

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

2005 APR 17 AM 10 05

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

No. 77-2-01484-5

EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Plaintiff,)

SECOND MEMORANDUM OPINION AND
ORDER RE: OBJECTIONS TO PROPOSED
CONDITIONAL FINAL ORDER

vs.)

SUBBASIN 9
(WILSON-NANEUM)

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

I. INTRODUCTION

Objections were filed regarding the Court's June 15, 2005 *Memorandum Opinion and Order Re: Objections To Proposed Conditional Final Order, Subbasin No. 9 (Wilson-Naneum) (Opinion)* and entry of the Proposed Conditional Final Order (CFO). A hearing was held on September 8, 2005 to consider those objections. In addition, certain Subbasin No. 9 claimants asked that a CFO not be entered while they pursued administrative actions with the goal of including those decisions in the CFO. Those decisions have now been issued. The Court, having been fully advised through written objections and oral argument, makes the following rulings, as set forth below in alphabetical order.

Victor and Darlene Boykiw, Court Claim No. 00185

The Boykiws filed an objection to entry of the Subbasin No. 9 CFO and appeared at the September 8, 2005 hearing. The Court entered a decision regarding the Boykiw's objections by way of Letter Order dated September 19, 2005 confirming a right for six acres and denying all other objections. Michael and Kelly Moeur were accorded an opportunity to file objections to that proposed right by October 7, 2005. No objections were filed and this matter is now final consistent with the award set out on page 4 of the Letter Order (Doc No. 19093) and summarized as follows: With a May 25, 1884, date of priority, a right to divert 0.12 cfs, 30 acre-feet per year for the irrigation of six acres in the southerly 900 feet of the westerly 330 feet of the SE¼NE¼ of Section 25, T. 17 N., R. 18 E.W.M. The point of

1 diversion from Spring Creek is located 300 feet north and 2460 feet west from the southeast corner of
2 Section 24, within the SW¼SE¼ of Section 24, T. 17 N., R. 18 E.W.M.

3 **Kayser Ranch, Claim No. 00991**

4 Kayser Ranch (Kayser) filed three exceptions to the *Opinion*, including a request that the Court
5 reconsider its decision regarding the water right once held by Olding and Galvin and allegedly
6 transferred to Adams. The Court decided a Motion For Reconsideration by Kayser on this issue in the
7 *Opinion* and hereby DENIES this second request.

8 Kayser also objects to the instantaneous quantity of its water right being cut in half on July 1 of
9 each year when other Subbasin 9 users do not have their rights similarly reduced. The rights at issue
10 were analyzed by Kittitas County Superior Court in *Ferguson* and that court reduced the quantity of all
11 water rights before it by half after July 1 of each year. Other parties in Subbasin 9 have water rights not
12 considered in *Ferguson* and were not reduced in the same manner. This Court is generally bound by the
13 decisions of prior courts adjudicating water rights. See RCW 90.03.170 The rights set forth in the prior
14 decrees are prima facie evidence of rights to the amount of water and priorities established therein as
15 against a person not a party to said decree. *Id.* See also this Court's *Memorandum Opinion Re: Res*
16 *Judicata* (June 21, 1985). Therefore, the Court DENIES this objection.

17 Kayser also objected to the Court not confirming water rights for lands in the NW¼ and SE¼ of
18 Section 3, T. 18 N., R. 19 E.W.M. The evidence from prior evidentiary hearings led to a conclusion that
19 water rights were established for lands that include the NW¼ of Section 3 and that Kayser had used
20 portions of the water it asserted had been transferred on land in both the NW¼ and SE¼ of Section 3.
21 The Court was precluded from confirming rights because no water right claim had been filed pursuant to
22 RCW 90.14 which described these lands. Kayser filed a request with Ecology pursuant to RCW
23 90.14.065 to amend the place of water use on Water Right Claim No. 118062 to include the NW¼, the
24 SW¼SW¼, the N½SE¼ and Government Lots 1, 2, 3 and 4 of Section 3, T. 18 N., R. 19 E.W.M. On
25 April 3, 2006, Ecology notified the Court it had approved the amendment.

