

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,)

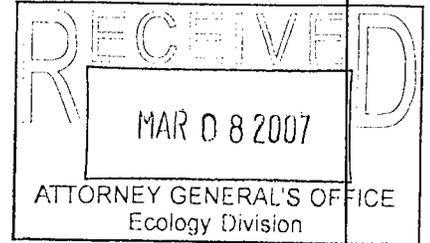
9 STATE OF WASHINGTON,)
10 DEPARTMENT OF ECOLOGY,)
11 Plaintiff,)

12 vs.)

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

No. 77-2-01484-5

MEMORANDUM OPINION AND ORDER
RE: EXCEPTIONS TO REPORT OF
REFEREE SUBBASIN 25
(TOPPENISH)



15 **I. INTRODUCTION**

16 This Court held a hearing October 13 -15, 2004 and January 11, 2007 to consider objections
17 to the Report of Referee Re: Subbasin 25 dated September 30, 2003 (Report). Exceptions/requests
18 for clarification were timely filed by the Yakama Nation, United States, Colleen Kent (Claim No.
19 1040), James and Susan Boisselle (Claim No. 00420), Melvin E. and Marilene Foster (Claim Nos.
20 01114, 14101, 14099, 14102 and 1698), Andrea Hoptowit (Claim No. 17668), Lester Hoptowit
21 (Claim No. 17660), Buddy Hoptowit (Claim No. 17,669), Gary and Karen Weisz (Claim No. 0837),
22 Virgil and Nadeen Boyle (Claim No. 17649), Stanley and Sharon Johnson (Claim No. 01431),
Willows Gun Club (Claim No. 2023), Tule Gun Club (Claim No. 1519), Mary Hale (Claim No.
23 2322), Mary Louise Shattuck (Claim No. 0464), Steve and Heidi Van Boven (Claim No. 1648),
24 Gregory and Barbara Bailey (Claim No. 01220), Troy and Kathleen Curfman (Claim No. 0842),
25 Curfmans/Schnell Farms, Inc. (Claim No. 01648) and the Department of Ecology (Ecology). The
Court, being fully advised rules as follows in regard to Subbasin 25 exceptions.

In addition, James C. and Gay T. Pigott and L. Patick Hughes and Mary Ellen Hughes filed
a Motion To File Late Claim on January 10, 2007. The Court was advised at the January 11, 2007
hearing that the Pigott/Hughes late claim may or may not go forward depending on availability of
evidence. Those entities apparently utilize water deriving from rights confirmed for delivery
through the Wapato Irrigation Project (WIP), which are a matter of record as set forth in the Order

1 Granting Summary Judgment (YRID), Appendix 4.3.5. dated October 14, 1993. No further action
2 has been taken in regard to this motion since the January 10, 2007 filing. To expedite the conclusion
3 of the adjudication, the Court will issue its Opinion and should the Pigott/Hughes group choose to
4 proceed, they may file an objection to the Court entering the Proposed CFO for Subbasin No. 25.

5 **II. ANALYSIS**

6 **a. Gregory and Barbara Bailey, Court Claim No. 01220**

7 Although Richard and Beverly Scott are joined to this claim, they made no appearance in
8 this proceeding. Any right shall be awarded to the Baileys only. The Referee declined to confirm a
9 right for the Bailey's land in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, T. 10 N., R. 17 E.W.M.
10 The Referee did recommend a *Walton* right for 76 acres in the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 17, T. 10 N., R.
11 17 E.W.M. As for the Section 8 lands, the Referee could not identify how much land was irrigated
12 by the allottee or non-Indian successor. Further, there was indication the water utilized by the
13 Baileys may derive from an arrangement with WIP, see the Report at page 139, line 9. However, as
14 the Referee aptly described in the Report at page 12, water users within the Toppenish-Simcoe Unit
15 of the WIP must generally follow the requirements for establishing a water right set forth in *Walton*.
16 See Report of the Court Concerning the Water Rights of the Yakima Reservation Irrigation District,
17 dated October 8, 1996. Therefore, the Referee was correct in requiring proof of beneficial use by
18 the allottee or within a reasonable time after leaving Indian ownership.

19 The Baileys primarily rely on documents to establish that use of water. They referred to DE
20 – 129 which establishes lease of the property between the White Swan Investment Company and
21 Komuro and Sackamaoto and connected their property to the original allotment number 698 for
22 Jane Meacham. DE – 155 is a Notice of Appropriation and Affidavit filed by the White Swan Land
23 Company dated August 23, 1910. That document indicates water is appropriated for the purpose of
24 irrigating and shows the irrigation for the previous 20 years. It also indicates the water was used on
25 the following lands: SE $\frac{1}{4}$ NW $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8 and “being the Jane Meachem Yakima
Indian Allotment No. 698 situated in the County of Yakima, State of Washington.” The Baileys
point out the land description is not consistent with Allotment No. 698 to Jane Meacham and is a
scrivener's error – essentially the properties were in the southwest and southeast quarters. The
Court agrees and also finds these documents establish water use on the property from about 1890 –
1910 and demonstrate an intent to continue use of the water thereafter. The testimony of Jack
Braden connects the irrigation of the property from that date to the present.

1 The Court confirms to the Baileys a right with a June 9, 1855 date of priority for the
2 irrigation of 80 acres in the SW¹/₄SE¹/₄ and SE¹/₄SW¹/₄ of Section 8, T. 10 N., R. 17 E.W.M.
3 Consistent with quantities used by this Court and the Referee, the Baileys shall be authorized to
4 divert from Spring Creek, 2.24 cubic feet per second and 480 acre-feet per year. The point of
5 diversion is located about 50 feet north and 20 feet east of the south quarter corner of Section 8.
6 The irrigation season shall be April 1 through October 31.

6 **b. James and Susan Boisselle (Claim No. 00420)**

7 Mr. Boisselle appeared at the October 14, 2004 hearing and presented evidence in support of
8 the exception. The Boisselles were joined to Claim No. 00420 on February 19, 2004. They own
9 land in the W¹/₂SW¹/₄ of Section 27, T. 11 N., R. 17 E.W.M. The Referee would not recommend a
10 right because claimants failed to supply evidence water was put to beneficial use by the Indian
11 owner or within a reasonable time after it left Indian ownership.

11 The property in question was originally allotted to Simon Goudy as Allotment 1489. Mr.
12 Goudy supplied sworn testimony regarding use of water on April 10, 1924. He testified to use of
13 water from Piute Ditch to irrigate approximately 30 acres in the SW¹/₄SW¹/₄ and the "North forth"
14 was irrigated with water from Medicine Valley although that practice was discontinued somewhere
15 around 1905. See DE-145. The Boisselles provided a realty document (DE-143) dated August 25,
16 1961, whereby the SW¹/₄SW¹/₄ of Section 27 left trust status and a patent issued to Alphonse Goudy,
17 Jr., and Baptistine Goudy. The testimony of Simon Goudy and the map set forth in DE-144
18 convince the Court that Mr. Goudy owned the entire W¹/₂SW¹/₄. That property was then sold to
19 Reuben Winters and eventually was purchased by the Boisselles. Mr. Winter's son, Darrell
20 Winters, submitted a document indicating the land had been irrigated from some period prior to
21 1961 when the Winters acquired it. Mr. Boisselle also testified that he recalled the property being
22 irrigated back into the early 1960s when his father farmed nearby property.

21 There is enough evidence to convince the Court that the property owned by the Boisselles
22 was originally allotted to Mr. Goudy who irrigated approximately 30-70 acres. Mr. Boisselle's
23 testimony regarding water use and the statement of Mr. Winters further convinces the Court water
24 was put to beneficial use within a reasonable time after leaving Indian ownership. Therefore, a
25 right is confirmed to irrigate 70 acres in the W¹/₂SW¹/₄ of Section 27, T. 11 N., R. 17 E.W.M. with a
priority date of June 9, 1855. The point of diversion is from Simcoe Creek in the center of
NE¹/₄NE¹/₄ of Section 33, T. 11 N., R. 17 E.W.M. Pursuant to the water duty section set forth on

1 page 12 of the Referee's Report, the Court confirms a quantity in the amount of 2.03 cubic feet per
2 second, 431 acre-feet per year. The season of use shall be April 1 through October 15.

3 c. **Virgil & Nadeen Boyle, Claim Nos. 17649, 02022**

4 The Boyles filed an exception in regard to Claim No. 02022 and also filed a late claim –
5 17649. Mrs. Boyle provided evidence at the October 14, 2004 hearing.

6 Claim No. 02022 concerns lands served by WIP. While acknowledging the property carried
7 rights established pursuant to contracts with WIP, the Referee was unable to specifically identify
8 any individual rights, as no Application of Water Right had been submitted nor had evidence of
9 non-foreclosure been presented. Mrs. Boyle testified there has been no foreclosure for non-payment
10 and they have supplied Applications for Water Rights for four of the five parcels, along with other
11 evidence. DE -147 and 148. Application No. 918 is for 40 acres of "A" land in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and
12 31 acres of "B" land in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26, T. 11 N., R. 17 E.W.M. Application No. 919
13 is for 37.5 acres of "A" lands in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ and 32.5 acres of "B" lands in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of
14 Section 26, T. 11 N., R. 17 E.W.M. Application No. 930 is 40 acres of "A" lands in the SE $\frac{1}{4}$ SE $\frac{1}{4}$
15 and 37.5 acres of "B" lands in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 26, T. 11 N., R. 17 E.W.M. Application
16 No. 988 applies to 32.5 acres of "A" lands in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26, T. 11 N., R. 17 E.W.M.
17 Applications 918 and 919 are both dated February 14, 1935 while 930 is dated April 3, 1935. These
18 contracts cover a total of 241 acres and the Court confirms the existence of those delivery
19 obligations. Although the Court can acknowledge the right of the claimant to use this water, the
20 Court cannot require the issuance of a specific water right certificate. The rights to the use of WIP
21 water are governed by federal rules and statutes.

22 Claim No. 17649 was filed April 1, 2004 and asserts a right to irrigate 78.56 acres in the
23 N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 3, T. 10 N., R. 17 E.W.M. This land was originally Allotment No. 2301 and
24 left Indian ownership December 3, 1954. The claim indicates a WIP diversion and Mrs. Boyle
25 confirmed at the hearing they were seeking a pro rata share of Wapato-Satus Unit water. She
supplied DE-146 in support, which contains a number of documents obtained from WIP including
an Application for Water Right. The evidence supports a finding of a right to irrigate 39.23 acres of
"A" lands in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and 39.33 acres of "A" lands in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 3, T. 10 N.,
R. 17 E.W.M. Mrs. Boyle states no foreclosure proceedings apply to this property. Although the
right of the claimant to use this water can be acknowledged, the Court cannot require the issuance
of a water right certificate. The rights to use WIP water are governed by federal rules and statutes.

