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NO. 39115-9

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RAYMOND RESER,

Petitioner/Appellant,

v.

POLLUTION CONTROL HEARINGS BOARD, et al,

Respondent/Respondent.

RAYMOND RESER PETITION FOR REVIEW

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I. INTRODUCTION

This case involves the involuntary relinquishment of a water right by the State of Washington, Department of Ecology ("Ecology"). Ecology determined that Petitioner Raymond Reser's water rights were relinquished due to nonuse between 1981 and 1996 while Reser's predecessor in interest occupied the property. Situated in Walla Walla County at the foothills of the Blue Mountains, Reser's land and water rights are commonly known as the Ferguson Farm.

The Ferguson Farm is irrigated under Department of Ecology Ground Water Certificate 378-A. CP 6 @ 000181. The ground water right was developed by a predecessor, Baker & Baker, a Washington corporation. Ground Water Certificate 378-A was issued on November 28, 1949.

Reser acquired the Ferguson Farm in 1995 pursuant to a land sale contract. Ownership was taken subject to an existing

tenancy by K-Farms, Inc. K-Farms occupied the Ferguson Farm during the alleged relinquishment period beginning in 1981 and concluding in 1996.

Pursuant to Washington's Administrative Procedure Act, Reser appealed Ecology's relinquishment determination to the State of Washington Pollution Control Hearings Board. ("PCHB"). PCHB thereafter entered summary judgment in favor of Ecology, upholding Ecology's findings and dismissing Reser's appeal. CP6 000331-347 (Order Granting Motion for Summary Judgment).

Reser filed a Petition for Judicial Review of PCHB's administrative order within the Superior of Walla Walla County. Upon Ecology's motion and pursuant to RCW 34.05.518, the Superior Court certified Reser's appeal to the Court of Appeals, Division III, without addressing the merits. The Court of Appeals affirmed PCHB's entry of summary judgment and dismissal. Mr. Reser's estate now seeks judicial review pursuant to RAP

13.4(b)(4).

II. IDENTITY OF PETITIONER

Petitioner is the Raymond E. Reser estate, by and through its duly appointed personal representative, Byron G. Reser.

III. COURT OF APPEALS DECISION

The Raymond E. Reser estate seeks review of the Court of Appeals, Division III, published decision dated October 12, 2023, attached as Appendix A. The Court of Appeals affirmed PCHB's entry of summary judgment and dismissal of Mr. Reser's appeal.

In arriving at its decision, the Court of Appeals asked, a) whether the evidence submitted prior to hearing established disputed issues of material fact, and b) whether Reser proved that his predecessor, K-Farms, had sufficient cause for the nonuse of water between 1981 and 1996 based upon Washington's "crop rotation" exception to relinquishment expressed within RCW 90.14.140(1)(k). Deciding in the negative, the Court of Appeals

affirmed the Pollution Control Hearing Board's (PCHB's) dismissal of Reser's appeal and affirmed Ecology's relinquishment determination arising from lack of water use at Ferguson Farm for a period exceeding five years.

IV. ISSUES PRESENTED FOR REVIEW

Reser seeks the Court's review of a single issue: Whether the entry of summary judgment by PCHB, as affirmed by the Court of Appeals, was appropriate. Both the PCHB and Court of Appeals determined that Reser failed to prove the existence of disputed issues of material fact regarding whether the predecessor's non-use of water is excused under Washington's "crop rotation" exception to water right relinquishment. RCW 90.14.140(1)(k).

V. STATEMENT OF THE CASE

A. State Water Law and Relinquishment.

Washington's water law follows the western American doctrine of water rights by appropriation. RCW 90.03.010;

Cornelius v. Department of Ecology, 182 Wash.2d 574, 586, 344 P.3d 199 (2015). Under the appropriation system, the water right holder must put the water claimed under the right to beneficial use or it relinquishes the right. RCW 90.14.160; *Department of Ecology v. Theodoratus*, 135 Wash.2d 582, 595, 957 P.2d 1241 (Wash. 1998). A core tenet of Western water law is that vested water rights may be subject to forfeiture or relinquishment when not beneficially used. RCW 90.14.180; See also *Cornelius v. Wash. Dep't of Ecology*, 182 Wn.2d 574, 624, 344 P.3d 199 (Wash. 2015).

Under limited circumstances, lack of beneficial use may be excused for "sufficient cause", thereby avoiding relinquishment. RCW 90.14.140(1). Among sufficient causes for non-use is "the temporary change in the type of crops grown resulting from the exercise of generally recognized sound farming practices." RCW 90.14.140(1)(k).

B. The Court of Appeals Decision.

The Court of Appeals addressed whether evidence submitted at the PCHB level established disputed issues of material fact, namely whether Reser's predecessor, K-Farms, had sufficient cause for nonuse of water beginning in 1981 and ending in 1996 based upon the "crop rotation" exception. The exemption statute at issue, RCW 90.14.140(1)(k), provides:

> For the purposes of RCW 90.14.130 through 90.14.180, "sufficient cause" shall be defined as the nonuse of all or a portion of the water by the owner of a water right for a period of five or more consecutive years where such nonuse occurs as a result of:
>
> . . .
>
> The reduced use of irrigation water resulting from crop rotation. For purposes of this subsection, crop rotation means the temporary change in the type of crops grown resulting from the generally recognized sound farming practices. Unused water resulting from crop rotation will not be relinquished if the remaining portion of the water continues to be beneficially used.

RCW 90.14.140(1)(k).

As a matter of first impression, the Court of Appeals

concluded that Subsection (k) introduces three concepts, which overlap: crop rotation, temporary change in the types of crops grown, and generally recognized sound farming practices. Appendix A at 12-13. In approaching the case, the Court of Appeals queried whether the nonuse of water for fifteen years resulting from a tenant gaining possession of a farm and changing the crop grown on the land from irrigated asparagus to dryland wheat constitutes a "crop rotation," within the meaning of RCW 90.14.140(1)(k), so as to avert relinquishment of water rights.

Despite agreeing that the historical occupants of Ferguson Farm had engaged in sound farming practices, the Court of Appeals found that the evidence submitted failed to create disputed issues of material fact. It affirmed the Pollution Control Hearing Board's (PCHB's) dismissal of Reser's appeal.

