An Introduction To Washington Water Law

Office of Attorney General

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SUMMARY

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

Amos V: 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 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 a particular body of water (lake, stream, or underground aquifer) to the ownership of the land over, under, and adjacent to the water in question. 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 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 in question) have no right to use the water in question.[1]

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

The riparian doctrine serves reasonably well where water is plentiful and all (or nearly all) landowners have access to some surface water or ground water 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 used to determine water rights on unpatented federal lands, but the riparian doctrine would be used 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

[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.

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 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 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 is even today 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 in the nature of a 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 ground water), the process requires an application to the state for a 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 touching 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. However, the courts have said 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.[4] 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 particular water bodies, reserving 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 right once applied for. If a landholder has exercised due diligence in appropriating water, the priority date on her use will "relate back" to the original date of application (or, at common law, the date the landholder gave notice of

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

[4] There are a few cases in which the law will not require a junior holder to stop using in deference to a senior right—notably, when the facts are such that cessation of the junior's use would not affect the senior right.

intent). A failure of due diligence will result in a later priority date, or even in the absence of a properly perfected water right. Because the analysis is very fact-dependent, litigation is often necessary to sort out the facts.

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 right has no legal right to apply the water to different land, or for a different purpose, except by following the statutory procedure for a change or transfer. Protection against speculation has been said to be the reason for requiring both continual beneficial use and appurtenancy. At least in general then, Washington water rights may not be "marketed" apart from the land to which they are appurtenant.

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.[5] The 1917 Water Code was comprehensive and established both a substantive and a procedural system.

[5] This requirement was not extended to ground water until 1945.

An important element of the code is the provision for *general adjudications* of 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 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 claimants 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 fix all the water rights in an area, but large ones involve enormous expenses of public and private resources.[6]

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 right, although if the permit is eventually granted and perfected, the priority of the resulting water right will "relate back" to the date of the application.

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[6] Ecology began a general adjudication of the surface water rights in the Yakima River Basin in 1977. The case is still pending in superior court, with several years of proceedings still uncompleted.

In considering 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 application adversely affect existing water rights; and (4) will granting the application be detrimental to the public interest.[7] Based on these factors, Ecology may grant, deny, or condition the application. 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.

Once Ecology grants a permit, the permit holder has a reasonable amount of time (typically stated in 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 unusual circumstances, Ecology may extend time for the perfection of a right, or may grant temporary permits, preliminary permits, or emergency permits.

Chapter V: The Ground Water Code

Ground water is subterranean or underground water that occupies the spaces within granular geologic materials or cracks in subterranean rock. Historically, the origin of ground water and its relationship to

[7] Whether as part of the general interest or otherwise, Ecology may also consider the affect of a proposed use on the quality of the water which is the proposed subject of appropriation.

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 ground water and the surface water in any area are interconnected (sometimes very directly, sometimes much less so), such that pumping ground water will eventually draw down the surface streams in the area, and removing of 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 ground water allocation.

Until 1945, ground water 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".[8] Underground streams were treated like surface water, but the courts evolved a strong presumption that, absent a high level of proof to the contrary, ground water was "percolating water". As to this category, the court adopted a "mixed" doctrine that attempted to recognize the special interests of the owner of the overlying land, while still allowing others to appropriate ground water so long as it did not "unreasonably" interfere with the rights of the landowner.[9]

In 1945, the Legislature enacted a comprehensive code for ground water. For the most part, this meant treating ground water like surface water for the purpose of obtaining permits for water rights. For several

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

decades, the courts treated the 1945 act as relating only to "percolating waters", but in 1973, the Legislature amended the definition of "ground water" to make it clear that the code covered all ground water. In subsequent case law, the courts have recognized this change.

The Legislature rejected the previous court-developed ground water doctrines and extended the prior appropriation doctrine to ground water rights. In doing so, the Legislature also reaffirmed the public ownership of ground water as well as surface water. The acquisition of ground water 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 ground water, the Legislature did create some exemptions: for certain relatively small 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 ground water permit are essentially the same as for a withdrawal of surface water, except that Ecology also analyzes whether a proposed ground water project is reasonable and feasible in terms of the 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 users. The seniority of a ground water right, as to

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

the quantity protected, is limited by this concept of "reasonable pumping level".

In 1985, the Legislature enacted a ground water management program to address issues of overdrafting and to promote efficient practices to meet future water needs. The statute directs Ecology to designate ground water areas and sub-areas, and authorizes the prioritization of water rights in the designated areas to preserve and protect ground water resources for present and future priority uses.

In the 1945 code, the Legislature recognized existing rights to ground water, but it also required all holders of pre-existing rights to file 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 ground water 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 ground water, rights have been forfeited as to claimants who did not file claims within fifteen years of the enactment of the ground water code, or 1960, although the courts have not explicitly ruled on this point.

As noted earlier, certain small ground water withdrawals are *exempt* from permitting requirements. These include (1) water for stock watering; (2) the watering of a lawn or noncommercial garden not exceeding one-half acre in area; (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 small withdrawals are not subject to the permitting requirement, they are subject to the substantive provisions of the water codes, such beneficial use requirements, continuous use, and the priority system. In recent years, there is recognition that the cumulative affect of exempt withdrawals may be significant. Since there is no requirement that the amount and nature of such withdrawals be reported, the state has no precise information concerning their cumulative effect.

The ground water code covers not only naturally occurring ground water, but also "artificially" stored ground water, such as water escaping into the ground from irrigation. Landholders may apply to appropriate these waters as well as natural ground water. However, in a case involving the federally-operated Columbia Basin Project, the courts 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 ground water. With this connection in mind, both statute and case law has confirmed that, to the extent the appropriation of surface water affects ground water rights, or the other way around, the prior appropriation doctrine should govern. Thus, a

senior ground water right has precedence over a junior surface water right. This is true even where the continuity of surface and ground water 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 *forfeiture*, in which rights are deemed forfeited if they have not been used for five consecutive years without sufficient cause. Forfeiture cases are highly fact-dependent, since they must include analysis of the length of non-use as well as an evaluation of the causes. They may arise in the course of general adjudications, more limited litigation over water rights, or administrative proceedings commenced by Ecology.

An alternative to the statutory forfeiture proceeding is the common law doctrine of *abandonment*, which applies when there is intentional nonuse or voluntary relinquishment of a water right. Since intent 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

recently found that a city had abandoned an old surface water right by failing to use it (and relying instead on ground water withdrawals) for thirty-six years.

A Washington water right may 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 have also held that one may not obtain publicly-owned water rights through prescription.[10]

A special word should be added about possible loss of pre-code water rights through failure to preserve by filing claims. As noted earlier, the Legislature required holders of pre-code rights (pre-1917 for surface water, pre-1945 for ground water) 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.

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

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

Generally, the term "transfer" is used when a right is transferred from one owner to another, and the term "change" indicates that the essential elements of a right have changed, such as the point of diversion, the place of use, or the purpose of use. The legal considerations for transfers and changes are similar, 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 "bundle of sticks" which is potentially subject to transfer or change. There is no fundamental right to transfer water rights, and transfers depend upon compliance with state statute.

Thus, the initial requirement for a transfer is that a valid right exists. In case law, this typically involves an analysis as to the extent of continuous beneficial use. The statute and the courts do not allow unperfected or inchoate rights to be transferred, as part of the general state policy against speculating with water rights.

The second requirement is that a transfer not harm 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, as with applications for original water rights, there is the public interest to consider. Although the transfer statutes do not expressly direct Ecology to consider the public interest in dealing with transfer applications, the courts have broadly interpreted Ecology's authority to do so. This is related to other statutory direction to maximize the net benefit in water rights decisions.

With increasing pressure on available resources, question has risen more recently about the authority to transfer water rights relating to *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 permitting an exempt withdrawal to be transferred to, for instance, a non-exempt 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 scarce.

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.

In very recent years, the Legislature has permitted an alternative procedure for approval of 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 conduct hearings on transfer applications for water in the county and may approve, deny, or modify the applications. Ecology has the authority to review the actions of the conservancy boards for consistency with state law and policy. If Ecology does not act (or if Ecology approves the transfer), the transfer is legally effective, subject to judicial review.

Chapter VIII: 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.

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 takes (or keeps) 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 hunting, fishing, and agriculture. The priority date of the federal reserved right is the date of the establishment of the reservation.[11]

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 transferred from one federal purpose to another without the requirement of following state permitting requirements.

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[11] The federal courts have held that certain Indian 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.

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 ongoing 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, had effectively diminished and limited the irrigation water rights relating to the Yakama Indian Reservation.

Congress has consented for federal rights to be adjudicated in state courts and has even expressed a preference for state or federal adjudication. Thus, federal reserved rights may be before the state courts in general adjudications, although ultimately subject to federal review as to compliance with federal law. 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 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 few 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 uses as military bases, national parks and forests, and etc.

Chapters IX & X: 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 paper notes two of the many government programs whose administration might affect the allocation of water.

Chapter 9 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. Municipal and commercial 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 10 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 ESA, living species who are in danger of extinction may be "listed" by the

federal government 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 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 ESA, 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[12]

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.[13] 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

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[12] 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); A. Dan Tarlock, *Law Of Water Rights And Resources* (1988).

[13] 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.

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 ground water. At some later time and different place, the water may re-emerge to recharge surface water flows. Under the right conditions, however, it may remain in the ground for thousands of years. In most areas it can be demonstrated that the ground water 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 snow pack 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, ground

water, 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 ground water) 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 plenteous rainfall from October through June and with most areas in close proximity to small lakes, streams, wetlands, and ground water 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.

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. A. Dan Tarlock, *Law Of Water Rights And Resources* 3.02[1] (1988) (Release #6, 7/94); 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

[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.

thus incapable of private ownership. *Kidd v. Laird*, 15 Cal. 161, 168 (1860); Tarlock, 3.02[1] (Release #6, 7/94); 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. 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

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

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. 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

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[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.

> 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

[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.

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. This public ownership tenet is reaffirmed in the 1971 Washington code, which also states that "[s]ubject to existing rights all waters within the state belong to the public". Wash. Rev. Code 90.03.010.

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, 3.02[1] (Release #6, 7/94); 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, 596 P.2d 285 (1979).

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[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 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, chapter 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, the Washington state area was part of the Oregon Territory, 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.*

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[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, chapter VIII below.

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 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 decision 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.

See also Tarlock, 3.02[2] (Release #1, 8/89) (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,

[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.

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.

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 then state statutes 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.

(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.

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[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.

(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 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 services. 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 444-45; *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 "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 state law would be based upon the prior appropriation doctrine.

C. THE EMERGENCE OF THE PRIOR APPROPRIATION 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 meet 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 an allocation system for beneficial use protecting the first water user over subsequent claims.[6] Given the geography, social customs, and economic policies of 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

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

[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).

as the exclusive criterion of the right to use 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 the 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 creek 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 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:

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[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: Ground Water, 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).

> 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[.]

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 passed 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 the appropriation is "diligently and continuously prosecuted to completion". *Id.* §§ 2-4. This act also recognized appropriations previously made and provided that it should not be construed to interfere with vested rights. *Id.* § 7.

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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.

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]

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:

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[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 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, section E.

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 nonriparian 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 nonriparian 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 (nonriparian) 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 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 from both 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 enacted a permanent 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 act shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise.

1917 Wash. Laws ch. 117, § 1.

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. As a result of this condition, the decisions on the water codes of other states are of importance[.]

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 AT RECONCILING 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, that it is unnecessary to lengthen this decision by citing them all.
>
> 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 by 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, section 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 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 land, 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

[11] This case was a continuation of a battle 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).

> 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 on public lands to a rule which would allow appropriation on private lands as well. *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. 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 in 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 the beneficial use within a reasonable period of time:

> [W]aters 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 this 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 nonriparians 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 nonriparian to show no injury. *Id.* at 553. But if there is ample water in the stream, the burden is on the riparian owner to prove "substantial injury" by the nonriparian diversion.

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 nonriparian 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 use water. 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

[12] In 1964, the Ninth Circuit Court of Appeals had the opportunity to review the 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 of Ahtanum Creek that borders the Yakama Reservation. In determining the tribal rights, the court had to

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 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 – inseparably part of the soil 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.

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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.

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*, 1 Wash. 587, 21 P. 314 (1889), 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.*[13]

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[13] *See also Eikenbary v. Calispel Light & Power Co.*, 132 Wash. 255, 231 P. 946 (1925). 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 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.

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. *See Department of Ecology v. Abbott*, 103 Wash. 2d 686, 694 P.2d 1071 (1985). The case of *Abbott* rose 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. Relying on *Brown*, the trial court had held that the prior appropriation permit system of 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. 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 effectiveness of the 1917 Water Code. *Abbott*, 103 Wash. 2d at 694.

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 for nonuse.

The Court, in *Abbott*, 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 modifies 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.

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

Abbott was the first case to have fully analyzed the 1917 Water Code 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. In 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"

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[14] In a companion case to *Abbott*, the 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 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)).

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 1800's 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 1860's and 1870's, 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*; *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 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 Dep't 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, 5.03[2] (Release #11, 8/99); 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 public domain. *Irwin*; *see* Territorial And Early Statehood Legislation *supra* ch. II, section 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*. 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". *See 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 appropriation" was the law of the state. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882); *Moyer v. Preston*, 6 Wyo. 308, 44 P. 845 (1896); *Colorado Dep't 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). The courts reasoned that the common law of riparianism was inapplicable 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.*

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

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 previous 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 superior riparian water right to 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. § 51 and 43 U.S.C. § 661).

While the Act of 1866 recognized and confirmed state water rights on public lands as against 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. §§ 321-329). 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. § 329. 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 the Desert Land Act 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 in the western states. 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. *California Oregon Power Co.*, 295 U.S. at 162. The Court further held that this rule applied to lands patented under all other land laws. *Id.*

In *California Oregon Power Co.*, the petitioner raised the issue as to whether an owner of riparian land who had acquired the land in 1885 by 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.

California Oregon Power Co., 295 U.S. 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*, at pages 552-53, 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. 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 that a riparian or littoral proprietor has no right to 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 prevailing 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. 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); A. Dan Tarlock, *Law Of Water Rights And Resources* 5.16[1], 5.17[3][a] (1988 [Release #11, 8/99]).

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

[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.

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 manner and 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 right, its purpose, 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 or she expects to develop. 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 rights to the water source. If the new appropriator is not limited to the purposes, place, time, point of withdrawal, etc., 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 requires 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*; Tarlock, 5.14[1] (Release #11, 8/99). 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; Tarlock, 5.14[1] (Release #11, 8/99).

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, time 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 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; *see also* Tarlock, 5.14[1] (Release #11, 8/99).

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 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 of 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 the 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 provides for specific information 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 withdrawal 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 use reasonable or due diligence in completing the project and applying the water to actual beneficial use. *In re Crab Creek*; *Longmire*; Tarlock, 5.14[2] (Release #11, 8/99); 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 maximizing of the beneficial use of the 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 ere 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. 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.[2] *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 take into consideration many specific factual aspects of the project, with special consideration for the "application of water to beneficial use for municipal

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[2] Legal proceedings are a statutory excuse for nonexercise of a water right. *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 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.

water supply purposes". *Id.* The permit 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 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 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).[3]

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.

[3] 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*.

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.

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, 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 the 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 in 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)).[4]

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

> "that 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."

[4] This finding is consistent with the analysis of beneficial use expressed at the turn of the century. *See* Wiel, 3 Cal. L. Rev. 460. As the demand of water increased at the turn of the century, there were challenges to the use of water by senior appropriators who may have been using water in quantities in more than necessary, given improved methods of employing water. *Id.* The increase in the number of users to a water source is a factor in considering what is beneficial use. 1 Wiel, at 482.

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 similar to its definition of beneficial use. It is that amount of water, which is in excess of the amount necessary for 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 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 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

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[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).

use analysis. In *Shafford*, the Court discussed the policy of prohibiting waste as a factor in adopting more reasonable manner of water use 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 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 not be considered waste, the use of water must be reasonably efficient. Absolute efficiency is not required. *Id.* at 472.

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

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[6] The Washington State 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.

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.

(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

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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. [Wash. Rev. Code] 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).

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

> reasonably 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[.]

[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.*

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

6. Beneficial Use 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).

Beneficial use, as a manner of use, 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]

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[9] The Ground Water 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.

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, 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.[11] 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

[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.

[11] Just one year prior to the passage of this act, the Legislature passed the law related to irrigation and irrigating ditches, and set forth a means of regulating that would provide for apportioning the water among all persons with first priority for domestic purposes and thereafter for irrigation of perennial plants. *See* 1889-90 Wash. Laws, p. 708.

that water is not available to satisfy all the existing rights for the use of that water. In these circumstances, water rights must cease to be 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, 508 (Release #11, 8/99); *see also* 1889-90 Wash. Laws, p. 708.

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 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. The doctrine has never been explicitly applied in Washington.

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 type of uses.[12]

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

[12] Those who hold to a strict "vested property right" theory of prior appropriations might question the authority to alter the priority by rule from that derived by strict application of "first in time is first in right". Supporters of the rule would point to the central role of the public interest in all allocation of water rights, and to the historic willingness of the courts to recognize gradual changes in perception as to what is in the public interest. These issues have not been directly tested in litigation.

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.*

In *Tenem Ditch Co. v. Thorpe,* 1 Wash. 566, 20 P. 588 (1889), the Washington Supreme Court provided that 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 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; *see also* Tarlock, 5.14[2] (Release #11, 8/99).

In *Hunter Land Co.*, James T. Hunter had settled on land in 1880 along what is called 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 serving 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 the Hunter diverted and used the water). The Court held that the priority date was the date upon which the 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 the 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. It is a doctrine set in equity allowing for one's diligent efforts to put water to beneficial use to be awarded and not to be lost by others who may intervene and divert water. *See* Tarlock, 5.14[2] (Release #11, 8/99). On the other hand, 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 Resources Act now codified in Wash. Rev. Code 90.03.

> 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 did not become firmly established until the right had been acquired by appropriation. The date of the application becomes the priority date at the time that the right was acquired by the appropriation under Wash. Rev. Code 90.03.340. In other words, the priority date was not established merely by the application for a water right. Under the law of the state, 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 (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 appurtenance rule is to prevent speculation of water rights and encourage the settlement of western arid lands. Tarlock, 5.07[2] (Release #11, 8/99). 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 the change or transfer of the water right. 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, 221 P. 328 (1923); *Geddis v. Parrish*, 1 Wash. 587, 591, 21 P. 314 (1889); *see also* Tarlock, 5.17[2] (Release #10, 6/98). Generally, a water right holder has no obligation to notify Ecology of the sale of a water right to a third party.[13] However, there is a statutory mechanism where a water right can be assigned to a new owner. Wash. Rev. Code 90.03.310. Many purchasers of land and water require such an 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.[14]

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[13] 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.

[14] 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,

Once a water rights 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, time 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.[15] If such change is authorized, the water rights may become appurtenant to another parcel of land without losing its priority. *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

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.

[15] 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.

> 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 an appropriation can transfer only the quantity of water that has been continuously put to beneficial use. 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, 784-85, 947 P.2d 732 (1997), the Court held that a municipality could not hold unused water rights for speculative purposes, and thus forfeited the municipal's right 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

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[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.

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 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 by 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" as the exclusive

[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 Devlopment 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.

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 prorata 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 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.

[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.

> 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 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 Ground Waters 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; and the Water Resources Management Act of 1991, Wash. Rev. Code 90.42. 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.

