

Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 67549-0
Title of Case: John Postema
v.
Pollution Control Hearings Board, et al
File Date: 10/19/2000
Oral Argument Date: 03/01/2000

SOURCE OF APPEAL

Appeal from Superior Court of Snohomish County
Docket No: 97-2-00979-9
Judgment or order under review
Date filed: 12/31/1998
Judge signing: Hon. Charles S. French

JUSTICES

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Dissent by Sanders, J.

No. 67549-0

SANDERS, J. (dissenting)--Still waters run deep; deeper, I think, than the majority cares to measure with the analytical tools at its disposal. On the surface the majority's analysis seems to make sense: when there is no more surface water available because of preexisting rights or designated minimum flows, groundwater withdrawal permits must be denied if they adversely 'impact' preexisting rights. So far so good; however the majority superficially assumes any diminution of surface water, however slight or even de minimis, constitutes an adverse 'impact' if it is 'measurable.' By 'measurable,' however, the majority does not mean quantifiable but rather 'qualifiable,' i.e., a mere determination that there is some, perhaps to an unknown degree, diminution in surface flow. Thus, according to the majority, a well water permit should be denied when we can say with scientific certainty that as little as a thimbleful, or even a molecule, of water would be diverted from the surface flow. There are at least two fundamental faults buried deeply beneath the surface of this thinking: (1) the statute doesn't say that and (2) we cannot rationally apply a standard with greater precision than the standard itself.

I also question dismissal of Postema's due process and equal protection claims on the ground they are 'premature.' Such claims 'mature' when a final action takes place, there being no requirement in the law that any person so deprived must exhaust a judicial appeal as a condition precedent to seeking relief under 42 U.S.C. sec. 1983.

I. Meaning of 'impairment'

RCW 90.03.290 provides as condition precedent to granting a permit to appropriate surface water 'the application will not impair existing rights' (Emphasis added.) The statute also provides, 'But where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, having due regard to the highest feasible development of the use of the waters belonging to the public, it shall be the duty of the department to reject such application'

RCW 90.03.290 (emphasis added). RCW 90.44.060 makes the surface water appropriation statute applicable to withdrawals of groundwater.

Therefore we must first determine under what circumstances a withdrawal of groundwater 'impairs' preexisting surface water rights, particularly previous minimum flow determinations published by the Department of Ecology, in order to determine when a withdrawal permit should be granted

or denied. The majority does not consider this question, only assumes its answer.

The majority purports to facially disagree with the position taken by the Department of Ecology that mere hydraulic continuity between the groundwater and the contiguous surface water is sufficient unto itself to establish the requisite impairment; however it rejects Postema's claim that surface water flow be necessarily measurable, in a quantifiable sense, by flow measuring devices which are accurate only within five percent. Unlike the majority, I would look to the statute to determine what the Department of Ecology must demonstrate to prove an 'impairment' of existing water rights so as to justify denial of the permit application. Recall the majority indicates even a de minimis effect on surface waters is sufficient to establish 'impairment.'

{W}e hold that a proposed withdrawal of groundwater from a closed stream or lake in hydraulic continuity must be denied if it is established factually that the withdrawal will have any effect on the flow or level of the surface water.'

Majority at 27-28 (emphasis added); see also Majority at 24. Aside from the fact RCW 90.03.290 does not say 'any,' the real question is what does the term 'impairment' mean. The majority assumes that any diversion of surface water, no matter how slight, is an 'impairment' as long as it can be measured. As such, the majority adopts the thrust of the 'qualitative' hydraulic continuity argument proffered by the Department of Ecology, which is satisfied by the mere interaction between ground and surface water resulting in the slightest diminution of the quantity of surface water through pumping of groundwater. In essence, the rule proffered by the majority allows the Department of Ecology to deny a groundwater permit if Ecology proves only a single molecule of surface water was lost to the stream--assuming such a molecule is 'ascertainable,' although perhaps not quantifiable, using the best available science. See Majority at 23. The majority admits the statutes at issue here--RCW 90.03.290 and 90.44.050--do not define the term 'impairment.' Majority at 21. Words that are not statutorily defined must be given their ordinary and usual meaning. *Garrison v. Washington State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). We may also look to a dictionary for the definition. *State v. Pacheco*, 125 Wn.2d 150, 154, 882 P.2d 183 (1994). Black's Law Dictionary defines 'impair' as '{t}o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner.' Black's Law Dictionary 752 (6th ed. 1990) (emphasis added). Were we to accept this definition, we must then ask: 'affect what?'

The answer to this question may be found in the general statement of public purpose upon which the whole statute is based:

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 public interest will be served.

