

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF YAKIMA

3 2006 JAN 26 PM 1 38

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

No. 77-2-01484-5

MEMORANDUM OPINION AND ORDER
RE: WATER RIGHTS FOR THE
UNITED STATES OF AMERICA
COURT CLAIM NO. 02276

11 THE STATE OF WASHINGTON,)
12 DEPARTMENT OF ECOLOGY,)

U.S. FOREST SERVICE
TOPPENISH NATIONAL
WILDLIFE REFUGE

13 Plaintiff,

vs.

14 JAMES J. ACQUAVELLA, et al.,)

15 Defendants.)

16 **I. INTRODUCTION**

17 The United States of America, through Court Claim No. 02276 asserted rights to use
18 various surface water sources in the Yakima River Basin. The Court entered its Supplemental
19 Report of the Court for those rights on October 5, 2005 (Supplemental Report) concerning the
20 water rights held by the United States on behalf of the U. S. Forest Service (USFS), and
21 Toppenish National Wildlife Refuge. A Notice for Hearing Exceptions to the Supplemental
22 Report was also entered requiring exceptions to be filed by November 9, 2005, and a hearing set
23 for December 8, 2005. Exceptions to the Supplemental Report were filed by Daniel Haller and
24 the United States, while the Department of Ecology (Ecology) sought clarification of certain
25 conclusions reached by the Court.

II. ANALYSIS

a. *Department of Ecology*

Ecology sought clarification of four water rights confirmed in the Supplemental Report.
Ecology also indicated that although the USFS submitted most of the applications for change

1 referenced in the Supplemental Report, the statutorily required fees were not included. Ecology
2 also noted an application for change was not submitted for the right based on Certificate S4-
3 23571C, which the agency indicates was discussed in the Supplemental Report at page 6, line 18.
4 However, the Court finds no reference to that water right on page 6, or anywhere else in the
5 Supplemental Report. Since Ecology's statement is advisory and not a true objection, no further
6 action will be taken. Ecology's requests for clarification will now be considered in the order set
7 forth in the pleadings.

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1. Certificate No. S4-26726C

The Court ruled on page 5, lines 2.5 to 9 of the Supplemental Report that the water right would not be modified and Ecology questioned whether this related to their request to delete the words "in even years" from the period of use. The Court has reviewed the Supplemental Report and the water right being confirmed based on S4-26726C does not have any language restricting water use to even years. The Court believes Ecology misread the Supplemental Report. The water right being confirmed on page 5, lines 10 to 20.5, based on Certificate No. S4-26733C did incorrectly identify that water could only be used in even years and in the Supplemental Report on page 5 at line 11 to 11.5 the Court deleted the words "in even years".

2. Water Right Claim No. 133924, Tieton Cattle Co.

The Court is unclear as to the clarification Ecology seeks. The Court ruled that since the United States amended its court claim to assert a right based on Water Right Claim No. 133924, there was no need to substitute parties and a right would be confirmed in the name of the United States. Ecology seems to suggest the need for a late court claim, when none is needed.

3. Water Right Claim No. 056651, Normandy Cabin

This request for clarification is also unclear. Ecology seems to suggest the claim form and the existing use at Normandy Cabin do not match and show that the place of use has been moved from Section 23, T. 16 N., R. 12 E.W.M. to Section 14, T. 16 N., R. 12 E.W.M.. However, the place of use and point of diversion described on WRC No. 056651 are in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14 and according to the evidence presented by the United States the current point of diversion and place of use are also in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14. During the exception hearing, the Court asked Ecology to explain why they have concluded that there has been a change from Section 23. Ecology was unable to do so and asked for the opportunity to provide that information by December 23. Ecology filed a post-hearing memorandum on this

1 matter. The memorandum suggests Ecology understood the United States to be relying on Water
2 Right Claim No. 056651 to support confirmation of a water right for cabins within Bumping
3 Lake Summer Homes Tracts (said cabins being within Section 23) and these cabins may have
4 been moved from Section 14. In its amended claim the United States did assert a right for
5 Bumping Lake Summer Home Tracts. The Court has reviewed the record and there is some
6 mention of cabins within the Bumping Lake Summer Homes Tracts as part of the April 14
7 exception hearing, RP pages 100 and 101. However, the evidence subsequently presented at the
8 exception hearing only addressed water use at Normandy Cabin, which is in Section 14, leading
9 the Court to confirm a water right for that single cabin. The Court did not confirm a water right
10 for Bumping Lake Summer Homes Tracts in its Supplemental Report, and none of the
11 exceptions by the United States were for Bumping Lake Summer Homes. The only water right
12 confirmed by the Court based on Water Right Claim No. 056651 is for Normandy Cabin in
13 Section 14. Therefore, the Court denies Ecology's request for clarification.