VI. GROUNDS FOR REVIEW

A. The "crop rotation" exemption to water right relinquishment presents an issue of substantial public interest.

The Court should accept review pursuant to RAP 13.4(b)(4). This case presents an issue of substantial public interest with respect to Washington's "crop rotation" exception to water right relinquishment. Expert testimony submitted by Reser demonstrates that material facts remain in dispute with respect to whether temporary crop rotations occurred at Ferguson Farm. The Court of Appeals and PCHB below erroneously disregarded the expertise of a practitioner in the industry.

1. *Reser's case presents issues of substantial public interest within the meaning of RAP 13.4(b)(4).*

This is a case of first impression for this Court. The Court of Appeals interpreted Subsection (k) of the RCW 90.14.140(1) to introduce three concepts, which overlap: crop rotation, temporary change in the types of crops grown, and generally

recognized sound farming practices. It correctly noted that "the Washington water code does not define any of these conceptions" and "[n]o Washington decision has calibrated the parameters of the trio of concepts".

RCW 90.14.140(1) iterates a limited number of circumstances which constitute "sufficient cause" to excuse voluntary non-use of a water right. Among of the youngest of these recognized by Washington's legislature is the "crop rotation" exception expressed within subsection (k). Questions concerning the correct interpretation and application of the crop rotation exception are likely to arise again and again at both the administrative level as well as courts in matters of involuntary relinquishment.

Perhaps most important, the issues presented by this case will repeatedly arise within Ecology's processing of water right change applications submitted throughout the State. When reviewing applications to change water rights, Ecology engages

in the practice of rendering a "tentative determination" as to whether all or a portion of the subject water right has been abandoned or relinquished. RCW 90.03.380(1). A "tentative determination," means a determination of the extent and validity of an existing water right established pursuant to either chapter 90.03 RCW or 90.44 RCW, or claimed pursuant to chapter 90.14 RCW. *See* Ecology POL 1120, Appendix B. As such, water right relinquishment is a common tool employed by Ecology when approving water right change applications.

Should this Court accept review, its decision has the potential to affect a number of proceedings at the agency level and lower tribunals. Thus, the Court's review may serve to avoid unnecessary litigation and confusion on a common issue. *See e.g. State v. Watson,* 155 Wn.2d 574, 577, 122 P.3d 903 (Wash. 2005) *(citing Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County,* 96 Wn.2d 201, 208, 634 P.2d 853 (Wash. 1981) ("A moot case will be reviewed if its issue is a matter of continuing

and substantial interest, it presents a question of a public nature which is likely to recur, and it is desirable to provide an authoritative determination for the future guidance of public officials."). This Court should accept review pursuant to RAP 13.4(b)(4).

B. Material facts are in dispute facts regarding whether nonuse of water arose from temporary crop rotations based upon sound farming practices.

The import of the Court of Appeals' decision is that avoidance of summary judgment required Reser to prove that his predecessors in interest subjectively intended to employ crop rotation as a sound farming practice. Both the PCHB and Court of Appeals disregarded the expert testimony of Dr. Robert Thornton who opined that the occurrence of crop rotations at Ferguson Farm constituted crop rotation for purpose of RCW 90.14.140(1)(k) exemption. Dr. Thornton's opinion presents disputed issues of material fact as to whether crop rotations at Ferguson Farms were a sufficient cause for any nonuse of water.

The Court of Appeals erred in affirming PCHB's entry of summary judgment.

1. *Temporary Crop rotations occurred at Ferguson Farm.*

The evidentiary record reflects that multiple crop rotations occurred at Ferguson Farm over the course of years. Owners rotated from irrigated asparagus to dryland wheat with agricultural burning, and then back to irrigated agriculture. The record likewise includes expert testimony opining that such practices reflected sound farming practices. Dr. Robert Turner expressly opined that historical practices at Ferguson Farm constitute crop rotations in alignment with sound farming practices in conformity with RCW 90.14.140(1)(k).

In affirming PCHB's entry of summary judgment, the Court of Appeals focused upon the element of "temporary", placing emphasis on its conclusion that Thornton rendered no opinion as to whether a temporary change in crops grown

occurred. Appendix A at 13. This conclusion misses the mark. Dr. Thornton did indeed conclude that the activities and crop changes at Ferguson Farm constituted crop rotations for purposes of RCW 90.14.140(1)(k). His opinion could not be arrived at without a simultaneous conclusion that the rotations were *temporary* in nature; an express element of the underlying statute. While Dr. Thornton did not offer a specific term of years to define "temporary" or evidence of the subjective intent of K-Farms when rotating from irrigated asparagus to dryland wheat, his expert opinion nevertheless raises a material fact in dispute regarding the "temporary" element of the crop rotation exemption. Summary judgment was inappropriate.

2. *The term "crop rotation" should be defined by industry standards and experts.*

Both the Court of Appeals and PCHB declined to accept Dr. Thornton's expertise wherein he concluded that temporary crop rotations, for purposes of RCW 90.14.140(1)(k), had

occurred at Ferguson Farm. The Court of Appeals subscribed to PCHB's rationale that Reser was obligated to prove intent on behalf of his predecessor K-Farms to employ crop rotation to benefit the soil. PCHB determined "[t]here is noting in the record to indicate K-Farms made any *intentional decision* to farm non-irrigated wheat 15 years in order to *benefit the soil*." CP16, 000342 (PCHB Order) (emphasis added). The Court of Appeals additionally determined that "[a]lthough K-Farms may have engaged in sound farming practices, no Kimball family member expressed that K-Farms' change from irrigated asparagus to dryland wheat resulted from sound farming practices." Appendix A at 14-15. Citing Wikipedia, the Court of Appeals described crop rotation as follows:

> Crop rotation is the practice of growing a series of different types of crops in the same area across a sequence of growing seasons. This practice reduces the reliance of crops on one set of nutrients, pest and weed pressure, along with the probability of developing resistant pests and weeds.

https://en.wikipedia.org/wiki/Crop_rotation (last visited Oct. 6. 2023).

