

RECEIVED

MAY 23 AM 9 02

FILED

MAY 23 2003

KIM M. EATON
YAKIMA COUNTY CLERK

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

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,)

No. 77-2-01484-5

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
Plaintiff,

MEMORANDUM OPINION AND ORDER
RE: EXCEPTIONS TO REPORT OF
REFEREE FOR SUBBASIN 18
(COWICHE CREEK)

vs.

JAMES J. ACQUAVELLA, ET AL.,
Defendants

I. INTRODUCTION

This Court held a hearing November 14, 2002 to consider exceptions to the Report of Referee for Subbasin 18 dated March 20, 2002 (Report). That hearing was continued on January 9, 2003, February 13, 2003 and March 20, 2003. Reed Riley (Claim No. 01104), Lloyd Garretson Company (Claim Nos. 02080 and 01592), Andrew L. Mullenhoff and Cyndie Mullenhoff (Claim Nos. 00532-534), David M. Christenson (Claim Nos. 00262, 00567 and 00517), Cowychee Ditch Company (Claim No. 01505), William G. Evans and Jeannette Evans (Claim No. 1832A and 1833), Eugene and Kathy Stevenson (Claim Nos. 00212 and 00216), Vance Parker (Claim No. 01662), the Department of Fish and Wildlife (Claim No. 02109)¹ and the Department of Ecology (Ecology) filed exceptions. Erving and Barbara LaBarr (Claim Nos. 00532-00534) responded to the Mullenhoff's exception. All parties appeared and participated in the hearing. The Court ruled on some exceptions during the November 14, 2002 hearing and those rulings are summarized below.

¹ The Court granted WDFW's Motion to File Late Exception at the February 13, 2003 hearing and then heard the evidence in support of the exception at the same hearing.

16,986

1 The Court reserved ruling on other matters until it could properly review the record and having been
2 fully advised through written exceptions and oral argument, makes the following rulings.

3 **II. ANALYSIS**

4 a. North Fork Cowiche Creek Claimants

5 Ecology took exception to any award of a water right to the following claimants, who claim
6 diversions from the North Fork of Cowiche Creek, on the basis that the claimant's predecessors
7 failed to receive a water right during the 1920's Alexander adjudication: John W. and Marilyn
8 Christenson (Claim No. 00262), John and Patsy Jo Dixon (Claim No. 00419), Erving and Barbara
9 LaBarr (Claim No. 01024), Beverly Faye Smith (Claim No. 01441) and Mike Casteel (Claim No.
10 01505). The Referee determined the Alexander adjudication did not include claims to water rights
11 for the North Fork of Cowiche Creek and he refused to not recommend rights for that stream on that
12 basis alone. At the outset, this Court must resolve Ecology's exception and decide whether the
13 prior adjudication culminating in the Alexander decree included water rights on the North Fork of
14 Cowiche Creek and any rights to springs in the North Fork basin.

15 The Referee found Alexander to be a general adjudication of the waters of Cowiche Creek,
16 and determined the valid rights to the South and Middle Fork and mainstem of Cowiche Creek – but
17 did not determine all of the valid rights to the North Fork. The Referee analyzed arguments
18 presented by the Christensons and found: 1. Prior owners of the Christenson property and adjacent
19 landowners were not named in the summons; 2. The Lis Pendens did not include the Christenson or
20 adjacent property; and 3. State Exhibit SE-6, an enlarged copy of the map prepared in 1920 to show
21 the ditches and lands connected to irrigation in the Cowiche Creek, did not extend the entire
22 distance up the North Fork. The Referee also rejected arguments by Ecology that North Fork water
23 users were adequately served by publication during Alexander. The Referee agreed with
24 Christensons that service by publication is only appropriate when a reasonable effort has been made
25 to personally serve the defendant and the defendant cannot be found within the state. The Referee
was persuaded the owners of the Christenson property at the time of the adjudication were not
transient and were capable of being served personally. Finally, three landowners were decreed
Alexander rights for lands irrigated with North Fork water. However, the Referee concluded the
three landowners had appeared on behalf of lands irrigated from the South Fork and presented
evidence in regard to lands associated with the North Fork while before the Alexander Referee.

1 The Court has reviewed the briefing submitted by the parties as well as the testimony and
2 argument submitted at the November 14, 2002 hearing. The Court has considered the cases cited by
3 the parties. The information is substantially the same as that before the Referee. Thus, it seems
4 Ecology is simply asking for a different decision based on the same arguments. The Court declines
5 to do so as it believes the Referee reached the correct decision. Whether or not prior adjudications
6 covered certain property is primarily a question of fact and depends on the circumstances
7 surrounding the prior proceeding. This Court has reached different decisions for different streams
8 depending upon those facts and circumstances. Compare Report of the Court: Subbasin No. 23
9 dated January 31, 2002 at p. 288-289. Here, the balance of the evidence tips toward the claimants
10 and the Court concurs with the Referee's conclusion that the Alexander proceeding was:

11 "a general adjudication of the water of Cowiche Creek, and determined the valid rights to
12 the South and Middle Fork and mainstem of Cowiche Creek. However, that adjudication
13 did not determine all of the valid rights to the North Fork." Report at 12.

14 b. Reed Riley (Claim No. 01104)

15 The Referee declined to recommend a water right for Reed Riley due to the perceived failure
16 of Mr. Riley to obtain a Certificate of Adjudicated Water Right resulting from the 1922 adjudication
17 of Cowiche Creek. Mr. Riley submitted a copy of Certificate Record No. Volume 1, Page 325. The
18 Court reviewed the Referee's analysis and the certificate supplied by Mr. Riley and finds a water
19 right is appropriate for the irrigation of 5 acres and stock watering in the N1/2NE1/4NE1/4 of
20 Section 18, T. 13 N., R. 18 E.W.M. Mr. Riley shall be entitled to divert 0.10 cubic feet per second,
21 20 acre-feet per year with a June 30, 1894 date of priority. The following right shall be inserted in
22 the Schedule of Rights at line 14, page 295 of the Report.

23 CLAIMANT NAME:	Reed Riley	Court Claim No. 01104
24 Source:	Cowiche Creek	
25 Use:	Irrigation of 5 acres and stock water.	
Period of Use:	April 1 through October 31	
Quantity:	0.10 cfs; 20 acre-feet per year	
Priority Date:	June 30, 1894	

1 Point of Diversion: 25 feet south and 720 feet east of the north
2 quarter corner, being within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of
3 Section 18, T. 13 N., R. 18 E.W.M.

3 Place of Use: N $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 18, T. 13 N., R. 18
4 E.W.M.

5 b. Lloyd Garretson Company (Claim Nos. 02080 and 01592)

6 The Lloyd Garretson Company (Garretson) filed seven exceptions/objections to the Report.
7 The Court, at the November 14, 2002, hearing granted exceptions 1-3, as there was no opposition.
8 Therefore, line 18, page 117 should be corrected to read "for cooling compressors and condensers in
9 a cold storage system." Line 6, page 118 should be corrected to show a date of 1948, rather than
10 1957 and also to show 0.138 cfs is utilized rather than 0.134 cfs. Garretson also requested a
11 correction at page 118, beginning at line 10 to change the quantity of water used to cool the
12 ammonia condenser from 3,000 gallons per day (gpd) for 30 days to 4,320 gpd for 210 days. That
13 results in an increase from 90,000 gallons to 907,200 gallons. That correction is so noted.

14 Exception 5 is to the certificate number referenced by the Referee in analyzing Claim No.
15 02080. The Referee had referenced Certificate No. 281, but Garretson contends that certificate is
16 appurtenant to land northeast of SR-12 and Certificate Number 278 is associated with Claim No.
17 02080 and use of warehouse water. The Court has reviewed the two certificates and the maps
18 attached to the claimants' exceptions and finds Certificate No. 278 does describe the area where
19 Warehouse No. 2 is located. The place of use description for Certificate No. 281 is hard to
20 interpret, as it references railroad rights-of-way and county roads. The maps show two railroads
21 and three roads that may be county roads. The Court accepts the claimants' position on this
22 exception. Exception No. 6 was withdrawn by the claimant at the November 14, 2002 hearing.

23 Exception No. 7 is to the Referee's failure to recommend a water right under Claim No.
24 02080 for the use by Garretson of water from Cowiche Creek for cooling fruit. Garretson takes the
25 position that it must be presumed cooling water was not mentioned in the applicable certificate
because the form utilized was pre-printed with "irrigation" as the purpose of use. Ecology
responded and supplied the Court with a copy of the claim submitted by Garretson in 1920 as a part
of the Alexander adjudication. Those claims identify the purpose of use as "irrigation, domestic,
and stock water." Further, the Report of Referee and Decree provides no support for Garretson's
argument, as neither mentions cooling water as a purpose of use.

