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KIM M. EATON  
CLERK OF  
SUPERIOR COURT  
YAKIMA, WASHINGTON

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,  
DEPARTMENT OF ECOLOGY,

Plaintiff

vs.

JAMES J. ACQUAVELLA, et al.,

Defendants.

Cause No. 77-2-01484-5

OPINION AND RULING RE: EXCEPTION  
OF RICHARD T. AND LYNN B. COLE TO  
SUPPLEMENTAL REPORT: SUBBASIN NO.  
11 (MANASTASH)

**FILED**  
DEC 04 1998

KIM M. EATON, YAKIMA COUNTY CLERK

Claimants Richard T. Cole and Lynn B. Cole, Court Claim No. 01969, have taken exception to the Report of Referee Re: Subbasin No. 11 (Manastash), dated May 9, 1994 (Volume 17) and also to the Supplemental Report of Referee Re: Subbasin No. 11 (Manastash), dated April 17, 1998 (Volume 17A). Both exceptions pertain to the priority date assigned to the water right awarded to the claimants for the irrigation of 7 acres in Section 13, Twp. 7 N., R. 17 E.W.M., laying south of Keach Ditch and north of the Kittitas Reclamation District Canal. As will be noted later, Keach Ditch receives its water from Manastash Creek.

Waters of Manastash Creek, and a number of ditches diverting water therefrom, were considered in an action commonly referred to as Gray and Geddis vs Johnson, Kittitas County Nos. 99 and 100. The decision therein was filed March 17, 1891 and the Decree was filed April 18, 1891. The claimants Coles' predecessor in ownership of their property was Olof

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1 Hanson, who was a party to that action and who claimed water rights in Section 7, but did not  
2 plead for any water rights in Section 13, the property now owned by the Cole's.

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4 In both the Report and the Supplemental Report, the Referee assigned the Cole's the  
5 priority date of their water right as being the date of the entry of the Gray decree, April 18, 1891.  
6 The Cole's had requested a priority date of 1882 and base their exception to the Referee's findings  
7 on the assertion that the water rights of Olof Hanson to the land he owned in Section 13 were not  
8 adjudicated in the Gray case. The Department of Ecology (DOE) opposes the Coles' exceptions  
9 and assert that the doctrine of "res judicata" is applicable in this present adjudication.

10 Both parties hereto reference Ecology vs Yakima Reservation Irrigation District, 121 Wn2d  
11 257, 290, for the definition of res judicata. Therein, it is set forth that:

12  
13 "Res judicata applies to bar relitigation when the following factors  
14 are met: (1) identity of subject matter; (2) identity of course of  
15 action; (3) identity of persons and parties; and (4) identity of the  
16 quality of the persons for or against whom the claim is made. A  
17 prior judgment is res judicata as to every question which was  
18 properly a part of the matter adjudicated, but it does not bar litigation  
19 of claims which were not in fact adjudicated."

20 The Referee, in the Report pp. 42-45 and in the Supplemental Report pp. 45-46, quite  
21 clearly set forth his findings with respect to the applicability of the Gray case to the Cole's  
22 property, albeit without specifically reiterating the exact language from the Gray Findings and  
23 Decree. To further illustrate the matters referred to by the Referee, we need to reference the  
24 specific language of the Gray Findings and Decree, from which the Referee obtained his  
25 conclusions.

26 Paragraph Thirty-Third of Findings of Fact dealt with the "Keach Ditch" and the persons  
receiving Manastash Creek water therefrom. The pertinent parts of this lengthy Finding are as  
follows:

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2 "In 1981 (should be 1871) Luther Keach and Mathias Becker,  
3 the grantors of the defendant E.S. Coleman and intervenors D.H.  
4 Wescott and William C. Wright, having a possessory right to land in  
5 said County requiring several hundred inches of water, began the  
6 construction of a ditch from the Manastash Creek to said lands, since  
7 known as the "Keach Ditch", but, from the great length of the ditch  
8 required, they did not get water to their lands until 1873. Said  
9 Coleman and his said grantors, thereupon with reasonable diligence  
10 appropriated from said Creek, through said ditch, and applied to  
11 beneficial uses on land now held by said Coleman, and have so  
12 continued to use to present day, 150 inches of said water. Said  
13 Wescott and Wright, and their grantors thereupon with reasonable  
14 diligence appropriated from said Creek through said ditch, and  
15 beneficially used upon land now owned by said Wescott and Wright,  
16 50 inches of said water, and have continued the use thereof to the  
17 present day."

18 "That the owners of said ditch, and other persons hereinafter  
19 mentioned, who used the same, enlarged said ditch from year to year  
20 and changed its head as their need of more water increased and did  
21 this especially in the years 1873, 1874, 1877, and 1878."

22 "That the owners of said ditch, to encourage persons to settle  
23 in their neighborhood and thus increase the value of their land, gave  
24 to Z. T. Butler, J. M. Pease, and J. D. Damman, an interest in said  
25 ditch and a right to use the same; and said Damman was induced to  
26 settle, take up and improve the lands which he now holds, by the gift  
of this right from said Keach."

"That in 1874, said J.D. Damman having a possessory right  
to land in said County requiring 360 inches of water, appropriated  
water from Manastash Creek, proceeded to beneficially use 360  
inches of water through said ditch upon said lands, which water has  
been so used ever since."