1 d. **Troy & Kathleen Curfman, Court Claim Nos. 00842 (A07815), 01219, 01830**

2 The Referee determined WIP rights could not be confirmed to the Curfmans because a copy
3 of the Application of Water Right had not been provided, nor was evidence presented to show there
4 had been no foreclosure. The Curfmans have now provided that evidence. The Court recognizes the
5 rights under Claim No. 00842 (A07815) for a proportionate share of WIP for the irrigation of
6 approximately 53.5 acres in the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 20, T. 10 N., R. 21 E.W.M. The NW $\frac{1}{4}$ NW $\frac{1}{4}$
7 consists of 40 acres of "A" lands while the NE $\frac{1}{4}$ NW $\frac{1}{4}$ consists of 13.3 acres of "B" lands. The
8 Court also recognizes the water rights under Claim No. 01219 for a proportionate share of WIP for
9 the irrigation of approximately 80 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 29 and the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section
10 20, T. 10 N., R. 21 E.W.M. The NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 20 consists of 40 acres of "A" lands while
11 the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 29 consists of 40 acres of "B" lands. The Court recognizes the water rights
12 under Claim No. 01830 for a proportionate share of WIP for the irrigation of about 74 acres in the
13 N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 25, T. 10 N., R. 20 E.W.M. The N $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$ consists of 37 acres of "A" lands
14 and there are 37 acres of "B" lands in the S $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$ in Section 25.

15 e. **Department of Ecology**

16 Ecology filed ten exceptions/requests for clarification. It also briefed certain issues raised
17 by other claimants such as the Johnsons, Fosters, Kents and Hoptowits. If a claimant's right is
18 addressed in a section specific to that entity, Ecology's concern will be addressed therein. The
19 matters resolved in this section are those not otherwise included in another section of this Opinion.

20 Ecology's first exception pertains to the U.S. Fish and Wildlife Service. There was an issue
21 raised by the Referee regarding the appropriate priority date for land acquired by the United States,
22 Department of Fish and Wildlife under Claim No. 13926. All parties agree that the appropriate date
23 of priority is May 2, 1991, consistent with the date of acquisition of the Tract 105A within
24 Toppenish National Wildlife Refuge. The second exception pertains to the rights of Stanley &
25 Sharon Johnson, Claim No. 0143, and is examined below in the section pertaining to the claimant.

Blodgett -- Ecology asks for three clarifications in regard to Sophia Blodgett, Claim Nos.
1712, 1711 and 2007. The Court grants the clarification regarding the description for the place of
use set forth on page 205 of the Report beginning at line 9 and replaces it with the following
description: The east 270 feet of the west 742 feet of Lot 2 of Coburn's Subdivision, except for the
south 150 feet thereof, lying in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 6, T. 10 N., R. 17 E.W.M. As for the issue
of whether the Blodgett right is a part of the Yakama Nation's right, parties are directed to Yakama

1 Nation's Exception 7 wherein the Court found the right was *in addition to* the Yakama Nation's.
2 The correct place of use description for Claim No. 02007 shall be: the east 540.2 feet of the west
3 877 feet of Lot 2 of Coburn's Subdivision, except in the east 135 feet and except the east 270 feet of
4 the west 405.2 feet, being within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 6, T. 10 N., R. 17 E.W.M.

5 **Hull** – The Court grants Ecology's suggested clarification in regard to Terry & Carol Hull,
6 Court Claim No. 01989. The place of use at page 208, lines 10-11 of the Report shall read: The
7 SW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ and the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, T. 11 N., R. 16 E.W.M. Page 208, line 16 is
8 amended to show an annual quantity of 438 acre-feet per year rather than 451.14 acre-feet per year.

9 **Jeld-Wen, Inc.** – Page 85, line 16 of the Report in regard to Claim No. 01515 shall be
10 amended to include a description that reads T. 10 N., R. 17 E.W.M. rather than R. 16 E.W.M.

11 **Kents** – See section below.

12 **Ramsey** – The Court grants the clarifications suggested by Ecology in regard to Kip &
13 Lyndia Ramsey, Claim No. 00669. The place of use at page 213, lines 9-10 of the Report shall be
14 modified to read: The S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ and the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3 and the
15 NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10, all in T. 10 N., R. 16 E.W.M.

16 **Yakima Investment Properties**

- 17 1. The instantaneous quantity set forth on page 212 of the Report, lines 5-6, shall be 1.827 cfs.
- 18 2. The Court finds the Yakama Nation and James and Sandra Lawrence are the claimants under
19 Court Claim No. 1886A. See also Yakama Nation Exception No. 19. Similarly, Yakima
20 Investment Properties was erroneously substituted for Court Claim No. 1886A and should have
21 been substituted for Court Claim No. 1886. The record is so modified.

22 **Lawrences** – The Court grants the clarification suggested by Ecology for Jim and Sandra
23 Lawrence claim and modifies the claim number at in the Report at page 118, line 18 to refer to
24 Court Claim No. 01886A, rather that 01866A.

25 **Brisbois** – Page 38, lines 5-8 of the Report are modified to reflect that Mr. Ray Brisbois is a
Yakama Tribal member.

WIP Water Awards

Ecology raised issues as to whether the following entities had water rights derivative of
those awarded to the United States or whether they were separate/in addition to those rights. It
appears there are some of both. The Court finds the following claimants derive water rights for the
parcels listed below from that granted to the United States, Bureau of Indian Affairs as trustees for

1 the Yakama Nation and water users within the Toppenish-Simcoe Unit of WIP. Although rights of
2 the claimant to use this water can be acknowledged, the Court cannot require issuance of a specific
3 water right certificate. The rights to the use of WIP water are governed by federal rules and statutes
4 and the landowners are only entitled to a prorata share of available water.

5 *Curfman, Troy & Kathleen*

6 See Section for Curfmans, *supra*.

7 *Gardner, Jesse W. and Edna P.* (Court Claim No. 01405) SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, T. 10 N.,
8 R. 16 E.W.M. (35 acres)

9 *Hull, Terry & Carol* (Court Claim No. 01989) S $\frac{1}{2}$ NE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 36, T. 11
10 N., R. 16 E.W.M. (155 acres and stock watering) and N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 13, T. 10 N., R. 16
11 E.W.M. (73 acres and stock water).

12 *Jeld-Wen, Inc.* (Court Claim No. 14175) NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 1, T.
13 10 N., R. 16 E.W.M. (75 acres).

14 *Ramsey, Kip and Lyndia* (Court Claim No. 00669) S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$,
15 SE1/4SE1/4 of Section 3, and NE1/4NE1/4 of Section 10, T. 10 N., R 16 E.W.M. (120 acres)

16 *Yakama Nation* (Court Claim No. 01798) SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, T. 10 N., R. 16 E.W.M.
17 (38 acres and stockwater)

18 As to *Blodgett, Sophia* (Court Claim Nos. 1712, 1711 and 2007) and *Brisbois, Ray E. &*
19 *Katherine* (Court Claim No. 01664), the Court indicated in addressing the Yakama Nation's
20 exceptions that this right is in addition the rights awarded to the United States. See Yakama Nation
21 Exceptions Nos. 7 and 8.

22 f. **Mary Hale (Claim No. 2322)**

23 The Report addressed Mary Hale's claim beginning on page 67 and denied a right on the
24 basis water had not been beneficially used while the land was in Indian ownership. Ms. Hale
25 participated in the October 15, 2004 hearing and submitted DE-152. She asserts water was
historically used for irrigation on the former allotments that constitute the 160 acres and requests a
reserved right, or, in the alternative a state-based right. In order to confirm a federal right, there
must be evidence of beneficial use of water while the land is in Indian ownership or within a
reasonable time after the property transfers to a non-Indian. See *Walton*. The Yakama Nation,
Ecology and the United States assert state law does not apply and the factual material is insufficient

1 to support a federal right. Ms. Hale urges the Court to find water was put to beneficial use within
2 the appropriate time frames under *Walton*. Specifically,

3 “[t]he non-Indian successor acquires a right to water being appropriated by the Indian
4 allottee at the time title passes. The non-Indian also acquires a right, with a date-of-
5 reservation priority date, to water that he or she appropriates with reasonable diligence after
6 the passage of title. If the full measure of the Indian’s reserved water right is not acquired
7 by this means and maintained by continued use, it is lost to the non-Indian successor.”
8 *Walton*, 647 F.2d at 51.

9 The decision here turns on the meaning of the word “appropriated.” Under state law an
10 appropriation usually requires a physical diversion, although Ms. Hale has cited cases where
11 regularly occurring flooding was found to be a protected practice by riparian users. See *Still v.*
12 *Palouse Irr. & Power Co.*, 64 Wn. 606 (1911); *Longmire v. Yakima Highlands Irr. & Land Co.*, 95
13 Wn. 302 (1917). The Court is not bound by state law when analyzing *Walton* claims, but may look
14 to such law for guidance. *Walton III* at 400. Further, these cases are distinguishable in the instant
15 matter. They apply to clear agricultural operations where the benefit of the flooding was critical to
16 the farming practice. Here, the more compelling inquiry is whether the evidence shows a deliberate,
17 purposeful effort was made by claimant’s predecessors to enhance the use of floodwater – either
18 through development of a water distribution system or improvements to the land that was flooded to
19 maximize the benefit of the water. Further, the Ninth Circuit clarified its analysis of due diligence
20 and intent. See *Walton III*, 752 F.2d 397 beginning at 402. According to the appellate court, an
21 “initial diversion of at least some water is an important indication of intent.” It rejected the trial
22 court’s decision that subirrigated land farmed by Walton and predecessors qualified for a federal
23 right. Such a practice is analogous to the technique used in this case as discussed below.

24 The Report, page 69, describes the condition of the property – the “land has never been
25 actually developed. The native vegetation is used for pasturing livestock.” Further, it states there are
“no man-made diversions on the creek. At various times in the spring, the branches of the creek will
naturally flood across most of the land water the natural vegetation on the property.” As some of the
other evidence suggests, undoubtedly cattle or other stock may have made some use of the land for
grazing as a result of this spring flooding, but there is no evidence the land was improved to
maximize that benefit. Indeed, the grasses were characterized as “natural vegetation.” The same
uses could be cited for any unimproved rangeland. Even if this Court were to sanction this practice,
there is no evidence to show any reliance on it during Indian ownership or within a reasonable time
after the land transferred to non-Indian ownership in 1907. See DE152. Accordingly, the claimant

1 has not succeeded in demonstrating that water was “appropriated” within the meaning of *Walton*
2 and during the appropriate timeframes.

