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Roll No. 267 387<sub>M</sub>  
BETTY MCGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR YAKIMA COUNTY

IN THE MATTER OF THE DETERMINATION )  
OF THE RIGHTS TO THE USE OF THE )  
SURFACE WATERS OF THE YAKIMA RIVER )  
DRAINAGE BASIN, IN ACCORDANCE WITH )  
THE PROVISIONS OF CHAPTER 90.03, )  
REVISED CODE OF WASHINGTON, )

NO. 77-2-01484-5

THE STATE OF WASHINGTON )  
DEPARTMENT OF ECOLOGY, )

MEMORANDUM OPINION RE:  
ROBERT C. ABRAHAMSON'S  
MOTIONS TO DISMISS COMPLAINT  
AND MOTION FOR PARTIAL  
SUMMARY JUDGMENT RE:  
BERGLAND LAKE

Plaintiff, )

vs. )

JAMES J. ACQUAVELLA, ET AL, )

Defendants. )

Robert O. Abrahamson, a claimant herein, has filed two motions. The first is a motion to dismiss this action on the alleged grounds that R.C.W. 90.03 is unconstitutional; that R.C.W. 90.03 violates the "appearance of fairness" doctrine; and that the Court has no jurisdiction over the claimant as the action was not commenced pursuant to Civil Rule 3(a). Joining in this motion are claimants Peter J. and Virginia F. Mellinger and George R. and Erma V. Hileman. The second motion by Mr. Abrahamson (for partial summary judgment re: Bergland Lake) alleges that the State, in this action, seeks to alter or modify water rights acquired from the State. For the reasons hereinafter stated, both motions are denied.

Motion to Dismiss Complaint

Firstly, claimants assert that R.C.W. 90.03.160 "is an unconstitutional delegation of the Court's powers to said referee, who is appointed by the plaintiff." Technically, this is a

1 misreading of the statute. The Court appoints the referee; whom  
2 the Legislature has said, by statute, must be either the "super-  
3 visor of water resources . . . or his duly authorized deputy."  
4 The supervisor or his deputy is the referee. The qualifications  
5 of a referee are set forth in R.C.W. 4.48.030, which must be read  
6 in para materia with R.C.W. 90.03.160. The qualifications are  
7 that the referee must be qualified to be a juror; competent as  
8 a juror between the parties and a duly admitted and practicing  
9 attorney (which undoubtedly is why the Legislature provided for  
10 a duly authorized deputy). All of these qualifications have been  
11 met in this action. It also seems clear that the Legislature, in  
12 imposing this additional requirement that the referee appointed  
13 by the Court be the supervisor or his deputy was purposely recog-  
14 nizing the need for the referee to have some expertise concerning  
15 water matters. This has been recognized in In Re Crab Creek and  
16 Moses Lake, 134 Wn. 7, 17-18 and In Re Ahtanum Creek, 139 Wn. 84  
17 at 91. Apparently, the gist of the claimant's argument is that  
18 the appointment of the referee "to preside over certain segments  
19 of the adjudication in place of the Court and the Judge" constitutes  
20 the acts of an administrative body exercising judicial functions.  
21 Firstly, the referee does not preside over any adjudication of  
22 the water rights. That function is performed by the Court pursuant  
23 to R.C.W. 90.03.200. Specifically, R.C. W. 90.03.160 states that  
24 the referee is to take the testimony and file a transcript thereof  
25 "for adjudication thereon by the court". The referee is required  
26 to give notice to all parties of all hearings for the taking of  
27 testimony and reception of evidence. R.C.W. 90.03.170. He has  
28 to file the transcript of all such testimony and all the evidence  
29 with the court and also make and file a complete report with the  
30

1 court. R.C.W. 90.03.190. The Court then receives exceptions to  
2 the report; rules on such exceptions; can take further evidence;  
3 and ultimately enters the decree of adjudication. R.C.W. 90.03.200.  
4 It should be noted that under R.C.W. 4.48.070, which again must be  
5 read in para materia, the referee's rulings on the admissibility  
6 of testimony and evidence are part of the record. If testimony or  
7 evidence is not admitted for use by the referee, he nonetheless  
8 must take the testimony or evidence and include it in the report  
9 for later ruling by the Court. As noted above, exceptions to the  
10 referee's actions and report may be taken by any claimant and  
11 shall be ruled upon by the Court. R.C.W. 90.03.200. Thus the  
12 Court becomes the real adjudicator of any decisions of law and  
13 fact in this action. Finally, the claimant's assertions of unconsti-  
14 tutionality and lack of due process are wholly negated by the U.S.  
15 Supreme Court in Pacific Livestock Co. v. Lewis, 241 U.S. 440,  
16 36 Sup.Ct.Rptr. 637 (1916) wherein the Court stated"

17 "That the State, consistently with due  
18 process of law, may thus commit the preliminary  
19 proceedings to the board (referee) and the  
final hearing and adjudication to the court  
is not debatable."

