BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF ROBERT ANDREWS and ROBERT J. PETERSEN, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY and JOHN R. RINTA, Respondents.	PCHB Nos. 77-4, 77-29 and 77-31 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

These consolidated matters, the appeal of the issuance of three ground water permits, came before the Pollution Control Hearings Board, W. A. Gissberg, Chairman, and Chris Smith at a formal hearing in Yakima on March 28 and 29, 1977. David Akana presided.

Appellant Andrews was represented by his attorneys, George Wolcott and R. Wayne Bjur; appellant Petersen was represented by his attorney, Steven L. Wilgers; respondent Department of Ecology

was represented by Laura E. Eckert, Assistant Attorney General; respondent Rinta appeared pro se. Yakima court reporter, Olive Blankenbaker, recorded the proceedings.

Having heard the testimony, having examined the exhibits, and being fully advised, the Pollution Control Hearings Board makes the following

FINDINGS OF FACT

I.

The area of concern in this matter is bounded approximately to the north by the Horse Heaven Hills and the Town of Prosser, to the east by the bend of the Columbia River near Kennewick and Richland, to the south by the Columbia River, and to the west by the foothills of the Cascades. Within this area there have been twelve lava flows identified. The size of each flow varies in area, some extending beyond the Horse Heaven Hills and covering hundreds to thousands of square miles. Two of the lava flows support the two major aquifers used for irrigation in the area. The majority of the water moves laterally in a south-southeasterly direction in the aquifers and may take up to hundreds of years to move underground a distance of twelve miles.

Within a portion of the above-described area the Department of Ecology, in early 1973, established, by a means not known to us, a so-called "Dead Canyon Hold Area", the present effect of which is that no action is or will be taken by the Department on any new ground water withdrawal application within the Hold Area until water appropriated under existing permits has been put to use and its effects

on existing rights have been determined. The geographical boundaries of the Hold Area were determined by the Department for administrative convenience. Certainly, based upon evidence adduced at the hearing on these appeals, the boundaries of the Hold Area were, and are now, not based upon any hydrological nor geological basis in fact.

II.

Recharge of water to the aquifers is thought to come from two major areas. The first of these is the Alder Creek area which is to the north and west and both inside and outside of the Dead Canyon Hold. Water from this recharge area moves laterally generally to the south and the Columbia River. The second recharge area is in the vicinity of the Glade Creek area which lies to the north and east and both within and without the Dead Canyon Hold. Rainwater is not considered to be a major source of recharge to the aquifers. Any conclusion regarding recharge is only tentative at this time because no detailed study thereof has been conducted. There is ground water available for appropriation in the Horse Heaven Hills, but the actual amount is now unknown.

III.

Respondent Rinta owns 1,440 acres of land intended for farming with deep well irrigation. He received permit G4-24252 to appropriate 2,500 gallons per minute (gpm) and 1,660 acre-feet of water per year, permit G4-24253 to appropriate 2,500 gpm and 880 acre-feet of water per year, and permit G4-24399 to appropriate an additional 1,500 gpm and 2,040 acre-feet of water per year at his existing well. Each permit allows the appropriation of water from the same aquifers in which appellants either have existing water rights or have applications for

permits to appropriate water which are prior in time to that of respondent Rinta. The granting of the foregoing permits to Rinta resulted in the subject appeals.

IV.

Appellant Andrews has four existing wells. The wells are approximately twelve miles from the proposed and existing Rinta wells. Two of the Andrews' wells exhibit artesian characteristics. One of the artesian wells, known as the number three well, draws water from aquifers located between 600 and 670 feet and between 850 and 900 feet. Andrews has two pending applications for proposed appropriations which applications are prior in time to the Rinta applications now on appeal. All of Andrews' existing and proposed wells are located within the Dead Canyon Hold Area.

A recent drilling of a Washington State Department of Natural Resources well located about one mile from Andrews' number three well substantially reduced the head of the well and caused Andrews a crop loss of about $80,000.00.

V.

Appellant Petersen, who farms 3,064 acres, has permits for four wells of which only one is operable. His well is located about six miles from the proposed and existing Rinta wells. Petersen and his son also have five pending permit applications, one of which is prior in time to the Rinta applications at issue. All of Petersen's existing and proposed wells are located within the Dead Canyon Hold Area.

As a consequence of the reduced amount of precipitation over

the last three years, the crop yield from Petersen's dry land farming is diminishing. Because 95% of his income is based on dry land farming, it is necessary for him to begin to irrigate his land from wells in order to be able to continue to farm his property.

VI.

A well owned by Matsen, who is not an appellant, is located about two miles north and east of the Rinta well. Matsen's 360-foot deep well has a static water level of 50 feet and produces 750 gpm with a 50-foot drawdown. The pump draws water at the 100-foot level. Although the Matsen well is and will be affected by existing and proposed Rinta wells, a drawdown caused by any Rinta well would be about 14 feet. It was not proven that Rinta's existing well caused the 50-foot drawdown in Matsen's well.

