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SUPERIOR COURT
STATE OF WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND 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, DEPARTMENT OF ECOLOGY, Plaintiff vs. JAMES J. ACQUAVELLA, et al., Defendants.	Cause No. 77-2-01484-5 MEMORANDUM OPINION AND ORDER RE: EXCEPTION OF TOM AND ZELDIA WORRELL TO SUPPLEMENTAL REPORT OF REFEREE, SUBBASIN NO. 22 (WIDE HOLLOW)

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YAKIMA COUNTY CLERK

I. INTRODUCTION

In the Supplemental Report of Referee, Subbasin No. 22, dated September 22, 1998, the Referee denied the exception filed by Thomas and Zeldia Worrell (Worrells) to the original Report of Referee. The Worrells' exception, in support of Court Claim Nos. 00735 and 01581, involves establishing a diversionary right to small springs on their property. The Referee's denial of the Worrells' claim rests on the conclusion that the spring does not meet the criteria set forth in Judge Walter Stauffacher's September 16, 1993 Opinion Re: Exception of Dwayne and Alvina Dormaier, Doc. 8584 (Dormaier) and July 16, 1996 Memorandum Opinion Re: Return Flow Exceptions of Harry Masterson and Mary Lou Masterson, Doc. 11,813 (Masterson). Those opinions provide a framework for analyzing claims to springs that arise on a user's property and sink back into the ground without joining any other above or underground watercourse. The Worrells present a slightly different scenario than that analyzed in Dormaier and Masterson. They also ask for a determination of the evidentiary burden a claimant must meet to establish the narrow exception to the water code recognized in Dormaier and clarified in Masterson for diversions of water from small, non-tributary springs.

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I. FACTUAL BACKGROUND

With one important exception, the facts are as generally set forth in the Supplemental Report of Referee Re: Subbasin No. 22. The several springs are located on the Worrell property on the south flank of Cowiche Mountain. These springs are all of minimal volume and by nature seep back into the soil very near their source if not developed and piped into a holding tank. The springs are several miles from the nearest stream channel. The property in question was first separated from public domain by patent on October 18, 1923. Earthen check dams were constructed at several locations around 1933 by a predecessor to the Worrells. The Worrells have also built or repaired four dams in the subbasin, but none of those dams currently store any water. The Worrells commenced development of the spring for diversion in 1972 and added pipeline in 1990. However, what is missing in the factual presentation, and is at issue in this exception, is whether expert testimony is needed to determine if the springs are hydrologically connected to any watercourse, above or below ground.

II. LEGAL ANALYSIS

Dormaier and Masterson establish the criteria for determining whether or not a particular spring is of the type that falls outside the auspices of the 1917 water code, RCW 90.03 et seq. (1917 code), for purposes of confirming water rights in this adjudication. If a spring or seepage meets the Dormaier and Masterson tests, then such waters are not surface flows of the Yakima River drainage basin and by definition not a part of this adjudication.

a. Dormaier and Masterson

Dormaier involved rights to a spring first used before enactment of RCW 90.03. Protection of pre-1917 rights to use water requires a claimant to file a claim pursuant to RCW 90.14. In Dormaier no RCW 90.14 claim was filed. The water source at issue was a small spring that, left to its own devices, would rise from the earth, trickle across the ground and seep back into the ground all within the Dormaier's property and without joining a surface watercourse.

RCW 90.03.010 states that implementation of the 1917 code would be subject to "existing rights" and that nothing therein would be "construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise." Emphasis added. The Dormaiers would have lost their "existing right" if it were based on a right to make beneficial use of public surface or ground waters and no claim was filed during the statutory period. See RCW 90.14.041. However, Judge Stauffacher found that at least for uses predating the 1917 water code, there was authority to support the Dormaier's argument that the spring on their property was not public water, but rather belonged solely to the land owner much like the soil itself. Dormaier, at p.5-9. Judge Stauffacher specifically left unanswered the question presented by the Worrells: What right does a post-1917 claimant have in small springs that arise on and do not flow off a user's property. Id., at 9-10.

