



CLEAN, FLOWING WATERS FOR THE WEST

The Center for
Environmental Law & Policy

WASHINGTON STATE WATER LAW DEVELOPMENTS

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I. Introduction: Prior Appropriation Reconsidered

Recent developments in Washington state water law illustrate the profound failure of the state's water allocation system – the prior appropriation doctrine – to meet and provide for societal needs.

The “first in time, first in right” rule that governs state water rights is, by its nature, inequitable. In water-short basins and/or drought years, junior water users must curtail their use, as occurs regularly in the Yakima, Walla Walla, Little Spokane and other watersheds around the state. Indeed, the prior appropriation system was deliberately designed to induce curtailment, by allocating water rights in excess of the water yield that nature provides during a typical or average year. The goal, certainly in the decades before instream water uses (e.g., fisheries, recreation) were recognized as worthy of protection, was to ensure that all water was put to use. In a good year, everyone would get water, and no water would be “wasted” by remaining instream. In a bad year, junior users were cut off. This approach was facilitated by the practice of the Department of Ecology and its predecessors to not assess how much water was physically available prior to issuing water rights.

To ameliorate the harsh results of the priority system, two additional principles are necessary to implement the water allocation regime: “use it or lose it” and “beneficial use.” These rules require that senior water users actually use their water rights, and that they do so with reasonable efficiency. See *Ecology v. Grimes*, 121 Wn.2d 459 (1993). Water not used, or wasted, becomes available to junior users.

As discussed below, several new programs and undertakings are occurring in state water law. Each reveals the failings of prior appropriation. The Columbia dams program, discussed in Part II, is specifically designed to bail out junior water users, despite the fact that the state has neither adopted nor enforced water efficiency requirements that would largely offset the problem of curtailment of junior rights. The Municipal Water Law, discussed in Part III, represents a legislatively successful but judicially suspect effort to get around “use it or lose it” laws. The exempt well loophole, described in Part IV, puts the most junior users at the front of the line, circumventing the priority system.

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The priority rules of prior appropriation are intended to work in tandem with the use and efficiency rules. Legislative, administrative and self-help efforts that interrupt this triad only end up harming existing water users and aquatic environments. Without question, reform is needed, but can occur only with comprehensive changes to the water code and water use practices.

II. Columbia Basin Dams & Water Projects

A. Proliferation of Water Supply Proposals

Washington has committed itself to a program to "aggressively pursue" new dams and reservoirs ("storage") in eastern Washington. See RCW Ch. 90.90. This has led to numerous proposed projects in eastern Washington, including:

1. Columbia "mainstem offchannel" dams at Crab Creek and Hawk Creek
2. Lake Roosevelt drawdown (requiring \$6 million annual payments to the Confederated Colville and Spokane Tribes, RCW 90.90.070(3))
3. Voluntary Regional Agreement w/Columbia-Snake River Irrigators Assn. and new water right applications, RCW 90.90.030
4. Bumping Lake enlargement
5. Conservation, fish passage and water management projects in the Yakima and Columbia mainstem
6. Shankers Bend dam on the Similkameen River
7. Walla Walla pump exchange and storage
8. Kennewick Aquifer Storage & Recovery project
9. Multiple tributary dams and water projects

In addition, the U.S. Bureau of Reclamation (USBR) is studying a proposal to build out the second half of the Columbia Basin Project via the Odessa Subarea Special Study. The Bureau is also promoting the Yakima Storage Study, examining two large water projects, Black Rock dam and the Wymer dam and pump exchange.

Finally, Oregon and Idaho are getting into the act with legislated studies of water projects and partnerships with the Bureau. See Attachment 1 for a list of projects, sponsors, timelines and URLs.

B. Observations

The proposals for new state and federal dam and water supply projects are driven by several factors, including politics, concerns about impacts of climate change, and the continuing profound failure of the prior appropriation doctrine, discussed above.

The potential impacts of climate change on water resources are frequently cited as justification for new dams and reservoirs. The goal is to capture projected earlier and heavier spring runoff and make that water available for late summer use, when mountain snowpack and water supplies will be reduced. See generally University of Washington Climate Impacts Group studies at <http://www.cses.washington.edu/cig/>. Ironically, it is just these impacts that caused a specially-convened committee of the National Academies of Science to recommend that Washington state not issue more water rights from the Columbia River, in order to maximize flexibility to manage river flows and water supply in the future. National Research Council of the National Academies, *Managing the Columbia*

River: Instream Flows, Water Withdrawals, and Salmon Survival (The National Academies Press, 2004). Washington's new program directly contradicts the NAS advice, notwithstanding that the state commissioned and paid for the study.

