PUBLIC INTEREST & WATER LAW

AN EXAMINATION OF PUBLIC INTEREST IN WASHINGTON STATE WATER LAW

by Rachael Paschal Osborn

Public Interest

INTRODUCTION

Balancing Tool

The public interest doctrine is a tool used to balance the resource-exploitive dominance of the prior appropriation system of water allocation. Consideration of the public interest has been in the law from inception, but was infrequently used in the early days of Washington's Water Code. Its importance emerged commensurate with the "environmental revolution" of the 1960s and 70s. The doctrine continues to evolve today. Future use of the public interest doctrine will continue to expand as the need to preserve water resources becomes more intense due to historic over-appropriation and future unfolding climate change. Professor Joseph Sax described the public interest phenomenon:

Public Resource

> Water, as a necessary and common medium for community development at every stage of society, has been held subject to perceived societal necessities of the time and circumstances. In that sense water's capacity for full privatization has always been limited. The very terminology of water law reveals that limitation: terms such as beneficial, non-wasteful, navigation servitude, and public trust all impart an irreducible public claim on water as a public resource, and not merely a private commodity.

Professor Joseph Sax, quoted in Bates, Sarah F., D.H. Getches, L J. MacDonnell, and C.F. Wilkinson, *Searching Out the Headwaters, Change and Rediscovery in Western Water Policy* at p.148 (Island Press 1993).

It is natural to ask, just what is the "public interest"? As a starting point, subject to pre-existing Native American tribal rights, water is a publicly owned resource. Rainfall, flowing waters, groundwater, saltwater and springs — all water in Washington State —is publicly owned, held by the state in trust for the citizens of the state.

Allocation System

Access to the use of Washington's waters is through the entry-gate known as the water right allocation system, based on the law of prior appropriation (with some early riparian rights grandfathered in). This system allows for privatization and commodification of public waters, and has led to overuse of water in many areas.

Public Uses

Public uses of water resources occur in various ways, often centered on the concept of "the commons." Aquatic uses of water are of ecological importance, and benefit animal and plant species ranging from mud-dwelling benthic invertebrates to the wild Pacific salmon. Not surprisingly, public interests enumerated in Washington's water policy statute include "wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." RCW 90.54.020(3)(a). Maintenance of high water quality is also a public interest. RCW 90.54.020(3)(b).

Stewardship

The public interest in water resources is also expressed through concepts such as stewardship and environmental justice. Stewardship entails a duty to protect public uses which cannot be reduced to private ownership. One aspect of stewardship called out directly in water law is the prohibition on waste of water (and corollary emphasis on water use efficiency). Environmental justice includes honoring the treaties and executive orders between Native American Tribes and the United States that permit non-Indians today to occupy the lands of Washington State and utilize its resources.

Instream Flows

Protecting waters in situ for public use and enjoyment has both intrinsic and economic value. Generally, such protections stand in opposition to the extractive goals of the water allocation system, although prior appropriation has been adapted to provide for some basic protection of instream flows.

This article begins by identifying where in Washington State's constitution and statutes references to the public interest may be found. I then examine the Washington State Department of Ecology's (Ecology's) water right procedures and provide examples of how the public interest has been implemented in water right decision-making — including Washington appellate decisions, and Pollution Control Hearings Board decisions that have discussed the public interest. The last section discusses the future of the public interest doctrine, including its relevance to the looming problem of climate change.

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Public Interest

Public Ownership

Equal Footing

Constitution

Navigable Waterways

Held in Trust

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EVOLUTION OF THE PUBLIC INTEREST IN WASHINGTON LAWS

The Washington State Constitution

The public interest in water is broadly established in Washington's laws. The Washington State Constitution, Article XVII, § 1, sets forth the declaration of public ownership of tidelands and bedlands:

> [t]he state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high tide within the banks of all navigable rivers and lakes… .

State ownership of navigable waters originates in the Equal Footing Doctrine, under which the United States' Constitution provides that new states enter the Union on the same footing as the original thirteen states. The original states assumed their sovereign attributes, including water ownership, based on the powers of the King of England. Hence all states, including Washington, own all waters not previously reserved by the US and Native American Tribes, or otherwise granted to third parties at the time of statehood. *See PPL Montana v. Montana*, 132 S.Ct. 1215 (2012).

Article XXI of the Washington Constitution provides that "[u]se of the waters of this State for irrigation, mining and manufacturing purposes shall be deemed a public use." This provision has been applied primarily in condemnation proceedings. Many other purposes are deemed acceptable and legal uses of water. *See* Utter, Robert F. and Hugh D. Spitzer, *The Washington State Constitution, A Reference Guide* at 224-25 (Greenwood Press 2002).

The Public Trust Doctrine

Generally

Flowing from the State Constitution is the constitutional and common law-based Public Trust Doctrine (PTD), which attached to Washington's navigable waterways no later than 1889, when Washington became a state. Contours of the PTD were first explicitly described by the Washington Supreme Court in *Caminiti v. Boyle,* a case challenging legislation that de-regulated the use of private docks:

> The public trust doctrine is an ancient common law doctrine that recognizes the public right to use navigable waters in place for navigation and fishing, and other incidental activities...This *jus publicum* interest as expressed in the English common law and in the common law of this state from earliest statehood, is composed of the right of navigation and the fishery....[S]overeignty and dominion over this state's tidelands and shorelands, as distinguished from *title,* always remains in the state, and the state holds such dominion in trust for the public.

107 Wn.2d 662, 669 (1987).

The PTD is "partially encapsulated" in Article 17 of the Washington state constitution. *Rettkowski v. Dep't of Ecology,* 122 Wn.2d 219, 232 (1993). Because of the doctrine's constitutional underpinnings, any legislation that impairs the public trust remains subject to judicial review. The legislature may dispose of the public right to use navigable waters only to promote the interests protected by the PTD or to further some other interest if doing so does not substantially impair the public trust resource. *Caminiti, supra; see also Utter*, *supra* at 216-17.

