A Report about Water Resources Management

October 2003

Table of Contents

Appendices

Introduction

A. Background

In June 2003, this writer submitted to the Honorable Brian Sonntag a report about the systemic failure of Washington State's water resources management system. Mr. Sonntag responded that the state's Whistleblower Act, RCW 42.40.020(5)(a), does not enable investigation of systematic failures of an agency or division. It does enable the State Auditor to investigate any action undertaken by a state employee in the performance of the employee's official duties.

This report is submitted to the State Auditor pursuant to RCW 42.40. The report distills the June 2003 report about water resources management, summarizes applicable statute and case laws, and provides examples of how state employees have recently violated state water resources-related codes and case laws.

B. Organization of This Report

Part II identifies and discusses applicable statute and case laws that govern water use permit decisions. The guiding legal principles that are supposed to inform water use decisions are identified in bold. The source of each is cited. The guiding principles are discussed and summarized.

Part III discusses two examples of recent permit decisions and identifies some of the ways in which the signatories to each failed to follow the law.

If the reader has questions about the history and development of Washington State water codes and case laws and their relationship and applicability to hydrology and water use permit decisions, please refer to the author's June 2003 paper on this topic. The content of that report is not repeated herein.

II. Applicable Water Resources Laws

A. Statute Laws

To permit or deny a water use, permit writers must make written findings of fact that

- **Water is legally and physically available.**
- **Water will be put to beneficial use.**
- **No other legally valid water uses will be impaired.**[1]
- **Water use will not be detrimental to the public welfare.**[2]

The statutory source of these guiding principles follows:

> The department shall make and file as part of the record in the matter, written findings of fact concerning all things investigated, and if it shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare, it shall issue a permit stating the amount of water to which the applicant shall be entitled and the beneficial use or uses to which it may be applied. RCW 90.03.290(3).

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[1] Under state statute, for new water uses, RCW 77.55.050 requires permit writers to consult with the Department of Fish and Wildlife to ensure a proposed use will not put fisheries at risk.

> **Review of permit applications to divert or store water -- Water flow policy.**
> It is the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state.
>
> The director of ecology shall give the director notice of each application for a permit to divert or store water. The director has thirty days after receiving the notice to state his or her objections to the application. The permit shall not be issued until the thirty-day period has elapsed.
>
> The director of ecology may refuse to issue a permit if, in the opinion of the director, issuing the permit might result in lowering the flow of water in a stream below the flow necessary to adequately support food fish and game fish populations in the stream.
>
> The provisions of this section shall in no way affect existing water rights. RCW 77.55.050.

The state statutory provision that existing water rights and, by transition, transfers of existing water rights, are in no way affected by the state's interest in protecting fisheries, appears to be inconsistent with federal laws, and contracts, especially those concerning Indian Treaty rights. This issue is too complex to address directly in this short summary. Others have recently addressed this issue far more extensively (see http://www.ecy.wa.gov/pubs/0211019.pdf). Suffice it to say, making a finding of fact that water is legally available necessitates knowing the measure, quality, and extent of Indian water rights, including, but not limited to, impacts on fisheries. Although this has been addressed in some locations in the state, water use permit writers lack the systemic means to make such findings relating to the legal availability of water.

[2] This finding is required only when the purpose of use changes.

When the user of a legally valid water right petitions for a change in the place of use, point of diversion and/or the purpose of use of the water right, by implication, written findings of fact are required.[3] In addition to the four findings of fact identified above, the permit writer must also find that

- **The water right to which the applicant seeks a change has been beneficially used.**[4]
- **The change will result in no increase in the annual consumptive quantity of water used.**

The statutory source of these guiding principles follows:

> The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used: PROVIDED, HOWEVER, That the right may be transferred to another or to others and become appurtenant to any other land or place of use without loss of priority of right theretofore established if such change can be made without detriment or injury to existing rights. The point of diversion of water for beneficial use or the purpose of use may be changed, if such change can be made without detriment or injury to existing rights. A change in the place of use, point of diversion, and/or purpose of use of a water right to enable irrigation of additional acreage or the addition of new uses may be permitted if such change results in no increase in the annual consumptive quantity of water used under the water right. For purposes of this section, "annual consumptive quantity" means the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right. RCW 90.03.380.

