

FILED
AUGUST 14, 2012
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

JERRIE VANDER HOUWEN, ANNE)	No. 29782-9-III
VANDER HOUWEN, and FORD)	
ELSAESSER, Chapter 11 Trustee for)	
JERRIE VANDER HOUWEN,)	
)	
Appellants,)	
)	
v.)	UNPUBLISHED OPINION
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF ECOLOGY,)	
)	
Respondent.)	
)	

Kulik, J. — The question presented here is whether the Pollution Control Hearings Board (Board) properly affirmed the Department of Ecology’s denial of Jerrie and Anne Vander Houwen’s (Mr. Vander Houwen) application for water rights.

We review the Board’s decision to determine if substantial evidence in the Board’s record supports the decision. Here, substantial evidence supports the Board’s findings—specifically, of impairment and detriment to water rights—so we affirm the Board’s denial of Mr. Vander Houwen’s water rights applications.¹

FACTS

A. Procedural Facts. Mr. Vander Houwen owned two parcels near Naches, Washington, one located within section 34, township 15 north, range 17 east, and the other in section 3, township 14 north, range 17 east, Willamette Meridian. In 1992, Mr. Vander Houwen filed two applications with Ecology seeking water rights permits for existing groundwater wells, one in section 5 and the other in section 34. In 1994, Ecology denied Mr. Vander Houwen's applications. Final Findings of Fact, Conclusions of Law and Order, *Vander Houwen v. Dep't of Ecology*, Nos. 94-108, 94-146 & 94-231 (Wash. Pollution Control Hr'gs Bd. Mar. 25, 1997) (*Vander Houwen I*).

Mr. Vander Houwen filed an appeal with the Board, which included the application denials as well as two cease and desist orders and two penalties imposed on Mr. Vander Houwen for unauthorized water use. The Board held an evidentiary hearing. Mr. Vander Houwen appeared pro se and did not offer any evidence other than his own testimony. The Board issued its findings of fact, conclusions of law, and order affirming Ecology's denial of the water rights applications and the issuance of the cease and desist orders and penalties.

¹ Mr. Vander Houwen ultimately went through bankruptcy. Mike Monson and Monson Fruit (Mr. Monson) is a successor purchaser of Mr. Vander Houwen's properties. However, any legal or equitable right to the water rights applications resides with Mr. Vander Houwen. *See* RCW 90.03.310.

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Pursuant to RCW 34.05.542(2), Mr. Vander Houwen petitioned for review of the Board's decision in the Yakima County Superior Court. More than two years later, the court issued a memorandum opinion affirming the cease and desist order and the penalties. Significantly, the court remanded the matter back to the Board for further proceedings regarding Ecology's denials of the water rights permit applications. Memorandum Opinion, *Vander Houwen v. Dep't of Ecology*, No. 97-2-00957-9 (Yakima County Super. Ct., Wash. Apr. 29, 2002).

In its memorandum opinion, the superior court concluded that "[t]he evidence does not support a finding that . . . water appropriation from the two wells as proposed in the permit applications would impair existing water rights or the proposed groundwater withdrawal will detrimentally affect the public interest." Memorandum Opinion, *Vander Houwen*, No. 97-2-00957-9 at 5. In other words, the superior court concluded that the evidence presented by Ecology was insufficient to establish the nonimpairment and no detriment elements of RCW 90.03.290. Prior to the hearing, the Board granted Ecology's motion to strike Mr. Vander Houwen's exhibits.

At the hearing on remand, Ecology presented evidence supporting its denial of Mr. Vander Houwen's water rights permit applications. Mr. Vander Houwen presented no witnesses and offered no evidence. The Board again affirmed Ecology's denial of Mr.

Vander Houwen's applications. Findings of Fact, Conclusions of Law and Order, *Vander Houwen v. Dep't of Ecology*, Nos. 94-108, 94-146 & 94-231 (Wash. Pollution Control Hr'gs Bd. June 26, 2003) (*Vander Houwen II*). Mr. Vander Houwen filed a petition for judicial review to superior court.

