

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

2005 DEC 22 PM 2:43

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,)
11 Plaintiff,)

MEMORANDUM OPINION AND ORDER
RE: EXCEPTIONS TO SUPPLEMENTAL
REPORT

12 vs.)

13 JAMES J. ACQUAVELLA, ET AL.,)
14 Defendants)

CASCADE IRRIGATION DISTRICT
COURT CLAIM NOS. 0891 AND 2800

15 **I. INTRODUCTION**

16 The Court filed its Report of the Court Concerning Cascade Irrigation District (Report)
17 on October 8, 1999. Therein, the Court determined Cascade had perfected a right to divert
18 50,750 acre-feet per year, but had relinquished a portion (15,138 acre-feet) between 1980 and
19 1984 when the maximum diverted was 35,612 acre-feet. The Court also set a schedule of
20 instantaneous diversions from the Yakima River. A number of parties filed exceptions to the
21 Report. One critical issue was the Court's ruling on relinquishment. On October 25-26, 2001,
22 the Court held a hearing on Cascade's relinquishment of its water right. On December 10, 2001,
23 the Court issued its *Memorandum Opinion Re: Unavailability of Water* holding Cascade had not
24 relinquished the 15,138 acre-feet between 1980 and 1984 as the "unavailability of water"
25 exception to relinquishment (RCW 90.14.140(1)(a)) excused Cascade's nonuse of water during
that period. The Court held a hearing April 29-May 2, 2002, to hear the remaining exceptions to
the Report. The Court issued its Supplemental Report Concerning Cascade's Water Rights on
July 15, 2004, (Supplemental Report) and a hearing for exceptions was held November 18, 2004.

26 **II. ANALYSIS**

27 The Court, being fully advised, provides the following analysis of the exceptions filed by
28 Cascade, the United States Bureau of Reclamation (United States), the Yakama Nation, Sweet
29 Grass Investments, LLC, and the Department of Ecology (Ecology).

19,223

1 **a. Ownership of the 16,800 Ac-Ft Storage Right**

2 The history of Cascade's limiting agreement and storage agreement are found in the
3 Report (pp. 20-22) and the Supplemental Report (pp. 11-15). The Court ruled Cascade's July 21
4 through October 15 storage right in the amounts of 150 cfs and 16,800 acre-feet per year would
5 issue to the Cascade Irrigation District and the United States for use by Cascade's water users.
6 The Court based its decision on Cascade's unique history, its agreement and contract, as well as
7 this Court's rulings regarding ownership of the water right (see *Memorandum Opinion RE:
Threshold Issues*, May 12, 1992, pp. 5-7).

8 Cascade takes exception to this ruling arguing it did not transfer any of its vested water
9 right to the United States, only its dam and storage right. There was no mention of Cascade's
10 notices of appropriation only the dam and the water rights associated with storage. Lacking
11 specificity in describing those vested rights, Cascade asserts they do not transfer. The United
12 States did not object to the Court's ruling in the Supplemental Report and believes the 16,800
13 acre-foot right, both storage and vested rights, were transferred to it through those agreements.

14 The evidence pertaining to this issue remains unchanged. On December 12, 1906,
15 Cascade and the United States entered into two agreements that enumerate Cascade's water
16 rights. CID 14 is the limiting agreement and identifies three periods of water use:

15	3/15-7/20	150 cubic feet per second
16	7/20-10/15	Per storage agreement
17	10/15-3/15	30 cubic feet per second

18 Cascade's limiting agreement is similar in form to other limiting agreements of the time (1905-
19 1906). The purpose of the limiting agreements was,

20 2. The limiting agreements limit diversion from the natural flow of the Yakima River,
21 including, where applicable, water courses tributary to the Yakima River, during the
22 months stated in each respective agreement regardless of the condition of the river or
23 other sources of water in the basin. *Additional Order RE: Limiting Agreements (Cascade
Irrigation District, Ellensburg Water Company, and West Side Irrigating Company)*,
24 May 12, 1994, p. 4.

25 The second agreement is known as the storage agreement (CID 16). Cascade agreed to
transfer not only its right to storage (and the dam) but to transfer all other rights as well:

1 Article 1. The party of the second part hereby surrenders and transfers to the United
2 States all its right to the *storage of the waters* of Lake Kachess *including interest in the*
3 *dam* built by it at the outlet of said lake; *and the transfer of all of said rights, title and*
4 *interest* shall become effective immediately upon the approval of this agreement by the
5 Secretary of the Interior. [Emphasis Added.]

6 In exchange for the transfer outlined in Article 1, the United States agreed to deliver to
7 Cascade water from storage:

8 Article 3. In consideration whereof the United States agrees to *deliver from storage works*
9 *now constructed or to be hereafter constructed* at points higher than the headgate. . . for
10 use upon the lands under the canal of the said company; a total amount of *16,800 acre-*
11 *feet* of water between July 20 and October 15 each year, measured at a point on the canal
12 of said company. . . and at no time shall the company require a flow in excess of 150
13 cubic feet of water per second. [Emphasis Added.]

14 To support its position, Cascade points to meeting minutes from the time of the
15 agreements attached to CID 16. The United States disagrees arguing these documents should be
16 used only as an aid and the Court should view the agreements within their “four-corners.” See
17 *H.F. Allen Orchards, et al., v. United States*, 749 F.2nd 1571, 1574 (citing from *Firefighters*
18 *Local Union Nos. 1784 v. Stotts*, 467 U.S. 561; *United States v. Armour & Co.*, 402 U.S. 673
19 (1971). Cascade relies on *Berg v. Hudesman*.

20 “[a]s a whole, the subject matter and objective of making the contract, all the
21 circumstances surrounding the making of the contract, the subsequent acts and conduct of
22 the parties to the contract, and the reasonableness of respecting interpretations advocated
23 by the parties.” *Id.*, 115 Wn.2d 657, 667, quoting *Stender v. Twin City Foods, Inc.*, 82
24 Wn.2d 250, 510 P.2d 221 (1973).

