

## **WASHINGTON COURT OF APPEALS AFFIRMS RELINQUISHMENT AND REJECTS EXEMPTIONS**

*City of Union Gap and Ahtanum Ridge Business Park, LLC, v. Washington Department of Ecology*, \_\_\_ Wn.App. \_\_\_, \_\_\_ P.3d \_\_\_, 2008 WL 4878895, Wash.App.Div.3, November 13, 2008 (No. 26555-2-III)

On November 13, 2008, the Washington Court of Appeals dealt a new blow to the City of Union Gap in its efforts to convert an unused industrial water right to municipal supply purposes. The court affirmed a summary judgment ruling by the Washington Pollution Control Hearings Board (PCHB) that an intended transfer of an industrial water right to the City of Union Gap did not occur soon enough to avoid relinquishment, rejecting the City's efforts to rely upon relinquishment exemptions for municipal water supply and a "determined future development."

### **Relinquishment in Washington**

Under Washington law, the owner of a water right relinquishes that right to the state if the right is not beneficially used for five consecutive years. RCW 90.14.160, 90.14.170, and 90.14.180. Nonuse may be excused for "sufficient cause" which is spelled out in the relinquishment statute. *See* RCW 90.14.140(1). In addition, certain water rights are exempt from relinquishment, including rights claimed for municipal water supply purposes and rights claimed for a "determined future development" to take place within 15 years of the last use of the water right. RCW 90.14.140(2).

### **Factual Background**

In 1999, Ahtanum Ridge Business Park, LLC – a developer – purchased a former slaughterhouse property and its water rights, intending to redevelop the property and sell the water rights to the City of Union Gap. It was undisputed that the water rights had gone unused since May 1995, when the slaughterhouse closed. Before purchasing the property, the developer met privately with City officials in the fall of 1999. The City officials agreed orally to buy the water rights once the developer purchased them. As the court characterized it, this agreement "was conceptual and did not include a purchase price, payment method, or the quantity of water rights to be transferred."

By May of 2000, the water rights had gone unused for five consecutive years. The developer had purchased the property and water rights, but did not yet have a written agreement to sell the water rights to the City. In March 2001, the City and the developer entered into a written agreement, but still did not agree on the purchase price, terms of payment, or the quantity of water supply, and in fact the parties continued to negotiate through 2005.

In July 2001, the City formally applied to change the purpose of the water rights from industrial to municipal supply. The Department of Ecology concluded that the water rights had been forfeited to the state because of unexcused nonuse for more than five

consecutive years. Both the Pollution Control Hearings Board and the Yakima County Superior Court agreed that the water rights had been relinquished.

### **“Determined Future Development” Exemption**

The City and the developer argued that these water rights were exempt from relinquishment because the developer timely claimed the rights for a “determined future development” and for “municipal water supply purposes” under RCW 90.14.140(2)(c) and (d) prior to the expiration of the five-year period of nonuse. The court first noted that the applicability of the statutory exemptions is a question of law, and that it need not review any factual determinations by the PCHB because there was no dispute over the material facts.

Following the Supreme Court’s approach in *R.D. Merrill Co. v. Pollution Control Hearings Board*, 137 Wn.2d 118, 969 P.2d 458 (1999), the court narrowly construed the exceptions to statutory forfeiture so as to further the purpose of the statutory scheme to “cause a return to the state of any water rights which are no longer exercised by putting said waters to beneficial use.” Construing the exemption for “determined future development” in *R.D. Merrill Co.*, the Supreme Court held that a plan is “determined” when it is fixed conclusively or authoritatively, and that such a plan must be “determined” within five years of the most recent beneficial use of the water right.

The court rejected the developer’s argument that its stated intent and its oral agreement in the fall of 1999 to sell the water rights to the City constituted a determined future development plan. Clearly troubled by the argument that “anyone may claim a water right for a determined future development” and the lack of “objective” evidence of the plan, the court reasoned:

The court’s decision in *R.D. Merrill Co.* is helpful. There, the court required an objective showing that a determined future development exists; specifically, “some affirmative steps toward realization of the fixed development plans must occur.” *R.D. Merrill Co.*, 137 Wn.2d at 146. The court set out a list of factors which would serve as objective evidence indicating actual implementation of a development. They include: “applying for necessary county and other permits, notifying the Department [of Ecology] of plans to use the water right in connection with a future development, actual physical development consistent with the fixed development plans such as clearing land or commencing construction, and acquiring additional lands, rights or materials needed to implement the determined development plan.” *Id.* Implicit in the court’s discussion is, first of all, the notion that the claim is for use of a water right actually held by the person or entity claiming the exception. And second, the claim is for some anticipated use of that right by the holder of that right, here Ahtanum. We conclude, then, that Ahtanum must show some determined future development, as opposed to a bald statement that a development exists, to assert the exception to the general rule of relinquishment. *See id.* at 142, 146. And it has not done so.

