



CLEAN, FLOWING WATERS FOR WASHINGTON

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Victory in the Statewide Cases

By Rob Caldwell

After five years, 130 appeals, a hearing before the Pollution Control Hearings Board (PCHB) and two different courts, still waters in Washington will now have a chance to run deep. On October 19th, 2000 the Washington State Supreme Court decided Postema v. Pollution Control Hearings Board (2000 WL 153089). The decision was a victory for CELP and those who care about the future of rivers and aquifers in Washington.

The Verdict

The Court held that when sur-face water flows are not available because of pre-existing set mini-mum flows, ground water permits must be denied. The Court determined that, in the words of dissenting Justice Richard Sanders, “any diminution of surface water, however slight or even de minimus, constitutes an adverse impact if it is measurable.” The “Postema” decision establishes that designated minimum instream flows constitute a water right for the public and as such are protected from impairment by subsequent groundwater rights.

The Facts

At issue in this case was the scientific fact that all ground and surface waters are interconnected. The appellants (Cascade Golf Course, Black River Quarry, Inc, Covington Water District, Hertzl Memorial Park, and John Postema) argued that because current stream measuring technology is only accurate to within five percent of the stream’s flow, they are entitled to water rights because Ecology could not measure the potential impairment of stream flows.

Citing CELP’s brief, the court held that using this piecemeal approach in apportioning rights to instream flows would not preserve flows necessary to protect fish, wildlife and other environmental resources. Not only could minimum flows be depleted, all senior rights in a stream could be impaired. Through these small but “immeasurable” groundwater withdrawal permits, a river or stream could be drained completely dry.

A Long time coming

CELP got involved in the “statewide” cases in 1996. Thanks go to numerous parties for their teamwork in this significant victory: Earthjustice for their help with intervention; former Executive Director Rachael Paschal and former associate attorney Michele Osborne; board members Greg Hicks and John Arum; and attorney Russ Busch. Finally, thanks to Deb Mull at the Attorney General’s Office, Karen Alston representing the Muckleshoot Indian Tribe and Mason Morrisette representing the Tulalip Tribe.

Significance

The Pacific Northwest is about to begin the greatest species recovery effort in the history of the world. Fortunately for the Pacific salmon, the Washington Supreme Court has elected to protect the public’s interest in protecting instream flows against impairment from further, ill-advised, groundwater appropriations.