WASHINGTON SUPREME COURT JETTISONS "OVERRIDING CONSIDERATIONS OF THE PUBLIC INTEREST" POLICY IN WATER RIGHT PERMITTING

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Foster v. Dept. of Ecology, ___ Wn.2d ___, ___ P.3d ___ (2015), 2015 WL5916933, Washington Supreme Court No. 90386-7 (October 8, 2015)

On October 8, 2015, the Washington Supreme Court issued its 6-3 decision in *Foster v. Ecology*, rejecting reliance on "overriding considerations of the public interest" to allow a new municipal groundwater right that would conflict with regulatory minimum instream flows and stream closures. Two years ago, in *Swinomish Indian Tribal Community v. Dept. of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013), the Court held that the Department of Ecology cannot rely on "overriding considerations of the public interest" to justify a regulation reserving water for future out-of-stream uses that would conflict with minimum instream flows previously established in the same regulation. In *Foster*, the Court dropped the other shoe, essentially eliminating the policy exception for "overriding considerations of the public interest" set forth in Washington's Water Resources Act.

The immediate effect of the *Foster* decision is reversal of the Washington Pollution Control Hearings Board's 2013 decision approving a new groundwater right issued to the City of Yelm. (See WWLPR Volume 18, No. 3 for a previous article on the PCHB's decision in *Sara Foster, et al. v. Dept. of Ecology and City of Yelm*, PCHB No. 11-155.) But the longer-term effects could be far more dramatic.

The Court majority's highly restrictive view of the "OCPI" exception rests on a novel construction of the word "withdrawal" as a merely temporary use of water. The Court's new definition of "withdrawal" – a term used throughout the Water Code – could have significant ramifications for water resource management in Washington.

Background: minimum instream flows in Washington

In 1969, the Washington Legislature gave Ecology's predecessor agency the authority to set numeric minimum instream flows. RCW 90.22.010 authorized the establishment of "minimum water flows or levels . . . for the purposes of protecting fish, game, birds, or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same." Two years later, the Legislature reaffirmed this approach when it enacted a comprehensive policy statute known as the Water Resources Act of 1971. (RCW chapter 90.54.)

The original purpose of the Act was to "set forth fundamentals of water resource policy for the state to insure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington and, in relation thereto, to provide direction to the department of ecology and other state agencies and officials, in carrying out water and related resources programs." (RCW 90.54.010.) In 1990, the Legislature added this finding: "Adequate water supplies are essential to meet the needs of the state's growing population and economy. At the same time instream resources and values must be preserved and protected so that future generations can continue to enjoy them." (RCW 90.54.010(1)(a).)

The Act includes a "general declaration of fundamentals" to guide utilization and management of Washington's water resources (RCW 90.54.020). In RCW 90.54.020(3)(a), the Legislature restated its policy commitment to retain "base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." This "base flows" policy relates directly to Ecology's "minimum water flows or levels" authority in RCW 90.22.010. (*See Swinomish*, 178 Wn.2d at 580; *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 81, 11 P.3d 726 (2000).)

RCW 90.54.020(3) provides:

> The quality of the natural environment shall be protected and, where possible, enhanced as follows:
>
> (a) 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. Lakes and ponds shall be retained substantially in their natural condition. *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.*
>
> (b) Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, *except in those situations where it is clear that overriding considerations of the public interest will be served*. . . . (Emphasis added.)

The Act gave Ecology rulemaking authority to develop "a comprehensive state water resources program" to provide "a process for making decisions on future water resource allocation and use." (RCW 90.54.040.) In conjunction with those rulemaking programs, Ecology was also given rulemaking authority to "[r]eserve and set aside waters for beneficial utilization in the future" and to "withdraw various waters of the state from additional appropriations" when "sufficient information and data are lacking to allow for the making of sound decisions" (RCW 90.54.050).

In response, Ecology adopted rules establishing 62 water resource inventory areas ("WRIAs") covering the entire state, and promulgated water resource management regulations for many WRIAs, including the Nisqually and Deschutes river basins in western Washington. (*See* Washington Administrative Code (WAC)

chapters 173-511 and 173-513.) Those regulations include numeric minimum instream flows for specific stream segments. In some cases, Ecology closed streams to further consumptive appropriations.

