

NO. 90386-7

SUPREME COURT OF THE STATE OF WASHINGTON

SARA FOSTER,

Appellant,

v.

WASHINGTON DEPARTMENT OF ECOLOGY; THE CITY OF
YELM, and WASHINGTON POLLUTION CONTROL HEARINGS
BOARD,

Respondents.

MOTION FOR RECONSIDERATION

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I. INTRODUCTION

Ecology asks the Court to reconsider parts of its October 8, 2015, decision in this case (Opinion) to address interpretations of the term “withdrawal.” Defining “withdrawal” to refer exclusively to temporary water use is inconsistent with statutory language, this Court’s prior opinions, and Ecology’s longstanding application of the water code. If the term “withdrawal” is exclusively defined as “only the temporary use of water,” *see* Opinion at 9–10, the decision will lead to unnecessary confusion and unintended consequences in the implementation of provisions of the groundwater code, RCW 90.44, that rely heavily upon a broader application of the term “withdrawal.”

Ecology respectfully requests modification of the Opinion to clarify that the term “withdrawal” is not exclusively associated with temporary water use by default, and is capable of having broad or narrow meaning depending upon its context of use in other statutory provisions. The Court has decided many water rights cases without distinguishing between the legal import of the terms “withdrawal” and “appropriation.” To do so now, in particular to hold that the term “withdrawal” means only a right to use water on a temporary basis, would introduce profound uncertainty for the State and its water users.

Ecology still maintains that the overriding considerations of the public interest (OCPI) exception was properly applied to the Yelm permit, and supports the City of Yelm's motion for reconsideration. However, should the Court uphold its original decision, Ecology urges the Court to make minor revision of its Opinion to avoid widespread confusion and inconsistency throughout the water code.

II. STATEMENT OF RELIEF SOUGHT

Ecology maintains its position that the decisions of the Pollution Control Hearings Board and superior court should be affirmed. Accordingly, Ecology agrees with the City of Yelm's request in its motion for reconsideration for the Court to reverse course and affirm the permit. In the alternative, if the Court sustains its reversal of the permit approval on reconsideration, Ecology requests the following:

- Replace the first sentence after the block quote on page 8 of the Opinion as follows: "Washington's other interrelated statutes concerning water rights also use "appropriation" to mean the assignment of a legal water right."¹
- Replace the first full sentence on page 9 of the Opinion as follows: "The term "withdrawal," unlike "appropriation,"

¹ Ecology asks the Court to remove the word "permanent" in this sentence.

carries with it no suggestion that it includes the assignment of a legal water right.”²

- Replace the sentence at the end of page 9 and beginning of page 10 of the Opinion as follows: “First, under RCW 90.54.020(3)(a), the word “withdrawals” means only the temporary use of water.”³
- Add the following language as a footnote to be placed after the sentence that ends at the beginning of page 10 of the Opinion:

“This analysis relating to the term “withdrawal” only relates to the OCPI provision, and does not involve or entail interpretation of the terms “withdrawal” and “appropriation” in provisions of the groundwater code, RCW 90.44.”

In the alternative, if the Court decides not to make the above revisions on pages 8, 9, and 10, Ecology urges the Court to add the suggested footnote to page 10 of the Opinion.

III. GROUNDS FOR RELIEF SOUGHT

Ecology makes this request based on the Court’s misapprehension of the term “withdrawal” as used in the water code. The Court properly notes different meanings to the terms “withdrawal” and “appropriation,” but goes too far in defining each term to the exclusion of the other when it

² Ecology also asks the Court to remove the word “permanent” in this sentence.

³ Ecology asks the Court to remove this sentence: “First, when the Legislature intends for the assignment of a permanent legal water right, it uses the term “appropriation”; when it intends for only the temporary use of water, it uses the term “withdrawal.”

limits the legal effect of “withdrawal.” Because the question of whether the Legislature intends to limit the term “withdrawal” to only a temporary use of water was not extensively briefed by the parties, Ecology submits this briefing for the Court’s consideration.

Ecology agrees that an “appropriation” of water is a “term of art” that generally means an “assignment” of a water right. Opinion at 7–8. Likewise, it is generally true that “a ‘withdrawal’ refers to the physical act of removing water.” Opinion at 8. However, these differences have no bearing on the temporal quality of the two terms described. Just as the physical act of removing water (or withdrawal) can be either temporary or permanent in nature, a water right can also be appropriated to authorize permanent or temporary uses alike. The terms themselves carry no assumption as to the intended scope of a use or right without further context of other operative words used in a given statutory provision.

First, this brief will show how the term “withdrawal” is used elsewhere by the Legislature and in different contexts to arrive at contrasting results. Second, this Court’s prior case law will be examined to show why a narrow reading of the term would result in inconsistency with the usage of the term “withdrawal” in past water rights cases. And third, this brief will conclude by discussing the practical, negative consequences

of reading in a temporal aspect to the otherwise broadly applied term “withdrawal.”

