

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

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3 IN THE MATTER OF THE DETERMINATION)
4 OF THE RIGHTS TO THE USE OF THE)
5 SURFACE WATERS OF THE YAKIMA RIVER)
6 DRAINAGE BASIN, IN ACCORDANCE WITH)
7 THE PROVISIONS OF CHAPTER 90.03,)
8 REVISED CODE OF WASHINGTON,)

No. 77-2-01484-5

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

9 STATE OF WASHINGTON,
10 DEPARTMENT OF ECOLOGY,
11 Plaintiff,

vs.

12 JAMES J. ACQUAVELLA, ET AL.,
13 Defendants

MEMORANDUM OPINION RE: CITY OF
ROSLYN'S MOTION TO REVISE ORDER
LIMITING POST-1905 DIVERSIONS
DURING PERIODS OF WATER
SHORTAGE

14 **I. INTRODUCTION**

15 This decision arises from the City of Roslyn's (Roslyn) Motion, dated November 10, 2004,
16 for an order directing that future orders limiting the diversions of post-1905 water right holders
17 provide an exemption for indoor domestic water use. Roza Irrigation District, joined by the City of
18 Yakima and most, if not all, of the major irrigation districts responded in opposition. The
19 Department of Ecology, the United States and the Yakama Nation also filed responses. A hearing
20 was held March 10, 2005 before Judge Walter A. Stauffacher. He subsequently referred this matter
21 to the Court Commissioner, who, having been fully advised pursuant to the record discussed above,
22 finds as follows.

23 **II. ANALYSIS**

24 Roslyn (Claim No. 1474) was confirmed a water right as a part of the Subbasin No. 1 (Cle
25 Elum) proceedings and specifically set forth in the Report of Referee dated June 15, 1988. The
pertinent elements of the right provide that Roslyn may divert 3.14 cfs, 446.7 acre-feet per year
from Domerie Creek for municipal supply with a September 2, 1908 date of priority. The priority
date is at issue in this motion because a September 2, 1908 priority date is quite junior in the
Yakima basin. As a consequence of the 2005 drought, Roslyn, along with other water right holders
with a post-May 10, 1905 priority were directed by order of the Court dated March 10, 2005, to
cease using water once the United States Bureau of Reclamation implemented prorationing within

1 the Yakima Irrigation Project. See Order (Doc. 18,638) at pages 2- 4. Roslyn however believes this
2 Court has the inherent equitable authority to exclude Roslyn from such an order on the basis that
3 doing so is consistent with the city's statutory obligation to "provide an adequate quantity of water
4 in a reliable manner at all times[.]" WAC 246-290-420(1); see also RCW 43.020.050(2) and
5 70.119A.060(1). Roslyn argues that the Court should provide a transition time of 10 years to allow
6 it to find and obtain approval for mitigation water, or, if necessary, rule that the health provisions
above prevail over anything contained in RCW 90.03.

7 The Washington State Department of Health (DOH) was permitted to participate as *amicus*
8 *curiae* and filed a brief that essentially echoes Roslyn's concerns and extends that concern to other
9 public water systems that hold junior priority dates which subject those rights to curtailment during
10 times of drought. According to DOH, there are approximately 14 public water systems subject to
11 the curtailment order serving a population of over 1800, of which Roslyn accounts for about two-
12 thirds. See Declaration of Virginia A. Stern dated February 17, 2005. None of those entities,
13 except Roslyn, have developed water system management plans. Like Roslyn, DOH believes the
Court should use its equitable powers to exclude the water rights pertaining to public water systems
from the curtailment order.

