SIGNIFICANT CASES FOR CHANGE APPLICATIONS

This case law summaries below were prepared by Assistant Attorney General's of the State Attorney General's Office, Ecology Division, except for the Winters Doctrine. The Winters Doctrine was prepared by an independent law student. Please keep in mind that any opinions expressed herein do not represent official opinions of the Attorney General's Office and this case law summary should not be construed as legal advice.

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ACQUAVELLA III (Department of Ecology v. Acquavella, 131 Wn.2d 746, 935 P.2d 595 (1997)):

Perfection of right/beneficial use

Ecology appealed a finding of the adjudication court that an irrigation district had not beneficially used all of the claimed water right. The court held:

- A right cannot be perfected based upon the capacity of the canal or on the amount of water provided in contracts entered but must be based on actual beneficial use.
- In order to perfect their rights, irrigation districts do not have to have actually used water on all acres to which they are entitled to apply water since RCW 90.03.3 80 allows the districts to legally distribute its water over any irrigationable acreage within the District without Ecology's approval.

CAMPBELL & GWINN, LLC. (Ecology v. Campbell & Gwinn, LLC, et al. 43 P.3d 4 (March 28, 2002):

Exempt withdrawal

This case involved a proposed 16 home development where the development planned to drill 16 wells to supply each of the planned homes. The developer asserted that a ground water permit was not required because each of the wells by itself would not use in excess of 5,000 gallons per day (GPD).

The Court held that when a developer intends to drill individual wells that will collectively use over 5,000 gpd to supply the future homes of a residential development, which use of water qualifies as group use under RCW 90.44.050, and must obtain a permit.

ELKHORN (Department of Ecology v. Jefferson Co. PUD 1, 121 Wn.2d 179, 849 P.2d 646 (1993)):

- Ecology has authority through section 401 of the Clean Water Act water quality certification to include a minimum streamflow requirement as a condition of the certification.

GRIMES (Ecology v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993)):

Perfection of right/beneficial use

- Case involved an adjudication of rights to Marshall Lake. Grimes appealed because he felt that his adjudicated right did not reflect his full beneficial use. The referee had reduced the right due to considerations of reasonable use. The court affirmed, holding:
- Only reasonable use counts as beneficial use. Reasonable use is determined case by case based on complexity of the system, current state of technology, cost of updating versus benefits, and local custom.

- "Local custom and the relative efficiency of irrigation systems in common use are important elements, but must be considered in connection with other statutorily mandated factors, such as the costs and benefits of improvements to irrigation systems, including the use of public and private funds to facilitate improvements."

HILLIS (Hillis v. Department of Ecology, 131 Wn.2d 373, 932 P.2d 139 (1997)):

Priority processing

- Ecology has authority to alter the way it processes water right applications.
- If Ecology establishes any prerequisite or qualification to a privilege or benefit conferred by law, such as a decision on a water right application, it must provide the public with an opportunity to comment (rulemaking).
- Ecology must adopt rules to implement a watershed approach or any other approach to water right processing that would vary from "first in time" as applied on a statewide basis.

HUBBARD (Hubbard v. Department of Ecology, 86 Wn. App. 119, 936 P.2d 27 (1997)):

Impairment test

- Hubbards challenged instream flow conditions that required them to stop groundwater withdrawals when flows in the Okanogan River fell below the minimum flow levels established by rule.
- Court found that the key question was whether significant hydraulic continuity exists between the aquifer and the river. The fact that the amount of effect on the river during periods when flows would be below the minimum regulatory level was only very small was not relevant.

MERRILL (R.D. Merrill Co. v. PollutionBd., 137 Wn.2d 118, 969 P.2d 459 (1999)):

