

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. 7742-01484-5

Memorandum Opinion Re:  
Exceptions to Supplemental  
Report of Referee and  
Motions, Subbasin No. 15  
(Wenas).

**FILED**  
JUN 30 1998

KIM M. EATON, YAKIMA COUNTY CLERK

**Introduction**

On June 12, 1997, the Court conducted the Exceptions hearing for the Supplemental Report of the Referee for Subbasin 15 (Wenas). At that same time, several other motions were presented to the Court. A number of the issues presented were taken under advisement. This opinion addresses and rules on those matters.

**Wenas Irrigation District's Place of Use Designation**

Background<sup>1</sup>

In 1925, the Wenas Irrigation District (WID) took ownership of and enlarged an existing dam. This dam was enlarged again in 1981

<sup>1</sup> The background information is taken from the Original Report of the Referee for Subbasin 15, pages 198-207.

13-207

1 to its present capacity of 3,033 acre-feet. The WID has two  
2 certificated water rights. As noted by the Referee, unlike most  
3 irrigation district rights, these certificates "describe a very  
4 specific place of water use, as opposed to the water rights of many  
5 irrigation districts which often describe the place of water use as  
6 'Lands within the boundaries of the XXX Irrigation District.'" Supplemental Report of the Referee, (hereinafter Supplemental  
7 Report) at 70. The first certificate, No. 2054, authorizes WID to  
8 store 1,300 acre-feet of water from Wenas Creek with a priority  
9 date of August 4, 1925. The "Place of Use" listed on this  
10 certificate indicates specific lands where this water can be used.  
11 The second water right certificate, No. R4-26435C, was issued for  
12 the additional storage capacity resulting from the enlargement of  
13 the dam. It approved the storage of an additional 1,733 acre-feet  
14 with a priority date of September 7, 1979. This second certificate  
15 authorizes the irrigation of 2,500 acres but the listed "Place of  
16 Use" is still the same specific lands as the original 1925  
17 certificate. It is undisputed that WID has never irrigated more  
18 than 2,013.5 acres.  
19

20 In the mid-eighties, WID amended its boundaries pursuant to  
21 RCW 87.03.555-605. However, the Place of Use legal descriptions on  
22 their water certificates were never amended to include the added  
23 land. As a result, the Referee concluded that this land could not  
24 be included in the authorized Place of Use for either of the WID's  
25 certificated rights. "[I]n order to serve lands not specifically  
26

1 described on the certificates [in the Place of Use designation],  
2 the district needed to comply with the change procedures identified  
3 in RCW 90.03.380." Supplemental Report, at 70. The change  
4 procedures referred to by the Referee are described in RCW  
5 90.03.380 and state, in pertinent part, that a water right:

6  
7 ". . . may be transferred to another or to others and  
8 become appurtenant to any other land or place of use  
9 without loss of priority of right theretofore established  
10 if such change can be made without detriment or injury to  
11 existing rights. . . . Before any transfer of such right  
12 to use water . . . , any person having an interest in the  
13 transfer or change, shall file a written application  
14 therefor with the department, and said application shall  
15 not be granted until notice of said application shall be  
16 published as provided in RCW 90.03.280. If it shall  
17 appear that such transfer or such change may be made  
18 without injury or detriment to existing rights, the  
19 department [Department of Ecology] shall issue the  
20 applicant a certificate . . . granting . . . such change  
21 of point of diversion or of use . . ."

22 RCW 90.03.380. As mentioned, WID enlarged its boundaries in the  
23 mid-eighties. However, WID did not comply with the change  
24 procedures set out in RCW 90.03.380 to amend the Place of Use  
25 description in their water certificates so that the certificated  
26 Place of Use corresponds with the district boundaries. Therefore,  
the Referee determined that the Place of Use designation on WID's  
water rights that would issue as a result of this adjudication  
would be the lands designated on WID's original certificates and  
not include the additional land as requested by WID.

1 Arguments

2 WID has taken exception to the Referee's Place of Use  
3 determination. WID has essentially four arguments to support why  
4 it's Place of Use should be the 2,500 irrigable acres within its  
5 current boundaries rather than the awarded 2,013.5 irrigated acres  
6 awarded by the Referee. First, in 1991 the legislature amended RCW  
7 90.03.380. This amendment specifically exempts irrigation  
8 districts from the requirements of RCW 90.03.380 when transferring  
9 district water within district boundaries. Second, in WID's  
10 opinion, the recent Supreme Court ruling in this case, Department  
11 of Ecology v. Acquavella, 131 Wn.2d 756, 935 P.2d 595 (1997)  
12 (Acquavella III), has already decided the issue. In WID's view,  
13 Acquavella III mandates that the Place of Use description on the  
14 certificate of an irrigation district should include the irrigable  
15 acres, not the historically irrigated acres within an irrigation  
16 district. Third, WID asserts that the Court does not have the  
17 authority to interfere with contracts between an irrigation  
18 district and its patrons. Finally, it is not "practical or  
19 feasible" for the Court to require irrigation districts to comply  
20 with RCW 90.03.380. These arguments will be taken in order.

21  
22 Analysis

23 WID asserts that it is not required to comply with RCW  
24 90.03.380 because of the 1991 amendment to that statute. The  
25 amendment explicitly exempts the transfer of district water within  
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1 irrigation districts boundaries from Department of Ecology (DOE or  
2 Ecology) oversight. The amendment reads as follows:

3  
4 "A change in place of use by an individual water user or  
5 users of water provided by an irrigation district need  
6 only receive approval for the change from the board of  
7 directors of the district if the use of water continues  
8 within the irrigation district, . . ."

9 RCW 90.03.380. It is WID's argument that once an irrigation  
10 district has changed its boundaries pursuant to RCW 87.03.555-605,  
11 then the 1991 amendment to RCW 90.03.380 relieves the district from  
12 the statutory requirements of 90.03.380 for changing its Place of  
13 Use designation.<sup>2</sup>

14 The Referee disagrees with WID's interpretation of RCW  
15 90.03.380. First, the Referee notes that WID added the new land to  
16 the district prior to the amendments to 90.03.380. Second, the  
17 Referee believes that the legislature, when it passed the 1991  
18 amendment, contemplated that all the lands within an irrigation  
19 district would be included in that irrigation district's  
20 certificated Place of Use. The WID is a unique district because it  
21 has a very specific Place of Use listed on its water right

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22 <sup>2</sup>WID cites, as additional support for its position, prior rulings of this court.  
23 See Exceptions of Wenas Irrigation District to the Supplemental Report of Referee  
24 Sub-basin No. 15, pg. 2. In the Order Re: Threshold Issues, (Aug. 13, 1992),  
25 the court held the following:

26 "9. IT IS HEREBY FURTHER ORDERED that changes in the place of use  
of water within the boundaries of an irrigation district may be  
approved by the board of directors of the irrigation district and do  
not require approval of the Department of Ecology."

This order came out after the 1991 amendments to RCW 90.03.380 and essentially is  
a restatement of that statute. Therefore, 90.03.380 and this order from the  
Threshold Issues will be treated as one and the same.

1 certificates whereas most irrigation districts' water rights are  
2 appurtenant to the district's boundaries--whatever those boundaries  
3 might be. Therefore, WID is in the unusual situation of being an  
4 irrigation district larger than its water right. Therefore, the  
5 Referee "believes that the language in the amendment to RCW  
6 90.03.380 assumed that place of use on the water right broadly  
7 described the irrigation district, rather than the situation that  
8 exists for the WID where specific lands were described."  
9 Supplemental Report, at 71.

10 The Court agrees with the Referee. Essentially, WID is  
11 arguing that it can avoid the change of use procedures in 90.03.380  
12 by changing its district boundaries. In their brief, WID stresses  
13 two points: irrigation districts can change their boundaries  
14 pursuant to RCW 87.03.555-605 and irrigation districts are exempt  
15 from the requirements of RCW 90.03.380 when transferring district  
16 water within their boundaries. According to WID, these two  
17 statutes read together dictate that once an irrigation district  
18 changes its boundaries, RCW 90.03.380 permits that irrigation  
19 district to transfer district water for use on the new land free  
20 from DOE supervision.

21 While this argument at first blush is compelling, it begs the  
22 question before the Court. How do RCW 87.03.555-605 and RCW  
23 90.03.380 interrelate? Can an irrigation district change its  
24 boundaries and thereby avoid the change in place of use  
25 requirements of 90.03.380? Put differently, is WID required to  
26

1 comply with only the change of boundary requirements in order to  
2 transfer water to its newly added land, or instead, is WID required  
3 to comply with both the change of boundary and change in place of  
4 use requirements? Unfortunately, the statutes themselves do not  
5 acknowledge one another and therefore do not resolve the question.  
6 However, there are good reasons to conclude, as the Court does,  
7 that WID must comply with both statutes in order to apply district  
8 water to land that is not listed in its certificated Place of Use.

9 First, as noted by the Referee, at the time WID changed its  
10 boundaries, the 1991 amendment to 90.03.380 did not exist. Thus,  
11 WID should have gone through both the change in boundary as well as  
12 the change in place of use procedures at that time in order to  
13 irrigate this newly acquired land. This was not done. WID is  
14 asking to make the 1991 amendment retroactive without any showing  
15 that this was the intention of the legislature.

16 Second, while the statutes do not directly speak to the issue  
17 in this case, they are helpful in its resolution. If the statutes  
18 are largely duplicative, then one could assume that compliance with  
19 one would satisfy the other. If, on the other hand, the statutes  
20 have different requirements, then it is more likely that compliance  
21 with both should be required.

22 The purpose of RCW 87.03.555-605 is to provide a process  
23 through which irrigation districts can change their boundaries.  
24 The statute requires that a petition be filed by an adjacent  
25 landowner or landowners interested in joining the irrigation  
26

1 district. RCW 87.03.560. Then notice is required and interested  
2 parties are afforded an opportunity to be heard by the board of  
3 directors of the irrigation district. RCW 87.03.565-70. If no one  
4 objects to the petition, the board of directors of the irrigation  
5 district can order the change in boundaries. RCW 87.03.580.  
6 However, "if any person interested in said district" objects and  
7 can "show cause" for their objection, then the issue is put to a  
8 vote of the district patrons. RCW 87.03.580-585. What is important  
9 is that either way, the ultimate decision is left up to the  
10 irrigation district--either through the board of directors on the  
11 basis of "the best interest of the irrigation district" or the  
12 members of the irrigation district themselves through an election.  
13 RCW 87.03.580 and 590.

14 On the other hand, the purpose of RCW 90.03.380 is to  
15 facilitate the transfer of a water right to different land or  
16 permit a change in the point of diversion while ensuring that no  
17 injury will result to other water users from the change. The DOE  
18 makes the ultimate decision regarding whether injury will occur  
19 from a proposed change in the place of use.<sup>3</sup> The no injury rule is  
20 a strict standard. If even one water user is injured by the  
21 proposed change, DOE is compelled to deny the change--it is not  
22 something to be put to a majority vote of water users. See RCW  
23 90.03.380. Nowhere in the change of boundary process under RCW  
24

25  
26 <sup>3</sup> RCW 90.03.380 states that "[i]f it shall appear that such transfer of such  
change may be made without injury or detriment to existing rights, then the  
department [DOE] shall issue to the applicant a certificate in duplicate granting  
the right for such transfer or for such change in point of diversion or use."

1 87.03 is there inquiry into whether or not injury will result to  
2 other water right holders from the proposed boundary change. The  
3 process merely allows for "interested parties" who can "show cause"  
4 to have their grievances heard before the board of directors of the  
5 irrigation district. However, the law is clear that other water  
6 users injured by a change in use are entitled to protection. RCW  
7 90.03.380; Haberman v. Sanders, 166 Wash. 453, 460 (1932). Clearly  
8 injury may result from the enlargement of a water right through its  
9 application to land without an attendant water right. See  
10 Acquavella III, at 762. While both 90.03.380 and 87.03.555-605 may  
11 result in a water right being applied to new land, the purposes,  
12 safeguards and ultimate decision maker in each situation are  
13 different; these statutes accomplish different things.

14 While WID argues that the 1991 amendment exempts irrigation  
15 districts from 90.03.380 process, the 1991 amendment, when read in  
16 the context of the entire statute, carves out an exception where an  
17 irrigation district can distribute its water within district  
18 boundaries without DOE approval. However, the 1991 amendment  
19 cannot be interpreted to put irrigation districts outside the  
20 appurtenance requirements of Washington water law by allowing them  
21 to spread water beyond its certificated place of use. To allow WID  
22 to irrigate land outside its certificated place of use by merely  
23 annexing additional land would be to allow it to make an end run  
24 around the appurtenance and injury rules of 90.03.380. This the  
25 Court will not do.  
26

1 WID's second argument is that Acquavella III has already  
2 decided the issue. In Acquavella III the Supreme Court held as  
3 follows:

4 "An individual's water right is appurtenant to the land  
5 on which the water is beneficially used; and that  
6 individual cannot transfer the use of that water to  
7 different land without first requesting DOE approval.  
8 RCW 90.03.380. This requirement explains why a water  
9 right certificate must specify the land to which the  
right attaches. In an irrigation district, however, a  
water right can be transferred and applied to any land  
within the district *without DOE oversight*:

10 A change in place of use by an individual water  
11 user or users of water provided by an  
12 irrigation district need only receive approval  
for the change from the board of directors of  
the district if the use of water continues  
within the irrigation district[.]

13 RCW 90.03.380. Although an irrigation district's water  
14 right is legally appurtenant to the land on which the  
15 water is applied, the right can be shifted to any land in  
16 the district on which the water can be beneficially used-  
17 -the right can be applied to any irrigable acreage. For  
18 this reason, it makes more sense for YTID's [the  
19 irrigation district in the case] certificate to denote  
the number of acres to which the water can be applied  
beneficially."

19 Acquavella III, at 761-62. WID asserts that this ruling gives  
20 irrigation districts complete discretion regarding both the change  
21 in place of use as well as the number of acres irrigated within  
22 district boundaries.

23 At first reading, WID's interpretation of the Acquavella III  
24 ruling has merit. However, the quoted paragraph reads differently  
25 with the peculiarities of this case in mind. Remember, unlike  
26

1 other irrigation districts (including YTID in Acquavella III), WID  
2 has specific acreage listed as the Place of Use on its water right  
3 certificates. In this regard, WID is more like the individual  
4 water right holder than an irrigation district. Also, the issue  
5 before this Court is whether WID must comply with 90.03.380 when it  
6 seeks to irrigate land outside of its certificated Place of Use but  
7 within its boundaries, not when it seeks to distribute water within  
8 its certificated Place of Use and its boundaries. The Acquavella  
9 III case is concerned with the latter, not the former. Therefore,  
10 once WID has complied with 90.03.380 and legally changed the Place  
11 of Use designation to include all the lands within the boundaries  
12 of the irrigation district, then the Acquavella III ruling would  
13 apply.