1 Appellate courts have taken a broad construction of the nature of rights settled in an
2 adjudication. Recently, the Court of Appeals, Division Three, determined that any claimed water
3 rights properly a part of the prior adjudication, but not confirmed by the decree, are extinguished
4 and such a decree is binding as to claims made in later proceedings. Ecology v. Acquavella, 112
5 Wn.App. 729 (2002). The Supreme Court has also addressed an argument similar to that proffered
6 by Garretson in McCleary v. Department of Game, 91 Wn.2d 647, 591 P.2d 778 (1979). There, the
7 Department of Game alleged that it was the successor to a nonconsumptive, fish propagation right
8 that survived a 1924 adjudication as a “preexisting” right allowed by RCW 90.03.005 in contrast to
9 water rights for irrigation purposes. Game further argued that because the 1924 adjudication court
10 failed to specifically disavow such nonconsumptive rights, the right was “inferentially perfected.”
11 The Supreme Court rejected the arguments and held:

12 “Whatever rights may have existed prior to entry of the 1924 decree were extinguished
13 if not mentioned in that decree. RCW 90.03.220. When the decree failed to grant
14 Game’s predecessor in interest a water right for fish hatchery uses, it was a denial of
15 that claim.” *Id.* at 651.

16 These authorities control this decision. Accordingly, this Court finds Garretson is barred,
17 on res judicata principles, from asserting a right for cooling water in this adjudication as such a right
18 did not survive the 1920 Alexander adjudication. *Id.*; Ecology v. Acquavella, 112 Wn.App. 729.
19 Exception No. 7 is DENIED.

20 Garretson has filed an application for change with Ecology and/or the Yakima County
21 Conservancy Board seeking to change the purpose of use under Certificate No. 278 from irrigation
22 to cooling water for the warehouse. The record shows that irrigation on the property where the
23 warehouse is located ceased at the time the warehouse was constructed and use of water for cooling
24 fruit began. The Court cannot confirm a water right for irrigation on this property because the
25 beneficial use of water for that purpose has not continued. The Court also cannot confirm a right to
use water for cooling because the claimant or its predecessors had not previously followed the
procedures in RCW 90.03.380. If Ecology or the Yakima County Conservancy Board is able to
approve the change in purpose of use, the Court may be in a position to then award a right in this
adjudication. Garretson should then make a motion to bring this back before the Court prior to the
date set for signing the CFO.

1 c. Andrew L. Mullenhoff and Cyndie Mullenhoff (Claim Nos. 00532-534)
2 Erving and Barbara LaBarr (Claim No. 01024)

3 The Mullenhoffs, represented by Attorney J. Jay Carroll, filed one exception to the
4 Referee's recommendation for Court Claim No. 00532 and one exception to the recommendations
5 for Court Claim Nos. 00533 – 34.

6 Under Claim No. 00532 the Mullenhoffs took exception to the Referee recommending a
7 right be confirmed for the irrigation of 3 acres. The Referee determined that Certificate No. 323
8 from the earlier adjudication of Cowiche Creek was the foundation for the water right being
9 asserted by the Mullenhoffs and Erving and Barbara LaBarr (Claim No. 01023). Certificate No.
10 323 authorized the irrigation of 12 acres within a place of use description that included the LaBarrs,
11 Mullenhoffs and several other claimants' land. The Referee found that none of the other
12 landowners within the area described on the certificate had a valid water right, only portions of the
13 LaBarr and Mullenhoff land had historically been irrigated under the right described in the
14 certificate. The Referee ultimately recommended a water right to the LeBarrs for the irrigation of 9
15 acres and a right to the Mullenhoffs for the irrigation of 3 acres. The Mullenhoffs objected,
16 asserting they should have been awarded a right to irrigate more than 3 acres. The LeBarrs,
17 represented by Attorney James Davis, responded to the exception and request the entire 12-acre
18 right. Among other things, the Referee relied on interpretation of a 1939 aerial photograph, but
19 noted the interpretation might not be accurate, as definitive evidence was lacking.

20 Under Claim Nos. 0533 and 0534, the Mullenhoffs asserted a right to use unnamed springs
21 to irrigate 3 to 4 acres. The Referee also did not recommend a water right for the use of these
22 springs due to insufficient evidence of use prior to December 31, 1932, and lack of evidence to
23 show when the property separated from federal ownership. The evidence presented at the exception
24 hearing addressed use of both the North Fork of Cowiche Creek and the springs.

25 Considerable information was provided to the Court and this decision is based on a totality
of the evidence. The Mullenhoffs had four witnesses testify in support of their exception: Andrew
Mullenhoff, Dr. Ward W. Carson, a certified photogrammetrist; Jack Northcott, who owned land to
the east of the LaBarr's property, and Roger C. Dennis, the son of the individual from whom the
Mullenhoffs purchased their land. The LaBarrs also had four witnesses testify in defense of their
claims: Erving and Barbara LaBarr; Austin Willard, who lived immediately west of the Mullenhoff

1 land; and Wilfred Arlington "Arlie" Knight, who is married to one of Allen G. Lewis' daughters
2 and worked on the Lewis property and visited it on a regular basis beginning in 1940.

3 The testimony offered by Mr. Mullenhoff and Roger C. Dennis related almost exclusively to
4 water use from the early 1970's to the present, which does not bear on whether a water right was
5 established in the late 1800's for this land. They did describe remnants of old irrigation systems
6 and locations of old structures on the property that assist in concluding there had been development
7 on the land by the early 1900's. Dr. Carson's testimony and Exhibit DE-243 provide evidence of
8 the number of acres that were being irrigated in 1939, the date of SE-9W (the aerial photograph
9 used by the Referee). Although Exhibit DE-246, offered by both the Mullenhoffs and the LaBarrs,
10 suggests that 26 acres were being irrigated on the land at the time of the earlier adjudication, a right
11 was only confirmed for the irrigation of 12 acres.

12 Mr. Knight and Mr. Willard's testimony leads the Court to conclude that none of the
13 Mullenhoff land north of the North Fork of Cowiche Creek was historically irrigated with water
14 diverted from the creek. The evidence shows that land owned by the Mullenhoffs south of the creek
15 was irrigated with creek water diverted in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 34. Dr. Carson determined
16 approximately 3.6 acres are in this area, a slightly larger number of acres than was recommended by
17 the Referee. Some of Dr. Carson's testimony and that of Mr. Northcott seemed to be aimed at
18 trying to prove that less than 9 acres on the LaBarr property were historically irrigated with water
19 diverted from the North Fork of Cowiche Creek. The Court finds the evidence insufficient to
20 conclude that less than 9 acres have historically been irrigated on the LaBarr property.

21 The Referee's recommendation concerning the number of acres will not be altered and the
22 Mullenhoffs exception on Claim No. 00532 is DENIED. Mullenhoffs assert that since the grant of
23 water rights in Alexander carried the priority date that corresponded with the Mullenhoff property
24 then the bulk of the 12-acre right is appurtenant to their property. Many factors may have led to the
25 Alexander court reaching the priority date that it did other than the explanation advanced by the
Mullenhoffs. One explanation may be the court simply selected one priority date for all the Lewis
property. Another possibility could be the Alexander court, like many courts of its time, struggled
with equitably meshing rights established under the riparian and appropriative doctrines. But the
largest obstacle facing the Mullenhoffs that was not adequately addressed was the beneficial use of
Cowiche Creek water on the property north of the creek. There was at best circumstantial evidence
of such a use (through existence of old pipes in that area) but no direct evidence of such a use in the

1 early part of the last century. Rather, the evidence leads to a conclusion that North Fork water was
2 used to irrigate only the portion of the Mullenhoff land south of the creek, and none of the land
3 north of the creek.

4 LaBarr's position that none of the Mullenhoff land should be awarded a water right to North
5 Fork of Cowiche Creek is also DENIED. There is considerable evidence that water from Cowiche
6 Creek had been used on the southern portion of the Mullenhoff property. The Court will modify the
7 place of use description for the water right awarded to the Mullenhoffs to show the irrigated land is
8 in that portion of the S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 34 lying south of the North Fork of Cowiche Creek
9 and within that portion of Government Lot 2 of Section 3 owned by the Mullenhoffs. This results in
10 portions of both the LaBarr land and the Mullenhoff land that has been irrigated from the North
11 Fork of Cowiche Creek not receiving a water right to use the creek.

