

NO. 281141

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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IN THE MATTER OF THE DETERMINATION OF THE RIGHTS TO THE  
USE OF THE SURFACE WATERS OF THE YAKIMA RIVER DRAINAGE  
BASIN, IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 90.03,  
REVISED CODE OF WASHINGTON,

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent/Cross-Appellant,

v.

JAMES J. ACQUAVELLA; UNITED STATES; YAKAMA NATION;  
AHTANUM IRRIGATION DISTRICT; JOHN COX DITCH  
COMPANY; and LA SALLE HIGH SCHOOL; DONALD BRULE;  
SYLVIA BRULE; JEROME DURNIL; and ALBERT LANTRIP.

Appellants/Cross-Respondents.

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**RESPONDENT/CROSS-APPELLANT STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY'S REPLY BRIEF**

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## I. INTRODUCTION

Statutory exceptions to relinquishment of water rights are to be narrowly construed in favor of beneficial use. *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 140, 969 P.2d 458 (1999). In this case, however, the Ahtanum Irrigation District (“AID”) argues that the “determined future development” exception to relinquishment, RCW 90.14.140(2)(c), should be interpreted to allow a party to resume the very same use that had been discontinued nine years earlier solely on the basis that a firm, fixed plan to resume the use was in place.

AID’s argument should be rejected. Not only does such a result 1) require an expansive application of an exception contrary to *R.D. Merrill*, it also 2) ignores statutory text contrary to canons of statutory construction in *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005), 3) runs contrary to beneficial use requirements in *Dep’t of Ecology v. Grimes*, 121 Wn.2d 459, 852 P.2d 1044 (1993), and 4) counters the objectives of relinquishment to make others whole or allow for new uses described in *R.D. Merrill*. As a result, the trial court should be reversed.

Additionally, AID is the only party that has responded to the Department of Ecology’s (“Ecology”) appeal regarding application of RCW 90.14.140(2)(c) to the present facts. It is unclear from the record

whether AID asserts organizational standing in order to represent the Hagemeiers, whose water rights are at issue in this appeal. Consequently, Ecology is concerned about the binding nature of this appeal on AID members, including the Hagemeiers. Ecology requests that this Court clarify whether or not AID does, in fact, represent the position of the Hagemeiers in this appeal.

## II. ARGUMENT

### A. **It Is A Verity On Appeal That The Hagemeiers Did Not Beneficially Use Their Water Right For More Than Five Successive Years**

Citing *Pacific Land Partners, LLC v. Dep't of Ecology*, 150 Wn. App. 740, 208 P.3d 586, *review denied*, 167 Wn.2d 1007, 220 P.3d 209 (2009), AID obliquely suggests that there has been no showing that the nine years' nonuse of the Hagemeiers' water right was "voluntary," as required for statutory relinquishment. See Reply Brief of Cross Respondent Ahtanum Irrigation District to State of Washington, Department of Ecology's Opening/Response Brief ("AID's Reply") at 8. *Pacific Land Partners* describes "voluntary" in this way:

The cases . . . set out the burdens of proof as follows: first Ecology must prove the lack of beneficial use for five successive years, then the burden of proof shifts to the property owner to show that the nonuse fits within at least one of the narrow statutory exceptions. In effect . . . "voluntarily fails, without sufficient cause, to beneficially use" has been interpreted to mean something

like “fails to beneficially use a known water right, unless this failure is excused under a statutorily recognized exception.”

*Pacific Land Partners*, 150 Wn. App. at 756 (citations omitted).

The trial court correctly determined that Ecology met its initial burden of showing at least five successive years of nonuse. CP at 477 (Memorandum Opinion Exceptions to the Supplemental Report of the Court and Proposed Conditional Final Order (“Memorandum Opinion”) at 22 (citing Supplemental Report at 73)). This determination has not been challenged on appeal. It is thus a verity. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

The trial court, however, *sua sponte* applied the determined future development exception to the Hagemeyers’ circumstance, thus excusing the nonuse and preventing relinquishment. CP at 477 (Memorandum Opinion at 22 (citing Supplemental Report at 73)). As argued in Ecology’s Opening/Response Brief, as a matter of law the Hagemeyers’ plan to resume prior irrigation is not a “determined future development” even under the facts as assumed by the trial court. *See* Respondent/Cross-Appellant State of Washington, Department of Ecology’s Opening/Response Brief (“Ecology’s Opening/Response Brief”) at 7–13. As argued below, nothing in AID’s brief changes this conclusion.

