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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF YAKIMA

DEC 11 11 57 AM '97

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2  
3 IN THE MATTER OF THE DETERMINATION )  
4 OF THE RIGHTS TO THE USE OF THE )  
5 SURFACE WATERS OF THE YAKIMA )  
6 RIVER DRAINAGE BASIN, IN )  
7 ACCORDANCE WITH THE PROVISIONS OF )  
8 CHAPTER 90.03, REVISED CODE OF )  
9 WASHINGTON, )  
10 STATE OF WASHINGTON, )  
11 DEPARTMENT OF ECOLOGY, )  
Plaintiff, )  
vs. )  
JAMES J. ACQUAVELLA, ET AL., )  
Defendants )

KIM M. EATON  
CLERK OF  
SUPERIOR COURT  
YAKIMA, WASHINGTON

No. 77-2-01484-5

MEMORANDUM OPINION AND ORDER  
RE: EXCEPTIONS TO SUPPLEMENTAL  
REPORT OF REFEREE SUBBASIN 8  
(THORP)

FILED

DEC 02 1997

KIM M. EATON  
YAKIMA COUNTY CLERK

I. INTRODUCTION

On July 10, 1997, various Subbasin 8 claimants participated in a hearing to resolve exceptions taken to the Supplemental Report of Referee for Subbasin 8. Many of the exceptions were resolved at the hearing; a few were not. This opinion clarifies the record regarding the status of the unresolved claims in that subbasin.

II. MATTERS RESOLVED AT JULY 10, 1997 HEARING

Judge Walter Stauffacher resolved the following exceptions by oral ruling.

a. Charles Gust – Claim No. 01560

The Court GRANTED Mr. Gust's exception. The water right shall have a priority date of June 30, 1882. Report of Proceedings (RP) at p. 20.

b. Wynn & Catherine Vickerman (Hubert A. and Mary M. Schmitt) – Claim No. 0596

The Vickermans have transferred ownership of the property in question to Hubert and Mary M. Schmitt and obtained the appropriate Substitution Order. The Referee recommended that two rights be confirmed to the Vickermans, however no legal description was provided to the Referee. Included with the exception filed by the Vickermans was a legal description for their property.

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1 Therefore, the court granted their exception. RP at 21. However, after the Schmitts were  
2 substituted for the Vickermans, an amended legal description was submitted apparently as a result  
3 of a survey of the property. The following legal description was provided:

4 Parcel V of that certain survey as recorded December 2, 1997 in Book 23 of Surveys at page  
5 28, under Auditor's File No. 199712020001, records of Kittitas County, State of  
6 Washington; being a portion of the Southeast quarter of the Southeast quarter of Section 30,  
Township 18 North, Range 18 East, W.M., in the County of Kittitas, State of Washington.

7 This legal description is a parcel within a survey recorded in the Kittitas County Auditor's office.  
8 In order for the Court to use this new legal description, a copy of the survey is needed to show that  
9 the parcel lies within the previously described land. Therefore, the Court requests a copy of the  
10 survey as soon as possible but no later than February 10, 2000.

11 c. David and Lila Fudacz, Larry Fudacz (Claim Nos. 04817 and 04818)

12 The Fudacz exception concerned the lack of an RCW 90.14 filing to support their claims to  
13 springs. In their exception, the Fudaczs made the court aware of WRC No. 133399 filed by John  
14 A. Wilcox. The court agreed that the claim covered the property and GRANTED the exception.  
15 Therefore, a right is confirmed for irrigation of 3 acres (the acreage remaining in the 90.14 claim  
16 not utilized by Norma Jean Wilcox as a part of the Wilcox claim) from the spring in the quantities  
17 of 0.06 cfs; 19.8 acre-feet per year with a June 30, 1910 priority date. RP at 21.

18 The Place of Use shall be the West 660 feet of the East 1008.7 feet of the South 260 feet of  
19 the NE1/4SE1/4 of Section 11, T. 18N., R. 17 E.W.M..

20 d. Gene & Sally Panattoni – Court Claim No. 01208

21 Ecology identified that the instantaneous and annual quantities were omitted from the  
22 Referee's Schedule of Rights on page 116 of the Supplemental Report. The Schedule should  
23 include such quantities and therefore the Court GRANTS Ecology's exception. The Panattoni's are  
24 awarded an instantaneous diversion of 0.02 cfs; 1 acre-foot per year. RP at 21.

