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STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

JERRIE VANDER HOUWEN, ANNE VANDER HOUWEN and
FORD ELSAESSER, Chapter 11 Trustee for JERRIE VANDER
HOUWEN,

Appellants,

vs.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

APPELLANTS' BRIEF

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I. INTRODUCTION

Jerrie Vander Houwen Orchards drilled two ground water wells near Yakima, Washington and sought certifications for these wells from DOE. This case involves a second appeal from the Pollution Control Hearing Board (PCHB) with regard to these water well applications filed in this case.

In the initial appeal, the PCHB denied the applications and Yakima County Superior Court Judge Van Nuys reversed the decision of the PCHB and remanded the case back to the PCHB for the taking of additional testimony as to whether the proposed withdrawals would impair any existing water rights. A second hearing was conducted and the PCHB again denied the applications. Vander Houwen again sought judicial review of this decision and the Superior Court upheld the PCHB decision. This appeal follows. As is set forth below, the record is devoid of any legitimate testimony or evidence that any impairment will occur if the Vander Houwen applications are approved. The Superior Court's Order should be reversed and Vander Houwen's applications should be approved.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The PCHB erred in its exclusion of evidence that the Department of Ecology (hereinafter DOE) had, subsequent to the Petitioner's application for a water right, granted over 30 other water rights through ground appropriation for wells drilled in the same area.

Issues Related to Assignment of Error No. 1:

1. Is the fact that DOE has granted over 30 other water well applications in the same area as Petitioner finding that there was no impairment to existing rights relevant to the issue of impairment of existing rights in this case?

Assignment of Error No. 2: The PCHB erred in making and entering Finding of Fact No. II which read:

There was an existing 8-inch diameter well on Section 34, which extended to a depth of 340 feet below the ground surface. **Mr. Vanderhouwen contacted Ecology in 1992 for advice as to how to get water for his orchard expansion. Ecology told him that it had no record of any water right for the well on Section 34. Ecology advised him to apply for a groundwater permit.**

Issues Related to Assignment of Error No. 2:

1. Is the finding of fact supported by substantial evidence in the record?

Assignment of Error No. 3: The PCHB erred in making and entering Finding of Fact No. III which read:

In March 1992, Mr. Vanderhouwen hired a well driller to deepen the existing well on section 34. The well driller bore the 8-inch well to a depth of 802 feet below ground surface, and installed casing to 600 feet. He encountered water at 580 feet. The well driller recorded the static water level of the deepened well at 530 feet. **The Naches River, at this point, lies about 530 feet below the top of the casing.**

Issues Related to Assignment of Error No. 3:

1. Is the finding of fact supported by substantial evidence in the record?

Assignment of Error No. 4: The PCHB erred in making and entering Finding of Fact No. IV which read:

Mr. Vanderhouwen, in late June 1992, had the same well driller bore a new well in the southeast portion of Section 5, Township 14 North, Range 17 East, Willamette Meridian. The well driller bored a hole 8" in diameter to a depth of 505 feet below ground surface. Below that level, he narrowed the hold to a 6" diameter, to a total depth of 625 feet. He installed 8" casing to the upper depth, and continued with 6" casing to the lower depth. He recorded the static water

level of the well as 340 feet below ground surface.
The Naches River, at this point, lies about 320 feet below the top of the casing.

Issues Related to Assignment of Error No. 4:

1. Is the finding of fact supported by substantial evidence in the record?

Assignment of Error No. 5: The PCHB erred in making and entering Finding of Fact No. XI which read:

The waters of the Naches River, which is a tributary to the Yakima River, are highly appropriated. This means there are periods when all of the water rights on the river are not satisfied. On the Naches River, water is highly managed between the United States Bureau of Reclamation, Ecology, and the Yakima Indian Nation. Water has been limited in this basin since 1905, when the Roza Irrigation District obtained the right to regulate its water from the Bureau against junior water users, which were those who acquired their rights prior to 1905. The District began exercising its rights aggressively at that time. In 1905, the Bureau had a total water right to serve 1.05 million acres. Few water right permits were granted between the period of 1917 and 1945 because of the withdrawal of water for the Bureau for planning under RCW 90.40.