14 WID's third argument is that the Court does not have the  
15 authority to interfere with the contracts between an irrigation  
16 district and its patrons. WID quotes this Court's Memorandum  
17 Opinion Re: Threshold Issues:

18  
19 "Historically, since the passage of the Water Act of  
20 1917, and even prior thereto, the holder of a water right  
21 could change the place of use of that water right if the  
22 proposed change was within the boundaries of the same  
irrigation district supplying the water simply by  
applying to the directors of the irrigation district and  
receiving their approval. . . .

23 In one instance, where a landowner held a water  
24 right appurtenant to certain lands under a contract with  
25 the district supplying the water, the landowner applied  
26 to the department's predecessor, under the above-cited  
statute, for a change of the place of the use of said  
water right within the district's boundaries. In  
Wenatchee Reclamation District v. Titchenal, 175 Wn. 398  
(1933) the Court held that the statute did not authorize

1 the department to interfere in the relationship between  
2 the district and its patrons."

3 Order Re: Threshold Issues, (Aug. 13, 1992) at 31-32. WID  
4 concludes from this passage that irrigation districts have always  
5 had discretion in how water is distributed within their boundaries.  
6 Assuming this is true, the passage does not say that irrigation  
7 districts have always had the autonomy to ignore the Place of Use  
8 limitation stated in their water right certificates.

9  
10 Apparently, WID also interprets Threshold Issues and Titchenal  
11 as saying that the State has no say whatsoever in the contracts  
12 between it and its patrons. It goes without saying, however, that  
13 the State can and must interfere with illegal contracts. In  
14 Titchenal the court was dealing with a contract that limited the  
15 patron's rights within the law. WID is attempting to avoid state  
16 law by contracting around the Place of Use limitations in their  
17 water certificates.

18 Finally, WID appeals to the Court that on grounds of  
19 practicality:

20 "If the reasoning of the Referee is upheld, the Wenas  
21 Irrigation District will have to file a Change of Place  
22 of Use with the Department of Ecology every time there is  
23 a request to transfer water to lands that are not  
24 specifically identified in the old water right  
certificates which were issued prior to the amendment of  
RCW 90.03.380. This is clearly not the purpose of the  
amended section. Nor is it practical or feasible.

25 The purpose of the amended statute was to allow the  
26 irrigation district to determine the most beneficial use  
of the application of water within its boundaries. The  
court and all parties are well aware of the Department of  
Ecology's cries of lack of funding and its inability to

1 process various water applications on a swift and timely  
2 basis.”

3 Exceptions of Wenas Irrigation District to Supplemental Report of  
4 Referee, pg. 3. This argument is also unpersuasive. While it is  
5 true that WID will have to file a change in Place of Use with the  
6 DOE every time they request to transfer water to lands not  
7 identified in their water right certificates, why this is not  
8 “practical or feasible” is not clear. Presumably, they need only  
9 go through the 90.03.380 procedures once in order to amend the  
10 Place of Use description to match the district boundaries. Once  
11 the Place of Use reflects their boundaries, WID is free to  
12 distribute this water within those boundaries without going through  
13 the RCW 90.03.380 process.  
14

15 Therefore, the Court rules that the Place of Use designation  
16 in WID’s water rights will be the lands listed on its water right  
17 certificates. WID may seek to amend its Place of Use pursuant to  
18 90.03.380 so that its Place of Use matches the irrigation district  
19 boundaries. If and when this is accomplished, the WID will be free  
20 to transfer district water within the entire district’s boundaries.  
21

## 22 **Limitations of Use Exceptions**

### 23 Introduction

24 As in prior subbasin reports, the Referee utilized technical  
25 information and expert testimony in order to determine a general  
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1 water duty for the basin.<sup>4</sup> Specifically, the Report of the Referee  
2 reads as follows:

3  
4 "The Plaintiff State of Washington submitted an  
5 exhibit entitled 'Supplemental Documentary Information,  
6 Wenas Creek Subbasin No. 15', which included information  
7 on soils, climate, irrigation and farming practices, and  
8 plant needs meant to aid the Referee in determining  
9 irrigation water requirements within the subbasin. In  
10 addition, two expert witnesses for the U.S. Bureau of  
11 Reclamation testified at a special hearing held on June  
12 12, 1991, to provide general information regarding crop  
13 irrigation requirements for water delivered to farms in  
14 the lower portion of the Yakima River Basin. In the  
15 absence of definitive testimony or other evidence, the  
16 Referee proposes to rely upon such expert testimony, and  
17 will calculate the maximum duty of water for the various  
18 uses in Subbasin No. 15 according to the following  
19 formulae: . . .

20  
21 B. Irrigation Water -- In order to be reasonably  
22 lenient about irrigation cropping patterns, the Referee  
23 will use an annual water duty of 5 acre-feet per acre for  
24 irrigation. This duty represents a maximum annual water  
25 volume for prevalent irrigation uses in this area . . . .  
26 It is the Referee's opinion that the aforementioned  
duties of water are reasonable maximum application rates  
for the soil and topographical conditions in Subbasin no.  
15. . .

It should be noted that the use of water under all  
irrigation rights is limited to the amount of water that  
can be beneficially applied to the number of acres  
identified in the water right [emphasis added]."

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<sup>4</sup>The Referee relied on testimony from two U.S. Bureau of Reclamation experts and the State exhibit entitled "Supplemental Documentary Information, Wenas Creek Subbasin No. 15." The Supplemental Documentary Information contained a variety of information relating to the soils, farming practices, crop requirements and the climate in the Wenas Basin. Specifically it includes the Soil Survey of Yakima County Area Washington, United States Department of Agriculture Soil Conservation Service, May 1985; Manual of Individual Water Supply Systems; United States Environmental Protection Agency, 1974, EPA-430/9-74-007; State of Washington Irrigation Guide; United States Department of Agriculture Soil Conservation Service in cooperation with the Washington State Cooperative Extension Service, 1985, WA210-VI-WAIG, October 1985; United States Weather Service Station, Yakima, Washington; Summary of climatological data beginning September 1946, and ending December 1989; Washington Climate for Grant, Kittitas, Klicitat, and Yakima Counties; Donaldson, W.R., 1979 Washington State University Cooperative Extension Service College of Agriculture in cooperation with the United States Department of Agriculture, EM4422, May 1979.

1 Report of the Referee for Subbasin No. 15 (Wenas Creek)

2 (hereinafter Report of the Referee) at 2-3. The basin wide water  
3 duty adopted by the Referee will be referred to herein as the  
4 "general water duty." In addition, the Report of the Referee  
5 restates the general water duty in the "Conclusions of Law" section  
6 of the report.

7  
8 "Duty of Water

9 Unless otherwise specified, the diversion of water  
10 from sources of water contained within the Subbasin No.  
11 15 for irrigation purposes shall be limited, at a  
12 maximum, to 1.0 cubic-foot per second for each 50 acres  
13 irrigated, not to exceed during each irrigation season, a  
14 total of 5 acre-feet per acre."

15 Id. at 310.

16 Due to the seemingly endless tension and fighting over water  
17 in the Wenas Basin, the Referee endeavored to be as specific as  
18 possible in the quantification of each water right. Therefore, the  
19 Referee put individual "Limitations on Use" within many water  
20 rights in an attempt to more accurately specify historic water use  
21 under those rights. The particular Limitations on Use (which will  
22 also be referred to as "limiting language") at issue before the  
23 Court is the limitation placed on the water rights of WID members  
24 who receive both WID storage water and natural flow creek water.  
25 The limiting language in these irrigators rights is intended to  
26 quantify, regardless of the source (natural flow or WID storage  
water), the maximum amount of water which has been historically  
used on the land. The limiting language reads as follows:

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"Limitations of Use: This land receives supplemental water from the Wenas Irrigation District. A maximum of \_\_\_\_\_ acre-feet per year can be used under this right and any right the land may enjoy through the district."

Id. at 297. The actual quantity in acre-feet is unique to each water right but in all cases was determined through specific evidence of historic use or, where such evidence was lacking, by application of the general water duty. The Original Report required "definitive testimony or other evidence" that more than 5.0 acre-feet had historically been used on the land in order to confirm a quantity larger than the general water duty. Original Report, at 2-3.

Arguments

Three members of the Wenas Irrigation District (WID) and the WID itself, on behalf of all its members, take exception to the Limitation of Use language placed on the water rights of WID members. Specifically, the claimants are the Christiansen Family Trust, Claim No.s 01222, 01647; Lazy Heart B, Inc., Claim Nos. 00432, (A)01362; Robert M. Messer, Claim No. 01612; and the WID, Claim No. 00432. These parties will be referred to collectively as "the Claimants." The Claimants make numerous arguments why the Limitation of Use language should be modified or stricken. In the opinion of the Court, all of these arguments boil down to these three issues. First, within the context of an adjudication, can the Court place language within the Claimants water rights which

1 limit their future acquisition and use of additional water rights  
2 on their land? Second, does the general water duty adopted by the  
3 Referee represent the maximum volume of water for which a water  
4 right can be confirmed absent contrary testimony? Third, is the  
5 general water duty adopted by the Referee arbitrary, unfair or a  
6 surprise to the Claimants?

7

8 Limiting Future Use

9 First, the Claimants maintain that the imposition of any  
10 language in their rights which limits the future use of the water  
11 on their land is illegal. They argue that the purpose of an  
12 adjudication is not to limit their future use, but instead to  
13 quantify their current water right. If the Claimants acquire  
14 additional water rights in the future, the limit on their water use  
15 should be beneficial use, not what has historically been used.  
16 Also, the Claimants argue that the limiting language is unfair  
17 because they were unaware, nor should they have been aware, that  
18 they were required to testify about the maximum amount of water  
19 that could be beneficially used on their land. They contend that  
20 claimants in other basins have not had similar limiting language  
21 placed in their rights and therefore they believed that they were  
22 testifying about their actual historic water use for the purpose of  
23 confirming their water right, not the maximum of water that could  
24 ever be beneficially used on their land. Finally, the Claimants  
25 maintain that the limiting language will inhibit the transfer of  
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1 WID storage water between WID patrons and that the Court lacks the  
2 authority to limit the use and transfer of WID water within  
3 district boundaries based on RCW 90.03.380.

4  
5 "A change in place of use by an individual water user or  
6 users of water provided by an irrigation district need  
7 only receive approval for the change from the board of  
8 directors of the district if the use of water continues  
9 within the irrigation district, . . ."

10 RCW 90.03.380. They also cite to Wenatchee Reclamation District v.  
11 Titchenal, 175 Wash. 404 (1933) for the proposition that the  
12 transfer of water within an irrigation district is a contract  
13 between district patrons and the Court has no authority to  
14 interfere with such contracts.

15 To the extent that the Limitations of Use language limits  
16 future use of water (regardless of its source) on the Claimants'  
17 land, the Court agrees. Although it is not clear that this was the  
18 intent of the limiting language, to avoid further confusion, the  
19 Court notes that the purpose of an adjudication is to confirm  
20 existing rights.

21 "A general adjudication is a special form of quiet title  
22 action to determine all existing rights to the use of  
23 water from a specific body of water. (citation omitted) .  
24 . . . An adjudication of water rights is only for the  
25 purpose of determining and confirming those rights  
26 (citation omitted) [emphasis added]."

27 Department of Ecology v. Grimes, 121 Wn.2d 459, 466 (1993); See  
28 also, Acquavella III, at 754-55. Existing water rights are  
29 quantified through evidence of historic beneficial use. Acquavella

1 III, at 755. "Under both state and federal law, beneficial use is  
2 'the basis, the measure and the limit' of the right to the use of  
3 water." Id., at 755 (citing Ickes v. Fox, 300 U.S. 82, 94 (1937)).  
4 Therefore, an irrigator's existing water right can only include  
5 water which that irrigator has put to beneficial use and can not  
6 include water that has been wasted. Grimes, at 471-72. By the  
7 same token, the maximum quantity of water that a claimant has  
8 historically used, and for which a water right can be confirmed,  
9 may be less than what could be beneficially used on the land in the  
10 future. While one would expect historic use, if such use has not  
11 been wasteful, to reflect the amount that could be beneficially  
12 used in the future, it need not be so--conditions, irrigation  
13 methods and crops may change. While the Court can not confirm a  
14 right in wasted water, neither can the Court prevent the legal  
15 acquisition and beneficial use of additional water in the future.  
16 To the extent that the Limitations of Use language limits the  
17 future use of all water, not just current adjudicated rights, it  
18 exceeds the scope of an adjudication.

#### 21 General Water Duty as the Limit of the Water Right

22 According to Ecology, the foregoing analysis misses the point.  
23 The limiting language is not intended to limit the future use of  
24 water, but instead to prevent the confirmation of wasteful water  
25 use as part of the Claimants existing water right. This brings us  
26 to the second question posed above: is the general water duty the

1 maximum volume of water for which a water right can be confirmed  
2 absent contrary testimony?

3 Ecology contends that the Original Report is clear; absent  
4 "definitive testimony or other evidence" which would indicate a  
5 different water duty (higher or lower), the Referee would adopt the  
6 general water duty in the quantification of water rights. Ecology's  
7 Response to Exceptions to Supplemental Report of the Referee, at 2.

8 Absent such testimony, 5.0 acre-feet per acre "represents the  
9 maximum annual water volume for prevalent irrigation uses. . ." and  
10 the maximum quantity for which a water right will be confirmed in  
11 this adjudication. Original Report, at 3. Accordingly, Ecology  
12 argues that "[t]he Referee is not limiting a claimant's use of  
13 district water; the Referee is limiting a claimant's water right to  
14 a level known to be beneficial and not wasteful." Ecology's  
15 Response to Exceptions to Supplemental Report of the Referee, at 3.

16 The Court agrees with Ecology and rules that the general water  
17 duty adopted by the Referee is reasonable and properly limits the  
18 extent of their adjudicated water rights absent definitive  
19 testimony that a larger water duty is warranted. Grimes is  
20 dispositive on the issue.

21  
22 "The referee observed that a larger water duty could  
23 be awarded [over and above the general water duty] to any  
24 claimant with specific information proving a right to a  
25 larger amount. The . . . [general] water duty was  
26 applied when 'quantitative evidence of the rate and  
volume of a right was neither submitted nor made clear  
during testimony' (citation omitted). The Referee also  
observed that 'the use of water under all irrigation  
rights is, however, limited to the amount of water that

1 can be beneficially applied to that number of acres  
2 identified in the water right' [emphasis added]."