12 4. Surface Water Certificate No. 8262, Bootjack Cabins

13 Ecology asked the Court to clarify the basis for the ruling the United States did not have
14 to comply with the change procedures in RCW 90.03.380 when the point of diversion being used
15 is not the location authorized by the certificate. The evidence presented by Richard K. Stiles and
16 the USFS, and not challenged by Ecology, was the source of water used and point of diversion
17 have not changed since the water system was constructed over 50 years ago. The diversion is in
18 an area that has not been surveyed, making it difficult to describe a precise location. RCW
19 90.03.380 provides a process to seek approval to change the location of a point of diversion.
20 However, it does not address correcting errors made in describing the location of a point of
21 diversion on the original certificate. The Court ruled at the exception hearing it has equitable
22 authority in an adjudication to correct obvious errors on water right certificates, particularly
23 when no statutory process is otherwise available. The Court will exercise this authority
24 sparingly when a similar fact pattern exists and only when it is clear an error was made in
25 describing the location and no physical change has occurred since the diversion was constructed.

23 b. *Exceptions of Daniel Haller*

24 Mr. Haller and his family own a cabin on USFS land near Bumping Lake. The cabin
25 obtains domestic water from an unnamed creek. Evidence was presented at the supplemental
hearing in support of a water right for the cabin owned by the Hallers. However, the Court

1 inadvertently neglected to address this claim in the Supplemental Report. Mr. Haller's exception
2 provided additional evidence of beneficial use and establishment of a right. Therefore, the Court
3 grants the exception and confirms a water right to the USFS with a priority date of July 21, 1944,
4 for the diversion of 0.01 cubic foot per second, 0.5 acre-foot per year from an unnamed creek for
5 continuous single domestic supply on Lot 13 of Bumping Lake Summer Homes, in Section 22,
6 T. 26 N., R. 12 E.W.M. The point of diversion is 800 feet south and 700 feet west of the center
of unsurveyed Section 22, in the NE¼SW¼ of Section 22, T. 26 N., R. 12 E.W.M.

7 c. *United States*

8 1. SWC No. 1808

9 The USFS asked that the water right be confirmed to the United States since the point of
10 diversion is on USFS land. No objections were filed. The Court confirms the right described in
the initial Report of the Court beginning on page 16, line 24, to the USFS.

11 2. SWC No. 0808

12 This certificate authorized water use for power generation. At the supplemental hearing
13 the United States presented evidence water was used for domestic supply and it had filed an
14 application to change the purpose of use from power generation to domestic supply. The Court
15 required evidence that beneficial use of water for power generation continued until the domestic
16 supply use commenced. In response, the United States filed documents to show water was used
17 for power generation at the time the certificate issued in 1931. The USFS exception also states
18 two special use permits were issued for summer homes at this site dating to 1976 which shows
19 the cabins existed at that time. The Court agrees issuance of the certificate in 1931 proves water
20 was beneficially used for power generation at that time. Chronologically, the record then shows
21 water use 45 years later with no use information for the intervening years. The Court denied the
22 exception at the December 8 hearing. However, in its post-hearing brief, the United States asked
the Court to reconsider its ruling asserting the Court apparently found the water right had either
been abandoned or had relinquished pursuant to RCW 90.14. The United States further argued
there was no evidence of non-use.

23 The Court made no finding of relinquishment or abandonment in its Supplemental Report
24 as there was no evidence of non-use; however, there was no evidence of beneficial use for power
25 generation after 1931. To confirm a right, evidence of **continued beneficial use is required**.

This issue was before the State Supreme Court in *Department of Ecology v. Acquavella*, 131

1 Wn.2d 746, 935 P.2nd 595 (1997) which found “Beneficial use is the basis, the measure and the
2 limit of the right to the use of water.” *Id.* at 755. Although the Court in its Supplemental Report
3 did not suggest the potential for relinquishment, the Supreme Court has directed the Court to
4 consider that potential when confirming rights in this adjudication:

5 When, in a general water adjudication, a court determines a water claimant’s water right
6 based upon evidence of historic beneficial use, the question will often arise whether the
7 claimant has continued to use the same quantity of water up to the present day. If a
8 claimant used a large quantity of water in the first half of the century, but currently uses
9 far less, the court must determine whether the claimant has abandoned or relinquished all
10 or part of the water right. *Id.* at 757.