Issues Related to Assignment of Error No. 5:

1. Is the finding of fact supported by substantial evidence in the record?

2. Are their conclusions of law contained in this Finding?

Assignment of Error No. 6: The PCHB erred in making and entering finding of fact XIV which read:

Approximately twenty years ago, federal Judge Quackenbush issued his “flip-flop” order, preventing releases in September and October from the Yakima River, to keep adequate flow in that river for fish. **The Yakama Indian Nation has water rights on the river pertaining to maintaining adequate flows for fish.**

Issues Related to Assignment of Error No. 6:

1. Is the finding of fact supported by substantial evidence in the record?

Assignment of Error No. 7: The PCHB erred in making and entering Finding of Fact No. XV which read:

The project targets operation flows at these dams to protect declining fish runs. There are two target locations in the basin: the Sunnyside Dam at Parker, and the Prosser Dam. **Historically flows at these locations have been lower than required.**

Issues Related to Assignment of Error No. 7:

1. Is the finding of fact supported by substantial evidence in the record?

Assignment of Error No. 8: The PCHB erred in making and entering Finding of Fact No. XVI which read:

Both the Legislature and Congress have in the past 20 years, authorized the Yakima Basin Enhancement Project, which is designed to ensure there is available water for existing users and fish. Recently the Bureau has requested Ecology to not appropriate any further waters, so the Bureau will be the first in line if a permit is authorized.

Issues Related to Assignment of Error No. 8:

1. Is the finding of fact supported by substantial evidence in the record?

Assignment of Error No. 9: The PCHB erred in making and entering Finding of Fact No. XVII which read:

There has been a growing recognition over the years of the relationship between ground and surface waters. This concern began prior to the Vanderhouwens' application to withdraw water rights. In 1999, the three managing entities, the Bureau, Ecology, and the Nation, entered a memorandum of agreement to help further the goal of protecting the management of the system to proper existing uses and fish. Bureau of Reclamation water is not readily available throughout the irrigation season. In most situations, the annual floodwaters service fish rights in the basin. There is no certainty the Naches and Yakima Rivers recharge fully every year. The Bureau considers return flow part of their water. The Bureau is currently spending considerable money to increase the fishery in the Yakima basin. In short, the project storage reservoirs

in the Yakima Basin are intensely managed to satisfy fishery management needs and water contract obligations.

Issues Related to Assignment of Error No. 9:

1. Is the finding of fact supported by substantial evidence in the record?

Assignment of Error No. 10: The PCHB erred in making and entering Finding of Fact No. XVIII which read:

Both the Vanderhouwens' wells draw from a thick sequence of saturated silts, clays, and gravels comprising the Ellensburg Formation. **The water drawn from the well in Section 34 is at an elevation slightly below that of the Naches River. The primary source of the water for this well is the Naches River Alluvium. In spring, the high waters of the river flow through the surrounding alluvium, comprised of sands and gravels, down through the aquifer to the well. During the summer, when the river water is lower, the water flows in the opposite direction. Pumping this well results, therefore, either in interrupting water destined for 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 as hydraulic continuity. The Naches River would show an affect in less then one week after pumping of this well.**

Issues Related to Assignment of Error No. 10:

1. Is the finding of fact supported by substantial evidence in the record?

Assignment of Error No. 11: The PCHB erred in making and entering Finding of Fact No. XIX which read:

The well in Section 5 draws from the same aquifer, but the well intake is farther below the Naches River than the intake for the Section 34 well. The Ellensburg Formation, from which the well draws water, in the vicinity of the Section 5 well, does not connect to the Naches River alluvium, but rather lies below it. Although the well is drilled through Tieton Andesite at the surface, there is no basaltic formation between the wellhead and the river. This Ellensburg aquifer is in hydraulic continuity, at the location of this 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. Due to the fact the Ellensburg Formation lies below the river at this location, the well water would be drawn down towards the well through the overlying aquitards. These aquitards are permeable. Pumping this well would probably induce losses from the river, to heal the void in the aquifer created by the withdrawal. Due to the presence of 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 34. It would likely take less than eight months after pumping this well for the river to be affected. 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.

Issues Related to Assignment of Error No. 11:

1. Is the finding of fact supported by substantial evidence in the record?

Assignment of Error No. 11: The PCHB erred in making and entering Finding of Fact No. XX which read:

There is no obvious window of time an impact of water withdrawal in the quantities and duration requested by the Vanderhouwens could be distributed through the Naches River so as to not impact fisheries interests and existing water rights. Although surplus water may be available in some years, this water would only be available for a few weeks. There is a strong public interest in the fishery in this river.

