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KIM M. FATON  
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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 )

NO. 77-2-01484-5

THE STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

CONDITIONAL FINAL ORDER  
SUBBASIN NO. 18  
(COWICHE CREEK)

Plaintiff,

v.

JAMES J. ACQUAVELLA, et al.,

Defendants.

I.

On March 20, 2002, Referee Douglas Clausing filed with the Court the Report of Referee Re: Subbasin No. 18 (Cowiche Creek). Thereafter, this Court set November 14, 2002, 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.

II.

On November 14, 2002, the Court held a hearing on exceptions to the Report of Referee. The hearing was continued until January 9, 2003, continued again until February 13, 2003, and concluded on March 20, 2003. The Court, after reviewing the exceptions and other materials and being fully advised, filed its Memorandum Opinion and Order Re: Exceptions to Report of Referee

18,179

1 Subbasin 18 (Cowiche Creek) on May 23, 2003. Those rulings  
2 pertained to the exceptions/requests for clarification filed by  
3 Reed Riley (Claim No. 01104), Lloyd Garretson Company (Claim Nos.  
4 02080 and 01592), Andrew L. Mullenhoff and Cyndie Mullenhoff  
5 (Claim Nos. 00532-534), David M. Christenson (Claim Nos. 00262,  
6 00567 and 00517), Cowychee Ditch Company (Claim No. 01505),  
7 William G. Evans and Jeannette Evans (Claim No. 1832A and 1833),  
8 Eugene and Kathy Stevenson (Claim Nos. 00212 and 00216), Vance  
9 Parker (Claim No. 01662), the Department of Fish and Wildlife  
10 (Claim No. 02109) and the Department of Ecology (Ecology).

11 III.

12 In the notice of hearing accompanying the Proposed  
13 Conditional Final Order, the Court allowed parties to file  
14 objections to the Proposed Conditional Final Order. Ecology,  
15 Lloyd Garretson Company and David Christenson filed objections.  
16 Erving and Barbara LaBarr responded in opposition to Mr.  
17 Christenson's objection. The Court also received a late-filed  
18 objection to entry of the Proposed Conditional Final Order from  
19 Walter E. Culbertson. The Court held a hearing August 14, 2003  
20 that was continued to October 9, 2003 (Christenson/LaBarr hearing)  
21 and then to February 12, 2004 (Lloyd Garretson Co. and Walter  
22 Culbertson) to consider these objections and rules as follows.

23 a. Department of Ecology

24 Ecology's objections are granted. Page 13, line 8.5 shall  
25 show the claim numbers to be 0262 and 0517. Page 19, line 11.5  
26 shall be amended to show the claim number as 01162. Page 26, line  
27 19 shall be amended to show the claim number as 010403.

28 b. Lloyd Garretson Company (Claim Nos. 01592/0280)

The Court delayed entry of this Conditional Final Order to  
allow the Lloyd Garretson Company (Company) an opportunity to  
change the purpose of use and season of use of the pertinent water

1 right. The Company presented to the Court on February 12, 2004  
2 the decision of the Yakima County Conservancy Board approving the  
3 request to add warehouse cooling as a purpose of use and Ecology's  
4 order modifying the approval. Ecology's modification was not  
5 appealed. At the hearing, Garretson also asked that the place of  
6 use be modified to include the parcel numbers for the land. The  
7 place of use that has been used references an abandoned railroad  
8 right-of-way that is no longer visible and county roads that have  
9 been moved, making interpretation of the legal description  
10 difficult. The Court agrees that adding the parcel number would  
11 be helpful in properly identifying the place of water use. Those  
12 parcel numbers are 181309-42004 and 181309-42021.

13 The Court modifies the recommended right on page 248 of the  
14 Report of Referee for Subbasin No. 18 (Cowiche Creek) as follows:

15 The purpose of use is changed to warehouse cooling water and  
16 irrigation of 10 acres and frost protection; the season of use is  
17 changed to April 1 to October 15 for irrigation and frost  
18 protection; and September 15 through May 15 for warehouse cooling;  
19 the quantity of water is changed to 0.06 cubic foot per second,  
20 14.2 acre-feet per year for warehouse cooling; 0.24 cubic foot per  
21 second, 47.32 acre-feet per year for irrigation and frost  
22 protection. The place of use is modified to add: being parcel  
23 numbers 181309-42004, 181309-42010 and 181309-42021.