The court's interpretation of RCW 90.14.140(1)(k) cannot be reconciled with the contrary findings of Dr. Thornton – an expert in the industry. RCW 90.14.140(1)(k) fails to express an element of intent which must be prospectively proven by the water user in order to avoid summary judgment. In similar vein, the statute omits any reference to the crop rotation being implemented to "benefit the soil." The statute likewise omits reference to nutrients, pests, or weed pressure. The Washington water code does not define any of elements enunciated in the crop rotation exemption and, as the Court of Appeals recognized, "[n]o Washington decision has calibrated the parameters of the trio of concepts."

Here, the Court of Appeals erred by affirming PCHB's entry of summary judgment. It's decision inappropriately requires Reser, as a condition of defeating summary judgment,

to prospectively prove elements not included within the express language of the crop rotation exemption. This includes the subjective intent of K-Farms to benefit to the Ferguson Farm soil and K-Farm efforts to manage nutrients, weeds or pests.

Dr. Thornton's opinion is unrefuted, and the record fails to reflect how PCHB holds any expertise in the matter of agricultural production and management. Reser, in turn, provided evidence in the form of the expert industry opinion of Dr. Thornton that crop rotations at Ferguson Farm qualified as sufficient cause to excuse any nonuse of water. Under these circumstances, sufficient evidence exists in the record to deny summary judgment. This Court should accept Reser's petition for review. RAP 13.4(b)(4).

VII. CONCLUSION

For the reasons stated in this petition, Reser respectfully requests that this Court accept review.

This document contains 2,294 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 14th day of February, 2024.

/s/ Wyatt E. Rolfe, WSBA No. 43581
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CERTIFICATE OF SERVICE

I certify that on February 14, 2024, I caused to be served the Raymond Reser Opening Brief in the above-captioned matter upon the parties herein via the Appellate Court filing portal.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 14th day of February 2024 in Walla Walla, Washington.

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APPENDIX A

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

RAYMOND RESER, Appellant, v. POLLUTION CONTROL HEARINGS BOARD, and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY. Respondents.	)	No. 39115-9-III ORDER GRANTING MOTION TO PUBLISH OPINION

THE COURT has considered the respondent's motion to publish the court's opinion of October 12, 2023, and the record and file herein, and is of the opinion the motion should be granted. Therefore,

IT IS ORDERED, the motion to publish is granted. The opinion filed by the court on October 12, 2023 shall be modified on page 1 to designate it is a published opinion and on page 19 by deletion of the following language:

> A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

PANEL: Judges Fearing, Lawrence-Berrey, Staab

FOR THE COURT:

George Fearing

GEORGE B. FEARING, Chief Judge

FILED
OCTOBER 12, 2023
In the Office of the Clerk of Court
WA State Court of Appeals Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

RAYMOND RESER, Appellant, v. POLLUTION CONTROL HEARINGS BOARD, and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY. Respondents,	)	No. 39115-9-III UNPUBLISHED OPINION

FEARING, C.J. — We must decide whether the nonuse of water for fifteen years resulting from a tenant gaining possession of a farm and changing the crop grown on the land from irrigated asparagus to dryland wheat constitutes a "crop rotation," within the meaning of RCW 90.14.140(1)(k), so as to avert relinquishment of water rights. We conclude that answering this question in the affirmative, as argued by Appellant Raymond Reser, stretches the concept of crop rotation beyond its elasticity. We affirm the Pollution Control Hearing Board's (PCHB's) dismissal of Reser's appeal of the Department of Ecology's (DOE's) determination that the water rights on Reser's Ferguson Farm terminated because of lack of use for more than five years. We also

affirm the PCHB's determination that estoppel does not preclude DOE from asserting relinquishment.

FACTS

This appeal concerns water rights attended to Ferguson Farm, 457.9 acres of agriculture land in Walla Walla County. Raymond Reser currently owns Ferguson Farm. The facts extend decades into the past and focus on water usage during the tenure of various owners and tenants.

Previous owner Baker & Baker, a Washington corporation, acquired water rights for Ferguson Farm. On November 28, 1949, the state issued Ground Water Certificate 378-A to reflect the existence of those rights.

On some unknown date, Richard Reynolds and Hellen Sparrow purchased Ferguson Farm, and the pair farmed the land until 1981. Reynolds and Sparrow raised irrigated asparagus. They relied on an artesian well situated on the property as the source of water.

Beginning in 1981, Richard Reynolds and Hellen Sparrow rented, under a fifteen-year lease, Ferguson Farm to K-Farms, Inc., a company owned by the Kimball family. The lease agreement included a right of first refusal to match the terms of any proposed purchase of Ferguson Farm.

K-Farms severed the asparagus plants and planted winter wheat every year during its fifteen-year rental of Ferguson Farm. Winter wheat is a nonirrigated crop. Thus, K-

Farms never irrigated the farmland. Nor did K-Farms maintain the farm's irrigation system.

On February 3, 1995, Raymond Reser purchased Ferguson Farm from the D. Richard Reynolds Trust and Hellen Sparrow. K-Farms had declined to exercise its right of first refusal to purchase the farmland. Reser's acquisition of the land, however, remained subject to K-Farms' existing farm lease, under which the latter could farm Ferguson Farm for two additional seasons.

On March 17, 1995, Larry Siegel, attorney for Raymond Reser, wrote to Bill Neve, then DOE's Walla Walla office watermaster. Siegel's letter read:

> Dear Mr. Neve:
>
> I represent Ray Reser who recently purchased farm property located in Walla Walla County which has in place an artesian well. Mr. Reser wanted me to inquire as to whether or not there is a *recorded water right* on this property. I have enclosed with this letter a copy of the legal description of the property. Please let me know at your earliest convenience *if a water right exists*.

Clerk's Papers (CP) at 250 (emphasis added). On March 29, 1995, Watermaster Neve replied:

> Dear Mr. Siegel:
>
> Enclosed please find a copy of Certificate of Ground Water Right No. 378, together with a copy of the associated well log report. ***This water right is appurtenant*** to your client's property per the legal description you sent to my office on March 27.
>
> I did not find any other water rights appurtenant to the subject property.

CP at 141 (emphasis added).

Since the PCHB granted the DOE summary judgment, we view the facts in a glow favorable to Raymond Reser. According to Reser, K-Farms did not view his purchase of Ferguson Farm favorably and refused to provide him its chemical application history for the land. Without access to this history, Reser lacked knowledge of the chemicals previously applied to the land. His crop advisor alerted Reser to potential residual chemical contamination of the soil and advised him not to raise any legumes or alfalfa. Reser grew small grains, which did not require irrigation, on Ferguson Farm from 1997 through 2000.