3 Grimes, at 471. Clearly the general water duty functions to limit  
4 an adjudicated water right absent "specific information proving a  
5 right to a larger amount." Id. Often a claimant will have a valid  
6 water claim but will lack records of actual historic diversions or  
7 other evidence by which to quantify their right. In these  
8 situations, rather than deny the claim, the general water duty is  
9 supplied by the Referee to approximate the actual but unknown  
10 historic diversions. Therefore, the historic beneficial use of  
11 water, determined either through direct evidence (diversion  
12 records, etc.) or indirectly through application of the general  
13 water duty, is used to quantify existing water rights. Beneficial  
14 use limits water use.

15 Therefore, the general water duty is the maximum volume of  
16 water for which a right can be confirmed unless a claimant  
17 successfully proves otherwise. However, if a claimant legally  
18 obtains additional water rights (either through appropriation under  
19 RCW 90.03.290 or transfer under RCW 90.03.380), the limit on the  
20 use of their water is the legal concept of beneficial use. They  
21 are not limited by their adjudicated water right. That said, a  
22 word of caution is in order. Although the transfer of irrigation  
23 district water between irrigation district patrons is exempt from  
24 the DOE approval under RCW 90.03.380, this exemption does not  
25 permit the waste of water. See RCW 90.03.005. Under no  
26

1 circumstances can an irrigator divert more water than he/she can  
2 beneficially use.

3  
4 Is the General Water Duty Unfair or Arbitrary?

5 Given that the general water duty is the maximum quantity of  
6 water for which a water right can be confirmed absent contrary  
7 testimony, the Claimants take exception to the quantity adopted as  
8 the general water duty. They argue that the 5.0 acre-feet per acre  
9 chosen by the Referee is too restrictive, arbitrary and unfair.

10 First, the Claimants take exception to the general water duty  
11 because "it is inconsistent with the expert testimony on water use  
12 in the Wenas Irrigation District." Exceptions of Wenas Irrigation  
13 District to Supplemental Report of Referee Subbasin No. 15,  
14 (hereinafter WID Exceptions) at 5. The Claimants points to the  
15 Engineering Report for Water Rights Claim: Wenas Irrigation  
16 District (hereinafter Bain Report) prepared by Richard Bain. While  
17 technically speaking the Claimants are correct (because the Bain  
18 Report is the only expert testimony specifically on "water use in  
19 the Wenas Irrigation District"), they ignore all of the other  
20 documents and testimony relied on by the Referee related to  
21 irrigation requirements in the Wenas Basin. See footnotes #4  
22 supra. The Referee's determination was not "inconsistent" with the  
23 expert testimony, he simply did not exclusively rely on the expert  
24 testimony that the Claimants would have preferred.  
25  
26

1           Second, again relying on the Bain Report, the Claimants argue  
2 that the 5 acre-feet standard water duty is a reasonable "average  
3 water use not the maximum water use." WID Exceptions, at 5. As an  
4 average, and not a maximum, they argue, the 5 acre-feet figure is  
5 too restrictive and does not represent a water duty at all. If  
6 indeed the Referee had chosen an average water use to represent the  
7 standard water duty, and the Washington Supreme Court had not ruled  
8 in Grimes the way that it did, the Claimants' argument might be  
9 persuasive. Instead, the Court has good reason to reject this  
10 argument. The Referee did not select 5 acre-feet as an average,  
11 but instead, chose 5 acre-feet as a reasonable maximum.

12  
13           "In order to be reasonably lenient about irrigation  
14 cropping patterns, the Referee will use an annual water  
15 duty of 5 acre-feet per acre for irrigation. This duty  
16 represents a maximum annual water volume for the  
prevalent irrigation uses in this area . . . [emphasis  
added]."

17 Report of the Referee, at 3. In addition, it is not entirely clear  
18 from the Bain Report why 5.0 acre-feet was determined to be the  
19 average water use in the Wenas Irrigation District. The Bain  
20 Report reads as follows:

21           "Irrigation water use was determined by evaluating  
22 several typical irrigation systems on farms within the  
23 Wenas Irrigation District. Three such examples are  
described below [emphasis added]."

1 Bain Report, at 7. The Bain Report goes on to analyze the acreage,  
2 water use, irrigation methods and soils on the three farms and  
3 concludes:

4 [c]onsidering the total acreage surveyed (293.8 acres)  
5 and water use (1467.2 acre ft.) the weighted average  
6 water use per acre for these farms was computed to be 5.0  
7 acre feet per acre. This average irrigation use was  
8 considered representative of the Wenas Irrigation  
9 District farms [emphasis added].

10 Id. What is unclear is why these three farms are considered  
11 representative of the entire WID when several farms were  
12 evaluated. The three farms represent roughly 15% of the acreage  
13 in the WID, let alone the Wenas basin. Without "very conclusive  
14 evidence" "showing arbitrariness", the Court is not prepared to  
15 overturn the Referee's water duty determination. Grimes, at 471.

16 The Claimants also believe that they have demonstrated that  
17 the water duty is arbitrary because "there are numerous cases of  
18 people who have already been allocated more than five acre-feet per  
19 acre of water." Id. at 23. The argument being, apparently, that  
20 because some land in the Wenas Basin has been confirmed rights  
21 higher than 5 acre-feet per acre, the general water duty does not  
22 reflect the maximum water use. Therefore, WID perceives the  
23 standard water duty as an arbitrary cap that does not reflect the  
24 proper maximum amount that can beneficially be used on a given  
25 parcel in the Wenas Basin.

26 Grimes has already decided this issue. In Grimes the Supreme  
Court stated "that a larger water duty could be awarded to any

1 claimant with specific information proving a right to a larger  
2 amount. . . ." Grimes, at 471. Clearly, setting the general water  
3 duty below the highest water use in an area is not arbitrary  
4 because the water duty is not intended to be the maximum amount  
5 used, but instead:

6  
7 "that measure of water, which, by careful management and  
8 use, without wastage, is reasonably required to be  
9 applied to any given tract of land for such period of  
10 time as may be adequate to produce therefrom a maximum  
amount of such crops as ordinarily are grown thereon. It  
is not a hard and fast unit of measurement, but is  
variable according to conditions [emphasis added]"

11 Grimes, at 469 (quoting In re Steffens, 756 P.2d 1002, 1005-06  
12 (Colo. 1988) (quoting from Farmers Highline Canal & Reservoir Co.  
13 v. Golden, 129 Colo. 575, 272 P.2d 629 (1954))).

14 If a Claimant demonstrated that the general water duty is  
15 insufficient to irrigate their land, then they were confirmed a  
16 larger water right. See Report of the Referee, at 2-3. Therefore,  
17 as was the case in Grimes, the Referee has merely shifted the  
18 burden to the Claimants to demonstrate a higher water use, if their  
19 water use exceeds the general water duty.

20 The Claimants persist in arguing that the general water duty  
21 is erroneous because the Wenas is a water short area; if there were  
22 more water it could be put to beneficial use. Again, the Claimants  
23 assume that the quantity selected by the Referee as the general  
24 water duty is an average water use in the basin. Therefore, using  
25 the average historic water use rather than the maximum amount that  
26

1 could be beneficially used is arbitrary and "inconsistent with the  
2 testimony and we believe inconsistent with the law." Id.

3 The Court has already set out its reasons why it will defer to  
4 the Referee's conclusion that 5.0 acre-feet per acre is a  
5 "reasonably lenient" water duty. The Referee did not believe he  
6 was using an average. However, assuming that 5.0 acre-feet were  
7 the average water use in a water short basin, it does not follow  
8 that the water duty adopted by the Referee is too low. First, as  
9 was the case in Grimes, all of the Claimants were given the  
10 opportunity to put on evidence of a higher water duty. Grimes, at  
11 471. Second, as noted, the general water duty is not intended to  
12 reflect the maximum water use in the area. The general water duty  
13 is determined in large part by soil conditions, crop requirements  
14 and climatic conditions. These factors are independent of the  
15 amount of water available in the basin. Third, there are numerous  
16 parties in the basin with water use well below 5.0 acre-feet. It  
17 would appear equally likely that these are the irrigators that  
18 could put more water to beneficial use if it were available, not  
19 those irrigators who already use a very large quantity of water per  
20 acre. Finally, nothing in this ruling prevents irrigators from  
21 legally obtaining additional water rights in the future, if that  
22 water can be put to beneficial use.

23 The final argument the Claimants make is that if the  
24 Limitation of Use language is not removed then they will be unable  
25 to grow different crops in the future than what is currently being  
26

1 grown on the land. Transcript of Proceedings, at 20-21. The  
2 Claimants state that in the past, different crops have been grown  
3 that have greater water requirements. Therefore, because the water  
4 duty was determined based on the crops currently grown in the Wenas  
5 Basin, the Claimants will be unable to switch to more water  
6 intensive crops, if they so desire, because the Limitation of Use  
7 isn't flexible enough to allow the change. Id. The claimants fear  
8 that they will be "locked in" to the crops that they are currently  
9 growing. Id.

10 Again, neither the limiting language nor the general water  
11 duty are intended to limit future water use. The purpose of the  
12 general water duty is to quantify existing water rights in the  
13 absence of definitive testimony indicating a right to a different  
14 quantity. The Limitations of Use language is doing just this--  
15 limiting the Claimants' adjudicated water rights, not future water  
16 use. Claimants who expected to be awarded a water right in excess  
17 of 5.0 acre-feet needed to put on testimony that more than 5.0  
18 acre-feet per acre had historically been used on their land. This  
19 isn't unfair, as it is precisely what was done in Grimes. Nor is  
20 it a surprise to the Claimants as the Report of the Referee clearly  
21 states that

22  
23 "Unless otherwise specified, the diversion of water  
24 from sources of water contained within Subbasin No. 15  
25 for irrigation purposes shall be limited, at the maximum,  
26 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."

1 Report of the Referee, at 310. Water rights confirmed in Subbasin  
2 No. 15, regardless of their source or sources, will be limited to  
3 5.0 acre-feet per acre unless the evidence indicates otherwise.  
4 The Court sees no reason why storage water should not be included  
5 as a "source of water contained in Subbasin No. 15." Therefore,  
6 the combination of natural flow and storage water confirmed in the  
7 claimants' adjudicated water rights will not exceed 5.0 acre-feet  
8 per acre unless they testified to a larger water use (as many  
9 claimants did).

10 In short, the Court will defer to the Referee's determination  
11 of a 5.0 acre-feet per acre general water duty.

12  
13 "In a water rights adjudication, the establishment  
14 of a water duty must not be disturbed in 'the absence of  
15 very conclusive evidence contrary to the . . .  
adjudication, showing arbitrariness on [the] part of [the  
adjudicator]. . . .'"

16 Grimes, at 471 (citing In Re Ahtanum Creek, 139 Wash. 84, 96  
17 (1926)). Those Claimants whose adjudicated rights have been  
18 limited by the general water duty had ample opportunity to testify  
19 to a larger water duty at the evidentiary hearings. If they did  
20 not, their claims are limited to 5.0 acre-feet per acre.

21  
22 Ruling

23 Accordingly, the Court rules as follows. The Limitation of  
24 Use language, as currently written, may be interpreted as limiting  
25 future water use on the land. However, limiting future water use,  
26

1 as opposed to existing water rights, is beyond the scope of an  
2 adjudication. As noted before, the purpose of an adjudication is  
3 to "confirm existing rights." Grimes, at 466-67. This involves a  
4 determination of "the amount of water that has been put to  
5 beneficial use [emphasis added]." Id. at 67. From the claimants'  
6 testimony, the Referee determines the amount of water which has  
7 historically been beneficially used on the land and therefore the  
8 quantity of the claimant's existing right. Frequently, claimants  
9 do not have specific diversion records or other specific evidence  
10 by which to determine the actual quantity of water historically  
11 used. In such situations, the general water duty is used to  
12 indirectly determine historic beneficial use and therefore, the  
13 extent of claimants' rights. All of the claimants had an  
14 opportunity to present evidence of historic use in excess of the  
15 general water duty and if they proved such use to the satisfaction  
16 of the Referee, they were confirmed a water right in accordance  
17 with their testimony.

18 RCW 90.03.380 allows for the transfer of water within  
19 irrigation districts with only the approval of the board of  
20 directors of the irrigation district. Therefore, this Court is  
21 without authority to prevent the future transfer of district water  
22 within district boundaries if that water is being put to beneficial  
23 use. But see "Wenas Irrigation District's Place of Use Designation"  
24 supra. The heading, "Limitations of Use" is somewhat misleading  
25 because it is not a limitation on water use but instead a  
26

1 limitation on the adjudicated water right. Regardless, for the  
2 sake of consistency this language will be retained. In addition,  
3 the limiting language will be amended to reflect this ruling but  
4 will not be stricken as it is useful for those who administer the  
5 water rights in the basin to know the extent of historic water use  
6 under those rights. Therefore, for purposes of clarifying the  
7 limiting language and to assist those who will administer the  
8 rights in the Subbasin 15, the Limitations of Use language will  
9 read as follows:

10  
11       Limitations of Use: In addition to the right granted  
12       from Wenas Creek, this land receives supplemental water  
13       from the Wenas Irrigation District. Historically under  
14       these rights, a maximum of \_\_\_\_\_ acre-feet has been used  
15       from both sources for irrigation of this land.

16 The quantities from the Supplemental Report will be retained as  
17 they resulted from specific testimony or where such testimony was  
18 lacking, the application of the general water duty.

19 **Mayos' Exceptions to Claims of Bertelsen, Claim No. 00434; Wood,  
20 Claim No. 02218; Day, Claim No. 01191; Lawrence Claim No. 01604.**

21       In a related exception to the Limitations of Use issue, the  
22 Mayos argue that no one in Subbasin 15 should have been awarded a  
23 water right with higher water use per acre than the 5.0 acre-feet  
24 per acre water duty. As discussed above in the "Limitations on  
25 Use" section, the Referee required claimants to put on "definitive  
26 testimony or evidence" of water use in excess of 5.0 acre-feet per  
27 acre in order to be awarded a water right larger than the general

1 water duty. Original Report, at 3. The Mayos assert that no one in  
2 the basin properly established such a right and ask the Court to  
3 adjust the above listed claimants' [Bertelsen, Wood, Day and  
4 Lawrence] water rights to a maximum of 5.0 acre-feet per acre.

