BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF DAVID C. PEARSON & BEVERLY A. PEARSON, husband and wife, and SQUILCHUCK-MILLER WATER USERS ASSOCIATION, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB NO. 85-110 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER, the appeal from a denial by Department of Ecology of an applicaton to change the point of diversion and place of use of a water right, came on for hearing upon a stipulated, written record submitted to the Board and completed on July 17, 1987. The record was read by the Board, Wick Dufford Chairman, Lawrence J. Faulk and Judith A. Bendor Members. The record was also read by William A. Harrison, Administrative Appeals Judge for the Board. Respondent elected a formal proceeding pursuant to RCW 43.21B.230.

Appellants were represented by Roger A. Braden, Attorney at Law. Respondent was represented by Jay J. Manning, Assistant Attorney General.

From the stipulated record submitted, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

This case arises within the drainage system of Squilchuck Creek, which is located near Wenatchee. The facts are amply set forth in detail by the "Agreed Statement of Facts" filed by the parties herein. The salient facts are as follows.

II

The Squilchuck drainage system includes Squilchuck Creek and its tributaries. Henceforth this will be referred to as the "system." The water rights to the system were adjudicated by decree of the Chelan County Superior Court in 1928.

III

The 1928 decree sets forth two grades of water rights pertinent here. The first is denominated as "Class I" and is senior in priority to the second which are denominated "Class II through XXX." Class I water rights collectively total 8 cubic feet per second (C.F.S.).

IV

During the low flows of summertime, water in excess of 8 C.F.S. is often not available. The 1928 decree provides that only Class I water

rights may be exercised at or below 8 C.F.S. When below 8 C.F.S. the Class I rights are to be exercised pro rata.

V

The water right at issue came into being under the first recorded claim in the system, that of Philip Miller dated 1870. The right was set forth by the 1928 decree as Class I and its point of diversion was then confirmed as being on Squilchuck Creek proper. Squilchuck Creek proper will hereafter be referred to as the "main stem" in contrast to tributaries. The main stem plus tributaries make up the system.

VI

Some 41 years after the 1928 decree, in 1969, one B. J. Mathews purchased the water right at issue and applied to the State for a certificate allowing change of the point of diversion and place of use. Specifically, the new point of diversion was requested for a tributary which entered the main stem upstream of the former point of diversion. The State granted the certificate allowing this change.

VII

The tributary to which Mr. Matthews moved the water right is an intermittent stream in contrast to the main stem which flows year around. Mr. Matthews already had a right to 0.07 C.F.S. of water from the point of diversion on the tributary when he bought and moved the subject water right to that point. That 0.07 C.F.S. utilizes all or nearly all (depending on the time of year and the weather) of the

water available from the tributary. Therefore, the subject water right has been relegated by nature to little or no use since being moved from the main stem to the tributary 18 years ago. The consequent effect of this was to leave that much more water available in the main stem for satisfying the rights of other users.

VIII

In 1979, appellants Mr. and Mrs. Pearson purchased the subject water right from Mr. Matthews with the intent of moving it from the tributary back to the main stem. Specifically they seek to change the point of diversion to coincide with land which they own on the main stem upstream from the tributary.

IX

In 1980, Pearsons applied to the State, respondent herein, for a certificate allowing their intended change of point of diversion and place of use. This was denied in 1985.

X

Exercise of the subject water right would reduce the amount of water in the main stem to a greater degree if the point of diversion were changed from the tributary to the main stem as requested by appellants. This goes back to the natural phenomena by which the tributary flow is intermittent, and exercise of the right during the summer is problematic while the main stem carries sufficient water to make exercise of the right quite feasible.

XI

Water users in the main stem have not objected to the Pearson proposal for change of the point of diversion, except for an irrigation district which holds water rights junior in priority to the right at issue here.