12 The evidence leads the Court to conclude that water from the springs on the Mullenhoff
13 property was used to irrigate a portion of the land since well before December 31, 1932, the date by
14 which water had to be used to establish a water right under the Riparian Doctrine. Water was used
15 to irrigate the lawn area around the home, an orchard that is about one-half acre in size; any
16 remaining water was used to rill irrigate a pasture. The pasture was only irrigated when there was
17 water in excess of that needed for the lawn and the orchard. The claimants were asserting a right to
18 irrigate 3 to 4 acres from the springs and Dr. Carson's testimony and evidence support a conclusion
19 that 3.74 acres (fields A and B on Exhibit DE-243) have historically been irrigated with that source.
20 Under the Riparian Doctrine, the priority date would be the date that first steps were taken to sever
21 the land from Federal ownership. That date is not in the record. However, Exhibit DE-245 is a
22 copy of the patent that issued to Isaac Davis for this and other land, and is dated April 25, 1895.
23 Lacking an earlier date in the record, the Court will use this as the priority date. The Court confirms
24 the following water right to the Mullenhoffs under Court Claim No. 00533 and 00534:

21 CLAIMANT NAME:	Andrew & Cyndie Mullenhoff	Court Claim No. 00533 00534
22 Source:	Unnamed Springs	
23 Use:	Irrigation of 3.74 acres	
24 Period of Use:	April 1 through October 31	
25 Quantity:	0.075 cfs; 15 acre-feet per year	

1 Priority Date:

April 25, 1895

2 Point of Diversion:

3 840 feet north and 300 feet east of the south
4 quarter corner AND 660 feet north and 900 feet
5 east of the south quarter corner, both being
6 within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 34, T. 13 N.,
7 R. 18 E.W.M.

8 Place of Use:

9 That portion of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 34, T.
10 13 N., R. 18 E.W.M. lying north of the North
11 Fork of Cowiche Creek and south of the
12 springs.

13 Ecology filed exceptions and a request for clarification in regard to the rights of the LeBarrs.
14 The exception filed by Ecology pertained to the res judicata effect of the prior adjudication on
15 springs claimed by the LaBarrs. The Court considered that argument in the first section above. In
16 summary, the Court denied Ecology's exception and finds the right recommended for the springs is
17 confirmed. That same ruling applies to the Mullenhoff claim to use springs that were not addressed
18 in the prior adjudication.² Ecology's request for clarification concerned whether the water for the
19 springs should have been for the irrigation of 10 acres or 8 acres. The evidence showed 10 acres
20 had historically been irrigated, but 2 acres were conveyed to the LaBarr's son, leaving the LaBarrs
21 owning 8 acres. The Court ruled at the exception hearing that the irrigation right under Claim No.
22 01023 correctly authorized the irrigation of 10 acres and the right set forth on page 297 is correct.

23 d. David M. Christenson (Claim Nos. 00262, 00567 and 00517)

24 David M. Christenson, on behalf of himself and John W. and Marilyn Christenson and
25 David M. and Peggy Christenson (hereinafter, the "Christensons") filed five exceptions to the
Report. The Christensons, represented by Attorney Lawrence E. Martin, submitted documentary
evidence during the filing period and also provided evidence and testimony at the November 14,
2002, hearing. Cardella Yvonne Johnson and David Christenson testified at the exception hearing.

Mrs. Johnson's testimony provides evidence of historic use of water on lands described in
both Exceptions 1 and 2. Her husband's family acquired what is now the Christenson land in

² Ecology objected, both at the hearing and in its April 23, 2003 Closing Statement, to testimony concerning oral representations by Mr. Herb King, a former Ecology employee, that the Mullenhoffs had a water right for use of springs. The Court notes that it has not relied on those statements in reaching its decision.

1 Section 28 in October, 1926. Her husband was born in 1927 and grew up on the land. She
2 personally became acquainted with the property in 1954 and began living there in 1957. Her
3 knowledge is based on information gained from family history and her husband's accounts of
4 growing up on the land. Mrs. Johnson indicated there was a dairy on the land when her in-laws
5 acquired it in 1926. Part of the land was a hay field and part was in pasture for the dairy cows. She
6 noted the land was flood irrigated with water diverted from the North Fork of Cowiche Creek and
7 springs. Her in-laws owned most of the NE $\frac{1}{4}$ and a 12-acre field in the NW $\frac{1}{4}$ of Section 28.

8 Exception 1 pertains to the Referee's denial of water rights for lands originally homesteaded
9 by Abijah O'Neal and now owned by the Christensons (O'Neal property). That decision resulted
10 from a lack of evidence showing a water right was established for the O'Neal property through
11 beneficial use of water prior to December 31, 1932. The Christensons provided copies of the Patent
12 and Homestead Proof for the O'Neal property and those documents were received into evidence as
13 exhibit DE-224. The homestead documents show O'Neal settled on the N $\frac{1}{2}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ and
14 SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28 in 1874. In 1886 when the Homestead Proof documents were filed, crops
15 had been planted on 40 acres, all but 10 acres had been fenced and a grainery had been constructed.
16 The crops grown included an orchard, wheat, barley, oats, potatoes and a garden. The Court
17 concludes there was sufficient evidence to find that a water right was established by Abijah O'Neal
18 and that beneficial use has continued.

19 According to the evidence presented by Mr. Christenson, 75.4 acres are irrigated within the
20 former O'Neal property. DE-178 is a parcel map showing the claimants' land and points of
21 diversion along with a chart showing how much water is diverted at each point of diversion. This
22 exhibit shows use of 0.78 cubic foot per second, 262.17 acre-feet per year from the North Fork of
23 Cowiche Creek and 1.0 cubic foot per second and 247.31 acre-feet per year from springs to irrigate
24 this 75.4 acres. A review of DE-178 leaves a significant question in the Court's mind as to whether
25 the springs have historically been used and are currently being used to irrigate the portion of the
claimants' land in the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 28. The area on the map, marked with a 2, where the
springs flow into the old Taylor Ditch, is near the east boundary of the NE $\frac{1}{4}$ of Section 28. It does
not appear that water could have been delivered to most of the claimants' land in the NE $\frac{1}{4}$ by
gravity flow. Clearly the springs could have been used to irrigate the claimants' land in Section 27,
land for which a right cannot be confirmed due to lack of a water right claim filed pursuant to RCW
90.14, and also could have been used in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28. The Referee

1 has already confirmed a right to use water from the North Fork of Cowiche Creek for this land and
2 the Court will also confirm a right to use the springs. Although a right is being asserted to use 0.78
3 cfs and 262.17 acre-feet per year from the North Fork of Cowiche Creek, Water Right Claim No.
4 001326, filed pursuant to RCW 90.14, only claims a right to 300 gallons per minute (0.67 cfs) and
5 120 acre-feet per year. Although the Court has in some circumstances confirmed rights for
6 quantities in excess of those claimed in a water right claim, it is often because the quantity claimed
7 is clearly in error or is obviously based on guidance provided by Ecology staff.³ Here, the
8 quantities on the claim form are clearly not based on the advice routinely given by Ecology. The
9 claimants are bound by quantities found in Water Right Claim No. 001326.

10 The Court confirms a water right under Court Claim No. 0262 for use of the North Fork
11 Cowiche Creek and a right under Court Claim No. 0262 and 0517 for use of the springs as follows:

12 CLAIMANT NAME:	Christenson Family	Court Claim No. 0262
13 Source:	North Fork of Cowiche Creek	
14 Use:	Irrigation of 75.4 acres and stock water.	
15 Period of Use:	April 1 through October 31	
16 Quantity:	0.67 cfs; 120 acre-feet per year	
17 Priority Date:	June 30, 1894	
18 Point of Diversion:	1300 feet south and 20 feet east of the north quarter 19 corner of Section 28, being within the NW ¹ / ₄ NE ¹ / ₄ of 20 Section 28, T. 14 N., R. 17 E.W.M.	
21 Place of Use:	That portion of the N ¹ / ₂ NE ¹ / ₄ lying southwest of 22 Livengood Road and that portion of the SW ¹ / ₄ NE ¹ / ₄ 23 lying northeast of the North Fork of Cowiche Creek, 24 both in Section 28, T. 14 N., R. 17 E.W.M.	
25 Limitation on Use:	A maximum of 0.67 cfs, 120 acre-feet per year can be used from the North Fork of Cowiche Creek under all three water rights awarded to the Christensons in this proceeding.	

