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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 SUBBASIN 28
(SUNNYSIDE)

vs.

JAMES J. ACQUAVELLA, ET AL.,
Defendants

FILED

MAY 20 2004

KIM M. EATON
YAKIMA COUNTY CLERK

I. INTRODUCTION

The Court held a hearing December 11, 2003 to consider exceptions to the Report of Referee for Subbasin 28 dated October 14, 2002 (Report). Jack & Janice Kaiser (Claim No. 00565), Danny T. Downs and Cherie A. Downs (Claim Nos. 01411-01413), Jack Holcroft & Doris L. Holcroft (Claim No. 02002), Ron Perrin and Jerilee Perrin (Claim No. 00331), Brian Lotze and Lori Lotze (Claim No. 00331), David A. Clure and Cynthia D. Clure (Claim No. 02062), Sunny Hop Ranches, Inc. (Claim No. 00698), R. J. McWhorter (Claim Nos. 00484, (A) 04498) and Anderson Land and Livestock (Claim Nos. 01310-01312) filed exceptions. In addition, Charles and Connie Walton, Claim No. 00331 filed a Motion to File Late Exception and exceptions. All parties, along with the Department of Ecology participated in the hearing. The Court, having been fully advised by the parties through written exceptions and oral argument, makes the following rulings.

II. ANALYSIS

Court Claim No. 01310 and 01312 – Anderson Land & Livestock

Anderson Land & Livestock (Andersons) took exception to the Referee not recommending confirmation of diversionary water rights for livestock watering. Richard E. Anderson testified at the exception hearing. Andersons own or lease approximately 6,000 acres in the lower Yakima valley used for raising livestock. The land is predominantly undeveloped rangeland. They assert rights to use several springs for diversionary stock watering.

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1 According to the testimony at the initial evidentiary hearing, most of the springs flow
2 between 2 and 4 gallons per minute, or approximately 0.006 cubic foot per second, 4 acre-feet per
3 year. The Referee did not recommend confirmation of water rights due to lack of evidence to show
4 the springs were developed and diverted to stock tanks prior to December 31, 1932, the date by
5 which water rights developed under the Riparian Doctrine had to be used. See *Department of*
6 *Ecology v. Abbott*, 103 Wn.2d 686, 694 P.2d 1071 (1985). In a few instances the Referee also
7 found that no water right claim was filed pursuant to RCW 90.14 for the water source being used.
8 Failure to file a claim waives and relinquishes any right that may have existed. RCW 90.14.071.
9 The Court will not address those water sources further, as Andersons did not provide any additional
10 water right claims beyond those already identified in the Report of Referee (those sources are:
11 Sulphur Spring/Creek, Colby Spring, Lower Maiden Spring, and Canyon Spring).

12 The Referee found the Andersons developed all of the springs after acquiring the land --
13 some time after the mid-1930's and too late for establishing a Riparian-based water right. By then,
14 the sole method for acquiring water rights was through the permit system in RCW 90.03. However,
15 Richard Anderson testified at the exception hearing that prior to his family acquiring the land it was
16 also used for cattle grazing and many of the springs were developed by prior owners. After they
17 acquired the large holdings, the Andersons extended the pipelines and placed tanks in other areas.
18 The Court concludes that it is reasonable that the prior owners of the Anderson property who were
19 also raising cattle would have developed these springs for livestock water. However, the stock
20 tanks would have been close to the springs, within the area homesteaded. Riparian rights could only
21 have been established for those lands contiguous with the spring and under the same ownership.

22 Two Spring is located approximately 100 feet north and 800 feet east of the center of
23 Section 14, in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, T. 11 N., R. 23 E.W.M. Water from the spring is piped
24 a short distance to a tank that is either in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ or NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 14 and to a tank in
25 the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14. Water Right Claim No. 091284 was filed for springs in Section 14,
with the place of use described as the NW $\frac{1}{4}$, SE $\frac{1}{4}$ of Section 14. Although the spring names are
identified as Butler or Dispute Springs, the Andersons are not asserting rights for springs with those
names and Two Spring is the only spring that serves land in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 14. The only
historical ownership information is a December 8, 1910 deed transferring land that includes the
S $\frac{1}{2}$ NW $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14 from Campbell Land Company to Broadacres Land
Company -- the land was transferred back to Campbell Land Company six months later. As the only

1 date in evidence, the Court will confirm a right with a December 8, 1910 priority date for the use of
2 0.006 cfs, 4 acre-feet per year for stock watering in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14.