25 e. Irwin & Dorothy Loucks – Court Claim No. 02046

1 The Loucks' right contained a discrepancy in regard to the priority date between the analysis  
2 set forth by the Referee at page 26 and the Schedule of Rights on Page 120. The court GRANTED  
3 the exception and RULED that the correct date is December 28, 1888. RP at 21.

4 f. Jennie Callahan & Lloyd K. Howry – Claim No. 1086

5 The purpose of use section for Claim 1086 was inadvertently omitted on Page 121. The  
6 court GRANTED the exception and the Schedule should include "Use: Single domestic supply  
7 including ½ acre of lawn and garden irrigation." RP at 21.

8 g. Mr. and Mrs. Clifford Lindsey – Claim No. 01189

9 Ecology noted the omission of "Priority Date" information and "Point of Diversion:"  
10 caption on Page 107. The court GRANTED the exception. The priority date shall be December 3,  
11 1879. RP at 21. The words "Point of Diversion" shall replace "Priority Date" on p. 107, line 6.

12 h. William, Jr. & Joy Fields & William R. Fields, Sr. – Claim Nos. 02372/02373

13 Ecology brought two exceptions. It argued that only a single claim is involved. In fact, two  
14 separate adjoining parcels are involved and both are served via Mill Ditch. The exception is  
15 DENIED except that on page 106 Court Claim No. 02372 should be changed to read Court Claim  
16 No. 02373.

17 Second, Ecology noted an omission regarding the Place of Use for Claim No. 2372 on page  
18 105. The exception was GRANTED and the legal description is: "That portion of the  
19 NE1/4NW1/4/NE1/4 of Section 11, T.18N., R.17E.W.M. lying south of the Thorp Mill Ditch and  
20 northeast of the Burlington Northern Railroad right of way." RP at 21-22.

21 i. Norma Jean Wilcox – Claim Nos. 01971 and (A)04311

22 Ecology correctly indicated that the point of diversion change identified in the narrative of  
23 the Supplemental Report on Page 95, Lines 4 ½ -7 did not get carried into the Schedule of Rights on  
24 Page 124. The court GRANTED the exception. Lines 19-20 should read "1650 feet north and 50  
25

1 feet west from the southeast corner of Section 11 being within the NE1/4SE1/4 of Section 11, T.18  
2 N., R. 17 E.W.M.." RP at 22.

3 The Supplemental Report of Referee, Page 132, was also clarified to confirm a right to  
4 divert from two springs. RP at 27. The exception was GRANTED.

5 j. Richard & Rita Hutchinson – Claim No. 0877

6 Ecology filed an exception in regard to the Referee recommending a December 3, 1879 right  
7 for the Hutchinson's claim of 10 acre-feet for stock water. Ecology's exception stems from the  
8 Report of Referee. In the Schedule of Rights set forth in that Report the annual quantity for stock  
9 water is 2 acre-feet. See Report at page 152, line 5. However, in the Referee's analysis of Claim  
10 877, the Hutchinsons were recommended a right to 10 acre-feet for stockwater purposes. Report at  
11 page 104, lines 8-14. The 2 acre-feet in the Schedule of Rights is a typographical error. The court,  
12 in its Order On Exceptions; Subbasin No. 8 (Thorp), March 9, 1995 directed the Referee to correct  
13 the annual quantity confirmed for the stockwatering to 10 acre-feet. Id. at page 8-9. The Referee  
14 did so in the Subbasin 8 Supplemental Report. The court confirmed the recommendation found on  
15 page 104 in its entirety and GRANTED the exception for 10 acre-feet of stock water with a  
16 December 3, 1879 priority date. RP at 22.

17 k. Thorp Town Ditch Association – Claim No. 0725

18 The court GRANTED the Thorp Town Ditch Association's exception to designate within  
19 the use section of the Referee's Supplemental Report, Schedule of Rights (Page 125) that the water  
20 right will be used for irrigating 23 lawns and 13 gardens. The Use section shall read:

21 "Irrigation of 15.5 acres, which includes 23 lawns and 13 gardens, stock water and fire  
22 protection" RP at 28.

