmed to the Coes consistent with the authorization contained
10 in the certificate. However, the claimant appears to be asserting an earlier
11 priority date, based on the Riparian Doctrine, than the date supported by the
12 certificate.

13 Hidden Valley Ranch is comprised of the following tracts of land:

14 The SE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 32, the NW $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 33, in
15 T. 20 N., R. 17 E.W.M.; Government Lot 4 of Section 4 and
Government Lots 1 and 2 of Section 5, except the westerly
16 437.54 feet of said Government Lot 2; in T. 19 N., R. 17 E.W.M.

17 Hidden Valley Ranch, as described above, is comprised of several separate
18 parcels acquired via different chains of title. Therefore, it is important to
19 consider the history of those parcels individually.

20 The W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 33, T. 20 N., R. 17 E.W.M. was sold by contract from the
21 Northern Pacific Railway Company (NPRC) to James M. Evans on May 9, 1896. The
22 Warranty Deed ultimately issued to James M. Evans on April 30, 1906. The W $\frac{1}{2}$ SW $\frac{1}{4}$ of
23 Section 33 is riparian to Swauk Creek, but not to the domestic spring authorized
24 for use by SWC No. S4-23164C. The first date in the record showing steps to sever
25 the land from Federal ownership is May 9, 1896, which would be the priority date
26 for any water rights established under the Riparian Doctrine.

1 The NW $\frac{1}{4}$ of Section 33, T. 20 N., R. 17 E.W.M. was sold on contract by the
2 NRPC to James M. Evans on March 21, 1896. The Warranty Deed issued to him on
3 June 4, 1906. The NW $\frac{1}{4}$ of Section 33 is riparian to Swauk Creek. As with the W $\frac{1}{2}$ SW $\frac{1}{4}$
4 of Section 33, the only date in the record showing steps to sever the land from
5 Federal ownership is the date reflected in the contract between NRPC and James
6 Evans. Therefore, any rights established under the Riparian Doctrine would bear a
7 priority date of March 21, 1896.

8 Government Lots 1 and 2 of Section 5, T. 19 N., R. 17 E.W.M. were sold by the
9 NRPC to B. F. Boise. The deed is dated November 18, 1901, however, the tax
10 liability statement in the deed relates back to 1891, reflecting separation from
11 the public domain had occurred by that date. Government Lots 1 and 2 of Section 5
12 are riparian to Swauk Creek. Therefore, any rights acquired under the Riparian
13 Doctrine would bear a priority date of June 30, 1891.

14 The S $\frac{1}{2}$ NE $\frac{1}{4}$ and the W $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 32, T. 20 N., R. 17 E.W.M. were
15 homesteaded by James M. Evans, who acquired Homestead Certificate No. 871 on
16 February 2, 1900. These lands are riparian to a tributary of Swauk Creek, but not
17 to Swauk Creek.

18 The E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 32 was homesteaded by Richard W. Benbow, who acquired
19 Homestead Certificate No. 892 on April 9, 1901. The E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 32 is
20 riparian to a tributary of Swauk Creek, but not to Swauk Creek.

21 The chain of title documents in the record contain only the earliest
22 transfers of title from the United States or from the Northern Pacific Railroad to
23 a private party. The Court is asked to presume that separation from the public
24 domain is synonymous with irrigation of the land. However, there is no evidence to
25 support that supposition. Incorporated in the claimant's priority date rationale

1 is the theory that a five year relation back period is applicable to accommodate
2 the Federal land patent requirements of five years of occupation and cultivation
3 prior to the homestead certificate issuing. The Court addressed this issue as part
4 of the exceptions filed to the Report of Referee for Subbasin No. 6 (Taneum). In a
5 Memorandum Opinion dated January 19, 1995, the Court directed the Referee to not
6 make an automatic calculation of the priority date back from the patent date, but
7 to rely on actual proof to support the claimed priority date.

8 The Referee has also concluded that none of the land in Section 33 separated
9 from the public domain via homestead entry. The record reflects contract purchases
10 from the NRPC, who acquired the land from the Federal government through acts not
11 related to the homestead laws. Therefore, the relation back theory is moot for
12 those lands. The S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 32 did separate via land patent to James Evans.
13 Evans homesteaded the W $\frac{1}{2}$ SE $\frac{1}{4}$ and S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 32, and none of these lands are
14 included within the area for which an irrigation rights is being asserted. Richard
15 Benbow homesteaded the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 32, of which approximately five acres in
16 the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ have been irrigated with water diverted from Swauk Creek. The 80
17 acre parcel homesteaded by Benbow is not riparian to Swauk Creek; therefore, any
18 water right must be based upon the Prior Appropriation Doctrine.

19 Although there appears to have been irrigation water delivered to a portion
20 of Government Lot 1 of Section 5 at some time, no claim is being asserted for use
21 of water in Section 5. Use of water within the SE $\frac{1}{4}$ and S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 32,
22 exclusive of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of said section, is for nondiversionary stock watering.
23 Stock are grazed throughout Hidden Valley Ranch. The stock have riparian access to
24 many surface water sources throughout the property. The stock water stipulation
25 discussed on Page 4 of this report covers this use.

1 There are several physical features associated with the use of Swauk Creek
2 water for irrigation that deserve consideration. The Ecology field investigation
3 reports indicate that the ditches from diversions 1 and 3 appear to have been out
4 of service for extended periods of time and no ditch remnants were observed
5 adjacent to the seven acre field lying east of Swauk Creek in the E $\frac{1}{2}$ NW $\frac{1}{4}$ of
6 Section 33. Bruce Coe advised the field inspector that diversion 3 had not been
7 used since 1980. There is minimal evidence in the record regarding the last date
8 of use of water from diversion 1. The field inspector apparently understood that
9 the only source of irrigation water available for the fields in the NW $\frac{1}{4}$ of
10 Section 33 was via the pump and sprinkler system at diversion 2. There is,
11 however, testimony that 12 acres are, or have been, served from the gravity ditch
12 from diversion 1.

13 The excavated reservoir constructed at diversion 2 was not described other
14 than being located adjacent to Swauk Creek. The Referee cannot determine from the
15 evidence whether the excavation intercepts shallow ground water or serves as a
16 holding pond for water diverted from the creek. There was no testimony of a creek
17 diversion to the pond.

18 The testimony was that 14 acres, primarily in the SW $\frac{1}{4}$ of Section 33, are
19 irrigated from diversion 3. Exhibit DE-95, which is an aerial photo, shows a 14
20 acre field in the SW $\frac{1}{4}$ of Section 33, however, the ditch leading from diversion 3
21 crosses the lower end of the field. Since the ditch functions by gravity flow,
22 only two or three acres below the ditch and above Swauk Creek could be irrigated
23 from this ditch. There is a field, approximately 5 acres in size, under the ditch
24 in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 32, which could be irrigated from this ditch. No
25
26

1 irrigation rights are being asserted for the fields in Section 5. Therefore, a
2 maximum of 8 acres could be irrigated by gravity flow from diversion 3.

3 Robert C. Coe, dba Hidden Valley Ranch filed two water right claims with
4 Ecology pursuant to RCW 90.14. Water Right Claim No. 116936 asserts a right to
5 0.30 cfs from Swauk Creek for the irrigation of 20 acres. There is no date of
6 first water use shown on the claim. The point of diversion described is 1300 feet
7 north and 1300 feet east of the southwest corner of Section 33, in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of
8 Section 33. This would place the diversion about 800 feet below diversion 3.
9 Water Right Claim No. 117338 asserts a right to divert 0.54 cfs, 72 acre-feet per
10 year from Swauk Creek for the irrigation of 36 acres in the NW $\frac{1}{4}$ of Section 33. The
11 point of diversion described is within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, which is
12 approximately 1000 feet upstream from diversion 1. The date of first water use
13 shown on the claim is 1895 to 1900.

14 There is no water right claim filed that could be construed as being for the
15 excavated pond located at diversion 2. The result is that all three diversion
16 points are at locations other than documented by the written records. Changes in
17 point of diversion, or the addition of points of diversion, along with changes in
18 place of use, occurring after June 6, 1917, must be accomplished through the
19 procedures set forth in RCW 90.03.380.

20 Excluding SWC No. S4-23164C, the record contains no evidence regarding
21 development of the various water sources, including the date of initiation and
22 extent of use. In addition, the record is not clear as to the current condition of
23 diversion 1 and the last date of use for the associated ditch. Due to those
24 deficiencies, the Referee cannot recommend confirmation of a water right, except
25 that embodied in the stock water stipulation, beyond the right authorized by SWC
26

1 No. S4-23164C. Therefore, consistent with the Plaintiff's recommendation in the
2 their report to the Referee, it is recommended that a right be confirmed with a
3 June 18, 1974, date of priority, for 0.06 cfs, 6 acre-feet per year from an unnamed
4 spring for group domestic supply and 1 acre-foot per year from the spring for stock
5 water. The point of diversion is located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33, T. 20 N.,
6 R. 17 E.W.M. and the place of use is the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33, T. 20 N.,
7 R. 17 E.W.M..

8

9 COURT CLAIM NO. 01479 -- George E. Fahey
10 & Natus C. Fahey
11 Mr. Marilyn Bateman
12 & Mrs. Marilyn Bateman

13 On August 27, 1981, George E. and Natus C. Fahey filed with the Court
14 Statement of Claim No. 01479. The basis for Claim No. 01479 is Surface Water
15 Certificates (SWCs) No. 11210 and No. S4-01322C. Court Claim No. 01479 asserts a
16 right for single domestic supply, including lawn and garden irrigation, stock
17 water, and fire protection as required. On October 1, 1990, Mr. and Mrs. Marilyn
18 Bateman, who now own the Fahey property, were joined to the claim. George Fahey
19 appeared at the Swauk Creek evidentiary hearing, provided testimony, and offered
20 exhibit DE-86 into evidence. The Batemans did not appear at the hearing.

21 During testimony, Mr. Fahey amended Court Claim No. 01479 concerning the
22 instantaneous quantity claimed. His testimony is that Pump House Spring yields
23 only one gallon per minute and that he wishes the record to reflect that quantity
24 as the accurate measure of the flow and the limit of the quantity claimed by
25 No. 01479.

26 The domestic spring, which is the source of water addressed by Claim
27 No. 01479, lies within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, T. 19 N., R. 16 E.W.M. The lands

1 upon which water has historically been used is not riparian to the spring. Surface
2 Water Certificate No. 11210, with an August 16, 1969 date of priority, authorized
3 the diversion of .02 cfs; 4 acre-feet per year from Pump House Spring for domestic
4 supply for two homes. It is appurtenant to the Fahey/Bateman home site within the
5 NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, T. 19 N., R. 16 E.W.M. and a second home site, previously
6 owned by Paul Kirk and now owed by the Batemans, within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1,
7 T. 19 N., R. 16 E.W.M.. Mr. Kirk and Mr. Fahey jointly owned the property now
8 owned by Mr. and Mrs. Marilyn Bateman. A second parcel was added to the place of
9 use authorized by Surface Water Certificate No. 11210 via Certificate of Change
10 recorded in Vol. 1-4, page 190.

11 The original use of Pump House Spring for domestic and stock water purposes
12 (water troughs and/or hauled water) is recorded via a Notice of Water Right filed
13 by Ellis George, W. T. Ellison, and S. E. Craig dated April 11, 1905. The notice
14 indicates that development and use of the spring by the three homestead families
15 began on May 12, 1892. The method of use was via a developed reservoir tank and
16 stock troughs at the spring and a wagon road to the spring to facilitate hauling
17 the water to their respective homesteads within Section 12, T. 19 N., R. 16 E.W.M..
18 The notice described the production of the spring to be approximately 1 gpm which
19 continues to be the production testified to by Mr. Fahey. If the entire flow of
20 the spring were diverted for beneficial uses for a year, the annual volume produced
21 would be 1.613 acre-feet. It is the Referee's opinion that during much of the year
22 constant demand for the full outflow will not exist. Therefore, an annual use of
23 .5 acre-foot per home site is reasonable for the two homes with minimal lawns and
24 gardens. This is a very restrictive water duty, however, the water source is very
25 limited, thereby precluding a more expansive use of water.

1 Although the places of use for the respective homes are not riparian to the
2 spring, early use via wagon transport is documented and a pipeline is reported to
3 have replaced the hauling practice during the 1920s. For the period after the
4 pipeline was built it appears that the spring was used exclusively at the ranch
5 headquarters within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, T. 19 N., R. 16 E.W.M. The change in
6 place of use and the physical delivery system modification occurred when Paul Kirk
7 moved the "foreman's cabin" to the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, T. 19 N., R. 16 E.W.M. and
8 Certificate of Change No. 1-4-190 issued authorizing the change of place of use.

9 Mr. Fahey testified to limited use of water on pasture adjacent to their
10 former home in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, T. 19 N., R. 16 E.W.M.. That use is not
11 authorized by SWC No. 11210 nor was there testimony as to early historical use of
12 the spring for that purpose. SWC No. 11210 did authorize up to 2 acre-feet per
13 year per home, inclusive of lawn and garden use. The traditional lawn and garden
14 size has been defined as one-half acre or less in size. With the one gallon per
15 minute production from the spring, it is not possible to get more than
16 approximately .5 acre-foot per home site. Historic use for stock water is
17 recognized; however, due to the quantity of water available from Pump House Spring,
18 no separate instantaneous quantity is being recommended for confirmation although
19 an annual quantity of .5 acre-foot is recommended for confirmation for that use.

20 Mr. Fahey provided the court with a clear record of domestic and stock water
21 use from "Pump House Spring" dating from May 12, 1892. The record does not contain
22 a Water Right Claim as required for preservation of pre-1917 appropriative water
23 rights, RCW Chapter 90.14. The Referee notes that Mr. Fahey and Mr. Kirk had a
24 certificate of water right at the time they were notified of the requirements of
25 RCW 90.14 and, therefore, could easily have misread RCW 90.14.041 which states,

1 "This section shall not apply to any water rights which are based on the authority
2 of a permit or certificate issued by the Department of Ecology or one of its
3 predecessors".

4 Although the Claims Registration Act, RCW 90.14, became state law in 1967, the
5 public filing period was not initiated until the 1969 legislature funded the
6 administrative process required by the law. The applications leading to SWC
7 No. 11210 and S4-01322C were submitted to the Department of Water Resources on
8 August 16, 1968, well over a year prior to the inception of the RCW 90.14 Claims
9 Registration period. Therefore, it was incumbent upon any owner of pre-existing
10 water rights to file a Statement of Claim during the registration period or
11 relinquish the right.

12 Mr. Fahey testified regarding two small springs located near Pump House Spring
13 which historically were developed with pipes and stock troughs. The testimony
14 described remnant physical diversion equipment, however, the Referee concluded that
15 recent stock use has been non-diversionary, rather than diversions to maintained
16 stock tanks. Therefore, the Referee concludes that use for stock water, other than
17 that quantity piped from Pump House Spring to stock tanks is covered by the stock
18 water stipulation discussed on Page 4 of this report.

19 SWC No. S4-01322C with a priority date of August 16, 1968 is appurtenant to
20 Section 1 and the N $\frac{1}{2}$ and SE $\frac{1}{4}$ of Section 12, all being within T. 19 N., R. 16 E.W.M.
21 That certificate authorizes use of 0.10 cfs; 21 acre-feet per year from an unnamed
22 spring and five unnamed streams for domestic supply, stock water, and fire
23 protection. The points of diversion from the various sources as authorized by SWC
24 No. S4-01322C are listed below:

25 Approximate Location of Diversion-Withdrawal:

1. 470 feet west and 720 feet south of the north quarter corner of
Section 1.
2. 1,195 feet west and 1,055 feet north of the east quarter corner of
Section 1.
3. 175 feet south of the center of Section 1.
4. 175 feet west and 1,320 feet north of the southeast corner of Section 1.
5. 880 feet east and 790 feet south of the north quarter corner of
Section 12.
6. 1,100 feet east and 1,130 feet south of the northwest
corner of Section 12.
7. 350 feet west and 1,050 feet north of the center of Section 12.
8. 280 feet east and 725 feet south of the center of Section 12.
9. 440 feet west and 475 feet south of the east quarter corner of
Section 12.

The record has scant details on the above-referenced sources collectively and none as to any of the individual sources. Mr. Fahey did testify that all of the excavated or improved stock water ponds are on channel except one. That pond and diversion did not function as planned due to excessively porous soil. No testimony or evidence other than SWC No. S4-301322C is in the record regarding a domestic supply associated with any water source authorized by that certificate. Use of water for fire protection is normally on an emergency basis and does not require a water right. It is the Referee's opinion that no water right should be confirmed for the domestic supply, as there was no evidence presented as to use of water under SWC No. S4-01322C for that purpose. The stock water used from all of the sources (intermittent streams and ponds) is via riparian access to the sources. Therefore, it is the Referee's recommendation that the stock water stipulation discussed earlier in this report adequately provides for the stock water use and no

1 other right be confirmed. As discussed above, the fire protection use is an
2 emergency response which does not require a water right.

3 To summarize the recommended confirmation from Pump House Spring, the Referee
4 proposes the following with a priority date of August 16, 1968: Domestic supply
5 for two home sites including minimal lawn and garden irrigation at 0.5 acre-foot
6 per home, stock water at 0.5 acre-foot per year. The instantaneous quantity
7 available to satisfy those uses through a common system is only 1 gpm, thus
8 judicious and cooperative use will be required. Pump House Spring is located 700
9 feet south and 300 feet west from the northeast corner of Section 11,
10 T. 19 N., R. 16 E.W.M..

11 The places of use for the two homes and diversionary stock water are as
12 follows:

13 The following parcels are in T. 19 N., R. 16 E.W.M. in Kittitas County,
14 Washington:

15 Beginning at the northwest corner of the NE $\frac{1}{4}$ of Section 12, which is the
16 true point of beginning; thence southerly along the west line of the said
NE $\frac{1}{4}$ 890 feet; thence east 660 feet; thence south 175 feet; thence S 23°
30' W 350 feet; thence N 65° 30' East, 610 feet; thence in a
17 north-northwesterly direction to a point on the north line of Section 12
which is 900 feet easterly of the northwest corner of the NE $\frac{1}{4}$ of
18 Section 12; thence westerly along said north line of Section 12 to the
true point of beginning; AND beginning at the southwest corner of
Section 1, thence northerly along the west line of Section 1, 230 feet to
19 the true point of beginning; thence easterly along a line parallel to the
south line of Section 1 1,000 feet; thence north 300 feet; thence in a
20 northwesterly direction to a point on the west line of Section 1 which is
1230 feet north of the southwest corner of Section 1; thence southerly
21 along the west line of Section 1 to the true point of beginning.

22 The Referee cannot recommend that the May 12, 1892 priority date
23 asserted be confirmed by the Court for the limited domestic supplies and
24 diversionary stock water set forth in detail above due to the lack of a water
25 right claim. The water right described above should be awarded to Mr. and Mrs.
26

1 Marlyn Bateman, current owners of the place of use for the water and the land
2 upon which the spring is located.

3

4 COURT CLAIM NO. 00648 -- First Creek Water Users Assoc., Inc

5 On April 9, 1981, Martha White, agent for the First Creek Water Users
6 Association, Inc. (FCWUA), filed with the Court Statement of Claim No. 00648.
7 Richard T. Cole, attorney for the FCWUA, represented the association and testimony
8 was provided at the evidentiary hearing by Jack White, J.P. Roan, and Dick M.
9 Szuba.

10 The claim asserts a right to 30 cfs diverted from First Creek, a tributary of
11 Swauk Creek (Subbasin No. 4). The diverted water is carried through a gravity flow
12 ditch system (Wold-Munson Ditch) and via natural drainage channels (Green Canyon)
13 into the upper Reecer Creek Drainage Basin (Subbasin No. 7) where it is used for
14 irrigation and stock water. All of the place of use as described in the claim lies
15 within Subbasin No. 7.

16 The bases for the claimed water right are appropriations dating from
17 June 1882. Documents on file with the State of Washington Department of Ecology
18 (Water Right Claim No. 118926) and Kittitas County (Kittitas County Superior Court
19 Decrees Nos. 784, 2770, and 6134 and various "Notices of Water Appropriation") have
20 been offered as foundation.

21 There is substantial documentation regarding the early development of the
22 First Creek diversion and the Wold-Munson Ditch, including descriptions of the
23 lands of Wold and Munson upon which water was to be beneficially used. It is also
24 well documented which lands are currently served First Creek water via the
25 Wold-Munson Ditch. The task before the Referee is to determine not only the
26

27 REPORT OF REFEREE
28 Re: Subbasin No. 4

Referee's Office
15 W. Yakima Ave Ste. 200
Yakima, WA 98902-3401

1 appropriate quantification and priority date(s) of the water right(s), but also to
2 lay out a record as to when the multitude of changes in place of use occurred.
3 This latter task is necessary because the current water use is five to ten miles
4 north of the lands originally served by Wold and Munson. All three of the
5 referenced Kittitas County Court Decrees have a bearing on the evolving use of the
6 Wold-Munson Ditch.

7 All of the water claimed is diverted from First Creek at a point 800 feet
8 south and 100 feet east from the north quarter corner of Section 30,
9 T. 20 N., R. 18 E.W.M. within Government Lot 1. First Creek is a tributary to
10 Swauk Creek, which is not riparian to the lands on which the water is used.
11 Therefore, water rights could only have been established under the Prior
12 Appropriation Doctrine. The First Creek Water Users Association place of use is
13 generally described as: Lot 1 and the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 4; Lots 1, 2, 4, 5, 6 & 7,
14 a portion of Lot 3, the SE $\frac{1}{4}$ NW $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 6; Lots 1, 2, 3, & 4, the
15 E $\frac{1}{2}$ W $\frac{1}{2}$, W $\frac{1}{2}$ E $\frac{1}{2}$ and a portion of the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 7; the SE $\frac{1}{4}$, SW $\frac{1}{4}$ and part of the
16 S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 17; Section 20; the S $\frac{1}{2}$, NW $\frac{1}{4}$ and a portion of the NE $\frac{1}{4}$ of
17 Section 21; the NW $\frac{1}{4}$, N $\frac{1}{2}$ NE $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27; the NE $\frac{1}{4}$, N $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, and
18 the N $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28; Section 29, all being in T. 19 N. R. 18 E.W.M.; Lots 1
19 & 2, S $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ of Section 1 and the E $\frac{1}{2}$ of Section 12, T. 19 N., R. 17 E.W.M.; and
20 a portion of the SW $\frac{1}{4}$ of Section 31, T. 20 N., R. 18 E.W.M..

21 The various Notices of Appropriation of Water and Affidavits regarding
22 historic water use offered into evidence will be discussed in some detail. Use of
23 water from First Creek via cross over ditch(es) into the Reecer Creek basin evolved
24 over a period of many years beginning during 1877. It also involved a number of
25 different claimants.

1 Exhibit DE-118 is an Affidavit of Water Right, dated May 26, 1890, which
2 contains a combined statement by Peter A. Wold and Alex A. Munson regarding
3 development of the Wold-Munson Ditch from First Creek. The affidavit establishes
4 the earliest priority date at November 2, 1877 when Alex A. Munson claimed 300
5 miners inches of water (6 cfs) from First Creek and began construction of a ditch
6 to convey water for mining and farming. The affidavit goes on to state that in
7 June of 1882 Wold and Munson entered into a partnership in the ownership of the
8 ditch and the water rights claimed by either or both of them. The ditch was
9 enlarged in 1882 and again in 1885 when it was enlarged to its final capacity. On
10 March 16, 1886, Munson and Wold claimed a right for 1500 miners inches to irrigate
11 their land consisting of 1600 acres.

12 Exhibit DE-119 is a copy of three Notices of Water Right signed by Peter A.
13 Wold and Alex A. Munson. One, filed on June 1, 1881, states that the proposed
14 ditch is partially constructed and is being taken out for the purpose of irrigating
15 their land and asserts a right to 1,000 miners inches of water from First Creek.
16 The second, filed June 12, 1882, states on that date they started a ditch on First
17 Creek through the natural channel of Green Canyon to terminate in Section 20,
18 T. 18 N., R. 18 E.W.M.. The ditch was designed with the intent to perfect as soon
19 as practicable 1,000 inches, more or less, in said ditch. The third notice is
20 dated April 10, 1886, and attempts to clarify the earlier notices. The attempt
21 fails.

22 Exhibit DE-118 (Affidavit of Water Right - Alex A. Munson and Peter W. Wold,
23 May 27, 1890), on page 2, establishes that enlargement of the Wold-Munson Ditch to
24 a capacity of 1,500 inches was initiated on March 1, 1885 and completed on
25 March 16, 1886. This affidavit asserts that collectively Wold and Munson owned

1 1,600 acres as of May 27, 1890, which they intended to irrigate with water from
2 First Creek delivered via the Wold-Munson Ditch.

3 Exhibit DE-110 submitted during the presentation for claimant William Grueter
4 (Claim No. 04914A) is a Notice of Appropriation of Water filed by Henry Kleinberg.
5 Mr. Kleinberg signed the notice on May 26, 1909 claiming all of the unappropriated
6 water in First Creek up to 200 cfs. The point of diversion was described as being
7 within Section 30, T. 20 N., R. 18 E.W.M. from which point a ditch was proposed to
8 be built parallel to the Wold-Munson Ditch to a reservoir site located within
9 Section 31, T. 20 N., R. 18 E.W.M.. The proposed place of use for the stored water
10 was to include Sections 3, 4, 5, 8, and 9 of T. 18 N., R. 18 E.W.M. and
11 Sections 27, 32, 33, and 34 of T. 19 N., R. 18 E.W.M.. The record is silent as to
12 any pursuit of the diversion and storage project and no Water Right Claim as
13 required by Chapter 90.14 of the Revised Code of Washington (RCW) is contained in
14 the record before the Referee. Due to the apparent lack of a perfected beneficial
15 use and the lack of a Water Right Claim, the Referee proposes to give the notice
16 filed by Henry Kleinberg no further consideration. It is interesting to note,
17 however, that the proposed place of use was all south of the service area of the
18 FCWUA and that Mr. Kleinberg filed his notice following the federal withdrawal of
19 all of the unappropriated waters in the Yakima River Basin. See Page 8 of this
20 report for a discussion of the U.S. withdrawal.