In addition to protecting traditional public uses of navigable waters such as navigation, commerce, and fishing, in Washington the PTD has been expanded to protect public uses such as "incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes ... ." *Orion Corp. v. State*, 109 Wn.2d 621, 641 (1987). The *Orion* Court also found that public trust principles are reflected in the policies of Washington's Shoreline Management Act, Ch. 90.58 RCW, which contemplates "protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life." *Id.*

The Public Trust Doctrine and the Washington Water Code

The Public Trust Doctrine has been employed by Courts to inform and decide permit decisions relating to Washington's Shoreline Management Act, Ch. 90.58 RCW, and the regulation of aquatic resources (for example, geoducks). *E.g.*, *Orion Corp., supra*; *Esplanade Properties v. Seattle,* 307 F.3d 978 (2002); *Nelson Alaska Seafoods v. Washington*, 143 Wn.App. 455 (2008).

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Public Interest

Delegated Authority

Instream Flow Issue

Water Code

Groundwater Code

Four Part Test

Power & Watersheds

Groundwater

Changes & Transfers

Other Code References

The Washington Supreme Court, however, has rejected use of the Public Trust Doctrine by Ecology's Water Resource Program as an independent source of authority in making water right enforcement and permitting decisions. *Rettkowski v. Dept. of Ecology*, 122 Wn.2d 219, 232 (1993); *R.D. Merrill v. Pollution Control Hrgs. Bd.*, 137 Wn.2d 118, 133-34 (1999); *Postema v. Pollution Control Hrgs. Bd.*, 142 Wn.2d 68, 98-99 (2000). The statements in these cases are based on *Rettkowski'*s questionable analysis that, because the Legislature has not specifically delegated authority to "assume the state's public trust duties" to Ecology's Water Resources Program, therefore such authority does not exist. *Rettkowski,* 122 Wn.2d at 232. As a constitutional and common law doctrine controlled by the judiciary, one would not expect to find express legislative delegation of the Public Trust Doctrine in an agency's enabling statutes.

The more important question, however, may be whether the Public Trust Doctrine constrains Ecology's decision-making in any way. This, as well as how the Doctrine informs the development and adoption of Washington's instream flow regulations (particularly for navigable rivers), has yet to be addressed by the courts.

Water Code Statutes and the Public Interest

PUBLIC OWNERSHIP

Public ownership of and interests in waters of the state are established in the initial sections of Washington's 1917 Surface Water Code. "Subject to existing rights all waters within the state belong to the public... ." RCW 90.03.010. Further, RCW 90.03.005 provides:

> [i]t 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.

Likewise, Washington's 1945 Groundwater Code establishes public ownership of groundwater resources: "Subject to existing rights, all natural groundwaters of the state [and] all artificial groundwaters that have been abandoned or forfeited, are hereby declared to be public groundwaters and belong to the public... ." RCW 90.44.040.

References to the public nature and ownership of groundwater are replete throughout the Groundwater Code. *E.g.*, RCW 90.44.050, .060, .070, .080, .090, .100, .105, .110, .130, .180, and .250.

PUBLIC INTEREST REGULATION

As the Washington State Supreme Court has observed: "[w]ithout question, the state water codes contain numerous provisions intended to protect public interests." *R.D. Merrill,* 137 Wn.2d at 134.

The most widely used public interest proviso resides in the water right permitting section of Washington's Surface Water Code, which establishes the "four part test" for issuance of a new water right. Applicants for a new water right must show that: (1) water is physically available; (2) the proposed use will not impair existing water right holders; (3) the use is beneficial; and of particular interest here, (4) the appropriation "as proposed in the application will not…be detrimental to the public welfare… ." RW 90.03.290(3). Also, use of water resources for power production is called out as a particular use subject to public interest review. RCW 90.03.290(1). Watershed planning also evokes public interest considerations: "[T]he department shall rely upon the [watershed] plan as a primary consideration in determining the public interest related to such decisions." RCW 90.82.130(4).

The Groundwater Code requires evaluation of the public interest when groundwater permits are processed, by explicitly referencing the water right permit provisions in the Surface Water Code. RCW 90.44.060. Groundwater changes or transfers also require public interest review, based on reference to the Surface Water Code procedures for new permits. RCW 90.44.100.

Under the Water Resources Act of 1971, RCW 90.54.010(10), "[e]xpressions of the public interest will be sought at all stages of water planning and allocation discussions." This statute ostensibly requires public interest review for all water right decisions. However the Supreme Court disregarded this statute when it ruled that Ecology may not consider the public interest when processing changes or transfers of surface water rights. *See* discussion of *PUD No. 1 of Pend Oreille County v. Ecology*, below.

The water code statutes contain numerous other references to the public interest or public welfare:

- RCW 90.03.110 and 90.44.220: Ecology to consider public interest in filing a general stream or groundwater adjudication.
- RCW 90.03.255 and 90.44.255: Legislative finding that it is in the public interest to impound excess water to be used for mitigation for new water rights and to offset impacts to instream resources.
- RCW 90.03.320: The public interest must be considered when a water right holder seeks an extension of time to put water to use.
- RCW 90.03.383: The public interest supports the grandfathering of interties existing and in use as of

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January 1, 1991, and it is in the public interest to develop a coordinated process to review proposals for interties commencing after that date.

- RCW 90.03.655: The department considers the public interest when deciding whether to expedite applications within a water source.
- RCW 90.42.040: Exercise of a trust water right may be authorized only if the department first determines that neither water rights existing at the time the trust water right is established, nor the public interest will be impaired.
- RCW 90.66.030: It is in the public interest to conserve and wisely use public waters to benefit the greatest possible number of Washington's citizens. Pursuant to the Family Farm Act, this is accomplished by limiting use of agricultural water to family farms no larger than 6,000 acres.
- RCW 90.80.030: The department must consider the public interest when deciding whether to create a local water conservancy board.

Family Farm Act

INSTREAM FLOW STATUTES

Instream Flow Protection

Protecting water instream — referred to as: in situ; instream; or environmental flows — is one of the strongest mechanisms for protecting the public interest in the water resource commons.