VII.

The amount of ground water which can be withdrawn from the two major aquifers changes from place to place. Productivity of wells could be affected by geological structural differences, porosity, sediment thickness, and permeability. Thus, the yield of water can vary tremendously from one place to another even though the underlying geology may be similar. The effect of one well drawing water from one location upon another well in another location is diminished by distance.

VIII.

The wells of the appellants and Matsen penetrate the same basalt layers and draw from the same general water aquifers. Nonetheless, each well exhibits different characteristics and productivity.

IX.

The appropriation of water from the Rinta permits would be from the same two major aquifer systems that supply the existing Andrews and Petersen wells. The proposed withdrawals would not have an adverse effect upon the pumping lift, or pressure in the case of the artesian wells, of each appellant's wells. Rather, the predicted effect, about one-inch drawdown in each of appellant's wells, is so slight as to be barely measurable.

X.

Based on present knowledge, there is no geological or hydrological reason for the boundary designation of the Dead Canyon Hold Area. It is likely that upon reconsideration by the Department of Ecology of the Hold Area, the boundaries thereof will be either expanded or elimin by it. A Department of Ecology study of the Horse Heaven Hills area was started in 1976, but due to the current drought, was curtailed. There has been no request by anyone, or action by the Department, to designate the Horse Heaven Hills a subarea within the meaning of RCW 90.44 because there has been no demonstrated need for it.

XI.

The Department has not formally established for the Horse Heaven Hills what a reasonable or feasible pumping lift would be considering such factors as farm size, economics, and availability of power. The Department opines that a reasonable or feasible pumping lift would be between 400 and 500 feet.

XII.

Any Conclusion of Law which should be deemed a Finding of

Fact is hereby adopted as such.

From these Findings, the Board comes to these

CONCLUSIONS OF LAW

I.

The Board has jurisdiction over the persons and over the subject matter of this proceeding in which the appellants' primary motivation is to attack the validity of the Dead Canyon Hold Area designation.

II.

The standards for the issuance of a permit to appropriate ground water are set forth in chapter 90.44 RCW. The Department must make five determinations prior to issuance of a water-use permit: (1) what water, if any, is available; (2) to what beneficial uses the water is to be applied; (3) will the appropriation impair existing rights; (4) will the appropriation detrimentally affect the public welfare; (RCW 90.44.060; 90.03.290) (5) will the appropriation exceed the capacity of the underground formations to yield water within a reasonable or feasible pumping lift in the case of pumping developments, or within a reasonable or feasible reduction of pressure in the case of artesian developments. (RCW 90.44.070).

There is no question that the water is for a beneficial use. As to the remainder of the foregoing determinations at issue, appellants did not prove that the Department's decision was erroneous. Respondent, on the other hand, presented evidence which affirmatively supported its decision. The lowering of the pumping lift of about one inch at appellants' wells is such a minute part of the estimated reasonable or feasible pumping lift of 400 feet (.02%) that it cannot be held

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significant or detrimental.

III.

Contrary to the contention of appellant, the Department need not consider RCW 90.44.130 in its initial determinations as to whether a permit should issue. The provision deals with "appropriators" of water from the same ground water body and gives the prior appropriator a preferre use of ground water. It is not relevant to the issuance of a permit in the first instance, but rather it is a regulatory provision that applies only to persons who have appropriated water, i.e., persons who have perfected rights to a well constructed pursuant to a permit. Even assuming it did apply, appellants have not shown harm under RCW 90.44.130.

IV.

Because respondent Rinta's proposed wells would draw water from the same aquifers as would appellants, the latter ask this Board to order that their prior applications be granted by the Department of Ecology notwithstanding the Dead Canyon Hold Order. We think it is not appropriate in the present proceeding. The matters before us are determined by the standards set forth in RCW 90.44.060 and .070 as applied to the instant permit. The Department's treatment of appellants' pending permit applications are separate matters which must be dealt with in another proceeding. Similarly, the establishment of the Dead Canyon Hold Area, which appears to make little sense in light of present information, cannot be indirectly challenged in this proceeding by a collateral attack. However, based upon the only information which is before us in this case, we would have had no hesitancy in declaring the Hold Area to have been unlawfully created if that matter were

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properly before us. We are aware of the value of water, especially in light of the present drought in the area. Suffice it to say that to the extent that appellants' applications are prior in time to that of Rinta's, they have a preferred use of the ground water to the extent of their appropriation and beneficial use. RCW 90.44.130

V.

The remainder of appellants' contentions are without merit.

VI.

The Department's action authorizing the issuance of permits under Application Nos. G4-24252, G4-24253, and G4-24399 should be affirmed.

VII.

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Pollution Control Hearings Board enters this

ORDER

The actions of the Department issuing permits to respondent Rinta under Application Nos. G4-24252, G4-24253, and G4-24399 are each affirmed.

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DATED this 18th day of April, 1977.

POLLUTION CONTROL HEARINGS BOARD

W. A. GISSBERG, Member

CHRIS SMITH, Member