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7 **STATE OF WASHINGTON**
KITSAP COUNTY SUPERIOR COURT
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TAHUYEH LAKE COMMUNITY CLUB, Plaintiff, v. STATE OF WASHINGTON, acting through its DEPARTMENT OF FISH AND WILDLIFE, Defendant.	NO. 08-2-00728-8 FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT 11 9 01724 6

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15 **I. JUDGMENT ENTRY**

Judgment Creditor:	State of Washington
Judgment Creditor's Attorney	James R. Schwartz
Judgment Debtor	Tahuyeh Lake Community Club
Judgment Debtor's Attorney	Dennis Reynolds
Costs and Statutory Attorney Fees	$200.00

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22 This matter was tried to the Court, without a jury, from April 4 through April 6, 2011.
23 The undersigned judge presided at the trial. The primary issue presented at trial related to
24 whether the State of Washington possesses a riparian right to use the surface of a body of
25 water commonly referred to as "Lake Tahuyeh." This issue required the resolution of the
26 following questions: (1) whether Tahuyeh qualified as a lake when the State acquired the

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1 property in 1939; (2) whether the 1939 deed by which the State of Washington acquired the
2 property was ambiguous; (3) whether the State owns a portion of the lake bed abutting the
3 upland State owned parcel; and (4) whether the State and the general public through the
4 State's ownership, acquired the right to recreate on Lake Tahuyeh incident to the State's
5 ownership of the abutting lot. Plaintiff, Tahuyeh Lake Community Club, appeared through its
6 counsel, Dennis Reynolds and the Defendant, State of Washington Department of Fish and
7 Wildlife, appeared through its counsel James R. Schwartz, Assistant Attorney General.

8 Plaintiff submitted testimony by the following witnesses: Henry Bruemmer, Charles
9 Ruiz, Vern Christopher, Dr. Lyndon Lee, Marc Adam, and Jeanette Bulette. Defendant
10 submitted testimony by the following witnesses: Dennis Gelvin, Terry Curtis, Richard
11 Belmont, Charles Brough, and Michele Culver. The Court issued its Memorandum of
12 Decision on July 15, 2011. That Memorandum of Decision is adopted as part of these
13 Findings of Fact and Conclusions of Law and attached as Exhibit A.

14 Based on the evidence presented at trial, the Court hereby makes the following
15 Findings of Fact and Conclusions of Law.

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II. FINDINGS OF FACT

17 1. The body of water located in Kitsap County that is the subject of this lawsuit is and has
18 always been a lake, and not merely a marsh-like area, because it is a reasonably
19 permanent body of water substantially at rest in a depression in the surface of the earth
20 and is of natural origin.

21 2. The lake is commonly known as "Lake Tahuyeh" or "Lake Tahuya" and is located
22 mostly within Section 17, Township 24 North, Range 1 West W.M.

23 3. Section 17, Township 24 North, Range 1 West W.M., which includes Lake Tahuyeh,
24 was surveyed at the request of the federal government in 1879. The surveyor drew a
25 meander line around Lake Tahuyeh to approximate the edge of the lake. The area
26 within the surveyed meander line was approximately 32 acres.

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4. Other official historic documents characterize the body of water as a lake and estimate the lake is approximately 17 acres in size.

5. Numerous maps produced by both government and private companies identify the body of water known as Lake Tahuyeh as a lake.

6. The lake was shallow, but deep enough to float a "largish" boat. The lake is deemed non-navigable by stipulation of all parties.

7. The lake supported a population of fish that includes brook trout and cutthroat trout.

8. The federal government conveyed Lot 3 of Section 17, Township 24 North, Range 1 West W.M. to Estus C. Combs in 1889. The federal patent that conveyed the property did not reserve any rights in the land or lake to the federal government.

9. Through a succession of conveyances, the Lake Tahuyeh Community Club came to acquire title to all land surrounding Lake Tahuyeh, save that owned by the Department. The Lake Tahuyeh Community Club is an association of 229 families owning property around the shoreline of Lake Tahuyeh.

10. Mr. Combs conveyed Lot 3 to Puget Sound Peat Moss. Puget Sound Peat Moss conveyed the following portion of Lot 3 to the State of Washington Department of Game in 1939.

> That part of No. 200 feet of Lot Three Sec. 17, Township 24 N, R 1, WWM, lying west of the C.C.C., road project #6 and between said road and the meander line of Tahuyeh Lake.

11. The property legally described in Findings #10 abuts Lake Tahuyeh.

12. The surrounding facts and circumstances together with the language used in the 1939 deed of conveyance indicate that Puget Sound Peat Moss intended to and did convey the property, legally described in Finding #10, to the State of Washington Department of Game including riparian rights to use the entire lake. The conveyance was intended to provide public access to Lake Tahuyeh.

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13. The 1939 deed from Puget Sound Peat Moss also conveyed a pie-shaped wedge of the lake-bed to the center of the lake.

14. In 1963, a predecessor in interest to Plaintiff, William Hobson, obtained a reservoir permit from the State of Washington under state law to clear a reservoir, construct a dam and impound water in Tahuyeh. The reservoir that replaced Lake Tahuyeh is approximately 125 acres.

Any conclusion of law deemed to be properly a Finding of Fact is hereby adopted as such.

III. CONCLUSIONS OF LAW

15. This Court has jurisdiction to adjudicate this matter.

16. The definition of lake that determines the factual and legal issues in this case is that definition provided in the Restatement (First) of Torts § 842:

> A "lake," as used in this Chapter [Interference With the Use of Water ("Riparian rights")], is a reasonably permanent body of water substantially at rest in a depression in the surface of the earth, if both depression and body of water are of natural origin or a part of a watercourse.

17. The Restatement definition is consistent with other sources of definitions of the term lake, including the various dictionary definitions. *See Webster's Third New International Dictionary* p. 1265 (2002 ed.); *Webster's Seventh New Collegiate Dictionary* (1916) (1972); *The American Heritage Dictionary of the English Language,* (4th ed. 2006; see also *Black's Law Dictionary* (2009 9th ed.).

18. The common law riparian right to recreate on water attaches to non-navigable lakes. *Botton v. State,* 69 Wn.2d 751, 756, 420 P.2d 352 (1967).

19. Riparian rights automatically transfer with real property, unless reserved in the language of the deed. *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 582, 38 P.147 (1894). The 1939 deed to the Department of Game did not reserve any such riparian rights.

