No. 39115-9

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RAYMOND RESER,

Appellant,

v.

POLLUTION CONTROL HEARINGS BOARD,

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondents.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

MATTHEW T. JANZ,
WSBA #50173
Assistant Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
360-586-6770
OID No. 91024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

The Court of Appeals' plain language determination that fifteen years of nonuse of irrigation water does not constitute a "temporary crop rotation" does not present a question of substantial public interest that warrants this Court's review. *See* RAP 13.4. Washington follows the "use it or lose it" principle for water rights, in which a holder of water rights relinquishes those rights after five years of continuous nonuse unless a statutory exception applies. Here, there is no dispute that the water right at issue was not in use for more than fifteen years before Petitioner Raymond Reser even purchased his farm, triggering relinquishment of the water right. The Court of Appeals properly rejected Reser's ex post facto attempt to characterize this extended period of nonuse as a "temporary crop rotation" to squeeze into a statutory exception to the relinquishment rule.

This Court should decline to review of the Court of Appeals' decision because application of the relinquishment

statute to the unique, undisputed facts in this case does not present a substantial issue of public importance. Reser's attempts to expand a statutory exception to fit the unique facts of his case is contrary to the plain language of the relinquishment statute and existing case law holding that exceptions to relinquishment are to be interpreted narrowly. It would also greatly diminish the important function played by relinquishment under Washington Water Law. This Court should decline review.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly determined that fifteen years of undisputed nonuse of a water right does not constitute a "temporary crop rotation" to avoid relinquishment of water rights under a RCW 90.14.140(1)(k).
2. Whether the Pollution Control Hearings Board correctly concluded there was no genuine issue of material fact and resolved the issue via summary judgment.

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background

This case involves the water rights associated with Ferguson Farm, a plot of land in Walla Walla County. It had a water right, Groundwater Certificate 378-A, associated with the land. CP 4. In 1980, Ferguson Farm was leased by Alfred (Fred) and Gale Kimball, who stopped all irrigation and farmed non-irrigated dryland wheat (winter wheat) for the fifteen-year period they controlled Ferguson Farm between 1981 and 1996. CP 14 (PCHB Order Granting Mot. for Summ. J.). This nonuse is not disputed by Reser. Alfred Kimball considered this a permanent change, declining to repair or maintain the existing infrastructure, allowing it to become unusable. CP 122 at 11 (Affidavit of Water Use, Alfred J. Kimball, December 26, 2019). He did this change to winter wheat as a conscious business decision, not wanting to "incur the cost, or take the time and effort required to irrigate on the Farm." *Id*. at 13.

Reser acquired the property in 1995 and took over farming operations from the Kimballs in 1996. Opinion at 3; CP 14. He does not dispute that he engaged in no irrigation when he purchased the farm until 2001. Opinion at 4; CP 15.[1] In 2017, Reser installed industrial irrigation equipment leading to complaints and an investigation by Ecology, resulting in the 2020 order of relinquishment that gave rise to this appeal. Opinion at 7; CP 16–17.

B. Procedural Background

Reser appealed Ecology's order to the Pollution Control Hearings Board (Hearings Board). Ecology filed a motion for summary judgment on all issues raised in the case. In opposing the summary judgment motion, Reser filed the declaration of Dr. Robert Thornton, an agronomist. CP 239–41 (Declaration of Robert Thornton). In his declaration, Thornton opined that "the temporary change in the type of crops grown at Ferguson Farm

[1] Whether the water right was exercised from 2001 to 2017 is disputed by the parties and is not part of the opinion of the Court of Appeals.

from 1981 constitute[s] an exercise of generally recognized sound farming practices." CP 21 (PCHB Order Granting Mot. for Summ. J.); CP 240. However, Thornton did not opine that the use on Ferguson farm represented a crop rotation and merely conclusively stated that the use was temporary. CP 240 at 7 (Thornton Decl.).

The Hearings Board found this evidence insufficient to meet Reser's burden and granted summary judgment to Ecology, affirming Ecology's finding that the water right had relinquished. CP 12–27. The Hearings Board determined that the nonuse in the first five years of the Kimball period was not contested and Reser failed to show an exception applied. CP 18–22.[2] The Hearings Board held that any resumption of use by Reser in 2001, so long after the more than five consecutive years of nonuse, could not

[2] The Hearings Board also rejected Reser's arguments that laches or equitable estoppel applied. Reser did not appeal the Hearings Board's decision that laches did not apply.

revive an already relinquished water right. CP 20:16–17 (PCHB Order Granting Mot. for Summ. J.).

Reser filed a petition for review of the Hearings Board's order in Walla Walla Superior Court, arguing the relinquishment exception for temporary crop rotation applied and that Ecology was equitably estopped from claiming relinquishment based on certain correspondence from Ecology's Walla Walla water master. Ecology successfully sought direct review of the case by the Court of Appeals. CP 415–16.

