

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

3 IN THE MATTER OF THE DETERMINATION)
4 OF THE RIGHTS TO THE USE OF THE)
5 SURFACE WATERS OF THE YAKIMA RIVER)
6 DRAINAGE BASIN, IN ACCORDANCE WITH)
7 THE PROVISIONS OF CHAPTER 90.03,)
8 REVISED CODE OF WASHINGTON,)

No. 77-2-01484-5

9 STATE OF WASHINGTON,
10 DEPARTMENT OF ECOLOGY,

Plaintiff,

vs.

11 JAMES J. ACQUAVELLA, ET AL.,
12 Defendants

MEMORANDUM OPINION AND ORDER
RE: EXCEPTIONS TO REPORT OF
REFEREE SUBBASIN 27,
(SATUS)

005
EEO 22
PM 2
01

13 **I. INTRODUCTION**

14 This Court held a hearing March 6, 2003 to consider exceptions to the Report of the Court
15 for Subbasin 27 dated July 23, 2002 (Report). The Yakama Nation filed exceptions as to its claims
16 (Claim Nos. 00752, 00753, 07253, 14025A and 14026A) as well as finding for other claimants and
17 various legal conclusions. The United States took exception to certain legal conclusions and to
18 rights confirmed to Satus Meadows (Claim No. 00252 – formerly Satus Gun Club) and the Estate of
19 Cox (Claim No. 00471). The United States filed late exceptions (allowed by Court order dated July
20 21, 2004) in regard to the rights of Melvin E. and Marilene Foster and a hearing was held October
21 13, 2004. The Department of Ecology (Ecology) took exception to recommendations regarding
22 Satus Meadows and asked for clarification on other rights. Satus Gun Club/Satus Meadows (Claim
23 No. 00252), David and Carolyn Flory (Claim No. 04358) and Melvin E. and Marilene Foster (Claim
24 Nos. 01114, 14101, 14099, 14102 and 1698) also filed/responded to exceptions.

25 All parties participated in the hearing. The Court ruled on some exceptions during the
hearing as set forth below. The Court reserved ruling on other matters. The Court, having been
fully advised by the parties through written exceptions and oral argument, makes the following
rulings in regard to the Subbasin 27 exceptions. The Court's analysis regarding the United States'
exceptions to the Fosters is set forth in a section under the Fosters' name below.

19,219

1 **II. ANALYSIS**

2 **a. United States**

3 The United States filed a number of exceptions to the Report. The Court ruled on the
4 exceptions during the exceptions hearing. Those hearings are summarized below.

5 1. Land Ownership Stipulation

6 The United States and Yakama Nation request clarification of language within a stipulation
7 set forth at page 3 of the Report, lines 11-13. The stipulation provides:

8 It is hereby stipulated that the description of lands set forth in the claims of the respective
9 claimants is the correct description of the lands for which the water right is claimed and that
10 such claim will constitute proof of the ownership thereof in the absence of a contest as to such
11 title.

12 The United States notes the language may be overbroad and subject to interpretation that the
13 Court's determination of property description in this proceeding is final and the only opportunity for
14 such a decision to be made. The Court had no such intention. Therefore, the underlined portion
15 above shall be replaced with the following language: "for purposes of this adjudication only."

16 2. Non-diversionary Stock and Wildlife Water Stipulation

17 The United States and the Yakama Nation take exception to the Court recognizing and
18 authorizing the Ecology to regulate the non-diversionary stock and wildlife water in the third
19 stipulation set forth at pp. 3-4 of the Report. Ecology concurred in the United States' and/or
20 Yakama Nation's regulation of the naturally occurring water sources for stock and wildlife
21 watering. Therefore, the last sentence of each of the four paragraphs should be MODIFIED to read
22 as follows: "Regulation of these watercourses, ponds and springs by the Bureau of Indian Affairs
23 and/or the Yakama Nation shall be consistent with such retention requirements."

24 3. "Super-Walton" Rights

25 The United States and Yakama Nation request the Court to withdraw its discussion at 7-10
of the Report regarding "Super-Walton" rights. Since that legal analysis was unnecessary to resolve
any claims in Subbasin 27, the Court withdraws the discussion regarding "Super-Walton" rights.

4. WIP Contractees

The United States and the Yakama Nation asked the Court to clarify its finding regarding the
status of Wapato Irrigation Project (WIP) contractees. These parties request clarification that
confirmation of a right at this time is appropriate because the right had not been foreclosed at the

1 time of the hearing. Further, the U.S. asks the Court to make clear the WIP rights are conditional on
2 payment of assessments, including those past due, and the Court's findings on whether assessments
3 have been paid are not intended to be preclusive or persuasive on this matter. The requests of the
4 United States and the Yakama Nation are consistent with previous Court rulings. Therefore, the
5 exception is GRANTED and the status of the WIP contractees should be construed accordingly.

6 5. Individual Rights

7 The United States and the Yakama Nation took exception to the Court confirming water
8 rights for Claim No. 00471 (Estate of Cox) and Claim No. 00252 (Satus Gun Club).¹

9 A. *Estate of Jack Cox and Estate of Rova Cox*

10 The Court found the parcel owned by Jack and Rova Cox in the west 1235 feet of the
11 SW¼SW¼ of Section 9, T. 9N., R. 21 E.W.M. had an Application for Water Right and, therefore, a
12 right to delivery of Class "A" project water. However, the Court made no findings as to whether
13 the Cox family, or their successors, the Holmes family, paid assessments precluding forfeiture
14 proceedings for any appurtenant WIP water right. The United States and Yakama Nation took
15 exception to recognition of a right on the basis the party of record (the Cox family) no longer owns
16 the property, while at the same time the Holmes have not filed pleadings to become a party . The
17 Referee instructed Mrs. Doris Holmes (who testified before the Referee on behalf of the claim) to
18 file such a motion yet none has to date. No one on behalf of Claim No. 00471 replied to the United
19 States/Yakama Nation's exception or appeared at the March 6, 2003 hearing. Lacking a response,
20 evidence assessments were paid to WIP or joinder to the claim the Court GRANTS the Exception
21 and withdraws the right confirmed to the Estates of Jack and Rova Cox at page 58. This decision
22 does not affect any contractual arrangement between individuals and WIP.

23 B. *Satus Gun Club -- Claim No. 00252*

24 The United States and Yakama Nation take exception to the Court confirming a water right
25 for the Satus Gun Club.² Their main contention is Satus Gun Club relies primarily on WIP return
flow and, absent a contract between the water user and the BIA, this Court cannot confirm a water
right. *See generally Ide v. United States*, 263 U.S. 497 (1924) and *United States v. Parkins*, 18 F.2d

¹ The Court notes the Yakama Nation has also taken exception to the Court confirming rights to other individual water users. Those exceptions are analyzed in the section entitled Yakama Nation.

² Ecology initially filed an exception on the basis the right confirmed exceeded the RCW 90.14 claim filed by the Club. The Court had determined an RCW 90.14 was unnecessary for water rights that are federal in nature. The Court will not address the issue at any greater length at this time.

1 642 (D. Wyo., 1926). The second contention made by the United States concerns the use of water
2 for a duck club rather than irrigation. Satus Gun Club made no showing as to number of acres
3 irrigated or which were practicably irrigable pursuant to *Walton*. Finally, the United States reminds
4 the Court the integrity of the project is potentially compromised by allowing individuals without
5 federal contracts to divert return flow otherwise intended and used by legitimate contractees.
6 Indeed, it has been the law of this case for nearly a decade that this Court will not confirm specific
7 rights to project return flow. See *Limiting Agreement decisions*.

