

COURT APPROVES HISTORIC GROUNDWATER SETTLEMENT BETWEEN WASHINGTON AND LUMMI INDIAN NATION

United States and Lummi Indian Nation v. Washington Department of Ecology, U.S. District Court (W.D. Wash.) No. C01-0047Z

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Following several years of litigation, Washington's first-ever tribal-state-federal water rights settlement has received federal court approval in Seattle. On November 20, 2007, U.S. District Court Judge Thomas Zilly signed a judgment and order approving the settlement to resolve a long-standing water conflict on the Lummi Reservation in northwest Washington.

Background

In January 2001, the United States, in its own right and on behalf of the Lummi Indian Nation, filed a lawsuit in federal district court against the Washington Department of Ecology and land owners who owned wells on a portion of the Lummi Reservation. The Lummi Indian Nation intervened in the suit as a plaintiff, and the court ordered the plaintiffs to join all non-Lummi land owners within the litigation area. The plaintiffs sought declaratory and injunctive relief concerning the Lummi Indian Nation's right to groundwater within the litigation area.

The dispute centered on how water should be allocated on the Lummi Peninsula portion of the Lummi Reservation, located northwest of Bellingham. The peninsula, which relies on a freshwater aquifer for its water supply, is bounded by the Strait of Georgia and Bellingham Bay. Over-pumping of the aquifer poses a risk of saltwater intrusion. The plaintiffs sought a declaration that the Treaty of Point Elliott implicitly reserved to the Lummi Nation rights to surface water on and groundwater under the Lummi Peninsula that are prior and paramount to the rights of other water users.

Settlement Agreement

In an order conditionally approving the settlement agreement, Judge Zilly stated that the agreement "reflects difficult decisions and substantial compromise, and it offers a comprehensive and workable solution for all water users in the Case Area." Judge Zilly observed that the settlement "exhibits a balance rarely seen in litigation concerning a precious and potentially scarce commodity; it preserves the resource rights of the Lummi Nation, while guaranteeing existing users a sufficient amount of water for their needs and making water available for a limited number of future users."

The agreement recognizes that approximately 900 acre-feet of water can be used each year without risking saltwater intrusion. Assuming an actual safe yield of 900 acre-feet

per year, the settlement agreement allocates a certain amount of groundwater to each of the constituencies involved in the litigation, without regard to seniority or vesting of water rights. Ecology is granted exclusive regulatory authority over approximately 120 acre-feet per year of this available water, to be allocated for use primarily by non-tribal property owners. An additional 95 acre-feet per year is already committed to non-Lummi water users under other settlements and service arrangements. The Lummi Nation may authorize withdrawal of all groundwater not subject to allocation by Ecology or committed to non-tribal water users, provided that chloride levels remain within an acceptable range. The settlement agreement identifies the presence of chloride as an indication of saltwater intrusion, and sets a goal of maintaining less than 100 milligrams of chloride per liter of water.

According to the court, the state allotment under the agreement provides water for every existing home in the litigation area, as well as sufficient water for approximately 110 currently undeveloped parcels. The court observed that these currently undeveloped parcels “would not have water rights but for the Settlement Agreement because, under federal and state law, water rights depend on actual use.”

The agreement provides for court appointment of a water master who will resolve any water conflicts that may arise in the future. Well drilling will require specific written approval from either the Lummi Nation or the Department of Ecology, depending upon which entity exercises water use authority over the applicant’s property. All residents with wells will be required to meter their water use and provide water quality sampling data. Wells using the Ecology allocation will have specific withdrawal limits based on the amount of water allotted to the state. Limits on wells using the Lummi allocation will be determined with reference to standards to protect against saltwater intrusion.

As the court recognized, the Settlement Agreement substantially departs from the methods under federal and state law for determining the priority of water rights. The water allocation system “obviates the need to quantify the water rights of the Lummi Nation or to determine whether various non-Indian successors perfected and maintained their *Winters/Walton* rights.” At the request of the parties, the court vacated certain prior orders in the case, in which it identified the water reserved to the Lummi Nation under the *Winters* doctrine as the amount associated with “practicably irrigable acreage” in combination with domestic supply, and ruled that where an Indian allottee transfers property to a non-Indian the successor must act with diligence to perfect the *Winters* rights and then maintain the water rights through continuous use.

“The Lummi Nation is pleased that we have been able to cooperatively resolve this vital issue for a portion of our Reservation,” said Chairwoman Evelyn Jefferson. “We look forward to solving similar issues in the rest of the Reservation and in the Nooksack basin.”

“I thank the Lummi Nation and the local water users for coming together to make this happen,” said Ecology Director Jay Manning. “For non-tribal water users, this means an end to the uncertainty that has shadowed the use and enjoyment of their property for

many years. For all residents, tribal and non-tribal alike, this agreement guarantees sustainable management practices to protect the resource now and into the future.”

Conclusion and Implications

Various property owners, acting pro se, objected to the settlement agreement prior to the court’s final approval. As of this writing, it is unknown whether the court’s final judgment will be appealed. Whether or not it is appealed, the *Lummi* settlement represents a dramatic departure from the status quo of tribal-state water disputes in Washington, and may point the way toward similar negotiated solutions elsewhere. The court’s final approval puts the settlement agreement into effect immediately, and authorizes the Lummi Nation and the Department of Ecology to begin their coordinated management program.