Evidence was admitted at earlier hearings showing the N½NW¼ and SE¼NW¼ of Section 3,
T. 18 N., R. 19 E.W.M., along with the SE¼SW¼, SW¼SE¼ and the N½SE¼ of Section 34, T. 19 N.,
R. 19 E.W.M. were owned by Peter Kuchen when water rights were established. Those rights were
addressed in *Thomas v. Roberts*, where the court found a right existed for 160 inches of water from
Naneum Creek for the irrigation of 160 acres. As a result of the NW¼ of Section 3 not being described
on any water right claim, the Court was unable to confirm a right for this portion of the Kayser property.
That has been remedied. The court previously confirmed a right to irrigate 125 acres of the 160 acres in

1 Section 34. The Court will now confirm a right for the remaining 35 acres to Kayser Ranch by
2 amending the right described on page 21, lines 23 to 25 of the June 15, 2005 *Opinion* to now confirm a
3 right with a June 30, 1887 priority date a right to divert 3.2 cubic feet per second in May and June, 1.6
4 cubic feet per second July 1 through October 15, 730 acre-feet per year for the irrigation of 160 acres
5 and stock water in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ and that portion of the N $\frac{1}{2}$ SE $\frac{1}{4}$ lying south of Adams
6 Ditch, all in Section 34, T. 19 N., R. 19 E.W.M. and Government Lots 3 and 4 (N $\frac{1}{2}$ NW $\frac{1}{4}$) of Section 3,
7 T. 18 N., R. 19 E.W.M. The authorized points of diversion are into the Adams Ditch, 150 feet north and
8 600 feet east of the west quarter corner of Section 28, being within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28,
9 T. 19 N., R. 19 E.W.M. and into the Keister Ditch, 1050 feet south and 550 feet east of the west quarter
10 corner of Section 28, being within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28, T. 19 N., R. 19 E.W.M.

11 Although Kayser successfully amended its WRC No. 118062 to add the SW $\frac{1}{4}$ SW $\frac{1}{4}$ and the
12 N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 3, T. 18 N., R. 19 E.W.M., the record does not reflect that water rights have been
13 established for this land. The court has already confirmed rights to other Kayser land based on the water
14 rights Kayser's predecessor, Peter Adams, purchased originating from Sliger and Topliff. See June 15,
15 2005 *Opinion* beginning on page 22, line 11 through page 23, line 2. As a result of the Court not
16 confirming rights based on the Olding/Galvin water rights, no water rights can be confirmed for the
17 Kayser land in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ and N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 3.

18 **David and Linda Lundy, Claim No. 15629**

19 The Court resolved the Lundy objection by Letter Order dated December 19, 2005. Thereafter,
20 Mr. Chester Vernon Stokes filed what appears to be an objection to that Order, suggesting Mr. Jenkins'
21 right should not have been modified in order to confirm a right to the Lundys. Many hearings were held
22 in regard to the agreement between the Lundys and the Jenkins that resulted in the right being confirmed
23 as described in the *Letter Order*. Mr. Stokes' objection raises no new issues and is therefore DENIED.
24 The Lundys are awarded a right with a June 30, 1883, date of priority for the diversion of 0.40 cfs in
25 May and June, 0.20 cfs in April and July 1 through October 15, 100 acre-feet per year for the irrigation
of 20 acres and 1 acre-foot per year for stock watering. The authorized point of diversion is located 500
feet north and 500 feet east of the center of Section 5 in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 5, T. 18 N.,
R. 19 E.W.M. The place of use is a portion of the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and W $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 5 described on
page two, lines 7 through 16 of the stipulation that is attached to the Court's Letter Order (Doc#19,208).
The water right awarded to the Jenkins on page 392 of the Supplemental Report of Referee for Subbasin
No. 9 is modified to authorize the diversion of 0.58 cfs in May and June, 0.29 cfs in April and July 1
through October 15, 145 acre-feet per year for the irrigation of 29 acres and 1.5 acre-feet per year for

1 stock watering. The place of use is modified to be the S½NE¼SE¼ and SE¼SE¼, of Section 5, T. 18
2 N., R. 19 E.W.M., except the westerly 400 feet thereof. The Jenkins water right is otherwise unchanged.

