

RECEIVED

2004 MAY 13 AM 11 03

FILED

MAY 13 2004

KIM M. EATON
YAKIMA COUNTY CLERK

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXCEPTIONS OF
SUPERIOR COURT
YAKIMA COUNTY WASHINGTON

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,)
Plaintiff,)

~~PROPOSED~~
CONDITIONAL FINAL ORDER
SUBBASIN NO. 29
(MABTON-PROSSER)

v.

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

I.

On August 18, 2003, Referee Douglas Clausing filed with the Court the Report of Referee Re: Subbasin No. 29 (Mabton-Prosser). Thereafter, this Court set January 8, 2004 for a hearing on exceptions to this report. The Court directed the Referee to serve 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.

17,764

II.

On January 8, 2004, the Court held a hearing on exceptions to the Report of Referee. Exceptions or requests for clarification were filed by Jeff Harris and Nanci Harris (Claim No. 01104), Wilford G. Blakley, Rickey D. Blakley and Vickie L. Blakley (Claim No. 00530) (Blakleys), the Yakama Nation, the United States and the Department of Ecology (Ecology). The Court resolved all exceptions at the January 8, 2004 hearing except that filed by the Blakleys. Those decisions are as follows:

- a. Jeff and Nanci Harris (Claim No. 01110) - The claimants provided a copy of the patent to Rachel Williams, the Indian allottee, as requested by the Referee. The Court thereby ordered that page 103 of the Report be modified to show Jeff and Nanci Harris have an interest in Wapato Irrigation Project Class "B" water for irrigation of 5.2 acres in the N1/2N1/2NW1/4 of Section 2, T. 8 N., R. 22 E.W.M.
- b. Department of Ecology - (1) The Court agreed the Referee had inadvertently transposed the rights for the Harrises on page 103 of the Report and ordered that page 103 be modified to show the 40 acres of "A" lands lie in the SE1/4NW1/4 and 40 acres of "B" lands lie in the SW1/4NW1/4, both within Section 3, T. 8 N., R. 22 E.W.M. (2) Ecology identified some confusion with the place of use description for the right confirmed to Ronald & Ruth Ferry, et al (Claim No. 00704). Ruth Ferry supplied the following legal description and the Court ordered that it replace the description on page 105, line 13:
Short Plat No. 975 which consists of that portion of Government Lot 5, Section 24, T. 9 N., R. 25 E.W.M., lying southerly and westerly of the following described line: Beginning at the southeast corner of said Government Lot 5; thence N 89°10'50" W along the south line of said Government Lot, 418.15 feet, to a point on the westerly right-of-way of Hansen Road, the true point of beginning; thence N 21°57'55" E

1 along the right-of-way 515.42 feet; thence N 74°50'25" W
2 184.89 feet; thence N 15°09'35" E 62.49 feet; thence
3 N 83°24'26" W 968.05 feet; thence N 71°36'23" W 582.00 feet,
4 more or less, to the ordinary high water mark of the Yakima
5 River. Also within Short Plat No. 975 is a parcel of land in
6 the N $\frac{1}{2}$ N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 24 lying westerly of Hansen Road and
7 easterly of the Yakima River and lying north of the following
8 described line: Beginning at the center of Section 24;
9 thence N 89°10'50" W 418.19 feet, thence S 21°57'55" W
10 84.19 feet to the point of beginning; thence
11 S 89°40'41" W 1818 feet to the Yakima River ordinary high
12 water mark, all being within Section 24, T. 9 N., R. 25 E.W.M.

13 c. Overlapping Yakama Nation and United States Exceptions

14 The Yakama Nation and the United States filed six exceptions
15 that were similar or considered the same subject matter. The Court
16 ruled on those exceptions at the hearing as follows.

- 17 (1) The Court granted U.S./Yakama Nation Exception 1 and
18 ordered the discussion at page 3, lines 1-19 regarding
19 water duty should be limited to lands outside the Wapato
20 Irrigation Project and the Yakama Reservation.
- 21 (2) The Court granted U.S./Yakama Nation Exception 2 and
22 modified Page 4, lines 11-14 to: "It is hereby stipulated
23 that the description of lands set forth in the claims of
24 the respective claimants is the correct description of
25 the lands for which the water right is claimed and that
26 such claim will constitute proof of the ownership thereof
27 for purposes of this adjudication only."
- 28 (3) The Court granted U.S. and Yakama Nation Exception 3 and
modified the Report at page 5, lines 14-15 to read:
"Retention of such water shall be deemed senior (or
first) in priority (except for the Yakama Nation's
instream flow right for fish) regardless of other rights
confirmed in this case."

1 (4) The Court granted U.S. and Yakama Nation Exception 4 and
2 struck the language in the Report beginning at page 11,
3 line 7 through line 20.

