

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

ROUND LAKE FARMS, LLC,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 21-046

ORDER ON SUMMARY JUDGMENT
MOTIONS

I. INTRODUCTION

Appellant Round Lake Farms, LLC, (Round Lake) filed an appeal with the Pollution Control Hearings Board (Board) on July 9, 2021, challenging the State of Washington, Department of Ecology’s (Ecology) modification of a Grant County Water Conservancy Board (Conservancy Board) decision regarding groundwater right G3-01216C. Ecology issued its decision on June 9, 2021. On October 3, 2022, Round Lake and Ecology filed cross motions for summary judgment on all the legal issues in the case.

The Board deciding this matter was comprised of Presiding Member Neil L. Wise, Board Chair Carolina Sun-Widrow, and Member Michelle Gonzalez. Attorney Norman M. Semanko appeared on behalf of Round Lake. Assistant Attorney General Matthew T. Janz appeared on behalf of Ecology.

In ruling on the motions, the Board considered the following materials:

1. Motion for Summary Judgment (*Round Lake Motion*);

- 1 2. Declaration of Randy Reber in Support of Motion for Summary Judgment, with
2 attached Exhibits (*Exs.*) A-C (*Reber Decl.*);
- 3 3. State of Washington, Department of Ecology’s Response to Round Lake Farms’
4 Motion for Summary Judgment (*Ecology Response*);
- 5 4. Declaration of Matthew Janz in Support of State of Washington, Department of
6 Ecology’s Response to Round Lake Farms’ Motion for Summary Judgment, with
7 attached Exhibit A (*Janz Decl.*);
- 8 5. Round Lake Farms, LLC’s Reply in Support of Motion for Summary Judgment (*Round*
9 *Lake Reply*);
- 10 6. State of Washington, Department of Ecology’s Motion for Summary Judgment
11 (*Ecology Motion*);
- 12 7. Declaration of Jaime Short in Support of State of Washington, Department of
13 Ecology’s Motion for Summary Judgment (*Short Decl.*);
- 14 8. Round Lake Farms, LLC’s Response in Opposition to Ecology’s Motion for Summary
15 Judgment (*Round Lake Response*);
- 16 9. Reply in Opposition to Round Lake Farms, LLC Motion for Summary Judgment
17 (*Ecology Reply*);
- 18 10. Notice of Appeal (*Round Lake Appeal*) with attached Ecology decision letter, dated
19 July 9, 2021 (*Decision Letter*); and,
- 20 11. The Board’s file in this matter.

- A water service contract.¹

Id., ¶ 10.

RCW 90.44.510 provides that Ecology “shall issue a superseding water right permit or certificate for a groundwater right where the source of water is an aquifer” in a groundwater management subarea and water from the Columbia Basin Project is delivered for use by the person holding the groundwater right. The superseding permit or certificate “shall designate that portion of the groundwater right that is replaced by water from the federal Columbia Basin project as a standby or reserve right” that may only be used when water delivered by the federal project is not available. RCW 90.44.510. *See also Fode*, PCHB No. 18-002c, p. 4. (“In 2004, the Legislature determined that if lands that are served by state water rights come to be served with federal surface water delivered by the Columbia Basin project, the state water rights as a matter of law become ‘standby or reserve’ rights that cannot be used when federal water is available.”).

RCW 90.44.550 was adopted in 2022 to replace RCW 90.44.520, which expired on July 1, 2021. The language of both statutes is essentially the same. In order to encourage more efficient use of water in the Odessa Subarea, RCW 90.44.550 provides that specified unused water is deemed a standby or reserve water supply, unless Ecology has issued a superseding water right pursuant to RCW 90.44.510. RCW 90.44.550(1). Further, the statute states that if “water from the federal Columbia basin project has been delivered to a place of use authorized under a right to withdraw groundwater from the aquifer, the provisions of RCW 90.44.510 apply and supersede

¹ In this context, a contract to deliver surface water to the irrigated lands.

1 the provisions of this section.” RCW 90.44.550(4). If a superseding water right has not been
2 issued, the statute also provides that portions of “rights protected under this section may not be
3 transferred outside Odessa subarea boundaries as defined in WAC 173-128A-040. Transfers
4 within Odessa subarea boundaries remain subject to the provisions of RCW 90.03.380, 90.03.390,
5 90.44.100, and WAC 173-130A-200.” RCW 90.44.550(5).