25 The minutes from what appears to be the November 26, 1906 meeting indicate the
company was transferring the “dam on Lake Kachess and all of its rights and appropriations of
the water of said lake” in addition to making payments to the United States for delivery of water.
The January 12, 1907 minutes discuss the dam and rights to stored waters.

Cascade constructed the dam and stored water.¹ In 1906, Cascade was already diverting
stored water for use on its lands. Cascade’s two agreements are unique from other agreements in
the adjudication. Cascade limited its right to (what was then) the natural flow from March 15-

¹ Cascade claims it could store as much as 32,000 acre-feet. However, Cascade’s beneficial use, as support by the agreement, was 16,800 acre-feet.

1 July 20. It also entered into an agreement for the use of stored water delivered by the United
2 States. Cascade argues it did not transfer its vested water right, only its dam and storage right.
3 Cascade's notices of appropriation were not specifically identified in the agreement or storage
4 contract however, its rights were. Cascade gave up its dam and rights in return for a secure flow
5 of water from storage. Cascade attempts to draw a line between water they divert pursuant to the
6 storage agreement and the actual storage of that water. The Court is not convinced the two can
7 be separated. The 16,800 acre-foot right perfected by Cascade consists of two linked elements:
8 the storage of water and use of said waters. The Court finds the diversion of this stored water is
9 part of Cascade's vested right.

10 Cascade further argues that when the United States acquired a water right, it knew how to
11 craft an agreement to accomplish the purchase -- case in point is the United States agreement
12 with the Washington Irrigation Company (WIC—now the Sunnyside Division). The United
13 States believes the WIC agreement differs factually from Cascade's. The Court agrees. The
14 WIC agreement played a significant role in the development of the Yakima Project. The United
15 States purchased the WIC system and appropriation for integration into the Yakima Project. It
16 was one of the critical elements for either success or failure of the Yakima Project. By its
17 purchase the United States would gain control over a potentially large appropriation that was
18 deemed a "menace" to successful completion of the project. WIC owned not only property but
19 real estate and continued to enter into contracts for water until 1919. After the United States'
20 purchase in 1906, WIC continued to operate the system for some unknown period of time. The
21 United States then took over the system and operated and maintained it until 1945. See
22 Sunnyside Division Report. The Court finds this purpose, history and the events surrounding
23 WIC agreement with the United States make it factually different from Cascade's agreement.

24 Cascade seeks treatment similar to that of other claimants specifically Union Gap
25 Irrigation District (Union Gap). The United States and Union Gap entered into an agreement that
on the surface has some similarity with Cascade's. The Court confirmed the water right to Union
Gap, not the United States. Union Gap's agreement is in a slightly different form than other
limiting agreements but still serves that purpose. The similarity with Cascade's agreement is that
both districts built dams on lakes the United States intended to use as part of the Yakima Project,
although Union Gap's crib dam was on its own land. To protect its interests, the United States
negotiated a settlement with Union Gap. Union Gap transferred the 40 acres, all appurtenances

1 and improvements (including the dam) to the United States and agreed to limit its claim to water.
2 That is where the similarities between the two agreements end. The United States did not agree
3 to supply a specific quantity of water from storage during a specific time period. It is noted that
4 the United States did not take issue with ownership of Union Gap's water right. It is not known
5 if the government would have prevailed on this issue if it had done so. Although consistency in
6 certain circumstances is favored, an argument cannot be sustained simply for consistencies sake.

7 The Court believes the agreements (CID 14 and CID 16) along with the supporting
8 documents support a finding Cascade transferred not only its right to the dam and storage rights,
9 but its right to use that vested water. The Court DENIES Cascade's exception and the ruling in
10 the Supplemental Report regarding ownership of the 16,800 acre-foot water right will remain
11 unchanged. The Court confirms a March 5, 1902 water right to Cascade Irrigation District and
12 the United States for use by Cascade's water users in the amount of 150 cfs, 16,800 acre-feet per
13 year from July 21 through October 15 for irrigation and stock water.

14 The U.S. also believes that by confirming a right solely to Cascade, this will create a
15 "two-bucket" right whereby Cascade would be entitled to only natural flow when, or even if,
16 available. Although the Court finds the right will be jointly held by Cascade and the United
17 States for use by Cascade's water users, the issue of delivering water pursuant to pre-project
18 water rights (one-bucket) was addressed in *Revised Order RE: Motion to Limit Treaty Water
19 Right for Fish to Natural Flow and Abatement of Non-Proratable Water Rights*, July 16, 1996.

20 Although recognizing the ownership issue is primarily between the United States and
21 Cascade, the Yakama Nation expressed a concern that any resolution not impact the United
22 States' obligations to other right holders. The Court's ruling should have no such impact.

23 **b. Clark Flats**

24 Securing a water right for the Clark Flats area has been a saga for not only the parties but
25 the Court as well. A great deal has been written about Clark Flats and can be found in the Report
and Supplemental Report. Without going into great detail regarding past decisions, the Court
will simply say it will base its decision on a water right for Clark Flats on the following: Clark
Flats has historically been served water from the Cascade Canal. Cascade inadvertently failed to
include the legal description for Clark Flats in its RCW 90.14 water right claim (CID 43).
Cascade filed an amendment request with Ecology to amend its RCW 90.14 claim to correct the
legal description as a ministerial error, see RCW 90.14.065(3) and CID 129, which Ecology

1 approved. (Doc. #19,133). Cascade complied with RCW 87.03.555-.640 to formally change its
2 boundaries to include Clark Flats plus other lands, although some of the land in Clark Flats was
3 previously included within the District. CID 132; CID 127. As such, Clark Flats is now
4 officially included within Cascade and on the RCW 90.14 claim.

5 The total irrigated land within Cascade including Clark Flats is 12,446.3 acres (Report at
6 13-14) which will constitute Cascade's water right from the Yakima River. The legal description
7 is found on CID 129 and in Order No. 2870 approving Cascade's RCW 90.14 amendment.

