BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF ALBERT BALLESTRASSE AND HERNANDO CHAVES AND ASSOCIATES, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY AND WALCZAK SPRINGS WATER SYSTEM, Respondents.	PCHB Nos. 78-51 and 78-80 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

These matters, the appeal of a denial of an application for a permit to appropriate surface waters and the appeal of a Cease and Desist Order, came before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith on May 31, 1978 in Seattle. David Akana presided.

Appellant, Ballestrasse, was represented by his attorney, Nelvin Bettis; appellant, Chaves, appeared pro se; respondent was represented by Robert E. Mack, Assistant Attorney General.

The appeal of the order to cease and desist using water from certain facilities is the subject matter of PCHB No. 78-80. Therein, appellant Chaves requested a stay of enforcement of the order until the outcome of the hearing regarding an application for a permit to appropriate water, which is PCHB No. 78-51. The request for a stay became moot by the action of respondent, Department of Ecology, which stayed its order until June 30, 1978.

After an unsuccessful informal conference in PCHB No. 78-51, the hearing proceeded. Witnesses were sworn and testified; exhibits were admitted.

Having heard the testimony, having examined the exhibits, and having considered the contentions of the parties, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

On June 28, 1976 appellant Ballestrasse, through his consulting engineer, Hernando Chaves and Associates, made application to the Department of Ecology (hereinafter "DOE") for the appropriation of 163 gallons per minute (gpm) of water to service 100 residential homes from Walczak Springs located about six miles northwest of Enumclaw in King County.

II

Notice of the application was duly published on July 29 and August 5, 1976 from which came one protest to the application. The protestant, who holds a Certificate of Surface Water Right for domestic and stockwatering use, has since connected to the appellant's community system. After notifying appellant of the protest, DOE took

no further action on the application until March, 1977, when it received a complaint from a farmer.

III

Following the filing of the application with the DOE, appellant designed a water system for the site and submitted it to the State Department of Social and Health Services (DSHS). Ordinarily, DSHS will not approve new water source plans without evidence of a permit for water appropriation issued by DOE. In this case, however, the plans and source were approved in August of 1976 by the DSHS agent after it appeared from his conversations with DOE's agent that the only serious objection to the application--those of the Departments of Fisheries and Game--had been dropped. Appellant commenced construction of the community water system in August of 1976. Approval for thirty-five homes was given by King County Building and Land Use Department and of this number, there are ten present domestic water users.

IV

On March 15, 1977, in response to a complaint from a riparian dairy farmer, DOE visited the site and discovered the presence of appellant's diversion facilities. Appellant was advised of the necessity for an approved permit to withdraw water. From subsequent visits to the site and to Newaukum Creek, respondent's agents variously estimated that from 47,120 (using a measuring device) to 485,280 (using crude estimates) gallons of water per day may be available from the springs. Appellant, on the other hand, estimates that 720,000 gallons of water per day would be available and that thirty-five homes would require only 22,500 gallons of water each day.

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V.

Newaukum Creek and its tributaries have been administratively closed to consumptive uses, except individual domestic use, since September, 1951. The closure was and is deemed necessary to prevent further reduction of coho salmon population caused by low summer flows in the creek.

VI

Although appellant's application states otherwise, DOE's maps do not show that the springs were tributary to Newaukum Creek and, as such, a field examination was indicated. Such examination disclosed that the springs did in fact feed the unnamed tributary to Newaukum Creek.

Because of the connection to the creek, the Departments of Fisheries and Game each requested that appellant's application for permit be denied.

VII

Four farmers claim riparian rights to the unnamed tributary to the creek which provides water for about 300 head of cattle. Although each cow requires from twenty to thirty-five gallons of water per day, the water in the unnamed tributary must be kept flowing to prevent disease found in stagnant water at the site. There have been instances where cattle drinking from the stream have been stricken with the disease and further appropriation of water which reduces stream flow concerns at least one major riparian farmer.

VIII

After considering the requests of the Departments of Fisheries

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and Game which were received in October of 1977, and other uses of water by riparian farmers, the DOE on February 7, 1978 denied the application on the grounds that riparian rights for stockwatering would be impaired and that the fisheries resource would be detrimentally affected by lower flows to Newaukum Creek.

IX

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

Appellant's burden, on an appeal of a denial of an application to appropriate water, is to show, by a preponderance of the evidence, that the DOE has erred with respect to the statutory determinations it must make under RCW 90.03.290 which are:

(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; and
(4) Will the appropriation detrimentally affect the public welfare.

Stemple v. Department of Water Resources, 82 Wn.2d. 109, 115 (1973). We are not persuaded that appellant has carried this burden with respect to those reasons for denial given by the DOE, namely, impairment of existing rights and detriment to the fisheries resource. Accordingly, the DOE denial of the application should be affirmed.

II

Under the circumstances of this case, appellant's claim of estoppel is not well taken. While the long delay by the Departments

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of Fisheries and Game to verify the connection of the springs with Newaukum Creek, and DOE's long period of inactivity on the permit application appear unwarranted, appellant must, as he was aware, secure a permit to appropriate water. Although he made application for water, he did not have a permit to appropriate it. Such permit is necessary before any water can be taken. See RCW 90.03.400; .410.

III

Appellant is not without options to provide water to the community water system, however. He may seek to secure water from a public supply or seek ground water from wells.

IV

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

From these Conclusions the Board enters this

ORDER

The denial of the application for a permit to appropriate water is affirmed.

DATED this 9th day of June, 1978.

POLLUTION CONTROL HEARINGS BOARD

Dave J. Mooney

DAVE J. MOONEY, Chairman

Chris Smith

CHRIS SMITH, Member

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