³Evidence has been entered in other subbasins that when a landowner sought Ecology's assistance in completing a water right claim and did not know how much water was being used, Ecology staff have recommended quantities often used by Ecology in issuing permits, i.e. 0.02 cubic foot per second or 9 gallons per minute and 4 acre-feet per acre irrigated.

1	CLAIMANT NAME:	Christenson Family	Court Claim No. 0262 Court Claim No. 0517
2	Source:	Unnamed springs	
3	Use:	Irrigation of 16 acres and stock water.	
4	Period of Use:	April 1 through October 31	
5	Quantity:	1.0 cfs; 32.8 acre-feet per year	
6	Priority Date:	June 30, 1874	
7	Point of Diversion:	1340 feet south and 50 feet west of the northeast 8 corner of Section 28, being within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of 9 Section 28, T. 14 N., R. 17 E.W.M.	
10	Place of Use:	That portion of the N $\frac{1}{2}$ NE $\frac{1}{4}$ lying southwest of 11 Livengood Road and that portion of the SW $\frac{1}{4}$ NE $\frac{1}{4}$ 12 lying northeast of the North Fork of Cowiche Creek, 13 both in Section 28, T. 14 N., R. 17 E.W.M.	

14 While gathering the documentary evidence needed to establish a right for the land settled by
15 O'Neal, the Christensons discovered documents showing the Taylor land, for which a right has
16 already been recommended for confirmation by the Referee, was settled on February 3, 1879.
17 Under the Riparian Doctrine, that would serve as the appropriate priority date. At the exception
18 hearing, the claimants asked to have the priority date recommended by the Referee modified to
19 reflect the new information. There were no objections to the Court considering this information.
20 The Court grants the Christensons' request and amends page 280 of the Report of Referee, line 6 $\frac{1}{2}$
21 to show a priority date of February 3, 1879. This right will also carry the same limitation of use
22 provision as the new right to the North Fork of Cowiche Creek awarded herein.

23 Exception 2 pertains to the Joseph Robbins lands, a portion of which is now owned by the
24 Christensons and located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28. Mrs. Johnson's testimony provided the
25 missing evidence of historic water use on this portion of the Christenson land. Already in evidence
were documents showing Robbins received a patent on July 20, 1881. This land is also riparian to
the North Fork of Cowiche Creek and an earlier priority date could have been established by a
showing of when Robbins settled on the land. That evidence is lacking, leaving the Court to use the
July 20, 1881, date as the priority date. An 11.5-acre field is irrigated with water diverted from the
creek. A claim is also being asserted for use of the springs that arise in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28.

1 However, there is no apparent way by which the spring water could have been delivered through a
2 gravity flow system to irrigate land in the NE¹/₄NW¹/₄ of Section 28. Therefore, the Court will not
3 confirm a right for use of the springs. DE-178 indicates the same 0.78 cfs that was claimed for the
4 land in the NE¹/₄ of Section 28 is also being claimed for this land. Since a pump is being used to
5 divert the water, it is reasonable to presume that when it is operating 0.78 cfs is being pumped,
6 irrespective of the field being irrigated. However, as previously mentioned, the Court can only
7 confirm a right to divert 0.67 cfs, 120 acre-feet per year total due to the limitations on the water
8 right claim that was filed for this property. Each right confirmed will contain a provision that limits
9 the total diversion to 0.67 cfs, 120 acre-feet per year under all rights.

CLAIMANT NAME:	Christenson Family	Court Claim No. 01104
Source:	North Fork of Cowiche Creek	
Use:	Irrigation of 11.5 acres and stock water.	
Period of Use:	April 1 through October 31	
Quantity:	0.67 cfs; 46 acre-feet per year	
Priority Date:	July 20, 1881	
Point of Diversion:	1300 feet south and 20 feet east of the north quarter corner of Section 28, being within the NW ¹ / ₄ NE ¹ / ₄ of Section 28, T. 14 N., R. 17 E.W.M.	
Place of Use:	That portion of the E ¹ / ₂ NE ¹ / ₄ NW ¹ / ₄ lying east of the North Fork of Cowiche Creek, in Section 28, T. 14 N., R. 17 E.W.M.	
Limitation on Use:	A maximum of 0.67 cfs, 120 acre-feet per year may be used from the North Fork of Cowiche Creek under all three water rights awarded to the Christensons in this proceeding.	

22 Exception 3 is directed at the Referee's conclusion that inadequate evidence of continued
23 beneficial use had been supplied to support a water right for these claimants. The Referee found
24 particularly vague the testimony of David Christenson that in turn recounted information supplied
25 by Mr. Harold Amos (whose relatives had owned and irrigated the Christenson land during the
1930s and 1940s). The Christensons challenge the Referee's conclusions and assert continuous

1 beneficial use need not be proven; once a right has vested it can only be lost through abandonment
2 or statutory relinquishment. The Christensons seem unclear as to what prevented the Referee from
3 recommending a water right for this portion of their land. It was not evidence of continuous
4 beneficial use that was missing, but adequate evidence to convince the Referee a right had been
initially established. That missing evidence, summarized above, has now been supplied.

5 The fourth exception filed by Christensons concerns RCW 90.14 and the claim registration
6 process contained therein. As previously discussed, the Referee accepted WRC Nos. 001325 and
7 001326 as applying to the springs and the North Fork of Cowiche Creek respectively for irrigation
8 of lands in Section 28. However, the Referee was unable to identify any water right claims
9 appurtenant to Section 27 land owned by the Christensons. Failure to file a claim relinquishes any
10 right that may have existed. RCW 90.14.071. None has been produced at this time and the Court is
unable to confirm any water rights for land owned by the Christensons in that section.

11 Exception 5 filed by the Christensons concerns the Referee's request for information as to
12 who owned the land now owned by the Christensons (and for which a water right is now sought)
13 during the Alexander adjudication period. It was the Referee's decision that the Alexander
14 adjudication did not determine the rights of those water users on the North Fork of the Cowiche
15 Creek who were not expressly named parties therein. The Christensons had not provided the names
16 of the owners of some of their land at the time or the Alexander adjudication, so the Referee was
17 not able to confirm that they were not named parties. Those names have been provided and as the
18 Christensons have maintained, their predecessors and the associated property, were not a part of the
Alexander adjudication.⁴ Ecology's exception that the North Fork of Cowiche Creek was not
included in the Alexander adjudication is analyzed and denied on page 2 of this Opinion.

19 e. Cowychee Ditch Company (Claim No. 01505)

20 Cowychee Ditch Company (CDC) filed four exceptions to the Referee's recommendation
21 set forth in the Report. CDC noted that it claimed 416 acres while the Referee only recommended
22 208 acres. Similarly, CDC objects to the quantity of water recommended by the Referee. The
23 Referee quantified a right based on a 0.01 cfs per acre water duty consistent with the finding in the
Alexander adjudication. CDC essentially makes two arguments to combat the recommendation by

24
25

⁴ George and Ella Chambers owned certain property in Section 28 but deeded it away as of October 1, 1919. The
Chambers participated in the adjudication in order to protect rights for lands in Sections 34 and 35.

1 the Referee. First, the number of acres should be greater. Second, 0.01 cfs per acre is inadequate
2 and to the extent less acres are irrigated today then in the 1920s it owes to the necessary reductions
3 in acres and resulting informal transfers to make some acreage productive. The Referee also raised
4 questions regarding whether all of the land served by the ditch company were within the authorized
place of use for the CDC water right. CDC stated it would address that concern.

5 The last exception concerns the use of Strobach Springs. CDC reserved the right to present
6 evidence on the use of these springs. However, it appears the springs may be located in a different
7 subbasin (Subbasin No. 17, Tieton River). The claim filed by CDC did not assert a right to use
8 those springs, resulting in CDC not being scheduled to appear and present evidence in that subbasin.
9 There also does not appear to be an RCW 90.14 claim filed with Ecology to protect any right that
10 may have been associated with those springs. CDC made no further argument concerning a right to
use these springs, so the exception is denied.

11 Ecology had four requests for clarification – the Court believes three will be resolved in
12 analyzing the CDC exceptions. CDC appeared at the exception hearing through Attorney Lawrence
13 E. Martin. No additional testimony was offered. However, four exhibits, DE-226-229 were entered
14 to clarify the number of acres that continue to be irrigated within the area described on Certificate
No. 288 from the prior adjudication, which is the foundation for most of the water right for CDC.

