

WASHINGTON STATE POLLUTION CONTROL HEARINGS BOARD ANNOUNCES NEW RULE FOR AVOIDING RELINQUISHMENT DUE TO WATER “UNAVAILABILITY”

***Ege v. Ecology*, PCHB No. 05-033 (Order Denying Summary Judgment, February 10, 2006).**

In closely-watched appeal challenging the Department of Ecology’s interpretation of a key exception to the five-year “use it or lose it” relinquishment statute, the Washington Pollution Control Hearings Board (PCHB) announced a new standard for applying the statutory excuse for nonuse of water due to “drought or other unavailability of water.” The Board’s new legal standard will require water right holders to prove (1) that their non-use of water was due to actions “reasonably outside their control” and (2) that they took “reasonably diligent steps” toward any actions they could have taken to make beneficial use of their water rights.

The PCHB’s recently-announced approach to water “unavailability” is another example of the Board’s strict construction of the statutory excuses for non-use and exemptions from relinquishment. See *City of Union Gap and Ahtanum Ridge Business Park v. Ecology*, PCHB No. 05-078 (January 5, 2006). However, because the PCHB ruled that “further evidence” was necessary but the appellants recently withdrew their appeal before the hearing on the merits, the PCHB has yet to apply its new test to specific facts.

Background

Washington’s relinquishment statute provides for forfeiture if a water right holder voluntarily fails, without sufficient cause, to use all or any portion of a water right for five consecutive years. See RCW 90.14.180. The relinquishment statute specifies several excuses for nonuse of water, defining “sufficient cause” as “the nonuse of all or a portion of the water by the owner of a water right for a period of five or more consecutive years where such nonuse occurs as a result of . . . [d]rought, or other unavailability of water,” among other things. RCW 90.14.140(1).

This appeal arose after Ecology denied applications by Karl and Carol Ege to change the point of diversion of their water rights from the surface water of the Methow River to groundwater wells on their property. Ecology found the Eges’ surface water rights had been relinquished due to nonuse. Mr. and Mrs. Ege acknowledged the nonuse, but asserted the “unavailability of water” as an excuse from relinquishment. Both the Eges and Ecology moved for summary judgment, based on a complicated and apparently undisputed set of facts.

The Eges’ water rights, originally established in 1936, are part of a shared community ditch system that was historically used to convey water from the Methow River for irrigation of numerous properties. The water was first diverted from the river through three diversion inlets into a two-mile-long side channel known as the Sloan-Wichert Slough, which had been used as a source of irrigation water since the earliest settlements

in the area. From the slough, water was diverted into two ditches, including the McKinney Mountain Ditch. From a headgate on the ditch, water was diverted through a series of smaller lateral ditches and used to successfully flood-irrigate the Ege property until the late 1960's. The Eges' water right certificates identified the Methow River as the source of the water, and the point of diversion as the point at which the McKinney Mountain Ditch diverted water from the slough.

As the PCHB described it, beginning in the early 1970's "multiple natural events and some human interventions" combined to make it increasingly difficult to utilize the ditch system to flood-irrigate the Ege property. These included flood-induced channel incision of the slough; construction of dikes – in response to flooding – which covered the previously open diversions from the river to the slough; and installation of culverts in the dikes which were inadequately-sized to allow sufficient flow into the slough. As a result of the lowering of the water surface elevation in the slough, the Ege property, which is at a higher elevation, could no longer be flood-irrigated with water from the ditch.

After flows in the slough and ditch became limited, the irrigators, including the former owners of the Ege property, undertook efforts to cure the problem of the lower water level in the ditch. In particular, they attempted to repair the dike and install larger culverts at the intake to the slough, which would have allowed more water from the river to flow into the ditch. The PCHB found that these efforts "were unsuccessful for many reasons, one of which was the ultimate refusal of a Department of Fish and Wildlife employee in 1987 to allow installation of larger culverts or to allow the culverts to be installed at a lower elevation to account for the scouring of the bed of the [slough]."

In 2002, the Methow River changed course and moved several hundred feet, rendering both the slough and the ditch useless. That same year, a state grant was approved to switch the McKinney Mountain Ditch irrigators to groundwater wells and abandon the ditch. All the property owners who had used the ditch system applied to change their water rights to groundwater wells. Although Ecology approved change applications for many of the other water right holders, it denied the Eges' application because of nonuse.

The PCHB noted that in the intervening years when water levels in the slough and ditch were inadequate for flood irrigation, some affected water right holders switched to pumping water from the ditch, pumping water from other surface water bodies, or pumping water from existing domestic wells to run sprinkler systems for irrigation. Although acknowledging that some of these actions were "taken without appropriate approvals from Ecology," the PCHB characterized them as "steps to continue to utilize their water rights."