3 Campbell Spring is located approximately 1100 feet north and 1200 feet east of the west
4 quarter corner of Section 15, in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 15, T. 11 N., R. 23 E.W.M. Section 15 is
5 some of the land Campbell Land Company sold to Broadacres Land Company in 1910. Water from
6 Campbell Spring is piped to a tank near the west section line for Section 15, to two tanks on the
7 south line of Section 21 and a third tank in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 33, all in T. 11 N., R.
8 23 E.W.M. WRC No. 042796 was filed for Campbell Spring, but only describes Section 15 as the
9 place of use for the water. The Court will confirm a right with a December 8, 1910 date of priority
10 to divert 0.006 cfs, 4 acre-feet per year from Campbell Spring for stock watering in the
11 W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 15, right at the border between Section 15 and Section 16
(Section 16 is owned by DNR and leased by the Andersons for cattle grazing).

12 Lozier Spring (or Lauzier) is located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6, T. 11 N., R. 23 E.W.M.
13 and is piped to one tank in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6, a tank in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 7 and a
14 third tank in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 18, all in T. 11 N., R. 23 E.W.M. The patent for the SE $\frac{1}{4}$ of
15 Section 6 issued to Daniel Goodman and was recorded on November 11, 1891; however, on
16 June 27, 1891 Mr. Goodman sold the land to William Peatross, which is an earlier date showing the
17 land had separated from Federal ownership. WRC No. 042799 was filed on this spring for use in
18 the SE $\frac{1}{4}$ of Section 6. The Court will confirm a Riparian right to use this spring to feed the stock
19 tank near the spring, but the other two tanks are outside the area described in the water right claim
20 and not in the area that could be considered riparian to the spring. The Court confirms a right with a
21 June 27, 1891 priority for the use of 0.006 cfs, 4 acre-feet per year for stock watering.

22 Lower Lozier (or Lauzier) Spring is located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17, T. 11 N.,
23 R. 23 E.W.M. Water from the spring is piped about 50 feet to a single stock tank. This spring
24 flows about 2 to 3 gallons per minute. WRC No. 042798 appears to describe Lower Lozier Spring.
25 There is no information in the record showing when the land transferred into private ownership;
however, the Court is aware that the Federal government gave the railroad the odd numbered
sections for future construction of the railroad. It would not be unreasonable to conclude that
Section 17, T. 11 N., R. 23 E.W.M. was one of the sections acquired by the railroad. The priority
date for riparian rights on railroad lands is the date the map of definite location was filed. A
landowner that is a claimant in Subbasin No. 29 (Mabton-Prosser) put on evidence that construction

1 of the railroad through the lower Yakima valley began in 1883, leading the Court to conclude that
2 the map of definite location would have been filed prior to construction. The Court used June 30,
3 1883 as the priority date for that landowner and will do the same for Anderson. The Court confirms
4 a right for the use of 0.006 cfs, 4 acre-feet per year from Lower Lozier Spring for stock watering in
the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17, T. 11 N., R. 23 E.W.M.

5 Washout Spring is located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19, T. 11 N., R. 23 E.W.M. and piped
6 to a nearby stock tank. WRC No. 042798 also describes this spring. As with Lower Lozier Spring,
7 private ownership of the land prior to 1917 is not shown, however, as with Section 17, this an odd-
8 numbered section and the Court will use the same logic to recommend confirmation of a right with
9 a June 30, 1883, date of priority for the diversion of 0.002 cfs, 1.4 acre-feet per year from Washout
Spring for stock watering in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19, T. 11 N., R. 23 E.W.M.

10 Maiden Spring is located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 18, T. 11 N., R. 24 E.W.M. and flows
11 approximately 10 gallons per minute. It is piped a short distance to a stock tank. WRC No. 091281
12 was filed on Maiden Spring. There is no information in the record showing the land went into
13 private ownership prior to 1917, and since it is not an odd numbered section, the Court cannot draw
14 the same conclusions about its ownership history as was made for the lands in Section 17 and 19.
15 Therefore, the Court cannot confirm a water right. West Maiden Spring is located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$
16 of Section 18, T. 11 N., R. 24 E.W.M. and is piped to a nearby stock tank. WRC No. 091281 was
17 filed for the N $\frac{1}{2}$ and SE $\frac{1}{4}$ of Section 18, and seems to cover West Maiden Spring as well as Maiden
Spring. However, as with Maiden Spring, there is no evidence as to when the land went into private
ownership, which prevents the Court from confirming a water right.

18 As the Referee so found, non-diversionary stock water rights are appurtenant to the land by
19 virtue of the stock water stipulation set forth on page 4 of the Report of Referee. Any livestock
20 grazing on the Anderson land may drink directly from the naturally occurring water sources.