3 Ms. Hale also argues she has a right under state law for this land by virtue of the riparian
4 location of that property to Toppenish Creek. This Court has previously determined that state law
5 does not apply to “lands that were allotted from the original reserved right and have now transferred
6 to non-Indian ownership.” See Subbasin 23 Report dated January 31, 2002 at p. 49; see also
7 *Colville v. Walton*, 647 F.2d 42, 52-53 (9th Cir., 1981) (holding that Washington water laws and
8 regulation were not controlling on the No Name Creek system of the Colville Reservation in regard
9 to allotted lands). The facts and geography regarding Toppenish Creek and this claim are even
10 more compelling toward such a finding than those presented in the Ahtanum watershed. Ms. Hale’s
11 exceptions are denied.

12 **g. Stanley & Sharon Johnson, Court Claim No. 01431**

13 The Referee raised an issue regarding the chain of title for the 80 acres lying in Government
14 Lot 3 and NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33, T. 10 N., R. 20 E.W.M. Ecology also raised an issue regarding
15 when the land left Indian ownership. The Johnsons supplied information to show the land was first
16 allotted to Andrew Jackson, a Yakama Indian who then transferred it to Raymond Leroy Walker in
17 1964 also an enrolled Yakama. The land was patented to Mr. Walker in 1967 and he sold it that
18 year to the first non-Indian, D.E. Clyde, who was 92 at the time of hearing. Mr. Clyde’s son, David
19 P. Clyde, supplied a letter referencing his father’s irrigation of the property beginning in 1968. The
20 Clydes sold to the Johnsons in 1974 who continued to irrigate. With this record, it is appropriate to
21 confirm a right consistent with the parameters set forth by the Referee on page 98 of the Report:
22 June 9, 1855 date of priority for the diversion of 0.67 cubic foot per second, 240 acre-feet per year
23 from Toppenish Creek for the irrigation of 40 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and north 240 feet of
24 Government Lot 3 of Section 33. The point of diversion would be that currently exercised near the
25 center of Section 33.

Ecology, the United States and the Yakama Nation raised concerns regarding the possibility
the Johnsons acquired in 1993 a portion of the water right that was ultimately confirmed to the
United States in trust for the Yakama Nation. That land is located in Government Lot 4 and that
portion of the NW $\frac{1}{4}$ SW $\frac{1}{4}$ lying southeast of Highway 97, Section 33, T. 10 N., R. 20 E.W.M. The
Referee recommended a 25-acre right for that portion of the NW $\frac{1}{4}$ SW $\frac{1}{4}$ lying southeast of Highway
97 and the northerly 250 feet of Government Lot 4 of Section 33. The Johnsons attended the

1 hearing on October 14, 2004 and responded to those concerns. The parties agreed to try to resolve
2 this matter at the conclusion of the hearing but Ecology notified the Court that although it and the
3 Yakama Nation agreed that a “notation on both the Nation’s and Johnson’s certificates is the desired
4 approach . . . we differ with regard to the text appropriate for those certificates.”

5 The first issue is whether the Johnson’s land was included in the Yakama Nation’s CFO.
6 The Court has reviewed US-213B and finds the NW¼SW¼ lying southeast of Highway 97 within
7 Section 33 was identified as irrigable land by the United States’ experts during the proceeding
8 culminating in the issuance of the CFO for trust and tribal fee land. The Court finds that
9 approximately 17 acres within the NW¼SW¼ were identified as irrigable and approximately 8
10 acres of the right are within Government Lot 4, which were not addressed in US-213B.

11 Since some of the Johnson’s land was awarded a right as a part of the Yakama Nation’s
12 CFO, the Court must clarify the record to show the water right appurtenant to the property is now in
13 the name of the Johnsons rather than the Yakama Nation. The Court has reviewed Ecology’s Post-
14 Hearing Statement Amended Response Re: Subbasin No. 25 dated November 18, 2004 and
15 generally agrees with the proposal set forth by the Yakama Nation. As a result, the Court finds and
16 includes herein the following statement: As the result of a sale of the NW¼SW¼ lying southeast of
17 Highway 97 within Section 33, T. 10 N., R. 20 E.W.M. from the United States in trust for Arthur L.
18 and Iva Gadley to Mr. and Mrs. Stanley Johnson (Claim Number 0143) the Johnsons are hereby
19 partially substituted for the United States for that portion of the water right awarded in the Yakama
20 Nation’s Conditional Final Order (September 12, 1996). The following language shall be included
21 on the certificate issued to the Johnsons: The portions of the water right appurtenant to the
22 NW¼SW¼ lying southeast of Highway 97 were a part of the Toppenish-Simcoe right confirmed to
23 the United States (as trustee for the Yakama Nation and certain tribal members) in the Yakama
24 Nation’s CFO (September 12, 1996). The Johnsons were partially substituted for the United States
25 for this parcel as a result of the land being removed from trust status and sold to them.

The Referee recommended a right, and this Court concurs, to the Johnsons, Report at page
98, with a June 9, 1855 date of priority for the diversion of 0.49 cubic foot per second, 150 acre-feet
per year¹ for the irrigation of 25 acres in the NW¼SW¼ lying south and east of Highway 97 and the

¹ The Court denies Ecology’s request for clarification regarding appropriate diversion rate as these lands were currently irrigated, not idle lands.

1 northerly 250 feet of Government Lot 4 of Section 33. The point of diversion is located 2200 feet
2 east and 10 feet north of the west quarter corner of Section 33. The source is Toppenish Creek² and
3 the irrigation season is April 1 through October 31.

4 h. **Colleen Kent (Claim No. 1040); Andrea Hoptowit (Claim No. 17668); Lester**
5 **Hoptowit (Claim No. 17660); Buddy Hoptowit (Claim No. 17,669); Melvin &**
6 **Marilene Foster – Trust Land Claims**

7 The exceptions filed by these claimants concern claims to water rights for lands held in trust
8 by the federal government. The Court resolved some of the main contentions in its *Memorandum*
9 *Opinion and Order Re: Objections To Proposed Conditional Final Order Subbasin No. 27* dated
10 July 12, 2006 beginning at page 5 in regard to land owned by Melvin Foster. There, the Court
11 identified the following issue -- Was the issue of appurtenancy/ownership of trust water rights
12 determined in the proceedings leading up to the Conditional Final Order entered September 12,
13 1996 in regard to the Yakama Nation's claims to on-reservation streams? The Court found:

14 After considering the factual and legal issues set forth above, it is the finding of this Court
15 that the proceedings and decisions leading up to entry of the Yakama Nation's September 12,
16 1996 Conditional Final Order included consideration of the Foster's land and the unchallenged,
17 expert evidence of the United States determined which trust and tribally owned fee lands were
18 "practically irrigable" or currently irrigated. The Court has examined the record and recounted
19 above the findings of HKM Associates in regard to the Foster's land. Although the Court did
20 not provide specific legal descriptions as to the lands to which the right is appurtenant (and does
21 not do so here), given the heavy reliance of the Court on the evidence submitted by the United
22 States, those documents would seem persuasive as to where the right belongs. This appears
23 logical considering the Court adopted the conclusions set forth in HKM's evidence as
24 Attachment A through E and such findings are only one level more abstract than a parcel-by-
25 parcel analysis. For example, as a result of findings set forth on pages 4-5 of the 1996 CFO the
Court has established how much water can be diverted from each source and the number of
acres to which this right can be applied. In doing so, this Court believes it has properly
performed its McCarran adjudication function *consistent with the evidence and argument*
submitted to it at that time. Anything beyond that is a matter of distribution to be determined by
the Secretary of the Interior pursuant to 25 U.S.C. § 381.

26 The lands owned by the Kents, Hoptowits (see October 14, 2004 RP at 16-17, 33) and Fosters in
27 Subbasin 25 that are held in trust would be governed by this Subbasin 27 ruling. The Court refers
28 parties to the remainder of the analysis set forth in the July 12, 2006 *Memorandum Opinion and*
29 *Order*.

30 ² The Yakama Nation and Ecology took exception to the use of Johnson Creek and indicated the right should be for
31 Toppenish Creek. The Court agrees and the right is so modified.

1 *Order*. These parties also indicated that water was used for watering stock, which they may do
2 from any naturally occurring water sources. The exceptions are otherwise denied.

3 The Fosters claim differs only marginally from the Kent/Hoptowit trust claims – Mr. Foster
4 owns 9/27 of an undivided allotment in fee while the remaining portion is in trust status. See
5 Referee’s Report at 53: This Court ruled in its July 12, 2006 *Memorandum Opinion, supra*,
6 “undivided land that is partially in trust is treated as ‘trust land.’” The Foster’s exception is denied.

7 1. Harry E. and Colleen Kent – Fee Land Claims

8 In addition to the trust land discussed above, the Kents own fee lands. The Referee was
9 prepared to confirm a right for lands within Property 1 once the Kents had delineated which 40
10 acres within the 80-acre parcel were in fee. Additionally, the Referee asked the Kents to describe
11 their diversion point. The Kents supplied that information in their June 8, 2004 filing. A right is
12 confirmed with a June 9, 1855 date of priority for irrigation of 35 acres and stock water in
13 S $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ and N $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ and S $\frac{1}{2}$ N $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ and N $\frac{1}{2}$ S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12,
14 T. 11 N., R. 16 E.W.M. The Kents shall have the right to divert 1.015 cubic feet per second, 215.6
15 acre-feet per year from a Simcoe Creek point of diversion within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 7,
16 T. 11 N. R. 16 E.W.M. The Kents also verified the point of diversion for the fee land in Property 2
17 and the right as recommended by the Referee at page 107 of the Report is confirmed.

18 The Kents supplied information regarding points of diversion for the 270 acres in Property
19 3, for which a right was confirmed. Those points are the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 7, T. 11 N., R.
20 16 E.W.M.; North Fork of Medicine Creek at SE $\frac{1}{4}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19, T. 11 N., R.
21 17 E.W.M.; South Fork of Medicine Creek at NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19,
22 T. 11 N., R. 17 E.W.M. See Supplemental Exceptions dated June 28, 2004.

