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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

96 JULIN AND FOR YAKIMA COUNTY

KIM M. EATON, YAKIMA COUNTY CLERK

NO. 77-2-01484-5

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. )

Memorandum Opinion Re:  
Return Flow Exceptions of  
Harry Masterson and Mary Lou  
Masterson

Claim No. 01467 and (A) 03296  
Subbasin No. 3

I. INTRODUCTION

One of the exceptions taken by Harry Masterson and Mary Lou Masterson (Mastersons) pertains to the use of waste, seepage or return flows (return flows) on new lands by the original appropriator. They assert that the Referee erred in finding that 86 acres are irrigated with return flows, and that such flows may be recaptured and used only on the specific lands to which the diverter holds a water right. It is essentially the position of the Mastersons that once water is diverted and brought to their property, it becomes their personal property and although they may not obtain a right to such water, the return flows may be used on any lands of their choosing. It is also their position that the water never leaves the borders of their property and thus never makes its way into any kind of drainage for appropriation by any other diverters. Hence, the Court must consider another of what appears to be

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1 an infinite number of return flow issues. See Memorandum Opinion Re:  
2 Motion for Reconsideration of Limiting Agreements dated April 1, 1994;  
3 Memorandum Opinion Re: Subbasin 8 Exceptions et seq. dated January 31,  
4 1995. The Court now adds the following chapter to the return flow saga.

5 **II. OPINION**

6 Whether water can be recaptured and used on lands that are not the  
7 authorized place of use appears to depend on whether the reused water  
8 is, under normal natural conditions, hydrologically connected to any  
9 natural watercourse. Considerations of waste also must enter into a  
10 scenario where so much water is running off the fields that constitute  
11 the actual place of use that additional lands can be irrigated. The  
12 Court will harmonize these sometimes inconsistent theories below.

13 **A. Tributary Water**

14 The following analysis applies to return flows that are  
15 hydrologically connected, either by way of surface or groundwater, to  
16 any natural watercourse. In its January 31, 1995 Memorandum Opinion,  
17 supra, the Court addressed the issue of return flows in subbasin 8 and  
18 particularly the exceptions of Grousemont Farms. Therein the Court made  
19 the following decisions:

20 1. An appropriator may obtain a right to non-Federal project  
21 return flow provided that flow naturally originated from and  
22 returned to a water course within the same watershed (non-  
foreign). Id. at 3.

23 2. Non-project, non-foreign return flows become subject to  
24 appropriation by others as soon as the water leaves the  
25 previous appropriator's land entitled to a water right and is  
in, or destined for the natural stream from which it  
originated. Id.

3. Any rights to this return flow are subject to the

1 availability of the water based on the first appropriator's  
2 right to make further uses of the water on the lands to which  
3 the right is appurtenant. An appropriator of return flows  
4 must also comply with the state requirements for appropriation  
5 by way of RCW 90.14 or the certification process. Id. at 4  
6 (emphasis added).

7 To answer the Masterson's contentions and to alleviate any future  
8 misunderstandings (assertions have been made by counsel at various court  
9 hearings that run counter to the holdings above, see May 16, 1996, Of.  
10 Tran. pp. 53-55) the Court will provide the following clarification.

11 Although the Mastersons cite to a number of cases, many from  
12 Washington, none of those cases stand for the proposition that an  
13 original diverter may reuse return flows on lands not the subject of the  
14 original diversion. Those cases simply say that the water may be reused  
15 by the same diverter; a position which this Court has consistently  
16 followed. See Memorandum Opinion Re: Subbasin 8 Exceptions et seq,  
17 supra; Memorandum Opinion Re: Motion For Reconsideration Of Limiting  
18 Agreements. It does not follow that the right to reuse applies to new  
19 lands that were not irrigated pursuant to a certificate issued by  
20 Ecology or a valid 90.14 water right filing.

21 In reaching the holdings set forth above, the Court relied  
22 primarily on the case of Fuss v. Franks, 610 P.2d 17 (1980, Wy). That  
23 case is particularly relevant to the Masterson's dispute. There the  
24 Fusses sought to enjoin diversions of return flow by the Franks of water  
25 that was originally diverted by the Fusses and others. The Fusses  
desired to use that water to irrigate other lands across a highway. The  
Franks had obtained a state certificate to divert the return flows while  
the Fusses had not. Therefore, the Fusses had to rely on the argument

1 that once legally diverted pursuant to an existing state certificate,  
2 the water became their personal property and was available to them for  
3 a further use on different lands; the precise argument advanced by the  
4 Mastersons in the instant case.

