WASHINGTON POLLUTION CONTROL HEARINGS BOARD MUDDIES THE WATERS ON "WATER AVAILABILITY"

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William Stinnette v. Dept. of Ecology, PCHB No. 15-007 (October 29, 2015), available at http://www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=1771

In *Stinnette v. Ecology*, the Washington Pollution Control Hearings Board embraced a novel concept of "legal availability" in applying the "water availability" prong of the four-part test for a new water right. The Board affirmed the Department of Ecology's denial of Mr. Stinnette's water right application because of detrimental impacts to the public interest, and then concluded that those detrimental impacts to the public interest necessarily resulted in water not being "legally available" for appropriation.

This circular approach essentially collapses the four-part test into only three factors: beneficial use, impairment, and detriment to the public welfare. A circular and superfluous determination of "legal unavailability" seems contrary to the legislative intent expressed in the Water Code, suggesting that further legislative clarification might be in order.

The Four-Part Test

Washington's Water Code establishes a four-part test for approval of a new water right to surface water or groundwater. The four-part test is generally summarized as:

- Is water available for appropriation?
- Is the proposed use of water a beneficial use?
- Would the appropriation impair existing rights?
- Would the appropriation be detrimental to the public welfare?

In order for a water right to be approved, the first two questions must be answered "yes" and the last two questions must be answered "no."

The four-part test is described in RCW 90.03.290. Subsection (1) requires Ecology to investigate each application to determine "what water, if any, is available for appropriation, and find and determine to what beneficial use or uses it can be applied." Subsection (3) requires Ecology to make written findings of fact concerning its investigation, and sets forth the four-part test as follows:

> [If Ecology] shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare, it shall issue a permit stating the amount of water to which the applicant shall be entitled and the beneficial use or uses to which it may be applied . . . . But where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, having due regard to the highest feasible development of the use of the waters belonging to the public, it shall be the duty of the department to reject such application and to refuse to issue the permit asked for.

Finally, Subsection (4) emphasizes that in determining whether or not a permit should be issued, "it shall be the duty of the department to investigate all facts relevant and material to the application."

It is well-settled that the four-part test entails an investigation of water availability, beneficial use, impairment, and detriment to the public welfare as four distinct factors. *E.g.,* Office of the Attorney General, *An Introduction to Washington Water Law* (2000) at 9; *Mead v. Ecology*, PCHB No. 03-055 (2004) (ruling that the four prongs of the four-part test are each "stand alone tests" which must be met before a new water right can issue).

The *Stinnette* Water Right Denial

The *Stinnette* case involved an application for a surface water diversion from a small creek in rural Stevens County. Mr. Stinnette filed his original application in 1997, requesting 0.11 cfs and 10 acre-feet per year for domestic supply for four homes and seasonal irrigation of 40 acres. By the time Ecology finally reviewed the application in 2014, Mr. Stinnette had reduced his water needs; he requested water for only one domestic use and seasonal irrigation of 10 acres from May through September.

No regulatory minimum flow had been established for the creek. The Washington Department of Fish and Wildlife (WDFW) expressed concerns about the potential significant impact the proposed withdrawal would have on fish in the creek, which had a flow of less than 1.0 cfs in November 2001. Based upon that agency's policy of discouraging diversions from very small streams, WDFW recommended denial of the application.

According to the Board's decision,

> Ecology denied Mr. Stinnette's water right application based on its determination that the proposed withdrawal would be detrimental to the public interest as it would significantly impact fish resources and habitat in Squaw Creek. Ecology also determined that water was not legally available for appropriation because of the detrimental impacts to the public interest.

The Board's Decision

After Ecology denied the application, the applicant appealed to the Pollution Control Hearings Board in January 2015. Hearings before the Board are

conducted *de novo*; the Board can consider new evidence and is not limited to reviewing the evidence before Ecology when it made its decision.

In May of 2015, in preparation for the PCHB hearing, WDFW conducted a site visit to ascertain whether fish were present in Squaw Creek and to determine the streamflow and water temperature. Two species of juvenile trout were identified downstream of the proposed diversion point, and the streamflow was measured at 0.55 cfs.

At the hearing, Mr. Stinnette appeared *pro se*. He testified that he believed his proposed diversion would not have any significant impact on the creek "because his proposed withdrawal is small, he will only divert water during high spring flows and he will provide mitigation." The Board refused to consider what it characterized as Mr. Stinnette's "last minute proposal" to limit his diversion to times of high spring flows:

> At the hearing, Mr. Stinnette testified that he now intends to further limit his withdrawal of water from Squaw Creek by only withdrawing during spring high flows and then storing that water for irrigation and fire suppression use later in the summer. . . . However, there was no indication in his application that Mr. Stinnette was requesting a right that was limited to spring withdrawals or that Mr. Stinnette intended to construct a system that would allow the water to be stored in underground tanks and used later. Moreover, Mr. Stinnette did not offer any analysis concerning the type of storage that would be required for his new proposal or any analysis to demonstrate that his new proposal is even possible. Accordingly, the Board is considering only Mr. Stinnette's written request and Ecology's written decision on that request as Ecology determined it to be modified through conversations with Mr. Stinnette.