In 1979, the Legislature enacted two statutes affecting the status of regulatory minimum flows. Under RCW 90.03.247, when a permit is approved "relating to a stream or other water body for which minimum flows or levels have been adopted and are in effect at the time of approval, the permit shall be conditioned to protect the levels or flows." And RCW 90.03.345 provides that the establishment of "minimum flows or levels under RCW 90.22.010 or 90.54.040 shall constitute appropriations within the meaning of this chapter with priority dates as of the effective dates of their establishment."

Policy exception for "overriding considerations of the public interest"

The "quality of the natural environment" policy expressed in RCW 90.54.020(3) includes two exceptions for "overriding considerations of the public interest" ("OCPI") but *Foster v. Ecology* involves only one of those two exceptions, in subsection (3)(a). In its 2000 *Postema* decision, the Supreme Court mentioned this exception – which was not at issue in *Postema* – as follows:

> [A] minimum flow set by rule is an existing right which may not be impaired by subsequent groundwater withdrawals. RCW 90.03.345; RCW 90.44.030. The narrow exception to this rule is found in RCW 90.54.020(3)(a), which provides that withdrawals of water which would conflict with the base flows "shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served." (*Postema*, 142 Wn.2d at 81.)

In *Swinomish*, the Court rejected Ecology's reliance on this OCPI exception to support an amended basin regulation with reservations of water for numerous future out-of-stream uses. Stating that "[s]everal important points concerning minimum flow rights and the overriding-considerations exception were established in *Postema* that bear on the present case" (*Swinomish*, 178 Wn.2d at 584-85), the Court continued:

> Here, as discussed in *Postema*, 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*, 178 Wn.2d at 585; emphasis in original.)

In *Swinomish* the Court saw "no meaningful difference" between reservations of water for beneficial use by future individual applicants and "individual applicants who presently seek to appropriate water for the same beneficial uses, insofar as impairment of the minimum or base flows is concerned." (*Id*. at 585-86.) However, the Court acknowledged that "in *Postema* the overriding-considerations 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." (*Id*. at 586.) After examining the OCPI exception, the Court invalidated Ecology's amended rule creating the reservations as "inconsistent with the statutory scheme." (*Id*. at 597.)

After *Swinomish*, it appeared that the OCPI exception in RCW 90.54.020(3)(a) would be available only with respect to individual water right permit applications, and then only in "extraordinary" circumstances. *Swinomish*, 178 Wn.2d at 576 ("[RCW 90.54.020(3)(a)] allows impairment of stream base flows when overriding considerations of public interest are served. . . . The exception is very narrow, however, and requires extraordinary circumstances before the minimum flow water right can be impaired").

City of Yelm's water right application

The City of Yelm applied for a groundwater right from a deep aquifer in the lower Nisqually and Deschutes watersheds. Because the cities of Olympia and Lacey also had similar pending applications, the three cities developed a regional approach to mitigation of impacts across the affected basins. The cities' joint effort included the development of a hydrologic model and interrelated mitigation strategies. The cities' model is conservative; it over-predicts potential depletions in surface waters within the modeled boundaries.

To address predicted flow depletions in portions of the lower Nisqually and Deschutes watersheds, each city developed a mitigation plan which became a condition for Ecology's approval of its water right. The City of Yelm's mitigation plan required the city to infiltrate reclaimed water to recharge the shallow aquifer system connected to Yelm Creek. The City also committed to working with the Nisqually Tribe to complete "out of kind" mitigation projects to restore and enhance degraded portions of Yelm Creek. All three cities collaborated to purchase and retire irrigation rights to offset summer depletions in the Deschutes River, which is closed under Ecology's regulation between April and November each year.

Although the "in kind" mitigation directly offsets the predicted impact of the cities' groundwater pumping during the summer months, two "shoulder" periods (generally during the months of April and October) exist during which the small depletions predicted by the model would not be fully offset by "in kind" mitigation water. The Washington Department of Fish & Wildlife considered the modeled depletions in the Deschutes River to be fully mitigated from a fish and wildlife perspective, even during the months of April and October, because the overall mitigation plan provided increased habitat for fish. Ecology determined that the combined benefits to instream resources of the in-kind and out-of-kind mitigation would far outweigh the modeled (and over-predicted) impacts to the affected streamflows.