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20. Conveyance of property abutting a lake conveys the riparian right to recreate on the entire lake. *Snively v. Jaber*, 48 Wn.2d 815, 821-22, 296 P.2d 1015 (1956); *Botton v. State* 69 Wn.2d 751, 420 P.2d 352 (1967).

21. Conveyance of property abutting a lake conveys a pie-shaped wedge of the lake bottom to the center of the lake. *Bourgois v. United States*, 12 Ct. Cl. 32, 545 F.2d 727, 730 (1976).

22. When the Department of Ecology issues a water certificate for appropriation of water under the 1917 water code, RCW 90.03, that certificate does not extinguish prior common law riparian rights of landowners abutting the body of water to recreate on the body of water.

23. When a person(s) expands the size of a natural lake by artificial means, such as a dam impoundment, that act does not extinguish prior common law riparian rights of landowners abutting the body of water to recreate on the body of water.

24. Defendant and the general public as authorized by the Department of Fish and Wildlife have a riparian right to recreate on the entire Lake Tahuyeh.

Any Finding of Fact deemed to be properly considered a Conclusion of Law is hereby adopted as such.

IV. JUDGMENT

Based on the foregoing Findings of Fact and Conclusions of Law, the Court enters final judgment in favor of Defendant, State of Washington Department of Fish and Wildlife, as follows:

1. The State of Washington, as owner of the property abutting a non-navigable lake called Lake Tahuyeh and legally described below, and the general public as authorized by the State of Washington Department of Fish and Wildlife, have a right to recreate on the entire surface of Lake Tahuyeh, which rights include the right to boat and fish on and throughout the entire lake.

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That part of the North. 200 feet of Lot Three, Sec. 17, Township 24 N, Range 1 West, W.M, lying west of the C.C.C., road project #6 and between said road and the meander line of Tahuyeh Lake.

2. The State of Washington owns a pie-shaped wedge of the bed of Lake Tahuyeh starting from the upland portion of the above described parcel, and running westward to the center of Lake Tahuyeh, and such rights include the right to construct improvements (including a dock or pier) that attach to the lake bed within this pie-shaped area to facilitate recreational use of the lake, as otherwise permitted by law.

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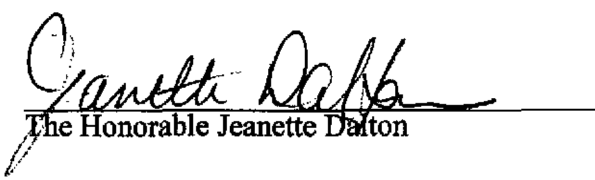
3. Any claims inconsistent with the above judgment and such other requests for declaratory relief by Plaintiff are dismissed with prejudice.

4. The state is awarded its statutory costs and statutory attorney fees.

DATED this 15 day of August, 2011.

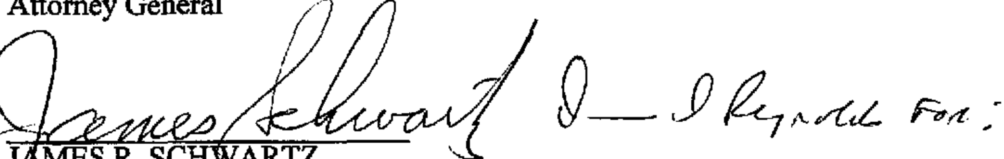
KITSAP COUNTY SUPERIOR COURNT



The Honorable Jeanette Dalton

Presented by:

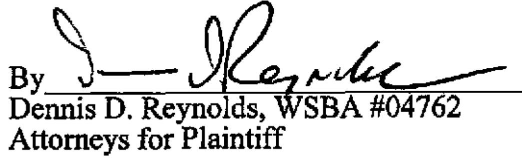
ROBERT M. MCKENNA
Attorney General



JAMES R. SCHWARTZ
Assistant Attorney General
WSBA #20168
Attorney for Defendant

Approved as to Form Only:

DENNIS D. REYNOLDS LAW OFFICE



By
Dennis D. Reynolds, WSBA #04762
Attorneys for Plaintiff

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EXHIBIT A

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SUPERIOR COURT OF WASHINGTON
IN AND FOR KITSAP COUNTY

TAHUYEH LAKE COMMUNITY CLUB,

Plaintiff,

vs.

STATE OF WASHINGTON, acting through its DEPARTMENT OF FISH AND WILDLIFE,

Defendant.

NO. 08-2-00728-8

MEMORANDUM DECISION

THIS MATTER came for bench trial on April 4-6, 2011. The Plaintiff is Tahuyeh Lake Community Club (the "Community Club") an association of property owners possessing land on the shoreline of the water body known as Lake Tahuyeh ("Tahuyeh"). The Defendant is the State Department of Fish and Wildlife (the "Department"),[1] which owns a small parcel of land on the same shoreline. The Community Club seeks to establish the nature of the State's rights in its shoreline property. Specifically, the Community Club seeks to establish that the State cannot use its parcel to provide public access to the waters of Lake Tahuyeh. In bringing this lawsuit, the members of the Community Club seek to protect important rights to the quiet enjoyment of their private shore side community. In defending this action, the State of Washington also seeks to defend values central to our society, those of public access to public lands. Fortunately, resolution of this action does not require this Court to resolve the relative importance of the competing values represented by the two parties. Rather, centuries of lawmakers have weighed these values for us, and their legal mandates dictate the necessary outcome of this case.

[1] The Department's predecessor in interest to the property at issue here, the Department of Game, is also referred to as the "Department."

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FACTS

This case turns on two narratives: the legal history and the ecological history of lands surrounding and including Tahuyeh.[2]

I. Legal history.

In the early days of our Republic, the government wished to both distribute land and to sell land as a way of raising money for the nation. Before this could happen, the land needed to be surveyed. Originally proposed by Thomas Jefferson,[3] the Public Land Survey System was put in place shortly after the revolutionary war. The system was created when the Continental Congress enacted the Land Ordinance of 1785,[4] directing that government land be surveyed in rectangles.[5] Under this system, surveys of public lands were undertaken to create parcels suitable for disposal by the government. Between 1803 and 1956, most land in the Western portion of the United States was surveyed by the federal government.[6] The surveys were conducted in accordance with detailed guidance set forth in *The Manual of Surveying Instructions for the Survey of the Public Lands of the United States*.[7]

Tahuyeh and its surrounds were surveyed in 1879. When a surveyor set about to survey an area of land, he would "meander" the watercourses in that area, describing by meander line the "sinuosities" of those watercourses.[8] The reason for meandering the watercourse was to accurately assess the size, and thereby the value of the dry land.[9] When the land was

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[2] The water body has been spelled both "Tahuyeh" and "Tahuya." The former, contemporary spelling is used throughout this decision for the sake of consistency, except in quotations.