23 l. Harold and Sherry Chamberlin – Claim No. 02316

24 Both Ecology and the claimants filed exceptions to the Supplemental Report of Referee.  
25 Ecology's first exception asserted that the court should eliminate consideration of Claim No. 02177

1 since the Referee did not recommend confirmation and the claim is duplicative of Claim No. 2316.  
2 The court DENIED this exception because the Schedule of Rights only refers to 02316 and the four  
3 water rights associated therewith; the narrative section of the Supplemental Report (Page 6 for the  
4 Chamberlins) merely sets forth the Referee's analysis of the Report and the Chamberlin's exception  
5 to the initial Report. RP at 38.

6 Ecology filed two other exceptions to the Supplemental Report, both bringing to the court's  
7 attention two oversights by the Referee. The court did not address those two exceptions. One  
8 exception pointed out an error on Page 13, Line 11 ½. The entry "Lines 1-22" should read "lines 1-  
9 11." The exception is GRANTED. Ecology's other exception concerned stockwater rights set forth  
10 on pages 109-110. The exception is GRANTED. Accordingly, "and stock water" should be deleted  
11 from Page 109, Line 16. Also deleted from Lines 18-181/2 is the following text: "1 acre-foot per  
12 year for stock water." On page 110, Lines 5 ½-6, add ";1 acre-foot per year for stock water."

13 The Chamberlins also excepted to the Referee's Supplemental Report. The court  
14 GRANTED their request that the place of use be modified. RP at 38. The Place of Use for three of  
15 the four water rights recommended for confirmation by the Referee shall be revised to change the  
16 westerly boundary to the "railroad right of way" as opposed to the current "Thorp Mill Ditch" on  
17 pages 109, 110 and 117 of the Schedule of Rights. Also, Page 13, Line 10 shall be changed by  
18 replacing "Thorp Mill Ditch" with "railroad right of way." On Page 109, Line 221/2 shall be  
19 changed from "NE1/4NE1/4" to "E1/2NE1/4."

20 The court also GRANTED the Chamberlin's exception as to the acres irrigated for a new  
21 total of 100 acres. RP at 38. Although not specifically discussed at the hearing, the Court hereby  
22 GRANTS the Chamberlin's exception to modify the January 1, 1881 water right. Accordingly, on  
23 Page 109 of Supplemental Report at Line 16, replace "6" acres with "26" acres and revise Line 18  
24 to reflect 0.65 cfs; 156 acre feet. The Chamberlin's request to change the date of priority of the  
25 1881 water right to December 3, 1879 was DENIED. RP at 38.

1 An issue much debated during the hearing concerned the ability of the Chamberlins to  
2 “bunch” their various water rights. That exception was DENIED. RP at 46.

3 **III. MATTERS NOT RESOLVED AT THE JULY 10, 1997 HEARING**

4 Many of the following claimants filed multiple exceptions. In addition to summarizing  
5 those that were resolved, the Court will rule on those that were not.

6 a. See portions of Chamberlin Claim No. 2316 above.

7 b. Elwin & Patricia Gibson – Court Claim No. 02046

8 The Gibsons urge the Court to admit into the record a map depicting multiple springs and  
9 ditches which deliver water to 30 acres in the S1/2SE1/4SW1/4 of Section 12, Township 18 N., R.  
10 17 E.W.M and a portion of the NE1/4NW1/4 of Section 13, T. 18 N., R. 17 E.W.M.. At the time of  
11 the Supplemental Hearing before the Referee, the claimants reserved exhibit number DE-S23 for  
12 putting such a map into the record. No objections were offered at the Exceptions Hearing regarding  
13 the entry of this map into the record. Accordingly, the map is ADMITTED as Exhibit DE-S23 and  
14 the clerk shall be instructed to enter the document in the record for Subbasin 8.  
15

16 Although the map is admitted into evidence, at the time of hearing attorney Richard Cole, on  
17 behalf of the Gibsons, indicated that information regarding priority date and what quantity of the  
18 spring at issue is natural flow would be provided to the Referee. RP July 10,1997 at p. 25. No such  
19 information was provided to the Court or to the Referee. Accordingly, the exception is DENIED  
20 and no right will be granted for the use of the spring set forth in Court Claim No. 02046.

