



The Water Report™

Water Rights. Water Quality. & Water Solutions in the West

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Floodplains Management

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& More!

WASHINGTON STATE RURAL WATER STRATEGIES

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INTRODUCTION

RURAL DOMESTIC WATER IN WASHINGTON STATE: THE BALANCING ACT

In Washington State, fairly apportioning rural domestic water between rural property owners, counties, instream flows, and tribes is a delicate balancing act.

Washington State adopted western water law prior appropriation in its code in 1891 (Laws of Washington, 1891). Subsequently, adoption of the codes governing the use of surface water and groundwater in 1917 (Title 90.03 Revised Code of Washington (RCW)) and 1945 (Title 90.44 RCW), respectively, solidified this doctrine. [Editors' Note: Under western water law's Prior Appropriation Doctrine (often referred to as "first in time, first in right") the water user with the oldest or "senior" right is entitled to receive all of their water right during times of shortage — which may require that "junior" users with later rights have their water use curtailed or completely denied.]

Currently, in many Washington basins, protecting existing appropriations precludes any new appropriations of water, even very small uses of groundwater for individual residences that are exempt from permitting (permit-exempt) under RCW 90.44.100. Herein lies the fundamental conflict: rural property owners who desire new rural water allocations are denied the ability to use groundwater for the construction of a new home. Not surprisingly, this results in legal disagreements and frustration.

The legal perspective on rural domestic water is changing. A series of Washington State Supreme Court (State Supreme Court) decisions have shifted the underlying paradigm from the belief that a permit-exempt groundwater right was paramount and undeniable, to a paradigm that other prior appropriations limit the legal availability of permit-exempt groundwater. This paradigm applies even for very small uses for which impairment can be measured only through mathematical modeling.

Washington State's Growth Management Act (GMA) (RCW 36.70A) also creates expectations that local governments address water resource availability — including legal water availability — in their land use and permitting decisions. The GMA requires proof of an adequate water supply prior to permit approval. Because of limits on water availability for new appropriation, local land use authorities have been thrust into the position of making water resource management decisions dependent upon legal water availability (see *Kittitas v. EWGMHB*, 2011, discussed below).

Rural property owners seeking to use domestic water for a home have generally not been aware of the ramifications of the prior appropriations water law. Local governments planning under the GMA are accustomed to assuring physical water availability, but the recent shift to local governments considering legal water availability arguably constitutes a

Rural Water

Permit-Exempt Uses

Instream Flows

Ecology Rules

Flow Levels Adopted

redistribution of water management in Washington State. The shift in the legal landscape regarding permit-exempt uses and unavailability of water for homes in Washington State is something new, just occurring over the last several years. An atmosphere of suspicion has arisen, amplified by: ongoing misunderstanding of rural property owners' existing rights; changes to local government's role in water management as a result of recent changes in the legal landscape; and expanded restrictions on rural property owners' use of permit-exempt groundwater.

LEGAL BACKGROUND

Beginning in 1945, the Washington State Legislature created the groundwater code, and, critical to this discussion, designated uses of groundwater that are exempt from permitting (RCW 90.44.050). Those groundwater exemptions are for: 1) stock-watering purposes; 2) for the watering of up to one-half acre lawn and noncommercial garden; 3) for single or group domestic uses not exceeding 5,000 gallons per day; or 4) for an industrial purpose not exceeding 5,000 gallons per day. The two relevant exemptions for this article are watering of up to one-half acre of lawn and noncommercial garden, and single or group domestic uses not exceeding 5,000 gallons per day.

Additionally, beginning in the mid-20th century as stream flows continued to decline, policy makers recognized the need to ensure adequate stream flow to protect fishery resources (RCW 90.22) through creating authority to administratively establish minimum instream flows. In subsequent years, out of stream water development continued to grow along with population, and agricultural and industrial demands continued as well. Concern over the need to maintain instream flows to protect fishery resources became increasingly relevant. The Water Resources Act of 1971 (RCW 90.54) called for the Washington State Department of Ecology (Ecology), the State's water management agency, to create a framework to balance the out-of-stream demands for agricultural and community needs with the instream needs to maintain productive fisheries. The Act provided a process whereby Ecology would set minimum instream flows rules in each watershed to ensure protection of instream resources.

To implement the Water Resources Act, Ecology adopted instream flow rules for many Water Resource Inventory Areas (WRIAs) through the 1970's and 1980's (Figure 1). The flow levels adopted into rule were flows determined to be fully protective of habitat to sustain wild fish populations and their respective life stages. However, in most years there are portions of the year where actual stream flows don't meet the levels aspired to in the rules.

