BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF U. S. BUREAU OF RECLAMATION, QUINCY-COLUMBIA BASIN IRRIGATION DISTRICT, EAST COLUMBIA BASIN IRRIGATION DISTRICT, and SOUTH COLUMBIA BASIN IRRIGATION DISTRICT, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and COLLIN E. and LEORA SKANE, Respondents.	PCHB Nos. 80-36, 80-37, 80-38, and 80-39 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON BIFURCATED ISSUE

This matter, the consolidated appeals from the issuance of a surface water permit to Collin E. and Leora Skane, came before the Pollution Control Hearings Board, David Akana (presiding) and Gayle Rothrock, at a formal hearing on September 29, 1981, in Ephrata, Washington.

Appellant U. S. Bureau of Reclamation was represented by its

attorney, William N. Dunlop; appellant Quincy-Columbia Basin Irrigation District was represented by its attorney, John Baird; appellant East Columbia Irrigation District was represented by its attorney, Richard A. Lemargie; appellant South Columbia Basin Irrigation District was represented by its attorney, William E. Davis. Respondent Department of Ecology was represented by Wick Dufford, Assistant Attorney General; respondents Skanes were represented by their attorney, William J. Plonske.

By agreement of the attorneys, the merits and issues were bifurcated for hearing. The issue tried on September 29, 1981, was whether the water supply as used at Skane's facility is ground water or surface water. The parties offered testimony from witnesses and documentary evidence in support of their respective cases.

From the testimony heard, exhibits examined, and post hearing briefs of counsel, the Board makes these

FINDINGS OF FACT

I

On April 10, 1979, Collin E. and Leora Skane filed an application for a permit to appropriate public surface waters of the state (No. S3-26217). The proposed point of diversion is within the south half of Section 3, Township 20 N, Range 28 EWM in Grant County. The water will be used on portions of property described as Farm Unit 55, Second Revision of Irrigation Block 40, Columbia Basin Project and an area lying northeasterly of Irrigation Block 40. The location of the point of diversion and place of use are entirely within the Quincy Basin

Subarea as described in chapter 173-124 WAC.

II

The application requests surface water from the Gloyd Seeps area, a tributary to Crab Creek, for non-consumptive use in a fish hatchery. The applicant originally sought 5.0 cubic feet per second (CFS) which was increased to 20 CFS by the Department of Ecology (DOE) with the assent of the applicant.

Notice of the application was published on June 22 and 29, 1979, as required by RCW 90.03.280.[1]

Objections to the granting of a permit were received from all appellants who contended that the water sought by Skane was not public water but waste, seepage, or return flow waters resulting from activities associated with the Columbia Basin Project, and thereby not subject to appropriation. DOE concedes that underground water results from activities associated with the Columbia Basin Project.

III

On May 15, 1972, the U. S. Bureau of Reclamation was issued Reservoir Permit No. R3-00013P for storage of 200,000 acre-feet of water in Potholes Reservoir. The source of water for Potholes Reservoir includes all unappropriated surface water of Crab Creek, and the naturally occurring surface water across the Skane property. As a

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1. The category of water, be it "surface" or "ground," involves similar applications for and notices of appropriation. RCW 90.03.260 - .280; RCW 90.44.060. WAC 508-12-220.

result of the permit issuance, there are no unappropriated surface waters available for consumptive use.

IV

Skane's hatchery consists of a 1,500 foot long ditch which collects water from the seep area to two rows of ponds. The ponds in each row are constructed on a slope so that one pond empties into the next. The outflow at the last pond in each row flows through a ditch and into Crab Creek, one-half mile away.

V

The collection ditch is about 15 feet deep and intercepts water in the ground. The four to five feet of water that may be observed in the ditch would, in the natural course of its flow, appear as water surfacing on the land before reaching Crab Creek. The character of the area affected by the surfaced water is that of a wetland, ponds, and marsh. This characteristic is a result of an increase in ground water levels attributable to U. S. Bureau of Reclamation activities in the Quincy ground water subarea described in chapter 173-134 WAC.

VI

There are no public ground waters available for consumptive appropriation in the Quincy Basin Subarea. Artificially stored ground waters are available for purchase from the Bureau.