Raymond Reser currently rotates the raising of soft white wheat, barley, garbanzo beans, and peas on Ferguson Farm. The rotation reduces irrigation needs on the farm and lessens the risk of disease.

Since acquiring the property, Raymond Reser has intermittently irrigated Ferguson Farms with hand lines, wheel lines, and controlled flooding. Reser has not irrigated Ferguson Farm every year due to weather conditions and the variety of crops rotated on the land. He has maintained Ferguson Farm's irrigation system in a condition permitting the access to water when necessary. Given the types of crops raised and the early date for harvest of winter wheat, Reser believes one viewing Ferguson Farm from the roadside or

by plane might conclude, in July through October, that he applies no irrigation even though the opposite may be true.

Raymond Reser participated in a federal program that mandated reduced irrigation during December 2007 through December 2011 and another program during 2013 through 2019. The first program prohibited full-width tillage and required crop rotation, residue management, and a direct seeding system, all of which practices required Reser to reduce water use. To participate in the program, Reser replaced some mainline equipment and upgraded other irrigation equipment. Reser spent $80,000 to maintain Ferguson Farm's irrigation system under this first program.

Beginning by at least 2013, Eric Hartwig, then DOE's Walla Walla watermaster, twice visited Ferguson Farm each year as part of his normal job duties. Before 2017, Hartwig did not observe any water being applied to the fields.

In the summer of 2017, DOE agent Eric Hartwig observed a center pivot installed on Ferguson Farm and a new irrigation main line and flow meter. During that summer, Ferguson Farm neighbors registered disquietude, about the new irrigation system, to Watermaster Hartwig. Neighbor Todd Kimball filed an environmental report tracking system complaint. He later testified that, despite driving by Ferguson Farm occasionally, he never saw irrigation on the land until the installation of irrigation pivots in 2017. Kimball, a shareholder of the former tenant of Ferguson Farm, asserted a belief that the water right had been relinquished due to more than five years of nonuse.

In the Fall of 2017, DOE Watermaster Eric Hartwig initiated an investigation of water usage at Ferguson Farm to determine whether the water right on the land was not utilized for at least five consecutive years. Review of DOE's records and aerial photographs confirmed water nonuse under Ground Water Certificate No. 378-A from 1997 through 2016. On January 25, 2018 Watermaster Hartwig notified Raymond Reser that DOE had concluded Ferguson Farm had failed to employ water for beneficial use for more than five consecutive years before 2017. DOE granted Reser sixty days to submit evidence and explain why DOE should not relinquish the water right.

On March 26, 2018, Raymond Reser's attorney, James Browitt, responded to the DOE instruction to show cause to submit evidence. Browitt's response included an affidavit of water use signed by Raymond Reser, United States Farm Service Agency crop data, letters from three people familiar with Ferguson Farm, and photos of Ferguson Farm fields. DOE Watermaster Eric Hartwig reviewed the information supplied by Raymond Reser.

In October 2018, Gale Kimball, another shareholder of the former lessee K-Farms, forwarded a letter to DOE, in which Kimball averred that, from 1981 to 1996, K-Farms did not irrigate the land authorized for use under Ground Water Certificate 378-A during the fifteen years K-Farms leased the property. Thus, DOE's investigation expanded to years before Raymond Reser gained possession of Ferguson Farm. Gale Kimball added that, despite farming neighboring land, she never saw irrigation on Ferguson Farms until

2017. On December 27, 2019 Fred Kimball and Alfred Kimball, both owners and officers of K-Farms, Inc., respectively submitted affidavits describing the nonuse of water occurring from 1981 to 1996.

By May 2020, DOE concluded that no water had been applied on Ferguson Farm and under Ground Water Certificate No. 378-A for a window of thirty-seven years from 1982 through 2016. DOE also determined that no sufficient cause justified an exemption from relinquishment of the water right under Washington law.

On May 5, 2020, DOE issued an order entitled Involuntary Relinquishment of Ground Water Certificate No. 378-A. The order outlined DOE's findings of fact resulting from its investigation into the use of the water rights on Ferguson Farm. The order declared that Ground Water Right Certificate No. 378-A would be declared relinquished, unless within thirty days Reser appealed to the PCHB.

PROCEDURE

Raymond Reser appealed to the PCHB. His appeal argued that any nonuse of water on Ferguson Farms was excused because of the crop rotation relinquishment exception found in RCW 90.14.140(1)(k). Reser also contended that Watermaster Bill Neve's March 29, 2015 letter works an estoppel to silence DOE from asserting any invalid water right.

DOE filed a motion for summary judgment. As part of his response to the motion, Raymond Reser filed a declaration from Dr. Robert Thornton, an expert on agricultural crop production. In his declaration, Thornton averred:

> 7. I have reviewed the water right relinquishment exemption under RCW 90.14.140(k) in light of the historical crop production at the Ferguson Farm. Based upon my experience in the industry, *the temporary change in the type of crops grown at Ferguson Farm from 1981 constitute an exercise of generally recognized sound farming practices.*
>
> 9. *A crop rotation which includes non-irrigated wheat for an extended period of time constitutes a sound farming practice. It is good for the soil* as it increases organic matter. It is much better than fallow rotation (bare soil), which reduces the soil microbial soil populations over time.
>
> 11. *The decision to rotate between raising non-irrigated wheat vs. irrigated wheat, and whether it is a sound farming practice, is also a question of economics.* If the crop rotation works economically, it is a sound farming practice.
>
> 12. I consult with growers that commonly practice a rotation of irrigated crop every other year followed by an irrigated crop the next year.
>
> 13. *The Ferguson Farm's rotation from asparagus to dry land wheat, to a current rotation of wheat, garbanzos and peas constituted a reasonable crop rotation that does not deviate from sound farming practices.*
>
> 14. I have reviewed Mr. Reser's affidavit dated March 26, 2018, and in particular paragraph 11 addressing the small grain operation from 1997 to 2000. *Mr. Reser's rotation from continuous wheat to a small grain operation for a number of years is a sound farming practice given risk of crop loss, and lack of insurance coverage, due to possible residual chemical carryover.*

CP at 240-41 (emphasis added).

