

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
KIM W. EATON
YAKIMA COUNTY CLERK
IN AND FOR YAKIMA COUNTY

IN THE MATTER OF THE DETERMINATION)
OF THE RIGHTS TO THE USE OF THE) NO. 77-2-01484-5
SURFACE WATERS OF THE YAKIMA RIVER)
DRAINAGE BASIN, IN ACCORDANCE WITH)
THE PROVISIONS OF CHAPTER 90.03,)
REVISED CODE OF WASHINGTON,)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)

Opinion Re: Exception of Dwayne
and Alvina Dormaier (Claim No.
4706 Re Subbasin No. 21 (Burbank
Creek)

Plaintiff,

vs.

JAMES J. ACQUAVELLA, et al.,

Defendants.

I. INTRODUCTION

The Dormaiers take exception to the Referee's finding that denies their claim to the use of certain springs in Subbasin 21. Primarily, their exceptions center around two arguments. First, they assert that they or their predecessor-in-interest should be allowed to modify a RCW 90.14 claim to include these springs. In the alternative, they maintain that the water issuing from these springs does not leave their property and therefore is not within the definition of public waters and is outside the scope of the statutory requirements for the filing of claims.

The Department of Ecology (DOE or "Ecology") counters that springs arising on an owner's property are subject to appropriation if such waters can be put to a beneficial use. Accordingly, such springs are to be regulated by DOE pursuant to their regulatory power derived from Ch. 90.03 RCW. They also caution that a ruling divesting DOE of regulatory

1 authority of such springs would seriously affect this state's water
2 resources. The Court will consider these arguments below.

3 **II. MODIFICATION OF THE 90.14 CLAIM**

4 RCW 90.14.041 required all persons claiming the right to use the
5 public waters to file with the DOE a statement of claim. RCW 90.14.071
6 sets forth the penalty for failure to file such claims and establishes
7 that such claimants are conclusively deemed to have waived their rights.
8 The Referee, this Court, and the Washington Supreme Court have
9 consistently enforced these statutory provisions. See Claim No. 1113,
10 Subbasin 16; see also Report of Referee, Preface to Subbasin and Major
11 Category Reports at 18-19 (filed May 18, 1988); Department of Ecology v.
12 Adsit, 103 Wn.2d 698, 706-707, 694 P.2d 1065 (1985). The Dormaiers
13 offer no new arguments and rely on equity to make their case. According
14 to Adsit, supra, at 707, however:

15 "Just as a State may create a property interest that is entitled to
16 constitutional protection, the State has the power to condition the
17 permanent retention of that property right on the performance of
reasonable conditions that indicate a present intention to retain
the interest." (Citing Texaco, Inc. v. Short, 454 U.S. 516, 530).

18 Based on the statute, case law and prior actions in this
19 adjudication in regard to failure to file such claims, the Court has no
20 choice but to deny this exception. Accordingly, the Dormaiers must rely
21 on their argument that these small springs are not public waters and
22 therefore not controlled by 90.14.

23 **III. ARE THE SPRINGS SUBJECT TO APPROPRIATION BY OTHERS**

24 **A. The Facts**

25 The facts do not appear to be the source of the disagreement

1 between DOE and the Dormaiers. Apparently, predecessors-in-interest to
2 the Dormaier property commenced appropriating water from the spring, at
3 the latest, in the early part of 1917. (See Exhibit "B":, Dormaier
4 Amended Supplemental Exception). The "spring", as the parties refer to
5 the small water source on the property, is a place where water issues
6 from the earth by operation of natural forces (see 78 Am. Jur. 2d 624),
7 trickles across the ground and then seeps back into the earth. There is
8 no testimony that this water is hydrologically connected to any other
9 surface water course. Mr. Dormaier testified that the flow was
10 continuous and has been piped to a cistern. See DOE Post Hearing Memo,
11 p.3 (7/14/93).

12 B. The Law

13 DOE asserts that statute, case law and prior decisions (by this
14 Court and others) establish that springs that arise and do not flow off
15 of the owner's property in a defined watercourse are subject to
16 appropriation. For statutory authority, they cite to their general
17 regulatory authority contained in 90.03.010 RCW and 90.03.245 and ask
18 the Court to read those provisions expansively.

19 Ecology advanced a similar argument in a case recently decided by
20 the Washington Supreme Court. In Rettkowski v. DOE, Cause No. 59086-9
21 (Sept. 9, 1993), DOE pointed to general statutes as inherent statutory
22 authority for utilizing particular procedures in issuing cease and
23 desist orders to certain water users on Sinking Creek. According to the
24 Supreme Court, such "bootstrap argument[s are] unpersuasive." Id. at

25 14. Regulatory bodies have only that power delegated to them

1 specifically by statute and they cannot modify or amend a statute
2 through their own regulation. State v. Thompson, 95 Wn.2d 753, 759, 630
3 P.2d 925 (1981); Rettkowski v. Ecology, supra, at 11. Similar to the
4 Rettkowski decision, this Court does not believe that the broad statutes
5 relied on by Ecology squarely address their jurisdiction over the
6 springs at issue here. Even if they did, these statutes took effect
7 subsequent in time to the initial appropriation of the water at issue.
8 Furthermore, in relying on RCW 90.03.010, DOE must also be ready to take
9 the bad with the good. That statute specifically allows for any
10 existing rights, be they rights acquired by appropriation or rights
11 acquired as private property owners. Nor does the Court find that the
12 general adjudication statute provides any authority to support the DOE's
13 position. DOE fails to explain how their interests and power derived
14 from these general statutes are frustrated by an inability to regulate
15 waters such as are here at issue.

