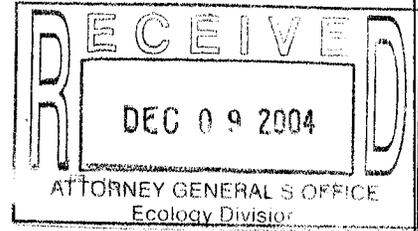


RECEIVED

2004 DEC 6 PM 2 29

KIM M. EATON
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON



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)
SURFACE WATERS OF THE YAKIMA)
RIVER DRAINAGE BASIN, IN)
ACCORDANCE WITH THE PROVISIONS OF)
CHAPTER 90.03, REVISED CODE OF)
WASHINGTON,)

No. 77-2-01484-5

CLARIFICATION OF MEMORANDUM
OPINION RE:

JAMES AND LUCINDA POISEL,

Appellants

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
Plaintiff,

v.

vs.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

JAMES J. ACQUAVELLA, ET AL.,
Defendants

Respondent

I. INTRODUCTION

This Court entered its Memorandum Opinion regarding the Poisels' appeal on November 4, 2004 finding that Poisels had not relinquished their water right and indicating the matter should be remanded to Ecology for further analysis. No judgment or order was entered making the Court's decision final. Ecology then submitted its motion for reconsideration, indicating it believes "the court's application of RCW 90.14.140 and *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 969 P.2d 458 (1999) is contrary to law." The Court established briefing dates in a November 30, 2004 letter and that process is pending. However, after further consideration of its Memorandum Opinion, the Court hereby modifies and limits that decision beginning at page 5, line 24 as set forth below.

1 **II. ANALYSIS**

2 The Court stated on page 5, line 24 that “under the facts presented here, the Court finds that the
3 unavailability of water exception (Subsection (1)(a)) or the operation of legal proceeding exception
4 (Subsection (1)(d)) apply to excuse the nonuse of water.” The Court hereby changes that sentence
5 to strike the reference to the operation of legal proceeding exception RCW 90.14.140 (Subsection
6 (1)(d)) and finds that the Poisel’s nonuse of water was excused pursuant to the “unavailability of
7 water exception,” RCW 90.14.140(1)(a). This decision is supported by the following facts.

8 The Poisels’ point of diversion was washed out in 1982. They filed for a change application
9 in 1992. Until 1998, all parties were awaiting a Conditional Final Order for Subbasin No. 15
10 (Wenas) from this Court, which established that a right did exist, prior to Ecology issuing a decision
11 on the change application. Once that right was confirmed in 1998, the Poisels could not use water
12 because they were awaiting the change decision from Ecology and they were unclear as to where to
13 place the point of diversion -- a costly endeavor requiring as much as \$30,000.00 according to Mr.
14 Poisel.

15 The unavailability of water exception arises not because of the drought in 2001 but because Mr.
16 Poisel did not have a point of diversion through which to take the water.¹ The Court has held
17 previously in other contexts that destroyed delivery systems do implicate the “unavailability of
18 water” exception. *See Memo. Op. Re: Unavailability of Water, Cascade Irrigation District* dated
19 December 10, 2001 (Doc. No. 15,557); *Supplemental Report of the Court on Remand Re: Yakima-
20 Tieton Irrigation District*, February 21, 2001 (Doc. No. 14,917). Here, the context is a bit different
21 because the unavailability of water continued due to the Poisels’ uncertainty as to where to place the
22 diversion structure given the pending transfer application. Without an existing diversion structure
23 (which in turn depends on an Ecology decision), the water is, fundamentally unavailable to them.
24 Mr. Poisel was very clear on this point during his testimony before Judge Stauffacher set forth at
25 page 4, beginning at line 24 of the November 4, 2004 Memorandum Opinion. The Court finds Mr.
Poisel’s statements particularly credible because they were made long before this change decision
became an issue.

¹ 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 The Court does want to be very clear on one point. Simply filing an application for change of a
2 point of diversion with the Department of Ecology does not, in and of itself, invoke the
3 unavailability of water exception set forth in RCW 90.14.140 (1)(a). This opinion relies on the fact
4 that the Poisels' point of diversion was washed out before they filed a change application.
5 Normally, a water user will want to replace the point of diversion more immediately, particularly in
6 the case of larger water delivery institutions. However, the Poisels' operation is relatively small and
7 they simply were not in a position, given the expense, to make the investment twice. Clearly, if a
8 water user's point of diversion is washed out and they do not wish to change the point of diversion,
9 they will, in most instances, need to resume that diversion within 5 years in order to prevent
10 relinquishment. The very specific facts involved herein are unique and compel this Court to apply
11 the exception.