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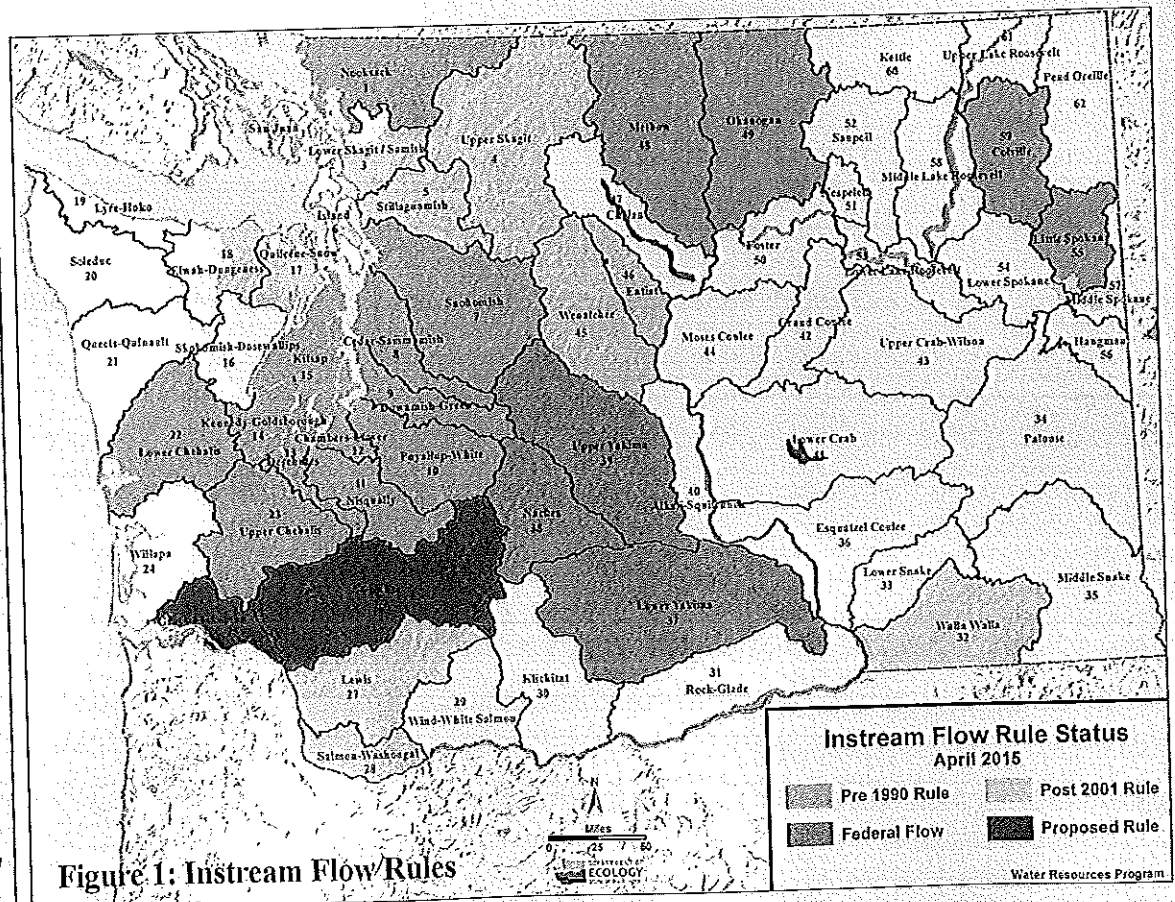


Figure 1: Instream Flow Rules

Rural Water

Curtailment

Connected Groundwater

De Minimus Impairment

Reservations (Future Use)

Overriding Public Interest

In-Kind Mitigation

Rural Protections

Exempt Wells Reliance

After adoption of an instream flow rule, the instream flow becomes protected as a water right with the priority date being the date of adoption of the rule. Water rights issued junior to the instream flow rule (after the adoption date) are curtailed when flows are not achieved, based on the instream flow provisions in water rights permits. For irrigation rights, curtailment is a normal expectation associated with prior appropriations. However, domestic users require an uninterrupted supply of water, and new permits for municipal and domestic uses cannot be curtailed without significant public health and safety concerns. Therefore, Ecology denies applications for new domestic, industrial, or municipal uses which would impair adopted instream flows.

As more instream flow rules were adopted, Ecology provided for new surface water rights for irrigation conditioned on the instream flow rule or denied applications for new appropriations of surface water. Later, Ecology extended these practices to groundwater hydraulically connected to surface water, where withdrawals would impair the adopted instream flows. Appeals of these denials began increasing throughout the 1990's.

