

1
2 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

3 IN AND FOR YAKIMA COUNTY

4 IN THE MATTER OF THE DETERMINATION)
5 OF THE RIGHTS TO THE USE OF THE)
6 SURFACE WATERS OF THE YAKIMA RIVER)
7 DRAINAGE BASIN, IN ACCORDANCE WITH)
8 THE PROVISIONS OF CHAPTER 90.03,)
9 STATE OF WASHINGTON,)
10 DEPARTMENT OF ECOLOGY,)

Case No. 77-2-01484-5

11 Plaintiff,

12 vs.

13 JAMES J. ACQUAVELLA, et al.,

14 Defendants.

) Memorandum Opinion Re
) Subbasin 6: Level Best Inc.
) Motion for Reconsideration &
) Exceptions of Level Best
) Inc. and Taneum Canal
) Company to Supplemental
) Report of Referee

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15 **Introduction**

16 The initial evidentiary hearing for Subbasin 6 (Taneum
17 Creek) was held on September 12, 1989. The Report of the
18 Referee Re: Subbasin No. 6 (Taneum) (hereinafter Original Report
19 was issued on June 9, 1994. Exceptions to the Original Report
20 were heard and various claims were remanded to the Referee on
21 September 8, 1994. The evidentiary hearing on the remanded
22 claims was held on January 30, 1995 which lead to the issuance
23 of the Supplemental Report of Referee Re: Subbasin No. 6
24 (Taneum) (hereinafter Supplemental Report) March 26, 1996.
25 Again exceptions were taken and the Court heard argument on
these exceptions August 11, 1996. Four issues were left

13,279

1 unresolved at this hearing. The purpose of this Memorandum
2 Opinion is to rule on these remaining issues.

3
4 **Exception of Level Best Inc. Re Priority Dates**

5 Background

6 Taneum Creek¹ has been the subject of two prior decrees.
7 The first is Tenem Ditch Co. v. F.M. Thorp et al., Fourth
8 Judicial District, Ellensburg (1888), (affirmed 1 Wash. 566
9 (1889)) (hereinafter Taneum I). The Taneum I decree divided the
10 waters of Taneum Creek in a two-thirds, one-third split between
11 the plaintiff Taneum Canal Company (hereinafter TCC) and the
12 defendants F.M. Thorp, Margaret Thorp, and John Hale.

13
14 "[S]aid plaintiff is the owner of the Tenems
15 Water ditch [TCC] hereinbefore mentioned . . . and is
16 the owner and entitled to divert by means of said
17 ditch two thirds of the water flowing in said Tenem
18 Creek at all times . . .

19 That the said defendants F.M. Thorp and John E.
20 Hale and said intervenor Margaret Thorp are the owners
21 of one third of said Tenem Creek and are entitled to
22 the unobstructed flow of said one third thereof down
23 the channel of said creek or into their water ditches
24"

25 Taneum I, (Decree, DE-92) at 1-2. The Taneum I court made no
distinction between John Hale, F.M. Thorp and Margaret Thorp

¹ Over the years, Taneum Creek has variously been referred to as Tenum, Tenem, Teanum, Taenum and Teanum Creek. The Court will refer to the creek as Taneum Creek unless specifically citing a source with one of these alternate spellings.

1 within the one-third right, as it concluded their interests were
2 identical. Id. The division was affirmed by the Washington
3 Supreme Court. Thorpe v. Tenem Ditch Co., 1 Wash. 566 (1889).

4 The second decree, Tenem Ditch Co. v. James Shellenberger,
5 et al., Kittitas County Superior Court (1906) (hereinafter
6 Taneum II) confirmed the two-thirds, one-third split decreed in
7 Taneum I. Between the time Taneum I and Taneum II were decided
8 (1888-1906), all the land owned by F.M. Thorp, Margaret Thorp
9 and John Hale had been sold to C.A. Splawn and W.D. Bruton.
10 Therefore, Taneum II involved Splawn and Bruton, as well as
11 numerous others, as defendants. TCC was again the plaintiff.
12 The Taneum II court ruled as follows:

13
14 "It is considered, Ordered, Adjudged and Decreed that
15 as against the defendants C.A. Splawn and W.D. Bruton,
16 the plaintiff [TCC] is the owner of and entitled to
17 the full flow of two thirds of the waters of Tenem
18 Creek; that as against the plaintiff the defendants
19 Splawn and Bruton are the owners of and entitled to
20 the full flow of one-third of the waters of said Tenem
21 Creek, the rights of the plaintiff and of said
22 defendants Splawn and Bruton being fixed and
23 determined by that certain decree [Taneum I], . . .and
24 their rights under said decree are in no wise
25 disturbed by this decree."

21 Taneum II, (Decree, DE-94) at 1. Clearly then, the Taneum II
22 court was attempting to reaffirm and continue the two-third,
23 one-third split decreed in Taneum I.