Requirement to review perfection, validity, and extent of right

- Basic facts: "This case presents several issues arising out of R.D. Merrill's applications for changes in water rights as part of R.D. Merrill's efforts to provide water for the Wilson Ranch, a cross-country ski resort. R.D. Merrill sought changes in points of diversion, place of use, and purpose of use." The Merrill project was a redesign of a proposed downhill ski area in the Methow Valley that was stopped by litigation over a Forest Service permit.
- "In order to decide whether to approve a change under RCW 90.03.3 80, the Department must tentatively determine the existence and extent of the beneficial use of a water right. Okanogan Wilderness League, Inc., 133 Wn.2d at 737-38. Quantification of the right and whether the right has been relinquished or abandoned in whole or in part are matters the Department must address in deciding whether to approve a transfer or change application."
- Review of validity and extent of right not required for changes to a ground water permit: "Unlike RCW 90.03.3 80, which requires beneficial use of water before a change may be approved, RCW 90.44.100 expressly allows for amendment [ground water rights] where

water has not actually been applied to beneficial use. Beneficial use is not a prerequisite to an amendment under RCW 90.44.100 where unperfected rights under a groundwater permit are concerned." (Note that the purpose of use of an inchoate ground water right is not eligible for change under RCW 90.44.100.)

Perfection of right/beneficial use

- "Plaintiffs contend that the Wilson irrigation right was never perfected and therefore is not subject to transfer or change under RCW 90.03.380. The Board held that the right had not been perfected. The superior court reversed. We uphold the Board's determination because substantial evidence supports its factual determinations which support its conclusion that the right was never perfected." There was a factual controversy whether water was supplied to the land through the ditch company's claim or the Wilson claim (which covered this land), as the diversion structure for the Wilson claim was never constructed as originally contemplated and Wilson paid the ditch company for use of the ditch although there was no record that he paid for the water itself. The court held that substantial evidence supported the Board's finding that the water was supplied under the ditch company claim, and therefore that ruling had to be accepted.

Statutory relinquishment

- Operation of legal proceedings exception: "RCW 90.14.140(1)(d) requires that nonuse of the water be 'the result of' the legal proceedings. [T]he 'operation of legal proceedings' exception thus requires ... that the non-use of water be attributable to the legal proceedings, i.e., that the legal proceedings prevent the use of the water .... Here, while development plans may have been delayed as a result of the litigation, it is not clear whether beneficial use of the water for other purposes was prevented while the litigation was pending."
- Determined future development exception: "RCW 90.14. 140(2)(c) refers to a 'determined future development to take place. . . within fifteen years[,] thus contemplating (1) a fixed determination - a firm definitive plan (2) of a future development which will take place within 15 years - encompassing the possibility of future development which may occur after the 5 years nonuse period. While the actual development need not occur within the five years nonuse period, there must be fixed development plans within that period."
- Dicta on determined future development exception: "Completion of development within 15 years should not be required because some large-scale projects will require a lengthy development period, particularly where extensive environmental review and construction are involved, and RCW 90.14. 140(2)(c) is clearly not intended to provide an exception only for small projects. However, there must be some development within the 15 year period in order for the right to remain valid."

What parameters of a right can or cannot be changed?

- The court held that purpose of use specified in a ground water permit could not be changed under RCW 90.44.100, which does not mention change of purpose of use but rather "manner of use." (The court did not define, however, the meaning of the term "manner of use.")
- The court did not address whether purpose of use for a groundwater certificate may be changed under RCW 90.03.3 80 based on theory that the groundwater code was intended to be supplemental and it makes no sense to prevent change of purpose of use for existing

ground water rights but to allow it for surface water rights. (Ecology has taken the position that purpose of use of perfected ground water rights can be changed under RCW 90.03 .380 because the ground water code is supplemental to the surface water code.)

- Season of use for a surface water right may be changed, since purpose of use is often tied to time of use. For example, if the purpose of use is irrigation, the right will almost always be used seasonally. Domestic water use often is year-round use. Thus, a change in purpose of use may require that time of use be changed as well in order to put the water right to the proposed new use." However, in view of the court's holding that RCW 90.44.100 does not allow change in purpose of use, it is not clear whether changes in season of use are permitted for ground water rights under that statute; however, if certificated ground water rights may be changed under RCW 90.03 .380, then seasonal changes would be allowed under the statute.