One such appeal led to the *Postema v. PCHB (Postema)* decision in 2000, in which the State Supreme Court concluded that groundwater hydraulically connected to surface water was to be regulated to protect the adopted instream flows. The State Supreme Court found that the standard of protection applied to any impairment on flows, even de minimus, and that these impacts did not have to be shown through physical measurement. The Court found that mathematical models which demonstrate an impact (no matter how small) that would impair instream flow levels was sufficient evidence to deny an application for a new appropriation. The *Postema* decision represented the first paradigm shift towards the general principal that groundwater and surface water are connected and that uses of groundwater have the potential to impair instream flows.

After the *Postema* decision, Ecology was challenged to meet two competing goals of the Water Resources Act: 1) setting instream flows at levels protective of instream fisheries resources; and 2) ensuring water availability for agricultural and community needs. To address this challenge, Ecology generally adopted instream flow rules that included reservations of water for future uses. The reservations, defined in each instream flow rule, allowed new permitted and permit-exempt junior surface and groundwater users to tap into a finite "bucket of water" still available for out-of-stream uses, despite impairment of instream flows, as authorized in law (RCW 90.54.050(1)). In some rules, Ecology waived impairment to instream flows through administrative action. Certain of these rules were contested in court.

In October 2013, the State Supreme Court issued the *Swinomish v. Ecology (Swinomish)* decision which invalidated the 2006 amendment to the Skagit Instream Flow Rule. Central to this decision was that the amendment of the Skagit Instream flow which created a reservation of water for future domestic uses impaired senior instream flows. Ecology had justified the impairment as being due to an "overriding consideration of the public interest." The Court concluded that Ecology did not follow statutory authority and voided the reservations when it invalidated the amendment. See Moon, *TWR #116 (Oct. 15, 2013)* and Water Briefs, *TWR #117 (Nov. 15, 2013)*.

In October 2015, the State Supreme Court issued the *Foster v. City of Yelm (Foster)* decision, which reaffirmed holdings from *Postema* and *Swinomish*, and further detailed interpretation of existing law to specify that all flow impairment to adopted instream flows from new uses must be mitigated in-kind through instream flow (and not through habitat enhancement). Importantly, the Court found that considering mitigation approaches beyond in-kind water for water mitigation would not address legal impairment of instream flows. See Moon, *TWR #141 (Nov. 15, 2015)*.

LAND USE PLANNING & WATER RESOURCES

Concerns about population growth during the 1980's, especially in the Puget Sound region, led to the adoption of Washington State's Growth Management Act (GMA) in 1990 (RCW 36.70A). Counties planning under the GMA are required to limit rural development to maintain the rural character of communities. Numerous other provisions include protecting and preserving agricultural and forest lands. The adoption of the GMA also affected water resource management by changing the requirements for subdivisions (RCW 58.17) and building permits (RCW 19.27.097) for applicants to ensure adequate water supply for new development.

With the difficulty in obtaining new surface and groundwater permits occurring statewide in the 1990's, developers steadily increased their reliance on permit-exempt groundwater withdrawals. As permitting of new groundwater rights came to a halt, reliance on the permit exemption expanded rapidly to meet the demand for new rural developments. In 2002, the State Supreme Court clarified in the *Campbell and Gwinn v. Ecology (Campbell and Gwinn)* decision that each project was limited to a single exemption, and a developer could not "daisy chain" a number of exemptions together to cumulatively use more than 5,000 gallons per day.

Rural Water

Single Exemption

Water Availability

Regulation of Exempt Uses

Instream Flow Rules

Reservations Risk

Mitigation Solutions

Reservoir Re-Timing

Supply Solutions

Subsequently, Kittitas County’s development regulations were challenged on the basis that the County was not limiting subdivisions to a single permit exemption. In the *Kittitas County v. EWGMHB (Kittitas)* decision in 2011, the State Supreme Court ruled that counties were obligated under the GMA to ensure that water resources were both physically and, more importantly, legally available. Also in *Kittitas*, the Court identified statutory requirements for counties to address water resource management issues. The Court stated that counties must comply with water law provisions (such as those addressed in *Campbell and Gwinn*) and consider water resource availability — including in light of restrictions established in instream flow rules. These interpretations were significant and signaled a second paradigm change as counties had not previously considered legal water availability from both existing out-of-stream water rights and instream flow.