24 Accordingly, in interpreting these decrees, the Referee
25 concluded that in order for a claimant to be eligible for a

1 portion of the one-third resulting from the Taneum decrees, a
2 claimant must be a successors in interest to the land of Splawn
3 and Bruton--the defendants awarded the one-third flow in Taneum
4 II.

5
6 "This Court is bound by the previous two decrees
7 in determining the rights to use waters from Taneum
8 Creek. In order for a claimant in this proceeding to
9 enjoy a portion of the right to one-third of the
creek's flow, there must be evidence that the land was
owned by C.A. Splawn or W.D. Bruton in 1906 [the date
of Taneum II]."

10 Original Report, at 8. The parties who are successors in
11 ownership to the lands owned by Splawn and Bruton in 1906 and
12 who are claiming a right to the one-third share of Taneum Creek
13 are Rocky Mountain Elk Foundation, E.L. Knudson Jr., Mike
14 Emerick, Level Best Inc., Springwood Investment and Jeff
15 Nesmith. See Original Report; Memorandum Opinion Re: Subbasin 6
16 Exceptions to Priority Dates, (Doc. # 10,319) at 2. These
17 claimants will collectively be referred to as "the one-third
18 owners."

19 A number of the one-third owners took exception to the
20 priority date awarded in the Original Report for their portion
21 of the one-third right. At the exceptions hearing to the
22 Original Report, Level Best (one of the one-third owners) argued
23 that the issue of priority date was of considerable importance
24 in allocating the one-third flow among the one-third owners.
25

1 "Level Best is not taking the position that this
2 priority date has anything to do with the two-thirds
3 right of Taneum Canal Company, but the priority date
4 would only apply to those parties under the one-third
5 that was decreed to Thorp and Hale [in Taneum I].

6 The original decree . . . [of] one-third to Thorp
7 and Hale did not set priority date as between the one-
8 third users. And I think it would be applicable and
9 we're asking again either upon direct evidence with
10 the documentation that we have attached already to
11 establish those priority dates or upon remand to have
12 the entire one-third owners go in and prove, No. 1,
13 that they had property that was under the one-third
14 distribution; No. 2, the dates that they started
15 applying the water to those various properties so that
16 the one-third . . . people can determine their
17 priority rights on that basis."

18 Transcript, 9/8/94 at 56-57. Counsel for Rocky Mountain Elk
19 Foundation (RMEF), another of the one-third owners, responded to
20 the argument of Level Best as follows:

21 "I think there is [sic] two ways to look at this
22 from the Court's perspective. Is it going to be a
23 factual question or is it a question that can be
24 determined as a matter of law.

25 . . .
26 The simple way to resolve this as a matter of law
27 is that these prior decrees held that all the water
28 had the same priority date. The alternative is to
29 remand it for a factual hearing where everyone can
30 drag out the patents, . . ."

31 Id., at 59. After hearing all the arguments on the matter, the
32 Court stated that:

33 "What I am going to do in connection with this is
34 I am going to take this under advisement and review
35 those cases and the documents. And if anything
further needs to be presented, the Court will advise
counsel and we'll have at the time of the other remand

1 hearing, we would have a hearing on that. But I want
2 to review those cases and those documents myself and
3 take a look at those before. And if I can decide it
4 as a legal matter, I will." [Emphasis added].

5 Id., at 69. The Court then did review the cases and documents
6 and on February 3, 1995, came out with its decision.

7 "Upon review of the Tenem decrees and supporting
8 documents submitted with the exceptions, the Court
9 agrees with this position [the position taken by the
10 Rocky Mountain Elk Foundation above] and rules that
11 all of the claimants whose water rights are based on
12 the Tenem I decree shall have the priority date of
13 June 30, 1873. This ruling shall apply to Rocky
14 Mountain Elk Foundation, E.L. Knudson, Jr., Mike
15 Emerick, Level Best, Inc., Springwood Investment
16 Corporation and Jeff Nesmith." [Emphasis added].

17 Memorandum Opinion Re: Subbasin 6 Exceptions to Priority Dates,
18 Feb. 3, 1995, (Doc. # 10,319) at 2. At no point did the Court
19 indicate to counsel that anything further needed to be presented
20 at a remand hearing in connection with the priority date issue.
21 Instead, the ruling was incorporated into the Court's Order on
22 Exceptions; Subbasin No. 6 (Taneum), Oct 12, 1995, (Doc. #
23 11,055) at 5.

24 "The Court upon reviewing the prior decrees
25 related to Taneum Creek and supporting documents filed
with the exceptions ruled in a Memorandum Opinion
signed February 3, 1995, that all parties to the Tenem
I decree would share the same priority date, that
being June 30, 1873."