5  
6 "We are not aware of any testimony or evidence being  
7 presented for any claim during the entire Subbasin  
8 Proceedings which showed any cause or request for the  
9 original opinion of the Referee to be refuted on this  
10 matter [emphasis added]."

11 Mayo Exception (Doc. # 12,331), at 2.

12 Ecology objects to the Mayos' motion on the basis of  
13 timeliness. No exceptions were taken with the quantities awarded  
14 to the listed claimants in the Original Report and therefore, these  
15 claimants had no opportunity to rebut the Mayos' claims and no  
16 reason to offer additional evidence at the remand hearing.  
17 Therefore, Ecology asserts that the Mayos' motion is plainly unfair  
18 and that the proper method of challenging these rights is to appeal  
19 the conditional final order.

20 The Mayos counter that the WID has taken exception to the  
21 Limitations of Use language on behalf of all its members. See  
22 Exceptions of Wenas Irrigation District to Supplemental Report of  
23 Referee Sub-basin No. 15, at 4. Therefore, when WID asserted that  
24 the Court has "no authority to limit an individual water user's use  
25 of district water", the above named claimants have indirectly taken  
26 exception to the Limitations of Use language. Id. at 5.

1           The Court rules that the Mayos' motion is not timely. First,  
2 no exception was taken to the limiting language in any of the four  
3 above named claimants rights in the Original Report. These  
4 claimants would have had no reason to expect that they would be  
5 required to put on additional testimony to bolster their claims.  
6 Second, while WID has taken exception on behalf of its members,  
7 this is not sufficient notice to these particular claimants that  
8 their water rights were being challenged. WID's arguments  
9 regarding the Limitations of Use language centered around proving  
10 that the general water duty unfairly and arbitrarily limited water  
11 use by district patrons. However, the Mayos' motion is not about  
12 the validity of the water duty, but whether the above named  
13 claimants put on definitive testimony or other evidence in order to  
14 justify the quantities awarded in their water rights. It would be  
15 patently unfair to attribute WID's arguments to these claimants,  
16 especially when they have no further opportunity to put on rebuttal  
17 testimony.

18           Even if the Mayos' motion were timely, the Court finds that  
19 there is evidence in the record to confirm the findings of the  
20 Referee despite the Mayos' vague assertion to the contrary. For  
21 Wood, See Evidentiary Hearing Subbasin No. 15, (Doc. # 7982) at 198;  
22 for Bertelsen, See Original Report of the Referee, at 42-43 and  
23 Evidentiary Hearing Subbasin No. 15, (Doc. # 7990) at 94; for  
24 Lawrence, See Evidentiary Hearing Subbasin No. 15, (Doc. # 7983) at  
25 68; and for Day See Original Report of the Referee, at 73-74. From  
26

1 this testimony, the Referee found sufficient evidence to grant  
2 these claimants a water right in excess of the general water duty.  
3 Grimes acknowledges the Referee's authority to do so. Grimes, at  
4 471. The Court will defer to the specific findings of the Referee.  
5 The Mayos' request to have these claimants rights limited to 5.0  
6 acre-feet per acre is denied.

7  
8 **Mayos' Exception to Instantaneous Rate of Diversion for Buchanan,**  
9 **Claim No. 02212; Christensen Family Trust, Claim No. 01222; Kisner,**  
10 **Claim No. 00494; Egge, Madison and Homier, Claim No. 01644.**

11 The Mayos also take exception to the instantaneous rate of  
12 diversion for the above listed claimants. Again, no exception was  
13 taken at the remand hearing on this issue. These claimants were  
14 not on notice that their instantaneous rate of diversion was in  
15 question. Therefore, the Court is in agreement with Ecology that  
16 exception to the instantaneous rate of diversion in the water  
17 rights of these claimants is not timely. The issue must be raised  
18 on appeal of the conditional final order. The motion is denied.

19  
20 **Exception of Lazy Heart B, Inc.**

21 Lazy Heart B is one of the Claimants who took exception to the  
22 Limitations of Use language discussed and ruled upon above in the  
23 "Limitations of Use" section supra. In addition, they have taken  
24 specific exception to a separate limitation placed on the right to  
25 the unnamed spring which arises on their property.

1 Analysis

2 In the Supplemental Report, Lazy Heart B was confirmed 144  
3 acre-feet from Wenas Creek for the irrigation of 46.5 acres. This  
4 amount was based on the testimony of Mrs. Rosella Calvert who  
5 testified on behalf of Lazy Heart B. See Evidentiary Hearing  
6 Subbasin No. 15, Dec. 1, 1992, at 207-08. In addition, Lazy Heart  
7 B is assessed by the WID for this land and receives 1.3 acre-feet  
8 per irrigated acre in storage water. Id. The combination of the  
9 two sources (Wenas Creek and WID storage) yields a quantity of  
10 203.8 acre-feet. This was the amount by which the Referee limited  
11 the Lazy Heart B's water right through the Limitations of Use  
12 language. See Supplemental Report of the Referee, at 142. At the  
13 supplemental hearing, Mrs. Calvert put on testimony regarding water  
14 use from the unnamed spring (the spring had apparently been  
15 overlooked at the original hearing because it was erroneously  
16 thought to be a groundwater claim). She introduced evidence which  
17 estimated the quantity of water from the spring based upon the size  
18 of the pipe which carries the water away from the spring. However,  
19 she conceded that no measurement had ever been taken of the total  
20 amount used in any particular year. Because the Referee considered  
21 testimony based on the size of the pipe insufficient to establish  
22 the quantity actually used, the award was instead based on WRC No.  
23 004167 which Lazy Heart B filed for this spring pursuant to RCW  
24 90.14. The right in the unnamed spring was for "0.22 cubic foot  
25 per second, 80 acre-feet per year for irrigation; 5 acre-feet per  
26

1 year for stock water." Supplemental Report, at 143. While the  
2 Referee did recognize that the spring was an additional source of  
3 water, he concluded that the spring did not provide a right to an  
4 additional quantity of water beyond that awarded in the Wenas Creek  
5 right.

6  
7 "Mrs. Calvert [on behalf of Lazy Heart B] testified at  
8 the initial Subbasin No. 15 evidentiary hearing  
9 concerning the quantity of water used to irrigate their  
10 lands. Since the spring flows into the irrigation ditch  
11 and is applied to the land along with Wenas Creek water,  
12 the Referee concludes that testimony [regarding the  
13 quantity for the Wenas Creek right] included the spring  
14 water. Therefore the annual quantity recommended for use  
15 from the spring shall not be in addition to the annual  
16 quantity of water confirmed from Wenas Creek."

17  
18 Supplemental Report, at 46-47. Therefore, the Referee placed a  
19 limitation on this right that is worded as follows:

20 "Limitations of Use:

21 The annual quantity of 80 acre-feet per year for  
22 irrigation is not in addition to the annual quantity used  
23 under the 1884 right to use Wenas Creek water on the same  
24 land."

25 Id.

26 Lazy Heart B, Inc. takes exception to this language because,  
in their view, this right from the unnamed spring is in addition to  
the 1884 Wenas Creek right found on page 142 of the Supplemental  
Report. "Lazy Heart B, Inc. has historically and continues to use  
its full entitlement from all sources. . . . No additional water  
is being requested, only that the limitation language be stricken  
to correspond to the actual beneficial use." Exceptions of Lazy

1 Heart B, Inc. to Supplemental Report of Referee Claim No. 00432 (A)  
2 01362, at 2. Lazy Heart B, therefore sees the Wenas Creek right  
3 and the unnamed spring right as separate rights that have  
4 historically both been used in their entirety.

5  
6 Ruling

7 As the Court has already ruled on the Limitations of Use  
8 language in general--including the exception of Lazy Heart B--the  
9 only question before the Court is whether the annual quantity in  
10 the confirmed right from the unnamed spring is in addition to that  
11 confirmed in the Wenas Creek right.

12 The Court rules that the right for the unnamed spring is not  
13 for an additional annual quantity beyond that in the Wenas Creek  
14 right. Again, "definitive testimony or other evidence" was  
15 required for the Referee to confirm a water right with a water duty  
16 in excess of 5.0 acre-feet per acre. Original Report, at 2-3. If  
17 the quantity awarded in the unnamed spring is used in addition to  
18 the Wenas Creek right and the WID storage rights appurtenant to the  
19 same acreage, the water use on this land could be as much as 6.10  
20 acre-feet per acre. The Court can not find anything in the record  
21 which indicates definitively that the spring water is used in  
22 addition to the Wenas and WID storage rights. Instead, while Lazy  
23 Heart B clearly testified that they use water from all three  
24 sources, the weight of the evidence indicates that the unnamed  
25 spring does not provide an additional quantity of water over and  
26

1 above the quantity in the Wenas Creek right. The priority date for  
2 this spring was determined to be 1884. Supplemental Report, at  
3 143. Mrs. Calvert stated that as a small child in 1926, she  
4 remembered that the spring was piped from its source and dumped  
5 into their irrigation ditch with their Wenas Creek water.  
6 Supplemental Evidentiary Hearing, Sept. 24, 1996, at 80-82.  
7 Therefore, since 1926 at the latest, and likely much earlier, the  
8 spring water and Wenas water have been commingled. Id. Therefore,  
9 while the water derives from two different sources, it has been  
10 applied to the land as one.

11 At the original evidentiary hearing, Lazy Heart B put on  
12 testimony regarding the water use on their land. The following is  
13 taken from the transcript for the Original Evidentiary Hearing held  
14 December 1, 1992. Mrs. Calvert was being questioned by her  
15 attorney, Mr. Hutton.

16  
17 "Q: We've helped you calculate your present use of the  
18 water, . . .

19 Q: On the Class 17 [the right in question] we've  
20 calculated that your irrigation . . . [is] .97 cfs or 1.9  
21 acre-feet per day, a total of 144 acre-feet annually or  
22 2.98 acre-feet per acre on the class right; is that  
23 correct?

24 A: That's correct.

25 Q: You also have to storage on that claim, part of your  
26 claim at 1.3 acre-feet per acre?

A: Yes [emphasis added]."

1 Original Evidentiary Hearing, 208. As this was testified to as the  
2 present use of water, certainly this would include the water  
3 derived from the unnamed spring as the two are commingled before  
4 being applied to the land. The fact that Lazy Heart B did not  
5 present evidence on the unnamed spring until the Supplemental  
6 hearing is inconsequential because they did not definitively  
7 establish that the spring provided an additional quantity of water  
8 over and above their confirmed right.

9 In the Supplemental Report, the Referee concluded that the  
10 unnamed spring did not fall under the Dormaier exception. See  
11 Opinion Re: Exception of Dwayne and Alvin Dormaier, Memo Opinion,  
12 Sept. 16, 1993. No exception was taken to this finding.  
13 Therefore, this spring is not the personal property of Lazy Heart  
14 B, but is instead public water and tributary to the natural flow of  
15 Wenas Creek. Accordingly, absent definitive testimony otherwise,  
16 the unnamed spring would be considered part of the Wenas Creek  
17 right.

18 Therefore, the Court denies the exception of Lazy Heart B  
19 regarding the limitation placed on the right to the unnamed spring  
20 on page 143 of the Supplemental Report. The Court concludes that  
21 the testimony regarding the quantity of water applied under the  
22 Wenas Creek right included the spring water. The Limitations of  
23 Use language found on page 143 of the Supplemental Report of the  
24 Referee will be retained.  
25  
26

1 **Robert M. Messer Exception - Claim No. 1612**

2 Once again, Mr. Messer has taken exception to the confirmation of a  
3 water right for the irrigation of 22 acres, rather than the  
4 "roughly 24" acres that he requested at the Remand hearing held  
5 September 24, 1996. Upon review of the record, at the initial  
6 evidentiary hearing there was entered into evidence the 1921  
7 Certificate No. 69 establishing a Class 14 right with an 1881  
8 priority date for 0.53 cfs for irrigation of 26.35 acres. Evidence  
9 was introduced that the Wenas Irrigation District assessed Mr.  
10 Messer for 24.01 acres. Other evidence was a county map showing a  
11 total ownership of 24 acres; a 1943 S.C.S. farm plan and aerial  
12 photo showing 22 acres as irrigated; a photo from John Mayo of the  
13 same 22 irrigated acres; and the State's investigative report  
14 stating 22 acres as the irrigated acreage. Although the 1921  
15 Certificate No. 69 gave an "inchoate" right for 26.35 acres, the  
16 evidence clearly showed 22 acres as being irrigated.

17 At the Remand hearing, Mr. Messer testified that he should  
18 have been confirmed "roughly 24" acres. Introduced into evidence  
19 was an April, 1995 survey of the property. He testified that it  
20 depicted his hay field and pasture, including his residence and  
21 also that of his mother-in-law, the combination of which amounted  
22 to 23.65 acres. He pointed out an old ditch line, known as the  
23 "Rennie" ditch (the land was owned by the Rennie family since 1907,  
24 although Certificate No. 69 had a priority date of 1881) more or  
25 less on the east side of the property, and testified that there  
26

1 were 3.61 acres above the old ditch line. He stated that the  
2 combination of the 23.65 acres and a portion of the 3.61 acres  
3 above the ditch comprise the 24 acres he claims are now irrigated.  
4 He further indicated that a change was made from the use of the  
5 ditch to a pressurized sprinkler system that took place in the  
6 1980's. The land had been irrigated by gravity flow until then and  
7 land above the ditch could not have been so irrigated. Therefore,  
8 there is no evidence that prior to the installation of the  
9 pressurized system in the 1980's that any of the 3.61 acres above  
10 the ditch were irrigated. The 22 acres confirmed by the Referee is  
11 the 23.65 acre parcel below the ditch, less the residences.

12 As previously noted, the 1921 Certificate No. 69 gave an  
13 "inchoate" water right for 26.35 acres. "Inchoate" is defined as:  
14 "Imperfect; partial; unfinished; begun, but not completed [emphasis  
15 added]." Black's Law Dictionary, Sixth Edition. Included in the  
16 Washington statutes dealing with water rights, R.C.W. 90.03.460  
17 states:

18  
19 "Nothing in this chapter contained shall operate to  
20 effect an impairment of an inchoate right to divert and  
21 use water while the application of the water in question  
22 to a beneficial use is being prosecuted with reasonable  
23 diligence, having due regard to the circumstances  
24 surrounding the enterprise, including the magnitude of  
the project for putting the water to a beneficial use and  
the market for the resulting water right for irrigation  
or power or other beneficial use, in the locality in  
question [emphasis added]."