The PCHB granted DOE's summary judgment motion, thereby rejecting the argument that Ferguson Farm qualified for the crop rotation relinquishment exception. The PCHB's written decision read, in part:

> However, Dr. Thornton did not address the issue of how it could be a sound farming practice when the extended crops only rotated when farm ownership changed over decades, or how such decades long change to dryland wheat farming constitutes "temporary change" in the types of crops grown. There is nothing in the record to indicate K-Farms made any intentional decision to farm non-irrigated wheat for 15 years in order to benefit the soil, or that it was part of any long-term sound farming practice. Indeed, Dr. Thornton stated in his declaration that growers "commonly practice a rotation of [non-]irrigated crop every other year followed by an irrigated crop the next year," contradicting his opinion that a 15-year non-irrigated wheat crop constitutes a sound farming practice.
>
> . . . Even construing all evidence in favor of the non-moving party, it would be an overly broad interpretation of the crop rotation exemption to conclude that a 15-year crop, that was only rotated when the property changed ownership, constituted a "temporary change" in types of crop grown "resulting from the exercise of generally recognized sound farming practices." RCW 90.14.140(1)(k). ***Thus, the Board concludes Reser has failed to meet his burden of proving the crop rotation exemption applies to excuse the 1981 to 1996 time period of non-use.***

CP at 371-72 (emphasis added) (footnote and citations omitted). The PCHB also concluded that Raymond Reser failed to establish with facts any of the elements of estoppel.

Raymond Reser sought judicial review of the PCHB decision with the Walla Walla County Superior Court. The superior court transferred judicial review to this court without addressing the merits.

LAW AND ANALYSIS

On judicial review of the PCHB ruling, Raymond Reser renews his two principal contentions before the PCHB. He argues that the PCHB erred when ruling he failed to establish what we label as the "crop rotation relinquishment exception" found in RCW 90.14.140(1)(k). Reser also argues that the doctrine of equitable estoppel bars Ecology from alleging nonuse of water rights on Ferguson Farm prior to March 29, 2000 because in 1995, Watermaster Bill Neve wrote that water rights were "appurtenant" to Ferguson Farm.

Crop Rotation Relinquishment Exception

On judicial review of the PCHB ruling, Raymond Reser agrees that water on Ferguson Farm went unused from 1981 to 1996. He claims, nonetheless, that the PCHB erred in determining he failed to prove crop rotation between 1982 and 2000 sufficed to prevent relinquishment of the water right. The PCHB actually ruled that he did not meet his burden of proving the applicability of the crop rotation exemption to the period of nonuse beginning in 1981 and ending in 1996, during which time K-Farms rented Ferguson Farm. Therefore, we focus on that fifteen-year period of nonuse when analyzing whether evidence established a temporary crop rotation occurred.

In his assignment of error, Raymond Reser does not explicitly argue that the PCHB improperly granted summary judgment on the issue of sufficient cause. Nevertheless, his arguments, requested relief, and references to summary judgment imply

that the PCHB erred in granting summary judgment because material facts concerning the applicability of the crop rotation exemption to the failure to beneficially use the water rights on Ferguson Farm from 1981 and 1996 remain in dispute. Thus, we address whether the evidence submitted creates disputed issues of material fact. CR 56(c). While the administrative procedure act does not explicitly authorize summary judgment proceedings, caselaw permits agencies to hold such proceedings. *Kettle Range Conservation Group v. Department of Natural Resources*, 120 Wn. App. 434, 456, 85 P.3d 894 (2003); *Eastlake Community Council v. City of Seattle*, 64 Wn. App. 273, 276, 823 P.2d 1132 (1992).

Washington follows the western scheme of water rights based on appropriation. *Loyal Pig, LLC v. Department of Ecology*, 13 Wn. App. 2d 127, 140, 463 P.3d 106 (2020). Under the appropriation system, the water right holder must put the water claimed under the right to beneficial use or the holder relinquishes the right. RCW 90.14.160; *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 595, 957 P.2d 1241 (1998). Not only must the water right holder appropriate the water to gain the right to apply a quantity of water to appurtenant land, but the holder must continue to appropriate the water to preserve the right.

RCW 90.14.160 declares:

> [a]ny person entitled to divert or withdraw waters of the state through any appropriation. . . who abandons the same, or who voluntarily fails, *without sufficient cause*, to beneficially use all or any part of said right

> to divert or withdraw for any period of five successive years . . ., shall relinquish such right or portion thereof, and said right or portion thereof shall revert to the state, and the waters affected by said right shall become available for appropriation in accordance with RCW 90.03.250.

(Emphasis added.) RCW 90.14.170 and RCW 90.14.180 provide similar language in that they require relinquishment of water rights when the right-holder ultimately fails to make beneficial use of such rights for five consecutive years without sufficient cause. The pending dispute requires us to analyze one of the sufficient causes recognized as an exception to forfeiture.

RCW 90.14.140(1) lists the sufficient cause exceptions to water rights relinquishment. The crop rotation exemption identified in RCW 90.14.140(1)(k) bears relevance to this appeal. RCW 90.14.140 states:

> (1) For the purposes of RCW 90.14.130 through 90.14.180, "sufficient cause" shall be defined as the nonuse of all or a portion of the water by the owner of a water right for a period of five or more consecutive years where such nonuse occurs as a result of:
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> . . . .
>
> (k) The reduced use of irrigation water resulting from *crop rotation*. For purposes of this subsection, crop rotation means *the temporary change in the type of crops grown* resulting from the *generally recognized sound farming practices*. Unused water resulting from crop rotation will not be relinquished if the remaining portion of the water continues to be beneficially used.

(Emphasis added.) Subsection (k) introduces three concepts, which overlap: crop rotation, temporary change in the types of crops grown, and generally recognized sound

farming practices. The Washington water code does not define any of these conceptions. No Washington decision has calibrated the parameters of the trio of concepts.

We agree that, based on the expert testimony of Robert Thornton, K-Farms and later Raymond Reser engaged in sound farming practices. But Reser concedes that Thornton rendered no opinion as to whether a temporary change in crops grown occurred. We focus on whether a temporary change in crops resulting from applying sound farming practices occurred.