5 The Wyoming Supreme Court disagreed with the Fusses' argument and  
6 stated the law as follows:

7 "[T]he owner of land upon which seepage or waste water rises  
8 has the right to use and reuse- capture and recapture- such  
9 waste waters for use only "upon the land for which the water  
10 forming the seepage was originally appropriated." [Quoting  
11 from Bower v. Big Horn Canal Ass'n, 307 P.2d 593 (1957)].  
12 When the water leaves the land for which it was appropriated  
13 and would, if left to flow uninterrupted, reach a natural  
14 stream, it becomes eligible to other and separate  
15 appropriation for other and different uses. It leaves the  
16 landowner upon which the seepage rose, and from which it has  
17 escaped, without any superior right to such water by reason of  
18 its having been utilized upon the land to which it was first  
19 appropriated." Fuss at 20.

20 The Wyoming Supreme Court then noted the rule that the first  
21 appropriator could go to the appropriate state agency and obtain another  
22 permit for use of the seepage water on "lands other than those upon  
23 which the seepage arises." Id. quoting with emphasis from Bower, supra.  
24 The rationale for that rule, according to the Fuss court, was in the  
25 doctrine that:

"waters become appurtenant to the lands for which they are  
acquired and, unless the statutes are followed with respect to  
change of use, the waters cannot be detached and assigned to  
other land without the loss of priority." Id.

That same rationale is quite compelling here, where Washington  
statutes also set forth specific requirements for changes in place of  
use. RCW 90.03.380. Section 380 is specific in mandating that rights  
to the use of water shall remain appurtenant to the land upon which the

1 water is used and that changes proceed through the Department of  
2 Ecology. The statute also mandates that changes in place of use cause  
3 no harm to existing rights which, obviously, reuse of return flows on  
4 other lands would be by making available less water to downstream users.  
5 Absent a second certificate with a priority date earlier than downstream  
6 users, the Mastersons are prevented from recapturing the return flow for  
7 any reason except reuse on the lands to which their water right is  
8 appurtenant. Fuss, supra. Therefore the analysis provided by the  
9 Referee in respect to the Mastersons (as set forth on page 1) is  
10 completely correct and will be the law of this case.

11 B. Non-tributary water

12 The Mastersons also argued orally that prior opinions of this Court  
13 (and therefore the Fuss decision discussed above) do not apply because  
14 the water never left the boundary of their property and thus was not  
15 available for appropriation by other users. Apparently, it is the  
16 Masterson's position that once water is diverted from the river and used  
17 once, then the fate of that water becomes a question of personal  
18 property and is no longer fettered by the requirements of state water  
19 law. The Masterson's do not present adequate factual material to  
20 support this position at this time. The Court, in this section and in  
21 the section below on waste, will address the proof component necessary  
22 for the Mastersons to prevail on their claim at remand.

23 In order to accommodate the needs of all water users in the basin,  
24 it is the strongly held position of the Court that water once diverted  
25 pursuant to state certification or a water right claim remains tied,

1 under most circumstances, to that state certificate or claim during the  
2 reuse of that water. RCW 90.03.380 ("The right to the use of water  
3 which has been applied to a beneficial use in the state shall be and  
4 remain appurtenant to the land or place upon which the same is used.")  
5 However, courts have consistently held that water may be recaptured and  
6 the appropriator not constrained by state water law in the use of that  
7 recaptured water when such flows, in the normal and natural course of  
8 events, would not flow toward a natural watercourse and thereby become  
9 subject to appropriation by other diverters. See Fuss v. Franks, supra;  
10 see also Ranson v. City of Boulder, 161 Colo. 478, 424 P.2d 122 (1967).  
11 Such a ruling relies on the theory that there is, by definition, no harm  
12 to downstream users when the water does not go downstream.

