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KIM M. EATON  
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF YAKIMA

IN THE MATTER OF THE DETERMINATION )	
OF THE RIGHTS TO THE USE OF THE )	No. 77-2-01484-5
SURFACE WATERS OF THE YAKIMA )	
RIVER DRAINAGE BASIN, IN )	MEMORANDUM OPINION RE:
ACCORDANCE WITH THE PROVISIONS OF )	
CHAPTER 90.03, REVISED CODE OF )	JAMES AND LUCINDA POISEL,
WASHINGTON, )	
)	Appellants
)	
STATE OF WASHINGTON, )	v.
DEPARTMENT OF ECOLOGY, )	
Plaintiff, )	STATE OF WASHINGTON,
vs. )	DEPARTMENT OF ECOLOGY,
)	
JAMES J. ACQUAVELLA, ET AL., )	Respondent
Defendants )	
)	
)	

**I. INTRODUCTION**

James and Lucinda Poisel (hereinafter Poisel or Mr. Poisel as he appeared/participated in the hearing) are claimants in this stream adjudication and appellants in this specific proceeding. They requested the Department of Ecology (Ecology) to change the point of diversion for a water right confirmed by this Court during the Subbasin No. 15 (Wenas Creek) proceeding. That application for change was filed with the agency on March 9, 1992. Ecology denied the request in February, 2004 and the Poisels timely appealed. This general adjudication court has jurisdiction to hear appeals of Ecology decisions pursuant to Pre-trial Order No. 12. See also RCW 90.03.210(2)(b). Since this involves the validity of the right, review by the Pollution Control Hearing Board (PCHB) is unnecessary and jurisdiction to hear the appeal vests immediately with the Court. *Id.*

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1 The standard of review is controlled by the Administrative Procedures Act (APA). RCW  
2 34.05.570(3). Under the APA, the Court must give great deference to administrative findings of fact  
3 and must uphold an agency's findings of fact if the decision is supported by evidence that is  
4 substantial when viewed in light of the whole record. RCW 34.05.570(3)(e); *R.D. Merrill v.*  
5 *Pollution Control Hearings Bd.*, 137 Wn.2d 118, 134-35, 969 P.2d 458 (1999). Errors of law are  
6 reviewed under RCW 34.05.570(3)(d) which states "(t)he court shall grant relief from an agency  
7 order in an adjudicative proceeding only if it determines that: . . .(d) The agency has erroneously  
8 interpreted or applied the law." Under this "error of law" standard, this Court reviews *de novo*.  
9 *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982), cert denied, 459  
10 U.S. 1106 (1983); *Clark v. DSHS*, 67 Wn. App. 830, 833, 841 P.2d 54 (1992).

## 11 **II. ANALYSIS**

12 This Court confirmed two water rights for the property owned by the Poisels during the  
13 Subbasin 15 proceedings pursuant to Court Claim No. 00684. See Conditional Final Order dated  
14 November 12, 1998 (CFO). Those rights derive from Wenas Adjudicated Certificates Nos. 58 and  
15 88.<sup>1</sup> The Poisels sought to make changes to both water rights, and pursuant to RCW 90.03.380, on  
16 March 9, 1992 filed an application with Ecology to do so. Only rights associated with Certificate  
17 No. 88 are at issue here as Ecology approved the change request regarding Certificate No. 58.  
18 Ecology denied the change request in regard to the rights authorized under Certificate No. 88  
19 because it determined the rights were relinquished. Before allowing changes, Ecology must, *inter*  
20 *alia*, make a tentative decision as to the extent and validity of the water right, *Okanogan Wilderness*  
21 *League v. Town of Twisp*, 133 Wn.2d 769, 777-779, 947 P.2d 732 (1997); *Public Utility Dist 1 of*  
22 *Pend Oreille Cy. V. Dep't of Ecology*, 146 Wn.2d 778, 790-794, 51 P.3d 744 (2002), although  
23 Superior Court is vested with the authority to finally and conclusively adjudicate water rights. This  
24 Court did exactly that during the Subbasin 15 process culminating in the November 12, 1998 CFO.  
25 Therefore, Ecology rests its decision on the nonuse of water during the 1999-2003 period.<sup>2</sup> All  
parties agree that the Poisels' diversion structure washed out in 1982.

