lit.

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

JAY L. SUMMERS, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	))))))))))	PCHB NO 91-42 FINAL FINDINGS OF FACT, CONCUSIONS OF LAW AND ORDER

This matter came on for formal hearing before the Washington State Pollution Control Hearings Board on April 29, 1992, in Cle Elum, Washington. Final closing arguments were filed on May 20 and June 2, 1992.

The issue in this appeal is whether the water proposed to be diverted by Mr. Summers is a tributary to or otherwise in continuity with the Walla Walla River.

Present for the Board was Presiding Board Member Annette S. McGee. The proceedings were taped, and a transcript was ordered. Board Chairman Harold S. Zimmerman reviewed the record.

Marilynn S. McMartin, Court Reporter for Affiliated Court Reporters, P. O. Box 994, Yakima, Washington, recorded the proceedings.

Appellant Jay L. Summers represented himself, and respondent Washington State Department of Ecology appeared through Assistant Attorney General Thomas McDonald

Testimony was heard, exhibits were admitted and examined, and written closing argument filed.

From the foregoing, the Board makes these

FINDINGS OF FACT

I

Jay L. Summers, 1775 Highland Road, Walla Walla, Washington, applied to the Department of Ecology (DOE) for a groundwater permit to divert two-thousand, two hundred, fifty (2,250) gallons of water per minute (gpm) for purposes of irrigation, commercial use, recreation, fish propagation, stock water and fire protection, on October 26, 1987.

Summers proposed to divert groundwater from an infiltration trench which was formed as a result of a gravel pit excavation by the Washington State Department of Transportation when widening State Highway No 125 in the mid 1980s.

Excavation of gravel created surface water, much like a well would.

II

The proposed point of withdrawal is within the Walla Walla River Basin located in Government Lot I within the NW 1/4 NW 1/4 of Section 13, T.6N., R. 35E., W.M. of Walla Walla County, approximately three miles south of the City of Walla Walla, Washington.

III

The infiltration trench covers approximately six acres in surface area, is five to ten feet deep, and located on the Summers' property approximately two-hundred feet south of the Walla Walla River.

IV

The Walla Walla River Basin is governed by the Basin Management Program for Water Resources Inventory Area 32, codified at ch. 173-531 WAC.

Pursuant to the Basin Plan, all surface streams are totally appropriated in the

Walla Walla River Basin during irrigation season, and the Walla Walla River and most of its tributaries are closed to further appropriation for consumptive use other than single domestic and stock water uses. WAC 173-532-040.

V

On January 14, 1991, after investigating Summers' application, the DOE issued its Report of Examination recommending that the application be approved in the amount of thirty (30) (gpm) to be used only for stock water, fire protection, and non-consumptive recreation and fish propogation. See Exhibit R-2.

DOE concluded that water was not available for commercial and irrigation uses, and that diversion of water for those purposes would impair existing rights. Therefore, it was denied.

VI

Mr. Summers has existing water rights for irrigation of his land. Evidence was provided to show that Summers has three existing surface and six groundwater rights. Exhibits R-8 and R-9. However, the surface water rights are regulated in the summer season because of the lack of water in the Walla Walla River, and his groundwater rights may not be producing the full allocation in the certificates of right, because of low water level for operation of the wells.

VII

On February 20, 1991, Summers appealed the January 14, 1991, Finding of Fact and Order signed by Theodore M. Olson, DOE Section, Supervisor, Water Resource Program which ordered a permit be issued "authorizing appropriation of public water for stockwater, fire protection, and non-consumptive recreation and fish propogation uses, subject to the

provisions set forth in the DOE Examiner's Report and that commercial and irrigation uses be denied."

VIII

DOE recommended in their Report of Examination that only thirty (30) gallons of water per minute be appropriated for the above purposes based on their conclusions that the infiltration trench is groundwater in direct hydraulic continuity with the Walla Walla River. This is the subject of the appeal.

Summers has the burden to show that DOE's conclusion is incorrect, and that the water he proposes to divert is not in continuity with the River.

IX

DOE generally defines the zone of direct hydraulic continuity to be three hundred feet (300) on each side of a stream channel, and the location of this infiltration trench ranges from approximately one hundred (100) to three hundred (300) feet from the River, as the River flows directly east to southeast of the trench. Exhibit R-2.

X

DOE relied on their expert witness Mr. James Lyerla, DOE's Water Resource Program. He testified that based upon his investigation of the area, and his review of relevant reports and stream measurements, large quantities of withdrawal of groundwater from the infiltration trench would diminish the flow to the Walla Walla River and, therefore, the trench is in continuity with the River. He relied primarily on his site visit to the area, observing that the trench was dug only into the gravel, and the river channel also consisted of gravel. However, he acknowledged not investigating the River up or downstream for three miles as to the types of soil.