1           Thus, it is abundantly clear that since 1917, when this  
2 statute became law, the "unfinished, not completed" inchoate right  
3 had to be prosecuted with reasonable diligence. From 1921 when the  
4 "inchoate" right was established by Certificate No. 69 for the 3.61  
5 acres above the ditch till the pipeline was installed in 1981 to  
6 allow a sprinkler system to irrigate the 3.61 acres, a period of 60  
7 years, clearly does not constitute "reasonable diligence" in  
8 commencing the irrigation of any part of the 3.61 acres above the  
9 ditch.

10           Additionally, it has been established that this property is  
11 riparian to Wenas Creek, from which the "Rennie" ditch diverted the  
12 water to irrigate this property. There was testimony at the  
13 original evidentiary hearing that Mr. Messer's stock drink directly  
14 out of Wenas Creek. As specifically noted by the Referee in the  
15 Supplemental Report, any inchoate riparian rights had to be fully  
16 exercised and put to use by December 31, 1932 or those rights are  
17 forfeited. "Our cases support adoption of that year as the cutoff  
18 date for exercise of unused riparian rights; 15 years after  
19 enactment of the water code, we now hold, as a matter of law,  
20 constitutes adequate notice." Department of Ecology vs. Abbott,  
21 103 Wn.2d 686, 695 (1985). Thus, it is beyond question that no  
22 right to the irrigation of any of the 3.61 acres above the ditch  
23 ever vested. The award of water rights for the 22 acres is  
24 affirmed.  
25  
26

1 **Motion to Install a New Measuring Device**

2 John Mayo, Nancy Mayo, Doug Mayo, the Haywire Outfit, and the  
3 Mayo Cattle Company (Mayos) moved the Court for authorization to  
4 install a new measuring device. This proposed measuring device  
5 would be situated in the Chambers Ditch (which is actually now a  
6 pipe) and downpipe from the point of diversion for the property  
7 served (Claim Nos. 05225, 05226, 05227, 00804, 00806, 00807 and  
8 00684). The Mayos propose the change based on perceived  
9 convenience for both themselves and the stream patrolman.  
10 Specifically, the sworn statement of Doug Mayo states as follows:

11  
12 "4. The diversion point, at which we have  
13 historically installed a measuring device . . . , is  
14 remote. This causes the monitoring of our diversion to  
15 be time consuming and difficult.

16  
17 5. That unannounced fluctuations in the in-stream  
18 water supply have made it difficult to maintain a  
19 consistent flow through our diversion.

20  
21 6. I would like to be able to install a flow meter  
22 which is located along our pipeline and is much easier to  
23 monitor both by myself and others. In addition, if I  
24 utilize the flow meter, I wouldn't have to construct as  
25 large of a dam at the point of diversion for purposes of  
26 operating the weir and the diversion.

7. The Chambers Ditch is now piped, therefore, it  
is more hydraulically efficient to measure the flow with  
a meter rather than a weir."

22  
23 Motion for Authorization to Install a Measuring Device, at 3.

24 Through the Affidavit of Kevin Brown, Ecology voiced concern  
25 regarding the proposed meter. The meter would be installed "one-  
26 half of a mile down the Chambers Ditch," while the headgate, which

1 regulates the flow, will remain at the Chambers Ditch diversion."  
2 Affidavit of Kevin Brown, at 1. Ecology anticipates a potential  
3 problem with the meter and the headgate being separated by such a  
4 distance because there would be a substantial time lag when the  
5 stream patrolman made an adjustment at the headgate and when the  
6 change in flow would be reflected downpipe at the meter. This  
7 problem is compounded because several adjustments at the headgate  
8 may be necessary to attain the proper flow. The lag between  
9 adjustment and measurement could result in a great waste of time  
10 for the stream patrolman who would need to wait for the lag in the  
11 flow and would be required to travel back and forth making  
12 adjustments until the desired flow was attained. Additionally, the  
13 proposed meter is manufactured to be accurate for flows between 1  
14 and 20 cfs. However, the Mayos are authorized to take a maximum of  
15 1.37 cfs into Chambers Ditch and often may be diverting much less.  
16 Thus, the accuracy of the measurements for flows below 1 cfs could  
17 not be trusted. Finally, Ecology requests that tests be performed  
18 to insure that back-pressure from the new device does not result in  
19 greater loss of water through the old concrete pipe. Id. at 2. In  
20 summary, Ecology requests the following conditions be required by  
21 the Court if the Mayos order is granted.

22  
23 "Approval of the measuring device should be subject to  
24 the following conditions:

25 A) The regulating structure must be at or near the  
measuring device to allow for regulation and proration.

26 B) Tests must be performed to insure that the back-  
pressure associated with this type of construction does

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not cause a significant loss of water through the old concrete pipe structure, resulting in diversion of a higher volume of water to satisfy the right(s), causing impairment to junior users.

C) Verification below 1 cfs: If the device is unable to measure flows below 1 cfs, then Ecology submits that the device is inadequate for the type of installation, or that when flows approach 1 cfs, the diversion must be terminated due to an inadequate measuring device."

Affidavit of Kevin Brown, at 2.

Ruling

After reviewing previous rulings, the proceedings on this motion and the submissions of the parties, the Court concludes that Ecology is owed deference regarding the conditions for approval of metering and measuring devices. There are several reasons for this deference. First, the Court has already ruled that the approval of Ecology is required for the installation of measuring devices of first priority users on Wenas Creek--including the Mayos Claims 05225 and 05227. Specifically, these first priority users must:

"install and maintain a measuring device approved by the Department of Ecology at or near his or her point of diversion from Wenas Creek so the stream patrolman can accurately determine the water user's diversion from Wenas Creek. [emphasis added]"

Ninth Order Pendente Lite, Wenas Creek, Yakima County, at 3.

Additionally, the Court has deferred to Ecology before on similar matters. For instance, the Court has stated that:

"in light of the acrimony that prevails on Wenas Creek, accuracy and certainty is of a premium. To achieve those

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goals, the Court will defer to the expertise of the DOE. The Court hereby orders that the appropriate permanent measuring devices and structures which will ensure a high level of accuracy, as determined by the DOE, be installed . . . [emphasis added]."

Memo Opinion Re: Wenas Creek Petition for 10th Order Pendente Lite,  
at 8.

The Court sees no reason to depart from its previous rulings. It is within the discretion of DOE to approve or disapprove measuring devices. Second, after reading the transcript, it is clear that the only "dispute" between the parties is whether the proposed location of the new measuring device would actually be more convenient for all involved. Both Ecology and the stream patrolman, Ray Day, indicate that having the headgate and measuring device one-half mile apart would result in more travel and result in a waste of time for those monitoring the diversion. See Affidavit of Kevin Brown, at 3; Verbatim Report of the Proceedings, at 97. Thus, the only party who could possibly benefit would be the Mayos. However, even the Mayos seem inconvenienced by their own motion. On several occasions, the Mayos indicated that they would just as soon go back to their old rectangular weir, especially if the location of the new device presents such a problem. See Proceedings, at 94, 96-97, 105, 107. "[W]hy spend \$1,500. I'd just put the [old] weir back in." Id., (Testimony of Doug Mayo) at 94. At one point, the Mayos even agreed with Ecology's concerns stating they had no objection to Ecology's conditions for approval of the device. Id., at 102.

1 Third, the matter is technical and highly fact specific. Indeed,  
2 the only people who seemed to really understand the intricacies of  
3 matter were the Mayos themselves, the stream patrolman (Ray Day)  
4 and the Ecology employee in charge of the Wenas (Kevin Brown).  
5 Technical and factual issues, when possible, are best left with the  
6 experts at Ecology rather than with the Court. Additionally, the  
7 Mayos recognize the validity of Ecology's conditions, Ecology's  
8 authority over the matter, and have expressed a willingness to work  
9 with Ecology on the measuring of their diversion. Id., at 101-102.  
10 Furthermore, upon the entering of the Conditional Final Order for  
11 the Wenas Subbasin, Ecology will again have complete authority over  
12 the administration of Wenas Creek. In sum, there is no reason for  
13 the Court rather than Ecology to decide this issue. The motion is  
14 denied.

15  
16 **Mayos Diversionary, Non-Irrigation Season Stockwater Motion**

17 The Mayos are requesting a diversionary stockwater right for  
18 Claims Nos. 00804, 05225 and 05226. They base their claim on this  
19 Court's ruling in Revised Pendente Lite Order Implementing  
20 Memorandum Opinion Re: Petition for Tenth Order Pendente Lite;  
21 Clarification of Ninth Order Pendente Lite; Amendment Sixth order  
22 Pendente Lite; Exceptions to Report of Referee Subbasin No. 15  
23 (hereinafter Revised Pendente Lite Order) (Doc. # 11,161) Nov. 21,  
24 1995. In this Order, the Court ruled as follows:

25  
26 "The Court does recognize Purdin Ditch non-irrigation  
season, diversionary stockwater rights of up to .25

1 c.f.s. Purdin Ditch does not need to re-state this claim  
2 at the Remand Hearing before the Referee."

3 Id. at 13. From this ruling and the arguments leading to it, the  
4 Mayos "expected diversionary stockwater to be granted to all  
5 certificate holders in the front [sic] of the Supplemental Report  
6 of the Referee." Mayos Rebuttal to Response of Ecology (Doc. #  
7 12,468), at 1. The Mayos saw "no reason to use the Remand Court's  
8 time to establish a right . . . [they] believed the Court had  
9 previously ruled upon" and that the assumption "that the Court had  
10 allowed diversionary stockwater to all certificate holders was  
11 strengthened when the assessment for Storage Season patrolman was  
12 assessed against all parcels holding a certificate, not just those  
13 which are riparian." Id. at 2.

14 The issue raised by the Mayos is this: did the Court, through  
15 the Purdin Ditch ruling quoted above, intend to grant a  
16 diversionary, non-irrigation season stockwater right to all  
17 certificate holders in Subbasin 15? A little background is  
18 required to answer this question. The Original Report discussed  
19 diversionary stock water in some detail:

21 "The certificates that issued as a result of the  
22 1921 adjudication of Wenas Creek identify irrigation as  
23 the only use authorized. Neither the Report of the  
24 Referee or the Decree discuss stock water in any manner.

25 . . .  
26 There has been testimony about historic stock  
watering practices in the basin, however, due to lack of  
water rights for that use, the Referee must conclude that  
stock watering was either non-diversionary on riparian  
lands or incidental to irrigation practices on non-  
riparian lands. Water would be available for stock  
watering in irrigation ditches during the irrigation

1 season where stock had access to drink from the ditches.  
2 There is no indication that water was being provided  
3 specifically for stock watering either during or after  
4 irrigation season.

5 The non-diversionary, riparian stock watering is  
6 covered by the stock water stipulation. When testimony  
7 supports it, diversionary stock watering will be  
8 recommended for confirmation in conjunction with  
9 irrigation uses only during irrigation season. . . . Due  
10 to the lack of certificates for this specific use, no  
11 additional instantaneous quantities beyond that being  
12 confirmed for irrigation can be confirmed." [emphasis  
13 added].

14 Original Report, at 11-12. It was therefore the position of the  
15 Referee that because the 1921 Decree was silent on non-irrigation  
16 season, diversionary stock water rights, they would not be  
17 confirmed in this adjudication.

18 The users of Purdin Ditch took exception as a group to the  
19 Purdin Ditch not being confirmed non-irrigation season,  
20 diversionary stock water. This issue of Purdin Ditch came before  
21 the Court during the November 9, 1995, oversight hearing. The  
22 Purdin Ditch users based their argument for diversionary, non-  
23 irrigation season stockwater rights on issues which were generally  
24 applicable to all certificate holders in the Wenas basin.  
25 Subsequent to the hearing (Nov. 21, 1995), the Court issued the  
26 Revised Pendente Lite Order which indeed granted Purdin Ditch a  
non-irrigation season, diversionary stockwater right. However,  
there is no indication in the transcripts or the Revised Pendente  
Lite Order that the Court intended this ruling to apply to anyone  
other than Purdin Ditch. Therefore, the Mayo's assumption that the

1 Purdin Ditch ruling applied to all certificate holders is  
2 speculative at best.

3 The Court is persuaded for a number of reasons to deny the  
4 claim despite the Mayos' arguments. First, it appears that the  
5 Court awarded the non-irrigation season, diversionary stockwater  
6 right to the Purdin Ditch users based more on an agreement by all  
7 the parties and Ecology rather than the arguments of the Purdin  
8 Ditch users. In the oversight hearing, Ms. Casey, on behalf of  
9 Ecology, said:

10  
11 "[D]uring the break I talked with some of the other  
12 attorneys here and I think everyone has agreed that  
13 that's [the diversionary stockwater for Purdin Ditch] a  
14 fairly diminimus amount of water and that it's not going  
15 to adversely affect other people, if Purdin Ditch is able  
16 to take that amount of water. . . .

17 And you may poll the attorneys here, but I think  
18 there was an agreement that no one wants to hurt Purdin  
19 Ditch by not allowing them to have that amount of water,  
20 and everyone is willing to work with them pending a  
21 decision at the remand hearing."

22 Oversight Hearing Transcript, November 9, 1995, at 68-69.

23 Second, there was evidence in the record to support the Purdin  
24 Ditch claim. Jerry Longmire, a Purdin Ditch user, testified in the  
25 Original Evidentiary Hearing that stock drank from the Purdin Ditch  
26 year round.

27 "All of those animals drank out of the creek and  
28 that, out of the ditch, out of the Purdin Ditch or it ran  
29 to them out of the Purdin Ditch. . . . But historically  
30 those ranches . . . have all through history taken water  
31 through that ditch [Purdin Ditch] perpetually."

1 Evidentiary Hearing Subbasin No. 15, December 3, 1992, at 91.

2 Third, the specific wording of the Purdin Ditch ruling should  
3 have put the Mayos on notice that the Court did not intend to award  
4 a general basin wide non-irrigation season, diversionary stockwater  
5 right.

6 "The Court does recognize Purdin Ditch non-irrigation  
7 season, diversionary stockwater rights of up to .25 cfs.  
8 Purdin Ditch does not need to re-state this claim at the  
9 Remand Hearing before the Referee." [emphasis added].