POSTEMA (HYDRAULIC CONTINUITY) (Postema v. PcHB, et al,, 142 Wn.2d 68 (2000)):

Impairment test

- "No impairment" is the legal standard for review of impairment; a de minim is impairment is not authorized by statute.
- Ecology may use methods such as modeling to determine hydraulic continuity and effects on surface water, and need not rely on gage readings to determine effect.
- "Hydraulic continuity" or connection between an aquifer and a stream where flows are not met part of the year is not alone sufficient to find impairment; impairment must be determined based on the facts such as the number of days flows are not met, the nature of the appropriation, the timing of the appropriation.
- Impairment of minimum flow right most likely exists if the withdrawal will effect the stream at a time that flows are unmet or would cause flows not to be met.
- Technically a closed stream is not protected from impairment because closure is not a minimum flow. However, in the context of new permits, the court held that closure is justified under the "availability" and "public interest" tests for new permits, and thus, any new permit that would "effect" a closed stream should be denied.
- Availability is not a test for changes to an existing surface water right and it is not clear whether public interest is such a test. However, even if the public interest is ruled not to apply to surface water changes, the change of a surface water right to a closed stream arguably violates the closure rule because it is in effect a new appropriation as to that stream and therefore contrary to the intent of RCW 90.54.020.

SCHUH (Schuh v Department of Ecology, 100 Wn 2d 1 80, 667 p 2d 64 (1983)):

Public Interest Test

- In Schuh, applicant sought to transfer a supplemental ground water permit to another parcel. Ecology found it would harm the public interest to allow the transfer because it would allow the transfer to leapfrog over other applicants who were waiting in line and take the available water.

- Upheld denying change to ground water right on the basis of public interest, impairment of applicants.

Enlargement test

- In Schuh, applicant sought to transfer a supplemental ground water permit to another parcel, for which the primary right (BOR water) was not available. Court upheld Ecology's finding that it would enlarge the right to allow the transfer because it would allow the right to be used as a primary right and thereby effectively remove the supplemental condition.

Impairment Test

- Under the 2001 amendment codified at RCW 90.03 .380(5)(a), existing applications are no longer entitled to protection from impairment by changes to existing surface and ground water rights. By applying this to ground water rights, the 2001 amendment overrules the portion of Schuh, supra, which held that pending applications for new permits were entitled to protection from a change.

SINKING CREEK (RETTKOWSKI) (*Rettkowski v. Dept of Ecology*, 219 122 Wn.2d 219, 858 P.2d 232 (1993)):

Requirement to review perfection, validity, and extent of right

- Ecology determined that ranchers who claimed pre code surface water rights to Sinking Creek and subflow from Sinking Creek were being impaired by later code based ground water irrigation rights that the State issued. Ecology's order requiring the irrigators to cease withdrawals was appealed to the Supreme Court. The court held as follows:
  - A determination as to the validity of pre-code rights is made by the superior court within a general stream adjudication.
  - Ecology lacks authority to determine the validity of a pre-code right for the purposes of enforcement action. Note: whether Ecology has authority to determine validity with respect to enforcement between competing code water rights has not yet been directly addressed by the appellate courts.
  - Ecology can make "tentative determinations" about the validity of existing rights for the purpose of issuing new water right permits.

SULLIVAN CREEK (Pend Oreille PUD #1 vs. Ecology)

Public Interest Test

- Ecology has authority under both federal and state law to condition a state water quality certification under § 401 of the CWA by imposing minimum instream bypass flows even when such conditions affect the exercise of existing water right held by the applicant. The Court upheld the minimum flow conditions imposed by Ecology for the purpose of maintaining the state water quality standards for Sullivan Creek.
- Ecology does not have authority under RCW 90.03.380 to consider whether approval of a surface water right change or transfer application would be contrary to the public interest.

The surface water change statute does not expressly include a public interest criterion and authority to apply the test is not provided by other provisions in the Water Code. (The public interest test does apply to applications to change or transfer ground water rights under RCW 90.44.100.)

- A surface water right must have been applied to beneficial use before it is eligible for changes of inchoate surface water rights, except under RCW 90.03.395 and .397, which allow a change of point of diversion downstream under certain conditions. Accordingly, the Court upheld Ecology's denial of the PUD's application for change of its 440 cubic foot per second (cfs) permit.
- Ecology has authority to tentatively determine whether a water right has been relinquished or abandoned when it evaluates an application for change or transfer of a water right. The Pollution Control Hearings Board may also make a tentative determination of the extent and validity of a water right when it reviews Ecology's action on a change application.
- The PUD did not abandon its 1907 priority date water right even though water had not been used since 1956. Repeated and successive (albeit unsuccessful) efforts by the PUD to develop a hydroelectric project demonstrated that the PUD did not intend to abandon its water rights. The Court reversed Ecology's decision to deny the PUD's application to change its 110 cfs water right.
- The PUD did not relinquish it 440 cfs permit because it made late payments of fees for hydropower purposes. (As noted above, this permit was not eligible for change, however, because it was never perfected through actual use.)
- The key question: Does Ecology have authority to consider the public interest in change applications?