VII

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

From these Findings of Fact come these

CONCLUSIONS OF LAW

I

"Surface" waters of the state are regulated by chapter 90.03 RCW. "Ground" waters of the state are regulated by chapter 90.44 RCW. "Ground" waters are defined in RCW 90.44.035:

> All waters that exist beneath the land surface or beneath the bed of any stream, lake or reservoir, or other body of surface water within the boundaries of this state, whatever may be the geological formation or structure in which such water stands or flows, percolates or otherwise moves, are defined for the purposes of this chapter as "ground waters." There is recognized a distinction between: (1) Water that exists in underground storage owing wholly to natural processes; for the purposes of this chapter such water is designated as "natural ground water." (2) Water that is made available in underground storage artificially, either intentionally, or incidentally to irrigation and that otherwise would have been dissipated by natural waste; for the purposes of this chapter such water is designated as "artificially stored ground water."

Cf. WAC 173-134-020(1), (6), (8); RCW 18.104.020(5)

II

The ground water code, chapter 90.44 RCW, is supplementary to the surface water code, chapter 90.03 RCW. RCW 90.44.020. As for the relative rights between competing ground and surface water uses, "first in time, first in right" applies. WAC 508-12-230. Cf. RCW 90.03.010.

III

The category of water as found upon Skane's property without the infiltration trench would have become "surface" water. Developing that water source as surface water at a point where it was technically

ground water, but was destined shortly to be surface water does not violate the intent of either the ground water code (RCW 90.44) or the surface water code (RCW 90.03). Ground and surface waters are interrelated. RCW 90.54.020(8). An administrative interpretation of this relationship and the selection of the appropriate water code has been made by DOE. We conclude that the decision was factually based and upon a reasonable interpretation of the water codes. It was proper to classify the water as "surface" water.

IV

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

From these Conclusions of Law the Board enters this

ORDER

The Department of Ecology determination that the water to be appropriated under permit S3-26217 is surface water is affirmed.

A hearing shall be scheduled to determine the remaining issues presented in this case.

DONE this 23rd day of August, 1982.

POLLUTION CONTROL HEARINGS BOARD

David Akana

DAVID AKANA, Lawyer Member

Gayle Rothrock

GAYLE ROTHROCK, Vice Chairman

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF U.S. BUREAU OF RECLAMATION, QUINCY-COLUMBIA BASIN IRRIGATION DISTRICT, EAST COLUMBIA BASIN IRRIGATION DISTRICT, AND SOUTH COLUMBIA BASIN IRRIGATION DISTRICT, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and COLLIN E. and LEORA SKANE, Respondents.	PCHB Nos. 80-36, 80-37, 80-38, and 80-39 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER, the appeal of the Washington State Department of Ecology's order that a permit for appropriation of public surface water be granted to Mr. and Mrs. Collin E. Skane, came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk, Chairman and Gayle Rothrock, Member, convened at Moses Lake, Washington on March 27 and 28, 1986. Administrative Appeals Judge William A. Harrison presided. Respondent elected a formal hearing pursuant RCW 43.21B.230.

The parties were represented by counsel as follows:

1. U.S. Bureau of Reclamation (formerly U.S. Water and Power Resources Service) by . . . . . .William Dunlop, Field Solicitor.

2. East Columbia Basin Irrigation District and South Columbia Basin Irrigation District by . . . . . .Richard A. Lemargie of LeMargie, Whitaker & Cordell.

3. Quincy-Columbia Basin Irrigation District by . . . . . .John W. Baird of Baird, White & Schultheis.

4. State of Washington, Department of Ecology by . . . . . Allen T. Miller, Jr., Assistant Attorney General.

5. Collin E. and Leora Skane by . . . . . William J. Plonske, Attorney at Law.

Reporter Malinda Avery recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. Post-hearing briefs were requested. The briefing cycle was completed on June 9, 1986. From testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

This matter arises north of Moses Lake in Grant County at the Gloyd Seeps.