XII

On August 28, 1985, appellants filed their Notice of Appeal from respondent's denial of their application for a certificate of change of point of diversion and place of use. The matter was set for hearing on October 8, 1985, and was thereafter continued upon a succession of continuance requests made by agreement of the parties. The matter was then submitted upon an agreed record completed on July 17, 1987.

XIII

Any Conclusion of Law hereinafter determined to be a Finding of Fact is hereby adopted as such.

From these facts, the Board comes to these

CONCLUSIONS OF LAW

I

There are two issues presented for resolution in this appeal:

1. Whether we have jurisdiction over the subject matter of this appeal in that it involves a water right originating prior to the Water Code of 1917?

2. Whether appellant's proposed change of point of diversion and place of use are consistent with the statutory criteria governing the same, namely, RCW 90.03.380 of the Water Code of 1917?

II

Jurisdiction Over the Subject Matter.

This Board reviews the orders of Department of Ecology upon the appeal of persons aggrieved. RCW 43.21C.110. It follows, therefore, that we have jurisdiction over the Ecology order denying appellant's application if Ecology has authority to make such an order. We hold that Ecology has such authority. Appellant reads the opening section of the Water Code, RCW 90.03.010, to exclude "existing rights" at the time of the 1917 enactment. This is correct for the limited purpose of that section which was to render appropriations initiated after the effective date of the Code subject to a permit system. But all surface water rights, even pre-1917 rights, are governed by the prior approval rule of RCW 90.03.380 whereby a right holder must apply for and receive a certificate before changing the point of diversion and place of use. See Department of Ecology v. Abbott, 103 Wn.2d 686 (1985) at 696, holding prior approval of the "supervisor of water resources" applicable to the change of use in a pre-1917 water right. Change of use is a kindred subject included with change of point of diversion and place of use in RCW 90.03.380. The reference to "supervisor of water resources" therein is now a

reference to respondent Department of Ecology which succeeded to the duties of the supervisor of water resources. RCW 43.21.120, RCW 43.27A.080, and RCW 43.21A.060. We conclude that we have jurisdiction over the subject matter of this appeal.

III

Consistency with the Statutory Criterion of RCW 90.03.380 Governing Change of the Point of Diversion and Place of Use.

The point of diversion and place of use can be changed upon prior State approval "if such change can be made without detriment or injury to existing rights." RCW 90.03.380.

IV

We first conclude that the statutory protection of "existing rights" does not invoke the rule of priority applicable elsewhere in water law. Even the right of a senior appropriator of waters to change his point of diversion depends on whether such change is detrimental to the rights of junior appropriators in existence at the time the change is proposed. Haberman v. Sander, 166 Wn. 453 (1932). In this case, the rights of all appropriators in the system, whether senior or junior to appellants' rights are protected by the statute from detriment or injury.

V

We next conclude that the change of point of withdrawal from the tributary to the main stem would result in greater quantities of water being withdrawn from the system because the withdrawal would be

year-round, rather than intermittent. That greater quantity would be lost to the other appropriators in the system. This constitutes a detriment to those other appropriators.

VI

We finally conclude that the proposed change of the point of withdrawal and place of use is inconsistent with RCW 90.03.380, and that the decision of respondent, Department of Ecology, should be affirmed.

VII

In reaching this conclusion we do not say that there may not be some lesser quantity of water which appellants could transfer as they wish to do. Since their right is Class I, it appears that they would be able to withdraw a share of whatever waters flow in the tributary and, further, that quantity, though less than sought here, might be correctly diverted from the main stem. Our order is without prejudice to appellants' opportunity to seek approval for transfer of a lesser quantity than sought here.

VIII

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

From these Conclusions, the Board enters this

ORDER

The denial of appellants' application for change of point of diversion and place of use is hereby affirmed.

DONE at Lacey, Washington, this 4th day of November, 1987.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford

WICK DUFFORD, Chairman

11/4/87

LAWRENCE J. FAULK, Member

Judith A. Bendor

JUDITH A. BENDOR, Member

William A. Harrison

WILLIAM A. HARRISON
Administrative Appeals Judge