24 Ecology's modification of the Conservancy Board ruling  
25 resulted in provisions the agency wished to have included with the  
26 water right. The Court agrees and adds the following Limitations  
27 on Use are also added:

- 28 1. The annual consumptive quantity for the irrigation of 2 acres  
and warehouse cooling is 11.13 acre-feet, not to be exceeded.
2. A metering plan shall be provided to Ecology that documents  
the location, type and size of meters to be installed to meet

1 the total and consumptive limits for the purposes identified  
2 herein by December 1, 2004. Meter installation and any  
3 plumbing modifications shall be completed by December 1,  
4 2005. Water shall be put to beneficial use consistent with  
5 these terms and conditions by December 1, 2006.

- 6 3. An approved measuring device shall be installed and  
7 maintained for each diversion of the source identified by  
8 this water right in accordance with the rule "Requirements  
9 for Measuring and Reporting Water Use, Chapter 173-173 WAC.  
10 4. Water use data shall be recorded bi-weekly. The maximum rate  
11 of diversion and the annual total volume shall be submitted  
12 to Ecology by January 31<sup>st</sup> of the following year.  
13 5. The following information shall be included with each  
14 submittal of water use data: owner, contact name if  
15 different, mailing address, daytime phone number,  
16 certificate/claim no., and source name. In the future,  
17 Ecology may require additional parameters to be reported or  
18 more frequent reporting. Ecology prefers web based data  
19 entry, but does accept hard copies. Ecology will provide  
20 forms and electronic data entry information.  
21 6. Chapter 173-173 WAC describes the requirements for data  
22 accuracy, device installation and operation, and information  
23 reporting. It also allows a water user to petition Ecology  
24 for modifications to some of the requirements.

25 Ecology personnel, upon presentation of proper credentials,  
26 shall have access at reasonable times, to water use records kept  
27 to meet the above conditions, and to inspect at reasonable times  
28 any measuring device used to meet the above conditions.

c. David M. Christenson (Claim Nos. 00262, 00567 and 00517

David Christenson filed four objections to the Court's  
May 23, 2003 Memorandum Opinion. The LaBarrs contested two of the

1 exceptions, to be discussed below. As to the uncontested  
2 exceptions, the Court grants Mr. Christenson's request to change  
3 the priority date set forth on page 11 to June 30, 1874. The other  
4 uncontested exception requires no action here as it reserves Mr.  
5 Christenson's right to appeal the Court's ruling on the effect of  
an RCW 90.14 claim on Section 27 lands.

6 Mr. Christenson objects to the instantaneous quantity  
7 confirmed by the Court of 0.67 cfs, consistent with the RCW 90.14  
8 claim. Mr. Christensen claimed the use of .78 cfs from the North  
9 Fork of Cowiche Creek, consistent with historical use of the water  
10 and argues that the difference between 0.67 cfs and 0.78 is very  
11 little and such a use substantially complies with the RCW 90.14  
12 claim. The LaBarrs assert that use of the extra water may result  
13 in the streamflow being inadequate to serve their right. However,  
14 the Court finds that Mr. Christenson and predecessors utilized the  
15 0.78 cfs quantity and that WRC No. 001325 substantially complies  
16 with the requirements of RCW 90.14. The instantaneous quantity set  
17 forth at page 11, line 14 of the May 23, 2003 Memorandum Opinion  
18 shall be amended to 0.78 cfs. The Court notes the evidence put in  
19 by Mr. Christenson indicates that when he operates more than one  
20 pump he greatly exceeds this quantity. The Court herein orders  
21 Mr. Christenson to divert only the quantity of water authorized by  
22 this Court up to a maximum of 0.78 cfs.

23 Mr. Christenson's final objection concerned the number of  
24 acres and quantities of water recommended by the Court for unnamed  
25 springs. The Court addressed this in its Memorandum Opinion and  
26 questioned whether the land could have been irrigated by gravity  
27 flow prior to the advent of pumps. A right was confirmed to use  
28 springs located in the SE<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub> of Section 28 to irrigate 16 acres  
in a portion of the NE<sup>1</sup>/<sub>4</sub> of Section 28. He asks the Court to  
increase the number of acres from 70.4 acres and the annual

1 quantity to 120 acre-feet per year. Mr. Christenson testified  
2 that historically springs located northwest of the Christenson  
3 property in the SW1/4SW1/4 of Section 21, on what was referred to  
4 as the Forney property, were diverted into Taylor ditch and that  
5 ditch ran along Livengood Road (on the north side of the  
6 Christenson property). The landowners dammed up the flow, which  
7 then flooded the property. The Court allowed this testimony over  
8 the hearsay objections of the LaBarrs<sup>1</sup> and that testimony was  
9 corroborated by Harold Amos, a long-time resident of the area.

