

EXHIBIT A-1

**YAKIMA RIVER BASIN
WATER RIGHTS ADJUDICATION**

The State of Washington, Department of Ecology v.
James J. Acquavella, et al.
Yakima County Superior Court Cause No. 77-2-01484-5

REPORT OF REFEREE

**RE: SUBBASIN NO. 8
(THORP)**

Submitted to:
The Honorable Walter A. Stauffacher
Yakima County Superior Court

REPORT OF REFEREE - VOLUME 19

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,)

No. 77-2-01484-5

8 THE STATE OF WASHINGTON,)
9 DEPARTMENT OF ECOLOGY,)

REPORT OF REFEREE
Re: Subbasin No. 8
(Thorp)

10 Plaintiff,)

11 v.)

12 JAMES J. ACQUAVELLA, et. al.,)

13 Defendants.)
14

15 To the Honorable Judge of the above-entitled Court, the following report is
16 respectfully submitted:

17 I. BACKGROUND

18 This report concerns the determination of a portion of the surface water
19 rights of the Yakima River Drainage Basin, specifically those rights located
20 within Subbasin No. 8 (Thorp). The criteria used by the Referee in the
21 evaluation of claims in this subbasin, consisting of applicable law and bases for
22 water right determinations, can be found in the Report of the Referee to the
23 Court, Preface to Subbasin and Major Category Reports, Volume 2, dated May 18,
24 1988.

25 Evidentiary hearings were conducted by the Referee on December 6, 7, 8 and
26 9, 1989.

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II. FIELD INVESTIGATIONS

Field surveys were conducted by the Department of Ecology staff during 1987 and 1988 to obtain information on existing water use patterns in Subbasin No. 8 for use in the adjudication proceedings. Ditches, pipelines, pumps and wells were located and mapped. Map exhibits were prepared to show all pertinent features. Aerial photographs and topographic maps of the area in addition to county assessor's plats were utilized in conjunction with on-site field investigation.

III. WATER DUTY

The Plaintiff did not provide expert testimony on water duty for this subbasin, but did identify Washington State University's circular entitled "Irrigation Requirements for Washington--Estimates and Methodology", as being previously submitted into evidence. Individual claimants and their witnesses provided testimony on water use. As much as possible, the Referee proposes to rely on the testimony of the witnesses appearing on behalf of the individual claimants.

The maximum duty of water for the various uses in Subbasin No. 8 will be calculated by the Referee, in the absence of definitive testimony or other evidence, according to the following formulae:

- A. Domestic supply and lawn and garden up to
1/4 acre.....0.02 cfs; 2 acre-feet per
year
Stock water.....1 acre-foot per year
(diversion)

B. Irrigation Water -- The Referee reviewed testimony and evidence submitted in an adjoining subbasin, Subbasin No. 6 (Taneum), which is located

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1 north of the Thorp subbasin. Subbasin No. 6 had a water purveyor, the Taneum
2 Ditch Company, that set forth through expert testimony, the general water duty of
3 6.6 acre-feet per year per acre irrigated needed from their primary sources of
4 water. Although the source of water for the Taneum Ditch Company is Taneum Creek
5 located in Subbasin No. 6, the service area (or place of use) lies predominately
6 within Subbasin No. 8. The Referee will utilize the water duty of 6.6 acre-feet
7 per year per acre irrigated when testimony is not provided for historic use.

8 The maximum rate of diversion or withdrawal will be calculated on the basis
9 of 1.0 cubic foot per second (449 gallons per minute) for each 50 acres of
10 irrigation, irrespective of the type of crop. Therefore, for each irrigated
11 acre, the Referee calculates the maximum instantaneous rate of diversion to be
12 0.02 cubic foot per second (9 gallons per minute). It is the opinion of the
13 Referee that the aforementioned duty of water is a reasonable maximum application
14 rate for the soil and topographic conditions in Subbasin No. 8. These volumes
15 and rates of water application will be employed by the Referee when quantitative
16 evidence of the rate and volume of a right was neither submitted nor made clear
17 during testimony.

18 IV. STIPULATIONS

19 Three stipulations were adopted during the hearing, among all claimants and
20 their counsel. The first stipulation concerns the use of exhibits and testimony
21 and reads as follows:
22

23 It is hereby stipulated by all claimants in the above-entitled cause that
24 all exhibits entered and all testimony taken at the hearing on claims held
25 beginning December 6, 1989, may be utilized by any party in the proof of a
26 claim or the contesting of a claim whenever relevant and material.

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1 The second is a stipulation by the parties in relation to the description
2 of properties identified in the claims of the defendants to this action, and
3 reads as follows:

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

9 In the third, the parties stipulated to the following in relation to "non-
10 diversionary" stock and wildlife watering use with regards to Subbasin No. 8:

11 1. Waters in natural watercourses in the subbasin shall be retained when
12 naturally available, an amount not to exceed 0.25 cubic feet per second
13 (cfs), for stock water uses in such watercourses as they flow across or are
14 adjacent to lands, which are now used as pasture or range for livestock.
15 Retention of such water shall be deemed senior (or first) in priority,
16 regardless of other rights confirmed in this cause. Regulations of these
17 watercourses by the plaintiff shall be consistent with such retention
18 requirements.

19 2. Waters in natural watercourses in the subbasin shall be retained when
20 naturally available, an amount not to exceed 0.25 cubic feet per second
21 (cfs), for wildlife watering uses in such watercourses as they flow across
22 or are adjacent to lands, which are now used as pasture or range for
23 wildlife. Retention of such water shall be deemed senior (or first) in
24 priority, regardless of other rights confirmed in this cause. Regulations
25 of these watercourses by the plaintiff shall be consistent with such
26 retention requirements.

