

Stock Water Working Group

Rettkowski Case Summary **September 3, 2009**

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CASE SUMMARY
RETTKOWSKI V. ECOLOGY (SINKING CREEK)
122 Wn.2d 219, 858 P.2d 232 (1993)

I. BACKGROUND

The *Rettkowski* case arose out of a long-standing dispute among individuals using a diminished water supply in the Sinking Creek area of Lincoln County south of the town of Wilbur. The State of Washington, Department of Ecology (Ecology) issued approximately twenty (20) cease and desist orders (enforcement orders) to farmers (the Irrigators) requesting that they cease withdrawing groundwater from their wells. The enforcement orders were based on Ecology's finding that the Irrigators' withdrawal of groundwater was affecting the surface water flow in Sinking Creek and its associated springs. The water flowing in Sinking Creek and from the springs (the surface water source) was used by several cattle ranchers owning property along Sinking Creek (the Ranchers).

The Irrigators' groundwater rights were evidenced by state groundwater certificates issued under RCW 90.44. Except for one surface water certificate issued in 1950, Ecology determined that the Ranchers' rights to the use of surface waters were considered "vested" rights, perfected prior to the adoption of the 1917 surface water code, RCW 90.03, and were thus, not evidenced by any Ecology-issued water permit or certificate. Some of the Ranchers' water rights were supported by claims filed pursuant to RCW 90.14 (the state water right claim registry), others were not. The Ranchers used the surface water at issue for stock watering, irrigation of pasture and annual crops, and recreation. Ecology verified the existence of the Ranchers' rights to use of water from Sinking Creek and its associated springs. Ecology determined that the Ranchers' water rights were perfected prior to the Irrigators' rights and therefore were considered "senior" to the Irrigators' certificated rights. The water sources at issue were not adjudicated.¹ Based on the prior appropriation doctrine (i.e., first in time, first in right) Ecology ordered the Irrigators to cease using water until such time that there was sufficient water to satisfy the senior water rights held by the Ranchers.

II. ISSUES PRESENTED

The main issues presented to the Washington Supreme Court:

- (1) Did Ecology act within its statutory authority when it issued enforcement orders to the Irrigators for the purpose of protecting the Ranchers' senior vested water rights?
- (2) Did Ecology violate the Irrigators' constitutional procedural due process rights by failing to first provide notice and conduct a hearing before issuance of the enforcement orders?

¹ A general adjudication is a process whereby all those claiming the right to use waters of a river or stream are joined in a single action to determine water rights and priorities between claimants. *Id.* at 229. "A general adjudication ensures that all interested parties are heard in a formal adjudicative setting and that adequate due process is afforded by all." *Id.*

III. THE COURT'S DECISION

The Supreme Court found that Ecology acted without statutory authority to issue the enforcement orders to the Irrigators. The Supreme Court stated that the decisive inquiries are whether Ecology possesses the statutory authority to: (1) determine the priorities of water rights in the basin, and (2) issue enforcement orders consistent therewith. *Rettkowski v. Ecology*, 122 Wn.2d 219, 225, 858 P.2d 232 (1993). The opinion resolved these "inquiries" using an analysis based on fundamental rules of administrative law and statutory construction. "[A]n agency may only do that which it is authorized to do by the legislature." *Id.* at 226.

The Supreme Court recognized that Ecology has the authority to regulate "in accordance with the rights [to divert water]," RCW 43.27A.064(3), and to regulate "whenever it appears . . . that a person is violating the provisions of [the water code]," including "first in time, first in right," RCW 43.27A.190. *Id.* at 226-227. However, the Court concluded that this general authority did not grant Ecology the specific statutory authority necessary to verify or determine the validity and priority of existing water rights. The Court was not persuaded by Ecology's position that it had "inherent authority" to regulate water rights in such a fashion. *Id.* at 226. The Court held that the only authority to determine the existence of water rights is the superior court through a general water rights adjudication pursuant to the Washington Water Code. *Id.* at 225.

Although the conclusion Ecology reached as to the relative priorities of the water rights in the Sinking Creek basin may ultimately prove to be correct, the only method of ascertaining this will be through a general adjudication.

Rettkowski, 122 Wn.2d at 234.

Ecology asserted that it had the authority to "tentatively" determine the existence, including priority and quantity, of water rights based on previous Supreme Court decisions that interpreted Ecology's (or its predecessor agency's) authority to make such determinations when deciding to grant or deny a water right application. Ecology reasoned that it must determine whether there is available water for the "applied-for" water right permit and whether if granted, the diversion of water would conflict with existing rights.

The Court did agree that Ecology had the ability to make these tentative determinations for the purpose of making decisions on permit applications. *Id.* at 228-229. However, once Ecology grants a permit based on a determination that it will not conflict with an existing "senior" water right, Ecology cannot regulate the new permittee to protect the same recognized senior right, even if the water is in short supply, or if new evidence shows that Ecology overestimated the amount of available water. The Court held that Ecology can only regulate if the priority of rights have been confirmed in a superior court general adjudication.