8 Satus Gun Club, now Satus Meadows filed a response to the various exceptions. It asks the
9 Court to make clear the stipulations set forth on pages 3-4 of the Report in regard to retention of
10 naturally occurring ponds, springs and water courses for "wildlife watering uses" be interpreted to
11 apply to waterfowl. Meadows also requests it not be limited to the water quantities set forth in the
12 RCW 90.14 claim filed by Gerhard F. Neils, Jr. Additionally, Meadows asserts the measurements
13 utilized by John Douglas in representing the claim were taken in December, 1997, when water is
14 typically impounded by the club and, therefore, after the irrigation season was complete. Further,
15 the subirrigation and springs which fill the pond are the result of natural flow in Mule Dry Creek
16 which flows underground for approximately one-half mile until the water reappears above ground in
17 the depression owned by Satus Meadows. Meadows concludes the water measured would not
18 necessarily be derivative of project return flow. Meadows asks for a right to irrigate 20.37 acres.

19 The Satus Meadows claim is confusing both factually and legally. The Court starts with the
20 basics. Because Meadows is a non-Indian successor to an allotment within the Yakama Reservation
21 and has not entered into a contract with the United States, it must establish a water right pursuant to
22 the *Walton* line of case law. See Report at 5-6. Accordingly, the burden lies with Meadows to
23 show the claimed water was put to beneficial use by an Indian allottee predecessor or within a
24 reasonable time after the property passed out of Indian allottee ownership. Meadows must also
25 show the water has been continuously used since the time of initial beneficial use. Finally, based on
a reading of *Walton*, this Court's finds any claim made by Meadows (or any other user similarly
situated) must be based on an initial irrigation use. This conclusion is appropriate because *Walton*
interprets the General Allotment Act as follows:

"the extent of an Indian allottee's right is based on the number of irrigable acres he owns. If the
allottee owns 10% of the irrigable acreage in the watershed, he is entitled to 10% of the water
reserved for irrigation (i.e., a "ratable share"). This follows from the provision for an equal and
just distribution of water needed for irrigation." 647 F.2d at 50.

1 In addition to examining conformance with *Walton*, the Court must also keep in mind the
2 parameters established by the *Limiting Agreements* decisions. Essentially, those decisions limit the
3 ability of claimants to use water that is available only through the efforts of the federal government.

4 Mr. John Douglas, one of the present owners of Satus Meadows, provided evidence as to the
5 historical use of water on the property. Mr. Douglas has personal knowledge of the property dating
6 back to the 1940s and has acquired additional knowledge that extends backward in time somewhat
7 further. In addition, historical documents were admitted at the hearing before the Referee. The
8 evidence discloses Meadows consists of approximately 80 acres comprising the S½SE¼ of Section
9 9, T. 9 N., R. 21 E.W.M. Mr. Douglas contends water used for irrigation, at least in part, comes
10 from water sources lying west of the Meadows property. Mr. Gunnyon, the initial Indian owner,
11 informed Mr. Douglas in 1979 that a small lake historically existed in the NE¼ of Section 8 and
12 SE¼ of Section 8. Section 8 lies directly west of Section 9 and Section 17 lies to the southeast
13 of Section 9. However, DE – 67, a U.S. Geological Survey Report (possibly in 1976), indicates a
14 1906 USGS study showed no ponds or marshy areas in the lowland except some backwater sloughs
15 in the Yakima River area. The USGS Report shows in 1908 water began to be diverted from Satus
16 Creek for irrigation in the Satus Meadows area. This practice created a waterlogging problem in
17 1929 when the Wapato Project took over operation of the Shearer Ditch. Shearer Ditch runs in a
18 southeasterly direction through the southwest quarter of Section 8 and the east half of Section 17.

19 In addition to return flow or seepage from Shearer Ditch, another possible water source
20 would be Mule Dry Creek, which runs in a northerly direction through Sections 19, 18 and the S½
21 of Section 7, all in T. 9, R. 21, to its confluence with Satus Creek in about the center of Section 7.
22 See SE – 1B; DE – 69. Mule Dry Creek flows into Satus Creek at least two sections west of the
23 Satus Meadows land in Section 9. Mr. Douglas stated at the hearing that Mule Dry Creek flows
24 underground to a parcel only 80 acres to the west of Satus Meadows, emerges as surface water, and
25 actually continues on an easterly path to the Kramer parcel, which is directly west of Satus
Meadows. See March 6, 2003 Transcript at p. 36-37. The Court has no mapping information or
other evidence which confirms that testimony regarding the source of water. Mr. Douglass notes
wastewater is spilled from WIP into the same general area. Transcript at page 44.

In terms of *Walton*, the property in question was allotted to Edward Gunnyon, an Indian, in
1906 and patented to Mr. Gunnyon on January 30, 1922. See Report at 44; DE – 65, 66. Mr.
Gunnyon deeded the property to G. H. MacCallum on October 9, 1922, which represents the date

1 the property left Indian ownership. As successors to an allottee, Meadows can only establish a right
2 to the amount of water put to beneficial use by the allottee or within a reasonable time after
3 acquisition by a non-Indian successor. Further, the claimant, in asserting a right to a portion of the
4 Federal reserved right created when the Yakima Reservation was established to use for the
5 wintertime flooding of land for waterfowl habitat, must show the use was a "primary purpose" of
the Treaty of June 9, 1855. This Court has already addressed this issue.

6 In addition to enunciating the standards for awarding rights for irrigation on the reservation,
7 the Court in its 1990 Memorandum Opinion RE: Motions For Partial Summary Judgment,
8 addressed the extent of the reserved right for the Yakima Indian Reservation. In determining the
9 implied reservations of water rights, the Court found the Treaty of 1855 contained two primary
10 purposes -- agricultural, supra at 42, and fishery. Supra at 45. The Yakama Nation also asserted a
11 right for use of water for light industry, wildlife, mining, recreation and livestock. The Court
12 denied a right for those uses, finding they were secondary uses of the reservation and treaty rights
13 were not established. The only right that could have been established for those uses would have
14 been under state law. In reaching its decision, the Court relied on Cappaert vs. United States, 48
15 L.Ed.2d 523 (1976) and United States vs. New Mexico, 57 L.Ed.2d 1052 (1978), the two leading
16 cases setting the parameters for determining the extent of Federal reserved rights. The *Acquavella*
Court on November 29, 1990, entered its Amended Partial Summary Judgment Entered As Final
Judgment Pursuant to Civil Rule 54 (b). On page 7 of the judgment, the Court ruled as follows:

17 "b. For Other Purposes. It is ordered that diversion of water to the Yakima
18 Indian Reservation (over and above the aforesaid diversions for irrigation purposes)
19 for commercial, industrial and other purposes are not and would not be in fulfillment
20 of the primary purposes of the Treaty with the Yakimas and, accordingly, are and
shall be limited to those quantities of water for those purposes that may be
established pursuant to the Laws of the State of Washington.

21 That judgment was affirmed by the Washington Supreme Court. Ecology v. Yakima Reservation
Irrig. Dist., 121 Wn.2d.257, 850 P.2d 1306 (1993).

22 The *Acquavella* Court extended its ruling that only two primary purposes of the treaty
23 existed, agriculture and fishery, to the on-reservation tributaries. Yakama Report at 7-8.

24 Accordingly, a use of water for wildlife must have been initially perfected as an irrigation use and
25 subsequently changed in order for a right to be confirmed to the Yakama Nation. In extending the
principles applied to the Yakama Nation, supra, it is the ruling of this Court that a *Walton*-based

1 right can only be established through an initial irrigation use by the allottee or the immediate
2 successor. Therefore, to establish a water right herein, Satus Meadows must provide proof that Mr.
3 Gunnyon or his immediate successor actually irrigated the land in question for the purpose of
4 growing a crop or pasture. That evidence is not before the Court.

5 Mr. Douglas testified he had no knowledge as to how the property was used during the time
6 Mr. Gunnyon owned the property or when it was held in trust for his benefit. A retired BIA
7 employee, Don Nielson submitted a letter, attached to DE – 67, indicating the property was
8 developed into a duck club in the late 1920's. However, a review of the testimony and exhibits
9 submitted by Mr. Douglas, both at the hearing before the Referee on November 17, 1999 and before
10 the Court on March 6, 2003, reveal no irrigation practices from the time when Mr. Gunnyon
11 acquired his interest in the property through a reasonable period after it was conveyed to
12 MacCallum in 1922. The only evidence of water use pertains to the development of a gun club
13 sometime in the late 1920's.