In Masterson, Judge Stauffacher revisited and narrowed Dormaier. At issue in Masterson were the rights to seepage or diffused surface water flowing off water righted land that would not, in the natural course of events and if not intercepted by the water user, join either a surface or underground watercourse. Relying in part on Ranson v. City of Boulder, 161 Colo. 478, 424 P.2d 122 (1967), Judge Stauffacher imposed strict evidentiary burdens on users claiming that springs or seepage are not "public" and therefore not subject to RCW 90.03 et seq.. Ranson holds that "flowing water is presumed to find its way to a stream, and the burden of proving otherwise rests upon the party claiming that such water is not tributary." Also significant in deciding Masterson was the intent underlying RCW 90.03. That statute establishes that, subject to existing rights, all water belongs to the public, RCW 90.03.010, that "maximum net benefits" are obtained from uses of water, RCW 90.03.005, and that an independent regulatory agency monitors uses of water to ensure that flows are used appropriately and not at the expense of others. Masterson, at 7. Finally, Judge Stauffacher expanded the tributary limitation to include underground sources of water.

Therefore, after Dormaier and Masterson, the law of the case is as follows: uses, initiated prior to 1917, of springs or seepage that rise from the earth, flow across and back into the ground without joining any other surface or underground watercourse are not public water subject to the requirements of RCW 90.03. The burden of proving that exception lies with the claimant since water is presumed to be flowing toward a stream. Successfully establishing that exception removes the claim to that water from Acquavella.

b. Worrell

The most significant factual difference between Dormaier and the claim presented by the Worrells is their use of water was initiated after 1917. Indeed, the Referee determined that "the Court specifically stated that its ruling 'only applies to appropriations of springs prior to the 1917 amendments because the water code specifically provides for existing rights.' Therefore, the Referee concluded the Dormaier decision is not applicable." Supplemental Report at 37. In addition to assessing the importance of that fact, briefing was requested on the following two questions:

1. Pursuant to the Court's Memorandum Opinion Re: Return Flow Exception of Harry Masterson and Mary Lou Masterson, Claim No. 01467 and (A)0326, Subbasin No. 3, what evidence must a claimant present to satisfy his or her burden of proving spring water will not join an above ground or below ground water course?

2. Is such a spring privately owned or public waters? Is Ecology v. Abbott, 103 Wn.2d 686, 694 P.2d 1071 (1985) applicable?

These matters and others raised in response to the Court's briefing request will be taken up below.

1. Basis For The Right In Dormaier

The Dormaier decision made clear and provided adequate authority that at least in the late 1800's/early 1900's, a narrow exception to the usual riparian/appropriation doctrines existed. In the unusual scenario where water bubbles up from the earth and seeps across the ground (usually forming a bog) and then sinks back into the ground, all on a singularly owned parcel, the right to use that water belongs to the land owner. This type of water is often referred to as "surface water,"

and its unique treatment is well-documented in casebooks[1], treatises and caselaw. However rights to the use of that water have been analyzed and limited in numerous ways.

A. *Statutes/Caselaw - Washington*

Perhaps the best line of authority supporting this unique right, whether the flows are called "surface water", seepage or springs, stems from Session Laws of 1889-1890, p. 710 (1890 statute) and the Session Laws of 1891, p. 327 (1891 statute). The 1890 statute reads as follows:

> All ditches now constructed, or hereafter to be constructed, for the purpose of utilizing the waste, seepage or spring waters of the state, shall be covered by the same laws as those ditches constructed for the purpose of utilizing the water of natural streams and lakes: *Provided*, That the person upon whose lands the seepage or spring waters first arise shall have a prior right to such waters, if capable of being used upon his lands.

This law was codified first at Bal. Code § 4114 and ultimately Rem. Code § 6339 (1915) and remained the law until it was repealed by Session Laws of 1917, p. 468, concurrent with the legislature enacting the 1917 code.

In Laws of 1891, p. 327, the legislature determined that:

> The Right to the use of water in any lake, pond, or flowing springs in this state, or the right to the use of water flowing in any river, stream, or ravine of this state, for irrigation, mining, or manufacturing purposes, or for supplying cities, towns, or villages with water, or for waterworks, may be acquired by appropriation, and as between appropriations, the first in time is the first in right. Codified at Rem. Code § 6316 (1915) (emphasis added).

Reading the two statutes together, it appears the law of appropriation applied to "flowing" watercourses. To not be superfluous, the 1890 statute must be restricted to those springs that did not run off the owner's land upon which they arose. An examination of the cases discussed below supports that interpretation. Hollett v. Davis, infra; Dickey v. Maddux, infra; Allison v. Linn, infra.

