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JAN 14 1993

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YAKIMA COUNTY CLERK

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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,)

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

JAMES J. ACQUAVELLA, et al.,

Defendants.

No. 77-2-01484-5

CONDITIONAL FINAL ORDER:
SUBBASIN NO. 12
(SHUSHUSKIN CANYON)

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On April 30, 1990, the Referee, William R. Smith, filed with the Court a "Report of Referee re: Subbasin No. 30 (Shushuskin Canyon)," dated April 24, 1990. Thereafter, this Court set October 1, 1990 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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Lacey WA 98504-0117

1 Written exceptions were received from the following
2 claimants:

- 3 1. Department of Natural Resources (Claim 0589);
- 4 2. Department of Wildlife;
- 5 3. Department of Fisheries;
- 6 4. Robert and Louise Acheson (Claims 0346, 3618A);
- 7 5. H. Edward Stroh (Claim 0187).

8 Appearing at the October 1, 1990 hearing on exceptions
9 were Hugh Spall, Attorney at Law, representing Defendants
10 Robert and Louise Acheson and H. Edward Stroh; Kerry O'Hara,
11 Assistant Attorney General for Plaintiff, Ecology; and
12 William R. Smith, Referee. William Frymire, Assistant
13 Attorney General, representing Defendants Departments of
14 Natural Resources, Fisheries, and Wildlife, appeared in an
15 earlier exceptions hearing for Subbasin 30 (Hanford), at which
16 time his exceptions relating to the Report of Referee for
17 Subbasin No. 12 were considered.

18 The Court, after reviewing the briefs and exceptions
19 filed, and after having heard argument and being fully
20 advised, ordered that the claims of H. Edward Stroh and Robert
21 and Louise Acheson be remanded for additional evidence. The
22 exceptions of the Department of Fisheries relating to Fish
23 Bypass Flow were denied. In response to the exceptions filed
24 by the Departments of Wildlife and Natural Resources, the
25 Court ordered that the language for the stockwater stipulation

1 agreed to in Subbasin No. 17 (Tieton) be included in the
2 Referee's Supplemental Report. The Court further ordered the
3 Referee to clarify in the Supplemental Report that no
4 diversionary water right was recommended for confirmation in
5 the claim asserted by the Department of Natural Resources, and
6 that the Referee was to consider the claim of Neil Leibly
7 (No. 2246) during the remand hearing. (See Order on
8 Exceptions, Subbasin No. 12 (Shushuskin Canyon), entered
9 January 11, 1991.)

10 On March 6, 1991, a remand hearing was conducted at which
11 time the Acheson, Stroh, and Leibly claims were considered.
12 Following review of the record of these proceedings, the
13 Referee determined that additional evidence was necessary to
14 make definitive recommendations to the Court regarding
15 quantifications of water rights for claimants Acheson and
16 Stroh. The remainder of the 1991 irrigation season was
17 allowed for the Department of Ecology to conduct streamflow
18 measurements and data collection.

19 On April 3, 1991, the United States (Claim 2276) moved
20 the Court to allow presentation of evidence and testimony at
21 appropriate subbasin hearings to support claims for public
22 domain Indian trust allotments. On April 11, 1991, the Court
23 granted the motion.

24 On December 18, 1991, a second remand hearing was held
25 for the purpose of obtaining additional evidence regarding

26 **CONDITIONAL FINAL ORDER**

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1 flow characteristics for Fogarty Ditch and to take evidence
2 regarding Yakima Public Domain Allotment E-604. Appearing at
3 this hearing were Hugh Spall, Attorney at Law, for Defendant
4 Acheson; Charles E. O'Connell, Jr., Department of Justice, and
5 Susan K. Driver, U.S. Department of the Interior, for
6 Defendant United States; and Kerry O'Hara, Assistant Attorney
7 General for Plaintiff Ecology. Defendant Stroh did not appear
8 at either the March 6 or December 18, 1991 hearings.

9 On March 4, 1992, Referee Smith filed with the Court a
10 "Supplemental Report of Referee Re: Subbasin No. 12
11 (Shushuskin Canyon)," dated March 3, 1992. Thereafter, this
12 Court set a hearing on July 16, 1992 to consider exceptions
13 filed in reference to this report. Pursuant to the direction
14 of the Court, the Referee then served a notice (together with
15 a copy of the report) upon all claimants in Subbasin No. 12,
16 scheduling a time period for the filing of any exceptions to
17 the supplemental report and for the aforementioned hearing on
18 exceptions. Pursuant to the Court's order of August 8, 1991,
19 amending Pre-Trial Orders No. 5 and 8, notification of the
20 report's filing was sent to all parties, providing an
21 opportunity for them to request a copy of the Supplemental
22 Report and advising of the dates for filing exceptions and of
23 the hearing on exceptions.

