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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

FILED FEB 1 1995 KIM M. EATON, YAKIMA COUNTY CLERK

IN THE MATTER OF THE DETERMINATION OF THE RIGHTS TO THE USE OF THE SURFACE WATERS OF THE YAKIMA RIVER DRAINAGE BASIN, IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 90.03, REVISED CODE OF WASHINGTON, STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Plaintiff, vs. JAMES J. ACQUAVELLA, et al., Defendants.	NO. 77-2-01484-5 Memorandum Opinion Re: Subbasin 8 Exceptions of Ivan and Mildred Hutchinson, Court Claim No. 0876, and Vernon G. and Ellen F. Meyer Court Claim No. 1875; Theiline Scheumann & Grousemont Farm, Claim No. 1335

I. INTRODUCTION

Claimants Ivan and Mildred Hutchinson and Vernon and Ellen Meyer have excepted to the Referee's use of the term "waste water" in describing their respective rights. The Court directs the Referee to remove that language and also makes the following conclusions concerning the exceptions filed by the aforesaid claimants and Grousemont Farms.

II. OPINION

A. Reuse of Water Within a Distributing Entities Boundaries

This Court held in its Memorandum Opinion Re: Motion for Reconsideration of Limiting Agreements that the United States retained rights in water once diverted and further uses of such water were within the discretion of the diverting entity. The Court now extends the same principle to all water diverters. DOE v. BOR, 118 Wn.2d 761, 827 P.2d 275 (1992)(The appropriator's rights in the particular molecules of

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diverted water do not necessarily end when the water has been used once for irrigation. An appropriator has a right to recapture used water, even under certain circumstances, when the water has left the appropriator's land and entered a natural watercourse.) Here, water users within the Taneum Canal Company and Kittitas Reclamation District are able to make a second use of some of the distributing entities diverted water. The use takes place within the boundaries of the distributing entity and thus the rights to that reused water are a matter strictly between the distributing entities and their contractees. Thus, although the Court cannot grant a specific right to these claimants individually, they may have a right derivative from their delivery contracts with KRD and Taneum Canal Company.

B. Rights to Non-Project, Non-Foreign Return Flow

As Grousemont Farm indicates, they have one of the most complex water right claims in this adjudication. Although the Court is not sure whether it can provide any real assistance in terms of the complicated set of facts affecting their right, it does appear that a potential conflict between the Court's finding in the Limiting Agreement opinion and the Report of Referee for Subbasin 8 requires resolution.

Essentially, the conflict arises because of imprecise language used by the Court. In the Memorandum Opinion Re: Motion for Reconsideration on Limiting Agreements, this Court held that it could not grant a right to non-project return flows. The Court should have more precisely limited this decision to foreign, non-project return flows. As defined in the prior memorandum opinion, foreign water is that which would not

have been in a stream without human effort. Id. at 10; Elgin v. Weatherstone, 123 Wash. 429, 432, 212 P. 562 (1923). What that Opinion did not consider was the question of rights as to non-project, non-foreign return flows or seepage water. The Court now holds, and should thereby rid any conflict with the Report of Referee, that an appropriator may obtain a right to return flow provided that flow naturally originated from and returned to a water course within the same watershed. Water that can be traced to a different watershed, hence imported water, is not subject to appropriation pursuant to this Court's holding in the Mem. Op. Re: Motion for Reconsideration of Limiting Agreements. See also Dodge v. Ellensburg Water Company, 46 Wn. App. 77, 82, 729 P.2d 631 (1986).

The more difficult question is at what point does seepage water, that runs off an appropriator's land, become subject to a new appropriation. That issue has been decided as to federal project water. Id.; DOE v. BOR, supra. This Court holds that as soon as the water leaves the appropriator's land and is in, or destined for the natural stream from which it originated, it becomes subject to appropriation by others. Fuss v. Franks, 610 P.2d 17 (1980)(seepage water, to be available for appropriation, must flow, or be capable of flowing, into natural stream); Binning v. Miller, 55 Wyo. 451, 102, P.2d 54 (1940)("[S]eepage water which, if not intercepted, would naturally reach the stream, is just as much a part of the stream as the waters of any tributaries and must be permitted to return thereto, if the owner cannot make beneficial use thereof.") Such rights are, of course, subject to

the availability of the water based on the first appropriator's right to make further uses of the water on the lands to which the right is appurtenant. An appropriator of such waters must also comply with the state requirements for appropriation by way of RCW 90.14 or the certification process.

Dated this 31st day of January, 1995.

Walter A. Stauffacher

Judge Walter A. Stauffacher