Two cases considered the meaning of the 1890 statute. In Nelson v. Sponer, 46 Wash. 14, 89 Pac. 155 (1907), the court held that the statute, if applied, effected an unconstitutional taking of

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[1] See Dormaier at 8-9 discussing excerpts from Legal Control of Water Resources (West 2d. Ed., 1991).

the riparian rights of a downgradient landowner who used the water from a spring even though it originated and ran off an upgradient owner's property. The lower landowner had used the water prior to the upgradient landowner and the Sponer court stated the statute could not be read to allow the upgradient owner use of the small supply of water at the expense of the lower owner's domestic needs. Id. at 15. In Hollett v. Davis, 54 Wash. 326, 103 Pac. 423 (1909) the court, consistent with Sponer, supra, interpreted the statute to have no application to springs with sufficient flow to form water courses. Id. at 329. In cases where springs arise on a property and flow sufficiently to form a watercourse and run off the property, the riparian doctrine was found to apply. Id. at 329-30. The court also stated: "What might be the rights of parties with respect to springs which do not create a water course, we are not called upon here to decide, and do not decide. . .." Id. at 330.

Other Washington courts have given special definition and treatment to "surface water." Whether a water source flowing from a spring was subject to appropriation was discussed in the very first Washington Reports. Geddis v. Parrish, 1 Wash. 587, 589 (1889) ("To maintain the right to a water-course, it must appear that the water usually flows therein in a certain direction, and in a regular channel with banks and sides.") "Surface water" was recognized and defined at least as early as 1896 in Cass v. Dicks, 14 Wash. 75, 44 Pac. 113 (1896). To decide Cass, the Court relied "upon the principle that such water is a part of the land upon which it lies, or over which it temporarily flows, and that an owner of lands has a right to the free and unrestrained use of it."

Although not specifically called "surface water," the distinction between water that had a natural outlet or formed a water course and that which did not was critical in Dickey v. Maddux, 48 Wash, 411, 98 Pac. 1090 (1908) and Hayward v. Mason, 54 Wash. 653, 104 Pac. 141 (1909) (Riparian rights cannot be asserted to the flow of surplus waters of a swamp or marsh which has no outlet, and where there is no natural stream or watercourse.) In Dickey v. Maddux, the Court held:

> An examination of the evidence convinces us that these pools of water were not live springs, and constituted nothing more than a bog occasioned by the seepage water. No stream or channel entered this bog or flowed therefrom. The respondents and their predecessors gathered this water by digging a large number of holes and small ditches, and it was only by this artificial means that any channel was made or any flow of the water obtained other than the natural percolating and seepage thereof, and there was but a comparatively small amount of that.
>
> We think there was no authority in law for the appropriation of water of this kind prior to the enactment of the state statute of 1891, even if that statute would authorize it, a question not necessary to be now decided. 48 Wash. at 414.

See also Miller v. Easter R. & Lumber Co., 84 Wash.31, 146 Pac. 171 (1915); Allison v. Linn, 139 Wash. 474, 247 Pac. 731 (1926) (Found that water flowing from a spring created an adequate stream to confirm a pre-1917 appropriation, otherwise seemed inclined not to find that waters were subject to appropriation). Thus, these cases indicate that only when water formed a channel was it subject to appropriation/riparian rights of use.

B. *Treatises*

The early commentators on water are unified in their approach to the nontributary spring issue. Kinney, The Law of Irrigation and Water Rights (2nd Ed., 1912) p. 516, classifies the water source at issue here as well as in Dormaier and Masterson as "surface water." 'Surface water' is "water on the surface of the ground, the source of which is so temporary or limited as not to be able to maintain for any considerable time a stream or body of water having a well-defined and substantial existence." Further, "where water is spread out and flows sluggishly over the surface, losing itself by percolation and evaporation, it is surface water, although it has its source in springs." Kinney concludes:

> Surface waters are not governed by the same rules of law which govern the waters of water courses or permanent bodies of water. No riparian rights attach, and the Arid Region doctrine of appropriation does not apply. A landowner may, however, capture surface water while it is flowing over his land and impound the same in a reservoir or other receptacle, and the water becomes his absolute property so long as it remains under his control, and no one may interfere therewith. But the law of appropriation, as the same is understood in this western country, does not apply. Id., at 519.