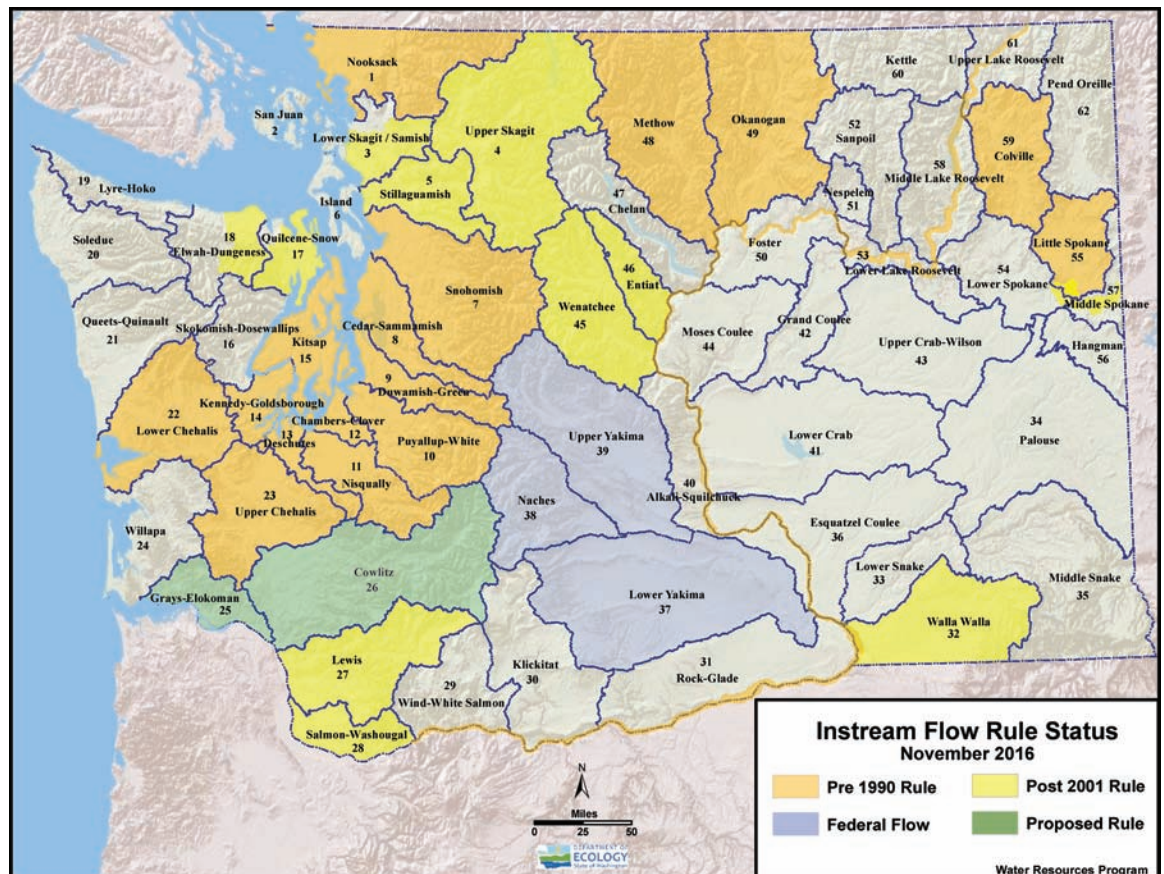
Under Washington's 1969 Minimum Water Flows and Levels Act, "[t]he department of ecology may establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be *in the public interest* to establish the same… ." RCW 90.22.010 (emphasis added).

Base Flows

Washington's Water Resources Act of 1971 mandates protection of public interests: "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." RCW 90.54.020(3)(a).

Enforceable Water Rights

Pursuant to these two statutes, Ecology adopts instream flow regulations that are defined as enforceable water rights. RCW 90.03.247, 90.03.345. These instream flow regulations are codified at Chs. 173-500 through 173-564 WAC. The state is divided into 62 administrative watersheds (Water Resource Inventory Areas), but Ecology has adopted instream flow regulations for only about half the state.



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"OCPI"

Actions that would harm or deplete instream flows and high quality waters may be taken only if "**o**verriding **c**onsiderations of the **p**ublic **i**nterest" (OCPI) are found to supersede the instream flow mandate. RCW 90.54.020(3)(a), (b). Significant litigation has placed a narrow construction on this exception, illuminating what the public interest is *not*. For example, new water supply for private development is not in the public interest, nor is providing water for public supply, at least insofar as these uses conflict with instream flows. *See* discussion of S*winomish Indian Tribal Community v. State* and *Foster v. Yelm*, below.

Fisheries Impacts (Objections)

The State Fisheries Code, RCW 77.57.020 (formerly 77.55.050, first adopted in 1949), provides:"It is the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state." The statute requires Ecology to notify the Washington Department of Fish & Wildlife (WDFW) of all water right applications, and authorizes WDFW to object to any proposed permit based on impacts to fisheries. Ecology has discretion to deny a water right based on WDFW's objection pursuant to the "detriment to public welfare" criterion for water right permitting. RCW 90.03.290(3); *see also* PCHB decisions below. WDFW's several hundred recommendations are collected in Ecology's Surface Water Source Limitation (SWSL) list, and continue to serve as low flow limitations for proposed water rights. *See* WAC 173-500-050(8) and 173-500-060(4).

TRUST WATER RIGHTS

Conversion to Instream Flow

Out-of-stream water rights may be "retired" and converted into enforceable instream flows via Washington's Trust Water Right program. Chs. 90.38 RCW (Yakima Basin) and 90.42 RCW (trust water rights program generally). Under this program, the state may purchase or acquire water rights by donation, and convert them to instream flows or create water banks that are used to mitigate new water rights. The state is often assisted in this process by non-profit organizations such as Washington Water Trust, which act as brokers between private parties and the state. Trust water rights have been utilized to increase flows in over-appropriated streams, usually to the benefit of fisheries restoration. However, the program is also frequently employed to "park" unused privately-held water rights and protect them from relinquishment, diminishing the value of the program to provide public benefits.