16 Next, DOE looks to previous rulings in this proceeding to establish
17 their position. However, as the Dormaier's point out, neither this
18 Court nor the Referee have been presented with this very narrow issue
19 and have not specifically ruled thereon to date. In referring to
20 "springs", it is not clear that the factual scenario herein had been
21 considered. Again, DOE cites to general rulings and attempts to
22 extrapolate a position for the Court on a very narrow issue.

23 Because neither the statutes nor prior rulings in this case address
24 the issue, the Court now turns to decisions made by appellate courts
25 both in Washington and other jurisdictions. Ecology relies on authority

1 from Arizona and Oregon to support their position. However, the
2 overwhelming trend of courts who have considered this issue support the
3 Dormaier's claim. Additionally, treatises, surveys and texts also lend
4 guidance in addressing this issue. In essence, they all say the same
5 thing. A spring arising on one's property that seeps back into the soil
6 (and does not run off the property) is the exclusive property of the
7 landowner and he or she may do with it as they please in much the same
8 fashion as the soil itself.

9 DOE refers the Court to Parker v. McIntyre, 47 Ariz. 484, 56 P.2d
10 1337 (1936) for guidance. They accurately state that the law of Arizona
11 provides that waters such as those in question here are subject to
12 appropriation based on whether such waters are sufficient in capacity to
13 be put to a beneficial use. This test, Ecology admits, is based on an
14 Arizona statute passed in 1928 that states unequivocally that waters of
15 all sources, including springs on the surface, belong to the public.
16 Ecology at 7-8 citing Section 3280, Rev. Code 1928. Because Washington
17 law is similar to Arizona law in that both states utilize the prior
18 appropriation test based on putting water to a beneficial use, DOE
19 therefore urges this Court to follow Arizona's lead.

20 The Court declines this invitation. First, Arizona is different in
21 that it embraced the prior appropriation system of water law from the
22 inception of the first territorial government. See Parker, supra, at 56
23 P.2d 1339. Washington water law, although now based exclusively on
24 prior appropriation, had its roots in both riparian and prior
25 appropriation water schemes until 1917, including the time when the

1 waters in question here were first appropriated. Although the right to
2 appropriate the springs is not based on the riparian doctrine per se, it
3 is significant that this dual system existed at the time the water was
4 first utilized. Because this is so, it makes the cases from other
5 jurisdictions that follow the riparian and mixed doctrines even more
6 persuasive.

7 Further, Ecology does not point to a similar Washington statute
8 specifically according DOE jurisdiction over the appropriations of small
9 springs. The existence of such a statute (passed in 1928) was crucial
10 to the Parker court's holding ("We hold, therefore, that under the law
11 of Arizona, as it existed in 1931, the waters of the springs in question
12 were subject to appropriation." Emphasis added).

13 The support for the Dormaier claim is significant and widespread.
14 In 78 Am. Jur. 2d p. 625, the editors state in pertinent part that

15 "Where the waters of a spring do not form a watercourse which
16 leaves the lands upon which the spring arises, but sink back
17 into the earth at the spring, spread over the surrounding
18 land, or flow in a course entirely upon the lands upon which
19 they arise, disappearing before reaching adjoining lands, the
spring is ordinarily regarded as the exclusive property of the
owner of the land on which it is situated, who has all the
rights incident thereto that one might have as to any other
species of property."

20 The editors then cite to four authorities, including a Washington
21 case, Mason v. Yearwood, 58 Wn. 276 (1910). Neither party hereto cited
22 to the Yearwood case. The dispute, in Kittitas County, was factually
23 complex but boiled down to whether the owner of property on which a new
24 spring broke out or surrounding property owners on to which the spring
25 drained had the right to make use of the water. The court acknowledged

1 that one may have a riparian right in a stream even though its source be
2 a spring upon the land of another but went on to hold that:

3 "The owner of land upon which a new spring breaks out may make
4 such use of the waters as he pleases, notwithstanding it
5 would, if unmolested, cause a stream to flow across another's
6 land." Yearwood, supra, at 280.

7 This statement is both broader and narrower than the question
8 presented in this dispute yet serves to provide enough direction to
9 decide the issue. What seems clear, is that the law in 1910 recognized
10 that the owner of land on which a spring arises may use that water as he
11 pleases when no other party has made a claim to it, particularly if the
12 outflow dissipates before flowing off of the owner's land such as
13 herein.