14 After filing its motion, Roslyn notified the Court on March 4, 2005 that it had entered into a
15 contract to acquire a senior water right. At that time, Roslyn had just begun the process of securing
16 approval from Ecology to transfer the right and otherwise complete the terms and conditions set
17 forth in the contract. The Court has received no updates on this potential transfer since March. In
18 addition, the Court entered an order *pendente lite* providing for a temporary water transfer for
19 mitigation purposes that would address Roslyn's water shortage for the 2005 irrigation season.
20 (Order Pendente Lite Re: MountainStar Resort & the City of Roslyn dated March 10, 2005). As a
21 result of these two actions, a number of responding irrigation interests have asked the Court to find
22 Roslyn's motion to be premature or moot. See Memorandum in Opposition filed on behalf of
Ellensburg Water Company et al. on February 18, 2005. Roslyn opposes that argument on a
number of grounds, set forth below.

23 a. *Mootness*

24 Roslyn believes the Court should resolve the town's motion and notes that it has the
25 *opportunity* to secure permanent mitigation water and has not completed the various steps necessary
to transfer the water right. Roslyn further argues that even if the motion is technically moot for the

1 current irrigation season in light of the temporary transfer of MountainStar's water rights, the Court
2 may decide the motion. Citing to *Ecology v. Adsit*, 103 Wn.2d 705 (1985), Roslyn notes that a
3 court may review moot cases if they present issues of continuing and substantial public interest. In
4 deciding if a case meets that standard, three factors apply: 1) whether the issue is of a public or
5 private nature, 2) whether an authoritative determination is desirable to provide future guidance to
6 public officers, and 3) whether the issue is likely to recur.

7 If this issue only applied to Roslyn and if DOH had not intervened to supply information
8 that this issue applies to other parties, this Court might agree that deciding it at this time is untimely.
9 If such were the case it might make more sense to await the outcome of Roslyn's effort to transfer
10 the senior water right it has recently commenced to secure. However, in its memorandum and
11 attached declarations, DOH makes it clear that at least 13 other public water systems with an impact
12 on some 600-plus water users are in the same predicament. These water users were allowed to
13 divert out of priority during the 2005 irrigation season because Ecology was successful in obtaining
14 water to mitigate for these uses pursuant to the Pendente Lite orders of this Court. See Documents
15 18788 – 90 and 18859. Therefore, it is apparent that although these entities were able to make it
16 through 2005, this issue is imminent and will not likely go away during future years of drought. As
17 a result, even though the issue does not necessarily need to be resolved for the 2005 irrigation
18 season, it is clear that the issue falls within the *Adsit* criteria above and requires this Court's
19 resolution.

20 b. *Transition Period*

21 The Court next turns to DOH and Roslyn's argument regarding the authority of the Court to
22 grant equitable relief to junior public water suppliers. Roslyn asserts public water suppliers with
23 junior water rights could work more effectively toward a transition from their current drought
24 predicaments if they knew they would be excluded from any future drought orders. Members of the
25 irrigation coalition argue the Court has no such authority.¹

Roslyn and DOH both assert that state law authorizes a court to use its equitable power to
ensure that substantial justice is attained in particular cases where the prescribed or customary
forms of ordinary law are inadequate. Put another way, those entities believe Washington courts

¹ The Yakama Nation asserts that Roslyn and presumably any other public water supplier cannot take water in
derogation of the Yakama Nation's federally reserved water right. Roslyn does not dispute the Yakama Nation's

1 may exercise equitable powers to prevent enforcement of a legal right where it would be
2 inequitable. See *Thisius v. Sealander*, 26 Wn.2d 810, 818 (1946). They also point to California
3 adjudication courts which have applied equitable principles within an adjudication context to avoid
4 a strict application of the priority scheme so long as the rights of the parties are not unreasonably or
5 adversely affected. See *Los Angeles v. San Fernando*, 14 Cal.3d 199, 290-91, 537 P.2d 1250 (1975).

