



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Northwest Regional Office • 3190 160th Avenue SE • Bellevue, Washington 98008-5452 • (425) 649-7000

October 15, 2008

Ms. Devon N. Shannon
Bricklin Newman Dold LLP
1001 Fourth Avenue, Suite 3303
Seattle, WA 98154

RECEIVED

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BRICKLIN NEWMAN DOLD, LLP

Dear Ms. Shannon:

I am writing to you today in response to your October 2, 2008, letter to Buck Smith of my staff. You requested a formal interpretation and decision as to the current validity of groundwater permit G1-22763P held by Whatcom County Water District #10. You specifically asked for a response to each of the following questions:

1. Is the District's [groundwater permit] G1-22763P void because it has expired?
2. Has the District relinquished G1-22763P to the extent that it has gone unused over the past five years?
3. If Ecology finds that a portion of G1-22763P has been relinquished, to what extent is the permit still valid?

Here are my responses to your questions:

1. An application for change to groundwater permit G1-22763P was approved by this office on December 31, 2002. (No appeals were filed during the statutory 30-day appeal period.) The change approval contains a development schedule that allows the District until January 1, 2013, to complete development of their project and January 1, 2020, to put the water to full beneficial use.

So, my response is the permit is not void nor has it expired. The District is still operating within their approved development schedule.

2. In *Department of Ecology v. Theodoratus* and reaffirmed in *R. D. Merrill Co. v. Pollution Control Hearings Board*, the Washington State Supreme Court ruled that a holder's right under a permit is an inchoate right, which is "...an incomplete appropriative right in good standing. It comes into being as the first step provided by law for acquiring an appropriative right is taken. It remains in good standing so long as the requirements of law are being fulfilled. And it matures into an appropriative right on completion of the last step provided by law".



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The relinquishment provisions of chapter 90.14 RCW apply only to perfected or certificated water rights, not to inchoate rights. In other words, one cannot lose (relinquish) a right that does not yet exist. The legislative purpose of the relinquishment statute is "to cause a return to the state of any water rights which are no longer exercised by putting said waters to beneficial use" (RCW 90.14.010). Further, the statute specifically states: "[n]othing in this chapter shall be construed to affect any rights or privileges arising from any permit to withdraw public waters..." (RCW 90.14.150).

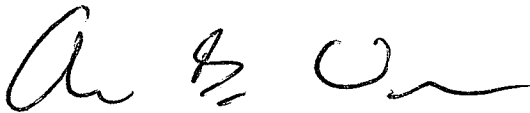
So, my response is groundwater permit G1-22763P is an inchoate (unperfected) right and therefore is not subject to relinquishment.

3. No portion of G1-22763P has been relinquished (see my response to #2).

In your letter you stated "[i]f there are additional documents that are directly responsive to the questions raised in the letter, SVCA asks that Ecology provide those documents with its response." I believe representatives of SVCA have already reviewed the entire file for groundwater permit G1-22763P and requested copies of all pertinent information. Other information that was likely used by the report writer (and not contained in the permit file) would be relevant statutes (chapters 90.03, 90.14, 90.44, & 90.54 RCW) and case law (*Theodoratus & R.D. Merrill*). I believe this information is readily available to you, but if not, please let me know.

If you have any questions, I can be reached at (425) 649-7270 or adun461@ecy.wa.gov.

Sincerely,



Andrew B. Dunn, LG, LHG
Section Manager
Water Resources Program
Northwest Regional Office

Cc: Jim Neher (Lake Whatcom Water & Sewer District)