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<sup>1</sup> Wenas Creek was previously adjudicated in the 1920's and certificates were issued by Ecology's predecessor.

<sup>2</sup> The Court acknowledges that a separate dispute, argued on October 14, 2004, is now before the Court regarding the date Ecology should use for analyzing relinquishment in this Yakima basin— the date the CFO was entered or the date the water right claim was last considered in a hearing. For purposes of this appeal only and with the agreement of Ecology, the Court is looking solely at post-CFO activities. Use of the post-CFO time period here has no impact on the other matter under advisement.

1 There are two issues for this Court to examine to determine if Ecology correctly denied Poisels'  
2 request for a change in point of diversion on the ground that the right had been relinquished for non  
3 use during the years of 1999-2003: 1. Was the right beneficially used during the five-year period of  
4 1999-2003? 2. If the water was not used, do any of the sufficient causes/exemptions set forth in  
5 RCW 90.14.140 apply?

6 a. Beneficial Use

7 First, was the water right beneficially used during the five consecutive year period of 1999-  
8 2003. Failure to use water, without sufficient cause, results in the relinquishment of the water right.  
9 RCW 90.14.160. In general, the factual presentation surrounding water use is somewhat confusing.  
10 Any use made during 1999-2001 would have been by Doug Mayo who owns a nearby property. It  
11 is clear that no use of the water in question occurred in 2002 or 2003 as the parties were informed  
12 by Ecology and/or the Wenas Creek stream patrolman that the informal, temporary transfer  
13 arrangement was inappropriate. There were some arrangements made between the Mayo family<sup>3</sup>  
14 and Mr. Poisel dating back to 1993. The essential terms of that arrangement allowed the Mayos to  
15 use the Certificate 88 water in exchange for pumping the Certificate 58 water to Poisel land. The  
16 problem of identifying beneficial use of the Certificate 88 water results from the fact that Mr.  
17 Mayo's system is an interconnected, pressurized, piped system with two operable creek diversions,  
18 three wells and a spill. See e.g., Verb. Tran. dated August 12, 2004 at 118. Once the wells are  
19 turned on, it becomes impossible to determine the source of water that is used and in fact, during the  
20 very water short year of 2001, it was not uncommon for Mr. Mayo to discharge more water back  
21 into Wenas Creek than he diverted. Verb. Tran. dated July 15, 2004 at 130.

22 There was some discussion about the legitimacy of the arrangement between the Mayos and the  
23 Poisels. This use was legitimized by Ecology and this Court at various times during the 1990's.  
24 Ecology took changing positions on this but the final court record, contained at pages 51-58 of the  
25 June 30, 1998 Memorandum Opinion, summarizes the situation in effect going into the 1999  
irrigation season. There the Court ruled:

“The 1997 irrigation season is over and the Court will not rule on the specific seasonal transfers  
at issue in the Mayo's motion. Upon the entry of the Conditional Final Order for Subbasin 15,  
Ecology will be responsible for assessing whether injury will result from the transfer of water or  
a change in point of diversion.”

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<sup>3</sup> Mr. Doug Mayo participated in the hearing and had been working with his father, Mr. John Mayo, on the farming operation in Wenas valley. Mr. John Mayo is now deceased.

1  
2 Of course, the “seasonal transfers” referred to by the Court are the arrangements entered into by  
3 the Mayos and Poisel. The Court notes that it specifically did not rule on those in the Memorandum  
4 Opinion. It appears the Court was attempting to avoid confusing even further an already confusing  
5 situation and defer to Ecology to make a final decision on the permanent change request of Poisel  
6 (hence the Court’s reference to Ecology’s need to assess injury as a result of the transfers/changes).  
7 That permanent change decision would have, at that time, seemed to be imminent after the signing  
8 of the CFO, since it would be logical for Ecology to await a final decision on the validity of the  
9 right prior to acting on the change decision. Clearly, the Court did not anticipate the situation that  
10 developed where the decision by Ecology would not be made until 2004 and did not contemplate a  
11 possible relinquishment of the right immediately after the entry of the CFO.