21 c. Larry O. and Veralene Hillis – Claim Nos. 0894, 1705, 12004

22 Ecology and Hillis took exception to the Supplemental Report. Some of the exceptions were  
23 resolved by the court at the July 10, 1997 hearing.

24 The following rulings apply to the exceptions filed by Ecology.  
25

1. The Court GRANTS Ecology's request to delete the following extraneous language on Page 130, Line 17 of the Supplemental Report: ";29.75 acre-feet per year.
2. The Court GRANTS Ecology's request to revise the wording of the Schedule of Rights at Page 109, Lines 5 ½ - 7 because the existing language does not accurately reflect the narrative limitations as to ditch losses or the acre-feet per year (375). The wording at Page 109 shall read "4.00 cfs; 3.00 cfs, 375 acre-feet per year for irrigation of 40.5 acres; 1.00 cfs for transportation (ditch) loss." The remainder of the quantity statement is unchanged.
3. The court DENIED Ecology's exception regarding stock water use under the May 4, 1880 water right set forth at Page 109, Lines 6-7. RP at 38.

The following rulings apply to the exceptions filed by Hillis.

1. The court GRANTED the Hillis's exception regarding lands irrigated in the SW1/4 of Section 26. Thus at Page 130, Line 17, the Supplemental Report shall be changed to indicate "Use: Irrigation of 16.5 acres". Line 19 shall be changed to 1.65 cfs, 140.25 acre-feet per year which is the additional quantity of water needed to irrigate 16.5 acres. This applies to lands in the SW ¼ of Section 26, T.18N., R. 17 E.W.M..
2. Hillis also excepts to the Referee's finding regarding the acres irrigated in Section 35. They argue it should have been 50.2 acres and not the 11 acres that was recommended. They indicate the use of the water is in the NW ¼ of Section 35. After hearing argument, the court took the matter under advisement. RP at 55. After reviewing the record, the Court finds that the part of the land irrigated in Section 35 that makes up a portion of the 50.2 acres claimed is in the NW1/4NE1/4, not in the NW ¼. The historical basis for the water right is the C.W. Pease water right notice, which only described the NW ¼ of Section 35, T.18N., R.17E.W.M. (along with the SW ¼ of Section 26), not the NE1/4 of Section 35. The Court can find no basis for a water right from Robinson Canyon Creek for the NE ¼ of Section 35. Lacking evidence of such a right, the Court can only confirm a right for that portion of the irrigated land lying in the NW ¼ of Section 35. It appears that a ditch runs from the point of diversion at Robinson Creek westerly and could irrigate 4 tracts numbered 1,2,3 and 3 on the exhibit. There is no evidence to rebut the Hillis's claim. Much of that

1 land is in the NE ¼. It appears that the line separating the NE and NW quarters  
2 approximately evenly splits the claimed land. Therefore, the Court GRANTS the exception  
3 to the extent there is a basis for the water right – such a basis exists only for those lands in  
4 the NE1/4NW1/4 of Section 35 constituting 25 acres. See Hillis Exception at p. 2. The  
5 Schedule of Rights on page 131 shall be revised to incorporate this determination

6 3. Hillis excepts to the Referee's finding regarding priority date for the land in the SW ¼ of  
7 Section 26. They ask that the Court utilize the "relation back" theory of five years from date  
8 of patent based on presentation of "some scintilla of evidence" that water was actually  
9 appropriated. Memorandum Opinion Re: Priority Date – Date of Patent or Date of Entry,  
10 January 19, 1995. As their "scintilla", they refer the court to the Geddis v. Gray decision, a  
11 Kittitas County decision adjudicating the rights of Manastash Creek and its conclusions  
12 regarding Watt Ditch. They point out that Watt Ditch did go through the Southwest Quarter  
13 of Section 26. Thus, by 1901, the priority date requested by Hillis, water was available in  
14 the area and that "it is reasonable to conclude the property was also being irrigated with  
15 water from Robinson Creek." Thus, 1901, not 1906 should be the date of priority. The  
16 Court DENIES this exception. First, evidence that water was available does not mean it was  
17 appropriated. Second, the owner of the Southwest Quarter of Section 26 was not named in  
18 the Gray decision as a participant in the Watt Ditch development. The priority date  
19 recommended by the Referee of September 23, 1906 is affirmed. RP at 56.

