

9-1-1998

## Washington Dep't of Ecology v. Theodoratus, 957 P.2d 1241 (Wash. 1998)

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John B. Ridgley, Court Report, Washington Dep't of Ecology v. Theodoratus, 957 P.2d 1241 (Wash. 1998), 2 U. Denv. Water L. Rev. 159 (1998).

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**Washington Dep't of Ecology v. Theodoratus, 957 P.2d 1241 (Wash. 1998)** (holding that quantification method utilized in issuing final water right certificate must be based upon actual application of water to beneficial use).

In 1973, George Theodoratus applied for a water right to serve a residential development planned near the Skagit River in Skagit County. The approved application purported to create a vested water right once the water supply system was capable of delivering water. The quantification method used to determine the extent of the water right was based on system capacity. The Department had commonly used this "pumps and pipes method" for at least the past 40 years. Several extensions were granted to the permit which originally called for completion of the system by 1980. In 1992, Mr. Theodoratus requested another extension. The Department granted the extension, subject to a condition that the vested water right would be determined based upon actual application of water to beneficial use, not on system capacity.

An appeal was filed with the Pollution Control Hearing Board which struck the conditions placed on the extension. The Department appealed to the superior court which reversed, holding that the Department had the discretion to condition subsequent extensions by providing that the final water certificate would be issued in the amount of water actually put to beneficial use. The Washington Supreme Court reviewed the lower court's finding to determine whether a final certificate of water right might be issued based upon the capacity of a developer's water delivery system, or whether a vested water right may be obtained only in the amount of water actually put to beneficial use.

The court held that state statutory and common law does not allow for a final certificate of water right to be issued based upon system capacity. "Relevant statutes, case law, and recent legislative history leave no doubt that quantification of Appellant's water right for purposes of issuing a final certificate of water right must be based upon actual application of water to beneficial use, not upon system capacity." The original permit required the Department to issue a vested right based on an unlawful method of quantification. Therefore, the Department has the authority to condition any extension, so that the final certificate will comply with all relevant statutes.

An interpretation of the relevant groundwater and surface water statutes, taken together, are consistent with a fundamental principle of Western water law which requires the actual application of water to a beneficial use. In Washington State, public groundwater appropriations are also subject to the state's surface water provisions. The court determined that the terms contained within the groundwater provision (granting a final certificate upon construction of a water system in compliance with the terms of the permit and perfection of the appropriative right) were inconsistent with the requirements of the surface

water code, specifically made applicable to the appropriation of groundwater, and therefore inapplicable.

Legislative intent based on statutory interpretation requires that the final certificate of water right be consistent with the beneficial use requirements. A determination of beneficial use is based upon diversion and actual use. "Perfection" and "beneficial use" have the same meaning under the applicable statutes, thereby limiting the appropriation to the actual use. This requirement effectuates legislative concerns about the availability of water resources given the ever increasing demand and eliminates speculation and uncertainty in the management of limited water resources.

*John B. Ridgley*

**Hillis v. State Dept. of Ecology, 932 P.2d 139 (Wash. 1997)** (holding the use of watershed assessments and the prioritization of applications for groundwater appropriations as within the department's statutory authority).

Developers in Kittias County, Washington, Larry and Veralene Hillis, filed nine applications for groundwater appropriations with the Department of Ecology ("Ecology") in 1992. After two years and no response from Ecology, the developers sought a writ of mandamus in superior court to compel Ecology to process their applications. The trial court granted the writ, and Ecology appealed. On appeal, Ecology challenged the writ of mandamus, which demanded the immediate processing of the applications, the cessation of watershed assessments until Ecology had investigated and decided upon all applications, and the court's holding that Ecology's decision to prioritize applications did not follow the APA procedures for rule making.

The Washington Supreme Court considered a few key circumstances when making its decision. Primarily, in 1993 the legislature severely cut Ecology's budget, causing them to implement some new priorities and decisions regarding the groundwater application backlog in its office. In addition, the area for which the developers sought groundwater rights already had nearly 1,000 applicants, some with seniority, and the area's drought created a water shortage for all involved. In deciding whether to compel Ecology to immediately process the Hillis' application and cease the watershed assessments, the court looked at Ecology's statutory authority and whether it acted arbitrarily and capriciously in making its decisions.

Ecology argued that the watershed assessments allowed them to process applications more quickly than taking the applications one by one and making decisions individually as it received them. Instead, the department could group the applications by area, conduct a watershed assessment to determine the availability of water in the area, and then decide on each application accordingly. Ecology also prioritized applications by those for public health emergency use, public project