[3] *See* Morris L. Hawk, *"As Perfect as Can be Devised:" Deprolph v. State of Ohio and the Right to Education in Ohio*, Comment, 45 CASE W. RES. L. REV. 679, 701 (1995).

[4] General Land Ordinance of 1785, *reprinted in* 28 JOURNALS OF THE CONTINENTAL CONGRESS 375 (Jon Fitzpatrick ed., 1933).

[5] Townships are supposed to be six miles square; sections are supposed to be one mile square containing 640 acres.

[6] William B. Stoebuck and John W. Weaver 18 WASH. PRAC., REAL ESTATE § 13.2 (2d ed.) (hereinafter Stoebuck, § 13.2).

[7] *Id.*

[8] William B. Stoebuck and John W. Weaver 18 Wash. Prac., REAL ESTATE § 13.5 (2d ed.) (hereinafter Stoebuck, § 13.5).

[9] *See Bernot v. Morrison*, 81 Wash. 538, 556 (1914).

1 subsequently conveyed by the government, its value would be calculated by subtracting the area
2 occupied by a watercourse. When Tahuyeh was surveyed, its shoreline was meandered.

3 In the late 19th century, Tahuyeh and its surrounds were owned by the United States
4 government. The lands were conveyed from the federal government to two individuals by
5 "patent."[10] Scarcely one month before Washington was admitted to the Union as the 42nd state,
6 Estus C. Combs received title to a portion of these lands on October 3, 1889; the other area of
7 land at issue in this case was patented to Simon McLeod. Mr. Combs' title included government
8 lots two, three and four of Section 17, Township 24 N., Range 1, WWM.; Mr. McLeod's title
9 was to government lot one.

10 The parcel currently owned by the Department, is a portion of the land originally
11 patented to Mr. Combs, government lot 2. The Department acquired its land on July 25, 1939
12 from Puget Sound Peat Moss, Inc. At that time, Puget Sound Peat Moss owned (as successor in
13 title to Mr. Combs) the land devised to the State, and approximately 133 acres of land
14 surrounding and including Tahuyeh.[11] A 1939 deed to the State Department of Game conveyed
15 fee simple title to the following described property:

16
17 > That part of the No. 200 feet of Lot Three Sec. 17, Township 24 N, R 1, WWM, lying west of the C.C.C. road project # 6 and between said road and the meander line of Tahuyeh Lake.
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19 In 1963 a predecessor in interest to members of the Community Club, William Hobson,
20 obtained permission from the State to construct a dam, impounding water in Tahuyeh.
21 Approximately half of the Department's lot was flooded as a result.

22 Through a succession of conveyances, the Community Club came to acquire title to all
23 land surrounding Tahuyeh, save that owned by the Department. The Community Club is an
24 association of 229 families owning property around the shoreline of Tahuyeh. The Community
25 Club considers Tahuyeh to be a privately owned reservoir, to which its members have exclusive
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29 [10] In the context of real property, federal patents refer to an instrument by which the United States Government conveys its lands. *See* Stoebuck, § 13.2, *supra.*

30 [11] Government Lots Two, Three, Four, and portions of Section 17, 18, and 19 in Township 24 R 1, WWM.

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rights of access and use. The Department is the sole property owner along the shoreline of Tahuyeh that is not a member of the Community Club.

II. Ecological history.

The critical factual dispute in this case concerns the ecological history of Tahuyeh. The parties disagree about whether, at historical times material to the case, Tahuyeh was a "lake." As discussed in the legal analysis in the sections below, the water body's status as a "lake" would entail that a property owner along its shoreline would have the right to make certain uses of the water body. Yet where a wetland body fails to qualify as a lake, the landowner has no such rights. The present section of this Memorandum will resolve the material facts concerning the historic water body; the legal significance of the facts will be discussed in following sections.

The Court had the opportunity to hear from several County residents who spent time at Tahuyeh in the first half of the last century. Henry Bruemmer, age 86, worked in the vicinity of Tahuyeh during the Second World War, clearing roads. He viewed Tahuyeh in the summer of 1942 and described it as a "marsh" with no visible open water. Over the course of perhaps a dozen hunting trips in later years he saw water in trenches dredged by peat harvesting, but no other open water. He even drove his pickup truck through a portion of the marsh.

Charles Ruiz, age 77, harvested peat moss on or around Tahuyeh in 1946-48. The structure used as the peat processing plant was on a small rise, from which Mr. Ruiz could see what he described as the marsh. In the summer he could see the glint of water in some portions of marsh, but it was otherwise "dry as it could be." He never saw open water in the middle of the water body. Mr. Ruiz hiked adjacent Green Mountain several times in late autumn and could see Tahuyeh, but identified no open water. Mr. Ruiz had heard that cutthroat sometimes ran in Tahuyeh River, but never saw any himself.

Vern Christopher, age 69, played by Tahuyeh when he was a child, when his father worked at nearby Camp Union. In the winter he would sled on Green Mountain, and said that if he had spotted ice on Lake Tahuyeh he would have gone there (but he did not). In the summer he fished open water by Gold Creek.

The Department called two eye witnesses. Charles Brough, who was raised at Camp Union, rode frequently past Tahuyeh in his childhood. He could see an area of open water, perhaps an acre in size.. In 1958 he launched a boat in Tahuyeh and caught an 18-inch cutthroat; he was able to drive close to the open water and did not have to carry the boat far. Mr. Brough said he had a hard time seeing the Tahuyeh from Green Mountain. Similarly, Richard Belmont testified that he fished Tahuyeh as a child, perhaps five or six times, sometime around 1952. He described the water body as a small lake with approximately five acres of open water. He said the fishing was good, and that he caught cutthroat, rainbow trout, and maybe steelhead.