6 In summary, if a landowner with a groundwater right contracts for surface water from the
7 Columbia Basin Project, Ecology shall issue a superseding water right designating the previously
8 used groundwater as a reserved right that cannot be used unless the surface water is not available.
9 If a water right holder does not take advantage of the Odessa Groundwater Replacement Program,
10 the original groundwater right may not be transferred out of the Odessa Subarea. Transfers within
11 the Odessa Subarea are processed under the standard water right transfer provisions.

12 Ecology has developed what is called the “Odessa clause.” The purpose of the clause is to
13 explain the Odessa Groundwater Replacement Program and the requirement of a superseding
14 water right per RCW 90.44.510. *Short Decl.*, ¶ 15. The clause states as follows:

- 15 1. This right lies within the Odessa Sub Area and eligible for replacement
16 water. If a water service contract is obtained in the future, this right shall be
17 subject to the following provisions;
- 18 2. In accordance with RCW 90.44.510, Ecology “shall issue a superseding
19 water right permit or certificate for a groundwater right where the source of water
20 is an aquifer for which the department adopts rules establishing a groundwater
21 management subarea and water from the federal Columbia Basin project is
delivered for use by a person who holds such a groundwater right. The
superseding water right permit or certificate shall designate that portion of the
groundwater right that is replaced by water from the federal Columbia Basin

1 project as a standby or reserve right that may be used when water delivered by
2 the federal project is curtailed or otherwise not available.

3 3. This water right authorizes use of groundwater in the Odessa Ground Water
4 Management Subarea.

5 4. This provision is being added to clarify that this right will be a standby
6 reserve right that is entirely supplemental to Columbia Basin Project water.
7 Groundwater withdrawn under this authorization shall only be used when delivery
8 of the Project water is interrupted during the Project's irrigation season.
9 Groundwater shall not be used before Project water delivery begins each season
10 and after Project water delivery ends each season.

11 5. Should the contract/delivery of water from the Project be terminated by
12 the water right holder, landowner or successor, this standby/reserve right shall be
13 subject to cancellation. However, such cancellation shall not occur if the
14 contract/delivery of water from the Project is terminated because of an action
15 outside of the control of the water right holder, landowner or successor such as the
16 failure of the United States Bureau of Reclamation and an irrigation district to renew
17 their contract.

18 6. Transfer of this standby reserve water right to other lands, or change in the
19 nature or purpose of use of this right is prohibited.

20 *Short Decl., ¶ 11.*

21 Whenever Ecology receives a change application on a groundwater permit with a place of
use that is eligible for the Odessa Groundwater Replacement Program, Ecology staff adds the
Odessa clause as a provision. *Short Decl., ¶ 12.*

Round Lake is located in Grant County, Washington, and has state water rights to use water
from Round Lake for irrigation of land located south of the lake. *Reber Decl., ¶ 3.* Due to water
supply changes, Round Lake purchased a groundwater right (G3-01216C) and applied for a
transfer to move the water right to property adjacent to the land south of the lake. The original

1 place of use for the G3-01216C right was located in the Odessa Subarea. The transfer application
2 requested to change a portion of the place of use to land that was previously untilled. Ecology
3 approved the change on March 26, 2018, without adding the Odessa clause.² *Id.*, ¶¶ 11-13.

4 For the 2019 irrigation season, Round Lake applied for and received a seasonal change
5 authorization that allowed them to irrigate land on the west side of East low Canal using the G3-
6 01216C water right.³ *Reber Decl.*, ¶ 13. In the 2020 transfer application, Round Lake proposed to
7 use water from two existing wells in Section 19, Township 22 North, and Range 28 East for
8 irrigating 317 acres from April 1 to October 31, 2020. The place of use would be changed by
9 adding the SW1/4 of Section 19 west of East low Canal. *Decision Letter*. The land added to the
10 place of use is in the Quincy Groundwater Management Subarea. *Reber Decl.*, ¶¶ 13-14. The
11 Conservancy Board approved the change request. *Id.*, ¶ 15. In its June 9, 2021, letter, Ecology
12 notified Round Lake that it had also approved the transfer, but modified the decision of the
13 Conservancy Board. Ecology added the Odessa clause to pages 9 and 10 of the Provisions section
14 of the Conservancy Board's Report of Examination. *Decision Letter*.