11 Additionally, this Court discussed the need for evidence of continued beneficial use in its
12 *Memorandum Opinion Re: Ahtanum Creek Threshold Legal Issues* (Doc #17284), dated October
13 8, 2003 at pages 5 and 6. The United States asserts a right to use water for a different purpose
14 than was authorized in Certificate No. 0808 and concedes the need to comply with RCW
15 90.03.380 to change the purpose of use under the water right. However, without evidence of
16 beneficial use between the time the certificate issued and the time when use of water for
17 domestic supply began, the Court cannot confirm a right. The Court again denies the exception.

18 3. SWC No. 0789

19 The Court was prepared to confirm a water right in the Supplemental Report, however,
20 the United States had to provide the lot numbers for the cabins served under the water right
21 which was accomplished as part of the exceptions filed on November 9, 2005. Thus, the Court
22 confirms a right with a July 22, 1933, date of priority for the diversion of 0.05 cfs, 3 acre-feet per
23 year group domestic supply for six cabins on Lots 6 – 11 of Rocky Run Summer Homes in the
24 NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26, T. 22 N., R. 11 E.W.M. The diversion point is located approximately
25 200 feet south and 200 feet east of the north quarter corner of Section 26, being within the
NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 26. The Court notes the place of use was incorrectly described in
the Supplemental Report as being in Section 36, rather than in Section 26. The language in the
Supplemental Report also suggests a right is being asserted to serve only one cabin; however,
that is not the case as six cabins, one on each lot, have been and continue to be served.

4. SWC No. 6628

In the Supplemental Report, the Court found it could confirm a water right for domestic
supply based on this certificate if a point of diversion location was provided. The Court also

1 noted the certificate authorized use of water for both domestic supply and power generation and
2 to confirm a power generation right the United States must prove that use continued. The USFS
3 was unable to provide evidence related to power generation use and no right will be confirmed.

4 The United States provided Mr. Tom Robison's declaration which showed latitude and
5 longitude coordinates for the point of diversion acquired from field GPS surveys conducted on
6 May 10 - 11, 2005. Attached to Mr. Robison's declaration is a map on which the coordinates are
7 spotted and identified as "Bumping Lake Marina End of Line at Lake." This indicates a point
8 where the pipeline from the water source ends at the marina. The correct point of diversion
9 location is the point where water is diverted from the source, which here is an unnamed creek
10 tributary to Bumping Lake. Mr. Robison also marked a location on the attachment with the
11 coordinates of latitude 46°61'59" and longitude of 121°18'37" and identified it as "Bumping
12 Lake Marina POD." The Court believes that is the correct location of the point of diversion.

13 The parties were contacted to determine if there were objections to the Court converting
14 latitude and longitude coordinates to a location on a map with section numbers. Ecology
15 volunteered to make that conversion and provided it in the Declaration of Michael G. Thomas
16 filed January 12, 2005. The declaration stated the point of diversion is located in the SE¼NE¼
17 of Section 22, T. 16 N., R. 12 E.W.M. The map closely matches the exhibit provided by Mr.
18 Robison. However, the point mapped by Ecology is the point identified as ". . . End of Line at
19 Lake", rather than the point where the line takes water from the source. Additionally, the map
20 raises a question. The place of use on SWC No. 6628 is Bumping Lake Boat Landing in the
21 SE¼ of Section 22, T. 16 N., R. 12 E.W.M. The map shows Bumping Lake Boat Landing lying
22 east of Bumping Lake, while the point of diversion and the ". . . End of Line at Lake" is
23 described as being west of the lake and serving an area called Bumping Lake Marina in the NE¼
24 of Section 22. The certificate also states the point of diversion is in the SE¼ of Section 22, while
25 the information provided by the USFS, as confirmed by Ecology's declaration, locates both the
diversion and place of use in the NE¼ of Section 22. A water right cannot be confirmed in light
of these discrepancies.

The Court has previously recognized that when describing both the place of use and point
of diversion in an unsurveyed area, it is possible for errors to occur. In light of that, the United
States will be provided a final opportunity to submit evidence to describe the location where

1 water is diverted and used. The Court also asks Ecology to review its administrative record for
2 this certificate to see if there is anything that might be of assistance.