10 Mr. Amos has lived on the property adjacent to the land now  
11 owned by Christenson for 80 years, land which his father owned and  
12 farmed prior to Mr. Amos' birth. Benton Carey, Mr. Christenson's  
13 predecessor (and the individual who filed the RCW 90.14 claims to  
14 be discussed below), was Mr. Amos's brother-in-law, marrying his  
15 sister in 1932. Mr. Amos worked on the Carey property between 1932  
16 and 1943 when he departed the area for military service. Mr. Amos  
17 returned to the area after the service and managed the family  
18 orchard, worked for the sheriff's office, served as a postmaster  
19 in Cowiche and then obtained his real estate license in 1972. The  
20 Court finds Mr. Amos's testimony credible. His testimony  
21 establishes that water from the springs on the Forney property,  
22 along with those on the Christenson land further down slope and  
23 toward the southeast, ran into Taylor Ditch and were beneficially  
24 used in the NE1/4 of Section 28 prior to 1932. However, a review  
25 of SE - 9T, an aerial photograph of the area from June 31, 1939  
26 shows that no more than 50 acres were irrigated then in the  
27 portion of the NE1/4 of Section 28 owned now owned by Christenson.

28 Mr. Christenson indicated that he installed the pipeline on  
his property in about 1975 and that prior to that someone else

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<sup>1</sup> The Court would note this information was, essentially, already in the record. See November 17, 1998 transcript at pages 67-72.

1 installed a pipeline to the point where the springs are diverted  
2 to his property. The testimony shows the springs historically used  
3 are in the SW1/4SW1/4 of Section 21 or even further to the west.  
4 That would place the point of diversion some three-quarters to one  
5 mile from the point of diversion claimed on WRC 001325 and at  
6 least half a mile from the SW corner of the NW1/4NE1/4 of Section  
28, the specific point of diversion set forth in WRC 001326.

7 Not clear to the Court at this time is how, or even if, the  
8 springs in Section 21 are diverted into the piping system and how  
9 that diversion correlates with the RCW 90.14 claim. The Court has  
10 reviewed the evidence and finds nothing that indicates how the  
11 spring water would infiltrate a piped system. Mr. Amos testified  
12 to use of a concrete box and an open ditch system, which could  
13 readily accumulate spring water, but the Court is unable to  
14 conclude the spring water enters the modern, piped system.  
15 Further, the possible points of diversion are considerably distant  
16 from the points set forth in the RCW 90.14. This Court cannot  
17 confirm a right because of the lack of evidence of how the springs  
18 have continued to be diverted. Additionally, the Court cannot  
19 find WRC No. 001326 substantially complies with the requirements  
20 of RCW 90.14 for a spring(s) located close to a mile from those  
21 identified in the claim. The exception to increase the quantity  
22 and acreage irrigated from springs is hereby DENIED. See the  
23 Court's *Memorandum Opinion Re: RCW 90.14 and Substantial*  
24 *Compliance*, entered on February 10, 1995.

25 d. Wayne Culbertson, Court Claim No. 08983

26 Mr. Culbertson appeared at the February 17, 2004 hearing and  
27 offered testimony. SE-117, an aerial photograph of the area where  
28 Mr. Culbertson's land is located, was admitted. Mr. Culbertson's  
objection was to modifications the Court made to the water right  
recommended for confirmation on page 295 of the Report of Referee

1 for Subbasin No. 18. The Court had denied Ecology's exception  
2 that the water right had relinquished due to several years of non-  
3 use. Ecology also asked that if the Court denied the  
4 relinquishment exception, the point of diversion and place of use  
5 should be modified. Ecology asked that the place of use be  
6 reduced to the S $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  and NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 14, T. 13 N.,  
7 R. 15 E.W.M. and the point of diversion be described as 10 feet  
8 north and 800 feet west of the southeast corner of Section 14.  
9 Mr. Culbertson did not respond to Ecology's exceptions or appear  
10 at the exception hearing. The Court so modified the place of use  
11 and point of diversion. Mr. Culbertson indicates the Court erred.

12 Mr. Culbertson's objections are as follows. He identified  
13 two proposed points of diversion, one approximately 1400 feet west  
14 and a short distance south of the southeast corner of Section 14,  
15 which is where a historical diversion into a gravity flow ditch  
16 has been located, and the second 800 feet west of the southeast  
17 corner of Section 14, where a pump is used to take water from the  
18 creek. Mr. Culbertson states that normal flood events have moved  
19 the creek channel, resulting in the gravity flow diversion  
20 changing over the years. The flood events can result in debris  
21 blocking the diversion to the gravity flow ditch such that it  
22 cannot be used. During those times the pump location is used.