The Court finds that the testimony of the Plaintiff's eyewitnesses credible but unpersuasive as regards the issues at hand. The Court finds that although Messrs. Bruemmer, Ruiz, and Christopher viewed Tahuyeh as almost exclusively a marsh, lacking substantial open water, they had only obstructed views from the banks of the water body or from the side of Green Mountain. Though the Court takes at face value that they did not see substantial open water, this does little to rule out the possibility that they saw only a portion of the lake.

The Court finds credible the statements of Messrs. Brough and Belmont, that they fished on Lake Tahuyeh. It is particularly probative that Mr. Belmont was able to float a boat on a substantial body of open water in 1952, and that he was able to easily launch his boat from an access point.

The chief witness relied upon by the Community Club was Dr. Lynden Lee, an accomplished wetlands scientist. It was Dr. Lee's ultimate opinion that, in the early 1900s, Lake Tahuyeh qualified as a "fen"[12] rather than as a lake: prior to the time water was impounded by a dam constructed by the Community Club, Dr. Lee opines that Tahuyeh would have been a relatively flat, marshy area, peat-based and mineral rich. Dr. Lee's opinion was formed on the basis of information including a visit to the current Lake, interviews with eye-witnesses, and extensive historical documents including aerial photographs. Dr. Lee interpreted a number of historic aerial photographs, which he said depicted vegetation consistent with a "low-energy" wetland system such as a fen. The pervasive vascular plant life indicated in photographs

[12] In colloquial English, a fen is "low land covered wholly or partially with water unless artificially drained." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1916) (1972) (hereinafter WEBSTER'S).

1 demonstrated Tahuyeh was not a lake, he opined, since prevalence of such vegetation would be
2 inconsistent with the ecological understanding of the term, lake.[13] Generally, he explained,
3 inland waters less than six-point-six feet deep are considered palustrine in nature and are not
4 lakes, which is to say they are characterized by the presence of trees, shrubs, and vegetation that is
5 rooted below water but grows above the surface.[14] To the extent the photographs indicated angular
6 depressions filled with water, he said, these suggest trenches dug in the process of harvesting
7 peat, rather than natural areas of open water. There was, however, no predominant open water
8 component in Tahuyeh.

9 Consistent with Mr. Bruemmer's testimony, Dr. Lee described a 1956 aerial photograph[15]
10 in which it "appeared" that automobiles had been driven across the central area of Tahuyeh.
11 Likewise, Dr. Lee testified – consistent with multiple eye witness accounts – that Tahuyeh could
12 have supported some fish populations as a fen, insofar as the fish could have survived at times of
13 relatively high water level and in the "junction environments" with the connecting streams.[16]
14 However – in contrast to the testimony of Mr. Brough – Dr. Lee opined that it is not feasible to
15 maneuver a boat through a fen, short of tying it to one's waste as a safety/rescue devise.

16 While the Court has no doubt in Dr. Lee's qualifications, it also finds much of the
17 doctor's testimony unhelpful to the resolution of the pertinent issues in this case. As further
18 discussed below, the Court cannot adjudicate the legal issues in this case based upon an
19 ecologist's definition of the term "lake." As regards the rights at issue in this case, that term is a
20 legal one, and is not necessarily mutually exclusive with a water body that an ecologist might
21 characterize as a fen. The Court finds Dr. Lee's testimony largely credible with regard to the
22 nature of vegetative life historically present in the Lake. But the Court finds the doctor less
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25 [13] On the ecological view referenced by Dr. Lee, lakes are, *inter alia*, water bodies of such a depth that pervasive colonization by vascular plant life is not feasible.
26 [14] *See* THE AMERICAN HERITAGE SCIENCE DICTIONARY (2005). From one of the trial's more colorful exchanges, it
27 appears this six-point-six foot figure derives from the somewhat arbitrary fact that ducks dive to such a depth in search of food. Dr. Lee testified that six-point-six feet of depth is typically considered the "flip point" between a
28 lake and a palustrine system.

[15] Ex. D-29.
29
[16] Because the fen would have been nutrient poor, the fish would likely have moved through the fen rather than
30 reside there.

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credible with regard to his interpretations of aerial photography, at least to the extent the interpretations are inconsistent with the testimony of Terry Curtis, discussed below.

One of the greatest insights into the historic nature of Tahuyeh comes from reconstructing the perceptions of the individual who surveyed the area for the federal government. According to both the 1850 and 1864 official manuals containing the instructions to federal surveyors, all lakes and deep ponds of an area of 25 acres and upwards (in the 1850 manual) or 40 acres (in 1864) were to be meandered. Tahuyeh was surveyed in 1879, and the record in this case includes contemporaneous notes written by the individual who performed the survey. The surveyor's notes indicate that the boundary of Tahuyeh was "meandered." Moreover, the surveyor labeled the area of the water body "Lake" Tahuyeh. The Court finds that the surveyor conducting the 1879 survey followed the survey instructions set forth in the *Manual of Surveying Instructions*, and therefore must have believed that the water body was a lake or deep pond of 40 or more acres.

The Court finds highly probative the multitude of historic documents in the record which demonstrate the view that Tahuyeh was a "lake," at least as far as the documents' authors understood the term. These documents include the following:

Ex. P-1	*Place Names of Washington*, which refers to Lake Tahuyeh as a "[s]hallow marshy *lake*, 17.9 acres..."[17]
Ex. P-3	*Lakes of Washington*, which describes Lake Tahuyeh as a peat bog *lake* with very little open water *surrounded* by 84 acres of marsh and with no fish.
Ex. P-7	Bureau of Land Management records and field notes relating to Lake Tahuyeh, which explains "[t]he *lake* in Section 17 is small it's banks low and swampy around its edges, is not very deep, and has a soft muddy bottom and about twenty acres of cranberry

[17] Emphasis added.

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marsh on the south and west side."[18] These notations come from surveyor's notes completed in 1879.

Ex. P-17 Tahuyeh Lake Community Club's permit to construct a dam, which contains language that requires the impounding structure to be equipped with fish passage. Testimony from several witnesses establishes that there was native cutthroat trout in the lake before the dam was built, impounding the water to its present volume of approximately 125 acre-feet.

Ex. P-33 A 1998 flood hazard assessment of the Tahuyeh Lake dam, performed by the Office of Dam Safety, which describes Tahuyeh Lake as occupying a shallow, elongated depression.