We narrowly construe the exceptions to relinquishment outlined in RCW 90.14.140(1) in order to implement legislative intent underlying the general provisions. *R.D. Merrill Co. v. Pollution Control Hearings Board*, 137 Wn.2d 118, 140, 969 P.2d 458 (1999). The party claiming sufficient cause for nonuse bears the burden of showing how its nonuse falls under one of the narrow categories in RCW 90.14.140. *R.D. Merrill Co. v. Pollution Control Hearings Board*, 137 Wn.2d 118, 140 (1999); *Department of Ecology v. Acquavella*, 131 Wn.2d 746, 758, 935 P.2d 595 (1997).

We interpret statutes to give effect to the legislative intent. *State v. Evans*, 177 Wn.2d 186, 193, 298 P.3d 724 (2013). We derive meaning from the context of the provision within the statute, as well as related statutes that disclose legislative intent. *Fode v. Department of Ecology*, 22 Wn. App. 2d 22, 30, 509 P.3d 325 (2022). An undefined term is given its plain and ordinary meaning unless a contrary legislative intent is indicated. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010).

DOE emphasizes language in RCW 90.03.390, which declares in part: "RCW 90.03.380 shall not be construed to prevent water users from making a *seasonal or temporary* change of point of diversion or place of use of water." (Emphasis added.) Based on this language in this other water rights statute, DOE contends that "temporary" is synonymous with "seasonal," which would require a change in crops once a year. Black's Law Dictionary (11th ed. 2019) defines "temporary" as "transitory" and "limited."

The law imposes no maximum number of years allowed to qualify as a "temporary" change under RCW 90.14.140(1)(k). Unless one views the passage of time on earth from the vantage of God, to whom a thousand years is like a day just gone by, or from the vantage of the billions of years since the Big Bang, five years seems beyond the realm of temporary. Nevertheless, because we apply the crop rotation relinquishment exception only when the right would otherwise be relinquished, a "temporary change" must encompass at least a window of time lasting five years. Perhaps the law might require that, during each of those years, there is a change in a crop, but we need not decide such. Raymond Reser seeks to expand the notion of temporary to fifteen years.

Since we must view exemptions narrowly, we conclude, based on the undisputed facts as to K-Farms' use of Ferguson Farm, that no temporary change in crops occurred based on sound farming practices. K-Farms changed the land's crop when it began its lease. Although K-Farms may have engaged in sound farming practices, no Kimball

family member expressed that K-Farms' change from irrigated asparagus to dryland wheat resulted from sound farming practices. K-Farms never rotated to another crop during its fifteen-year lease. No Kimball testified that K-Farms deemed any change in crops to be temporary or that K-Farms intended to change to another crop.

Wikipedia, an expression of common understanding, describes "crop rotation" as:

> Crop rotation is the practice of growing a series of different types of crops in the same area across a sequence of growing seasons. This practice reduces the reliance of crops on one set of nutrients, pest and weed pressure, along with the probability of developing resistant pests and weeds.

https://en.wikipedia.org/wiki/Crop_rotation (last visited Oct. 6. 2023). The raising of crops from 1982 to 1996 does not fit this description.

Raymond Reser cites WAC 173-430-030(1), which recognizes agricultural burning as a practice that may be undertaken for crop rotation purposes. Nevertheless, WAC 173-430-030 does not provide any legal rules. The regulation provides definitions of terms found in the provision of chapter 173-400 WAC. WAC 173-430-030(1) defines "agricultural burning" as:

> the burning of vegetative debris from an agricultural operation necessary for disease or pest control, *necessary for crop propagation or crop rotation*, or where identified as a best management practice by the agricultural burning practices and research task force established in RCW 70.94.6528(6) or other authoritative source on agricultural practices. Propane flaming for the purpose of vegetative debris removal is considered commercial agricultural burning.

(Emphasis added.)

The language of WAC 173-430-030(1) indicates that agricultural burning may be performed on land for reasons *related* to crop rotation and reasons *unrelated* to crop rotation. Just because K-Farms performed agricultural burning on the land at issue does not automatically indicate that it undertook the practice for crop rotation purposes.

Estoppel

On March 1995, Raymond Reser's counsel, by letter, asked DOE Watermaster Bill Neve whether there was a "recorded water right" on Ferguson Farm and whether "a water right existed." CP at 250. Neve replied by attaching a water right certificate to the correspondence and penning that the water right was "appurtenant to" Ferguson Farm. CP at 141. We must decide whether Neve's response works an estoppel that precludes DOE from now asserting that a five-year period of nonuse caused a relinquishment.

A party asserting equitable estoppel must prove the following elements by clear, cogent, and convincing evidence:

> (1) an admission, statement or act inconsistent with a claim later asserted, (2) reasonable reliance on that admission, statement, or act by the other party, and (3) injury to the relying party if the court permits the first party to contradict or repudiate the admission, statement or act.

Department of Ecology v. Theodoratus, 135 Wn.2d 582, 599 (1998). If a party asserts equitable estoppel against the government, the party must establish two additional elements. Because asserting equitable estoppel against the government is disfavored, (4) asserting the doctrine must be necessary to prevent a manifest injustice, and (5) the

exercise of government functions must not be impaired as a result of estoppel. *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 599 (1998). To prove manifest justice, the evidence must present unmistakable justification for imposition of the doctrine when a municipality has acted in its governmental capacity. *City of Mercer Island v. Steinmann*, 9 Wn. App. 479, 482, 513 P.2d 80 (1973).

We note that Raymond Reser's counsel did not expressly ask in his 1995 letter whether the water right was legal or valid. He instead asked if there was an existing water right appurtenant to the property. Existing may imply an unenforceable right. Watermaster Bill Neve employed the word "appurtenant," and Reser claims the word "appurtenant" is tantamount to a legal right.

We further note that Raymond Reser knew or could have known, at the time of his counsel's letter, that K-Farms had not watered Ferguson Farm for fifteen years and that the irrigation equipment was in disrepair. We do not know whether Reser informed his counsel of these facts, but counsel never volunteered such facts to Watermaster Bill Neve. No facts suggest that Neve conducted any investigation into the water use on Ferguson Farm, any relinquishment of the water right, or the enforceability of the water certificate. Neve never expressly declared that Ferguson Farm's water certificate remained binding on DOE.