In May 2004, Mr. Monson took ownership of Mr. Vander Houwen's property in section 34 and Naches LLC took ownership of the property in section 5. Apparently, Mr. Vander Houwen did not transfer the water rights permit applications to Mr. Monson or Naches LLC. On May 14, 2010, the court issued a letter opinion affirming the Board's decision.

B. Facts established in *Vander Houwen II*. Mr. Vander Houwen purchased two parcels of land. The parcel in section 34 contained an existing groundwater well drilled to 340 feet below ground surface. Mr. Vander Houwen contacted Ecology in 1992 to discuss obtaining water for his orchard expansion. Ecology informed Mr. Vander Houwen that there was no record of a water right for an existing well. Ecology told Mr. Vander Houwen to apply for a groundwater permit.

Rather than apply for a permit, in March 1992, Mr. Vander Houwen hired a well driller to deepen the well. The well driller deepened the well to a depth of 802 feet below ground level and installed casing to 600 feet. The static water level in the well was 530

feet and the Naches River was approximately 530 feet below the top of the casing.

Clerk's Papers (CP) at 10-11.

In June, Mr. Vander Houwen hired the same well driller to drill a new well on his land in section 5. The well driller bored a hole to a total depth of 625 feet and installed casing. The static water level in the well was recorded at 340 feet below ground level. The Naches River, at that point, is approximately 320 feet below the top of the casing. CP at 11.

The Naches River, a tributary of the Yakima River, is highly appropriated by water users. As a result, there are periods of time when all of the water rights on the Naches River are not satisfied. Water rights on the Naches River have been curtailed in many dry years.

In 1992, Mr. Vander Houwen filed two applications for permits to appropriate groundwater from his wells on his land. Ecology investigated the applications and denied them because the applications did not meet the four-part test—availability, benefit, impairment, and detriment—required by RCW 90.03.290(3).

Over the years, there has been a growing recognition of the relationship between ground and surface waters. Before Mr. Vander Houwen submitted his applications for water rights, Ecology and others had become concerned about the availability of water in

the Yakima Basin System, which includes the Naches River. In particular, Ecology has been concerned with the interaction of ground and surface water in the Yakima Basin System.

Both of Mr. Vander Houwen's wells draw from a thick sequence of saturated silts, clays, and gravels comprising the Ellensburg Formation. The water drawn from the well in section 5 is at an elevation slightly below that of the Naches River.² The primary source of the water for this well is the Naches River Alluvium. In the spring, the high waters of the river flow through the surrounding alluvium, which is composed of sands and gravels, down through the aquifer to the well. During the summer, when the water in the river is lower, the water flows in the opposite direction.

Pumping this well results in either intercepting water headed toward the river or inducing losses from the river to fill the void created by the groundwater pumping. This phenomenon is described in the science of hydrogeology by the term *hydraulic continuity*. The Naches River would show an effect in less than one week after the pumping of this well.

The well in section 34 draws from the same aquifer, but the well intake is farther

² In finding of fact XVIII, the Board erroneously refers to the well in section 34 but goes on to describe the characteristics of the well in section 5. And in finding of fact XIX the Board did the reverse. We use the correct identifiers and these findings are then supported by substantial evidence.

below the Naches River than the intake for the section 5 well. The Ellensburg Formation, from which the well draws water, does not connect to the Naches River Alluvium, but, instead, lies below it. Although the well is drilled through Tieton andesite (a lava rock similar to basalt) at the surface, there is no basaltic formation between the wellhead and the river. This Ellensburg Formation is in hydraulic continuity, at the location of the well, with the Naches River. Water withdrawal from the well would lower the pressure within the Ellensburg Formation, causing water from the river, during high flows, to flow faster toward the well. Because the Ellensburg Formation lies below the river at this location, the well water would be drawn toward the well through the overlying permeable aquitards.

Pumping this well would eventually induce losses from the river to fill the void in the aquifer created by the withdrawal. Because of the presence of the intervening aquitards, the effect of pumping this well on the river would not be as immediate as the effect of withdrawing water from the well in section 5. It would likely take less than eight months after pumping for the river to be affected through reduction in flow. Over time, however, the total impact on the river would equal the amount of water withdrawn from the well, minus whatever irrigation amount would not be drawn by the crops, but which would be recharged to the system.