**B. A Firm, Fixed Plan To Resume A Pre-Existing Water Use Cannot Constitute A “Determined Future Development”**

AID argues that the determined future development exception only requires: 1) that a firm, fixed plan to resume a pre-existing use be in place before the expiration of five years from the last beneficial use of a water right, and 2) that it be implemented within 15 years of the last beneficial use. *See* AID Brief at 4–5, 7. This argument gives no effect to statutory text making the exception applicable only to a “future development.” RCW 90.14.140(2)(c). While the Hagemeyers may have had a determined *plan* to resume irrigating their land, they did not have a determined *future development* that would excuse relinquishment.

Ecology is aware of nothing in the record that suggests the Hagemeyers were ever inconsistent in their intent to resume previous agricultural irrigation during a nine-year lapse in use.<sup>1</sup> As such, Ecology does not dispute that the Hagemeyers had a “plan” that was “fixed” or “determined.” *See* AID’s Reply at 2 (quoting CP at 479 (Memorandum Opinion at 24)). However, a mere assertion of intention, regardless of how unwavering it may be, does not constitute a claim for an exception on the basis of a determined future development. The exception requires more. “[The property owner] must show some determined *future*

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<sup>1</sup> Generally, in interpreting what constitutes a “determined” development plan, courts have looked to whether and to when it was fixed. *See e.g., Pacific Land Partners*, 150 Wn. App. 740.

*development*, as opposed to a bald statement that a development exists, to assert the exception to the general rule of relinquishment.” *City of Union Gap v. Dep’t of Ecology*, 148 Wn. App. 519, 529, 195 P.2d 580 (2008) (emphasis added).

While the Hagemeyers may have shown a “determined” use, they failed to show a determined *future development* contrary to the statutory text. *See e.g., Roggenkamp*, 153 Wn.2d at 624 (all the words in a statute should be given meaning). AID only briefly addresses the “development” portion of the exception, and then only to dispute Ecology’s use of the dictionary definition of the word. *See* AID’s Reply at 5. In contrast to AID’s assertions, Ecology indeed relies upon this Court’s decision in *Union Gap*, 148 Wn. App. 519.<sup>2</sup> *See* Ecology’s Opening/Response Brief at 12–13. In *Union Gap*, this Court clarified that the word “development” refers to “a land-use type of development,” which “as used in this exception, refers to the development (or possible development) of land.” *Union Gap*, 148 Wn. App. at 530–31. As argued in Ecology’s Opening/Response Brief, no “development” of land is necessary to simply

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<sup>2</sup> In addition, as the agency charged with implementing the Water Code, Ecology does have authority to interpret and to apply the exceptions to relinquishment, including the determined future development exception. *See e.g. Overlake Hosp. Ass’n v. Dep’t of Health*, \_\_\_ P.3d \_\_\_, 2010 WL 3705227 (Wash. 2010) and *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004). Equally important, in so doing Ecology is following traditional canons of statutory construction. *See* Ecology’s Opening/Response Brief at 10–13, where statutory canons of construction are discussed in detail.

resume a prior use of water in a fashion consistent with the prior land use. Such a practice merely constitutes the delayed *maintenance* of a *right already developed*, not a “development” (i.e., “growth or progress”) to come in the future. *See* Ecology’s Opening/Response Brief at 11–12.

Additionally, AID’s assertion that the Hagemeyers’ resumption of irrigation was “immediate” upon their return to the property, AID’s Reply at 5, further supports that the Hagemeyers’ actions were the resumption of a previous, long-idle use and not a “development.” If it is indeed true that the Hagemeyers “immediately” resumed irrigation,<sup>3</sup> this subverts even the trial court’s unsupported assumption that “[I]and that has . . . sat idle for ten years . . . would certainly need development prior to being suitable for irrigation.” CP at 479–80 (Memorandum Opinion at 24–25).