10 Revised Pendente Lite Order, at 13.

11 Fourth, there has been no testimony from any of the claimants  
12 in Subbasin 15, other than Purdin Ditch, about historic  
13 diversionary stockwater use outside the irrigation season.  
14 Therefore, if the Court were to grant a basin wide diversionary,  
15 non-irrigation season right, there would be no evidence in the  
16 record upon which to base quantities and priority dates for these  
17 diversionary rights. Allowing diversions without quantity and  
18 priority date information defeats the purpose of an adjudication  
19 and flies in the face of the Revised Pendente Lite Order requiring  
20 Ecology to attempt to simply maintain a live flowing stream in all  
21 of Wenas Creek during the non-irrigation season. If all the  
22 claimants in Subbasin 15 were granted a diversionary, non-  
23 irrigation stockwater right, more than a live flowing stream would  
24 likely be required to meet diversionary stock requirements.  
25 Therefore, since no one other than the Purdin Ditch users testified  
26 about historic non-irrigation season, diversionary stockwater use,

1 the Court will not "create" this new right for the other claimants.  
2 There is no evidence in the record that the Mayos historically have  
3 diverted non-irrigation season stockwater. The Mayos had two  
4 opportunities to put on testimony as to their historic use of non-  
5 irrigation season, diversionary stockwater—the original and remand  
6 hearings. They did not make use of either opportunity.

7 The Court therefore rules as follows. Although the 1921  
8 Decree did not specify an irrigation season, the Referee has ruled,  
9 and the Court concurs, that an irrigation season will be imposed  
10 based upon historic irrigation practices in the basin.  
11 Supplemental Report, at 4. The Referee has also ruled that  
12 diversionary stockwater will not be awarded outside of the  
13 irrigation season. Original Report, at 12. Purdin Ditch took  
14 exception to this ruling and the Court made a specific ruling for  
15 Purdin Ditch based upon testimony of historic off-season  
16 diversionary stockwater use. Revised Pendente Lite Order, at 13.  
17 The Mayos did not put on testimony upon which the Referee could  
18 base a diversionary stockwater right. The Court therefore denies  
19 the Mayos motion for diversionary stockwater.

#### 21 **Seasonal Transfer Motion**

22 The Mayos have also petitioned the Court for two seasonal  
23 changes in point of diversion and two seasonal transfers of water.  
24 The requested seasonal changes in points of diversion are:

- 25 1) A change of James Poisel's water right for .47 cfs, with a  
26 priority date of June 30, 1867 from its historic point of  
diversion in section 4, T. 14, R. 18 to the Mayo's diversion  
in section 5;

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2) A second change of James Poisel's water right for .09 cfs, with a priority date of June 30, 1870 from its historic point of diversion in section 4, T. 14, R. 18 to the Mayo's diversion in section 5.

The requested seasonal transfers are:

- 1) A transfer of .38 cfs with a priority date of June 30, 1870 from the land of James Poisel in section 10 to 19 acres of the Mayo's land in section 4;
- 2) A transfer of .63 cfs with a priority date of June 30, 1870 from the land of James Poisel in section 10 to 31.4 acres of the Mayo's land in section 5.

Arguments

Ecology has no objection to the changes in point of diversion. These changes have been authorized on a temporary basis in the past and can be made in the future without impairment to existing rights. Ecology's Response to Motion for Seasonal Transfer, at 2.

However, Ecology does object to the requested seasonal transfers "because they would impair existing rights as follows." Id. First, both water rights have a priority date of June 30, 1870 and would be transferred to the Mayos' land which has water rights of later priority or lands with no surface water right at all. Second, the water which is to be transferred has not recently been used and the land had not been tilled for planting. Id. Accordingly, Ecology believes "[t]his would result in junior rights being regulated earlier and more often than if the transfer had not occurred." Id., at 3.

1 Analysis

2 Ecology's response to the proposed transfers presents the  
3 Court with two issues. First, will detriment or injury result when  
4 water is transferred off of land with an earlier priority date than  
5 the land to which it is being transferred? Second, will injury to  
6 other water users result when a water right is transferred off of  
7 the land to which it is appurtenant when that water right has not  
8 recently been used and will not be used on the land that season?

9 The Court believes that RCW 90.03.380 provides the answer to  
10 the first question.

11  
12 "(1) The right to the use of water which has been applied  
13 to a beneficial use in the state shall be and remain  
14 appurtenant to the land or place upon which the same is used:  
15 PROVIDED, HOWEVER, that the right may be transferred to  
16 another or to others and become appurtenant to any other land  
or place of use without loss of priority of right theretofore  
established if such change can be made without detriment or  
injury to existing rights." [emphasis added].

17 RCW 90.03.380. The priority date of the receiving land in a  
18 proposed transfer is, by itself, irrelevant in determining if  
19 injury will result from a proposed transfer. Therefore, the  
20 Poisels' 1870 water can be transferred to the Mayo's later class or  
21 no class land and retain its 1870 priority date if the transfer  
22 does not cause "detriment or injury to existing rights."

23 This brings us to the second question: will detriment or  
24 injury to existing rights result, within the meaning of RCW  
25 90.03.380 or RCW 90.03.390, when a water right is transferred off  
26 of the land to which it is appurtenant when that land has not

1 recently been irrigated and will not be irrigated that season. Put  
2 differently, does revival and transfer of a recently unused water  
3 right result in injury to other water users?

4 It is well established rule of western water law that a water  
5 right which has historically been applied to a beneficial use can  
6 be transferred if the transfer will not cause injury to other water  
7 rights. Okanogan Wilderness League, Inc. v. Town of Twisp, 133  
8 Wn.2d 769, 777-78 (1997) (hereinafter Twisp). RCW 90.03.380 is a  
9 codification of this principle.

10 In arguing that the Poisels' land has not recently been  
11 irrigated and has not been tilled for irrigation for the upcoming  
12 season, Ecology appears to be arguing, as did the Plaintiff in  
13 Twisp, that the beneficial use of a water right must be continuous  
14 in order for a water right to be transferable. Id. at 777. The  
15 Twisp court dismissed this argument. Twisp involved a proposed  
16 change in point of diversion but the beneficial use analysis is the  
17 same.

18  
19 "[T]o the extent that . . . [the Plaintiff in the  
20 case] suggests that nonuse of the water right, in and of  
21 itself, means that a change in diversion may not be  
22 permitted under RCW 90.03.380 because 'revival' of the  
23 right will adversely affect other water rights, the  
24 argument is incorrect. The statute plainly refers to  
25 water beneficially used and to avoidance of harm to other  
26 water rights, not merely to nonuse for a period of time  
[emphasis added]."

1 Twisp, at 779. The Supreme Court goes further stating that whether  
2 RCW 90.03,380 will preclude a proposed transfer<sup>5</sup> of an unused water  
3 right, "depends upon whether that right has been abandoned or  
4 otherwise extinguished." Id., at 780.

5 The water right which the Poisels' seek to transfer to the  
6 Mayos has been confirmed in this adjudication. Supplemental Report,  
7 at 87. Therefore, if the Poisels' water rights have not been  
8 "abandoned or otherwise extinguished", they are transferable.

9 The Twisp Court ruled that the relinquishment statute, RCW  
10 90.14.160 did not codify common law abandonment. Twisp, at 784.  
11 Therefore, there are two avenues by which a water right holder can  
12 lose their water right—common law abandonment and statutory  
13 relinquishment under RCW 90.14.160.

14 Common law abandonment is the intentional relinquishment of a  
15 water right. Twisp, at 781 (citing Jensen v. Department of Ecology,  
16 102 Wn.2d 109, 115 (1984); Miller v. Wheeler, 54 Wash. 429, 435  
17 (1909)). Intent is determined by the conduct of the parties and  
18 the burden of proof rests with the party alleging abandonment.  
19 Twisp, at 781 (citing Acquavella III, at 757). Nonuse is not per  
20 se abandonment but is instead evidence of intent to abandon.  
21 Twisp, at 781. "[L]ong periods of nonuse raise a rebuttable  
22 presumption of intent to abandon, thus shifting the burden of proof  
23 to the holder of the water right to explain reasons for the  
24 nonuse." Id. The cases cited in Twisp as examples of long periods  
25

26  

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<sup>5</sup>Again, Twisp dealt with a change in point of diversion not a proposed transfer.

1 of nonuse range from 10-29 years. Id. The Poisels' right, on the  
2 other hand, "has not been irrigated for several years and has not  
3 been tilled and prepared for planting this year." Ecology's  
4 Response to Motion for Seasonal Transfer, at 2. The Court does not  
5 believe this qualifies as a "long period" of nonuse sufficient to  
6 shift the burden to the Poisels to explain their reasons for  
7 nonuse. Therefore, the several years of nonuse can only be used by  
8 Ecology as evidence of intent to abandon. However, Ecology has  
9 presented no other evidence indicating the Poisels' intent to  
10 abandon their right. The Court does not feel Ecology has met its  
11 burden of proof. Instead, although it is not essential for  
12 resolution of the issue, the Poisels have adequately explained the  
13 reason for the period of nonuse. The Poisels' original point of  
14 diversion was damaged and rendered inoperable by a flood. Verbatim  
15 Report of Proceedings, (June 10, 1993), at 75. As a result the  
16 Poisels have requested a change in point of diversion from the DOE.  
17 However, this request can't be processed until a conditional final  
18 order is entered for the Wenas Basin. According to Mr. Poisel,  
19 "[a]ll the paperwork has been done and everything is in progress,  
20 but I'm in limbo until this proceeding is done. . . . I can't get  
21 water there [to the land which the right is appurtenant] until I  
22 get my point of diversion." Transcript of Proceedings, at 111.  
23 This is adequate explanation for several years of nonuse of a water  
24 right. Therefore, the Court rules that the Poisels did not intend  
25  
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However, the beneficial use inquiry is the same in each situation.

1 to relinquish their water right and, as a consequence, the right  
2 has not been abandoned under the common law.

3 The second way in which a water right holder can lose his/her  
4 water right is through statutory relinquishment. In 1967, the  
5 Legislature passed RCW 90.14.160 which provides that:

6  
7 "Any person entitled to divert or withdraw waters of  
8 the state through any appropriation authorized by  
9 enactments of the legislature prior to enactment of  
10 chapter 117, Laws of 1917, or by custom, or by general  
11 adjudication, who abandons the same, or who voluntarily  
12 fails, without sufficient cause, to beneficially use all  
13 or any part of said right to divert or withdraw for any  
14 period of five successive years after the effective date  
15 of this act, shall relinquish such right . . . [emphasis  
16 added]"

17 RCW 90.14.160. No evidence has been presented to the Court which  
18 would indicate that the Poisels have relinquished their right under  
19 RCW 90.14.160. First, the Court has already ruled that the  
20 Poisels' right has not been abandoned. Second, there is no  
21 evidence which indicates that the Poisels have failed to divert or  
22 withdraw their water for a period of five successive years. Third,  
23 even if the Poisels had failed to use their water for five  
24 successive, they have "sufficient cause" for nonuse. Sufficient  
25 cause is defined in RCW 90.14.140. It provides that:

26  
27 "(1) For the purposes of RCW 90.14.130 through  
28 90.14.180, 'sufficient cause' shall be defined as the  
29 nonuse of all or a portion of the water by the owner of a  
30 water right for a period of five or more consecutive  
31 years where such nonuse occurs as a result of:

32 . . .  
33 (d) the operation of legal proceedings; . . ."

1 RCW 90.14,140. The Acquavella proceedings have been ongoing since  
2 1977. The alleged relinquishment occurred in the 1990's.  
3 Therefore, the Poisels' right has not been relinquished under RCW  
4 90.14.160.

5  
6 Ruling

7 The 1997 irrigation season is over and the Court will not rule  
8 on the specific seasonal transfers at issue in the Mayo's motion.  
9 Upon the entry of the Conditional Final Order for Subbasin 15,  
10 Ecology will be responsible for assessing whether injury will  
11 result from the transfer of water or a change in point of  
12 diversion. The Court rules, however, that the priority date of the  
13 land receiving a water transfer is irrelevant in determining if  
14 injury will result from the transfer. Also, the Court holds that  
15 an injury does not result within the meaning of RCW 90.03.380 or  
16 RCW 90.03.390 when an unused water right, which has not been  
17 abandoned under the common law or relinquished under RCW 90.14.160,  
18 is proposed for a transfer.

19  
20 **Mayos' Response to the Report of Richard Bain**

21 On June 13, 1997, the Court heard oral argument on the motions  
22 and exceptions to the Supplemental Report. On June 25, 1997, the  
23 Mayos entered with the Court a statement entitled "Sworn Statement  
24 of Douglas Mayo, P.E., In Response to the Richard C. Bain, Jr.,  
25 Report dated June 9, 1997" (Doc. # 12, 506) (hereinafter "Sworn  
26

1 Statement") in an attempt to critique and criticize the methodology  
2 and findings of the Engineering Report for Water Rights Claim:  
3 Wenas Irrigation District (hereinafter the "Bain Report"). The  
4 Bain Report was a study conducted by Richard Bain to assess the  
5 source of the springs that arise in the South Fork of Wenas Creek.  
6 Through the Sworn Statement, the Mayos attacked many of the  
7 assumptions, facts and conclusions found in the Bain Report and  
8 attempted to reassert their position regarding the source of the  
9 springs in question.

10 Through the Affidavit of Lawrence Martin, the attorney of  
11 record for WID, WID requests that the Court strike the Sworn  
12 Statement. Motion of Wenas Irrigation District to Strike Late  
13 Statement of Douglas Mayo and Affidavit of Lawrence E. Martin,  
14 (Doc. # 12,511). The Affidavit notes that the hearing on this  
15 matter had already been held and no continuance was requested by  
16 the Mayos. Additionally, WID argues that they will be put at a  
17 disadvantage if the Sworn Statement is admitted because they will  
18 have no opportunity to cross-examine Douglas Mayo regarding the  
19 foundation for his opinions and conclusions.

20 The Court agrees with WID. The Sworn Statement is not timely  
21 and could be prejudicial to WID. The Bain Report was admitted into  
22 evidence in this case in a timely fashion. Mr. Bain was admitted  
23 as an expert in this matter and was available for cross-examination  
24 during the hearing on this motion held June 13, 1997. No request  
25 for a continuance to provide the Court with additional information  
26

1 was made and, therefore, no further evidence will be accepted and  
2 the Sworn Statement will be stricken from the record.

3  
4  
5 **Motion for Temporary Order**

6 John and Doug Mayo, James Poisel, Miles Yates, and John Turner have  
7 moved the Court to not allow the Wenas Irrigation District (WID) to  
8 direct water from the south fork of Wenas Creek to the John  
9 Ashbaugh property lying to the north of Fletcher Lane except under  
10 the following conditions: (1) delivery of storage water down the  
11 south fork in a sufficient amount to provide for transportation  
12 loss in addition to the amount to be diverted at the Ashbaugh pump;  
13 (2) provide proper measuring devices to confirm that the amount  
14 delivered at the pump is storage water and not natural flow rising  
15 from springs upstream from the new diversion point; and (3) that  
16 during the non-irrigation season, there should be a live flowing  
17 stream provided by WID in the south fork of Wenas Creek. Both the  
18 Department of Ecology (DOE) and WID filed responses to this motion.