ANALYSIS

A. Standard of Review. Judicial review of a decision by the Board is governed by the Administrative Procedure Act (APA), chapter 34.05 RCW. *Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep't of Ecology*, 146 Wn.2d 778, 789-90, 51 P.3d 744 (2002); RCW 34.05.518(1), (3)(a). An appellate court reviews administrative decisions on the record of the administrative tribunal rather than the record of the superior court. *Sherman v. Moloney*, 106 Wn.2d 873, 881, 725 P.2d 966 (1986). This court sits in the same position as the superior court and applies the standards of the APA directly to the record before the board. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

This court may grant relief if the Board's order is not supported by evidence that is substantial when viewed in the light of the whole record before the court. *See* RCW 34.05.570(3)(e). Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the declared premise. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995) (quoting *Nghiem v. State*, 73 Wn. App. 405, 412, 869 P.2d 1086 (1994)). We should overturn an agency's factual findings only if they are clearly erroneous, and we are definitely and firmly convinced that a mistake has been made. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588, 90

P.3d 659 (2004). This court will review the evidence in the light most favorable to the party who prevailed in the highest administrative forum to exercise fact-finding authority. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001) (quoting *State ex. rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992)).

B. Preliminary Issues. Ecology raises several issues: standing, assignment of error by Mr. Vander Houwen, and error first raised in a reply brief in the superior court.

1. Standing. Ecology contends that Mr. Monson lacks standing to pursue this appeal because Mr. Vander Houwen is the party with an interest in the water applications. Ecology bases its argument on evidence showing that Mr. Monson purchased Mr. Vander Houwen's property.

Mr. Vander Houwen explains that this case was filed on his behalf and there is no dispute that he is the applicant and the appellant. The owner of an application for a water right is not necessarily the owner of the property. Generally speaking, legal rights associated with a water permit application attach to the permit holder, not to the land or to the owner of the land where the water will be used. It is not until a water right is perfected, through the issuance of a water right certificate, that rights attach to the property (and therefore the property owner). *Hanson Indus., Inc. v. Kutschkau*, 158 Wn.

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App. 278, 294-95, 239 P.3d 367 (2010) (quoting Order Granting Summary J., *Buck v. Dep't of Ecology*, No. 06-018 (Wash. Pollution Control Hr'gs Bd. Aug. 3, 2006)), *review denied*, 171 Wn.2d 1011 (2011).

2. *Error raised for the first time on appeal.* Without citation to legal authority or the record, Ecology asserts that Mr. Vander Houwen failed to properly assign error to the findings on appeal and that he raised errors for the first time in a reply brief.

After the Board issued its findings of fact and conclusions of law and order in *Vander Houwen II*, Mr. Vander Houwen timely filed a petition for review of the Board's decision in the Yakima County Superior Court. In his briefs filed with superior court, Mr. Vander Houwen did not assign error to any findings of fact entered by the Board. This argument was apparently raised in the reply brief. Mr. Vander Houwen also did not assign error to the Board's decision granting Ecology's motion in limine, nor did he offer any legal argument in either of his superior court briefs on this point.

Under the APA, new issues can be raised on appeal only if they fall expressly within the statutory exceptions of RCW 34.05.554. *US W. Commc'n, Inc. v. Utils. & Transp. Comm'n*, 134 Wn.2d 48, 72, 949 P.2d 1321 (1997). RCW 34.05.554 precludes appellate review of issues that were not raised before the agency. RCW 34.05.554 allows new issues during the review of an order if (1) the person did not know and was under no

duty to discover facts giving rise to the issue, or (2) the person was not notified of the administrative proceeding. The statute serves the important policy purpose of protecting the integrity of administrative decision making. *King County v. Wash. State Boundary Review Bd. for King County*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993).

Here, Mr. Vander Houwen seeks to challenge the various findings of fact made by the Board. This is not a surprise and encompasses the whole point of his appeal. This court has the authority to examine the findings under RAP 2.5(a)(2).