27 3. Waters in naturally occurring ponds and springs (with no surface
28 connection to a stream) in the subbasin shall be retained for stock water
29 uses, when such ponds and springs are located on or adjacent to lands which
are now used as pasture or range for livestock. Said uses embody
entitlements to a level in the water bodies sufficient to provide water for
animals drinking directly therefrom while ranging on riparian lands, and
with the same priority as provided in paragraph 1. Regulation of the ponds
and springs by the plaintiff shall be consistent with such retention
requirements.

4. Waters in naturally occurring ponds and springs (with no surface
connection to a stream) in the subbasin shall be retained for wildlife
watering uses, when such ponds and springs are located on or adjacent to
lands which are now used as pasture or range for wildlife. Said uses
embody entitlements to a level in the water bodies sufficient to provide
water for wildlife drinking directly therefrom while ranging on riparian
lands, and with the same priority as provided in paragraph 2. Regulation

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1 of the ponds and springs by the plaintiff shall be consistent with such
2 retention requirements.

3 5. Nothing in this stipulation mandates that any lands, associated with
4 water rights or water retention as provided herein, shall be reserved for
5 wildlife purposes.

6 V. LAND DESCRIPTIONS

7 The Referee has chosen, in the interest of minimizing future controversy
8 and confusion, to reduce legal descriptions of properties relating to confirmed
9 rights to the smallest reasonable legal subdivision in which are contained the
10 actual places of use. It is believed that the basic integrity of the right will
11 not only be preserved, but strengthened by this measure.

12 VII. SPECIAL ISSUES

13 Return Flows

14 Many of the defendants in this subbasin are asserting rights to the use of
15 return flow waters. The Court has used the definition of "return flows"
16 contained in 2 Hutchins, Water Right Laws in the Nineteen Western States (1974),
17 page 568 as follows: "'Return flow' is water diverted for irrigation or other
18 use that returns to the stream from which it is diverted, or to some other
19 stream, or that would do so if not intercepted by some obstacle."

20 The Court considers return flow waters to include waste water and seepage
21 water. The defendants who are claiming return flow waters lie below the Kittitas
22 Reclamation District canal. The contract between the United States and the
23 Kittitas Reclamation District specifically addresses return flow waters within
24 the reclamation district boundaries as follows:

25 34. (a) The United States does not abandon or relinquish any of the
26 waste, seepage or return flow-waters attributable to the irrigation of the
27 lands to which water is supplied under this contract. All such waters are
28 reserved and intended to be retained for the use and benefit of the United
29 States as a source of supply for the project.

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1 (b) If suitable drainage or return-flow water from any part of the
2 project shall at any time be or become available at points where it can be
used on lands within the District, the United States may supply such water
as a part of the supply to which the lands in the District are entitled.

3 Therefore, return flow waters that originate from the Kittitas Reclamation
4 District (KRD) system may be considered by the United States to be part of the
5 water to which district lands are entitled, or part of the four acre-feet per
6 acre that is delivered by KRD to district patrons.

7 Additionally, in a recent Washington State Supreme Court case, State of
8 Washington, D.O.E. v. U.S. Bureau of Reclamation, et al., 118 Wn.2d 761, 827 P.2d
9 275 (1992), the Supreme Court held that the appropriator of the water retains its
10 rights to use the water so long as the water remains within the boundaries of the
11 appropriator's property and that only Federal agencies and those entities with
12 whom they contract have authority to make decision regarding the distribution of
13 water within a Federal irrigation project. The Supreme Court found that the
14 Federal government, through the Bureau of Reclamation, was the appropriator of
15 water in a Federal project and had control of the water until it left the project
16 boundaries.

17 Additionally, the return flow water derived from irrigation practices using
18 water from the Kittitas Reclamation District, the West Side Irrigating Company,
19 Taneum Canal Company and the Menastash Water Ditch Company canals or seepage from
20 the canals would be foreign return flows as the water in these canals is diverted
21 from the Yakima River outside Subbasin No. 8, Taneum Creek or Manastash Creek,
22 also outside of Subbasin No. 8. The Washington State Court of Appeals has held
23 in the case of Dodge v. Ellensburg Water Co., 46 Wn App. 77, 82, 729 P.2d 631
24 (1986), that ". . . no water rights, prescriptive or otherwise, exist in these
25 waters." In a much earlier case, Elgin v. Weatherstone, 123 Wash. 429, 212 P.

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1 562 (1923), the Washington Supreme Court ruled that foreign waters are of a
2 vagrant or fugitive nature and may be used by the first person who can take them
3 from the stream where they are found. The ruling also found that the fact that a
4 riparian owner was first to appropriate vagrant surplus waters in a creek did not
5 give him the exclusive right to take it the next year.

6 The above cited cases lead the Referee to conclude that rights cannot be
7 confirmed for the use of return flow waters that originate from the application
8 of water from either the Kittitas Reclamation District, the West Side Irrigating
9 Company, the Taneum Canal Company or the Manastash Water Ditch Association,
10 canals, or seepage from those canals. Therefore, the only possible rights to
11 return flow waters that could be confirmed in the Thorp Subbasin would be return
12 flows resulting solely from the use of surface waters originating within the
13 subbasin, such as Fogey Creek. In order for the Referee to recommend that rights
14 be confirmed for use of return flow waters, the defendants would need to present
15 evidence to show that the return flows originated from use of creek(s) water, not
16 Yakima Project water or foreign return flows; evidence of the quantity of return
17 flow water used; historic use of the water; and the legal foundation for the
18 water use. Without that specific testimony, the Referee cannot recommend
19 confirmation of rights for use of return flow water.

21 VI. WATER RIGHT PRIORITIES

22 When the testimony and evidence leading to a confirmed right is no more
23 specific with respect to the priority date than the year, the Referee has elected
24 to use the 30th of June as representing a midpoint of that particular year. In
25 those cases when the priority to be confirmed is not more specific than the
26

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1 month, the last day of that month will be used. This has been done in the
2 interest of consistency and compatibility with other rights.