Currently, the State Supreme Court is deliberating in the *Whatcom County v. Hirst (Hirst)* case. This case is a specific challenge to the interpretation of instream flow rules and the obligations of counties to protect adopted instream flows. At the core, the question is whether counties have an obligation under the GMA to take actions beyond those in which Ecology’s instream flow rules require. The Supreme Court is reviewing the 2015 appeals court ruling about Whatcom County’s obligations to regulate permit-exempt uses even despite the fact that the existing instream flow rule for the Nooksack Basin (WRIA 1) does not apply to those uses. The appeals court ruled that the County’s obligations were to align development regulations with the instream flow rule, and thus found that Whatcom County was in compliance with the GMA. Petitioners in the *Hirst* case argued in their appeal to the Supreme Court that the instream flow rule must apply to permit-exempt uses, and that compliance with the GMA requires the County to regulate permit-exempt uses even if the instream flow rule does not.

The *Hirst* case has the potential to further define how permit-exempt uses are to be regulated under state law. This pending decision could directly affect all Puget Sound counties with adopted instream flow rules written in the 1970’s and 1980’s, even though Ecology intended those rules to apply only to its permitting decisions.

CURRENT SOLUTIONS & TOOLS

Of the 62 watersheds in Washington State, identified as Water Resource Inventory Areas (WRIA) by Ecology (www.ecy.wa.gov/water/wria/), 29 watersheds plus the mainstem Columbia River have adopted Ecology instream flow rules. An additional three watersheds (Yakima Basin) are protected by Federal Flow targets resulting from Bureau of Reclamation’s Yakima Project. Unsurprisingly, these 32 subject watersheds represent approximately 76 percent of Washington State’s total population.

In light of the *Swinomish* and *Foster* decisions, adopting new instream flow rules with reservations includes significant legal risks. In the Skagit basin, because the reservations were challenged and found invalid in 2013, rural property owners who built homes under the invalidated reservations have legal uncertainty with respect to their water supply. This has affected property values, impacted ability to buy and sell, and created financing difficulties. Adopting new rules with reservations would impart significant uncertainty about how the Skagit basin ruling would apply to the new rules, if the rules contain provisions to allow for new permit-exempt uses. The State is additionally working on mitigation solutions in lieu of and/or in addition to instream flow rule revisions.

In watersheds with instream flow rules, new appropriations must address impairment on senior instream flows as well as impairment of existing senior users.

Options to accommodate new appropriations that have been successfully used in Washington include:

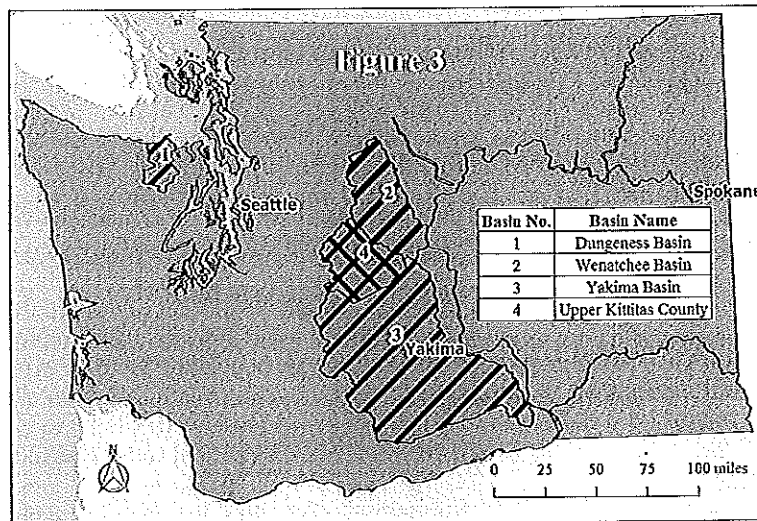
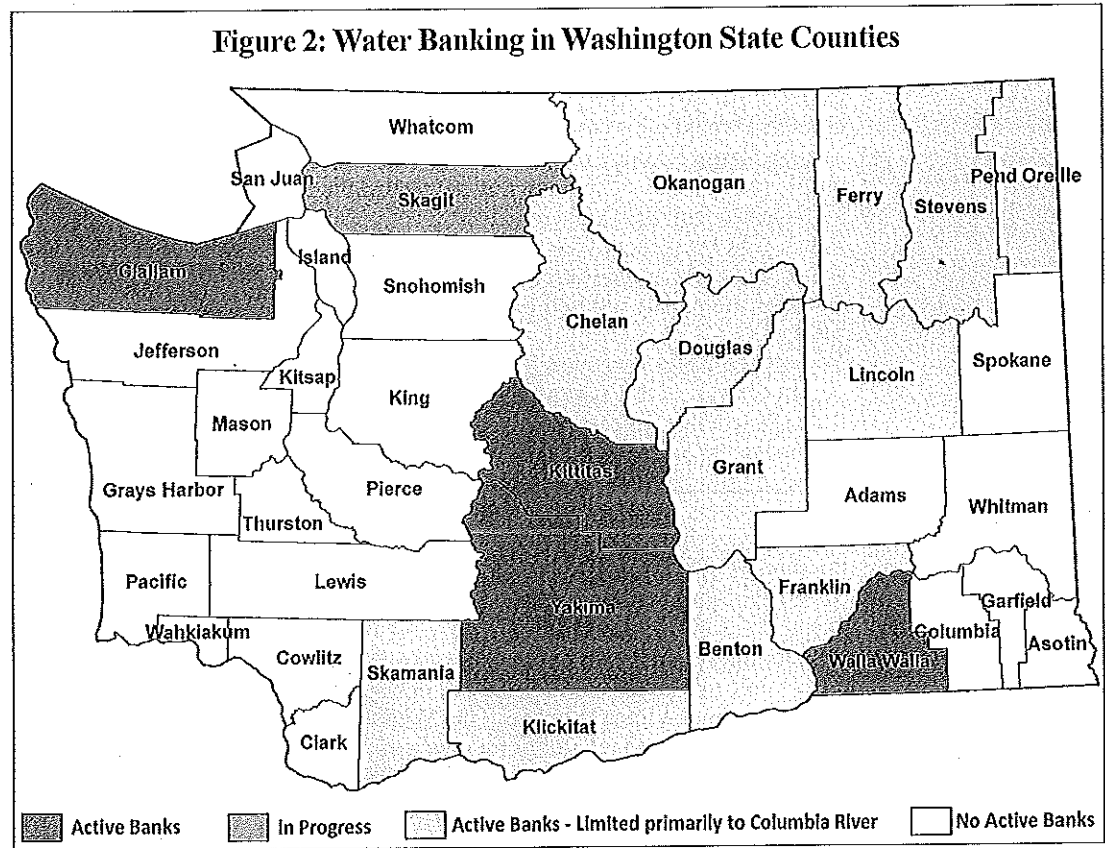
- Modifying water storage in reservoirs to address seasonal impairment of instream flows through water supply agreements.
- Creating mitigation banks to offset potential impairment of existing out-of-stream and instream uses.
- Where other options are unavailable, using other water supply options such as rainwater collection systems or trucked water from outside a basin where water is available or legal rights exist.