XI

Mr. Summers maintains that the River bank is dirt and the streambed is gravel deposits on top of clay and hard pan Therefore, the trench is not in continuity with the River. However, he does not dispute that there is only gravel in the vicinity of the trench.

XII

Flow records were measured and documented by William L. Neve of DOE's Water Resource Program, which provided evidence that as the Walla Walla River flows past the Summers property, groundwater flow emerges and contributes to the River. Exhibit R-7. Neve's upstream measurement was taken about three-hundred (300) feet south of the southern end of the trench and measured 2.42 cubic feet per second. (cfs). The second measurement taken one hundred feet (100) north of the southern end of the trench downstream showed 3.97 cfs, thus showing a gain of over 1.5 cfs or seven hundred (700) gpm.

XIII

Summers argues that flow measurements should have been conducted by certified personnel, and that Neve's measurements should have been taken at more intervals.

DOE has no specific certification criteria required of an employee to conduct flow measurements, but they authorize employees in their Water Resource Program to do the measuring, and Neve was so authorized.

Appellant did not present any direct evidence that Neve's flow measurements were incorrectly taken

XIV

Water Supply Bulletin No. 45 analyzes the general flow regime of the area. It explains that as the River flows past the trench, the river is gaining in the quantity of flow. Exhibit R-4.

XV

There is no dispute that the trench is higher than the River and that on the surface, water is flowing from the trench to the River. There is a dispute as to the amount of flow of gallons per minute.

The trench is approximately 8.8 feet above the stream with the slope toward the River.

There is also a man-made berm approximately ten feet high which separates the water, and it is likely restricting the amount of flow from the pond to the River, but there is no dispute that there is seepage through pervious material used in the berm. Exhibits R-2, 11-D, and 11-E.

XVI

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

From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

The Pollution Control Hearings Board has jurisdiction over this appeal. Chapter 70.94 and 43.21B RCW.

II

Because this is an appeal of a DOE decision, the appellant has the burden of proof. Even if the Board sympathizes with the appellant's assumption that more flow measurements should have been taken, there was no direct evidence presented to support Mr. Summers' opinion that the infiltration trench is not in hydraulic continuity with the Walla Walla River. To the contrary, the only flow measurements that were provided were by DOE, which demonstrated the continuity with the River.

III

The proposed point of withdrawal is within the Walla Walla River Basin and therefore governed by the Basin Management Program for Water Resources Inventory Area 32, Walla Walla River Basin, codified at ch. 173-531 WAC. Pursuant to the Basin plan, all surface streams are totally appropriated in the Walla Walla River Basin during the irrigation season, and the Walla Walla River and most of its tributaries are closed to further appropriation for consumptive use other than single domestic and stock water uses. WAC 173-532-040.

Any further appropriation could impair existing rights, and the Board concludes, as a matter of law that DOE properly determined that there are no waters available for further appropriation for consumptive use, other than single domestic and stock water.

IV

Furthermore, the Board concludes that the Walla Walla River Basin Plan is consistent with the statutory authority that requires Ecology to first find that water is available prior to issuing a permit and to consider the interrelationship of the ground and surface waters. RCW 90.44.030, 90.54.020(8). "Full recognition shall be given in the administration of water allocation and use programs to the natural interrelationships of surface and ground waters." RCW 90.54.020(8). The ground water code incorporates this "interrelationship" by clarifying that any groundwater that is "part of or tributary to" a stream or the withdrawal "may affect" the flow of the stream is junior to the rights to the surface water. RCW 90.44.030.

V

From the evidence presented, the Board concludes that the withdrawal of water from the trench would have an effect on the Walla Walla River because of the hydraulic continuity

of the trench with the River. DOE may only issue a permit if it determines that water is available and that such appropriation will not impair existing rights. RCW 90.44.060 and RCW 90.03.290.

VI

Summers has the ability to irrigate his land through existing groundwater rights, if he can expand his system to withdraw the amount of water that he is already permitted. Finding of Fact number VI.

VII

In summary, the Board concludes that Summers has failed to establish direct evidence that the infiltration trench is not in continuity with the Walla Walla River, and that DOE's determination, based on the only expert evidence submitted, is proper.

VIII

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

From the foregoing, the Board issues this:

ORDER

DOE's Order to issue the permit as recommended and conditioned is hereby AFFIRMED.

DONE this 15th day of July, 1992.

POLLUTION CONTROL HEARINGS BOARD

ANNETTE S. McGEE, Presiding

HAROLD S. ZIMMERMAN, Chairman

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