  Yes--for groundwater changes. RCW 90.44.100 states that change applications shall be issued only after "finding as prescribed in the case of an original application." The findings required for an original application (see RCW 90.03.290—incorporated in GWC by RCW 90.44.060) require a determination that the new water use will not harm the public interest.

<u>THEODORATUS, GEORGE T.</u> (Ecology v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998)):

On July 2, 1998, the State Supreme Court issued its opinion in State of Washington, <u>Department of Ecology v. George **Theodoratus**</u> The decision was split 7- 2 with Justice Madsen writing the majority opinion. The court affirmed Ecology's authority to place new conditions on extensions for water permits and to issue certificates for water rights only when and to the extent water is put .to actual beneficial use. The following summarizes and discusses the opinion.

Summary of relevant findings

- A final certificate of water right may only be issued when the water right is perfected into an appropriative right by the actual application of water to beneficial use. Neither the statutory nor common law allow for a final certificate of water right to be issued based upon system capacity (pumps and pipes).

- Water must be put to actual beneficial use before a vested water right is created. A perfected right requires that the appropriation be complete by the actual application of water to beneficial use.
- In defining beneficial use of water, the law provides no distinction based upon the type of the use, whether it is for irrigation or public water supply systems. However, the court recognized that this case did not involve a municipality and declined to address issues concerning municipal water suppliers in the context of this case. The court did, however, indicate that municipalities would not be treated any differently.
- Any financial risks and ability to obtain financing by the permittee is not a consideration in defining beneficial use.
- Ecology has the authority to condition permits and extensions to permits. The conditions of the original permit do not necessarily create a vested right to proceed under those conditions when renewal of such permit is requested. If the law changes or the renewal of a permit involves consideration of information not considered when granting the original permit, Ecology "has authority to condition any extension to satisfy any public interest concerns which arise, provided, of course, that it also must comply with all relevant statutes".
- Ecology is not required to promulgate a rule under the APA if Ecology's action reflects statutory and case law. As such, by implementing the language of the law, Ecology's action is not an issue of agency "policy", and rule making is not required.
- When reviewing Ecology's decisions, Ecology's interpretations of ambiguous statutes which it is charged to administer, is entitled to great weight.

Perfection of right/beneficial use

- A ground water right for a public water system may not be perfected based on the capacity of the water system built (sometimes referred to as "pumps and pipes") but rather must be based on actual beneficial use. Court did not decide whether a municipal water right could be perfected based on capacity, but indicated reservations about that view.

TWISP (Okanogan Wilderness v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997)):

Issues: Several issues were presented to the Supreme Court related to the right to change or transfer an existing water right: The two primary issues were:

1. What are the standards or findings that must be made in granting a change or transfer of a water right?
2. Did the town of Twisp, both as a matter of law and under the facts of the case, abandon its water right?

Holding:

- The Department of Ecology's decision granting a change in the point of diversion for the town of Twisp's surface water right was in error because the water right had been abandoned and was therefore no longer valid. Although the Department of Ecology's decision was reversed, the Court followed many of the legal arguments made by the Department. The Court concluded:

- A change in the point of diversion or the place of use of water right may be granted only if the change does not cause harm to other water rights.
- The transfer or change of water right may be granted only to the extent the water right has been historically put to beneficial use as beneficial use determines the measure of a water right.
- The existence and quantification of a water right must be determined, including whether or not the water right has been lost for non-use, before the Department can approve a change or transfer of the water right.
- Abandonment is a common law principle for the loss of a water right. To prove abandonment, the party claiming abandonment must show the water right holder ceased using the water and intended not to use it.
- There is rebuttable presumption of an intent to abandon if there have been long periods of non-use, and the burden of proof shifts to the water right holder to give reasons justifying the non-use.
- Abandonment is a common law process, and is not equivalent to the statutory relinquishment process set forth in chapter 90,14 RCW. Chapter 90.14 does not require proof of intent to abandon and is not a codification of common law abandonment.
- Although municipalities are exempt for loss of a water right under the statutory relinquishment laws, chapter 90.14 RCW; no exemption is available for loss of a water right if the elements of abandonment are shown.

