An Introduction To Washington Water Law

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TABLE OF CONTENTS

PART II
FUNDAMENTALS OF WASHINGTON WATER LAW

TABLE OF AUTHORITIES

SUMMARY

"But let justice run down like waters, and righteousness as a mighty stream."

Amos 5:24

Just as in Old Testament times, water and justice are closely associated. Water is elemental to life, to commerce, and to civilization. Limits on available water doom lands and landowners to limited development. Control of the allocation of water automatically carries with it great political and economic power. It is hardly surprising that modern citizens, like Amos, see water as a metaphor for justice itself. The history of the struggle to achieve justice is the story of *Washington Water Law*.

Chapter I: Who owns the water?

Washington, like other U. S. jurisdictions, adopts the European notion that water is a natural resource held in common for the public good. As such, water in its natural flowing or seeping state is not susceptible to "ownership." Private parties do have the right, however, to take this common resource and put it to use. In a sense, a party obtains "ownership" of water molecules that have actually been captured and put to use, but as soon as the water is no longer used and is released back into nature, any "ownership" of the water ceases and it reverts to its "common public resource status."

Deciding who may appropriate water, which uses are appropriate and serve the public good, and how to sort out disputes over water use are the fundamental tasks of water law.

Like most other states, Washington has declared, both in its Constitution and in statute, that water is a public resource held in trust for the people. This principle is the foundation of the state's authority to define both the substance and the process of obtaining the right to use water. The state regulates water as a public resource and as an outgrowth of the state's "police power" to protect the general public health and welfare.

Chapter II: Who gets to take water and put it to use?

The early history of Washington water law is, above all, the story of the struggle between two doctrines of water rights: the *riparian* doctrine and the doctrine of *prior appropriation*. In its classic form, the riparian doctrine ties the right to use water from a particular body of water (lake,

stream, or underground aquifer) to the ownership of the land over, under, and adjacent to that water body. If a body of water is entirely confined to one person's land, that person has an exclusive right to use of the water. If a body of water is adjacent ("riparian") to land held by more than one landowner, they all have an equal right to use of the water. If there is insufficient water to meet all needs, the equal shares are reduced proportionally. Date of first use of water is irrelevant, and "nonriparians" (that is, those whose land is not adjacent to the water body in question) have no right to use the water.[1]

The riparian doctrine serves reasonably well where water is plentiful and all (or nearly all) landowners have access to some surface water or groundwater to meet their needs. It is the water law doctrine in Great Britain and in the eastern United States.

When the arid West was developed, an alternative theory of water allocation arose. First developed in connection with mining claims on federal land, the prior appropriation doctrine awards water rights to the parties who first take water and put it to beneficial use. "Riparian" status is not relevant in a prior appropriation system; a landowner may move water through pipes or ditches for many miles to reach distant land. Prior appropriation rights, unlike riparian rights, are prioritized, with the earliest appropriation "senior" to all later appropriations. Furthermore, in case of a water shortage, the senior water right holders have the right to full use of their water rights, and "junior" holders must stop using the water if necessary to enable the exercise of senior rights.[2]

While inland western states, such as Colorado, embraced the prior appropriation doctrine for all rights, Washington courts initially followed the lead of California in following a mixed doctrine: prior appropriation law would be applied to determine water rights on unpatented federal lands, but the riparian doctrine would be applied in all other cases, such as disputes between private landowners. The early Washington cases represent an attempt to hold to this "mixed" view, despite the growing evidence that "prior appropriation" more closely accommodated Washington's policy needs.

Unlike the courts, the Washington Legislature tended to favor the prior appropriation doctrine. In the territorial period, the Legislature enacted laws adopting the prior appropriation

[1] Every jurisdiction following the riparian theory has, inevitably, created various exceptions and conditions on the general rules discussed above.

[2] As discussed at some length in Chapter II, each state choosing the prior appropriation doctrine has gradually arrived at its own version, with bumps and wrinkles unique to that state.

system for use in Yakima County, and later amendments extended this rule to Kittitas County. In 1890 and 1891, the first statehood Legislature enacted more general statutes adopting prior appropriation as the standard for water use. In 1917, the Legislature adopted the first comprehensive water code for surface water and adopted the prior appropriation standard for the issuance, regulation, and adjudication of water rights.

These legislative acts left the courts with the job of "squaring" its earlier adherence to the riparian doctrine with the legislative choice of prior appropriation as the water law standard. In a series of cases, the courts gradually backed away from the riparian doctrine, finally holding that riparian rights are lost unless put to beneficial use (completely inconsistent with classic versions of the riparian doctrine) and that a later riparian use yields in priority to a previously-exercised non-riparian appropriation. Although Washington even today has a theoretically "mixed" system, riparian rights today are either curious artifacts of early history or are indistinguishable from prior appropriation rights.

Chapter III: What is the nature of a water right in Washington?

As noted in previous chapters, the first principle of a Washington water right is that the water itself always remains in public ownership and subject to regulatory control. However, by lawful appropriation, a person may obtain a right to use water which is a form of property right, a right which may not be eliminated without due process. Under the common law, the fundamental elements of an appropriative right were expressing an intent to use water and putting it (with due diligence) to some beneficial use. The expression of intent fixed the priority date of the appropriation, provided that actual beneficial use subsequently occurred. The intent could be expressed either by the physical act of diverting water or through some notice, such as a posting. Since 1917 (1945 for groundwater), the process requires an application to the state for a water right permit.

Both at common law and under the codes, an appropriator must confirm the intent to take water by acting with "due" or "reasonable" diligence to accomplish the actual appropriation. A hundred years of case law has established how much "diligence" must be exercised to perfect a water right. Mere delay due to personal or financial difficulties is not sufficient but delay due to litigation affecting the lands or rights in question will generally excuse delays in putting water to use.

A critical element in perfecting a water right is not merely putting water to use, but to *beneficial* use. Although the state constitution declares certain water uses to be beneficial (irrigation, mining, and manufacturing), this list has never been held to be exclusive, and any use of water which is related to human needs or is economically productive would probably meet the standard. Also, non-diversionary uses of water, such as leaving water instream to benefit fish species, are recognized as being beneficial uses. However, the courts have held that there is no right to waste water, and water used far in excess of reasonable practices, or used for frivolous purposes, would not meet the "beneficial use" standard.[3] Beneficial use determines not only whether a landholder has a water right, but also the quantification of that right. Although beneficial use was originally a case law concept, it has been incorporated into the statutory water codes.

The *priority date* of a water right is crucial in any prior appropriation system. As noted above, holders of "senior" water rights are entitled to full exercise of their right before more "junior" holders may take water. At common law, the priority date was the date of first clear intent to appropriate, assuming that the subsequent conditions of actual appropriation for beneficial use had been met. Under the water code, the date of application for a right is the priority date, under most circumstances. Occasionally, the state has acted to prioritize uses in a particular water body, creating a reservation of some portion of a stream or lake for specified "higher priority" uses.

The establishment of priority dates has been one of the most fertile fields for litigation in all water law. Many of the cases arise because of the necessity to undertake "reasonable diligence" to perfect a water right. If a landholder has exercised due diligence in appropriating water, the priority date on her use will "relate back" to the date the application for the permit was filed (or, at common law, the date the landholder gave notice of intent). A failure of due diligence will result in a later priority date, or even in the loss of the water right.

Finally, the concept of *appurtenancy* is also crucial in understanding Washington water law. When a landholder obtains a right to apply water to a particular tract of land for some beneficial use, the right becomes attached, or "appurtenant," to that land. Subsequent sales or conveyances of the land will include the appurtenant water rights, unless the conveyor explicitly reserves the water rights. The holder of the water right has no legal right to apply the water to

[3] For irrigation uses, courts often calculate "water duty" based on expert analyses of the amount of water required for a particular crop or agricultural practice in the specific area where the water would be used. "Water duty" thus assists the tribunal in analyzing whether water has been put to beneficial use.

different land, or for a different purpose, except by following the statutory procedure to seek a change or transfer of the right.

Chapter IV: The Surface Water Code

Although the Legislature in 1891 began requiring formal notice for the acquisition of water rights, only in 1917 did Washington begin to require a formal permitting system for water rights.[4] The 1917 Water Code was comprehensive and established both a substantive and a procedural system for the issuance, regulation, and adjudication of water rights.

An important element of the code is the provision for *general adjudications* of rights to water from particular bodies of water, basins, or aquifers. The adjudication is a sort of "quiet title" action seeking to determine who has water rights in the subject water and with what priority and in what quantity. The purpose of an adjudication is not to lessen, increase, or modify existing water rights, but to determine what they actually are. Adjudications are conducted in state court, either by a superior court judge, or by a referee who takes evidence and makes recommended findings to the court. All potential claimants to rights to water in the subject area are served and have the opportunity to prove the extent of their claims. Claims may be based on pre-code common law rights, alleged riparian rights, rights acquired under the water codes, or rights derived from some other possible source. Adjudications are the only formal way to determine the validity and extent of all the water rights in a particular area.

Since 1917, no surface water may be appropriated without a permit. The permit requirement has withstood constitutional challenge. Notice of a permit application is published, and other parties may file objections. Unlike land-use applications, applications for a water rights permit do not "vest" the applicant in any substantive or procedural law or regulation which exists at the time an application is filed, although if the permit is eventually granted and the water right is perfected through use of the water, the priority date of the resulting water right will "relate back" to the date of the application.

Under Wash. Rev. Code 90.03.290, in evaluating permit applications, Ecology looks to four factors, often described as the "four part test": (1) is there water available; (2) is the application for a beneficial use; (3) will granting the permit impair (*i.e.*, adversely affect) existing water rights;

[4] This requirement was not extended to groundwater until 1945.

and (4) will granting the permit be detrimental to the public interest?[5] Based on these factors, Ecology may approve or deny the permit application, or approve it with certain conditions. Ecology's decision may be appealed to the Pollution Control Hearings Board and, from there, to the courts. Interested third-parties may intervene and participate both in administrative and in judicial proceedings involving challenges to Ecology's decisions on permit applications.

Once Ecology grants a permit, the permit holder has a reasonable amount of time (typically stated in a "construction schedule" for the permit) to perfect a water right through the actual, physical appropriation of water for the proposed beneficial use. If this is accomplished with due diligence, the landholder is granted a certificate confirming the extent and nature of the water right obtained. In certain circumstances, Ecology may extend time for the perfection of a right, or may grant temporary permits, preliminary permits, or emergency permits.

Chapter V: The Groundwater Code

Groundwater is subterranean or underground water that occupies the spaces within granular geologic materials or cracks in subterranean rock. Historically, the origin of groundwater and its relationship to surface water bodies was a mystery, and there are still unanswered questions in the science of hydrogeology.

However, it is now universally recognized that the groundwater and the surface water in any area are interconnected (sometimes very directly, sometimes less so), such that pumping groundwater from a well will eventually draw down the surface streams in the area, and removing surface water will, similarly, eventually affect recharge of underground aquifers. This relationship is called *hydraulic continuity*. The extent and nature of hydraulic continuity is often at the heart of disputes about groundwater allocation.

Until 1945, groundwater rights were entirely a matter of common law in Washington. The courts evolved a doctrine which depended upon an unscientific distinction between "underground streams" and "percolating water."[6] Underground streams were treated like surface water, but the courts evolved a strong presumption that, absent a high level of proof to the contrary, groundwater was "percolating water." As to this category, the court adopted a "mixed" doctrine that attempted

[5] As part of its analysis on the impairment test or the public interest test, Ecology may also consider the effect of a proposed use on the quality of the water which is the proposed subject of appropriation.

[6] In truth, actual "underground streams" are extremely rare, and there is no scientific or logical basis for the distinction.

to recognize the special interests of the owner of the overlying land, while still allowing others to appropriate groundwater so long as it did not "unreasonably" interfere with the rights of the landowner.[7]

In 1945, the Legislature enacted a comprehensive code for groundwater. For the most part, this meant treating groundwater like surface water for the purpose of obtaining permits for water rights. For several decades, the courts treated the 1945 act as relating only to "percolating waters," but in 1973, the Legislature amended the definition of "groundwater" to make it clear that the code covered all groundwater. In subsequent case law, the courts have recognized this change.

The Legislature rejected the previous court-developed groundwater doctrines and extended the prior appropriation doctrine to groundwater rights. In doing so, the Legislature also reaffirmed the public ownership of groundwater as well as surface water. The acquisition of groundwater rights was made dependent on obtaining a permit, to be obtained through an application process essentially identical to the process for obtaining surface water rights.

In extending the codes to groundwater, the Legislature did create some exemptions from the permitting requirement: for certain types of groundwater withdrawals, and for the use of water reclaimed from a wastewater treatment facility. These waters may be lawfully appropriated for certain enumerated uses without application for a permit.

The standards for obtaining a groundwater permit are essentially the same as for a withdrawal of surface water, except that Ecology also analyzes whether a proposed groundwater project is reasonable and feasible in terms of the well pumping practices to be employed. Case law has established that even senior appropriators may be regulated if their pumping practices are unreasonable or harmful to the aquifer or to the rights of other water users. The seniority of a groundwater right, as to the quantity protected, is limited by this concept of a "reasonable or feasible pumping lift."

In 1985, the Legislature enacted a statute directing Ecology to establish a groundwater management program to address issues of overdrafting and to promote efficient practices to meet future water needs. The statute directs Ecology to designate groundwater areas and sub-areas, and

[7] In English common law, groundwater belongs to the owner of the land above; this doctrine is very much analogous to the riparian doctrine of surface water rights.

provides that, in developing the program, priority shall be given to areas or sub-areas where water quality is imminently threatened.

In the 1945 code, the Legislature recognized existing rights to groundwater, but it also required all holders of pre-existing rights to file declarations of claims stating the beneficial use made, the date of earliest beneficial use and continuity of use, the amount of water claimed, the land the water was applied to, and descriptions of the well or other water works and the geologic formation involved. Ecology keeps a claims registry showing who claims pre-1945 groundwater rights. The Legislature provided that failure to file a claim within specified dates would result in a loss of the water right in question; the date has been extended and re-opened on several occasions.

As noted earlier, the courts found that holders of pre-1917 surface water rights would forfeit their rights if they failed to file a claim within fifteen years of enactment of the surface water code (1932). If the same logic is applied to groundwater, rights have been forfeited as to claimants who did not file claims within fifteen years of the enactment of the Groundwater Code, or 1960, although the courts have not explicitly ruled on this point.

As noted earlier, certain types of groundwater withdrawals are *exempt* from permitting requirements. These include (1) water for stock watering (with no quantity limit); (2) the watering of a lawn or noncommercial garden not exceeding one-half acre in area (with no quantity limit; (3) single or group domestic uses not exceeding five thousand gallons a day; and (4) industrial uses not exceeding five thousand gallons a day. Although these types of withdrawals are not subject to the permitting requirement, they are subject to the substantive provisions of the water codes, such as the priority system and requirements for continuous beneficial use and to not impair senior water rights. There is recognition that the cumulative effects caused by permit-exempt groundwater withdrawals may be significant. Since there is no universal requirement that the amount and nature of such withdrawals be reported, the state has no precise information concerning their cumulative effect.

The Groundwater Code covers not only naturally occurring groundwater, but also "artificially" stored groundwater, such as water that escapes into the ground from irrigation. Landholders may apply to appropriate these waters as well as naturally occurring groundwater. However, in a case involving the federally-operated Columbia Basin Project, the Washington Supreme Court held that, under federal law, the Bureau of Reclamation was entitled to manage

return flow from the project and that such waters were not available for appropriation under state law.

Even in the 1945 code, the Legislature recognized the connection between surface water and groundwater. With this connection in mind, both statute and case law has confirmed that, to the extent the appropriation of surface water affects groundwater rights, or the other way around, the prior appropriation doctrine should govern. Thus, a senior groundwater right has precedence over a junior surface water right. This is true even where the continuity of surface and groundwater is distant, or indirect.

Chapter VI: How can water rights be lost?

The unique nature of water rights as property is evident in the requirement that maintenance of a water right requires continual beneficial use, otherwise known as the "use it or lose it" doctrine. Without continued use, the right may be lost by operation of law, without any requirement for compensation. By contrast, water rights put to continuous beneficial use and otherwise in compliance with the law are vested property rights and cannot be taken away without compensation.

There are several legal procedures for determining whether a water right has been lost or should be taken away. The first is the statutory procedure of *relinquishment*, in which rights are deemed forfeited if they have not been used for five consecutive years without sufficient cause. "Sufficient cause" excusing nonuse can be asserted based on numerous statutory exceptions to relinquishment. Relinquishment cases are highly fact-dependent, since they must include analysis of the length of non-use as well as an evaluation of whether any exceptions are applicable to excuse the non-use. They may arise in the course of general adjudications of water rights, administrative relinquishment proceedings commenced by Ecology, or in appeals of Ecology's decisions on applications for changes and transfers of water rights.

An alternative to statutory relinquishment is the common law doctrine of *abandonment*, which applies when there is intentional nonuse or voluntary relinquishment of a water right. Since intent to abandon a water right is an element, abandonment is often difficult to prove. The courts have held that one asserting abandonment must meet a high standard of proof, but, in one particular case, found that a city had abandoned an old surface water right by failing to use it (and relying instead on groundwater withdrawals) for thirty-six years.

Historically, a Washington water right could theoretically be lost through *prescription* – that is, where another party meets the burden of proving that the water in question was used by the other party in an open, notorious, exclusive, continuous, and hostile manner for the statutory period of ten years or more. The law disfavors loss of water rights through prescription and sets a high standard of proof. The courts also held that one may not obtain publicly-owned water rights through prescription.[8] In 1967, the Legislature ended acquisition of all water rights by prescription or adverse use through the enactment of a statute.

A special word should be added about possible loss of pre-code water rights through failure to preserve them by filing statements of claims. As noted earlier, the Legislature required holders of pre-code rights (pre-1917 for surface water, pre-1945 for groundwater) to register their claims with the state. The claims system was formalized by the enactment of the Claims Registration Act in 1967. The constitutionality of the claims registration requirement has been upheld. The act provided that claims not filed by 1974 were conclusively deemed waived and relinquished, although the registry has been reopened for certain specific purposes since that date. Ecology has recorded about 169,000 claims under the act, but only litigation could establish how many of the claims represent valid water rights.

Chapter VII: How may water rights be changed or transferred?

Generally, the term "transfer" is used when a water right is transferred from one owner to another, and the term "change" indicates that one or more of the essential elements of a right, such as the point of diversion, the place of use, or the purpose of use, have changed. The legal considerations for applications for transfers and changes of water rights are the same, and the two are here treated together.

Transfers have been recognized since the mining days in California, when the courts permitted miners to transfer their rights from one mine to another. Washington's Supreme Court issued its first water right transfer decision in the year of statehood, 1889.

The first step in analyzing how water rights may be transferred is recognizing the nature of the right to be transferred. A water right holder may transfer only rights he in fact holds – rights defined by the quantity continuously put to beneficial use, the point of diversion or withdrawal, the purpose of use, and the priority of the right as against other water rights. These define the

[8] The law also theoretically allows the loss of water rights by the equitable doctrines of estoppel and laches. In practice, however, these doctrines are rarely significant in water rights cases.

"bundle of sticks" which is potentially subject to transfer or change. There is no fundamental right to transfer or change water rights, and they can only be approved upon compliance with state statute.

Thus, the initial requirement for a transfer is that a valid water right exists. This involves an assessment of the validity and extent of the water right sought to be transferred. In case law, this typically involves an analysis as to the extent of continuous beneficial use of water under the right. With certain exceptions, such as for transfers of groundwater rights under Wash. Rev. Code 90.44.100, transfers of unperfected or inchoate rights are not allowed.

The second requirement is that a transfer not harm or impair other existing rights. This requirement applies not only to rights senior to the right being transferred, but even to junior rights, because the right of these "juniors" to continued use of their present water rights is still "senior" to the proposed transfer. The extent of harm to other rights may of course be fact-dependent and vigorously disputed.

Third, in processing an application for transfer of a groundwater right under Wash. Rev. Code 90.44.100, there is the public interest to consider, just like for an application for a new permit. To approve such an application, Ecology must determine that approval of the transfer would not be detrimental to the public interest. However, because there is no public interest test expressly included in Wash. Rev. Code 90.03.380, this requirement is not applicable to applications for transfers of surface water rights.

With increasing pressure on available water resources, questions have risen about the authority to transfer water rights relating to *permit-exempt wells*. The Legislature has enacted statutes permitting exempt rights to be consolidated with permitted rights in some circumstances, but there does not appear to be any general principle allowing a permit-exempt withdrawal to be transferred to, for instance, a non-exempt purpose of use, or to a different place of use.

Washington law permits water rights to be transferred through *condemnation*. Condemnation may be initiated by a government seeking to obtain water rights for some government purpose or by a competing water rights holder claiming need to use water for a "superior" use. Cases in this area are rare.

Water rights may also be transferred through *interties* connecting public water supply systems. State statute permits public water supplies to be physically interconnected under certain described circumstances. If an approved intertie occurs, the water may be used anywhere within

the intertied system. The Departments of Health and Ecology both exercise some regulatory discretion over interties, and the process involves a balance between the need for an adequate supply of domestic water and the need for an orderly system of water rights determination.

The Legislature has created an alternative procedure for the processing of applications for transfers and changes: *water conservancy boards*. These boards may be created in any county by action of the county legislative body, with approval by Ecology. Once created, a conservancy board may receive and evaluate applications for transfers and changes of water rights in the county and may approve or deny them. Ecology has the authority to review the actions of the conservancy boards for consistency with state law and policy, and may affirm, reverse, or modify a conservancy board's decision on an application. If Ecology does not act (or if Ecology approves the transfer), the transfer is legally effective, subject to judicial review.

Chapter VIII: How are water rights for municipal supply purposes governed?

Washington law affords special protection to municipal water rights by exempting them from the general rule that unexercised water rights are relinquished. However, until 2003, the law did not define what municipal water rights are or set their parameters. A decision by the Washington Supreme Court, *Department of Ecology v. Theodoratus*, 135 Wash. 2d 582, 957 P.2d 1241 (1998), cast uncertainty over the nature and status of water rights for municipal supply purposes throughout Washington. This uncertainty prompted the Legislature to enact the Municipal Water Law (MWL) in 2003.

The MWL includes amendments to the water resources laws administered by the Department of Ecology and the public water system laws administered by the Department of Health, and provides greater flexibility for public water purveyors, while also requiring them to take measures to conserve water. The MWL includes a definition of the term "municipal water supply purposes." Notably, the definition does not require that an entity be a public entity, such as a city or public utility district, to be able to hold a water right for municipal purposes. The nineteen-section law not only defines water rights for municipal supply purposes and clarifies who can hold them, but also addresses water rights changes, water conservation, water utility service obligations, and consistency of water system planning with local government comprehensive plans and development regulations.

The MWL has been subject to extensive litigation, which has resulted in several Washington appellate court decisions that are discussed in this chapter. The cases have involved

challenges to the constitutionality of certain provisions of the MWL, and issues over the interpretation and implementation of several of its provisions.

Chapter IX: Are there unique statutes and rules governing water rights in the Columbia River Basin?

Because of its scale and complexity, the Columbia River Basin poses numerous challenges for management of its vast water resources. Among other things, there is a treaty between the United States and Canada relating to management of the river's water, and the federal government operates a large project for the production of hydropower from the river. The fisheries of the Columbia River are now estimated at less than 10 % of their historic levels, and thirteen salmon and steelhead populations have been listed as threatened or endangered under the federal Endangered Species Act.

In 2006, the Washington Legislature enacted Wash. Rev. Code 90.90, which governs the management of water from the Columbia River and authorized Ecology to implement the Columbia River Water Management Program. Also, there are other laws, and rules adopted by Ecology, which govern and affect water rights and the management of water in the Columbia River Basin. Additionally, the Yakima River Basin Integrated Plan is a comprehensive effort to find collaborative solutions to stabilize water supplies for future generations in the Yakima River Basin, an area of critical importance in Washington. In 2008, Ecology formed the Office of the Columbia River to implement the Columbia River Water Management Program and the Yakima River Basin Integrated Plan.

Wash. Rev. Code 90.90 directs Ecology to develop new water supplies in the Columbia River Basin—through storage, conservation, and other measures—to meet the economic and community development needs of people and the instream flow needs of fish. This chapter also describes other statutes, and rules adopted by Ecology, which uniquely relate to water rights in the Columbia River Basin.

Wash. Rev. Code 90.38, a statute concerning water rights in the Yakima River Basin, authorizes Ecology to implement Washington's role in carrying out the Yakima River Basin Integrated Plan. The purposes of the Integrated Plan are to ensure reliable water supplies, improve fish habitat and streamflow conditions, and address challenges caused by climate change in the Yakima River Basin.

Chapter X: Is there interaction between land use regulation and water rights and water resources management?

In Washington, the interrelationship between land use planning and permitting laws administered by local governments and the laws governing water rights and the management of water resources administered by the Department of Ecology has become increasingly important and challenging. The availability of water supply has always been a factor in both land use planning and permitting activities. However, as new water supplies have become less readily available to serve new development throughout the state, the tension between these two areas of law and policy has increased.

Issues relating to permit-exempt groundwater use have arisen in the context of land use laws requiring showings that there is adequate water supply available to serve proposed development projects. A provision in the law governing subdivisions of land, Wash. Rev. Code 58.17.110, requires counties and other local governments to determine that "adequate provisions are made for . . . potable water supplies" before they can approve applications for subdivisions. Similarly, a provision in the law governing the issuance of building permits, Wash. Rev. Code 19.27.097, provides that "[e]ach applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building" before a building permit can be issued.

The tension between the land use laws and the water resources laws is reflected in several Washington appellate court decisions, which are discussed in this chapter. Notably, in 2016, the Washington Supreme Court issued its landmark decision in *Whatcom County v. Hirst*, 186 Wash. 2d 648, 381 P.3d 1 (2016). *Hirst* held that Whatcom County's comprehensive plan and zoning code failed to comply with the Growth Management Act's (GMA) requirements to protect water resources because they allowed the approval of subdivisions and building permits for homes that would rely on permit-exempt wells for water supply in areas that are closed to new water uses under Ecology's rule governing water management in the Nooksack River Basin, even though that rule's closures do not expressly apply to permit-exempt groundwater use. The Court concluded that, to comply with the GMA, counties are required to go beyond Ecology's rules when necessary to adequately protect water resources, which includes applying the minimum instream flows and closures in Ecology rules that do not expressly govern permit-exempt use to land use applications seeking to rely on permit-exempt wells for water supply.

The *Hirst* decision generated significant uncertainty for local governments in performing their land use planning and permitting functions and severely limited the ability of landowners to obtain building permits for the construction of new homes that would be reliant on permit-exempt wells for water supply throughout the state. In 2018, the Washington Legislature responded to the *Hirst* decision by enacting Wash. Rev. Code 90.94, the Streamflow Restoration Act (SRA). This law provides a pathway for local governments to issue building permits for homes that would be supplied with water through the groundwater permit exemption for domestic use. The SRA also required the formation of local watershed planning groups to develop watershed plans that will offset impacts from new domestic permit-exempt wells and achieve a "net ecological benefit" in fifteen water resources inventory areas (WRIAs) throughout the state. Ecology has adopted watershed plans for all fifteen WRIAs governed by the SRA.

Chapter XI: Are state water rights affected by federal law or by the rights of Indian tribes?

For the most part, water rights law is state law. The United States Constitution does not assign the federal government any specific role over water rights (except as they may be involved in a federal area, such as interstate and foreign commerce or international relations), and Congress has generally deferred to the states in the development of water law. One exception to this rule concerns the water rights of the federal government itself, derived from the reservation of land within the state for some federal purpose, including Indian reservations.

Although the United States generally defers to the states as to the substance and process for defining water rights, the federal government itself is not subject to state law or state regulation, except where it has explicitly consented to be so. When the federal government retains land for a federal use, the courts recognize an implied reservation of sufficient water to accomplish the intended use.

This doctrine of "reserved rights" has been developed primarily through the law concerning Indian reservations. The United States Supreme Court has held that the establishment of a reservation automatically implies (whether or not the subject is covered in the treaty or other instrument establishing the reservation) the reservation of sufficient water to meet the primary purposes of the reservation. In the case of Indian reservations, the uses might vary, but would always include domestic use and might typically also include agricultural irrigation use, and uses

for fishing and hunting. The priority date of the federal reserved right is the date of the establishment of the reservation.[9]

Federal reserved rights are not limited by the concept of continuous use for a beneficial purpose. They have been held to cover contemplated future uses as well as existing uses. Therefore, the existence of continuity of reserved rights does not depend upon actual appropriation or continuous use. Federal water may also be changed from one federal purpose to another without the requirement of following state permitting requirements.

In adjudications or other litigation fixing water rights, the courts have generally looked to the concept of "practically irrigable acreage" in calculating the extent of a federal reserved right, at least when related to irrigation purposes. This involves a calculation of the "practically irrigable" land in the reservation, together with an analysis of the amount of water needed to irrigate the land in question. It is not necessary that the land actually be in irrigation, or that it even be economically feasible to irrigate it.

In defining Indian and other federal reserved rights, history and past practice may often be more important than the application of any specific logical standard. Thus, in the adjudication of the water in the Yakima River Basin, the Washington Supreme Court determined that the actions of the United States government through the years, especially in connection with a 1945 consent decree, and a tribal claim for compensation for harm to fisheries resources, had effectively diminished and limited the irrigation water rights and instream flow rights to support fish associated with the Yakama Reservation.

In the McCarran Amendment, Congress waived federal sovereign immunity and allowed the United States to be named as a party in state general water rights adjudications. Thus, Congress has consented for federal reserved water rights, including tribal rights, to be adjudicated in state courts. However, this does not preclude the United States from filing a lawsuit in federal court seeking determination of the validity and extent of federal reserved water rights, including tribal rights.

The state generally lacks authority to exercise regulatory control over waters reserved to the federal government or for the use of a tribe. However, there are exceptions for such things as

[9] The federal courts have held that certain Indian reserved water rights, such as those related to treaty fishing rights, enjoy a priority date of "time immemorial." In Washington, the distinction is not of great significance, since most of the reservations were created very early, before the priority dates of any potentially competing water rights.

reservation boundary waters, for reservation waters in excess of the primary needs of the reservation, and for water rights derived from state law, even if appurtenant to land within a reservation.

Although there are fewer cases concerning the application of reserved rights to federal reservations which are not Indian reservations, it seems clear that the same basic rules apply to such other federal lands, such as national parks and forests, and military bases, etc.

Chapters XII & XIII: What other laws might affect the exercise of water rights?

The law is, of course, a "seamless web," and water law cannot be separated from the complex web of rights and obligations of which it forms only a small part. This treatise notes two of the many government programs whose administration might affect the allocation of water.

Chapter XII concerns *public water supply systems*. These systems, some publicly-operated and some operated by private parties, are subject to regulation by the Department of Health, to protect the supply of drinking water in the state. The state's program is a creature of state law, but it also serves to carry out the purposes of the federal Safe Drinking Water Act. The state program regulates public water supply systems in various ways, with an eye to preserving the quality of the water used for drinking and other domestic purposes. Water utilities are, thus, subject to regulation both by Ecology (as to the type of water rights they exercise) and by Health (as to the quality and management of their drinking water supplies).

Chapter XIII addresses some of the implications of the Endangered Species Act (ESA), a federal statute whose administration is divided between the federal Departments of Commerce and Interior. Under the ESA, species that are in danger of extinction may be "listed" by the federal government as either "endangered" or "threatened" and are thereafter entitled to certain federal protection, intended to protect existing stocks and prevent extinction. With the listing of several stocks of salmon, ESA has become an important consideration in the management of Washington's natural resources, including water. Much of the ESA concerns how species are "listed" and what steps are to be taken by federal agencies if a listing occurs. A significant feature of ESA is its prohibition of "taking" endangered species, defined to include the destruction of habitat which threatens the integrity of endangered species. Those found liable for a "take" are subject to injunctive relief as well as to monetary damages.

Although states are not directly involved in the administration of the ESA, the ESA is an exercise of the federal commerce power, and the states are preempted from any acts inconsistent

with it. Furthermore, there is significant question whether a state could be liable for a "take" if its actions, including its management of public resources such as water, are held to meet the federal definition of a "take." Although the courts have not squarely addressed this issue, states are justified in their concern about managing public resources in such a way as to avoid or minimize ESA liability.

INTRODUCTION AND PRELIMINARY NOTE[10]

Although the total amount of water on the planet is theoretically constant, the distribution of water across the earth, whether through space or through time, is in a constant state of change. Even in a small area, such as the state of Washington, the distribution of water follows a complex pattern of interlocking cycles ranging from short-term weather changes to long-term (and little-understood) shifts in temperature and climate. Where water flows, seeps, or drips today, it might disappear tomorrow.

Compared to water in its dynamic movement, land seems constant and static.[11] Land can be conquered, defended, divided up into parcels, fenced, mapped, and occupied. The law of land ownership reflects this static quality. By contrast, the "ownership" of water is a highly uncertain proposition. Not only is it difficult to define or draw boundaries in water, but the water itself flows here and there, evaporates into the air or sinks into the ground, returns in the form of rain or floods or ice, and disappears again. Beyond the small quantities that can be captured and temporarily contained in vessels or other storage, water cannot be reduced to possession in any meaningful way. Thus, the right to possess or use water has not developed like the law of land ownership, but in a distinct way that reflects the nature of water itself.

Water is in constant movement, circulating from the sea, into the atmosphere, falling onto the land, and eventually returning to the sea by stream flow and precipitation. As precipitation falls from the sky, a portion immediately flows as surface water through the streams and creeks, returning to the sea as one part of a cycle. The exact amount flowing varies widely through time and space, affected by floods, droughts, dams, and diversions, whether naturally occurring or the result of human intervention. Most of the planet is covered with oceans, lakes, ponds, streams, and marshes – the most obvious sources of water for human consumption and use.

Another portion of water leaks through the Earth's surface to become groundwater. At some later time and different place, the water may re-emerge to recharge surface water flows.

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[10] References: Ralph W. Johnson, *Riparian And Public Rights To Lakes And Streams*, 35 Wash. L. Rev. 580 (1960); Bates, Getches, MacDonell, & Wilkinson, *Searching Out The Headwaters: Change and Rediscovery in Western Water Policy* (1993); Anthony Dan Tarlock and Jason Anthony Robison, *Law Of Water Rights And Resources* (2024).

[11] Inhabitants of earthquake zones know that land can move, too, but over the course of a typical human life, it is infinitely more static than water.

Under the right conditions, however, it may remain in the ground for thousands of years. In most areas it can be demonstrated that the groundwater and surface water systems are connected to each other, but the precise nature of the connection is often the subject of debate.

Still another portion of the precipitation forms a natural storage of snowpack that will provide a flow through the system during the warmer seasons of the year. As the snow melts, some flows down into the surface water system and back to the sea. Some snow-melt sinks into the ground and adds to the aquifers there. If conditions are right, part of the snow may remain in frozen ice sheets or in glaciers for a short or a very long time. The proportion of water in each "zone" – surface water, groundwater, ice – changes constantly. This hydrological cycle has played an important role in the development of the water resources and the ultimate creation of the law regulating the use of water.

In Washington, the hydrological cycle provides for dramatically different results for the eastern and western parts of the state. East of the Cascade Mountain Range, the average annual rainfall is relatively low, with some regions semi-arid. The surface water supply (and to a smaller extent, the groundwater) is highly sensitive to seasonal cycles and to longer-term climatic changes, such as droughts. Furthermore, the relatively scarce water is concentrated in a few rivers and streams. Without irrigation, land only yards away from a lake or stream may be too dry to cultivate. Despite the low precipitation, large areas are well suited for farming. Irrigation uses the greatest percentage of water and is of enormous economic value in Washington's arid interior.

In contrast, the western part of the state receives much greater precipitation with more than 120 inches in specific locations. The Olympic Mountains receive the greatest level of precipitation in the western part of the United States. By and large, the water in western Washington is evenly distributed, with almost all parts receiving plentiful rainfall from October through June and with most areas in close proximity to small lakes, streams, wetlands, and groundwater aquifers. Because of the abundant moisture, only isolated areas of western Washington need to rely on irrigation for farming. The primary uses of water in western Washington are municipal and industrial. However, climate change may affect precipitation patterns, temperatures, and demands for water in the future, both east and west of the Cascade Mountain Range.

The development of water law has greatly relied on and reacted to the effects of the hydrological cycle in a particular region. Nature itself has provided the basis for water law theories and has prompted changes in these theories throughout history. That fact is most directly evidenced

by the development of two primary water law doctrines in the United States: *riparianism*, which developed in the more humid regions, and *prior appropriation*, which developed in the arid regions of the west. The early development of Washington water law illustrates the tension between the riparian principles (which were, by and large, satisfactory to handle disputes in the western part of the state) and the prior appropriation doctrine (which proved far more useful than the riparian in eastern Washington, just as it did in the other arid parts of the western United States). The tension between the needs of the state's two regions (one strongly agricultural in nature, the other with a more diverse economic base) underlies the development of water law in the state, both by the courts and by the Legislature.

PART I:

THE HISTORICAL DEVELOPMENT OF WASHINGTON WATER LAW

I.

THE PRINCIPLE OF COMMON OWNERSHIP OF WATER

A. WATER NOT SUBJECT TO ORDINARY PRIVATE OWNERSHIP CONCEPTS

Modern water law developed, in part, from doctrines established in Roman law and preserved through centuries of European civil law. Up to the early 1800s, water disputes were generally decided under these principles, as well as principles borrowed from tort or property law.[1] As might be expected, the development of water law as a separate subject began in the arid western regions where institutions were created for the distribution and use of water as a scarce resource. Anthony Dan Tarlock and Jason Anthony Robison, *Law Of Water Rights And Resources* § 2:6 (2024); Samuel C. Wiel, *Running Water*, 22 Harv. L. Rev. 190 (1908-09).

The Roman influence on American common law is most directly seen in the fundamental principle that water is a public or community resource, owned by no one. *Lux v. Haggin*, 69 Cal. 255, 10 P. 674 (1886); Frank J. Trelease, *Government Ownership And Trusteeship Of Water*, 45 Cal. L. Rev. 638 (1957). Under the Roman principle of natural law, water was considered *res communes*, or common to the community, and thus incapable of private ownership. *Kidd v. Laird*, 15 Cal. 161, 168 (1860); Tarlock & Robison, *supra,* § 3.3; 1 Samuel C. Wiel, *Water Rights In The Western States* 3 (3d ed. 1911). As common law developed, courts have relied on the "common community" attribute of water to define the nature of the water as public or *publici juris*. As a public resource, the corpus of the water is not owned or possessed by anyone while it is flowing in its natural channel. *Eddy v. Simpson*, 3 Cal. 249, 252 (1853); *Kidd*, 15 Cal. at 168; *Farm Inv.*

[1] In analyzing state and federal issues, Frank Trelease, a noted water scholar, argues that the United States Supreme Court has, by and large, not used property concepts in water cases. *See* Frank J. Trelease, *Government Ownership And Trusteeship Of Water*, 45 Cal. L. Rev. 638 (1957); *see also* The Nature And Elements Of A Water Right In Washington *infra* ch. III.

Co. v. Carpenter, 9 Wyo. 110, 61 P. 258, 265 (1900). Nor is it a chattel under property law. *Mitchell v. Warner*, 5 Conn. 497, 519 (1825).

B. WATER SUBJECT TO USUFRUCTUARY RIGHT TO CAPTURE AND USE

While the law does not recognize real or personal property rights in water flowing in its natural state, as noted water scholar Samuel Wiel commented, an appropriator may obtain a usufructuary right to "capture" and use flowing waters. 1 Wiel, at 35[2]; *Tyler v. Wilkinson*, 24 F. Cas. 472 (C.C.D. R.I. 1827); *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882); *Rigney v. Tacoma Light & Water Co*., 9 Wash. 576, 583, 38 P. 147 (1894); *Vernon Irrig. Co. v. City of Los Angeles*, 106 Cal. 237, 39 P. 762 (1895). This usufructuary right is the right to divert and put the water to beneficial use and is not a possessory right in the water itself. Thus, the general rule is that an appropriator becomes the owner of the "particles of water," and personal property rights attach when the water has been diverted for a beneficial use.[3] *Parks Canal & Mining Co. v. Hoyt*, 57 Cal. 44, 46 (1880); 1 Wells A. Hutchins, *Water Rights Laws In The Nineteen Western States* 144 (1971).

This basic principle of public ownership has guided both the common law development of water rights and the legislative enactments providing for governmental regulation over the management and allocation of water resources. From early on, the Washington Supreme Court recognized the common ownership of water. *See Crook v. Hewitt*, 4 Wash. 749, 750, 31 P. 28 (1892); *Rigney*, 9 Wash. at 583. In *Crook v. Hewitt*, the Court held that a water right holder has no property interest in the water itself "but a simple usufruct while it passes along."[4] *Crook*, 4 Wash.

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[2] As discussed in The Water Codes: Groundwater, ch. V below, somewhat different principles were originally applied to groundwater, but the law concerning surface and groundwater has steadily converged.

[3] Of course, this diversion must also comport with the law prior to a property interest being obtained. *McLeary v. Department of Game*, 91 Wash. 2d 647, 591 P.2d 778 (1979) (water rights cannot be obtained through prescription or adverse possession); *see* The Nature And Elements Of A Water Right In Washington *infra* ch. III.

[4] For a full discussion of the usufructuary nature of the right, see The Nature And Elements Of A Water Right In Washington, chapter III below.

at 750. The Court reached a similar conclusion in *Shafford v. White Bluffs Land & Irrigation Co.*, 63 Wash. 10, 114 P. 883 (1911). Moreover, the Court held that while flowing waters are free to all, they are only available for private use "as sanctioned by custom or statute." *Shafford*, 63 Wash. at 15.

> It must not be held, under an open contract, that the user has a right to insist upon any given manner of use. Otherwise the right, to say nothing of the necessity, of prescribing rules and regulations would be of no avail to protect others from that prodigality which has so far marked the progress of the American pioneer. Neither must it be held, in the strict sense, that any one has a right to use water at will. Flowing waters are free to all, and only so far as sanctioned by custom or statute may they be put to private uses. While the cry "There is land for all" has sustained us in our disposition of the public domain, we are met at the outset of our irrigation policies by the fact that there is not, and probably never will be, even with perfect practice, water for all.

Shafford, 63 Wash. at 14.

While an appropriator owns no title to the water, one may obtain a personal property interest in the "molecules" of water which the appropriator has diverted and has under his or her "control and possession." *Department of Ecology v. U.S. Bureau of Reclamation* (*U.S. Bureau*), 118 Wash. 2d 761, 827 P.2d 275 (1992); *Madison v. McNeal*, 171 Wash. 669, 674, 19 P.2d 97 (1933). Possession has been interpreted as having control and management of the water. *See* 1 Wiel, at 35; 1 Hutchins, at 144. Under common law, once taken and in possession of the user, the water becomes the private property of the user during possession and control. *Dunsmuir v. Port Angeles Gas, Water, Elec. Light & Power Co.*, 24 Wash. 104, 114, 63 P. 1095 (1901) (holding that water becomes personal property when diverted in pipes for distribution).

As courts essentially developed a rule of capture to explain how water is appropriated and reduced to possession, they often compared water to the capture of wild animals, *ferae naturae*. *See Spring Valley Waterworks v. Schottler*, 110 U.S. 347, 373-74, 4 S. Ct. 48, 28 L. Ed. 173 (1884).

Accordingly, once water escapes or is voluntarily abandoned, it again becomes a part of the public community, and the original appropriator can no longer claim a right to such water. *Id.*[5]

C. WATER DECLARED TO BE A PUBLIC RESOURCE; SUBJECT TO MANAGEMENT AND POLICE POWER REGULATION OF STATE

Seventeen western states, including the state of Washington, have declared either by constitution or statute that state waters are public common resources to be managed by the states in the public interest. *See* Wash. Rev. Code 90.03.010; 2 *Water And Water Rights* § 12.01 (Beck ed., 1991). "The modern expression is that such waters are owned by the state in trust for the people." *Murphy v. Kerr*, 296 F. 536, 540 (D. N.M. 1923), *aff'd*, 5 F.2d 908 (8th Cir. 1925). Washington's constitution states that the use of water for irrigation, mining, and manufacturing purposes is deemed a public use. Wash. Const. art. XXI, § 1. Early on, Washington enacted legislation that recognized public ownership in the use of water, and it also provided that the state itself owned the water and thereby had the opportunity to regulate and manage it. *See* 1889-90 Wash. Laws, pp. 706-29.[6] In 1917, the Legislature enacted further legislation providing that all waters within the state belonged to the public and, subject to existing rights, any further appropriations for beneficial use shall be acquired only as provided in the 1917 enactment. Wash. Rev. Code 90.03.010 ("[s]ubject to existing rights all waters within the state belong to the public.").

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[5] The question of capture, ownership, and abandonment arose in the case of *U.S. Bureau*. The issue presented in this case was whether the state could legally permit the use of water that was return flow from irrigation in the federal Columbia River Basin Irrigation Project. The irrigation districts argued that the water remained under the Bureau's control and possession and thus could not be subject to further appropriation by the state. The state asserted that it had the right to authorize the appropriation of this water to others because the Bureau had abandoned any interest by failing to retain continued control and possession of the water. *U.S. Bureau*, 118 Wash. 2d at 770. Such water, then, returns as public water subject to further appropriation. The Court agreed with the Bureau of Reclamation and the irrigation districts finding that, as long as the water was flowing within the boundaries of the project, it was not available for further appropriation by others. *Id.* at 763. Moreover, even after the water discharged into the Columbia River, the Bureau may still claim possession of such water and divert it further down the Columbia River into its project. The case may be read as a special exception to the general rule that water once abandoned returns to public ownership, based on the nature of the water rights reserved for the federal Columbia River Basin Irrigation Project.

[6] Irrigation And Irrigating Ditches, pp. 706-28 (Mar. 4, 1890); Irrigation And Irrigating Ditches, Act Amended, pp. 728-29 (Mar. 20, 1890); Irrigation, Unit Of Measure Of Water For, p. 729 (Mar. 26, 1890).

The purpose of declaring state waters a common public resource served "to lay the foundation for state control over the management and use of stream waters, and the principle of public or state ownership is more compatible with state control than would be that of ownership by no one." 1 Hutchins, at 141; *see also* Tarlock & Robison, *supra,* § 3.3; Trelease, 45 Cal. L. Rev. 638. Washington's provisions establishing sovereign interests, rather than creating proprietary ones, enables the state to assert its police power authority to regulate and allocate water resources for the benefit of the public. Wash. Rev. Code 90.03.010. Washington courts have confirmed that the management and regulation of the waters are an exercise of the police powers of the state. *Peterson v. Department of Ecology*, 92 Wash. 2d 306, 316, 596 P.2d 285 (1979); *Department of Ecology v. Abbott*, 103 Wash. 2d 686, 696, 694 P.2d 1071 (1985).

The state's police power over the waters of the state has been held to include the power to limit and even extinguish existing water rights. *Department of Ecology v. Adsit*, 103 Wash. 2d 698, 706, 694 P.2d 1065 (1985).[7]

[7] For a more detailed discussion of these cases, see Loss Of Water Rights, ch. VI below.

II.

THE DEVELOPMENT OF WATER LAW IN WASHINGTON

A. TERRITORIAL AND EARLY STATEHOOD LEGISLATION

The development of water law in Washington has largely been tied directly to the manner in which land has been settled and patented.[1] From 1848 to statehood in 1889, the Washington state area was, first, part of the Oregon Territory, and, starting in 1853, the Washington Territory. These territories were established by Congress. *See* Charles Horowitz, *Riparian And Appropriation Rights To The Use Of Water In Washington*, 7 Wash. L. Rev. 197 (1932); Robert E. Ficken, *Washington: A Centennial History* (1988). In establishing the Territory of Oregon, Congress preserved existing property rights generally, and specifically required that the rights of Indians, missionary stations, and British subjects be protected.[2] The Donation Land Act of 1850 made public land available to settlers in the Oregon Territory, provided that existing property rights continued to be respected. Act of Mar. 2, 1853, ch. 90, p. 172.

Because of the unmanageability of the Oregon Territory, Washington became its own territory under the Organic Law of 1853. *Id.* The rights protected and accrued under the original treaty with Great Britain, and the congressional act creating the Oregon Territory, were to be fully protected under the Territory of Washington. *Id.* § 6. Although land was beginning to be developed and water diverted and used, neither the treaty nor the acts creating the Oregon and Washington Territories provided any specific legislation on water use and water rights. This left the courts with the primary job of determining who would have a right to use water and the relation of those rights to other rights.

An 1856 act of the Territorial Legislature of Washington abrogated the Oregon law in force in Washington and recognized the common law in all civil cases except as otherwise provided in law. 1855-56 Wash. Terr. Laws, p. 7. This action was the foundation of an independent

[1] Section E of this chapter provides essential historical context for a discussion of Washington law.

[2] The Northwest, like the rest of the continent, had of course been occupied for thousands of years by various Native peoples before the Europeans arrived. There is a discussion of Indian reserved water rights in Federal Reserved Water Rights: Indian Reservations And Federal Lands, ch. XI below.

jurisprudence for the Washington Territory and the basis for the development of a distinctive approach to water law. The western water law being developed through individual cases before the courts of other western jurisdictions at this time informed the decisions of the Washington courts and became the foundation for much of the water law in Washington.

B. THE INITIAL CHOICE OF WASHINGTON COURTS: THE RIPARIAN DOCTRINE

A riparian right arises by virtue of ownership of the land bordering the stream, lake, or other water body. The word riparian itself is derived from the Latin "ripa," which means riverbank. John M. Gould, *A Treatise On The Law Of Waters, Including Riparian Rights, And Public And Private Rights In Waters Tidal And Inland*, 148 (3d ed.). There has been much debate on the original basis for riparian water law. Legal scholars have argued as to whether or not it is based upon French civil law, English common law, or the Code Napoleon. The earlier analyses of riparianism are best summarized by Chancellor Kent, whose writings were heavily relied upon throughout the nineteenth century. Chancellor Kent states:

> Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (currere solebat), without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it or a title to some exclusive enjoyment. He has no property in the water itself but a simple usufruct while it passes along. . . . . Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it or give it to another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the enjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it . . . . This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application.

Anthony Dan Tarlock and Jason Anthony Robison, *Law of Water Rights and Resources* § 3.7 (2024) (quoting 111 Kent, *Commentaries* 617-22 (13th ed. 1888)).

Though the riparian doctrine has antecedents in European civil and in English common law, its specifically American version developed in the eastern United States as a result of conflicts related to the use of water to run mills. The most celebrated decision is *Tyler v. Wilkinson*, 24 F. Cas. 472 (C.C.D. R.I. 1827). In *Tyler*, a conflict arose between two riparian proprietors on the Pawtucket River that formed a boundary line between the states of Massachusetts and Rhode Island. The lower riparian mill operators sought to enjoin the upper riparian users of water who

were retaining the water for their purposes to the detriment of the lower mill operators. The court described what has been noted as the first American use of riparianism in reference to water courses.

The court relied primarily on the legal notion that every proprietor along the river is entitled to the land of the bed of the river to the middle of the stream, usually expressed as "*usque ad filum aquae.*"[3] Based upon this ownership, the court held that the proprietor has the right to the natural flow of the river without "diminution or obstruction." The court recognized that the riparian owner has no property in the water itself but only the usufruct or the right to use it as the water flows along. The court then relied upon the legal and historical precedent that the water is "common to all" and, therefore, all riparian proprietors have an equal right to the use of the water. The court recognized that some diminution may occur for the purposes of allowing the "reasonable use" of water. The test for "reasonable use" is essentially whether or not the use will be injurious to any proprietors along the stream. The court clearly rejected any notion that the rights were based upon priority of appropriation or some exclusive use of water unless it is otherwise provided for in law. *See Tyler*, 24 F. Cas. at 474.

Tyler illustrates two of the main features of the riparian doctrine – features which distinguish it from prior appropriation theories: (1) riparian rights attach only to land bordering a stream or water body, and cannot be obtained by the owners of more distant land; and (2) as among riparian owners there is no priority of right – all riparian owners have equal rights, to be sorted out by the courts in cases of conflict, based on notions such as "reasonable use."

As competing demands for water grew, the riparian doctrine became divided into (a) the natural flow theory and (b) the reasonable use theory. Under the natural flow theory, the riparian owner could divert water for domestic purposes that included family, livestock, and gardening, and otherwise had the right to have the water in the stream or lake kept at its "natural flow" level. Under the reasonable use theory, the use of the stream is limited to what is reasonable, having due regard for the rights of others on the water source. *Geddis v. Parrish*, 1 Wash. 587, 21 P. 314 (1889). The reasonable use theory recognizes the common or correlative rights among the riparian owners such that each riparian owner has an equal right to make reasonable use of the water.

[3] *Tyler* also shows elements of the reasoning that eventually produced the prior appropriation doctrine. *See* The Development Of Water Law In Washington *infra* ch. II.

Early interpretation of the riparian doctrine by the Washington courts relied upon both the "natural flow" and the "reasonable use" theories. In *City of New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 P. 735 (1901), *Kalama Electric Light & Power Co. v. Kalama Driving Co.*, 48 Wash. 612, 94 P. 469 (1908), *Judson v. Tidewater Lumber Co.*, 51 Wash. 164, 98 P. 377 (1908), and *Mally v. Weidensteiner*, 88 Wash. 398, 153 P. 342 (1915), the Washington Supreme Court applied the "natural flow" theory.

In *City of New Whatcom*, the plaintiffs sought to enjoin Bellingham Bay Water Company from diverting water from Whatcom Creek for the purpose of supplying water for municipal purposes. The plaintiff operated a mill on Whatcom Creek – downstream from Whatcom Lake – from which the water company was diverting water. The water company was also riparian to Whatcom Creek. The Court relied on the traditional analysis of riparian water rights, finding it significant that the plaintiff's rights vested before the adoption of the state constitution.

> This court has decided that these rights are to be determined by the rule of the common law, so far as not repugnant to or inconsistent with the constitution and laws of the United States, or the Organic Act or laws of Washington Territory, or incompatible with the institutions and conditions of society in this state, and that the riparian owner is to be protected in the use and enjoyment of the water naturally flowing by and over his land, and, for the purpose of protecting the rights of a grantee of the government . . . his title relates back to the first act necessary on his part in the proceedings to acquire title.

City of New Whatcom, 24 Wash. at 500.

The right, the Court stated, "is not a mere easement or appurtenance, but is inseparably annexed to the soil itself." *Id.* at 502 (citing *Crook v. Hewitt*, 4 Wash. 749, 31 P. 28 (1892) (quoting with approval *Gould on Waters* (2d ed.) at 396)). The Court concluded that the constitution protected the plaintiff's vested rights, which the Legislature could not divest except by eminent domain. The Court concluded that the impact on the plaintiffs was unreasonable and held that the water company must honor the rights of the plaintiffs or pay compensation for acquisition of their rights.

In *Kalama Electric Light & Power Co.*, the use of water for electric power generation was protected from another riparian use based on a landowner's right to the natural and ordinary flow of water through its land. In *Judson*, the Court held that a riparian landowner's right to the natural flow of the river includes the protection of land from erosion caused by the construction activities of another riparian proprietor along the Puyallup River. The Court recognized that the Puyallup is

a navigable river, and although riparian rights are generally associated only with nonnavigable water courses, the Court held that the respondents, "as riparian proprietors on this river, have the right to prevent the obstruction." *Judson*, 51 Wash. at 169; *see also Mally* (the Court was using the frequently cited natural flow language to justify the prescriptive rights of an appropriator).

In *Geddis v. Parrish*, 1 Wash. 587, 21 P. 314 (1889), *Nesalhous v. Walker*, 45 Wash. 621, 88 P. 1032 (1907), and *Benton v. Johncox*, 17 Wash. 277, 49 P. 495 (1897), the Washington Supreme Court applied the "reasonable use" theory. Relying on California law, the Court in *Nesalhous* made the distinction between the "natural" uses and other uses to the water:

> [R]iparian owners are entitled to have their natural wants supplied by using so much of the water as is necessary for strictly domestic purposes, and to furnish drink for man and beast, before any can be used for purposes of irrigation; and after their natural wants are supplied, each party is entitled to a reasonable use of the remaining water for irrigation and where the interests of the parties will be conserved thereby, the court may apportion the flow of the water of the stream to the respective owners by periods of time so that each may have the full flow during the designated period.

Nesalhous, 45 Wash. at 625.

In *Benton*, the Court rejected any notion that the Washington Territorial Laws or the state statutes effective at that time abolished the common law doctrine related to riparian rights. The Court held that the riparian rights of one who had obtained a federal patent attached at the very inception of the title to the land. The time at which the right attached to the land was based upon the first act of the settler to acquire the title, and not when the patent was actually issued. The riparian rights were protected against subsequent appropriation of water naturally flowing on the land.

The Court affirmed the basic riparian notion that every riparian had an equal right to the use of water as it was accustomed to flow, without diminution or alteration, subject to reasonable use for domestic, agriculture, and manufacturing. The riparian right was an incident to the estate – not an easement or an appurtenance.[4] *Benton*, 17 Wash. at 281.

Benton established several important principles that would continue to be important in Washington law.

[4] The Court refused to recognize that the doctrine of prior appropriation applied to private property during this period. The customs, laws, and decisions of the courts adopting prior appropriation, including the 1866 Mining Law, were interpreted by the courts to apply only to public lands. Any such rights were no longer valid once the government had disposed of the land without reserving the water. *Benton*, 17 Wash. at 289.

(1) The doctrine of prior appropriation applies only to public lands.

(2) Washington recognizes the common law riparian doctrine. The court, adopting the analysis from the Atlantic states as well as the Mississippi Valley, stated: "It certainly cannot be true that a difference in climatic conditions or geographical position can operate to deprive one of a right of property vested in him by well settled rule of common law." *Benton*, 17 Wash. at 283.

(3) Riparian rights apply once the land goes into private ownership and "relate back to the first act of the settler necessary in the proceedings to acquire title." *Id.* at 288.

(4) Each riparian has an equal right to the water, and each may make reasonable use thereof.

(5) Riparians are entitled to protection against appropriations occurring after their priority date regardless of who first used the water.

(6) The Territorial Act of 1873, relating to the appropriations of water in Yakima County, only applies to appropriations on public lands.

(7) The Water legislation passed in 1889, 1890, and 1891 contains nothing in derogation of the above conclusions.

(8) A corollary to these principles is that a valid appropriation on public lands will be protected against, and may cut off, subsequently accruing riparian rights. *See Offield v. Ish*, 21 Wash. 277, 57 P. 809 (1899); *Longmire v. Smith*, 26 Wash. 439, 67 P. 246 (1901).

The more recent case of *Harris v. Brooks*, 225 Ark. 436, 283 S.W.2d 129 (1955), illustrates the modern analysis of riparian rights. In *Harris*, the plaintiffs had a recreational facility on a lake. Their recreational business required a certain lake level to maintain boating and fishing. Another riparian on the same lake grew rice, and during drought periods he would divert water from the lake, causing the lake level to lower. The Court held that the lowering of the lake to a particular level unreasonably interfered with the plaintiffs' riparian recreational uses. The Court weighed the social values of both riparian uses and made several findings:

- The right to use water for strictly domestic purposes – such as for household use – is superior to many other uses of water.
- Other than domestic use, all other lawful uses of water are equal. Some of the lawful uses of water recognized by the state are fishing, swimming, recreation, and irrigation.
- When one lawful use of water is destroyed by another lawful use, the latter must yield, or it may be enjoined.

- When one lawful use of water interferes with or distracts from another lawful use, then a question arises as to whether, under all the facts and circumstances of that particular case, the interfering use shall be declared unreasonable and as such enjoined, or whether a reasonable and equitable adjustment should be made, having due regard to the reasonable rights of each. A use that causes substantial harm to another use may still be reasonable if "the legal merit or utility of the activity which produces it outweighs the legal seriousness or gravity of the harm."

Harris, 225 Ark. at 444-46; *accord Crook v. Hewitt*, 4 Wash. 749, 31 P. 28 (1892).

As this Arkansas case illustrates, neither the rice grower nor the recreational business was adjudged to have a "prior" or "higher" right to the lake water than the other party. Agricultural and recreational/business use of the water were deemed equally lawful and appropriate. Where the rice farming operation resulted in damage to the recreational business interests, the court balanced the equities, finding in this case that the rice grower's diversion of lake water unreasonably interfered with the recreation business's rights to use the water. The "natural" level of the lake was not adopted as a factor in the decision.[5] Had the same case arisen in Washington, the prior appropriation doctrine would have dictated a completely different analysis.

These early conflicting definitions of riparian rights continued relatively unchanged until they underwent substantial modification in 1917 and were thereafter based upon legislation as well as developments in the common law. From then on, it was clear that the law in Washington would be based upon the prior appropriation doctrine.

C. THE EMERGENCE OF THE PRIOR APPROPRIA-TION DOCTRINE AS THE DOMINANT LAW IN WASHINGTON

The doctrine of prior appropriation largely evolved from the local customs practiced by miners on public lands in order to deal with scarce water conditions and settle disputes. *See Irwin v. Phillips*, 5 Cal. 140 (1855); 1 Wells A. Hutchins, *Water Rights Laws In The Nineteen Western States* 159-75 (1971). The arid climate west of the one-hundredth meridian, coupled with the need for large quantities of water to develop mining claims and to irrigate crops, prompted development of an allocation system for water use protecting the first water user over subsequent claims to

[5] The *Harris* decision discusses, and specifically rejects, recognition of the prior appropriation doctrine in Arkansas. *Harris*, 225 Ark. at 441.

water.[6] Given the geography, social customs, and economic policies for disposing western lands, "the future growth and well-being of the entire region depended upon a complete adherence to the rule of appropriation for a beneficial use as the exclusive criterion of the right to the use of water."[7] *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 157, 55 S. Ct. 725, 79 L. Ed. 1356 (1935).

In Washington, two territorial statutes began to recognize elements of the prior appropriation doctrine. The first of these was an act passed in 1873 relating to irrigation and water rights in Yakima County. 18 Wash. Terr. Laws, pp. 520-22. This law recognized and declared the right to appropriate the waters of the streams and creeks of that county for beneficial purposes without regard to riparian statutes. *Id.* §§ 1, 2, 8. It further provided that all controversies over the use of water in Yakima County shall be determined by the dates of appropriation. *Id.* §§ 4, 11. In 1885, this legislation was substantially reenacted and also made applicable to Kittitas County. 25 Wash. Terr. Laws, pp. 508-11. Neither act mentions riparian rights, and they impliedly preclude the recognition of riparian rights by providing that controversies are to be resolved by reference to the dates of appropriation.