It would seem then that the matter had been decided and
ruled upon. However, several months later, Level Best moved to

1 re-open RMEF's claim on the basis of a newly discovered aerial
2 photograph which, in Level Best's opinion, demonstrated that
3 some of RMEF's land was not being cultivated in 1942 and had
4 only subsequently been developed. Therefore, this land should
5 not enjoy the same priority date as the other one-third owners.
6 The Certification of Counsel accompanying Level Best's motion to
7 re-open states that Level Best intended to introduce this
8 evidence at the supplemental evidentiary hearing. Certification
9 of Counsel (Doc. # 11,283) at 2. However, given the short time
10 between the filing of the Motion to Re-Open and the supplemental
11 evidentiary hearing (5-days), the Court did not rule on the
12 Motion until after the hearing was held. At the hearing Level
13 Best did introduce the aerial photograph into evidence.
14 However, Level Best went further by putting additional patent
15 information into the record in order to re-argue the priority
16 date question. In justifying the introduction of the additional
17 patent evidence at the supplemental evidentiary hearing on a
18 question the Court had already ruled on, counsel for Level Best
19 stated that:

20
21 "[T]he Judge's decision has not taken the form of
22 an Order, it is a Memorandum Decision. But the
23 memorandum decision, again, has not been transcribed
24 in the form of an order, it is not finally binding
upon any party and the evidence that I am submitting
will hopefully have Judge Stauffacher, give him a
chance to change his mind and avoid legal error.

25 So the documents that I am submitting go to
priority date and that was the exception of Level Best
as to priority dates." [Emphasis added].

1 Transcript 1/30/96 at 15. The Referee allowed the additional
2 evidence over the objection of RMEF but cautioned that:
3

4 "[T]o the extent that evidentiary documents might
5 be entered in today in support of the various
6 exceptions that Level Best filed, I think that if we
7 efficiently get the records in, they can be given the
8 weight that they should be given as we proceed into
9 this.

10 But I do agree that the matter of priority that
11 it's share and share alike with a June 30, 1873
12 priority date for the parties with the one-third/two-
13 third split, that's my reading." [Emphasis added].
14

15 Id., at 17.

16 Subsequent to the supplemental evidentiary hearing, the
17 Court came out with its ruling on Level Best's motion to re-
18 open. The Order read as follows:
19

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

C. After entry of the Order on Exception to
Report of Referee, Subbasin 6 dated October 12, 1995,
Level Best failed to timely motion the Court for
Reconsideration pursuant to CR 59. . . ."

26 Order Re Motion of Level Best to Reopen Court Claim No. 00284
27 Rocky Mountain Elk Foundation, (Doc. # 11,369), Feb. 28, 1996 at
28 2 (hereinafter Motion to Re-Open).
29

1 Clearly, then, the Court ruled that further evidence regarding
2 RMEF's priority date should not have been introduced at the
3 exceptions hearing and should be disregarded.

4 Level Best pressed the issue further by filing a Motion for
5 Reconsideration on March 11, 1996. The Motion for
6 Reconsideration restates the arguments made at the supplemental
7 evidentiary hearing -- "that the property owned by Rocky
8 Mountain Elk Foundation in Section 6 and in Section 5 do not
9 have any part of the 1/3 interest." Level Best Motion for
10 Reconsideration, (Doc. # 11,404), March 11, 1996, at 4. In
11 addition, despite the dicta in the Court's Memorandum Opinion in
12 Motion to Re-Open at 4, Level Best insists that their motion for
13 reconsideration is timely as the Courts rulings on the priority
14 dates among the one-third owners had not taken the form of a
15 final "judgment" within the meaning of CR 59 and 54. Assuming
16 this is true, the Court notes that Local CR 59 for Yakima County
17 deems that "any motion for reconsideration not heard within (30)
18 days of the written decision shall be deemed denied." [Emphasis
19 added] LCR 59. Therefore, the motion is deemed denied under LCR
20 59.

21 On March 18, 1996, the Referee came out with the
22 Supplemental Report of the Referee Re: Subbasin No. 6 (Taneum)
23 (Doc. # 11,427) (Supplemental Report). In the Report, the
24 Referee noted that:
25

1 "... Level Best, Inc., entered several exhibits during
2 the supplemental hearing in what appeared to be an
3 effort to establish an earlier priority date [than
4 RMEF and some of the other one-third owners]. The
5 Court having already ruled on the exceptions related
6 to priority date did not remand that issue to the
7 Referee for consideration. In response to Level Best,
8 Inc.'s, Motion to Reopen Court Claim no. 00284, the
9 Court on February 28, 1996, issued a Memorandum
10 Opinion and Order denying the motion. The Court
11 restated its February 3, 1995, ruling that the
12 successors to Tenem I, including Level Best, Inc.,
13 would share a priority date of June 20, 1873, and
14 ordered the Referee to use that priority date."

9 Supplemental Report, at 4. Undeterred, Level Best once again
10 took exception arguing, as it did at the initial oversight
11 hearing, the remand hearing, its Motion to Re-Open and its
12 Motion for Reconsideration, that the lands owned by RMEF in
13 Section 5 and Section 6 were not covered by the Taneum I decree.
14 Therefore, this land is not entitled to a share of the one-third
15 right.

