# WASHINGTON COURT OF APPEALS ISSUES NEW INTERPRETATION OF STATE'S WATER RIGHTS RELINQUISHMENT STATUTE

***Pacific Land Partners, LLC, v. Ecology*, 150 Wn.App. 740, 208 P.3d 586 (2009)**

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In its third decision in four years applying Washington's water right relinquishment statute, Division III of the Court of Appeals affirmed forfeiture of a water right from the Walla Walla River based on nonuse after foreclosure by the federal Rural Economic and Community Development Agency (RECD). As in *Motley-Motley, Inc. v. Pollution Control Hearings Board*, 127 Wn. App. 62, 110 P.3d 812 (2005) and *City of Union Gap v. Ecology*, 148 Wn. App. 519, 195 P.3d 580 (2008), the appeals court rejected efforts by the current water right holder to claim various exceptions from relinquishment. The decision underscores the need for continued beneficial use of water rights during and after foreclosure proceedings.

**Washington's Relinquishment Law**

Under Washington law, the owner of a water right certificate "who voluntarily fails, without sufficient cause, to beneficially use all or any part of said right" for any period of five successive years relinquishes that right to the state. RCW 90.14.180. Similar forfeiture provisions apply to vested rights established prior to the permit system and to rights established under riparian ownership. RCW 90.14.160, 90.14.170.

The relinquishment statute defines "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" various circumstances listed in RCW 90.14.140(1). The list of "sufficient causes" for nonuse includes "drought, or other unavailability of water," and the "operation of legal proceedings." RCW 90.14.140(1)(a), (d). In addition, certain water rights are exempt from relinquishment, including 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).

The party asserting statutory relinquishment of a water right has the burden of proving nonuse. Once that occurs, the burden shifts to the water right holder to prove that nonuse is excused by a statutory exception. *Ecology v. Acquavella*, 131 Wn.2d 746, 758, 935 P.2d 595 (1997).

Between 1983 and 1999, the "operation of legal proceedings" excuse was interpreted broadly by the Pollution Control Hearings Board (PCHB) to apply to "all proceedings authorized or sanctioned by law and brought or instituted in a court or legal tribunal for the acquiring of a right or the enforcement of a remedy." The PCHB announced this interpretation in *Attwood v. Ecology*, PCHB No. 82-58 (1983) (excusing nonuse of water prior to entry of final decree in a general stream adjudication). Beginning in 1999, however, the "operation of legal proceedings" excuse was significantly narrowed by the Washington Supreme Court. In *R.D. Merrill Co. v. Pollution Control Hearings Board*, 137 Wn.2d 118, 141-42, 969 P.2d 458 (1999), the court held:

> While this may be a correct definition of what constitutes a legal proceeding, the fact that a legal proceeding exists involving a water right holder's land or development plans does not in itself compel application of the exception.
>
> RCW 90.14.140(1)(d) requires that nonuse of the water be 'the result of' the legal proceedings. . . . Read narrowly to preserve the general statutory provisions, the exception requires that the nonuse of water be attributable to the legal proceedings, i.e., that the legal proceedings prevent the use of the water.

The *Pacific Land Partners* case unfolded against the backdrop of this evolving interpretation of the relinquishment statutes.

**Factual Background**

From 1973 to 1987, Mr. Lavern Mickelson owned 200 acres of property with an appurtenant surface water certificate for irrigation from the Walla Walla River. By 1986, he had encountered financial difficulties and stopped irrigating. In 1987, the federal Rural Economic and Community Development Agency (RECD) foreclosed on Mr. Mickelson's property and bought the property and its appurtenant water right at a foreclosure sale. In 1988, the RECD removed the irrigation equipment from the property. In March 1995, the RECD offered the property to the public at auction.