The first state Legislature enacted a rather comprehensive water code providing for the appropriation of water for irrigation. 1889-90 Wash. Laws, pp. 706-29.[8] The first section of that act reads, in part:

> Any person is entitled to take from any of the natural streams or lakes in this state water for the purposes of irrigation, not heretofore appropriated or subject to rights existing at the time of the adoption of the constitution of this state, subject to the conditions and regulations imposed by law[.]

[6] For a general description of the local mining customs, see *Jennison v. Kirk*, 98 U.S. 453, 457-58, 25 L. Ed. 240 (1878), and *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154, 55 S. Ct. 725, 79 L. Ed. 1356 (1935).

[7] Because our current water code is based upon the prior appropriation doctrine, a more complete analysis of that doctrine is contained in chapters IV and V below, The Water Codes: Surface Water and The Water Codes: Groundwater, respectively.

[8] Irrigation And Irrigating Ditches, pp. 706-28 (Mar. 4, 1890); Irrigation And Irrigating Ditches, Act Amended, pp. 728-29 (Mar. 20, 1890); Irrigation, Unit Of Measure Of Water For, p. 729 (Mar. 26, 1890).

Id. § 1. This act also provided a method by which existing rights would be adjudicated, and clearly contemplated a decree setting priorities for ditches, "each according to the time of its said construction and enlargement." *Id.* § 60.[9]

In 1891, the Legislature enacted further legislation in the same vein. 1891 Wash. Laws, pp. 327-29. The legislation states:

> *The right to the use of water* in any lake, pond or flowing spring in this state, or the right to the use of water flowing in any river, stream or ravine of this state for irrigation, mining or manufacturing purposes, or for supplying cities, towns or villages with water, or for water works, *may be acquired by appropriation , and as between appropriations the first in time is the first in right*.

Id. § 1 (emphasis added).

This act also provided for the posting of notices of the intent to appropriate and for the "relation back" of the priority date to the notice date, provided that the appropriation is "diligently and continuously prosecuted to completion." *Id.* §§ 2-4. This act also recognized appropriations that were previously made and provided that it should not be construed to interfere with vested rights. *Id.* § 7.

These statutes were a codification of the first few court decisions, which firmly established that appropriation of water for use on public lands is recognized by custom and protected by the common law and federal legislation in Washington. *Tenem Ditch Co. v. Thorpe*, 1 Wash. 566, 20 P. 588 (1889); *Ellis v. Pomeroy Imp. Co.*, 1 Wash. 572, 21 P. 27 (1889); *Geddis*.

The *Tenem Ditch Co.* decision illustrates these points. The Tenem Ditch Co. had constructed a ditch on unpatented public land along Tenem Creek in 1874, diverting two-thirds of the flow of the creek for the purpose of irrigating the lands of the ditch company's members. Thorpe, who was not a member of the ditch company, patented the land containing the diversion point in 1880 and claimed a riparian right to the natural flow of the stream. The Washington Supreme Court ruled that the ditch company had a right under federal law to appropriate water from the creek before the United States conveyed title to the land. Therefore, the company's right was senior to Thorpe's, which could relate back only to the date he acquired his land from the public domain.[10]

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[9] This act, however, provided a means of regulating rights based more on the riparian method of regulating all waters equally, or in some shared use, rather than strictly on a first-in-time basis.

[10] It is a curious point that *Tenem Ditch Co.* cites *federal* law as the basis for the ditch company's prior appropriation rights, while conceding that state law would favor a riparian claim. The Court appears to have forgotten

The Court concluded that the ditch company's prior appropriation of the water was superior to Thorpe's right (obtained when Thorpe received a patent to the land). The Court enumerated several conclusions of law:

(1) The prior appropriation of the flow of any water over the public lands of the United States is a vested right.

(2) The right of the prior appropriator exists based on the ownership of the land by the United States.

(3) The United States recognizes that the local custom forms the law giving the right to the first appropriator.

(4) When the land is transferred from ownership of the United States, the right of the prior appropriator under the laws of the United States ceases.

(5) The rights of the patent holder are subject to prior appropriators as of the date the patent to the land issues, and not the date that a homesteader first entered the land (there is no relation back to the date of entry on the land for the purpose of obtaining a riparian water right).

A similar result was reached in *In re the Water Rights of Alpowa Creek*, 129 Wash. 9, 224 P. 29 (1924). *In re Alpowa Creek* involved the adjudication of rights to the use of water from Alpowa Creek, which flows from the Blue Mountains and into the Snake River in southeast Washington. The primary issue before the Washington Supreme Court was whether appropriators of water on non-riparian land would take preference or priority over the use of water by riparian owners. During the dry season, there was insufficient water to satisfy both uses. The appropriators on the non-riparian land finished construction and began to divert water from their ditch (the Houser ditch) in 1877. The riparian owners began to obtain patents to their land from 1877 to 1901. These riparian owners argued that the diverters from the Houser ditch failed to use reasonable diligence in applying the water to beneficial use. The riparian owners therefore argued that they should have preference in obtaining their riparian rights, measured by the time they obtained the patents to their land.

The Court determined that the (non-riparian) appropriators had perfected a water right by expressing an intent to appropriate the water and perfecting the right through reasonable diligence and the application of the water to beneficial use. Once perfected, that water right related back to the date upon which initial notice was first given by the diversion of water through the Houser

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that the federal government recognized prior appropriative rights only as an accommodation to the choices made by western state courts. *See* Federal Response To State Allocation And Regulation Of Water *infra* ch. II, § E.

ditch, thereby establishing and vesting the appropriators with a priority date of 1877. Under previously established law, these appropriators then took preference over the riparian landowners who had obtained patents to their land between 1877 and 1901.

While the Court recognized that riparian rights "cannot be defeated by subsequent appropriation," the Court also held that an appropriation for beneficial use "is superior to subsequently acquired riparian rights." *In re Alpowa* Creek, 129 Wash. at 13; *see also Benton v. Johncox*, 17 Wash. 277, 49 P. 495 (1897).

In 1917, the Legislature passed the first comprehensive water management legislation. 1917 Wash. Laws ch. 117. The 1917 Water Code created a system to be administered by the state for the management and use of state waters. *See* Wash. Rev. Code 90.03. The key provision of the 1917 legislation states:

> The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this chapter provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right. Nothing contained in this chapter shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise.

Wash. Rev. Code 90.03.010.

In *West Side Irrigating Co. v. Chase*, 115 Wash. 146, 196 P. 666 (1921), the Court recognized the legislative intent to provide a complete system of regulating and distributing waters of the states:

> The state of Washington appears to have been one of the last of the states to enact a full and complete irrigation code. Under these circumstances, it had the advantage of the previous experience of many other states, and an examination will show that the legislature of this state undertook to embody in its code the important and best provisions of the laws from the other states.

West Side Irrig. Co., 115 Wash. at 151.

With the adoption of the 1917 Water Code, it was clear that the Legislature had chosen prior appropriation as the guiding principle for the allocation of water rights in Washington. In the succeeding decades, the courts followed this policy choice, squaring it where possible with the earlier judicial tendency to look to the riparian doctrine. The unresolved tension between the two doctrines is the background for several important twentieth-century water law cases.

D. JUDICIAL EFFORTS TO RECONCILE THE RIPARIAN AND PRIOR APPROPRIATION DOCTRINES

1. Doan Creek

The first appellate case dealing with the water rights adjudication provisions of the new water code was *In re the Water Rights of Doan Creek*, 125 Wash. 14, 215 P. 343 (1923). In that case, the Court had the occasion to review the state's application of the riparian doctrine in relation to the prior appropriation doctrine. The Court stated:

> We have so often held that the law of riparian rights, modified to the extent of reasonable use by the riparian owners and to the extent of appropriations upon public lands, obtains in this state, since the very early case of *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495 . . . down to the recent case of *Smith v. Nechanicky*, 123 Wash. 8, 211 Pac. 880. . . .
>
> On the other hand, however, we have recognized the right of prior appropriation of water as against lands belonging to the public domain, until segregated from the public domain, and that such prior appropriation, once established, is superior to riparian rights and subsequent appropriations.

In re Doan Creek, 125 Wash. at 20.

The holding that appropriations must be on land belonging to the public domain followed the approach of California courts, which held that once land left federal ownership into private ownership, riparian rights attached. *See* Territorial And Early Statehood Legislation *supra* ch. II, § A.

2. Weitensteiner v. Engdahl

Two days after issuing *In re Doan Creek*, the other department of the Washington Supreme Court held that the prior appropriation doctrine could apply on private lands. *Weitensteiner v. Engdahl*, 125 Wash. 106, 215 P. 378 (1923).[11] Weitensteiner and Engdahl owned adjacent tracts of land in Stevens County, and each claimed the right to appropriate most of the waters in Grouse Creek. Both parties claimed a combination of rights based on riparian ownership and prior appropriation. The earliest appropriation was by Engdahl, who had diverted water from the creek on land then owned by a railroad. Weitensteiner claimed that this appropriation, which occurred after the land had been conveyed out of the public domain, was subordinate to Weitensteiner's

[11] This case was a continuation of a battle over water use that Weitensteiner had with others in the area. *See Weidensteiner v. Mally*, 55 Wash. 79, 104 P. 143 (1909); *Mally v. Weidensteiner*, 88 Wash. 398, 153 P. 342 (1915).

riparian rights. The Court ruled in favor of Engdahl on this point, finding that a prior appropriation, even as to land in private ownership, is senior in right to subsequently acquired riparian rights. The Court observed:

> While the common law requires ownership or the possession of land adjoining the stream in order to acquire a riparian right to the use of water, the Arid Region Doctrine of appropriation is the doctrine of the separate ownership of the land and the water right. Hence it follows that a good title to a water right may be had without the owner thereof having the title or possession of any land, except the ditch or canal; and, upon the other hand, if the water of a certain stream has all been appropriated before the settlement of the land upon its banks, even in those states which recognize both the common law of riparian rights and the doctrine of appropriation, the settlers who afterward become the riparian owners, may acquire no right to the use of water.

Weitensteiner, 125 Wash. at 114-15 (quoting 2 *Kinney On Irrigation And Water Rights* 767 (2d ed.)). In response to the argument that Weitensteiner did not hold a valid water right because his use of water was not made on public lands, the Court stated:

> But we cannot think the contention tenable. Unquestionably, as against the owner of the private property on which the appropriation is made, no rights could be acquired short of adverse user for the period of the statute of limitations, but as against subsequent appropriators not in privity with the owner of the land on which the appropriation is made, such an appropriation is valid.

Id. at 113.

The Court has subsequently cited *Weitensteiner* as the case which changed the common law rule that one could only appropriate water on public lands to a rule which would also allow appropriation on private lands. *Drake v. Smith*, 54 Wash. 2d 57, 61, 337 P.2d 1059 (1959); *Hunter Land Co. v. Laugenour*, 140 Wash. 558, 570, 250 P. 41 (1926).

3. Brown v. Chase

The debate as to the relationship between riparian and prior appropriative rights in this state continued and was thought to be resolved by the Washington Supreme Court in *Brown v. Chase*, 125 Wash. 542, 217 P. 23 (1923). In *Brown*, the state had granted rights under the 1917 Water Code to an irrigation district to appropriate 125 cubic feet per second of water from the Wenatchee River. The Wenatchee River is a non-navigable stream, and the water would irrigate nonriparian land. Riparian landowners objected to the appropriation based upon the riparian doctrine, which would permit only riparian owners to acquire rights to water from a non-navigable stream.

There was sufficient water to satisfy the needs of the riparian landowners so they could show no harm by the irrigation district's appropriation of water. The Court rejected the riparian landowner's arguments and indicated that, under the 1917 Water Code, riparian rights were only protected to the extent that water was put to beneficial use within a reasonable period of time:

> Waters of non-navigable streams in excess of the amount which can be beneficially used, either directly or prospectively, within a reasonable time, on, or in connection with riparian lands, are subject to appropriation for use on nonriparian lands.

Brown, 125 Wash. at 553.

Thus, water not already appropriated by riparian users, or soon to be appropriated by them, was, in the Court's view, available for appropriation by non-riparians. Though it recognized that its decision must be "in harmony with the legislation" on the matter, the Court primarily relied on the evolution of the common law principles developed for water use in the arid western states. *Id.* at 553. The Court also suggested the existence of a principle that would in fact emerge as a major doctrine in Washington law to limit the rights of riparians vis-à-vis appropriators:

> [I]t was not to the interest of the state that the water of a non-navigable stream should be idle or going to waste because one of its citizens, having a preference right to its use, unjustifiably neglects to avail himself thereof while others stand ready and willing, if permitted, to apply it to the irrigation of their arid lands. On the other hand, the preference accorded an abutting owner should not be limited to his immediate, present use of the water. We said that it comports with the general policy of the state to hold that this statute [Laws of 1890, Rem. & Bal. Code 6382] contemplated the use by the abutting owner of the water necessary for his present needs, and for those that accrue as he, in good faith, proceeds with reasonable dispatch to construct the improvements for applying the water to his adjacent arid lands.

Id. at 549-50.

The Court reached its conclusions in light of what it perceived as the fundamental purpose of the prior appropriation doctrine: to provide certainty and not to allow anyone to hinder or create uncertainty for others who are diligently putting water to productive use. Riparian rights would be fit into the prior appropriation system by denying riparians an exclusive right to share and share alike in the unappropriated water of streams and lakes. That water would be available for appropriation by non-riparians and riparians alike. In addressing the "loose and general expressions" of earlier case law, the Court declared that there was a presumption that the riparian lands require all of the water of the stream, and the burden is on the non-riparian to show that their water use would cause no injury to riparian rights. But if there is ample water in the stream, the

burden is on the riparian owner to prove "substantial injury" by the non-riparian diversion of water. *Id.* at 553.

The most significant finding by the Court was that riparian landowners are subject to the principle of the prior appropriation doctrine to apply water to beneficial use within a reasonable period of time. While *Brown* clarified some of the previous decisions of the Court, it left unanswered the question of "the reasonable period of time" for a riparian to beneficially use water. In other words, it was unclear as to how to calculate if there were "excess waters" in the stream for non-riparian use when the riparian owners had the right to beneficially use the water within a reasonable period of time. The Court appeared to leave this question to the facts of each individual case. However, it created a considerable debate by many water law practitioners. *See* Horowitz, 7 Wash. L. Rev. 197; Ralph W. Johnson, *Riparian And Public Rights To Lakes And Streams*, 35 Wash. L. Rev. 580 (1960); Charles E. Corker & Charles B. Roe, Jr., *Washington's New Water Rights Law – Improvements Needed*, 44 Wash. L. Rev. 85 (1968).

Brown established the new standard for riparian rights that has been followed by the courts ever since. The cases that followed *Brown* sought to clarify when a riparian owner has a right to protest the use by another and to clarify the definition of a "reasonable period of time" in which one has to put water to beneficial use. The Court, in *Proctor v. Sim*, 134 Wash. 606, 236 P. 114 (1925), discussed the protection afforded riparian rights in the 1917 Water Code. It stated that the code is not to be construed to lessen, enlarge, or modify the existing rights of any riparian (*see* Wash. Rev. Code 90.03.010) but made clear that the effect of *Brown* was to do precisely that to the extent that "excess waters" were not to be held back for riparians only.[12] The Court held that an appropriator may divert water in excess of the water a riparian is currently beneficially using or will be using in a reasonable period of time and extended the doctrine of *Brown* to nonnavigable lakes. The Court in effect held that the existing rights of the riparian owner do not include exclusive rights to excess waters, citing as consistent with Washington law the conclusions reached by the

[12] In 1964, the federal Ninth Circuit Court of Appeals had the opportunity to review Washington water law and recognized the significance of the ruling in *Brown*. *United States v. Ahtanum Irrig. Dist.*, 330 F.2d 897 (9th Cir. 1964). *Ahtanum* was an action to quiet title to the Yakama Indian Tribe the rights to the use of water from Ahtanum Creek, which borders the Yakama Reservation. In determining the tribal water rights, the court had to consider the nontribal rights to use the water based upon state law. The court, citing *Brown,* found that in Washington, the existence and continuation of "riparian rights . . . are, like appropriative rights, dependent upon beneficial use." *Id.* at 904.

Oregon Supreme Court in *In re Hood River*, 114 Or. 112, 227 P. 1065, 1089 (1924); those waters are available for appropriation.

4. The Stranger Creek Case

In 1970, the Washington Supreme Court again undertook to clarify what it perceived as a conflict in the earlier court rulings on the nature of riparian rights and their relationship with appropriative rights. *In re the Water Rights of Stranger Creek*, 77 Wash. 2d 649, 466 P.2d 508 (1970). The Court in *In re Stranger Creek* viewed the natural use doctrine of riparian rights as part of the theory that treats water rights as an attribute of ownership of the soil, with the water right being a property right that is inseparably part of the land:

> At traditional common law, the riparian water right was a strict natural flow theory and was regarded as an absolute incident of property ownership. Thus, a riparian owner could fail or refuse to put his water to beneficial use and at the same time prevent others from using it by assertion of his "riparian water rights." Historically, then, the relationship between "riparian" and "appropriative" water rights could be characterized as one between strict proprietary rights and rights related to usage.

Id. at 655. But the Court said Washington's treatment of riparian rights had been unclear as to whether they were properly to be viewed as a strict proprietary right or as a right based on usage:

> In Washington, the concept of riparian rights in water has reflected both characteristics. In our first case on the subject, *Geddis v. Parrish*, we said that this state adopted the "reasonable use" theory of riparian rights rather than the strict common law "natural flow" theory. But in other early cases we said that riparian rights are property rights and that these rights are inseparably annexed to the soil and are part of the fee title. Thus, from the beginning, the term "riparian water rights" has lent itself to two understandings in Washington: first, as being in the nature of a proprietary interest, with the attendant connotation that the owner could obstruct beneficial use by others by making no use of the water himself; second, the term may be understood as connoting a right to a prior claim for purposes of beneficial use.

Id. at 655-56 (citations omitted).

Upon reviewing both the court cases and the legislative developments, the Court found that the law was "firmly established" for the preference for beneficial use in concepts of both riparian and appropriative rights to water. *Id.* at 656. Thus, a riparian owner who had not put water to beneficial use could not maintain an action against an appropriator who had. *Id.* at 656-57.[13]

[13] In *Northport Brewing Co. v. Perrot*, 22 Wash. 243, 244, 60 P. 403 (1900), the Court refused to allow an action brought by a person claiming riparian rights, stating "the answer is fatally defective, in that it does not appear

5. Department Of Ecology v. Abbott

In 1985, the Washington Supreme Court addressed the question of what constitutes a "reasonable period of time" for riparian landowners to put their water to beneficial use. *Department of Ecology v. Abbott*, 103 Wash. 2d 686, 694 P.2d 1071 (1985). The *Abbott* case arose out of a 1982 general stream adjudication in which the superior court had held that a riparian landowner's common law rights were undiminished by the 1917 Water Code. The trial court had held that the prior appropriation permit system established by the 1917 Water Code applied only to water "in excess" of a riparian's future water needs for "ordinary" or "natural" domestic uses. In that view, all reasonable future needs for ordinary and domestic uses would be deemed part of the riparian's right. *Abbott*, 103 Wash. 2d at 693. The Washington Supreme Court disagreed, finding that the "excess" or "surplus" waters available for appropriation are those waters the riparian owners would not put to beneficial use by a date certain following the date the 1917 Water Code became effective. *Id.* at 694-95.

The Court first found that the 1917 Water Code provided sufficient notice to all riparian owners that the prior appropriation doctrine was the dominant law of the land and that, under that doctrine, anyone claiming water was required to diligently put water to beneficial use or risk losing the right because of nonuse. The Court then held that fifteen years was a reasonable time for riparian landowners to "learn about the Code" and to protect their rights by putting the water to beneficial use; thereby all rights had to be perfected by 1932. If they were not, they were lost as a result of nonuse.

The *Abbott* Court did not altogether extinguish riparian rights. The Court recognized that riparian rights are vested property rights, subject however, to the common law notion that one's right to property in water is not limited or protected by application of past doctrines, but develops and is modified based on local custom and conditions:

> That a state has the [police] power to either modify or reject the doctrine of riparian rights because unsuited to the conditions in the state and to put into effect the doctrine of prior appropriation has long been settled.
>
> . . . Riparian rights may be limited . . . in order to further state policy encouraging beneficial use.

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therefrom that appellant is making any beneficial use of the water which he is diverting from the stream." *See* Johnson, 35 Wash. L. Rev. at 593; Corker, 44 Wash. L. Rev. 85; Johnson, 35 Wash. L. Rev. at 601-15.

Id. at 696-97[14] (citations omitted).

Abbott was the first case to have fully analyzed the 1917 Water Code's effect on riparian rights. More importantly, the Court discussed the legislative policies and common law development since 1917 that provided the basis for the courts' affirmation of the prior appropriation doctrine as the law of this state.

In the sixty-two-year march from *In re Doan Creek* to *Abbott*, the courts moved, step by step, from a dual recognition of riparian and prior appropriation rights in Washington to a position that riparian rights are of little meaning unless the water claimed under them has been put to "beneficial use" – or in other words, perfected by prior appropriation. Thus, the only riparian rights that still count in Washington are those that cannot be distinguished from prior appropriation rights, those whose exercise is so senior that they amount to the same thing. By imposing a "beneficial use" requirement on riparian rights, the Court transformed the riparian doctrine beyond recognition. The inherent conflict between the two doctrines remains, but in this state, riparian rights are best understood as an important factor in the historical evolution of water law rather than a viable present-day alternative to the acquisition of rights by prior appropriation.

E. FEDERAL RESPONSE TO STATE ALLOCATION AND REGULATION OF WATER

The development of water law in the latter half of the 1800s was pivotal in the historical and current attitude that the states possess the authority to manage the water within their borders, and the federal government should not be meddling in such decisions. For many years, Congress took no legislative action related to water use; then, in both the 1860s and 1870s, Congress endorsed the water law as it was developing locally. In the absence of federal legislation authorizing water appropriation, courts by and large held that such federal inaction constituted a recognition of state-created water rights. *See Broder v. Natoma Water & Mining Co.*, 101 U.S. 274, 276, 25 L. Ed 79 (1879); *Sparrow v. Strong*, 70 U.S. (3. Wall) 97, 104, 18 L. Ed. 49 (1865); *Irwin v. Phillips*, 5 Cal. 140 (1855); *Gold Hill Quartz Mining Co. v. Ish*, 5 Or. 104 (1873). Some courts acknowledged the superior title of the federal government and at first found miners to be

[14] In a companion case to *Abbott*, the Supreme Court also confirmed that the state, under its police powers, may take away a water right if the holder of that right fails to register a claim to the right as required by law. *Department of Ecology v. Adsit*, 103 Wash. 2d 698, 707, 694 P.2d 1065 (1985) (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 530, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982)).

trespassers on public lands; however, water scholar Samuel C. Wiel observed that this recognition was a mere formula of words without practical force, however sound it might have been in technical theory. 1 Samuel C. Wiel, *Water Rights In The Western States* (3d ed. 1911); *see Crandall v. Woods*, 8 Cal. 136, 143 (1857); *Hughes v. Devlin*, 23 Cal. 502, 507 (1863); *Boggs v. Merced Mining Co.*, 14 Cal. 279, 374, 1859 WL 142 (1859); 1 Wiel, at 91. In sum, until 1866, with the enactment of the first mining laws, the federal government, by silent acquiescence, approved the doctrine of prior appropriation as "evidenced by local legislation, judicial decisions, and customary law and usage." *Colorado Department of Natural Resources v. Southwestern Colorado Water Conserv. Dist.*, 671 P.2d 1294, 1305 (Colo. 1983), *cert. denied sub nom. Young v. Southwestern Colorado Water Conserv. Dist.*, 466 U.S. 944, 104 S. Ct. 1929, 80 L. Ed. 2d 474 (1984).

Without federal guidance to resolve water controversies, the western states developed several theories to justify the adoption of the prior appropriation doctrine. *See* Tarlock & Robison, *supra* § 4:5; NOTE, *Federal-State Conflicts Over The Control Of Western Waters*, 60 Colum. L. Rev. 967 (1960). California adopted the prior appropriation doctrine as a theory for protection of a miner's use of water in a dispute between two water users on the public domain. *Irwin*; *see* Territorial And Early Statehood Legislation *supra* ch. II, § A. Thirty-one years after adopting the prior appropriation doctrine to allocate water among miners on public land, the California Supreme Court recognized the common law of riparian rights on land patented from the federal government. *Lux v. Haggin*, 69 Cal. 255, 10 P. 674 (1886). In this noted case, the California Supreme Court held that federal patents carried riparian rights on non-navigable waters as a matter of state, and not federal, law, "unless the waters are expressly or impliedly reserved by the terms of the patent, or of the statute granting the land, or unless they are reserved by the congressional legislation authorizing the patent." *Lux*, 10 P. at 720; Samuel C. Wiel, *Fifty Years Of Water Law*, 50 Harv. L. Rev. 252, 256-59 (1936). The effect of this case was to limit the application of the appropriation doctrine to public lands still in federal ownership. *Lux*.[15]

By contrast, the Colorado Supreme Court, around the same time, completely rejected any common law riparian rights and instead unequivocally held that the doctrine of "prior

[15] Given similar semi-arid conditions to California, the state of Washington followed this hybrid system. *Benton v. Johncox*, 17 Wash. 277, 279-80, 289, 49 P. 495 (1897); *see* The Initial Choice Of Washington Courts: The Riparian Doctrine *supra* ch. II, § B.

appropriation" was the law of the state. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882); *Colorado Department of Natural Resources*; *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982); *see* Moses, *The Historical Development Of Colorado Water Law, In Tradition, Innovation And Conflict: Perspectives On Colorado Water Law* 25 (L. MacDonnell ed., 1986); *see also Moyer v. Preston*, 6 Wyo. 308, 44 P. 845 (1896). The courts reasoned that the common law of riparianism was impractical to meet the arid conditions and need to irrigate; an alternative system was "an absolute necessity." *Coffin*, 6 Colo. at 446. In fact, the Colorado Supreme Court viewed the protection of the prior appropriation doctrine so important that it found appropriative rights "entitled to protection as well after the patent to a third party of the land over which the natural stream flows, as when such land is a part of the public domain." *Id.* at 446-47. Moreover, while the federal government retained sovereignty over public lands, it did not keep proprietary rights necessary for riparian rights to attach to federal patents. *Id.*

In the midst of this legal development in the western states, the passage of the Homestead Act of 1862 threatened to undermine the prior appropriation system since it allowed subsequent private patentees to claim superior federal riparian water rights over previously established appropriative rights. *See* Act of May 20, 1862, ch. 75; *Union Mill & Mining Co. v. Ferris*, 24 F. Cas. 594 (C.C.D. Nev. 1872); *Van Sickle v. Haines*, 7 Nev. 249 (1872); *Thorp v. Freed*, 1 Mont. 651, 662 (1872). In *Van Sickle*, for example, a subsequent federal patentee secured a riparian water right that was superior to a right held by a downstream prior appropriator, who previously had diverted water flowing through public lands. Such uncertainty for prior appropriators and private patentees alike finally prompted Congress to pass the Act of 1866, which explicitly recognized and acknowledged state-created water rights on public lands. Act of July 26, 1866, ch. 262, 14 Stat. 251 (1866) (codified as 43 U.S.C. § 661). The Act of 1866 provided:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed[.]

43 U.S.C. § 661.

This act did not establish a new federal water rights system. Rather, it was a "voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use."

Broder, 101 U.S. at 276; *see also Jennison*, 98 U.S. at 459; *Basey v. Gallagher*, 87 U.S. (20 Wall.) 670, 683-84, 22 L. Ed. 452 (1874); *Atchison v. Peterson*, 87 U.S. (20 Wall.) 507, 512-13, 22 L. Ed. 414 (1874). Four years later, in 1870, Congress amended the Act of 1866 and reaffirmed the protection of existing prior appropriation water rights, stating:

> All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or reorganized by [the Mining Act of 1866].

Act of July 9, 1870, ch. 235, 16 Stat. 218 (1870) (codified as 30 U.S.C. § 52).

While the Act of 1866 recognized and confirmed state water rights on public lands as against the federal government, the amendment of 1870 clarified the intent of Congress that patentees who acquired title to public lands took it subject to any water rights previously acquired. Read together, the two acts confirmed the validity of prior appropriation rights enforced by the state and territorial courts before 1866. 1 Wiel, at 99. However, they failed to address the type of water right a patentee of land under the Homestead Act or other federal act would obtain, as well as the future effect of such rights. California assumed that federal title carried with it ordinary incidents of private land ownership, including riparian rights and, therefore, when land was patented, the individual received the government's riparian rights, subject only to previous grants of water. *See Conger v. Weaver*, 6 Cal. 548 (1856); *see also* Trelease, 45 Cal. L. Rev. at 650. However, the United States Supreme Court shortly thereafter held otherwise: that common law riparian rights do not pass with the land when it goes from public domain to private control. *See Sturr v. Beck*, 133 U.S. 541, 549-52, 10 S. Ct. 350, 33 L. Ed. 761 (1890); *Jennison*; *Atchison*, 87 U.S. at 512. The effect of the 1866 and 1870 acts on lands patented after 1866 remained unclear until 1935, when the United States Supreme Court construed appropriative rights to "reach into the future as well." *California Oregon Power Co.*, 295 U.S. at 155; *see also California v. United States*, 438 U.S. 645, 656 n.11, 98 S. Ct. 2985, 5 L. Ed. 2d 1018 (1978). More recent commentators, however, question whether the acts had such a prospective application. *See* Tarlock, Corbridge, & Getches, *Water Resource Management* 174 (1993); NOTE, 60 Colum. L. Rev. at 971.

In 1877, Congress passed the Desert Land Act to encourage reclamation and settlement of public desert lands within the states of California, Oregon, and Nevada (to which Colorado was later added in 1891 by amendment) and the territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota. Act of March 3, 1877, 19 Stat. 377 (codified as 43

U.S.C. §§ 321-339). With larger tracts of land available under this act, settlers could claim irrigable lands by "conducting water upon the same." subject to existing rights. 43 U.S.C. § 321. The Desert Land Act ratified the 1866 and 1870 acts, providing that "all surplus water over and above actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights." *Id.*

In construing the Desert Land Act, the Washington Supreme Court held that it related only to the reclamation of desert lands. *See Still v. Palouse Irrig. & Power Co.*, 64 Wash. 606, 612, 117 P. 466 (1911); *Bernot v. Morrison*, 81 Wash. 538, 559-60, 143 P. 104 (1914). The California Supreme Court followed Washington's interpretation of the Desert Land Act in *San Joaquin & Kings River Canal & Irrigation Co. v. Worswick,* 187 Cal. 674, 690, 203 P. 999, *cert. denied*, 258 U.S. 625, 42 S. Ct. 382, 66 L. Ed. 797 (1922). The Oregon Supreme Court, however, held differently in *Hough v. Porter*, 51 Or. 318, 95 P. 732 (1908), *opinion supplemented*, 98 P. 1083, 1092-94 (1909), *reh'g denied*, 102 P. 728 (1909), construing the act to impose the prior appropriation system on all western states. In 1935, the question came before the United States Supreme Court in *California Oregon Power Co.* The Court rejected the state of Washington's interpretation and held that the Desert Land Act applied to all public domain lands in the western states, and not just so-called "desert" lands. More importantly, it held that the act severed the water from the public lands and left the unappropriated waters of non-navigable sources open to appropriation by the public under the laws of the states. The Court further held that this rule applied to lands patented under all other land laws. *California Oregon Power Co.*, 295 U.S. at 162.

In *California Oregon Power Co.*, the petitioner raised the issue of whether an owner of riparian land who had acquired the land in 1885 from a predecessor-in-interest by patent under the 1862 Homestead Act, and who had never sought to make an appropriation of the water, could enjoin an appropriator who was using water based upon the authority of the state of Oregon. The petitioner claimed that a riparian right to the water attached to the lands when the patent was issued to its first predecessor in title. The Court stated the issue as:

> [W]hether – in the light of pertinent history, of the conditions which existed in the arid and semiarid land states, of the practice and attitude of the federal government, and of the congressional legislation prior to 1885 – the homestead patent in question carried with it as part of the granted estate the common law rights which attached to riparian proprietorship.

Id. at 153-54. The Court provided an analysis of congressional intent in passing the mining laws, the homestead and preemption laws, and finally the Desert Land Act. In its final holding, the Court stated:

> What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain become *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. . . . The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation.

Id. at 163-64.

Thus, this decision provided for the post-hoc recognition of the prior appropriation doctrine and allowed the states to choose which laws and customs govern private water rights on federal lands subject to limitations involving federal navigation, commerce, and reserved rights. *California Oregon Power Co.*; *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 19 S. Ct. 770, 43 L. Ed. 1136 (1899). Subsequent decisions of the United States Supreme Court have reaffirmed appropriative rights, noting that through the long history between the federal government and the states "runs the consistent thread of purposeful and continued deference to state water law by Congress." *California*, 438 U.S. at 653.

The Washington Supreme Court has also rendered an opinion as to the effect of federal patents to the public domain. In *Bernot*, the issue was raised as to the ownership of the bed of an unnavigable lake. In determining this question, the Court recognized the federal government's deference to the custom and the common law created in the state:

> The law is well settled that grants of the government of the United States of lands bordering on streams and other waters, without reservation or restriction, are to be construed as to their effect according to the law of the state in which the lands lie.

Bernot, 81 Wash. at 551 (citing *Hardin v. Jordan*, 140 U.S. 371, 11 S. Ct. 808, 35 L. Ed 428 (1891)).

The Court held that it was for the state to determine under its laws the effect of the patent from the United States to a littoral proprietor to a non-navigable lake or a riparian proprietor to a non-navigable stream or river. In interpreting the state laws, the Court held that the riparian and littoral proprietors respectfully own the beds of unnavigable streams and lakes. *Id.* at 558-60. In a

subsequent case, *Hill v. Newell*, 86 Wash. 227, 149 P. 951 (1915), the Court analyzed the state's title to the beds and shores of navigable lakes and streams and held that a riparian or littoral proprietor has no ownership of the water and shores of the stream. The Court held:

> Navigable streams and lakes are as much a part of the public domain as are the lands abutting or joining, and the grantee of the government takes only such title as is granted by it. It is a rule that a grant from the government will not be enlarged by construction[.]

Id. at 229.

In consequence, it has been the uniform holding of the United States Supreme Court that it will recognize and administer the law that is applicable in the particular state when passing upon the extent of its own grant, when that grant is bordered or intersected by a navigable stream or lake.

PART II:

FUNDAMENTALS OF WASHINGTON WATER LAW

III.

THE NATURE AND ELEMENTS OF A WATER RIGHT IN WASHINGTON

A. PRIOR APPROPRIATION LAW

The prior appropriation doctrine has become the law in this state through common law development and legislative enactment. *Postema v. Pollution Control Hearings Bd.*, 142 Wash. 2d 68, 79, 11 P.3d 726 (2000). The establishment of the doctrine in this state has been based upon the core principle that the prior appropriation doctrine exists to allow for private rights to a resource that is public and never loses its public character. Waters are *publici juris* and are available for private use, but are not subject to private ownership. *See* The Principle Of Common Ownership Of Water *supra* ch. I; *see also* Wash. Rev. Code 90.03.010; *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 583, 38 P. 147 (1894); *Department of Ecology v. U.S. Bureau of Reclamation* (*U.S. Bureau*), 118 Wash. 2d 761, 827 P.2d 275 (1992). While a person may obtain a right to the use of water in the state, this right does not vest that person with an ownership interest in the water itself, but only authorizes a usufruct, which is a right to only the use of the water. *Rigney*, 9 Wash. at 583.

In granting a usufructuary right to the water, the state retains control of its use and does not part with ownership. *See* The Principle Of Common Ownership Of Water *supra* ch. I; *see also Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (10th Cir. 1981). An appropriator owns no title to the water and only obtains a personal property interest in the molecules of the water which the appropriator has diverted and has under his or her control and possession. *U.S. Bureau*, 118 Wash. 2d at 767. If a right to use water is not being exercised, the appropriator cannot prevent others from its use based on future speculative demand. *Washington ex rel. Liberty Lake Irrig. Co. v. Superior Ct. for Spokane Cy.*, 47 Wash. 310, 91 P. 968 (1907); *see also Miller v. Wheeler*, 54 Wash. 429, 103 P. 641 (1909).

Under the common law that developed in the state of Washington, one obtains a prior appropriative water right by expressing an intent to use the water and, with reasonable diligence, applying the water to beneficial use. *Thompson v. Short*, 6 Wash. 2d 71, 106 P.2d 720 (1940); *Madison v. McNeal*, 171 Wash. 669, 19 P.2d 97 (1933); *In re the Water Rights of Alpowa Creek*, 129 Wash. 9, 15, 224 P. 29 (1924); *In re the Water Rights of Doan Creek*, 125 Wash. 14, 215 P. 343 (1923); *Sander v. Bull*, 76 Wash. 1, 135 P. 489 (1913).[1]

In determining whether a water right is created by an appropriator, the Court considers several elements in the prior appropriation doctrine that must be met for the creation of a water right.

> Appropriation of water consists in the intention, accompanied by reasonable diligence, to use the water for the purposes originally contemplated at the time of its diversion.

Offield v. Ish, 21 Wash. 277, 280-81 57 P. 809 (1899). Many of these elements have been recognized by the Washington Supreme Court as terms of art in Washington water law. They include the intent to use water with reasonable or due diligence, beneficial use, priority of right, perfection and appurtenancy.

B. THE ELEMENT OF INTENT

An appropriator's intent to use water is determinative both of the priority date in which the right is legally recognized, and of the purpose for which the right may be exercised. Intent, as it is relevant to creating a priority date, is discussed below in Priority Date/The Relation Back Doctrine, section E of this chapter.

The purpose of this section is to discuss intent as an element of the prior appropriation doctrine that defines the water right, its purpose, and conditions, etc. Intent, whether manifested by physical acts or through the current statutory application process, is important because it provides and defines the expectation of the new appropriator as to the extent of the water right he

[1] These cases began to define the specific elements of the prior appropriation doctrine based upon disputes that arose between riparian landowners and nonriparian appropriators.

or she expects to develop.[2] Definition of this intent is critical for the expectations of the current appropriators and potential appropriators (or applicants) of water from the same source. The existing and potential users rely on the notice of intent they receive to provide them with information of the extent to which a new appropriator will use the water, allowing them to determine whether such use will be detrimental to their interests and their rights to the water source. If the new appropriator is not limited to the purposes of use, place of use, period of use, and point of diversion or withdrawal, as was first intended, the expectations of other existing and potential water users are compromised, as there can be no reliance on or certainty of the extent to which the water will be used in the future, and the ability to protect against speculative use of water is defeated.

Under common law, the first step to acquiring an appropriative water right required some physical act showing intent to appropriate the water for beneficial use. *In re the Water Rights of Crab Creek & Moses Lake*, 134 Wash. 7, 235 P. 37 (1925); *In re Alpowa Creek*; Anthony Dan Tarlock and Jason Anthony Robison, *Law of Water Rights and Resources* § 4:62 (2024). The physical act put others on notice that there was an intent to use a necessary quantity of water for a particular purpose. *In re Crab Creek,* 134 Wash. at 13.

Therefore, an appropriator's intent, as evidenced by the notice given to use the water, provides the basis for defining how an appropriator may use water to the exclusion of subsequent appropriators. These elements include the purpose and place of use, point of diversion or withdrawal, period of use, etc.

In *In re Alpowa Creek,* riparian owners argued that the quantity of water that the Houser ditch eventually diverted was greater than the amount that was first intended by the nonriparian appropriators. The riparians complained that the Houser ditch was diverting water in a quantity that was in excess of the quantity that could flow through the original capacity of the ditch. The

[2] The effect and significance of intent as an element of a water right can be modified through legislation. The 2003 Municipal Water Law created more flexibility for water rights that are for municipal water supply purposes, which arguably reduces the significance of intent as an element of such rights. *See* the Municipal Water Law, ch. VIII, below.

ditch had been enlarged for additional capacity five years after water was first diverted in 1877. The riparian owners argued that their right should be subject, if at all, to only that quantity of water that the ditch could carry in its original size.

The Washington Supreme Court rejected this argument, relying upon evidence of the intent of the original appropriators from the Houser ditch. The evidence showed that there was an original intent to appropriate the full quantity of the water that the ditch could carry after being enlarged in 1883. The Court stated:

> The intention of the original appropriators must be seriously considered. The notices given by them showed that they appropriated, or intended to appropriate, a larger quantity of water than is given by the decree to this ditch. It is probably true that these notices, being unauthorized by law, did not actually create rights, but they are strong evidence of claims of right and of the intention of the parties, and these intentions were made public in the only way possible at that time and under the circumstances. It is our view, therefor, that it is immaterial that the ditch was subsequently enlarged.

In re Alpowa Creek, 129 Wash. at 15-16.

The intent, as inferred from the notice or actual commencement of use, defines and limits the extent to which the appropriation may be made, allowing the use of the water "for the purposes originally contemplated at the time of its diversion." *Offield*, 21 Wash. at 280-81; *see also Longmire v. Smith*, 26 Wash. 439, 67 P. 246 (1901).

In 1891, the Legislature enacted a provision in the code that recognized the importance of the initial notice of one's intent to use water. The law required any person intending to appropriate water to post a notice of such intent in a "conspicuous" place at the point of intended storage or diversion. 1891 Wash. Laws ch. CXLII, § 2, p. 327. In the notice, the person was to claim the quantity of water to be used, the purpose and place of use, and the means by which it is to be used or diverted. *Id.*

The 1891 law requiring the posting of a notice was not the exclusive means of initiating the right to use water. *In re Crab Creek*, 134 Wash. at 12. One could also satisfy the notice requirement by commencing with actual diversion of the water in accordance with customary procedures. *Id.*; *In re Alpowa Creek*. The Court in *In re Crab Creek* held that notice or actual

diversions must be sufficient to show the intent to which the person desired to use the water. *In re Crab Creek*, 134 Wash. at 15.

> [T]hat the actual use of water upon a portion of the land is notice of an appropriation of sufficient water for all the land, in the same way that notice is given by the written notice of appropriation of the amount of the intended appropriation.

Id.

In 1917, the Legislature created a permit system for authorizing the use of water. This system provides for one to state their intent to use the water at the time an application for the permit is filed. *See* Wash. Rev. Code 90.03.250, .260. The application must set forth:

> [T]he source of the water supply, the nature and amount of the proposed use, the time during which water will be required each year, the location and description of the proposed ditch, canal, or other work, the time within which the completion of the construction and the time for the complete application of the water to the proposed use.

Wash. Rev. Code 90.03.260. The code further requires that specific information be included in the application if the proposed use is for particular purposes, including agricultural, power, reservoir, municipal water supply, and mining purposes. Wash. Rev. Code 90.03.260; *see also* Wash. Rev. Code 90.44.060 (making same requirements applicable to groundwater permit applications).

C. REASONABLE DILIGENCE

Once a water right has been commenced, whether under the former law by notice or actual diversion, or after 1917 by application for a permit, the appropriator must exert reasonable or due diligence in completing the project and applying the water to actual beneficial use. *In re Crab Creek*; *Longmire*; Tarlock & Robison, *supra* § 4.44; Wash. Rev. Code 90.03.320. The principle of reasonable diligence is to ensure that once notice is given to appropriate water, there is no more delay than necessary in applying the water to actual beneficial use. If the water is left unused or held for speculative purposes, others who are willing and able to use the water are denied its use. The prior appropriation system favors timely applications of water for beneficial use, having as one of its goals the maximization of benefits from the use of water. *See* Wash. Rev. Code 90.03.005; *Department of Ecology v. Theodoratus*, 135 Wash. 2d 582, 957 P.2d 1241 (1998).

Reasonable diligence does not amount to a set period of time; rather, it is determined on a case by case analysis. *In re Alpowa Creek*, 129 Wash. at 14. To maintain a right, immediate use of the water is not required: "The doctrine of common sense applies." *Id.* at 15.

The requirement of reasonable diligence was an element of common law appropriation in Washington and is now embodied in the water code. A representative case of the common law era is *Grant Realty Co. v. Ham, Yearsley & Ryrie,* 96 Wash. 616, 165 P. 495 (1917). There, an issue arose as to whether the defendant had used due diligence in completing his project and applying the water to beneficial use. In the latter part of 1908, the defendant had conceived an idea for water use. An investigation was begun with notices of appropriation being filed in 1909 and 1910. For the purposes of securing a dam site for the project, condemnation proceedings were commenced in 1910. Also in 1910, the plaintiffs posted notice of appropriation for the same water. The plaintiffs had in fact become owners of the property which the defendants sought to condemn. After the condemnation proceedings had commenced, the plaintiffs constructed their own dam on the land to impound water for their own project. Thereafter, the plaintiffs began diverting and using the water. The condemnation litigation did not result in a final determination until 1915.

The plaintiffs claimed that the defendants' project was speculative and that the defendants had failed to use reasonable diligence in prosecuting their project; thereby leaving the plaintiffs with the senior right to the water. The plaintiffs argued that diligence allows for only temporary interruptions caused by the "elements." Defendants, on the other hand, argued that delays caused by litigation must be excused.

The Washington Supreme Court disagreed with both parties. The Court looked at whether the cause of any delay is incidental to the project. *Grant Realty Co.*, 96 Wash. at 624. For example, the Court stated:

> [Matters] personal to the appropriator, such as pecuniary inability, sickness and the like, are not circumstances excusing great delay in the construction of the works necessary to actual diversion and use of the water.

Id. While litigation is personal in nature, if it is essential as to the construction of the project, like condemning the land for a dam site, the litigation is incidental to the project and is an excuse for

delay.[3] *Id.* The litigation must, however, be pursued with diligence or the Court may find the excuse insufficient. *Id.* at 630.

The Court in *Grant Realty Co.* also discussed whether it was appropriate for the defendant to cease working on any other part of the project until such time as the condemnation proceedings were complete and the dam site was assured. The Court held that reasonable diligence did not require the defendant to continue with other work on the project that ultimately would rely on the dam. Any construction of flumes and ditches, the Court found, would probably have to be reconstructed once the dam was built. "The law of diligence is not a rule of unreason and waste." *Id.* at 630.

The law of due diligence has been codified as part of the current permit process. When a permit is issued authorizing a person to divert or withdraw water Ecology must determine a reasonable time in which actual construction of a project must be commenced. That project must "thereafter be prosecuted with diligence and completed within the time prescribed by the Department." Wash. Rev. Code 90.03.320. In fixing the time for commencement of the work, completion of the work, and application of the water to beneficial use, Ecology must consider many specific aspects of the project, including unique factors to be considered for the "application of water to beneficial use for municipal water supply purposes." *Id.* The permit's development schedule may be extended "having due regard to the good faith of the applicant and the public interests affected." *Id.*; *see Theodoratus*. The water code is discussed in more detail in The Water Codes: Surface Water, chapter IV below.

D. BENEFICIAL USE OF THE WATER; THE ISSUE OF WASTE

The element of beneficial use arose out of the traditional notion that in the arid west, water should not sit idle. *See* Charles Horowitz, *Riparian And Appropriation Rights To The Use Of Water*

[3] The "operation of legal proceedings" is a statutory exception to relinquishment when there is nonexercise of a water right. Wash. Rev. Code 90.14.140(1)(d); *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wash. 2d 118, 969 P.2d 458 (1999). In *R.D. Merrill*, the Washington Supreme Court narrowly interpreted the operation of legal proceedings as an excuse for nonuse of water. The Court held that the legal proceedings must have an effect on the ability of the appropriator to use the water. *Id.* at 141-42.

In Washington, 7 Wash. L. Rev. 197 (1932). The policy of beneficial use is evidenced in the early judicial decisions that eroded the protections afforded to unused riparian rights. *See* The Development Of Water Law In Washington *supra* ch. II. Early statehood statutory enactments recognized the need to use water beneficially. Until the water is put to beneficial use, the water does not ripen into an appropriative or perfected right. *Theodoratus*; *see also Farmers High Line Canal & Reservoir Co. v. City of Golden*, 975 P.2d 189, 198 (Colo. 1999). Beneficial use has been defined by the courts as the basis, measure, and limit of the water right. *In re the Water Rights of Marshall Lake & Marshall Creek Drainage Basin*, 121 Wash. 2d 459, 852 P.2d 1044 (1993).[4]

Beneficial use thus defines several principal elements of the water right. Beneficial use describes the purposes or activities for which the water may be used. It also determines the actual measure of a water right. *In re Marshall Lake*, 121 Wash. 2d at 468. Finally, beneficial use is the element of the appropriation doctrine that articulates the principle for legal intervention to limit any water use that cannot be justified as reasonable in amount and beneficial in purpose.

The determination of each of the three elements of the beneficial use requirement involves questions of fact and includes the consideration of several factors. Samuel C. Wiel, *What Is Beneficial Use Of Waters?*, 3 Cal. L. Rev. 460 (1914-1915 Nov.-Sept.). *Shafford v. White Bluffs Land & Irrig. Co*., 63 Wash. 10, 114 P. 883 (1911); *United States v. Alpine Land & Reservoir Co.*, 697 F. 2d 851, 855 (9th Cir. 1983). Wiel describes how the factors of reasonable use are applied in any particular case. It is within the discretion of the court to determine what is "reasonable" in each case according to the facts proved. 1 Samuel C. Wiel, *Water Rights In The Western States* (3d ed. 1911). The leading Washington case, *In re Marshall Lake*, illustrates the process through which reasonable use determines the extent of one's water right.

[4] This case is also known as *Department of Ecology v. Grimes*, although here we will continue to refer to it as *In re Marshall Lake*.

1. The Leading Case: In Re Marshall Lake

In *In re Marshall Lake*, the Grimes family had diverted two to three cubic feet per second from Marshall Lake for the irrigation of a hay field. The evidence showed that the Grimes' existing diversion system was inefficient and allowed for a great loss of water. In his initial report to the superior court, the referee recommended that Grimes be confirmed a right to the use of only 1.5 cubic feet per second, rather than the amount of their present diversions.

The referee arrived at the figure of 1.5 cubic feet per second first by establishing the amount of water necessary to irrigate the hay, and then adding a factor to provide for reasonable transportation loss in moving the water from the lake to the field. To establish the water needs of the hay field, the Washington Supreme Court relied on an irrigation report published by Washington State University, which was used by Ecology in establishing standard water duties for the locality. Washington State University, *Irrigation Requirements for Washington – Estimates And Methodology*, Research Bulletin XBO925 (1982) (Irrigation Report). The referee then allowed for an additional 25 percent for transportation loss after balancing several factors, including the 3 cubic feet per second of historical use, the concepts of beneficial use, and sound irrigation practices.

The reasonable efficiency test became a primary issue on appeal, as it was challenged by several irrigation districts that filed an amicus brief before the appellate court. The Court accepted review to consider the legality of the test and to otherwise review the superior court's quantification of appellant Grimes' water right.

The Court affirmed the decision by the superior court on the quantification of Grimes' water right, based on the factual record and by applying the "doctrine of beneficial use." *In re Marshall Lake*. The Court, however, rejected the reasonable efficiency test as a means of quantification. The Court's analysis did not focus on the legality of the test as much as it focused on the simple issue of whether the nature and extent of a water right for irrigation is limited to the beneficial use of water as defined by the standard of reasonably efficient practice. A secondary issue was whether the quantification of a water right based on a standard of reasonable efficiency,

and not on the actual quantity of water appropriated, results in an unconstitutional taking of property.

2. Beneficial Use Definition

The Court held that beneficial use is a term of art referring to both the purposes of the use of water, and the measure of the water right. *In re Marshall Lake*, 121 Wash. 2d at 468. The historical emphasis on requiring the "beneficial use" of water is, the Court found, because of the ever increasing demands made upon the available water sources. *Id.* at 468 (citing 1 *Water And Water Rights* § 19.2, at 87 (R. Clark ed., 1967)).

The *In re Marshall Lake* opinion defined beneficial use of water is the amount "necessary" for the specific use. *Id.* at 468. It is determined by a judicially created principle of "reasonable use." *Id.* Reasonable use is, in turn, determined by water duty and waste. *Id.*

3. Water Duty

Water duty is defined as

> [T]hat measure of water, which by careful management and use, without wastage, is reasonably required to be applied to any given tract of land for such period of time as may be adequate to produce therefrom a maximum amount of such crops as are ordinarily grown thereon. It is not a hard and fast unit of measurement, but is variable according to conditions.

In re Marshall Lake, 121 Wash. 2d at 469 (quoting *In re Steffens*, 756 P.2d 1002, 1005-06 (Colo. 1988)).

The Court gave a great amount of deference to the referee's determination of water duty based on the findings set forth in the Irrigation Report. *Id.* at 469-70. The burden is on the appropriator to prove a right to an amount larger than the recommended quantity in the Irrigation Report. *Id.* at 470. The Court recognized that Grimes had not provided any "quantitative evidence" of a greater water duty. The Court also found that the Irrigation Report recommended a water duty based on conditions existing in proximity to Grimes' land. This latter finding goes to the issue of whether the referee looked at customary practices in the locality. This was important in the Court's decision to affirm the superior court. Water duty is not, however, necessarily based on "customary

practices." The data on water duty in the Irrigation Report is based on soil conditions, climate, and available irrigation methods in the area. *See In re the Water Rights of Ahtanum Creek*, 139 Wash. 84, 245 P. 758 (1926).

4. Waste

The Court in *In re Marshall Lake* separately analyzed the principle of waste. The Court found that there is no valid right to water which is wasted. *In re Marshall Lake*, 121 Wash. 2d at 471. The Court defined waste similarly to its definition of beneficial use. It is that amount of water, which is in excess of the amount necessary to accomplish the purposes of the appropriation. *Id.* Waste is also defined as a "[l]oss of a resource such as water without substantial benefit." 6 *Waters And Water Rights* 556 (Clark ed., 1972).

The Court then provided some guidance on how to determine whether a use of water is wasteful. The use must be "a reasonable and economical use of water in view of other present and future demands upon the source and supply." *In re Marshall* Lake, 121 Wash. 2d at 471 (citing Frank J. Trelease, *The Concept Of Reasonable Beneficial Use In The Law Of Surface Streams*, 12 Wyo. L.J. 1, 16 (1956)). This finding provides the referee, or for that matter the administrative agency, the discretion to determine whether a use is wasteful based on economical considerations in relation to present and future uses of the river. The referee is therefore not restricted to determining whether the irrigation system was economical to the current appropriator, such as Grimes. Rather, the referee may consider the economics of the use of water based on competing present and future users. This is again consistent with Wiel's analysis that beneficial use reflects changing conditions and will become more restrictive as a quantification of the use of water as greater demands are placed on the water source.

> In determining the amount of water which a user applies to a beneficial use . . . the system of irrigation in common use in the locality, if reasonable and proper under existing conditions, is to be taken as the standard, although a more economical method might be adopted. Advance in methods of irrigation and increase in number of users, must be considered in deciding the requirement of beneficial use, and thereby the extent of the appropriation.

1 Wiel, at 481 (footnotes omitted).

The Washington Supreme Court concluded that "the difference between absolute waste and economical use has been said to be one of degree only." *In re Marshall Lake*, 121 Wash. 2d at 472 (citing *In re the Water Rights of Deschutes River*, 134 Or. 623, 286 P. 653, 294 P. 1049 (1930)). In *In re Deschutes River*, the Oregon Supreme Court had found that:

> It is the duty of the court in adjudicating water rights to suppress all wasting of water, and the court may go further and declare what shall constitute the economic use of the water and to fix its proper duty by a decree awarding the use of a certain amount of water for that purpose. . . .
>
> . . . .
>
> . . . "As to the second phase of the proposition, the power of the court of equity to determine what is an economic use of the water and to make a decree accordingly, we take the same view. As we have said, there is a wide margin between the absolute waste of water and its economical use. But the difference between the two questions is one of degree only."

In re the Water Rights of Deschutes River, 134 Or. 623, at 666-67, 286 P. 653, 294 P. 1049 (1930) (citing *Kinney On Irrigation* at 1623 (2d ed.)).[5]

Long before *In re Marshall Lake*, the Washington Supreme Court consistently recognized the concept of waste as underlying the beneficial use analysis. In *Shafford*, the Court discussed the policy of prohibiting waste as a factor in adopting more reasonable water use practices to ensure beneficial use as demand increases. In affirming an irrigation district's authority to promulgate rules for a more reasonable and efficient delivery and use of water, the Court stated:

> It must not be held, under an open contract, that the user has a right to insist upon any given manner of use. Otherwise the right, to say nothing of the necessity, of

[5] The Washington Supreme Court's cite in *In re Marshall Lake* to Professor Trelease's analysis on reasonable beneficial use is also instructive. Frank J. Trelease, *The Concept Of Reasonable Beneficial Use In The Law Of Surface Streams*, 12 Wyo. L.J. 1 (1956). Trelease discusses California's interpretation of this issue:

> [W]hat may be a reasonable beneficial use where water is present in excess of all needs would not be a reasonable beneficial use in an area of great scarcity and need, and that what is beneficial use at one time may, because of changed conditions, become a waste of water at a later time.

Trelease, 12 Wyo. L.J. at 17 (citing *Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist.*, 3 Cal. 2d 489, 45 P.2d 972 (1935)); *see also Department of Ecology v. Abbott*, 103 Wash. 2d 686, 694 P.2d 1071 (1985).

> prescribing rules and regulations would be of no avail to protect others from that prodigality which has so far marked the progress of the American pioneer. . . .
>
> "With the gradual development of the country and the bringing of more and more land under ditches, the need for water increases, and equity demands that no irrigator shall take more than he can put to beneficial use. Flowing water must be considered as a common fund, subject to beneficial use by individuals according to orderly rules, each man taking only the amount he can employ to advantage. Under any other theory full development of arid regions is impossible."

Shafford, 63 Wash. at 14-15 (quoting F.H. King, professor of agriculture physics of the University of Wisconsin).

In *Avery v. Johnson*, 59 Wash. 332, 109 P. 1028 (1910), the Court held that the trial court is first to determine the amount that is "actually necessary" to irrigate the land of the senior appropriator and the excess of water being wasted by the senior is available for subsequent appropriators. *See also Miller* (the law of appropriation will not tolerate waste of water, and while imported water is generally not subject to the rights of prior appropriators, it will be found abandoned if wasted).[6]

The Court in *In re Marshall Lake* affirmed these previous rulings in upholding the referee's finding that wasteful practices occur when one-half to two-thirds of water is lost in the delivery system. While some conveyance loss, as measured by an efficiency factor, is allowed and would

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[6] The Washington Legislature has recognized the concept of waste, not as a new law, but in recognition of the historical development of water use in this state.

> [B]ased on the tenet of water law which precludes wasteful practices in the exercise of rights to the use of waters, the department of ecology shall reduce these practices to the maximum extent practicable, taking into account sound principles of water management, the benefits and costs of improved water use efficiency . . . .

Wash. Rev. Code 90.03.005; *see also* Wash. Rev. Code 90.44.110, 90.22.040. This is consistent with the laws of 1889, which stated:

> The owner of any ditch shall carefully maintain embankments thereof, so that the waters of such ditch may not flood or damage the premises of others, and such owner shall make a tail ditch so as to return the water in such ditch with as little waste as possible into the stream or lake from which it was taken.

1889-90 Wash. Laws, p. 711.

not be considered waste, the use of water must be reasonably efficient. Absolute efficiency is not required. *Id.* at 472.

Subsequent to *In re Marshall Lake*, the Pollution Control Hearings Board upheld an administrative order Ecology issued to the Methow Valley Irrigation District requiring it to end its wasteful water use practices. The Board applied the *In re Marshall Lake* Court's holdings concerning waste and found that the irrigation district's water use was unlawfully wasteful because of excessive conveyance losses. *Methow Valley Irrigation District v. Department of Ecology*, PCHB No. 04-005 (May 9, 2005); *Methow Valley Irrigation District v. Department of Ecology*, PCHB Nos. 02-071 and 02-074 (Aug. 20, 2003).

5. Reasonable Efficiency Standard Rejected

After the Washington Supreme Court made its finding that a right must be reasonably efficient and affirmed the referee's quantification of rights based on water duty and the principle of waste, the Court then proceeded to analyze the reasonable efficiency test cited by the referee.[7] The points made by the Court in rejecting the test are:

(1) The rights of users of water for irrigation purposes are vested rights in real property and factors in a reasonable efficiency test cannot be applied if they would impair the appropriator's property right

(2) Customary irrigation practices in the locality is a factor that must be considered in determining the beneficial use of water.

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[7] The *In re Marshall Lake* Court also rejected the argument that the standard of beneficial use is limited to a consideration of the established means of use of water according to the reasonable custom of the locality. The Court held that customary practices cannot justify the waste of water. The Court also held:

> Local custom and the relative efficiency of irrigation systems in common use are important elements, but must be considered in connection with other statutorily mandated factors, such as the costs and benefits of improvements to irrigation systems, including the use of public and private funds to facilitate improvements. RCW 90.03.005.
>
> In limiting the Grimeses' water use by a requirement of reasonable efficiency, the referee properly considered the Irrigation Report, the Grimeses' actual water use, and their existing irrigation system.

In re Marshall Lake, 121 Wash. 2d at 475 (footnote converted to text).

(3) In analyzing beneficial use and waste, the Court held that no taking occurred in reducing a water right under these doctrines.

In re Marshall Lake, 121 Wash. 2d at 473-74.

In referencing the factors of the test which referred to impacts on the water source and on the flora and fauna resulting from the improvements to the irrigation system, the Court appeared to adopt the argument that such factors are based on recent legislation that cannot be applied to prior established rights.[8] *Id.* at 475. The Court did not, however, discuss how such rights would be impaired by application of these factors. In an interesting twist, the Court found that these factors are based on the state's obligations in Wash. Rev. Code 90.03.005 and 90.54.010, and cannot be applied to impair prior existing rights.

The Court also rejected the reasonable efficiency test because it is "without statutory authorization in an adjudication proceeding;" and because "the test is contrary also to long established principles of Western water law." *Id.* at 476-77.

Finally, the Court found that the reasonable efficiency test was clearly contradictory to the standard set forth by the Legislature in the eminent domain statute. Wash. Rev. Code 90.03.040. This statute allows persons to condemn another water use for a "superior use." However, a person cannot condemn an irrigation use for another irrigation use if the current use of water is:

> [R]easonably necessary for the irrigation of his land . . . to the full extent of the soil, by the most economical method of artificial irrigation applicable to such land according to the usual methods of artificial irrigation employed in the vicinity[.]