3 5. SWC No. 0748

4 SWC No. 0748 authorized use of water from Morse Creek for mining. The United States
5 acknowledged at the Supplemental Hearing the need to file an application to change the purpose
6 of use from mining to domestic supply. However, the Court found it could not confirm a right as
7 no evidence was presented to show water had been used for mining or that beneficial use of
8 water for that purpose had continued. Additionally, the certificate did not describe the point of
9 diversion from Morse Creek, so the Court asked the United States to provide that information.
10 Mr. Robison's declaration stated the diversion is in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of unsurveyed Section 6,
11 T. 16 N., R. 11 E.W.M. The Court seeks a more exact location for the point of diversion, such as
12 number of feet south and west of the northeast corner of the section, which is how diversions are
13 typically described. The United States agreed to review an aerial photograph of the area and see
14 if they could provide the Court with a point of diversion. Lacking the ability to do that, a site
15 visit would be performed as soon as weather permits and a GPS location obtained. Mr.
16 Robison's declaration also provided information about use of water for mining. Attached to the
17 declaration is a copy of a letter from the Supervisor of Hydraulics concerning construction of the
18 reservoir used for mining. Mr. Robison's declaration states the USFS records show the existence
19 of water lines from the mine tunnel to the clubhouse building and indicates recreational use by
20 the 1940's.

21 On December 23, 2005 and January 9, 2006, the United States provided additional
22 information as requested by the Court. The point of diversion is actually located approximately
23 1600 feet north and 420 feet west of the southeast corner of Section 31, being within the
24 NE $\frac{1}{4}$ SE $\frac{1}{4}$ of unsurveyed Section 31, T. 17 N., R. 11 E.W.M.(not in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6
25 as previously indicated). The United States also provided copies of document from the special
use permit files confirming beneficial use of water. The Court finds there is sufficient evidence
to conclude a right was developed for using water from Morse Creek for mining and will confirm
a right for that purpose. Although the certificate authorized a diversion of 5.0 cubic feet per
second for mining, there has been no evidence to demonstrate the quantity of water used for
domestic supply. The Court will confirm a quantity consistent with recreational domestic
supply, with the understanding the United States will seek Ecology's approval under RCW

1 90.03.380 to change the purpose of use from mining to domestic supply. A right is hereby
2 confirmed with a June 16, 1932, date of priority for the diversion of 0.01 cubic foot per second,
3 0.5 acre-foot per year for mining within the NE¼SE¼ of Section 31, T. 17 N., R. 11 E.W.M.
4 The point of diversion is located approximately 1600 feet north and 420 feet west of the
5 southeast corner of Section 31, being within the NE¼SE¼ of unsurveyed Section 31, T. 17 N.,
6 R. 11 E.W.M. The United States should provide evidence if it believes the quantity proposed is
inconsistent with the beneficial use.

7 6. SWC No. 2067

8 The Court was prepared to confirm a right based on this certificate if the United States
9 provided the point of diversion location and the annual quantity of water used. Mr. Robison's
10 declaration had an attached map that purports to show the point of diversion in the SE¼SW¼ of
11 Section 26, T. 17 N., R. 13 E.W.M. However, the Court believes the location is in error. A
12 careful review of that map shows the scale which would place the identified point in the
13 SE¼SW¼ of Section 26 as 1 inch = 800 feet. However, given the size of the lots and the written
14 dimensions, the scale actually is 1 inch = 100 feet. The Court asks the USFS to review its
15 special use permits and any other available information and provide an accurate point of
16 diversion. Further, the Court requests Ecology to review its administrative record for the
17 certificate to determine whether its records would be of assistance. The Court also does not
18 concur with the annual quantity evidence submitted by Mr. Robison, which presumed a
19 continuous diversion of the instantaneous quantity of 0.005 cfs 24 hours per day for the entire
20 year, resulting in an annual quantity of 3.6 acre-feet per year being used. No evidence supports a
21 conclusion that a single recreation cabin on forest service land is occupied and using water every
22 single day of the year. Based on presentations made during the hearings related to regulation of
water rights with post-1905 priority dates, 3.6 acre-feet per year would be sufficient for 7 or 8
recreational cabins (about 0.5 acre-foot per cabin). If an accurate point of diversion is provided,
the Court will confirm a right to divert 0.005 cfs, 0.5 acre-foot per year.