Prior to the auction, Mr. Paul Bernsen, owner of Pacific Land Partners, investigated the diversion and found the old intake structure buried in silt. He also contacted the Department of Ecology and asked about the status of the Mickelson water right. He obtained a memo from

Ecology staff that said the water right previously associated with the property had been lost because of nonuse. Mr. Bernsen posted this Ecology memo at the RECD public auction, and was the successful bidder. He paid $112,000 for the property, and executed a sales agreement acknowledging that the prior water right had expired for nonuse, that an easement from the Army Corps of Engineers for the diversion pipeline had also lapsed, and "therefore the property is being offered as dry land."

Despite these acknowledgements and the initial memo he obtained from Ecology, Mr. Bernsen believed that nonuse of the water right was excused from relinquishment by the "operation of legal proceedings" due to the RECD foreclosure. After making his successful bid on the property, he again contacted Ecology to ask about the "legal proceedings" exception and its applicability to the foreclosure. He provided Ecology with documents substantiating the federal foreclosure proceedings, and requested confirmation that the "legal proceedings" exception would excuse nonuse during the RECD ownership.

In May 1995, Ecology responded by stating that it appeared the property had been "in various stages of litigation" until Mr. Bernsen bought it, and that the five-year nonuse period started running as of the date of his purchase. Ecology told him that "it would be advisable to bring this property into full irrigation within the next 5 years." However, Mr. Bernsen never used the water right.

In December 2000, Mr. Bernsen applied to place the water right temporarily into the Trust Water Right program for three years. When Ecology investigated the application, it determined that the water right had not been put to beneficial use since 1983 and that Mr. Bernsen had not shown "sufficient cause" for the nonuse. Ecology issued an order of relinquishment in 2002, which Mr. Bernsen appealed unsuccessfully to the PCHB.

**The Court of Appeals' Decision**

The court stated the issue as "whether the water right appurtenant to the Mickelson property was relinquished due to nonuse before Mr. Bernsen bought the property." The court began its analysis by noting that the relinquishment statute applies to "a person who holds a water right and who voluntarily fails, without sufficient cause, to beneficially use all or a portion of the right" for five consecutive years, and that under the statute the word "person" includes the United States of America "when claiming water rights established under the laws of the state of Washington." RCW 90.14.031(1).

The court first disposed of Mr. Bernsen's argument that Ecology was equitably estopped from denying that the RECD's nonuse of the water right was excused from relinquishment:

> Ecology's opinion regarding application of the legal proceedings exception – which was based on evidence presented by Mr. Bernsen – involved a legal

> conclusion, rather than an issue of fact. Equitable estoppel does not apply to statements that are issues of law, even when the statement of law is incorrect.

Next, the court addressed the "operation of legal proceedings" exception, discussing the 1999 decision in the *Merrill* case that "the legal proceedings must prevent beneficial use of the water for any purpose" in order for the exception to apply:

> Mr. Bernsen carried the burden of showing that the legal proceedings exception excused nonuse of the Mickelson property water right from 1986 through May 1995. . . . While the foreclosure proceedings may have prevented Mr. Mickelson from using the water right for irrigation, the foreclosure proceedings did not in themselves prevent all beneficial use of the water right after the RECD bought the property in 1987. The RECD chose to remove the irrigation equipment rather than to continue that beneficial use. Mr. Bernsen does not show how foreclosure prevented any beneficial use of the water right. He does not provide evidence that the RECD was restrained by the foreclosure legal proceedings from using the water right for any purpose.

Finally, the court refused to address newly-asserted arguments by Pacific Land Partners based on federal preemption and sovereign immunity, because those issues had not been raised before the Pollution Control Hearings Board. *See* RCW 34.05.554(1).

Concluding that "the water right was relinquished due to nonuse during the period it was owned by the RECD," the court additionally went on to address Mr. Bernsen's nonuse after 1995. The court stated that even if the water right "was not relinquished by May 1995, . . . Mr. Bernsen's failure to beneficially use the water right during the first five years of his ownership is fatal to his claims."