3
4 VIII. TESTIMONY AND REFEREE'S ANALYSES

5 Plaintiff Testimony

6 The Plaintiff State of Washington, Department of Ecology, was represented
7 by Mr. Charles B. Roe and Ms. Ceil Buddeke, Assistant Attorneys General.

8 The State introduced into evidence the following generic exhibits:

<u>NUMBER</u>	<u>DESCRIPTION</u>
SE-1	Map -- Subbasin No. 8--Inset A.
SE-2	Map -- Subbasin No. 8.
SE-3	Water Right Certificates, Permits, Surface Water Claims RE: Subbasin No. 8.
SE-4	Investigation Reports for the Claimants in Subbasin No. 8

14 Additionally, oral testimony was given by Mr. Clay Keown, Field
15 Investigator, Ecology Adjudication Section.

16 Claimant Testimony

17 Seventy-three defendants filed statements of claim or notices of appearance.
18 All claimants and their legal counsel, if so represented, are as follows:

<u>Court Claim No.</u>	<u>Name</u>	<u>Attorney</u>	<u>Page(s)</u>
21 2266	William Bews, Jr. Rt. 1 Box 375 Ellensburg, WA 98926	Kenneth D. Beckley P. O. Box 858 Ellensburg, WA 98926	19, 149
24 1722	Dale K. & Jewel E. Black Rt. 1 Box 415 Ellensburg, WA 98926	Hugh M. Spall P. O. Box 831 Ellensburg, WA 98926	24, 149

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1 COURT CLAIM NO. 4817 & 4942 - David W. and Lyla M. Fudacz
2 COURT CLAIM NO. 4818 - Larry T. Fudacz

3 Late Statements of Claim and supplemental claims were filed by the Fudaczs
4 for use of water from three unnamed springs and return flows for irrigation and
5 stock water supply. The claimants were represented by James Hurson, attorney.
6 David Fudacz testified at the evidentiary hearing on behalf of both claims.

7 The properties in question utilize the same sources of water and
8 distribution system, and operate as a unit. Spring and return flow waters
9 originate at two points, identified as "A" and "B" on the Fudacz exhibit map (DE
10 92). Based on the aerial photo, the springs emerge within a 100 foot area in the
11 SW~~1/4~~NW~~1/4~~SE~~1/4~~ of Section 11, although additional springs breakout all along the
12 railroad tract area. The springs feed concrete underground lines conveying water
13 to a point ("C") located at the southern most portion of the David and Lyla
14 Fudacz property approximately 800 feet south and 1,320 feet west from the east
15 quarter corner of Section 11, T. 18 N., R. 17 E.W.M.. The water is transported
16 to their property to irrigate 7.71 acres of timothy hay. This same system also
17 conveys water to Larry Fudacz's property for irrigation of 24.41 acres of timothy
18 hay and row crops. They pasture up to 180 sheep and several horses and cattle.
19 Surface methods are still the predominate method of application of water through
20 both concrete and earthen ditches and plastic and concrete pipes. Both farms
21 benefit from return flow when their neighbor, Andrew Dyk, irrigates his property.

22 David and Lyla Fudacz also have 4.12 acres which received water primarily
23 from the West Side Irrigating Company and waste water from a ditch along Goodwin
24 Road. Within the last few years, the claimants obtained an easement from their
25 neighbors the Leavitts, and recently began taking delivery of water from the West
26 Side Irrigating Company for the other 24.41 acre parcel. The West Side

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1 Irrigating Company is a Major Claimant in these proceedings. Their claim will be
2 addressed through the Major Claimant pathway.

3 Three patents have issued each describing a portion of the property the
4 Fudaczes own. The Northern Pacific Railroad received a patent dated May 31,
5 1870, for several hundred acres, including the E~~NE~~ and the NE~~SE~~ of Section
6 11. A patent issued to Rueben Pardee dated February 28, 1897, which in part
7 described the NW~~SE~~ and the NE~~SW~~ of Section 11. The David and Lyla Fudacz
8 property lies within the above described patented land. A patent issued to
9 Alanson J. Mason dated September 29, 1888, and included the S~~SE~~ of Section 11
10 wherein lies Larry Fudacz's property.

11 This general area was developed and irrigated beginning in the late 1800's,
12 as testified to, not only by Mr. Fudacz, but by other claimants in these
13 proceedings. In the early 1900's, the claimants' springs were the subject of
14 litigation between Ruth Mason and John Yearwood/John Newman, et al. Mr. Yearwood
15 had enlarged the spring channels on his property to convey the accumulating
16 spring water off his property and to John Newman. The channelling work affected
17 the flow of water onto the Mason property. The final opinion issued in June
18 1919, resulting in Ms. Mason being entitled to use 10 miners inches under 4 inch
19 pressure (0.2 cubic feet per second) from the springs for irrigation, domestic
20 supply and stock water. The Yearwood and Newman uses were acknowledged, but
21 there was no quantification of those uses. The Fudaczes own a portion of
22 Yearwood and Newman properties.

23 The claimants make use of waste waters or tailwaters, which are defined as
24 return flows. Although a right to use of natural return flows can be confirmed
25 if historically used and quantified, and with the appropriate water right
26 documentation, those flows imported into the subbasin are considered foreign

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1 return flows and are not subject to allocation. See the Special Issues Section
2 of this report beginning on page 5.