14 The second issue raised by the exceptions is whether and how much of the flow utilized by
15 Meadows is Wapato Irrigation Project return flow. The Court cannot confirm a right to federal
16 project return flow. Further, the Court has required claimants using a combination of natural flow
17 and project return flow to make an effort to estimate how much of the water utilized is natural flow.
18 Satus Meadows retains that burden and has not provided the necessary information to allow the
19 Court to conclude what portion of the water utilized is Mule Dry Creek flow and how much is WIP
20 water. That information will also be needed to establish a right.

21 Based on the analysis above, the Court cannot confirm a water right to Satus Meadows. Its
22 claim to a water right is, therefore, DENIED. The Court agrees with Meadows the wildlife
23 stipulation on pages 3-4 does apply to waterfowl.

24 Ecology also sought a point of clarification in regard to the right established by Satus
25 Meadows. Because the Court is unable to confirm a water right at this time, the clarification request
will not be addressed.

b. Yakama Nation

The Yakama Nation filed many exceptions to the Court's Report. Some of those exceptions
are addressed above in the section pertaining to the United States, including Exception Nos. 1, 2, 4,
5 and 7. In addition, Exceptions 9-12 and 22 were filed in regard to the Court's recommendations
for the various claims of the Fosters. The remainder of the exceptions will be analyzed below.

1 1. Yakama Nation Exception No. 3; Foster General Exception – Application of
2 Walton to lands held in trust or fee by the Yakama Nation or its members.

3 The Yakama Nation seeks clarification that *Walton* only applies to non-Indian successors of
4 Indian allottees on the Yakama reservation. While the Court believes the statement to be too
5 general, the Court does not disagree with the changes the Nation requests. The Court has agreed to
6 delete page 7, lines 1-15 of the Report.

7 2. Exception No. 6, 18, 19 – Who has the water right?

8 Exception No. 6 concerns the name in which the water rights that are derivative of the
9 Yakama Nation’s right should issue. In the Report, the Court referred to the rights as “WIP rights”
10 and stated the right would be “confirmed to the United States on behalf of the Bureau of Indian
11 Affairs, Wapato Irrigation Project and its water users.” The Yakama Nation asks such rights be
12 confirmed in the name of the “United States, Bureau of Indian Affairs as trustees for the Yakama
13 Nation and water users within the Wapato-Satus Unit of the Wapato Irrigation Project.” The Court
14 agrees. The Report at page 10, lines 4-15 shall be so MODIFIED.

15 Exceptions 18 and 19 pertain to use of language at page 42, lines 7-9 and page 48, lines 20-
16 22. That language shall be MODIFIED to incorporate the Yakama Nation’s recommendation.

17 3. Exception No. 8 – Durfey

18 The Yakama Nation indicated its objection to the Durfey only applies if the Court does not
19 grant Exception No. 1. The Court granted Exception No. 1 and No. 8 will not be addressed.

20 4. Exception No. 13 – Harris

21 The Yakama Nation filed two exceptions to the Court confirming a water right to the Harris
22 family. The first exception is based on the Yakama Nation’s Exception No. 6 granted above. The
23 language contained at lines 13-16, page 33 of the Report is hereby MODIFIED to read as follows:
24 “Because no application was provided, the Court is unable to confirm a proportionate share of the
25 right confirmed to the United States, Bureau of Indian Affairs as trustee for the Yakama Nation and
water users within the Wapato-Satus Unit of the Wapato Irrigation Project.”

 That statement applies to lands owned by Harris in Government Lot 4 within the SW¼SW¼
of Section 19, T. 9 N., R. 22 E.W.M. When preparing the Report, the Court could not confirm a
right for the property because no Application for Water Right was in evidence as required by prior
rulings. In their response, the Harris’s attached an Application dated November 21, 1935 filed by
J.A. Roberts for 38.2 acres of “Class A water” in Lot 4 within the SW¼SW¼ of Section 19, T. 9 N.,

1 R. 22 E.W.M. Allotment No. 3781 is encompassed in that property description. Based on that
2 evidence, the Harris' request a right for 38.2 acres in Lot 4 located in the SW¼SW¼ of Section 19,
3 T. 9N, R. 22 E.W.M. The Court agrees and pages 32-34, and 58 are amended to reflect the change.

4 The Yakama Nation also took exception to the Court's confirming water rights to the Harris
5 family because the parcels described by the Court were not entitled to WIP deliveries. It appears
6 that resulted from typographical errors made by the Court in analyzing the claims at pages 32-34
7 and in listing the rights on page 58 of the Report. For example one parcel of property was listed on
8 page 32 line 22 as lying within the SE¼SW¼ of Section 9, rather than Section 19. The Report is so
9 modified. Additionally, two rights confirmed at page 58 showed the wrong Range. At lines 23-25,
10 the two rights shall be MODIFIED to read: Section 19, T. 9 N., R. 22 E.W.M.

11 5. Exception No. 14 – Hastings/Shattuck

12 The Yakama Nation takes exception to the Court granting a non-diversionary stock water right
13 for Claim No. 7859 on the basis Jack Shattuck does not own the property and by definition cannot
14 be a riparian owner entitled to a stock water right. See August 22, 2002 Declaration of Roger A.
15 Jacob. No party responded on behalf of Claim No. 7859. Additionally, questions were raised at the
16 hearing before the Referee as to whether Mr. Shattuck owned the property in Section 28. Absent
17 evidence to the contrary, the Court finds the lands encompassed by Claim No. 7859 are not owned
18 by Mr. Shattuck and these claimants not entitled to a riparian non-diversionary stock water right.

19 6. Exception No. 15 – Hastings/Shattuck

20 The Yakama Nation takes exception to the Court granting a non-diversionary stock water right
21 during the irrigation season. They base this exception on the testimony of Mr. Hastings stating the
22 reason for the claim was for stock watering during the off-season. However, nothing indicates the
23 stock were actually removed during the irrigation season. The Court DENIES the exception.

24 7. Exception No. 16 – Hastings/Shattuck

25 The Nation objects to page 36, lines 16-20 that the claimant could establish a state right on
the reservation. The Court had indicated a right could be confirmed if certain evidence and analysis
was provided. That information has not been provided. Therefore, the Court does not reach the
specific exception as the claimants did not make an effort to establish a right under state law.

8. Exception No. 20, 23 – Whitney

The Yakama Nation takes a provisional exception to the Whitney's right, unless the Court
grants the Nation's Exception No. 1, concerning the effect of the Court's finding of land description

1 in other proceedings and the Court clarifies that the point of diversion and source of water is the
2 pond on the Whitney property. The Court granted the Nation's Exception No. 1. Additionally, the
3 Court reviewed the Report and finds the point of diversion and source of water is the pond located
4 on the Whitney property as fed by the Yakima River, which the Nation seems to acknowledge.
5 Line 2, page 63 and line 3, page 64 shall be MODIFIED to read "Unnamed pond fed by the Yakima
6 River" rather than Yakima River.

7 9. Exception No. 21 -- Yakama Nation Claim No. 14,025(A)

8 The Court requested more information regarding lands reacquired by the Yakama Nation,
9 which the Nation alleged had been continuously irrigated. The Nation submitted the Declaration of
10 Charles B. Ray. Mr. Ray testified he was familiar with water use on the 4 parcels in question dating
11 back to 1925. The Court finds the Yakama Nation enjoys a *Walton* right for the following property:

- 12 • Lots 43 (4.5 acres) and 45 (2.7 acres), Block 9, Section 25, T. 8 N., R. 18 E.W.M.
13 (Allotment No. 1218);
- 14 • Lot 36 (2 acres), Block 9, Satus Ranch Subdivision, Section 35, T. 8 N., R. 18 E.W.M.
15 (Allotment No. 1219); and,
- 16 • Lot 16 (0.8 acres), Block 10, Satus Ranch, Section 24, T. 8 N. R. 18 E.W.M. (Allotment
17 No. 4363).