Wash. Rev. Code 90.03.040. The Court cited this section in its finding that vested rights include "the right to diversion, delivery and application 'according to the usual methods of artificial

[8] Yet, in citing Wash. Rev. Code 90.03.005 and 90.03.010, the Court found that "[o]ther laws may, however, operate to define existing rights in light of environmental values." *In re Marshall Lake*, 121 Wash. 2d at 476. Arguably, these factors may still be considered in defining reasonable efficiency in the use of water if, by their application, they do not impair any existing rights. It is clear that "property owners have a vested interest in their water rights to the extent that the water is beneficially used." *Id.* at 477 (quoting Wash. Rev. Code 90.03.040). However, the courts have been willing to affect prior established rights under police power laws. *Abbott,* 103 Wash. 2d at 696-97.

irrigation employed in the vicinity.'" *In re Marshall Lake*, 121 Wash. 2d at 477 (quoting Wash. Rev. Code 90.03.040).

6. Beneficial Uses Adopted In Statute

The doctrine of beneficial use has been codified through several legislative enactments. In the 1891, the Legislature recognized the right to use water for specific purposes, which included irrigation, mining, manufacturing, supplying cities, towns, or villages, and for waterworks. 1891 Wash. Laws, p. 327. In 1917, the Legislature specified that any right to use waters of the state may be acquired "only by appropriation for a beneficial use." Wash. Rev. Code 90.03.010. Not until 1969 did the Legislature actually define the types of beneficial use.

> "Beneficial use" shall include, but not be limited to, use for domestic water, irrigation, fish, shellfish, game and other aquatic life, municipal, recreation, industrial water, generation of electric power, and navigation.

Wash. Rev. Code 90.14.031(2).

Two years later, the Legislature again defined beneficial use as part of the 1971 Water Resources Act.

> Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.

Wash. Rev. Code 90.54.020(1).

The doctrine of beneficial use as a limit on the amount of water that can be used has also been codified by the state Legislature. In 1890, the Legislature recognized that a person is limited to the quantity of water necessary for irrigation:

> [I]t shall not be lawful for any person to run any greater quantity of water through his irrigating ditch than is absolutely necessary for irrigating his land . . . and for domestic and stock purposes.

1889-90 Wash. Laws § 22, p. 712.

Similarly, in 1917, the Legislature required that "in any event" an application for a water permit "shall not be approved for more water than can be applied to beneficial use for the purposes named in the application." Wash. Rev. Code 90.03.290. The code was amended in 1979 to include specific recognition of the illegality of waste.

> Further, based on the tenet of water law which precludes wasteful practices in the exercise of rights to the use of water, the department of ecology shall reduce these practices to the maximum extent practicable, taking into account sound principles of water management, the benefits and costs of improved water use efficiency, and the most effective use of public and private funds, and, when appropriate, to work to that end in concert with the agencies of the United States and other public and private entities.

Wash. Rev. Code 90.03.005.[9]

The Registration and Relinquishment Act of 1967 provides the clearest legislative intent and analysis of the state's beneficial use policy.

> The future growth and development of the state is dependent upon effective management and efficient use of the state's water resources.

Wash. Rev. Code 90.14.010. The Legislature finds that:

> (1) Extensive uncertainty exists regarding the volume of private claims to water in the state;
>
> (2) Such uncertainty seriously retards the efficient utilization and administration of the state's water resources, and impedes the fullest beneficial use thereof;
>
> (3) A strong beneficial use requirement as a condition precedent to the continued ownership of a right to withdraw or divert water is essential to the orderly development of the state;
>
> (4) Enforcement of the state's beneficial use policy is required by the state's rapid growth;
>
> (5) 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,

[9] The Groundwater Act further provides that any well be constructed to prevent "waste of said public waters and of conserving their head." Wash. Rev. Code 90.44.060.

> swimming, and other recreational and aesthetic uses must be subjected to the beneficial use requirement[.]

Wash. Rev. Code 90.14.020.

The concept of beneficial use is at the very heart of Washington's water rights system. Beneficial use analysis determines who has established a water right, and how that right should be quantified. It serves as a limitation on common law riparian rights but also restrains appropriators by insisting on reasonable practice. It honors the establishment of vested property rights, but is flexible enough to take account of changing conditions. It depends in part on the facts – who diverted how much water, where, and when – and in part on public policy notions as to what is "beneficial." It is not surprising that nearly every water rights dispute is at least partly about "beneficial use."

E. PRIORITY DATE / THE RELATION BACK DOCTRINE

1. The Priority Date Of The Water Right

A significant element of any water right under the appropriation doctrine is the priority date of that right. A priority date sets in time the level of protection the right will have in relation to other appropriators from the same water source. A water right is superior or "senior" to all those rights that have later priority dates; and, likewise, a water right is subject to or "junior" to all those rights that have earlier priority dates. The basis of the priority date is therefore summarized in the maxim: "first in time is first in right." This was first codified in Washington in 1891[10] "*as between appropriations the first in time is the first in right.*" 1891 Wash. Laws ch. CXLII, § 1, p. 327. This concept was repeated in the 1917 legislation and remains the law of the state. *See* Wash. Rev. Code 90.03.010.

The priority date determines the level of protection a water right will have as among all other rights to the same water source, to the extent that water is not available to satisfy all the

[10] In 1873, the Washington Territorial Legislature recognized the creation of rights under the prior appropriation doctrine for irrigation in Yakima County. This law was applied to Kittitas County by the Territorial Legislature in 1886.

existing rights for the use of that water. In these circumstances, water rights must stop being exercised, beginning with the most "junior" right (the right with the most recent priority date). Consequently, the senior water rights may continue to fully exercise their rights to the exclusion of the junior rights. This contrasts dramatically with the riparian doctrine, which would require sharing of water on a *pro rata* basis in times of a water shortage. *See* Tarlock & Robison, *supra* § 4.32; *see also* 1889-90 Wash. Laws, p. 708.

In many western states, but not Washington, the right to require juniors to cease using water to protect a senior right is not absolute. A doctrine called the "futile call" has been created in the common law to address the circumstances where a senior water right holder may receive no benefit if the junior water rights are shut off, making it "futile" to require the junior to cease using water. *See Washington ex rel. Cary v. Cochran*, 138 Neb. 163, 292 N.W. 239 (1940). For example, the hydrology of a river may be such that water is naturally lost through seepage and evaporation as the water flows downstream – often referred to as a "losing stretch" of the river. If a junior appropriator is upstream of a senior appropriator on this losing reach, regulating the junior during dry periods may provide no benefit to the senior water right holder if the water would otherwise not eventually flow to the senior diversion. The regulation or "call" of the river would be "futile," and the junior has the right to continue use of the water. *Id.*; *see* Clayton K. Yeutter, *A Legal-Economic Critique Of Nebraska Watercourse Law*, 44 Neb. L. Rev. 11, 39-43 (1965). The Colorado Legislature has codified the futile call doctrine. *See* Colo. Rev. Stat. 37-92-502.

However, in Washington, the futile call doctrine has not been judicially or statutorily recognized. *Fort v. Department of Ecology*, 133 Wash. App. 90, 135 P.3d 515 (2006). *Fort* involved a challenge to Ecology's issuance of a regulatory order requiring certain holders of adjudicated rights to water from Beaver Creek in Okanogan County to curtail their water use because of a shortage. The appellant was required to stop using his class 8 and 9 water rights in favor of rights in senior classes and asserted that under the futile call doctrine he should be able to continue to exercise his water rights because the senior water right holders' abilities to access water would not be improved by his curtailment of use.

The Court of Appeals held that the futile call doctrine "has not been recognized," and rejected the appellant's request for it to be applied by the Court, reasoning that its adoption is a matter of policy that should be considered by the Legislature:

> Mr. Fort argues that Washington courts have traditionally considered long established principles of western water law. However, the Washington Supreme Court's position is clear on this matter. "[W]ater management is a huge issue in this state. There is clearly controversy as to the best way to manage this state's water resources. However, policy decisions are the province of the Legislature, not of this court." This is a matter for the legislature's consideration.

Fort v. Department of Ecology, 133 Wash. App. 90, 98-99, 135 P.3d 515 (2006) (citations omitted).

The priority of one's right may be based upon the type of use and not simply a date. In the 1971 Water Resources Act, Wash. Rev. Code 90.54, the Legislature stated that the policy of the state was to establish a comprehensive planning process "so that water resources and associated values can be utilized and enjoyed today and protected for tomorrow." Wash. Rev. Code 90.54.010(1)(b). The Legislature set forth several fundamentals of water resource policy, which includes the allocation of water "among potential uses and users . . . based generally on the securing of the maximum net benefits for the people of the state." Wash. Rev. Code 90.54.020(2). The state has implemented these policies by adopting rules that provide for allocation of water in specific water resource areas based on priority of uses. *See, e.g.,* Wash. Admin. Code 173-555 (Water Resources Program in the Little Spokane River Basin, WRIA at 55).

For instance, in Wash. Admin. Code 173-555, water is allocated from the Little Spokane with the first three cubic feet per second available only for future domestic, stock watering, and noncommercial agriculture irrigation. Wash. Admin. Code 173-555-040(2). Any additional amount over the three cubic feet per second may be allocated to other consumptive and nonconsumptive uses. *Id.* All new permits for water from the Little Spokane River are authorized and conditioned under the authority of the rule. New permits for domestic, stock watering, and noncommercial agriculture irrigation, are superior to permits for other uses, "regardless of the date of the priority of right." Wash. Admin. Code 173-555-050. Therefore, a right issued pursuant to

the rule that prioritizes the use of water based upon type of use rather than the date of the application may not be regulated to protect a right with a senior priority date but lower priority use. To limit regulatory chaos, the rule is clear and reserves a specific amount of water that will be available for the senior types of uses.[11]

2. The Relation Back Doctrine

The establishment of the priority dates for water rights has been one of the most contentious issues raised in disputes over the use of water. The establishment of the date is not accomplished by consideration of only a particular point in time; it involves an analysis of the appropriator's actions from the initiation of the right to the final steps in completing the appropriation and use of the water. This analysis is captured in the relation back doctrine, which was created by the courts and is now codified in the water code.

The priority date was, under common law, recognized as the date that an appropriator first initiated the use of water, or, for riparian rights, the date the riparian land was patented from the federal government. The priority date is now, under the code, the date the application for a permit is filed. Wash. Rev. Code 90.03.340. The relation back doctrine was created under the principles of equity to allow an appropriator to receive as a priority date the date the appropriator first initiated the use of water and not the later date when the appropriation was completed. The ability to receive the early priority date depended on the appropriator's diligence in applying the water to use. Therefore, prior to the completed appropriation, the priority date is merely an expectation until such time that the water right was fully created as evidenced by a completed appropriation through the application of water to beneficial use. Only then did the right relate back to the earlier priority date. Wash. Rev. Code 90.03.340; *Hunter Land Co. v. Laugenour*, 140 Wash. 558, 565, 250 P. 41 (1926); *see also Theodoratus*.

[11] Basin water management rules issued by Ecology subsequent to the rule for the Little Spokane River Basin took a different approach by reserving water for new future uses only for domestic purposes, and not for other purposes of use. One example is Wash. Admin. Code 173-518, the rule for the Dungeness River Basin. The validity of this rule was upheld by the Court of Appeals in *Bassett v. Department of Ecology*, 8 Wash. App.2d 284, 438 P.3d 563 (2019).

In *Tenem Ditch Co. v. Thorpe,* 1 Wash. 566, 20 P. 588 (1889), the Washington Supreme Court provided the first analysis as to the early understanding of the appropriation doctrine in the state. Recognizing that local customs provided the basis for the law of appropriation, the court held that the "doctrine of relation is a fiction of law which is applied for the purpose of the furtherance of justice, but never is invoked and enforced for the purpose or to the effect of violating private agreement or to work injustice to others." *Tenem Ditch Co.*, 1 Wash. at 569-70. In a companion case, *Ellis v. Pomeroy Improvement Co*., 1 Wash. 572, 21 P. 27 (1889), the Washington Supreme Court again recognized the relation back doctrine but refused to apply it, finding that Mr. Ellis was estopped to claim an earlier priority date than others who had diverted and used water because he had acquiesced through agreement and tacit consent for the others to use the water. *Id.* at 576. The Court summarized:

> While, therefore; Ellis, at the time of filing [for a patent of land], might have also appropriated the water, and thus acquired water-rights by taking steps sufficient to assert his claim to these (if no prior appropriation had occurred), the mere taking up of the land did not work itself a prior appropriation, nor even indicate any purpose so to do; but his not doing so, on the contrary, left such rights subject to appropriation, until he made final proof and thereby acquired a vested right, by any one who complied with the law or local custom in an appropriation of such water-right. Appropriation, as herein used, may be defined as the intent to take, accompanied by some open, physical demonstration of such intent, and for some valuable use. It is proper to add that such intent or demonstration must be followed up with reasonable diligence and consummated without unnecessary delay. . . . Until final proof, then, he had no vested right and his patent could not, therefore, relate back, under any circumstances, to his original filing, and back of this final proof, while long prior to this, by the actual appropriation in 1878, the company (of which he was one) had acquired a positive, certain, and vested right. Therefore, regardless of Ellis' subsequent acts and his estoppel, which we have first referred to, we have no hesitancy in saying that on the principle alone of prior appropriation we concur in holding that appellee's right was superior, being prior in point of time.

Ellis, 1 Wash. at 577-78.

In *Hunter Land Co.*, James T. Hunter had settled on land in 1880 along Hunter Creek in Stevens County. The following year, one Sogle settled land nearby. Hunter and Sogle came to an understanding that Hunter could extend to his own land a ditch that Sogle was constructing, thus

supplying both properties with water. However, before the extension could be built, a dispute arose and Hunter abandoned his claim to the Sogle ditches. Hunter moved upstream and constructed another ditch to his own property. In 1885, this ditch was complete and water was diverted to the land. An issue arose as to who had the superior right to the use of water: Hunter, who had arrived and settled upon the land first, or Sogle, who was the first to divert and use the water. Resolution of this issue rested on the respective priority dates of the parties' water rights.

The Court had three possible dates to consider for Hunter's rights: the date construction commenced for the Sogle ditch with the understanding that there would be an extension to Hunter's lands; or the later date when Hunter began construction of the separate ditch to his land; or 1885 (when Hunter diverted and used the water). The Court held that the priority date was the date upon which Hunter constructed the single ditch to his land, stating the general rule that:

> [W]hen the actual diversion of water to a beneficial use on land is at a time later than the work of constructing the means by which it is diverted is begun, the time of diversion relates back to the beginning of the work only when the work has been pursued with reasonable diligence, so that the real question is, was the work in this instance pursued with reasonable diligence.

Hunter Land Co., 140 Wash. at 565.

The Court rejected the Hunter Land Company's argument that its priority date should, at a minimum, be the same date which Sogle received based upon the time at which it began construction on the ditch to Sogle's property, with the understanding that the ditch would be extended to the Hunter's land. The court found that Hunter had abandoned his claim to extend that ditch:

> But while Hunter, as we have before stated, assisted in the construction of the Garden ditch with the expectation that it would be extended onto his land, it is clear that he later abandoned any claim of right therein and began the construction of an independent ditch, through which he diverted water to his property. The appellant's rights therefore must date from Hunter's individual effort, and, as this was later in time than the Sogle appropriation, it is later in right.

Id. at 567.

The *Hunter Land Co.* case highlights the purpose and effect of the relation back doctrine. Water law borrowed the property doctrine of relation back to protect the appropriator against intervening rights that would subordinate his or her expected priority. Tarlock & Robison, *supra* § 4.64. However, if a claimant has failed to use diligence in putting the water to use, or, as in *Hunter*, if the effort has been abandoned, the right will not relate back to the initiation of the appropriation. *Hunter Land Co.*

The relation back doctrine was codified by the Legislature in 1917 when it passed the water code and established the permit system.

> The right acquired by appropriation shall relate back to the date of filing of the original application with the department.

Wash. Rev. Code 90.03.340.

In codifying the relation back doctrine, the Legislature recognized that the priority date does not become firmly established until the right has been acquired by appropriation. Under Wash. Rev. Code 90.03.340, the date that the application was filed with Ecology becomes the priority date at the time that the right was "acquired by the appropriation." In other words, the priority date was not established merely by the filing of the water right application. An appropriation is not complete until it has been perfected in accordance with the provisions of Wash. Rev. Code 90.03, which requires the actual application of water to beneficial use within a reasonable time. Wash. Rev. Code 90.03.320; *see Theodoratus*, 135 Wash. 2d at 591-92. The Legislature, therefore, simply codified the common law development of the relation back doctrine and establishment of the priority date. However, rather than lose a priority date for lack of due diligence as provided for in the common law, the code provides that the entire permit authorizing the use of water shall be cancelled if due diligence requirements are not met. Wash. Rev. Code 90.03.320.

F. APPURTENANCY

Once appropriated, a right to use the quantity of water applied to beneficial use attaches to the land on which it is used. *United States v. Ahtanum Irrig. Dist*., 124 F. Supp. 818, 827 (E.D.

Wash. 1954); *Neubert v. Yakima-Tieton Irrig. Dist.*, 117 Wash. 2d 232, 237, 814 P.2d 199 (1991); *Foster v. Sunnyside Valley Irrig. Dist.*, 102 Wash. 2d 395, 400, 687 P.2d 841 (1984); *Thompson*, 6 Wash. 2d at 87; *Lawrence v. Southard,* 192 Wash. 287, 300, 73 P.2d 722 (1937); *Madison*. The purpose of the appurtenancy rule is to prevent speculation of water rights and encourage the settlement of western arid lands. Tarlock & Robison, *supra* § 4:75. The appurtenancy requirement was in response to "water monopoly practice, sales of excess appropriations and decrees recognizing exaggerated claims." 5 *Waters And Water Rights*, 411 (Clark ed., 1972) (citing Mead, *Irrigation Institutions*, pp. 149-53 (1903)); Michael V. McIntire, *The Disparity Between State Water Rights Records And Actual Water Use Patterns*, 5 Land & Water L. Rev. 23 (1970).

While appurtenancy emerged as a tool to limit speculation of water rights, it did not necessarily prohibit the opportunity to transfer or change a water right. Washington, like the other western states recognizes the law of appurtenancy, but allows for changes and transfers of water rights. Wash. Rev. Code 90.03.380, 90.44.100; *see* Transfer And Change Of Water Rights *infra* ch. VII. Upon conveyance of the land to which a water right is appurtenant, water rights pass with the land unless there is an express reservation. *Drake v. Smith*, 54 Wash. 2d 57, 337 P.2d 1059 (1959); *Tedford v. Wenatchee Reclamation Dist.*, 127 Wash. 495, 499, 221 P. 328 (1923); *Geddis v. Parrish*, 1 Wash. 587, 591, 21 P. 314 (1889); Tarlock & Robison, *supra* § 4.75. Generally, a water right holder has no obligation to notify Ecology of the sale of a water right to a third party.[12] However, there is a statutory mechanism where a water right application or permit can be assigned to a new owner. Wash. Rev. Code 90.03.310. Many purchasers of land and water require such an

[12] Some water rights have conditions on the right that may require notification of the sale and purchase of a water right. For example, the Family Farm Act has a limitation on the number of acres that can be irrigated under one ownership. Wash. Rev. Code 90.66.040, .050, .060. As such, the purchase of this type of water right by a person who would exceed the acreage limitations may limit the viability of such a sale. *Id.*

By way of further example, Ecology may have required changes in ownership as a condition of the right. This sometimes occurs when a basin is heavily regulated or where property has been subdivided and the water right has been split among the smaller parcels.

Prospective purchasers of water rights may want to have the water right assigned to them in order to avoid future disputes, to receive notice of new water right applications from neighbors, and to receive notification on changes in the law or future adjudications that could affect the right.

assignment be accomplished as part of the purchase, so that ownership disputes are avoided. This is especially important since water rights can be separated from the land.[13]

Once a water right has been sold to a new purchaser, that purchaser may continue to use the water on the same land, in the manner and quantities historically used by the original owner without any additional approval. However, if the new purchaser desires to change the use of water in any way (i.e., place of use, purpose of use, period of use, or point of diversion/withdrawal), the new purchaser must obtain approval of such change from Ecology. Wash. Rev. Code 90.03.080; 90.44.100.[14] If such change is authorized, the water right may become appurtenant to another parcel of land while retaining its priority date. *R.D. Merrill Co. v. Pollution Control Hearings Bd.,* 137 Wash. 2d 118, 125-26, 969 P.2d 458 (1999); *Schuh v. Department of Ecology*, 100 Wash. 2d 180, 185, 667 P.2d 64 (1983).

> Washington State codified the appurtenance rule in the water code, providing that:
>
> The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used: PROVIDED, HOWEVER, That the right may be transferred to another or to others and become appurtenant to any other land or place of use without loss of priority of right theretofore established if such change can be made without detriment or injury to existing rights.

Wash. Rev. Code 90.03.380(1).

Protection against speculation is now provided for in the process and standards for maintaining or transferring a water right. Rights may be lost for nonuse, and, with certain

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[13] An assignment is particularly helpful when the original holder of the water right is a shareholder in an irrigation district or canal company. As a general rule, a share in an irrigation company represents a water right that is appurtenant to the shareholder's land unless it has been sold for use on other land. *Berg v. Yakima Valley Canal Co.*, 83 Wash. 451, 145 P. 619 (1915); *Fossum Orchards v. Pugsley*, 77 Wash. App 447, 892 P.2d 1095 (1995). Persons receiving water under a contract with a water distributing entity are owners of the rights. *In re the Water Rights of the Yakima River Drainage Basin* (*Acquavella* I), 100 Wash. 2d 651, 674 P.2d 160 (1983); *Lawrence v. Southard*, 192 Wash. 287, 73 P.2d 722 (1937). However, irrigation districts and/or canal companies may have an objection to the sale or transfer of the water right. The assignment of the right would provide an opportunity for those objections to be known early in the sale.

[14] Transfers of water rights to other land are subject to the rules on nonimpairment of other rights. *See* Transfer And Change Of Water Rights *infra* ch. VII.

exceptions (such as for inchoate groundwater rights), only the quantity of water that has been continuously put to beneficial use can be transferred. *See* Loss Of Water Rights and Transfer And Change Of Water Rights, chapters VI and VII below, respectively. In *Thorp v. McBride*, 75 Wash. 466, 135 P. 228 (1913), for example, in transferring a water right that had not been beneficially used, the Court refused to preserve the use for future speculation. Similarly, in *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wash. 2d 769, 784-86, 947 P.2d 732 (1997), the Court held that a municipality could not hold an unused water right for speculative purposes, and that the right had been abandoned because of years of nonuse.

IV.

THE WATER CODES: SURFACE WATER

A. PRE-1917 CODES

In 1873, the Washington Territorial Legislature recognized and established the law of prior appropriation in this state. 1873 Wash. Terr. Laws, p. 520.[1] *See In re the Water Rights of Marshall Lake & Marshall Creek Drainage Basin,* 121 Wash. 2d. 459, 467, 852 P.2d 1044 (1993). In 1890, a year after Washington became a state, the state Legislature passed the first laws on water use for irrigation. 1889-90 Wash. Laws, pp. 652, 671, 706, 729.[2] In 1891, the Legislature passed more comprehensive legislation on the right to use water for irrigation, mining, manufacturing, and for cities and towns. 1891 Wash. Laws ch. CXLII, p. 327.[3]

The 1891 Law codified the notice system for acquiring water rights. A person who wished to appropriate water was required to post notice of the intended use of water in a "conspicuous place at the point of intended storage or diversion." *Id.* § 2. A copy of the notice must have been filed with the county auditor. *Id.* Once the right was perfected by actual storage or diversion of water, the priority date for the water right would relate back to the date that notice was posted. *Id.* § 4. However, this did not become the exclusive means of creating the right. Rights could still be acquired through the common law notice of actually appropriating the water in accordance with customary practices. *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wash. 2d 118, 137, 969 P.2d 458 (1999); *In re the Water Rights of Crab Creek & Moses Lake*, 134 Wash. 7, 235 P. 37 (1925).[4] The posting and filing of notice of use and the establishment of the priority date

[1] This law applied only to Yakima County for irrigation of agricultural lands. In 1886, the Territorial Legislature passed a similar act applicable to both Yakima and Kittitas Counties. 1886 Wash. Terr. Laws, p. 508.

[2] Drains And Ditches, Construction And Repair Of; Irrigating Districts, Organization and Government Of; Irrigation And Irrigating Ditches; Irrigation And Irrigating Ditches, Act Amended; respectively.

[3] Concerning Appropriation Of Water For Irrigation, Mining And Manufacturing.

[4] The significance between the commencement of a water right under statutory notice requirements and common law is the establishment of the priority date. Under the common law, the date of notice of intended use of water is provided by one beginning to construct the project and divert the water. *See* The Development Of Water Law In Washington *supra* ch. II. Therefore, the priority date granted under the statute by merely posting notice may be earlier in time than the priority date under common law. *See In re Crab Creek*, 134 Wash. at 20.

through the "relation back" were the legislative precursor of the permit system enacted by the Legislature twenty-six years later in the 1917 Water Code.

The 1891 statute also provided for the condemnation of water rights by any person. *See* 1889-90 Wash. Laws, pp. 719-21 (On The Condemnation Of Water Rights). This provision also survived the 1917 legislative enactment and became an important consideration of the courts in analyzing the trend towards the adoption of elements of the appropriation doctrine in this state. *See Washington ex rel. Liberty Lake Irrig. Co. v. Superior Ct. for Spokane Cy.*, 47 Wash. 310, 91 P. 968 (1907); *Brown v. Chase,* 125 Wash. 542, 549, 217 P. 23 (1923); *also see Department of Ecology v. Abbott*, 103 Wash. 2d 686, 692, 694 P.2d 1071 (1985). The 1891 legislation also was the first legislation to recognize that water rights were to be managed as "the first in time," providing the exclusive right to water over all those who subsequently obtained a right. 1891 Wash. Laws ch. CXLII, § 1, p. 327. Only one year earlier, the 1890 Legislature had recognized a riparian process of managing rights.[5] 1889-90 Wash. Laws, pp. 706-715. The 1890 law required water rights to be regulated in a pro rata type basis, with some uses given preference over others, in times of water shortage. *Id.* § 9, p. 708. The 1891 laws clearly repealed these riparian elements of water management.

B. THE 1917 WATER CODE

The 1917 Water Code was the most comprehensive water legislation enacted to that date. 1917 Wash. Laws ch. 117 (codified in Wash. Rev. Code 90.03). The Laws of 1891 were, to a large extent, readopted when the state Legislature passed the 1917 Water Code. The 1917 Legislature, however, went much further in establishing state management over the use of water. The act established a mechanism for adjudication of water rights, enforcement and regulation of water rights, and, most significantly, a permit system for obtaining new water rights and transferring or changing existing rights. In *West Side Irrigation Co. v. Chase*, 115 Wash. 146, 196 P. 666 (1921), the Washington Supreme Court recognized that the legislative purpose of the 1917 Water Code was to create a mechanism for avoiding the private disputes that were occurring over the use of water.

> It is well known that for many years much trouble arose over the right to take water for irrigation and domestic purposes. There were many private disputes, and there

[5] For a more detailed discussion of the riparian doctrine and its integration with the prior appropriation doctrine, see The Development Of Water Law In Washington, chapter II above.

> were no adequate provisions of law whereby prior rights of appropriators could be easily and satisfactorily settled and determined. From time to time the legislature of the state had enacted laws with the view of correcting the condition thus existing, but they were more or less fragmentary and did not fully meet the situation nor accomplish the purposes desired. In 1917 the legislature passed the so-called water code, which had been for years under consideration, and which was intended to cover the whole field of irrigation and to correct the abuses which had been inherent in earlier irrigation methods.

West Side Irrig. Co., 115 Wash. at 149-50. Ten years later, the Court recognized the code as a comprehensive system to manage and regulate water:

> The water code clearly expresses the legislative purpose to provide a complete system of regulation for the distribution of the waters of the state . . . Upon the state supervisor of hydraulics [Director of Ecology] is imposed the duty of supervising the public waters within the state, and to regulate and control the diversion of water in accordance with the rights thereto.

Washington v. Lawrence, 165 Wash. 508, 510, 6 P.2d 363 (1931) (citation omitted).

The Washington Supreme Court has interpreted the Act of 1917 as a comprehensive system that provides both the substantive and procedural authority for the creation of water rights. The 1917 Water Code has been recodified in several chapters,[6] but still remains the foundation for management of the state's waters. However, several legislative acts enacted since 1917 have amended or otherwise supplement the 1917 Water Code. Among the more important legislative enactments are the Regulation Of Public Groundwaters Act of 1944, Wash. Rev. Code 90.44; the Water Rights, Registration, Waiver, And Relinquishment Act of 1967, Wash. Rev. Code 90.14; the Water Resources Act of 1971, Wash. Rev. Code 90.54; the Water Resources Management Act of 1991, Wash. Rev. Code 90.42; the Municipal Water Law of 2003 (which amended Wash. Rev. Code 90.03 and other statutes); and the Streamflow Restoration Act of 2018, Wash. Rev. Code 90.94. These, as well as other enactments, play an important role in the decisions made by the courts and the state agencies as to the management of the water resources. This chapter will focus on the adjudication process, the permit process, and enforcement.

[6] For example, the duties of the state engineer, enacted in chapter 117, section 8 of the 1917 Water Code, are now codified as the director's duties in the chapter describing the general duties of Ecology, Wash. Rev. Code 43.21A.

1. The Adjudication Process

The adjudication process has been described as a form of quiet title action to determine all existing rights to the use of water from a specific water body. *In re Marshall Lake*, 121 Wash. 2d at 466. It is also considered to be a general adjudication whereby all those claiming the right to use water from a specific water source are joined in a single action to determine the rights and priorities for the use of water from that source. *Department of Ecology v. Acquavella* (*Acquavella* I)*,* 100 Wash. 2d 651, 652, 674 P.2d 160 (1983). New uses or rights cannot be granted. Wash. Rev. Code 90.03.245. Claims for existing rights are analyzed as to their current validity and limited to the extent they are being exercised to beneficially use water. *Acquavella* I; *In re Marshall Lake*. An adjudication cannot lessen, enlarge, or modify existing water rights. *See In re Marshall Lake*, 121 Wash. 2d at 466. The action is only to confirm the validity and extent of existing rights already established under state and federal law.[7]

> Rights subject to determination proceedings conducted under RCW 90.03.110 through 90.03.240 and 90.44.220 include all rights to the use of water, including all diversionary and instream water rights, and *include rights to the use of water claimed by the United States.*

Wash. Rev. Code 90.03.245 (emphasis added).

Congress has consented to jurisdiction of the state courts for determination of the United States' claims for use of water in a general stream adjudication, waiving its sovereign immunity under the McCarran Amendment. 43 U.S.C. § 666(a).[8] The waiver is only applicable in general stream adjudications or, in other words, an adjudication to the rights of an entire water source. This includes all tribal claims to use water, as the federal government acts in a trust relationship with the tribes and represents the tribes in adjudications. *Department of Ecology v. Acquavella* (*Acquavella* II)*,* 121 Wash. 2d 257, 265, 850 P.2d 1306 (1993).

An adjudication may be initiated by Ecology upon finding that the public interest will be served by a determination of water rights, or pursuant to the filing of a petition by a planning unit,

[7] An adjudication can, however, modify the quantity of water that is authorized if the claim is not supported by evidence of historic beneficial use.

[8] These include, *e.g.*, state water rights held by the U.S. Bureau of Reclamation for its projects in Washington and federal reserved water rights, including those asserted for federal lands, and for tribes.

or by one or more persons claiming a right to divert waters. Wash. Rev. Code 90.03.110.[9] Ecology, as the plaintiff, has the duty to prepare and file with the most "convenient" superior court of the county in which the water source is at least partially located, a report of the names of all those claiming the right to divert water and, for each claim, a description of the right to the diversion, and a "brief statement" of the facts relating to the water use. *Id.* Prior to commencing an adjudication, Ecology is required to consult with the administrative office of the courts to determine whether sufficient judicial resources are available to commence and to prosecute the adjudication in a timely manner, and to report to the appropriate committees of the Legislature on the estimated budget needs for the court and the department to conduct the adjudication. *Id.*

Upon filing of the report, the superior court must order the clerk of the court to issue a summons against all known parties identified by Ecology in its report as possibly claiming rights to use water. Wash. Rev. Code 90.03.120. The notice must require the claimant, as a defendant, to file a statement of claim to, or interest in, any water right. *Id.* Further, the notice must state that unless they appear at a specific time and place, judgment will be entered determining their rights according to the evidence. *Id.* To the extent that court rules allow and funding is available, the court is encouraged to conduct the adjudication by "employing innovative practices and technologies appropriate to large scale and complex cases, such as: (a) Electronic filing of documents, including notice and claims; (b) appearance via teleconferencing; (c) prefiling of testimony; and (d) other practices and technologies consistent with court rules and emerging technologies." *Id.*

Service must be provided as in any civil action commenced in superior court. Wash. Rev. Code 90.03.130. However, a court may consider the practicality of personal service considering the large number of claimants that may be in the case and the identity of interest that may exist between the claimants. In *Acquavella I*, the Washington Supreme Court held that personal service was not required on all those claiming a water right that received water from a water distributing entity that could represent the individual water users' interests in the case. The Court held that:

> Undoubtedly this was in the mind of the Legislature when RCW 90.03.120 was enacted, to provide that water rights holders who receive water under contract from distributing entities are not necessary parties to a water rights adjudication. Were it

[9] In 1997, the Legislature also authorized "planning units" to petition Ecology for an adjudication if the planning unit finds the adjudication will provide certainty regarding water rights within the particular water basin subject to planning. Wash. Rev. Code 90.03.105 (1997 Wash. Laws chs. 442, 101, 301).

> otherwise, and all water users were necessary parties, there would be a tremendously unwieldy duplication of claims.

Acquavella I, 100 Wash. 2d at 659. *See also* Wash. Rev. Code 90.03.120 ("any persons claiming the right to water by virtue of a contract with a claimant to the right to divert the same, shall not be necessary parties to the proceeding").

In response to the summons, the claimant, as defendant, must file an "adjudication claim" that provides specific information on the historical use of water, including the "purpose or purposes of use of the water and the annual and instantaneous quantities of water put to beneficial use," "the date the first steps were taken under the law to put the water to beneficial use," and the legal basis for the water right. Wash. Rev. Code 90.03.140. When service is complete, the court may appoint a referee or other judicial officer to assist the court; all or any issues, whether of fact or law, may be referred to a referee. Wash. Rev. Code 90.03.160. The court may adopt special rules of procedure for an adjudication, "including simplified procedures for claimants of small uses of water." *Id.*

Within the date set by the court for filing evidence, each claimant shall file evidence to support their adjudication claims. Wash. Rev. Code 90.03.635. Such evidence may include, *e.g.*, water right documents, deeds, aerial photographs, prior water right adjudication decrees, crop records, water metering records, and "any other evidence to support that a water right was obtained and was not thereafter abandoned or relinquished." *Id.*

After the filing of adjudication claims and the filing of evidence by claimants, Ecology is directed to conduct a preliminary investigation for the purpose of examining the validity and extent of the water rights that are claimed.[10] During Ecology's investigation, claimants and Ecology "are encouraged to confer as may be beneficial to clarify the factual and legal basis for the claim." Wash. Rev. Code 90.03.640. After the investigation is conducted, Ecology shall file with the court its report of findings as to each timely filed adjudication claim. Subsequently, based on the evidence filed by claimants and Ecology's report of findings, Ecology shall file either or both a

[10] Legislative enactments in 2009 and 2023 amended Wash. Rev. Code 90.03 to significantly change the procedure for water rights adjudications. 2009 Wash. Laws ch. 332; 2023 Wash. Laws ch. 160. This is exemplified by the new requirement for Ecology to conduct a preliminary investigation of claimed water rights and file a report of findings on them. Earlier adjudications were conducted through a process where a report with findings and recommendations on claimed water rights were issued by a referee, and exceptions on the report could be filed by those who disagreed with the referee's findings, for consideration by the court during a hearing. The former procedure is described in *In re Marshall Lake*, 121 Wash. 2d 459.

motion for a partial decree in favor of all claims that Ecology finds to be substantiated with factual evidence, or a motion seeking the court's determination of contested claims. *Id.*

Early settlement of contested water rights claims is encouraged. Ecology or another party "may move the superior court to allow parties to meet for settlement discussions for a set length of time, either before an appointed mediator or without a mediator." Wash. Rev. Code 90.03.645. If a settlement is reached, Ecology shall file a motion to approve the settlement and disclose the terms of the settlement to other parties to the adjudication. Then, the court shall conduct a hearing to consider any objections by other parties and decide whether to approve the settlement. *Id.*

When the adjudication concludes and a decree is issued confirming any water rights, the full nature of those rights are specified in the decree and each right is then documented in a "certificate of adjudicated water right" issued by Ecology. Wash. Rev. Code 90.03.240.

The burden is on the claimant of a water right to prove the validity and extent of the claimed right. *See Ahtanum Irrig. Dist.*, 124 F. Supp. 818, 827. However, a defendant who fails to appear in the proceeding and submit proof of their claim to a water right is estopped from subsequently asserting any right. Wash. Rev. Code 90.03.220. Water rights not confirmed in a decree are lost or extinguished. *McLeary v. Department of Game,* 91 Wash. 2d 647, 650-51, 591 P.2d 778 (1979). Upon expiration of the court claim filing period provided in Wash. Rev. Code 90.03.120, Ecology "shall file a motion for default against defendants who have been served but who have failed to timely file an adjudication claim." Wash. Rev. Code 90.03.625.[11]

In determining the validity of the claims for water rights, the court must consider whether the rights were properly created based on diligent application of the water to beneficial use. *See* The Nature And Elements Of A Water Right In Washington *supra* ch. III. Any right that is based upon a certificate issued through the permit system by the state after 1917 for surface water, or after 1945 for groundwater, must have complied with the conditions of their permits for beneficial use and due diligence prior to receiving the certificate. *See Department of Ecology v. Theodoratus*, 135 Wash. 2d 582, 957 P.2d 1241 (1998); *see also Neubert v. Yakima-Tieton Irrig. Dist.*, 117 Wash. 2d 232, 814 P.2d 199 (1991). However, claims for rights that were created prior to the

[11] A requirement for proving a pre-code water right claim is the earlier filing of a statement of water right claim with Ecology under the Water Right Claims and Registration Act. *See* ch. VI. § 6, below. If the filing of such a statement of claim was required and not filed, Ecology can move to request the court to deny the adjudication claim, and the court shall grant Ecology's motion unless the claimant "shows good cause why the motion should not be granted." Wash. Rev. Code 90.03.630.

permit system are subject to the water code and require evidence that the right was legally created under the common law or statutory notice requirements, and perfected by the beneficial use of water. *See In re Marshall Lake*.

Quantification cannot solely be based on water amounts stated in claims, authorized in certificates, or agreed upon by parties. A water right only is created upon the actual application of water to beneficial use. *See Theodoratus*; *Acquavella* II; *Department of Ecology v. Acquavella* (*Acquavella* III), 131 Wash. 2d 746, 935 P.2d 595 (1997). The quantity of water continually applied to beneficial use of water is the basis for quantification of the right. *Acquavella* III. In *Acquavella* III, the Washington Supreme Court was asked to affirm the superior court's reliance on a consent decree entered into between several irrigation districts in the Yakima River Basin and the United States to settle disputes related to the quantity and cost of water delivered by the United States Bureau of Reclamation to the districts. Pursuant to the consent decree, the districts entered into new contracts with the Bureau for specific quantities of water. The Court rejected the argument that the consent decree or any contract can establish the quantity of a water right. The Court emphasized and reaffirmed its previous decisions that the actual water applied to "beneficial use is 'the basis, the measure and the limit' of the right to the use of water." *Acquavella* III, 131 Wash. 2d at 755 (quoting *Ickes v. Fox*, 300 U.S. 82, 94, 57 S. Ct. 412, 81 L. Ed. 525 (1937)); *see also In re Marshall Lake*, 121 Wash. 2d at 466; *In re Crab Creek*.

In determining the validity of pre-code or certificated water rights, the court in an adjudication also must consider whether an otherwise valid water right, or a portion of the right, had been lost by nonuse under common law abandonment or statutory relinquishment. The principles of common law abandonment were affirmed by the Washington Supreme Court in *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wash. 2d 769, 947 P.2d 732 (1997). *See* Loss Of Water Rights *infra* ch. VI.

Under the 1967 Relinquishment Act, the Legislature specifically provided that statutory forfeiture provisions may be applied in general adjudication proceedings. Wash. Rev. Code 90.14.200(2); *see also Acquavella* III. All rights, including those created prior to the permit system established in 1917 by enactment of the water code, or by "custom," are subject to forfeiture under the relinquishment law. Wash. Rev. Code 90.14.160; *see* Loss Of Water Rights *supra* ch. VI. Applying abandonment and relinquishment requirements in an adjudication is consistent with the purpose of an adjudication to confirm the validity of existing rights.

> When, in a general water adjudication, a court determines a water claimant's water right based upon evidence of historic beneficial use, the question will often arise whether the claimant has continued to use the same quantity of water up to the present day. If a claimant used a large quantity of water in the first half of the century, but currently uses far less, the court must determine whether the claimant has abandoned or relinquished all or part of the water right.

Acquavella III, 131 Wash. 2d at 757. In *Department of Ecology v. Acquavella* (*Acquavella V)*, 177 Wash. 2d 299, 343-45, 296 P.3d 835 (2013), the Supreme Court held that a water right claimant, the Hagermeiers, relinquished a water right because of a continuous period of nonuse in excess of five years. The Court rejected the Hagermeiers' argument that their nonuse of water was excused under Wash. Rev. Code 90.14.140(2)(c), the "determined future development" exception to relinquishment. *Acquavella V*, 177 Wash. 2d at 344.

An adjudication must also determine the place of use; the land to which said water right is appurtenant." Wash. Rev. Code 90.03.240. The water right is appurtenant to the land upon which the water is beneficially used. Wash. Rev. Code 90.03.380. In *Acquavella* III, an issue was whether the water right decree had to specify irrigated rather than irrigable acreage within an irrigation district for the place of use. The Court interpreted the issue as merely a question of what category of acreage should be specified in a water right certificate for an irrigation district. *Acquavella* III, 131 Wash. 2d at 762. In addressing this issue, the Court recognized that the water right is legally appurtenant only to land on which the water is applied and the use of the water cannot be transferred to different land without Ecology's approval. *Id.* The Court further held that in determining the reasonable use of water, the number of actual irrigated acres must be determined and analyzed. However, the Court also recognized that an irrigation district has specific statutory authority to change the use of water delivered by the district to any land located within the district without Ecology's approval. *Id.*; Wash. Rev. Code 90.03.380. Therefore, the Court, in answering the question of what category of acreage should be specified on the water right certificate for an irrigation district, found that it is more appropriate for the certificate to indicate the irrigable acreage. *Acquavella* III, 131 Wash. 2d at 762-63. The Court did not, however, address whether the term "irrigable" on the certificate allowed an expanded or greater number of acres to be actually irrigated at one time than was authorized or historically irrigated. The authority and criteria for changing the place of use to allow expansion of acreage, are provided in Wash. Rev. Code 90.03.380. *See* Transfer And Change Of Water Rights *infra* ch. VII.

The adjudication process is the sole means of determining the existence, amount, and priorities of existing water rights in a scenario involving unadjudicated pre-code water rights. *Rettkowski v. Department of Ecology*, 122 Wash. 2d 219, 858 P.2d 232 (1993). Ecology does not have the independent authority to make determinations of the validity and extent of water rights for the purpose of regulating between unadjudicated existing rights. *Id.*

In *Rettkowski*, Ecology attempted to resolve a dispute that arose between cattle ranchers who lived along Sinking Creek in Lincoln County and irrigators who were withdrawing groundwater to irrigate land above the valley but within the Sinking Creek area. For many years, the ranchers had been experiencing less water flowing in Sinking Creek. They claimed pre-code riparian surface water rights from Sinking Creek for watering their cattle and a small amount of water for irrigation. Through monitoring and studies, Ecology had determined that the groundwater being withdrawn by the irrigators was affecting the level of Sinking Creek and was therefore having an impact on the ability of the cattle ranchers to exercise their rights. The irrigators' water rights were based upon groundwater certificates issued through the post-code permit process by Ecology and its predecessor agencies. After several attempts to resolve the dispute, Ecology ultimately made the decision that the cattle ranchers had pre-code riparian rights which were senior to the irrigators' permitted rights. Based upon a further finding that the withdrawal of groundwater by the irrigators was impairing the cattle ranchers' rights, Ecology issued orders to the irrigators requiring them to cease and desist withdrawing water until such time that the cattle ranchers' rights were no longer impaired.

Prior to a hearing on the merits of the case before the Pollution Control Hearings Board where they appealed the administrative cease and desist orders, the irrigators filed an action in court challenging the authority of Ecology and the Pollution Control Hearings Board to make a determination as to the validity of the ranchers' water rights. The issues before the Washington Supreme Court were summarized as "whether Ecology possesses the statutory power to: (1) determine the priorities of water rights in the basin, and (2) issue enforcement orders consistent therewith." *Id.* at 225.

The Court rejected Ecology's argument that it had the authority to make "tentative determinations" of the priorities of existing water rights in order to regulate among those water rights. While the Court recognized that Ecology has the authority to tentatively determine the existence of water rights within the context of making decisions on permit applications, no such

authority exists for the purposes of regulating among water rights. *Id.* at 227-28. The Court specifically found that making such a determination of the existence of the water rights is vested only in the superior court, citing the authority to initiate a general adjudication. Wash. Rev. Code 90.03.110; *Rettkowski*, 122 Wash. 2d. at 228. The Court relied on basic administrative law providing that an agency may only do that which it is statutorily authorized to do by the Legislature. *Id.* at 226. Because Ecology's statutes are silent as to determining water rights in a regulatory context, the Court rejected any such authority. *Id.* at 227. *Rettkowski* stands for the proposition that in a scenario involving unadjudicated claimed pre-code water rights and rights established under the post-code permit system, Ecology lacks authority to tentatively determine the validity and extent of the pre-code rights for the purpose of regulating among water rights of different types. The implications of this case on enforcement are discussed below.

2. The Permit Application Process

a. Introduction

Since 1917, no diversion or use of water can be commenced until a permit is obtained. Wash. Rev. Code 90.03.250. Any use of water or the performance of any work in connection with the use of water cannot be considered an appropriation of such water unless it is so provided for in a permit. *Id.*[12] This language, however, must be read with other sections of the act that protect inchoate rights and riparian rights[13] which existed in 1917 without having applied water to beneficial use. *See* Wash. Rev. Code 90.03.010, .460. The 1917 Legislature specifically recognized "inchoate" rights, which was consistent with the adoption of the prior appropriation doctrine. Appropriative rights that commenced with construction of the diversion works prior to 1917, but did not commence actual diversion of the water until after 1917, have generally been recognized, so long as the water was put to use with diligence and perfected within a reasonable period of time. *See* The Development Of Water Law In Washington *supra* ch. II; *see also* AGO 1927-28, at 500.

[12] While the 1917 Water Code does not specify that it only applies to surface water rights and is often referred to as the "water code," it has generally been acknowledged as the surface water code. A permit system for the use of groundwater was established in the 1945 Groundwater Act, codified in Wash. Rev. Code 90.44. *See* The Water Codes: Groundwater *infra* ch. V.

[13] Pre-code riparian rights were protected under the 1917 Water Code, but the Washington Supreme Court subsequently ruled that those rights were lost if they had not been beneficially used prior to 1932. *Department of Ecology v. Abbott*, 103 Wash. 2d 686, 694 P.2d 1071 (1985). For a full discussion of this issue, see The Development Of Water Law In Washington, chapter II above.

The 1917 Water Code provided:

> Nothing in this chapter contained shall operate to effect an impairment of any inchoate right to divert and use water while the application of the water in question to a beneficial use is being prosecuted with reasonable diligence, having due regard to the circumstances surrounding the enterprise, including the magnitude of the project for putting the water to a beneficial use and the market for the resulting water right for irrigation or power or other beneficial use in the locality in question.

Wash. Rev. Code 90.03.460.

The requirement for a permit has withstood constitutional challenge. The Washington Supreme Court has held that the permit system is a "reasonable exercise" of the state's police power. *Peterson v. Department of Ecology,* 92 Wash. 2d 306, 596 P.2d 285 (1979). The Court stated:

> The relevant inquiry in such a challenge is whether the regulatory scheme is an exercise of police power rather than one of condemnation. The question is one of social policy which requires the balancing of the public interest in regulating the use of private property against the interests of private landowners not to be encumbered by restrictions on the use of their property. The court must decide each case on its own facts. We find the permit requirement to be a reasonable exercise of the State's police power.

Id. at 316 (citations omitted).

Ecology's decision to issue a permit is a discretionary act (*id.*) and the failure to issue a permit is not an unconstitutional taking of property. *Id.* at 316; *see also Postema v. Pollution Control Hearings Board*, 142 Wash. 2d 68, 80, 11 P.3d 726 (2000); *Schuh v. Department of Ecology,* 100 Wash. 2d 180, 186, 667 P.2d 64 (1983) (Ecology's decision on an application for a permit or an amendment to a permit is a discretionary act that cannot be set aside absent a clear showing of abuse of discretion).

b. The Permit Application

Any person may apply for the right to appropriate water for beneficial use. Wash. Rev. Code 90.03.250. Person is defined as any firm, association, water users' association, corporation, irrigation district, or municipal corporation, as well as an individual. Wash. Rev. Code 90.03.015(3). Wash. Rev. Code 90.03.250 through .370 provide the application process and requirements for obtaining a permit and, eventually, a certificate documenting the right to use water.

Specific information on the proposed use of water must be provided in an application for a permit to appropriate water. *See* Wash. Rev. Code 90.03.260. Water for irrigation purposes, power purposes, municipal water supply, and mining purposes all have separate and specific requirements for the application. Ecology may require maps, drawings, and other data for consideration of the application. *Id.* If Ecology finds that the application is defective, it must return the application to the applicant for "correction or completion." Wash. Rev. Code 90.03.270. However, the application does not lose its "priority of filing" unless the information required by Ecology is not filed within a "reasonable" time period set by Ecology.

The applicant must publish notice of the completed application in a form and within a time period required by Ecology. Wash. Rev. Code 90.03.280. The publication must appear in a newspaper of general circulation published in the county or counties "in which the storage, diversion, and use is to be made." *Id.* Ecology may require publication in other newspapers once a week for two consecutive weeks. *Id.*

The application is equivalent to the notice requirements in common law and the previous statutory requirement of posting notice under the 1890 laws. Upon publication, it gives notice to all that the applicant intends to use water as provided in the application. If a permit is granted, the intention of the applicant is relevant as it establishes the proposed needs of the applicant, which others who apply later for water rights are subject to and may rely on as an indication of the extent of the applicant's needs. *See* The Nature And Elements Of A Water Right In Washington *supra* ch. III; *see also Schuh*, 100 Wash. 2d at 185.

Unlike applications for land use permits, water right applications are not subject to the vesting doctrine; an application for a water permit does not vest the applicant with the right to have the permit processed under the law that exists at the time the application was filed. In *Stempel v. Department of Water Resources*, 82 Wash. 2d 109, 508 P.2d 166 (1973), the Washington Supreme Court reversed and remanded a decision by the Department of Water Resources (Water Resources) based, in part, on laws that were enacted by the Legislature after the application for a permit had been filed and granted by Water Resources. In *Stempel,* Water Resources had received an application in 1967 for the diversion of water from Loon Lake for domestic water supply. Despite the objections that water pollution and health problems would occur if further water were withdrawn from the lake, Water Resources issued the water right permit in 1968. The permit was ultimately appealed to the Washington Supreme Court. The Court stated one issue: "[W]hat is the

department currently obligated to consider when acting upon a water appropriation application?" *Stempel*, 82 Wash. 2d at 111. Between the time that Water Resources had issued the permit and the Court heard the appeal, two significant statutes were enacted. These were the State Environmental Policy Act of 1971 (SEPA) and the Water Resources Act of 1971 (WRA). The Court analyzed the case under the policy directives of those recent enactments. The Court held that, on remand, the agency had to consider the policy and substantive elements of those acts in determining whether to issue a permit. *Id.* at 120. The Court found that there was no final decision prior to the enactments of the new acts and, therefore, the applicant had no vested rights:

> The appellant-department contends that SEPA and WRA may not be applied in this case because the application for the water use permit, its issuance, the contested hearing, and the superior court review all occurred prior to August 9, 1971, the effective date of the acts. Although these events did transpire before the effective date of SEPA and WRA, the agency's action had not been finalized prior to the passage of the statutes and remains tentative even to this date. The statutes' application in this case cannot be deemed retroactive, although relating to some events occurring prior to the statutes' enactment.
>
> . . . These facts indicate an investigation critical to the department's determination of whether or not to issue the permit is continuing. It is untenable to assert the permit's issuance was final and vested rights with Loon Lake Park Company, when deliberations as to the appropriateness of such an issuance are still to take place. On the contrary, the permit issuance was stayed, was not final and operative, and vested no rights. To conclude otherwise would "validate" a permit issuance though litigation is being pursued alleging its invalidity.[14]

Id. at 119-20.

c. Standards For Review Of Permit Application

The core section of the code that provides the general standards and criteria for reviewing an application for a permit is Wash. Rev. Code 90.03.290. This lengthy section sets forth four general criteria for reviewing an application for a water permit. *See Postema v. Pollution Control Hearings Board*, 142 Wash. 2d at 79. Specifically, the code states that if Ecology "shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof as

[14] The *Stempel* case also highlights how many of the other environmental statutes may be considered in applying the specific criteria for issuing a water permit, including the requirement that approval of the application would not be contrary to the public interest, which is discussed below in this chapter. Also, once a water permit is issued, and even after a right is perfected and a certificate is issued, the right continues to be subject to beneficial use and nonwaste standards that may be refined by the Legislature or changed by modern practices. *See In re Marshall Lake*; *Abbott*, 103 Wash. 2d at 697.

proposed in the application will not impair existing rights or be detrimental to the public welfare, it shall issue a permit stating the amount of water to which the applicant shall be entitled and the beneficial use or uses to which it may be applied." Wash. Rev. Code 90.03.290. That section also states: "[b]ut where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, having due regard to the highest feasible development of the use of the waters belonging to the public, it shall be [the] duty of the department to reject such application and to refuse to issue the permit asked for." *Id.* These four criteria have been summarized as general permit requirements that the proposed use be for a beneficial purpose, that water be available for the appropriation, that the proposed use not impair existing water rights, and that the use not be detrimental to the public welfare or contrary to the public interest. This has been referred to as the "four-part test." *Hillis v. Department of Ecology*, 131 Wash. 2d 373, 383, 932 P.2d 139 (1997).

As recognized by *Stempel,* the Water Resources Act of 1971 sets forth several principles of water management that must also be considered in permitting decisions. Wash. Rev. Code 90.54. This act includes protection and enhancement of instream flows, protection of water quality, water use conservation, and administration of the water for the benefit of the public generally. Wash. Rev. Code 90.54.020. The policy guidelines underscore Ecology's discretion in making permitting and management decisions pursuant to its mandate to act in the public interest. The greatest discretion may be provided in the policy to maximize the use of water for the benefit of the people:

> Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost.

Wash. Rev. Code 90.54.020(2). In Wash. Rev. Code 90.03.005, the 1979 Legislature provided greater definition to this principle:

> It is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and the retention of waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights.

The permit application analysis pursuant to the four-part test and the other relevant statutes is discussed below.

d. Beneficial Use Criteria

An application must state the beneficial use to which the water will be applied. Wash. Rev. Code 90.03.260. Any right or use of water can only be acquired by "appropriation for a beneficial use." Wash. Rev. Code 90.03.010. In reviewing an application, the beneficial use criterion requires an analysis of both the proposed type of use and the proposed quantity of water for that use. For the purpose of this chapter, beneficial use will be defined and analyzed based upon its reference and use in the application process. However, beneficial use is a term of art that should be understood and applied as the courts have interpreted it over the years. For a more detailed analysis, see The Nature And Elements Of A Water Right In Washington, chapter III above.

There is no one definition of the types of beneficial uses. The constitution states that uses of water for irrigation, mining, and manufacturing are "deemed a public use." Wash. Const. art. XXI, § 1. The permit application process references five types of water use for which specific information must be provided to Ecology in an application: irrigation, power, community or multiple domestic supply, municipal water supply, and mining. *See* Wash. Rev. Code 90.03.260. The Water Resources Act of 1971 provides a more complete list of beneficial uses of water for the permit application process.[15]

> Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.

Wash. Rev. Code 90.54.020(1).

Consistent with the common law development of the concept of beneficial use, the Legislature has also codified the term beneficial use as defining the quantity or "the measure and limitation" on use of water. Under Wash. Rev. Code 90.03.290, an application for water "shall not be approved for more water than can be applied to beneficial use for the purposes named in the application." The Legislature's recognition of beneficial use as also a limitation on the manner of use is more strongly stated in the 1967 Registration & Relinquishment Act. In that act, the Legislature declared:

[15] The term beneficial use is also defined in the Water Rights, Registration, Waiver & Relinquishment Act, Wash. Rev. Code 90.14.031(2).

> (3) A strong beneficial use requirement as a condition precedent to the continued ownership of a right to withdraw or divert water is essential to the orderly development of the state;
>
> (4) Enforcement of the state's beneficial use policy is required by the state's rapid growth;
>
> (5) 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[.]

Wash. Rev. Code 90.14.020(3), (4), (5).

The water code also recognizes the principle that the use of water cannot be wasted. Wash. Rev. Code 90.03.005. The courts have recognized that beneficial use exclude wasteful practices. *In re Marshall Lake*. The code requires Ecology to reduce wasteful practices to the maximum extent practicable. Wash. Rev. Code 90.03.005. See The Nature And Elements Of A Water Right In Washington, chapter III above, for more analysis on beneficial use.

In the *Theodoratus* case, the Supreme Court analyzed the basic principles of beneficial use and perfection within the context of the statutory scheme set forth in Wash. Rev. Code 90.03. Under the 1917 Water Code, Ecology issues a permit and establishes a time period during which the water is to be actually applied to beneficial use, allowing for an opportunity for application for an extension of time depending upon the circumstances. Wash. Rev. Code 90.03.320. The final certificate would then be issued to the extent the appropriation has been perfected by actual use of the water. Wash. Rev. Code 90.03.330. The Court in *Theodoratus* found that the requirement of beneficial use effectuated the legislative intent expressed in both the surface and groundwater statutes. In conclusion, the Court held that neither the statutes nor the case law support the use of a system capacity or pumps and pipes as a basis for defining beneficial use or determining the measure of a water right. *Theodoratus*, 135 Wash. 2d at 592-97.

The Court noted that Theodoratus was a private developer and his development was finite. Theodoratus was not a municipality, and the Court declined to address any different issues of beneficial use concerning municipal water suppliers. *Id.* at 594. The Court recognized that under statute there are differences between municipal and other water uses, citing Wash. Rev. Code 90.03.260 and 90.14.140(2)(d). Wash. Rev. Code 90.03.260 sets forth the requirements for an application to appropriate water and requires specific information in applications for municipal water supply rights, and Wash. Rev. Code 90.14.140(2)(d) provides for an exemption from

relinquishment if the water right is for municipal water supply purposes. While the Court did not discuss the municipalities' arguments related to this issue, the Court did indicate that even these statutory differences may not provide the distinction for defining beneficial use differently for municipalities, or support a theory that the system capacity of a municipality is the measure of the water right. The Court specifically cited to the governor's veto of SSB 5783, wherein the governor vetoed language which would have created vested rights for municipal water supply based upon system capacity. *Theodoratus*, 135 Wash. 2d at 594. The uncertainty over municipal water rights cast by the *Theodoratus* decision prompted the Legislature to enact the 2003 Municipal Water Law, which is discussed in Chapter VIII below.

e. Protection Of Existing Water Rights Criteria

An application for a water permit cannot be approved unless Ecology finds that the proposed water use would not impair existing water rights. Wash. Rev. Code 90.03.290. In applying this part of the four-part test, Ecology must make a tentative determination as to whether existing water rights may be impaired by the proposed use.[16] *Rettkowski*, 122 Wash. 2d at 228. Determining whether any particular existing right will be impaired by a new withdrawal is difficult unless the facts present an immediate impact on an existing right, for example, where a water supply is very limited. Otherwise, many water sources have water physically present, and it is only when the aggregate of all rights authorized on paper (permits, certificates, statements of claims) is considered that there is evidence that the water source has been fully, if not overly, appropriated.

The fact that a water source is, on paper, over-appropriated, is not conclusive evidence that existing rights will be impaired by a new appropriation. Many of these paper rights may not represent valid rights. The determination of the validity of rights requires an analysis similar to a superior court's analysis in an adjudication. Because determining validity of all claims is very costly and time consuming, it is not always a practical approach. The application may be granted, leaving the analysis of impairment, for all practical purposes, to the regulatory process. *See United States v. Anderson*, 591 F. Supp. 1, 14 (E.D. Wash. 1982), *aff'd in part*, *rev'd in part, and remanded*, 736 F.2d 1358, 1365 (9th Cir. 1984). Under the regulatory approach, any impairment that occurs in the future will be addressed by regulating the junior rights on behalf of an impaired

[16] Neither the tentative determinations of existing rights nor an approval of the application for a permit are considered an adjudication of those rights. *Rettkowski*; *Mack v. Eldorado Water Dist.*, 56 Wash. 2d 584, 587, 354 P.2d 917 (1960); *Madison v. McNeal*, 171 Wash. 669, 680, 19 P.2d 97 (1933).

senior right. However, this regulatory approach itself is not practical and has been criticized by the Pollution Control Hearings Board.[17] In *Black Star Ranch v. Department of Ecology*, PCHB No. 87-19 (Feb. 19, 1988), the Board upheld Ecology's denial of a permit application on the ground that approving the permit and regulating to curtail use later if exercise of the water right causes impairment of other rights would not be a prudent water management approach. The Board reasoned that "the state water agency's function is prevention, not enforcement." *Id.*

One practical problem is that regulation of the junior rights may not occur because under *Rettkowski*, in a scenario involving unadjudicated claims to pre-code water rights and other types of rights, Ecology cannot regulate on behalf of senior rights unless the rights are confirmed in a general adjudication in court. Regulation is also costly and may result in "too little, too late" for seniors who cannot afford any time without water. On the other hand, a determination of impairment resulting in the denial of a permit application because, on paper, the source is over-appropriated may not be sufficient if the determination solely relies on the assumption that all existing water rights are valid and will continuously be in use for the fully authorized quantities.

