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1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR YAKIMA COUNTY

3 IN THE MATTER OF THE DETERMINATION)
4 OF THE RIGHTS TO THE USE OF THE)
5 SURFACE WATERS OF THE YAKIMA RIVER)
6 DRAINAGE BASIN, IN ACCORDANCE WITH)
7 THE PROVISIONS OF CHAPTER 90.03,)
8 REVISED CODE OF WASHINGTON,)
9 STATE OF WASHINGTON,)
10 DEPARTMENT OF ECOLOGY,)

NO. 77-2-0148-5

MEMORANDUM OPINION
RE: FISH PROPAGATION

Plaintiff,

vs.

11 JAMES J. ACQUAVELLA, et al.,)
12 Defendants.)

13 The Court has read, and re-read, the Report of the Referee Re.
14 Subbasin 19; the Exceptions to the Report of the Referee; the
15 Memorandums of counsel; all of the cases cited in those memorandums;
16 and the transcript of the oral arguments to the Court. The claimants,
17 Mr. and Mrs. Sweeten and the South Naches Channel Companies are
18 claiming water rights for fish propagation in this adjudication. The
19 facts, as presented to and found by the Referee are relatively clear.

21 Claimants had requested that water rights for "fish propagation"
22 purposes be confirmed to them in this adjudication, with a priority
23 date as of the initial appropriation of water by them or their
24 predecessors for irrigation purposes. They are presently "ponding"
25 and using water for this endeavor. However, there is no evidence in

MEMORANDUM OPINION
RE. FISH PROPAGATION - 1

7677

1 the record to indicate that use of water for fish propagation occurred
2 or vested prior to the enactment of the 1917 Water Code (now R.C.W.
3 90.03) or prior to December 31, 1932 under the Riparian doctrine. The
4 claimants are apparently continuing to irrigate their orchards as in
5 the past. No claim of water for fish propagation was filed by the
6 claimants pursuant to R.C.W. 90.14 and there has been no application
7 made to the Department of Ecology for a change of purpose of use as
8 directed by the 1917 act, now R.C.W. 90.03.380. Thus, the Referee
9 found that no right to water for fish propagation had been established
10 and therefore, only awarded water right to the claimants for
11 irrigation and domestic supply, including stock watering.

12 This case is a general adjudication of water rights pursuant to
13 R.C.W. 90.03.110-240. (The 1917 Act). The purposes of the act are
14 set out in R.C.W. 90.03.010 (in part) as follows:

15 "Subject to existing rights all water within the state
16 belong to the public, and any right thereto, or the use
17 thereof, shall be hereafter acquired only by appropriation
18 for a beneficial use and in the manner provided and not
19 otherwise; and, as between appropriations, the first in time
20 shall be the first in right. Nothing contained in this
21 chapter shall be construed to lessen, enlarge, or modify the
22 existing right of an riparian owner, or any existing right
23 acquired by appropriation, or otherwise." (Emphasis added).

24 Additionally, we find that in 1979, the legislature further
25 defined the parameters of this proceeding as follows:

26 R.C.W. 90.03.345. "Rights subject to determination
27 proceedings conducted under R.C.W. 90.03.110 through
28 90.03.240 and 90.44.220 include all rights to the use of
29 water, including all diversionary and instream water rights,
30 and include rights to the use of water by the United States.
31 Nothing in this section shall be construed as establishing
32 or creating any new rights to the use of water. This

1 section relates exclusively to the confirmation of water
2 rights established or created under other provisions of
state law or under federal laws." (Emphasis added).

3 It is within this framework that we must address this issue.

4 It is the contention of the claimants that a change of use of
5 water that has been appropriated to another use is permissible, citing
6 to In Re Alpowa Creek, 129 Wash. 9 (1924). In that case a notice was
7 filed claiming water for milling and manufacturing and also one for
8 agricultural irrigation. Part of the waters were used for a mill and
9 a mine, but these operations ceased and all of the water was used then
10 for irrigation. An adjudication was commenced under the 1917 act (now
11 R.C.W. 90.03). Various riparian owners contested a preference given
12 for all of the water appropriated, including the mining and milling.
13 The Supreme Court, referring to 27 Ruling Case Law 1279, held that
14 such a change of use was permissible to maintain the original
15 appropriation date for all of the water claimed. It is interesting to
16 note that the decision made no mention whatsoever of the provisions of
17 the statute regarding the change of purpose of use.