II

Prior the advent of the United States Columbia Basin Project ("Project") the lands brought into question by this appeal were highly dessicated. On the particular site in question there were no surface

waters. Moreover, it is probable that such waters as did exist were sufficiently below land surface as to be unreachable, except by digging or drilling deeper than has yet occurred.

III

After the advent of the Project the site in question became laden with waters imported artificially by the Project. The means by which this occurred, and the surrounding circumstances are these: First, the Project commenced diversion of water from the Columbia River at Grand Coulee Dam. This is pursuant to Washington State Permit to Appropriate Public Surface Waters No. 15994, priority date May 16, 1938, granted to the Project operator, United States Department of the Interior, Bureau of Reclamation ("Bureau"). This diversion was for the purpose of irrigating 600,000 acres of lands in Washington State. Through an elaborate system of pumps, canals and other works these waters were moved southward and put to irrigation use north of the site in question. Despite the application of only so much water as is needed by the soil, it was foreseen that certain waters would permeate downward after application to the crop lands and then continue migrating southward either as ground or surface waters. These are referred to as waste, seepage and return flows ("WSR"). It is this WSR which crosses the site in question and empties into Crab Creek. Once there, it flows to the Potholes Reservior where it is recaptured and routed further southward by other Project works for irrigation of lands south of the site in question. It is accurate to say that the water at issue is passing through a pre-determined course beginning

far north of the site in question and ending far south of it.

IV

Although the Bureau also holds the rights to all unappropriated water of Crab Creek for storage in Potholes Reservior (Washington State Reservior Permit No. R300013P) it does rely, in addition, upon the entire quantity of WSR just described for Project irrigation of lands south of Potholes Reservior. The contract between the Bureau and the affected Irrigation Districts, dated December 18, 1968, and now in effect provides:

> WASTE, SEEPAGE, AND RETURN FLOW WATERS
>
> 24(a). The United States does not abandon or relinquish any of the waste, seepage, or return flow waters attributable to the irrigation of the lands to which water is supplied under this contract. All such waters are reserved and intended to be retained for the use and benefit of the United States as a source of supply for the project. The recapture and/or reuse of waste, seepage, or return flow waters for further utilization by the District through the irrigation system shall not be considered as inconsistent with the intent of Article 32. (emphasis added).

V

Those persons engaged in a business for profit are charged a fee by the Bureau for water service. This is the means established by federal law for reimbursing the cost of constructing and operating the expansive works of the project. Currently, those receiving irrigation waters pay approximately $21 per acre per year to the Bureau for the waters provided.

VI

By 1973, the constant passage of Project WSR waters through the site in question had created an extensive marsh which its owner had opened to duck hunting. In 1973 that same owner, Herman L. Jones, entered into a water service contract with the Bureau for the purpose of developing fish rearing and holding ponds on the site. This provided for payment of $400 per year.

VII

In 1975, respondents Collin E. and Leora Skane purchased the site in question, some 120 acres. They entered into further water service contracts with the Bureau, and began development of a fish hatchery. Through trenches dug into the hillside they intercepted and diverted the Project WSR waters into a system of fish hatchery ponds. They have since engaged in fish rearing as a commercial enterprise, and sell their trout to commercial buyers in many states and also in Canada.

VIII

Soon after the establishment of the hatchery, the Washington State Department of Fisheries (DOF) inquired whether Mr. Skane possessed a permanent water right. This was antecedent to granting a DOF permit which was necessary at that time. In reviewing his water service contract with the Bureau, Mr. Skane discovered a clause by which the Bureau reserved the right to divert water away from the hatchery at any time. Paragraph 8(e), p. 2, Exhibit A-38. From this he concluded that his hatchery investment was in jeopardy because he had no

permanent or vested water right. Therefore he ceased payment to the Bureau under his water service contract in 1978. The contract provided for $250 per year when payment ceased. Thereafter, in April, 1979, he applied to respondent, Washington State Department of Ecology (DOE) for a permit to appropriate public surface water with reference to the same Project WSR waters for which he had just ceased paying the Bureau. He did not endeavor to negotiate with the Bureau concerning the clause to which he objected in the water service contract before taking these actions.