18 c. **Department of Ecology**

19 Ecology requests the Court to clarify certain findings in the Report. Those clarifications are
20 set forth below or in the section that pertains to the specific claimant such as Foster.

21 1. Chinn, Leola, et al. (Court Claim No. 01991)

22 Ecology requested a more specific place of use for a 40-acre right to be included at page 58,
23 lines 18-19. The Court GRANTS the Exception and MODIFIES the place of use to: "That portion
24 of the W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 17, T. 9 N., R. 21 E.W.M., lying north and east of Drain 260-A."

25 Ecology also requests a more specific place of use at page 58, lines 18-19 for a 5-acre right. The
Court GRANTS the Exception and MODIFIES the place of use to: "That portion of the SW $\frac{1}{4}$ NE $\frac{1}{4}$
of Section 17, T. 9 N., R. 21 E.W.M. lying between Drain 260-A and Satus No. 2 Canal."

2. Harris, Jeffrey and Nanci (Court Claim No. 00730)

Ecology asked for clarification as to number of acres confirmed to Jeffrey and Nanci Harris.
In the Report, the Court granted rights based on the number of acres in the Application for Water
Rights. Ecology asked whether the Court should confirm rights based on the number of acres in the

1 Applications For Water Right, but then used acreage quantities based on assessments by the Bureau
2 of Indian Affairs. The Court clarifies its Report to note acreages will be based on the amount set
3 forth in the Applications for Water Right. The number of acres on page 58 remain the same.

4 3. Whitney, Fred & Anne (Court Claim No. 01587)

5 Ecology notes that lines 11-13, page 63 of the Report may inadvertently contain Lot 4, a
6 place of use specifically addressed on page 64. Ecology is correct. Page 63, lines 11-13 is
7 MODIFIED to EXCLUDE Lot 4 from lines 11-13. Ecology also notes, correctly, the Court claim
8 on pages 63 and 64 should be listed as 01587, not 00252. The Report is so MODIFIED.

9 4. Rescorla, Howard & Sandra; Harris, Dennis & Plank, Roy (Court Claim No.
10 02012)

11 The Court's Report references ownership by Dennis Harris, Roy Plank and Howard and
12 Sandra Rescorla. However, the Court listed the claim under the Rescorlas only and confirmed the
13 water rights in their names only. Mr. Rescorla was the only one to testify or otherwise provide
14 evidence at the November 19, 1999 hearing. However, in reviewing the ownership information, it
15 appears Mr. Harris and Mr. Plank are claimants of record and the Rescorlas have not provided the
16 appropriate information to remove Mr. Plank and Mr. Harris from the claim. Therefore, the Report
17 shall be modified at page 42 to include Roy Plank and Dennis Harris as claimants and they also
18 shall be included in the table at page 58, lines 4-6.

19 5. Typographical Note at page 2, lines 21-22

20 Ecology pointed out a typographical error in the report where the Court inadvertently
21 duplicated a portion of a sentence. At line 22, the following sentence portion shall be DELETED:
22 "in maximum application rates for the soil and topographic conditions."

23 d. **David and Carolyn Flory, et al. (Claim No. 04358); Yakama Nation Exception
24 No. 17**

25 The Court determined, at page 38 of the Report, the claimants asserting a right under Claim
No. 04358 (originally the Kramers and now the Florys) would be entitled to a water right for
wildlife purposes, in much the same fashion as the Satus Meadows, upon a showing the property in
question was purchased from an Indian allottee. The Florys, et al., use water on the property in the
S½SW¼ of Section 9, T. 9 N., R. 21 E.W.M. for maintaining wildlife habitat. The Florys supplied
the requested ownership information, but in the interim, questions have been raised as to whether
the water used is return flow from the Wapato Irrigation Project and secondly whether a specific
water right can be quantified by the Court to an individual for wildlife purposes as opposed to

1 irrigation purposes. See e.g. Yakama Nation's Exception No. 17; United States Exception to Satus
2 Meadows. If the water utilized is project return flow, this Court cannot confirm a specific right.

3 Whether the water utilized by the Florys, et al. is project return flow is a question of fact.
4 The evidence before the Court would appear to support the Yakama Nation's contention the water
5 used for wildlife purposes is return flow. That parcel, located in the S½SW¼ of Section 9, is
6 immediately to the west of the Satus Meadows (Claim No. 00252) parcel and much of the Court's
7 analysis for that claim is incorporated herein. For example, the map supplied by Ecology, SE-1B,
8 shows some surface water on the S½SW¼ of Section 9. It appears to arise from seepage flow.
9 Further, there are no natural watercourses near the parcel – Satus Creek is approximately 1 mile to
10 the north and Mule Dry Creek is over one mile to the west. However, one WIP canal is somewhat in
11 the vicinity and seepage or return flow from diversions from the canal could be the cause of the
12 water emerging as springs on the Flory, et al. property. The testimony by Wendell Oliver before the
13 Referee indicates the area lies within the natural floodplain of Satus Creek and was most likely a
14 wetland before irrigation commenced in 1908 with the construction of Shearer Ditch. Mr. Oliver
15 also notes that unsolicited irrigation flows contribute to the creation of the pond. The burden lies
16 with the water user to distinguish what portion is project return flow and how much is natural flow.

17 The second obstacle to granting a right pertains to the Satus Meadows decision that in order
18 to receive a share of the Yakama Nation's reserved right, the original allottee or their immediate
19 successor must have used the water for irrigation. See *Walton*, 647 F.2d at 50-51. Otherwise, the
20 claimant, in asserting a right to a portion of the Federal reserved right created when the Yakima
21 Reservation was established, must show that use of water for the wintertime flooding of land for
22 waterfowl habitat was a "primary purpose" of the Treaty of June 9, 1855.

23 In addition to enunciating the standards for awarding rights for irrigation on the reservation,
24 the Court in its 1990 Memorandum Opinion RE: Motions For Partial Summary Judgment,
25 addressed the extent of the reserved right for the Yakama Reservation. In determining the implied
26 reservations of water rights, the Court found the Treaty of 1855 contained two primary purposes --
27 agricultural, supra at 42, and fishery, supra at 45. The Nation also asserted a right for use of water
28 for light industry, wildlife, mining, recreation and livestock. The Court denied a right for those
29 uses, finding they were secondary and treaty rights were not established. The only right that could
30 have been established for those uses would have been under state law. In reaching its decision, the
31 Court relied on Cappaert vs. United States, 48 L.Ed.2d 523 (1976) and United States vs. New

1 Mexico, 57 L.Ed.2d 1052 (1978) for determining the extent of federal reserved rights. This Court
2 on November 29, 1990, entered its Amended Partial Summary Judgment Entered As Final
3 Judgment Pursuant to Civil Rule 54 (b). On page 7 of the judgment, the Court ruled as follows:

4 “b. For Other Purposes. It is ordered that diversion of water to the Yakima
5 Indian Reservation (over and above the aforesaid diversions for irrigation purposes)
6 for commercial, industrial and other purposes are not and would not be in fulfillment
7 of the primary purposes of the Treaty with the Yakimas and, accordingly, are and
8 shall be limited to those quantities of water for those purposes that may be
9 established pursuant to the Laws of the State of Washington.

10 That judgment was affirmed by the Washington Supreme Court. Ecology v. Yakima
11 Reservation Irrig. Dist., 121 Wn.2d.257, 850 P.2d 1306 (1993). This Court extended its ruling that
12 only two primary purposes of the treaty existed, agriculture and fishery, to the on-reservation
13 tributaries. Yakama Report at 7-8. Accordingly, a wildlife use must have been initially perfected as
14 an irrigation use and subsequently changed. That evidence is not before the Court. Further, the
15 evidence shows the deliberate use of water for wildlife did not commence until the 1920’s. Report
16 at 39. Thus, a right could not be established pursuant to state law during that time frame without a
17 permit/certificate from Ecology’s predecessor as the 1917 Water Code required agency approval.