23 **i. Mary Louise Shattuck (Claim No. 0464)**

24 The Referee addressed the claim of Mary Shattuck beginning on page 142 of the Report and
25 denied a right on the basis water had not been beneficially used while the land was in Indian
ownership. Ms. Shattuck participated in the October 15, 2004 hearing and submitted additional
evidence. See DE-153, 154. Ms. Shattuck asserts water was historically used for irrigation on the
former allotments that constitute the 600-plus acres (she claims a right to irrigate 370 acres) and
asks for a reserved right, or, in the alternative a state-based right. In order to confirm a federal right,
there must be beneficial use of water while the land is Indian ownership or within a reasonable time
after the property initially transfers to a non-Indian. See *Walton*. The Yakama Nation and United

1 States assert state law does not apply and the factual material is insufficient to allow the Court to
2 confirm a federal right beyond 278 acres. Ms. Shattuck counters there is adequate evidence to find
3 water was put to beneficial use within the appropriate time frames under *Walton*. Specifically,

4 “[t]he non-Indian successor acquires a right to water being appropriated by the Indian
5 allottee at the time title passes. The non-Indian also acquires a right, with a date-of-
6 reservation priority date, to water that he or she appropriates with reasonable diligence after
7 the passage of title. If the full measure of the Indian’s reserved water right is not acquired
8 by this means and maintained by continued use, it is lost to the non-Indian successor.”
9 *Walton*, 647 F.2d at 51.

10 Ms. Shattuck believes evidence from the October 19, 1999 hearing shows water was put to
11 beneficial use with reasonable diligence after title transferred into non-Indian ownership. The
12 Referee noted most of the Shattuck land left Indian ownership between 1918 and 1921. She further
13 argues that concluding water use within 15 years shows reasonable diligence is consistent with state
14 law. See *Ecology v. Abbott*, 103 Wn.2d 686, 694 P.2d 1071 (1985). Although the United States
15 disagreed at the hearing, the Court finds that standard is generally acceptable and consistent with
16 the practice in other courts. *United States v. Ecology*, 2005 WL 1561518 (W.D.Wash.) dated June
17 23, 2005 at pages 42-43 (“Washington law provides guidance for evaluating whether *Winters* rights
18 were put to use with reasonable diligence by non-Indian successors. As urged by the parties, 15
19 years is a reasonable time for water rights to be put to use by a non-Lummi.” *Citing Abbott, supra*).

20 The evidence supplied by Ms. Shattuck shows that by 1925, lands were being irrigated in the
21 S½SE¼ of Section 27. See YIN 267. She supplied DE-154, a Patent in Fee Report for Carrington
22 Olney dated September 27, 1918, for Allotment No. 201, the W½NW¼ of Section 35. That
23 document shows a few acres were cultivated and the balance used for pasture. By 1937, 278 acres
24 were irrigated by a man-made irrigation system as confirmed by the United States’ expert, Mr.
25 Ralph Saunders. See October 19, 1999 RP at pages 274-75. Evidence shows irrigation continued,
26 *Id.* at 229, 273 – 280, including the testimony of Mrs. Shattuck, who began living on the property in
27 about 1950. As with other similarly situated claimants, the Court believes the inquiry is whether the
28 evidence shows a deliberate, purposeful effort had been made by claimant’s predecessors to use
29 water for irrigation with reasonable diligence. Such an inference can be drawn from the evidence
30 and the Court finds water was put to beneficial use within a reasonable time.

31 The Court confirms a right with a June 9, 1855 priority date to irrigate 278 acres in the
32 SE¼SE¼ of Section 27, SW¼SW¼ of Section 26, W½NE¼, E½NW¼ and NW¼NW¼ of Section
33 35, all within T. 10 N., R. 19 E.W.M. See US-231. The points of diversion are located in the

1 SW $\frac{1}{4}$ NE $\frac{1}{4}$ and NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34 and SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35, T. 10 N., R. 19 E.W.M. See
2 DE – 79. Mrs. Shattuck shall be authorized to divert 7.784 cfs, 1668 acre-feet per year from
3 Toppenish Creek consistent with the Referee’s water duty parameters set forth on page 12 of the
4 Report. The irrigation season shall be April 1 through October 31. No rights to flood water shall be
5 confirmed herein, but may be used if the property is inadvertently flooded.

6 Mrs. Shattuck also argues she has a right under state law for her land by virtue of the
7 riparian location of the property to Toppenish Creek. This Court has previously determined that
8 state law does not apply to “lands that were allotted from the original reserved right and have now
9 transferred to non-Indian ownership.” See Subbasin 23 Report dated January 31, 2002 at p. 49; see
10 also *Colville v. Walton*, 647 F.2d 42, 52-53 (9th Cir., 1981) (holding that Washington water laws and
11 regulation were not controlling on the No Name Creek system of the Colville Reservation in regard
12 to allotted lands). The facts and geography regarding Toppenish Creek and this claim are even
13 more compelling toward such a finding than those presented in the Ahtanum watershed.

14 **j. Tule Gun Club (Claim No. 1519)**

15 The Referee addressed the Tule Gun Club (TGC) claim beginning on page 153 of the Report
16 and denied a right on the basis water had not been beneficially used while the land was in Indian
17 ownership. TGC participated in the October 15, 2004 hearing and submitted no additional evidence.
18 TGC asserts water was historically used for irrigation on the former allotments that constitute the
19 club’s 160-plus acres and asks the Court to confirm a reserved right, or, in the alternative a state-
20 based right. In order to confirm a federal right, the Court must find beneficial use of water while
21 the land is Indian ownership or within a reasonable time after the property initially transfers to a
22 non-Indian. See *Walton*. The Yakama Nation and the United States assert state law does not apply
23 and the evidence is insufficient to support a federal right. TGC urges there is adequate evidence to
24 find water was put to beneficial use within the appropriate time frames under *Walton*. Specifically,

25 “[t]he non-Indian successor acquires a right to water being appropriated by the Indian
allottee at the time title passes. The non-Indian also acquires a right, with a date-of-
reservation priority date, to water that he or she appropriates with reasonable diligence after
the passage of title. If the full measure of the Indian’s reserved water right is not acquired
by this means and maintained by continued use, it is lost to the non-Indian successor.”
Walton, 647 F.2d at 51.

TGC points to evidence supplied at the October 19, 1999 hearing to show beneficial use
with reasonable diligence after title transferred into non-Indian ownership. It asserts Dr. Rod
MacKintosh’s testimony shows water use by 1925 which is 8 years after leaving Indian ownership

1 and that use of water within 15 years is reasonably diligent under Washington law. See *Ecology v.*
2 *Abbott*, 103 Wn.2d 686, 694 P.2d 1071 (1985). Although the United States disagreed at the hearing,
3 the Court finds that standard acceptable and consistent with the practice in other courts. *United*
4 *States v. Ecology*, 2005 WL 1561518 (W.D.Wash.) dated June 23, 2005 at pages 42-43
5 (“Washington law provides guidance for evaluating whether *Winters* rights were put to use with
6 reasonable diligence by non-Indian successors. As urged by the parties, 15 years is a reasonable
7 time for water rights to be put to use by a non-Lummi.” *Citing Abbott, supra*).

8 The Report notes Dr. MacKintosh participated at the hearing but did not provide a summary
9 of that testimony. The Court has reviewed Dr. MacKintosh’s testimony from the Referee’s hearing.
10 The salient points from that testimony are that the property, in 1929, was in native grass or tules,
11 that evidence of cow grazing was present and that a berm existed which contained boards and that
12 water was running through that structure. RP at 201-202.

13 As with other similarly situated claimants, the inquiry is whether the evidence shows a
14 deliberate, purposeful effort was made by claimant’s predecessors to use water for irrigation. Such
15 an inference can be drawn from the evidence. In addition to the testimony of Dr. MacKintosh
16 which places a diversion structure on the property by 1929, there is also YIN 267, a map of irrigated
17 area as of 1925 on the Yakama Reservation and includes the TGC property. Additionally, US-226 is
18 a 1937 aerial photo of the property and was interpreted by the United States aerial photography
19 expert, Mr. Ralph Saunders, to show 76 were irrigated as of that date. Mr. Prentice testified to how
20 water was used from the late 1940’s to the present. This evidence convinces the Court water was
21 put to beneficial use within a reasonable time and will confirm a right consistent with that evidence.
22 A right is confirmed with a June 9, 1855 priority date to irrigate 12 acres in the N½NW¼ of Section
23 33 lying north of Pumphouse Road and 64 acres in the S½SW¼ of Section 28, both in T. 10 N., R.
24 19 E.W.M. The points of diversion are located in the SW½SW½ and SE½SW½ of Section 28, T.
25 10 N., R. 19 E.W.M. See DE – 77. The Tule Gun Club shall be authorized to divert 2.128 cfs, 456
acre-feet per year from Toppenish Creek consistent with the Referee’s water duty parameters set
forth on page 12 of the Report. The irrigation season shall be April 1 through October 31.

TGC also argues that it has a right under state law for its land by virtue of the riparian
location of that property to Toppenish Creek. This Court has previously determined that state law
does not apply to “lands that were allotted from the original reserved right and have now transferred
to non-Indian ownership.” See Subbasin 23 Report dated January 31, 2002 at p. 49; see also

1 *Colville v. Walton*, 647 F.2d 42, 52-53 (9th Cir., 1981) (holding that Washington water laws and
2 regulation were not controlling on the No Name Creek system of the Colville Reservation in regard
3 to allotted lands). The facts and geography regarding Toppenish Creek and this claim are even
4 more compelling toward such a finding than those presented in the Ahtanum watershed.

4 **k. United States**

5 The United States filed a number of exceptions to the Report. In particular, the United
6 States asks the Court to 1. Not award the water rights of the United States to other parties; 2. Not
7 allocate the United States' trust water to specific parcels of land; and 3. To revise the Report's
8 discussion and application of allottee water law. The United States also joins in the Yakama
9 Nation's Exception Nos. 2 and 3, summarized below. The United States also requests the language
10 in the Report be modified as specifically set forth in its brief.

11 The Court agrees with the United States that certain statements of the Referee could be
12 considered to award a portion of the water right confirmed in the Yakama Nation's September 12,
13 1996 CFO to individual fee landowners. The rights of individual fee landowners are separate and
14 are analyzed pursuant to the standards set forth in the *Walton* line of cases. Therefore, the
15 statements set forth on pages 7 (line 17), 31 (lines 6-8), 38 (line 15), page 59 (lines 12-14, 20-22),
16 80 (lines 15-18), 81 (lines 5-6), 83 (lines 21-23), 92 (lines 3-12), 100 (lines 3-5), 131 (lines 1-3),
17 204 (lines 11-13), 205 (lines 11-13) and 206 (lines 11-13) are hereby eliminated or modified to
18 exclude any impression that the water rights to individual fee landowners are a portion of that right
19 set forth in the September 12, 1996 CFO. In addition, the Court further finds that "after acquired"
20 parcels held in fee by the Yakama Nation are separate from the 1996 CFO's award.

21 As to the arguments relating to whether the Referee could designate portions of the trust
22 water to specific trust lands, the Court addressed this issue in Subbasin No. 27 in regard to lands
23 owned by Melvin Foster and will repeat and confirm that analysis in the sections pertaining to the
24 Fosters, Kents and Hoptowits.