B. Case Law

Case law has clarified and refined the nature of the requisite findings of fact identified above. Significant clarifications follow.

- **Appropriation of water for a new use, and change in the purpose of use and/or place of use of an extant, legally valid water use may not impair any other water right, including when ground and surface waters are in hydraulic continuity.**

The source of this guiding principle follows:

In the case of Postema and Jorgensen v. Pollution Control Hearings Board et. al. (142 Wn.2d 68, 11 P.3d 726) (2000), Ecology argued, and the Washington State Supreme Court agrees, that if a withdrawal from groundwater will impair one's ability to use a surface water right, permission to use groundwater must be denied.[5]

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[3] This fact is not in dispute. Ecology's Water Resources Program permit writers appear to agree with this. It is stated in many water use permits and certificates.

[4] An undeveloped water use permit may not be changed.

[5] Other cases also discuss impairment. Postema is the capstone which also addresses surface and groundwater continuity, as well as impairment.

- **Conversely, if a proposed use would rely on waters available during peak periods of precipitation and stormwater runoff when the volume of water is sufficient to meet the needs of all other legally valid water uses plus the proposed use, permission to use water must be granted.**

Postema and Jorgensen v. Pollution Control Hearings Board et. al. (142 Wn.2d 68, 11 P.3d 726) (2000) is also the source of this guiding principle.

- **The measure and extent of a legally valid water right is the measure and extent of actual use, not the system capacity determined by the size of constructed pumps and pipes, and not only the issuance of a water use certificate.**

In the case of Department of Ecology v. George Theodoratus (135 Wn.2d 582) (1998) the primary issue was whether a final certificate of water right, (i.e., a vested water right) may be issued based upon the maximum capacity of a water delivery system, or whether it may be obtained only in the volume of water actually put to beneficial use (used without waste). The State Supreme Court concluded that state statutory and common laws do not allow for a final certificate of water right to be issued based upon system capacity. Legal validation of a water right depends on the amount of water actually put to continuous, beneficial use, not the maximum capacity of the pumps and pipes constructed to deliver the water**.** In June 2003, the Legislature expanded the definition of "municipal use" and exempted from this limitation all water suppliers serving 15 or more connections to enable them to grow into their water rights over time. For most other water rights (primarily individuals and agricultural users), if a water right is not exercised for any consecutive period of 5 years, it is legally considered to be "relinquished" and no longer a valid right.[6]

- **If appropriation of a quantity of water would degrade water quality, thereby resulting in violation of a water quality code, an application to use water must be denied.**

Ecology argued and the Washington State Supreme Court and the United States Supreme Court agree that water quality and water quantity are inextricably linked (Jefferson County PUD v. Department of Ecology, 511 U.S. 700 (1994) (also known as Elkhorn) and Public Utility District No. 1 of Pend Oreille County v. State of Washington, Department of Ecology, 146 Wn.2d 778, 51 P.3d, 744) (also known as Sullivan Creek) (2002)). If a diversion or withdrawal of water would concentrate contaminants or otherwise impair water quality, thereby causing the violation of a water quality standard, permission to use the water must be denied.

[6] There are exceptions to this norm.

C. Summary

1. **To permit or deny a water use, permit writers must make written findings of fact that**

    a. **Water is legally and physically available.**
    b. **Water will be put to beneficial use.**
    c. **No other legally valid water uses will be impaired.**
    d. **Water use will not be detrimental to the public welfare.**

2. **When the user of a legally valid water right petitions for a change in the place of use, point of diversion and/or the purpose of use of the water right, by implication, written findings of fact are required. In addition to the four findings of fact identified above (a-d), the permit writer must also find that**

    e. **The water right to which the applicant seeks a change has been beneficially used.**
    f. **The change will result in no increase in the annual consumptive quantity of water used.**

3. **Appropriation of water for a new use, and change in the purpose of use and/or place of use of an extant, legally valid water use may not impair any other water right, including when ground and surface waters are in hydraulic continuity.**