Ex. P-34 A Department of Ecology description of Lake Tahuyeh, which describes the Lake as a surveyed lake, 17.9 acres and shallow in depth. The description further states that the *shoreline* is described as private ownership: "Ownership is small private with a portion of State land on the northwest *shore*..."[19]

Ex. P-35 The 1958 *Peat Resources of Washington* by George B. Rigg, which describes Tahuyeh Lake as follows: "[t]he Tahuyeh River flows across the peat into the north end of the *lake*, and out of the south end of the *lake*...The lake *and the peat area* lie in a depression in a hilly region of glacial drift..."[20]

[18] Emphasis added.

[19] Emphasis added.

[20] Emphasis added.

Ex. P-39 The Tahuyeh Lake Integrated Aquatic Vegetation Management Plan of 2003, which explains: "Lake Tahuyeh was originally *surrounded* by a large marsh and has been enlarged by a dam at the south end..."[21]

Ex. P-50 *Reconnaissance Data on Lakes in Washington*, prepared in 1976 by the Department of Ecology, which remarks: "the original lake which was *surrounded* by a large marsh has been enlarged by a dam on the Tahuya river..."[22]

Taken as a whole, these documents persuade the Court that Lake Tahuyeh has always been a lake, not merely a marsh-like area as postulated by the Community Club. The historical documents suggest an area of open water (perhaps of varying size) *surrounded* by a marshy area. This view is consistent with eyewitness accounts of the Lake, as the Court finds that the eyewitnesses who disclaimed any open water in the Lake were viewing only the marshy surrounds.

The Court also finds the testimony of Mr. Terry Curtis, a photogrammetry expert for the Department, to be persuasive and credible. Mr. Curtis detailed a number of early maps and photos which depict Tahuyeh.[23] He explained that he viewed these documents stereoscopically, enabling him to see, for example, that texture on the surface of the Lake was in fact *floating* vegetation (in an August, 1951 photograph).[24] The Court was able to view the aerial photographs stereoscopically with a device provided by Mr. Curtis, and finds his testimony to be highly credible for having incorporated this technique. Mr. Curtis (viewing a 1956 photograph)[25] found no road through the wetland, and the Court finds this conclusion credible (in contrast to Dr. Lee's appraisal that there were tire tracks across the center of Tahuyeh).

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[21] Pg. IV-5 (emphasis added).

[22] Pg. 35 (emphasis added).

[23] These include the following exhibits: D-1, D-7, D-19, D-18, D-20, D-24, D-26, D-27, D-29, D-30, D-37, D-41, and D-44.

[24] Ex. D-27.

[25] Ex. D-29.

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1 While it is clear that the water level in the lake fluctuated in the early years (either by
2 human intervention or natural water flow), and for the reasons set forth at length below, Tahuyeh
3 Lake was always and continues to be a lake.
4
5 ## ANALYSIS

6 The primary issue presented in this case is whether the Department currently possesses a
7 riparian right of use to the surface of Tahuyeh. This question turns principally on the question of
8 whether Tahuyeh was a "lake" when the State received its shoreline parcel in 1939.
9
10 ### I. Does the Department have the riparian right to recreate on the surface of
11 Tahuyeh?

12 The riparian rights issue raises several distinct questions that must be addressed in turn.
13 First, the Court must decide whether, on the record presented in this case, Tahuyeh qualified as a
14 "lake" at the time the Department obtained its shoreline parcel in 1939. Second, if Tahuyeh was
15 a "lake" in 1939, the Court must determine if the conveyance from Mr. Combs to the Department
16 had the effect of transferring ownership of riparian rights. Finally, if the Department acquired
17 riparian rights to Tahuyeh, the Court must determine whether these rights extend to only a
18 fraction of the lake, or to the entire lake.
19
20 #### A. Did Tahuyeh qualify as a "lake" for purposes of riparian rights in 1939?

21 No Washington legal authority gives this Court a clear definition of the term "lake," as
22 applied to the law of riparian rights.[26] The Community Club cites scholarly treatises and the
23 definition used by the U.S. Department of Agriculture;[27] the State cites to a contemporary
24 English language dictionary.[28] None of these sources give conclusive legal guidance for a
25 Washington trial court.
26
27
28 [26] The parties agree that Tahuyeh was not a *navigable* lake in its natural state.
29 [27] Plaintiff's Trial Brief at 13.
30 [28] Defendant's Trial Brief at 4.

One water rights treatise defines a lake as, "a reasonably permanent, naturally occurring, and compact body of water that is substantially at rest in a depression on the earth's surface."[29] The Restatement (Second) of Torts gives a similar definition of lake for riparian rights purposes:

> A "lake," as used in this Chapter [Interference With The Use Of Water ("Riparian Rights")], is a reasonably permanent body of water substantially at rest in a depression in the surface of the earth, if both depression and body of water are of natural origin or a part of a watercourse.[30]

Many English language dictionaries define the term lake with reference to size, being larger than small bodies of water such as a pond.[31] But the Restatement takes the view this distinction of size "is not essential" for purposes of riparian rights.[32]

The Community Club invites the Court to embrace more technical definitions of the term "lake." Chiefly, the Community Club points to the *National Soil Survey Handbook*, published by the Natural Resources Conservation Service, a component of the U.S. Department of Agriculture.[33] The *Handbook* contains an extensive glossary of landform terms, and defines a lake as:

> An inland body of permanently standing water fresh or saline, occupying a depression on the Earth's surface, generally of appreciable size (larger than a pond) and too deep to permit vegetation (excluding subaqueous vegetation) to take root completely across the expanse of water.[34]

The *Handbook* is a technical resource for the "National Cooperative Soil Survey,"[35] which compiles soil information for various stakeholders such as farmers, community planners, and

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[29] Plaintiff's Trial Brief at 13 (quoting WATER AND WATER RIGHTS (Robert E. Beck, ed., 1991) (Supp. 1999)).

[30] RESTATEMENT (SECOND) OF TORTS § 842 (hereinafter RESTATEMENT). A substantially identical definition was used in the first iteration of the *Restatement*. RESTATEMENT (FIRST) OF TORTS § 842 (1939).

[31] *See, e.g.*, WEBSTER'S, *supra* ("a considerable inland body of standing water"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (4th ed., 2006) ("A large inland body of fresh water or salt water"). *See also* BLACK'S LAW DICTIONARY (1891) (9th ed.) ("A large body of standing water in a depression 1of land...").

[32] RESTATEMENT, § 842, cmt. a.