18 The Court DENIES Claim No. 04358 for the reasons set forth above. The Court will include
19 the claim on the list of parties entitled to use surface water for non-diversionary stockwater.

20 e. **Melvin E. and Marilene Foster (Claim Nos. 01114, 14101, 14099, 14102 and
21 1698)**

22 The Fosters filed various exceptions to the Court’s Report as did the Yakama Nation.
23 Ecology requested clarification of two legal descriptions for the places of use set forth in the Report
24 at pages 26 and 57. Finally, the Court allowed the United States to pursue late exceptions by Order
25 dated July 21, 2004. These exceptions/clarifications shall be addressed in this section.

1. United States Exception to Individual Water Right For WIP Serial Nos. 2949,
1451, 2985, 2840, 3746, 3775, 4411, 3776, 3761, 5170, 5179 and 5200.

26 The United States urges this Court to determine it erred in recommending individual water
27 rights to the Fosters for the WIP parcels set forth above (2949, 1451, 2985 and 2840 are held in trust
28 for the benefit of Mr. Foster and apparently receive water through WIP). The remaining parcels
29 (3746, 3775, 4411, 3776, 3761, 5170, 5179 and 5200) are held in trust for Mr. Foster, but make up a
30 portion of the PIA water right confirmed to the Yakama Nation for future lands within the Satus

1 Subbasin. The United States and Yakama Nation object to the Court designating a portion of the
2 PIA right to any specific land even though those lands were included in the evidence that made up
3 the United States claim to water from Satus Creek. Those governments ask the Court to
4 acknowledge its jurisdiction ends once the overall PIA is established for lands held in trust and
5 leave it to the appropriate forum to sort out what property receives a share of the trust water. The
6 United States cites to 25 U.S.C. § 381, a portion of the General Allotment Act, which provides:

7 In cases where the use of water for irrigation is necessary to render the lands within any
8 Indian reservation available for agricultural purposes, the Secretary of the Interior is
9 authorized to prescribe such rules and regulations as he may deem necessary to secure a just
10 and equal distribution thereof among the Indians residing upon any such reservation; and no
11 other appropriation or grant of water by any riparian proprietor shall be authorized or
12 permitted to the damage of any other riparian proprietor.

13 The United States also points to an Order On Motion To File Late Notice Of Claim entered
14 by then Judge Burdick (now Justice Burdick of the Idaho Supreme Court) in the Snake River Basin
15 Adjudication (SRBA Order). See Order dated July 24, 2001 attached to United States' Exceptions
16 dated April 29, 2004. Although an Idaho trial court decision does not bind this Court, the United
17 States notes the similarity of the fact pattern and urges the Court to adopt the Idaho court's decision.

18 The Yakama Nation takes the position these rights were previously adjudicated in the
19 context of the Nation's Conditional Final Order dated September 12, 1996. It points out Mr. Foster
20 in Subbasin No. 27 along with the Kents and Hoptowits in Subbasin No. 25 are beneficial owners of
21 trust allotments. To designate portions of the award under the 1996 CFO would disrupt management
22 of that water and serve to prejudice the thousands of tribal members who are similarly situated but
23 who would not have water rights apportioned to their trust property. The Yakama Nation believes
24 the situation is analogous to the relationship between irrigation districts and patrons. The Court has
25 confirmed rights in the name of specific irrigation districts but left allocation decisions to the
26 districts. In addition, the Nation urges the Court not to look to the General Allotment Act to resolve
27 this matter because this is a PIA issue and nothing in the PIA decisions relating back to *Arizona v.*
28 *California*, 373 U.S. 546, 600 (1963) compels application of 25 U.S.C. § 381 or other provisions of
29 the General Allotment Act in quantifying or allocating treaty-reserved water.

30 The Fosters provided briefing on this issue in both the Subbasin No. 25 and 27 exceptions
31 process. First, the Fosters point to the *Walton* line of cases and their reading thereof that reserved
32 water belongs to each allottee based on their portion of the arable land base. See *Colville v. Walton*,

1 460 F.Supp. 1320 (E.D. WA. 1978); *Colville v. Walton*, 647 F.2d 42 (9th Cir. 1980). That ruling
2 was interpreted by the Court as the basis for confirming water rights to the trust parcels beneficially
3 owned by the Fosters. See Report at 25. They also note meetings were held with the Yakama
4 Nation and tribal members were told the United States had filed claims on all of the trust parcels but
5 not the fee lands. They were invited to review maps to confirm their trust lands were included ;
6 however because they found the maps confusing the Fosters indicate they chose to put forth their
7 own claims to make sure their trust lands were included in the PLA presentation. The Yakama
8 Nation and the United States informed the Court at the hearing the Foster's land was covered. The
9 Fosters are concerned if the water becomes separated from the land, it will be pooled and sold off
10 the reservation. They do not understand how land taken from trust into fee status carries a water
11 right while land remaining in trust does not. They also assert if the 1996 CFO somehow changed
12 the character of the water right that was appurtenant to the land, then they were deprived an
13 opportunity to dispute that by the segregation of certain claims into pathways.

14 To reach its own conclusion as to which entity actually owns the water right, the Court
15 begins with an analysis of the 1996 CFO. That order was entered after the Court analyzed the
16 uncontested evidence submitted by the United States on behalf of the Yakama Nation and entered a
17 Report of the Court for the Yakama Indian Nation, dated November 13, 1995 and a Supplemental
18 Report of the Court dated June 21, 1996. The focus of the 1996 CFO and the litigation leading up
19 to it only pertained to diversions from the strictly on-reservation creeks – Toppenish, Simcoe and
20 Satus. The CFO is clear it applies to the Yakama Nation. See CFO at 3 (“the final decree shall set
21 forth the following in regards to the Yakama Indian Nation, Court Claim Nos. 2276 and 7253); see
22 also page 8-9 (“The Department of Ecology shall issue a Certificate of Adjudicated Water Right to
23 the United States, in trust for the Yakama Indian Nation as to those water rights from Toppenish,
24 Simcoe and Satus Creek specifically set forth in this Conditional Final Order”). It should be noted
25 the Court does not believe the issue of ownership was raised during those periods.³

³ Toward that end, the Court rejects the Foster's argument they were somehow prevented from participating in the major claimant pathway or the federal reserved right pathway. They present no order or other pleading indicating this Court excluded them from that process. Those classifications only serve to provide organization to a process that potentially impacts thousands of water users. Entities from one pathway appear and participate in others as they see fit to protect their claims. The Monthly Notice provides all claimants an opportunity to keep abreast of the filings and hearings pertaining to any and all claims in this adjudication. To the extent the Fosters were participating they would have received this Notice and were not excluded from the process that resulted in entry of the 1996 CFO.

1 The CFO also describes, beginning on page 4, paragraph 3, the rights that were quantified
2 for the Yakama Nation both in regard to "Future and Idle lands" as well as "Presently irrigated
3 lands" from the three on-reservation creeks. The CFO references numbers of acres and acre-feet for
4 diversion from the various water sources. The CFO incorporated by reference Attachment D and E
5 from the Report. In regard to Future and Idle lands, Attachment D indicates that 13,329 acres in the
6 Satus area would be irrigated by the proposed irrigation plan submitted by the United States.
7 Attachment E shows 387.3 acres of presently irrigated trust and tribal fee lands would continue to
8 be irrigated. The Fosters continue to query whether their lands were included in the presently
9 irrigated category submitted as a part of this claim and where the exhibit is that specifically
10 identifies those lands. The Court was appraised during the October 13, 2004 hearing that Foster's
11 land was included. However, the Court believes the Foster's should be allowed to review the
12 exhibit to specifically determine if their trust land was included and orders that it be made available
13 to them.