21 In summation, the record shows that A.A. Munson and P.A. Wold progressively
22 planned for delivery of irrigation and mining or milling water to their collective
23 ownerships in T. 18 N., R. 18 E.W.M.. The total of those lands in 1890, as set
24 forth in DE-118, was 1,600 acres. There were distinct changes in the intent of
25 Munson and Wold over time, with the earliest notice filed by A.A. Munson for 300
26

1 inches being presumably for his privately held lands with a date of November 2,
2 1877. The second plan included both Munson and Wold property with the composite
3 notice being for 1,000 inches with a date of June 1, 1881. Finally, Munson and
4 Wold enlarged the ditch beginning on March 1, 1885. On March 16, 1886 the ditch
5 was finished in its final configuration with a purported capacity of 1,500 miners
6 inches. There is no statement in the record as to how many acres Munson and Wold
7 had irrigated by 1886 or, for that matter, by May 27, 1890..

8 On May 1, 1891, approximately one year after the Munson and Wold affidavit
9 (DE-118) was recorded, Peter A. Wold entered into an agreement to sell all of his
10 interest in the Wold-Munson Ditch, including the physical works and the water
11 rights, to Jacob Bowers and his wife. The parcel of land sold to Mr. and Mrs.
12 Bowers was that portion of the following described tract lying north and east of
13 the Town Ditch: NE $\frac{1}{4}$ of Section 20; NW $\frac{1}{4}$ and SW $\frac{1}{4}$ of Section 21, T. 18 N., R. 18
14 E.W.M.. The total parcel was described as being approximately 160 acres.

15 During the period 1891 to 1893 a dispute arose as to obstruction of the
16 Wold-Munson Ditch flow by B.K. May, thus preventing water from being delivered to
17 the lands of Munson and Wold in T. 18 N., R. 18 E.W.M.. As a result of the
18 conflict, Wold and Munson brought an action against Mr. May in Kittitas County
19 Superior Court, which resulted in Decree No. 784 (DE-121). The Court ruled that
20 Wold and Munson were the owners of the waters of First Creek to the extent of 1500
21 inches under four inch pressure and are entitled to divert that quantity into their
22 ditch. The defendant was enjoined from interfering with that water.

23 The Findings of Fact and Conclusions of Law stated that Peter Wold owned the
24 E $\frac{1}{2}$ E $\frac{1}{2}$, the NW $\frac{1}{4}$ and the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, T. 18 N., R. 18 E.W.M. and Alexander A.
25 Munson owned the E $\frac{1}{2}$ NW $\frac{1}{4}$, the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and Lot 1 of Section 18, the SE $\frac{1}{4}$ of Section 8 and

1 the E $\frac{1}{2}$ of Section 17, all in T. 18 N., R. 18 E.W.M.. It would appear that even
2 though Peter Wold had sold part of the described land to the Bowers, he must have
3 represented their interests in the suit. The Court established that the lands
4 required one inch of water under a four inch pressure, or 0.02 cubic foot per
5 second, for each acre irrigated. The Court did not mention the initial
6 appropriation by Munson of 300 inches of water in 1877, only referencing an
7 appropriation of 1,500 inches in 1881 and the partnership formed in 1882 between
8 Wold and Munson. The Court apparently was not aware of the Affidavit of Water
9 Right, dated May 26, 1890, which showed that the ditch was enlarged to the 1,500
10 inch capacity beginning on March 1, 1885, and concluded that the full 1,500 inch
11 capacity was the initial intent by Wold-Munson and that diligent effort resulted in
12 completion and beneficial use of the 1,500 inches of water.

13 However, the Referee believes there were a series of project decisions made
14 beginning with the 1877, 300 inch Notice of Appropriation posted by Alex A. Munson,
15 the two notices filed jointly by Munson and Wold for 1,000 inches in 1881 and 1882,
16 and finally the 1,500 inch size initiated on March 1, 1885. The changing project
17 scope was likely driven by increasing land ownership by Wold and Munson and the
18 realization of ditch losses over the 13 miles traversed by the ditch. The Referee
19 has concluded, therefore, that three different priority dates are appropriate for
20 the water conveyed through the Wold and Munson Ditch. November 2, 1877, for 300
21 inches; June 1, 1881, for an additional 700 inches, and finally, March 1, 1885, for
22 the final 500 inches of the intended ditch capacity.

23 Kittitas County Superior Court Decree No. 2770 in the case of Francis C.
24 Faulkner and Henry C. Sanders v. James Hamilton, et al., May 15, 1899, was a result
25 of a suit filed to resolve a dispute regarding proportionate shares of Alex A.
26

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1 Munson's water right to First Creek. Numerous defendants were initially named,
2 however, many disclaimed any interest in the water and did not make an appearance
3 in the case. The Findings of Fact for this case identified the lands owned by
4 Alex Munson and when he settled and acquired title to the lands. It also
5 identified that in 1883 he was the owner of one-half interest in the Wold & Munson
6 Ditch. The Court concluded that the land first settled by Munson had a superior
7 water right to that settled at a later date and, consistent with the earlier
8 findings in Decree No. 784, that one inch of water under four inch pressure was
9 needed for each acre irrigated. The ruling of the Court was that the SE $\frac{1}{4}$ of
10 Section 8, T. 18 N., R. 18 E.W.M., then owned by the plaintiff's Francis C.
11 Faulkner and Henry C. Sanders, was entitled to 160 inches of water; the E $\frac{1}{2}$ NE $\frac{1}{4}$ and
12 E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 17, T. 18 N., R. 18 E.W.M., then owned by defendant, Sallie
13 Fellows, was entitled to 160 inches of water; a tract of land 8 acres in size in
14 the northeast corner of the W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 17, T. 18 N., R. 18 E.W.M., then owned
15 by James Hamilton, was entitled to eight inches of water. The water rights for
16 these three parcels would have equal and senior water rights. The Referee believes
17 that this land enjoyed the earliest water right established by Munson, with a
18 November 2, 1877 date of priority. There is a minor discrepancy between the Notice
19 of Water Right for 300 inches and the Court's recognition of senior rights for 328
20 inches, however, the Referee does not believe it is significant.

21 The Conclusions of Law that preceded Decree No. 2770 also stated that James
22 Hamilton owned the remainder of the Munson land, lying in the NW $\frac{1}{4}$ and the E $\frac{1}{2}$ SW $\frac{1}{4}$ of
23 Section 17 and all of that part of the W $\frac{1}{2}$ E $\frac{1}{2}$ of Section 17, T. 18 N., R. 18 E.W.M.
24 except that discussed in the previous paragraph. The Court identified that this
25 land enjoyed the remainder of the Munson interest in the Wold & Munson Ditch, but

1 it was subordinate to the 328 inches (6.56 cfs) previously mentioned. This land
2 totals 392 acres and if it were all irrigated, 392 inches of water (7.84 cfs) would
3 be needed. Neither the Findings of Fact nor the Decree stated the entire 392 acres
4 were irrigated.

5 As a result of Peter Wold transferring all of his interest in the Wold-Munson
6 Ditch to the Bowers when they purchased land from him, the Referee concludes that
7 the limit of the Wold portion of the right is 3.20 cubic feet per second for the
8 irrigation of 160 acres. Decree No. 2770 limited the Munson portion of the water
9 right to 14.4 cubic feet per second (720 inches) for the irrigation of 720 acres.

10 Shortly after Decree No. 2770 was signed on May 15, 1899, transactions were
11 completed whereby Sallie Fellows sold all of her interest in the 160 inches of the
12 A.A. Munson water right confirmed to her in the decree. By deed dated October 25,
13 1899 (DE-123), Barthal Zwicker acquired 35/160 interest, Ida S. Robbins acquired
14 35/160 interest, Charles Ollier Robbins acquired 20/160 interest, William Von Essen
15 Robbins acquired 35/160 interest and Fanny Thomas acquired 35/160 interest. These
16 proportionate shares are all of the 160 inch right confirmed to Sallie Fellows by
17 the Court through Decree No. 2770. The tract of land to which the right was
18 appurtenant on May 15, 1899 was described as the E $\frac{1}{2}$ E $\frac{1}{2}$ of Section 17,
19 T. 18 N., R. 18 E.W.M.. The deed (DE-123) from Sallie Fellows to the new owners of
20 the 160 inches sold only the water right and her interest in the Wold-Munson Ditch,
21 not the land to which it was appurtenant. The deed did not describe the lands
22 owned by the parties buying the water right or the land they intended to irrigate
23 with the water. It is clear, however, that the limit of the water right conveyed
24 was a total of 160 inches (3.2 cfs) for the irrigation of 160 acres. Thus, Barthal
25 Zwicker purchased 35 inches of water for the irrigation of 35 acres, Ida S. Robbins

1 bought 35 inches of water for the irrigation of 35 acres, etc. The Court had ruled
2 in Decree No. 2770 that Sallie Fellows had 160/328 of the superior right delivered
3 via the Wold-Munson Ditch. Therefore, these rights would enjoy a November 2, 1877,
4 date of priority.

5 The next record of a water right transfer is a deed dated October 27, 1900,
6 (DE-124) from Ida S. and W. J. Robbins to Charles Ollier Robbins, William Von Essen
7 Robbins, Fanny O. Thomas, and Barthal Zwicker. This conveyance was a sale of the
8 James Hamilton portion of the Alex A. Munson water rights as confirmed by the Court
9 via Decree No. 2770. The Hamilton interest in the Wold-Munson Ditch and water
10 rights appears to have previously been transferred to Ida S. and W.J. Robbins.

11 The proportionate interests in this deed are 7/32 to Barthal Zwicker, 4/32 to
12 Charles Ollier Robbins, 7/32 to Fanny Thomas, 7/32 to William Von Essen Robbins,
13 and 7/32 remained with Ida S. and W.J. Robbins. It is necessary to establish the
14 proportionate shares of the water right in acres and quantity of water, and the
15 appropriate priority date(s) for the shares. James Hamilton had been confirmed two
16 separate water rights by the Court through Decree No. 2770. He had 8 inches of the
17 superior class equal to the Sallie Fellows 160 inches and 392 inches of inferior
18 right stemming from water use beginning in 1890.

19 We now have five property owners in control of the Sallie Fellows and the
20 James Hamilton portions of the undivided one-half interest in the Wold-Munson Ditch
21 and water rights, as originally developed by Alex A. Munson and described in detail
22 in Decree No. 2770. Because the evidence is lacking to do otherwise, the Referee
23 proposes to divide both the 8 acre senior right of James Hamilton and the 392 acre
24 junior right according to the proportions in the deed from Ida S. and W.J. Robbins.

1 In order to clearly present the proportionate interest the Referee has devised the
2 following table format:

4 SALLIE FELLOWS PORTION OF A.A. MUNSON INTEREST

5 INCH	ACRES	PRIORITY	OWNER
35	35	Superior (1877)	Barthal Zwicker
35	35	Superior (1877)	Ida & W.J. Robbins
35	35	Superior (1877)	Fanny O. Thomas
35	35	Superior (1877)	William Von Essens Robbins
20	20	Superior (1877)	Charles Ollier Robbins
8 160	160		TOTALS

9 JAMES HAMILTON PORTION OF A.A. MUNSON INTEREST

10 INCHES	ACRES	PRIORITY	OWNER
1.75	1.75	Superior (1877)	Barthol Zwicker
1.75	1.75	Superior (1877)	Ida W. & W.J. Robbins
1.75	1.75	Superior (1877)	Fanny O. Thomas
1.75	1.75	Superior (1877)	William Von Essens Robbins
1.00	1.00	Superior (1877)	Charles Ollier Robbins
13 8	8		TOTALS

14 JAMES HAMILTON PORTION OF A.A. MUNSON INTEREST

15 INCLES	ACRES	PRIORITY	NAME
85.75	85.75	Inferior (1881)	Barthal Zwicker
85.75	85.75	Inferior (1881)	Ida S. & W.J. Robbins
85.75	85.75	Inferior (1881)	Fanny O. Thomas
85.75	85.75	Inferior (1881)	William Von Essens Robbins
49.00	49.00		Charles Ollier Robbins
19 392	392		TOTALS

20 The terms of the two deeds which split the rights, as shown above, reflect a
21 share and share alike interest in the combined superior and inferior rights. Thus,
22 if water were only available for the superior right of 168 inches, each owner would
23 be entitled to their proportionate share. Neither of the deeds, discussed above,
24 describe the lands to which the rights were being transferred. Lacking a complete
25 record as to the sequential transfers of the various portions of the Wold and
26 Munson water rights, the Referee will trace those portions for which sufficient

1 documentation was provided and will recommend that further evidence be presented
2 for the remaining portions.

3 Review of the various exhibits entered into the record during the evidentiary
4 hearing for either Subbasin No. 4 or Subbasin No. 7 has lead the Referee to
5 conclude that the parties who had the Munson water rights in 1900 owned the
6 following lands: Barthal Zwicker: the SW $\frac{1}{4}$ of Section 17; the E $\frac{1}{2}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ of
7 Section 20, both in T. 19 N., R. 18 E.W.M.. Ida S. and W. J. Robbins: the SW $\frac{1}{4}$ NE $\frac{1}{4}$
8 and SE $\frac{1}{4}$ (except NE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section 20, the SE $\frac{1}{4}$ of Section 17, both in T. 19 N.,
9 R. 18 E.W.M.. Fanny O. Thomas: the N $\frac{1}{2}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 28, T. 19 N.,
10 R. 18 E.W.M.. William Von Essens Robbins: the SE $\frac{1}{4}$ of Section 21, T. 19 N.,
11 R. 18 E.W.M.. Charles Ollier Robbins: The N $\frac{1}{2}$ of Section 21, T. 19 N.,
12 R. 18 E.W.M., and may have occupied the SW $\frac{1}{4}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 34, T. 20 N.,
13 R. 18 E.W.M.. It may be that any of these individuals owned other land not listed
14 above, however, the record only contains information to the ownership of the above
15 land. The record is silent concerning any transfer of the portion of the Munson
16 right held by Faulkner and Sanders, the plaintiffs in the case that resulted in
17 Decree No. 2770, therefore, the Referee must conclude that portion of the Munson
18 right is still appurtenant to the E $\frac{1}{2}$ NE $\frac{1}{4}$ and E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 17, T. 18 N.,
19 R. 18 E.W.M..

20 Exhibit DE-125 is a copy of a Warranty Deed, dated April 24, 1917, whereby
21 Peter and Margareta Glesener conveyed the E $\frac{1}{2}$ NW $\frac{1}{4}$, the E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 20, the NE $\frac{1}{4}$
22 the E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 29 and the SW $\frac{1}{4}$ of Section 17, all in T. 19 N., R. 18 E.W.M.
23 with water rights (100/129 share) to C.M. Cahoon. These parcels are all located
24 within the FCWUA service area. The deed identifies that the title for the water
25 right conveyed with the described property derived from Barthal Zwicker. It

1 further relates the Zwicker's interest in the water right back to Sallie Fellows
2 and James Hamilton. Barthal Zwicker did acquire portions of both those segments of
3 the A. A. Munson rights and we know that he once owned the E $\frac{1}{2}$ NE $\frac{1}{4}$, the E $\frac{1}{2}$ SW $\frac{1}{4}$ of
4 Section 20 and the SW $\frac{1}{4}$ of Section 17. The interest Zwicker bought is reflected in
5 the table on Page 69 of this report and totals 122.5 inches of water from First
6 Creek, which could be used to irrigate 122.5 acres. You could conclude that since
7 the Gleseners transferred to Cahoon 100/129 share of the water rights, that the
8 Gleseners thought they had 129 inches, sold Cahoon 100 inches and kept 29 inches.
9 In any case, the deed is specific that 100 inches of water was conveyed to Cahoon
10 and since the total inches owned by Zwicker was 122.5 inches, the Gleseners
11 retained 22.5 inches. It is important to note that although the land sold to
12 Cahoon totaled approximately 560 acres, the water right transferred with the land
13 was 100 inches (2 cfs), which according to the decrees was used to irrigate 100
14 acres. That is the limit of the right. The priority of the rights transferred was
15 not addressed in the deed. Thirty percent of the Zwicker water rights enjoyed the
16 senior priority of 1877 and 70 percent had the junior priority of 1881. Lacking
17 anything in the record to provide guidance, the Referee will assign priority dates
18 in that same percentage. Therefore, 30 inches of water sold to Cahoon would have
19 an 1877 priority and 70 inches would have an 1881 priority. The priority date for
20 the water right retained by Glesener would have the same percentage, 6.75 inches
21 would have an 1877 priority and 15.75 inches would have an 1881 priority. The sale
22 to Cahoon occurred prior to June 6, 1917, when the Surface Water Code was adopted
23 establishing procedures for transferring water rights. Prior to that time, water
24 rights could be transferred without loss of priority at the owners will.
25 Therefore, even though we do not know that Barthal Zwicker owned the NE $\frac{1}{4}$ and E $\frac{1}{2}$ NW $\frac{1}{4}$
26

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1 of Section 29, T. 19 N., R. 18 E.W.M., the water rights could have been exercised
2 on that land after Cahoon's purchase. There is nothing in the record to show which
3 lands were owned by the Gleseners subsequent to their sale to Cahoon, so we do not
4 know where their 22.5 inches was used.

5 Charles Ollier Robbins and William Von Essens Robbins acquired rights derived
6 from the Sallie Fellows and James Hamilton portions of the Wold-Munson rights as
7 set forth in Decree No. 2770 and reflected in tabular form on Page 69 of this
8 report. Charles Ollier Robbins purchased a total of 70 inches of water for 70
9 acres and William Von Essens Robbins purchased 122.5 inches for 122.5 acres. The
10 land they owned at that time is described on Page 70 of this report. They sold
11 their described water rights separate from any land to John A. Shoudy by deed dated
12 October 23, 1912 (DE-128, page 3). The deed reflects that they sold 11/32 of the
13 water right held by Sallie Fellows and 11/32 of the water right held by James
14 Hamilton. That percentage is confirmed by the other documents in the record.

15 Charles Robbins had 49 inches of James Hamilton inferior priority water right
16 and 21 inches of superior priority water right acquired from Sallie Fellows and
17 James Hamilton. William Von Essen Robbins had 85.75 inches of inferior priority
18 water rights acquired from James Hamilton and 36.75 inches of superior priority
19 water rights acquired from Sallie Fellows and James Hamilton. John Shoudy,
20 therefore, acquired a total of 192.5 inches of water, which would be sufficient to
21 irrigate 192.5 acres. As discussed above, 30% enjoys an 1877 priority date and 70%
22 an 1881 priority date.

23 The property owned by John A. Shoudy when he acquired the water rights
24 appears to have been the NW $\frac{1}{4}$, the S $\frac{1}{2}$, and a parcel 4 rods x 100 rods in the NE $\frac{1}{4}$
25 (the exact location is not clear), all in Section 21, T. 19 N., R. 18 E.W.M.. The
26

1 NW $\frac{1}{4}$ and the S $\frac{1}{2}$ of Section 21 are within the area served by the FCWUA. Shoudy
2 acquired a right to irrigate 192.5 acres within an area 480 acres in size.

3 Exhibit DE-133 is a Notice of Appropriation of Water signed by Simeon Evans
4 on June 15, 1911. The notice states that construction of a ditch was initiated on
5 October 1, 1907, and continued to June 15, 1911, at which time the ditch was nearly
6 complete. Mr. Evans claimed 4 cfs of the unappropriated surplus and flood water of
7 First Creek for irrigation of the E $\frac{1}{2}$ W $\frac{1}{2}$ of Section 6, T. 19 N., R. 18 E.W.M. and
8 other unspecified lands in the vicinity. This ditch was separate, but ran parallel
9 to the Wold-Munson Ditch and utilized the same natural water courses of upper Green
10 Canyon. The Referee notes that construction of this ditch and apparent initiation
11 of the right began well after the United States withdrew all of the unappropriated
12 surface waters in the Yakima River Basin, see Page 8 for a discussion of the
13 federal withdrawal.

14 Exhibits DE-127, 128, and 129 are Affidavits of Simeon Evans, Emma Evans,
15 Peter A. Wold and C.O. Robbins dated May 10, 11 or 12, 1920. These affidavits were
16 executed in conjunction with litigation which lead up to Decree No. 6134, Cascal
17 Investment Company, et al. v. Henry Washburn, et al. Henry Washburn was a
18 successor in ownership of lands previously owned by Simeon Evans. Mr. Evans
19 clarifies the timing of his diversion from First Creek, the location of his point
20 of diversion lower on First Creek than the intake for the Wold-Munson Ditch, and
21 that First Creek water was only used to irrigate a one acre orchard as a
22 replacement for spring water intercepted by the Wold-Munson Ditch. All of the
23 affidavits stated that naturally occurring water within Green Canyon was
24 predominantly used to irrigate the Evans land. The Green Canyon water was used
25 prior to construction of the Wold-Munson Ditch when the land was owned by a James
26

1 Lawson. When the Wold-Munson Ditch was constructed, it intercepted the Green
2 Canyon water, so Lawson, and subsequently Evans, was allowed to withdraw from the
3 Wold-Munson Ditch the Green Canyon water intercepted by the ditch.

4 Decree No. 6134 Cascal Investment Company et al. v. Henry Washburn, et al.,
5 signed by the Court on December 1, 1920 (DE-126) seems to have resulted from a
6 dispute over the carriage of water in the Wold-Munson Ditch and used on the Evans
7 land, owned by Henry Washburn at the time of the dispute. The decree, in paragraph
8 one, states that the parties to the action are the owners of a certain ditch known
9 as the Wold and Munson ditch, together with its rights of way and including the
10 natural channel or water course of Green Canyon, and of the waters of First Creek
11 to the extent of 1500 miner's inches under a four inch pressure, and "all waters
12 naturally flowing into said ditch throughout its course". That segment of the
13 decree could be interpreted as confirming to the parties a right to divert 1500
14 miners inches from First Creek and use the naturally occurring water in Green
15 Canyon throughout the course of the ditch. However, prior court decrees had
16 already limited the Wold-Munson water right to 720 miners inches. The Referee
17 believes that Decree No. 6134 does nothing more than settle a dispute as to use of
18 water from the Wold-Munson Ditch on lands owned by Henry Washburn, which lands were
19 situated in the vicinity of Section 6, T. 19 N., R. 18 E.W.M.. As the facts
20 finally came out, Mr. Washburn did not claim any right to water from First Creek
21 which had been diverted into the Wold-Munson Ditch. The record before the Referee
22 does not contain a copy of the Findings of Fact and Conclusions of Law that
23 preceded Decree No. 6134, so the Referee has no knowledge of the facts before the
24 Court at that time. This decree was entered after adoption of the Surface Water
25 Code on June 6, 1917, and clearly was not an adjudication of the rights to First
26

1 Creek as provided in the code. However, the Referee concludes that in 1920 the
2 owners of the Evans land in Section 6 were not asserting a right to use First Creek
3 water. That, along with the uncertainty about whether an appropriation of water in
4 1907 after the Federal withdrawal was initiated, was legal, leads the Referee to
5 conclude that the land in Section 6 does not enjoy a right to use First Creek water
6 conveyed through the Wold-Munson Ditch.

7 It is reasonable to assume that the Wold-Munson Ditch will capture some water
8 along its course through Green Canyon. However, any assertions of a water right to
9 naturally occurring water in Green Canyon should have been made at the Subbasin
10 No. 7 (Reecer Creek) evidentiary hearing.

11 The Zwicker to Cahoon, and C.O. Robbins and William Von Essen Robbins to
12 Shoudy portions of the A.A. Munson rights can be traced to the FCWUA service area
13 lands. Thus, (from Zwicker) 100 inches of First Creek water (2.00 cfs) for
14 irrigation of 100 acres in the SW $\frac{1}{4}$ of Section 17, the E $\frac{1}{2}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ NE $\frac{1}{4}$ of
15 Section 20, the NE $\frac{1}{4}$ and E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 29, T. 19 N., R. 18 E.W.M.. Thirty inches
16 (0.6 cfs) would have a November 2, 1877, date of priority and 70 inches (1.4 cfs)
17 would have a June 1, 1881, date of priority. The rest of the Zwicker right is the
18 22.5 inches retained by the Gleseners on April 24, 1917. The record is silent as
19 to the land on which this right has been exercised since 1917. In order to
20 recommend confirmation of a water right for the 22.5 inches, the Referee needs
21 evidence of the land owned by the Gleseners in 1917 and any further action they
22 took in regards to use of this water subsequent to that date.

23 The Robbins/Shoudy portion of the A.A. Munson rights consist of a total of
24 192.5 inches of water for the irrigation of 192.5 acres. The rights acquired are
25 of two priorities. A total of 57.75 inches (1.155 cfs) for irrigation of 57.75
26

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1 acres have a priority date of November 2, 1877 and 134.75 inches (2.695 cfs) for
2 irrigation of 134.75 acres have a priority date of June 1, 1881. The
3 Robbins/Shoudy portion of the right is appurtenant to the following described
4 lands:

5 The S $\frac{1}{2}$ and that portion of the N $\frac{1}{2}$ of Section 21, which is described as
6 follows:

7 A tract of land bounded by a line beginning at a point on the west boundary
8 line of the NE $\frac{1}{4}$ of said Section, 66 feet north of the southwest corner of
9 said quarter section, and running thence east 66 feet; thence north on a line
10 parallel with the west boundary line of said quarter section 1,650 feet;
11 thence west 66 feet to the west boundary line of said quarter section; thence
12 north to the north boundary line of said quarter section; thence west to the
13 northwest corner of said section; thence south on the west boundary line of
14 said section to the southwest corner of the NW $\frac{1}{4}$ of said section; thence east
15 on the south boundary line of said NW $\frac{1}{4}$ of said section 990 feet; thence north
16 66 feet; and thence east on a line parallel with the south boundary line of
17 said quarter section 1,650 feet to the point of beginning. ALL in
18 T. 19 N., R. 18 E.W.M..

19 Exhibits from the Subbasin No. 7 evidentiary hearing show that Fanny Thomas
20 owned the N $\frac{1}{2}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 28, T. 19 N., R. 18 E.W.M. at the time she
21 acquired the Wold-Munson water rights from Sallie Fellows and Ida S. and W.J.
22 Robbins on October 25, 1899. This land is within the service area for the FCWUA.
23 Ms. Thomas acquired 35 inches with a November 2, 1877, date of priority, for the
24 irrigation of 35 acres and 87.5 inches with a June 1, 1881, date of priority for
25 the irrigation of 87.5 acres.

