WASHINGTON SUPREME COURT REJECTS "OVERRIDING CONSIDERATIONS OF THE PUBLIC INTEREST" AND INVALIDATES RESERVATION OF WATER FOR OUT-OF-STREAM USES

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Published in *Western Water Law & Policy Reporter*
Volume 18, No. 2
December 2013
www.argentco.com

Swinomish Indian Tribal Community v. Washington Dept. of Ecology, 178 Wn.2d 571, 311 P.3d 6 (2013)

The Washington Supreme Court has decided that "overriding considerations of the public interest" do not allow the Washington Department of Ecology to create a reservation setting aside water for future out-of-stream beneficial uses in the Skagit River Basin. In a broadly-worded opinion reinforcing the supremacy of minimum instream flows necessary for fish, wildlife, scenic, and aesthetic values, the Court has undermined other basin regulations with similar set-asides for domestic, industrial, municipal, or agricultural use, and created significant uncertainty about the validity of numerous minimum instream flow rules that do not satisfy the "water availability" prong of the four-part test for a water appropriation.

Background

The Department of Ecology first promulgated a basin regulation for the Skagit River basin in 2001. The rule did not allocate any water for new out-of-stream uses, and set minimum instream flows at levels that were already not achieved during periods of low flow, usually during late summer and early fall. Skagit County appealed the rule, arguing that the minimum flows effectively prevented

new development. Ecology commenced a new rule-making process in an attempt to reach consensus on a compromise regulation, and then eventually entered into a settlement with the County, issuing an amended rule the same day.

The amended rule established "reservations" of water for specified uses in 27 sub-basins, including domestic, municipal, commercial/industrial, agricultural irrigation, and stock watering out-of-stream uses. This reserved water was not subject to curtailment during periods when the minimum flows are not met. Ecology determined that "overriding considerations of the public interest" would be served by allowing these future out-of-stream uses notwithstanding their impact on minimum flows.

The Washington Water Resources Act provides a "general declaration of fundamentals" for utilization and management of water, including the following: "Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. . . . Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served." RCW 90.54.020(3)(a).

The Swinomish Tribe appealed the amended rule, arguing that Ecology had no authority to allow new uses that would impair the minimum flows promulgated in 2001. On October 3, 2013, the Supreme Court issued a sweeping 6-3 ruling agreeing with the Tribe.

The Court's Decision

The Supreme Court rejected Ecology's use of the "overriding considerations of the public interest" ("OCPI") exception as the basis for a reservation that would enable new out-of-stream water uses that would conflict with minimum flows. The gist of the Court's opinion is that "a minimum flow set by rule is an existing water right that may not be impaired by subsequent withdrawal or diversion of water from a river or stream. The exception in RCW 90.54.020(3)(a) is a *narrow* exception, not a device for wide-ranging reweighing or reallocation of water through water reservations for numerous future beneficial uses." *Swinomish*, 311 P.3d at 13 (emphasis in original).

The Court relied on its previous discussion of minimum flows in *Postema v. Pollution Control Hr'gs Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000), including the explanation that "once established, a minimum flow constitutes an appropriation with a priority date as of the effective date of the rule establishing the minimum flow. . . . Thus, a minimum flow set by rule is an existing right which may not be impaired by subsequent groundwater withdrawals." *Swinomish*, 311 P.3d at 12 (citing *Postema*, 142 Wn.2d at 81). The Court stated that "Ecology's interpretation of RCW 90.54.020(3)(a) does not follow our discussion of the overriding-considerations exception in Postema." *Id*. Although it acknowledged that in *Postema* the OCPI exception "was not directly at issue, and we did not engaged [sic] in a detailed examination of its language or the statutory context to determine its meaning," *Swinomish*, 311 P.3d at 13, the Court proceeded to hold that Ecology's application of the OCPI exception in the amended Skagit Basin rule was inconsistent with the entire statutory scheme.

The Court held that Ecology's use of the OCPI exception "conflicts with the prior appropriation doctrine." *Swinomish*, 311 P.3d at 14. The Court explained that reservations "constitute appropriations of water," citing RCW 90.03.345. "Reservations of water must therefore meet the same requirements as any appropriation of water under the water code. '[B]efore a permit to appropriate may be issued, Ecology must affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to the public welfare.' " *Id*. at 14 (citing *Postema*, 142 Wn.2d at 79, and RCW 90.03.290(3)). Instead of meeting this four-part test, Ecology relied on its "OCPI" determination to create reservations of water.

The Court explained: "At least two of the requirements to appropriate water could not be met under RCW 90.03.290(3). The proposed beneficial uses are for noninterruptible year-round uses, but water is not available for the proposed noninterruptible out-of-stream uses for which the water reservations are made. In addition, year-round withdrawals of water will impair the existing minimum flow rights, another reason why an application to appropriate would have to be denied under RCW 90.03.290(3)." *Id*. at 14.

The Court held that the Amended Skagit Basin Rule reserving water for designated future beneficial uses is "in excess of Ecology's authority and invalid." *Id*. at 21.

Consequences for Ecology's Rulemaking

The Court's decision undermines not only the Skagit Rule amendments, but numerous other basin regulations in which Ecology has paired highly restrictive minimum flows with reservations of water for specified uses, relying on "overriding considerations of the public interest" to do so. These include basin regulations adopted for the Stillaguamish (WAC 173-505-090), Quilcene-Snow (WAC 173-517-150), Dungeness (WAC 173-518-080), Lewis (WAC 173-527-110), Salmon-Washougal (WAC 173-528-110), and Wenatchee (WAC 173-545-090) water resource inventory areas.

Even more significant are the implications of the Court's decision for Ecology's approach to setting minimum flows. The linchpin of the Court's reasoning is that reservations are "appropriations of water" under RCW 90.03.345, and "must therefore meet the same requirements as any appropriation of water under the water code" – i.e., the four-part test (beneficial use; water availability; no impairment of existing rights; no detriment to the public welfare). However, the statute on which the Court relies does not apply solely to reservations; it explicitly applies to minimum flows as well: "The establishment of reservations of water for agriculture, hydroelectric energy, municipal, industrial, and other beneficial uses . . . or minimum flows or levels . . . shall constitute appropriations within the meaning of this chapter with priority dates as of the effective dates of their establishment." RCW 90.03.345.

Under the Court's reasoning in *Swinomish*, minimum instream flows set by rule must also satisfy the four-part test, or they risk being invalidated as *ultra vires*. If Ecology establishes minimum flows at levels that are simply not present in the river at various times, by definition water is unavailable and the four-part test cannot be satisfied. Numerous existing minimum flows set by rule are now vulnerable to challenge based on failure to meet the "water availability" prong of the four-part test. Additionally, where a minimum instream flow has the effect of foreclosing all economic development in a basin, it may be difficult for Ecology to

defend such a rule under the "no detriment to the public welfare" prong of the four-part test.

Conclusion and Implications

Ecology has reinstated the 2001 version of the Skagit Basin Rule, and announced (with the concurrence of the Swinomish Tribe) that new water uses begun in the Skagit Basin in reliance on the 2006 reservations will be allowed to continue while Ecology seeks to acquire "mitigation" water rights to offset the impacts on instream flows. To date, Ecology has not publicly addressed the broader implications of the Court's decision for the agency's existing water management regulations and pending rulemaking activities. Careful examination of those broader implications may have to await future litigation.

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