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

FILED

SEP - 9 2004

KIM M. EATON
YAKIMA COUNTY CLERK

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,)

~~PROPOSED~~ ~~SP~~
CONDITIONAL FINAL ORDER
SUBBASIN NO. 28
(SUNNYSIDE)

Plaintiff,)

v.)

JAMES J. ACQUAVELLA, et al.,)

Defendants.)

I.

On October 14, 2002, Referee Douglas Clausing filed with the Court the Report of Referee Re: Subbasin No. 28 (Sunnyside). Thereafter, this Court set February 13, 2003, 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. The Court granted two requests for continuation of the hearing, resulting in December 11, 2003, being the final date set for hearing exceptions.

II.

On December 11, 2003, 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 Memorandum Opinion and Order Re: Exceptions to Report of Referee Subbasin 28 (Sunnyside) on May 20, 2004, addressing all of the exceptions.

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III.

The Court allowed parties to file objections by August 20, 2004 to the entry of the Conditional Final Order and objections were timely filed by R. J. McWhorter (Claim No.), David & Cynthia Clure (Court Claim No. 02062) and the Department of Ecology. Those objections are analyzed below. Along with requests for clarification, Ecology filed comments in regard to the Clures; an analysis of those comments will be provided in the subsection pertaining to the Clures.

a. R. J. McWhorter

Mr. McWhorter raises an objection to the Court not confirming a right to lands in Sections 13, 22 and 23. He suggests that there are seeps on those lands that would show during wet years but to develop them would be inefficient and wasteful. Instead, a piping system was utilized to bring water to those properties. However, based on ownership records, the Court determined that Sections 13, 22 and 23 lands were not riparian to the spring for which a right was granted. Therefore, the use of water on those properties would be appropriative and would therefore require a permit/certificate unless initiated prior to 1917. There is no such evidence before the Court and led to the denial of a right for those lands. Mr. McWhorter may use any naturally occurring water in Sections 13, 22 and 23 to water cattle pursuant to the stockwater stipulation.

Mr. McWhorter also raises the issue of fire suppression or prevention. This Court has consistently held that water may not be used for fire prevention without an otherwise valid irrigation right for purposes of wetting lands. However, on December 12, 1996, the Court entered a *Stipulation Re: Water Use For Fire Suppression*, stating that use of water for fire suppression is a recognized emergency use and does not require a water right. This stipulation applies to all claimants in this proceeding.

Based on the above, Mr. McWhorter's objections to entry of this Conditional Final Order are hereby DENIED.

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2 b. David & Cynthia Clure -- Court Claim No. 02062

3 The Clures have submitted information in an attempt to comply
4 with this Court's analysis that a right could be confirmed if
5 evidence was supplied showing that the land left federal ownership
6 prior to June 7, 1917. The Clures submitted three patents. Only
7 one patent includes the property in question and it issued to
8 Alfred E. Johnson on May 25, 1921. The Clures note that the
9 operative date is the date of entry and not the final date that
10 the patent issued. Under the riparian doctrine, priority date is
11 when steps were first taken to separate the land from the federal
12 ownership. That might be the date of entry if there is evidence
13 of that date. If no evidence prior to patent issuance is
14 provided, then the applicable priority date would be the date of
15 the patent. Ecology points out that pursuant to this Court's
16 Memorandum Opinion Re: Priority Date - Date of Patent or Date of
17 Entry", there must be evidence to show the date when steps were
18 taken to separate the land from federal ownership. In this
19 instance, the only document in the record is the patent, which
20 issued on May 25, 1921. Since that date is after adoption of the
21 1917 Surface Water Code, this Court cannot confirm a right under
22 the Riparian Doctrine. The Clure objection is therefore DENIED.

23 Ecology also seeks clarification as to the appropriate RCW
24 90.14 claim. The water right claim applicable to the Clure's
25 claim is 11682~~8~~.⁵⁷⁰

26 c. Department of Ecology

27 Ecology, in regard to a water right recognized for Ron &
28 Jerilee Perrin, Court Claim No. 00331, point out that too many
acres were confirmed pursuant Certificate 7320. Ecology is
correct. The Court made a typographical error in regard to the
Perrins and the number of acres authorized to be irrigated should
be 4.25 acres.

 Ecology also seeks direction from the Court in regard to
language to use when drafting certificates for the Perrins, the

1 Lotzes and Waltons. There confusion results from a
2 misinterpretation of the Court's language at page 9. There, the
3 Court wrote:

4 "These claimants have rights to use any natural flow water in the
5 springs and creek by virtue of the certificates that issued for
6 their land. That quantity cannot be defined. The Court will
7 confirm rights to these claimants, but each water right will carry
8 a provision that limits the use to natural flow only."

9 Ecology reads this statement to infer that the Court could
10 not determine a quantity for the water right when in fact the
11 Court intended for it to apply to the amount of available natural
12 flow water in the area. The Court did limit and quantify the
13 quantities of water for the three claimants. However, the Court
14 does believe adding the words "natural flow up to" for the
15 quantities in each of the three rights is appropriate and thereby
16 GRANTS the objection.

17 IV.

18 The Court ORDERS as follows:

- 19 1. The Report of Referee for Subbasin No. 28 (Sunnyside), filed
20 with the Court on October 14, 2002, as amended by the Memorandum
21 Opinion and Order Re: Exceptions to Report of Referee for Subbasin
22 28 (Sunnyside) filed by the Court on May 20, 2004, and amended
23 herein is entered as a Conditional Final Order confirming the
24 rights recommended for confirmation in said report as existing
25 rights.
- 26 2. All claims to water rights before the Referee pertaining to
27 Subbasin No. 28 not so confirmed are denied.
- 28 3. The rights within Subbasin No. 28 (Sunnyside) shall be
administered according to this Conditional Final Order.
4. 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

1 Section XII of Pretrial Order No. 8 (Procedures for Claim
2 Evaluation, dated March 3, 1989) of this Court.

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4 DATED this 9th day of September, 2004.

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SIDNEY P. OTTEM, COURT COMMISSIONER