15 The following facts are undisputed in this case:

- 16
- 17 • Ecology has the authority to condition water right transfers. *Ecology Motion*, p. 8; *Round*
18 *Lake Response*, p. 5, n.1; *Round Lake Reply*, p. 2.

20 _____
21 ² According to Jaime Short, Ecology's Water Resources Section Manager for the Eastern regional office, the 2018
transfer approval should have included the Odessa clause. *Short Decl.*, ¶ 13.

³ This approval was also issued without the Odessa clause.

- 1 • There is no water delivery contract for Lake Roosevelt surface water at the place of use
2 identified in Round Lake’s 2020 change request. *Ecology Motion, p. 10; Round Lake*
3 *Motion, p. 6; Round Lake Response, p. 2; Reber Decl., ¶ 12.*
- 4 • A portion of the proposed place of use is in the Odessa Subarea and therefore eligible for
5 replacement surface water from the Columbia Basin Project. *Short Decl., ¶¶ 13, 16; Reber*
6 *Decl., ¶ 12; Round Lake Appeal, p. 3; Round Lake Motion, p. 6; Ecology Motion, p. 7.*

7 **III. ANALYSIS**

8 **A. SUMMARY JUDGMENT STANDARD**

9 Summary judgment is a procedure available to avoid unnecessary trials where there is no
10 genuine issue of material fact. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 675-
11 76, 292 P.3d 128 (2012). The summary judgment procedure is designed to eliminate trial if only
12 questions of law remain for resolution, and neither party contests the facts relevant to a legal
13 determination. *Rainier Nat’l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443
14 (1990), *review denied*, 117 Wn.2d 1004 (1991).

15 A moving party is entitled to summary judgment “if the pleadings, . . . together with the
16 affidavits, if any, show that there is no genuine issue as to any material fact and the the moving
17 party is entitled to a judgment as a matter of law.” Civil Rule 56(c); *See, Magula v. Benton Franklin*
18 *Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment
19 proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d
20 451, 456, 824 P.2d 1207 (1992).

1 Summary judgment is subject to a burden shifting scheme. If the moving party satisfies its
2 burden, then the nonmoving party must present evidence demonstrating that material facts are in
3 dispute. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).
4 When determining whether an issue of material fact exists, all facts and inferences are construed
5 in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068
6 (2002). However, bare assertions concerning alleged genuine material issues do not constitute facts
7 sufficient to defeat a summary judgment motion. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140,
8 331 P.3d 40 (2014). A nonmoving party cannot rely on speculative statements or conclusory
9 allegations to defeat summary judgment. *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App.
10 731, 736, 150 P.3d 633 (2007).

11 Once it is determined that no genuine issues of material fact exist, the court then analyzes
12 which party is entitled to judgment as a matter of law. *Skagit Hill Recycling v. Skagit Co.*, 162 Wn.
13 App. 308, 318, 253 P.3d 1135 (2011).

14 **B. LEGAL ISSUES**

15 The parties submitted and agreed to the following legal issues which govern the case:

- 16 1. Whether the Department of Ecology erred in applying the provisions of
17 RCW 90.44.510 to Round Lake Farms' ground water right no. CG3-01216C.
- 18 2. Whether the Department of Ecology erred in conditioning the ground water right
19 to prohibit future transfers/changes of use.
- 20 3. Whether Ecology improperly modified and approved Round Lake Farms'
21 Application for Change/Transfer under Ground Water Certificate No. G3-01216C.
4. Whether Ecology's actions misinterpreted or misapplied relevant legal authorities,
including RCW 90.03.380, RCW 90.44.520, and RCW 90.80.070.

1 Prehearing Order, p. 2.

2 **C. BOARD ANALYSIS**

3 **1. Parties' arguments:**

4 Round Lake argues that Ecology mistakenly applied RCW 90.44.510 to its water right
5 transfer application. Round Lake contends that Ecology should have unconditionally approved the
6 transfer under RCW 90.03.380. Round Lake also contends that Ecology's conditions are contrary
7 to RCW 90.44.510, 90.44.520, 90.03.380, and 90.80.070. Round Lake does not dispute that
8 Ecology has general conditioning authority over water right transfers or that there is currently no
9 water delivery contract for the property.

