BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF AUDREY HUGUENIN, et. al. and CITY OF COLVILLE, Appellants & Intervenors, and WEIR H. BELL, Appellant & Respondent, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB Nos. 79-77, 79-78, 79-89, 79-99, 79-100, 79-101, 79-102, and 80-42 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of Department of Ecology regulatory orders relating to water rights claimed by Weir H. Bell, came on for hearing before the Pollution Control Hearings Board, Nat W. Washington, Chairman, and David Akana, Member, convened at Colville, Washington, on August 25, and 26, 1980. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to

RCW 43.21B.230 in each of the above consolidated matters.

Appellants and intervenors Huguenin et. al., were represented by their attorney, David E. McGrane. Intervenor City of Colville was represented by its attorney, Andrew C. Braff. Appellant and respondent Bell was represented by his attorney, William J. Powell. Respondent Department of Ecology was represented by Wick Dufford, Assistant Attorney General. Reporter Lorraine Warner recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard, exhibits examined, and having viewed the site and being fully advised, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

This is a dispute concerning the right to divert the waters of Prouty Creek in Stevens County for the purpose of irrigation.

By grant dated April 11, 1892, the United States of America conveyed to George F. Prouty, a homesteader, government lots 1, 2, and 3 of Sec. 7, T.35N, R.40 E.W.M. and the SE 1/4 of the NE 1/4 of Sec. 12, T.35N, R.39 E.W.M. This totaled approximately 160 acres. The property then changed hands three times ending with its acquisition by F. Joseph Greif on May 14, 1907. A year and a half later in 1908, Greif sold the Sec. 12 parcel (40 acres) to Heberling together with access across Greif's retained land to Prouty Creek for a 2-inch pipeline. This pipeline was intended solely for domestic and not irrigation diversion.

Following these events, Greif sought to establish the irrigation water right which is under dispute in this case. Acting under the law then prevailing (Chapter CXLII, Laws of 1891), Grief posted a written notice near the southeast corner of lot 1 on May 31, 1909. The notice proclaimed Greif's intent to divert water from Prouty Creek at the rate of 5 cubic feet per second for irrigation and domestic purposes on lots 1, 2, and 3 (some 120 acres). The notice further stated that diversion would be by means of "ditch and flume" commencing near the southeast corner of lot 1 and running generally south for one-fourth mile. The notice finally stated Greif's intention that the works for this diversion would be completed within five years. The notice was duly recorded with the Stevens County Auditor on June 9, 1909, where it remains on file.

II

Greif sold lots 1, 2, and 3, about one year after posting the written notice, to Emanuel Sheppardson on April 26, 1910. During 1910, whether constructed by Greif or Sheppardson, there was a small dam which diverted water from Prouty Creek at the place stated in the notice. The water ran into ditches some two feet wide which ran southerly about one-forth mile to the area of the then existing house. There, by several narrower ditches, Sheppardson applied the waters of Prouty Creek to a garden and orchard of approximately one-half acre each, total one acre. The garden produced corn, the orchard produced cherries, and these were sold to neighbors if not kept for home use. This irrigated acre was in contrast to the

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unirrigated, remaining acreage of the property which then and now produces the crop which provides the primary income from the land. The one-half acre cherry orchard was pulled out by 1915.

In 1924, Sheppardson's widow, Rhoda A. Sheppardson, conveyed an easement to the Federal Land Bank allowing the same diameter pipe, at the same depth, from the same point of diversion as the domestic water pipeline allowed when Greif disposed of the Section 12 property in 1908 (see Finding of Fact I, above). We find this to be a latter day reinforcement of the 1908 domestic pipeline easement and unrelated to the 1909 irrigation water right at issue.

III

Rhoda A. Sheppardson sold lots 1 and 2 to Axel Berg on July 1, 1925. At this date the dam and ditches which irrigated the one acre garden-orchard in 1910 were gone. No irrigation was carried out from Prouty Creek by or through Axel Berg during his 21 year ownership. Berg once made a casual attempt to irrigate which began and ended, in failure, all within one day.

IV

Berg sold lots 1 and 2 to Lawrence S. Dailey on September 20, 1946. No irrigation was carried out from Prouty Creek by or through Lawrence S. Dailey during his 9 year ownership. In 1950, Dailey signed a letter protesting a proposed irrigation diversion from Prouty Creek by one Charles Windell in which Dailey asserted prior use of Prouty Creek for stockwater. No assertion was made by Dailey claiming any irrigation right. (Exhibit R-6.)