Likewise, the Bureau of Reclamation has submitted applications to withdraw an additional 130,000 acre-feet from Lake Roosevelt and commit it to various permanent out-of-stream uses, but has conducted no critical analysis of the impacts of the melting headwaters (the Columbia Icefields in British Columbia) on future river flows and water availability. In August 2008, the Bureau announced with fanfare its "Water for America" Initiative, a new program "focused on securing water resources for future generations and coping with 21st Century water challenges, including decreasing water supplies caused by potential climate change and population growth." See <http://www.usbr.gov/wfa/>. However, the only coping happening occurring at Lake Roosevelt appears to involve allocating more water before the November elections.

Some of the state and federal dam and reservoir construction projects identified above would require astonishing subsidies. The tables below, taken from the Bureau of Reclamation's Odessa Subarea study, indicate that construction costs for water supply and delivery infrastructure would range from \$1 to \$6 billion dollars.

Table 2. Water Supply Options Summary

Water Supply Option	Active Storage (acre-feet)	Groundwater Acres Served		Estimated Construction Cost Range
		acres	percent	
<i>Banks Lake Drawdown</i>	715,000*	Up to 140,000	100	n/a
<i>Banks Lake Raise</i>	50,000	16,700	12	\$ 18,600,000 - 130,000,000
<i>Potholes Reservoir Re-op</i>	50,000	16,700	12	\$ 1,920,000 - 62,400,000
<i>Dry Coulee</i>	481,000	140,000	100	\$ 1,020,000,000 - 1,950,000,000
<i>Rocky Coulee</i>	126,000	46,900	34	\$ 234,000,000 - 416,000,000
<i>Lower Crab Creek</i>	200,000	60,000	43	\$ 252,000,000 - 494,000,000
	472,000	140,000	100	\$ 348,000,000 - 676,000,000

* Currently 125,000 acre-feet of this is used to assist with Columbia River fish flow objectives.

Table 1. Water Delivery Alternatives Summary

Water Delivery Alternative	Groundwater Acres Served		Additional Columbia River Diversion (acre-feet)	Estimated Construction Cost Range*
	acres	percent		
<i>Alternative A</i>	140,000	100	515,300	\$ 2,160,000,000 - 4,680,000,000
<i>Alternative B</i>	127,300	91	453,200	\$ 1,944,000,000 - 3,848,000,000
<i>Alternative C</i>	70,100	50	216,800	\$ 1,000,000,000 - 1,714,500,000
<i>Alternative D</i>	40,700	29	125,900	\$ 377,000,000 - 700,000,000

* Construction costs for water delivery infrastructure do not include costs for new water supply. See Table 2 - Water Supply Options Summary for this component.

These estimates do not include the substantial energy subsidies required to pump water 600 feet uphill from Lake Roosevelt to the Columbia Plateau (both direct energy expenditures and foregone hydropower generation at Grand Coulee and ten downstream dams). A recent economic study estimated the subsidies at \$500 per year per acre (in 1990 dollars). Whittlesey, et al., "Water Project Subsidies: How They Develop and Grow," *Illahee*, Vol. 11, Nos. 1&2 (Spring-Summer 1995). Bonneville Power Authority ratepayers will not begin to pay off this subsidy until 2010, despite the fact that the Columbia Basin Project came on-line in the 1940s.

As recently discovered in the Yakima basin, irrigators are not interested in paying for exorbitant water projects. Comments on the Yakima Storage EIS filed jointly by the Yakama Nation and Roza Irrigation District, two of the junior and frequently curtailed water users in the basin, flatly rejected the Black Rock project, with projected costs of close to \$7 billion. Senior users indicated they have no intention of paying for water projects that they do not need. A recent proposal by the Yakima Storage Alliance, a Black Rock booster group, proposes imposition of a local property tax to pay for the project.

The proposed projects are also notable for their environmental impacts. State water projects must dedicate one-third of new reservoir water to instream flow augmentation for fisheries. RCW 90.90.030. In the mainstem Columbia, the actual quantities to be dedicated to fisheries are virtually indiscernible, although there may be some tributary benefits. The primary benefit of assigning fishery flow requirements to new dam projects is to open them up for public funding. One interesting aspect of the issue is the Washington Legislature's political determination that Columbia River instream flows need only be protected in July and September each year. RCW 90.90.030(2). This finding contradicts federal requirements under the Endangered Species Act and is a good example of the longstanding refusal by the state of Washington to credibly address instream flow issues for the mainstem Columbia.

Most of the Columbia water projects will not be built. The real concern should be for the profound waste of public funds – tens of millions of dollars – on appraisal, feasibility and environmental studies. Without question, this money would be better spent on conservation projects that could yield real water savings and relief for junior users and the environment.