21 **Court Claim No. 02062 – David A. and Cynthia Clure**

22 David and Cynthia Clure took exception to the Referee not recommending a water right for
23 their property. Attorney Greg McElroy appeared on their behalf at the exception hearing. One
24 exception was filed on behalf of the Clures and Downs, et al. (analyzed below). That exception
25 largely addressed the Referee's conclusion that water rights could not be confirmed due to his belief
the water used was predominantly return flow generated by the Yakima Project. In addition to the
return flow issue, the Referee also found water rights could not be awarded to the Clures as no

1 permit or certificate issued under RCW 90.03 supported the water use. The Referee concluded that
2 much of the water use was initiated in the 1970s when the only way to establish a water right was
3 by obtaining a state-issued permit and certificate. The exception stated the Clures would provide
4 title documents and other records to support their water right claim. At the exception hearing no
5 testimony or exhibits were offered to specifically support the Clures' claim to a water right.

6 As a result of the claimants not producing any additional historical information, the Court
7 was prepared to not confirm a right. However, Ecology supplied a series of documents that has
8 changed the Court's mind. Exhibit SE-117 is the administrative record for Surface Water Permit
9 No. 507, which issued in April of 1925 to Western Union Life Insurance Company, authorizing the
10 diversion of 1.0 cfs from Corral Creek for the irrigation of 85 acres in Section 11, T. 9 N.,
11 R. 26 E.W.M. This application was protested in 1924 by A. F. Johnson who owned the SW $\frac{1}{4}$ NW $\frac{1}{4}$
12 and W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 2, T. 9 N., R. 26 E.W.M., which includes most of the land now owned by
13 the Clures. The basis of Mr. Johnson's protest was his concern that issuance of a permit would
14 deprive him of the use of springs that arose on his land and flowed into Corral Creek. The protest
15 indicated he was using water for domestic, stock and irrigation. The investigation conducted by the
16 Supervisor of Hydraulics stated Mr. Johnson had a valid right to use the springs. The Clures are
17 also using springs located on their property. Under the Riparian Doctrine, water use must have
18 been in place by December 31, 1932. *Abbott, supra*, at 103 Wn.2d 686,

19 A prior owner of the Clure property, Margaret Meacham, testified that A. F. Johnson had
20 owned the Clure's land in the 1920's and then sold it to Lawrence Davis in 1935. Mr. Clure's
21 testimony was that 10 acres were being irrigated when he acquired the property. Water Right Claim
22 No. 116827 filed pursuant to RCW 90.14 describes use of a spring for irrigation of 15 acres. The
23 evidence supports a conclusion that 10 acres of land have been irrigated since before 1924, early
24 enough to support a Riparian water right if the land left Federal ownership prior to June 6, 1917.
25 That information is still lacking. If the claimants are able to provide that information prior to the
date for submitting objections or comments on the Proposed Conditional Final Order, the Court will
confirm a right for the diversion of 0.20 cubic foot per second, 40 acre-feet per year for the
irrigation of 10 acres in that portion of the following described parcel west of Corral Creek:
Beginning at the northwest corner of the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, T. 9 N., R. 26 E.W.M.; thence N
88°56'28" E 93 feet; thence S 3°31'48" W 739.92 feet; thence S 25°11'15" W 809 feet to a point on
the south line of said SW $\frac{1}{4}$; thence west along the south line of said SW $\frac{1}{4}$ 205.9 feet; thence N

1 26°52'33" E 1006.0 feet; thence N 5°30'26" E 562.6 feet to the point of beginning. Two points of
2 diversion in the SW¼SW¼ of Section 2 and one in the NE¼SW¼ of Section 2 shall be authorized.

3 The remaining water use on the claimants' land was established after 1974 and a permit and
4 certificate under RCW 90.03 was required. That was not obtained; therefore, no water right exists.

5 **Court Claim No. 01411 – 01413, (A)10914 -- Danny T. and Cherie A. Downs**

6 **Court Claim No. 02002 – Jack and Doris L. Holcroft**

7 **Court Claim No. 00331 – Brian and Lori Lotze**

8 **Ron and Jerilee Perrin**

9 **Charles Walton**

10 These claimants took exception to the Referee not recommending water rights for their land
11 even though surface water certificates had previously been issued to them or their predecessors.

12 The Downs also took exception to no right being confirmed for use of springs on their property.

13 Charles Walton filed a late exception, which the Court allowed, and sought to have a portion of the
14 water right claimed in Court Claim No. 00331 awarded to his land. Attorney Greg McElroy
15 appeared for these claimants, except Charles Walton.

16 Three surface water certificates issued for lands now owned by the parties. Certificate No.
17 10745, with an April 12, 1965 priority date issued to Danny T. and Cherie A. Downs authorizing
18 the diversion of 0.02 cubic foot per second (cfs), 1 acre-foot per year for stock watering; 0.16 cfs,
19 32 acre-feet per year from an "unnamed stream tributary of Kiona Canal" for the irrigation of 8
20 acres. The point of diversion is in Government Lot 4 of Section 10, T. 9 N., R. 26 E.W.M. and the
21 place of use is Government Lot 4 of Section 10 lying south of Old Inland Empire Highway and
22 north of the right-of-way for the Oregon-Washington Railroad and Navigation Company. Court
23 Claim No. 01412 is for the same lands and source of water.