There are more than 400 reservoirs on the Columbia River and its tributaries. By modifying how water is stored and released, water managers re-time water availability for rural uses so that there is no legal impairment of senior water rights. For example, Ecology’s Office of the Columbia River reached agreement with Federal and local water managers, and the State has been able to make nearly 400,000 acre-feet of water available to be split equally between instream, agricultural, and municipal needs. *See also* Haller & Tebb, *TWR* #150.

In several basins, permit-exempt water supply solutions have been crafted and implemented that produce legally available water, prevent impairment to existing uses and instream flows, and provide for both new permit-exempt and permitted uses of groundwater (Figure 2). These solutions have varied from market-based reallocation of senior water rights, groundwater storage and recharge, and the fortifying of mutually agreeable instream flow rules with reservations.

Rural Water

Water Banking Status



The following three examples will focus on water supply efforts in the Yakima Basin, Dungeness Basin, and the Wenatchee Basin, shown in Figure 3.

Mitigation Required

Water Banks Mitigation

Yakima Basin Water Exchange

In September 2007, Ecology received a petition to close Upper Kittitas County to new permit-exempt uses of groundwater due to impairment of existing senior water rights. After initial negotiations with Kittitas County did not go favorably, Ecology issued an emergency groundwater rule in July 2009 limiting new uses of groundwater under the permit exemption unless mitigated by an existing senior water right. By February 2010, Ecology had approved the first private sector water bank to mitigate new permit-exempt uses, forming the foundation of the Yakima Basin Water Exchange. Ecology chose the private sector mitigation model, in large part, because the Yakima Basin already supported an active water market, and there was a significant network of adjudicated privately-held senior water rights in the mainstem and tributaries to the Yakima River. To date, the Yakima River Basin supports 14 private and publicly-run water banks fully mitigating new junior water users in Upper Kittitas County and the greater Yakima Basin. By no means is the Yakima Basin Water Exchange complete, but it is serving new demand by providing mitigation for permit-exempt rural water users in most areas of the basin. See Cronin & Fowler, *TWR* #102.