Also disappointing is the state's failure to embrace water pricing. Scarce goods command a price, and water is certainly becoming a scarce good. Imposition of fees on water usage is generally acknowledged to be the most effective method to induce conservation practices, yet is never discussed by state officials. Until pricing and aggressive water conservation practices become the routine approach to water management, the state is simply throwing money to the wind.

III. The Municipal Water Law in Two Acts

A. Act I: Lummi Nation v. State of Washington

In late 2006, six western Washington Indian tribes, four environmental groups and three individuals filed suit to overturn the 2003 Municipal Water Law, 2E2SB 1338, as facially unconstitutional. The gist of the complaints is that the MWL retroactively amends and expands certain water rights to the detriment of third party water rights. Because water rights are form of property right, third party rights are vested in the conditions that existed at the time they were granted, and are protected under the state and federal constitutions.

King County Superior Court Jim Rogers ruled on summary judgment that three statutory provisions of the bills, RCW 90.03.015(3) and (4) and 90.03.330, offend separation of powers requirements, finding them to be:

retroactive statutes that unconstitutionally attempt to reinstate water that were invalidated by the Washington Supreme Court in Department of Ecology v. George Theodoratus, 135 Wn.2d 682.

Lummi Nation, et al. v. State of Washington, et al., King County Superior Court No. 06-2-40103-4SEA (6/11/08). The Court denied summary judgment to Plaintiffs on other

provisions of the law, including sections relating to place of use and population limitation provisions on water rights.

All parties have petitioned for direct review in the Washington Supreme Court and a briefing scheduled has been established.

For environmental views on the problems created by the Municipal Water Law, see Attachment 2 (Osborn, R.P., "Environmental Perspectives on the Municipal Water Law," WA-AWRA Section Newsletter (May-June 2008)).

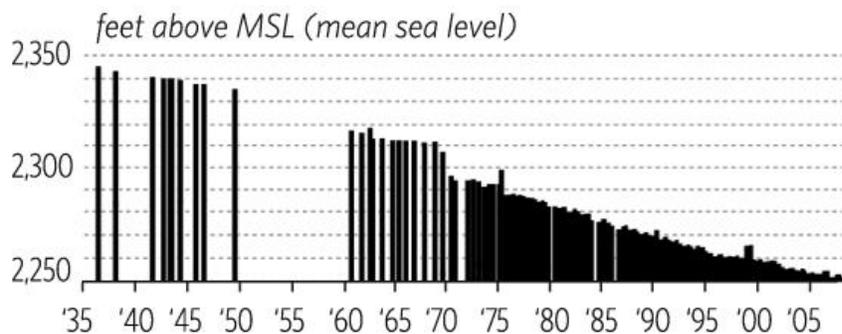
B. Act II: Cornelius v. Department of Ecology & WSU

Two environmental organizations and one individual appealed the Department of Ecology's consolidation of existing water rights held by Washington State University. This type of consolidation is, or has been, a frequently-used mechanism to implement the Municipal Water Law, serving to convert non-municipal rights into municipal water supply purposes and facilitate access to unused "pumps & pipes" water rights.

The fundamental problem triggering the WSU appeal is illustrated by the following graph, which records the seventy-two year decline in water levels in the Grande Ronde Aquifer, sole source of water for the Pullman-Moscow region.

Water level elevation 1935-2007

WSU test well water level elevation



SOURCE: Washington State University

Graphic courtesy of The Spokesman-Review

The Pollution Control Hearings Board (PCHB) denied all claims raised by Appellants, but found it lacked jurisdiction to consider constitutional claims. Cornelius v. Ecology and Washington State University, PCHB No. 06-099. Appeal has been filed in Whitman County Superior Court and Appellants are seeking direct review in the Court of Appeals. Cornelius v. State of Washington, Whitman Co. Superior Court No. 08-2-00181-2.

The Cornelius case raises a number of issues relating to implementation of the Municipal Water Law, including the propriety of Ecology's use of a "simplified" determination of the validity and extent of water rights and the retroactive application of the definitions section to immunize a non-municipal supplier from relinquishment requirements.

In addition the case raises several issues relating to administration of the state water code and the transfer statutes, including whether proof of pumping from an illegal point of withdrawal may be used to prove that a water right holder has actually used its water right, whether an invalid claim may support a supplemental water right, whether thirty-plus years of non-use constitutes due diligence in putting water to use, whether Ecology has the authority or duty to protect public interests when an aquifer is being depleted, and more.