10 Ecology responds that the Odessa clause is only informational and is not in force unless,
11 and until, a water contract exists for delivery of surface water from the Columbia Basin Project.
12 Ecology states that the Odessa clause is within its conditioning authority, and it adds the Odessa
13 clause to all groundwater right approvals in the Odessa area. Also, Ecology argues that it did not
14 convert Round Lake's water right into a standby or reserve right since no federal water contract
15 existed.

16 **1. Legal Issue 1**

17 Legal Issue 1 asks whether Ecology erred in applying RCW 90.44.510 to Round Lake's
18 water transfer. It is undisputed that a portion of Round Lake's place of use is within the Odessa
19 Subarea and therefore, eligible for replacement surface water from the Columbia Basin Project.
20 The Odessa clause, added to the Conservancy Board approval, begins with the statement that the
21

1 water right “lies within the Odessa Sub Area and [*sic*] eligible for replacement water.⁴ **If a water**
2 **service contract is obtained in the future, water use under this right shall be subject to the**
3 **following provisions”** (emphasis added). By its own terms, the Odessa clause only applies if a
4 water delivery contract is developed for the place of use. *See* RCW 90.44.550 (If water from the
5 federal Columbia basin project has been delivered . . . the provisions of RCW 90.44.510 apply).
6 The Odessa clause is not effective or enforceable unless and until a water delivery contract is
7 developed for the place of use. Once a water contract exists, the Odessa clause becomes binding
8 and enforceable, pursuant to RCW 90.44.510 and 90.44.550.

9 However, the Board concludes that Ecology did not apply the provisions of RCW
10 90.44.510 to Round Lake’s water transfer. Had it done so, Ecology would have issued a
11 superseding water right, as required by the statute. It is also undisputed that there is no water
12 service contract for the relevant place of use. Therefore, RCW 90.44.510 is not currently applicable
13 to the Round Lake transfer.

14 RCW 90.44.510 potentially applies because a portion of the place of use is in the Odessa
15 Subarea. Therefore, Ecology included the Odessa clause in the transfer provisions. *Short Decl.*, ¶
16 12 (“Whenever I receive a change application on a groundwater permit where a place of use is
17 eligible for the Odessa Groundwater Replacement Program, I add the ‘Odessa Clause’ as a
18 provision.”). Ecology developed the Odessa clause “to explain to the water user the Odessa
19 Groundwater Replacement Program and the requirement of a superseding water right certificate
20

21 ⁴ *See also Short Decl.*, ¶ 16 (A “portion of the Round Lake permit at issue in this case is eligible for water through
the Odessa Groundwater Replacement Program from the Columbia Basin Project.”)

1 per RCW 90.44.510.” *Short Decl.*, ¶ 15. Adding an informational clause is not an application of
2 RCW 90.44.510.

3 The Board rules in favor of Ecology on Legal Issue 1.

4 **2. Legal Issue 2**

5 Legal Issue 2 asks whether Ecology erred in conditioning Round Lake’s water right to
6 prohibit future transfers. It is undisputed that Ecology has authority to condition water right
7 transfers. *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 597, 957 P.2d 1241 (1998). The Board
8 concludes that Ecology did not condition Round Lake’s water right to prohibit future transfers.
9 The Odessa clause does contain a provision prohibiting transfer of “this standby reserve water
10 right to other lands, or change in the nature or purpose of use of this right.” *Short Decl.*, ¶ 11. This
11 prohibition only applies to a standby reserve water right created by the superseding water right
12 required by RCW 90.44.510. As stated above, Round Lake has no water service contract for the
13 area in question, RCW 90.44.510 does not apply, and Ecology has not issued any superseding
14 water right.

15 Because there was no water delivery contract in place, Ecology included the Odessa clause
16 for informational purposes only. *Short Decl.*, ¶¶ 13, 15. Ecology did not prohibit any transfers of
17 Round Lake’s water right,⁵ and only notified Round Lake of possible future conditions on a reserve
18 water right that does not exist yet.

19 The Board rules in favor of Ecology on Legal Issue 2.
20

21 _____
⁵ As noted earlier, Ecology approved Round Lake’s current transfer request.