In *Hubbard v. Department of Ecology*, 86 Wash. App. 119, 936 P.2d 27 (1997), the Washington Court of Appeals addressed the issue of whether a proposed use of groundwater would impair existing rights from a surface water source that was in "hydraulic continuity" to the groundwater supply, *i.e.*, where the aquifer and a stream are connected. In *Hubbard*, the appellants challenged Ecology's decision to approve their groundwater permit application with conditions requiring that water use would be curtailed at times when the minimum instream flows established in the rule for the Okanogan River Basin are not met. *Id.* at 122. Pursuant to Wash. Rev. Code 90.22.010 and Wash Rev. Code 90.54.040, Ecology has adopted rules in numerous basins throughout the state, which, among other things, established minimum instream flows for surface water bodies, and closed some water bodies from further appropriations of water.

The Court rejected the appellants' argument that their groundwater use could not be controlled by the instream flow requirements because the aquifer they sought to pump from was a source of water that was entirely separate from the river. The Court recognized that when groundwater is tributary to or may otherwise affect the flow of surface water, the groundwater and

[17] The Pollution Control Hearings Board is a quasi-judicial administrative agency charged with reviewing Ecology's water right decisions. Wash. Rev. Code 43.21B.

the surface water are considered one source for the purposes of regulating based upon first in time is first in right. *Id.* at 124 (citing Wash. Rev. Code 90.44.030). The Court held that even if the groundwater is "minutely" tributary to or otherwise affecting the surface water, all senior rights to the surface water are superior to subsequently acquired groundwater rights. Based upon the finding that the groundwater was tributary to the surface water, the Court then analyzed whether the effect would impair the senior water rights from the surface water source. The senior surface water right in question in *Hubbard* was the minimum instream flow for the Okanogan River prescribed in Wash. Admin. Code 173-549. Although the effect on the river would be very small, if not "negligible," on the surface water source, the Court held:

> Any effect on the river during the period it is below the minimum instream flow level conflicts with existing senior water rights (such as the minimum flow level itself) and may be reasonably considered detrimental to the public interest. In such cases, Ecology is directed to reject the applications and refuse to issue permits.

Hubbard, 86 Wash. App. at 125-26.

Hubbard was the first appellate court decision that specifically addressed the standard for impairment when Ecology evaluates a permit application under Wash. Rev. Code 90.03.290. Earlier cases generally presented issues of impairment between two existing water right holders, both of whom were claiming that the other was impairing their senior right. Unlike a dispute between existing water users, the permit application process requires Ecology to predict impairment caused by a proposed future use of water. In the application process there are not necessarily other existing appropriators claiming or having evidence that they will be impaired.

The *Hubbard* case also presented the element of hydraulic continuity within the impairment equation. While a proposed direct diversion out of a surface water source will clearly affect that source, an application for a groundwater withdrawal requires an analysis to determine whether any surface water sources, in addition to the groundwater, will be impacted by the withdrawal. Ecology must determine whether there is a connection between the groundwater and the surface water, such that the withdrawal of groundwater will affect the surface water.

The Groundwater Code recognizes the need to recognize and manage the waters that are connected between ground and surface water sources:

> The rights to appropriate the surface waters of the state and the rights acquired by the appropriation and use of surface waters shall not be affected or impaired by any of the provisions of this supplementary chapter and, to the extent that any underground water is part of or tributary to the source of any surface stream

> or lake, or that the withdrawal of ground water may affect the flow of any spring, water course, lake, or other body of surface water, the right of an appropriator and owner of surface water shall be superior to any subsequent right hereby authorized to be acquired in or to ground water.

Wash. Rev. Code 90.44.030. In the 1971 Water Resources Act, the Legislature also recognized this hydrogeologic fact:

> Full recognition shall be given in the administration of water allocation and use programs to the natural interrelationships of surface and ground waters.

Wash. Rev. Code 90.54.020(9). In a regulatory context, the Washington Supreme Court has recognized this legislative intent:

> [Wash. Rev. Code 90.44.030] emphasizes the potential connections between ground water and surface water, and makes evident the Legislature's intent that ground water rights be considered a part of the overall water appropriation scheme, subject to the paramount rule of "first in time, first in right."

Rettkowski, 122 Wash. 2d at 226 n.1.

After *Hubbard* was decided, there continued to be controversy as to the legal requirements and standards for determining first, the extent of hydraulic continuity and its effect on surface water, and second, whether such effect should be deemed to be an impairment of a surface water right. In 1996, Ecology issued approximately 600 permit application decisions around the state, denying many proposed new groundwater uses because of impacts they would cause on instream flow levels, stream ecology, and salmon. In *Postema v. Pollution Control Hearings Board*, the Washington Supreme Court heard several consolidated cases challenging Ecology's application denials.[18] These cases raised issues over hydraulic continuity and impairment and placed the analysis in *Hubbard* squarely before the Court. *Postema v. Pollution Control Hearings Bd.*, 142 Wash. 2d 68, 11 P.3d 726 (2000).

In *Postema,* Ecology denied groundwater permit applications based on findings that the proposed water withdrawals would affect surface water and that such effect would impair the existing rights to the surface water. As in *Hubbard*, Ecology's findings of impairment were made because the streams in question were subject to rules that either established minimum instream flow levels that were not being met year-round or closed the stream to further appropriations. A

[18] Of the 600 decisions on water right applications, over 130 were appealed to the Pollution Control Hearings Board. Of those, five cases ultimately reached the Washington Supreme Court.

principal issue was whether the law requires that impairment on a surface water be measurable by tools such as stream gauges or can be proven by using conceptual and numeric models.

The *Postema* Court held that "*minimum flows*, once established by rule, are *appropriations* which cannot be impaired by subsequent withdrawals of groundwater in hydraulic continuity with the surface waters subject to the minimum flows." *Id.* at 82 (alteration in original). However, the Court rejected the position that a showing of hydraulic continuity where minimum flows are unmet a substantial part of the year equates to impairment of existing rights as a matter of law. Hydraulic continuity of an aquifer with a stream having unmet minimum flows is not, in and of itself, a basis for denial of a groundwater permit application. Rather, a proposed withdrawal of groundwater must be denied if it is established factually that the withdrawal would have an adverse effect on stream flow. *Id.* at 93.

The Court rejected appellants' arguments that, to deny a permit application based on a finding of impairment, a "direct and measurable impact," or "significant measurable effect," on surface water must be shown using standard stream measuring devices, such as a gauge: "Ecology is entitled to use more advanced techniques [such as modeling] as they become available and scientifically acceptable." *Id.* at 92-93. Moreover, the Court held that there can be a finding that a proposed water use would cause impairment even if the adverse effect on stream flow would be de mimimis: "RCW 90.03.290 does not, however, differentiate between impairment of existing rights based on whether the impairment is de minimis or significant. If withdrawal would impair existing rights, the statute provides the application must be denied."[19] *Id.* at 90.

After its *Postema* decision, the Washington Supreme Court next considered the impairment standard under Wash. Rev. Code 90.03.290 in *Foster v. Washington State Department of Ecology*, 184 Wash. 2d 465, 362 P.3d 959 (2015). *Foster* involved a challenged to a water permit issued by Ecology to the City of Yelm with a condition requiring implementation of a mitigation plan that was designed to offset impacts on instream flows. The mitigation plan included the retirement of existing water rights so water would stay instream, the reintroduction of reclaimed water back into the stream system, and improvements to stream conditions and protection of habitat through stream restoration and other measures. *Id.* at 469-470. However, although the mitigation plan would

[19] As for the disposition of the five cases consolidated in *Postema*, the Supreme Court upheld two permit denials on grounds there was sufficient evidence in the record showing that the proposed groundwater withdrawals would impair minimum instream flows, and remanded the other three cases to the Pollution Control Hearings Board for further fact-finding and consideration on whether impairment would occur.

improve stream conditions and benefit salmon at critical times of the year, the permit would impair minimum instream flows established by rule during certain times, most likely during the weeks in April and October when the retirement of irrigation rights would not offset new water use by Yelm. Nevertheless, Ecology found that a "net ecological benefit" would result from the mitigation, which warranted approval of the permit application based on "overriding considerations of the public interest" (OCPI). *Id.* at 469-470.

Wash. Rev. Code 90.54.020(3)(a) provides that:

> Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. *Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.*

(Emphasis added.) In an earlier decision, the Washington Supreme Court held that OCPI is a very narrow exception to the requirement that new water uses cannot impair instream flows. The Court invalidated provisions in Ecology's instream flow rule for the Skagit River Basin that, based on Ecology's finding of OCPI, established reservations of water allowing limited new water uses even though they would cause flow reductions at times when the minimum flow requirements are not met. *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wash. 2d 571, 311 P.3d 6 (2013).

In *Foster*, the Court followed its earlier decisions in *Postema* and *Swinomish* and held that OCPI could not be applied to allow the issuance of a water permit when the proposed water use would impair instream flows because "the OCPI exception does not allow for the permanent impairment of minimum flows," and, for OCPI to allow such water use, "any impairment of minimum flows must be temporary." *Foster,* 178 Wash. 2d at 475. The Court rejected the argument that Yelm's mitigation plan entailed "extraordinary circumstances" justifying approval of a permit based on OCPI because the plan would create a "net ecological benefit":

> The water code, including the statutory [OCPI} exception, is concerned with the *legal* injury caused by impairment of senior water rights—water law does not turn on notions of "ecological" injury. Our cases have consistently recognized that the prior appropriation doctrine does not permit even de minimis impairments of senior water rights. Postema, 142 Wn.2d at 90. Therefore, we reject the argument that ecological improvements can "mitigate" the injury when a junior water right holder impairs a senior water right.

Id. at 476 (alteration in original).

In 2018, as part of its enactment of the Streamflow Restoration Act, the Legislature included provisions that intended to address concerns over the *Foster* decision's holdings on the impairment standard:

> A joint legislative task force on water resource mitigation is established to review the treatment of surface water and groundwater appropriations as they relate to instream flows and fish habitat, to develop and recommend a mitigation sequencing process and scoring system to address such appropriations, and to review the Washington Supreme Court decision in *Foster*. . . .

Wash. Rev. Code 90.94.090. This statute directed Ecology to issue permit decisions for up to five water resource mitigation pilot projects to "inform the legislative task force process while also enabling the processing of water right applications that address water supply needs." Wash. Rev. Code 90.94.090(9). The joint task force issued its final report, that includes both majority and minority recommendations for actions regarding mitigation in the context of water rights permitting, in 2022. Joint Legislative Task Force on Water Resource Mitigation Report (Nov. 14, 2022). To this date, there have been no statutory amendments based on recommendations in the report.

In addition to existing water rights, other water right applicants also must be considered when determining whether a specific applicant's proposed use of water may impair other rights. In *Schuh*, the Court held that "an individual's place in line for these permits is an existing right to be considered under this statute."[20] *Schuh*, 100 Wash. 2d at 187. The *Schuh* case is discussed in more detail in The Water Codes: Groundwater, chapter V below. Historically, this has not been an issue because Ecology has processed water right applications for proposed new uses from a single water source in the order they are received. However, as greater numbers of applications have been filed and funding has limited Ecology's staff resources, Ecology has set priorities for processing applications for certain types of uses. *Hillis*, 131 Wash. 2d at 378-79. Although the *Hillis* Court recognized that, under *Schuh*, a "place in line for a water permit is an existing right to be considered" (*id*. at 392), the Court held that it is not arbitrary and capricious for Ecology to prioritize the applications for emergency uses, transfers, and short term public projects. However,

[20] The *Schuh* decision was unique on its facts and the Court deferred to Ecology's analysis of public interest in denying an application for change of a groundwater right.

these policies must be established through rulemaking procedures under the APA. *Id.* at 397-99. After the *Hillis* decision, Ecology adopted a rule governing the processing of applications based on prioritization with respect to types of water uses and areas of the state. This rule, known as the "Hillis Rule," includes criteria for priority processing of water right applications. Wash. Admin. Code 173-152.

The *Hillis* Court did not overrule *Schuh*, nor is the opinion necessarily inconsistent with *Schuh*. But it did limit the applicability of *Schuh* by creating an opportunity for some applications to jump over existing senior applicants, which the *Schuh* Court, as a policy matter, disapproved. Subsequent to these two decisions, the Legislature amended Wash. Rev. Code 90.03.380, which governs water right change applications, to provide that applications for changes and transfers of existing water rights may be processed ahead of earlier filed water permit applications. 2001 Wash. Sess. Laws. ch. 237, § 5. Wash. Rev. Code 90.03.380(5)(a) provides that "[p]ending applications for new water rights are not entitled to protection from impairment, injury, or detriment when an application relating to an existing surface or groundwater right is considered." Still, when Ecology processes permit applications, it must ensure that a proposed water use would not impair other applications for new permits that have senior priority because of earlier filing.

f. Water Quality Considerations

Appropriators' expectation that their water rights will not be impaired includes both water quality and quantity impact caused by another's use. *See* Anthony Dan Tarlock and Jason Anthony Robison*, Law of Water Rights and Resources,* § 4:96 (2024); *see also In re the Petition of Clinton Water Dist. to Appropriate Water From Deer Creek*, 36 Wash. 2d 284, 218 P.2d 309 (1950). As originally conceived, the prior appropriation system provided a pragmatic set of rules to allocate and distribute surface waters, given its importance to the economic development of the West. The prior appropriation system, however, did not account for water quality concerns. *See* Ralph W. Johnson, *Water Pollution And The Public Trust Doctrine*, 19 Envtl. L. 485, 489-90 (1989). As a result, water pollution control and quality management has generally not been integrated into water allocation systems, creating what the United States Supreme Court calls "an artificial distinction."

Public Utility Dist. 1 of Jefferson Cy. v. Washington Department of Ecology (*Elkhorn*), 511 U.S. 700, 719, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994).[21]

In more recent years, the Washington Legislature has recognized the importance of water quality in managing the state's water resources in a number of water rights statutes. Since water rights holders do not have a vested property right to pollute, the Washington Legislature can establish pollution controls to protect water quality without facing successful constitutional takings claims. *See* Johnson, 19 Envtl. L. at 504-05; *see also Abbott*, 103 Wash. 2d at 696-97 (Washington Supreme Court held that there was no unconstitutional taking and that water rights remain subject to reasonable state police powers).

The 1917 Water Code's revised provision on state water policy requires the state to play an active role in protecting water quality. *See* Wash. Rev. Code 90.03.005. Wash. Rev. Code 90.03.005 states, in part: "It is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and the retention of waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights." To carry out this broad mandate, the Ecology has authority under Wash. Rev. Code 90.22.010 to establish minimum water flows or levels to preserve water quality or wildlife resources. Furthermore, Ecology may consider water quality concerns as an element of deciding that the issuance of the water appropriation permit "will not impair existing rights or be detrimental to the public welfare." Wash. Rev. Code 90.03.290.

The Water Resources Act of 1971 similarly established a state water resource policy that emphasized the importance and connection between water quality and quantity to protect natural values. It requires that the quality of the natural environment "shall be protected and, where possible, enhanced as follows":

> (a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. . . .

[21] As competing uses continue to increase, some commentators lament that "the public interest in water quality is often subordinated to maintaining the integrity of the appropriation system itself." *See* David H. Getches, Lawrence J. MacDonnell & Teresa A. Rice, *Controlling Water Use: The Unfinished Business Of Water Quality Protection* 91-120 (1991).

> (b) Waters of the state shall be of *high quality*. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. . . . [W]astes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served.

Wash. Rev. Code 90.54.020(3)(a), (b) (emphasis added).

Washington case law has affirmed legislative intent to consider water quality when managing and allocating state waters. This water quality goal, however, remains fairly limited in scope. In *Stempel*, an water permit applicant sought to appropriate waters from Loon Lake. Several residents around the lake opposed the application on grounds that the appropriation would contribute pollution to the lake. *Stempel*, 82 Wash. 2d at 111. The Washington Supreme Court interpreted SEPA[22] and the WRA[23] to determine what Ecology must consider when reviewing a water permit application. In light of the recent enactment of these "two significant and far-reaching statutes," the Court flatly rejected the notion that the state's 1917 Water Code did not allow water pollution and health concerns to be evaluated in water allocation decisions. *Id.* at 117. It further made clear that Ecology is "obligated, under [these statutes], to consider the total environmental and ecological factors to the fullest in deciding major matters." *Id*. Accordingly, Ecology was required to assess "possible pollution reentry problems resulting from domestic water use in the vicinity of the lake." *Id*. at 119. In short, when it evaluates permit applications, Ecology must evaluate water quality.[24]

In addition to Washington statutory provisions and case law requiring water quality to be considered in water resource management decisions, the federal Clean Water Act further reinforces the state's obligation and commitment to maintain high water quality under the act's section 401 state certification process.[25]

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[22] Wash. Rev. Code 43.21C.

[23] Wash. Rev. Code 90.54.

[24] It is noteworthy that Ecology administers both the water allocation and water quality control programs. By contrast, most other western states have two different agencies that administer and enforce water quality laws separately from water allocation rights. *See* Getches, at 91-120.

[25] Section 401 of the federal Clean Water Act requires any applicant for a federal "license or permit to conduct any activity . . . which may result in any discharge into the navigable waters" to provide the federal agency a certification from the state that the discharge will comply with state water quality requirements. 33 U.S.C. § 1341(a)(1). This certification process enables states to ensure that federal hydroelectric licensees not only comply with

In *Elkhorn*, which involved a proposal to construct and operate a new hydroelectric power plant, the United States Supreme Court established that states may regulate water quantity as a condition of water quality certification under the Clean Water Act. At issue was whether a state minimum stream flow imposed on the applicant for a federal license was a permissible condition of a section 401 state certification under the Clean Water Act. *Elkhorn*, 511 U.S. at 709-10. Given the broad definition of pollution under federal and state water pollution statutes,[26] the Court determined that "reduced stream flow, *i.e.,* diminishment of water quantity, can constitute water pollution." *Id*. at 719. The Court thus concluded that "the State may include . . . stream flow requirements in a certification issued pursuant to § 401 of the Clean Water Act insofar as necessary to enforce a designated use contained in a state water quality standard." *Id*. at 723. Moreover, section 401(d) grants states authority to place "other limitations" on the application to ensure compliance with the Clean Water Act and "any other appropriate requirement of State law." *Id*. at 708 (quoting 33 U.S.C. § 1341(d)). Such "other limitations" may include minimum instream flow conditions necessary to ensure compliance with water quality standards adopted under section 303 of the Clean Water Act; it does not, however, limit states to protect designated uses exclusively through enforcement of specific numerical criteria or limits to discharges under section 303. *Id*. at 712-15. Accordingly, the Court found that because the proposed quantity of water use may constitute pollution by affecting the water's designated fisheries use, the state of Washington may condition quantity as an "other limitation" under section 401.

Subsequent to the United States Supreme Court's decision in *Elkhorn*, in a case involving a proposal to re-start a hydroelectric power project, the Washington Supreme Court held that Ecology could include minimum instream flow conditions in a section 401 certification even when they would limit the exercise of pre-existing water rights. *Public Utility Dist. No. 1 of Pend Oreille County v. Department of Ecology*, 146 Wash. 2d 778, 51 P.3d 744 (2002) (*Sullivan Creek*). In *Sullivan Creek*, the Pend Oreille Public Utility District applied for a federal license to re-start its power project on Sullivan Creek, for which it held water rights for power generation purposes. *Id.*

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the Federal Energy Regulatory Commission's requirements for issuance of a license but also meet state water quality standards. Under section 401, the federal licensing agency is prohibited from granting a license or permit until the state has granted or waived the water quality certification. *Id*. In this regard, the purpose of section 401 is to ensure that federal agencies do not authorize activities in violation of the Clean Water Act.

[26] 33 U.S.C. § 1362(19) (pollution includes "alteration of the chemical, physical, biological, and radiological integrity of water"); *see also* Wash. Rev. Code 90.48.020 (pollution means "alteration of the physical, chemical or biological properties, of any waters of the state").

at 784-85. Ecology issued a section 401 certification which included minimum instream flow conditions for protection of fish habitat in the creek. *Id.* at 787.

The District challenged the section 401 certification and asserted that *Elkhorn* did not support the inclusion of the flow conditions because, in contrast to the District, the power project applicant in *Elkhorn* did not hold pre-existing water rights and a flow condition "may not be imposed if it limits the amount of water a water right holder may use under an existing water right." *Id.* at 812. Based on its analysis of provisions of the Clean Water Act, the Court rejected the District's argument and held that, under *Elkhorn*, "Ecology has authority to impose instream flow conditions in a state water quality certification under § 401 of the Clean Water Act regardless of whether the applicant for the federal license has existing water rights." *Id.* at 821.

In 2003, out of concern that Ecology might limit the exercise of existing water rights through water quality enforcement actions, the Legislature amended the water quality statute, Wash. Rev. Code 90.48, to include a provision limiting Ecology's regulatory authority under that statute. Wash. Rev. Code 90.48.422(3) provides that the "department may not abrogate, supersede, impair, or condition the ability of a water right holder to fully divert or withdraw water under a water right permit, certificate, statutory exemption, or claim granted or recognized under chapter 90.03, 90.14, or 90.44 RCW through the authority granted to the department in this chapter." However, Wash. Rev. Code 90.48.422 "does not expand or contract the legal holdings" of the *Elkhorn* and *Sullivan Creek* decisions and shall not "be construed to affect the department's authority related to the issuance of certifications under section 401 of the federal clean water act." Wash. Rev. Code 90.48.422(1), (3). Thus, Ecology retained its authority to include minimum instream flow conditions in section 401 certifications for hydropower projects.

g. Water Availability Criteria

Ecology must determine that water is available before granting a water permit. Wash. Rev. Code 90.03.290. Water availability is directly linked to the protection of existing water rights criteria discussed above. As such, the determination of available water supply requires a similar analysis as to the validity and quantity of existing water rights. *See* The Nature And Elements Of

A Water Right In Washington *supra* ch. III. Logically, if the proposed appropriation will impair existing water rights, water is not available for the new appropriation.[27]

In *Postema*, the Washington Supreme Court held that water is unavailable for appropriation under Wash. Rev. Code 90.03.290 when a proposed water use "would reduce the flow in surface waters closed to further appropriations." *Postema*, 142 Wash. 2d at 94. Through its rulemaking for river basins, in addition to setting minimum instream flows, Ecology is authorized to close streams from further appropriations of water. In essence, Ecology can determine that a surface water body must be closed to new water uses because setting minimum instream flows that must be maintained in the stream would not be sufficient under Wash. Rev. Code 90.54.020(3)(a) to protect "base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values."

Such stream closures included in Ecology's rules for river basins embody Ecology's determination that water is unavailable from the surface water source:

> Stream closures by rule embody Ecology's determination that water is not available for further appropriations. Since this is a basis on which a water permit application

[27] In cases that were ultimately decided by the Washington Supreme Court in *Postema*, applicants raised the proposition that there should be the opportunity to show that water is available and that no impairment of other water rights will occur by "creating" water through certain land use modifications. In a hearing before the Pollution Control Hearings Board, an applicant requested credit for increasing recharge to the groundwater as a result of deforestation. *Black River Quarry v. Department of Ecology*, PCHB No. 96-56 (Nov. 15, 1996) *aff'd on other grounds* 142 Wash. 2d 68. Black River Quarry argued that the trees naturally consumed groundwater and that by deforestation, the water was no longer consumed and therefore "recharged" the groundwater. By merely withdrawing this quantity of "recharged" groundwater that the trees otherwise would have consumed, Black River Quarry argued that there would be no impairment to existing water rights and that such water is available for its appropriation. The Pollution Control Hearings Board rejected that argument:

> > Black River Quarry is not entitled to any credit for increasing recharge to the ground water, as a result of deforestation. . . .
> >
> > The underlying rationale of our […] decision is that the water which is used by vegetation, absent that vegetation, belongs to the public and is subject to the rights of prior appropriators. The public, as beneficiary of regulatory base flows, where those flows currently are not being satisfied, has a first call on any water gain from the removal of the vegetation. This would be inconsistent with the first in time, first in right precept of the water code, and would result in totally new water policy, which can only be done by the legislature.

Black River Quarry, PCHB No. 96-56, at 15-16 (citations omitted). Since *Black River Quarry* was decided, the Legislature amended Wash. Rev. Code 90.03.255 to provide that Ecology, in evaluating an application for a water right, consider any "other resource management technique" that is proposed that might result in increased water supply. 1997 Wash. Laws ch. 360, § 2. Subsequent to the 1997 amendment, the Pollution Control Hearings Board rejected an argument that vegetation removal was an adequate "other resource management technique" that could warrant approval of a water permit. The Board concluded that "cutting down all trees and other vegetation in an area and a plan to prevent them from growing back for the duration of a water right cannot reasonably be construed as a resource management technique." *CPM Development Corp. v. Department of Ecology*, PCHB No. 03-071 (Mar. 12, 2007).

> must be denied under [Wash Rev. Code] 90.03.290 independent of the question whether a withdrawal would impair an existing right, *we hold that a proposed withdrawal of groundwater from a closed stream or lake in hydraulic continuity must be denied if it is established factually that the withdrawal will have any effect on the flow or level of the surface water*.

Id. at 95 (emphasis added). Thus, although there is linkage in Ecology's analyses for the impairment and availability criteria in Wash. Rev. Code 90.03.290, this ground for Ecology to deny a water permit application based on unavailability of water is independent from application of the non-impairment criterion discussed above in this chapter.

The determination of water availability is also linked to the general legal principle that one has the right to appropriate "public waters." In two cases involving federal reclamation projects, the Washington Supreme Court has held that certain waters are not "public" and are therefore not available for appropriation. *Jensen v. Department of Ecology*, 102 Wash. 2d 109, 685 P.2d 1068 (1984); *Department of Ecology v. U.S. Bureau of Reclamation* (*U.S. Bureau*); 118 Wash. 2d 761, 827 P.2d 275 (1992).

In *U.S. Bureau*, the federal government had state-issued water rights to deliver and serve water to individual farmers who had land within the Columbia River Basin Project in eastern Washington. A percentage of the water that is conveyed to farms seeps away or is otherwise not consumed and accumulates as "return flow." *U.S. Bureau,* 118 Wash. 2d at 763. Irrigation districts that received water from the Bureau delivered water to the farms pursuant to contracts that expressly stated the "return flow" was not abandoned by the federal government and was reserved as a supply for the project. *Id.* at 764.

The case arose because Ecology granted a permit to a farmer for the use of return flow water from a channel located within the project, and for irrigation of land located within the project. Ecology argued these waters were public waters, and to the extent they were return flow resulting from the Bureau's use of water, the Bureau had abandoned them. The Bureau argued that these return flows remained in its possession and control and, although it was not currently using the return flow, such waters were not subject to further allocation by the state.

Under the unique facts of the case, the Washington Supreme Court held:

- A water right does not vest an appropriator with title to any molecules of water until the water is diverted.

- Once the molecules of water are diverted and under the appropriator's "control and possession," the appropriator has a personal property interest in the water.
- An appropriator's property interest in the molecules of water continues in the portion of water that is first applied to the authorized beneficial use, seeps into the ground and accumulates as return flows.
- An appropriator has a right to recapture the seepage or return flows and reuse the water for the use authorized under the original right.
- An appropriator may recapture and reuse return flow while the water continues to flow on the appropriator's land, and, once leaving the land, if the appropriator retains intent to recapture the water. Until the appropriator loses or abandons control of the water, it is not public water available for appropriation.

Id. at 767-70.

In *Jensen*, the return flow from the Columbia Basin Project seeped into and commingled with the natural groundwater, which was public water subject to appropriation. *Jensen*, 102 Wash. 2d at 113. Unlike in *U.S. Bureau*, the accumulating return flow was protected for the Bureau under a rule adopted by Ecology that deemed this water as "artificially stored groundwater" and not public waters available for appropriation. Wash. Admin. Code 173-136. The rule promulgated by Ecology provides that any water existing at a certain depth in the ground was attributable to the Bureau's project, and any withdrawal required permission of the Bureau and payment of the normal project dues. *Jensen*, 102 Wash. 2d at 115-16. The Court upheld the rule and the authority of Ecology to deny an application for a new permit that would allow use of the designated artificially stored groundwater.

In other cases, the Court has found that water is not available be-cause of the effect the withdrawal may have on the quality of the resource itself. *See* Water Quality Considerations *supra* ch. IV, section B.2(f).

h. Public Interest Criteria

A permit cannot be issued if the proposed use of water will be "detrimental to the public welfare" or "detrimental to the public interest." Wash. Rev. Code 90.03.290. Further, "[e]xpressions of the public interest will be sought at all stages of water planning and allocation discussions." Wash. Rev. Code 90.54.020(10). The public interest criterion provides for the greatest level of discretion afforded Ecology in the permit process. It invokes the application of

the general environmental and water management policies enacted by the Legislature. *See Schuh*; *Stempel*.

In *Schuh*, Ecology denied an application for a transfer and change of a water right based in part on the fact that the change would allow the applicant to skip over many senior applicants for water. Such a scheme would be contrary to the public welfare because "the comprehensive regulatory and management scheme adopted by the DOE would be substantially and detrimentally affected." *Schuh*, 100 Wash. 2d at 183.

In *Stempel*, Ecology argued that the public welfare test does not allow analysis of pollution and health concerns implicated by the proposed water use. These concerns, Ecology argued, were beyond the purpose of the water code "to provide a system for the distribution of state waters." *Stempel*, 82 Wash. 2d at 117; *Lawrence*, 165 Wash. at 510. The Washington Supreme Court disagreed. The Court considered the many policies enacted by the Legislature in SEPA and the WRA. These statutes place an obligation on Ecology "to consider the total environmental and ecological factors to the fullest in deciding major matters." *Stempel*, 82 Wash. 2d at 117. The Court analyzed in depth the public policy behind SEPA and the WRA. Although the proposed withdrawal would not be a major action under SEPA, Ecology is required to consider the provisions of SEPA; namely, that "presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations." *Id.* at 118 (quoting Wash. Rev. Code 43.21C.030(2)(b)).

The 1971 Water Resources Act, Wash. Rev. Code 90.54, provides the most comprehensive list of legislative policies that guide the allocation of water in the public interest. Wash. Rev. Code 90.54.010, 020. These policies generally require a balancing of the natural resources and values with the state's economic well-being. *Id.* Specifically, the policies require allocation of water in a manner that preserves instream resources, protects the quality of the water, provides adequate and safe supplies of water and promotes regional water supply systems that serve the public generally. Wash. Rev. Code 90.54.020(3), (5), (8). These policies have been implemented to grant and deny permit applications when the other elements of the prior appropriation system would dictate a different result. *See Cascade Investment Properties v. Department of Ecology*, PCHB Nos. 97-47, 97-48 (1997) (Ecology acted lawfully in denying a senior permit application and approving a junior application to promote water systems serving the public generally instead of smaller private systems).

In *Cascade Investment Properties*, Clallam County and the City of Sequim had established an urban growth area (UGA) under the Growth Management Act. An element of the UGA designation was that Sequim and Clallam County would supply water in the UGA, which encompassed the area that Cascade Investment Properties sought to develop a residential subdivision that it would serve with its own water right. Cascade had filed a permit application prior to the date that an application had been filed by Sequim. Ecology concluded that water was available for Cascade's proposed use and that such use would not impair other water rights. However, Ecology denied the application solely under the public interest criterion because water from Sequim's municipal system was available to serve the subdivision and approving Cascade's application would result in more septic systems which would be detrimental to the public interest. Subsequently, Ecology approved Sequim's permit application, which authorized Sequim to supply the water to Cascade's development. The Pollution Control Hearings Board upheld Ecology's decision, concluding that Ecology correctly denied Cascade's application because an approval would be contrary to the public interest.

In *Center for Environmental Law v. Washington Department of Ecology*, 196 Wash. App. 360, 378-79, 383 P.3d 608 (2016), the Court of Appeals held that Ecology must consider aesthetic values in determining whether a water permit application meets the public interest test. *Center for Environmental Law* involved a challenge to Ecology's approval of a water permit for hydropower generation purposes. The appellants asserted that the proposed water use would impair views of water flowing over a dam and falls on the Similkameen River. *Id.* at 366-67. Citing Wash. Rev. Code 90.54.020(3)(a), which states that "[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values," the Court recognized that "[a]esthetics is a component of the public interest analysis." *Id.* at 375. The Court upheld the permit approval based on its finding that Ecology included conditions in the permit that were adequate to protect aesthetic values. *Id.* at 379.

Lastly, deference is given to Ecology in interpretation of the public interest as applied in specific cases.

> [D]ue deference must be given "to the specialized knowledge and expertise of the administrative agency." Here, the DOE is in a far better position to judge what is in the public interest regarding water permits than a court.

Schuh, 100 Wash. 2d at 187.

i. Permit Conditions

When Ecology determines that an application can be approved and a permit issued, it must determine the permit conditions that must be followed in exercising the water right. The permit cannot authorize any greater quantity of water than can be applied to beneficial use. Wash. Rev. Code 90.03.290. The permit also must provide the time for the appropriator to construct the proposed project and put the water to beneficial use. Wash. Rev. Code 90.03.320.

This statutory process is a codification of the common law requirement to act with due diligence and apply the water to beneficial use within a reasonable period of time. *See* The Nature And Elements Of A Water Right In Washington, ch. III, *supra*. Under the statute, Ecology determines what a reasonable period of time will be for development of the project associated with the permit. Ecology must set a development schedule that specifies the times for commencement of the work, the completion of the work, and the application of the water to beneficial use. Wash. Rev. Code 90.03.320.

The development schedule for the permit may be extended, allowing for additional time for construction of the project and application of the water to beneficial use. Good cause must be shown, and any extension must be determined based on the "good faith of the applicant and the public interest affected." *Id.* There are specific criteria for establishing the development times for permits for municipal water supply, which also apply in fixing the time for any extension. If the permit holder fails to comply with the terms of the permit, including the development schedule and any extensions, Ecology may issue a notice for the permit holder to show cause why the permit should not be cancelled. If cause is not shown, the permit "shall be cancelled." *Id.*[28]

In *Concerned Neighbors of Lake Samish v. Department of Ecology*, PCHB Nos. 11-126, 11-127, 11-128 (July 24, 2012), the Pollution Control Hearings Board reversed Ecology's decision to issue extensions for several permits associated with a proposed residential subdivision. In a scenario where the permittee had already received several extensions and had not yet commenced construction over twenty years after the permits were issued, the Board held that Ecology's approval of additional extensions was unlawful: "the project has languished, and during significant periods of time there was no evidence of continuous, steady or constant effort to put the water to

[28] Ecology adopted a policy, POL-1050 (1991, rev. 2021), that sets forth the standards for Ecology's evaluation of requests for extensions of time for water permits.

beneficial use. The Board concludes that there has been a lack of reasonable diligence in the development of the water right and Permits at issue."

Upon finding that the "appropriation has been perfected in accordance with the provisions of this chapter [Wash. Rev. Code 90.03]," Ecology issues a water right certificate. Wash. Rev. Code 90.03.330. The priority date for the right then relates back to the date of filing of the application. Wash. Rev. Code 90.03.340. This process also codifies the common law principles that a water right is created or "perfected" through the actual beneficial use of water, and once perfected, the right receives a priority date based on the date that action to appropriate water was first taken. At this time, the appropriation is complete and the water right is vested. *Ickes v. Fox*, 300 U.S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937).

The process of determining permit conditions, including the time frames for applying water to beneficial use, and ultimately issuing a certificate for the right, was addressed by the Washington Supreme Court in *Theodoratus*. Theodoratus appealed Ecology's decision to issue a permit extension with conditions that were not included in the original permit. The original permit provided that the water right certificate would be issued with maximum water quantity figures based on the capacity of the permanent diversion and distribution facilities which had been installed, together with a main line capable of delivering the water to an existing or proposed distribution system. (Otherwise known as "pumps and pipes.") In the extension, Ecology did not restate this condition; rather, it included a condition that provided that the water right certificate would be issued with maximum quantities based on meter data of the actual use of water. *Theodoratus*, 135 Wash. 2d at 588.

The Court upheld the state's authority to place new conditions on extensions for permits. The Court recognized that the decision to issue a permit in the first place is a discretionary act. An agency that has authority to issue or deny permit applications also has the authority to condition any permits that it approves. Any extension of a permit, or other type of "renewal," is a discretionary act of Ecology and in considering an extension request, Ecology should consider any laws that have changed in the interim or any information that was not otherwise considered when

the original permit was granted.[29] *Id.* at 597-98; *see also Center for Environmental Law v. Washington Department of Ecology*, 196 Wash. App. 360, 378-79, 383 P.3d 608 (2016).

j. Temporary And Preliminary Permits

The code authorizes Ecology to issue temporary and preliminary water right permits. A temporary permit may be issued after an application is filed, but prior to a decision on the application. Wash. Rev. Code 90.03.250. The statute provides little guidance:

> [A] temporary permit may be granted upon a proper showing made to the department to be valid only during the pendency of such application for a permit unless sooner revoked by the department[.]

Wash. Rev. Code 90.03.250.[30]

While a temporary permit authorizes the use of water, a preliminary permit is issued by Ecology to require the applicant "to make such surveys, investigations, studies, and program reports, as in the opinion of the department may be necessary" for it to make a decision on the pending application. Wash. Rev. Code 90.03.290(2)(a). Preliminary permits do not authorize the use of water. *See Will v. Department of Ecology*, PCHB No. 09-022 (Apr. 6, 2011). The preliminary permit can be issued for only up to three years, and it can be extended only with the approval of the governor, but not to exceed a total of five years. To extend the preliminary permit, the applicant must file, before expiration of the initial preliminary permit, a verification of the work done. Ecology must then find that the applicant has been acting in good faith, with the intent and ability to carry on the proposed development. If the applicant fails to comply with the preliminary permit, it and the application for the permit is automatically cancelled. Wash. Rev. Code 90.03.290(2)(a).[31]

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[29] The uncertainty over municipal water rights cast by the holding in *Theodoratus* that perfection of water rights is based on actual water use rather than the completion of construction of "pumps and pipes" prompted the Legislature to enact the 2003 Municipal Water Law, which is discussed in chapter VIII, below.

[30] Ecology adopted a policy, POL-1035 (1991, rev. 1992), that sets forth the requirements for applying for and obtaining a temporary permit. Ecology will require the four permit criteria in Wash. Rev. Code 90.03.290 and the requirements of SEPA to be met, and any temporary permit should be issued only if Ecology is confident that a permit will be issued in a reasonable time.

[31] Ecology also has adopted a policy for reviewing an application for a preliminary permit. POL-1030 (1991, rev. 2001). The policy provides that the preliminary permit is issued to retain one's application (priority) date while collecting necessary data under a set timeline. Preliminary and temporary permits may be issued simultaneously, thereby allowing an applicant to put to beneficial use the water they are diverting or withdrawing to collect data and information "[i]f water use is necessary to obtain information required by a preliminary permit." POL-1030.

V.

THE WATER CODES: GROUNDWATER

A. BASIC GROUNDWATER HYDROLOGY

Groundwater is subterranean or underground water that occupies the voids within granular geologic materials or cracks in solid rock. The exact relationship between groundwater and the underground structures where it is found is not fully understood. Nevertheless, basic scientific principles help describe the relationship of movement and exchange between surface and groundwaters. The complex nature of surface and groundwater interactions has shaped the law of groundwater in Washington.

The principle of hydraulic continuity refers to the hydraulic connection and dynamic interactions between groundwater and surface water. An aquifer is in hydraulic continuity with lakes, streams, rivers, or other surface water bodies whenever it is discharging into surface waters and contributing to instream flows, or being recharged by surface waters. Recharge areas are those where the force of gravity causes precipitation (rain or snowmelt) to infiltrate into surface soils and percolate down to the water table. Discharge areas are those where groundwater flows into streams or lakes, something that can occur only where the water table is higher than the stream or lake bottoms, or, less commonly, where underground water is under sufficient pressure to seep upward into stream or lake bottoms.

Where hydraulic continuity occurs, surface and groundwater cannot be considered separate sources of water; withdrawal from one will affect the other. The magnitude and timing of the effects of water extraction at one location on water availability at other locations is dependent upon the degree of hydraulic continuity.

The hydrogeologic principle of Darcy's Law governs the dynamic interactions between ground and surface water. Darcy's Law explains that when an aquifer is hydraulically connected to a stream, the flow into or out of the stream is proportional to the difference between the stream stage elevation and the water table elevation. This interaction in turn explains the effects of pumping groundwater from wells on surface and instream waters.

Pumping water from wells affects groundwater in three fundamental ways: it lowers groundwater pressures and heads; it reduces groundwater storage; and it changes the rates of groundwater recharge and discharge. As water moves from an aquifer into a well, a cone of depression forms, spreading outward from the well until it encounters a hydraulic boundary, such as surface water. Pumping from a well in turn reduces stream flow, through the concept of "capture," by lowering the aquifer water table to a level that reduces or prevents groundwater from recharging the stream.

Generally, the effect of a pumping well on a regional, hydraulically continuous flow system is not observable during short pumping tests. However, as the New Mexico Supreme Court has acknowledged, the connection is apparent over the long term:

> The relationships derived from Darcy's law show that the effects of ground-water withdrawals on a nearby stream arise gradually and that if the well is some distance from the stream many years elapse before the effects of the withdrawal are fully reflected in the stream-flows. The relationships show, however, that ultimately the annual stream-flow is reduced by an amount equal to the annual ground-water appropriation. The relationships also show that once a ground-water appropriation is made, and continued for a period of time, the effects on surface water flows are not terminated at the time that the ground-water appropriation is terminated but continue, gradually diminishing, for many years after the ground-water appropriation is ended.

City of Albuquerque v. Reynolds, 71 N.M. 428, 439-40, 379 P.2d 73 (1963) (quoting state engineer); *see also* Gregory A. Hicks, *Protecting And Promoting Wildlife Habitat On State And Private Land In Washing-ton's Arid Interior*, 4 Hastings Envtl. L.J. 13, 35-37 (1997) (explaining how regional groundwater pumping in the Swanson Lakes Wildlife Area of Washington has diminished surface water supplies, causing the actual disappearance of creeks, ponds, wet marshes, and meadows).[1]

In sum, successful management of water resources, based on established scientific relationships, depends on the consideration of water uses in a geographic context sufficiently broad to account for the attenuated and sometimes far-reaching effects of groundwater withdrawal. Such a system-wide approach will help provide a comprehensive accounting and better understanding of water resources.

[1] A study by the United States Geological Survey concerning an area in western Washington provided significant insights regarding the varied and complex responses to groundwater pumping that may occur in hydrogeologic environments. David S. Morgan & Joseph L. Jones, U.S. Geological Survey Open-File Report 95-470, *Numerical Model Analysis Of The Effects Of Ground-Water Withdrawals On Discharge To Streams And Springs In Small Basins Typical Of The Puget Sound Lowland, Washington* 73 (1996).

B. COMMON LAW PRINCIPLES OF GROUNDWATER

For the first half of the twentieth century, no statutory law in Washington existed to regulate and administer groundwater rights. Consequently, the law of groundwater appropriation developed independently of the law of surface water. Washington's judicial decisions initially defined the right to use subterranean waters in two leading cases, *Patrick v. Smith*, 75 Wash. 407, 134 P. 1076 (1913), and *Evans v. City of Seattle*, 182 Wash. 450, 47 P.2d 984 (1935). Rather than following English case law that granted the owner of land absolute title to everything underneath their land, these cases adhered to the common law distinction between "underground streams" and "percolating waters."

Underground streams were deemed to have permanent, well-known and defined subterranean channels and were governed by the same appropriation rules as applied to surface streams and lakes. William Goldfarb, *Water Law* 5 (1984) (citing R.E. Clark, *Classes Of Water And Character Of Water Rights in* 7 *Waters And Water Rights* § I at 300 (1978)). Percolating waters, on the other hand, included subterranean waters without a definite channel that were subject to a concept that the Court somewhat inappropriately labeled as "correlative rights." *Patrick*, 75 Wash. at 414-415; *Evans*, 182 Wash. at 457-459. All underground waters, however, were presumed to be "percolating" and the burden of showing otherwise was made almost impossible. *Evans*, 182 Wash. at 453-455 (clear and convincing proof required); *Wilkening v. Washington*, 54 Wash. 2d 692, 344 P.2d 204 (1959). Failure to understand the complicated nature of groundwater resources led to the creation of these unscientific categories, which were not based on hydrologic principles.

The appropriation rules that emerged from *Patrick* and *Evans* included the following:

(1) A person who interferes with the reasonable use of percolating waters by a landowner is liable for damages unless the draining off of the water is necessary in connection with a "reasonable use" of the interferor's own property.[2]

(2) If, in connection with the reasonable use of their own property, a landowner interferes with the reasonable use of "percolating waters" by another landowner, no damages are recoverable.

[2] Under this rule, the withdrawal of "percolating waters" by a landowner for commercial purposes to the exclusion of another's use would appear to involve an unreasonable use of the landowner's property. *Evans*, 182 Wash. at 459.

These principles do not, in fact, represent a "correlative rights" approach as the courts claim; rather, they involve a combined reasonable use and correlative rights doctrine. *See* VII *Washington Real Property Deskbook*, § 117.7 at 117-22 (3d ed. 1996). In a strict correlative rights jurisdiction, there are shared interests in a common res that limit each user to her fair share. *See Restatement (Second) of Torts* 858 (1979). The doctrine of "reasonable use," on the other hand, allows an owner to take all the water she needs, regardless of impact on her neighbor, if the owner's withdrawal is required for a reasonable use of her land. *See, e.g.*, *Wisconsin v. Michels Pipeline Constr., Inc.*, 63 Wis. 2d 278, 217 N.W.2d 339 (1974). The doctrine of reasonable use thus allows a landowner to interfere with (or even destroy) a neighbor's water use so long as the landowner is making a reasonable use of her own property. Indeed, in the *Evans* case, recovery was denied even though the City of Seattle (treated as an ordinary landowner) had totally dried up plaintiff's springs (used for domestic water supply) by draining percolating underground waters from the city's own gravel pit.

Subsequently, however, the Court created an exception to the reasonable use doctrine recognized in *Evans*, which is applicable where damage was caused as a result of a public improvement project. In *Washington v. Ponten*, 77 Wash. 2d 463, 463 P.2d 150 (1969), liability was imposed on the state for draining nearby domestic wells in connection with an excavation for a freeway. The Court concluded that because the state was pursuing rights obtained by eminent domain and was using property in a way no private owner would, it should not be considered an "ordinary landowner" making beneficial use of its property as occurred under the *Evans* decision. *Ponten*, 77 Wash. 2d at 472-473. In *Bjorvatn v. Pacific Mechanical Construction, Inc.*, 77 Wash. 2d 563, 464 P.2d 432 (1970), the Court reached a similar conclusion where the Municipality of Metropolitan Seattle caused subsidence of adjacent property by draining water in connection with constructing a sewer. *See also United States v. Alexander*, 148 U.S. 186, 13 S. Ct. 529, 37 L. Ed. 415 (1893) (holding that plaintiff could recover for the loss of water from his well since the government was exercising eminent domain powers and could not raise the immunity defense of an ordinary landowner).

C. THE 1945 GROUNDWATER CODE

1. Defining Groundwaters To Supplement The 1917 Surface Water Code

In 1945, the Legislature enacted a comprehensive groundwater code to regulate and control allocation of public groundwater. 1945 Wash. Laws ch. 263 (now codified in Wash. Rev. Code 90.44). In defining the term "groundwaters," the Legislature initially adopted common law language of the Washington courts:

> All bodies of water that exist beneath the land surface and that there saturate the interstices of rocks or other materials – that is, the waters of underground streams or channels, artesian basins, underground reservoirs, lakes or basins, whose existence or whose boundaries may be reasonably established or ascertained – are defined for the purpose of this act as "ground waters."

1945 Wash. Laws ch. 263, § 3.

Given the code's unclear language, judicial decisions in Washington did not take into account the impact of the 1945 Legislature's enactment of the state's Groundwater Code and continued to distinguish between underground and percolating waters until 1979. *Peterson v. Department of Ecology,* 92 Wash. 2d 306, 596 P.2d 285 (1979). In *Peterson*, the Court held that from the effective date of the Act in 1945, rights in the use of groundwater arise only by permit, and the decision to issue a permit is a discretionary act. *Id.* at 312-314. The delay in judicial recognition of the scope and effect of the Groundwater Code was apparently the result of confusion over whether the code was intended to apply to "percolating" waters. In *Ponten*, for example, Justice Neill, in dissent, opined that "percolating waters" were not "ground water" as defined in the Groundwater Code. *Ponten*, 77 Wash. 2d at 477-478.

Subsequent to the 1969 *Ponten* decision, in 1973 the Legislature clarified any doubt as to statutory coverage of the Groundwater Code by amending the definition of "groundwaters." 1973 Wash. Laws ch. 94, § 2. This amended definition now reads, in pertinent part, as follows:

> "Groundwaters" means all waters that exist beneath the land surface or beneath the bed of any stream, lake or reservoir, or other body of surface water within the boundaries of this state, whatever may be the geological formation or structure in which such water stands or flows, percolates or otherwise moves. There is a recognized distinction between natural groundwater and artificially stored groundwater.

Wash. Rev. Code 90.44.035(3).

The purpose of assigning such a broad definition to groundwater was to "reaffirm the intent of the legislature that 'groundwaters,' . . . means all waters within the state existing beneath the land surface, and to remove any possible ambiguity which may exist as a result of the dissenting opinion in *State v. Ponten*, 77 [Wash.] 2d 463 (1969)."[3] 1973 Wash. Laws ch. 94, § 1. Accordingly, if water is located underground it is unambiguously classified as groundwater for purposes of the 1945 Groundwater Code.

2. Permit System: Extending The 1917 Code's Permit System To Groundwater

By enacting the Groundwater Code, the Legislature adopted a new and substantially different approach to the regulation of groundwater use and the administration of groundwater rights. Essentially, the Legislature rejected both the correlative rights and the reasonable use doctrines relating to groundwater and extended the prior appropriation principles of the 1917 surface water code to groundwaters.[4] Wash. Rev. Code 90.44.020; *see* The Emergence Of The Prior Appropriation Doctrine As The Dominant Law In Washington *supra* ch. II, § C. Wash Rev. Code 90.44.020 states "[t]his chapter . . . is enacted for the purpose of extending the application of such surface water statutes to the appropriation and beneficial use of groundwaters within the state."

By expressly extending the prior appropriation doctrine to groundwater, the Legislature also extended the notion of public ownership to such water.[5] Wash. Rev. Code 90.44.040 thus provides:

> Subject to existing rights, *all natural ground waters* of the state as defined in RCW 90.44.035, also *all artificial ground waters that have been abandoned or forfeited*, are hereby declared to be *public ground waters* and to belong to the public

[3] Note that this definition explicitly includes percolating waters.

[4] The doctrine of prior appropriation for surface streams and lakes on the public domain has been recognized since statehood. *Tenem Ditch Co. v. Thorpe*, 1 Wash. 566, 20 P. 588 (1889). The doctrine of riparian rights was recognized at the same time. *Benton v. Johncox*, 17 Wash. 277, 49 P. 495 (1897); *see* The Emergence Of The Prior Appropriation Doctrine As The Dominant Law In Washington *supra* ch. II, § C.

[5] Extending the prior appropriation system to groundwater has been constitutionally challenged as a taking of property without due process of law. *See* Anthony Dan Tarlock and Jason Anthony Robison, *Law Of Water Rights And Resources* § 5:22 (2024). The Washington Supreme Court held that the permit requirement for use of groundwater is a reasonable exercise of the state's police power and that Ecology's decision not to issue a groundwater permit did not constitute an unconstitutional taking of property. *See Peterson*, 92 Wash. 2d at 316. Similarly, the New Mexico Supreme Court held that a statute declaring groundwater a public resource subject to beneficial use was not an unconstitutional taking of property without due process. *New Mexico v. Dority*, 55 N.M. 12, 225 P.2d 1007 (1950).

> and *to be subject to appropriation for beneficial use* under the terms of this chapter and not otherwise.

(Emphasis added.)

In defining the management of this public resource, the Legislature made the acquisition of rights to groundwater dependent on compliance with an exclusive permit system. Wash. Rev. Code ¶, .055, .060. The permit system was absolute as of June 6, 1945, as provided in Wash. Rev. Code 90.44.050:

> After June 6, 1945, no withdrawal of public ground waters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided[.]

Certain uses of groundwater, however, are exempted from the permit requirement. Wash. Rev. Code 90.44.050; *see* Exemptions Under The Groundwater Permit System *infra* ch. V, § C.4. Also exempt from the requirement to obtain a permit is the distribution and use of reclaimed water generated from a wastewater treatment facility.[6] Wash. Rev. Code 90.46.120. Affirming the Legislature's intent, the Washington Supreme Court held that groundwater is a publicly owned resource that requires a permit for withdrawal, except in limited circumstances. *Jensen v. Department of Ecology,* 102 Wash. 2d 109, 113, 685 P.2d 1068 (1984); *Hillis v. Department of Ecology*, 131 Wash. 2d 373, 383, 932 P.2d 139 (1997). Moreover, the Court has held that the code's permit requirement is a reasonable exercise of state police power, such that a denial of a permit application does not constitute an unconstitutional taking of property.[7] *Peterson*, 92 Wash. 2d at 316.

The procedures for processing a groundwater permit application are the same as those required for obtaining a surface water right permit under Wash. Rev. Code 90.03.250 through 90.03.340. Wash. Rev. Code 90.44.060 provides, in pertinent part, that:

> Applications for permits for appropriation of underground water shall be made in the same form and manner provided in RCW 90.03.250 through 90.03.340, as amended, the provisions of which sections are hereby extended to govern and to apply to groundwater, or groundwater right certificates and to all permits that shall

[6] *See* Public Water Supply, § C.9, below, for discussion on reclaimed water.

[7] In light of the United States Supreme Court's ruling that groundwater is an article in interstate commerce and that laws forbidding the export of water across state boundaries are presumed to be unconstitutional, states likely have limited latitude to manage interstate groundwater resources. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).

> be issued pursuant to such applications, and the rights to the withdrawal of ground water acquired thereby shall be governed by RCW 90.03.250 through 90.03.340[.]

For a full discussion of the requirements to obtain a surface water right, which are also applicable for acquisition of a groundwater right, see The Water Codes: Surface Water, chapter IV. In addition to these requirements, groundwater rights are limited by a concept of feasibility and reasonableness in light of the characteristics of the aquifer being tapped. Wash. Rev. Code 90.44.070 provides, in part:

> No permit shall be granted for the development or withdrawal of public ground waters beyond the capacity of the underground bed or formation in the given basin, district, or locality to yield such water within *a reasonable or feasible pumping lift* in case of pumping developments, or within a reasonable or feasible reduction of pressure in the case of artesian developments.

(Emphasis added.)

Not surprisingly, Washington cases prior to the 1970s did not explicitly address the question of the extent of protection afforded to well owners based on reasonable pumping levels. The purpose of this limitation is to protect the capacity of groundwater bodies by prohibiting methods and rates of extraction harmful to efficient utilization of the aquifer. In contrast to surface water appropriations, a senior appropriator of groundwater is not "absolutely protected in either his historic water level or his historic means of diversion." *Baker v. Ore-Ida Foods, Inc*., 95 Idaho 575, 584, 513 P.2d 627 (1973). Accordingly, some senior appropriators of groundwater may have to modify their withdrawal works in order to promote economic growth and development. In groundwater appropriation lawsuits the issues generally involve a right to a given pressure level rather than a simple right to an amount of water.

While the Groundwater Code recognizes the priority system, it only protects groundwater appropriators to the extent they have reached or are below reasonable groundwater pumping levels. *See Warner Valley Stock Co. v. Lynch*, 215 Or. 523, 336 P.2d 884 (1959); *Montana ex rel. Crowley v. Gallatin Cy. Dist. Ct.*, 108 Mont. 89, 88 P.2d 23 (1939). Analogous procedures have been adopted to protect groundwater development in other prior appropriation doctrine states. *See Fundingsland v. Colorado Ground Water Comm'n*, 171 Colo. 487, 468 P.2d 835 (1970); *Baker*.

The principle of "safe sustaining yield" in the code further protects vested groundwater rights against later appropriations:

> As between appropriators of public groundwater, the prior appropriator shall as against subsequent appropriators from the same groundwater body be

> entitled to the preferred use of such groundwater to the extent of his appropriation and beneficial use, and *shall enjoy the right to* have any withdrawals by a subsequent appropriator of ground water limited to *an amount that will maintain and provide a safe sustaining yield* in the amount of the prior appropriation.

Wash. Rev. Code 90.44.130 (emphasis added). The policy behind this limitation is to prohibit overdraft or "mining" of groundwater resources – that is where the depletion of an aquifer occurs at a rate faster than the natural rate of recharge. For a discussion on groundwater mining, see *Fundingsland*.

In 1985, the Legislature enacted a statute directing Ecology to establish a groundwater management program to address issues of overdrafting and mining and to promote "the protection of water quality, assurance of quantity, and efficient management of water resources to meet future needs." Wash. Rev. Code 90.44.400(1). Rules adopted by Ecology under this authority further explain that the intent of this program is "to forge a partnership between a diversity of local, state, tribal and federal interests in cooperatively protecting the state's ground water resources." Wash. Admin. Code 173-100-010. The program calls for Ecology to designate groundwater areas or sub-areas, or separate depth zones within such areas or sub-areas through rulemaking.[8] Each area designated must enclose all or any part of a distinct body of public groundwater. Following the designation of sub-areas, areas, and zones, Ecology then establishes the priorities of right to withdrawal water for each groundwater area separately. The priority date of a certificate of a vested groundwater right relates back to "the date of filing of the original application for a withdrawal with the department . . . ." Wash. Rev. Code 90.44.130. Once groundwater management programs are adopted, Ecology and affected local governments shall use the programs as guiding documents "when reviewing and considering approval of all studies, plans, and facilities that may utilize or impact the implementation of the program." Wash. Rev. Code 90.44.430.

In order to prevent overdraft, Ecology also may designate groundwater areas or sub-areas and separate depth zones within an area or sub-area, and accordingly establish priority of rights to withdraw public groundwater. Wash. Rev. Code 90.44.130.[9]

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[8] Ecology, local government, or groundwater users, however, may initiate the development of a groundwater management program for each area or sub-area. In fact, the statute provides local government the option to assume "the lead agency role in developing the ground water management program and in implementing the provisions of RCW 90.44.400 through 90.44.420." Wash. Rev. Code 90.44.400(2).

[9] The Department of Ecology has taken the position that the "safe sustaining yield" requirement in Wash. Rev. Code 90.44.130 is applicable when Ecology evaluates applications for new groundwater right permits, but is not

When Wash. Rev. Code 90.44.070 and .130 are construed together, they define the level of protection afforded to groundwater rights and the relationship between appropriators. Simply put, the "safe sustaining yield" principle of Wash. Rev. Code 90.44.130 is qualified by the "reasonable or feasible pump lift" concept of Wash. Rev. Code 90.44.070. Thus, the right of the prior appropriator of groundwater has been interfered with if a new groundwater user prevents the prior appropriator from fully satisfying her well appropriation at or below the "reasonable or feasible pump lift" level for the aquifer in question. Conversely, if the prior appropriator's well is shallow and the new withdrawal of groundwater does not prevent her from withdrawing from a deeper level that is still within the "reasonable or feasible pump lift" standard, no interference with her right has occurred. In this latter scenario, the "safe sustaining yield in the amount of the prior appropriation" is still available within the aquifer, but not within the capacity of the prior appropriator's well as constructed. Her means of withdrawal are thus not protected until she reaches the "reasonable or feasible pump lift" well depth. At that level and below, her ability to satisfy her appropriation at the well depth she has reached is part and parcel of her right.[10] This approach is reflected in Ecology's rule concerning impairment of groundwater rights:

> [A] groundwater right which pertains to qualifying withdrawal facilities, shall be deemed to be impaired whenever:
>
> (1) There is an interruption or an interference in the availability of water to said facilities, or a contamination of such water, caused by the withdrawal of groundwater by a junior water right holder or holders; and
>
> (2) Significant modification is required to be made to said facilities in order to allow the senior groundwater right to be exercised.

applicable during its evaluation of applications to change existing groundwater rights. In *Cornelius v. Department of Ecology*, the Supreme Court did not reach the question of whether this interpretation is correct but held that Ecology did not err by not applying the "safe sustaining yield" standard to ascertain whether exercise of a senior priority groundwater right that would be changed could cause impairment of a junior groundwater right. *Cornelius v. Department of Ecology*, 182 Wash. 2d 574, 600-601, 344 P.3d 199 (2015) ("Although RCW 90.44.130 clearly protects senior water users against overdrafting by subsequent users, it is unclear whether the senior users' enjoyment of a 'safe sustaining yield' applies only to new users who wish to appropriate water or if it applies to existing users who seek to amend. However, here, that is an academic question. WSU is the senior water user, not Cornelius. Thus, Ecology . . . did not err by not applying the safe sustaining yield provision to WSU.").

[10] Although no appellate case decisions have considered the interplay between the "reasonable or feasible pumping lift" and "safe sustaining yield" standards, this interpretation has been litigated and upheld in decisions by the Pollution Control Hearings Board. *See, e.g.*, *Cornelius v. Department of Ecology*, PCHB No. 06-099 (Apr. 17, 2008); *Graves v. Ecology & City of Okanogan*, PCHB Nos. 88-140, 141 & 144 (May 10,1989); *Shinn v. Department of Ecology*, PCHB Nos. 75-613, 75-648 to 75-652 (Jan. 29, 1975).

Wash Admin. Code 173-150-060. "'Qualifying withdrawal facilities' means those withdrawal facilities which in the opinion of the department constitute a reasonable development of the aquifer," which, among other requirements, "must have a depth of aquifer penetration which will allow the withdrawal of water from a reasonable or feasible pumping lift." Wash. Admin. Code 173-150-030(8).

This interpretation of the Groundwater Code harmonizes the correlative objectives of the code by promoting the full utilization of the public resource while at the same time protecting prior rights. An interpretation that protects well depths absolutely, on the other hand, would limit groundwater development to the level of the earliest and shallowest wells in an aquifer. Conversely, an interpretation which offers no such protection would make groundwater development a mere "race to the bottom," rendering the protection of prior appropriations illusory. Through harmonization of Wash. Rev. Code 90.44.070 and .130, the extent of protection provided by Washington's Groundwater Code depends upon a site-specific factual inquiry and technical analysis that takes into consideration both the geohydraulic characteristics of the aquifer and the state of well construction and pump technology.

3. The Groundwater Code And Pre-1945 Common Law Groundwater Rights

While the 1945 Groundwater Code exempts "existing rights" from the appropriation procedure for acquiring water right permits, there is no indication that the Legislature intended to exclude groundwater rights vested prior to 1945 from this comprehensive groundwater rights system.[11]

Wash. Rev. Code 90.44.090, for example, provided for the issuance of a water right certificate to "[a]ny person, firm or corporation claiming a vested right to withdraw public

[11] Wash. Rev. Code 90.44.040 does not elaborate on the term "existing rights." Compare Wash. Rev. Code 90.03.010 under the earlier surface water statute, which goes to considerably greater length, stating in part:

> Nothing contained in this chapter shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise.