Finally, Ecology maintains that Mr. Vander Houwen cannot challenge the Board's decision to grant Ecology's motion in limine excluding evidence showing that Ecology had granted other water rights permits in the area. The Board argues that the evidence was not relevant to the "narrow issue on remand—whether [Mr.] Vander Houwen's applications failed the no impairment prong of the statutory four part test for granting a water right." Resp't's Br. at 20 n.7.

Assuming this court can review this issue, the result would be the same. Evidence of other permits is irrelevant to the issues raised by Mr. Vander Houwen's appeal.

C. Challenges to the Findings. Mr. Vander Houwen challenges numerous findings made by the Board.

1. Finding of Fact II.³ Finding of fact II tracks the testimony of Darrell Monroe

of Ecology and Mr. Vander Houwen.

2. *Findings of Fact III and IV.* Mr. Vander Houwen maintains that findings of fact III and IV are defective. These two findings give the distance from the Naches River to each well. The evidence supporting these findings is contained in the reports of examination for each well.

3. *Finding of Fact XI.* Mr. Vander Houwen challenges finding of fact XI. He argues that the use of the term “highly appropriated” to describe the waters of the Naches River is not defined. CP at 14-15. However, the term “highly appropriated” was discussed at the 2003 hearing.

4. *Finding of Fact XIV.* Mr. Vander Houwen challenges the second part of this finding. Specifically, “The Yakama Indian Nation [YIN] has water rights on the river pertaining to maintaining adequate flows for fish.” CP at 16. But in his brief, Mr. Vander Houwen concedes that the YIN has a fish water right.

5. *Finding of Fact XV.* Mr. Vander Houwen challenges the last sentence that reads, “Historically flows at these locations have been lower than required.” CP at 16. However, this statement is supported by Robert Barwin’s testimony.

Similarly, Mr. Vander Houwen claims that findings of fact XVI and XVII are not

³ As noted above, findings of fact refer to the Board’s findings following its hearing on remand.

supported by substantial evidence. However, these findings, like finding of fact XV are also based on the testimony of Mr. Barwin of Ecology.

6. Findings of Fact XVIII and XIX. In these findings, the Board mistakenly referred to the well in section 34 when it was describing the characteristics of the well in section 5, and vice versa. When this error is corrected, there is substantial evidence to support both of these findings.

Mr. Vander Houwen also alleges that there is no substantial support in the record for the “opinion” in finding of fact XIX. Appellant’s Br. at 20. However, the record amply demonstrates that Ecology’s hydrogeologist, John Kirk, is an expert in his field and is competent to testify on the scientific matters at issue. There was no challenge to Mr. Kirk’s qualifications, and Mr. Vander Houwen asked Mr. Kirk a number of questions seeking his opinion as an expert.

7. Finding of Fact XX. Mr. Vander Houwen objects to finding of fact XX that concerns the effect of potential water withdrawals at the two wells. Finding of fact XX is supported by substantial evidence in the record.

8. Finding of Fact XXI. Mr. Vander Houwen challenges finding of fact XXI. This finding gives the priority of water rights within the watershed. The information regarding water rights is supported by the record except for the dates of 1917 (surface

rights) and 1944 (groundwater rights).

9. Finding of Fact XXII. Overall, finding of fact XXII is supported by evidence in the record.

D. Requirements for a Water Right. With limited exceptions, private individuals or entities must apply to Ecology for a permit to appropriate water.

RCW 90.03.250, .260; RCW 90.44.060. In reviewing an application for a water right permit, Ecology must determine (1) whether any water is available to be appropriated, (2) whether the proposed use will be beneficial, (3) whether the appropriation will impair existing water rights, and (4) whether the appropriation will detrimentally affect the public welfare. RCW 90.03.290(3); *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 79, 11 P.3d 726 (2000).

RCW 90.44.060 provides that this four-part test is applicable to groundwater. Each of the four parts is a separate determination that must be met before a new water right can issue. *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 384, 932 P.2d 139 (1997).

At issue here are elements of impairment and detriment. In *Postema*, the court rejected the Board's holding that "hydraulic continuity, where minimum flows are unmet a substantial part of the year, equates to impairment of existing rights as a matter of law." *Postema*, 142 Wn.2d at 93. Specifically, the court concluded:

We hold that hydraulic continuity of an aquifer with a stream having

unmet minimum flows is not, in and of itself, a basis for denial of a groundwater application However, where there is hydraulic continuity and withdrawal of groundwater would impair existing surface water rights, including minimum flow rights, then denial is required. Ecology may use new information and scientific methodology as it becomes available and scientifically acceptable for determining hydraulic continuity and effect of groundwater withdrawals on surface waters.

