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KIM M. EATON, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

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,)

NO. 77-2-01484-5

Plaintiff,

MEMORANDUM OPINION RE:
NON-LAWYERS AND THE
UNAUTHORIZED PRACTICE
OF LAW

vs.

JAMES J. ACQUAVELLA, et al.,

Defendants.

I. INTRODUCTION

In October, 1995, the Department of Ecology (Ecology) filed a Notice of Limited Participation/Association for Subbasin Evidentiary Hearings. It was the intent of that Notice to notify subbasin claimants that Ecology might elect to be represented by staff at certain subbasin hearings rather than the Attorney General's Office. The Notice specified that Ecology would designate the staff member 30 days prior to the hearing and would do so in the monthly newsletter. Additionally, the Notice indicated that the non-attorney staff "will be responsible for direct and cross-examination of witnesses and evidentiary objections at the Subbasin Evidentiary Hearings." The Notice also made clear that an Assistant Attorney General would continue to represent Ecology in all

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1 other matters. The Notice was published again in November and mentioned
2 before counsel and the Court on the November 8, 1995 oversight day.

3 In preparation for the Subbasin 2 and 6 Remand Hearings conducted
4 in January/February 1996 by Referee Doug Clausing, Ecology filed their
5 designation of two staff members on November 17, 1995, and published
6 that designation in the December 1995 monthly newsletter. No objections
7 were filed until the February 1, 1996 hearing, when counsel for Subbasin
8 2 claimants Ranch Properties, David & Marilyn Lund, Lee & June Lund,
9 Gerald J. Griffin, Earl & Valerie Gentry, and Big Creek Water Users
10 (hereinafter Subbasin 2 claimants) delivered a memorandum to the Ecology
11 staffperson who was beginning to question the expert testifying on
12 behalf of the claimants set forth above. The memorandum is entitled Non-
13 lawyers and the Unauthorized Practice of Law. The memorandum contained
14 no note for argument nor any motion. The claimants did assert at the
15 time of hearing that the Ecology staffperson, who is not a Washington
16 Bar Association licensed attorney, would not be authorized "to represent
17 the Department of Ecology in terms of making objections or asking
18 questions." See Transcript, February 1, 1996, at p. 51. They now ask
19 the Court to enjoin this representation.

20 Thus this Court must decide if representation by non-attorney,
21 Ecology staff in subbasin hearings before the Referee constitutes the
22 unauthorized practice of law. For the reasons set forth below, the
23 Court concludes such representation does not constitute the unauthorized
24 practice of law and Ecology may be represented by staff in subbasin
25 hearings.

1 II. OPINION

2 A. Relevant Rules

3 RCW 2.48.190 provides that:

4 "No person shall be permitted to practice as an attorney or
5 counselor at law or do work of a legal nature for compensation . .
6 . unless he . . . has been admitted to practice law in this state."
7 See also RCW 2.48.170.

8 RCW 2.48.180 makes such unauthorized legal work by a non-attorney
9 a misdemeanor.

10 There are good reasons for this prohibition. First, it protects
11 members of the public from individuals who would purport to represent
12 their interests but who may not have the training, knowledge of ethical
13 responsibilities, etc. Hagan v. Kassler Escrow, Inc., 96 Wn.2d 443, 635
14 P.2d 730 (1981). Second, the prohibition protects the judicial system
15 which would not function properly if overburdened by non-lawyers unaware
16 of court rules and the particulars of court proceedings.

17 Both parties to this dispute agree that the judiciary has the sole
18 authority to control all persons practicing law and define what is or is
19 not the practice of law in any given circumstance. See Subbasin 2
20 Claimants Brief at 2; Ecology at 4; Hagan, supra. Although the Supreme
21 Court has not directly spoken on the precise issue before this Court,
22 there appears to be ample authority in the case law to support Ecology's
23 position.

24 B. Benefits Versus Risks

25 Ecology appears to take the position that the services performed by
staffpersons in the subbasin hearings does constitute the practice of

1 law. They rely on Cultum v. Heritage House Realtors, Inc., 103 Wn.2d
2 623, 694 P.2d 630 (1985), wherein the Supreme Court discussed several
3 "sound and practical reasons why some activities which fall within the
4 broad definition of 'the practice of law' should not be unauthorized
5 simply because they are done by laypersons." Subbasin 2 Claimants do
6 not reveal any reason why Ecology's staff should be enjoined from
7 appearing in the subbasin hearing- they only insist that doing so
8 encompasses the practice of law. In light of this absence of rationale,
9 the Court will substitute the general concerns set forth above for
10 purposes of this analysis. Ecology's reasoning for having staff rather
11 than an Assistant Attorney General attend and participate in the
12 subbasin hearings are twofold: (1) Expedite those hearings; and (2)
13 Budgetary constraints. If, after balancing the benefits and the risks,
14 the Court determines there is no genuine risk and necessary benefits
15 which can be obtained, then the Court may allow the Ecology personnel to
16 represent their interests. Id.; see also Treatment of L.G., 78 Wn.
17 App. 420, 426 (1995).