14 The water rights quantified in the 1996 CFO from Toppenish, Simcoe and Satus Creeks
15 were awarded to the United States, Bureau of Indian Affairs as trustee for the Yakama Indian
16 Nation and no mention is made of the rights of tribal members to use that water. However, the
17 Court believes this was more of a generalization rather than a specific finding and the Court did
18 note on page 2 of the Report that "YIN claims sufficient water to irrigate all practicably irrigable
19 lands within the Yakama Indian Reservation owned by or held in trust for YIN and its members."
20 The Nation was very clear at the October 13, 2004 hearing the Fosters' trust lands were included in
21 the 1996 CFO and helped to make up the land base that formed the basis for the water right. See
22 e.g. October 13, RP at 170-71. Thus, although there is no question the CFO accords the beneficial
23 ownership of the PIA right from the creeks to the Yakama Nation, that fact, in and of itself, does not
24 deprive tribal members of any rights. Therefore, it is necessary to look at the case law and statutes
25 to determine if they shed any light on this problem.

26 The parties refer to the *Colville* cases, *U.S. v. Powers*, 305 U.S. 344 (1939), the decision
27 from the SRBA court and *Grey v. United States*, 21 Cl. Ct. 285 (1990). The Court has reviewed
28 those authorities along with the General Allotment Act of 1887.

29 The general notion underlying the Allotment Act was to allot reservation lands for the
30 exclusive use of individual Indians with the remaining reservations lands made available for
31 homesteading by non-Indians. The federal government, after holding allotted lands in trust for

1 individual Indians for a 25-year period, could convey the land to the allottee in fee, “discharged of
2 said trust and free of all charge or incumbrance whatsoever.” 25 U.S.C. § 348. The only mention of
3 water rights in the Act is found in Section 7 (25 U.S.C. § 381) and provides:

4 In cases where the use of water for irrigation is necessary to render the lands within any
5 Indian reservation available for agricultural purposes, the Secretary of the Interior is
6 authorized to prescribe such rules and regulations as he may deem necessary to secure a just
7 and equal distribution thereof among the Indians residing upon any such reservation; and no
8 other appropriation or grant of water by an riparian proprietor shall be authorized or
9 permitted to the damage of any other riparian proprietor.

10 *Powers, supra*, settled the issue that Indian allottees have a right to use reserved water.

11 “[W]hen allotments were made for exclusive use and thereafter conveyed in fee, the right to use
12 some portion of tribal waters essential for cultivation passed to the owners.” *Id.* at 532. The *Powers*
13 Court stated the “statute itself clearly indicates Congressional recognition of equal rights among
14 resident Indians.” The Supreme Court noted it would not consider the extent of the rights of the
15 non-Indian purchasers because the issue was not property framed for resolution in that proceeding.
16 The Ninth Circuit would be left to make that judgment in *Colville Confederated Tribes v. Walton*,
17 647 F.2d 42, 49-51 (1981). The *Colville* Court, relying on the general proposition that termination
18 or diminution of Indian rights requires a clear inference of Congressional intent toward that end,
19 concluded “that an Indian allottee may sell his right to reserved water.” *Id.* at 50. The Ninth Circuit
20 made other findings regarding the attributes of the right acquired by non-Indian purchasers, such as:

21 “the extent of an Indian allottee’s right is based on the number of irrigable acres he owns. If
22 the allottee owns 10% of the irrigable acreage in the watershed, he is entitled to 10% of the
23 water reserved for irrigation (i.e., a ‘ratable share’). This follows from the provision for an
24 equal and just distribution of water needed for irrigation.”

25 However, these cases do not directly consider whether there is any distinction between the
rights of allottees holding fee title as opposed to those with parcels that remain in trust ownership.
The Court agrees with the United States that the PIA claim advanced by the federal government
only sought to obtain rights from the tributaries for trust and tribal fee land. Rights for individual
fee landowners from Toppenish, Simcoe and Satus creeks are not part of the United States’ award,
but are separate awards of different water. Further, a question remains about how to treat trust lands
that may have been missed by the United States and/or the Yakama Nation when the PIA claim was

1 presented. In the light of that distinction, those authorities provide only a limited illumination in
2 assisting the Court in analyzing the issues before it.

3 *Grey v. United States*, 21 Cl. Ct. 285, concerns the delivery of irrigation water resources to
4 Native American Allottees residing on the Salt River Indian Reservation. There, the water rights
5 had been quantified for the tribe for allocation to allotted lands pursuant to a 1910 (Kent Decree)
6 process in the Arizona territorial court. Individual allottee owners asserted the federal government
7 had a duty to deliver water to their allotted lands which duty was breached. The Court of Claims
8 denied the claims of the individual allottee owners finding there was no statute on which to base
9 their claim and the nature of a *Winters* right places title to the water right with the tribe and not the
10 individual Indians. 21 Cl. Ct. at 299. According to that court,

11 Allotted tribal lands and the corresponding *Winters* right to water are communal in nature.
12 Title resides in the tribe itself and is not held by individual Indians. . . Nothing in the
13 General Allotment Act or other statutes governing irrigation of allotments suggest that
14 Congress was partitioning and conveying tribal water rights as it did with tribal lands.
15 Neither the Supreme Court nor the Federal Circuit have presumed a Congressional intent to
16 convey to Indian allottees an appurtenant right to an individual share of their tribe's reserved
17 waters. The Supreme Court has only confirmed that an Indian allottee has the "right to use
18 some portion of tribal waters essential to cultivation. . . . *Citing Powers, supra.*

19 The Claims Court also instructed the General Allotment Act created no vested rights beyond
20 an Indian allottee's right to receive their share of tribal water and *Winters* rights can exist only in a
21 coherent system if held by the federal government with title residing in the tribes themselves. Like
22 *Powers* and *Walton*, there is no way to tell from the recited facts or the application of those facts to
23 the law that sheds any light on whether *Grey* involved allotments still held in trust by the United
24 States for individual tribal members or allotments that have gone into fee status.

25 The SRBA Order involved a request by Alan Oliver proceeding *pro se* that a portion of the
right decreed in the SRBA to the United States in trust for the Shoshone-Bannock Tribes be
apportioned to an 80-acre parcel of land allotted to Mr. Oliver, who is a Tribal member. Mr.
Oliver's trust property was a part of the landbase claimed by the United States and was covered by
the 1995 decree. In reaching its decision, the SRBA court relied primarily on *Grey v. United States*,
and in particular the discussion of the relationship between tribal water rights and allotted tribal
lands held by tribal members.

In consideration of the analysis above, this Court finds that the Fosters cannot be awarded a
specific portion of the PIA right for their trust property that was confirmed to the United States,

1 Bureau of Indian Affairs as trustee for the Yakama Nation from the three on-reservation tributaries.
2 The role of this Court in adjudicating water rights is to quantify rights, not allocate them. This
3 Court, in reaching its decision that resulted in entry of the 1996 CFO only considered the PIA
4 evidence submitted by the United States. The United States' June 18, 2004 brief summarizes that
5 evidence and shows the PIA study was directed at trust and tribal fee lands only. Further, the Court
6 believes the Yakama Nation's analogy to an irrigation district is not unreasonable. The Court has
7 not segregated any water rights of the irrigation districts to the specific lands of a patron. How water
8 is parceled out in any given year is an internal matter within the district and would seem to be the
9 same in regard to tribal members with trust lands.

10 However, the Court notes that in this instance, the distinction between what is quantification
11 and what is allocation is a difficult one. As a result, it is easy to understand how the Fosters and
12 other owners of trust lands would have a concern that water be delivered for irrigation of their trust
13 parcels. Their lands help make up the irrigable land base that resulted in the PIA award. The Court
14 went to some length in the CFO to define the place of use where water could be used. See CFO at
15 4-5. Additionally, the governments agree the Fosters' trust lands were included in the analysis
16 performed by HKM Associates. Therefore, it is not as if the parties are working in the dark as to
17 which lands make up the PIA right. In addition, the "just and equal" distribution requirement of the
18 General Allotment Act also compels they receive water. Finally, there can be no doubt that
19 although the case law is unwilling to accord the trust allotments specific water rights, those
20 authorities are very clear in requiring that allotments receive a share of tribal water. See *Powers*,
21 *supra*; see also *Grey*, *supra*. Hence, although a right cannot be quantified for the specific parcels
22 held in trust for allottees, that does not mean those parcels do not have rights to receive water. And,
23 if those individually held trust lands were included in the PIA analysis said it would seem a
24 quantification of a water right for those trust lands occurred. Determining if those lands have a
25 right is well within the province of this Court.