26 The Bowers bought Peter Wold's water rights in conjunction with portions of
27 Sections 20 and 21, T. 18 N., R. 18 E.W.M.. It is the Referee's belief that Bowers
28 acquired approximately 160 acres to which the entire Peter Wold water right was
29 appurtenant. Court Decree No. 784 almost certainly served to limit the extent of
30 the right which was transferred to Bowers (see discussion on Page 65 of this
31 report). There is no evidence in the record that the water right was ever
32 transferred to another party.

1 transferred off the land purchased by the Bowers in 1891 and, therefore, the
2 Referee must conclude that it is still appurtenant to 160 acres in the NE $\frac{1}{4}$ of
3 Section 20, the NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of Section 21, R. 18 N., R. 18 E.W.M., which is
4 outside of the FCWUA service area.

5 Exhibit DE-134 consists of several warranty deeds and quit claim deeds that
6 purport to show the transfer of portions of the Wold-Munson water rights and
7 ditches, in some cases with land and in some cases without any land. Many of these
8 deeds are dated in the 1940s and all of them are later than 1920. Some document
9 the transfer of land that the Referee has already determined enjoys a portion of
10 the Wold-Munson water rights, while many document the sale of water rights or land
11 with water rights for which there has been no foundation laid to show a connection
12 between the holders of the water right prior to 1917 and those selling the land
13 and/or water right. The Referee believes there have been transfers of the water
14 rights off the land to which it was appurtenant subsequent to adoption of the
15 Surface Water Code in 1917 without compliance with the change procedures specified
16 in RCW 90.03.380. The Referee cannot recommend confirmation of a water right in
17 those instances. Additionally, the supporting documentation is not present to show
18 that the individuals who were purporting to sell the water rights had any legal
19 interest in the water right.

20 For instance, during the years 1929 through 1945 Cascal Investment Company
21 and John Bruce Bonnie appear in the record. Their interest invariably shows up in
22 the capacity of the grantor of water rights interest in the Wold-Munson Ditch. The
23 Referee needs linkage from Cascal and John Bonnie back to the appropriate
24 Wold-Munson Ditch water right component. If there is a connection between these
25 transfers and the Wold/Bowers right or the Faulkner and Sanders portion of the

1 Munson right, more evidence must be submitted in order to make that connection
2 clear. Any transfers that may have occurred after the Surface Water Code was
3 adopted on June 6, 1917, are subject to the procedures now codified in RCW
4 90.03.380.

5 The only evidence presented regarding the instantaneous quantities diverted
6 via the Wold-Munson Ditch from First Creek is early notices and affidavits filed by
7 Peter A. Wold and/or Alex A. Munson. The wording in those documents relates
8 primarily to proposed ditch capacity or intended diversions. Ecology exhibit SE-5,
9 Conveyance Loss/Gain presents measurement data for three dates, May 1, July 23, and
10 September 18, all in 1991. The data reflect the total diversion into the ditch
11 from First Creek on those three dates and also address ditch loss/gain for the
12 upper ditch. The highest instantaneous flow of 8.55 cfs was measured at station
13 No. 2, on the ditch, on May 1, 1991. On the same date station No. 1 was measured
14 at 7.91 cfs, thus there was a modest gain in the upper ditch on May 1, 1991.

15 The second date when a measurement was taken was on July 23, 1991. The flow
16 in the ditch had declined by 70%, by that date. There was still a small gain in
17 the ditch flow between station Nos. 1 and 2 on July 23.

18 The final flow measurement was performed on September 18, 1991. The measured
19 flow had declined to 1.74 cfs. On September 18 there was a modest loss of flow
20 between station Nos. 1 and 2 with the actual flow passing station No. 2 being only
21 1.64 cfs. Based on the very limited evidence about the ditch flows and conveyance
22 loss and gain, the Referee cannot recommend that the right confirmed for FCWUA
23 include a component for conveyance loss or gain.

24 If the ditch can carry more than 8.55 cfs the record does not exist to
25 establish what the capacity is. It is also apparent that the flow available in
26

1 First Creek declines markedly after the spring runoff. There is a huge difference
2 between the claimed 21,900 acre-feet per year, the total possible if the claimed 30
3 cfs were diverted for 180 days, which would be 10,800, and the probable yield if
4 the 1991 measurements of between 1.74 cfs and 8.5 cfs are typical, which would
5 result in 1,500 - 3,000 acre-feet per year being diverted during the irrigation
6 season. The historical documents in the record have led the Referee to conclude
7 that the portion of the Munson water rights that are appurtenant to lands within
8 the FCWUA are limited to a maximum diversion of 8.3 cfs. The Referee does not
9 believe it would be appropriate to simply assume continued diversion of 8.3 cfs for
10 the entire irrigation season when calculating the annual quantity of water. The
11 ditch measurements made by the Department of Ecology reflect a decline in the flow
12 over the irrigation season that the Referee believes will vary each year, depending
13 on the weather patterns. Five acre-feet per year for each acre that the Referee
14 recommends confirmation of a water right would be reasonable for this area and the
15 typical flow patterns that might be expected of First Creek.

16 The record contains no facts as to the diversion rates for nonirrigation
17 season stock water requirements. The record does contain testimony of the number
18 of stock carried on several of the various ranches within the FCWUA service area
19 including J.P. Roan, 200 pair; Jack White, 100 pair; James Nelson (diversionary
20 stock water was recommended for the entire ranch from Reecer and Jones Creeks); D.
21 Szuba, 400 sheep. Stock are apparently grazed on the Hoff, Stewart, and DeGroote
22 properties although no testimony was provided as to number of livestock and source
23 of water used to water the stock.

24 Due to the lack of evidence regarding nonirrigation season use of the ditch
25 as to quantities and the need for information regarding several FCWUA patrons stock
26

1 use, the Referee does not propose confirmation of a specific stock water right. It
2 is clear that a right exists and that, at least in part, an 1877 priority date is
3 applicable.

4 Water Right Claim No. 118926 filed, by the FCWUA, with the Department of
5 Ecology pursuant to RCW 90.14 on June 16, 1974, asserts a right to irrigate 2,918
6 acres, of which 1,860 acres were being irrigated in 1974. A total instantaneous
7 diversion from First Creek of 30 cfs was claimed with 12.8 cfs being used in 1974.
8 The annual quantity claimed for irrigation and stock water is 21,900 acre-feet per
9 year with use in 1974 of 9,340 acre-feet. The legal descriptions for the place of
10 use as provided in Water Right Claim No. 118926 and Court Claim No. 00648 appear to
11 be identical.

12 The Referee concludes that a recommendation can be made to confirm two water
13 rights under the Prior Appropriation Doctrine to the First Creek Water Users
14 Association under Court Claim No. 00648: With a November 2, 1877, date of
15 priority, 2.49 cfs, 622.5 acre-feet per year for the irrigation of 124.50 acres and
16 with a June 1, 1881, date of priority, 5.81 cfs, 1452.5 acre-feet per year for the
17 irrigation of 290.5 acres. The total number of acres as recommended by the Referee
18 is 415. The place of use for both rights is based on the land ownerships of
19 Cahoon, Thomas and Shoudy in the early 1900s and lying within the FCWUA service
20 area. Based on review of exhibit SE-1, it appears to the Referee that
21 approximately 700 acres are being irrigated within the area which is being
22 confirmed a water right for the irrigation of 415 acres. The Referee recommends
23 that the place of use be as follows; however, during the exception phase of the
24 proceeding for this subbasin, the claimant must identify which 415 acres within the
25 described area will be irrigated, unless during the exception phase evidence is
26

1 presented that will allow a right to be confirmed for the irrigation of additional
2 acreage. The place of use shall be:

3 The SW $\frac{1}{4}$ of Section 17, the E $\frac{1}{2}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 20, the W $\frac{1}{2}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$,
4 SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, that portion of the N $\frac{1}{2}$ of Section 21, which is
5 described as follows: A tract of land bounded by a line beginning at a point
6 on the west boundary line of the NE $\frac{1}{4}$ of said Section, 66 feet north of the
7 southwest corner of said quarter section, and running thence east 66 feet;
8 thence north on a line parallel with the west boundary line of said quarter
9 section 1,650 feet; thence west 66 feet to the west boundary line of said
10 quarter section; thence north to the north boundary line of said quarter
11 section; thence west to the northwest corner of said section; thence south on
12 the west boundary line of said section to the southwest corner of the NW $\frac{1}{4}$ of
13 said section; thence east on the south boundary line of said NW $\frac{1}{4}$ of said
14 section 990 feet; thence north 66 feet; and thence east on a line parallel
15 with the south boundary line of said quarter section 1,650 feet to the point
16 of beginning; the N $\frac{1}{2}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, and the NE $\frac{1}{4}$ and E $\frac{1}{2}$ NW $\frac{1}{4}$ of
17 Section 29, ALL in T. 19 N., R. 18 E.W.M..

1 As a final point, the Referee is convinced that during the spring
2 considerable flow from Subbasin No. 7 streams and local runoff channels is
3 intercepted by the Wold-Munson Ditch. There was no claim by the FCWUA or any of
4 the various water users of the association for use of that water during the
5 Subbasin No. 7 evidentiary hearings.

16
17 COURT CLAIM NO. 01561 -- Gold Placers, Inc.

18 Statement of Claim No. 01561 was filed with the Court by John D. Thomas, Jr.,
19 at that time attorney for the claimant. The claim asserts a water right from
20 Boulder Creek tributary to Williams Creek and Williams Creek tributary to Swauk
21 Creek, for 1.50 cfs based upon the appropriative doctrine and Surface Water
22 Certificate (SWC) No. 9156.

23 Attorney John Gilreath appeared at the hearing in behalf of Gold Placers,
24 Inc., providing testimony, and offering exhibits. Mr. Gilreath testified that the
25 place of use authorized by SWC No. 9156 accurately reflects the mining claims upon

1 which water has been used. The Referee will rely upon that testimony to resolve
2 what appear to be differences between the Surface Water Certificate, exhibit map
3 DE-50-A, and and the state's map exhibit SE-2.

4 Certificate No. 9156 issued to Golden Thunderbird Mining Company, Inc. on
5 August 28, 1964 with a priority date of December 18, 1961. It authorizes use of
6 1.5 cfs for placer mining within the following parcels of land:

7 E $\frac{1}{2}$ of Blackjack; mineral survey #1203
Discovery and Theresa; mineral survey #343
8 Bigney; mineral survey #1206
Elliot; mineral survey #1206
9 1916; mineral survey #1159
Little May; mineral survey #1159
10 Boulder Creek; mineral survey #1159
Nugget and Gold Bar; mineral survey #1204
11 New Discovery; mineral survey #1205
Last Chance
12 Golden Eagle
Snyder

13 In addition to SWC No. 9156, Mr. Gilreath testified to the riparian character
14 of the mining claims on Boulder and Williams Creeks. There was no testimony or
15 other evidence of when the land separated from federal ownership or use of water
16 prior to the priority date of SWC No. 9156, therefore, a water right based upon the
17 riparian doctrine cannot be recommended under Court Claim No. 1561.

18 During evaluation of the State's Exhibit containing copies of Surface Water
19 Certificates, the Referee noted SWC No. 6187, SWC No. 5001, and SWC No. 8286 (See
20 Claim No. 01471, Del L. Holter), each of which appear to be appurtenant to portions
21 of the place of use owned or controlled by Gold Placers, Inc. There has been no
22 assertion on behalf of Gold Placers of any interest in those three certificates.

23 SWC No. 9156 authorizes use of 1.5 cfs during the entire year. During the
24 hearing no evidence was presented as to the capacity of the pump used for the
25 mining operation or the periods of the year when water is, or has been, used. The
26

1 record is clear that a more or less mobile gold recovery facility has been operated
2 at various times. The Referee is faced with the options of blindly recommending
3 confirmation of the certificate as it reads or declining to make a recommendation
4 due to the limited record. The later course of action has been chosen because more
5 than 30 years have elapsed since the water right was perfected. It also seems more
6 likely than not that water dependent mining operations are not practical during the
7 winter months in this mountainous area. A further question to resolve is the
8 historic duration of the operations during years of peak water use. Although
9 Surface Water Certificate No. 9156 does not specify an annual quantity of water, it
10 is the intent of the Referee to determine an appropriate number of acre-feet per
11 year and an appropriate season of use before a favorable recommendation for a water
12 right is made.

13 Since no claimant has come forward to assert an interest in Surface Water
14 Certificates 6187 and 5001, the Referee recommends to the Department of Ecology
15 cancellation of those water right certificates.

17 COURT CLAIM NO. 01663 -- William J. Grueter
18 (A)04913 & Patricia M. Grueter
18 (A)04914

19 On August 28, 1981, William J. and Patricia M. Grueter filed with the Court
20 Statement of Claim No. 01663 asserting a water right from Currier Creek in
21 Subbasin No. 7. On December 20, 1989, William and Patricia Grueter filed an
22 amended Statement of Claim with the Court asserting water rights from two
23 additional sources, First Creek and an unnamed creek, both tributary to Reecer
24 Creek.

1 Attorney Richard T. Cole represented William and Patricia Grueter for the
2 Subbasin No. 7 hearing, but withdrew as their attorney on November 22, 1991, prior
3 to the Subbasin No. 4 hearing. Therefore, Mr. Grueter appeared in his own behalf
4 for the Subbasin 4 (Swauk Creek) hearing. Mr. Grueter requested that his exhibits
5 and testimony from the Subbasin No. 7 hearing be included, by reference, in support
6 of the amended claim during the Subbasin 4 proceedings.

7 The record, including the testimony of Mr. Grueter during the Subbasin No. 4
8 and 7 hearings, reflects a claim to waste or tail water emanating from the service
9 area of the First Creek Water Users Association (FCWUA) for irrigation of 18 acres
10 of land within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, T 19 N., R. 18 E.W.M. and stock water for
11 up to 1,200 feeder cattle. The stream channel upon which two diversions are
12 located is described as an unnamed intermittent tributary of Reecer Creek. Water
13 available in this local drainage was described by Mr. Grueter as being a
14 combination of local runoff, Kittitas Reclamation District (KRD) seepage, and
15 return flow and tailwaters from First Creek, tributary of Swauk Creek, distributed
16 within the FCWUA service area.

17 The only direct diversion of First Creek water for delivery into Subbasin
18 No. 7 is located in Section 30, T. 20 N., R. 18 E.W.M. At that diversion the FCWUA
19 turns water into the Wold-Munson Ditch which carries the First Creek water out of
20 Subbasin No. 4 into the headwaters of Green Canyon in Subbasin No. 7. The service
21 area of the FCWUA lies north and westerly of the Grueter property, which lies
22 within Section 34, T. 19 N., R. 18 E.W.M..

23 The only water right claim filed with the Department of Ecology pursuant to
24 RCW 90.14 for use of First Creek water within Subbasin No. 7 was Water Right Claim
25 No. 118926 filed by the FCWUA for their service area, which does not include lands
26

27 REPORT OF REFEREE
28 Re: Subbasin No. 4

Referee's Office
15 W. Yakima Ave Ste. 200
Yakima, WA 98902-3401

1 as far south as the Grueter's ownership in Section 34, T. 19 N., R. 18 E.W.M.,
2 therefore, that claim cannot be considered to be for the Grueter property.

3 On May 27, 1909, Henry Kleinberg recorded a Notice of Appropriation of Water
4 by which he claimed all the unappropriated water in First Creek to the extent of
5 200 cfs. Mr. Kleinberg intended to divert water from First Creek to a proposed
6 storage reservoir to be located in Section 31, T. 20 N., R. 18 E.W.M.. The purpose
7 of use contemplated was for irrigation, domestic supply, and stock water within
8 Sections 3, 4, 5, 8, and 9, all being within T. 18 N., R. 18 E.W.M., and
9 Sections 27, 32, 33, and 34, all being within T. 19 N., R. 18 E.W.M.. There has
10 been no evidence presented that a water right was perfected under Mr. Kleinberg's
11 Notice of Appropriation.

12 No water right claim was filed to protect the Notice of Appropriation posted
13 by Henry Kleinberg on May 27, 1909 (exhibit DE-110), therefore, any water right
14 which may have been associated with that claimed right was waived and relinquished,
15 RCW 90.14.071. The Referee cannot recommend confirmation of rights for return flow
16 water generated from the application of water from out of basin sources such as
17 First Creek and/or KRD water (see Page 5 of this report). Those options were
18 considered in the Referee's Report for Subbasin No. 7, and no water rights were
19 recommended for confirmation to Mr. Grueter by the Referee in Subbasin No. 7 and
20 none can be recommended for First Creek water imported from Subbasin No. 4.

1
2 COURT CLAIM NO. 01789 -- John J. Hanson
3 & Lila A. Hanson
4
5 COURT CLAIM NO. 01790 -- John J. Hanson
6 & Lila A. Hanson
7 James Hanson
8 & Susan Hanson
9 William Hanson
10 & Diana Hanson
11 Michael Hanson
12 & Ulrike Hanson

13 On August 31, 1981, John and Lila Hanson filed Claim Nos. 01789 and 01790 with
14 the Court asserting water rights to runoff waters tributary to Swauk Creek, First
15 Creek tributary to Swauk Creek, and to Swauk Creek. On May 5, 1994, James A. and
16 Susan D. Hanson, William C. and Diane J. Hanson, and Michael M. and Ulrike C.
17 Hanson were joined as claimants to Court Claim No. 01790. John J. Hanson appeared
18 at the evidentiary hearing, provided testimony, and offered documents into evidence
19 in support of Court Claim No. 01789.

20 The properties to which Claim Nos. 01790 and 01789 are appurtenant are not
21 contiguous parcels. Rights are said to have been perfected based upon the riparian
22 and/or appropriative doctrines dating from prior to 1900. Mr. Hanson testified
23 that all of Section 29, T. 20 N., R. 17 E.W.M. is the property to which Court Claim
24 No. 01789 is applicable. There are, in fact, some minor exceptions for
25 rights-of-way and property line boundary adjustments. Exhibit DE-78 contains a
copy of the U.S. patent to the Northern Pacific Railway Company (NPRC) for
Section 29, T. 20 N., R. 17 E.W.M.. The patent date is May 5, 1896.

26 The basis for the applicability of the Riparian Doctrine relies upon not only
27 the date of separation from the public domain, but also the location of a surface
water source adjacent to or within the property. The record clearly establishes

1 that there is no naturally occurring surface water source within Section 29,
2 T. 20 N., R. 17 E.W.M.. There is seasonal runoff; however, the predominant
3 hydrologic feature is characterized as local infiltration of precipitation and snow
4 melt water. Stock have historically been grazed on Section 29 and they have had
5 access to seasonal runoff, however, the principle source of stock water has been
6 provided from wells. To the extent that the stock utilizes natural runoff channels
7 when water is available, the stock water stipulation described on Page 4 of this
8 report would cover that use.

9 Exhibit DE-80 contains a plan and location map for a proposed reservoir on the
10 Hanson property within Section 29, T. 20 N., R. 17 E.W.M.. Also contained in DE-80
11 is a letter from Bruce A. Cameron of the Department of Ecology regarding Reservoir
12 Application No. R-21660. The letter is dated January 3, 1973. The record does not
13 contain a copy of the application or the decision which is referenced in Mr.
14 Cameron's letter. It is clear, however, that the planned reservoir was never
15 constructed. Therefore, no water right has been perfected and the Referee cannot
16 recommend confirmation of a right for a proposed reservoir. If, at some future
17 date, construction of a reservoir is again contemplated, the property owner will
18 need to contact the Department of Ecology concerning any required dam plan approval
19 or water right permits.

20 Lila A. Hanson testified and offered exhibits in support of Court Claim
21 No. 01790 at the evidentiary hearing. Exhibit DE-81 contains legal descriptions
22 for two Hanson parcels located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28 and the W $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$
23 of Section 27, both in T. 20 N., R. 17 E.W.M.. Also contained in DE-81 is a copy
24 of an aerial photograph upon which the two parcels are outlined in red. This

1 exhibit corrects the map notations on SE-1. In particular, the parcel in
2 Section 27 is depicted on SE-1 south of the actual location.

3 Mrs. Hanson referred the Court to exhibits and testimony provided by claimants
4 Hartman, Claim No. 01685, regarding separation of the land from public ownership.
5 The Hanson parcel, located south of Swauk Creek within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28,
6 is 1.31 acres in size and was originally part of the Ansel Beach Kenworthy
7 homestead. The patent issued to A.B. Kenworthy on June 4, 1896. The Kenworthy
8 homestead was riparian to Swauk Creek.

9 Therefore, the 1.31 acre tract was riparian to Swauk Creek, however, there is
10 no surface water body utilized as a source of water for this parcel. Water is
11 reported to be supplied to the home and livestock from a well. Natural
12 precipitation and/or snow melt water occasionally collects in natural low spots on
13 the property but soon percolates into the ground. To the extent that stock grazing
14 on the parcel can utilize the naturally occurring water before it percolates into
15 the ground, the stock water stipulation as described on Page 4 of this report would
16 cover that use. The parcel in the W $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27 is five acres in size.

17 In spite of evidence which attests to very early settlement of Sections 27 and
18 28, T. 20 N., R. 17 E.W.M. the record is nearly silent as to any appropriative use
19 of surface water for the two small parcels owned by Mr. and Mrs. Hanson.

20 Although Mr. and Mrs. John J. Hanson filed no water right claims themselves,
21 claims filed by neighboring landowners do describe a place of use large enough to
22 include their two parcels. Water Right Claim (WRC) No. 002825, was filed by Alice
23 R. Burke on February 19, 1971 for water from Swauk Creek via the Burke Ditch to
24 irrigate 100 acres and for stock water within Section 28, T. 20 N., R. 17 E.W.M.;
25 WRC No. 153537, was filed by the Trans-West Company on June 27, 1974 for water from

1 Swauk Creek. No point of diversion is provided on WRC No. 153537, although 1.6 cfs
2 is claimed for irrigation of an undisclosed number of acres and stock water within
3 the S $\frac{1}{2}$ NW $\frac{1}{4}$ and the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 27, T. 20 N., R. 17 E.W.M..

4 Although reference is made to possible use of First Creek water on the Hanson
5 property many years ago, there is no information as to the location of the point of
6 diversion. There is also no RCW 90.14 water right claim in the record for use of
7 First Creek water in either Section 27 or 28.

8 During the years since at least the early 1970s there has been no attempt by
9 the Hansons to supplement, by any surface water irrigation practices, the moisture
10 which occurs as a result of precipitation and the resulting runoff.

11 The Referee has concluded that no claim to a right for diversion and
12 beneficial use of surface water is actually before the Court. In fact, the Hansons
13 offered no description of a system to convey and use water. They did, however,
14 express a keen interest in continued use of the properties including relying on the
15 natural weather cycles for precipitation and the very limited seasonal runoff water
16 which flows through natural draws and/or highway culverts.

17 The Referee does not recommend confirmation of a water right under Court Claim
18 Nos. 01789 or 01790.

19
20 COURT CLAIM NO. 00919 -- Aubrey E. Hart
21 & Blanche M. Hart

22 On August 7, 1981, Aubrey E. and Blanche M. Hart filed with the Court Statement
23 of Claim No. 00919. Mr. Hart appeared at the Swauk Creek evidentiary hearing and
24 testified in support of the claim.

25 On June 2, 1970, A. E. Hart filed three Water Right Claims (WRCs), pursuant to
26 RCW 90.14, with the Department of Ecology, Nos. 000483, 000484, and 000485. Each

1 short form claim asserts a water right for use of an unnamed spring dating from
2 1894 for domestic and stock water for use within the NE $\frac{1}{4}$ of Section 11,
3 T. 19 N., R. 16 E.W.M. On June 26, 1974, A. E. Hart filed with the Department of
4 Ecology WRC Nos. 130078 and 130079. Claim No. 130078 identifies use from an
5 unnamed spring for domestic supply and stock water within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 11.
6 Claim No. 130079 identifies a spring-fed pond as the source of water for domestic
7 supply, stock water, and irrigation within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11.

8 According to the state's Investigation Report, SE-45, the only diversionary
9 use of water appears to be within that portion of the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 11, lying
10 easterly of State Highway No. 10. At that location is the Hart home, a small
11 orchard (approximately two acres), and diversionary use for stock water. The
12 source of water for that gravity flow system is two unnamed springs located
13 1,200 feet south and 700 feet east from the N $\frac{1}{4}$ corner of Section 11, being within
14 the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of said section. Water used from the other springs and two ponds
15 located on the property are for non-diversionary stock water.

16 Mr. Hart testified that the frame house, which their current home replaced,
17 was built in 1909. According to information he got from the preceding owner,
18 George Adams, a log home was replaced by the frame house. Mr. Hart could not
19 advise the Court as to the earliest use of the spring or the date the log home was
20 built. He did testify that George Adams' father homesteaded the property and built
21 the log home. He is claiming a priority date of 1894.

22 Testimony or other evidence as to the yield of the spring or capacity of the
23 delivery system is absent. Mr. Hart did, however, testify that he can run up to
24 three irrigation sprinklers at one time. With 35 to 40 pounds gravity pressure in
25 the system, it is reasonable to expect that each sprinkler would require .01 cfs

1 and an additional .01 cfs is appropriate for the domestic supply and incidental
2 stock water, for a total of 0.04 cfs. The primary source of stock water is the
3 riparian sources, which is covered by the stock water stipulation discussed on Page
4 of this report. Due to the lack of testimony regarding the annual quantity
5 historically used, the Referee proposes use of the standard water duty for the home
6 and four acre-feet per acre for irrigation. Thus, 1 acre-foot per year is
7 recommended for in-house domestic supply and incidental stock water, and 8
8 acre-feet per year for irrigation of two acres. Lacking testimony of the
9 irrigation season, the Referee has adopted the period of April 15 to October 15,
10 which is reasonable for this area.