The court characterized the issue of relinquishment during Mr. Bernsen's ownership as "whether the Board was required to enter a finding that Mr. Bernsen's nonuse of the water right was voluntary." Mr. Bernsen contended that the PCHB never found and Ecology never proved that he voluntarily failed to use the water right. He argued that without a finding that his nonuse was voluntary, the burden of proof never shifted to him to prove that he had sufficient cause for nonuse.

Noting that "voluntarily" is not defined in the relinquishment statute, the court gave the word "its ordinary and usual meaning as found in a dictionary," i.e., "of one's own free will . . . . proceeding from the will: produced in or by an act of choice . . . done by design or intention: not accidental. . . . intentionally; without coercion." Mr. Bernsen contended that his nonuse of the water right was involuntary between the time of his purchase and 1998, because the water

intake in the river was buried in silt; all the irrigation equipment had been removed; the pipeline easement had lapsed; he could not have set up irrigation in time for the 1996 crop year; and financial obstacles forced him to seek alternative sources for his water, such as new wells. The court rejected this argument:

> No case has interpreted the language of RCW 90.14.180 the way Mr. Bernsen urges here. . . . In effect, the language 'voluntarily fails, without sufficient cause, to beneficially use' (RCW 90.14.180) has been interpreted to mean something like 'fails to beneficially use a known water right, unless this failure is excused under a statutorily recognized exception.' . . . Whether or not Mr. Bernsen's nonuse from March 1995 to March 1998 was against his will, it was not accidental. The directive from the legislature is that his right must be forfeited unless he qualifies for one of the narrowly defined exceptions.

The court went on to address Mr. Bernsen's contention that two relinquishment exceptions applied to his nonuse. Rejecting Mr. Bernsen's argument that "unavailability of water" excused nonuse because of the siltation at the diversion intake, the court relied upon the PCHB findings that an operable irrigation system could have been installed within about six months at a cost of less than $10,000: "Mr. Bernsen failed to show that he could not have beneficially used his water right within five years after he bought the property."

The court also rejected Mr. Bernsen's argument that the water right was exempt from relinquishment during his ownership because it was "claimed for a determined future development" – pivot irrigation – to take place within 15 years of the most recent beneficial use of the water right. *See* RCW 90.14.140(2)(c). Following caselaw requiring a "firm, fixed, definitive development plan" prior to the expiration of five years of nonuse (*see R.D. Merrill Co.,* 137 Wn.2d at 142-43), the court observed that although Mr. Bernsen spent at least $100,000 on development of the property for pivot irrigation, he also explored various alternative plans and ideas during that time. This consideration of inconsistent alternatives proved fatal: "Mr. Bernsen failed to show he had settled upon a single, fixed plan for pivot irrigation before May 2000."

The court agreed with the PCHB's conclusions that neither the "unavailability of water" excuse nor the "determined future development" exemption applied. Accordingly, the relinquishment order was affirmed.

**Conclusion and Implications**

*Pacific Land Partners* is the first Washington appellate case to hold that a lender – including a federal agency lender – will relinquish a water right if it fails to beneficially use water while pursuing foreclosure. This may encourage lenders to take different approaches to foreclosure,

aimed at preserving property values through continued agricultural operations wherever possible. Lenders without the authority or the wherewithal to allow continued irrigation will face the unpleasant prospect of seeing the value of their collateral significantly reduced. Given the current economic downtown, the outcome of this case may be expected to fuel proposals for legislative amendments to protect lenders – and borrowers as well – in foreclosure proceedings.

*Pacific Land Partners* is also the first appellate case to analyze the meaning of the word "voluntarily" in the relinquishment statute, equating it with "not accidentally." On the facts of this case, the court did not have occasion to give examples of "accidental" nonuse. Although delineation of the boundaries of "accidental" nonuse must await a future case, it should be expected that under most circumstances "voluntary" nonuse will be found where the nonuse does not qualify for any of the statutory exceptions to relinquishment.

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