24 Certificate No. 7816 issued to Mrs. S. F. Rayhill with a May 18, 1959 priority date and
25 authorizes a 0.01 cfs diversion for stock water; 0.35 cfs, 68 acre-feet per year for irrigation of 17
acres in that part of Government Lot 1 of Section 9, T. 9 N., R. 26 E.W.M. lying south of the right-
of-way for Oregon-Washington Railroad and Navigation Co. and east of a line that is at the
approximate location of what appears to be an extension of Knox Road. Holcrofts own this land.

Certificate No. 7320, with an April 3, 1958 priority date issued to Eugene M. and Jean B.
Hillhouse authorizing the diversion of 0.20 cfs, 40 acre-feet per year from unnamed springs for the
irrigation of 10 acres in a portion of Government Lot 1 of Section 9, T. 9 N., R. 26 E.W.M. north of
the Old Inland Empire Highway and the westerly portion lying south of the highway. This land is
now owned by the Perrins, Lotze and Walton.

1 Although Ecology's predecessor issued certificates in the 1950s and 1960s, the Referee
2 concluded a water right could not be awarded due to this Court's previous rulings on the Kiona
3 Irrigation District (Kiona) claim. There, the Court also considered a certificate that issued in the
4 1950s. The evidence showed that most, if not all, of the water diverted by Kiona was Yakima
5 Project return flows, for which rights could not be established. See Kiona's *Report of the Court*
6 (dated June 21, 1995) and *Supplemental Report of the Court* (dated November 13, 1995); See also
7 *Additional Order Re: Limiting Agreements*, dated May 12, 1994. Following the Kiona analysis, the
8 Referee concluded the pertinent certificates authorized use of water that is actually Yakima Project
9 return flows – water for which a right cannot be awarded. Donald Schramm, Jr., a hydrologic
10 engineer employed by the Sunnyside Valley Irrigation District (SVID), testified at length at the
11 Subbasin No. 28 hearings. His testimony supported the Referee's conclusion that natural flow
12 water does not exist in the water sources authorized for use by the three certificates and that return
13 flow water resulting from delivery of water by the Sunnyside Division and Roza Irrigation District
14 was the water being diverted and used by the claimants.

15 These claimants took exception to that conclusion and presented evidence in opposition.
16 Michael Black, a civil engineer hired by the claimants, testified at the exception hearing, as did
17 Donald Schramm, Jr. Attorney Charles Flower represented the Sunnyside Division. Ecology
18 appeared through Assistant Attorney General Sharonne O'Shea. Charles Shockey appeared for the
19 United States and Attorney Thomas Cowan represented Roza Irrigation District. After conclusion
20 of the exception hearing, Mr. Flower withdrew as attorney for the Sunnyside Division and
21 Mr. Cowan is representing the division in the Subbasin No. 28 proceeding. Additionally, Dan
22 Downs testified to clear up apparent confusion over the claims he had filed. Having being joined to
23 Court Claim No. 00331 after the evidentiary hearing, no evidence had previously been introduced
24 as to water use on Charles Walton's property. Mr. Walton provided it at the exceptions hearing.

25 There is clear agreement among the parties that Yakima Project return flow contributes
significantly to the water sources in the area of claimants' land and water rights cannot be awarded
for use of such flows absent contracts. The disagreement lies in whether, and how much, naturally
occurring surface water is available and whether it can be appropriated by the claimants. The
testimony shows, as acknowledged by the witnesses, that hydrology is an inexact science. The
testimony of two witnesses whose opinions differed on how much naturally occurring surface water
is available for use from Little Corral Creek and proximate unnamed springs must be evaluated.

1 The USGS Corral Canyon Quadrangle Map for this area (SE-5) shows both Corral Creek
2 and Little Corral Creek as intermittent streams above the northernmost canal that conveys project
3 water into the area. The Court finds this shows naturally occurring water during some portions of
4 the year – not contrary to Mr. Schramm’s testimony and consistent with Mr. Black’s testimony.
5 Mr. Schramm estimates that no more than 67 acre-feet per year, with an average discharge of 0.19
6 cfs of natural flow is available in the Corral Creek drainage. The water sources used are within the
7 greater Corral Creek drainage, but more specifically within the Little Corral Creek drainage. Mr.
8 Black did not provide an estimate of how much natural flow water might be available, but testified
9 the water flowing in the creek and springs could also be from outbreaks of confined aquifers whose
10 water would not be from local precipitation, but from recharge over the past thousands of years.
11 Water from the confined aquifers would not be accounted for in Mr. Schramm’s estimations.