Requirement to review perfection, validity, and extent of right

- In 1990's the Town of Twisp applied to Ecology to change the point of diversion on a 1912 10 cfs surface water claim for which no water had been diverted since at least 1948. Ecology granted that change application, without looking at whether and to what extent the right had been perfected or whether it had been abandoned or relinquished. In fact, only 3.8 cfs at most had been diverted. OWL, a local environmental group, appealed that order to the PCHB, and the PCHB found that the Twisp right was only perfected to 3.8 cfs and had not been abandoned. OWL appealed that directly the Supreme Court.
- In response to Twisp's argument that under Rettkowski Ecology had no authority to review validity and extent of rights during changes, the court responded as follows:
    - "A transferred right or a change in point of diversion may be granted only to the extent the water right has historically been put to beneficial use.
    - " [I]n order to decide whether to approve a change in point of diversion, the Department must tentatively determine the existence and extent of beneficial use of the water right. [I]f the Department concludes that a water right has been abandoned or otherwise lost, then it should deny the change in diversion point. The department's determination could not, however, be a final determination of the validity of the water right."

Common Law Abandonment

- Statutory relinquishment (RCW Chapter 90.14) and common law abandonment are two separate and distinct means through which a water right allocation is returned to public ownership.
- Statutory relinquishment did not apply because Twisp is a municipality and the water right was for municipal water supply purposes, an exception to relinquishment.
- "Abandonment is the intentional relinquishment of a water right. Intent is determined with reference to the conduct of the parties. The burden of proof of abandonment is on the party alleging abandonment. Nonuse is not per se abandonment. However, the general rule in western water law is that nonuse is evidence of intent to abandon, and long periods of nonuse raise a rebuttable presumption of intent to abandon, thus shifting the burden of proof to the holder of the water right to explain reasons for the nonuse."

Court found abandonment based on these facts: "Twisp stopped using the surface water under the 1912 right sometime between 1939 and 1948 when the town began using groundwater from wells located within the town. Sometime in or after 1948, the diversionary works were destroyed in floods and subsequently the diversion area was riprapped. Although the evidence does not show who did the riprapping, Twisp did not try to reclaim the diversion point. Finally, as the Board noted in its findings, in 1967 and 1971 when Twisp belatedly sought groundwater certificates for its wells, it did not mention the 1912 water right even though the application forms asked whether there were any other water rights appurtenant to the lands served by the groundwater withdrawals.

In a memo from AAG Deb Mull to Ecology, the following is a summary of R.D. Merrill:

TO: Fred Rajala, Water Resources Program
John Williams, SWFAP
Department of Ecology, MS 47600

FROM: Deborah L. Mull, Assistant Attorney General Attorney General of Washington, Ecology Division, MS 40117

SUBJECT: Okanogan Wilderness League v. R.D. Merrill and Dept. of Ecology Supreme Court Opinion

On January 7, 1999, the Washington State Supreme Court issued its opinion in the above referenced appeal. I thought it would be helpful to provide you with a summary of the decision so you could circulate it to the water conservancy boards. Let me know if you have any questions or concerns after reviewing this memorandum.

SUMMARY OF GENERIC LEGAL RULINGS

Ecology must quantify a water right sought to be changed before it can approve the change request.

- A change approval is precluded where a once-perfected water right has been abandoned relinquished.
- For purposes of a change application, quantification of a water right is not based solely upon the most recent historic use. All factors, including weather variation, should be considered.
- Claimants asserting a claim to pre-code water rights must establish that the water was diverted or withdrawn in order to prove that the water right was perfected.
- Seasonal changes are implicitly recognized by the legislature when allowing changes in purpose of use. However, seasonal use changes can only be authorized if there will be no impairment of existing rights and the change would not be detrimental to the public welfare.
- RCW 90.44.100 allows changes in point of diversion and place of use for an unperfected (i.e., inchoate) ground water right so long as the change does not alter the original purposes of the water right. Under this statute, changes of unperfected ground water rights cannot be made for speculative purposes.
- Before change approvals can be given under RCW 90.44.100, Ecology must affirmatively find that water is available, that existing rights will not be impaired, and that the change will not be detrimental to the public welfare. The determination that water is legally available, as contrasted with physical availability, is made at the time the application is filed and is not revisited for purposes of changes under RCW 90.44.100. However, the remaining criteria of physical availability, impairment, and detriment to the public welfare are measured as of the date the Department makes its change decision.