IX

The precedent established by DOE's predecessor, Washington State Department of Water Resources in the matter of one Allen E. Rotta who applied in 1968 for irrigation use of Project WSR waters was that said application should be rejected because:

> "At this point in time these waters must be considered to be waste, seepage and return flow attributable to the Columbia Basin Project, and since they occur within the project boundaries, cannot be considered public waters subject to appropriation."

X

In considering Mr. Skane's application for a public water appropriation permit DOE found, as we find now, that the proposed use of the water by Mr. Skane would be non-consumptive. Only negligible amounts would be lost to evapo-transpiration as waters pass through the hatchery ponds. As much water, or more, empties from the site into Crab Creek with the establishment of Mr. Skane's hatchery as

before. The hatchery does not impair, reduce or delay the flow of Project WSR waters into Potholes reservoir or their delivery to irrigated lands thereafter.

XI

The Skane application for a public water appropriation permit was recommended for approval by DOE on February 13, 1980. From this, appellants Bureau and Irrigation Districts appealed to this Board on March 13, 1980. The proceedings before this Board were bifurcated such that the question of whether the waters were ground or surface waters was decided first. By our earlier Findings, Conclusions and Order entered in August, 1982, the waters were determined to be surface waters. This decision was appealed to the Superior Court for Grant County by the Bureau and Irrigation Districts. The decision was affirmed, and the cause was remanded here by the Court in March, 1986. All remaining issues are now before us.

XII

It is Mr. Skane's understanding that issuance of a state water appropriation permit will remove the possibility that water could be diverted away from his hatchery by the Bureau, and will remove the obligation to pay a water service fee to the Bureau.

XIII

In the course of this hearing the Bureau disclosed, without objection, that it offered a water service contract to Mr. Skane containing assurance of a 40 year non-interruptible water supply at $250 per year.

XIV

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

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

For the reasons which follow, the public surface water appropriation permit to be granted to Mr. and Mrs. Skane by DOE is unlawful and should be reversed.

II

Permits for appropriation of public surface water must be in compliance with the State Water Code of 1917, chapter 90.03 RCW.

III

The Water Code requires essentially four determinations prior to the issuance of a water right permit:

1) what water, if any, is available

2) to what benefical uses the water is to be applied

3) will the appropriation impair existing rights; and

4) will the appropriation detrimentally affect the public welfare.

Stempel v. Dept. of Water Resources, 82 Wn.2d 109 (1973).

IV

The subject permit fails under the first of these criteria because water is not available as envisioned in the Water Code. The Code provides:

> "But where there is no unappropriated water in the proposed source of supply . . . it shall be the

> duty of the supervisor [DOE] to reject such application and refuse to issue the permit asked for". RCW 90.03.290 (emphasis added).

Thus, for water to be available for public appropriation it must be not only existent but must, in addition, be unappropriated water.

V

From earliest times it has been held that an appropriation of water consists of an intention to appropriate followed by reasonable diligence in applying the water to a beneficial use. In Re: Alpowa Creek, 129 Wash. 9, 13 (1924), In Re: Doan Creek, 125 Wash. 14 (1923), Sander v. Bull, 76 Wash. 1 (1913), Ellis v. Pomeroy Improvement Company, 1 Wash. 572, 578 (1889).

VI

The waters at issue were intentionally appropriated by the Bureau from the Columbia River and applied with reasonable diligence to beneficial use. This was accomplished by a lawful state permit and these are appropriated waters. Although these waters have already been appropriated by the Bureau, the subject permit would allow appropriation of the same waters by Mr. Skane. This is contrary to the cited provision of RCW 90.03.290 calling for denial of applications where the proposed supply contains no unappropriated water.

VII

The DOE urges that the non-consumptive character of the proposed use is an overriding factor in this case. This apparently explains its departure from the Rotta application which concerned a proposal

for consumptive use of Project WSR waters. While the non-consumptive character of use does render the proposal consistent with the third criteria of the Water Code that there be no impairment of existing rights, yet it remains inconsistent with the first criteria that water be available for appropriation. Availability is lacking where, as here, there is no unappropriated water in the water supply. Nothing in RCW 90.03.290 makes an exception to the requirement of water availability even where the use would be non-consumptive.