Kinney makes clear that once surface water reaches and becomes a part of a natural water course, or forms a well-defined channel, then it ceases being surface water and becomes subject to the laws of appropriation. Id. at 517-18.

Weil, Water Rights In The Western States (Third ed., 1911) is in accord. He states:

> When a spring furnishes a stream of water that rises to the surface, the right of appropriation attaches, but where the admitted quantity is so insignificant that a surface stream is impossible, when spread over the width of ground involved, the use of the water belongs to the person upon whose land it first arises. Id., at 357.

Finally, in Farnham, Waters and Water Rights (Volume III, 1904) the flow of small springs that rise to the surface in a diffused state and then disappear by percolation or evaporation are also referred to as surface water. Farnham, at p. 2556 ("The chief characteristic of surface water is its inability to maintain its identity and existence as a water body.") When surface waters reach and become a part of a natural watercourse they lose their character as surface waters, and come under the rules governing watercourses. Id., at 2558. If the spring does not form a flowing stream, however, the owner of the land has a right to the exclusive use of it. Id., at 2739.

C. *Other States*

Other states have examined similar issues. In Metcalf v. Nelson, 8 S.D. 87, 65 N.W. 911 (S.D., 1895) the South Dakota Supreme Court found for the landowner in regard to whether another could remove spring water located on the landowner's property. It held:

> It must be remembered that we are not dealing with a running stream, or with riparian rights, but simply with percolating waters which have combined and struggled to the surface on plaintiff's land. We think the plaintiff had more than the ordinary usufruct in the water of this spring, so long, at least, as it was held in the spring. He might consume or dispose of it all if he chose. He might convey it away in pipes, or carry it off in tanks. If medicinal, he might bottle it, and sell it for the healing of the nations. . ..
>
> While it may not be technically correct to say that the landowner is the absolute owner of percolating waters gathered into a spring or well, such is often the expression of the courts and text writers, and probably means what, in respect to water, is practically equivalent to ownership, -- the exclusive right to use and dispose of it. 65 N.W. at 912.

Vanderwork v. Hewes, 15 N.M. 439, 110 Pac. 567 (1910) and its progeny in New Mexico are quite similar to the situation at bar. There, a question arose as to the right of a landowner to use and dispose of surface and seepage water [not tributary to any watercourse] gathered on his land without procuring a permit from the territorial engineer. A nearby landowner had applied with the territorial engineer for a license to use the spring's flows. In making his application, the landowner relied on New Mexico statutes that gave authority to the territorial engineer to license the use of "all natural waters flowing in streams and watercourses." Id., at p. 568. The same distinction between flowing and non-flowing water was expressed in the 1890 and 1891 Washington laws analyzed above. The Hewes court held that the water, while surface and seepage water, was the sole property of the landowner to use at his discretion without procuring any permit from the state engineer. To reach its decision, the court distinguished cases applying "use" water right analyses to disposition of underground and artesian waters as opposed to the private ownership of seepage water:

> The case at bar is entirely different, in this: that a small quantity of water percolates to the surface and forms a small basin wholly upon the [landowner's property], and coming from a source unknown, so far as the record discloses. It must be conceded that for many years the law as to such waters has been that the water was a part of the land, and that each landowner could do with it as he chose. Id.

The New Mexico Supreme Court reviewed the distinction made in Hewes, supra and held:

> The law of appropriating water does not apply to springs which do not have a well defined channel through which the water can flow. [Cite omitted.] However, if the water rises to the surface and thereafter flows in a stream so as to form a definite channel, it may be appropriated. Burgett v. Calentine, 56 N.M. 194, 242 P.2d 276 (1951).

See also Ulibarri v. Hagan, 98 N.M. 676, 652 P.2d 226 (1982) (To determine whether adjudication court had jurisdiction over spring water dispute, the New Mexico Supreme Court remanded for finding as to whether spring in question was part of stream system adjudicated or nontributary waters that merely "sink in soil" and do not form a natural channel.)

The New Mexico decisions are similar to the early Washington cases that required the spring water to form or join another watercourse to be subject to appropriation. Moreover, the New Mexico cases culminated in a comparatively recent case, Ulibarri v. Hagan, supra, when more extensive science regarding groundwater and ground/surface water continuity was available.

Like New Mexico, Colorado has given this issue recent scrutiny. Colorado has a statute nearly identical to that enacted in 1890 by the Washington legislature.

