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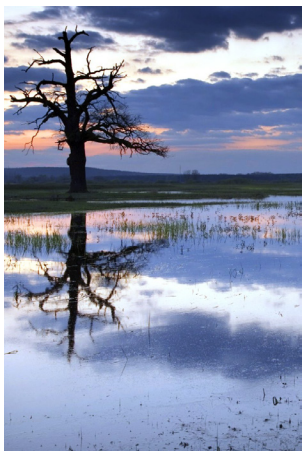

Court Reinforces Finality of Water Rights Determinations and Avoids Ownership Dispute

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On September 5, 2018, Division II of the Washington State Court of Appeals published a water law decision that rejected an appeal by a party claiming an ownership interest in the water right because the appeal was late and failed to challenge the proper agency action. The decision underscores the importance of statutes of limitation for appeals of Department of Ecology ("Ecology") determinations and the related principle of finality in water law determinations. The court also interprets a "catch-all" avenue for appeal of administrative decisions under the Administrative Procedure Act (APA), which may have broader relevance to regulatory practitioners outside the water law realm.

The case resolves a collateral challenge to Ecology's prior approval of a transfer of a water right from an individual to the City of Napavine. At its heart, however, is a familial feud between an aunt and her nephew, both of whom claimed an interest in the underlying groundwater right that was the subject of Ecology's decision. The aunt and nephew's relatives had earlier obtained the subject groundwater right for irrigation of a family farm. The state's construction of I-5 eventually split the farm, and the Aunt and Nephew purportedly inherited the resulting parts of the farm. This division ultimately led to the Nephew's competing claim over ownership of at least part of the underlying water right.

These competing familial claims over the water right were not part of the initial water right transaction or administrative change process. In 2003, the Aunt sold the water right to the City of Napavine. The nephew was not involved in the transaction and presumably may not have been aware of it. The City filed an application in 2004 seeking Ecology's approval to change the purpose of use to municipal and the place of use to the City's urban growth area. Ecology ultimately approved the application eight years later in 2012 by issuing a Report of Examination with accompanying public notice in 2012. The decision explains the Report of Examination was delayed until 2012 by the need for the city to test its new wells for any interference with other water wells. The nephew did not participate in that process or appeal Ecology's decision. However, several years later in 2015, presumably upon learning of the transaction and Ecology's approval of the change/transfer to the City, the nephew wrote to Ecology to inform it that the City's application did not disclose his purported joint ownership of the water right. Ecology responded with a letter in which it indicated that Ecology's decision is final and can no longer be appealed, and suggested that the nephew's dispute was a civil matter between him and his aunt.

The Nephew appealed Ecology's 2016 letter to the Pollution Control Hearings Board (PCHB) challenging Ecology's analysis that it could not re-open the process or unwind its 2012 decision. The PCHB ultimately granted Ecology's summary judgment motion on the grounds that the PCHB was without jurisdiction to hear the appeal. On appeal, the Court of appeals eventually affirmed the PCHB's conclusion that the letter from Ecology was not an appealable order. Additionally, the court rejected the nephew's alternative argument that he was entitled to seek judicial relief under a catch-all appeal provision in the APA for "other agency action" that is neither an agency order nor an agency rule. RCW 34.04.570(4). The court relied on language in the APA that limits the catch-all avenue to appeals to those "whose rights are violated by an agency's *failure to perform a duty* that *is required by law to be performed*..." Ultimately, the Court concluded that Ecology was under no legal duty to return the City's change/transfer application to correct the errors the nephew eventually alleged in the description of the ownership of the underlying water right. The Court acknowledged that the Water Code includes a provision in RCW 90.03.270 that Ecology "shall" return an application when it finds an application to be defective, the Court held that the provision applies only while the application is pending, and is inapplicable after Ecology has rendered its decision.

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From the perspective of municipal water suppliers and other purchasers of water rights, the case is welcome protection from claims brought by someone seeking to unwind a transaction years after it has been completed. The result may appear severe to the nephew if his allegations are correct and he was truly unaware of the transaction between his aunt and the City. However, as noted by Ecology in its letter, the case does not preclude legal recourse directly against his aunt. In addition, the superior court informed the Nephew that, to the extent he alleged an ownership interest in the subject water right, "his remedy is to file a quiet title action."

From the perspective of a person seeking to assert an ownership interest in a water right that is involved in an Ecology application, the court decision offers some lessons. First, legal action against an Ecology application decision must be made on time and must contest the agency's decision document. Second, Ecology and the PCHB lack administrative authority to determine or resolve property ownership disputes, but they have administrative processes to address property division where the parties agree. For example, if the lands irrigated by a water right are divided without attention to the appurtenant water rights, the property owners may ask Ecology to conduct an "administrative division" of a water right that could result in the issuance of new water right documents. However, all persons owning an interest in the water right "must agree as to how the water right is to be divided based on historic beneficial use." Where parties may not be in agreement, however, water right ownership issues should be raised as early as possible in a water rights application matter, but one should not rely on the state agencies to address or resolve such issues satisfactorily because of the agencies' limited authority. Third, property disputes including water rights ownership are civil law matters that generally lie within the jurisdiction of the superior courts in Washington. As a result in addition to carefully tracking time requirements, a person seeking to challenge or contest water rights ownership should consider both an appeal of Ecology action to the PCHB and civil law action in superior court.

For more information

If you are interested in learning more about the court's decision, please contact Adam Gravley or Tadas Kisielius at (206) 623-9372.

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