We question whether, under the undisputed circumstances, Raymond Reser could reasonably rely on any representation of the DOE Watermaster as to whether or not

Ferguson Farm's water right had been forfeited. We question whether manifest justice demands estoppel when counsel's letter never disclosed the circumstances behind the nonuse of water on the farmland. We also question whether working an estoppel would impair a government function.

Regardless of whether other elements apply, we reject application of estoppel, as a matter of law. To prevail, Raymond Reser must show that Watermaster Bill Neve represented that the water right was enforceable. We doubt Neve did so, but, if he did, such a representation constituted a legal representation.

When the representation allegedly relied on is a matter of law, rather than fact, equitable estoppel will not apply. *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 599 (1998). Whether DOE can issue a landholder a water right certificate on any basis other than actual beneficial use is an issue of law. *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 600 (1998). Whether a water right remains valid despite nonuse also constitutes a question of law.

CONCLUSION

We affirm the PCHB's decision holding that water rights on Ferguson Farm were relinquished and the doctrine of estoppel does not preclude DOE from relinquishing the right.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, C.J.

WE CONCUR:

Lawrence-Berrey, J.

Staab, J.

APPENDIX B

POL 1120 WATER RESOURCES PROGRAM POLICY FOR CONDUCTING TENTATIVE DETERMINATIONS OF WATER RIGHTS

Resource Contact:	Policy and Planning Section	Effective Date: August 30, 2004 Revised: NEW
References:	RCW 43.27A.190; RCW 90.03.290, 90.03.380, 90.03.390 & 90.03.397; RCW 90.44.100 & 105; RCW 90.14.130; and POL 1070 and 1200	
Purpose:	To define tentative determinations and describe situations in which a tentative determination of a water right is required. The policy sets forth methods and tools which can be used to conduct a tentative determination.	
Application:	This policy is applicable to the investigation of changes or transfers to existing water rights and enforcement actions.	

This policy supercedes any previous policy statement with which it conflicts.

Definition. The following definition is intended within this policy:

> **"Tentative determination,"** means a determination of the extent and validity of an existing water right established pursuant to either chapter 90.03 RCW or 90.44 RCW, or claimed pursuant to chapter 90.14 RCW. Such determinations are tentative, as final determinations of the extent and validity of existing water rights can only be made by Superior Court through a general adjudication of water rights.[1]

Evaluation.

1. Who makes a tentative determination?

   The department of Ecology or a water conservancy board may make a tentative determination.

2. What is a tentative determination?

   A tentative determination is a water conservancy board's or the department of Ecology's finding of the amount of water perfected and beneficially used under a water right that has not been abandoned or relinquished due to non-use. In a proposal to change or transfer a water use, a tentative determination may include a decision as to the portion of

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[1] Recent court cases have concluded that the department's authority on making tentative determinations is limited to establishing the degree to which water use complies with the attributes of the water right, rather than adjudicating between water users. See *Rettkowski v. Department of Ecology*, 219 122 Wn. 2d 219, 858 P. 2d 232; *R.D. Merrill v. Pollution Control Hearings Board* 137 Wn. 2d 118, 969 P.2d 459 (1999); *Okanogan Wilderness League v. Town of Twisp* 133 Wn. 2d 769, 947 P. 2d 732 (1997) and *Public Utility District Number One of Pend Oreille County v. Department of Ecology* 70372-8 (2002).

the water right that is eligible for change, for instance, in some cases only consumptively used water may be eligible for change. A tentative determination is conducted for all uses associated with the entire certificate, permit or claim. In situations where forfeiture of water is not an issue, a simplified tentative determination may be needed.

3. Under what circumstances should a tentative determination be conducted?

A tentative determination is made in association with Ecology's and water conservancy boards' permitting activities. A tentative determination is required when:

a. Evaluating uses associated with an existing surface water right that is the subject of an application for change or transfer under RCW 90.03.380, 90.03.390 or 90.03.397;

b. Evaluating uses associated with an existing groundwater right that is the subject of an application for change, transfer, or consolidation under RCW 90.44.100, 90.44.105, or 90.03.380;

c. Evaluating water uses appurtenant to the existing and proposed place of use under an application for change or application for a new water right;

d. Evaluating water uses that may be considered as potentially impaired under an application for change or application for a new water right;

e. Evaluating existing water uses associated with water rights pursuant to RCW 90.14.130 or other regulatory statutes that results in a departmental order.

4. When, for example, is a tentative determination not warranted?

a. When the department administratively recognizes the division of a water right resulting from a property sale or transfer pursuant to the provisions of POL 1070.

b. When consolidating exempt wells under an existing water right permit or certificate pursuant to RCW 90.44.105[2].

c. When a water right is donated pursuant to RCW 90.42.080(1)(b) & 5, and 90.42.040(9)[3].

d. When a water right is acquired as a result of a water conservation project pursuant to RCW 90.42.040(7)[3].

e. When a replacement well is installed pursuant to RCW 90.44.100.

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[2] The water quantities associated with the exempt well are established by RCW 90.44.105 or by agreement with the Department of Health.

[3] Chapter 90.42 RCW contains various requirements for determining the extent and validity of trust water right acquisitions. See *Washington Water Acquisition Program, Finding Water to Restore Streams* (March 2003, Publication No. 03-11-005).

5. What is a simplified tentative determination?

A simplified tentative determination may be conducted when a tentative determination or other actions confirming beneficial use of the water right has recently occurred. Under these circumstances, an investigation of the complete history of the water right is not required. Instances where simplified tentative determinations can be conducted include:

a. The existing water right has had recent departmental action, such as the issuance of a change approval within the last 5 years;

b. The existing water right was confirmed as part of an adjudication or other court action that determined the extent and validity of the right within the last 5 years;

c. The existing water right is for a municipal water supply in accordance with RCW 90.03.330(3).