15 The Court reviewed the newly entered exhibits along with the evidence presented at the
16 initial evidentiary hearing. CDC appears to have amended its exception as a result of the new
17 evidence offered at the exception hearing. That evidence supports a conclusion 289 acres are being
18 irrigated with water delivered by CDC within the area described on Certificate No. 288. CDC is
19 now seeking to have the Court confirm a right to irrigate those 289 acres. Exhibit DE-226 provides
20 the legal description of those lands and assisted the Court in determining that the lands described
21 are also set forth in Certificate No. 288. CDC in its exception seemed to be asking the Court to
22 confirm a right for more than the 0.01 cubic foot per second per irrigated acre initially authorized in
23 the earlier adjudication. However, at the exception hearing, CDC asserted a right to 2.89 cubic feet
24 per second, which is consistent with 0.01 cubic foot per second for each irrigated acre, and is
25 diverted continuously when available from the beginning of the irrigation season to its end. The
claimant is seeking an annual quantity of 1226.72 acre-feet per year, which is the quantity it could
divert during the irrigation season if 2.89 cfs is diverted continuously from April 1 to November 1,

1 the season of use authorized in Certificate No. 288. That annual quantity of water is not
2 unreasonable considering that some of the water is undoubtedly lost through ditch conveyance loss.

3 The Court amends the water right described on page 281 of the Report of Referee to
4 authorize the diversion of 2.89 cubic feet per second, 1226.72 acre-feet per year for the irrigation of
5 289 acres. The place of use shall be that on exhibit DE-226. The point of diversion, season of use,
6 and quantity of water authorized for stock watering remain unchanged. The Court believes this
7 ruling also resolves Ecology's requests for clarification 1, 2 and 4 in regard to CDC. Clarification
8 No. 3 concerns the second water right that was awarded to CDC and described on page 282 of the
9 Report of Referee. The Referee recommended a right be confirmed for the irrigation of 50 acres,
10 however, Ecology believes the place of use is only 40 acres in size. The Court has reviewed the
11 Yakima County Assessor map Ecology submitted with its request for clarification and concurs the
12 place of use is only 40 acres. Therefore, the right described on page 282 is amended to authorize
13 the diversion of 0.80 cubic foot per second, 200 acre-feet per year for the irrigation of 40 acres and
14 0.20 cubic foot per second, 2 acre-feet per year for stock watering (consumptive).

15 f. William G. Evans and Jeannette Evans (Claim No. 1832A and 1833)

16 William and Jeannette Evans, represented by Attorney J. Jay Carroll, filed two exceptions in
17 regard to the number of acres recommended in the Report. Claim No. 1832A applies to lands in
18 Government Lots 1 & 2 of Section 5, T. 13 N., R. 17 E.W.M. The Referee recommended a water
19 right for 27 acres, while the claimants in their exception request a right be quantified for 58.7 acres.
20 However, during the exception hearing the Evans amended the exception to request a right to
21 irrigate 35 acres. They acknowledged the historic water right most likely would have only been for
22 that portion of Government Lots 1 and 2 of Section 5 lying north of the gravity flow ditch that
23 delivered water to the land. The Referee had estimated that acreage to be 27 acres. The claimants
24 have examined the maps and aerial photographs and contend 35 acres are and historically have been
25 irrigated with water diverted from Cowiche Creek. There was no challenge to the claimant's request
at hearing for 35 acres. Therefore, the Court grants the Evans exception and amends the water right
recommended for confirmation on page 262, line 1, of the Report of Referee to authorize the
diversion of 0.70 cubic foot per second, 140 acre-feet per year for the irrigation of 35 acres and frost
protection. The exception did not address whether the place of use needed to be larger to
accommodate the additional acreage, so the Court will not alter that authorized place of use.

1 Claim No. 1833 applies to lands in the NE¹/₄ of Section 4 and the SW¹/₄NW¹/₄ of Section 3.
2 The claimants assert a right for the irrigation of 101.6 acres in the NE¹/₄ of Section 4, while the
3 Referee recommended a right for 85.4 acres. The Evans did not present additional evidence at the
4 November 14, 2002 hearing, suggesting the error was strictly mathematical. The Court has
5 reviewed Exhibit DE-117, which is an aerial photograph of the Evans land with the fields and
6 number of acres in each field identified. The land owned by the Evans in the NE¹/₄ of Section 4 and
7 the SW¹/₄NW¹/₄ of Section 3 are highlighted in green. The Court finds that a total of 121.6 acres are
8 being irrigated in that area. The Referee recommended that three water rights be confirmed for this
9 land. The first, based on Certificate No. 258 authorized the irrigation of 16.2 acres; the second,
10 based on Certificate No. 269, authorized the irrigation of 85.4 acres and the third, based on
11 Certificate No. 268, authorized the irrigation of 20 acres; for a total of 121.6 acres. The Referee has
12 recommended confirmation of water rights that total the number of acres claimed. It is possible the
13 claimant has overlooked the 16.2-acre right associated with Certificate No. 258 as set forth on page
14 258 of the Referee's Report for Subbasin No. 18. It appears to the Court that the claimant and the
15 Referee agree on the number of acres in the NE ¹/₄ of Section 4 and the SW¹/₄NW¹/₄ of Section 3.
16 Therefore, the Court denies this portion of the Evans exceptions.

17 Ecology had requests for clarifications concerning the Evans' claims. Under Claim No.
18 01833, on page 258, line 8 the township number should be 14 rather than 13 and on line 10 the
19 township number should be 13 instead of 14 and on page 257, line 5¹/₂ the instantaneous quantity
20 should be 1.70 (instead of 1.72) cubic feet per second. Ecology also sought clarification as to
21 whether a water right should have been awarded at all for the lands described on page 258 of the
22 Report. Those lands were excluded from the legal description that was attached to Court Claim No.
23 01883 when it was originally filed by John I. Haas, Inc. Evans responded that they acquired land in
24 this area through several different purchases and that at the time of the hearing the Evans put on
25 evidence in support of water rights for all of the land they then owned. Court claims are often
amended during this adjudication and conformed to the proof entered at the hearing. The Court
concludes that is the case in this instance and affirms the Referee's recommendation.

g. Eugene and Kathy Stevenson (Claim Nos. 00212 and 00216)

The Stevensons filed two exceptions in regard to Claim No. 00216 concerning typographical errors in the place of use of that water right. Ecology requested the same clarifications. The Court

1 GRANTED both exceptions at the time of hearing. The Place of Use, set forth at page 251, line 22
2 shall be amended to read "The SW $\frac{1}{4}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3, T. 13 N., R. 17 E.W.M."

3 The Stevensons also filed exceptions in regard to Claim No. 00212. First, they sought
4 direction from the Court on whether they would retain the point of diversion recommended by the
5 Referee in applying to change the point of diversion with Ecology to the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 3.
6 The Court indicated this would be a matter between them and Ecology and would probably depend
7 on what type of change they sought. If it is their desire to maintain the current diversion, they are
8 advised to insure that Ecology is aware of that. The Court requested that Ecology expedite its
9 consideration of the Stevenson's request.

10 The remaining exceptions taken by the Stevensons relate to Court Claim No. 00212. The
11 Stevensons ask the Court to clarify that six acres owned by them in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 3 are
12 not irrigable, which is why a water right was awarded for the irrigation of 34 acres within a 40-acre
13 place of use. The Court has reviewed the aerial photographs of the claimants' land in the record and
14 finds there is a rocky outcrop in the northeast corner of the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 3 that is not
15 irrigable and constitutes the six-acre area for which a water right was not awarded. The Stevensons
16 have also asked that the water right awarded under Court Claim No. 00212 be divided between
17 themselves and two parties to whom they have sold land. The Stevensons sold one acre of land to
18 Sandra Rowan and 1.47 acres to David and Cynthia Feriante and have properly joined them to
19 Court Claim No. 00212. The land sold was previously irrigated by the Stevensons. According to
20 Mrs. Stevenson's testimony, there is approximately 0.75 acre now irrigated on Ms. Rowan's land
21 and 1.0 acre now irrigated on the Feriante land. Portions of the land previously irrigated are now
22 covered by buildings and driveways. Ms. Rowan's proportionate share of the water right awarded
23 under Court Claim No. 00212 would then be 0.02 cubic foot per second, 4 acre-feet per year for the
24 irrigation of 0.75 acre and the Feriante's proportionate share of the water right would be 0.0294
25 cubic foot per second and 5.88 acre-feet per year for the irrigation of 1 acre. That would leave the
Stevensons with a right to 0.6306 cubic foot per second, 126.12 acre-feet per year for the irrigation
of 31.53 acres. Mrs. Stevenson supplied legal descriptions for the land sold to Ms. Rowan and the
Feriantes and that will be used as the place of use for their water rights. The Court has awarded the
quantities of water based on the number of acres historically irrigated within the area owned by Ms.
Rowan and the Feriantes. Mrs. Stevenson testified the land was irrigated before it was subdivided
and sold, thereby establishing a right to the quantity of water being awarded.