20 4. Hillis excepts to the Referee's recommendation that a right be confirmed for the irrigation of  
21 40.5 acres in the NW ¼ of Section 26. They seek a right for irrigation of 223.5 acres in the  
22 E1/2NE1/4 of Section 27 and the NW ¼ of Section 26. After hearing argument by the  
23 Wensleys and Hillis, the court ruled that the acreage authorized to be irrigated shall be  
24 increased to 150 acres and the place of use for the right shall be the E1/2NE1/4 of Section  
25 27 and the NW1/4 of Section 26, T.18N., R.17 EWM. RP at 53. Mr. Hillis did not except to  
the quantity of water authorized for use, which were based on measurements of water  
actually diverted and used. Therefore, that portion of the right remains unchanged.

5. Hillis's final exception relates to capture and reuse of return flows on his farm. Apparently,  
water collects in a pond on their property. Testimony indicates that the source of this water

1 is primarily runoff from Kittitas Reclamation District imported water. The Hillis's do not  
2 request a water right per se, which this Court could not grant, but rather acknowledgement  
3 that use of such return flow is permissible. The Hillis's can recapture return flow and make  
4 a second use of it but they can neither compel the continued availability of that water nor  
5 can they establish a right to it. See Memorandum Opinion Re: Motion For Reconsideration  
6 Of Limiting Agreements, April 1, 1994 (Document No. 9092); See also Additional Order  
7 Re: Limiting Agreements (Cascade Irrigation District, Ellensburg Water Company and  
8 Westside Irrigation Company), May 12, 1994 at pp. 3-4.

8 d. Willowbrook Farms, Limited -- Claim No. 0520/(A) 0569

9 Willowbrook Farms excepts to the Referee's Supplemental Report in regard to the Referee's  
10 finding that the RCW 90.14 claim does not apply to all the lands irrigated by the water right. They  
11 also assert that because the Referee did not, in his initial Report, indicate that the 90.14 claim was  
12 insufficient to support the entire place of use, the Referee is estopped from doing so in a subsequent  
13 report. The claimant asks for an additional hearing in which to present the evidence they would  
14 have presented had they been aware of the RCW 90.14 problem at the Referee's Supplemental  
15 Hearing. The Court GRANTS the exception. Willowbrook shall present that evidence at the  
16 February 10, 2000 water day hearing. Concurrently, the Court requests that Willowbrook pursue  
17 amendment of its claim with Ecology pursuant to RCW 90.14.065. If that amendment is granted by  
18 Ecology, Willowbrook should be prepared to so inform the Court at the February 10, 2000 hearing.

18 e. Theilene P. Scheumann (Grousemont Farms) – Claim No. 01335

19 Ecology and Theilene Scheumann, the claimant, filed exceptions to the Supplemental  
20 Report. Many of these were resolved at the time of hearing; a few were taken under advisement.

21 Ecology's exceptions are resolved as follows:

- 22 1. Ecology identified that the Referee referenced the Supplemental Report of Referee for  
23 Subbasin 11, on page 73, line 2-3 and page 78, lines 15-17. That Supplemental Report of  
24 Referee had not yet issued. They are correct and their exception is GRANTED for page 73,  
25 and line 3 is revised by replacing the word "supplemental" with "Referee's." However, on  
page 78, the reference is to the original Report of Referee, so that exception is DENIED.

1 2. Ecology excepted to the instantaneous quantity awarded on three rights for Grousemont  
2 Farms described on pages 78-80. The Referee had determined that it was appropriate to  
3 average the instantaneous quantity measured at takeouts 5 and 6 and use that average on the  
4 right awarded to Packwood Canal Company for Grousemont Farm land served by  
5 Packwood. See right awarded to Packwood Canal Company, page 129, line 1-10. Ecology  
6 mistakenly concluded that the average instantaneous quantity would also be applied to the  
7 right awarded to Grousemont. Therefore, the Court DENIES the exception.