12 Nonetheless, the Court cannot read the 1998 Memo Opinion as specifically allowing the  
13 seasonal transfers. Nor did the water users obtain the permission of Ecology to temporarily change  
14 the use of the water right. Obviously, since the parties had obtained temporary changes and orders  
15 *pendente lite* from this Court, they were aware such authorizations were necessary to use the water  
16 in a manner that differed with the confirmed rights. Further, the Court must give deference to  
17 Ecology on findings of fact. RCW 34.05.570(3)(e); *R.D. Merrill*, 137 Wn.2d at 134-35. Even if the  
18 Mayo use of Certificate 88 water had been authorized, it is not clear in light of the system utilized  
19 that such water was used. Therefore, the Court finds that the record substantially supports the  
20 position of Ecology on the issue of water use by Mayo and to the extent any water was used during  
21 the 1999-2003 time frame (which has not been conclusively established), that use was unauthorized.  
22 This Court will not reward noncompliance.

23 On the other hand, there is something slightly inequitable about the actions of Ecology and the  
24 situation that is alluded to in the Court’s June 30, 1998 Memorandum Opinion in regard to an  
25 abandonment analysis. Although abandonment is a concept separate and distinct from  
26 relinquishment, there is an underlying similarity of the doctrines and makes the Court’s holding in  
27 1998 regarding abandonment instructive here. The Court found that the Poisels’ original point of  
28 diversion was washed out by the flood. *See Memo. Op.* at 56. As a result, the Poisels’ requested a  
29 change in point of diversion. According to Mr. Poisel at that time,

30 “all the paperwork has been done and everything is in progress, but I’m in limbo until this  
31 proceeding is done. . .I can’t get water there [to the land which the right is appurtenant] until I  
32 get my point of diversion.” *Id.*

1 As a result, the Court found Mr. Poisel's "limbo" (essentially the need for the Court to finalize  
2 confirmation of the right which would in turn allow Ecology to process the transfer) to be an  
3 adequate explanation for several years of nonuse of a water right and therefore the right had not  
4 been abandoned. *Id.*

5 Those same actions become important as the Court turns its attention to the sufficient causes for  
6 the nonuse of water found at RCW 90.14.140. As the irrigation season for 1999 commenced, the  
7 only issue for Ecology to address when analyzing the request for transfer was whether there would  
8 be impairment – clearly there was no dispute at that time as to whether the Poisels had a water right.  
9 At that time, it could be reasonably expected that a decision from Ecology on the transfer would be  
10 forthcoming in the near future. Therefore, it seems the Poisels had the following options: 1. Look  
11 for a temporary means for delivering water to their Certificate 88 lands, 2. Rebuild the established  
12 point of diversion, 3. Construct a new diversion structure at the proposed point of diversion, 4.  
13 Wait for Ecology's change decision and not use water.

14 The Court believes that the Poisels remained in their self-described "limbo" situation under any  
15 of those scenarios. As for Options 2 or 3, Mr. Poisel testified that he obtained estimates to construct  
16 points of diversion and those costs reached as much as \$30,000. It would make no sense for the  
17 Poisels to expend that amount of money or even a few thousand dollars to build a structure at one  
18 site, only to receive a decision from Ecology requiring that structure to be torn down and developed  
19 at another site. This Court would not expect a water user to replicate the role of Sisyphus. As for  
20 Option 1, there is no evidence that a satisfactory temporary arrangement was available. Further,  
21 without direction from Ecology, would a reasonable person not have assumed that a temporary  
22 solution was unnecessary when a decision on the transfer seemed imminent in 1999 after this Court  
23 confirmed the water rights? Also, the Poisels did develop an arrangement with the Mayos during  
24 the 1990's, and, rightly or wrongly, were under the impression that this arrangement was continuing  
25 until at least 2001. Moreover, there was no certainty (as the evidence before the Court suggests)  
that Mr. Mayo could or would utilize the water. If the Poisels had a washed-out diversion and  
intended only to replace it without moving it, this Court's decision might be different. However,  
under the facts presented here, the Court finds that the unavailability of water exception (Subsection  
(1)(a)) or the operation of legal proceeding exception (Subsection (1)(d)) apply to excuse the  
nonuse of water.