1. The Adjudication Process

The adjudication process has been referred to as a simple quiet title action of existing water rights. *See In re Marshall Lake*, 121 Wash. 2d at 467; *In re the Water Rights of Yakima River Drainage Basin* (*Acquavella* II), 121 Wash. 2d 257, 850 P.2d 1306 (1993). It is also considered 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

[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.

their current validity and limited to the extent they are beneficially using 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 [Wash. Rev. Code] 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 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). 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. *Acquavella* II, 121 Wash. 2d at 265.

An adjudication may be initiated by Ecology upon finding that the "interest of the public will be subserved" or pursuant to a petition by one or more persons claiming a right to divert waters. Wash. Rev. Code

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

90.03.110.[8] 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 fact relating to the water use. *Id.*

Upon filing of the report, the superior court must order the clerk of the court to issue a summons for return between sixty to ninety days against all new parties claiming the right to divert water. Wash. Rev. Code 90.03.120. The notice must require the claimant, as a defendant, to file a statement of claim 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.*

Service must be provided as in any civil action. 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:

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[8] 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).

> Undoubtedly this was in the mind of the Legislature when [Wash. Rev. Code] 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 otherwise, and all water users were necessary parties, there would be a tremendously unwieldy duplication of claims.

Acquavella I, 100 Wash. 2d at 659.

In response to the summons, the claimant, as defendant, must file a statement that provides specific information on the historical use of water. Wash. Rev. Code 90.03.140. When service is complete, the court refers the matter to a designee of Ecology to act as a referee in taking testimony. Wash. Rev. Code 90.03.160, .190. In a "complex case with more than one thousand named defendants", the superior court has the discretion to retain portions of the proceeding related to a particular class of defendants, if significant legal issues are involved and if it will be more efficient for the parties. Wash. Rev. Code 90.03.160.

The referee takes testimony and issues a report to the court. Wash. Rev. Code 90.03.160, .190. The referee's report generally includes findings and recommendations of the claimant's water rights. The report then is subject to "exceptions" filed with the superior court by those who disagree with the referee's findings. Wash. Rev. Code 90.03.200; *see also In re Marshall Lake*, 121 Wash. 2d at 466-67. A hearing is held in the superior court on the exceptions filed against the referee's report. Wash. Rev. Code 90.03.200. The case is considered a suit in equity, with the court allowed to take additional evidence or remand the matter back to the referee for a "further" or a supplemental report. *Id.* When the decree is issued confirming any water rights, the full nature of those rights are

specified in the decree and provided in a "certificate" issued by Ecology. Wash. Rev. Code 90.03.240.

The burden is on the claimant of a water right to prove the claimed right. *See Ahtanum Irrig. Dist.*, 124 F. Supp. 818. The water code does not necessarily require the claimant to appear at the hearing to have a right confirmed. As provided in Wash. Rev. Code 90.03.120, the court will consider the evidence before it, and that evidence may consist of only the information in Ecology's report. *See* Wash. Rev. Code 90.03.110. However, a claimant who fails to appear in the proceeding to prove the claim is estopped from subsequently asserting any right except as otherwise provided for in the decree. Wash. Rev. Code 90.03.230. Water rights not confirmed in a decree are lost or extinguished. *McLeary v. Department of Game,* 91 Wash. 2d 647, 591 P.2d 778 (1979).

A final adjudication of a right determined prior to June 6, 1917, must be recognized in any subsequent adjudication as "conclusive among the parties thereto, and the extent of use so determined shall be prima facie evidence of rights to the amount of water and priorities so fixed as against any person not a party to said decree". Wash. Rev. Code 90.03.170.

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 before 1945 for ground water, 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 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 be based on 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 forfeiture. The principles of common law abandonment were recently 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 requirements may be applied in general adjudication proceedings. Wash. Rev. Code 90.14.200; *see also Acquavella* III. All rights, including those created 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 forfeiture 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.

An adjudication must also determine "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. 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 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 763. The Court did not, however, address whether the term "irrigable" on the certificate allowed 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, which will allow expansion of acreage, are provided for 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 rights. *Rettkowski v. Department of Ecology*, 122 Wash. 2d 219, 858 P.2d 232 (1993). Ecology does not have the independent authority to make this determination 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 ground water 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 riparian rights from Sinking Creek for their cattle and a small level of irrigation. Through monitoring and studies, Ecology had determined that the ground water 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 ground water certificates issued through the 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 ground water 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, the irrigators filed an action 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 permit decisions, no such authority exists for the purposes of regulating among water rights. *Id.* at 237. 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 that provides an agency may only do that which it is 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. 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 had been 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.*[9] This language, however, must be read with other sections of the act that protect inchoate rights and riparian rights[10] 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.

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.

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

[10] 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 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. *See also Schuh v. Department of Ecology,* 100 Wash. 2d 180, 667 P.2d 64 (1983) (Ecology's decision on permits and amendments to permits is a discretionary act that cannot be set aside within a clear showing of abuse).

(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 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 the application is defective, Ecology must return the application for a "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 the "reasonable" time established 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 has filed an intent 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 are subject to and may rely on as 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 these recent enactments. The Court held that, on remand, Water Resources must consider the policy and substantive elements of these acts in issuing a permit. *Id.* at 120. The Court found that there was no final decision prior to the enactments of these 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.[11]

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

[11] The *Stempel* case also highlights how many of the other environmental statutes apply to the specific criteria for issuing a permit for appropriating water. Also, once a water permit is issued and even after a right is perfected, the right continues to be subject to beneficial use and nonwaste standards that may be redefined by the Legislature or changed by modern practices. *See In re Marshall Lake*; *Abbott*, 103 Wash. 2d at 697.

reviewing an application for a water permit. 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 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: "But 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 criteria have been summarized as general permit requirements that the 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 be in the public interest. This has been referred to as the "four-part test". *See 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, conservation of water use, and administration of the water for 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 provided 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 criteria requires an analysis of both the proposed type of use and the proposed quantity of 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 water for irrigation, mining, and manufacturing are "deemed a public use". Wash. Const. art. XXI, § 1. The permit application process references four types of water use that must provide specific information to Ecology as part of their application: Irrigation, power, municipal water supply, and mining. *See* Wash. Rev. Code 90.03.260. The Water Resources Act of 1971 provides a more complete and most likely the relevant list of beneficial uses of water for the permit application process.[12]

> 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 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:

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[12] 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 a recent Washington Supreme Court case, the Court analyzed the basic principles of beneficial and perfection within the context of the statutory scheme set forth in Wash. Rev. Code 90.03. *Theodoratus*. Under the 1917 Water Code, Ecology issues permits and establishes a time period with which the water is to be actually applied to beneficial use, allowing for an opportunity for application for extensions of time "depending upon the circumstances". The final certificate would then be issued to the extent the appropriation has been perfected by actual use of the water. The Court in *Theodoratus* found that the requirement of beneficial use effectuated the legislative intent expressed in both the

surface and ground water 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 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 Wash. Rev. Code 90.14.140(2)(d) provides for an exemption from relinquishment if the water is used 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 based upon system capacity. *Theodoratus*, 135 Wash. 2d at 594.

(e) Protection Of Existing Water Rights Criteria

Applications for a water permit cannot be granted unless Ecology finds that the use of the water would not impair existing water rights. Wash. Rev. Code 90.03.290. In analyzing these criteria, Ecology must

make a tentative determination as to whether existing water rights may be impaired by the proposed use.[13] *Rettkowski*. 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, 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 senior right. However, this regulatory approach itself is not

[13] 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, 354 P.2d 917 (1960); *Madison v. McNeal*, 171 Wash. 669, 19 P.2d 97 (1933).

practical and has been rejected by the Pollution Control Hearings Board.[14] One practical problem is that regulation of the junior rights will not occur for most of the state because Ecology cannot regulate on behalf of senior rights unless the rights are confirmed in a Washington Supreme Court general adjudication. *Rettkowski.* 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 an 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 from ground water will impair existing rights from a surface water source that was in "hydraulic connection" to the ground water supply. The court recognized that when a ground water resource is tributary to or may otherwise affect the flow of surface water, the ground water and 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 ground water is "minutely" tributary to or otherwise affecting the surface water, all senior rights to the surface water are superior to subsequently acquired ground water rights. Based upon the finding that the ground

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

water 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 established by rule pursuant to Wash. Rev. Code 90.22.010 and 90.54.040. 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 is the only appellate court decision that has specifically addressed the standard for impairment when Ecology considers application for water use under Wash. Rev. Code 90.03.290. Earlier cases generally presented issues of impairment between two existing appropriations, both of whom were claiming that the other was impairing their senior right. Unlike the dispute between existing water users, the application process requires Ecology to predict impairment caused by a 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 presents 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 ground water withdrawal requires an analysis to determine whether any surface water sources, in addition to the ground

water, will be impacted by the withdrawal. Ecology must determine whether there is continuity between the ground water and the surface water, such that the withdrawal of ground water will affect the surface water. The code recognizes the need to recognize and manage the waters that are connected between the 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 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."

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

There continues to be controversy as to the legal requirement and standard in determining first, the effect or extent of hydraulic continuity

on surface water, and second, whether such effect should be considered an impairment of a surface water right. In 1999, the Washington Supreme Court accepted for review several appeals that raise these issues and that place the analysis in *Hubbard* squarely before the Court. *Jorgensen v. Pollution Control Hearings Board*, Washington Supreme Court No. 67786-7 (to be argued Mar. 1, 2000). In *Jorgensen,* Ecology denied ground water applications based on a 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 finding of impairment was made because the streams in question were subject to rules that either closed the stream to further appropriators or established instream flow levels that were not being met year round. A principal issue is whether the law requires that impairment on a surface water be measurable by tools such as stream gauges or proven by using conceptual and numeric modalities. *See Hubbard*; *Anderson v. Department of Ecology*, Pollution Control Hearings Bd. (PCHB) No. 78-38 (Aug. 18, 1978); *Richert v. Department of Ecology*, PCHB No. 90-158 (1990).

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".[15] *Schuh*, 100 Wash. 2d at 187. The *Schuh* case is discussed in more detail in The Water Codes: Ground

[15] The *Schuh* decision was unique on its facts and the Court deferred to Ecology's analysis of public interest in denying an amendment to a ground water right.

Water, chapter V below. Historically, this has not been an issue because Ecology has processed, in the order they are received, water right applications for proposed diversions from a single water source. *See Hillis*, 131 Wash. 2d at 378. However, as greater numbers of applications have been filed and funding has limited Ecology's resources, Ecology has set priorities for processing applications for certain types of uses. *Id.* at 387. 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. *Id.* at 397. However, these policies must be established through rulemaking procedures under the APA. *Id.* at 397-98. 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.

(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* A. Dan Tarlock, *Law of Water Rights and Resources,* 5.19[1], [2] (1988 [Release #11, 8/99]); *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 the importance of appropriation to the economic development of the West. The prior appropriation system did

not account for water quality concerns and other limits. *Washington v. Lawrence*, 165 Wash. 508, 6 P.2d 363 (1931); *see* Ralph W. Johnson, *Water Pollution And The Public Trust Doctrine*, 19 Envtl. L. 485, 490 (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 Dep't of Ecology* (*Elkhorn*), 511 U.S. 700, 719, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994).[16]

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 489; *see also Abbott*, 103 Wash. 2d at 696-97 (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

[16] 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).

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. 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.
>
> (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 applicant sought to appropriate waters from Loon Lake. Several residents around the lake opposed the appropriation on grounds that the appropriation would contribute pollution to the lake. *Stempel*, 82 Wash. 2d at 111. The Washington Supreme Court, in turn, interpreted SEPA[17] and the WRA[18] to determine what Ecology must consider when reviewing a water appropriation 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 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, Ecology must evaluate water quality in the allocation process.[19]

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[17] Wash. Rev. Code 43.21C.

[18] Wash. Rev. Code 90.54.

[19] 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.

In addition to Washington statutory provisions and case law requiring water quality to be considered in water resource management decisions, the 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.[20]

In *Elkhorn*, 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 was a permissible condition of a section 401 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,[21] 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

[20] 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 enabled states to ensure that federal hydroelectric licensees not only comply with the Federal Energy Regulatory Commission, 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.

[21] 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").

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 709 (quoting 33 U.S.C. § 1341(d)). Such "other limitations" may include stream flows 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 discharge 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.

(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; Tarlock, 5.05[2] (Release #11, 8/99). Logically, if the proposed appropriation will impair existing water rights, water is not available for the new appropriation.[22] The determination of water availability is also

[22] Applicants have raised the proposition that there should be the opportunity to show that water is available and that no impairment will occur by "creating" water through certain land use modifications. In a hearing before the Pollution Control

directly 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

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Hearings Board, an applicant requested credit for increasing recharge to the ground water as a result of deforestation. *Black River Quarry v. Department of Ecology*, PCHB No. 96-56 (1996), *aff'd*, King Cy. Sup. Ct. No. 96-2-20613-0KNT, *and on appeal to* Washington Supreme Court, No. 67786-7 (to be argued Mar. 1, 2000) (*Jorgensen .v. PCHB*). Black River Quarry argued that the trees naturally consumed ground water and that by deforestation, the water was no longer consumed and therefore "recharged" the ground water. By merely withdrawing this quantity of "recharged" ground water 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 holding:

> Black River Quarry is not entitled to any credit for increasing recharge to the ground water, as a result of deforestation. *Accord State Engineer v. Castle Meadows, Inc.*, 856 P.2d 496, 505 (Colo. 1993); *Giffen v. State of Colorado,* 690 P.2d 1244 (Colo. 1984); *RJA, Inc. v. Water Users Association of District 6,* 690 P.2d 823 (Colo. 1984); in *Southeastern Colorado District v. Shelton Farms, Inc.*, 529 P.2d 1321 (Colo. 1975).
>
> * * *
>
> 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.

King County Superior Court affirmed the Board, recognizing that giving credit for changes in vegetation would "gut" the current statutory scheme and that water left in the ground by vegetation remains public water subject to the rights of prior appropriators. Since *Black River Quarry*, the Legislature has amended Wash. Rev. Code 90.03.255 to provide that Ecology, in evaluating an application for a water right, consider "other resource management technique" that might result in increased water supply. 1997 Wash. Laws ch. 360, § 2. The 1997 amendments have not been specifically analyzed by a court and it is unclear whether the amendments support a reversal of the decision in *Black River Quarry*.

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 a state-issued permit to deliver and serve water to individual farmers who had land within the Columbia River Basin Irrigation District in eastern Washington. *Id.* at 763. A percentage of the irrigable water seeps away or is otherwise not consumed and accumulates as "return flow". 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. 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 appropriation 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 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, the appropriator continues to have "control and possession" of the water. Until the appropriator loses or abandons control of the water, it is not public water available for appropriation.

U.S. Bureau.

In *Jensen*, the return flow seeped into and commingled with the natural ground water, which was public water subject to appropriation. Unlike *U.S. Bureau*, the accumulating return flow was protected for the Bureau under a rule that held this water "artificially stored ground water" and not public waters available for appropriation. Wash. Admin. Code 173-136-020. The rule promulgated by Ecology provides that any water existing at a certain depth in the ground was all Bureau water, and any withdrawal required permission of the Bureau and payment of the normal project dues. *Jensen*, 102 Wash. 2d at 115-16; Wash. Admin. Code 90.03.030. The Court upheld the rule and the authority of Ecology to deny a new appropriation to the designated artificially stored ground water. *Schuh*, 100 Wash. 2d at 187.

In other cases, the Court has found that water is not available because 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 use of water will be detrimental to the public welfare. Wash. Rev. Code 90.03.290. On the other hand, to grant a permit, the use of water must be in the public interest. *Id.*; *accord* Wash. Rev. Code 90.54.020(10). The public interest criteria 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 primarily 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 criteria does not allow analysis of pollution and health concerns caused by the proposed withdrawal. 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 wellbeing. *Id.* Specifically, the policies require allocation of water in a manner that preserves instream resources, protects the quality of the water, provides adequate and save 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 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) (denied of senior applicant and granted junior applicant to promote water systems serving the public generally instead of smaller private systems); *Jorgensen*, (consider the interrelationship of surface and ground water; and protection of base river flows).

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 provide water to the UGA, which encompassed the area that Cascade Investment Properties sought to develop and serve by its own water right. Cascade had an application, senior to an application for water permit that was filed by Sequim. Ecology concluded that water was available for Cascade's proposed use and that the withdrawal would not impair other rights. However, Ecology denied the application solely under the public interest criteria because Sequim's municipal system was available and approving Cascade's application would result in more septic systems which would be detrimental to the public interest. Subsequently, Ecology approved Sequim's application for a permit that authorized Sequim to serve the Cascade development. The Pollution Control Hearings Board affirmed Ecology's decision, finding that denial under the public interest criteria was supported.

Lastly, wide deference is given to Ecology in interpretation of 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 granted and a permit issued, it must determine the several conditions of the water use.

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.

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 *supra* ch. III. Under the statute, Ecology determines what a reasonable period of time will be for the permitted project. Ecology must "prescribe" 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.

Under the statute, a permit may be extended, allowing for additional times to construct and apply the water to beneficial use. Wash Rev. Code 90.03.320. Good cause must be shown, and any extension must be determined on the "good faith of the applicant and the public interest affected." *Id.* The specific criteria for establishing times for municipal water supply, also apply in fixing the time for any extension. If the permit holder fails to comply with the terms of the permit or the 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.*

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. This 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 back to the date action to appropriate was first taken. At this time, the appropriation is complete and the right "vests". *Ickes v. Fox*, 85 Fed. 2d 294, 298 (D.C. Cir. 1936), *aff'd,* 300 U.S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937).

The process of determining the conditions, including the time frames for applying water to beneficial use, and ultimately certifying the right has been recently addressed by the Washington Supreme Court in *Theodoratus*. Theodoratus filed an appeal of 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 for 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 latest extension, Ecology did not restate this condition; rather, Ecology included a condition which provided that the water right certificate would be issued for the quantity of water based on the meter data of the actual use of water.

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 which has authority to issue or deny permits also has the authority to condition them. Any extension of a permit or "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. *Theodoratus*, 135 Wash. 2d at 597-98.

(j) Temporary And Preliminary Permits

The code provides for Ecology to issue temporary and preliminary 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.[23]

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. 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

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

done. Ecology must then find that the applicant has been acting in good faith, with the intent and ability to finish the proposed development. If the applicant fails to comply with the preliminary permit, it and the application for the permit automatically cancels. Wash. Rev. Code 90.03.290.[24]

[24] Ecology also has adopted a policy for reviewing an application for a preliminary permit. POL-1030. 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 apply to beneficial use the water they are diverting or withdrawing to collect data and information. POL-1030.

V.

THE WATER CODES: GROUND WATER

A. BASIC GROUND WATER HYDROLOGY

Ground water is subterranean or underground water that occupies the voids within granular geologic materials or cracks in solid rock. The exact relationship between ground water 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 ground waters. The complex nature of surface and ground water interactions has shaped the law of ground water in Washington.

The principle of hydraulic continuity refers to the hydraulic connection and dynamic interactions between ground water 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 ground water 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 ground water cannot be considered separate sources; 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 well extraction on surface and instream waters.

Pumping from wells affects ground water in three fundamental ways: it lowers ground water pressures and heads; it reduces ground water storage; and it changes the rates of ground water 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. 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 ground water 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. The connection however is apparent over the long term as the New Mexico Supreme Court has acknowledged.

> "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 Washington's Arid Interior*, 4 Hastings Envtl. L.J. 13, 35-37 (1997) (explaining how regional ground water pumping in the Swanson Lakes Wildlife Area of Washington has diminished surface water supplies, causing the actual disappearance of creeks, ponds, lakes, wet marshes, and meadows).