3 Two 90.14 RCW water right claims were filed which appear to describe the
4 Fudacz property. Claim No. 121941 was filed for use of water from a drain ditch
5 on the south side of Goodwin Road for irrigation of lawn and garden and stock
6 water supply. Since the "short form" was used, no specific point of diversion,
7 quantities or date of first use was given. Use of the "short form" under RCW
8 90.14 was for asserting a right to water for the purposes described in the Ground
9 Water Code's exemption to the permit process (Section 90.44.050 RCW) which are
10 domestic supply, stock watering, irrigation of up to one-half acre of lawn and
11 non-commercial garden, and industrial supply as long as less than 5,000 gallons
12 per day is being used. Use of the short form waived any right that may have
13 existed in excess of those quantities and uses.

14 Under Claim No. 121943, 10 gallons per minute (gpm), 0.5 acre-foot per year
15 was claimed from a spring for continuous stock water. No point of diversion was
16 given. Claim No 121943 preserves a right to use of the spring for stock water
17 only. The place of use described in these two claims was "All that portion of
18 the NE*SW* and NW*SE* of Section 11, lying north and east of the Chicago,
19 Milwaukee, and St. Paul Railroad". Only a portion of the David and Linda Fudacz
20 land falls within the described place of use--the 4.12 acre parcel on which only
21 water from the West Side Irrigating Co. and a waste water ditch are used for
22 irrigation. The spring is used for stock water supply.

23 The Referee recommends that a right be confirmed to David W. and Lyla M.
24 Fudacz under Court Claim No. 04817, under the Riparian Doctrine, with a priority
25 date of February 28, 1897, for 0.02 cfs and 2 acre-feet per year for continuous
26 stock water supply from the spring area. The springs are located within the

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1 following points of diversion: "A" is located approximately 1,500 feet north and
2 200 feet east from the south quarter corner of Section 11; and "B" is located
3 approximately 1,400 feet north and 200 feet east from the south quarter corner of
4 Section 11; both being within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, T. 18 N., R. 17 E.W.M.

5 Due to the lack of a RCW 90.14 claim for irrigation and lack of testimony
6 about the nature of the return flow waters being used, the Referee cannot
7 recommend confirmation of an irrigation right under either Court Claim No. 4817
8 or 4818.

9
10 COURT CLAIM NO. 1810 - Ben F. and Nina M. George

11 The Claimants filed a Statement of Claim asserting a right to use water
12 from an unnamed spring for irrigation and stock water. Mr. George testified at
13 the evidentiary hearing on behalf of their claim.

14 The subject property has been in the George family since 1928. The Georges
15 own the SE $\frac{1}{4}$ of Section 3 and the NE $\frac{1}{4}$ of Section 10, T. 18 N., R. 17 E.W.M. and
16 are entitled to water from both the Taneum Canal Company and the Kittitas
17 Reclamation District (KRD). The portion of their property receiving water from
18 the unnamed spring is located within the E $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3, lying east of the
19 Thorp Mill Ditch. This property does not benefit from water delivered through
20 either the Taneum ditch or KRD. The State's Investigation Report identified this
21 property having West Side Irrigating Company water appurtenant to it; however,
22 Mr. George testified that he does not convey West Side water to this acreage.

23 Approximately 12 acres are irrigated from the unnamed spring. Water is
24 diverted from a point located approximately 800 feet south and 900 feet west from
25 the east quarter corner of Section 3, being within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3.
26 These springs originate east of the West Side canal and, although they flow

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1 CLAIMANT NAME: David W. and Lyla M. Fudacz COURT CLAIM NO. 4817

2 Source: Two unnamed springs

3 Use: Stock water

4 Period of Use: Continuous

5 Quantity: 0.02 cubic foot per second, 2 acre-feet per year

6 Priority Date: February 28, 1897

7 Point of Diversion: 1. 1,500 feet north and 200 feet east from the south
8 quarter corner of Section 11;
9 2. 1,400 feet north and 200 feet east from the south
10 quarter corner of Section 11; both being within the
11 NW~~SE~~ of Section 11, T. 18 N., R. 17 E.W.M.

12 Place of Use: That portion of the E~~W~~ of Section 11, T. 18 N.,
13 R. 17 E.W.M. described as follows: Beginning at the east
14 quarter corner of Section 11; thence N 89°19'11" W
15 1,329.81 feet to a point which is the approximate center
16 of Goodwin Road; thence S 00°17'19" 20 feet to the south
17 right of way boundary of said county road and the true
18 point of beginning; thence S 00°17'19" W 187 feet; thence
19 N 89°19'11" W parallel with the south right of way of
20 said county road 820.19 feet; thence N 73°03'37" 164.29
21 feet; thence N 00°27'51" 131.02 feet; thence continuing N
22 00°27'51" W 10 feet to a point on the south right of way
23 of said county road; thence S 89°19'11" E on said road
24 right of way 979.45 feet to the true point of beginning.

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**SUPPLEMENTAL
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PURSUANT TO ORDER ON
EXCEPTIONS OF
MARCH 9, 1995

14 To the Honorable Judge of the above-entitled Court, the following report is
15 respectfully submitted:

16 The Order issued by the court on the March 9, 1995, ruled upon several
17 exceptions to the Report of Referee and remanded certain exceptions to the Referee,
18 with instructions, for further evaluation and subsequent recommendations to the
19 Court.