In light of these effects of the cities' comprehensive mitigation program, neither the Nisqually nor the Deschutes basin regulation would require denial of the City's groundwater application. Each regulation contains a "Groundwater" provision stating that future groundwater right applications "will not be affected by this chapter unless it is verified that such withdrawal would clearly have an adverse impact upon the surface water system contrary to the intent and objectives of this chapter." (WAC 173-511-050 and 173-513-050.) The acknowledged net ecological benefits to the stream system from the mitigation program, including increased fish habitat, would appear to make impossible a finding of clear adverse impact to the system. Had Ecology simply applied the basin regulations as written, it could have approved Yelm's groundwater right.

Instead, Ecology relied on OCPI to justify Yelm's groundwater withdrawals during the "shoulder season" periods when modeled depletions were not fully offset by

"in kind" mitigation water. After conducting a hearing, the Pollution Control Hearings Board ("PCHB") reached the same conclusion. The PCHB found that "the majority of depletions to various affected surface water bodies from Yelm pumping . . . are fully mitigated with in-kind water, and those that are not fully mitigated with in-kind water have been mitigated with out-of-kind efforts that serve as a substantial and compelling basis for Ecology's OCPI determination." The Thurston County Superior Court affirmed the PCHB.

The Supreme Court decision

The Supreme Court majority disagreed. Stating that the facts in *Foster* "somewhat mirror those in *Swinomish*," the Court explained that "*Swinomish* and the plain language of the OCPI exception—specifically, 'withdrawals of water'—largely resolves this case." Focusing on the words "withdrawals of water" in RCW 90.54.020(3)(a), the Court reasoned that "appropriation" is a term of art meaning "the assignment of a permanent legal right" but "withdrawal" means something different.

Citing several provisions of the Water Code, the Court reasoned that the term "withdrawal" is not synonymous with "appropriation": "The term 'withdrawal,' unlike 'appropriation,' carries with it no suggestion that it includes the permanent assignment of a legal water right. The terms have different meanings." Turning to Washington's statutory scheme "as a whole," the Court observed that RCW 43.83B.410 authorizes emergency "withdrawal" of water during drought conditions "on a temporary basis."

Reading RCW 90.54.020(3)(a) together with the emergency drought statute, the Court concluded:

> First, when the legislature intends for the assignment of a permanent legal water right, it uses the term "appropriation"; when it intends for only the temporary use of water, it uses the term "withdrawal." And second, the statutory scheme as a whole rigorously protects minimum flows/essential minimums by not permitting the temporary withdrawal of water that would impact essential minimums even in the case of drought. (*Foster*, 2015 WL 5916933, ¶14.)

The Court held that "the OCPI exception does not allow for the permanent impairment of minimum flows" because the Legislature did not use the term "appropriations" in the OCPI exception. Instead, the Legislature's use of the term "withdrawals of water . . . shows a legislative intent that any impairment of minimum flows must be temporary." Finally, the Court held that the plain language of the OCPI exception did not authorize approval of the City of Yelm's permit, which was a permanent legal water right "that will impair established minimum flows indefinitely."

The Court went on to explain that its conclusion was "implicit" in the *Swinomish* decision, and to disagree with Ecology's argument that the three cities' regional mitigation program amounts to the sort of "extraordinary circumstances" required under *Swinomish* for application of the OCPI exception. According to the Court, the mitigation plan "is largely irrelevant to the analysis" because it does not mitigate the injury that occurs to the minimum instream flow as a senior water right:

> The water code, including the statutory exception, is concerned with the *legal* injury caused by impairment of senior water rights—water law does not turn on notions of "ecological" injury. . . . we reject the argument that ecological improvements can "mitigate" the injury when a junior water right holder impairs a senior water right. (*Id*. at ¶17; emphasis in original.)