8 Cascade also filed an objection regarding the Karla Smith lands, and the need to file a
9 change application for the Clark Flats land. Since Ms. Smith's lands are in the Clark Flats area;
10 the Court believes no further discussion is needed. Also, since Cascade successfully amended its
11 RCW 90.14 claim to include Clark Flats, no change is now needed.

12 **c. Annual Quantity**

13 The United States and the Yakama Nation's assert there is no right to Clark Flats and no
14 additional amount should be awarded for those lands. If this problem is remedied, the United
15 States and the Nation argue Cascade is bound by its limiting agreement/storage contract.
16 Ecology approved Cascade's RCW 90.14 claim amendment including Clark Flats (Doc.
17 #19,133). Thus, Cascade's water rights will include Clark Flats. Cascade is bound by its
18 limiting agreement/storage contract with the United States. See *Additional Order Re: Limiting*
19 *Agreements (Cascade Irrigation District, Ellensburg Water Company, and West Side Irrigating*
20 *Company)*, May 12, 1994, Doc. #9238.

21 Although Cascade did not object to the methodology of the Court's calculation, it did
22 object to the quantity authorized from the Yakima River (44,493 acre-feet). Cascade argues this
23 quantity does not accurately reflect the total amount diverted for the Cascade service area due to
24 the location of the measuring device on the canal as it relates to the location of both Clark Flats
25 and Strawberry Flats and use of water from the creeks. The United States also took exception to
the total quantity awarded from both the Yakima River and the creeks, which was 50,750 acre-
feet The United States argues no more than 49,825 acre-feet can be diverted pursuant to
Cascade's two agreements. Both Cascade and the United States offer different methods to
quantify the water rights.

Delving into each objection regarding quantifying Cascade's water rights is not helpful.
The parties seemed to reach agreement that the limiting agreement (150 cfs) and storage contract

1 (16,800 acre-feet) considered together result in a right to divert 49,825 acre-feet per year. These
2 agreements limit Cascade to such quantities from the Yakima River and its tributaries. Cascade
3 makes use the following creeks: Currier/Reecer, Lyle, Naneum, Coleman, Caribou, Parke and
4 Badger. The evidence shows Cascade has diverted at least 49,825 acre-feet from all the sources
5 it beneficially uses. CID 114; CID 101.

6 As a result, the Court awards a March 5, 1902, right to divert 150 cfs and 49,825 acre-
7 feet per year to Cascade for use within its service area, including Clark Flats, from the Yakima
8 River and the above named tributaries. Cascade may divert this water April 1st through October
9 15th for irrigation and stock water purposes. The Supplemental Report is modified accordingly.
10 This quantity meets the spirit of Cascade's agreements (CID 14 and CID 16) and Cascade's
11 Stipulation with Ecology (Doc. 10,.056). See also the Court's rulings in its *Additional Order Re:*
Limiting Agreements (Cascade Irrigation District, Ellensburg Water Company, and West Side
Irrigating Company), May 12, 1994, Doc. #9238.

12 **d. Notice of Appeal of Ecology's 2003 Decision**

13 Cascade filed a Notice of Appeal Regarding Report of Examination with the Court on
14 March 6, 2003 (Doc. #16,773). Cascade appealed the quantities recommended by Ecology in its
15 decision. Ecology used the quantities set forth in the Court's Report for Cascade. Those
16 quantities have since been changed by the rulings herein. Cascade is now entitled to a right for
17 150 cfs and 49,825 acre-feet per year from April 1 through October 15.

18 The Court therefore directs Cascade and Ecology to notify the Court and other
19 appropriate parties of their current position regarding this appeal no later than Tuesday,
20 February 7, 2006. If Cascade continues with this appeal, it shall so notify the Court and the basis
21 for the appeal in writing no later than February 7, 2006, providing copies to the appropriate
22 parties. If Cascade decides to not pursue the appeal, it shall prepare an Order of Dismissal of
23 said appeal, and provide copies to the Court and other parties as appropriate no later than
24 February 7, 2006.

25 **e. Currier/Reecer Creek**

Based on testimony from the 2002 hearing, the Court had questions regarding source of
water and whether Cascade had changed its point of diversion. Supplemental Report at 71-74.
Cascade, in its RCW 90.14 claim, identified the source as Reecer Creek. The 2002 testimony
suggested Currier Creek was used, not Reecer Creek, and the diversion point was different.

1 To assist the Court, Cascade provided clarification on this issue through Tony Jantzer's
2 August, 2004 Declaration. John Gilreath, attorney, also suggested that the Court could find
3 helpful information in the exception and declarations filed in Subbasin No. 7 (Reecer Creek) for
4 Pautzke Bait Company, Court Claim No. 01724. The Court has reviewed those documents. In
5 this general area of Kittitas County several of the creeks have had different names depending on
6 the map used and the local history of the area. In this particular instance, Currier Creek has been
7 known as Reecer Creek, and Reecer Creek has been known as Faust/First Creek.

8 Cascade established it historically diverted water from a point located 200 feet north and
9 1400 feet east from the center of Section 15, being within the NE¼ of Section 15, T. 18 N., R. 18
10 E.W.M. Cascade asserts it has not changed its point of diversion. This point is described on
11 Cascade's RCW 90.14 claim (CID 32). This is the point of diversion the Court will confirm.
12 The source will be identified as Currier/Reecer Creek, recognizing it could go by either name.

13 The Court requested a legal description of the lands served by Currier/Reecer Creek.
14 Supplemental Report, pp. 76-77. Cascade supplied a description of those lands via the
15 Declaration of Tony Jantzer Regarding Report of Court RE Lands Serviced by Specific Creeks,
16 dated August 30, 2004 (Doc. #18,145). The Court will not repeat the description here, but will
17 include the document as an attachment to this Opinion. According to Mr. Jantzer's declaration,
18 Cascade provides Currier/Reecer Creek water to approximately 10,769 acres.