IV. Exempt Well Issues

For general information, see Attachment 3: Center for Environmental Law & Policy, Permit-Exempt Well Information & Sources (May 2008)

A. The Problem

The use of permit-exempt wells, pursuant to RCW 90.44.050, as a source of water supply in Washington state is creating crisis. Some symptoms of the problem include:

- The Maps: 7,000 new exempt wells every year; see www.celp.org/kittitas/petition/overview.html
- For Want of a Comma: AG Opinion that stockwater use of exempt wells is subject to no limitation on quantities, and potential expansion of that finding to commercial and industrial uses. See Dunn, K. "Got Water? Limiting Washington's Stockwater Exemption to Five Thousand Gallons Per Day," 83 Washington Law Review 249 (2008)
- Six-Packs Now 28-Packs: Flagrant disregard of a decision of the Washington Supreme Court, which limited use of exempt wells for subdivisions. See Department of Ecology v. Campbell & Gwinn, 146 Wash.2d 1, 43 P.3d 4 (2002).
- OCPI Abuse: Consistent adoption of reservations for future water use into watershed rules, even where basin closure is necessary to protect instream flow, water quality and aquatic habitat, based on "overriding considerations of the public interest." RCW 90.54.020. See Section B(4) below.

B. Some Recent Strategies

1. Department of Ecology Exempt Well Working & Advisory Groups

Ecology convened a committee of county planning and health department representatives, who met over the course of 2-3 years to explore methods to implement water adequacy requirements for county land use decisions as they relate to exempt wells. See RCW 19.27.097 and 58.17.110(2). The working group produced a model MOA, but no county to date has adopted it. Ecology is now creating a stakeholder group of broader constituency to muddle over the issues.

2. Kittitas Valley and Johns Creek Petitions

In September 2007, the Kittitas County group Aqua Permanente and CELP filed a petition for rulemaking, pursuant to RCW 34.05.033 and 90.54.050, to close the Kittitas Valley to new exempt wells pending completion of studies to determine if water is available to serve new water users. The petition was inspired by rampant subdivision development relying on exempt wells for water, combined with frequent curtailment of surface water users in the Yakima basin. Ecology denied the petition and instead entered into an MOA with Kittitas County that effectively guarantees access to and use of new exempt wells for future growth. Salient provisions of the MOA have been adopted as an emergency rule. WAC Ch. 173-539A.

In May, 2008 the Squaxin Island Tribe filed a petition to amend the local watershed rule, WAC 173-514 to close Johns Creek to new exempt wells, based on concerns about depletion of instream flows. Ecology denied the petition, but promised to commence a hydrogeology study and impose water conservation requirements on local landowners. To date, state commitments remain unfulfilled.

3. Chamokane Creek

The Spokane Tribe of Indians re-opened the federal case U.S. v. Anderson, CV-72-3643JLQ (Eastern Dist. of Washington) in an effort to address exempt well abuse in the Chamokane Creek basin, which forms the eastern boundary of the Spokane Reservation. The Anderson case adjudicated rights in Chamokane Creek in the 1980s, allocating water both on and off reservation and establishing a temperature-based instream flow, and a federally-appointed water master has managed the decree for the past two decades. The decree was silent as to exempt wells, and rampant use of the wells on the east (state) side of the creek may be depleting flows in the stream system. The Court has directed the parties to conduct a groundwater study and has ordered briefing for 2010.

4. WRIA Rules & Exempt Wells

As part of its water management strategy, the Department of Ecology is adopting rules for watersheds around the state. Recent rules have included "reserves" to allow continued and future use of exempt wells, even in basins that should be closed to protect instream flows, water quality and aquatic habitat. Examples include:

- The Methow Basin rule, WAC Ch. 173-548, allowed for a "2 cfs" reservation for domestic use in seven sub-basins. Although a 1990 study indicates that the reservation was probably fully allocated at that time, there has been no accounting for or regulation of new exempt wells in the Methow Valley.
- The Skagit Basin rule, WAC Ch. 173-503, creates a reservation for exempt wells in the tributaries by invoking the "overriding considerations of the public interest" or OCPI justification. The rule calls for mitigation of new water uses by extending PUD water supply lines into tributaries, then crediting increased septic discharge as water resource augmentation. The Swinomish Tribe has filed suit challenging this rule.
- The Walla Walla Basin rule, WAC Ch. 173-532, allows for continued development of exempt wells in this heavily over-appropriated basin, where water rights are frequently regulated. The rule requires mitigation for exempt wells in "high density" areas (defined as 1 or more houses per ten acres), but does not require mitigation elsewhere, despite the fact that the shallow aquifer is hydraulically connected to streams that support endangered salmon habitat.

- The Lewis-Salmon-Washougal rules, currently in draft, continue the trend of creating reservations of water for exempt wells. See draft WAC Chs. 173-527, 173-528.

See also CELP Materials, found at www.celp.org, including:

- Proceedings, Exempt Well Workshop (Ellensburg, May 30-31, 2008)
- Survey of Exempt Well Treatment in Washington's WRIA Rules (May 2008)
- Skagit and Methow Watershed Exempt Well Case Studies (May 2008)