Relinquishment Protection

BENEFICIAL USE OF WATER RESOURCES

Anti-Speculation

Early prior appropriation law was founded on the concept of anti-speculation — it required that water rights be used in fact ("use it or lose it") and with reasonable efficiency. A water right is a "usufruct" — meaning it is a right of use, not physical ownership, and the way in which the water is used informs the scope of the water right. Water hoarding and waste have long been prohibited. The goal has been to extend scarce supplies to as many users as possible, thereby promoting economic development. These rules are encompassed within the doctrine of "beneficial use" — an all-purpose legal concept which requires that water use be actual, for a beneficial purpose, reasonably efficient, and accomplished without waste. While the origin of these rules was to promote private exploitation of water resources, the beneficial use doctrine now serves important public interests, including stewardship of water resources for the public good.

Beneficial Use

Washington's Water Resources Act of 1971 explicitly denominated beneficial purposes of water to include instream uses that depend on water as a public commons, including navigation, water quality, recreation, fish and wildlife habitat, and scenic beauty. RCW 90.54.020(1).

"Waste"

The surface water and groundwater codes prohibit waste of water. RCW 90.03.005; 90.44.110; see also RCW 90.03.400 (waste of water a criminal misdemeanor). Combined with the history of the development of prior appropriation law, these statutes informed the Washington Supreme Court's important ruling that water resources must be used with reasonable efficiency. *Dept. of Ecology v. Grimes*, 121 Wn.2d 459 (1993). The *Grimes* decision provides a detailed framework by which the efficiency of agricultural water use should be evaluated. A lesser known administrative case documented the procedures and law for finding waste of water by an irrigation district (harming both junior water users and instream flows), holding that "the prohibition on waste is a long-standing precept of water law enunciated in both common law and statute." *Methow Valley Irr. Dist. and Okanogan Wilderness League v. Dept. of Ecology*, PCHB No. 02-071, -074, *Findings of Fact, Conclusions of Law and Final Order* at 25 (2003).

Reasonable Efficiency

Principles of reasonable efficiency and water conservation create a strong foundation for reducing wasteful extraction of water from the source, preserving it as a public commons or making it available for appropriation. However, despite strong laws and precedent, Ecology's Water Resource Program has virtually no process or framework to require efficient water use by existing water rights.

PUBLIC WATER SUPPLY AND THE PUBLIC INTEREST

Public Supply

A public interest exists in the provision of public water supply. However, public supply water rights are limited by requirements of diligence and efficiency. RCW 90.03.460; RCW 70.119A.180. Washington's Municipal Water Law of 2003 — which grandfathered large, unused water rights held by various types of water purveyors — has undermined the ability of the state to protect water resources for the public good. *See* RCW 90.03.330(3) (finding inchoate water right certificates to be "in good standing");

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Cornelius v. Ecology, 182 Wn.2d 574, 601-02 (despite 40-plus years of non-use, a municipal water right has nonetheless been used with reasonable diligence).

Further, the extractive nature of public water supply puts it in competition with instream flows and sustainable groundwater systems that benefit the public. Washington courts recently declined to elevate public water use over public interests in instream flows. In *Foster v. City of Yelm* the Washington Supreme Court observed that "municipal water needs, far from extraordinary, are common and likely to occur frequently as strains on limited water resources increase throughout the state." 184 Wn.2d 465, 476 (2015). The Court also addressed the issue in *Swinomish Indian Tribal Community v. State*, 178 Wn.2d 571, 587:

Water Availability

> There is no question that continuing population growth is a certainty and limited water availability is a certainty. Under [Ecology's invalid] balancing test, the need for potable water for rural homes is virtually assured of prevailing over environmental values. But the Water Resources Act of 1971...explicitly contemplates the value of instream resources for future populations: Adequate water supplies are essential to meet the needs of the state's growing population and economy. At the same time *instream resources and values must be preserved and protected so that future generations can continue to enjoy them.* RCW 90.54.010(1)(a). (Emphasis in original)

Inchoate Municipal Rights

Public interests in preservation of water resources as a commons directly conflicts with the provision of water for a public water supply. However, as long as pre-existing unused municipal rights enjoy priority, the degradation of instream flows and aquatic habitat will increase, and public use and enjoyment of them will continue to decline.

OTHER EXPRESSIONS OF THE PUBLIC INTEREST RELEVANT TO WATER RESOURCE ALLOCATION

"Safe Sustaining Yield"

"Mining"

The "safe sustaining yield" proviso of the Groundwater Code authorizes Ecology "to limit withdrawals by appropriators of groundwater so as to enforce the maintenance of a safe sustaining yield from the groundwater body." RCW 90.44.130. "Safe yield" and the more conservative term "sustainable yield" generally are defined to mean maintaining groundwater withdrawals to prevent groundwater "mining" (i.e., withdrawing more groundwater than is replenished naturally). However, pursuant to the Washington Supreme Court, this statute applies only to new water users and (perhaps) senior appropriators seeking to limit junior users. *See Cornelius v. Washington State University*, below. Eastern Washington basalt aquifers are in substantial overdraft ("mined") condition, and unfortunately RCW 90.44.130's "safe, sustaining yield" mandate has done nothing to address the problem. [The physical status of these aquifer systems are described in US Geological Survey, Columbia Plateau Groundwater Availability Study at https://wa.water.usgs.gov/projects/cpgw/index.html.]

SEPA Exemptions

The Washington State Environmental Policy Act (SEPA), Ch. 43.21C RCW, is designed to protect public interests in Washington's environment. However, the Legislature and Ecology have categorically exempted water diversions of less than 50 **c**ubic **f**eet per **s**econd (cfs) for irrigation projects, or 1 cfs or 2,500 **g**allons **p**er **m**inute (gpm) for any use, from SEPA's environmental impact evaluation requirements and commensurate mitigation potential. RCW 43.21C.035 and WAC 197-11-800(4).