A. The Water Code Does Not Use “Withdrawal” to Refer Exclusively to Temporary Uses of Water

Since its inception, the water code relating to use of groundwater, RCW 90.44, has used “withdrawal” to refer to rights subject to prior appropriation. For example, statutes establishing the permitting system for groundwater rights state that “*no withdrawal of public groundwaters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made . . .*” RCW 90.44.050 (emphasis added). Similarly, RCW 90.44.060 states: “Applications for *permits for appropriation of underground water . . . and the rights to the withdrawal of groundwater acquired thereby* shall be governed by [statutes relating to permits for surface water].” (Emphasis added.)

While the word “withdrawal” can describe a physical taking of groundwater (parallel in meaning to the physical “diversion” of surface water), nothing in the water code suggests that the Legislature intended use of the term “withdrawal of water” to be materially distinct from the term “appropriation of water.” The Court reaches its conclusion that the terms have distinctive meanings by scrutinizing select provisions in the

surface water code, RCW 90.03, which was enacted several decades before the groundwater code and generally does not reference groundwater withdrawals.⁴

This analysis inadvertently overlooked the provisions of RCW 90.44 itself, which was adopted after RCW 90.03 but incorporates it by reference. In fact, a straightforward reading of RCW 90.44 shows that the legislature uses the terms “withdrawal” and “appropriation” interchangeably. Both terms typically refer to the physical taking of water and the establishment of a water right, which is subject to the limitations of the prior appropriation doctrine and entitled to the protections afforded by the doctrine.⁵

In some instances, the terms “withdrawal” and “appropriation” are used by the Legislature to describe a permanent beneficial use of water,

⁴ The majority discusses “Washington’s other interrelated statutes” to interpret OCPI, referencing RCW 90.03.010 (Appropriation of water rights), RCW 90.03.550 (Municipal water supply purposes), RCW 90.03.383 (Interties), RCW 90.03.370 (Reservoir permits), and RCW 43.83B.410 (Drought conditions). Opinion at 8–10.

⁵ See also RCW 90.44.070 (permits for “development *or withdrawal*” of groundwater subject to limitations of pumping capacity); RCW 90.44.080 (certification issued upon *perfected appropriation* of groundwater requires information on *means of withdrawal*); RCW 90.44.100 (holder of a *valid right to withdraw* public groundwaters may . . . change withdrawal location upon amending a permit); RCW 90.44.105 (“holder of a *valid right to withdraw* public groundwaters may consolidate that right” with an exempt right); RCW 90.44.110 (“permit or certificate of *vested right to withdraw and appropriate* public groundwaters” may be specified to avoid waste); RCW 90.44.130 (prior appropriators are “entitled to the preferred use of such groundwater . . . and shall enjoy the right to have *any withdrawals by a subsequent appropriator* of groundwater limited” to avoid impairment.); RCW 90.44.220 (adjudication to determine rights of appropriators of groundwater or of surface water); RCW 90.44.230 (“In any determination of *the right to withdrawal* of groundwater . . . judgment shall determine the priority of right and the quantity of water to which *each appropriator* who is a party to the proceedings shall be entitled . . .”); RCW 90.44.250 (“reports from each *groundwater appropriator* as to the amount of *public groundwater being withdrawn* and as to the manner and extent of the beneficial use.”) Emphasis added in all.

but not always. For example, an appropriation including a “*temporary permit*” is only authorized when a “permit to make said *appropriation* has first been granted.” RCW 90.03.250 (Appropriation procedure—Application for permit—Temporary permit) (emphasis added). Likewise, when drought conditions are present, Ecology may “authorize emergency *withdrawal* . . . on a *temporary* basis.” RCW 43.83B.410(1). In both of these examples the term “temporary” is the operative word used to describe the temporal aspect of a physical “withdrawal” or legal “appropriation,” not the other way around.

The same is true when the Legislature describes permanent uses and rights in the groundwater code. When the term “temporary” is absent in the code, the assumption is that a “withdrawal” or “appropriation” is used without limitation as far as the duration of the authorization goes. “[N]o *withdrawal* of public groundwaters of the state shall be begun . . . unless an application to *appropriate* such waters has been made to the department and a permit has been granted” RCW 90.44.050 (emphasis added). Both terms of art are again used in the groundwater permit statute, but this time there is no limitation because of the absence of any qualifying words, such as “temporary.” The independent terms “withdrawal” and “appropriation” alone never define the scope of a right—it is the Legislature’s context and usage that gives them meaning.

B. Prior Court Opinions Also Make No Distinctions and Refer to “Withdrawals” and “Appropriations” to Similarly Describe Permanent Water Rights

The terms “withdrawal” and “appropriation” have been used interchangeably by this Court as well, with no limitation as to “withdrawal” being exclusively temporary. *Dep’t of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 16, 43 P.3d 4 (2002) (“In general, when one appropriates water one does so by means of diversion of surface water or by *withdrawal* of groundwater.”) Permit applicants are referred to as “applicant[s] to withdraw groundwater,” *Campbell & Gwinn*, 146 Wn.2d at 12. And this Court has consistently viewed permit-exempt “withdrawals” as appropriations subject to the rule of first in time first in right, and has not viewed them as being only temporary in nature. *Id.* at 13 n. 8 (“RCW 90.44.050 itself provides that a right acquired under the exemption is to be treated as all other rights, and thus is subject to the prior appropriation doctrine’s first in time first in right principle.”)

