WASHINGTON ENACTS RELINQUISHMENT EXCEPTION FOR WATER RIGHT CHANGE APPLICATIONS

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Published in *Western Water Law & Policy Reporter*
Volume 16, No. 6
April 2012
www.argentco.com

Continuing a recent pattern of incremental reforms to the water right relinquishment statute, Washington has enacted an amendment intended to protect water rights for which change applications are pending before the Department of Ecology. House Bill 1381 passed the Legislature with nearly unanimous support and was signed by Governor Chris Gregoire on March 7, 2012. The bill amends RCW 90.14.140(1) to provide that "[w]aiting for a final determination from the department of ecology on a change application" will constitute "sufficient cause" for nonuse of a water right. However, water right holders should view this amendment with some caution. If this new exception is narrowly construed, it may well turn out to be a trap for the unwary – instead of a safe harbor from relinquishment.

Washington's Relinquishment Statute

Washington enacted its first statutory forfeiture law in 1967. Nonuse of a water right prior to 1967 could result in loss of the right only under application of the common law abandonment doctrine – which requires a showing of intent to give up the right coupled with lack of use. The relinquishment statute eliminates the requirement to prove intent to abandon a water right.

Under RCW chapter 90.14, a water right may be subject to relinquishment if, without sufficient cause, the holder of the right voluntarily fails to beneficially use the right for a period of five consecutive years after July 1, 1967. Relinquishment applies only to water rights that have been beneficially used; under RCW 90.14.150, water rights that are still in permit status are not subject to relinquishment.

There are three separate relinquishment statutes, each applicable to a particular category of water rights. RCW 90.14.160 provides for relinquishment of water rights that vested prior to the 1917 Water Code, generally evidenced by water right claims, or that were authorized by a general adjudication. RCW 90.14.170 provides for relinquishment of riparian rights. RCW 90.14.180 provides for relinquishment of surface water and groundwater rights authorized under water right certificates.

Significantly, relinquishment can occur in whole or in part. Unlike some other western states, Washington law allows partial relinquishment where a water right is actually used but not exercised to its fullest extent. This is the typical circumstance in which water right holders find themselves, and is more common than situations involving total nonuse. Relinquishment is often referred to as a "use it or lose it" rule – but in Washington it is perhaps better characterized as "use it **all**, or lose it a little bit at a time."

Relinquishment Exceptions

As might be expected, the risk of partial relinquishment operates as a tremendous disincentive to conservation. Recognizing this, the Washington Legislature has occasionally flirted with the idea of comprehensive reform of relinquishment law, but has ended up instead enacting a hodgepodge of exceptions. The heart of Washington's relinquishment law is RCW 90.14.140 – which specifies exceptions falling into two categories: "sufficient causes" for nonuse (RCW 90.14.140(1)) and outright exemptions from relinquishment (RCW 90.14.140(2)).

Several types of water rights are completely exempt from relinquishment, including rights claimed for power development, rights used for a standby or reserve water supply, rights claimed for a "determined future development", rights claimed for municipal water supply purposes, and trust water rights held by the State for purposes of instream flow or groundwater preservation. RCW 90.14.140(2). For a water right that is not exempt under RCW 90.14.140(2), nonuse must be excused by a "sufficient cause" in order to avoid relinquishment.

"Sufficient causes" include drought or other unavailability of water, active service in the U.S. armed forces during military crisis, the operation of legal proceedings, federal or state agency leases or options, reduced water need due to weather conditions, reliance on return flows, and "temporary" crop rotation. RCW 90.14.140(1).

The Effect of HB 1381

HB 1381 amends RCW 90.14.140(1) to add "[w]aiting for a final determination from the department of ecology on a change application" to the list of "sufficient causes" for nonuse

of water. In testimony before legislative committees, supporters of the bill generally described it as necessary to avoid "penalizing" a water right holder due to delays and backlogs at Ecology.

Ecology's Fiscal Note on the bill even went so far as to suggest that HB 1381 would amount to a tolling provision: "We anticipate that the addition of this exception would create an incentive for water users in jeopardy of relinquishing their water rights due to nonuse to submit a change application to the department so they would now have sufficient cause for nonuse as they wait for the department to act on their application." The agency estimated that approximately 20 water right change applications would be filed each year by applicants seeking "relinquishment protection" by filing a change application.

HB 1381 passed the House on a vote of 89-2 and passed the Senate on a vote of 48-0. Governor Chris Gregoire signed the law on March 7, 2012. Now the question is: what will be the impact of this broadly-supported new relinquishment exception?

Ecology's water right permitting program suffers from serious lack of funding and processing backlogs, and water right change applications can sometimes take years to reach a final decision. Horror stories abound, but *Welke v. Ecology*, PCHB No. 07-013 (2007), provides the best recent example of the problems the Legislature hoped to address in enacting HB 1381. In *Welke*, the water right holders were under the mistaken belief that they were not authorized to use their water while their application for a change in the point of diversion was pending before Ecology. When Ecology finally got around to acting on their change application – ten years after it was filed – the agency determined that the water right had been relinquished for nonuse.