19 1. Water Right for Currier/Reecer Creek

20 Cascade requested a right be confirmed to Currier/Reecer Creek according to the
21 analysis in the Supplemental Report, pp. 71-77. Thus, the Court confirms a right to
22 Currier/Reecer Creek in the amounts of 7.05 cfs and 641 acre-feet per year based on the
23 following schedule and season:

24 April 1 through July 20: 628.0 acre-feet per year
25 July 21 through October 15: 13.0 acre-feet per year
641.0 acre-feet per year

26 The point of diversion from Currier/Reecer Creek is 200 feet north and 1400 feet east
27 from the center of Section 15, being within the NE¼ of Section 15, T. 18 N., R. 18 E.W.M..

28 The priority date is May 18, 1904. The purpose of use shall be irrigation of 10,769 acres
29 and stock water supply from April 1 through October 15.

1 **f. Quantity from All Sources**

2 Cascade is entitled to divert water for irrigation and stock water supply from the Yakima
3 River and the natural flow in the authorized tributaries. These diversions shall not exceed:

4	Yakima River:	150.0 cfs	49,825.0 acre-feet per year
5	Currier Creek:	7.05 cfs,	641.0 acre-feet per year
6	Lyle Creek:	10.0 cfs,	1,137.0 acre-feet per year
7	Naneum Creek:	17.52 cfs,	917.0 acre-feet per year
8	Coleman Creek:	25.0 cfs,	2,002.0 acre-feet per year
9	Caribou Creek:	30.0 cfs,	1,271.0 acre-feet per year
10	Parke Creek:	7.87 cfs,	353.0 acre-feet per year
11	Badger Creek:	15.6 cfs,	1,552.0 acre-feet per year
12			7,873.0 acre-feet per year

13 The following provisions will be included in *all* water rights confirmed to Cascade.
14 These provisions have been slightly modified from the 2004 Supplemental Report:

15 Cascade Irrigation District is confirmed a right to divert a combined maximum of 150 cfs
16 and 49,825 acre-feet per year from the Yakima River, and the natural flow of
17 Currier/Reecer Creek, Lyle Creek, Naneum Creek, Coleman Creek, Caribou Creek, Parke
18 Creek and Badger Creek. Cascade shall not exceed these quantities during the irrigation
19 season.

20 Cascade Irrigation District is also bound by its 1906 storage agreement with the United
21 States (CID 16). From July 21 through October 15, Cascade shall not divert water in
22 excess of 150 cfs and 16,800 acre-feet per year from the Yakima River and the natural
23 flow of Currier/Reecer Creek, Lyle Creek, Naneum Creek, Coleman Creek, Caribou
24 Creek, Parke Creek and Badger Creek.

25 Cascade Irrigation District shall continue to measure and monitor its use of the Yakima
River and those tributaries to which it is confirmed water rights. Cascade shall make the
data available upon request and within a reasonable time for review by the United States
Bureau of Reclamation and the Department of Ecology.

 The parties are bound by this Court's rulings in Additional Order RE: Limiting
Agreements (Cascade Irrigation District, Ellensburg Water Company, and West Side
Irrigating Company), May 12, 1994 (Doc. #9238); Memorandum Opinion RE: Motion
for Reconsideration of Limiting Agreements, April 1, 1994 (#9092).

 Ecology is also instructed to include the place of use descriptions provided in
Mr. Jantzer's Declaration (Doc. 18,145) in the appropriate water right for each creek.

1 Cascade is also authorized to divert 10 cfs and 250 acre-feet per year from the Yakima
2 River from October 16th through March 31st (non-irrigation season) for stock water purposes.
3 The point of diversion is 1,980 feet south and 600 feet east of the northwest corner of Section 18,
4 being within the SW¼NW¼ of Section 18, T. 18 N., R. 18 E.W.M. (McManamy POD). The
place of use is CID 129.

5 **g. Acres Served from Each Creek**

6 The Court requested that Cascade supply the number of acres served by each creek along
7 with a legal description of those lands. Supplemental Report, pp. 56-57. Cascade supplied a
8 description of those lands via the Declaration of Tony Jantzer Regarding Report of Court RE
9 Lands Serviced by Specific Creeks, dated August 30, 2004 (Doc. #18,145). The Court will not
10 repeat the descriptions here, but will include Mr. Jantzer's declaration as an attachment to this
11 Memorandum Opinion and Order. The lands and acreage identified shall be included by
Ecology in the Certificate of Water Rights that will be issued to Cascade.

12 **h. Points of Diversion**

13 **1. Gravity Flow Point of Diversion**

14 A right was not confirmed in either the Report or Supplemental Report for use of the old
15 gravity flow point of diversion. No timely exception to either report was filed for this issue. At
16 the November 18, 2004 hearing, Cascade asked the Court to authorize use of its old gravity flow
17 point of diversion yet indicated it was no longer in use. Cascade claims it did not abandon that
18 point and wants the flexibility to use it "if need be." The Court interprets this statement to mean
19 Cascade is requesting its gravity flow point be considered a standby or reserve point of diversion.

20 Evidence and testimony show the last time Cascade used its original gravity flow point of
21 diversion was in 1990. At that time a flood occurred that destroyed its headworks (Supplemental
22 Report, p. 30). The old headgate is no longer in existence. Cascade was unable to deliver water
23 to Strawberry Flats, Clark Flats and the Garrison ditch lands through its system. (Report, p. 6,
24 26.) Three pumps were installed on the Yakima River to divert water to these lands because the
25 flume was inoperable. The flume that conveyed water from the Yakima River was deemed
unnecessary once the pumps were installed. Cascade had no reason to repair or replace the
flume. The flume is no longer in use and Cascade has been removing a portion of it each year.
Testimonies of Haberman, October 25, 2001, pp. 40-43; Rivera, April 29, 2002, pp. 99-100;
108; 111; Clerf, April 30, 2002, p. 212, Jantzer, May 2, 2002, p. 657-658, Supplemental Report,

1 p. 30. See also CID 26.2-26.3 *Orders Pendente Lite*, May 14, 1992 and June 10, 1993.
2 (Documents #7411 and #8330).

