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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF JAMES J. SMITH, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and MAURICE LUCAS, Respondents.	PCHB No. 81-34 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of two Department of Ecology decisions on surface water rights and permitted uses applications, came before the Pollution Control Hearings Board: Nat W. Washington, Board Chairman, presiding; and Gayle Rothrock and David Akana, Board Members, at a formal hearing in Mount Vernon, Washington, on July 9, 1981. Appellant James J. Smith appeared and represented himself; respondent Maurice Lucas appeared and represented himself, and respondent Department of Ecology was represented by Wick Dufford, Assistant

Attorney General. Court Reporter Kim Otis recorded the proceedings.

Having heard the testimony, having examined the exhibits, having considered the contentions of the parties, and having issued a Proposed Order to which exceptions were received and reviewed, the Board makes these

FINDINGS OF FACT

I

James J. Smith, appellant, and Maurice Lucas, a respondent, live on adjacent pieces of property south of the East Quarter corner of Section 29, Township 36, Range 11 East near the town of Marblemount in Skagit County. Each man bought his property in 1972, built homes and other improvements in succeeding years, and by 1976 both had established structures for permanent homes there. Before 1977 both Smith and Lucas established diversions from the same unnamed stream (partly flowing through U. S. Forest Service land and their respective properties) for domestic use and for future power supply. The Lucas property is above the Smith property on the subject stream.

II

James J. Smith filed for a State of Washington Water Right Claim in 1973, in which he claimed using stream water for domestic and irrigation purposes. No amount of water was listed or approved and no history of beneficial use was recorded, in accordance with his short form claim filing.

III

In 1977 and 1978 the U. S. Forest Service advised Smith and Lucas that right-of-way easements (Special Use Permits) for their stream

diversions, including any power generation equipment and pipe located on USFS land, must be obtained. Those permits could issue if a person had a "water right claim" or has "received water rights." "Sometime in late 1978 or early 1979, Smith gave up his stream diversion on USFS land, after a long wait for a Special Use Permit, and took a diversion on his own property. Lucas first obtained a Special Use Permit from the Forest Service in March of 1977 and, in order to help secure additional permits, asked for letters from DOE Resource Management informing the Forest Service of DOE's intention to issue water rights permits for Lucas's proposed power supply diversions.

IV

DOE surveys of flow rate on the subject stream on USFS-owned land in the spring of 1978 revealed a stream flow of .5 cfs. Lucas' survey of the subject stream during a hot period in July 1980 revealed only a .07 cfs flow rate.

V

In July of 1977 Lucas filed for a water right permit to divert .2 cubic feet per second from the subject unnamed stream for single domestic use and consumptive power generation purposes.[1] In September of 1977, Smith filed for a water right permit to divert .5 cubic feet per second for single domestic use, irrigation of 1 acre of land, power generation and aesthetic purposes (waterfall maintenance). Smith later orally amended his application to exclude

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1. The water would be disposed of in an excavated pit on the Lucas property, not returned to the stream.

power generation.

VI

A DOE field inspection of the Smith and Lucas properties occurred in May 1978, after the Department of Fisheries completed review and approval of the Lucas application. The Department of Game completed its review of the Lucas application in October 1978, and approved the request, provided Lucas obtain a hydraulics permit. Lucas applied for an additional water right on a stream parallel to the subject stream in September 1978. DOE visited the Lucas property again in May 1979, and in July 1980--on the latter occasion to caution Lucas against interference with Smith's domestic water supply. The current operation of Lucas' power generation and supply system has caused a severe diminution of stream flows during summer months more often than would naturally occur. DOE made a final visit to both properties in August 1980.[2] Just after this visit Lucas applied for a third water right permit for power generation purposes on a third stream in the area.

VII

On February 18, 1981, the Department of Ecology issued two Reports of Examination and permitted withdrawals of water relative to the subject stream; one for Smith and one for Lucas. Lucas was granted .2 cfs for the purposes requested, with a maximum withdrawal of 138 acre feet per year, provided that Smith's domestic supply (including

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2. Lively discussions between the DOE resource management official and Smith and Lucas, separately, occured during various site visits and office visits.

one-half acre of irrigation) is not interfered with. Smith was granted .02 cfs for domestic and irrigation purposes with a maximum withdrawal of 2 acre feet per year. He was also granted .1 cfs for aesthetic non-consumptive use.[3]

VIII

Water losses to gravel from the stream in question are experienced along the stream bed at various points along the subject properties and below the Smith property the entire stream sinks into gravel before reaching the Skagit River. The end portion of the stream normally is at very low flow each year during the low-water summer period, but has never been measured or adjudged to be less than .07 cfs from the evidence presented.