11 There is no patent document in the record or other chain of title documents
12 that could assist in determining the appropriate priority date for the domestic
13 springs. However, we do have Mr. Hart's testimony attributable to George Adams,
14 whose father built the log home preceding the 1909 frame home. Adjoining land with
15 a spring source within a few hundred feet was settled in 1892 (Claim No. 01479 -
16 Fahey/Bateman). Mr. Hart testified that local information put the homestead action
17 by the Adams family in 1894, with even earlier settlers likely having lived on the
18 property. Although the testimony is not supported by documents, the Referee is
19 convinced that a priority date of June 30, 1894 is appropriate for use of the
20 domestic spring.

21 A water right will not be recommended for emergency fire protection since all
22 available sources of water can be utilized during fire fighting.
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2 COURT CLAIM NO. 01685 -- Kenneth J. Hartman
3 & Ruthie J. Hartman
4 Donald A. Hartman
5 & Ruth D. Hartman
6 Daniel V. Byrne
7 & Martha Wyckoff Byrne

8 On August 28, 1981, a Statement of Claim was filed with the Court by Kenneth
9 J. Hartman, Donald A. Hartman, Ruth D. Hartman, and Ruthie J. Hartman. The Hartman
10 family is asserting rights to Swauk Creek, Williams Gulch, and an unnamed spring.
11 On July 21, 1994, the Court granted a motion to join Daniel V. Byrne and Martha
12 Wyckoff Byrne as additional parties to Court Claim No. 01685.

13 The claimants were collectively represented by attorney Michael Bauer.
14 Kenneth J. Hartman provided testimony during the evidentiary hearing. The uses
15 claimed include irrigation, stock water, and domestic supply.

16 During his testimony Mr. Hartman modified the place of use for Court Claim
17 No. 01685 to include the: E $\frac{1}{2}$ of Section 20, N $\frac{1}{2}$ and SW $\frac{1}{4}$ of Section 28, and the N $\frac{3}{4}$ W $\frac{1}{2}$
18 of Section 21, all being within T. 20 N., R. 17 E.W.M.. There are minor exceptions
19 to the ownership in Section 28 due to highway widening and two farmstead land
20 exchanges in the northwest corner of that section and in the southeast corner.

21 The first portion of the claim to be dealt with is the use of 300 miners
22 inches (6 cfs) of water from Swauk Creek for irrigation of 95 acres lying within
23 the E $\frac{1}{2}$ SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ of Section 28. The land is served via a ditch used in common
24 with the Burke Ranch (Court Claim No. 01475), which lies south of the Hartman
25 Ranch. According to testimony by Kenneth Hartman the 95 acres are irrigated
26 between April 1 and October 15 each year depending upon the weather and available
27 stream flow. Mr. Hartman testified that he had no personal knowledge regarding the
28 ditch capacity and simply ran the ditch. The 300 inches is based on a Notice of

1 Water Right, which will be discussed in detail later. Mr. Hartman did not provide
2 specific testimony regarding water duty or ditch loss, therefore, the Referee will
3 use the testimony provided by Richard Bain and his report (DE-37) submitted in
4 behalf of the Burkes' claim, since the fields are adjacent and the ditch is used in
5 common. Stock water for up to 50 pair of cattle which are run on Section 28 rely
6 on riparian access to Swauk Creek and drink directly from the creek.

7 During Mr. Hartman's testimony he described two intermittent drainages which
8 are intercepted by the Hartman-Burke Ditch. One intersects the ditch a few hundred
9 feet northeasterly of the center of Section 28 and the second one intersects the
10 ditch about 500 feet southeasterly from the northwest corner of Section 27. Since
11 there is no means of bypassing the flow of these drainages, any water which reaches
12 the ditch during irrigation season is used to irrigate the fields below the
13 interception point. The testimony did not include enough detail to quantify the
14 water available for use, however, it is clear that since the ditch was built those
15 streams have been used to the extent water is available.

16 The following water right claims were filed pursuant to Chapter 90.14 of the
17 Revised Code of Washington (RCW). Water Right Claim No. 002826, filed on
18 February 19, 1971 by Alice R. Burke, asserts a right to use up to 6 cfs from Swauk
19 Creek for irrigation of 50 acres and stock water within Section 28. Water Right
20 Claim No. 002825, filed on February 19, 1971 by Alice R. Burke, claims a right to
21 4 cfs diverted from Swauk Creek for irrigation of 100 acres within Section 28,
22 T. 20 N., R. 17 E.W.M.. On June 25, 1974, Kenneth J. Hartman filed with the
23 Department of Ecology, Water Right Claim No. 138208 asserting a right to use 6 cfs
24 from Swauk Creek water for irrigation of 100 acres. The place of use on Water
25 Right Claim No. 138208 is the NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of Section 28. It is the Referee's
26

1 belief that the NW $\frac{1}{4}$ was entered in error. It is clear from the record that the
2 historic irrigation practice is within the NE $\frac{1}{4}$, which the Hartmans have also owned
3 since 1956. There may, however, be an acre or two irrigated within the southeast
4 corner of the NW $\frac{1}{4}$ of Section 28. No testimony was presented regarding the legal
5 description disparity. Mr. Hartman apparently has not utilized the amendment
6 process provided for in the Claims Registration Law, Chapter 90.14.065 of the
7 Revised Code of Washington (RCW), however, between the three water right claims
8 discussed, the Referee believes any right that exists has been adequately protected
9 from waiver or relinquishment.

10 The chain of title to the Hartman Ranch is somewhat complicated because the
11 ranch has been put together through a series of purchases. The first matter to
12 deal with is the irrigated lands within Section 28. A Homestead Patent issued to
13 Ansel B. Kenworthy on June 4, 1896, for the N $\frac{1}{2}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$ and the SE $\frac{1}{4}$ NE $\frac{1}{4}$, of
14 Section 28, T. 20 N., R. 17 E.W.M.. That property is riparian to Swauk Creek.

15 The SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, T. 20 N., R. 17 E.W.M. was part of the homestead of
16 George D. Virden for which the patent was signed on June 4, 1896. The Virden
17 homestead was riparian to Swauk Creek. The final portion of the Hartman Ranch upon
18 which water is used for irrigation is the E $\frac{1}{2}$ SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28,
19 T. 20 N., R. 17 E.W.M.. That 120 acre parcel was the James H. Kinney homestead for
20 which the patent was signed on June 4, 1896. The James H. Kinney homestead was
21 riparian to Swauk Creek.

22 On September 20, 1889, a Notice of Water Right was filed by George Virden,
23 A.B. Kenworthy, and James H. Kinney claiming a right to 300 miners inches from
24 Swauk Creek. The ditch described was approximately one mile in length and ran
25 along the northerly side of Swauk Creek to a point at the southerly property line

1 of the James H. Kinney land claim on the south section line of Section 28,
2 T. 20 N., R. 17 E.W.M.. That ditch alignment is consistent with the current
3 Hartman-Burke Ditch location. it is apparent from the Notice of Water Right the
4 land was occupied several years prior to the patent issuing. Other than the actual
5 patents, the Hartman family offered no evidence of the dates when action was first
6 taken to separate the three homesteads of George D. Virden, A.B. Kenworthy, and
7 James H. Kinney from Federal ownership. There was, however, evidence and testimony
8 provided during presentation of the Pat and Mary Burke Claim No. 01475 establishing
9 June 30, 1878, as the date George D. Virden settled on his homestead. Since the
10 Hartman Ranch now includes the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, T. 20 N., R. 17 E.W.M. (a
11 portion of the George D. Virden homestead) the priority date for the irrigated
12 lands within that 40 acre tract would enjoy a priority date of June 30, 1878.
13 Review of Exhibit SE-2 indicates that approximately 20 acres are irrigated from the
14 Hartman-Burke Ditch within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, T. 20 N., R. 17 E.W.M.. The
15 remaining 75 irrigated acres within the Hartman Ranch irrigated under the
16 Hartman-Burke Ditch would have a priority date of September 20, 1889, based upon
17 the Notice of Water Right filed by George D. Virden, A.B. Kenworthy, and James H.
18 Kinney.

19 Both the Burkes and the Hartmans appear to be asserting a right for the entire
20 6 cubic feet per second under that appropriation. The testimony indicates that 6
21 cubic feet per second is diverted into the ditch and the two ranches rotate their
22 use so that only one ranch is irrigating at a time, resulting in all of the water
23 being used on each ranch when they irrigate. It is clear from the record that it
24 takes considerable coordination, working around haying schedules and varying creek
25 flows. However, the Referee believes it would be appropriate to pro-rate the
26

1 quantity based on the number of acres irrigated by each claimant. There was no
2 testimony that the original appropriators rotated their water use in the same
3 manner as is being done today or when this practice was initiated. If the
4 landowners choose to rotate their use of water in order to make their irrigation
5 practice more effective, that is a private matter between them.

6 The Hartmans are irrigating 70 percent of the total acres irrigated from this
7 ditch. The Hartmans proportionate share of the water based on the acreage they own
8 would be 4.23 cfs, leaving 1.77 cfs for the Burkes. A deed between James H. Kinney
9 and William L. Virden dated October 30, 1899, transferred the E $\frac{1}{2}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of
10 Section 28 from Kinney to Virden along with 100 inches from the ditch taken out by
11 J.H. Kinney, et al. and filed in the auditors office on September 24, 1889. This
12 water is obviously part of the Virden, Kenworthy, Kinney appropriation earlier
13 discussed and would serve to limit to 2 cfs the quantity of water that could be
14 used on the E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 28. There has been no claim asserted for use of water
15 on the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28. Mr. Bain's report (DE-37) identified a water duty of
16 7.5 acre-feet for each acre irrigated, which will be adopted by the Referee for
17 this ranch. The report (DE-37) addressed conveyance loss for the entire 4200 foot
18 long ditch. Approximately 1000 feet of the ditch is concrete lined and the rest is
19 unlined. According to Mr. Bain's report, the ditch would loose an average of
20 0.06 cfs per 1,000 feet, or 0.252 cfs for the entire ditch. The conveyance loss
21 will also be prorated between the Burkes and Hartmans in the same ratio as
22 discussed previously. The Referee believes that 6 cfs appropriated by Kinney,
23 Kenworthy, and Virden, included any conveyance loss.

24 The Referee recommends that a right be confirmed to the Hartmans under the
25 Riparian Doctrine with a June 30, 1878, date of priority for the diversion from
26

1 Swauk Creek of 0.85 cfs, 150 acre-feet per year for the irrigation of 20 acres, and
2 0.04 cfs for conveyance loss for use on that portion of the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28,
3 T. 20 N., R. 17 E.W.M. lying southeast of the county road.

4 The Referee also recommends that a right be confirmed to the Hartmans under
5 the Prior Appropriation Doctrine with a September 20, 1889, date of priority for
6 the diversion of 3.20 cfs, 562.5 acre-feet per year for the irrigation of 75 acres,
7 0.14 cfs for conveyance loss, for use in the E $\frac{1}{2}$ SW $\frac{1}{4}$ and that portion of the E $\frac{1}{2}$ NE $\frac{1}{4}$
8 lying northwest of Swauk Creek and southeast of the county road, all in Section 28,
9 T. 20 N., R. 17 E.W.M..

10 Court Claim No. 01685 asserts a right dating from June 28, 1917 for a spring
11 located near the north quarter corner of Section 21, T. 20 N., R. 17 E.W.M., lying
12 within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 21. Water Right Claim No. 138206 was filed on
13 June 25, 1974 by Donald A. and Kenneth Hartman for that spring. The uses claimed
14 include domestic supply, stock water, and irrigation of 1 acre. The quantity
15 claimed is 10 gpm, 20 acre-feet per year and the date of first use is given as
16 prior to 1897. Court Claim No. 01685 indicates historic use from this spring of
17 0.5 gpm from April 15 through October 15. Use of water for a domestic supply was
18 not included in the Court Claim although testimony provided by Kenneth Hartman
19 amended the claim to include domestic use. Mr. Hartman's testimony also
20 established that use of the spring terminated in 1980 for all uses except riparian
21 stock water. The farmstead has apparently relied upon a low yielding well for many
22 years. Although the record is not entirely clear, it was the Referee's impression
23 that the Hartman family has no intent to resume use of the spring via the pipe and
24 pump distribution system. Due to that impression and the long period of nonuse,
25 the Referee will recommend no confirmation of a water right from the spring in the
26

1 NW $\frac{1}{4}$ of Section 21, except as is provided via the stock water stipulation which is
2 discussed in detail on Page 4 of this report. If it is determined that decision
3 frustrates the intent of the Hartman family, the Referee will need additional
4 factual record upon which to evaluate the claimed use. In particular, it would be
5 essential to have a copy of the documents which separated the land from the public
6 domain. Although some general reference to early system development are in the
7 record, details would be valuable. When the home was built and the pipeline first
8 laid through the Harwood property would provide key facts. The current pump and
9 holding tank appear to date from 1948. Since the Court Claim states 0.5 gpm and
10 the RCW 90.14 claim states 10 gpm, clarification as to historic developed capacity
11 would be appropriate.

12 The final component of Court Claim No. 01685 relates to use of water from a
13 developed spring located within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 20, T. 20 N., R. 17 E.W.M..
14 The spring and the place of use for the diverted water lie outside the Swauk Creek
15 drainage basin and, as such, should properly have been considered during the
16 evidentiary hearing for Subbasin No. 3 the Teanaway River Basin. However, the
17 Hartman Court Claim No. 01685 was not included in the Subbasin No. 3 proceeding;
18 therefore, the Referee has evaluated the record created during the Subbasin 4
19 evidentiary hearing.

20 Testimony provided by Kenneth Hartman establishes that overflow from the
21 spring located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 20, T. 20 N., R. 17 E.W.M. flows to the
22 Teanaway drainage. There is a stream channel which runs southerly near the east
23 line of the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 20. The spring overflow contributes to that stream
24 if it is not fully used on the Hartman property. Mr. Hartman's testimony included
25 a description of a ditch from the spring which runs along a narrow strip of hay

1 ground, on the north margin of the field and a second ditch which carries creek
2 water along the south side of that 7 to 8 acre field. The Hartman ownership within
3 the NE $\frac{1}{4}$ of Section 20 appears to date from the 1940s and '50s depending upon which
4 parcel is being considered. There was no evidence presented of water use prior to
5 the 1940's.

6 Donald A. and Kenneth J. Hartman filed Water Right Claim No. 138205 with the
7 Department of Ecology on June 25, 1974. That claim describes an unnamed spring at
8 a location which closely matches that described in Court Claim No. 01685. The
9 Water Right Claim asserts a right for 10 gpm, 20 acre-feet per year for domestic
10 supply and stock water with a date of first water use of prior to 1897.

11 There are claimants of record in Subbasin No. 3, both north and south of the
12 Hartman ownership on what appears to be the stream channel under consideration
13 here. Those claimants have been deprived of any knowledge of the Hartman claim to
14 water from the Teanaway Drainage Basin. In addition to that deficiency, little
15 record has been created as to the chain of title, time of first use, quantities
16 used, etc.

17 Under the circumstances, and with the limited record available, the Referee
18 cannot recommend approval of a surface water right for the spring or stream located
19 within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 20, T. 20 N., R. 17 E.W.M.. If the Hartmans take
20 exception to the Referee's recommendation relative to the water used within
21 Section 20, it is recommended that the exception be remanded by the Court to be
22 considered during the supplemental hearing for Subbasin No. 3 (Teanaway River).
23 Any exception taken to the Referee's Report as to water used from and within the
24 Swauk Creek drainage basin would be appropriately before the Court during the
25 Subbasin No. 4 exception hearing.

26
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1 As a final matter, the stock which are grazing on the various portions of the
2 Hartman Ranch have access to the streams and spring. It is, therefore, appropriate
3 for stock watering demands to be addressed through the riparian stock water
4 stipulation which is described in detail on Page 4 of this report. The Referee,
5 therefore, proposes that no diversionary stock water right be recommended for
6 confirmation by the Court.

7

8 COURT CLAIM NO. 01691 -- Joe Harwood
9 & Dorothy Harwood

10 On August 28, 1981, Brian Frederick, attorney for Joe and Dorothy Harwood,
11 filed with the Court Claim No. 01691. The claim asserts water rights from an
12 unnamed creek and three unnamed springs. Dorothy Harwood appeared pro se at the
13 evidentiary hearing at which time she provided testimony as did her son, Gary
14 Harwood.

15 The Harwoods own the E $\frac{1}{2}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 21 and the N $\frac{1}{2}$ SW $\frac{1}{4}$ and E $\frac{1}{2}$ NW $\frac{1}{4}$ of
16 Section 22, T. 20 N., R. 17 E.W.M.. Rights are being asserted to divert 0.80 cfs
17 from an unnamed creek for the irrigation of 35 acres and stock water; from two
18 unnamed springs for 0.10 cfs from each spring for domestic supply, stock water, and
19 irrigation of 10 acres; and from a spring in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 22, T. 20 N.,
20 R. 17 E.W.M. for stock water only.

21 The water system for the house is served by two springs which are plumbed into
22 a common 1 $\frac{1}{4}$ inch pipeline about 4000 feet long. The springs are located in the
23 NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 21, T. 20 N., R. 17 E.W.M., 1100 feet south and 200 feet west
24 from the northeast corner of said section. The springs are reported by Dorothy
25 Harwood to have a date of first use of 1914, at which time Mr. Micheletto installed
26 the original pipeline. The affidavit of Katie and John Micheletto, exhibit DE-77,

1 was offered in support of the 1914 date. Water use from the springs historically
2 has been for the farmstead located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 21 and a 4 $\frac{1}{2}$ acre
3 alfalfa field east of the farmstead, in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said section. Up to 50 head
4 of cattle are watered via stock tanks filled from the domestic system. A garden
5 hose has periodically been used to sprinkler irrigate portions of the alfalfa field
6 and a one-half acre lawn and garden area, including eight fruit trees.

7 Water has, in the past, been diverted by gravity ditch from an unnamed stream
8 at a point located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 21, T. 20 N., R. 17 E.W.M.. Use of
9 that system ceased during the mid-1970s because of a change from alfalfa to wheat
10 and because the flume segments of the system were in a state of disrepair.
11 Approximately 35 acres of alfalfa were once irrigated from May 1 through
12 approximately July 1 when the irrigation was stopped for harvesting. Irrigation
13 did not resume after haying. Testimony of Gary Harwood was that they wish to
14 retain a water right for irrigation water from the stream for use "if things would
15 change".

16 There is also a developed stock pond and an undeveloped spring on the
17 property. The pond was built around 1980. No water is diverted out of the pond
18 for beneficial use, although stock have access to it for watering. The spring
19 located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 22 is not developed.

20 On June 18, 1974, Joe Harwood filed with the Department of Ecology five water
21 right claims (WRCs) as prescribed by Chapter 90.14 RCW. WRC No. 117684 was filed
22 on a short form. The source of water is identified as springs which are used for
23 domestic supply and stock water within Section 21, T. 20 N., R. 17 E.W.M..

24 WRC No. 117685 was filed on a long form. The source of water is identified as
25 an unnamed creek for irrigation of 35 acres and stock water. The point of

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1 diversion is described as being 1260 feet east and 670 feet north from the
2 southwest corner of Section 21. Attached to WRC No. 117685 were two supplemental
3 sheets, one of which contains a legal description of the place of use and a small
4 map of the 400 acre parcel. The creek location, point of diversion, and general
5 area of the irrigated 35 acres are depicted on the map. The mapped point of
6 diversion is shown as near the center of the NE $\frac{1}{4}$ of Section 21 being within the
7 S $\frac{1}{2}$ NE $\frac{1}{4}$ of said section. The point of diversion described in WRC 117685 is within
8 the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, whereas the mapped point of diversion lies approximately
9 one-half mile northeasterly in a different drainage draw. The mapped version is
10 consistent with testimony as to the creek location, point of diversion, and field
11 location. There is an amendment process provided in RCW 90.14.065 where, in
12 certain circumstances, a water right claim can be amended. That process has not
13 been initiated for WRC 117685.

14 WRC No. 117686 was omitted from the Department of Ecology exhibits, therefore,
15 a copy was entered into the record by the claimant. It is a short form that
16 identifies the source of water as an unnamed creek. The purposes of use include
17 domestic supply, stock water, and irrigation. Attached to the claim is a legal
18 description of the place of use and a map showing the unnamed creek and the
19 property boundary within Section 22, T. 20 N., R. 17 E.W.M.. There was no
20 testimony regarding development of any water source located within Section 22,
21 T. 20 N., R. 17 E.W.M., nor was any use of water identified in that section.

22 Water Right Claim No. 117687 was also filed on a short form with the word
23 "attached" entered in the legal description portion of the form. The record does
24 not contain the attachment, therefore, the claim cannot be evaluated as not even
25 the section, township, and range have been entered on the face of the form.

1 RCW 90.14.051 allowed for the use of "short forms" for water uses that are
2 exempt from the water right permitting process provided in RCW 90.44.050, i.e. use
3 of up to 5,000 gallons per day for domestic supply, stock water, industrial use and
4 irrigation of up to one-half acre of lawn and/or non-commercial garden.

5 Chain of title evidence was not included in the record, therefore, it is not
6 possible to determine when steps were first taken to sever the land from Federal
7 ownership. That information is critical in determining priority dates under the
8 Riparian Doctrine. It may be that more than one chain of title is involved. The
9 date of first use of water on the Harwood property is asserted to be in May of
10 1914, which is supported by the Micheletto affidavits. Since that is the earliest
11 date in the record, the Referee must conclude the water uses were initiated after
12 the U.S. Bureau of Reclamation withdrew all of the unappropriated water in the
13 Yakima River drainage basin; see Page 8 of this report for a discussion of the
14 effects of that withdrawal.

15 Due to deficiencies in the record regarding Court Claim No. 01691, the Referee
16 is unable to recommend confirmation of a water right.

17
18 COURT CLAIM NO. 02259 -- David Holmquist, et al.
19 & Christianne Holmquist
20 Dean Tonseth
21 Danielle Tonseth
22 Ken Fyall
23 Kathy Fyall

24 On September 1, 1981, Statement of Claim No. 02259 was filed with the Court in
25 behalf of the Holmquists, Tonseths, and Fyalls by their attorney, Michael Cooper.
26 Court Claim No. 02259 asserts a right to use 1 cfs from an unnamed spring for
irrigation of 30 acres and for stock water. The claimed place of use is a portion
of the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, T. 19 N., R. 17 E.W.M. and the described point of

1 diversion is 2,100 feet west and 500 feet south from the northeast corner of
2 Section 28. Dean Tonseth appeared at the Swauk Creek evidentiary hearing in behalf
3 of the claimants.

4 Testimony provided by Dean Tonseth established that the property description
5 in Court Claim No. 02259 is in error and should have reflected the following
6 description: That portion of the $N\frac{1}{2}N\frac{1}{2}$ of Section 28, T. 19 N., R. 17 E.W.M. lying
7 northeast of the Yakima River and westerly of Hayward Road, and that portion of the
8 $S\frac{1}{2}$ of Section 21, T. 19 N., R. 17 E.W.M. lying easterly of the Burlington Northern
9 Railroad line and westerly of the Kittitas Reclamation District (KRD) canal.

10 Mr. Tonseth testified that the field examiner's report, state's exhibit SE-47,
11 is generally accurate as to the locations of the various spring areas and the
12 property descriptions. There are, in fact, four areas where springs emerge on the
13 property; one within the $W\frac{1}{2}NW\frac{1}{4}SE\frac{1}{4}$ of Section 21, one within the $SW\frac{1}{4}SE\frac{1}{4}SE\frac{1}{4}$ of
14 Section 21, and two springs in the $N\frac{1}{2}NW\frac{1}{4}NE\frac{1}{4}NE\frac{1}{4}$ of Section 28. The southerly spring
15 appears to be the one described in Court Claim No. 02259. The only spring which
16 has remnants of old pipe and flume diversion facilities is the spring located near
17 Hayward Road and the north section line of Section 28. Mr. Tonseth testified that
18 water was originally piped from this spring down to the Huhn homestead in the
19 southwesterly area of the current Tonseth, et al., property. Domestic water has
20 been provided to the current home via a well for a long period of time. Apparently
21 the gravity flow pipeline which delivers KRD water to the property can be utilized
22 to carry spring water to the vicinity of the current home for early and late season
23 domestic irrigation.

24 Mr. Tonseth testified that the only uses of the various springs, except the
25 two springs located in Section 28, are for riparian stock water, along with
26

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1 subirrigation occurring from springs below the KRD canal. A spring located
2 westerly of the highway in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28 has been used to fill a
3 stock water tank during extremely dry years, however, no testimony was offered as
4 to such use prior to 1917.

5 The spring located in the N $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ near Hayward Road is used for riparian
6 stock water and during early spring and late fall to supply one or two lawn
7 sprinklers near the homes which are located in the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 28,
8 T. 19 N., R 17 E.W.M.. All of the field irrigation within this ownership is
9 accomplished via a gravity flow sprinkler system with the KRD canal as the water
10 source.

11 On June 28, 1974, David E. Holmquist and Gerald Reed, et. ux., filed Water
12 Right Claim (WRC) No. 143464 with Ecology pursuant to the requirements of RCW
13 90.14. The short form claim indicates that the source of water is ground water
14 from a "sump". The purposes of use claimed are stock water and irrigation.
15 Because the "short form" was used there is no information about the location of the
16 source being used, nor is there any specifics about the quantity of water claimed
17 and date of first water use. Mr. Tonseth testified to his belief Mr. Holmquist
18 intended to file WRC No. 143464 for springs, not ground water, and that he probably
19 had in mind the irrigation use for the houses. The limited facts contained in WRC
20 No. 143464 do not lead the Referee to that conclusion.

21 Mr. Holmquist and Mr. Reed filed a second claim, No. 143465, on the same day.
22 This claim identifies a spring and/or stream as the source for irrigation of 10
23 acres and stock water. The point of diversion is described as being 2,100 feet
24 west and 500 feet south from the northeast corner of Section 28, being within the
25

1 NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of said section. Water use was described as being within portions of the
2 NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, T. 19 N., R. 17 E.W.M..

3 WRC No. 143465 seems to describe the spring lying westerly of the highway
4 within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28. Mr. Tonseth testified that use of this spring
5 was primarily riparian stock water, although during extremely dry years a stock
6 tank had been taken to a pipe under the highway where it could be filled to ensure
7 stock water access. No historic use evidence was presented regarding that
8 practice. Testimony was presented that up to 140 head of cattle had been watered
9 via this technique a few times.