14 Another citation relied on by the Am. Jur. editors is the Oregon
15 case of Fitzstephens v. Watson, 344 P.2d 221 (1959). Both DOE and the
16 Dormaier's cite to this case to support their positions. The Court
17 agrees with the conclusion reached by both parties to a certain extent.
18 Ecology states "that where water leaves a spring in a watercourse, it is
19 subject to appropriation regardless of whether it leaves the property
20 where it arose." DOE at 8. The Dormaiers cite from the case that

21 "[w]here spring waters arising on an owner's land do not flow
22 from the spring in such a manner as to constitute a water
23 course, it has been held that the owner is entitled to the
24 exclusive use of such waters as against competing claimants."

25 The case stands for both propositions. However, DOE misinterprets
what the case does not stand for. It is possible for spring waters that
form a watercourse and join with another stream all on one singularly
owned parcel to be subject to appropriation. Those, however, are not

1 the facts of this case. Here, the waters do not form a running stream
2 nor do they leave the property. Both facts are important.

3 State court rulings across the country support the position of the
4 Dormaier's. For example, another of the cited cases in Am. Jur. arises
5 in New York. In the case of Bloodgood v. Ayers, 108 NY 400, 15 NE 433
6 (1888), the court held that if a spring does not form a flowing stream,
7 the owner of the land upon which it arises has a right to the exclusive
8 use of it. According to that court, "[s]uch a spring belongs to the
9 owner of the land. It is as much his as the earth or minerals beneath
10 the surface; and none of the rules relating to watercourses and their
11 diversions apply." (Emphasis added).

12 The California Court of Appeals was even more emphatic in regard to
13 a property owner's right in the case of Simons v. Inyo Cerro Gordo
14 Mining & Power Co., 192 Pac. 144 (1920). There, in a per curiam opinion
15 denying a petition for rehearing the court stated:

16 "We also refuse to approve the broad statement that there
17 cannot be a private ownership in springs of water.

18 * * *

19 A spring may have no natural outlet, in which case the owner
20 of the land in which it lies, under ordinary circumstances,
21 owns the water as completely as he does the soil." Id. at 152.

22 Additionally, a recently updated casebook on water law considers
23 the problem in the following fashion. In trying to define the riparian
24 user class and identifying the benefitted parcels of riparian lands they
25 make the general statement that "the type of watercourse involved... is
irrelevant." J. Sax, R. Abrams and B. Thompson, Legal Control of Water
Resources p. 38 (West 2d ed., 1991). One exception to this statement
involves precisely the issue presented here. According to the authors,

1 "[s]ome jurisdictions hold that springs...that do not become a part of
2 a watercourse that flows off of the land on which they originate are the
3 exclusive private property of the landowner." Id. at footnote 6.

4 These cases and other materials all seem to rely on two factors:
5 (1) Does the water issuing from the spring form or join with another
6 surface watercourse, and (2) Does the water flow off the land? The
7 first factor seems more important as the Washington case of Yearwood v.
8 Mason, supra, and the Sax textbook, supra, point out. However, because
9 the springs on the Dormaier claim neither leave the property nor form a
10 defined watercourse, they are precisely the type of water sources the
11 courts and commentators cited above were concerned with.

12 Accordingly, this Court will follow their lead and hold that when
13 water arises from springs and seeps back into the ground without forming
14 a stream or leaving the owner's property, then that water is the
15 exclusive private property of that landowner. This ruling should not be
16 read expansively. It only applies to appropriations of springs prior to
17 the 1917 amendments because the water code specifically provides for
18 existing rights whether acquired through prior appropriation, by a
19 riparian owner or otherwise. See RCW § 90.03.010 (emphasis added).
20 This ruling also does not address appropriations of springs that form a
21 water course, leave the owner's property, hydrologically connect to any
22 defined surface water channel, or affect any existing rights.

23 The Court suggests however, that based on its research the issue of
24 whether water issuing from such springs that is appropriated on that
25 owner's property after 1917 is a question that remains unanswered in

1 this state. Ecology may operate under the policy that it has been
2 answered, but based on the vague directives in the statute as well as
3 case law in this and other jurisdictions, the outcome is far from
4 predictable.

5 The Court would also point out that because users of spring waters
6 such as the Dormaiers obtain the right to use water on their property as
7 a subset of their private property rights and do not proceed under the
8 statute, then they also jeopardize receipt of the statute's protection
9 of the water from that spring. If, for example, a nearby landowner were
10 to receive a DOE permit to use groundwater that resulted in the spring
11 drying up, then the Dormaiers and those similarly situated may lose the
12 water code's protection of their water. Here, the Dormaiers make this
13 choice, and if they choose to use this water as part of their private
14 property rights, then they cannot be confirmed a water right in this
15 adjudication.

16 An appropriate order setting forth the specific holding and
17 dismissing the Dormaiers from this water rights adjudication action may
18 be noted for presentation if so desired.

19 Dated this 16th day of September, 1993.

20
21 Walter Stauffer

22 Judge
23
24
25