

STATE OF WASHINGTON
ENVIRONMENTAL AND LAND USE HEARINGS OFFICE
POLLUTION CONTROL HEARINGS BOARD

REX T. LYLE, JUANITA H. LYLE, CHRIS
T. LYLE, AND KEVIN J. LYLE,

Appellants,

vs.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY; AND BOERSMA LAND &
CATTLE, LLC

Respondents.

Case No.: PCHB No. 16-043

Motion for Summary Judgement and Response
to State of Washington, Department of
Ecology's Motion for Partial Summary
Judgement on Issue 5.

I. RELIEF REQUESTED

Rex T. Lyle, Juanita H. Lyle, Chris T. Lyle, and Kevin J. Lyle, Appellants move for summary judgement on Issue 5 and request that Pollution Control Hearings Board reverse Washington Department of Ecology's approval of Boersma Land & Cattle, LLC's Application for Change No. 6210-A.

II. BACKGROUND

The Attorney General of Washington states the following in their Motion for Partial Summary Judgement on Issue 5:

"For the purposes of this motion, Ecology does not contest that the approved change may have a detrimental effect on the existing wells near the new place of use and point of withdrawal, or that those wells "show a substantial cumulative increase in pumping lift." Indeed, the problem of a declining groundwater level is unfortunately endemic throughout the OGS. Ecology's ROE predicts that the drawdown from the proposed change would increase the rate of decline in the water level by 3.8 feet per year at a nearby long-term monitoring well in Section 8, T.15N., R.32E.W.M. Stearns Decl. at 32."

Motion for Summary Judgement and Response to State of Washington,
Department of Ecology's Motion for Partial Summary Judgement on Issue 5. - 1

1 The State of Washington, Department of Ecology's Report of Examination for Application for
2 Change No. 6210-A concedes the point that there is potential for impairment in the amount of an
3 increased rate of decline to a nearby long term test well in the amount of 3.8 feet per year.

4 The Attorney General of Washington refers to RCW 90.44.130 in their Motion for
5 Partial Summary Judgement on Issue 5:

6 "Ecology has the authority to manage groundwater
7 withdrawals and jurisdiction "to limit withdrawals by
8 appropriators of groundwater so as to enforce the maintenance of
9 a safe sustaining yield from the groundwater body." RCW
10 90.44.130. Ecology has set the acceptable rate of decline within
11 the OGS at thirty feet over three consecutive years, measured in
12 spring. WAC 173-130A-060."

13 The first sentence of RCW 90.03.380 states:

14 "(1) The right to the use of water which has been applied
15 to a beneficial use in the state shall be and remain appurtenant
16 to the land or place upon which the same is used: PROVIDED,
17 HOWEVER, That the right may be transferred to another or to
18 others and become appurtenant to any other land or place of use
19 without loss of priority of right theretofore established if such
20 change can be made without detriment or injury to existing
21 rights."

22 The phrase "without detriment or injury to existing rights" can only be interpreted as meaning
23 zero detriment.

24 Washington Supreme Court rulings in Case No. 90386-7 Sara Foster v. Washington State
25 Department of Ecology; City of Yelm; and Washington Pollution Control Hearings Board clearly
26 states, "Our cases have consistently recognized that the prior appropriation doctrine does not
27 even permit de minimis impairments of senior water rights. *Postema*, 142 Wn2d at 90". The
28 Supreme Court invalidated Ecology's interpretation of RCW 90.54.020(3)(a) defining
"overriding considerations of the public interest" (OCPI) with respect to impairment. RCW
90.03.380 is clear that existing water rights shall not be impaired.

Motion for Summary Judgement and Response to State of Washington,
Department of Ecology's Motion for Partial Summary Judgement on Issue 5. - 2

1 State of Washington Supreme Court ruling in Case No. 87672-0, Swinomish Tribe v.
2 Washington State Department of Ecology ruled that Ecology exceeded their statutory authority
3 under circumstances that bear a penumbra of similarity to Ecology's interpretation of WAC 173-
4 130A-060.