A recent study provided significant insights regarding the varied and complex responses to ground water pumpage 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). The study generated a three-dimensional computer model that illustrated how the hydraulic effects of pumping one well can propagate throughout a moderately large ground water basin and reach some of the surface water boundaries. The model also calculated that a hypothetical well pumped at several hundred gallons per minute, a rate common for a municipal or irrigation well, would reduce heads, stream flow, and spring discharge over areas of many square miles,

irrespective of whether pumping occurred from the unconfined or underlying confined aquifers.

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 ground water withdrawal. Such a system-wide approach will help provide a comprehensive accounting and better understanding of water resources.

B. COMMON LAW PRINCIPLES OF GROUND WATER

For the first half of this century, no statutory law in Washington existed to regulate ground water rights. Consequently the law of ground water appropriation developed independently of 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 his 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, which the Court somewhat inappropriately labeled "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 (clear and convincing proof required); *Wilkening v. Washington*, 54 Wash. 2d 692, 344 P.2d 204 (1959). Failure to understand the complicated nature of ground water resources led to these unscientific categories 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.[1]

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

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

[1] 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 taker's property. *Evans*, 182 Wash. at 459.

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 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 of the *Evans* case, applicable where damage was caused as a result of a public improvement project. *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). Thus, 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 under the *Evans* decision. In *Bjorvatn v. Pacific Mechanical Construction, Inc.*, 77 Wash. 2d 563, 464 P.2d 432 (1970), the Court reached a similar conclusion

where "Seattle Metro" caused subsidence of adjacent property by draining water in connection with constructing a sewer.

C. THE 1945 GROUND WATER CODE

1. Defining Ground Waters To Supplement the 1917 Surface Water Code

In 1945, the Legislature enacted a comprehensive ground water code to regulate and control allocation of public ground water. 1945 Wash. Laws ch. 263 (now codified in Wash. Rev. Code 90.44). In defining the term "ground waters", 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 ground water 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 of 1945, rights in the use of ground water arise only by permit, and the decision to issue a permit is a discretionary act. *Id.* The delay in judicial recognition in the scope and affect of the Ground Water Act 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 ground water code. *Ponten*, 77 Wash. 2d at 477-78.

In 1973 then, the Legislature clarified any doubt as to statutory coverage by amending the definition of "ground waters". 1973 Wash. Laws ch. 94, § 2. This amended definition, as set forth in Wash. Rev. Code 90.44.035, now reads, in pertinent part, as follows:

> "ground waters" 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 ground water and artificially stored ground water.

Wash. Rev. Code 90.44.035(3).

The purpose of assigning such a broad definition to ground water was to "reaffirm the intent of the legislature that 'ground waters,' . . . 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 [*Washington*] *v. Ponten*, 77 [Wash.] 2d 463 (1969)".[2] 1973 Wash. Laws ch. 94, § 1. Accordingly, if water is located underground it is unambiguously classified as ground water for purposes of the 1945 Ground Water Code.

[2] Note that this definition explicitly included percolating waters.

2. *Permit System: Extending The 1917 Code's Permit System To Ground Water*

By enacting the ground water code, the Legislature adopted a new and substantially different approach to the protection of ground water rights. Essentially, the Legislature rejected both the correlative rights and the reasonable use doctrines and extended the prior appropriation principles of the surface water code to ground waters.[3] Wash. Rev. Code 90.44.020; *see* The Emergence Of The Prior Appropriation Doctrine As The Dominant Law In Washington *supra* ch. II, section C. "This chapter . . . is enacted for the purpose of extending the application of such surface water statutes to the appropriation and beneficial use of ground waters within the state." Wash. Rev. Code 90.44.020.

By expressly extending the prior appropriation doctrine to ground water, the Legislature also extended the notion of public ownership to such water.[4] Wash. Rev. Code 90.44.040 thus provides:

> Subject to existing rights, *all natural ground waters* of the state as defined in [Wash. Rev. Code] 90.44.035,

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[3] 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, section C.

[4] Extending the prior appropriation system to ground water has been constitutionally challenged as a taking of property without due process of law. *See* A. Dan Tarlock, *Law Of Water Rights And Resources* 6.03[2] (1988). The Washington Supreme Court held that the permit requirement to withdrawal public ground water is a reasonable exercise of the state's police power and that Ecology's decision not to issue a ground water permit did not constitute unconstitutional taking of property. *See Peterson.* Similarly, the New Mexico Supreme Court held that a statute declaring ground water 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).

> 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 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 dependent on compliance with an exclusive permit system.[5] Wash. Rev. Code 90.44.050, .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[.]

Enumerated uses of relatively minor amounts, however, are exempted from the permit requirement. Wash. Rev. Code 90.44.050; *see* Exemptions Under The Ground Water Permit System *infra* ch. V, section C.4. Also exempt from obtaining a permit is the distribution and use of reclaimed water, or effluent, generated from a wastewater treatment facility. Wash. Rev. Code 90.46.120. Affirming the Legislature's intent, the Washington Supreme Court held that ground water is a publicly owned resource that requires a permit for withdrawal, except in limited circumstances defined by regulation or other applicable laws. *Jensen v.*

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[5] The ground water code establishes substantive limitations for the use and regulation of the state's finite resource. AGO 1984 No. 19, at 10.

Department of Ecology, 102 Wash. 2d 109, 113, 685 P.2d 1068 (1984); *Hillis v. Department of Ecology*, 131 Wash. 2d 373, 932 P.2d 139 (1997). Moreover, the Court has held the code's permit requirement a reasonable exercise of police power, such that a denial of a permit does not constitute an unconstitutional taking. *Peterson*, 92 Wash. 2d at 316.

The procedures for processing a ground water application were similar to those provided for when obtaining surface water right permits under Wash. Rev. Code 90.03.250 through 90.03.340.[6] Wash. Rev. Code 90.44.060 provides, in pertinent part:

> Applications for permits for appropriation of underground water shall be made in the same form and manner provided in [Wash. Rev. Code] 90.03.250 through 90.03.340, as amended, the provisions of which sections are hereby extended to govern and to apply to ground water, or ground water right certificates and to all permits that shall be issued pursuant to such applications, and the rights to the withdrawal of ground water acquired thereby shall be governed by [Wash. Rev. Code] 90.03.250 through 90.03.340[.]

For a full discussion of the requirements to obtain a surface water right which would be applicable for acquisition of ground water rights, see The Water Codes: Surface Water, chapter IV above. In addition to these requirements, ground water 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:

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

> 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 the code's limitation is to protect the capacity of ground water bodies by prohibiting methods and rates of extraction harmful to efficient use of the aquifer. In contrast to surface water appropriations, a senior appropriator 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 may have to modify their diversionary works in order to promote economic growth and development. In ground water appropriation suits the issues general involve a right to a given pressure level rather than a simple right to an amount of water.

While the ground water code recognizes the priority system, it only protects ground water appropriators to the extent they have reached or below reasonable ground water 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 ground water development in

other 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 ground water rights against later appropriations.

> As between appropriators of public ground water, the prior appropriator shall as against subsequent appropriators from the same ground water body be entitled to the preferred use of such ground water 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 ground water resources – that is where the depletion of an aquifer occurs at a rate faster than the natural rate of recharge. For a discussion on ground water mining, see *Fundingsland.*

In 1985, the Legislature enacted a ground water 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). Regulations promulgated by Ecology as a result of this act 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 ground water areas or sub-areas, or separate depth zones within such areas or sub-areas through rulemaking.[7] Each area designated must enclose all or any part of a distinct body of public ground water. Following the designation of sub-areas, areas, and zones, Ecology then establishes the priorities of right to withdrawal water for each ground water area separately. The priority date of a certificate of a vested ground water right relates back to "the date of filing of the original application for a withdrawal with the department, or the date or approximate date of the earliest beneficial use of water". Wash. Rev. Code 90.44.130. Once ground water management programs are adopted, Ecology and Social & Health Services 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 ground water areas or sub-areas and separate depth zones within an area or sub-area and accordingly establish priority of rights to withdraw public ground water. Wash. Rev. Code 90.44.130.

When Wash. Rev. Code 90.44.070 and .130 are construed together, they define the level of protection afforded to ground water rights and the relationship between appropriators. Simply put, the "safe sustaining yield" principle of Wash. Rev. Code 90.44.130 is qualified by the

[7] Ecology, local government, or ground water users, however, may initiate the development of a ground water 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 [Wash. Rev. Code] 90.44.400 through 90.44.420". Wash. Rev. Code 90.44.400(2).

"reasonable or feasible pump lift" concept of Wash. Rev. Code 90.44.070. Thus, the right of the prior appropriator has been interfered with if a new development 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 development 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.[8]

This interpretation 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 protected well depths absolutely, on the other hand, would limit ground water development to the level of the earliest and shallowest wells in an aquifer. Conversely, an interpretation which offered no such protection would make ground water development a mere "race to the bottom", rendering

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[8] Though no appellate cases interpret this state's ground water code on protection of works, this interpretation has been litigated and upheld in determinations of the Pollution Control Hearings Board. *See, e.g., Shinn v. Department of Ecology*, PCHB Nos. 75-613, 75-648 to 75-652 (Jan. 29, 1975).

the protection of prior appropriations illusory. *See Mathers v. Texaco, Inc.,* 77 N.M. 239, 421 P.2d 771 (1966). In the end, the extent of protection provided by the Washington's ground water 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 pump and well construction technology.

3. The Ground Water Code And Pre-1945 Common Law Ground Water Rights

While the 1945 Ground Water Code exempts "existing rights" from the appropriation procedure for acquiring rights, there is no indication that the Legislature intended to exclude ground water rights vested prior to 1945 from this comprehensive ground water rights system.[9]

Wash. Rev. Code 90.44.090, for example, provides for the issuance of water right certificates to "[a]ny person, firm or corporation claiming a vested right to withdraw public ground waters of the state by virtue of prior beneficial use of such water".[10] To obtain such a

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[9] 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 statutes, 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).

[10] 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 1951 No. 49-51-467, at 3 (emphasis added).

certificate, however, a claimant had to submit a declaration within three years of 1945 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 (if for irrigation) and a description of the well, other works, and the geologic formation. In response to such declarations, the state was to make findings in the same manner as to an original application to appropriate 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

> the 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 19 (emphasis in original).

Additionally, the code is unambiguous in requiring a permit to withdraw ground water pursuant to 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[.]

While this provision provides an enumerated list of exceptions to the permit requirement, "existing rights" are not mentioned. Following the rule of statutory construction, exemptions to a statute are narrowly construed to give maximum effect to the policy underlying the general rule. *See, e.g.*, *City of Yakima v. International Ass'n of Fire Fighters Local 469,* 117 Wash. 2d 655, 818 P.2d 1076 (1991); *Washington v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977). A broad reading of the "exemption" language in Wash. Rev. Code 90.44.050 to include ground water rights exercised prior to 1945 would violate the rules of statutory construction and increase the size of the "exempt" sector of appropriated ground water. AGO 1984 No. 19.

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 Ground Water Code. Wash. Rev. Code 90.14.068 reads, in part:

> [A]ny person claiming under state law a right to withdraw and beneficially use ground water under a right that was established before the effective date of the ground water 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 common-law ground water rights. As for unexercised natural and artificial ground water within the state, however, the code clearly

provides for the forfeiture and abandonment of such waters which in turn become public waters subject to appropriation. Wash. Rev. Code 90.44.040; *Jensen*, 102 Wash. 2d at 114.

While no case law has held that common-law ground water 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 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, 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 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 without compensation. *Id.* at 697.

Applying this reasoning to resolve pre-code ground water rights, unused common-law ground water rights arguably terminated fifteen years after the enactment of the code in 1960 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[11], the

[11] An Attorney General Opinion is not controlling, but is entitled to considerable weight. *See Everett Concrete Products, Inc. v. Department of Labor & Indus.*, 109 Wash. 2d 819, 828, 748 P.2d 1112 (1988); *Bellevue Fire Fighters Local 1604 v. City of Bellevue*, 100 Wash. 2d 748, 751 n.1, 675 P.2d 592 (1984).

code most likely now governs all ground water rights thus rendering the case law as stated in *Patrick*, *Evans*, and *Ponten* obsolete.[12]

4. *Exemptions Under The Ground Water Permit System*

While the general rule is that ground water cannot be withdrawn from any aquifer without a permit issued by Ecology, the Legislature provided for four major classes of exemptions under the ground water right permit system: (1) stock watering purposes; (2) the watering of a lawn or of a noncommercial garden not exceeding one-half in area; (3) single or group domestic uses in an amount not exceeding five thousand gallons a day; and (4) 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 water "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 small withdrawals are exempt from procedural requirements to obtain water right permits, they are not exempt from other substantive provisions in the ground water code. Specifically, such exemptions must comply with the beneficial use requirement, are supplemental to surface water rights, and are subject to the priority system. Wash. Rev. Code 90.44.040, .020, .060.

Recognizing that in some circumstances small withdrawals might affect the water system, the Legislature authorized Ecology to "require the person or agency making any such small withdrawal to furnish

[12] The enactment of 1973 Wash. Laws ch. 94 explicitly reaffirming the code's comprehensive coverage, underscores this point.

information as to the means for and the quantity of that withdrawal". Wash. Rev. Code 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 operate the water system and resolve disputes.

While the amount of water withdrawn from exempt wells remains difficult to quantify, it is clear that the cumulative impact will affect ground water supply. *See* Robert N. Caldwell, *Six-Packs For Subdivisions: The Cumulative Effects Of Washington's Domestic Well Exemption*, 28 Envtl. L. 1099, 1108-20 (1998). A recent Attorney General Opinion addressed the cumulative impacts presented by exempt wells and concluded that:

- Where a single housing development requires greater than 5000 gallons per day, regardless of the number of wells drilled, the project is considered a single withdrawal of ground water and is not exempt from the permit requirements of Wash. Rev. Code 90.44 and 90.03.
- The statutory exemption does not authorize "intertie" or interconnection of exempt wells to create a public water system[13]; the intertie statute could be applied if the exempt withdrawals applied

[13] Intertie law only applies to public water systems and must have an existing water right permit or certificate. Wash. Rev. Code 90.03.383(2)(a); 70.119A.020(4). Since exempt withdrawals do not have permits or certificates and cannot be subject to a water right claim, they cannot qualify under the intertie law. Under the 1997 Consolidation Act, however, "the holder of a valid right to withdraw public ground waters may consolidate that right with a ground water right exempt from the permit requirement under [Wash. Rev. Code] 90.44.050, without affecting the priority of either of the water rights being consolidated". Wash. Rev. Code 90.44.105 (1997 Wash. Laws ch. 446, § 1).

for a permit, or were consolidated (pursuant to 1997 Wash. Laws ch. 446) with another water right with a permit or certificate.

- Ecology must review applications for water right permits, even applications for uses of water that are otherwise exempt under Wash. Rev. Code 90.44.050. The following criteria used in water right decisions are defined in Wash. Rev. Code 90.03.290: "if it shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare".
- There is no statutory or other lawful basis for issuing a water rights certificate to the holder of a water right based on an exempt ground water 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.

AGO 1997 No. 6.

Washington law does not allow the owner of an 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-home use to industrial; an exempt withdrawal is strictly limited to the land to which the water was applied unless (a) the owner of the rights applies for and receives a permit or (b) the exempt right is first consolidated with a right covered by a permit or certificate.[14] *Id.*

[14] A change in the location or purpose of use of an "exempt" withdrawal would be meaningless because Ecology could not prevent its continued use after the change is processed.

Under the rules of statutory construction, the "exemption" language should be narrowly construed. *Id.* at 5-7. If the Legislature had included the drilling of multiple exempt wells within the code's exemptions, it "would undercut the unity and integrity of the state's water system and could increase the complexity of any litigation or other dispute about the water in question". *Id.* at 7.

The Opinion, however, did not address whether the well exemption would apply to a new subdivision proposal connected to an older land development. *See Hillis,* 131 Wash. 2d at 377-78. As stated above though, if a "project" requires greater than 5000 gallons of water per day, a permit is required. While the Opinion did not define the scope of a "project", it did refer to case law developed under SEPA and to legislative intent to conclude that the impact of a proposal as a whole should be considered in determining whether the domestic withdrawal exemption was appropriate in a given case, and that a project that was unified in purpose should not be broken down into separate components, for instance, considering each well constituting a separate project. AGO 1997 No. 6, at 7. The Opinion also recognized that it was responding to a specific fact pattern, and if the facts varied, "such as withdrawals independently made by different persons, or a series of separate withdrawals occurring over a long period of time, the answer might well be different". *Id.* at 7 n.7. The agency letter also provided guidance on how the agencies intended to work with the local governments on resolving the water needs for developments that were currently or were intending to use the exemption of water.

5. *Artificially Stored Ground Waters*

The ground water code's permit system applies not only to natural ground waters but also to all artificial ground waters. The code defines artificially stored ground water 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 waste.

Wash. Rev. Code 90.44.035(5).

Artificially stored ground water generally occurs as natural seepage from irrigation. *Jensen*, 102 Wash. 2d at 113. 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. However, the designation of it as artificially stored water allows it to be protected for use by the original appropriator, similar to the common law doctrine of recapture. *Id.*; *Department of Ecology v. U.S. Bureau of Reclamation* (*U.S. Bureau*), 118 Wash. 2d 761, 827 P.2d 275 (1992). Unless abandoned or forfeited, artificially stored ground water is not public water. *See* Wash. Rev. Code 90.44.040. Moreover, artificially stored ground water does not lose its identity and become public ground water when it commingles with naturally occurring ground water. *Jensen*, 102 Wash. 2d at 115; *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 waters located within a designated area, sub-area, or zone pursuant to Wash. Rev. Code 90.44.130, any person, firm, or corporation must file a certified declaration within 90 days after the designation of the ground water area

with Ecology. *Id.* In case the claimant fails to file within the ninety-day period, the claimant may request a "reasonable extension of time" not to exceed two additional years. Upon a showing of good cause, Ecology may only grant such an extension. Ecology may "accept or reject" such declarations, however, they do not convey any right to withdraw public ground waters. Claimants who have filed declarations of ownership of artificially stored ground waters must obtain permits to appropriate public ground waters following the same procedures used for all other ground water applications. Wash. Rev. Code 90.44.130.

For claimants declaring ownership of artificially stored ground water subsequent to the designation of the ground water area, sub-area, or zone, the statute provides a three-year filing period following the "earliest artificial storage". The Legislature provided the same extension procedures for these claimants.

There is growing interest to "intentionally" create artificially stored ground water through well injection programs. This allows users, like municipal supplies, to store winter stream flows in the ground water aquifer and withdraw this water in the summer months. The reclaimed Water Use Act of 1992, as amended in 1997, recognizes the opportunity to intentionally recharge ground water with reclaimed water (treated effluent). 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 Ground Water Rights*

Transfers and changes to ground water rights are governed by the general provisions of Wash. Rev. Code 90.03.380, and, more specifically, by the provisions of the ground water 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 ground water permit or certificate may amend or change the method of withdrawal or the manner or place of use of water without losing the priority of the right. Such changes provide flexibility for ground water permit 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 number of conditions for the granting of a ground water amendment. Ecology must determine, pursuant to Wash. Rev. Code 90.03.380, 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 Wash. Rev. Code 90.03.380, the ground water code specifically requires the same analysis for a change to a ground water right as for issuing a new water right. This implicates the full analysis in Wash. Rev. Code 90.03.290 and 90.54. *See* The Water Codes: Surface Water *infra* ch. IV, section B. In essence, the ground water code treats applications for ground water changes procedurally the same as original applications for ground water rights. *R.D. Merrill Co.*, 137 Wash. 2d at 131-32.