AID’s position also fails to square with what the Washington Supreme Court has identified as the “obvious purpose” of the determined future development exception: “avoid[ing] relinquishment *only where fixed development plans will take longer than five years to come to fruition.*” *R.D. Merrill*, 137 Wn. 2d at 143 (emphasis added). AID does not, and cannot, show on the record an aspect of a land use development

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<sup>3</sup> Ecology has found no mention in the record of facts supporting the need to “develop” the Hagemeyers land much less how long such development could be expected to take. The suggestion of “immediate” resumption is an assertion by AID.

plan requiring more than five years to realize.<sup>4</sup> Under some circumstances, agricultural irrigation may constitute a “land use type of development” within the meaning of *Union Gap*, but the record in this case contains no information whatsoever to support such a case.<sup>5</sup>

Under the approach taken by AID and the trial court, the determined future development exception would wholly swallow the relinquishment rule. In most circumstances, some amount of work or preparation is likely necessary in order to resume a prior use of water that has been dormant for five or more years. If performing such deferred maintenance counts as “development,” the effect would be that the five-year grace period for forgiving non-use for any reason would be lengthened to 15 years simply by asserting a “firm, fixed” intention to

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<sup>4</sup> As noted in Ecology’s Opening/Response Brief, the Hagemeyers solely testified to their intention to resume a prior use of water. See Ecology’s Opening/Response Brief at 13–15. The trial court asserted the determined future development exception on behalf of the Hagemeyers *sua sponte*, including making the assumption (without any support in the record) that “[l]and that has . . . sat idle for ten years . . . would certainly need development prior to being suitable for irrigation.” CP at 479–80 (Memorandum Opinion at 24–25).

<sup>5</sup> Consider, for example, *Wirkkala v. Dep’t of Ecology*, PCHB Nos. 94-171, -172, -173, -174 (Nov. 2, 1994), where the purported development plan was a change in irrigation systems. The PCHB did not find that application of the determined future development was appropriate due to the scope of the project but considered agricultural irrigation to be a valid type of development. See also *Pacific Land Partners, LLC v. Dep’t of Ecology*, PCHB NO. 02-137, at CL 15 (May 9, 2005) (upheld on other grounds in *Pacific Land Partners*, 150 Wn. App. 740) (wherein the PCHB specifically found that the irrigation of raw land could have been achieved within less than five years, making application of RCW 90.14.140(2)(c) inappropriate). Again, it was not the ultimate use but the ability to implement the use in less than five years that the PCHB considered determinative.

return to a pre-existing use and taking whatever actions are necessary to resume that use. See Ecology Opening/Response at 8–12. This result would run contrary to the bedrock principle of water law that requires beneficial use in order to preserve a water right. See e.g., *Grimes*, 121 Wn.2d 459; *Dep't of Ecology v. Acquavella*, 131 Wn.2d 746, 935 P.2d 595 (1997); *R.D. Merrill*, 137 Wn.2d at 126; see also Ecology Opening/Response at 7–10.

**C. Allocation Of Water To The Yakama Nation Is Consistent With The Principles Of Relinquishment In *R.D. Merrill***

AID seems to suggest there is some significance to the fact that once relinquished, the Hagemeyers' water right will not be available to the state to appropriate for new uses in the Ahtanum Creek watershed, which is over-appropriated. AID Brief at 8. Ecology agrees that once relinquished, the Hagemeyers' right will not be available for new uses. This fact, however, has no legal bearing on whether the Hagemeyers' right has been relinquished. The water is already appropriated and allocated by the 9th Circuit to return to the Yakama Nation. *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 340 (9th Cir. 1956) and *United States v. Ahtanum Irrig. Dist.*, 330 F.2d 897, 913 (9th Cir. 1964) (under the 9th Circuit's interpretation of the Code Agreement, federal water rights contractually made available to non-Tribal members return to the Tribe for

use upon relinquishment). Allowing other right-holders, such as the Yakama Nation, to fully exercise their water rights is a result consistent with the relinquishment statutes and with the statutory construction given to them by the state supreme court: “the Legislature intended that water be beneficially used, and, if not, that water rights be returned to the state so that the water will be available for appropriation by others who will put the water to beneficial use.” *R.D. Merrill*, 137 Wn.2d at 140. This is not a situation where relinquished water will go unused, even if it does not go to *new* uses.

