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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

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

Plaintiff,

vs.

JAMES J. ACQUAVELLA, et al.,

Defendants.

FILED NO. 2,01434-5 JAN 19 1995

KIM M. EATON, YAKIMA COUNTY CLERK

Memorandum Opinion Re: Priority Date - Date of Patent or Date of Entry

I. INTRODUCTION

The following issue was originally brought before this Court in the Exceptions to Referee Report for Subbasin 6. Essentially, the issue, as initially raised by Level Best, Inc., concerns whether the priority date should be the date of some actual proof of diversion from a water course or whether the Court can make a basin-wide determination that if an original appropriation can be traced back to the date of patent from the United States government, then the priority date automatically relates back at least an additional five years (provided the right has not been abandoned). The theory supporting such an assertion is that some proof would need to have been made of an entry and continued occupancy and cultivation for five years in order to initially receive the patent.

Because this issue has been raised by a number of claimants with different factual situations, the Court will enter an opinion that

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1 considers this issue only as a legal issue and it is not intended to
2 apply to any particular set of facts.

3 **II. OPINION**

4 Primarily, the various claimants making this assertion rely on
5 Longmire v. Smith, 26 Wash. 439 (1901) and 63A Am. Jur. 2d, §§ 68, 70,
6 Public Lands. The Court will examine these authorities and the
7 arguments derived from them by the claimants.

8 Longmire involved a riparian landowner's suit to quiet title to
9 water appropriated from the Wenas Creek for irrigation of three parcels.
10 The plaintiff appealed a decree by Yakima County Superior Court Judge
11 John Davidson which divided the use of Wenas Creek based on a schedule.
12 Like Level Best in Subbasin 6, the plaintiff appealed, asking for a
13 specific, decreed right securing full enjoyment of his prior
14 appropriation rather than a shared right based on a schedule.

15 After reviewing the voluminous record, the Washington Supreme Court
16 determined specific dates for plaintiff's (and plaintiff's predecessors-
17 in-interest) appropriations thereby allowing for prioritizing of use of
18 the creek. For example, as to the so-called "Perkins" tract of land,
19 the Longmire court found "that Perkins in 1871 settled upon said
20 premises..., and the middle of June is mentioned as the time when
21 Perkins diverted water in a ditch to irrigate the premises." Longmire
22 at 444. Based on these early, but specific, appropriations of water,
23 plaintiff was found to hold three of the four oldest priority dates;
24 priority dates preceding the actual patent date.

25 Although dicta in the Longmire decision might be construed

1 differently, it was obvious, based on the findings of fact set forth
2 above as well as certain statements of law to be discussed below, that
3 actual proof of a water appropriation was heavily relied on by the court
4 and conclusive as to that matter. First, the court stated the
5 elementary proposition of water law that the first appropriator is
6 entitled to the quantity actually appropriated to the exclusion of
7 subsequent appropriators. Id. at 447. The right to that water only
8 becomes vested when the appropriation is made. Id. Moreover, although
9 the claimants herein infer otherwise (reliance on proof of cultivation
10 is at the heart of their Am Jur argument), the Longmire court and this
11 Court recognize a distinction between "cultivation" for homestead
12 purposes and actual diversions and uses of water. The Longmire court
13 said:

14 "Certainly, when the possessory right to a definite tract of
15 agricultural land was acquired by the settler, and made known by
16 his residence and cultivation thereon, and by the use of water from
the stream, the intention to appropriate and continue to use the
water should be inferred." Id. at 448 (emphasis added).

17 Webster's Dictionary defines "cultivate":

18 "To prepare for the raising of crops...: to loosen or break up the
19 soil about for the purpose of killing weeds and modifying moisture
retention of the soil..."

20 Obviously, cultivation can take place without, (and would appear to
21 normally precede), the addition of water. Hence, to prove cultivation
22 pursuant to the early homestead rules does not by itself reflect an
23 appropriation of water.

24 The only language the claimants may rely on is found at page 449.
25 There, in discussing the conclusions capable of being derived from the

1 actual evidence in that case, the court said the following:

2 "It seems fairly deducible from the evidence that the plaintiff, by
3 himself and his predecessors in interest, conforms to these
4 requisites for actual appropriations on the tracts of land
5 hereinbefore described. It is true, more difficulty is involved in
6 the investigation and determination of the time and the amount of
7 the appropriation than where the procedure has been accurately
8 defined by statute. But these appropriators were farmers beginning
9 in an unsettled and new country, and the reduction of their lands
10 to cultivation was in the usual course of such operations under
11 such conditions. There can be no reasonable hesitancy in arriving
12 at the conclusion that they intended to acquire sufficient water to
13 irrigate their lands, and by various means- ditches, the use of
14 sloughs, and natural channels- they utilized the water; and we
15 think the evidence, fairly interpreted, shows the use of reasonable
16 diligence in the continuous increasing use of the water for the
17 purpose of rendering their farms available for agricultural
18 purposes to the full extent of the soil thereof." *Id.* at 449
19 (emphasis added).

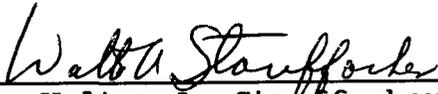
20 That statement reflects the practical problem of producing evidence
21 to substantiate historical uses or initial diversions often faced in
22 water disputes, including the Yakima River adjudication. The issue
23 rings even more true for these early diversions which took place in the
24 upper basin. In recognition of this challenge, this Court and the
25 Referee give great latitude in accepting evidence that would normally
not be admitted in a "typical" civil dispute. However, the Longmire
court appeared to reach their decision as to an appropriation date with
the benefit of some evidence. See also *In Re Waters of Doan Creek*, 125
Wash. 14, 25 (1923) (some evidence of actual appropriation); *Leiser v.*
Brown, 121 Wash 125, 126 (1922) (some evidence of actual appropriation).
This Court would likewise be reluctant to award a priority date without
some scintilla of evidence, regardless of how scant, to support a
particular finding of an actual appropriation or diversion in order to
establish that priority date.

1 As suggested by a reading of 63A Am. Jur. 2d, §§ 68, 70, there
2 likely would be some evidence that existed at the time of patent. For
3 example, testimony by two witnesses as to occupation and cultivation was
4 required prior to receiving the patent. Id. Perhaps such testimony or
5 other relevant documentation could be produced and submitted to the
6 Referee to satisfy this Court's minimum evidentiary requirement.

7 **III. CONCLUSION**

8 Based on the above this Court holds and accordingly directs the
9 Referee in the subbasin reports, be they initial or supplemental
10 reports, to not make an automatic calculation of the priority date based
11 on the date of the patent. Although the Court cannot make such a
12 finding as matter of law, claimants, on remand or at the initial
13 hearing, may submit any proof available tending to support the claimed
14 priority date. Once admitted into evidence then that proof, even if
15 somewhat thin, may support the claimed priority date.

16 Dated this 19th day January, 1995.

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 Judge Walter A. Stauffacher
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