19 With respect to item (3), all parties appear to be in  
20 agreement that this is covered by the Court's previous Revised  
21 Pendente Lite Order Implementing Memorandum Opinion Re: Petition  
22 For Tenth Order Pendente Lite; Clarification of Ninth Order  
23 Pendente Lite; Amendment Sixth Order Pendente Lite; Exceptions to  
24 Report of Referee Subbasin No. 15 ( Document No. 11,161; Nov. 21,  
25 1995). Therein, the Court ruled "...to eliminate the 3 c.f.s.  
26 reservoir outflow ceiling during the storage season, and to require

1 the WID to pass a portion of water necessary to attempt to maintain  
2 a live "flowing" stream (approximately 0.25 c.f.s.) in all reaches  
3 of the North and South Channels." (Emphasis added) Paragraph 8.

4 More specifically, the Court, in Paragraph 9, ordered as follows:

5  
6 "a) Wenas Irrigation District is never required to  
7 release more water than what is measured to the inflow  
8 into the reservoir (the natural flow).

9 b) Subject to (a) above, Wenas Irrigation District shall  
10 release the amount of water necessary to attempt to  
11 maintain a live 'flowing' stream in all reaches of the  
12 North and South Channel subject to the discretion of the  
13 watermaster; the amount of water necessary is to be  
14 determined by the Court-appointed stream patrolman in  
15 consultation with the Department of Ecology. Wenas  
16 Irrigation District shall attempt to maintain the 'target  
17 flow'. 'Target flow' is defined as 0.25 c.f.s. as  
18 measured by the stream patrolman in all reaches of the  
19 North and South Channel of Wenas Creek by the Department  
20 of Ecology." (Emphasis added).

21  
22 Therefore, if there is natural flow water available, as  
23 distinguished from "storage" water, WID is required to attempt to  
24 maintain a "target flow" of 0.25 c.f.s. in the South Fork of Wenas  
25 Creek during the non-irrigation season.

26  
27 The other two issues are inextricably intertwined and are  
28 therefore addressed together herein. Many of the basic factual  
29 matters have been agreed upon or are unchallenged. Generally, it  
30 is uncontested that below the Purdin Ditch diversion for  
31 approximately a mile and a half, more or less, the south channel of  
32 Wenas Creek is dewatered for approximately nine months out of the  
33 year. It is a "losing" reach on the south channel. Then springs

1 begin to upwell on the John Boyd property, within the boundaries of  
2 the WID, although the Boyd property is not irrigated from either  
3 natural flow or storage water, as that property has been irrigated  
4 from deep wells on the property. Other springs and underground  
5 tile drains then contribute to a "gaining" reach on down the south  
6 channel and east of Fletcher Lane. Prior to 1977, some water was  
7 flowing in the south channel east of the Purdin Ditch down to the  
8 Longmire property. In that year, the Longmire's gave up their  
9 point of diversion on the south channel and began receiving their  
10 water from the Purdin Ditch, which resulted in some water being  
11 saved due to no conveyance loss in the south channel. After that  
12 change of the Longmire's point of diversion there were no more take  
13 out points on the south channel from Purdin Ditch on down to the  
14 Mayo's take out No. 1 east of Fletcher Lane, (Ray Day, Transcript  
15 3-16-95, p. 166), which is outside of the WID boundaries.

16 In July of 1995, John Ashbaugh installed a pump at Fletcher  
17 Lane on the south channel east of the Boyd property to complete a  
18 transfer of his WID "storage water" rights from his 67.4 acres of  
19 land in Sec. 12. Twnp. 15, R. 17 to his 65.2 acres of land in Sec.  
20 32, Twnp. 15, R. 18. This pump was within the WID boundaries,  
21 (Mayo Exhibits 15, 16), and was characterized as pumping WID  
22 "return flow", with the WID storage water for those lands remaining  
23 in the reservoir because no storage water was used on the Section  
24 12 lands. After installation of the pump, some downstream first  
25 priority water users complained that they were not receiving all of  
26

1 their first priority water. Incidentally, the pump was about 6 to  
2 8 feet inside the WID boundary. (Mayo Transcript 6/12/97, p. 153).

3 At this juncture, it should be noted, from the Supplemental  
4 Report of the Referee herein, that the land of Mr. Ashbaugh from  
5 which the WID storage rights were transferred has a priority date  
6 of June 30, 1879. The Stoshner-Ashbaugh lands to which these WID  
7 storage water "return flows" were transferred carry a priority date  
8 of June 30, 1871. (Claims 00472, [A]01364, 00945, [A]04298).  
9 Downstream, the Mayos have 59.4 acres with a priority date of June  
10 30, 1867 (Claim No. 805), and 79 acres bearing a priority date also  
11 of June 30, 1871 (Claim Nos. 05225, 05227). The other Mayo lands  
12 have priority dates of 1882, 1884 and 1888. Further downstream,  
13 James Poisel has 19.46 acres with a priority date of June 30, 1867  
14 and 55.3 acres with a priority date of June 30, 1870 (Claim No.  
15 00684). The land of Miles Yates carries a priority date of June 30,  
16 1870 (Claim No 00160), as does the land of John Turner (Claim No.  
17 04514). Thus, we see that the Mayo's have 59.4 acres with an  
18 earlier priority date, and 79 acres with the same priority date as  
19 that of the land of John Ashbaugh to which the "storage" water  
20 right will be applied and further that Miles Yates, James Poisel,  
21 and John Turner each have earlier priority dates for the water to  
22 their lands than that of Mr. Ashbaugh to which these denominated  
23 storage water "return flows" were transferred. Also to be noted is  
24 that the earlier and same priority date lands of the Mayos, and the  
25 earlier priority date lands of James Poisel, Miles Yates, and John  
26

1 Turner are all outside of the boundaries of the WID and only  
2 receive their water from Wenas Creek.

3       Additionally, it should be recognized that the Wenas Subbasin  
4 (Subbasin 15) is quite unique and different from all of the other  
5 30 subbasins in the Yakima River Basin. It has no connection at  
6 all with the federal project in the rest of the Yakima River Basin,  
7 with the minimal exception that whatever water, if any, is left in  
8 Wenas Creek as it leaves the Wenas subbasin will flow into the  
9 Yakima River. The surrounding hills provide spring snowmelt, all  
10 of which drains down to form Wenas Creek, providing the "natural  
11 flow" of water down the creek. This natural flow water declines  
12 considerably after the early irrigation season. The Wenas  
13 Reservoir dam was built about 1911, but then was enlarged in 1981.  
14 It is just to the north and west of the WID north boundary. The  
15 natural flow water passes through the reservoir and continues  
16 downstream to where it splits into the north channel and south  
17 channel which later reunite into one stream approximately at  
18 Fletcher Lane, which generally divides the upper valley and lower  
19 valley areas. The WID lower boundary is again north and west of  
20 Fletcher Lane in the upper valley portion of the basin.

21       The active storage within the reservoir (Wenas Lake), is about  
22 3,200 acre feet; actual storage will vary year to year. Storage  
23 waters are usually not released or used until late spring after the  
24 natural flow recedes, and such storage water is then used to  
25 supplement the reduced natural flow to the WID shareholders in the  
26

1 upper valley. There are about 3,670 acres within the boundaries of  
2 the WID of which about 2,013 acres are assessed for reservoir  
3 storage water. Additionally, groundwater is pumped from relatively  
4 deep wells of 100 to over 500 feet in depth. (Bain Report, WID 1).  
5 Thus, we find that there is natural flow water, storage waters and  
6 groundwater commingled in the upper valley. It should also be  
7 noted that most of the lands within the WID are now sprinkler  
8 irrigated; however, rill irrigation was the predominant method 30  
9 years ago. (Bain Report). This combination of natural flow,  
10 storage and groundwaters begin to upwell on the John Boyd property,  
11 within the lower WID boundary and continues to do so on downstream  
12 in the "gaining reach" of the south channel and east of Fletcher  
13 Lane, as previously noted. This provides the flow of waters to the  
14 lands in the lower valley outside of the WID boundaries.

15 It is the position of the WID that by reason of the transfer  
16 of Mr. Ashbaugh's WID storage water rights to be pumped from the  
17 south channel just downstream of the spring on the John Boyd  
18 property, that it is, in effect, using "storage water return flows"  
19 to provide the storage water to him.

20 In the Revised Pendente Lite Order, (Doc. # 11,161) supra, the  
21 Court had ruled as follows:

22  
23 "a)The Court hereby ORDERS that WID may capture and  
24 utilize its storage water return flows within its  
25 boundaries, and that once the water leaves the District  
26 boundaries, the water is subject to allocation based on  
seniority and prior right. However, the senior right  
holders cannot compel continued flows that emanate from  
storage and the District may make further use of that  
water as it sees fit.

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b) The Court ORDERS that District patrons may only divert storage waters unless those patrons also have a senior right to any remaining natural flows. Natural flows not used to satisfy natural flow senior rights must pass through the District boundaries and be made available for diversion by senior water right holders below Fletcher Lane."

It should be noted that this Order was issued pursuant to three days of testimony (March 15-17, 1995), which the Court has again reviewed. While there was general agreement that the springs upwelling in the lower end of the upper valley are "return flows", there was a wide divergence of opinion as to the source and composition of the return flows. It was interesting to note that both John Mayo (Transcript 3-15-95, p. 122-123), and John Ashbaugh (Transcript 3-15-95, p. 151) noted that some of the spring water coming from underground was warm water, warmer than creek water, which does not freeze and even steams in the winter. It was also generally acknowledged that because the water returns to the one stream, Wenas Creek, that without sophisticated testing, it is somewhat impossible to determine if the water constitutes return flows from natural flow water, storage water or even groundwater upwelling. It was further generally acknowledged that return flows have somewhat decreased over time as sprinkler irrigation has replaced flood or rill irrigation.

These issues were re-visited at the hearing held on June 12, 1997, with a more focused approach than previously on the

1 composition of the denominated "return flows" arising from springs  
2 in the lower south channel.

3 The main thrust of the WID's position that the amount of water  
4 being pumped from the south channel east of the springs to the  
5 Ashbaugh property is "storage water return flow" is based upon  
6 Jensen v. DOE, 102 Wn.2d 109. Therein, the State Supreme Court  
7 quoted this statement:

8  
9 "One who by the expenditure of money and labor diverts  
10 appropriable water from a stream, and thus makes it  
11 available for fruitful purposes, is entitled to its  
12 exclusive control so long as he is able and willing to  
13 apply it to beneficial uses, and such right extends to  
14 what is commonly known as wastage from surface run-off and  
15 deep percolation, necessarily incident to practical  
16 irrigation. Considerations of both public policy and  
17 natural justice strongly support such a rule. Nor is it  
18 essential to his control that the appropriator maintain  
19 continuous actual possession of such water. So long as he  
20 does not abandon it or forfeit it by failure to use, he  
21 may assert his rights. It is not necessary that he  
22 confine it upon his own land or convey it in an artificial  
23 conduit. It is requisite, of course, that he be able to  
24 identify it; but, subject to that limitation, he may  
25 conduct it through natural channels and may even commingle  
26 it or suffer it to commingle with other waters. In short,  
the rights of an appropriator in these respects are not  
affected by the fact that the water has once been used."  
(Emphasis added).

20 Id. at 114-15.

21  
22 This exact language was first authored by U.S. District Judge  
23 Dietrich in United States v. Haga, 276 F. 41, 43-44, (1921). That  
24 case dealt with "surface waste and seepage incident to the use of  
25 water from government canals in the irrigation of lands lying along  
26 or near the creek above the defendant's point of diversion" (p.

1 42). This concerned the Boise-Payette or Boise project which the  
2 U.S. government commenced in 1906, whereby 150,000 arid acres were  
3 included, and the water in question flowed into a tributary of the  
4 Boise river that normally did not have natural flow therein much  
5 past June 1 of each year.

6 Later, in 1924, the U.S. Supreme Court used this exact same  
7 quote, crediting Judge Dietrich, in Ide v. United States, 68 L. Ed.  
8 407, 412. This dealt with a very large Shoshone project approved  
9 and started by the U.S. in 1904, applying waters "...to large areas  
10 of public land, all naturally arid and susceptible of cultivation  
11 only when irrigated." In question was the use of a natural ravine  
12 called Bitter Creek, which previously only had a natural flow for  
13 short and irregular periods, but after irrigation began it  
14 gradually increased in volume and duration as the irrigated area  
15 was extended. Using the quoted language, the U.S. Supreme Court  
16 held that the seepage from the irrigated lands was properly  
17 identified so as to allow continued governmental control thereof.

18 Then we turn to the Jensen matter, supra, which deals  
19 specifically with groundwater in the federal Columbia Basin  
20 Project. Briefly, Mr. Jensen purchased land in the Quincy basin  
21 and later in 1974, applied to the Department of Ecology (DOE) for a  
22 permit to withdraw public ground water. Not receiving a permit, he  
23 applied to withdraw artificially stored groundwater, which required  
24 an agreement with the U.S. Bureau of Reclamation (BOR), to pay for  
25 withdrawn water. In 1973, the DOE had established the Quincy  
26

1 groundwater subarea and the BOR filed a declaration claiming all  
2 water which had percolated into underground storage as a result of  
3 project irrigation. (see WAC 173-124 and WAC 173-134A-020 which  
4 states "By the end of 1973 irrigation season (in October) there  
5 were approximately 3,493,142 acre-feet of imported waters stored  
6 underground in the Quincy groundwater subarea. These imported  
7 waters are derived from the activities of the bureau and the  
8 Columbia Basin project.") The Supreme Court then "...found that the  
9 mingling of waters from separate sources did not cause a loss of  
10 identity, as water is distinguishable and measurable by quantity,"  
11 and also "nothing in the statutory scheme suggests that commingling  
12 causes artificially stored water to lose its identity" (p. 116).  
13 Finally, the court concluded "A division by volume of artificially  
14 stored and naturally occurring groundwater is supported by law and  
15 statute." (p. 119)

16 A distinguishing feature of each of these three cases is that  
17 they each dealt with large federal projects in arid areas to which  
18 the BOR began supplying large amounts of water for irrigation that,  
19 in turn, produced identifiable quantities of waste, seepage and  
20 return flow (WSRF) waters. In Haga, supra, and Ide, supra, prior  
21 to the project water being applied there was very little, if any,  
22 WSRF water. After the projects become operative, it was relatively  
23 easy to identify the WSRF water as being project water. In Jensen,  
24 supra, it is even more definitive, by the establishment of the  
25 Quincy groundwater subarea and the quantification numbers stated in  
26

1 WAC 173-134A-020 that there was clear identification of the WSRF  
2 waters to be under the control of and for the use by the BOR.