[33] U.S. Department of Agriculture, Natural Resources Conservation Service, *National Soil Survey Handbook*, title 430-VI, *available at* http://soils.usda.gov/technical/handbook/ (last visited April 28, 2011).

[34] *Id.* at Part 629.02.

[35] *Id.* at Part 600.01.

scientists.[36] Such stakeholders may well need to distinguish between bodies of water that support permanent vegetation. But that has no bearing on whether the distinction is pertinent in the present case.

There is some authority for the proposition that a lot is conclusively riparian if it bounders a "meander line," at least in the absence of evidence showing the lot was meant to run only to the meander line and not to the actual edge of the watercourse.[37] As the present case illustrates, this approach would place the disposition of valuable contemporary property rights in the hands of a federal surveyor wandering the forests of our State more than a century past. The Court cannot abdicate to a 19th century functionary the job of adjudicating the property claims at issue in this case.

In the absence of controlling Washington authority, and finding the definition to be not otherwise inconsistent with Washington law, the Court will apply the definition contained in the *Restatement*.

Having found that the *Restatement* definition governs, the evidence in this case requires the conclusion that Tahuyeh was indeed a lake in 1939. The Community Club's eyewitnesses did not see substantial open water on Lake Tahuyeh because its open water was surrounded by a substantial marshy area, where the peat moss was harvested. There was adequate water in which to float a largish boat in the 1950s, and the Court believes the same was true in 1939, at least some of the year. Although the portion of open water may have been as small as an acre at some times of the year, the legal standard requires only that the body be "reasonably permanent."

It is also highly significant that Tahuyeh has been consistently referred to as a lake, long before its water was impounded at its current volume. The colloquial meaning of the English

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[36] *See* http://www.nrcs.usda.gov/programs/soilsurvey/ (last visited April 28, 2011).

[37] William B. Stoebuck and John W. Weaver, 17 WASH. PRAC., REAL ESTATE § 9.12 (hereinafter Stoebuck, § 9.12) ("A landowner whose land bounds upon a stream, lake or salt water, *i.e.*, whose land description includes a boundary described as going to such a body of water *or to the meander line along it, is a 'riparian' owner*") (emphasis added); William B. Stoebuck and John W. Weaver, 17 WASH. PRAC., REAL ESTATE § 10.5 (hereinafter Stoebuck, § 10.5) ("...Washington's decision in *Mood v. Banchero* seems to imply, though it does not hold, that if one side of land described by reference to a government survey or by metes and bounds exactly coincides with the shore of a body of water, the land is riparian. A description to a meander line is presumed to carry to the actual water boundary unless it is clearly shown that the parties actually intended it to carry only to the meander line.") (*citing Mood v. Banchero*, 67 Wash.2d 835 (1966)).

KITSAP COUNTY SUPERIOR COURT
614 Division Street
Port Orchard, WA 98366
(360) 337-7140

word, lake, necessitates that Tahuyeh was consistently viewed as a largish body of inland water. These historical actors could well have referred to the area as a swamp or marsh, but did not do so. They called Tahuyeh a lake because they saw a body of water, and that "reasonably permanent" body of water is indeed a lake for present purposes.

The fact that Lake Tahuyeh contained extensive vascular vegetation does not change this result. Though there is surely some minimum limitation on the depth of a lake under the *Restatement* definition, this Court has no reason to believe that a lake must be of such a depth to exclude the vascular vegetation described by Dr. Lee.

B. Did the Department receive a property interest in the riparian right to use the entire surface of Tahuyeh?

1. Did Estus C. Combs acquire the bed of Tahuyeh from the federal patent?

When Washington obtained statehood in 1889 it acquired ownership "to the beds and shores of all navigable waters in the state."[38] The same is not true for nonnavigable lakes. But as discussed below, under Washington law the owner of a riparian lot adjacent to a nonnavigable lake owns a pie-shaped wedge of the lake bottom extending to the center of the lake; a riparian owner with a lot circling a nonnavigable lake owns the entire lake bottom. Applying this rule, the State Supreme Court has held that a federal patentee acquired the bed of a nonnavigable lake adjoining his lot, absent a reservation to the contrary.[39] It is therefore clear that the Community Club's predecessors in title, Mr. Combs and Mr. McLeod, acquired the bed of Lake Tahuyeh when they received their federal patents in 1889, which contained no reservation of the lakebed.

2. Did Estus C. Combs convey a riparian lot to the State?

It is well established that where a deed includes a call to a meander line, the lot is presumed to bounder the watercourse defined by that meander line.[40] "This rule is subject to the

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[38] Const. art. XVII, § 1.

[39] *Bernot v. Morrison*, 81 Wash. 538, 538 (1914).

[40] *Vavrek v. Parks*, 6 Wash.App. 684, 689 (Div. II, 1972) ("As a general rule, a deed conveying land, which employs a meander line (the waterside boundary of a government lot) as one of the calls in its description, will be construed

qualification that if the parties to the deed appear to have intended that the meander line should be the actual boundary, then such intention will be given effect."[41] The question, therefore, is whether the Community Club has presented evidence that Estus C. Combs *did not* intend to convey to the State a riparian lot in 1939.

In assessing Mr. Combs' intent with regard to the 1939 conveyance, the Court must consider the language of the deed along with the circumstances surrounding the transaction:

> The court's duty is two-fold: interpretation and construction; i.e., first, to find the true sense of the written words as the parties used them, as evidenced by (1) the facts and circumstances at the time of the transaction and (2) by the practical construction given by the parties while in interest with respect to the ambiguity; and secondly, after the true sense is ascertained, to subject the instrument, in its operation, to established rules of law.[42]

The Court finds that the parties likely were contemplating public access to Lake Tahuyeh by the conveyance to the Department. It was a historic aberration for a grant of land to be only 200 feet wide and run between a known access road and a lake, at least where other acquisitions of property during those early decades were much larger parcels of land. The mere dimensions of the Department's lot strongly suggest – and probably require – the conclusion that the lot was intended for water access.