20 The claims remanded to the Referee are identified as follows:

21 Harold E. Chamberlin and Sherry A. Chamberlin, Claim No. 02316

22 Gerald D. Detwiler and Carol L. Detwiler, Claim No. 02074

23 Douglas A. Dicken, Claim No. 01722

24 David W. Fudacz and Lyla M. Fudacz, Claim No. 04817

25 Larry T. Fudacz, Claim No. 04818

26 Elwin Gibson and Patricia Gibson and Irwin Loucks and Dorothy Loucks,
27 Claim No. 02046

28 Charles Gust, Claim No. 01560

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- 1 Ivan Hutchinson and Mildred Hutchinson, Claim No. 00876
- 2 James Ogden, Claim No. 01961
- 3 Robert F. Lapen and Linda L. Lapen, Claim No. 01446
- 4 Vernon G. Meyer and Ellen F. Meyer, Claim No. 01875
- 5 Murray Pacific Corporation and Roger C. Sparks and Rita M. Sparks and
- 6 Dale Dyk and Bart G. Bland and Dave Duncan & Sons and James V. Leishman
- and Duncan Family Trust and Douglas A. Dicken, Claim No. 00931
- 7 Packwood Canal Company, Inc., Claim No. 00785
- 8 Gene Panattoni and Sally Panattoni, Claim No. 01208
- 9 Peoples National Bank of Washington, Claim No. 00738
- 10 Theiline P. Scheumann, Claim No. 01335
- 11 Randell Shannon and Tresa Shannon, Claim No. 01809
- 12 Virginia Anderson, Claim No. 00500
- 13 Thorp Town Ditch Association, Claim No. 00725
- 14 Larry O. Hillis and Veralene Hillis, Claim No. 01705
- 15 Wynn Vickerman, Claim No. 00596
- 16 Norma Jean Wilcox, Claim No. 01971
- 17 Willowbrook Farms Ltd. Partnership, Claim No. 00520
- 18 3 Bar G Ranch, Inc., Claim No. 02068

19 Ecology's exception to the annual quantity of water recommended for
 20 confirmation to Richard O. and Rita Hutchinson, Claim No. 00877 and Ecology's
 21 exception asking for a definition of the term "supplemental" as used by the Referee
 22 and the Court were denied by the Court.

23 On February 10, 1995, the Court entered a Memorandum Opinion Re: RCW 90.14
 24 and Substantial Compliance, incorporating the Court's earlier oral ruling

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1 concerning substantial compliance. Exceptions making substantial compliance with
2 RCW 90.14 arguments filed by the following claimants were denied by the Court:

- 3 1. Claim No. 02068, 3 Bar G Ranch
- 4 2. Claim No. 00932 & 17500, Dave Duncan, et al.
- 5 3. Claim No. 04817, 04818, 04942, Larry, David & Lyla Fudacz
- 6 4. Claim No. 02046, Claude & Lillian Gibson, Elwin & Patricia Gibson, Erwin
& Dorothy Loukes
- 7 5. Claim No. 00829, Ronald & Margaret McMillian
- 8 6. Claim No. 01809, Randell & Teresa Shannon

9 On July 19, 1995, the Court entered a Memorandum Opinion Re: Priority Date -
10 Date of Patent or Date of Entry addressing the proof needed to establish priority
11 dates. The Referee will look to that opinion when considering evidence presented
12 concerning priority dates. The claimants who filed exceptions specifically on
13 priority date were Dale & Jewel Black (now Dickens), Claim No. 01722; Harold &
14 Sherry Chamberlin, Claim No. 02316; Larry & Veralene Hillis, Claim No. 00894, 01705
15 & 01204; and Willowbrook Farms, Claim No. 00520. Additionally, the Court entered a
16 Memorandum Opinion on January 31, 1995, related to the exceptions filed by
17 Grousemont Farms, Ivan and Mildred Hutchinson and Vernon and Ellen Meyer. That
18 opinion guided the Referee in addressing those exceptions later in this report.

19 Hearings, for the purpose of opening the record for testimony and evidence
20 relating to the exceptions, were conducted by the Referee beginning on June 5,
21 1995. The Department of Ecology was represented by Assistant Attorney General Jo
22 Messex Casey.

23 COURT CLAIM NO. 00500 -- Virginia Anderson

24 Court Claim No. 00500 was filed jointly by Arthur G. Thayer and John J. Thayer
25 who did not appear at the original evidentiary hearing because of John Thayer's
26 death and Arthur's poor health. Margaret A. Thayer, a sister, succeeded to the

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1 ambiguous on its face and that the described point of diversion is indeed located
2 on Hatfield Canyon Creek. Therefore, the Referee's conclusion that no water right
3 claim was filed on the unnamed stream should be affirmed.

4 Mr. Burrue1 filed WRC No. 121389 on a short form claiming ground water as a
5 source for a domestic supply. Mr. Black did not appear to provide testimony
6 supporting his contention that Mr. Burrue1 made an error in distinguishing the
7 source as ground water, rather than surface water. Although Mr. Spall suggests
8 that no well exists on the Black property, the record is silent in that regard.
9 Mr. Black did testify that water from the smaller spring is used at the house and
10 barn, but provided no historic use or quantification testimony regarding that use.
11 Lacking that clarifying testimony, the Referee concludes that WRC No. 121389 has
12 not been established as being a filing on the house spring. Further, there is no
13 record upon which a right could be quantified even if a water right claim had been
14 filed. The original finding of the Referee should stand and a right not be
15 confirmed under Court Claim No. 01722.

16
17 COURT CLAIM NO. 04817 -- David W. Fudacz
(A)04942 & Lyla M. Fudacz

18 COURT CLAIM NO. 04818 -- Larry T. Fudacz

19 Attorney Richard T. Cole filed exceptions for David Fudacz relative to the
20 Report of Referee for Subbasin No. 8 (Thorp). The exceptions relate to the
21 findings of the Referee that all irrigation water rights associated with Court
22 Claims 04817, 04818 and 04942 were waived and relinquished due to deficiencies in
23 filing of Water Right Claims (WRC) as prescribed by RCW 90.14. The Court denied
24 the claimant's substantial compliance arguments and their attempts to amend their
25

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1 RCW 90.14 claim through their exceptions, see the Court's Order On Exceptions for
2 Subbasin No. 8 (Thorp) dated March 9, 1995.