Issues Related to Assignment of Error No. 11:

1. Is the finding of fact supported by substantial evidence in the record?

Assignment of Error No. 12: The PCHB erred in making and entering Finding of Fact No. XXI which read:

Ecology gives priority to the senior rights, within this watershed, namely the surface rights existing prior to 1917, and the groundwater rights existing prior to 1944, which are the respective dates of the surface and

groundwater codes. The remaining rights are pro-rated, in times of water shortage.

Issues Related to Assignment of Error No. 12:

1. Is the finding of fact supported by substantial evidence in the record?

Assignment of Error No. 13: The PCHB erred in making and entering Finding of Fact No. XXII which read:

The water shortage of the Yakima River Basin and the lower reach to which the Naches River contributes, has created a substantial public interest in improving river flow and fish passage conditions for endangered species and to protect existing water rights. The Department of Fish and Wildlife has listed the river on the Surface Water Source Limitation list for low flows in order to preserve habitat for salmonid species.

Issues Related to Assignment of Error No. 13:

1. Is the finding of fact supported by substantial evidence in the record?

Assignment of Error No. 14: The trial court erred in denying the Petitioner's Petition for Review and upholding the PCHB determination to deny the Petitioner's request for reversal of the PCHB decision and to be granted his water rights in this case.

Issues Related to Assignment of Error No. 14:

1. Was the PCHB's decision and findings related thereto supported by substantial evidence and/or a proper interpretation or application of existing law?

III. STATEMENT OF THE CASE

Vander Houwen owns farm land lying northeast of the town of Naches and the Naches River. He desired to utilize ground water for irrigation purposes on these lands. There are two ground water wells at issue in this appeal. (CP 10-12, FF I, V & VI)

Before beginning the specific discussion, a bit of an overview of the hydraulic landscape is in order so that the testimony can be put in perspective. We are dealing with two ground water wells in this case. The first issue is whether there is some sort of link between the withdrawal of that ground water and the flow of the Naches River. This would establish "hydraulic continuity" between the two events.

It is undisputed that neither well draws water directly from the Naches River. In other words, this is not a direct diversion from

the river. Rather, the wells that have been drilled tap into water in confined aquifers below the surface.

The first "layer" is the Naches River itself. Beneath the Naches River is a small layer called the "Naches River Alluvium" which is about a five foot layer of sands and gravels beneath the river itself. Some water from the Naches River moves into this alluvium. (RP II at 97)¹.

Geologically the next formation encountered is the Teton Andesite, which is essentially a layer of basalt rock for the next 285 feet or so below the surface. The next formation encountered is called the Ellensburg formation. This consists of materials with alternating layers of sand, sandstones, silts, clays and fine sands. Both of the wells in question in this case are drilled into this Ellensburg formation and find their water supply from that aquifer. (RP II 95-96, 113)

The first well was drilled in 1992 and is located in section 5, Township 14 N. Range 17 E.W.M. (Section 5 well). This well is located approximately .15 miles (about 800 feet) from the Naches

¹ Appellant will use the term "RP II" to reference the Report of Proceedings at the PCHB for the March 17, 2003 hearing.

River. (RP II 39). The well has a total depth of 625 feet. The static water level of the well was measured in 1992 at 340 feet below the surface. It was estimated that the top of this well water is at an elevation that is approximately 40 feet lower than the Naches River in the area where the Section 5 well is drilled. (RP II 97). However, as noted above, the water source for the section 5 well is the Ellensburg formation aquifer. A total amount of water of 350 acre feet of water to irrigate 60 acres of land was sought from the well. (CP 12, FF VI)

The second well is located in section 34, Township 15 N., Range 17 E.W.M. This well is located approximately 1.7 miles (about 9000 feet) from the Naches River (CP 12, FF V). The well is completed to a depth of 880 feet below the surface and draws its water exclusively from the Ellensburg formation aquifer. (RP II 113). A total amount of water of 750 acre feet of water to irrigate 379 acres of land was sought from the well. (CP 11, FF V).