18 **1. Risks**

19 One critical factor for the Court to consider is the background and
20 training of the staffpersons and their ability to represent Ecology in
21 these proceedings. See L.G., supra, at 426. There can be little doubt
22 that Ecology's staff are well trained and particularly knowledgeable in
23 the area of water rights. Any that would participate in the hearings
24 have engaged in this type of work for many years. In fact, the Referee
25 assigned to Acquavella to assist the Court in determining the water

1 rights is such an individual. It has already been held during the
2 pendency of this case that the Referee need not be a Washington state
3 licensed attorney. Consequently, given the background of these agency
4 specialists there is little chance that the people of the state of
5 Washington will be harmed by their representation. See id.

6 Additionally, the unique role of Ecology in a water rights
7 adjudication must be considered. The adjudication statute contemplates
8 that Ecology should have the first opportunity at analyzing the rights
9 in order to simplify and reduce the work of the Superior Court.

10 "Upon the completion of the service of summons. . . , the superior
11 court in which said proceeding is pending shall make an order
12 referring said proceeding to the department to take testimony by
13 its duly authorized designee, as referee. . . ." RCW 90.03.160
14 (emphasis added).

15 Hence, since Ecology is charged with initially assessing and
16 analyzing the testimony to come up with a recommendation to the superior
17 court, does it really matter whether the eliciting of these facts comes
18 from the Referee, an Assistant Attorney General or another designee of
19 Ecology. Indeed, RCW 90.03.200 refers to the filing of the report "of
20 the department". Hence, it can be seen that the initial report,
21 although signed by the Referee, actually reflects a collaborative effort
22 by Ecology. There is nothing compromising about this process because
23 all parties still retain the opportunity to take any exceptions to the
24 report to the superior court. Therefore, if Ecology chooses to provide
25 additional personnel to assist the Referee in obtaining the necessary
26 facts, that is certainly within their prerogative.

27 The second risk posed by non-lawyer representation, overburdening

1 of the judiciary, is also not an issue in this specialized proceeding.
2 First, an adjudication proceeding anticipates and is therefore capable
3 of processing numerous claims by laypersons. Accordingly, it must be
4 recognized that these proceedings are far more informal than a regular
5 superior court proceeding. The system must work in such a fashion to
6 allow claimants, many of whom cannot afford the services of an attorney,
7 to stake their claim. The adjudication statute appears to contemplate
8 this as well by providing that parties, attorneys or agents can be
9 served. RCW 90.03.170, .190. Often in the subbasin hearings neighbors
10 or friends have presented the claim on behalf of the actual claimant.
11 Furthermore, the adjudication statute was changed during the pendency of
12 this case to allow the Court to conduct certain evidentiary hearings in
13 order to lessen the burden on the referee and reduce the overall
14 expenditures of all the parties, including the plaintiff, Ecology. RCW
15 90.03.160.

16 The rules of evidence have also been interpreted to allow for
17 introduction of the best available information, if not the most
18 foolproof. Very rarely do evidentiary objections take place and if so
19 it would be even more rare for the objection to be lodged by Ecology.
20 In a water rights adjudication, the necessary elements of a controversy
21 stem from the adverse interests of the claimants rather than the
22 administrative agency. Hence Ecology's interest is primarily one of
23 fact finding, ensuring accuracy and recordkeeping from a position of
24 neutrality.

25 Finally, the staff people would no doubt be present at the subbasin

1 hearings anyway. Thus, they already have reviewed the documents and
2 have the specific knowledge to aid the Referee in ensuring the record is
3 adequate to make a decision on a water right. Given that Ecology should
4 not take an adversarial role in these hearings, then the need for an
5 Assistant Attorney General to become familiar with the various claims is
6 eliminated. The Court resolves all of the legal exceptions during the
7 exception phase of the process and remands only those claims which need
8 further factual development.