1 Ecology sought clarification of the water right claim filed pursuant to RCW 90.14 that
2 would be the basis for the water right under Court Claim No. 00211 and 00215 discussed on pages
3 212 and 213 of the Report of Referee. The Referee did not reference a water right claim in his
4 discussion. Ecology suggests that Water Right Claim No. 151084 appears to be appurtenant and
5 suggests a remand to clarify that. The Court has reviewed Water Right Claim No. 151084 and
6 agrees that claim is appurtenant to the lands and water source for which a water right was
7 recommended for confirmation. No remand is necessary to clarify that fact.

8 Lastly, Ecology identifies what appears to be a typographical error in describing the place of
9 use on Certificate No. 277 from the earlier adjudication of Cowiche Creek. On page 206, line 8, the
10 Referee described the place of use for Certificate No. 277 as being in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and
11 N $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 3, when it actually is in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3.
12 The Court acknowledges the typographical error and that the proper place of use description for
13 Certificate No. 277 is the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3.

14 h. Vance Parker (Claim No. 01662)

15 The prior owner and original claimant did not appear and present evidence at the initial
16 hearing. Therefore, the Referee did not recommend confirmation of a water right. Mr. Parker seeks
17 an opportunity to present that evidence. Vance Parker appeared at the exception hearing and
18 offered exhibits and testimony in support of his claim. Mr. Parker asserts a right to irrigate 15 acres
19 of the 30 acres he acquired from Raymond Farabee the original claimant. At the present time, Mr.
20 Parker is irrigating 3.5 acres of lawn and nursery stock. He intends to develop an old hay field that
21 lies in that portion of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 32, T. 14 N., T. 17 E.W.M. lying south of Cowiche
22 Mill Road into a larger nursery.

23 Since Mr. Farabee did not participate in the original evidentiary hearing, the investigation
24 report for this claim was not entered into evidence. It was entered as State's Exhibit SE-72 during
25 the exception hearing. The investigation report indicates that in 1992, 27 acres were being irrigated
with water diverted from the South Fork of Cowiche Creek. State's Exhibit SE-1C also shows most
of the land being irrigated. The point of diversion was located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 32.
A 5 HP pump was placed on the creek at the point of diversion and handlines were used to sprinkle
irrigate the land. When Mr. Parker acquired the land in December of 1999, most of the land was
not being irrigated, as Mr. Farabee had been ill. He did note in his testimony the existence of a hay
field lying in the northerly portion of the land and that he intended to irrigate portions of that field in

1 the future as part of his nursery. He had been told by neighbors he did not have water rights, so he
2 did not pursue putting that land back under irrigation. This past year he became aware of the
3 adjudication and was joined to the claim and filed the exception discussed herein.

4 Part of Mr. Parker's exhibit DE-238 is a 1947 aerial photograph showing his land being
5 irrigated. Three certificates from the Alexander adjudication appear to cover at least some of the
6 claimant's land; all with an 1873 priority date. Certificate No. 299 authorized the diversion of 1.65
7 cfs for the irrigation of 82.6 acres, 33.9 of which are in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 32. Mr. Parker
8 owns the northerly 600 feet of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ lying north of the creek. Certificate No. 301 confirmed
9 the diversion of 0.15 cfs for the irrigation of 7.3 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 32. Therefore,
10 the two certificates authorize irrigation of 40.2 acres, which is the entire area. Lastly, Certificate
11 No. 300 authorized the diversion of 0.77 cfs for the irrigation of 38.6 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of
12 Section 32. The land that Mr. Parker is currently irrigating and intends to irrigate in the future lies
13 within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 32. None of the certificates authorize a point of diversion in the
14 SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 32, where Mr. Parker is currently diverting water. The diversion location
15 described is in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32, which is half a mile north of the creek. It appears an
16 error was made in describing the point of diversion in the certificates. The Court suspects that at
17 one time this land, along with the other land described in the certificates, was served by a gravity
18 flow ditch that has since been replaced with pumps. Even though the certificates appear to describe
19 an erroneous point of diversion location, it is clear there has been a change in diversion location
20 since those water rights were established. Mr. Parker will need to contact Ecology's Central
21 Regional Office concerning the need to comply with the procedures for changing the point of
22 diversion authorized in the certificate to the location where his pump is located. RCW 90.03.380.

23 The record supports a conclusion that a water right was legally established for the land Mr.
24 Parker is currently irrigating and intends to irrigate in the future. This right is described in
25 Certificate No. 300. Although Mr. Parker is currently only irrigating 3.5 acres, the water right
appurtenant to his land is at least 27 acres. However, Mr. Parker is only asserting a right to irrigate
15 acres. Although the testimony indicates a short period of non-use, the evidence has not been
sufficient for the Court to conclude that the right, or a portion of the right has relinquished due to
five or more consecutive years of non-use without a sufficient cause. The Court acknowledges that
the point of diversion described is only a 40-acre tract and is not on the creek. However, that is the

1 location authorized by the certificates and Mr. Parker will need to comply with the change
2 requirements of RCW 90.03.380. The Court will confirm a right to Mr. Parker as follows:

3 Claimant Name: Vance Parker Claim No. 1162
4 Source: South Fork of Cowiche Creek
5 Use: Irrigation of 15 acres
6 Period of Use: April 1 through October 31
7 Quantity: 0.30 cubic foot per second, 60 acre-feet per year
8 Priority Date: **June 30, 1873**
9 Point of Diversion: Within the SW¼NE¼ of Section 32, T. 14 N., R. 17 E.W.M.
10 Place of Use: That portion of the NW¼SE¼ of Section 32, T. 14 N., R. 17 E.W.M.
11 lying south of Cowiche Mill Road

12 i. Washington State Department of Fish and Wildlife (Claim No. 02109)

13 The Washington State Department of Fish and Wildlife (WDFW) takes exception to the
14 Referee's denial of water rights for the seasonal irrigation of approximately 30 acres of grass, grains
15 and forage for wildlife habitat in Oak Creek Wildlife Area, located within the S½NE¼ of
16 Section 36, T. 36 N., R. 16 E.W.M. The Referee denied the claim in light of testimony generally
17 about the delivery system being in disrepair for all WDFW land in the area and that water had not
18 been used since the late 1970's. Therefore, it was the Referee's opinion the right had relinquished.
19 WDFW argues the Referee misunderstood the testimony, that while WDFW land in Sections 24 and
20 35 are no longer irrigated and the delivery system to those lands is in disrepair, the Section 36 lands
21 were consistently irrigated during the time in question. The Court does note the inclusion of
22 WDFW's name on the list of those entitled to use natural occurring surface water for livestock and
23 wildlife watering. Certificate No. 297, confirmed to Aimee Fear during the Alexander hearing
24 applies to the lands in the S1/2NE1/4 of Section 36. This certificate had not been issued at the time
25 of the initial evidentiary hearing, however, WDFW subsequently paid the necessary fees and the
certificate has issued. Therefore, the only impediment to WDFW receiving a right in this
adjudication is evidence of continuous beneficial use during the late 1970's up through the present.

WDFW submitted such evidence at the February 13, 2003, hearing and also pointed out relevant testimony and evidence in the record established before the Referee at the 1998 hearing.

1 First, the agency relies on Ecology's Investigation Report, SE – 15D. The investigation was
2 performed in 1993 and notes a "4-foot diameter cement culvert, set vertically in the bank of the
3 South Fork of Cowiche Creek," that diverts water into a 12-inch diameter gravity-flow pipeline and
4 ultimately to risers and an open unlined gravity-flow ditch "for irrigation of grass, grains, and
5 forage for wildlife habitat." The testimony during the hearing before the Referee of John
6 McGowan, Manager of Oak Creek Wildlife Area and neighbor Joseph Pellicer (who also utilizes
7 the same diversion and conveyance system) also established the irrigation system was in working
8 order as of the date of the hearing in 1998. See Verbatim Report of Proceedings, dated October 26,
9 1998 at 49-57 and Report of Referee at 153-154. At the February 13, 2003 hearing, Manager John
10 McGowan testified that water had been consistently diverted through the structure described above
11 and put to beneficial use periodically during the last 25 years. Mr. McGowan did testify that
12 although Ecology indicated 30 acres were being irrigated, he used a planimeter and aerial
13 photograph to determine that 32 acres are being irrigated. Although the testimony suggest all of the
14 land is not irrigated each year, the irrigation has been such to protect the right and prevent a finding
15 of relinquishment. The court concludes sufficient evidence was presented to find that a right exists
16 under Court Claim No. 02109 for the irrigation of 32 acres in the S½NE¼ of Section 36.

