

WATER LAW UPDATE: POLLUTION CONTROL HEARINGS BOARD RECENT DECISIONS

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Presented at the 17th Annual Conference on Washington Water Law
April 10 and 11, 2008
Law Seminars International

I. Introduction

The following materials provide a summary of water right cases decided during the past year by the Pollution Control Hearings Board (PCHB).

II. *Will v. Ecology*, PCHB No. 05-023

Findings of Fact, Conclusions of Law and Order (June 26, 2007)

This case arose in the Okanogan River Basin, WRIA 49. Ecology approved changes to a groundwater permit to add a new point of withdrawal and create a more flexible place of use. The original permit was expressly subject to senior surface water rights downstream in the Sinlahekin Creek basin, and Ecology's change authorization maintained that original restriction. The water right holder appealed this condition, challenging Ecology's determination that his wells are in hydraulic continuity with surface water in Sinlahekin Creek.

Mr. Will had previously conducted a short pump test resulting in no observed drawdown, and he testified that there is an abundance of surface water in the area around his farm. Based on his personal observations and the results of the pump test, Mr. Will argued that pumping from his wells would not affect any surface water rights or flows in Sinlahekin Creek.

The PCHB held that Mr. Will was precluded by the doctrine of *res judicata* from challenging the original condition on his water right permit making it subject to existing surface water rights.

Although it affirmed the Ecology condition on this basis, the Board also provided an illuminating discussion of its current views on hydraulic continuity and groundwater-surface water interaction. The Board observed:

Groundwater and surface water are not separate categories of water. There is a dynamic connection between them and, in hydrology, there is no meaningful distinction between surface water and groundwater because they form a continuum in the hydrologic cycle. These designations just describe the physical location of some of the water in a water body within the hydrologic cycle. In a given portion of a stream, groundwater could become surface water through upwelling springs, and surface water may become groundwater in other portions of the stream by sinking back into the ground.

The Board endorsed Ecology's use of the Theis nonequilibrium equation to assess the effect of the proposed wells on the creek and to determine that the wells and the creek are in "significant" hydraulic continuity. Responding to Mr. Will's arguments about the results of his pump test, the PCHB accepted Ecology's view that, because of areas of low conductivity, an aquifer pump test might not show direct effect on surface waters for months or longer. Mr. Will's argument was not helped by the fact that he had simultaneously received approval of a similar change to a surface water right from Sinlahekin Creek, which, as the Board pointed out, could not have occurred in the absence of a finding of hydraulic continuity between his wells and the creek.

III. Naselle Water Co. v. Ecology, PCHB No. 07-057

Order Granting Motion for Summary Judgment (August 13, 2007)

This case also involves an attempt to invalidate a previously-imposed restriction on a water right. As in the *Will* case, the failure to have appealed the previous decision was fatal.

In 1996, the Naselle Water Company had obtained a surface water right that was, according to the Report of Examination, "supplemental" to another certificate. The ROE provided that the total diversion from both rights could not exceed a specified annual quantity. When the water company filed its Proof of Appropriation showing use of a higher annual quantity, Ecology notified it that a certificate would issue for only the maximum amount identified in the 1996 ROE. The water company appealed.

Holding that the terms of the 1996 ROE are no longer subject to challenge after the 30-day appeal period had expired, the Board granted Ecology's motion to dismiss the appeal for lack of jurisdiction.

IV. Welke v. Ecology, PCHB No. 07-013

Order Granting Summary Judgment (September 20, 2007)

This case presents a cautionary tale with very unfortunate facts. In 1993, Mr. and Mrs. Welke purchased land in Okanogan County with an existing irrigation right on Myers Creek. After the purchase closed, Mr. Welke wrote to Ecology to request that the water right be changed to their names. An Ecology employee responded that he was unable to find any record of a water right associated with their property, and stated: "If we cannot come up with any water right, water use will have to be curtailed." Mr. Welke responded with another letter providing more information. The same Ecology employee engaged in further research, but still failed to locate any right to divert water from Myers Creek.

The owners sent a business associate to Ecology's offices to do additional research. He located a water right certificate granting an irrigation right from Myers Creek covering the Welkes' property. The point of diversion described on the certificate, however, was different from the diversion point that had been used prior to the Welkes' purchase. Accordingly, the business associate prepared an application to change the point of diversion and filed it with Ecology in 1996. In response to the change application, Ecology sent the Welkes a letter saying that the agency could not process their application for "some time" because it was short of staff. The letter also said "I regret that a decision on your application cannot be made sooner and strongly advise against investing further in your project unless you are issued a water right permit."

