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## Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep't of Ecology, 51 P.3d 744 (Wash. 2002)

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**Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep't of Ecology, 51 P.3d 744 (Wash. 2002)** (holding (1) the Washington surface water statute requires application of water to a beneficial use prior to granting an application for change in point of diversion; (2) the Washington Department of Ecology may make tentative determinations of water rights; (3) a public interest standard may not be used as a justification to deny an application for change in point of diversion; and (4) the Washington Department of Ecology may condition a water quality certification on instream flow requirements under the Clean Water Act).

Public Utility District No. 1 ("District") applied to change the points of diversion for its 1907 and 1980 water rights to the original point of diversion for the 1907 right, roughly 7,500 feet downstream, in order to build a hydropower project. The Washington Department of Ecology ("Ecology") denied both applications. Ecology denied the application under the 1907 right because of nonuse since 1956, and because a change in the diversion contradicted public interest. Ecology denied the 1980 right application on the grounds that (1) a change in diversion cannot be granted when an inchoate right is at issue; (2) the utility relinquished its right because of failure to pay licensing fees; and (3) the change would be contrary to public interest.

The District appealed Ecology's decisions to the Washington Pollution Control Hearing Board ("Board"), which found (1) Ecology possessed necessary authority to condition the grant of a water quality certification on the maintenance of instream flows, even in conflict with existing water rights; (2) the Washington surface water statute ("WSWS") was inapplicable to inchoate rights, and thus Ecology possessed authority to deny the 1980 right diversion; (3) Ecology could consider public interest when considering applications for a change in point of diversion; (4) Ecology and the board could make tentative decisions on the validity of water rights when reviewing change applications; (5) the District's 1980 right had not been relinquished for failure to pay licensing fees; and (6) the facts presented did not merit summary judgment for Ecology on the issue of abandonment of the 1907 right.

Ecology and the District petitioned for review of the board's decisions in Pend Oreille County Superior Court. The superior court consolidated the petitions and the Washington Supreme Court granted review. The court affirmed all of the summary judgment decisions, except the grant of authority to Ecology allowing a public interest standard to deny an application for change in point diversion.

Upon review, the court first addressed the disputed points of the WSWS, affirming the grant of summary judgment to Ecology. The court held that WSWS required beneficial use of water prior to granting a permit to change the point of diversion. The court found

the District's argument, that the second sentence of WSWS allows a change in the point of diversion prior to the establishment of a beneficial use, incorrect because the legislature explicitly addressed undetermined rights. The legislature confirmed that no other change could be made of water without first applying it to a beneficial use.

Next, the court addressed Ecology's ability to make tentative determinations regarding water rights. The District argued that Ecology lacked the authority to adjudicate water rights and determine abandonment. The court held that the permit process required Ecology to tentatively determine whether a right existed before allowing changes in the point of diversion, though the determination could not be considered final.

The court reversed the Board's grant of summary judgment allowing Ecology to use a public interest standard to deny the district's application under the WSWS. The Board believed that the surface water statute required Ecology to weigh public interest when considering applications to change diversion points. The court held that legislative intent underlying the WSWS clearly disallowed Ecology from using a public interest standard to deny applications.

The court next considered the issue of abandonment of the District's 1907 water right. Contrary to Ecology's claim, the District continually attempted to develop a hydropower project, indicating continual use. This evidence of continual planning for development overcame Ecology's claim of abandonment, and the court affirmed the Board's decision that Ecology improperly denied the application on these grounds.

The court affirmed summary judgment for the District on the issue of statutory forfeiture of the District's 1980 right. The court held that the Board correctly found for the District on this issue, because legislative forfeiture of water rights could not apply to inchoate rights. In addition, the court found forfeiture contradicted the intent of the legislature, which specifically included provisions for late payments of licensing fees.

Finally, the court upheld summary judgment affirming Ecology's authority to set minimum flow requirements on the water quality certification for Sullivan Creek. The District's project required a license from the Federal Energy Regulatory Commission, which necessitated a state water quality certification. The court held that section 303 of the Clean Water Act ("CWA") granted Ecology the authority to undertake any necessary action in order to comply with the Act. In addition, the court found that the state's antidegradation policy prevented any potential degradation of existing beneficial uses. Regulations of the United States Environmental Protection Agency also prohibited any activity even partially eliminating an existing beneficial use. The instream flow requirements protected existing beneficial uses, including fish spawning, recreation and commerce. The court dismissed the District's argument that the CWA pertained to water quality as opposed to quantity, holding that depletion of a water

body could destroy all beneficial uses, and thus constituted pollution. The court determined that the legislature expressly protected water quantity in addition to quality, through the CWA's broad definition of pollution which hedges against physical alterations of water endangering beneficial use.

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## WEST VIRGINIA

**Monongahela Power Co. v. Office of Water Res., 567 S.E. 2d 629 (W. Va. 2002)** (holding impaired water reports submitted to the Environmental Protection Agency are not reviewable by the state environmental quality board or by the state circuit courts).

Monongahela Power filed an appeal with the State Environmental Quality Board ("Board") to challenge the West Virginia Department of Environmental Protection's ("DEP") decision to withdraw its Waste Load Allocations ("WLAs"). The Board affirmed the DEP's withdrawal of the WLAs. Then, Monongahela Power appealed to the Circuit Court of Kanawha County. The circuit court stated the Board did not have jurisdiction to hear permit appeals, and reversed the Board's decision. The circuit court ordered removal of the Upper Blackwater River from the 1996 and 1998 section 303(d) lists, and prohibited the river to be listed on future 303(d) lists until the DEP established sufficient evidence to support its listing. In addition, the circuit court determined that DEP was not required to implement the Total Maximum Daily Load ("TMDL") calculations that the Environmental Protection Agency ("EPA") established. In addition, the court ordered the DEP to eliminate the "Waterbodies with Biological Impairment" category on the 1998 303(d) list.

The Supreme Court of Appeals of West Virginia held that neither the Board nor the circuit court had jurisdiction to hear appeals of the 303(d) list, or to review the TMDL list. The court stated the 303(d) lists and TMDL reports are reviewable only in the United States District Court. In addition, the court determined the circuit court exceeded its authority in ordering the DEP to remove the river from its current and future 303(d) lists, to disregard the TMDL list issued by the EPA, to restore Monongahela Power its waste allocation permits, and to eliminate the "Waterbodies with Biological Impairment" category. The court ordered the DEP to update and revise the TMDL list and to stay the pending permits.

Pursuant to the Clean Water Act ("CWA"), the DEP submitted a record of streams that did not meet water quality standards, known as a 303(d) list, for the EPA to review. For every stream on this list, the DEP was also required to submit a TMDL, which calculates the level of