lib.

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

CITY OF KENNEWICK, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 92-31 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came on for hearing on May 4, 1992, in Lacey, Washington, before the Pollution Control Board with Harold S. Zimmerman, Board Chairman, presiding, Board Member Annette McGee in attendance, and John H. Buckwalter, Administrative Law Judge, as legal advisor.

At issue was order no. DE 92WR-003 issued by the Department of Ecology, State of Washington (hereinafter DOE) ordering the City of Kennewick (hereinafter the City) to pay an inspection fee of $10,065.

Appearances were:

William L. Cameron, City Attorney, for appellant City.

Kerry O'Hara, Assistant Attorney General, for respondent DOE.

Proceedings were recorded by Leah M. Yates, CPR, of Spanaway, Washington. Witnesses were sworn and testified, exhibits were admitted and examined, and arguments of counsel were heard. From these, the Board makes these

FINDINGS OF FACT

I

The City lies on the south side of the Columbia River in Benton County, State of Washington. The eastern portion of the City is on a low plain next to the River, and the western and southern portions lie on two higher plateaus which are separated by Zintel Canyon.

II

Zintel Canyon is a natural watercourse which drains approximately 24 square miles of the area south of the City. The canyon is almost always dry, but occasionaly drains off sufficient rain water to flood the lower portion of the City. Since the 1950's the City has considered building a flood control dam in the canyon but was constrained by financial considerations.

III

After receiving a loan from the Public Trust Fund in 1987, the City entered into a contract on July 18, 1991, with the Department of the Army, United States Government, under the Flood Control Act of 1965 for the construction of a flood control dam in Zintel Canyon.

In general terms, discussed more specifically below, the contract provided that the Government would be responsible for the design and construction of the dam and that the City as Sponsor would pay 25% of the costs, would acquire the necessary lands to which it will retain title after construction is completed, and will be responsible for

subsequent operation, periodic inspection, modification, or repair of the dam as prescribed by the Government.

IV

In the early part of 1992 the City acquired the necessary property from the Washington Department of Natural Resources. The United States Government, acting through the Corps of Army Engineers (hereinafter the Corps) subcontracted with a private firm for the construction of a 90' compacted concrete dam in Zintel Canyon and sent a copy of its plans and specifications to DOE for comment. Work is underway on the dam.

V

After expending approximately 270 hours on reviewing the Corps' specifications, by letter dated June 21, 1991, DOE requested the Corps to pay an inspection fee of $10,065 to DOE. By letter dated July 12, 1991, the Corps responded that, under the Supremacy Clause of the United States Constitution, it was not obligated to pay the inspection fee. DOE then, by letter dated July 21, 1991, requested the City, as the "ultimate dam owner and operator", to pay the inspection fee. The City responded on August 13, 1991, that it (the City) was not responsible for the fee since the dam was being constructed by the Corps, not by the City. After further correspondence and discussions between the parties, DOE issued Order DE 92WR-003 on January 24, 1992, requiring the City to pay the $10,065 inspection fee. The City filed

a timely appeal for this Board's review of DOE's order.

VI

No issues have been raised here such as whether the Corps rightfully declined paying the inspection fee or whether the amount of the fee was properly determined by DOE. The only issue under consideration in this review is whether, under the facts of this case, Kennewick is liable for the inspection fee imposed by DOE on the Zintel Canyon dam project. This is an issue of first impression not only with this Board but, as stated by DOE, with that Department also.

VII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact the Board makes these

CONCLUSIONS OF LAW

I

This Board has jurisdiction over the parties and subject matter of this appeal. RCW's 43.27A.190, 43.21B.310, 90.03.600. Because this is an appeal of the imposition of a fee by DOE, respondent DOE has the burden of proof.

II

DOE is required to review plans and specifications for proposed dams by RCW 90.02.350, the portions of which, relevant in this matter, provide that:

> *Any person, corporation or association intending to construct...a dam..., shall before beginning said construction..., submit plans and specifications of the same to (DOE) for examination and approval as to its safety...No such dam shall be constructed...until the same...shall have been approved as to its safety by (DOE).*

RCW 90.03.470 (9) requires that fees "For the examination of plans and specifications as to safety of controlling works for storage of...water" shall be collected in advance.

The above statutory requirements are restated in WAC 508-12-300.