As to a permit-exempt withdrawal, RCW 90.44.050 provides that “to the extent that it is regularly used beneficially, [the permit-exempt use] shall be entitled to a right equal to that established by a permit.” RCW 90.44.050; *Five Corners Family Farmers v. Dep’t of Ecology*, 173 Wn.2d 296, 300, 268 P.3d 892 (2011). Although exempt “withdrawals” do not require permitting, they are rights otherwise

protected against temporary interruption and deserve full protection of prior appropriation, while also being required to not cause impairment of senior water rights; the first appropriator is entitled to the quantity of water appropriated by him to the exclusion of subsequent claimants. *Id* at 300; *Swinomish Indian Tribal Community v. Dep't of Ecology*, 178 Wn.2d 571, 598, 311 P.3d 6 (2013) (permit-exempt groundwater uses cannot “jump to the head of the line” in priority).

In fact, all of the water uses that have been considered by this Court in cases that have involved withdrawals under the groundwater permit exemption have been permanent in nature. *Campbell & Gwinn*, 146 Wn.2d 1 (water for domestic purposes to serve houses on a year-round basis); *Five Corners Family Farmers*, 173 Wn.2d at 300 (stock-watering purposes); *Kittitas Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 178, 256 P.3d 1193 (2011) (water for domestic purposes to serve houses on a year-round basis); *Swinomish Indian Tribal Community*, 178 Wn.2d 571, (water for domestic purposes to serve houses on a year-round basis).

C. The Opinion’s Definition of “Withdrawal” as Only Relating to a “Temporary” Water Use Threatens to Sow Confusion Regarding Permit-Exempt Water Rights

Introducing a material distinction between the definitions of “withdrawal” and “appropriation,” where “withdrawal” is only a

temporary use, is particularly troublesome with regard to permit-exempt groundwater uses. It is critical for the administration of the prior appropriation system to eliminate any confusion that permit-exempt groundwater withdrawals have only a limited “temporary” status because the word “withdrawal” is used in RCW 90.44.050. *All* prior appropriators, exempt and permitted alike, are entitled to preferred use of such groundwater and “enjoy the right to have *any withdrawals by a subsequent appropriator* of groundwater limited” to avoid impairment. RCW 90.44.130 (emphasis added).

The distinction drawn by the Court between “withdrawal” and “appropriation” threatens profound confusion for, and even injury to, permit-exempt water users. For example, if the term “withdrawals” in RCW 90.44.050 is read to only allow *temporary* uses of water, then the statute could also be logically read to mean that exempt users who are now using (or want to use) water on a permanent basis would be subject to interruption in watershed basins. This could implicate hundreds of thousands of homeowners statewide that are currently accessing water for their homes under the permit exemption in RCW 90.44.050 for domestic use. Homeowners now and in the future would face an uncertain future with respect to whether they will have reliable access to water for their homes.

The Court recognized the importance of permit-exempt withdrawals in the prior appropriation scheme in *Five Corners Family Farmers*, finding that the exempt stockwater right would have priority over a later applicant for a water permit. *Five Corners Family Farmers* at 303–04.⁶ If a permit-exempt withdrawal is not considered to be an “appropriation” -- but only a “temporary” use of water that does not have status as a water right within the prior appropriation system -- then such rights could be interrupted by junior water rights. Permit-exempt withdrawals are not temporary or second-class uses, and must be regulated and protected according to the prior-appropriation system.

IV. CONCLUSION

Ecology respectfully asks the Court to consider its October 8 ruling in light of RCW 90.44 and to clarify its decision with regard to the word “withdrawal.”

Ecology makes this request while supporting the City of Yelm’s request for the Court to revisit its decision in this case to hold that the plain meaning of the OCPI provision supports affirmance of Yelm’s permit. However, should the Court maintain its reversal, in the alternative,

⁶ These withdrawals are no different from permitted appropriations: “A proposed withdrawal of groundwater from a closed stream or lake in hydraulic continuity must be denied if it is established factually that the withdrawal will have any effect on the flow or level of the surface water.” *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 95, 11 P.3d 726 (2000). It is critical that both permit-exempt “withdrawals” and permitted “appropriations” have equal status as water rights.

Ecology seeks revision of the Court's Opinion to avoid unintended consequences in the future administration of water rights.

RESPECTFULLY SUBMITTED this 28th day of October 2015.

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A handwritten signature in black ink, appearing to read "Robin G. McPherson", with a long, wavy horizontal line extending to the right.

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 28th day of October 2015, I caused to be served Respondent State of Washington, Department of Ecology's Motion for Reconsideration in the above-captioned matter upon the parties herein as indicated below:

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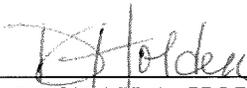
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DATED this 28th day of October 2015 in Olympia, Washington.



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