Wash. Rev. Code 90.03.010. For more discussion on how the 1917 Water Code addressed existing riparian rights, see *Department of Ecology v. Abbott*, 103 Wash. 2d 686, 692, 694 P.2d 1071 (1985).

groundwaters of the state by virtue of prior beneficial use of such water."[12] To obtain such a certificate, however, a claimant had to submit a declaration within three years of 1945 stating that the beneficial use of groundwater was made, the date of earliest beneficial use and continuity of use, the amount of water claimed, the land the water was applied to (if for irrigation) and a description of the well and other withdrawal works. In response to such declarations, the state was to make findings in the same manner as for an original permit application and to issue a water certificate if the findings "sustain the declaration." Interpreting this provision, the Attorney General's Office came to the "inescapable conclusion" that:

> [T]he legislature meant to define "existing rights" as having the same essential *attributes* as the rights which would be acquired under the code. The law recognized and preserved existing rights then being exercised, but it defined them in a way which eliminated their initial character under the correlative rights or reasonable use doctrines. In short, the legislature announced a rule of property defining all ground water rights in the State--old and new--and it provided at least three years for persons claiming existing rights to take steps to preserve them in accordance with the new definition of their attributes. It therefore follows that the legal regime for protection of works discernible from the Ground Water Code applies to pre-1945 as well as post-1945 ground water rights.

AGO 1984 No. 19, at 14-15 (emphasis in original).

Additionally, the code is unambiguous in requiring a permit to withdraw groundwater:

> After June 6, 1945, no withdrawal of public ground waters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided[.]

Wash. Rev. Code 90.44.050.

While this provision provides an enumerated list of exceptions to the permit requirement, "existing rights" are not mentioned. Following a rule of statutory construction, exceptions to a statute are narrowly construed to give effect to the policy underlying the general rule. *See, e.g.*, *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wash. 2d 571, 582, 311 P.3d 6 (2013). A broad reading of the permit exemption language in Wash. Rev. Code 90.44.050 to include groundwater rights exercised prior to 1945 would violate the rules of statutory construction and increase the scope of permit-exempt groundwater use.

[12] An early Attorney General Opinion interpreting this provision advised that "*any* vested ground water right is entitled to a certificate at any time within three years after the effective date of chapter 122, Laws of 1947, which period may be extended two (2) additional years." AGO 49-51 No. 467, at 2 (emphasis added).

In 1997, the Legislature re-opened the Water Rights Claims Registry in a final attempt to address the scattered and incomplete records for water rights established before the 1917 Surface Water Code and the 1945 Groundwater Code. Wash. Rev. Code 90.14.068 reads, in part:

> [A]ny person claiming under state law a right to withdraw and beneficially use groundwater under a right that was established before the effective date of the groundwater code established by chapter 263, Laws of 1945, shall register the claim with the department during the filing period unless the claim has been filed in the state water rights claims registry before July 27, 1997. A person who claims such a right and fails to register the claim as required is conclusively deemed to have waived and relinquished any right, title, or interest in the right.

Wash. Rev. Code 90.14.068(1).

This provision alone has not brought finality to the debate over unexercised pre-code common-law groundwater rights. As for unexercised rights to natural and artificial groundwater within the state, however, the code clearly provides for the forfeiture and abandonment of them if they are not exercised, which would cause the water to become public water subject to appropriation. Wash. Rev. Code 90.44.040; *Jensen*, 102 Wash. 2d at 114.

While no case law has held that common-law groundwater rights were extinguished unless perfected by beneficial use, *Department of Ecology v. Abbott*, 103 Wash. 2d 686, 694 P.2d 1071 (1985), addressed a parallel issue under the surface water code: "Whether unused riparian [surface water] rights survived adoption of the use-oriented 1917 water code[.]" *Abbott*, 103 Wash. 2d at 693. The Washington Supreme Court held that all riparian rights not beneficially used by 1932, fifteen years after the enactment of the code in 1917, may be terminated. *Id.* at 695. The Court reasoned that the state's proposed fifteen-year period was a constitutionally reasonable period of notice for riparian water right holders to comply with the new use requirements of the 1917 Water Code. Thus, the reversion of unused riparian rights to the state was a valid exercise of police power and did not exact an unconstitutional taking of property without compensation. *Id.* at 697.

Applying this reasoning to resolve pre-code groundwater rights, unused common law groundwater rights arguably terminated in 1960, fifteen years after the enactment of the Groundwater Code in 1945, unless it can be shown that they were continuously applied to beneficial use. Given the reasoning of *Abbott* and the deference accorded to Attorney General

Opinions,[13] the code most likely now governs all groundwater rights, thus rendering the case law as stated in *Patrick*, *Evans*, and *Ponten* obsolete.[14]

4. Exemptions Under The Groundwater Permit System

a. Exemptions From the Permit Requirement

While the general rule is that groundwater cannot be withdrawn from any aquifer without a permit issued by Ecology, the Legislature provided four categories of exemptions from the requirement to apply for and obtain a permit: (1) "for stock-watering purposes"; (2) "for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area"; (3) "for single or group domestic uses in an amount not exceeding five thousand gallons a day"; and (4) "for an industrial purpose in an amount not exceeding five thousand gallons a day." Wash. Rev. Code 90.44.050. Persons qualifying under such exemptions withdrawing groundwater "regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter." *Id.*

While these categories of withdrawals are exempt from requirements to obtain water right permits, they are not exempt from other substantive provisions in the Groundwater Code. Specifically, such exemptions must comply with the beneficial use requirement and are subject to the priority system. Wash. Rev. Code 90.44.040; *Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash. 2d 1, 9, 43 P.3d 4 (2002) (permit-exempt groundwater rights are "subject to the basic principle of water rights acquired by prior appropriation that the first in time is the first in right"); *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wash. 2d 571, 598, 311 P.3d 6 (2013); *Fox v. Skagit County*, 193 Wash. App. 254, 262, 372 P.3d 784 (2016) (permit-exempt wells are subject to the prior appropriation doctrine and "cannot infringe senior water rights").

Recognizing that in some circumstances that permit-exempt withdrawals might affect the water system, the Legislature authorized Ecology to require a permit-exempt groundwater user "to furnish information as to the means for and the quantity of that withdrawal." Wash. Rev. Code

[13] An Attorney General Opinion does not provide precedent that is controlling upon a court, but is entitled to considerable weight. *See Whatcom County v. Hirst*, 186 Wash. 2d 648, 679, n.10, 381 P.3d 1 (2016); *City of Seattle v. Department of Labor & Industries*, 136 Wash. 2d 693, 703, 965 P.2d 619 (1998).

[14] The enactment of 1973 Wash. Laws ch. 94, which amended the definition of "ground waters" to explicitly reaffirm the Ground Water Code's comprehensive coverage, underscores this point.

90.44.050. The proviso is evidence that the Legislature tried to be careful to avoid letting the exemptions swallow the rule, by balancing the policies behind the exemptions with the state's need for information to manage the water system and resolve disputes.

A person who can qualify for a permit-exempt groundwater withdrawal can choose to file an application for a permit for such use, and, if one is filed, Ecology must apply the four-part test under Wash. Rev. Code 90.03.290 when it evaluates the application. AGO 1997 No. 6. Moreover, there is no statutory or other lawful basis for Ecology to issue a water right certificate to the holder of a right based on a permit-exempt groundwater withdrawal, unless either (a) the owner of the right applies for and receives a permit or (b) the exempt right is first consolidated with a right covered by a permit or certificate under Wash. Rev. Code 90.44.105. *Id.*

Washington law also does not allow the owner of a permit-exempt well to transfer or change the withdrawal of water to a different location or for a different purpose, such as changing the use of the water from domestic use to industrial use. A permit-exempt exempt withdrawal is strictly limited to the land to which the water was applied unless (a) the owner of the right applies for and receives a permit, or (b) the exempt right is first consolidated with a right covered by a permit or certificate under Wash. Rev. Code 90.44.105.[15] *Id.*

b. Court Decisions Relating to the Permit Exemptions

Washington appellate court decisions have provided holdings on issues relating to three of the four categories of permit-exempt groundwater use: single and group domestic, stock watering, and industrial. The scope of the exemption from permitting requirements for single and group domestic use under Wash. Rev. Code 90.44.050 was considered by the Supreme Court in *Campbell & Gwinn, L.L.C.*, 146 Wash. 2d 1, 43 P.3d 4 (2002). In *Campbell & Gwinn*, the proponent of a residential subdivision project in Yakima County notified Ecology that it intended to construct multiple permit-exempt wells to supply water to homes on twenty individual lots that it owned. Under this proposal, each well would withdraw less than 5,000 gallons per day, but together the wells would withdraw more than that quantity of groundwater. Consistent with the 1997 Attorney

[15] A change in the location or purpose of use of an "exempt" withdrawal would be meaningless because Ecology could not prevent the use of water for the original purpose or at the original location after a change is approved.

General's Opinion concerning Wash. Rev. Code 90.44.050,[16] Ecology communicated its position that the project would not qualify for the domestic exemption because all the water use within the subdivision would constitute one groundwater withdrawal that would exceed 5,000 gallons per day. Subsequently, a declaratory judgment action was filed in court seeking a ruling on whether the project was eligible for multiple permit-exempt groundwater withdrawals, or whether Ecology's contrary position that the entire project would involve a single withdrawal exceeding the 5,000 gallon per day limit was correct. *Campbell & Gwinn, L.L.C.*, 146 Wash. 2d at 4-8.

The Supreme Court ruled in favor of Ecology and held that a common residential project can only qualify for one group domestic permit-exempt use of groundwater not exceeding 5,000 gallons per day. The Court determined that a group of lots that make up a development are to be treated as one "group" for domestic use under the exemption, even if multiple wells would be utilized. Thus, the developer of a subdivision who is planning for enough water for multiple homes is entitled to only one 5,000 gallon per day exemption from the permitting requirement for the project.

The Court reasoned that the 5,000 gallon per day limit applies to the use proposed for the project and not to the amount of water that would be withdrawn from each individual well. In this case, the developer was the project proponent (rather than an individual lot owner) so the total quantity of water required for the project was the relevant metric for determining whether there was eligibility for an exemption, regardless of the number of proposed wells. *Id.* at 12-14. Consequently, the project proponent was required to apply for and obtain the necessary groundwater permit for its 20-lot development,

Central to the Court's decision was the application of the plain meaning rule in statutory interpretation. The majority held that the language of Wash. Rev. Code 90.44.050 clearly limits the exemption to a single withdrawal of up to 5,000 gallons per day for domestic uses, irrespective of whether such use is single or grouped, or is supplied by only one or multiple wells. The Court reasoned that allowing multiple exemptions for individual wells within a

[16] AGO 1997 No. 6 ("Where a property owner wishes to develop land and supply the development with domestic water from several wells, and each well will pump less than 5000 gallons per day but all the wells together will pump more than 5000 gallons per day, the project is a single withdrawal of ground water and is not exempt from the permit requirements of chapters 90.44 and 90.03 RCW. . . . A group of wells drilled by the same person or group at or about the same time in the same area for the same purpose or project should be considered a single 'withdrawal' and would not be exempt from the permitting requirement contained in RCW 90.44.050 if the total amount withdrawn for domestic use exceeds 5000 gallons per day.").

development in order to circumvent the permit requirement would be contrary to legislative intent to regulate groundwater use and protect existing rights and the public welfare. *Id.* at 16-17.

In the wake of the *Campbell & Gwinn* decision, questions on how the Court's holding should be applied to certain factual circumstances remain unanswered. The Court stated:

> In this case it is the developer, not the homeowner, who is seeking the exemption in order to drill wells on the subdivision's lots and provide for group domestic uses in excess of 5,000 gpd. The developer may not claim multiple exemptions for the homeowners.

Id. at 14. No case has involved a factual scenario where individual lot owners within a subdivision have sought to qualify for permit-exempt groundwater uses. Further, no case has considered what constitutes a single common development that can only qualify for one groundwater exemption over an extended period of time, or when development is proposed to occur in multiple phases.

In *Five Corners Family Farmers v. State*, 173 Wash. 2d 296, 268 P.3d 892 (2011), the Supreme Court considered whether there is any limit to the quantity of groundwater that can be used under the exemption from permitting for stock watering under Wash Rev. Code 90.44.050. In that case, an organization of farmers and two environmental organizations filed a declaratory judgment action seeking a ruling that the stock watering exemption is limited to uses of water that do not exceed 5,000 gallons per day. The lawsuit was prompted by the proposed development of a large cattle feedlot in Franklin County that would rely in part on the stock watering exemption to supply water for 30,000 head of cattle, and by an Attorney General's Opinion interpreting the exemption from permitting for stock watering as not being limited to any maximum quantity of water that can be used. AGO 2005 No. 17.

The Supreme Court held that "under a plain reading of RCW 90.44.050, groundwater withdrawn without a permit for stock-watering purposes is not limited to 5,000 gallons per day."[17] *Five Corners Family Farmers*, 173 Wash. 2d at 313. The Court reasoned that Wash. Rev. Code 90.44.050 contains four distinct categories of permit-exempt groundwater uses, that each category is limited by its own qualifying language, and that, unlike the "single and group domestic" and

[17] The Supreme Court agreed with the Attorney General's interpretation of Wash. Rev. Code 90.44.050 in AGO 2005 No. 17. *Five Corners Family Farmers*, 173 Wash. 2d at 309 ("We find much of the reasoning in the attorney general's 2005 opinion persuasive and have incorporated it in our analysis.").

"industrial" categories of use which include language limited them to no more than 5,000 gallons per day, there is no such quantity limit for stock watering:

> Given that the "five thousand gallons a day" limitation appears twice in the exemption clause, it is evident that the legislature knew how to attach that limitation to multiple categories, and yet it chose only to apply it to two categories. There is simply no textual basis for the conclusion that "five thousand gallons a day" modifies "for stock-watering purposes.

Id. at 313. Thus, the amount of water that can be used under the stock-watering exemption is unlimited.[18]

In *Kim v. Pollution Control Hearing Board*, 115 Wash. App. 157, 61 P.3d 1211 (2003), the Court of Appeals considered an issue relating to the scope of the exemption from permitting for industrial groundwater use under Wash. Rev. Code 90.44.050. *Kim* involved an appeal of an order Ecology issued to the Kims requiring them to stop using groundwater for irrigation at a commercial nursery they operated. The Kims were using between 100 and 300 gallons of groundwater per day to water plants at the nursery without a permit and asserted that they qualified to use water under the exemption for "an industrial purpose in an amount not exceeding five thousand gallons a day."

The Court ruled in favor of the Kims and held that the use of groundwater for a commercial nursery falls within the scope of the permitting exemption for industrial use. The Court rejected Ecology's arguments that water use "for an industrial purpose" does not include agricultural water use, and that interpreting the term "industrial" to include water use for a commercial nursery growing plants would render meaningless the exemption for irrigating a noncommercial garden not exceeding one half acre in size:

> [T]here is no logical reason to allow a business in the construction industry, aluminum industry, or automobile industry to take 5,000 gallons per day without a permit, while denying the same right to a commercial nursery in the horticulture industry. We hold that the words "for industrial purposes" must be applied according to their plain terms, and that their plain terms include the Kims' commercial nursery.

Kim, 115 Wash. App. at 162-163.[19]

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[18] However, as the Supreme Court noted, there are other factors that could limit permit-exempt stock watering use, including the requirement that permit-exempt groundwater use cannot cause impairment of senior water rights. *Five Corners Family Farmers*, 173 Wash. 2d at 310, n. 3.

[19] No subsequent case has considered whether the holding in *Kim* is limited to water use for a nursery in the "horticultural industry" or whether the "industrial" exemption also allows water use for irrigation of a commercial farm in the "agricultural industry."

c. Impacts Caused By Permit-Exempt Groundwater Use

While the amount of water withdrawn from permit-exempt wells remains difficult to quantify, it is understood that the cumulative impacts caused by permit-exempt uses may affect groundwater supply and instream flows. *See* Robert N. Caldwell, *Six-Packs For Subdivisions: The Cumulative Effects of Washington's Domestic Well Exemption*, 28 Envtl. L. 1099,1108-20 (1998). This understanding is reflected in the Washington Legislature's enactment of the Streamflow Restoration Act (SRA), which requires planning and the implementation of projects to offset the adverse effects of permit-exempt groundwater uses on instream flows in certain watersheds. *See* The Interaction Between Land Use Regulation and Water Resources Management: The Streamflow Restoration Act, ch. X, below.

5. Artificially Stored Groundwaters

The Groundwater Code's permit system applies not only to natural groundwaters but also to all "artificial" groundwaters. The code defines artificially stored groundwater as:

> [W]ater that is made available in underground storage artificially, either intentionally, or incidentally to irrigation and that otherwise would have been dissipated by natural processes.

Wash. Rev. Code 90.44.035(5).

Artificially stored groundwater typically occurs as a result of seepage of water from irrigation into the ground. *Jensen*, 102 Wash. 2d at 114. It is water that otherwise would return to the natural water system and be available for further use by a junior appropriator or a new appropriation. This water would not be present in the aquifer but for the return flow and seepage from irrigation, or other activity, that causes it to "artificially" enter the aquifer.

The designation of such water as artificially stored groundwater allows it to be protected for use by the original appropriator, similar to the common law doctrine of recapture. *Id.* at 114-115; *see also Department of Ecology v. U.S. Bureau of Reclamation* (*U.S. Bureau*), 118 Wash. 2d 761, 768, 827 P.2d 275 (1992). Unless abandoned or forfeited, artificially stored groundwater is not public water. *See* Wash. Rev. Code 90.44.040. Moreover, artificially stored groundwater does not lose its identity and become public groundwater when it commingles with naturally occurring groundwater. *Jensen*, 102 Wash. 2d at 115-116; *see also Ide v. United States*, 263 U.S. 497, 506, 44 S. Ct. 182, 68 L. Ed. 407 (1924).

To claim ownership of artificially stored groundwaters located within a designated groundwater area, sub-area, or zone pursuant to Wash. Rev. Code 90.44.130, any person, firm, or corporation must file a certified declaration of ownership within 90 days after the designation of the groundwater area with Ecology.[20] Wash. Rev. Code 90.44.130. In case the claimant fails to file a declaration within the ninety-day period, the claimant may request a "reasonable extension of time" not to exceed two additional years. Ecology may only grant such an extension upon a showing of good cause. For claimants declaring ownership of artificially stored groundwater subsequent to the designation of the groundwater area, sub-area, or zone, the statute provides a three-year filing period following the "earliest artificial storage" of water. The Legislature provided the same extension procedures for these claimants. *Id.*

Declarations must describe the works which created the artificially stored groundwater, describe the lands "purported to be underlain by" such water, state the quantity of water claimed, and provide "evidence competent to show that the water claimed is in fact water that would have been dissipated naturally except for artificial improvements by the claimant." *Id.* Ecology may "accept or reject" such declarations of ownership of artificially stored groundwater. However, while Ecology's acceptance of a declaration indicates its recognition that the claimant has ownership of the groundwater, it does not convey any right to withdraw and use the water. Claimants who have filed and gained approval of declarations of ownership of artificially stored groundwaters must obtain permits to appropriate public groundwaters following the same procedures required for all other groundwater permit applications. Wash. Rev. Code 90.44.130.

Wash. Rev. Code 89.12.170 provides a streamlined process for the allocation of artificially stored groundwater associated with the Columbia Basin Project, which does not require compliance with the claim declaration procedure in Wash. Rev. Code 90.44.130. This provision allows Ecology to enter into an agreement with the Bureau of Reclamation for the allocation of groundwater that exists in the Columbia River Basin because it stems from return flow and seepage water from the Columbia Basin Project, after Ecology establishes a groundwater area pursuant to Wash. Rev. Code 90.44.130. *See* Columbia River Basin Water Management ch. IX, below.

[20] The process for designation of a groundwater area, sub-area, or zone is described in ch. V. § C.2., above.

There is growing interest to "intentionally" create artificially stored groundwater through well injection programs and other underground storage and recovery projects. This allows users, such as municipal water suppliers, to capture surface water when it is available during times of high stream flows, store the water in the groundwater aquifer, and then withdraw this water for beneficial use during the summer months and other periods when stream flows are low. The term "underground artificial storage and recovery project is defined as "any project in which it is intended to artificially store water in the ground through injection, surface spreading and infiltration, or other department-approved method, and to make subsequent use of the stored water." Wash. Rev. Code 90.44.035(6); Wash. Rev. Code 90.03.370(3).

Permitting for artificial storage and recovery projects is governed by Wash. Rev. Code 90.03.370. *See also* Wash. Rev. Code 90.44.460. The proponent of such a project, who already must hold a water right for the diversion and use of surface water or withdrawal and use of groundwater, is required to obtain a "reservoir permit" providing authorization to store water underground and a "secondary permit" authorizing the withdrawal of the artificially stored groundwater from the aquifer and its beneficial use. To qualify for issuance of a reservoir permit, an underground geological formation "must meet standards for review and mitigation of adverse impacts identified" relating to several concerns including "[a]quifer vulnerability and hydraulic continuity," "[p]otential impairment of existing water rights," "[g]eotechnical impacts and aquifer boundaries and characteristics," and "[c]hemical compatibility of surface waters and groundwater." Wash. Rev. Code 90.03.370(2)(a). Under Wash. Rev. Code 90.03.370(2)(b), the Legislature directed Ecology to adopt a rule establishing "[s]tandards for review and standards for mitigation of adverse impacts for an underground artificial storage and recovery project." Ecology subsequently adopted its Underground Artificial Storage and Recovery rule. Wash. Admin. Code 173-157.

Additionally, the Reclaimed Water Use Act recognizes the opportunity to intentionally recharge groundwater with reclaimed water (treated wastewater). Wash. Rev. Code 90.46. One primary issue is whether the water injected in the ground can be available as surplus water in the aquifer in the future when the "stored" water will be withdrawn. The geohydrology of the system may be a factor as aquifers tend to equalize from the new infusion of water, possibly resulting in no net surplus of water.

6. Changes To Groundwater Rights

Transfers and changes to groundwater rights are governed by the general provisions of Wash. Rev. Code 90.03.380, and, more specifically, by the provisions of the Groundwater Code, Wash. Rev. Code 90.44.100. *See* Transfer And Change Of Water Rights *infra* ch. VII. Under Wash. Rev. Code 90.44.100(1), the holder of a groundwater permit or certificate may change the point of withdrawal or the place of use of water without losing the priority of the right. Such changes provide flexibility for groundwater right holders, but "do not alter the original project or the quantity of water needed." *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wash. 2d 118, 131, 969 P.2d 458 (1999).

There are a several criteria that must be met for the approval of an application to change a groundwater right. Unlike Wash. Rev. Code 90.03.380, Wash. Rev. Code 90.44.100 requires that Ecology must make "findings as prescribed in the case of an original [permit] application." This implicates the full analysis under the four-part test required in Wash. Rev. Code 90.03.290. *See* The Water Codes: Surface Water *infra* ch. IV, § B. Thus, Ecology must determine, that water is available for beneficial use and that the proposed appropriation will not impair existing rights or be detrimental to the public welfare. *R.D. Merrill Co.*, 137 Wash. 2d at 131-32. Unlike applications for changes of surface water rights, groundwater changes can only be approved if Ecology determines that they would not be detrimental to the public welfare or contrary to the public interest. In *Public Utility Dist. No. 1 of Pend Oreille County v. Department of Ecology*, 146 Wash. 2d 778, 795-796, 51 P.3d 744 (2002), the Supreme Court held that the public interest test is not required under Wash. Rev. Code 90.03.380 because it is not expressly included in that statute, in contrast to Wash. Rev. Code 90.44.100 which requires findings as prescribed in a permit application.

In contrast to Wash. Rev. Code 90.03.380, which generally[21] requires beneficial use of water before Ecology may approve a change of a water right, Wash. Rev. Code 90.44.100 allows amendments as to the place of use and point of withdrawal specified in groundwater permits and certificates regardless of whether or not the water has already been applied to beneficial use. *R.D. Merrill Co.*, 137 Wash. 2d at 129-130 (holding that a transfer of an inchoate and unperfected

[21] As discussed in Transfer And Change Of Water Rights *infra* ch. VII, there are some limited exceptions to Wash. Rev. Code 90.03.380's requirement for prior beneficial use of water before a water right change application can be approved.

groundwater right was permissible); *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wash. 2d 769, 777-79, 947 P.2d 732 (1997) (construing Wash. Rev. Code 90.03.380 to allow changes of surface water rights only where water has been applied to beneficial use, thereby confirming an appropriator's right to change or transfer water only when the right has been perfected into a vested property interest through the beneficial use of that water). In *R.D. Merrill Co.*, the Court explained that "[b]y expressly allowing amendment of a *permit*, RCW 90.44.100 plainly contemplates that an unperfected water right may be involved. It follows that water may not actually have been beneficially used." *R.D. Merrill Co.*, 137 Wash. 2d at 130 (emphasis in original). The Washington Supreme Court reasoned that for changes of place of use or points of withdrawal, groundwater is treated differently from surface water because:

> A holder of an appropriative right to withdraw ground water may sink a well in the location stated in the permit application, but discover it provides no water. Another location on the property is found which is likely to provide ample water to satisfy the appropriative right.

Id. at 131. In *Cornelius v. Washington Department of Ecology*, 182 Wash. 2d 574, 596-597, 344 P.3d 199 (2015), the Supreme Court rejected an argument that, in contrast to rights to inchoate water documented by permits, prior beneficial use is required before certificates documenting rights to inchoate water can be changed. The Court held that because Wash. Rev. Code 90.44.100 expressly allows "an amendment to the appropriate permit or certificate of groundwater right," changes to so-called "pumps and pipes" certificates that were prematurely issued based on system capacity rather than the actual beneficial use of water[22] are permissible.

However, the *R.D. Merrill* Court specifically rejected the argument that the purposes of use specified for inchoate groundwater rights could also be changed. *R.D. Merrill*, 137 Wash. 2d at 130-131 ("RCW 90.44.100 does not authorize amendments for changes in purpose of use."); *see also City of West Richland v. Department of Ecology*, 124 Wash. App. 683, 692-693, 103 P.3d 818 (2004). Wash. Rev. Code 90.44.100 only authorizes changes of point of withdrawal and place of use. The purpose of use of a water right can only be changed for quantities of water that have already been applied to beneficial use, consistent with Wash. Rev. Code 90.03.380.

While Wash. Rev. Code 90.44.100(2) requires approval of an application for a change in point of withdrawal to gain authorization for the construction of additional or replacement wells

[22] *See* Municipal Water Law, ch. VIII § B, below, for an explanation of pumps and pipes certificates.

at a new location, Wash. Rev. Code 90.44.100(3) provides that no such application is needed for constructing replacement or new additional wells at the original location (point of withdrawal) specified for a groundwater right.[23] Instead of submitting a water right change application, a groundwater right holder who seeks to construct an additional or replacement well at the original location is required to submit a Showing of Conformance form with Ecology demonstrating compliance with Wash. Rev. Code 90.44.100(3). The water right holder must confirm, among other things, that the new well will tap the same body of public groundwater as the original well, that use of the original well will be terminated and it will be properly decommissioned, that there will be no increase in the quantity of water that will be withdrawn, and that construction and use of the new well will not cause impairment of any other water rights with earlier priority dates. Wash. Rev. Code 90.44.100(3).

7. Priority Enforcement Between Groundwater, Surface Water, And Instream Flow Rights

In contrast to the early common law cases, in the 1945 Groundwater Code, the Legislature recognized the hydraulic connection between surface water and groundwater, and, thus, the potential for tension between ground and surface water users. Foreseeing priority enforcement problems involving conflicts between surface and groundwater rights, the Legislature prioritized surface water rights as superior to subsequent groundwater rights "to the extent that any underground water is part of or tributary to the source of any surface stream or lake, or that the withdrawal of groundwater may affect the flow of any spring, water course, lake, or other body of surface water." Wash. Rev. Code 90.44.030. Interpreting this provision in *Postema v. Pollution Control Hearings Board*, the Washington Supreme Court recognized that Wash. Rev. Code 90.44.030 "emphasizes the potential connections between groundwater and surface water, and makes evident the Legislature's intent that groundwater rights be considered a part of the overall water appropriation scheme, subject to the paramount rule of 'first in time, first in right.'" *Postema*, 142 Wash. 2d at 80 (quoting *Rettkowski v. Department of Ecology*, 122 Wash. 2d 219, 226 n.1, 858 P.2d 232 (1993)).

[23] The original location is "the area described as the point of withdrawal in the original public notice published for the application for the water right for the well." Wash. Rev. Code 90.44.100(4).

Under the Water Resources Act of 1971, the Legislature directed Ecology to administer water allocation and use programs in a manner that gives "[f]ull recognition . . . to the natural interrelationships of surface and groundwaters." Wash. Rev. Code 90.54.020(9). To ensure the protection of these connected waters, the Legislature directed that base flows[24] shall be retained in all perennial rivers and streams as a baseline before groundwater can be allocated. Wash. Rev. Code 90.54.020(3)(a); *see also* Wash. Rev. Code 90.22.010. This standard is required to help protect fish, wildlife, scenic, aesthetic and other important environmental and navigational values. Under limited circumstances, however, groundwater withdrawals in conflict with instream base flows may be authorized only "where it is clear that overriding considerations of the public interest will be served."[25] Wash. Rev. Code 90.54.020(3)(a). Similarly, Ecology has authority to condition all surface water rights to preserve minimum instream flows established by regulation for each river basin. Wash. Rev. Code 90.03.247. *See* Protection of Existing Water Rights Criteria ch. IV, § B.2(e) above.

In *Hubbard v. Department of Ecology*, 86 Wash. App. 119, 936 P.2d 27 (1997), the Court of Appeals ruled that the connection between groundwater and surface water may exist even when the point of withdrawal of the groundwater is several miles removed from the affected stream. Even though the effect of the proposed well pumping on the flow of the river would be minimal, the Court upheld Ecology's decision to restrict groundwater withdrawal in order to protect instream flows in the Okanogan River given the hydraulic continuity between the aquifer and river. The Court stated: "Any effect on the river during the period it is below the minimum instream flow level conflicts with existing senior rights (such as the minimum flow level itself) and may be reasonably considered detrimental to the public interest." *Hubbard*, 86 Wash. App. at 125; *see* Protection of Existing Water Rights Criteria ch. IV, § B.2.(e) above.

Subsequently, in *Postema*, the Supreme Court held that a showing of hydraulic continuity where minimum flows are unmet a substantial part of the year does not equate to impairment of existing rights as a matter of law. Rather, a proposed withdrawal of groundwater must be denied

[24] While the statute does not define "base flows," Ecology has provided a definition for the term: "[i]n a hydrologic sense, the term base flow normally refers to flow sustained in a stream during extended periods without precipitation or, that component of streamflow primarily derived from ground water effluent." State Water Program, *Western Washington Instream Resources Protection Program: An Overview* at 3 (1979).

[25] As discussed in chapter IV § B.2(e) above, the scope of the "overriding considerations of the public interest" exception is very narrow and limited.

if it is established factually that the withdrawal would have an adverse effect on stream flow. However, the Court held that there can be a finding that a water use would cause impairment even if the adverse effect on stream flow would be de mimimis, and Ecology can use advanced scientific techniques, such as modeling (rather than a standard stream measuring device, such as a gauge) to determine such an effect. *Postema*, 142 Wash. 2d at 90-93; *see* Protection of Existing Water Rights Criteria ch. IV, § B.2(e) above.

VI.

LOSS OF WATER RIGHTS

A. STATUTORY FORFEITURE AND ABANDONMENT

The unique nature of a water right as a property interest is evident in the statutory and common law requirements that the maintenance of the water right requires continual beneficial use, otherwise known as the "use it or lose it" doctrine.[1] A water right is a vested property interest to the extent that an appropriator diverts and applies the water to a beneficial use. *Longmire v. Smith,* 26 Wash. 439, 67 P. 246 (1901); *Lawrence v. Southard,* 192 Wash. 287, 299, 73 P.2d 722 (1937); *Rettkowski v. Department of Ecology,* 122 Wash. 2d 219, 228, 858 P.2d 232 (1993). Water law also recognizes that, as a vested property interest, a water right cannot be taken away without the due process protection afforded by the Constitution. *See Nielson v. Sponer,* 46 Wash. 14, 16, 89 P. 155 (1907) (waters rights must receive due process protection); *Sheep Mountain Cattle Co. v. Department of Ecology,* 45 Wash. App. 427, 431, 726 P.2d 55 (1986) (a water rights holder is entitled to notice and a new hearing).

Unlike other property rights, a water right remains a valid property interest only if the holder of the right actively maintains the right by continuously putting the water to an actual beneficial use. Wash. Rev. Code 90.14.020, .160-.180. A water right may be lost in whole or in part by nonuse under statutory forfeiture provisions or common law abandonment. When a water right is relinquished, it reverts back to the state and becomes available for appropriation. Wash. Rev. Code 90.14.160-.180.

The principle of "use it or lose it" is grounded in two fundamental concepts of water law: maximizing beneficial use and providing certainty of water rights. Wash. Rev. Code 90.14.010-.020. The Legislature has recognized the principle of maximizing the use of water as a fundamental element of the water law in the state. The water code states that:

> It is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and the retention of waters within streams and lakes in sufficient quantity and quality to protect instream and natural

[1] Federal and tribal reserved water rights are also an exception to the "use it or lose it" principle. *See* Federal Reserved Water Rights: Indian Reservations And Federal Lands *supra* ch. XI.

values and rights.

Wash. Rev. Code 90.03.005.

This policy was furthered by the Legislature's passage in 1967 of the Registration and Relinquishment Act, 1967 Wash. Laws ch. 233, Wash. Rev. Code 90.14. The Legislature declared, in part, that:

> (3) A strong beneficial use requirement as a condition precedent to the continued ownership of a right to withdraw or divert water is essential to the orderly development of the state;
>
> (4) Enforcement of the state's beneficial use policy is required by the state's rapid growth[.]

Wash. Rev. Code 90.14.020. Under both common law principles and statutory enactment, the requirement of a beneficial use standard is enforced as a condition to maintain a right: *R.D. Merrill Co. v. Pollution Control Hearings Board,* 137 Wash. 2d 118, 126, 969 P.2d 458 (1999); *Department of Ecology v. Acquavella (Acquavella* III), 131 Wash. 2d 746, 755, 935 P.2d 595 (1997). The Washington Supreme Court also has consistently upheld the principle of maximizing the use of the water and the loss of rights for failure to do so. *In re the Water Rights of Marshall Lake & Marshall Creek Drainage Basin,* 121 Wash. 2d 459, 852 P.2d 1044 (1993); *Okanogan Wilderness League, Inc. v. Town of Twisp,* 133 Wash. 2d 769, 784, 947 P.2d 732 (1997); *see Department of Ecology v. Abbott,* 103 Wash. 2d 686, 694 P.2d 1071 (1985); *Department of Ecology v. Adsit,* 103 Wash. 2d 698, 694 P.2d 1065 (1985).

1. Statutory Forfeiture

Forfeiture is a statutory provision to terminate water rights if they are not used continuously within a prescribed period of time. 1967 Wash. Laws ch. 233, §§ 1-26 (codified as Wash. Rev. Code 90.14.130-.230). In Washington, statutory forfeiture relinquishes a water right for the voluntary failure to continuously use water for five or more consecutive years unless sufficient cause is shown. Wash. Rev. Code 90.14.160-.180. This provision applies to appropriative rights established prior to the enactment of the 1917 and 1945 Water Codes (Wash. Rev. Code 90.14.160, .210), riparian rights (Wash. Rev. Code 90.14.170), and appropriative rights established by codes under the permit system (Wash. Rev. Code 90.14.180).

"Any person ... who abandons the same, or who voluntarily fails, without sufficient cause, to beneficially use all or any part of said right" forfeits the water right. Wash. Rev. Code

90.14.160; *see also Acquavella* III, 131 Wash. 2d at 758. There must be proof of nonuse, but in contrast to common-law abandonment, forfeiture does not require proof of intent to abandon. *Public Utility Dist. No. 1, of Pend Oreille County v. Department of Ecology*, 146 Wash. 2d 778, 798, 51 P.3d 744 (2001); *Okanogan Wilderness League, Inc.,* 133 Wash. 2d at 784. Once the right is lost, the water reverts back to public ownership and become available for appropriation in accordance with state provisions. Wash. Rev. Code 90.14.160-.180. The relinquishment of water rights does not require just compensation within the meaning of the Fifth Amendment because the property right embodied in a water right exists only to the extent of continuing beneficial use. *Adsit,* 103 Wash. 2d at 706; *see also In re Marshall Lake,*121 Wash. 2d at 479*; Texaco, Inc. v. Short,* 454 U.S. 516, 530, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982). The enforcement of the beneficial use standard through the state's forfeiture standard is a valid source of police power. *Adsit*, 103 Wash. 2d at 707.

As noted previously, statutory relinquishment of a water right occurs only if the person "abandons or voluntarily fails, without sufficient cause," to beneficially use all or a portion of the water. Wash. Rev. Code 90.14.160-.180. The term "sufficient cause" is specifically defined in the code, which essentially provides an exclusive list of affirmative defenses a water right holder can raise to excuse five or more years of nonuse. Wash. Rev. Code 90.14.140. Nonuse due to drought, active service in the armed forces, temporary reductions in irrigation use,[2] and legal proceedings, among others, are deemed defenses or "sufficient cause" to prevent the relinquishment of a vested water right. Wash. Rev. Code 90.14.140(1).

Although not listed as "sufficient cause" for nonuse, the code also lists several uses of water that are simply not subject to relinquishment. These include water rights for power development purposes; for standby or reserve water supply for use in times of drought; for agricultural industrial process water; for trust water rights (discussed in further detail *supra*); rights claimed for a future determined development; and rights claimed for municipal water supply purposes. Wash. Rev. Code 90.14.140(2). Only a few of these exemptions have been

[2] In 2001, the Legislature added several new exceptions for "sufficient cause" for nonuse concerning irrigation water. These exceptions include temporary reductions in water use due to changing weather conditions, conservation of water under the Yakima River Basin Water Enhancement Project, use of transitory return flows, and crop rotation. Wash. Rev. Code 90.14.140(1)(g)-(k).

interpreted by the courts.[3]

In *R.D. Merrill Co.,* the Washington Supreme Court considered two of these exceptions: the operation of legal proceedings as "sufficient cause for nonuse" and a right claimed for a determined future development, which is a specific exemption from the relinquishment statute. 137 Wash. 2d at 139. In *R.D. Merrill Co.,* the validity of several water rights were at issue based on arguments that these rights were lost for nonuse under the statutory forfeiture provisions of Wash. Rev. Code 90.14. Merrill argued that any nonuse was within the enumerated exceptions to the forfeiture statute and that, therefore, no forfeiture had occurred.

The Court in *R.D. Merrill Co.* first interpreted the standard for addressing exceptions to relinquishment. As exceptions, the statutory provisions must be narrowly construed for the purpose of giving effect to the legislative intent. *R.D. Merrill Co.,* 137 Wash. 2d at 140. The Court recognized that the legislative intent was based on the purpose and policy of water law to maintain beneficial use of the water, and if the appropriator ceases to use the water it should be available for other appropriators who can and will use it beneficially. *Id.* Further, the Court held that the party asserting the exception from relinquishment has the burden of showing how nonuse falls within the specific exceptions. *Id.*[4] (citing *Acquavella* III, 131 Wash. 2d at 758).

In addressing the exception for "the operation of legal proceedings," the Court held that the legal proceedings must involve more than simply proceedings relating to the land or development plans associated with the land in which the water is used. *Id.* at 141. Rather, the Court stated that the appropriator must demonstrate that the legal proceedings prevented the use of water:

> Read narrowly to preserve the general statutory provisions, the exception requires that the nonuse of water be attributable to the legal proceedings, i.e., that the legal proceedings prevent the use of the water.

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[3] The exemption from relinquishment for municipal water supply purposes, Wash. Rev. Code 90.14.140(2)(d), was addressed in *Crown West Realty, LLC v. Pollution Control Hearings Bd.*, 7 Wash. App. 2d 710, 739-53, 435 P.3d 288 (2019). The court rejected Crown West's contention that it was a municipal water supplier for the purposes of avoiding relinquishment. For a more thorough discussion of *Crown West*, see the Municipal Water Law ch. VIII, *infra*.

[4] In its analysis of burden of proof, the Court did not make any distinction between the exceptions that are "sufficient cause" under Wash. Rev. Code 90.14.140(1) and the exceptions to the relinquishment itself under Wash. Rev. Code 90.14.140(2).

Id. at 141-42.[5] The "operation of legal proceedings" exemption to relinquishment was also addressed in *Pacific Land Partners, LLC, v. Department of Ecology*, 150 Wash. App. 740, 208 P.3d 586 (2009). In *Pacific Land Partners, LLC*, a water right owner appealed a relinquishment order issued by the Department. The water right owner had purchased land from the federal government at a public foreclosure auction, including its appurtenant surface water right. The owner purchased the property with the understanding that the water right, which had previously been used for irrigation, had been "cancelled for nonuse" and that a federal pipeline easement had lapsed. *Id*. at 745-46. The owner erroneously believed the previous federal foreclosure proceedings would justify nonuse of the water right under Wash. Rev. Code 90.14.140(1)(d). In affirming the relinquishment order, the Court noted that the water right had not been beneficially used for almost nine years before the property was purchased at auction. Moreover, the owner failed to demonstrate how the federal foreclosure proceedings prevented beneficial use of the water right for any purpose. *Id.* at 753.

In addition to the "operation of legal proceedings" exception, the *R.D. Merrill Co.* Court also analyzed the exemption for a "determined future development." The Court held that the water right holder must have a firm ("conclusively or authoritatively fixed") development plan prior to the expiration of five years from the date of last use of water. Feasibility studies alone do not constitute such a plan. *R.D. Merrill,* 137 Wash. 2d at 143. Regardless of whether development takes place within fifteen years of the date of last use, if the plan was not fixed and determined within the first five years, relinquishment has already occurred. The Court specifically wished to avoid a situation in which a water right applicant, after the five years of nonuse, decides to plan a future development simply to avoid relinquishment. *Id.* The Court's analysis does not allow the water right holder to change the plan once it is fixed and determined, and requires the "actual physical development to be consistent with the plan." *Id.* at 146; *see also Pacific Land Partners,* 150 Wash. App. 3d at 759-60 (rejecting a "future determined development" exception to relinquishment where a water right owner failed to demonstrate a single, fixed plan within the first five years).

[5] Notably, years after *R.D. Merrill Co.* was decided, the Legislature added a new exception to relinquishment that applies to water right holders waiting for a final determination from the Department on an application to change a water right. Wash. Rev. Code 90.14.140(1)(l). This exception is in addition to the operation of legal proceedings exception under Wash. Rev. Code 90.14.140(1)(d).

If a plan is fixed and determined within the five years, the water right holder must still take action to develop the fixed plan within fifteen years from the date of last use in order to avoid relinquishment. Factors that may serve as objective evidence of development include, but are not limited to: (1) applying for necessary permits; (2) notifying Ecology of a plan to use the water for a future development; (3) actual physical development consistent with the plan; (4) acquisition of additional land, materials, etc. to effectuate the plan. *R.D. Merrill,* 137 Wash. 2d at 146. While the statute provides that the determined future development is to "take place" within 15 years of July 1, 1967, or the most recent beneficial use, the Court held that the entire project need not be developed within the 15 years. However, in adopting the reasonable diligence standard established in the common law and codified for water permits, the Court held that the applicant must finish the development with reasonable diligence. *Id.*

More recently, the Washington Court of Appeals considered a "determined future development" exception to relinquishment in *City of Union Gap v. Department of Ecology*, 148 Wash. App. 519, 195 P.3d 580 (2008). In *City of Union Gap*, a developer bought water rights intending to sell them to the city of Union Gap; however, the sale did not take place within the five-year period required to avoid relinquishment. The court determined that the developer, as the water right holder, failed to demonstrate the existence of a determined future development under Wash. Rev. Code 90.14.140(2)(c). *Id.* at 530. The court rejected the argument that a plan to sell water rights to the city was sufficient to excuse nonuse as a determined future development. *Id.* at 530-31. The court also rejected the argument that the developer or city could claim an exemption from relinquishment because the intended future use of the water rights was for municipal water supply purposes. *Id.* at 531; Wash. Rev. Code 90.14.140(2)(d). The court reasoned that the developer, as the water right holder, could not claim its water rights were for municipal water supply purposes without the Department approving a change application from industrial to municipal use, which was denied. *City of Union Gap*, 148 Wash. App. at 532. Moreover, even if the city could claim the rights for municipal water supply purposes, the application to change the water rights was untimely as the rights were not put to beneficial use in more than six years. *Id.*

The Court in *R.D. Merrill Co.* also had the opportunity to address how the term "voluntary failure" of nonuse of water is applied in the groundwater context under Wash. Rev. Code 90.14.160-.180. *R.D. Merrill Co.,* 137 Wash. 2d at 133 n.7. The Court explained how once a right

is perfected and a certificate is issued, the relinquishment statutes provide for loss of the right if the nonuse is voluntary. *Id.* Nonuse is not voluntary if the water cannot be withdrawn because the "well runs dry."[6] Whether nonuse of a water right is "voluntary" was also addressed in *Pacific Land Partners, LLC,* 150 Wash. App. at 757-58. There, the water right owner argued that the nonuse of the water was involuntary for a period of years due to various problems, including missing irrigation equipment, a lapsed easement, and financial obstacles. The court rejected this argument. The evidence showed that an irrigation system could have been constructed within six months for less than $10,000, and the owner failed to demonstrate that water could not be put to beneficial use within five years of purchasing the property. *Id.*

R.D. Merrill Co.'s analysis of the applicability of the relinquishment statutes to certificated rights is consistent with the notion that the relinquishment provisions of the code only apply to perfected or certificated water rights, and not to unperfected permitted rights. In other words, one cannot lose a right that does not yet exist. When the right is perfected by application of the water to beneficial use, it becomes a vested property interest. *Rettkowski,* 122 Wash. 2d at 228. In the forfeiture statute, the legislative purpose of the relinquishment act is "to cause a return to the state of any water rights which are *no longer* exercised by putting said waters to beneficial use." Wash. Rev. Code 90.14.010 (emphasis added).

Further, the statute specifically recognizes that water right permits are not affected by the relinquishment statutes. Wash. Rev. Code 90.14.150. The permits are subject to the authority of Ecology to either cancel for lack of diligence in putting water to use or to grant extensions of time to put water to beneficial use. Wash. Rev. Code 90.03.320. In *R.D. Merrill Co.,* the Court reaffirmed its previous rulings that a holder's right under a permit is an inchoate right, which is "an incomplete appropriative right in good standing ... so long as the requirements of law are being fulfilled." *R.D. Merrill Co.,* 137 Wash. 2d at 130 (quoting *Department of Ecology v. Theodoratus,* 135 Wash. 2d 582, 596, 957 P.2d 1241 (1998) (quoting 1 Wells A. Hutchins, *Water Rights Laws In The Nineteen Western States* 226 (1971))). Loss of an inchoate right or permit

[6] The Court analyzed the specific exception from relinquishment for drought and nonavailability of water as support for the position that nonuse is not "voluntary" if the "well runs dry." This begs the question: Who has the burden to prove nonuse was "voluntary"; the person claiming relinquishment or the appropriator who claims the failure to use water was based on "drought, or other unavailability of water"? *See* Wash. Rev. Code 90.14.140; *see also Pacific Land Partners, LLC*, 150 Wash. App. 3d at 756 (clarifying that the Department must first prove the lack of beneficial use, after which the burden shifts to the water right owner to show that the nonuse fits within a statutory exception).

because of the failure to apply water to beneficial use within a reasonable period of time is not equivalent to loss of a water right, "but rather to the failure of having a water right in the first place." *See* Fred R. Disheroon, *New Directions In Western Water Law As To Loss Of Water Rights By Forfeiture, Abandonment, Or Lack Of Perfection in Water Law, Trends, Policies, And Practice* 159, 160 (1995); *see also* Roe & Rasband, A.B.A. Nat. Res. L. Man., *Changes To Water Rights* 341 (1996). When a permit holder fails to put water to beneficial use with due diligence, the permit is administratively "cancelled" by Ecology without following the statutory procedures for abandonment. Wash. Rev. Code 90.03.320.

2. Abandonment

The statutory procedure for determining that water rights have been lost for nonuse is *forfeiture,* as noted in the previous section. Courts may also find that water rights have been lost even where no statutory forfeiture proceeding has occurred, employing the common law doctrine of *abandonment.*

Common law abandonment occurs when there is intentional nonuse of the water or voluntary relinquishment of a water right. *See Okanogan Wilderness League, Inc.,* 133 Wash. 2d at 781; *Jensen v. Department of Ecology,* 102 Wash. 2d 109, 115, 685 P.2d 1068 (1984); *Miller v. Wheeler,* 54 Wash. 429, 435, 103 P. 641 (1909). The intent to abandon may be shown by explicit declarations or inferred by the parties' conduct. *Okanogan Wilderness League, Inc.,* 133 Wash. 2d at 781 (citing *Acquavella* III, 131 Wash. 2d at 757). However, because courts historically have required both intent and an act of voluntary relinquishment, it is difficult to prove abandonment. *Pacific Land Partners LLC,* 150 Wash. App. at 756, n.7. The Washington Supreme Court has adopted the general rule that "long periods of nonuse raise a rebuttable presumption of intent to abandon a water right." *Okanogan Wilderness League*, 133 Wash. 2d at 783. The burden of proof of abandonment rests with the party alleging abandonment. *Id.* at 781 (citing *Acquavella* III, 131 Wash. 2d at 757; *Miller,* 54 Wash. at 436). The Washington Supreme Court has indicated that a high standard of proof is necessary: "[C]ourts will not lightly decree an abandonment of a property so valuable as that of water in an irrigated region." *Jensen,* 102 Wash. 2d at 115 (quoting *Miller,* 54 Wash. at 435); *see also Thorp v. McBride,* 75 Wash. 466, 469, 135 P. 228 (1913).

In *Okanogan Wilderness League, Inc.,* the Court considered whether a municipality could have lost its water right when it had switched from using its diversion on the Twisp River to using

wells. Ecology authorized the withdrawal of groundwater in the 1960s. To satisfy new growth, Twisp applied to Ecology for a change of the Twisp surface water rights to groundwater. Ecology granted the transfer. However, the Court found that the Town of Twisp's failure to use its 1912 water right since 1948 raised the presumption of intent to abandon. *Okanogan Wilderness League, Inc.,* 133 Wash. 2d at 785. Twisp's generalized claim about the growth needs of a city was held insufficient to rebut the presumption. *Id.* at 784-85. While water for municipal purposes is exempt from statutory forfeiture,[7] the law of abandonment does not distinguish or discriminate between uses. *Id.* The Washington Supreme Court rejected a municipality's statutory defense for waters relinquished prior to the statute's enactment in 1967 and held that the municipality had abandoned its water right through years of nonuse under principles of common law abandonment. *Id.* at 784; *see* Wash. Rev. Code 90.14.140(2)(d).

The Washington Supreme Court addressed abandonment again in *Public Utility Dist. No. 1, of Pend Oreille County,* 146 Wash. 2d at 798-802. There, a public utility district sought to change points of diversion for two water rights in order to reestablish power production. The Department denied these changes, in part, on the basis that the older of the two rights at issue had been abandoned due to nonuse. The water right in question had been used to generate power until a portion of a flume collapsed and the district decommissioned the project. Despite decommissioning the project, the district continued to develop projects for hydroelectric power production, including applying and paying for a new federal hydroelectric license, engaging in engineering studies, and maintaining its storage right. *Id*. at 799-800. The Court distinguished this case from *Okanogan Wilderness League* "as the water right holder there offered a single, invalid reason for nonuse of the water right at issue." *Id.* at 802. Taking the facts as a whole, the Court determined that the district met its burden to rebut any presumption of abandonment due to a long period of nonuse. *Id.* at 802. The Court also clarified that the common law doctrine of abandonment remains viable after the enactment of the 1967 relinquishment statutes. *Id.* at 799.

3. Temporary Trust Water Right Donations

The Legislature has authorized the Department to operate a Trust Water Rights Program (TWRP) that allows water right holders to place existing water rights into trust. Wash. Rev. Code

[7] Wash. Rev. Code 90.14.140(2)(d); *see Cornelius v. Department of Ecology*, 182 Wash. 2d 574, 596, 344 P.3d 199 (2015) (upholding the Department's use of a streamlined process to make a simplified tentative determination of water rights for a municipal water supply because those rights are immune from relinquishment).

90.38 (applies to the Yakima Basin); Wash. Rev. Code 90.42 (applies statewide). Generally, the TWRP can be used for two purposes: (1) temporarily allowing a water right holder to place their water right into trust while not in use to avoid relinquishment and provide environmental benefits; or (2) permanently holding water rights in trust to establish water banks to make water available for new uses in areas that are fully allocated. Wash. Rev. Code 90.42.080. The Department may acquire water rights into the TWRP through donations, purchases or leases, or through other agreements, such as a water banking agreement.[8] *Id*.

A temporary donation of a water right into the TWRP prevents the donated portion of that right from being relinquished due to nonuse. Wash. Rev. Code 90.14.140(2)(h). Donors receive their water right back at the end of the temporary donation period without penalty. Water rights held in the TWRP retain their original priority date. Wash. Rev. Code 90.42.040(3). Water rights held in trust on a temporary basis provide environmental benefits by contributing to instream flows and groundwater preservation but cannot be used to mitigate new water use[9]. *See Crown West Realty, LLC v. Pollution Control Hearings Bd.*, 7 Wash. App. 2d 710, 720, 435 P.3d 288 (2019) (explaining that the owner of the water right agrees to leave the allotted water in its stream or aquifer while in the TWRP).

To temporarily donate a water right into the TWRP, the water right holder submits a TWRP donation form to the Department. The Department[10] is required to accept a temporary donation of a water right into the TWRP provided it satisfies the conditions specified in Wash. Rev. Code 90.42. Generally, among other requirements, the donated quantity of water cannot exceed the highest quantity of water put to beneficial use over the most recent five-year period. Wash. Rev. Code 90.42.080(9)-(11). A trust water right is established once the Department agrees to hold a water right in the TWRP. The Department is required to provide public notice of trust water right donations in accordance with Wash. Rev. Code 90.42.050.

While a water right is in the TWRP, the water right is considered "exercised" according to Wash. Rev. Code 90.42.040(4)(c). A temporary donation may be canceled at the request of the donor or if the Department determines that the water right no longer qualifies for donation. If

[8] Permit-exempt uses under Wash. Rev. Code 90.44.050 and water right permits are not eligible for donation.

[9] Water rights that have been temporarily donated to the TWRP can later be used for mitigation, if a change in purpose to instream flow for mitigation is approved under Wash. Rev. Code 90.03.380.

[10] Unlike a change application, which can be reviewed by a water conservancy board or the Department, a water conservancy board lacks the final authority to authorize a transfer of a water right into the TWRP. *Crown West Realty, LLC.*, 7 Wash. App. 2d at 721 (citing Wash. Rev. Code 90.80.055(1)(b)).

necessary, a temporary trust water right donation may also be modified to avoid impairment to other water rights. Wash. Rev. Code 90.42.080(4). Once the donation term ends or has been canceled, the water right reverts to the donor, and the water is once again subject to the relinquishment provisions of Wash. Rev. Code 90.14.

While a temporary trust water right donation can protect a water right from relinquishment during the donation period, it cannot restore a water right that was already relinquished due to nonuse.

B. OTHER THEORIES BY WHICH WATER RIGHTS MAYBE LOST

1. Prescription[11]

While the law never favored prescription or adverse possession *(Downie v. City of Renton,* 167 Wash. 374, 377, 9 P.2d 372 (1932)), early Washington courts recognized this doctrine as a means to acquire rights to use water. *Dontanello v. Gust,* 86 Wash. 268, 270, 150 P. 420 (1915); *Mason v. Yearwood,* 58 Wash. 276, 281, 108 P. 608 (1910). To establish a prescriptive right, the adverse user bears the burden of proving that the use and possession was open, notorious, exclusive, and continuous and hostile for the statutory period of ten years. *Downie,* 167 Wash. at 378; *Smith v. Nechanicky,* 123 Wash. 8, 12, 211 P. 880 (1923) (all elements must be proven to satisfy acquisition of title by prescription). In *Downie,* the court found that the city failed to prove a prescriptive right because the city's separate and isolated acts of draining its reservoir into a neighboring private pond was not of a sufficiently open, notorious, and hostile character to put the private landowner on notice of the adverse title. *Downie,* 167 Wash. at 377-78. Where a lower river owner claimed adverse possession to all the water diverted down his dam and intake, the court also denied a prescriptive right, reasoning that the "lower use is, as a general rule, in its very nature not adverse." *Dontanello,* 86 Wash. at 272 (quoting *Allen v. Roseberg,* 70 Wash. 422, 427, 126 P. 900 (1912)); *see also Smith*, 123 Wash. at 14-15 (holding that adverse use of a lower riparian owner was not established by clearing obstructions from upstream since this action did not interfere with the upper appropriator's diversion and use of the water). Once the right has been acquired by prescription, title vests in the claimant to the same extent as if the right had been conveyed by deed. *Dontanello,* 86 Wash. at 271.

[11] Water rights may be changed or lost through eminent domain proceedings. *See* Transfer And Change Of Water Rights *infra* ch. VII.

Prescription or adverse possession, however, could not be applied to public waters of the state. *McLeary v. Department of Game,* 91 Wash. 2d 647, 652, 591 P.2d 778 (1979). In *Peterson v. Department of Ecology,* 92 Wash. 2d 306, 316, 596 P.2d 285 (1979), the Washington Supreme Court also denied the acquisition of a right to use groundwater by adverse possession.

In 1967, the Legislature ended acquisition of all water rights by prescription with the enactment of Wash. Rev. Code 90.14.220, which provides: "No rights to the use of surface or ground waters of the state affecting either appropriated or unappropriated waters thereof may be acquired by prescription or adverse use." At least so long as this statute remains in place, prescription is not a valid basis for depriving a person of valid water rights.

2. Estoppel And Laches

Water rights can also be lost under the doctrines of estoppel and laches. *See Wilson v. Angelo,* 176 Wash. 157, 163, 28 P.2d 276 (1934); *Hollett v. Davis,* 54 Wash. 326, 332, 103 P. 423 (1909). To establish equitable estoppel, a claimant must prove: "(1) an admission, statement, or act inconsistent with a claim later asserted; (2) reasonable reliance on that admission, statement, or act by the other party; and (3) injury to the relying party if the court permits the first party to contradict or repudiate the admission, statement or act." *Department of Ecology v. Theodoratus,* 135 Wash. 2d 582, 599, 957 P.2d 1241 (1998) (citing *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. I,* 124 Wash. 2d 816, 831,881 P.2d 986 (1994)).

Under the 1917 Surface Water Code, the Legislature limited estoppel claims in water right adjudications, so that the rights of all parties would be final and prior rights would be extinguished if not set forth in the decree. *McLeary,* 91 Wash. 2d at 650-51 (citing Wash. Rev. Code 90.03.220). In addition, the statutory provision estopped "any defendant who shall fail to appear in such proceedings, after legal service, and submit proof of his claim ... from subsequently asserting any right to the use of such water embraced in such proceeding, except as determined by such decree." Wash. Rev. Code 90.03.220. In analyzing this statutory provision[12] and adjudication decree, the Court refused to invoke estoppel against a water user who asserted the same right as the claimant to divert water for irrigation in a previous water rights adjudication. *Wilson,* 176 Wash. at 163.

[12] The Court used the adjudication section of the water code even though this case was brought as a suit in equity to enforce rights rather than an action under the water code. *Wilson,* 176 Wash. at 160.

Where equitable estoppel claims involving water rights are raised against the government, the Washington Supreme Court is cautious in applying the doctrine. *Theodoratus,* 135 Wash. 2d at 599. In *Theodoratus*, the Court denied an equitable estoppel claim against the government that would have required Ecology to continue using a system capacity to measure water rights. *Id.* The Court explained: "Equitable estoppel against the government is not favored." *Id.* (citing *Kramarevcky v. Department of Social & Health Serv.,* 122 Wash. 2d 738, 743, 863 P.2d 535 (1993)). "Therefore, when the doctrine is asserted against the government, equitable estoppel must be necessary to prevent a manifest injustice, and the exercise of government functions must not be impaired as a result of estoppel." *Theodoratus*, 135 Wash. 2d at 599 (citing *Kramarevcky*, 122 Wash. 2d at 743). Each element requires proof by clear, cogent, and convincing evidence. *Theodoratus*, 135 Wash. 2d at 599 (citing *Kramarevcky,* 122 Wash. 2d at 744).

Laches is an equitable defense based on estoppel.[13] There are no significant cases analyzing of the doctrine of laches. The Washington Supreme Court has held that the doctrine of laches cannot be invoked to defeat a lower riparian who failed to raise an injunction claim for wrongful diversion of upstream waters for nine years. *Rigney v. Tacoma Light & Water Co.,* 9 Wash. 576, 586, 38 P. 147 (1894) (holding that the respondent had a clear and positive right to use and enjoy water that was not waived by delay in commencing a legal action).

C. Water Right Claims And Registration Act

Special word should be added about water rights established, or claimed to have been established, before the water codes for surface water (1917) and groundwater (1945). To that extent that these rights are actually involved in litigation, they may be modified or extinguished through forfeiture, abandonment, condemnation, or the other theories discussed above. Pre-code rights, however, may also be lost merely by failure to follow statutory procedures prescribed by the Legislature to identify and preserve such claimed rights.

In light of the incomplete and uncertain records for water rights established before the 1917 Surface Water Code and the 1945 Groundwater Code, the Legislature enacted the Water

[13] "A defendant asserting the doctrine of laches must affirmatively establish: (1) knowledge by plaintiff of facts constituting a cause of action or a reasonable opportunity to discover such facts; (2) unreasonable delay by plaintiff in commencing an action; and (3) damage to defendant resulting from the delay in bringing the action." *Davidson v. State*, 116 Wash. 2d 13, 25, 802 P.2d 1374 (1991).

Right Claims Registration Act in 1967. The Legislature found that:

> (2) Such uncertainty seriously retards the efficient utilization and administration of the state's water resources, and impedes the fullest beneficial use thereof[.]

Wash. Rev. Code 90.14.020.

This act directed the then Water Resources Department to record the amount and location of these pre-code water rights by authorizing the state to accept and register water right claims. Legal challenges to the Water Right Claims Registration Act have been unsuccessful as the Washington Supreme Court has upheld the constitutionality of the act. *Adsit,* 103 Wash. 2d at 705-07.