10 Two other Water Right Claims, Nos. 152107 and 152108, were filed with Ecology
11 on June 27, 1974 by Clayton C. Denman. Both claims indicate the sources are
12 unnamed springs in the general vicinity of the property depicted in exhibit SE-2
13 for Court Claim No. 02259 and referred to by Mr. Tonseth as the "upper place". The
14 Referee believes Mr. Tonseth is asserting no right to use any of the springs in the
15 "upper place" for purposes other than riparian stock water covered by the Stock
16 Water Stipulation, therefore, no further effort will be made to interpret WRC
17 Nos. 152107 and 152108.

18 The Referee finds some evidence reflecting very early use of surface water in
19 the vicinity of Court Claim No. 02259, however, there are records and facts lacking
20 for a definitive quantification of any diversionary water right. The record
21 contains no chain of title documents upon which a priority date could be based.
22 Exhibit DE-93 provides a date of 1886 for homestead entry by Gustave Huhn, but
23 there is no patent document upon which the linkage to a specific parcel of land can
24 be based.

25
26
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28 Re: Subbasin No. 4

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1 Judging from testimony by Mr. Tonseth, the irrigation source for nearly the
2 entire parcel of land is the Kittitas Reclamation District (KRD) and has been for
3 many years. Even though the record shows an ability to capture both spring water
4 and seepage from the KRD, little of the record deals with the volume which would
5 realistically be available without the contribution from the KRD. Mr. Tonseth
6 suggests that there might be enough to run a sprinkler or two near the house.

7 Due to the uncertainty as to the applicability of the water right claims filed
8 to the sources being used and the limited historical facts, the Referee cannot
9 recommend confirmation of any diversionary right. The use of water by stock via
10 riparian access is adequately covered by the stock water stipulation discussed on
11 Page 4 of this report.

12

13 COURT CLAIM NO. 01471 -- Del L. Holter

14 On August 27, 1981, Jacob J. Kirsch filed with the Court a Statement of Claim
15 for use of water from Williams Creek, tributary to Swauk Creek. Jacob J. Kirsch
16 testified at the evidentiary hearing. Mr. Kirsch substituted Del L. Holter as the
17 claimant for Claim No. 01471 on January 17, 1996.

18 During his testimony at the evidentiary hearing, Mr. Kirsch explained that he
19 no longer intended to seek confirmation of a water right on Williams Creek. He
20 amended his claim to reflect an interest in a developed spring/vertical shaft which
21 he constructed during 1951. Mr. Kirsch testified that Surface Water Certificate
22 No. 8286, which issued in November of 1961, is the basis for his claim. SWC
23 No. 8286 authorized the use of 0.01 cfs for domestic supply and 0.03 cfs for mining
24 with a priority date of July 19, 1960. There are several issues which the Referee
25 must deal with before it is possible to quantify any surface water right which may

26

27 REPORT OF REFEREE
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1 exist based on SWC No. 8286. Mr. Kirsch presented evidence to the court which
2 leads the Referee to believe that the excavation completed by Mr. Kirsch in 1951
3 was, in fact, a shallow well, dug to bedrock, in a dry draw. Water is said to
4 stand in the completed shaft seven feet below land surface and a trench down to
5 bedrock was necessary in order to lay a gravity flow pipe downhill from the shaft.
6 Rights to the use of ground water are not being determined in this proceeding.

7 Mr. Kirsch reported to the Court that beginning in 1951 he used water for his
8 mine and cabin. By 1985 Mr. Kirsch had sold mining fractions to Jack Pickard,
9 George Roach, Calvin Arndt, Charles Liercke, and William Drager along with water
10 use from the system associated with Surface Water Certificate No. 8286. The record
11 is silent as to how many domestic supplies were intended to be included under SWC
12 No. 8286. Mr. Kirsch is seeking a right for domestic supply for six cabins, along
13 with mining. Surface water certificates issued by the predecessor to the
14 Department of Ecology during the early 1960s typically did not contain quantities
15 for total acre-feet per year. During the current general adjudication proceedings
16 each claimed water right is expected to have a limit recommended for acre-feet per
17 year. Water used for mining and cabins is frequently seasonal, however, the
18 existing record does not provide facts upon which the Referee can make a decision.

19 Finally, SWC No. 8286 is appurtenant to the following parcel of land:

20 All of that portion of Black Jack Placer Mine, designated as Survey
21 No. 1203, located in the $SE\frac{1}{4}SW\frac{1}{4}SW\frac{1}{4}SE\frac{1}{4}$ of Section 2, T. 20 N., R. 17
22 E.W.M. which is described as follows: Commencing at corner No. 1,
23 from which the south quarter corner of said section bears south
46°29' east 421.22 feet distant, and running thence north 16°25' west
24 599.5 feet to corner No. 2; thence north 63°25' east 727.3 feet;
25 thence southerly to a point in the southerly boundary line which is
702 feet northeasterly from corner No. 1, measured along said south
boundary line; and thence south 62°15' west, along said south
boundary line, 702 feet to the point of beginning. EXCEPT: 1.
Easement for right-of-way for logging railway over a strip 75 feet in

1 width, conveyed to Cascade Lumber Company by 57 of Deeds, page 11.
2 2. Easement for county road as conveyed by 58 of Deeds, page 384.

3 It is not clear from the record whether all six of the domestics and the
4 mining use are located within the referenced parcel and how many of those uses
5 are active.

6 After carefully considering the record, the Referee cannot recommend that
7 a surface water right be confirmed primarily because the source appears to be
8 ground water, rather than surface water. Even if the source were determined to
9 be surface water, facts are needed for quantification of the right. The
10 Referee cannot recommend that a right be confirmed under SWC No. 8286 for
11 domestic services added after the 1985 sale of mining shares by Mr. Kirsch.

12 The Referee recommends that the Department of Ecology issue a Superseding
13 Certificate under No. 8286 to reflect ground water as the source.

14
15 COURT CLAIM NO. 01848 -- Nancy D. Horst
 & Russell B. Moye

16 On August 3, 1981, Nancy D. Horst filed a Statement of Claim with the Court on
17 behalf of herself and Russell B. Moye. The claim asserts a water right under the
18 riparian doctrine for use of water from Swauk Creek for household purposes. The
19 claim does not contain a legal description, point of diversion, or quantities
20 claimed (beyond the term "minimal").

21 Mr. Moye appeared at the evidentiary hearing, presented copies of deeds for
22 the record, and testified regarding his knowledge of water use on the property.
23 Three deeds describe tracts of land lying within the N $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15,
24 T. 20 N., R. 17 E.W.M. Exhibits DE-66 and DE-67 describe parcels sold by Avis M.
25 Eastwood to Russell and Jane Moye, and Rex and Lenora Kelly during 1959-60. The

1 tract of land described in DE-66 is not riparian to Swauk Creek, however, the tract
2 described in DE-67 is riparian to the creek. The record does not contain
3 information regarding how and when these properties separated from public
4 ownership. Mr. Moye's testimony was clear that during his years associated with
5 the property the only use of Swauk Creek water has been an occasional bucket dipped
6 from the creek for domestic use at the family cabins. The normal source of water
7 for the domestic supplies has been, and still is, a well (since the early 1960s).

8 Water Right Claim (WRC) No. 161174 was filed with the Department of Ecology on
9 June 13, 1974, in compliance with RCW 90.14, by Nancy Horst and Russell Moye. The
10 legal description for the place of use provided matches the legal description on
11 the deed identified as exhibit DE-68. WRC No. 161174 is a short form claim
12 asserting a water right to Swauk Creek for domestic supply, stock water, and
13 irrigation. Mr. Moye testified that since at least 1960, there has been no stock
14 water used on the property nor irrigation.

15 The primary source of water for the Horst and Moye property is a well adjacent
16 to Swauk Creek. Although there may be considerable continuity between the water in
17 the well and Swauk Creek, the source of that water supply is, by definition, ground
18 water. Ground water sources are not included in the general adjudication
19 proceedings for the Yakima River Basin.

20 Lacking a record which provides facts about the early development of the
21 property and the 35 years since 1959 when only buckets of creek water have been
22 dipped, the Referee cannot recommend confirmation of a diversionary water right for
23 Claim No. 01848.

24 As a matter of long standing practice, the Department of Ecology and its
25 predecessor agencies have ruled that water rights for riparian non-diversionary

1 uses, including the human uses commonly referred to as "Dipper Rights", do not
2 require a water right permit or certificate. It is acknowledged that intermittent
3 riparian uses by humans has occurred in the Swauk Creek basin since long before
4 recorded history.

5

6 COURT CLAIM NO. 05284 -- Peggy E. Hunt
7 Wallace M. Stampfly
8 Phyllis J. Stampfly
Randall J. Stampfly

9 On May 1, 1990, Peggy E. Hunt filed Claim No. 05284 with the Court asserting
10 water rights to Reecer Creek and First Creek. On June 8, 1990, the Court approved
11 further processing of the claim. On November 22, 1994, Phyllis J. Stampfly,
12 Wallace M. Stampfly, and Randall J. Stampfly were joined as additional parties to
13 Claim No. 05284.

14 The place of use indicated by Claim No. 05284 is the NE $\frac{1}{4}$ of Section 33,
15 T. 19 N., R. 18 E.W.M. On June 26, 1974, Gerald Hunt filed with the Department of
16 Ecology Water Right Claim (WRC) No. 131522 in response to the requirements of
17 Chapter 90.14 RCW, The Claims Registration Act. WRC No. 131522 asserts a water
18 right to Reecer Creek in the quantity of 0.75 cfs for the irrigation of 280 acres
19 within the E $\frac{1}{2}$ E $\frac{1}{2}$ of Section 33, T. 19 N., R. 18 E.W.M..

20 The use of Reecer Creek water for this property was addressed during the
21 evidentiary hearing for Subbasin No. 7. A water right was recommended by the
22 Referee for confirmation in the quantities of 0.75 cfs; 126 acre-feet per year for
23 the irrigation of 75 acres, with a priority date of June 30, 1878.

24 Wayne C. Hunt appeared in behalf of Peggy E. Hunt (his mother) at the Subbasin
25 No. 4 evidentiary hearing and testified as to water use on the NE $\frac{1}{4}$ of Section 33,

1 T. 19 N., R. 18 E.W.M.. Although Wayne Hunt testified that water use for stock
2 water and irrigation pre-dated 1900, he had no personal knowledge to support that
3 testimony and presented no documents which would allow establishment of a priority
4 date or quantification of the historic uses.

5 Mr. Hunt testified that the NE $\frac{1}{4}$ of Section 33 had access to tail water/waste
6 water originating from use of First Creek water on lands served by the First Creek
7 Water Users Association (FCWUA). That organization's members own and irrigate land
8 north and west of the Peggy Hunt property. The waste water (return flow) in
9 question is carried in ditches and is said to have originated from First Creek in
10 Subbasin No. 4. The Hunt property in the NE $\frac{1}{4}$ of Section 33 is not riparian to
11 First Creek. It also is not included within the service area of the FCWUA nor was
12 a Water Right Claim filed in response to RCW 90.14 (Water Rights Claim Registration
13 Act) for use of First Creek water within the NE $\frac{1}{4}$ of Section 33, T. 19 N., R. 18
14 E.W.M.. Any return flow (or "waste") water resulting from the importing and use of
15 First Creek water would be foreign return flow which has been previously addressed
16 by the Court, see discussion on Page 5 of this report.

17 No claim to water from local seasonal runoff was presented by Peggy Hunt
18 during the Subbasin No. 7 hearing, although Wayne Hunt referred, during his
19 testimony for Subbasin No. 4, to local runoff water being collected in Section 28
20 along with First Creek tail water.

21 The Referee cannot recommend confirmation of a water right for any use of
22 First Creek water under Claim No. 05318. Although the property may have made
23 beneficial use of water entering the property for many years, there is no legal
24 basis upon which a right can be confirmed.

1
2 COURT CLAIM NO. 01271 -- Helen R. Kirk
3 & The Estate of Paul H. Kirk

4 On August 25, 1981, Paul H. and Helen R. Kirk filed Statement of Claim
5 No. 01271 with the Court. The Kirks assert a right to use .01 cfs from two springs
6 for a single domestic supply. The claim refers to Surface Water Certificate
7 No. 11210, as amended by Certificate of Change recorded in Volume 1-4, Page 190, as
8 the basis for their claimed water right. There was no appearance at the
9 evidentiary hearing in support of this claim.

10 Lacking a record to evaluate for Claim No. 01271, the Referee cannot recommend
11 confirmation of a water right. Claim No. 01479, filed by George E. and Natus C.
12 Fahey and Mr. and Mrs. Marlyn Bateman, involves the same water system and place of
13 use. George Fahey and Paul Kirk sold the property to Marlyn Bateman and his wife.
14 See Page 54 for a discussion of Claim No. 01479.

15
16 COURT CLAIM NO. 00163 -- Timothy M. Knoll

17 A Statement of Claim was submitted by Timothy M. Knoll for the use of water
18 from Williams Creek for irrigation and mining. Mr. Knoll stated in his claim that
19 17 of the 25 acres he claimed rights for are owned by his brother, Fred Knoll.
20 Neither of the Knolls appeared at the evidentiary hearing to present testimony in
21 support of this claim. Therefore, the Referee cannot recommend confirmation of a
22 water right under Court Claim No. 00163. Although the Department of Ecology via
23 its "Plaintiff's Report to the Referee" recommends that the non-diversionary Stock
24 Water and Wildlife Stipulation applies to the Knoll property, the Referee declines
25 to agree with that recommendation. Mr. Knoll did not assert a right for stock
26 water in Claim No. 00163. In addition, nothing contained in the record clearly

1 establishes that stock grazing on the Knoll property have riparian access to a
2 natural surface water source.

3 Should Mr. Knoll or his brother wish to pursue this claim during the exception
4 phase of this proceeding, they should be prepared to present evidence that a water
5 right was perfected by use before June, 1917. The use would also need to be
6 documented by a water right claim filed with the Department of Ecology between 1969
7 and June 30, 1974 pursuant to Revised Code of Washington 90.14, or via a permit or
8 certificate issued by the Department of Ecology or a predecessor agency.

9 Water Right Claims 000599, 000600, and 097175 filed by George L. Johnson make
10 reference to the mining claims Louis Quetsch Placer, Big Nugget Placer, Gold Bar
11 Placer, Fourth of July Placer, and Jumbo Placer. If Mr. Knoll elects to pursue
12 Claim No. 00163 it would be advisable for him to carefully evaluate the referenced
13 Water Right Claims for applicability to his property, and to be prepared to clarify
14 use of water by livestock grazing on the property.

15
16 COURT CLAIM NO. 06626 -- Lavinal Corporation

17 On October 11, 1991, Gerald Sweeney (President) filed Statement of Claim with
18 the Court in behalf of the Lavinal Corporation. The claim asserts a water right to
19 Swauk Creek in the amount of 100 gpm for placer mining. On November 14, 1991, the
20 Court signed an Order approving further processing of Claim No. 06626 by the
21 Referee. Due to the late filing of this claim, a site inspection was not conducted
22 by Ecology field staff. Mr. Sweeney appeared at the evidentiary hearing and
23 testified regarding Claim No. 06626 in behalf of Lavinal Corporation.

24 The transmittal letter attached to Court Claim No. 06626 contains a
25 description of the property (the $S\frac{3}{4}SE\frac{1}{4}SE\frac{1}{4}$ of Section 3, T. 20 N., R. 17 E.W.M.)

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27 REPORT OF REFEREE
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1 asserted to be the place of use of water, but does not contain a description of the
2 point of diversion on Swauk Creek other than "within property boundary". The land
3 is riparian to Swauk Creek. The mining claim patent submitted with Claim No. 06626
4 has been used to evaluate the ownership history of the property since no exhibits
5 were offered during the evidentiary hearing. It is clear that efforts were taken
6 to separate the Ben Hur, Sioux, Comanche, and Pawnee mining claims from the public
7 domain before 1917. The Federal government issued a patent dated May 7, 1918 to
8 William T. Burcham, Frank Kerstetter, Eva Kerstetter, and Anna Burcham which
9 includes the Lavinal Corporation property.

10 The only RCW 90.14 Water Right Claim (WRC) in the record applicable to the
11 claimant's property is WRC 136707 filed by Clifford W. Burcham, asserting a right
12 to use water from Williams Creek within the S $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ and the S $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$, all in
13 Section 3, T. 20 N., R. 17 E.W.M.. However, Lavinal Corporation is not asserting a
14 right to Williams Creek.

15 Two water right claims forms were submitted by Lavinal Corporation with Court
16 Claim No. 06626, but appear to be unrecorded with the Department of Ecology. There
17 are no numbers assigned to the claims and the Ecology exhibit containing recorded
18 water right claims does not include those claims.

19 The record, as it currently stands, concentrates on anticipated future water
20 uses and/or existing use of ground water as opposed to documenting historic uses of
21 surface water. Lacking evidence upon which to evaluate any historic surface water
22 use and the uncertainty surrounding a water right claim for Swauk Creek, the
23 Referee cannot recommend confirmation of a water right as asserted under Court
24 Claim No. 06626.

1

2 COURT CLAIM NO. 01738 -- Liberty Townsite

3 Henrietta Fackler filed Claim No. 01738 with the Court in behalf of Liberty
4 Townsite and provided testimony at the evidentiary hearing in support of the claim.
5 The claim is for water diverted from Williams Creek, tributary to Swauk Creek, via
6 a gravity flow ditch. The stated purposes of use include mining and domestic
7 supply, including lawns and gardens, for 20 homes sites within a 17-acre townsite.
8 The water right is claimed with a date of first use of May 1, 1884, under the Prior
9 Appropriation Doctrine.

10 Two Water Right Claims were filed with the Department of Ecology, pursuant to
11 RCW 90.14, during late-1974 which are applicable to the Liberty Townsite. Water
12 Right Claim No. 124012 was filed by Ralph Fackler in behalf of the people of the
13 townsite, and Water Right Claim No. 150276 was filed by Wesley Engstrom for his
14 parcel within the townsite. Ralph Fackler claimed 1,500 gpm; 279 acre-feet per
15 year from Williams Creek for irrigation of 20 acres and operation of an arrastra.
16 The season of use claimed is May 1 through November 30 each year.

17 Wesley Engstrom's Claim No. 150276 asserts a right to use 120 gpm; 96
18 acre-feet per year for domestic supply, garden irrigation, fire protection, and
19 milling from Williams Creek via a ditch (Liberty Townsite ditch), beginning in the
20 SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, T. 20 N., R. 17 E.W.M.

21 The evidence presented clearly reflects a very long history of water use
22 beginning on May 1, 1884, via the Liberty Townsite ditch. Use of water includes
23 domestic supply, lawn and garden irrigation, mining, and fire protection. Although
24 stock watering is discussed, it appears that the small parcels and character of the
25 land use does not allow for maintaining stock within the townsite. Irrigation for
26

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1 other than a few small gardens or lawns is not a historic practice within the
2 townsite.

3 The record contains references to various physical distribution components,
4 i.e., earthen ditch, aluminum pipeline, and buried fire protection system, etc.
5 Exhibit DE-56 contains notations which indicate that wells and a system of buried
6 pipelines supply domestic water to the townsite.

7 Without arbitrarily arriving at quantities reflecting historic use and current
8 use, the Referee cannot recommend confirmation of a water right for the Liberty
9 Townsite. Testimony regarding the system capacity and use patterns is necessary to
10 complete the record.

11

12 COURT CLAIM NO. 00348 -- Dennis Mickens
13 & Georgiana Mickens
14 Deral S. Morrow
15 & Wilma J. Morrow
16 U.S. Bureau of Land Management

17 On May 5, 1980, Melvin A. and Gladys G. Wallick filed with the Court Statement
18 of Claim No. 00348. The Wallicks claimed water from two unnamed springs, tributary
19 to Deer Creek, and Deer Creek. The purposes of use include domestic supply and
20 irrigation of 30 acres. The claimed water right is based upon Surface Water
21 Certificate No. 10415. On January 19, 1989, the Court granted a motion to
22 substitute Dennis and Georgiana Mickens with 50 percent interest, Deral S. and
23 Wilma J. Morrow with 30 percent interest, and Joann Sullivan with 20 percent
24 interest in Claim No. 00348. Both Mr. and Mrs. Wallick and Joann Sullivan filed
25 with the Court motions to substitute parties to reflect succession of the Sullivan
interest in Claim No. 00348 to the United States Bureau of Land Management (USBLM).
On August 1, 1991 and June 11, 1993, Orders of Substitution were signed. Georgiana

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27 REPORT OF REFEREE
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1 Mickens was the only party to Claim No. 00348 that testified at the evidentiary
2 hearing.

3 No record having been presented to the Court regarding claimants USBLM, Melvin
4 and Gladys Wallick, and Deral and Wilma Morrow interest in Claim No. 00348, the
5 Referee cannot recommend confirmation of a water right to their respective portions
6 of the property. The attorney of record for the United States, Charles O'Connell,
7 advised counsel for the Department of Ecology (Ecology) that the USBLM had no
8 interest in asserting a claim to any water for their lands within Subbasin 4.

9 Georgiana Mickens appeared and testified regarding Claim No. 00348. The
10 original property owned by the Wallicks was sold in four parcels. Of the four
11 parcels the Mickens bought two, including the place of use for all of the actively
12 used water supplies. Testimony supplied by Georgiana Mickens established that no
13 use of water had been perfected on the Morrow parcel. Ecology field inspectors
14 confirmed that information as set forth in exhibit SE-32. The Morrows failure to
15 appear is consistent with the lack of a perfected water right for their parcel.

16 Surface Water Certificate No. 10415 issued to Melvin Wallick for domestic
17 supply and irrigation of 30 acres. The priority date for that state-granted water
18 right is July 24, 1963. In 1975, Dennis and Georgiana Mickens purchased from the
19 Wallicks approximately 76 acres. The land they purchased included the place of use
20 for the domestic use and the entire 30 acre hay field which had been irrigated.
21 Testimony provided by Georgiana Mickens and observations of the Department of
22 Ecology field investigators provide facts upon which the Referee can define the
23 existing water right associated with SWC No. 10415. The acres irrigated have been
24 reduced by the Mickenses to 25 and the season of use has been reduced to the period
25 May 1 through June 15. Flow in Deer Creek has greatly diminished since 1981 due to
26

1 logging activities in the drainage basin. In fact, Georgiana Mickens testified
2 that between 1981 and 1990 there was insufficient water to run their irrigation
3 system. If the system were operated for six weeks at the authorized quantity of
4 .60 cfs, a total of 54 acre-feet would be applied to the 25 acre hay field. It
5 seems more likely that the creek will not sustain that flow except in an
6 extraordinary wet year when irrigation may be unnecessary.

7 Taking the total record into account, the Referee recommends that the
8 irrigation right should be confirmed for .60 cfs; 25 acre-feet per year for the
9 irrigation of 25 acres from May 1 through June 15. Domestic use for a home and
10 farmstead has been perfected and is currently in use year around in the quantity of
11 .02 cfs, 1 acre-foot per year for domestic supply. Georgiana Mickens testified
12 that no irrigation is attempted with spring water due to the limited quantity of
13 water available. The place of use for the 25 acres of irrigation is the $SE\frac{1}{4}SE\frac{1}{4}NE\frac{1}{4}$
14 of Section 10 and the $W\frac{1}{2}SW\frac{1}{4}NW\frac{1}{4}$ of Section 11, both being within T. 20 N., R. 17
15 E.W.M.. The point of diversion on Deer Creek is 1,000 feet south and 800 feet east
16 from the center of Section 11, being within the $NW\frac{1}{4}SE\frac{1}{4}$ of Section 11,
17 T. 20 N., R. 17 E.W.M..

18 The place of use for the domestic supply and farmstead is the $S\frac{1}{2}S\frac{1}{2}SW\frac{1}{4}NW\frac{1}{4}$ of
19 Section 11, T. 20 N., R. 17 E.W.M.. The location of the springs is 600 feet north
20 and 400 feet east from the southwest corner of Section 11 for the primary domestic
21 spring which lies within the $SW\frac{1}{4}SW\frac{1}{4}$ of Section 11, T. 20 N., R. 17 E.W.M.; the
22 backup domestic spring is located 100 feet north and 500 feet east from the $W\frac{1}{4}$
23 corner of Section 11, being within the $SW\frac{1}{4}NW\frac{1}{4}$ of Section 11, T. 20 N., R. 17
24 E.W.M..

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1 Use of water for a few head of stock around the farmstead is incidental to the
2 domestic supply. The primary source of stock water is riparian access of the
3 animals to various springs and Deer Creek. The stock water and wildlife water
4 stipulation as set forth in detail on Page 4 of this report is, therefore,
5 applicable to the Mickenses property.

7 COURT CLAIM NO. 00576A -- Frank Oechsner
8 Paul Weaver
8 & Florence A. Weaver

9 On March 5, 1981, Frank Oechsner filed with the Court Statement of Claim
10 No. 00576A which asserts a right to surface water from unknown sources. Mr.
11 Oechsner's attorney, John Gilreath, appeared in his behalf at the Subbasin 4
12 evidentiary hearing. Mr. Oechsner was unable to appear as he was in the hospital.
13 On October 12, 1994, Paul and Florence A. Weaver were joined to the claim.

14 Mr. Gilreath clarified the place of use description for Claim No. 00576A such
15 that it reflects the E $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 32, T. 19 N., R. 18 E.W.M.. He also restated
16 for the record that Mr. Oechsner was claiming only diversionary stock water from
17 Subbasin No. 4 sources and not irrigation. Due to the location of the E $\frac{1}{2}$ NE $\frac{1}{4}$ of
18 Section 32, T. 19 N., R. 18 E.W.M. within Subbasin No. 7 (Reecer Cr.), Claim
19 No. 00576A was heard during that evidentiary hearing. Although Mr. Oechsner
20 offered no testimony during his appearance in the Subbasin No. 7 evidentiary
21 hearing as to the origin of the water in the unnamed stream, Mr. Gilreath agreed
22 with the Department of Ecology's field examination report which describes the
23 origin as First Creek. The field examiners reported that the water was waste water
24 from the First Creek Water Users Association (FCWUA); however, Mr. Gilreath did not
25 believe it was waste water. His position was that the source was surface water and

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1 that it was most likely from First Creek in Subbasin No. 4. The Referee did not
2 confirm a water right to water originating within Subbasin 7 due to lack of
3 evidence, lack of a Water Right Claim (RCW 90.14), and lack of historic use
4 testimony.

