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FILED
FEB 28 1996
KIM M. EATON, YAKIMA COUNTY CLERK

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.)

NO. 77-2-01484-5

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ORDER RE MOTION OF LEVEL
BEST TO REOPEN COURT CLAIM
NO. 00284 ROCKY MOUNTAIN
ELK FOUNDATION

THIS MATTER came before the Court pursuant to the Motion filed by Level Best, Inc., said motion being dated January 26, 1996, and requesting this Court to reopen the claim of Rocky Mountain Elk Foundation, Court Claim No. 00284, so as to introduce into evidence a 1942 aerial photograph and a 1993 aerial photograph at the Subbasin 6 Remand Hearing held by Referee Clausing.

This Court having considered all memoranda, legal arguments of counsel and documentary evidence as it relates to legal issues arising therein, and for good cause appearing,

Order Re Motion to Reopen
Claim of RMEF - 1

11,369

1 The Court makes the following Findings:

2 A. The Court, in a Memorandum Opinion dated February 3, 1995,
3 determined that Rocky Mountain Elk Foundation, E. L. Knudson, Jr., Mike
4 Emerick, Level Best, Springwood Investment Corporation and Jeff Nesmith
5 would share a June 30, 1873 priority date for their respective water
6 rights. This decision was based on the Court's interpretation of the
7 Tenem I and Tenem II decrees. The Memorandum Opinion was subsequently
8 incorporated into the Order On Exceptions to Report of Referee, Subbasin
9 6 dated October 12, 1995 p. 5.

10 B. Because the Court previously decided this precise issue and
11 entered a final order disposing of it and because Level Best, Inc., had
12 a full and fair opportunity to argue the issue during that phase of the
13 litigation, the doctrine of collateral estoppel applies and precludes
14 Level Best's introduction of new evidence for the purpose of rearguing
15 Rocky Mountain Elk Foundation's priority date.

16 C. After entry of the Order On Exception to Report of Referee,
17 Subbasin 6 dated October 12, 1995, Level Best failed to timely motion
18 the Court for Reconsideration pursuant to CR 59. Even if such a motion
19 had been timely filed, introduction of one photograph from 1942 is
20 insufficient to demonstrate that Rocky Mountain Elk Foundation and its
21 predecessors failed to make a beneficial use of the water in originally
22 establishing its water right in 1873. Additionally, RCW 90.14.160
23 (which requires one who has established a water right to continue that
24 beneficial use) was not enacted until 1967.

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Now Therefore, It Is Hereby Ordered:

That the Referee shall include in the Conditional Final Order for Subbasin 6 that the priority date for the respective water rights of Rocky Mountain Elk Foundation, E. L. Knudson, Jr., Mike Emerick, Level Best, Springwood Investment Corporation and Jeff Nesmith is established to be June 30, 1873.

DATED this 28th day of February, 1996.



Judge Walter A. Stauffacher