The Court concluded:

> The exception, by its terms, permits only temporary impairment of minimum flows. Municipal water needs do not rise to the level of "extraordinary circumstances" that we held are required to apply the OCPI exception, nor can a mitigation plan "mitigate" by way of ecological benefit the legal injury to a senior water right. (*Id*. at ¶18.)

Three Justices dissented, objecting to the "novel and unprecedented definition of the key word 'withdraw' as only temporary, which is contrary to the consistent meaning of the word in the water code," and to the majority's characterization of the case as similar to *Swinomish*. The dissent pointed out that Washington's groundwater code, RCW chapter 90.44, refers throughout to "withdrawal" or the

right to "withdraw" groundwater in the context of permanent appropriative rights. The dissent also included a detailed discussion of the PCHB findings, concluding that it is "unreasonable to ignore the effect of the mitigation plan" because it "neutralizes any depletion of water flow. As a result, a substantial supply of water is made available to the public in return for a net ecological gain resulting from the mitigation plan."

Motions for reconsideration

Both Ecology and the City of Yelm have filed motions for reconsideration of the Court's decision, raising concerns similar to those set out in the dissent. Ecology suggests that, if applied throughout the Water Code, the Court majority's unprecedented interpretation of "withdrawal" to mean "not an appropriation" and "only temporary" will create havoc for groundwater permitting and management of permit-exempt groundwater wells. Both parties appear to share the dissent's view that the Court majority's approach to statutory construction was flawed in this case.

Additional grounds for reconsideration could include the Court's overruling, *sub silentio,* of portions of *Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 43 P.3d 4 (2002), its oft-cited decision construing the groundwater permit exemption in RCW 90.44.050. In that case, the Court specifically interpreted the term "withdrawal":

> *The term "withdrawal" is, as Ecology urges, a term of art in water law*, although Ecology does not go so far as to define it. In general, *when one appropriates water one does so by means of diversion of surface water or by withdrawal of groundwater*. The words "diversion" and "withdrawal" both relate to the actual physical acquisition of water to put to beneficial use, and both also relate to the type of right a water right holder has, i.e., diversionary and withdrawal rights. *Neither term, in and of itself, defines the scope of the right*, and the word "withdrawal" and the words "any withdrawal" do not establish the plain meaning of the exemption in RCW 90.44.050. (*Campbell & Gwinn*, 146 Wn.2d at 16; emphasis added.)

In *Campbell & Gwinn*, the Court consistently discussed permit-exempt groundwater withdrawals as appropriations of water, even though RCW

90.44.050 uses the term "withdrawal" throughout and never mentions "appropriation":

> While the exemption in RCW 90.44.050 allows *appropriation* of groundwater and acquisition of a groundwater right without going through the permit or certification procedures of chapter 90.44 RCW, once *the appropriator* perfects the right by actual application of the water to beneficial use, the right is otherwise treated in the same way as other perfected water rights. . . . Thus, it is *subject to the basic principle of water rights acquired by prior appropriation* that the first in time is the first in right. (*Campbell & Gwinn*, 146 Wn.2d at 9; emphasis added; citations omitted.)

See also Campbell & Gwinn at 16 ("the Legislature did not intend unlimited use of the exemption for domestic uses, and did not intend that water *appropriation for such uses* be wholly unregulated") (emphasis added). After *Foster*, it is questionable whether the Court's characterization in *Campbell & Gwinn* of a permit-exempt groundwater withdrawal as an "appropriation" remains viable.

Conclusion and Implications

The Supreme Court's decision in *Foster* essentially uncouples regulatory minimum instream flows from the instream values and resources those regulations were intended to protect. If mitigation creating net ecological benefit is "largely irrelevant" and any flow depletion—no matter how slight—requires permit denial, it is difficult to envision any context in which "overriding considerations of the public interest" could apply to water right permitting.

The Court majority's interpretation of the words "withdrawals of water" in the OCPI policy is even more problematic. If applied throughout the Water Code, the Court's definition of "withdrawal" would render many provisions nonsensical, particularly those relating to withdrawal of groundwater. The Court majority might take advantage of the motions for reconsideration to change, clarify, or narrow the holding in *Foster*. Failing that, the Washington Legislature may have to clarify its intent to provide adequate water supplies to meet the needs of the state's growing population while protecting instream resources and values.