

Focus on: Ecology's approach to municipal water right transfers

Background

The Legislature passed the Municipal Water Law (MWL) in 2003 in response to the *Theodoratus v. Ecology* decision. In that decision, the Supreme Court ruled that Ecology had erred in issuing water right certificates based on system capacity (referred to as "pumps and pipes certificates") instead of documented beneficial use, as required by law. The ruling made uncertain the validity and status of numerous pumps and pipes certificates that included both perfected (used) and unperfected (unused, "inchoate") quantities, held by municipal water suppliers.

The 2003 law ensured that municipal water right certificates issued by Ecology were "in good standing" at the time the law was passed. Among other things, the law also provided a streamlined pathway for municipal suppliers to serve customers throughout their utility service area and modify their service area boundaries without having to submit a change application to Ecology, under RCW 90.03.380.

In another key provision, the law protected municipal pumps and pipes certificates from diminishment by Ecology, except in specific situations. One of those situations identified in the law reads, "Except as provided for the issuance of certificates under RCW 90.03.240 and for the issuance of certificates following the approval of a change, transfer, or amendment under RCW 90.03.380 or 90.44.100, the department shall not revoke or diminish a certificate for a surface or ground water right for municipal water supply purposes as defined in RCW 90.03.015 (RCW 90.03.330(2))"¹.

Tentative determinations

When a water right holder applies for a water right change or transfer, Ecology is obligated to conduct an analysis and make a tentative determination of the extent and validity of a water right. A tentative determination is necessary to ensure that a change does not cause detriment or injury to other rights.²



The legislature, under RCW 90.03.330, envisioned that when Ecology processes a water right change, that the agency might be required to modify the water right based on the tentative determination under RCW 90.03.380.

In conducting a tentative determination of the extent and validity of municipal water rights, Ecology considers the legislative intent for municipal suppliers to have flexibility to use inchoate water rights to serve the utilities' future growth. In *Cornelius v. Ecology* (2105), Ecology approved water right changes for Washington State University (WSU) after conducting a tentative determination of extent and validity and concluding that WSU's inchoate water right quantities remained valid and in good standing.

The State Supreme Court upheld the decision. Citing RCW 90.03.330(3), the Court acknowledged that municipal pumps and pipes certificates are rights in good standing. However, the Court further clarified that such "water rights must still be 'prosecuted with reasonable diligence' to remain valid."³ Key in the Court's decision was the fact that WSU was seeking changes to support its own customer needs and growth within its system, and not to profit by selling water rights to another entity.

Overall, the MWL is silent about situations where one municipal water supplier is no longer needing or able to use their inchoate quantities represented in

municipal water right certificates and seeks to transfer inchoate rights to another entity.

The concept of original intent

Without statutory direction in situations where one municipal water supplier is seeking to transfer a municipal water supply certificate with inchoate quantities, Ecology must look to relevant case law.

The “original intent” approach is grounded in Washington water law and comports with the principle that a water right cannot be “enlarged” through the approval of a change application. A tentative determination necessarily involves ascertaining the scope of a water right to determine to what extent it is valid and eligible for change.⁴

Part of this evaluation involves assessing the original intent behind the water right, which can be viewed as a limiting attribute of the water right itself. Courts have defined an appropriation as “an intention to appropriate followed by a reasonable diligence in applying the water to a beneficial use.”⁵ Washington courts further suggested that the appropriator’s original intent limits the extent of the appropriation: “Appropriation of water consists in the intention accompanied by reasonable diligence to use the water *for the purposes originally contemplated* at the time of its diversion.” (emphasis added)⁶.

Thus, Courts have considered original intent to determine the proper scope of water rights. For instance, in *Schuh v. State Dept. of Ecology*, the Court upheld Ecology’s determination that the transfer of an irrigation water right would enlarge the right because it was supplemental to any water that was supplied by the federal Columbia Basin Project.⁷ The Court upheld Ecology’s finding that the permit originally contained this limitation based upon the context surrounding the issuance of the permit,

including findings that the permittee “was notified at the time he applied for the permit that his farm was within the federal project area” and that he “actually irrigated his farm from the federal project.”⁸

Similarly, in *Alpowa Creek*, the Court considered an appropriator’s original intent in determining the proper quantification of an appropriation. The Court looked at the notices given by the non-riparian appropriators, and concluded that they had intended to appropriate the larger quantity.⁹ The Court therefore rejected the riparian owners’ argument that the appropriation should be limited to the capacity of the original ditch.

Conclusion

There is no direct statute, including the MWL, informing the approach that Ecology should take regarding transferring inchoate quantities of municipal water rights between entities. Without that specific legislative direction, Ecology must rely on case law regarding the approach to water right changes and transfers, and must ensure protection of senior water right holders.

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¹ [Chapter 90.03 RCW: WATER CODE.](#)

² *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 779, 947 P.2d 732 (1997); see also RCW 90.44.100 (prohibiting groundwater right amendments that enlarge the right).

³ *Cornelius v. Washington Dep’t of Ecology*, 182 Wn.2d 574, 601, 344 P.3d 199 (2015).

⁴ *Okanogan Wilderness League, Inc.*, 133 Wn.2d at 779.

⁵ *In re Water Rights in Alpowa Creek in Garfield & Asotin Ctys.*, 129 Wash. 9, 13, 224 P. 29, 31 (1924)

⁶ *Offield v. Ish*, 21 Wash. 277, 280–81, 57 P. 809 (1899)

⁷ 100 Wn.2d 180, 185, 667 P.2d 64 (1983).

⁸ *Id.* at 184.

⁹ 129 Wash. at 15-16.