

# RISK OF RELINQUISHMENT INCREASES WITH DECISION IN LOYAL PIG, LLC V. DEPARTMENT OF ECOLOGY

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On May 5, 2020, the Washington Court of Appeals, Division III, ruled in *Loyal Pig, LLC v. Department of Ecology*<sup>1</sup> that no five-year grace period exists for purposes of calculating the annual consumptive quantity of water (ACQ) applicable to a water right in connection with an application to change a diversion location or place of use. Prior to this case, the ACQ applicable to a water right was not recalculated in connection with a change application if it had been calculated within the past five years in connection with a prior change application. As the court admitted in the ruling, this decision could lead to water rights holders relinquishing portions of their water rights if they make frequent changes in transfer diversion points or application sites within five years, a common practice in irrigated agriculture.

## WATER RIGHTS 101 – IRRIGATION IN WASHINGTON

In order to use water in Washington, an irrigator must have a water “right,” i.e., permission from the Department of Ecology (Ecology) to use a certain amount of water, diverted from a certain point, on a certain piece of land. Ecology manages water rights permits (authorization to take water) and water rights certificates (documentation of a “perfected” water right put to full beneficial use).

In irrigation-dependent agriculture, it is common practice to make frequent changes to diversion points and irrigation sites in order to ensure crop rotations and efficient water use. Such changes generally require an administrative “change application” process in which Ecology examines the irrigator’s water use to determine whether the change can be approved without harm to other water rights holders in the area. Ecology also examines whether the water user has been putting its water to full beneficial use; if not, the water right may be partially reduced.

## LOYAL PIG

The case involved a dispute over whether plaintiff Loyal Pig, LLC (Loyal Pig), holder of a water rights certificate, was required to recalculate its ACQ in 2017 when it filed a change application. Loyal Pig had applied for, and received, an earlier change in its water right in 2014. As part of the 2014 change application, the Benton County Water Conservancy Board (Board) calculated Loyal Pig’s ACQ based on its use of water for the previous five years, as required by RCW 90.03.380. The calculation would limit the amount of water Loyal Pig could apply on the new location. When Loyal Pig filed an additional change application in 2017, the Board used the ACQ figure from 2014, as it was calculated within five years of 2017, or within the “five-year grace period.”

However, Ecology reversed the Board's decision and determined that Loyal Pig's ACQ should have been recalculated for the five years preceding 2017.

### **Prior Appeals Set the Stage**

Loyal Pig appealed Ecology's reversal first to the Pollution Control Hearing Board (PCHB), and when unsuccessful there, to the Benton County Superior Court. Before the PCHB, Loyal Pig maintained that Washington's water rights relinquishment statute<sup>2</sup> and Ecology's past practices and policies mandate that a five-year grace period must be granted for ACQ calculations relating to change applications.<sup>3</sup> After PCHB sided with Ecology, Loyal Pig took the dispute to Superior Court, now arguing that Ecology's interpretation of RCW 90.03.380 amounted to administrative rulemaking without the proper procedure.<sup>4</sup> The Superior Court agreed with Loyal Pig that Ecology engaged in inappropriate rulemaking, barred Ecology from requiring a new ACQ calculation for a second change application within a five-year window, and enjoined Ecology from requiring sequential ACQ calculations without formal rulemaking.<sup>5</sup> Ecology appealed.

### **Court of Appeals' Decision**

The Court of Appeals reversed the Superior Court's decision, agreeing with Ecology's interpretation of RCW 90.03.380. In doing so, the court found that the explicit language of RCW 90.03.380(1) requires Ecology to review the "most recent five year period" of water use to determine ACQ before approving a change application. Based on statutory construction, the Court dismissed the argument that Ecology had engaged in unauthorized rulemaking; rather, the Court found that Ecology simply applied the law as written.<sup>6</sup>

Notably, the Court acknowledged that the statute places an irrigator at risk of premature relinquishment or reduction of its water right by impliedly granting Ecology the right to limit the amount of a change in use of a water right to the current ACQ, which could be lower than the underlying water right. As stated by the Court, "frequent changes could penalize irrigators by reducing a water right."<sup>7</sup> The current law also promotes excessive use of irrigation water in order to save water rights.<sup>8</sup> While the Court pointed out that Ecology may ignore the most recent five-year period if the water right had been in the trust water rights program prior to the change application, it offered little else as consolation for its ruling except to say that it would "welcome a change in the law."<sup>9</sup> Although this was the only reference to Ecology's Trust Water Rights program in the opinion, it is a very important practical point for irrigators—when in doubt about future water use, put it into trust, which allows water users to temporarily or permanently donate water rights during periods of non-use to avoid relinquishment.<sup>10</sup>

### **The Upshot for Irrigators**

The ruling in *Loyal Pig* raises several issues for irrigators who frequently apply for changes of use in their water rights.

First, if a water rights holder is now forced to recalculate its ACQ with each change application without the five-year grace period, the water rights holder must repeatedly account for the potential reduction in beneficial use of its water right at each application. Accordingly, each change application opens the door to a finding that the water rights holder has not been making full beneficial use of its right, and an accompanying reduction or relinquishment of the right.

This will heavily impact eastern Washington farmers, where profitable production of diverse crops demands varying irrigation practices. In order to accommodate alternating crops to ensure healthy soils and efficient water

use, irrigators require frequent changes in diversion points and irrigation sites, a reality the Court of Appeals openly acknowledged.<sup>11</sup> As stated by the court “we would welcome a change in the law.”<sup>12</sup>

Second, regulators may advocate in court and within the legislature to keep the newly decided law as-is based on their argument that it could ultimately bring more accuracy to water-right transfers. To succeed on such a contention, regulators may urge that recurrent ACQ calculations on each change application will result in avoiding outdated information skewing an understanding of whether a farm has sufficient water to give.

Third, based on the widespread impact this decision will have and the Court's own call for change, we expect both an appeal and legislation addressing both the relinquishment statute and the water right transfer statute's requirements regarding the timing of ACQ calculations. In the meantime, irrigators need to carefully review the most recent five years of water use and consider whether a change application may put them at risk of relinquishment. If so, enrolling that water in the trust water program offered by Ecology may be a better course of action for the immediate (and unclear) future.

## FOOTNOTES

<sup>1</sup> *Loyal Pig, LLC v. Wash. Dept. Ecology*, No. 36525-5-III (Wash. Ct. App. May 5, 2020).

<sup>2</sup> See RCW 90.14 et seq.

<sup>3</sup> *Loyal Pig*, slip op. at 4.

<sup>4</sup> *Id.* at 7.

<sup>5</sup> *Id.* at 10.

<sup>6</sup> *Id.* at 25.

<sup>7</sup> *Id.* at 17.

<sup>8</sup> *Id.* at 18.

<sup>9</sup> *Loyal Pig*, slip op. at 18.

<sup>10</sup> See Chapter 90.38 RCW.

<sup>11</sup> *Loyal Pig*, slip op. at 18.

<sup>12</sup> *Id.*

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