"PREVENTION, NOT ENFORCEMENT": THE CONUNDRUM OF "REGULATION" BETWEEN WATER RIGHTS IN WASHINGTON

***Rettkowski v. Ecology,* 122 Wn.2d 219, 858 P.2d 232 (1993)**
***Anderson Parker Investments, LLC v. Ecology*, PCHB No. 09-115 (2010)**

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Since the Washington Supreme Court decision in *Rettkowski v. Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1993), the Washington Department of Ecology has been precluded from determining "the existence, quantities, and relative priorities of various legally held water rights" outside of the context of a general stream adjudication conducted by a superior court. The Supreme Court held that Ecology has no authority to issue cease and desist orders to water right holders it unilaterally determines to be junior in priority to senior water right holders – or, in the agency's parlance, to "regulate" one water right in favor of another.

During the 18 years since *Rettkowski* was decided, Ecology has repeatedly sought legislative authority to "regulate" between water rights; all these efforts have been unsuccessful. Recently, Ecology relied on its inability to "regulate" as a justification for denying a water right change. In *Anderson Parker Investments, LLC v. Ecology*, PCHB No. 09-115 (2010), the Pollution Control Hearings Board endorsed Ecology's rejection of a mitigation proposal that would have created a trust water right for instream flows, agreeing with Ecology that because of *Rettkowski* the agency could not prevent junior water right holders from using the water.

An attempted "fix" of the *Anderson Parker* problem – a bill providing an explicit process for Ecology to protect similar trust water rights dedicated to instream flows – failed to pass the 2011 Legislature. After *Anderson Parker,* water right applicants may be under pressure to support legislation to undo *Rettkowski* – or face new obstacles in fashioning mitigation proposals to enable approval of their applications.

Washington's water code

In 1917, Washington enacted its current water code, RCW chapter 90.03, which set up an exclusive permit system for new surface water appropriations. The permit system was extended to groundwater in 1945 with the enactment of RCW chapter 90.44. A state agency – presently the Department of Ecology – administers the permit system, which embodies the doctrine of prior appropriation (or "first in time, first in right").

The water code recognizes and protects older appropriative rights established prior to enactment of the surface water and groundwater permit system, subject to requirements to file water right claims to document those vested rights. *See* RCW 90.14.010 – 90.14.121. One stated purpose of the water right claims requirement was: "Water rights will gain sufficient certainty of ownership as a result of this chapter to become more freely transferable, thereby increasing the economic value of the uses to which they are put, and augmenting the alienability of titles to land." RCW 90.14.020(7).

From its inception, Washington's water code has contained provisions for a general adjudication process for determining water rights. *See* RCW 90.03.110 – 90.03.245; RCW 90.03.620 – 90.03.645; RCW 90.44.220. Responsibility for conducting general adjudications is entrusted to the superior courts. To date, adjudications have occurred in only a small number of Washington's water sources.

Ecology's permitting authority

Under the water code, Ecology must investigate each application for a new water right to determine whether a four-part test is met: (1) water is available for appropriation; (2) the proposed appropriation is for a beneficial use; (3) the appropriation will not impair existing rights; and (4) the appropriation will not be detrimental to the public welfare. RCW 90.03.290; see *also* RCW 90.44.060 (making RCW 90.03.290 applicable to groundwater).

Most changes and transfers of water rights must also be approved by Ecology. RCW 90.03.380; RCW 90.44.100. Some change applications are decided first by county water conservancy boards under RCW chapter 90.80, but the local boards' decisions are subject to veto by Ecology. *See* RCW 90.80.080. Changes to groundwater rights must satisfy the same four-part test as applications for new water rights. RCW 90.44.100(2). Changes to surface water rights are subjected only to an impairment test, i.e., they must not cause detriment or injury to existing rights. RCW 90.03.380(1).

Ecology's permitting decisions and decisions on applications to change or transfer existing water rights are appealable to the Pollution Control Hearings Board (PCHB).