In contrast to Wash. Rev. Code 90.03.380, which requires beneficial use of water before Ecology may approve a change in surface

water use, Wash. Rev. Code 90.44.100 allows amendments as to manner and place of use, and point of withdrawal to ground water 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 (holding that a transfer of an inchoate and unperfected ground water 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 limit the transfer 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*, [Wash. Rev. Code] 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, points of withdrawal, or manner of use, ground water 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.

The Court specifically rejected the argument that the purpose of use could also be changed for permits. *Id.* The purpose of use can only be

changed for quantities of water that have already been applied to beneficial use, consistent with Wash. Rev. Code 90.03.080, and the restrictions on speculation. *Id.* at 131-32. Before the 1997 amendment, Wash. Rev. Code 90.44.100 required an amendment application for the construction of additional or replacement wells at the same location *or* a new location. The statute now provides that no application is needed when constructing replacement or new additional wells at the original location.[15] Wash. Rev. Code 90.44.100(2)(c). However, replacement or new wells at the same location must still comply with conditions pursuant to Wash. Rev. Code 90.03.280. *See* Wash. Rev. Code 90.03.290 (incorporated by reference in Wash. Rev. Code 90.44 under Wash. Rev. Code 90.44.060).

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

In contrast to the early common law cases, the Legislature recognized the hydraulic connection and thus potential conflict between ground and surface waters under the 1945 Ground Water Code. Foreseeing priority enforcement problems between surface and ground waters, the Legislature prioritized surface water rights as superior to subsequent ground water "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". Wash. Rev. Code

[15] 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).

90.44.030. Interpreting this provision in *Rettkowski*, the Washington Supreme Court found that Wash. Rev. Code 90.44.030 emphasized "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 v. Department of Ecology*, 122 Wash. 2d 219, 226 n.1, 858 P.2d 232 (1993).

Under the Water Resources Act of 1971, the Legislature directed Ecology to administer water allocation and use programs in a manner that gave "[f]ull recognition . . . to the natural interrelationships of surface and ground waters." Wash. Rev. Code 90.54.020(9). To ensure the protection of these connected waters, the Legislature provided for base flows[16] in all perennial rivers and streams as a baseline for future allocation of ground water. Wash. Rev. Code 90.54.020(3)(a); *see also* Wash. Rev. Code 90.22.010. This standard, in turn, would help protect fish, wildlife, scenic, aesthetic and other important environmental and navigational values. Under limited circumstances, however, ground water withdrawals in conflict with instream base flows may be authorized "where it is clear that

[16] While the statute does not define base flows, Ecology has provided a definition: "[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* 3.

overriding considerations of the public interest will be served". Wash. Rev. Code 90.54.020(3)(a). Similarly, Ecology has authority to condition all surface water allocations to preserve minimum instream flows established by regulation for each river basin. Wash. Rev. Code 90.03.247.

In *Hubbard v. Department of Ecology*, 86 Wash. App. 119, 936 P.2d 27 (1997), the court of appeals ruled that the connection between ground water and surface water may exist even when the point of withdrawal of the ground water is several miles removed from the affected stream. Even though the effect of the proposed pumping on the flow of the river would be minimal, the court upheld Ecology's decision to restrict ground water withdrawal in order to protect instream flows in the Okanogan River given the "significant 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. In another case, the Pollution Control Hearing Board reached a similar result finding that hydraulic continuity is established "if the evidence demonstrates that *any* of the water from the ground at the place, and depth, in question would otherwise have

contributed to a particular surface water". *In re Appeals from Water Rights Decisions of the Dep't of Ecology*, PCHB No. 96-8, at 23 (July 16, 1996)[17] (emphasis in original); *see Jones v. Department of Ecology*, PCHB No. 94-63-66 (1995); *Summers v. Department of Ecology*, PCHB No. 91-42 (1992); *Plakos v. Department of Ecology*, PCHB No. 87-38 (1988).

[17] This ruling is currently on appeal before the Washington Supreme Court.

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, 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, 89 P. 155 (1907) (waters rights must receive due process protection); *Sheep Mountain Cattle Co. v. Department of Ecology*, 45 Wash. App. 427, 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. 2 *Water And Water Rights* § 17.03 (Beck ed., 1991). A water right may be lost in

[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. VIII.

whole or in part by nonuse under statutory forfeiture provisions or common law abandonment.

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. Charles B. Roe, Jr. & William J. Brooks, *Loss Of Water Rights: Old Ways And New*, 35 Rocky Mtn. Min. L. Inst. 23-1 (1989). 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 lake in sufficient quantity and quality to protect instream and natural 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, 969 P.2d 458 (1999);

Department of Ecology v. Acquavella (*Acquavella* III), 131 Wash. 2d 746, 758, 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 90.14.170; *see also* A. Dan Tarlock, *Law Of Water Rights And Resources* 5.18[2] (1988) (Release #11, 8/99) (proof of nonuse must be by clear and convincing

evidence) (citing *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944)). There must be proof of nonuse, but in contrast to common-law abandonment, forfeiture does not require proof of intent to abandon. *See Okanogan Wilderness League, Inc.*, 133 Wash. 2d at 784; *Department of Ecology v. Acquavella* (*Acquavella* I), 100 Wash. 2d 651, 656, 674 P.2d 160 (1983). 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. 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*; *see also In re Marshall Lake*; *Texaco, Inc. v. Short*, 454 U.S. 516, 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 706.

As noted previously, statutory relinquishment of a water right occurs only if the person "abandons or voluntarily fails without sufficient cause" to use 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, municipal water supplies, 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. Although not listed as "sufficient cause" for nonuse, the code also lists several uses of water that are simply not subject

to the relinquishment sections. These include water rights for power development purposes; for standby or reserve water supply for use in times of drought; for claims of a future determined development; and for claims for municipal water supply purposes. Only a few of these exemptions have been interpreted by the courts.

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. 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.*[2] (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.

R.D. Merrill Co., 137 Wash. 2d at 141-42.

The *R.D. Merrill Co.* Court similarly analyzed the exception 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 do not constitute such a plan. 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.[3] The Court specifically wished to

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[2] 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). It is questionable whether the category of these exceptions has any legal significance.

[3] In 1986, the Court of Appeals indicated that a proposed building of a dam and certificate changes to the water right may satisfy a "determined future development". *Sheep Mountain Cattle Co.*

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. 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".

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. 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.

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 ground water 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".[4]

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

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[4] 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.

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 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*, is 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, 103 P. 641 (1909). The intent to abandon may be shown by explicit declarations or inferred by the parties'

conduct. 2 *Water And Water Rights* § 17.03(a). However, because courts historically have required both intent and an act of voluntary relinquishment, it is difficult to prove abandonment. Tarlock, 5.18[1] (Release #11, 8/99); *Edgemont Imp. Co. v. N.S. Tubbs Sheep Co.*, 22 S.D. 142, 115 N.W. 1130 (1908); *In re Manse Springs & Its Tributaries*, 60 Nev. 280, 108 P.2d 311 (1940). For example, nonuse for an extended period of time is evidence of intent to abandon, not *per se* abandonment. 2 *Water And Water Rights* § 17.03(a); *Consolidated Home Supply Ditch & Reservoir Co. v. Town of Berthoud*, 896 P.2d 260, 266-67 (Colo. 1995); *Okanogan Wilderness League, Inc*, 133 Wash. 2d at 783 (holding that long periods of nonuse raise a rebuttable presumption of intent to abandon a water right). Moreover, such inferred intent to abandon is rebuttable if the user provides reasons for the nonuse. 2 *Water And Water Rights* § 17.03(a); Roe, 35 Rocky Mtn. Min. L. Inst. at 23-7. In addition, the burden of proof of abandonment rests with the party alleging abandonment. *Okanogan Wilderness League, Inc.*, 133 Wash. 2d at 781; *Acquavella* III, 131 Wash. 2d at 757; *R.D. Merrill Co.*, 137 Wash. 2d at 140. 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, 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 ground water in the 1960s. To

satisfy new growth, Twisp applied to Ecology for a change of the Twisp surface water rights to ground water. 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. While water for municipal purposes is exempt from statutory forfeiture, 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); *see also Consolidated Home Supply Ditch & Reservoir Co.; City & County of Denver v. Snake River Water Dist.,* 788 P.2d 772, 776 (Colo. 1990) (29 years of nonuse); *In re the Water Rights of Clark Fork River Drainage Area,* 254 Mont. 11, 833 P.2d 1120, 1123 (1992) (23 years of nonuse).[5]

[5] Sixteen of the nineteen western states have enacted forfeiture statutes applicable to surface waters. *See* Novak, *Abandonment And Forfeiture: How To Hold A Water Right As Development Takes Place*, 28 Rocky Mt. Min. L. Inst. 1249, 1255 (1982); *Roe*, 35 Rocky Mt. Min. L. Inst. 23.02[2][a].

B. OTHER THEORIES BY WHICH WATER RIGHTS MAY BE LOST

1. Prescription[6]

While the law never favored prescription or adverse possession (*Downie v. City of Renton*, 167 Wash. 374, 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, 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 377; *Smith v. Nechanicky*, 123 Wash. 8, 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. 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, 126 P. 900 (1912)); *see also Smith* (holding that adverse use of a lower riparian owner was not

[6] Water rights may be changed or lost through eminent domain proceedings. *See* Transfer And Change Of Water Rights *infra* ch. VII.

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.

Prescription or adverse possession, however, could not be applied to public waters of the state. *McLeary v. Department of Game,* 91 Wash. 2d 647, 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 ground water 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. 1*, 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[7] 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.

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 a recent case, 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. The Court explained: "Equitable estoppel against

[7] 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.

the government is not favored." *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. *Id.* Each element must be proved by clear, cogent, and convincing evidence. *Id.* at 744.

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, 38 P. 147 (1894). Beyond this case, the doctrine is essentially untested as a possible basis for deprivation of water rights.

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 ground water (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 Ground Water Code, the Legislature enacted the Water 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.*

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, in part:

> [A]ny person claiming under state law a right to withdraw and beneficially use ground water under a right that was established before the effective date of the ground water 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 .

To date, Ecology has 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]

B. 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 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). The right itself is not established and does not vest until the water is applied to actual beneficial use.

As discussed above, beneficial use defines the measure and limitation of the right. These elements of the right define the "bundle of sticks" one has in ownership of a water right. To the extent the water is

[1] *See also* Appurtenancy *supra* ch. III, section F.

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. In order to approve a transfer or change, the 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 lost by nonuse. *R.D. Merrill, Co.* Once the existence and extent of the right is determined, Ecology must determine if the transfer would impart 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 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. Knowing the quantity of water historically put to beneficial use is important when considering a transfer of the water right because if the transfer will result in increased consumptive use, there will be a new demand on the system to satisfy that the transfer and the right would unlawfully be enlarged.

See A. Dan Tarlock, *Law Of Water Rights And Resources* 5.17[5] (1988 [Release #11, 8/99]); *Okanogan Wilderness League, Inc.*; *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. at 778 (quoting *In re the Water Rights of Marshall Lake and Marshall Creek Drainage Basin*, 121 Wash. 2d 459, 468, 852 P.2d 1044 (1993)).

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 131; *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.*

There is an exception to the rule that a water right cannot be changed before its original beneficial use. In Wash. Rev. Code 90.44.100, Ecology may authorize an amendment to a permit for a change of a well location (point of withdrawal) or to change the manner or place of use. By allowing a change to a permit, the Court held the code provides for a change to an *unperfected* ground water 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.* 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. The Court found it was correct not to

allow a change in the purpose of use of water when put to beneficial use. *Id.* at 130-31.

> Given these statutory limitations, [Wash. Rev. Code] 90.44.100 cannot be used to speculate in water rights even though amendment is allowed where unperfected rights are involved.

Id. at 131.

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*; Tarlock, 5.17[3][a] (Release #11, 8/99). In spite of the maxim "first in time is first in right", the principle of nonimpairment 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, 5.17[3][a] (Release #11, 8/99).

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. 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. Annual consumptive quantity is determined by considering the amount of water diverted, less the return flow of the water. *Id.* 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).

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 has 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). In its analysis, the Court cited with approval the decision in *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993). The Idaho Supreme Court, in *Hardy,* held that any application to amend a permit provides the state with the opportunity to review the entire permit under the public interest analysis provided for by statute. Based upon the inchoate nature of the right, the Court held that there was no retroactive application of the statute and that as an inchoate or contingent right, the water right remained vulnerable to being abridged or modified by law. *Id.* at 951.

The transfer statute, Wash. Rev. Code 90.03.380, does not specify that the public interest must be analyzed. Nor have the Washington appellate courts directly answered the question of whether the public interest should be considered in water right transfers under Wash. Rev. Code 90.03.380. The courts have, however, provided some guidance.

In *Schuh*, the Washington Supreme Court discussed the public interest criteria for reviewing ground water transfers, which are also subject to review under Wash. Rev. Code 90.44.100. 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. *See* The Water Codes: Surface Water *supra* ch. IV. In *Stempel v. Department of Water Resources*, 82 Wash. 2d 109, 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. These policies require the state to manage the 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). The Pollution Control Hearings Board also has directly addressed the issue and has affirmed Ecology's analysis of the public interest in considering transfers of existing water rights. *Pend Oreille Cy. Public Utility Dist. 1 v. Department of Ecology* (*Sullivan Creek*), PCHB Nos. 97-177, 98-043, 98-044 (argued Jan. 2000).

Although Wash. Rev. Code 90.03.380 does not specify a public interest requirement for transfers, the standard for maximizing beneficial use of water provides the state administering agency with great discretion to apply conditions that go beyond the prevention of injury to vested water rights. Wash. Rev. Code 90.03.005; 90.54.020. In order to maximize beneficial use of all the waters of the state, conditions may be placed on transfers to adequately protect the environment or limit the impacts on communities whose social and economic structures rely upon the use of water in a specific area. *See City of Thornton v. Bijou Irrig. Co.*, 926 P.2d 1 (Colo. 1996); MacDonnell, 43 Okla. L. Rev. at 119. In *City of Thornton*, the Court affirmed the authority of the state water court to provide for conditions on a transfer for the protection of lands that will be

dewatered and subject to "desert encroachment". *City of Thornton*, 926 P.2d at 86.

Consideration of the public interest in analyzing a water right transfer is consistent with the analysis that occurs in considering an application for a new water right. *See* Wash. Rev. Code 90.03.290. If one desires to change an underlying water right that was authorized based on a public interest review under Wash. Rev. Code 90.03.290, of any changes should arguably also be analyzed under the public interest analysis. Otherwise the proposed change never receives a public interest review, perhaps undermining the effectiveness of the public interest considered at the initial decision to issue the right, and inconsistent with the goal of assuring that all appropriations of water not be detrimental to the public welfare. In *Hardy*, the Court recognized that if the applicant does not agree with any additional conditions based upon a public interest analysis, the applicant can revoke its request for a transfer and continue to operate under the specific terms of the underlying right. *Hardy*, 849 P.2d at 952.

4. Transfer of Exempt Wells

See AGO 1997 No. 6 (no authority to transfer or change water right created under ground water exception); Wash. Rev. Code 90.44.105 (1997 Wash. Laws ch. 446, § 1) (exempt rights may be consolidated with a ground water permit or right).

Although appellate courts have not considered the issue, the Attorney General has concluded that, as a general matter, the owner of a well exempt from permitting (*see* The Water Codes: Ground Water *supra* ch. V) has no right to transfer or change such rights. AGO 1997 No. 6;

see also Wash. Rev. Code 90.44.105 (consolidation of exempt rights with a ground water permit or right).

5. Transferring Water Rights Through Condemnation

The state water code 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). 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. 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.

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; (5) no use of the spring had previously been made by the riparian owners.

In *Washington ex rel. Kennewick Irrigation District*, the district sought to condemn a water right held by Pacific Power & Light (PP&L). 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.

In *Mack* the Court, in contrast, 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

respondents 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. 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 turn 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* Wash. Rev. Code 8.12.030, 35.92.010 (cities); 57.08.011 (water districts); 8.28.050 (municipal corporations in another state); 87.03.140-.150 (irrigation districts); 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.

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 grandfather in existing interties that had been approved by Health but that 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 70.119A 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 90.03.383 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 [Wash. Rev. Code] 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 [Wash. Rev. Code] 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 [Wash. Rev. Code] 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.

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 appointing authority is directed to "ensure that individual water right holders who divert water for use within the county are represented on 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 serve without completing the necessary training. Wash. Rev. Code 90.80.050.

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. *Id.* Any water right holder who claims that a proposed transfer would impair the holder's rights may intervene in the proceeding and is entitled to a hearing before the board. Wash. Rev. Code 90.80.070(3), (4). 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 "in accordance with Wash. Rev. Code 90.03.380", the board "shall issue the applicant a certificate conditionally approving the transfer, subject to review by the director [of Ecology]". Wash. Rev. Code 90.80.070(3). If a water right holder establishes by a preponderance of evidence that the proposal would impair existing rights, the board "may not approve the transfer unless the applicant and the impaired party agree upon compensation for the impairment". Wash. Rev. Code 90.80.070(4).

As noted, the acts of the water conservancy boards are subject to approval by Ecology. The director of Ecology is directed to "review each proposed transfer conditionally approved by a board for compliance with

state water transfer laws including [Wash. Rev. Code] 90.03.380, 90.03.390, and 90.44.100, rules and guidelines adopted by the department, and other applicable 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 extend by the director, but only with the consent of the parties to the transfer. *Id.* If the director fails to act within the time period, the board's action 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 local office-holders. Ecology's expertise and statewide perspective come into play only on department review, and then within a relatively narrow window of time. It remains to be seen whether this change results in a saving of resources, more efficient decision-making, or improvements in the law regarding transfers of rights.

VIII.

FEDERAL RESERVED WATER RIGHTS: INDIAN RESERVATIONS AND FEDERAL LANDS

A. INTRODUCTION

Up to now, the primary theme of this discussion 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 statutes 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 and used the North American continent before European exploration and settlement.[1] At the end of the chapter, we will discuss the relatively few

[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, statutes, and agreements 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.

cases defining the scope of federally-reserved rights where the federal lands in question were reserved for non-Indian federal purposes.

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 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, 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.*

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[2] U.S. Const. art. VI, cl. 2; *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

[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 used 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.

United States, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908). Two earlier decisions set the pattern for *Winters*.

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 704-05. 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 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 Tribe[4] to 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 Indian Tribe from fishing and took essentially all of the fish for the licensees. The defendants asserted that the fishing right included in the treaty of the United States with the Yakama Indian Tribe 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 as well as the appurtenant water rights. The Court rejected these arguments and found that the tribe's reserved right to fish "at all usual and accustomed places" survived the conveyance of the land containing these "usual and accustomed places". *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 conveyance of 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

[4] The Yakima Indian Nation subsequently changed the spelling of its name to "Yakama". For ease of reference, the current spelling will be used.

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 concluded 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 withdrew 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 for the agricultural irrigation of reservation land. *Id.* at 565. 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 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 portions of 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 had occurred. 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

1. Priority Date Of Federal Reservation

Winters establishes, first, that the priority of a federal reservation of water rights is the date of the creation of the reservation. *Winters*, 207 U.S. at 572; *Cappaert v. United States*, 426 U.S. 128, 138-39, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976). The implication of the *Winters* decision is that such a reservation would be subordinate to appropriations

of public water prior in date to the creation of the reservation. *Winters*, 207 U.S. at 575, 577. In cases involving reserved rights based on aboriginal use, some courts have adopted "time immemorial" as the priority date for a reservation. See, for example, *United States v. Adair*, 723 F.2d 1394, 1412-15 (9th Cir. 1984), confirming the hunting and fishing rights of certain Oregon tribes. 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.[5]

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 right:

> [T]he implied-reservation-of-water doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation[.]