A. First PCHB Appeal And Remand From Superior Court.

When this case came before the Court the first time, it ruled that the evidence of any conceivable impairment to existing water

rights was sorely lacking. The Superior Court had several options available to it in connection with the determination that the PCHB had erred in its determination to deny Petitioner's water application. It could have simply ordered an outright reversal of the PCHB determination. See RCW 34.05.574. However, that same statute gave the Court the power to remand this matter back to the PCHB. This is the course of action that was chosen. However, that remand must be considered within the terms under which it was given. The parties did not go back to the PCHB to start at ground zero. The case was remanded back to the PCHB for further proceedings consistent with the Court's order. In particular, the Court defined the scope of the remand as:

The Court concludes that, given the Washington State Supreme Court ruling in *Postema v. PCHB*, 142 Wn.2d 68 (2000), inadequate evidence was presented to the Board regarding Vanderhouwen's failure to satisfy the statutory requirements of RCW 90.03.290 as hydraulic continuity alone is not sufficient to support Ecology's denial of a water right application. **The Court remands this matter to the Board for further proceedings to present evidence in addition to hydraulic continuity supporting Ecology's denial of Vanderhouwen's application for permits for ground water wells.**

(CP 28 (emphasis added))

The remand in this case was for DOE to present evidence as to the production of additional evidence to justify its denial of Vander Houwen's applications. As more fully set forth in the Court's memorandum opinion:

The underlying factual issue in this case is whether the Naches River is in hydraulic continuity with Petitioner's two wells, and if so, whether the proposed withdrawal adversely affects public interest or impairs existing water rights.

* * * *

Here, there was not a showing that the Naches River, a "highly" appropriated river but not a "fully" appropriated river had minimum flows established by regulation. There was evidence that some rightful users, in some years, have had their water allocations diminished. There was no evidence supporting a finding that impairment would necessarily occur.

* * * *

There was no evidence as to the length of time it would take to equalize the pressure, or at what rate this discharge would occur, or what impact seasonal recharges due to weather would have on the flow.

Mr. Vanderhouwen raised the issue in his testimony, and DOE did not respond with evidence, as to whether there is an opportunity for the aquifer to resaturate during a season when agricultural demands on the Naches are minimal or non-existent.

(CP 45-46).

No such additional evidence was presented by DOE. As outlined below, the DOE continued its presentation of the simple fact that it considered hydraulic continuity to exist as justifying its wrongful denial of these applications. Substantial evidence in the record does not support these unsupported allegations.

IV. ARGUMENT

A. Argument with Respect to Findings of Fact (Assignments 2-13).

Findings must be made on all of the material issues presented in the case in order to inform the appellate court what issues were actually decided and the manner in which they were determined. *See Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 422, 886 P.2d 172 (1994). There is no general form of the findings because the court has recognized that, “the nature and degree of exactness of required findings depends on the circumstances of the particular case.” *Federal Signal*, 125 Wn.2d at 422.

The findings must be made on issues that establish the existence or nonexistence of material factual matters. *In re LaBelle*, 107 Wn.2d 196, 219, 728 P.2d 138 (1986).

Statements of the positions of the parties, and a summary of the evidence presented, with findings which consist of general conclusions drawn from an indefinite, uncertain, undeterminative narration of general conditions and events are not adequate.

Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 36, 873 P.2d 498 (1994).

1. Finding of Fact II

No evidence in the record supports the propositions that Mr. Vander Houwen made any such contact or said any such thing.

2. Findings of Fact III and IV

Finding of fact III and IV are defective in that they recite that the Naches River lies at a distance below the wells drilled listed above. There is no substantial evidence in the record to support these assertions.

3. Finding of Fact XI, XIV and XV

The Naches River is part of the Yakima River Basin. What does “highly appropriated” mean? That is not a finding of fact. That is a conclusion of law. Petitioner will set forth the history of this Yakima watershed at this point and then reference back to this argument as we go forward. Roza Irrigation District has nothing to do with the administration of the “rights” of the system.

Within the Yakima River Basin, there existed certain nomadic tribes that were dependent on hunting, fishing and other activities. *See Department of Ecology v. Yakima Reservation Irrigation Dist.*, 121 Wn.2d 257, 266, 850 P.2d 1306 (1993). In 1855, a treaty between the United States and these bands (now called the Yakima Indian Nation) was signed. *YRID*, 121 Wn.2d at 266. In 1902, the U.S. congress enacted the Reclamation Act which allowed for the construction of dams, reservoirs and canals for the purpose of reclaiming "arid" lands. In 1905 the state of Washington enacted a law to allow for the withdrawal of the state's then unappropriated waters for this purpose. *YRID*, 121 Wn.2d at 267. By 1933, the last of the six storage reservoirs was completed which then brought the total storage capacity of the project to 1,070,700 acre feet of water. *YRID*, 121 Wn.2d at 269-70.