The court's invocation in this case of the "affirmative steps" requirement from *R.D. Merrill Co.* is questionable, because it collapses the two distinct requirements announced by the Supreme Court for the "determined future development" exemption from relinquishment. The first requirement is for a fixed plan prior to the end of five years of nonuse. The second requirement is for "some affirmative steps toward realization" of that fixed plan prior to the expiration of *fifteen* years from the date of last use. In this case, only the former requirement is at issue; fifteen years have not yet elapsed since the date of last use of the water right.

Having confused the requirement for taking steps toward implementation of the plan with the requirement for fixing a plan, the court went on:

The only person who risks losing a water right is the person entitled to the right—the owner of the water right. And, of course, the water right owner is also the only entity who should bear the burden of proving that it should retain the water right. A water right owner avoids relinquishment only by showing sufficient cause or by the application of an exception. RCW 90.14.140. The exceptions asserted by Ahtanum, therefore, required *Ahtanum* to act—to claim its rights for a determined future development.

The court explained: "In other words, Ahtanum is responsible for its rights, not Union Gap. And so it is the water rights owner who must demonstrate the existence of a 'determined future development.'" Ruling that "development" means "a land-use-type of development," the court held that the developer's "potential sale to Union Gap is not a 'determined future development.'"

### **"Municipal Water Supply Purposes" Exemption**

The court also rejected the developer's and the City's arguments that one or both of them had claimed the water rights for "municipal water supply purposes" prior to the expiration of five years of nonuse. The court stated first that "our earlier discussion about the word 'claimed' applies here. And the statutory scheme again assumes that the exception is asserted by the water right owner."

The court explained:

Here, Union Gap asserts a claim of municipal use but Union Gap does not own the water rights. Ahtanum owns the rights. And, moreover, the owner's claim must be made *before* five years of nonuse passes. *Cf. R.D. Merrill Co.*, 137 Wn.2d at 143. In other words, this exception can save Ahtanum's rights from relinquishment for nonuse only when it, the owner of the water rights, can demonstrate that it timely chose to assert its water rights for municipal water supply purposes.

The developer contended that it demonstrated that it claimed its rights for municipal water supply purposes in 1999 by decommissioning its wells, giving the City control over the rights, and developing its land without using the water rights. The court disagreed:

Ahtanum gave Union Gap some control at an unknown time because it did not want to pay the cost of transferring the rights. Allowing Union Gap to “control” the rights, then, had less to do with asserting the rights for municipal water supply purposes and more to do with avoiding the cost of satisfying a condition precedent to the parties’ agreement. The parties’ purchase-sale agreement was contingent on Ecology approving the transfer. Ahtanum was obligated to assert the rights for municipal water supply purposes only after Ecology approved the transfer. But Ecology denied the transfer.

The court also rejected the argument that the water rights were “claimed for municipal water supply purposes” when Union Gap filed an application to change the purpose of the rights from industrial to municipal:

But again, only Ahtanum, the water rights owner, can claim the exception to relinquishment. *See R.D. Merrill Co.*, 137 Wn.2d at 142, 146. And even if Union Gap could claim the rights for such purposes, its “claim” was untimely. *Cf. id.* at 143. Union Gap filed the application in July 2001, more than six years after the rights were last beneficially used.

The court concluded that Ahtanum relinquished its water rights to the state.

### **Conclusion and Implications**

It would be an understatement to say that this case presents unusual facts – not least of which would be the fact that, as the PCHB observed, there was “not a single document or official action” by the City of Union Gap establishing a firm, definitive or conclusively fixed plan for the acquisition and use of the water rights before the end of the five-year period of nonuse. This lack of convincing evidence proved fatal to the effort to claim the “municipal” exemption or the “determined future development” exemption from relinquishment.

The court of appeals’ misapplication of the rules enunciated by the Supreme Court in *R.D. Merrill Co.* may create some momentary confusion about the “determined future development” exemption from relinquishment. The court’s decision also implicitly suggests that the Department of Ecology might defeat an exemption from relinquishment and cause forfeiture simply by delaying action on a water right change application, raising troubling implications for water right transfers. However, given the peculiar facts of this case, the court of appeals’ reasoning will probably be confined to those facts and is unlikely to herald a departure from existing law.