23 7. Water Right Claim No. 009188

24 In its written exceptions the United States stated it had no additional information to
25 support this claim. However, during the exception hearing the United States requested that the
record be left open to allow additional evidence to be submitted. That evidence came in as part
of the January 9 submission. The Ferris summer home, located on Lot 4 of the Teanaway

1 Summer Homes, is at the same location as a Civilian Conservation Corps camp that operated in
2 the early 1930's using the same water system. The evidence suggests water would have been
3 used at that time. Ideally, USFS would have asserted a position on whether the water right
4 confirmed in the initial Report at page 17, lines 8 through 16 includes the Ferris cabin on Lot 4.
5 The Court confirmed a right for group domestic supply for Teanaway Summer Home Tracts;
6 however, the United States' evidence did not show how many lots were being served or if Lot 4
7 was one of them. The Court reviewed the evidence submitted to support the already confirmed
8 right and finds that when Certificate No. 8300 was issued five cabins were being served. With
9 the evidence showing the cabin on Lot 4 was in place and receiving water prior to certificate
10 issuance, the Court concludes the cabin on Lot 4 now owned by the Ferris family is covered by
11 that certificate and the water right previously confirmed. There is still insufficient evidence to
12 show beneficial use of water at that cabin prior to June 6, 1917, which would be necessary for
13 Water Right Claim No. 09188 to support a right separate from that already confirmed.

12 8. Water Right Claim No. 036790

13 The Court denied a water right under this claim for lack of evidence to show a right was
14 perfected under the Prior Appropriation Doctrine through beneficial use prior to June 6, 1917.
15 Additionally, the water right claim describes a use of water only on Lot 7 of North Fork
16 Teanaway Recreation Residence Tract (one cabin), while the United States asserts a right for
17 Lots 6, 7, 8 and 9 (four cabins). The Robison Declaration and the exceptions assert special use
18 permits were in effect for these lots since 1948 and the water system serves all four cabins.
19 However, this does not establish a water right for the lots. As previously stated in the
20 Supplemental Report beginning at page 10, line 24, in order to confirm a water right, evidence
21 must show first water use by June 6, 1917. That evidence is still lacking. Additionally, Water
22 Right Claim No. 036790 can only protect a water right on Lot 7 of the North Fork Teanaway
23 Recreation Residence Tract because that is the place of use on the claim form. The Court Denies
24 a right based on this claim.

22 9. Water Right Claim No. 149338

23 The USFS was unable to provide additional beneficial evidence so no right for this claim
24 can be confirmed.

1 10. Water Right Claim No. 056651

2 The United States simply acknowledges the Court confirmed a water right for domestic
3 supply and indicates the Cyr family will be filing an application for change with Ecology to add
4 a purpose of use to the water right confirmed by the Court.

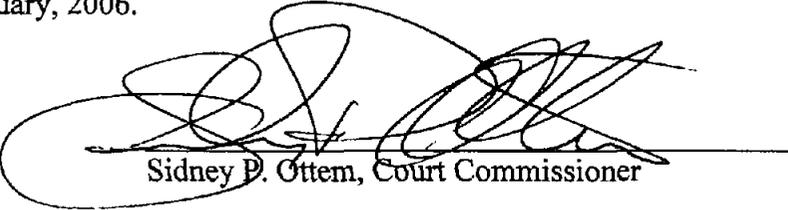
5 11. Water Right Claim No. 133924

6 In the Supplemental Report, the Court found a water right could be confirmed upon
7 submittal of a point of diversion location. That information was provided, so a right is confirmed
8 to the United States with a June 30, 1912, date of priority for the diversion from June 1 to
9 October 31 of 0.03 cfs, 1 acre-foot per year from an unnamed spring for stock watering and
10 domestic supply in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 4, T. 13 N., R. 14 E.W.M. The point of diversion
11 is located 600 feet south and 350 feet east of the northwest corner of Section 4, in the
12 NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 4, T. 13 N., R. 14 E.W.M.

13 **III. CONCLUSION**

14 This Opinion resolves the exceptions/requests for clarification as to the Supplemental
15 Report for the United States Forest Service and Toppenish National Wildlife Refuge. There are
16 a few claims for which rights could not be confirmed and the Court has identified additional
17 information required in order to confirm a water right. The parties shall have until April 3, 2006,
18 to provide that information. At that time, a proposed Conditional Final Order (along with a
19 notice of entry) will be issued incorporating any changes based on information provided.

20 Dated this 26th day of January, 2006.

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Sidney P. Ottem, Court Commissioner