Rural Water
Quasi-Government Water Bank
Other Strategies
Legislative Exemption
Successful Solutions
Population Growth
Urban Development
Transfers Impacted
Closed Basins Options
Scale of Impacts

Dungeness Basin Water Exchange

In the Dungeness River Basin, one water bank administered by a non-profit organization, Washington Water Trust, was established along with the Dungeness Instream Flow Protection Rule (Dungeness Rule) in December 2012. The Dungeness Water Exchange provides mitigation for new permit-exempt water users that would otherwise be precluded following adoption of the Dungeness Rule. In contrast to the Yakima Basin, Ecology opted to form a quasi-government water bank structure where the state, a non-profit, and a county collaboratively developed the water bank. This choice was made, in large part, due to the nexus with the Dungeness Rule and the Dungeness' geography of less widely-held private water rights. The Dungeness Water Exchange also utilizes strategies beyond mitigation with existing senior water rights, including groundwater modeling and aquifer recharge. In total, the Dungeness Water Exchange has allocated more than 130 mitigation certificates satisfying new permit-exempt water demand. See Cronin, *TWR* #139.

Wenatchee Basin Instream Flow Rule

In contrast to the Yakima and Dungeness Water Exchanges, the Wenatchee Basin Instream Flow Rule (Wenatchee Rule) provided reservations of both permitted and permit-exempt water for new uses. Following the *Swinomish* decision, concern was cast over the validity of the Wenatchee Rule's reservations due to the similarities to the Skagit Rule. Ecology suspended issuing water right permits for water from the reservation. In demonstrating the collaborative nature of the Wenatchee Rule development, Chelan County requested a legislative confirmation of the Wenatchee Rule reservation. In March of 2016, with the support of tribal governments, environmental groups, and state and local governments, the Washington State Legislature passed a bill declaring the Wenatchee Rule reservation valid. New permitted and permit-exempt uses in the Wenatchee Basin are relying on the instream flow reservation. While the Wenatchee Rule legislative exemption model is not sustainable or universally applicable across Washington State, it is an example of a solution in the suite of options where interested parties are in agreement.

The common lineage between the Yakima and Dungeness Basin approaches is seeking solutions that provide certainty and reliability for new permit-exempt rural water users. Where the Wenatchee Basin differs is that it is a near-term solution crafted to uphold an existing mutually agreeable instream flow rule and associated reservation based on the waning instream flow rule with reservations model. The paradigm continues waxing toward understanding legal water availability, the current legal landscape, and regulation of permit-exempt uses. Successful solutions involve multiple interests finding agreement on how to achieve success in protecting instream resources while providing reliable water supply options for current and future rural water users' needs.

CHALLENGES

Washington State anticipates about a million additional residents calling our state home in the next 10 years. There is no Growth Management strategy that has been adopted by the state or local governments that attempts to reduce the projected population increase — only to manage where the population growth should occur. New residents will use water, and municipal water conservation will supply only a portion of the new demand.

Ecology's unpublished data estimates that roughly 85 percent of the population increase over the past 30 years has been in areas served by municipal water systems, which represents primarily urban development. Most of the water supply to support this population increase in urban areas is anticipated to come from conservation by existing users within existing municipal water systems. In addition, under the State's Municipal Water Law, municipal water systems have flexibility to use existing water rights throughout their service areas. This is why the largest municipal water system utilities are well positioned to serve anticipated growth.

However, other municipalities, especially smaller cities, face significant challenges. The *Postema* decision's strict impairment standard for new appropriations created significant incentives for utilities to find creative mitigation strategies associated with their applications for new water rights. Now, under the *Foster* decision, mitigation must address legal impairment of even de minimus impacts from water rights changes and transfers. This standard will make it harder to reallocate existing rights to new uses. The *Foster* decision has the potential to create a chilling effect on budding water markets and water banking.

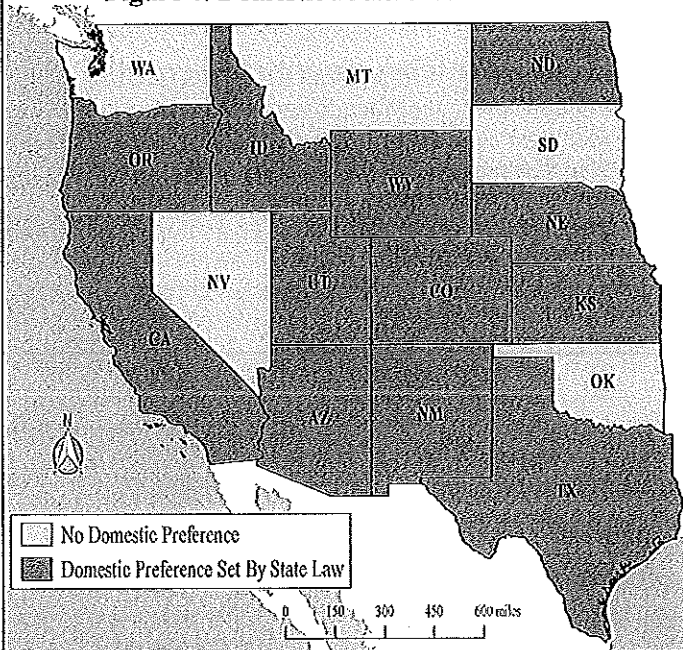
The challenges are even greater in rural areas. In basins with adopted instream flows and closures for new water rights, the need to address legal impairment of unmet flows limits rural property owners' ability to develop in areas where existing rights are not available for mitigation. In some areas of the state with instream flow rules and closures, the only legal access to water is from a rainwater collection system or by obtaining trucked water deliveries. However, many are skeptical of those water sources from a reliability, safety, and cost standpoint. Rural property owners and local governments, especially, look to Ecology to find solutions which will enable them to access a safe and reliable source of water using a permit-exempt well to enable building a home in a rural area. Under the State Supreme Court decisions discussed above, Ecology is constrained to find adequate mitigation that fully addresses legal impairment to instream flows.