3 Although Cascade claims it did not relinquish this point of diversion, that argument is not
4 supported by the record. It's been at least 15 years since Cascade used this part of its system –
5 the part Cascade claims as a standby, reserve or backup system. RCW 90.14.140(2)(b) is clear on
6 the subject that a right is not relinquished:

7 If such right is used for a standby; or reserve water supply to be used in time of drought
8 or other low flow period so long as withdrawal or diversion facilities are maintained in
9 good operating condition for the use of change reserve or standby water supply.

10 “Diversion facilities” is not defined in the statute or in Webster’s II². The Court believes
11 “diversion facilities” would include the point of diversion and associated infrastructure—here the
12 flume to get water to the Cascade service area. “Good operating condition” is also not defined,
13 however, the terms used by Cascade to describe the 1990 flood impact on the flume were “took
14 out” or “destroyed.” The diversion point and flume have gone unused for a substantial period. It
15 is not clear water can be conveyed to the service area once diverted. Thus, the delivery system is
16 not in “good operating condition” – a prerequisite for maintaining the gravity diversion point.

17 Cascade must provide evidence it can divert up to 150 cfs at the old point, and the system
18 remains in “good operating condition” to convey that water to Cascade’s service area. If that
19 evidence is provided, the Court will consider including the gravity flow point of diversion on
20 Cascade’s Yakima River water right. Cascade shall provide this evidence no later than Tuesday,
21 February 7, 2006, with a copy to Ecology, the U.S. and the Yakama Nation. With the current
22 record, the Court DENIES Cascade’s request to include the gravity flow diversion point.

23 2. Additional Points of Diversion

24 Cascade requested all the pumps installed on the Yakima River listed in Ecology’s
25 Report of Examination dated February 3, 2003, be included in its water rights. The Court
GRANTS this exception and confirms the following points of diversion:

1. 1980 feet south and 660 feet east from the northwest corner of Section 18, being within the SW¼NW¼ of Section 18, T. 18 N., R. 18 E.W.M. (McManamy POD).

²In Webster’s facilities are defined as: “3. Something that facilitates an action or process. 4. Something created to serve a particular function.” See page 460.

- 1 2. 1980 feet south and 1980 feet east of the northwest corner of Section 11, being within
2 the SE¼NW¼ corner of Section 11, T. 20 N., R. 13 E.W.M. (Lake Easton/KRD
3 POD).
- 4 3. 2333 feet south and 491 feet west of the northeast corner of Section 34, being within
5 the SE¼NE¼ of Section 34, T. 19 N., R. 17 E.W.M. (Strawberry Flats POD).
- 6 4. SE¼SW¼ of Section 28, T. 19 N., R. 17 E.W.M. (Clark Flats POD).

7 3. Badger Creek Point of Diversion

8 The Court found an error in the Supplemental Report at p. 98, lines 16-19. The Parke
9 Creek diversion point was described instead of the Badger Creek diversion. The Supplemental
10 Report is modified to show the correct Badger Creek diversion location at 750 feet north from
11 the south quarter corner of Section 31, being within the S½ of Section 31, T. 17 N., R. 20
12 E.W.M. (Supplemental Report, p. 95; Cascade Post-Trial Memorandum, July 22, 2002, p. 11
13 (Doc. 16,101)).

14 4. Change Applications

15 To comply with thus Court's instructions, Cascade filed two change applications. One
16 application seeks to add Cecelia Buck's point of diversion to its water right. The second would
17 allow Cascade to change its source for non-irrigation stock water supply from the Yakima River
18 to five creeks: Currier/Reecer, Lyle, Caribou, Coleman and Naneum Creeks. On November 18,
19 2004, the Court entered two Pendente Lite orders allowing a temporary authorization for these
20 two changes during the pendency of this adjudication. Ecology or the Kittitas County
21 Conservancy Board are authorized to act on change applications. RCW 90.82; 90.03.380.

22 The Court is finalizing Cascade's water rights. The Court requests Cascade or Ecology
23 provide a written update on the status of these change applications and if necessary a target date
24 to complete processing them. Decisions already made should be provided to the Court. This
25 update or copies of the decisions shall be provided no later than Tuesday, February 7, 2006.

26 **i. Crawford's Deed of Water Right**

27 Cascade filed an exception to the priority date for the Crawford Deed of Water Right
28 (CID 22)—April 3, 1909. See Supplemental Report, p. 42. CID 22 replaced the original deed
29 which was lost. Cascade asserts the more appropriate date for the original deed is October 1903
30 which is consistent with other agreements in the record. The Court GRANTS this exception.

1 **III. EXCEPTIONS FILED BY SWEET GRASS INVESTMENTS, LLC.**

2 Sweet Grass Investments, LLC. (Sweet Grass) is a Subbasin No. 10 (Kittitas) claimant
3 through Court Claim No. 1041 and 1448. The Court confirmed water rights to Sweet Grass with
4 priority dates of July 1, 1874 and May 24, 1884. See *Memorandum Opinion and Order RE:
5 Exceptions to Supplemental Report of Referee*, Subbasin No. 10 (Kittitas), May 18, 2005 (pp. 37-
6 40). Sweet Grass seeks acknowledgement its water rights are senior to those of Cascade's 1904
7 creek rights. Cascade's priority date for the creeks is May 18, 1904, well after the water rights
8 established by Sweet Grass. Thus, Sweet Grass' water rights are senior to those of Cascade.
9 "[A]s between appropriations, the first in time shall be the first in right." RCW 90.03.010.