5 It appears from the record that there are two possibilities for the origin of
6 the surface water Mr. Oechsner uses for his cattle watering. The first would be
7 diversion of water from First Creek specifically for beneficial use within the
8 E $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 32, T. 19 N., R. 18 E.W.M.. No RCW 90.14 Water Right Claim was
9 filed describing such a diversion and use. There is also no factual record upon
10 which to base such a contention.

11 The second possibility is that the FCWUA rights cover the use of First Creek
12 water by Frank Oechsner. In response to RCW 90.14 requirements the FCWUA filed
13 Water Right Claim No. 118926 in behalf of their water user members. The claim
14 asserts a right to 1500 miners inches (30 cfs) of the waters of First Creek for
15 irrigation of member lands and associated stock water. The E $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 32,
16 T. 19 N., R. 18 E.W.M. is not within the described service area of the FCWUA nor is
17 Mr. Oechsner claiming to be a member. He testified simply that "the surface water
18 comes from Jack White" (a FCWUA member). The field examiner's report explains that
19 Jack White exclusively utilizes water from First Creek to irrigate his fields in
20 Sections 20 and 29, T. 19 N., R. 18 E.W.M. and that the return flow water from
21 those fields drains to a common point near the southeast corner of Section 29. Mr.
22 Oechsner diverts his stock water at or near his northeast property corner from the
23 ditch leaving the Jack White property. The KRD canal forms the south boundary of
24 the White property and is approximately 200 yards north of the NE $\frac{1}{4}$ of Section 32.

Based upon the existing record, Mr. Oechsner seems to be utilizing foreign return flow water which originates either from the KRD canal and/or the FCWUA ditch (from First Creek). As discussed on Page 5 of this report, water rights cannot be confirmed for the use of foreign return flows.

The record does not provide a basis upon which the Referee can recommend confirmation of a water right for water originating from First Creek for diversionary stock water.

9 COURT CLAIM NO. 05318 -- Carolyn Ann Olson

10 On May 11, 1990, Carolyn Ann Hunt filed a late Statement of Claim No. 05318
11 with the court in behalf of herself and the Estate of Gerald C. Hunt. On
12 June 8, 1990, the Court entered an Order affirming the petition by Carolyn Hunt for
13 admission as a late claimant. Ms. Hunt has remarried, thus the claim is now under
14 Carolyn Hunt Olson.

15 Claim No. 05318 asserts rights to water from Reecer Creek, unnamed ponds, and
16 First Creek. Carolyn Olson withdrew her assertion as to water from Reecer Creek
17 and use of water from the four ponds for non-diversionary stock water was addressed
18 in the Referee's Report for Subbasin No. 7. First Creek is a tributary to Swauk
19 Creek in Subbasin No. 4, therefore, that portion of Claim No. 05318 relating to
20 stock water and irrigation accomplished by diverting First Creek water is being
21 addressed in this report.

22 Carolyn Olson testified at the evidentiary hearing for Subbasin No. 4 and
23 offered exhibits which clearly depict the physical location of ditches which enter
24 her land from the north and west boundaries of the property. The ditch on the west
25 is a lateral utilized by the Kittitas Reclamation District (KRD) to distribute

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1 water. Carolyn Olson testified that her interest in First Creek water delivered
2 via that lateral is for stock water available during the non-irrigation season
3 (when the Kittitas Reclamation District is not running water through the lateral).
4 First Creek water is reported to be run into the lateral during the non-irrigation
5 season and subsequently runs south through the Olson property.

6 Irrigation water to serve approximately 55 acres is diverted from the two
7 ditches which enter the Olson property at points No. 2 and No. 3 along the north
8 property line, as depicted upon Exhibit DE-69. Mrs. Olson testified that the water
9 in those ditches was either excess First Creek water and/or waste water from
10 property within Sections 28 and 29.

11 Testimony relative to the volume and/or quantity of water available for use
12 was limited to statements that the flow varies in relation to activities of
13 up-slope irrigators and the weather. Water to satisfy stock water requirements is
14 reported to be available year around.

15 The two ditches entering the property from the north appear to run down
16 shallow natural draws. Mrs. Olson's testimony reflects reliance on water imported
17 from First Creek through the Munson/Wold Ditch by the First Creek Water Users
18 Association (FCWUA) and subsequently allowed by the water users group to flow down
19 drainage outside their respective properties and the FCWUA service area. Carolyn
20 Olson anticipated that Jack White would testify regarding how and why First Creek
21 water is run under the KRD canal and down the KRD lateral to her property in the W½
22 of Section 33 during the non-irrigation season. Mr. White did testify, but not
23 regarding the use of water below his property.

24 The only Water Right Claim entered into the record for the general area of
25 Ms. Olson's property is No. 131522. It was filed with the Department of Ecology on
26

1 June 26, 1974 pursuant to RCW 90.14, by Gerald Hunt. The source of water
2 identified in the Claim is Reecer Creek. Water use was asserted to have occurred
3 within the E $\frac{1}{2}$ E $\frac{1}{2}$ of Section 33, T. 19 N., R. 18 E.W.M.

4 Court Claim No. 05318 filed by Carolyn Olson relates to water use in the W $\frac{1}{2}$ of
5 Section 33, T. 19 N., R. 18 E.W.M. As amended by Carolyn Olson during testimony in
6 both the Subbasin 7 and 4 hearings Claim No. 05318 does not assert a right to use
7 water diverted from Reecer Creek in the W $\frac{1}{2}$ of Section 33, except for stock
8 watering. The record is clear that the W $\frac{1}{2}$ of Section 33 is not located within the
9 service area of the FCWUA nor is that parcel of land included in Water Right Claim
10 No. 118926 filed by the FCWUA. The 280 acre Olson parcel located within the W $\frac{1}{2}$ of
11 Section 33, T. 19 N., R. 18 E.W.M. has access to Kittitas Reclamation District
12 water as a patron of that district.

13 The water that enters the Carolyn Olson property at points described as
14 numbers 1, 2, and 3 on Exhibit DE-69 and via testimony has been characterized as
15 excess or waste water from the lands of FCWUA members. Water diverted from First
16 Creek and carried via the Munson-Wold Ditch from Subbasin No. 4 into Subbasin No. 7
17 is imported or foreign water in Subbasin 7. Return flows (waste water, excess
18 water, etc.) which is the result of the application of imported water is generally
19 referred to as foreign return flows. Mrs. Olson did not provide historic
20 information regarding use of First Creek water on the property nor the quantities
21 of water upon which a water right could be based. If indeed the only water
22 available to the Carolyn Olson property, excluding any KRD water received as a
23 district patron, is return flow water from the FCWUA ditch, a water right could not
24 be recommended for approval. The discussion presented on page 5 of this report
25 explains the Court's Memorandum Opinion restricting confirmation of water rights
26

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1 for foreign return flow waters. Additionally, there is no water right claim, filed
2 pursuant to RCW 90.14, of record which would preserve for the W $\frac{1}{2}$ of Section 33,
3 T. 19 N., R. 18 E.W.M. interest in a diversionary water right.

4 In summation, the Referee cannot recommend confirmation of a water right under
5 Claim No. 05318 from any source originating within Subbasin No. 4 inclusive of
6 First Creek.

7

8 COURT CLAIM NO. 00189 -- First Interstate Bank of Washington

9 On August 24, 1981, Freda L. Penkert filed Court Claim No. 00189 asserting
10 rights to domestic supply and stock water from three springs. The place of use
11 provided by Freda Penkert includes the NE $\frac{1}{4}$ of Section 31 and the W $\frac{1}{2}$, and N $\frac{1}{2}$ NE $\frac{1}{4}$ of
12 Section 32, all being within T. 20 N., R. 17 E.W.M.. On June 11, 1990, First
13 Interstate Bank of Washington was substituted for Ms. Penkert. First Interstate
14 Bank of Washington is Trustee for the Freda L. Penkert Trust. Attorney Richard T.
15 Cole represented the Freda L. Penkert Trust at the evidentiary hearing. Shirley
16 Nelson, an employee of First Interstate Bank of Washington, appeared to testify
17 regarding Court Claim No. 00189.

18 The chain of title documents indicate that the current holdings of the Freda
19 L. Penkert Trust were acquired over a period of time and via three or four separate
20 purchases. There is no chain of title documentation for the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 32,
21 T. 20 N., R. 17 E.W.M., nor was there a water source or use of water claimed for
22 that 80 acre parcel. Therefore, that parcel will not be addressed further.

23 Freda L. Penkert purchased the NW $\frac{1}{4}$ and the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 32,
24 T. 20 N., R. 17 E.W.M. on August 21, 1933. All of the claimed water sources except
25 the domestic spring currently used are located on that 240 acre parcel. In fact,

1 the three spring areas and the excavated pond are all located within the S $\frac{1}{2}$ NW $\frac{1}{4}$ and
2 the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 32, which was homesteaded by Marion Evans. A patent was
3 issued to Marion Evans by the U.S. Government on February 6, 1899. Two spring
4 areas lying north and east of the farmstead are used by grazing cattle when water
5 is available. There is, and has been, no diversionary use of these two springs,
6 therefore, the stock water stipulation as set forth on page 4 of this report will
7 adequately cover that riparian stock water use.

8 The excavated pond is a man-made structure of relatively modern vintage. It
9 was constructed to capture local runoff water for stock water. No water right will
10 be recommended for use of this pond nor is it a natural source that would be
11 covered by the stock water stipulation. However, it is obvious from exhibit DE-140
12 that the pond is located in an area accessible by cattle.

13 The spring area located 1,200 feet south and 100 feet west of the center of
14 Section 32 has been developed via a vertical concrete culvert set in the spring
15 area with a gravity flow pipeline running south to two stock water tanks located in
16 the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ or NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 32. There was no testimony regarding when
17 the spring area was developed to provide a diversionary source of stock water.
18 Stock do have access to water emanating from the spring area, therefore, the Stock
19 Water Stipulation will be applicable for that use. If the claimant can provide
20 information regarding the early history of this water source, the Referee will
21 reevaluate the claim for possible confirmation of a diversionary stock water right.

22 The NE $\frac{1}{4}$ of Section 31, T. 20 N., R. 17 E.W.M. was purchased by Freda L.
23 Penkert on April 4, 1943. The NE $\frac{1}{4}$ of Section 31 was patented to the Northern
24 Pacific Railway Company (NPRC) by the U.S. Government on May 5, 1896. The NPRC
25 sold via warranty deed the NE $\frac{1}{4}$ of Section 31 to Laura Fielding on January 16, 1907.

1 No testimony was provided as to when the spring in the NE $\frac{1}{4}$ of Section 31 was
2 developed for a domestic supply located in that quarter section. If that use
3 predated December 31, 1932, a riparian right could be recommended. The second
4 matter to consider is the change in the place of use since the Penkerts bought the
5 NE $\frac{1}{4}$ of Section 31 on April 4, 1943. The state field investigation report, exhibit
6 SE-58, establishes that the domestic spring was originally developed to serve a
7 home located within the NE $\frac{1}{4}$ of Section 31. That home was vacant when the Penkerts
8 purchased the property in 1943. The Penkerts subsequently changed the place of use
9 for the spring water to their farmstead located in Section 32. The previous source
10 of water for the farmstead in Section 32 was a well. A change in place of use
11 occurring after June 6, 1917, requires compliance with Chapter 90.03.380 of the
12 Revised Code of Washington (RCW).

13 Three water right claims were filed with Ecology by L.A. Penkert in response
14 to the requirements of the Claims Registration Act, RCW 90.14. WRC No. 067629 was
15 filed on a short form for use of a spring located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 31,
16 T. 20 N., R. 17 E.W.M. for stock water and domestic supply. The place of use
17 described is the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 32, T. 20 N., R. 17 E.W.M.. The Penkert
18 farmstead is located within that 10 acre parcel near the west quarter corner of
19 Section 32. WRC Nos. 067632 and 067633 are also filed on short forms and identify,
20 respectively, a pond and a spring as the water sources for stock water. The place
21 of use for WRC No. 067632 is within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 32 and WRC No. 067633
22 reflects the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 32. Both parcels lie in T. 20 N., R. 17 E.W.M..
23 Mr. Cole also brought to the Court's attention WRC Nos. 011223 and 008565, both of
24 which were filed by the Washington State Department of Natural Resources (DNR) for
25 lands owned by DNR.

1 Due to the lack of testimony regarding use of the spring prior to December 31,
2 1932, and the lack of compliance with RCW 90.03.380, the Referee cannot recommend
3 that a water right be confirmed for use of the spring for a domestic supply. Early
4 water use on the NE $\frac{1}{4}$ of Section 31, T. 20 N., R. 17 E.W.M. is inferred, but
5 testimony was predominantly focused on Section 32. If the claimant elects to file
6 an exception so that additional testimony can be provided, the use of water from
7 this domestic spring for a stock tank should be discussed. Information contained
8 in the field inspector's report, SE-58, suggests that a stock tank is filled from
9 the overflow of the domestic spring. Testimony provided by Ms. Nelson was that no
10 stock water was provided from the domestic spring.

11

12 COURT CLAIM NO. 02057 -- Douglas F. Sanders
13 & Marcia H. Sanders
14 Estate of Lester F. Sanders
& Dollie C. Sanders

15 Douglas F. and Marcia Sanders, and Lester F. and Dollie C. Sanders filed a
16 Statement of Claim with the Court for the use of water diverted from an unnamed
17 spring and an unnamed creek tributary to Hurley Creek. Dollie C. Sanders testified
18 at the evidentiary hearing.

19 The property upon which the claimed use has occurred is the Southern Star
20 Mining Claim, being portions of the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 13 and the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 24
21 of T. 21 N., R. 17 E.W.M.. The Southern Star Mining Claim is not patented property
22 and has not separated from Federal ownership; therefore, water rights could not
23 have been established under the Riparian Doctrine, which relies on separation from
24 the public domain as foundation for any rights.

25 Lester F. and Douglas F. Sanders filed Water Right Claim No. 046101 with the
26 Department of Ecology during late 1973 asserting that first use of water occurred

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1 in 1909. The stated purpose of use is for domestic supply and mining in the
2 quantities of 10 gpm; 16 acre-feet per year from an unnamed spring.

3 Evidence and testimony presented at the hearing indicate that a cabin existed
4 on the mining claim beginning in 1909 until it was demolished during 1969 at the
5 insistence of the US Forest Service. Exhibit DE-9 is the February 17, 1969
6 agreement between the U.S.F.S. and Lester and Dollie Sanders whereby the cabin was
7 to be removed and not replaced. The record indicates no use or, at most,
8 intermittent use via bucket, for domestic water from the unnamed spring has
9 occurred since the land was logged in the late 1960s. The testimony and exhibits
10 indicate that the logging destroyed most of the spring flow.

11 The record also indicates that early mining activity on the property, now
12 called Southern Star Mining Claim, was initiated in 1890 by George Hampton.
13 Physical structures on the property included a mine shaft, a water wheel (relic),
14 and arrastra. No testimony was submitted as to any periods of diversionary water
15 use after 1957.

16 The only water observed on the property on August 9, 1990 by the Department of
17 Ecology field investigators was a small excavated pond with no apparent source
18 feeding it, but some standing water. Ms. Sanders testified that seasonally more
19 water is available, but less than 10 gpm.

20 Ms. Sanders also testified that no attempt to improve the unnamed spring has
21 taken place since the late 1960s because a reliable water source invites unwanted
22 use by hunters and recreationists. Water is apparently used occasionally, by
23 bucket, during the period May through September for non-potable domestic, panning,
24 and ore sampling. Domestic drinking water is hauled to the mining claim.

The evidence establishes that no diversionary water use has occurred on the Southern Star Mining Claim since at least 1969 when the old 1909 vintage cabin was removed and the spring was damaged by logging equipment. The earliest use of water dates to 1890 when Mr. Hampton filed the original mining claim encompassing the same property. No evidence was provided as to the quantities or sources of water which might have served to run the water wheel and arrastra for ore processing. It is also clear that no attempt has been made since well before 1957 to operate any mining operation except exploratory work including panning ore samples. There was no testimony regarding diversionary domestic use.

Having considered the entire record, the Referee cannot recommend confirmation of a water right under Court Claim No. 02057, because no diversionary water use exists.

Although there is a shallow excavated pond on the mining claim it apparently is an interception of shallow occurring ground water and is, therefore, not within the confines of the current surface water general adjudication proceeding.

COURT CLAIM NO. 01278 -- William Siepmann
& Elda Irene Siepmann

On August 26, 1981, William and Elda Irene Siepmann filed Court Claim No. 01278. The Claim asserts a water right for irrigation of 60 acres and stock water from an unnamed spring tributary to Swauk Creek in the amounts of 1.0 cfs and 300 acre-feet per year. The spring diversion is reported to be located within the NW $\frac{1}{4}$ of Section 10, T. 20 N., R. 17 E.W.M.. The claimant's son, Harry H. Siepmann, appeared in behalf of his mother, Elda Irene (Siepmann) Johnston and as heir to the estate of William Siepmann, and testified at the evidentiary hearing. Harry H. Siepmann has not been joined to the claim as a party.

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Offered as exhibits were photographs and copies of early 1900s Water Right Notices. The photos are marked DE-105 through DE-108 and the three Water Right Notices are collectively marked DE-109. Mr. Siepmann's testimony suggests that documents regarding chain of title were already in the Court records. The Referee has carefully checked the files related to Court Claim No. 01278 and has not found chain of title records. The record contains Water Right Claim No. 053745 filed pursuant to RCW 90.14, Ecology's field investigation report, and the exhibits admitted at the hearing.

Although Court Claim No. 01278 identifies a single unnamed spring in Section 10 as the water source, information provided to Ecology's field investigators, and to the Court via testimony by Harry Siepmann adds several other possible sources. The field investigator's report, SE-55, describes the irrigation water as being diverted from an unnamed spring-fed stream at a point 800 feet north and 1300 feet west from the center of Section 15, being within the $SE\frac{1}{4}NW\frac{1}{4}$. The field examiner also describes an unnamed spring located 100 feet north and 400 feet east from the west quarter corner of Section 15. This spring was reported to be supplying water to two homes, including approximately one-half acre of lawn and garden irrigation, and for stock water for up to 25 head of horses within the $W\frac{1}{2}NE\frac{1}{4}SW\frac{1}{4}$ of Section 15.

During his testimony Mr. Siepmann explained that the current irrigation system utilizes water from Wild Cat Gulch. Exhibit DE-109 contains a copy of a Notice of Water Rights filed on June 8, 1903 by George McFry for the $N\frac{1}{2}SW\frac{1}{4}$ and the $S\frac{1}{2}NW\frac{1}{4}$ of Section 15, T. 20 N., R. 17 E.W.M.. That land is now owned by the Siepmann family. The water source and point of diversion are not identified in the notice although it is clear that a ditch was to be utilized to convey 100 inches of water to the

1 Wild Cat Gulch property. Also contained in exhibit DE-109 is a Notice of Water
2 Right dated April 3, 1905 for 100 inches of water diverted from the head of Mill
3 Gulch by George McFry. The place of use for this water is the same as described by
4 Mr. McFry in his 1903 notice.

5 The final document of DE-109 is a Notice of Water Right filed by George McFry
6 on February 20, 1906 for 100 inches of water from a stream. The notice does not
7 describe the source or the point of diversion, although the place of use is
8 provided and is the same parcel described for the two previous notices.

9 Mr. Siepmann testified that a hand-dug ditch collected water from the head of
10 Mill Gulch in Sections 4 and 5 of T. 20 N., R. 17 E.W.M. and ran several miles to
11 the Wild Cat drainage. He explained that only in very dry years would he use water
12 from the upper Mill Gulch ditch to maintain water in the ponds for fire protection.
13 Current irrigation is 40 acres of alfalfa via a gravity ditch system from an
14 unnamed stream and an 8 hp pump with mainline and 26 sprinklers.

15 On December 18, 1973, William H. Siepmann filed with the Department of Ecology
16 a Water Right Claim under the procedures set forth by Chapter 90.14 RCW. Mr.
17 Siepmann elected to file his Claim No. 053745 on a short form. Use of the short
18 form for a surface water source is very significant, since RCW 90.14.051 limits the
19 applicability of short forms to uses consistent with the exemption from permit
20 requirements of RCW 90.44.050. Thus, short form claims can only protect water
21 rights for uses of less than 5,000 gallons per day of water for stock water,
22 domestic supply and less than one-half acre of lawn and/or non-commercial garden
23 irrigation.

24 WRC No. 053745 indicates that water was claimed for domestic supply,
25 irrigation, and stock water from a small stream, emanating from a mountain fissure.

1 The land upon which water was to be used was described as the S $\frac{1}{2}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, and tax
2 4 within Section 15, T. 20 N., R. 17 E.W.M..

3 The record does not contain a water right claim for a diversion from upper
4 Mill Gulch, therefore, any historic claim to a water right from that source has
5 been waived and relinquished, see RCW 90.14.171. The remaining identifiable
6 sources described in Court Claim No. 01278, or the testimony of Harry Siepmann, are
7 the spring-fed stream channel (Wild Cat Creek) and an unnamed spring (the domestic
8 water source).

9 The Referee is not clear to which water source WRC No. 053745 relates.

10 Mr. Siepmann did not testify as to any knowledge regarding his father's intent with
11 that filing and the contents of the form are of little use in clarifying the real
12 intent. In any case, the end result is not favorable for recommending confirmation
13 of water rights. The reasons for those circumstances are several. First, the
14 failure to file a water right claim pursuant to RCW 90.14 for one source or the
15 other would result in relinquishment of any right for that source. If WRC
16 No. 053745 were assumed to refer to Wildcat Creek and the irrigation system, the
17 short form choice severely limits the possible water right that could be confirmed.
18 On the other hand, if WRC No. 053745 refers to the domestic spring there are still
19 unanswered questions as to the date when the area served separated from the public
20 domain and when the spring water was first used for the current (or prior) uses.

21 The consequences of the various deficiencies in the record and lack of water
22 right claims are such that the Referee cannot recommend confirmation of any
23 diversionary water right under Court Claim No. 01278.

24 It appears that a majority of the year the stock water requirements for the
25 property are satisfied by the animals drinking directly from the ponds or stream

1 channels. That type of nondiversionary use is covered by the stock water
2 stipulation discussed on Page 4 of this report.
3

4 COURT CLAIM NO. 00706 -- Karla E. Smith
5 (A)05228 & Richard L. Hall

6 On May 20, 1981, Karla E. Smith filed Claim No. 00706 with the Court. Water
7 was claimed from the Yakima River and delivered through the Cascade Irrigation
8 District canal. The claim asserted a right to divert .50 cfs for irrigation of 39
9 acres and stock water. During April of 1990, Karla E. Smith filed with the Court
10 an amended statement of claim. The amended claim asserts water rights to the
11 Yakima River and an unnamed stream for stock watering only. The priority date
12 claimed is December 28, 1888. Karla E. Smith appeared at the evidentiary hearing
13 and testified in support of the amended claim.

14 In compliance with the requirements of Chapter 90.14 of the Revised Code of
15 Washington, Karla E. and Clifton C. Smith filed a Water Right Claim (WRC) with the
16 Department of Ecology. WRC No. 018455 asserts a water right to use the Yakima
17 River water for irrigation and stock watering. There was no water right claim
18 filed for use of a spring.

19 The unnamed spring cited in amended claim No. (A)05228 and the Yakima River
20 are both accessible by stock grazing on the Smith property and no evidence has been
21 submitted to the Court that diversionary stock water is being claimed.
22 Non-diversionary stock watering is covered by the stock water stipulation discussed
23 on Page 4 of this report, therefore, it is recommended that no additional right be
24 confirmed under Claim No. 00706.
25
26

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1
2 COURT CLAIM NO. 00970 -- Gordon C. Tang
3 01063 & Linda Tang
4 01064
5 01065
6 01066

7 On August 20, 1981, Ralph Charlton, acting as an agent for Gordon C. Tang,
8 filed with the Court five Statements of Claim together with copies of Water Right
9 Claims filed pursuant to RCW 90.14. Mr. Tang appeared at the evidentiary hearing,
10 provided testimony, and offered into evidence exhibit DE-85 (orthophoto maps and
11 Point of Diversion List). Jess Schober, who leased the land from 1947 to 1977,
12 also testified in support of the Tang claims.

13 Mr. Tang used the map which was pre-marked with the assistance of Mr. Schober
14 to show the location of various springs and ponds, since he had limited personal
15 knowledge of several of the water sources. The Swauk Creek diversions are not
16 reflected on DE-85. Mr. Tang bought most of the ranch during 1981 from the Estate
17 of Warren Davis, however, other parcels were purchased during 1984. Warren Davis,
18 the previous owner of the main ranch, died about 1976, five years prior to Mr.
19 Tang's purchase.

20 During his testimony, Mr. Tang amended his court claims to add additional
21 springs and ponds not identified as water sources by Claim Nos. 00970, 01063,
22 01064, 01065, or 01066. Those sources will be discussed after the original five
23 claims have been addressed.

24 Several water right claims (WRC) were filed with the Department of Ecology by
25 Warren J. Davis on June 26, 1974, for lands now owned by the Tangs. The
26 correlation between the Court Claims and Water Right Claims is as follows: Court
27 Claim No. 00970 (Swauk Creek) and WRC No. 130507; Court Claim No. 01063 (spring)

1 and WRC No. 130509; Court Claim No. 01064 (a second spring) and WRC No. 130508;
2 Court Claim No. 01065 (a third spring) and WRC No. 130511; Court Claim No. 01066 (a
3 fourth spring) and WRC No. 130510.