The Bureau of Reclamation (BOR) has no water right. It simply administers the rights of those that do have such a right. The BOR has no water right for fish propagation. The BOR may well want to have fish present in the Yakima and Naches River system. It simply has no right to do so.

The only “fish” right for waters of the Yakima River that exists is found within the Yakima Indian Nation (YIN). YIN was granted the:

maximum quantity . . . minimum instream flow necessary to maintain anadromous fish life in the river, according to annual prevailing conditions. This diminished reserved right for water for fish has a priority date of time immemorial.

YRID, 121 Wn.2d at 265.

Accordingly, the “fish” right belongs to YIN and they have the first and best right to that amount of water in the Yakima River which is the “minimum necessary,” to support fish life and that right has a priority date of “time immemorial.” Only God has a better water right in that regard and YIN may very well dispute that God has a better water right.

There was no testimony that YIN has ever had a claim that its rights were not satisfied. While DOE or BOR or any other groups of letters may want more water in the Yakima River system, there is no testimony nor authority that they have right to require that that water

be present. None. YIN has the fish water right and it is undisputed that that right for water from the Yakima River has been met.

4. Finding of Fact XVI

There is no substantial evidence in the record to support this assertion.

5. Finding of Fact XVII

There is no substantial evidence in the record to support this assertion. Petitioner cannot dispute or point to evidence that does not exist in the record.

6. Finding of Fact XVIII

This assertion is not only not supported by the record, it is not true. DOE's own witness testified that the water from this well is drawn from the Ellensburg Formation. (RP II at 113). The rest of this finding is simply not supported by substantial evidence in the record.

7. Finding of Fact XIX

Again, there is no substantial evidence in the record to support this alleged "opinion." It would seem that it does not matter where the well drew water from. It simply would not matter because

the DOE would find some form of “hydraulic continuity” irrespective of the location. This does not even rise to the level of contemplating sound science. This well draws from a water source over 400 feet below the river and is protected by a 250 foot layer of basalt rock, and, yet, there is some theory of “hydraulic continuity?” This is ridiculous. There is no substantial evidence nor sound science to support this finding of fact.

8. Finding of Fact XX

There is no substantial evidence in the record to support this finding. The evidence at the hearing was either equivocal or non conclusive. It certainly did not support what the finding states.

9. Finding XXI

This finding is not supported by substantial evidence and is simply wrong as a legal matter. DOE has to follow the law and give priority to those water users that are first in time. The years 1917 and 1944, while may be significant in other regards, have no bearing on this determination.

10. Finding XXII

There is no substantial evidence as to any sort of “water shortage” in the Yakima River Basin, especially that would rise to the level of “impairment.” As noted above, while various agencies may well love to have more water for habitat preservation or for fish propagation, the fact that they may desire to do so does not elevate that desire to some form of protected right.

B. The PCHB Erred in Excluding Evidence of Other Approvals of Ground Water Application in the Area.

As noted above, the Petitioner sought to introduce evidence of other ground water applications that had been approved by DOE since the time that Petitioner made his application. The PCHB determined that such evidence would not be “relevant.” It was in error.

In fact, if one were to look at finding of fact XVI (CP 15), it clearly states that and apparently relies on the fact that there has been no additional rights in the basin for the past twenty years. That is simply untrue. Petitioner was prepared to present evidence that there had been over 30 applications **granted** since the Petitioner had requested the water right. There is no question that such evidence

was relevant. DOE may have tried to distinguish the well sites but the evidence was indeed relevant. It was error not to consider that evidence.

C. The PCHB and the Trial Court Erred in Denying the Petitioner's Applications for Water Rights.

In order to be entitled to the issuance of the requested water use permit, the appellant was required to make a four part showing: (1) that there is water available for appropriation; (2) that the water will be put to beneficial use; (3) that the appropriation will not impair existing rights; and (4) that the appropriation will not detrimentally affect the public welfare. *See Hillis v. Department of Ecology*, 131 Wn.2d 373, 384, 932 P.2d 139 (1997); RCW 90.03.290.

The only item at issue in this judicial review is the third element dealing with "impairment." As noted above, Judge Van Nuys found that the PCHB position that "hydraulic continuity" alone was sufficient to constitute "impairment" was erroneous. She remanded the case back to the PCHB for DOE to present evidence of actual impairment so as to justify the denial of the requested permit. Judge Van Nuys relied on *Postema v. PCHB*, 142 Wn.2d 68, 11 P.3d

726 (2000) in coming to her conclusion. A close examination of this case illuminates the significant deficiencies that still exist in this case.