Growth Management Act

The Growth Management Act (GMA), Ch. 36.70A RCW, includes several provisions requiring local government to protect water resources as part of comprehensive plans and development regulations. The GMA goal to protect the environment, expressed in RCW 36.70A.020(10), includes:

> "water quality…and the availability of water"), 36.70A.030(15)(d) and (g) ("Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:...(d) That are compatible with the use of the land by wildlife and for fish and wildlife habitat; and...(g) That are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas), 36.70A.070(1) (land use elements "shall provide for protection of the quality and quantity of groundwater used for public water supplies"), 36.70A.070(5)(c)(iv) (rural elements to include measures "[p]rotecting ...surface water and groundwater resources."

Sustainability

Local governments must also consider water sustainability when issuing building permits and subdivision approvals. RCW 19.27.097, 58.17.110. These statutes were litigated in the *Kittitas County* and *Whatcom County* (aka *Hirst*) decisions, discussed below.

The Washington Water Code and Tribal Treaty Water Rights

Treaty Rights

In Washington, a largely unfulfilled public interest resides in recognition of Native American Tribal water rights, particularly the rights reserved by the Tribes to protect treaty fisheries. The treaties enabled settlement of Washington by non-Indians and created essentially contractual obligations of the state and federal governments. Respect for, and conduct upholding, treaty provisions promotes environmental justice and the public interest.

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"Stevens Treaties"

In the mid-nineteenth century, various Native American Tribes of the Pacific Northwest entered into a series of treaties with the United States — now known as the "Stevens Treaties" — that reserved to the Tribes their ancestral fishing rights. *See*, e.g., *Treaty of Point Elliott*, Art. V, Jan. 22, 1855, 12 Stat. 927, 928; *Treaty with the Yakama*, Art. III, ¶ 2, June 9, 1855, 12 Stat. 951, 953. In addition to reserving rights to take fish on and off reservation, the Tribes retained the right to co-manage fisheries with state agencies, and to maintain healthy aquatic habitat that produces the fisheries. *U.S. v. Washington*, 827 F.3d 836 (9th Cir. 2016), *modified* 853 F.3d 946 (2017), *cert. pending*.

Off-Reservation Fisheries

Tribal water rights to support off-reservation fisheries are recognized by the Washington Supreme Court. In 1993, the Court held that, pursuant to the US-Yakama treaty, the Yakama Nation holds an aboriginal water right to maintain off-reservation instream flows sufficient to support treaty fishery habitat. *State v. Yakima Reservation Irrigation District*, 121 Wn.2d 257, 262 (1993). Many Tribes located in Washington hold similar rights, largely unquantified and less limited, based on treaties reserving their rights to fisheries and other natural resources.

Tribal Priority Dates

Native American fisheries-based water rights have a priority date of "time immemorial." *United States v. Adair*, 723 F.2d 1394, 1397 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1983). Pre-dating the state water code statutes and pre-1917 water claims, all Washington state water rights are subordinate to Tribal fisheries-based water rights. Tribes also own "*Winters*" water rights for on-reservation water use that supports both off-stream and instream uses. The *Winters* or reserved rights doctrine recognizes Tribal rights to a quantity of water sufficient to fulfill the purposes of Native American reservations. The priority date of such rights is usually the date of treaty or executive order establishing the reservations, or time immemorial for fishing and hunting rights.

Tribal Rights Protection

The mechanism for protection of Tribal interests in the water rights process is less than optimal. Ecology notifies Tribes of water right applications pending in areas where they exercise fishing rights. The 1989 Centennial Accord contemplates substantive consultation between the State and Tribes for this type of resource allocation. *Centennial Accord between the Federally Recognized Indian Tribes in Washington State and the State of Washington* and implementing documents, available at Governor's Office of Indian Affairs, http://goia.wa.gov. However, Ecology routinely issues water rights that jeopardize Tribal interests, casually noting in some but not all new water permits that "[t]his authorization to make use of public waters of the state is subject to existing rights, including any tribal water rights held by the United States for the benefit of tribes, to the extent they may exist." Ecology will engage in notification to Tribes per Water Resource Program Policies PRO-1043A (Dispute Resolution, State and Tribal Comments on Water Right Applications) (rev. 1990) and PRO-1105A (Notification of Indian Tribes of Water Right Applications) (rev. 1990). Experience has shown that Tribal vigilance is required to ensure protection of instream flows.

APPLICATION OF PUBLIC INTEREST IN AGENCY ACTIONS AND COURT DECISIONS

Agency Interpretations

Water Right Process

New Water Rights

When a proposed water user applies for a new water right, Ecology must first investigate to determine whether the proposed use will meet the statutory requirements. As noted, the four-part test for a water right requires that: 1) water be available; 2) that the new use not impair existing uses; 3) that the use be beneficial (i.e., a proper purpose and quantity for that purpose); and 4) that it not cause harm to the public welfare, also called the public interest. RCW 90.03.290(3).

Report of Examination

At one time, the water right investigation to address these elements was pro forma. Findings from Ecology's water right investigation are set forth in document called a Report of Examination (ROE) which, until the 1990s, might be written up on two pages. Since that time, however, the investigation and findings have become much more elaborate.

This increased analysis arises for primarily three reasons:

Fully Appropriated

First, Washington's waters are for the most part fully or over-appropriated. To issue or deny a water right takes a lot more evaluation than in previous years to ensure that senior water users are not impaired and to generally protect the public interest in a sustainable water supply. Present-day ROEs typically include sections discussing: SEPA; hydrologic impacts including hydrogeological analysis for groundwater rights; notification to Native American tribes; notification to other affected agencies; water system plans (if public water supply is involved); and many other factors. *See* Dept. of Ecology, Water Resource Program Policy, Water Rights Processing Procedures, PRO-1000, pp. 8-10 (rev. 3-30-15).

Second, the advent of environmental laws, including consideration of the real-world impacts of water use, has made the evaluation much more complicated.

Mitigation Plans

Finally, arriving quite recently, applications for new water rights often include a mitigation plan to offset the adverse impacts arising from over-appropriation and environmental repercussions.