12 The Referee has considered the influence of project return flows in many Kittitas County
13 subbasins. In most cases, the existence of those return flows has not prevented the Referee from
14 recommending confirmation of water. The Referee has reduced the quantity of water or stated the
15 confirmed portion was only for the naturally occurring surface waters. Generally, the Referee has
16 included in his report a section that discusses the case law as it relates to use of return flows and the
17 inability of this Court to confirm water rights for those return flows. The significant difference
18 between claimants in Kittitas County and those now before the Court is the Court’s prior ruling on
19 Kiona, which can be distinguished from the factual settings in Kittitas County. The surface water
20 application filed by Kiona specifically acknowledged the water it proposed to divert was project
21 return flows and use of the water did not begin until after 1950. Kiona did not contest the United
22 States’ position that return flow waters were being used and that a right could not be confirmed in
23 this proceeding. The Court directed the United States to work with Kiona to establish a contract
24 that would allow the district to continue using water from Corral Creek.

25 In Kittitas County, none of the claimants had water right permits/certificates that issued
pursuant to RCW 90.03. To confirm a water right, evidence showing a water right was established
prior to adoption of the Surface Water Code in 1917 was necessary. While there were irrigation
districts delivering water in the Kittitas valley before 1917, those were not part of the Yakima
Project at that time. Some districts did ultimately enter into contracts with the Federal government
for delivery of project water. However, prior to 1917, they operated with water rights established
under the Prior Appropriation Doctrine.

1 Certain evidence introduced during the exception hearing (specifically the administrative
2 record for the permits and certificates issued by the state) show use of springs and Little Corral
3 Creek in the early 1900's. See the Court's discussion of the Clure claim on pages 5-6. Contrary to
4 the permit that issued to Kiona, none of the permits at issue here specifically state that return flow is
5 being used. These claimants have rights to use any natural flow water in the springs and creek by
6 virtue of the certificates that issued for their land. That quantity cannot be defined. The Court will
7 confirm rights to these claimants, but each water right will carry a provision that limits the use to
8 natural flow only. The right shall also indicate that due to the uncertainty of the extent of the natural
9 flow, that should the irrigation districts make their delivery system more efficient, there may be
10 insufficient water to satisfy all rights. Claimants have no right to challenge or interfere with such a
11 change in use. The Court confirms the following water rights:

1. To Ron and Jerilee Perrin, under Court Claim No. 00331, with an April 3, 1958 date of
12 priority a right to divert 0.085 cfs, 17 acre-feet per year from unnamed springs/Little Corral
13 Creek for the irrigation of 17 acres in the following described portion of Government Lot 1
14 of Section 9, T. 9 N., R. 26 E.W.M.: Beginning at a point on the south boundary line of the
15 right-of-way of Old Inland Empire Highway, 150 feet from the intersection of the west line
16 of Government Lot 1 with the south line of said right-of-way; thence running southeasterly
17 in a straight line to a point on the north boundary line of the right-of-way of Oregon-
18 Washington Railroad & Navigation Co., 310 feet from the west line of Government Lot 1;
19 thence easterly following the north boundary line of the railroad right-of-way 358 feet;
20 thence northerly 558 feet to the south boundary line of the right-of-way said highway, 290
21 feet from the point of beginning; thence westerly to the point of beginning.
2. To Brian and Lori Lotze, under Court Claim No. 00331, with an April 3, 1958 date of
22 priority a right to divert 0.075 cfs, 15 acre-feet per year from unnamed springs/Little Corral
23 Creek for the irrigation of 3.75 acres in the following described portion of Government Lot
24 1 of Section 9, T. 9 N., R. 26 E.W.M.: Beginning at the intersection of the west line of
25 Government Lot 1 with the south boundary line of the right-of-way of the Old Inland
Empire Highway; thence running southerly following the westerly line of Government Lot 1
to the northerly right-of-way of the Oregon-Washington Railroad & Navigation Co; thence
easterly following the north boundary line of said railroad right-of-way 310 feet; thence
northwesterly in a straight line to a point on the south boundary line of the highway right-of-

1 way 150 feet from the intersection of said Government Lot 1 and said highway right-of-way;
2 thence following the southerly boundary of said highway 150 feet to the point of beginning.
3 3. To Charles Walton, under Court Claim No. 00331, with an April 3, 1958, date of priority a
4 right to divert 0.04 cfs, 8 acre-feet per year from unnamed springs/Little Corral Creek for the
5 irrigation of 2 acres in the following described portion of Government Lot 1 of Section 9,
6 T. 9 N., R. 26 E.W.M.: Beginning at the intersection of the west line of Government Lot 1
7 with the north boundary line of the right-of-way of the Old Inland Empire Highway; thence
8 running easterly 458 feet to the west right-of-way of Old Gold Mountain Road, also known
9 as Hatfield Road; thence running northerly following said west right-of-way of Old Gold
10 Mountain Road to the intersection of said road and the north boundary of said Government
11 Lot 1; thence westerly following the north boundary of Government Lot 1 443 feet to the
12 west boundary of said government lot; thence southerly 573 feet to the point of beginning.