5 III. ARGUMENT

6 There is no language set forth in RCW 90.44.130 granting additional authority to
7 Ecology with respect to "impairment" beyond what is written in of RCW 90.03.380.
8 Furthermore, RCW 90.44.130 makes no reference to procedural instructions regarding water
9 right transfers within groundwater management areas that would allow special exceptions to
10 impairment under RCW 90.03.380. The impairment standard defined in RCW 90.03.380 must
11 therefore be adhered to.

12 Ecology's impairment test under WAC 173-130A-60 is inadequate toward identifying
13 "overriding" considerations of public interest. Water right transfer "Application for Change No.
14 6210-A" would clearly impair the rate of decline in the nearby long-term monitoring well in
15 Section 8, T.15N., R.32E.W.M. Allowing a marginal increase of 3.8 feet per year in
16 groundwater decline to the nearby long-term monitoring well does not fit the definition of "limit
17 withdrawals by appropriators of groundwater so as to enforce the maintenance of a safe
18 sustaining yield from the groundwater body". RCW 90.44.130. This transfer would also likely
19 impair domestic water needs near the proposed point of withdrawal protected by the exempt well
20 statute. Exempt wells are defined in RCW 90.44.050.

21 Our case bears clear similarity to Washington Supreme Court rulings in Case No. 90386-
22 7 Sara Foster v. Washington State Department of Ecology; City of Yelm; and Washington
23 Pollution Control Hearings Board. WAC 173-130A-060 serves as an exception to the overall
24 prioritization of water rights and those withdrawals of water under statute cannot impair senior
25 water rights with earlier priority. WAC 173-130A-060 is clearly an exception to the impairment
26 standard specified in RCW 90.03.380. Water right transfers are also not permitted when they
27 might impair junior water rights.

28 Given the State of Washington Supreme Court ruling in Case No. 90386-7 Sara Foster v.
Washington State Department of Ecology; City of Yelm; and Washington Pollution Control

1 Hearings Board PCHB should reject Ecology's approval of Boersma Land & Cattle, LLC's
2 Application for Change No. 6210-A based on "*stare decisis*". The Supreme Court states, "Our
3 cases have consistently recognized that the prior appropriation doctrine does not even permit de
4 minimis impairments of senior water rights. *Postema*, 142 Wn2d at 90". The Supreme Court
5 invalidated Ecology's interpretation of RCW 90.54.020(3)(a) defining "overriding considerations
6 of the public interest" (OCPI) with respect to impairment. RCW 90.03.380 is clear that
7 existing water rights shall not be impaired.

8 State of Washington Supreme Court ruling in Case No. 87672-0, Swinomish Tribe v.
9 Washington State Department of Ecology provides further evidence that PCHB should reject
10 Ecology's approval of Boersma Land & Cattle, LLC's Application for Change No. 6210-A
11 based on "*stare decisis*". WAC 173-130A-060 fits the paradigm ruled against in Swinomish
12 Tribe v. Washington State Department of Ecology. WAC 173-130A-060 fits the example of an
13 exception to RCW 90.03.380. There is a clear penumbra between the issue of exceptions to
14 RCW 90.44.050 raised in Swinomish and Ecology's current interpretation of WAC 173-130A-
15 060. Ecology's interpretation of WAC 173-130A-060 is inconsistent with the plain language of
16 RCW 90.44.050.

17 IV. CONCLUSION

18 Summary judgement is appropriate at this time as a matter of law.

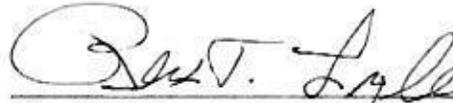
19 Given rulings in these two Washington Supreme Court cases, we the appellants move for
20 summary judgement reversing and thereby denying Washington State Department of Ecology's
21 approval of "Application for Change No. 6210-A".

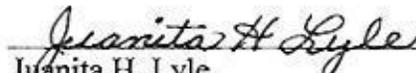
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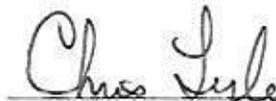
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5 Dated this 6th of July, 2016

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8 Rex T. Lyle

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11 Juanita H. Lyle

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14 Chris T. Lyle

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17 Kevin J. Lyle