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Allocation Problems

All of these factors require explanation and analysis in the ROE. The resulting detailed analysis provides much greater consideration and protection of public interests in water resources than has previously occurred in the 100-year history of the Washington Water Code. That said, the proverbial horses have long-departed the barn. Washington has allocated too much water from Washington's rivers and aquifers, as is evident in the health of aquatic ecosystems throughout the state, measured by metrics such as: endangered species listings; impaired water quality listings; and declining groundwater levels (especially in eastern Washington basalt aquifer systems).

Explicit Application of the Public Interest Test in Water Right Processing

Agency Guidance

Guidance Lacking

Ecology guidance on use of the public interest in water right decisions is minimal. Although the agency has promulgated numerous policies governing various water right topics, it has not done so for the public interest test. Ecology's Water Right Investigator's Manual (May 2013) contains two pages of discussion about use of the public interest, recommending that permit writers research the Water Resources Act, SEPA, consistency with natural resource, land use and water supply plans, water conservation, and protection of aquifer zones.

Water Right Decisions

Permitting Factor

As noted above, Ecology is required to consider detriment to the public interest in water right decisions. RCW 90.03.290. Consideration of the public interest is often limited to determining whether a third party protested, or WDFW commented on, a subject application. If not, no detriment is found. Examples of public interest findings in recent Ecology decisions include the following:

Public Interest Findings

- Washington Dept. of Fish and Wildlife, Water Right No. S3-29491 (McGilvra Springs) (2015). Application for stockwater/wildlife diversion denied because it is redundant to an existing water right claim, and therefore speculative and not in the public interest.
- Kitsap Public Utility District, Water Right No. G1-23071 (Pioneer Hill) (2014). Application to add new point of diversion to municipal water right approved. It is in the public interest to bring an illegal well serving a rural subdivision under the umbrella of the local public utility district's water rights.
- Wilson Creek-Coulee City area Reports of Examination, e.g., Isaac Land, Mark Gregson (draft denials 2014). Permits denied because "[t]he area is experiencing significant groundwater level declines. New water rights would worsen aquifer mining. It would impair existing water rights and would not be beneficial to the long term economic stability of the area, which relies heavily on agriculture and ranching. Therefore issuance of this application is not in the public's interest."
- Sherman Polinder, Report of Examination, Water Right No. S1-28777 (2015). Controversial permit "correcting" unauthorized water use is in the public interest because user will be required to curtail during low flow periods, will meter and report water use, and will be able to continue agricultural operations. This water right raises an interesting public interest problem, because the instream flow regulations that trigger curtailment of the right, WAC 173-501-030, are obsolete. Specifically, they are inadequate to provide habitat for Endangered Species Act-listed salmonids. This fact was not identified or considered in the ROE, nor did the WDFW object to the proposed water use.

Economic Element Rejected

Washington courts have rejected the use of private economic activity as a public interest factor. The profit element of a given transaction is not a proper consideration for evaluating a proposed water right. *Schuh v. Dept. of Ecology*, 100 Wn.2d 180, 186, n.2 (1983). More recently, the Court ruled that the reservation of domestic water for residential development is a private, not public, use, and cannot serve as an "overriding public interest" to the detriment of instream flows. *Swinomish Indian Tribal Community v. State*, 178 Wn.2d 571, 587 (2013).

Private Economic Activity

Nonetheless, the Office of the Columbia River (OCR), which issues water rights for the Columbia River mainstem, equates the public interest with private economic activity. OCR-issued water rights typically contain assertions that the public interest is served through issuance of the water right because the project will generate new jobs, revenue, and other economic benefits to individuals and communities in the Columbia Basin. For example, a recent OCR-issued water right states that "[t]he proposed use of water would support a business currently employing many people in and around Paterson, Washington. The continued viability of this business provides jobs and economic stability to a region of the state largely dependent on agricultural commodities. Favorable processing of this application would not be detrimental to the public interest." *OCR Report of Examination, St. Michelle Wine Estates Ltd.,* Water Right No. G4-33121 (2-24-15).

Interpretations Mixed

In sum, Ecology's interpretations of the public interest prong are mixed. Protection of instream flows clearly merits proactive public interest findings, but there remains a strong emphasis on authorizing illegal water uses and promoting economic activities. When challenged, these latter uses often do not prevail in the courts.

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Public Interest

Case Review

Base Flow Protection

Groundwater Withdrawals

Hydraulic Connectivity

Closures

Change Applications

Growth Management Act

Reserves & "OCPI"

Municipal Rights

Mitigation Requirements

Courts Decisions on the Public Interest in Water Law

The following chronological list identifies most of the cases discussing public interest or public welfare concerns in the context of a water resources dispute, including cases in which the term was not explicitly used, but public interest concerns were at issue in the case. Some are water right appeals, and a few involve challenges that implicate the water resource statutes. (Disclosure: the author represented a party or amicus in some of the decisions discussed below.)

