BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF THOMAS L. MYERS, Appellant, v. DEPARTMENT OF ECOLOGY, JOE BAIRD, HAROLD MEILI, VELMA A. WEETMAN, ED C. CHISSUS, DONALD J. BARNER, RENE R. LINDELL, DON C. MITTLESTADT, Respondents.	PCHB No. 84-183, 84-184, 84-185, 84-186, 84-187, 84-188, 84-189 & 84-190 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

THIS MATTER, the appeal of an approval by the Washington State Department of Ecology of eight permits for surface water appropriation came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk, Chairman and Gayle Rothrock, Member, convened at Spokane, Washington on April 29, 1986. Administrative Appeals Judge William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by his attorney, Robert L. Henry. Respondent Department of Ecology appeared by Charles W. Lean, Assistant Attorney General. Reporter Denise Micka recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

This matter concerns Fish Lake located near Cheney in Spokane County.

II

On July 2, 1984, the Washington State Department of Ecology (DOE) approved the issuance of eight permits to appropriate the waters of Fish Lake. Each was to serve a residence located near the Lake, and each was for fire protection and irrigation of a one-half acre garden. One permit would also allow sufficient water for use inside one of the residences.

III

The total annual withdrawal of the eight permits combined is limited by DOE to nine acre/feet. Thus, if water were withdrawn to this maximum, it might reduce the level of Fish Lake, a 47 acre body of water by some two and one-half inches. However, the effect of such withdrawals is likely to bring in bank storage waters so that even the two and one-half inch maximum would be unlikely to occur.

IV

The potential draw-down from these permits would not have any significant adverse effect on fishing, boating, swimming or other recreational uses of Fish Lake.

V

The DOE approval of the eight permits was timely appealed to this Board by appellant, Thomas E. Myers on July 23, 1984.

VI

Mr. Myers is the successor in title to one Mr. Albert C. Farrington who made homestead entry in 1884 to lands in Section 4, Town 23N, Range 42E. These lands encompass a portion of the eastern shore of Fish Lake. In 1907, Albert C. Farrington established a resort on Fish Lake. In 1947, he conveyed or devised the land and resort to his son, Orr Farrington who sold to Mr. Myers in 1962.

VII

The resort has operated since 1907 by using waters of Fish Lake to supply its water needs. However, the quantities of water withdrawn from the lake for the resort have increased during Mr. Myer's ownership. Since 1962, Mr. Myers has expanded the resort by addition of a restaurant, a lounge and recreational vehicle sites, all supplied with water which he withdraws from Fish Lake. Mr. Myers holds no permits for water appropriation. Rather, he relies upon (1) a theory that he holds exclusive rights to the waters of Fish Lake due to the patent granted to his predecessor or (2) he holds vested water rights

based on actual withdrawal of water from the lake by his predecessors or himself.

VIII

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

The primary theory advanced by Mr. Myers is that he holds exclusive rights to the waters of Fish Lake due to the patent granted to his predecessor. Because of this, he contends that the State, by its Department of Ecology, lacks authority to grant any right of water appropriation. We disagree. For ease of reference, we repeat in this Conclusion of Law I the wording relating to "Jurisdiction of Department of Ecology" in our Order Affirming Jurisdiction entered herein upon pre-hearing motion on December 24, 1985:

Jurisdiction of Department of Ecology. The Department of Ecology (DOE) holds jurisdiction over the waters of Fish Lake, which are the waters at issue. It does so by virtue of the Water Code of 1917 which states at RCW 90.03.010, in pertinent part:

> "Subject to existing rights all waters within the state belong to the public . . ."

Under RCW 43.21.130 DOE ". . . shall regulate and control the diversion of water in accordance with the rights thereto . . .". In this case, DOE may therefore determine the scope of existing rights

and resultant public water available for appropriation.

Appellant argues, however, that the Enabling Act of 1889 under which Washington gained statehood did not expressly refer to non-navigable lakes (App.'s. Motion Brief, p. 6, lines 11-22). But this is beside the point. Under California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) where non-navigable waters overlay lands patented by the United States to individuals prior to Washington's statehood:

> ". . . all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named; with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain."

This is the guiding rule in this case, and was re-affirmed in Ickes v. Fox, 300 U.S. 82, 95 (1937) and California v. U.S., 438 U.S. 645 (1978). To the extent that Bernot v. Morrison, 81 Wash. 838, 143 Pac. 104 (1914) attempts to sever particular land patents from the whole, and create for them a different rule, the same was expressly disapproved by California Oregon Power Co., above. Nevertheless, appellant urges that he holds exclusive rights to the waters of Fish Lake and may retain them in their natural state free of any use by others. We disagree.

The "plenary control" spoken of in California Oregon Power Co., above, has been exercised by Washington State to effect a dual system of both riparian and appropriative water rights. Benton v. Johncox,

17 Wash. 277, 280-81, 49 Pac 495 (1897). Thus, in non-navigable lakes there may be either riparian or appropriative rights. Proctor v. Sim, 134 Wash. 606, 236 Pac. 114 (1925). Appropriative rights are based upon actual withdrawal of water for beneficial use. Riparian rights may consist of recreational rights (such as fishing boating or swimming). Bach v. Sarich, 74 Wn.2d 575, 445 P.2d 648 (1968). Riparian rights may also consist of withdrawal rights, but these must be put to use by 1932. If not so put to use such rights are forfeited, and the same results from exercise of the police power, and is not an unconstitutional taking. Department of Ecology v. Abbott, 103 Wn.2d 686 (1985). Any existing appropriative and riparian rights which are proven by appellant are entitled to protection from impairment by subsequent rights granted by DOE permit. RCW 90.03.010 and 90.03.290 of the Water Code. However, there is no type of water right which is immune from consideration by Department of Ecology or which intrinsically prevents Department of Ecology from issuing water rights to others where consistent with the Water Code and related statutes.

We conclude that appellant holds no right, exclusive or otherwise, to the waters of Fish Lake derived solely from the patent of his predecessor.

II

As to appellant's water rights based on actual withdrawal, these, as we have said, could be either appropriative or riparian. We first conclude that appellant has not shown that he holds any appropriative

right to the waters of Fish Lake. Moreover, such riparian recreational rights as appellant possesses under Bach, supra, would not be impaired by these proposed appropriations. Finally, the proposed appropriation would not impair the withdrawal of water presently being made by appellant for his resort. However, the only doctrine which plausibly supports appellant's withdrawals, on this record, is the riparian right of withdrawal. Under Abbott, supra, the maximum extent of this right was the amount of water put to use by 1932. Therefore, since water withdrawal by appellant has apparently been expanding as his resort expands, we are not prepared to conclude that such withdrawals as appellant now makes are supported by riparian right. We conclude that the proposed appropriation permits would not impair any existing water rights.

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 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. Stempel v. Dept. of Water Resources, 82 Wn.2d 109 (1973). The appellant has not shown that the approval of the eight subject permits was inconsistent with his criteria, and the approval should be affirmed.

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 approval by Department of Ecology of eight permits for withdrawal of the waters of Fish Lake is hereby affirmed.

DONE at Lacey, Washington this 3rd day of July, 1986.

POLLUTION CONTROL HEARINGS BOARD

7/3/86

LAWRENCE J. FAULK, Chairman

GAYLE ROTHROCK, Vice Chairman

WILLIAM A. HARRISON
Administrative Appeals Judge