Jribno

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF WARREN J. RIDDLE, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 77-133 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This appeal came on for hearing before the Pollution Control Hearings Board, Chris Smith and Dave J. Mooney, members, on January 10, 1978, in Spokane, Washington. Hearing examiner William A. Harrison presided. The last post-hearing brief in this matter was received on March 3, 1978.

Appellant appeals from an order of the Department requiring him to release sufficient water from his diversion dam to satisfy "downstream stock water rights" at all times. Respondent elected a formal hearing pursuant to RCW 43.21B.230. The Spokane court reporting firm of

Reiter, Storey and Miller recorded the proceedings.

Appellant appeared pro se; respondent was represented by Robert E. Mack, Assistant Attorney General. Having heard the testimony, having examined the exhibits, having considered briefs and arguments, and being fully advised, the Hearings Board makes and enters the following

FINDINGS OF FACT

I

This case involves a dispute over the waters of Deadman Creek, a surface water located in Spokane County. There has not been a general adjudication of water rights on Deadman Creek under the Water Code of 1917 (RCW 90.03.110-.240). Neither has the respondent, Department of Ecology, adopted minimum flow regulations for Deadman Creek under chapter 90.22 RCW.

II

The appellant, Warren J. Riddle, irrigates some 200 acres of alfalfa by withdrawing water from Deadman Creek as it crosses his farm. (The point of diversion is indicated by a red "x" on Exhibit R-1.) Appellant claims a right, by appropriation, to four cubic feet per second from Deadman Creek for this irrigation and other beneficial uses. This claim is based upon the 1911 "Notice of Water Right" (Exhibit R-2) of one John Fuher which, with minor variation, specifies the same point of diversion and place of use as now utilized by appellant. Appellant has filed this claim of water right with the respondent, Department of Ecology, pursuant to chapter 90.14 RCW.

III

Acting in response to complaints concerning Deadman Creek, the respondent, Department of Ecology (DOE), issued a regulatory order to appellant, being Docket No. DE 77-424, dated August 26, 1977. That order stated, inter-alia:

> . . .
> You are withdrawing/diverting water from Deadman Creek. Regulation is required because your use interferes with riparian stockwater rights as required to be maintained in Chapter 90.22 RCW.
>
> . . .
>
> IT IS ORDERED that sufficient water to satisfy downstream stock water rights be released from your diversion dam on Deadman Creek at all times.
> . . . .

From this order, appellant appeals.

IV

Specifically, the DOE contends that appellant's withdrawals from Deadman Creek interfere with the stockwater rights of two downstream owners, persons named Knapp and Feryn who together own some 124 head of cattle. Such stockwater rights as Knapp and Feryn may hold are not evidenced by any writing.

V

At the time the appealed order was issued, August, 1977, conditions of unusual drought prevailed throughout the state. Although the flow in Deadman Creek was not always sufficient for his own irrigation needs, the appellant, Riddle, discussed the situation with Mr. Feryn, one of the downstream cattle owners. Riddle promised

to bypass such water as he could spare although he, Riddle, contended that he was not legally required to do so. Riddle did allow water to flow by his point of diversion, downstream. At all times when respondent, DOE, found water flowing in Deadman Creek upstream of Riddle, it likewise found water flowing downstream of Riddle (Exhibit R-6). The DOE does not know how much stream flow is required to water the 124 cattle downstream and therefore cannot say that the flows which it observed downstream of Riddle (Exhibit R-6) are insufficient. Mr. Feryn was not present to testify as to the sufficiency of water flow at his property, and the respondent's own field investigation of Mr. Feryn's property disclosed that water was available for Feryn's cattle on August 23, 1977, three days prior to the date of the appealed order.

We find, therefore, that at and prior to the date of the appealed order, DOE did not show that Riddle was not releasing sufficient water to satisfy downstream stockwatering requirements.

VI

Any Conclusion of Law hereinafter stated which is deemed to be a Finding of Fact is adopted herewith as such.

From these Findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I

We have found that DOE did not show that Riddle was not releasing sufficient water to satisfy downstream stockwater requirements when the appealed order was issued. While this fact renders the order inappropriate

when issued, we must review it further because the order operates prospectively in commanding appellant to release sufficient water "at all times". This feature of the order poses an ongoing controversy between the parties which is now ripe for decision.

II

In issuing the appealed order, DOE determined the legal rights and duties of the appellant as contrasted with those of the downstream cattle owners. This difficult determination was made without the guidance of a general adjudication of the water rights in that locality, as set out in the Water Code of 1917 (RCW 90.03.100-.240). Nevertheless, DOE acted properly in attempting to decipher the existing water rights. This is so because of the language of RCW 43.21.130 which states that DOE ". . . shall regulate and control the diversion of water in accordance with the rights thereto . . .". There is no authority for the proposition that water rights do not begin until the adjudication specified in the Water Code of 1917 supra, nor is the statutory mandate to DOE that it shall regulate water only in accordance with adjudicated rights.