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.

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[5] 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 their historic homelands for countless centuries. *See discussion in 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 give Indian tribes an agricultural base. *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 practice (fishing and hunting) as well as for agriculture. *Adair*, 723 F.2d at 1410.

There has been some argument that the "purpose" of an Indian reservation should be defined in broader terms, such as the establishment of a "homeland" for Indian tribes, allowing for flexibility for later developments in water use. *See, e.g.*, Felix S. Cohen, *Handbook Of Federal Indian Law* 588 (Rennard Strickland et al., eds., 1982). No court has specifically adopted such a broad reading, however, in the sense of allowing reserved water rights to be used for purposes neither stated nor implied in the documents creating the reservation. In a case involving a national forest rather than an Indian reservation, the Court suggested that the federal government, to obtain water rights for some purposes other than the "primary purposes" of the reservation, must obtain them from the state "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).

The quantification of a reserved water right is complicated by the principle that federal reserved rights are for potential future as well as for

historical use. 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. 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]

Where courts must quantify rights, they recently have primarily followed what is called the "practical irrigable acreage" standard first laid out in *Arizona*. *Arizona*, 373 U.S. at 600-01. This involves calculating the potentially irrigable acreage in 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*

[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 10,000 arable acres of land, the tribe had never irrigated more than 2000.

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 "PIA" (practicably irrigable acreage) in the future.

The Washington Supreme Court dealt with these quantification principles in one of the Yakima River adjudication cases, 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 Indian Tribe 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 Indian Nation; (2) an act of the Secretary of 1914 reserving 147 cubit feet per second (cfs) of water for

the reservation did not in and of itself limit or quantity the reserved right (*id.* at 284-85); (3) various acts of the federal government between 1905 and 1968 had not subordinated the Indians' right to water for fishing to the rights of irrigation users (*id.* at 286-87); (4) a 1968 settlement of a proceeding before the Indian Claims Commission had confirmed the diminishment of the Indian fishing right to some extent (*id.* at 287-91); (5) a consent judgment entered in 1945 confirmed the irrigation water rights of the Indians to those specified in the judgment (*id.* at 291-98); and (6) a 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).

The case illustrates that, as in often true in Indian 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 Indian Tribe was entitled to.[7]

As noted earlier, the courts have also recognized that 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

[7] The Yakima Basin adjudication is continuing, and the final judgment could result in appeals on various issues.

prevent junior water users from depleting a stream below a certain protective level. *Adair*. 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.

3. 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 appurtenant surface waters.[8] No cases have tested whether the United States could, if its intentions were sufficiently clear, reserve non-appurtenant water for a federal reservation.

4. Ground Water Issues

Almost all reserved right cases have involved surface water, and the courts have only recently tackled the question whether the federal government may reserve rights in ground water as well. *Cappaert* involved the protection of an underground pool from harmful adjacent ground water withdrawals. Although recognizing that the circuit court had found a federal reserved right in ground water, 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

[8] In *Arizona*, 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.

to groundwater, citing the absence of any controlling precedent for doing so. *In re Big Horn*, 753 P.2d at 99-100.

Recently, the Arizona Supreme Court directly tackled the question, however, and concluded that federal reserved water rights law does not differentiate between surface and ground water, especially where they are in continuity. *In re the Water Rights of Gila River System & Source*, 989 P.2d 739 (Ariz. 1999). The Court made its finding even though Arizona state law treated ground water 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.

5. 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 litigation, in which the Court impliedly approved a change of the use of reserved Indian water rights from agricultural to domestic and commercial. The case does 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.

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*, 647 F.2d 42 (9th Cir. 1981), in which the Ninth Circuit held that nonmember 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*. 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.* 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.[9] If the water is used for irrigation, the 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. Some tribes have also asserted the right to regulate all reservation water, whether subject to the tribe's proprietary interests or not. *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 found that the tribe, and not the state, had regulatory authority over the use of the water in No Name Creek. The *Colville Confederated Tribes* holding may be limited in its precedental value to the peculiar facts which inspired it.[10]

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[9] 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 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.

[10] The court seems to have concluded that No Name Creek contained no "excess" unappropriated waters, because the Tribe asserted that it needed the water to protect tribal fishing. This point is not clear, however.

By contrast, the Ninth Circuit has found that the state, not the tribe, has 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), an adjudication had revealed that Chamokane Creek, which forms part of the boundary of the Spokane Indian 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 this water, and that tribal interests were sufficiently protected by access to the federal courts.

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 Indian Tribe lacked the authority to regulate the uses of "excess" waters appurtenant to the tribe's reservation, confirming that the regulatory authority over such water remained with the state.[11]

[11] This holding is consistent with the United States Supreme Court's conservative approach to the question of tribal authority over non-member affairs. In recent 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).

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)[12], Congress waived federal sovereign immunity and allowed the United States to be named in state water rights adjudications, including both judicial and administrative proceedings.[13] The Court has found that the McCarran Amendment impliedly permits federal reserved 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 decide and quantify the water rights of the United States and of Indian tribes.

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[12] The text of the McCarran Amendment:

> 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).

[13] The McCarran Amendment waives the sovereign immunity of the United States both in its own capacity and as trustee for Indian tribes. *See, e.g., Washington v. Confederated Tribes & Bands of the Yakima Indian Nation,* 439 U.S. 463, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979). The point was considered even more directly in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 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 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, 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 a an adjudication of the surface water rights in a basin is sufficiently comprehensive to invoke the McCarran Amendment, and that ground water need not be included in the adjudication. *United States v. Oregon*, 44 F.3d 758, 769 (1994).[14]

In consenting to state court jurisdiction over federal water rights, the McCarran Amendment does not withdraw or modify the jurisdictional of the federal courts. Federal courts may have original, federal question,

[14] The Washington Supreme Court reached a similar conclusion in the Yakima River adjudication. *Acquavella* II.

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]

E. NON-INDIAN FEDERAL RESERVED RIGHTS

As noted earlier, the great bulk 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. From the few non-Indian federal cases that have been decided, however, it appears that the same principles apply. *Cappaert* involved the reservation of sufficient water to protect a population of desert pupfish in a national monument. In *United States v. New Mexico*, the Court rejected a claim by the United States for instream flows within a national forest, but on the basis that the claim was unrelated to the primary purpose of the reservation; all members of the Court appeared to concede that the United States could have reserved water for any federal purpose, had its intent been sufficiently clear. In *Arizona v. California*, the Court upheld the

[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 "wasteful and duplicative").

decision of the special master to award water rights to the United States for the Lake Mead National Recreation Area. From these cases, it appears that 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.

IX.

PUBLIC WATER SUPPLY LAW

A. INTRODUCTION

The construction and operation of public water systems is governed by various statutes and regulations implemented and enforced by the Washington State Department of Health. The fundamental purpose of the state drinking water program is to help ensure that the public water systems of the state provide safe and reliable drinking water to their customers. What follows is an overview of the Department of Health's role in the regulatory oversight of public water systems. Also included is a brief summary of the impacts of other regulatory obligations, including water rights requirements, on the construction and operation of public water systems.

B. BACKGROUND

The federal Safe Drinking Water Act (SDWA) and its implementing regulations establish a set of regulatory requirements and enforcement powers designed to help ensure a safe and reliable supply of drinking water. 42 U.S.C. § 300f-300j; 40 C.F.R. pts. 141-143.[1] Under the SDWA, the Environmental Protection Agency (EPA) is the federal agency responsible for enforcing federal drinking water requirements. As such, EPA may accord primary enforcement responsibility or "primacy" to

[1] Prior to the enactment of the SDWA in 1974, Board of Health and Department of Health regulations governed public water supplies.

a state that, among other factors, has a system of drinking water regulations no less stringent than the federal requirements and has an adequate means of enforcing its regulatory program. 42 U.S.C. § 300g-2. A state that achieves primacy has a degree of autonomy in developing and enforcing its drinking water program and is eligible to receive federal money to use for the administration of that program.

Like all but one state, the state of Washington has achieved primacy. Washington's drinking water regulations are in several important respects more comprehensive than the federal regulations, notably with respect to the size of regulated systems and in the amount of regulation specific to planning.

C. GENERAL REGULATORY REQUIREMENTS

1. The Regulatory Agencies Involved

Wash. Rev. Code 70.119A.080(1) provides that the Department of Health (Health) "shall administer a drinking water program which includes, but is not limited to those program elements necessary to assume primary enforcement responsibility" under the SDWA. Both Health and the Board of Health exercise rule making power with respect to various aspects of the drinking water regulations. Wash. Rev. Code 43.20.050(2), 70.142.010, 43.70.040. These regulations are administered and enforced by Health and, in certain circumstances, by the local health jurisdictions. Wash. Rev. Code 70.119A.060(3); 43.70.130(3), (4); 70.05.060(1).

To coordinate the enforcement responsibilities shared by Health and the local health jurisdictions, the state and the local jurisdictions have entered into joint plans of operation. Wash. Admin. Code 246-290-030, 246-291-030. Though the joint plans of operation vary somewhat from

jurisdiction to jurisdiction, generally speaking, they assign responsibility for regulation of the larger water systems to Health and responsibility for the regulation of smaller water systems to the local jurisdictions.

2. *Systems Subject To Regulation*

One way in which the drinking water regulations are more comprehensive than the federal regulations is in their application to public water systems of almost all sizes. Under Wash. Rev. Code 70.119A.020, a "public water system" is defined, in relevant part, as:

> [A]ny system, excluding a system serving only one single-family residence and a system with four or fewer connections all of which serve residences on the same farm, providing piped water for human consumption[.]

Wash. Rev. Code 70.119A.020(4).

On the other hand, the SDWA defines a "public water system" as "a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals". 42 U.S.C. § 300f(4)(A). There are approximately 4,250 public water systems in Washington which fall under the federal definition. These systems are called "Group A" public water systems and are further defined as "community" and "noncommunity" public water systems. Wash. Admin. Code 246-290-020. Group A systems serve about 4.9 million people or about 86 percent of the population.

Systems smaller than Group A systems are called "Group B" public water systems. Wash. Admin. Code 246-291-010. State regulation of these smaller systems is not a primacy requirement. Washington's more inclusive definition of "public water system," however, adds about

12,050 water systems to the total regulated. Under Board of Health regulations, a local health officer may eliminate any or all requirements for a Group B system with only two connections where the health officer has assumed primary responsibility for the system. Wash. Admin. Code 246-291-030(3). Group B systems serve about 118,000 people.

The form of system ownership does not affect the obligation to meet public water system requirements. Under Wash Rev. Code 70.119A.020(6), a "purveyor" is defined as "any agency or subdivision of the state or any municipal corporation, firm, company, mutual or cooperative association, institution, partnership, or person or any other entity, that owns or operates a public water system. It also means the authorized agents of any such entities." Under Wash. Admin. Code 246-290-001(3), water system purveyors are responsible for complying with Group A regulations. Under Group B regulations, the water system owner is generally responsible for compliance. Wash. Admin. Code 246-291-001(2). The definition of "owner" under Wash. Admin. Code 246-291-010 is similar to that of "purveyor".

3. Public Water System Construction, Expansion, Improvement

Any proposed new water system, any proposed expansion or modification of an existing system, including any proposal to use a new water source or to modify an existing source is subject to various approvals by Health and/or the local health jurisdiction. Wash. Admin. Code 246-290 (Group A); Wash. Admin. Code 246-291 (Group B). The nature of the submissions required and their sequencing will depend on the nature of the project. Whether submissions are made to Health, to the

local health jurisdiction or to some combination of the two will depend on the size of the project and the joint plan of operation in effect between Health and the local health jurisdiction. A purveyor who fails to make a required submission or fails to obtain a required approval may be subject to enforcement action including the imposition of substantial civil penalties.

By way of example, a purveyor proposing a new Group A public water system would begin by submitting a water system plan or small water system management program at a level of detail determined in conjunction with Health. Wash. Admin. Code 246-290-100, -125. The plan typically would address the system's capacity to achieve and maintain compliance with relevant local, state, and federal plans and regulations through operational, technical, managerial and financial capabilities. Wash. Admin. Code 246-290-100. The proponent must next submit a project report and construction documents. Wash. Admin. Code 246-290-110, -120. The project report describes why the project is being proposed and includes engineering design calculations showing how the project will meet its objectives, while the construction documents identify how a project will be constructed. Wash. Admin. Code 246-290-110(1), -120(1). Within sixty days of a project's completion and before use of the project a professional engineer must certify that the project has been built in compliance with department regulations and principles of standard engineering practice including testing and disinfecting practices. Wash. Admin. Code 246-290-120(5).

A purveyor proposing to expand an existing Group A system must follow a similar process. Unless the water system has an approved water

system plan that adequately addresses the proposed project, the purveyor must begin by submitting a water system plan or water system plan amendment. Wash. Admin. Code 246-290-100. Health will not generally consider for approval a project report or construction documents submitted by a purveyor who is required to have a water system plan unless a current, approved water system plan that adequately addresses the project is on file with Health. Wash. Admin. Code 246-290-110(4), -120(3).

When a project is distribution-related, the purveyor may elect not to submit project reports and construction documents to Health for review and approval. Wash. Admin. Code 246-290-125. This option is only available when, among other things, the purveyor has an approved water system plan that includes a request identifying the types of projects for which the submittal exception procedure is requested, the purveyor has obtained the services of an engineer, who is not the same as the design engineer, to review the projects, and the system meets the requirements of Wash. Admin. Code 246-294 to have a category "green" operating permit. Distribution-related projects include storage tanks, booster pump facilities, transmission mains, pipe linings, and tank coating. They do not include source or water quality treatment projects. Wash. Admin. Code 246-290-010.

The process applicable to the development or expansion of a Group B public water system is similar to the Group A process. The owner must submit a water system plan, followed by a design report. Wash. Admin. Code 246-291-140, -120. The design report includes both engineering calculations and construction specifications. Like project reports and construction documents for Group A systems, design reports

will not generally be considered for review and approval when submitted to Health by owners of Group B systems required to have a water system plan unless the owner has a current, approved water system plan that adequately addresses the project. Wash. Admin. Code 246-291-120(2).

4. Source Development

All public water systems must "provide an adequate quantity and quality of water in a reliable manner at all times." Wash. Admin. Code 246-290-420(1), 246-291-240; *see also* Wash. Rev. Code 70.119A.060. The source of a system's supply directly relates to the system's safety; that is, whether the water is free of health-threatening contaminants and is the highest quality water available, as well as to its reliability. Development of a new water system or a new source of supply for an existing system requires approval of the source.

Under Wash. Admin. Code 246-290-130, no new source for a Group A system may be used until the purveyor demonstrates to Health that the source is reasonable and feasible for the size and type of system, may legally be used in conformance with state water rights laws, supplies water that is physically and reliably available in the necessary quantities, adequately provides for source protection, is designed and constructed in conformance with Wash. Admin. Code 246-290, meets water quality standards under Wash. Admin. Code 246-290-310, and is or is not ground water under the influence of surface water (GWI). Wash. Admin. Code 246-290-640 prescribes the requirements for determining whether a source is a GWI source. No new source for a Group B system may be used unless the purveyor submits similar information to Health in

accordance with Wash. Admin. Code 246-291-100 or -110 and receives Health approval.

To demonstrate an adequate quantity of water, the purveyor must document that the source may legally be used in conformance with state water rights laws. Wash. Admin. Code 246-290-130(3); 246-291-100(2)(a), -110(3)(a). The absence of documentation of water rights may lead to denial of a project. For example, a single Group B water system that does not use more than 5,000 gallons of water per day is exempt from water rights requirements under Wash. Rev. Code 90.44.050. However, when more than one such Group B water system is used to supply water to one development or project, the withdrawals from the water systems together constitute a single withdrawal for purposes of Wash. Rev. Code 90.44.050 and a water right permit is required. AGO 1997 No. 6. Requests for approval of such multiple Group B systems are subject to denial under Wash. Admin. Code 246-291-100. A purveyor's ability to document adequate water rights can also affect the system's ability to plan for future expansion.

5. Water Quality And Source Protection

With respect to water quality, Wash. Admin. Code 246-290-310 establishes maximum contaminant levels for a wide variety of contaminants including bacteria, organic and inorganic chemicals and radionucleides. Contaminants are classified as primary or secondary depending on the level of health risk presented. Where Health makes a determination of low source vulnerability to contamination, purveyors may obtain monitoring waivers for certain organic and inorganic chemical

contaminants, thereby reducing the monitoring burden. Wash. Admin. Code 246-290-300(4), (7); *see also* Wash. Rev. Code 70.119A.115.

Wash. Admin. Code 246-290-300 establishes monitoring requirements for each category of contaminant identified in Wash. Admin. Code 246-290-310. Monitoring requirements vary, to some extent, depending on system size. The smallest Group A systems, for example, are normally required to collect one bacteria sample per month; the largest systems three hundred or more per month. Wash. Admin. Code 246-290-300(2)(c). Wash. Admin. Code 246-290-310 prescribes the follow up action a purveyor is to take when a maximum contaminant level violation occurs. Follow up action may include public notification as prescribed by Wash. Admin. Code 246-290-330.

The maximum contaminant levels and monitoring requirements for Group B systems are set forth in Wash. Admin. Code 246-291-300 through -360 and are, in general, less inclusive than those applicable to Group A systems. On the basis of public health concerns, Health may require the purveyor of either a Group A or Group B system to monitor for additional substances, and to take any necessary follow-up action. Wash. Admin. Code 246-290-300(10), 246-291-350.

To help ensure that the drinking water source is protected from potential risk of contamination, ground water sources of supply for all public water systems must be surrounded by a sanitary control area of one hundred feet for wells and two hundred feet for springs unless engineering justification supports a smaller area. Wash. Admin. Code 246-290-135, 246-291-100. The purveyor must own the sanitary control area or have the right to exercise complete sanitary control of the area through other

legal means. Additionally, Group A water system purveyors using well or spring sources must develop and implement a wellhead protection program. Wash. Admin. Code 246-290-135(3). The wellhead protection program must include a wellhead protection area (WHPA), using six-month, one-, five-, and ten-year time of travel boundaries or boundaries established using alternate criteria approved by Health in settings where ground water time of travel is not a reasonable delineation criterion, an inventory of all known and potential sources of contamination located within the WHPA, documentation of the purveyor's notification of all owners or operators of known or potential sources of contamination, a contingency plan to ensure customers have an adequate supply of potable water in the event that contamination results in the temporary or permanent loss of the principal source of supply, and documentation of coordination with local emergency incident responders. The list of potential sources of contamination must be updated every two years. Wash. Admin. Code 246-290-135(3)(c)(iii).

For surface water and GWI sources, the water system purveyor must develop and implement a watershed control program. Wash. Admin. Code 246-290-135(4), 246-291-110(4). The watershed control program must, at a minimum, include watershed description, an inventory of all potential surface water contamination and activities, watershed control measures, including documentation of ownership and relevant written agreements and monitoring of activities and water quality, and documentation of water quality trends. Wash. Admin. Code 246-290-135(4)(c). The program must be updated at least every six years.

