BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF GARY J. WARNER, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB NOs. 83-62, 83-63 & 83-64 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER

These matters, the appeal of Reports of Examination or Orders on three surface water withdrawal application, came on for hearing on June 19, 1984, in Spokane, Washington. Seated for and as the Board were Lawrence Faulk and Gayle Rothrock (presiding). Five other appeals relative to these proposed water appropriations and one other on the Warner property were heard at the same time. Dismissals of these five appeals occurred on June 22, 1984.

The proceedings were electronically recorded and officially court reported by Suzanne Gurich of Spokane Reporting Service.

Respondent Department of Ecology was represented by Assistant Attorney General, Wick Dufford. Permittees/appellants Gary and Mary Lou Warner represented themselves.

Witnesses were sworn and testified. Exhibits were admitted and examined and oral argument was heard. From the testimony, evidence, and contentions of the parties the Board makes these

FINDINGS OF FACT

I

Appellant Warner lives and owns property in Lincoln County near Davenport and the Spokane River in Township 27 North, Range 37 East, W.M. Canyon Creek flows through his property and various springs exist on his property.

Mr. Warner and his family have plans to develop an environmental, agricultural, and industrial-based school for young people. Such plans call for the appropriation of water for recreational, irrigation, drinking, and hydroelectirc power uses.

II

Appellant's schedule for implementation shows the comprehensive plan could be effected in six years. Any waters of the state appropriated on his property would be put to full beneficial use in six years of less.

III

In May, 1982, in order to effect plans for the development of the property, appellant applied for permits of appropriation for .02 cfs, 6 AF/yr. out of Homestead Spring (S3-27301) for domestic supply for 6

units; for .002 cfs, .5 AF/yr. out of Canyon Spring (S3-27302) for drinking water; for .34 cfs, 8 AF/yr. out of Canyon Creek (S3-27303) for supplemental domestic supply, pond maintenance and hydro-electric power generation; and for 6 gpm, 6 AF/yr. from a well (G3-27309) on the property for supplemental domestic supply.

IV

Water use records of the state reveal there are no apparent rights to surface water downstream of the Warner property on Canyon Creek. Oftentimes there is no discernible waterflow through the culvert on neighboring property to the identifiable terminus of the stream--the stream being so small--but there exists a channel and a periodic flow of a living stream.

V

There is no history of use of water on the subject property to irrigate as much as 30 acres. Thirty acres would represent a bold new application. There is a certificate of record (S3-21409C) which authorized up to 10 acres to be annually irrigated. That certificate is not on trial here. The only existing application to uses testified to here indicates 3.5 acres for annual irrigation.

The state Water Code does not provide for irrigating variable acreage--whether dependent upon the year, the economic position of the irrigator, or the irrigator's energy for the particular task at hand.

VI

We find that maintaining living water supplies in rivers, streams and springs provides for wildlife habitat, stockwatering

opportunities, and preservation of recreational, educational and aesthetic values all in the public interest.

The Warners desire to develop and maintain water resources on their property in a fashion which maintains these opportunities and values and should not find themselves overutilizing water, under authority of any state water permit, in the name of "unconscionable waste of public water."

VII

Homestead Spring, the subject of recommended permit S3-27301, is already used for group domestic water supply can be further enhanced by appellant Warners to beneficial uses.

Canyon Spring, the subject of recommended permit S3-27302, is tributary to Canyon Creek, and is desired for use for intermittent drinking water supply for hikers, nature study classes, and wildlife. This further enhancement barely qualifies as a consumptive use and very little will actually be appropriated.

Canyon Creek is the subject of recommended permit S3-27303, to which most of the objections are raised for different reasons by both appellants and his neighbors. Its proposed uses for hydroelectric power generation, for group domestic supply and fire protection, and for maintenance of a 2-acre pond can be beneficial if diversions occur, as represented, at proper points along the creek.

The drainage area of Canyon Creek is quite small and sustained flows are maintained by local springs generally originating from a highly fractured granite bedrock, overlaid by a series of permeable

basalt flows. These basalts collect and store annual recharge from high precipitation periods and, through vertical leakage of this stored groundwater, recharge the granites, thereby maintaining the local springs which feed Canyon Creek during the summer. The gradient of this perennial creek is quite steep at one point, flowing down a narrow canyon, and flattens out some after entering the Warner property. The stream then flows over a sediment-filled granite channel to its terminus, at which point it goes subterranean. For a variety of reasons all the surface flow of Canyon Creek at the Chase's property and to the road culvert discharges to the groundwater system.

VIII

Surface Water Certificate S3-21409C is presently appurtenant to appellants' property in the amount of .11 cfs (50 gpm) out of Canyon Creek, not to exceed 35.5 AF/yr. for up to 10 acres of irrigation and a continuous domestic supply and stockwatering.

Claim #033538 on state records asserts water for single domestic supply, presumably from Homestead Spring.

IX

Appellant was aggrieved by the DOE Reports of Examination on his three surface water applications, feeling the DOE's recommendations were too limiting, and thus appealed those Reports to the Board on May 26, 1983. Some months of attempts at settlement by the appellant, the neighbors, DOE and the Board ensued.

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

The Board has jurisdiction over these persons and these matters. RCW 43.21B.

II

Lawful appropriations of water, through approval of the DOE, are made under statutory authority of RCW 90.03, 90.44, and 90.54.

The criteria for approving a proposed withdrawal at chapter 90.03.290 RCW are:

a) that sufficient water is available from the source to support the appropriation;

b) that the withdrawal will not impair existing rights;

c) that the withdrawal is for a beneficial use, and

d) that the appropriation will not be detrimental to the public interest.

[See also Stempel v. Board of Water Resources, 82 Wn.2d 109, 115 (1973).]

III

As recommended by DOE these three surface water permits as issued, would not interfere with existing rights nor be inattentive to the public interest. Water is available for appropriation and the uses

for power generation, education, group domestic supply, recreation, maintenance of wildlife habitat, fire protection, intermittent drinking water and pond maintenance are, indeed, beneficial. Additional irrigation authorization would not be beneficial.

Under state law DOE has authority to allocate available water among potential uses and users based on securing the greatest benefit to the people of the state. RCW 90.54.010. Public policies on development, the cost to the public treasury, absolute availability of water for present and future needs, and the integrity of the area's characteristic geology help determine the answers to public interest questions.

IV

The legislature has found a strong beneficial use requirement is an appropriate precedent to the continuing development and ownership of a permit to withdraw or divert water and that such requirement is essential to the orderly development of the state. RCW 90.14 and RCW 90.54. We conclude appellants Warner can practically develop their three subject surface water permits to beneficial uses over a six-year period and they should, in due course, apply to DOE for an extension of the development period and be granted same.

V

Under chapter 90.54 RCW living streams must be maintained with or without formal minimum flows being established by regulation. Development under terms of the recommended permits would not interfere with the continued existence of Canyon Creek. The creek's behavior

and visibility depends on any channelization and careful development, and the peculiarities of nature, as well as absolute water appropriation decisions made by DOE.

The subject surface water permits should issue, as recommended.

VI

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

From these Conclusions the Board makes this

ORDER

Surface water permits S3-27301, S3-27302, S3-27303, as issued by the Washington State Department of Ecology, are affirmed.

DATED this 27th day of September, 1984.

POLLUTION CONTROL HEARINGS BOARD

Gayle Rothrock

GAYLE ROTHROCK, Chairman

Lawrence J. Faulk 9/26/84

LAWRENCE J. FAULK, Vice Chairman