4. **Conversely, if a proposed use would rely on waters available during peak periods of precipitation and stormwater runoff when the volume of water is sufficient to meet the needs of all other legally valid water uses plus the proposed use, permission to use water must be granted.**

5. **The measure and extent of a legally valid water right is the measure and extent of actual use, not the system capacity determined by the size of constructed pumps and pipes, and not only the issuance of a water use certificate.**

6. **If appropriation of a quantity of water would degrade water quality, thereby resulting in violation of a water quality code, an application to use water must be denied.**

Taken together, these findings require a uniform, integrated water accounting system that characterizes the volumes of water available, reserved, diverted or withdrawn, consumed through use, and returned to the hydrological system at each spatial and temporal increment of the watershed. The level of spatial and temporal resolution must be fine enough to provide information sufficient to make the requisite findings of fact. Water quality must be demonstrated to be of good quality. Where there are violations of state and/or federal water quality standards, the volume of water contributed from up-gradient locations that is required to dilute the concentration of contaminants must be reserved instream to accomplish this.

III. Case Studies in the Applicability of Water Resources Laws

Black's Law Dictionary[7] defines a "finding of fact" as "a conclusion by way of reasonable inference from the evidence." Written findings of fact must include the major premises, the minor premises, and the conclusions. Without including the evidence upon which the conclusion is based, the conclusion bears no logical relationship to the evidence. Therefore, it is not a finding of fact. It is merely the expression of an opinion (see the author's June 2003 report about water resources management for discussion of findings of fact).

There are many examples of recently approved water use permits and certificates which do not contain the requisite written findings of fact identified in Part II. Two examples were selected because they are comparatively simple and direct. The permits to change these two water rights appear in Appendices A and B, respectively.

A. Case A: Application #S2-25289 to Change a Water Right

On May 27, 2003, Don Davidson, a senior permit writer in the Southwest Region of Ecology's Water Resources Program, and Thomas Loranger, Water Resources Supervisor of the Southwest Regional Office, signed "Application for Change to Appropriate Public Waters of the State of Washington, Report of Examination Application #S2-25289." Some of the respects in which this Report of Examination (ROE) fails to establish the evidentiary basis for making the requisite findings of fact will be identified.

As originally issued, S2-25289 permitted diversion from Cloquallum Creek at an instantaneous rate of **.**4 cubic feet per second (cfs). The original permit limited the annual volume to 30 acre-feet[8] of water. The purpose of use was irrigation.

A change was sought to enable diversion from Cloquallum Creek at an instantaneous rate of **.**12 cfs. Under the new permit, the annual volume diverted was limited to 22.5 acre-feet per year. The original purpose of use, irrigation, remained unchanged, although a greenhouse was added. The ROE permitted only 15 acres to be irrigated.

As noted above, before a permit writer may permit the transfer or change to a water right, a finding must be made that the water right to which the applicant seeks a change has been beneficially used (see 2e above). This might, in fact, have been the case in this example. However, if so, the permit writer did not document it. The applicant's failure to put the previously permitted water to use would be sufficient grounds to stop the water use change in its tracks. The fact of whether or not the old water right had been used should have been investigated and documented. Permit signatories do not have the legal authority to authorize a transfer without this finding.

From 2f above, the permit writer has a legal responsibility to find that the consumptive use of water under the new use would be no greater than consumption under the old use. Assuming for a moment that the permit writer had made the finding that water was, in fact, put to

[7] Black's Law Dictionary, 5th Edition (1996).
[8] An acre-foot is the volume required to cover an acre with water at a depth of one foot.

beneficial use, there is no mention in the ROE about the nature and extent of the use. The permit writer cites only the old permitted use, not the actual use of water. Likewise, the consumptive use under the new use was not mentioned. Therefore, it is impossible to determine whether there is a change in the consumptive use of water, a finding permit signatories are required to make. Granted, it is counter-intuitive that somebody diverting .28 cfs less water and irrigating 15 fewer acres, the differences between the old and new uses, would consume more water. However, it is possible. The law does not require exercise of intuition. It requires the exercise of logic. The two do not always render the same result.