RCW 90.54.020(3)(a). Reading 'impair' in the statutory context, with due regard for the public policy to be advanced, we must conclude withdrawals of water which do not conflict with the preservation of one or more of the identified interests do not 'impair' existing water rights or base flows. Thus to justify denial of the permit, the Department of Ecology should be required to demonstrate, for example, that there would be fewer fish as a result of the withdrawal, or that navigable waters would be rendered

unnavigable because of the withdrawal, or that the watercourse would be less 'aesthetically' pleasing because it would be perceptively different before and after the groundwater withdrawal to the eye of the observer. Conversely, withdrawal of an actual, measurable amount--such as a thimbleful--which would have no demonstrable adverse effect (i.e., injurious effect on wildlife, fish, etc.), would not 'impair' preexisting rights, and thus is no justification to deny the permit. This approach is consistent with other provisions of the Water Code which require the Department of Ecology to have 'due regard to the highest feasible development of the use of the waters belonging to the public . . . ,' RCW 90.03.290, as well as a number of the interests stated in RCW 90.54.020(2), which include 'maximum net benefits for the people of the state,' and maintenance of base flows 'necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.' RCW 90.54.020(3)(a). The majority compounds its erroneous interpretation of the statutory term 'impair' when it allows the Department of Ecology to deny a groundwater withdrawal permit based upon the mere qualitative demonstration that it will have some effect, however slight, on surface waters which have been fully appropriated or are functioning at minimum flow. See Majority at 25 ('However, where minimum flows would be impaired, then an application must be denied.').

The error with this approach is not only the failure to accord 'impair' its statutory meaning but also the factual prospect (perhaps a subject for remand) that standard measuring equipment with a five percent tolerance was used by the Department of Ecology to determine minimum flows and preexisting rights in the first instance. In that event deviations of actual flow within the tolerance of stream measuring equipment will not defeat preexisting rights or minimum flows designated by Ecology through use of standard measuring equipment to five percent accuracy. Instream flow regulations, and other rules which limit surface water withdrawals in the Snohomish River basin, are published in the Washington Administrative Code (WAC) chapter 173-507. These rules establish instream flows for 10 locations within the Snohomish River basin and authorize control stations to measure such flows and regulate compliance. See WAC 173-507-020(1) ('Instream flows are established for stream management units with monitoring to take place at certain control stations as follows') (emphasis added). The control station number for each of the instream flow control points is intended to correspond to a United States Geological Survey stream gage number for the same location. Ex. A-18 (Draft Initial Watershed Assessment Water Resources Inventory Area 7 Snohomish River Watershed 22 (Mar. 17, 1995)). A witness for the Department of Ecology, Mr. Linton Wildrick, acknowledged the limitations of standard measuring equipment which are used to set these minimum flows and monitor compliance: Measurement of streamflow reduction caused by ground water withdrawals is very difficult and rarely attempted. In most cases, a successful test requires a well to be very close to the stream and to be pumped at a high rate for an extended period. This situation rarely occurs. Unless the well captures approximately five percent (5%) of the stream flow, the effect cannot be accurately detected with standard measuring equipment. Five percent of the flow of many streams exceeds the pumping rates of all but the largest wells. Consequently, such tests are rarely practical. For this reason, hydrologists usually estimate hydraulic properties based on standard aquifer testing and then calculate or model stream flow effects based on those properties.

Administrative R. at 236 (emphasis added) (Ecology's Br. in Resp. to Mots.

for *Summ. J. re Statewide Issues*, App. 2 (Decl. of Linton Wildrick)). Because the accuracy of standard measuring equipment is limited to within five percent, hydrologists 'measure' smaller effects of groundwater withdrawal upon the flow of a particular stream by estimates and theoretical modeling. While this approach may be the 'standard professional practice,' *id.* at 237, it nevertheless is intended to guesstimate the withdrawal or diversion of such a small amount of water is within the tolerance of existing minimum flows and preexisting rights which the department is charged to protect.

Despite the obvious scientific approximation which yields a minimum flow determination, the majority attributes a precision to the determination beyond its nature, much like searching for Martian Canals with a pair of binoculars: 'We also reject Postema's argument that a significant measurable effect on stream flows is required The statutes do not authorize a de minimis impairment of an existing right.' Majority at 24 (emphasis added). The scope of the existing water right--minimum flows--is not calculated to the centiliter but rather at best to the limits of measuring devices actually used to quantify stream flow. By disallowing even an immeasurable effect on minimum flows, the majority approach injects irrationality into the equation, requiring greater specificity than the standard itself.²

Further, by allowing the Department of Ecology to deny a proposed groundwater withdrawal because of an immeasurable effect on stream flows, the majority disregards the statutory prerequisite to establish impairment and ignores its own interpretation of this term of art. See, e.g., Majority at 23 (Impact or effect of impairment must be ascertainable using the best available science.). If a particular groundwater withdrawal has an immeasurable effect on stream flows, it cannot be said that such impact is 'ascertainable'--even using the best available science.

In summary, the majority defines 'impairment' as any effect, no matter how insignificant, on the quantity of surface water, even though there will be no real life effect on any of the interests which the Water Code is designed to protect. However, a proper construction of the statute requires a proposed withdrawal of groundwater from a closed stream or lake in hydraulic continuity be denied only if it is established factually the withdrawal will have an appreciable and material adverse effect on the minimum flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic, other environmental values, or navigation.