"Prevention, not enforcement"

The Washington Supreme Court has held that Ecology "must reject the application and refuse to issue a permit if there is no unappropriated water available, if withdrawal will conflict with existing rights, or if withdrawal will detrimentally affect [the] public interest." *Jensen v. Ecology*, 102 Wn.2d 109, 112-13, 685 P.2d 1068 (1984). Accordingly, Ecology has historically denied applications in situations where impairment of other rights appeared likely to occur.

In numerous cases before the PCHB, disappointed permit applicants have argued that Ecology should have granted their permit applications and then turned to "regulation" to address impairment or over-appropriation. The PCHB has overwhelmingly rejected these arguments.

In 1988, the PCHB affirmed the denial of a new water right application in a basin where Ecology was conducting an ongoing study of the basin aquifers but had incomplete information to determine whether there was water available or whether the appropriation would impair existing rights. The PCHB held that in such a situation the appropriate response was to deny the permit application because "in these circumstances the proposed use 'threatens to prove detrimental to the public interest.'" *Black Star Ranch and Eckerich v. Ecology*, PCHB No. 87-19 (1988) at 11 (quoting RCW 90.03.290). The PCHB explained that development of the proposed new appropriation posed risks of hardship not only to other water users whose rights may be interfered with, but to the permittee as well. The risk of hardship to the permittee arose "because the solution to an interference problem is to shut him off, thus threatening the loss of his investment." The PCHB explained:

> The water codes are designed to prevent new appropriators from buying into this kind of trouble. Otherwise the permit system would have no function. All uses could simply be regulated on the basis of priority. Where there wasn't enough water to go around, those who guessed wrong would just have to suffer the consequences. The permit system is intended, to the extent possible, to head off such problems before they occur. In large measure, the state water agency's function is prevention, not enforcement.

Id. at 12. In subsequent cases, the PCHB has cited *Black Star Ranch* in affirming denial of groundwater permit applications where Ecology had identified a high risk that further appropriations would result in groundwater mining to the detriment of prior appropriators. *E.g.*, *Stout v. Ecology*, PCHB No. 89-99 (1990); *Lamberton v. Ecology*, PCHB No. 89-95 (1990).

The PCHB has even rejected an applicant's proposal to make its permit interruptible – enabling Ecology to shut off flow on days when actual river flows fell below regulatory minimum flow levels – in order to protect instream flows from impairment:

> Because new water rights, if perfected, exist in perpetuity, the state water code requires Ecology to investigate any new application to protect existing water rights from impairment. RCW 90.03 does not contemplate permitting all requested uses and then requiring Ecology to regulate them on the basis of priority to prevent junior rights from impairing senior ones. The permitting system is designed to head off regulatory problems inevitable if new rights are granted that must be interrupted to service senior ones. As this Board has stated: 'In large measure, the state water agency's task is prevention, not enforcement.'

Strobel v. Ecology, PCHB No. 96-52 (1997).

Unfortunately, Washington's water right permitting system has not entirely headed off such regulatory problems. The limits of the "prevention, not enforcement" approach are obviously tested when, notwithstanding the agency's application of the four-part test in approving a new water appropriation, the exercise of a junior water right appears to actually cause impairment of an existing right. This is the situation that gave rise to the *Rettkowski* case.

The Supreme Court's decision in *Rettkowski*

In *Rettkowski v. Ecology*, a group of ranchers who claimed pre-1917 rights to the waters of Sinking Creek for stockwatering complained that the creek was being dewatered by permitted groundwater withdrawals by irrigators with water rights issued between the 1950's and 1979. The ranchers' complaints began in the mid-1960's, but Ecology continued to issue groundwater permits in the area. In 1982, Ecology issued a report concluding that diminished Sinking Creek flows were due in part to increased groundwater withdrawals. In 1990, Ecology determined that the ranchers' rights were superior in priority to the irrigators' rights, and issued orders to the irrigators to cease their groundwater pumping on the ground that it was injuring the ranchers' senior water rights. The irrigators appealed.