4 Since Mr. Tang's purchase of the ranch up to 300 head of cattle and 7 horses
5 have been pastured on the ranch. According to Mr. Tang's testimony no water has
6 been used on the ranch for irrigation purposes since his purchase in 1981. The
7 previous owner died in 1976 so it seems reasonable to assume that no irrigation has
8 occurred since 1976. Mr. Schober has personal knowledge of the ranch operations
9 since 1947, but provided no testimony regarding irrigation. Court Claim No. 00970
10 states that a 5 hp irrigation pump was installed in 1976 at a point on Swauk Creek
11 located in the SW $\frac{1}{4}$ of Section 17, T. 19 N., R. 17 E.W.M.. The pump location was
12 confirmed by Ecology's inspector.

13 Although components of former irrigation systems are on the ground, no
14 record was established as to when the first use occurred or the most recent use.
15 Mr. Tang did not testify as to specific historic use or to intended future
16 utilization of Swauk Creek water except for riparian stock water.

17 Attached to Claim No. 00970 is a Notice of Appropriation filed by John N.
18 House asserting use of 50 miners inches (1.0 cfs) from Swauk Creek since May 13,
19 1889. Although no chain of title documents were admitted into the record, a
20 statement in the Court claim advises that John House received a patent dated
21 September 21, 1892, for the property described in Claim No. 00970. The point of
22 diversion described in the Notice of Appropriation is approximately 500 feet east
23 of the northwest corner of Section 20, T. 19 N., R. 17 E.W.M. The ditch was
24 described as running easterly approximately 3600 feet to serve irrigation water
25 within the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 20, T. 19 N., R. 17 E.W.M. Court Claim No. 00970

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1 describes two points of diversion from Swauk Creek; (1) within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of
2 Section 17, and (2) within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 20, for a total diversion of
3 4.5 cfs for irrigation of 90 acres and stock water within the SW $\frac{1}{4}$ of Section 17 and
4 the NW $\frac{1}{4}$ of Section 20, T. 19 N., R. 17 E.W.M. There was nothing presented to show
5 where the 90 acres that have been, or will be, irrigated are located within the 320
6 acres described. A rough map (no scale) attached to Claim No. 00970 shows the
7 location of a pump between two points of diversion. According to Claim No. 00970
8 the pump was installed in 1976. An additional statement is as follows, "Since
9 appropriation - location of diversion and use has extended northerly into the
10 adjoining quarter of Section 17".

11 Water Right Claim No. 130507 asserts a right to 2.0 cfs diverted from Swauk
12 Creek at a point within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17, T. 19 N., R. 17 E.W.M. for
13 irrigation of 35 acres and stock water. The described place of use includes the
14 S $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, all within Section 17, T. 19 N., R. 17 E.W.M; and the N $\frac{1}{2}$ N $\frac{1}{2}$
15 of Section 20, T. 19 N., R. 17 E.W.M. There is nothing to indicate where the
16 irrigated 35 acres are within the described 220 acres.

17 There is no testimony or other evidence available to the Referee which could
18 be used to reconcile the differences in points of diversion, place of use, and use
19 of water between that being asserted in this proceeding and the RCW 90.15 claim.
20 In addition, there is essentially no evidence upon which historic use could be
21 determined except the John House Notice of Appropriation for the N $\frac{1}{2}$ NW $\frac{1}{4}$ of
22 Section 20. Lacking a basis upon which a water right quantification and
23 prioritization could be based, the Referee has little choice but to recommend that
24 a right not be confirmed for Claim No. 00970, except as to non-diversionary stock

1 watering from the channel of Swauk Creek, which is covered by the stock water
2 stipulation addressed on Page 4 of this report.

3 Court Claim No. 01063 asserts a right from a spring for stock water, however,
4 the location of the spring is not provided. Water Right Claim No. 130509
5 identifies a spring located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 7, T. 19 N., R. 17 E.W.M.,
6 however, map DE-85 depicts no spring in that portion of Section 7. Both the Court
7 Claim and WRC No. 130509 describe the place of use as in Sections 7 and 16.
8 Sections 7 and 16 are a mile apart and it is unlikely a spring could serve areas
9 that widely separated. It appears there are errors on WRC No. 130509 and Claim
10 No. 01063. State exhibit SE-38 (the State's Investigation Report) states that a
11 spring with a pipeline and stock tank are located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 7,
12 T. 19 N., R. 17 E.W.M., however, no evidence was provided by the claimant to
13 clarify the point of diversion or the place of use. The place of use discrepancy
14 is not addressed in the state's investigation report. No testimony regarding first
15 use or chain of title was offered and the number of stock grazed on the pasture
16 served by the spring was not provided. The confusing record and lack of facts
17 prevent the Referee from recommending confirmation of a right under Claim
18 No. 01063, except for non-diversionary stock watering covered by the stock water
19 stipulation discussed in detail on Page 4 of this report.

20 Court Claim No. 01064 asserts a stock water right on a spring located within
21 the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 17, T. 19 N., R. 17 E.W.M.. WRC No. 130508 seems to describe
22 the same spring and use of water. Exhibit DE-85 has a spring marked on it,
23 however, it is within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 17, not the SE $\frac{1}{4}$ SE $\frac{1}{4}$ as reflected in WRC
24 No 130508 and the Court claim. State exhibit SE-39 agrees with WRC No 130508,
25 placing the point of diversion in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 17 and confirming that at

1 some previous time water had been piped from the spring to stock tanks. The record
2 does not contain information as to the date of first water use or the number of
3 stock grazing within the SE $\frac{1}{4}$ of Section 17, T. 19 N., R. 17 E.W.M. There is also a
4 need to clarify the spring location, as Mr. Tang testified that DE-85 is the
5 correct location for all of his springs. Jess Schober also testified that the
6 spring is located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 17. The Referee cannot recommend
7 confirmation of a right other than non-diversionary stock water covered by the
8 stock water stipulation.

9 Court Claim No. 01065 asserts a stock water right to a spring. No point of
10 diversion is provided in Claim No. 01065, however, the associated WRC No. 130511
11 describes a spring location within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8, T. 19 N., R. 17 E.W.M..
12 State exhibit SE-40 describes the point of diversion as being 1,200 feet north and
13 300 feet east from the center of Section 8. Exhibit DE-85 shows the spring in the
14 NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8 about 600 feet north of the location indicated in SE-40. The
15 record establishes that this spring is undeveloped and accessible by the livestock
16 grazing within the N $\frac{1}{2}$ of Section 8, T. 19 N., R. 17 E.W.M.. Since the use of water
17 for livestock is via riparian access the stock water stipulation as discussed on
18 page 4 of this report adequately covers the use. If additional testimony is
19 offered at a remand hearing it would be advisable for the record to be clarified as
20 to the correct location of the spring.

21 Court Claim No. 01066 asserts a right to water from a spring located in the
22 NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17, T. 19 N., R. 17 E.W.M.. There are remnants of a diversionary
23 stock watering system observed by Ecology's field inspector, however, the pipeline
24 was not functional during the November 14, 1990 field inspection. Livestock have
25 riparian access to the spring area. Lacking testimony regarding the historic and

1 current water use and facts necessary to calculate appropriate quantities, the only
2 alternative is to recognize a non-diversionary use covered by the stock water
3 stipulation.

4 Mr. Tang marked on DE-85 a spring-fed pond located 600 feet east of the center
5 of Section 13, T. 19 N., R. 16 E.W.M.. Livestock have riparian access to this
6 pond. A second spring-fed pond is noted on DE-85 in the center of the SW $\frac{1}{4}$ of
7 Section 7, T. 19 N., R. 17 E.W.M.. Livestock also have riparian access to the
8 second pond. Mr. Tang referred the Referee to a spring marked on DE-85 by a red
9 square with a line drawn to the margin of the map where the notation "Live Spring"
10 is written in red ink. The point depicted on the map is approximately 700 feet
11 south and 350 feet west of the E $\frac{1}{4}$ corner of Section 17 being within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of
12 Section 17. Stock have riparian access to this spring. A stock water spring is
13 also marked on DE-85 in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 20, T. 19 N., R. 17 E.W.M.. This
14 spring is located near the outlet of the Kittitas Reclamation District canal
15 tunnel. Stock have riparian access to this spring. A stock water pond is marked
16 on DE-85 in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, T. 19 N., R. 17 E.W.M. Stock have riparian
17 access to this pond. Mr. Tang testified that all of the red marks on DE-85 reflect
18 water sources used by livestock. There is a marked pond within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of
19 Section 12, T. 19 N., R. 16 E.W.M. which was not discussed during testimony. This
20 pond may be located on property not owned by Mr. Tang, however, it is marked on
21 DE-85. All of the water sources discussed above are accessible by stock grazing
22 the areas surrounding them, therefore, the stock water stipulation covers this use,
23 to the extent that the sources are naturally occurring surface waters.

1
2 COURT CLAIM NO. 01144 -- Carla L. Thomas
3 U. S. Bank of Washington

4 On August 24, 1981, Dorothy Thomas filed Statement of Claim No. 01144 with the
5 Court. On December 26, 1989, the Court granted a motion by U.S. Bank of
6 Washington, trustee for the Estate of Dorothy Thomas, to substitute Carla Thomas and
7 U.S. Bank of Washington for Dorothy Thomas and Peoples National Bank of Washington.

8 A Notice of Appearance in behalf of Carla Thomas and U.S. Bank of Washington
9 was filed with the Court by attorney John P. Gilreath. Carla Thomas appeared at
10 the evidentiary hearing in her own behalf and provided testimony for the record.

11 Ms. Thomas owns all that portion of the SE $\frac{1}{4}$ of Section 9, T. 19 N., R. 17
12 E.W.M., lying easterly of Bettas Road and westerly of Highway 97. She advised the
13 Court that U.S. Bank of Washington had no further interest in the parcel described
14 above as she is the sole owner of the parcel.

15 The exclusive use of water from a spring and spring-fed pond located 1,200
16 feet south and 400 feet west from the E $\frac{1}{4}$ corner of Section 9, T. 19 N., R. 17
17 E.W.M. is for livestock grazing the Thomas property. The stock drink directly from
18 the surface water sources, as do wildlife. The stock water and wildlife
19 stipulations discussed on Page 4 of this report cover non-diversionary stock water
20 uses and no other right is necessary. Therefore, the Referee does not recommend
21 confirmation of any other right under Court Claim No. 01144.

1
2 COURT CLAIM NO. 02267 -- M. Marvin Wallace

3 On September 1, 1981, Claim No. 02267 was filed with the Court. Attorney
4 Michael R. Bauer appeared at the evidentiary hearing in behalf of Mr. Wallace.
5 Robert C. Wallace and Marvin L. Wallace, the claimant's sons, and Richard C. Bain,
6 a consultant hired by the claimant testified at the evidentiary hearing.

7 Court Claim No. 02267 includes nine sources of water, seven being springs, one
8 the Yakima River, and one an unnamed creek. Two of the spring sources are located
9 within Subbasin No. 5, Elk Heights, and will be addressed in the Report of Referee
10 for that subbasin. The property owned by M. Marvin Wallace within Subbasin No. 4
11 encompasses those portions of the E $\frac{1}{2}$ of Section 11, the SW $\frac{1}{4}$ of Section 12, the NW $\frac{1}{4}$
12 of Section 13, and the NE $\frac{1}{4}$ of Section 14, lying northeasterly of the Yakima River
13 in T. 19 N., R. 16 E.W.M..

14 During the registration period for the Water Rights Claims Registration Act
15 Chapter 90.14 RCW, M. Marvin Wallace filed six Water Right Claim (WRC) forms with
16 the Department of Ecology. They were all filed on June 29, 1974. The Water Right
17 Claim Nos. are 140805 for the Yakima River, 140815, 140816, 140817, 140813, and
18 140814, all for unnamed springs. WRC 140813 and 140814 were filed for the springs
19 located in Subbasin No. 5 and will not be addressed in this report.

20 Robert Wallace testified that the content of Exhibit DE-91 contains the chain
21 of title for all of the Wallace property located in Subbasin No. 4, however, it
22 actually is a chain of title for only the NE $\frac{1}{4}$ of Section 14, T. 19 N., R. 16
23 E.W.M., plus a copy of a Warranty Deed from George Dubinsky to M. M. Wallace. The
24 deed, dated April 1, 1964, pertains to several tracts of land both east and west of

1 the Yakima River (Bristol Flats Farm). All of the land lying west of the Yakima
2 River lies in Subbasin No. 5.

3 It appears to the Referee that the Wallace holdings in Subbasin 4 total 700
4 acres more or less. Testimony by Robert Wallace put the irrigated acres within
5 Subbasin No. 4 at 148 and water use beginning around 1894 via a water wheel, wooden
6 flumes, and ditches and continued in a like manner until the early 1960s when M. M.
7 Wallace bought the Dubinsky property. Robert Wallace has personal knowledge from
8 the date of purchase in the early 1960s, but only as to the general effort to
9 irrigate portions of the property. He has not been involved with much actual
10 operational activity.

11 Testimony was provided by Marvin L. Wallace regarding the day to day operation
12 of the farm and irrigation practices, but he provided no detail. His estimate of
13 the irrigated acres was 140 to 142. The water sources claimed are the Yakima
14 River, a creek originating on the Aubrey Hart property to the north, and a spring.
15 Also identified as a source for irrigation of a lawn and garden was a cistern by
16 the house, which appears to be fed by a spring via a gravity flow pipeline.

17 Testimony provided by Richard Bain was almost exclusively related to crop
18 water demand, soil characteristics, field contours reflected on ASCS aerial
19 photographs and existing irrigation equipment. It is noteworthy that no discussion
20 of the pumping capacity of the current system is in the record from any witness,
21 nor was any detail about the historic delivery systems provided. Exhibit DE-89
22 (farm plan view) is generally of very poor quality and is especially compromised
23 due to lack of Section reference points. After reviewing Figure 1 in Mr. Bain's
24 Report (DE-88), it seems apparent that the report includes lands westerly of the
25 Yakima River, which would not be served by diversions in Subbasin No. 4, in the
26

1 acreage total for the Bristol Flat ranch. If that is in fact true the references
2 to 829 gross acres on Figure 1 is explained.

3 There are nine fields identified on Figure 1 of the Bain Report lying
4 northeast of the river, four of which also lie northeasterly of the state highway.
5 Only field No. 7 (northeast of the highway and adjacent to Hart Creek) is discussed
6 directly by Mr. Bain in his report. Mr. Bain apparently included all nine parcels
7 to arrive at the acreage of 138.5. A four acre paddock mentioned in the report is
8 also northeasterly of the highway and may not have been included within the total
9 of 138.5 irrigated acres.

10 The Referee is faced with many questions in analyzing this claim. In order to
11 evaluate the applicability of the Riparian Doctrine, chain of title documents are
12 needed for all of the lands, whereas only documents for the NE $\frac{1}{4}$ of Section 14,
13 T. 19 N., R. 16 E.W.M. are in the record. Although the record establishes early
14 efforts to irrigate portions of the Bristol Flats property, how much, how early,
15 and within which legal subdivisions is unknown. It is not clear whether the water
16 wheel functioned by gravity spill from the wheel into a ditch system or via
17 mechanical linkage to a pump and then to a gravity flow system. In addition, the
18 photograph provided in the Bain Report shows a line shaft turbine pump sitting on
19 top of a well casing. This raises the question of whether the water source for
20 irrigation on the Bristol Flats property is ground water or Yakima River surface
21 water.

22 Due to the lack of adequate evidence the Referee has no choice but to
23 recommend that diversionary water rights not be confirmed from any of the sources.
24 Stock water available via riparian access to the sources is adequately covered by
25 the stock water stipulation discussed on Page 4 of this report.

1
2 COURT CLAIM NO. 00519 -- Robert H. Weaver
3 & Mary B. Shelton
4

5 Paul P. Weaver, on behalf of himself and Mary B. Shelton, filed a Statement of
6 Claim with the Court for the use of water from Williams and Price Creeks. Williams
7 Creek is a tributary to Swauk Creek and Price Creek is a tributary to Williams
8 Creek. The basis of the claimed rights are the Riparian and Appropriative
9 Doctrines. The claimed uses of water are for irrigation, domestic supplies for two
cabins, and stock water.

10 On February 13, 1992, attorney Lawrence E. Martin was associated as council of
record with Richard T. Cole for claimants. Paul P. Weaver is deceased and on
11 March 23, 1992, Robert H. Weaver was joined as an additional party to Claim
12 No. 00519, having succeeded to Paul Weaver's interest in the claim. Robert H.
13 Weaver and Mary B. Shelton were represented during the evidentiary hearing by
Richard T. Cole, and testified at the evidentiary hearing.

14 Their personal knowledge of the property began in the late 1940s as the result
of visits to the property. Robert H. Weaver and Nancy St. George own the S $\frac{1}{2}$ NE $\frac{1}{4}$ and
15 Mary B. Shelton owns the N $\frac{1}{2}$ NE $\frac{1}{4}$, both being within Section 31, T. 21 N., R. 18
16 E.W.M. Up to 50 pair of cattle are seasonally grazed on the NE $\frac{1}{4}$ of Section 31 with
riparian access to the stream channels and to the irrigation ditches.

17 There are two points of diversion (PODs) from Williams Creek for gravity flow
irrigation ditches. The easterly diversion is located 900 feet south and 200 feet
18 east of the northwest corner of Section 32, T. 21 N., R. 18 E.W.M., being within
the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 32. The ditch runs northwesterly approximately 600 feet.
19 The westerly diversion is located 900 feet south and 400 feet west of the northeast
20 corner of Section 32, T. 21 N., R. 18 E.W.M., being within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 32.
21

1 corner of Section 31, T. 21 N., R. 18 E.W.M., being within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of
2 Section 31. The ditch runs northwesterly approximately 850 feet.

3 There are three points of diversion on Price Creek, two of which are for
4 irrigation ditches and one is for the domestic supply for two cabins. The easterly
5 diversion is located 1000 feet west and 600 feet north from the east quarter corner
6 of Section 31, being within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of said section. A ditch runs northerly
7 approximately 150 feet supplying irrigation water to a small meadow west of the
8 ditch. The domestic diversion is located 1100 feet west and 600 feet north of the
9 east quarter corner of Section 31, being within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of said section. A
10 pipeline runs from this POD northwesterly approximately 800 feet to the cabins.
11 Sprinklers are used around the cabins for irrigation to reduce the fire hazard.
12 The remnants of a log cabin are located a short distance from the current cabins
13 and a saw mill was once operated on the property in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 31.
14 The third diversion on Price Creek is located approximately 1250 feet east and 550
15 feet north of the center of Section 31, being within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of said section. A
16 ditch runs northwesterly approximately 450 feet serving a large meadow area lying
17 westerly of the ditch.

18 Claimants assert that approximately 20 acres have been irrigated from Williams
19 Creek at the instantaneous rate of 1.0 cfs via the two ditches described above and
20 25 acres at the instantaneous rate of 2.0 cfs via the described ditches from Price
21 Creek. Mr. Weaver marked on both exhibits, SE-2 (state's Swauk Creek Basin map,
22 inset "A"), and DE-15 (claimant's 1977 aerial photograph of Section 31), the area
23 irrigated. The flows of both Williams and Price Creeks are perennial, however, the
24 flow in both creeks drops to very low levels after snow melt is complete.

25
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27 REPORT OF REFEREE
28 Re: Subbasin No. 4

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1 The Referee has studied the 1977 aerial photograph with the objective of
2 assessing the irrigable acres and the location of the creeks and ditches within the
3 NE $\frac{1}{4}$ of Section 31, T. 21 N., R. 18 E.W.M. The NE $\frac{1}{4}$ of Section 31 is riparian to
4 both Williams and Price Creeks. Most of the E $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 31 was covered by
5 timber in 1977 with small clearings located north of Price and Williams Creeks,
6 respectively. The field contour lines drawn on exhibit DE-15 by Paul Weaver north
7 of Williams Creek depict very small areas which total somewhat less than four
8 acres. The larger of the two areas, the westerly location, is heavily wooded
9 whereas the easterly area is a clearing with a few scattered large trees. The net
10 result is that the irrigated area appears to be no more than an acre or two. The
11 only area identified as being irrigated from Price Creek within the E $\frac{1}{2}$ NE $\frac{1}{4}$ of
12 Section 31 is no more than an acre.

13 The field, located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 31 and lying southwest of the
14 cabins, encompasses six or seven acres as drawn by Paul Weaver on exhibit DE-15.
15 The NE $\frac{1}{4}$ of Section 31, T. 21 N., R. 18 E.W.M. was homesteaded by the Price family.
16 The patent issued on September 26, 1922 to Anna B. Price, as reflected by a copy of
17 that document contained in exhibit DE-14 (chain of title records). In order for
18 there to be a right under the Riparian Doctrine, first steps to sever the land from
19 the public domain had to have begun prior to June 6, 1917, and water used for all
20 the beneficial purposes prior to December 31, 1932. There is no evidence of when
21 steps were first taken to sever the land, other than the patent.

22 Two water right claims were filed with the Department of Ecology (Ecology)
23 pursuant to the requirements of the Revised Code of Washington (RCW) 90.14, by Paul
24 P. Weaver. The property was owned jointly by Paul P. Weaver and his sister, Mary
25 Shelton. Water Right Claim (WRC) No. 125940 was filed for 2.0 cfs from Price Creek

1 for irrigation of 25 acres and stock water in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 31,
2 T. 21 N., R. 18 E.W.M. The described point of diversion is located 2200 feet south
3 adn 1800 feet west of the northeast corner of Section 31, within the SE $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of
4 Section 31. This approximates the location of POD 3 from Price Creek. A large
5 cleared field lies within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 31 and the testimony was that a 6
6 or 7 acre portion of that field is irrigated via a gravity flow ditch from POD 3
7 from Price Creek. A second small ditch from POD 1 is approximately 500 feet
8 upstream on Price Creek from the main ditch. This short ditch is reported to serve
9 a small meadow of about 1 acre north of Price Creek. Neither the second ditch or a
10 diversion for the domestic water system were identified by WRC No. 125940.

11 WRC No. 125941 was filed for 1.0 cfs from Williams Creek for the irrigation of
12 5 acres and stock water in the W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 31, T. 21 N., R. 18 E.W.M.. The
13 described point of diversion is 1800 feet west and 700 feet south of the northeast
14 corner of said section. That point of diversion is within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of
15 Section 31, which is on the north branch of Williams Creek. The testimony about
16 the actual diversion points and place of use conflicts with the water right claim.
17 The two points of diversion and the irrigated areas they reportedly serve are
18 several hundred feet east and on the south branch of Williams Creek.

19 Testimony was presented which suggests that Paul P. Weaver must have made an
20 error in completing both water right claims, in that the E $\frac{1}{2}$ NE $\frac{1}{4}$ was not included as
21 a place of use for irrigation. There was no explanation offered as to the failure
22 to claim a use for domestic supply or to explain the point of diversion
23 discrepancies. Although there is a procedure, RCW 90.14.065, for amending water
24 right claims through the Department of Ecology, no attempt has been made by the
25 claimants to initiate that process. If points of diversion and a use of water has
26

1 been added since the right was established, or the place of water use has been
2 changed since 1917, compliance with the change procedures in RCW 90.03.380 is
3 necessary.

4 The priority dates claimed for both Williams and Price Creeks are somewhat
5 unclear in the record as WRC Nos. 125940 and 125941 assert a date of first use of
6 water in April 1914, whereas a date of September 20, 1915 is asserted in the
7 claimants' summary which was entered as an exhibit. There was no evidence offered
8 to substantiate either of those dates, with the earliest date of water use in the
9 record being the early 1940's. If the first use of water is proven to be either
10 1914 or 1915, the Federal Withdrawal of the Unappropriated Waters of the Yakima
11 River on May 10, 1905 would preclude appropriations without a written release from
12 the United States Bureau of Reclamation. Refer to page 8 of this report for
13 discussion of the Federal withdrawal.

14 The Referee has concluded that the current record does not establish that
15 steps were taken to sever the land from the public domain prior to the Federal
16 withdrawal. In light of the withdrawal, that early severance action would be
17 necessary in order for a right to have been established under the Riparian
18 Doctrine.

19 If the deficiencies in the record discussed above were resolved, the record is
20 both incomplete and contradictory as to quantities of water diverted, annual water
21 duties, and acres irrigated in the various fields. As discussed previously, the
22 disparity between the historic points of diversion and water right claims must be
23 resolved.

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27 REPORT OF REFEREE
28 Re: Subbasin No. 4

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1 In conclusion, the Referee finds that water rights, other than
2 non-diversionary riparian stock water use covered by the stock water stipulation
3 discussed on Page 4, cannot be recommended for confirmation.
4

5 COURT CLAIM NO. 00184 -- John F. Gemmill
6 00823 & Carol D. Gemmill
7 COURT CLAIM NO. 00246 -- Reba Bailey
8 00247
9 (A)01354
10 COURT CLAIM NO. 00375 -- Richard L. Banker
11 & Margaret L. Banker
12 COURT CLAIM NO. 00389 -- Glen W. Christianson
13 & Dorothy Christianson
14 COURT CLAIM NO. 00408 -- Joyce Christianson
15 & Estate of Lyle Christianson
16 Marjorie Christianson
17 COURT CLAIM NO. 00409 -- Marjorie Christianson
18 COURT CLAIM NO. 00589 -- WA State Dept. of Natural Resources
19 (A)00590
20 COURT CLAIM NO. 00803 -- City of Ellensburg
21 COURT CLAIM NO. 01285 -- Frederick C. Porter
22 & Margaret A. Porter
23 COURT CLAIM NO. 01555 -- Miner's Mining, Inc.
24 COURT CLAIM NO. 02027 -- Lyle F.R. Knudson
25 & Ruth M. Knudson
26 COURT CLAIM NO. 02050 -- Wilma Preston
27 02051

28 The above listed claims were filed with the Court asserting rights to use
waters within Subbasin No. 4. There was no appearance at the evidentiary hearing
in support of these claims, therefore, the Referee recommends that diversionary
rights not be confirmed under any of the above listed claims.