14 The Court hereby confirms a right to WDFW under Court Claim No. 02019 as follows:

15 Claimant Name: Washington State Dept. of Fish and Wildlife Claim No. 2019

16 Source: South Fork of Cowiche Creek

17 Use: Irrigation of 32 acres

18 Period of Use: April 1 through October 31

19 Quantity: 0.64 cubic foot per second, 128 acre-feet per year

20 Priority Date: **June 30, 1873**

21 Point of Diversion: 1000 feet north and 1100 feet east from the west quarter corner of
22 Section 36, within the SW¼NW¼ of Section 36, T. 14 N., R.
23 16 E.W.M.

24 Place of Use: That portion of the S½NE¼ of Section 36, T. 14 N., R. 16 E.W.M.
25 lying south of Cowiche Creek

1
2 j. Department of Ecology

3 Ecology filed a number of exceptions and requests for clarification. The Court ruled on all
4 of the requests for clarification at the November 14, 2002 hearing. Many of the requests for
5 clarifications sought correction of typographical errors or statements that are not material to the
6 rights being recommended for confirmation. The rulings on those will not be repeated in this
7 decision.⁵ The Court included its analysis of Ecology's requests for clarification regarding
8 Cowychee Ditch Company (Claim No. 01505) and Eugene & Kathy Stevenson (Claims No. 00211,
9 00212, 00216), Erving & Barbara LaBarr (Claim No. 01023), and William G. & Jeannette M.
10 Evans, (Claim No. 01833) in the section pertaining to those claimants. The clarifications not
11 previously addressed that modify the water right recommended for confirmation in the Report are:

- 12 1. John & Patsy Jo Dixon (Claim No. 00419), on page 288, line 10½, delete the words
13 "north and" from the place of use description.
- 14 2. Santos & Nicki Cantu (Claim No. 01259), on page 261, line 15, add "Period of Use:
15 April 1 to October 31".
- 16 3. Squire Ingham Co. (Claim No. 01198), on page 250, beginning on line 5 add the
17 following to the place of use description: "Said land also lying within Yakima County
18 Assessor's Office parcels numbered 181309-41008, 181309-41002, 181309-41007, 181309-
19 41006 and 181309-41003. The Court ruled that correct instantaneous quantity for the right
20 would be 1.05 cubic feet per second, as recommended by the Referee.
- 21 4. Beverly Smith (Claim No. 01441), the difference in the point of diversion location
22 contained in Ecology's request for clarification compared to that recommended by the
23 Referee is insignificant. The location recommended by the Referee will continue to be used.
- 24 5. Gail & Dona Thornton (Claim No. 07108), on page 255, line 7½, replace west with east
25 and on line 10 change Section 3 to Section 4; on page 295, line 8, replace west with east and
on line 10½ change Section 3 to Section 4.
6. Allen & Wanda Wilkinson (Claim No. 08188), on page 275, beginning on line 20½,
replace of Place of Use description with the following: That portion of the SE¼SE¼SE¼ of
Section 32, T. 14 N., R. 17 E.W.M., described as follows: Beginning at a point 990 feet

⁵ See November 14, 2002 Report of Proceedings for rulings regarding Ecology's requests for clarification: Clifford and Janet Mowery (Claim No. 00318), Herbert and Anne Resen (Claim No. 00336), Carl and Arta Lust (Claim No. 00430), R. G. Olels and David Christenson (Claim No. 00517), Andrew and Cyndie Mullenhoff (Claim No. 00532), Snow Mountain Ranch (Claim No. 00696), Beverly Fay Smith (Claim No. 01441), Washington State Dept. of Fish and Wildlife (Claim No. 02109).

1 south of the northeast corner of the SE¹/₄SE¹/₄ of Section 32; thence west 660 feet; thence
2 south to the south line of the SE¹/₄SE¹/₄; thence east to the southeast corner of Section 32;
3 thence north to the point of beginning.

4 7. Lance & Eva Mifflin (Claim No. 02017), the recommendation by the Referee shall stand;
5 the purchasers of a portion of the Mifflin land have been contacted about the need to be
6 joined to the claim.

7 8. John I. Haas/Lorn J. & Olivia J. Weitz (Claim No. 01833), page 260, line 12, amend
8 place of use description to add "and southwest of Pioneer Road" after the word "Road" and
9 on page 102, line 2, the priority date should be changed to June 30, 1871.

10 The Court's ruling on the exceptions filed by Ecology are as follows.

11 1. Snow Mountain Ranch (Claim No. 00696)

12 Ecology took exception to the Referee's recommendation that a water right be confirmed
13 under this claim. If its exception is denied, Ecology sought clarification of the number of acres
14 authorized for irrigation. Ecology also identified an omission on page 197, lines 7 and 8, of the
15 Report of Referee. The word "not" was inadvertently omitted. The Court agrees with that
16 clarification. Snow Mountain, through their attorney, J. Jay Carroll, responded to Ecology's
17 exceptions and appeared at the exception hearing. Snow Mountain presented no additional
18 evidence. Michael Thomas testified on behalf of Ecology.

19 Some of the facts do not seem to be in dispute, just the conclusion that should be reached
20 from an analysis of those facts. The evidence shows that until 1981, 125 acres were consistently
21 irrigated with Cowiche Creek water. Mrs. Gilbert died in 1981 and the acres irrigated were reduced
22 immediately after her death. Her heirs increased the number of acres being irrigated and testified
23 the entire 125 acres were again being irrigated at the time of the hearing before the Referee in 1998.
24 In preparation for the evidentiary hearings, Ecology visited the property in 1992, finding 45.5 acres
25 being irrigated and again in 1995, finding 77 acres being irrigated.

Ecology asks the Court to limit the water right confirmed to Snow Mountain to the number
of acres that were irrigated between 1981 and 1986, arguing that the water right for any of the land
not irrigated by 1986 was relinquished due to five consecutive years of nonuse. Snow Mountain, in
its reply to the exceptions, argues the burden of proof lies with Ecology to prove five successive
years of non-use, a burden that was not met. In support, Snow Mountain cites to R. D. Merrill Co.

1 v. Pollution Bd., 137 Wn.2d 118, 140-41, 969 P.2d 458 (1999). The Court agrees with the legal
2 standard set forth by Snow Mountain and the allocation of burdens established by that precedent.

3 The Court has reviewed the testimony from the 1998 hearing. The testimony was that 125
4 acres were consistently irrigated until 1981 when Mrs. Gilbert died. Fewer acres were irrigated for
5 a period of time after that, but the record does not indicate for how many years. October 27, 1998
6 Verbatim Report at p. 32. In 1992, when Ecology conducted its investigation, 45.5 acres were
7 irrigated and 77 acres were irrigated in 1995. The Referee appears to have concluded the reduced
8 number of acres continued from 1981 until 1992 and it was 1996 before the entire 125 acres were
9 again irrigated. However, the record does not contain enough information to reach that conclusion.
10 What Ecology observed in 1992 and 1995 must be limited to those years and lacking diversion
11 records or other reliable evidence, the Court finds there was insufficient evidence to conclude there
12 were five successive years of reduced or non-use. See Department of Ecology v. Acquavella, 131
13 Wn.2d 746, 758-759. Therefore, the Court denies Ecology's exceptions that only the number of
14 acres irrigated between 1981 and 1986 should be awarded a water right.