Using substantially the same language as in the preceding paragraph, except as to the  
amounts of water, the Finding then stated the appropriation in 1876 of Z.T. Butler and in 1878  
that of J. T. Pease.

1 Next, the Thirty-Third Finding went on to explain the status of others using Keach Ditch as  
2 follows:

3  
4 “That to encourage settlement in the neighborhood, the  
5 owners of said ditch either expressly permitted or suffered other  
6 persons in the vicinity to take water from Manastash Creek through  
7 said ditch to their lands, and to enlarge and improve said ditch, but  
8 gave them no interest in the ditch, except a right to use it for the  
9 conveyance of their water, and gave them no right to the water which  
10 the owners of the ditch had already appropriated. Those persons  
11 were Olof Hanson, A. Anderson, J. William Vaughn, Charles  
12 Swanson, Jacob Jensen, and H. H. Swasey, and their grantors Heney  
13 Toner also took water from said ditch, but disclaims any right to do  
14 so.” (Emphasis added)

15 Then, again using substantially the same language as previously noted, the Finding set  
16 forth the appropriations by J. William Vaughn in 1879; by A. Anderson in 1880; by H.H. Swasey  
17 in 1881 and Charles Swanson in 1888.

18 There were two others of those permittees which were noted differently as follows:

19 “ In 1880, Jacob Jenson appropriated water from the Manastash  
20 Creek and with reasonable diligence proceeded to apply 10 inches  
21 thereof to beneficial uses upon the school land in which he had a  
22 possessory right as elsewhere mentioned in these findings, and has  
23 continued such use to the present time. But these facts are not  
24 pleaded by said Jensen in this action. (Emphasis added)

25 Also, “in 1882, Olof Hanson appropriated from the  
26 Manastash Creek through said ditch, upon the S. ½ of the N. ½ of  
Section 13, in Twp 17 N of Range 17 E, to which land he had a  
possessory right 30 inches of water and with reasonable diligence  
applied said water to beneficial uses on said land, and has  
continuously used same ever since. But these facts are not pleaded  
by said Hanson in this action.” (Emphasis added)

Thus, it is perfectly clear that the court in the Gray case made specific findings of a water  
right for those who claimed such rights and further was specific in ruling that Heney Toner

1 disclaimed any right to water through Keach Ditch and that Jacob Jensen and Olof Hanson, the  
2 Cole's predecessor, did not make any claim to water obtained through Keach Ditch.

3 In the Conclusions of Law, the Court set forth all of the water rights that had been claimed  
4 and proven, specifically providing that the "permittees" J. William Vaughn, A. Anderson, H. H.  
5 Swasey, and Charles Swanson were to receive their water rights through Keach Ditch. These  
6 rights were then specifically awarded in the Decree, filed April 18, 1891, where J. William  
7 Vaughn received a Class 7 right; A. Anderson received a Class 8 right; H. H. Swasey received a  
8 Class 9 right; and C. Swanson received a Class 15 right all being noted as receiving their right  
9 through Keach Ditch. It is further noted that the herein claimants predecessor, Olof Hanson, did  
10 receive his claimed water right for this Section 7 land as a Class 5 right in the Decree, but was not  
11 awarded any water right for unclaimed use in Section 13.

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13 All of this was succinctly summarized by the Referee in the Report without quoting from  
14 the Findings, Conclusions and Decree as is done herein. Further, the Referee made note of the  
15 fact that three other claimant successors of Olof Hanson Section 13 land had not filed R.C.W.  
16 90.14.071 claims herein and recited to the fact that since such claims had not been filed, no water  
17 right could be confirmed for them. This clearly is a parallel situation, wherein no claim having  
18 been made, no right can be awarded.

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20 Res judicata clearly applies in this instance: (1) as to the identity of the subject matter the  
21 Gray case dealt with claimed water rights as does this adjudication; (2) the identity of cause of  
22 action deals with the diversions of Manastash Creek water through Keach Ditch to Section 13; (3)  
23 the identity of persons and parties deals with all persons and parties to the Gray case to water  
24 through Keach Ditch; and (4) the identity of the quality of the persons for or against whom the  
25 claim is made pertains to Olof Hanson and his successors in interest of lands in Section 13. Every  
26 question as to the claimed water right for the Olof Hanson lands in Section 13 was before the

1 Court in the Gray case adjudication and those matters were specifically adjudicated and ruled upon  
2 therein.

3 As an aside, it is interesting to note that in Barnes vs Belsaas, 73 Wn 205, 206, (1913)  
4 dealing with claimants to water rights to Keach Ditch, the Supreme Court found "The amount of  
5 water which each of the plaintiffs is entitled to, as between themselves, was adjudicated and  
6 determined by the Superior Court of Kittitas County in the year 1891." (Emphasis added)

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8 In view of all of the foregoing, it is hereby Ruled as follows: The Referee, in the Report  
9 (Volume 17) and the Supplemental Report (Volume 17A) was entirely correct in holding that the  
10 claimants Cole's present water right for their lands in Section 13 cannot and does not have a  
11 priority date prior to April 19, 1891.

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13 Dated this 4<sup>th</sup> day of December, 1998

14  
15 Walter Stauffer

16 Judge  
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