Superior Court of the State of Washington
For Chelan County

Lesley A. Allan, Judge
Department 1
T.W. Small, Judge
Department 2

John E. Bridges, Judge
Department 3
Bart Vandegrift
Court Commissioner

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December 15, 2011

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Re: City of Leavenworth v. Department of Ecology
Chelan County Superior Court Cause No. 09-2-00748-3

Dear Mr. Pors and Mr. Reichman:

This matter came before the court on September 27, 2011 on the parties' cross-motions for summary judgment. Plaintiff City of Leavenworth ("the city") appeared and was represented by its attorney, Thomas Pors. Defendant Department of Ecology ("the department") appeared and was represented by its attorneys, Alan Reichman and Sarah Bendersky. The court has considered all pleadings submitted in connections with the motions, relevant authorities and arguments of counsel. This letter constitutes the court's memorandum decision.

This case involves a dispute regarding the city's water rights. The state, acting through the department, regulates the use of water and allocates water rights pursuant to a statutory scheme. As noted by counsel at the hearing in this matter, water law has developed over a long period of time and is seemingly dissimilar to any other area of law in this state. The lengths of the briefs submitted by counsel suggest that it is a complicated area of law, not susceptible to clear explanation, even by those ostensibly well-versed in its nuances. That being said, the court will attempt to sort through the myriad arguments made by the parties to resolve the issues presented herein.

The core facts of the case begin with Surface Water Certificate 8105 ("certificate 8105" or "8105"), which granted certain water rights to the city with a priority date of June 20, 1960.[1] The specific water right is described in 8105 as "1.50 cubic feet per second for municipal supply." The certificate does not include a statement of the maximum yearly amount of water that can be used.

In 1983 and again in 1989, the city filed applications for additional water rights. Ultimately, on June 10, 1993, the department issued two contemporaneous decisions or "Reports of Examination" ("ROE's") addressing these applications. The ROE's granted to the city the right to obtain water from additional locations to meet peak demand, but did not increase the overall water available to the city. In these ROE's, the department made findings that a reasonable annual quantity of water available under certificate 8105 can be calculated at 275 acre-feet.

In July 1993, the city appealed from the two ROE's to the Pollution Control Hearings Board ("PCHB"). The city contended that the total quantity of water available to the city should be higher than 1,375 acre-feet per year. Subsequent to the filing of the appeals, the city and the department entered into settlement negotiations. Ultimately, the parties reached a settlement of the PCHB case and entered into a Stipulation and Agreed Order of Dismissal on February 9, 1994.

On April 10, 1995, the department issued two amended ROE's, which amended the prior ROE's of June 10, 1993. These two decisions were sent to the city via certified mail on or about April 12, 1995, each with a nearly identical cover letter. These letters stated that the respective applications had been granted and also contained the following language: "This letter and enclosed Amended Report of Examination constitute our determination and order. You have the right to obtain review of this order." The letters went on to advise of the timelines (30 days) and manner for seeking review with the PCHB. The city did not appeal from either of the amended ROE's.

The two amended ROE's contained the same language as the original ROE's regarding certificate 8105: specifically, that 275 acre-feet was a reasonable calculation of the quantity of water available annually pursuant to that certificate. The amended ROE's also both found that the city currently has 1,375 acre-feet of water available annually. Further, the amended ROE's granted the city up to 90 acre-feet per year in "additive" or "primary" water for a total maximum of 1,465 acre-feet per year.

In 2002, the Department of Health ("DOH") approved the 2002 Leavenworth Water System Plan. In that plan – apparently prepared by the city – the city represented that certificate 8105 provided for a maximum annual water quantity of 275 acre-feet. All apparently was well until 2008, when the city requested DOH to amend its water system plan to indicate that certificate 8105 provided for a maximum annual quantity of more

[1] The city also holds at two previously-issued certificates which are referenced in various exhibits, but are not directly implicated in this dispute.

than 1,085 acre-feet, for a total city water portfolio of 2,185.95 acre-feet per year. When consulted by DOH, the department (of ecology) objected to the requested amendment. After apparent fruitless discussions, the city initiated this action.

Both parties have filed motions for summary judgment on various issues. The court will attempt to address all necessary issues in logical order.[2]

The first issue is whether the department possessed the authority to tentatively determine or otherwise quantify the water available under certificate 8105 in the course of considering the city's two applications for additional water rights. The court concludes that the department acted within its authority in making this tentative determination.

In deciding whether to grant or deny a water rights application, the department is required by statute to consider four criteria:

1. That water is available;

2. That is being requested for a beneficial use; and

3. That appropriation will not impair existing rights; or

4. That appropriation will not be detrimental to the public welfare.

RCW 90.03.290. "Beneficial use" is a term of art in water law and encompasses both the purposes for which water may be used and the amount of water necessary for a particular purpose. *See Dept. of Ecology v. Grimes,* 121 Wn.2d 459, 469 (1993). The department also has the authority to impose conditions on the granting of a permit. *Dept. of Ecology v. Theodoratus,* 135 Wn. 2d 582, 597 (1998).

It is axiomatic that in order to determine whether an application for water qualifies as a beneficial use, the department must consider – among other things – the amount of water that the applicant already has available to meet its uses. Although providing water to municipal customers unquestionably falls within the types of use that are potentially "beneficial,"[3] an application would nonetheless be denied if an applicant already possessed sufficient water rights to meet its needs. Thus, as occurred here, when faced with an application for additional water rights, the department must determine what

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[2] Both parties have submitted numerous declarations and exhibits as part of the summary judgment motions. Both parties have also moved to strike portions of the other's declarations. A substantial portion of the declarations appear to ultimately have very little relevance to the predominantly legal issues submitted for decision on summary judgment. The court therefore denies all motions to strike but has disregarded in its consideration of this case any irrelevant legal conclusions and opinions offered by lay witnesses.