The Supreme Court identified the issues before it as "whether Ecology possesses the statutory power to (1) determine the priorities of water rights in the basin, and (2) issue enforcement orders consistent therewith." The court answered both questions in the negative, because the authority to adjudicate and enforce water rights was specifically granted to the superior courts in the general adjudication provisions of the water code. The court explained that even though general stream adjudications could be complex and

protracted, "[t]he allocation of water rights in this state is of such great magnitude that we cannot tolerate a 'cheap and easy' solution."

The court's analysis began with "a fundamental rule of administrative law – an agency may only do that is it is authorized to do by the Legislature." While Ecology could not identify any statute that specifically authorized the procedures it followed in issuing the "cease and desist" orders to the irrigators, Ecology argued that it derived inherent authority to do so from the penumbra of several statutes. The Supreme Court disagreed:

> [T]hese broad enabling statutes are silent as to how Ecology is to determine water rights in a regulatory context. This silence is even more telling when compared to the elaborate general adjudication process for determining water rights entrusted to the superior courts by RCW 90.03. Nowhere in Ecology's enabling statutes was it vested with similar authority to conduct general adjudications or even regulatory adjudications of water rights. An administrative agency cannot modify or amend a statute through its own regulation. . . . The absence of a specific grant to Ecology to determine water rights, coupled with an explicit grant to another branch of government to do exactly that, makes Ecology's determination of such rights seemingly ultra vires.

Rettkowski v. Ecology, 122 Wn.2d 219, 227, 858 P.2d 232 (1993).

Ecology also asked the court to recognize its "regulation" of water rights as an extension of its authority to make "tentative determinations" in the context of applications for water right permits. The court rejected that argument, noting first that "there is nothing 'tentative' about Ecology's orders, which shut off every irrigation well in the Sinking Creek basin." The court explained that Ecology's authority in the permitting situation is limited to tentatively determining whether there are existing water rights with which the proposed use would conflict. But once a permit has been granted, the situation is significantly different, because "[p]ermit holders have a vested property interest in their water rights to the extent that the water is beneficially used." The court explained:

> Unlike the permitting process, in which Ecology only tentatively determines the existence of claimed water rights, a later decision that an existing permit conflicts with another claimed use and must be regulated necessarily involves a determination of the priorities of the conflicting uses. In order to properly prioritize competing claims, it is necessary to examine when the use was begun, whether the claim had been filed pursuant to the water rights registration act, RCW 90.14, and whether it had been lost or diminished over time. These determinations necessarily implicate important property rights. It is because of the complicated nature of such

> inquiries, and their far-reaching effect, that the Legislature has entrusted the superior courts with responsibility therefor.

Id. at 228. The court emphasized the due process protections inherent in the general adjudication procedures specified in the water code. Although initiated by Ecology, a general adjudication is conducted under the auspices of the superior court. Ecology's role is to advise the court as to the parties claiming rights to the water source, and the priority, amount, and validity of such rights. However, these determinations are not made by Ecology *sua sponte*; Ecology conducts hearings in which all parties can present evidence as to their claims, examine the evidence of other claimants, and question the validity of competing claims. "A general adjudication ensures that all interested parties are heard in a formal adjudicative setting and that adequate due process is afforded to all." *Id*. at 229.

By contrast, if Ecology were allowed to "regulate" based on its own determination of relative priorities, "Ecology could circumvent the general adjudication process by conducting minor, ad hoc investigations and subsequent piecemeal adjudications throughout the state." *Id*. at 230. The court cautioned that a claim which allegedly dates back to the turn of the century may be found, upon closer examination, to be flawed for a variety of reasons – but "Ecology's orders assumed that the Ranchers' claims were entirely valid without ever undertaking the formal statutory process necessary to make such a determination." *Id*. at 231. The court observed that most of what Ecology attempted to accomplish through its "ad hoc adjudication" between the ranchers' and the irrigators' rights could have been legally accomplished by following the adjudication provisions in the Water Code.