6. How are tentative determinations conducted?

Generally, tentative determinations include an examination of the record of historic water use. Year-by-year demonstration of water use may not be required for the evaluation. However, yearly water use records may be appropriate if such records are available, if there are allegations of non-use, or if the proposed action prompts a closer examination of the water right record. For instance, water right changes which involve adding irrigated acres to an existing water right or adding an additional purpose of use require an assessment of the most recent five years of continuous water use.[4] For simplified tentative determinations (conducted on water rights where forfeiture of water is not an issue), year-by-year demonstration of water use is generally not required.

a. Examine the available materials to verify the applicant's assertions of historic beneficial use of water. The agency may require adequate information be provided by the applicant, may conduct its own investigation, or may do both. Evidence of the extent of the beneficial use, water quantities used, and other characteristics of the water use may include direct water measurement and observation by the investigator, declarations and affidavits of parties with personal knowledge of historic water use on the subject property, water meter records[5], power records, crop or product sales records, water billing records, population estimates, county assessor records, aerial or other historic photographs, remote sensing imagery, crop irrigation guides, water duty publications, land use or tax records, field surveys and other data.

b. Materials should be reviewed so that a reasonable, objective conclusion can be made as to project intent and initiation, the date of first use of the water, the period and rate of

[4] See POL 1210 and PRO 1210 for guidance on establishing water use and estimating the annual consumptive quantity of a water right.
[5] Ecology prefers metered water use data when available (Chapter 173-173 WAC).

development of the original water use, the history associated with any expansion or contraction of water use, and the quantity of water appropriated on both an instantaneous and annual basis, the place of use and the purpose of use. The review should investigate whether the materials support a pattern of consistent water use to determine if subsequent to the perfection of the water right, some or all of the water right has been forfeited or abandoned. A prolonged period of non-use should be a signal to the investigator to request additional information from the applicant or to assemble additional materials that may provide a clearer picture of historic water use. Although there are numerous tools and methods available for reviewing historic use of water under a water right, generally tentative determinations require taking the following steps:

i. *Evaluate the instantaneous and annual quantities of water diverted or withdrawn and put to beneficial use, including determinations of consumptive and nonconsumptive use*. Any evidence that supports the applicant's assertions of water use should be examined. The investigator should work with the applicant to assemble the information necessary to determine historic beneficial use. The tentative determination will consider whether the water quantities diverted or withdrawn are consistent with a reasonable water use in accordance with *Ecology v. Grimes.*[6]

ii. *Verify the source of water*. Verification of the existing water source, through a site visit and/or hydrologic or hydrogeologic evaluation, should be done in conjunction with evaluating historic records of diversion or withdrawal quantities.

iii. *Determine the location of the diversion or withdrawal facilities*. Determine the location of the existing diversion or withdrawal facilities and consider whether the location of the facilities have changed since establishment of the water use. Additionally, consider whether there have been modifications to the original facility that may imply that the water quantities available through the existing system differ from water quantities available through any previous system. Historic information or site observations of remnant portions of old diversion or withdrawal systems should alert the examiner that additional information may be necessary to clarify any previous modifications of use.

iv. *Determine the place of use and extent of beneficial use*. Determine the location of the place of water use. Consider whether the place of use has changed since the water use was established. Consider whether the original water diversion or withdrawal facility could have supplied water to the existing place of use.

[6] See Ecology v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993)

v. *Determine the purpose of use.* Determine the purposes of use to which the water has been historically applied and the quantities of water beneficially used for each purpose of use. Consider whether the existing water uses are consistent with historic water uses.

vi. *Determine the period of use associated with each beneficial use*. Determine the period of use for each of the recognized beneficial uses.

vii. *Determine the date of priority of the water right recognized through a tentative determination*. The date of priority has little import in evaluating the application, since applications for change or transfer and applications for permit can not result in the impairment of *any* existing water right. The priority date is determined by considering the history of establishment of the water use, assertions by the water user, and applicable laws but is necessary to complete the final paperwork at completion of the change/transfer.

c. The investigator should use best professional judgment in determining the amount of data needed and in making a tentative determination of the extent and validity of a water right.

7. Tentative determinations in the face of unauthorized changes to water rights.

a. In some situations, changes to historic uses associated with water rights have been made in the diversion or use of water without first obtaining authorization for the changes pursuant to chapters 90.03 and 90.44 RCW. Such unauthorized changes to existing water rights are commonly referred to as "de facto, or after-the-fact changes".

b. When evaluating unauthorized changes to water rights[7], the department generally considers beneficial use to be the measure of the right, even if some attributes of the right may not be consistent with the current authorization[8]. However, determining whether the beneficial use is associated with the right proposed for change can be difficult depending on the unauthorized changes that have occurred. For example, an unauthorized change in point of diversion may be relatively easy to investigate, whereas an unauthorized change in purpose or place of use may be very difficult to investigate.

c. Use of water in a manner inconsistent with one's water right authorization may not result in forfeiture or abandonment of that right, provided such use is beneficial and not wasteful.[9] Consideration of unauthorized water use as representing beneficial use of the water right is determined on a case by case basis, through careful examination of the

[7] If a permit writer determines that an unauthorized change has occurred that is not the subject of the current application for change, an application and public notice amendments are required.

[8] Several courts have considered the relative weight of beneficial use and unauthorized changes with conflicting decisions (e.g. *Ecology v. Abbott* (1985); *Ecology v. Grimes* (1993); *Russell Smith v. Water Resources Dept. (Oregon)* (1998); *Ecology v. Acquavella (Lavinal)* (2003); *USA and Pyramid Lake Paiute Tribe of Indians v. Alpine Land & Reservoir Co. and Nevada State Engineer* (2003). The permit writer should consider the circumstances of the specific situation in determining the relative weight of beneficial use and appurtenancy.

[9] Ecology may use enforcement actions to encourage compliance with RCWs 90.03.380 and 90.44.100.

specific facts associated with the water right file. Determinations of beneficial use of the water right must be reviewed and approved by the appropriate regional section head.

i) If the investigation does not support the extent of the original right to the satisfaction of the permit writer and the regional section head, then the permit writer must conclude that the water right, in whole or in part,

   (1) was not perfected; or

   (2) has been forfeited; or

   (3) was abandoned.

ii) If the investigation supports the extent of the original right to the satisfaction of the permit writer and the regional section head, then the permit writer may include, in whole or in part, the beneficial uses that were not previously authorized within the tentative determination (see POL 1200).

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February 14, 2024 - 10:45 AM

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Superior Court Case Number:	21-2-00538-9

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