- *Stempel v. Dept. of Water Resources*, 82 Wn.2d 109, 508 P.2d 166 (1973). The newly enacted SEPA and Water Resources Act function as an overlay on the water code to require consideration of environmental, public interest values.
- *Dept. of Ecology v. PUD No. 1 of Jefferson County,* 121 Wn.2d 179, 849 P.2d 646 (1993), *affirmed, PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology,* 511 U.S. 700, 114 S.Ct. 1900 (1994). RCW 90.54.020(3)(a) (requiring protection of instream values) is an "appropriate requirement of state law," which serves as "congressional authorization to the states to consider [instream flow quantity issues] when imposing conditions on section 401 certificates." "Inasmuch as issues regarding water quality are not separable from issues regarding water quantity and base flows...Ecology's base flow limitation in the 401 certificate was an appropriate measure to assure compliance with RCW 90.54.020(3)(a) as well as the water quality standards."
- *Hubbard v. Ecology,* 86 Wn.App. 119, 936 P.2d 27 (1997). New groundwater withdrawals that deplete protected instream flows are a detriment to the public interest. Also, RCW 90.03.005's balancing of economic uses with protection of instream flows expresses the public interest.
- *Postema v. PCHB*, 142 Wn.2d 68, 11 P.3d 726 (2000). When Ecology issues a water right decision, it must consider the relationship between ground and surface waters. In assessing hydraulic connectivity, Ecology may and should use new scientific methods to determine impairment. If a proposed new groundwater withdrawal will deplete instream flows when a river is not meeting its regulatory minimum flows, the new withdrawal must be denied. Minimum flows set by rule are appropriations with a priority of the date of rule adoption, and entitled to protection from impairment similar to diversion-based water rights. Likewise, withdrawals that would deplete streams or rivers that are closed by rule must also be denied.
- *PUD No. 1 of Pend Oreille County v. Dept. of Ecology*, 146 Wn.2d 778, 51 P.3d 744 (2002). Because the surface water transfer statute, RCW 90.03.380, does not explicitly mention the public interest, therefore Ecology may not consider the public interest when processing change applications. Although the Court rejected use of RCW 90.54.020(10) ("[e]xpressions of the public interest will be sought at all stages of water planning and allocation discussions"), the decision does not discuss why it does not apply. This is a glaring inconsistency given the emphasis that Court decisions have placed on mandatory language in other sections of the same statute, e.g., *Swinomish Indian Tribal Community, Foster v. Yelm, Hirst, infra*.
- *Kittitas County v. Eastern Washington Growth Management Hearings Board,* 172 Wn.2d 144, 256 P.3d 1193 (2011). The Growth Management Act, Ch. 36.70A RCW, contains numerous provisions requiring local land use authorities (e.g., counties) to protect water resources. *See* RCW 36.70A.020(10) (GMA goal to protect the environment, including "water quality…and the availability of water"), .070(1) (requiring that land use elements "shall provide for protection of the quality and quantity of groundwater used for public water supplies"), (5)(c)(iv) (requiring that rural elements include measures "[p]rotecting...surface water and groundwater resources"), and RCW 19.27.097 and 58.17.110, requiring counties to assure adequate potable water is available when issuing building permits and approving subdivision applications.
- *Swinomish Indian Tribal Community vs. State*, 78 Wn.2d 571, 311 P.3d 6 (2013). Challenge to the creation of out-of-stream water reserves in an instream flow rule to serve new development. The Court rejected Ecology's finding that private use of water (e.g., permit exempt wells for residential supply) supports a finding of overriding public interest. That a proposed water use is beneficial alone does not mean it serves the public interest.
- *Cornelius v. Dept. of Ecology and Washington State Univ.,* 182 Wn.2d 574, 344 P.3d 199 (2015). Junior users cannot employ the "safe, sustaining yield" requirement of RCW 90.44.130 to prevent a senior municipal user from over-drafting an aquifer. Also, 40-year history of failure to develop a water right does not offend requirement of reasonable diligence.
- *Foster v. Yelm*, 184 Wn.2d 465, 362 P.3d 969 (2015). (1) Instream flow rights may not be impaired; and (2) the use of out-of-kind mitigation projects to mitigate for impacts that cause impairment to instream flow rights is not permissible. "[W]e reject the argument that ecological improvements can 'mitigate' the injury when a junior water right holder impairs a senior water right." Water resource mitigation must be in-kind, in-place, and in-time. *See also Okanogan Wilderness League and CELP v. Dept. of Ecology and Kennewick Gen. Hosp.*, Thurston County Sup'r Ct. No. 15-2-00998-0, Order [on Vacatur] (June 17, 2016) (vacating PCHB ruling that out-of-kind mitigation may be used to offset instream flow impairment).
- *Whatcom County v. Western Wash. Growth Mgt. Hrgs. Bd.*, 186 Wn.2d 648, 381 P.3d 1 (2016)

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(aka *Hirst*). The Growth Management Act requires local land use authorities to protect water resources and supply when adopting comprehensive plans and associated regulations. Counties must determine both physical and legal water availability when issuing building permits and may not simply rely on the Department of Ecology's assessment (or lack of a specific Ecology rule). Whatcom County's comprehensive land use plan fails to protect water availability.

Pollution Control Hearings Board decisions

Water Right Appeals

Washington's administrative trial court for water right appeals, the Pollution Control Hearings Board (PCHB), regularly interprets the public interest prongs of the water code to decide cases. The following provides a non-exhaustive sampling of PCHB decisions involving the public interest factor.

Fisheries

- *Stinnette v. Dept. of Ecology*, PCHB No. 15-007, Findings of Fact, Conclusions of Law and Order (2015). WDFW's recommendation, that water is not available for appropriation in a creek supporting fisheries, serves as basis for Ecology to deny water right application as detrimental to the public interest.

Groundwater Impact

- *Squaxin Island Tribe v. Dept. of Ecology and Miller Land & Timber LLC,* PCHB No. 05-137, Modified Findings of Fact, Conclusions of Law, and Order (2006). Proposed withdrawal of groundwater in continuity with salmon-bearing stream will reduce numbers of fish available to tribal members and therefore is not in the public interest.

Diligence

- *Oroville-Tonasket Irrigation Dist. v. Dept. of Ecology, et al.,* PCHB No. 91-170 et seq., Findings of Fact, Conclusions of Law, and Order (1996). Extension of time to allow development of reservoir permit not in the public interest, where district failed to diligently pursue development of the permit, and detriment to downstream lake users will ensue.

Cumulative Impact

- *Fleming v. Dept. of Ecology, et al.,* PCHB No. 93-320, *et seq*., Findings of Fact, Conclusions of Law and Order (1994). The public interest includes an examination of net benefits as between diversionary uses and retention of water instream. Therefore consideration should be given to the cumulative impact of similar water permit requests that might be made in the future. Proposal to divert one-third of small stream for golf course denied.

Groundwater Use & Impairment

- *Jones, et al. v. Dept. of Ecology,* PCHB No. 94-63, Final Findings of Fact, Conclusions of Law, and Order (1995). A new appropriation of hydraulically connected groundwater would constitute an impairment of existing rights and a detriment to the public welfare where surface water is over-appropriated and closed to further appropriation.