Id.

Mr. Vander Houwen contends that the only issue in this case is the third element dealing with impairment. Ecology argues that the issue before this court is whether Mr. Vander Houwen's applications met the third and fourth elements—the impairment and detriment elements.

There are two sets of findings. The findings, conclusions, and order attached to respondent's brief are dated March 25, 1997. These findings are from *Vander Houwen I*; they are not at issue here. The findings dated June 26, 2003, are at issue.

The findings show that the waters of the Naches River are highly appropriated. This means that there are periods when all of the water rights on the river are not satisfied. All unappropriated surface water in the Yakima River Basin has been withdrawn from appropriation under chapter 90.40 RCW to meet the needs of the Yakima River Basin Water Enhancement Program project. Water rights on the Naches River have been curtailed in dry years. Bureau of Reclamation water is not reliably available. There

is no certainty that the Naches River and Yakima River will recharge fully every year.

Pumping from the well on section 5 will intercept water destined for the river or induce losses from the river to fill the void created by ground pumping. Water withdrawal from the well on section 34 will lower pressure within the Ellensburg Formation, causing water from the river, during high flows, to flow faster toward the well. Pumping the well in section 5 would probably induce losses from the river to fill the void in the aquifer created by the withdrawal.

There is no obvious window of time that the withdrawal requested by Mr. Vander Houwen could be distributed through the Naches River in a manner that would not impact fisheries and existing water rights. Although surplus water may be available in some years, this water would only be available for a few weeks. The water shortage of the Yakima River and the lower reach to which the Naches River contributes has created substantial public interest in improving river flow and fish passage conditions and protecting existing water rights.

Mr. Vander Houwen seeks a substantial amount of water. For one well, he seeks irrigation water from March 15 through October 15 of each year based on a withdrawal of 500 gallons per minute (gpm) for an annual withdrawal of 750 acre feet. For the other well, he seeks a withdrawal of 350 gpm for a total annual withdrawal of 350 acre feet

during the same period. If approved, the two applications would likely impair existing rights and would be detrimental to the public interest.

The court in *Postema* rejected the premise that a stream with unmet flows necessarily established impairment if there was an effect on the stream from groundwater withdrawals. *Postema*, 142 Wn.2d at 93. The court stated:

While the number of days minimum flows are unmet is a relevant consideration, it may be, for example, that due to seasonal fluctuations and time of withdrawal, groundwater withdrawal affecting the stream level will not impair the minimum flow rights. However, where minimum flows would be impaired, then an application must be denied.

Id.

The facts show that hydraulic continuity exists between the wells and the Naches River. The Naches River is not fully appropriated. *Postema* states that a right may be denied where minimum flows would be impaired. Here, the findings show that water will be diminished when the wells are pumped and that this will occur during low years.

The evidence as to detriment is convincing. All unappropriated surface water in the Yakima River Basin has been withdrawn from appropriation under chapter 90.40 RCW. The Bureau of Reclamation, Ecology, and YIN have invested significant sums of money seeking to improve the fisheries in the Yakima River Basin. Granting Mr. Vander Houwen's water permits would result in a reduction of water in the Naches River that

would undermine the public investment in the basin to improve the fisheries. Ecology determined that approving the applications was contrary to the public welfare, and the Board agreed with Ecology.

Mr. Vander Houwen argues that there is no showing that the YIN's water rights for fish have been impaired. Mr. Vander Houwen maintains that because the YIN has superior water rights to everyone, its rights are impacted last. Regardless as to whether the YIN's rights have been affected, the Bureau's investment in the fisheries will be affected if the water rights permits are granted here.

E. Conclusion. Substantial evidence supports the Board's findings of fact. We affirm the Board's decision denying Mr. Vander Houwen's applications for water rights.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, J.

WE CONCUR:

Brown, J.

Korsmo, C.J.