8 Grousemont Farms' exceptions are resolved as follows:

- 9 1. The exception regarding inclusion of stockwater as a diversionary use on each confirmed  
10 right is GRANTED.
- 11 2. The exception regarding changing the priority date on page 113, line 6 of the Supplemental  
12 Report of Referee to November 1, 1881 is GRANTED.
- 13 3. The exception regarding the 1887 water right summarized at Page 119 of the Supplemental  
14 Report, lines 1 through 13 is GRANTED. The right as revised will be for 3.42 cfs; 778 acre-  
15 feet per year for irrigation of 61 acres. The Place of use description is revised by replacing  
16 the exception that begins on line 11 with the following: "EXCEPT that portion of the said  
17 NE1/4SW1/4 lying southerly of a line beginning at the southwest corner of said  
18 NE1/4SW1/4 and running to a point 660 feet south from the center of Section 19." The  
19 remainder of the legal description is unchanged.
- 20 4. The court GRANTED the exception as to the place of use for the January 30, 1889 right as  
21 reflected on Page 121. The legal description shall read E1/2SE1/4SE1/4 of Section 13, T.18  
22 N., R 17 E.W.M.
- 23 5. Claimants filed an exception regarding the use of springs in Section 24. The Referee denied  
24 a right to the springs on two grounds: The RCW 90.14 claim indicated the point of diversion  
25 was in Section 25 rather than Section 24 and for failure to present evidence as to when the  
water was first used. The Affidavit of Robert Mundy addresses the latter point to some  
extent regarding when the spring was first used. Essentially, it is Mr. Mundy's contention  
that the infrastructure to bring the water to Grousemont Farm had to have been installed

1 prior to the building of the Packwood canal because such structures had to go beneath the  
2 canal.

3 However, there is no explanation as to why the wrong description was entered on the  
4 RCW 90.14 claim for the point of diversion. Nonetheless, Grousement Farms indicates that  
5 it “substantially complied” with the requirements of RCW 90.14. See Ecology v. Adsit, 103  
6 Wn.2d 698, 694 P.2d 1065 (1985). Substantial compliance applies when the claimant  
7 provides correct information to Ecology, regardless of the form used so the agency has  
8 “adequate records for administration of the state’s waters.” Adsit, at 704. It is doubtful that  
9 the information provided by Grousemont can be characterized as correct. However, the  
10 legislature has provided Grousemont and other water users with a process for amending a  
11 claim when the initial filing contained incorrect information. See RCW 90.14.065. Further,  
12 dating back to the original hearing (May 9, 1994) the claimants have indicated that they  
13 would follow the statutory process to amend the claim. See Supplemental Report at page  
14 86, line 24. There is no evidence that this has been attempted.

15 The Court will not issue a ruling until the statutory process has been followed. The  
16 Court requests that claimant and Ecology work together to amend the claim. During the  
17 February 10, 2000 water day hearing, Grousement and Ecology should be prepared to  
18 update the Court as to how the parties are proceeding. If no effort to amend the claim has  
19 been attempted, the Court will automatically deny the exception. If the claimant has  
20 exhausted its administrative remedies and Ecology denies the request to amend the claim,  
21 the Court will revisit the “substantial compliance” argument

22 6. Grousemont took exception to the denial of a water right for the SW1/4SW1/4 of Section 18  
23 – property which they assert is irrigated with Fogey Creek water. That land was  
24 homesteaded by George Crandall, with a patent issuing on March 16, 1882. See  
25 Supplemental Report of Referee, page 82, lines 12-13. Evidence of historical water use was  
provided through a 1913 agreement between the City of Ellensburg and the United States.  
Id. at lines 14-16. There is some question as to whether the water that was the subject of the  
agreement originated from the power canal or Fogey Creek.

Grousemont, in its exception, has provided evidence and authority that the natural  
flow of Fogey Creek, prior to the building of Power Canal, would be through the

1 SW1/4SW1/4 of Section 18. See Affidavit of Robert Mundy at page 4. That the water now  
2 runs through an artificial watercourse (pipeline) rather than a natural stream so it can go over  
3 the Power Canal does not alter the riparian status of the stream. See Matheson v. Ward, 24  
4 Wash. 407, 64 P. 520 (1901). The Court agrees that the SW1/4SW1/4 was riparian to Fogey  
5 Creek prior to the building of Power Canal.