6 Other parties view the equitable power of this adjudication Court differently. EWC at al.
7 argue the Court has no such authority to allow Roslyn and others similarly situated to take water out
8 of priority. They distinguish the case relied on by Roslyn (*Thisius, supra*) on the basis that the
9 senior water users in the basin have done nothing to create Roslyn's problem. In essence there is no
10 element of bad faith. They also similarly distinguish the California cases cited by Roslyn based on
11 a difference in the factual predicate. Ecology takes a position somewhat in the middle. The agency
12 agrees the Court has authority to craft a suitable remedy in its decision on Roslyn's motion, but only
13 if that remedy gives credence to the priority system. Accordingly, Ecology proposes a three-year
14 transition period to allow Roslyn and other public water distributors to secure senior water rights
15 but would require them to compensate senior right holders in the event they do not acquire
16 substitute rights. The Yakama Nation objects to the Court entering a decision that would have a
17 negative impact on its federal reserved right. The U.S. believes the Court should enforce the
18 priority system and not create a "super priority" for a class of junior water right holders in
19 derogation of federal and state law.

20 Roslyn and DOH rely on the provisions set forth in RCW 43.20.050 and RCW 70.119A.060.
21 Those statutes generally require the Department of Health to adopt rules and provide oversight to
22 ensure that public water systems provide a safe and reliable supply of water. Naturally, these
23 statutes are primarily concerned with the quality of the water supply. Roslyn and DOH extend this
24 analysis to include any issues surrounding the quantity of water. In essence, those entities believe
25 that if water is not available it is not a safe and reliable supply and therefore inconsistent with the
26 statutory mandate set forth above. With the exception of Roslyn, none of the junior public water
27 systems have a plan in place to ensure that the systems can move forward to find an alternative
28 supply of water when their junior rights are curtailed.

dispute and added a provision to its proposed order clarifying that nothing would affect the Nation's federal reserved water rights. Since there is no disagreement, the Court will not address the issue any further.

1 The predicament of junior public water suppliers is a difficult one and the Court is mindful
2 of the unique concerns their situation presents. However, the Court is not persuaded by the
3 arguments of Roslyn and Health that the drinking water statutes take precedence over the provisions
4 in RCW 90.03. Indeed, the Court believes the two statutory schemes are best read together by
5 looking at the drinking water statutes as picking up where RCW 90.03 leaves off. In essence,
6 public supply plans should not be approved unless an adequate water right underlies that plan.

7 The prior appropriation doctrine was fully embraced by the state of Washington in 1917
8 through enactment of RCW 90.03 et seq. often referred to as the Water Code. The policy and
9 attributes underlying the prior appropriation doctrine are set forth in RCW 90.03.010.

10 The power of the state to regulate and control the waters within the state shall be exercised
11 as hereinafter in this chapter provided. . . and, as between appropriations, the first in time
12 shall be the first in right.

13 In RCW 90.54.020 the Washington legislature enunciated the beneficial uses within the state
14 but indicated no preference between those uses. Additionally, the legislature enacted a statute to
15 address the situation that is before the Court concerning the regulation of water during the pendency
16 of an adjudication. RCW 90.03.210 states:

17 “During the pendency of such adjudication proceedings prior to judgment or upon review by
18 an appellate court, the stream or other water involved *shall* be regulated or partially
19 regulated according to the schedule of rights specified in the department’s report upon an
20 order of the court authorizing such regulation.” Emphasis added.

21 The order entered by the Court on March 10, 2005 and to which Roslyn requests to be excluded is
22 consistent with the statutory authorization. Accordingly, this would seem to be the most specific
23 statute on the issue. There is no mention of excluding domestic or municipal rights from that
24 regulation in RCW 90.03.210 and in fact, the various schedules of rights include domestic and
25 municipal rights in a priority placement.

Placing this issue in a larger context also undercuts the logic advanced by Roslyn and the
Department of Health. First, what would be the purpose of commencing an adjudication of water
rights if public domestic rights would receive a special exemption from the quantities and priorities
established in such a proceeding. To interpret this issue as Roslyn suggests would lead to the
conclusion that the Court has unnecessarily undertaken time consuming and costly proceedings
related to the adjudication of numerous water rights. The Court does not believe the legislature

1 would have intended this result without providing the Court specific guidance to avoid such a
2 purposeless inquiry. Finally, the Court does not believe the legislature would go to the trouble of
3 creating an exemption from relinquishment if municipalities were to be accorded special status in
4 prioritizing water rights. See RCW 90.14.140(2)(d). There would be no reason for such rights to be
5 lost (and therefore no need for a sufficient cause) if such rights were not the standard garden variety
6 of water right subject to the usual rules common to water law including a priority system.