25 **1. Steve and Heidi Van Boven (Claim No. 1648)**

26 The Referee addressed the Van Boven's claim beginning on page 165 of the Report. He was
27 prepared to confirm a right upon presentation of information on the following three issues: 1. the
28 land was owned by an Indian or held in trust for the Indian; 2. the location of the point of diversion
29 from the creek; and 3. an estimation of the quantity of water used to rill irrigate the field in the
30 SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 17.

1 In response, the Van Bovens submitted a July 10, 1897 document from the United States to
2 John Wesley, an Indian; a patent from the United States to F.A. Williams dated August 11, 1909;
3 and a Report dated June 12, 2004 prepared by Timothy D. Reiersen, P.E. Those documents address
4 the issue raised by the Referee and rights could be confirmed. However, no party appeared at the
5 exception hearing in support of the claim. Mr. Lawrence E. Martin, Esq., had represented the Van
6 Bovens, but indicated after sale of the property he no longer did. No Order Substituting Parties was
7 pursued and the Court is unaware of the identity of the successor. The Court denies the claim at this
8 time but would reconsider if the successor to the Van Bovens should appear prior to entry of a CFO.

8 m. **Gary and Karen Weisz (Claim No. 0837)**

9 Mr. Weisz appeared at the October 14, 2004 hearing to testify. The issue the Referee
10 identified concerned the date when the property left Indian ownership. Mr. Weisz tried to provide
11 another copy of the Court Claim; however, that is not evidence. Mr. Weisz was given the
12 opportunity to supply documents to assist the Court in making its determinations but none were
13 filed. Accordingly, the Court must deny the exception.

13 n. **Willows Gun Club (Claim No. 2023)**

14 The Willows Gun Club was analyzed beginning on page 174 of the Report and a right
15 denied on the basis water had not been beneficially used while the land was in Indian ownership.
16 Willows participated in the October 15, 2004 hearing and submitted DE-149-51. It asserts water
17 was historically used for irrigation on the former allotments that constitute the club's 360-plus acres
18 and asks the Court to confirm a reserved right, or, in the alternative a state-based right. In order to
19 confirm a federal right, there must be evidence of beneficial use of water while the land is in Indian
20 ownership or within a reasonable time after the property transfers to a non-Indian. See *Walton*. The
21 Yakama Nation and the United States assert state law does not apply and the factual material is
22 insufficient to support a federal right. Willows urges there is adequate evidence to find water was
23 put to beneficial use within the appropriate time frames under *Walton*, 647 F.2d at 51. Specifically,

24 “[t]he non-Indian successor acquires a right to water being appropriated by the Indian
25 allottee at the time title passes. The non-Indian also acquires a right, with a date-of-
reservation priority date, to water that he or she appropriates with reasonable diligence after
the passage of title. If the full measure of the Indian's reserved water right is not acquired
by this means and maintained by continued use, it is lost to the non-Indian successor.”

The decision here turns on the meaning of “appropriated.” Under state law an appropriation
usually requires a physical diversion, although Willows cited a few cases where regularly occurring

1 flooding was found to be a protected practice by riparian users. See *Still v. Palouse Irr. & Power*
2 *Co.*, 64 Wn. 606 (1911); *Longmire v. Yakima Highlands Irr. & Land Co.*, 95 Wn. 302 (1917). The
3 Court is not bound by state law when analyzing *Walton* claims but may look to it for guidance.
4 *Walton III* at 400. Further, the cases cited are distinguishable. They apply to clear agricultural
5 operations where the benefit of the flooding was critical to the farming practice. Here, the more
6 compelling inquiry is whether the evidence shows a deliberate, purposeful effort was made by
7 claimant's predecessors to enhance the use of the floodwater – either through development of a
8 water distribution system or improvements to the land that was flooded to maximize the benefit of
9 the water. Further, the Ninth Circuit clarified its analysis of due diligence and intent. See *Walton*
10 *III*, 752 F.2d 397 beginning at 402. According to that court, an “initial diversion of at least some
11 water is an important indication of intent.” Further, it rejected the trial court’s decision that
12 subirrigated land farmed by Walton and predecessors qualified for a federal right. A subirrigation
13 practice is analogous to the technique used by these claimants as analyzed below.

12 The Referee discussed water use at the time the land transferred to non-Indian ownership in
13 detail on page 176. The land was classified in the certificates of appraisal, which show the
14 property was all unimproved and some was subject to being covered by overflow from Toppenish
15 Creek during flood season. As other evidence suggests, cattle or other stock may have made some
16 use of the land for grazing as a result of this spring flooding, but there is no evidence that the land
17 was improved to maximize that benefit. Indeed, the grasses were characterized as salt grasses or
18 other natural vegetation. The same uses could be cited for any unimproved rangeland. The
19 testimony of Mr. Halverson and Mr. Seal provides no assistance on that issue. Accordingly, the
20 claimant has not succeeded in demonstrating water was appropriated within the meaning of *Walton*
21 while in Indian ownership or with reasonable diligence after transferring to non-Indian ownership.

20 Willows also argues it has a right under state law for its land by virtue of the riparian
21 location of the property to Toppenish Creek and also offers Water Right Claim 200,144, filed
22 pursuant to RCW 90.14, in support. This Court has previously determined state law does not apply
23 to “lands that were allotted from the original reserved right and have now transferred to non-Indian
24 ownership.” See Subbasin 23 Report dated January 31, 2002 at p. 49; see also *Colville v. Walton*,
25 647 F.2d 42, 52-53 (9th Cir., 1981) (holding that Washington water laws and regulation were not
controlling on the No Name Creek system of the Colville Reservation in regard to allotted lands).
The facts and geography regarding Toppenish Creek and this claim are even more compelling

1 toward such a finding then those presented in the Ahtanum watershed. The exception of Willows
2 Gun Club is denied.

3 o. **Yakama Nation**

4 The Yakama Nation raised numerous exceptions. They are considered below in the same
5 order as the Nation's June 15, 2004 brief, to the extent applicable.

6 *YN Exception No. 1* – The Nation asks that awards to each claimant within WIP be changed
7 to indicate they have right to a prorata share of available water up to the limit of their right. The
8 exception is GRANTED.

9 *YN Exception No. 2* – The Court GRANTS the Nation's exception regarding land
10 description as it has for Subbasins 27 and 29: Page 4 of the Report is hereby amended to read: "It is
11 hereby stipulated that the description of lands set forth in the claims of the respective claimants is
12 the correct description of the lands for which the water right is claimed and that such claim will
13 constitute proof of the ownership thereof for purposes of this adjudication only."

14 *YN Exception No. 3* – The Court grants this exception regarding the wildlife/stockwater
15 stipulation and amends the language (as underlined below) in paragraphs 1 and 2 on pages 5-6 to
16 read "Retention of such water shall be deemed senior (or first) in priority (except for the Yakama
17 Nation's instream flow right for fish) regardless of other rights confirmed in this case." Paragraphs
18 1- 4 shall be amended to substitute "Yakama Nation" for "plaintiff" on lines 9, 13, 18 and 22.

19 *YN Exception No. 4* – The Court GRANTS the Nation's exception that requests the Court
20 find that *Anderson*, 736 F.2d 1358 applies to lands reacquired by Yakama Nation and due diligence
21 is not required during the period of tribal holding.

22 *YN Exception No. 5*

23 Consistent with the Court's ruling in Subbasin 27, the Court GRANTS the Nation's
24 exception concerning the interpretation of *Walton* and modifies the Report of Referee as follows:

25 p. 9, line 18 – delete "allottees or"

pp. 9-10 replace "on-reservation claimant" with "non-Indian purchaser."

p. 9 "is either owned by an Indian allottee or was conveyed from an Indian allottee" with
"was acquired from an Indian."

p. 10 delete paragraph 4

YN Exception No. 6 – The Court GRANTS the Nation's exception to hold WIP rights are
only lost through a foreclosure proceeding

1 *YN Exception No. 7* – The Court GRANTS the Nation’s exception regarding fee ownership
2 by a tribal member. The Blodgett fee rights are in addition to that claimed by the Yakama Nation.
3 The Court also finds, as the Nation requests, that deliveries of tribal water through WIP are a matter
4 of internal governance.

5 *YN Exception No. 8* – Similar to Exception 7, the Nation’s exception is GRANTED.

6 *YN Exception No. 9* – The Nation indicated in briefing it would only pursue this exception if
7 claimant filed an exception. None was filed by the Careys and therefore the Court takes no action.

8 *YN Exception No. 10* – This exception pertains to land reacquired by the Nation from Mr.
9 and Mrs. Clements. See YIN 363. The Referee did not grant a right to Ms. Clements (Claim No.
10 01760) based on 1) Lack of evidence on the annual quantity and instantaneous amounts being used
11 to irrigate, and 2) beneficial use at the time the land was owned by a non-Indian. The Nation
12 supplied further argument on both points and submitted YIN 363, 365-374 in support.

13 The land in question is the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28 and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, T. 10
14 N., R. 19 E.W.M. The record shows the land went into non-Indian ownership in 1916. Referee’s
15 Report at p. 46. Mrs. Clements, a Yakama Nation member, acquired it in 1960 and the Nation
16 obtained title in 2000. YIN 363. These facts must be analyzed consistent with *United States v.*
17 *Anderson*, 736 F.2d 1394 (9th Cir., 1983). Pursuant thereto, this Court can grant water rights to the
18 Nation for this land if water was put to beneficial during the period of non-Indian ownership – here,
19 from 1916 to 1960 – and with reasonable diligence after first leaving Indian ownership. *See also*
20 *Walton II* at 647 F.2d at 51; *Walton III* at 752 F.2d at 402. The Court is not bound by state law but
21 may look to it for guidance. *Walton III* at 400. The Referee did not question the continued use of
22 water from the late 1930’s through the time the water returned to Indian ownership in 1960.
23 Mrs. Clements’s testimony supports that finding. Therefore, the analysis is limited to how much
24 acreage was irrigated by the allottee or the non-Indian successor with reasonable diligence.

25 As to beneficial use, the Nation argues the land could not be irrigated between 1916 and the
early 1930’s because seepage from the WIP canal waterlogged the property and the land could only
be fully irrigated when Marion Drain was widened and deepened in 1937. See YIN 365 – 374. The
property in question lies in the lower part of the Wapato Irrigation Project and Toppenish Creek
runs through it. *Id.*; SE – 1 (Subbasin No. 25). Marion Drain is located about one-quarter of a mile
to the north of property and the evidence shows the drain would be deep enough to drain property to
the south of the drain. See YIN – 369; 368 (“ . . .the Main Drain must be deepened to provide

1 adequate drainage for a large area to the north of the Main Drain as well as a strip perhaps one-half
2 mile wide along the south side of the drain"). In essence, the non-Indian allottee and successor
3 could not be expected to do what technology and economics would not allow.