> All ditches constructed for the purpose of utilizing the waste, seepage or spring waters of the state, shall be governed by the same laws relating to the priority of right as those ditches constructed for the purpose of utilizing the water of running streams; but the person upon whose lands the seepage or spring waters first arise shall have the prior right to such waters, if capable of being used upon his lands. 37-82-102, 15 C.R.S.

The difference between this and the 1890 Washington statute is the use of "running streams." However, the 1891 Washington statute, which applied the appropriation doctrine only to "flowing" streams, seems to give the same import to the 1890 Washington statute.

The Colorado statute has been interpreted many times, including the case relied on by Judge Stauffacher, Ranson v. City of Boulder, supra. Ranson clarifies that 37-82-102, 15 C.R.S. applies only to nontributary springs. Ranson, at 122-23. Like Washington, it cannot be used to protect springs/seeps that form or join a watercourse. SRJ I Venture v. Smith Cattle, Inc., 820 P.2d 341 (Colo. 1991).

Other issues relevant to this dispute were examined in SRJ I Venture v. Smith Cattle. First, the facts involved in that dispute are important. The only authority that appellant could assert to protect their use of the springs and seeps was 37-82-102, 15 C.R.S., the counterpart to Washington's 1890 statute. Otherwise, the use of the water was undecreed and therefore junior to the right asserted by the other party. Id. at 346. Thus, 37-82-102, 15 C.R.S was adequate, by itself, to protect the property owner's right to use non-tributary springs on the owner's property without

having that right decreed. This is very similar to the outcome in Dormaier. Second, in reaching a decision that the spring in question was not tributary, the Colorado Supreme Court relied on the hydrologic testimony of an expert. Third, it affirmed a prior decision that extended the concept of what is "tributary":

> In *Giffen v. State of Colorado*, 692 P.2d 1244, 1247 (Colo. 1984), we rejected the concept that water is inherently nontributary if it is evaporated from soil or surface or transpired by plant life and consequently fails to actually reach the stream. Thus "water lost by evapotranspiration is an integral part of a single hydrologically connected system and must be regarded as tributary to the aquifer and, subsequently, to the stream." *Id.*

The Colorado law is nearly identical to that in Washington from 1890-1917. The treatment of the statute by the courts in that state assists this Court in reaching its conclusions, particularly when the examination is recent.

D. *Conclusion*

In synthesizing the above information, the decisions in Dormaier and Masterson are correct. A different treatment for small springs and seepage appears to have occurred around the turn of last century. The statutes, commentators, cases and treatises all appear to have carved a narrow exception to the riparian and appropriation doctrines for surface water such as non-tributary springs and seeps. Colorado has a statute nearly identical to the one in effect in Washington from 1890-1917. The Colorado Supreme Court interpreted the statute only to apply to non-tributary springs. Ranson, supra. Moreover, the burden was placed on the person seeking the protection of the statute because water is presumed to flow toward other water courses. Id. Finally, RCW 90.03.010 indicates that "existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise" are not enlarged, lessened or modified by the enactment of the 1917 water code. From 1890-1917 there was statutory authority according rights in waste, springs and seepage to the owners of that land. Read narrowly, to apply only to non-tributary/non-flowing springs and

seepage, the right does not effect a taking. See Hollett v. Davis, supra. Accordingly, the Court holds that landowners who initiated pre-1917 uses of small springs and seepage, that in the natural course of events, arise and return to the earth without joining or forming a water course or leaving the owner's property have a prior right to those small water sources. Laws of 1890, p. 710; Hollett v. Davis, supra; Ranson v. City of Boulder, supra; RCW 90.03.010.

2. Did the Right to Non-Tributary Springs Survive the Water Code

This Court, as did Judge Stauffacher in Dormaier, has determined that there was a right held by the landowner to make use of non-tributary springs until the water code was enacted in 1917. As discussed previously, in 1917 the legislature specifically repealed the provision providing for such a right. What then happened to the non-tributary rights? Worrells contend that the 1917 Act did not mean to encompass and include water from a spring that is essentially de minimis to a watershed. They provide no authority for this proposition that distinguishes the 1917 water code.

RCW 90.03.010, the central provision of the original 1917 legislation reads in pertinent part:

> The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this chapter provided, Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right. Nothing contained in this chapter shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise.