4 (5) The Court granted U.S. and Yakama Nation Exception 5 and
5 notes that any confirmed water rights in the Wapato
6 Irrigation Project for the claimants in Subbasin 29 with
7 Applications for Water Rights may only be lost pursuant
8 to foreclosure proceedings under federal law, rules and
9 regulations.

10 (6) The Court granted U.S. Exception 6 and Yakama Nation
11 Exception 10 and modified the language at page 110, lines
12 17 through 21 to indicate that "As to the use of water
13 adjudicated for Subbasin No. 29 claimants, the State is
14 provided authority to regulate outside of the Yakama
15 Reservation and the Bureau of Indian Affairs and/or the
16 Yakama Nation are authorized to regulate water use within
17 the Reservation."

18 d. Other Yakama Nation Exceptions

19 The Yakama Nation filed four other exceptions to which the
20 Court made the following findings:

21 (1) As to Yakama Nation Exception 6, the Court modified the
22 language at page 14, lines 15-17 to show that rights
23 stemming from WIP contracts shall be issued in the name
24 of the "United States, Bureau of Indian Affairs as
25 trustee for the Yakama Nation and water users within the
26 Wapato-Satus Unit of the Wapato Irrigation Project."

27 (2) The Court granted Yakama Nation Exceptions 7, 8 and 9 and
28 modified the "Water Duty" section beginning at page 109,
line 20 to read "Water Duty For Lands Outside of the
Yakama Reservation." The Section beginning at line 3,
page 110 was modified to read Irrigation Season For Lands

1 Outside of the Yakama Reservation." The section entitled
2 "Certificates of Adjudicated Water Right" at page 110,
3 line 10, was amended to read "Certificates of Adjudicated
4 Water Right for lands outside of the Yakama Reservation."

5 e. Wilford G. Blakley, Rickey D. Blakley and Vickie L. Blakley
6 (Claim No. 00530) (Blakleys)

7 The Blakleys supplied the Court with further documentary
8 evidence and testimony in support of their exception at the January
9 8, 2004 hearing. They own and irrigate approximately 69 acres lying
10 in that portion of the SE $\frac{1}{4}$ of Section 27, T. 9 N., R. 25 E.W.M.
11 lying southeast of the Yakima River and northwest of the frontage
12 road along I-82, excluding the Northern Pacific Railroad right-of-
13 way through the property. The Referee did not recommend
14 confirmation of a water right due to lack of evidence to show that
15 a right had been established through beneficial use prior to
16 December 31, 1932, as required by the Riparian Doctrine.

17 In the record from the original hearing (Exhibit DE-14) are
18 copies of two Notices of Water Appropriation filed by T. J. Marley
19 in 1909 and 1911. At the exception hearing exhibits were entered
20 showing the ownership history for the claimants land. It was
21 originally conveyed by the United States to Northern Pacific
22 Railroad. In 1903, the railroad sold land, including Government
23 Lots, 1, 4, 5 and 6 and the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 27 to Ferdinand Lions.

24 The land changed hands a couple times in 1903 and 1904. By
25 the end of 1904, H. R. Mann owned the S $\frac{1}{2}$ SE $\frac{1}{4}$ and Lots 1, 4, 5 and 6
26 of Section 27 and in 1905 sold Lots 4 and 6 and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of
27 Section 27 to P. F. Parker and then to T. J. Marley. It appears
28 that Mann continued to own the SE $\frac{1}{4}$ SE $\frac{1}{4}$ and Government Lot 5 of
Section 27. Marley continued to own the portion of the land he
purchased until 1919. The deed transferring the land in 1919
mentions the Marley water right. After that document, there are no

1 legible documents to show who owned any of the land until 1958.
2 There is a statement from G. R. Hileman claiming he owned
3 Government Lots 4, 5 and 6 of Section 27 and irrigated that land
4 from the Yakima River during his ownership. There are also deeds
5 from 1958 to the present showing ownership history.

6 Mr. Blakley put in evidence to show the existence of an old
7 irrigation system on the property. Remnants of a water wheel are
8 visible near the diversion point described in the Marley Notices of
9 Appropriation. He found wire-wrapped wooden pipe buried on the
10 property and a concrete pipeline under the railroad tracks. Mr.
11 Blakley drew on a map (DE-64) the area where he found wooden pipe
12 that he believes was part of the mainline and the concrete pipeline
13 under the railroad track. He suggested that the existence of the
14 pipeline under the railroad track shows that the pipeline existed
15 when the railroad line was constructed through the property.
16 Although the exact date is not in evidence, Exhibit DE-66, from the
17 Benton County Historical web site states that Northern Pacific
18 Railroad started construction of the line up the Yakima Valley from
19 Kiona through Prosser in 1883. The Blakley's property lies between
20 Kiona and Prosser. The Blakleys own a portion of land that was
21 once held by Northern Pacific Railroad and is riparian to the
22 Yakima River. Under the Riparian Doctrine, the priority date for
23 the water right is the date the map of definite location for the
24 proposed railroad is filed. That date is not in the record for
25 Yakima County. Although that date is not in the record, the Court
26 concludes that if construction of the line began in 1883, the map
27 of definite location should have also been filed. Therefore, any
28 water right the Court confirms for the Blakleys will have a
June 30, 1883, date of priority.