15 Ecology's second exception addressed the number of acres authorized for irrigation even if
16 its first exception is denied. The claimant's land is identified on State's Exhibit SE-1A and the land
17 being irrigated during the site inspections is marked with green dots. Ecology's cartographer, Anna
18 Trombley, utilized Geographic Information System (GIS) software to determine that within the area
19 marked with green dots, approximately 77 acres are being irrigated. The claimants had testified to
20 irrigating the land identified on SE-1A as being irrigated, plus an additional field that was not
21 shown. That additional area is approximately six acres, marked in red cross-hatching in the
22 NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 31. That evidence would result in a total of 83 acres being irrigated, not the
23 125 acres estimated by Mr. Gilbert. During the 1998 evidentiary hearing, Mr. Gilbert estimated the
24 number of acres in two fields and marked the acres on SE-1A. The first field is in the S $\frac{1}{2}$ SE $\frac{1}{4}$ of
25 Section 31. Mr. Gilbert estimated it to be 10 acres, while the cartographer identified 5.4 acres. The
second field located north of the creek was estimated to be 20 acres, however the cartographer
concluded the area consisted of 15 acres. Based on the analysis of the cartographer, Ecology
suggests Mr. Gilbert's estimate that 125 acres were being irrigated is not accurate and the Court
should instead rely on the agency's analysis of the number of irrigated acres from SE-1A, plus the
additional field that was added by Mr. Gilbert.

1 Snow Mountain asserts the Court should not rely on Ecology's "snapshot in time" of what
2 was being irrigated in 1992. It is correct that the number of acres irrigated in any one year is not
3 demonstrative of the extent of the water right. However, the Court is concerned over the
4 discrepancy between the number of acres estimated by Mr. Gilbert for two fields and the number of
5 acres found using GIS. If the claimants had indicated there was a larger overall area being irrigated
6 than Ecology identified (beyond the one field in the NW $\frac{1}{4}$ SW $\frac{1}{4}$) there would be merit to the
7 claimants' argument. However, that does not seem to be the case. The testimony at the original
8 hearing suggests that the witnesses agreed that SE-1A identified the fields being irrigated, except
9 for the one additional field. Mr. Gilbert then estimated the number of acres irrigated within the
10 area. Tr. pp. 42, 53 October 27, 1998. Ecology has clearly shown that estimate to be in error. Mrs.
11 De La Chappel's testimony also seemed to suggest that less acres were being irrigated in 1998 than
12 had been irrigated prior to Mrs. Gilbert's death. Tr. pp. 33 October 27, 1998.

13 Having reviewed the evidence from the initial hearing and the exceptions and responses, the
14 Court concludes that the water right should be reduced from 125 acres to 83 acres and the quantity
15 of water authorized for use similarly reduced. The Referee recommended three water rights
16 because there were three different certificates appurtenant to the Snow Mountain Ranch property.
17 The water rights for Snow Mountain described on pages 273 and 283 are amended as follows:
18 On page 273, beginning on line 13 $\frac{1}{2}$, to authorize the diversion of 1.05 cubic feet per second, 210.4
19 acre-feet per year for the irrigation of 52.6 acres in the N $\frac{1}{2}$ S $\frac{1}{2}$ of Section 31, except the east 960
20 feet of the NE $\frac{1}{4}$ SE $\frac{1}{4}$. On page 283, beginning on line 12 $\frac{1}{2}$ to authorize the diversion of 0.11 cubic
21 foot per second, 21.6 acre-feet per year for the irrigation of 5.4 acres in the E $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ and
22 W $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 31. The right beginning on line 1 of page 283 is unchanged.

23 2. Richard & Juanita Howe, Clarke & Merry Smith (Claim No. 01403)

24 Ecology took exception to the Referee's conclusion that a right be confirmed for the
25 irrigation of 20 acres. Ecology points to testimony that suggests the only water being used by the
26 Howes was water delivered by Yakima-Tieton Irrigation District or the Cowychee Ditch Company
27 and the claimant was not aware of the existence of an independent water right for the land.

28 The claimants did not appear at the exception hearing, nor did they respond to Ecology's
29 exception. The Court reviewed the record concerning this claim and the Report of Referee on pages
30 89 through 91. Ecology appears to have missed a few key details within the Report. For example,
31 the Referee points out confusion over two ditches called Cowiche Ditch, but spelled differently, and

1 reached, correctly, the conclusion that the Cowiche Ditch serving the Howes property was not the
2 Cowychee Ditch Company ditch, which only serves land north of the creek. The Howes property
3 lies south of the creek. It is clear from Mr. Howe's testimony that although he could not identify a
4 certificate giving him authority to use Cowiche Creek, creek water was in fact used to irrigate his
5 land. There is no evidence to support a conclusion that the water right to Cowiche Creek has
6 relinquished. Ecology's exception is denied.

6 3. Walter E. Culbertson (Claim No. 08983)

7 Ecology took exception to a right being recommended for confirmation under this claim.
8 They believe the evidence was insufficient to prove a continuing water right. Ecology agrees that
9 Culbertson's land had a water right from the prior adjudication. Ecology's exception suggests there
10 was no evidence presented concerning irrigation of the property prior to Mr. Culbertson's
11 ownership. Mr. Culbertson did not appear at the exception hearing, nor did he respond in writing to
12 Ecology's exception. The Court reviewed the record and the Report of Referee.

13 Although Ecology asserts there is no evidence of when use of water to irrigate the land
14 stopped, Mr. Culbertson testified that pasture was being irrigated from Cowiche Creek when he
15 acquired the land, but that he did not continue that irrigation. Therefore, the Court concludes that
16 the non-use at issue began when Mr. Culbertson acquired the land in 1992.

17 Mr. Culbertson's testimony lead the Referee to conclude that Mr. Culbertson had a
18 determined future use in mind when he ceased irrigating, thereby providing a 15-year period within
19 which water had to be used in order to prevent relinquishment. Ecology suggests that the guidance
20 provided in to R. D. Merrill Co. v. Pollution Bd., 137 Wn.2d 118, 969 P.2d 458 (1999) would
21 preclude such a conclusion. Merrill holds that the proposed future development must be
22 conclusively or authoritatively fixed before the expiration of the five-year period of non-use
23 specified by RCW 90.14.160. Mr. Culbertson, who was the landowner when water use ceased,
24 testified to his intent to resume irrigation. After he ceased irrigation, vandals damaged the ditch that
25 was used to deliver water to his property. Mr. Culbertson testified that before he invested money to
26 repair the ditch and resume irrigating, he wanted to wait the outcome of this adjudication, which
27 would determine the extent of the water right he held.

28 Although not relied on by the Referee, the Court believes Mr. Culbertson's testimony raises
29 an additional sufficient cause that would support a conclusion the water right has not relinquished.
30 RCW 90.14.140(2)(c) provides that the nonuse of water for five consecutive years does not result in

1 relinquishment when that nonuse owes to the "operation of legal proceedings." In its recently filed
2 Exceptions and Requests for Clarifications for Subbasin No. 23 (Ahtanum), filed on March 4, 2003,
3 Ecology took the position a water right had not relinquished when a landowner chose not to spend
4 money repairing an irrigation delivery system while awaiting the outcome of this adjudication.
5 Ecology cited to the operation of legal proceedings sufficient cause. See Ecology's Exceptions
6 Subbasin 23, page 12. When it authored the Subbasin No. 23 Report, the Court had queried
7 whether such a set of facts, if properly supported, should invoke that statutory provision.
8 Accordingly, the Court generally agrees with Ecology's position in regard to the applicability of
9 the operation of legal proceedings sufficient cause in this situation. The Court therefore relies on
10 the sufficient cause provision as an additional basis for denying Ecology's exception herein.

11 Ecology's exception No. 1 asks the Court to reduce the described place of use for the water
12 right awarded to Mr. Culbertson to more precisely describe the area where the 15 acres authorized
13 for irrigation are located. They suggested a legal description that the Court hereby adopts. The
14 Court modifies the place of use description on page 295, line 22½ to read: The S½SE¼SE¼ and
15 the NW¼SE¼SE¼ of Section 14, T. 13 N., R. 15 E.W.M. Ecology sought a clarification of the
16 point of diversion authorized for use. Their efforts to map the water rights recommended for
17 confirmation showed that the point of diversion described was not located directly on the creek and
18 proposed an alternate location that the Court herein adopts. The point of diversion described on
19 page 294, line 20½, is amended to read "10 feet north and 800 feet west of the southeast . . ."

20 III. CONCLUSION

21 The Court ORDERS that the claims addressed in this Opinion are modified to reflect the
22 Court's findings. The Court further ORDERS that those decisions be included in the Referee's
23 Schedule of Rights set forth in the Report. This Opinion and Order resolves the exceptions to the
24 Report. Subbasin 18 shall therefore proceed to Conditional Final Order as set forth in the Proposed
25 Conditional Final Order accompanying this Opinion. A Notice of Entry is also included.

Dated this 23rd day of May, 2003.


Sidney Ottem, Court Commissioner