The point of diversion for all three of these water rights is as described in the permit that preceded issuance of the certificate: 50 feet south and 800 feet west of the east quarter corner of Section 9, being within Government Lot 1 of Section 9.

13 4. To Jack and Doris Holcroft, under Court Claim No. 02002, a right with a May 18, 1959 date
14 of priority a right to divert 0.353 cubic foot per second from unnamed springs for the
15 irrigation of 17 acres in Government Lot 1 of Section 9, T. 9 N., R. 26 E.W.M., except that
16 portion lying northerly of Oregon-Washington Railroad and Navigation Co. right-of-way
17 and westerly of the following described line: Beginning at a point on the north line of said
18 railroad right-of-way, 668 feet east of the west line of said Government Lot 1; thence
19 northerly to a point on the south boundary of the Old Inland Empire Highway, which point
20 is 440 feet east of the west line of said government lot; thence northerly to a point on the
21 north line of said highway right-of-way, which point is 458 feet east of said west line and at
22 a point on the west line of Gold Mountain Road, also known as Hatfield Road; thence
23 northerly along the west line of said road to the north line of said government lot and the
24 terminus of said line. The point of diversion shall be as authorized in the permit that
25 preceded issuance of the certificate, 762 feet west of the east quarter corner of Section 9,
being in Government Lot 1 of Section 9.

5. To Danny T. and Cherie A. Downs, under Court Claim No. 01412, a right to divert 0.17 cfs,
33 acre-feet per year from an unnamed stream for the irrigation of 8 acres in that portion of

1 Government Lot 4, Section 10, T. 9 N., R. 26 E.W.M. described as follows: Beginning at
2 the intersection of the east line of said Government Lot 4 with the southerly boundary of Old
3 Inland Empire Highway; thence westerly following said south boundary of said right-of-way
4 1105 feet; thence southerly on a line parallel with the west line of said lot 500 feet to the
5 north boundary of the right-of-way of Oregon-Washington Railroad and Navigation
6 Company; thence easterly following said boundary line of said railway a distance of 1200
7 feet to the east line of said Lot 4; thence northerly following the east list of said Lot 500 feet
8 to the point of beginning. The diversion point shall be located 100 feet north and 1000 feet
9 east of the west quarter corner of Section 10, being within Government Lot 4, Section 10.

9 Mr. Downs other exceptions are for claims for water rights that have no underlying
10 certificates. Court Claim No. 01411 was filed by Mr. Downs on an unnamed stream that flows
11 through Government Lot 1 of Section 10, T. 9 N., R. 26 E.W.M. Water is diverted from this stream
12 to irrigate 2.5 acres located in Government Lot 2 of Section 10. Government Lots 2 and 3 of
13 Section 10 are primarily irrigated with water delivered by the Benton Irrigation District (part of the
14 Sunnyside Division), which delivers water in the general area. Water Right Claim No. 154468 was
15 filed by Mr. Downs pursuant to RCW 90.14. One of the purposes of RCW 90.14 was to require that
16 water right claim forms be filed for all water uses initiated prior to adoption of the State Surface and
17 Ground Water Codes. The Surface Water Code was enacted effective June 6, 1917; therefore, filing
18 a claim form could only protect surface water rights established prior to that date. After June 6,
19 1917 the only way to obtain a surface water right was through the permit system in RCW 90.03.

18 The evidence shows the Downs initiated the claimed water use after acquiring the land,
19 which clearly would have been at a time when a permit would have been required. For the Court to
20 confirm a water right for use of this stream, the Downs must provide evidence that either water was
21 first used prior to June 6, 1917, (Prior Appropriation Doctrine) or prior to December 31, 1932
22 (Riparian Doctrine), and that both Government Lots 1 and 2 of Section 10 separated from Federal
23 ownership to the same individual and were still jointly held when water was first used. That
24 evidence is currently lacking and leads the Court to deny a water right under Court Claim No.
25 01411. Water rights are being asserted under Court Claim No. 01413 for use of two springs or
seeps for non-diversionary stock watering. The Downs are on the list of claimants who have a non-
diversionary stock water right pursuant to the stipulation set forth on page 4 of the Report of

1 Referee. Their livestock have the right to drink from any naturally occurring water source on the
2 Downs property. No other water right will be confirmed under Court Claim No. 01413. The
3 Downs had filed amended claim (A)10914, asserting a right to divert from a stream that flows
4 through Government Lot 1 of Section 9, a stream to the west of their property and used by the
5 Holcrofts. The Downs are not pursuing that claim.