Rejecting the argument that the public trust doctrine justified Ecology's attempted "regulation" between water rights, the court explained that "the issue in this case has never been Ecology's ability to regulate generally, which is admitted. Rather, at issue is Ecology's specific ability to establish and prioritize water rights unilaterally, without a general adjudication, to the detriment of other water users." *Id*. at 232. The court held that Ecology had no authority to issue cease and desist orders to the irrigators without first utilizing a general adjudication to determine the existence, amount, and priorities of the water rights claimed in the Sinking Creek basin.

"The end of civilization as we know it"

Two justices vigorously dissented from the court's opinion in *Rettkowski*, arguing for Ecology's authority to regulate: "The Director of Ecology, upon reading the majority opinion, will surely scratch her head in wonderment that she has the responsibility for issuance of water use permits but no authority to regulate those permits." *Id*. at 237 (Guy, J., dissenting). The dissent argued that the court's decision leads to "absurdity" because Ecology "might issue a permit with the condition that the appropriation is subject to

existing rights; but if a week later it became clear that water use under the permit was impairing a senior right, Ecology could not act to protect the senior water user because that would constitute an adjudication of the water rights involved." *Id*. at 238.

Characterizing the court majority's decision as "bad law and bad policy," the dissent concluded with a plea for a far-reaching legislative reexamination of Washington water law:

> To those who cry out that the majority's unsettling opinion constitutes the end of civilization as we know it, or that the sky is truly falling, do not despair. The Legislature must now address itself to a comprehensive water policy defining duties, assigning responsibility to perform those duties, and providing funding necessary to carry out those duties. The Legislature must consider whether western water law meets today's societal needs, given the understanding that water is not an infinite resource. The Legislature must now examine the water resources of this state and determine, for example (1) who controls those resources; (2) the extent of all government allocations of those water resources; (3) the present water usage from all sources, allocated and unallocated; (4) what water resources will be available in the future; (5) what future water needs will be; (6) how water allocations should be made; (7) what public interest is involved in water allocations and use; and, (8) if water allocations are to be changed as to existing users, whether under existing law that constitutes a taking for which compensation must be paid.
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> The majority's opinion provides a legislative opportunity to address the difficult and politically sensitive issues involving allocation of water resources. Given the imperative that resources must be properly managed for all users – public, agricultural, hydroelectric, fish and wildlife, recreational – the majority's opinion may lead to comprehensive, well-considered water resource management that is workable and understandable.

Id. at 243-44.

Since *Rettkowski* was decided in 1993, the Legislature has enacted several new programs in the area of water resources – e.g., local watershed planning, county water conservancy boards, and trust water right program reforms – but the comprehensive reevaluation of western water law and policy envisioned by the *Rettkowski* dissent has not occurred. However, the predictions of doom that greeted the *Rettkowski* decision have not come true, either. Ecology's inability to "regulate" between water rights has not led to chaos as initially predicted, which perhaps explains why several efforts by the agency to obtain

authority to "regulate" (including a recent proposal for "limited adjudications") have been rebuffed by the Legislature.

The *Anderson Parker* case

It appears that the greatest impact of the *Rettkowski* decision may be felt by water right applicants. In *Anderson Parker Investments, LLC v Ecology*, PCHB No. 09-115 (2010), the Pollution Control Hearings Board reviewed and affirmed Ecology's denial of a water right change based in part on the agency's inability to "regulate" against other water rights.

In *Anderson Parker*, the applicant sought changes in the place of use, purpose of use, points of diversion, and season of use of an unadjudicated water right claim with a 1911 priority date. To offset the impact of the proposed change in season of use, the applicant would have permanently transferred a portion of the water right (totaling approximately 1 cfs during the irrigation season) into the state's Trust Water Right program. Ecology presented evidence that approximately 100 intervening junior certificate or permit holders are located between the existing point of diversion and the proposed downstream points of diversion, with rights subject to interruption or curtailment when minimum instream flows are not being met. One of the reasons Ecology denied the water right change was its concern that it could not "regulate" the interruptible certificates of junior water users in favor of such a Trust Water Right.