Generally, ground water sources must have continuous disinfection that provides effective contact time and chlorine residual concentrations. Wash. Admin. Code 246-290-250(4); *see also* Wash. Admin. Code 246-291-230(3). Health may modify the requirement for disinfection where a source has a satisfactory bacteriological history and an adequate sanitary control area. Wash. Admin. Code 246-290-250(4). Surface water and GWI sources must comply with surface water treatment requirements in accordance with Part 6 of Wash. Admin. Code 246-290 which establishes filtration and disinfection as treatment technique requirements. A "treatment technique requirement" is defined by specific design, operating, and monitoring requirements. It is established instead of a primary MCL when monitoring for a contaminant is not economically or technologically feasible. Wash. Admin. Code 246-290-010. Among the contaminants for which a treatment technique is established are *Giardia lamblia*, viruses, and turbidity.

Health will not approve any new or expanding Group B systems using surface water or GWI sources unless the system is under the ownership and operation of a Health approved satellite management agency and provides continuous effective treatment including filtration, disinfection and any other measures required under Wash. Admin. Code 246-290. Wash. Admin. Code 246-291-110, -230(4), -340. The minimum level of treatment for nonexpanding Group B systems is filtration and disinfection. Wash. Admin. Code 246-291-230(5).

In addition to source protection requirements, the purveyor must protect the system from contamination due to cross-connections with any source of nonpotable liquid, solid, or gas that could contaminate the

potable water supply by backflow. Wash. Admin. Code 246-290-490 prescribes the cross-connection control requirements for Group A systems. In much less detail, Wash. Admin. Code 246-291-270 sets forth the cross-connection control requirements applicable to Group B water systems.

6. Operation And Maintenance

Purveyors must ensure that systems operate in accordance with an approved water system plan or small water system management program, both of which must include an operations and maintenance program, and "good operations procedures". Wash. Admin. Code 246-290-415(1); *see also* Wash. Admin. Code 246-291-230(7). Additionally, a public water system must employ a "certified operator" if the system is a Group A system or uses a surface water or GWI source. Wash. Rev. Code 70.119.030.

7. Operating Permits

Wash. Rev. Code 70.119A.110(1) provides that no person may operate a Group A public water system except under a permit issued by Health. Operating permits are issued for one year and must be renewed annually. Wash. Rev. Code 70.119A.110(5). Each application must be accompanied by an annual fee. Wash. Rev. Code 70.119A.110(6). If a system transfer is proposed, the transferee must apply for and obtain a new permit before the transferee takes possession or begins operation of the system. Wash. Rev. Code 70.119A.110(1).

Upon permit application, Health evaluates the subject system with respect to its enforcement history and its compliance with applicable regulations. Health then places the system in one of four permit categories

based on that evaluation. A category green system has no unresolved enforcement issues and is in substantial compliance with regulatory requirements, including requirements pertaining to operator certification, water system plan approval, contaminant levels and financial viability. A category yellow system has no unresolved enforcement issues but is in violation of one or more regulatory requirements, including requirements pertaining to operator certification, water system plan approval, contaminant levels and financial viability. A category red system is the subject of an unresolved enforcement action or is "built-out," having reached the maximum number of services allowed by Health approval. A category blue system is one which Health has not evaluated but is allowing to operate pending evaluation. Wash. Admin. Code 246-294-040.

A system's categorization is significant in a number of ways. Category yellow and category red systems are issued conditional permits. Wash. Admin. Code 246-294-040, -050. A category red system may also be denied a permit. *Id.* To satisfy the conditions, the system owner must bring the system into regulatory compliance and/or resolve any unresolved enforcement issue. Failure to comply with the conditions may result in enforcement action. Wash. Admin. Code 246-294-090.

A system's permit category also determines the "adequacy" of the system. Systems in the red category are characterized as inadequate. Systems in the green category are characterized as adequate. Systems in the yellow category may be characterized as adequate or inadequate depending on the nature of the regulatory violations. Wash. Admin. Code 246-294-040.

Under the Growth Management Act (GMA), local governments must determine whether applicants for subdivision approvals and building permits have made appropriate provisions for or have adequate water supply for the proposed project. Wash. Rev. Code 58.17.110, 19.27.097. The local governments' determinations should be based on Health and Board of Health standards with regard to meeting applicable water quality standards and Department of Ecology standards with regard to water rights. *See* AGO 1992 No. 17. A local government reviewing a subdivision or building permit application should consult with both Health and Ecology to determine the adequacy of the water supply. In addition, prospective home buyers, lenders, and other individuals and institutions may contact Health and Ecology to determine the status of water systems serving particular properties and water rights. Financial institutions may refuse to lend money secured by property unless the property securing the loan is served by an adequate water system, that is, a system in substantial compliance with applicable regulations.

For a Group A system, Health determines the adequacy of the system according to operating permit criteria and uses a system's operating permit category to provide adequacy information to local governments and others. Systems characterized as inadequate are not adequate to serve new or additional connections. Adequacy determinations for Group B systems are made by Health or the local health jurisdiction, whichever has the primary enforcement responsibility for Group B systems in the particular county. Group B adequacy categories are identified in Wash. Admin. Code 246-291-130(2). A Group B system may be "fully approved/adequate", "provisionally adequate", or

inadequate. Only a "fully approved/adequate" system qualifies as adequate to serve new or additional connections.

8. Planning

(a) Individual Water System Planning

All new Group A systems and certain other Group A systems are required to develop long range comprehensive water system plans that take into account water quality, water resources, source protection, reliability, financial viability, and conservation. Wash. Admin. Code 246-290-100. New Group B systems and certain other Group B systems are also required to plan in accordance with Wash. Admin. Code 246-291-140. Each purveyor of a Group A water system required to do a water system plan must demonstrate "system capacity," that is, the "system's operational, technical, managerial, and financial capability to achieve and maintain compliance with all relevant local, state, and federal plans and regulations." Wash. Admin. Code 246-290-010, -100(1)(a). Individual water system plans must also identify existing and proposed service areas for six-year and twenty-year planning horizons. Plans often call for the provision of service to expanded retail service areas, or to wholesale areas through the use of interties. The plans must be consistent with related plans including local land use plans such as those adopted under the GMA.

Because a water system plan must be consistent with local land use plans, the decisions of the Growth Management Hearings Boards can affect Health's ability to approve a water system plan. For example, where, pursuant to Wash. Rev. Code 36.70A, a board invalidates the comprehensive plan developed by a local jurisdiction under the GMA,

Health may, in certain circumstances, not be able to approve water system plans for water systems located in that jurisdiction.

With respect to water resources, Ecology, pursuant to a Memorandum of Understanding with Health, has the opportunity to review the Group A water system plans. *See* Wash. Rev. Code 43.70.310, 90.03.386. The purveyor must provide a water resource analysis including a water right assessment. Wash. Admin. Code 246-290-100(4)(d). A system that cannot demonstrate sufficient water rights at the planning stage must reassess its water rights at the project stage when a proposed project involves a new source or a system expansion. Wash. Admin. Code 246-290-110, -120. To the extent that a given system lacks water rights or has insufficient water rights, as determined by Ecology, Health may not be able to approve the specific projects.

In the case of a public health threat caused by a failing public water system, Ecology may, upon notification by Health or the local health jurisdiction, process a water right application ahead of competing applications if the application resolves or alleviates the public health threat. Wash. Admin. Code 173-152-050.

(b) Coordinated Water System Planning

The Public Water System Coordination Act of 1977, Wash. Rev. Code 70.116, where implemented, requires or encourages local governments to consider water delivery in a regional context, to develop and apply consistent design standards and, generally, to restrict the unnecessary construction of new water systems. Prior to enactment of the Coordination Act, there was very little coordination among water utilities and among agencies, such as local land use planning agencies, whose

decision making impacted water utilities. Water systems tended to be approved and built without much regard for larger planning considerations or for the impact of those systems on the water resource. Small water systems were proliferating even in areas already served by existing systems.

Small systems have been and continue to be less reliable than larger systems which are professionally managed and operated.[2] Economies of scale make it much more expensive, on a per-customer basis, to operate small systems than large systems. Additionally, most small systems are privately rather than publicly owned and are therefore ineligible for most low interest loans and other financial benefits available to publicly owned systems. Because of financial constraints, small system owners might not make repairs, construct improvements or take other measures necessary to protect against contamination when problems arise.

Many small water systems are served by wells. Each operating well necessarily taps an aquifer which may serve as a source for many different water systems. Each well drilled represents a potential conduit by which contaminants may reach a source aquifer. Generally speaking, the vulnerability of any source aquifer increases as the number of wells tapping that aquifer increases.

Where it has been implemented, the Coordination Act has largely alleviated these types of problems. Under the Coordination Act, Health as well as local planning agencies and water utilities were directed to

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[2] The Legislature has recognized the inherent problems with small water systems. Wash. Rev. Code 70.116.060; 1995 Wash. Laws ch. 376, § 1(3).

"study geographical areas where water supply problems relating to uncoordinated planning, inadequate water quality or unreliable service appear to exist". Wash. Rev. Code 70.116.040(1). If the result of such study indicates that problems exist, Health or the county legislative authority is to designate the area in question as a "critical water supply service area" (CWSSA).

Once a CWSSA's external boundaries are established, a "coordinated water system plan" (CWSP) for the designated area is developed. Wash. Rev. Code 70.116.050(2). In practice, a CWSP consists of two principal elements. *See* Wash. Admin. Code 246-293-230, -240. The first element, often called the "regional supplement", consists of general guidelines and standards pertaining to all systems within the CWSSA. The second element is a compilation of individual water system plans in which system owners detail how they will specifically implement the general guidelines and standards within their individual service areas. Plan content is prescribed in Wash. Admin. Code 246-290-100. Nonmunicipally owned systems not planning to provide water service beyond their existing service areas are exempt from the individual planning provision under Wash. Rev. Code 70.116.050(1), except for the establishment of service area boundaries. These systems may otherwise be required to develop a water system plan under Wash. Admin. Code 246-290-100 or Wash. Admin. Code 246-291-140.

Plans for new and expanding systems must provide for adequate fire flow. Wash. Rev. Code 70.116.080; Wash. Admin. Code 246-293-601 to -690. Volumes of water necessary for fire flow may greatly exceed volumes otherwise required for ordinary domestic service.

Where water is scarce or water rights uncertain, fire flow demands may be a significant control on development.

The proposed service area boundaries of the systems within the CWSSA are identified in the individual water systems plans. A purveyor must designate the system's existing service area and proposed future service area if expansion is contemplated. Individual future service areas "shall not be inconsistent with adopted land use plans, ordinances, and growth policies of cities, towns, and counties, located within the future service areas boundaries." Wash. Admin. Code 246-293-250(4).

The county reviews the proposed boundaries to determine whether any proposed boundaries overlap. Where proposed future service areas overlap, the county may resolve the conflict informally or by assigning disputed service areas to one or more of the purveyors claiming those areas. Any unresolved disputes or final decision made by the county may be referred or appealed to the Secretary of Health. Wash. Rev. Code 70.116.070; Wash. Admin. Code 246-293-401 to -430. From time to time service area conflicts arise between purveyors after a CWSP is approved. The Coordination Act does not authorize the Secretary to formally resolve conflicts that arise after a CWSP is approved. Instead, the parties to the conflict must generally resolve the conflict themselves.

Once it has finished preparing a CWSP, the WUCC sends it to the county legislative authority. The county legislative authority reviews the CWSP to determine whether, among other things, any segment is "inconsistent with any current land use plans, shoreline master programs, and/or developmental policies of the general purpose local government or governments whose jurisdiction the water system plan affects".

Wash. Rev. Code 70.116.050(7). The county must also hold a public hearing on the CWSP. It then submits the CWSP to Health for final approval.

At the conclusion of the CWSP development process, all land within a CWSSA will either be within the individual service area of one of the existing purveyors or will be unclaimed by any purveyor. Each purveyor identified in the approved CWSP has what is essentially a right of first refusal to provide water service to any prospective customer within that purveyor's individual service area. A prospective customer cannot seek water from another purveyor or build a new water system unless the existing system voluntarily relinquishes a portion of its service area, or is unable to provide water service to the prospective customer in a "timely and reasonable" manner. Wash. Rev. Code 70.116.060(3); Wash. Admin. Code 246-293-190.

If a designated purveyor agrees or if it is determined that a purveyor is unable to provide timely and reasonable water service, then the prospective customers may seek an alternative source. The CWSP may prescribe a hierarchy of customer alternatives which the prospective customer must adhere to. Wash. Rev. Code 70.116.060(3)(a). Wash. Admin. Code 246-293-190(1)(a) prescribes alternatives where the CWSP is silent.

If a prospective customer is located inside the external boundary of a CWSSA but outside the individual service area boundaries of all purveyors, the prospective customer again must look to the CWSP to see if it prescribes service alternatives. Wash. Admin. Code 246-293-190(1)(b) prescribes the alternatives when the CWSP is silent.

Pursuant to 1995 amendments to the Coordination Act, once the Secretary approves the CWSP, timely and reasonable determinations are made by the county, according to guidelines developed by the Secretary. Wash. Rev. Code 70.116.060(3). Under Wash. Rev. Code 70.116.060(3)(b), an existing purveyor is unable to provide service in a timely and reasonable manner if service cannot be provided within 120 days unless otherwise specified by the county. A prospective customer who believes that a purveyor has not or cannot provide water service in a timely and reasonable manner should look to the applicable CWSP to find the procedure for raising such a claim.

When a CWSP includes a service area for a city, town, or special purpose district that extends beyond the corporate boundaries of the city, town, or special purpose district and the municipal purveyor seeks to extend water service outside of its corporate boundaries, review by the county boundary review board is not implicated. Under Wash. Rev. Code 36.93.090(4), a county boundary review board may review the extension or permanent water service outside of the existing service of a city, town, or special purpose district where "service area" is defined to "include all of the area within its corporate boundaries plus . . . the area outside of the corporate boundaries which it is designated to serve pursuant to a coordinated water system plan approved in accordance with [Wash. Rev. Code] 70.116.050". *See also* AGO 1991 No. 28.

CWSPs have already been approved or are in advanced stages of development in most areas where the Coordination Act is likely to be implemented. To date Health has participated in the development of twenty-one CWSPs covering most of the state's urban areas. The process

for updating the plan is the same as that for developing the initial plan. Wash. Admin. Code 246-293-280. After adoption of the initial CWSP, the county may at any time, determine that it should be updated or revised. Once every five years, the Secretary may also determine that the plan should be updated or revised. Wash. Rev. Code 70.116.060(6).

Pursuant to the Water Resources Act of 1971, Wash. Rev. Code 90.54, Department of Ecology regulations set forth procedures for the reservation of water for future public water supply in general geographic areas. Preservation and protection of water in a potable condition for adequate and safe supplies to satisfy human domestic needs is one of the fundamentals of state water resource policy. Wash. Admin. Code 173-590-010(4). Petitions must include, among other things, a copy of the CWSP. Wash. Admin. Code 173-590-070. If reservation is deemed appropriate by Ecology, it shall adopt or amend a regulation to reserve water for future public water supply for a general geographic area. Wash. Admin. Code 173-590-110. The priority date of any permit issued pursuant to Wash. Rev. Code 90.03.290 and 90.44.060 which authorizes withdrawal and use of reserved waters shall be the effective date of the regulation. Wash. Admin. Code 173-590-160. Under Wash. Admin. Code 173-590-090, notice of a petition for reservation must be sent to the Secretary of Health.[3] By Health policy, the CWSP must be approved by Health prior to submittal to Ecology and Health will assist Ecology in the

[3] The regulations refer to the secretary of the Department of Social and Health Services. However, Health was created as in independent agency in 1989. Prior to the creation of Health, the drinking water program was administered by DSHS.

development of any regulation regarding reservation for future public water supply.

(c) Satellite System Management Agencies

A "satellite system management agency" is a "person or entity that is certified by the secretary [of health] to own or operate more than one public water system on a regional or county-wide basis, without the necessity for a physical connection between such systems". Wash. Rev. Code 70.116.134(6); *see also* Wash. Admin. Code 246-295-010.

Since 1995, Wash. Rev. Code 70.119A.060 has prohibited the creation or approval of any new public water system unless:

> It is owned or operated by a satellite system management agency established under [Wash. Rev. Code] 70.116.134 and the satellite system management system complies with financial viability requirements of the department; or (b) a satellite management system is not available and it is determined that the new system has sufficient management and financial resources to provide safe and reliable service.

Wash. Rev. Code 70.119A.060(2)(a). The approval of any new system not owned by a satellite system management agency (SMA) is conditioned upon compliance with Health operating requirements or, if the operating requirements are not met, future management or ownership by an SMA. Wash. Rev. Code 70.119A.060(2).

With respect to the development of a new Group B public water system, Health further requires, where no SMA is available, that when such a system will use ground water only and is not located within the boundaries of a CWSSA, the developer shall contact the following potential water service providers in writing: the public water system, if

any, that has a service area identified in a Health approved water system plan which includes the proposed development area, and each existing public water system serving property within one thousand feet. Wash. Admin. Code 246-291-140(2)(c). Upon completion of these steps, the developer has the option of developing an independent water system, subject to the conditional approval requirements of Wash. Rev. Code 70.119A.060(2).

Health reviews and approves applications from purveyors, individuals and others seeking to become approved SMAs and maintains a list of approved SMAs that identifies the county or counties within which each SMA is approved and the type of management for which the SMA is approved. Wash. Admin. Code 246-295-040(4). With the exception of the requirement that new systems be owned or operated by an SMA, SMAs are not mandated but their use is intended to enhance the public health protection provided to the water system users. Wash. Admin. Code 246-295-001. The operation of small water systems by one SMA can also serve to prevent or remedy the problems often associated with smaller water systems. *See* Wash. Rev. Code 70.116.134(3).

Anyone seeking approval as an SMA must submit to Health a notice of intent to become an SMA, participate in a presubmittal conference with Health to discuss SMA plan content, and submit an SMA application and plan. Wash. Admin. Code 246-295-040.

When an SMA is willing to take ownership of systems that have red operating permits or have not obtained an operating permit, the SMA may be allowed a "special provision" whereby they are given time to bring the system into compliance. Wash. Admin. Code 246-295-110(1). To

obtain this special provision, the SMA must define how and within what time frame it will bring the systems into compliance. Health and, if applicable, the public water system must agree to the SMA's proposal. The time frame may subsequently be extended if agreed upon by the SMA and Health, however, if the time frame initially agreed upon passes and no extension has been granted, the system shall remain out of compliance and the SMA shall be removed from the approved SMA list. Wash. Admin. Code 246-295-110(2).

Health may revoke, suspend or modify an SMA approval when, among other things, the SMA fails to comply with its SMA plan, it violates public water system statutes or regulations, or fails to comply with applicable local ordinances, regulations, plans and policies. Wash. Admin. Code 246-295-100. If an SMA is removed from the approved list and desires reinstatement, the SMA must reapply. Reapplication is subject to any limitations imposed by final departmental order or order on judicial review. Wash. Admin. Code 246-295-100(5).

9. Water Use Efficiency

Providing a safe and reliable supply of drinking water means ensuring that current and future drinking water needs are met. Delivery of a reliable supply of drinking water to a growing population is complicated by water quality threats to the water resource, protection of streamflow and fish habitat, and listings of threatened and endangered fish under the Endangered Species Act, and water rights issues.

Listings of threatened and endangered species under the Endangered Species Act, 16 U.S.C. §§ 1531 to 1544 may have implications for Health's and local health jurisdictions' approval of public

water system submittals as well as Health's administration of the Drinking Water State Revolving Fund.