As a starting point, the DOE has not presented evidence as to hydraulic continuity between the wells and the Naches River. In particular, the DOE did solicit testimony from its hydrologist, Mr. Kirk, but he failed to give his opinion on a “more probable than not basis.”

Mr. Kirk testified, as an expert as follows:

Q: Okay. Thank you. What is your opinion as to the hydraulic continuity between the well in Section 5 and the Naches River?

A: I believe it is in hydraulic continuity.

Q: And then will the well when it's pumped affect the Naches River?

A: Yes it will.

* * * *

Q: Mr. Kirk, what is your feeling as to the hydraulic continuity as to this well in Section 34 and the Naches River?

A: I believe that it is hydraulic continuity through the Naches River alluvium. Which is in continuity with the river.

Q: And so then again pumping of the well would have an affect on the Naches River?

A: Yes, eventually it would

(RP II 111 & 115)

Mr. Kirk does not express any opinion on a more probable or not basis. In fact, his expression with respect to the Section 34 well is not an opinion at all. It is simply his “feeling” or “belief”. This does not meet the expert witness standards.

Aside from these facts, there is no testimony as to what the “effect” would be. The ultimate standard is one of “impairment” of existing rights if Vander Houwen was to pump from the proposed wells. Even taken at face value, the best one could deduce from the testimony from DOE is that there would be some sort of “effect” from that pumping. There is absolutely no testimony that this would be a detriment to existing rights.

Even the testimony of Mr. Kirk directly contradicts the findings from the PCHB. It states that water drawn from the Section 34 well (a mile and a half from the Naches River) would be reflected in a week. There is absolutely no such evidence in the record. In

fact, Mr. Kirk could not give an estimation on when any such affect would be reflected. It would be less than a year and probably less than 8 months. However, it would be a guess to try to put any amount of time on the exact time frame involved. (RP II 127-28)

There was no testimony at the hearing as to the impairing of existing rights because no such rights were identified. There was some mention that in certain “drought” years, some water users cannot satisfy all of their irrigation rights. It does not take a rocket scientist to figure that one out. A drought year means that there is insufficient water to satisfy the existing needs.

There was absolutely no testimony that, during non-drought years, existing rights have been impaired. There was no testimony at all that water rights for the Yakima Indian Nation for fish purposes have ever not been met. There is absolutely no showing of impairment of existing water rights in this case.

The best that DOE can point to is that there is an “effect” on the Naches River from the operation of the Vander Houwen wells. This is not enough to justify a denial of the applications at issue herein. What is the “effect” of a gallon of water over the course of a

year? Is it two gallons? There must be substantial evidence that existing rights are being impaired and there is no such evidence in the record.

The evidence presented at the remand hearing shows, at best, that hydraulic continuity may exist in some fashion between the wells at issue herein and the Naches River. This is not enough in light of the remand order issued by the Judge. There is no substantial evidence in the record showing the impairment of an existing right nor any other reason to deny the applications at issue herein. Accordingly the PCHB decision should be reversed.

In the trial court's first remand order, she relied largely on *Postema v. PCHB*, 142 Wn.2d 68, 11 P.3d 726 (2000). In *Postema*, five individuals appealed the denial of the various applications that they made for groundwater appropriation permits. While Ecology did give varying reasons for the denials, the decision in each case ultimately rested on the fact that the proposed ground water well would be in hydraulic continuity with a surface water source and that fact established "impairment" as a matter of law. *Postema*, 142 Wn.2d at 731-32.

The Court ultimately rejected the positions of each of the parties to the case and, instead, came to a middle ground. On the one hand, Ecology had argued that, because the stream that was in “hydraulic continuity” with the proposed well and the stream had minimum flow levels that were not being met, that impairment existed as a matter of law. The Court rejected this concept. *Postema*, 142 Wn.2d at 741.

On the other hand the Court likewise rejected the applicants’ theory that Ecology was required to demonstrate a “direct and measurable impact on surface water” that was “a significant measurable effect on stream flows.” *Postema*, 142 Wn.2d at 741. The Court rejected this concept as well.