The Board explained that even if it had entertained Mr. Stinnette's proposal for a diversion restricted to springtime high flows, it would have affirmed Ecology's denial anyway because Ecology had determined that *any* diversion from the creek would be contrary to the public interest.

The Board's decision did not identify the reduced quantity of water Mr. Stinnette was seeking, the amount of streamflow in the creek during the spring high flow period, or the existence of any other water appropriations from the creek. Although it cited state policy requiring retention of base flows necessary to provide for preservation of fish, the Board did not identify specific base flows. The Board found only that a WDFW biologist testified that "based on his observations and experience, any diversion at any time of the year will have a negative impact" on fish. Mr. Stinnette did not offer any expert testimony or other evidence in support of his argument that his proposed diversion would not significantly affect fish resources in the stream. Accordingly, the Board concluded that he failed to meet his burden of demonstrating that Ecology's decision was erroneous.

The Board concluded that in light of WDFW's recommendation, it was reasonable for Ecology to determine that the proposed diversion would be detrimental to the public interest "and that water was not legally available for appropriation." The Board concluded that Mr. Stinnette's requested water right "fails two prongs of the four-part test" under RCW 90.03.290(3): detriment to the public interest, and lack of "legal availability" of water due to detriment to the public interest. The Board did not otherwise discuss or elaborate on its notion of "legal availability" tied to the public interest prong of the four-part test.

What Is the "Water Availability" Prong of the Four-Part Test?

Historically, a water right application would fail to meet the "water availability" prong of the four-part test if the water source was already over-appropriated by other existing water rights. *E.g., Mead v. Ecology*, PCHB No. 03-055 (2004) (Ecology demonstrated unavailability of water by "showing the creek is already over-appropriated" by at least six other water rights downstream from the diversion). Determining water availability by comparing streamflows to the amount of water already appropriated from the proposed water source is consistent with the legislative language establishing the four-part test:

> But **where there is no unappropriated water in the proposed source of supply,** or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, . . . it shall be

> the duty of the department to reject such application and to refuse to issue the permit asked for.

RCW 90.03.290(3) (emphasis added).

In addition to existing out-of-stream water appropriations, regulatory minimum instream flows constitute appropriations which are taken into account in determining water availability. *See* RCW 90.03.345 (minimum instream flows established by regulation are appropriations within the meaning of RCW chapter 90.03). Additionally, Ecology has promulgated regulations closing some streams. A regulatory closure is not an appropriation, but rather "a recognition that the water in the stream is insufficient to meet existing rights and provide adequate base flows." *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 94 (2000). In such circumstances, the Supreme Court has held that new water rights must be denied because water is unavailable.

In *Stinnette*, there was no indication that the water source was closed by regulation or subject to regulatory minimum instream flows. The Board's decision cited no evidence of any existing appropriations from the creek, and did not compare the amount of water present in the creek with the amount of water sought by Mr. Stinnette.

Rather than finding that "there is no unappropriated water" in the creek, the Board ruled that Mr. Stinnette's application failed the "water availability" prong only because it failed the "public interest" prong. Under this concept of "legal availability," failing to meet the "public interest" prong inexorably leads to a determination that water is not "legally available" – in effect collapsing the four-part test into a three-part test. This circular determination of "legal unavailability" is completely unnecessary, because failing to meet any other prong of the four-part test requires denial of a water right. It is a peculiar departure from the well-settled understanding – based on explicit legislative language – of the four-part test consisting of four distinct stand-alone factors.

It is not immediately apparent why Ecology and the Board adopted this approach to "water availability" in applying the Water Code's four-part test. Arguments regarding "legal availability" of water have arisen in contexts other than the application of the four-part test under the Water Code, such as subdivision

approvals relying on permit-exempt groundwater wells. *E.g., Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 179-80 (2011) (dispute over "whether the requirement of RCW 58.17.110 that counties assure appropriate provisions are made for potable water supplies means only that counties must assure that water is factually available underground or that water is both factually and legally available"). Perhaps Ecology arrived at its notion of "legal availability" in *Stinnette* by importing arguments the agency has made in other contexts not involving the four-part test. However, the Board does not appear to have analyzed whether the "availability" prong of the four-part test is equivalent to concepts of water availability under the Growth Management Act, the building code, or other land use statutes.

Conclusion and Implications

There is no basis in the Water Code for a circular and superfluous determination that water is not "legally available" for appropriation where the appropriation would be detrimental to the public interest. Even if Ecology and the Board had not applied their novel concept of "legal availability" here, Mr. Stinnette's application still flunked the "public interest" prong of the four-part test – and that alone was sufficient to require denial. Thus, perhaps the immediate lesson to be drawn from the *Stinnette* case is that it might behoove a disappointed water right applicant to hire an attorney (or at least a fisheries biologist) before pursuing an appeal.

In the larger context, unforeseen consequences could result from disregarding the legislative language in RCW 90.03.290 and grafting unrelated concepts of "legal availability" onto the availability prong of the four-part test. The Legislature's intent seems clear, but the Board's decision in *Stinnette* suggests that further clarification might be in order.