3 Although the Court did not specifically refer the question of priority date to
4 the Referee, that issue was the fourth exception filed by Fudacz. The claimants
5 are asserting a priority date of June 30, 1889. The record is clear that a patent
6 was issued to Rueben Pardee on February 28, 1897, for the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of
7 Section 11, T. 18 N., R. 17 E.W.M. within which the Fudacz farmstead lies. The
8 evidence indicates that the springs were in existence before the Westside Canal was
9 put into service around 1890 and that flow from the springs increased dramatically
10 over the next 20 years. Spring water has been used via pipelines and ditches to
11 irrigate the 7.71 acre field and presumably supplied stock water to the adjoining
12 4.12 acre field to the west. Testimony indicates that water is not run through the
13 pipeline running north between the two Dave Fudacz parcels during the
14 non-irrigation season. Therefore, the Referee recommends that the diversionary
15 stock water right previously recommended be modified to eliminate the
16 non-irrigation season and to reduce the annual quantity from 2 acre-feet per year
17 to 1 acre-foot. Thus, Page 166, Line 4 is amended to read April 15 through
18 October 31. The priority date of February 28, 1897, is appropriate as it reflects
19 the patent date. The Riparian Doctrine has been relied upon lacking evidence to
20 substantiate an earlier date. The Referee acknowledges that steps to sever the
21 land from Federal ownership began earlier than 1897; however, the record lacks
22 specific dates other than the homestead patent on which to base the priority date.
23 The exception states that there is evidence that water was first used in 1884;
24 however, that evidence was not brought to the Referee's attention.

25
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27 SUPPLEMENTAL REPORT OF REFEREE
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1 The Referee recommends that a diversionary stock water right be issued to the
2 Fudacz's as described above.
3

4 COURT CLAIM NO. 02046 -- Elwin Gibson
5 & Patricia Gibson
6 Irwin Loucks
& Dorothy Loucks

7 The Referee recommended confirmation of two water rights: One from a spring
8 located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, T. 18 N., R. 17 E.W.M. having a June 20, 1878,
9 priority date, and the other being the Yakima River at a point in common with the
10 diversion for the Thorp Mill Ditch having a priority date of December 28, 1888.
11 The recommended Yakima River water right is for substantially fewer acres than
12 encompassed by the claimants' farming practices. Exceptions to the Report of
13 Referee relating to Court Claim No. 02046 were filed with the Court by Richard T.
14 Cole on behalf of the claimants and by Jo Messex Casey, Assistant Attorney General,
15 on behalf of Plaintiff State of Washington Department of Ecology (Ecology).
16 Ecology requests refinement of the place of use for the spring water.

17 Claimants Gibson and Loucks assert that Water Right Claim (WRC) No. 118943
18 substantially complies with the filing requirements of RCW 90.14 for their combined
19 ownership. The basis for that conclusion is that Ben Gibson, the signatory on the
20 claim form, mistakenly omitted major portions of their ranch ownership. Gibson and
21 Loucks further contend that the Referee had both sufficient facts and the
22 discretion to amend WRC Claim No. 118943 to include all of the claimant's land
23 located within the SW $\frac{1}{4}$ and SE $\frac{1}{4}$ of Section 12 and the NE $\frac{1}{4}$ and NW $\frac{1}{4}$ of Section 13,
24 T. 18 N., R. 17 E.W.M. The Court has ruled via Memorandum Opinion RE: RCW 90.14
25 and Substantial Compliance that amendments to water right claims is exclusively a
26

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28 Re: Subbasin No. 8

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FINDINGS OF FACT

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I, DOUGLAS CLAUSING, as Referee in this proceeding, having carefully examined the testimony and evidence, do hereby make the following Findings of Fact pursuant to the Order on Exceptions entered by this court on March 9, 1995:

Based upon the additional testimony and evidence obtained at either the exception hearing or the supplemental hearing, the Report of Referee - Subbasin No. 8, dated May 9, 1994, should be modified as ordered by the Court on March 9, 1995, and by recommendations made herein. Following are the rights recommended for confirmation in the May 9, 1994, Report of Referee for Subbasin No. 8, which were not modified as a result of the exceptions taken and the additional recommendations made by the Referee as a result of the Court's rulings at the exception hearing and the testimony and evidence presented at the supplemental hearing:

CLAIMANT NAME:	Elwin and Patricia Gibson and Claude and Lillian Gibson	COURT CLAIM NO. <u>02046</u>
Source:	An unnamed spring	
Use:	Irrigation of 9.5 acres and stock water	
Period of Use:	April 1 to October 31	
Quantity:	0.19 cubic foot per second, 62.7 acre-feet per year for irrigation and 2 acre-feet per year for stock water	
Priority Date:	June 30, 1878	
Point of Diversion:	1100 feet north and 550 feet east from the south quarter corner of Section 11, being within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, T. 18 N., R. 17 E.W.M.	
Place of Use:	The NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, T. 18 N., R. 17 E.W.M.	

SUPPLEMENTAL REPORT OF REFEREE
Re: Subbasin No. 8

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1 CLAIMANT NAME: David W. and Lyla M. Fudacz COURT CLAIM NO. 04817

2 Source: Two unnamed springs

3 Use: Stock water

4 Period of Use: April 15 to October 31

5 Quantity: 0.02 cubic foot per second, 1 acre-foot per year

6 Priority Date: February 28, 1897

7 Point of Diversion: 1. 1,500 feet north and 200 feet east from the south
quarter corner of Section 11;
8 2. 1,400 feet north and 200 feet east from the south
quarter corner of Section 11; BOTH being within the NW $\frac{1}{4}$ SE $\frac{1}{4}$
9 of Section 11, T. 18 N., R. 17 E.W.M.

