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 RULING RE: EXCEPTION TO SUPPLEMENTAL REPORT—GARY MATTHEWS, CLAIM NO. 00516, SUBBASIN NO. 11.

FILED
JAN 2 0 2000
KIM M. EATON
YAKIMA COUNTY CLERK

The Claimant, Gary Matthews, has excepted to the Referee's Supplemental Report, Subbasin 11 for not awarding to the Claimant a water right for one-half acre of lawn and garden irrigation from April 1 through October 1 from Manastash Creek. The Claimant states that "The Referee correctly references State vs Allen, 134 Wn 7 (1925) for the proposition that to the extent that riparian rights have not been exercised and so long as the title to the property remains in State ownership (school lands) riparian rights do not attach to the land until the transfer from the State to private ownership" The Referee had specifically noted the ruling of State vs Allen, supra, p. 26 that "... until school lands pass into private ownership, riparian rights on a stream on such lands do not attach." Further, the Referee indicated "The Water Code was adopted during 1917, thereby providing the only means by which new water rights could be established through the permit procedures set forth in R.C.W. 90.03.250-340. No evidence has been presented which demonstrates that a permit was obtained." It was further noted that the subject property did not

separate from State ownership until March 7, 1918 and that no evidence was presented which demonstrates that a permit was obtained.

Although acknowledging State vs Allen, supra (technically In Re: Crab Creek and Moses Lake), Claimant's take the position that from 1917 to 1932, even with the 1917 act, water rights could still be established by either appropriation and permit or by putting riparian waters to beneficial use, citing to Dep't of Ecology vs Abbott, 103 Wn2d 686 (1985), asserting that in Abbott "...the Supreme Court ...commenting on whether un-used riparian rights survived adoption of the 1917 water code...concluded they did. However, if a riparian owner did not take steps by 1932 to use riparian rights then they would be forfeited and relinquished. Page 695."

This is, in essence, a reference to an inchoate interest in the land. Black's Law Dictionary, Fifth Edition, defines "Inchoate Interest: An interest in real estate which is not a present interest, but which may ripen into a vested estate, if not barred, extinguished or diverted." However, following State Vs Allen, supra, there were no inchoate riparian interests in state school lands until the lands passed into private ownership-in this instance, in March, 1918.

Ecology, in it's Response to Claimant's Exception, merely referenced Allen, supra, and Abbott, supra, and indirectly referenced the inchoate interest stating "...no riparian right attached to the land prior to 1918 when it passed from state to private ownership. A riparian right could not be perfected after 1918 when it did not attach before the date in 1917 when the Water Code was enacted."

In consulting with the Referee's office on this matter, it was brought to the Court's attention that a different counsel, representing a claimant in a different subbasin, made specific reference to In Re: Stranger Creek, 77 Wn2d 649 (1970) concerning this issue. Therein, at p. 657 the Supreme Court stated "We hold that the state may establish riparian water rights in its trust lands, to the same extent that such rights could be established by a private owner...To the extent that the Doan Creek and Crab Creek cases are inconsistent with this holding, they are overruled." This reference was to In Re: Doan Creek, 125 Wn 14 and In Re: Crab Creek and Moses Lake; State vs Allen, 134 Wn 7. Thus, the Court specifically overruled the holding in State vs Allen, supra, "that until school lands

pass into private ownerships, riparian rights on a stream on such lands do not attach." This ruling, overturning State vs Allen, would therefore establish inchoate riparian rights in the state school trust lands, which were created by the Washington State Enabling Act, February 22, 1889 (25 Stat. 676) Therefore, State vs Abbott, supra, allowing inchoate riparian rights to become perfected riparian water rights if applied to beneficial use prior to a 1932 cutoff date, not withstanding the 1917 water code, would apply to the subject property, which passed into private ownership in March 1918.

This is further buttressed by the Supreme Court referring to In Re: Stranger Creek in Key Design Inc. vs Moser, 138 Wn2d 875, (1999) p. 882 as follows: "We will not overturn an established rule unless the party challenging it makes a clear showing that the rule is incorrect and harmful. An example of such a showing occurred in In Re: Stranger Creek, 77 Wn2d 649, in which we over ruled two prior cases when the Department of Natural Resources showed that the holdings worked to the public detriment by destroying the benefits of the use of the State's trust land and the holdings were not compelled by the state constitution."

In view of all of the foregoing, the Court holds that the exception of the Claimant is allowed and the right requested by the Claimant will be granted pursuant to whatever evidence of beneficial use was presented by the Claimant

Dated this 20th day of January, 2000

Judge