3 **Chester Vernon and Roma B. Stokes, Claims No. 02311, 02312, 02313 and 02314**

4 Mr. Stokes filed an objection to the place of use and number of acres authorized to be irrigated
5 for the right confirmed under Court Claim No. 02314 as described on page 422 of the Supplemental
6 Report for Subbasin No. 9. Objections were filed to the place of use as described in that report resulting
7 in the Court modifying the place of use description in its *Opinion*. This matter was further considered at
8 the September 2005 hearing wherein Mr. Stokes submitted a copy of an aerial photo in support of his
9 objection. The Court reviewed that aerial photo and other evidence in the record. The Court agrees
10 with Mr. Stokes that the place of use description does not capture all of the land he irrigates within the
11 area described in Court Claim No. 02314. The irrigated fields are not contiguous, resulting in the need
12 to describe a much larger area than is actually irrigated. The Court will modify the place of use. The
13 Court GRANTS Mr. Stokes request and modifies the place of use described on page 422 of the
14 Supplemental Report and on page 26, lines 1 through 3 of the June 15, 2005 *Opinion* to now be the
15 SW¼SW¼ and E½SW¼ lying north of the KRD canal in Section 5, T. 18 N., R. 19 E.W.M.

16 Mr. Stokes also requests an increase in the number of acres authorized to be irrigated from 40 to
17 56. He originally claimed a right to irrigate 56 acres; however, the Referee found 40 acres were
18 irrigated. Mr. Stokes did not initially take exception to this finding and the Supplemental Report reflects
19 the same number. In response to an exception by Ecology concerning the place of use and the Court's
20 response to that exception, Mr. Stokes then requested the increase in the number of acres to 56 as
21 initially claimed. However, the only evidence offered in support of this request is another copy of the
22 aerial photo that was reviewed by the Referee prior to his conclusion that 40 acres were irrigated. The
23 photo is of poor quality and does not provide a basis for increasing the acres. Therefore, the Court
24 DENIES the portion of the objection related to number of acres.

25 **Robert and Lorene Swedberg, Claim No. 01861**

On October 31, 2005, Mr. Swedberg filed a late exception requesting the Court consider
additional documentary evidence attached to the late exception. The document is a June, 1931
agreement between several people whose names the Court recognizes as being landowners along
Naneum Creek. The agreement states the named parties own the number of acres of irrigable and
tillable land set opposite their respective names and the lands are riparian to Naneum Creek. The
agreement proposed to hire an attorney (Stephen E. Chaffee) to bring a test suit to determine whether the
waters of Naneum Creek could be diverted at a point above their lands and delivered to non-riparian

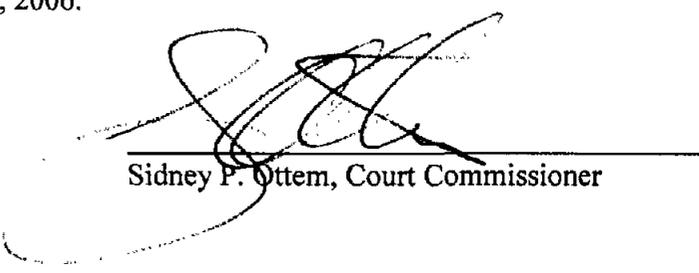
1 lands. Mr. Swedberg's predecessor, Minnie Bregg, is identified as having 100 acres. The Court
2 concludes this document was presented in an effort to modify the water right confirmed to Mr.
3 Swedberg from 75 acres to 100 acres. The Court awarded Mr. Swedberg the right to irrigate 75 acres
4 based on information in the *Thomas v. Roberts* Findings of Fact and Decree, wherein that court found
5 the Breggs had a right to irrigate 75 acres. That decree was entered in 1925, only six years prior to the
6 agreement. Mr. Swedberg presented nothing to explain the difference between the 75 acres
7 acknowledged in *Roberts* and the 100 acres described in the agreement. The Court does note the
8 language in the agreement identifies the acres as irrigable and tillable, not irrigated and tilled. This
9 suggests the land owned was greater than the land irrigated. The Court finds there to be insufficient
10 evidence to modify the water right awarded to Mr. Swedberg and DENIES the exception.

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II. CONCLUSION

This Opinion resolves objections to the Proposed Conditional Final Order for Subbasin No. 9. A signed Conditional Final Order for Subbasin No. 9 is attached.

Dated this 17th day of April, 2006.



Sidney P. Ottem, Court Commissioner