4 Walton offered a similar argument in *Walton III*, essentially asserting his predecessor non-
5 Indian owner could not irrigate with No Name Creek the maximum amount of land owned because
6 the property was waterlogged. The Ninth Circuit looked somewhat skeptically on this in reviewing
7 the district court's decision as to the amount of land irrigated by the Whams – the initial non-Indian
8 successor and Walton's predecessor. 752 F.2d at 403-404. However, that skepticism resulted more
9 from the static amount of land irrigated during the initial 23-27 year period after title passed into
10 non-Indian ownership, rather than a philosophical quarrel with the district court over technological
11 limitations. Further, unlike in *Walton III*, this Court has no information a lesser amount of land was
12 irrigated during the period after title left Indian ownership.

13 The Court finds that the Yakama Nation enjoys a right to irrigate 80 acres lying within the
14 SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28 and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, T. 10 N., R. 19 E.W.M. with a June 9,
15 1855 date of priority. Consistent with the water duty used by the Referee, the Nation may divert a
16 proportional share of available flows but no more than 0.028 cfs per acre (2.24 cfs total) and 5 acre
17 feet per acre (400 acre-feet total). The point of diversion on Toppenish Creek shall be 1,300 feet
18 west and 20 feet north of the southeast corner of Section 28, in the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 28, T. 10 N.,
19 R. 19 E.W.M. The irrigation season shall be June 1 through October 1 consistent with the
20 testimony of Carmella Clements and Henry Clements. See Report of Referee at p. 45. Since the
21 property is now in tribal ownership, it will not be subject to loss for nonuse.

22 *YN Exception No. 11*

23 This exception concerns an undivided parcel held partially in trust by the United States
24 (19/27) and the remainder in fee by Mr. Melvin Foster. The Court has considered this issue in
25 Subbasin No. 27 and held undivided parcels such as this which are partially in trust and partially in
fee status shall be treated as trust land because the United States considered those lands in its 1994
claim and study resulting in the 1996 CFO. Thus, any right this land may hold through the United
States has already been established.

YN Exception No. 12

This exception is similar to YN 7 and 8 above with the key difference being that the Nation
has acquired this property. The Nation asks that the Court clarify the right is *in addition* to the

1 Nation's right established by the September 12, 1996 CFO, not a part of the PIA right. The Court
2 GRANTS this exception.

3 *YN Exception No. 13* – The Nation indicated it would reserve the right to comment on the
4 issue of whether it has a treaty right for hunting should the claimants involved (Greenhead, LLC –
5 Claim No. 00787, The Estate of Howard Wright – Claim No. 01516 and Holtzinger Ranches –
6 Court Claim No. 01517) pursue an exception. No exception was filed by those claimants and the
7 Court will not consider this exception.

8 *YN Exception No. 14* – The Nation opposed a water right for Mary Hale. The arguments set
9 forth by the Nation were analyzed above in the section pertaining Ms. Hale's exception.

10 *YN Exception No. 15* -- Similar to Exception 7, the Nation's exception is GRANTED in
11 regard to the right confirmed to Huylar

12 *YN Exception No. 16* – Similar to Exception 7, the Nation's exception is GRANTED in
13 regard to the right confirmed to Jensen.

14 *YN Exception No. 17*— The Nations excepts to the Referee's use of the name Johnson Creek
15 in confirming rights to the Johnsons under Claim No. 01431. The Referee did note that Johnson
16 Creek was a branch of Toppenish Creek. The Court has reviewed SE – 1 (Ecology's map) and finds
17 that Toppenish Creek shall be included as the source on any certificate of right issued.

18 *YN Exception No. 18* – The Nation acquired 80 acres of the land formerly owned by Carroll
19 and Ella Lawrence (Claim Nos. 01641/02405(A)) lying within the S½SW¼ of Section 23, T. 10 N.,
20 R. 18 E.W.M. Mr. and Mrs. Lawrence did not appear at the Referee's hearing. The Nation joined
21 the claim on February 19, 2004. The property was in trust until the 1960's when Mr. Lawrence, a
22 tribal member, took it out of trust. It remained in his ownership or that of family members until it
23 was sold to the Nation in 2001. YIN-375. This land is eligible for a ratable share of the reserved
24 right to the extent it is practicably irrigable acreage. *Walton*, 647 F.2d 42, 51 (9th Cir., 1981).

25 The Nation submitted exhibits (YIN-375-387, 387A-B) and the testimony of
Dr. Wagemann to show this land is practicably irrigable. Toppenish Creek and its flood channels
meander throughout the property. Dr. Wagemann testified about 20.5 acres of the 80-acre parcel
were susceptible to irrigation and had been historically irrigated. See RP beginning at 119. The
20.5 acres are comprised of 4 parcels. YIN-381A. To reach these conclusions, Dr. Wagemann
examined soil profiles, historic photos and documents. He discussed a number of documents and
maps that were admitted, all of which provide support for his contention the parcel was irrigated

1 beginning at least in the 1960's when the property left trust status. In particular, YIN – 385 and 382
2 demonstrate water was used for irrigation on the parcel. The documents consist of correspondence
3 and attached hand-drawn map between BIA land officials and the use of water on the parcel.

4 The Court finds the Nation enjoys a right to irrigate 20.5 acres in the S½SW¼ of Section 23,
5 T. 10 N., R. 18 E.W.M. with a priority date of June 6, 1855. The diversion points on Toppenish
6 Creek are approximately 20 feet west and 20 feet south of the center of Section 23 and 700 feet east
7 and 50 feet south of the west quarter corner of Section 23. The Nation shall be authorized to divert
8 0.56 cubic foot per second and 123 acre-feet per year. The irrigation season shall be from April 1 to
9 October 15.

10 *YN Exception No. 19* – The Nation acquired a portion of the property owned by Jim and
11 Sandra Lawrence, see YN 388 and YN 388A, and claim a portion of any right confirmed pursuant
12 to Claim No. 01886A. Pursuant to YN 388, the Nation has acquired the NW¼SW¼ of Section 32,
13 T. 11 N., R. 17 E.W.M. The Referee recommended a water right for that portion of the parcel lying
14 north of Simcoe Creek. James and Sandra Lawrence sold this land to the Nation but retained
15 ownership of the SW¼NW¼ of Section 32, which also was recommended for a water right. The
16 Court modifies page 217 to show the claimant as Yakama Nation and James and Sandra Lawrence
17 rather than Yakima Investment Properties.

18 *YN Exception No. 20* – The Court grants this exception to find the Yakama Nation and its
19 members do not necessarily need to show an application for water right to use part of the Wapato -
20 Satus Unit water. Such water is diverted from the Yakima River and quantification controlled by
21 other decisions of this Court and the use thereof, once diverted, controlled by applicable federal
22 rules. See Yakama Nation's Conditional Final Order, September 12, 1996 at pp. 8-9.

23 *YN Exception No. 21* – The Court grants the exception to hold that the *Walton* criteria, not
24 PIA, applies to non-Indian owned fee land on the Reservation.

25 *YN Exception No. 22* – This exception pertains to Court Claim No. 00617, (A)01260 and
(A)02411 and the land previously owned by Tim & Barbara Tillman that was acquired by the
Nation in 2002. See YN - 389. The Referee indicated he was prepared to recommend a right upon
a showing the land had originally been allotted. That record is now before the Court pursuant to
YN - 389 showing the land was allotted to Peal Charl and that it went into non-Indian ownership in
1926. Because the record before the Referee demonstrated the right had been used from about 1926

1 until it returned to tribal ownership in 2002, a right will be confirmed. The record is also adequate
2 to show the Nation has purchased the land and the Court will confirm the right to the Nation.

3 Therefore, the Nation enjoys a right to irrigate 70 acres from a tributary of Simcoe Creek in
4 the S½SE¼ of Section 32, T. 11 N., R. 17 E.W.M. with a priority date of June 9, 1855. The
5 diversion point is approximately 2640 feet west of the southeast corner of Section 32 being on the
6 south quarter corner of Section 32. The Nation shall be authorized to divert 2.03 cubic feet per
7 second and 431.2 acre-feet per year. The irrigation season shall be from April 1 to October 15.

8 *YN Exception No. 23* – The Referee noted he would grant a right to the Nation under Claim
9 No. 14022 if the 1913 BIA Report was in the record. The Nation pointed out the document in
10 question was provided as a part YIN - 290. The Nation also pointed out that water use from 1979
11 for this parcel was unnecessary because it has been owned by tribal member since 1973. See
12 Declaration of Debra Jim dated June 14, 2004. Therefore, a right is confirmed as set forth on page
13 184 of the Report beginning on line 10.

14 *YN Exception No. 24* – The Nation filed exceptions in regard to Willows Gun Club which
15 were considered above in the section pertaining to Willows Gun Club exception.

16 *YN Exception No. 25* – This exception concerns the former Hedden property and a right is
17 now claimed by the Yakama Nation under Court Claim 14023. The Referee indicated he was
18 prepared to recommend a right for 19 acres upon proof of when the property left Indian ownership.
19 The Nation supplied YIN – 391, which shows the first Indian owner was Elmer Ashue, the allottee.
20 The first non-Indian owner was John Warrell who took possession in 1917 and obtained title in
21 1919. The land was in non-Indian ownership until the Nation acquired it in 1998 from Norman
22 Hedden. Thus, the Court will apply *Anderson* in analyzing this exception.

23 The Nation contends a right should be confirmed for 33 acres rather than 19 acres since the
24 land was irrigated with due diligence once the technology existed to drain it in the mid-1930's. See
25 YIN 392-397. The Referee found 19 acres were irrigated in 1937 with a similar amount irrigated in
1949. The Court analyzed a similar issue in relation to Exception No. 10 above. However, the
record was more developed in regard to the actual drainage program that was instituted and the fact
that land was irrigated as a result of the implementation of the drainage.