6 However, this Court cannot grant a right to Fogey Creek as requested by the claimant  
7 because they have not addressed the Referee's conclusion that the Agreement, which at this  
8 time is the only evidence of a water right, was referring to water in the Power Canal rather  
9 than Fogey Creek. Hence, although Grousemont has demonstrated a riparian basis of the  
10 right, they have failed to demonstrate an historic use of Fogey Creek. The Court will allow  
11 Grousemont to present any evidence it may have of the historic use of Fogey Creek on the  
12 land in question during the February 10, 2000 water day hearing. Failure to present such  
13 evidence at that time will result in the exception being denied.

- 14 7. The exception regarding the right to divert 7.0 cfs as a maximum instantaneous quantity  
15 from Fogey Creek is GRANTED. Page 130, line 5 of the Supplemental Report is amended  
16 to change 4.71 cfs to 7.0 cfs.
- 17 8. Grousemont Farms also took exception to the priority date recommended for the irrigation  
18 of lands from Fogey Creek on page 130 of the Referee's Supplemental Report. They assert  
19 the basis for the priority date should have been based on a riparian analysis and therefore  
20 receive a March 22, 1890 priority date. That exception was DENIED for failure to show  
21 that the lands were/are riparian to Fogey Creek.
- 22 9. Grousemont took exception to the instantaneous and annual quantities of water allocated to  
23 the Packwood Canal Company on Page 129 of the Supplemental Report. Packwood's right  
24 has been held in abeyance while it pursues amendment of its RCW 90.14 claim with  
25 Ecology. However, this right pertains strictly to water that is delivered to Grousemont. The  
Referee based his decision on the instantaneous diversion limitation of 1 cfs on the  
agreements for flumes entered into between the City of Ellensburg and various landowners  
in 1903. The 3 acre-feet/acre limitation was based on the fact that much of the water flowing

1 into the Packwood Canal that is used on Grousemont's 15.2 acres is return flow. The 3 acre-  
2 feet limit is consistent with what was granted for Robinson Canyon Creek water uses by  
3 Packwood. Grousemont argues that the water duty for the area is 25 acre feet per acre and  
4 that based on Mr. Bain's analysis, half of that quantity is return flow and half is natural flow.  
5 Similarly, Grousemont (per Richard Bain's measurement) asserts in regard to the  
6 instantaneous flow that 4.3 – 5.1 cfs is used (4.45 had been used in prior calculations).

7 The Pease Agreement entered into in 1903 indicates that 100 inches would be  
8 delivered through the flume to the lands now being irrigated by Grousemont. 100 inches  
9 equals approximately 2 cfs. That is the basis for the right. The Referee concluded that  
10 Taneum Canal Company return flow would make up some portion of that water.  
11 Grousemont offers the only evidence on how to split the diversion between natural and  
12 return flow; ½ return flow, ½ natural flow. Because the instantaneous right established by  
13 the Pease Agreement must be cut in half to 1 cfs to accommodate the portion that is return  
14 flow, the exception taken by Grousemont must be DENIED. The Court GRANTS the  
15 exception regarding annual use to confirm a right to 193.80 acre-feet. That quantity reflects  
16 half of the water duty (25.5 acre-feet) recognized by the Referee as applying to those lands  
17 (Report of Referee, page 76 lines 7-13). Thus, the acre feet quantity on the top of page 129  
18 should be changed from 45.6 acre-feet to 193.80 acre-feet.

19 f. Packwood Canal Company – Claim No. 00785/04801

20 Pursuant to the Order signed on July 8, 1999, the court will reserve ruling on Packwood's  
21 exceptions until the matter captioned Packwood Canal v. Ecology, No. 99-2-01764-1 is decided.

22 **IV. CONCLUSION**

23 This Opinion and Order resolves nearly all exceptions to the Referee's Supplemental Report.  
24 Those matters not resolved (Packwood Canal Company, Wynn and Catherine Vickerman,  
25 Willowbrook Farms, Grousemont Farms) shall proceed as directed in the Court's analysis of their  
26 respective claim set forth above.

Dated this 2nd day of December.

  
Sidney Ottem, Court Commissioner