1 In this situation the two “sufficient causes” work together and stem from the same fundamental  
2 underlying issue – the fact that the Poisels’ diversion structure washed out and that they could not  
3 get a decision from Ecology allowing or not allowing them to move the point of diversion. The  
4 unavailability of water exception arises not because of the drought in 2001 but because Mr. Poisel  
5 does not have a point of diversion through which to take the water.<sup>4</sup> The Court has held previously  
6 in other contexts that destroyed delivery systems do implicate the “unavailability of water”  
7 exception. *See Memo. Op. Re: Unavailability of Water, Cascade Irrigation District* dated  
8 December 10, 2001 (Doc. No. 15,557); *Supplemental Report of the Court on Remand Re: Yakima-*  
9 *Tieton Irrigation District*, February 21, 2001 (Doc. No. 14,917). Here, the context is a bit different  
10 because the unavailability of water continued due to the Poisels’ uncertainty as to where to place the  
11 diversion structure given the pending transfer application. Without an existing diversion structure  
12 (which in turn depends on an Ecology decision), the water is, fundamentally unavailable to them.

13 Ecology argues that the “legal proceedings” exception does not apply to agency decision-  
14 making. Moreover, the agency indicates the Supreme Court has interpreted this exception as  
15 “applying to judicial proceedings or litigation.” The Court cannot identify any authority to hold one  
16 way or another as to whether or not an administrative determination is a “legal proceeding” to  
17 exempt the non-use of water from application of relinquishment. *R.D. Merrill* did note the  
18 definition of legal proceedings supplied by the PCHB (“all proceedings authorized or sanctioned by  
19 law and brought or instituted in a court or legal tribunal for the acquiring of a right or the  
20 enforcement of a remedy”). Although that definition may appear to exclude agency action on its  
21 face, a deeper look suggests the opposite.

22 In *R.D. Merrill*, the development company argued that the operation of legal proceedings  
23 excused the nonuse of water because of litigation involving its ability to develop a ski area on  
24 federal land adjacent to its land. *R.D. Merrill* at 141. Earlier in the opinion, the Supreme Court  
25 summarized facts that appear to describe that litigation or at least some portion thereof. The Court  
stated:

“One earlier proposed development involved a lengthy delay due to litigation involving an  
environmental review conducted by the United States Forest Service in conjunction with a  
special permit to develop ski facilities.” *Id.* at 124.

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<sup>4</sup> The Court generally agrees with the position of Ecology that to invoke the drought exception, there must be some evidence that the unavailability of water caused by the drought was the reason the water was not used. Here the reason the water was not used by the Poisels owed to the destroyed diversion works and not the drought.

1 Although how one obtains a special permit from the Forest Service was not detailed, there is at  
2 least some similarity to the facts at hand. At minimum, the litigation started with an entity that was  
3 unable to obtain the permission of an agency to utilize a natural resource in a specific way.  
4 Granted, the “legal proceeding” may have evolved to a court process, *but the proceeding was*  
5 *started by and would include the initial stages before the agency.* The Supreme Court chose not to  
6 construe that definition in order to reach its decision stating “this may be a correct definition of  
7 what constitutes a legal proceeding” but pronounced that it was more concerned with whether or not  
8 the process actually prevented the use of water. At the very least, the Court did not specifically  
9 sanction that definition so this Court is not bound by it when analyzing the Poisel appeal.

10 While acknowledging *R.D. Merrill's* instruction to construe the statutory provisions in RCW  
11 90.14.140 narrowly, the Court is very hesitant to establish a fixed definition for “legal proceedings”  
12 and generally believes that *potentially*, when one seeks to acquire some right or enforce a remedy  
13 through a statutory authorized process then that *may* constitute a “legal proceeding.” The Court  
14 does find that the facts involved herein fall under RCW 90.14.140(1)(d) and constitute a sufficient  
15 cause for nonuse because the inability to get the change decision from Ecology which was a major  
16 contributor to the Poisels’ inability to use the water. In sum, it is difficult for this Court to look at  
17 the process the Poisels have been involved in and define when the “legal proceeding” began without  
18 including the actions of Ecology. First, in order to obtain a change in use of a water right, the  
19 Poisels only recourse is to file an application with Ecology.<sup>5</sup> Further, the agency is required to  
20 make factual findings and issue an order in a quasi-adjudicative fashion. Appeals from Ecology  
21 decisions are typically taken to the Pollution Control Hearings Board.<sup>6</sup> It would be very difficult to  
22 construe the proceedings of the PCHB as anything but a legal proceeding. The Court also notes that  
23 Superior Court is the ultimate arbiter of the validity of water rights and therefore Ecology’s actions  
24 in analyzing change requests are only a part of a process that eventually can land in Superior Court,  
25 which is, plainly, a legal proceeding.