Since the original registration act, the Legislature has stepped in and enacted statutes in 1979, 1985, and 1997 to prevent the forfeiture of certain pre-code water rights and to bring contested water claims to an end, even though state law formerly established that "such claims were conclusively deemed waived and relinquished if not filed by 1974." Reed D. Benson, *Maintaining The Status Quo: Protecting Established Water Uses In The Pacific Northwest, Despite The Rules Of Prior Appropriation,* 28 Envtl. L. 881, 897 (1998); 1979 Wash. Laws ch. 216; Wash. Rev. Code 90.14.043, .044; House Bill Report on House Bill 1118, 55th Leg., Reg. Sess. (Wash. 1997), at 1-3; Wash. Rev. Code 90.14.071. The most recent claim registration was codified as Wash. Rev. Code 90.14.068(1) which reads, inpart:

> [A]ny person claiming under state law a right to withdraw and beneficially use groundwater under a right that was established before the effective date of the groundwater code established by chapter 263, Laws of 1945, shall register the claim with the department during the filing period unless the claim has been filed in the state water rights registry before July 27, 1997. A person who claims such a right and fails to register the claim as required is conclusively deemed to have waived and relinquished any right, title, or interest in the right.

Following the last opening, Ecology had recorded a total of about 169,000 claims in the claims registry. Short of litigation, it is impossible to assess how many of these claims represent vested water rights. Many claims may be invalid, overstated, overlapping, abandoned, reduced, or modified in their scope.

PART III:

OTHER LAWS AFFECTING WASHINGTON WATER RIGHTS

VII.

TRANSFER AND CHANGE OF WATER RIGHTS

A. INTRODUCTION AND HISTORY

Generally, a water right transfer occurs when ownership of the right is transferred from one person to another. A water right change occurs when certain elements of a right are changed, such as the point of diversion or the purpose or place of use. Transfers and changes have been important tools for managing the distribution of water and for meeting new water demands. They operate through a quasi-market system, but water is not a commodity in the normal sense. It is a resource held in common by all citizens and, therefore, transfers are regulated by the state for the purpose of protecting other water rights and to manage the water consistent with the public interest. The term "water right transfer" has been used to include both the transfer of ownership of the right as well as changes to elements of the right, and when used in this chapter, the term "transfers" includes changes to a water right.

Transfers were first recognized in California during the mining era. Lawrence J. MacDonnell, *Transferring Water Uses In The West,* 43 Okla. L. Rev. 119 (1990). The water rights were considered a valuable asset that a miner could move from one mining claim to another. Water transfer cases were among the first cases being reported by the Washington Supreme Court. *Ellis v. Pomeroy Improvement Co.,* 1 Wash. 572, 21 P. 27 (1889). In *Ellis,* the Court rejected any objections made to a change of point of diversion where the head of a ditch was moved up the creek a short distance. Although it may not have been relevant to the final outcome of the case, the Court's opinion recognized that consideration would be given to whether or not the change materially affected the rights of the parties, and whether such change was necessary to fulfill the purposes and enjoyment of the right. *Id.* at 575.[1]

A. LEGAL FRAMEWORK FOR TRANSFERS

The ability to transfer a water right is dependent upon several factors, most of which result from the nature of the right itself. Logically, one can transfer only that which one

[1] *See also* Appurtenancy *supra* ch. III, § F.

owns. The ownership or "bundle of sticks" encompassing the water right must be defined before any transfer can occur. The water right holder owns what is known as a usufructuary right to the water - the right to use the water for a beneficial purpose. *See* The Nature And Elements Of A Water Right In Washington *supra* ch. III. The state retains control of the water and does not part with ownership. The usufructuary right is defined and limited by a quantity of water, the place of use, the period of use, the purpose of use, and the point of diversion or withdrawal. *See id.* ch. III; *R.D. Merrill Co. v. Pollution Control Hearings Bd.,* 137 Wash. 2d 118, 126-27, 969 P.2d 458 (1999). Generally, the right itself is not established and does not vest until the water is applied to actual beneficial use. Permits represent inchoate water rights that are not vested until perfected through beneficial use. *Cornelius v. Department of Ecology,* 182 Wash. 2d 574, 586, 344 P.3d 199 (2015).

As discussed above, beneficial use defines the measure and limitation of the right. *In re the Water Rights of Marshall Lake & Marshall Creek Drainage Basin,* 121 Wash. 2d 459, 468, 852 P.2d 1044 (1993). These elements of the right define the "bundle of sticks" one has in ownership of a water right. To the extent-the water is used consistent with the authorization or initial establishment of the right, the right remains a property interest for use of water appurtenant to the land.

The ownership interest in a water right does not per se include a property right to transfer the water right. Transfers occur only as authorized by statute. Wash. Rev. Code 90.03.380, 90.44.100. Municipal water suppliers also have the option of modifying the place of use of a municipal purpose water right through a water system planning process administered by the Department of Health, rather than seeking a change in the place of use through Ecology. Wash. Rev. Code 90.03.386(2); *see also* Municipal Water Rights *infra* ch. VIII.

In order to approve a transfer or change, Ecology must tentatively determine whether the right is valid, the extent or limitation of the right in terms of quantity, time, etc., and whether the right has been relinquished or abandoned due to nonuse. *R.D. Merrill, Co.*, 137 Wash. 2d at 127. Once the existence and extent of the right is determined, Ecology must determine if the transfer would impair any other rights and, if granted, if it would be in the public's interest. *Id.; Okanogan Wilderness League, Inc. v. Town of Twisp,* 133 Wash. 2d 769, 947 P.2d 732 (1997).

1. Determining The Validity Of The Right

The code authorizes the transfer of rights to use of water "which has been applied to beneficial use." Wash. Rev. Code 90.03.380. The determination of the validity of a water right is therefore based on the extent to which the water has been applied continually to actual beneficial use, or perfected, within the terms and conditions of the water right. The critical element in determining the validity of a right is quantifying the amount of water that has been applied historically to beneficial use. Seasonal use is also relevant to water right transfers. *R.D. Merrill,* 137 Wash. 2d at 128. Knowing the quantity of water historically put to beneficial use, including any restrictions on time of use, is important when considering a transfer of the water right. If the transfer will result in increased consumptive use, there will be a new demand on the system to satisfy that transfer and the right would unlawfully be enlarged. *See* Anthony Dan Tarlock and Jason Anthony Robison, *Law Of Water Rights And Resources* § 4.82 (July 2025); *Okanogan Wilderness League, Inc.,* 133 Wash. 2d 769*; Schuh v. Department of Ecology,* 100 Wash. 2d 180, 667 P.2d 64 (1983).

In *Okanogan Wilderness League, Inc.,* the Court relied on two important "principles of western water law" in holding that only a water right that has been perfected through the actual beneficial use of water can be changed. *Okanogan Wilderness League, Inc.,* 133 Wash. 2d at 777-78. First, the Court recognized that the quantification of existing use of water is important in analyzing whether the change will impair the other existing rights.

> If a right has not been beneficially used to its full extent, or if the right has been abandoned, then issuance of a certificate of change, in the amount of the original right, could cause detriment or injury to the other rights.

Id. at 779. The Court also recognized that one can only transfer that which one owns. *Id.* at 777-78. A water right is defined and measured by the beneficial use of the water. *Id.* at 778.

> The owner of a water right is entitled to the amount of water necessary for the purpose to which it has been put, provided that purpose constitutes a beneficial use.

Id. (quoting *In re the Water Rights of Marshall Lake and Marshall Creek Drainage Basin,* 121 Wash. 2d at 468).

In *R.D. Merrill, Co.,* the validity of a water right was also in question because of an application to change the right. The Court reaffirmed its analysis that beneficial use defines

the right. *R.D. Merrill, Co.,* 137 Wash. 2d at 123. In both *R.D. Merrill Co.* and *Okanogan Wilderness League, Inc.,* the validity of the right was dependent upon whether the perfected right was otherwise invalid under the principles of common law abandonment and statutory forfeiture. If the right had been lost, it was no longer valid and could neither be exercised or transferred. *See* Loss of Water Rights *supra* ch. VI.

The requirement that a water right be established by beneficial use prior to any change or transfer evolved in part from the anti-speculation principle of water law. A water right cannot be maintained by holding the water for "some speculative future." *Okanogan Wilderness League, Inc.,* 133 Wash. 2d at 783; *R.D. Merrill Co.,* 137 Wash. 2d at 130-31; *see* The Nature And Elements Of A Water Right In Washington *supra* ch. III. If one who is authorized to use water abandons plans for the use of the water, it is not this person's right to determine how this water will otherwise be used. Rather, the water must remain in the source for junior appropriators and be available for reappropriation by the state to applicants who are ready and willing to use the water. *See Schuh*, 100 Wash. 2d 180.

There are exceptions to the rule that a water right cannot be changed before it is put to beneficial use. Under Wash. Rev. Code 90.44.100, Ecology may authorize an amendment to a groundwater permit to change or add a well location (point of withdrawal) or to change the manner or place of use. *See* The Water Codes: Groundwater *supra* ch. V, § 6 Changes to Groundwater Rights. By allowing a change to a permit, the Court held the code provides for a change to an *unperfected* groundwater right—water that has not been applied to beneficial use. *R.D. Merrill Co.,* 137 Wash. 2d at 130. This change does not allow for a change of purpose. *Id*.; *City of West Richland*, 124 Wash. App. 683, 693, 103 P.3d 818 (2004). Changing the purpose of an inchoate or unperfected water right would allow for an opportunity to speculate with water that one has never used or created any right to; changing only the means of withdrawing and applying the water does not invite such speculation. *R.D. Merrill Co.,* 137 Wash. 2d at 130-31.

> Given these statutory limitations, RCW 90.44.100 cannot be used to speculate in water rights even though amendment is allowed where unperfected rights are involved.

*Id.*at 131.

After the Court's decision in *Okanogan Wilderness League*, the code was amended to allow changes in point of diversion for inchoate surface water rights, when certain

conditions are met. Under Wash. Rev. Code 90.03.395 and 90.03.397, Ecology may approve a change in the point of diversion for a surface water permit when such modification will provide both environmental benefits and water supply benefits, among other conditions.

There are other exceptions specific to municipal water rights that allow changes to inchoate municipal water rights. *See* Municipal Water Rights, ch. VIII. Under Wash. Rev. Code 90.03.570, unperfected surface water rights held by a municipal supplier for municipal water supply purposes can be changed, if certain conditions are met. Additionally, unperfected groundwater rights documented by system capacity certificates may also be amended under Wash. Rev. Code 90.44.100. In *Cornelius,* the Court confirmed that the plain language of Wash. Rev. Code 90.44.100 and its reasoning in *R.D. Merrill* allows unperfected water rights documented by system capacity certificates to be amended to add well locations. *Cornelius*, 182 Wash. 2d at 597. The Court noted that system capacity or "pumps and pipes" certificates issued prior to the enactment of the municipal water code represent rights in good standing that are deemed perfected, even if the rights were not actually put to beneficial use (provided the water rights are "prosecuted with reasonable diligence"). *Id.* at 597, 601-02*;* Wash. Rev. Code 90.03.330(3).

2. Analyzing Injury To Other Rights

Water rights have been described as "pieces of a jigsaw puzzle," and the purpose of the prior appropriation doctrine is to not allow any one piece to encroach on another piece by changes to the water right or otherwise. *See* John M. Gould, *Water Right Transfers And Third Party Effects,* 23 Land & Water L. Rev. 1, 12 (1988). The impact on water rights includes all those senior and junior to the water right proposed for transfer. *Schuh*, 100 Wash. 2d at 186-87*;* Tarlock & Robison, *supra* § 4.74. In spite of the maxim "first in time is first in right," the principle of non-impairment operates to protect junior water right holders from the consequences of changes or transfers of senior water rights. The junior appropriator has certain rights to the continuation of the water source as it existed at the time that the junior appropriated the water. Tarlock & Robison, *supra* § 4.76.

In analyzing impact or injury to other existing water rights, all contingencies are considered. A change of point of diversion of a water right may not cause injury, but the change of manner of use may lead to additional water being consumed and consequently

there may be an injury to downstream users. Much of this analysis is dependent upon considering what quantity of water of the underlying water right was diverted and actually consumed as compared to the water that was diverted and returned to a water source through seepage, spillage, leakage, or otherwise and relied upon others. Impairment to other rights may result from either detrimental impacts, in quantity or quality, to the resource, or direct interference with the ability of one to exercise an existing right. *See* Wash. Rev. Code 90.03.005, .380; 90.44.100. To avoid any additional impact caused by the transfer on a water source, the analysis for a transfer or change requires a determination of the consumptive use of water. This analysis also prevents improper enlargement of a water right.

The code allows changes for the irrigation of additional acres or new uses if such changes result in no increase in the annual consumptive quantity of water used. Wash. Rev. Code 90.03.380(1)(a). Annual consumptive quantity (ACQ) is determined by considering the estimated or actual amount of water diverted, less the annual return flow, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water.[2] *Id.; Loyal Pig, LLC v. Department of Ecology*, 13 Wash. App. 2d 127, 139, 463 P.3d 106 (2020). For water rights held by the United States Bureau of Reclamation within the boundaries of the Columbia Basin Project, no ACQ analysis is required to change the number of irrigated acres provided the change meets the criteria set forth in Wash. Rev. Code 90.03.380(1)(b).

The return flow calculation is important because many appropriators rely on return flow to satisfy their rights. *See United States v. Union Gap. Irrig. Co.,* 209 F. 274 (E.D. Wash. 1913); *Santa Fe Trail Ranches Property Owners Ass'n v. Simpson,* 990 P.2d 46 (Colo. 1999). If a transfer would lessen the amount of return flow, it is enlarging the right that was otherwise perfected and is creating a circumstance of impairing other rights to the use of water. *See Haberman v. Sander,* 166 Wash. 453, 7 P.2d 563 (1932).

Improper enlargement of a water right can occur even when a proposed transfer does not increase the quantity of water. In *Schuh*, the water permit in question limited the amount of water that could be withdrawn based on the availability of water from the Columbia Basin

[2] Certain limited exceptions apply to the general rule that annual consumptive use is measured based on the most recent five years. For example, the calculation may be adjusted if the water right has been in the trust water rights program or nonuse of the water right has been excused from relinquishment. Wash. Rev. Code 90.03.615; *Loyal Pig LLC*, 13 Wash. App. 2d at 142.

Project. *Schuh*, 100 Wash. 2d at 182. The farmer seeking to transfer water planned to move these supplemental or standby water rights to an area outside of the Columbia Basin Project. The Court held that this transfer was unlawful because moving standby or supplemental water rights out of the federal project area would change the scope and character of the rights. *Id.* at 184. Changing a supplemental water right to a primary water right operates as an unlawful enlargement of the right. *Id.* at 186.

Enlargement is also addressed in *Burbank Irrigation District #4 v. Department of Ecology*, 27 Wash. App. 2d 760, 534 P.3d 833 (2023). In *Burbank,* an irrigation district sought to amend its water right certificate to allow an annual groundwater right to be withdrawn from a new point of diversion. One of the issues before the Court was whether this transfer would unlawfully enlarge the water right. The parties disagreed about the scope and character of the water right intended by the original certificate. *Id.* at 773. The irrigation district argued that its original water certificate was intended to operate as a new, independent water right. *Id.* at 774. By contrast, Ecology argued that the water right was not intended to allow for the withdrawal of additional water (i.e., a non-additive water right). *Id.* at 774. The Court remanded the case to the Pollution Control Hearings Board for an evidentiary hearing, as "[t]he scope and character of a water right is a question of fact."[3] *Id*. (citing *Schuh*, 100 Wash 2d. at 183-84).

3. Considerations Of The Public Interest

In the 1971 Water Resources Act, the Legislature required Ecology to consider expressions of the public interest in any allocation decisions. Wash. Rev. Code 90.54.020(10). The Legislature also provided, as a "fundamental" water policy, that the allocation of water must be based upon "securing of the maximum net benefits for the people of the state." Wash. Rev. Code 90.54.020(2). The public interest analysis grants the state broad discretion in analyzing requests for water transfers and changes in water rights. In analyzing the public interest criteria required for permit extensions under Wash. Rev. Code 90.03.320, the Washington Supreme Court broadly interpreted Ecology's authority to condition any extension to "satisfy any public interest concerns which arise, provided, of course, that it also must comply with all relevant statutes." *Department of Ecology v. Theodoratus,* 135 Wash. 2d 582, 597, 957 P.2d 1241 (1998).

[3] On remand, the challengers withdrew their appeal.

When an applicant seeks to divert public waters anew, Ecology is required to consider the public interest as part of its decision to issue a water permit. Wash. Rev. Code 90.03.290. By contrast, when a transfer application is made under Wash. Rev. Code 90.03.380, the transfer statute does not specify that the public interest must be analyzed. Prior to 2001, no Washington appellate court had directly answered the question of whether the public interest should be considered in surface water right transfers under Wash. Rev. Code 90.03.380. This issue was addressed by the Washington Supreme Court in *Public Utility Dist. No. 1 of Pend Oreille County v. Department of Ecology*, 146 Wash. 2d 778, 51 P.3d 744 (2002). In *Sullivan Creek,* Ecology argued that it had the authority to consider the public interest in reviewing a transfer application based on other statutes requiring public interest review. *See Pend Oreille Cy. Public Utility Dist. 1*, 146 Wash. 2d at 796 (citing Wash. Rev. Code 90.03.005; 90.54.020(2)). The Court rejected this argument and determined that Wash. Rev. Code 90.03.380 provides no authority for Ecology to consider the public interest when a surface water transfer application is made. *Pend Oreille Cy. Public Utility Dist. 1*, 146 Wash. 2d at 798. As part of its reasoning, the Court noted that transfers made to water rights under Wash. Rev. Code 90.03.380 involve perfected water rights, and the public interest analysis was previously completed at the time of the permit application. *Id.* at 796.

In *Schuh,* the Washington Supreme Court discussed the public interest criteria for reviewing groundwater transfers, which are also subject to review under Wash. Rev. Code 90.44.100. *Schuh*, 100 Wash. 2d at 186. Under Wash. Rev. Code 90.44.100, changes in points of withdrawal and the manner or place of use must be analyzed under the same standards as an original application, which includes a public interest review.[4] *See* The Water Codes: Surface Water *supra* ch. IV. In *Stempel v. Department of Water Resources,* 82 Wash. 2d 109, 119-20, 508 P.2d 166 (1973), the Court recognized the policy statements in Wash. Rev. Code 90.54.020 as substantive requirements that must be considered in analyzing a water right application. *But see Center for Environmental Law and Policy v. Department of Ecology,* 196 Wash. 2d 17, 31, 468 P.3d 1064 (2020) (holding that Wash. Rev. Code 90.54.020 is a general declaration of fundamentals that provides guidelines but does not mandate how Ecology must manage water resources); *Bassett v. Department of Ecology*, 8

[4] Appropriations of groundwater must comply with Wash. Rev. Code 90.03.250-.340, which are incorporated by reference in Wash. Rev. Code 90.44.060.

Wash. App. 2d. 284, 305, 438 P.3d 563 (2019) (the maximum net benefits language of Wash. Rev. Code 90.54.020 "does not impose a formal test."). These policies instruct the state to manage water to secure the maximum net benefits for the people of the state, to protect and enhance the natural environment, and seek public interest considerations at all phases of water allocation decisions. Wash. Rev. Code 90.54.020(2), (3), (10).

4. Transfer of Exempt Wells

The Attorney General has concluded through a formal opinion that, as a general matter, the owner of a well exempt from permitting *(see* The Water Codes: Groundwater *supra* ch. V) has no right to transfer or change such rights. *See* AGO 1997 No. 6 (no authority to transfer or change water right created under groundwater exemption); Wash. Rev. Code 90.44.105 (1997 Wash. Laws ch. 446, § 1) (exempt rights may be consolidated with a groundwater permit or right). Further, Wash. Rev. Code 90.44.105 does allow permit exempt water rights to be consolidated with non-exempt water rights provided the holder of a valid right complies with the requirements outlined by the statute. Ecology has established procedures to assist groundwater right certificate and permit holders seeking to consolidate a valid water right with a permit exempt water right pursuant to its POL-1230 "Policy For Implementing The Consolidation Of Rights For Exempt Ground Water Withdrawals" (effective Jan. 11, 1999).

5. Transferring Water Rights Through Condemnation

The state water code declares that the beneficial use of water is a public use and allows "any party" to exercise the right of eminent domain over water rights. Wash Rev. Code 90.03.040. The statute also provides that if a new water right permit is denied because of conflict with existing rights, and the applicant acquires those rights through purchase or condemnation, Ecology may grant a new water right to the applicant in recognition of the condemnation. Wash. Rev. Code 90.03.290.

While condemnation proceedings are rare, there are several illustrative cases where water rights have been condemned. *Washington ex rel. Andersen v. Lincoln Cy. Sup. Ct.,* 119 Wash. 406, 205 P. 1051 (1922); *Washington ex rel. Kennewick Irrig. Dist. v Superior Ct.,* 118 Wash. 517, 204 P. 1 (1922); *Mack v. Eldorado Water Dist.,* 56 Wash. 2d 584, 354 P.2d 917 (1960). More recently, the Washington Supreme Court also addressed whether Wash. Rev. Code

90.03.040 can be used to condemn a right of way to transport water. *Hallauer v. Spectrum Properties*, 143 Wash. 2d 126, 18 P.3d 540 (2001).

In *Washington ex rel. Andersen,* Mr. Campbell had, under a lease agreement, used water for thirty years for irrigation, domestic, and stock water from a neighbor's spring. However, when the lease expired, the neighbor was unwilling to renew it, which left Mr. Campbell with a farm and no water. Mr. Campbell then sought to condemn his neighbor's spring and a right of way, for installation of a pipeline.

The primary issue in *Washington ex rel. Andersen* was whether the use of water for domestic uses constituted a public use. *Washington ex rel. Andersen*, 119 Wash. at 409-10. The Court held that it did, notwithstanding the fact that our constitution expressly listed irrigation, mining, and manufacturing purposes as public uses but did not mention domestic uses. In so holding, the Court went on to state that the Legislature is not precluded from declaring certain purposes be public uses, but the determination of whether a use is a public use is one that must be ultimately decided by the courts. *Id.* at 410.

Even though Mr. Campbell was engaged in a private enterprise that on the surface appeared to have only incidental benefits to the public, the Court authorized the condemnation. This conclusion was reached by the Court because: (1) no other options were available to Mr. Campbell; (2) agriculture uses are important to the state in the development of the arid regions of the state; (3) there was no other choice of location for the enterprise where the domestic use was the foundation for the agriculture enterprise; (4) the source of the water is naturally occurring and had not been enhanced by physical structures; and (5) no use of the spring had previously been made by the riparian owners. *Id.*at 411.

In *Washington ex rel. Kennewick Irrigation District,* the district sought to condemn a water right held by Pacific Power & Light (PP&L). 118 Wash. at 520. In that proceeding, the City of Prosser sought and was granted intervention, arguing that it wanted a portion of PP&L's water right as its use was a superior use to the use proposed by the district. The Court held that the use contemplated by the irrigation district was superior and denied the city's claims. *Id.* at 525.

In *Mack*, the Court disallowed a condemnation because the proposed use was not superior to the current use. The appellants (Mack, et al.) were private owners of a thirty-acre tract of unimproved land that they sought to develop and use for domestic purposes. The

respondent, a water district, used the water for "municipal purposes." The Court in reaching its decision relied heavily upon the fact that the respondents could access the water through other means than condemnation. *Mack*, 56 Wash. 2d at 588. Under the statute, the Court must determine what use will be for the greatest public benefit and that use "shall be deemed the superior one." With very little guidance in the statute, the courts appear to have relied on the equities of the factual cases before them.

A water right may be transferred or lost through the exercise of eminent domain. To condemn a water right, the condemning party need not show that it has been forfeited or abandoned (indeed, eminent domain is probably not necessary if the right has already been lost through nonuse), and the state and federal constitutions require compensation for the loss.

The Washington Constitution contains two provisions that bear upon the acquisition of water rights by eminent domain. The first, article I, section 16 (Amendment 9), establishes the general requirements relating to the exercise of the power of eminent domain. That section provides:

> Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided,* That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

Wash. Const. art. I, § 16 (amend. 9).

The second section of the Washington Constitution to be noted is article XXI, section 1, which provides: "The use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use."

The power of eminent domain is an attribute of sovereignty. It is an inherent power of the state, not derived from, but limited by the fundamental principles of the constitution. A municipal corporation thus does not have the inherent power of eminent domain but, instead, it may exercise such power only when it is expressly so authorized by the Legislature. *City of Tacoma v. Welcker,* 65 Wash. 2d 677, 683, 399 P.2d 330 (1965).

The Legislature in tum has delegated the power of eminent domain to counties, cities, ports, public utilities, school districts for public uses, and to private parties for private ways of necessity. *See, e.g.,* Wash. Rev. Code 8.12.030, 35.92.010 (cities); 57.08.005 (water districts); 8.24.010 (landowner for private way of necessity); 8.28.050 (municipal corporations in another state); 87.03.140-.150 (irrigation districts); and 90.03.040 (any person). In the water code, the Legislature has allowed for eminent domain of water rights:

> [A] ny person may exercise the right of eminent domain to acquire any property or rights now or hereafter existing when found necessary for the storage of water for, or the application of water to, any beneficial use ... including the right and power to condemn an inferior use of water for a superior use. In condemnation proceedings the court shall determine what use will be the greatest public benefit, and that use shall be deemed a superior one: PROVIDED, That no property right in water or the use of water shall be acquired hereunder by condemnation for irrigation purposes, which shall deprive any person of such quantity of water as may be reasonably necessary for the irrigation of his land .... Such property or rights shall be acquired in the manner provided by law for the taking of private property for public use by private corporations.

Wash. Rev. Code 90.03.040.

Notably, Wash. Rev. Code 90.03.040 does more than allow the condemnation of water rights. The statute also permits condemnation of a right of way to transport water for beneficial use. *Id.*; *Hallauer*, 143 Wash. 2d at 145. In *Hallauer,* the petitioners sought to condemn an easement for a pipeline to transport water from a spring located on their neighbor's property. The question before the Court was "whether the showing of necessity to condemn a right of way to transport water is identical to the showing required to condemn a private way of necessity." *Hallauer*, 143 Wash. 2d at 131. Unlike cases involving condemnation of private rights of ways, which typically require reasonable necessity (e.g., land to be landlocked) to condemn an easement, the Court determined that "RCW 90.03.340 does not require necessity based upon the landlocked nature of the condemnor's property, but expressly states the relevant

necessity as "*necessary for* the storage of water for, *or the application of water to, any beneficial use*." *Id.* at 146. The Court explained that the power to condemn property rights to transport water is necessary where appropriative, not riparian, water rights are concerned, "as appropriative rights "do not require that the owner's land abut a stream or other water body." *Id*. at 135. As a result, there must necessarily be a way to acquire a right to convey water to its place of use.

6. Transferring Water Rights Through Interties

In 1991, the Legislature adopted the "Interties" Bill which is codified as Wash. Rev. Code 90.03.383 and .386. The primary intent of this legislation was to recognize existing interties that had been approved by Health but had never received authorization as changes pursuant to Wash. Rev. Code 90.03.380. Additionally, the legislation was to provide a mechanism that allowed a quicker authorization for transfers during times of emergency. Wash. Rev. Code 90.03.383(7). Lastly, the intertie legislation was enacted to address the failure of smaller public water systems due to water quality or quantity concerns. The intertie legislation was seen as a vehicle for correcting this problem by providing the mechanism for increasing the reliability of public water systems by allowing the exchange and delivery of water between the systems. Wash. Rev. Code 90.03.383(1).

Interties are defined under the act as interconnections between public water systems permitting the exchange or delivery of water between those systems for other than emergency supply purposes. Wash. Rev. Code 90.03.383(2)(a). Under the definition, there must be a physical connection that permits the flow of water between pubic water systems. Wash. Rev. Code 90.03 does not define public water systems. Wash. Rev. Code 70A.100.030 does define that term. A public water system is generally defined as a system that has two or more connections providing pipe water for human consumption. Second, under the definition, the flow of water must be within established instantaneous and annual withdrawal rates as specified in the system's existing water rights.

Intertie legislation is internally inconsistent in how a transfer through an intertie is to be analyzed under Wash. Rev. Code 90.03.380. Under Wash. Rev. Code 90.03.383(4), an intertie may be permitted without any analysis under Wash. Rev. Code 90.03.380 or 90.44.100. The language of this section does however require the standard of "no impairment" to be met. However, other provisions of Wash. Rev. Code make it clearer that Wash. Rev. Code

90.03.380 analysis is required. Wash. Rev. Code 90.03.383(2)(a), (7).

The Attorney General has issued a formal Attorney General Opinion on certain elements of the intertie legislation. AGO 1996 No. 19. Otherwise, there has been no judicial opinion or analysis of the legislation. The Attorney General Opinion makes three fundamental findings:

> (1) The procedure established in RCW 09.03.383(3) for modifying a water right permit based on an intertie between public water supply systems applied only to interties existing and in use on January 1, 1991.
>
> (2) Under RCW 90.03.383(3), when the Department of Ecology processes a change in place of use occasioned by an intertie between public water supply systems, the resulting permit(s) should show the quantity of water delivered through the intertie as well as the change in place of use.
>
> (3) Under RCW 90.03.383(4), the Department of Ecology's scope of inquiry is whether each system's use is within the annual and instantaneous withdrawal rate specified in its water right authorization and whether the exchange or delivery through the intertie adversely affects existing water rights.

AGO 1995 No. 19.

Under Ecology's Municipal Water Law Policy, Wash. Rev. Code 90.03.380 is not applicable to municipal water suppliers when they interconnect and consolidate into one entity. Ecology Municipal Water Law Policy and Interpretive Statement, Pub. No. 24-11-100 (Nov. 1, 2024).

7. Water Conservancy Boards

The 1997 Legislature authorized an alternative means of processing applications for transfers of water rights. Wash. Rev. Code 90.80 (1997 Wash. Laws ch. 441). The legislative authority of a county may create a water conservancy board, subject to approval by the director of Ecology, "for the purpose of expediting voluntary water transfers within the county." Wash. Rev. Code 90.80.020(1). The same statute describes the circumstances under which a conservancy board may be created.

Each water conservancy board consists of three commissioners, appointed by the county legislative authority for staggered six-year terms. Wash. Rev. Code 90.80.050. The county legislative authority is permitted to appoint two additional commissioners for a total of five. *Id.* The appointing authority is directed to "ensure that at least one commissioner is

an individual water right holder who diverts or withdraws water for use within the area served by the board." *Id.* Commissioners must be residents of the county creating the board or of a contiguous county. *Id.* Ecology is directed to provide training for board members. Wash. Rev. Code 90.80.040. No commissioner may participate in board decisions without completing the necessary training. Wash. Rev. Code 90.80.040, .050(4).

Once a board is created, it has authority to consider applications for water right transfers "if the water proposed to be transferred is currently diverted or used within the geographic boundaries of the county, or would be diverted or used within the geographic boundaries of the county if the transfer is approved." Wash. Rev. Code 90.80.070(2). The board must hold a hearing and must publish notice of the hearing so the public has an opportunity to comment on the proposal. Wash. Rev. Code 90.80.070(3). Any person may submit comments to the board on the proposed transfer, which the board is required to consider when making a decision on the application. Wash. Rev. Code 90.80.070(3). If a majority of the board determines that an application is complete, in accordance with the law, and that the transfer can be made without injury or detriment to existing water rights, including rights established for instream flows, "the board "must issue a record of decision approving the transfer, subject to review by the director [of Ecology]." Wash. Rev. Code 90.80.070(4). If a majority of the board decides an application cannot be approved, the board makes a record of decision and report of examination denying the transfer, which is also submitted to the director of Ecology for review. Wash. Rev. Code 90.80.070(5); .080.

As noted, acts of the water conservancy boards are subject to approval by Ecology. The director of Ecology must "review each record of decision made by a board for compliance with applicable state water law." Wash. Rev. Code 90.80.080(2). A party claiming impairment by a transfer may file objections with Ecology. Wash. Rev. Code 90.80.080(3). Ecology is directed to "review the action of the board and affirm, reverse, or modify the action of the board within forty-five days of receipt." Wash. Rev. Code 90.80.080(4). This period may be extended by the director "for an additional thirty days by the director or at the request of the board or applicant." *Id.* If the director fails to act within the prescribed time period, the board's decision becomes the decision of Ecology and is final. *Id.* Ecology's decisions to approve water conservancy board acts, including decisions accomplished by "nonaction" are appealable in the same manner as other water right decisions made pursuant to Wash. Rev.

Code 90.03. Wash. Rev. Code 90.80.090.

The enactment of this chapter grants water right holders an alternative method of obtaining approval for water right transfers. The initial decision is shifted away from Ecology to a local board appointed by county legislative authorities, but Ecology maintains final authority to approve, disapprove, or modify a board's decision. The relationship between Ecology and local conservancy boards was addressed in *Benton County Water Conservancy Board v. Department of Ecology*, 3 Wash. 3d 59, 546 P.3d 394 (2024). The Benton County Water Conservancy Board sued Ecology after Ecology refused to grant an administrative division of certain water rights held by Plymouth Ranch LLC (Plymouth) and Frank Tiegs LLC (Tiegs) and directed the water right holders to apply for a transfer under Wash. Rev. Code 90.03.380. Plymouth and Tiegs followed this instruction; however, the Board disagreed with Ecology's decision and initiated litigation on its own behalf. *Benton County Water Conservancy Board*, 3 Wash. 3d at 72. The Court determined that the Board lacked standing to challenge Ecology's decision, as conservancy boards do not operate as agents of local water right holders seeking to transfer their water rights. *Id.* at 72-73. Water conservancy boards are a unit of local government that "exercises coextensive authority with the Department to process certain individual water right transfer applications." *Id.* at 76 (citing Wash. Rev. Code 90.80.050-.055, .070). Given their function, conservancy boards must maintain separation from individual water right holders to avoid conflicts of interest. *Id.* (citing Wash. Rev. Code 90.80.120).

PART III:

OTHER LAWS AFFECTING WASHINGTON WATER RIGHTS

VIII.

THE MUNICIPAL WATER LAW

A. INTRODUCTION

Since 1967, Washington law has afforded special protection to municipal water rights by exempting them from the general rule that unexercised water rights are relinquished. However, the law did not define what municipal water rights are or set their parameters. The Washington Supreme Court's decision in *Department of Ecology v. Theodoratus*, 135 Wash. 2d 582, 957 P.2d 1241 (1998), cast uncertainty over the nature and status of water rights for municipal supply purposes throughout Washington. This uncertainty prompted the Legislature to enact the Municipal Water Law (MWL). Laws of 2003, 1st Spec. Sess., ch. 5. The MWL is a landmark law enacted in 2003 to address uncertainties that arose from *Theodoratus* over who could qualify to hold water rights for municipal purposes, and the status of numerous water certificates that had been issued to cities and other water right holders based on system capacity rather than actual water use ("pumps and pipes"). *See* The Water Codes: Surface Water ch. IV, §§ (d) and (i), *supra*.

The MWL is titled as "A[n Act] relating to certainty and flexibility of municipal water rights and efficient use of water," and includes amendments to the water resources laws administered by the Department of Ecology[1] and the public water system laws administered by the Department of Health. It provides greater flexibility for public water purveyors, but also imposes new requirements for such purveyors to conserve water. It also requires more effective linkage between water system and land use planning. The nineteen-section law not only defines water rights for municipal supply purposes and clarifies who can hold them, but also, among other things, addresses water rights changes, water conservation, water utility service obligations, and consistency of water system planning with local government comprehensive plans and development regulations.

[1] The Department of Ecology's interpretations of the provisions of the MWL that it administers can be found in its Water Resources Policy 2030, the Municipal Water Law Interpretive and Policy Statement.

B. PROVISIONS OF THE MUNICIPAL WATER LAW

1. Defining "Municipal Water Supply Purposes" and "Municipal Water Supplier"

Wash. Rev. Code 90.03.015(3) defines the term "municipal water supplier" and states that it "means an entity that supplies water for municipal water supply purposes." For a water right holder to qualify as being a municipal supplier, it must therefore hold at least one water right that qualifies as being for "municipal water supply purposes," which is defined in Wash. Rev. Code 90.03.015(4). Thus, municipal water suppliers can hold water rights for non-municipal purposes along with rights that qualify as being for municipal purposes.

Prior to enactment of the MWL, the term "municipal water supply purposes" was not defined in any statute, or any Ecology rule or policy statement. In particular, the lack of a definition caused uncertainty as to whether only public (and not private) entities could hold water rights for municipal purposes. *Lummi Indian Nation v. State of Washington*, 170 Wash. 2d 247, 255-56, 241 P.3d 1220 (2010). The meaning of this term is important for several reasons, and especially because water rights that qualify as being for municipal water supply purposes are exempt from loss through relinquishment if they are not exercised, in full or in part, for a period of more than five years. Wash. Rev. Code 90.14.140(2)(d). *See* Loss of Water Rights, ch. VI, *supra*. The MWL defines the term "municipal water supply purposes" as meaning "a beneficial use of water: (a) For residential purposes through fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year," or "(b) for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district," or "(c) indirectly for the purposes in (a) or (b) of this subsection through the delivery of treated or raw water to a public water system for such use." Wash. Rev. Code 90.03.015(4). Notably, the definition does not require that an entity be a public entity, such as a city or public utility district, to be able to hold a water right for municipal purposes. Under Wash. Rev. Code 90.03.015(4)(a), a privately owned (*i.e.*, non-governmental) water system can qualify to hold a municipal water right by supplying water to fifteen or more residential service connections or for residential water use for a non-residential population in compliance with the definition.

If a water right qualifies as being for municipal purposes by meeting the requirements in Wash. Rev. Code 90.03.015(4)(a), (b), or (c) by, for example, being used to serve water to fifteen

or more residential service connections, then the right can be exercised for any of the municipal uses listed in the statute. The types of uses that fall under the umbrella of municipal water supply purposes are uses "generally associated with the use of water in a municipality," and include, but are not limited to, "commercial, industrial, irrigation of parks and open spaces, institutional, landscaping, fire flow, water system maintenance and repair, or related purposes." Wash. Rev. Code 90.03.015(4).

Wash. Rev. Code 90.03.550 supplements the definition of "municipal water supply purposes" in Wash. Rev. Code 90.03.015(4) by specifying additional uses of water that can be made under municipal rights. Water that is withdrawn or diverted under a municipal water right can also serve certain "instream" uses that benefit fish, wildlife, and the environment. Wash. Rev. Code 90.03.550 provides that "[b]eneficial uses of water under a municipal water supply purposes water right may include water withdrawn or diverted under such a right and used for . . . [u]ses that benefit fish and wildlife, water quality, or other instream resources or related habitat values," or uses needed to implement environmental obligations required in a watershed plan, a habitat conservation plan under the federal Endangered Species Act, a hydropower license issued by the Federal Energy Regulatory Commission, or an irrigation district management plan**.**

Another provision of the MWL, Wash. Rev. Code 90.03.560, is also directly related to the definition of "municipal water supply purposes" because it requires Ecology to amend water right certificates and other documents to state that water rights that meet the definition are for municipal water supply purposes:

> When requested by a municipal water supplier or when processing a change or amendment to the right, the department shall amend the water right documents and related records to ensure that water rights that are for municipal water supply purposes, as defined in RCW 90.03.015, are correctly identified as being for municipal water supply purposes.

Thus, even if a water right certificate states that the purpose of use is non-municipal, such as for community domestic use, the certificate can be modified, *i.e.*, conformed, to state that the right is for municipal water supply purposes. However, a water right has to meet the municipal definition under Wash Rev. Code 90.03.015(4) to qualify for modification, and the fact that a water right is held by a municipal supplier (*i.e.*, an entity that holds at least one water right that qualifies as being for municipal purposes under the definition) does not automatically mean that the right is eligible for such conformance. Wash. Rev. Code 90.03.560 "does not authorize any other water

right or other portion of a right held or acquired by a municipal water supplier to be so identified without the approval of a change or transfer of the right or portion of the right for such a purpose." Instead, the water right holder would have to apply for a change in purpose of use pursuant to the appropriate water right change statute.[2]

2. Quantifying Municipal Water Right Certificates

In response to the *Theodoratus* decision, the MWL amended Wash. Rev. Code 90.03.330, which governs the issuance of water right certificates, to address certificates that Ecology had historically issued through proof of appropriation based on system capacity. *Lummi Nation,* 170 Wash. 2d at 256. Prior to the 1990s, Ecology and its predecessor agencies engaged in a practice of issuing certificates to certain water suppliers based on system capacity, rather than actual beneficial use of water. Such certificates are commonly known as "pumps and pipes" certificates. These certificates document water rights that may be entirely, or in part, inchoate, because water has not yet been used. Oftentimes these certificates reflect water rights that have been partially perfected through beneficial use but include some quantity of inchoate water that has not yet been perfected. Although the Supreme Court expressed in *Theodoratus* that it provided no holdings related to municipal water rights (because the water right holder in that case was a private real estate developer, and not a municipality), it generated legal uncertainty as to the status of existing "pumps and pipes" certificates, which led to enactment of the MWL. *Theodoratus*, 135 Wash. 2d at 594; *Lummi Nation,* 170 Wash. 2d at 255-56; *see* The Water Codes: Surface Water ch. IV, § (d), *supra*.

As amended by the MWL, Wash. Rev. Code 90.03.330 states, in relevant part:

> (1) Upon a showing satisfactory to the department that any appropriation has been perfected in accordance with the provisions of this chapter, it shall be the duty of the department to issue to the applicant a certificate. . . .
>
> (2) Except as provided for the issuance of certificates under RCW 90.03.240 and for the issuance of certificates following the approval of a change, transfer, or amendment under RCW 90.03.380 or 90.44.100, the department shall not revoke or diminish a certificate for a surface or ground water right for municipal water supply purposes as defined in RCW 90.03.015 unless the certificate was issued with ministerial errors or was obtained through misrepresentation. . . .

[2] If, for example, a municipal water supplier acquires a water right that is designated as being for agricultural irrigation purposes and it wants to exercise the right to supply water to homes and businesses as part of its public water system, it would have to apply to Ecology for a change of purpose of use to municipal purposes.

> (3) This subsection applies to the water right represented by a water right certificate issued prior to September 9, 2003, for municipal water supply purposes as defined in RCW 90.03.015 where the certificate was issued based on an administrative policy for issuing such certificates once works for diverting or withdrawing and distributing water for municipal supply purposes were constructed rather than after the water had been placed to actual beneficial use. Such a water right is a right in good standing.
>
> (4) After September 9, 2003, the department must issue a new certificate under subsection (1) of this section for a water right represented by a water right permit only for the perfected portion of a water right as demonstrated through actual beneficial use of water.

Wash. Rev. Code 90.03.330(3) provides that water rights for municipal purposes documented by "pumps and pipes" certificates that were issued prior to September 9, 2003 (the date the MWL became effective) are "rights in good standing." Such rights include quantities of water that have not yet been used and may continue to be exercised to increase water use to serve new growth. After September 9, 2003, Ecology can issue certificates "only for the perfected portion of a water right as demonstrated through actual beneficial use of water." Wash. Rev. Code 90.03.330(4). Thus, maximum water quantities on certificates issued after the MWL became effective must be based on the maximum amount of water that is actually used, rather than system capacity.

Wash. Rev. Code 90.03.330(2) provides that Ecology may not revoke or diminish water rights that qualify as being for municipal purposes, including those documented by "pumps and pipes" certificates covered under Wash. Rev. Code 90.03.330(3), except when the agency: (1) issues certificates under Wash. Rev. Code 90.03.240 at the conclusion of general water rights adjudications; (2) issues certificates following changes, transfers, or amendments under Wash. Rev. Code 90.03.380 or 90.44.100; or (3) determines that a certificate was issued with ministerial errors or obtained through misrepresentation. Thus, under certain circumstances, such as when Ecology processes an application for change or transfer of a water right documented by a "pumps and pipes" certificate, Ecology may revoke the certificate, or issue a decision approving a change of the water right for a quantity less than provided on the original certificate. Revocation or diminishment may occur based on the tentative determination of validity and extent of the water right, to prevent impairment of other existing water rights, or to prevent detriment to the public welfare. Also, municipal water rights, including those documented by pumps and pipes, can be reduced based on determinations of their validity and extent in a general adjudication in court.

3. Maximum Connection and Population Limits

Prior to the MWL, there was also ambiguity as to whether maximum connection and population figures stated on certificates and other water right documents issued by Ecology and its predecessor agencies were limiting attributes of water rights. As amended, Wash. Rev. Code 90.03.260(4) and (5) provide that a water right for municipal supply purposes is not limited to maximum service connection or population figures specified in a water right application or any subsequent water right documents if the municipal water supplier has an approved water system plan or other approval from Health authorizing service to a specified maximum number of service connections.

Under Wash. Rev. Code 90.03.260(4), applicants seeking water rights for community or multiple domestic water supply must state the number of connections they seek to serve. However, as amended by the MWL, if the applicant is a municipal water supplier that has an approved water system plan under Wash. Rev. Code 43.20, or has approval from Health to serve a specific number of connections, the projected number of connections that were stated in the application (or later-issued certificate) will not limit the water right, so long as the number of connections served is consistent with the approved water system plan or other Health approval. Wash. Rev. Code 90.03.260(5) states that applications for municipal supply must state the present population to be served and estimate the municipality's future requirement for water. However, as amended by the MWL, if the municipal water supplier has an approved water system plan under Wash. Rev. Code 43.20, or has Health approval to serve a specific number of connections, the population figures will not limit the population that can be provided water, as long as the water service is consistent with the approved system plan or other Health approval.

4. Changing the Place of Use for a Municipal Water Right

Wash. Rev. Code 90.03.386(2) allows a municipal water right holder to modify the place of use of a water right through the Health-administered water system planning process, rather than having to apply to Ecology for a change in place of use under Wash. Rev. Code 90.03.380 or 90.44.100 (which, among other things, requires a tentative determination of the validity and extent of the water right). *See* Transfer and Change of Water Rights, ch. VII, *supra*. Wash. Rev. Code 90.03.386(2) provides that the "place of use" of a water right for municipal supply purposes is specified as the service area under a Health-approved water system plan or other planning

document provided that the water supplier remains in compliance with its plan and the service area is consistent with certain land use and watershed plans and regulations. Under this provision, when Health approves a municipal water supplier's water system plan, the service area set in the plan supersedes the places of use specified in the supplier's water rights. The supplier does not need to obtain approval of changes in place of use from Ecology for any affected water rights that would be used in the approved service area but outside the place of use specified for the rights in the supplier's certificates and other water rights documents.

Before the municipal supplier may use its water rights throughout the service area, it must satisfy certain conditions related to its water system plan approval. These conditions require consistency with applicable local government plans and development regulations at the time of plan approval, and compliance with the plan during operations. For a municipal water supplier's authorized place of use under its water rights to be changed to coincide with the supplier's service area under Wash. Rev. Code 90.03.386(2): (1) Health must approve a planning or engineering document describing the service area; (2) the supplier must be in compliance with the terms of its water system plan or small water system management program; and (3) the alteration of the place of use cannot be inconsistent with other local planning documents.

5. Changing an Unperfected Municipal Surface Water Right

Another provision of the MWL provides an exception to the general requirement that unperfected surface water rights cannot be changed under Wash. Rev. Code 90.03.380. *See* Transfer and Change of Water Rights, ch. VII, *supra*. Wash. Rev. Code 90.03.570 states that "[a]n unperfected surface water right for municipal water supply purposes or a portion thereof held by a municipal water supplier may be changed and transferred in the same manner as provided by Wash. Rev. Code 90.03.380 for any purpose," if certain conditions specified Wash. Rev. Code 90.03.570(1) or (2) are met. Such conditions include (1) the water right holder being in compliance with an approved water system plan in an area where instream flows have been established by rule, (2) there being a watershed plan with a detailed plan for meeting instream flows, and (3) the flows, or milestones for reaching them, being met.

6. Water Conservation Standards—And Coordination Between Water System and Land Use Planning

Wash. Rev. Code 70A.125.170, which is administered by Health, established new water conservation standards for municipal water suppliers and provides that "[i]t is the intent of the legislature that the department [of health] establish water use efficiency requirements designed to ensure efficient use of water while maintaining water system financial viability, improving affordability of supplies, and enhancing system reliability." This provision prescribes a comprehensive set of requirements regarding "water use efficiency," including conservation planning requirements, system leakage standards, and system reporting requirements. [3] Health has adopted rules in accordance with this section to effectuate its purpose to increase water conservation by municipal suppliers. *See* Wash. Admin. Code 246-290-810 through -840. Similarly, Wash Rev. Code 90.03.386(3) provides that a municipal water supplier "must implement cost-effective water conservation in accordance with the requirements of Wash. Rev. Code 70A.125.170 as part of its approved water system plan," and sets forth certain requirements for conservation-related analyses that must be included in water system plans for municipal suppliers that supply water to one-thousand or more service connections.

Another MWL provision administered by Health, Wash. Rev. Code 43.20.260, requires planning to coordinate water availability with land use planning as a means to accomplish growth management objectives. Under Wash. Rev. Code 43.20.260, when Health approves a water system plan, it is required to ensure that water service to be provided under the plan for any new industrial, commercial, or residential use is consistent with any comprehensive land use plan or development regulations adopted by a city, town, or county that covers the service area. Also, under this provision, a municipal water supplier has a duty to provide retail water service within its retail service area if certain conditions are met, including consistency with local land use comprehensive plans or development regulations. *See* Public Water Supply Law, ch. XII, *infra*, for discussion on the laws administered by Health.

[3] Moreover, three other sections of the MWL include measures that intend to promote water conservation practices. Wash. Rev. Code 90.48.495 requires sewer plans to consider water conservation measures that would reduce flows to sewerage systems. Wash. Rev. Code 90.48.112 and Wash. Rev. Code 90.46.120(3) require wastewater plans and water supply plans to include consideration of opportunities for water reclamation and reuse. The use of reclaimed water (recycled treated wastewater) by municipal suppliers reduces demand for new water.

C. CASES INVOLVING THE MUNICIPAL WATER LAW

Since it became effective in 2003, the MWL has been subject to extensive litigation, which has resulted in several Washington appellate court decisions. The cases have involved challenges to the constitutionality of certain provisions of the MWL, and issues over the interpretation and implementation of several of its provisions.

1. *Lummi Indian Nation v. State*

The first case, *Lummi Indian Nation v. State*, 170 Wash. 2d 247, 241 P.3d 1220 (2010), involved a facial[4] challenge to the constitutionality of eight provisions of the MWL that ultimately reached the Washington Supreme Court. In *Lummi Indian Nation*, several tribes, environmental groups, and citizens contended that Wash. Rev. Code 90.03.015(3) and (4) and 90.03.330(3) violate the constitutional separation of powers. Further, the challengers alleged that those provisions and Wash. Rev. Code 90.03.260(4) and (5), 90.03.386(2), and 90.03.560 violate the right to substantive due process, and that Wash. Rev. Code 90.03.260(4) and (5), 90.03.330(2), and 90.03.386(2) violate the right to procedural due process.

The Supreme Court concluded that all eight provisions of the MWL that were challenged are constitutional on their face and upheld their validity. The Court rejected the challengers' contentions that the new definitions of "municipal water supplier" and "municipal water supply purposes" in Wash. Rev. Code 90.03.015(3) and (4), and the "in good standing" provision in Wash. Rev. Code 90.03.330(3), violate the separation of powers doctrine.[5] The challengers asserted that these provisions have retroactive effect and overruled the Court's earlier decision in *Theodoratus* and therefore interfere with the function of the judicial branch of government. The Court reasoned that the definitions do not contravene a purported holding in *Theodoratus* that private entities are ineligible to hold water rights for municipal supply purposes because they are not municipalities: "[s]ome of the parties have suggested that the court's conclusion that Theodoratus was not a

[4] A "facial" constitutional challenge asserts that a statute is unconstitutional "on its face" without any application of the statute in a specific factual scenario. If the court rules in a facial challenge that the statute is unconstitutional it is invalidated and stricken from the code. In contrast, an "as applied" constitutional challenge asserts that an agency's application of the statute in a specific scenario caused a violation of the Constitution.

[5] The doctrine of separation of powers preserves the constitutional division between the three branches of government and ensures that the activities of one branch do not threaten or invade the prerogatives of another. *Cornelius v. Department of Ecology*, 182 Wash. 2d 574, 589, 344 P.3d 199 (2015). The Legislature violates separation of powers when it applies "the law to an existing set of facts, affect[s] the rights of parties to the court's judgment, . . . interfere[s] with any judicial function," or adjudicates facts. *Lummi Indian Nation,* 170 Wash..2d at 263.

municipality implies a holding that private parties could not be municipal water suppliers. Whether or not private parties could function as municipal water suppliers was not before the court." *Lummi Indian Nation*, 170 Wash. 2d. at 256. n.1. The Court also reasoned that Wash. Rev. Code 90.03.330(3) does not contravene a holding in *Theodoratus* by reinstating and reviving water rights documented by "pumps and pipes" certificates after they were supposedly invalidated by that decision:

> The legislature made no attempt to apply the law to an existing set of facts, affect the rights of parties to the court's judgment [in *Theodoratus*], or interfere with any judicial function. Instead, the legislature allowed those who had planned their property development to rely upon the water rights previously approved by the statutorily authorized administrating agency.

Lummi Nation, 170 Wash .2d at 263.

The Court also rejected the challengers' assertions that those three provisions and Wash. Rev. Code 90.03.560 violate due process by operating retroactively to revive relinquished water rights through the new definitions, and allow expanded water use under municipal water rights documented by "pumps and pipes" certificates, to the detriment of other right holders. The Court reasoned that, because this case involves a facial challenge, "no case has been pleaded or proved where any individual rights holder's reasonable expectation of the enjoyment of water rights has actually been impaired or deprived in violation of due process of law." *Id.* at 267. The Court thus held that these provisions all facially comport with the constitutional right to substantive due process:[6]

> Nothing in these amendments changes the legal status of the group the challengers attempt to represent: junior water right holders who take water subject to the rights of senior rights holders whose status may be improved by these changes. Instead, these amendments confirm what the department has already declared (that certain water rights are in good standing) and statutorily define something that had previously been statutorily undefined (the meaning of municipal water supplier).

[6] Substantive due process is the principle that the Constitution protects fundamental rights from government interference. The Fifth and Fourteenth Amendments to the United States Constitution prohibit the government from depriving any person of "life, liberty, or property without due process of law." The Washington Supreme Court has recognized that "[v]ested water rights cannot be deprived without due process of law." *Lummi Nation*, 170 Wash. 2d at 265.

Lummi Nation, 170 Wash. 2d at 266-67. The Court reasoned that the new definitions resolved ambiguity in the law over who could hold municipal water rights and that they, therefore, did not operate retroactively to exempt certain non-governmental water rights from relinquishment and resurrect water rights that previously had been relinquished to the detriment of other water right holders. Further, the Court disagreed with the challengers' contention that Wash. Rev. Code 90.03.330(3) violates substantive due process by operating retroactively to expand municipal rights documented by "pumps and pipes" certificates by eliminating the beneficial use requirement for perfection of such rights, thus causing increased water use to the detriment of other water right holders. *Id.* at 268-69.

The Court further held that Wash. Rev. Code 90.03.386(2) does not violate the constitutional right to due process. The Court determined that it could not violate substantive due process because it operates only prospectively (and not retroactively). Moreover, the Court rejected the challengers' contention that Wash. Rev. Code 90.03.386(2) violates procedural due process[7] because it eliminated the requirement to file an application with Ecology pursuant to Wash. Rev. Code 90.03.380 or 90.44.100 to seek a change in place of use of a municipal water right and, instead, allows municipal water right holders to change places of use through the water system planning process administered by the Department of Health. The Court was not persuaded by the challengers' argument that the Health-administered process is inadequate because it lacks sufficient notice to the public, and does not include a tentative determination of the validity and extent of the right, and the requirement that the proposed change cannot impair other water rights:

> The challengers contend that this facially violates due process because changes might be approved by the Department of Health or local legislative body without notice or comment to other rights holders.
>
> But, like the due process challenges above, this is not a facial due process defect. Washington law still gives considerable process before any change can be made, and any impact on the rights of others will be at best collateral and indirect.

Id. at 270.

Similarly, the Court held that Wash. Rev. Code 90.03.260(4) and (5) also do not violate due process rights. The Court concluded that these provisions do not violate substantive due

[7] Procedural due process is a constitutional principle that ensures fair procedures before the government can deprive an individual of life, liberty, or property. This principle requires that individuals are given notice and an opportunity to be heard before any governmental action that could adversely affect their rights.

process because they "only apply when an applicant seeks approval for a new permit" and thus only apply prospectively, and did not change the law in a manner that interferes with other water rights: "prior to the 2003 amendments, no provision of the water code that we have found or have had our attention drawn to limited municipal water suppliers to some maximum number of clients." *Id.* at 272. Further, the Court rejected the challengers' contentions that these provisions violate due process because they allow the holder of a municipal water right to increase the number of connections or population they can serve without filing an application for a new water permit, which provides other water right holders with notice and an opportunity to be heard. The Court found no provision in the Water Code treating connections and populations limits in documents for municipal water rights as binding limitations in the first place and noted that Health "has long had the obligation to review and approve water plans to ensure adequacy for a given population." *Id.* at 272.

2. Cornelius v. Department of Ecology

While in *Lummi Nation* the Supreme Court held that all eight sections of the MWL that were challenged are constitutional on their face, that case did not involve any claims that the MWL violated the Constitution "as applied" in a specific factual scenario. The Court noted that "many of the arguments before us might be better raised in an 'as applied' challenge." *Lummi Nation*, 170 Wash. 2d at 258. Several years later, "as applied" constitutional claims ultimately reached the Court in *Cornelius v. Department of Ecology*, 182 Wash. 2d 574, 344 P.3d 199 (2015). In *Cornelius*, two environmental groups and a citizen, Scott Cornelius, challenged Ecology's approval of six applications for changes of water rights for municipal supply purposes held by Washington State University. The University operates a public water system to supply its campus in Pullman and sought changes of points of withdrawal (well locations) under the rights for the purpose of "well consolidation." The University's objective in pursuing well consolidation was to gain flexibility in operating its water system by being allowed to exercise any of the water rights in its portfolio by pumping water from any of its seven wells, including its two newest, deepest, and most productive wells. *Id.* at 582. The challengers contended that allowing well consolidation would allow the University to use more groundwater than could be used if the proposed changes of points of withdrawal were denied and the water rights could only be exercised by pumping water at the original well locations specified for the rights—and that increased groundwater pumping by the University would exacerbate the decline of the Palouse Basin Aquifer. *Id.* at 599.

In their constitutional claims,[8] the challengers asserted that the MWL, as applied by Ecology in its approval of the University's applications, violated the separation of powers and the right to substantive due process. The Supreme Court ruled in favor of Ecology and held that the agency's application of Wash. Rev. Code 90.03.015(4) and 90.03.330(3) in its evaluation of the applications was not unconstitutional. As discussed above, the Court had earlier held in *Lummi Indian Nation* that the challenged MWL provisions were constitutionally sound on their face. The Court rejected the "as applied" constitutional challenge in *Cornelius* on the ground that it was a "thinly veiled facial challenge" that lacked merit for the same reasons why the facial challenge to the MWL had failed in the earlier case. *Cornelius*, 182 Wash. 2d at 590.

The constitutional claims centered on two water right certificates held by the University that stated that the water rights are for "domestic purposes." The challengers alleged that Ecology's and the Pollution Control Hearings Board's retroactive application of the definition of "municipal water supply purposes" to determine that those two water rights are for municipal purposes, and, thus, exempt from relinquishment and valid for change, violated the constitution. The Court held there was no violation of separation of powers because application of the MWL to the University's water rights had not upset the result of any earlier court decision that had determined the validity and extent of the University's rights:

> Here, there are no previously litigated adjudicative facts regarding WSU's past water rights. Accordingly, there is no way that the PCHB violated the separation of powers doctrine by applying the MWL to WSU's certificates—there were no "adjudicative facts" the PCHB could have upset. The PCHB merely applied the MWL definition to WSU in the current adjudication. That is the precise general application of the MWL we found constitutional in *Lummi Indian Nation.*

Id. at 591 (citations omitted). Further, the Court rejected Scott Cornelius's argument that his right to substantive due process as a junior water right holder was violated by retroactive application of the "municipal water supply purposes" definition because it had resurrected those two earlier-relinquished water rights so they would allow additional water use by the University that would cause further decline of the Palouse Basin Aquifer and therefore impair Mr. Cornelius's use of his own groundwater right. The Court reasoned that the definition had not retroactively changed the

[8] In addition to the constitutional issues, *Cornelius* involved other important issues relating to water right change applications that were decided by the Supreme Court. Such issues are discussed in Transfer and Change of Water Rights, ch. VII, *infra*.

law to Mr. Cornelius's detriment because it for the first time defined a term that previously had not been defined in the water statutes. The Court held it was lawful for the municipal definition to be applied retroactively to clarify that the two water rights labeled as being for "domestic purposes" qualified as being rights for municipal purposes that were exempt from relinquishment:

> Here, Ecology merely applied RCW 90.03.560 and RCW 90.03.015 retroactively to WSU to determine that WSU's water rights were valid and met the definition of "municipal water supply purposes." This is precisely the kind of action we found constitutional in *Lummi Indian Nation*.

Id. at 594 (citations omitted).

The *Cornelius* Court also considered an important non-constitutional issue involving interpretation of Wash. Rev. Code 90.03.330(3), which, as discussed above, provides that water rights documented by "pumps and pipes" certificates issued prior to 2003 are "rights in good standing." In evaluating the University's applications for groundwater right changes under Wash. Rev. Code 90.44.100, Ecology was required to perform a tentative determination of the validity and extent of the rights to ascertain whether they were eligible for change. *See* Transfer and Change of Water Rights, ch. VII, *infra*. The challengers contended that Ecology erred in finding that inchoate, never-used water under the University's "pumps and pipes" certificates was valid and eligible for change. The Supreme Court disagreed and held that Ecology acted lawfully in performing its tentative determination and finding that the inchoate water was eligible for change because the University had shown reasonable diligence in putting water to beneficial use. While approximately 60% of the water authorized under the University's water rights remained inchoate, and its water use had not increased during the last several years because of conservation efforts, the Court concluded that the University has exercised reasonable diligence in developing as an educational institution and the inchoate portions of its water rights were therefore eligible for change:

> Here, we find WSU has exercised reasonable diligence. Although in other circumstances failing to use the full extent of one's water rights for decades might not meet the reasonable diligence requirement, here WSU meets the requirement because of its unique situation and development throughout the decades. WSU is a large public institution that has developed new facilities and increased enrollment over the years. It is in the unusual position of being unable to predict or plan its own growth because its budget and enrollment targets are largely controlled by the legislature. Additionally, WSU is not speculating its water rights, and it has not exercised the full extent of its rights at least in part because

> of water conservation measures. Considering these circumstances, taking away WSU's water rights for lack of reasonable diligence would hinder WSU's ability to educate students, and it would essentially punish WSU for taking water conservation measures.