The Eges, however, relied upon the long-term community efforts by the ditch owners "in lieu of adopting an individual solution to the irrigation problems" on the Ege property. The property did not have an existing well. Mr. Ege estimated that in the 1970's it would have cost more than \$50,000 to install a well and other systems to irrigate with sprinklers. The PCHB found that neither party submitted evidence of the cost of installing a pump in the ditch or the slough, although Mr. Ege submitted a declaration disputing the efficacy

of pumping water from the ditch to his property because of the minimal flows in the ditch.

The PCHB Decision

After reviewing the evidence submitted by the Eges and Ecology, the PCHB concluded that “there are material facts related to the causes for nonuse of water that have not been fully set out in the record, and therefore, this matter cannot be decided on summary judgment.” However, the Board went on to set forth its interpretation of the relevant statutory requirements.

Under Washington law, once nonuse is proven for the requisite five-year period, the burden shifts to the water right holder to establish “sufficient cause” for nonuse. The Eges argued that the unavailability of water through the ditch system provided sufficient cause for nonuse; Ecology argued that water was available in the Methow River itself. The Board phrased the “key question” as “what defines ‘unavailability’ sufficient to justify the nonuse of water? If water exists at the point of diversion, but it is completely or to some degree inaccessible to the water holder, then is it available such that the nonuse was voluntary?”

Ecology asked the PCHB to define “unavailability” so as to require a water right holder to “pursue all practicable remedies” to ensure beneficial use; the Eges argued for a more general rule of “common sense” that would assess the reasonableness of the parties’ conduct in each situation. The PCHB determined that the standard for “unavailability” lies “somewhere in between” the rules offered by the parties in this case.

The PCHB held first that to constitute “sufficient cause” for nonuse under the relinquishment statute, an action must be “outside the control of the water user.” The Board cited decisions from the pending Yakima River general stream adjudication holding that “sufficient cause” had been shown by “the combination of a destroyed diversion structure and lack of action by Ecology,” and by “reasonable maintenance” after breakdowns prevented diversion. The Board went on to cite other cases concluding that “where the water rights holder could take certain steps to access or use water, or take actions within their own control,” then sufficient cause for nonuse “for an extended period of time” could not be established. The Board summarized this approach as “an assessment of the reasonableness of the nonuse based on the amount of control the water rights holder had in the particular situation.”

The PCHB concluded that “a two part test or inquiry is to be applied where a water rights holder claims sufficient cause for nonuse based on the ‘drought, or other unavailability of water’ exception to relinquishment,” asking first: “Has the water rights holder proved sufficient cause for the nonuse of water due to actions reasonably outside their control?” and then: “If there were actions the water rights holder could have taken to make beneficial use of the water, did they take reasonably diligent steps to do so?”

The PCHB decided that it needed to review additional evidence in order to properly apply this two-part test to the Eges' water rights: "The Eges' reliance on the efforts of third parties and the Ditch Association to correct the problems in the [ditch] is a relevant consideration in assessing the reasonableness and diligence of their attempts to make use of the water, but it is only one of several relevant factors that should be considered in the analysis. . . . Testimony at hearing would provide or clarify facts related to available diversion and irrigation options, availability of water at the diversion point, available and changing technology, cost, strategies used by other irrigators, the relevance of these factors, and other considerations best left to the parties to address."

Recently, the Eges withdrew their appeal prior to the hearing on the merits, so we are left with the PCHB's legal interpretation of "unavailability" but without an example of how the PCHB would have applied its two-part test to these various considerations.

Conclusion and Implications

In fashioning its two-part test for determining "unavailability" of water, the PCHB did not mention an interesting footnote in a 1999 opinion by the Washington Supreme Court discussing this aspect of relinquishment:

If, as the Department [of Ecology] suggests, hydrologic or engineering difficulties are encountered which prevent beneficial use of water after a final certificate of groundwater right has been issued, for example, *where a well "runs dry," the resulting failure to actually apply water to beneficial use before amendment is sought may be excused*. The statutory relinquishment statutes evidence legislative intent that loss of a water right, and its priority, not occur where unavailability of water prevents beneficial use. For example, RCW 90.14.160-.180 define five years of nonuse as the voluntary failure to beneficially use the water right. Further, RCW 90.14.140(1)(a) establishes that sufficient cause precluding relinquishment for nonuse exists where there is drought or unavailability of water.

R.D. Merrill Co. v. PCHB, 137 Wash.2d 118, 133 n.7, 969 P.2d 458 (1999) (emphasis added). The Supreme Court's example, in which a well that "runs dry" could preclude relinquishment, might not pass muster under the PCHB's new two-part test. Rather, the PCHB's legal interpretation of "unavailability" probably makes it necessary to ask: why didn't the water right holder just drill another well? That, in turn, compels the question: when is water ever truly "unavailable"?