IX

The by-pass requirement imposed upon Lucas is for the delivery of enough water down the stream channel to satisfy Smith's single domestic supply at the latter's point of diversion, when that can be accomplished, given stream-bed characteristics and proper functioning and use of Lucas' by-pass equipment. Therefore, the by-pass actually must be some quantity in excess of .01 cfs be allowed to flow by Lucas' diversion works.

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3. The Department of Ecology clarifies the order of priorities as follows:
1--Lucas .01 cfs for domestic supply
2--Smith .01 cfs for domestic supply (including one-half acre irrigation)
3--Lucas .19 cfs for power generation and supply
4--Smith .01 cfs for an additional one-half acre of irrigation
5--Smith .10 cfs for aesthetics

X

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

State law requires the Department to make four determinations prior to the issuance of a water use permit: a) what water, if any, is available; b) to what beneficial uses is the water to be applied; c) will the appropriation impair existing rights; and d) will the appropriation detrimentally affect the public welfare. Stemple v. Department of Water Resources, 82 Wn. 2d 109, 115 (1973). RCW 90.03.290.

II

Some water is available for appropriation.

III

Waters of the State may be appropriated for consumptive and non-consumptive beneficial uses. Single domestic supply, irrigation, aesthetics, and power supply are beneficial uses. RCW 90.54.020 and WAC 173-500-050(4).

IV

Under state law the department has authority to allocate the available water among potential uses and users based on securing the greatest benefit to the people of the state. RCW 90.54.010. The authority to allocate tempers the rule of first in time, first in right of RCW 90.03.010 in that an application first in time may not

necessarily be accorded first rights to water for the intended use.[4] Thus, Lucas' power generation and supply uses, which are wholly consumptive, must be tempered by the requirement that Lucas by-pass sufficient water to meet Smith's domestic requirements even though Lucas' permit application preceeded Smith's by 79 days. RCW 90.54.020(3a)

V

From the evidence presented, the Department apparently has not formally determined whether the stream is perennial. The evicence suggests it is, in the legal meaning of that term. Neither has DOE, under authority of RCW 90.54.020(3a) and WAC 173-500-050(3), appeared to have established base flows for the subject stream. However, the lack of an established base flow does not require that the Department allow the year-round consumptive appropriation of the entire stream. If necessary, on a case-by-case basis through regulatory orders and the permit-issuing process, the Department should comply with the overall intent of the applicable legislation on streams of the state. Chapter 90.54 RCW. Stemple, supra.

VI

The claim made by Smith under the Washington Water Right Claim Registration Act, chapter 90.14 RCW, does not operate as an application for the appropriation of water and does not have the

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4. For example, the Department may "preserve" or reserve supplies of water for human domestic needs, which may come at a later time, than an earlier filed, non-domestic use. RCW 90.54.020(4). However, as between domestic appropriations, first in time is first in right. RCW 90.03.010.

effect of conferring a priority date as of the time of its filing (1973) upon any water rights which Smith may acquire by appropriation.

VII

The Department of Ecology has not allocated waters as required under chapter 90.54 RCW. Accordingly, DOE Reports of Examination and recommended permitted surface water withdrawals under these applications should be vacated and the applications remanded to the Department for further consideration. This may profitably include: a) the actual availability of water for appropriation and the allocation of uses and users under RCW 90.54; and b) whether the design, location, or seasons of use of the low-head hydroelectric power system and its back-up system can be modified to preserve domestic, irrigation, and aesthetic uses from the subject stream, helping avoid seasonal conflict amongst users. It is not the function of this Board to make these considerations in the first instance; such is the responsibility of the Department. And, the Department conceivably can, after considering the matter further, reach the same result.

VIII

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 Reports of Examination and recommended permitted surface water withdrawals under applications S1-22912 and S1-22967 are vacated and the matters remanded for further consideration consistent with this decision.

DONE this 16th day of October, 1981.

POLLUTION CONTROL HEARINGS BOARD

Gayle Rothrock

GAYLE ROTHROCK, Member

CONCUR:

Nat W. Washington

NAT W. WASHINGTON, Chairman

David Akana

DAVID AKANA, Member