20 Concomitantly, the assertion of a violation of the "appearance  
21 of fairness" doctrine is wholly without merit. As noted above,  
22 the Department of Ecology does not appoint the "judge" (referee).  
23 This Court appoints the referee, who serves only as the arm of the  
24 Court, for the taking of testimony and submitting a report. The  
25 Court itself exercises the judicial functions, not the Department  
26 of Ecology. The Department has brought this action so that "the  
27 interest of the public will be subserved by a determination of  
28 the rights. . ." to the water of the Yakima River Basin. R.C.W.  
29 90.03.110. The Department is not in an adversarial position;  
30

1           In view of the above, this Court can find no conflict of  
2 interest which would or could give rise to any possible violation  
3 of the doctrine.

4           In oral argument, Abrahamson's counsel indicated that he was  
5 withdrawing his claim of improper commencement of the action.  
6 However, inasmuch as two other claimants had joined in the motion,  
7 this Court will consider the issue. Additionally, it was stated  
8 in oral argument that the word "summons" in the motion and brief  
9 should have been the word "complaint". The other two claimants  
10 merely adopted Mr. Abrahamson's motion and brief, so the Court  
11 will address both the "complaint" and the service of "summons".

12           The brief states: (Memorandum, p. 4) " -- the commencement  
13 of an "action" requires both the filing of a complaint and com-  
14 mencement of service by way of summons. --- Such was not done  
15 in the case herein, in that a summons was not served upon the  
16 defendants and therefore the essence of jurisdiction required by  
17 the taking of property has not been satisfied in accordance with  
18 law." The short answer to this is that the "complaint" in this  
19 special proceeding was filed in accordance with R.C.W. 90.03.110.  
20 A statement of the facts and the accompanying plan or map was  
21 filed herein to initiate this action. The statement of facts  
22 clearly complies with the statutory requirements. It was conceded  
23 that such a "statement of facts and map: are the same as a "complaint"  
24 in this special proceeding. Only the "summons", containing the  
25 requisite information, need be served upon the claimants. R.C.W.  
26 90.03.120. This summons is "reasonably calculated, under all the  
27 circumstances to apprise interested parties of the pendency of  
28 the action and afford(s) them an opportunity to present their  
29 objections (claims)". Mullane v. Central Hanover Bank & Trust Co.,  
30

1 339 US 306, 94 L.Ed. 865. Additionally, and contrary to claimants'  
2 assertions in the brief, the records of this Court show personal  
3 service of a proper summons on Robert O. and Toni L. Abrahamson  
4 on June 12, 1979 and on George R. and Erma V. Hilemen on August 4,  
5 1979. Peter J. and Virginia F. Mellinger, pursuant to R.C.W.  
6 90.03.130 and the order of this Court, were served a summons by  
7 certified mail on April 25, 1980, with the signed Return Receipt  
8 being received April 30, 1980. Therefore, there is no basis  
9 in fact for this assertion by claimants.

10 There being no merit to any of the claimants' complaints,  
11 the motion to dismiss is denied.

12 Motion for Partial Summary Judgement Re: Bergland Lake

13 In this motion, Mr. Abrahamson, supported by an affidavit,  
14 alleges purchase of land from the State Department of Transportation,  
15 and that said purchase includes a "freeway" lake known as Bergland  
16 Lake. He further complains that, in this action, the State Depart-  
17 ment of Ecology "attempts to alter, change or modify" the contract  
18 of purchase "to eliminate the subject matter of the contract".  
19 The obvious fallacy of this argument is demonstrated by the claimant  
20 himself when he states: (Memorandum, p.3) "The intended effect of  
21 the above-referenced proceeding is to determine, clarify and/or  
22 quantify a water right. . . ." that is a property right of the  
23 claimant. (Emphasis added). Precisely. This action is to confirm  
24 in Mr. Abrahamson his property rights to water and present to him  
25 a certificate establishing the precise nature and extent of that  
26 right R.C.W. 90.03.240. Whatever right he may have, it will be  
27 established and certified in this action, not "altered, changed or  
28 modified". The motion is denied.

29 DATED this 12<sup>th</sup> day of February, 1985.

30 Walter Stauffer  
JUDGE