10 **IV. SUMMARY**

11 Included with this Memorandum Opinion and Order is a proposed Conditional Final
12 Order. Any party wishing to comment or object to the proposed Conditional Final Order shall do
13 so in writing no later than Tuesday, February 7, 2006. If Cascade elects to supplement the record
14 regarding the gravity flow diversion, it shall do so by this date. All other information requested
15 by the Court shall be provided no later than February 7, 2006. Any responses will be due
16 Friday, February 24, 2006. The Court will review those comments or objections. If the Court
17 determines that a hearing is needed one will be scheduled at that time or a written decision will
18 be provided. The Court anticipates entering the Conditional Final Order on Thursday, March 9,
19 2006. *Failure by a party to file written comments or objections by the above identified dates will
20 preclude subsequent participation in any hearing.*

21 Dated this 22nd day of December, 2005.

22 
23 Sidney P. Ottem, Court Commissioner

24 Attached: Attachment A (Document #18,145)
25 Legal Description (From CID 129)

On this day the undersigned in Yakima, Washington, sent to the attorneys of record for plaintiff and for the United States and the Yakama Nation, a copy of this document by U.S. mail, postage prepaid.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

[Signature]

Date Signed

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AUG 31 2004

KIM M. EATON
YAKIMA COUNTY CLERK

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

IN THE MATTER OF THE DETER-
MINATION OF THE RIGHTS TO
THE USE OF THE SURFACE WATERS
OF THE YAKIMA DRAINAGE BASIN,
IN ACCORDANCE WITH THE
PROVISION OF CHAPTER 90.03
REVISED CODE OF WASHINGTON,
THE STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

JAMES J. ACQUAVELLA, et al,

Defendants.

)
)
)
) NO. 77-2-01484-5
)
) DECLARATION OF TONY
) JANTZER REGARDING
) REPORT OF COURT RE:
) LANDS SERVICED BY
) SPECIFIC CREEKS
)
) CASCADE IRRIGATION
) DISTRICT
)
) CLAIM NO. 0891 & 2800
)
)

TONY JANTZER deposes and says:

1. I have been the manager of the District since March of 1996. As part of my duties, I am the custodian of Cascade's records and documents, including contracts, maps, diversion records and other data kept in the regular course of business. I have researched the historic and current records regarding water use by the District and submit this declaration based on my review of the records and documents and my own training, experience, and

18,145

1 personal knowledge. The purpose of this declaration is to provide additional
2 evidence and testimony regarding the service area of particular Creeks used by
3 Cascade Irrigation District, as requested by the Court in its Supplemental
4 Report.
5

6 2. The waters diverted out of BADGER CREEK serve the portions of
7 the following listed sections and parts of sections that lie within the Cascade
8 Irrigation District, comprising of approximately 1,125 acres:
9

10 South ½ of the Southwest ¼ and the Southeast ¼ of Section 29; South
11 ½ of the Southwest ¼ and South ½ of the Southeast ¼ of Section 28;
12 North ½ of Section 33; South ½ of Section 27; North ½ of Section 34;
13 South ½ of Section 26; North ½ of Section 35; and those portions of the
14 Northwest ¼, North ½ of the Southwest ¼, the Southwest ¼ of the
15 Northeast ¼, and Southeast ¼ of Section 36 situated South of Badger
16 Creek, All within Township 17 North, Range 19 E.W.M.. AND the
17 Southwest ¼ of Section 31, All within Township 17 North, Range 20
18 E.W.M., including the track of land to the North of Badger Creek.

19 3. The waters diverted out of PARKE CREEK serve all of the lands
20 above-mentioned under Badger Creek, plus the portions of the following listed
21 sections and parts of sections that lie within the Cascade Irrigation District
22 comprising of approximately 4,477 acres of land:

23 West ½ of Section 31; Northwest ¼ and Northeast ¼ and Southeast ¼
24 and Northwest ¼ of the Southeast ¼ of Section 30; West ½ of the
25 Northwest ¼ and the South ½ of the Southwest ¼ of Section 18; the
26 Southwest ¼ of Sec. 20; and all of Sec. 19; ALL within Township 17
27 North, Range 20 E.W.M. AND the Southwest ¼ of Section 36; Section
28 25; the East ½ of the Southeast ¼ and the Southeast ¼ of the
29 Northeast ¼ of Section 26; Section 24; Section 13, including the land
30 lying North of Parke Creek; the East ½ of Section 14, including the
31 land lying North of Parke Creek; the Northeast ¼ of Section 23; ALL
32 within Township 17 North, Range 19 E.W.M.

33 4. The waters diverted out of CARIBOU CREEK serve all of the
34 lands listed under Parke Creek, plus the portions of the following listed
sections and parts of sections that lie within the Cascade Irrigation District,
comprising of approximately 5,242 acres of land:

HALVERSON APPELLATE, P.S.

311 NORTH FOURTH STREET - P.O. BOX 22730
YAKIMA, WASHINGTON 98907-2715
PHONE (509) 575-6611

1 Northwest ¼ of Section 14; the South ½ of Section 11; Section 12; ALL
2 within Township 17 North, Range 19 E.W.M.

3 5. The waters diverted out of COLEMAN CREEK serve all of the
4 lands listed under Caribou Creek plus the portions of the following listed
5 sections and parts of sections that lie within the Cascade Irrigation District
6 comprising of approximately 6,846 acres of land:
7

8 North ½ of Section 11; the Northwest ¼ and Southwest ¼ and
9 Southeast ¼ of Section 2; the Northwest ¼ and Northeast ¼ and
10 Southeast ¼ of Section 10; the Northeast ¼ of the Northwest ¼ and
11 the Northeast ¼ of Section 9; Section 3; the East ½ of Section 4; ALL
12 within Township 17 North, Range 19 E.W.M. AND the South ½ of
13 Section 34; the Southeast ¼ of the Southeast ¼ of Section 33; ALL
14 within Township 18 North, Range 19 E.W.M.

15 6. The waters diverted out of NANEUM CREEK serve all of the
16 lands listed under Coleman Creek, plus the portions of the following listed
17 sections and parts of sections that lie within the Cascade Irrigation District,
18 comprising approximately of 7,103 acres of land:

19 West ½ of Section 4 within Township 17 North, Range 19 E.W.M.
20 AND the South ½ of Section 33, within Township 18 North, Range 19
21 E.W.M.

22 7. The waters diverted out of LYLE CREEK serve all of the lands
23 listed under Naneum Creek plus the portions of the following listed sections
24 and parts of sections that lie within the Cascade Irrigation District, comprising
25 of approximately 8,575 acres of land:
26

27 Section 5; the North ½ of Section 6; ALL within Township 17 North,
28 Range 19 E.W.M. AND the South ½ of Section 32; the South ½ and
29 Northeast ¼ of Section 31; ALL within Township 18 North, Range 19
30 E.W.M.