10 Place of Use: That portion of the E $\frac{1}{2}$ of Section 11, T. 18 N.,
R. 17 E.W.M. described as follows: Beginning at the east
11 quarter corner of Section 11; thence N 89°19'11" W
1,329.81 feet to a point which is the approximate center
12 of Goodwin Road; thence S 00°17'19" W 20 feet to the south
right of way boundary of said county road and the true
13 point of beginning; thence S 00°17'19" W 187 feet; thence
N 89°19'11" W parallel with the south right of way of said
14 county road 820.19 feet; thence N 73°03'37" W 164.29 feet;
thence N 00°27'51" W 131.02 feet; thence continuing N
15 00°27'51" W 10 feet to a point on the south right of way
of said county road; thence S 89°19'11" E on said road
16 right of way 979.45 feet to the true point of beginning.

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The aforementioned changes shall be incorporated into the Report of Referee

dated May 9, 1994.

SIGNED and DATED at Yakima, Washington, this 4th day of March,

1997.


DOUGLAS CLAUDING, Referee

SUPPLEMENTAL REPORT OF REFEREE
Re: Subbasin No. 8

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

KIM M. EATON
CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON
DEC 03 1999
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2
3 IN THE MATTER OF THE DETERMINATION)
4 OF THE RIGHTS TO THE USE OF THE)
5 SURFACE WATERS OF THE YAKIMA)
6 RIVER DRAINAGE BASIN, IN)
7 ACCORDANCE WITH THE PROVISIONS OF)
8 CHAPTER 90.03, REVISED CODE OF)
9 WASHINGTON,)

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
Plaintiff,

vs.

JAMES J. ACQUAVELLA, ET AL.,
Defendants

No. 77-2-01484-5

MEMORANDUM OPINION AND ORDER
RE: EXCEPTIONS TO SUPPLEMENTAL
REPORT OF REFEREE SUBBASIN 8
(THORP)

FILED
DEC 02 1999

KIM M. EATON
YAKIMA COUNTY CLERK

12 I. INTRODUCTION

On July 10, 1997, various Subbasin 8 claimants participated in a hearing to resolve exceptions taken to the Supplemental Report of Referee for Subbasin 8. Many of the exceptions were resolved at the hearing; a few were not. This opinion clarifies the record regarding the status of the unresolved claims in that subbasin.

16 II. MATTERS RESOLVED AT JULY 10, 1997 HEARING

Judge Walter Stauffacher resolved the following exceptions by oral ruling.

18 a. Charles Gust - Claim No. 01560

The Court GRANTED Mr. Gust's exception. The water right shall have a priority date of June 30, 1882. Report of Proceedings (RP) at p. 20.

20 b. Wynn & Catherine Vickerman (Hubert A. and Mary M. Schmitt) - Claim No. 0596

The Vickermans have transferred ownership of the property in question to Hubert and Mary M. Schmitt and obtained the appropriate Substitution Order. The Referee recommended that two rights be confirmed to the Vickermans, however no legal description was provided to the Referee. Included with the exception filed by the Vickermans was a legal description for their property.

Therefore, the court granted their exception. RP at 21. However, after the Schmitts were substituted for the Vickermans, an amended legal description was submitted apparently as a result of a survey of the property. The following legal description was provided:

Parcel V of that certain survey as recorded December 2, 1997 in Book 23 of Surveys at page 28, under Auditor's File No. 199712020001, records of Kittitas County, State of Washington; being a portion of the Southeast quarter of the Southeast quarter of Section 30, Township 18 North, Range 18 East, W.M., in the County of Kittitas, State of Washington.

This legal description is a parcel within a survey recorded in the Kittitas County Auditor's office. In order for the Court to use this new legal description, a copy of the survey is needed to show that the parcel lies within the previously described land. Therefore, the Court requests a copy of the survey as soon as possible but no later than February 10, 2000.

c. David and Lila Fudacz, Larry Fudacz (Claim Nos. 04817 and 04818)

The Fudacz exception concerned the lack of an RCW 90.14 filing to support their claims to springs. In their exception, the Fudacz's made the court aware of WRC No. 133399 filed by John A. Wilcox. The court agreed that the claim covered the property and GRANTED the exception. Therefore, a right is confirmed for irrigation of 3 acres (the acreage remaining in the 90.14 claim not utilized by Norma Jean Wilcox as a part of the Wilcox claim) from the spring in the quantities of 0.06 cfs; 19.8 acre-feet per year with a June 30, 1910 priority date. RP at 21.

The Place of Use shall be the West 660 feet of the East 1008.7 feet of the South 260 feet of the NE1/4SE1/4 of Section 11, T. 18N., R. 17 E.W.M..

d. Gene & Sally Panattoni – Court Claim No. 01208

Ecology identified that the instantaneous and annual quantities were omitted from the Referee's Schedule of Rights on page 116 of the Supplemental Report. The Schedule should include such quantities and therefore the Court GRANTS Ecology's exception. The Panattoni's are awarded an instantaneous diversion of 0.02 cfs; 1 acre-foot per year. RP at 21.

e. Irwin & Dorothy Loucks – Court Claim No. 02046

2 into the Packwood Canal that is used on Grousemont's 15.2 acres is return flow. The 3 acre-
3 feet limit is consistent with what was granted for Robinson Canyon Creek water uses by
4 Packwood. Grousemont argues that the water duty for the area is 25 acre feet per acre and
5 that based on Mr. Bain's analysis, half of that quantity is return flow and half is natural-flow.
6 Similarly, Grousemont (per Richard Bain's measurement) asserts in regard to the
7 instantaneous flow that 4.3 – 5.1 cfs is used (4.45 had been used in prior calculations).