[3] *See* RCW 90.54.020(1)

water is already available to the applicant. This is precisely what the department undertook to do with regard to the city's two applications. Its ROE's included specific findings regarding the amount of water available to the city under its three preexisting certificates, including 8105.

This issue is further complicated, however, by case law related to this topic and the statutory scheme for adjudication of water rights. First, it is undisputed that the department lacks authority to ultimately adjudicate water rights; rather, that authority is reserved to the superior courts by statute. *See* Chapter 90.03 RCW. Further, there is no statutory scheme that provides for the department to "tentatively determine" water rights. However, the concept of the department making a tentative determination of water rights has been discussed in case law.

Most prominent is the decision in *Rettkowski v. Dept. of Ecology*, 122 Wn.2d 219 (1993). In *Rettkowski,* the Court held that the department has no authority to tentatively determine the relative priority of water rights in a dispute between competing users in a regulatory action.[4] However, the *Rettkowski* Court noted that the concept of tentative determinations had been developed in the context of permitting cases. *Id.* at 227-28. The discussion of tentative determinations in *Rettowski* implicitly approves of the department's authority to engage in this type of analysis in the permitting context.

Concomitantly, the department also possesses the authority to impose conditions when issuing a permit. *Dept. of Ecology v. Theodoratus*, 135 Wn.2d at 597. Again, inherent in the general scheme of water rights permits, one such condition could be the total amount of water that could be used by a particular entity. Thus, the department was authorized to determine the total amount of water that should be utilized by the city, or an "aggregate cap."

Thus, this court concludes that analysis of the city's existing water rights – through a tentative determination – was a proper exercise of the department's authority in considering the city's water rights applications. The court also concludes that the department was authorized to issue a permit for additional water rights with a cap on the total amount of water the city could use annually.

The next issue presented for consideration is whether the city should be allowed to now challenge the two amended ROE's issued in 1995. As set forth in the cover letters transmitting the ROE's, any appeal was required to be filed with the PCHB within 30 days of receipt of the documents. It is undisputed that the city did not file an appeal this period. As a practical matter, the city does not seek to challenge the grant of additional

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[4] Of potential significance to the future of this dispute is the similar observation by the *Rettowski* Court that PCHB is likewise without authority to conduct adjudicative hearings regarding such rights. 122 Wn.2d at 228-29.

water in the amount of 90 acre-feet per year, which was the net effect of the two ROE's.[5] Rather, the city seeks only to challenge the department's quantification of the city's rights under certificate 8105. Thus, the true issue may better be framed as: what is the effect of the department's tentative determination regarding certificate 8105 under the facts of this case?

On this issue, the department contends that the two ROE's – including the annual quantification of certificate 8105 – should be given res judicata effect and the city should be precluded from challenging the quantification. The department contends that the tentative determination stands as, in essence, a final determination of the city's rights under 8105 until such time as a general adjudication of all water rights in the Wenatchee River Basin might theoretically occur at some future date. Conversely, the city argues that the doctrine of res judicata cannot apply to a tentative determination.[6]

In this court's view, the department fundamentally misapprehends a crucial element of the doctrine of res judicata: specifically, that there must be a final adjudication of the particular claim or dispute at issue. *Pederson v. Potter,* 103 Wash.App. 62, 67 (2000). As previously noted, it is well-established that the department has no authority to make a final determination of a party's water rights; rather, that responsibility is reserved and entrusted to the superior courts in the context of a general adjudication. *See Rettowski, supra;* Chapter 90.03 RCW. Here, the department has failed to explain how, if it is precluded from making such a final determination, its quantification of certificate 8105 can be considered to have res judicata effect.

In this regard, it is important to distinguish between the quantification of certificate 8105 and the ultimate decision reached in the two 1995 ROE's. Specifically, because the city failed to timely appeal from the 1995 amended ROE's, it is generally bound by the conditions of those permits. These include such things as the amount of additional water granted (up to an additional 90 acre-feet per year), the total it can use each year (1,465 acre-feet), reporting requirements, well construction requirements, etc. The city cannot seek judicial review of the ROE's or any of their provisions at this time.

Perhaps to clarify, although the department's tentative determination of a quantification for certificate 8105 does not have any future res judicata effect, the city cannot mount a belated piecemeal attack to that determination to the extent that is constitutes one of the factors considered by the department in issuing the amended ROE's. Conversely, in the event of some future water-related dispute, litigation or adjudication, the department cannot rely on this quantification of 8105 as binding.

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[5] In fact, the city strenuously opposes the department's suggestion that, if the annual quantification for certificate 8105 is held to be of no effect, that the two 1995 ROE's must also be reversed, vacated or withdrawn.

[6] *See, generally,* the various briefs of the parties.

In light of the foregoing analysis, the court does not believe that it is required to address any of the remaining issues. Briefly, the department and city agree that any statements by the city in its water system applications regarding the quantification of certificate 8105 do not have the legal effect of limiting the city's rights under 8105. Further, because the court has concluded that the department's tentative determination has no res judicata effect and that the city may challenge that quantification in future water-related disputes, the due process and contract-based claims have effectively been resolved.

Counsel shall prepare and present an appropriate order. Thank you.

Sincerely,

Lesley A. Allan
Superior Court Judge

C: Superior Court file