III

DOE contends that the City is liable for the inspection fee because the City "intends" to build the dam, while the City maintains that it is not liable because the Corps, not the City, "intends" to build it.

IV

There is no question that, although the City may make suggestions or recommendations, the Corps has sole responsibility and authority for the drawings, specifications, contracts, and work performance in constuction of the dam. Agreement, Article II,a. However, the controlling terminology in the statute does not contemplate who is going to <u>build</u> the dam, but who <u>intends</u> that the dam be built.

V

DOE argues that the City's Notice of Appeal which states that "since the 1950's, it has been the desire of the City to have the

Corps construct a flood control dam in Zintel Canyon..." shows the City's "intent" to construct the dam. We do not believe that the statute contemplates a party's desire that sometime, someone, somewhere will construct a dam. We believe and conclude that the statute applies where there is an intent to build a specific dam at a specific place within a specific time frame for which plans and specifications have been drawn.

VI

We look instead to the Agreement between the City and the Army to determine the source of the intent to build.

On page 1, the Agreement cites Section 221 of the Flood Control Act of 1970, Public Law 91-611, for the proposition that "the construction of any water resource project by the Secretary of the Army shall not be commenced until each non-Federal interest has entered into a written agreement to furnish its required cooperation for the project...". It is apparent that the City is the only party which will benefit from its construction, that it is the City's intent that the dam be built , and that without that intent, the Army would not have initiated or participated in its construction.

VII

The City's intent is further apparent from its willingness to contribute 25% of the total project costs (Agreement Article II,f), which costs include the acquisition and use of property, furnishing

materials, and "continuing planning and engineering costs (and) costs of applicable engineering and design." (Agreement Article I,b, *emphasis added*)

VIII

We conclude that the intent to build the Zintel Canyon dam emanates, not from the Corps, but from the City.

VIII

DOE further contends that the City is liable for the inspection fee because, after completion of the dam, the City will become its owner. The City claims that, under the Agreement, it will not be the owner but acting only as a "caretaker".

IX

Article II,b of the Agreement provides that "When the Government determines that the Project, or functional portion of the Project is complete, the Government shall turn the completed Project or functional portion over to the Local Sponsor, which shall accept the Project or functional portion and be solely responsible for operating, repairing, maintaining, replacing, and rehabilitating the Project or functional portion..." (*emphasis added*).

In performing the above functions, the City's claim that it will be acting as a caretaker for the Army is not tenable. As caretaker the City would be acting as an agent for the Army. But the Agreement specifically states in Article XIII that "The parties to this

Agreement act in an independent capacity in the performance of their respective functions under this Agreement and neither party is to be considered the officer, agent, or employee of the other."

Furthermore, the provision that the City "shall accept the Project" indicates a resultant ownership of the dam, not the acceptance of a caretaker's functions.

X

The Army will retain certain rights such as the right to enter onto the City's land for the purpose of inspection to determine whether the City is fulfilling its obligations under the Agreement and, if necessary, for the purpose of completing, operating, maintaining, repairing, replacing, or rehabilitating the Project. The Board recognizes that these might be regarded as proprietary rights. Instead, the Board regards them as Government contractual rights to assure that the Project into which the Government is contributing the bigger proportion of the money is maintained according to Government standards.

XI

The Board concludes that, following the completion of the Project and its acceptance, the City will be the owner of the dam.

XII

In summation, the Board concludes that the intent to build the Zintel Canyon Dam came from the City, that the City will be the

ultimate owner of the dam, that the purpose of the statutory requirements is to preserve the safety of this State's residents and property through DOE's inspection of the plans and specifications, that DOE is to be recompensed for such inspections, and that the City is liable for such recompense.

Whether or not the City can include this inspection cost as part of the total project costs under Article I,b of the Agreement must be decided by the parties to that Agreement. The jurisdiction of this Board does not extend to that issue.

XIII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such. From these Conclusions of Law the Board enters the following

ORDER

DOE's Order No. DE 92-WR-003 that the City of Kennewick pay the $10,065 inspection fees for the Zintel Canyon Dam Project is AFFIRMED in its full amount.

DONE this 20th day of May, 1992.

POLLUTION CONTROL HEARINGS BOARD

HAROLD S. ZIMMERMAN, Chairman

ANNETTE S. McGEE, Member

JOHN H. BUCKWALTER
Administrative Law Judge
Presiding.