8 The Pease Agreement entered into in 1903 indicates that 100 inches would be
9 delivered through the flume to the lands now being irrigated by Grousemont. 100 inches
10 equals approximately 2 cfs. That is the basis for the right. The Referee concluded that
11 Taneum Canal Company return flow would make up some portion of that water.
12 Grousemont offers the only evidence on how to split the diversion between natural and
13 return flow; ½ return flow, ½ natural flow. Because the instantaneous right established by
14 the Pease Agreement must be cut in half to 1 cfs to accommodate the portion that is return
15 flow, the exception taken by Grousemont must be DENIED. The Court GRANTS the
16 exception regarding annual use to confirm a right to 193.80 acre-feet. That quantity reflects
17 half of the water duty (25.5 acre-feet) recognized by the Referee as applying to those lands
18 (Report of Referee, page 76 lines 7-13). Thus, the acre feet quantity on the top of page 129
19 should be changed from 45.6 acre-feet to 193.80 acre-feet.

20 f. Packwood Canal Company – Claim No. 00785/04801

21 Pursuant to the Order signed on July 8, 1999, the court will reserve ruling on Packwood's
22 exceptions until the matter captioned Packwood Canal v. Ecology, No. 99-2-01764-1 is decided.

23 IV. CONCLUSION

24 This Opinion and Order resolves nearly all exceptions to the Referee's Supplemental Report.
25 Those matters not resolved (Packwood Canal Company, Wynn and Catherine Vickerman,
Willowbrook Farms, Grousemont Farms) shall proceed as directed in the Court's analysis of their
respective claim set forth above.

Dated this 2nd day of December.


Sidney Ottem, Court Commissioner

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FILED

OCT - 9 2003

KIM M. EATON
YAKIMA COUNTY CLERK

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

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

NO. 77-2-01484-5

THE STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

CONDITIONAL FINAL ORDER
SUBBASIN NO. 8
(THORP)

Plaintiff,

v.

JAMES J. ACQUAVELLA, et al.,

Defendants.

I.

On May 9, 1994, the Referee, John E. Acord, filed with the Court the Report of Referee Re: Subbasin No. 8 (Thorp). Thereafter, this Court set December 8, 1994, for a hearing on exceptions to this report. Pursuant to the direction of the Court, the Referee then served a notice (together with a copy of the report) upon all parties setting a time period for filing any exceptions to the report and for the aforementioned hearing on exceptions.

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II.

On December 8, 1994, the Court held a hearing on exceptions to the Report of Referee. The Court, after reviewing the exceptions and other materials and being fully advised, filed its Order On Exceptions RE: Subbasin 8 (Thorp) on March 9, 1995, which, among other matters, ordered that the Referee schedule a supplemental hearing to further consider certain claims as specified by the order.

III.

On June 5 and 6, 1995, Referee Douglas Clausing conducted a supplemental hearing as directed by the Court. On March 4, 1997, the Referee filed the Supplemental Report of Referee Re: Subbasin No. 8 (Thorp). This Court set July 10, 1997, for a hearing on exceptions to the supplemental report. Pursuant to direction of the Court, the Referee then served notice (together with a copy of the supplemental report) upon all parties, setting a time period for filing any exceptions to the supplemental report and for the aforementioned hearing on exceptions.

IV.

On July 10, 1997, the Court held a hearing on exceptions to the Supplemental Report of Referee Re: Subbasin No. 8 (Thorp). The Court orally ruled on several exceptions during the hearing and in its Memorandum Opinion and Order Re: Exceptions to Supplemental Report of Referee Subbasin No. 8 (Thorp), dated

1 December 2, 1999. On January 28, 2000, the Court filed its
2 Memorandum Opinion and Order Re: Packwood Canal's Exceptions to
3 Supplemental Report of Referee Subbasin 8 (Thorp). The Court set
4 a hearing on February 10, 2000, to take additional testimony in
5 regard to the exceptions filed by Willowbrook Farms Limited and
6 Theiline P. Scheumann (Grousemont Farms). On August 3, 2000, the
7 Court filed its Memorandum Opinion and Order Re: Willowbrook
8 Farms, Limited and Theiline P. Scheumann.

9 V.

10 Willowbrook Farms asked the Court to delay entry of a
11 Conditional Final Order while it sought amendment of its RCW
12 90.14 claim. Willowbrook Farms ultimately succeeded in amending
13 its RCW 90.14 claim and filed a motion requesting the Court to
14 confirm a water right consistent with the amended claim. The
15 Court filed its Memorandum Opinion Re: Willowbrook Farms LLP on
16 July 22, 2003.

17 VI.

18 The Court orders as follows:

- 19
- 20 1. The Report of Referee for Subbasin No. 8 (Thorp), filed
21 with the Court on May 9, 1994, as amended by the
22 Supplemental Report of Referee Re: Subbasin 8 (Thorp) filed
23 with the Court on March 4, 1997, as amended by the Court's
24 Orders on December 2, 1999, January 28, 2000 and August 3,
25

1 2000 and as further amended by the Memorandum Opinion on
2 July 22, 2003 are entered as a Conditional Final Order
3 confirming the rights recommended for confirmation in said
4 reports, opinions and orders as existing rights.

5
6 2. All claims to water rights before the Referee pertaining
7 to Subbasin No. 8 not so confirmed are denied.

8
9 3. The rights within Subbasin No. 8 (Thorp) shall be
10 administered according to this Conditional Final Order.

11 4. This Conditional Final Order, relating to the
12 confirmation of rights and denial of claims of water rights,
13 constitutes a final order for purposes of appeal (see RAP
14 2.2(d)), except for purposes of final integration of all
15 confirmed rights as provided in Section XII of Pretrial
16 Order No. 8 (Procedures for Claim Evaluation, dated March 3,
17 1989) of this Court.

18
19 DATED this 9th day of October, 2003.

20
21
22 
23 _____
24 SIDNEY P. OTTEM, COURT COMMISSIONER