16 To summarize, after wading through all this background, we
17 have two items before the Court. First, a Motion for
18 Reconsideration that, even if timely, has been deemed denied by
19 operation of LCR 59. Second, an Exception based on information
20 not properly in the record (at least not for use in proving
21 priority date), dealing with an issue that has been ruled on,
22 incorporated into an order, and carried forward in the
23 Supplemental Report. Therefore, it would seem that the Court
24 has adequate procedural grounds on which to deny Level Best's
25 Motion for Reconsideration and Exceptions to the Supplemental

1 Report. However, in the hope of finally putting the issue to
2 rest, the Court will address Level Best's arguments.

3
4 Argument

5 In their Motion for Reconsideration and their Exceptions to
6 the Supplemental Report, Level Best did not directly reargue the
7 issue of priority dates among the parties claiming water under
8 Taneum I (a question which the Court has clearly ruled upon).
9 Instead, Level Best took the alternative tack of questioning who
10 in fact are the legitimate successors to the water decreed in
11 Taneum I. Although the parties to which the Taneum I ruling
12 applies were directly named and the priority date established in
13 Memorandum Opinion Re: Subbasin 6 Exceptions to Priority Dates,
14 Level Best still believes that there is a live controversy as to
15 who the one-third owners are. "The Court did not rule
16 specifically who had the valid rights under Taneum I." Level
17 Best Exceptions at 3. Indirectly then, Level Best has again
18 raised the priority date question. A claimant who can otherwise
19 established a water right to Taneum Creek but is not a successor
20 to the water decreed in the Taneum decrees, will necessarily
21 have a junior priority date to those who are successors to the
22 one-third right. This is because the Taneum decrees determined
23 the most senior rights on the creek. Therefore, we are back to
24 the priority date question, albeit from a different angle.

1 Level Best's argument is that owners of property in Section
2 5 and Section 6 do not have a valid right under Taneum I and
3 therefore, don't share in any of the one-third flow. Since
4 Taneum II clearly states that it does nothing to disturb the
5 Taneum I decree, then Section 5 and Section 6 land are not
6 included in the Taneum II decree either. Therefore, the
7 argument goes, claimants in these sections have no present claim
8 to the one-third flow, and their water rights, if they exist at
9 all, would necessarily be junior to Level Best's because the
10 Taneum decrees established the earliest rights on the creek.

11 Level Best bases this argument on language found in the
12 Memorandum Opinion for Taneum I. In that Opinion, Judge Turner
13 indicated that the one-third flow was intended for use on the
14 "lands owned by Thorp in the fall of 1873."² Taneum I,
15 Memorandum Opinion, (DE-90) at 9. Level Best argues that in the
16 fall of 1873 Thorp did not own³ any property in Section 5 or
17 Section 6. According to Level Best, in the fall of 1873, Thorp
18 owned the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 4. Level Best Exceptions, at 5. This
19 is the property referenced in Taneum I as being settled by F.M.
20 Thorp prior to 1873. See Taneum I, Findings, (DE-91), ¶ III.

21

22

23 ² Level Best points to the answer of Splawn and Bruton in Taneum II (DE-94) as
24 additional evidence that this was the intent of Judge Turner in Taneum I.
25 However, it should be noted that the interpretation of Taneum I by the
attorneys for Splawn and Bruton do not determine the meaning of the Taneum I
decree.

³ Strictly speaking, Thorp did not own any land in the fall of 1873 as no
patents had issued on any of the property in question. Ownership is a term
that is used loosely to reflect land in possession of the party or that is
being homesteaded.

1 Also, Level Best asserts that F.M. Thorp "presumptively" owned
2 the E $\frac{1}{2}$ NW $\frac{1}{4}$ and the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 4.⁴ Level Best Exceptions at
3 5. Level Best purports to rely on the Answer of Defendants
4 Splawn and Bruton (DE-93) in Taneum II as proof that F.M. Thorp
5 came into possession of this land in 1869. "The cross-complaint
6 further indicated in the same year [1869] predecessor of Bruton
7 (presumptively Thorp) also settled on the East half of the
8 Northwest quarter and the North half of the Southwest quarter."
9 Level Best Exceptions, at 5. Level Best insists that this is
10 the only land owned by Thorp in 1873 is therefore the only land
11 to which the one-third flow is appurtenant.

12
13 "It is submitted that the property owned by Rocky
14 Mountain Elk Foundation in Section 6 and Section 5 do
15 not have any part of the 1/3rd interest. . . . The same
16 would be true in regards to Mr. Emerick who does not
17 have property in the W1/2 of Section 4. Any owners of
18 the Section 5 property would, likewise, have no claim
19 to the 1/3 water right.