Under such a formulation, it might be necessary to remand some of the cases to the Pollution Control Hearings Board to determine if the facts meet the statutory 'impairment' standard. Of course, nothing forecloses Ecology from presenting analysis or new evidence of impact on the minimum flows necessary to meet the impairment standard at the time of the hearing upon remand. However, I posit a simple factual determination that groundwater withdrawals would lower the groundwater table, without also quantifying the effects on the surface water in terms of the interests the Water Code protects, is insufficient to comply with the statute.

II. Postema's constitutional claims

I also question affirming the superior court's dismissal of Postema's equal protection and due process claims simply because his well water application 'is still pending administratively' as a result of a judicial remand.

Majority at 60. In point of fact Postema already received a final administrative determination which he challenged on judicial review, which review has now resulted in a remand for further proceedings.

Like substantive due process claims, equal protection claims are actionable when the wrongful action is taken. *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 964-65, 954 P.2d 250 (1998); see also *Rutherford v.*

City of Berkeley, 780 F.2d 1444, 1447 (9th Cir. 1986) (substantive due process violated at moment harm occurs); *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 21 n.11, 829 P.2d 765 (1992) ('{A}n action for a violation of substantive due process is ripe immediately . . . because the harm occurs at the time of the violation.');

Cox v. City of Lynnwood, 72 Wn. App. 1, 8, 863 P.2d 578 (1993) (substantive due process is violated at the moment harm occurs). Accordingly, what we are looking for is a final decision by the administrative decision-maker, not exhaustion of administrative remedies or appeals. See *Sintra*, 119 Wn.2d at 32 (Utter, J. concurring) ('{F}inality would not have required appeals, for example, to the Board of Zoning Appeals.' (citing *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985))). Here, Postema obtained a final and adverse decision from the administrative decision-maker. At that point his cause of action accrued for violation of his civil rights--whether or not he chose to appeal. The fact that he did appeal, and obtained a remand to the Board, does not remedy the earlier violation of his civil rights, if there was one. Not surprisingly, the majority fails to cite any authority to contradict the well-settled principle that such civil rights claims are ripe at the time the wrongful action is taken.

In the context of this case the error may seem less than significant; however it is an ill-considered precedent which will play havoc with that great body of law essential to protect and remedy civil liberty deprivations.

Again without citation to authority, the majority summarily concludes '{b}ecause the equal protection claim is premature, the sec. 1983 claim was also properly dismissed by the superior court as premature.' Majority at 61. But Supreme Court precedent clearly holds exhaustion of state administrative remedies is not required before a litigant may have a cause of action pursuant to 42 U.S.C. sec. 1983. *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100 (1990) ('{T}he constitutional violation actionable under sec. 1983 is complete when the wrongful action is taken.');

see also *Monroe v. Pape*, 365 U.S. 167, 183, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961) ('It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal {remedy} is invoked.');

overruled on other grounds by *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); *Patsy v. Board of Regents*, 457 U.S. 496, 516, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982); *Felder v. Casey*, 487 U.S. 131, 147, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988).

Accordingly, the majority erroneously affirms dismissal of Postema's civil rights action, a dismissal clearly contrary to binding precedent.

Conclusion

The majority disregards the ordinary and usual meaning of the term 'impairment' to hold even the slightest effect on surface flows justifies denying a groundwater withdrawal permit application. This approach defeats the meaning of the term 'impairment' within its statutory context to the prejudice of the public purpose upon which the entire statute is expressly based. When impairment is given its ordinary and usual meaning, and read in its statutory context, withdrawals of water which do not conflict with the preservation of the statute's identified interests do not 'impair' existing water rights or minimum flows. Moreover, we cannot rationally apply a standard with greater precision than was used to create the standard in the first place. I would therefore remand these cases to the Pollution Control Hearings Board for further proceedings to properly apply the correct standard.

I would also reverse the superior court's dismissal of Postema's equal

protection and due process claims. Once Postema obtained a final and adverse decision from the administrative decision-maker he was entitled to seek redress for the violation of his rights without regard to the prospect or outcome of judicial review. The majority clearly errs. For these reasons I dissent.

1 Barron's Law Dictionary defines 'de minimis' as: 'insignificant; minute, frivolous. Something or some act which is 'de minimis' in interest is one which does not rise to a level of sufficient importance to be dealt with judicially.' Barron's Law Dictionary 128 (3d ed. 1991).

2 Arguably the accumulation of such de minimis diversions might at some point reach a level measurable in the stream using the same equipment used to set the standard in the first place; however that is the cumulative impact issue not addressed by the majority. See Majority at 20. But since our system is based on priorities it would seem, as Postema argues, projected cumulative impacts from other hypothetical future users would not serve as a lawful statutory basis to deny a permit to a current applicant whose application, if granted, would not violate the standard.