24 Written exceptions were received as follows:
25
26

- 1 1. Robert and Louise Acheson, Claim Numbers 0346, 3618,
2 3618A, objecting to the Referee's recommendation and
3 to the adjudication process;
- 4 2. Kittitas Reclamation District, as to the findings
5 and conclusions relative to Claim No. 2276, the
6 United States of America, as it pertains to Public
7 Domain Allotment E-604;
- 8 3. Ellensburg Water Company, as to the Claim of the
9 United States in relation to the priority date
10 established for Public Domain Allotment E-604;
- 11 4. State Department of Ecology, seeking clarification
12 of the priority date recommended for the Public
13 Domain Allotment E-604, and seeking correction of
14 several typographical errors.

15 Appearing at the July 16 hearing were Robert Acheson,
16 appearing pro se; John P. Gilreath, Attorney at Law,
17 representing Defendant Kittitas Reclamation District; Donald
18 Bond, Attorney at Law, representing Defendant Ellensburg Water
19 Company; Deborah Mull and Kerry O'Hara, Assistant Attorneys
20 General representing Plaintiff, Department of Ecology; Charles
21 O'Connell, Attorney for the Department of Justice (United
22 States); William R. Smith, Referee, and Tom McDonald,
23 Assistant Attorney General for the Referee.

24 The Court, after reviewing the exceptions filed, along
25 with supporting briefs and other materials, and having heard

1 arguments of counsel and claimants, and otherwise being fully
2 advised, ordered that the exception of Robert and Louise
3 Acheson be denied. As to the issue of the Off-Reservation
4 Public Domain Allotments, supplemental briefing and argument
5 was offered, resulting in a Memorandum Opinion of the Court
6 signed on November 12, 1992, and subsequent Order entered with
7 the Court on December 10, 1992. The Court thereby ordered
8 that Allotment E-604 was withdrawn from the public domain
9 pursuant to the provisions of the Indian Homestead Act of 1844
10 (43 U.S.C. § 190) and, as such, is held in trust by the United
11 States and is specifically reserved for the benefit and
12 protection of the respective Indian allottee and appropriate
13 heir(s). (Order, p. 1.) At the time of withdrawal from the
14 public domain, there was a reservation of water to accomplish
15 the purpose of the reservation, such reservation to be
16 measured as that amount of water necessary to irrigate all of
17 the "practically irrigable acreage" within the allotment.
18 (Order, p. 2.) The priority date for Allotment E-604 is the
19 date it was withdrawn and reserved from the public domain,
20 i.e., August 16, 1895. (Order, p. 2, Slip Op. pp. 7-8.)
21 Further, by reference herein, it is noted that the correct
22 legal description for Allotment E-604 is the W $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 24,
23 T17N, R18 E.W.M., and the references contained within the
24 Supplemental Report of Referee are hereby corrected to conform
25 to this description.

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The Court, having reviewed the filings, testimony and Reports of Referee and having heard argument and otherwise being fully advised, orders as follows:

1. The "Report of Referee Re: Subbasin No. 12" as filed with the Court on April 30, 1990 and the "Supplemental Report of Referee Re: Subbasin No. 12" as filed with the Court on March 4, 1992, and as amended by the Order Re: Off-Reservation Public Domain Indian Allotments (as described, supra) are entered as a Conditional Final Order confirming claimed rights recommended for confirmation in said reports as existing rights.

2. All claims to water rights before the Referee pertaining to Subbasin No. 12 not so confirmed, are denied.

3. This Conditional Final Order, relating to the confirmation of rights and denial of claims of water rights, constitutes a final order for purposes of appeal (see RAP 2.2(d)), except for purposes of final integration of all confirmed rights as provided in Section XII of Pretrial Order

1 No. 8 (Procedures of Claims Evaluation, dated March 3, 1989)
2 of this Court.

3 DATED this 14th day of January, ~~1992.~~ ^{1993 was}

4
5
6 Walter Stauffer
JUDGE WALTER STAUFFER

7 Presented by:

8
9 Kerry O'Hara
10 KERRY A. O'HARA, WSBA #17268
11 Assistant Attorney General
12 Attorneys for Plaintiff
13 State of Washington
14 Department of Ecology

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