In a ruling granting summary judgment in Ecology's favor, the PCHB explained:

> Ecology asserts that in the absence of authority to regulate water from a water right claim against certificate or permit holders with interruptible rights, these interruptible water right holders would be able to withdraw or divert the water as the water travels downstream past control points. This would allow interruptible water right holders to withdraw or divert more water than they would otherwise be entitled because the additional flows could delay curtailment of their water rights. When the water right holders approved under Anderson Parker's proposed transfer subsequently withdraw the water, it amounts to a "double dip" effect on the Columbia River. Because it is possible to withdraw this water twice, it impacts the unmet minimum instream flow established for the Columbia River.

The PCHB's decision does not specifically address the likelihood of this "double dip" occurring (although it does acknowledge that it is "unclear how frequently Ecology would be required" to curtail junior water right holders). Because they are interruptible, the junior water right holders would be curtailed by Ecology (under its clear authority to enforce minimum instream flow regulations) when river flows are at or below regulatory minimum flows. When river flows exceed the regulatory minimum flows by more than 1

cfs – the amount of the proposed trust water right – junior interruptible rights could legally be exercised to the extent of that excess flow. From the PCHB's decision, it may be inferred that a "double dip" could theoretically occur only when river flows exceed minimum flows by less than 1 cfs.

The applicant argued that in administering the Trust Water Right program, Ecology has the same opportunity as any other water right holder to obtain injunctive relief in superior court to enjoin junior water right holders from usurping a trust water right. Thus, Ecology's inability to "regulate" was irrelevant; Ecology would have been able to protect the 1 cfs trust water right without resorting to "regulation" of junior water rights.

Ecology cited *Strobel v. Ecology*, PCHB No. 96-52 (1997), for the proposition that the water code is "designed to prevent potential problems between water right holders without regulation" – which begs the question of why, utilizing the "prevention, not enforcement" approach, the agency had issued approximately 100 junior water rights in potential conflict with this senior 1911 right and minimum instream flows.

Characterizing as "persuasive" Ecology's argument that it could not "regulate" against junior water right holders who might take the water instead of leaving it in the river, the PCHB granted summary judgment to Ecology. The PCHB ruled that "Ecology does not have a duty to seek injunctive relief in Superior Court on behalf of water right change applicants" as part of its evaluation of water right change applications:

> The Board recognizes it may be difficult at times for a claim holder who seeks a water right change to structure a proposal that would avoid impairment, but this does not justify a shift in responsibility from the change applicant to Ecology to fashion a proposal that prevents impairment.

The 2011 Legislature failed to pass a bill that would have provided a quick process for Ecology to obtain injunctive relief in superior court to prevent infringement of a trust water right. After the PCHB's ruling, the applicant in *Anderson Parker* resubmitted its request and obtained a determination that "overriding considerations of the public interest" justified approval of the change.

Conclusion and Implications

For decades, Ecology has denied applications for new water rights, using a "prevention, not enforcement" approach and refusing to rely on future "regulation" to address conflicts between water users. Ironically, in *Anderson Parker* Ecology presumed that hordes of junior water right holders would take water to which they are not entitled, and relied on the *lack* of "regulation" to reject the effectiveness of the applicant's streamflow augmentation. Because the PCHB decision in *Anderson Parker* was not appealed, the

courts have not had an opportunity to address whether this result was compelled by *Rettkowski*.

It seems clear that the PCHB's decision in *Anderson Parker* will raise the stakes for other water right applicants hoping to use an existing water right to offset the impacts of a new appropriation or change. In effect, *Anderson Parker* has shifted to water right holders and applicants the responsibility to address Ecology's inability to "regulate" between water right claims and water right permits/certificates. It remains to be seen whether this new pressure on applicants will be translated into the legislative grant of authority that Ecology has sought for nearly two decades since *Rettkowski* was decided.

4818-9355-5466, v. 1