

## **YAKIMA COUNTY SUPERIOR COURT AFFIRMS RELINQUISHMENT OF WATER RIGHTS SOUGHT BY CITY**

*City of Union Gap and Ahtanum Ridge Business Park, LLC, v. Washington Department of Ecology*, Case No. 06-2-00271-6 (Yakima County Superior Court, Oct. 9, 2007)

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On October 9, 2007, the Yakima County Superior Court upheld a ruling by the Washington Pollution Control Hearings Board (PCHB) that an intended transfer of an industrial water right to the City of Union Gap did not occur soon enough to avoid relinquishment. According to the PCHB, the “determined future development” exemption in the relinquishment statute “does not apply to plans that could be fully implemented in less than five years.” The Court affirmed the PCHB’s conclusion that the City’s plan to acquire the water rights of a defunct slaughterhouse was not sufficiently “definite” by the time the five-year relinquishment period had expired. Total forfeiture of the water rights will result, unless the Superior Court ruling is overturned on appeal. See the February 2006 issue of the *Western Water Law & Policy Reporter* for a discussion of the PCHB ruling in the *Union Gap* case, 10 *West. Water L. & Pol’y Rptr.* 98 (Feb. 2006).

### **The Court’s Decision**

The Superior Court agreed with the PCHB’s analysis, requiring evidence of a “conclusive deal” in order to apply the “determined future development” exemption from statutory relinquishment. All parties agreed that the water rights at issue had gone unused for five consecutive years. The appellants asserted that the rights were exempt from relinquishment as a result of the water right owner’s plan to sell the rights to the City of Union Gap.

Following the Supreme Court’s approach in *R.D. Merrill Co. v. Pollution Control Hearings Board*, 137 Wn.2d 118, 969 P.2d 458 (1999), the Superior Court narrowly construed the exceptions to statutory forfeiture so as to “fulfill the purpose of the statute which is to

‘cause a return to the state of any water rights which are no longer exercised [through] beneficial use.’” RCW 90.14.140(2)(c) provides that, notwithstanding nonuse, there can be no relinquishment of any water right claimed for a “determined future development” to take place within fifteen years of the most recent beneficial use of the water right. The Superior Court stated that “*R.D. Merrill* instructs that ‘determined’ of ‘determined future development’ means ‘to fix conclusively or authoritatively.’ . . . That case further requires that the ‘conclusively or authoritatively fixed future development’ take place before the five year period of nonuse takes place.”

The Court concluded, based upon the record before the PCHB and “in light of the burdens and restrictive interpretations required by *R.D. Merrill*,” that neither the developer nor the City conclusively or authoritatively “fixed” a development plan before the five-year nonuse period ran in 2000.

### **Handshake Deal?**

Addressing the evidence of an oral “handshake” agreement between the developer and the City’s Mayor in the summer of 1999 before the developer purchased the property and water rights, the Court observed that the developer “had nothing to sell but a concept” at that point. Once it acquired the water rights, the developer “needed to produce an authoritatively fixed plan” before the expiration of the five-year period, but “the only plan demonstrated was a desire to sell the water rights” to the City. This plan was not sufficient to satisfy the Court. Nor was the City’s need and desire for the water relevant because, as the Court pointed out, the City did not own the water rights. The Court concluded that the “handshake agreement” did not conclusively or authoritatively fix a development plan: “It was not a conclusive deal because such an arrangement must be reduced to writing to comply with the Statute of Frauds and formally adopted by the city council – as this arrangement eventually was after the expiration of the five year period.”

Characterizing the arrangement as “tentative” and “non-permanent” only, the Court cited with approval the PCHB finding that “there is not a single document or official action by Union Gap establishing a firm, definitive or conclusively fixed plan for the acquisition and use of the Washington Beef water rights” before the end of the five-year period of nonuse. However, the PCHB decision cited evidence that the developer held the water rights from the time it acquired the slaughterhouse property in October 1999 to the end of the five-year period in May 2000, and planned throughout that time to sell the rights to the City for municipal supply. Neither the PCHB nor the Superior Court identified any action by the developer that was inconsistent with that plan. Nevertheless, the developer’s plan was not sufficient for the water rights to be “claimed for a determined future development to take place within fifteen years of the most recent beneficial use” and therefore exempt from relinquishment.

## Conclusion and Implications

In this case, the lack of a “document or official action” by the City of Union Gap within the five-year nonuse period was fatal to the developer’s claim of an exemption from relinquishment for a “determined future development.” The result in this case suggests that the developer might have avoided relinquishment had it pursued more careful documentation of its arrangement with the City. However, the Superior Court’s dismissal of the City’s intentions – based upon the City’s lack of ownership – ultimately ignores the complexity inherent in a situation in which the planned “future development” requires transfer to another party who does not own the water right. The search for a “conclusive deal” imposes a new constraint unwarranted by the Supreme Court’s analysis of the “determined future development” exemption in the *Merrill* case.