The Board found that Mr. Welke interpreted this letter to mean that the status of his right to divert water was still in question, and that he was not authorized to divert water from Myers Creek. The Welkes had stopped diverting from Myers Creek in 1995, based upon the statement in Ecology's initial letter. Mr. Welke was confused about the status of the certificate, and believed that he had to wait until Ecology told him he could use the water.

Finally, Ecology investigated the Welkes' change application in 2006 – ten years after it was filed. By 2006, however, Mr. and Mrs. Welke had not used the water for irrigation for more than five continuous years. Ecology found that the water right had been relinquished for nonuse and denied the application for the change in point of diversion.

The Board rejected the Welkes' argument that the doctrine of equitable estoppel precluded Ecology's determination that their water right was not eligible for change due to

more than five continuous years of nonuse. Significantly, the Board held that the Welkes' reliance on Ecology's statements was not reasonable under the circumstances:

Water rights are a valuable commodity and they are subject to loss if they are not used. . . . While it is regrettable that Mr. Welke did not fully understand his rights, it was not reasonable for him to simply wait several years for Ecology to tell him he could use water from Myers Creek. He had some responsibility to resolve any confusion about his rights under Certificate #218 and to take necessary steps to preserve those rights.

The PCHB concluded its lengthy discussion of equitable estoppel by ruling that "if the representation relied upon is a matter of law, the doctrine will not be invoked even when the elements can be proved," citing *Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 43 P.3d 4 (2002). The Board held: "If Ecology had stated that Mr. Welke could not use water under Certificate #218, which the Board finds it did not, it would have been an incorrect opinion regarding the law. . . . any suggestion by Ecology that Mr. Welke could not use water from Myers Creek would be a matter of water law, precluding the use of equitable estoppel."

The Board granted summary judgment dismissing the Welkes' appeal.

V. Burton Water Company v. Ecology and Misty Isle Farms, PCHB No. 07-100

Order on Summary Judgment (March 3, 2008)

This appeal involves an Ecology decision to approve a change in place of use for water rights held by Misty Isle Farms, a cattle ranch on Vashon Island. Burton Water Company, a public water system providing drinking water to 415 households, obtains groundwater from a shallow aquifer. The primary recharge area for the shallow aquifer is land owned by Misty Isle Farms. In 2002, Ecology approved a change to Misty Isle Farms' water rights allowing irrigation of additional lands acquired since the water rights were issued. The 2002 change authorization was granted on the condition that Misty Isle Farms conduct a five-year sampling and monitoring program on a 54-acre parcel where particular water quality concerns had been identified. After reviewing the monitoring report, Ecology issued an order in 2007 granting final approval, and the Burton Water Company appealed.

Misty Isle Farms and Ecology moved for summary judgment dismissing the appeal. The Board ruled that the scope of this appeal is limited to the 2007 decision, and that the terms of Ecology's 2002 decision are not subject to challenge in this case. The Board denied summary judgment, however, because it found there are material facts in dispute with respect to impairment, detriment to the public interest, and compliance with the terms of the 2002 Ecology decision. The case remains pending.

VI. Cornelius, et al. v. Ecology and Washington State University, PCHB No. 06-099

Order on Summary Judgment (as amended on reconsideration) (January 18, 2008)

Ecology approved changes in points of withdrawal to consolidate Washington State University's water rights serving its Pullman Campus – to enable pumping from any of the WSU campus wells. (Similar changes were approved for the City of Pullman on the same day.) Appellants Scott Cornelius, Palouse Water Conservation Network, and Sierra Club Palouse Group challenged the WSU change approvals, raising numerous issues.

The PCHB ruled on summary judgment as follows:

Constitutional claims: The appellants asserted constitutional challenges to the Municipal Water Law, “as applied” to the facts in this case. The appellants, joined by Ecology, also contended that the Board lacks jurisdiction to consider the constitutional claims. The PCHB held that, regardless of how they are labeled by the parties, the constitutional challenges raised by the appellants “are tantamount to a facial challenge of the statute,” and that the Board does not have jurisdiction over such a facial challenge.