The meaning of the statute is clear on its face. "All waters within the state belong to the public", and any right or use of that water shall be through appropriation and as provided in the code. Essentially, Worrells ask for an exception to this statutory provision, and the Court is mindful of the narrow construction that applies. R.D. Merrill Co. v. Pollution Bd., 137 Wn.2d 118 (1999)("it is important to bear in mind that generally exceptions to statutory provisions are narrowly construed in order to give effect to legislative intent underlying the general provisions.")

Of relevance in determining whether post-1917 uses of nontributary springs and seeps fall outside the water code is Ecology v. Abbott, 103 Wn.2d 686, 694 P.2d 1071 (1985). At issue in Abbott were the unexercised rights of a riparian to the "ordinary" and "natural" uses of Deadman Creek and whether the 1917 code required use of those rights by a certain time or the approval of Ecology for any changes in such use. The Court held that although the 1917 Code did not extinguish unexercised riparian rights when the law became effective, it did within a reasonable time (determined to be 15 years) thereafter. Id. at 695. Because the right to non-tributary springs and seeps is neither appropriation nor riparian in nature, the Abbott analysis is more important then the holding.

First, the Abbott court took great pains to decipher the effect of the 1917 code on earlier versions of statutory water law. It notes that the 1917 code abrogated the acts of 1890 and 1891 and provided for a new system of application, permit and certification. Id. at 692. Second, the court emphasized RCW 90.03.010's declaration that "*all* waters within the state belong to the public, and any right thereto . . . shall be hereafter acquired . . . in the manner provided and not otherwise . . .. Id. (emphasis in original). Further, "any person . . . desiring to appropriate water . . . for a beneficial use shall [apply] to the supervisor of water resources for a permit . . .and shall not use or divert such waters until he has received a permit . . .". Finally, the Abbott court cited RCW 90.03.010 and its mandate that the 1917 code not be construed to lessen, enlarge or modify any *existing* rights. With the repeal of the 1890 statute granting the use of nontributary springs and seeps to the landowner, there was no authority allowing initiation of a diversionary use without a state permit.

This Court holds that if a diversionary use of nontributary springs or seepage was not initiated prior to implementation of the 1917 code, the only method by which a landowner could obtain such a right thereafter is through the permit/certificate system set forth in RCW 90.03.250.

However, if the applicant provides proof and/or Ecology finds that spring or seepage water does exist that is not tributary to any other watercourse and does not flow off the applicant's land, then such uses would meet the requirements of RCW 90.03.290. By definition use of such a water source is neither detrimental to the public welfare nor impairs existing rights. See RCW 90.03.290. If provided adequate documentation, Ecology would have no legitimate reason for not granting that right and should make every effort to do so expeditiously.

2. What Evidence Is Required To Establish That A Spring Does Not Form A Tributary Of The Yakima River?

In Masterson, Judge Stauffacher wrote:

> Because water belongs to the public, RCW 90.03.010, and because it is the goal of state water policy to obtain the "maximum net benefits" from uses of water, RCW 90.03.005, the Ranson evidentiary burden shall rest on the Mastersons and all water users making this argument [that springs or seepage is not tributary]. If this proof is clearly shown, then only reluctantly will this Court allow uses of water to fall outside the water code and the accompanying state oversight to ensure that water is used appropriately and not at the expense of other water users. If a water user can overcome this significant burden and demonstrate to the satisfaction of the Referee that the return flow in question would not flow to a natural watercourse, surface or underground, and thereby not be available to a downstream user, then . . . a water user may reuse that runoff water as an incident of personal property. To even the playing field, the Court also extends this ruling to owners of land claiming the sole use of springwater, including the requirement the springwater not flow into any natural watercourses, either on the surface or underground. [Cite to Ranson v. City of Boulder, supra.]