Because of the competition for the water resource, assuring optimal use of the resource is important. Under Wash. Rev. Code 43.20.230, Health is responsible for developing procedures and guidelines related to water use efficiency as they apply to public water systems. To promote water use efficiency, Health requires that public water systems address water conservation and encourages the use of reclaimed water. Wash. Rev. Code 43.20.230(1), (2). Additionally, Health supports conservation as an element in watershed planning under Wash. Rev. Code 90.82, and provides advice and technical assistance in the development of water use efficiency plans. Wash. Rev. Code 43.20.230(3).

(a) Conservation

All Group A systems required to submit a water system plan must conduct a water resource analysis including development and implementation of a water conservation program. These systems are required to evaluate a set of conservation measures, based upon water system size and water supply status, and implement those measures that are cost-effective. Wash. Admin. Code 246-290-100(4)(d). The water resource analysis must also include water demand forecasts and collection of water use data. Within the water system plan, the purveyor must also evaluate the feasibility of adopting and implementing water delivery rate structures to encourage water conservation. Wash. Rev. Code 43.20.235. Group A systems not required to submit a water system plan under Wash. Admin. Code 246-290-100 must address water conservation as part of a small water system management program. Wash. Admin. Code 246-290-

105(4)(h). New or expanding Group B systems are also required to develop a water conservation program as part of a water system plan under Wash. Admin. Code 246-291-140.

(b) Reclaimed Water Use

Pursuant to Wash. Rev. Code 90.46, Health administers the reclaimed water, or reuse, program jointly with Ecology. Regarding the use of reclaimed water, the Legislature has said:

> It is hereby declared that the people of the state of Washington have a primary interest in the development of facilities to provide reclaimed water to replace potable water in nonpotable applications, to supplement existing surface and ground water supplies, and to assist in meeting the future water requirements of the state.
>
> . . . Use of reclaimed water constitutes the development of new basic water supplies needed for future generations.

Wash. Rev. Code 90.46.005.

"Reclaimed water" is defined as "effluent derived in any part from sewage from a wastewater treatment system that has been adequately and reliably treated, so that as a result of that treatment, it is suitable for a beneficial use or a controlled use that would not otherwise occur and is no longer considered wastewater". Wash. Rev. Code 90.46.010(4). Pursuant to Wash. Rev. Code 90.46.110, five reclaimed water projects are underway or have been conducted in order to further effectuation of the goals of the statute.

A municipal, quasi-municipal, other governmental entity or holder of a waste discharge permit issued under Wash. Rev. Code 90.48 that generates reclaimed water may apply to Ecology for a permit authorizing

land application of reclaimed water or to Health for a permit for industrial and commercial uses of reclaimed water. Wash. Rev. Code 90.46.030, .040. Under Wash. Rev. Code 90.46.010, "land application" means "application of treated effluent for purposes of irrigation or landscape enhancement for residential, business, and governmental purposes. Industrial uses include heating and cooling". Commercial uses include toilet and urinal flushing, decorative fountains and washing sidewalks.

Health's primary responsibility is to evaluate potential health effects of proposed reuse projects. Ecology must refer applications for land application permits to Health where a significant risk to the public health exists. Wash. Rev. Code 90.46.040(3). A permittee may distribute the water according to permit provisions governing location, rate, water quality, and purposes of the use. Wash. Rev. Code 90.46.030(2), .040(2).

Reclaimed water may be beneficially used for surface percolation provided the reclaimed water meets the ground water recharge criteria as measured in ground water beneath or down gradient of the recharge project site. Wash. Rev. Code 90.46.080(1). This use of reclaimed water must be incorporated into a water or sewer comprehensive plan adopted by the local government and approved by Ecology or Health as applicable. Under Wash. Rev. Code 90.46.010 the "ground water recharge criteria" means the contaminant criteria of the drinking water quality standards adopted by the Board of Health or Health.

Reclaimed water may also be beneficially used for discharge into constructed beneficial use wetlands and constructed treatment wetlands provided the reclaimed water meets the class A or B reclaimed water standards as defined in the reclamation criteria and this use is incorporated

into a water or sewer comprehensive plan adopted by the local government and approved by Ecology or Health as applicable. Wash. Rev. Code 90.46.090(1). Reclaimed water intended for beneficial reuse may be used to augment streamflow where this use is similarly incorporated into a sewer or water comprehensive plan and the reclaimed water meets water pollution control requirements under Wash. Rev. Code 90.48. Wash. Rev. Code 90.46.100.

Direct discharge for surface percolation or into the identified wetlands where the reclaimed water does not meet the ground water recharge criteria or the reclamation criteria may occur where Ecology, in consultation with Health, has specifically authorized the use at a lower standard. Wash. Rev. Code 90.46.080(3), .090(2).

Where a wastewater treatment facility that proposes the use of reclaimed water intended to augment or replace potable water supplies or create the potential for development of additional potable water supplies, such use or uses shall be considered in the development of the regional water supply plan or plans addressing potable water supply service by multiple water purveyors. Wash. Rev. Code 90.46.120.

D. OTHER AGENCY AUTHORITY IN RELATION TO THE PUBLIC WATER SYSTEM REGULATIONS

A number of local, state and federal agencies, other than Health, have the authority either to directly enforce the state drinking water regulations or to take actions that tend to result in improved compliance.

Local health jurisdictions are authorized to enforce the state drinking water regulations, to bring injunctive and receivership actions and, in some instances, to impose civil penalties in the same manner and

to the same extent as Health. Wash. Rev. Code 70.05.060, 43.70.190, 70.119A.050. Wash. Rev. Code 70.05.120 provides that any person violating or neglecting to obey a health regulation promulgated by the Board of Health is guilty of a misdemeanor and is subject to a fine and up to ninety days in jail.

EPA is authorized to bring a civil action in federal district court to require compliance and the court is authorized to impose fines of up to $5,000 per day for willful violation of the federal primary contaminant standards. 42 U.S.C. § 300i. Health sometimes refers cases involving chronic noncompliance to the EPA for federal enforcement.

Certain systems that meet the jurisdictional thresholds established under Wash. Rev. Code Title 80 are subject to a set of regulations administered by the Washington Utilities and Transportation Commission (UTC). While these regulations focus on rate and economic regulation, the UTC has the authority to issue orders and enforce requirements across an array of operational and management areas according to its own particular definitions of a water system, company, and owner that relate to its separate statutory authority. UTC does not assert jurisdiction over all public water systems and there is no statewide regulation of water rates.[4]

Wash. Rev. Code 80.04.110(4) authorizes the state utilities and transportation commission (UTC) to audit any non-municipal water system "upon receipt of an administrative order from the department [of

[4] For instance, water districts and public utility districts set rates pursuant to independent statutory authority under Wash. Rev. Code Titles 57 and 54, respectively, while certain privately owned systems set their own rates without any regulatory oversight.

health] . . . finding that the water delivered by the system does not meet state board of health standards . . . or standards adopted under [the Coordination Act]". The UTC has the authority to order systems within its jurisdiction to provide improved water quality and improved water service as well as to require specific repairs or improvements. Wash. Rev. Code 80.28.030, .040, .130.

Ecology's decisions with respect to applications for water rights permits, may indirectly impact compliance with the drinking water regulations. The Legislature has recognized that the two agencies' have related responsibilities. Under Wash. Rev. Code 43.70.310:

> Where feasible, the department and the state board of health shall consult with the department of ecology in order that, to the fullest extent possible, agencies concerned with the preservation of life and health and agencies concerned with protection of the environment may integrate their efforts and endorse policies in common.

Under Wash. Rev. Code 90.03.386:

> Within service areas established pursuant to chapters 43.20 and 70.116 Wash. Rev. Code, the department of ecology and the department of health shall coordinate approval procedures to ensure compliance and consistency with the approved water system plan.

With the Water Resources Act of 1971, the Legislature "set forth fundamentals of water resource policy for the state to insure [sic] that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington and, in relation thereto, to provide direction to the department of ecology, other state agencies and officials, and local governments in carrying out water and related resources programs." Wash. Rev. Code 90.54.010(2). Specifically, the Legislature

determined that among the fundamentals for utilization and management of waters of the state is "development of water supply systems, whether publicly or privately owned, which provide water to the public generally in regional areas within the state shall be encouraged. Development of water supply systems for multiple domestic use which will not serve the public generally shall be discouraged where water supplies are available from water systems serving the public." Wash. Rev. Code 90.54.020(8).

X.

THE ENDANGERED SPECIES ACT

Since 1991, the National Marine Fisheries Service (NMFS) has listed fifteen salmon species that originate in or migrate through Washington as threatened or endangered under the Endangered Species Act (ESA).[1] Three others are candidates for listing.[2] Three more species in the salmon family are listed or are proposed for listing.[3] Each of these actions has significant impact on water appropriation throughout Washington by potentially limiting water availability for appropriation.

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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 (64 Fed. Reg. 14308, 14321 (March 24, 1999)); Upper Columbia River spring chinook – endangered (*Id.* at 14324); Puget Sound chinook – threatened (*Id.* at 14319); Snake River spring and summer chinook – threatened (57 Fed. Reg. 14653, 14661 (April 22, 1992)); Snake River fall chinook – threatened (*Id.* at 14661); Upper Willamette River chinook – threatened (64 Fed. Reg. 14308, 14323 (March 24, 1999)); Columbia River chum – threatened (64 Fed. Reg. 14508, 14513 (March 25, 1999)); Hood Canal summer chum – threatened (*Id.* at 14513); Ozette Lake sockeye – threatened (64 Fed. Reg. 14528, 14533 (March 25, 1999)); Snake River sockeye – endangered (56 Fed. Reg. 58619, 58623 (November 20, 1991)); Lower Columbia River steelhead – threatened (63 Fed. Reg. 13347, 13365 (March 19, 1998)); Middle Columbia River steelhead – threatened (64 Fed. Reg. 14517, 14525 (March 25, 1999)); Upper Columbia River steelhead – endangered (62 Fed. Reg. 43937, 43950 (August 18, 1997)); Snake River steelhead – threatened (*Id.* at 43950); and Upper Willamette River steelhead – threatened (64 Fed. Reg. 14517, 14524 (March 25, 1999)).

[2] Lower Columbia River/Southwest Washington coho (60 Fed. Reg. 38011, 38022 (July 25, 1995)); Puget Sound/Strait of Georgia coho (*Id.* at 38024); Baker River (Skagit watershed) sockeye (63 Fed. Reg. 11750, 11760 (March 10, 1998)).

[3] Coastal-Puget Sound bull trout – proposed threatened (63 Fed. Reg. 31693 (June 10, 1998)); Columbia River bull trout – threatened (63 Fed. Reg. 31647 (June 10, 1998)); Southwest Washington/Columbia River coastal cutthroat trout – proposed threatened (64 Fed. Reg. 16397, 16408 (April 5, 1999)).

This chapter provides an overview of the Endangered Species Act, outlines in detail ESA's major sections, and describes how ESA may impact water appropriation.

Congress's intent in enacting 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, ESA uses two major strategies: (1) identifying species needing protection and the means necessary to protect and recover those species; and (2) preventing and punishing the taking of listed species and the destruction of their habitats.

The purposes of 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, 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).

Three sections provide the backbone of ESA. First, section 4 contains the process for the initial listing of endangered and threatened species. 16 U.S.C. § 1533. This section also provides for the identification of critical habitat for the species, as well as preparation of recovery plans. Second, section 7 mandates that all federal agencies do everything possible to protect listed species. 16 U.S.C. § 1536. This section requires all federal agencies to consult with either the Secretary of

the Interior or the Secretary of Commerce before taking any action that may affect a listed species.[4] The consultation is designed to ensure that federal actions will not jeopardize the species' continued existence. The obligation to consult affects anyone seeking a federal permit, federal funding, or any other federal action or authorization necessary to a private project.

Third, section 9 prohibits taking of endangered species.[5] 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). 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 which 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 (HCP) encompassing the applicant's lands or areas of operation for the

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[4] For terrestrial species, 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.

[5] 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.

affected species. Sections 6 and 7 contain additional exceptions to the take prohibition.

A. SECTION 4 – LISTING DECISIONS, CRITICAL HABITAT DESIGNATION, 4(D) RULES, AND RECOVERY PLANS

1. Listing Decision

Section 4 of ESA establishes the procedures for listing species as threatened or endangered. 16 U.S.C. § 1533(a)(1). 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).

Under section 4, listing may be proposed by the Secretary of the Interior or any interested person. 16 U.S.C. § 1533(b)(3)(A). The responsibility for listing is divided between the Secretary of the Interior (United States Fish & Wildlife Service (FWS)) for terrestrial species, and the Secretary of Commerce (NMFS) for virtually all marine species, with the exception of some marine mammals. 16 U.S.C. § 1532(15), 1533(a)[6].

[6] Under a Memorandum of Understanding dated August 28, 1974, NMFS has ESA jurisdiction over anadromous fish species such as salmon, while FWS had ESA jurisdiction over other species of fish. *See* 16 U.S.C. § 1532(15).

The secretary[7] is required to make a finding as to whether the petition presents sufficient scientific or commercial data indicating that the petitioned action may be warranted. 16 U.S.C. § 1533(b)(3)(A). This finding must be made, to the extent it is practicable, within ninety days of receiving the petition. If the petition presents sufficient information, the secretary shall commence a review of the status of the species concerned. *Id.* Within twelve months of receiving a petition found to contain sufficient information, the secretary is required to make one of the following findings: (1) that the petitioned action is not warranted; (2) that the petitioned action is warranted; or (3) that the petitioned action is warranted but (a) it is precluded by pending proposals to determine whether any species is an endangered or threatened species, and (b) expeditious progress is being made to add qualified species to either of the lists. 16 U.S.C. § 1533(b)(3)(B).[8]

The secretary 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

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[7] The term "secretary" will be used generically to refer to both the Secretary of the Interior and the Secretary of Commerce, unless it is necessary to differentiate between the two.

[8] The calendar year runs from the date of publication of the proposed rule regardless of when the proposed rule was issued. *Oregon Natural Resources Coun., Inc. v. Kantor*, 99 F.3d 334, 339 (9th Cir. 1996). The listing decision may be deferred for up to six months to allow for the gathering of additional information. If an emergency poses a significant threat to the well-being of any species, the secretary may bypass formal listing procedures and list the species. Emergency listings can only remain in force for 240 days. 16 U.S.C. § 1533(b)(7).

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).[9]

2. *Critical Habitat Designation*

Once a species is listed as threatened or endangered, section 4 of ESA provides for the protection of the species' ecosystem through the designation of critical habitat. 16 U.S.C. § 1533(a)(3). The designation of critical habitat in turn triggers the section 7 consultation processes. *Natural Resource Defense Coun. v. Department of the Interior*, 113 F.3d 1121 (9th Cir. 1997). 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. Critical habitat includes the areas, within the geographic region occupied by the species at the time it is listed, on which are found the physical or biological features that (a) are essential to the conservation of the species and (b) may require special management considerations or protection. 16 U.S.C. § 1532(5)(A)(i). Areas outside the geographic area occupied by the species at the time it is listed may be designated as critical habitat if

[9] In one case involving the secretary's consideration of conservation efforts made by a take, the court held that the decision to list a species may not be deferred where such deferral is based upon non-regulatory, future, and voluntary state efforts. *Oregon Natural Resources Coun. v. Daley*, 6 F. Supp. 2d 1139 (D. Or. 1998).

the secretary determines that a designation limited to the species' present range would be inadequate to ensure the conservation of the species. 16 U.S.C. § 1532(5)(A)(ii).

The only regulatory impact of critical habitat is that section 7(a)(2) of ESA requires that federal agencies consult with the secretary to ensure that any action authorized, funded, or carried out by a federal agency not result in destruction or adverse modification of critical habitat. Currently only 113 species (nine percent of the 1,179 listed species) in the United States, under the jurisdiction of FWS, have designated critical habitat. 64 Fed. Reg. 31,871, 31,872 (1999).

Although the secretary is authorized to designate a species' critical habitat concurrently with new listings to the maximum extent possible, in actuality habitat designation and species listing processes are often on separate tracks. Under ESA regulations, a designation of critical habitat is "not prudent" if it could increase the threat of either a taking or other adverse human activity, or the designation would not benefit the species. 50 C.F.R. § 424.12(a)(1)(i)-(ii). In determining whether to exclude habitat from critical habitat designation, the secretary must weigh the benefit of designation against the risk of designation. In the event that designation will not benefit the species, because the identification of the habitat would, for example, disclose the species' location to unscrupulous collectors, the secretary is not required to designate habitat at all. *Id.*

Critical habitat is not determinable when the information sufficient to perform required analyses of the impacts of the designation is lacking or when the biological needs of the species are not sufficiently known to permit identification of an area as critical habitat. 50 C.F.R.

§ 424.12(a)(2)(i)-(ii). A one-year extension for designation is permitted when critical habitat is not currently determinable. 50 C.F.R. § 424.12(b)(2). In addition, the secretary is expressly authorized to delay the critical habitat designation when prompt listing of the species is essential to its survival. 50 C.F.R. § 424.12(b)(1). It should be noted, however, that critical habitat designation is not a prerequisite to enforcement of the section 9 prohibition against takings. *United States v. Glenn-Colusa Irrig. Dist.*, 788 F. Supp. 1126 (E.D. Cal. 1992).

The initial determination of critical habitat is to be made on the basis of the best scientific data available. 50 C.F.R. § 424.14(a). This requires identifying geographic areas containing the physical and biological features considered to be essential to conservation of the species. 50 C.F.R. § 424.12(b). The secretary, however, is to consider probable economic as well as other impacts on human activities resulting from the critical habitat designation. 50 C.F.R. § 424.19. Therefore, the process of critical habitat designation involves some discretion and balancing of competing factors. Any portion of an area will be excluded from the critical habitat if the benefits of exclusion outweigh the conservation benefits of inclusion, except that an area cannot be excluded from critical habitat if it would result in a species' extinction. 50 C.F.R. § 424.19.[10]

For example, on February 5, 1999, NMFS issued a proposed rule designating critical habitat for nine evolutionary significant units (ESUs)

[10] Nondesignation of critical habitat may not be based upon habitat management programs created by the state. *Natural Resources Defense Coun. v. Department of the Interior.*

of steelhead previously listed and currently proposed for listing in Washington, Oregon, Idaho, and California. Designated Critical Habitat: Proposed Critical Habitat For Nine Evolutionarily Significant Units Of Steelhead In Washington, Oregon, Idaho, And California, 64 Fed. Reg. 5740 (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.

This designation also included the adjacent riparian zones because they are inextricably related to the overall functioning of streams and contribute to the conservation of the species. Adjacent riparian zones provide off-channel rearing habitat for juvenile salmonids during periods of high water flow, prevent erosion, store and recycle nutrients, and influence stream hydraulics and water quality. *Id.* at 5743. NMFS defined an adjacent riparian zone as "the area adjacent to a stream that provides the following functions: shade, sediment, nutrient or chemical regulation, streambank stability, and input of large woody debris or organic matter". *Id.* at 5744. The agency contended that this descriptive definition "provide[d] the best means to characterize the adjacent riparian zone because such analyses are more likely to accurately capture the unique attributes of a particular landscape". *Id.* at 5744.

The issue of the impact of an appropriation of water pursuant to a valid state water right may arise in the section 7 consultation process. For example, if the water right holder needs a Clean Water Act section 404 permit from the United States 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 steelhead 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. *See* Endangered Species Act: Section 7 – 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).