V

Dailey sold lots 1 and 2 to John W. Sleeth on August 3, 1954, who failed to apply waters of Prouty Creek to irrigation and sold to Melinda Hemnes on February 16, 1957. Two year later, on March 18, 1959, Melinda Hemnes applied to the State of Washington for a permit to divert waters of Prouty Creek for irrigation and stock water on lots 1 and 2. The application form posed the question, "are there any existing water rights appurtenant to the above described property?" (referring to lots 1 and 2). Hemnes answered "no." Hemnes was granted a permit, No. 11625 but failed to apply waters of Prouty Creek to irrigation. This is so although Hemnes constructed a holding pond into which waters of Prouty Creek were diverted but not thereafter applied to irrigation.

VI

Hemnes sold lots 1 and 2 to Ed Chester on July 9, 1962, together with surface water permit 11625. No irrigation was carried out from Prouty Creek by or through Ed Chester or, following divorce, Dorothy Chester Olmstead during their 6 year ownership. Surface water permit 11625 was cancelled by order of the State on April 11, 1969.

VII

Dorothy Chester Olmstead sold lots 1 and 2 to James H. Becker on May 15, 1968. Becker sold lot 1 to Kenneth Huguenin in 1969 or 1970. Huguenin sold lot 1 to its present owner, William Schumaker in 1974 or 1975. No irrigation was carried out from Prouty Creek by or through Becker or Huguenin during their ownership.

VIII

Becker sold lot 2 to Weir H. Bell, appellant herein, on August 1, 1973. On August 8, 1973, Bell filed a Water Right Claim with the State asserting a right to divert the waters of Prouty Creek at five cubic feet per second for irrigation of 25 acres on lot 2, based upon the 1909 claim of Greif.

Appellant/Respondent Bell contends that certain indistinct depressions in the field between Prouty Creek and the county road are indications of old irrigation ditches. The evidence that these depressions were the remains of old irrigation ditches is not persuasive.

In 1977, Bell filed an "Application for Change of Water Right" with the Department of Ecology (DOE) seeking to move the point of diversion from lot 1 to lot 2. This was granted by DOE order in 1979, which order was appealed to this Board by seven of Bell's neighbors. While those appeals were pending DOE issued a regulatory order, in 1980, prohibiting Bell from diverting water from Prouty Creek under authority of the 1909 Greif claim. Bell has appealed this regulatory order to the Board. These matters were consolidated for hearing.[1]

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1. DOE issued and Bell appealed to this Board one further regulatory order which was consolidated herein also. This order, 80-163, required Bell to cease certain groundwater withdrawals from a well until approval of a change of location. The parties have stipulated that this order may be reversed.

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

The issues posed for determination are those in the Second Pre-Hearing Order entered August 18, 1980. We will first consider whether Bell has a water right, for regulatory purposes, which is further divided into the question of 1) whether his claimed right came into being and, if so, the question of 2) whether it was later abandoned.

1) Whether the claimed right came into being? Bell claims a water right based upon succession to the 1909 claim of Greif. We conclude that the law applicable to Greif's 1909 claim was Chapter CXLII, Laws of 1891. Under that statute the right to use the water of any stream could be acquired by appropriation according to the following mandatory procedure:

> 1. Written notice was to be posted at the intended point of diversion stating a) intended withdrawal in cubic feet per second, b) the purpose for which the water is appropriated, c) the place of intended use and d) the means of diversion.
>
> 2. A copy of the written notice was to be filed for record with the auditor of the county where posted within ten days of posting.
>
> 3. Construction of the works for diversion was to be commenced within six months after posting.

We conclude that Greif complied with each of the above procedures.

The 1891 statute then goes on, however, to provide that:

1. the "works must be diligently and continuously prosecuted to completion" and

2. "By strict compliance to the above rules the appropriator's rights to the use of the water actually stored or diverted relates back to the time the notice was posted . . ." (emphasis added.)