However, Ecology still had to make some sort of showing of impairment. It can’t just say, “trust me.”:

This does not mean, however, that there is no need to show any impact on the surface water resource, nor does it mean that measurement is irrelevant to the inquiry. As explained, though, Ecology is entitled to use more advanced techniques as they become available and scientifically acceptable. **Applicants should then be provided the opportunity to challenge Ecology's factual determinations.**

We also reject 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. As the King County Superior Court noted, existing rights may or may not be impaired where there is hydraulic continuity depending upon the nature of the appropriation, the source aquifer, and whether it is upstream or downstream from or higher or lower than the surface water flow or level, and all other pertinent facts.

Additionally, we reject the premise that the fact that a stream has unmet flows necessarily establishes impairment if there is an effect on the stream from groundwater withdrawals. The Board held that the number of days the minimum flow levels are not met may be considered in determining water availability, but declined to rule on whether it can be the sole consideration. The superior courts affirmed. The conclusion is correct. 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.

Postema, 142 Wn.2d at 741 (emphasis added).

In this case, Ecology presented no evidence as to impairment of rights with respect to the waters of the Naches River. It simply tried the same old argument that hydraulic continuity equates to impairment as a matter of law. This concept was rejected by the

Court in *Postema* as well as Judge Van Nuys. Ecology had the opportunity to present evidence as to some sort of impairment of existing rights but chose not to do so. The reason is obvious. It could not make any such showing. As the *Postema* 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, and accordingly affirm the superior courts. 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.

Postema, 142 Wn.2d at 741.

Ecology didn't even try. There was no new information and scientific methodology that was "scientifically acceptable" presented to the PCHB to show some sort of impairment in this case. The best Ecology could do was have its witness take his best "guess" that some sort of unquantifiable "effect" would occur in the Naches River some eight months or so after the well had been pumped. This doesn't even come remotely close to being substantial evidence in

the record to demonstrate an impairment on existing rights if this permit is granted. There is no such evidence in this record and, accordingly, this petition for review should be granted.

To go a step further, DOE never even tried to establish what those “rights” were that were being impaired. The Yakama Indian Nation does indeed have a right to water in the Yakima River for fish purposes. However, that right has a priority date of “time immemorial,” and trumps every other water right in the Yakima River. How is there impairment on that issue? There was no evidence presented on any other impairment of existing irrigation rights—none whatsoever.

In short, Ecology presented no evidence of any impairment of existing rights for the logical reason that no such impairment exists. The best it could do was make some speculative showing of some sort of amorphous “effect” on the Naches River if the appellant pumped water from his well. As the Court in *Postema* made patently obvious, such a showing is not sufficient to deny the water rights application at issue herein. Accordingly, the PCHB decision

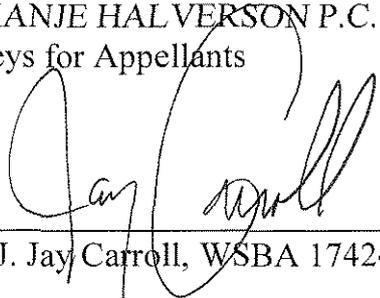
and the Court's affirmance thereof should be reversed and the Petitioner should be granted its requested permits.

V. CONCLUSION

For the reasons stated above, the Court's Order should be reversed and the PCHB decision should likewise be reversed with no remand. The DOE has now had two opportunities to show some sort of impairment that might exist on the Naches River if the wells sought by the Petitioner were allowed. It has failed to do so. After more than twenty years, it is now time to put this issue to bed. The trial court should be reversed and the water certificates sought should be issued.

Respectfully submitted this 22 day of June, 2011.

VELIKANJE HALVERSON P.C.
Attorneys for Appellants

By: 

J. Jay Carroll, WSBA 17424

CERTIFICATE OF SERVICE

I, JENNIFER FITZSIMMONS, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am the assistant to J. Jay Carroll, the attorney for Appellants, and am competent to be a witness herein.

On June 22, 2011, I caused to be sent via U.S. Mail, the original and one copy of the foregoing document to the following:

Clerk, Court of Appeals, Div. III
500 N. Cedar Street
Spokane, WA 99201

On June 22, 2011, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

Joan Margaret Marchioro
WA State Atty General's Office
Ecology Division
2425 Bristol Ct SW, Fl 2
PO Box 40117
Olympia, WA 98504

U.S. MAIL

Dated this 22nd day of June, 2011.

VELIKANJE HALVERSON P.C.


Jennifer Fitzsimmons
Legal Assistant to J. Jay Carroll