20 . . .
21 It is not so much the priority date (June 30,
22 1873, even though Claimant believes the evidence
23 produced would establish at least an 1872 priority
24 date for the lands covered for the 1/3 right) as much
25 as who and what lands were covered by the Taneum I
Decree. Clearly, Section 6 property was not. Clearly
the E1/2 of Section 4 property was not. Clearly
Section 5 was not. Level Best's property in Sec. 4
was. [Emphasis in original].

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Level Best Exceptions, at 5.

⁴ The patent to this land issued to Antwine Bertram on November 15, 1875.

1
2 Ruling

3 Neither the Memorandum Opinion, the Findings, nor the
4 Decree associated with Taneum I accurately specify the place of
5 use for the one-third water right. Consequentially, the case
6 permits any number of plausible interpretations. The Court will
7 concede Level Best has a plausible interpretation of Taneum I.
8 However, it is not the only interpretation, nor does the Court
9 think that it is the best. Instead, the Court still feels that
10 the Taneum I ruling, when taken in its entirety and in
11 conjunction with Taneum II, makes the best sense when
12 interpreted as awarding to F.M. Thorp, Margaret Thorp, and John
13 Hale one-third of the creek without restriction as to place of
14 use.

15 In analyzing the Taneum Decrees, it is well to keep in mind
16 that, despite all the discussion about the meaning of Taneum I,
17 ultimately it is Taneum II which is controlling. Taneum II re-
18 adjudicated Taneum Creek and supersedes Taneum I. Therefore, it
19 is the Taneum II court's interpretation (even if erroneous), not
20 Level Best's or the cross-complaint of Splawn and Bruton, which
21 determines the meaning and relevance of Taneum I. Again, the
22 ruling in Taneum II is as follows:

23
24 "It is considered, Ordered, Adjudged and Decreed
25 that as against the defendants C.A. Splawn and W.D.

However, Bertram sold this land to F.M. Thorp on September 15, 1874. (DE-84).

1 Bruton, the plaintiff [TCC] is the owner of and
2 entitled to the full flow of two thirds of the waters
3 of Tenem Creek; that as against the plaintiff the
4 defendants Splawn and Bruton are the owners of and
5 entitled to the full flow of one-third of the waters
6 of said Tenem Creek, the rights of the plaintiff and
7 of said defendants Splawn and Bruton being fixed and
8 determined by that certain decree [Taneum I], in an
9 action therein pending wherein this plaintiff was
10 plaintiff and F.M. Thorp and John E. Hale were
11 defendants and Margaret Thorp and others were
12 intervenors, and their rights under said decree are in
13 no wise disturbed by this decree." [emphasis added].

9 Taneum II, (Decree, DE-94) at 1.

10 Level Best places a great deal of emphasis on the fact that
11 Taneum II expressly indicates that Taneum I is "in no wise
12 disturbed by this decree." Therefore, in Level Best's
13 estimation, Taneum I indirectly dictates the meaning of Taneum
14 II. In effect, however, Level Best would have this Court find
15 ambiguity in Taneum II, where none exists, based on Level Best's
16 understanding of Taneum I. However, the statement that Taneum
17 II does not disturb Taneum I does not warrant this backward
18 reasoning. Taneum II clearly grants one-third of the flow of
19 Taneum Creek to defendants Splawn and Bruton and places no
20 restriction on its place of use, nor does it differentiate any
21 of this land in terms of priority date. Therefore, it seems
22 much more reasonable that, rather than giving added (unwritten)
23 meaning to Taneum II, the acknowledgment of Taneum I merely
24 reflects the Taneum II court's understanding of Taneum I -- that
25 the Taneum I court granted to F.M. Thorp, Margaret Thorp and

1 John Hale one-third of the creek. It is true that Judge Turner
2 arrived at the quantity of one-third based on his calculation of
3 the requirements of the "lands owned by him [F.M. Thorp] in the
4 fall of 1873," but nowhere in Taneum I are the parties limited
5 as to the place of use of that water in the future. Remember
6 that the water code, and therefore the appurtenance requirement
7 of RCW 90.03.380, was not enacted until 1917. While common law
8 prior appropriation (and many decrees of that era) recognized
9 the appurtenance of water right to land, Judge Turner, at least
10 expressly, did not. The Decree itself makes absolutely no
11 mention of land at all. F.M Thorp, Margaret Thorp and John Hale
12 are simply awarded an unrestricted right to one-third of Taneum
13 Creek. The Supreme Court upheld this decision. Thorpe v. Tenem
14 Ditch Co., 1 Wash. 566 (1889).

15 Despite the arguments of Level Best, even if it were Judge
16 Turner's intention to limit the place of use of the one-third
17 right, it is simply impossible to determine with any precision
18 the lands which he had in mind as being owned by F.M. Thorp in
19 the fall of 1873. First, although the Court recognizes that
20 property "ownership" without a patent was common in this era,
21 F.M. Thorp technically did not own any land in 1873 because no
22 patents had issued. Second, in 1873, Taneum I recognized that
23 F.M. Thorp as being in possession as homestead owner of the
24 W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 4. No other land is recognized as being
25 "owned" or under the control of F.M. Thorp in the fall of 1873.