- The public trust doctrine does not serve as an independent source of authority for the Department to use in its decision-making apart from the provisions in the water code.
- The exceptions to the relinquishment statute are to be narrowly construed.
- The "operation of legal proceedings" exemption from relinquishment requires the nonuse of water to be the result of the legal proceedings (i.e., the legal proceedings prevent the use of water).
- The "determined future development" exemption from relinquishment requires the water user to:

  1. Have a firm definitive plan within five years of the first date of nonuse of water (Note: Feasibility studies do not constitute a firm definitive plan.); and
  2. Within 15 years of the nonuse of water, commence development of the determined plan; and

  (Note: Full plan completion is not required within the fifteen years, but some development must have occurred. Factors which may serve as evidence indicating development has occurred include, but are not limited to: (1) applications for permits; (2) notification to the Department of the plan; (3) actual physical development; and (4) acquisition of other necessary lands, rights, and/or materials needed to develop the plan.)

  3. Prosecute the development with diligence.

ANALYSIS

Statutory Requirements for Change Decisions

In issuing its decision, the Supreme Court relied heavily upon its O.W.L. v. Town of Twisp decision. O.W.L. v. Town of Twisp 133 Wn.2d 769 (1999). The Court held that even though a water right may have been historically perfected at some time, the right may have been lost through common law abandonment and/or relinquishment. As such, the Court held it would be improper to rely solely upon the quantity historically perfected. The Court also held that it would be error to rely upon the most recent use because, allowing for weather variations, that use may be considerably higher or lower in a given season or year. While not explicitly stated, the Court, implicitly held that the entire history of use was germane in determining what quantity of water had been beneficially used and is therefore subject to change. The Court did not provide any specific formula for determining beneficial use The Court further affirmed its holding in Twisp that Ecology must tentatively quantify the water right before approving a change application.

The Court also addressed the issue of what time period should be used to determine whether the statutory tests of beneficial use, no impairment, and no detriment to the public welfare have been met: present day conditions or conditions that existed when the water right was originally granted (i.e., during the time period of the priority date). In order to understand the Court's ruling on this issue, it is important to understand the context of the arguments presented. In its brief, O.W.L. asserted that the test of availability is measured by modem day conditions. O.W.L. asserted that the Department cannot find that water is available because today the Methow River is over-appropriated. Ecology responded that the change statute allows

water right holders to retain their priority date; therefore the proper date for determining legal availability is the priority date of the water right. Ecology further argued that modem day evidence is used in determining physical availability, impairment, and detriment to the public welfare. The Court, without distinction as to physical or legal availability, held that the time for determining availability is the date the application is filed. However, the fact that the Court did not make a distinction between legal and physical availability does not mean the distinction does not apply. The analysis utilized by the Court makes clear it was addressing only the issue of legal availability. In a footnote, the Court affirmed Ecology's findings of no detriment to the public welfare, findings made by considering modern day evidence.

Seasonal Use Changes

In addressing changes in seasonal use, the Court found that a water right is limited by time as well as volume. The court held that "timing changes which alter the length of period or the season of the year during which water is diverted and used can cause impermissible third party effect." Slip Op. at 8. The Court held that once the time of use is defined, Ecology must analyze whetl a change in the timing of use would result in impairment before a change can be authorized. The Court also found that the statutory authorization that allows changes in purpose of use implicitly allows changes in season of use as long as the statutory tests of no impairment, etc. are met. If impairment is caused by the change in season of use, the Court held that the change should be denied or conditioned to avoid the impairment.

Unperfected Groundwater Right Changes

The Court upheld the changes authorized by Ecology, as modified by the PCHB, for the two unperfected groundwater rights. The Court reasoned that the use of the word "permit" in RCW 90.44.100 allows changes to unperfected rights because, by definition, a permit is an unperfected water right. Therefore, for groundwater changes, beneficial use of the water need not occur before a change is authorized. However, the Court affirmed that changes in purpose of use are not allowed for unperfected groundwater rights.'[1] The Court's rationale is based upon the statute and the common law anti-speculation element of western water law that the Court adopted in Ecology v. Theodoratus 135 Wn.2d 582, 957 P.2d 1241 (1998). The Court reasoned that because changes in purpose of use are not allowed for unperfected groundwater rights under the statute and the applicant must proceed with due diligence in pursuing their project, the ability to change unperfected water rights under RCW 90.44.100 cannot be used for speculative purposes. The Court held that the types of changes authorized under RCW 90.44.100 "do not alter the original project." These types of changes merely allow some flexibility in locating the groundwater. Lastly, the Court refused to affirm Ecology's position that changes to unperfected groundwater rights can only be made if there is a hydrologic or engineering difficulty because no such reference was made in the statute.