26 However, the Court grants the United States exception and will deny Foster's claim that
27 water be specifically designated to their trust parcels to the extent those trust parcels are included in
28 the 1996 CFO. The Court wants to be clear this decision does not apply to any of the Fosters' trust
29 parcels that may not have been included in the land base that made up the 1996 CFO and would,
30 therefore, not be entitled to a distribution from any current or future reservation project. This
31 decision also does not apply to the Fosters' allotted fee lands. The Court believes a fair reading of

1 *Powers* and *Walton* necessitates that Indian allottees have access to a ratable share of the reserved
2 right, either through a right that is specific to their property or through a portion of the right held by
3 the tribe for the benefit of its members. *Powers* at 527 (quoted above); *Walton* at 51 (quoted
4 above). As the Court understands the briefing supplied by the United States, the trust lands should
5 have been included in the 1996 CFO, while the fee lands were specifically not included. Ideally,
6 the only lands that should require attention in this stage of the proceeding would be the Fosters' fee
7 lands. However, the Court shall require that the requested exhibit be made available to the Fosters
8 to allow them to determine if their trust land was included in the PIA award. If any trust allotments
9 were not included, the parties may choose to inform the Court and the issue can then be addressed.

10 With this decision made, the Court will now examine the recommendations set forth in the
11 Report and the exceptions filed by the parties and quantify rights consistent with this decision.

12 2. Parcels 2816, 2817, 2813, 2813A

13 A review of the Report beginning at page 23 indicates WIP parcels 2816, 2817, 2813 and
14 2813A pertain to lands owned in fee by the Fosters. The Court is unaware of any exceptions in
15 regard to these parcels so the decision set forth in the Report at pages 23-24 is unchanged.

16 3. WIP parcels 2949, 1451, 2985, 2840 and 2819

17 WIP parcels 2949, 1451, 2985, and 2840 are lands which currently receive WIP water and
18 are so assessed. With the exception of WIP parcel 2819, these lands are held in trust for the benefit
19 of Mr. Foster. In regard to WIP 2819, the Fosters own an undivided ½ interest of the 80-acre parcel
20 and the Yakama Nation owns the other ½ interest in trust. There is no application for water right.

21 Pursuant to the analysis above, the Court finds it erred in confirming water rights to these
22 lands as they are held in trust by the United States for the benefit of Mr. Foster. Nonetheless, the
23 Fosters, like other WIP patrons, may have a contractual arrangement with WIP that requires
24 delivery of water to these properties.

25 WIP No. 2819 pertains to 80 acres in the SE1/4NE1/4 and NE1/4SE1/4 of Section 21, T. 9
N., R. 21 E.W.M. The Fosters own an undivided ½ interest of the 80-acre parcel and the Yakama
Nation owns the other ½ interest in trust. The Court confirmed a right to the Fosters for a
proportionate share of WIP for the irrigation of approximately 40 acres (20 acres of "A" lands and
20 acres of "B" lands) in the two quarter-quarter parcels. As fee owners, it appears it would be
appropriate for the Court to confirm a right although it is not clear from the Court's analysis on
page 25 of the Report whether or not there is an applicable Application for Water Right. The Court

1 proposes to follow its decision on page 25 and continue to recognize a right derivative of that held
2 by the United States for the benefit of WIP and its users and in the name of the Fosters. The Court
3 suggests the Yakama Nation and the Fosters convene to determine how to divide up this right.

4 4. Yakama Nation Exception No. 9; Foster Exception No. 2; Ecology
5 Clarification No. 3

6 The Yakama Nation, the Fosters and Ecology ask the Court to review the right confirmed at
7 page 57 for 32.5 acres of "B" land and 40 acres of "A" land on WIP No. 1451. The Court indicates
8 the Class "B" right is appurtenant to the NW1/4NE1/4 of Section 22 and the Class "A" right is
9 appurtenant to the SW1/4SE1/4 of Section 22, T. 9 N., R. 21 E.W.M. All parties indicate the Class
10 "B" right is appurtenant to 32.5 acres in the SW1/4SE1/4 of Section 15 and the Class "A" right is
11 appurtenant to 40 acres in the NW1/4NE1/4 of Section 22, T. 9 N., R. 21 E.W.M. See Declaration
12 of L. Niel Allen dated September 3, 2002 at 3-4; Ecology's Exceptions/Clarifications dated
13 September 6, 2002 at 4; Foster's Exceptions dated September 6, 2002 at 3. Accordingly, the Court
14 grants the exceptions and the table set forth at pages 57-58 shall be so modified.

15 5. Yakama Nation Exception No. 10 – Foster Allotments 3775, 3776 and 4411

16 The Yakama Nation took exception to the confirmation of water rights for Allotments 3775,
17 3776 and 4411 because those lands were not confirmed water rights during the processing of water
18 rights for the Yakama Nation from the on-reservation streams. However, that statement is
19 inconsistent with later assurances the Foster's trust allotments were included in the 1996 CFO. The
20 Court confirmed rights to the three allotments, constituting a total of 175 acres. Without going into
21 the arguments further, the Court finds, consistent with its analysis above, that it will not designate
22 water rights to these three parcels or the other parcels set forth on page 30 (3746, 3761, 5170 and
23 5179) at this time. See also page 61 which is hereby stricken from the Report. The Court will allow
24 the Fosters to renew this exception once they review the necessary evidence to determine if those
25 allotments were included as part of the 1996 CFO.

26 6. Yakama Nation Exception No. 11 – Foster Mule Dry Creek

27 The Nation asks for clarification as to whether the non-diversionary stockwater right for
28 Mule Dry Creek is appurtenant only to land owned by the Fosters', not to the Yakama Nation's
29 tribally-owned property within Range Unit 11. The Fosters do not object to the Court clarifying the
30 claim is limited to the Foster land. See Foster Reply dated November 20, 2002 at page 2. The
31 Court so finds.

1 7. Yakama Nation Exception No. 12, 22 – Foster Annual Quantity/Water Duty

2 The Yakama Nation asks the water duty for future and idle lands be changed from the
3 awarded water duty of 6.31 acre-feet per acre to the same water duty held by other future and idle
4 Yakama Nation trust and tribal fee lands. This exception is implicated by the Court’s decision
5 regarding its authority to designate rights to specific trust lands. The amount of water delivered to
6 trust lands on an annual basis is an operational matter between the United States, Yakama Nation
7 and impacted tribal members.

8 8. Foster Exception No. 1 – Estate of Keith Edwards

9 According to the Declaration of Marilene Foster, dated September 5, 2002, the Fosters have
10 acquired the property owned by Keith Edwards. Mr. Edwards was married to Mr. Foster’s aunt,
11 Nora Foster Edwards, and inherited the property at the time of her death. The land in question was
12 originally allotted to Nora Edwards. At the time of Mr. Edwards’ death, the property was inherited
13 by his daughter, Patricia Lanting, who conveyed it to the Fosters in 2000. A copy of the statutory
14 warranty deed between the parties was attached to Mrs. Foster’s Declaration. The Fosters had
15 leased the property dating back to 1965 and farmed or grazed the property since that time. In
16 addition, they paid the WIP assessments on the land and supplied copies of receipts from WIP dated
17 May 9, 2000 showing no assessments were due at that time. Mrs. Foster also declared that no
18 foreclosure of the Applications for Water Right appurtenant to the water right had occurred.

19 Based on the above, the Court confirms the water right to the Fosters for 20 acres of “A”
20 water and 20 acres of “B” water appurtenant to the N½N½SW¼ of Section 22, T. 9 N., R. 21
21 E.W.M. and 40 acres of “A” water and 37.50 acres of “B” water in the S½NW¼ of Section 22, T. 9
22 N., R. 21 E.W.M. The table set forth at pages 57-58 of the Report shall be MODIFIED to include
23 the right described above, along with other Foster rights delivered by WIP, under Claim No. 01114.
24 Additionally, the Fosters are authorized to use the water delivered by WIP for stock water purposes.