The Court of Appeals affirmed the Hearing Board's decision holding in an unpublished opinion. *See* Opinion. Notably, the Court of Appeals concluded that Reser "stretches the concept of crop rotation beyond its elasticity." Opinion at 1. After granting Ecology's motion for publication of the decision, Reser filed a petition for review with the Washington Supreme Court.

IV. REASONS WHY REVIEW SHOULD BE DENIED

While the issue of relinquishment of water rights itself is a fundamental issue of water law, not every case addressing this issue will similarly present issues of substantial public interest. Here, Reser attempts to stretch the concept of "temporary crop rotation" to cover an undisputed cessation of irrigation to dryland farming practices for a period of at least fifteen years. The Court of Appeals properly rejected his attempts to fit this extended period of nonuse into a narrow exception for temporary crop rotations, stretching the term far beyond its possible meaning. This decision provides clarity on the interpretation on the crop rotation exception and how Ecology should apply it on a statewide basis, but its application of the law to the unique, undisputed facts in this case does not warrant this Court's attention. While there may be hard cases as to whether a particular practice constitutes a "temporary crop rotation" in the future, this is not such a case. Accordingly, under RAP 13.4(b)(4), this case does not involve an issue "of

substantial public interest that should be determined by the Supreme Court."

A. Reser Failed to Meet His Burden to Establish That the Nonuse Was Excused

The Court of Appeals correctly affirmed the Hearings Board's decision that Reser's water right had been relinquished, and that the period of nonuse did not fall within the statutory exception for temporary crop rotations. Even if a water right is not used for five years, there may be sufficient cause to excuse the nonuse. RCW 90.14.140. These exceptions and exemptions are to be interpreted narrowly. *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 140, 969 P.2d 458 (1999).

This matter concerns the temporary crop rotation exception found in RCW 90.14.140(1)(k). The statute states that a reduced amount of irrigation water[3] may be excused if the

[3] The issue of whether a complete cessation of use may qualify for a temporary crop rotation exception when the statute contemplates only a reduction of use was argued by the State, but did not form a part of the Court of Appeals Opinion.

nonuse is a result of a crop rotation, which is defined in the statute as "the temporary change in the type of crops grown resulting from the exercise of generally recognized sound farming practices." *Id.* Applying this definition, the Court of Appeals found that this exception required a showing that the no-use at issue is (1) a crop rotation; (2) that is temporary; and (3) based on the exercise of generally recognized sound farming practices. Opinion at 12–13. The Court of Appeals' decision that the 15-year period of nonuse did not constitute a temporary crop rotation is correct both as an issue of undisputed evidence and as a matter of law. Opinion at 10–16.

Starting with the evidence, the Court of Appeals correctly held that, as the party asserting the statutory exemption, Reser bore the burden of proving that the 15-year period of nonuse constituted a temporary crop rotation. Reser's only evidence on this point was a declaration by its expert, Thornton, an agronomist who opined that the farming done by Reser and Alfred Kimball in the relevant period represented "generally

recognized sound farming practices." CP at 240 at 7 (Thornton Decl.). Thornton did not opine, however, that the use on Ferguson farm represented a crop rotation. Moreover, as the Court of Appeals held, "Reser concede[d] that Thornton rendered no opinion as to whether a temporary change in crops grown occurred." Opinion at 13. As the Court of Appeals correctly noted, "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." Opinion 14–15. K-Farms never rotated to another crop during its fifteen-year lease. The owner of K-Farms, Alfred Kimball stated that K-Farms deemed any change in crops to be temporary or that K-Farms intended to change to another crop. CP 122–23 (Kimball Affidavit); CP 138–39 (Alfred Kimball Letter, December 26, 2019). Contrary to Reser's arguments, this determination was not just about Kimballs' intent; it was also about the lack of evidence of any temporary change in crops at all during the period the

Kimballs farmed the land. Opinion at 13. Because there was no evidence that this generational move away from irrigation was a temporary crop rotation, Reser failed to meet his burden.

The Court of Appeals' decision was also correct as a matter of law. By whatever definition of temporary, a generational move away from irrigating land does not qualify. The critical period in this case was the first five-year period of nonuse between 1981 and 1986. *See* RCW 90.14.180 (stating that failure to use all or a portion of a water right for five or more successive years without sufficient cause shall cause the right to relinquish to the state). Looking at Reser's argument in the light most favorable to him, the earliest he resumed irrigation was in 1999. The evidence is insufficient to show that the water right was not used from 1981 to 1999 due to the presence of a *temporary* crop rotation as defined by the statute. RCW 90.14.140(1)(k).