[1] There is some indication in the opinion that changes in purpose of use for perfected groundwater rights may not be allowed. However, when the opinion is read in context with the legal arguments made by the parties, it is my opinion that changes in purpose of use to perfected ground water rights can still be made pursuant to RCW 90.03.380. I do not believe that the Supreme Court has disallowed that type of change.

Public Trust Doctrine

The Court affirmed its ruling in Ecology v. Rettkowski 122 Wn.2d 219 (1993) as it relates to the public trust doctrine, finding that Ecology has no independent authority under this doctrine to take action. The Court also recognized that the water codes contain numerous provisions intended to protect the public interests. Lastly, the Court held that it was not necessary to utilize the public trust doctrine as a cannon of construction given the numerous statutory references contained in the water codes.

Perfection Requirements

The Supreme Court disallowed the Wilson irrigation right, finding that there was no evidence that the right had ever been perfected. The Court's analysis turned primarily upon the Administrative Procedure Act's requirements for Superior Court review. The Supreme Court found that the Superior Court had exceeded its authority in substituting its factual findings for the PCHB's findings. The Supreme Court, applying the substantial evidence standard of review, found that the Board's findings were supported. The Court specifically referenced the fact that no independent diversion work was constructed by Wilson. The lack of construction indicated that the intent to appropriate water under the 1914 notice was never carried out. The Court further held that, for purposes of determining whether a claim has been perfected, diversion of the water pursuant to the language in the notice is a key requirement.

Statutory Relinquishment

In addressing the Willis/Miller water right, the Supreme Court remanded this right to the PCHB for further proceedings because the record was incomplete concerning whether the right has been relinquished. The Supreme Court directed that a full hearing be held to determine the historic water use and to determine the applicability of any of the exemptions from relinquishment. The Supreme Court provided legal rulings that will guide the subsequent proceedings. The Court began its analysis by noting that exemptions from relinquishment are to be narrowly construed. The Court also noted that while the party asserting relinquishment has the duty to prove nonuse of the water, the party asserting that one of the exemptions applies has the burden to prove the applicability of the exemption.

In addressing the specific exemptions at issue, the Court rejected Merrill's argument that "all proceedings authorized or sanctioned by law and brought or instituted in a court or legal tribunal for acquiring of a right or the enforcement of a remedy" constituted "legal proceedings" that would make the "operation of legal proceeding" exemption applicable. The Court held that the legal proceeding must prevent the use of water.

As to the "determined future development" exemption, the Court held that the water right holder must have a firm definitive plan prior to the expiration of five years from the date of last use of water. The plan must be fixed prior to the end of the five years. Feasibility studies do not constitute such a plan. Regardless of whether development takes place within fifteen years of the date of last use, if the plan was not fixed and determined within the first five years, relinquishment has already occurred. The Court specifically wished to avoid a situation in which a water right applicant, after the five years of nonuse, decides to plan a future development simply to avoid relinquishment. The Court's analysis does not allow the water right holder to change the plan once it is fixed and determined, and requires the "actual physical development... [to be] consistent with the plan." If a plan is fixed and determined within the five years, the water

right holder must still take action to develop the fixed plan within fifteen years from the date of last use in order to avoid relinquishment. Factors that may serve as objective evidence of development include, but are not limited to: (1) applying for necessary permits; (2) notifying Ecology of a plan to use the water for a future development; (3) actual physical development consistent with the plan; (4) acquisition of additional land, materials, etc. to effectuate the plan. The Court held that the entire project need not be developed within the fifteen years but that the applicant must proceed with reasonable diligence within the fifteen years.

I hope this memorandum helps you understand the Supreme Court's ruling and its implications. If you would like to discuss this case further, feel free to contact me.