12 Ecology also asserts that relinquishment could have been avoided by obtaining a seasonal
13 authorization allowing Mr. Mayo to pump the water to himself or the Poisels. First and foremost,
14 there are no facts to support that Mr. Mayo could or would pump the Certificate 88 water to the
15 Poisel property. Second and similarly important is the legal reality that RCW 90.14.140(2) suggests
16 that the leasing of water (Subsection (2)(f)) is an exemption from the nonuse of water while RCW
17 90.14.140(1) sets forth the sufficient causes for nonuse. The two provisions are independent of one
18 another and there is no hierarchy stated or implied in the statute that a water user must avail
19 themselves of the Section 2 exemptions before relying on the Section 1 sufficient causes. Nor is a
20 user who claims the "unavailability of water" sufficient cause as a protection from nonuse under
21 any specific duty to go to such lengths to utilize water. Obviously, temporarily transferring the
22 water right by a lease does qualify under RCW 90.14.140(2)(f) and exempts a user from
23 relinquishment. However, under Ecology's theory, RCW 90.14.140(1) and the sufficient causes for
24 nonuse would not even come into play and there would be no need for Section (1) if every water
25 user was under a duty to transfer water when it could not otherwise be used. The Court also notes
that as to having the Mayos divert and use the water, Ecology has demonstrated conflicting
positions. Ecology has gone to great length to show that Mayos could not, should not or did not
need the water during the time period. So, obtaining the seasonal transfer, in and of itself, would
not guarantee that water would be used and this Court has so found.

In summary, the Court does not believe the objectives of RCW 90.14 are fairly implemented
when read as a whole in the Poisel situation. Simply put, if Mr. Poisel had received a decision

1 granting or denying the change in point of diversion and did not take action in the ensuing five
2 years, then the Court might be persuaded to find differently. But it seems inequitable in this very
3 unique situation for Ecology to have a request for a permanent change before it, fail to act on that
4 request, which in turn makes it difficult for the landowner to take permanent actions to modify the
5 necessary infrastructure and facilitate the use of water, and then assert the right has been
6 relinquished.

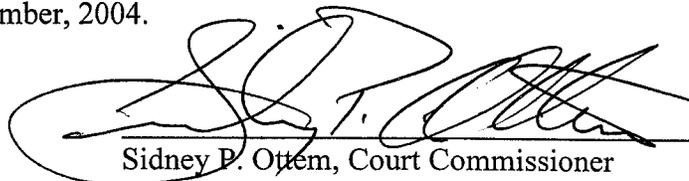
6 II. **CONCLUSION**

7 The Court finds that under RCW 90.14(1)(a), the Poisels are excused for not beneficially
8 using water pursuant to their water right between 1999-2004 and this matter is remanded to Ecology
9 for further determinations pursuant to RCW 90.03.380 as to whether the transfer will cause
10 impairment.

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

19 The Court will await a written response from Ecology as to whether it still wishes to pursue
20 its Motion for Reconsideration. If Ecology does intend to pursue its Motion, the briefing schedule
21 set forth by the Court in its November 30, 2004 letter will apply. If not, the Court has attached a
22 Proposed Order and requests the parties to provide comment, including concurrences, by January 4,
23 2005.

24 Dated this 6th day of December, 2004.

25 
Sidney P. Ottem, Court Commissioner

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

3 IN THE MATTER OF THE DETERMINATION) No. 77-2-01484-5
4 OF THE RIGHTS TO THE USE OF THE)
5 SURFACE WATERS OF THE YAKIMA) [PROPOSED] ORDER REVERSING
6 RIVER DRAINAGE BASIN, IN) ECOLOGY DENIAL OF APPLICATION
7 ACCORDANCE WITH THE PROVISIONS OF) CHANG IN POINT OF DIVERSION
8 CHAPTER 90.03, REVISED CODE OF) (CLAIM NO. 00684)
9 WASHINGTON,)
10 STATE OF WASHINGTON,) JAMES AND LUCINDA POISEL,
11 DEPARTMENT OF ECOLOGY,) Appellants
12 vs.)
13 JAMES J. ACQUAVELLA, ET AL.,) v.
14 DEFENDANTS) STATE OF WASHINGTON,
15) DEPARTMENT OF ECOLOGY,
16) Respondent

13 The above-entitled matter having come before the Court upon the petition of James Poisel
14 for review of denial for Application for Change in Point of Diversion, the Court having heard
15 evidence from the parties, having considered both pre and post trial briefs and having issued a
16 Memorandum Opinion dated November 4, 2004 and Clarification of Memorandum Opinion dated
17 December 3, 2004, it is hereby ORDERED:

- 17 1. That relinquishment of Claimant's water right has not occurred because the unavailability
18 of water exception (RCW 90.14.140(1)(a)) applies to excuse the appellants' non-use of
19 water.
20 2. This matter is remanded to the Department of Ecology for further determinations pursuant
21 to RCW 90.03.380 on the sole issue of whether the transfer will cause impairment to other
22 water right holders.

23 Dated this _____ day of _____, 200__.

24 _____
25 Sidney P. Ottem, Court Commissioner