3 The WID places considerable emphasis on DOE v. BOR, 118 Wn.2d  
4 761 (1992), which basically deals with an appropriator's rights to  
5 recapture and re-use WSRF water, setting forth the "geographical"  
6 and "control and possession" tests. Once again, this case deals  
7 with a vast federal BOR project. Indeed, it appears that Mr.  
8 Hanson's property, upon which the WSRF waters upwelled in a spring,  
9 is within the Quincy-Columbia Basin Irrigation District and also  
10 the Quincy groundwater subarea, as referred to in Jensen, supra.  
11 In the matter sub judice, this Court has basically ruled that WID  
12 is subject to both the "geographical" and the "control and  
13 possession" tests, (Revised Pendente Lite Order, [Doc. # 11,161]),  
14 supra, in essence ruling that the WID can capture and utilize it's  
15 storage water return flows within it's boundaries, but after the  
16 water leaves the WID boundaries, it is subject to senior priority  
17 rights due to the fact that the WID patrons can only use storage  
18 water and storage water return flows within the WID boundaries.  
19 Additionally, the Supreme Court made particular and specific  
20 reference to the fact that distribution decisions within a federal  
21 project remain with the federal government. Thus, it appears that  
22 those decisions have little bearing on this Wenas subbasin matter.

23 As previously referred to, the Supreme Court in Jensen, supra,  
24 held "...that the mingling of waters from separate sources did not  
25 cause a loss of identity, as water is distinguishable and  
26

1 measurable by quantity." (Emphasis added). In this Wenas subbasin,  
2 there is no question that there is some "storage water return flow"  
3 upwelling in the spring on the Boyd property. The movant's  
4 position, basically, is that due to the commingling of all these  
5 various waters, the quantity of water taken by the Ashbaugh pump  
6 from July through September cannot be determined to be "storage  
7 water return flow" alone, and is therefore taking some of their  
8 earlier priority date natural flow water, and they therefore  
9 request that Ashbaugh's storage water be conveyed down the south  
10 channel to the pump rather than taking it from the spring upwelling  
11 on the Boyd property.

12 Although not cited herein, the Court is well aware of two  
13 prior cases dealing with the Wenas basin. In Longmire v. Smith, 26  
14 Wn. 439, 443 (1901), the Supreme Court notes that 80 acres of the  
15 "Cleman Tract" were subirrigated by the waters of the Wenas. In  
16 Longmire v. Yakima Highlands Irrigation and Land Company, 95 Wn.  
17 302 (1917), the Supreme Court sets forth a brief description of the  
18 Wenas basin and notes that when the trial of the action started in  
19 January of 1913, the Wenas dam was almost completed. Again, the  
20 Court makes several references throughout the opinion about the  
21 "lateral subirrigation" in the basin. Interestingly, that case  
22 "restrains the impounding of waters to be used upon nonriparian  
23 land." (p.307) (Emphasis added). Thus, it is clear that prior to  
24 the completion of the Wenas dam, there was substantial natural flow  
25 water and apparently groundwater commingling and being used for  
26

1 irrigation without any storage water at all being involved in the  
2 upwelling springs.

3       Shortly after the March, 1917, publication of this second  
4 case, the Wenas-Yakima Corporation filed a petition on June 10,  
5 1917 for an adjudication and the action was commenced on October 3,  
6 1918 by the State Hydraulic Engineer in Yakima County, Cause No.  
7 12935. The Report of Referee states, at that time, "The amount of  
8 land under irrigation from Wenas Creek and tributaries is 8,500  
9 acres of which 1,300 acres are in the upper valley and 7,200 acres  
10 are in the lower valley. The principal tributaries of the Wenas  
11 Creek and from which water is diverted for irrigation are Dry  
12 Creek, Lewis Canyon Creek, Mitchell Canyon Creek, Cottonwood Creek  
13 and several unnamed streams flowing from the foot hills that  
14 originate on a low elevation and carry water only during excessive  
15 rains or melting snow periods." (p.6). "The Wenas Creek drains an  
16 area of one hundred ninety-three square miles. The topography and  
17 geology of the valley are such that the irrigation of the upper  
18 valley land and the upper end of the lower valley, causes water to  
19 seep through the soil and return to the stream water supply. These  
20 springs are numerous, rising along the entire length of the stream  
21 between the George Longmire place and the lower end of the valley.  
22 The springs show little fluctuation during the low water period and  
23 furnish water for the irrigation of five hundred acres of land  
24 during the entire irrigation period, while the supply of water for  
25 irrigation purposes in the Wenas Creek is often depleted by August  
26

1 first above the point where the return seepage water begins." (p.  
2 7-8). "The use of large quantities of water at this season  
3 (spring) is to be commended as the subsoils will hold a part of it  
4 in storage and allow it to return slowly in form of seepage springs  
5 at a period when the stream reaches a minimum flow, thus increasing  
6 the value of the stream for irrigation purposes." (p. 15-16)  
7 Therefore, it is readily apparent that, basically from time  
8 immemorial, the early spring snow melt and natural flow in the  
9 upper valley would, in a large measure, seep into the ground and  
10 later re-surface through numerous springs at the upper end of the  
11 lower valley, contributing considerably to the irrigation of the  
12 lands of the lower valley in the July, August and September periods  
13 of the year. This was clearly occurring long before the  
14 construction of the Wenas Dam and before storage ever began.

15 Factually, this distinguishes the Wenas subbasin from the  
16 conditions as they existed in the Haga, Ide, Jensen and DOE v. BOR  
17 cases, supra, with respect to the "identity" of "storage water  
18 return flow." Here, there has always been substantial amounts of  
19 ground water upwelling in the springs long before the addition of  
20 "storage water return flows," as in the cited cases. Now, of  
21 course, there is some storage water that is being applied to the  
22 upper valley lands during the July, August and September period  
23 that will, in some measure, contribute somewhat to the "return  
24 flow" upwelling in the springs furnishing water to the lower  
25 valley. As noted in Jensen v. DOE, supra, p. 119, "[a] division  
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1 by volume of artificially stored and naturally occurring  
2 groundwater is supported by law and statute." (Emphasis added).  
3 The question here becomes, then, one of "identity" in a "division  
4 by volume" of the waters upwelling in the springs on the John Boyd  
5 property.

6 Substantially, all of the testimony given at the hearing on  
7 June 12, 1997 on this matter was directly related to the "identity"  
8 in the "division by volume" of the spring in question upwelling on  
9 the John Boyd property. The three main witnesses were John Mayo,  
10 one of the movants; Richard Bain, who filed a report on behalf of  
11 WID and Kevin Brown, the stream patrolman for the DOE in the Wenas  
12 Valley. It is noted that Mr. Mayo is a Civil Engineer who was  
13 employed for 20 years by CH2M Hill with supervisory duties over  
14 surface water hydrologists, groundwater hydrologists and irrigation  
15 engineers. Mr. Bain also is a Civil Engineer employed for 14 years  
16 with a firm on water quality, water pollution control and water  
17 resource projects and since 1984 has been self employed working  
18 with conservation districts, irrigation districts, and irrigators.  
19 He provided expert testimony for the WID evidentiary hearing in  
20 1991. Mr. Brown was a stream patrolman in the Wenas and in 1991  
21 began working for the DOE dealing in water resources regulation and  
22 permitting and in early 1995 was specifically assigned to the  
23 Wenas.

24 All of the above mentioned witnesses generally agree that the  
25 upwelling spring water somewhat is composed of return flows from  
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1 three sources—natural flow waters, groundwater and storage water  
2 that has occurred both naturally and from application of the  
3 natural flow, well waters and storage waters for the irrigation of  
4 the upper valley. John Mayo testified that a small percent of the  
5 spring water could be storage water, although there was no way to  
6 know where the water was from (Tr. 6-12-95, p. 136). The storage  
7 water is only applied in the hot summer months, so very little  
8 would go into deep percolation as there would be wind evaporation  
9 and loss upon the hot surface of the land, (Tr. p. 128). He  
10 indicated that to determine what is storage return flow would take  
11 a number of measurements over a period of a year or more. (Tr. p.  
12 125). In the end, he ventured a guess that maybe five percent  
13 might be district return flow.

14 Kevin Brown related that the DOE had had several conversations  
15 and meetings with the WID to attempt to quantify the volume of  
16 water. WID provided diversion records, flow records and releases  
17 from the reservoir and the flow rates of the north and south  
18 channels and after evaluation over the winter, DOE concluded that  
19 it was insufficient to determine a quantification of how much was  
20 district return flow (Tr. p.185).

21 At the request of WID, Richard Bain made a field visit to the  
22 area on June 3, 1997, just days before the hearing. It is also  
23 noted that Mr. Bain testified for the District previously after  
24 repeated visits in 1991-1992. Pursuant to his June 3 area visit he  
25 prepared a nine page report (WID Exh. 1). He discusses the  
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1 permeability of the soils in the basin and the percolation of  
2 waters therein. He concludes that 3000-3200 acre feet of reservoir  
3 storage water is used in the upper valley along with natural flow  
4 waters and ground waters from wells. He assumes 2500 to 3000  
5 irrigated acres in the upper valley, for a total irrigation water  
6 use of 12,000 acre-feet.

7 Of that 12,000 acre-feet, about 7,000 acre-feet is  
8 consumptively used by crops, leaving 5,000 acre-feet of return  
9 flow, deep percolation and seepage. Inasmuch as the 3,000-3,200  
10 acre-feet of storage water is 25 percent of the total 12,000 acre-  
11 feet used, he therefore assumes the storage water return flow is  
12 also 25 percent of the total 5,000 acre-feet of return flow which  
13 would be in the amount of 1,250 acre-feet. As the Ashbaugh pump  
14 uses about 250 acre-feet over a 100 day period of use, he therefore  
15 uses about 20 percent of the total of the reservoir storage return  
16 flow water.

17 In discussing his report, Mr. Bain stated that "...I went about  
18 trying to construct an estimate of what might be from storage on an  
19 analyzed (sic--annualized?) basis...". (Tr. p. 163). He indicated  
20 that "...there's going to be natural flow rights with the class  
21 waters in the early season in particular. And then there's a lot  
22 of folks that pump groundwater and they have some pretty good size  
23 wells out there...". (Tr. p. 166). Further on, he agreed that to  
24 give an opinion on what portion of the spring water today is return  
25 flow, "you'd want to know what's been coming down the north fork  
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1 and south fork (of Wenas Creek) during the prior four to six months  
2 or get real sophisticated with dye studies and other things." (Tr.  
3 p. 172). He indicated that he was asked to give an estimate of the  
4 annual availability of return flow (Tr. p. 178). He agreed that  
5 the water he saw flowing in the Spring Creek area drains probably  
6 were a product of substantial saturations that occurred during the  
7 past winter and spring prior to his visit on June 3 (Tr. p. 179),  
8 and those conditions may vary substantially from drainage in August  
9 and September (Tr. P. 180). As to the 1250 acre-foot storage  
10 return flow, he testified "...that as to the when, where or in what  
11 quantities it's going to pass down and be available for recapture,  
12 you don't know." "The exact mix at a particular point in time, it  
13 couldn't be done that way." (Tr. p. 180-181).

14 In giving his assessment of Mr. Bain's report, Kevin Brown  
15 testified that there was not sufficient information to determine  
16 specifically as to the water coming out of the springs what is  
17 return flow from what is natural flow, what is return flow from  
18 natural flow class water put on before storage water is delivered  
19 or what is return flow from storage water versus well water put on  
20 the land, (Tr. p.192).

21 From the evidence and testimony presented herein, it is, at  
22 present, virtually impossible to determine the "identity" of the  
23 waters upwelling in the Boyd springs in terms of being  
24 "distinguishable and measurable by quantity." As previously noted,  
25 historically there has been continuous percolation through the  
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1 upper valley basin from early spring snowmelt, natural flow waters  
2 and even groundwater contributing to sublateral irrigation long  
3 prior to there even being any storage water to be applied to the  
4 land. Unquestionably, the addition of storage water in the WID  
5 during the July through September months will add some water to  
6 that already percolating through the upper valley soils in the form  
7 of "return flow." With the time he had available, Mr. Bain has  
8 testified that he has attempted to give an estimate of the amount  
9 of storage water return flow resulting from the application of  
10 storage, which he opined would be 1250 acre-feet. As noted, supra,  
11 however, he testified that as to the when, where or in what  
12 quantities it's going to pass down and be available for recapture,  
13 you don't know. He indicated that it might be possible with  
14 sophisticated dye studies and other things. After explaining that  
15 the Ashbaugh pump would pump 250 acre-feet in 100 days, one fifth  
16 of the total estimated storage return flow from the entire WID  
17 upper valley land, from the one point of diversion just below the  
18 upwelling spring, he concluded that you couldn't tell the exact mix  
19 of storage water return flow. This clearly shows that the identity  
20 of the water as storage water return flows has not become  
21 distinguishable and measurable by quantity, as required by the  
22 cases cited herein. Consequently, the water being pumped from the  
23 spring barely within the WID boundary cannot be classified or  
24 identified as being storage water return flows.  
25  
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1 Therefore, if the Ashbaugh's are to pump WID storage water from  
2 this point of diversion on the south channel to supply water to  
3 their land in Section 32, they must meet the conditions set forth  
4 by the DOE. Those conditions are that the WID specifically approve  
5 the transfer of WID storage water shares from Section 12 to section  
6 32 and that the WID releases sufficient storage water from the  
7 reservoir to flow in a live stream down the south fork to the  
8 Ashbaugh pump. This would have to provide for conveyance loss as  
9 well. (Mayo Exh. 56). The motion of John Mayo, Doug Mayo, James  
10 Poisel, Miles Yates and John Turner is granted.

11  
12 **Conclusion**

13 The individual rulings as set forth herein shall be  
14 incorporated into the Second Supplemental Report of the Referee for  
15 Subbasin 15. Together with the issuance and filing of the Second  
16 Supplemental Report, a proposed Conditional Final Order for  
17 Subbasin 15 shall be filed and noted for presentation herein.

18 Dated this 30<sup>th</sup> day of June, 1998.

19  
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21 \_\_\_\_\_  
22 Judge