5 **Court Claim No. 00565 – Jack Kaiser**

6 Mr. Kaiser filed an exception to the Referee not recommending a right to irrigate his land
7 with Yakima River water. He testified at the exception hearing and introduced DE-117 and 118.
8 Mr. Kaiser owns approximately 8.6 acres that is part of Government Lots 2, 3 and 4 of Section 10,
9 T. 9 N., R. 26 E.W.M. He began leasing the land from Union Pacific Railroad beginning in 1977
10 and purchased it in 1994; however, he has been in the area and familiar with the land since 1962
11 and at that time it was being farmed and irrigated with Yakima River water. The land is in pasture.
12 The Referee did not recommend confirmation of a water right primarily due to lack of evidence to
13 show that a water right was established -- the land is riparian to the Yakima River and its flows
14 must have been used to irrigate the land prior to December 31, 1932.

15 Although Mr. Kaiser indicated his exhibits would show that a water right was established in
16 1910, that is not the case. DE-117 is a copy of Court Claim No. 00565, filed by Union Pacific Land
17 Resources Corporation, making the corporation (owner of the land in 1981) a party to this
18 proceeding. The claim indicates the land was acquired from private parties in 1910 and that a water
19 right was initiated in 1910. However, it does not establish that a water right exists for the land. It is
20 merely a statement that the railroad believed there was a water right for the land. Exhibit DE-118 is
21 the quit claim deed transferring the land from Union Pacific Railroad to Jack and Janice Kaiser.
22 The deed is also not proof that a water right was legally established for the land.

23 The Court inquired of Mr. Kaiser if he had any knowledge of the history of water use on the
24 land. Mr. Kaiser thought Mike Hunt owned the land in 1957, but had no other information. The
25 Court is still without evidence to show a water right was legally established for the lands described
in Court Claim No. 00565 – specifically evidence the land was irrigated with water diverted from
the Yakima River prior to 1932. Therefore, the Court Denies the Kaiser's exception.

24 **Court Claim No. 00484 – R. J. McWhorter**

25 Mr. McWhorter took exception to the Referee not recommending water rights for use of
springs located on his property. Mr. McWhorter, represented by Attorney Joanne Comins-Rick,

1 testified at the exception hearing and DE-124, a series of land ownership and lease documents was
2 entered into evidence. Mr. McWhorter owns hundreds of acres in the lower Yakima valley upon
3 which numerous springs arise that are used to raise livestock (cattle and sheep).

4 The exception did not identify a specific spring for which a right was being sought;
5 however, Mr. McWhorter's testimony at the exception hearing was only about use of Lonesome
6 Spring, located in the N½NE¼ of Section 18, T. 10 N., R. 26 E.W.M. The evidence presented at
7 the initial hearing convinced the Referee that diversionary use of water from Lonesome Spring was
8 not initiated until the 1940's when Mr. McWhorter's father acquired the land. However, the
9 testimony at the exception hearing was that the land was leased between 1923 and the time of
10 purchase and the diversionary use began shortly after the lease was initiated. The initial
11 development of the spring was a pipe from the spring to a trough, with overflow from the first piped
12 to a second trough, overflow from the second piped to a third, etc. A total of between 5 and 8
13 troughs were constructed in the system. At some time a cistern was installed to allow storage of a
14 larger quantity of water. The cistern is located in the NW¼NW¼ of Section 17, T. 10 N.,
15 R. 26 E.W.M. Mr. McWhorter testified that Lonesome Spring will flow up to 8 gallons per minute,
16 but during the summer could flow as little as 3 gallons per minute. He did not testify to the distance
17 between the series of troughs. His testimony does suggest that sometime after the initial
18 development, the piping system was expanded so that watering troughs are located all over the
19 acreage he now owns. This occurred after the mid-1940 when the Federal government took over the
20 property Mr. McWhorter owned north of Rattlesnake Ridge – land that became part of the Hanford
21 Reservation – leading him to purchase the land south of the ridge. In 1956 Mr. McWhorter built a
22 home in the NE¼ of Section 31, T. 10 N. R. 16 E.W.M., and extended the piping system from
23 Lonesome Spring to the home site, where a 15,000 gallon cistern was built to store the water.

24 Mr. McWhorter asserts rights under the Riparian Doctrine; that doctrine was addressed most
25 recently in *Department of Ecology v. Abbott*, 103 Wn.2d 686, 694 P.2d 1071 (1985). Reviewing the
1917 water code that "all waters within the state belong to the public . . ." the *Abbott* Court found
"No exception is made for waters devoted to 'ordinary', 'natural', or domestic use." *Id.* at 692.
After 1917, the only way to establish a new water right was through the permit procedures of the
Surface Water Code, now RCW 90.03. Riparian rights initiated prior to adoption of the Surface
Water Code had to be put to beneficial use within 15 years according to the *Abbott* Court and ruled
December 31, 1932, was the cutoff date. Mr. McWhorter's testimony at the evidentiary and

1 exception hearings show water was first used for domestic supply in 1956. By then, a permit was
2 necessary and Mr. McWhorter did not obtain one. Therefore the Court denies a water right for a
3 domestic supply use of Lonesome Spring.