1 **3. Legal Issue 3**

2 Legal Issue 3 asks whether Ecology improperly modified Round Lake’s application.
3 Ecology modified the Conservancy Board’s decision in three places: (1) a modification of the legal
4 description on page two of the Report of Examination (ROE); (2) changing a sentence regarding
5 public notice on page five of the ROE; and, (3) adding the Odessa clause to the Provisions section
6 on pages nine and ten of the ROE. *Decision Letter*. Round Lake only challenges the third
7 modification relating to the Odessa clause.

8 Based on the analyses for Legal Issues 1 and 2, the Board concludes that Ecology did
9 modify the application, but the challenged modification was not improper. Ecology merely added
10 an informational clause to the Provisions in the Conservancy Board decision approving the
11 transfer. There was no improper, substantive change to the decision.⁶ The Board rules in favor
12 of Ecology on Legal Issue 3.

13 **4. Legal issue 4**

14 Legal Issue 4 asks whether Ecology misinterpreted or misapplied RCW 90.03.380,
15 90.44.520, and 90.80.070. RCW 90.03.380 governs permanent water right transfers.⁷ As
16 explained above, RCW 90.44.520 expired July 1, 2021, and was adopted as RCW 90.44.550 in
17 2022. RCW 90.80.070 governs the Conservancy Board transfer approval process and does not
18 apply to Ecology. Ecology’s primary role in this process is determined by RCW 90.80.080, which
19

20 _____
21 ⁶ Any sub-issues regarding the substance of the Odessa clause conditions are not ripe, as the Odessa clause is not currently effective for Round Lake’s transfer request. *See Ecology Motion, p. 10.*

⁷ RCW 90.03.390 applies to seasonal water right transfers.

1 states “[Ecology] shall review the record of decision of the [conservancy] board and shall affirm,
2 reverse, or modify the action of the board” RCW 90.80.080.

3 With no water contract from the Columbia Basin Project, RCW 90.03.380 still applies to
4 Round Lake’s transfer request. RCW 90.44.550(5). This statute allows the transfer of water rights
5 if “such change can be made without detriment or injury to existing rights.” RCW 90.03.380(1).
6 Presumably, Ecology reviewed Round Lake’s proposed transfer under this statute. *See Round Lake*
7 *Motion, p. 9*. Round Lake’s primary objection to Ecology’s decision centered on the addition of
8 the Odessa clause. Round Lake alleges that Ecology misinterpreted or misapplied RCW
9 90.03.380 but provides no specific arguments or evidence to support the allegation, other than the
10 addition of the Odessa clause.

11 Under the facts of this case, the Board concludes that Ecology did not misconstrue or
12 misapply RCW 90.03.380 or RCW 90.44.550. Ecology has no obligations under RCW 90.80.070.
13 The Board rules in favor of Ecology on Legal Issue 4.

14 Based on the above analysis, the Board concludes that there are no genuine issues of
15 material fact pertaining to the legal issues in this case, and that Ecology is entitled to judgment as
16 a matter of law on Legal Issues 1-4. Therefore, the Board grants Ecology’s motion for summary
17 judgment. With regard to Round Lake’s motion, the Board again concludes that there are no
18 genuine issues of material fact, but under the facts of this case Round Lake is not entitled to
19 judgment as a matter of law. Consequently, the Board denies Round Lake’s motion for summary
20 judgment.

21 **IV. ORDER**

ENVIRONMENTAL HEARINGS
Pollution Control Hearings Office
Shorelines Hearings Office



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STATE OF WASHINGTON

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January 24, 2023

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Re: **PCHB N0. 21-046c**
ROUND LAKE FARMS, LLC V. WASHINGTON STATE DEPARTMENT OF
ECOLOGY

Dear Parties:

Enclosed is the Pollution Control Hearings Board's Order on Summary Judgment in the above referenced matter.

You are being given the following notice as required by RCW 34.05.461(3): Any party may file a petition for reconsideration with the Board. A petition for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final decision. WAC 371-08-550.

This is a FINAL ORDER for purposes of appeal to Superior Court within 30 days. See Administrative Procedures Act (RCW 34.05.542) and RCW 43.21B.180.

Sincerely,

A handwritten signature in cursive script that reads "Neil L. Wise".

Neil L. Wise, Presiding

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January 24, 2023

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NLW/jm/P22-046c

Encl.

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via email only.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED January 24, 2023, at Tumwater, WA.

A handwritten signature in cursive script that reads "Jessica Monroe". The signature is written in black ink and is positioned above a horizontal line.