Managing at the scale of individual domestic rural properties and individual residences creates a significant challenge. Even cumulatively, these impacts are generally small compared to other uses, except

Rural Water

in water-limited tributaries. In many rural areas, on a basin-wide generalized scale, the smallest total use of water is from the rural domestic users. Yet, the challenge to allow continued rural development played out in the Yakima Basin from July 2009 to February 2010 and is playing out today in the Skagit Basin.

Figure 4: Domestic Preference in the West



Both basins have either experienced or are experiencing complete moratoriums on new permit-exempt groundwater appropriations, with no mitigation structures in place. It should be noted that the discussion revolves around new permit-exempt uses of groundwater — to date, nowhere in the State have junior permit-exempt groundwater uses been curtailed through regulation for impairment to existing senior water users, either surface or ground.

As a byproduct of rural development, new permit-exempt groundwater users are confronted with being the last users in the prior appropriation scheme and have the most junior right to use water. However, to many prospective permit-exempt groundwater users this seems unfair, and to many of them this situation represents bad public policy. Some portion of the public believes that water is a basic human right and should not be denied to someone to supply their home. To address these values, many states have a legislative priority for domestic use of water administered under the Prior Appropriation Doctrine. See Clyde, TWR #83. These states do not apply the prior appropriation framework to the individual residence, which could be an option for Washington State to consider (see Figure 4).

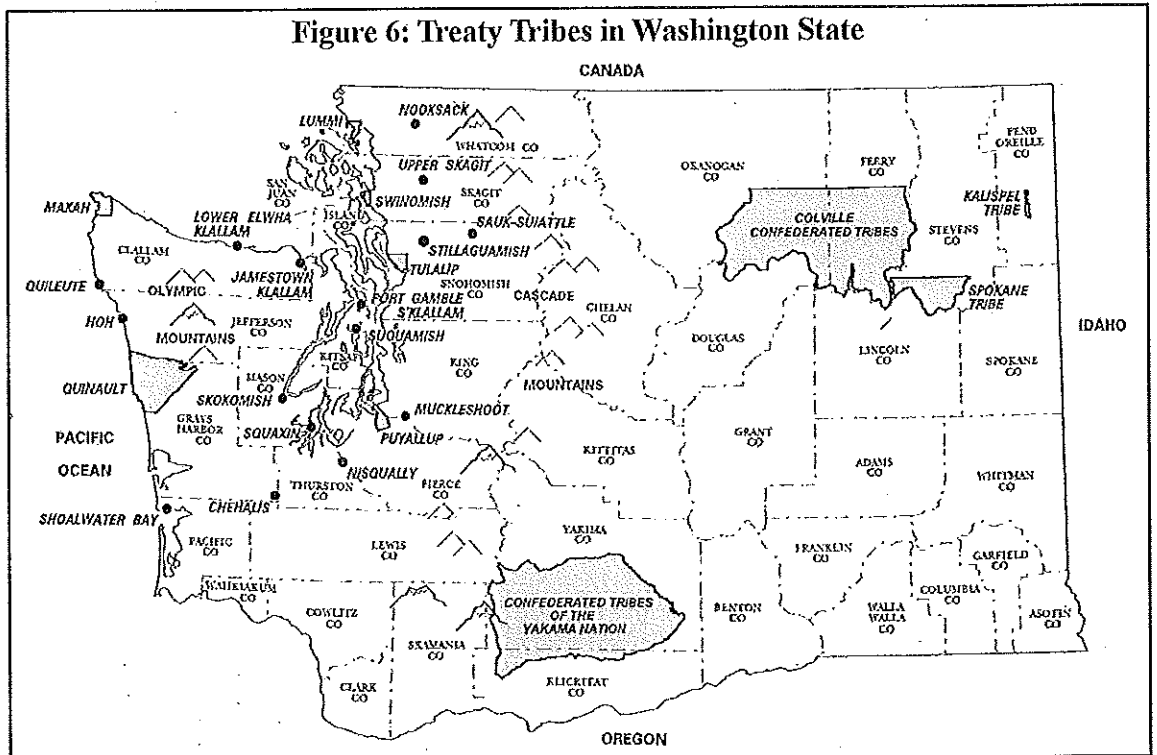
Additionally, one key issue that is critical to mention but will not be discussed in detail here is the State's obligation to meet tribal treaty rights. Figure 5 shows the Treaty Tribes in Washington State. A full discussion of treaty rights and water resources is worthy of an entire article, and is under dispute in federal court in