1 Claimants With Recommended Non-Diversionary Stock Water And Wildlife Rights

2 Reba Bailey
3 Mr. Marlyn Bateman and Mrs. Marlyn Bateman
Boise Cascade Corporation
4 Sheryle Bonnell
Kenneth A. Braniff and Noreen E. Braniff
5 Pat and Mary Burke
Glenn Burzenski
6 Selma Burzenski
Daniel V. Byrne and Martha Wyckoff Byrne
7 Darrell Clark and Mabel Clark
Robert C. Coe and Josephine W. Coe
8 Columbia Cascade Land Company
First Interstate Bank of Washington
9 Kathy and Ken Fyall
John F. Gemmill
10 John J. Hanson and Lila A. Hanson
Aubrey E. Hart and Blanche M. Hart
11 Donald A. Hartman and Ruth D. Hartman
Kenneth J. Hartman and Ruthie J. Hartman
12 David Holmquist, et al. and Christianne Holmquist
Dennis Mickens and Georgiana Mickens
13 Deral S. Morrow and Wilma J. Morrow
Janis Newbury
14 Frederick C. and Margaret A. Porter
William Siepmann and Elda Irene Siepmann
15 Karla E. Smith and Richard L. Hall
Gordon C. and Linda Tang
16 Carla L. Thomas
Danielle and Dean Tonseth
17 U.S. Bureau of Land Management
M. Marvin Wallace
18 Washington State Department of Natural Resources
Robert H. Weaver and Mary B. Shelton
19

20 VIII. FINDINGS OF FACT

21 I, DOUGLAS CLAUSING, as Referee in this proceeding, having carefully examined
22 the testimony and evidence and having investigated Subbasin No. 4, do hereby make
23 the following Findings of Fact:

24 1. That the waters of Subbasin No. 4 and lands irrigated or waters
25 otherwise utilized therefrom are situated in Kittitas County.

1 2. That the claims to any diversionary or withdrawal rights within Subbasin
2 No. 4 of the following named claimants are denied in their entirety for reason set
3 forth in the body of this report:

4 Reba Bailey (00246 & 00247)
5 Richard L. Banker and Margaret L. Banker
6 Estate of Ed Bergdal
7 Sheryle Bonnell
8 Kenneth A. Braniff and Noreen E. Braniff
9 Glenn Burzenski
10 Selma M. Burzenski
11 Glen W. Christianson and Dorothy Christianson
12 Joyce Christianson and Estate of Lyle Christianson
13 Marjorie Christianson (00408 & 00409)
14 Ellensburg, City of
15 First Interstate Bank of Washington
16 Kathy Fyall and Ken Fyall
17 John F. Gemmill and Carol D. Gemmill (00184 & 00823)
18 Gold Placers, Inc.
19 Vernon R. Gray
20 William J. Grueter and Patricia M. Grueter
21 James Hanson and Susan Hanson
22 John J. Hanson and Lila A. Hanson (01789 & 01790)
23 Michael Hanson and Ulrike Hanson
24 William Hanson and Diana Hanson
25 Joe Harwood and Dorothy Harwood
26 David Holmquist, et al. and Christianne Holmquist
27 Del L. Holter
28 Nancy D. Horst and Russell B. Moye
29 Peggy E. Hunt
30 Helen R. Kirk and The Estate of Paul H. Kirk
31 Timothy M. Knoll
32 Lyle F.R. Knudson and Ruth M. Knudson
33 Lavinal Corporation
34 Liberty Townsite
35 Miner's Mining, Inc.
36 Janis Newbury
37 Frank Oechsner
38 Carolyn Ann Olson
39 Estate of Freda L. Penkert
40 Frederick C. Porter and Margaret A. Porter
41 Wilma Preston (02050 & 02051)
42 Douglas F. Sanders and Marcia H. Sanders
43 Estate of Lester F. Sanders and Dollie C. Sanders
44 William Siepmann and Elda Irene Siepmann
45 Karla E. Smith and Richard L. Hall
46 Phyllis J. Stampfly
47 Randall J. Stampfly

27 REPORT OF REFEREE
28 Re: Subbasin No. 4

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1 Wallace M. Stampfly
2 Gordon C. Tang and Linda Tang (00970, 01063, 01064, 01065, 01066)
3 Carla L. Thomas
4 Danielle and Dean Tonseth
5 U.S. Bureau of Land Management
6 M. Marvin Wallace
7 Paul Weaver and Florence A. Weaver
8 Robert H. Weaver and Mary B. Shelton
9 WA State Dept. of Natural Resources

10 3. That the name of the claimant(s), court claim number(s), sources of
11 water, uses for which rights have been established, time periods when water may be
12 used, amounts of water designated in the right, priority of water right, location
13 of points of diversion, and description of lands to which water rights are
14 appurtenant are as follows:

15 CLAIMANT NAME: **First Creek Water Users
16 Association, Inc.** COURT CLAIM NO. 00648
17 Source: First Creek, tributary to Swauk Creek.
18 Use: Seasonal irrigation of 124.5 acres.
19 Period of Use: April 1 through October 15
20 Quantity: 2.49 cfs; 622.5 acre-feet per year
21 Priority Date: **November 2, 1877**
22 Point of Diversion: 800 feet south and 100 feet east from the north quarter
23 corner of Section 30, being within Government Lot 1,
24 Section 30, T. 20 N., R. 18 E.W.M.
25 Place of Use: The SW $\frac{1}{4}$ of Section 17; the E $\frac{1}{2}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 20,
26 the W $\frac{1}{2}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, that portion of
27 the N $\frac{1}{2}$ of Section 21, which is described as follows: A
28 tract of land bounded by a line beginning at a point on
the west boundary line of the NE $\frac{1}{4}$ of said Section, 66 feet
north of the southwest corner of said quarter section, and
running thence east 66 feet; thence north on a line
parallel with the west boundary line of said quarter
section 1,650 feet; thence west 66 feet to the west
boundary line of said quarter section; thence north to the
north boundary line of said quarter section; thence west
to the northwest corner of said section; thence south on

the west boundary line of said section to the southwest corner of the NW $\frac{1}{4}$ of said section; thence east on the south boundary line of said NW $\frac{1}{4}$ of said section 990 feet; thence north 66 feet; and thence east on a line parallel with the south boundary line of said quarter section 1,650 feet to the point of beginning; the N $\frac{1}{2}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, and the NE $\frac{1}{4}$ and E $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 29, ALL in T. 19 N., R. 18 E.W.M.

CLAIMANT NAME:	Pat Burke & Mary Burke	COURT CLAIM NO. 01475
Source:	Swauk Creek	
Use:	Irrigation of 39.6 acres and stock water	
Period of Use:	April 1 to October 31	
Quantity:	1.69 cfs; 297 acre-feet per year for irrigation; 1 acre-foot per year for stock water and 0.08 cfs for conveyance loss	
Priority Date:	June 30, 1878	
Point of Diversion:	200 feet south and 1,200 feet east from the northwest corner of Section 27, being within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 27, T. 20 N., R. 17 E.W.M.	
Place of Use:	That portion of the SE $\frac{1}{4}$ of Section 28 lying north of Swauk Creek and south of the Burke-Hartman Ditch	

REPORT OF REFEREE

Referee's Office
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1 CLAIMANT NAME:

Pat Burke
& Mary Burke

COURT CLAIM NO. 01475

2 Source:

Swauk Creek

3 Use:

Irrigation of 65 acres and stock water

4 Period of Use:

April 1 to October 31 for irrigation; continuously for
stock water
(see instantaneous flow limits)

5 Quantity:

2.00 cfs total April 1 through October 31; 1.75 cfs, 488
acre-feet per year for irrigation of 65 acres and 1
acre-foot per year for stock water; 0.25 cfs April 1
through October 31 for conveyance loss; 0.25 cfs
November 1 through November 30 and February 1 through
March 31, 1.0 cfs December 1 through January 31,
8.5 acre-feet per year for stock water.

6 Priority Date:

June 30, 1878

7 Point of Diversion:

1,000 feet south and 600 feet east of the northwest corner
of Section 27, being within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27,
T. 20 N., R. 17 E.W.M.

8 Place of Use:

That portion of the N $\frac{1}{4}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28,
T. 20 N., R. 17 E.W.M. lying southeast of Swauk Creek

1 CLAIMANT NAME: Kenneth J. Hartman COURT CLAIM NO. 01685
2 & Ruthie J. Hartman
3 Donald A. Hartman
4 & Ruth D. Hartman
5 Source: Swauk Creek
6 Use: Irrigation of 20 acres
7 Period of Use: April 1 to October 15
8 Quantity: 0.85 cfs; 150 acre-feet per year for irrigation; 0.04 cfs
for conveyance loss.
9 Priority Date: June 30, 1878
10 Point of Diversion: 200 feet south and 1,200 feet east from the northwest
corner of Section 27, being within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 27,
T. 20 N., R. 17 E.W.M.
11 Place of Use: That portion of the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, T. 20 N., R. 17
E.W.M.
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27 REPORT OF REFEREE
28 Re: Subbasin No. 4

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1 CLAIMANT NAME: **First Creek Water Users** COURT CLAIM NO. 00648
2 **Association, Inc.**

3 Source: First Creek, tributary to Swauk Creek.

4 Use: Irrigation of 290.5 acres

5 Period of Use: April 1 through October 15.

6 Quantity: 5.81 cfs; 1452.5 acre-feet per year.

7 Priority Date: **June 1, 1881**

8 Point of Diversion: 800 feet south and 100 feet east of the north quarter
9 corner of Section 30, being within Government Lot 1,
Section 30, T. 20 N., R. 18 E.W.M.

10 Place of Use: The SW $\frac{1}{4}$ of Section 17, the E $\frac{1}{2}$ NW $\frac{1}{4}$ and the E $\frac{1}{2}$ SW $\frac{1}{4}$ of
11 Section 20, the W $\frac{1}{2}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, that
12 portion of the N $\frac{1}{2}$ of Section 21, which is described as
13 follows: A tract of land bounded by a line beginning at a
14 point on the west boundary line of the NE $\frac{1}{4}$ of said
15 section; 66 feet north of the southwest corner of said
16 quarter section, and running thence east 66 feet; thence
17 north on a line parallel with the west boundary line of
18 said quarter section 1,650 feet; thence west 66 feet to
19 the west boundary line of said quarter section; thence
20 north to the north boundary line of said quarter section;
thence west to the northwest corner of said section;
thence south on the west boundary line of said section to
the southwest corner of the NW $\frac{1}{4}$ of said section; thence
east on the south boundary line of said NW $\frac{1}{4}$ of said
section 990 feet; thence north 66 feet; and thence east on
a line parallel with the south boundary line of said
quarter section 1,650 feet to the point of beginning; the
N $\frac{1}{2}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, and the NE $\frac{1}{4}$ and E $\frac{1}{2}$ NW $\frac{1}{4}$ of
Section 29, ALL in T. 19 N., R. 18 E.W.M.

1 CLAIMANT NAME: **Pat Burke**
2 & **Mary Burke** COURT CLAIM NO. 01475
3 Source: Dunford Spring
4 Use: Irrigation of 5 acres and stock water
5 Period of Use: April 1 to October 31 for irrigation; continuously for
6 stock water
7 Quantity: .067 cubic foot per second, 28.25 acre-feet per year for
irrigation; .01 cubic foot per second, 1 acre-foot per
year for stock water
8 Priority Date: **August 31, 1882**
9 Point of Diversion: 1,100 feet south and 1,100 feet west from the center of
10 Section 34, being within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 34,
T. 20 N., R. 17 E.W.M.
11 Place of Use: The W $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ and E $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 34, T 20 N. R. 17
12 E.W.M.

27 REPORT OF REFEREE
Re: Subbasin No. 4

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1 CLAIMANT NAME:

Kenneth J. Hartman
& Ruthie J. Hartman
Donald A. Hartman
& Ruth D. Hartman
Daniel V. Byrne
& Martha Wyckoff Byrne

COURT CLAIM NO. 01685

5 Source: Swauk Creek

6 Use: Irrigation of 75 acres

7 Period of Use: April 1 to October 15

8 Quantity: 3.20 cfs; 562.5 acre-feet per year for irrigation. 0.14
cfs for conveyance loss

9 Priority Date: September 20, 1889

10 Point of Diversion: 200 feet south and 1200 feet east from the northwest
corner of Section 27, being within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 27,
T. 20 N., R. 17 E.W.M.

11 Place of Use: E $\frac{1}{2}$ SW $\frac{1}{4}$ and that portion of the E $\frac{1}{2}$ NE $\frac{1}{4}$ lying northwest of
Swauk Creek and southeast of the county road, all in
Section 28, T. 20 N., R. 17 E.W.M.

27 REPORT OF REFEREE

Re: Subbasin No. 4

Referee's Office
15 W. Yakima Ave Ste. 200
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1 CLAIMANT NAME: **Aubrey E. Hart** & **Blanche M. Hart** COURT CLAIM NO. 00919
2
3 Source: Two unnamed springs
4 Use: Domestic supply, stock water and irrigation of 2 acres
5 Period of Use: continuously for domestic supply and stock water; April 15 through October 15 for irrigation
6
7 Quantity: 0.01 cubic foot per second, 1 acre-foot per year for domestic supply and stock water; 0.03 cubic foot per second, 8 acre-feet per year for irrigation
8
9 Priority Date: **June 30, 1894**
10
11 Point of Diversion: 1200 feet south and 700 feet east from the north quarter corner of Section 11, being within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, T. 19 N., R. 16 E.W.M.
12
13 Place of Use: That portion of the NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 11, T. 19 N., R. 16 E.W.M. lying easterly of State Highway No. 10
14
15 CLAIMANT NAME: **Boise Cascade Corporation** COURT CLAIM NO. 02206
16 (A)03119
17 (A)05238
18 Source: First Creek
19 Use: Timber management (road watering)
20 Period of Use: May 1 through December 1
21
22 Quantity: 0.011 cfs; 1.84 acre-feet per year
23
24 Priority Date: **September 30, 1896**
25
26 Point of Diversion: Between the east and west boundaries of Section 23, being within the S $\frac{1}{2}$ of Section 23, T. 20 N., R. 17 E.W.M.
27
28 Place of Use: The S $\frac{1}{2}$ of Section 23, T. 20 N., R. 17 E.W.M.

1 CLAIMANT NAME: **Darrell Clark**
2 & **Mabel Clark** COURT CLAIM NO. 01087

3 Source: **Yakima River**

4 Use: **Irrigation of 50 acres**

5 Period of Use: **April 15 to October 15**

6 Quantity: **1 cubic foot per second, 250 acre-feet per year**

7 Priority Date: **July 27, 1899**

8 Point of Diversion: **220 feet north and 300 feet east from the center of
Section 28, within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, T. 19 N.,
R. 17 E.W.M.**

10 Place of Use: **The S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 33, T. 19 N., R. 17 E.W.M.**

11 CLAIMANT NAME: **Dennis Mickens**
12 & **Georgiana Mickens** COURT CLAIM NO. 00348

13 Source: **Two unnamed springs**

14 Use: **Continuous domestic supply for one home**

15 Period of Use: **Continuous**

16 Quantity: **0.02 cfs; 1 acre-foot per year**

17 Priority Date: **July 24, 1963**

18 Point of Diversion: **1. 600 feet north and 400 feet east from the southwest
corner of Section 11, being within the SW $\frac{1}{4}$ SW $\frac{1}{4}$
2. 100 feet north and 500 feet east of the west quarter
corner of Section 11, being within the SW $\frac{1}{4}$ NW $\frac{1}{4}$, both points
being in Section 11, T. 20 N., R. 17 E.W.M.**

21 Place of Use: **The S $\frac{1}{2}$ S $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 11, T. 20 N., R. 17 E.W.M.**

1 CLAIMANT NAME:

**Dennis Mickens
& Georgiana Mickens**

COURT CLAIM NO. 00348

2 Source: Deer Creek

3 Use: Irrigation of 25 acres

4 Period of Use: May 1 through June 15

5 Quantity: .60 cfs; 25 acre-feet per year

6 Priority Date: **July 24, 1963**

7 Point of Diversion: 1000 feet south and 800 feet east of the center of
8 Section 11, being within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11,
9 T. 20 N., R. 17 E.W.M.

10 Place of Use: SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10 and the W $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 11 in
11 T. 20 N., R. 17 E.W.M.

12 CLAIMANT NAME: **Columbia Cascade Land Company, Inc.** COURT CLAIM NO. 01096

13 Source: An unnamed stream

14 Period of Use: Continuously

15 Quantity: 0.50 cubic foot per second

16 Priority Date: **June 30, 1965**

17 Point of Diversin: 550 feet north and 650 feet east from the southwest corner
18 of Section 17, being within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17,
T. 21 N., R. 18 E.W.M.

19 Place of Use: The S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 18, T. 21 N., R. 18 E.W.M.

20 Limitations of Use: The diversion intake shall be tightly screened at all
21 times with wire having a mesh opening not greater than
0.125 (1/8) inch.

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Re: Subbasin No. 4

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1 CLAIMANT NAME: **Columbia Cascade Land Company, Inc.** COURT CLAIM NO. 01096

2 Source: An unnamed spring

3 Use: Group domestic supply

4 Period of Use: Continuously

5 Quantity: 0.006 cubic foot per second, 2 acre-feet per year

6 Priority Date: June 30, 1965

7 Place of Use: The Plat of Liberty Mountain No. 1; and Plat of Liberty
8 Mountain No. 2; and the unplatted portion of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of
9 Section 18; all in the S $\frac{1}{2}$ of Section 18, T. 21 N.,
R. 18 E.W.M.

10 CLAIMANT NAME: **Liberty Mountain Ownership Association, Inc.** COURT CLAIM NO. 01095

11 Source: Two unnamed springs

12 Use: Group domestic supply

13 Period of Use: Continuously

14 Quantity: 0.014 cubic foot per second, 5 acre-feet

15 Priority Date: June 30, 1965

16 Point of Diversion: Spring Lot C; and Park Lot A; both within the Plat of
17 Liberty Mountain No. 1, Section 18, T. 21 N., R. 18 E.W.M.

18 Place of Use: Lands served by Liberty Mountain Ownership Association,
19 Inc., within the S $\frac{1}{2}$ of Section 18, T. 21 N., R. 18 E.W.M.

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27 REPORT OF REFEREE

28 Re: Subbasin No. 4

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1 CLAIMANT NAME: Linda L. Lewis, Michelle L. Maillot COURT CLAIM NO. 00747
2 and Robert L. Van Kirk

3 Source: An unnamed stream

4 Use: Single domestic supply

5 Period of Use: Continuously

6 Quantity: 0.01 cubic foot per second, 2 acre-feet per year

7 Priority Date: July 21, 1966

8 Point of Diversion: 1000 feet north and 1200 feet west from the south quarter
corner of Section 10, being within the SE¹/₄SW¹/₄ of
Section 10, T. 20 N., R. 17 E.W.M.

9 Place of Use: SE¹/₄SE¹/₄SW¹/₄ of Section 10, T. 20 N., R. 17 E.W.M.

10 Limitations of Use: The diversion intake should be tightly screened at all
times with wire having a mesh opening not greater than
0.125 (1/8) inch.

1
2 CLAIMANT NAME: **Mr. Marlyn Bateman** COURT CLAIM NO. 01479
3 & **Mrs. Marlyn Bateman**
4 Source: Pump House Spring
5 Use: Domestic supply for two residence and stock water
6 Period of Use: Continously
7 Quantity: 0.00222 cubic feet per second (1 gallon per minute), 1.0 acre-foot per year for domestic supply; 0.50 acre-foot per year for stock water
8 Priority Date: **August 16, 1969**
9 Point of Diversion: 700 feet south and 300 feet west from the northeast corner of Section 11 being within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 11, T. 19 N., R. 16 E.W.M.
10
11 Place of Use: The following parcels in T. 19 N., R. 16 E.W.M. in Kittitas County, Washington:
12
13 Beginning at the northwest corner of the NE $\frac{1}{4}$ of Section 12, which is the true point of beginning; thence southerly along the west line of the said NE $\frac{1}{4}$ 890 feet; thence east 660 feet; thence south 175 feet; thence S 23° 30' W 350 feet; thence N 65° 30' East, 610 feet; thence in a north-northwesterly direction to a point on the north line of Section 12 which is 900 feet easterly of the northwest corner of the NE $\frac{1}{4}$ of Section 12; thence westerly along said north line of Section 12 to the true point of beginning; AND beginning at the southwest corner of Section 1, thence northerly along the west line of Section 1, 230 feet to the true point of beginning; thence easterly along a line parallel to the south line of Section 1 1,000 feet; thence north 300 feet; thence in a northwesterly direction to a point on the west line of Section 1 which is 1230 feet north of the southwest corner of Section 1; thence southerly along the west line of Section 1 to the true point of beginning.
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28 REPORT OF REFEREE Referee's Office
Re: Subbasin No. 4 15 W. Yakima Ave Ste. 200
Yakima, WA 98902-3401

1 CLAIMANT NAME: **Robert C. Coe** COURT CLAIM NO. 01146
2 & **Josephine W. Coe**

3 Source: An unnamed spring

4 Use: Group domestic supply and stock water

5 Period of Use: Continuously

6 Quantity: 0.06 cubic foot per second, 6 acre-feet per year for group
7 domestic supply, 1 acre-foot per year for stock water

8 Priority Date: **June 18, 1974**

9 Point of Diversion: 1200 feet north and 600 feet west of the south quarter
10 corner of Section 33, being within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of
11 Section 33, T. 20 N., R. 17 E.W.M.

12 Place of Use: The NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33, T. 20 N., R. 17 E.W.M.

13 CLAIMANT NAME: **Fred Chapman** COURT CLAIM NO. 01423
14 Source: Swauk Creek

15 Use: Single domestic supply

16 Period of Use: Continuously

17 Quantity: 0.01 cubic foot per second, 1 acre-foot per year

18 Priority Date: September 30, 1974

19 Point of Diversion: 1100 feet north and 100 feet east from the west quarter
20 corner of Section 27, being within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of
21 Section 27, T. 20 N., R. 17 E.W.M.

22 Place of Use: The NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, T. 20 N., R. 17 E.W.M.

Limitation of Use: Use shall be limited to in-house domestic use and not for
irrigation of lawn and garden.

27 REPORT OF REFEREE
28 Re: Subbasin No. 4

Referee's Office
15 W. Yakima Ave Ste. 200
Yakima, WA 98902-3401

1 4. All prior claims to rights for surface water from Subbasin No. 4,
2 including those claims filed under the provisions of Chapter 90.14 RCW, are denied,
3 unless expressly provided for herein. The "Water Rights Claims Registry" directed
4 by RCW 90.14.111 should be supplemented with appropriate notations to the records
5 of those claims specifically identified in the "Water Right Claims" section of
6 Plaintiff's Exhibit No. SE-3.

7 5. The following Surface Water Certificates and Certificates of Change,
8 issued by the Department of Ecology or its predecessor agencies of the State of
9 Washington, will be made null and void:

10 Certificates of Surface Water Right

11 1366 1389 4626 5001
12 6187 8286 9060 9156
13 10415 10755 10943 10944
14 11247 11210 S3-20375C S4-01322C
15 S4-23164C S4-23221C S4-23501C S4-23574C
16 S4-23995C

17 Certificate of Change recorded in Volume 2, Page 732

18 Certificate of Change recorded in Volume 1-4, Page 190

19 In conformance with RCW 90.03.240, Certificates of Adjudicated Water Right
20 will be issued to those parties for whom rights were confirmed through this
21 proceeding.

IX. CONCLUSIONS OF LAW

Confirmation of Rights

The priority date, source, point of diversion, location, maximum instantaneous diversion rate, annual quantity, period of use, nature of beneficial use, and place of use which are shown in the foregoing Findings of Fact for each claimant therein referred are recommended to be confirmed as water rights of those claimants.

Duty of Water

Unless otherwise specified, the diversion of water from sources of water contained within Subbasin No. 4 for irrigation purposes shall be limited, at a maximum, to 1.0 cubic-foot per second for each 50 acres irrigated, not to exceed during each irrigation season, a total of 5 acre-feet per acre for orchards and 6 acre-feet per acre for alfalfa/pasture.

Irrigation Season

Unless otherwise identified within a specific water right, the irrigation season shall be defined as that period from April 1 to and including October 31 of each year. The Referee recognizes that extraordinary circumstances may dictate the application of water prior to or subsequent to the defined irrigation season, and, in that event, express approval from the Department of Ecology must be obtained annually prior to such deviation.

1 Certificates of Adjudicated Water Right

2 Upon entry of the final decree in this action, and upon payment of the
3 statutory fee prescribed in RCW 90.03.470(11), together with the appropriate county
4 auditor recording fee, the Director of the Department of Ecology is required to
5 issue Certificates of Adjudicated Water Right in accordance with the provisions of
6 RCW 90.03.240.

7

8 Administration of Water

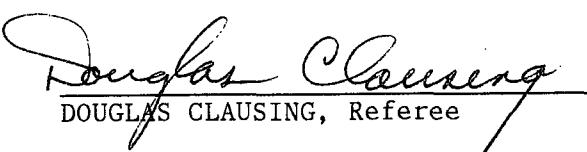
9 The use of Subbasin No. 4 waters should be regulated by the Department of
10 Ecology on the basis of Certificates of Adjudicated Water Rights issued as a result
11 of this proceeding, and on the basis of any permits and certificates that may have
12 issued outside of this proceeding under appropriation procedures of Chapter 90.03
13 RCW. When available water in Subbasin No. 4 is insufficient to supply all rights,
14 and upon a finding that regulation is required, the Department may regulate junior
15 water rights in the interest of satisfying senior water rights.

16 Whenever regulation of junior water rights is necessary, the Department may
17 enter at reasonable times upon the lands of any and all parties having rights and
18 shall regulate diversion facilities so as to apportion the waters as herein
19 adjudicated.

20 Confirmation of a water right does not guarantee nor imply that right-of-way
21 or trespass rights exist upon private or public lands for the diversion and/or
22 distribution system of that water.

1 As provided by Chapter 90.03.360 RCW and Chapter 508-64 WAC, any person
2 authorized to use surface water from Subbasin No. 4 may be required to provide and
3 maintain, at the water user's expense, proper diversion works and/or measuring
4 devices. Design, installation, maintenance, and operation of such works and
5 measuring devices will be as prescribed by the Department.

6 SIGNED and DATED at Yakima, Washington this 25th day of March,
7 1996.

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9 
10 DOUGLAS CLAUSING, Referee

11 bj

27 REPORT OF REFEREE
28 Re: Subbasin No. 4

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15 W Yakima Ave Ste 200
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