Information Lack

- *Black Star Ranch v. Dept. of Ecology,* PCHB No. 87-19 (1988). Lacking information regarding impairment of existing rights and water availability, Ecology's "appropriate response is to deny the permit, and hold that in these circumstances the proposed use 'threatens to prove detrimental to the public interest.'"

New Directions for Water Right Processing.

Evolving Law

Washington water law has evolved to the point where issuance of a new water right virtually always requires water-for-water mitigation, unless the new right is non-consumptive. A review of water right reports of examination during the autumn of 2017 reveals that almost all new water rights are issued for affirmative public interest purposes (i.e., not just because they were not detrimental to the public welfare). Water rights were issued, for example, for a fishery acclimation pond, a tribal hatchery, and a geothermal heating system for a community college. Changes to existing water rights often serve private interests, but often serve the public interest too. For example, a trust water right resulting from retirement of a power plant diversion dedicated a substantial 360 cubic feet per second to instream flows in the Naches River for salmon restoration in the Yakima Basin. Several water rights were also granted for private development purposes, but all were mitigated using water-for-water mitigation. Increasingly, and as discussed below, water law is evolving to serve greater public needs and interests.

THE PUBLIC INTEREST AND THE FUTURE OF WATER LAW

The Evolving Water Code

Social Values & Depletion

Water law is an evolving doctrine, and allocation policies and procedures have changed commensurate with changes in both social values and technology and increasingly depleted surface and ground waters. For example, when the Water Code was originally developed, keeping water instream was considered "waste." Washington's landmark Water Resources Act of 1971 changed this historic policy by explicitly recognizing that instream values and uses such as water quality, fish and wildlife, recreation, scenic beauty and so forth are beneficial use purposes under the Water Code. In 1993, in *Ecology v. Grimes*, the Washington Supreme Court recognized that standards for water conservation should improve over time, and could impact the quantities of water needed to be available to existing water rights. In 2000, *Postema* recognized that Ecology must use best science to determine impairment, and that may lead to changes in policy and practices governing water right decisions. *See also Whatcom County,* 186 Wn.2d at 666:

"Beneficial Use" Expansion

> Ecology's understanding of hydraulic continuity has altered over time, as has its use of methods to determine hydraulic continuity and the effect of groundwater withdrawals on

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Public Interest

Climate Change & Decision Making

surface waters. When Ecology adopted the minimum instream flow rules, such as those contained within the Nooksack Rule, it 'did not believe that withdrawals from deep confined aquifers would have any impact on stream flows.' However, we now recognize that groundwater withdrawals can have significant impacts on surface water flows, and Ecology must consider this effect when issuing permits for groundwater appropriation. (citations omitted).

The Public Interest and Climate Change

Humans are now confronted with the greatest environmental challenge ever: climate change, also increasingly a phenomenon of climate destruction. Evidence continues to grow on global, continental, and local scales, and includes massive wildfires, sea level rise, ocean acidification, and extreme weather events. Irrevocable changes are occurring, such as disappearing polar ice and glaciers, coral bleaching, and species extinctions. Locally, Washington's rivers and aquifers are already affected by climate change, and impacts will worsen. Warming temperatures diminish mountain snowpack and glaciers, reducing summertime runoff to streams and rivers and recharge to groundwater. This in turn depletes instream flows, harming aquatic habitat and reducing water available to existing water users.

Despite the impacts climate change is working on Washington's hydrology, Ecology does not reference or consider climate change impacts in water right decision-making. This must change, as the four essential elements of water rights — water availability, impairment, beneficial use, and the public interest — are all affected.

Protection of the public commons will become a foremost factor in Washington's water allocation system in the future. Humans can and do adapt to changing hydrology, occupying almost every hydrologic niche on the planet. As the regimes of precipitation, snowpack and available water change over time, human society will adapt. But if the people of Washington (and other western states) wish to preserve public uses of water resources — particularly keystone aquatic species such as salmon — historic water allocation must be reconsidered, and soon. The flexibility and importance of the public interest in Washington's water resources provides the vehicle for assessing climate impacts for new and existing water rights.

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She welcomes feedback on this article.

CONCLUSION

The public interest provisos of Washington's water codes properly focus on protection of instream flows and associated public uses, although agencies and courts have protected other activities under the public welfare umbrella. Water resource scarcity, exacerbated by climate change, makes the law of the public interest an increasingly critical tool to manage and allocate water for the future.

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Tribal Water Rights to maintain off-reservation instream flows sufficient to support treaty fishery habitat: *State v. Yakima Reservation Irrigation District*, 121 Wn.2d 257, 262 (1993). This decision affirmed *State v. Acquavella,* Yakima Cty. Sup. Ct. No. 77-2-01484-5, Memorandum Opinion re: Motions for Partial Summary Judgment (Oct. 22, 1990); *see also State v. Acquavella*, Yakima Cty. Sup. Ct. No. 77-2-01484-5, Final Order Re: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places (Mar. 1, 1995); *State v. Acquavella,* Yakima Cty. Sup. Ct. No. 77-2-01484-5, Memorandum Opinion re: "Flushing Flows" (Dec. 22, 1994).

Climate Change: *See World Scientists' Warning to Humanity,* BioScience (Nov. 13, 2017), in which 15,364 scientists from across the planet co-signed a letter warning of the disastrous impacts associated with the changing climate at: http://scientists.forestry.oregonstate.edu/sites/sw/files/Ripple_et_al_warning_2017.pdf.

Climate Change and Water Availability Impact*: See* University of Washington, Climate Impacts Group, *Climate Change Impacts and Adaptation in Washington State* (esp. Section 6: How Will Climate Change Affect Water in Washington?) (2013); Mote, P., et al., *Climate Change Impacts in the United States: The Third National Climate Assessment, Chapter 21: Northwest*, J. M. Melillo, et al., Eds., U.S. Global Change Research Program (2014).

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