31 8. The waters diverted out of CURRIER CREEK serve all of the
32 lands listed under Lyle Creek, plus the portions of the following listed sections
33
34

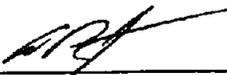
HALVERSON APPLICANT, P.S.

311 NORTH FOURTH STREET - P.O. BOX 22730
YAKIMA, WASHINGTON 98907-2715
PHONE (509) 575-6611

1 and parts of sections that lie within the Cascade Irrigation District comprising
2 of approximately 10,769 acres of land:

3 North ½ of Section 31, within Township 18 North, Range 19 E.W.M.
4 AND Section 36; the South ½ and the South ½ of the Northwest ¼ of
5 Section 25; Section 26; the North ½ of Section 35; the East ½ of Section
6 15; Section 22 EXCEPT for the Northwest ¼ of the Northwest ¼ ; the
7 East ½ of the Northwest ¼, the Northeast ¼, and the Southeast ¼ of
8 Sec. 27; ALL within Township 18 North, Range 18 E.W.M.

9 DATED: Aug 30 2004

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16 TONY JANTZER

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HALVERSON APPELLATE, P.S.

311 NORTH FOURTH STREET - P.O. BOX 22730
YAKIMA, WASHINGTON 98907-2715
PHONE (509) 575-6611

All lands located within the Cascade Irrigation District Boundaries as set forth on Exhibit "A" attached to the Notice, and a portion of the North $\frac{1}{2}$ of the Northeast $\frac{1}{4}$ of Sec. 33, T. 19 N., R. 17 E.W.M.; a portion of the North $\frac{1}{2}$ of the Northwest $\frac{1}{4}$ and a portion of the West $\frac{1}{2}$ of the Northeast $\frac{1}{4}$ of Section 33, T. 19 N., R. 17 E.W.M., and a portion of the West $\frac{1}{2}$ of the Northwest $\frac{1}{4}$ and a portion of the Northwest $\frac{1}{4}$ of the Northeast $\frac{1}{4}$ of Sec. 34, T. 19 N., R. 17 E.W.M.; a portion of the Southwest $\frac{1}{4}$ and a portion of the Southeast $\frac{1}{4}$ of Section 8, Township 18 North, Range 18 E.W.M., all of which are serviced by Cascade Irrigation District.

EXHIBIT A

Beginning at a point on the east boundary line of Section Thirty-four (34) in Township Nineteen (19) north, Range Seventeen (17) east of the Willamette Meridian where the same is intersected by a line running parallel with and twenty-five (25) feet from the center and on the north side of the canal of the Cascade Canal Company and thence running south on said east boundary line of Section Thirty-four (34) and the east boundary line of Section Three (3) Township Eighteen (18) North, of Range Seventeen (17) East of the Willamette Meridian, to the north and east bank of the Yakima River, thence running southeasterly on the east bank of said river to the intake of the canal of the Ellensburg Water Company; thence running easterly and on a line parallel with and fifty (50) feet north of the center of said canal of the Ellensburg Water Company and following said canal easterly, southerly and westerly, parallel with and fifty (50) feet from the center and on the upper side of said canal throughout its entire course from its said intake to its termination at a point in the southeast quarter of Section Twenty-eight (28) Township Seventeen (17) north, Range nineteen (19) east of the Willamette Meridian which is one thousand three hundred and fifty-two (1352) feet north and seven hundred (700) feet west of the corner common to Sections Twenty-seven (27), Twenty-eight (28), Thirty-three (33) and Thirty-four (34) in Township Seventeen (17) north, range Nineteen (19) East of the Willamette Meridian; thence running south at right angle to the 1/16 section line a distance of three hundred (300) feet; thence south 68°44' east; one thousand one hundred and forty-eight (1148) feet to the section line between sections twenty-eight (28) and thirty-three (33) township, seventeen (17) north; Range Nineteen (19) East of the Willamette Meridian; thence east along said section line two hundred and forty-six (246) feet to the section corner common to sections twenty-seven (27), Twenty-eight (28), thirty-three (33) and thirty-four (34) in township seventeen (17) north, range nineteen (19) East of the Willamette Meridian; thence south along the section line

between said Sections thirty-three (33) and thirty-four (34) a distance of ten hundred and nineteen (1019) feet; thence to the right at an angle of $90^{\circ}35'$ thirteen hundred and twenty (1320) feet to the $1/16$ section line; thence north on the $1/16$ section line four hundred and fifty-six (456) feet; thence at an angle of 20° to the left a distance of ninety (90) feet; thence with an angle of 11° to the left one hundred and seventeen (117) feet; thence with an angle of $5^{\circ}47'$ to the right one hundred and twenty-five (125) feet; thence with an angle of $23^{\circ}10'$ to the left ninety (90) feet; thence with an angle of $32^{\circ}13'$ to the right, eighty-five (85) feet; thence with an angle of $28^{\circ}6'$ to the left one hundred and sixty-five (165) feet; thence with an angle of $9^{\circ}6'$ to the right one hundred and ninety (190) feet; thence with an angle of $16^{\circ}26'$ to the right one hundred and thirty-five (135) feet; thence with an angle of $21^{\circ}37'$ to the left two hundred and seventy-seven (277) feet; thence with an angle of $21^{\circ}50'$ to the left, sixty-five (65) feet; thence with an angle of $7^{\circ}6'$ to the right, three hundred and sixty (360) feet; thence with an angle of $47^{\circ}42'$ to the left two hundred fifteen and $5/10$ (215.5) feet; thence with an angle of 15° to the right nine hundred and thirteen (913) feet; thence north with an angle of $76^{\circ}4'$ west, four hundred and fifteen (415) feet; thence south on the $1/16$ section line eight hundred and sixty-nine (869) feet; thence at an angle of $90^{\circ}16'$ to the right, five hundred and two (502) feet; thence at an angle of $89^{\circ}40'$ to the right, one thousand six hundred and eighty-nine and $5/10$ (1689.5) feet to the $1/16$ section line; thence west along the $1/16$ section line one thousand two hundred and sixty-five (1265) feet; thence with an angle of 37° to the left seven hundred (700) feet; thence with an angle of 25° to the right one thousand eight hundred and thirty-five (1835) feet; thence with an angle of 42° to the left a distance of four hundred and eighty (480) feet, being a point on the section.