This scenario is more like that presented in *Walton III*. There, Walton offered a similar
argument to the *Walton III* court, arguing that his predecessor non-Indian owner could not irrigate
the maximum amount of land they owned with No Name Creek flows because the property was

1 waterlogged. The Ninth Circuit looked somewhat skeptically on this argument in reviewing the
2 district court's decision as to the amount of land irrigated by the Whams – the initial non-Indian
3 successor and Walton's predecessor. 752 F.2d at 403-404. That skepticism resulted from the static
4 amount of land irrigated during the initial 23-27 year period after title passed into non-Indian
5 ownership. As a result, the *Walton III* Court limited Walton to the amount of land irrigated within a
6 reasonable time after purchasing the property, despite the fact technology would later open up
7 additional irrigation opportunities. Here, as in *Walton III*, this Court has information that a lesser
8 amount of land was irrigated during the period after title left Indian ownership. Accordingly, the
9 Nation will be limited to the amount of land irrigated with a reasonable time after the land left
10 Indian ownership – 19 acres. The irrigation of 33 acres did not occur until nearly 40 years after title
11 was acquired by a non-Indian. The exception is denied and the right shall be confirmed as set forth
12 on page 188 of the Referee's Report beginning at line 16.

13 *YN Exception No. 26* – This exception concerns Claim No. 14024 and land that was acquired
14 by the Nation from Vernon Lawrence. The Referee identified problems with the record and
15 ultimately determined no rights could be confirmed. In response, the Nation filed YN 398 – 401
16 and Dr. Reichmuth and Mr. Jim Lawrence testified at the hearing. The parties have divided this
17 claim into three parcels based on the original allotment numbers. The Court will respond in kind.

18 Allotment 585

19 The Nation requests a right to irrigate 20-25 acres for the property within Allotment 585,
20 described as the NE $\frac{1}{4}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ and the W $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 26, T. 10 N., R. 16
21 E.W.M. The Referee did not confirm a right because the evidence was too general to determine the
22 number of acres irrigated. Mr. Lawrence purchased the property from Mr. Ralph Ethier in
23 November, 1968. Mr. Ethier acquired the property in 1929. Mr. Ethier was a non-Indian but the
24 property most likely left Indian ownership prior to his acquisition. It was patented to Meda Olney
25 in 1910. The Court can only confirm a right for the water appropriated by the allottee or the non-
Indian successor within a reasonable time after acquiring the property. *Walton* 647 F.2d at 50-51.

The decision hinges on an assessment of Mr. Lawrence's Declaration. Mr. Lawrence
indicates he is an enrolled member of the Yakama Nation and was born on his mother's allotment
on Lateral A in 1927 near the property in question. He lived on the reservation his entire life with
the exception of two years. Prior to acquiring ownership of the land, he ran cattle on nearby leased
land. He would visit with Mr. Ethier and became friends and after acquiring the property,

1 Mr. Ethier lived in Mr. Lawrence's home. Mr. Lawrence also declares a general familiarity with
2 Toppenish Creek as a result of 75-plus years of living in the area. He stated that about 20-25 acres
3 of land were irrigated at the time he purchased the land, which was consistent with Mr. Ethier's
4 prior practice each year before the transfer. He also noted the presence of an old pump on the
5 property at the time of acquisition. The Referee analyzed the record and determined water was used
6 on the property beginning in 1900 by tribal members and the use continued in the late 1920's.
7 Aerial photography showed 25 acres to be irrigated by 1957. Therefore, the Court will confirm a
right to irrigate 25 acres consistent with Mr. Lawrence's testimony.

8 The Court finds that the Yakama Nation enjoys a right to Toppenish Creek for irrigation of
9 25 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ and the W $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 26, T. 10 N., R. 16
10 E.W.M. with a priority date of June 9, 1855. The diversion point is unknown and shall be supplied
11 by the Nation. The Nation shall be authorized to divert 0.7 cubic foot per second and 150 acre-feet
per year. The irrigation season shall be from April 1 to October 15.

12 Allotment 586

13 The Nation seeks a right to irrigate 13 acres in part of the land that comprised Allotment 586
14 which includes the W $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25, T. 10 N., R. 16 E.W.M. In 2003 the Nation
15 deeded to Vernon and Michelle Lawrence the remainder of that allotment, being the E $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$,
16 W $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 26, T. 10 N., R. 16 E.W.M. See YIN - 400. Therefore, the Nation only
seeks a right to irrigate 13 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25.

17 Much of the information set forth above in regard to Allotment 585 applies to Allotment 586
18 as well. Specifically, as far as Allotment No. 586 lands are concerned, Mr. Lawrence notes that
19 Mr. Ethier irrigated about 13 acres each year, consisting of hay and grain crops, as well as an
20 orchard. Mr. Lawrence subsequently installed a more efficient watering system consistent with the
21 information set forth in YIN - 285. Mr. Lawrence also increased the irrigated ground to encompass
about the entire 20 acres.

22 The Court can only confirm a right for the water appropriated by the allottee or by the
23 allottee's non-Indian successor within a reasonable time after acquiring the property. *Walton* 647
24 F.2d at 50-51. The Referee was convinced that irrigation on the allotment had ensued beginning
25 around 1877, however, he indicated a right for this allotment could not be confirmed without
evidence clarifying the location of the irrigated acres. The Declaration of Mr. Lawrence provides
some evidence of how the property was irrigated at least during his familiarity with the property

1 and. See Report at 190. Therefore, the Court will confirm the right as requested by the Yakama
2 Nation as clarified by Mr. Lawrence.

3 The Court finds that the Yakama Nation enjoys a right to Toppenish Creek for the irrigation
4 of 13 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25, T. 10 N., R. 16 E.W.M. with a priority date of June
5 9, 1855. The diversion point is the headworks of the Toppenish Feeder Canal. The Nation shall be
6 authorized to divert 0.364 cubic foot per second and 73.71 acre-feet per year. The irrigation season
7 shall be from April 1 to October 15.

7 Allotment 587

8 The Nation seeks a right to irrigate 10 acres in the N $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 26, T. 10 N., R.
9 16 E.W.M. YIN - 398 details the chain of title history of that parcel, which began in 1911 when the
10 property was patented to Virginia Kamhout, formerly Virginia Olney. The land went out of Indian
11 ownership in 1911 and was conveyed to various entities, but returned to Olney ownership in 1919.
12 The Ethiers ultimately acquired title to the property in 1929. Mr. Ethier deeded the property to the
13 Lawrences in 1968. The Referee did not recommend a right because of a lack of information
14 regarding irrigation after the property left non-Indian ownership. Mr. Lawrence declared that based
15 on his memory, water was diverted to the property to irrigate 10 acres. The Court will rely on
16 Mr. Lawrence's information and confirm the right accordingly.

17 The Court finds the Yakama Nation enjoys a right from Toppenish Creek to irrigate 10 acres
18 in the N $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 26, T. 10 N., R. 16 E.W.M. with a priority date of June 9, 1855.
19 The diversion point is the headworks of the Toppenish Feeder Canal. The Nation shall be
20 authorized to divert 0.28 cubic foot per second and 56.7 acre-feet per year. The irrigation season
21 shall be from April 1 to October 15.

22 *YN Exception No. 27* – This Exception pertains to Claim No. 13884 for lands known as the
23 Mission property and includes the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 17, T. 10 N., R. 17 E.W.M. The Referee
24 identified a number of gaps in the record which the Nation has attempted to fill through YN
25 Exhibits 402-413 and testimony at the hearing.

The first issue pertained to when the property was originally allotted and then left Indian
ownership. The original allottee was Susanna Simpson and the property went out of Indian
ownership in 1919 when L.E. Braden bought the land. YN - 404. The land subsequently returned
to Indian ownership in 1987 when acquired by the Nation. The second issue is lack of proof as to
how many acres were irrigated from 1920 to 1937. The Referee found that 55 acres were irrigated

1 in 1937 and also found that “irrigation development” occurred on the property in question in 1921,
2 1924, and 1925. However, the Referee would not extrapolate that the number of acres irrigated
3 during those periods was the same as in 1937 (55 acres). The Referee’s analysis was based on
4 application of *Walton* which authorizes a court to confirm rights only for those lands irrigated while
5 in Indian ownership and those lands irrigated with reasonable diligence after title passed to a non-
6 Indian. The Nation asks the Court to interpret the same evidence and come to a conclusion that a
7 right was established.

8 The Court will grant the Nation’s exception and finds a right has been established for 55
9 acres in the N½SW¼ of Section 17, T. 10 N., R. 17 E.W.M. A review of *Walton*, 647 F.2d at 50-
10 51, and its progeny provide no clear standard as to what constitutes a “reasonable time” for a non-
11 Indian to develop irrigation. Here, there is an indication development began almost immediately
12 upon the non-Indian acquiring title in 1921 and culminated in a total of 55 acres being irrigated in
13 1937. The Court believes this is adequate evidence to comport with the *Walton* standard.

14 The final problem addressed by the Nation concerns any possible nonuse of water by non-
15 Indian owners from about 1979 until the Nation acquiring the land in 2003. The Nation submitted
16 the testimony of Dr. Reichmuth at the hearing who engages in stream restoration projects through
17 his company Geo-Max. After being qualified as an expert in river mechanics, geomorphology and
18 stream construction, Dr. Reichmuth explained the Mission property had not been irrigated from
19 1974 to the present (with the exception of a couple of flood years) because water had become
20 unavailable because of channel degradation. In an effort to curtail flooding, channelization and
21 diking of the river occurred which moved the stream to a more southerly channel and prevented the
22 water from being available to the Mission property. The Court agrees that unavailability of water
23 did result in little or no irrigation from 1979 to early 2000’s.

24 The Court finds that the Yakama Nation enjoys a right from Toppenish Creek to irrigate 55
25 acres in the N½SW¼ of Section 17, T. 10 N., R. 17 E.W.M. with a priority date of June 9, 1855.
The diversion point is the headworks of the Toppenish Feeder Canal. The Nation shall be
authorized to divert 1.54 cubic feet per second and 311.85 acre-feet per year. The irrigation season
shall be from April 1 to October 15.

YN Exception No. 28 – The Court grants this exception to note any rights related to YRID
and its members is set forth in the Court’s Report dated October 8, 1996 and Conditional Final

1 Order dated February 13, 1997. The Referee indicated no additional rights would be confirmed for
2 the claimants listed on page 199 because there was no appearance in the Subbasin No. 25 process.

3 *YN Exception No. 29* – The Court has analyzed the facts related to this exception and
4 resolved it in YN Exception No. 19.

5 *YN Exception No. 30* – The Court grants this exception. The right is to a share of the
6 Yakama Nation’s right as delivered under federal law which applies to the WIP.

7 *YN Exception No. 31* – The exception is granted for the reasons set forth in Exception No. 7.

8 *YN Exception Nos. 32 and 33* – The Court clarifies the Referee’s Report, page 207, lines 11-
9 14, page 213, lines 11-14 and page 214, lines 10-14 to find the rights confirmed on those pages are
10 not a part of the right confirmed to the Yakama Nation. The Court also clarifies the discussion on
11 those pages to indicate there is no Yakima Reservation Irrigation District ownership of these rights.