It is clear that T. J. Marley owned Government Lots 4 and 6
and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 27 at the time he filed his notices of

1 appropriation. The record does not show Marley owning Government
2 Lot 5 or the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 27 at any time, but in particular
3 there is no evidence he owned the land at the time the Notices of
4 Appropriation were filed. It is reasonable to conclude that water
5 diverted under the Notices of Appropriation would have been used on
6 the lands owned by Marley at the time of the appropriations;
7 however, the same conclusion cannot be made for lands he did not
8 own. Therefore, the Court concludes there is sufficient evidence
9 in the record to find that a water right was established under the
10 Riparian Doctrine to irrigate the lands in Government Lots 4 and 6
11 and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 27, but not for the lands in Government
12 Lot 5 and the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 27. The Referee estimates that of
13 the 69 acres being irrigated, approximately 30 acres lie in
14 Government Lot 5 and the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 27, leaving
15 approximately 39 acres being irrigated within the area that was
16 owned by Marley at the time of the Notices of Appropriation.

17 The Referee also identified a problem with the RCW 90.14 water
18 right claim filed by a prior owner of the Blakleys' land. The
19 claim form does not state the quantity of water for which a water
20 right is being asserted. The Blakleys have submitted a request to
21 Ecology to amend the water right claim form to identify the
22 quantity of water for which a right is being asserted. The Court
23 has reviewed Water Right Claim No. 111683, which asserts a right to
24 use water from the Yakima River for the irrigation of 100 acres in
25 Government Lots 4, 5, and 6, except the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Lot 5, the
26 SE $\frac{1}{4}$ SE $\frac{1}{4}$, the S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ and the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 27, T. 9 N.,
27 R. 25 E.W.M. The Court finds that WRC No. 111683 substantially
28 complies with the requirements of RCW 90.14 to protect a right to
use waters from the Yakima River for the irrigation of up to 100
acres within the area owned by the Blakleys.

1 Mr. Blakley testified to using a 25 HP pump, rated at 450
2 gallons per minute (1 cubic foot per second) to divert water from
3 the Yakima River near where the original diversion was located.
4 Part of the land is in pasture and the rest is in hay and all of it
5 is irrigated with hand lines. A watering trough for livestock they
6 raise is filled during the irrigation season from the irrigation
7 system and from their domestic well the rest of the year. He
8 begins irrigating in March and irrigates until the end of October.

9 Based on the evidence presented at the exception hearing, the
10 Court finds that a water right can be confirmed under Court Claim
11 No. 00530 with a June 30, 1883, date of priority for the diversion
12 of 1 cubic foot per second, 234 acre-feet per year from March 15 to
13 October 31 for the irrigation of 39 acres and stock watering in
14 Government Lots 4 and 6 and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 27, T. 9 N.,
15 R. 25 E.W.M. The point of diversion is located approximately 1560
16 feet north and 200 feet west of the south quarter corner of
17 Section 27, being within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 27, T. 9 N.,
18 R. 25 E.W.M.

19 III.

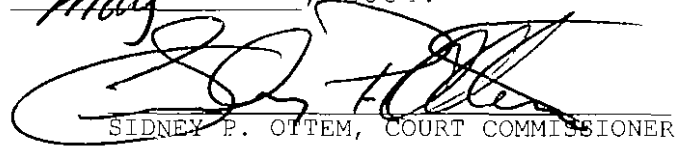
20 The Court ORDERS as follows:

- 21 1. The Report of Referee for Subbasin No. 29 (Mabton-Prosser),
22 filed with the Court on August 18, 2003, as amended by the Court's
23 oral rulings on January 8, 2004 (set forth above), as further
24 amended by the decision in Paragraph II regarding the Blakleys
25 (Claim No. 00530), and as further amended by oral rulings at the
26 May 13, 2004 hearing granting the Yakama Nation's objections and
27 denying those of Guyla Grow (Claim Nos. 01117-01125) are entered as
28 a Conditional Final Order confirming the rights recommended for
confirmation in said reports as existing rights.
2. All claims to water rights before the Referee pertaining to
Subbasin No. 29 not so confirmed are denied.

1 3. The rights within Subbasin No. 29 (Mabton-Prosser) shall be
2 administered according to this Conditional Final Order.

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

9 DATED this 12th day of May, 2004.

10 
11 SIDNEY P. OTTEM, COURT COMMISSIONER