1 However, if Taneum I was meant to limit the one-third right to
2 this property, it was overruled by Taneum II because Bruton
3 never had any interest in this property yet in Taneum II he was
4 clearly awarded a share in the one-third flow. Third, the
5 Taneum I court did mention land homesteaded by John Thorp in the
6 NE $\frac{1}{4}$ of Section 15 [sic—likely the Court meant 5].⁵ Regardless,
7 F.M. Thorp did not acquire any interest in this property until
8 1874 or after. Forth, Level Best's argument that F.M. Thorp
9 "presumptively" owned the E $\frac{1}{2}$ NW $\frac{1}{4}$ and the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 4 is
10 just that, presumptive. The record indicates that F.M. Thorp
11 purchased this property in September of 1874. Level Best points
12 to the Answer of Defendants Splawn and Bruton (DE-93) as proof
13 that F.M. Thorp took possession of this property in the fall of
14 1873. See Level Best Exceptions, at 5. What that document says
15 is this:

16
17 "[t]hat the predecessor in interest of defendant W.D.
18 Bruton settled upon the said E. $\frac{1}{2}$ of the N.W. $\frac{1}{4}$ and
19 the N. $\frac{1}{2}$ of the S.W. $\frac{1}{4}$ of said Section 4, as a pre-
20 emptor in the year 1869, and from thence continued to
reside thereon under the pre-emption laws of the
United States, and thereafter made final proof and
obtained patent from the United States thereto, . . ."
21 [Emphasis added].

22
23 ⁵ It is likely that the Taneum I court acknowledged this land because it is
24 the land John Hale owned in 1888 when Taneum I was decided (John Hale
25 acquired this property from F.M. Thorp in July of 1884). F.M. Thorp did not
purchase this property until September of 1874. However, since this is the
only land ever owned in the area by John Hale, and since he is clearly
awarded a right in the one-third flow, obviously this land in NE $\frac{1}{4}$ of Section
5 is included in the Taneum I ruling. This gives credence to this Court's
interpretation of Taneum I as allowing the one-third flow to be used on all
the land owned by F.M. Thorp, even if acquired after 1873.

1 Answer of Splawn and Bruton, (DE-93) at 7, ¶ V. The predecessor
2 in interest is not named. However, the record indicates that
3 Antwine Bertram became the patent owner, not F.M Thorp.
4 Therefore a better presumption is that Mr. Bertram was in
5 possession of this land in the fall of 1873.
6

7 Regardless, the point should be made. From the record, it
8 is impossible to determine exactly who owned what in the fall of
9 1873 - nor does it appear to this Court that Judge Turner
10 intended to limit the place of use of the one-third flow to just
11 that land. What is clear is that by 1888 when Taneum I was
12 decided, F.M. Thorp and John Hale had acquired patent to all the
13 land in question - this is precisely the same land subsequently
14 owned by Splawn and Bruton in 1906 when Taneum II was decided.
15 Much of this same land is now owned by Rocky Mountain Elk
16 Foundation, E.L. Knudson, Jr., Mike Emerick, Level Best, Inc.,
17 Springwood Investment Corporation and Jeff Nesmith.

18 Therefore, despite the continued arguments of Level Best,
19 it appears clear to this Court that Taneum II awarded one-third
20 of the flow of Taneum Creek to Splawn and Bruton without
21 restriction as to place of use. The Taneum II court did not
22 distinguish a particular place of use on their property or
23 differentiate priority dates within their property. The most
24 reasonable explanation for this would be that the court did not
25 intend to limit the place of use within Splawn's and Bruton's
property or distinguish priority dates among parcels. The

1 Taneum II court was clearly aware of Taneum I. Had the court
2 interpreted Taneum I as limiting the place of use within
3 Splawn's and Bruton's property to just Section 4 (as has been
4 argued by Level Best), certainly it would have said so in the
5 decree.

6 Therefore, this Court rules that all parties claiming a
7 right to a portion of the one-third flow must demonstrate that
8 they are successors in interest to the land owned by Splawn and
9 Bruton in 1906 and have continuously beneficially used the water
10 since. Rocky Mountain Elk Foundation, E.L. Knudson, Jr., Mike
11 Emerick, Level Best, Inc., Springwood Investment Corporation and
12 Jeff Nesmith are all successors in interest to Splawn and Bruton
13 and have put on evidence of actual beneficial use sufficient to
14 establish their water right. The Court rules they, along with
15 TCC, share a priority date of June 30, 1873.

16
17 **Proration Administration**

18 The remaining three issues all related to exceptions taken
19 by Taneum Canal Company (TCC). First, given that all of the
20 parties who take water from Taneum Creek have the same priority
21 date, TCC asked this Court to give guidance as to how Taneum
22 Creek would be administered in times of water shortage.