4 The Court must decide to what extent Lonesome Spring was developed and water put to
5 beneficial use for stock watering by 1932. The evidence before the Referee suggested that did not
6 occur until the McWhorters actually purchased the land in the mid-1940's. However, the recent
7 testimony was that Mr. McWhorter's father developed the system shortly after he began leasing the
8 land in 1923. Presently, the system extends into seven sections. Various sections were acquired by
9 the McWhorters from different entities and have different historical ownerships. The Riparian
10 Doctrine cannot be applied to lands that were not owned by the same person who owned the land
11 where the Lonesome Spring is located. Diversion of water to other lands would be appropriative
12 and could not have a right under the Riparian Doctrine. While Mr. McWhorter testified that
13 Lonesome Spring is located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 18, T. 10 N., R. 26 E.W.M., State's Map
14 Exhibit SE-1B, the State's Investigation Report for the McWhorter claim, and the USGS
15 Quadrangle map that is part of Exhibit SE-5J show Lonesome Spring in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of
16 Section 8, T. 10 N., R. 26 E.W.M. The maps show three springs that all lie very near the common
17 section corner between Sections 7, 8, 17 and 18 that appear to all feed into the pipeline that goes to
18 a cistern just southeast of the northwest corner of Section 17. Although Mr. McWhorter's testimony
19 refers to Lonesome Spring, his exhibits and testimony are about a spring in the NE $\frac{1}{4}$ of Section 18,
20 raising a question as to whether the USGS map is correct on the names of the springs. The Court
21 proposes to consider the evidence for the spring located in the NE $\frac{1}{4}$ of Section 18.

22 The evidence presented as part of DE-124 shows that Sections 7, 15, 17 and 18 of T. 10 N.,
23 R. 26 E.W.M. were held by Northern Pacific Railroad initially and then sold (it was unusual for the
24 railroad to own an even-numbered section). At the time Mr. McWhorter's father leased the land, it
25 was owned by Conservation Land Company. Stock tanks were part of the delivery system from the
springs in all of these sections and the Court finds these tanks, which are the closest to the springs,
were used prior to the end of 1932. The Court also finds that riparian rights were established for
use of a spring in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 7 and a second spring in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 18 for
stock watering in tanks located in Sections 7, 15, 17 and 18. The maximum flow from the springs is
8 gallons per minute, but during the summer months the flow drops to about 3 gallons per minute.
The maximum annual flow that might be expected would be about 10 acre-feet per year.

1 The priority date for riparian rights on railroad land is the date the map of definite location is
2 filed with the county. That information is not in the record for Benton County. However, a
3 Subbasin No. 29 landowner, just across the river from this subbasin supplied evidence that
4 construction of the railroad along the Yakima River began in 1884, leading the Court to conclude
5 that the map of definite location must have been filed by at least the prior year. Therefore, the
6 Court will use June 30, 1883 as the priority date.

7 A water right is confirmed with a June 30, 1883 date of priority for the use of 0.018 cubic
8 foot per second (8 gpm), 10 acre-feet per year from two springs for stock watering in the SE $\frac{1}{4}$ SE $\frac{1}{4}$
9 of Section 7, the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 15 and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ of 17, all in T. 10 N.,
10 R. 26 E.W.M. One spring is located 300 feet south and 200 feet west of the northeast corner of
11 Section 18 and the second is located 150 feet north and 900 feet west of the southeast corner of
12 Section 7, all in T. 10 N., R. 26 E.W.M. The Court cannot confirm a right to fill the tanks located in
13 Sections 13, 22 and 23.

14 **Court Claim No. 00698 – Sunny Hop Ranch, Inc.**

15 Sunny Hop Ranch, Inc., took exception to language used by the Referee in his report for
16 Subbasin No. 28. Sunny Hop Ranch, Inc., appeared through Counsel J. Jay Carroll at the exception
17 hearing. The exception is to language on page 170, lines, 8 through 13, of the Report of Referee
18 where the Referee discusses the relinquishment provisions of RCW 90.14. The claimant asked to
19 have that language struck and Ecology concurred with that request. The Court finds that language
20 to be unnecessary and, therefore, strikes lines 8 through 13 on page 170 of the Report of Referee.

21 **III. CONCLUSION**

22 The Court ORDERS that the claims addressed in this Opinion are modified to reflect the
23 Court's findings. The Court further ORDERS that those decisions modify the Referee's Schedule
24 of Rights set forth in the Report. This Memorandum Opinion and Order resolves the exceptions to
25 the Report. Subbasin 28 shall therefore proceed to Conditional Final Order as set forth in the
Proposed Conditional Final Order accompanying this Opinion. A Notice of Entry is also included.

Dated this 20th day of May, 2004.


Sidney P. Ottem, Court Commissioner