13 In a prior dispute in this adjudication, the Court decided that  
14 natural springwater that arises on an owner's land and does not join  
15 with a natural surface watercourse or leave the owner's land before  
16 dissipating back into the soil is the private property of that land  
17 owner and may be used like any other incident of private property. See  
18 Memorandum Opinion Re: Exception of Dwayne and Alvina Dormaier, Doc.  
19 8564, September 16, 1993. The Dormaier opinion bears somewhat on the  
20 outcome of this dispute and the Court wishes to maintain a consistent  
21 approach to similar scenarios.

22 However, the Colorado Supreme Court in Ranson, supra, set forth  
23 evidentiary guidelines that are applicable here. They determined that  
24 "flowing water is presumed to find its way to a stream, and the burden  
25 of proving otherwise rests upon the party claiming that such water is

1 not tributary." 424 P.2d at 123.

2 Because water belongs to the public, RCW 90.03.010, and because it  
3 is the goal of state water policy to obtain the "maximum net benefits"  
4 from uses of water, RCW 90.03.005, the Ranson evidentiary burden shall  
5 rest on the Mastersons and all water users making this argument. If  
6 this proof is clearly shown, then only reluctantly will this Court allow  
7 uses of water to fall outside the water code and the accompanying state  
8 oversight to ensure that water is used appropriately and not at the  
9 expense of other water users. If a water user can overcome this  
10 significant burden and demonstrate to the satisfaction of the Referee  
11 that the return flow in question would not flow to a natural  
12 watercourse, surface or underground, and thereby not be available to a  
13 downstream user, then (with the caveat for waste set forth below) a  
14 water user may reuse that runoff water as an incident of personal  
15 property. To even the playing field, the Court also extends this ruling  
16 to owners of land claiming the sole use of springwater, including the  
17 requirement the springwater not flow into any natural watercourses,  
18 either on the surface or underground. See Ranson, supra.

19 C. Waste

20 Although the Court has ruled that a water user may reuse return  
21 flow unfettered by state regulation if that water user can prove the  
22 return flow would not join any natural watercourses, the water user must  
23 also demonstrate why, when there is so much runoff to irrigate new land,  
24 the original diversion is not wasteful in the first place. Underlying  
25 such an inquiry is that limiting diversions to only a beneficially used

1 amount of water from a watercourse will help ensure availability to all  
2 water users -- particularly where surplus water cannot find its way back  
3 to a natural watercourse and thereby be available to satisfy downstream  
4 users.

5 The doctrine of waste was examined in Ecology v. Grimes, 121 Wn.2d  
6 459 (1993); RCW 90.03.005. Part and parcel of the doctrine of  
7 beneficial use is the rule that water excess to that of an  
8 appropriator's actual requirements is waste and no right can be  
9 established to the excess. Id. at 471. The Grimes Court also stated  
10 that a "particular use must not only be of benefit to the appropriator,  
11 but it must also be a reasonable and economical use of the water in view  
12 of other present and future demands upon the source of supply." Id.  
13 Additionally, although the local custom and relative efficiency of  
14 irrigation systems in common use are important elements for determining  
15 whether a practice is wasteful, other factors may be considered. Id. at  
16 475. According to the Supreme Court:

17 "An irrigator's rights are to be measured by his  
18 necessities...and not by any fanciful notion of his own . . .  
19 . . . "[C]ustom can fix the manner of use of water for  
20 irrigation only when it is founded on necessity." Id. quoting  
Shafford v. White Bluffs Land & Irrig. Co., 63 Wash. 10  
(1911).

21 Primarily, waste occurs when the diversion exceeds the amount  
22 reasonably necessary for beneficial purposes. Tulare Irrig. Dist. v.  
23 Lindsay-Strathmore Irrig. Dist., 3 Cal 2d 489, 45 P.2d 972 (1935). When  
24 a water user makes a claim that enough water is running off the  
25 certificated lands during their irrigation practices to allow irrigation

1 of additional lands, then the Referee should be alert to a potential  
2 wasteful practice. Such a wasteful practice is particularly troublesome  
3 when that water is unavailable for use by downstream users through  
4 return flow.

5 **III. CONCLUSION**

6 The exception of the Mastersons in regard to the use of return  
7 flows is hereby remanded to the Referee for evaluation of additional  
8 factual evidence to be presented by the Mastersons. The Referee shall  
9 analyze all claims to return flows pursuant to the Order accompanying  
10 this Memorandum Opinion.

11 Dated this 16<sup>th</sup> day of July, 1996.

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15 Judge Walter A. Stauffacher  
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