Id. at 602–03.

Notwithstanding the Supreme Court's affirmance of Ecology's treatment of water right change applications in *Cornelius*, the inclusion of the words "in good standing" in Wash. Rev. Code 90.03.330(3) has raised a question whether the inchoate portion of a "pumps and pipes" certificates documenting a water right for municipal supply purposes is deemed to be fully perfected and valid for change even though the water has never been used, or whether there must be a showing of reasonable diligence to develop the project associated with the water right in order for the right to remain valid and eligible for change. In discussing the process for evaluating water right change applications, the Court stated:

> When individuals apply to amend their water rights certificates under RCW 90.44.100, rights represented by system capacity certificates for municipal supply purposes are rights "in good standing," i.e., the rights are deemed perfected, even if they were not actually put to beneficial use. RCW 90.03.330(3). However, although the water need not actually have been put to beneficial use for the rights to remain in good standing, the water rights must still be "prosecuted with reasonable diligence" to remain valid. RCW 90.03.460.[9] What constitutes reasonable diligence depends on the circumstances, including the magnitude of the project, the engineering and physical features to be encountered, and public interests.

Id. at 601–02. The Court's statement that "rights represented by system capacity certificates for municipal supply purposes are rights 'in good standing,' i.e., the rights are deemed perfected, even if they were not actually put to beneficial use" could be read to support a position that such rights are automatically valid for change. However, in elaborating on its use of the word "perfected" in the following sentence, the Court elaborated that while "the water need not actually have been put to beneficial use for the rights to remain in good standing, the water rights must still be 'prosecuted

[9] Wash. Rev. Code 90.03.460 states: "Nothing in this chapter contained shall operate to effect an impairment of any inchoate right to divert and use water while the application of the water in question to a beneficial use is being prosecuted with reasonable diligence, having due regard to the circumstances surrounding the enterprise, including the magnitude of the project for putting the water to a beneficial use and the market for the resulting water right for irrigation or power or other beneficial use, in the locality in question."

with reasonable diligence' to remain valid." This sentence supports the reading that inchoate water under "pumps and pipes" certificates is still subject to the reasonable diligence requirement and is not deemed to be automatically valid and eligible for change.[10]

3. Crown West Realty, LLC v. Pollution Control Hearings Board

The next appellate court decision that included issues relating to the MWL, *Crown West Realty, LLC v. Pollution Control Hearings Board*, 7 Wash. App. 2d 710, 435 P.3d 288 (2019), involved Crown West's appeal of Ecology's decisions to deny four applications to change its water rights. Ecology denied the applications for several reasons, including its determination that the water rights were not valid for change because they did not qualify as being for municipal water supply purposes and, thus, were not exempt from relinquishment stemming from a long period when water use had been reduced under the rights. The *Crown West Realty* decision includes judicial interpretations of the term "municipal water supply purposes" under Wash. Rev. Code 90.03.015(4).

Crown West operates a business and industrial park in Spokane Valley and holds four groundwater rights that state they are for commercial, industrial, and domestic uses. Prior to the industrial park, there was a naval supply depot on the site where water was supplied to personnel who lived in residential structures. However, the residential water use did not continue after the naval facility ceased operation in 1958. Also, water use declined considerably since peak use at the site in the 1970s. Crown West asserted that its water rights qualified as being for municipal purposes under Wash Rev. Code 90.03.015(4)(a) and were therefore exempt from relinquishment notwithstanding the decline in water use because they had been exercised to serve fifteen or more residential connections at the naval facility in the past.[11] The basis of Crown West's assertion was that they provide "residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year" at the industrial park at the present time. Wash. Rev. Code 90.03.015(4)(a).

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[10] The Department of Ecology's current policy on interpretation and application of Wash. Rev. Code 90.03.330(2) and (3) explains that in evaluating an application for change of a water right documented by a "pumps and pipes" certificate, Ecology will tentatively determine the validity and extent of the water right, and may revoke or diminish it to the extent it determines that there has not been "reasonable diligence to complete the original project as described in the water right documents." Water Resources Policy 2030, the Municipal Water Law Interpretive and Policy Statement, Pub. 24-11-100 (Nov. 10, 2024).

[11] The Department of Ecology conceded that use of water at the naval supply depot from 1942 to 1958 would have met the municipal water supply purposes definition. *Crown West*, 7 Wash. App. 2d.at 736-37.

The Court of Appeals upheld Ecology's determination that Crown West's water rights did not qualify as being for municipal water supply purposes. The Court held that, since Wash. Rev. Code 90.03.015(4) states that "'municipal water supply purposes' means a beneficial use of water" for certain types of uses, a water right must be exercised for at least one of those uses to qualify as being for municipal purposes. In reaching this conclusion, the Court stated that "'[b]eneficial use' is a term of art in Washington water law that means an actual use of water, rather than a potential future use. Presumably, this principle applies equally to exclude past use." *Crown West Realty*, 7 Wash. App. 2d at 738 (citing *Theodoratus*, 135 Wash. 2d at 589). Thus, a water right must be exercised consistent with the statutory definition of "municipal water supply purposes" to qualify for the exemption from relinquishment for municipal rights.[12] This means that water use that met the municipal definition in the past (such as by serving fifteen or more residential connections) is not sufficient for the water right to continue to qualify as being for municipal purposes if nonuse of water exceeding five years occurred after that time. *Id.* at 734 ("The law determines relinquishment at the time of the expiration of the five years of nonuse. Events occurring after the five-year statutory period of a water right's nonuse matter none because relinquishment already occurred."). The Court rejected Crown West's assertion that the inclusion of words "claimed for municipal water supply purposes" in the relinquishment exemption under Wash. Rev. Code 90.14.140(2)(d) means that municipal use only must be intended or contemplated (without actually using water in accordance with the definition) in order for the right to qualify as being for municipal purposes. *Id.* at 739–41 ("We doubt the legislature intended a perpetual relinquishment exemption for all water rights when an entity merely contemplated or intended a municipal use, regardless of the actual beneficial uses occurring under the right.").[13]

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[12] If a water right is continually exercised in accordance with the definition and qualifies as being for municipal purposes by, for example serving water to fifteen or more residential connections, then any reduction in water use is excused under the exemption from relinquishment for municipal water rights. *Id*. at 741 ("one could conclude that the municipality need only apply some of its use to a municipal water supply purpose in order to avoid a loss of a portion of the unused right in order to avoid relinquishment.").

[13] Similarly, in *City of Union Gap v. Department of Ecology*, 148 Wash. App 519, 531-32, 195 P.3d 580 (2008), the Court of Appeals held that a water right that was for industrial purposes did not qualify for the exemption from relinquishment for municipal water rights based on the intention of the water right holder to transfer the water right to a city for municipal use. Wash. Rev. Code 90.14.140(2)(d) provides that a water right will not be relinquished "[i]f such right is claimed for municipal water supply purposes under chapter 90.03 RCW." In *City of Union Gap*, the Court concluded that a purported "claim" to exercise the water right for municipal purposes could not trigger the municipal exemption. The Court noted that the term "municipal water supply purposes" under the definition in Wash. Rev. Code 90.03.015(4) "requires a showing of a specific beneficial use." *Id.* at 531.

The Court also rejected Crown West's position that its exercise of the water rights to supply water to businesses in its industrial park met the criterion in Wash. Rev. Code 90.03.015(4)(a) to provide "residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year." Crown West contended that there is residential water use at its industrial park even if people do not stay there overnight because it supplies water to 5,000 to 6,000 employees there who use it "for drinking, cleansing, toileting, and even cooking." *Id.* at 744. The Court disagreed, reasoning that "residential use of water for a nonresidential population" includes water used in a residential setting, but does not include water used in an office, commercial, or industrial setting. The Court concluded that, since workers at the industrial park do not stay there overnight, Crown West's water rights do not qualify as being for municipal purposes because they are not being exercised to supply water for use in a residential setting.[14] *Id.* at 746-49.[15]

[14] The Court of Appeals also rejected Crown West's argument that its water rights qualified as municipal rights under Wash. Rev. Code 90.03.015(4)(c) because they were used to deliver water to a neighboring municipal water supplier through an emergency intertie. Under Wash. Rev. Code 90.03.015(4)(c), municipal water supply purposes include "a beneficial use of water . . . indirectly for [municipal purposes] through the delivery of treated or raw water to a public water system for such use." In rejecting Crown West's argument, the Court reasoned that the statutory language assumes actual delivery of water to a public water system and that water is put to beneficial use. *Crown West,* 7 Wash. App. 2d. at 753. Because Crown West had not delivered water for municipal purposes through the emergency intertie, the Court concluded that the water rights are not for municipal supply purposes.

[15] The next case involving the MWL that reached an appellate court was *Burbank Irrigation District #4 v. Department of Ecology*, 27 Wash. App. 2d 760, 534 P.3d 833 (2023), which was an appeal of Ecology's decision to deny a water right change application filed by an irrigation district that supplies water to the Town of Burbank. The application sought approval to transfer part of a water right held by the district to the City of Pasco for use in its public water system. Ecology denied the application for several reasons, including its determination that inchoate water under a water right documented by a "pumps and pipes" certificates was not valid and eligible for change. However, the decision by the Court of Appeals only reached an issue that did not involve any provision of the MWL: whether approval of the proposed change and transfer would cause an unlawful enlargement of the water right. *See* Transfer and Change of Water Rights, ch. VII, *supra*.

IX.

COLUMBIA RIVER BASIN WATER MANAGEMENT

A. INTRODUCTION

Because of its scale and complexity, the Columbia River Basin poses numerous challenges for management of its vast water resources. Among other things, there is a treaty between the United States and Canada relating to management of the river's water, and the federal government operates a large project for the production of hydropower from the river. The fisheries of the Columbia River are now estimated at less than 10% of their historic levels, and thirteen salmon and steelhead populations have been listed as threatened or endangered under the federal Endangered Species Act. As the Department of Ecology notes in one of its rules for management of water in the Columbia River Basin:

> The Columbia River is an international as well as an interstate river with its waters subject to laws of seven western states, the Province of British Columbia, Canada and the federal governments of the United States and Canada. The flows and levels of the river are in a state of continuous change through the operation of numerous federally owned or federally licensed dams located within the river. The waters of the Columbia River are operated to support extensive irrigation development, inland navigation, municipal and industrial uses, and hydroelectric power development. Among all these uses, the anadromous fisheries of the Columbia River, which are dependent on clean flowing water, require for their survival the establishment of minimum flows of water and special actions by all agencies sharing in the management of the Columbia River.

Wash. Admin. Code 173-563-010.

To address water resources issues in the Columbia River Basin, the Columbia River Initiative (CRI) was established in 2001. The CRI involved a planning group with numerous stakeholders that was convened to determine the impacts of water diversions on streamflow and fish populations in the Columbia River, and to develop rules governing the issuance of future water right permits. This effort resulted in development of the Columbia River Water Management Program in 2006. A memorandum of understanding between the State of Washington, the United States Bureau of Reclamation and the East Columbia Basin Irrigation District, South Columbia Basin Irrigation District, and Quincy Columbia Basin Irrigation District, along with an agreement in principal between Washington and the Confederated Tribes of the Colville Reservation, provided the bases for creation of the Columbia River Water Management Program. This program

is intended to develop and implement projects to meet current and future needs for water from the Columbia River and its tributaries.

This chapter will describe the state law relating to the Columbia River Management Program, and other laws that govern and affect water rights and the management of water in the Columbia River Basin. This chapter will also describe rules adopted by the Department of Ecology that relate to the Columbia River, and its Office of Columbia River. In addition, this chapter will discuss the Yakima River Basin Integrated Plan.

B. THE COLUMBIA RIVER BASIN WATER SUPPLY LAW

In 2006, the Washington Legislature enacted Wash. Rev. Code 90.90, which governs the management of water from the Columbia River and authorized Ecology to implement the Columbia River Water Management Program. Wash. Rev. Code 90.90.005, which provides the legislative finding for this law, states: "[t]he legislature finds that a key priority of water resource management in the Columbia river basin is the development of new water supplies that includes storage and conservation in order to meet the economic and community development needs of people and the instream flow needs of fish." Further, it "declares that a Columbia river basin water supply development program is needed, and directs the department of ecology to aggressively pursue the development of water supplies to benefit both instream and out-of-stream uses."

The law includes provisions that established accounts in the state treasury for implementation of the Columbia River Water Management Program, which receive funding from appropriations made by the Legislature, and other sources. Wash. Rev. Code 90.90.010 created the "Columbia river basin water supply development account" which may receive legislative appropriations and funds from other sources, and is intended to fund projects using tax exempt bonds. Expenditures from this account "may be used to assess, plan, and develop new storage, improve or alter operations of existing storage facilities, implement conservation projects, develop pump exchanges, or any other actions designed to provide access to new water supplies within the Columbia river basin for both instream and out-of-stream uses." Wash. Rev. Code 90.90.010(2)(a). Two-thirds of the funds in this account shall be used to support the development of new storage facilities and pump exchanges, and the other one-third shall be used for other purposes, including the maintenance or enhancement of instream flows. Wash. Rev. Code 90.90.010(2)(b). "Net water savings achieved through conservation measures funded by the account" shall be placed in the State Water Right Trust Program to support instream flows "in proportion to the state funding

provided to implement a project." Wash. Rev. Code 90.90.010(4). Ecology "may enter into water service contracts with applicants receiving water from the program to recover all or a portion of the cost of developing the water supply," and "may deny an application if the applicant does not enter into a water service contract." Wash. Rev. Code 90.90.010(6). Thus, Ecology is authorized to recover costs for the development of water supply projects from water users who benefit from them.

Additionally, Wash. Rev. Code 90.90.090 created the "Columbia river basin taxable bond water supply development account," which is subject to requirements that are similar to those that are applicable to the account established by Wash. Rev. Code 90.90.010 to fund projects through tax exempt bonds. Further, Wash. Rev. Code 90.90.100 created the "Columbia river basin water supply revenue recovery account," which receives funds from cost recovery from water users who benefit from projects, and other sources, and also is subject to requirements similar to those in Wash. Rev. Code 90.90.010.

Wash. Rev. Code 90.90.020 governs the allocation and development of water supplies gained through the development of new storage facilities made possible with funding from the Columbia River accounts. "Two-thirds of active storage shall be available for appropriation for out-of-stream uses," and "[o]ne-third of active storage shall be available to augment instream flows and shall be managed by the department of ecology. The timing of releases of this water shall be determined by the department of ecology, in cooperation with the department of fish and wildlife and fisheries comanagers, to maximize benefits to salmon and steelhead populations." Wash. Rev. Code 90.90.020(1)(a). Water developed to offset out-of-stream uses and for instream flows is deemed adequate mitigation for the issuance of new water rights based on water supply gained through the storage projects. Wash. Rev. Code 90.90.020(2). Ecology is directed to focus its efforts to develop water supplies to meet the following needs: alternatives to groundwater for agricultural irrigation water users in the Odessa Subarea; sources of water supply for pending water right permit applications; a new uninterruptible supply of water for the holders of interruptible rights on the Columbia mainstem that are curtailed when minimum flows required by rule are forecast to be unmet; and "[n]ew municipal, domestic, industrial, and irrigation water needs within the Columbia river basin." Wash. Rev. Code 90.90.020(3).

The law requires Ecology to provide reports with forecasts on water supply and demand in the Columbia River Basin, and to establish and maintain a water resources information system for

the area. Under Wash. Rev. Code 90.90.040(1), "[t]o support the development of new water supplies in the Columbia river and to protect instream flow, the department of ecology shall work with all interested parties, including interested county legislative authorities and watershed planning groups in the Columbia river basin, and affected tribal governments, to develop a Columbia river water supply inventory and a long-term water supply and demand forecast." The inventory must list conservation projects that have been implemented and the amount of water conservation they have achieved, and a list of potential water supply and storage projects in the basin with their estimated costs and benefits. Wash. Rev. Code 90.90.040(1)(a)–(b). Ecology is required to update the inventory annually, and update the supply and demand forecast every five years. Wash. Rev. Code 90.90.040(2)-(3). Under Wash. Rev. Code 90.90.050(1), "to better understand current water use and instream flows in the Columbia river mainstem, the department of ecology shall establish and maintain a Columbia river mainstem water resources information system that provides the information necessary for effective mainstem water resource planning and management." Such information must include the total aggregate quantity of water rights issued under state permits and certificates, and claimed through statements of water rights claims, and the total aggregate volume of current water use under those rights as metered and reported by water users. Wash. Rev. Code 90.90.050(2). Ecology is required to maintain the system on its website and periodically update its data. Wash. Rev. Code 90.90.050(3).

The Columbia River law includes provisions related to certain specific areas and projects in the Columbia River Basin. Wash. Rev. Code 90.90.060,.070, and .080 relate to the Lake Roosevelt Incremental Storage Releases Program. This is a project that generates additional water supply for irrigation and municipal uses by implementing additional releases of water from storage in Lake Roosevelt through the United States Bureau of Reclamation's operation of its Columbia Basin Project:

> These new releases of Lake Roosevelt water of approximately eighty-two thousand five hundred acre feet of water, increasing to no more than one hundred thirty-two thousand five hundred acre feet of water in drought years, will bolster the state economy and will meet the following critical needs: New surface water supplies for farmers to replace the use of diminishing groundwater in the Odessa aquifer; new water supplies for municipalities with pending water right applications; enhanced certainty for agricultural water users with water rights that are interruptible during times of drought; and water to increase flows in the river when salmon need it most.

Wash. Rev. Code 90.90.060(3). Wash. Rev. Code 90.90.070 created an account related to this project and directs the state treasurer to make payments to the Confederated Tribes of the Colville Reservation and the Spokane Tribe of Indians. The purpose of the payments is for the state to "share a portion of the benefits derived from Lake Roosevelt water releases and to mitigate for any impacts such releases may have upon the tribes." Wash. Rev. Code 90.90.060(2).

Wash. Rev. Code 90.90.110 relates to the project that generates additional water supply through the reoperation of Sullivan Lake in Pend Oreille County, and requires that "[t]wo-thirds of the water made available through reoperation of Sullivan lake funded from the Columbia river basin water supply development account . . . must be used to supply or offset out-of-stream uses . . . in Douglas, Ferry, Lincoln, Okanogan, Pend Oreille, and Stevens counties. At least one-half of this quantity must be made available for municipal, domestic, and industrial uses." This provision ensures that counties in northeast Washington are benefited by the Sullivan Lake Project.

Wash. Rev. Code 90.90.120, which was added to the law through a legislative amendment in 2023, relates to the Walla Walla Water 2050 Plan, which is a comprehensive plan for management of water resources in the Walla Walla River Basin. Through this enactment, the Legislature authorized the Walla Walla Water 2050 initiative, which is an effort to improve stream flows and water supplies in the basin over several decades. The plan "must be used as an integrated water resource strategy, through a coordinated effort between the states of Washington and Oregon, affected federally recognized tribes, affected federal, state, and local agencies, and agricultural, environmental, business, and other community stakeholders," and in developing water supplies, Ecology "should employ an integrated water resource management strategy that will provide concurrent water supply benefits to both instream and out-of-stream uses and address a variety of water resource and ecosystem challenges affecting fish passage, habitat functions, and agricultural, municipal, industrial, and domestic water supply." Wash. Rev. Code 90.90.120(1)–(2). Under Wash. Rev. Code 90.90.120(7), Ecology "is authorized to fund the development, construction, and implementation of projects to implement the Walla Walla water 2050 plan that may be located outside of the state, provided that the projects benefit instream and out-of-stream water demands in the state." Thus, Ecology can provide funding for water storage or other projects located in Oregon that will provide benefits in Washington. Further, under Wash. Rev. Code 90.90.120(9), Ecology is authorized "to designate water supplies developed under this section for instream flow purposes and placed into the trust water rights program authorized under chapter 90.42 Wash. Rev.

Code. Water supplies developed under this section that are designated for instream flow purposes are unavailable to satisfy existing water rights, including water rights with superior priority." Thus, water for instream flows that is generated through projects implemented under this law, including those involving Oregon water rights, are placed into the State Trust Water Rights Program and the water will be unavailable for use even by holders of water rights with senior priority dates. Water supplies developed under the law must be apportioned between the states consistent with any written agreements with the state of Oregon and the Confederated Tribes of the Umatilla Indian Reservation, and there is legislative intent for the state to share in the cost to implement the plan "with at least one-half of the total costs to finance the implementation of the Walla Walla water 2050 plan funded through federal, private, and other nonstate sources, including private funding sources from entities that benefit from projects. This section applies to the total costs of the Walla Walla water 2050 plan and not to individual projects within the plan and includes funding for projects that have been completed prior to July 23, 2023." Wash. Rev. Code 90.90.120(8), (11).

C. THE OFFICE OF THE COLUMBIA RIVER

The Department of Ecology formed the Office of Columbia River (OCR) in 2008 to implement the Columbia River Basin Water Management Program. OCR is the unit within Ecology that administers the Columbia River Basin Water Management Program. OCR plans and implements water supply projects and carries out other responsibilities it is charged with under Wash. Rev. Code 90.90, including managing funding from the state capital budget appropriated by the Legislature for specific water supply projects, providing reports with forecasts on water supply and demand in the Columbia River Basin, and maintaining a water resources information system for the basin.

OCR's website explains that:

> Our Columbia River Water Management Program seeks to meet current and future water needs along the Columbia River and its tributaries. We're charged with "aggressively pursuing" water solutions that concurrently meet water needs for families, industry, and farms (out-of-stream), and ecosystems and fish (instream). We're working to resolve conflicts over water and provide water security in the face of drought and changing climate.

https://ecology.wa.gov/About-us/Who-we-are/Our-Programs/Office-of-Columbia-River (last visited June 26, 2025). Also, OCR's website explains that it implements "projects to meet current and future water needs in the Columbia River Basin. By ensuring the region is prepared to respond

to droughts, our work supports growing communities, the agricultural economy, endangered fish, and the natural environment. Sustainable solutions in our watersheds are critical to securing a healthy planet for future generations." *Id.*

Projects advanced by OCR, in collaboration with other entities, including the United States Bureau of Reclamation, include the Lake Roosevelt Incremental Storage Releases Program, the Sullivan Lake Project, the Odessa Groundwater Replacement Program, and the project for creation of a groundwater area in the Pasco Basin based on return flow and seepage water from the Columbia Basin Project.[1] In addition, OCR conducts Ecology's efforts in implementing the Yakima River Basin Integrated Plan, which is discussed below.

D. OTHER LAWS AFFECTING COLUMBIA RIVER WATER RIGHTS

In addition to the Columbia River Basin Water Supply law, there are other statutes that uniquely affect water rights and water management in the Columbia River Basin. Wash. Rev. Code 90.40, which is titled as "Water Rights of the United States," authorized the United States to reserve waters for appropriation in Washington for the purpose of developing federal water projects in the state. Under federal law, the United States is required to obtain state water rights and comply with state water law to develop and operate water supply projects. 43 U.S.C. § 383; *Department of Ecology v. Acquavella*, 131 Wash. 2d. 746, 750, 935 P.2d 595 (1997). The reservations of water made under Wash. Rev. Code 90.40 provide certainty to the United States Bureau of Reclamation that it would obtain adequate state water rights authorizing the use of water that would be made available for its the development of water supply projects in Washington. This facilitated the development of the Columbia Basin Project, a massive water storage project that includes Grand Coulee Dam and Lake Roosevelt, and currently supplies irrigation water for over 670,000 acres of land in central and eastern Washington. *See Department of Ecology v. U.S. Bureau of Reclamation,* 118 Wash. 2d 761, 827 P.2d 275 (1992).

A provision in the Water Code that was added through a 2024 legislative amendment allows the Bureau of Reclamation to increase the maximum numbers of acres that can be irrigated under its water rights for the Columbia Basin Project without having to meet the requirement to not increase the "annual consumptive quantity" (ACQ) of water that can be used through such water

[1] A comprehensive listing of OCR's projects can be found in Ecology's website at https://waecy.maps.arcgis.com/apps/MapSeries/index.html?appid=5eddde7e2e5742ec8a858e92fb011f90 (last visited June 26, 2025).

right changes. *See* Transfer and Change of Water Rights, ch. 7, *supra*. Wash. Rev. Code 90.03.380(1)(b) states:

> For water rights held by the United States bureau of reclamation for water use within the boundaries of the Columbia Basin project, the bureau . . . may apply for and obtain approval for a change in the number of acres that may be irrigated with such water rights, so long as such a change does not result in any increase in the instantaneous or annual out-of-stream authorized quantity of such rights and so long as the department determines that such a change would not result in an impairment of any other water rights. The provisions of (a) of this subsection [which requires that a water right change application seeking to add irrigated acreage cannot be approved if it would result in an increase in ACQ] do not apply to a change application filed pursuant to this subsection (1)(b).

This provision exempts applications for changes of Columbia Basin Project water rights from having to meet the ACQ test in Wash. Rev. Code 90.03.380(1)(c), which provides that "'annual consumptive quantity' means the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right." This provision makes it more feasible for the United States to supply water to increased acreage in the Columbia Basin Project through water conservation efforts by farmers and the filing of applications for changes of its existing water rights, without having to apply for new water right permits to increase its authorized maximum annual and instantaneous water quantities.

Under Wash. Rev. Code 89.12.170:

> The department of ecology is authorized to enter into agreements with the United States for the allocation of groundwaters that exist as a result of the Columbia Basin project. Such agreements will be used for purposes of allocating that groundwater and shall not require compliance with the procedures set forth in RCW 90.44.130 for declarations of claims of ownership of artificially stored groundwater within a groundwater area or subarea. Before entering into an agreement with the United States for the allocation of groundwaters that exist as a result of the Columbia Basin project, the department of ecology shall first establish a groundwater area or subarea under the procedure provided in RCW 90.44.130.

This statute allows Ecology to enter into an agreement with the Bureau of Reclamation for the allocation of groundwater that exists in the Columbia River Basin because it stems from return flow and seepage water from the Columbia Basin Project, after Ecology establishes a groundwater area associated with artificially stored groundwater under Wash. Rev. Code 90.44.130. This

provision streamlines the process for developing projects that can allocate groundwater that only exists as a result of the Columbia Basin Project.

Wash. Rev. Code 90.44.510 and 90.44.550 are provisions in the Groundwater Code that relate to water use in the Odessa groundwater subarea, where there has been a decline in the aquifer, and OCR and other entities are implementing the Odessa Groundwater Replacement Program to provide increased surface water supply from the Columbia Basin Project to farmers and replace groundwater pumping in the area. Wash. Rev. Code 90.44.510 states:

> The department shall issue a superseding water right permit or certificate for a groundwater right where the source of water is an aquifer for which the department adopts rules establishing a groundwater 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 project as a standby or reserve right that may be used when water delivered by the federal project is curtailed or otherwise not available. . . . The total number of acres irrigated by the person under the groundwater right and through the use of water delivered from the federal project must not exceed the quantity of water authorized by the federal bureau of reclamation and number of acres irrigated under the person's water right permit or certificate for the use of water from the aquifer.

Under this provision, a groundwater right holder in the Odessa Subarea who converts to surface water supply receives a superseding permit or certificate from Ecology that replaces their existing permit or certificate and indicates that the groundwater right is a standby right that can only be exercised when surface water from the Columbia Basin Project is unavailable. Further, the total number of acres that can be irrigated under the water user's standby groundwater right and the Bureau of Reclamation's surface water rights for the Columbia Basin project cannot exceed the number of acres authorized under the groundwater right. This assures that there will not be "doubling up" of water rights that could increase water use and exacerbate the decline of the Odessa Aquifer and also indicates that the Odessa Groundwater Replacement Project is not intended to increase irrigated acreage in the Odessa Subarea (which also could compromise efforts to arrest the aquifer's decline).

Wash. Rev. Code 90.44.550, created an exception from relinquishment for groundwater rights in the Odessa Subarea when water is not used under such rights: "In order to encourage more efficient use of water. . . [a]ny period of nonuse of a right to withdraw groundwater from the aquifer is deemed to be involuntary due to a drought or low flow period under RCW 90.14.140(2)(b)."

Wash. Rev. Code 90.44.550(1). Such "unused water is deemed a standby or reserve water supply that may again be used after the period of nonuse" if certain conditions are met. *Id.* Water right holders who want to be eligible for this exception from relinquishment are required to provide notice to Ecology. Wash. Rev. Code 90.44.550(2). Further, portions of water rights that go unused and are protected from relinquishment under this provision may not be transferred to an area outside of the Odessa Subarea. Wash. Rev. Code 90.44.550(5).

E. RULES AFFECTING COLUMBIA RIVER WATER RIGHTS

In addition to the statutes discussed above, Ecology has adopted rules that govern the management of water resources in the Columbia River Basin. Wash. Admin. Code 173-563 established the instream resources protection program for the main stem Columbia River, which includes "any groundwater the withdrawal of which is determined by the department of ecology to have a significant and direct impact on the surface waters of the main stem Columbia River." Wash. Admin. Code 173-563-020(1). This rule, which set minimum instream flow requirements for the Columbia River, was adopted in 1980. Subsequent to its adoption of the instream flow rule, Ecology issued approximately 330 permits for water rights from the Columbia River. These rights are interruptible during periods when the minimum flow requirements are not met, in order to retain water in the river.[2]

In 1993, in response to the listings of threatened or endangered salmon species under the federal Endangered Species Act, Ecology adopted Wash. Admin. Code 173-563-015, which established a moratorium on the issuance of new permits for water from the Columbia River. The intention behind the moratorium was to obtain sufficient information to determine whether sufficient water is available to approve any permit applications so that sound water allocation decisions could be made in the future. The moratorium regulation was set to expire on June 30, 1994, unless it was amended before that date, and Ecology acted to extend it until 1999. In 1997, the Legislature enacted Engrossed Substitute House Bill 1110, which stated that "WAC 173-563-015 as it existed prior to the effective date of this section . . . is void." E.S.H.B. 1110, 55th Leg.,

[2] The minimum average weekly flows that are required to remain in the Columbia River under Wash. Admin. Code 173-563-040 and 173-563-052 are equivalent to a flow of 52 million acre-feet at the Dalles Dam during the period from April through September each year. Wash. Admin. Code 173-563-100(1). The last year that the minimum instream flows required under Wash. Admin. Code 173-563-040 were not met was 2001. Under Wash. Rev. Code 90.90.020(3)(c), as part of the Columbia River Water Management Program, Ecology is directed to develop water supply for "[a] new uninterruptible supply of water for the holders of interruptible water rights on the Columbia river mainstem that are subject to instream flows or other mitigation conditions to protect stream flows."

Reg. Sess. 1997. This law eliminated the Columbia River moratorium, and, subsequent to its enactment, the Governor directed Ecology to amend the Columbia River water allocation rule and announced that no permits would be approved until Ecology amended the rule to modify its standards for water allocation.

In 1998, Ecology adopted a new rule that amended the 1980 rule to address instream flow needs for fish populations in the Columbia River that are listed under the Endangered Species Act. This amendment provides that the minimum instream flows established in the 1980 rule do not apply to any applications for permits for water from the Columbia River that are decided on by Ecology after July 27, 1997, and any water rights that are approved in association with such applications:

> The instream flows established and implemented by this chapter for instream and out-of-stream uses, and the average weekly flows applied by this chapter to out-of-stream uses do not apply to any application for water from the main stem Columbia River on which a decision is made by the department of ecology on or after July 27, 1997. Any water right application considered for approval or denial after that date will be evaluated for possible impacts on fish and existing water rights. The department will consult with appropriate local, state, and federal agencies and Indian tribes in making this evaluation. Any permit which is then approved for the use of such waters will be, if deemed necessary, subjected to instream flow protection or mitigation conditions determined on a case-by-case basis through the evaluation conducted with the agencies and tribes.

Wash. Admin. Code 173-563-020(4). While applications processed after 1997 are not subject to the minimum flow requirements, they are subject to instream flow protection or mitigation conditions based on case-by-case evaluations of possible impacts to fish and existing water rights that would be caused by the proposed water uses. And Ecology is required to "consult with appropriate local, state, and federal agencies and Indian tribes in making this evaluation."[3] *Id.* The 1997 rule amendment, however, had no effect on the Columbia River permit applications that Ecology approved prior to 1997, so they continue to have conditions requiring that water use is curtailed when the minimum instream flows are not met. Wash. Admin. Code 173-563-100. In

[3] In its unpublished opinion in *Kennewick Public Hospital District v. Pollution Control Hearings Board*, 126 Wash. App. 1030, 2005 WL 697224 (2005), the Court of Appeals overturned decisions by Ecology approving five applications for permits for Columbia River water based on inadequate consultation with the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, and the Nez Perce Tribe because Ecology consulted with the Columbia River Intertribal Fish Commission (which provides technical and legal support to Tribes) instead of directly with those tribes themselves. While this decision is instructive on the rule's consultation requirement, an unpublished appellate court decision has no precedential value.

2001, the Columbia River experienced its first drought since the instream flow rule was adopted, which resulted in curtailment of the use of water by holders of water rights with those conditions.

Additionally, another Ecology rule, Wash. Admin. Code 173-531A, governs the management of water resources in the John Day-McNary Pools Reach of the Columbia River. This rule created a reservation of water for future irrigation use and a reservation for future municipal use of water from the John Day-McNary Pools Reach. However, development of uses of water from those reservations was required to be completed by 2020. Wash. Admin. Code 173-531A-040(1); Wash. Admin. Code 173-531A-050(1). Further, any permit applications evaluated after 1997 are subject to the same process that is required in the rule for the main stem Columbia River:

> Any application for waters reserved under WAC 173-531A-040 or 173-531A-050 which is considered for approval or denial after July 27, 1997, will be evaluated for possible impacts on fish and existing water rights. The department will consult with appropriate local, state, and federal agencies and Indian tribes in making this evaluation. Any permit which is then approved for the use of such waters will be, if deemed necessary, subjected to instream flow protection or mitigation conditions determined on a case-by-case basis through the evaluation conducted with the agencies and tribes.

Wash. Admin. Code 173-531A-060.

F. THE YAKIMA RIVER BASIN INTEGRATED PLAN

The Yakima River Basin Integrated Plan (Integrated Plan) is a comprehensive effort to find collaborative solutions to stabilize water supplies for future generations in the Yakima River Basin, an area of critical importance in Washington. The Yakima River Basin is home to a multi-billion dollar agricultural industry and is also an important fish-bearing region. The United States Bureau of Reclamation's Yakima Basin Project, which includes several reservoirs and other infrastructure, supplies irrigation water to over 400,000 acres of land in the basin. Further, the basin was the subject of a general adjudication of water rights that determined the validity and extent of all rights to surface water from the Yakima River and its tributaries. *See Department of Ecology v. Acquavella*, 198 Wash. 2d 687, 498 P.3d 911 (2021) (*Acquavella VI*).

The United States Congress has enacted several laws to promote enhancement of water supplies in the Yakima River Basin, and the Bureau of Reclamation completed a study of ways to provide needed waters through improvements of the Yakima Basin Project. This study led to development of the Integrated Plan for improving water supply, habitat, and streamflow conditions, and addressing challenges caused by climate change in the Yakima River Basin. The

Integrated Plan addresses seven elements: fish passage; fish habitat enhancement; modifying existing irrigation structures and operations; surface water storage; water market-based reallocation (water banks); groundwater storage; and enhanced water conservation. Implementation of the Integrated Plan involves a coalition of state, federal, Tribal, and local partners.

In 2013, the Legislature passed a bill that amended Wash. Rev. Code 90.38, to authorize the Department of Ecology to implement the state's role in carrying out the Integrated Plan:

> The department is authorized to implement the integrated water resource management plan in the Yakima river basin, through a coordinated effort of affected federal, state, and local agencies and resources, to develop water supply solutions that provide concurrent benefits to both instream and out-of-stream uses, and to address a variety of water resource and ecosystem problems affecting fish passage, habitat functions, and agricultural, municipal, and domestic water supply in the Yakima river basin, consistent with the integrated plan.

Wash. Rev. Code 90.38.060.

The law defines the Integrated Plan as "the Yakima river basin integrated water resource management plan developed through a consensus-based approach by a diverse work group of representatives of the Yakama Nation, federal, state, county, and city governments, environmental organizations, and irrigation districts, which is to be implemented consistent with congressional Yakima river basin water enhancement project enactments. . . ." Wash. Rev. Code 90.38.010(2). The legislative purpose of the law is to "[i]mprove the ability of the state to work with the United States and various water users of the Yakima river basin in a program designed to satisfy both existing rights, and other presently unmet as well as future needs of the basin," and to "[e]stablish legislative intent to promote timely and effective implementation of the integrated plan in the Yakima river basin, and to promote the aggressive pursuit of water supply solutions that provide concurrent benefits to both instream and out-of-stream uses in the Yakima river basin as rapidly as possible." Wash. Rev. Code 90.38.005(2).

Wash. Rev. Code 90.38.070(1) created the "Yakima integrated plan implementation account" in the state treasury, which may receive legislative appropriations and funds from other sources and is intended to fund projects using tax exempt bonds. Expenditures from this account "may be used to assess, plan, and develop projects under the Yakima river basin integrated water resource management plan or for any other actions designed to provide access to new water supplies within the Yakima river basin for both instream and out-of-stream uses, consistent with

the integrated plan. . . .” Wash. Rev. Code 90.38.070(2). Ecology “may enter into water service contracts with applicants receiving water from the program to recover all or a portion of the cost of developing water supplies made possible with funding from the account created in this section,” and “may deny an application if the applicant does not enter into a water service contract.” Wash. Rev. Code 90.38.070(4). Thus, Ecology is authorized to recover costs for the development of water supply projects from water users who benefit from them.

Additionally, Wash. Rev. Code 90.38.080 created the “Yakima integrated plan implementation taxable bond account,” which is subject to requirements that are similar to those that are applicable to the account established by Wash. Rev. Code 90.38.070 to fund projects through tax exempt bonds. Further, Wash. Rev. Code 90.38.090 created the “Yakima integrated plan implementation revenue recovery account,” which receives funds from cost recovery from water users who benefit from projects, and other sources, and is also subject to requirements similar to those in Wash. Rev. Code 90.38.070.

The Department of Ecology’s Office of Columbia River conducts Ecology’s efforts in implementing the Integrated Plan and addressing its seven elements. OCR works in cooperation with the United States Bureau of Reclamation, the Yakama Nation, farmers, cities, counties, and environmental interests to implement projects to achieve integrated water solutions in the Yakama River Basin. Such projects include the Teanaway Community Forest (which involved the state’s purchase of 50,241 acres of land to protect a vital portion of the Yakima River Basin watershed), the project to raise the level of Lake Cle Elum by three feet to increase water storage, the project to improve fish passage at Lake Cle Elum, and the project to develop the Kachess Drought Relief Pumping Plant that would access water stored in Lake Kachess to meet water needs for irrigation during drought periods.[4]

[4] A listing of OCR’s Yakima River Basin Integrated Plan projects can be found in Ecology’s website at https://waecy.maps.arcgis.com/apps/MapSeries/index.html?appid=5eddde7e2e5742ec8a858e92fb011f90 (last visited June 26, 2025).

X.

THE INTERACTION BETWEEN LAND USE REGULATION AND WATER RESOURCES MANAGEMENT: THE STREAMFLOW RESTORATION ACT

In Washington, the interrelationship between land use planning and permitting laws administered by local governments and the laws governing water rights and the management of water resources administered by the Department of Ecology has become increasingly important and challenging. The availability of water supply has always been a factor in both land use planning and permitting activities. However, as new water supplies have become less available to serve new development throughout the state, the tension between these two areas of law and policy has increased.

A. LAND USE PLANNING AND PERMITTING FOR PROJECTS RELIANT ON PERMIT-EXEMPT GROUNDWATER USE FOR WATER SUPPLY

Issues relating to permit-exempt groundwater use have arisen in the context of land use laws requiring showings that there is adequate water supply available to serve proposed development projects. A provision in the law governing subdivisions of land, Wash. Rev. Code 58.17.110, requires counties and other local governments to determine that "appropriate provisions are made for . . . potable water supplies" before they can approve applications for subdivisions. Similarly, a provision in the law governing the issuance of building permits, Wash. Rev. Code 19.27.097, provides:

> Each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply.

Wash. Rev. Code 19.27.097(1)(a).

The tension between the land use laws and the water resources laws is reflected in several Washington appellate court decisions. In *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wash. 2d 144, 256 P.3d 1193 (2011), the Washington Supreme Court considered a challenge to development regulations issued by Kittitas County pursuant to the

Growth Management Act (GMA). The case was commenced by the filing of an appeal of the County's regulations to the Growth Management Hearings Board by several conservation organizations. This case considered the scope of a local government's obligations and authority when it reviews applications for proposed developments that seek to supply water to homes through permit-exempt groundwater wells under Wash. Rev. Code 90.44.050.

The Board ruled that the regulations violated the GMA because they allowed the filing of multiple applications for separate subdivision projects with common ownership or a common scheme of development. The Board reasoned that provisions in the GMA requiring protection of water resources,[1] and Wash. Rev. Code 58.17.110, were violated because the County failed to require either that a single application for land division be filed for a common development, or that multiple applications include sufficient information, to better enable the County to determine whether a project could qualify for a groundwater permit exemption for group domestic use under Wash. Rev. Code 90.44.050 and the Supreme Court's decision in *Department of Ecology v. Campbell & Gwinn*, *LLC*, 146 Wash. 2d 1, 43 P.3d 4 (2002). *Kittitas County*, 172 Wash. 2d at 175-77; *see* The Water Codes: Groundwater, ch. V § C.3(b), *supra*, for discussion of the *Campbell & Gwinn* decision).

The Supreme Court affirmed the Board's decision and held that local governments have responsibilities and obligations under the GMA and other land use laws to protect water resources, and that they are not preempted from taking actions that affect the use of water by Ecology's authority under the state water resources statutes. The Court concluded that "the County is not precluded and, in fact, is required to plan for the protection of water resources in its land use planning." *Kittitas County*, 172 Wash. 2d at 179. The Court ruled that the County's regulations failed to comply with the GMA because they did not adequately protect water resources:

> Without a requirement that multiple subdivision applications of commonly owned property be considered together, the County cannot meet the statutory requirement that it assure appropriate provisions are made for potable water supplies. Instead, nondisclosure of common ownership information allows subdivision applicants to submit that appropriate provisions are made for potable water through exempt wells

[1] Wash. Rev. Code 36.70A.020(10) (GMA goal to protect the "availability of water"); Wash. Rev. Code 36.70A.070(1) (requiring that land use elements in comprehensive plans "shall provide for the protection of the quality and quantity of groundwater used for public water supplies"); Wash. Rev. Code 36.70A.070(5)(c)(iv) (requiring that rural elements in plans include measures protecting surface and groundwater resources).

> that are in fact inappropriate under *Campbell & Gwinn* when considered as part of a development, absent a permit.

Id. at 180. Further, the Court concluded that in implementing Wash. Rev. Code 58.17.110 and Wash. Rev. Code 19.27.097, counties must ascertain that water is *legally* available, and not just *physically or factually* available, before they can approve applications for subdivisions and building permits. The Court rejected the County's position that it was only required to ascertain that water is physically available, e.g., through hydrogeological data showing that a well could successfully yield water, to determine that there is an appropriate provision for potable water supply to approve a subdivision under Wash. Rev. Code 58.17.110:

> To interpret the County's role under RCW 58.17.110 to only require the County to assure water is physically underground effectively allows the County to only condone the evasion of our state's water permitting laws. This could come at a great cost to the existing water rights of nearby property owners, even those in adjoining counties, if subdivisions and developments overuse the well permit exemption, contrary to the law.

Id.[2]

The next case involving the interaction between land use regulation and water management to reach a Washington appellate court was *Fox v. Skagit County*, 193 Wash. App. 254, 372 P.3d 784 (2016). In *Fox*, the Court of Appeals held that an applicant for a building permit did not qualify for one because their proposed permit-exempt well would not provide an adequate supply of water for a home under Wash. Rev. Code 19.27.097.

This dispute arose after the Supreme Court's decision in *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wash. 2d 571, 311 P.3d 6 (2013), where the Court

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[2] The Court further pronounced that, while counties are responsible to make land use decisions, including determinations of whether adequate water supply is legally available to support proposed subdivisions and building permits, and to comply with GMA provisions requiring the protection of water resources through land use planning, Ecology has a role to assist counties in such activities:

> While Ecology is responsible for appropriation of groundwater by permit under RCW 90.44.050, the County is responsible for land use decisions that affect groundwater resources, including subdivision, at least to the extent required by law. In recognizing the role of counties to plan for land use in a manner that is consistent with the laws regarding protection of water resources and establishing a permitting process, we do not intend to minimize the role of Ecology. Ecology maintains its role, as provided by statute, and ought to assist counties in their land use planning to adequately protect water resources.

Kittitas County, 172 Wash. 2d at 180.

invalidated the 2006 amendment to the Skagit River Basin Instream Flow Rule, Wash. Admin. Code 173-503. *See* Protection of Existing Water Rights Criteria, ch. IV § B.2(e), *supra*, for discussion of the *Swinomish Indian Tribal Community* decision. The 2006 Amendment had provided reservations of water that would allow some new water uses in the basin notwithstanding their impacts on minimum instream flows established by the rule. As a result of the *Swinomish* decision, the rule reverted back to its original version, which does not include the water reservation that would have provided a source of water to supply the Foxes' proposed new residence.

The Foxes had a building permit application pending before Skagit County, which, under the *Swinomish* decision, the County deemed to be "incomplete" because the Foxes had not demonstrated that they have an adequate supply of water for their proposed house under Wash. Rev. Code 19.27.097. The Foxes proposed to obtain their water supply from a permit-exempt well that was understood to be in hydraulic continuity with the river and the County followed the Supreme Court's decision in *Kittitas County v. Eastern Washington Growth Management Hearings Board* and determined that adequate water supply was not legally available because the Foxes' domestic water use would be subject to interruption when minimum instream flows under the Skagit Rule are not met. *Fox*, 193 Wash. App. at 260.

The Foxes filed a petition for writ of mandamus against Skagit County that requested the Skagit County Superior Court to order the County to approve the building permit application. *Id.* at 261. The Superior Court denied the Foxes' request and they appealed to the Court of Appeals, which affirmed the superior court's decision.

The Court of Appeals rejected several legal theories that the Foxes advanced to support their position that they qualified for a building permit. The Foxes contended, among other things, that the groundwater permit exemptions shield a prospective water user from all regulation, that all landowners have a form of riparian or correlative right that is an irreducible right to water beneath their land, and that the Skagit Rule does not actually govern permit-exempt groundwater use. The Court of Appeals disagreed and held that the Foxes did not demonstrate that they have an adequate water supply to support their proposed home because permit-exempt groundwater use is subject to the water rights priority system, and the Skagit Rule's minimum instream flows are applicable to permit-exempt groundwater use:

> We conclude that a permit-exempt well under RCW 90.44.050 is subject to the prior appropriation doctrine and therefore may be limited by senior water rights, including the instream flow rule. Accordingly, because the Foxes' well may be

> interrupted, water is not legally available for purposes of their building permit application.

Id. at 260.

Later in 2016, the Washington Supreme Court issued its landmark decision in *Whatcom County v. Hirst*, 186 Wash. 2d 648, 381 P.3d 1 (2016). This case involved a challenge to Whatcom County's comprehensive land use plan under the GMA. The advocacy group Futurewise and several area citizens filed an appeal with the Growth Management Hearings Board to contest Whatcom County's enactment of an ordinance that updated its comprehensive plan and zoning code. Futurewise contended that the comprehensive plan's rural element violated the GMA because it did not include sufficient measures to protect rural character by adequately protecting water resources. *Hirst*, 186 Wash. 2d at 660-62.

The Board ruled in favor of Futurewise and held that the ordinance did not adequately protect groundwater and surface water in the rural area of the County because it failed to ensure that rural development would not further impair water availability. The Board reached this conclusion based on its understanding that under Wash. Admin. Code 173-501, Ecology's water management rule for the Nooksack River Basin, water was no longer available for new uses in the County's rural areas because the minimum instream flows and closures established by that rule applied to permit-exempt groundwater use in the basin. *Id.* at 662-63.

This case tested the range of the Supreme Court's earlier decision in *Kittitas County v. Eastern Washington Growth Management Hearings Board*. In that case, the Supreme Court held that Kittitas County's development regulations failed to comply with the GMA because they did not include provisions to prevent the filing of multiple subdivision applications for a common development project to attempt to sidestep the requirement that a development is eligible for only one group domestic permit-exempt groundwater withdrawal. Here, the Board found that Whatcom County had adequate provisions to prevent the improper daisy-chaining of permit-exempt wells by filing multiple subdivision applications related to one common development. However, the Board concluded that the rural element of the plan violated GMA provisions requiring protection of water resources by allowing developments that would rely on permit-exempt wells for water supply without mitigation to ensure they would not cause any adverse impacts on stream flows.

On appeal of the Board's decision, the Court of Appeals ruled in favor of the County and reversed the Board's decision on the water resources issues. *Whatcom County v. Western Washington Growth Management Hearings Board*, 186 Wash. App. 32, 344 P.3d 1256 (2015). Subsequently, the Supreme Court reversed the Court of Appeals and ruled that the County's comprehensive plan and zoning code failed to comply with the GMA's requirements to protect water resources because they allowed the approval of subdivisions and building permits for homes that would rely on permit-exempt wells for water supply in areas that are closed to new water uses under the Nooksack Rule. *Hirst*, 186 Wash. 2d at 665-66. The Court stated: "[w]e hold that the County's comprehensive plan does not protect water availability because it allows permit-exempt appropriations to impede minimum flows." *Id.* at 668.

The Court held that GMA provisions requiring protection of water resources in land use planning and permitting by counties require this level of protection for instream flows even though the Nooksack Rule did not expressly subject permit-exempt groundwater use to the rule's minimum instream flows and stream closures:

> The GMA requires counties to ensure an adequate water supply before granting a building permit or subdivision application. The County merely follows the Department of Ecology's "Nooksack Rule"; it assumes there is an adequate supply to provide water for a permit-exempt well unless Ecology has expressly closed that area to permit-exempt appropriations. This results in the County's granting building permits for houses and subdivisions to be supplied by a permit-exempt well even if the cumulative effect of exempt wells in a watershed reduces the flow in a watercourse below the minimum instream flow. We therefore hold that the County's comprehensive plan does not satisfy the GMA requirement to protect water availability. . . .

Id. at 658 (footnote omitted).

The Court concluded that, to comply with the GMA, counties are required to go beyond Ecology's rules when necessary to adequately protect water resources, which includes applying the minimum instream flows and closures in Ecology rules that do not expressly govern permit-exempt use to land use applications seeking to rely on permit-exempt wells for water supply. Thus, in evaluating subdivision and building permit applications, counties were required to apply the same standards that Ecology applied under the Supreme Court's decision in *Postema v. Pollution Control Hearings Board*, 142 Wash. 2d 68, 11 P.3d 726 (2000) in processing water permit applications to ensure that permit-exempt groundwater use in hydraulic continuity with closed streams or water bodies with instream flows that are not being met is not allowed:

> We hold that the same [*Postema*] standard applies to counties when issuing building permits and subdivision approvals. We have been protective of minimum instream flow rules and have rejected appropriations that interfere with senior instream flows.

Id. at 666; *see* Protection of Existing Water Rights Criteria, ch. IV § B.2(e), *supra*, for discussion of the *Postema* decision.

B. THE STREAMFLOW RESTORATION ACT

The *Hirst* decision generated significant uncertainty for local governments in performing their land use planning and permitting functions, and severely limited the ability of landowners to obtain building permits for the construction of new homes that would be reliant on permit-exempt wells for water supply throughout the state. In 2018, the Washington Legislature responded to the *Hirst* decision by enacting the Streamflow Restoration Act (SRA). This law provides a pathway for local governments to issue building permits for homes that would be supplied with water through the groundwater permit exemption for domestic use. The law also required the formation of local watershed planning groups to develop watershed plans that will offset impacts from new domestic permit-exempt wells and achieve a "net ecological benefit" in fifteen water resources inventory areas (WRIAs) throughout the state.[3]

The SRA amended Wash. Rev. Code 19.27.097 to provide standards for local governments to evaluate building permit applications and determine whether there is adequate water supply to support their approval in different parts of the state. In WRIAs with water management rules "that explicitly regulate permit-exempt groundwater withdrawals, evidence of an adequate water supply must be consistent with the specific applicable rule requirements." Wash Rev. Code 19.27.097(1)(b). This provision governs the Stillaguamish, Quilcene-Snow, Elwha-Dungeness, Lewis, Salmon-Washougal, Walla Walla, Wenatchee, Entiat, Methow, and Middle Spokane WRIAs.

Under Wash Rev. Code 19.27.097(1)(c), in WRIAs where watershed plans were developed in the past under Wash. Rev. Code 90.82 and there are water management rules that "do not specifically regulate permit-exempt groundwater withdrawals," evidence of an adequate water supply must be consistent with a new SRA provision, Wash. Rev. Code 90.94.020, which requires

[3] Ecology's interpretation and implementation of provisions of the Streamflow Restoration Act are provided in the Water Resources Program's Policy 2094, the "Streamflow Restoration Policy and Interpretive Statement."

the development of an updated watershed plan to offset impacts from new domestic permit-exempt wells. This provision governs the Nooksack, Nisqually, Lower Chehalis, Upper Chehalis, Okanogan, Little Spokane, and Colville WRIAs.

Wash Rev. Code 19.27.097(1)(d) provides similar standards for WRIAs where watershed plans were not developed in the past and there are rules that do not specifically regulate permit-exempt groundwater use. Wash Rev. Code 19.27.097(1)(d) requires compliance with Wash. Rev. Code 90.94.030 in order for building permits to be issued and governs the Snohomish, Cedar-Sammamish, Duwamish-Green, Puyallup-White, Chambers-Clover, Deschutes, Kennedy-Goldsborough, and Kitsap WRIAs.

Wash. Rev. Code 19.27.097(1)(e) provides that Ecology "may impose requirements to satisfy adjudicated water rights" that can affect the issuance of building permits in the Lower Yakima, Naches, and Upper Yakima WRIAs, which are in the area of the state where surface water rights have been adjudicated through the *Department of Ecology v. Acquavella* case, which was a general adjudication of water rights in the Yakima River Basin. *See* Columbia River Basin Water Management ch. IX, *infra*. Similarly, Wash. Rev. Code 19.27.097(1)(f) provides that additional requirements apply in the Lower Skagit-Samish and Upper Skagit WRIAs as a result of the Supreme Court's decision in *Swinomish Indian Tribal Community v. Department of Ecology*. *See* Protection of Existing Water Rights Criteria, ch. IV § B.2(e), *supra*, for discussion of the *Swinomish Indian Tribal Community* decision. In other areas of the state where there is no water management rule that governs water use, "physical and legal evidence of an adequate water supply may be demonstrated by the submission of a water well report consistent with the requirements of chapter 18.104 RCW," meaning there are no restrictions on the issuance of building permits. Wash. Rev. Code 19.27.097(1)(g). Lastly, under Wash. Rev. Code 19.27.097(5), "[a]ny permit-exempt groundwater withdrawal authorized under RCW 90.44.050 associated with a water well constructed . . . before January 19, 2018, is deemed to be evidence of adequate water supply under this section." Thus, permit-exempt wells constructed prior to the date the SRA became effective automatically provide evidence supporting the issuance of building permits based on "vesting" prior to the new law.[4]

[4] Relating to subdivision applications, the SRA amended Wash. Rev. Code 58.17.110 to add the following provision:

Wash. Rev. Code 90.94.020 provides the standards for planning and for permit-exempt groundwater use to enable the issuance of building permits in the WRIAs where watershed plans were previously adopted under Wash. Rev. Code 90.82: "potential impacts on a closed water body and potential impairment to an instream flow are authorized for new domestic groundwater withdrawals exempt from permitting under RCW 90.44.050 through compliance with the requirements established in this section." Wash. Rev. Code 90.94.020(1). The planning unit for each WRIA "must update the watershed plan to include recommendations for projects and actions that will measure, protect, and enhance instream resources and improve watershed functions that support the recovery of threatened and endangered salmonids." Wash. Rev. Code 90.94.020(4)(a). The updated plans are required to project the number of new permit-exempt groundwater withdrawals that would occur over the twenty-year period from 2018 to 2038 and identify projects to offset the potential impacts they would cause to instream flows. And, prior to the adoption of a plan, Ecology is required to "determine that actions identified in the watershed plan, after accounting for new projected uses of water over the subsequent twenty years, will result in a net ecological benefit to instream resources within the water resource inventory area." Wash. Rev. Code 90.94.020(4)(c). This provision also required that Ecology would have to unilaterally adopt rules "that meet the requirements of this section" (including the adoption of updated watershed plans) by certain dates if the planning units were unable to reach consensus and approve plans for adoption by Ecology. Wash. Rev. Code 90.94.020(7).

Similarly, Wash. Rev. Code 90.94.030 provides the standards to enable the issuance of building permits in the WRIAs where watershed plans were not previously adopted under Wash. Rev. Code 90.82. This provision includes requirements parallel to those in Wash. Rev. Code 90.94.020 for planning units to formulate new "watershed restoration and enhancement plans" (rather than update preexisting watershed plans). However, in contrast to Wash. Rev. Code 90.94.020, this provision requires that if a planning unit failed to approve a plan by June 30, 2021,

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> If water supply is to be provided by a groundwater withdrawal exempt from permitting under RCW 90.44.050, the applicant's compliance with RCW 90.44.050 and with applicable rules adopted pursuant to chapters 90.22 and 90.54 RCW is sufficient in determining appropriate provisions for water supply for a subdivision, dedication, or short subdivision under this chapter.

Wash. Rev. Code 58.17.110(4).

then Ecology "shall submit the final draft plan to the salmon recovery funding board" for its review before Ecology would adopt the plan after considering whether to modify the final draft plan based on recommendations from that board. Wash. Rev. Code 90.94.030(3)(h).

For implementation of the SRA, the Legislature allocated $300 million over fifteen years to provide funding for a range of water supply projects, including those that improve instream flows. These funds are available statewide and administered by Ecology through a competitive grants program. Three "watershed restoration accounts" for these funds were created and are governed by Wash. Rev. Code 90.94.060, .070, and .080.

Ecology has adopted watershed plans for all fifteen WRIAs governed by Wash. Rev. Code 90.94.020 and .030. Plans for five of them, the Snohomish, Cedar-Sammamish, Deschutes, Kennedy-Goldsborough, and Kitsap WRIAs, were adopted by Ecology after the Salmon Recovery Funding Board's technical review of draft final plans because the planning units for those WRIAs were unable to reach consensus and approve plans. Additionally, under Wash. Rev. Code 90.94.020, Ecology adopted an updated watershed plan and an accompanying rule for the Nooksack WRIA after the planning unit there failed to approve a plan. In sum, in the fifteen WRIAs where planning was required under the SRA, planning units were able to reach consensus to approve plans that were ultimately adopted by Ecology in nine of the WRIAs.[5]

[5] Additionally, the SRA includes Wash. Rev. Code 90.94.090, which established a "joint legislative task force on water resource mitigation," and authorizes Ecology to issue water right permits involving pilot projects that are designed to address the Supreme Court's decision in *Foster v. Department of Ecology*, 184 Wash. 2d 465, 362 P.3d 959 (2015). Such permits may be issued if impacts on stream flows can be mitigated based on criteria provided in the new law. *See* Protection of Existing Water Rights Criteria, ch. IV § B.2(e), *supra*.

XI.

FEDERAL RESERVED WATER RIGHTS: INDIAN RESERVATIONS AND FEDERAL LANDS

A. INTRODUCTION

Up to now, the primary theme of this treatise has been the development of a state law of water rights. The federal government and the federal courts played only a background role in this development, through early laws and decisions accommodating the states. Now we confront the area in which the federal legal system retains its constitutional primacy: the water rights associated with federally-created reservations of land within the exterior boundaries of the states. For the most part, this law developed in connection with the creation of Indian reservations, lands reserved as homelands for the people who inhabited the North American continent before European exploration and settlement.[1] At the end of the chapter, we will discuss cases defining the scope of federally-reserved rights where the federal lands in question were reserved for non-Indian federal purposes, such as for national forests.

The law of federal reserved rights developed from the tension between two principles: (1) except where it consents, the federal government itself is not subject to state law or to regulation by state government;[2] (2) by its own policy choice, the United States has consistently deferred to the states for the development of water rights laws, both as to the substance of the law and as to the procedures for implementing and enforcing it. The result of this tension is that, while states cannot destroy or alter the nature of federal water rights, the rights themselves take on some of the character of state water rights, particularly with regard to the process by which they are exercised,

[1] Objection may be made to categorizing the water rights of Indian tribes as federal reserved rights. As pre-existing sovereign governments, the tribes, through treaties or other agreements with the United States, are deemed to have reserved certain lands to themselves, with the implied reservation of sufficient water to provide for the future needs of the tribes. Because the United States has the constitutionally assigned role of managing commerce with Indian tribes, the federal government and the federal courts have had the primary role of defining the nature of rights and privileges arising out of treaties, agreements, and statutes dealing with tribal affairs. Since the federal courts have defined the law in the language of federal reservation, we adopt that form of analysis here, while recognizing that often a federal reserved right derives from tribal sovereignty and often reflects and recognizes a pre-existing tribal practice or privilege.

[2] U.S. Const. art. VI, cl. 2 (Supremacy Clause of the United States Constitution); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

adjudicated, and transferred. Thus, a federal reserved water right in Washington may differ in some respects from a federal reserved right in Oregon or Ohio.[3]

B. BASIC FEDERAL RESERVED RIGHTS LAW: THE WINTERS DOCTRINE

The law of federal reserved water rights derives to a remarkable extent from one brief United States Supreme Court opinion: *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908). Two earlier United States Supreme Court decisions set the pattern for the *Winters* decision.