23 As discussed above, the Taneum decrees establish a one-
24 third two-third split of Taneum Creek. However, Taneum II was
25 slightly more specific. Rather than simply dividing the creek

1 two-thirds to TCC and one-third to Splawn and Bruton, the court
2 set an upper limit on their diversions.

3

4 "That as against all of the other parties to this
5 suit the plaintiff [TCC] is the owner of 4000 inches
6 [80 c.f.s] of the waters of said Tenem Creek and is at
7 all times intitled to the full flow of such an amount
8 of water down to the head of its canal; and the
9 defendant's Splawn and Bruton as against all of the
10 other defendants in this action are the owners of 2000
11 inches [40 c.f.s] of the waters of said Tenem Creek
12 and entitled to the full flow thereof down to the
13 heads of their ditches; . . ."

9

10 Taneum II, Decree (DE-94), at 2. This decree was filed in May
11 of 1906 and established the rights of the parties as of that
12 time. However, it says nothing about the actual use of that
13 water since. The parties must demonstrate continuous beneficial
14 use of the water in order to be confirmed a water right in this
15 adjudication and cannot rely exclusively on decrees and
16 contracts to establish their right. See Memorandum Opinion Re:
17 Threshold Issues, at 16 (1945 Consent Decree can only be used as
18 some evidence in this case to assist in determining a vested
19 water right but does not itself establish the right). As noted,
20 Taneum Canal Company, Rocky Mountain Elk Foundation, E.L.
21 Knudson, Jr., Mike Emerick, Level Best, Inc., Springwood
22 Investment Corporation and Jeff Nesmith, all were confirmed a
23 water right by the Referee based on the Taneum decrees. See
24 Original Report and Supplemental Report. However, the
25 quantities confirmed, based upon the evidence presented to the
Referee, did not match the quantities decreed in Taneum II.

1 While TCC was confirmed a right in the full 4000 inches or 80
2 c.f.s., the "one-third owners" did not prove a right to the full
3 2000 inches or 40 c.f.s. Instead, by the Court's calculation,
4 the one-third owners collectively were only confirmed a right to
5 17.47 c.f.s. Therefore, the rights confirmed no longer
6 represent relative rights of two-thirds, one-thirds. Instead,
7 relative to one another, TCC has 82% while the "one-third
8 owners" have roughly 18% of the total amount confirmed from
9 Taneum Creek.

10 This brings us to the issue at hand. Given that all the
11 parties share the same priority date, in times of shortage (ie.
12 when there is less than 97.47 c.f.s in the creek -- TCC's 80
13 c.f.s and the "one-third owners'" 17.47) how will the stream be
14 apportioned? TCC argues that the Conditional Final Order for
15 Subbasin 6, will replace the Taneum decrees. When that CFO is
16 signed there will no longer be a two-thirds, one-thirds split
17 because there will no longer be classes of users on Taneum
18 Creek. Instead there will simply be water users who derive
19 their rights from Taneum Creek who happen to share an identical
20 priority date. Consequentially, all the water rights should be
21 reduced pro-rata in times of shortfall, as would be the case in
22 any basin between water users sharing the same priority date.

23
24 "If the court were to conclude that TCC is wrong
25 . . . it is possible that there would be periods of
time during which one third (1/3) of the creek . . .
exceeds the amount they [the "one-third owners"] could
beneficially use. As the Court can see that is an

1 incongruous result because TCC's right would be
2 reduced to two-thirds (2/3) but the successors to
3 Thorp and Bruton would continue to receive their full
4 entitlement of water even though they have an equal
5 priority date with TCC."

6 TCC's Rebuttal to Reply of RMEF, at 4.

7 Rocky Mountain Elk Foundation (RMEF) sees nothing
8 incongruous about this result at all. Instead RMEF argues that
9 the Court should abide by the Taneum decrees despite the maximum
10 quantities confirmed through this adjudication. RMEF
11 characterizes the Taneum decrees as "low-water decrees." (Tr.
12 9/12/96 at 65).

13 "[W]hen there's plenty of water, no one cares,
14 but when you get down to under 300 CFS, like it says
15 you do in low-water years [presumably counsel means
16 300 inches which the court in Taneum I referred to as
17 the least amount of water that is ever in Taneum
18 Creek], that's when they decreed the 2/3-1/3 split."
19 Id., at 69-70.

20 "The decrees, again, are low-water decrees saying
21 that when you get down to it that's how they're
22 divided, that's what the judges in their wisdom
23 dictated a long time ago, and that's worked up till
24 now. What Taneum Canal Company is asking you to do is
25 go and overturn those earlier decrees . . ." Id., at
73.

21 Ruling

22 The Court agrees with TCC and rules that during times of
23 shortage, all water users deriving a right from the Taneum
24 decrees shall receive a pro-rata share of the water. The Taneum
25 decrees were intended to fairly apportion the water between TCC

1 and the "one-third owners." Once apportioned, the parties were
2 enjoined from interfering with the others portion of the creek.
3 Other than the quantity, therefore, the Taneum decrees put TCC
4 and the "one-third owners" on equal footing. This is the reason
5 why this Court has given all of the parties the same priority
6 date in this adjudication.