VIII

The reasoning which supports the statutory rule against public appropriation of water already appropriated is, we think, that stated by Hutchins as the general rule of western water law:

> "The general rule is that one who diverts water from a natural stream pursuant to a valid right of diversion and use becomes the owner of the particles of water."

Water Rights Laws in the Nineteen Western States, Wells A. Hutchins, 1971, Volume I, p. 144. This is the rule in Washington. Madison v. McNeal 171Wash. 669, 674 (1933). In this case the Bureau has diverted water from a natural stream, the Columbia River, pursuant to a valid right of diversion. It has become the owner of the particles of water at the site in question. Such water is subject to an agreement for its sale or use. See Madison, supra, Methow Cattle Co. v. Williams, 64 Wash.457, 460 (1911) and Thorpe v. Tenem Ditch Co., 1 Wash. 566, 570 (1889). The water now under consideration is therefore not any longer public surface water as addressed by the Water Code because, in

the words of RCW 90.03.010 a "right thereto or to the use thereof" has been "acquired. . . by appropriation" and the appropriated water at issue is private property of the Bureau as appropriator. It was therefore improper to approve a permit to appropriate public surface water where, as here, there is none.[1] The permit should be reversed.

IX

Even were these Project WSR waters relinquished back into the public domain (which they are not where, as here, they are within Project boundaries and recaptured for further use[2]) a public right of appropriation therein could not be used to compel the continued release of such waters to the second appropriator. Stevens v. Oakdale Irrigation District, 13 Cal. 2d 343 (1939) and Miller v. Wheeler, 54 Wash. 429 (1909). Thus, even the proffered public permit would not provide protection against the interruption of Mr. Skane's water supply by the Bureau as original appropriator. Consequently, this application for a public permit could not, in any event, provide the relief which apparently caused the application to be made.

1/ This conclusion is unaltered by the fact, raised by DOE, that we have held similar waters to be "waters of the state" as that term is used in the Water Pollution Control Act. Courtright Cattle Co. v. DOE PCHB No. 83-11 (1983). "Waters of the state" defines the scope of state authority to regulate against pollution, not the authority to permit water appropriation which is as set out above.

2/ See U.S. Bureau of Reclamation v. Department of Ecology and Schrom, PCHB Nos. 84-64, et. seq. (1985) and cases cited therein where migration of the water beyond Project boundaries and lack of recapture were each held necessary to a "relinquishment of the water particles." Neither element is present in this case.

X

Assuming for the sake of argument that the Project WSR waters at issue were public waters available for appropriation (as we have concluded they are not) the Skane permit would detrimentally affect the public welfare, and for that reason should be reversed. This is so because it has been shown, generally, that those who engage in business for profit pay fees for the water imported by the Project. This same water is the lifeblood of the business begun for profit by Mr. Skane. That his business should escape payment for these imported waters would be detrimental to those who do pay, and to the public provider of these waters, and thus to the public welfare.

XI

In summary, we conclude that the permit in question is inconsistent with RCW 90.03.290, and should be reversed. Because of this, we need not reach the question of whether DOE is estopped to argue that the water right of the Bureau is limited to uses which do not include fish rearing. We observe, for the guidance of the parties, that this record is replete with correspondence between the Bureau and DOE or its predecessor agencies to the effect that minor non-irrigation uses under the Bureau's permit, some far larger than this one, can be handled in due course. We see no reason why this should not be so. Moreover, we see nothing in the outcome of this controversy which is inimical to the long term, successful operation of respondents' fish hatchery. Indeed, all parties to this appeal appear to be motivated by a common desire for water to be dedicated to

this beneficial use.

XII

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

From these Conclusions of Law the Board enters this

ORDER

The recommendation for approval of a public surface water appropriation permit to Collin E. and Leora Skane is hereby reversed.

DONE at Lacey, Washington this 27th day of June, 1986.

POLLUTION CONTROL HEARINGS BOARD

6/27/86

LAWRENCE J. FAULK, Chairman

GAYLE ROTHROCK, Vice-Chairman

WILLIAM A. HARRISON
Administrative Appeals Judge