township seventeen (17) north, range nineteen (19) which point is three thousand one hundred and ninety (3190) feet west of the corner common to sections twenty-eight (28), twenty-nine (29), thirty-two (32) and thirty-three (33) township seventeen (17) north, range nineteen (19) East of the Willamette Meridian, thence running east to said common section corner; thence south to the present terminus of the canal of the Cascade Canal Company on the east boundary line of said section thirty-two (32); thence running southerly twenty-five (25) feet; thence running easterly and afterwards northerly and westerly on a line parallel with and twenty-five (25) feet from and on the upper side of the present canal of the Cascade Canal Company to the place of beginning.

Excepting from the foregoing body of land the right of way of the Chicago, Milwaukee & Puget Sound Railway Company and the land embraced in the plat of the Town of Kittitas;

Also excepting and excluding from the boundaries of said district the following described lands:

The certain lands which were heretofore platted and known as Shoudy's Third Addition, Shoudy's Second Addition, Nob Hill Addition, Mick's Addition and Michel's First Addition, to the City of Ellensburg, there being included in the excepted portions all portions of said additions which have been vacated since the original platting thereof; and Blocks 1, 2, 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17 and 18 of State Land Commissioner's plat of Section Thirty-six (36) Township Eighteen (18) North, Range Eighteen (18) East of the Willamette Meridian.

All that part or portion of the northeast quarter of section eleven (11) in township seventeen (17) north, range nineteen (19) East of Willamette Meridian lying southerly of a line forming the southern boundary of the right of way and way of the Chicago, Milwaukee & Puget Sound Railway Company, as now located and established on, over and across said quarter section. Said

Beginning on the east boundary of Section 11 at a point ninety feet south of the intersection of said boundary with the center line of the main track of the railway of said company, as now located and established over and across said section; and running thence southwesterly on a curve to the left and a radius of five hundred and twenty-three and seven-tenths feet, the tangent to said curve making an angle approximately 84° with said east boundary of said section, a distance of six hundred and twenty-nine and five tenths feet, said curve being fifty feet easterly from and parallel to the center line of the east leg of said wye as there now located; thence southerly along a curve to the left having a radius of thirteen hundred and nine and one-tenth feet, a distance of seven thousand six hundred and eighty-one feet, said curve being fifty feet easterly from and parallel to said center line of the east leg of said wye as now located; thence southerly along a straight line parallel to and fifty feet easterly from the center line of the tail track of said wye, a distance of two hundred forty-one and four-tenths feet; thence at right angles westerly, a distance of one hundred feet; thence at right angles northerly, in a straight line parallel to and fifty feet westerly from the center of the tail track of said wye, a distance of two hundred forty-one and four-tenths feet; thence northerly deflecting to the left along a curve having a radius of thirteen hundred and nine and one-tenths feet; a distance of seventy-six and eight tenths feet, said curve being parallel to and fifty feet westerly from the center line of the west leg of said wye; thence northwesterly deflecting to the left along a curve having a radius of five hundred twenty-three and seven-tenths feet a distance of four hundred and thirteen feet, said curve being fifty feet westerly from and parallel to the center line of the west leg of said wye; thence westerly in a straight line parallel to and two hundred feet southerly from the

Bound Railway Company, a distance of two thousand one hundred and twenty four feet to the north and south center line of said section eleven.

All of that portion of the southeast quarter of the southeast quarter of section two, township seventeen north, range nineteen E. W. M. lying south of the Cascade Canal, comprising about 10 acres.

All of that portion of the northwest quarter of the northeast quarter of section eleven in township seventeen north, range nineteen E. W. M. bounded on the north by Fourth Avenue of the town of Kittitas; on the east by King Street of the town of Kittitas on the south by the right of way of the Chicago Milwaukee & Puget Sound Railway Company and on the west by the section line of said section, comprising 18.96 acres.

All of that portion of the southwest quarter of section eight township eighteen north, range eighteen lying south of the canal of the Cascade Canal Company, comprising about ten acres;

All of that portion of the southwest quarter of the southeast quarter of section two, township seventeen north, range nineteen E. W. M. lying east of the west line of King Street of the town of Kittitas extended due north to the junction with the right of way of the Cascade canal and lying between the Cascade canal on the north and the County road on the south.

All of that portion of the southeast quarter of section twenty-six township seventeen, north, range nineteen E. W. M. lying east and south of the right of way of the canal of the Ellensburg Water Company.

The southeast quarter of the northwest quarter of section thirteen, township seventeen north, range nineteen E. W. M.

The east half of the northwest quarter; the southwest quarter of the northwest quarter; and the northwest quarter of the southwest quarter; of section four, township seventeen north, range nineteen E. W. M., and all those portions of the northeast quarter of the east quarter and the northwest quarter of the southeast quarter

of section four township seventeen north, range nineteen E.W.M.
lying north of the right of way of the Chicago, Milwaukee &
Puget Sound Railway Company.

All of that portion of the northwest quarter of the southwest
quarter of section ~~twelve~~ five, township seventeen north, range
nineteen E, W, M, bounded by a line commencing at the intersection
of the north boundary line of the right of way of the Ellensburg
Water Company's irrigation canal with the western boundary of said
quarter of quarter section; thence running north on the east
boundary of the county road two hundred ninety-eight and eighty-
eight one-hundredths feet; thence running east five hundred and
forty; thence running south three hundred and forty-nine feet to
a point one hundred and fifty feet north of the right of way of
said irrigation canal; thence running southeasterly on a line
parallel with and one hundred and fifty feet distant from said
north boundary of said irrigation canal a distance of seven hundred
and eighty feet; thence running south one hundred and fifty feet
to the north boundary of said irrigation canal; thence running
westerly on said north boundary of said irrigation canal to the
place of beginning.