7 However, through no fault of TCC, the "one-third owners"
8 collectively have not used their decreed 2000 inches or 40
9 c.f.s. of Taneum Creek water. The Taneum decrees, (or any
10 decree, or contract for that matter) don't operate to
11 perpetually guarantee a water right. See Memorandum Opinion Re:
12 Threshold Issues, at 16. Water rights are determined through
13 beneficial use and can be lost through forfeiture and
14 abandonment. See Okanogan Wilderness League, Inc. v. Town of
15 Twisp, 133 Wn.2d 769. As the Referee did not confirm to the
16 "one-third owners" their full 40 c.f.s entitlement, the Court
17 can only assume that the water was never put to beneficial use
18 or has since been abandoned or relinquished.

19 For this Court to continue the two-thirds, one-third split
20 in times of water shortage, is not to leave the parties on an
21 equal footing, but to force TCC to bear a disproportionate share
22 of the proration burden. Therefore, Taneum Creek will no longer
23 be divided on a two-thirds, one-third basis during times of
24 shortage. Instead, all water users deriving a right from the
25

1 Taneum decrees shall receive their pro-rata share of the creek,
2 based upon their present adjudicated right.

3

4 **Irrigation vs. Conveyance Loss Distinction**

5 Also, TCC has repeatedly taken exception to the Referee's
6 characterization of part of their water right as conveyance
7 water. In Memorandum Opinion Re: Subbasin 6 Exceptions of
8 Taneum Canal Co. & Department of Ecology to Taneum Canal Co.,
9 (Doc. # 10,320), Feb. 3, 1995, at 3, the Court specifically
10 ruled on the issue. However, due to some confusion, TCC again
11 raised the exception at the oversight hearing held Sept. 12,
12 1996.

13 The Court maintains its previous position. See Id.
14 Conveyance is a beneficial use of water. Only legally wasteful
15 conveyance is not a beneficial use. Nothing in the record
16 indicates that TCC's conveyance water is being legally wasted.
17 All irrigation rights include conveyance water whether it is
18 specifically differentiated from the irrigation water or not.
19 The distinction between conveyance and irrigation water in TCC's
20 right was made by the Referee simply because TCC presented very
21 specific information on that point. However, distinguishing
22 conveyance water from irrigation water in no way implies that
23 TCC is not entitled to divert both conveyance and irrigation
24 water at its headgate.

25

1 **Taneum Canal Company's Irrigation Season**

2 Finally, TCC took exception to its irrigation season ending
3 on October 31st. TCC insists that "[s]pecifically in dry years
4 it is necessary to irrigate new seeding timothy hay, . . . into
5 November to ensure the viability of the new seeding." Taneum
6 Canal Company's Exception to the Supplemental Report of the
7 Referee: Subbasin 6, (Doc. # 11640), May 14, 1996, at 1. In the
8 report of the Supplemental Report, the Referee stated that:

9
10 "The normal irrigation season throughout the entire
11 Yakima Basin generally is through the end of October.
12 Although there was testimony of occasionally
13 irrigating into November, there was no specific
testimony that would allow the Referee to quantify
that use and recommend that the irrigation season
extend into November." [Emphasis added].

14 Supplemental Report, at 8. In response, TCC stated,

15
16 "The evidence indicated that the use in November was
17 related to climate and crop patterns. The use is not
extensive.

18 Given the decreed right [Taneum decrees] and the
19 nature of the use it is not necessary to make a
20 specific quantification of the November use. The
right should extend from February 20 to November 15th
of each year." [Emphasis added].

21 Taneum Canal Company's Exception to the Supplemental Report of
22 the Referee: Subbasin 6, (Doc. # 11640), May 14, 1996, at 2.

23
24 "[T]here is no real need to quantify what's used in
25 that period of time because it's the overall right.
It's already been quantified in both an instantaneous
amount and an acre-feet per year limitation."
[Emphasis added].

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(Tr. 9/12/96 at 60). The Court interprets these statements to mean that TCC is not asking for any additional water. Therefore, as there is testimony that a minimal amount of water is occasionally used for seeding of timothy hay in November, the Court will extend TCC's irrigation season to November 15th. TCC's instantaneous diversion rate and acre-feet per year limitation shall remain the same.

Conclusion

The Court has ruled that all parties (including TCC and all of the "one-third owners") claiming a water right based on the Taneum decrees share the same priority date of June 30, 1873. In addition, during times of water shortage when not all of these rights can be met, all water users deriving a right from the Taneum decrees shall receive a pro-rata share of the water. The Court denies TCC exception to part of its right being characterized as conveyance water and grants the extension of TCC's irrigation season to November 15.

Dated this 23rd day of July, 1998.

Walter A. Stauffacher
Judge Walter A. Stauffacher