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City of West Richland v. Dep't of Ecology, 103 P.3d 818 (Wash. Ct. App. 2004)

Lukas Staks

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where other remedies were available. The district court found Summit Water should have petitioned for review under the ordinance, and that the thirty-day timeframe to challenge a county's land use decisions had already expired.

On appeal, Summit Water argued the district court's rulings that CLUDMA authorized Summit County to promulgate the ordinance and that the timely filing constraints of CLUDMA did not apply to Summit Water. To support this contention, Summit Water argued Utah's comprehensive regulation of water precluded Summit County from regulating water under CLUDMA.

The Utah Court of Appeals gave no deference to the district court's statutory interpretations. The court held CLUDMA's authorization for county land use ordinance-making did not exclude water regulations such as the ordinance. While the court determined no Utah law explicitly authorized land use decisions to encompass water decisions, the court reviewed treatises, persuasive authority, and the language of CLUDMA to conclude that county water decisions fell under the ambit of land use decisions.

CLUDMA allowed counties "to provide for the health, safety, and welfare" of their "present and future inhabitants." The ordinance "recognize[d] that the health, safety[,] and welfare of the inhabitants of Snyderville Basin, depended in large part, on the availability of drinking water and the reliability of the water suppliers." The court noted other jurisdictions upheld zoning ordinances ensuring essential services such as water, and concluded water decisions fell under the umbrella of land use safeguards contemplated by CLUDMA.

Regarding Summit Water's contention that Utah preempted the regulation of water, the court stated no legislative attempt to preempt local regulation of water existed. On the contrary, the legislature explicitly allowed local jurisdictions to control water systems, if not otherwise inconsistent with state law. The court thus affirmed the district court's decision.

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WASHINGTON

City of West Richland v. Dep't of Ecology, 103 P.3d 818 (Wash. Ct. App. 2004) (holding the owner of inchoate groundwater permits may alter the manner of use of his permits, but may not alter the purpose of use of his permits).

In August 1993 the Department of Ecology ("DOE") granted two family farm groundwater permits to John Michel pursuant to the Family Farm Water Act ("FFWA"). Michel failed to meet development schedules stipulated in the permits and, in October 2000, DOE issued an order to show cause, asking Michel to explain his inaction regarding his permits. Before Michel answered DOE's order, the Benton

County Water Conservancy Board ("BCWCB") approved a request by the City of West Richland ("Richland") to transfer Michel's agricultural irrigation rights to Richland's municipal water supply. If transferred, Richland would use Michel's permitted water mainly for lawn irrigation. DOE reversed the BCWCB decision and cancelled Michel's permits.

Michel appealed DOE's permit cancellation to the Pollution Control Hearings Board ("PCHB"). DOE and Michel reached a settlement wherein Michel agreed to develop his two inchoate groundwater rights. Shortly thereafter, Richland appeared before PCHB to contest DOE's decision to invalidate the Michel-Richland groundwater permit transfer. Michel did not participate in this appeal. PCHB upheld DOE's prohibition of the transfer of the unperfected water rights, arguing the transfer proposed a change in purpose from agricultural to residential irrigation. On appeal, the Benton County Superior Court reversed PCHB and held that Washington case law and statutes empowered DOE to change the purpose for the water permits. DOE appealed to the Washington Court of Appeals.

The court concluded that the Michel-Richland transfer was invalid. The Court reviewed the FFWA, which allowed transfer of family farm permits under three circumstances: (1) the permit was transferred for use for agricultural irrigation purposes, (2) the permit was transferred exclusively via lease agreement for any beneficial water purpose, and (3) the permit was transferred for any beneficial purpose of use and the water was within the boundaries of an urban growth area at the time of transfer. Viewed in the larger statutory framework, however, the development status of the family farm permit was crucial. Washington law allowed permit holders with a perfected claim, specifically one that put water to beneficial use, to change the "purpose of use" from their original permits. In contrast, Washington law also stated that a permit holder with unperfected water rights could only change the "manner or place of use" of the water. The court relied on case law to differentiate between "purpose of use" and "manner of use." "Manner of use" changes did not "alter the original project or the quantity of water needed." Michel held two unperfected water permits and could therefore only change their "manner of use." Richland, the court said, impermissibly proposed changing the "purpose of use" from agricultural irrigation of a small farm in the original project to municipal water supply.

Even if Michel had perfected his water right, the court noted that Michel failed to satisfy FFWA requirements for to transfer his family farm permit. Specifically, Michel and Richland did not intend the transfer for agricultural purposes, the duration of the permit "lease" to Richland extended beyond the temporary change of purpose envisioned by the legislature, and Richland impermissibly planned to use

the water within an urban growth area. The court reversed the superior court and affirmed PCHB.

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Gunstone v. Jefferson County, No. 29709-4-II, 2004 Wash. App. LEXIS 499 (Wash. Ct. App. Mar. 23, 2004) (holding the public duty doctrine does not apply when a blocked culvert bursts on county land and destroys private property).

Reed and Diane Gunstone ("Gunstones") filed suit against Jefferson County ("County") in the Superior Court of Kitsap County to recover damages suffered when a seventy-foot deep lake created by a blocked culvert burst its banks and flooded their property. The trial court granted summary judgment in favor of the County, stating the public duty doctrine shielded the County from liability. The Gunstones appealed to the Washington Court of Appeals, arguing the County's response to the blocked culvert was proprietary, not governmental.

The culvert, located on County land, diverted surface water under the Old Gardiner Road in Jefferson County, Washington. In 1984 the Gunstones warned the County that the culvert partially collapsed. The County did not repair the culvert. During a winter storm in 1996, the culvert became completely blocked and twenty-six million gallons of surface water collected behind the culvert. The County responded to the problem by digging a relief trench. The relief trench did not solve the problem, and the fill supporting the Old Gardiner Road collapsed. The debris and water from the collapse damaged the Gunstones' property.

The Gunstones argued the County's response to the blocked culvert was proprietary since the blocked culvert was on County land. The Gunstones argued the County acted as a property owner because the County had no duty to respond to blocked culverts on private land. The County responded that the response to the blocked culvert was governmental because the burst banks and flooding constituted an emergency.

The court agreed with the Gunstones' argument and held the County's response to the blocked culvert was not governmental. The court reasoned the County's response was not governmental because the response was not comparable to typical emergency responses such as crime or fire. Consequently, the public duty doctrine did not shield the County from liability.

The court also discussed whether strict liability applied to the County based on the culvert's artificial diversion and collection of surface waters. The court held that the superior court must decide the issue of strict liability on remand. The court thus reversed and re-