23 He asks the Court to approve two points of diversion, one at  
24 the gravity flow ditch and the second at the pump location.  
25 Certificate No. 279 from the prior Cowiche Creek adjudication,  
26 authorizes use of a diversion in the SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 14, which  
27 the Court concludes was the location of the diversion into the  
28 ditch used at the time the certificate issued. Mr. Culbertson in  
his objection described the diversion to the gravity flow ditch as  
being 1400 feet west of the southeast corner of Section 14, which  
is the distance identified by the Referee after reviewing SE-6,



1 the map from the earlier adjudication. However, on SE-117, Mr.  
2 Culbertson wrote that the diversion is 1100 feet west of the  
3 southeast corner. A diversion at that location would not be in  
4 the area described in Certificate No. 279. Additionally, upon  
5 review of SE-117, the Court believes a ditch with a diversion 1100  
6 feet west of the southeast corner could not have served much of  
the irrigated land via gravity flow.

7 Although the diversion is now located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$  of  
8 Section 23, it is very near the section line and according to Mr.  
9 Culbertson's testimony the creek channel naturally changes course.  
10 The Court concludes that the diversion authorized for use by the  
11 certificate is currently located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 23, and  
12 that this minor change does not require compliance with RCW  
13 90.03.380 to change the authorized point of diversion location.  
14 The second diversion location in the SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 14 is not  
15 authorized by the certificate and the Court concludes it was added  
16 after the certificate issued. Therefore, in order for this  
17 diversion to be an authorized point of diversion on the water  
right, Mr. Culbertson needs to comply with the procedures in RCW  
90.03.380 to add the point of diversion. He should contact  
Ecology's Central Regional Office concerning that procedure.

18 Mr. Culbertson also objected to the place of water use  
19 proposed by Ecology, that being the S $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  and NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  of  
20 Section 14. His objection states that lands in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$  of  
21 Section 14 have historically been irrigated and are within the  
22 place of use on the certificate. Mr. Culbertson identified on SE-  
23 117 the location of the lands that have been irrigated and  
24 continue to be irrigated. The Court's review of that exhibit  
25 leads to a conclusion that the irrigated lands lie in the  
26 SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  and SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 14.  
27  
28

1 The Court MODIFIES the water right recommended for  
2 confirmation on Page 294 of the Report of Referee for Subbasin No.  
3 18, at lines 14½ through 24 as follows: The point of diversion is  
4 located 20 feet south and 1400 feet west of the northeast corner  
5 of Section 23, being within the NW¼NE¼ of Section 23, T. 13 N.,  
6 R. 15 E.W.M. The place of use is modified to the SW¼SE¼SE¼ and  
SE¼SW¼SE¼ of Section 14, T. 13 N., R. 15 E.W.M.

7 IV.

8 After reviewing the decisions set forth in Section III,  
9 comments were received from Erving and Barbara LaBarr (Claim No.  
10 01024) in regard to their claim and from the Department of Ecology  
11 in regard to the claim of the Lloyd Garretson Co. (Claim Nos.  
12 01592, 02080). The Court GRANTS those objections and makes the  
13 following rulings. The priority date for the Labarrs in regard to  
14 the spring for which a right has already been confirmed shall be  
15 changed to September 22, 1891, consistent with land patent  
16 documents issued to Allen Lewis, a predecessor to the LaBarrs.  
17 The changes regarding the Lloyd Garretson Co. right are  
18 incorporated on page 3 above regarding number of acres (10), acre-  
19 feet per year (47.32) and adding parcel number 181309-42010 to the  
20 place of use.

21 V.

22 The Court ORDERS as follows:

23 1. The Report of Referee for Subbasin No. 18 (Cowiche Creek),  
24 filed with the Court on March 20, 2002, as amended by the  
25 Memorandum Opinion and Order Re: Exceptions to Report of Referee  
26 for Subbasin 18 (Cowiche Creek) filed by the Court on May 23,  
27 2003, as amended by rulings herein are entered as a Conditional  
28 Final Order confirming the rights recommended for confirmation in  
said reports as existing rights.

1 2. All claims to water rights before the Referee pertaining to  
2 Subbasin No. 18 not so confirmed are denied.

3 3. The rights within Subbasin No. 18 (Cowiche Creek) shall be  
4 administered according to this Conditional Final Order.

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

11 DATED this 9<sup>th</sup> day of September, 2004.

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14 SIDNEY P. OTTEM, COURT COMMISSIONER  
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