It remains to be seen, however, whether HB 1381 will protect water right holders in similar circumstances. Some skepticism is in order, based upon the express statutory language elsewhere in RCW 90.14.140(1) and rules of statutory interpretation.

To begin with, the introductory clause of RCW 90.14.140(1) is hardly a model of clarity. It states: "For the purposes of RCW 90.14.130 through 90.14.180, 'sufficient cause' shall be defined 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: . . ." – followed by the list of twelve "sufficient cause" exceptions including the newly-enacted amendment.

The first issue posed by this introductory language is that it includes five or more consecutive years of nonuse in the definition of "sufficient cause" – which, applied literally, means that a "sufficient cause" that does not continue for at least five years provides no protection from relinquishment. *See Pacific Land Partners, LLC v. State Dept. of Ecology*, 150 Wn. App. 740, 756-58, 208 P.3d 586 (2009) (stating that "[r]elinquishment is precluded

if one of the enumerated exceptions in RCW 90.14.140 prevented beneficial use up to the end of the five-year period" and "the question is whether water was unavailable due to hydrologic, engineering, or other external reasons throughout the five-year period"). Applied literally, this language could result in relinquishment in situations where water right change applicants wait for fewer than five years to get decisions from Ecology.

The second issue with this introductory language is that nonuse must occur "as a result of" the sufficient cause. This language has been interpreted by the courts to avoid relinquishment only where the "sufficient cause" actually prevented the use of water. The Washington Supreme Court has explained: "In addressing the exceptions to relinquishment, it is important to bear in mind that generally exceptions to statutory provisions are narrowly construed in order to give effect to legislative intent underlying the general provisions." *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 140, 969 P.2d 458 (1999).

Construing the "operation of legal proceedings" exception, the Supreme Court held that "the exception requires that the nonuse of water be attributable to the legal proceedings, i.e., that the legal proceedings prevent the use of water." *Id*. at 141-42. The Court elaborated:

> "This approach is in keeping with the general provisions favoring beneficial use of water unless there is **some legitimate reason why the water cannot be used**. Here, while development plans may have been delayed as a result of the litigation, it is not clear **whether beneficial use of the water for other purposes was prevented** while the litigation was pending."

Id. at 142 (emphasis added). *See also Ege v. Ecology*, PCHB No. 05-033 (narrowly construing the "unavailability of water" exception).

Based upon *Merrill*, a water right holder should expect similar questions to be asked about nonuse during the time a water right change application is pending before Ecology. Under the Washington water code, an applicant can continue to exercise a water right as originally authorized while applying for approval of a change to the right. It may be very difficult to establish that waiting for Ecology to make a decision actually prevented a water right holder from using water. Unless there is some other "legitimate reason why the water cannot be used," nonuse might result in relinquishment if the new exception is narrowly construed.

It should be noted that HB 1381 was originally introduced as part of a package of bills by the same sponsor addressing various aspects of relinquishment reform. One of those bills, HB 1378 – which failed to pass the Legislature – would have amended RCW 90.14.140 to require that it be "liberally construed to effectuate" its purposes. It should also be noted that Ecology's former manager of the Water Resources Program testified in opposition to

that entire package of bills during the 2011 legislative session. Ecology supported HB 1381 in the 2012 session – but at that point HB 1381 was unaccompanied by any other legislation providing for "liberal construction" of relinquishment exceptions. Unless the Legislature enacts a contrary statement of legislative intent similar to HB 1378, the courts and the PCHB will probably continue to apply the rule of narrow construction, with predictable results.

Conclusion and Implications

Water right holders should be cautious about relying on the new relinquishment exception for nonuse while waiting for Ecology to act on a change application. Notwithstanding Ecology's description of HB 1381 during the legislative process, applicants should not assume that nonuse is automatically exempt from relinquishment during the time a change application is pending. Until the courts definitively construe this new exception, protection from relinquishment can be assured only if the water right holder continues to exercise the water right while waiting for Ecology to act on a change application – either by using the water or placing it temporarily in the Trust Water Right program.

HB 1381 illustrates some of the difficulties inherent in incremental reform of Washington's relinquishment laws. HB 1381 is almost universally popular and undeniably stems from concepts of fundamental fairness. Nevertheless, this new relinquishment exception will be applied in the context of a broader existing statute, and subject to existing rules that can make relinquishment difficult to avoid.

HB 1381 is a modest reform – a tweak to a statute in need of an overhaul. The State of Washington has yet to conquer the challenge of comprehensive relinquishment reform that protects water right holders, prevents water hoarding, and removes disincentives to water conservation.

Note: HB 1381, Washington Laws of 2012, chapter 7 can be found at:
http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Law%202012/1381.SL.pdf

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