9 Subbasin 2 claimants further argue that raising objections to
10 evidence and cross-examining witnesses constitutes the unauthorized
11 practice of law. The Court has already noted that few, if any,
12 objections to evidence are raised by Ecology to introduction of evidence
13 in the subbasin pathway. In Subbasin 2, no objections were lodged by
14 Ecology representatives. If objections had been raised based on rules
15 of evidence, then that would be a completely different matter and the
16 subbasin 2 claimant's objection could be well taken. Such is not the
17 case however. As for the cross-examination undertaken by Ecology
18 personnel, that label only applies by the skinniest of definitions.
19 According to Black's Law Dictionary, cross-examination is"

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21 "[t]he examination of a witness upon a trial or hearing, or upon
22 taking a deposition, by the party opposed to the one who produced
him, upon his evidence given in chief, to test its truth, to
further develop it, or for other purposes." Emphasis added.

23 Ecology is not "opposed" in the strict sense to anyone's water
24 right. It is their obligation to ensure that a water right has been
25 properly established pursuant to state law. Moreover, in questioning a

1 witness or a claimant, it is more likely than not that the effort of
2 Ecology tends to aid rather than hurt the claimant. Many claimants in
3 this adjudication come into the hearing unrepresented and with no real
4 idea of how to accomplish their objective of establishing a water right.
5 A review of the questions asked by Ecology tends to convince this Court
6 that their goal is to develop the record to aid the Referee in writing
7 the report. (See discussion above on the collaborative efforts of
8 Ecology employees.) Therefore, rather than burdening the judiciary,
9 production of a better factual record through the participation by
10 Ecology actually tends to unburden it.

11 Further, according to the authority relied on by subbasin 2
12 claimants, if the representation only extends to "facts, figures, or
13 factual conclusions, as distinguished from legal conclusions. . .", see
14 AGO 61-62 No.6, then such a representation is not technically the
15 practice of law. Finally, whatever evidence is produced by the process
16 still remains subject to the independent analysis of the Referee and
17 ultimately this Court. RCW 90.03.200 provides:

18 "If exceptions are filed [to the Referee's report] the action shall
19 proceed as in case of reference of a suit in equity and the court
20 may in its discretion take further evidence or, if necessary,
21 remand the case for such further evidence to be taken by the
22 department's designee, and may require further report by him. *WTS*

21 It is ^{the} role of the Referee in the subbasin hearings to elicit the
22 necessary facts for the Referee, or ultimately the Court, to determine
23 a water right. All legal questions are determined by the Court after
24 exception to any recommendation made by the Referee. If a remand
25 hearing is necessary, it is strictly for the purpose of supplementing

1 the factual record. Such is the type of limited fact-finding hearing
2 that is conducted at the subbasin hearing level pursuant to RCW 90.03.

3 **2. Benefits**

4 In regard to benefits, Ecology cites the Court to Fraass Survival
5 Systems, Inc. v. Absentee Shawnee Economic Development Authority, 817 F.
6 Supp. 7 (S.D.N.Y. 1993). There, the court permitted a tribal agency to
7 be represented by a non-lawyer member of the agency because of financial
8 difficulty. Here, Ecology's primary purpose in designating a
9 staffperson to participate in subbasin hearings is to reduce
10 expenditures. Ecology's position as a governmental agency is fairly
11 analogous to the situation in Fraass. The Court agrees with the
12 comparison, and being well aware of the financial burden placed on
13 Ecology by this adjudication, (see also attachments to Ecology Brief
14 discussing their budgetary plight), will apply the ruling in Fraass to
15 this case. Additionally, as Ecology points out, the Court can consider
16 cost concerns in overseeing this adjudication. See RCW 90.03.160.

17 **III. CONCLUSION**

18 Although it is somewhat unusual to conduct a proceeding like this
19 without the participation of counsel for Ecology, weighing the risks and
20 benefits convinces the Court that allowing staff, rather than the
21 Attorney General's office, to represent Ecology is permissible. As in
22 Fraass and L.G., supra, the Court will reserve the discretion to order
23 the appearance of counsel if the Court or the Referee determines it
24 necessary. However, whether one considers this representation to not be
25 the practice of law or the permissible practice of law by laypeople

1 under a broad definition of that concept, this Court will allow Ecology
2 to be represented by staff in the subbasin pathway.

3 Dated this 11th day of April, 1996.

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5 Walter A. Stauffacher
6 Walter A. Stauffacher
7 Judge
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