Other factors lead the Court to this conclusion, include that the consideration for the transfer of the property was apparently not money, but rather the Department's agreement to allow the grantor to control the level of Tahuyeh Lake, and to allow removal and harvest of the sphagnum moss. If the transfer was not intended to run into the lake at all, then raising or lowering the level of the lake would have had no consequences to the State. The fact that such an agreement was specifically negotiated as consideration for the deed indicates to his Court that the grantor intended to convey, and did convey, the bed of the lake under the water as well as the

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against the grantor, and if he owns to the water, he will be deemed not to have cut off the grantee from the water"); *Thomas v. Nelson*, 35 Wash.App. 868, 870 (Div. II, 1983) (same); Stoebuck, §§ 9.12, 10.5, *supra* (same).

[41] *Vavrek*, 6 Wash.App. at 689 (citing *Harris v. Swart Mortgage Co.*, 41 Wash.2d 354 (1952)).

[42] *Vavrek*, 6 Wash.App. at 689 (citing *King County v. Hanson Inv. Co.*, 34 Wash.2d 112 (1949); *Newman v. Buzard*, 24 Wash. 225 (1901)).

upland parcel to the road. The Court therefore determines that the lot conveyed to the Department included riparian rights to Tahuyeh Lake, which the lot abutted.

C. Under the 1939 conveyance, did the Department acquire the right to use the entire surface of Tahuyeh?

In Washington, ownership of a riparian lot abutting a nonnavigable lake includes the submerged lakebed extending to the centerline of the lake.[43] "Riparian owners own the beds of nonnavigable lakes and ponds in pie-shaped wedges that extend from their upland lot lines to the center."[44] As determined above, the State received a riparian lot in 1939. As such, the lot included ownership of a pie-shaped wedge of the bed of Lake Tahuyeh as it then existed.

The Community Club has argued that the beds of the lake did not pass to the State by virtue of the 1889 Enabling Act.[45] This is correct, but is not dispositive. The State's claim to a proportionate share of the lakebed derives from its title to a riparian lot along the lakeshore. The conveyance of that lot carried with it a corresponding pie-shaped portion of the lakebed.

Although a riparian owner possesses title ownership to only a pie-shaped portion of a lake bed, the owner's rights of use extend to the entire surface of the lake, so long as doing so does not interfere unreasonably with the riparian rights of other owners.[46] The rationale, in part, that "these riparian rights if not enjoyed and exercised in common, cannot be enjoyed or exercised at all."[47]

In reaching this conclusion the Court does not minimize the impact that such a ruling may have on the solitude currently enjoyed by the members of the Community Club. Yet the

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[43] *Island County v. Dillingham Dev. Co.*, 99 Wash.2d 215, 223 (1983); *Powell v. Schultz*, 4 Wash.App. 213, 214-15 (Div. II, 1971); *Litka v. Anacortes*, 167 Wash. 259, 262 (1932).

[44] Stoebuck, § 9.12, *supra*.

[45] *See, e.g.*, Plaintiff's Response to State's Motion for Summary Judgment at 37; Enabling Act, 25 Stat. ch. 180, 676 (1889).

[46] *Bach v. Sarich*, 74 Wash. 575, 580 (1968); *Snively v. Jaber*, 48 Wash.2d 815, 821-22 (1956). Some other states do not follow this rule. *See* Peter N. Davis, *Recreational Use of Watercourses*, 4 MO. ENVTL. L. & POL'Y REV. 71, 71 (1996).

[47] *Judd v. Bernard*, 49 Wash.2d 619, 622 (1956). *See Snively*, 48 Wash.2d at 821 ("What practical value would the vested rights to boat, swim, fish, and bathe, have to any riparian owner if such rights were restricted to his fenced-in pie-shaped portion of the lake?").

Court simply cannot find that the State is categorically ineligible to assert riparian rights to access the entire surface of the lake. There may be facts on which the Community Club would have a cause of action against the State, if it permitted the public to utilize the lake in a manner that unreasonably interfered with the recreational rights of Community Club members. But those facts are not now before the Court, and cannot impact the disposition of this action.

II. Do the Community Club's statutory appropriation rights, pursuant to the Certificate of Surface Water Right, give it the exclusive right to make recreational use of the lake?

Finally, the Court must address the Community Club's argument that its Certificate of Water Rights gives its members the *exclusive* right to the beneficial use of water impounded in Lake Tahuyeh.[48] To adequately address this argument it is important to delve into the history of Washington's water use law.

Prior to 1917, landowners in Washington State could acquire water rights through two systems.[49] Riparian rights described rights that an owner acquired by virtue of owning property that abutted a watercourse.[50] This system, which derived from English common law,[51] developed in the eastern portion of our country where water resources were relatively abundant. As our Country expanded westward, the riparian rights system proved an inadequate means to allocate scarce water between farmers and miners whose operations were distant from a lake or stream. The law of prior appropriation developed to govern the water rights of these users in arid land, nonadjacent to a watercourse.[52] The law of prior appropriation followed the rule of "first in time, first in right," whereby the first user to appropriate water could assert that right as against a subsequent user.[53] From early statehood these two systems operated in disorganized parallel.

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[48] Plaintiff's Response to State's Motion for Summary Judgment, Tab 7, at 32-33.

[49] *See Deadman Creek Drainage Basin in Spokane Co. v. State*, 103 Wash.2d 686, 691-92 (1985). *Cf.* Ralph W. Johnson, *Riparian and Public Rights to Lakes and Streams*, 35 WASH. L. REV. 580 (1960).

[50] *Deadman Creek*, 103 Wash.2d at 689.

[51] *Deadman Creek*, 103 Wash.2d at 689.

[52] *See* Lynn B. Squires, *Unused Riparian Water Rights in Washington – Department of Ecology* v. *Abbott, 103 Wn.2d 686, 294 P.2d 1071 (1985)*, 60 WASH. L. REV. 787, 789 (1985).

[53] *Id.*, at 789.

The Water Code of 1917 addressed the interplay of riparian rights and the law of prior appropriation.[54] The 1917 Code provided that new water rights could be acquired only through appropriation,[55] but specified that rights of existing owners would not be impaired.[56] This situation changed appreciably with passage of the Water Rights Registration Act of 1967.[57] Under the 1967 Act, a person "claiming the right to... make beneficial use of public surface or ground waters" is required to register with the department of water resources.[58] Property owners were given seven years from the Act's passage within which to register claims of water rights.[59] Moreover, owners with a riparian right to "divert or withdraw" water forfeited that right if not exercised for a period of five years.[60] A landowner loses a *consumptive* riparian right not exercised by 1932.[61]

Returning to the case at bar, the Community Club argues that it is entitled to the exclusive beneficial use of water impounded in Lake Tahuyeh.[62] The Community Club argues that this right derives from its Certificate of Water Rights, which conveyed to the Community Club a property right in the water now impounded in the lake. At the least, they argue the Certificate gives the Community Club exclusive right to enjoy the beneficial uses, such as swimming, fishing, and boating. On its face, the Certificate recites that the Community Club is entitled to make recreational use of water impounded in the lake.