Next, this Hearings Board has jurisdiction to hear and decide appeals from any person aggrieved by an order of DOE, RCW 43.21B.110. It follows, therefore, that in testing the merits of the appealed order, this Hearings Board must also determine the legal rights and duties of the appellant and downstream cattle owners. This is not a general adjudication as accorded to the superior courts by the Water Code of 1917, supra. Scheibe v. DOE, PCHB No. 36 (1972). Neither is the general adjudication of the Water Code of 1917 the

exclusive procedure by which a water right may be brought under judicial scrutiny. State ex rel. Roseburg v. Mohar, 169 Wn. 368, 13 P.2d 454 (1932), Pate v. Peterson, 107 Wn. 93, 180 P. 894 (1919) and Waters of Crab Creek, In re, 194 Wn. 634, 79 P.2d 323 (1938).

III

Appellant, Riddle, holds an appropriative surface water right of four cubic feet per second from the waters of Deadman Creek in accordance with the Notice of Water Right admitted as Exhibit R-2. This Notice of Water Right is sufficient to confer a water right under chapter 142, Laws of 1891 provided that the appropriation was diligently prosecuted to completion. . . . The Notice of Water Right contains a sworn statement, at paragraph 2, that "It is intended to divert said water. . .". From those words, written more than sixty years ago by one who is a stranger to this appeal, we conclude that the appropriation was diligently completed shortly after that statement of intent. State v. Smith, 85 Wn.2d 840, 540 P.2d 424 (1975), Ford v. United Brotherhood of Carpenters, 50 Wn.2d 832, 315 P.2d 299 (1957) and cases and sections from Wigmore on Evidence, (3d Edition) cited therein re: concluding that an act intended to be done was done. There is no evidence that the appropriation was not completed shortly after the statement of intent. The priority of appellant's right relates back to the date of posting which is August 21, 1911.

IV

The respondent, DOE, contends that downstream landowners have rights, superior to appellant's, to such water as their cattle can drink directly from Deadman Creek. This contention rests on one or

both of the following legal theories, namely 1) that the language of RCW 90.22.040 creates a state policy favoring in-stream stock-watering and that this policy can be implemented by diminishing water rights for other beneficial uses which were in existence when this state policy came into being (1969) or 2) that the downstream owners hold riparian water rights which are superior to appellant's appropriative right. For the reasons which follow, we disagree.

1) RCW 90.22.040 states that:

> STOCKWATERING REQUIREMENTS. It shall be the policy of the state, and the department of water resources shall be so guided in the implementation of RCW 90.22.010 and 90.22.020, to retain sufficient minimum flows or levels in streams, lakes or other public waters to provide adequate waters in such water sources to satisfy stockwatering requirements for stock on riparian grazing lands which drink directly therefrom where such retention shall not result in an unconscionable waste of public waters. The policy hereof shall not apply to stockwatering relating to feed lots and other activities which are not related to normal stockgrazing land uses.

In this case there has been no implementation of RCW 90.22.010 and .020 by which minimum flows for streams may be established by regulation after notice and public hearing. Nevertheless, DOE argues that the policy favoring in-stream stockwatering, like a phantom ship floating above the water, exists free of the context in which it is found. Assuming that this interpretation is correct, however, neither the statute itself nor the legislative history give any clue as to how the policy is to be implemented, other than through minimum flow regulations under RCW 90.22.010 and .020. In the absence of legislative guidance on how to implement such a policy, we will not condone the

diminishment of appellant's irrigation water right which was in existence when this policy came into being with the advent of RCW 90.22.040 in 1969. It is important to note in this regard that RCW 90.22.030 states, "The establishment of levels and flows pursuant to RCW 90.22.010 shall in no way affect existing water and storage rights and the use thereof . . .".

Even if the language of RCW 90.22.040 does create a stockwatering policy which can diminish water rights existing when that policy came into being (1969), we conclude that DOE did not show that that policy was violated by appellant. DOE did not show that adequate waters were not available to meet downstream stockwatering requirements nor that appellant's release of water for stockwatering would not result in an unconscionable waste.

We therefore conclude that RCW 90.22.040 provides no support for the DOE regulatory order now on appeal.

2) Riparian water rights. In this case, DOE has not affirmatively shown who, downstream of appellant, holds a riparian water right nor what number of cattle must be watered pursuant to such a right. The complex and conflicting theories which compete for supremacy in determining a riparian right make it all the more imperative to define a riparian right carefully before attempting to protect it by regulatory order. We conclude that DOE has not shown any specific downstream riparian right which is superior to appellant's appropriative right.

V

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 issues this

ORDER

The Department of Ecology Order, Docket No. DE 77-424, is hereby reversed.

DONE at Lacey, Washington this 13th day of March, 1978.

POLLUTION CONTROL HEARINGS BOARD

DAVE J. MOONEY, Chairman

CHRIS SMITH, Member