Worrells and Ecology ask this Court to further define that burden. The Worrells argue that testimony by a claimant is adequate or alternatively that the burden set forth in Ranson does not apply because water is not "flowing". Ecology asserts that the claimant must provide "clear and satisfactory" evidence, a standard articulated in Ranson (p. 124), the case relied on in Masterson for placing the burden on a claimant to show that a spring or seepage is not hydrologically connected to an above or underground watercourse. In its opening brief, page 16, Ecology indicates such a standard would require the Worrells and other claimants of the Dormaier exception to:

professionally demonstrate the presence of a set of limiting physical conditions at their site, such as the following examples: a) that spring discharge, if left to flow, would either be discharged to the atmosphere by evaporation/evapotranspiration, or b) that spring discharge in excess of the evaporation/evaporation rates would not infiltrate through soils; c) hydrogeologic evidence that water infiltrating permeable soils would not contribute to an underlying aquifer; d) that a ground water system underlying their property is not directly or indirectly connected to ground water or surface water outside their property boundaries; e) geologic evidence of extensive and substantial natural barriers preventing ground water flow from their property; and, potentially, f) other evidence uniquely specific to their site.

The burden of persuasion must generally be determined on a case-by-case basis. See Tegland, Washington Practice 142 (3rd Edition, 1989). Because the landowner is claiming an exception to the water code, the burden of persuading the trier of fact lies with him/her. In Washington, there are three evidentiary burdens of persuasion. Accordingly, depending on the type of case, the trier of fact must find that there is proof beyond a reasonable doubt, proof by clear, cogent and convincing evidence, or proof by a preponderance of the evidence. Dependency of C.B., 61 Wn. App. 280, 282-83, 810 P.2d 518 (1991). Occasionally, the clear, cogent and convincing standard is referred to as "clear and satisfactory." See Tegland, Washington Practice at 150. To determine the appropriate burden, considerations of trial convenience, access to facts, and substantive policy may be factors for consideration. Id., at 142. The normal burden in Acquavella is preponderance of the evidence.

First, this Court acknowledges the meaning and intent of the Masterson ruling regarding the evidentiary burden. The major downside of finding an exception to the 1917 code and Ecology oversight is that a party(ies) may utilize the non-tributary exception to divert water theoretically not used by anyone else when in reality they may be placing a burden on a water source used by many. See Declaration of Anna Hoselton, dated March 24, 1999, at p. 3. However, that is no different than any other water right case. If nearby water users or Ecology are concerned over a claim to non-

tributary springs or seepage water, they should be prepared to dispute the claim at the time of trial as they do with any other claim to water.

Second, Judge Stauffacher's reluctance regarding this issue was noted: he referred to this as a "significant burden." This same reluctance is obvious in the Colorado opinions. See SRJ I Venture v. Smith Cattle, Inc., supra (narrowly reading statute to find that even spring or seep water that is lost through evaporation/evapotranspiration is part of hydrologic cycle and thus tributary). The Colorado cases make clear that what separates the early decisions on this issue and the recent trends is a better understanding of how water sources connect. In particular, limited understanding was exhibited in the early cases for the complex connections between surface and groundwater. Often, small springs that do not appear to connect to other watercourses indicate something more significant is likely occurring underground. See Declaration of Anna Hoselton at 3-4; See also SRJ I Venture v. Smith Cattle, Inc., supra. However, such knowledge should make proving the necessary facts (or rebuttal thereof) that much simpler.

Therefore, the distinguishing factor here is that a successful claim to nontributary water removes the use of that water from Ecology oversight. Does that justify raising the evidentiary bar? It does not. In essence, the claim to such small springs is based on a statute like all other claims to water. The normal burden should apply. Ecology will undoubtedly participate in every claim to use nontributary or seepage water. It will have an opportunity to cross-examine such claimants and put on its own witnesses. Accordingly, a landowner proceeds at his or her own risk if expert testimony is not presented as to whether the water rises and sinks on their property and does not form or join another above or underground watercourse. Further, the Court will not extend the notion of hydrologic continuity for nontributary springs to require proof that water is not lost

through evaporation/evapotranspiration as the SRJ I Venture court did, nor does Ecology seem to think such proof is needed. See Declaration of Anna Hoselton at 6.

IV. CONCLUSION

Prior to enactment of the 1917 water code, existing statutes and cases allowed landowners to develop and divert small springs and seeps that briefly surface and dissipate back into the ground without joining or forming a water course. The burden of persuasion for such claims is preponderance of the evidence. In 1917, the water code abolished such rights and the only way to obtain the right to use small, non-tributary sources of water is through the permit/certificate system. The exception of the Worrells is denied. The Referee's recommendation to confirm a non-diversionary stock water and wildlife right is affirmed.

Dated this 8 day of November, 1999.

H. James Gavin, Judge

Sidney Otten, Court Commissioner