25 9. Foster Exception 3 – Claims 14099, 14102 and 1698 (Lands Currently
 Irrigated)

 The Fosters take exception to the Court denying their claim to a water right for parcels of
land encompassed by Claims 14099, 14102 and 1698. That analysis was set forth in the Report
beginning at page 28. Claims 14102 and 1698 are fee lands and 14099 includes a number of
allotments held in trust for Mr. Foster. The Court will not confirm rights for the trust parcels
contained in 14099, but does instruct the United States and the Yakama Nation to assist the Fosters

1 in determining if the lands within these claims were included in the land base that resulted in the
2 1996 PIA award. At the March 6, 2003 hearing, the Yakama Nation also questioned whether the
3 Court could confirm rights in light of the manner in which the parcels are irrigated.

4 The Court analyzed the historical irrigation practices in its Report at pages 28-29 and will
5 not repeat that discussion. However, the Court did have questions that have been essentially
6 answered. The first question considered which lands were included as a part of the PIA right
7 confirmed to United States on behalf of the Yakama Nation. The briefing reveals the Nation's PIA
8 right would only include trust lands. The record indicates landowners were instructed to pursue a
9 separate right for fee properties. The Court has reviewed the evidence and claim information to
10 determine which lands are in fee status. Based on the chain of title information, the Court finds that
11 Claim No. 14102 is comprised of Allotment Nos. 2048 and 2859 (80 acres) and located in the
12 S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 14, T. 9 N., R. 21 E.W.M. The patent for the SE $\frac{1}{4}$ NW $\frac{1}{4}$ was issued in 1914 to
13 Carlson and the SW $\frac{1}{4}$ NW $\frac{1}{4}$ was issued to the Yakima Produce and Trading Company in 1910. DE
14 - 91. The Fosters were joined to Claim No. 1698 by order of this Court on November 1, 1999. A
15 review of the Motion reveals the Fosters should have been *substituted* (rather than joined) based on
16 the Affidavit of Patricia Hastings, the original claimant. Claim No. 1698 is for 40 acres located in
17 the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15, T. 9 N., R. 21 E.W.M. and held in fee by the Fosters. The patent
18 issued in 1912 to McClelland. DE - 90.

19 With the fee land identified, the Court also sought specific information as to which portions
20 of the fee lands were irrigated, the history of that irrigation and the source of the irrigation. Mr.
21 Foster testified about 12-15 acres on the west side of the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15 were not flooded.
22 He also noted in regard to the S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 14 about 65 acres are irrigated. Mr. Foster also
23 testified regarding the water sources used in irrigating those parcels. Mostly, runoff from Satus
24 Creek irrigates these two parcels with the creek running through the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15 and
25 just north of the S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 14. The NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15 also receives runoff from a
pond to the northeast along with a spring which adds to a stream in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15 and
is utilized by the Fosters in irrigating the fee lands.

Guidance has been provided by the Ninth Circuit as to the law to apply when analyzing the
beneficial use of water on fee allotments. Under *Walton, supra*, and *U.S. v. Anderson*, 736 F.2d
1358 (Ninth Cir., 1984) a non-Indian successor only succeeds to the water right put to beneficial use
by the allottee or by the successor within a reasonable time. If the right is reacquired by a tribal

1 member, that entity “reacquires only those rights which have not been lost through non-use and
2 those rights will have an original, date-of-the-reservation priority.” *Anderson* at 1362; Report of the
3 Court Yakama Nation, *supra*. This use analysis is not based on state law, although a court may look
4 to state law for guidance. *Colville Tribes v. Walton*, 752 F.2d 397, 400 (1985).

5 In terms of historical irrigation, Mr. Foster testified to his knowledge of irrigation on the two
6 fee parcels. He acquired or began to manage the watering of the property in the early 1970’s. See
7 Declaration of Melvin E. (Tim) Foster dated November 19, 1999. Prior to that, the fee parcels were
8 irrigated for pasture and grazed by livestock. *Id.* Mr. Foster’s father raised alfalfa in the area so it
9 is reasonable to conclude that Mr. Foster’s knowledge could extend back to the 1940’s or even
10 earlier. In addition the Declaration of Charles Ray, DE – 86, provides that both fee parcels were
11 irrigated by the flooding from Satus Creek, which is, in turn, fed in that area by other water sources.
12 Mr. Ray was 86 years old when he signed the declaration in 1999 and noted in the declaration he
13 had knowledge of farming practice in the relevant area dating back to the mid-1930s.

14 In regard to the property in the S½NW¼ of Section 14, Mr. Foster noted the presence of an
15 old concrete foundation that formed the base of a silage silo. A now deceased neighbor told Mr.
16 Foster that when the neighbor was 10, he would chase a cow around the inside of the concrete wall
17 which, along with the addition of water, served to pack down the silage. Mr. Foster also surmised
18 the property used to grow the silage was adjacent to the silo because hauling the corn a great
19 distance would have caused the corn kernels to fall off. He believed the corn would have been quite
20 dry because no machinery was available to cut the corn when the stocks were filled with moisture.
21 He noted the land immediately to the south of the silo was blow sand and not capable of growing
22 crops. Thus, the land immediately to the north of the silo, which he now allows to be flooded, was
23 the likely nearby area to have grown the crop. March 6, 2003 Transcript at 98-100. As noted
24 above, the two quarter-quarter parcels came out of trust status in 1910 and 1914.

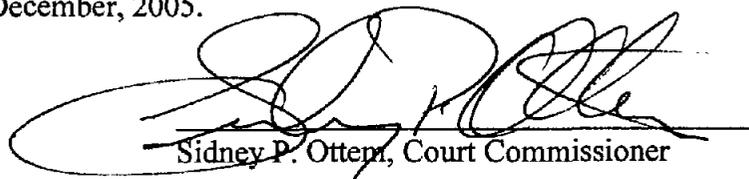
25 Mr. Foster also provided some information as to the 40-acre parcel in the NE¼NE¼ of
Section 15. He testified William Shear used to farm the land in question in about 1915 by using a
canal running from the duck pond to the west. See also Declaration of Charles Ray dated
November 8, 1999. This became more difficult when the federal project was implemented shortly
thereafter. Because of a layer of clay about 18 inches down that underlies much of the area, the
ground becomes water saturated when the Project water begins to be distributed forcing salts to the
surface and making the environment for growing crops undesirable.

1 The Court finds the two fee parcels in question were irrigated within a reasonable time after
2 being transferred to a non-Indian and continue to be irrigated. The process of overflowing the creek
3 is unusual but the testimony of the Fosters convinces the Court this process is used in a deliberate
4 manner and hay/pasture has been grown as a result. The Court will confirm a right to irrigate 25
5 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15 and 65 acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 14, all within the T. 9
6 N., R. 21 E.W.M. The Fosters shall be entitled to use a proportionate share of available water from
Satus Creek for this purpose with a date of reservation priority of June 9, 1855.

7 **III. CONCLUSION**

8 The Court ORDERS that the claims addressed in this Opinion are modified to reflect the
9 Court's findings. The Court further ORDERS that those decisions be included in the Schedule of
10 Rights set forth in the Report. This Memorandum Opinion and Order resolves the exceptions to the
11 Report. Subbasin 27 shall therefore proceed to Conditional Final Order as set forth in the Proposed
12 Conditional Final Order accompanying this Opinion. A Notice of Entry is also included. However,
13 the Court notes that it has provided the Fosters an opportunity to review certain evidence.
14 Accordingly, comments/objections to the Conditional Final Order shall be allowed if filed by
February 7, 2006. Responses must be filed by March 3, 2006. Failure to file written comments
shall preclude participation in the hearing to enter the CFO.

15 Dated this 22nd day of December, 2005.

16
17
18 
Sidney P. Ottem, Court Commissioner