**D. It Is Unclear Whether AID Asserts Organizational Standing In Order To Represent Its Individual Members**

AID is unique among irrigation districts in the Yakima River Valley. Rather than holding water rights in its own name for the benefit of unnamed members (as do the other districts), AID patrons each have water rights issued in their individual names.<sup>6</sup> AID simply operates the irrigation system that allows these individuals to exercise their water rights.

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<sup>6</sup> CP at 2112 (VRP (Oct. 28, 2008) at 125, ll. 2–11):

MR. DAVIS [counsel for AID]: That's a very good point, because in the case of Roza, in the case of Sunnyside and the case of Selah-Moxee, we didn't bring in each individual water user and ask them to prove up their use on their particular parcel with priority date and all of that.

In [Ahtanum], that's what happened. Each of these individuals were required to do that. And that's because the certificates have been, since 1925, have been in the names of the individuals.

Based on this relationship between AID and its members, AID must assert organizational standing consistent with *Int'l Ass'n of Firefighters v. Spokane Airports*, 146 Wn.2d 207, 45 P.3d 186 (2002),<sup>7</sup> in order to represent the individual interests of members such as the Hagemeyers, rather than simply asserting the separate interests of AID as an entity. During the trial court's objections phase, Ecology and other parties raised concern that AID has not made clear which, if any, of its members it was representing in their individual capacity and whether counsel for AID was serving as counsel for both AID and the individual members.<sup>8</sup> CP at 5866–68 (VRP (May 11, 2006) at 46–48); CP at 2106–14 (VRP (Oct. 28, 2008) at 119–27); CP at 463–64 (Memorandum Opinion at 8–9). Indeed, at least one other party to this appeal believes that AID does not represent its members in an individual capacity and only has standing to assert the interests of the entity itself:

But when you have an entity, the question is who does the entity bind in the proceeding.

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<sup>7</sup> In *Spokane Airports*, the Supreme Court adopted and set forth the organizational standing criteria as: “(1) the members of the organization would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither claim asserted nor relief requested requires the participation of the organization’s individual members.” *Spokane Airports*, 146 Wn.2d at 213–14.

<sup>8</sup> See e.g. “MR. BARRY: And, like Ms. O’Shea, I don’t think I really heard an answer from Mr. Davis as to who he represents, in the sense that Mr. Schuster is here as the representative of the Nation or I represent a number of federal agencies along with the BIA.” CP at 2110–11 (VRP (Oct. 28, 2008) at 123–24, ll. 24–4).

And I think, at least it's always been my assumption, that AID bound essentially no one because of the nature of the rights that [AID's counsel] was representing; that they are individual rights, and each individual has to be before this Court on a personal basis; that the Court has personal jurisdiction over that individual before they're bound by a decision of the court.

CP at 2111 (VRP (Oct. 28, 2008) at 124, ll. 15–24) (argument by Patrick Andreotti, counsel for John Cox Ditch Co.).

This uncertainty continues in the instant appeal in the case of the Hagemeyers. It is possible that the Hagemeyers have consented to AID representing their interests and to AID asserting that their irrigation use was “immediate” upon return to their property. It is possible that AID meets the organizational standing standard and may bind all of its members to its positions. To date, however, Ecology is unaware of any such assertion or proof being advanced in this proceeding.

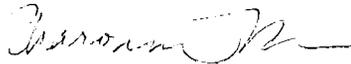
Without clarity around the relationship between AID and its members, *res judicata* and collateral estoppel may not effectively bar revisiting this issue in future appeals or proceedings with AID members. Both doctrines require the same parties, or a party in privity with an original party, in both proceedings. *See e.g., Pederson v. Potter*, 103 Wn. App. 62, 67–69, 11 P.3d 833 (2000). In the interest of finality, Ecology asks that this Court require AID to clarify the capacity in which it filed its response brief to Ecology's appeal.

### III. CONCLUSION

Ecology respectfully requests that this Court overturn the trial court's application of RCW 90.14.140(2)(c) to the Hagemeiens' record. Further, Ecology requests that this Court find that nine-years of undisputed and unexcused non-use renders the Hagemeiens' portion of "Answer 19" relinquished pursuant to the statutory directive that redistributes precious water to those who can beneficially use it.

RESPECTFULLY SUBMITTED this 21 day of October, 2010.

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