Finally, before approving the transfer of an existing water right, 1c above requires a finding that no other legally valid water uses will be impaired, including, but not limited to, instream flows, Indian Treaty rights and other state-administered water rights. The age or priority date of the other rights is not material. Impairment of any water right would be sufficient grounds to stop the change. Permit signatories have an obligation to protect the interests of other water users and uses.

Minimum instream flows have been set in the subject water resources inventory area (WRIA). There is no mention about whether these flows are met or would be met if the proposed transfer is implemented. There are multiple down-gradient, legally valid water users along the hydrological system to which the waters proposed for transfer are tributary. Some of them might have rights to use water that are older and have standing to use water before the applicant. Without conducting a general water rights adjudication or otherwise making tentative determinations about the down-gradient rights to water, it is not possible to make the finding that no other legally valid water uses would be impaired.

B. Case B: Application 1812 to Change Water Right Certificate 1036-A

On February 23, 2003, Jill Walsh, a senior permit writer in the Southwest Region of Ecology's Water Resources Program, signed "Application for Change to Appropriate Public Waters of the State of Washington, Report of Examination, Application #1812." On February 25, 2003, Mike Harris, former Water Resources Supervisor of the Southwest Regional Office, signed the same document permitting a change in the point of withdrawal of the certificate of water use. Some of the respects in which this ROE fails to establish the evidentiary basis for making the requisite findings of fact will be discussed.

As originally issued in 1951, water use Certificate 1036-A permitted pumping at an instantaneous rate of 250 gallons per minute (gpm), not to exceed 146 acre-feet per year from Southeast Tacoma Mutual (SETM) Well #3. The purpose of use was municipal supply. The applicant sought transfer of Certificate 1036-A from SETM Well #3 to SETM Well #2.

Since issuance of the original certificate, ownership of SETM wells has changed. The SETM wells have been subsumed by another water purveyor and connected to the purveyor's other water system. It appears the permitted change would enhance efficient delivery of water within the integrated water system. The ROE describes this. It also enumerates the findings of fact permit writers are required to make. However, there is no evidentiary foundation demonstrated in the ROE for making the requisite finding of fact that no other legally valid water uses would be impaired. As in Case A, the systemic relationships between the proposed

water use and other water rights are not discussed. Therefore, it is not possible to make a finding identified under 2f above that no other water rights would be impaired.

The reason given in the ROE for the transfer is "Over time, production in Well 3 has declined such that it no longer serves as a viable production well, and currently the well is equipped only for emergency use." The reasons for the reduced well productivity are not explored. Perhaps the productivity of Well #3 declined because the pump is old and dysfunctional. Alternatively, perhaps all the paving and development in the area since 1951 has destroyed the potential for groundwaters to recharge and, as a result, the static water level of Well #3 declines seasonally. Unfortunately, the depth of neither well is given. It is not clear from the ROE why Well #3 is less productive than it used to be. If depletion of the hydrological potential in the area is part of the answer, this information might have stopped further processing of the application. A lack of information about this does not enable a finding that if the water right is transferred, no other water rights would be impaired. The absence of evidence simply negates the capacity to make any finding about this topic.

It appears the Puyallup Tribe of Indians has longstanding interests in the waters in WRIA 12 at locations down-gradient from the point of withdrawal. Article 3 of the Treaty of Medicine Creek of 1854 reserves to the Puyallup Tribe the "right of taking fish at all usual and accustomed" locations, which courts have said is a right dating from time immemorial. If the transfer of certificate 1036-A would impair the hydrological capacity required to sustain historical contract (treaty) fisheries, the water might not be legally available. The ROE does not address this possibility.

Based on information available online (see http://www.ecy.wa.gov/services/gis/maps/wria/number/wria12.htm), it appears some of the waters down-gradient from the proposed point of withdrawal of Certificate 1036-A do not meet water quality standards. As discussed under 2f above, if the transfer of a water right would degrade water quality, thereby resulting in violation of a water quality code, application to use or transfer the water must be denied.

There are many other examples of cases in which the Department of Ecology's Water Resources Program did not make the requisite findings of fact. These exist in all four regions of the state. If additional examples are required, please inform the author.

Appendix A
Case A: Application #S2-25289 to Change a Water Right

Appendix B
Case B: Application 1812 to Change Water Right Certificate 1036-A