The Court of Appeals was right to reject Reser's argument as an expansive, rather than narrow, interpretation of the

relinquishment statute. Reser's interpretation of the exception would mean that any virtually any cessation of irrigation followed by resumption of irrigation at a later date would qualify for this narrow exception. Construing either 15 or 20 years (1981 to 2001) of nonuse followed by a resumption of use as a temporary crop rotation would "eat the rule" and be so broad as to excuse most if not all nonuse of water. Water users could resume use, long after the right has relinquished, then seek to explain away the nonuse as part of a temporary crop rotation, as is the case here. In contrast, the Court of Appeals' opinion correctly applied the statute as written and hews to existing caselaw narrowly interpreting the exceptions to relinquishment.

The Court of Appeals' interpretation is reasonable and consistent with a narrow construction of a statutory exception that gives effect to the intent underlying the general relinquishment provisions which favor beneficial use of water rights. *R.D. Merrill Co.*, 137 Wn.2d at 140.

B. Reser Did Not Present a Disputed Issue of Material Fact to Defeat Summary Judgment

Reser argues he should have defeated summary judgment due the existence of a genuine issue of material fact. This argument, too, does not warrant review as an issue of substantial public importance. As detailed above, the only evidence produced by Reser in opposition to summary judgment before the Hearings Board was a declaration by Dr. Robert Thornton, an agronomist. CP 239–41 (Thornton Decl.). This declaration is insufficient to create a genuine issue of material fact necessary to defeat a summary judgment motion.

Summary judgment is appropriate where in the light most favorable to the non-moving party, there is no genuine issue of material fact. CR 56. A party seeking to establish a genuine issue of material fact needs to submit evidence to establish such a factual dispute. It must do more than state conclusions or merely state the ultimate facts to defeat a summary judgment motion. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40, 46

(2014). A sworn declaration that merely states a conclusory opinion is insufficient. *Id.*

The Court of Appeals correctly determined that the Thornton Declaration did not establish that the nonuse by the Kimballs was in fact a temporary crop rotation. Reser produced no new evidence establishing that the nonuse was temporary or that it was in fact part of a crop rotation rather than what it appeared to be—a shift in agricultural production to dryland wheat with no intention to shift back. The Kimballs chose to engage in dryland wheat farming purposefully and allowed the irrigation equipment fall into disrepair by not utilizing or maintaining the equipment. CP 122–23 (Kimball Affidavit). Since there was no evidence produced that the nonuse from 1981 to 1986 was a temporary crop rotation, the Court of Appeals was correct to uphold the Hearings Board's decision. Therefore, this Court should not find that the Hearings Board granting summary judgment to Ecology rises to an issue of substantial public interest warranting review.

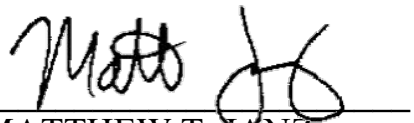
V. CONCLUSION

This case is not one of substantial public interest meriting review by this Court. Rather, the Court of Appeals correctly applied the temporary crop rotation exception to the relinquishment statute to a set of undisputed, unique facts involving a change to dryland wheat for approximately two decades. Reser's request for discretionary review fails to meet the criteria of RAP 13.4(b). Ecology respectfully requests that the Supreme Court deny Reser's Petition for Review.

This document contains 2,400 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 14th day of March 2024.

ROBERT W. FERGUSON
Attorney General



MATTHEW T. JANZ
WSBA #50173
Assistant Attorney General
Attorneys for Respondent
matt.janz@atg.wa.gov
360-586-6756

CERTIFICATE OF SERVICE

I certify that on March 14, 2024, I caused a true and correct copy of this State of Washington, Department of Ecology's Answer to Petition for Review to be served on the following in the matter indicated below.

Counsel for Raymond Reser:

Wyatt E. Rolfe
Rolfe Law Office, PLLC
PO Box 2908
Walla Walla, WA 99362

Via appellate court's portal

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 March 2024, in Olympia, Washington.

Rio Oberlies-Rodrigues
RIO OBERLIES-RODRIGUES
Paralegal

ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION

March 14, 2024 - 2:56 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	39115-9
Appellate Court Case Title:	Raymond Reser v. Pollution Control Hearings Board, et al
Superior Court Case Number:	21-2-00538-9

The following documents have been uploaded:

- 391159_Answer_Reply_to_Motion_20240314145319D3435563_1874.pdf
  This File Contains:
  Answer/Reply to Motion - Answer
  The Original File Name was 2024-03-14EcyAnswerPetReview.pdf

A copy of the uploaded files will be sent to:

- Lisa.Petersen@atg.wa.gov
- counsel@water-law.com
- lalseaef@atg.wa.gov
- wyatt.rolfe@rolfelawoffice.com

Comments:

Sender Name: Rio Oberlies-Rodrigues - Email: rio.oberlies-rodrigues@atg.wa.gov
Filing on Behalf of: Matthew Janz - Email: matt.janz@atg.wa.gov (Alternate Email: ECYOlyEF@atg.wa.gov)

Address:
PO Box 40117
2425 Bristol Court SW
Olympia, WA, 98504-0117
Phone: (360) 586-6770

Note: The Filing Id is 20240314145319D3435563