the *United States v. Washington* (the "Culverts Case"). On June 27, 2016, a three-judge appeals panel of the Ninth Circuit Court of Appeals ruled that treaties between the United States and tribes, under which 24 tribes ceded 64 million acres of land to the US, include ongoing obligations for the state to protect habitat for fish to ensure protection of the rights of the tribes to fish. Given the broad implications of the case, the State has petitioned the 9th Circuit for an en banc review of the panel's judgment. Washington's petition has received amicus briefs from Idaho and Montana. Overall, instream flows associated with tribal treaty fisheries habitat have not been quantified for the vast portions of the State, which creates significant uncertainty and a further challenge to water resource management.

Culvert Case

Tribal Rights Uncertainty

Figure 6: Treaty Tribes in Washington State



Rural Water**Competing Positions****Water Allocation Issues****Dialogue****Local Government****Water Supply Assessment****Collaboration**

In conclusion, a number of challenges confront future sustainable water management of rural permit-exempt groundwater uses in Washington State in the absence of a single universally applicable strategy. Strategies to provide for permit-exempt groundwater uses must weigh the rights of senior water right holders, instream flows for fisheries and Tribes, and public opinion while addressing water availability limitations from the state scale to the local scale in tributaries.

RISING ABOVE CONFLICT: FUTURE RURAL DOMESTIC WATER STRATEGIES

To solve the problem of water allocation in Washington State, the Water Resources Act of 1971 intended to ensure that water supplies would be available for current and future municipal, rural water uses (domestic), agricultural, and instream needs. However, existing appropriations, case law, and physical limits on water availability make that outcome very difficult. In particular, Ecology adopting new instream flow rules — that would not preclude all new uses of water in large areas of a watershed — is a difficult and in many cases impossible scenario.

Ecology undertook a two-year process involving rural property owner representatives, counties, tribes, fellow state agencies, and environmental groups with interests in water policy to have a dialogue about finding solutions for rural water supply needs. To date, there has been little success in achieving consensus to meet the multiple objectives of the Water Resources Act of 1971. Discussions should and will continue to involve rural property owner representatives, counties, tribes, fellow state agencies, and environmental groups with interests in water policy.

Pending the outcome of the *Hirst* case, Washington is faced with a challenge to harmonize the expectations on local governments to manage land use within the constraints of the Prior Appropriation Doctrine as well as the ability for rural property owners to obtain new legally available water supplies. Thus, there is a significant burden on local governments to not deny rights to use private property, and at the same time to not impair the rights of existing water right holders.

Truly integrating land use and water supply strategies means that land use planning should also include some level of up-front assessment of water supply. At the same time, rural property owners should have some assurance that they will not later have their plans upended by unforeseen governmental regulation or litigation affecting water availability. It has been demonstrated that collaborative and inclusive approaches, such as the Wenatchee Basin Instream Flow Rule, Dungeness Water Exchange, and the Yakima Water Exchange, have the ability to provide certainty and reliability for most rural property owners. Therefore, land use and water resource managers could integrate their approaches to create certainty and reliability for local governments and rural property owners while upholding commitments to instream flows.

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References

WASHINGTON STATE CASE LAW: Ecology actively maintains a comprehensive digest of case law in Washington State, including those cases referenced in this article. For full access to all case law referenced in this article, please refer to Ecology's website: www.ecy.wa.gov/programs/wr/caselaw/cl-home.html

WASHINGTON ADMINISTRATIVE CODE: <http://app.leg.wa.gov/wac/>

REVISED CODE OF WASHINGTON: <http://app.leg.wa.gov/rcw/>

United States v. Washington (Culvert Case): <http://cdn.ca9.uscourts.gov/datastore/opinions/2016/06/27/13->

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