12 *YN Exception No. 34* – The Court applies the same analysis from the Nation’s Exceptions 32
13 and 33 to 34 and page 216, lines 20-24 of the Report. The Court further finds, based on the
14 Referee’s discussion on page 58, line 19 through page 59, line 2 that a *Walton* right had been
15 established by the prior owners. The owners then appeared to start taking delivery of WIP water
16 under the Toppenish-Simcoe Unit. The water right confirmed by the Referee was for a
17 proportionate share of the WIP water right through the Toppenish-Simcoe Unit and a provision was
18 set forth on page 216, lines 20-24 to that effect. It seems the Nation is asking to have that provision
19 removed, which the Court will grant, as it is consistent with the Referee’s findings. Removal of that
20 language will address other objections raised by the Nation in Exception 34 in regard to how the
21 Limitation of Use language describes how WIP operates.

22 *YN Exception No. 35* -- The Court has analyzed the facts related to this exception and
23 resolved it in the Nation’s Exception No. 19.

24 *YN Exception No. 36* – The Court grants the Nation’s exception and finds the adjudicated
25 rights issued by Ecology should indicate, if such is the case, that the right is to the use of a prorata
share of the Yakama Nation’s federally reserved right not subject to state law or oversight.

YN Exception No. 37—The Court grants this exception for the reasons set forth in the
Court’s response to the Nation’s Exception No. 1.

YN Exception No. 38 -- The Court grants this exception and strikes the language at page 220,
lines 5-12 of the Referee’s Report authorizing state oversight of water.

YN Exception No. 39 – See Exception No. 36.

1 *YN Exception No. 40* – The Court grants this exception to finds none of the rights delivered
2 through the WIP shall be subject to state oversight, but rather that water shall be managed and
3 administered by WIP and /or the Yakama Nation.

4 *Pheasant Holdings*

5 The Yakama Nation filed a motion asking the Court to allow it to pursue a late claim in
6 Subbasin No. 25 pertaining to the land once held by Pheasant Holdings but acquired by the Nation
7 in 2000. The Court allowed the late claim, which became Claim No. 18073, by order dated August
8 12, 2004. The merits of Claim No. 18073 were presented on October 13, 2004. See RP at page 66.

9 The land at issue is located in the N½SW¼ of Section 27, T. 10 N., R. 19 E.W.M. The
10 northern boundary of the property is Marion Drain and the north channel of Toppenish Creek runs
11 through the middle of the property. Mr. Tracy Hames, a water fowl biologist for the Yakama
12 Nation, is currently responsible for managing the property and has personal knowledge of it dating
13 back to 1989. He indicated the property was irrigated at that time and has been irrigated since then.
14 Mr. Hames also supplied a review of YIN 365-374, which discusses use of the property in the early
15 part of the 1900's beginning in 1905. That review indicates a drain was built around 1912 to
16 facilitate irrigation of otherwise waterlogged ground and was widened and deepened in 1937 to
17 become Marion Drain. A series of letters contained in those exhibits also verifies the property
18 between the drain and Toppenish Creek could not be farmed until drained.

19 The Court analyzed a similar issue in regard to Exception No. 10 above and land that was
20 formerly owned by Jim Clements. It was determined a right could be confirmed under these
21 precise circumstances and the Court notes the former Clements property touches the former
22 Pheasant Holdings property. Therefore, the Court will only review the evidence dating to 1937 as
23 to the amount of property actually irrigated.

24 Dr. Wangemann, as set forth in YIN- 421 and 422 and summarized in testimony, concluded
25 that approximately 66.1 acres were irrigated in 2002. According to Dr. Wangemann, approximately
43.5 acres were irrigated lying south of Toppenish Cree and 22.6 acres were irrigated lying north of
the creek. YIN - 418, 423 – 423A, photographs of the Pheasant Holdings property, confirm
irrigation of about the same amount in 1949, 1959 and 1964.

While the record is not perfect, the Court finds the Yakama Nation has met its burden and
finds that 66.1 acres have been irrigated in the N½SW¼ of Section 27. However, the property is
subject to an Application for Water Right with the United States Bureau of Indian Affairs, Wapato

1 Irrigation Project. Although the right originally authorized delivery of WIP water for 40 acres of
2 "A" water in the west half of the 80-acre parcel and 40 acres of "B" water in the east half of the
3 property, certain lands were excluded in 1963. According to a document in YIN – 415 (Request for
4 Elimination of Certain Lands), the southeasterly portion of the parcel was eliminated from WIP
5 delivery. Thus, 20 acres north of Toppenish Creek and the westerly 20 acres continue to receive
6 WIP water. The remainder of the parcel is irrigated with flow from Toppenish Creek – 26.1 acres.

7 The Court finds that the Yakama Nation enjoys a right to irrigate 26.1 acres lying within the
8 E3/4N½SW¼ of Section 27, T. 10 N., R. 19 E.W.M. with a June 9, 1855 date of priority.

9 Consistent with the water duty used by the Referee, the right shall allow diversion of a proportional
10 share of available flows but no more than 0.028 cfs per acre (0.73 cfs total) and 6 acre feet per acre
11 (156.6 acre-feet total). There is no evidence to indicate a point of diversion, which should be
12 supplied. The irrigation season shall be April 1 through October 15. Since the property is now in
13 tribal ownership, it will not be subject to loss for nonuse.

14 **Claim No. 14352, Former Gilbert John and Betty Jean Carl Lands**

15 The Yakama Nation's Motion To File Late Exception and Amend Late Claim For Claim No.
16 14352 was granted and an evidentiary hearing held January 11, 2007. The Court finds as follows.

17 This claim consists of two parcels that make up the SE¼ of Section 30, T. 10 N., R. 19
18 E.W.M. and were originally allotted to individual Yakama Indians, allotment No. 467 (S½SE¼
19 allotted to Sally Heanan) and allotment No. 469 (N½SE¼ to Horace Heanan). Both allotments
20 were conveyed to C. S. Hale, a non-Indian, in 1906. John Rentschler, as a married man, acquired
21 No. 467 in 1919 and No. 469 in 1941, both from Hale. His wife, Esther Guyette Rentschler, was a
22 member of the Yakama Nation. In 1966 the properties transferred to Viola Rentschler O'Neill, the
23 daughter of John and Esther Rentschler. Ms. O'Neill is not an enrolled member of the Nation. The
24 O'Neill's sold the property in 1987 to John and Betty Carl – Mr. Carl, a Yakama Nation member
25 died in 2004. Ms. Carl sold the land to the Yakama Nation in 2004.

Given that Ms. Rentschler was an enrolled member of the Yakama Nation, the Court finds
that allotment No. 467 was in non-Indian ownership from 1906 – 1919. Using a 15-year period, as
the Washington Supreme Court did in *Abbott* and as accepted by the Western District in the Lummi
case, *supra*, this Court finds the due diligence period was not exhausted during non-Indian
ownership in the early part of 1900's. Various witnesses including Ms. Tynan and Mrs. Carl
supplied evidence of irrigation for the period of non-Indian ownership during the 1960's through

1 1986, which covered the period when the property was in non-Indian ownership. See Declaration
2 of Betty Jean Carl at p. 3; see also Declaration of Tracy Hames at p. 3. Mr. Rentscher, Jr. indicated
3 about 60 acres were irrigated from the 1930's through 1966. While Ecology has argued Water Right
4 Claims filed by Mr. Carl in the 1970-74 period are evidence that some of the land was irrigated with
5 well water, the Court believes this evidence is fairly limited and not compelling since Mr. Carl was
6 not available to explain his intent in regard to the information set forth in the documents. The Court
7 finds the testimony of witnesses, discussed above, to be more compelling.

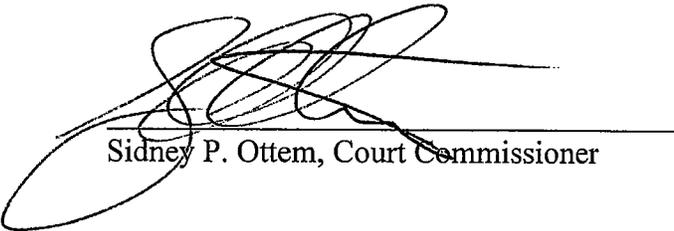
8 Therefore, the Court confirms a right with a June 9, 1855 priority date for irrigation of 60
9 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 30, T. 10 N., R. 19 E.W.M. Consistent with the water duty used by
10 the Referee, the right shall allow diversion of a proportional share of available flows from
11 Toppenish Creek but no more than 0.028 cfs per acre (1.68 cfs total) and 6 acre feet per acre (360
12 acre-feet total). The point of diversion lies in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30, T. 10 N., R. 19
13 E.W.M. Declaration of Thomas Elliot at 4. The irrigation season shall be April 1 through October
14 15. Since the property is now in tribal ownership, it will not be subject to loss for nonuse.

15 The N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 30, allotment No. 469, left Indian ownership in 1906 and returned in
16 1941. Although there was testimony by Mr. Rentschler Jr. that his family leased the property prior
17 to acquiring it in 1941 and also farmed the land at that time, the Court is unaware of any authority
18 that provides the same standard to Indian-leased property as *Walton* does for land in Indian
19 ownership. Consistent with *U.S. v. Anderson*, 736 F.2d 1358 (1984), only rights exercised during
20 that period can be confirmed to the Nation. Mr. Rentschler Jr. indicated the north portion of the
21 property was irrigated by way of a tractor and "V" disc farming implement whereby pools of water
22 were opened up and managed. However, that did not occur until around the 1940's. As argued by
23 Ecology, there is no compelling evidence of irrigation during that period. In fact, the evidence
24 presented by the Nation tends to show the property was used for grazing or even cutting of natural
25 grasses which may, or may not, suggest irrigation. See Declaration of Tracy Hames at 4. Mr.
Hames also testified that there were remnants of irrigation diversions on the Toppenish Creek
system but they could not be placed in a time sequence that is helpful to the Nation's case. This
Court cannot confirm a right to the Nation when the property was not irrigated with reasonable
diligence by the first non-Indian owner. See *Anderson, supra*; see also *Walton*, 647 F.2d at 50-51.
If water does overflow Toppenish Creek or otherwise make its way to the property naturally, the
Nation is able to use the water accordingly.

1 **III. CONCLUSION**

2 The Court ORDERS that the claims addressed in this Opinion are modified to reflect the
3 Court's findings. A Proposed Conditional Final Order accompanies this Memorandum Opinion.
4 Unless objections to this Opinion are filed by April 16, 2007, the Court shall enter the CFO at the
5 May 10, 2007 water day hearing.

6 Dated this 5th day of March, 2007.

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9 Sidney P. Ottem, Court Commissioner
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