“Municipal water supplier” and “municipal water supply purposes”: The Board ruled that WSU is a “municipal water supplier” under RCW 90.03.015(3). The Board also held that each of WSU's rights at issue is for a municipal water supply purpose.

Application of the municipal water law: The Board ruled that Ecology's application of RCW 90.03.330(3) to WSU's water right certificates was proper.

Perfection and reasonable diligence: The Board ruled that the groundwater change statute, RCW 90.44.100, allows changes to unperfected groundwater rights, regardless of whether the right is represented by a permit or certificate. The Board also held that WSU had exercised reasonable diligence to perfect the inchoate portion of its rights, noting that the “reasonable diligence” requirement “is a flexible standard, and the Board believes that flexibility in interpreting it is particularly important with regard to water rights for municipal supply purposes.” The Board noted that WSU had developed campus facilities and increased student enrollment over time, and has not engaged in marketing its water rights.

Beneficial use: The appellants contended that irrigation of the WSU golf course fails to satisfy beneficial use requirements. The Board ruled: “By virtue of Respondent's motion for summary judgment, Appellants have the burden to show that a triable issue exists whether WSU's water use is reasonably efficient. Without more, the observations of Mr.

Cornelius, who is admittedly not an expert in this area, along with the photographs and temperature data, fail to establish a genuine dispute about the reasonable efficiency of WSU's water use."

Enlargement: The appellants raised several "enlargement" claims based upon two separate theories. The Board rejected the Appellants' first theory – that "enlargement" occurs when a change in point of withdrawal enables a water right holder to exercise a greater quantity of an existing right than is being exercised at the original point of withdrawal. The Board specifically overruled conclusory "enlargement" language in *Jellison v. Ecology*, PCHB No. 88-124 (1989). The Appellants' second theory of "enlargement" is predicated upon the "supplemental" nature of the University's most junior water right and the effect on that "supplemental" right of Ecology's determination that one of WSU's older water right claims is not a valid right. This latter issue was heard in January 2008; the Board's decision is pending.

Relinquishment: The Board ruled that to the extent that each of WSU's rights are claimed for, and meet the definition of, "municipal water supply purposes" under RCW chapter 90.03, as a matter of law the rights are categorically exempt from relinquishment for nonuse. The Board reached this conclusion "by interpreting and applying the statutes as they are written, without reaching Appellants' facial challenge to the constitutionality of the 2003 MWL."

Abandonment: The Board also granted summary judgment for WSU on the issue of abandonment, noting "the important distinction between abandoning a *well* and abandoning a water *right*." (Emphasis in original.) The Board found no intent to abandon any WSU right.

Impairment: The Board concluded that Appellants had put material facts into dispute on the question of impairment, sufficient to defeat summary judgment. However, the Board specifically rejected "Appellants' theory that impairment results simply because consolidation of the rights may allow WSU to pump more of its authorized rights from a declining source aquifer than is presently possible from existing wells." This issue was heard in January 2008; the Board's final decision is pending.

Aquifer depletion: The Board granted summary judgment for WSU on this issue because "Appellants' arguments regarding aquifer depletion fundamentally challenge the *exercise* of WSU's water rights, not the change or consolidation of them." (Emphasis added.)

Detriment to public welfare: Observing that "this Board has recognized that public interest and impairment determinations are related, and inadequate impairment analysis may bring into play the public interest criterion," the PCHB ruled that its conclusion that the impairment issue must proceed to hearing "necessarily prevents summary judgment on

the issue of the public welfare.” This issue was heard in January 2008; the Board’s final decision is pending.

Adequacy of SEPA review: The Appellants argued that the DNS issued by WSU failed to disclose adverse impacts of increased pumping by WSU on the declining water levels in the Grande Ronde Aquifer. Their arguments were based on the assumption that but for the well consolidation, WSU would not have been able to pump enough water from its existing wells to serve campus needs. Finding no need for additional environmental analysis, the PCHB ruled that Ecology’s decision to rely on the existing DNS was not clearly erroneous.

Sarah Mack has over twenty-five years of experience representing clients in complex project permitting and related litigation throughout Washington. Her practice emphasizes water rights and water supply planning, including administrative and judicial appeals, for both public sector clients and private developers. She is one of the attorneys representing Washington State University in *Cornelius, et al. v. Ecology, et al.*, PCHB No. 06-099.

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