7 Obviously, DOH and, therefore, the junior public water systems are in a difficult situation
8 when the system was developed prior to legislation and oversight by the agency, resulting in no
9 examination of the water right to determine if it is adequate to support the use. The same result
10 would occur if an adjudication court examined a public water system's right and found that a water
11 right could not be confirmed or confirmed it in a fashion that was inadequate for the needs. In that
12 light, the Court believes it is endowed with the equitable authority to fashion a remedy to assist the
13 public water suppliers. RCW 90.03.200 states "Appellate review of the decree shall be in the same
14 manner as in *other cases in equity*, except that review must be sought within sixty days from the
15 entry thereof." Emphasis added. The issue then becomes what is the extent of the equitable
16 powers of an adjudication court. The Court believes, based on cases cited by Roslyn and the
17 Department of Health that it can establish equitable solutions provided the rights of the parties are
18 not unreasonably or adversely affected. Obviously, protection of the public health is a key concern.
19 However, the Court does not believe granting an exclusion from the priority system is a fair
20 exercise of its equitable power because it does unreasonably and adversely affect the rights of
21 others. Therefore, the Court believes the compromise suggested by Ecology is the most equitable
22 and workable solution.

23 Ecology's proposal would provide a three-year transition period to allow Roslyn and other
24 junior public water systems/domestic water users to secure senior water rights for replacement or
25 mitigation. Additionally, during that three-year period, Roslyn et al would be required to make all
reasonable and diligent efforts to secure temporary transfers of rights not subject to any curtailment
order. Public water suppliers would also be required to update their water plans with the
Department of Health, as necessary, during the transition period.

The final piece of Ecology's plan concerns the issue of compensation for holders of water
rights with a May 10, 1905, should any public water system use water out of priority. The Court
believes equity requires such compensation because the water users with May 10, 1905 priority

1 dates have done nothing to cause this predicament. It is this aspect of Ecology's proposal that
2 makes the Court's exercise of equity workable because it serves to eliminate or at least considerably
3 reduce the adverse affects on the May 10, 1905 water right holders. At the same time, it ensures
4 that public water systems will have water available for domestic uses.

5 The Court is not certain as to the specifics of how such a program would work and offers the
6 following only as suggestions at this time. The Court believes a workable program might involve
7 either Ecology or Reclamation serving as an intermediary to collect and use such funds to acquire
8 senior water rights to replace the amounts removed by the out of priority public water systems.
9 Acquisition of rights for transfer or mitigation would be the first priority of those agencies when
10 seeking to obtain water rights during a drought year. The value of any water used out of priority by
11 the junior public water systems should be based on the market for that particular year. To the extent
12 such rights are not available in a given year, the money could be carried over to assist in future
13 drought years.

12 **III. CONCLUSION**

13 As set forth above, this Court finds that Roslyn and similarly situated public water purveyors
14 with water rights junior to May 10, 1905 shall be accorded a three-year transition time during which
15 those entities must seek a more reliable way of providing water during times of drought. The Court
16 does not believe that the provisions in the health statutes and regulations prevail over the water code
17 set forth in RCW 90.03. As a result, to the extent junior public water providers such as Roslyn are
18 required to use water out of priority, they shall be required to mitigate that use to affected May 10,
19 1905 water right holders as specifically outlined above. The Department of Ecology shall draft and
20 circulate an order consistent with the rulings set forth above for presentation to the Court at the
21 October 13, 2005 water day hearing. That order shall be filed by September 21, 2005. Because its
22 rights are based on federal law, the order shall make clear the Yakama Nation's reserved rights are
23 not impacted by this decision.

24 Dated this 24th day of August, 2005.

25 
Sidney P. Ottem, Court Commissioner