The first of the two was *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 19 S. Ct. 770, 43 L. Ed. 1136 (1899). This was an action brought by the United States to restrain the defendant from constructing a dam across the upper Rio Grande River. The government's assertion was that the dam would divert essentially the entire flow of the river and would hamper the navigability of the river further downstream. The defendants argued that they had obtained the requisite water rights from the territory of New Mexico. The Court recognized and accepted the right of a state or territory to change the common law rules concerning riparian water rights. *Rio Grande Dam*, 174 U.S. at 703. However, the Court found that no state could, by changing its law and permitting appropriations from public waters, defeat the right of the United States to protect the navigability of a river. *Id.* The Court also found that Congress had not, in enacting the Desert Land Act, consented to the diminution of the federal right to preserve the navigability of a stream for interstate and foreign commerce. *Id.* at 704-06. In other words, the Court found that the United States retained an interest in public waters, at least for the purposes of preserving navigability; that the states and territories had no power to cut off this interest or subordinate it to appropriations of water under local law; and that Congress had never consented to the diminution of this right.

The second precursor to *Winters* arose in the state of Washington. In *United States v. Winans*, 198 U.S. 371, 25 S. Ct. 662, 49 L. Ed. 1089 (1905), the federal government sought to restrain the defendants from obstructing the rights of members of the Yakama Indian Nation to

[3] Thus, if the United States reserves land in Ohio for federal purposes, the water right associated with the reservation will be defined and enforced in the terms of the riparian doctrine recognized by Ohio and 30 other eastern states to determine water rights. If the United States reserves land in Washington for federal purposes, any analysis of the nature of the right must take account of the prior appropriation doctrine which has become the dominant principle of Washington water law. It does not necessarily follow that the same case would produce inconsistent results in the two states, but the nature of the federal right might be described and defined using different terms.

exercise fishing rights on the Columbia River. The defendants had installed fish wheels in the river under licenses from the state, devices which excluded the Yakama Nation from fishing and took essentially all of the fish for the state licensees. The defendants asserted that the fishing right included in the treaty of the United States with the Yakama Nation could no longer be exercised on lands that the federal government had conveyed out of the public domain, and that the exercise of Indian fishing rights would harm the riparian rights of the landowners along the river as well as the state's right to sell, regulate, and control the lands along the river and the appurtenant water rights. The Court rejected these arguments and found that the Naton's reserved right to fish "at all usual and accustomed places" survived the conveyance of the land containing those areas. *Winans*, 198 U.S. at 380-81. The Court found that the tribal fishing rights "imposed a servitude upon every piece of land as though described [in the treaty]." *Id.* at 381. *Winans* was not a water rights case as such, but it confirmed that the land that was conveyed from the public domain was still subject to the reservation of certain rights by the United States, either for itself or for parties to whom the government had treaty obligations.

With these precedents, the Court was prepared, in *Winters*, to lay the basis for a doctrine of federal reserved water rights. *Winters* arose out of an act of Congress in 1874 setting aside a large tract of land in Montana for the occupation of several Indian tribes "at the will and sufferance of the government of the United States." *Winters*, 207 U.S. at 567. Subsequently, in order to open up parts of this land for general settlement, the United States reached an agreement with the tribes in which the tribes gave up their occupancy of most of this tract in return for creation of a reservation in the remaining area. This agreement was ratified by Congress in 1888, in an act creating the Fort Belknap Indian Reservation. *Id.* at 568. The northern boundary of this reservation was the Milk River, a non-navigable stream. The United States and the tribes diverted portions of the flow of the Milk River in the succeeding years for domestic use by the tribes and by the federal officers who occupied the reservation, and additional amounts of water for the irrigation of reservation land for agriculture. *Id.* at 565-566. The United States asserted that the entire flow of the Milk River was necessary to serve the purpose of the Fort Belknap Indian Reservation.

Henry Winters and others were the principals of a ditch and irrigation company whose members had acquired portions of the land ceded by the tribes when the reservation was created. These lands, like the reservation lands on the other side of the river, were riparian. In 1898, following the applicable laws of Montana, the company gave the requisite notices and began the

process of diverting water from the Milk River to their lands. The United States brought suit to enjoin the Winters group from maintaining dams or reservoirs appropriating Milk River waters. Both sides claimed riparian rights, but the Winters group also claimed rights derived from their prior appropriation, which they asserted to have been made without notice of the claims of the United States.

The Court ruled in favor of the United States. First, the Court found that the creation of the Fort Belknap Indian Reservation implicitly included the reservation of water for the reservation, reasoning that it would have been a meaningless act to place people on a reservation whose lands were arid and, without irrigation, "practically valueless." *Winters*, 207 U.S. at 576. Thus, the Court found that it was not significant that no *express* reservation of water was included in the agreement with the tribes. In aid of this finding, the Court noted the principle that ambiguities in treaties and agreements with the Indians will be resolved from the standpoint of the Indians. *Id.* Finally, the Court rejected an argument that the admission of Montana into the union in 1889 repealed the reservation of water rights in favor of the applicability of state law. *Id.* at 577. The Court stated:

> The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be.

Id. (citing *Rio Grande Dam*; *Winans*). The Court declined to consider arguments based on riparian rights, thus implicitly finding that the creation of the reservation itself was a kind of "appropriation" senior in priority to the appropriations of the non-Indian settlers.

C. WINTERS EXPLAINED AND IMPLEMENTED: SUBSEQUENT DEVELOPMENTS IN THE LAW

In several decisions issued after *Winters*, the United States Supreme Court has summarized the parameters of the Winters Doctrine. In *Cappaert v. United States*, the Court pronounced:

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

Cappaert v. United States, 426 U.S. 128, 138, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976) ; *see also Sturgeon v. Frost*, 577 U.S. 424, 436, 136 S. Ct. 1061, 194 L. Ed. 2d 108 (2016). Further, the Court has stated:

> [T]he Federal Government's reservation of land for an Indian tribe also implicitly reserves the right to use needed water from various sources—such as groundwater, rivers, streams, lakes and springs—that arise on, border, cross, underlie, or are accomplished within the reservation.

Arizona v. Navajo Nation, 599 U.S. 555, 561, 143 S. Ct. 1804, 216 L. Ed.2d 540 (2023).

1. Priority Date Of Federal Reservation

Winters establishes that the priority date for a water right associated with a federal reservation of land is the date of the creation of the reservation. *Cappaert v. United States*, 426 U.S. at 138. The implication of the *Winters* decision is that such a reserved right to water would be subordinate to appropriations of public water prior in date to the creation of the reservation. In cases involving reserved rights based on aboriginal water use prior to establishment of a reservation by treaty, agreement, or congressional act, some courts have adopted "time immemorial" as the priority date for a reservation. For example, in *United States v. Adair*, 723 F.2d 1394, 1412-15 (9th Cir. 1984), the Ninth Circuit confirmed the hunting and fishing rights of certain Oregon tribes and recognized a priority date of "time immemorial" for the water rights supporting them. Since most of the Indian reservations in Washington, including all of the larger ones, were created in the nineteenth century, well in advance of almost all other water appropriations, this distinction is unlikely to be of practical significance in most cases.[4]

2. Quantity Of Reserved Right – Calculation, Issues Of Beneficial Use, Due Diligence

The United States Supreme Court has defined the scope of a federal reserved water right as follows:

> The implied-reservation-of-water doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.

Cappaert, 426 U.S. at 141. *Winters* itself states that the purpose is based on the intent of the federal government at the time it established the reservation, typically by reference to the statute, treaty, or executive order creating the reservation. *Winters*, 207 U.S. at 577.

[4] The choice of "time immemorial" in *Adair* was apparently based on the notion that the priority date should be the date a right was first put to beneficial use, coupled with the knowledge that Indians have hunted and fished in their historic homelands for countless centuries. *See Adair*, 723 F.2d at 1414. As discussed below, however, federal reserved rights are an exception to the "use it or lose it" principle requiring beneficial use.

For the most part, the courts have defined the "purpose" of a reservation in quite specific terms. In *Winters*, the Court found that the reservation was for agricultural irrigation and domestic water supply purposes, without specifically finding this list exclusive. Later cases have generally held that reservations created in the nineteenth century were primarily established to provide Indian tribes with the opportunity to develop an agricultural base on their reservations. *See, e.g.*, *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963). However, *Adair* found that creation of a reservation could imply the use of water for long-established aboriginal practices (fishing and hunting) as well as for agriculture. *Adair*, 723 F.2d at 1410.

In *United States v. New Mexico*, a case involving a national forest rather than an Indian reservation, the United States Supreme Court drew a distinction between "primary" and "secondary" purposes of reservations:

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

United States v. New Mexico, 438 U.S. 696, 702, 98 S. Ct. 3012, 57 L. Ed. 2d 1052 (1978).

There has been some argument that the "purpose" of an Indian reservation should be defined in broad terms, such as the establishment of a "homeland" for Indian tribes, allowing for flexibility for later developments on a reservation by allowing reserved water rights to be used for purposes neither stated nor implied in the documents creating the reservation. *See, e.g.*, Felix S. Cohen, *Handbook Of Federal Indian Law* § 21.03[3] (Nell Jessup Newton & Kevin K. Washburn, eds., 2024). There has been no federal appellate case that has ruled on the homeland theory so the issue is unsettled. In *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 201 Ariz. 307, 315, 35 P.3d 68, 76 (2001), the Arizona Supreme Court recognized the homeland theory in confirming rights to water for a tribe to allow for "flexibility and practicality" for its future water uses and held "that the purpose of a federal Indian reservation is to serve as a 'permanent home and abiding place' to the Native American people living there."

However, in *United States v. Washington*, a case involving the Lummi Indian Nation's claims for reserved rights to groundwater associated with its reservation, the federal district court held that the Nation's rights were not for broad "homeland" purposes:

> Because water rights stemming from a reservation of public land are implied only where "without the water the purposes of the reservation would be entirely defeated," the Court finds no community purpose beyond agriculture and domestic use. The Treaty of Point Elliott does not evidence a primary homeland or community purpose, for which water was reserved at the time of the Treaty. As such, the Court finds that as a matter of law the Treaty of Point Elliott reserved water for agriculture and domestic use sufficient to fulfill the purposes of the Reservation.

United States. v. Washington, 375 F. Supp. 2d 1050, 1066 (2005) (quoting *United States v. New Mexico,* 438 U.S. 696, 702, 98 S. Ct. 3012, 57 L. Ed. 2d 1052 (1978).[5]

The quantification of a reserved water right is complicated by the principle that federal reserved rights are for potential future use as well as for present use and historical use that occurred in the past. In other words, the United States and the tribes, unlike most other appropriators, are not limited to the quantity of water historically put to beneficial use, nor may the state impose a "due diligence" requirement on the federal government to put water to beneficial use in order for the water right to be retained. This principle is implicit in *Winters* itself, which found that the United States had reserved water rights with a priority date of the reservation's creation, notwithstanding that the actual diversion of water occurred somewhat later. It was made express in subsequent cases such as *Conrad Investment Co. v. United States*, 161 F. 829 (9th Cir. 1908), in which the Ninth Circuit found that the United States could claim reserved rights "not only for present uses, but for future requirements." *Id.* at 832. The *Conrad* court avoided the quantification thicket by leaving its decree open-ended, allowing for the possibility of additional claimed water rights in the future.[6]

[5] After this decision, the State of Washington, the United States, and the Lummi Indian Nation reached a settlement of the case that established the Nation's reserved rights to groundwater in the aquifer underlying the Lummi Reservation. A challenge to this settlement was rejected by the Ninth Circuit in *U.S. ex rel. Lummi Nation v. Dawson*, 328 Fed. Appx. 462 (2009).

[6] A different approach was taken in *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939), in which the same court quantified the water rights of the Paiute Tribe based solely on historical use. The court's finding was based on the fact that, although the reservation contained approximately10,000 arable acres of land, the tribe had never irrigated more than 2,100 acres.

Where courts must quantify rights, they have primarily followed what is called the "practicably irrigable acreage" standard first laid out by the United States Supreme Court in *Arizona*. *Arizona*, 373 U.S. at 600-01. This involves calculating the potentially irrigable acreage within the reservation, and then calculating the water required to irrigate that acreage, without reference to whether any or all of the land is actually in cultivation. In a state case, the Wyoming Supreme Court defined practically irrigable acreage as "those areas susceptible to sustained irrigation at reasonable costs." *In re the Water Rights of Big Horn River System*, 753 P.2d 76, 99-107 (Wyo. 1988), *aff'd without opinion in Wyoming v. United States*, 492 U.S. 406, 109 S. Ct. 2994, 106 L. Ed. 2d 342 (1989) (tie vote on the recusal of Justice O'Connor). This formulation raises the possibility of factoring in the economic feasibility of irrigating particular land, but it is not clear whether the courts will follow this form of practicably irrigable acreage (PIA) analysis in the future.

The Washington Supreme Court dealt with these quantification principles in one of its Yakima River Basin adjudication decisions, although the Court found a basis other than PIA for calculating the extent of the Indian water rights in question. In *In re the Water Rights of Yakima River Drainage Basin* (*Acquavella* II), 121 Wash. 2d 257, 850 P.2d 1306 (1993), the Court dealt with the part of the case that quantified the water rights associated with creation of the Yakama Indian Reservation by treaty in 1859. In this case, after creating the reservation, the United States government had taken a whole series of actions with respect to the water in the Yakima River Basin, sometimes explicitly acting as trustee for the Yakama Nation and sometimes acting more generally. Competing appropriators argued that these acts of the United States either cut off the pre-existing reserved rights for the reservations or, at a minimum, served to quantify and limit those rights. The Washington Supreme Court held: (1) the Secretary of the Interior had not limited or fixed the Indian water rights by creating a reclamation project on the Yakima River in 1906 (*id.* at 280-83) and especially that the Secretary's actions had not cut off or limited the fishing and hunting rights of the Yakama Nation; (2) an action of the Secretary of Interior reserving 147 cubic feet per second (cfs) of water for the reservation, and a subsequent law enacted by Congress in 1914 relating to that measure, did not limit or quantify the Nation's reserved water rights (*id.* at 284-86); (3) various actions of the federal government between 1905 and 1968 had not subordinated the Nation's right to water for fishing to the rights of non-Indian irrigation water users (*id.* at 286-87); (4) a 1968 settlement of a proceeding before the Indian Claims Commission

had confirmed the diminishment of the Nation's fishing right to some extent (*id.* at 287-91); (5) a consent judgment entered in 1945 confirmed the Nation's water rights for irrigation to be those specified in the judgment (*id.* at 291-98); and (6) the Congressional act of 1914 modified the treaty rights of the Indians and changed the priority date of some of their water rights (*id.* at 298-303).

In *Acquavella II*, the Court recognized that the PIA standard would be applicable to determine the Nation's reserved water rights for irrigation if the actions that affected those rights after the creation of the Yakama Reservation had not occurred: "[t]he judicially created 'practicably irrigable acreage standard' . . . need not be applied, as the treaty rights of the Indians were previously quantified by Congress." *Id.* at 302. The case illustrates that, as in often true in Indian water rights cases, the history and facts of a particular matter are often more important than general principles in resolving a controversy. Because the federal government had been so intensely involved in the management of the Yakima River during the past century, including its participation on behalf of the Indians in several judicial proceedings, the Court found that history to be especially relevant in sorting out how much water the Yakama Nation was entitled to.

3. Reserved Water Rights for Fishing and Hunting Purposes

As noted above, the courts have also recognized that treaty rights for Indian fishing and hunting may include an implied right to sufficient water to maintain the activities in question. A reserved water right for fishing or hunting is generally nonconsumptive in nature and allows its holder to prevent junior water users from depleting a stream below a certain protective level. *See Adair*, 723 F.2d at 1418. The courts have not developed any single methodology for determining the appropriate water level in a stream; this would presumably vary depending on the practices protected and the needs of the particular fish or wildlife species in question.

In *Acquavella II*, the Washington Supreme Court found that the Nation's reserved rights to water to fulfill its treaty fishing rights had been substantially diminished, but not extinguished, by actions of the United States. Those actions included a settlement of the Nation's claims to the federal Indian Claims Commission for compensation for loss of fisheries resources caused by federal activities. *Acquavella II*, 121 Wash. 2d at 286-291. As a result of this diminution of the Nation's rights to water to maintain fish in the Yakima River and its tributaries to fulfill their treaty right to fish in their usual and accustomed places, the Court affirmed the Superior Court's ruling that:

> The maximum quantity to which the Indians are entitled as reserved treaty rights is the minimum instream flow necessary to maintain anadromous fish life in the river, according to annual prevailing conditions. This diminished reserved right for water for fish has a priority date of time immemorial. Additional instream flow for fish, beyond this amount, is subordinate to vested irrigation water rights.

Id. at 264. It is notable that this is a narrative standard rather than a numerical standard which requires that a certain quantity of water be retained instream.

A case before the Federal District Court, *United States v. Anderson*, 591 F. Supp 1 (E.D. Wash. 1982), involved a lawsuit brought by the United States on behalf of the Spokane Tribe seeking a determination of the Tribe's reserved rights to water from Chamokane Creek, which borders the Spokane Reservation. In *Anderson*, the Court held that, under the Winters Doctrine, since "one of the purposes for creating the Spokane Reservation was to ensure the tribe's access to fishing areas and to fish for food, "the Tribe has the reserved right to sufficient water to preserve fishing in the Chamokane Creek." *Id.* at 5. In contrast to the Washington Supreme Court in *Acquavella II*, the Court imposed a numerical standard requiring that a minimum flow of 20 cubic feet per second of water be retained in the creek in order to maintain adequate water temperature for trout populations. *Id.* Use of water for irrigation by non-tribal members with junior water rights is curtailed when this minimum instream flow level is not met.

Another case in federal court, *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), involved a lawsuit brought by the United States on behalf of the Colville Confederated Tribes seeking to enjoin Mr. Walton, a non-Indian owner of land on the Colville Reservation, from using water in the No Name Creek Basin. This basin includes Omak Lake and is located entirely on the Colville Reservation. The Ninth Circuit held that the Tribes have a reserved right to the quantity of water necessary to maintain the Omak Lake fishery, which "includes the right to sufficient water to permit natural spawning of the trout." *Id.* at 48. Like in *Acquavella II*, this is a narrative rather than numerical standard for fulfilling the tribal treaty fishing right.

While the *U.S. v. Washington* case over treaty fishing rights which resulted in the landmark *Boldt* decision does not involve any claims for tribal reserved water rights associated with the fishing rights, there has been consideration as to whether the case could possibly have ramifications for state water resources management in the future. In its 2017 decision in the phase of *U.S. v. Washington* which is commonly known as the "Culverts Case," the Ninth Circuit held that the State of Washington violated treaties with several tribes by building and maintaining

barrier culverts that have adversely affected salmon by blocking streams. *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), *aff'd by equally divided U.S. Supreme Court*, 584 U.S. 837, 138 S. Ct. 1832, 201 L. Ed, 200 (2018). The Court reasoned that the treaties guaranteed rights for the tribes to engage in off-reservation fishing and take up to fifty percent of the fish available for harvest, and required the state to ensure that sufficient fish would be available so the tribes could make a moderate living. The Court held that the state's construction of culverts under its roads violated the treaties. *Id*. at 962-966. Consequently, the Court ordered the state to take corrective actions to remedy the blockage of fish by the culverts. *Id*. at 979-980. This decision has prompted the question of whether a similar action in the future could relate to water rights and the effects of water uses on stream flows and salmon habitat.

4. Groundwater

Almost all reserved right cases have involved surface water, and the courts have only more recently tackled the question whether the federal government may reserve rights to groundwater as well. *Cappaert* involved the protection of an underground pool from harmful adjacent groundwater withdrawals. Although recognizing that the circuit court had found a federal reserved right in groundwater, the United States Supreme Court finessed the issue by describing the underground pool as "surface water." *Cappaert*, 426 U.S. at 142. In the Big Horn Adjudication, the Wyoming Supreme Court declined to extend the reserved rights doctrine to groundwater, citing the absence of any controlling precedent for doing so. *In re Big Horn*, 753 P.2d at 99-100. In contrast, in the Gila River Adjudication, the Arizona Supreme Court concluded that federal reserved water rights law does not differentiate between surface and groundwater, especially where they are in continuity, and recognized rights to groundwater. *In re the Water Rights of Gila River System & Source*, 195 Ariz. 411, 419, 989 P.2d 739, 747 (Ariz. 1999). The Court made its finding even though Arizona state law treated groundwater differently from surface water and held that "[h]olders of federal reserved rights enjoy greater protection from groundwater pumping than do holders of state law rights to the extent that greater protection may be necessary to maintain sufficient water to accomplish the purpose of a reservation." *Id.* at 751.

In *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262 (9th Cir. 2017), the Ninth Circuit held the Winters Doctrine applies to groundwater and that the reserved water rights associated with the Agua Caliente Reservation extended to groundwater. The Court rejected the argument that the Winters Doctrine is only applicable to surface water:

> The *Winters* doctrine was developed in part to provide sustainable land for Indian tribes whose reservations were established in the arid parts of the country. And in many cases, those reservations lacked access to, or were unable to effectively capture, a regular supply of surface water. Given these realities, we can discern no reason to cabin the *Winters* doctrine to appurtenant surface water. As such, we hold that the *Winters* doctrine encompasses both surface water and groundwater appurtenant to reserved land.

Id. at 1271.

5. Appurtenancy Issues

All of the cases to date speak of the authority of the United States to reserve appurtenant water for reservation purposes and all of the cases have involved waters appurtenant to reservation lands.[7] No cases have tested whether the United States could, if its intentions were sufficiently clear, reserve non-appurtenant water for a federal reservation.

6. Changes In Use And Transfer Of Reserved Water Rights

Again, there is little judicial guidance in this area. Most of the examples are in the *Arizona v. California* litigation, in which the courts impliedly approved a change of the purpose of use of reserved Indian water rights from agricultural to domestic and commercial. *See Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) ("The Special Master in Arizona v. California determined that the purposes for which the reservation was created governed the quantification of reserved water, but not the use of such water."). That case did not address, however, such issues as whether changes would be permitted if they harmed junior appropriators, and whether they are subject to any conditions state law might place on changes and transfers.

In *U.S. v. Anderson*, the federal court litigation involving the Spokane Reservation, the Ninth Circuit stated that "[t]he tribe is, of course, entitled to utilize its water for any lawful purpose," and that "[i]f the tribe chooses to use water for irrigation in a non-consumptive manner [to maintain stream flows], it does not thereby relinquish any of its water rights to state permittees or subject the exercise of its rights to state regulation." *United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir. 1984). Thus, the Ninth Circuit found that the purposes of use allowed under the

[7] In *Arizona v. California*, the United States Supreme Court upheld the award of Colorado River rights to the Cocopah Reservation, portions of which are not appurtenant to the river. However, the reservation in question consists of discrete portions, some of which do abut on the river. The Court does not discuss the possibility of reserving water rights in non-appurtenant waters.

Spokane Tribe's reserved water rights can be changed, but, like in *Arizona v. California*, it also did not consider issues relating to whether there may be any limits to such changes in order to protect other water right holders.

There is also no case law addressing whether Indian or other federal reserved rights may be transferred to other parties. The one exception is that presented in *Colville Confederated Tribes v. Walton*, in which the Ninth Circuit held that non-tribal member purchasers of land previously allotted to tribal members with appurtenant water rights obtain the allottees' right to use reserved water, with a date-of-reservation priority date. *Colville Confederated Tribes*, 647 F.2d at 51; *accord Adair*, 723 F.2d at 1417. However, the *Colville Confederated Tribes* Court imposed a requirement that the nonmember purchaser put the right to beneficial use "with reasonable diligence" after obtaining title. *Id.* Such federal reserved water rights held by non-tribal members who own land that was sold by a tribal member are commonly known as "Walton rights." It does not appear that any court has ever confirmed the right of a tribe or a tribal member to transfer water rights separately from the land to which the rights are appurtenant.

D. THE REGULATION AND ADJUDICATION OF FEDERAL RESERVED WATER RIGHTS

Aside from the existence of water rights for federal reservations, there arises a "process" question as well: who regulates those rights and sorts out disputes with others claiming the same water? Where an Indian reservation is involved, this becomes a three-way issue. Depending on the circumstances, the Indian tribe, the state, or the federal government may play a regulatory role. Because of federal statutory law, the law of *regulatory* jurisdiction (which government agency has the duty to keep track of water rights, issue permits, and regulate against violators) has developed quite separately from the law of *adjudicatory jurisdiction* (which tribunal has jurisdiction to resolve disputes as to the nature and extent of a federal reserved right in any particular body of water).

1. Regulatory Jurisdiction

As to *regulating the on-reservation use of tribal reserved waters*, it seems implicit in the decisions that this is a matter committed to tribal self-government.[8] If the water is used for

[8] The cases typically do not distinguish between the ownership of the water right (the proprietary interest) and the authority to regulate its use (the governmental interest). One case which does explore this area is *In re Big*

irrigation on a reservation, the federal General Allotment Act may give the Secretary of the Interior a role in water distribution. 25 U.S.C. § 381.

Much more controversy has arisen over *regulation of unappropriated waters on reservations and of on-reservation appropriations by non-members of the reservation tribe*. States have typically allowed, and regulated, the use of water by non-members, on or off the reservation. In contrast, some tribes have asserted the right to regulate all water use on a reservation, including use by non-members. *See, e.g.*, *Holly v. Totus,* 655 F. Supp. 548 (E.D. Wash. 1983); *Colville Confederated Tribes*.

Colville Confederated Tribes concerns the regulatory authority over No Name Creek, a small creek arising out of a spring on the Colville Reservation and flowing into Omak Lake, a lake with no outlet which is, like the creek, entirely contained within the reservation. The Ninth Circuit held that the tribe, and not the state, had regulatory authority over the use of the water in No Name Creek, including use by non-tribal members. *Colville Confederated Tribes*, 647 F.2d at 52-53. The *Colville Confederated Tribes* holding may be limited in its precedential value to the particular facts which inspired it. *Id.* at 53 ("[W]e note that the state's interest in extending its water law to the reservation is limited in this case. Tribal or federal control of No Name waters will have no impact on state water rights off the reservation.").

In contrast, the Ninth Circuit has held that the state, not the tribe, has some regulatory authority over a stream that serves as the *boundary of a reservation*. In *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984), the Court found that Chamokane Creek, which forms part of the boundary of the Spokane Reservation, contained "excess" water over and above that necessary to satisfy the reserved rights of the Spokane Tribe. The Ninth Circuit found that the state, not the tribe, had the regulatory authority over the use of this water on land owned by non-tribal members, and that tribal interests were sufficiently protected by access to the federal court, which had appointed a water master to administer water rights.[9] *Id.* at 1365.

Horn River System, 835 P.2d at 282-83, attempting to sort out the regulatory authority of the tribe from that of the state engineer.

[9] Subsequently, in 2019, a settlement agreement was reached between the State of Washington, the Spokane Tribe, and the United States, to address the impacts of permit-exempt groundwater use on instream flows in Chamokane Creek. The agreement centers on a mitigation program that will improve stream flows for fish, allow existing domestic permit-exempt groundwater uses to continue, and provide water for future domestic needs. The agreement recognizes that there is no longer any "excess" water available for new uses.

At least in the cases arising so far, the courts have not confirmed tribal assertions of general regulatory authority over non-member uses of water, on or off the reservation. In *Holly v. Confederated Tribes & Bands of the Yakima Indian Nation*, 655 F. Supp. 557 (E.D. Wash. 1985), *aff'd without opinion*, 812 F.2d 714 (9th Cir. 1987), the federal court found that the Yakama Nation lacked the authority to regulate the uses of "excess" waters (above those necessary to satisfy the tribe's reserved rights) appurtenant to the tribe's reservation by non-tribal members.[10]

2. Adjudicatory Jurisdiction

The centerpiece of any discussion about adjudicatory jurisdiction and federal water rights is a federal statute. In the McCarran Amendment, codified as 43. U.S.C. § 666(a),[11] Congress waived federal sovereign immunity and allowed the United States to be named as a party in state water rights adjudications, including both judicial and administrative proceedings.[12] *See also* The Adjudication Process, ch. IV § B.1, *supra*. The Court has found that the McCarran Amendment impliedly allows federal reserved water rights to be adjudicated in state courts. *United States v. District Ct. for Eagle Cy.*, 401 U.S. 520, 524, 91 S. Ct. 998, 28 L. Ed. 2d 278 (1971). Thus, state courts often determine and quantify the water rights of the United States and of Indian tribes.

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[10] This holding is consistent with the United States Supreme Court's conservative approach to the question of tribal authority over non-member affairs. In several cases dealing with this issue (none of them specifically involving water rights), the Court has not found an example in which a tribe's interest in protecting self-government was strong enough to justify assuming regulatory control over non-members. *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997); *South Dakota v. Bourland*, 508 U.S. 679, 113 S. Ct. 2309, 124 L. Ed. 2d 606 (1993); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989).

[11] The text of the McCarran Amendment follows:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to such a suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances[.]

43 U.S.C. § 666(a).

[12] The McCarran Amendment waives the sovereign immunity of the United States both in its own capacity and as trustee for Indian tribes. Thus, tribal reserved water rights can be determined in water rights adjudications in state courts. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 809-811, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976).

It is important to note that the McCarran Amendment applies only to general stream adjudications, and the United States has not waived its sovereignty as to water rights disputes involving fewer than all claimants to water rights from a given stream. *Dugan v. Rank*, 372 U.S. 609, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963). The tribes themselves cannot be joined in an adjudication without their consent, as the McCarran Amendment does not waive the sovereign rights of the tribes. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 566 n.17, 103 S. Ct. 3201, 77 L. Ed. 2d 837 (1983). However, if the United States is a party as trustee for a one or more tribes in an adjudication, the tribes are bound by the result. *Id.*

Several cases have turned on how comprehensive a water rights adjudication must be to invoke the McCarran Amendment. The Idaho Supreme Court decided that federal sovereign immunity would be waived only if a Snake River adjudication included all of the river's tributaries. *In re the Water Rights of Snake River Basin Water System*, 115 Idaho 1, 764 P.2d 78, 86 (1988). However, the Ninth Circuit has held that an adjudication of the surface water rights in a basin is sufficiently comprehensive to invoke the McCarran Amendment, and that groundwater need not be included in the adjudication. *United States v. Oregon*, 44 F.3d 758, 769 (1994).[13]

In consenting to state court jurisdiction over federal water rights, the McCarran Amendment does not withdraw or modify the jurisdiction of the federal courts over cases involving water rights, including federal reserved rights.[14] Federal courts may have original, federal question, or diversity jurisdiction over water rights disputes, including general stream adjudications; in such cases, the jurisdiction is concurrent with that of the states. *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 808-09, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976). This case stands for the proposition also that in cases where the McCarran Act applies, the federal courts will generally abstain from jurisdiction and allow the state courts to proceed. Otherwise, the purposes behind the McCarran Amendment would be frustrated. *Id.* at 820.[15]

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[13] In light of the increased understanding of the hydraulic connection between surface and groundwater sources and the potential for the use of groundwater to affect surface water bodies, courts may be inclined in the future to decide that general water rights adjudications must address both in order to be sufficiently comprehensive.

[14] There have been several cases in Washington where the United States has filed suit in federal court on behalf of tribes seeking determinations of the tribes' reserved water rights. These include the federal court cases involving the Spokane Tribe, the Colville Confederated Tribes, and the Lummi Nation discussed above.

[15] The United States Supreme Court has also rejected the notion of bifurcating an adjudication so that Indian or other federal rights are quantified by the federal courts and then incorporated into an ongoing state adjudication. *San Carlos Apache Tribe*, 463 U.S. at 567-69 (describing the notion as "duplicative and wasteful").

E. NON-INDIAN FEDERAL RESERVED WATER RIGHTS

As noted earlier, most of the federal reserved water rights cases involve Indian Reservations, presumably because these by their very nature involve the use of water for the domestic, agricultural, and other economic needs of a group which has reserved the land as a homeland. However, several court decisions have extended the reserved rights doctrine to encompass not only Indian reservations, but water uses in national forests, national parks and monuments, and military reservations.

In *Arizona v. California*, the United States Supreme Court found that the Winters Doctrine is applicable to other federal establishments and affirmed allocations of water for non-Indian federal uses. The Court upheld the decision of the special master to award reserved water rights to the United States associated with the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge, and the Gila National Forest. *Arizona v. California*, 373 U.S. at 601.

In *Cappaert*, the Court stated that the Winters Doctrine "applies to Indian reservations and other federal enclaves," and confirmed a federal reserved right for the United States for sufficient water to protect a population of desert pupfish in the Devil's Hole National Monument. *Cappaert v. United States*, 426 U.S. at 138. In *United States v. New Mexico*, the Court rejected a claim by the United States for a reserved right to instream flows within a national forest, but on the basis that the claim was unrelated to the primary purpose of the reservation. The Court recognized that the United States could have reserved water for any federal purpose, had Congress's intent at the time the national forest was created been sufficiently clear. *United States v. New Mexico,* 438 U.S. at 711-12.

Thus, in state water right adjudications conducted pursuant to the McCarran Amendment, federal reserved water rights appurtenant to lands managed by the federal government can be asserted by the United States on lands managed by the federal government. If the United States claims such rights, the courts will apply the *Winters* analysis to any claim involving a federal reserved right, looking to the nature of the reservation and the intent of Congress in setting aside federal land.[16]

[16] For instance, in the *Acquavella* adjudication of Yakima River Basin water rights, the Yakima County Superior Court confirmed water rights for the United States Forest Service in the Snoqualmie National Forest and Wenatchee National Forest, and other non-Indian federal reserved water rights.

XII. PUBLIC WATER SUPPLY

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See January 2000 Version

XIII.

THE ENDANGERED SPECIES ACT

The National Marine Fisheries Service (NMFS) has listed fourteen salmon species that originate in or migrate through Washington as threatened or endangered under the federal Endangered Species Act (ESA).[1] Also, two populations of bull trout have been listed.[2] Each of these actions may impact water use throughout Washington by potentially limiting water availability for new water rights and potentially affecting the exercise of existing rights. This chapter provides an overview of the Endangered Species Act and its major sections and describes how the ESA may impact water resources management and water rights.[3]

Congress's intent in enacting the ESA was "to halt and reverse the trend toward species extinction, whatever the cost." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 154, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978). In order to achieve this intent, the ESA uses two major strategies: (1) identifying species needing protection and the means necessary to protect and recover those species; and (2) preventing the taking of listed species and taking enforcement actions against violators who cause takes of listed species.

The purposes of the ESA include providing "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," as well as establishing "a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). At the same time, the ESA recognizes the state ownership of and regulatory interest in water by declaring, as its policy, that federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species. 16 U.S.C. § 1531(c).

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[1] The Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973), is codified as amended at 16 U.S.C. §§ 1531 to 1544. The Washington salmon that have been listed under ESA are Lower Columbia River chinook – threatened; Upper Columbia River spring chinook – endangered; Puget Sound chinook – threatened; Snake River spring and summer chinook – threatened; Snake River fall chinook – threatened; Columbia River chum – threatened; Hood Canal summer chum – threatened; Ozette Lake sockeye – threatened; Snake River sockeye – endangered; Lower Columbia River steelhead – threatened; Middle Columbia River steelhead – threatened; Upper Columbia River steelhead – endangered; Snake River steelhead – threatened; and Lower Columbia River coho – threatened.

[2] Coastal-Puget Sound bull trout – threatened; Columbia River bull trout – threatened.

[3] There are also species listed as endangered and threatened under state law. The Washington Endangered Species Act is administered by the Department of Fish and Wildlife. Wash. Admin. Code 220-610.

The following are summaries of pertinent sections of the ESA, followed by discussion on the potential implications of the ESA on Washington state water rights.

A. SECTION 4 – LISTING DECISIONS, CRITICAL HABITAT DESIGNATION, 4(D) RULES, AND RECOVERY PLANS

Section 4 contains the process for the initial listing of endangered and threatened species. 16 U.S.C. § 1533. A species is considered threatened if it is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). An endangered species is "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). The term species includes any subspecies or any distinct population segment of any species. 16 U.S.C. § 1532(16). The Secretary of the Interior or the Secretary of Commerce[4] must determine whether a species is endangered or threatened based on any of the following factors: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a)(1). The secretary's determination must be made "solely on the basis of the best scientific and commercial data available" after conducting a review of the species and after taking into account the efforts, if any, being made by any state, foreign nation, or subdivision of a state or foreign nation to protect such species. 16 U.S.C. § 1533(b)(1)(A).

Also, once a species is listed as threatened or endangered, section 4 provides for the protection of the species' ecosystem through the designation of critical habitat, as well as the preparation of recovery plans for the species. 16 U.S.C. § 1533(a)(3), (f). Preservation of the ecosystem upon which the species depends is crucial to its conservation because habitat destruction is typically the most serious threat to a species' survival. After a species is listed as a threatened species, under section 4(d) the secretary must issue regulations that provide for the conservation of the species. 16 U.S.C. § 1533(d). The appropriate agency must develop a recovery plan under ESA section 4(f) for the conservation and survival of the listed species, unless such a plan would not promote the species' conservation. Recovery plans must include site-specific management

[4] For terrestrial species, the ESA is implemented by the Secretary of the Interior through the United States Fish & Wildlife Service (FWS). Where marine species are involved, however, the Secretary of Commerce acts through NMFS.

schemes, objective criteria to measure the species' progress, and estimates of the cost of implementing the plan. 16 U.S.C. § 1533(f)(1)(B).

B. SECTION 7 – INTERAGENCY COOPERATION

Section 7 mandates that all federal agencies do everything possible to protect listed species. 16 U.S.C. § 1536. All federal agencies, in consultation with the Secretary of the Interior or the Secretary of Commerce, are directed to use their authorities to further the purposes of the ESA by carrying out programs for the conservation of listed species. 16 U.S.C. § 1536(a)(1); *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257 (9th Cir. 1984) (in order to meet the ESA's mandates, the Department of the Interior could operate a dam to conserve listed species to the exclusion of other water uses because the secretary's obligation under the ESA supersedes his obligation under federal water reclamation laws); *Riverside Irrig. Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (the Corps of Engineers is required under the ESA to consider direct and indirect impacts to listed species of projects it is authorizing, permitting, or funding). The agencies have discretion as to how to accomplish this requirement.

This section requires all federal agencies to consult with the secretary before taking any action that may affect a listed species. All federal agencies, in consultation with the secretary, have a substantive duty to ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2); *American Rivers v. National Marine Fisheries Serv.*, 1995 WL 464544 (D. Or. Apr. 14, 1995). This requires consultation between the federal agency taking action (action agency) and either FWS or NMFS, depending on the species involved. The obligation to consult affects anyone seeking a federal permit, federal funding, or any other federal action or authorization necessary to a private project.

Examples of federal agency action which require consultation include:

- Operation of hydroelectric and storage projects of the Bureau of Reclamation and Army Corps of Engineers. 62 Fed. Reg. 43,937 (1997) (Final Rule listing the Upper Columbia River steelhead);
- Bureau of Reclamation's renewal of water contracts. *Natural Resources Defense Coun. v. Houston*, 146 F.3d 1118 (9th Cir. 1998);

- United States Forest Service's reissuance of a special use permit to convey water in an irrigation ditch across Forest Service managed lands;
- Army Corps of Engineers permitting of a pumping facility on the Columbia River; and
- United States Navy lease of an agricultural land to farmers who in turn contracted for water from a local water district. *Pyramid Lake Paiute Tribe v. Department of the Navy*, 898 F.2d 1410 (9th Cir. 1990).

The FWS and NMFS have issued joint regulations detailing the consultation process. 50 C.F.R. pt. 402. If the secretary, based upon the best scientific and commercial data available, informs the action agency that a listed species may be present in the area of the proposed action, the agency must conduct a biological assessment evaluating the potential effects of the action on any listed species. 16 U.S.C. § 1536(c).

The effects of the action include both direct and indirect effects on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. 50 C.F.R. § 402.02. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. *Id.* For example, NMFS determined that the indirect effect of installing a pumping station on the Columbia River was the decreased flows which would result from that pumping station. *See* Consultation, Biological Opinion for Inland Land, Inc., Columbia River, prepared for Department of Army Corps of Engineers by National Marine Fisheries Service, May 16, 1997 (Inland Land Biological Opinion).

The identified effects are used to develop an environmental baseline. 50 C.F.R. § 402.02. The environmental baseline includes the past and present impacts of all federal, state, or private actions and other human activities in the action area, the anticipated impacts of all proposed federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of state or private action that are contemporaneous with the consultation in process. *Id.*

The definition of environmental baseline seems to suggest that a perfected water right may be considered part of the environmental baseline while a non-perfected water right or a water right which has been relinquished or abandoned would not be considered part of the environmental baseline. For example, in a biological opinion in a section 7 consultation for an Army Corps of Engineers permit covering a pumping station on the Columbia River, a pending but unperfected water right which had been repeatedly extended was not considered part of the environmental

baseline. *See* Inland Land Biological Opinion. It thus stands to reason that a biological opinion's environmental baseline may not include unquantified tribal or federal reserved water rights.

The regulations require that an agency performing a major construction activity must prepare a biological assessment. A biological assessment is the information collected by or at the direction of a federal agency to determine whether the proposed action is likely to adversely affect the listed species or its critical habitat, jeopardize the continued existence of a species proposed for listing, or adversely modify proposed critical habitat. 50 C.F.R. § 402.12.

If the assessment finds that a protected species or its critical habitat may be adversely affected, the action agency must initiate formal consultation with the secretary. However, if the action agency determines, after completion of a biological assessment or informal consultation, that the action is not likely to adversely affect the listed species or its critical habitat, informal consultation is terminated and formal consultation is not required. 50 C.F.R. § 402.13(a). The secretary must concur with the agency's determination of no adverse effect in writing. *Id.*

An applicant for a federal permit or license, who reasonably believes that a listed species may be affected by its proposed project, may request that the permitting or licensing agency initiate consultation with the secretary. 16 U.S.C. § 1536(a)(3).

Where formal consultation is required, the secretary must issue a biological opinion. 16 U.S.C. § 1536(b)(1)(A)-(B). The biological opinion must discuss the effects of the proposed action on protected species and state whether the secretary believes that jeopardy is likely to result from the action. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. Where the secretary believes jeopardy will occur, the secretary must specify reasonable and prudent alternatives to the action which will avoid jeopardy, if such alternatives are available. 16 U.S.C. § 1536(b)(3)(A). During the consultation process, section 7(d) prohibits an agency or applicant from making any irreversible or irretrievable commitment of resources to the project that forecloses any reasonable and prudent alternatives to the project. 16 U.S.C. § 1536(d); *Houston* (ESA violated by renewing water contracts prior to completing section 7 consultation).

If the secretary, after consultation, concludes that no jeopardy will result from the proposed project, the secretary shall provide the agency and the applicant, if any, with a no jeopardy biological opinion. The secretary shall also provide the agency and applicant with an incidental take statement. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

If the secretary, after consultation, determines that jeopardy to the listed species will occur, then the secretary shall issue a jeopardy biological opinion specifying reasonable and prudent alternatives to the action that will avoid jeopardy.[5] 16 U.S.C. § 1536(b)(3)(A). Reasonable and prudent alternatives must be consistent with the original action and economically and technically feasible. For example, a biological opinion for a pumping facility in the Columbia River proposed, as a reasonable and prudent alternative, that pumping from the facility be restricted to ensure that there was no net loss in stream flow during the juvenile salmonid migration period, at times when flow objectives are not being met. *See* Inland Land Biological Opinion. The facility could be operated during those periods if "the permittee proves to NMFS' satisfaction that he will provide for instream use, at the point of the diversion or upstream of this point during periods when flow objectives are not likely to be met, an amount of water from completed water rights that is equivalent to the flow depletion caused by the use." *Id.* In other words, the permittee could exercise his water right during low flow periods as long as he provided substitute "wet" water in the same quantity, in approximately the same location and at the same time as he made the diversion.

Following consultation, the secretary shall provide the agency and applicant with an incidental take statement. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). The incidental take statement must identify reasonable and prudent measures the secretary finds necessary to minimize the impact of the incidental takings on the species. 16 U.S.C. § 1536(b)(4)(C)(ii). A section 7 incidental take statement, if followed, exempts the agency action from section 9's taking prohibitions. 16 U.S.C. § 1536(o)(2). However, if there are no reasonable and prudent alternatives available, the incidental take statement will provide that incidental taking is prohibited by section 9.

[5] If the secretary determines that jeopardy will occur, an exemption from the requirements of section 7(a)(2) may be sought from the Endangered Species Committee, also known as the "God Committee," which is comprised of seven Cabinet secretaries and agency administrators. 16 U.S.C. § 1536(e). The Committee can grant such an exemption if it determines, based on the report of the secretary, that: no reasonable and prudent alternatives to the agency action exist; the benefits of the proposed action clearly outweigh the benefits of alternative actions conserving the species or its habitat; the action is of regional or national significance; and there has not been an irreversible or irretrievable commitment of resources. 16 U.S.C. § 1536(h)(1)(A). The Committee also must establish reasonable mitigation and enhancement measures necessary to minimize the effects of agency action on the species or critical habitat concerned. 16 U.S.C. § 1536(h)(1)(B).

C. SECTION 9 – PROHIBITED ACTS

Section 9 prohibits taking of endangered species.[6] 16 U.S.C. § 1538. Taking is broadly defined and includes an array of actions from actual killing of a listed species to causing harm to the species' habitat. 16 U.S.C. § 1532(19); *see Babbitt v. Sweet Home Chapter of Comm'ties for a Great Oregon*, 515 U.S. 687, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995) (definition of harm includes habitat modification).

The ESA defines take as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Regulations promulgated by FWS and NOAA further define harm to mean an act that actually kills or injures wildlife, but such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering. 50 C.F.R. § 17.3; 50 C.F.R.§ 222.102; *see Babbitt*, 515 U.S. 687 (Court upheld habitat modification as a component of FWS's definition of harm); *Palila v. Hawaii Department of Land & Natural Resources*, 649 F. Supp. 1070 (Haw. 1986) (habitat destruction that prevents the recovery of the species by affecting essential behavioral patterns causes actual injury to the species and causes a take). It is irrelevant whether the taking is direct or indirect. *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) (Massachusetts's licensing of gillnet and lobster fishermen caused take of endangered Northern Right whales through entanglement in fishing gear).[7]

When an individual water use causes a harm to a listed species, the persons causing the use may incur take liability under the ESA. Listed species may be harmed by a water use when the appropriation results in or contributes to:

- lack of sufficient stream flow to sustain healthy fish population;
- water quality problems such as high water temperatures;
- loss of riparian shade;

[6] Section 9's prohibition against "take" relates only to endangered species. Pursuant to regulation, the FWS extends the protection afforded an endangered species, including the prohibitions contained in section 9, to those it lists as threatened. NMFS addresses this issue on a species-by-species basis.

[7] On April 17, 2025, the Department of Interior and the Department of Commerce proposed a rule to amend 50 C.F.R. § 17.3 and 50 C.F.R. § 222.102 to rescind the definition of the term "harm" that includes habitat modification or degradation. 90 Fed. Reg. 16,102 (Apr. 17, 2025). If this rule amendment is adopted, and is upheld if any lawsuits are filed to challenge the rule, the U.S. Supreme Court's holding in *Babbitt* could effectively be overruled.

- adverse alteration of a stream channel;
- blockage of fish passage to usable habitat;
- mortality through stranding of fish during low flow periods; and
- mortality and injury to fish caused by diversion structures.[8]

Section 9 and all other ESA provisions are enforced through sanctions enumerated in section 11. Section 10, however, affords some relief to those who propose projects or other actions that may conflict with the needs of listed species. Section 10 provides for incidental take permits to allow the incidental taking of an endangered or threatened species under limited circumstances. 16 U.S.C. § 1539. An important prerequisite for a section 10 incidental take permit is the preparation of a habitat conservation plan encompassing the applicant's lands or areas of operation for the affected species. Sections 6 and 7 contain additional exceptions to the take prohibition.

D. SECTION 10 – HABITAT CONSERVATION PLANS

As discussed above, NMFS and FWS can issue an incidental take permit pursuant to the ESA under certain circumstances. Such a permit allows a taking of an endangered species as long as it is incidental to and not the purpose of an otherwise lawful activity. In order to obtain an incidental take permit, an applicant must submit a habitat conservation plan (HCP) that specifies the following: (1) any taking of a listed species will be incidental (not intentional); (2) the plan will, to the maximum extent practicable, minimize and mitigate the impacts of taking; (3) funding will be available to implement the plan; (4) the taking will not appreciably reduce the likelihood of the survival and recovery of the listed species in the wild; and (5) any measures required under section 7's consultation requirements and substantive mandates will be met. 16 U.S.C. § 1539(a)(2)(B). The last requirement emphasizes that the granting of an incidental take permit is a federal action subject to section 7's prohibition against activities that would jeopardize the continued existence of a listed species or adversely modify its critical habitat.

HCPs offer several benefits to private parties. First, such plans allow endangered species conservation issues to be addressed on a regional basis as opposed to the project-by-project approach of section 7 consultation. Second, HCPs offer an opportunity to avoid multiple, successive, and conflicting demands to mitigate the impact of activities on endangered species. Another rationale for the process is that implementation of HCPs provide opportunities to increase

[8] Adoption of a final rule rescinding the definition of "harm," so it would not include habitat modification or degradation would call into question whether some or all of these circumstances would cause harm to a listed species.

conservation and recovery of the species over merely enforcing ESA's take prohibition. On the negative side, HCPs require time and money. A scientifically defensible and effective HCP requires extensive wildlife research.

In 2000, Seattle established an HCP for the Cedar River Watershed located thirty-five miles southeast of the city. This 90,000-acre watershed supplies two-thirds of the region's drinking water supply and is home to several threatened and endangered species, including the chinook salmon, northern spotted owl, marbled murrelet, and common loon. Over the fifty-year term of this HCP, Seattle plans to protect and improve water quality and aquatic and upland habitat for listed species in these headwaters. To this end, the city intends to open up more than seventeen miles of river for anadromous chinook, coho, and steelhead trout species by constructing fish ladders and screens at the Landsburg Diversion Dam, which has blocked fish passage into the municipal watershed for more than a century. In addition, the city proposes to maintain instream water flows to support indigenous chinook, coho, and steelhead trout. By managing the river to flow more natural flows, Seattle hopes such measures will help restore the lower river ecosystem, which continues to face intense urbanization pressures.

E. SECTION 11 – ENFORCEMENT

The provisions of the ESA are subject to enforcement by the federal government and through citizen suits. The ESA authorizes the Departments of Justice, the Interior, and Commerce to initiate criminal enforcement, civil penalties, and forfeiture actions. 16 U.S.C. § 1540(a), (b), (e).

The relief available under ESA includes injunctive relief against any person alleged to be in violation of ESA or its regulations, civil penalties up to $25,000 for each violation, and civil forfeiture of listed plants and animals and equipment used in furtherance of the unlawful act. 16 U.S.C. § 1540(a), (e)(4), (e)(6). Criminal violations of ESA may result in a prison sentence and/or monetary fine. 16 U.S.C. § 1540(b).

The ESA also authorizes the filing of a citizen suit against an alleged violator of the ESA. 16 U.S.C. § 1540(g). A citizen suit may not be filed if the secretary has commenced a penalty action or the United States has commenced and is diligently prosecuting a criminal action for the alleged violation. *Id.* A citizen suit can be used to enjoin any person, including the state and federal government, who is alleged to be in violation of the ESA or its implementing regulations, and to

compel the secretary to apply the take prohibitions of sections 4(d) and 9. 16 U.S.C. § 1540(g)(1)(A), (B). The ESA provides for award of attorney's fees to the prevailing party. 16 U.S.C. § 1540(g)(4).

F. WHAT IS SUPREME? – STATE WATER RIGHTS VS. THE ESA

There is some uncertainty as to whether and how the ESA may affect water resources management and the exercise of state water rights in Washington. As described in prior chapters, under western water law, first in time is first in right and the rights and responsibilities of a water right holder flow from that principle. The ESA, on the other hand, can potentially upset the "natural" order by requiring that the exercise of water rights, regardless of their priority date, may be restricted in order to protect listed species. The federal government is not subject to the prior appropriation doctrine and, therefore, it may elect to regulate a water right holder, regardless of the seniority of its water right, to further the purposes of the ESA. If the ESA is found to be supreme, the relevance of the prior appropriation doctrine in the protection of protected species would be squarely at issue.

The few courts that have addressed the issue of the interaction of the ESA with state water rights have expressed the view that the ESA controls. However, in each instance, the facts of the case dictated the outcome. *County of Okanogan v. National Marine Fisheries Serv.*, 347 F.3d 1081 (9th Cir. 2003), *cert. denied* 541 U.S. 1029, 124 S. Ct. 2094, 158 L. Ed. 2d 710 (2004), involved requirements imposed by the U.S. Forest Service (USFS) on holders of special use permits allowing the operation of ditches that convey water on land in the Okanogan National Forest. After steelhead and chinook salmon were listed as endangered species, and bull trout was listed as a threatened species, assessments under section 7 of the ESA were conducted for special use permits for ditches on the Chewuch River and Early Winters Creek in the Methow River Basin. Under section 7, USFS was required to consult with NMFS because management of the special permits providing rights-of-way for the ditches in the National Forest was a federal action that required USFS to cooperate with NMFS with respect to steelhead and salmon, and the FWS with respect to bull trout. NMFS issued biological opinions that resulted in reissuance of the special permits with requirements to maintain adequate flow levels for protection of the ESA-listed fish species. Among other things, the ditch operators were required to reduce diversions of water from the ditches during times of low flow in order to protect fish. Okanogan County, a ditch company, and several individuals filed suit to challenge the new fish protection conditions in the special permits.

The Court rejected the plaintiffs' argument that "the Forest Service does not have the authority to condition the use of the rights-of-way in a national forest on the maintenance of instream flows because such restrictions deny them their vested water rights under state law." *County of Okanogan*, 347 F.3d at 1084. The Court determined that the instream flow conditions were lawful under the ESA and upheld the special permits:

> [W]e are of the view that the Forest Service had the authority to restrict the use of the rights-of-way to protect the endangered fish. The permits themselves, from their inception provided the government with unqualified discretion to restrict or terminate the rights-of way.

Id. at 1085. The Court in *County of Okanogan* focused on the ESA's requirements on federal agencies and provisions in the special permits that emphasized that they could be reopened or revoked based on federal law requirements. On that basis, the Court did not find that implementation of the ESA through requirements to protect listed species unlawfully interfered with state water rights.

In *United States v. Glenn-Colusa Irrig. Dist.*, 788 F. Supp. 1126 (E.D. Cal. 1992), the United States brought an action under section 9 seeking to enjoin an irrigation district's take of listed salmon through the operation of its pumping facility. The District's pumping station diverted water under state water rights from the Sacramento River killing between 400,000 to 10,000,000 threatened Sacramento River winter-run chinook salmon per year, due to inadequate fish screens at the pumps' intake. *Glen-Colusa Irrig. Dist.*, 788 F. Supp. at 1130. The United States moved for an injunction prohibiting the irrigation district from taking fingerling salmon in the course of pumping water. The court determined that there was no genuine question that a take was occurring due to the pumping activities. *Id.* at 1133. The Court determined that the district's pumping activity harmed or killed salmon by trapping, entraining, and battering salmon smolts against an outdated fish screen, by chewing up salmon smolt in the water pumps, and by creating prime predator habitat in the pump station diversion channel. *Id.* at 1130.

The irrigation district asserted that its state water rights should prevail over the ESA, but the Court rejected that contention. After acknowledging the policy in section 2(c)(2) of the ESA, that federal agencies should cooperate with state and local authorities to resolve water resource issues in concert with the conservation of endangered species, the Court stated:

> This provision does not require, however, that state water rights should prevail over the restrictions set forth in the Act. Such an interpretation would render the Act a nullity. The Act provides no exemption from compliance to persons possessing state water rights, and thus the District's state water rights do not provide it with a special privilege to ignore the Endangered Species Act. Moreover, enforcement of the Act does not affect the District's water rights but only the manner in which it exercises those rights.

Id. at 1134. The Court concluded that the irrigation district was taking listed salmon in violation of section 9 and issued an injunction precluding use of the pumping facility during peak downstream migration season. *Id.* at 1135.

The *Glen-Colusa Irrigation District* Court focused on the direct effects of the pumping activity on listed species, not the generalized effects caused by exercising a water right. Thus, the case may stand for the proposition that the specific *method* of water appropriation constituted the take. However, given the ESA's broad purpose to protect listed species and Congress's intent that it apply broadly, the existence of a state water right would not likely be a sufficient defense against a take action. *See Strahan*, 127 F.3d at 162 (quoting S. Rep. No. 93-307, at 7 (1973)).

While, when considering ESA take liability, there likely would be no shield for water use under a perfected water right with a priority date prior to the listing of a species, the prior appropriation doctrine may, however, create difficulties in proving that a particular appropriation has harmed a species. Proof of a taking under the ESA requires a showing that the alleged activity has actually harmed the species or if continued will actually, as opposed to potentially, cause harm to a species. *United States v. Town of Plymouth*, 6 F. Supp. 2d 81 (D. Mass. 1998). If, for example, the cumulative effects of many water uses result in a lack of adequate stream flows harming a listed species, it may be difficult to demonstrate that a particular use is the cause of the harm. The consideration of the priority system in the determination of which water user(s) cause harm to the species may serve to complicate the assignment of responsibility.[9]

The Ninth Circuit Court of Appeals decided a section 7 case involving water provided under Bureau of Reclamation contracts. In *Klamath Water Users Protective Association v. Patterson*, 191 F.3d 1115 (9th Cir. 1999), the main question was whether irrigators receiving water from the Klamath Basin Project were third-party beneficiaries of a contract between the Bureau

[9] As noted above, a rule has been proposed to rescind the current definition of "harm" so that it would not include habitat modification or degradation. If this rule is ultimately adopted and withstands any legal challenge, there could be ramifications for proof of causation of takes stemming from the exercise of water rights.

and California Oregon Power Company (now PacifiCorp) governing the operation and management of the Link River Dam. PacifiCorp operates the Link River Dam under a fifty year contract signed in 1956. *Klamath Water Users*, 191 F.3d at 1118. The dam serves as a means for the Bureau to satisfy its contractual obligations to supply water to users in the basin and for flood control. PacifiCorp's interest is in controlling the flow of water through its downstream hydroelectric facilities. *Id*. The Bureau, in response to a 1992 biological opinion issued by the FWS requiring minimum elevations in Upper Klamath Lake to protect listed species, sought to establish a new operations plan for the dam. In the interim, the Bureau issued a yearly operations plan requiring minimum levels in the lake that resulted in less water being delivered to downstream irrigators holding Bureau contracts. *Id.* at 1119. The irrigators, based on their alleged third-party beneficiary status, filed suit to enforce the original contract between PacifiCorp and the Bureau. In a counter-claim, PacifiCorp argued that section 7 of ESA applied and, therefore, the company was not liable to the irrigators for implementing the interim plan, because the ESA could alter the obligations of the government contract. *Id.*

The Court first determined that the irrigators were not third-party beneficiaries to the original contract. *Id.* at 1118. Next, rejecting the irrigators' assertion that PacifiCorp, not the Bureau, had the right to control the storage and release of water, the court found that the terms of the contract show the "unmistakable intent" that the Bureau controls the dam and retains authority regarding decisions on the use of Klamath Basin Project water. *Id.* at 1122. Turning to the ESA, the court stated that it was well settled that contracts can be altered by subsequent congressional legislation, in this instance the passage of the ESA in 1973. Because the Bureau retains control of the dam, it has responsibilities under the ESA which "include taking control of the Dam when necessary to meet the requirements of the ESA, requirements that override the water rights of the Irrigators." *Id.* The Court concluded that the Bureau had the authority to operate the dam to comply with ESA. *Id.*

Looking beyond case decisions, there are other instances where the interaction between the ESA and water rights has come into play in Washington. The Corps of Engineers' issuance of a Clean Water Act section 404 permit to construct a pumping facility on the Snake River in Washington was the subject of a NMFS section 7 biological opinion. S and S Farms, June 4, 1997 (S & S Farms Biological Opinion). Consistent with its biological opinion for Inland Land, NMFS

focused on the impact the diversion of water from the Snake River would have on listed species, not the placement of the pumping facility in the river. NMFS concluded that flow reductions in the Snake and Columbia Rivers are a cause of the decline of listed Snake River salmon and that flow augmentation is an important tool for salmon restoration, especially in low flow years. S & S Farms Biological Opinion at 3-8. Therefore, in order to be exempt from the take prohibitions of section 9, the Corps must place conditions on the section 404 permit (1) requiring the permittee to measure and report water use to NMFS, and (2) prohibiting water withdrawals during flow objective periods unless (a) NMFS informs the permittee that flow objectives are likely to be met based on runoff forecasts, or (b) the permittee proves to NMFS that he will provide, at his diversion point during periods when flow objectives are not being met, water equivalent to that being diverted for the new use. S & S Farms Biological Opinion at 18.

Water rights can be implicated when critical habitat for a listed species is designated under section 4 of the ESA. For example, in 1999, NMFS issued a proposed rule designating critical habitat for several evolutionary significant units (ESUs) of steelhead. Designated Critical Habitat: Proposed Critical Habitat For Nine Evolutionarily Significant Units Of Steelhead In Washington, Oregon, Idaho, And California, 64 Fed. Reg. 5,740 (1999). In identifying critical habitat for steelhead, NMFS listed ten essential features: "adequate (1) substrate; (2) water quality; (3) water quantity; (4) water temperature; (5) water velocity; (6) cover/shelter; (7) food; (8) riparian vegetation; (9) space; and (10) safe passage conditions." *Id.* at 5743. Following these guidelines, NMFS included all river reaches accessible to listed steelhead within the range of the ESUs, except for the stretches along Indian reservation lands, as critical habitat for steelhead. *Id.* at 5748.

Issues relating to the potential impacts of water use pursuant to state water right within critical habitat for an ESA-listed species may arise during the section 7 consultation process. For example, if the water right holder needs a Clean Water Act section 404 permit from the Army Corps of Engineers to place a pumping facility in a river in designated critical habitat, under section 7 the Corps will be required to consult with NMFS regarding the issuance of the permit. In that process, the water right holder may be required to consider how their actions directly or indirectly interfere with watershed functions, such as reduced flows and increased water temperatures, and how they, in turn, ultimately affect listed fish species and their riparian habitat. If a permit is ultimately issued, it may contain conditions on the exercise of the water right intended to eliminate or minimize the potential impact to the listed species' designated critical habitat.

Issues involving the interaction between the ESA and state water rights have emerged in the Walla Walla River Basin. In the 1990s, continuing declines in populations of summer steelhead and bull trout prompted listings under the ESA, which created additional legal obligations for irrigators in the Walla Walla Basin to restore depleted summer stream flows. In 2000, these listings spurred two irrigation districts in Oregon and one in Washington to enter into a settlement agreement with FWS to avoid the take of listed species. Under the settlement agreement, the irrigation districts were required to bypass water to maintain minimum instream flows in the Walla Walla River throughout the summer. Walla Walla Water 2050 Plan Legislative Report.

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State Regulations

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Constitutional Provisions

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