We conclude that only the efforts of Greif and his successor Sheppardson could be construed as diligent and continuous effort to complete the diversion works. We further conclude that, notwithstanding the representations of the posted and recorded notice, the water actually diverted by Greif or Sheppardson never exceeded that necessary for irrigation of one acre. The water right of Greif therefore came into being to the extent necessary to irrigate only one acre, and not 25 acres as claimed by Bell.

2. Whether the water right was abandoned? The Greif right was acquired by appropriation, and may be lost, under the common law, because of abandonment. Miller v. Wheeler 54 Wash. 429 (1909). This is in accord with the law of other western states. See 2 W.A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 256-84 (1974). The Miller case, above, set forth the two elements of common law abandonment in this state:

1. an actual relinquishment and

2. the intent to abandon,

which must concur. Miller, supra, P. 435.

Regarding actual relinquishment, we conclude that no waters of Prouty Creek were diverted and applied to irrigation by Greif's successors from, at the latest, 1925 to Bell's acquisition in 1973. This non-user of 48 years constitutes an actual relinquishment of the

Greif water right.

Regarding the intent to abandon, the protracted non-user in this case is evidence from which we infer an intent to abandon. This type of inference was described with approval by the Supreme Court of Colorado in Knapp v. Colorado River Water Conservation District, 131 Colo. 42, (1955) wherein it is stated:

> Decisions of courts of last resort are legion in support of the firmly recognized principle that where a water right is not used for an unreasonable period of time, intent to abandon it may be implied. (279 P.2d 426).

In this case, the intent to abandon shown by non-user alone is corroborated by two other overt acts. The first of these is the 1950 letter signed by Lawrence S. Dailey, a successor of Greif, affirmatively citing stockwater rights but making no mention of any irrigation right. The second is the 1959 water right application of Melinda Hemnes, a successor of Greif, expressly disclaiming any existing water rights appurtenant to the "Greif" property which she sought to irrigate via that 1959 application.

The evidence is clear and definite that the water right of Greif, to irrigate one acre, was abandoned and lost before Bell acquired the "Greif" property in 1973. The DOE order allowing change of the point of diversion of this right should therefore be reversed, and the DOE order prohibiting diversion under claim of this right should be affirmed.

II

Because of our Conclusion of Law I relating to

abandonment, we need not consider the issues of impairment of other water rights since the same are moot.

III

We have examined the other contentions raised by the parties and find them to be without merit.

IV

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

From these Conclusions the Board enters this

ORDER

The Department of Ecology Order for Change Under Registered Claim No. 32954 dated May 9, 1979, is hereby reversed. The Department of Ecology Order No. 80-164 prohibiting diversion from Prouty Creek under Claim No. 32954 is hereby affirmed.

Pursuant to the parties' request, our review of Department of Ecology Order No. 80-163 relating to withdrawal of water from a well is to be disposed of by an agreed order to be presented by the parties.

DONE at Lacey, Washington, this 16th day of December, 1980.

POLLUTION CONTROL HEARINGS BOARD

Nat W. Washington

NAT W. WASHINGTON, Chairman

David Akana

DAVID AKANA, Member

ACCEPTANCE OF SERVICE CLERK'S STAMP

BEFORE THE POLLUTION CONTROL HEARINGS BOARD

STATE OF WASHINGTON

IN THE MATTER OF AUDREY HUGUENIN, et al., and CITY OF COLVILLE, Appellants and Intervenors, and WEIR H. BELL, Appellant and Respondent, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB Nos. 79-77, 79-78, 79-89, 79-99, 79-100, 79-101, 79-102 & 80-42 ORDER DISMISSING REVIEW OF DEPARTMENT OF ECOLOGY ORDER NO. 80-163

ORDER

Department of Ecology Order No. 80-163 having been superseded by the approval of a change in point of withdrawal under Ground Water Permit No. G3-25592P, and the Department of Ecology having formally cancelled said Order, the Board concludes that the request to review said Order is moot.

KENNETH O EIKENBERRY ATTORNEY GENERAL
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Accordingly, review of Department of Ecology Order No. 80-163 is hereby dismissed.

DONE this 20th day of August, 1984.

POLLUTION CONTROL HEARINGS BOARD

GAYLE ROTHROCK, Chairman

8/20/84

LAWRENCE J. FAULK, Vice-Chairman

Presented by:

WICK DUFFORD
Assistant Attorney General
Attorney for
Department of Ecology

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