Ecology also asserts that relinquishment could have been avoided by obtaining a seasonal  
determination allowing Mr. Mayo to pump the water to himself or the Poisels. First and foremost,

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<sup>5</sup> Ecology argues the Poisels could have availed himself of the Water Conservancy Board process authorized in RCW 90.80 et seq. The Court notes that Poisel application for change was filed in 1992 and Conservancy Boards were not authorized until 1997 and not assembled until some time thereafter.

<sup>6</sup> In this dispute, the connection of Ecology to a legal proceeding is even greater as the appeal is directly to this Court.

1 there are no facts to support that Mr. Mayo could or would pump the Certificate 88 water to the  
2 Poisel property. Second and similarly important is the legal reality that RCW 90.14.140(2) suggests  
3 that the leasing of water (Subsection (2)(f)) is an exemption from the nonuse of water while RCW  
4 90.14.140(1) sets forth the sufficient causes for nonuse. The two provisions are independent of one  
5 another and there is no hierarchy stated or implied in the statute that a water user must avail  
6 themselves of the Section 2 exemptions before relying on the Section 1 sufficient causes. Nor is a  
7 user who claims the “operation of legal proceedings” or “unavailability of water” sufficient causes  
8 as a protection from nonuse under any specific duty to go to such lengths to utilize water.  
9 Obviously, temporarily transferring the water right by a lease does qualify under RCW  
10 90.14.140(2)(f) and exempts a user from relinquishment. However, under Ecology’s theory, RCW  
11 90.14.140(1) and the sufficient causes for nonuse would not even come into play and there would  
12 be no need for Section (1) if every water user was under a duty to transfer water when it could not  
13 otherwise be used. The Court also notes that as to having the Mayos divert and use the water,  
14 Ecology has demonstrated conflicting positions. Ecology has gone to great length to show that  
15 Mayos could not, should not or did not need the water during the time period. So, getting the  
16 seasonal transfer, in and of itself, would not guarantee that water would be used and this Court has  
17 so found. The foregoing reasons cannot be ignored in analyzing Ecology’s argument that the facts  
18 herein do not fit the “legal proceeding” sufficient cause.

19 In summary, the Court does not believe the objectives of RCW 90.14 are fairly implemented  
20 when read as a whole in the Poisel situation. Simply put, if Mr. Poisel had received a decision  
21 granting or denying the change in point of diversion and did not take action in the ensuing five  
22 years, then the Court might be persuaded to find differently. But it seems inequitable to this Court  
23 for Ecology to have a request for a permanent change before it, fail to act on that request, which in  
24 turn makes it difficult for the landowner to take permanent actions to modify the necessary  
25 infrastructure and facilitate the use of water, and then assert the right has been relinquished.

## 21 II. CONCLUSION

22 The Court finds that under either sufficient cause (RCW 90.14(1)(a) or (d), the Poisels are  
23 excused for not beneficially using water pursuant to their water right between 1999-2004 and this  
24 matter is remanded to Ecology for further determinations pursuant to RCW 90.03.380 as to whether  
25 the transfer will cause impairment.

1 Ecology has asked the Court's guidance on a number of questions that relate to how the  
2 agency should handle water use allocations when two water rights are applied to the same property  
3 and when arrangements are made to informally transfer water between water users without the  
4 authority of the Court or Ecology. As to the second question, it is apparent from the decision above  
5 that the Court is very reluctant to sanction such arrangements when processes are readily available  
6 to water users with the Court and with the agency. As to the first question, the Court's answer will  
7 not be helpful because whether two rights can be legitimately used on the same property will simply  
8 depend on the facts.

9 The Poisels should prepare an order consistent with this decision to be circulated to Ecology  
10 and presented for entry by the Court at the December 9, 2004 water day hearing.

11 Dated this 4<sup>th</sup> day of November, 2004.

12   
13 Sidney P. Ortem, Court Commissioner