3. 4(d) Rules

After listing the species as threatened, under section 4(d) the secretary must issue regulations that provide for the conservation of the species (4(d) Rule). 16 U.S.C. § 1533(d). A 4(d) Rule serves several purposes. First, it describes in enforceable, predictable terms the various activities that constitute "take" for purposes of sanctions, permits, and consultations. Second, it identifies activities (e.g., policies, programs, projects) that are exempt from the take prohibition. Finally, it serves as

notice to the public that the take prohibition is in effect with regard to the threatened species.

The secretary, through regulations, may extend the prohibitions against taking endangered species in section 9(a)(1) to threatened species. 16 U.S.C. § 1533(d). Pursuant to regulation, FWS automatically applies all regulatory prohibitions applicable to endangered species to any species NMFS lists as threatened, unless the agency adopts a special rule to the contrary. 50 C.F.R. § 17.31. Rather than have a similar blanket rule, NMFS makes such determination on a species-by-species basis.

In the interim 4(d) Rule, NMFS listed activities that violate the 4(d) Rule and therefore, are prohibited under section 9. These activities included:

> 1. Destruction or alteration of coho salmon habitat in the ESU, such as removal of large woody debris or riparian shade canopy, dredging, discharge of fill material, draining, ditching, diverting, blocking, or altering stream channels or surface or ground water flows; and
>
> 2. Land-Use activities that adversely affect coho salmon habitat in the ESU.

4. Recovery Plans

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 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). In addition, such plans generally include a discussion of species biology, past and present distribution, and the reasons for a species' listing as threatened or endangered. Most plans

also include a description of the target population representing the point at which a species would be considered recovered. An outline or narrative within recovery plans details actions or conditions necessary to promote species recovery and may also identify federal agencies responsible for carrying out activities aimed at implementing the species' recovery. Examples of recovery techniques include: (1) set asides or special management classifications on public lands; (2) acquisitions of privately-owned habitat; (3) reintroduction; (4) captive breeding; (5) restrictions on harvest; and (6) designation of "experimental populations".

Section 4(f) authorizes the secretary to give priority to species most likely to benefit from having recovery plans, particularly species under pressure from construction or other developmental activities. 16 U.S.C. § 1533(f)(1)(A). The act does not specify time limits in section 40(f) within which the secretary must develop, implement, or revise a recovery plan. *Strahan v. Linnon*, 967 F. Supp. 581, 596 (D. Mass. 1997). The FWS prioritizes recovery plan development and implementation according to both immediacy of threats to the species' survival and the species' "recovery potential". However, the secretary is specifically directed not to give priority to species on the basis of taxonomic classifications. 16 U.S.C. § 1533(f)(1)(A). In other words, there should be no preference for photogenic or charismatic species. Again, however, development and implementation of a recovery plan is independent of the protection afforded a listed species under section 9, which prohibits takings.

Recovery plans are prepared using one of two methods: (1) FWS or NMFS personnel supervise preparation of the plan, which is actually

written by an outside group or individual under contract; or (2) FWS or NMFS establishes its own "recovery team" to prepare the plan. The recovery team typically is composed of representatives from agencies that will be charged with implementing the plan, scientists with expertise about the species involved, representatives from industries that may be affected by the plan, and FWS and NMFS personnel. 16 U.S.C. § 1533(f)(2).

Section 4(f) requires that the secretary provide the public with notice and an opportunity to comment on recovery plans before approving new or revised plans. 16 U.S.C. § 1533(f)(4). The secretary must "consider" all information presented during this comment period. *Id.* Congress, however, has made it clear that the development and content of recovery plans will continue to be based solely on biological considerations.

Although over 650 recovery plans have been approved, only a few have been implemented. There are several reasons for this. First, the mandate to implement recovery plans applies only to the Secretaries of the Interior and Commerce. Therefore, section 4(f) does not, on its face, legally obligate federal agencies outside the Departments of the Interior and Commerce or nonfederal entities to implement the recovery plan directives, even if a plan indicates that such an agency's cooperation is imperative to achieving recovery goals. As a result, agencies such as the United States Forest Service and the Army Corps of Engineers, which commonly direct projects that affect listed species, are not directly bound by the mandate to implement recovery plans. In addition, insufficient knowledge of a species' biological requirements or inadequacy of current management techniques may undermine recovery efforts. Also, it is

difficult to develop effective recovery plans for wide-ranging predators such as grizzly bears and wolves. Funding, of course, also limits recovery plan implementation. Recovery efforts often require substantial amounts of money and resources. ESA implicitly recognizes that funding may limit recovery plan implementation by directing the secretary to prioritize plan development and implementation based on the species' likelihood of benefiting from the measures.

B. SECTION 7 – INTERAGENCY COOPERATION

Section 7 of ESA requires consultation between the federal agency taking action (action agency) and the secretary where a listed species may be impacted. Under section 7, all federal agencies, in consultation with the secretary, are directed to use their authorities to further the purposes of 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 ESA's mandates, the Interior could operate a dam to conserve listed species to the exclusion of other water uses because the secretary's obligation under ESA supersedes his obligation under reclamation laws). *Riverside Irrig. Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (the Corps is required under 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.

Section 7 further provides that 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. 1995). The consultation required in section 7 takes place between the action agency and either FWS or NMFS, depending on the species involved.

The regulations define section 7's pertinent phrases. "Jeopardize the continued existence of" any endangered or threatened species includes engaging in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. 50 C.F.R. § 402.02.

"Destruction or adverse modification" of designated critical habitat is defined to mean "direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species". 40 C.F.R. § 402.02. The Department of the Interior interprets the adverse modification of critical habitat consultation standards to be nearly identical to the jeopardy consultation standard. 64 Fed. Reg. 31,871, 31,872 (1999).

The term federal agency includes any department, agency, or instrumentality (including federal regulatory agencies) of the United States. 16 U.S.C. § 1532(7). The term agency action is interpreted broadly in *Conner v. Burford,* 848 F.2d 1441 (9th Cir. 1988), and includes: issuance of a permit or promulgation of a regulation; actions in which there is discretionary federal involvement or control, 50 C.F.R. § 402.03; and actions carried out by federal agencies in the United States and upon the high seas, 50 C.F.R. § 402.02. The responsibility for

determining whether jeopardy is likely to occur rests with the action agency. *See, e.g., Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989 (9th Cir. 1993).

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).

In 1986, FWS and NMFS 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* 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 which 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 forfeited, 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. In addition, a Biological Opinion's environmental baseline may not include unquantified Tribal or federal reserved water rights.

The implementing regulations require that an agency performing a major construction activity[11] 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. An agency can voluntarily prepare a biological assessment for actions not involving major construction activities. *Id.* The regulations also provide that the secretary can request that an agency prepare a biological assessment; however, the agency can refuse to comply. *Id.*

The biological assessment must be completed within 180 days of its initiation or within such period mutually agreed to by the secretary and the agency, and before any contract for construction is entered into and before construction is begun. 16 U.S.C. § 1536(c)(1). 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,[12] that the action is not

[11] Major construction activity is defined as "a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in [NEPA]". 50 C.F.R. § 402.02.

[12] Informal consultation is described in the regulations as "an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required". 50 C.F.R. § 402.13(a).

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). If a federal agency receives from the applicant written assurance that the applicant has a definite action planned which it will carry out if authorized, the federal agency must consult with the secretary concerning the permit or license. 50 C.F.R. § 402.11(b), (c). This early consultation follows the same procedures governing formal consultation. 50 C.F.R. § 402.11(d).

Where formal consultation is required, the secretary must issue a biological opinion within ninety days of the initiation of consultation, unless the secretary and the agency mutually agree to extend consultation. 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, he 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 which 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); *see also Pacific Rivers Coun. v. Thomas*, 936 F. Supp. 738 (D. Idaho 1996).

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 and prudent alternatives to the action which will avoid jeopardy.[13] 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

[13] 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).

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 withdrawal.

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.

C. SECTION 9 – PROHIBITED ACTS

Under section 9, no person[14] subject to the jurisdiction of the United States, absent an incidental take permit obtained under section 10,

[14] The definition of "person" includes any officer, employee, department, or instrumentality of any state, municipality, or political subdivision of a state. 16 U.S.C. § 1532(13).

may take an endangered species[15] within the United States, the territorial seas of the United States, or upon the high seas. 16 U.S.C. § 1568(a)(1). Section 9 also prohibits the import, export, sale, possession, delivery or shipment in interstate or foreign commerce of any species taken in violation of the act. *Id.* Finally, it is unlawful to violate any regulation promulgated by the secretary pertaining to a listed endangered or threatened species. *Id.*

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 further define harm to mean an act which 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; *see Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995) (Court upheld habitat modification as a component of FWS's definition of harm); *Palila v. Hawaii Dep't 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 effects a take under 9). Harass is defined as an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal

[15] As noted above, FWS adopted a rule that extends the protection afforded an endangered species to threatened species, including the prohibitions contained in section 9. NMFS addresses this issue on a species-by-species basis.

behavioral patterns. 50 C.F.R. § 17.3. It is irrelevant whether the taking is direct or indirect. *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) (Massachusetts' licensing of gillnet and lobster fishermen caused take of endangered Northern Right whales through entanglement in fishing gear); *Palila v. Hawaii Dep't of Land & Natural Resources*, 639 F.2d 495 (9th Cir. 1981); *see also Glenn-Colusa Irrig. Dist.*; *Defenders of Wildlife v. Environmental Protection Agency*, 882 F.2d 1294 (8th Cir. 1989) (EPA's strychnine registration effected a take of a listed species).

When an individual water appropriation causes a harm to a listed species, the persons causing the appropriation may incur take liability under ESA. Listed species may be harmed by a water appropriation 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;
- 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.

When considering take liability, there should be no distinction for water appropriation based upon a perfected water right with a priority date prior to the listing of a species. Although not directly on point, *Glen-Colusa Irrigation District* provides an indication of how a court may

handle such an issue. The Glen-Colusa Irrigation District's pumping station withdrew water 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 1129. The United States moved for an injunction prohibiting the irrigation district from taking fingerling salmon in the course of pumping water. *Id.* at 1130. The court determined that there was no genuine question that a take was occurring due to the pumping activities. *Id.* at 1132. 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 1129.

The Irrigation District attempted to argue that state water law rights should prevail over ESA. *Id.* at 1134. In rejecting this argument, the court determined that

> 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 ESA. 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 in *Glen-Colusa Irrigation District* focused on the direct effects of the pumping activity on listed species, not the generalized effects of using a water appropriation. Thus, the case may stand for the proposition that the specific *method* of water appropriation constituted the take. However, given ESA's broad purpose to protect listed species and

Congress' intent that it apply broadly, the existence of a water right would not likely be a sufficient defense against a take action. *Cf. Babbitt* (ownership of timber not a defense); *see also Strahan*, 127 F.3d at 162 (quoting S. Rep. No. 93-307, at 7 (1973)).

The prior appropriation doctrine may, however, create difficulties in proving that a particular appropriation has harmed a species. Proof of a taking under 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 appropriations result in a lack of adequate stream flows harming a listed species, it may be difficult to demonstrate that a particular appropriation is the cause of the harm. The addition of the priority system to the determination of which appropriation(s) cause harm to the species serves to complicate the assignment of responsibility.

A court could take at least three different approaches when faced with melding the prior appropriation doctrine together with ESA. First, a court could find that ESA simply preempts all aspects of state water law. Under this simplistic approach, the secretary or a third-party citizens' group would seek a permanent injunction against any water appropriation whose appropriation takes a listed species. Any appropriation, regardless of the priority date of its water right, which contributes to a take, would be subject to take liability under section 9.

Second, a similar, yet perhaps more draconian, approach would be for the plaintiff to file a lawsuit seeking a permanent injunction from take against all appropriators within a particular basin where instream flows for

a listed species were not being met. The action would be similar to a CERCLA cost recovery action for a hazardous waste cleanup site. All appropriators would be considered potentially responsible parties who are jointly and severally liable for the harm to the listed species.

Under this approach, the federal court, using its equitable powers, could fashion a remedy to ensure that target flows were being met annually, thus eliminating the harm to the listed species while allowing some appropriations. The court might also employ its equitable powers to impose best management practices and enjoin certain less beneficial uses, regardless of the state water code. Practically speaking, this approach may result in a process as complex as a general stream adjudication.

Third, the court could attempt to respect the prior appropriation doctrine while enforcing ESA. Under this approach, the plaintiff would first have to determine the priority dates within a particular basin. State water law would only be preempted to the extent that it conflicts with federal law. For example, a senior water right holder's appropriation which in and of itself would not take a listed species would not be considered a take. Instead, the water right holder whose appropriation resulted in instream flows for a listed species not being met would find that that water right was preempted by federal law. Although in theory this approach appears relatively straight forward, this approach would be nearly impossible given the uncertainties in priority dates for most of Washington's water rights. In addition, this theory is further complicated by uncertainties in Washington's definitions of the water doctrine, beneficial use, and perfection.

D. SECTION 10 – HABITAT CONSERVATION PLANS

As discussed above, NMFS and FWS can issue an incidental take permit pursuant to ESA 10(a), 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) which 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 which would jeopardize the continued existence of a listed species or adversely modify its critical habitat. In addition, as a federal action, issuance of a section 10(a) permit triggers NEPA compliance.

In addition to the above factors, Congress has also voiced a strong desire that section 10 plans address conservation of unlisted as well as listed species. Although FWS interprets treatment of unlisted species as optional, the agency has conceded that an applicant who does not submit a comprehensive conservation plan runs the risk that activities covered by the plan may have to be halted in order to assess the activities' impact on newly listed species.

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 conservation and recovery of the species over merely enforcing ESA's take prohibition. Such opportunities include protection of unoccupied habitats of listed species, protection of unlisted species, and active habitat management. In addition, because HCPs are entered into voluntarily, they increase the potential that private landowners will use good faith efforts to fulfill conservation plans. Finally, when HCPs are developed for multiple landowners in an entire region, they have the potential to provide ecosystem-oriented solutions to species versus development conflicts. On the negative side, HCPs require time and money. A scientifically defensible and effective HCP requires extensive wildlife research.

Despite the effort and expense involved, there has been a recent explosion of HCP activity. As of August 1996, approximately 400 HCPs covering millions of acres of habitat had either been approved or were being developed. In the prior ten years, only a dozen HCPs were approved. This flurry of activity has alarmed some who fear that potential adverse impacts on species recovery may result from loss of habitat.

Seattle recently developed 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 listed 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 ESA are subject to enforcement by the federal government and through citizen suits. 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). In addition, the Coast Guard, Customs Service, and Department of Agriculture may, on occasion, develop cases. 16 U.S.C. § 1540(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. Any person who knowingly

violates any provision relating to endangered species commits a Class A misdemeanor punishable by up to one year in prison, a fine of not more than $50,000, or both. 16 U.S.C. § 1540(b)(1). Any person who knowingly violates any regulation relating to a threatened species is subject to the penalties of a Class B misdemeanor— up to six months in prison, a fine not to exceed $25,000, or both. *Id.* Protecting oneself from bodily harm is a defense to prosecution. 16 U.S.C. § 1540(b)(3).

ESA also authorizes the filing of a citizen suit against an alleged violator of ESA. 16 U.S.C. § 1540(g). A citizen suit cannot be commenced until sixty days after written notice of the violation has been provided to the secretary and the alleged violator. 16 U.S.C. § 1540(g)(2)(A). 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 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). A citizen suit may also be brought against the secretary for alleged failure to perform any nondiscretionary act or duty in section 4. 16 U.S.C. § 1540(g)(1)(C). Finally, 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 V. ESA

An issue of great important to those living in the western United States is whether ESA trumps their state based water rights. For several

years, reauthorization of ESA has stalled in Congress due in part to squabbling over the inclusion of provisions stating that western water rights cannot be infringed upon ESA. 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. ESA, on the other hand, can potentially upset the "natural" order by requiring that 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 ESA. If ESA is found to be supreme, the relevance of the prior appropriation doctrine in the protection of protected species will be squarely at issue.

The few courts that have addressed the issue of the interaction of ESA with state water rights have expressed the view that ESA controls. However, in each instance, the facts of the case dictated the outcome. For example, in *Glenn-Colusa Irrigation District*, 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 in the Sacramento River. As the court pointed out, there was no genuine question that the district's pumping from the river caused the death or injury of listed salmon. *Glenn-Colusa Irrig. Dist.*, 788 F. Supp. at 1133. Responding to the government's motion, the irrigation district asserted, *inter alia*, that its state water rights should prevail over ESA. *Id.* at 1134. The court rejected that contention. After acknowledging the policy in section 2(c)(2) of 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.

In an earlier case, the district court addressed the interaction of the Clean Water Act and ESA in the context of state water rights. In *Riverside Irrigation District*, dam developers sought a Clean Water Act section 404 nationwide temporary permit to discharge sand and gravel into Wildcat Creek, a tributary of the South Platte River, during dam construction. Reviewing the proposed project, the Army Corps of Engineers determined that the operation of the dam and the altered water flow, not the placement of fill into the creek, could adversely impact the endangered whooping crane, whose critical habitat was 250 to 300 miles downstream. *Riverside Irrig. Dist.*, 568 F. Supp. at 585. The Corps, after consultation with the FWS, informed the plaintiffs that a permit could be had if they pursued one of the alternatives outlined in the biological opinion. The plaintiffs appealed, and the issue before the court was

whether the Corps exceeded its statutory authority in determining that the project did not qualify for a nationwide permit. *Id.* at 585.

Dismissing plaintiffs' argument that federal deference to state water law dictates a reversal of the Corps' decision, the court stated that the question was not one of state water law, rather it was whether the Corps' actions were appropriate under the Clean Water Act. After reviewing section 7 of ESA and cases analyzing an agency's responsibility to consider all potential effects of a project on an endangered species, the court concluded that the Clean Water Act authorized the Corps to consider deleterious downstream environmental effects of the dam on the whoopers and their habitat and to stop the project. *Id.* at 588-89. Turning to the language of section 101(g) of the Clean Water Act, which set forth congressional policy behind the act,[16] the court rejected plaintiffs' claim that the provision evidenced Congress' intent to preclude interference with state water rights and interstate compacts. After stating that, in enacting section 101(g), "congress did not intend to limit § 404's scope where it might affect state water-rights law," the court concluded:

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[16] Section 101(g) of the Clean Water Act provides:

> It is the policy of the Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superceded, abrogated, or otherwise impaired by this chapter. It is further the policy of Congress that nothing in this chapter shall be construed to supercede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g).

> The plaintiffs' argument is further diminished because the defendant's actions did not abrogate or supercede any state water rights. As discussed above, the defendant only placed conditions on the construction of the dam that might affect the plaintiffs' water rights. While the defendant is barring plaintiffs from exercising their water rights in a manner inconsistent with federal law, he is not taking away the rights. They may still be utilized, so long as in a manner consistent with federal law.

Id. at 589. The court held that the Corps acted within its authority in denying plaintiffs a permit.

The Corps' issuance of a Clean Water Act section 404 permit to construct a pumping facility on the Snake River in Washington state was the subject of a NMFS section 7 biological opinion. *See* Endangered Species Act – Section 7 Consultation, 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 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. It is interesting to note that the conditions in the section 404 permit subsequently issued to S & S Farms were somewhat less stringent than stated by NMFS in its biological opinion.

Finally, 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 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 which 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 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 ESA, the court stated that it was well settled that contracts can be altered by subsequent congressional legislation, in this instance the passage of ESA in 1973. Because the Bureau retains control of the dam, it has responsibilities under 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 affirmed the district court's determination that the Bureau had the authority to operate the dam to comply with ESA. *Id.*

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