But under Washington law, the Certificate of Water rights does not give the Community Club the type of exclusive right the Community Club seeks. The crucial distinction here is

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[54] Laws of 1917, ch. 117. *See* Chapter 90.03 RCW.

[55] Laws of 1917, ch. 117, § 1. *See* RCW 90.03.010.

[56] Laws of 1917, ch. 117, § 1 ("Nothing in this title shall lessen, enlarge, or modify the rights of a riparian owner existing as of June 6, 1917"). *See* RCW 90.03.010.

[57] Laws of 1967, ch. 233. *See* Chapter 90.14 RCW.

[58] Laws of 1967, ch. 233, § 4. *See* RCW 90.14.041 (now referencing the Department of Ecology).

[59] Under the 1967 Act owners had until July 1, 1972, Laws of 1967, ch. 233, § 4, but this was extended to June 30, 1974 when the Act was amended in 1969. Laws of 1969 ex. sess., ch. 284, § 13. *See* RCW 90.14.041.

[60] Laws of 1967, ch. 233, § 17. *See* RCW 90.14.170.

[61] *Dept. of Ecolog v. Abbott*, 103 Wash.2d 686 (1985).

[62] *See* RCW 90.54.020(1) ("Uses of water for...recreational... purposes... and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial"); RCW 90.14.031(2) ("'Beneficial use' shall include... recreation").

KITSAP COUNTY SUPERIOR COURT
614 Division Street
Port Orchard, WA 98366
(360) 337-7140

between *consumptive* and *non-consumptive* water rights. The legislation discussed above is concerned almost exclusively with the rights of land owners to make consumptive beneficial use of water.

The Community Club has argued that even if the Department's lot might originally have included riparian use rights, those rights have been lost through the Department's failure to timely register them. But the Water Rights Registration Act specifically provides that there is no need to register such recreational rights as boating and swimming.[63] This result is commonsensical, as the Department pointed out in closing argument. The contrary outcome would impose a duty on every waterside property owner in Washington to obtain permission to recreate in the water by her property. The statutes do not impose such a requirement.

Registration aside, the Community Club's appropriation rights as memorialized in the Water Rights Certification, do not eviscerate the State's riparian rights. Under the 1917 Water Code it would clearly be impermissible for the State to make *consumptive* use of water impounded in the lake. But authority cited by the Community Club is distinguishable on precisely that basis.[64]

There is no authority for the proposition that a riparian owner loses the right to make recreational use of the self-same water that is later appropriated for the use of another owner. Indeed, under the Water rights Registration Act, the Community Club would not have been allowed to appropriate the water if doing so would have destroyed the riparian rights of another owner, such as the State.[65] Nor is this a situation where there has been a conclusive adjudication of all water rights in a drainage pursuant to litigation commenced by the department of

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[63] The statute reads:

> All rights to divert or withdraw water, *except riparian rights which do not diminish the quantity of water remaining in the source such as boating, swimming, and other recreational and aesthetic uses* must be subjected to the beneficial use requirement.

Laws 1967, ch. 233 § 2 (emphasis added). *See* RCW 90.14.020(5).

[64] *See, e.g., Deadman Creek Drainage Basin in Spokane Co. v. State*, 103 Wash.2d 686 (1985).

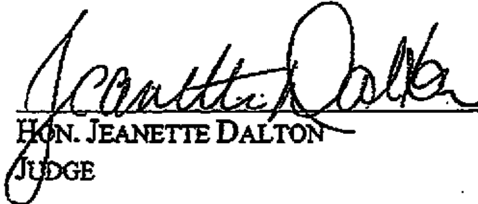
[65] Laws of 1917, ch. 117, § 31 (in ruling on an application for appropriation rights the adjudicator must find whether the application will impair existing rights). *See* RCW 90.03.290(3). In *In re Clinton Water District*, for example, the Supreme Court upheld an administrative decision to deny an appropriation application by a water district, since the appropriation would have impaired the riparian rights of a lakeside owner to recreate on the lake and pasture livestock on his land. 36 Wash.2d 284 (1950). If the appropriation had been allowed, the lakeside owner would have been subject to health regulations governing sources of drinking water.

ecology.[66] Even non-consumptive riparian rights may be extinguished by a decree in such litigation,[67] but the Community Club's Water Certificate does not render the same result.

CONCLUSION

For the reasons set forth above, the Court therefore finds for the Department. The Department is instructed to prepare findings of fact and conclusions of law consistent with this decision, and to note presentation on the Court's Friday 1:30 calendar.

DATED this 15 day of July, 2011.



HON. JEANETTE DALTON
JUDGE

[66] Laws of 1917, ch. 117, § 14. *See* RCW 90.03.110.

[67] *See, e.g., Dept. of Ecology v. Acquavella*, 112 Wash.App. 729 (Div. III, 2002); *McLeary v. Dept. of Game*, 91 Wash.2d 647 (1979).

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CERTIFICATE OF SERVICE

I, Greg McLawsen, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

On July 15, 2011, I caused a copy of the foregoing document to be served in the manner noted on the following:

Dennis Reynolds Law Office 200 Winslow Way West, Suite 380 Bainbridge Island, WA 98110	☑ Via U.S. Mail ☑ Via Fax: 206.780.6865 ☐ Via Hand Delivery ☐ Via E-mail
Office of the Atty. Gen. of Wash. 1125 Washington St. SE PO Box 98504-0100	☑ Via U.S. Mail ☑ Via Fax: 360.943.6150 ☐ Via Hand Delivery ☐ Via E-mail
	☐ Via U.S. Mail ☐ Via Fax: 206-574-0101 ☐ Via Hand Delivery ☐ Via E-mail
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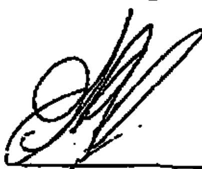
DATED July 15, 2011, at Port Orchard, Washington.



Greg McLawsen
Judicial Law Clerk
Kitsap County Superior Court

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