18 Alpowa, supra, has been cited in two cases in recent years. In
19 Department of Ecology v. Abbott, 103 Wn.2d 686, 696, (1985), we find
20 the following: "Generally, an appropriation is not limited to the use
21 for which the appropriation was initially made. See In Re Alpowa
22 Creek, 129 Wash. 9. 224. p.29 (1924). Since 1917, however, by statute
23 changes in use must first be approved by the supervisor of water
24 resources. In this case, a change in use from logwashing to
25 irrigation should be allowed only if an application to do so was filed

1 with and approved by the supervisor of water resources." (Emphasis
2 added). It was held therein that since no approval had been sought or
3 obtained for the change of use from log washing to irrigation that the
4 court in that adjudication could only award the amount of water
5 historically used for irrigation and did not include the amount of
6 water that had been used for logwashing in the water right. It should
7 be noted that the change from logwashing to irrigation in D.O.E. v.
8 Abbott, supra, took place long after the enactment of the 1917
9 statute, while in Alpowa, supra, it is somewhat unclear, but it
10 appears that the change from mining and milling to irrigation occurred
11 somewhat before 1917.

12 More recently, Alpowa, supra, was again referred to in Neubert v.
13 Yakima-Tieton Irrigation District, 117 Wn.2d 232, (1991). There, the
14 Yakima-Tieton Irrigation District (YTID) had attempted to
15 differentiate "frost protection water" from "irrigation water",
16 arguing that the water users had not appropriated water for frost
17 protection purposes, but only for irrigation purposes. Citing to
18 Alpowa, supra, the Court held that a change of use was permissible.
19 The main thrust of the opinion, however, was that frost protection
20 water was part of and included in an appropriation of water for
21 agricultural purposes. Neither the statute, R.C.W. 90.03.380, or the
22 holding in D.O.E. v. Abbott, supra, were mentioned.

23 The pertinent parts of Chapter 117, Session Laws of 1917, Section
24 39, provide, "The ... purpose of use may be changed, if such change
25 can be made without detriment or injury to existing rights. ...

1 Before any ... change of purpose of use can be made, any person ...
2 shall file a written application therefor ..." (Now codified in
3 R.C.W. 90.03.380). It further provides that if there is no detriment
4 or injury to existing rights, a certificate for such change of purpose
5 of use shall be issued by the department. The claimants herein have
6 argued that water for fish propagation (aquaculture) is the same
7 purpose of use as water for irrigation (agriculture), that is, for the
8 production of food, and therefore, there is no change in the purpose
9 of use of the water. However, both the state statutes and case law
10 delineate that there is such a difference of purpose.

11 In R.C.W. 90.54.020, the legislature has categorized the uses for
12 which water may be diverted as follows:

13 "Utilization and management of the waters of the state
14 shall be guided by the following declaration of
15 fundamentals: (1) Uses of water for domestic, stock
16 watering, industrial, commercial, agricultural, irrigation,
17 hydroelectric power generation, mining, fish, and wildlife
18 maintenance and enhancement, recreational, and thermal power
19 production purposes, and preservation of environmental and
20 aesthetic values, and all other uses compatible with the
21 enjoyment of the public waters of the state, are declared to
22 be beneficial." (Emphasis added).

23 Similarly, in R.C.W. 90.14.031 we find:

24 (2) "Beneficial use" shall include, but not be limited to,
25 use for domestic water, irrigation, fish, shellfish, game
and other aquatic life, municipal, recreation, industrial
water, generation of electric power, and navigation.
(Emphasis added).

Thus, it clearly appears to be the intent of the legislature to
differentiate the purposes for which water may be put to beneficial
use.

1 Additionally, the difference in the purpose of use between fish
2 propagation and irrigation was recognized in McLeary v. Dept. of Game,
3 91 Wn.2d 647 (1979). In a 1924 adjudication, Game's predecessor had
4 filed a claim for irrigation and also for fish hatchery purposes. The
5 claim was only allowed for the irrigation purposes. No statutorily
6 required permit for fish hatchery purposes was ever obtained. After
7 Game purchased the property in 1971, it desired to use the water
8 appurtenant to the land for a proposed fish hatchery. The Court held
9 that there was no right for fish hatchery purposes. This is clear
10 recognition of the distinction between use of water for irrigation
11 purposes and use of water for fish propagation purposes.

12 As in this matter, Game in McCleary, supra, argued that water for
13 fish propagation was a nonconsumptive use. Therein, the Court stated:
14 "Appellant's attempted distinction between consumptive and
15 nonconsumptive uses is not helpful and may not be used to narrow the
16 scope of a general adjudication. First, the statute speaks of
17 "diversion" of water for beneficial use. No distinction of
18 "nonconsumptive" uses can arise from the language." Therefore, this
19 is not an issue.

20 In view of the statutory requirements, the holdings of D.O.E. v.
21 Abbott, supra, and McCleary v. Dept. of Game, supra, and that no claim
22 was filed under R.C.W. 90.14, nor any permit obtained pursuant to
23 R.C.W. 90.03.380, the Referee was correct in holding that fish
24 propagation cannot be included for confirmation in the claimants
25 existing water right.

MEMORANDUM OPINION
RE. FISH PROPAGATION - 6


JUDGE